LET THEM HEAR IT: PEACEFUL PROTESTS NEAR THE HOMES OF SUPREME COURT JUSTICES

by
Srikanth Reddy[*]

All of us—not just attorneys and politicians—need to be more critical and skeptical of the Supreme Court. Criticism by ordinary people is good and appropriate, even if it hurts the Justices' feelings. That includes public protests. When a case matters enough to them, members of the public can and should criticize the Court and its Justices, including by peacefully gathering and protesting near a Justice's home, or when a Justice appears out in the world.

---

[*] Assistant Professor of Law, Elon University School of Law. Thanks to Zak Kramer for his advice on writing this Article, to David Levine for telling me this was a worthy topic, and to Chrystal Clodomir for commiserating with and—more importantly—encouraging me. Thanks to Enrique Armijo, Eric J. Segall, Sam Singer, and participants at the 2025 Richmond Law Junior Faculty Forum and the 2025 SEALS Annual Conference for their thoughtful and helpful feedback. Finally, thanks to Esther Bouquet and Abbey Marzen for their excellent research assistance, and to the editors of the Lewis & Clark Law Review for their work to make this a better Article. Any mistakes are my own.

INTRODUCTION

Decision-makers come to eat at the Washington, D.C., branch of Morton's The Steakhouse, an outpost of the restaurant chain that caters to the powerful and the elite in the nation's capital.[1] So perhaps it wasn't surprising that on July 6, 2022, Brett Kavanaugh, Associate Justice of the Supreme Court of the United States—a decision-maker if there ever was one—went to the Morton's in D.C. for dinner.[2]

Twelve days earlier, on June 24, the Supreme Court had issued its decision in *Dobbs v. Jackson Women's Health Organization*,[3] in which the Court—by a 5–4 vote, with Justice Kavanaugh joining Justice Samuel Alito's majority opinion—overturned *Roe v. Wade*[4] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[5] and held that the United States Constitution does not provide a right to abortion.[6] The result in *Dobbs* was more or less a foregone conclusion when the Court issued its decision, because on May 2, journalists from Politico had published

[1] Don't just take my word for it. From the Morton's website: "The patio at the Connecticut Avenue location overlooks Washington's infamous K Street Corridor, while the dining room caters to DC's powerful elite. Mingle amongst the decision-makers of DC, indulging in Morton's legendary steakhouse favorites for lunch or dinner." *Washington D.C. (Downtown)*, MORTON'S THE STEAKHOUSE, https://www.mortons.com/location/mortons-the-steakhouse-washington-dc-downtown/ [https://perma.cc/A9ES-EDRH] (last visited Jan. 23, 2026).

[2] *See* Ryan Lizza & Eugene Daniels, *Schumer Ups Pressure on McConnell in USICA-Reconciliation Dance*, POLITICO: PLAYBOOK (July 8, 2022, at 06:09 EDT), https://www.politico.com/newsletters/playbook/2022/07/08/schumer-ups-pressure-on-mcconnell-in-usica-reconciliation-dance-00044652 [https://perma.cc/9NGU-E6GG].

[3] 142 S. Ct. 2228, 2240 (2022).

[4] 410 U.S. 113 (1973).

[5] 505 U.S. 833 (1992).

[6] *Dobbs*, 142 S. Ct. at 2242 (holding that "*Roe* and *Casey* must be overruled" because the Constitution "makes no reference to abortion, and no such right is implicitly protected by any constitutional provision"); *see also id.* at 2316 (Roberts, C.J., concurring in the judgment) (arguing that the Court should have resolved the case on narrower grounds, rather than overruling *Roe* and *Casey*). *But see id.* at 2338 (Breyer, Sotomayor & Kagan, JJ., dissenting) (explaining that the Court still embraces "all the decisions" cited in *Roe* and *Casey* which recognize the right to make personal choices about "intimate relationships, the family, and contraception" (internal quotations omitted)).

an initial draft of Justice Alito's majority opinion, revealing that the Court was poised to strike down *Roe* and *Casey*.[7] Protests against the impending decision began almost immediately after Politico published its story.[8] Yet the official announcement of the *Dobbs* decision in late June was still seismic, immediately setting off a new, widespread wave of protests from supporters of abortion rights—at the Supreme Court itself[9] and across the nation.[10]

The mood among many protesters had scarcely subsided 12 days later. So when a protest group known as ShutDownDC found out Justice Kavanaugh was dining at Morton's, protesters soon gathered in front of the restaurant and urged the manager to kick Justice Kavanaugh out.[11] That didn't happen, and Justice Kavanaugh reportedly ate his meal without hearing or seeing the protesters.[12] But he did leave before dessert and exited through the back of the restaurant, apparently to avoid the protest.[13]

When news of the incident broke two days later, it generated a small and probably predictable storm of controversy. Some people on the political left appeared to enjoy what had happened to Justice Kavanaugh or find it amusing. Democratic Congresswoman Alexandria Ocasio-Cortez's sarcasm on X was representative: "Poor guy. He left before his soufflé because he decided half the

---

[7] *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, at 14:14 EDT), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/LWE9-H4FL].

[8] *See* Ellie Silverman, Justin Wm. Moyer & Joe Heim, *Crowds Protest at Supreme Court After Leak of* Roe *Opinion Draft*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/dc-md-va/2022/05/03/protests-roe-v-wade-supreme-court/ [https://perma.cc/TXK7-PH8T].

[9] Jenny Gathright, Debbie Truong, Jacob Fenston, Dee Dwyer & Tyrone Turner, *Crowd Swelled Outside Supreme Court Friday Night Following* Dobbs *Ruling*, DCIST (June 25, 2022, at 00:30 EDT), https://dcist.com/story/22/06/24/supreme-court-protesters-dobbs/ [https://perma.cc/XA52-RG8Y].

[10] Shawn Hubler, *Abortion Rights Protesters Voice Their Anger in Cities Across the Country*, N.Y. TIMES (May 24, 2025), https://www.nytimes.com/live/2022/06/24/us/roe-wade-abortion-supreme-court#abortion-rights-protesters-voice-their-anger-in-cities-across-the-country [https://perma.cc/6B9B-Y2EZ] (reporting on protests in Washington, D.C.; Chicago; Boston; Tallahassee, FL; Philadelphia; Seattle; Portland, OR; New York City; Los Angeles; Little Rock, AR; and Louisville, KY); Kelly McCleary & Holly Yan, *Protests Spread Across the US After the Supreme Court Overturns the Constitutional Right to Abortion*, CNN (June 27, 2022, at 22:05 EDT), https://www.cnn.com/2022/06/27/us/supreme-court-overturns-roe-v-wade-monday [https://perma.cc/3ES4-ZYBN].

[11] Lizza & Daniels, *supra* note 2; Tierney Plumb, *Activists Crash Brett Kavanaugh's D.C. Dinner at Morton's This Week*, EATER DC (July 8, 2022, at 11:05 PDT), https://dc.eater.com/2022/7/8/23200165/crashed-brett-kavanaugh-dc-dinner-mortons [https://perma.cc/2NYZ-2P6M].

[12] Lizza & Daniels, *supra* note 2.

[13] *Id.*

country should risk death if they have an ectopic pregnancy within the wrong state lines. It's all very unfair to him. The least they could do is let him eat cake[.]"[14] Some on the right expressed disapproval of *those* reactions. An associate editor for Fox News wrote a column accusing several "liberal journalists" and "leftists" of mocking Justice Kavanaugh and justifying his "harassment"; the column noted that a man had been charged weeks earlier with attempting to kill Justice Kavanaugh after allegedly traveling from California and arriving at the Kavanaughs' suburban Maryland home with a gun and a knife in the early morning hours of June 8, upset about the impending decision in *Dobbs*.[15]

Morton's was upset, saying in a statement to a reporter that Justice Kavanaugh and other diners were "unduly harassed by unruly protesters."[16] The statement went on: "Politics, regardless of your side or views, should not trample the freedom at play of the right to congregate and eat dinner. There is a time and place for everything. Disturbing the dinner of all of our customers was an act of selfishness and void of decency."[17] ShutDownDC was unapologetic and—presumably hoping to subject Supreme Court Justices to even more pop-up protests when they were out and about in D.C.—announced it would pay service-industry workers in Washington up to $250 for a "confirmed sighting" in public of Justices Kavanaugh, Alito, Clarence Thomas, Neil Gorsuch, Amy Coney Barrett, or Chief Justice John Roberts.[18]

That small squall over Justice Kavanaugh's truncated dinner out, however, was

---

[14] Alexandria Ocasio-Cortez (@AOC), X (July 8, 2022, at 13:28 PT), https://x.com/AOC/status/1545505082569117698 [https://perma.cc/S6AG-TZQS].

[15] Gabriel Hays, *Leftists Cackle at Justice Kavanaugh Being Chased Out of DC Restaurant: 'I Couldn't Give a Sh—,'* FOX NEWS (July 8, 2022, at 12:14 EDT), https://www.foxnews.com/media/leftists-cackle-justice-kavanaugh-chased-dc-restaurant [https://perma.cc/CJ99-9HQE]; *see also* Houston Keene, *Biden Remains Silent on Attempted Kavanaugh Assassination*, FOX NEWS (June 16, 2022, at 11:51 EDT), https://www.foxnews.com/politics/biden-remains-silent-attempted-kavanaugh-assassination [https://perma.cc/AHY2-CQYW]. The California man, Nicholas John Roske, pleaded guilty in 2025, to attempting to assassinate a justice of the United States, in violation of 18 U.S.C. § 351(c). Press Release, U.S. Dep't of Just., California Man Pleads Guilty to Attempted Murder of Supreme Court Justice in Maryland (Apr. 8, 2025), https://www.justice.gov/opa/pr/california-man-pleads-guilty-attempted-murder-supreme-court-justice-maryland [https://perma.cc/JS3A-U3WJ].

[16] Lizza & Daniels, *supra* note 2.

[17] *Id.* (emphasis omitted).

[18] ShutDownDC (@ShutDown_DC), X (July 8, 2022, at 07:55 PDT), https://x.com/ShutDown_DC/status/1545421407223521280 [https://perma.cc/7W8Y-MMXM]. Justices Kavanaugh, Alito, Thomas, Gorsuch and Barrett voted in *Dobbs* to overturn *Roe* and *Casey*; Chief Justice Roberts did not vote to overturn *Roe* and *Casey* but concurred in the judgment in *Dobbs*, upholding a Mississippi statute that prohibited abortions after the 15th week of pregnancy, before a fetus would be viable outside the womb. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240, 2317 (2022).

emblematic of a larger debate. *Dobbs* set off an explosion of dissatisfaction with—and scrutiny of—our court system generally, and the Supreme Court in particular.[19] Nearly four years later, it still reverberates.[20] The Court's approval ratings sank and have remained at or near historic lows.[21] Criticism has increased and grown sharper.[22] Journalists have trained more attention on the Court, shedding more light on how it operates and exposing example after example of ethically questionable behavior by several of the Justices.[23] The general public, perhaps more aware of the Supreme Court's role in shaping American life, has taken more direct action: organizing and voting, yes, but also protesting.[24]

Some of the criticism and scrutiny in general, and some of the protesting in particular, has felt more personal—maybe uncomfortably so, and in instances such as the attempt to kill Justice Kavanaugh, sometimes dangerously and illegally so.[25]

---

[19] *See* Jeffrey M. Jones, *Supreme Court Approval Holds at Record Low*, GALLUP (Aug. 2, 2023), https://news.gallup.com/poll/509234/supreme-court-approval-holds-record-low.aspx [https://perma.cc/SEZ4-J7X9].

[20] *See* Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/ [https://perma.cc/8EPG-4SND].

[21] *See* Jones, *supra* note 19.

[22] *Id.*; *see also* Caroll Doherty, Jocelyn Kiley, Baxter Oliphant, Andrew Daniller, Hannah Hartig et al., *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sep. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ [https://perma.cc/S4WJ-WPLX] (finding that 40% of Americans approved of the Supreme Court in July 2023, tying the record low first measured in September 2021).

[23] *See, e.g.*, Edwin Rios, *What Ethical Controversies Are US Supreme Court Justices Facing?*, THE GUARDIAN (July 12, 2023, at 13:28 EDT), https://www.theguardian.com/law/2023/jul/12/us-supreme-court-justices-ethics-rules-controversy-explain [https://perma.cc/WHC7-HPUH]; Jodi Kantor & Abbie VanSickle, *Inside the Supreme Court Ethics Debate: Who Judges the Justices?*, N.Y. TIMES (Dec. 5, 2024), https://www.nytimes.com/2024/12/03/us/supreme-court-ethics-rules.html [https://perma.cc/EYA9-XDQT].

[24] *See* Francesa Paris & Nate Cohn, *After* Roe*'s End, Women Surged in Signing Up to Vote in Some States*, N.Y. TIMES: THEUPSHOT (Aug. 25, 2022), https://www.nytimes.com/interactive/2022/08/25/upshot/female-voters-dobbs.html [https://perma.cc/Q6HQ-XWJK]; Ashley Kirzinger, Audrey Kearney, Mellisha Stokes, Alex Montero, Liz Hamel & Mollyann Brodie, *How the Supreme Court's* Dobbs *Decision Played in 2022 Midterm Election: KFF/AP VoteCast Analysis*, KFF (Nov. 11, 2022), https://www.kff.org/other/poll-finding/2022-midterm-election-kff-ap-votecast-analysis/ [https://perma.cc/5GM3-ANYT]; Roudabeh Kishi, *Abortion-Related Demonstrations in the United States: Shifting Trends and the Potential for Violence*, ACLED (June 23, 2022), https://acleddata.com/2022/06/23/abortion-related-demonstrations-in-the-us/ [https://perma.cc/AJF6-R7FB]; *Abortion Rights at Forefront of Women's March Rallies in Runup to Election Day*, ASSOCIATED PRESS (Nov. 2, 2024, at 15:34 PDT), https://apnews.com/article/womens-march-abortion-rights-election-28e54f912ffa36e9e61f1daf696a1e32 [https://perma.cc/5NKQ-RNS4].

[25] *See* Michael Levenson, *Man Pleads Guilty to Trying to Assassinate Justice Kavanaugh*, N.Y.

Some of the Justices in the spotlight have pushed back at the criticism themselves; defenders of the Court and of individual Justices have also objected to it, arguing that it's dangerous and threatens judicial independence, and even that the protests near the Justices' homes were illegal under a federal statute, 18 U.S.C. § 1507, which threatens criminal punishment against anyone who "pickets or parades" near a judge's home "with the intent of influencing" the judge.[26]

This Article pushes back against that pushback and argues that criticism of our courts in general, and of the Supreme Court in particular, is beneficial—including the kind of criticism that manifests itself as ordinary citizens gathering and shouting and annoying or inconveniencing Justices while they're in public or in their homes. The Article argues that peaceful protests of that nature can be valuable and are acceptable and legal. (I'm using "protests" as a catchall for all sorts of activities—demonstrations, rallies, parades, picketing—that involve people gathering in public to advocate for a cause. In this sense, "protests" may protest acts or decisions that have already occurred; the existing status of something; or actions or decisions the protesters don't want to occur.)

The Article is *not* a call for 24/7/365 protests at the Justices' homes and public appearances, and I see no risk that the Justices will be subjected to them.[27] Passion fuels such protests, and only rarely—perhaps when the stakes feel close to existential—will enough people feel so passionately about Supreme Court cases.[28] Passion also inevitably cools with time; almost four years after *Dobbs*, supporters of abortion rights are no longer gathering near Justices' homes to protest the decision.

TIMES (Apr. 8, 2025), https://www.nytimes.com/2025/04/08/us/kavanaugh-assassination-attempt-guilty.html [https://perma.cc/67R7-UD8V].

[26] 18 U.S.C. § 1507; *see, e.g.*, Joan Biskupic, *Analysis: Supreme Court Justices Respond to Public Criticism with Distance and Denial*, CNN (Sep. 13, 2022, at 05:08 EDT), https://www.cnn.com/2022/09/13/politics/supreme-court-public-criticism-distance-denial-roberts [https://perma.cc/2PC4-UFEA] (noting that, in the weeks following the Court's *Dobbs* decision, the conservative Justices "demonstrated a lack of awareness about the public concern and appeared even more disconnected"); Rich McKay, *Clarence Thomas Warns Supreme Court Can't Be 'Bullied,'* REUTERS (May 7, 2022), https://www.reuters.com/world/us/after-abortion-leak-justice-thomas-warns-supreme-court-cant-be-bullied-2022-05-06/ [https://perma.cc/Y5N3-EP97]; Letter from Chuck Grassley, Ranking Member, Judiciary Comm., to Merrick Garland, Att'y Gen. of the U.S. (May 11, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_to_justice_dept.supremecourtthreats.pdf [https://perma.cc/HBG7-WB4E] (arguing that protests at Justices' homes violated 18 U.S.C. § 1507 and demanding prosecution); Letter from Tom Cotton, U.S. Sen., to Merrick Garland, Att'y Gen. of the U.S. (May 10, 2022), https://www.cotton.senate.gov/imo/media/doc/garland_letter.pdf [https://perma.cc/TN42-AKTK] (same).

[27] Nor is this Article a call for trespassing onto Justices' property. I am defending protests, like those around *Dobbs*, that occur on public streets and sidewalks.

[28] *Cf.* William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986) (recognizing that "important constitutional litigation can generate its own tides of public opinion, just as a large ship causes a considerable wake").

But the arguments in this Article are perhaps even more important and relevant now, during Donald Trump's second presidency. Public approval of the Supreme Court remains low,[29] and questions only grow louder about the Court's credibility and whether it favors President Trump for partisan reasons, rather than principled legal ones.[30] Meanwhile, in the first year of his second term, President Trump and his Department of Justice have not hidden their contempt for free speech and the rights of protesters,[31] or their willingness to investigate and prosecute perceived opponents of the President solely for political reasons, without regard for facts or law.[32] Courts may soon have to consider whether protests near the Justices' homes

[29] *See* PEW RSCH. CTR., TRUMP'S JOB RATING DROPS, KEY POLICIES DRAW MAJORITY DISAPPROVAL AS HE NEARS 100 DAYS 46 (2025), https://www.pewresearch.org/wp-content/uploads/sites/20/2025/04/pp_2025-4-23_trump-100-days_report.pdf [https://perma.cc/8P4Z-U3X9] (reporting that 51% of Americans had a favorable view of the Supreme Court in April 2025, compared to 47% who had an unfavorable view, and observing that public opinion of the Court had improved slightly since 2023 but remained "near historic lows").

[30] *See* Nancy Gertner & Steven I. Vladeck, Opinion, *This Supreme Court Is Its Own Worst Enemy*, N.Y. TIMES (Oct. 7, 2024), https://www.nytimes.com/2024/10/07/opinion/supreme-court-legitimacy.html [https://perma.cc/D8KU-JV6C]; *63% of Voters Disapprove of the Trump Administration's Handling of the Jeffrey Epstein Files, Quinnipiac University National Poll Finds; Nearly Half of Voters Would Consider Joining a Third Party, Just Not One Created by Elon Musk*, QUINNIPIAC UNIV.: POLL (July 16, 2025), https://poll.qu.edu/poll-release?releaseid=3928 [https://perma.cc/MBF5-5L6W] (reporting that 63% of registered voters surveyed in July 2025 thought the Supreme Court was mainly motivated by politics, compared to only 30% who thought the Court was mainly motivated by law); Steve Vladeck, *167. The Inconsistent Court Strikes Again*, ONE FIRST (July 14, 2025), https://www.stevevladeck.com/p/167-the-inconsistent-court-strikes [https://perma.cc/CH7T-LFUQ] (arguing that the Court needed to provide explanations "to rationalize what, at least at first blush, sure look like alarming inconsistencies in the Court's behavior that seem best-explained not by a legal principle, but by which party controlled the White House . . . at the time of the Court's ruling").

[31] *See generally* Ben Makuch, *US Free-Speech Rights Shredded Despite Trump Vow to Be First-Amendment Champion*, THE GUARDIAN (June 19, 2025, at 07:00 EDT), https://www.theguardian.com/us-news/2025/jun/19/us-free-speech-rights-trump [https://perma.cc/2LH7-BD2Q] (describing Trump Administration crackdowns on protesters, journalists, and universities); Cristian Farias, *Donald Trump Is Torching the First Amendment. Judges Are Putting Him in His Place*, VANITY FAIR (May 22, 2025), https://www.vanityfair.com/news/story/donald-trump-first-amendment-judges [https://perma.cc/3XR2-NSK3] (detailing judicial pushback against Trump Administration efforts to detain and deport students and activists for pro-Palestinian speech).

[32] *See generally* Alexander Mallin, *Bondi, as New AG, Launches 'Weaponization Working Group' to Review Officials Who Investigated Trump*, ABC NEWS (Feb. 5, 2025, at 14:14 PDT), https://abcnews.go.com/US/bondi-new-ag-launches-weaponization-working-group-review/story?id=118501463 [https://perma.cc/EDM8-57X2] (reporting the creation of a group to conduct investigations into officials who prosecuted Trump); Glenn Thrush, *As White House Steers Justice Dept., Bondi Embraces Role of TV Messenger*, N.Y. TIMES (May 13, 2025), https://www.nytimes.com/2025/05/12/us/politics/pam-bondi-trump-justice-dept.html

are legal and whether prosecutions under 18 U.S.C. § 1507 violate protesters' right to free speech.

In Part I, I describe the reaction to *Dobbs*, including the protests near the Justices' homes, and the plunge in the Court's reputation. I also describe the negative reaction to that reaction by some of the Justices and their supporters, rooted in what I think are two broad concerns: keeping the Justices safe and preventing improper influences upon their decisions. In Part II, I address the safety concerns—acknowledging the distressing and unacceptable increase in violence and threats against members of the judiciary—but argue that those concerns shouldn't shield the Justices from criticism, including the types of protests that took place after *Dobbs*. In Part III, I refute concerns about influence, pointing out that attempting to influence Justices and other judges—even through criticism—is commonplace. I argue that criticism from the public, including in the form of protests, is less of a threat to the judiciary than other types of criticism Justices and judges face, and that it can even be beneficial. Finally, I also argue that contrary to some commentary that accompanied the *Dobbs* protests, 18 U.S.C. § 1507 does not prohibit protests near the Justices' homes.

I. THE REACTION TO *DOBBS*, AND CONCERNS ABOUT THAT REACTION

A. Protests, Polls, and (Bad) Press

If Supreme Court Justices are like the rest of us, it's easy to imagine that, on many nights over these last four years, the current Justices have lain awake and wondered: *Does everyone hate us?* Indeed, if they haven't wondered about that, the rest of us would be justified in wondering about them: *Just how out of touch are you, exactly?* Of course, not everyone hates the Supreme Court right now—and of course, "hate" is too casual and imprecise a word—but the current Court is historically unpopular and untrusted.

The protests that erupted around *Dobbs*, starting from the publication of Justice Alito's draft opinion and continuing for weeks after the Court's actual decision, were the most immediate and visible sign that antipathy toward the Court had reached a new level. After Politico published the draft opinion, but before the Court officially decided *Dobbs*, protests erupted across the country.[33] By June 2022,

[https://perma.cc/52WY-RJ8Y] (explaining Bondi's coordination with White House and her performative approach); Ken Dilanian, *Pam Bondi Reshapes the DOJ Around Trump's Priorities*, NBC NEWS (Mar. 14, 2025, at 10:39 PDT), https://www.nbcnews.com/politics/justice-department/s-trumps-justice-department-now-rcna195289 [https://perma.cc/MM8J-Q2J3] (detailing Bondi's purge of career prosecutors who investigated Trump and her vow to remove employees who "despise Donald Trump").

[33] Silverman et al., *supra* note 8.

protests in support of abortion rights outnumbered anti-abortion protests by more than three to one—a sharp shift from 2020, when there were more anti-abortion protests than abortion-rights protests.[34] The number of abortion-related demonstrations in the country at that point, only halfway through 2022, was 51% higher than in all of 2021, which itself saw a 129% increase from 2020.[35] This was different.

And while protests about abortion have occurred for decades, and advocates on both sides of the issue (and many other issues) have long gathered and demonstrated near the Supreme Court on days when cases are argued and decisions come down, the *Dobbs* protests that were focused most directly at the members of the Supreme Court in and around Washington, D.C., were—again, in a word—different. At the Supreme Court building itself, where demonstrations began after the Politico report on the draft opinion and continued into the summer,[36] a security fence went up around the perimeter of the Court almost immediately after the draft opinion became public.[37] The fence, eight feet high and "reminiscent of the unscalable fencing placed around the U.S. Capitol after the violence of Jan. 6, 2021,"[38] remained there for almost four months.[39]

Strikingly, protests were not confined to the streets and sidewalks around the Supreme Court. This time, many supporters of abortion rights seemed to want to speak directly to the Justices in the *Dobbs* majority.[40] It was as if, to show the Justices how personal the decision was to them and how much it mattered to them, those protesters decided they needed to make their protests more personal for the Justices. "You don't get to take away my bodily autonomy and get [to] enjoy your Saturday at home," said one protester taking part in a demonstration that moved between the homes of Chief Justice Roberts and Justice Kavanaugh on the weekend after Politico

---

[34] Kishi, *supra* note 24.

[35] *Id.*

[36] Amy Howe, *Security Fencing Around Court is Removed, but Building Remains Closed to Public*, SCOTUSBLOG (Aug. 29, 2022), https://www.scotusblog.com/2022/08/security-fencing-around-court-is-removed-but-building-remains-closed-to-public/ [https://perma.cc/SLB8-V32T].

[37] Alexandra Hutzler, *High Fence Erected Outside Supreme Court as Abortion-Related Protests Continue*, ABC NEWS (May 5, 2022, at 10:37 PDT), https://abcnews.go.com/Politics/high-fence-erected-supreme-court-abortion-related-protests/story?id=84518199 [https://perma.cc/NR25-Q2BG].

[38] *Id.*

[39] *See* Howe, *supra* note 36.

[40] *See* Mary Papenfuss, *Protesters Target Supreme Court Justices Homes Following Leaked Draft Opinion*, HUFFPOST (May 9, 2022, at 03:28 EDT), https://www.huffpost.com/entry/protesters-supreme-court-justices-homes_n_62788d49e4b0d7ea4cce8eb0 [https://perma.cc/9US6-P89A].

published the draft opinion.[41] "You can do one or the other."[42]

In the days after Politico's scoop, supporters of abortion rights gathered on the streets outside Justice Alito's home and the homes of Chief Justice Roberts and Justice Kavanaugh.[43] A week after the initial Politico story on the draft opinion, about 100 protesters reportedly "marched" to Justice Alito's home in Alexandria, Virginia.[44] It was unclear whether Justice Alito was home, but during what the report called an "abortion-rights vigil," protesters lit candles in front of the driveway and chanted slogans, including, "Our body, our rights, our right to decide!" and, "Abort the court!"[45]

Days earlier, "a few dozen" protesters took to the residential streets of Chevy Chase, Maryland—where Chief Justice Roberts and Justice Kavanaugh lived—chanting, "Keep abortion safe and legal" and holding signs that said things like, "Keep your rosaries off our ovaries."[46] Another report from Chevy Chase similarly described "dozens" of protesters going from Justice Kavanaugh's home to Chief Justice Roberts' home, chanting things like, "No uterus, no opinion," and "[T]he world is watching," as Montgomery County, Maryland, and Washington, D.C., police observed.[47] That report included one arguably inflammatory statement from a protest organizer who said, "If you take away our choices, we will riot," but the organizer made that statement to a reporter, rather

---

[41] Rafael Sanchez-Cruz, *Pro-Choice Protests Outside Maryland Homes of Justices Roberts and Kavanaugh*, WUSA 9 (May 9, 2022, at 04:38 EDT), https://www.wusa9.com/article/news/local/protests/pro-choice-protests-outside-the-homes-of-justices-roberts-and-kavanaugh/65-eebbc2e2-7593-4eaa-9992-f34383a6544f [https://perma.cc/KL8B-A9QY]; *see also* Gerstein & Ward, *supra* note 7 (reporting the leak of the draft opinion).

[42] Sanchez-Cruz, *supra* note 41.

[43] Ali Zaslav, Jessica Dean & Ted Barrett, *Senators Quickly Pass Bill to Expand Security for Families of Supreme Court Justices*, CNN (May 9, 2022, at 23:07 EDT), https://www.cnn.com/2022/05/09/politics/supreme-court-justices-security-senate-vote/index.html [https://perma.cc/YH5A-ER42].

[44] Nancy Vu, *Alito's Home Draws Latest Abortion-Rights Demonstration After* Roe *Opinion Breach*, POLITICO (May 9, 2022, at 23:42 EDT), https://www.politico.com/news/2022/05/09/samuel-alito-home-protest-abortion-rights-00031285 [https://perma.cc/A2VF-XNNP].

[45] *Id.*

[46] Betsy Klein, *White House Warns Against 'Violence, Threats, or Vandalism' After Protests Outside Supreme Court Justices Homes*, CNN (May 9, 2022, at 10:21 EDT), https://www.cnn.com/2022/05/09/politics/abortion-protests-supreme-court-justices/index.html [https://perma.cc/Z5KU-2WJD]. It would be fair, based on video clips, to describe at least some of the chanting as loud; at least one protester was using a megaphone. *Abortion Rights Supporters Chant Outside Supreme Court Justice' Homes*, CNN, at 00:18 (May 9, 2022), https://www.cnn.com/2022/05/09/politics/abortion-protests-supreme-court-justices/index.html [https://perma.cc/C9HC-645M] (video embedded on webpage).

[47] Sanchez-Cruz, *supra* note 41.

than shouting it at a Justice or leading the crowd in chanting it.[48]

The protests continued for weeks, until and after the Supreme Court issued its decision in *Dobbs*, but none of them appear to have resulted in any violence.[49] Some protests were described by organizers merely as vigils.[50] Soon after the leaked draft opinion, a group called Ruth Sent Us—described in conservative media as a "leftist"[51] and "far-left"[52] group—announced plans to protest at the homes of the six Justices appointed by Republican presidents and published a map on its website that provided those Justices' addresses.[53] But, as reported, even this group limited its plans to only peaceful "walk-by" protests.[54]

While the extent and nature of the *Dobbs* protests gave the impression that the Supreme Court was exploring new depths of unpopularity and distrust, more concrete evidence in the form of polling data confirmed it—and has continued confirming it. According to polling by Gallup, the Supreme Court's approval rating in July 2024 was 43%, which was actually a slight improvement from the previous rating of 41% in September 2023.[55] It wasn't always this way. The Court's approval rating was consistently in the high 50s or low 60s in the early 2000s—even after

---

[48] *Id.*

[49] *See* Jasmine Golden & Ann E. Marimow, *Supreme Court Marshal Presses Md., Va. Leaders to Stop Home Protests*, WASH. POST (July 2, 2022), https://www.washingtonpost.com/dc-md-va/2022/07/02/supreme-court-justices-picketing-homes/ [https://perma.cc/W2SY-WYF8].

[50] *See* Zaslav et al., *supra* note 43 (reporting that "ShutDownDC hosted a vigil" outside Justice Alito's home); Ellie Silverman, *Outside Kavanaugh's Home, a Neighbor Rallies for Abortion Rights*, WASH. POST (May 7, 2022), https://www.washingtonpost.com/dc-md-va/2022/05/07/wooten-holway-protest-justice-kavanaugh-neighbor/ [https://perma.cc/N7XT-UPUZ] (reporting statements of a neighbor of Justice Kavanaugh: "I organize peaceful candlelit vigils in front of his house").

[51] Caroline Downey, *Pro-Abortion Group Publicizes Conservative Supreme Court Justices' Home Addresses Ahead of Planned Protests*, NAT'L REV. (May 5, 2022, at 12:53 PT), https://www.nationalreview.com/news/pro-abortion-group-publicizes-conservative-supreme-court-justices-home-addresses-ahead-of-planned-protests/ (on file with the Lewis & Clark Law Review).

[52] *Ruth Sent Us*, INFLUENCE WATCH, https://www.influencewatch.org/organization/ruth-sent-us/ [https://perma.cc/JZ43-6XMW] (last visited Jan. 26, 2026).

[53] Damare Baker, *An Old Question Returns to Washington: Is It Ever Okay to Protest in Front of Someone's Home?*, WASHINGTONIAN (May 12, 2022), https://www.washingtonian.com/2022/05/12/roe-alito-home-protests-supreme-court-justices-houses/ [https://perma.cc/Y4NY-X46S]. The map was soon removed from the Ruth Sent Us website for violating Google Maps' terms of service. *Id.*

[54] *See* Downey, *supra* note 51.

[55] *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/M6FH-48AF] (last visited Jan. 26, 2026).

deciding a presidential election in *Bush v. Gore*[56]—and was 58% in July 2020.[57] But in September 2021, the approval rating hit an all-time low in Gallup polling (which goes back to 2000), dropping to 40%.[58] It fell to 40% again in September 2022, not quite three months after the *Dobbs* decision, and was still at 40% in July 2023.[59] The Court's *disapproval* rating has been above 50% in six consecutive Gallup polls, since September 2021; it had been above 50% only twice before in the history of the poll.[60]

Polling on the public's trust and confidence in the Supreme Court has followed a similar trajectory. The percentage of people who had either "a great deal" or "quite a lot" of confidence in the Supreme Court ranged consistently between the mid-40s and the mid-50s from 1973—when Gallup began polling the question—until 2004.[61] In 2022, that figure plummeted to 25%; it has barely improved since then, hitting 27% in 2023 and 30% in 2024 before declining again to 27% in 2025.[62] Likewise, the percentage of people who said they have a "great deal" of "trust and confidence" in "the judicial branch headed by the U.S. Supreme Court" dropped into single figures for the first time in September 2022 (7%) and September 2023 (9%); in those same polls, the percentage of people with "not very much" trust and confidence or "none at all" exceeded 50% for the first time, hitting a combined 53% in September 2022 and resting at 51% a year later.[63]

---

[56] Bush v. Gore, 531 U.S. 98, 102, 110 (2000) (per curiam) (reversing Florida Supreme Court's order of manual recount of votes for presidential election).

[57] *Supreme Court*, *supra* note 55.

[58] *Id.* In polling by the Pew Research Center, which goes back to 1987, the percentage of Americans with a "favorable" rating of the Supreme Court fell to an all-time low—44%—in July 2023. Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/ [https://perma.cc/RX3F-JY23]. That represented a 26% drop from 2020. *Id.* And a PBS NewsHour/NPR/Marist poll in June 2023, one year after the *Dobbs* decision, tracked the Supreme Court's approval rating at 39%—the same rating the Court had received a year earlier. Geoff Bennett, Lisa Desjardins & Kyle Midura, Transcript, *Poll Shows Americans' Trust in Supreme Court Remains Low*, PBS (June 21, 2023, at 18:40 EDT), https://www.pbs.org/newshour/show/poll-shows-americans-trust-in-supreme-court-remains-low [https://perma.cc/KPJ6-V46G].

[59] *Supreme Court*, *supra* note 55.

[60] *Id.*

[61] *See id.*

[62] *Id.*

[63] *Id.* For similar polling trends, see *Confidence in the Supreme Court Remains Low*, AP-NORC (June 27, 2024), https://apnorc.org/projects/confidence-in-the-supreme-court-remains-low/ [https://perma.cc/ZYJ8-A73A] ("Sixteen percent of U.S. adults have a great deal of confidence in the people running the Supreme Court."), and Thomas Beaumont & Linley Sanders, *7 in 10 Americans Think Supreme Court Justices Put Ideology over Impartiality: AP-NORC Poll*, ASSOCIATED PRESS (June 26, 2024, at 21:02 EDT), https://apnews.com/article/supreme-court-trump-presidential-immunity-abortion-gun-2918d3af5e37e44bbad9c3526506c66d

Moreover, the polling suggests our growing disapproval of the Supreme Court and our loss of confidence in it aren't based on ordinary concerns about the Court's competence, but on more fundamental concerns about fairness and impartiality. More and more of us think the Court plays favorites. "The only constant is that the court achieves the results it wants in cases before it regardless of prior precedent, regardless of the rules of interpretation and regardless of what institution wins," Professor Mark Lemley said in 2023.[64]

The growing perception is that ideology often drives those results. A trio of political scientists argued in 2022 that, after years of aligning with the views of the "average American," the Court's decisions had recently "shifted sharply to the right," and that, based on surveys conducted over several years, the Supreme Court was no longer representative of the average American, but of the average Republican voter.[65] *Seventy percent* of respondents in the June 2024 AP-NORC poll believed Supreme Court Justices were "[m]ore likely to try to shape the law to fit their own ideologies"; only 28% of respondents thought the Justices were "[m]ore likely to provide an independent check on other branches of government by being fair and impartial."[66] It may not be a surprise that 84% of Democrats polled thought the Justices were more likely to be driven by ideology, but so did 74% of Independents, and 50% of Republicans.[67]

[https://perma.cc/FF5E-KPW2] ("A solid majority of Americans say Supreme Court justices are more likely to be guided by their own ideology rather than serving as neutral arbiters of government authority.").

[64] Greg Stohr, Zoe Tillman, Jennifer A. Dlouhy & Jordan Fabian, *An Aggressive Supreme Court Reshapes the US as Its Standing Erodes*, BLOOMBERG (June 21, 2023, at 04:52 PDT), https://www.bloomberg.com/news/features/2023-06-20/supreme-court-power-expands-as-epa-abortion-decisions-reshape-us-law [https://perma.cc/8G36-QGLE]; *see also* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113–114 (2022) ("None of this is to say that textualism, originalism, and fidelity to precedent aren't playing a role in modern Court opinions. But they are tools the Justices deploy to achieve particular results those Justices have already decided they want to reach; they can't explain those results because they aren't used consistently.").

[65] Stephen Jessee, Neil Malhotra & Maya Sen, Opinion, *The Supreme Court Is Now Operating Outside of American Public Opinion*, POLITICO (July 19, 2022, at 04:30 EDT), https://www.politico.com/news/magazine/2022/07/19/supreme-court-republican-views-analysis-public-opinion-00046445 [https://perma.cc/E2MG-77VP]; *see also* Stephen Jessee, Neil Malhotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court is Now Much More Conservative than the Public*, PROC. NAT'L ACAD. SCIS., June 6, 2022, at 1, 1–7 (finding that after Justice Barrett replaced Justice Ginsburg, the Court's median shifted right).

[66] *Confidence in the Supreme Court Remains Low*, *supra* note 63.

[67] *Id.* It's likely many Republicans' complaints that ideology drives the Justices' decisions stem from a belief that the Supreme Court is too *liberal*, or too often favors *Democrats*. In the June 2024 article about the AP-NORC poll, one Republican who planned to vote for Donald Trump in the November 2024 presidential election feared that the Justices were "getting influenced and pressured by a lot of people and a lot of entities on the left." Beaumont & Sanders, *supra* note 63. "Let's be honest," the Republican continued. "It's anything to crucify Trump." *Id.*

My theory is that *Dobbs*—by erasing a constitutional right that seemed well-established and secure, that people relied on,[68] and that most people favored[69]—got the attention of Americans in a way that Supreme Court decisions rarely do. Many of those people—normal people, without law degrees, who don't know about originalism or substantive due process—may have taken a closer look at the Court and continued to pay attention to this institution that, until then, may have seemed remote from their daily lives and inscrutable.

And whether it's because *Dobbs* and other decisions have simply drawn more attention to the Court, or because more and more people now think the members of the Supreme Court make decisions based on politics, or for some other reason, the media since *Dobbs* has devoted more resources to investigating the Court and the actions of individual Justices.[70] As Professor Jake Charles said, the way the Justices operate is "a matter of public consciousness" now, in a way it wasn't before: "I think now there's a spotlight on the Supreme Court and especially a greater tendency of journalists to treat Supreme Court Justices as political actors and so to do investigations and to figure out conversations or views they've expressed in other settings."[71] And "that's a good thing."[72] Professor Charles found the ongoing discourse "heartening":

> [T]here's more public engagement about this question of: "Maybe we should actually know something about the nine people that have the most power in the U.S., or among the most power in the U.S., and not treat them as . . . the oracles that are up on the hill that we can't . . . look behind the curtains and see what's going on there."[73]

Journalists' digging has produced a series of extraordinary stories about the Supreme Court and some of the Justices, revealing a Court that interest groups have spent heavily to influence through access to Justices;[74] a Court that still appears

---

[68] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2347 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting). *But see id.* at 2276–77 (majority opinion) (concluding that overruling *Roe* and *Casey* would not "upend substantial reliance interests").

[69] In May 2022, a month before the Supreme Court decided *Dobbs*, 63% of people surveyed by Gallup said overturning *Roe* would be a "bad thing"; 32% said it would be a "good thing." *Abortion*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx [https://perma.cc/JH2B-3VBX] (last visited Jan. 27, 2026).

[70] *See, e.g.*, Linda Greenhouse, *What in the World Happened to the Supreme Court?*, THE ATLANTIC (Nov. 14, 2022), https://www.theatlantic.com/ideas/archive/2022/11/supreme-court-dobbs-conservative-majority/672089/ [https://perma.cc/TYA3-Z786].

[71] SUPREME MYTHS: *Professor Jake Charles*, at 50:13–51:33 (Apple Podcasts, June 20, 2024).

[72] *Id.*

[73] *Id.*

[74] *See* Sarah McCammon, *Former Evangelical Activist Says He 'Pushed the Boundaries' in Supreme Court Dealings*, NPR (Dec. 8, 2022, at 17:28 ET), https://www.npr.org/2022/12/08/1141546218/supreme-court-leaks-reverend-rob-schenk-dobbs-hobby-lobby

vulnerable to such influence campaigns;[75] Justices who have misused their office for

[https://perma.cc/JY7M-K8ZN] (reporting that a former leader of a religious-right organization described to journalists and testified before the House Judiciary Committee about the organization's efforts to wine and dine Justice Antonin Scalia, Justice Thomas and Justice Alito, and "embolden" them to take positions and write opinions that would advance the organization's agenda); Peter S. Canellos & Josh Gerstein, *'Operation Higher Court': Inside the Religious Right's Efforts to Wine and Dine Supreme Court Justices*, POLITICO (July 8, 2022, at 15:15 EDT), https://www.politico.com/news/2022/07/08/religious-right-supreme-court-00044739 [https://perma.cc/9TF9-NZ7N] (reporting on claims that same organization recruited and coached donors to reinforce conservative positions during expensive dinners with Justices Thomas, Alito, and Scalia); Jodi Kantor & Jo Becker, *Former Anti-Abortion Leader Alleges Another Supreme Court Breach*, N.Y. TIMES (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html [https://perma.cc/Q6AZ-PRDV] (reporting on former anti-abortion minister's claims that he obtained advance word of the 2014 *Hobby Lobby* outcome from a donor who had dined with Justice Alito).

[75] In a series it called *Friends of the Court*, ProPublica published a string of jaw-dropping stories in 2023 about "Justices' Beneficial Relationships With Billionaire Donors." *Friends of the Court*, PROPUBLICA, https://www.propublica.org/series/supreme-court-scotus [https://perma.cc/YPJ4-VDQ6] (last visited Jan. 27, 2026). Most of the articles were about Justice Thomas and his acceptance of valuable gifts and vacations—many of which he didn't disclose, in apparent violation of the law—from billionaires, many of whom are associated with conservative causes and Republican politics. *See, e.g.*, Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, at 05:00 EDT), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/56MT-EK3V]; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Defends Undisclosed "Family Trips" With GOP Megadonor. Here Are the Facts.*, PROPUBLICA (Apr. 7, 2023, at 20:20 EDT), https://www.propublica.org/article/clarence-thomas-response-trips-legal-experts-harlan-crow [https://perma.cc/CU8J-Z728]; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Billionaire Harlan Crow Bought Property from Clarence Thomas. The Justice Didn't Disclose the Deal.*, PROPUBLICA (Apr. 13, 2023, at 14:20 EDT), https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus [https://perma.cc/BY3E-M6Y3]; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023, at 06:00 EDT), https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus [https://perma.cc/X268-SXMW]; Brett Murphy & Alex Mierjeski, *Clarence Thomas' 38 Vacations: The Other Billionaires Who Have Treated the Supreme Court Justice to Luxury Travel*, PROPUBLICA (Aug. 10, 2023, at 05:45 EDT), https://www.propublica.org/article/clarence-thomas-other-billionaires-sokol-huizenga-novelly-supreme-court [https://perma.cc/DB59-DENT]; Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Secretly Participated in Koch Network Donor Events*, PROPUBLICA (Sep. 22, 2023, at 05:00 EDT), https://www.propublica.org/article/clarence-thomas-secretly-attended-koch-brothers-donor-events-scotus [https://perma.cc/9XT9-KCBB]; Justin Elliott, Joshua Kaplan, Alex Mierjeski & Brett Murphy, *A "Delicate Matter": Clarence Thomas' Private Complaints About Money Sparked Fears He Would Resign*, PROPUBLICA (Dec. 18, 2023, at 06:00 EST) [hereinafter *A Delicate Matter*], https://www.propublica.org/article/clarence-thomas-money-complaints-sparked-resignation-fears-scotus [https://perma.cc/PHP3-JXBY].

In the latter article, ProPublica reported that Justice Thomas was unhappy with his financial situation around the year 2000, and that people on the political right responded. *See A Delicate*

personal interests;[76] and Justices who appear unbound by ordinary standards of judicial conduct and ethics, including recusal rules that seemed applicable in cases where there were reasonable questions about impartiality.[77] These exposés have no

Matter, *supra*. Democrats on the Senate Finance Committee found that around the same time, in 1999, Justice Thomas had received a loan from a friend and used it to buy a luxury recreational vehicle for $267,230. Memorandum from Fin. Comm. Democratic Staff to Ron Wyden, Chairman, Senate Comm. on Fin. 1 (Oct. 25, 2023), https://www.finance.senate.gov/imo/media/doc/senate_finance_committee_welters_thomas_memo_102523.pdf [https://perma.cc/2GHV-JDEF]; *see* Jo Becker & Julie Tate, *Clarence Thomas's $267,230 R.V. and the Friend Who Financed It*, N.Y. TIMES (Aug. 5, 2023), https://www.nytimes.com/2023/08/05/us/clarence-thomas-rv-anthony-welters.html [https://perma.cc/AZQ2-HH8W]; *see also* Jo Becker, *Justice Thomas's R.V. Loan Was Forgiven, Senate Inquiry Finds*, N.Y. TIMES (Oct. 26, 2023), https://www.nytimes.com/2023/10/25/us/politics/clarence-thomas-rv-loan-senate-inquiry.html [https://perma.cc/PB2S-Z7JZ] (reporting on findings of the Senate Finance Committee). The loan called for Justice Thomas to make only interest payments for five years and then pay off the principal, but the friend forgave the balance after nine years, at which point Justice Thomas had only made interest payments. Memorandum from Fin. Comm. Democratic Staff to Ron Wyden, *supra*, at 3–4. An ethics lawyer told the New York Times that Justices should not accept loans from wealthy individuals outside of their families: "[Y]ou have to ask, why is a justice going to this private individual and not to a commercial lender, unless the justice is getting something he or she otherwise could not get." Becker & Tate, *supra*.

[76] *See* Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor's Staff Prodded Colleges and Libraries to Buy Her Books*, ASSOCIATED PRESS (July 11, 2023, at 02:14 PDT), https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-colleges-b2cb93493f927f995829762cb8338c02 [https://perma.cc/6LUM-V4BP].

[77] Justices Sotomayor and Gorsuch had not recused from cases involving Penguin Random House, the publisher of their books. *See* Devan Cole, *2 Supreme Court Justices Did Not Recuse Themselves in Cases Involving Their Book Publisher*, CNN (May 5, 2023, at 13:01 EDT), https://www.cnn.com/2023/05/04/politics/sonia-sotomayor-neil-gorsuch-book-recusal-supreme-court-cases/index.html [https://perma.cc/56XF-WBTG].

More significantly, and contrary to the views of many independent observers and ethics experts, Justices Thomas and Alito didn't recuse themselves from cases involving Donald Trump's attempts to overturn the 2020 presidential election—such as Trump v. Anderson, 144 S. Ct. 662, 664–65 (2024) (per curiam), reversing the Colorado Supreme Court's decision to remove Trump from 2024 Republican primary election ballots for engaging in insurrection against the United States, and Trump v. United States, 144 S. Ct. 2312, 2327–32 (2024), holding that former presidents enjoy either absolute or presumptive immunity from criminal prosecution for official acts in office.

Reporters uncovered actions by the wives of Justices Thomas and Alito that seemed to make it reasonable to question their impartiality in those cases. Justice Thomas's wife, Ginni Thomas, was deeply involved in Trump's attempted election subversion (not to mention cuckoo-deep into debunked claims and discredited conspiracy theorists); she communicated with his Chief of Staff and with Republican state legislators in hopes of overturning election results. *See, e.g.*, Bob Woodward & Robert Costa, *Virginia Thomas Urged White House Chief to Pursue Unrelenting Efforts to Overturn the 2020 Election, Texts Show*, WASH. POST (Mar. 24, 2022), https://www.washingtonpost.com/politics/2022/03/24/virginia-thomas-mark-meadows-texts/ [https://perma.cc/74RT-2TXR]; Emma Brown, *Ginni Thomas Pressed 29 Ariz. Lawmakers to Help Overturn*

doubt continued to depress the public's approval of, and trust in, the Supreme Court.

B. The Reaction to the Reaction

In the face of all the protests, the underwater approval ratings, the unflattering and potentially incriminating reporting, and the new waves of critiques of the Supreme Court that each of those phenomena set off, many of the Justices have had trouble understanding and accepting the criticism. Even though much of the public

---

Trump's Defeat, Emails Show, WASH. POST (June 10, 2022), https://www.washingtonpost.com/investigations/2022/06/10/ginni-thomas-election-arizona-lawmakers/ [https://perma.cc/R9HC-7RUN]; Nicholas Wu & Kyle Cheney, *Ginni Thomas Tells Jan. 6 Panel She Still Believes False Election Fraud Claims, Chair Says*, POLITICO (Sep. 29, 2022, at 17:42 EDT), https://www.politico.com/news/2022/09/29/ginni-thomas-jan-6-panel-false-election-fraud-claims-00059627 [https://perma.cc/Q3MD-YBYJ].

Separately, flags associated with Trump's "Stop the Steal" campaign to overturn his election defeat flew at different times at the Alitos' home in Virginia and their vacation home in New Jersey. *See* Jodi Kantor, *At Justice Alito's House, a 'Stop the Steal' Symbol on Display*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html [https://perma.cc/2YP4-H2P6]; Jodi Kantor, Aric Toler & Julie Tate, *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html [https://perma.cc/A2JN-MQ86]; Jodi Kantor, *The Alitos, the Neighborhood Clash and the Upside-Down Flag*, N.Y. TIMES (May 28, 2024) [hereinafter Kantor, *The Alitos*], https://www.nytimes.com/2024/05/28/us/justice-alito-neighbors-stop-steal-flag.html [https://perma.cc/B3SW-U4PT]. Justice Alito said that, after an argument with neighbors who displayed a "Fuck Trump" sign at their home, his wife Martha-Ann Alito, against his wishes, flew an upside-down American flag—a symbol Trump supporters adopted after the 2020 election—at their Virginia home in January 2021, including days after Trump supporters attacked the Capitol on January 6, 2021. *See* Shannon Bream & Greg Norman, *Alito Says Wife Displayed Upside-Down Flag After Argument with Insulting Neighbor*, FOX NEWS (May 17, 2024, at 13:07 EDT), https://www.foxnews.com/politics/alito-wife-displayed-upside-down-flag-argument-insulting-neighbor [https://perma.cc/D8N2-ZZJ9]; Letter from Samuel A. Alito, Jr., J., U.S. Sup. Ct., to Richard J. Durbin & Sheldon Whitehouse, Sens., U.S. Senate (May 29, 2024) [hereinafter Letter to Durbin & Whitehouse], https://www.judiciary.senate.gov/imo/media/doc/Letter%20from%20Justice%20Alito%20to%20Senators%20Durbin%20and%20Whitehouse.pdf [https://perma.cc/UTU9-9CN2]. However, the neighbor who'd argued with Martha-Ann Alito said the argument occurred in February 2021 and had corroborating evidence, suggesting the argument could not have been why the flag flew at the Alitos' home in January. *See* Kantor, *The Alitos*, *supra*. Another flag adopted by some of Trump's supporters after the 2020 election, known as the "Appeal to Heaven" flag or the Pine Tree flag, flew at the Alitos' New Jersey home in the summer of 2023. *See* Kantor, Toler & Tate, *supra*. Justice Alito said neither he nor his wife knew that flag was associated with the "Stop the Steal Movement"—something he didn't say about the upside-down flag flown at their Virginia home. *See* Letter to Durbin & Whitehouse, *supra*; Adam Liptak, *Alito Refuses Calls for Recusal Over Display of Provocative Flags*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/us/alito-supreme-court-recusal-flag.html [https://perma.cc/TT8R-TNF7].

has found a lot to dislike or question about the Court and the way it's operating, those Justices and their supporters have gotten defensive, and appeared obtuse, irritated, or even angry in their responses to the criticism. Professor Amanda Frost captured the attitudes of many of the Justices:

> They don't acknowledge we live in a different era where the idea that they can do things behind closed doors, without anyone wondering what they're up to—that that era has passed . . . . I don't think the court has realized it has to be more transparent and accountable than it has been in the past.[78]

In the months after *Dobbs*, defenders of the decision and of the Supreme Court granted that the Court was subject to criticism, but they seemed unable to understand why *Dobbs* had provoked such a reaction or why it might have caused people to question the Court's legitimacy—even though such questions came from members of the Court itself.[79] Without naming *Dobbs* or any other recent decisions, Justice Kagan warned in speeches that the Supreme Court's worst moments over history had occurred when Justices "essentially reflected one party's or one ideology's set of views in their legal decisions," and that it was dangerous for democracy if the Court over time "loses all connection with the public and with public sentiment."[80] Justice Alito seemed to take offense to that veiled criticism in an unusually public statement to The Wall Street Journal: "[S]aying or implying that the court is becoming an illegitimate institution or questioning our integrity crosses an important line."[81]

Chief Justice Roberts (who only concurred in the judgment in *Dobbs*) also bristled at questions about the Supreme Court's legitimacy, allowing in a speech that people could express their views, but saying he didn't "understand the connection between opinions that people disagree with and the legitimacy of the court."[82] CNN analyst Joan Biskupic wrote that the Chief Justice "seemed willfully oblivious to why the public has turned on the court," noting that the public could see that in their work broadly—not merely in *Dobbs*—the Justices had "broken from their usual adherence to precedent, offered dubious rationales and voted in what appears to be partisan lockstep."[83] Chief Justice Roberts appeared to think critics didn't want the Supreme Court to have the job of interpreting the Constitution, and warned that the task shouldn't be left to "the political branches" and "public

---

[78] Stohr et al., *supra* note 64.

[79] *See* Jess Bravin, *Kagan v. Roberts: Justices Spar Over Court's Legitimacy*, WALL ST. J. (Sep. 28, 2022, at 18:46 ET), https://www.wsj.com/articles/kagan-v-roberts-justices-spar-over-supreme-courts-legitimacy-11664394642 [https://perma.cc/68EV-8KJ3].

[80] *Id.*

[81] *Id.*

[82] Biskupic, *supra* note 26.

[83] *Id.*

opinion."[84] But Biskupic pointed out what the Chief Justice was missing: the sense among many Americans that the Court "appears to be abandoning its constitutional role, in favor of one *indistinguishable* from the political branches."[85]

Other reactions from the Justices and their supporters have been pricklier, spanning a spectrum from irritation and sarcasm to obstinacy and anger. Not long after Politico published the draft of the *Dobbs* opinion, Justice Thomas—in an apparent reference to either the leak of the opinion, the protests that had begun around the country, or both—said in a speech that "we are becoming addicted to wanting particular outcomes, not living with the outcomes we don't like," and declared that the Supreme Court "can't be an institution that can be bullied into giving you just the outcomes you want."[86] In July 2022, after *Dobbs* had been decided, Justice Alito spoke at a conference on religious liberty in Rome and sarcastically mocked foreign leaders—including the Prime Ministers of the United Kingdom and Canada, and the President of France—who had criticized *Dobbs*.[87] Similarly, Judge William Pryor of the Eleventh Circuit used a speech at the Federalist Society's annual convention later that year to mock Senator Sheldon Whitehouse (D-Rhode Island), law professors, and liberal journalists and commentators who had criticized the Supreme Court and the Federalist Society.[88] And while defending originalism, the judicial philosophy many conservative judges and Justices purport to favor and use, Judge James Ho of the Fifth Circuit urged judges to "get comfortable" with "harsh criticism," almost suggesting it was a sign

---

[84] *Id.*

[85] *Id.* (emphasis added).

[86] McKay, *supra* note 26.

[87] Devin Dwyer, *Justice Alito Mocks Prince Harry and Other Foreign Critics of Abortion Decision*, ABC NEWS (July 28, 2022, at 17:08 PT), https://abcnews.go.com/Politics/justice-alito-mocks-prince-harry-foreign-critics-abortion/story?id=87564162 [https://perma.cc/M2GP-XKMA].

[88] *See* Avalon Zoppo, *Judge William Pryor Mocks Federalist Society Critics*, LAW.COM (Nov. 10, 2022, at 14:01 PT), https://www.law.com/2022/11/10/judge-william-pryor-mocks-federalist-society-critics/ (on file with the Lewis & Clark Law Review); Jacqueline Thomsen & Nate Raymond, *Conservative U.S. Judge Mocks Federalist Society's Critics at Annual Convention*, REUTERS (Nov. 10, 2022, at 11:06 PST), https://www.reuters.com/legal/government/conservative-us-judge-mocks-federalist-societys-critics-annual-convention-2022-11-10/ [https://perma.cc/7DKX-QRCY]. The Federalist Society is a conservative legal organization that, over decades, has been instrumental in pushing federal and state judiciaries to the right. One of its leaders, Leonard Leo, advised Donald Trump and helped him appoint federal judges to the bench, including Justices Gorsuch, Kavanaugh and Barrett. *See* Andrew Perez, Andy Kroll & Justin Elliott, *How a Secretive Billionaire Handed His Fortune to the Architect of the Right-Wing Takeover of the Courts*, PROPUBLICA (Aug. 22, 2022, at 14:45 EDT), https://www.propublica.org/article/dark-money-leonard-leo-barre-seid [https://perma.cc/B3J7-5VVD]; Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court [https://perma.cc/P9FB-PF6H].

of a job well done; he claimed originalist judges face "a concerted campaign of condemnation" when their decisions produce "results despised by the cultural elites who lead the national discourse."[89]

More recently—after all the news reports about his accepting gifts from billionaires with partisan ties and about his wife's political activities, including support of Trump's effort to overturn the 2020 election—Justice Thomas spoke of the "negativity" in his and his wife's lives over the last few years, and bitterly denounced what he vaguely referred to as "the nastiness and the lies."[90] In the same speech, he said he and his wife try to ignore their critics; though Justice Thomas conceded he couldn't prevent people from saying or doing "horrible things," he said he had to accept that "they can't change you unless you permit that."[91] He also noted with regret that when he first joined the Court, he "didn't need so much security back then."[92]

And not unlike a college football coach on the verge of being fired, or every unpopular politician ever, Justice Alito has blamed the media for the Court's sinking reputation. In conversation at the Supreme Court Historical Society dinner in 2024—when, it should be noted, he was recorded surreptitiously—he said, "It's easy to blame the media, but I do blame them because they do nothing but criticize us. And so they have really eroded trust in the court."[93] As one critic noted, based on his comments, Justice Alito showed little self-reflection, appearing not to "stop and think about why the media is criticizing the Court, or contemplate the substance of the media reporting that lowered the public's opinion of it."[94]

At the root of some of those reactions by Justices and their like-minded defenders, I think, are concerns that criticizing the Court and staging protests near the Justices will make them less safe and more vulnerable to violence. This was a common worry expressed about the *Dobbs* protests, from President Biden down to

---

[89] Jacqueline Thomsen, *Fifth Circuit's Ho Calls on Judges to Embrace 'Harsh Criticism,'* BLOOMBERG L. (Oct. 25, 2023, at 17:38 PDT), https://news.bloomberglaw.com/us-law-week/fifth-circuits-ho-calls-on-judges-to-embrace-harsh-criticism [https://perma.cc/2BP6-A3QF] (reporting comments made by Judge Ho during a Heritage Foundation lecture).

[90] Abbie VanSickle, *Justice Thomas Denounces 'the Nastiness and the Lies' Faced by His Family*, N.Y. TIMES (May 10, 2024), https://www.nytimes.com/2024/05/10/us/politics/clarence-thomas-supreme-court.html [https://perma.cc/Z357-7B6F].

[91] *Id.*

[92] *Id.*

[93] Josh Gerstein, *Alito and His Wife Are Captured in Audio Recordings Talking About Abortion Leak, Flag Controversy*, POLITICO (June 11, 2024, at 10:12 EDT), https://www.politico.com/news/2024/06/10/alito-wife-supreme-court-recordings-00162610 [https://perma.cc/YZY5-FG8D].

[94] Madiba K. Dennie, *Sam Alito, Who Does Things People Don't Like, Still Unsure Why People Don't Like Him*, BALLS & STRIKES (June 11, 2024), https://ballsandstrikes.org/legal-culture/alito-audio-sam-alito-unsure-why-people-dont-like-him/ [https://perma.cc/W6MZ-ZPX3].

neighbors of Justices.[95] President Biden, through his press secretary, defended the right to protest but emphasized that it "should never include violence, threats, or vandalism. Judges perform an incredibly important function in our society, and they must be able to do their jobs without concern for their personal safety."[96] On May 11, nine days after Politico's report on the leaked draft opinion, Attorney General Merrick Garland directed the United States Marshals Service[97]—which protects federal judges who sit on lower courts, but not ordinarily Supreme Court Justices[98]—to "help ensure the Justices' safety by providing additional support to the Marshal of the Supreme Court and Supreme Court Police."[99] Soon after, Garland directed the Marshals Service to provide "around-the-clock security" at all of the Justices' homes.[100]

Aside from safety concerns, those who criticize the criticism and protests directed at the Supreme Court in the last few years also insist that those activities should be silenced or restricted because they threaten judicial independence. That

[95] In an article about a neighbor of Justice Kavanaugh's who organized protests, other residents of the neighborhood—even residents who supported abortion rights—expressed some uneasiness with the protests. *See* Silverman, *supra* note 50. "I think you vote, and you expand the court. You don't go to a guy's house," one anonymous man said. *Id.* Some of the unease came from concerns about being uncivil or disrespectful, but there were also fears of something darker. *See id.* "I worry about lines being crossed," the same man said. "This constant escalation, I think, makes it dangerous." *Id.*

[96] Jen Psaki (@PressSec), X (May 9, 2022, at 09:00 EDT), https://x.com/PressSec/status/1523649143951962115 [https://perma.cc/ZM22-3MC4].

[97] Although it's a bureau within the Department of Justice, "the primary role and mission of the United States Marshals Service [is] to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court." 28 U.S.C. § 566(a). The Marshals Service is authorized to "provide for the personal protection of Federal jurists, court officers, witnesses, and other threatened persons in the interests of justice where criminal intimidation impedes on the functioning of the judicial process or any other official proceeding." 28 U.S.C. § 566(e)(1)(A).

[98] *See Judicial Security*, U.S. MARSHALS SERV., https://www.usmarshals.gov/what-we-do/judicial-security [https://perma.cc/WN3A-93FF] (last visited Jan. 28, 2026). The Marshals Service protects the approximately 2,700 federal judges on lower courts and more than 30,000 federal prosecutors and court officials. *Id.* But it typically only protects Supreme Court Justices when the Justices travel outside of Washington, D.C., if requested. *Id.*

[99] Press Release, U.S. Dep't of Just., Justice Department Statement Regarding Supreme Court Security (Feb. 6, 2025), https://www.justice.gov/opa/pr/justice-department-statement-regarding-supreme-court-security [https://perma.cc/5V4B-9V2H]. The Marshal of the Supreme Court isn't part of the Marshals Service, but is a Supreme Court officer with several duties, including overseeing the Supreme Court Police. 28 U.S.C. § 672(c).

[100] Press Release, U.S. Dep't of Just., Attorney General Merrick B. Garland Meets with Supreme Court Officials Regarding Judicial Security (Feb. 6, 2025), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-meets-supreme-court-officials-regarding-judicial-security [https://perma.cc/P4GC-V3CQ].

view was reflected in calls from members of Congress who criticized the *Dobbs* protests and urged President Biden and Attorney General Garland to condemn them and do more to protect the Justices.[101] While Republican members of Congress denounced the protests, so did some Democrats.[102] That view is seen in Justice Thomas's insistence that the Court can't be "bullied" into desired outcomes, and in Judge Ho's urging judges to "get comfortable" in the face of condemnation.[103] We can even discern it in Chief Justice Roberts' and Justice Alito's apparent inability to understand questions about the Court's legitimacy. For them, it's as if simply acknowledging the idea that the Court might ever make decisions based, even in part, on something other than the neutral, objective application of neutral, objective law to neutral, objective fact—whether it be public sentiment or partisanship or the Justices' ideologies—makes the Court susceptible to that very evil.[104]

II. SAFETY CONCERNS ARE REAL, BUT SHOULDN'T SHIELD THE JUSTICES FROM THE REST OF US ENTIRELY

All judges in the United States, from the Justices on the Supreme Court to the lowest-level state-court judges, should be safe in their workplaces. They should not have to fear violence at work or in their personal lives because of the decisions they make. As Chief Justice Roberts wrote in his 2022 year-end report: "The law requires every judge to swear an oath to perform his or her work without fear or favor, but we must support judges by ensuring their safety. A judicial system cannot and should not live in fear."[105]

Concerns about the safety of Supreme Court Justices and other judges are real and can't be minimized. Chief Justice Roberts revisited the topic in his 2024 year-end report, feeling "compelled" to address the rise in violence and intimidation

---

[101] *See, e.g.*, Letter from Chuck Grassley, *supra* note 26; Letter from Tom Cotton, *supra* note 26.

[102] *See* Tierney Sneed, *Republicans Call for DOJ to Enforce Law That Would Bar Abortion Rights Demonstrators from Protesting at Justices' Homes*, CNN (May 12, 2022, at 14:46 EDT), https://www.cnn.com/2022/05/12/politics/supreme-court-justices-abortion-protests-garland/index.html [https://perma.cc/D845-JR83] (reporting that Republicans "ramped up" pressure on Attorney General Garland to enforce federal law making it "illegal to hold protests outside the homes of judges in order to influence their decisions," and that Democrats were "split" on whether the protests were appropriate, noting that Senator Richard Durbin (D-Illinois) called them "reprehensible").

[103] *See* McKay, *supra* note 26; Thomsen, *supra* note 89.

[104] *See* Biskupic, *supra* note 26; Dennie, *supra* note 94.

[105] CHIEF JUSTICE JOHN ROBERTS, 2022 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2022), https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf [https://perma.cc/44FM-6F7W].

directed at judges, noting that they undermine judicial independence.[106] It is deeply regrettable that threats to judges, and attempted violence and actual violence against judges, have become more common—seemingly almost routine in some cases, or something that judges should simply accept as part of the job. In 2019, there were 179 "serious threats" against federal judges—meaning threats that trigger an investigation by the United States Marshals Service.[107] That may sound high, but that number has only grown. There were 224 such threats in 2021 and 457 in 2023.[108] Within the first eight months of the 2025 fiscal year, roughly one-third of all federal judges received threats.[109]

The worst incidence of violence against a federal judge in recent years occurred in 2020, when a self-described "anti-feminist" attorney posed as a deliveryman and went to the home of Esther Salas, a district judge in New Jersey, intending to kill her.[110] Although Judge Salas was not injured, the gunman shot and killed her 20-year-old son and wounded her husband.[111] Evidence suggested the gunman, who left the scene and later died from a self-inflicted gunshot wound, may have also been planning to target several other judges, including Justice Sonia Sotomayor.[112]

The attempt to assassinate Justice Kavanaugh in 2022 was not the only serious threat against the Justices in recent years. A Florida man pleaded guilty in 2023 to transmitting an interstate threat to kill after calling the Supreme Court and leaving

---

[106] CHIEF JUSTICE JOHN ROBERTS, 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY 5 (2024) [hereinafter 2024 YEAR END REPORT], https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf [https://perma.cc/A7B4-HT79] ("I feel compelled to address four areas of illegitimate activity that, in my view, *do* threaten the independence of judges on which the rule of law depends: (1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments.").

[107] Joseph Tanfani, Peter Eisler & Ned Parker, *Exclusive: Threats to US Federal Judges Double Since 2021, Driven by Politics*, REUTERS (Feb. 13, 2024, at 16:55 PST), https://www.reuters.com/world/us/threats-us-federal-judges-double-since-2021-driven-by-politics-2024-02-13/ [https://perma.cc/N8Z9-KTK4].

[108] *Id.*

[109] Mattathias Schwartz, *Marshals' Data Shows Spike in Threats Against Federal Judges*, N.Y. TIMES (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/federal-judges-threats.html [https://perma.cc/YWR8-6D9X].

[110] Nicole Acevedo, *Judge Esther Salas Applauds New Law Named After Her Son, Who Was Killed by a Gunman Targeting Her*, NBC NEWS (Dec. 20, 2022, at 14:38 PST), https://www.nbcnews.com/news/latino/judge-esther-salas-law-son-killed-gunman-target-rcna62637 [https://perma.cc/6NWF-J6F9].

[111] *Id.*

[112] *See* Bill Whitaker, *Federal Judges Call for Increased Security After Threats Jump 400% and One Judge's Son Is Killed*, CBS NEWS (May 30, 2021, at 18:56 EDT), https://www.cbsnews.com/news/federal-judge-threats-attack-60-minutes-2021-05-30/ [https://perma.cc/634H-PVY3]; William K. Rashbaum, *Misogynistic Lawyer Who Killed Judge's Son Had List of Possible Targets*, N.Y. TIMES (July 25, 2020), https://www.nytimes.com/2020/07/25/nyregion/roy-den-hollander-esther-salas-list.html [https://perma.cc/5LRK-933E].

a voicemail in which he threatened to kill Chief Justice Roberts.[113] And in September 2024, the Department of Justice charged an Alaska man with nine counts of threatening a federal judge and 13 counts of making threats in interstate commerce for allegedly using the Supreme Court's website to send more than 465 threatening messages to six unidentified Justices and two family members of Justices.[114] "The messages contained violent, racist, and homophobic rhetoric coupled with threats of assassination via torture, hanging, and firearms, and encouraged others to participate in the acts of violence," according to the indictment, and some were allegedly intended to intimidate the Justices or "retaliate" against them for actions they had taken as Justices.[115] And although it was a hoax, one of Justice Barrett's sisters received a threat in March 2025 that there was a pipe bomb in her mailbox at her South Carolina home.[116]

The federal and state governments should do whatever is reasonably necessary to protect judges and allow them to do their jobs without fear. Indeed, Congress and the Executive Branch have taken steps in recent years to protect the federal judiciary. The reaction to the leak of the *Dobbs* opinion led to improved protection for Supreme Court Justices and their families. Specifically, Congress responded first with the Supreme Court Police Parity Act, which became law in June 2022 and provided Justices and their families the same sort of protection that high-ranking members of Congress and the Executive Branch and their families receive.[117] The bill gave the Marshal of the Supreme Court and the Supreme Court Police authority "in any location" to protect the Justices and "any member of the immediate family of the Chief Justice, any Associate Justice, or any officer of the Supreme Court if the

---

[113] Eileen Sullivan, *Alaska Man Charged With Threatening 6 Supreme Court Justices*, N.Y. TIMES (Sep. 19, 2024), https://www.nytimes.com/2024/09/19/us/politics/supreme-court-justices-threats-fbi.html [https://perma.cc/C7B8-S4VL]; Press Release, U.S. Att'y's Off., Middle Dist. of Fla., Fernandina Beach Man Sentenced to Prison for Threatening To Kill A United States Supreme Court Justice (Apr. 2, 2024), https://www.justice.gov/usao-mdfl/pr/fernandina-beach-man-sentenced-prison-threatening-kill-united-states-supreme-court [https://perma.cc/BC79-S3M8].

[114] Sullivan, *supra* note 113; Indictment at 1–2, United States v. Anastasiou, No. 3:24-cr-00099 (D. Alaska, Sep. 17, 2024), Dkt. No. 2.

[115] Indictment, *supra* note 114, at 1–2.

[116] Mattathias Schwartz & Abbie VanSickle, *Judges Fear for Their Safety Amid a Wave of Threats*, N.Y. TIMES (Mar. 21, 2025), https://www.nytimes.com/2025/03/19/us/trump-judges-threats.html [https://perma.cc/2R8N-KKGE].

[117] *See* Supreme Court Police Parity Act of 2022, Pub. L. No. 117-148, § 2, 136 Stat. 1288 (codified at 40 U.S.C. § 6121(a)(2)); Press Release, Sens. John Cornyn & Chris Coons, Sen. Coons, Cornyn Introduce Bill to Extend Security and Protection for SCOTUS Justices & Families (May 5, 2022), https://www.coons.senate.gov/news/press-releases/sens-coons-cornyn-introduce-bill-to-extend-security-and-protection-for-scotus-justices-and-families [https://perma.cc/34U8-53F7].

Marshal determines such protection is necessary."[118]

Congress subsequently passed broader legislation to provide greater security and peace of mind to all federal judges, enacting the Daniel Anderl Judicial Security and Privacy Act of 2022—known as the JSPA, and named after Judge Salas's son.[119] The JSPA made it harder to find federal judges' personally identifying information online, with the goal of making federal judges and their families more secure and thus ensuring that judges are able to do their jobs without fearing reprisal from people affected by their decisions.[120] In its findings accompanying the law, Congress observed that the availability of information online and the use of social media had made it easier for "malicious actors" to learn where judges live and spend their leisure time, and to learn more about members of judges' families, and that federal judges had been subjected to an increasing number of personal threats "in connection to their role" as judges.[121]

Accordingly, the JSPA directed federal government agencies, upon request from a federal judge or the judge's immediate family members, not to publicly post or display personal information about the judge or the judge's family.[122] To encourage state and local government agencies to apply similar protective measures, the JSPA authorized the Attorney General to award grants to state and local governments to create or expand programs designed to protect federal judges' personal information in government databases and registries.[123] The JSPA also made it unlawful for "data broker[s] to knowingly sell, license, trade for consideration, transfer, or purchase" such information about federal judges and their immediate family members, and generally prohibited other people and businesses from publicly posting or displaying on the internet such information upon written requests from federal judges not to do so.[124] Additionally, the JSPA authorized the United States Marshals Service to hire more personnel.[125]

No one could find fault with such legislation or dispute the need for it. Reassessing how we protect the judiciary, and devoting more money and manpower to secure courts and judges is necessary and appropriate. Making it harder to access federal judges' personally identifying information, and thus making it harder for

---

[118] 40 U.S.C. § 1621(a).

[119] Daniel Anderl Judicial Security and Privacy Act (JSPA) of 2022, Pub. L. No. 117-263, § 5932, 136 Stat. 2395, 3458–59.

[120] *Id.* § 5932; *see* Nicole Saad Bembridge, *The Hidden Subtitle of the NDAA That Will Ban Basic Facts About Judges Online*, REASON (Dec. 23, 2022, at 08:30 PT), https://reason.com/2022/12/23/the-hidden-subtitle-of-the-ndaa-that-will-ban-basic-facts-about-judges-online/ [https://perma.cc/YZW9-AMZE].

[121] Daniel Anderl Judicial Security and Privacy Act § 5932.

[122] *Id.* § 5934(a).

[123] *Id.* § 5934(c).

[124] *Id.* § 5934(d).

[125] *Id.* § 5936(b).

malicious actors to threaten or inflict violence upon them, is unquestionably good.

But we need to recognize what legislation like the JSPA cannot do and should not do. It cannot make the locations of Supreme Court Justices' homes secrets unknown to everyone but the United States Marshals and the Supreme Court Police. Judges, and even Justices on the Supreme Court, are still people. Unless they live in walled-off fortresses atop hills, or surrounded by moats, they'll still live in communities with other people.[126] They'll get summoned for jury duty.[127] They'll go to church.[128] They'll shuttle their kids to and from school.[129] They'll coach youth basketball teams.[130] They'll go on walks around their neighborhoods and talk to neighbors who are bringing trash bins in from the street.[131]

These sorts of normal, everyday, real-world interactions with the rest of us benefit the Supreme Court, which Professor Eric Segall has argued "is more removed from the day-to-day lives of the American people" than perhaps any other government institution.[132] The more the Justices are "detached" from the lives of

---

[126] *See, e.g.*, Silverman, *supra* note 50 (noting that neighbor organizing protests in Justice Kavanaugh's neighborhood didn't know him personally but had met him and had seen his wife at grocery store); Kantor, *The Alitos, supra* note 77; *cf.* Paul Schwartzman & Peter Hermann, *LGBTQ Flags and Quinoa: The Liberal Va. Enclave Where J.D. Vance Lives*, WASH. POST (July 16, 2024, at 23:49 EDT), https://www.washingtonpost.com/dc-md-va/2024/07/16/jd-vance-alexandria-home/ [https://perma.cc/74QT-CBQB] (reporting on neighbors' interactions with then-vice presidential candidate J.D. Vance in a Alexandria, Virginia, neighborhood, and noting that even though the mayor didn't want to draw attention to where politicians lived, "Word spreads").

[127] *See, e.g.*, Dan Morse & Robert Barnes, *Chief Justice Roberts Reports for Jury Duty in a Maryland Court*, WASH. POST (Apr. 15, 2015, at 11:16 EDT), https://www.washingtonpost.com/local/crime/chief-justice-roberts-reports-for-jury-duty-in-a-maryland-court/2015/04/15/8f6d410c-e37d-11e4-b510-962fcfabc310_story.html [https://perma.cc/QCS4-BDCK].

[128] *See generally* Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP: NEWS (Apr. 8, 2022), https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx [https://perma.cc/3W9C-5U4Z] (detailing the religious identities of the current Justices).

[129] *E.g.*, Piper Hudspeth Blackburn, *Barrett Concerned About Public Perception of Supreme Court*, ASSOCIATED PRESS (Sep. 12, 2021, at 18:46 PST), https://apnews.com/article/health-amy-coney-barrett-courts-coronavirus-pandemic-us-supreme-court-73389c829dc170751a95c5c1d4fc7ca6 [https://perma.cc/92HV-VQM3] (noting Justice Barrett's comments during a lecture that her "regular life" includes "running carpools, throwing birthday parties, [and] being ordered around" for and by her children).

[130] *E.g.*, Ann E. Marimow, *Brett Kavanaugh Worried that Scandal Would End His Coaching Days. Now the Supreme Court Justice is Back on the Basketball Court.*, WASH. POST (Nov. 27, 2018, at 16:09 EST), https://www.washingtonpost.com/local/brett-kavanaugh-worried-that-scandal-would-end-his-coaching-days-now-the-supreme-court-justice-is-back-on-the-basketball-court/2018/11/27/0d48e4d8-f25b-11e8-80d0-f7e1948d55f4_story.html [https://perma.cc/WSU4-6TJ2].

[131] *See, e.g.*, Kantor, *The Alitos*, *supra* note 77.

[132] Eric Segall, *Supremely Elite: The Lack of Diversity on Our Nation's Highest Court*, 41 ABA

ordinary citizens and from different slices of society, the more they risk failing to understand how their decisions—which often address "important social questions with enormous political and real-world ramifications"—will actually affect people and the country.[133] Justices themselves have levied such criticism at their colleagues. For example, when the Supreme Court struck down race-based college admissions programs at Harvard University and the University of North Carolina in 2023, holding that such programs violated the Equal Protection Clause of the Fourteenth Amendment, Justice Ketanji Brown Jackson ripped the majority for its "let-them-eat-cake obliviousness" to the effect race still has in American life, and for "having so detached itself from this country's actual past and present experiences."[134] We can't make Supreme Court Justices invisible or untraceable, and we shouldn't want them to exist on another plane, unknown to the rest of us and unknowing.

Consequently, the valid safety concerns that underlay the JSPA shouldn't lead us to prohibit the types of protests we saw after *Dobbs*. Protecting the Justices from violence shouldn't include isolating them further by prohibiting advocacy toward them or criticism of them—including peaceful protests in public spaces, whether the Justices are out at a restaurant or even in their homes.

After all, the Justices are public officials who deal with matters of public concern and make decisions that potentially can impact every American. They're like members of Congress and high-ranking members of the Executive Branch in that sense, but they aren't *more* important. And their counterparts atop the political branches aren't immune from protests. Protests at the White House—outside the

---

HUM. RTS., no. 1, 2014, at 1, 18.

[133] *See id.* at 18–19. Professor Segall cites Brown v. Board of Education, 347 U.S. 483 (1954) (holding that racial segregation in public schools violates the Equal Protection Clause), National Federation of Independent Businesses v. Sebelius, 567 U.S. 519 (2012) (partially upholding the constitutionality of the Affordable Care Act), McCullen v. Coakley, 573 U.S. 464 (2014) (holding that a Massachusetts law creating buffer zones around abortion clinics was an unconstitutional restriction on speech), Crawford v. Marion County Election Board, 553 U.S. 181 (2008) (holding that an Indiana voter ID law was constitutional), and Shelby County v. Holder, 570 U.S. 529 (2013) (holding that Section 4 of the Voting Rights Act was unconstitutional), as examples of decisions that may show how "removed" and "out of touch" the Court has been from the segments of American life and the American people its decisions have touched. Segall, *supra* note 132, at 18–19.

[134] Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 143 S. Ct. 2141, 2277 (2023) (Jackson, J., dissenting); *see also, e.g.*, Jana Nestlerode, *Re-"Righting" the Right to Privacy: The Supreme Court and the Constitutional Right to Privacy in Criminal Law*, 41 CLEV. ST. L. REV. 59, 71 n.73 (1993) (first citing Florida v. Bostick, 501 U.S. 429, 444–45 (1991) (Marshall, J., dissenting) (criticizing majority opinion for believing passenger approached by police during "suspicionless bus sweep" would feel free to decline officers' requests); and then citing California v. Hodari D., 499 U.S. 621, 630 n.4 (1991) (Stevens, J., dissenting) (criticizing majority opinion for mistakenly assuming innocent people have no reason to fear sudden approach of strangers, and describing it as "ivory-towered analysis of the real world" that "fails to describe the experience of many residents, particularly if they are members of a minority")).

fence and quite removed from the Oval Office and the residence, admittedly—are routine, of course, but so are protests when presidents appear in public.[135] Even before she became the Democratic presidential nominee in 2024, protesters had demonstrated outside Vice President Kamala Harris's official residence in Washington,[136] her home in Los Angeles,[137] and when she traveled elsewhere.[138] Pro-Palestinian protesters camped out near Secretary of State Antony Blinken's home in Arlington, Virginia, for six months in 2024 before being removed.[139] Those protests weren't unique; in recent years Cabinet officials and members of Congress from both parties have dealt with protests outside their homes on a wide range of issues.[140] When asked in May 2022, after the draft *Dobbs* opinion had been leaked, if he was "comfortable" with the protests then occurring outside Justices' homes, Senator Chuck Schumer (D-New York) said he was if the protests were peaceful, and noted that there were protests "three, four times a week outside my house. The American way to peacefully protest is OK."[141]

---

[135] *See generally* Maegan Vazquez, *How Past US Presidents Engaged with Activists and Mass Protests*, CNN (June 2, 2020, at 13:57 EDT), https://www.cnn.com/2020/06/02/politics/us-presidents-protests-change/index.html [https://perma.cc/A7TN-EE5H] (discussing protests of past presidents).

[136] Andrew Stanton, *Kamala Harris Confronted by Protesters Outside Her House*, NEWSWEEK (May 2, 2023, at 18:42 EDT), https://www.newsweek.com/kamala-harris-protesters-outside-house-philippines-president-1797909 [https://perma.cc/E5MT-S3HP].

[137] Terry Castleman, Rebecca Ellis & Jenny Jarvie, *Police Arrest Young Climate Protesters for Blocking Street Near Kamala Harris' Home*, L.A. TIMES (Apr. 15, 2024, at 12:48 PT), https://www.latimes.com/california/story/2024-04-15/youth-climate-advocates-protest-outside-kamala-harris-house [https://perma.cc/4Q2S-M2V5].

[138] Anabel Sosa, *Vice President Kamala Harris Met by Protesters Outside Fundraiser in San Francisco*, L.A. TIMES (June 5, 2024, at 18:41 PT), https://www.latimes.com/california/story/2024-06-05/vp-kamala-harris-greeted-by-over-a-hundred-protesters-outside-fundraiser-in-san-francisco [https://perma.cc/GM6A-ET8C].

[139] Ciara Wells, *Pro-Palestinian Encampment Removed From Secretary Blinken's Arlington Home By Police*, WTOP NEWS (July 27, 2024, at 08:17 PT), https://wtop.com/arlington/2024/07/pro-palestinian-encampment-removed-from-secretary-blinkens-arlington-home-by-police/ [https://perma.cc/E4PK-XEJ6].

[140] *See* Michael Schaffer, *Antony Blinken's Family Is the Latest Target of Washington's Ugliest Protest Trend*, POLITICO MAG. (Feb. 16, 2024, at 05:00 EST), https://www.politico.com/news/magazine/2024/02/16/protesting-public-officials-homes-00141766 [https://perma.cc/FGM4-GVQ3] (providing a "partial recent list of Beltway VIPs visited at home by protesters," including Senators Josh Hawley, Lindsey Graham, Mitch McConnell, Susan Collins, Dianne Feinstein and Chuck Schumer; Postmaster General Louis DeJoy; National Security Adviser Jake Sullivan; and Defense Secretary Lloyd Austin; as well as Justices Kavanaugh, Alito and Barrett).

[141] Natalie Prieb, *Schumer Says He Sees No Issue with Peaceful Protests at Houses of Supreme Court Justices*, THE HILL (May 10, 2022, at 15:50 ET), https://thehill.com/homenews/senate/3483411-schumer-says-he-sees-no-issue-with-protests-at-houses-of-supreme-court-justices/ [https://perma.cc/C6YD-DSQZ].

And it bears repeating and emphasizing that the large, public protests related to abortion are nonviolent and safe. The overwhelming majority of abortion-related protests across the nation in 2021 and through June 2022—all but seven—were peaceful and occurred without incident.[142] That includes the protests at the Justices' homes and at Morton's.[143] While Justices have faced threats from individuals, such as Justice Kavanaugh's would-be assassin, I found no reports of violence or threatening actions at any protests that occurred near the Justices or their homes. To the contrary, those protests were described as peaceful vigils,[144] or as featuring "marching, chanting and reading the First Amendment," not to mention dancing.[145] Perhaps the most offensive behavior was "chanting slogans, using bullhorns, and banging drums."[146]

Let me also dispense with the argument that by getting so close—maybe even uncomfortably close—to the Justices, the *Dobbs* protesters weren't going to persuade the Justices in the majority to change their votes, and risked doing more harm than good to the protesters' cause. In 2022, a professor and expert on protest rights thought the protests at the Justices' homes after the draft *Dobbs* opinion was published would "backfire," reasoning that if the Supreme Court ultimately issued a different decision in apparent response to the protests, the Court would look like a political body.[147] And another professor who studies social movements thought the protests might hurt supporters of abortion rights by diverting attention from their cause to debates about whether they were "harassing" the Justices.[148]

Research suggests, however, that "nonnormative nonviolent protests," featuring tactics that aren't considered acceptable but are peaceful—such as striking, boycotting, engaging in sit-ins, occupying public spaces—can effectively generate public support for protesters' causes.[149] In a study of reactions to news articles about different Black Lives Matter protests, for example, researchers concluded that

---

[142] Kishi, *supra* note 24.

[143] *See* Plumb, *supra* note 11.

[144] Silverman, *supra* note 50.

[145] Golden & Marimow, *supra* note 49.

[146] *Id.*

[147] Bill Sternberg, *Protests at Supreme Court Justices' Homes: Ill-conceived? Illegal?*, FREE SPEECH CTR. (May 13, 2022), https://firstamendment.mtsu.edu/post/protests-at-supreme-court-justices-homes-ill-conceived-illegal/ [https://perma.cc/H48Q-XAW3].

[148] Baker, *supra* note 53 (quoting Cathy Lisa Schneider, an American University professor).

[149] Eric Shuman & Eran Halperin, *What Kinds of Protests Actually Work?*, PSYCH. TODAY (Nov. 21, 2020), https://www.psychologytoday.com/us/blog/the-psychology-intergroup-conflict-and-reconciliation/202011/what-kinds-protests-actually-work [https://perma.cc/VP7K-3AXE] (citing and discussing Eric Shuman, Tamar Saguy, Martijn van Zomeren & Eran Halperin, *Disrupting the System Constructively: Testing the Effectiveness of Nonnormative Nonviolent Collective Action.*, 121 J. PERSONALITY & SOC. PSYCH. 819 (2021) (finding that nonnormative nonviolent tactics like strikes and sit-ins generate support among resistant advantaged groups)).

subjects' support for police reform was highest after reading about one nonviolent, nonnormative protest—refusing to pay municipal fines and fees.[150] The disruption caused by the nonnormative tactics generated pressure for reform, while the nonviolent nature of the protest made subjects believe the protesters had good, constructive intentions.[151] This effect was most notable in people who were initially resistant to the protest.[152] So protesters unhappy with the Supreme Court may have good reason to believe that protesting in ways that may seem transgressive but are still peaceful—like protesting outside a Justice's home, or outside a restaurant in which a Justice is dining—could be more effective than, say, a rally on the National Mall.

In any case, how they protest is a choice that belongs to protesters; the right to protest doesn't depend on protesters' popularity or their ability to persuade.[153] Protesters who were walking between Chief Justice Roberts' and Justice Kavanaugh's homes almost a year after *Dobbs* had no illusions they would actually influence the Justices, as one of them explained: "We weren't trying to intimidate or persuade them to change their minds because we knew that wasn't going to happen."[154]

Yet protesters may still have reason to protest outside a Justice's home rather than at a large rally in a public park or in a march down the main road in town. They may want to do as much as they can to make the Justices hear them. A protester with ShutDownDC said in 2022 that the group started going to the Justices' homes after the Supreme Court installed tall security fencing around its building.[155] "If they won't listen to us at the court," she said, "then they're going to have to listen to us at their home."[156] And if the Court's decisions threaten or affect the protesters personally—as decisions about abortion or almost any other issue the Court confronts may—they also may feel justified in voicing their displeasure by intruding on the Justices' personal lives.[157] *Why*, the protesters may think, *should*

---

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *See* Hill v. Colorado, 530 U.S. 703, 716 (2000) ("The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience."); Snyder v. Phelps, 562 U.S. 443, 454–58 (2011) (protecting peaceful speech on matters of public concern even when speech is "hurtful" and "may fall short of refined social or political commentary").

[154] Lawrence Hurley, *Free Speech or Federal Crime? Protesters Are Still Marching Outside Conservative Supreme Court Justices' Homes*, NBC NEWS (May 14, 2023, at 03:00 PDT), https://www.nbcnews.com/politics/supreme-court/free-speech-federal-crime-protesters-are-still-marching-conservative-s-rcna78678 [https://perma.cc/94G9-3AQJ].

[155] Baker, *supra* note 53.

[156] *Id.*

[157] *See* Sanchez-Cruz, *supra* note 41 (quoting a protester who said, "You don't get to take away my bodily autonomy and get [to] enjoy your Saturday at home").

Justices be quarantined from the effect of their votes? Let them see and hear what they've done, to whom they've done it, and why it matters. A professor of justice and peace explained:

> [Justice Alito] is going to strip away 50-year-old privacy and autonomy rights from all the childbearing people in America. . . . It's ironic to say that his property and his privacy are sacrosanct when the Supreme Court is about to take away basic autonomy rights from half the country.[158]

Such protests do not, by their very nature, endanger the Justices or put them at unacceptably greater risk. Even in connection with issues they're passionate about, very few people actually want to engage in violence or harm others.[159] Terrible recent instances of violence and attempted violence at public officials' homes—from the killing of Judge Salas' son,[160] to the attempt to kill Justice Kavanaugh,[161] to the attack that gravely injured Representative Nancy Pelosi's husband,[162] to the killing and wounding of two Minnesota state lawmakers and their spouses[163]—were the work of individuals acting on their own, not as members of a group engaged in a coordinated protest.[164] Perhaps this is because people who care enough to organize a protest want to spread their message—to the officials who are the objects of their protests, to the general public, or both—and are thoughtful enough to realize that violence would turn off potential converts.[165] The protesters who gathered at Justices' homes wanted not

---

[158] Baker, *supra* note 53.

[159] *See* Charles Homans, *The Surprising Reality of Political Violence in America*, N.Y. TIMES (Sep. 23, 2024), https://www.nytimes.com/2024/09/22/us/politics/political-violence.html [https://perma.cc/RDY4-JMVR] (reporting that political violence in the United States remains rare, with only a "tiny percentage" of Americans surveyed willing to commit such acts themselves).

[160] *See supra* notes 110–11 and accompanying text.

[161] Levenson, *supra* note 25.

[162] Olga R. Rodriguez, *Man Gets 30 Years in Prison for Attacking Ex-Speaker Nancy Pelosi's Husband with a Hammer*, ASSOCIATED PRESS (May 17, 2024, at 20:45 PST), https://apnews.com/article/paul-pelosi-nancy-hammer-attack-depape-sentence-b41b6c776fb27f62913e3754afa1ceac [https://perma.cc/VF8N-CY5H].

[163] Chris Hippensteel, Nicholas Bogel-Burroughs, Ernesto Londoño, Mike Baker & Mark Walker, *What We Know About the Minnesota Shooting Suspect*, N.Y. TIMES (June 23, 2025), https://www.nytimes.com/2025/06/14/us/politics/minnesota-shootings-gunman-suspect.html [https://perma.cc/FJ53-4TCH].

[164] *Cf.* Homans, *supra* note 159. The article describes people who attempt to assassinate a president as "often idiosyncratic in their motives," or "hav[ing] a history of mental illness, or both." *Id.* A researcher on extremism said, "there's a kernel of something" ideological in such violent acts, but "also clearly a very deranged, twisted, incoherent worldview." *Id.*

[165] *See* Maria J. Stephan & Erica Chenoweth, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, 33 INT'L SEC. 7, 7–13 (2008) (finding that "a campaign's commitment to nonviolent methods enhances its domestic and international legitimacy and encourages more broad-based participation in the resistance").

to harm the Justices, but simply to influence them—or at least take the first step toward influencing them, by getting the Justices to hear them.[166] And as I explain in Part III, that's perfectly acceptable.

III. ATTEMPTING TO INFLUENCE THE JUSTICES IS NORMAL—EVEN BENEFICIAL—AND THAT INCLUDES PEACEFULLY PROTESTING NEAR THEIR HOMES

The other component of the pushback against the *Dobbs* protests, as I noted in Part I, is the idea that the presence of protesters, not far from the Justices' front doors, may change the way the Justices decide cases. We don't want judges to be improperly influenced, or even to appear as if they may have been. The Supreme Court articulated these concerns, as argued by the federal government, in *United States v. Grace*:

> It is said that the federal courts represent an independent branch of the Government and that their decisionmaking processes are different from those of the other branches. Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing or pressure groups. Neither, the Government urges, should it *appear* to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court.[167]

"Influence," in this view, is insidious. The threat of it wasn't enough for the government to prevail in *Grace*, however. The Court held that the public sidewalks on the perimeter of the Supreme Court's grounds are public fora for First Amendment purposes, and struck down, as applied to those sidewalks, a law that banned picketing on Court grounds.[168]

Still, "influence" was also the operative word in the statute, 18 U.S.C. § 1507, that people who took issue with the *Dobbs*-related protests near Justices' homes relied on to argue that such protests were illegal or shouldn't be allowed.[169] The

---

[166] *See* Silverman, *supra* note 50.

[167] 461 U.S. 171, 182–83 (1983).

[168] *Id.* at 179–80. *But cf.* Hodge v. Talkin, 799 F.3d 1145, 1158, 1162 (D.C. Cir. 2015) (holding that the Supreme Court's plaza, unlike sidewalks on the perimeter of Court grounds considered in *Grace*, was not a public forum, and therefore upholding as reasonable, against a First Amendment challenge, a content-neutral ban on protests at the plaza).

[169] *See, e.g.*, Letter from Chuck Grassley, *supra* note 26; Letter from Tom Cotton, *supra* note 26; Governor Larry Hogan (@GovLarryHogan), X (May 11, 2022, at 14:00 PST),

statute says, in relevant part:

> *Whoever*, with the intent of interfering with, obstructing, or impeding the administration of justice, or *with the intent of influencing any judge*, juror, witness, or court officer, *in the discharge of his duty, pickets or parades* in or near a building housing a court of the United States, or *in or near a building or residence occupied or used by such judge*, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, *shall be fined under this title or imprisoned not more than one year, or both*.[170]

But what's wrong with influencing judges, or simply trying to influence them?

A. Attorneys Influence Judges, Including Supreme Court Justices, Routinely—Even Through Harsh Criticism

People attempt to influence, and *do* influence, judges—including Justices of the Supreme Court—every single day. This, in most instances, is neither surprising nor scandalous. It's the job of attorneys. They write briefs and argue in court to convince judges to rule in their clients' favor—in other words, to influence the judges' decisions.[171] Even people who aren't parties to cases try to influence judges' decisions in particular cases through amicus briefs.[172] Judges' own law clerks present judges with their views about how cases should be decided.[173] And judges attempt to influence, and *do* influence, other judges—both their colleagues on the bench and any judges who might confront similar cases or issues in the future—through

---

https://x.com/GovLarryHogan/status/1524494786031280128 [https://perma.cc/4BYE-AHJ7].

[170] 18 U.S.C. § 1507 (emphasis added).

[171] *See, e.g.*, Richard A. Posner, *Convincing a Federal Court of Appeals*, LITIGATION, Winter 1999, at 3, 3 (addressing "what is convincing and what is not in appellate briefs and arguments"). And this function is not strictly limited to attorneys. Pro se litigants routinely argue on their own behalf, trying—just as lawyers do—to convince judges to decide cases in a particular way.

[172] *See generally* Paul M. Collins, Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917 (2015) (outlining how amicus briefs influence Supreme Court decisions, with the Justices even adopting language from amicus briefs directly into their opinions).

[173] *See* Posner, *supra* note 171, at 3 ("Most federal appellate judges, in my experience, ask one or more of their clerks to read the briefs in advance of argument and then to discuss with the judge how the clerk thinks the case should be decided. The clerks are just advisors, but they are often influential advisors and so they are an important part of [attorneys'] audience."). *See generally* Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51 (2008) (explaining that law clerks' ideological preferences "exert an independent influence" on Justices' merits votes).

questions at oral argument,[174] suggested revisions of circulating opinions,[175] and written opinions issued by courts, including concurring[176] and dissenting opinions.[177]

Attempts to influence judges are not limited to individual cases, either. Attorneys, from litigators to law professors to judges and Justices themselves, frequently speak and write about broader issues in the law. For that matter, so do law students—future attorneys.[178] Whether they're calling attention to problems or proposing solutions or offering new perspectives or presenting grand jurisprudential theories, and whether they're doing it through books,[179] law review articles,[180]

---

[174] *See* Timothy R. Johnson, Ryan C. Black, Jerry Goldman & Sarah A. Treul, *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 246 (2009) (noting that while Justices are questioning lawyers, they are often also communicating their views to one another).

[175] *See, e.g.*, Joan Biskupic, *Memos Show How Supreme Court Justices Scramble at the End of the Session*, CNN (May 15, 2023, at 05:02 EDT), https://www.cnn.com/2023/05/15/politics/supreme-court-backchannel-affirmative-action-namby-pambies [https://perma.cc/6SCN-LQ72]; Jodi Kantor & Adam Liptak, *How Roberts Shaped Trump's Supreme Court Winning Streak*, N.Y. TIMES (Nov. 6, 2024), https://www.nytimes.com/2024/09/15/us/justice-roberts-trump-supreme-court.html [https://perma.cc/9QA8-CMDP].

[176] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring); Katz v. United States, 389 U.S. 347, 360–62; (Harlan, J., concurring) (1967). For a recent example, consider Justice Clarence Thomas's concurrence in Trump v. United States, 144 S. Ct. 2312, 2347–2352 (2024). Attorney General Garland had appointed Special Counsel Jack Smith to investigate and prosecute alleged crimes committed by President Trump; in his concurrence, Justice Thomas urged "lower courts" to answer "essential questions" about whether Smith's appointment was constitutionally valid. *Id.* at 2348. Two weeks later, district judge Aileen Cannon—relying in part on Justice Thomas's concurrence—concluded that Smith's appointment was invalid and dismissed a separate criminal case against Trump. United States v. Trump, 740 F. Supp. 3d 1245, 1252, 1260, 1267 n.20, 1291 (S.D. Fla. 2024).

[177] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting), *overruled by*, Brown v. Bd. of Educ., 347 U.S. 483 (1954); Olmstead v. United States, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting), *overruled by*, *Katz*, 389 U.S. 347.

[178] *See, e.g.*, Abbey Marzen, Note, *Crafting New Boundaries: Model Legislation to Address the New-Real Threat of Virtual Child Pornography Without Running Afoul of* Ashcroft v. Free Speech Coalition, 37 ST. THOMAS L. REV. 20, 48 (2024) (discussing the need for new legislation surrounding virtual child sex abuse material).

[179] *See generally, e.g.*, JUSTICE JOHN PAUL STEVENS, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION (2014) (proposing six amendments to address perceived Supreme Court missteps).

[180] *See, e.g.*, Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890) (describing the constitutional right to privacy; written by future Supreme Court Justice Louis Brandeis and a classmate, largely considered one of the most influential essays in privacy law); *see also* Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203 (1954) (describing Warren and Brandeis' article on privacy as "perhaps the most famous and certainly the most influential law review article ever written").

speeches,[181] op-ed pieces,[182] blog posts,[183] podcasts,[184] or social media posts,[185] attorneys of all varieties want to make listeners and readers—including judges—think and then act differently on the topics of their speeches and writings. (I, for one, am hoping that after they read this Article, the Justices will realize how they and the Supreme Court can actually benefit from crowds of peaceful protesters outside their homes expressing concerns about a legal issue or criticizing their work.)

Attempts to influence judges through criticism—even harsh criticism—are accepted, too. Criticism typically involves a negative assessment of some choice or decision. Explicitly or implicitly, it calls for people with authority to change or fix or improve those choices and decisions, either now or in the future.[186] As a former Second Circuit judge argued, lawyers have a duty to criticize courts—"to identify and discuss incorrect actions by the courts," for the purpose of improving the law and the legal system.[187] Attorneys do this through all of the means and forms of communication mentioned above.[188] Judges do it too, and not simply in their

---

[181] *See, e.g.*, Erwin Chemerinsky, *Transcript of Speech Given at the First Conference of Professional and Judicial Ethics*, 84 REVISTA JURÍDICA U.P.R. 855, 855–56 (2015) (offering "vision" of First Amendment that's more protective of lawyers' and judges' speech than the Model Rules of Professional Conduct or Model Code of Judicial Conduct).

[182] *See, e.g.*, J. Michael Luttig, Opinion, *A 2009 Supreme Court Ruling May Require Barrett to Recuse Herself from 2020 Election Cases*, WASH. POST (Oct. 17, 2020), https://www.washingtonpost.com/opinions/2020/10/17/amy-coney-barrett-recuse-2020-election-cases-caperton-v-massey-coal-co/ [https://perma.cc/579P-69CE].

[183] *See, e.g.*, Josh Blackman, *About Justice Jackson's "Recusal" from Loper Bright*, REASON: THE VOLOKH CONSPIRACY (July 3, 2024, at 00:12 PDT), https://reason.com/volokh/2024/07/03/about-justice-jacksons-recusal-from-loper-bright/# [https://perma.cc/7CV4-3EHL] (arguing that "the usual recusal rules will not work for the Supreme Court").

[184] *See, e.g.*, STRICT SCRUTINY: *A Deregulatory Sh*t Show Waiting to Happen* (Crooked Media, Nov. 27, 2023), https://crooked.com/podcast/a-deregulatory-sht-show-waiting-to-happen/ [https://perma.cc/HU4F-4TZU].

[185] *See, e.g.*, Bob Loeb (@bobloeb.bsky.social), BLUESKY (Dec. 11, 2024, at 13:56 PT), https://bsky.app/profile/bobloeb.bsky.social/post/3ld2qoz2chk2x [https://perma.cc/3QG7-FQC4] (arguing that judicial unwillingness to compromise has impaired judges' ability to reach collective decisions).

[186] *See* Mathieu Lemay, *Why Do Ideas Matter in Politics: What is Criticism?*, MEDIUM (Mar. 27, 2025), https://medium.com/@lemaym/why-do-ideas-matter-in-politics-what-is-criticism-18ed3d212cc6 [https://perma.cc/N6JM-ZXHR].

[187] Roger J. Miner, *Criticizing the Courts: A Lawyer's Duty*, COLO. LAW., Apr. 2000, at 31, 31. Judge Miner noted that the Preamble to the ABA's Model Rules of Professional Conduct imposes a duty on lawyers "to challenge the rectitude of official action," *id.* (quoting MODEL RULES OF PRO. CONDUCT: PREAMBLE, SCOPE, AND TERMINOLOGY ¶¶ 4–5 (A.B.A. 1997)), and to use their knowledge "to reform the law." *Id.*

[188] *See generally, e.g.*, David S. Cohen, *Silence of the Liberals: When Supreme Court Justices Fail to Speak Up for LGBT Rights*, 53 U. RICH. L. REV. 1085 (2019) (arguing that liberal Justices' silence on LGBTQ rights has harmed equality); Neal K. Katyal, Opinion, *The Dismissal of the Trump Classified Documents Case Is Deeply Dangerous*, N.Y. TIMES (July 15, 2024),

opinions. Like any other attorney, they also may levy criticism through speeches, books, articles, and more.[189] We can argue about whether specific instances of criticism are too harsh, and if so, whether they might backfire in terms of influence. But no one seriously suggests that criticism shouldn't be allowed.

Consider Judge Aileen Cannon, the district judge in the Southern District of Florida who handled two separate but related cases stemming from then-former President Donald Trump's alleged illegal retention at his Florida home of classified documents containing "national defense information."[190] Attorney criticism of Judge Cannon wasn't limited to the sort of routine debates over legal reasoning that typical decisions might trigger. It went further and was harsher, even calling her integrity into question, and it made its way into media coverage of her and the cases.[191] Attorneys questioned her fitness and qualifications for her position as a district judge, noting her relative youth and inexperience with criminal trials, both as a federal prosecutor and as a judge.[192] They questioned her capacity to manage her docket generally and handle the cases against Trump specifically.[193] They dug

---

https://www.nytimes.com/2024/07/15/opinion/trump-court-classified-documents.html [https://perma.cc/HL7M-ZYCZ] (arguing that Congress has long authorized special-counsel appointments under 28 U.S.C. §§ 515, 533); Ed Whelan (@EdWhelanEPPC), X (June 27, 2024, at 12:39 PT), https://x.com/EdWhelanEPPC/status/1806412035061850414 [https://perma.cc/A97M-7C83] (criticizing Justice Sotomayor for "hackery").

[189] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 719 (2015) (Scalia, J., dissenting) (criticizing the majority opinion's "style that is as pretentious as its content is egotistic," and asserting that its "showy profundities are often profoundly incoherent"); Sophie Austin, *Justice Kagan Says There Needs to Be a Way to Enforce the US Supreme Court's New Ethics Code*, ASSOCIATED PRESS (July 25, 2024, at 17:15 PDT) https://apnews.com/article/supreme-court-elena-kagan-ethics-code-0de5fc0fb31eaab57202cf96b4e9c3e7 [https://perma.cc/VY83-JQ6A] (reporting on speech by Justice Kagan); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 254 (2009) (comparing District of Columbia v. Heller, 554 U.S. 570 (2008) to Roe v. Wade, 410 U.S. 113 (1973), and arguing that *Heller* represented the Supreme Court's "failure to adhere to a conservative judicial methodology in reaching its decision"; written by federal circuit judge).

[190] *See* Trump v. United States, 54 F.4th 689, 695, 697, 702 (11th Cir. 2022) (holding that Judge Cannon lacked jurisdiction to block the United States from using records lawfully seized during search of Trump's residence in criminal investigation of Trump); *see also* 18 U.S.C. § 793(e) (establishing unauthorized possession of national defense information as a crime); United States v. Trump, 740 F. Supp. 3d 1245, 1252 (S.D. Fla. 2024) (order from Judge Cannon granting Trump's motion to dismiss the indictment against him), *appeal dismissed*, United States v. Trump, No. 24-12311, 2024 WL 6081345, at *1 (11th Cir. Nov. 26, 2024).

[191] *See* Tierney Sneed & Hannah Rabinowitz, *Isolated and Inexperienced: A Portrait of the Judge Overseeing Trump's Documents Case from Veterans of Her Courtroom*, CNN (June 7, 2024, at 07:37 EDT), https://www.cnn.com/2024/06/07/politics/aileen-cannon-judge-trump-classified-documents/index.html [https://perma.cc/JX7E-C2FT] (reporting that attorneys describe Cannon as indecisive and overwhelmed by process).

[192] *Id.*

[193] *See id.*

into her law clerks' experiences working for her.[194] Most notably, attorneys hinted and even plainly stated their views that she was biased in favor of Trump[195]—perhaps, some speculated, because she hoped in return for elevation to the Eleventh Circuit or Supreme Court if Trump became president again.[196] Whether the criticism directed at Judge Cannon was valid, and whether its harshness was justified, are beside the point. Even though she's merely a district judge—not a Justice on the Supreme Court, whose position inherently warrants even more scrutiny—there was no serious suggestion that attorneys or the media or anyone else shouldn't have been allowed to criticize her harshly.

That's because free speech protects criticism. As Justice William Brennan, Jr. reminded us in *New York Times Co. v. Sullivan*, the United States has made "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[197] He later explained the bases of that commitment in *Rosenblatt v. Baer*:

> There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.[198]

Criticism of courts and judges is no different—and has value. Chief

---

[194] Ellie Quinlan Houghtaling, *Here's Why Judge Aileen Cannon's Law Clerks Seem to Have Suddenly Quit*, NEW REPUB. (Mar. 22, 2024, at 15:23 ET), https://newrepublic.com/post/180070/judge-aileen-cannon-law-clerks-left [https://perma.cc/CAT9-R4UY].

[195] *See, e.g.*, Charlie Savage & Alan Feuer, *Judge in Trump Documents Case Rejected Suggestions to Step Aside*, N.Y. TIMES (June 20, 2024), https://www.nytimes.com/2024/06/20/us/politics/aileen-cannon-trump-classified-documents.html [https://perma.cc/AS64-CEB5] (reporting that critics of Judge Cannon had suggested "she could be in over her head, in the tank for Mr. Trump—or both"); Joyce Vance, *Mar-a-Lago Update*, SUBSTACK: CIVIL DISCOURSE WITH JOYCE VANCE (Feb. 7, 2024), https://joycevance.substack.com/p/mar-a-lago-update [https://perma.cc/XM5N-XUNG] (arguing that "it's impossible to avoid the conclusion that the scales are being tipped" in Trump's favor); Dennis Aftergut & Laurence H. Tribe, *Judge Aileen Cannon Is Quietly Sabotaging the Trump Classified Documents Case*, SLATE (Jan. 16, 2024, at 17:11 PT), https://slate.com/news-and-politics/2024/01/judge-aileen-cannon-trump-classifed-sabotage.html [https://perma.cc/Z6X5-DU7J] (asserting that Cannon was "bend[ing] the law to benefit" Trump, who appointed her to the bench).

[196] *See, e.g.*, Richard W. Painter (@RWPUSA), X (June 24, 2024, at 17:09 PT), https://x.com/RWPUSA/status/1805392859996241965 [https://perma.cc/57S4-H2WC] ("Judge Cannon sure looks like she's auditioning for the next open seat on the Supreme Court if Trump wins the election.").

[197] 376 U.S. 254, 270 (1964).

[198] 383 U.S. 75, 85 (1966).

Justice Roberts himself acknowledged this in his *2024 Year End Report on the Federal Judiciary*, writing that criticism of courts "comes with the territory" and "can be healthy" in a democracy with "robust First Amendment protections."[199] He even cited two of his predecessors who agreed. He noted that former Chief Justice William Howard Taft once said—in a speech Taft gave as a Sixth Circuit judge—that "'[n]othing tends more to render judges careful in their decisions and anxiously solicitious [sic] to do exact justice than the consciousness that every act of theirs is to be subject[ed] to the intelligent scrutiny of their [fellow-men], and to their candid criticism.'"[200] And Chief Justice Roberts quoted former Chief Justice William Rehnquist, who wrote that a "'natural consequence'" of the life tenure federal judges receive "'should be the ability to benefit from informed criticism from legislators, the bar, academ[y], and the public.'"[201]

Criticism can bring attention to, and spark debate about, potentially troubling decisions and court practices, and lead judges to reevaluate them and even change them. Take the Supreme Court's recent decision to adopt an ethics code.[202] It seems unlikely the Court would have taken such action if not for the criticism and pressure it faced—from attorneys and judges, from Congress and President Biden, and from the media and the general public—after serial revelations of ethically dubious behavior by Justices.[203] And the subsequent criticism of the new ethics code as toothless might push the Court to make further changes.[204]

The critiques over the last decade of the Supreme Court's use of its "shadow docket" are another example. The term "shadow docket" refers to the cases that come to the Court without a final judgment in the court below—often with one party seeking a stay or injunction—and are decided without full briefing and oral argument in the Supreme Court.[205] Professor William Baude coined the phrase in

---

[199] 2024 YEAR END REPORT, *supra* note 106, at 5.

[200] *Id.* at 8 (quoting William H. Taft, *Recent Criticism of the Federal Judiciary*, 29 AM. L. REV. 641, 642 (1895)).

[201] *Id.* at 5 (quoting WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2005), https://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf [https://perma.cc/A5EP-SKEE]).

[202] *See generally* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (U.S. SUP. CT. 2023) [hereinafter CODE OF CONDUCT], https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/F8UM-CTGE] (providing a "Statement of the Court Regarding the Code of Conduct" and the conduct code itself).

[203] *See* discussion *supra* notes 74–77.

[204] *See* Ann E. Marimow, *Justice Kagan Calls for a Way to Enforce Supreme Court Ethics Code*, WASH. POST (July 25, 2024), https://www.washingtonpost.com/politics/2024/07/25/supreme-court-kagan-ethics-code-reform/ [https://perma.cc/EJ6W-NJZ2]; Colleen Long & Zeke Miller, *Biden Seriously Considering Proposals on Supreme Court Term Limits, Ethics Code, AP Sources Say*, AP NEWS (July 16, 2024, at 17:10 PDT), https://apnews.com/article/election-supreme-court-biden-9c1a40b8f989bfa31a08eb3890abb1a7# [https://perma.cc/X7HZ-FQUW].

[205] William Baude, Foreword, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY

2015, when he wrote that the Court granted "debatable and mysterious" stays and injunctions in important cases, and asserted that the Court's orders in those cases often warranted further explanation, "to reassure us" that those decisions are not "thoughtless or the result of unjustified inconsistency."[206]

Since then, debate about the shadow docket has blossomed, spurring additional questions about the Court's increasing use of the shadow docket,[207] the precedential effect of shadow docket orders,[208] and whether the Supreme Court's use of the shadow docket favors the Executive Branch—or the Executive Branches of particular presidents.[209] The Justices themselves have sparred about the topic.[210] And it appears that even members of the Court who initially bristled at shadow-docket criticism have come around and at least recognized that the Court has made

---

1, 1, 3, 18–19, 21–22 (2015). Professor Baude used "shadow docket" to describe "a range of orders and summary decisions that defy [the Supreme Court's] normal procedural regularity." *Id.* at 1.

[206] *Id.* at 1, 3, 18.

[207] *See, e.g.*, James Romoser, *Symposium: Shining a Light on the Shadow Docket*, SCOTUSBLOG (Oct. 22, 2020), https://www.scotusblog.com/2020/10/symposium-shining-a-light-on-the-shadow-docket/ [https://perma.cc/YJ7X-PD3J]; Nina Totenberg, *The Supreme Court and 'The Shadow Docket,'* NPR: MORNING EDITION (May 22, 2023, at 05:00 ET), https://www.npr.org/2023/05/22/1177228505/supreme-court-shadow-docket [https://perma.cc/66T4-2Y7L].

[208] *See, e.g.,* Harry Isaiah Black & Alicia Bannon, *The Supreme Court "Shadow Docket,"* BRENNAN CTR. FOR JUST. (July 19, 2022), https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket [https://perma.cc/4TZW-CWMC].

[209] *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 124–27 (2019) (documenting that the Trump Administration "has filed an unprecedented number of requests for emergency relief"—at least 21 stays in two and a half years compared to eight total during the prior 16 years—and observing that the Court's willingness to grant such relief "gives at least the appearance that the Court is showing favoritism not only for the federal government as a party, but for a specific political party when it's in control of the federal government"). *But see* Pablo Das, Lee Epstein & Mitu Gulati, *Deep in the Shadows?: The Facts About the Emergency Docket*, 109 VA. L. REV. ONLINE 73, 74, 76, 98 (2023) (analyzing Supreme Court's 2021–2022 term and concluding that there was nothing "particularly nefarious" or "particularly shadowy" in Court's use of the emergency docket).

[210] For example, in dissenting from the Court's denial of an application by abortion providers for an injunction against a Texas law set to take effect that prohibited abortions after six weeks, Justice Kagan criticized the majority for allowing what she called a "patently unconstitutional law" to go into effect without full briefing, "and after less than 72 hours' thought." Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting). She added that "the majority's decision is emblematic of too much of this Court's shadow-docket decisionmaking—which every day becomes more unreasoned, inconsistent, and impossible to defend." *Id.*; *see also* Danco Lab'ys, LLC, v. All. for Hippocratic Med., 143 S. Ct. 1075, 1075 (2023) (Alito, J., dissenting) (noting disagreement with recent criticisms by Justices of "shadow-docket decisionmaking," but arguing that if those criticisms "were warranted in the cases in which they were made, they are emphatically true here" (citation omitted)).

a lot more decisions on the shadow docket in recent years, and that it may not be a good thing.[211] Because of criticism, changes to the shadow docket may be on their way. We can see, then, that attorneys influence and attempt to influence judges, and that criticism—one method of influence—of courts and judges by attorneys is normal and beneficial.

B. We Let Politicians Do it Too, Even Though it's Detrimental

The question arises: May anyone else besides attorneys (and pro se litigants in individual cases) influence judges through criticism? Politicians certainly may—and do. Whether they *should* criticize, and whether their criticism is *beneficial*, are separate questions. As I will show, it can have a detrimental effect on perceptions of judicial integrity and impartiality. But even if it's a bad idea, they're allowed to do it; no one prosecutes them for it or suggests their criticism should be subject to prior restraints. And if politicians are free to do it, ordinary people—members of the public who typically don't have the capacity to wreak the same sort of damage on the judiciary—should be able to do it also.

In fact, there have been several instances in recent years when politicians' criticism of courts has been criticized for a variety of reasons, including for potentially endangering judges, or for appearing to improperly politicize courts and call judicial integrity into question. Yet the criticism from politicians has continued unabated. President Obama, a lawyer and former professor at the University of Chicago Law School,[212] weighed in a couple of times on Obamacare cases that were pending at the Supreme Court, suggesting in the first case that striking down the law would be the sort of judicial activism conservative critics had long decried, and calling a subsequent case an "easy" one that "probably shouldn't even have been taken up."[213] More recently, after the Supreme Court struck down the use of

---

[211] *See* Steve Vladeck, *Bonus 80: "The Shadow Docket" at One*, ONE FIRST (May 16, 2024), https://www.stevevladeck.com/p/bonus-80-the-shadow-docket-at-one [https://perma.cc/7CK9-2QC2]. Professor Vladeck noted an emerging consensus "that a surge in emergency applications in recent years has (1) fundamentally transformed the nature of the Court's work; and (2) placed difficult burdens on the justices with respect to how they resolve them." He cited recent comments by Justices Thomas and Kavanaugh about the increased pressure on the Court caused by the increase in shadow-docket filings, and about the way the Court makes decisions in those cases, in less time and with less briefing. *Id.* Justice Thomas, at least, called the situation something the Court "will have to address." *Id.* (citing Jonathan H. Adler, *Justice Thomas Raises Concerns About Increase in Expedited Appeals on "Shadow Docket,"* REASON: THE VOLOKH CONSPIRACY (May 10, 2024, at 19:10 PDT), https://reason.com/volokh/2024/05/10/justice-thomas-raises-concerns-about-increase-in-expedited-appeals-on-shadow-docket/ [https://perma.cc/54Z4-XZPM]).

[212] Robin I. Mordfin, *From the Green Lounge to the White House*, UNIV. OF CHI. L. SCH. (Aug. 20, 2009), https://www.law.uchicago.edu/news/green-lounge-white-house [https://perma.cc/7XP2-RMQ5].

[213] Scott Bomboy, *Obama's Supreme Court Criticism Hardly New for Presidents*, NAT'L

affirmative action in the college admissions programs at Harvard and North Carolina,[214] a reporter noted that the Congressional Black Caucus had said the Court had "thrown into question its own legitimacy,"[215] and then asked President Biden, a lawyer and former chairman of the Senate Judiciary Committee,[216] if the Court had gone "rogue."[217] Biden's response? "This is not a normal Court."[218]

And of course, as a candidate, President, former President, and President again, Donald Trump (not a lawyer) has repeatedly impugned and threatened judges and attacked the judicial system with statements that have run the gamut from racism to baseless conspiracy theories.[219] Trump, more than any other political figure, is associated with the sharp rise in threats against judges in the last decade. Reuters reported in 2024 that since Trump began his first presidential campaign in 2015, the average annual number of "threats and hostile communications" directed at judges, federal prosecutors, and court staff and buildings has "more than tripled."[220] As he faced criminal charges and other lawsuits while running in 2024, Trump's supporters waged "a campaign of threats and intimidation at judges, prosecutors and other court officials" in both the federal and state systems, taking their cue from Trump's attacks on judges, prosecutors and the judicial system itself as political

---

CONST. CTR: CONST. DAILY BLOG (June 10, 2015), https://constitutioncenter.org/blog/obamas-supreme-court-criticism-hardly-new [https://perma.cc/EDY6-NL3C]; Sarah Wheaton, *Obama: Supreme Court Shouldn't Have Heard Obamacare Challenge*, POLITICO (June 8, 2015, at 12:53 EDT), https://www.politico.com/story/2015/06/obamacare-supreme-court-president-obama-questions-118742 [https://perma.cc/G8SY-JTHB].

[214] Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175 (2023).

[215] *Remarks by President Biden on the Supreme Court's Decision on Affirmative Action*, THE WHITE HOUSE (June 29, 2023, at 12:48 EDT), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/06/29/remarks-by-president-biden-on-the-supreme-courts-decision-on-affirmative-action/ [https://perma.cc/D4WR-XD97].

[216] *See BIDEN, Joseph Robinette (Joe), Jr.*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/b000444 [https://perma.cc/X8Q3-6DEA] (last visited Feb. 2, 2026).

[217] *Remarks by President Biden on the Supreme Court's Decision on Affirmative Action*, *supra* note 215.

[218] *Id.*

[219] *See* Joseph Tanfani, Ned Parker & Peter Eisler, *Judges in Trump-Related Cases Face Unprecedented Wave of Threats*, REUTERS (Feb. 29, 2024, at 12:00 GMT), https://www.reuters.com/investigates/special-report/usa-election-judges-threats/ [https://perma.cc/TT53-BQVM]; Kristine Phillips, *All the Times Trump Personally Attacked Judges—and Why His Tirades Are 'Worse Than Wrong,'* WASH. POST (Apr. 26, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/ [https://perma.cc/C2M7-H6F9].

[220] Tanfani et al., *supra* note 219.

opponents biased against him.[221] If anything, things have deteriorated in the first year of Trump's second term,[222] with threats now extending to members of judges' families.[223]

Importantly, the threat to judicial independence—or at least the perception of it—is particularly acute when a critical mass of politicians directs its criticism at an individual judge. Consider the case of Harold Baer, Jr., a district judge in the Southern District of New York who in 1996, after concluding that police had lacked reasonable suspicion to justify an investigative stop, initially suppressed as evidence $4 million worth of drugs found in a defendant's car and the defendant's admission that she was transporting drugs.[224] Judge Baer based his decision in part on his view that, because residents of that Manhattan neighborhood viewed "police officers as corrupt, abusive and violent," the men who placed bags containing drugs in the car hadn't been evasive when they left the scene after seeing police officers.[225]

But a cascade of national, bipartisan criticism followed. Over 200 members of the House of Representatives called for Judge Baer's impeachment, as did Senate Majority Leader (and presidential candidate) Bob Dole (R-Kansas); and the White House suggested President Clinton (who had appointed Baer but was running against Dole for re-election) might ask Baer to resign if he didn't reverse his decision.[226] And two months after his initial ruling, Judge Baer did just that,

---

[221] *Id.*

[222] *See* Schwartz, *supra* note 109 (reporting on a spike in threats in March and April of 2025 coinciding with "harsh rhetoric—often from Mr. Trump himself—criticizing judges" who ruled against the Trump Administration).

[223] Ned Parker, Mike Spector, Peter Eisler, Linda So & Nate Raymond, *These Judges Ruled Against Trump. Then Their Families Came Under Attack.*, REUTERS (May 3, 2025), https://www.reuters.com/investigations/these-judges-ruled-against-trump-then-their-families-came-under-attack-2025-05-02/ [https://perma.cc/M3WA-HG6N].

[224] United States v. Bayless, 913 F. Supp. 232, 237–42, *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996); Joseph P. Fried, *Harold Baer Jr., Judge Whose Civil Liberties Rulings Drew Fire, Dies at 81*, N.Y. TIMES (May 29, 2014), https://www.nytimes.com/2014/05/29/nyregion/harold-baer-jr-judge-whose-civil-liberties-decisions-drew-criticism-dies-at-81.html [https://perma.cc/74FS-MSZ6] (recounting that Judge Baer initially suppressed evidence of $4 million in drugs for lack of reasonable suspicion). *See generally* Meghan K. Jacobson, Note, *Assault on the Judiciary: Judicial Response to Criticism Post-*Schiavo, 61 U. MIA. L. REV. 931 (2007) (discussing political backlash against Judge Harold Baer, Jr. after he suppressed drug evidence).

[225] *Bayless*, 913 F. Supp. at 242 (observing that "had the men not run when the cops began to stare at them, it would have been unusual").

[226] Jacobson, *supra* note 224, at 935. Following the attacks from politicians, four judges from the Second Circuit issued a statement defending Judge Baer, without addressing the merits of his ruling. *See id.* at 936; Don van Natta Jr., *Judges Defend a Colleague from Attacks*, N.Y. TIMES (Mar. 29, 1996), https://www.nytimes.com/1996/03/29/nyregion/judges-defend-a-colleague-from-attacks.html [https://perma.cc/LSF5-BKAG]. They said the prospect of asking for his resignation was "an extraordinary intimidation," and said the attacks threatened judicial independence. Natta, *supra*. Chief Justice Rehnquist also weighed in obliquely, saying in a speech

deciding to deny the defendant's suppression motion.[227] No one other than Judge Baer could say for sure why he changed his mind, but the facts made it very easy to think political pressure and fear of losing his job caused him to flip.[228] And that alone was enough to damage the idea that the judiciary is impartial and operates independent of political pressures.[229]

Thirty years later, we appear to have learned no lessons from that episode. It's true that individual politicians do occasionally get burned for going too far in their criticism of judges when rhetoric sounds threatening or is too extreme in some other way. When Senator Schumer spoke at a Supreme Court rally for abortion rights in 2020, he seemed to direct some sort of threat at Justices Gorsuch and Kavanaugh, saying they had "released the whirlwind" and would "pay the price" if they ruled against abortion rights in a case before the Court.[230] After Chief Justice Roberts—among many other critics—called Schumer's remarks "threatening statements" that were "inappropriate" and "dangerous," Schumer said he shouldn't have used the words he used, and he only meant President Trump and Republicans would face political consequences if the Supreme Court took abortion rights away from women.[231] But those instances of individual regret or chastening don't lead to

---

that judges should expect criticism, but that retaining judicial independence—one of the "crown jewels of our system of government"—was essential for the judiciary to function. Jacobson, *supra* note 225, at 937 (quoting John Gibeaut, *Taking Aim*, 82 A.B.A. J. 50, 55 (1996)).

[227] *See Bayless*, 921 F. Supp. at 212 (vacating the initial decision and denying defendant's motion to suppress after reopening the hearing and considering additional testimony); *see also* Jacobson, *supra* note 224, at 936 ("We may never be certain whether Judge Baer's reconsideration and eventual reversal of his original order was merely the result of additional evidence or instead the unfortunate byproduct of an unconstitutional attack on the separation of powers and independence of the judiciary.").

[228] *See* Don van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES (Apr. 2, 1996), https://www.nytimes.com/1996/04/02/nyregion/under-pressure-federal-judge-reverses-decision-in-drug-case.html [https://perma.cc/4EPF-356V]; Don van Natta Jr., *Drug Case Reversal*, N.Y. TIMES (Apr. 3, 1996), https://www.nytimes.com/1996/04/03/nyregion/drug-case-reversal.html [https://perma.cc/89L9-5ZPZ] (reporting that "lingering, unanswered questions will probably fuel the perception among some lawyers that Judge Baer bowed to political pressure"); Robert L. Brown, *From Earl Warren to Wendell Griffen: A Study of Judicial Intimidation and Judicial Self-Restraint*, 28 U. ARK. LITTLE ROCK L. REV. 1, 7 (2005).

[229] *See* Brown, *supra* note 228, at 7. Brown, an Associate Justice on the Arkansas Supreme Court, wrote that "the appearance that [Judge Baer] did defer to the will of the man who appointed him judge is palpable and if he did so, judicial impartiality was grievously impaired." *Id.*

[230] Ian Millhiser, *The Controversy Over Chuck Schumer's Attack on Gorsuch and Kavanaugh, Explained*, VOX (Mar. 5, 2020, at 08:40 PST), https://www.vox.com/2020/3/5/21165479/chuck-schumer-neil-gorsuch-brett-kavanaugh-supreme-court-whirlwind-threat [https://perma.cc/U9N2-M8MZ].

[231] *Id.* Even those comments, Millhiser argued, suggested Schumer didn't view Justices Gorsuch and Kavanaugh as legitimate, which was "exactly the sort of statement that a

greater reticence in general.[232] Politicians as a group don't seem to have realized the harm they might be doing and thus don't hold their tongues.

Moreover, politicians haven't only exerted pressure in individual cases, but have also made the composition of the Supreme Court and lower courts a political issue, which necessarily brings along criticism—implicit or explicit—of Justices and judges currently on the bench. We've moved beyond the types of promises about demographics that Ronald Reagan, who promised to put a woman on the Supreme Court,[233] and Joe Biden, who promised to put a Black woman on the Court,[234] made. Candidates from both parties are now essentially telling voters: *I'll appoint Justices and judges who'll decide cases the* right *way—the way* we *want them decided, not the way the Justices and judges appointed by the other side decide them*. The nadir of this trend—so far—came during the 2016 presidential campaign, when Donald Trump (1) promised only to appoint to the Supreme Court Justices who would vote to overturn *Roe v. Wade*, and (2) compiled and publicized lists of individual judges he would consider for spots on the Supreme Court.[235] Justices Gorsuch, Kavanaugh

---

political leader makes to justify future norm violations that, once again, will push the United States deeper down the death spiral." *Id.*

[232] *See* D. Brooks Smith, Lecture, *Judicial Independence and the Rule of Law*, 27 LEWIS & CLARK L. REV. 395, 411–12 (2023).

[233] *See Sandra Day O'Connor: First Woman on the Supreme Court*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/visiting/exhibitions/SOCExhibit/Section3.aspx [https://perma.cc/2VVH-Q2VZ] (last visited Feb. 2, 2026).

[234] *See Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court*, THE WHITE HOUSE (Feb. 25, 2022, at 14:02 EST), https://bidenwhitehouse.archives.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/ [https://perma.cc/KG9C-WTNY]; *see also Read the Full Transcript of the South Carolina Democratic Debate*, CBS NEWS (Feb. 25, 2020, at 23:35 EST), https://www.cbsnews.com/news/south-carolina-democratic-debate-full-transcript-text/ [https://perma.cc/PD48-4UWM] (providing then-Vice President Biden's statements during a debate: "I'm looking forward to making sure there's a black woman on the Supreme Court, to make sure we in fact get every representation").

[235] *See* Peter Sullivan, *Trump Promises to Appoint Anti-Abortion Supreme Court Justices*, THE HILL (May 11, 2016, at 12:26 ET), https://thehill.com/policy/healthcare/279535-trump-on-justices-they-will-be-pro-life/ [https://perma.cc/KY5Y-7NC3]; Aaron Blake, *The Final Trump-Clinton Transcript, Annotated*, WASH. POST: THE FIX (Oct. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/ [https://perma.cc/MH4F-6FLU] (transcribing Trump saying the Justices he would "appoint will be pro-life"). Trump's lists came in waves. Alan Rappeport & Charlie Savage, *Donald Trump Releases List of Possible Supreme Court Picks*, N.Y. TIMES (May 18, 2016), https://www.nytimes.com/2016/05/19/us/politics/donald-trump-supreme-court-nominees.html [https://perma.cc/VZY2-KLU6] (providing Trump's initial list during his campaign); Reena Flores & Major Garrett, *Donald Trump Expands List of Possible Supreme Court Picks*, CBS NEWS (Sep. 23, 2016, at 12:42 EDT), https://www.cbsnews.com/news/donald-trump-expands-list-of-possible-supreme-court-picks/ [https://perma.cc/N37A-BN2W] (listing ten additional judges,

and Barrett all appeared on Trump's lists, and all of them voted in *Dobbs* to overturn *Roe*.[236] The result of all this is to make judges and courts seem undeniably political.[237]

I submit that the Justices and other judges also have a role to play here in preventing that perception from taking root, and that—collectively—they've failed in that role too many times in recent years. If they're truly interested in being independent and apolitical—and in being perceived that way—they have an obligation to act that way. (I set aside for this discussion any ethical concerns about whom the Justices associate with or what they or members of their families might be doing that might require them to recuse from cases—even though those concerns are real and substantial.[238]) In their work, the Justices often claim to be guided exclusively by the law, without concern for the consequences of their decisions.[239] If that were true, it would certainly suggest they're independent and not political actors. But if that were true, it would also suggest they shouldn't comment about politicians, as Justice Ruth Bader Ginsburg did when she criticized Donald Trump as he ran for president in 2016;[240] and they shouldn't comment upon the reaction

including Neil Gorsuch, that Trump would consider for the Supreme Court); Press Release, The White House, President Donald J. Trump's Supreme Court List (Nov. 17, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/ [https://perma.cc/GK6W-AH8X] (publishing Trump's 25 potential Supreme Court nominees, including Kavanaugh and Barrett, while in office).

[236] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240, 2278–79 (2022); *see* sources cited *supra* note 235.

[237] *See* Smith, *supra* note 232, at 410 (explaining the belief that "the public's view of a partisan judiciary results from increasingly harsh language used by political actors, some in media, and the ever-growing politicization of the nomination and confirmation process").

[238] *See* discussion *supra* note 77.

[239] *See, e.g.*, *Dobbs*, 142 S. Ct. at 2278 (rejecting view that maintaining public approval of Court favored upholding *Roe* and declaring that "we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work"); Niz-Chavez v. Garland, 141 S. Ct. 1474, 1486 (2021) (rejecting dissenting Justices' "raw consequentialist calculation" of costs and benefits of Court's ruling); Moore v. United States, 144 S. Ct. 1680, 1726 (2024) (Thomas, J., dissenting) (criticizing the majority as "not ashamed to lay bare the consequentialist heart of its opinion"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) ("Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will.").

[240] *See* Eliza Collins, *Justice Ruth Bader Ginsburg Faces Criticism Over Trump Attacks*, USA TODAY (July 13, 2016, at 12:58 ET), https://www.usatoday.com/story/news/politics/onpolitics/2016/07/13/scotus-ruth-bader-ginsburg-trump/87024248/ [https://perma.cc/NAG7-J66V] (reporting bipartisan criticism of Justice Ginsburg for publicly criticizing then-candidate Trump). *But see* Jessica Taylor, *Ginsburg Apologizes For 'Ill-Advised' Trump Comments*, NPR (July 14, 2016, at 10:44 ET), https://www.npr.org/2016/07/14/486012897/ginsburg-apologies-for-ill-advised-trump-comments [https://perma.cc/B6KT-9CMG] (reporting that Justice Ginsburg apologized for publicly criticizing then-candidate Trump).

to their decisions, including criticism, as Justice Alito sarcastically did in his speech in Rome after the *Dobbs* decision.[241] That seems like part of the bargain for the life tenure federal judges receive. The Constitution only requires them to maintain good behavior.[242] In exchange, they don't have to campaign for office.[243] Except perhaps in academic settings, there's little reason for them to comment on matters of public concern, including their decisions and any reaction to them.

And while some judges have occasionally objected to attacks from politicians—after President Trump in his first term dismissed a district judge who enjoined one of his Administration's policies as an "Obama judge," for example, Chief Justice Roberts took the rare step of responding to a journalist's request for comment by stating that the federal judiciary was not made up of "Obama judges or Trump judges, Bush judges or Clinton judges"[244]—the judiciary hasn't spoken in a strong, unified, consistent voice against such criticism. When Chief Justice Roberts criticized Senator Schumer for his comments directed at Justices Gorsuch and Kavanaugh in 2020, for example, Schumer's spokesperson pointed out that the Chief Justice hadn't said anything the previous month when Trump called on Justices Ginsburg and Sotomayor to recuse themselves from all cases involving him or his Administration.[245]

Attacks from President Trump and his supporters—including other elected officials—have only become more frequent in the first year of Trump's second term, including calls for the impeachment of district court judges who have ruled against the Trump Administration.[246] Chief Justice Roberts has pushed back on a few occasions—including by issuing a pointed statement criticizing the idea of impeaching judges—and Justices Sotomayor, Kagan and Jackson have each made public appearances before judges and law students at which they criticized attacks on the judiciary as threats to judicial independence and the rule of law.[247] (None of

---

[241] *See* Dwyer, *supra* note 87.

[242] *See* U.S. CONST. art. III, § 1.

[243] *See id.* art. II, § 2.

[244] Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap Over Judges*, ASSOCIATED PRESS (Nov. 21, 2018, at 15:42 PST), https://apnews.com/article/north-america-donald-trump-us-news-ap-top-news-immigration-c4b34f9639e141069c08cf1e3deb6b84 [https://perma.cc/4Z66-DGBF].

[245] Jan Wolfe & Lawrence Hurley, *U.S. Chief Justice Slams Schumer for 'Dangerous' Comment on Justices in Abortion Case*, REUTERS (Mar. 4, 2020, at 17:09 PST), https://www.reuters.com/article/world/us-chief-justice-slams-schumer-for-dangerous-comment-on-justices-in-abortion-idUSKBN20R2MU/ [https://perma.cc/4WT2-4NBU].

[246] *See, e.g.*, Lawrence Hurley, *Chief Justice Pushes Back Against Calls to Impeach Judges Who Rule Against Trump*, NBC NEWS (Mar. 18, 2025, at 16:46 PDT), https://www.nbcnews.com/politics/supreme-court/chief-justice-pushes-back-calls-impeach-judges-rule-trump-rcna196922 [https://perma.cc/7CUP-MBWD].

[247] *Id.*; Lawrence Hurley, *Chief Justice John Roberts Defends Independent Judiciary as Trump Officials Criticize Courts*, NBC NEWS (May 7, 2025, at 16:58 PDT), https://www.nbcnews.com/politics/supreme-court/supreme-court-john-roberts-independent-judiciary-trump-officials-

those four Justices specifically addressed or referred to President Trump in any of their statements or remarks.[248]) Maybe it's impossible for the Justices to keep up with attacks from President Trump and refute every false or out-of-bounds declaration, and rebuttals from four Justices are better than none. But surely the Justices could do more to convince the wider American public—not merely other judges or groups of attorneys or law students—that they're independent and must remain so. Instead of speaking individually, couldn't they demonstrate unity and speak together—as the Supreme Court did in *Cooper v. Aaron*,[249] or as these same nine Justices did in 2023 when they announced they were subscribing to the Court's new Code of Conduct[250]—against political attacks?

If Justices don't shut down attempts from certain politicians to exert pressure and influence, Justices may allow people to associate them with those politicians and think they're allies. During President Trump's first term, when a district judge in the State of Washington temporarily blocked enforcement of his executive order that sought to ban Muslims from entering the United States, Trump called him a "so-called judge," undermining the judge's basic legitimacy and authority.[251]

---

rcna205461 [https://perma.cc/E7M3-AS3U]; Abbie VanSickle, *Chief Justice Urges Political Leaders to Tone Down Rhetoric*, N.Y. TIMES (June 28, 2025), https://www.nytimes.com/2025/06/28/us/chief-justice-roberts-threats.html [https://perma.cc/5CPQ-JZSB]; Josh Gerstein, *Justice Sonia Sotomayor Dunks on Trump—Without Naming Him Once*, POLITICO (Mar. 28, 2025, at 19:49 EDT), https://www.politico.com/news/2025/03/28/sonia-sotomayor-supreme-court-trump-administration-00259127 [https://perma.cc/HM4R-5BQ4]; Justin Jouvenal, *Supreme Court Justice Kagan Says Independence of Judges Is Under Threat*, WASH. POST (July 24, 2025), https://www.washingtonpost.com/politics/2025/07/24/kagan-talk-supreme-court-california/ [https://perma.cc/3YQB-3J3M]; Josh Gerstein, *Ketanji Brown Jackson Sharply Condemns Trump's Attacks on Judges*, POLITICO (May 1, 2025, at 21:31 EDT), https://www.politico.com/news/2025/05/01/ketanji-brown-jackson-sharply-condemns-trumps-attacks-on-judges-00323010 [https://perma.cc/AZ3Z-5AGN].

[248] *See* sources cited *supra* note 247.

[249] 358 U.S. 1, 4, 17–20 (1958) (rejecting Arkansas lawmakers' argument that they weren't bound by Brown v. Bd. of Educ., 347 U.S. 483 (1954) in a unanimous opinion, signed by all nine Justices).

[250] *See generally* CODE OF CONDUCT, *supra* note 202 ("The undersigned Justices are promulgating this Code of Conduct to set out succinctly and gather in one place the ethics rules and principles that guide the conduct of the Members of the Court.").

[251] Matt Zapotosky, Lori Aratani & Justin Jouvenal, *Federal Judge Temporarily Blocks Trump's Entry Order Nationwide*, WASH. POST. (Feb. 4, 2017), https://www.washingtonpost.com/world/national-security/federal-judge-temporarily-blocks-trumps-immigration-order-nationwide/2017/02/03/9b734e1c-ea54-11e6-bf6f-301b6b443624_story.html [https://perma.cc/J8EL-PKU2]; *see* Will Baude, Opinion, *The Deadly Serious Accusation of Being a "So-Called Judge,"* WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/04/the-deadly-serious-accusation-of-being-a-so-called-judge/ [https://perma.cc/XDA3-T5DN] (noting that "'so-called judge' raises such a red flag" because it hints that judge "is not *really* a judge, that he lacks judicial power"; and even if it "is just a hint . . . it flirts with a deadly serious issue").

Professor Eric Posner called on then-Circuit Judge Gorsuch, whom Trump had nominated for the Supreme Court, to defend the integrity of the district judge and the entire federal judiciary by publicly condemning Trump's attack.[252] Gorsuch's response was weak, however. The best he could do was call Trump's remark "disheartening" and "demoralizing."[253] And he only made those comments privately, in a meeting with a Senator, four days after Trump's comments; the Senator, not Gorsuch, publicized them.[254] Gorsuch did use the same words—"disheartening" and "demoralizing"—publicly several weeks later, when testifying in his confirmation hearing before the Senate Judiciary Committee, but he was careful to say they applied to anyone's criticism of the judiciary, and not to address Trump's criticism of judges specifically.[255] In answering questions about Trump's comments, Gorsuch also said, "Judges have to be tough. We get called lots of names, all over the place. We have to accept criticism with some humility. Makes us stronger and better."[256] Of course, since joining the Supreme Court, Justice Gorsuch has not always ruled in cases the way Donald Trump would have wanted him.[257] But because he wouldn't stand up to Trump when it might have endangered his nomination to the Court, it doesn't take much cynicism for an observer to think he wouldn't disappoint Trump when the stakes are high—as they were in *Dobbs*, for example.

---

[252] Eric Posner, Opinion, *Gorsuch Must Condemn Trump's Attack on a Judge*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/opinion/gorsuch-must-condemn-trumps-attack-on-a-judge.html [https://perma.cc/KJS8-CPZT]. Professor Posner even urged those who backed Gorsuch's nomination for the Supreme Court to withdraw their support if he didn't condemn Trump's attack. *Id.*

[253] Abby Phillip, Robert Barnes & Ed O'Keefe, *Supreme Court Nominee Gorsuch Says Trump's Attacks on Judiciary Are 'Demoralizing,'* WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/politics/supreme-court-nominee-gorsuch-says-trumps-attacks-on-judiciary-are-demoralizing/2017/02/08/64e03fe2-ee3f-11e6-9662-6eedf1627882_story.html [https://perma.cc/R2LM-Z5AB].

[254] *See id.*

[255] *See* Sean Sullivan, *Gorsuch Calls Attacks on Federal Judges 'Disheartening' and 'Demoralizing,'* WASH. POST (Mar. 21, 2017, at 15:36 ET), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/neil-gorsuch-confirmation-hearings-updates-and-analysis-on-the-supreme-court-nominee/gorsuch-calls-attacks-on-federal-judges-disheartening-and-demoralizing/ [https://perma.cc/QY83-95V5].

[256] Ashley Killough, *Gorsuch: Criticism of Judges—Including Trump's—'Disheartening,'* CNN (Mar. 22, 2017, at 08:30 EDT), https://www.cnn.com/2017/03/21/politics/neil-gorsuch-trump-criticism-disheartening/index.html [https://perma.cc/AK3L-FZNP].

[257] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (holding that Title VII of the Civil Rights Act protects homosexual and transgender people from workplace discrimination); *cf.* Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 9, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618 & 17-1623) ("Title VII's prohibition on discrimination because of sex does not bar discrimination because of sexual orientation.").

These attempts by politicians to influence courts, including through criticism, harm the judiciary by degrading the perception that its decisions aren't partisan. President Trump and some of his more rabid supporters gave us another vivid example of this phenomenon in the first six months of his second term. First, they made it plain and public that Justice Barrett had not ruled in Trump's favor as often as they wanted; Trump reportedly complained to others that she was "weak,"[258] and Trump's hatchet men and women—including attorneys who, frankly, knew better—slurred her in the media and online as, among other things, a "DEI hire" who has "her head up her ass."[259] Then, when Justice Barrett wrote the majority opinion in *Trump v. CASA, Inc.*, granting partial stays of universal injunctions district courts had entered against Trump's executive order purporting to end birthright citizenship for some immigrants,[260] they singled her out for praise. At a White House press conference after the Supreme Court issued its decision, Trump thanked Justice Barrett by name for writing her opinion "brilliantly," and also name-checked Chief Justice Roberts and Justices Thomas, Alito, Gorsuch and Kavanaugh, calling them "great people."[261] Mike Davis, an attorney close to Trump, openly suggested the pressure on Justice Barrett from Trump and figures on the right had influenced her vote, telling a reporter that "[s]ometimes feeling the heat helps people see the light."[262]

If the Supreme Court is politicized because politicians have made it so—and because the Justices have appeared to engage in political speech or allowed

---

[258] Kristen Holmes & John Fritze, *Trump Privately Complains About Amy Coney Barrett and Other Supreme Court Justices He Nominated*, CNN (June 3, 2025, at 09:00 EDT), https://www.cnn.com/2025/06/03/politics/amy-coney-barrett-justice-trump [https://perma.cc/SL6F-MA2P].

[259] Adam Gabbatt, *'She Is Evil': Amy Coney Barrett Under Attack by the Right Wing After Supreme Court USAID Ruling*, THE GUARDIAN (Mar. 8, 2025, at 10:12 EST), https://www.theguardian.com/us-news/2025/mar/08/amy-coney-barrett-under-attack-by-right-wing [https://perma.cc/S9ZW-KCDR]; Rachel Scott, *Trump Frustrated by Justice Amy Coney Barrett, Other Supreme Court Picks: Sources*, ABC NEWS (June 3, 2025, at 15:50 PDT), https://abcnews.go.com/Politics/trump-frustrated-justice-amy-coney-barrett-supreme-court/story [https://perma.cc/7QW9-9Z2B].

[260] 145 S. Ct. 2540, 2548–49 (2025); *see* Exec. Order No. 14160, 90 Fed. Reg. 8449 (Jan. 29, 2025).

[261] John Fritze & Dan Berman, *Amy Coney Barrett Leaves No Doubt that She Stands with Trump and the Conservative Supermajority*, CNN (June 27, 2025, at 17:21 EDT), https://www.cnn.com/2025/06/27/politics/amy-coney-barrett-trump-conservative-supermajority [https://perma.cc/G6NB-HKXX].

[262] Lawrence Hurley, *After Criticism from MAGA World, Amy Coney Barrett Delivers for Trump*, NBC NEWS (June 29, 2025, at 02:00 PDT), https://www.nbcnews.com/politics/supreme-court/maga-world-criticism-amy-coney-barrett-trump-rcna215622 [https://perma.cc/JN3G-8B7Y].

themselves to be associated with politics—then political speech in response to what the Justices say and do seems appropriate. And if politicians can engage in it, it seems only fair—and, in my view, less concerning—for the public to engage in it also, even through criticism and protest.

C. So Why Can't the Rest of Us Criticize and Try to Influence the Justices Also?

Criticism from the public seems to have much less potential to harm the judiciary and threaten judicial independence than criticism from politicians. Ordinary citizens don't typically have the same sort of platform politicians have, and therefore can't make judges as uncomfortable and put them under as much pressure by drawing large audiences and directing their attention at judges. Ordinary citizens can't threaten to impeach judges, or to affect their working conditions or their workloads.

Even as it carries less risk, criticism of Supreme Court Justices by the general public can also have value, just as criticism from attorneys can. If the members of the Supreme Court heed Justice Gorsuch's advice and accept criticism from the public with some humility, it can play an important role in restoring trust and confidence in the Court.[263] First, criticism from the public lets other actors in the system know that courts have a trust or credibility problem. When those actors have the ability to push for and implement actual changes, as the President and Congress do, reforms or shifts in the ways the Supreme Court operates are possible. The Court's recent adoption of a code of conduct is an example, coming after the negative reaction to the many stories about some of the Justices' questionable ethics led to criticism and threats of action from Congress and President Biden.[264]

Second, criticism can simply let the Justices know that they may have made a mistake—or, when it comes to consistently low approval ratings, maybe several mistakes—and force them to reflect and perhaps reconsider.[265] We certainly want Justices who aren't afraid, when the law and the facts require it, to make decisions that much of the public—even the majority of it—dislikes or disagrees with.[266] The

---

[263] *See supra* text accompanying note 256.

[264] *See generally* CODE OF CONDUCT, *supra* note 202 (providing the newly issued Supreme Court Code of Conduct); Charles Geyh, *The New SCOTUS Code of Conduct*, SCOTUSBLOG (Nov. 24, 2023, at 00:00 PST), https://www.scotusblog.com/2023/11/the-new-scotus-code-of-conduct/ [https://perma.cc/59HY-CN7P] (explaining both the positive aspects and negative aspects of the newly promulgated Supreme Court Code of Conduct); *see also* discussion *supra* notes 74–77 (describing reports of Justices' questionable ethical choices).

[265] *See generally* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007). Professor Sunstein concluded that public outrage is irrelevant in "the general run of cases," but that there are some circumstances when judges legitimately consider it "because and to the extent that consequences matter, and because and to the extent that outrage provides information about the proper interpretation of the Constitution." *Id.* at 212.

[266] *See* THE FEDERALIST NO. 78, at 469–70 (Alexander Hamilton) (Clinton Rossiter ed.,

Supreme Court's judgments can't depend on what they might do for the Court's approval ratings. But being unpopular isn't a sign of excellence or a virtue in and of itself. It can also be a sign that a Justice or the Court has gone astray. And through history, up to the current day, the members of the Supreme Court—despite protestations to the contrary—have cared about public opinion[267] and have acted or made decisions based in part on public reaction (or expected public reaction); both anecdotal evidence[268] and academic studies[269] support this.

The Supreme Court's 2005 decision in *Kelo v. City of New London*[270]—which produced an overwhelmingly negative response[271] and even a protest movement—is, in a couple of ways, an instructive example of public criticism of the Court. For one thing, it shows us *Dobbs* was not the first time protests directed at Justices got personal, and perhaps uncomfortably so. And *Kelo* also shows us how such intense and personal criticism of the Court can be productive.

Kelo, by a 5–4 vote and in a majority opinion written by Justice John Paul Stevens, upheld a Connecticut city's authority to take homeowners' land through eminent domain for a proposed economic development plan, ruling that the plan qualified as a "public use" under the Takings Clause of the Fifth Amendment, even though it would not make the land available to the general

1961) (arguing that judicial independence safeguards against "occasional ill humors in the society" and requires "an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community").

[267] Former Chief Justice Rehnquist acknowledged that public opinion, if "sufficiently great and sufficiently sustained," could affect judges' decisions, at least in important constitutional cases. Rehnquist, *supra* note 28, at 768. That wasn't scandalous, he argued, but unavoidable reality, because judges exist outside of courthouses and pay attention to current events like the rest of us. *Id.* at 768–69. Trying not to pay attention to public opinion, he argued, would be worse. *Id.* If a judge tried "to seal himself off hermetically from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead would be influenced by the state of public opinion at the time he came to the bench." *Id.*

[268] *See, e.g.*, Amelia Thomson-DeVeaux, *Who Can Stop The Supreme Court?*, FIVETHIRTYEIGHT (Oct. 15, 2018, at 06:01 PT), https://fivethirtyeight.com/features/who-can-stop-the-supreme-court/ [https://perma.cc/WUY2-DLM3]; Kantor & Liptak, *supra* note 175.

[269] *See, e.g.*, Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 364 (2014); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1019 (2004).

[270] 545 U.S. 469, 470 (2005) (holding that economic-development takings satisfy the Fifth Amendment's public-use requirement).

[271] *See* William Woodyard & Glenn Boggs, *Public Outcry:* Kelo v. City of New London*—A Proposed Solution*, 39 ENV'T L. 431, 440–41 (recounting public and media reaction to decision).

public.[272] In response, "'A public outcry immediately arose.'"[273] Polls, lopsided in the extreme, revealed strong disapproval (by a ratio of 11 to 1, in one poll) of the idea of taking private property for economic development and strong approval (89% support) of new legislation to limit state governments' ability to use eminent domain.[274] Citizens across the country "filled the pages of their local newspapers with letters to the editor and opinion pieces expressing dismay at the Court's ruling."[275]

Some people went further and tried to give the Justices in the majority in *Kelo* what they thought would be a taste of the Justices' own medicine. A California man, Logan Darrow Clements, had the idea to use eminent domain to seize the Justices' homes, focusing on Justice David Souter—who had voted with the *Kelo* majority[276]—and Justice Souter's farmhouse in Weare, New Hampshire.[277] The New Hampshire Libertarian Party had similar ideas, attempting to seize both Justice Souter's home and Justice Stephen Breyer's vacation home in Plainfield, New Hampshire.[278] When Clements appeared on the Fox News program *Hannity & Colmes*—whose hosts were enthusiastic about his idea[279]—he called his campaign

---

[272] *See Kelo*, 545 U.S. at 472, 478, 489–90. Justices Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer joined Justice Stevens in the majority. *Id.* at 470. Justice Sandra Day O'Connor wrote the primary dissent, joined by Chief Justice Rehnquist and Justices Scalia and Thomas. *Id.* at 470, 494.

[273] Woodyard & Boggs, *supra* note 271, at 440 (quoting Les Christie, *Taking Your Home Away: The Supreme Court Has Ruled that New London Could Take Homes Away. What's Next?*, CNNMONEY.COM (Aug. 3, 2005, at 09:17 EDT), http://money.cnn.com/2005/07/25/real_estate/investment_prop/eminent_domain_v_deveopment/index.htm (on file with the Lewis & Clark Law Review)).

[274] *Id.* at 440–41 (first citing Michael Corkery & Ryan Chittum, *Eminent-Domain Uproar Imperils Project*, WALL ST. J. (Aug. 3, 2005, at 00:01 ET), https://www.wsj.com/articles/SB112301915571102998 [https://perma.cc/7SVQ-FGCZ]; and then citing Press Release, Quinnipiac Univ. Polling Inst., Connecticut Voters Say 11–1 Stop Eminent Domain, Quinnipiac University Poll Finds; Saving Groton Sub Base Is High Priority (July 28, 2005), http://www.quinnipiac.edu/x1296.xml?ReleaseID=821 (on file with the Lewis & Clark Law Review)).

[275] *Id.* at 441.

[276] *Kelo*, 545 U.S. at 470.

[277] HANNITY & COLMES: *Supreme Court Justice Could Face Poetic Justice* (Fox television broadcast, aired Dec. 15, 2005) (transcript available at 2005 WLNR 20273102); Kathy McCormack, *Souter Foes Visit His Hometown*, N.H. UNION LEADER, Jan. 21, 2006, at B1.

[278] Norma Love, *New England States Have Long History of Using Eminent Domain*, TIMES ARGUS (Oct. 17, 2018), https://www.timesargus.com/news/new-england-states-have-long-history-of-using-eminent-domain/article_8ee89bb8-3746-515f-9b41-6787149ecc5f.html [https://perma.cc/Z593-UBBU].

[279] Sean Hannity enjoyed the thought of Justice Souter's losing his home. "This is the America [Justice Souter] believes we ought to live in," Hannity said. "And I think it's perfectly fitting that it happens to him. And I assume maybe he'll feel a little bit differently seeing when his

"a home schooling project for five special needs students," and made the point that the Justices couldn't be held accountable through elections: "They're in there for life. The only thing we can do is to educate them as to the importance of property rights."[280]

Ultimately, Clements didn't seize Justice Souter's home. But he made a real effort through legal means. He and his supporters collected enough signatures to get Weare residents to vote on whether the town should take Souter's land.[281] They recruited residents to run for seats on the town's governing board.[282] They held a two-day rally in Weare to attract attention and support, gathering about 60 people, some from as far away as Pennsylvania and Texas.[283] Weare's deputy police chief was prepared for a protest near Justice Souter's home, but Clements and his supporters apparently didn't go near the home.[284] Many people in Weare and elsewhere—even people who disagreed with *Kelo*—had misgivings about the effort,[285] or saw it as "spiteful,"[286] "overkill,"[287] or, in the words of a New Hampshire state representative from Weare, "an act of revenge and an improper attack on the judicial system."[288] But others thought it was necessary to make a point,[289] and

house is taken, his home is ripped away from him." HANNITY & COLMES, *supra* note 277.

[280] *Id.*

[281] McCormack, *supra* note 277.

[282] *See id.* ("Some Weare residents have formed their own group . . . in support of the Souter property proposal; they include a resident running for town selectman."); HANNITY & COLMES, *supra* note 277 (reporting that supporters of the Lost Liberty Hotel project were running for town council).

[283] McCormack, *supra* note 277; Elizabeth Mehren, *A Door-to Door Bid to Single Out Justice*, L.A. TIMES (Jan. 22, 2006, at 00:00 PT), https://www.latimes.com/archives/la-xpm-2006-jan-22-na-domain22-story.html [https://perma.cc/B3MV-E8DD]; *Activists Hold Rally Against Souter*, TIMES ARGUS (Oct. 17, 2018), https://www.timesargus.com/news/activists-hold-rally-against-souter/article_53230589-0f66-5c8d-bf59-828042c5d805.html [https://perma.cc/B659-GGYK].

[284] McCormack, *supra* note 277; *Activists Hold Rally Against Souter*, *supra* note 283. Unsurprisingly, the location of Souter's home was no secret in a small New Hampshire town. A resident who disagreed with *Kelo* and was running for a position on the board went there with a New York Times columnist. John Tierney, *Supreme Home Makeover*, N.Y. TIMES (Mar. 14, 2006), https://www.nytimes.com/2006/03/14/opinion/supreme-home-makeover.html [https://perma.cc/35XK-262Z] (describing Justice Souter's reputation and residents' views of the decision).

[285] Tierney, *supra* note 284; Mehren, *supra* note 283.

[286] Editorial, *Politics of Revenge—Seizure of Justice's Home Would Be Foul Play*, S.D. UNION-TRIB. (Jan. 28, 2006).

[287] Tierney, *supra* note 284.

[288] McCormack, *supra* note 277. In my research, I found no statements from Justice Souter defending his vote in *Kelo* or commenting on Clements' plan to seize his home.

[289] *See* Mehren, *supra* note 283.

considered the campaign "clever"[290] and "the ultimate in civic protest—using the ruling to protest the ruling."[291] The movement finally fizzled out when voters in Weare rejected the ballot measure.[292]

Although Clements' form of protest was arguably more transgressive than the *Dobbs* protests near the Justices' homes because it was arguably more invasive upon a Justice's personal life, it was peaceful and democratic in its methods—nonnormative and nonviolent, like the *Dobbs* protests—and therefore, in my view, also legitimate (even if I also think it was more "overkill" than "clever"). And there's a postscript. Although Clements failed in his quest, the public's loud and sustained negative response to *Kelo* had a real impact: As of 2019, the number of states that had reformed their eminent domain laws in response to *Kelo* was up to 45.[293] All of that criticism of a Supreme Court decision by ordinary people, and all of that protest activity, contributed to real changes in the law.

D. Peaceful Protests Near Justices' Homes Must Be Acceptable Too—and 18 U.S.C. § 1507 Doesn't Mean Otherwise

As a law professor, years before she became a judge, Justice Barrett once surveyed various ways both public officials and private citizens had expressed their disagreement with Supreme Court decisions.[294] She didn't consider protests outside the Justices' homes—although she did include demonstrations on the sidewalks outside the Court—and she reached no firm conclusions about the propriety of specific forms of disagreement.[295] But Justice Barrett did seem to think disagreement with the Court—even if sometimes expressed with "vehemence"—was a sign of the nation's health, rather than a problem: "'So long as groups continue to argue about the meaning of our common Constitution, so long do they remain committed to a common constitutional enterprise.'"[296]

If criticism of the Supreme Court and the Justices is acceptable and can even be beneficial, then the only apparent objection to the large public protests of *Dobbs*

---

[290] *Slices of Americana*, USA TODAY, July 1, 2005, at 11A ("On this Independence Day weekend, it's reassuring to know that clever protest is still an American tradition.").

[291] *See* Mehren, *supra* note 283.

[292] Editorial, *Found Liberty; Weare Does Right by Souter, Everyone*, N.H. UNION LEADER, Feb. 7, 2006, at A8.

[293] Ilya Somin, *Will Connecticut Finally Enact Meaningful Eminent Domain Reform?*, REASON: THE VOLOKH CONSPIRACY (Apr. 23, 2019, at 23:34 PT), https://reason.com/volokh/2019/04/23/will-connecticut-finally-enact-meaningful-eminent-domain-reform/ [https://perma.cc/4HTU-FXNS].

[294] Amy Coney Barrett, *Introduction*, 83 NOTRE DAME L. REV. 1147, 1147–48 (2008).

[295] *See id.* at 1170–72.

[296] *Id.* at 1172 (quoting Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 427 (2007)).

by ordinary citizens in and around Washington, D.C., is an objection to form. Protests are but one form of criticism, and surely no one would object to criticism of the Justices in other forms—letters to the Supreme Court, angry posts on social media, speeches, op-eds, songs, books, advertisements, etc. The law would even permit a citizen critic to protest by trying to seize Justice Alito's home. So what's wrong with peaceful public protests, whether they occur outside a public place like Morton's or outside the Justices' homes?

I dismiss here the argument—made by some defenders of the current Supreme Court and other observers—that protesting near Justices' homes, as happened around the *Dobbs* decision, is illegal. That argument is based on a federal statute, 18 U.S.C. § 1507, which on its face may indeed appear to make it a crime for anyone to picket or parade near a Justice's home "with the intent of influencing" the Justice's voting on particular cases.[297] After the leak of the *Dobbs* draft opinion, Senators Charles Grassley (R-Iowa) and Tom Cotton (R-Arkansas) made that argument while urging Attorney General Garland to prosecute the protesters, and the governors of Maryland and Virginia made it while asking Garland for additional resources from the Department of Justice to protect the Justices whose homes were in their states.[298] Senators Ted Cruz (R-Texas) and Katie Britt (R-Alabama) were still making that argument in the spring of 2023.[299] And some legal scholars seemed to back them up, agreeing that the protests at the Justices' homes were likely illegal under 18 U.S.C. § 1507.[300]

I disagree. I'll note first the irony in the arguments since *Dobbs*, from some of the Justices on the Supreme Court and their supporters, that no one without ulterior motives could reasonably question the Justices' ethics or impartiality or decisionmaking, and that people must be kept away from their homes. Given the public's declining confidence in the Supreme Court's impartiality and everything we've learned recently about Justices' ethical missteps, when could it be more

---

[297] 18 U.S.C. § 1507.

[298] Letter from Chuck Grassley, *supra* note 26; Letter from Tom Cotton, *supra* note 26; Governor Larry Hogan, *supra* note 169.

[299] Hurley, *supra* note 154.

[300] *See* Sneed, *supra* note 102 (reporting that legal experts said 18 U.S.C. § 1507 appeared applicable to protests and would likely be upheld as constitutional); Eugene Volokh, *Federal Statute Bans Picketing Judges' Residences "With the Intent of Influencing [the] Judge,"* REASON: THE VOLOKH CONSPIRACY (May 6, 2022), https://reason.com/volokh/2022/05/06/federal-statute-bans-picketing-judges-residences-with-the-intent-of-influencing-the-judge/ [https://perma.cc/WWT6-NCCQ] (concluding that "it appears likely that such protests are illegal" under § 1507); *see also* Steven M. Fasciale, Comment, *Protesting Near Judges' Homes: An Exploration of Judicial Independence and Free Speech in Light of 18 U.S.C. § 1507*, 54 SETON HALL L. REV. 1191, 1200–28 (2024) (arguing that § 1507 would be upheld as constitutional if applied to protests near Justices' homes). Professor Volokh, however, later recognized that protesters could reasonably argue that applying § 1507 to them would be unconstitutional. *See* Hurley, *supra* note 154.

important to put the Court, the Justices themselves, and even their homes under scrutiny? There's much we still need to know about events in the household of Justice Thomas and Ginni Thomas, for instance.[301] And the flags that quite literally flew at the Alitos' homes raised serious questions about whether Justice Alito should have recused himself from high-profile cases at the Court.[302] An argument now that the Justices' homes are off limits couldn't be less convincing.

More importantly, using § 1507 to prosecute protesters for the types of protests we saw around *Dobbs*, or invoking it to inhibit such protests from even occurring, would be an unconstitutional restriction on speech. For one thing, as I'll explain in the next Section, the statute wasn't meant to address the sorts of protests that occurred near Justices' homes in relation to *Dobbs*. And as I'll explain in the following Section, applying § 1507 to such protests would be unconstitutional under the current view of the First Amendment and restrictions on speech.

1. Section 1507 Wasn't Meant for These Kinds of Protests

Legislative history tells us that Congress enacted § 1507 at a time when it didn't value free speech or the First Amendment as we do today, and that it almost certainly wasn't concerned with preventing the types of protests near Justices' homes that happened because of *Dobbs*. Section 1507 was part of the Internal Security Act of 1950,[303] which Congress enacted to "protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for other purposes."[304] The findings Congress made in support of the Internal Security Act (also known as the McCarran Act), during a period now known as the "Red Scare" and identified with McCarthyism, reflect a fear and paranoia regarding communism that made that era a low-water mark for the First Amendment and protection of speech.[305] Courts eventually struck down many of

---

[301] *See* discussion *supra* notes 75 & 77.

[302] *See* discussion *supra* note 77.

[303] Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987 (codified as amended at 50 U.S.C. §§ 831–835).

[304] *Id.*

[305] *Id.* § 2, 64 Stat. at 987–89 (finding, among other things, that Communists "in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement" and that Communists in the United States sought a moment when "overthrow of the Government of the United States by force and violence may seem possible of achievement"); *see* David Goldberger, *Protecting Speech We Hate*, 32 LITIG. 40, 41 (2006) (discussing the judiciary's failure to protect First Amendment rights during the Red Scare and McCarthyism); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 29–31, 36 (1996) ("During the second Red Scare, in the early 1950s, the First Amendment once again went into hibernation. With the Cold War at its height and fears of domestic subversion rampant, communists were perceived to be simply too dangerous to warrant First Amendment protection."); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI.

its provisions, and even those provisions that survived constitutional challenges—often in decisions made when courts, too, were in the grip of the Red Scare—seem questionable today.[306]

Section 1507 sprang from those same fears and plainly targeted those same Communists. It was written with Communists—and no one else, apparently—in mind. A Senate Judiciary Committee report noted that the practice of picketing courts had begun only recently and been employed at federal courthouses in New York, Los Angeles and San Francisco "solely in connection with proceedings involving alleged Communist Party members or Communist sympathizers."[307] The report included a single reference to one instance of picketing at a judge's residence, with no details about what happened there.[308]

Instead, what concerned Congress and provided the impetus for the legislation was the conduct of the protesters at the courthouses,[309] which could fairly be described as obstructing or interfering with the administration of justice through disruptive tactics.[310] The Senate Judiciary Committee report described large crowds, sometimes numbering in the hundreds, that picketed a federal building "and even surg[ed] into the building in large numbers, overcrowding the courtroom and corridors and making it next to impossible for persons having legitimate business to go where they were required to be."[311] Protesters outside the Ninth Circuit in San Francisco used a sound truck outside the building "and created so much noise that it seriously interfered with the ability to hear the proceedings inside the building."[312]

To the extent there was any fear about undue influence on the outcomes of cases, it was mostly fear that protests and picketing might affect jurors and witnesses; judges were understood to be made of sterner stuff. A committee of the Judicial Conference of the United States that studied the pending legislation was unanimous

---

L. REV. 1205, 1352 (1983) (describing restrictive Supreme Court decisions during the Red Scare and McCarthy era as "blemishes" on First Amendment tradition).

[306] *See generally* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 S.D. L. REV. 1 (1991) (chronicling how Cold War-era federal and state anti-communist laws were successively invalidated or fell into disuse).

[307] S. REP NO. 81-732, at 2 (1949).

[308] *Id.*

[309] *Id.* In fact, before § 1507 was enacted, there was some debate about whether it was even necessary, given federal judges' power to punish contempt of their authority and "misbehavior" that obstructed the "administration of justice." *Id.* at 3 (quoting 18 U.S.C. § 401).

[310] *See* 18 U.S.C. § 1507.

[311] S. REP. NO. 81-732, at 2.

[312] *Id.* Similarly, an article in the American Bar Association Journal advocating for the legislation described "crowds jamming entrances, corridors and courtrooms, members of which carried derogatory signs, handed out uncomplimentary literature, shouted threats and epithets, and broadcast by sound trucks statements against jurors, witnesses, the judges and court officers." *Prohibiting the Picketing of Federal Courts: The Report of the Association's Special Committee*, 36 A.B.A. J. 116, 116 (1950).

in its view that "picketing demonstrations" were incapable of influencing a judge's decisions or actions, but might influence jurors or witnesses.[313] The concern related to judges was not that such protests *would* influence their decisions, but that the public might *think* they had—that people would have the perception that "fear of force and intimidation," rather than the "orderly process of judicial decision," led the judge to his or her conclusion.[314] While that may be a valid concern, it doesn't apply to the *Dobbs* protests. "Force" and "intimidation" connote violence, or at least the threat of it, and peaceful protests like the ones that took place around *Dobbs* don't raise those same concerns.[315]

To recap: 18 U.S.C. § 1507 was not meant for the peaceful protests that occurred near Justices' homes in reaction to the Supreme Court's decision in *Dobbs*. Section 1507 became law at a time when Congress didn't value the First Amendment and free speech. It targeted Communists specifically. It was chiefly intended to address conduct that disrupted courthouse operations. And though Congress and judges worried protesters' conduct might influence jurors and witnesses, they had little concern when § 1507 became law that judges would let the disruptive tactics they had recently seen influence their handling of cases—never mind peaceful protests.

Moreover, it doesn't appear that the Department of Justice has ever prosecuted anyone under § 1507 for protesting at or near a judge's home. Such protests may be rare, but they were not unprecedented or inconceivable before *Dobbs*. In 1995, about 400 civil rights activists held a two-hour demonstration consisting of "prayers, hymns and fiery speeches" near Justice Thomas's home—albeit at the entrance to his subdivision, not directly in front of his home.[316] The protesters, in a reporter's words, said it would be the first in a series of demonstrations "aimed at persuading Thomas and other conservatives on the Supreme Court to stop trying to dismantle affirmative action and other federal programs helpful to minorities."[317] Even though the protesters openly sought to influence the ways Justices voted, there don't appear to have been any calls for the Department of Justice to prosecute them for violating § 1507.[318]

---

[313] REPORT OF THE PROCEEDINGS OF THE REGULAR ANNUAL MEETING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (1949), https://www.uscourts.gov/sites/default/files/1949-09_0.pdf [https://perma.cc/2DWU-8VSM]; *see also Prohibiting the Picketing of Federal Courts: The Report of the Association's Special Committee*, *supra* note 312, at 116 ("Perhaps judges and court officers may be able to overlook some of this criticism, but laymen who are witnesses or jurors cannot be expected to be uninfluenced by such actions.").

[314] S. REP. NO. 81-732, at 4.

[315] *See id.*

[316] Eric Lipton, *400 Activists Protest Outside Justice's Home*, WASH. POST (Sep. 12, 1995), https://www.washingtonpost.com/archive/local/1995/09/13/400-activists-protest-outside-justices-home/e843dcb3-2cf2-4df9-8e1c-ee0db767a81e/ [https://perma.cc/GD6K-V3XL].

[317] *Id.*

[318] Nor did I find any references to possibly invoking § 1507 when the *Kelo* protesters

It's possible there simply haven't been enough protests near judges' homes to draw firm conclusions from the fact that the Justice Department doesn't seem to have prosecuted anyone for them. But the fact that § 1507 has remained sheathed for nearly 75 years against attempts to influence judges may suggest that it doesn't apply to protests like those around *Dobbs*, or at least that the Justice Department believes applying it to such protests would raise real constitutional concerns.

2. Using § 1507 to Prohibit Such Protests Would Unconstitutionally Restrict Speech Based on Content

But even if we ignore the intent behind 18 U.S.C. § 1507 and focus solely on the words in the statute—which on their face do appear to cover at least some of the protests that took place around the decision in *Dobbs*; there were undoubtedly people protesting near Justices' homes who wanted to influence the Justices' votes in *Dobbs* or future cases involving abortion—I don't believe the First Amendment would permit the government to use § 1507 to charge the *Dobbs* protesters, or people who participate in similar protests in the future.

Applying § 1507 that way would be a content-based restriction on speech and therefore presumptively unconstitutional.[319] In *Reed v. Town of Gilbert*, the Supreme Court held, in an opinion written by Justice Thomas, that a law regulating speech is content based on its face if it applies to particular speech "because of the topic discussed."[320] A law that targets speech about a specific subject and singles it out for differential treatment, or that prohibits "public discussion of an entire topic," is content based "even if it does not discriminate among viewpoints within that subject matter."[321] And a content-based restriction on speech—even if it was enacted with no animus and no intent to censor or favor any particular speech or ideas, and even if it seems perfectly reasonable—must be struck down unless it can survive strict scrutiny, which requires the government to prove that the restriction "furthers a compelling interest" and is "narrowly tailored" to achieve it.[322]

The Supreme Court in *Reed* struck down a town's laws regulating the ways outdoor signs could be displayed.[323] Some categories of signs were subject to more strict regulations than others. The Court reasoned that the town's sign restrictions were content based on their face because determining which restrictions applied to

gathered in Justice Souter's hometown and tried to seize his home. *See supra* text accompanying notes 276–92.

[319] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 791–92 (2011); United States v. Playboy Ent. Grp., 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible.").

[320] 576 U.S. 155, 163 (2015).

[321] *Id.* at 169 (citing Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 537 (1980)).

[322] *See id.* at 171 (citation omitted).

[323] *Id.* at 163.

a given sign depended "entirely on the communicative content of the sign."[324] Applying strict scrutiny, the Court assumed without deciding that the town's asserted interests (aesthetic appeal and traffic safety) were compelling, but held that the regulations were not narrowly tailored.[325] To the contrary, they were "hopelessly underinclusive"—the town offered no good reasons why it had to limit some types of signs to preserve aesthetic appeal and maintain traffic safety but didn't have to limit other types.[326]

Under *Reed*, applying 18 U.S.C. § 1507 to forbid protesting near a Justice's home about legal issues and cases before the Court must also be a content-based restriction on speech.[327] Such an application would single out and prohibit a specific type or category of speech. Determining whether protesters were engaged in that type of speech—whether you call it political speech, or speech about legal issues, or even speech intended to influence a Justice in the discharge of his or her duty—would "depend entirely on the communicative content,"[328] of their speech, and *Reed* shows that prohibiting protesters from engaging in it would be a content-based restriction on speech.[329]

Nor could such a prohibition survive strict scrutiny. The government could probably successfully assert it has a compelling interest in maintaining without disruption the administration of justice (the primary concern behind the enactment of § 1507, as I explained above) or something along the lines of maintaining "public confidence in judicial integrity," an interest the Supreme Court recognized as compelling in *Williams-Yulee v. Florida Bar*.[330] (Pause for a moment, however, to consider that part of the reason for the protests about *Dobbs*, and part of the protesters' message, was a *lack* of confidence in judicial integrity. May the government permissibly restrict speech expressing doubt about the very idea the government puts forth as its reason for restricting speech?)

---

[324] *Id.* at 164.

[325] *Id.* at 171–72.

[326] *Id.*

[327] Of course, as an initial matter, it's long-established that protests in the form of picketing or parading are speech that the First Amendment protects. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 460–61 (2011); Gregory v. Chicago, 394 U.S. 111, 111–12 (1969); Thornhill v. Alabama, 310 U.S. 88, 101–06 (1940).

[328] *Reed*, 576 U.S. at 164.

[329] *Id.* at 169 (reasoning that a law "banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed").

[330] Williams-Yulee v. Fla. Bar, 575 U.S. 433, 447–48 (2015); *see supra* notes 309–12 and accompanying text. In *Williams-Yulee*, the Supreme Court upheld against a First Amendment challenge a state law that prohibited candidates in judicial elections from personally soliciting campaign funds. 575 U.S. at 437–38.

But assuming the administration of justice and public confidence in the judiciary *are* compelling interests, the government would be unlikely to prove that § 1507's prohibition of speech, applied to *Dobbs*-type protests, is narrowly tailored. Prohibiting peaceful protests near homes would be overinclusive as to the administration of justice, given that the prohibition wouldn't address the sort of behavior at courthouses that concerned Congress when it enacted § 1507. And for at least two reasons, it would be underinclusive regarding the interest in maintaining public confidence in the judiciary.

First, as I've explained, so many people—legal scholars, other attorneys, politicians—*are* allowed to speak on issues before the Court and attempt to influence them, just as ordinary members of the public hope to do by protesting.[331] If efforts to influence the Justices through speech, without threats or violence, must be prohibited to maintain confidence in the integrity of the judiciary, the greater threat surely comes from the attorneys and politicians who do seek to influence the Justices and have credentials and authority and power that most of the people—perhaps almost all of the people—protesting near Justices' homes after *Dobbs* surely did not have. Forbidding the people *without* the power from protesting would suggest the government is simply targeting them, rather than maintaining confidence in the judiciary.[332]

Second, everyone—even those ordinary members of the public—can attempt to influence the Justices in other ways: purer forms of speech (e.g., letters, articles, books, speeches, posts on social media) and even peaceful protests in other public fora, like the streets outside a restaurant at which a Justice is dining, or the sidewalks outside the Supreme Court building.[333] The members of the Supreme Court are no doubt aware of large protests on the streets around the Court, just as they would be aware of protests on the streets in front of their homes. It would write a strange legal fiction to treat the latter as pernicious attempts to influence them while allowing the former. Such underinclusiveness suggests applying § 1507 to peaceful protests near the Justices' homes would not actually serve a compelling interest.[334]

---

[331] *See* discussion *supra* Sections III.A–C.

[332] "Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 801–02 (2011) (explaining that a law restricting sale of violent video games to minors was underinclusive and not narrowly tailored because it singled out "purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why").

[333] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 456 (2011) (recognizing public streets as traditional public forum, used for assembly and debate); United States v. Grace, 461 U.S. 171 (1983) (holding that public sidewalks surrounding Supreme Court are traditional public forums).

[334] *Williams-Yulee*, 575 U.S. at 449 (2015) ("Underinclusiveness can also reveal that a law does not actually advance a compelling interest."); *see also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 232 (1987) (finding a tax exemption for certain publications based on subject

It's true that in *Williams-Yulee*, the Supreme Court upheld a restriction on speech meant to protect public confidence in the judiciary and, in doing so, shrugged off concerns that the restriction was fatally underinclusive.[335] In that case, a candidate who ran for election as a county judge in Florida challenged a Florida Bar rule that banned judicial candidates from personally soliciting campaign funds.[336] Against the state's compelling interest in judicial integrity, she argued that the rule was underinclusive because it didn't ban a candidate's *campaign* from soliciting funds (which could also lower confidence in judicial integrity) and because candidates were allowed to write thank-you notes to campaign donors (which allowed candidates to know who had given money to their campaigns, raising the risk of bias).[337] In dissent, Justice Antonin Scalia agreed that Florida's rule was impermissibly underinclusive, pointing out—in a passage that may seem prescient now—that it did not prevent the candidate from asking an attorney "for a personal loan, access to his law firm's luxury suite at the local football stadium, or even a donation to help her fight the Florida Bar's charges"—all of which Justice Scalia asserted could erode confidence in the judiciary as much as requests for campaign funds could.[338] Justice Thomas joined Justice Scalia's dissent, and Justice Alito, who dissented separately, said he "largely agree[d]."[339]

Chief Justice Roberts' majority opinion dismissed those arguments, reasoning that policymakers "need not address all aspects of a problem in one fell swoop" and may instead focus on their "most pressing concerns."[340] Because the ban on personal solicitation of campaign funds aimed "squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary"—and because it applied "evenhandedly" to all candidates regardless of viewpoint or means of soliciting funds, and wasn't "riddled with exceptions"—the Court concluded it was not fatally underinclusive.[341] Responding to Justice Scalia, Chief Justice Roberts

matter to be underinclusive in advancing the interest of encouraging new publications); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 104–05 (1979) (striking down, for being underinclusive, a state statute prohibiting newspapers but not other forms of media from printing the names of juvenile offenders).

[335] *See Williams-Yulee*, 575 U.S. at 437, 448–52.

[336] *Id.* at 440–41.

[337] *Id.* at 448–50.

[338] *Id.* at 470 (Scalia, J., dissenting); *accord id.* at 479 (Alito, J., dissenting).

[339] *Id.* at 462, 470 (Scalia, J., dissenting); *id.* at 479 (Alito, J., dissenting).

[340] *Id.* at 449.

[341] *Id.* It's also worth noting that in *Reed*, decided not quite two months after *Williams-Yulee*, the Supreme Court—in Justice Thomas's majority opinion—seemed to take a much less forgiving approach to underinclusivity, striking down the town's content-based sign code for being underinclusive, without considering whether the town had permissibly targeted a pressing concern while leaving less problematic speech unregulated. Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

observed that there was no reason to think judicial candidates were "in the habit of soliciting personal loans, football tickets, or anything of the sort," and that the First Amendment didn't require governments to regulate nonexistent problems.[342]

The same logic would not hold if § 1507 were applied to prohibit protesters from peacefully demonstrating outside the homes of the Justices, because such action wouldn't be aimed squarely at the conduct that is undermining public confidence in the judiciary. As I've pointed out, attorneys and politicians can have much more influence on the Supreme Court through reasoned argument and criticism that can direct unwanted attention upon the Justices, or even by threatening their positions on the bench. And that doesn't even cover the Justices' own ethically questionable—or flat-out unethical—activities that have been reported in the last few years, which may involve protected speech or association but have contributed to the sharp drop in the public's confidence in the Court: seeming to align themselves with certain politicians, parties, and interest groups; failing to consistently denounce political attacks on courts and judges; and accepting gifts from, and associating with, people who donate to political causes or have interests in cases and issues that appear before the Court. The hypotheticals that Justice Scalia raised and Chief Justice Roberts waved away in *Williams-Yulee* are now real, and they do undermine confidence in the integrity of the Supreme Court: We have evidence that Justice Thomas has literally received, among many other high-value gifts, a personal loan—which he failed to disclose and used to buy a luxury RV, and which was largely forgiven[343]—and tickets to watch University of Nebraska football games from a luxury suite at the stadium.[344] Preventing the public from protesting outside his home, for fear that it might influence him, without clamping down on other ways he might be influenced, would be fatally underinclusive.

3. Cox v. Louisiana *Doesn't Make Protests Near Justices' Homes Illegal*

Scholars have cited the Supreme Court's decision in *Cox v. Louisiana*[345] as conclusively determining that 18 U.S.C. § 1507 makes protesting near Justices'

---

[342] *Williams-Yulee*, 575 U.S. at 451–52 (citing Burson v. Freeman, 504 U.S. 191, 207 (1992) (rejecting the argument that failure to regulate all speech made a statute fatally underinclusive when there was no evidence some speech left unregulated was causing problems: "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist")).

[343] Memorandum from Fin. Comm. Democratic Staff to Ron Wyden, *supra* note 75, at 2.

[344] Murphy & Mierjeski, *supra* note 75.

[345] The Supreme Court produced two opinions in *Cox*, both written by Justice Arthur Goldberg, based on the same facts and combining to overturn three convictions of a civil rights leader under Louisiana law. Cox v. Louisiana (*Cox I*), 379 U.S. 536, 552, 558 (1965); Cox v. Louisiana (*Cox II*), 379 U.S. 559, 560 (1965). The second opinion is the one relevant to the discussion of 18 U.S.C. § 1507. In the first opinion, the Court overturned convictions under Louisiana law for disturbing the peace and obstructing public passages, concluding that the convictions violated the leader's rights to free speech and assembly. *Cox I*, 379 U.S. at 552, 558.

homes illegal,[346] but the facts and the law in *Cox* are too different from the *Dobbs* protests and current free speech doctrine for *Cox* to control. *Cox* arose from a protest during which college students peacefully marched to a sidewalk across the street from a courthouse, where they peacefully sang, prayed, and held signs, and the leader of the demonstration gave a speech, all to protest the arrests the previous day of 23 students who had been picketing stores with segregated lunch counters.[347] Under a Louisiana statute that was modeled on, and essentially identical to, 18 U.S.C. § 1507, the petitioner in *Cox*, the protest leader, was convicted for picketing near a state courthouse.[348] The Supreme Court ultimately overturned the conviction on due process grounds,[349] but it rejected the protest leader's arguments under the free speech guarantees of the First Amendment that the Louisiana statute was facially invalid[350] and unconstitutional as applied to him.[351]

Although those conclusions—that a virtually identical Louisiana statute did not unconstitutionally infringe the free speech rights of protesters—may seem to settle whether the federal government could make it illegal under § 1507 to protest near Justices' homes, the reasoning in *Cox* doesn't transfer to the present day. First, in concluding that the Louisiana law was not facially unconstitutional, the Supreme Court held that protesting, or "picketing and parading," was not "free speech alone" or "a pure form of expression," but *conduct* the state could regulate to vindicate its important interests in protecting its judicial system from "the pressures which

---

[346] Sneed, *supra* note 102; Volokh, *supra* note 300; *see* Fasciale, *supra* note 300, at 1200–28. A year after *Dobbs*, however, Professor Volokh had moderated his views, noting that "residential picketing aimed at influencing decisions is indeed prohibited" under *Cox*, at least in theory, but explaining that § 1507's focus on influencing judges makes it reasonable to argue it's an unconstitutional content-based restriction on speech. Hurley, *supra* note 154 (reporting Professor Volokh's comment that "it would be reasonable to argue that the law is an unconstitutional content-based ban on speech because of its focus on influencing judges").

[347] *Cox I*, 379 U.S. at 538–44.

[348] *Cox II*, 379 U.S. at 560–61.

[349] *Id.* at 568–75.

[350] *Id.* at 560–64.

[351] *Id.* at 564–66. Justice Tom C. Clark, who dissented in *Cox* from the Court's decision to overturn the conviction on due process grounds, pointed out that because of the Justices' personal interest in 18 U.S.C. § 1507, it would be difficult or surprising for them to strike it—or the virtually identical Louisiana statute—down. *Cox II*, 379 U.S. at 585 (Clark, J., dissenting) ("I understand that § 1507 was written by members of this Court after disturbances similar to the one here occurred at buildings housing federal courts. Naturally, the Court could hardly be expected to hold its progeny invalid either on the ground that the use in the statute of the phrase 'in or near a building housing a court' was vague or that it violated free speech or assembly. It has been said that an author is always pleased with his own work."). This raises questions about whether the Justices of the Supreme Court could fairly hear cases in which the government used § 1507 to prosecute participants in protests near the Justices' homes.

picketing near a courthouse might create."[352] That conduct, the Court concluded, did not receive First Amendment protection simply because it was "intermingled" with free speech.[353] For support, the Court pointed to other examples of what it considered conduct mixed with speech that could also be prohibited: causing a panic in a theater by falsely shouting "fire,"[354] encouraging the commission of a crime,[355] or uttering "fighting words."[356] Finally, in holding that the Louisiana statute was also constitutional as applied to the protest leader, the Court rejected his argument that his conduct and the activities that occurred during the protest did not present a "clear and present danger" to the administration of justice.[357]

I don't contend that 18 U.S.C. § 1507 is facially invalid, but I do contend that it would be unconstitutional as applied to the *Dobbs* protests and any similar future protests near Justices' homes.[358] Much of what convinced the Supreme Court to uphold the Louisiana statute in *Cox* would appear misguided today if the federal government applied § 1507 to protests near the homes of Justices. For one thing, the Court—perhaps because it was considering a facial challenge and could envision constitutional applications of the statute against disruptive or threatening mobs[359]—treated protesting and picketing as conduct that could be regulated, even

---

[352] *Cox II*, 379 U.S. at 562–64.

[353] *Id.* at 564.

[354] *Id.* at 563 (citing Schenck v. United States, 249 U.S. 47, 52 (1919), *abrogated by*, Brandenburg v. Ohio, 395 U.S. 444 (1969)).

[355] *Id.* (citing Fox v. Washington, 236 U.S. 273, 275–78 (1915)).

[356] *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[357] *Id.* at 565–66; *see Schenck*, 249 U.S. at 51–52 (establishing that the First Amendment doesn't protect words "in such circumstances" and "of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent").

[358] Facial challenges to laws under the First Amendment are "hard to win," and succeed only when the challenger demonstrates that the law prohibits a "substantial amount" of protected speech when judged against the law's "plainly legitimate sweep." Moody v. NetChoice, LLC, 144 S. Ct. 2383, 2397 (2024) (quoting Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021)). I acknowledge that § 1507 can be applied constitutionally against protests that disrupt court proceedings—the sort of expressive conduct that led to § 1507's enactment, and that the Supreme Court believed the protesters in *Cox* had engaged in.

[359] All of the Justices voted to uphold the Louisiana statute that mirrored 18 U.S.C. § 1507 against both facial and as-applied challenges under the First Amendment, and all of them pointed to the threat mobs would pose to the administration of justice. *See Cox II*, 379 U.S. at 561–62 (noting that picketing of federal courthouses by leaders of Communist Party led to passage of 18 U.S.C. § 1507, and that judicial proceedings have no room "at any stage" for "influence or domination by either a hostile or friendly mob"); *id.* at 575 (Black, J., dissenting) (expressing "no doubt" that Louisiana had power to protect courts from "intimidation" by picketing and parading crowds near courthouses and homes); *id.* at 589 (Clark, J., dissenting) ("I have always been taught that this Nation was dedicated to freedom *under law* not under mobs, whether they be integrationists or white supremacists.").

as the Court recognized it was conduct combined with speech.[360] For another thing, the Court lumped peaceful protest near a courthouse in with speech that falls entirely outside the protection of the First Amendment, like "fighting words" and falsely shouting "fire" in a theater.[361]

All of that seems outdated now because it ignores protesting's expressive content. We recognize today that peaceful protests and picketing are "expressive activities" that involve speech and receive strong First Amendment protection.[362] Even though expressive conduct isn't pure speech, laws that restrict expressive conduct are still subject to strict scrutiny if the restrictions are content based—*Reed* and other cases make clear that prohibiting protests about issues and cases before the Supreme Court would constitute content-based restrictions of speech.[363] Moreover, even if § 1507 on its face prohibits protesters near the Justices' homes from trying to influence the Justices, it can't be that such speech and expressive conduct meant to influence the Justices is categorically unprotected speech.[364] After all, other speakers—attorneys, politicians—engage in it, and even the protesters can express the same message through other forms of speech and in other places. The contribution such expression makes to society's "exposition of ideas"[365] distinguishes it from historically unprotected categories of speech—such as fighting words—that offer little social value.[366]

---

[360] *See Cox II*, 379 U.S. at 574 (ruling that "there is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations").

[361] *See id.* at 563.

[362] United States v. Grace, 461 U.S. 171, 176–77 (1983).

[363] *See* Reed v. Town of Gilbert, 576 U.S. 155, 169 (2015); *see also, e.g.*, Boos v. Barry, 485 U.S. 312, 315, 318–29 (1988) (applying "exacting scrutiny," requiring a compelling interest and narrow tailoring, to strike down content-based law that prohibited display of signs critical of foreign governments near foreign governments' embassies because it wasn't narrowly tailored); Texas v. Johnson, 491 U.S. 397, 406–12, 418–20 (1989) (applying exacting scrutiny to a state law prohibiting desecration of American flag and affirming reversal of protester's conviction for burning a flag, which was "politically charged expression"); United States v. Eichman, 496 U.S. 310, 312 (1990) (applying *Johnson* to bar prosecution under federal flag protection statute); *Grace*, 461 U.S. at 177 (stating that government has "very limited" ability to restrict expressive conduct in public areas associated with "free exercise of expressive activities," such as streets and sidewalks, and in those areas "an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest"); Carey v. Brown, 447 U.S. 455, 459–63, 471 (1980) (striking down a law that generally prohibited residential picketing but permitted peaceful labor-related picketing of workplaces; laws discriminating among speech-related activities in public forum must be "finely tailored to serve substantial state interests," justifications for distinctions "must be carefully scrutinized," and the statute discriminating among pickets based on subject matter could not survive such scrutiny).

[364] *Cf.* United States v. Stevens, 559 U.S. 460, 470–71 (2010) (rejecting the view that government can punish or restrict speech it deems "valueless or unnecessary," or when it determines the balance of costs and benefits weighs in favor of restriction).

[365] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[366] *See Stevens*, 559 U.S. at 471 ("[Descriptions of historically unprotected categories of

Snyder v. Phelps, a much more recent decision than *Cox*, provides a relevant, modern understanding of protesters' rights.[367] In *Snyder*, the Supreme Court upheld the right under the First Amendment of members of the infamous Westboro Baptist Church to express their views—specifically, that God hates the United States for tolerating homosexuality—by peacefully picketing and holding a demonstration near the funeral site and funeral procession for a Marine who had died in Iraq.[368] The Court didn't just treat the protesters' picketing as speech, but as "speech on public issues" or "speech on matters of public concern," which sits atop "the hierarchy of First Amendment values, and is entitled to special protection."[369] Speech deals with a matter of public concern, the Supreme Court explained, when it relates to matters of political or social concern, or when it's a subject of general interest that's of concern to the public.[370] And although the members of the church may have hurt or upset the family members of the fallen Marine, the First Amendment allowed them to speak by "picketing peacefully on matters of public concern" from an archetypal public forum: "a public place adjacent to a public street."[371]

Picketing on the streets near the Justices' homes, about issues before the Supreme Court and cases decided by the Court, should be no different. Therefore, applying § 1507 to protests near the Justices' homes would trigger strict scrutiny, and as I've explained, wouldn't survive such scrutiny.

4. Neither Frisby v. Schultz *Nor the "Captive Audience" Doctrine Make Such Protests Illegal, Either*

Some experts have also cited *Frisby v. Schultz*[372]—incorrectly, in my view—for the idea that protests near the Justices' homes were illegal.[373] In *Frisby*, the Supreme Court upheld, against a First Amendment challenge, a town ordinance that completely banned picketing "before or about" any residence.[374] But *Frisby* doesn't

speech] do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor.").

[367] Snyder v. Phelps, 562 U.S. 443, 447 (2011).

[368] *Id.* at 448, 460–61.

[369] *Id.* at 451–55 (citations and internal quotations omitted).

[370] *Id.* at 453.

[371] *Id.* at 456.

[372] 487 U.S. 474 (1988).

[373] *See, e.g.*, Aaron Blake, *Yes, Experts Say Protests at SCOTUS Justices' Homes Appear to Be Illegal*, WASH. POST (May 11, 2022), https://www.washingtonpost.com/politics/2022/05/11/protest-justice-home-illegal/ [https://perma.cc/J2VA-QPPH]; Sara Swann, *Is It Legal to Protest Outside Justices' Homes? The Law Suggests No*, POLITIFACT (May 13, 2022), https://www.politifact.com/article/2022/may/13/it-legal-protest-outside-justices-homes-law-sugges/ [https://perma.cc/AFN9-F8FR].

[374] *Frisby*, 487 U.S. at 476.

conflict with any of my analysis above. It addressed distinct facts and applied a different legal framework, and therefore doesn't apply to the *Dobbs* protests and doesn't provide any support for applying 18 U.S.C. § 1507 to protests near Justices' homes.

First, unlike § 1507, the ordinance in *Frisby* was content neutral—a ban on residential picketing regardless of the content, subject matter, purpose or speaker—which meant the Court didn't apply strict scrutiny but only considered whether the ordinance was narrowly tailored to serve a "significant" government interest and left open "ample alternative channels of communication."[375] And second, *Frisby* didn't endorse content-neutral prohibitions on *all* picketing in residential areas within a town. The ordinance was a response to a series of peaceful protests opponents of abortion held outside the home of a doctor who performed abortions, and in considering whether it left open alternative channels of communication, the Court construed it to prohibit only "focused picketing taking place solely in front of a particular residence."[376] The Court noted that its narrow construction of the ordinance avoided "constitutional difficulties" that would have arisen if it were read—as lower courts read it—to ban all residential picketing in the town, including "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses."[377]

Neither *Frisby* nor any other authority supports a *content-based* ban on picketing or protests that disfavors or prohibits speech on particular topics or messages.[378] And rather than endorsing blanket restrictions on protests in residential areas, the Court in *Frisby* affirmed that: (1) "picketing on an issue of public concern" is "at the core of the First Amendment";[379] (2) even in residential areas, public streets are archetypal public fora, traditionally used for public assembly and debate;[380] and (3) content-based restrictions on speech and "'communicative activity'" such as picketing in such fora are subject to strict scrutiny, permissible only if the government shows "'that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'"[381]

Nor does the "captive audience" doctrine, which the Supreme Court invoked in *Frisby*, justify using § 1507 to prohibit protests near the Justices' homes. In

---

[375] *Id.* at 484.

[376] *Id.* at 476, 483.

[377] *Id.* at 482–83.

[378] *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 163, 169 (2015); Carey v. Brown, 447 U.S. 455, 462–63 (1980); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94–96 (1972) (holding that government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views," and "may not select which issues are worth discussing or debating in public facilities").

[379] *Frisby*, 487 U.S. at 479.

[380] *Id.* at 480.

[381] *Id.* at 481 (quoting Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983)).

upholding the ordinance in *Frisby*, the Court concluded that the ordinance served a "significant" government interest: "the protection of residential privacy."[382] That interest included an interest in protecting "the unwilling listener."[383] Although people typically bear the burden of avoiding speech they don't want to hear, the Court reasoned that "the home is different"; people aren't required to allow "unwanted speech" into their homes.[384] Therefore, the Court concluded, the First Amendment permits the government "to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[385]

It may seem, then, that the captive-audience doctrine provides sanction for a ban on *Dobbs*-style protests under § 1507. But once again, distinctions between *Frisby* and demonstrations near the homes of Supreme Court Justices suggest a different conclusion. Initially, whether the government could even assert that § 1507 advances its interest in protecting the Justices' residential privacy is questionable. That wasn't the interest Congress had in mind when it enacted the statute, and § 1507 itself declares no such purpose—unlike the ordinance in *Frisby*.[386]

More importantly, even if residential privacy were the relevant interest, *Carey v. Brown* tells us that interest wouldn't make § 1507's content-based restriction on speech tolerable.[387] The Supreme Court in *Carey* struck down an Illinois statute that barred all residential picketing except labor picketing, even though it assumed the state's asserted interest in protecting residential privacy was compelling or "of the highest order."[388] The content-based distinction among types of picketing was fatal;

---

[382] *Id.* at 484 (citing *Carey*, 447 U.S. at 471 (explaining that the state's interest in "protecting the well-being, tranquility, and privacy of the home" is "of the highest order in a free and civilized society")).

[383] *Id.*

[384] *Id.* at 484–85; *see* Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 731 (1969). The fact that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound," the Court reasoned in *Rowan*, "does not mean we must be captives everywhere." *Rowan*, 397 U.S. at 738 (rejecting a First Amendment challenge to a statute allowing recipients of mailed advertisements that recipients found offensive to have a Postmaster General order senders to remove recipients from mailing lists).

[385] *Frisby*, 487 U.S. at 487.

[386] *Cf. id.* at 477; *Carey*, 447 U.S. at 464 & n.8 (citing the legislature's finding that accompanied a picketing statute as reflecting the "importance which the State attaches to the interest in maintaining residential privacy").

[387] *See Carey*, 447 U.S. at 462.

[388] *Id.* at 457, 464–65, 470–71. Because the statute in *Carey* distinguished protests based on their content, the Supreme Court officially held that it violated the Equal Protection Clause of the Fourteenth Amendment, although the Court recognized that First Amendment issues were woven into its equal protection framework. *Id.* at 457, 460, 463, 470–71; *see also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 94–95 (1972) (applying an equal protection analysis to an ordinance that distinguished among different forms of picketing, but recognizing that the equal protection

the statute was not "finely tailored" to protect residential privacy because its restriction on picketing was overinclusive and underinclusive.[389] There was "nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy" than peaceful picketing on other issues.[390] Similarly, there's no reason to think peaceful protests at the Justices' homes about issues before the Supreme Court would disrupt residential privacy more than peaceful residential protests about anything § 1507 doesn't prohibit. *Carey* did recognize that the government can protect residential privacy, but emphasized that it must do so in a content-neutral way, "'by enacting reasonable time, place and manner regulations applicable to all speech *irrespective of content*.'"[391] It may not serve that interest with a content-based restriction on speech.[392]

At most, then, *Frisby* would permit the jurisdictions in which the Justices live—the District of Columbia, Maryland, Virginia, or individual cities and towns—to enact content-*neutral* bans on residential picketing directed at single residences.[393] It doesn't authorize total bans on residential picketing, or on protests that move through neighborhoods or pass repeatedly in front of individual homes,[394] as many of the *Dobbs* protests did.[395]

CONCLUSION

The Supreme Court has immense power. Like other actors at the highest levels of government, the Justices on the Court affect our lives with their decisions. Many of the American people now understand and feel that in a way they didn't before *Dobbs*. And since *Dobbs*, many ordinary Americans have realized that the Supreme Court and the Justices aren't infallible and irreproachable.

The reaction to *Dobbs* showed us that sometimes, when it's personal enough and matters enough, people want the Supreme Court to hear them. Members of the public have a right to gather in protest and attempt to make the Justices hear them; safety concerns and misplaced fears about improper influences shouldn't prevent that from happening. All of us, including the Justices, might benefit if they listen.

It doesn't appear to have been officially confirmed anywhere, but there's a story, falling somewhere between urban legend and fact, that Justice Scalia once

---

claim was "closely intertwined with First Amendment interests").

[389] *Carey*, 447 U.S. at 461, 464–65.

[390] *Id.* at 465.

[391] *Id.* at 470 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)).

[392] *Id.* at 471.

[393] Of course, those jurisdictions could also impose content-neutral regulations on the time, place, and manner of such protests. Frisby v. Schultz, 487 U.S. 474, 481 (1988); *Carey*, 447 U.S. at 470.

[394] *See Frisby*, 487 U.S. at 482–83.

[395] *See, e.g.*, Sanchez-Cruz, *supra* note 41.

went to the home of Justice Anthony Kennedy and yelled at Justice Kennedy for his vote in a case. The two of them did live near each other in Northern Virginia.[396] Professor Eric Segall, who heard the story from other people, has told it at least twice, although the details varied a bit between tellings. In one telling, Justice Scalia "accost[ed] Kennedy verbally outside of his house"[397] after the Supreme Court decided either *Casey* or *Lee v. Weisman*, both of which were decided in June 1992.[398] In another telling of the story—wherein Professor Segall cautioned, "we don't even know if it happened," but which he said he had heard "from many people"—Justice Scalia went to Justice Kennedy's house "and yelled at him—like, screamed at him through the window" after the decision in *Casey*.[399]

That is not model behavior, of course, if it did in fact occur, and I don't suggest that anyone emulate it by accosting Supreme Court Justices outside their homes or approaching their windows and shouting at the Justices through them. Nor am I suggesting that the law must allow people to intrude upon the Justices' property and do those things. But the First Amendment allows us to speak whether we're dispensing refined wisdom or only expressing anger or frustration.[400] The impulse to tell people they're wrong—an impulse often born of anger or frustration—is natural, and the impulse to *go* to those people and tell them they're wrong is understandable. How else, we might think, will they learn? And how else can we know they hear us?

---

[396] *See* Carter G. Phillips, *A Snow Story*, SUP. CT. HIST. SOC'Y (Feb. 12, 2021), https://supremecourthistory.org/scotus-scoops/snow-story-by-carter-g-phillips/ [https://perma.cc/N73G-9Q6Q] (recounting how Justices Scalia and Kennedy carpooled through a blizzard to reach oral argument); SUPREME MYTHS: *Author A.J. Jacobs*, at 16:40 (Apple Podcasts, May 3, 2024) (stating that Justices Scalia and Kennedy "were neighbors in Virginia").

[397] Transcript, *Panel 2: Justice Kennedy's Prose—Style and Substance*, 35 Ga. ST. U. L. REV. 907, 935 (2019).

[398] *See generally* Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992) (reaffirming *Roe*'s core holding and adopting "undue burden" standard for abortion regulations), *overruled by*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); Lee v. Weisman, 505 U.S. 577 (1992) (holding, in an opinion written by Justice Kennedy, that nonsectarian prayer offered by clergyman at public high school graduation violated the Establishment Clause).

[399] SUPREME MYTHS, *supra* note 396, at 16:40–17:35.

[400] *See* Cohen v. California, 403 U.S. 15, 26 (1971). As Justice John Marshall Harlan II wrote in *Cohen*:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id.