
JUSTICES ON YACHTS: A VALUE- OVER-REPLACEMENT THEORY

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The Justices have it made. On top of their government salaries, guaranteed until retirement or death, they are pampered with luxuries supplied by various wealthy benefactors—billionaire friends, big publishing houses, and well-funded nonprofits. These benefactors make (and forgive) large loans, book fancy resorts in exotic locations, and save seats on their yachts—glacial-iced cocktails included. The public is rankled. Something seems amiss, but it is hard to say exactly what. There is scant evidence of any quid pro quo. None of this luxury treatment has likely changed any Justice’s vote in any particular case. Thus, the problem here is not run-of-the-mill corruption.

In this Article, we explore an alternate theory. These donors are not trying to influence individual votes; they are trying to influence Justices’ decisions about whether to keep voting at all. The Justices’ government salaries are generous. But their private-sector earning potential is far higher, providing a strong incentive to retire relatively early and maximize lifetime consumption. Supplying a sitting Justice with a luxury lifestyle reduces the retirement incentive, “locking in” the Justice as a voter in more cases.

We explore this strategy for influencing the Court and model its expected results. We argue that, rationally, the strategy will be deployed differentially. All other things equal, Justices who are older and more ideologically extreme, compared with the expected replacement Justice, will

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receive more pampering. This will systematically alter both the mix of cases the Court hears and its substantive decisions to favor moneyed and politically hard-line interests.

INTRODUCTION

As a number of recent reports have detailed, many of the Justices on the Supreme Court have lives of luxury, partly—and sometimes largely—funded by others.¹ These “other” benefactors range from new billionaire friends to publishing houses to nonprofit entities.² Many have decried that the Roberts Court is tainted with corruption.³ And indeed, the public’s perception of the Supreme Court has never been lower.⁴

Others argue that these reports of corruption are overblown and politically motivated—unfairly targeting conservative members of the Court.⁵ Specifically, the argument goes, none of the pampering of Justices

1. See, e.g., Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/FM64-G43V>]; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/C3X3-R6LL>]; Devan Cole & Audrey Ash, *Alito in the Hot Seat over Trips to Alaska and Rome He Accepted from Groups and Individuals Who Lobby the Supreme Court*, CNN (June 22, 2023, 6:00 AM), <https://www.cnn.com/2023/06/22/politics/alito-barrett-supreme-court-ethics-travel/index.html> [<https://perma.cc/URG2-RH4S>]; Steve Eder, Abbie VanSickle & Elizabeth A. Harris, *How Supreme Court Justices Make Millions from Book Deals*, N.Y. TIMES (July 27, 2023), <https://www.nytimes.com/2023/07/27/us/politics/supreme-court-justices-book-deals.html> [<https://web.archive.org/web/20230806024958/https://www.nytimes.com/2023/07/27/us/politics/supreme-court-justices-book-deals.html>]; Brian Slodysko & Eric Tucker, *Supreme Court Justice Sotomayor’s Staff Prodded Colleges and Libraries to Buy Her Books*, AP NEWS (July 11, 2023, 2:14 AM), <https://apnews.com/article/supreme-court-sotomayor-book-sales-ethics-coll-eges-b2cb93493f927f995829762cb8338c02> [<https://perma.cc/QJ5J-RQYB>]; Walter Shapiro, *Sonia Sotomayor’s Book Scandal Is Banal and Troubling*, NEW REPUBLIC (July 19, 2023), <https://newrepublic.com/article/174418/sonia-sotomoyors-book-scandal-banal-troubling> [<https://perma.cc/C6JC-ZY63>].

2. See sources cited *supra* note 1.

3. See, e.g., Randall D. Eliason, *Why the Supreme Court Is Blind to Its Own Corruption*, N.Y. TIMES (May 18, 2023), <https://www.nytimes.com/2023/05/18/opinion/supreme-court-clarence-thomas-corruption.html> [<https://web.archive.org/web/20231001165303/https://www.nytimes.com/2023/05/18/opinion/supreme-court-clarence-thomas-corruption.html>]; Jennifer Rubin, *Sheldon Whitehouse Was Right All Along: The Supreme Court Is Corrupt*, WASH. POST (June 25, 2023, 7:45 AM), <https://www.washingtonpost.com/opinions/2023/06/25/whitehouse-alito-ethics> [<https://perma.cc/W6J9-2JK3>]; Moira Donegan, *The U.S. Supreme Court Has Hijacked American Democracy*, GUARDIAN (July 11, 2023), <https://www.theguardian.com/commentisfree/2023/jul/11/supreme-court-republican-justices-shame-power-thomas-alito-roberts> [<https://perma.cc/7GMP-A3Q9>]; Ciara Torres-Spelliscy, *Opinion: The Supreme Court Was Enabling Corruption Well Before the Clarence Thomas Scandal*, L.A. TIMES (May 30, 2023, 3:30 AM), <https://www.latimes.com/opinion/story/2023-05-30/supreme-court-clarence-thomas-john-roberts-corruption> [<https://perma.cc/Z2XJ-JRFD>].

4. 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/4JQD-SKHH>].

5. See, e.g., Mark Paoletta, *Justice Thomas Acted Properly and Was Not Required to Disclose His Trips*, NAT’L REV. (Apr. 27, 2023, 6:30 AM), <https://www.nationalreview.com/2023/04/justice->

Thomas or Alito can be credibly shown to have changed any of their votes on the Court.⁶ Consequently, there is no real reason to question the integrity of the Court or its decision-making.

The common responses have been twofold. First, some have tried to draw connections between the individuals fueling the Justices' lifestyles and parties before the Court.⁷ These connections are, however, somewhat tenuous. And, where they exist, there are good reasons to think that the relevant Justices would have voted the same way, even in their absence.⁸

Second, and perhaps more commonly, some have appealed to the tarnishing of the public legitimacy of the Court.⁹ That is, they have argued that even if the decision-making of the Court is unperturbed, the behavior is unseemly, and the public has lost confidence in the Court.¹⁰ But this response leaves something to be desired. Even if it is true that the public is losing confidence in the Court, if the Justices have done nothing wrong, then perhaps it is the public that deserves rebuke.

In this Article, we aim to supply another theory: a rational-actor explanation of how private actors lavishing luxuries on the Justices impacts

thomas-acted-properly-and-was-not-required-to-disclose-his-trips [https://perma.cc/F84E-VX3H] (“This latest effort by the Left is not about ethics, but about destroying the Supreme Court now that there is an originalist majority.”); Mark Paoletta (@MarkPaoletta), X (Oct. 30, 2023, 11:02 AM), https://x.com/MarkPaoletta/status/1719052122451284062?s=20 [https://perma.cc/FZV4-ZZ4Z] (arguing that the allegations against Justice Thomas are politically motivated); Tom Cotton (@TomCottonAR), X (Oct. 25, 2023, 1:48 PM), https://x.com/TomCottonAR/status/1717282033540493693?s=20 [https://perma.cc/R3BX-YGRH] (same).

6. Juan Williams, *I Consider Clarence Thomas a Friend, and I'm Shocked by Recent Reports*, HILL (Apr. 17, 2023, 9:30 AM), https://thehill.com/opinion/columnists/3954416-i-consider-clarence-thomas-a-friend-and-im-shocked-by-recent-reports [https://perma.cc/6WDX-CBGW] (articulating this view but ultimately disagreeing with it).

7. See, e.g., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, supra note 1; Zoe Tillman, *Clarence Thomas's Billionaire Friend Did Have Business Before the Supreme Court*, BLOOMBERG (Apr. 24, 2023, 11:02 AM), https://www.bloomberg.com/news/articles/2023-04-24/clarence-thomas-friend-harlan-crow-had-business-before-the-supreme-court [https://archive.is/oHfin]; Madison Hall, *2 Supreme Court Justices Failed to Recuse Themselves from Cases Involving Their Publisher After Receiving Large Amounts in Book Advances and Royalties*, BUS. INSIDER (May 10, 2023, 2:11 PM), https://www.businessinsider.com/justices-didnt-recuse-themselves-from-cases-with-their-book-publisher-2023-5 [https://archive.is/yRH4] (discussing payments from publishers made to Justice Gorsuch and Justice Sotomayor).

8. See, e.g., *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, supra note 1 (reporting Justice Alito joining a 7-1 majority decision). Importantly, we do not mean to take a strong position as to whether the Justices would have voted differently but for the treatment. Rather, we simply observe that the evidence is weak for that claim. Our observation here is that even in the absence of such evidence, we can explain both the pampering and what is wrong with it.

9. See, e.g., Lin & Doherty, supra note 4; *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx [https://perma.cc/B9UT-ZGJH] (showing a decade-low point in favorability of 41%).

10. See Lin & Doherty, supra note 4; GALLUP, supra note 9.

the Court's decisions, and thus, why it is wrongful. Our key observation is that such pampering functions not by influencing how any Justice is inclined to vote, but rather by influencing *whether the Justice will stick around to vote at all*. Justices, especially iconoclastic ones, have strong pecuniary incentives to retire early. As their stars rise, their potential private-sector earning power—at law firms, on the speaking circuit, as lobbyists, and more—skyrockets. Each marginal year on the bench, then, represents a significant opportunity cost: one more year in power means one less year reaping the rewards of enormous wealth.

Corporations and billionaires can reduce the opportunity cost of staying on the bench by supplying Justices with the luxurious lifestyles they would enjoy if they were to step down. But why would they? To avoid replacement. Even if Justice Thomas has never changed a vote because of a gift, it is highly likely that those votes would have been different if cast by someone else. Thus, whenever one prefers some Justice's average expected votes to the expected votes of their replacement, one should compensate the Justice for declining to retire.

This simple model generates a number of surprising empirical predictions and substantive consequences. First, the predictions. Rational actors should not pamper all Justices the same. Rather, they should be willing to fund a Justice up to the Justice's expected "value over replacement," given the funders' own priorities.¹¹ As we argue, this fact will tend to result in more luxury treatment as Justices' ideologies become more extreme. Rational actors will also need to fund Justices more as retirement looks more attractive. This will tend to result in more luxury treatment for older Justices, whose private sector earning potential will be higher and for whom the demands of the Court may be more onerous.

The substantive consequences of this model for the Court's decisions are significant. First, if it is the ideologically extreme Justices whose terms are artificially extended, the Court's decisions will likewise become, on average, more extreme. This effect will be especially pronounced on the Court's grants of certiorari, in which a lower requisite vote threshold means a wider range of potential outcome-critical voters. But these ideology-amplifying effects will not be uniform. Yachts are expensive. Not everyone has one. Thus, it will be the Justices whose most radical views disproportionately favor moneyed interests—large corporations, unions, or the wealthy—who are differentially retained. Other interests—for example,

11. See Keith Woolner, *VORP: Measuring the Value of a Baseball Player's Performance* (2002), <https://web.archive.org/web/20080926233543/http://www.stathead.com/articles/woolner/vorp.htm>; Nate Silver, *Value Over Replacement Justice*, FIVETHIRTYEIGHT (May 11, 2010, 8:05 PM), <https://fivethirtyeight.com/features/value-over-replacement-justice> [<https://perma.cc/8S3T-6LRF>].

criminal defendants and the poor—will remain unable to pay to retain friendly votes.

I. THE PUZZLE OF PAMPERING JUSTICES

We begin with the facts. As has been recently reported, many Justices across the ideological spectrum have benefited from the largesse of wealthy benefactors. There appear to be three basic patterns.

First, some Justices have themselves allegedly been treated to expensive vacations and other perks by private individuals and nongovernment entities.¹² For example, Justice Clarence Thomas and his wife flew by private jet to Indonesia and spent “nine days of island-hopping in a volcanic archipelago on a superyacht staffed by a coterie of attendants and a private chef.”¹³ If he had paid for it himself, the trip would have cost in the range of \$500,000.¹⁴ As another example, Justice Samuel Alito went on a luxury fishing trip, in which he flew by private jet and stayed in a \$1,000-per-day resort.¹⁵ The total cost of the trip would have exceeded \$100,000 had he paid himself.¹⁶

Second, some Justices have received generous book deals from publishing houses.¹⁷ Specifically, Justices Clarence Thomas, Sonia Sotomayor, Neil Gorsuch, Amy Coney Barrett, and Ketanji Brown Jackson have all received book deals that have paid them, at a minimum, hundreds of

12. *Clarence Thomas and the Billionaire*, *supra* note 1 (detailing a number of luxurious vacations Justice Thomas was treated to by billionaire-friend Harlan Crow); Cady Inabinett, *Supreme Court Disclosures Reveal More Luxury Travel from Private Interests*, OPENSECRETS (July 5, 2023, 2:50 PM), <https://www.opensecrets.org/news/2023/07/supreme-court-disclosures-reveal-more-luxury-travel-from-private-interests> [<https://perma.cc/5M3L-GNYZ>].

13. *Clarence Thomas and the Billionaire*, *supra* note 1.

14. *Clarence Thomas and the Billionaire*, *supra* note 1. As for other perks, Justice Thomas was allegedly the beneficiary of some financially advantageous deals. Harlan Crow purchased Justice Thomas’s childhood home, which Justice Thomas’s mother allegedly continues to live in. 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, 2:20 PM), <https://www.propublica.org/article/clarence-thomas-harlan-crow-real-estate-scotus> [<https://perma.cc/RYW6-9K3J>]. Anthony Welters, a healthcare entrepreneur, gave Justice Thomas a loan for a luxury motorcoach and allegedly forgave that loan after some period. Steven Lubet, *Why This Gift to Clarence Thomas Is the Worst*, WASH. MONTHLY (Nov. 2, 2023), <https://washingtonmonthly.com/2023/11/02/why-this-gift-to-clarence-thomas-is-the-worst> [<https://perma.cc/NGA8-FMXY>].

15. *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, *supra* note 1.

16. *Id.*

17. Eder et al., *supra* note 1; Devan Cole, *Justice Ketanji Brown Jackson Set to Publish “Lovely One” Memoir*, CNN (Jan. 5, 2023, 2:09 PM), <https://www.cnn.com/2023/01/05/politics/ketanji-brown-jackson-memoir-lovely-one/index.html> [<https://perma.cc/4QLA-89MZ>]; Jim Milliot, *The Sales Numbers on Books by Supreme Court Justices*, PUBLISHERS WKLY. (Aug. 4, 2023), <https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/92922-the-sales-numbers-on-books-by-supreme-court-justices.html> [<https://perma.cc/55K6-7BGZ>].

thousands of dollars.¹⁸ Justices Barrett’s, Sotomayor’s, and Jackson’s deals were worth millions.¹⁹

Third, at least one Justice has relatives who were allegedly given generous gifts from private individuals. Justice Thomas’s wife, Ginni Thomas, has received hundreds of thousands of dollars from political advocacy groups,²⁰ and his grandnephew’s private school tuition was paid for by billionaire-friend Harlan Crow.²¹

Many of the reports have treated these allegations as *per se* corruption. But government officials receiving gifts from friends, being treated to vacations, or receiving book deals is not obviously illegal. Consider as an exemplar the federal honest services fraud statute, 18 U.S.C. § 1346.²² The statutory language is slim, but a consensus of courts has interpreted it to mean that such fraud is committed either by a government official engaging in a quid pro quo or by a government official depriving the public of their services with some intent to benefit themselves.²³

Consequently, some commentators have attempted to draw such connections between Justices, their benefactors, and parties before the Court. For example, one ProPublica report noted that Justice Alito had his fishing trip paid for by Paul Singer, a billionaire whose hedge fund brought its dispute with the nation of Argentina to the Court in 2014.²⁴ Another report from Bloomberg News pointed out that Harlan Crow—Justice Thomas’s benefactor—had a noncontrolling interest in a company with a copyright case that came before the Court. The case was dismissed on a petition for certiorari.²⁵

By our assessment, such accounts fall short of showing that any Justices changed their votes for their benefactors’ sake.²⁶ For example, in the Singer-

18. See Eder et al., *supra* note 1; Cole, *supra* note 17; Milliot, *supra* note 17.

19. See Eder et al., *supra* note 1; Cole, *supra* note 17; Milliot, *supra* note 17.

20. Jane Mayer, *How Troubling Are the Payments and Gifts to Ginni and Clarence Thomas?*, NEW YORKER (May 9, 2023), <https://www.newyorker.com/news/daily-comment/how-troubling-are-the-payments-and-gifts-to-ginni-and-clarence-thomas> [https://perma.cc/8QYR-YC7T].

21. Joshua Kaplan, Justin Elliott & Alex Mierjeski, *Clarence Thomas Had a Child in Private School. Harlan Crow Paid the Tuition.*, PROPUBLICA (May 4, 2023, 6:00 AM), <https://www.propublica.org/article/clarence-thomas-harlan-crow-private-school-tuition-scotus> [https://perma.cc/8UYM-6FJ3].

22. 18 U.S.C. § 1341 prohibits “scheme[s] or artifice[s] to defraud,” and 18 U.S.C. § 1346 states that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. §§ 1341, 1346. Another such exemplar is 18 U.S.C. § 201, which prohibits “bribery” of public officials in the “performance of any official act.” *Id.* § 201(b)(2)(A).

23. See, e.g., *United States v. Avenatti*, 81 F.4th 171, 194 (2d Cir. 2023).

24. *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, *supra* note 1.

25. Tillman, *supra* note 7.

26. After extensive review of Harlan Crow’s business before the Court, Bloomberg only points to a single certiorari petition that was denied. With respect to Paul Singer’s business before the Court,

Argentina case, Justice Alito joined seven other Justices, including all of the conservatives, in affirming the lower court.²⁷ Only Justice Ginsburg dissented. Hardly shocking behavior.

Of course, wealthy individuals will have interests, direct and indirect, in cases before the Court. Thus, Justices who mingle with such wealthy individuals will be exposed to people and entities with business before the Court. But this is probably unavoidable. Consider the clerks. After their term at the Court, Supreme Court clerks are often recruited by elite law firms precisely because they have a specialized expertise—an intimate knowledge of the Court and the Justices. Currently, former clerks are barred from appearing before the Supreme Court for three years. But thereafter, they may appear. And given that many of them maintain strong relationships with the Justice for whom they clerked, Justices are again personally connected to parties before the Court. But all of this is largely the product of the fact that the Justices are people, and people know other people. None of it is explicit corruption.

We note that some reporting has argued that certain Justices improperly failed to *report* some of the gifts they received.²⁸ If true, that would be a distinct legal transgression from the one we are interested in. Our main question is whether, had the Justices assiduously reported their pampering, that pampering would have been wrong.

The other leading theory of wrongfulness has to do with public perception. Some argue that, irrespective of whether luxury treatment changes the Justices' votes or opinions, it harms the Court's public legitimacy. There is some evidence that the Supreme Court's reputation has taken a hit. Public perception of the institution is at an all-time low.²⁹

But the value of public legitimacy depends somewhat on the quality of the public's judgment. Few think, for example, that the Court should disfavor unpopular parties who appear before it for the sake of building popularity. So too might the public object if they realized that the Court's clerks draft many of the Justices' opinions. But this division of labor is not inherently unethical, and public opinion polls should not be the main factor in deciding whether to retain it. The same is true for practices like former clerks

ProPublica points to a handful of cases in which he was involved, but Justice Alito credibly claims he was not aware of Singer's connection to the cases and in any event did not know Singer well. *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, *supra* note 1; *Clarence Thomas and the Billionaire*, *supra* note 1.

27. *Republic of Argentina v. NML Capital*, 573 U.S. 134, 135, 146 (2014).

28. *See Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, *supra* note 1; *Clarence Thomas and the Billionaire*, *supra* note 1.

29. *See Lin & Doherty*, *supra* note 4; GALLUP, *supra* note 9.

reimbursing their Justices for the costs of having the Justices' official portraits painted.³⁰ To put the point bluntly, the public is sometimes wrong. The Justices should worry about legitimacy the most when something wrongful is actually going on. When it is not, they will often be justified in sticking to their guns, retaining their norms, and waiting for public opinion to eventually fall in line.

Thus, the question remains unanswered: What, if anything, is wrong with Justices on private yachts?

II. THE MODEL: VALUE OVER REPLACEMENT JUSTICE

In our view, what is wrong with putting a Justice on your private yacht is that it obviates the need for the Justice to go out and buy their own.

In this Part we attempt to explain, using a simple rational-actor model, why moneyed interests pamper Justices. In short, those interests shower luxuries on Justices who, from the interests' point of view, have a high expected "value over replacement."³¹ This positive explanation of what is going on tees up a normative evaluation of the practice, which we present in Part III.

Our model begins with the assumption that an individual Justice's votes on various important issues are at least somewhat predictable by those who care about those issues. The model then adopts the observation that "Supreme Court Justice" is not the only job available to current Supreme Court Justices. Indeed, it is in some ways among the least attractive options. There are a wide range of extraordinarily remunerative career choices for Justices who leave the bench, from being named partner at a major law firm to giving speeches at six figures a pop.³² At some point, the opportunity cost of staying on the bench may become too high. For comparatively prominent

30. *Portraits of Judges of the D.C. Circuit Courts*, HIST. SOC'Y OF THE D.C. CIR., <https://dcchs.org/about-the-portraits> [<https://perma.cc/GJ9D-UJCN>].

31. See sources cited *supra* note 11. To be clear, we recognize that, in reality, benefactors pamper Justices for a mix of motivations including the aesthetic benefit of proximity to power, the prestige in such proximity, and the hope for substantively favored legal outcomes.

32. Andy Kroll, Andrea Bernstein & Ilya Marritz, *We Don't Talk About Leonard: The Man Behind the Right's Supreme Court Supermajority*, PROPUBLICA (Oct. 11, 2023, 5:00 AM), <https://www.propublica.org/article/we-dont-talk-about-leonard-leo-supreme-court-supermajority> [<https://perma.cc/U4PB-SVVW>] ("There was always a concern that [Justice Antonin] Scalia or [Justice Clarence] Thomas would say, 'Fuck it,' and quit the job and go make way more money at Jones Day or somewhere else," [George] Conway said, referring to the powerful conservative law firm."); *In Demand: Washington's Highest (and Lowest) Speaking Fees*, ABC NEWS (July 14, 2014, 11:30 AM), <https://abcnews.go.com/Politics/washingtons-highest-lowest-speaking-fees/story?id=24551590> [<https://perma.cc/WAZ4-BDC2>] (listing the speaking fees of various former high-level officials); see also Isabella B. Cho, *Former Supreme Court Justice Stephen Breyer Will Return to Harvard Law School's Faculty This Fall*, HARV. CRIMSON (July 16, 2022), <https://www.thecrimson.com/article/2022/7/16/breyer-return-hls> [<https://perma.cc/UA3H-XVS2>].

or senior Justices at the height of their private-sector earning potential, the siren song of wealth may lure them to step down. Doubly so for Justices who have served enough years that the government will continue to pay their full salaries for life, even upon retirement.³³

Anticipating such retirements, special interests might wish to intervene. If Justices' retirement incentives arise from strong outside options and thus high opportunity costs, such interests can prevent retirement by reducing those opportunity costs. That is, wealthy parties can offer the Justices the lifestyle that money enables directly—no retirement needed.

This strategy will in fact change the Court's substantive decisions. It will not do so by changing any Justice's vote, but rather by changing which Justices are around to vote in the first place.

Exactly when and how will rational special interest groups deploy such a strategy? And to what effects on the Court's decisions? Our model generates several real-world predictions. Each could profitably be tested empirically to see whether our model of pampering accurately describes what is going on at the Court.

First, consider a factor that, perhaps surprisingly, probably does not affect pampering very much: the political party of the sitting President. While Joseph Biden is President and the Democratic Party has a majority in the Senate, it will be critical for conservatives to ensure that the Republican-appointed Justices remain on the Court. If Justice Clarence Thomas, Chief Justice John Roberts, Justice Samuel Alito, Justice Neil Gorsuch, Justice Brett Kavanaugh, or Justice Amy Coney Barrett was to leave the Court, they would likely be replaced by someone much less conservative (and indeed, someone quite liberal).

This dynamic, however, will probably not generate a short-run increase in the pampering of conservative Justices. The conservative Justices, too, would prefer not to leave the Court while Biden remains President. Among other things, doing so could cause them to be labeled a traitor by the very organizations—law firms, businesses, and NGOs—most likely to otherwise offer them large private-sector salaries.³⁴ At any rate, it is usually no tremendous burden for a Justice to wait for a year or two before departing. Control of the Presidency changes hands regularly.

33. 28 U.S.C. § 371 (setting forth the rules for years of service for Justices receiving a pension).

34. Certainly, not all of a Justice's options are sensitive to ideological disappointment. But we think options that trade on the Justice's standing—like working the speaking circuit, being a rainmaker at a firm, or serving as a symbol of prestige at any institution—will be so responsive. Thus, though departing during the opposite-party Presidency may not completely eliminate the value of their outside options, it may reduce it significantly.

There will be some exceptions. Observe that reliably appointing a Justice requires the assent of the President *and* the Senate.³⁵ Thus, there may sometimes be long periods between when the average Democrat- or Republican-appointed Justice can retire and be replaced with a similarly average Democrat or Republican. In the midst of such a period, with no end in sight, we would predict additional pampering of older, out-party Justices who are long past their preferred, wealth-maximizing retirement date.

Usually, though, it is the idiosyncrasies of an individual Justice, not the cycles of electoral politics, which will determine the level of pampering. Here is why: We have just argued that most Justices will, if they can, wait to be replaced by a President of their own party. Thus, the relevant question is not whether one prefers the sitting Justice to a random replacement or a replacement by the opposing party. It is whether one prefers the sitting Justice to the expected replacement chosen by the Justice's *own* party.

What results from this more refined model of appointment strategy? Our next concrete prediction: Justices with more extreme legal and political views will receive more pampering.

To understand why, begin with the assumption that the average new Republican-appointed Justice will vote, in expectation, like the average of recent Republican-appointed Justices. Assume the same for Democrats. More precise predictions than these may not be possible. Consider that President Donald Trump's three appointees, despite being hand-picked by Leonard Leo and uniformly conservative, disagree about a great deal.³⁶ And there is always the possibility of "getting Soutered"—appointing a Justice who ends up voting with the other party's appointees.³⁷ Thus, the safe bet for parties mulling the consequences of judicial turnover is to assume that replacements are, on average, average.

35. U.S. CONST. art. II, § 2, cl. 2 (setting forth the requirement of advice and consent by the Senate for confirming federal judges).

36. See, e.g., Tucker Higgins, *Trump's Two Supreme Court Justices Kavanaugh and Gorsuch Split in First Term Together*, CNBC (June 29, 2019, 10:00 AM), <https://www.cnbc.com/2019/06/28/trumps-two-supreme-court-justices-kavanaugh-and-gorsuch-diverge.html> [https://perma.cc/C5PL-8878]; Jonathan H. Adler, *Barrett v. Gorsuch*, VOLOKH CONSPIRACY (June 14, 2022, 7:42 AM), <https://reason.com/volokh/2022/06/14/barrett-v-gorsuch> [https://perma.cc/T82W-ZR2K].

37. Elizabeth Dias & Jeremy W. Peters, *For Conservatives, Court Fight Is on Their Turf and in Their D.N.A.*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/conservatives-supreme-court-fight.html> [https://perma.cc/6GTX-54CU]. This phenomenon extends beyond Justice Souter himself. It applies in varying degrees to the jurisprudence of, for example, Justices Stevens and Kennedy as well. Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html> [https://perma.cc/2PBH-XCF2]; Ben Jacobs, *Who Is Anthony Kennedy? Supreme Court Wildcard Was Critical "Swing Vote."* GUARDIAN (June 28, 2018, 9:19 AM), <https://www.theguardian.com/law/2018/jun/27/who-is-anthony-kennedy-supreme-court-justice-retires-profile> [https://perma.cc/27MQ-VPUY].

Many people and interest groups will roughly share the legal ideology and policy preferences of at least one party's average expected replacement Justice. Such actors need not engage in strategic activity around judicial succession. They can simply sit back and let the process work. Indeed, such parties should, all things equal, prefer high levels of judicial turnover when their preferred parties are in power. Delaying the departure of aging Justices risks what happened with Justice Ginsburg. By the time Barack Obama became President, Justice Ginsburg had survived several serious health scares.³⁸ But she reportedly was unmoved by President Obama's suggestion that she retire.³⁹ The result was that she was replaced, not with an average Democratic appointee, but with a Republican one. Regularly replacing aging Justices with younger, healthier appointees from the same political party reduces this risk substantially.⁴⁰ If any strategic behavior is appropriate here, it is a kind of "anti-pampering": offering sitting Justices *even more* lucrative nonjudicial options to induce retirement.

The incentives are different for parties with more extreme legal ideologies or policy preferences. When a Justice is appointed who happens to share those extreme views, the dominant strategy may well be to induce that Justice to hold on as long as possible. This is because the appointment of such a Justice could represent a once-in-a-generation opportunity to achieve legal victories. Consequently, replacement of the Justice, even by the Justice's preferred political party, could be highly undesirable. In such cases, inducing the Justice to stay on the Court as long as possible could be the optimal strategy, irrespective of the increased risk of a Justice Ginsburg scenario.⁴¹

Consider this illustration. A billionaire activist is extremely invested in animal wellbeing to the exclusion of all other policy issues. He thinks that the law should recognize a wide and radical set of animal rights, including the right not to be killed for food. Perhaps his policy preferences are rooted

38. Susan Dominus & Charlie Savage, *The Quiet 2013 Lunch That Could Have Altered Supreme Court History*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/25/us/politics/rbg-retirement-obama.html> [<https://perma.cc/DC8N-VND4>].

39. Emily Bazelon, *Why Ruth Bader Ginsburg Refused to Step Down*, N.Y. TIMES MAG. (Sept. 30, 2020), <https://www.nytimes.com/2020/09/21/magazine/ginsburg-successor-obama.html> [<https://perma.cc/CWW4-734C>].

40. Of course, replacement is not without risk—for example, by "getting Soutered." But the exception, in some sense, has reformed the informal rules of nomination, with more efforts to ensure the ideological commitment of nominees. *No More Souters*, WALL. ST. J. (July 19, 2005, 12:01 AM), <https://www.wsj.com/articles/SB112173866457289093> [<https://perma.cc/7J8Q-LD6Y>].

41. This strategy does involve balancing some delicate risks and preferences. As Justices age, they may die and thus be replaced by a Justice of the opposite party. Benefactors must assess that risk, weighing their preference for a particular Justice's jurisprudence over the likely jurisprudence of her replacement, who could be appointed by the other party.

in a similarly radical legal theory: that animals are “persons” for purposes of the Fourteenth Amendment.⁴² The billionaire’s legal and policy views are quite extreme, compared with the views of the average expected judicial appointee from either political party.⁴³ But suppose that a new Supreme Court Justice is appointed who, unbeknownst to the appointing political coalition, shares the billionaire’s radical views.

Here, the billionaire’s optimal strategy is to try to induce the animal-rights Justice to remain on the Court as long as possible. In any case implicating animal welfare, the Justice is likely to provide a vote for the animals. This will not always lead to a win for the animals. But it will in cases in which other legal and ideological cleavages make the animal-rights Justice the median vote.⁴⁴

Crucially, the animal-rights Justice will not merely be a likely vote in favor of animal interests. Rather, the Justice will be *much more likely than the expected replacement Justice* to be so. Animal welfare is, if anything, a slightly left-coded issue.⁴⁵ But full legal personhood for animals remains a minority view in all political factions—to say nothing of likely nominees to the Court.⁴⁶ Indeed, if neither Democratic nor Republican appointees to the Court are likely to care much about animal wellbeing, the billionaire will not have much preference between the two. This substantially lowers the cost of a Ginsburg scenario from the billionaire’s point of view. Thus, the riskiness of attempting to delay the animal-rights Justice’s retirement is minimized.

Judicial pampering is therefore likely to be more pronounced for Justices whose views are as follows: very right-wing (even by the standards of likely Republican appointees); very left-wing (even by the standards of likely Democratic appointees); or so unusual as to be completely off the political map.

Our model also gives rise to another concrete prediction: older Justices will get more pampering than younger ones. Two of the model’s internal dynamics drive this outcome. First, there is the value of a given Justice’s

42. U.S. CONST. amend. XIV.

43. For an exemplar case involving animal rights before the Court, see *Nat’l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1142–43 (2023).

44. *Cf. id.* (holding, in a 5-4 decision, that a California state law imposing higher safety regulations for livestock did not violate the Dormant Commerce Clause).

45. Julia Jeanty & Grace Adcox, *Voters Demand Farm Animal Protections from Both Politicians and Companies*, DATA FOR PROGRESS (Aug. 3, 2022), <https://www.dataforprogress.org/blog/2022/8/2/voters-demand-farm-animal-protections-from-both-politicians-and-companies> [<https://perma.cc/K8SQ-JH4W>].

46. Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/G2LU-47ZT>].

outside option, which determines the opportunity cost of staying on the bench. The more lucrative the private-sector salary, the less attractive remaining on the bench seems, even given factors like the power and prestige of the judicial role.

Justices' outside options are not maximally valuable the moment the Justice takes the bench. No one wants to pay huge speaker fees to hear a former Justice talk about what she learned, saw, or did during her two-week tenure on the Court, nor does anyone want to pay a Big Law partner's salary for a former Justice's signature on a brief if he quit before penning his first majority opinion.⁴⁷ Perhaps that is overstatement; *someone* might pay a very short-tenured Justice. The point, however, is that fewer will pay, and the top bid will be lower. The value of the Justices' outside options are determined in large degree by the fame and prestige they cultivate while on the Court. And cultivation takes time. If that is right, then Justices' opportunity costs of staying on the bench will grow over time, as will the pampering required to get them to stay.

Focusing exclusively on this outside-option value for Justices then, we would predict that judicial pampering follows a curve over time. It initially grows with Justices' prestige and fame. But then it levels off and falls as elderly Justices become less fit for demanding lives on the speaker circuit or in large law firms.

But there is an added complexity. Even when there is less demand for elderly Justices, such that there is a drop-off in their outside-option value, Justices still have the option of retiring completely. That is, a ninety-year-old Justice⁴⁸ would likely find law firm life too demanding, but would also likely find life as a Supreme Court Justice burdensome. Thus, we would anticipate that there is some price to keep a Justice from choosing to retire from all work. Consequently, for a Justice with a high value over replacement, pampering may either fail to fall off or even increase monotonically over time. It may simply be quite expensive to induce a seventy-five-year-old—who would rather be vacationing—to keep hearing cases.⁴⁹

There is at least anecdotal evidence of both of our model's predictions holding in the real world. Recent reporting has revealed that, among sitting

47. Some Justices might be sufficiently excellent lawyers that they could command a Big Law partner salary. But, we observe, the fact that they were on the Supreme Court for a brief tenure will not add much to their exit-option value.

48. For example, Justice Oliver Wendell Holmes, Jr., retired at the age of ninety. *Oliver Wendell Holmes, Jr., 1902-1932*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/associate-justices/oliver-wendell-holmes-jr-1902-1932> [<https://perma.cc/63ED-ZDQL>].

49. See, e.g., Lubet, *supra* note 14.

Justices, Justice Thomas has perhaps received the most extensive judicial pampering.⁵⁰ Among the perks he has received from wealthy friends and acquaintances are numerous luxury vacations, trips on private jets, renovations to his mother's home, private school tuition payments for his grandnephew and legal ward, and a mostly forgiven \$267,000 loan for an RV.⁵¹

Justice Thomas is notably the oldest sitting Justice. He has also been a philosophical and political outlier on the Court for most of his career. Justice Thomas is perhaps an even more committed originalist than was Justice Scalia.⁵² At a minimum, Justice Thomas is more willing to ignore stare decisis and overturn vast bodies of settled law.⁵³ He famously writes separately to say so.⁵⁴ And in those writings, he makes his very conservative political ideology clear: for example, calling abortion “a tool of eugenic manipulation,”⁵⁵ and college affirmative action “naked racism.”⁵⁶

The other two Justices who, reporting suggests, have in recent years received substantial pampering are Justices Alito and Sotomayor.⁵⁷ They are notably the next two oldest Justices after Justice Thomas. They are also, respectively, probably the next most conservative and most liberal Justices—excluding the young Justices appointed by Presidents Trump and Biden.

Moreover, the prominent “Never Trump” conservative commentator George Conway recently described judicial pampering in exactly our terms.⁵⁸ He explained that conservative activist Leonard Leo acted as a “den

50. See *supra* notes 7, 12, 14 & 20 and accompanying text.

51. See *supra* notes 7, 12, 14 & 20 and accompanying text.

52. See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 35 (2009) (stating that Justice Thomas subscribes to a stronger brand of originalism than Justice Scalia).

53. See, e.g., Matt Ford, *Clarence Thomas Is Throwing the Supreme Court's History Out the Window*, NEW REPUBLIC (May 19, 2022), <https://newrepublic.com/article/166534/clarence-thomas-roe-stare-decisis> [<https://perma.cc/C8BX-9TUL>] (“‘We use stare decisis as a mantra when we don't want to think,’ Thomas declared at an event earlier this month. And at the Dallas legal conference last week, he was even more blunt. ‘I always say that when someone uses stare decisis, that means they're out of arguments,’ Thomas remarked. ‘Now they're just waving the white flag. And I just keep going.’ His implication is that stare decisis isn't actually an important principle in the American legal system—it's just a crutch for idiots and losers.”).

54. Richard Wolf, *After 25 Years, Clarence Thomas Still Dissents*, USA TODAY (Oct. 21, 2016, 6:05 AM), <https://www.usatoday.com/story/news/politics/2016/10/21/supreme-court-clarence-thomas-25-years-scalia/92063306> [<https://perma.cc/9M5L-UBD8>].

55. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1784 (2019) (Thomas, J., concurring).

56. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2202 (2023) (Thomas, J., concurring).

57. Alison Durkee, *Here Are All the Supreme Court Controversies That Led to Adopting an Ethics Code*, FORBES (Nov. 14, 2023, 9:28 AM), <https://www.forbes.com/sites/alisondurkee/2023/11/14/here-are-all-the-supreme-court-controversies-that-led-to-adopting-an-ethics-code> [<https://perma.cc/86V5-DN1G>].

58. See Tom Nichols, *Never Trump Means Never*, ATLANTIC (Nov. 29, 2022), <https://www>

mother” to the Justices:

Leo saw it as his responsibility, Conway said, to help take care of the judges even after they had made it to the highest court in the country. “There was always a concern that Scalia or Thomas would say, ‘Fuck it,’ and quit the job and go make way more money at Jones Day or somewhere else,” Conway said, referring to the powerful conservative law firm. “Part of what Leonard does is he tries to keep them happy so they stay on the job.”⁵⁹

III. WHY IT MATTERS

What is wrong with judicial pampering if our value-over-replacement theory is correct? Again, our theory assumes that no one has acted illegally, changing their vote quid pro quo. They need not even act unethically, where ethics is defined in terms of something like the Supreme Court’s brand-new code of conduct.⁶⁰ All that is happening is that the Justices’ rich friends and benefactors are making the Justices’ lives nicer, with no request for anything in return.

One potential problem is that this nevertheless changes the Court’s decisions. If pampering is selectively deployed to delay the retirement of more extreme Justices, then it produces more extreme votes and more extreme outcomes. This on its own could be troubling for political moderates. It could even be troubling for political radicals who reject judicial fiat as a legitimate mode of social change.⁶¹

It is worth pointing out here that this radicalizing effect may be substantially larger than it would first appear. After all, not all cases are decided 5-4, such that the unusually extreme Justice would cast the deciding vote. Nor will all cases present issues relevant to that Justice’s unusual preferences. This latter factor, however, is endogenous to the Justices’ legal and political ideologies. That is, the Justices choose their docket, such that more extreme Justices may act at the certiorari stage to select more cases relevant to their nonstandard views.

At the certiorari stage, a single Justice’s vote is substantially more

.theatlantic.com/newsletters/archive/2022/11/never-trump-means-never/672295 [https://web.archive.org/web/2022120220820/https://www.theatlantic.com/newsletters/archive/2022/11/never-trump-means-never/672295/] (describing the “Never Trump” movement).

59. Kroll et al., *supra* note 32.

60. See generally CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. (SUP. CT. 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/UR3N-MDYV] (codifying “principles that [the Justices] have long regarded as governing [their] conduct”).

61. See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1705 (2021).

potent than at the merits stage. A grant of certiorari requires only four votes.⁶² Thus, an extreme Justice will be able to add their favored cases to the Court's merits docket whenever any other three Justices are willing to hear them. Those three may have their own reasons for interest in the case, since cases that reach the Supreme Court pose a variety of difficult questions. Indeed, extreme Justices' agenda-setting power may be even stronger given the Court's informal "J3" procedure. J3 refers to the practice whereby a Justice signals their willingness to join three other Justices in voting for certiorari.⁶³ When a J3 has been cast, the extreme Justice needs to find only two other full-throated votes to secure review of a preferred case. Thus, over a span of years, a Justice with views far from the Court's median might generate a significant number of opportunities to cast the deciding vote in favor of those views.

On another view, however, strategic judicial pampering is just ordinary, acceptable politics. One of us has argued elsewhere that the best way to understand the Supreme Court is as a special kind of political body, a kind of super-Senate that changes slowly, deliberates carefully, and is comparatively unexposed to the vagaries of direct democracy.⁶⁴ On this view, there may be nothing wrong *per se* with Justices on yachts. It might simply be a kind of lobbying—and a relatively mild one.⁶⁵ In this picture, judicial pampering is a way for everyone who cares about political issues to have their say in the public arena.

The problem, however, is that pampering *is not* a way for everyone to have their say. It is a way for everyone with a yacht to have their say. Only certain interests will have backers who can offer luxuries to the Justices and thus induce them to stay on the bench. Billionaires both disfavor taxes and have the cash to pay for Justices' luxury vacations. Thus, Justices who happen to be unusually anti-tax will be overrepresented on the Court, as measured in years served. Criminal defendants and their advocates favor humane prison conditions. But they have no private jets to offer unusually pro-prisoners'-rights Justices. Such Justices will thus, on average, depart the Court earlier than their anti-tax brethren. Thus, over time, the practice of

62. Amy Howe, *Rule of Four*, SCOTUSBLOG, <https://www.scotusblog.com/election-law-explainers/rule-of-four> [https://perma.cc/KC8B-NKGP].

63. *Information on Case Selection*, BLACKMUN ARCHIVE, <http://blackmun.wustl.edu/case-selection.html> [https://perma.cc/8N5T-3CUT].

64. Guha Krishnamurthi, *Term Limits and Embracing a Political Supreme Court*, 107 MINN. L. REV. HEADNOTES 26, 39–42 (2022), https://minnesotalawreview.org/wp-content/uploads/2022/10/Krishnamurthi_Final-1.pdf [https://perma.cc/W7KQ-FXD8].

65. Ordinary political-influence campaigns involve direct assistance in a politician's effort to stay in office, for example, by making direct campaign contributions or independent expenditures in support of reelection. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 350 (2010).

lavishing luxuries on Justices will have a selection effect that benefits moneyed interests. The consequence is a systematic warping of the Court's decision-making to favor already-powerful members of American society.

Some may question whether even this warping effect is worrisome. After all, in other political contexts, like campaign finance, the Supreme Court has "rejected the premise that the Government has an interest in equalizing . . . influence."⁶⁶ But that rejection was on First Amendment grounds.⁶⁷ The idea in those cases—*Citizens United v. FEC* and its forebears—was that the ability to engage in *speech* to influence elections by *persuasion* need not be equal. Just the opposite. On that view, the First Amendment requires that everyone be allowed to speak as much as they like—or can afford.

But even this strident First Amendment argument carries no water when there is no speech involved. Everyone agrees that influencing elections—via, for example, straightforward bribes—is both bad and regulable.⁶⁸ That is in part because bribes are not speech. They do not serve First Amendment values like truth-seeking, effective self-governance, or expressive autonomy. Nor does supplying a Justice a sweetheart loan to buy an RV. Even if unfettered—and thus unequal—*expression* serves some normative or constitutional good, it does not follow that unequal *conduct* does the same.

CONCLUSION

The public's perception of the Supreme Court is at an unprecedented nadir. Allegations of lavish treatment of the Justices by private parties and institutions have resulted in allegations of corruption. At the same time, the facts on the ground regarding the pampering of Justices do not reveal prototypical corrupt acts. This raises a puzzle: What, if anything, is actually wrong with the benefacting of Justices?

We have attempted to give an account of judicial pampering and its potential bad effects that assumes no breaches of integrity. Influencing Justices to stay on the Court does not call into question the impartiality of any of their votes. But such strategies are nevertheless likely to systematically influence the Court's decisions in at least two ways: They will move the Court's decisions, on average, away from the ideological center and toward the fringes. They will also have a distributional effect, systematically advantaging the best-funded radical interests. Both of these, we think, are effects worth worrying about in the ongoing debate over

66. *Id.* (internal quotation marks omitted).

67. *Id.*

68. *See id.* at 356–57.

judicial conduct.

That debate will doubtless continue, focusing now on the Court's newly promulgated ethics code.⁶⁹ On our reading of that code of conduct, nothing in it expressly forbids—or even discourages—the judicial pampering described here. That might be because the code labors under the misapprehension that the touchstone of judicial corruption is selling votes on cases. As we have shown, that is mistaken. Judicial pampering has other negative effects. Even if it does not corrupt the Justices, it may nevertheless work to corrupt the Court by purchasing the continued presence of outlier Justices who would otherwise retire.

69. See *supra* notes 57, 60.