Dobbs, Deliberative Interference, and Legitimacy

Matthew Slovin*

The leak of the Supreme Court's draft decision in Dobbs *was followed months later by another leak, the contents of which were perhaps even more shocking: sources on the Court told leading correspondents that the vote count among the Justices was "effectively frozen" by the opinion leak. As a result, no one can say how the case would have been decided in the absence of leaks. That is a problem, especially considering* Dobbs *decided the constitutional rights of tens of millions.*

This Article introduces the concept of "deliberative interference"—external influence on the Court's internal discussions—to the roiling scholarly and public debate regarding the Court's legitimacy. It argues that the deliberative interference in Dobbs *raises serious questions about the decision's legitimacy. Part I discusses the leak, the public's reaction to it and the later reporting that it impacted deliberations. Part II considers sources of pressure that could have resulted in this lock-in effect, including movement pressure, which was intentionally applied during the deliberations. Part III discusses how pressure from the leak, whatever its exact form, influenced the Court's deliberations. Part IV contains the crux of this Article's argument. Applying an established framework, Part IV argues that the decision's legitimacy is seriously threatened by deliberative interference. Part V concludes by proposing solutions for how we might remedy judicial decisions that have been impacted by deliberative interference, as well as how we might prevent deliberative interference in the first place. With the Supreme Court vulnerable to pressures that life tenure cannot guard against, these issues must be immediately confronted.*

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INTRODUCTION

The 2022 leak of the Supreme Court's draft opinion in *Dobbs v. Jackson Women's Health Organization*[1] was, in the Court's own words, a "grave assault on the judicial process."[2] Reporters have since concluded that the leak helped solidify the vote among the Justices.[3] The leak thus appears to have influenced deliberations, and the Court acknowledges that interference with deliberations threatens "the integrity of judicial proceedings."[4]

The identity and motive of the leaker remain unknown, and a commentator has suggested that those unknowns preclude a full examination of the leak's impact on *Dobbs*.[5] But to assess the leak's impact on the decision, what matters is how the leak impacted the Court's deliberations, not where the leaker fell on the ideological spectrum. The unanswered questions—while perhaps important to Court security and criminal liability[6]—are irrelevant to assessments of the effect of the leak.

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1. 597 U.S. 215 (2022).

2. Press Release, Sup. Ct. of the U.S., Statement of the Court Concerning the Leak Investigation (Jan. 19, 2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf [https://perma.cc/7NEQ-N87A].

3. Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of* Roe v. Wade, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html ("The identity and motive of the person who disclosed it remains unknown, but the effect of the breach is clear: It helped lock in the result, . . . undercutting Chief Justice Roberts and Justice Breyer's quest to find a middle ground."); Joan Biskupic, *How Ginsburg's Death and Kavanaugh's Maneuvering Shaped the Supreme Court's Reversal of* Roe v. Wade *and Abortion Rights*, CNN (Mar. 23, 2023, 5:01 AM), https://www.cnn.com/2023/03/23/politics/supreme-court-abortion-joan-biskupic-nine-black-robes/index.html [https://perma.cc/LHJ6-RL5W] ("The leak also had the effect of hindering internal debate among the justices in the Dobbs case. Justices later privately revealed that public disclosure of the 5-4 split and the tone of the opinion outright rejecting Roe v. Wade effectively froze the votes. That eliminated the opportunity for compromise, as can happen with hard-fought cases in the final weeks of negotiation.").

4. Press Release, Sup. Ct. of the U.S., *supra* note 2; *see also* Mathilde Cohen, *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*, 62 AM. J. COMPAR. L. 951, 958–59 (2014) ("Lacking legitimacy at the ballot box, judges' authority must rely on another form of legitimacy, which consists [of] persuading the public that their decisions are the result of reasoned deliberations.").

5. *See* Kantor & Liptak, *supra* note 3 ("Amid all the procedural questions surrounding Dobbs, 'the leak is the biggest potential stain on the case, especially if it was intended to influence deliberations,' said William Baude, a University of Chicago law professor and former clerk to Chief Justice Roberts. 'But because the motive and culprit are unknown, it's been hard to evaluate.'").

6. The Marshal's Report on the leak outlined a number of federal criminal statutes potentially implicated by the leak. *See* OFF. OF THE MARSHAL, SUP. CT. OF THE U.S., MARSHAL'S REPORT OF FINDINGS & RECOMMENDATIONS 8–9 (Jan. 19, 2023), https://www.supremecourt.gov/publicinfo/press/Dobbs_Public_Report_January_19_2023.pdf [https://perma.cc/7NEQ-N87A];

This Article conducts such an assessment. It concludes that the leak compromises *Dobbs*'s legitimacy—at least if outlets' reporting on the leak is accurate.[7] By presenting a novel theory centered on the sanctity of judicial deliberations, the Article joins the robust recent literature critiquing the Court's legitimacy.[8]

This Article proceeds in five parts. Part I of this Article revisits the leak, including the public's reaction and the Court's investigation. Here I argue that the leaker's identity, ideology, and motive are irrelevant to the decision's legitimacy.[9] Part II explores reasons why the leak might have impacted the Court's deliberations and suggests that the leak must have exerted pressure on the Court by analyzing three types of pressure that were likely at play: movement pressure, legacy pressure, and breach pressure. Also in Part II, I explain why the leak-induced pressure fundamentally differed from other examples of pressure on the Court and why life tenure is inadequate to insulate Justices from these pressures.[10] Part III discusses how pressure from the leak, whatever its exact form, influenced the Court's deliberations. This influence, which I term "deliberative interference," precludes us from knowing how *Dobbs* would have been resolved in its absence. Before the leak, Chief Justice John Roberts and Justice Stephen Breyer tried to convince Justices Brett Kavanaugh and Amy Coney Barrett to preserve some constitutional right to abortion, but the leak thwarted that effort.[11] Part IV contains the crux of my argument. Applying legitimacy theory, I argue that the deliberative interference raises serious questions about *Dobbs*'s

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see also Chad Marzen & Michael Conklin, *Information Leaking and the United States Supreme Court*, 37 BYU J. PUB. L. 101, 120–26 (2023) (discussing potential criminal consequences of the leak); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 524 & n.43 (2013) (noting some courts have applied a criminal statute prohibiting theft of government property to confidential information).

7. I assume the truth of this reporting for purposes of this Article. *The New York Times* did not reveal how it determined that the "clear" effect of the leak was to "help[] lock in the result." *See* Kantor & Liptak, *supra* note 3. But its reporting was based on "internal documents, contemporaneous notes, and interviews with more than a dozen people from the court—both conservative and liberal—who had real-time knowledge of the proceedings." *Id.* CNN's conclusion that the leak "effectively froze the votes" and "eliminated the opportunity for compromise" was based upon what "Justices later privately revealed." *See* Biskupic, *supra* note 3.

8. *See, e.g.*, Jonathon J. Booth, *The Cycle of Delegitimization: Lessons from* Dred Scott *on the Relationship Between the Supreme Court and the Nation*, 51 U.C. L. CONST. Q. 5 (2024); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019).

9. *See infra* Part I; *see also infra* Section IV.D.2 (addressing counterargument that if the leaker is a supporter of abortion rights, discrediting *Dobbs* rewards their wrongdoing).

10. *See infra* Section II.F.

11. *See infra* Section III.B.

legitimacy.[12] Though primarily focusing on the concept of legal legitimacy, this Article also examines the implications for *Dobbs*'s sociological and moral legitimacy by measuring the Justices' conduct in *Dobbs* against federal law, the Court's newly promulgated ethics code, and principles of judicial decision-making.[13] Part IV also discusses potential counterarguments, including that we should overlook the deliberative interference because Justices Kavanaugh and Barrett had already signed on to Justice Alito's draft opinion prior to the leak.[14] Part V considers possible solutions to two problems raised by this Article: deliberative interference and in-effect judicial decisions that have been influenced by deliberative interference.

I. LEAK

On the evening of May 2, 2022, *Politico* published a draft opinion in *Dobbs* authored by Justice Alito and reported that four other Justices had also voted to overturn *Roe v. Wade*.[15] Though the Court had experienced leaks

12. In the wake of the *Dobbs* leak, scholars have studied the impact of leaks in general on the Court's legitimacy. *See, e.g.*, Nathan T. Carrington & Logan Strother, *Plugging the Pipe? Evaluating the (Null) Effects of Leaks on Supreme Court Legitimacy*, 20 J. EMPIRICAL LEGAL STUD. 669 (2023) (survey considering whether leaks influence public perceptions of the Supreme Court's legitimacy). One of this Article's novel contributions is to consider the effect of the *Dobbs* leak on the *Dobbs* decision specifically.

13. *See infra* Section IV.C.

14. *See infra* Section IV.D.

15. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/2T5H-WYMQ].

before,[16] the *Politico* story was apparently the first publication of a full draft majority opinion in the Court's history.[17]

After the leak, the public immediately began speculating about the leaker's identity and motive.[18] The day after *Politico* published its story, Chief Justice

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16. In this Article, I focus on the leak of the draft decision and vote count to *Politico* in May 2022, as well as the later leaks to CNN and *The New York Times* revealing that the *Politico* leak locked in the vote count. But there were other leaks surrounding *Dobbs*. One week before the leak of the draft decision and vote count, the editorial board of *The Wall Street Journal* wrote that Chief Justice Roberts "may be trying to turn another Justice" toward a "middle ground" position that would not overturn *Roe*. *See Abortion and the Supreme Court*, WALL ST. J. (Apr. 26, 2022, 6:39 PM), https://www.wsj.com/articles/abortion-and-the-supreme-court-dobbs-v-jackson-mississippi-john-roberts-11651009292. Commentators have suggested this was a leak, rather than speculation. *See* Josh Blackman, *The WSJ Is Worried About the Chief Justice "Turn[ing]" Votes in* Dobbs, REASON: VOLOKH CONSPIRACY (Apr. 27, 2022, 1:43 AM), https://reason.com/volokh/2022/04/27/the-wsj-is-worried-about-the-chief-justice-turning-votes-in-dobbs [https://perma.cc/2XV4-9QWJ]; Tom Goldstein, *How the Leak Might Have Happened*, SCOTUSBLOG (May 5, 2022, 1:20 PM), https://www.scotusblog.com/2022/05/how-the-leak-might-have-happened [https://perma.cc/SU6F-63CF] ("In substance, [the first leak] was that the court had voted to overrule *Roe v. Wade*, but that the precise outcome remains in doubt because Chief Justice Roberts is trying to persuade either Justice Brett Kavanaugh or Justice Amy Coney Barrett to a more moderate position that would uphold the Mississippi abortion restriction without formally overturning *Roe*.").

For leaks in other cases, see *infra* note 81 and accompanying text, discussing a leak during deliberations in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012); and Jonathan Peters, *The Supreme Court Leaks*, SLATE (July 6, 2012, 2:25 PM), https://slate.com/news-and-politics/2012/07/the-supreme-court-leaking-john-roberts-decision-to-change-his-mind-on-health-care-should-not-come-as-such-a-surprise.html [https://perma.cc/E6SL-3G8T], discussing leaks from the Court in a number of other cases and situations.

17. *See* @jonathanwpeters, X (May 3, 2022, 12:28 PM), https://x.com/jonathanwpeters/status/1521572303812939776 [https://perma.cc/GZ22-VB3N] (professor of media law referring to a leak of a full draft majority opinion as "unprecedented"); *see also* Akhil Reed Amar, *The End of* Roe v. Wade, WALL ST. J. (May 14, 2022), https://www.wsj.com/articles/the-end-of-roe-v-wade-11652453609 ("Never before has a full draft, footnotes and all, of a would-be majority opinion seeped out to the world while a Supreme Court case of major moment was still under consideration.").

18. *See, e.g.*, Mary Wood, *Unpacking the Supreme Court Leak: Professor Douglas Laycock Discusses* Dobbs *Breach*, UNIV. VA. SCH. L. (May 3, 2022), https://www.law.virginia.edu/news/202205/unpacking-supreme-court-leak [https://perma.cc/9WXR-YF6N] ("I think it is more likely to be someone on the pro-life side hoping to lock in the votes for this draft."); Goldstein, *supra* note 16 ("In these circumstances, which ideological side would think it benefits from leaking the opinion? It seems to me, that is the left."); Carrie Severino, Opinion, *Supreme Court Leak Is Shameful Attempt to Poison an Outstanding Opinion*, FOX NEWS (May 3, 2022, 11:00 AM), https://www.foxnews.com/opinion/supreme-court-roe-wade-leak-carrie-severino [https://perma.cc/YJ4J-GPWT] ("This leak is just the latest iteration of the left's shameful campaign to intimidate and undermine the Court."). On social media, conservative pundits and attorneys even went so far as to name the specific Court employees they believe leaked the draft. *See* Will Sommer (@willsommer), X (May 4, 2022, 3:30 PM),

Roberts said in a press release that "[t]o the extent this betrayal of the confidences of the Court was intended to undermine the integrity of our operations, it will not succeed."[19] Chief Justice Roberts also ordered the Marshal of the Court to investigate the source of the leak.[20]

On January 19, 2023, the Marshal published a report stating that "investigators have been unable to determine at this time, using a preponderance of the evidence standard, the identity of the person(s) who disclosed the draft majority opinion in *Dobbs v. Jackson Women's Health* [*Organization*] or how the draft opinion was provided to Politico."[21]

Justices have taken different approaches in their public-facing comments about the leak. For example, Justice Alito told *The Wall Street Journal* that the leak "was part of an effort to prevent the *Dobbs* draft . . . from becoming the decision of the court."[22] He offered no proof for that assertion, other than saying he "personally [has] a pretty good idea who is responsible," and he admitted he lacked the level of proof needed to name the leaker.[23] He called it "infuriating" that some believe the draft was leaked by someone hoping to solidify the majority.[24] Former Justice Stephen Breyer has been more circumspect when discussing the leak, calling it "unfortunate."[25] He said he has a theory about who is responsible but did not elaborate.[26]

Two years later, elected officials appear interested in uncovering the leaker.[27] But no matter the leaker's identity and motive, nobody (besides

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https://x.com/willsommer/status/1521980684348366850 [https://perma.cc/6RSP-X3TS]. The Office of the Marshal found "nothing to substantiate" the social media posts naming individual clerks. *See* OFF. OF THE MARSHAL, *supra* note 6, at 16.

19. Press Release, Sup. Ct. of the U.S. (May 3, 2022), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22 [https://perma.cc/4XTQ-7D9N].

20. *Id.*

21. OFF. OF THE MARSHAL, *supra* note 6.

22. James Taranto & David B. Rivkin Jr., *Justice Samuel Alito: 'This Made Us Targets of Assassination*,*'* WALL ST. J. (Apr. 28, 2023, 2:06 PM), https://www.wsj.com/articles/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9.

23. *Id.* It is unclear how Justice Alito can be certain of the leaker's motive despite apparently not being certain of the leaker's identity. *See id.* (describing Justice Alito as "certain" of the leaker's motive).

24. *Id.*

25. Meet the Press, *It's 'Possible'* Dobbs *Could Be Overturned: Justice Breyer Full Interview*, NBC NEWS, at 40:45 (Mar. 30, 2024), https://www.nbcnews.com/meet-the-press/video/it-s-possible-dobbs-could-be-overturned-justice-breyer-full-interview-208015941530 [https://perma.cc/N2H8-MTJE].

26. *Id.* at 43:09.

27. Mike Lee (@BasedMikeLee), X (May 2, 2024, 3:21 PM), https://x.com/BasedMikeLee/status/1786159146615570807 [https://perma.cc/6VR3-X4UD] (U.S. Senator Mike Lee calling it "indefensible" that the *Dobbs* leak was "never adequately investigated"); *'An*

perhaps one or more Justices) can say what the case's outcome would have been if there had not been a leak—if deliberations had not been impacted.[28] Perhaps the leaker was a supporter of abortion rights who miscalculated what the impact of the leak would be.[29] Perhaps the leaker was an opponent of abortion rights who knew exactly what the impact of the leak would be.[30] And though it is unlikely, perhaps the leaker was motivated by something besides abortion rights, such as a desire to increase public access to the Court's deliberative process.[31]

It does not matter which of those scenarios played out because the relevant inquiry is how the leak impacted the Court. A recent example helps demonstrate the irrelevancy of the leaker's identity and motive. On June 26, 2024, the Court inadvertently published draft opinions in two consolidated cases pertaining to Idaho's near-total abortion ban.[32] The following day, the Court officially published those opinions.[33] Nothing suggests that the accidental early publication influenced the Court's deliberations, which were almost certainly complete. But had early publication affected deliberations,

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Arm of the GOP': Raskin Sounds Off on SCOTUS, MSNBC, at 04:30 (June 16, 2024), https://www.msnbc.com/inside-with-jen-psaki/watch/-an-arm-of-the-gop-raskin-sounds-off-on-scotus-213075525719 [https://perma.cc/6FFV-W6R8] (U.S. Representative Jamie Raskin discussing the Supreme Court's radio silence on the *Dobbs* leak investigation).

28. *See* Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2276 (2017) ("Efforts by third parties to identify a judge's thoughts or psychological attitudes obviously need to rely on objective, publicly available evidence.").

29. *See* Ed Whelan, *NYT's 'Inside Story' on* Dobbs, NAT'L REV. (Dec. 15, 2023, 10:47 AM), https://www.nationalreview.com/bench-memos/nyts-inside-story-on-dobbs [https://perma.cc/VT2R-ZTKK] ("It sure seems to me much more plausible that the leak was a desperate effort to put intense political pressure on the conservative justices so that one of them would abandon the Alito majority.").

30. *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1179 (2023) ("Indeed, one leading theory is that the leaker's motivation was to prevent the Chief Justice from persuading a member of the majority—likely Justice Brett Kavanaugh—to join the Chief Justice in a plurality opinion that upheld the Mississippi statute, under a much-narrowed *Roe* and *Casey*."). *But see* Orin S. Kerr, Dobbs *Was Never in Doubt*, REASON: VOLOKH CONSPIRACY (Dec. 15, 2023, 6:16 PM), https://reason.com/volokh/2023/12/15/dobbs-was-never-in-doubt [https://perma.cc/7L3C-CMGM] ("Given [the] timing, the theory that the leak was designed to 'lock in' the majority, or that it had that effect, seems implausible to me.").

31. *See* Margaret B. Kwoka, *Leaking and Legitimacy*, 48 U.C. DAVIS L. REV. 1387, 1390–91 (2015) (describing a trend of leakers who are "transparency advocates").

32. *See* Abbie VanSickle, *Supreme Court Appears Poised to Allow, for Now, Emergency Abortions in Idaho*, N.Y. TIMES (June 26, 2024), https://www.nytimes.com/2024/06/26/us/politics/supreme-court-abortion-idaho.html.

33. Moyle v. United States, 603 U.S. 324 (2024).

it would be fair to question the decision's legitimacy, even though publication was unintentional and done by the Court itself.[34]

What's relevant to *Dobbs*'s legitimacy is not the leaker's motive or identity but whether the leak impacted the Court's deliberations[35]—and we know that it did.[36] Additional leaks have revealed that the publication of the draft decision impacted the Justices' deliberations.[37]

A normative point about leaks: leaks like the one that publicized the draft decision and vote count (i.e., state-of-play leaks) are harmful because they risk influencing ongoing deliberations—they are potentially disruptive.[38] In response to the *Dobbs* leak, a journalism professor pointed out that journalists should exercise caution in evaluating the motivations of leakers.[39]

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34. *See infra* Section IV.C.2.b (discussing judges' obligation to decide cases based on the law).

35. *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955) ("That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court."); *see also* James M. Smith, *Leak Undermines Judicial Independence*, BERKS BARRISTER, Summer 2022, at 6, 8.

36. *See supra* note 3 and accompanying text.

37. *Id.*

38. *See* Press Release, Sup. Ct. of the U.S., *supra* note 2 ("It is no exaggeration to say that the integrity of judicial proceedings depends on the inviolability of internal deliberations."); *see also* Josh Blackman, *A Taxonomy to Measure Supreme Court Leaks*, REASON: VOLOKH CONSPIRACY (May 9, 2022, 12:45 AM), https://reason.com/volokh/2022/05/09/a-taxonomy-to-measure-supreme-court-leaks [https://perma.cc/DW2E-6S6Y] ("Generally, leaks made prior to the end of the term, when votes are still in flux, are intended to move those votes."). Another state-of-play leak occurred in 2024, when a news outlet obtained a Wisconsin Supreme Court draft order accepting for review a case about whether abortion is protected by the state constitution. *See* Jack Kelly, *Wisconsin Supreme Court Will Hear High-Profile Abortion Rights Case, Draft Order Shows*, WIS. WATCH (June 26, 2024), https://wisconsinwatch.org/2024/06/wisconsin-supreme-court-abortion-right-planned-parenthood [https://perma.cc/5YDM-D2V4]. Though that leak created the potential for deliberative interference, there is no indication that the leak impacted deliberations, and the Wisconsin Supreme Court finalized its order six days later. *See* Order Granting Petition for Leave to Commence an Original Action, Planned Parenthood of Wis. v. Urmanski, No. 2024AP330-OA (Wis. July 2, 2024).

39. *See* Emmily Bristol, *UO Experts Weigh In on Supreme Court Leak, Possible End of* Roe, OR. NEWS (May 11, 2022, 5:00 AM), https://around.uoregon.edu/content/uo-experts-weigh-supreme-court-leak-possible-end-roe [https://perma.cc/P39U-P9ZU]; *see also SPJ Code of Ethics*, SOC'Y PRO. JOURNALISTS, https://www.spj.org/ethicscode.asp [https://perma.cc/PU7X-ZQB5] (instructing journalists to give the public "as much information as possible to judge the reliability and motivations of sources" and to "[c]onsider sources' motives before promising anonymity"). One commentator has suggested that *Politico* might not know the leaker's identity. *See* David Lat, *My Latest Theory About the SCOTUS Leaker*, ORIGINAL JURISDICTION (July 26, 2022), https://davidlat.substack.com/p/my-latest-theory-about-the-scotus [https://perma.cc/948L-M5NK]. If that is indeed the case, it is unclear how *Politico* would have weighed the leaker's possible motive.

But leaks like the one that informed the public that there was deliberative interference in *Dobbs* are good because judicial decisions should be the product of uncompromised deliberation, and such leaks can help ensure decisions live up to that ideal; these leaks can be restorative since they potentially allow the deliberative interference to be remedied.[40]

II. PRESSURE

Though we know the leak interfered with the Court's work, it is unclear why. This Part contextualizes *Dobbs* in order to hypothesize an answer to that question. I consider three types of pressure that could have helped lock in the vote: movement pressure, legacy pressure, and breach pressure.[41] These pressures are not unique to *Dobbs*,[42] but they were perhaps at their strongest during those deliberations.

This Article's ultimate conclusion, however—that the leak's impact on the Court's deliberations potentially delegitimizes its opinion—does not rely upon any specific mechanism of how any of the Justices experienced pressure.[43] It is enough that we know (due to subsequent leaks) that

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40. *See* Daniel Epps, *The Supreme Court Is Leaking. That's a Good Thing*, WASH. POST (Aug. 3, 2020, 9:44 AM), https://www.washingtonpost.com/outlook/2020/08/03/supreme-court-leaks-cnn-biskupic-confidentiality ("Learning how the court goes about its business can help the public decide whether we should treat its decisions as legitimate—and whether we should be comfortable letting the unelected justices exercise as much power as they do."); *see also* Kirk O. Hanson & Jerry Ceppos, *The Ethics of Leaking*, L.A. TIMES, Oct. 6, 2006, at B13 (arguing leaks are "more easily ethically justified" when they reveal government misconduct).

41. This is not intended to be an exhaustive list of pressures that were at play in *Dobbs*. Other attempts to exert pressure during the *Dobbs* deliberations did not succeed. For example, Justices faced pressure to change their vote, rather than maintain it, such as when a man went to Justice Kavanaugh's home after the leak intending to assassinate him. *See* Maria Cramer & Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, N.Y. TIMES (June 8, 2022), https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html. That pressure failed as Justice Kavanaugh did not change his vote. In another example of unsuccessful pressure on the Court during *Dobbs*, conservative leaders called upon the Court to immediately publish its opinion after the leak. *See* The Heritage Foundation, *Heritage President Kevin Roberts Responds to* Dobbs *Leak*, YOUTUBE, at 01:26 (May 3, 2022), https://www.youtube.com/watch?v=c8ZiwSMweyw [https://perma.cc/UER7-PSS3]; The Heritage Foundation, *Supreme Court Leak: Is* Roe *Over?*, YOUTUBE, at 04:32 (May 3, 2022), https://www.youtube.com/watch?v=HuSx95xYwF8 [https://perma.cc/V9RQ-7SD6] (noting that the Heritage Foundation Vice President of Domestic Policy Roger Severino urged the Supreme Court to "issue the opinion as soon as humanly possible"). But the Court did not announce its decision until almost two months later.

42. *See infra* Section II.D.

43. *See infra* Section IV.D.1.

publication impacted deliberations.[44] Nevertheless, I will attempt to explain why the leak might have had an effect on the Court.

After discussing movement, legacy, and breach pressure, I distinguish the leak-induced pressure from other historical examples of external pressure on the Court and explain why life tenure is not a sufficient safeguard against these pressures.

A. Movement Pressure

Movement pressure was intentionally exerted during the *Dobbs* deliberations.[45] A movement exists when people "try to exert power by contentious means" and they are "backed by well-structured social networks and galvanized by culturally resonant, action-oriented symbols."[46]

Professors Robert Tsai and Mary Ziegler have concluded that *Dobbs* is a movement opinion, "the rhetorical unification of two movements: an elite legal conservative movement of judges, lawyers, and political patrons, as well as a grassroots-powered antiabortion movement."[47] They reason that *Dobbs* utilizes a method of constitutional interpretation that helps traditionalist movements and hurts progressive ones.[48] *Dobbs* incorporates the rhetoric of conservative movements, including by overstating *Roe*'s supposed negative effect on American law and politics.[49] It overturned *Roe* even though the petitioner did not originally ask the Court to do so.[50] It rejected a possible alternative constitutional foundation for abortion rights

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44. *See supra* note 3 and accompanying text.

45. *See infra* note 69 and accompanying text.

46. SIDNEY G. TARROW, POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS 6 (2011).

47. *See* Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2177 (2024).

48. *See id.* at 2209; *see also* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 870 ("Generally, the story goes, conservative originalism was a political success because it offered a perfect fit between conservative ends and a seemingly impartial interpretive means. Understood in this way, originalism represents a perfectly subtle and seemingly innocuous strategy to introduce conservative values into American constitutional law."); *id.* at 925 ("The attraction of originalism to movement conservatives seems obvious: originalism has proven to be a remarkably effect[ive] tool in the promotion of conservative values and outcomes.").

49. Tsai & Ziegler, *supra* note 47, at 2209.

50. *See id.* at 2210; *see also* ELIZABETH DIAS & LISA LERER, THE FALL OF ROE: THE RISE OF A NEW AMERICA 261 (2024) (discussing how, in *Dobbs*, the initial goal was to "chip away" at *Roe*, not "overturn the decision altogether"); *id.* at 301 (discussing how the State of Mississippi's cert petition mentioned the possibility of overturning *Roe* and *Casey* only in a footnote).

that no party had addressed.[51] And it relies on historians connected to the antiabortion movement.[52]

Tsai and Ziegler also argue that *Dobbs* was decided by movement jurists.[53] Movement jurists are "socially embedded in movement-aligned networks outside of the formal legal system" and are "willing to use a judge's tools of the trade in the service of a movement's goals," even if it causes backlash.[54] They are most easily recognized through their participation in movement events.[55] Justices Barrett, Thomas, and Alito spoke out against abortion rights prior to their nominations.[56] And a number of the Justices maintain close ties to the conservative legal movement.[57] Justice Alito has even spoken out against efforts to separate judges from the movement.[58]

In the immediate aftermath of *Roe*, the antiabortion movement initially pursued other strategies besides reversal, such as recognition of a

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51. *See* Tsai & Ziegler, *supra* note 47, at 2210–11; *see also* Siegel, *supra* note 30, at 1135 ("Justice Alito's disparaging dicta on equal protection—his anxious effort to undermine the authority of an equal protection claim that was not even in the case—was couched in . . . movement-inflected language.").

52. *See* Tsai & Ziegler, *supra* note 47, at 2154.

53. *See id.* at 2210; *see also* Siegel, *supra* note 30, at 1135 ("The *Dobbs* opinion performs its history-and-traditions analysis with the energies of movement-identified judges achieving a goal long sought by 'Team Originalism.'").

54. Tsai & Ziegler, *supra* note 47, at 2159.

55. *Id.* at 2176, 2181–82 (discussing Justices Sotomayor and Alito's attendance at ideologically affiliated events); DIAS & LERER, *supra* note 50, at 217 (noting Justice Kavanaugh's attendance at twenty-five consecutive Federalist Society annual conferences); NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT 41–42 (2019) (discussing how public appearances by Justices give elite legal audiences "special influence with them").

56. *See* Tsai & Ziegler, *supra* note 47, at 2196–97 (noting that Justice Thomas "routinely denounced the very idea of legal abortion"); *id.* at 2202 (discussing how Justice Alito took pride in a 1985 memo arguing that the constitution does not protect the right to abortion); *id.* at 2207 (discussing how Justice Barrett belonged to an anti-abortion organization that published an advertisement calling for *Roe* to be overturned); *see also* DIAS & LERER, *supra* note 50, at 216 (noting that Justice Barrett "had made her personal views opposing abortion very clear").

57. *See* DIAS & LERER, *supra* note 50, at 108–09 (discussing Justices Alito and Thomas's ties to the Federalist Society); *see also* Tsai & Ziegler, *supra* note 47, at 2163–64, 2206 (discussing Justices Gorsuch and Kavanaugh's ties to the Federalist Society); DAVID DALEY, ANTIDEMOCRATIC 32–33 (2024) (noting how conservative legal movement founder Michael J. Horowitz was inspired in 1979 by his observation that left-leaning judges and litigants were closely aligned).

58. *See* Samuel Alito, Assoc. Just., Sup. Ct. of U.S., Address to the Federalist Society (Nov. 12, 2020), https://www.rev.com/blog/transcripts/supreme-court-justice-samuel-alito-speech-transcript-to-federalist-society [https://perma.cc/2QP7-SPH8] (praising those who fought a proposal "to bar federal judges from membership in the [Federalist] Society").

constitutional right to life.[59] The tides within the movement began to shift toward modifying the Court's composition when President Ronald Reagan complained on the campaign trail about judicial activism on the issue of abortion.[60] But his relatively uncontroversial nomination of Sandra Day O'Connor signaled that the Court was distinct from movements.[61] The antiabortion activists did not begin to focus on confirming movement-aligned judges until three Republican nominees preserved a pre-viability constitutional right to abortion in 1992 in *Planned Parenthood v. Casey*.[62] In 2005, George W. Bush nominated Harriet Miers, who was not a judge and therefore did not have an established record that could complicate her confirmation.[63] But social conservatives pushed for a selection who—like Justice Thomas—bore hallmarks of a movement Justice, and Miers ultimately withdrew and was replaced by Alito.[64]

Because *Dobbs* can be viewed as a movement opinion decided by movement jurists, it is possible that movement pressure, intensified by the leak, shaped the decision.[65] When Supreme Court vote counts have leaked in the past, the information has been used to serve movement ends, such as when the leader of an evangelical nonprofit prepared public relations materials

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59. *See* Tsai & Ziegler, *supra* note 47, at 2190. *See generally* Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869 (providing additional historical context on originalism and the antiabortion movement).

60. Tsai & Ziegler, *supra* note 47, at 2191.

61. *Id.* at 2191–92.

62. *See id.* at 2189, 2195–96, 2199; *see also* Josh Blackman, *The Future of the Conservative Legal Movement After* Dobbs*—IU Mauer FedSoc Chapter*, YOUTUBE, at 05:12 (Feb. 6, 2023), https://www.youtube.com/watch?v=qCtaAcgOcVI [https://perma.cc/5A5X-7Y8M] (stating that, after *Casey*, the conservative legal movement "doubled down and reaffirmed itself to try to find judges who would not be so easily swayed by social pressures").

63. Tsai & Ziegler, *supra* note 47, at 2200–01; *see also* DEVINS & BAUM, *supra* note 55, at 123 (noting how Bush viewed Miers as a "stealth" candidate because of her lack of paper trail).

64. DEVINS & BAUM, *supra* note 55, at 127; Tsai & Ziegler, *supra* note 47, at 2200–02; *see also* Lombardo v. City of St. Louis, 594 U.S. 464, 469 (2021) (Alito, J., dissenting) (criticizing the Court for being "unwilling" to bear "criticism" that would follow from denying certiorari in an excessive force case); The Federalist Society, *25th Anniversary Gala 11-15-07*, YOUTUBE, at 18:54 (Apr. 20, 2011), https://www.youtube.com/watch?v=CbqvP0Ixux0 [https://perma.cc/H587-Z3NA] (Leonard Leo praising Justice Thomas at Federalist Society gala for "resisting the allure of praise and approval" and for teaching "that there is nothing wrong with being attacked or hated if you are standing up for what is right").

65. *See* DALEY, *supra* note 57, at 33 (quoting conservative legal movement founder Michael J. Horowitz: "A movement comprised of small numbers of people can influence national policy when policy is essentially fixed at one place and by a small group of decision makers against whom pressure can be applied").

based on a tip of the outcome in a case involving contraception access.[66] The *Dobbs* leak, whatever its purpose, also aided movements by freezing the vote, assuring them of their preferred outcome.[67]

The conservative legal movement was clearly a source of movement pressure during the *Dobbs* deliberations.[68] After the Federalist Society's 2021 National Lawyers Convention, a leader of the conservative legal movement predicted that there would be "efforts to pressure the Justices" to overturn *Roe* "both before, and in the wake of oral arguments" in *Dobbs*.[69]

The stakes in *Dobbs* were high for the conservative legal movement; several commentators believed that the Court's failure to reverse *Roe* would end the movement.[70] If they are correct, then any post-leak vote switch would

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66. 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.

67. *See infra* note 70 and accompanying text.

68. I do not deny that there was competing pressure from progressive movements in *Dobbs*. *See supra* note 41; *see also* Letter from Rep. Jim Jordan, Chairman, House Comm. on the Judiciary, to Merrick B. Garland, Att'y Gen. (July 23, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/FILE_2681.pdf [https://perma.cc/5XVB-FL3N] (noting that, after the leak, "conservative justices faced relentless protests at their homes, seemingly intended to influence the Court's decision"). But I view any such pressure as beyond the scope of this Article because those movements were harmed, not helped, by the deliberative interference.

69. Josh Blackman, *#FedSoc2021 and* Dobbs, REASON: VOLOKH CONSPIRACY (Nov. 13, 2021), https://reason.com/volokh/2021/11/13/fedsoc2021-and-dobbs [https://perma.cc/3FCV-UKGH]. The Federalist Society, "long the standard-bearer for the conservative legal movement," has been criticized by another group of conservative lawyers, in part because it has not adequately defended "the independence of the courts." *See* George Conway et al., Opinion, *The Trump Threat Is Growing. Lawyers Must Rise to Meet This Moment*, N.Y. TIMES (Nov. 21, 2023), https://www.nytimes.com/2023/11/21/opinion/trump-lawyers-constitution-democracy.html.

70. J. Joel Alicea, *The Fate of the Conservative Legal Movement*, CITY J., Winter 2022, at 96, 98 (arguing that, while the effect of *Dobbs* on the conservative legal movement should be irrelevant to the case's outcome, failure to overturn *Roe* would "likely shatter" the movement); *see also* J. Joel Alicea, *An Originalist Victory*, CITY J. (June 24, 2022), https://www.city-journal.org/article/an-originalist-victory [https://perma.cc/242S-UYXN] ("By any objective standard, for almost 50 years, the goal that has united all wings of the conservative legal movement—and has bound the conservative political movement to the conservative legal movement—was the overruling of *Roe* and *Casey*, a necessary first step toward any broader pro-life goal."); Nathanael Blake, *If the Supreme Court Whiffs on Abortion, They'll Blow Up the Conservative Legal Movement*, FEDERALIST (Dec. 7, 2021), https://thefederalist.com/2021/12/07/if-the-supreme-court-whiffs-on-abortion-theyll-blow-up-the-conservative-legal-movement [https://perma.cc/2KFM-L2KZ]; Advisory Opinions, *The Federalist Society in Peril*, DISPATCH, at 27:01 (Apr. 4, 2024) (statement of David French), https://thedispatch.com/podcast/advisoryopinions/the-federalist-society-in-peril [https://perma.cc/F5LP-ZCD6] (noting that, after *Dobbs*, "all of the air went out of the conservative-legal-movement-has-failed balloon").

have revealed the movement's cause of death. The leak, therefore, likely "would have trained immense pressure from conservative elites on [Justices Barrett and Kavanaugh][71] to stick with their original votes, thus preserving *Dobbs*'s eventual five-member majority."[72]

B. Legacy Pressure

By ensuring that there would be a historical record of how the Justices planned to resolve *Dobbs* in February 2022, the leak likely exacerbated legacy pressure on the Court. I define legacy pressure to mean a Justice's concern about how they will be evaluated by various audiences, and it is likely omnipresent.[73]

Legacy pressure is not inherently problematic and can serve as a legitimizing force on judicial decision-making.[74] For example, it might lead a Justice to try to enhance the Court's institutional legitimacy by aligning their decisions with public opinion.[75] But legacy pressure is more troubling when combined with movement pressure because it introduces the possibility that the legacy a judge is concerned about is their legacy within favored movements. Movement-tinged legacy pressure provides no guarantee that a judge's decision-making will be in line with public sentiment or even the judge's actual substantive legal views. Instead, a judge might try to please preferred audiences.[76]

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71. The pressure would have fallen on Justices Barrett and Kavanaugh specifically because, as discussed *infra*, Chief Justice Roberts was then attempting to persuade them not to overturn *Roe*. *See infra* note 136 and accompanying text.

72. Aaron Tang, Opinion, *Did the Supreme Court's Leak Investigation Let the Justices off the Hook?*, N.Y. TIMES (Jan. 20, 2023), https://www.nytimes.com/2023/01/20/opinion/abortion-supreme-court-leak.html; *see also* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 21 (2014) (observing that Justices notice criticism by the Federalist Society); Josh Blackman, *Ten Reflections on Justices Kavanaugh and Barrett's Votes in* Dobbs, REASON: VOLOKH CONSPIRACY (Dec. 16, 2023), https://reason.com/volokh/2023/12/16/ten-reflections-on-justices-kavanaugh-and-barretts-votes-in-dobbs [https://perma.cc/CK6S-R68B] (arguing that, if it "leaked out that Kavanaugh was originally on board, but later flipped to the moderate position," he would become "*persona non grata* in conservative circles").

73. *See* DEVINS & BAUM, *supra* note 55, at 23 ("There is . . . nothing about [the Justices'] backgrounds or professional experiences that would render irrelevant what other people think of them. Indeed . . . there is reason to think that on average, an interest in the esteem of other people is especially strong for the Justices.").

74. *See* Thomas G. Donnelly, *Supreme Court Legitimacy: A Turn to Constitutional Practice*, 47 BYU L. REV. 1487, 1503 (2022).

75. *See id.*

76. *See* DEVINS & BAUM, *supra* note 55, at 147.

The leak almost certainly intensified legacy pressure. If any Justice in the majority at publication later switched their vote, their switch would be public knowledge.[77] The Roberts Court's history shows why a switch in public view might have adverse legacy effects.

In 2012, the Court considered the constitutionality of the Affordable Care Act's individual mandate in *National Federation of Independent Business v. Sebelius*.[78] At conference on March 30, Chief Justice Roberts and four others voted that the individual mandate exceeded Congress' power under the Commerce Clause.[79] The Court did not vote on whether the individual mandate was a valid exercise of the taxing power, under which the Court eventually upheld the mandate.[80] On June 2, just twenty-six days before the Court announced its decision, *National Review* editor Ramesh Ponnuru revealed during a Princeton University reunion panel that, according to his sources at the Supreme Court, Chief Justice Roberts "seems to be going a little bit wobbly" in his vote.[81] Four days after the decision, CBS News reported that Chief Justice Roberts initially voted to strike down the law before changing his mind.[82]

The fact that Chief Justice Roberts seemed prepared to strike down the individual mandate but later voted to uphold it has impacted his legacy.[83] Roberts's vote in *Sebelius* was top of mind even after the *Dobbs* leak; the week after *Politico* published the draft decision and vote count, it quoted an anonymous attorney "close to several conservative justices" who said there

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77. *See* Lisa Camooso Miller, *Friday Reporter with Politico's Josh Gerstein*, YOUTUBE, at 21:20 (Sept. 2, 2022), https://www.youtube.com/watch?v=49U_g-9Hkvc [https://perma.cc/DNG9-GU7G] ("Justices may have been more inclined not to change their position since it had been laid out publicly.").

78. 567 U.S. 519, 530–31 (2012).

79. JOAN BISKUPIC, THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS 233–34 (2019).

80. *Id.* at 234.

81. Orin Kerr, *More on the Supreme Court Leak*, REASON: VOLOKH CONSPIRACY (July 3, 2012), https://volokh.com/2012/07/03/more-on-the-supreme-court-leak [https://perma.cc/C5W3-XSJJ]; *see also* Michael McGough, Opinion, *Conservatives Worry that John Roberts Will 'Go Wobbly' on 'Obamacare*,*'* L.A. TIMES (May 23, 2012), https://www.latimes.com/opinion/la-xpm-2012-may-23-la-ol-roberts-supreme-health-20120523-story.html.

82. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012), https://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law [https://perma.cc/2Z24-U8VK].

83. BISKUPIC, *supra* note 79, at 222; *see also* Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 758–59 (2018) (noting that Roberts's vote in *Sebelius* "angered many grassroots conservatives"); MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL: THE KAVANAUGH CONFIRMATION AND THE FUTURE OF THE SUPREME COURT 303 (2019) (noting that after *Sebelius*, the political right "lost respect for" Roberts).

is "a price to be paid for what [Roberts] did" in *Sebelius*.[84] "Everybody remembers it."[85]

The fallout from Roberts's publicized alleged switch could have dissuaded a Justice concerned about their legacy from reversing course in *Dobbs*. If a Justice who at one time voted to overturn *Roe* later voted to preserve it, and their reversal took place in the public's view because of the leak, that might be their primary legacy.

C. Breach Pressure

I define breach pressure to mean one or more Justice's hesitation to engage in deliberations with their colleagues because of a concern about potential leaks. To the extent that their reluctance causes them to decline to meaningfully participate in deliberations, their reluctance is a form of pressure exerted on the process.[86] After the *Dobbs* leak, a former clerk to Chief Justice Roberts pointed out that, when deliberations play out in public view, it "inevitably frays the degree of candor [Justices] have when sharing ideas in deliberating a case. It increases suspicions."[87]

It is possible that the deliberative interference in *Dobbs* can be explained by the Justices' lack of trust in one another after the leak (i.e., breach pressure).[88] If Justices believed that anything they might say or write to one another could be publicized, it is difficult to imagine productive deliberations

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84. Josh Gerstein et al., *Alito's Draft Opinion Overturning* Roe *Is Still the Only One Circulated Inside Supreme Court*, POLITICO (May 11, 2022), https://www.politico.com/news/2022/05/11/alito-abortion-draft-opinion-roe-00031648 [https://perma.cc/JN43-7A4J].

85. *Id.*

86. *See* GABRIEL SCHOENFELD, NECESSARY SECRETS: NATIONAL SECURITY, THE MEDIA AND THE RULE OF LAW 267 (2010) (noting that "constant anxiety that sensitive information will hemorrhage" deprives decision-makers of valuable resources and ensures that "decisions of profound consequence are taken without adequate counsel").

87. Henry Gass, *Can Roberts Steer Supreme Court Safely Through Abortion Crisis?*, CHRISTIAN SCI. MONITOR (May 24, 2022), https://www.csmonitor.com/USA/Justice/2022/0524/Can-Roberts-steer-Supreme-Court-safely-through-abortion-case-crisis [https://perma.cc/A2PU-4KAN] (quoting Roman Martinez).

88. *See* Nina Totenberg, *After the Leak, the Supreme Court Seethes with Resentment and Fear Behind the Scenes*, NPR (June 8, 2022), https://www.npr.org/2022/06/08/1103476028/after-the-leak-the-supreme-court-seethes-with-resentment-and-fear-behind-the-scenes [https://perma.cc/77NH-NSRQ] (describing the Court, a few weeks before the *Dobbs* decision was handed down, as "riven with distrust among the law clerks, staff and, most of all, the [J]ustices themselves"); John Fritze, *Justice Clarence Thomas Decries Washington as 'Hideous' and Pushes Back on 'Nastiness' of Critics*, CNN (May 10, 2024), https://www.cnn.com/2024/05/10/politics/clarence-thomas-pushes-back-critics/index.html [https://perma.cc/F6MP-G5PF] (noting that, during a speech at a judicial conference, Justice Thomas "appeared to lament a lack of trust within the Supreme Court" caused by the leak).

taking place.[89] Only a small amount of the Court's deliberative process consists of face-to-face communication,[90] and so members of the Court could have been concerned about creating written records that could leak.

D. Historical Examples of Pressure on the Court

I next discuss earlier examples of external pressure on the Court to set up a comparison to the pressure created by the *Dobbs* leak. External pressure on the Supreme Court is perhaps as old as the institution itself.

Outside pressure helped shape the Court's anticanonical decision in *Dred Scott v. Sandford*.[91] The Court teetered between resolving the case on broad grounds—by holding that Black people are barred from citizenship—or on narrow (albeit still brutal) ones—by holding that Dred Scott remained enslaved.[92] President James Buchanan wanted to put an end to the national slavery debate, but he had a problem: if only the five proslavery Justices from the South issued a broader ruling, the decision would be viewed as less authoritative.[93] Justice John Catron enlisted President Buchanan's help in persuading Buchanan's friend and fellow Pennsylvanian Robert Cooper Grier to join the broader decision; Catron "seemed to discern no ethical problem in soliciting a politician to intervene for the purpose of influencing the action of one of the justices in a case before the Court."[94] Buchanan "seemed equally indifferent to the ethics of the matter and readily complied."[95] He wrote to Justice Grier to request a sprawling decision "that moved beyond the particulars of Dred Scott's individual status into that of all black Americans—slave and free, North and South,"[96] which is what he received.

The Court also faced external pressure during the Franklin D. Roosevelt administration. In 1935, as the Justices considered whether Congress had the power to invalidate contracts that used gold as currency, the administration leaked a speech that hinted at possible defiance if the Court allowed such

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89. *See supra* note 87 and accompanying text.

90. *See* Cohen, *supra* note 4, at 953.

91. 60 U.S. (1 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amends. XIII–XV.

92. *See* KENNETH M. STAMPP, AMERICA IN 1857: A NATION ON THE BRINK 87–94 (1990).

93. *See id.* at 91; *see also* JEAN H. BAKER, JAMES BUCHANAN 86 (2004) ("Any ruling by five southern justices alone would have lacked the imprimatur of a national settlement."); DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 311 (1978).

94. STAMPP, *supra* note 92, at 91; *see also* FEHRENBACHER, *supra* note 93, at 311.

95. STAMPP, *supra* note 92, at 91.

96. BAKER, *supra* note 93, at 84.

contracts.[97] By the following year, it was well known that President Roosevelt was considering a plan to expand the Court.[98] Though it is unclear whether the Court was responding to those institutional concerns, it overturned precedent invalidating minimum wage laws and began upholding New Deal legislation in what has been called the "switch in time that saved the nine."[99]

The pressure was also high on the Court in *Sebelius*, which a legal commentator had called Chief Justice Roberts's "moment of truth" during deliberations.[100] After the Court's conference in *Sebelius*, President Obama said he is "confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress."[101] Senator Mitch McConnell and Representative Lamar Smith referred to President Obama's remarks as an attempt to intimidate the Court.[102]

Leaks from the Court indicated that Chief Justice Roberts's vote was "in flux."[103] Conservative media began a counter-attack—which itself resembled a pressure campaign—against what it viewed as an effort by liberals to apply improper influence.[104]

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97. *See* MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930–1941, at 147–48, 299 (2021).

98. *See id.* at 299.

99. *See id.* at 296–310 (laying out evidence for and against the thesis that the Court was responding to political pressure).

100. Jeffrey Rosen, *Second Opinions*, NEW REPUBLIC (May 4, 2012), https://newrepublic.com/article/103090/conservative-judges-justices-supreme-court-obama [https://perma.cc/P7WH-77B5].

101. Jan Crawford, *Obama Court Comments Create Stir*, CBS NEWS (Apr. 4, 2012), https://www.cbsnews.com/news/obama-court-comments-create-stir [https://perma.cc/D4EF-Y796].

102. *See* Donovan Slack, *McConnell Lambasts Obama for Supreme Court Comments*, POLITICO: POLITICO44 BLOG (Apr. 3, 2012), https://www.politico.com/blogs/politico44/2012/04/mcconnell-lambasts-obama-for-supreme-court-comments-119470 [https://perma.cc/YF84-HLU3]; *Republicans Slam Obama over Warning to 'Unelected' Supreme Court*, FOX NEWS (Apr. 3, 2012), https://www.foxnews.com/politics/republicans-slam-obama-over-warning-to-unelected-supreme-court [https://perma.cc/2PCN-BEVH].

103. *See* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 231 (2013); *see also* Kerr, *supra* note 81 and accompanying text (discussing how a *National Review* editor, citing sources at the Court, had revealed that Chief Justice Roberts had gone "wobbly" in *Sebelius*).

104. *See, e.g.*, *Pressuring the Chief*, NAT'L REV. (May 24, 2012), https://www.nationalreview.com/2012/05/pressuring-chief-editors [https://perma.cc/6XFX-5Z7E]; Opinion, *Targeting John Roberts*, WALL ST. J. (May 23, 2012), https://www.wsj.com/articles/SB10001424052702303610504577416710604278438; George F. Will, Opinion, *Liberals Put the Squeeze to Justice Roberts*, WASH. POST (May 25, 2012), https://www.washingtonpost.com/opinions/liberals-put-the-squeeze-to-justice-roberts/2012/05/

E. Distinguishing Factors

The pressure that I argue the Justices faced following the *Dobbs* leak likely differed in kind and degree from prior examples of pressure on the Court. It differed in kind because, in most prior examples, the pressure came from a different source: the political branches.[105] *Sebelius*, however, could be analogous to the deliberative interference in *Dobbs* because, in both cases, legacy pressure, movement pressure, and breach pressure might have been felt.[106] Any conservative movement pressure or breach pressure was presumably unsuccessful,[107] but if legacy pressure swayed Chief Justice Roberts to uphold the individual mandate (which some scholars doubt[108]), then *Sebelius* too is delegitimized in my view.[109]

But in the other cases I list, the Court faced political branch pressure, not legacy pressure. In *Dred Scott*, President Buchanan shaped the Court's decision.[110] The New Deal-era Court might have felt pressure to reach particular outcomes as a result of President Roosevelt's threatened defiance and court-packing plan.[111] And it is possible *Sebelius* was also impacted by

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25/gJQANa4hqU_story.html; *see also* BLACKMAN, *supra* note 103, at 230 (suggesting conservative media might have intended to sway Roberts).

105. I cannot conclude that legacy and movement pressures were not also at play in the examples I give, but if those pressures were applied, they were secondary to political branch pressure.

106. *See supra* Sections II.B, II.D; *see also supra* notes 102–04 and accompanying text; Crawford, *supra* note 82 (observing that, during *Sebelius* deliberations, there were "countless news articles . . . warning of damage to the court and to Roberts' reputation" if the Court struck down the individual mandate, and noting that Chief Justice Roberts "pays attention to media coverage" and "is keenly aware of his leadership role").

107. The decision was a blow to the conservative legal movement, and Chief Justice Roberts allegedly began considering a shift in position prior to the first *Sebelius* leaks. *See* Erwin Chemerinsky, Opinion, *Another Conservative Attack on Obamacare, Another Loss at the Supreme Court*, L.A. TIMES (June 17, 2021, 10:31 AM), https://www.latimes.com/opinion/story/2021-06-17/supreme-court-affordable-care-act-constitutional-obamacare-aca.

108. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2255 (2019) ("Personally, I am skeptical of the story that Chief Justice Roberts voted against conscience in *NFIB* (as apparently is Fallon).") (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

109. I note that, based on the various reporting on deliberations in *Dobbs* and *Sebelius*, it is much clearer that the pressure in *Dobbs* had an effect than it is that the pressure in *Sebelius* had an effect. *Compare* Crawford, *supra* note 82 ("It is not known why Roberts changed his view on the mandate and decided to uphold the law."), *with* Kantor & Liptak, *supra* note 3 (concluding that the leak's "clear" effect was to help "lock in the result"). Therefore, we should be far more skeptical of *Dobbs*'s legitimacy than *Sebelius*'s.

110. *See* FEHRENBACHER, *supra* note 93, at 312.

111. *See supra* note 99 and accompanying text; *see also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING

President Obama's statement that it would be "unprecedented" for the Court to declare the Affordable Care Act unconstitutional.[112]

The Justices might have felt political branch pressure in *Dobbs*. But it is not clear why the leak would have intensified that particular pressure, and it was the leak that led to the deliberative interference. And though political branch pressure is troubling, life tenure serves as a safeguard against it—at least in theory.[113]

The examples of pressure I gave also likely differ from that in *Dobbs* in degree. The conservative legal movement had devoted decades of resources to overturning *Roe*, and many commentators predicted that the Court's failure to do so would spell the death of the movement.[114] Considering several Justices were brought up in that movement,[115] those predictions likely packed a punch; one conservative commentator bluntly stated that he believes the stakes for the movement "absolutely weighed on the minds of Kavanaugh and others" in *Dobbs* since Kavanaugh owes his seat to the movement.[116]

The consequence for ignoring the pressure in the other cases would have been mild by comparison. In *Dred Scott*, Justice Grier would have disappointed President Buchanan by limiting his view of the case to Dred Scott's status alone.[117] So too would the New Deal-era Justices have disappointed President Roosevelt by continuing to strike down favored legislation, and they also might have had to cope with an expanded court.[118]

OF THE CONSTITUTION 229 (2009) ("To this day, scholars continue to fight over whether the Court 'switched' under pressure.").

112. *See supra* note 101 and accompanying text; *see also* Grove, *supra* note 108, at 2254 (referring to "a barrage of criticism declaring that a ruling against President Obama's signature legislation would destroy the Court's reputation").

113. *See infra* Section II.F.

114. *See supra* note 70 and accompanying text; *see also* Blackman, *supra* note 62, at 04:20 (showing Professor Josh Blackman state during a presentation to a Federalist Society chapter that "behind all of the conservative legal movement was a sort of single bull's eye, a target if you will, which was *Roe v. Wade* and the hope, the prayer, the dream was that one day *Roe* could be overruled").

115. *See supra* note 57 and accompanying text.

116. Blackman, *supra* note 62, at 16:07. If Professor Blackman is correct that Justices considered the stakes for the conservative legal movement during the *Dobbs* deliberations, that could be considered a separate instance of deliberative interference compromising the legitimacy of the Court's decision (although one could argue deliberative interference requires an identifiable external act, such as a leak).

117. *See* FEHRENBACHER, *supra* note 93, at 311–12.

118. *See generally* TUSHNET, *supra* note 97, at 147–48, 296–310 (detailing the pressure placed on the Court to uphold the constitutionality of the federal government's economic policy during the Great Depression).

But defecting in *Dobbs* would have apparently meant striking a match to a decades-long movement to which members of the Court belonged.[119]

F. Insufficiency of Life Tenure as a Safeguard

Though political branch pressure on the Court is not uncommon, the fact that the Justices have life tenure ostensibly stops that pressure from impacting the Court's work. Justice Barrett has said that life tenure "insulate[s] us from politics,"[120] and it is true that permanent appointments shield judges from removal at the whims of the political branches.[121] In fact, a desire to protect the judiciary from external forces was among the reasons why the Framers chose to permit judges to serve "during good Behaviour."[122]

But life tenure is inadequate to insulate the Court from legacy, movement, and breach pressures.[123] Unlike political branch pressure, those forms of

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119. *See* The Federalist Society, *Abortion,* Dobbs*, and The Future of the Conservative Legal Movement*, YOUTUBE, at 44:56 (Feb. 28, 2022), https://www.youtube.com/watch?v=F1u3l_WQpkA [https://perma.cc/6JNE-C2VG] (Professor Josh Blackman stating that Justices Kavanaugh and Barrett were "basically engineered in a Federalist Society petri dish, right, they were basically grown up in our camps"); *see also* Robertson, *supra* note 83, at 747 (arguing that social identities "foster a sense of kinship; people are more likely to be favorably disposed to people they recognize as sharing one or more social identities"); RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 184 (2016) (noting that personal and career experiences influence judicial behavior).

120. Josh Gerstein, *Sotomayor and Barrett Stress Supreme Court Camaraderie*, POLITICO (Feb. 23, 2024, 7:02 PM), https://www.politico.com/news/2024/02/23/sotomayor-barrett-supreme-court-camaraderie-00143045 [https://perma.cc/W8L9-FVN9].

121. *See* Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 888 (2011) (arguing that life tenure "promotes institutional independence because a high degree of security of tenure promotes the judiciary's autonomy to review and interpret the law"); *see also* Cohen, *supra* note 4, at 958 ("According to deliberative theorists, high courts' relative insulation from electoral politics may be precisely what leads them to being exemplary deliberative institutions."); Kevin Arlyck, *The Executive Branch and the Origins of Judicial Independence*, 1 J. AM. CONST. HIST. 343, 376–77 (2023) (noting that the text of the Constitution "made judges independent in their offices").

122. U.S. CONST. art. III, § 1; *see* THE FEDERALIST NO. 78, at 407 (Alexander Hamilton) (Gideon ed., 2001) ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [judges'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.").

123. *See* Kevin C. Milne, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting a Privilege for the Federal Judiciary*, 44 WASH. & LEE L. REV. 213, 232–33 (1987) (noting that, despite life tenure, "the prospect of an unfavorable public reaction to a judge's decision could influence a judge's ability to adjudicate impartially").

pressure are not applied by institutions that could potentially have removal power in the absence of life tenure.[124] Legacy pressure results from a judge's personal concern about how they will be perceived; its source is the jurists themselves.[125] Breach pressure comes from a Justice's worry that their deliberative statements or choices will be aired publicly. Movement pressure is exerted by networks which might have elected officials as members. But the networks themselves, such as the conservative legal movement, play no formal role in our constitutional system and therefore would not have removal power even in the absence of life tenure.

Because legacy and movement pressures—the forces I suggest might have led to the deliberative interference—are not directly exerted by the political branches, life tenure is powerless against them. When there is evidence of those pressures then, judicial decision-making is especially vulnerable to external influence.

III. INFLUENCE

A. The Problem of Deliberative Interference

Pressure alone is insufficient to conclude a judicial decision is illegitimate. If public pressure could delegitimize a decision, it would incentivize those anticipating an undesirable outcome to create the appearance of pressure during deliberations. For legitimacy to be threatened, the pressure must have had an effect; there must have been external influence on the Court. The external influence need not have occurred with the intent to influence deliberations, however.[126]

Apex courts are often thought of as "model deliberative institutions."[127] But when members of a deliberative body become unpersuadable, as appears to have occurred after the leak, deliberations are compromised.[128] This "lock-

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124. *See supra* notes 120–22 and accompanying text.

125. Elected officials could *try* to exert legacy pressure, but judges should be steeled against such attempts. To the extent that an elected official's attempt to apply legacy pressure succeeds, it is because the influenced judge is receptive to that pressure.

126. *See supra* Part I (discussing the irrelevancy of the leaker's motive to the legitimacy of *Dobbs*).

127. *See* Cohen, *supra* note 4, at 958 & n.19.

128. *See id.* at 957 ("Deliberation relies on people's capacity to be swayed by rational arguments.").

in effect" represents a systemic bias in judicial decision-making.[129] At the Supreme Court, the Justices' post-argument conference—at which an initial vote is taken—simply represents the beginning of the deliberative process.[130] From argument to decision, the Court's process is closed to the public, presumably to guard against deliberative interference.[131] Confidentiality has historically been a part of the Court's culture; the public does not typically learn any information about a case during the period between oral argument and decision announcement.[132]

B. Deliberative Interference in Dobbs

Regardless of the precise mechanism through which the leak influenced the Court's deliberations,[133] the point is that it did.[134] Leading Supreme Court correspondents have concluded that the leak locked in the *Dobbs* majority.[135]

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129. *See* Kevin J. Lynch, *The Lock-in Effect of Preliminary Injunctions*, 66 FLA. L. REV. 779, 792–94 (2014); *see also* Robertson, *supra* note 83, at 759 (noting that "judges are human—and therefore susceptible to the same unconscious biases that afflict us all").

130. *See* BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 178–79 (1997) (citing studies concluding that vote switches occur in over half of Supreme Court cases); Gerstein & Ward, *supra* note 15 ("Deliberations on controversial cases have in the past been fluid. Justices can and sometimes do change their votes as draft opinions circulate and major decisions can be subject to multiple drafts and vote-trading, sometimes until just days before a decision is unveiled.").

131. *See* SCHWARTZ, *supra* note 130, at 57; *see also* Milne, *supra* note 123, at 232 (noting that confidential deliberations are important because "a judge may refuse to change an opinion during subsequent deliberations once the judge's position becomes known to the public"); *cf.* United States v. Olano, 507 U.S. 725, 737–38 (1993) (noting that "the primary if not exclusive purpose of jury privacy and secrecy is to protect the jury's deliberations from improper influence").

132. *See* Milne, *supra* note 123, at 231–32.

133. *See supra* Part II.

134. If the leak had a lock-in effect not because of legacy, movement, or breach pressure but because Justices worried that a post-leak vote switch would make it seem as if they were influenced by public pressure from the leak, some might argue the external influence does not affect legitimacy. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1139–51 (1995) (arguing it is proper for the Court to take public perception into account when deciding a case); Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 378 (2020) (endorsing the view that "it can be legally legitimate for the Justices to consider the Court's sociological legitimacy in their decision making and perhaps even to decide cases based on sociological legitimacy concerns"). *But see* Grove, *supra* note 108, at 2260 ("Indeed, there are indications that, in our legal culture, 'impact on the Court' may not be an acceptable factor in legal analysis at all . . . .").

135. *See supra* note 3 and accompanying text. *But see* Kerr, *supra* note 30 (arguing it "seems implausible" that the leak locked in the majority because four other Justices signed on to Justice Alito's opinion within days of its circulation).

Before the leak, Chief Justice Roberts and Justice Breyer attempted to convince Justices Kavanaugh and Barrett to preserve some constitutional right to abortion, according to anonymously sourced reports.[136] Cross-ideological coalition-building is crucial to Chief Justice Roberts's stated effort to maintain the Court's institutional legitimacy.[137] This particular attempt "raised fears among conservatives and hope among liberals that the chief could change the outcome."[138] The leak made his effort "all but impossible."[139] Chief Justice Roberts and Justice Breyer therefore did not have a full opportunity to persuade their colleagues, which jeopardizes their status as equal participants in the deliberative process.[140]

In 2006, one commentator observed that "there has not been a single instance in the history of the United States in which the press's publication of a 'legitimate but newsworthy' government secret has gravely harmed the national interest."[141] That statement might have been true when made, but it is not true today. The public has an interest in unobstructed judicial deliberation, especially on matters of great importance like the existence of a constitutional right to abortion.[142] The *Dobbs* leak damaged that interest.

I do not argue that *Dobbs* would have been resolved differently had there not been a leak. One Court correspondent wrote that it "appears unlikely" that Justice Kavanaugh "was ever close to switching his earlier vote."[143] And commentators have observed that the Justices ultimately acted consistent with their judicial philosophies.[144] But the public was deprived of the opportunity to know how the Court would have resolved the case if it had

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136. *See* Joan Biskupic, *The Inside Story of How John Roberts Failed to Save Abortion Rights*, CNN (July 26, 2022, 7:53 AM), https://www.cnn.com/2022/07/26/politics/supreme-court-john-roberts-abortion-dobbs/index.html [https://perma.cc/A7Z2-324P]; *see also* Kantor & Liptak, *supra* note 3.

137. *See* Donnelly, *supra* note 74, at 1507.

138. Biskupic, *supra* note 136.

139. *Id.*

140. *See* Cohen, *supra* note 4, at 957.

141. Geoffrey R. Stone, *The Lessons of History*, A.B.A. NAT'L SEC. L. REP., Sept. 2006, at 1, 3; *see also* Sandra Coliver, Commentary, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 20 HUM. RTS. Q. 12, 66 (1998) ("[T]here have been few instances anywhere in the world in recent memory where information disclosed by a government servant damaged a vital state interest.").

142. Others might disagree. *See* Nikhil Menezes & David E. Pozen, *Looking for the Public in Public Law*, 92 U. CHI. L. REV. (forthcoming 2025) (noting the inherent difficulty in identifying what is in the public's interest).

143. *See* Biskupic, *supra* note 136.

144. *See* Advisory Opinions, *supra* note 70, at 28:30. *But see* DIAS & LERER, *supra* note 50, at 214–15 (noting some doubt in the antiabortion movement about Justice Kavanaugh's abortion views prior to his nomination).

engaged in unfettered deliberation.[145] We are instead left to rely on an investigative reporter's conclusion that it "appears unlikely" that, even if not for the leak, there would be a constitutional right to abortion today.[146] Once we learn that external pressure affected deliberations, we must ask whether the Court has acted legitimately.

IV. LEGITIMACY

I turn now to the impact of deliberative influence on legitimacy.[147] As Mathilde Cohen has observed, because unelected judges cannot base their legitimacy on electoral support, they must instead persuade the public that their decisions are the product of reasoned deliberation.[148]

Richard Fallon has divided legitimacy into three concepts: sociological legitimacy, moral legitimacy, and legal legitimacy.[149] Though I analyze the deliberative interference in *Dobbs* under each of these frameworks, my primary focus is on the opinion's legal legitimacy.

A. Sociological Legitimacy

Sociological legitimacy in the legal context refers to the belief that formal legal authorities deserve to be respected and obeyed.[150] It "depends wholly on facts about what people think, not an independent moral appraisal of how people ought to think."[151] Neutrality by decision-makers is a key component of the legal system's sociological legitimacy.[152]

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145. *See* NBC NEWS, *supra* note 25, at 42:21 (noting Justice Breyer's belief that compromise is always possible "until the last minute").

146. *See* Biskupic, *supra* note 136.

147. One scholar has concluded that the leak did not affect deliberations and does not impact *Dobbs*'s legitimacy. *See* Elizabeth Yoder, *The* Dobbs *Leak as an Illustration of the Impasse Between Legal Ethics and Reality*, 36 GEO. J. LEGAL ETHICS 881, 886–92 (2023). I respectfully disagree on both points. Leading Supreme Court correspondents have concluded that deliberations were affected. *See supra* note 3 and accompanying text. *But see* Kerr, *supra* note 30 (arguing that, because four other justices signed on to Justice Alito's draft decision within days of its circulation, "the theory that the leak was designed to 'lock in' the majority, or that it had that effect, seems implausible"). And, as I explain in this Part, the deliberative interference delegitimizes the decision.

148. Cohen, *supra* note 4, at 958–59; *see also* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992) (noting that the Court "lacks an electoral connection to provide legitimacy").

149. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

150. *Id.* at 22.

151. *Id.* at 23.

152. *See* Kwoka, *supra* note 31, at 1422.

I do not argue against *Dobbs*'s sociological legitimacy, which is an empirical question. In May 2023, 61% of Americans believed overturning *Roe* was a "bad thing,"[153] but that hardly means that group believes *Dobbs* should not be followed.[154] Given that political actors have mobilized to try to restore *Roe*[155] or constitutionalize the right to abortion at the state level,[156] it seems likely that *Dobbs* has achieved sociological legitimacy.[157]

B. Moral Legitimacy

Moral legitimacy asks whether, "morally speaking," people should respect or endeavor to obey the law.[158] The concept of moral legitimacy is further subdivided into ideal theories and minimal theories.[159] Under an ideal theory, the question is whether conditions are "perfectly just," a target that no government has reached.[160] A minimal theory tests whether conditions are "sufficiently just"—in other words, "short of ideal" but "nevertheless good enough to deserve respect or obedience."[161]

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153. Lydia Saad, *Broader Support for Abortion Rights Continues Post*-Dobbs, GALLUP (June 14, 2023), https://news.gallup.com/poll/506759/broader-support-abortion-rights-continues-post-dobbs.aspx [https://perma.cc/5GAL-MGGN].

154. *See* FALLON, *supra* note 149, at 41 (noting that "a charge of legal illegitimacy need not, though in some cases it might, imply that a Supreme Court decision has no legal claim to obedience").

155. Statement from President Joe Biden on the Anniversary of Dobbs v. Jackson Women's Health Organization (June 24, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/24/statement-from-president-biden-on-the-anniversary-of-dobbs-v-jackson-womens-health-organization [https://perma.cc/HC68-G8XP] ("My administration will continue to protect access to reproductive health care and call on Congress to restore the protections of *Roe v. Wade* in federal law once and for all.").

156. Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, ASSOCIATED PRESS (Nov. 7, 2023, 9:31 PM), https://apnews.com/article/ohio-abortion-amendment-election-2023-fe3e06747b616507d8ca21ea26485270 [https://perma.cc/J2EF-YB95].

157. *See* Carrington & Strother, *supra* note 12, at 692 (concluding public opinion of the Court's legitimacy is unaffected by leaks); *see also* Jeffery J. Mondak, *Institutional Legitimacy and Procedural Justice: Reexamining the Question of Causality*, 27 LAW & SOC'Y REV. 599, 607 (1993) (finding that "variance in perceptions of procedural justice does not produce variance in perceptions of institutional legitimacy").

158. FALLON, *supra* note 149, at 23.

159. *Id.* at 24.

160. *Id.* at 24–28; *see also* POSNER, *supra* note 119, at 74–75 (noting that the federal judiciary has serious flaws "like every human institution, including almost every government instrumentality").

161. FALLON, *supra* note 149, at 24, 28.

These concepts can be applied to the idea of deliberative interference.[162] Ideal legitimacy in this regard might involve the sequestration of judges during the pendency of a case to prevent them from learning prejudicial information.[163] In that extreme example, the Justices would not have learned that their votes in *Dobbs* had been made public, and therefore there could not have been deliberative interference.

Turning to minimal legitimacy, one could argue that a system in which Justices are permitted to interpret the Constitution after experiencing deliberative interference is insufficiently just. I restrict my argument against *Dobbs*'s legitimacy to its legal legitimacy, but it is worth asking whether a judiciary that tolerates deliberative interference is minimally legitimate.[164]

C. Legal Legitimacy

I turn next to the branch of legitimacy upon which I base my argument: legal legitimacy. In assessing whether a Supreme Court decision is legitimate, "we are concerned with whether the Justices' decisions accord with or are permissible under constitutional and legal norms."[165] In other words, the question is not whether the public endorses a particular Court action (sociological legitimacy) or whether that action should be permissible (moral legitimacy), but rather whether it *is* permissible.

Professor Fallon suggests that judicial decisions are delegitimized if a Court "decided a case or issue that it had no lawful power to decide" or "rested its decision on considerations that it had no lawful authority to take into account."[166] Deliberative interference implicates both of these delegitimizing factors, as I will explain.

I begin by discussing positive law that is offended by deliberative interference.[167] I then examine three principles of judicial decision-making—

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162. *See id.* at 29 ("Fair procedures for judicial and quasi-judicial decision making can also contribute to a regime's moral legitimacy in the minimal or relative sense.").

163. *See, e.g.*, Milne, *supra* note 123, at 232.

164. *See* Arthur S. Miller & D. S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 BUFF. L. REV. 799, 819–20 (1973) ("Does the moral force of a judgment weaken if the Justices venture beyond the materials presented by the parties, explore critical social problems and prescribe solutions, while pretending merely to decide 'cases' or 'controversies?'").

165. FALLON, *supra* note 149, at 35.

166. *Id.* at 40; *see also* Charles Barzun, *Impeaching Precedent*, 80 U. CHI. L. REV. 1625, 1644 (2013) (arguing that, to discredit cases on the grounds that they were decided due to improper influence, a distinction must be drawn between "considerations judges *properly* rely on when deciding cases and those they rely on *im*properly").

167. *See infra* Section IV.C.1.

candor, law-based reasoning, and good faith—that are implicated by *Dobbs*.[168] Finally, I consider counterarguments to my argument against *Dobbs*'s legitimacy.[169]

1. Positive Law

The Court's decision in *Dobbs* violates two binding sources of law, compromising the legitimacy of the decision: 28 U.S.C. § 455—a federal recusal statute—and the Court's later enacted ethics code.[170]

a. Section 455

Federal law requires a Justice to recuse "in any proceeding in which his impartiality might reasonably be questioned."[171] If a Justice decides a case despite a statutory requirement to recuse, they have acted without lawful power, and the resulting decision is illegitimate.[172]

"Impartiality" has been defined to mean "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."[173]

Section 455 does not limit its application to certain stages of a case.[174] Even if a Justice acts impartially in casting their initial vote, their neutrality could be compromised later on, as I argue occurred in *Dobbs*.[175] Once their votes were public, Justices Barrett and Kavanaugh, whom Chief Justice Roberts had been engaging, no longer maintained an open mind;[176] therefore,

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168. *See infra* Section IV.C.2; *see also* Grove, *supra* note 108, at 2247 n.30 (referring to good faith and judicial candor as matters of legal legitimacy and noting they are "often treated as important . . . elements of legal decisionmaking").

169. *See infra* Section IV.D.

170. Many have observed that the Justices' Code of Conduct lacks an enforcement mechanism. *See, e.g.*, JOANNA R. LAMPE, CONG. RSCH. SERV., LSB11078, THE SUPREME COURT ADOPTS A CODE OF CONDUCT 3 (2023). That does not mean that the Code is non-binding (though, as I discuss *infra*, it is fair to debate the impact of a subsequently enacted ethics code on a judicial decision).

171. 28 U.S.C. § 455(a). For a judge to be disqualified, the impartiality must originate from an "extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

172. *See supra* note 166 and accompanying text.

173. *See* MODEL CODE OF JUD. CONDUCT (AM. BAR ASS'N 2011).

174. *See* § 455(d)(1).

175. *See infra* notes 202–08 and accompanying text.

176. *See supra* notes 135–40 and accompanying text.

they were required to recuse. The deliberative interference prejudiced them against a vote switch—to the benefit of the State of Mississippi and to the detriment of the Jackson Women's Health Center.[177] And because the deliberative interference did not come to light until after *Dobbs* was decided, the clinic was deprived of the opportunity to at least consider whether to seek recusal by one or more Justices.[178]

Analogizing to the rehearing context nicely illustrates the impartiality problem of a leak leading to a lock-in effect. The Court can decide to rehear a case after a decision on the merits.[179] After deciding a case on the merits, the Justices' votes are, of course, public knowledge. If the public nature of a Justice's vote led that Justice to dig in their heels and refuse to consider any possible alternative outcomes, that Justice cannot be an impartial participant in the process of deciding whether to rehear a case or, if the case is reheard, how to resolve it. Throughout the deliberative process, and if necessary on rehearing, a Justice must not let their initial positions bias their decision-making.

Preliminary injunctions are another example.[180] To obtain a preliminary injunction, a party must argue that it is likely to succeed on the merits of its claim.[181] Judges therefore must attempt to decide how the case will turn out before it has fully developed.[182] Their decision is made public, at which time they are subject to internal and external pressures to justify their earlier decision.[183] One scholar predicts that those pressures may cause judges to rely on their earlier decision when it comes time to decide the case on a full record.[184] If that is proven to be true, those judges are no longer impartial after their initial decision is made public.[185]

A judge who cannot continue to deliberate with an open mind after their initial vote is made public is no longer impartial, and thus must be recused under § 455. Such a rule, if widely followed, might incentivize undesirable leaks.[186] That problem must be addressed, perhaps through bolstered court

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177. *See supra* notes 135–40 and accompanying text.

178. *See* SCHWARTZ, *supra* note 130, at 39–40 (discussing the Court's recusal procedure).

179. *See* SUP. CT. R. 44; *see also infra* Section V.B.4 (discussing rehearing as a potential solution to the problem of a delegitimized judicial decision).

180. *See* Lynch, *supra* note 129, at 779.

181. *See id.* at 796–800 (discussing courts' evaluation of this factor).

182. *Id.* at 800.

183. *Id.* at 781.

184. *See id.* at 809.

185. *See id.* at 813 (referring to the lock-in effect as a cognitive bias affecting judicial decision-making).

186. *See supra* note 38 and accompanying text.

security protocols[187] or clearer consequences for leakers. But we should insist on strict neutrality from the judiciary even though bad actors could attempt to manufacture partiality.

b. Code of Conduct for Justices of the Supreme Court of the United States

Dobbs's legitimacy is also threatened because the decision likely contravenes the Code of Conduct for Justices of the Supreme Court of the United States, which puts certain considerations outside the bounds of permissible deliberation.

Canon 3(A) of the Code states: "A Justice should not be swayed by partisan interests, public clamor, or fear of criticism."[188] Because the leak led to deliberative interference, one or more Justices appear to have been swayed by public clamor.[189] And if movement pressure contributed to the deliberative interference, one or more Justices also violated Canon 2(B): "A Justice should not allow . . . social, political, . . . or other relationships to influence official conduct or judgment."[190]

Though the Code was promulgated after *Dobbs* was decided, perhaps a decision reached in violation of a subsequently enacted Code is not legally legitimate or entitled to precedential effect.[191] And even though *Dobbs* predates promulgation, the Court has said the Code "largely represents a codification of principles that we have long regarded as governing our conduct."[192]

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187. *See* OFF. OF THE MARSHAL, *supra* note 6, at 18 ("If [the leaker] was a Court employee, or someone who had access to an employee's home, that person was able to act with impunity because of inadequate security with respect to the movement of hard copy documents from the Court to home, the absence of mechanisms to track print jobs on Court printers and copiers, and other gaps in security or policies."); *see also* Pozen, *supra* note 6, at 589 (noting that, in the Executive Branch, "components that handle classified material . . . employ a wide range of information security technologies and protocols"). Of course, even had Court security been adequate in those regards, it would not have stopped a verbal leak (as opposed to a document leak), which itself could cause deliberative interference.

188. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(A) (U.S. SUP. CT. 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/LY3J-Z4CY].

189. *See supra* Section III.B.

190. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 2(B).

191. *See infra* Section V.B.1.

192. STATEMENT OF THE CT. REGARDING THE CODE OF CONDUCT (U.S. SUP. CT. 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/LY3J-Z4CY].

Commentators have observed that the Code lacks an enforcement mechanism,[193] but unenforceability does not mean a decision issued in violation of the Code is legitimate.

2. Principles of Judicial Decision-Making

I next consider whether the Justices' conduct during the *Dobbs* deliberations comports with three key components of legitimate judicial decision-making: candor, deciding cases based on law, and good faith.

a. Judicial Candor

Judicial candor has been described as a "legal obligation," one that is "rooted in the nature of the judicial role within the American legal system."[194] Like the concept of moral legitimacy,[195] judicial candor has minimal and ideal dimensions.[196] The deliberative interference in *Dobbs* implicates subjective candor (which concerns itself with judges' mental states), rather than objective candor (which concerns itself with whether a judge's legal premises support a decision).[197]

Because of the coercive power wielded by judges, they should ideally disclose the entire reasoning chains that lead them to their decisions.[198] Only when they do that can the public evaluate whether the judges have legitimately exercised their power.[199] The Court clearly fell short of ideal candor in *Dobbs* by failing to disclose the deliberative interference.

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193. *See supra* note 170.

194. Fallon, *supra* note 28, at 2311; *see also* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 2–3 (2012) (discussing obligation of judicial candor); Miller & Sastri, *supra* note 164, at 822–23 (calling for greater transparency by the Court about its decision-making process).

195. *See supra* Section IV.B; *see also* Fallon, *supra* note 28, at 2290–91 (equating the minimal and ideal measures of judicial candor with those of morality).

196. *See* Fallon, *supra* note 28, at 2269.

197. *Id.* at 2275 (distinguishing between subjective and objective candor).

198. *Id.* at 2306; *see also* Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 2–3 (1979) (noting "general agreement" that "candor should accompany any effort by the Court to abandon or cut down its earlier pronouncements"); POSNER, *supra* note 119, at 294 (arguing judges must "balance the public interest in candor on the part of public officials against competing interests").

199. Fallon, *supra* note 28, at 2306–07; *see also* SCHOENFELD, *supra* note 86, at 57 (noting, as an "elementary proposition of democratic theory," that legitimate power requires "the *informed* consent of the governed"); Cohen, *supra* note 4, at 961 ("[H]igh court judges' reason giving is deemed to be fundamental to the political and moral legitimacy of a democracy."). Fallon has noted that "requiring maximal disclosure of thoughts that judges entertained but put aside as

But Justice Kavanaugh might have fallen short of even minimal candor. Arguably, a judge's obligation of candor requires them to, among other things, refrain from intentionally misleading their audience and refrain from statements that they know are likely to mislead their audience.[200] It may also mandate judges to only make arguments they believe to be valid when they write separately.[201] Kavanaugh, one of the Justices whom Chief Justice Roberts had been engaging prior to the leak,[202] wrote in a solo concurrence that, in overturning *Roe*, the Court adhered to the principle of "judicial neutrality."[203] But Kavanaugh was not neutral after the leak; his decision to join the majority was frozen in place, meaning he no longer viewed the case with an open mind.[204] He could not have experienced lock-in effect as the result of the leak (as reports suggested[205]) and still believed that he was adhering to strict principles of judicial neutrality. His appeal to neutrality appears misleading and potentially false, compromising its legitimacy.[206] Kavanaugh likely would not have violated principles of judicial candor had

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legally and morally irrelevant could encourage judges to report musings or attitudes that would needlessly undermine public confidence in the fair administration of justice." *See* Fallon, *supra* note 28, at 2307. In other words, perhaps the public would lose faith in the judiciary if the deliberative interference had been disclosed in the decision. I have two responses. First, the fact that the leak had a lock-in effect suggests that the deliberative interference was not disregarded as morally irrelevant. Second, public confidence in the judicial system is more significantly undermined when, as here, there is a failure to disclose by justices followed by public disclosure in the media.

200. *See* Fallon, *supra* note 28, at 2292–93.

201. *See id.*

202. *See supra* note 136 and accompanying text.

203. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 347 (2022) (Kavanaugh, J., concurring). The invocation of neutrality in *Dobbs* is the culmination of "decades-long work of conservative movements linking neutrality to a history-and-tradition test—and suggesting that the Court had damaged its legitimacy by straying from this path" in cases such as *Roe*. Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 184 (2023).

204. *See supra* note 139 and accompanying text; *see also supra* note 171 and accompanying text (discussing impartiality requirement in the recusal context).

205. *See* Kantor & Liptak, *supra* note 3; *see also supra* notes 135–40 and accompanying text.

206. *See* Fallon, *supra* note 28, at 2293; *see also* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 32 (1984) ("It is understandable that the more controversial and politicized the decision, the more a court will want to appear above controversy. Such false appeals to neutrality are, nonetheless, illegitimate."); Ziegler, *supra* note 203, at 190 ("As in the case of *Dobbs*, justifying a method as neutral may legitimize deeply unpopular or revolutionary results, and framing a method as neutral may disguise the political origins or resonance of an opinion.").

he refrained from writing separately.[207] But because he did and suggested that the Court had been "scrupulously neutral," when in fact it was not neutral after the leak, he arguably breached his candor obligation.[208]

The revelations of deliberative interference also raise questions regarding the candor displayed by Chief Justice Roberts during *Dobbs*. The day after *Politico* published the draft opinion, Roberts promised the public that the leak would not impact the "integrity" of the Court's operations and that the "work of the Court will not be affected in any way."[209] But we now know that did not turn out to be true,[210] and Roberts never modified his public-facing comment or acknowledged the deliberative interference in any way. To the extent his statement was forward-looking—that is, a promise that the integrity of the Court's work would not be impacted from the time of the leak until publication—it appears not to have been true.[211]

In sum, *Dobbs* does not meet the ideal standard for judicial candor because it leaves unmentioned the deliberative interference.[212] It might also fail minimal candor requirements, both because of Justice Kavanaugh's assertion that the Court acted neutrally—a view that Kavanaugh likely could have recognized as misleading, given the leak's lock-in effect—and because of Chief Justice Roberts's failed promise that the leak would not impact the Court's work.

b. Law-Based Decision-Making

The leak's impact on the deliberation process raises questions regarding the Justices' adherence to the norm of law-based decision-making—a critical component of American legal culture and a supposed constraint on

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207. *See* Fallon, *supra* note 28, at 2295 ("Minimal requirements of judicial candor may be slightly looser for a judge who joins a majority opinion that another judge has authored than for a judge who writes an opinion of her own . . . .").

208. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 338 (2022) (Kavanaugh, J., concurring).

209. *See supra* note 19 and accompanying text.

210. *See supra* notes 135–40 and accompanying text.

211. One scholar suggested that Chief Justice Roberts might have been indicating that no votes would change following the leak. *See* William J. Aceves, *Critical Constitutional Law and the Alito Palimpsest*, 27 U. PA. J. CONST. L. (forthcoming 2025) (manuscript at 45 n.277). If that is the correct interpretation, then there was no absence of candor from Chief Justice Roberts.

212. Posner has argued that judges should acknowledge their "priors" when they decide cases. *See* POSNER, *supra* note 119, at 185. Perhaps one such prior is how a leak shaped their decision-making.

ideological judging.[213] The fact that the leak had a lock-in effect suggests that Justices in the majority were not guided solely by the law in reaching their decision. Even more flexible models of judicial decision-making, which allow for more than rigid application of legal principles, do not permit judges to cease deliberating simply because their vote is suddenly public. For instance, the attitudinal model, developed by legal realists, acknowledges that Justices' attitudes and values shape their decisions.[214] But those are beliefs that are formed prior to the Court's acceptance of a case, not influenced by external pressures during deliberations.[215]

The jury context has its own constraints on permissible decision-making. In a civil or criminal trial, jurors are required to decide solely on the evidence, free from outside influence.[216] To determine whether a new trial is required, courts analyze the nature of the information that reached the jury, as well as the information's likely effect on an average jury.[217] Those same factors can be applied to the question of whether judges have engaged in law-based decision-making. Applying them here, a scholar noted long before *Dobbs* that publicity of a judge's preliminary vote could lead to a lock-in effect.[218] More specific to *Dobbs*, commentators have observed that the leak likely put intense pressure on the Justices to maintain their early vote.[219]

c. Good Faith

Fallon suggests that "legitimacy in Supreme Court decision making requires good faith in argumentation," which he defines as a Justice's consistency with their "actual substantive and methodological beliefs."[220] We cannot completely assess whether the Justices were consistent with their beliefs in *Dobbs* because of the deliberative interference; Justices Kavanaugh or Barrett might have identified more with Chief Justice Roberts's

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213. *See* DEVINS & BAUM, *supra* note 55, at 56, 157; *see also* Wendy L. Martinek, *Judges as Members of Small Groups*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 73, 77 (David E. Klein & Gregory Mitchell eds., 2010) (noting that because this norm is "woven tightly into the fabric of legal education and the legal profession," judges "come to the bench already well inculcated with this norm"); Robertson, *supra* note 83, at 759.

214. *See* Martinek, *supra* note 213, at 76.

215. *See, e.g.*, *supra* note 55–58 and accompanying text.

216. *See* Manley v. AmBase Corp., 337 F.3d 237, 251 (2d Cir. 2003) (citing United States v. Olano, 507 U.S. 725, 738 (1993)).

217. *Id.* at 252 (citing United States v. Schwarz, 283 F.3d 76, 99 (2d Cir. 2002)).

218. Milne, *supra* note 123, at 232.

219. *See supra* notes 71–72 and accompanying text.

220. FALLON, *supra* note 149, at 130, 152.

concurrence,[221] but we were deprived of the opportunity to find out. A presumption of good faith might typically apply to the Justices,[222] but the revelations of deliberative interference disturb that presumption.

D. Counterarguments

Next, I consider a number of counterarguments against my claim that the deliberative interference in *Dobbs* delegitimizes the decision. They can be divided into two groups: knowledge gap counterarguments, which emphasize lingering unknowns, and excuse counterarguments, which assume deliberative interference but present reasons why we might nevertheless overlook it.

1. Knowledge Gap Counterarguments

One could argue that legitimacy cannot be affected unless the precise mechanism through which the leak impacted deliberations can be established. I have not here attempted to specify exactly *why* the leak interfered with the Court's work in *Dobbs*, although I have presented theories which I view as plausible.[223] The sources of pressure I present are not equally nefarious. The application of movement pressure would mean a group with an interest in the case's outcome attempted to influence it through extrajudicial means—a devastating, though very real, possibility for our legal system.[224] But the application of breach pressure would simply mean the Justices were worried about additional leaks,[225] which is not inherently problematic.

Ultimately, I view the exact pressure mechanism in much the same way as I view the leaker's identity and motive: interesting but irrelevant to legitimacy. I have argued that the deliberative interference impacts legitimacy because, among other reasons, certain Justices no longer viewed the case with an open mind (violating federal recusal law) and because the leak was a source of public clamor that held sway over them (violating the Code of Conduct for Justices of the Supreme Court of the United States).[226]

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221. *But see supra* note 144 and accompanying text (noting that the Justices acted consistently with their existing judicial philosophies).

222. *See* FALLON, *supra* note 149, at 148 (espousing a theory that "invites us to view our coparticipants in constitutional argument as proceeding in good faith").

223. *See supra* Part II (analyzing movement, legacy, and breach pressures).

224. *See supra* notes 68–69 and accompanying text (discussing efforts to influence the justices in *Dobbs*, even after oral argument).

225. *See, e.g.*, *supra* note 88.

226. *See supra* Section IV.C.1.

These reasons for delegitimization pertain to how the justices reacted in response to the leak, not why they reacted the way they did. Even if the leak led to deliberative interference because the Justices feared that a subsequent vote switch would make it appear as if they switched due to the leak, they still ceased viewing the case with an open mind and were swayed by public clamor.[227] We can wonder about the form of pressure the leak exerted on the Justices, but we cannot reserve judgment on legitimacy simply because we are unsure.

Another counterargument could be that it is unclear whether Justices Kavanaugh and Barrett were conscious of the fact that they were experiencing lock-in effect.[228] If Justice Kavanaugh was unaware that the leak caused him to entrench in his initial vote, then he did not violate his obligation of candor when he insisted that the Court had acted neutrally.[229] But the test for recusal is not based on whether a judge is aware of their biases.[230] Instead, it is whether their "impartiality might reasonably be questioned."[231] Regardless of self-awareness, the circumstances surrounding the leak could reasonably lead to questions about the Justices' impartiality, thus necessitating recusal. One or both Justices could deny that the leak locked in their vote but, at least in the jury context, courts disregard jurors' reports regarding whether outside influence affected their decision-making.[232]

As another counterargument, some might question the wisdom of concluding a decision is illegitimate on the basis of reports by media (albeit established and well-sourced media).[233] I reiterate that I have assumed the truth of these reports for purposes of this Article.[234] If Congress or another institution initiated formal remedial proceedings because of the deliberative interference in *Dobbs*,[235] it could and should insist on more probative evidence, such as sworn statements and documents from Court employees

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227. *But see* Hellman, *supra* note 134, at 1139–51 (arguing that theories of adjudication permitting courts "to take appearance concerns into account are superior to those that do not").

228. *See* Lynch, *supra* note 129, at 785 (noting that lock-in effect can be subconscious).

229. *See supra* Section IV.C.2.a.

230. *See* Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 859 (1988) ("The judge's lack of knowledge of a disqualifying circumstance . . . does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons." (quoting 28 U.S.C. § 455(a))).

231. 28 U.S.C. § 455(a).

232. *See, e.g.*, Bibbins v. Dalsheim, 21 F.3d 13, 17 (2d Cir. 1994).

233. *See* Mark Fenster, *Disclosure's Effects: WikiLeaks and Transparency*, 97 IOWA L. REV. 753, 806 (2012) (referring to the "claim that disclosure harms internal deliberations" as "subjective, and unprovable"). Professor Orin Kerr has speculated that Justice Breyer was likely a source for the *New York Times* report that concluded the leak's effect was to help solidify the vote. *See* Kerr, *supra* note 30.

234. *See supra* note 7 and accompanying text.

235. *See infra* Section V.B.2 (discussing the Supreme Court Review Act).

regarding how the leak impacted deliberations.[236] Though some courts have recognized a privilege pertaining to judicial deliberations, part of its purpose is to protect judges' reasoning from external influences.[237] The privilege would therefore yield because the information would be needed to determine whether a judicial decision is tainted by deliberative interference.[238]

2. Excuse Counterarguments

One excuse counterargument pertains to the timing of the leak. Because Justices Kavanaugh and Barrett had already signed on to Justice Alito's draft opinion when the leak occurred,[239] maybe *Dobbs* is legitimate despite subsequent deliberative interference.[240] But this counterargument fails for four reasons. First, it does not undercut my assertion that Justices were impacted by bias after the leak because, as I have discussed, impartiality is required throughout an entire proceeding.[241] Second, this argument ignores the existence of vote switches, a common occurrence at the Court.[242] In discussing the leak, Justice Breyer said he generally believes compromise is possible "until the last minute."[243] Third, it strips members of the Court of their ability to persuade their colleagues, a critical component of group judicial decision-making.[244] At the time four Justices endorsed Justice Alito's

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236. *But see supra* note 232 and accompanying text (suggesting that self-reports of how outside influence affected decision-making may be unreliable). I note that *New York Times* reporters reviewed "internal documents" and "contemporaneous notes" and interviewed "more than a dozen people from the court" in reaching their conclusion that the leak locked in *Dobbs*'s result. *See* Kantor and Liptak, *supra* note 3.

237. *See In re* Certain Complaints Under Investigation by an Investigating Comm., 783 F.2d 1488, 1520 (11th Cir. 1986).

238. *See id.* at 1525 (holding that subpoenas seeking testimony about judge's communications are enforceable because need for testimony outweighed judge's asserted interest in non-disclosure).

239. *See supra* note 15 and accompanying text; *see also* Whelan, *supra* note 29 ("Why, after joining the Alito draft, would they have had any reason to reconsider?").

240. *See* Kerr, *supra* note 30 (arguing that it is implausible that the leak locked in the majority because four other justices had signed on to Justice Alito's draft decision within days of its circulation).

241. *See supra* Section IV.C.1.a.

242. *See* SCHWARTZ, *supra* note 130, at 179.

243. *See* NBC NEWS, *supra* note 25, at 42:27.

244. *See supra* note 140 and accompanying text; *see also* DEVINS & BAUM, *supra* note 55, at 53 ("Judges on an appellate court have no choice but to 'interact on a regular basis,' and opinion writing is often the 'product of an intensive and iterative process among the judges.'" (quoting Martinek, *supra* note 213, at 74–75 (discussing the importance of the equal opportunity to be heard in deliberations))). In fact, scholars have tied the opportunity to persuade to legitimacy. *See*

majority opinion, no other opinions had been circulated; no other Justice had yet attempted to persuade their colleagues to join their position.[245] Finally, it misunderstands the purpose of judicial deliberations. When the Supreme Court decides a case, it should not function like a group of voters, simply expressing individual preferences with no opportunity for revision.[246] Rather, Justices are part of a deliberative process during which individuals can be expected to change their views.[247] The timing counterargument overemphasizes a non-final vote in a process where fluidity is a feature, not a bug.[248]

One could argue that, even if there was deliberative interference, as long as the Justices reason in a manner that is not inconsistent with their prior jurisprudence, perhaps legitimacy is preserved.[249] And some have argued that the Justices were consistent with their philosophies in *Dobbs*.[250] But determining whether an opinion is consistent with a Justice's philosophy is not necessarily an easy task. Even in *Dobbs*, it is difficult to conclude with

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Cohen, *supra* note 4, at 957 & n.18. Cohen ultimately concludes that an "occasional imbalance of influence among judges" is not necessarily a deliberation failure as long as each participant considers the issues and reaches a conclusion. *Id.* at 996.

245. *See* Gerstein et al., *supra* note 84. When draft dissents circulate, they are sometimes "compelling enough to convert a justice who was initially in the majority." *See* Cohen*, supra* note 4, at 991.

246. *See* Cohen, *supra* note 4, at 957; *see also* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 164 (1998) (noting that justices "may have to modify their most preferred policy choice in order to accommodate the preferences of the other members of the Court"); Samuel Bray, *Banana Republican*, REASON: VOLOKH CONSPIRACY (July 29, 2024), https://reason.com/volokh/2024/07/29/banana-republican [https://perma.cc/J7GS-3F8L] ("To treat judges as fundamentally being vote-casting officials is a symptom of treating them as legislators.").

247. *See* Cohen, *supra* note 4, at 957; *see also* Schoenfeld, *supra* note 86, at 267 (noting that leaks can destroy "our government's ability to deliberate in an orderly and coherent fashion").

248. *See* NBC NEWS, *supra* note 25, at 42:21; *see also supra* notes 147–48 and accompanying text.

249. *See* Barzun, *supra* note 166, at 1650–51 (recognizing that, under some theories of stare decisis, decisions might still be entitled to precedential weight if "pressures on the Court aligned with its own independent constitutional analysis"); *see also* FALLON, *supra* note 149, at 153 (suggesting the good faith requirement for judicial decision-making prevents a Justice from joining an opinion "if she cannot justify an outcome consistently with methodological premises that she believes valid").

250. *See supra* note 144 and accompanying text. There are indeed similarities between Justice Kavanaugh's prior jurisprudence and Justice Alito's *Dobbs* majority opinion, such as in their analysis of when the Court can overturn a precedent. *Compare* Ramos v. Louisiana, 590 U.S. 83, 121–22 (2020) (Kavanaugh, J., concurring in part) (listing whether a precedent is "egregiously wrong" as one factor in the stare decisis analysis applicable in constitutional cases), *with* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (concluding stare decisis does not compel adherence to *Roe* because *Roe* was "egregiously wrong from the start").

any confidence that it would have been jurisprudentially inconsistent for Justices Kavanaugh or Barrett—the supposed targets of Chief Justice Roberts's persuasion campaign[251]—to have joined Roberts's concurrence. And this argument fails to consider the impact to legitimacy caused by the Court's lack of subjective candor.[252]

Next, even if we presume the legal correctness of *Dobbs*, the deliberative interference cannot be excused. To analogize to the bribery context—another instance in which cases have been decided based on improper influence—in deciding the legal effect of a judicial bribe, courts decline to consider whether the case involving a bribe was rightly decided.[253]

Another counterargument pertains to the leaker. Because the possibility that the leaker was a supporter of abortion rights has not been ruled out,[254] one could argue against concluding that *Dobbs* is delegitimized. It might be asked: Why should the leaker potentially benefit from their own wrongdoing by having a disfavored decision discredited? That possibility is far outweighed by the fact that tens of millions of Americans lost rights through a case influenced by improper considerations.[255]

Finality is another potential reason to excuse deliberative interference. If revelations of deliberative interference could threaten any judicial decision, then no judgment is truly final. But the finality concern is particularly weak for *Dobbs*, which itself disturbed finality by overturning precedent.[256] When settled law is discarded through a case that involved deliberative interference, it is hard to see why finality excuses deliberative interference. And even in cases of deliberative interference where precedent is not overturned, courts could take reliance interests into account when analyzing whether to give precedential force to the case that involved deliberative interference.[257]

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251. *See supra* note 136 and accompanying text.

252. *See supra* Section IV.C.2.a.

253. *See* United States v. Manton, 107 F.2d 834, 845–46 (2d Cir. 1939) (holding that it was not improper, in a criminal trial of a judge accused of taking a bribe, for the jury not to be instructed to consider whether the bribed judge's decision was correct); *see also* Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 564 (S.D.N.Y. 2014) ("In cases in which the tribunal has been corrupted, 'no worthwhile interest is served in protecting the judgment.'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 70, cmt. b (1982))).

254. *See* Whelan, *supra* note 29.

255. Katie Shepherd et al., *1 in 3 American Women Have Already Lost Abortion Access. More Restrictive Laws Are Coming.*, WASH. POST (Aug. 22, 2022, 3:36 PM), https://www.washingtonpost.com/nation/2022/08/22/more-trigger-bans-loom-1-3-women-lose-most-abortion-access-post-roe.

256. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) ("We hold that *Roe* and *Casey* must be overruled.").

257. *See infra* Sections V.B.1.a–b.

Finally, one might argue that either the duty to sit or the rule of necessity overrides a Justice's obligation to recuse due to deliberative interference.[258] But the duty to sit does not apply when a Justice is disqualified,[259] and I have argued that deliberative interference can disqualify a Justice.[260] And while the rule of necessity can override the obligation to recuse,[261] it does not do so where there remain at least six non-disqualified Justices.[262] And here, it appears that at most two Justices—Justices Barrett and Kavanaugh—were disqualified due to deliberative interference.[263] Thus, neither the duty to sit nor the rule of necessity applies.

V. SOLUTIONS

To this point, I have attempted to connect the concepts of deliberative interference and illegitimacy. In this Part, I consider them as separate problems. I begin by exploring ways the Court could restructure its deliberations to try to prevent deliberative interference in the first place. I then examine solutions to the problem of judicial decisions that remain in effect despite being influenced, at least in part, by deliberative interference.

A. Solutions to Deliberative Interference

There are several ways in which the Court could modify its deliberation process to reduce the likelihood of deliberative interference. As the *Dobbs* leak shows, Court personnel cannot always be trusted to respect confidentiality.[264]

First, the Court could cease taking a preliminary vote at conference. The Warren Court chose not to vote at conference in *Brown v. Board of Education*

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258. *See* CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon 3(B)(1) (U.S. SUP. CT. 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/LY3J-Z4CY] (duty to sit); *id.* Canon 3(B)(3) (rule of necessity).

259. *See id.* Canon 3(B)(1).

260. *See supra* Section IV.C.1.a; *see also* Lynch, *supra* note 129, at 813 (noting that the lock-in effect creates systematically biased outcomes).

261. CODE OF CONDUCT FOR JUSTS. OF THE SUP. CT. OF THE U.S. Canon (3)(B)(3).

262. *See* United States v. Will, 449 U.S. 200, 212 (1980) (noting that "in this Court, when one or more Justices are recused but a statutory quorum of six Justices eligible to act remains available . . . the Court may continue to hear the case"); 28 U.S.C. § 1 (providing that six Justices represent a quorum).

263. *See supra* note 136 and accompanying text (noting that before the leak and subsequent lock-in effect, Chief Justice Roberts and Justice Breyer tried to convince Justices Kavanaugh and Barrett to switch their votes).

264. *See* Totenberg, *supra* note 88.

to maintain confidentiality.[265] Of course, the conference vote serves an important purpose: it helps the Court decide who should draft an initial majority opinion.[266] But, without a vote, assignments could be made based on which justice is likely to be best equipped to command a majority based on the Court's discussion. There would be no vote tally that could be shared with the press until a later stage, and the universe of individuals with insider information would be smaller since only the justices participate in conference.

Second, the Court could anonymize the voting process. After the Justice assigned to write the majority opinion circulates their signed draft, the other members could distribute anonymous opinions. Once all opinions have been circulated and a vote taken, the outcome would immediately be made public, essentially eliminating the possibility of disruptive state-of-play leaks.

Finally, the Court could limit the amount of personnel with information access, a tactic that has been used by the Executive Branch.[267] In the *Dobbs* leak investigation, the Marshal's office determined that aside from the Justices, at least 82 employees had access to electronic or hard copies of the opinion draft.[268] Tightening the flow of information at the Court could hurt the clerkship experience and perhaps deprive the Justices of valuable input, but at least it would reduce the likelihood that confidential knowledge will leak and harm deliberations.[269] And, because there would be fewer suspects, leaks would become easier to investigate.

B. Solutions to Delegitimized Decisions

In Part IV, I argued that *Dobbs* is delegitimized because of deliberative interference.[270] But concluding that a decision is illegitimate does not automatically impact the decision's legal effect. To revisit Fallon's concepts of legitimacy, even if a Supreme Court decision loses public acceptance (sociological legitimacy) or moral authority (moral legitimacy), it remains an

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265. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 294–95 (2004).

266. *See* SCHWARTZ, *supra* note 130, at 17.

267. *See* Pozen, *supra* note 6, at 589 ("The President's main practical tool of prevention is limiting the circle of secret keepers.").

268. *See* OFF. OF THE MARSHAL, *supra* note 6, at 11.

269. *See* Pozen, *supra* note 6, at 589 (noting that, while reducing the number of information keepers might reduce "the expected odds of leaking," it increases "the risks of decisionmaking defects associated with insularity and compartmentalization").

270. *See supra* Part IV.

official decision of the Court.[271] The same is true if the decision lacks legal legitimacy by violating accepted legal authorities.[272]

The risk of a Supreme Court decision becoming delegitimized—or at least arguably delegitimized[273]—on the basis of deliberative interference is by no means limited to *Dobbs*.[274] And if leaks from the Court continue, the public might learn more facts about specific deliberations that call other decisions into question due to improper influence.

In this Section, I present ways to remedy a scenario in which a decision is discredited but remains in effect.[275] As I will show, our institutions—Congress, courts, even movements themselves—are not powerless to respond to delegitimized decisions.

1. Diminish Precedential Value

Perhaps decisions that have been delegitimized due to deliberative interference should not be given precedential weight. Charles Barzun has argued that courts should consider whether improper motivations or political pressure influenced a particular decision in determining whether that decision is entitled to precedential effect.[276] On rare occasions, justices have considered those historical circumstances.[277] After all, if the *Dobbs* majority

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271. *See supra* Sections IV.A–B.

272. *See supra* Section IV.C.

273. It is fair to ask how confident we must be that deliberative interference took place to conclude that a decision is illegitimate (i.e., whether a preponderance or some other standard applies). Again, here I have assumed the veracity of the reporting on the leak. *See supra* note 7.

274. *See* Jennifer Haberkorn & Darren Samuelsohn, *Roberts's Switch: Gasoline on the Fire*, POLITICO (July 2, 2012, 3:00 PM), https://www.politico.com/story/2012/07/robertss-switch-gasoline-on-the-fire-078075 [https://perma.cc/M3C8-87SR] (quoting an attorney for the losing party in *Sebelius* after learning of Chief Justice Roberts's alleged vote switch as saying that *Sebelius* "was political, not legal, which reduces its value as a precedent").

275. Regardless of one's views on the argument presented *supra* Part IV—that *Dobbs* is delegitimized by the deliberative interference—it is worthwhile to consider responses to the possible problem of delegitimized Supreme Court decisions.

276. *See* Barzun, *supra* note 166, at 1660–72.

277. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 121–22, 121 n.16 (1996) (Souter, J., dissenting) (arguing that *Hans v. Louisiana*, 134 U.S. 1 (1890), the case relied upon by the majority, can be explained by an extrajudicial consideration: "the likelihood that a judgment against the State [of Louisiana] could not be enforced" after federal troops withdrew from the South, signaling the end of the Reconstruction Era and leaving federal courts powerless against Southern states' effort to repudiate their debt); *cf.* Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 628–29 (discussing whether decisions that involved judicial bribery should be given stare decisis effect).

could use history to show that abortion was a crime at common law,[278] or that *Roe* supposedly impacted American politics,[279] perhaps *Dobbs*'s critics can use history—albeit far more recent history—to show *Dobbs* was impacted by deliberative interference.

Deliberative interference could impact a delegitimized decision's status as a precedent in one of three ways: as a stare decisis consideration, as a reason for lower courts to disregard it as a vertical precedent, or as evidence of a violation of ethics requirements.

a. Stare Decisis

Because of the harmful effects of having delegitimized precedents, stare decisis analyses should take into account whether a decision involved deliberative interference. In fact, in light of the deliberative interference, it raises due process concerns if *Dobbs* binds future litigants without any consideration of the case's procedural irregularity.[280] A court's accounting for deliberative interference in its stare decisis analysis will help to avoid arbitrary judicial decision-making, which was a reason given to justify the practice at founding.[281]

Courts could consider such information in one of two ways: through the existing quality-of-reasoning and changed factual circumstances factors or through a novel deliberative interference factor (invoked only when applicable). In either case, a court could require clear and convincing evidence of deliberative interference.[282]

b. Vertical Precedent

Barzun argues that, depending on the rationale for the practice of vertical precedent, even lower courts could be able to consider evidence that a

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278. *But see supra* note 52 and accompanying text (citing scholars who have noted *Dobbs*'s reliance on historians connected to the antiabortion movement).

279. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 228–29, 269 (2022).

280. *See* Minzner, *supra* note 277, at 625–32 (arguing that, when the process in the initial suit was corrupted, future litigants cannot be bound by the judgment); *see also* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1072 (2003) ("An idiosyncrasy of . . . circumstance may have pushed one or even two decisions in a particular direction.").

281. *See* THE FEDERALIST NO. 78, *supra* note 122, at 407 (Alexander Hamilton) ("To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.").

282. *See supra* note 273.

Supreme Court case was decided on the basis of improper considerations.[283] Lower courts have occasionally defied Supreme Court pronouncements before, though primarily on grounds more directly tied to a decision's substance.[284] For example, despite *Dred Scott*, an Illinois federal court held that Black Americans were citizens.[285]

Scholars debate the rationale for the practice of precedent.[286] If vertical precedent exists so that litigants are treated with integrity—that is, with principle—then perhaps a decision made by a court that failed to act with integrity is not binding.[287] And if it exists because the earlier decided case is afforded a presumption of correctness, then a lower court could consider the higher court's improper considerations because those considerations bear on (though are not dispositive of) correctness.[288] However, if the justification for vertical precedent is to provide certainty, lower courts should not analyze whether a case was decided on the basis of improper considerations; they should simply respect precedent so that society knows what rules govern its behavior.[289]

By denying precedential effect to a decision impacted by deliberative interference, a lower court could essentially force the Supreme Court to reconsider the tarnished case.[290] Forced reconsideration could simply give the Court another chance to consider the same legal issue and reach the same conclusion—though this time free of external influence.[291]

c. Code of Conduct Violation

There might be another reason besides deliberative interference alone to reduce *Dobbs*'s precedential weight: the decision violates the newly promulgated Code of Conduct for Justices of the Supreme Court of the United

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283. *See* Barzun, *supra* note 166, at 1663.

284. *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818–19 (1994).

285. *See* Martha S. Jones, *Hughes v. Jackson: Race and Rights Beyond* Dred Scott, 91 N.C. L. REV. 1757, 1771 (2013).

286. *See* Caminker, *supra* note 284, at 865 (disputing that a single rationale entirely accounts for the practice of vertical precedent); *see also* Barzun, *supra* note 166, at 1646.

287. Barzun, *supra* note 166, at 1652–54, 1663.

288. *Id.* at 1648–52, 1663.

289. *Id.* at 1662–63.

290. *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 89 (1989).

291. Caminker, *supra* note 284, at 861 ("Arguably, forced reconsideration of an issue might prove beneficial even if the superior court reaffirms its precedent; the challenge might induce the court to fortify its original position with improved reasoning.").

States.[292] To give *Dobbs* precedential effect is to deny the Code retroactive application. A decision that runs afoul of a subsequently enacted ethics code might not deserve special weight.

2. Supreme Court Review Act

Senator Sheldon Whitehouse has proposed legislation that would allow Congress to more easily respond after the Supreme Court interprets the Constitution to take away previously protected rights.[293] The bill, titled the Supreme Court Review Act, permits the Senate to bypass the filibuster after a rights-diminishing decision.[294] While the legislature cannot constitutionally reverse a judgment of the Supreme Court, the Act would allow Congress to "*effectively* override" disfavored decisions with proactive application.[295]

Had the Act been enacted before *Dobbs*, the decision's substance might have prompted Congress to restore abortion rights.[296] But the Act could also be used to redress decisions delegitimized by external influence.[297]

3. Inspector General

An Inspector General for the judicial branch could help combat the problem of opinion illegitimacy risk. Senator Chuck Grassley and former Representative Jim Sensenbrenner have proposed the creation of such a role.[298]

While an Inspector General likely could not directly challenge a delegitimized judicial decision,[299] they would have tools at their disposal to

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292. *See supra* Section IV.C.1.b.

293. *See generally* S. 4681, 117th Cong. (2022) (requiring the Government Accountability Office to notify Congress of Supreme Court decisions and outlining procedures for the consideration of legislation related to said decisions).

294. *Id.* § 3(e).

295. *See* Aaron-Andrew P. Bruhl, *The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue and Destabilizing the Filibuster*, 25 U. PA. J. CONST. L. ONLINE 1, 7 (2023).

296. *See id.* at 3–4.

297. *See* Sheldon Whitehouse, *Knights-Errant: The Roberts Court and Erroneous Fact-Finding*, 84 OHIO ST. L.J. 837, 885 (2024) (noting Congress's ability to remedy erroneous fact-finding by the Court).

298. *See* Judicial Transparency and Ethics Enhancement Act of 2013, S. 575, 113th Cong. (2013).

299. *See* Steve Vladeck, *Bonus 49: An Article III Inspector General*, ONE FIRST (Oct. 19, 2023), https://stevevladeck.substack.com/p/bonus-49-an-article-iii-inspector [https://perma.cc/JWF4-V7SQ] (noting that the principle against extrajudicial revision prohibits non-Article III actors, such as a hypothetical Inspector General, from sitting in judgment of Article III judges).

investigate the legitimacy of such decisions and take certain punitive measures if necessary. For example, Congress could require the justices to make ethics-related disclosures to the Inspector General, which could include disclosing whether the justices know of any deliberative interference in any case.[300] If Congress learned of any delegitimizing information through the ethics disclosures, it could use other mechanisms such as the Supreme Court Review Act to effectively overrule the delegitimized decision. The Inspector General could also investigate and discipline court employees besides judges, such as clerks.[301]

4. Rule 44 of the Rules of the Supreme Court of the United States

The Court itself has the power to remedy a delegitimized decision without waiting for an appropriate case to reach its docket (at which time the Court could potentially reject its delegitimized precedent).[302] It could use Rule 44 as its vehicle.

Rule 44 provides for petitions for rehearing of decisions.[303] Courts have used rehearing to remedy judicial decisions that involved corrupt processes.[304] Rule 44 requires petitions for rehearing of merits decisions to be filed within twenty-five days after the decision, "unless the Court or a Justice shortens or extends the time."[305] Therefore, a losing party seeking to challenge a delegitimized decision would require a justice to extend the filing deadline, assuming the delegitimizing information is not revealed within twenty-five days of the decision.[306]

If the losing party obtained an extension, it might still face an uphill climb to rehearing. A petition for rehearing cannot be granted "except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision."[307] So even if a majority believes the case is sufficiently discredited to be reheard (whether because of changed composition or changed hearts),

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300. *See id.* (discussing Congress's ability to empower an Inspector General).

301. To the extent the *Dobbs* leaker was a non-judge employee, the Inspector General could therefore help identify them. As I have argued, that revelation would not impact *Dobbs*'s legitimacy. *See supra* Part I. But punishment for the leaker would discourage future actions that could impact the legitimacy of judicial decisions.

302. *See* Barzun, *supra* note 166, at 1667–72 (discussing whether evidence of improper influence is relevant to a stare decisis analysis).

303. *See* SUP. CT. R. 44.

304. *See* Minzner, *supra* note 277, at 628, 630.

305. SUP. CT. R. 44(1).

306. We first learned of the deliberative interference in *Dobbs* thirty-two days after the decision. *See* Biskupic, *supra* note 136 (listing publication date of July 26, 2022).

307. SUP. CT. R. 44(1).

one Justice who ruled against the rehearing petitioner initially must agree that the case should be heard again. The Court can also grant rehearing *sua sponte*.[308]

The purpose of rehearing a case after a delegitimized decision would be to ensure unimpeded deliberations. It is difficult to predict whether rehearing would result in a different outcome in any particular case.

5. Disobedience

If lower courts, Congress, and the Supreme Court each failed to respond to a delegitimized decision, states and the public could defy it.

It would not be unprecedented for there to be defiance of a Supreme Court decision because of procedural concerns. For example, in 1823, the Court decided *Green v. Biddle*,[309] which involved the constitutionality of Kentucky laws that required landowners to compensate occupying claimants prior to ouster for improvements made to the land.[310] The Court declared the laws invalid, holding that they violated a compact between Kentucky and Virginia.[311] But Kentucky courts continued to enforce the land laws for nearly another decade, reasoning that because only three of the seven justices heard the case, it "cannot be considered as having settled any constitutional principle."[312]

Widespread defiance also followed the *Dred Scott* decision.[313] Several Northern states enacted laws "declaring that their Black residents were citizens of the United States," contrary to the case's holding.[314] The State of Maine fined a town government for denying a Black man the right to vote on the grounds that, under *Dred Scott*, he was not a citizen.[315] Jonathon Booth has argued that, just as *Dred Scott* began a cycle of Court delegitimization and defiance, so too could *Dobbs*.[316]

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308. *See* Rosemary Krimbel, *Rehearing* Sua Sponte *in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 921 (1989).

309. 21 U.S. 1 (1823).

310. *Id.* at 11–15.

311. *Id.* at 17.

312. *See* FRIEDMAN, *supra* note 111, at 86 (quoting Bodley v. Gaither, 19 Ky. (3 T.B. Mon.) 57, 58 (1825)).

313. *See* Booth, *supra* note 8, at 34–43.

314. *Id.* at 35–36.

315. *Id.* at 37.

316. *See id.* at 56.

VI. CONCLUSION

The need for careful, unimpeded deliberation is at its highest when the Court is considering whether to take away a fundamental right. The leak of Justice Alito's draft majority opinion in *Dobbs* appears to have prevented the Court from fulfilling that imperative. If the leak was intended to interfere with deliberations, it was a vicious attack on American government—one that apparently succeeded. Regardless of intent, the leak harmed the deliberative process. When asked, Justice Breyer did not rule out the possibility that the Court would have found a middle ground were it not for the leak.[317] No one can say for sure.

It is time to consider the Court's vulnerability to pressures that life tenure cannot protect against. If we do not, movement justices—who could be said to wear two uniforms: that of an umpire and that of a player—might learn a perverse lesson: If your team is ahead on the scoreboard, tell the world and the game will be called.

317. *See* NBC NEWS, *supra* note 25, at 41:15.