

NOT ENOUGH RESPECT FOR THE JUDICIARY—OR TOO MUCH? ARROGANCE AND THE MYTH OF JUDICIAL SUPREMACY

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In recent months, we've heard a lot of judges complain that the judiciary doesn't get enough respect.¹ I have a different take. I wonder sometimes if the judiciary gets too much respect.

I. THE LEAST DANGEROUS BRANCH—OR THE MOST ARROGANT?

When I was a litigator—and before then, a lawyer in the legislative and executive branches—I detested the self-importance and subordination to elite approval that have pervaded the judicial branch for as long as I've been a student of it. And since becoming a judge myself, I confess that my views haven't changed. If anything, they've been reinforced.

I've watched as federal judges stood by and done nothing, as cultural elites bombarded certain Justices and judges with absurd ethical complaints.² As the Justice Department refused to prosecute individuals for harassing certain Justices at their own homes.³ As elite law schools allowed students to disrupt events to protest certain judicial decisions.⁴

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¹ See, e.g., Nate Raymond, *US judges group warns of threats to judiciary's independence*, REUTERS (Mar. 5, 2025), <https://www.reuters.com/legal/government/us-judges-group-warns-threats-judiciarys-independence-2025-03-05/> [<https://perma.cc/3UY7-T3WF>]; Tiana Headley, *Ex-Federal Judges Group to Defend Judicial Independence*, BLOOMBERG (May 1, 2025), <https://news.bloomberglaw.com/us-law-week/ex-federal-judges-form-coalition-to-defend-judicial-independence> [<https://perma.cc/5DBH-98NV>].

² See, e.g., Josh Blackman, *Judge James C. Ho's Remarks on Justice Thomas and Judge Kacsmaryk*, REASON (Apr. 18, 2023), <https://reason.com/volokh/2023/04/18/judge-james-c-hos-remarks-on-justice-thomas-and-judge-kacsmaryk/> [<https://perma.cc/LEA3-HMNQ>]; James C. Ho, *The Attack on the Courts*, NAT'L REV. (July 25, 2024), <https://www.nationalreview.com/magazine/2024/09/the-attack-on-the-courts/> [<https://perma.cc/9Q6X-4FWKz>].

³ The Justice Department declined to prosecute open and obvious violations of federal law protecting the judiciary. See 18 U.S.C. § 1507; *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 118th Cong. 30–32 (2023) (S. Hrg. 118-32) (exchange between U.S. Senator Ted Cruz and U.S. Attorney General Merrick Garland); James C. Ho, *Fighters, Climbers, and the War for the Judiciary*, 1 TEX. A&M J. L. & CIV. GOVERNANCE 421, 424 n.16 (2025).

⁴ See, e.g., James C. Ho, *Agreeing to Disagree: Restoring America by Resisting Cancel Culture*, 27 TEX. REV. L. & POL. 1, 3, 5–6 (2022) (discussing protests of litigators and federal judges at various law schools); Nate Raymond & Karen Sloan, *Conservative judge urges U.S. judiciary to not hire Yale protesters as clerks*, REUTERS (Mar. 17, 2022), <https://www.reuters.com/legal/legalindustry/conservative-judge-urges-us-judiciary-not-hire-yale-protesters-clerks-2022-03-17/> [<https://perma.cc/VL7L-G9ZL>] (discussing Judge Larry Silberman's call for federal judges not to hire students who support cancellation of Supreme Court litigator Kristen Waggoner).

It wasn't until this year—following the inauguration of a new President—that the Federal Judges Association suddenly found its voice, and suddenly discovered a crisis over judicial independence.⁵

After years of silence, it's obvious that these concerns are not sincere, but strategic. What they're really championing is not judicial independence, but judicial supremacy. What we're really seeing in the judiciary is not principle, but arrogance.

In fact, arrogance is such a longstanding and pervasive problem in the judiciary that a number of terms have been coined over the years to capture the phenomenon.⁶ I've spent more time as a litigator than as a judge. For those of us who have been litigators, I'm sure we all have our own stories and experiences dealing with judicial pomposity.

Too many judges think that they're better than other people. Too many judges have an overinflated view of their intelligence and their abilities. Too many judges think they know politics—when they don't. Too many judges think they know national security—when they don't. In short, too many judges have forgotten the virtue and value of humility. And I think a big part of the blame goes to the notion of judicial supremacy.

Law students are taught—implicitly, if not explicitly—to venerate (if not worship) judges.⁷ When the truth is that we should really regard judges more like bureaucrats. Judges and bureaucrats have at least one thing in common, under our current system. If you don't like your Senator or your Representative, if you disagree with the President or his Cabinet, you can vote them out of office. Their jobs are subject to the will of the people.

But if you have life tenure, there's a big opportunity, and thus a great temptation, to become arrogant—whether it's constitutional life tenure in the federal judiciary, or *de facto* life tenure in

⁵ See, e.g., Danielle Wallace, *Federal judge appointed by Trump quits group over statement on threats*, FOX NEWS (Mar. 12, 2025), <https://www.foxnews.com/politics/federal-judge-appointed-trump-quits-group-over-statement-threats> [https://perma.cc/XD6T-99US].

⁶ See, e.g., *In re Colbert*, 2025 WL 3550621, at *12 (La. Dec. 11, 2025) (Weimer, C.J., concurring) ("Terms have been coined to describe undesirable traits a judge may develop as a result of wearing a judicial robe—such as 'Black Robe Fever' or 'Robe-itis.' . . . The symptoms include becoming self-righteous, self-centered, self-serving, pompous, and acting as if the judge is above the law or the law does not apply to a judge, as contrasted to being a servant of the people and a disciple of the law. Manifestations include possessing traits of bias, prejudice, abuse of judicial power, and being overly authoritative, insensitive, and disrespectful. Other traits include a lack of civility, poor temperament, extreme impatience, and overstepping authority . . . Displays of disrespect, disdain, volatility, and a lack of courage to follow the law as written have no place in judging. Abuse of power involves using the judicial power for personal gain, partisanship, politics, or favoritism, or to intimidate or retaliate against others who do not bend to the judge's will. Such behavior fosters distrust of courts and alienation of those who turn to courts for resolution of issues.").

⁷ A recent exchange between two former federal judges articulates my concerns about judge worship. Paul Grewal notes that, a decade after leaving the bench, he sees "the distortions that come from judicial service"—namely, that "[y]ou think that everyone relishes every word you write or speak." Gregg Costa adds this: "[W]e are living in an era, especially inculcated by law schools, where judges are viewed as the heroes of our republic. As another former judge, I adhere to the view of one of our greatest jurists (Brandeis): the most important role in our democracy is that of private citizen." Paul Grewal & Gregg Costa, LINKEDIN (Dec. 23, 2025), https://www.linkedin.com/posts/paul-grewal-288978b4_2026-will-mark-10-years-since-i-wore-a-robe-activity-7409429252380631040-M9zD? [https://perma.cc/K7NZ-PHCC]. Costa may have had in mind Professor Paul Carrington's criticism of the "moral arrogance of judicial heroism," for which he placed substantial blame on "the advent of the legal academy." PAUL D. CARRINGTON, STEWARDS OF DEMOCRACY 150, 181 (1999); see, e.g., *id.* at 189 ("Academic theorists . . . provide a receptive, sometimes even a fawning, audience for heroic judges and give less frequent applause to text-bound legal drones.").

the bowels of the administrative state. It's why I've written about federal civil service laws as an affront to the President's executive power under Article II of the Constitution.⁸ And it's why I've written about judicial supremacy as a distortion of the judicial power under Article III.⁹

II. THE MYTH OF THE CO-EQUAL JUDICIARY

It's often said that the judiciary is a "co-equal" branch of government.¹⁰ You hear that said by the media, and by legal academics. You see it taught in schools across America.

But it's wrong.¹¹ The judiciary has an important role in our constitutional republic. But it's a limited one. Judges don't write the law. Judges don't execute the law. And that's for one simple reason. As Americans, we believe that we can govern ourselves.

Our Constitution begins "We the *people*"—not we the few with life tenure. Our Founders didn't fight a Revolutionary War to replace one king in royal garb with hundreds of kings in judicial robes. Judges are supposed to apply the law to whatever disputes are brought before us—and leave *everything else* to the other branches of government.

We're not an active branch. We're a passive branch. And under the Constitution of our Founders, we're the *least powerful* branch. We have the power to issue judgments. But we lack the power to enforce them. We hold neither the sword nor the purse. All we have is our voice.¹²

That means that we have to *earn* the respect of the other branches. And we do that by proving to the world that our rulings are based on what the law is—and not on our personal views on what the law should be.¹³

III. JUDICIAL INSINCERITY ABOUT JUDICIAL INDEPENDENCE

I'm tired of hearing judges today complain about threats to judicial independence. These judges need to get over themselves. To begin with, it's profoundly insincere. Because you're only hearing these complaints from these critics in 2025. You didn't hear them speak up in 2024, or 2023, or 2022—when we heard countless attacks on certain members of the Supreme Court, and certain judges across America.

⁸ See, e.g., Feds for Med. Freedom v. Biden, 63 F.4th 366, 389 (5th Cir. 2023) (Ho, J., concurring).

⁹ See, e.g., *In re Westcott*, 135 F.4th 243, 250–51 (5th Cir. 2025) (Ho, J., concurring).

¹⁰ See, e.g., *United States v. Cowan*, 524 F.2d 504, 507 (5th Cir. 1975).

¹¹ See, e.g., THE FEDERALIST NO. 48, at 334 (James Madison) (J. Cooke ed. 1961) (noting the "superiority" of the legislative branch as compared to the judiciary); *Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991) (same).

¹² See, e.g., THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (J. Cooke ed. 1961) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 818 (1987) (Scalia, J., concurring in the judgment) (same).

¹³ See, e.g., *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.").

You can't defend judicial independence only when it comes to judicial decisions you like. That's not protecting the judiciary; that's politicizing the judiciary. Yet that's exactly what we're seeing. Cultural elites praise and protect judges who do their bidding—and condemn and cancel those who don't.¹⁴

They vigorously defend district judges against criticism¹⁵—unless those judges live in Texas or Florida.¹⁶ They strenuously condemn forum shopping—but not if the courts are in Boston or San Francisco.¹⁷ They strongly oppose the impeachment of judges¹⁸—except when those judges are named Thomas or Alito.¹⁹ They're happy to impeach a *President* for an alleged abuse of power²⁰—but horrified if anyone even *suggests* impeaching a *judge* on the same basis.²¹

They've even politicized judicial security. Today, they're fearful when a judge receives an unsolicited pizza delivery at home.²² But just a few years ago, they applauded when swarms of protestors disrupted certain Justices' homes for weeks on end. Members of Congress and senior White House officials "welcomed" and "encouraged" protests at the Justices' homes.²³ In addition, activists offered to pay for tips on the Justices' daily activities, so that they could be protested outside of their homes as well. For example, one of those tips enabled activists to protest

¹⁴ See generally James C. Ho, *Fair-Weather Originalism: Judges, Umpires, and the Fear of Being Booed*, 26 TEX. REV. L. & POL. 335 (Winter 2021–2022); James C. Ho, *Pressure is a Privilege: Judges, Umpires, and Ignoring the Booring of the Crowd*, HERITAGE FOUND. (Dec. 6, 2023), <https://www.heritage.org/courts/report/pressure-privilege-judges-umpires-and-ignoring-the-booring-the-crowd> [https://perma.cc/9QPB-TS54].

¹⁵ See, e.g., ABA Condemns Remarks Questioning Legitimacy of Courts and Judicial Review, AM. BAR ASS'N (Feb. 11, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-statement-re-remarks-questioning-judicial-review/> [https://perma.cc/GSB8-6YB5].

¹⁶ See, e.g., James C. Ho, *Forum Shopping, Forum Shaming, and the Fear of Being Booed*, 1 TEX. A&M J. L. & CIV. GOVERNANCE 31 (2024); Blackman, *Remarks on Justice Thomas and Judge Kacsmaryk*, *supra* note 2.

¹⁷ See generally *Forum Shopping*, *supra* note 16.

¹⁸ See, e.g., Statement of the American Bar Association: ABA Stands Firmly with Statement of Chief Justice John Roberts in Rejecting Inappropriate Calls for Judicial Impeachment, AM. BAR ASS'N (Mar. 18, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/aba-president-statement-re-roberts-rejecting-impeachment-calls/> [https://perma.cc/6T3L-Q3B2].

¹⁹ See, e.g., H.R. Res. 1353, 118th Cong. (2024) (calling for the impeachment of Justice Thomas), and H.R. Res. 1354, 118th Cong. (2024) (calling for the impeachment of Justice Alito); James Taranto & David B. Rivkin Jr., *Justice Samuel Alito: 'This Made Us Targets of Assassination'*, WALL ST. J. (Apr. 28, 2023), <https://www.wsj.com/us-news/justice-samuel-alito-this-made-us-targets-of-assassination-dobbs-leak-abortion-court-74624ef9> [https://perma.cc/U39P-93RQ] ("The idea has always been that judges are not supposed to respond to criticisms, but if the courts are being unfairly attacked, the organized bar will come to their defense.' Instead, 'if anything, they've participated to some degree in these attacks.'") (quoting Justice Alito).

²⁰ See, e.g., H.R. Res. 755, 116th Cong. (2019) (calling for the impeachment of Donald Trump for "abus[ing] the powers of the Presidency").

²¹ See, e.g., AM. BAR ASS'N, *supra* note 18.

²² See, e.g., Derek Hawkins, *Fake pizza orders sent to judges seen as threat to judicial safety*, WASH. POST (May 11, 2025), <https://www.washingtonpost.com/politics/2025/05/11/justice-judges-threats-intimidation-pizza-deliveries/> [https://perma.cc/SHG8-NHZE].

²³ See, e.g., Andrew C. McCarthy, *Biden Encourages People to Violate the Law by Protesting at Justices' Homes*, THE HILL (May 11, 2022), [https://thehill.com/opinion/judiciary/3483790-biden-encourages-people-to-violate-the-law-by-protesting-at-justices-homes/](https://thehill.com/opinion/judiciary/3483790-biden-encourages-people-to-violate-the-law-by-protesting-at-justices-homes) [https://perma.cc/9HW2-PPBQ]; Yael Halon, *Progressive Lawmakers Rally Behind Protesters at Justices' Homes, Churches: 'I Welcome It'*, FOX NEWS (May 10, 2022), <https://www.foxnews.com/media/progressive-lawmakers-tlaib-omar-warren-protesters-supreme-court-justices-homes> [https://perma.cc/KT58-99Y2]; Allie Griffin, *Jean-Pierre: 'For sure' White House approves protest of Kavanaugh steak dinner*, N.Y. POST (July 8, 2022), <https://nypost.com/2022/07/08/jean-pierre-white-house-approves-protest-of-kavanaugh-steak-dinner/> [https://perma.cc/L383-VRMZ].

Justice Kavanaugh at a downtown restaurant.²⁴ So to review the bidding: protestors good, pizza bad. A \$20 large pepperoni is an outrage, but a \$250 bounty on a Supreme Court justice is “democracy” at work.²⁵

The double standards are everywhere.²⁶ And they aren’t inadvertent. They’re intentional. Because the elites don’t want neutrality. They want conformity. If you don’t conform, they’ll call you corrupt, unethical, racist, sexist. They’ll say and do whatever it takes to get you to bend the knee. And even if you still won’t conform, they’ll attack you anyway, because they know that others will get the message and comply. The double standards don’t trouble the elites, because to them, this isn’t a debate—it’s a war.

Moreover, the elites aren’t just insincere. They also fundamentally misunderstand the purpose of judicial independence under our Constitution. Most people don’t believe in judicial independence because they think judges should be *imperial*. They believe in judicial independence because judges should be *impartial*.²⁷

If we abuse our power, if we abandon impartiality, if we lose the people’s trust, that will be fatal to the rule of law. And it will be entirely our fault.

IV. THE REAL THREATS TO ORIGINALISM

The American people expect judges to use our independence to follow the law—nothing more, nothing less. And that’s the whole point of originalism. But there are at least three problems with the state of originalism in the judiciary today.

²⁴ See ShutDownDC (@ShutDown_SC), X (July 8, 2022, at 10:55 ET) https://x.com/ShutDown_DC/status/1545421407223521280 [https://perma.cc/23PZ-3S4X]; *see also, e.g.*, Ryan Lizza and Eugene Daniels, *Schumer ups pressure on McConnell in USICA-reconciliation dance*, POLITICO: PLAYBOOK (July 8, 2022), <https://www.politico.com/newsletters/playbook/2022/07/08/schumer-ups-pressure-on-mcconnell-in-usica-reconciliation-dance-00044652> [https://perma.cc/H4KJ-5UFF] (noting that a tip led to a restaurant protest against Justice Kavanaugh); Thomas Catenacci, *ShutDownDC Group Offers Bounties on Twitter for Public Sightings of Conservative Supreme Court Justices*, FOX NEWS (July 8, 2022), <https://www.foxnews.com/politics/shutdowndc-group-offers-bounties-twitter-public-sightings-conservative-supreme-court-justices> [https://perma.cc/82UK-3XJT]; Virginia Kruta, *ShutDownDC Promises To Pay Tipsters For SCOTUS Whereabouts*, DAILY WIRE (July 8, 2022), <https://www.dailystrike.com/news/shutdowndc-promises-to-pay-tipsters-for-scotus-whereabouts> [https://perma.cc/A52H-473K].

²⁵ When asked for the President’s position on protests of Justices at restaurants, White House press secretary Karine Jean-Pierre responded: “this is what a democracy is.” Houston Keene, *White House grilled on protesters targeting Justice Kavanaugh at DC restaurant*, FOX NEWS (July 8, 2022), <https://www.foxnews.com/politics/white-house-grilled-protesters-targeting-justice-kavanaugh-dc-restaurant> [https://perma.cc/AYC5-SPT5].

²⁶ *See also* Josh Blackman, “*Brazenly Partisan*” Judges Scrutinize Trump’s Mind, But Refuse To Explain Themselves, CIVITAS (Dec. 11, 2025), <https://www.civitasinstitute.org/research/brazenly-partisan-judges-scrutinize-trumps-mind-but-refuse-to-explain-themselves> [https://perma.cc/MC9F-SU3N] (“There is a never-ending stream of faux-outrage about judicial ethics, but these self-professed experts ignore actual problems where judges engage in partisanship.”).

²⁷ *See, e.g.*, G. Barry Anderson, *Preserving the Independence of the Judiciary*, LITIGATION, Winter 2009, at 3 (“When told about the importance of judicial independence, the public’s first reaction is to ask, ‘Independent from what?’ The fear is that ‘independent’ translates into ‘unaccountable’ and perhaps even ‘arrogant.’ I have found that focusing on judicial ‘impartiality’ is far more effective, and perhaps more accurate.”).

First is insubordination in the district courts.²⁸ As an appellate litigator for over a decade, my job was to protect my clients who had been wronged by a lower court. In that job, I had plenty of frustrations with appellate judges. But what most stands out in my mind are the district courts.²⁹

Appellate courts are multi-member bodies. Appellate judges can't do anything on their own. We have to convince our colleagues to go along, before we get to exercise judicial power. That's not true in the district courts. Their decisions are typically made by just one district judge. They're the only members of the judiciary who can exercise the judicial power of the United States without anyone's consent but their own.³⁰

With unilateral power, there's unique danger that some district courts may get off track. There's a reason why there are jokes about God wishing that he was a federal *district* judge.³¹ So it's vital that district judges exercise their powers carefully and with integrity. And it's critical that appellate judges who claim the originalist mantle will be ready and willing to intervene when district judges refuse to stay in their lane.

That leads me to my second concern: fair-weather originalism.³² As a purely abstract intellectual matter, originalism has essentially won the day. Justices Kagan and Jackson both testified during their confirmation hearings that they agree with and embrace originalism.³³

But here's the problem: It's one thing to talk about originalism in theory. But what happens in practice when originalism leads to results that are despised by the cultural elites who control the national discourse? Originalists face a concerted campaign of condemnation. We're not just wrong as an intellectual matter. We're not merely disagreeing in good faith over the proper meaning of legal terms. We're fundamentally bad people. We're too extreme for polite society.

²⁸ See *In re Westcott*, 135 F.4th at 251–52 (Ho, J., concurring); *Fighters*, *supra* note 3, at 428–29.

²⁹ See, e.g., *United States ex rel. Harman v. Trinity Industries Inc.*, 872 F.3d 645, 647 (5th Cir. 2017) (noting that district court sent case to trial “[d]espite . . . a caution from this court that the case ought not proceed”); see also *In re Westcott*, 135 F.4th at 250 n.1 (Ho, J., concurring) (collecting examples).

³⁰ See, e.g., *In re Westcott*, 135 F.4th at 251 (Ho, J., concurring); James Taranto, *The Case of District Judges vs. Trump*, WALL ST. J. (May 9, 2025), <https://www.wsj.com/opinion/the-case-of-district-judges-vs-trump-law-legal-system-courts-judiciary-judge-james-c-ho-43367ee1> [<https://perma.cc/82Y6-8HT2>]; Transcript of Oral Argument at 97–98, *Trump v. CASA, Inc.*, 606 U.S. ____ (2025) (No. 24A884) (“[T]here are 680 district court judges, and . . . sometimes they're wrong, and all Article III judges are vulnerable to an occupational disease, which is the disease of thinking that I am right and I can do whatever I want. Now, on a multi-member appellate court, that is restrained by one's colleagues, but trial judge, the trial judge sitting in the trial judge's courtroom is the monarch of that . . . realm.”).

³¹ See, e.g., THE BAR AND GRILL SINGERS, *Appointed Forever* (YouTube, Oct. 19, 2015), <https://www.youtube.com/watch?v=ZzFWiQQrBIA> [<https://perma.cc/AZ5G-QHU6>] (“Imagine me as God. I do. I think about it day and night. It feels so right. To be a federal district judge and know that I'm appointed forever.”) (sung to the tune of *Happy Together*); *LULAC v. Abbott*, No. 3:21-CV-259 (W.D. Tex. Nov. 19, 2025) (Smith, J., dissenting) (“There's the old joke: What's the difference between God and a federal district judge? Answer: God doesn't think he's a federal judge.”).

³² See generally *Fair-Weather Originalism*, *supra* note 14.

³³ See *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (“[S]ometimes [our Founders] laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.”); Press Release, Senator Dick Durbin, *Durbin Questions Judge Ketanji Brown Jackson on Her Judicial Philosophy During Second Day of Her Nomination Hearing to the Supreme Court* (Mar. 22, 2022), https://www.durbin.senate.gov/newsroom/press-releases?PageNum_rs=147 [<https://perma.cc/PD2X-MUUX>]; Press Release, Senator Mike Lee, *Senator Lee Questions SCOTUS Nominee Judge Ketanji Brown Jackson* (Mar. 22, 2022), <https://www.lee.senate.gov/2022/3/senator-lee-questions-scotus-nominee-judge-ketanji-brown-jackson> [<https://perma.cc/6Y4Z-DDPL>].

I would submit that the principal challenge that originalists face is not a matter of intellect, but a matter of intimidation and insult. During his Senate confirmation hearing, the Chief Justice famously compared judges to umpires.³⁴ It's an appropriate metaphor. But it's also a revealing metaphor. A number of studies have shown how umpires and refs across different sports will alter their calls, to avoid the booing of the crowd.³⁵ It's such a common phenomenon that there's a name for it: It's called "working the refs."

And here's the thing: There is every reason to fear that the problem is even more extreme when it comes to judges. After all, people usually don't know the names of umpires and refs. So the booing is temporary. It goes away after a few moments. But the elites know full well how to boo and demean judges for the rest of their lives. And judges who have spent their entire lives collecting gold stars adjust accordingly.

So I accept the Chief Justice's sports analogy. But I do so for reasons that he might not have intended. We've all heard of "fair-weather sports fans." Well, if you're an originalist only when elites won't be upset with you—if you're an originalist only when it's easy—that's not principled judging. That's fair-weather originalism.

And that leads me to my third and final concern. Because of these elite cultural pressures, I worry that judges are too often tempted to find ways to avoid the kinds of issues that most energize and anger cultural elites—cases about abortion, transgender ideology, religious liberty, and illegal immigration.

There's a temptation to invent procedural problems or to distort the facts (or both) to avoid reaching the merits.³⁶ Or to use discretionary review to avoid deciding those cases altogether.³⁷ I've noticed a pattern: Judges claim the originalist mantle, but they do so by favoring commercial controversies over cultural ones. As judges, we all know that we will get much less pushback if we rule for a corporation or against the administrative state, than if we rule against the elites in the culture wars.³⁸

³⁴ See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

³⁵ See *Fair-Weather Originalism*, *supra* note 14, at 341–43 (discussing TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON (2011)).

³⁶ See, e.g., *Parents Protecting Our Children v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14–15 (2024) (Alito, J., dissenting from the denial of certiorari) ("I am concerned that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions."); *Christian Legal Society v. Martinez*, 561 U.S. 661, 707–18 (2010) (Alito, J., dissenting) (detailing the numerous ways in which "[t]he Court provides a misleading portrayal of this case").

³⁷ See, e.g., *Josh Blackman, Judicial Courage*, 26 TEX. REV. L. & POL. 355 (Winter 2021–2022) (collecting examples); *Env't Tex. Citizen Lobby v. ExxonMobil Corp.*, 123 F.4th 309, 351–53 (5th Cir. 2024) (Ho, J., in support of dismissing rehearing en banc as improvidently granted) (collecting additional examples).

³⁸ See, e.g., *Env't Tex. Citizen Lobby*, 123 F.4th at 354 (Ho, J., in support of dismissing rehearing en banc as improvidently granted) ("Our job is to apply legal principles even-handedly—not to favor cases cheered by corporate interests over cases jeered by cultural elites."); *MCR Oil Tools, L.L.C. v. U.S. Dep't of Transp.*, 102 F.4th 326, 326 (5th Cir. 2024) (Ho, J., concurring) (citing *Woodlands Pride, Inc. v. Paxton*, No. 23-20480 (5th Cir.) (same); cf. James C. Ho, *Originalism, Common Good Constitutionalism, and Our Common Adversary: Fair-Weather Originalism*, 46 HARV. J.L. & PUB. POL'Y 957, 964 (2023) (same)).

V. PRINCIPLES OF JUDICIAL SELECTION

Now, I do think it's possible that, in the coming months, the judiciary will make a turn for the better—to more consistently and faithfully apply our written Constitution, rather than a woke Constitution. That's because, as 2025 has unfolded, we've seen an increasing confidence in our Constitution and an increasing backlash against wokeness.³⁹ So, for those of us who are upset over fair-weather originalism, the good news is that the weather may be getting better. But even the good news strikes me as still bad news. Because the quality of the judiciary shouldn't have to turn on the quality of the weather. And because we all know that, as night follows day, the weather will turn back again someday.⁴⁰

If I have any real good news to share, it's this: Arrogance in the judiciary isn't inevitable. Before I took the bench, I spent over fifteen years participating in one way or another in the judicial selection process—first, as a lawyer at the Justice Department and then on the Senate Judiciary Committee, and again later as the vice-chair of the Federal Judicial Evaluation Committee in Texas. That experience taught me three basic principles of judicial selection.

First, I think of the advice that Moses got about selecting good judges. The Book of Exodus tells us to choose “trustworthy men who hate dishonest gain.”⁴¹ In other words, pick people you can trust to rule honestly, based on the law, and *only* the law. Ruling based on who's favored or disfavored by cultural elites is most certainly awarding dishonest gain.

Second, consider the advice that Paul gave in his first epistle to Timothy about choosing a good leader. Don't pick “a recent convert, or he may become conceited and fall under the same judgment as the devil.”⁴² Instead, recall what was done when it was time to replace Judas among the 12 disciples. As the Book of Acts put it, “choose one of the men who have been with us *the whole time*.”⁴³ In other words, don't pick Johnny-come-latelies—the ones who only showed up after it became socially acceptable and career enhancing to do so. Choose only from those who have been here from the beginning, even when it was hard—those who were with us, not out of convenience, but out of conviction.

Third, Jesus rejected the arrogance of many leaders. He admonished His disciples to choose humility over elitism. In Matthew 20, He observed that “the rulers of the Gentiles lord it over [their people], and their high officials exercise authority over them. Not so with you. Instead, whoever wants to become great among you must be your servant . . . just as the Son of Man did

³⁹ As one scholar recently observed: “Remember the despair you felt exactly five years ago and now look. What a world.” Novi Zhukovsky, *Trump Administration Urges White Men To File Workplace Discrimination Claims*, N.Y. SUN (Dec. 18, 2025), <https://www.nysun.com/article/trump-administration-urges-white-men-to-file-workplace-discrimination-claims> [https://perma.cc/7Z7H-6DTA] (quoting Manhattan Institute senior fellow Robert Henderson); *see also, e.g.*, James Freeman, *The Blessings of Free Speech*, WALL ST. J. (Dec. 24, 2025), <https://www.wsj.com/opinion/the-blessings-of-free-speech-40bb33fe> [https://perma.cc/NC2A-5RQY] (“What a difference a year makes.”).

⁴⁰ A renowned Supreme Court litigator put it this way: “If we begin to think that this vibe shift is permanent or self-sustaining, we will fail future generations—and worse, we will fail the soul of liberty itself.” Maggie Severns & Jess Bravin, *Kristen Waggoner's Legal Crusade for Conservative Christian Values*, WALL ST. J. (Dec. 18, 2025), <https://www.wsj.com/us-news/law/kristen-waggoner-alliance-defending-freedom-supreme-court-conservative-christians-19be5bda> [https://perma.cc/GPU8-WY66].

⁴¹ Exodus 18:21.

⁴² 1 Timothy 3:6.

⁴³ Acts 1:21.

not come to be served, but to serve.”⁴⁴ In other words, pick people who will use power, not to serve themselves, but to serve others. People who are *willing* to be a judge—not people who are *desperate* to be a judge. People whose goal isn’t to get onto a bench, but to get into heaven.⁴⁵

Our judiciary would be stronger if we didn’t just talk about these principles, but actually followed them, in every case. And I do mean *all three* principles. If you’re able to recite the correct vision of the judge’s role, well, that’s certainly important. But any reasonably smart person can fake an interview. If we’re granting life tenure, then we deserve a lifelong record of commitment to the Constitution—even, and indeed especially, when the result is unpopular. Moreover, correctness and commitment are necessary, but insufficient. We should also demand people of humility, with a demonstrated devotion to service over self, if we’re going to have any confidence that a judge will stand against the tide, stand up to the mob, and withstand the seductions and pressures of the cultural elite.

CONCLUSION

My hope is that judicial supremacy will ultimately prove to be self-defeating—that the harder its proponents push, the more likely they’ll fail.

I recently criticized the Supreme Court for treating a district court in Texas like a Denny’s.⁴⁶ We’ve never expected judges to be available at all hours of the night, 24/7, at the drop of a hat. We don’t do so for ordinary litigants. We shouldn’t do so just for those held as members of Tren de Aragua, either.⁴⁷

⁴⁴ Matthew 20:25–26, 28.

⁴⁵ Justice Thomas was once asked: “What helps you stay so consistent in your philosophy and interpretation of the Constitution, in spite of the relentless attacks on you?” His response noted the profound importance of his “abiding faith.” As he explained, “I use my litany of humility. I keep it directly across my desk from me, that you understand that it’s not about you. It’s about things that are far more important than you. And whether people are mad at you has nothing to do with whether you’re right. You know, you can be in the middle of a hurricane. Or you can be on a calm day. North is still north. You can be in a thunderstorm. North is still north. People can yell at you. North is still north. It doesn’t change fundamental things. And in this business, right is still right. Even if you stand by yourself. And I think you’ve got to be comfortable with that.” HERITAGE FOUND., *President’s Club Meeting with Justice Clarence Thomas*, at 4:22 (YouTube, Nov. 12, 2007), <https://www.youtube.com/watch?v=zssxz-oND7k>.

⁴⁶ See *A.A.R.P. v. Trump*, 137 F.4th 391, 394 (5th Cir. 2025) (Ho, J., concurring); see also Paul G. Cassell, *A Supreme Court Injustice to a District Judge*, WALL ST. J. (May 20, 2025), <https://www.wsj.com/opinion/a-supreme-court-injustice-to-a-district-judge-law-policy-969be392> [https://perma.cc/F5DZ-DAZG] (“According to the Supreme Court, Judge Hendrix’s timeline to address the motion began 34 minutes after midnight. That’s unreasonable. Judge Hendrix had no idea when or if an emergency motion would be filed. Was he expected to wait up all night to check if any motions came across the docket?”).

⁴⁷ Every litigator knows, and established rules confirm, that every federal court in the country is routinely “closed” and “inaccessible” to lawyers and litigants on a regular basis. *See, e.g.*, S. Ct. R. 30(1); Fed. R. App. Proc. 26(a)(3); Fed. R. Civ. Proc. 6(a)(3). Now, it is true that federal law also “deem[s]” the courts “always open” just to ensure that judges always have the legal authority to file and accept documents. *See* 28 U.S.C. § 452. But that’s a far cry from requiring judges to be available 24/7 at a detainee’s beck and call and holding them delinquent if they’re not. Just consider how courts behave when the preferences of the cultural elite conflict with the notion of 24-hour service from the federal judiciary. *See, e.g.*, Josh Blackman, *The First Circuit Is Not A Denny’s*, REASON (Nov. 9, 2025), <https://reason.com/volokh/2025/11/09/the-first-circuit-is-not-a-dennys/> [https://perma.cc/7P8S-MJZ5]; *Abbott v. League of United Latin American Citizens*, 607 U.S. __, __ (2025) (No. 25A608) (Kagan, J., dissenting from the grant of the application for stay) (objecting to Justices reviewing court records “over a holiday weekend”).

But I believe there's a broader lesson to be learned here as well. If you want respect, you need to earn it. If you want to be trusted as a judge, then you need to act like one. If you act like a Denny's, then don't be surprised if everyone starts treating you like one.

I'll end with a quote from the Gospel of Luke:

Beware of the teachers of the law. They like to walk around in flowing robes and love to be greeted with respect in the marketplaces and have the most important seats in the synagogues and the places of honor at banquets. They devour widows' houses and for a show make lengthy prayers.⁴⁸

If the American people can't expect the judiciary to stay in its lane, then federal judges shouldn't expect the American people to follow them.

⁴⁸ Luke 20:46-47. For a helpful discussion on the problem of "lengthy prayers" in the judicial context, consider Luke Burton, *Less Is More: One Law Clerk's Case Against Lengthy Judicial Opinions*, 21 J. APP. PRAC. & PROCESS 105, 105-06 (2021) (arguing that "judicial opinions . . . are generally longer than they should be," in part because many judges want to "show what they know"). A judicial opinion should not remind you of the bar scene from *Good Will Hunting*.