
THE IMPERIAL SUPREME COURT

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The past few years have marked the emergence of the imperial Supreme Court. Armed with a new, nearly bulletproof majority, conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines. Unlike previous shifts in the Court, this one isn't marked by debates over federal versus state power, or congressional versus judicial power, or judicial activism versus restraint. Nor is it marked by the triumph of one form of constitutional interpretation over another. On each of those axes, the Court's recent opinions point in radically different directions. The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts. And it has done so using a variety of (often contradictory) interpretative methodologies. The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court.

My goal in this essay is not to criticize these decisions on the merits, though there is much to criticize; lots of others will do that. Nor do I aim simply to make the legal realist point that the Justices will do what they want in the cases before them, though the last few Terms provide ample evidence for that claim too. Rather, my argument is that the Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself. The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices' own, but by undercutting the ability of any entity to do something the Justices don't like. We are in the era of the imperial Supreme Court.

In Part I, I show that the Court has not been favoring one branch of government over another, or favoring states over the federal government, or the rights of people over governments. Rather, it is withdrawing power from all of them at once. In Part II, I show that this result cannot be explained by any consistent judicial philosophy. The Court is happy to embrace conflicting philosophies to achieve the ends it wants in the case before it. In Part III, I suggest that the imperial Supreme

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Court is something new and dangerous and that we must consider more radical options to protect the American form of government.

I. CONCENTRATING POWER IN THE COURT

The sole consistency that I can find [in our antitrust merger cases] is that . . . the Government always wins.

— Justice Potter Stewart¹

Were Justice Stewart on the Court today, he might have to revise his famous aphorism. The only consistency I can find in modern Supreme Court cases is that the Court always wins. Political debates over the role of the Court in prior eras tended to focus on the relative allocation of power between other parts of the government. Did the rise of the administrative state take too much power out of the hands of Congress and give it to the executive branch?² Did “activist” federal courts overstep their bounds in striking down acts of Congress as inconsistent with the Constitution?³ Did the growth of federal power — legislative or judicial — encroach on the power of the states?⁴ The Court in different periods has sided with different political actors in each of these debates.

¹ United States v. Von’s Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

² See, e.g., Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (setting forth the nondelegation doctrine in holding that “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested”); Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (*Benzene*), 448 U.S. 607, 717 n.30 (1980) (Marshall, J., dissenting) (“[T]he nondelegation doctrine . . . was last used to invalidate an Act of Congress in 1935 [in *Schechter Poultry*]”); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–44 (2011).

³ See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 220 (2004); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1092 (2001); Keenan D. Kmiec, *The Origin and Current Meaning of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1444 (2004); Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 622 (2012); Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, 210 (2018); Earnest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141–42 (2002). While one might compare the current Court’s activism to the Warren Court’s, the Warren Court was involved in the sort of institutional politics I describe in the text, strengthening individual rights against the government and strengthening federal power against the states. Even if that was “activist,” that activism was directed toward a consistent purpose within the federal system. The Warren Court deferred to congressional action, for instance, in upholding the Civil Rights Act and the Voting Rights Act. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 324–326 (1966).

⁴ See, e.g., *Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) (applying the Tenth Amendment to strike down provisions of federal gun control law); *Reno v. Condon*, 528 U.S. 141, 149 (2000) (evaluating the role of the Tenth Amendment in restricting government power); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976) (applying the Eleventh Amendment to insulate states from liability); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 5 (1989) (effectively reversing *Fitzpatrick* and applying federal law to the states); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (re-reversing and applying Eleventh Amendment immunity).

What's different about the modern Court is that it doesn't consistently seem to take one side or the other in any one of these debates. Let's consider each of the potential holders of power in our federal system.

A. Administrative Agencies

Conservatives have long sought to rein in the power of the administrative state (though those efforts curiously seemed to be put on hold during the Trump Administration). Many of those efforts have targeted the “*Chevron*⁵ deference” courts have given since 1984 to agency interpretations of unclear statutory commands.⁶ That deference is based on agency expertise, and it has traditionally been at its highest in complex areas where agency expertise is more important.⁷

Despite the expectations of some, the Court didn't overrule *Chevron* last Term. Instead, it took an even more powerful step to limit agency power. In *West Virginia v. EPA*,⁸ the Court held that agencies can't take action on anything the Court considers a “major question” without clear and explicit congressional approval, no matter how detailed and bound up with agency expertise that question is and regardless of congressional intent to delegate that question to the agency.⁹ Indeed, the facts of *West Virginia v. EPA* involve individual decisions about how to account for carbon emissions from a variety of different polluters, decisions which must be made in response to constantly changing conditions;¹⁰ it is impossible to imagine Congress making those decisions itself on an ongoing basis. So the practical effect of the decision is to make it impossible for the EPA to regulate carbon emissions by coal plants and to drastically limit its power to handle climate change more generally.¹¹

⁵ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837.

⁶ *See id.* at 843–44.

⁷ It was, ironically, conservatives who developed the doctrine to protect Reagan Administration decisions, though in recent years it has been conservatives who sought to get rid of it. *See* Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 622 (2021).

⁸ 142 S. Ct. 2587 (2022).

⁹ *Id.* at 2610, 2616. Strictly speaking, the Court's “major questions” doctrine purports to allow for delegations of major questions to agencies as long as those delegations are sufficiently clear. But in *West Virginia v. EPA*, the Court ignored the actual language of section 111 of the Clean Air Act, 42 U.S.C. § 7411, because it did not like the way the agency had used its power. As the dissent pointed out, a plain reading of the statutory authorization covered what the EPA did. *West Virginia v. EPA*, 142 S. Ct. at 2627 (Kagan, J., dissenting); *see also* Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (distinguishing efforts to apply *Chevron* more carefully on important issues from broader efforts to resist delegation).

¹⁰ *West Virginia v. EPA*, 142 S. Ct. at 2601.

¹¹ The extent to which the Court will prevent legislative delegation may soon be presented since Congress — to the surprise of many — reacted swiftly to *West Virginia v. EPA* by passing an even more express delegation of authority to the EPA to regulate greenhouse gases. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, secs. 60101–03, 60107, 606113–14, 60201, §§ 132–38,

The “major questions” doctrine the Court employed is a recent judicial invention, one that has no basis in the Constitution or congressional mandate.¹² It seems to be designed to allow the Court to reject significant agency actions that are within their grant of power but that the agency implements in ways the Court doesn’t like, such as the EPA’s efforts to restrict carbon emissions in *West Virginia v. EPA*. Justice Gorsuch’s concurrence would have gone even further, dredging up the idea of a “nondelegation” doctrine that would sometimes forbid Congress from authorizing agency action no matter how clearly Congress expressed that preference.¹³

West Virginia v. EPA is the most recent and most significant example of the Court taking power from administrative agencies, but it is far from the only one. The Court also used “emergency” procedures to block the implementation of EPA water-quality rules.¹⁴ It overturned most of the government’s vaccine mandates, in part by substituting its own judgment of the harms from COVID-19 for the agency’s¹⁵ but in part

136 Stat. 1818, 2065, 2067, 2070, 2076–79 (amending Clean Air Act to define greenhouse gases as air pollutants). The Act did not (and could not) expressly overrule *West Virginia v. EPA* because it was a budget bill, but it did expressly add greenhouse gases to the list of pollutants the EPA had found threatened public health and could therefore be regulated. For discussion, see Patrick Parenteau, *The Inflation Reduction Act Doesn’t Get Around the Supreme Court’s Climate Ruling in West Virginia v. EPA, But It Does Strengthen EPA’s Future Abilities*, THE CONVERSATION (Aug. 24, 2022, 1:43 AM), <https://theconversation.com/the-inflation-reduction-act-doesnt-get-around-the-supreme-courts-climate-ruling-in-west-virginia-v-epa-but-it-does-strengthen-epas-future-abilities-189279> [<https://perma.cc/E5VD-U8YD>].

¹² See *West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting) (“The majority claims it is just following precedent, but that is not so. The Court has never even used the term ‘major questions doctrine’ before.”); David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 48–58 (2002); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937, 1944 (2017); Daniel Deacon & Leah Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 2–8), <https://ssrn.com/abstract=4165724> [<https://perma.cc/7QH4-WWPE>]; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 224, 228, 247, 256–57 (2001).

To be sure, the Court has previously noted that Congress is unlikely to abdicate entirely on “essential” issues, leaving them to the administrative agencies. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015). But there is a difference between refusing to read a delegation into congressional silence, as the Court did in *King*, and rejecting an express delegation of power on the grounds that certain important issues required Congress to be especially clear.

¹³ *West Virginia v. EPA*, 142 S. Ct. at 2624–26 (Gorsuch, J., concurring). For prior suggestions that Congress should be prevented altogether from delegating certain powers to agencies, see *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst. (Benzene)*, 448 U.S. 607, 671–88 (1980) (Rehnquist, J., concurring in the judgment); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1288 (1985). For discussion of the idea, see Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

¹⁴ *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1348 (2022) (Kagan, J., dissenting).

¹⁵ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 662–64 (2022). Uncontroverted evidence in the case showed that the Occupational Safety and Health Administration (OSHA) mandate would have saved 6500 lives and prevented hundreds of thousands of hospitalizations. The Court’s response was that “it is not our role to weigh such tradeoffs.” *Id.* at 666. But as noted below in the discussion of court procedure, weighing the balance of the hardships and the public interest not only is the Court’s job, but in the context of ordering the mandate stayed, it is the Court’s only job. See *infra* p. 107.

by declaring that the Occupational Safety and Health Administration doesn't have the power to issue regulations that govern health and safety in the workplace unless those regulations govern harms that exist *only* in the workplace.¹⁶ In recent years the Court has taken away the power of the Federal Trade Commission (FTC) to seek disgorgement remedies in enforcement actions in federal court, following what does appear to be the plain language of the FTC Act¹⁷ but overruling or ignoring its own prior precedent and the historical understanding of equitable powers.¹⁸ Notably, while the Court has not overruled *Chevron*, it often decides these cases without citing or applying *Chevron* at all.¹⁹ And it has held that administrative law judges are unconstitutional unless they are confirmed by the Senate or their decisions are subject to discretionary reversal by a Senate-confirmed agency head.²⁰ The Court has not (yet) gone so far as to dismantle the administrative state. But it is clearly embarked on a project to rein in the power of administrative agencies, at least when they do things the current Court majority doesn't like.

By contrast, the Court apparently didn't consider the Trump Administration's ban of all immigrants from certain countries or the Trump Administration's regulatory exemption from the Affordable Care

¹⁶ *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665. This is a truly remarkable holding that, if taken seriously, would prevent OSHA from regulating any number of workplace hazards, from remediating asbestos to requiring hard hats, because employees could face similar health risks off the job too. *But see* Biden v. Missouri, 142 S. Ct. 647, 653–54 (2022) (upholding vaccine mandate for health care workers who receive Medicare reimbursement).

¹⁷ Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b).

¹⁸ *See* *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1349 (2021). The Court's decision is at odds with each of *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). *See* *Weinberger*, 456 U.S. at 320 (maintaining the Court's historic equity power to deny injunctive relief despite a technical statutory violation where Congress had not clearly foreclosed historic equitable discretion); *Porter*, 328 U.S. at 399 (“An order for the recovery and restitution of illegal rents . . . may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief.”); *Mitchell*, 361 U.S. at 296 (district courts' authority “to restrain violations” of the Fair Labor Standards Act also includes the implied power to order the payment of lost wages); *see also* Caprice L. Roberts, *Supreme Disgorgement*, 68 FLA. L. REV. 1413, 1424–26 (2016) (explaining the history of the equitable disgorgement power). Courts have traditionally permitted equitable monetary relief incident to injunctions. *See* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 236, at 245 (San Francisco, A.L. Bancroft & Co. 1881) (“[W]herever the court of equity has jurisdiction to grant the remedy of injunction for some special purpose, even though the injunction covers only a portion of the controversy, it may go on and decide all the issues, and make a final decree granting full relief.”); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 931–33, at 209–11 (Boston, Charles C. Little & James Brown 1839) (“[I]n most cases of this sort, the bill usually seeks an account, in one case of the books printed, and in the other of the profits, which have arisen from the use of the invention, from the persons, who have pirated the same. And this account will, in all cases, where the right has been already established, or is established under the direction of the Court, be decreed as *incidental*, in addition to the other relief by a *perpetual injunction*.” *Id.* § 933, at 210–11 (emphasis added)).

¹⁹ *See, e.g.*, *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896 (2022).

²⁰ *See* *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1981 (2021).

Act's contraception mandate to involve "major questions."²¹ Some of that difference may reflect the Court majority's support for the Trump Administration's policies on the merits. But it also may reflect a difference between the current majority's view of administrative agencies and its view of presidential power. The latter has continued to expand in recent years.²² Indeed, the Court has recently embraced the consolidation of presidential power over agencies under a theory termed the "unitary executive."²³ It remains to be seen whether the conservative judicial support for presidential power will survive the transition to a Democratic president. But as Blake Emerson notes, there is considerable tension between the Court's "unitary executive" idea and its increasing scrutiny of agency action.²⁴

B. Congress

While the Court's effort to limit the power of agencies might in turn seem to shift power to Congress, which has traditionally been on the other side of separation of powers battles,²⁵ the Court is cutting back congressional power too. Most radically, in *TransUnion LLC v. Ramirez*,²⁶ the Court held that Congress had no power to create a cause of action enforceable in federal court based on a new theory of harm unless that new theory of harm was analogous to one that existed at the time of the Founding.²⁷ In that case, Congress created a cause of action for people whose data was deliberately mishandled by credit reporting agencies, giving them the right to recover statutory damages of \$100 to \$1000 even if they could not show that they suffered financial injury as a result of being misclassified.²⁸ The Court held that while Ramirez,

²¹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2372–73 (2020). For further discussion, see generally Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. (forthcoming 2023), <https://ssrn.com/abstract=4033753> [<https://perma.cc/YF9W-RZ36>]; and Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4119098> [<https://perma.cc/SU4Y-G2XA>].

²² See William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505, 508 (2008).

²³ See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (holding that Congress could not restrict the power of the President to fire the head of the Consumer Financial Protection Bureau (CFPB)); DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* 156–57 (2021).

²⁴ Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. (forthcoming 2022) (manuscript at 2), <https://ssrn.com/abstract=4254219> [<https://perma.cc/US3G-BZ9U>] ("The unitary executive theory presumes that the President alone may exercise executive power. But by wresting away the policymaking discretion Congress has delegated to executive agencies, the Court *itself* exercises executive power. . . . The Court is thus constructing the unitary executive with one hand and fragmenting it with the other." (footnote omitted)).

²⁵ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 659–60 (1988); *INS v. Chadha*, 462 U.S. 919, 959 (1983).

²⁶ 141 S. Ct. 2190 (2021).

²⁷ *Id.* at 2200.

²⁸ *Id.* at 2200–01.

who was wrongly classified as a terrorist by the credit agency, suffered harm, other class members who couldn't show financial loss could not bring a claim to enforce the statute because there was no "case or controversy" under Article III.²⁹

While a plaintiff's ability to collect statutory damages would naturally seem to satisfy the "case or controversy" requirement, the Court held that it didn't because Congress could create new causes of action only if they addressed the sorts of injuries analogous to those that courts considered in the eighteenth century.³⁰ The ability to collect \$1000 in statutory damages, the Court held, did not qualify.³¹ Justice Kavanaugh's opinion for the Court was express in worrying that if the Court allowed Congress to create new causes of action, people might be able to seek redress for other forms of injury Congress decided to recognize.³² The Court specifically mentioned harm to the environment as an example of something Congress couldn't legislate a cause of action for,³³ which is particularly ironic in light of *West Virginia v. EPA*. But its implications may run much more broadly, striking down statutory damages rules in very different fields like copyright³⁴ and calling into question the power to create procedural mechanisms like class actions.

Nor is *TransUnion* alone in restricting congressional power to act. The Court in 2022 rendered campaign finance reform (even more) toothless in *FEC v. Ted Cruz for Senate*,³⁵ holding that candidates had a First Amendment right to loan unlimited amounts of money to their own campaigns and then collect campaign contributions that would otherwise violate the law to repay themselves that money.³⁶ On another occasion, it held that Congress had no power to create a new agency whose head could not be fired summarily by the President, even though

²⁹ *Id.* at 2200–03 (citing U.S. CONST. art. III, § 2, cl. 1)

³⁰ *Id.* at 2204–05 (“[W]e cannot treat an injury as ‘concrete’ for Article III purposes based only on Congress’s say-so.” *Id.* at 2205.). This claim is so at odds with the history of legal rights that it prompted even Justice Thomas to dissent. *Id.* at 2214 (Thomas, J., dissenting).

³¹ *Id.* at 2201, 2205 (majority opinion). This is particularly remarkable because the payment of money from a defendant to a plaintiff seems precisely the sort of concrete dispute courts have long resolved. And it is hard to imagine that if Congress gave an administrative agency the power to order defendants to pay \$1000 to plaintiffs, the Court would refuse to hear appeals from that agency decision on the grounds that there was no live controversy.

³² *Id.* at 2205–06.

³³ *Id.*

³⁴ See generally Thomas F. Cotter, *Standing, Nominal Damages, and Nominal Damages Workarounds in Intellectual Property After TransUnion*, 56 U.C. DAVIS L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4086988> [<https://perma.cc/U92E-8JRD>]. Cotter is more confident than I am that copyright statutory damages survive *TransUnion*. While equitable remedies in IP do pass the Court's history test, those remedies are under attack by the Court too. See *infra* notes 47–51 and accompanying text. But statutory damages do not have the same history, and they seem to do exactly what Justice Kavanaugh objects to — allow a plaintiff to sue to recover money not because they can show a loss but simply because Congress believed they should be able to recover that money.

³⁵ 142 S. Ct. 1638 (2022).

³⁶ *Id.* at 1656–57.

numerous government agencies and commissions have long had independent leadership.³⁷ And it stood in the way of efforts of congressional committees to subpoena documents from the Trump Administration in *Trump v. Mazars USA, LLP*.³⁸ This is part of a longer-term effort to cut back congressional power³⁹ even when expressly delegated by the Constitution.⁴⁰ And while courts have always restricted the power of Congress to act in unconstitutional ways,⁴¹ what is remarkable about *TransUnion* and *Mazars* is that they reflect a judicial decision to reject congressional power even absent a claim that it violated some constitutional right.

C. Federal Courts

If the Supreme Court is limiting the power of both Congress and the executive branch, perhaps that power is shifting to the federal courts, giving them greater power to police the actions of the other branches of government? In fact, however, the Court has also limited the power of lower federal courts in various ways. In the last two Terms, the Court held that federal courts can't review agency immigration decisions even when they clearly violate the statute, upholding but also extending statutory restrictions on judicial review of detention, deportation, and discretionary relief.⁴² And the Court has proved no more welcoming to new judicial initiatives than it has to those from Congress or the executive branch. It has restricted the power of federal courts to apply common law torts principles,⁴³ the power of courts to remedy unques-

³⁷ See *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2143, 2192 (2020). Members of the Federal Trade Commission, the Federal Reserve Board, and the National Labor Relations Board, among others, are all nominated for terms and cannot be removed at will. *Id.* at 2224 (Kagan, J., dissenting).

³⁸ 140 S. Ct. 2019, 2036 (2020). *But cf.* *Nixon v. United States*, 506 U.S. 224, 229 (1993) (holding that the Senate has sole discretion over impeachment procedures); *McGrain v. Daugherty*, 273 U.S. 135, 152 (1927) (acknowledging that Congress can subpoena information in support of its legislative authority). For discussion, see Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 127–28 (2021) (“What the cases surrounding access to Donald Trump’s financial records and the cases surrounding access to Richard Nixon’s White House tapes have in common above all else is . . . [a] project of judicial empowerment at the legislature’s expense. . . . Whereas the Nixon Court acted to push a lawless president out of office, the Trump Court acted to ensure that the information sought by other institutional actors could not have electoral or institutional consequences for another lawless president.” (footnote omitted)).

³⁹ See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (striking down section 4(b) of the Voting Rights Act).

⁴⁰ E.g., U.S. CONST. amend. XV, § 2 (“Congress shall have power to enforce this article by appropriate legislation.”).

⁴¹ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 511–12 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress’s power under section 5 of the Fourteenth Amendment).

⁴² *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2062–63 (2022) (citing 8 U.S.C. §§ 1231(a)(6), 1252(f)(1)); *Patel v. Garland*, 142 S. Ct. 1614, 1627 (2022) (citing 15 U.S.C. §§ 1252(a)(2)(B)(i), 1255).

⁴³ *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022) (holding that courts cannot award emotional distress damages under federal law).

tionable constitutional violations,⁴⁴ and the ability of juries to award punitive damages.⁴⁵ It has broadened the doctrine of qualified immunity to such an extent that no right seems “clearly established” unless the Supreme Court itself has held it so, regardless of how clear the right is in the appellate courts.⁴⁶ Nor is the Court merely restricting the continued development of common law and equity. It has curbed the traditional powers of federal courts in equity, reading even an express grant of equity power in the Lanham Act so narrowly that it might as well not exist.⁴⁷ Three or perhaps four Justices in *Minerva Surgical, Inc. v.*

⁴⁴ See *Egbert v. Boule*, 142 S. Ct. 1793, 1800 (2022). Ironically, given *TransUnion*, the Court said its prior precedent in *Bivens* did not apply because Congress has the power to create a cause of action for constitutional violations by Customs and Border Protection agents, so the courts shouldn’t apply their own precedents to do the same. *Id.* at 1803. But as we have seen, the Court is undercutting Congress’s power to act at the same time.

⁴⁵ See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003).

⁴⁶ See *Egbert*, 142 S. Ct. at 1807; *id.* at 1821 n.5 (Sotomayor, J., concurring in the judgment in part and dissenting in part) (quoting *Wood v. Moss*, 572 U.S. 744, 757 (2014)); Pamela S. Karlan, *What’s a Right Without a Remedy?*, BOS. REV. (Mar. 1, 2012), <https://www.bostonreview.net/articles/pamela-karlan-supreme-court-rights-legal-remedies> [<https://perma.cc/K59H-WQKG>].

⁴⁷ *Romag Fasteners, Inc. v. Fossil Inc.*, 140 S. Ct. 1492, 1496–97 (2020). Some background is in order. The statute in this case expressly gave courts the power to award remedies “subject to the principles of equity.” 15 U.S.C. § 1117(a). The Court disregarded that language because it concluded that “principles” of equity meant only “fundamental truth or doctrine” that was unquestioned in all fields. *Romag*, 140 S. Ct. at 1496 (quoting *Principle*, BLACK’S LAW DICTIONARY (3d ed. 1933); *Principle*, BLACK’S LAW DICTIONARY (4th ed. 1951)). That has never been the rule. The shift to this more restrictive standard for applying equitable doctrine is even more curious because the principle the Court chose to disregard in *Romag* — that intentional infringement was required for disgorgement of profits, *id.* at 1494 — meets even the Court’s new high bar for allowing equity doctrine. For many years, courts in trademark cases unanimously followed the holding in *Champion Spark Plug Co. v. Sanders*, 331 U.S. 125 (1947), that an accounting is appropriate only when “fraud or palming off” is present, *id.* at 131, and that courts would grant an accounting of a defendant’s profits only if the defendant acted in bad faith, *see id.* at 131–32. See, e.g., *W. Diversified Servs., Inc. v. Hyundai Motor Am., Inc.*, 427 F.3d 1269, 1273–73 (10th Cir. 2005). The three cases that the *Romag* majority cites for the proposition that willfulness need not be proved to obtain disgorgement of the defendant’s profits are outlier decisions that are more than ninety years old. *Romag*, 140 S. Ct. at 1496; *see also* Pamela Samuelson, John M. Golden & Mark P. Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. REV. 1999, 2014–23 (2020). The requirement of intentional infringement is a fundamental principle of equity in trademark cases.

Nor is this a rule peculiar to trademark law. To the contrary, the equitable remedy of disgorgement of defendant’s gains (as opposed to recovering plaintiff’s own losses) has traditionally been limited to “conscious wrongdoers.” See DAN B. DOBBS & CAPRICE L. ROBERTS, *LAW OF REMEDIES* § 4.3(5), at 420 (3d ed. 2018) (“Serious and conscious wrongdoing should be required to justify a recovery of defendant’s profits except when a different rule is imposed by statute.”); DOUGLAS LAYCOCK & RICHARD L. HASEN, *MODERN AMERICAN REMEDIES* 673–93 (5th ed. 2019). The theory is straightforward: requiring the defendant to pay more than the plaintiff lost makes sense only if the goal is to punish or deter the defendants by depriving them of their ill-gotten gains. Remedy jurisprudence has traditionally reserved such penalties for intentional acts. See *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 207 (1942) (“There may well be a windfall to the trademark owner where it is impossible to isolate the profits which are attributable to the use of the infringing mark. But to hold otherwise would give the windfall to the wrongdoer.”).

*Hologic, Inc.*⁴⁸ would have eliminated a longstanding (and admittedly problematic) equitable doctrine in patent law, not because it was problematic but simply because it *was* an equitable doctrine.⁴⁹ They suggested that courts had no power to apply equitable doctrines to federal statutes unless they were “part of the well-settled common-law backdrop” of the statute.⁵⁰ And in *Minerva*, even a century of application of the estoppel doctrine in equity didn’t qualify to make it part of the “backdrop.” That is a remarkable change from the broad grant of power that has characterized equity for centuries.⁵¹

Procedural changes at the Court have also undermined the power of lower courts, both by refusing to give deference in places where it has long been held due and by trampling on the rules of equity that govern stays. As Stephen Vladeck and others have documented, the Court increasingly makes significant changes in the law on what William Baude has termed the “shadow docket” without full briefing or argument.⁵² In fact, the growth of the shadow docket is so dramatic that the Court last Term issued more “emergency” orders than opinions in cases on its regular docket.⁵³ And those cases increasingly concern not merely procedural issues like stays but also full rulings on extremely important and controverted issues. In the last Term, for instance, the Court overturned the government’s vaccine mandate⁵⁴ and required both Alabama and Louisiana to hold elections using an illegal map, all without consideration of the merits.⁵⁵ The result has been, as Justice Kagan noted, to

⁴⁸ 141 S. Ct. 2298 (2021).

⁴⁹ *Id.* at 2314 (Barrett, J., dissenting). Justice Alito felt the Court should decide expressly whether to overrule prior precedent. *Id.* at 2311 (Alito, J., dissenting) (citing Westinghouse Elec. & Mfg. Co. v. Formica Insulation Co., 266 U.S. 342 (1924)). For a discussion of the history of and problems with the doctrine, see Mark A. Lemley, *Rethinking Assignor Estoppel*, 54 HOUS. L. REV. 513 (2016).

⁵⁰ *Minerva*, 141 S. Ct. at 2314 (Barrett, J., dissenting); see also *id.* at 2320 (“If we had authority to develop federal common law on [assignor estoppel], we could take sides in that debate. But no one contends that we do.”); *id.* at 2307 (majority opinion) (“[Petitioner’s] view is untenable because it would foreclose applying in patent cases a whole host of common-law preclusion doctrines . . .”).

⁵¹ See, e.g., *Norstar Bank v. Morabito*, 607 N.Y.S.2d 426, 427 (App. Div. 1994) (“Once equity is invoked, the court’s power is as broad as equity and justice require.” (citation omitted) (citing Ripley v. Int’l Rys. of Cent. Am., 188 N.Y.S.2d 62, 82 (App. Div. 1959), *aff’d*, 171 N.E.2d 443 (N.Y. 1960))).

⁵² William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015) (coining the term); Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 128 (2019); STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (forthcoming 2023).

⁵³ Kimberly Strawbridge Robinson, *Supreme Court Conservatives Want More Robust “Shadow Docket,”* BLOOMBERG L.: U.S. L. WK. (July 8, 2022, 12:51 PM), <https://news.bloomberglaw.com/us-law-week/supreme-courts-conservatives-want-more-robust-shadow-docket> [https://perma.cc/8QL4-KRTK] (sixty-six emergency orders and sixty merits opinions).

⁵⁴ See *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 662–64 (2022) (per curiam).

⁵⁵ *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.) (Alabama); *Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022) (mem.) (Louisiana). As a result of those decisions, not only Alabama and

render “the Court’s emergency docket not for emergencies at all. [It] becomes only another place for merits determinations — except made without full briefing and argument.”⁵⁶

The Court’s increased use of the shadow docket has been coupled with a rather striking disregard of the traditional rules of equity governing stays and other temporary relief. While the Court itself set out those rules in no uncertain terms not too many years ago,⁵⁷ it has disregarded them in the interest of quickly reaching the result it wants rather than waiting for full briefing. In issuing a stay striking down the vaccine mandate for government contractors, the Court not only disregarded the normal purpose of a stay — to preserve the status quo pending a full substantive hearing⁵⁸ — but affirmatively announced that it was free to ignore the balance of hardships and the public interest altogether, paying attention only to the question of who was ultimately likely to win the case.⁵⁹ That is directly contrary to the law, which requires consideration of relative hardships to the parties and to the public before issuing a stay.⁶⁰ The Louisiana case is a particularly striking departure from procedural norms. There, the Court converted a motion to stay an injunction into a merits case before a final judgment on the merits and then immediately ruled on that newly created merits case.⁶¹ In doing so, it effectively nullified the detailed decisions of both the district court and the Fifth Circuit without even entertaining briefing on the merits, much less giving deference to the factfinding of lower courts.

The Court’s disregard of procedure and the deference it is supposed to give to factfinding isn’t limited to the shadow docket. In *Kennedy v.*

Louisiana but also Georgia and Ohio will hold the 2022 election using an illegal map rigged to favor Republican candidates. See Michael Wines, *Maps in Four States Were Ruled Illegal Gerrymanders. They’re Being Used Anyway.*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/2022/08/08/us/elections/gerrymandering-maps-elections-republicans.html> [<https://perma.cc/A5WJ-XAR3>].

⁵⁶ *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting).

⁵⁷ *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–12 (1982).

⁵⁸ See, e.g., *Nken v. Holder*, 556 U.S. 418, 432 (2009) (“The authority to grant stays has historically been justified by the perceived need ‘to prevent irreparable injury to the parties or to the public’ pending review.” (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942))).

⁵⁹ *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 666.

⁶⁰ *eBay*, 547 U.S. at 391. For criticism of the Court’s abdication of its equitable responsibility in this case, see David M. Driesen, *The Death of Law and Equity*, VERFASSUNGSBLOG (Jan. 19, 2022), <https://verfassungsblog.de/the-death-of-law-and-equity> [<https://perma.cc/W4ZP-9KCR>].

⁶¹ *Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022) (mem.) (“[T]he application for stay is treated as a petition for writ of certiorari before judgment, and the petition is granted.”); accord *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.) (same procedural posture).

By contrast, when the Court agrees with the decision below, it is happy to invoke those same equitable doctrines to deny a stay, even when the equities seem to point the other way. See *United States v. Texas*, 91 U.S.L.W. 3013, 3013 (U.S. 2022) (mem.) (denying stay of lower court order vacating Biden Administration’s guidelines directing Immigration and Customs Enforcement to prioritize national security, public safety, and border security), *granting cert. to* 40 F.4th 205 (5th Cir. 2022).

Bremerton School District,⁶² the Court took the remarkable step of re-writing the facts of the case, ignoring what actually happened (as found by both the district court and the court of appeals and documented with photographs), and writing its own (false) set of facts to tell a more favorable story for the outcome it wanted to reach.⁶³ It has reached out to decide issues not presented by the case before it,⁶⁴ despite clear and longstanding rules against issuing advisory opinions.⁶⁵ And it has repeatedly violated its own rules for standing and mootness, dismissing actual controversies between parties with a concrete interest for lack of standing in *TransUnion*⁶⁶ and *Whole Woman's Health v. Jackson*⁶⁷ while overlooking problems of standing and even mootness when the Court has decided it wants to rule on a particular issue, as it did in *West Virginia v. EPA*.⁶⁸

The practical effect of these changes has been that while the Court is taking power away from Congress and the executive branch, it isn't vesting that power in the lower federal courts. To the contrary, it is hamstringing them by bypassing longstanding procedural and substantive rules and its own doctrine in order to reach out, take, and decide major legal questions that either are not presented at all or have not proceeded through the courts to establish a record.

D. States

All this in turn might seem to shift power to the states. Conservatives of another era pushed for greater power for states vis-à-vis the federal government. Prior Court limits on federal power often expressly delegated that power to the states.⁶⁹ And some cases, such as *Dobbs v.*

⁶² 142 S. Ct. 2407 (2022).

⁶³ Compare *id.* at 2416–19, with *id.* at 2435–40 (Sotomayor, J., dissenting).

⁶⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); Petition for a Writ of Certiorari at i, *Dobbs* (No. 19-1392), 2020 WL 3317135.

⁶⁵ *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (“We have long understood [Article III] to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.”).

⁶⁶ See *supra* pp. 102–03.

⁶⁷ 142 S. Ct. 522, 530, 539 (2021) (refusing to allow most constitutional challenges to Texas’s “bounty” statute allowing private citizens, but not government officials, to enforce its antiabortion law).

⁶⁸ See 142 S. Ct. 2587, 2606–07 (2022). The decision of the Court to reach the merits of that case was particularly striking because it involved an Obama-era EPA regulation that had been withdrawn by the Trump Administration several years before and that the Biden Administration had decided not to reinstate. The case was moot, and the Court reached out to issue an advisory opinion on the legality of a regulation that was not and never would be in force. See *id.* at 2604–06 (reciting these facts); Tom Merrill, *West Virginia v. EPA: An Advisory Opinion?*, REASON: VOLOKH CONSPIRACY (July 25, 2022, 7:05 AM), <https://reason.com/volokh/2022/07/25/west-virginia-v-epa-an-advisory-opinion> [<https://perma.cc/9AET-3EUE>].

⁶⁹ See *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (restricting federal power to punish violence against women); *United States v. Lopez*, 514 U.S. 549, 551–52 (1995) (restricting federal

Jackson Women's Health Organization,⁷⁰ do give power to state governments, albeit at the expense of individual rights. But the current Court has regularly imposed new limits on the power of the states to regulate in areas they have long been able to, from public health to public safety. In the past year, the Court held that the State of California had no power to prevent the spread of COVID-19 by applying neutral rules of general applicability that governed group gatherings to churches.⁷¹ It held that public school districts had no power to prevent their employees from leading students in public prayer on school grounds during school events.⁷² It extended its string of decisions holding that the Federal Arbitration Act⁷³ (FAA) overrides virtually all state and federal causes of action.⁷⁴ And it overturned New York's law regulating the carrying of guns in public places, creating a new constitutional right to carry guns that does not appear to be limited by most state registration or safety requirements.⁷⁵

The Court seems poised to intrude even further on states' rights next Term. It granted certiorari in a voting case in which the petitioners argue that state courts and executive officials have no power to apply state voting laws and constitutions and that the exclusive decisionmaker

power to regulate intrastate gun sales). At least some of those decisions turn out, with hindsight, to have been merely a first step towards *restricting* state power, however. While *Lopez* phrased its decision in terms of federalism and state autonomy over guns, the Court in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), took away that very state autonomy once it had a majority willing to implement its own views of gun regulation more expressly. *See id.* at 2122; *see also* *Gonzales v. Raich*, 545 U.S. 1, 22–23 (2005) (rejecting the logic of *Lopez* when the federal government sought to impose on the states a regulation the conservative majority liked — there, banning marijuana).

⁷⁰ 142 S. Ct. 2228 (2022).

⁷¹ *See* *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam); *id.* at 1298 (Kagan, J., dissenting). *Tandon* is arguably an extension of a longer-term project at the Court to exempt the Christian religion from virtually all laws of general applicability. *See* *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1724 (2018) (holding that Colorado violated the rights of a religious cake maker by applying nondiscrimination laws against him); *see also id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment) (arguing that corporate religious beliefs trumped nondiscrimination law); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691–92 (2014) (holding that the state could not enforce a healthcare mandate that conflicted with corporate religious beliefs). While the *Masterpiece Cakeshop* majority did not reach the merits of the petitioner's free speech claim, the Court looks poised to do so next Term in *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.) (granting certiorari).

⁷² *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022). To be clear, the Court pretended that it was not ruling that broadly by blatantly mischaracterizing what happened in the case, as the dissent pointed out with photographic evidence. *See id.* at 2435–40 (Sotomayor, J., dissenting).

⁷³ 9 U.S.C. §§ 1–16.

⁷⁴ *See* *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1924–25 (2022); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 231, 238–39 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–44 (2011); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 616, 624–25, 640 (1985). For an explanation of why those decisions are not based in a sound interpretation of the FAA, see Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 7–12, 43–45 (2015).

⁷⁵ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2122 (2022).

for federal elections must be state legislators.⁷⁶ A decision for petitioners would not only be a remarkable intrusion on state legal process — essentially holding that *Marbury v. Madison*⁷⁷ is federal law but states are precluded from following it — but also present a real risk that the United States will no longer be permitted to hold democratic elections.⁷⁸

In each of these cases (except *Dobbs*), the Court siphoned power away from the states.⁷⁹ Some of those cases involved the Court's expansion of the few individual rights it favors. More on that in the next section. Others involved Court intervention in how states decide things. But each of them withdrew from states power they had long held in areas of their core competency — health and safety, public education, and the design of their own governments. And even *Dobbs* put a different sort of power in the hands of the current Court — the power to overrule prior Supreme Court decisions it simply doesn't like.

E. Individual Rights

Circumscribing the power of all branches of government at all levels might be thought to correspondingly increase the freedom of individuals, who are less subject to government regulation. In fact, however, with the exception of a few favored areas where the Court created new rights — the right to carry guns in public⁸⁰ and the right of government officials to pray at public events⁸¹ — the Court's recent history has been one of withdrawing rights from the public. Most famously, it eliminated the right to reproductive freedom, giving states the power to compel birth.⁸² It has also effectively eliminated the power of federal courts to enforce the right to vote, announcing that it was withdrawing from efforts to protect the right to vote against partisan gerrymandering a few years back⁸³ and following up by affirmatively preventing federal and

⁷⁶ *Moore v. Harper*, 142 S. Ct. 2901, 2901 (2022) (mem.) (granting certiorari); see Petition for Writ of Certiorari at 15–16, *Moore* (No. 21-1271), 2022 WL 5551818.

⁷⁷ 5 U.S. (1 Cranch) 137 (1803).

⁷⁸ For further discussion, see generally Vikram David Amar & Akhil Reed Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1 (2022); Pamela S. Karlan, *The New Counter-majoritarian Difficulty*, 109 CALIF. L. REV. 2323 (2021).

⁷⁹ And even *Dobbs* may turn out, like *Lopez* three decades earlier, to be not an expansion of states' rights but a first step to restricting the power of all governments to do something the Court doesn't like. Just as the Court first decided gun control was a states' rights issue before taking power away from the states, it may well ultimately conclude that states too have no power to permit abortion.

⁸⁰ *Bruen*, 142 S. Ct. at 2122.

⁸¹ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2416 (2022).

⁸² See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

⁸³ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

possibly even state courts from blocking concededly discriminatory gerrymandering schemes.⁸⁴ And it declared that one of the most famous rights given to criminal defendants — the *Miranda* warning — was not in fact a right at all that citizens could enforce, but just a prophylactic rule that the Court might change at any time.⁸⁵ At least one Justice signaled his desire to go further by rolling back protections for marriage equality and contraception access.⁸⁶

F. Judicial Philosophy

Nor can these changes be explained by a particular judicial philosophy, whether originalism, textualism, dictionary fetishism, stare decisis, or anything else. Conservative Justices regularly recite fidelity to each of those methodologies. And sometimes they apply them. But they are just as happy to depart from them when it serves their interests to do so.

Textualism is the backbone of conservative decisions — until it isn't. In *West Virginia v. EPA*, the Court ignored the D.C. Circuit's detailed textual reading of the Clean Air Act in favor of a judicially created constitutional doctrine first mentioned more than a century after the founding and that hasn't really been applied until the last few decades.⁸⁷ In *New York State Rifle & Pistol Ass'n v. Bruen*,⁸⁸ the Court ignored the text of the Second Amendment to create a new constitutional right to override the ability of states to regulate guns.⁸⁹ In *Kennedy*, it ignored not only the text of the First Amendment but the facts of the case before it in order to throw out the bulk of the Establishment Clause.⁹⁰ I have written elsewhere about the Court's inconsistent use of dictionaries,

⁸⁴ *Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022) (mem.) (Louisiana); *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) (Wisconsin); *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (mem.) (Alabama).

⁸⁵ See *Vega v. Tekoh*, 142 S. Ct. 2095, 2101 (2022). While *Vega* arose in the context of a civil claim for damages against the government, an action of the type today's Court disfavors, the Court's reasoning is arguably inconsistent with the Court's prior ruling that *Miranda* was a constitutional requirement that Congress could not overrule. See *Dickerson v. United States*, 530 U.S. 428, 432 (2000). And it seems inconsistent with the incorporation of the *Miranda* warning against the states, which makes sense only if *Miranda* is part of the constitutional protection against self-incrimination. See *id.* at 438–39.

⁸⁶ *Dobbs*, 142 S. Ct. at 2300–01 (Thomas, J., concurring).

⁸⁷ See *supra* notes 8–13 and accompanying text. As Justice Kagan put it in dissent: “Some years ago, I remarked that ‘[w]e’re all textualists now.’ It seems I was wrong. The current Court is textualist only when being so suits it.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (alteration in original) (citation omitted) (quoting Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE, at 8:29 (Nov. 25, 2015), <https://youtu.be/dpEtszFTg?t=509> [<https://perma.cc/V6YU-TF85>]).

⁸⁸ 142 S. Ct. 2111 (2022).

⁸⁹ See *id.* at 2122; *id.* at 2177 (Breyer, J., dissenting).

⁹⁰ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); *id.* at 2435–40, 2447 (Sotomayor, J., dissenting).

which seem primarily to provide cover for whatever version of plain meaning the Justice invoking the dictionary seems to prefer.⁹¹

Nor does originalism fare any better. *Bruen* and *Kennedy* both ignored the original understanding of the Constitution to implement a decidedly new version of the First and Second Amendments that would look quite unfamiliar to the Framers.⁹² The Court's decisions invalidating the Voting Rights Act's crucial preclearance regime⁹³ manifestly ignored the purpose and history of that act.⁹⁴ And in *Dobbs*, the Court went to considerable lengths to gin up a history suggesting that the Founders intended to regulate abortion while ignoring contrary evidence.⁹⁵ Even the rare decision expanding individual rights — Justice Gorsuch's 2020 decision in *Bostock v. Clayton County*⁹⁶ prohibiting workplace discrimination on the basis of sexual orientation and gender identity — reflected a clear departure from the original intent of Title VII.⁹⁷

Nor is the Court any longer constrained by the principle of fidelity to past precedent. *Dobbs* in particular shows the limits of stare decisis as a constraint on judicial activism. The Court there expressly overruled fifty years of precedent, including its own prior decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹⁸ that it shouldn't overrule established precedent on the question of abortion.⁹⁹ But while *Dobbs* is the most dramatic example, it is not alone. *Vega v. Tekoh*¹⁰⁰ essentially overruled *Dickerson v. United States*,¹⁰¹ giving no weight to stare decisis in undercutting the constitutional significance of the *Miranda* warning when it comes to private claims for violation of constitutional rights.¹⁰²

⁹¹ Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299, 300–01 (2020).

⁹² Michael L. Smith, *Abandoning Original Meaning*, 36 ALB. L. REV. (forthcoming 2023) (manuscript at 1), <https://ssrn.com/abstract=4211660> [<https://perma.cc/TM5G-ZE9Z>] (“[T]he Supreme Court had the opportunity [in *Bruen*, *Dobbs*, and *Kennedy*] to take an originalist approach to the Constitution and interpret it based on its original public meaning. The Supreme Court declined to do so.”).

⁹³ See, e.g., *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

⁹⁴ See, e.g., *id.* at 562–66 (Ginsburg, J., dissenting).

⁹⁵ The American Historical Association, the Organization of American Historians, and thirty other groups issued a statement in the wake of *Dobbs* criticizing the Court for “declin[ing] to take seriously the histor[y]” and “adopt[ing] a flawed interpretation of abortion criminalization that has been pressed by anti-abortion advocates for more than 30 years. . . . These misrepresentations are now enshrined in a text that becomes authoritative for legal reference” Joint Statement, Am. Hist. Ass’n & Org. of Am. Historians, History, The Supreme Court, and *Dobbs v. Jackson* (July 2022), [https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-\(july-2022\)](https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah-(july-2022)) [<https://perma.cc/T85Q-FWFL>].

⁹⁶ 140 S. Ct. 1731 (2020).

⁹⁷ See *id.* at 1737.

⁹⁸ 505 U.S. 833 (1992).

⁹⁹ *Id.* at 853.

¹⁰⁰ 142 S. Ct. 2095 (2022).

¹⁰¹ 530 U.S. 428 (2000).

¹⁰² See *Vega*, 142 S. Ct. at 2108; *id.* (Kagan, J., dissenting).

None of this is to say that textualism, originalism, and fidelity to precedent aren't playing a role in modern Court opinions. But they are tools the Justices deploy to achieve particular results those Justices have already decided they want to reach; they can't explain those results because they aren't used consistently.

II. CONFRONTING THE IMPERIAL ERA

The Court's cases in the 2020s can't be explained by any of the normal power axes — Congress versus the administrative state, courts versus the other branches, states versus the federal government, government versus individual rights. Nor can they be explained by fidelity to a philosophy of law, and certainly not by fidelity to *stare decisis* and the legal process itself. True, there are individual cases that benefit some of those parties at the expense of others. If a state sues an administrative agency, one of them has to win. But there is no consistent explanation for the cases that fits any of the conventional axes of Supreme Court politics.¹⁰³

There is one consistent theme in the cases, however. They centralize power in the Supreme Court, which today is not only the most activist of any Court in the past century, but increasingly the locus of all legal power. This is not a Court that “calls balls and strikes,” as the ludicrous metaphor suggests.¹⁰⁴ It is not even a Court that is using the tools of common law and equity to adapt the law in ways that it prefers. It is a Court that is consolidating its power, systematically undercutting any branch of government, federal or state, that might threaten that power, while at the same time undercutting individual rights.¹⁰⁵

I don't necessarily think the Court's new majority is doing this intentionally, aggregating power for its own sake. A more plausible explanation is that a newfound conservative majority is simply doing whatever it wants in the cases before it, consistent with a particularly

¹⁰³ Maxwell Stearns has suggested that constitutional law is incoherent more generally because it begins from a series of conflicting premises. See generally Maxwell L. Stearns, *Constitutional Law's Conflicting Premises*, 96 NOTRE DAME L. REV. 447 (2020).

¹⁰⁴ Chief Justice Roberts famously said at his confirmation hearing that his job was simply to “call balls and strikes.” *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. 56 (2005) (statement of John G. Roberts, Jr., J.). But as any number of scholars have recognized, that's nonsense. See, e.g., ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 310 (2014); cf. Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012) (analyzing the metaphor as metaphor). Juries might “call balls and strikes” — that is, decide the particular facts before them in accordance with set rules. Judges do more, and the Supreme Court does much more. A closer analogy might be the Commissioner of Baseball, setting the rules of the game. If so, today's Court is one that has decided to add additional bases to the game for one side but not the other.

¹⁰⁵ For arguments that this has been happening for longer than the last two years in certain fields, see generally Josh Chafetz, Essay, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73 (discussing the Court's changes to election law); and Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1 (2012). But at a minimum it both accelerated in the past Term and crossed into many new disciplines.

strong form of the legal realist idea that judges just implement their own policy preferences.¹⁰⁶ On that theory, perhaps the restrictions it has imposed on the power of Congress, administrative agencies, lower courts, and the states are simply byproducts of its desire to rewrite the law on the merits. In other words, the imperial Supreme Court may result not from a desire to take power away from other branches of government but from a desire to do what the Court wants and to prune back what it views as obstacles to that goal. Congress or the states are passing laws you don't like? Restrict their power to do so. Administrative agencies are tackling climate change? Create new obstacles to their doing so. Cases aren't making their way through the courts fast enough, or are being mooted by events? Reach out and take them anyway.

This is not a good development. And that is true whether or not it is part of an intentional power grab. Alexander Bickel once called the judiciary “the least dangerous branch.”¹⁰⁷ While many have debated whether that is true,¹⁰⁸ the premise of the observation stems from the institutional constraints on the Court's power. Some of those constraints are inherent — the Court doesn't have an army or a large budget, for instance.¹⁰⁹ But many are norms. Appellate courts defer to lower court factfinding.¹¹⁰ They defer to agency expertise.¹¹¹ They interpret statutes charitably to avoid holding them unconstitutional.¹¹² And they

¹⁰⁶ A full analysis of legal realism would be a book in its own right. For a few of the major sources, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

¹⁰⁷ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Bickel in turn drew the language from Alexander Hamilton's *The Federalist No. 78*. *Id.* at ix, 16.

¹⁰⁸ See, e.g., KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 3, at 114–16; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 71–72, 103–104 (1980); Gregory Curfman, *The Most Dangerous Branch: A Review of the Supreme Court's 2021–2022 Term*, HARV. L. SCH.: BILL OF HEALTH (July 8, 2022), <https://blog.petrieflom.law.harvard.edu/2022/07/08/supreme-court-decisions-2022> [<https://perma.cc/XH5F-VL2Q>]; Sanford Levinson, *Alexander Bickel Has Left the Building*, SCOTUSBLOG (Aug. 20, 2012, 11:17 AM), <https://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-alexander-bickel-has-left-the-building> [<https://perma.cc/EM8G-2VU2>].

¹⁰⁹ See, e.g., THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“The judiciary . . . has no influence over either the sword or the purse . . .”).

¹¹⁰ E.g., *The Ship Potomac*, 67 U.S. (2 Black) 581, 584 (1862) (“It is not enough for the appellant merely to raise a doubt on conflicting testimony, that the judgment of the Court below may possibly be erroneous.”).

¹¹¹ E.g., *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹¹² See *United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (resolving case on procedural grounds because resolution of constitutional question was not “absolutely necessary to a decision” (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring))); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (“When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 251 (2012) (“[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction . . . , the Court will decide only the latter.”).

take cases as they are presented to them rather than reaching out to make the law or to change the facts to suit the ruling they would like to make.¹¹³ The result is that, as one federal appellate judge put it to me in a private conversation, “I almost never get to do what I really want to do.” Those limits counterbalance the rather remarkable power the Court has had since *Marbury* to interpret and even reject state and federal laws.

The imperial Supreme Court is dismantling those norms. A Court that rejects *stare decisis*, that does not defer to considered policy decisions simply because it disagrees with them, that throws out established judicial procedure to take and decide cases that it wants whether or not there is a live dispute or whether the facts or the courts below present those cases for resolution, is much more dangerous. Right now the danger is mostly apparent in the dismantling of political institutions and the withdrawal of individual rights, because the substantive tenor of the conservative majority has targeted those things. And the Court has taken these actions in ways that favor Republican interests and hurt Democratic ones. But even conservatives should be worried about an imperial Supreme Court, which in the future might just as easily swing in the other direction. And if the Court decides next Term that we don’t have a right to elect the winners of elections, as it seems poised to do, it may dismantle the political apparatus of our country for good.

I conclude this Essay by suggesting, somewhat reluctantly, that we must begin to consider some more radical fixes to rein in the power of the Court, including changes to the number and tenure of Justices and limits on the Court’s jurisdiction over certain matters. The objection to those measures — an objection I have long shared — has been that they will undermine the legitimacy of the Court, turning it in the minds of the public into just another political institution and undermining respect for the rule of law. But that ship has sailed.¹¹⁴

A Congress that wants to address this problem has several options available to it. It could directly overrule some of the Court’s invented doctrines such as the “major questions” doctrine. It could also strip the Court of jurisdiction over some issues, though perhaps not constitutional ones.¹¹⁵ And because it could do that, it could probably compel the Court to actually apply the rules of Article III standing in both directions, preventing it from deciding that a right to collect statutory damages from a defendant isn’t a “case or controversy” and perhaps also

¹¹³ *E.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (“[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008))).

¹¹⁴ *See, e.g.*, Josh Gerstein, *Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy*, POLITICO (Sept. 14, 2022, 5:56 PM), <https://politi.co/3BgqGnY> [<https://perma.cc/SH74-MREX>].

¹¹⁵ *See generally* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010).

preventing the Court from reaching out to take cases that aren't actually presented to it. The issue is not free from doubt, because Article III is a constitutional requirement, but virtually none of the current Article III rules are required either by the history of law and equity or by the language of the Constitution itself.¹¹⁶

Structurally, there may be ways to change the Court that might in the long run restore its tattered credibility. The current composition of the Court is in part a function of brass-knuckle politics by Republicans, who would not have the majority they do had they not behaved in a nakedly political manner in refusing to consider Judge Garland's nomination and then rushing through Justice Barrett's. But it is also a function of luck. The fact that Presidents can appoint Justices only upon the happenstance of death or retirement (and, these days, having a Senate of the same political party) has meant that Republicans have appointed eleven Justices in the last twenty years they held the presidency¹¹⁷ while Democrats have appointed only five Justices in the last twenty years they held the presidency.¹¹⁸ The combination of accident (of death) and strategic timing (of retirement) contributes to the political nature of judicial appointments. It also influences the age of the Justices who are picked and means that some Justices serve more than twenty-five years on the Court (including in recent years Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas — all Republican appointees).¹¹⁹

While judges have life tenure, there is no constitutional requirement that they must spend that entire tenure as active members of the Supreme Court, and indeed many Justices retire from the Court but continue to sit on the circuit courts.¹²⁰ Congress could pass a law that

¹¹⁶ The standing doctrine itself is a twentieth-century creation that traces to *Fairchild v. Hughes*, 258 U.S. 126 (1922). In its modern form it traces to the early 1980s. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482–83 (1982). While the Court has sometimes said that Congress has no power to alter this constitutional requirement, see *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (“In no event . . . may Congress abrogate the Art. III minima: A plaintiff must always have suffered ‘a distinct and palpable injury to himself’ . . . that is likely to be redressed if the requested relief is granted.” (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)) (citing *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976))), it has also said the opposite, see, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992) (“[T]he . . . injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” (quoting *Warth*, 422 U.S. at 500)). For a discussion of numerous circumstances in which Congress has the power to create standing, see generally Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169 (2012).

¹¹⁷ Or perhaps only ten, depending on how one counts; President Reagan elevated Justice Rehnquist to Chief Justice, but he was already on the Court at the time.

¹¹⁸ See *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/6VKF-H7GK>].

¹¹⁹ See *id.*

¹²⁰ See, e.g., *Kelly v. Liberty Ins. Corp.*, 916 F.3d 95 (1st Cir. 2019) (Souter, J., Ret.); *United States v. Gillenwater*, 749 F.3d 1094 (9th Cir. 2014) (O'Connor, J., Ret.); *United States v. Mateos*, 623 F.3d 1350 (11th Cir. 2010) (O'Connor, J., Ret.).

gives each new Justice an eighteen-year term of active service and staggers the appointments so that each President appointed one Justice every two years. Justices wouldn't be removed from the Court after eighteen years, but they would be able to hear cases only in the lower courts.¹²¹ Another possibility — though only a partial solution — would be to separate the Supreme Court into one Court that hears constitutional issues and another that hears other legal questions. Many other countries have such a system.¹²² While it wouldn't solve all the problems I have described, it might render the nonconstitutional decisions less political and therefore protect doctrines of equity and private law from being infected by the Court's power grab.

But any of this requires a working Congress with a will to actually protect our system of government. I fear we don't have such a thing right now, and it's not clear we soon will. And that may leave us with the darkest alternative. Responding to the 1832 decision in *Worcester v. Georgia*,¹²³ President Andrew Jackson is reported to have said "John Marshall has made his decision; now let him enforce it."¹²⁴ The immediate danger of the imperial Supreme Court is that it will damage our constitutional system by usurping power that doesn't belong to it. But the longer-term danger may be the opposite. The Court ultimately exists on the credibility of its judgments, and if it damages that credibility enough, the federal or state governments may decide that they can

¹²¹ This idea has been proposed by people across the political spectrum. See, e.g., Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323 (2007) (proposing terms of "eighteen years followed by lifetime service in a lower federal court"); James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST (Aug. 9, 2002), <https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limits-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c> [<https://perma.cc/6SHR-XFB8>]. Another variant comes from Christian Turner, who suggests a presidential appointment every two years but also having that person take office unless the Senate affirmatively rejects the choice. If the Senate rejected three choices in a row the President could simply pick one of the three. Christian Turner, *The Way Forward on Supreme Court Appointments*, HYDRATEXT (Sept. 24, 2018), <https://www.hydratext.com/blog/2018/9/24/the-way-forward-on-supreme-court-appointments> [<https://perma.cc/N7QK-DLTK>]. There would, of course, be transition issues from the current Court, but they could be managed, either by adding Justices on a temporary basis until existing members left the Court or by compelling retirement every two years of the most senior Justice who has sat on the Court for more than eighteen years until there were no more Justices appointed under the old system. *Id.*

¹²² See generally Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44 (2007).

¹²³ 31 U.S. (6 Pet.) 515 (1832).

¹²⁴ See, e.g., *Remembering the Time Andrew Jackson Decided to Ignore the Supreme Court in the Name of Georgia's Right to Cherokee Land*, SUSTAINATLANTA (July 28, 2016), <https://sustainatlanta.com/2015/04/02/remembering-the-time-andrew-jackson-decided-to-ignore-the-supreme-court-in-the-name-of-georgias-right-to-cherokee-land> [<https://perma.cc/TM52-6QA2>].

simply ignore it.¹²⁵ The Court has always walked a bit of a tightrope when it comes to public approval and government obedience to its mandates.¹²⁶ It took a flying leap off that tightrope in 2022, and it seems poised to continue its dive in the coming Term, with cases targeting affirmative action,¹²⁷ the Clean Water Act,¹²⁸ nondiscrimination laws,¹²⁹ and the electoral process itself.¹³⁰ It remains to be seen where things might land.

¹²⁵ Noah Feldman has called *Dobbs* “institutional suicide” for the Supreme Court. Noah Feldman, Opinion, *Abortion Ruling Is Suicidal for the Supreme Court*, BLOOMBERG L.: U.S. L. WK. (June 24, 2022, 12:29 PM), <https://news.bloomberglaw.com/us-law-week/abortion-ruling-is-suicidal-for-the-supreme-court-noah-feldman> [<https://perma.cc/E3XZ-23BY>].

¹²⁶ See generally, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2010).

¹²⁷ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (mem.); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022) (mem.).

¹²⁸ See *Sackett v. EPA*, 142 S. Ct. 896 (2022) (mem.).

¹²⁹ See *303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.).

¹³⁰ See *Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.).