

# THE UNITED STATES SUPREME COURT'S NEW CONSERVATIVE SUPERMAJORITY: A CONSTITUTIONAL COUNTER-REVOLUTION?

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## 1 U.S. CONSTITUTIONAL LAW: CHANGE AMIDST CONTINUITY

The United States has the oldest written constitution in the world. Its staying power has proved remarkable, with the same brief document (fewer than ten printed pages) serving as the nation's fundamental law since 1787 with only twenty-seven amendments (the first ten adopted immediately after its adoption, the three most important modifications coming after the Civil War in mid-19<sup>th</sup> century, and merely 11 ratified in the twentieth century, none after 1992). The basic principles embodied in the constitutions have remained constant, with separation of powers along with checks and balances and federalism shaping the basic structures of government. The meanings of these principles, however, have evolved, and the distribution of power within government has shifted radically over time. Evolving doctrines reflect the role of the courts in interpreting the constitution, an authority established by the Supreme Court, rather than explicitly stated in the constitution's text.<sup>1</sup> This role as interpreter, along with an independent judiciary enjoying lifetime tenure and a highly political selection process (all federal judges are nominated by the President and confirmed by a majority of the Senate) combine to create a federal judiciary with not only significant legal authority but also potent political power. The apex of the courts' power is the exercise of judicial review: federal courts are empowered to rule statutes and actions of the other branches of government and of the states unconstitutional and hence void. The Court's interpretive authority has doubtless contributed to the constitution's longevity, allowing flexibility of legal doctrines for a rapidly changing society.

## 2 THE CURRENT CONJUNCTURE: INCREMENTAL CHANGE, A NEW CONSTITUTIONAL CYCLE, OR A CONSTITUTIONAL COUP?

Given the institutional arrangements of U.S. government, constitutional change by judicial interpretation is normal, so it is no surprise that constitutional law is change and that judges are the agents of that change.

Ironically, even the advocates of originalism, who claim to interpret constitutional provisions according to their meanings supposedly fixed in 1787, in effect practice a form of “living constitutionalism” by seeking to alter stable meanings of various constitutional provisions by court decisions.<sup>ii</sup> Yet the current conservative originalists do not conceive of themselves as updating constitutional meanings to fit the present, but rather their self-defined task is to restore the original, unchanging meanings that have been corrupted by past liberal courts – in effect, to resurrect the “Constitution in Exile” (so named because the predominant jurisprudence of the last decades has supposedly substituted liberal interpretations for the true, timeless principles embedded in the original document).

The current conjuncture in constitutional law is the result of several decades of struggle by a conservative legal movement.<sup>iii</sup> Despite early disappointments, based on assuming that merely appointing conservatives to the judiciary could fundamentally reorient constitutional law, this movement learned that radical change required creating new institutions, such as think tanks and the incredibly effective Federalist Society, and a new professional culture. Beginning with Nixon’s presidency, judicial appointments have been overwhelmingly Republicans nominated by Republican presidents (14 out of 19 appointments since 1970), and the Supreme Court clearly shifted from the liberalism of the Warren Court to the right, beginning tentatively during the Burger years (1969 – 1985) and picking up speed under Chief Justice Rehnquist (1985 – 2005). Yet conservative goals remained unmet – at the time of Rehnquist’s death in 2005, abortion remained legal (if restricted); affirmative action was upheld (begrudgingly and temporarily); gun control laws (weak and ineffective though they were) had not been struck; religious liberty still balanced a somewhat tempered free exercise clause with a complex and context-dependent establishment clause; and deregulation was growing, but the so-called administrative state still seemed viable. After 18 years of the Roberts court, however, all of the main goals of the conservative legal movement had been, or were in the process of being, achieved.<sup>iv</sup>

Yet some liberal observers retained their faith in Chief Justice Roberts as a moderating force on the Court, acting, as he had in upholding the constitutionality of Obamacare,<sup>v</sup> as a drag on the more radically conservative justices. The Chief Justice’s image as an institutionalist, diluting decisions in order to maintain the Court’s credibility by issuing more moderate rulings that appear less “political,” was further burnished this term by decisions rejecting more far-fetched conservative assaults on Section 2 of the Voting Rights Act and claims to exclusive power over national elections proposed by the independent state legislatures theory, supposedly confirming his grip on the Court despite the Trump-created six-to-three conservative supermajority.<sup>vi</sup> More critical observers, however, noted moderate decisions represented only a sprinkling among the spate of extremely conservative decisions handed down this term as well as last, but also that even these “defeats” contained less visible victories for conservative goals.<sup>vii</sup> In fact, most of the conservatives’ unadulterated victories have only been accomplished in the last two years of the Chief Justice’s long tenure, after his position as swing vote was undermined by the three new justices added to the Court by Trump, establishing a six-to-three conservative “supermajority” which rendered Roberts’ vote superfluous for conservative outcomes.<sup>viii</sup>

Rather than Roberts successfully circumscribing the new supermajority’s right turn within the normal channels of limited, evolutionary change,<sup>ix</sup> the Court at present seems to be poised to make a radical break with the dominant constitutional paradigm of legal liberalism, established during the last decisive turning point in constitutional history, 1937. This view comports with theories of constitutional jurisprudence that understand that history as exhibiting cycles characterized by decades of doctrinal stability punctuated by decisive turning points in the Supreme Court’s understanding of the country’s basic legal framework. Such constitutional “moments” (Ackerman), sometimes seen as

anti-oligarchic (Fishkin and Forbath) or republican (Pope), or simply as cycles (Balkin), have recurred periodically throughout history, in effect producing multiple constitutions instead of one continuous one, given that the understanding of the original document changed so dramatically after convulsive political upheavals.<sup>x</sup> Such bold moments of constitutional change probably both reflect and affect the underlying convulsions, perhaps aiding in breaking the logjams retarding progress in the political system. If so, the United States appears primed for such a break. The current political alignment is widely recognized as polarized and stagnant; actually, the recently proposed concept of calcification better captures the extreme dysfunctionality of U.S. politics.<sup>x1</sup> Though such determinations are difficult at close range, perhaps the time is ripe for a new cycle of constitutional law and a decisive break in U.S. politics – although the content and even the direction of such changes remain impossible to predict with any certainty, depending on the outcome of numerous struggles, including the invincibility of the conservative Supreme Court supermajority vs. the reaction of reforms to reign in the Court.

### 3 SUPREME COURT IDEOLOGIES AND CONTENDING CONSTITUTIONAL VISIONS

To unmask the ideology of contemporary justices of the Supreme Court as well as to surface the political visions enshrined in constitutional jurisprudence, it is helpful to take a brief tour through at least the most recent cycles of constitutional law.

After the Civil War (1861-1865), three key amendments fundamentally reshaped not only American society but also the original constitution of 1787. The thirteenth amendment abolished slavery; the fifteenth amendment assured that the right to vote could not be abridged because of race (formally, although it was superseded by rampant discrimination in practice); and most importantly, the fourteenth amendment, which aimed to guarantee full and equal citizenship to the recently emancipated ex-enslaved persons by assuring that no state could deny the privileges or immunities of national citizenship, the due process of law, or the equal protection of the laws. Almost immediately, however, the conservative Supreme Court began to dilute these protections for formerly enslaved people while applying them to expand the rights of corporations.<sup>xii</sup> Toward the end of the nineteenth century, rapid social changes, particularly the proletarianization of the native working class, as small farmers and crafts workers lost their properties and were forced into factory work; urbanization; conglomeration of competitive businesses into giant corporations (“trusts”); and immigration, combined to provoke various reform movements of populist, progressive, or socialist tendencies. The legislative reforms enacted by these social movements in turn evoked a reaction from the courts in defense of capital, white supremacy, and entrenched elites. The epitome of racist reaction came in *Plessy v. Ferguson*, the 1896 case in which the Supreme Court gave its imprimatur to legalized segregation, holding that Jim Crow laws did not violate the equal protection of the fourteenth amendment because they were “separate but equal.”<sup>xiii</sup> But the paradigmatic instance of judicial hostility to social reform, specifically labor protections, came with *Lochner v. New York*.<sup>xiv</sup> To remedy the horrendous conditions in which bakers labored in New York City tenements, the state legislature unanimously passed the Bakeshop Reform Act limiting bakers’ hours to 10 per day/60 per week. Challenged by a bakery owner, the law was struck by the U.S. Supreme Court as a violation of liberty of contract, seen as included in the “liberty” protected by the fourteenth amendment, although contractual liberty is not mentioned explicitly in the constitution. Although recognizing that states have “police powers” to legislate for the health, safety, welfare, and morals of the community, the majority of five justices believed that the Bakeshop Act was not a reasonable application of legitimate police powers. Two dissenting opinions, garnering four dissenting votes, attacked the decision as an

invalid use of raw political power: relying on substantive due process to create a non-existing right to contract; exhibiting extreme judicial activism in substituting the policy judgments of the justices for the will of an elected legislature; being formalistic in ignoring the reality of unhealthy working conditions; and falsely upholding equality against “class legislation” (protecting one group’s interest against another’s) while resulting in protections for owners against workers’ rights. Although not all reforms were invalidated as unconstitutional at the end of the 19<sup>th</sup> and beginning of the 20<sup>th</sup> centuries, enough were so that *Lochner* came to be viewed as representative of the Supreme Court’s vision and rulings during this period, nicknamed the “*Lochner* Era” (roughly 1897 – 1935).<sup>xv</sup>

Even if the Court was not consistently conservative but rather oscillated in its decisions during this epoch, critics used *Lochner* to capture the many flaws they detected in the Court’s jurisprudence. And significantly, when Franklin Roosevelt was elected president during the Great Depression, the Court was still dominated by four solidly conservative justices (the “Four Horsemen”) who generally commanded a majority relying on a couple of swing votes to defeat the minority liberals. This rigidly conservative Court ignored the popular support for Roosevelt’s reform and relief programs and struck down the major pillars of the New Deal. Enjoying a popular mandate in the landslide elections of 1936, FDR proposed to reform the Court by creating generous retirement packages for justices over 70 and ½ years old and allowing the president to nominate an additional justice to the court for every justice who failed to avail themselves of the offer (a plan that could have added up to six new justices to the nine already on the bench). Although the number of justices is not fixed in the constitution and has varied from five to ten, and despite FDR’s overwhelming popularity and backing for the New Deal, the plan failed to garner political support. Whether or not resulting from the threat to pack the court, however, a sufficient number of justices changed their thinking, and voting, or retired to fundamentally alter the Court’s decisions.<sup>xvi</sup> The jurisprudence of the *Lochner* era, based on activist judges enforcing formal equality, property rights, and limited and decentralized government, yielded to a new era of New Deal liberalism emphasizing judicial restraint fostering civil rights and liberties, social reforms, more egalitarian policies, and an activist and enlarged welfare state – an abrupt and fundamental transformation dubbed the “Constitutional Revolution of 1937.” This “paradigm shift”<sup>xvii</sup> established New Deal liberalism as the predominant approach to understanding constitutional language for a generation or constitutional cycle, marginalizing alternative constitutional visions. But challengers to this liberal orthodoxy have gathered force in recent decades and have succeeded, or at least are appearing to succeed so far, in mounting a constitutional “counter-revolution” portending a sharp break with liberal legalism and the adoption of competing constitutional perspectives.

Legal Liberalism: The “legal liberalism” that dominated U.S. constitutional law from 1937 until recently was complex and naturally developed with the evolving nature of society and its constitutional conundrums. Initially, its strongest hallmark was its commitment to judicial restraint; in reaction to the activist conservatism of anti-reformist judges during the *Lochner* Era, New Deal justices preached and practiced restraint in the exercise of judicial review, allowing almost any regulatory legislation to pass constitutional muster. In the famous *Carolene Products* Footnote Four, the Court announced that it would no longer second-guess elected governments’ regulation of the economy (as long as they were enacted for legitimate goals and employed reasonable means – the so-called “mere rationality” test), but it would scrutinize policies more skeptically in three instances: 1) when the legislation infringed on fundamental rights protected by the constitution; 2) when the law restricted democratic procedures; or 3) when the law invidiously affected vulnerable minorities. The reasoning behind this decision was that elected governments, not unelected judges, should make policies and that citizens unhappy with

these policies could use democratic processes (elections, lobbying, etc.) to challenge them. In the three instances described in Footnote Four, however, litigation would have to substitute for normal democratic procedures because 1) the fundamental legal rights that undergird democratic politics might be denied to citizens; 2) the procedures by which the popular will is determined were potentially being distorted; or 3) some “discrete or insular” minorities are subject to discrimination that in effect renders them a “permanent minority” with no chance of winning majority support for their interests.<sup>XVIII</sup> In these instances, the Court would apply “strict scrutiny” – the government would have to demonstrate that the law aimed to achieve a “compelling” (not merely legitimate or even important) interest and that the means employed were necessary (sometimes described as “narrowly tailored” or “least burdensome possible” and not merely “rational” or “substantially related”). In other words, the liberal Supreme Court renounced the *Lochner* Era Court’s prioritization of economic rights of contract and property, based on its underlying vision of a constitution that protected a laissez-faire version of capitalism, and instead focused on protecting civil rights and liberties but allowing regulations appropriate for welfare state (or “modern”) capitalism. The Court’s permissive view of federalism, based on a generous interpretation of the national government’s powers under the commerce clause, also continued the trend, rapidly expanded during the New Deal and even more so to fight World War II, of a growing and active national government, the so-called administrative state.

After World War II, however, the Court increasingly moved into areas affecting social policies. Having fought against the abominable racism of fascism, the racial discrimination embodied in legal segregation in the South’s Jim Crow system came under more vigorous attack. The movement for civil rights for racial minorities, initially Southern blacks, compelled the court to be more activist in its exercise of judicial review in overturning popularly enacted laws enforcing the separation of the races and endorsing discrimination against African Americans. The Warren Court declared racial segregation unconstitutional (overruling *Plessy*) in *Brown v. Board of Education* and its progeny; waded in to the “political thicket” in requiring reapportionment based on “one man, one vote”; dramatically expanded the procedural rights of criminally accused defendants; adopted rules protecting the free exercise of minority religions while restricting the establishment of majority Christianity (most controversially rejecting prayers in public schools); and found a privacy right not explicitly named in the text of the constitution. The trend continued even after Nixon appointed four justices, instituting a more conservative Burger Court: women’s equality rights were strengthened, and the 1973 *Roe v. Wade* decision held that constitutionally protected privacy included the right to decide to terminate pregnancy.

Justifying this activist agenda was the liberals’ determination to be “realistic” about both the consequences of legal decisions and the necessities of modern capitalist democracies. Proposed by Progressive critics of the *Lochner* Era courts’ formalism, legal realism argued that law should be more enlightened and effective by taking into account the social context of legal disputes as well as formal rules, recognizing that, as Justice Holmes famously stated, that “the life of the law has been not logic, but experience.”<sup>XIX</sup> In fact, it can be argued that the difference between 20<sup>th</sup> century, New Deal liberalism and the classical laissez-faire liberalism of the 19<sup>th</sup> century is not so much a philosophical disagreement, with the theoretical roots of both anchored in Locke’s emphasis on individual rights and limited government, but rather an empirical dispute over whether a “small” or “big” government can best protect individuals given the facts of modern life. With judges who no longer blocked reforms but rather legitimated active regulatory and welfare policies, who actively protected civil rights and civil liberties, and who were willing to accommodate legal interpretations and precedents compatible with a vigorous modern capitalist state, liberals came to view the courts as key instruments of social change. In fact, Kalman

makes this article of faith the defining characteristic of legal liberalism, using the term to refer to “trust in the potential of courts, particularly the Supreme Court, to bring about ‘those specific social reforms that affect large groups of people . . . policy change with national impact.’”<sup>XX</sup>

Conservatism: Although FDR’s policies were widely popular, producing Democratic majorities in Congress and mostly Democratic Presidents for at least four decades after the Depression, the New Deal was never truly accepted by powerful elites.<sup>XXI</sup> Still, New Deal liberalism was hegemonic among moderate conservative politicians, for example, President Dwight Eisenhower, and even legal conservatives accepted the progressive critiques of *Lochnerism* as illicitly using substantive due process to justify an anti-majoritarian judicial activism. Beginning with Barry Goldwater’s resounding defeat for president in 1964 and culminating in Ronald Reagan’s triumph in 1980, however, conservatism was transformed as a “new right” surfaced these seeds of reaction against New Deal liberalism. Arguing that the welfare state had run its course, and in fact was harming progress, undermining individual flourishing and liberty, perhaps even containing the seeds of totalitarianism, the newly energized conservatives instituted a series of governmental rollbacks and reorientations that came to be known as neoliberalism. Reaganism, following the same playbook as Thatcherism in Britain, enacted privatization, deregulation, tax cuts, and anti-union measures, while bolstering military spending. Although its rhetoric, like its 19<sup>th</sup> century version of liberalism, glorified the minimal state, this set of neoliberal policies was unlike classical liberalism in entailing more of a redeployment than a reduction of the state’s role.<sup>XXII</sup>

The new conservatism soon manifest itself within a newly energized conservative legal movement that had many reverberations with *Lochnerian* jurisprudence, including a reorientation of individual rights from emphasizing civil liberties and rights to revaluing economic rights. Seen through the more libertarian eyes of contemporary conservatism, government regulations are viewed as inherently coercive, while the market is valued for its responsiveness to individual choice (again, this liberating view of the market vs. liberal’s beliefs that government can enhance individual freedom is founded as much in different readings of modern reality as in philosophical principle). This shift was accompanied by a renewed view that the role of government in the economy was limited not just as a matter of policy but by the constitution, and that the national government’s role was severely constrained by states’ rights. Equality was seen, as by Jacksonian egalitarianism, as same treatment, and conservative judges adopted the formalistic view that the constitution was “colorblind.” Going beyond formal equality of opportunity was construed as government redistribution of wealth, in effect the government choosing sides in social competition and ensuring “special rights” for favored groups. These more libertarian ideals did not always comport easily or logically with classical (“Burkean” after the 18<sup>th</sup> century British thinker Edmund Burke) conservatism, with its emphasis on traditional social hierarchies, law and order, and religion, but various practical accommodations were continually being constructed and revamped.<sup>XXIII</sup> A final contradiction, and sure sign that the current conservative ambition seeks more than to merely moderate liberalism but rather aims to return to a “Constitution in Exile,” is the evolving views on the right of judicial review. Whereas “old conservatives” such as law professors such as nixed Supreme Court nominee Robert Bork and Chief Justice William Rehnquist accepted the anti-*Lochner* doctrine of judicial restraint, and centered the evils of judicial activism as the main axis of their criticisms of liberal courts, the “new” conservatives have begun to recognize that judicial activism, meaning at least the rejection of disfavored precedents and the invalidation of much welfare state social and economic legislation, will be necessary to overthrow the New Deal regime and restore a legal and political order resembling that of the pre-1937 *Lochner* Era. While conservative politicians continue to berate liberals for “liberal judicial activism,” and conservative judges still adhere at least verbally to judicial restraint,

new conservative academics are beginning to broach the need for a more activist conservative judicial role and even to preach the resurrection of *Lochner* as valid constitutional law.<sup>xxiv</sup>

Civic Republicanism: One final vision of constitutionalism is worth noting, although this approach lacks the political heft of liberalism and conservatism. This vision operates at the margins of the political arena, stemming mainly from a revival of “republicanism” among law professors in the 1990s, but currently enjoying a second wave of interest.<sup>xxv</sup> Before dismissing this vision as purely academic and politically insignificant, it is well to recall the influence of the Federalist Society, which began as a club for conservative law students; one should also notice that of republicanism is little known today, adherents argue that it once had a major place in the way Americans understood the constitution, including the founding generation, but persisting throughout U.S. history.<sup>xxvi</sup> If this claim is correct, it implies that even though the explicit language and concepts of republicanism enjoy little visibility, its basic values resonate deeply with traditional American ideology, and in fact, many adherents to progressive politics seem to implicitly advocate republican ideas without recognizing it as a coherent alternative to liberalism and conservatism.<sup>xxvii</sup>

Civic republicanism is less hyper-individualistic than liberalism, whether in its 19<sup>th</sup> or 20<sup>th</sup> century version. Rather than seeing people as isolated atoms, it recognizes that individuals are embedded in social relations and structures, giving republicanism more of a sense of community and of the public than competing visions. Republicans also de-emphasize the split between private and public spheres, a schism so crucial to liberalism. They recognize that politics and economics cannot be sharply separated; as James Harrington, an 18<sup>th</sup> century British republican stated, “power follows property.” This insight leads republicans to stress the necessity of equal citizenship, which requires some limits to economic inequality for a republican form of government. Thus, republicans such as Ganesh Sitaraman stand neo-Lochnerian conservatism on its head, agreeing that the constitution does necessarily entail a political economy and not just political procedures as legal liberals contend, but the republican version of constitutional political economy is the opposite of that envisioned by *Lochner* – not a laissez faire inegalitarian market but an economy with egalitarian limits imposed politically.

Republicans, however, do not advocate equality at the price of liberty, because they do not conceive of liberty and equality as being opposing values requiring some tradeoff, as do liberals. Instead, some measure of equality is a prerequisite of real liberty because republicans define freedom not in negative terms as freedom from interference but rather more positively as independence, lack of dominance or subordination. They also recognize that private parties and social structures as well as government can be sources of domination.<sup>xxviii</sup> Republicans value choice, but recognize that subordinate status, and not just interfering behavior, can limit choices.<sup>xxix</sup> If liberty means being free of subordination to the arbitrary will of another, republicans thus place great value on citizenship and democracy, so that citizens can enjoy self-government not only as individuals but as participants in making the laws in a free state. This self-governing democracy, in turn, demands much of citizens: that they be virtuous (not in a moralistic individual sense that defines that word today) in the sense of being devoted to the common good and willing to exercise the duties of citizenship. The great danger to republics is seen as corruption, not merely bribery but the subversion of the general public interest by partial private interests, a corruption that historically has given rise to oligarchies and demagoguery and spelled the end of free republics. Many of these ideas have influence in the contemporary American public sphere, even if the coherent vision of republicanism remains largely unarticulated beyond the academy.

The New Supermajority: Justices appointed by Republican Party presidents have been numerically predominant throughout the decades since the Warren Court in the 1960s. Since 1970,

Republican presidents have nominated almost three-quarters (14 of 19) of new justices although the country has been led by Republican presidents only about 60% of this time. In fact, there has not been a majority of Democratic-appointed justices since the Warren Court – the Burger, Rehnquist, and Roberts Courts have all had Republican majorities, although Republican appointed justices did not always vote along conservative lines (e.g., Brennan, Stevens, Souter, and even Blackmun and Kennedy) until recent times. Courts in recent years have often featured a liberal-conservative split along a four-to-four alignment with a moderately conservative Republican playing the role of swing vote (Powell, O’Connor, Kennedy, and even Roberts providing the “vote of Minerva”). This pattern was broken as the Republican Party turned sharply to the right after the rise of the Tea Party in 2010. Senator Mitch McConnell first blocked President Obama’s nomination of Merrick Garland during the last year of Obama’s term, then powered through the confirmation of Amy Coney Barrett in the waning days of the Trump lame duck presidency, to produce a “supermajority” of six solidly conservative votes (Thomas, Roberts, Alito, Gorsuch, Kavanaugh, and Barrett) to three reliably liberals (Kagan, Sotomayor, and Jackson).<sup>xxx</sup>

For several reasons, it is difficult to match justices’ votes with political ideologies, or even with the constitutional visions discussed above. In the first place, cases present concrete legal issues, not more abstract political principles. Also, several justices, especially the Trump and Biden appointees, have not served long enough to establish clearly discernable voting patterns. Finally, various political and strategic factors, both internal and external to the Court, influence position taking and voting. Still, the six-three conservative-liberal pattern is crystal clear. Moreover, within the conservative bloc, there appears to be a less obvious, more fluid but nonetheless apparent division between more moderate conservatives (Roberts, Kavanaugh, Barrett) versus more extreme conservatives (Gorsuch, Thomas, and Alito). The difference among conservatives appears to be less a matter of substantive ideology or policy and more a question of strategy. The moderates prefer taking a slower, more incremental approach to changing constitutional doctrine, believing that a minimalist strategy will prevent the Court from appearing too “political,” thus risking the loss of legitimacy as a purely legal institution with the public. The justices in the more extreme bloc seem more impatient with this gradualist strategy, apparently believing that now is the moment to redeem the “lost constitution” of pre-Warren Court (or even Lochnerian) days and that the majority should “strike while the iron is hot” to remedy the constitutional heresies introduced by the “Constitutional Revolution of 1937.” To the extent that the more extreme wing can bring the “moderates” along to form solidly conservative majorities, the current supermajority threatens to roll back the constitutional law paradigm of the last eight decades in a conservative “counter-revolution.”

#### 4 NOVEL METHODS OF INTERPRETATION

Central to the conservative legal movement has been not only a more libertarian substantive vision of law but also advocacy of a method of interpretation as the one valid way to understand the constitution and other legal texts: originalism. Despite its claims to be the true traditional approach, originalism as adopted by the conservative legal movement is actually quite new, dating from the Reagan era. In the 1980s, Reagan’s Attorney General Edwin Meese and Justice Department lawyers began to harshly criticize the Warren Court and legal liberals for adopting the concept of a “living constitution,” one whose proper meaning would necessarily change with the times and corresponding social changes. In place of this flexible way of understanding constitutional provisions, originalists claimed that the only legitimate meaning was the meaning attributed to the constitution’s words by its authors. That understanding would not change; if circumstances changed such that application of the original provisions



were not appropriate, the proper solution was to amend the constitution (or pass a new statute, if the text being interpreted was legislation), not to allow judges to modify the meanings according to their notion of what was suitable law in contemporary cases. The great virtue of this method touted by its advocates was its objectivity – the meaning of the text was fixed in the words as written by the authors themselves, independent of the subjective opinions and values of the judge applying the law. Practicing this method would produce results that were more stable and predictable, as well as valid and ultimately more democratic (since the meaning would flow from authors with some claim to represent popular sovereignty, since constitutions are popularly ratified and statutes are passed by elected legislators) compared to the variable, unforeseeable, and potentially idiosyncratic results stemming from unelected judges applying a variety of eclectic methods (including not only trying to discern original intent but also interpreting the words themselves, following precedents (*stare decisis*), discerning the purpose of the provision, including as shaped by the overall structure and purpose of the document, balancing various values, and pragmatically assessing the consequences of alternative rulings).

It soon emerged, however, that there was not one originalism but two: the old, or original originalism, argued that the true meaning of the text was to be found in what the authors, or framers if interpreting the constitution, intended the document to mean. Hence they looked for evidence of intent – whether in legislative histories, news accounts, statements in public and private documents, etc., trying to get inside the minds of the authors. Justice Antonin Scalia was a harsh critic of this original intent approach, however, pointing out that intent was subjective and nebulous. Not only is it difficult to know the true intent of another person (not to mention persons dead for over two hundred years), but sometimes people do not know their own intentions, let alone act consistently with them for a variety of reasons. Scalia and others promoted a new originalism, or textualism, that argued for focusing exclusively on the words of the text and trying to understand the meaning of those words as the authors would have understood them at the time they wrote them, that is, the public meaning of the words when written.<sup>xxxI</sup>

The difference between old and new originalism was on full display in *Bostock v. Clayton County*<sup>xxxII</sup> in which the issue was whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation or gender manifestation. Both authors of majority and minority opinions claimed to be using originalism but arrived at contrary conclusions. Justice Gorsuch, writing for the Court, focused on the text of Title VII that prevents discrimination in employment “because of . . . sex.” His majority opinion asserted that these words are manifestly broad enough to include sexual orientation and an individual’s presentation of gender, since both are aspects of the ample understanding of the word “sex.” Justice Alito, however, wrote in his dissent that it is impossible to imagine that the members of Congress who passed the Civil Rights Act in 1964 had intended to forbid discrimination other than between men and women and certainly had had no intention to protect homosexuals or other gender non-conformists. So focusing on the words of the statute, the text itself, as opposed to the minds of the authors, the intent of the legislators, produced results diametrically opposed to each other, rather than one, supposedly objective, interpretation.

Critics of originalism level a battery of charges against the supposed merits of this method of interpretation. Among other problems, skeptics doubt that the original intent of the framers of the constitution can be known, that there is sufficient evidence of their intent (or intents – since people are rarely of one mind, and there were multiple authors with conflicting views, and it is not even clear who the “authors” were – the fifty-five who attended the drafting constitution, including or not sixteen attendees who failed to sign it, or the thousands who attended ratifying conventions, including or not those who opposed or reluctantly endorsed the new constitution). And what about the absence of intent?

Could the framers in 1787 had an intent about speech issues on the internet? Or a right to possess semi-automatic weapons? More serious than purely methodological critiques are those who question the democratic claims of originalists – do we really want to be governed by the values and understanding of the elite white males, including many intricately implicated in slavery? – and the practicality of abiding by the constraints adopted over two centuries ago – can a government limited by a constitution adopted a century before the industrial revolution in this country respond effectively to climate change caused by modern industry? In the end, the critics chafe against the notion of living “under the dead hand of the past.”

Textualism, or the new originalism, suffers from many of the same methodological shortcomings as original intent. Ultimately, however, because of the ambiguity inherent in the English language (not unique to English, however), the method proves to be subjective; meaning relies on choices – choices as basic as which portions of text to analyze, for example<sup>xxxiii</sup> - made by the interpreter, not on meaning objectively embedded in words themselves. Professor Reva Siegel argues that originalism is not really one thing, a method of interpretation, but really two: a methodological approach and a political movement. Originalism as methodology, warts and all, has its supporters and detractors, but its main political appeal to supporters is that it claims to be objective, an approach that only expert practitioners, such as judges, can apply to understand the constitution and other legal texts. Thus, originalism both excludes broader, more democratic participation in establishing the meanings of law while it also veils the subjective and conservative values prioritized by originalists as they assert their substantive visions of law, a practice Siegel derisively labels “living originalism.”<sup>xxxiv</sup>

## 5 RECENT DECISIONS, NEW DOCTRINES

A brief survey of some of the most salient decisions rendered by the Supreme Court in recent years, especially the key opinions announced at the ends of court terms in June of 2022 and 2023, serves to highlight the dramatic influence of the new supermajority on various areas of law, especially constitutional interpretations.

Labor and Employment: The Supreme Court has a long tradition of hostility to workers and especially to unions. In fact, arguably one of the principal purposes of passing the National Labor Relations Act (NLRA) was to remove employment relations from the realm of judge-decreed common law to the domain governed by legislation adopted by a popularly elected body. Arguably, judges have been “deradicalizing” labor law ever since,<sup>xxxv</sup> although conservative Congressional majorities, as with the enactment of the Taft-Hartley and Landrum-Griffith amendments, as well as conservative presidents from Eisenhower to Trump, exercising their power to shape the National Labor Relations Board (NLRB) through appointments, have aided the rightward migration. Recent decisions demonstrate that the Supreme Court continues in this traditional vein of anti-workerism.

The Roberts Court handed down the two most important labor decisions even before the supermajority was consolidated. In 2017 *Epic Systems v. Lewis* continued a string of cases in which the Court prioritized consent to arbitration over worker rights.<sup>xxxvi</sup> In *Epic Systems*, the Court agreed to enforce an employee’s agreement (consent here was ludicrously formal, as employees had been notified by email that coming to work the next day constituted consent!) to individually arbitrate employment disputes rather than sue collectively in a class action, despite workers’ rights to pursue “concerted activities for the purpose of collective bargaining or other mutual aid or protection” guaranteed by Section 7 of the NLRA. In 2019 *Janus v. AFSCME* struck a blow against public employees’ right to organize

collectively by finding that the mandatory payment of agency fees (money collected to allay the cost of union negotiation of a collective bargaining agreement from the paychecks of employees in the covered bargaining unit) under an agreement covered by state law was an unconstitutional infringement of an objecting employee's free speech rights (in effect, forcing him to endorse the union through acquiescing in the fee payments).<sup>xxxvii</sup> Although both employees in these cases enjoyed the same "choice" (to accept an imposed contract or quit), the Court found one "consent" valid and the other continued employment a choice "coerced" by the state.<sup>xxxviii</sup> The logical inconsistency, however, pales in the face of a more obvious consistency: both decisions undermine workers' ability to collectively advance their interests in both the private (*Epic Systems*) and public (*Janus*) sectors.

More recent cases have continued this anti-worker tilt. In 2021, the Court used the takings clause of the fifth amendment to invalidate a California agricultural worker law that guaranteed union organizers limited access to landowners' property in order to discuss unionization with their employees. In *Cedar Point Nursery*, the majority held that this was in effect a takings of the landowners' property by the government.<sup>xxxix</sup> The ruling eschewed precedents in order to make new law. In the first place, under existing labor law union organizers can be denied access to private property if other means to communicate with workers are available, so the Court could have merely applied this rule and found alternative access available. The decision also modified takings jurisprudence by failing to treat the access law as an instance of possible regulatory takings. If instead of a physical seizure of property a regulation simply "goes too far" in burdening an owner's property rights, it can be judged a takings, requiring both a public purpose and just compensation. Three factors determine what is "too far": the character of the government action, the economic impact of the regulation, and the interference with reasonable investment-backed expectations. But Chief Justice Roberts, writing for the majority, ruled that the California organizer access law amounted to a physical, not merely regulatory, takings, obliterating the Court's traditional distinction between temporary physical invasions and permanent physical occupations. Since the access right was permanent, even though the access was intermittent, the law constituted a takings and required that the government justly compensate Cedar Point Nursery.

During this past term, the Court again ruled against a union in *Glacier Northwest v. International Brotherhood of Teamsters*.<sup>xl</sup> The company had sued the union in state court for damages it alleged the union intentionally inflicted by calling a strike that caused some of the company's concrete product to be ruined. The union argued that state damage claims were preempted by national law; under the *Garmon* doctrine, such claims are preempted and referred to the NLRB when the union's actions are "arguably protected" by the NLRA. Finding that the Teamsters not only unreasonably failed to protect their employer's perishable product, concrete, against "foreseeable, aggravated, and imminent danger due to the sudden cessation of work," but actually helped create the danger by pouring the concrete into trucks before striking, where it could spoil and possibly damage the trucks as well if left idle, a surprisingly broad coalition of eight justices agreed that the union's actions were not arguably protected by the NLRA and thus the company could sue the union for damages in state court. Two liberals joined the moderate conservatives in the majority opinion, possibly to stave off a harsher decision favored by the far-right justices, several of whom would have overturned precedent and made it far easier for employers to sue unions for damages incurred because of strikes. In a lone dissent, Justice Jackson emphasized that by not deferring to the much more expert Labor Board, the Court was substituting its reading of the complex facts of the case instead of letting an administrative agency experienced in the intricacies of labor relations judge the circumstances surrounding the dispute. Although the decision could have been worse from labor's perspective, because it merely applied rather than revised legal

doctrine, the practical effect is to chill the right to strike, protected by the NLRA; since all strikes incur costs to the employer (as well as to the union), unions will be more hesitant to exercise the “economic weapon” on behalf of their interests and rights if they have to worry about compensating their employers for any costs that they could have reasonably foreseen and avoided.<sup>XL1</sup> But in effect, the Court in its two most recent cases reveals that it continues to value property rights over worker rights.<sup>XLII</sup>

Speech: Since long before the advent of the supermajority, the Roberts Court has enjoyed the reputation among some analysts as a staunch defender of free expression, and indeed, the Supreme Court in recent years has upheld a wide array of free speech claims against sundry challengers. The praise for the Roberts Court as a strong civil libertarian must be qualified, however. For one thing, despite some variation, the “speech” protected has at least in some cases seemed disconnected from the traditional political expression that some theorists see as the core of the first amendment’s concerns. Also, the Court’s sharpest critics allege that the Court has managed to invert free speech doctrine such that the constitution’s key right, instead of protecting the weak and despised, now serves as a bulwark to protect the powerful and comfortable.<sup>XLIII</sup>

This Court’s prototypical free speech decision was *Citizens United v. Federal Elections Commission*.<sup>XLIV</sup> The Court went beyond the actual factual disputes in the case, beyond even what the parties were seeking, to announce a doubly abstract ruling reaffirming that spending money in elections counts as speech protected by the constitution and that campaign expenditures by corporations as well as real people deserved this constitutional protection. The symbolic as well as specific impact of this ruling had wide-ranging practical impact, opening the floodgates for money from large donors to inundate the American political system. This decision can be seen as part of a larger deregulatory scheme that some have labeled “first amendment Lochnerism.”<sup>XLV</sup> These decisions, seeing regulations as “forced expression,” have been criticized as a “civil rights movement for corporations,”<sup>XLVI</sup> and on a par with the Court’s weaponizing the first amendment against workers as well as for employers (e.g., *Janus*).

This term the Court issued a couple of decisions protecting the speech of social media giants against torts suits by people claiming indirect harm from postings online. The rulings hinged on Section 230 of the Communication Decency Act which protects social media companies from liability based on material posted by users of their platforms.<sup>XLVII</sup> The Court also made it slightly more difficult for Colorado to prosecute an alleged online harasser by requiring a subjective state of mind of at least recklessness (as opposed to intent) on the part of the harasser to constitute a true threat, rather than an objective standard by which a reasonable person would have understood the messages to have been threatening.<sup>XLVIII</sup> This term’s most significant free expression case, however, fell squarely within the deregulatory framework that favors the strong and traditional hierarchies, and since it collaterally involved religious beliefs, will be discussed below under religious liberty.

Second Amendment (guns): In 2022, the day before the most explosive decision of the term was announced, the Court announced an opinion that rivaled *Dobbs* as an example of what critics decry about originalism and called into question the wisdom of using a (questionable) image of society in 1787 as the criteria for laws appropriate for today’s society, one notably rocked almost weekly by mass shootings. Ever since the Supreme Court ruled in *District of Columbia v. Heller*<sup>XLIX</sup> in 2008 that the second amendment protected an individual right to gun ownership, and not merely the existence of state militias as opposed to a standing army as had been the consensual interpretation previously, federal lower courts had used a bifurcated test to assess the constitutionality of gun regulations: if the regulation severely burdened the ownership of guns, judges applied strict scrutiny, but if the restriction was not an onerous burden, judges used a more lenient intermediate level scrutiny. But in *New York Rifle & Pistol*

*Association v. Bruen*, Justice Thomas upended this practice and substituted a new test more consistent with his originalist belief that constitutional “meaning is fixed according to the understandings of those who ratified it”: whether the restriction was “consistent with this Nation’s historical tradition of firearm regulation.” Applying this test, he held that a New York requirement that a person had to show “proper cause” for need to carry a gun was a violation of the second amendment. He stated that this test should not preclude all restrictions, e.g., bans on carrying guns in sensitive areas such as school or government buildings, and that the contested regulation need not be a “dead ringer” for traditional regulations but could be analogous to such historical laws. Still, lower courts are already striking even commonsense restrictions such as laws prohibiting gun ownership by persons under domestic restraint orders or with drug convictions, decisions that show how inapt the “consistent with tradition” is for dealing with contemporary problems not even recognized when the second amendment was adopted and how this vague test is already generating a flood new appeals to the Supreme Court.

Abortion: Without a doubt the decision of the supermajority that has grabbed the most attention and aroused the most intense public backlash was the *Dobbs v. Jackson Women’s Health Organization*<sup>L</sup> decision that overturned *Roe v. Wade*<sup>LII</sup> and ended a half-century of constitutional protection for a right to decide to terminate pregnancy. The decision was controversial even before it was released because the draft opinion was leaked in April before the official ruling was announced in June, an impropriety almost unheard of in the Court’s history.<sup>LIII</sup> Beyond the political heat generated, the decision is notable as an example of originalism and its critics and as an exemplar of the more incremental as opposed to radical strategies among the new supermajority.

Justice Alito, writing for five conservative justices, launched a witheringly hostile attack on not only *Roe*, which had established a constitutional right to abortion in 1973, but also on the more centrist *Planned Parenthood of Southeast Pennsylvania v. Casey*,<sup>LIII</sup> written by three moderate conservatives in 1992, a decision that had upheld the constitutional right but rejected *Roe*’s trimester scheme in favor of an “undue burden” test, under which Republican state legislatures and increasingly conservative courts had conspired to whittle away at abortion rights in recent decades. Instead, Alito insisted that the proper standard was whether the framers of the fourteenth amendment would have intended that the “liberty” protected by its due process clause include a privacy right covering abortions. Noting that not only did three-fourths of the states ratifying the amendment criminalize abortion but also that the vast majority of states still had criminal statutes when *Roe* was decided, and claiming that even the traditional common law treated abortion as a crime, Alito ruled that there was no constitutional basis for abortion rights (although he emphasized that his decision did not threaten other privacy rights, since unlike abortion, they did not involve the life of a fetus). He also assayed the criteria that the Court uses in weighing whether it is justified in overturning precedent (adhered to in *Casey* as reasons not to invalidate *Roe* entirely) and concluded that none of them indicated adhering to past abortion precedents.

The three liberal justices issued an acerbic dissent. The opinion written jointly emphasized the importance of *stare decisis* and argued that all the criteria for following precedence dictated that the Court should uphold abortion rights. They criticized Alito’s history as superficial (an example of “law office history” written by judges and clerks who lack the expertise of historians) and sought to correct the account of the common law, noting that abortions before “quickening” were not considered criminal offenses. The more telling attack on originalism, however, was based on the observation that in 1868, the framers of the fourteenth amendment were all men and that women at that time were by and large denied citizenship and the vote, meaning that women’s intents and understandings would have been entirely excluded from “original intent.” They also noted the negative practical impact on participation

and equal citizenship in the economy as well as in public life the majority's decision would have.<sup>LIV</sup>

Concurrences revealed divergences within the supermajority. Justice Thomas penned a yet more extreme opinion in which he denounced all substantive due process jurisprudence and suggested that the Court rethink other decisions finding rights based on an implicit right to privacy not explicitly protected in the constitution. Thomas' stance would threaten a wide array of popular rights, from marriage equality and gay sex all the way to contraception for married couples. Justice Kavanaugh, on the other hand, tried to assuage the public that the majority opinion would not entail radical implications such as retroactively criminalizing abortions or banning travel to other states to obtain an abortion. Justice Roberts rejected the reasoning of Alito's majority opinion: he concurred that Mississippi's ban on abortions before fifteen weeks was constitutional, but he did not believe that it was necessary to overturn *Roe* to uphold this statute since fifteen weeks still left a reasonable time for a woman to decide about an abortion without unduly burdening her decision. Arguing for a minimalist approach ("if it is not necessary to decide, it is necessary not to decide"), Roberts urged (unsuccessfully) the Court to leave the issue of the constitutionality of abortion bans to another day.

Reaction has been heated, and polarized. Many conservative states have enacted statutes even more restrictive than the Mississippi law at issue in *Dobbs*. Liberals have marched and protested and voted – passing popular abortion referendums and punishing Republicans at the polls (though mainly by deflating expectations of a "red wave" in the 2022 midterm elections; the real test awaits 2024). Much confusion reigns about what is legal or illegal under the widely varied state laws that are now permitted. Finally, although many have read Alito's opinion as returning the issue of abortion to the states, his argument that the constitution does not guarantee a right to decide to terminate a pregnancy and that his originalist holding returns the issue "to the people and their elected representatives" leaves open space for the Congress to pass national legislation on the subject. Democrats have called for a national statute to protect abortion rights, while not surprisingly Republicans have introduced bills to ban abortion nationwide, but the gridlock hamstringing the national government probably ensures that the present situation, with about half the states permitting relatively open access and about half severely restricting abortions, will continue until elections can break the logjam (which is not inconceivable, given the salience of the issue and the skew of about two-thirds of the public favoring legal access).

**Discrimination and Affirmative Action:** The Court's June decision against affirmative action in college admissions as discriminatory came as no surprise to anyone since race-based equal protection, like abortion, has been another era where increasingly conservative justices have been gradually retreating from 1970s precedents established by the Burger Court. In 1978, Justice Powell crafted a finely balanced opinion in *Bakke* that held that diversity in student bodies could be a compelling interest to justify the consideration of race in admissions decisions.<sup>LIV</sup> A skeptical majority of five justices reluctantly affirmed this holding in 2003, but Justice O'Connor famously opined that "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary."<sup>LVI</sup> But a two decades wait was sufficient for the restive supermajority, who agreed to hear challenges to admissions at both Harvard and the University of North Carolina, both highly selective institutions that considered race as part of admissions decisions. Students For Fair Admissions, brainchild of Edward Blum, a prominent conservative culture warrior who engineered the successful challenge to the Voting Rights Act's preclearance requirement in the *Shelby County v. Holder* decision authored by Chief Justice Roberts,<sup>LVII</sup> alleged that the universities were advantaging African American applicants while discriminating against, among others, Asian Americans.

The Chief Justice wrote for the majority that the schools' admissions processes "cannot be

reconciled with the guarantees of the Equal Protection Clause” (or Title VI of the 1964 Civil Rights Act, which forbids racial discrimination in education by private institutions like Harvard) because they “lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful endpoints.” In a dissent mirroring progressives’ legal realist critiques of *Lochner* Era formalism, Justice Sotomayor criticized the majority for a holding that “cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter,” noting that legal equality will be subverted by a decision that entrenches real racial inequality in education.

Commentators have differed on the practical significance of the decision. Some have noted that few colleges are highly selective and that banning affirmative action at elite institutions will affect few college applicants.<sup>LVIII</sup> Others provocatively suggested that the changing demography of the country, with a highly pluralistic ethnic mix replacing a more bifurcated white-black division, rather than legal doctrine doomed race-conscious policies.<sup>LIX</sup> Still others noted that Roberts left the door open to other measures to foster diversity, mentioning that although these particular race-conscious policies were unconstitutional, nothing in the holding prohibits schools from “considering an applicants discussion of how race affected his or her life.” Many diversity advocates have long suggested race-neutral means, such as economic standing, educational background, or more nebulous factors such as “resourcefulness,” as criteria that could produce racially diverse student bodies without explicitly considering race.<sup>LX</sup>

Perhaps the longer-term impact depends on the repercussions for various efforts to mitigate racial disparities in various fields, especially whether the decision chills diversity and inclusion programs in the workplace. And the key to that issue may be the dueling visions of constitutional equality on display in opinions offered by the Court’s only two African American justices. Justice Thomas, long a vocal critic of affirmative action despite being a beneficiary of such policies, wrote that “While I am painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law.” Justice Jackson detailed the actual history of the fourteenth amendment, adopted to guarantee the equal rights of recently enslaved people, to debunk a false originalism that sustains an “ostrich-like” vision of the constitution as colorblind. She strongly assailed the majority: “With let-them-eat-cake obliviousness today, the majority pulls the ripcord and announces ‘colorblindness for all’ by legal fiat. But deeming race irrelevant in law does not make it so in life,” but rather undermines the efforts of universities to solve “America’s real-world problems.”<sup>LXI</sup>

Religious Liberty: If the current Supreme Court can predictably be counted on to be hostile to workers, one group that is almost assured of favorable treatment in Court is Christians, or at least some Christian sects. Arguably, religion has always fared well legally and politically in the United States, a country where religiosity is exceptionally strong relative to comparably developed nations, and the constitution in its very first amendment has not one, but two clauses aimed at protecting religious conscience: a ban on government prohibiting the free exercise of religion and an injunction against government making any law “respecting an establishment of religion.” The current supermajority, however, has expanded religious protections even beyond these religious freedoms and employed freedom of expression and anti-discrimination to enhance what conservatives call religious liberty.

After Justice Scalia led a conservative majority in diluting the strong free exercise standards established by the liberal Warren Court, a bipartisan reaction in Congress and conservative counter-reaction in the courts began ratcheting back up the level of protection afforded religious groups claiming

that laws infringed their practice of their religion.<sup>LXII</sup> Part of the explanation hinges on the groups making free exercise claims; whereas in the past claimants tended to be members of non-mainstream religions, such as Seven Day Adventists, Jehovah's Witnesses, or Orthodox Jews, more recent suits have involved more politically powerful religions, especially evangelical Christians and the Catholic church. Corresponding to trends in free exercise, the Supreme Court has weakened the prohibition on establishing religion. Again, whereas historically the Court had restrained more powerful religions in their attempts to have governments endorse their religious views with the objective of protecting less powerful sects, the conservative justices sought to dilute the standards used to define establishment.<sup>LXIII</sup>

These seemingly contradictory trends combined and culminated in 2022 in the case of a football coach who wished to pray on the field after his school's games.<sup>LXIV</sup> Based on a controversial, and critics charge distorted, reading of the facts, Justice Gorsuch held that the coach's free speech as well as free exercise rights were violated when the Bremerton School District tried to prevent him from praying. Characterizing the prayers as personal and private, Gorsuch dismissed the district's reason for trying to stop them based on concerns of an establishment clause violation. In the course of dismissing the establishment clause defense as not a compelling justification, the justice asserted that the *Lemon* test, a strict standard for establishment violations first enunciated in 1971 that had increasingly been supplemented or ignored in recent years, had been explicitly rejected by the Court. The dissenting liberal justices complained vociferously that based on dubious mischaracterizations of the facts, the majority were egregiously downplaying the grave danger that the prayers on public property, at the end of a school sponsored event, by a coach who not only was a public employee of the district but also leader respected by youthful students, ran a serious risk of appearance of public endorsement of religion.

Not only have the plaintiffs in religious rights cases changed, but also the types of claims involved recently are different. Whereas formerly claims involved the personal exercise of explicitly religious practices, such as respecting the sabbath or wearing religious clothing, today such free exercise claims tend to involve secular conduct that affects other people, with the paradigmatic case being persons engaged in commerce who do not wish to serve LGBTQ+ customers. In June the conservative majority ruled for a website designer who contended that having to design wedding sites for same-sex marriages would amount to coerced speech. Despite (again) a shaky factual basis and a highly dubious claim to standing and ripeness, Justice Gorsuch found that Colorado's Anti-Discrimination Act would violate 303 Creative LLC's free speech by forcing her to seem to endorse couples' unions that contravened her religious belief that marriage is only between a man and a woman. Gorsuch did not accept that all businesses have a right to discriminate on any basis; critics had worried that a favorable ruling for the plaintiff here could open the door to rampant racial discrimination, almost sanctioning a return to a private, individualistic form of segregation. Gorsuch sought instead to distinguish web design as a particularly expressive form of commercial activity. To the extent he failed to clarify the distinction between expressive and non-expressive business activities, however, a plethora of litigation is almost sure to follow.

In dissent, Justice Sotomayor wrote almost a treatise on anti-discrimination law. She showed that historically racial bigots had made the same types of justifications for discrimination based on beliefs they argued should be protected by free speech and free exercise of religion. She noted that the majority's affirmation that alternative sources exist for services such as wedding websites or wedding cakes for LGBTQ+ couples begs the question; the purpose of anti-discrimination laws is not to ensure the adequacy of available services but to prevent the real harms of discrimination and assaults on personal dignity occasioned by refusals or second-class service. In other words, she once again urged legal



realism and presented a vision of a society based on actual, not merely formal, equality.

Professor Elizabeth Sepper anticipated the current decisions almost a decade earlier when she characterized the conservative movement to safeguard “religious liberty” as “Free Exercise Lochnerism” (analogous to free speech Lochnerism). Noting that exempting businesses (both physical persons and corporations) from general regulations such as anti-discrimination laws on the basis of claimed religious beliefs threatened, if “exemptions lead to exemptions,” to result in “deregulation by exemption.” She noted the similarity to underlying assumptions behind Lochnerian jurisprudence: a severe skepticism about governmental regulation based on a view of the marketplace as a pre-political, natural, and generally beneficent private ordering towards which is required governmental neutrality among groups. Thus, any government regulation is resisted as redistribution, a taking from some to favor others, because it represents a deviation from a set of social relations antedating government policies, structured naturally without legal regulation beyond a few common law rules such as property rights and contract law. Legislated law that disturbs the natural ordering is seen as “class legislation,” prohibited by a constitution based implicitly on this laissez faire political economy. Just as forcing bakers to contract for ten hours or fewer of work violate their rights to free contracting implicitly protected in a Lochnerian view of the constitution, so forcing businesses to contract to provide gay couples wedding services is judged to violate constitutional principles that protect free markets from regulation illicitly favoring new egalitarian rules limiting traditional (“natural” or God-ordained) hierarchies.<sup>LXV</sup>

One interesting insight furnished by this perspective is the potential for free exercise and free expression Lochnerism to reconcile the seemingly contradictory philosophical principles of libertarian and traditional conservatism. The deregulatory thrust of the Supreme Court’s recent rulings both diminishes the government’s authority to regulate the economy and also weakens government policies undermining traditional hierarchies and social authority. Not coincidentally, these new constitutional protections please the two main bases of the Republican party: business elites seeking unrestricted laissez faire markets and populist evangelical Christians seeking to stymie challenges to “traditional values.”

Professor Leah Litman has published a provocative analysis that links the new Supreme Court’s approaches in anti-discrimination law and religious liberty. She argues that the conservative justices now perceive conservative Christian groups to be persecuted minorities – not so much because of actual discriminatory behavior harming them as much as the fact that their beliefs about traditional social hierarchies are no longer accepted as unquestionably hegemonic, but now are often criticized as being homophobic, sexist, racist, xenophobic, anti-scientific, or simply narrow-minded. Combined with the conservative view that the United States has now achieved a largely racism-free, colorblind society, Litman argues that conservative judges are making it easier to sue alleging discriminatory infringements on religious freedom than claiming racial discrimination.<sup>LXVI</sup> Ironically, both the new anti-discrimination jurisprudence and religious liberty law demonstrate how conservatives live in a different empirical world, since these claims are based more on a reading of “alternative facts” than a rejection of legal liberalism’s core principles. Thus, conservatives give extensive lip service to the principle of non-discrimination, quoting ad nauseum *Brown* and Martin Luther King’s “I Have a Dream” speech as if they were descriptions of current reality rather than aspirations for a better society. And when protecting religious free exercise (and simultaneously diluting anti-establishment principles), conservatives accept *Carolene Product’s* injunction for the Court to scrupulously scrutinize laws adversely affecting “discrete

and insulated minorities,” but misperceive loss of hegemonic status as qualifying conservative Christian groups for such special judicial protection.

Administrative State: Decisions about administrative regulations have received much less public attention than the Court’s rulings on abortion and religious liberty/discrimination, possibly because they seem more technical and procedural. Their potential impact, especially in the long run, however, is possibly more serious. And they constitute the very core of the conservative legal movement’s goals, as given popular expression by Steve Bannon who announced at the beginning of Trump’s administration its goal would be nothing less than to “deconstruct the administrative state.”<sup>LXVII</sup> As the Supreme Court moved right slowly during the Rehnquist era and since, there have been hints that conservatives sought to dismantle the modern centralized active state established by the New Deal (even though less firmly consolidated than in most Western European democracies). There were several cases where the previous liberal Courts’ acquiescence of national power was deemed incompatible with a more traditional decentralized federalism.<sup>LXVIII</sup> The national government’s administrative agencies have also had their powers challenged in cases prescient of contemporary doctrinal developments. The initial position of the conservative legal movement, however, was to carve out a very deferential stance toward executive autonomy. The *Chevron* doctrine was created in the context of the Reagan administration at a time when liberals had lost the presidency to a staunch conservative but retained a toehold in the federal courts. Reagan appointed agency heads who gave conservative glosses to laws passed under much more liberal administrations, in some cases actually ignoring or reversing the original purposes of laws. When activists sued to reverse these new conservative policies, liberal judges were tempted to constrain these new policies, holding them to be invalid interpretations of their authorizing statutes. In *Chevron v. Natural Resources Defense Council*, however, Justice Stevens decreed that the proper role for judges involved a two-step analysis: first, to determine if there was genuine ambiguity in the statute, and second, if there was, to defer to the implementing agency’s interpretation, provided it was reasonable.<sup>LXIX</sup> This *Chevron* doctrine put the (more liberal) courts in a very deferential posture relative to (more conservative) executive agencies, and no one was a more enthusiastic cheerleader for the doctrine than Justice Scalia. With Democratic administrations, however, especially Obama’s, and with Trump’s successes in putting extreme conservatives in federal judgeships, conservatives have begun to rethink *Chevron* deference to what they pejoratively call “the deep state,” increasingly limiting its scope or ignoring it altogether.<sup>LXX</sup>

The Covid 19 pandemic’s need for more extensive regulation to protect public health invoked some of the starker assaults on administrative agencies’ regulations. The Supreme Court found that the Center for Disease Control did not have authority to limit housing evictions as a health measure,<sup>LXXI</sup> but a bigger blow to combatting Covid in the face of vaccine hesitancy came when the majority of the Supreme Court held that the Occupational Health and Safety Administration did not have the authority to mandate that large employers require their employees to get vaccinated or test and mask. The majority per curiam opinion was based on straightforward textual analysis of the agency’s authorizing statute, but a concurrence by Justice Gorsuch, describing a major questions exception to judicial deference to agency interpretations, presaged the emergence of a significant innovation.<sup>LXXII</sup>

The major questions doctrine was first adopted by the Court as a justification to rule against the Environmental Protection Agency in June of 2022. Siding with West Virginia’s challenge to President Obama’s power plan (which had never been implemented, was revoked by Trump, and was in limbo

while the Biden administration developed its own plan – leading many to argue that there was no “case or controversy” involved and thus the issue was not “ripe” for decision), Chief Justice Roberts invoked this novel doctrine, despite it not having a long history or basis in constitutional text (demonstrating the slipperiness of these highly touted conservative methods of interpretation). According to the major questions approach, when the agency’s interpretation of their authority or of the statute authorizing the regulation is not sufficiently clear and affects an issue having significant political or economic impact, rather than deferring to the agency’s interpretation, courts should disallow the regulation and demand that Congress “speak with clarity” about its intent for its legislation.<sup>LXXIII</sup>

Critics have concentrated their fire on three aspects of this novel doctrine. First, critics point out that modern social problems demand solutions that legislatures cannot anticipate (e.g., the Clean Air Act was passed in 1963 and expanded in 1977 and 1990, before widespread recognition of climate change), and even about known problems, legislators lack the expertise to fashion detailed solutions. Thus, effective legislation must of necessity be rather general and flexible, with administrative agencies filling in the specifics. Second, critics charge that it amounts to a power grab by and for activist judges because it lodges broad discretion in the hands of courts at the expense of agency judgments. Two crucial triggers open the door for subjective political decisions by judges. First, when is a law insufficiently clear? Second, when does an issue have sufficiently significant political or economic impact? Both of these criteria that supposedly justify the court taking decisions into their own hands lack objective standards, leaving the door wide open for judges’ political views to determine the issue.<sup>LXXIV</sup> Although conservatives decry executive agencies as being bureaucratic and unaccountable, critics note the irony that this doctrine removes regulatory decisions to federal judges, who as trained lawyers, lack scientific expertise and as unelected, lifetime appointees, have less democratic accountability than agencies who are responsible to both the elected Congress and the president for appointments and budgets. A third criticism of the major questions doctrine unveils its underlying policy bias in the current political context. Conservatives no longer look forward to reliable control the executive branch (as Republicans have lost the popular vote for president in every election but one since 1988) but do have the upper hand in the judicial branch. Furthermore, given the narrow balance of partisan margins in the Congress and the multiple veto nature of our checked and balanced legislative process (including non-constitutional checks such as the filibuster in the Senate in addition to separation of powers checks), judges striking regulations and demanding new clarifying statutes is tantamount to deregulation. This outcome matches exactly conservative policy preferences – a dismantling of the administrative state in favor of a pre-New Deal Lochnerian minimal government.<sup>LXXV</sup>

This June the supermajority did not rely on the major questions doctrine to continue its attack on environmental legislation but instead employed a politically slanted textualism to strike down an important provision of the Clean Water Act. In *Sackett v. EPA*, the issue was whether a family could fill in wetlands on their lot in order to build a house. Although the EPA ruled that this action would violate wetlands protection, Justice Alito wrote a majority opinion asserting that this regulation went beyond the agency’s authority to protect the “waters of the United States,” defined as navigable waterways and “adjacent” wetlands. Alito asserted that “adjacent” meant that wetlands had to have a surface connection to navigable waterways, but Justice Kavanaugh, who concurred in the result but rejected Alito’s rationale, noted that “adjacent” merely means nearby, not “adjoining,” as two houses can be adjacent even though

separated by a fence. Quite apart from legal issues of interpretation, these two environmental law cases from the last two Court terms show the extreme danger of allowing judges to fashion critical environmental policy for a world threatened by the disastrous effects of drastic climate change.

Another decision announced this year that received significant attention was *Biden v. Nebraska* in which the Court's majority blocked the President's plan to grant substantial debt relief for student loans under the authority of the Higher Education Relief Opportunities for Students (HEROES) Act. This statute authorizes the Secretary of Education to "waive or modify" any provision in student assistance programs in case of a national emergency. Declaring that the Covid pandemic had created such a triggering event, the administration announced a plan to forgive student loan debts up to \$10,000 (double this figure for low-income debtors). The first hurdle to six states who challenged the plan was establishing standing, since none could show an "injury in fact," but the Court allowed Missouri to sue in the name of its independent loan collection agency despite that entity's autonomy (and failure to join or support the suit) and lack of any evidence of any loss. In a much-criticized textualist analysis, Chief Justice Roberts ruled that "modify" referred only to small, gradual changes, while "waiver" meant the entire nullification of a requirement; in a reverse-Goldilocks analysis, Roberts then found that the partial loan forgiveness was too large-scale to qualify as a modification, too partial to count as a waiver, falling into an impermissible no-man's land in between.<sup>LXXVI</sup> In a profound dissent, Justice Kagan asserts that "the Court, by deciding this case, exercises authority it does not have. It violates the Constitution."<sup>LXXVII</sup> In criticizing the Court's lack of judicial restraint in striking down policies that it political opposes rather than judging them on legal grounds, she notes that the Court is not acting like a court. One could argue that the supermajority is returning to the Supreme Court's *Lochner*-Era role of playing "super-legislature," shaping public policy rather than allowing elected bodies to make the requisite political judgments.

Several commentators have reacted with a "gloom, not doom" assessment of these decisions, noting that they merely invalidate particular interpretations or regulations and not the statutes themselves.<sup>LXXVIII</sup> Several caveats suggest that these attacks on the administrative state are more serious, however. First, as noted, new or amended legislation is almost impossible in the state of semi-permanent gridlock currently paralyzing American government. Second, new policies are themselves subject to constraints because of these rulings. For example, new climate initiatives have taken the form of more passive, market-reactive subsidies to private renewable energy investments instead of regulations, partly at least because of Supreme Court hostility to environmental regulation.<sup>LXXIX</sup> And Biden's unusually forceful promise to pursue another plan to relieve student debt under another statute will be subject to cumbersome procedural stipulations that the HEROES act could have avoided by being an emergency measure. A more serious threat for the long run is the possibility that the supermajority could go beyond relying on its own readings of particular statutes or even be discontent with the huge discretionary power it has appropriated for itself under the major questions doctrine, questioning not merely agency interpretations of legislative authority but rejecting Congress' authority to delegate rule-making power in the first place. The so-called non-delegation doctrine asserts that Congress cannot authorize executive agencies to make regulations without giving clear and specific guidance on how to implement laws. This doctrine has been used to strike national statutes only three times, all at the height of *Lochnerian* antipathy to the New Deal in 1936-37, and it lacks support in a longer and earlier history solidly in

support of Congressional delegations. Yet some of the more extreme conservatives on the Supreme Court have indicated interest in reviving the non-delegation rule, and at least one critic of the major questions doctrine sees it as not merely a readily accessible exception to *Chevron* deference but as a Trojan horse for reintroducing the more radical non-delegation principle.<sup>LXXX</sup> Finally, some political observers have noted a schism among conservative elites in their approaches to the administrative state: while the conservative legal movement, or at least the supermajority of justices on the Supreme Court, seems intent on disempowering administrative agencies, Trump and his supporters seem more determined to politicize them if they are successful in regaining the White House, consolidating presidential control over the “deep state,” and “weaponizing” the bureaucracy for vengeance against Trump’s political enemies.<sup>LXXXI</sup>

**Elections:** If both prongs of the attack on the administrative agencies arguably represent oblique threats to democracy by the more extreme right elements of conservatism, the Court’s decisions in the far-right direct challenges to democratic voting and election laws seem to reflect more moderation. These rulings have surprised some observers, who note that the Roberts Court has a record of undermining democratic procedures. For example, the Chief Justice himself invalidated the pre-clearance provisions the Voting Rights Act, an effective guard of minority voting rights.<sup>LXXXII</sup> And in 2019, Roberts rejected a challenge to partisan gerrymandering, holding that the long-standing practice might be unfair, but that “fairness” was a ideal that lacked judicially manageable standards, meaning that the issue was a non-justiciable political question beyond the proper realm for courts.<sup>LXXXIII</sup> More recently with a supermajority firmly in place, the six conservative justices approved two Arizona voting restrictions (against counting provisionally ballots cast in the wrong precincts and against delivering others’ absentee ballots to polling places, so-called “vote harvesting”) against Voting Rights Act challenges. Section 2 of the VRA as amended in 1982 prohibits election rules with discriminatory effects as well as intents, but writing for the majority, Justice Alito suggested that all voting rules entail burdens and, using 1982 as a baseline, he weighed the Arizona restrictions against the state’s interest in fraud prevention (a largely chimerical concern in U.S. elections, but one that looms large in conservative circles, especially since Trump’s loss in 2020, supposedly in a stolen election according to what liberals call “the Big Lie”). Justice Kagan in dissent noted that the very purpose of the 1982 law was to eradicate unnecessarily restrictive laws common at that time (a kind of 1984-ish originalism that enshrined the very status quo that the law intended to remedy into a benchmark for what was permissible) and that Alito’s reasoning ignored the actual text of the law.<sup>LXXXIV</sup>

In two 2023 decisions, the Chief Justice assembled more moderate majorities who backed more centrist opinions. In a Voting Rights suit challenging Alabama’s congressional map, Roberts surprised worried voting rights activists by striking the districts as racially discriminatory based on the facts of the case and the Court’s precedents (and perhaps on an assessment that Alabama’s arguments to reinterpret that precedence were too far reaching). The longevity of the decision could be doubtful, however, as the majority included the three liberal justices, more normally isolated in dissent, and Justice Kavanaugh, who concurred separately, noting that Section 2 might have a limited temporal validity (analogously to Justice O’Connor’s endorsement in *Grutter* of an expiration date for affirmative action).<sup>LXXXV</sup>

Roberts also managed to deflate a radical conservative interpretation of the Elections Clause in *Moore v. Harper* decided in June.<sup>LXXXVI</sup> The liberal as well as the more moderate justices ruled against

conservatives' extreme version of the so-called independent state legislature theory. This theory, first hinted at in Chief Justice Rehnquist's concurrence in *Bush v. Gore*, reads the electoral clause literally as vesting state authority to direct federal elections for Congressional representatives and presidential electors exclusively in the "Legislature thereof," precluding any constraints being placed on state legislators by state governors, state courts, state constitutions, or potentially even the voters acting through referenda. Opponents of this theory, in addition to denouncing the shockingly undemocratic implications that it could possibly justify, made textualist arguments noting that at the time of adoption of the constitution, "legislature" connoted the entire legislative process, including gubernatorial roles and judicial review by state courts, as well as the legislature as a specific institution.<sup>LXXXVII</sup> Based on precedents and historic practices, Roberts rejected the North Carolina legislature's assertion that its redistricting map was exempt from review by the North Carolina Supreme Court. But having rebuffed the extreme claim that state legislatures can regulate federal elections without being subject to state law, Roberts left the door cracked for future attempts to free state legislatures from the checks and balances of their state legal systems. Elections expert Richard Pildes points out that Roberts' subtle observation that "state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections" assures that the Supreme Court, and not state law and other state checks, will ultimately decide the limits of state legislatures' authority in shaping electoral laws.<sup>LXXXVIII</sup>

Although radical attempts to revise voting and electoral laws seem to have been thus far thwarted, skeptics on the left remain wary of future developments. Critics charge that Republican strategists, who as recently as the George W. Bush administration were touting a "permanent Republican majority," now seem reconciled to reigning in democratic procedures in order to ensure that a Republican minority can govern, depending on anti-majoritarian institutions such as the Electoral College, gerrymandering, unlimited campaign donations, the Senate filibuster, and ultimately, the unelected federal courts. The most thoughtful analysis of this threat comes from historian Nancy MacLean, who uses a biography of economist James Buchanan and his public choice constitutionalism to buttress her contention that the right wants to construct a version of democracy in which a wealthy elite rules by limiting popular sovereignty through a constitution interpreted as prioritizing economic rights such as property and contract protection.<sup>LXXXIX</sup> Such a minoritarian "democracy" might resemble the *Lochner* Era, when the Supreme Court's jealous protection of economic rights limited popular reforms, preserving the economic dominance of corporations and wealthy Robber Barons as well as solidifying traditional social hierarchies. Such a "rollback of the twentieth century" would indeed amount to a constitutional counter-revolution.<sup>XC</sup>

## 6 REACTIONS AND REFORMS TO THE SUPREME COURT:

The shocking decisions announced in June of 2022, especially *Dobbs*, have produced reverberations with public opinion, draining the Supreme Court of much of its popular support. Since 2020, the Court has reversed its overwhelmingly positive image with the public; instead of approving of the Court by 70 to 29 percent, opinion now views it unfavorably by 54 to 44 percent. This loss of approval no doubt reflects a shift from seeing the Court as "middle of the road" (56% in 2020) to

“conservative” (50% by 2023, with only 40% continuing to view the Court as centrist). And the public now has changed its mind about institutional power as well. In 2020, only 25 percent believed that the Court had too much power (65% said it had about the right amount); now a majority of 51 percent say that the Court is too powerful, with only 40 percent affirming that it has about the right amount of power. These perceptions, like almost all political stances in the U.S. nowadays, are sharply polarized by party. A strong majority (68%) of Republicans continue to have a favorable image of the Court, which they still mostly view as middle of the road and as having about the right power, while Democrats are much less favorable (only 24%) and overwhelmingly perceive the Court as conservative and too powerful.<sup>XCI</sup>

Perhaps more damaging to the Supreme Court’s popular prestige than even its more radical rulings were a series of revelations about close ties between several conservative justices and billionaire Republican donors and possible conflicts of interest among the justices more generally. The damaging stories began with reporting by ProPublica that Justice Thomas had enjoyed many free trips and luxury vacations at the expense of Houston billionaire and mega-funder of conservative causes, Harlan Crow, all without the required reporting. Stories followed about other favors received by the Justice from Crow. Thomas’ wife Ginni has long been the source of controversy because of her ties to far-right politics, including alleged indirect involvement in the disorders at the Capitol on January 8, 2021. The Thomas scandal was followed in quick order by reports of similar undisclosed entertainment of Justice Alito by Paul Singer, a hedge fund billionaire with frequent litigation before the Court. Then allegations of inadequate disclosures by Chief Justice Roberts of his wife’s \$10 million earnings as a legal recruiter drew further fire, and Justice Gorsuch was cited as profiting from a land sale to a buyer whose law firm had business before the court just shortly before assuming office. Even Justice Sotomayor received criticism for trips and appearances promoting her book. Since these news items, longstanding criticism of various justices for their political socializing and speechmaking has given way to heftier conflict of interest charges and calls for Congress to legislate an ethics code for the Court, since Supreme Court justices are exempt from the code of ethics regulating the behavior of all other federal justices. Democrats have sponsored and passed through Senate committee such a bill, but Republicans are resisting.<sup>XCII</sup> The Court itself seems reluctant to either adopt its own code or have one legislated for it, with Justice Alito baldly asserting that the latter would be unconstitutional because “No provision in the Constitution gives them [the Congress] the authority to regulate the Supreme Court – period.”<sup>XCIII</sup>

Even before the new supermajority had begun to hand down radically conservative decisions, the refusal of Republican to acquiesce in a final Obama appointment (in fact, McConnell managed to ensure that the Senate would not even hold hearings on Garland’s nomination) provoked a wave of outrage and demands for Supreme Court reform among Democrats. Democratic candidates for president responded with promises to pack or otherwise reform the Court, and when elected, Biden created a Presidential Commission on the Supreme Court. Far from being an instrument for change, however, the Commission proved to be a reliable tool for displacing political pressure as the President instructed Commissioners to consider and assess the pro’s and con’s of a wide arrange of reform proposals, but to make no recommendations (that might have accentuated, rather than diverted, pressure to act).<sup>XCIV</sup> Despite this limitation, the commission received a broad range of expert testimony, assembled a wide array of possible reforms, and amassed an impressive amount of information about the advantages and disadvantages of various options. In the process of studying the issues, a clear consensus seemed to

emerge – against proposals to expand the Court by adding justices (the idea of “packing” the Court, the suggestion that has received by far the most attention in the media) but in favor of ending life tenure, either by installing an age limit on active service or, even more supported, by instituting term limits.

Professors Ryan Doerfler and Samuel Moyn make a useful distinction between two types of reform proposals, each reflecting a different way of diagnosing the problem with the Supreme Court.<sup>xcv</sup> Liberals (perhaps better labeled as centrists or moderates, or derogatorily as “corporate Democrats”) since the Warren Court have maintained great faith in courts, the Supreme Court in particular, as a protector of the rule of law, a bulwark of American democracy, and even an instrument for social change. They view problems with the current Supreme Courts as stemming from having the wrong personnel on the Court – not just conservatives, but extremist conservatives who reject what liberals conceive to be “law” (legal liberalism, the hegemonic paradigm regnant since the New Deal). Their goal is to reign in or remove conservative justices and restore legitimacy to the Court. Progressives (perhaps better labeled leftists or even populists or democratic socialists) have a much less charitable view of the Supreme Court not merely as an aggregation of individual justices but as an institution; seeing the Court’s role in American politics as less democratic than elected branches, they think the basic problem with the Court is too much unresponsive and unaccountable power. Their goal is to reshape the institution to make it more democratic by reducing its power.

Differing diagnoses dispose critics to advocate different solutions. Liberals favor diluting the conservative justices’ influence by implementing reforms such as expanding the court; by limiting the justices tenure by imposing mandatory retirement ages or term limits; to expand the pool of decision-makers by drawing on a random set of judges from appeals courts; by requiring partisan balance on the court (limiting the number of judges from one party or creating an even number of seats); or revamping the selection process (replacing the current political procedure of presidential nomination and Senate confirmation with selection by a non-partisan panel). All of these are designed to make the justices less “political.” Critics further to the left tend to think that the Supreme Court is inherently political and that judges’ decisions will inevitably be influenced by ideological value judgments (although being political does not equate to being partisan, although with the justices’ party identifications matching perfectly their political ideologies for the first time in history since 2010,<sup>xcvi</sup> distinguishing the two can prove difficult at times). The solution must therefore be structural, not personal, rendering the Court’s role in our politics more democratic by disempowering it. Such reforms aim at the Court’s functions, especially judicial review, for example, by legislation stripping the Court of appellate jurisdiction in certain matters,<sup>xcvii</sup> requiring a supermajority for the Court to strike a law (or at least a Congressional statute); or allowing Congress (perhaps by a supermajority vote) to override decision of the Supreme Court. Doerfler and Moyn suggest criteria for choosing among reform proposals (neutrality, democracy, rights protection, regularity, pragmatism, and feasibility, both legal and political) and conclude by favoring institutional disempowering, contrasting personnel reforms as seeking non-partisan ends by non-partisan means, but favoring the non-partisan means of democratic elections toward the goal of progressive/partisan change (although recognizing that their preferred political outcomes are by no means assured by institutional reforms).

A more modest set of proposals is advocated by law professors Daniel Epps and Ganesh Sitaraman.<sup>xcviii</sup> Based on more limited criteria (preserving the Court’s non-partisanship, downplaying



the stakes in judicial appointments, and preserving judicial review while encouraging more judicial restraint), they propose two novel reforms: a lottery would treat all appeals court justices as associates of a Supreme Court that would operate through randomly selected panels to hear and decide cases; a balanced bench would require that only five justices would be nominated from each party, and these ten would then have to agree on the selection of another five justices chosen from current appeals court judges. Epps and Sitaraman's purpose in proposing the creative solutions is to preserve the Court's legitimacy as an institution "above the political fray," and although they would result in a dramatically restructured institution if adopted, their goal is evidently less radical than Doerfler and Moyn's goal of democratizing the Court by reducing its role and power in the U.S. political system.

## 7 FINAL CONSIDERATIONS

Although judgments must be tentative in the midst of the fray, momentous constitutional law changes are afoot in the United States. Whether this movement will amount to a constitutional counter-revolution, deposing the reigning paradigm operative for the last eighty years, or not cannot be definitively determined at this point – not least because politics, including judicial politics, is not pre-determined. Future directions depend not only on the Supreme Court justices, especially the conservatives, but also in the elite and popular reactions to the changes in constitutional doctrine that this Court has already made and will make in coming terms.

The pull between the more moderate and extreme poles of the supermajority will have the most significant short-term impact on how far the changes already underway will go. There is already some evidence that Chief Justice Roberts has not entirely lost control of the Court to Justices Thomas and Alito and their more radically conservative views. Decisions joining liberal and moderate conservative votes in upholding the Voting Rights Act and in rejecting the purest view of independent state legislatures theory has already convinced some observers that indeed "the Supreme Court reads electoral returns" and that Court majorities can be convinced to restrain conservative changes in order to avoid possibly inciting a loss of legitimacy and a negative public reaction to an obviously "political" and "extremely conservative" Court. Next term will pose the opportunity to continue the Court's sharp right turn, but it could also offer chances to lower the political temperature. With the more highly visible controversial decisions (involving guns, abortion, affirmative action, and LGBTQ+ rights) already in place, the Court might tone down its opinions, for example, in an upcoming second amendment challenge to restricting gun possession for persons convicted of domestic abuse<sup>XCIX</sup> – perhaps an obvious occasion to be less absolutist about rights to bear arms, and perhaps be less rigid in judging a wealth tax case of limited immediate impact though of potential far-reaching implications.<sup>C</sup> It could focus more on governmental issues near and dear to conservative priorities, undermining the administrative state, but of less fervent immediate concern to the public. Two such upcoming cases present chances to further hobble the administrative state: a case challenging the funding of the Consumer Financial Protection Agency<sup>CI</sup> and a case presenting a direct challenge to the *Chevron* doctrine.<sup>CII</sup> Although weakening federal administrative agencies might have alarming results for the public in the longer run, for instance, crippling the government's ability to deal effectively with climate and environmental issues, not to mention more mundane health, safety, and welfare concerns, its impacts are less immediate, visible,

and attributable to the Court, and can be shrouded under a cloud of abstract rhetoric about expanding “freedom” and reducing government “waste” and “meddling.” Or the Court might resort back to making procedural rulings with indirectly conservative consequences, as past conservative, but more balanced, Courts have done, to avoid the backlash that more visible substantive decisions might have.<sup>CIII</sup>

At least for the foreseeable future, moderate conservatives within the Court may be a more effective anchor against change than the threat of reform from outside the Court. The Democrats’ response to the conservative constitutional hard right turn to date has been surprisingly weak (even for the Democrats!). President Biden, probably reflecting his centrist politics and his generation of liberals’ veneration for the Supreme Court as well as his personal experience as long-time chair of the Senate Judiciary Committee, has limited his reaction to criticizing particular decisions without criticizing the Court per se. He has made it abundantly clear he is not interested in institutional reform and even most progressives have not gone beyond ritualistic calls to “pack” the Court, a personnel reform in Doerfler and Moyn’s classification and probably the least effective of all. Even if liberals had the desire for reforms, they lack the means, having only the slimmest majority in the Senate (and a nominal one at that, including several very conservative Democrats unwilling to back many party proposals) and having lost the House to the Republicans by an equally slim majority in 2022.

If stalemate seems most likely in the near term, much rests on the election of 2024 (as well as future elections, obviously). Having consolidated a “Trump Court” (perhaps an inaccurate label, since only three of the conservative six supermajority were appointed by Trump and the two most predictably conservative justices, Thomas and Alito, antedate Trump), conservatives can merely rest on their laurels and enjoy the fruits of past victories. On the other hand, liberals and the left should recognize that an electoral victory in 2024 that merely stops a return of Trump (who at this point seems intent on a comeback and likely to win the Republican nomination, although informed commentators judge him as a weak candidate in the general election) will not be sufficient to counteract the new supermajority on the Supreme Court. If, as in the 2020 election, a Democratic president defeats Trump but fails to bring along an accompanying secure Democratic majority, there will be no effective check on the Supreme Court’s right turn (except, to some extent, the inevitable drag of the lower courts, which if increasingly staffed with Democratic appointees, could furnish some resistance, although formally bound by Supreme Court binding precedents). This deadlock creates something of a Catch 22 for progressives, since a continued calcified status quo actually works to conservative advantage. Conservatives of a libertarian bent actually prefer a government unable to act, and a government that is stymied, prevented from taking effective actions to solve the public’s real problems, is likely to provoke conservative anti-government backlashes at the polls. It would appear then that nothing short of unprecedentedly strong progressive showings at the polls (as in 1936), as well as liberal political willingness to rethink their image of the Supreme Court and take on the arduous task of reform, can realistically lead to democratization of what has traditionally been an elitist veto point in a political system already checked at many points.

- I *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
- II Reva Siegel, “Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism, and Some Pathways for Resistance,” 101 *Tex. L. Rev.* 1127 (2023).
- III This movement’s strategies are astutely described and assessed by Steven Teles, *The Rise of the Conservative Legal Movement* (Princeton: Princeton University Press, 2008).
- IV Linda Greenhouse, “Roberts Court’s Accomplishments in 18 Years,” *New York Times* (July 11, 2023).
- V *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).
- VI Adam Liptak, “In Court Rulings, The Chief Justice Exhibits His Sway,” *New York Times* (July 2, 2023): pp. 1, 20.
- VII Richard H. Pildes, “The Supreme Court Rejected a Dangerous Theory. But It’s Not All Good News,” *New York Times* (June 28, 2023), notes that although Roberts’ opinion in *Moore v. Harper* rejected the radical version of independent state legislature theory that claimed that state legislatures had unlimited authority to mandate federal election rules, it subtly adopted a weaker version in holding that state courts cannot arrogate to themselves power vested in state legislatures by the U.S. constitution’s electoral clause and asserted the federal court’s power to interpret state constitutions in this matter to assure that state courts do not “transgress the ordinary bounds of judicial review.” This tactic of rejecting a radically conservative result while embedding reasoning with starkly conservative implications in the rationale is exactly what Roberts did in his famous (infamous to hard-line conservatives) opinion upholding the constitutionality of Obamacare. While he concluded that the individual mandate requiring uncovered individuals to buy health insurance was constitutional under the spending powers of Congress, he affirmed the conservative justices’ views of a diminished commerce clause, insufficient to authorize the individual mandate, and arguably crippled the health reform’s scheme to expand Medicaid for the uninsured by allowing states to opt out of this provision of the Affordable Care Act.
- VIII Michael Waldman, *The Supermajority: How the Supreme Court Divided America* (New York: Simon & Schuster, 2023), provides a detailed and illuminating analysis of the changes that the 6-3 majority has wrought for the functioning of the Supreme Court and U.S. constitutional doctrine.
- IX Common law methods usually emphasize the importance of stare decisis (“let the decision stand,” deference to precedent). While this approach allows more flexibility and innovation than often recognized, it produces evolutionary doctrinal change and discourages abandoning old doctrine in favor of novelty.
- X Bruce Ackerman, *We the People* (Cambridge: Harvard University Press, 1991); Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution* (Cambridge: Harvard University Press, 2022); James Gray Pope, “Republican Moments,” 139 *U. Penn. L. Rev.* 287 (December 1990); Jack Balkin, “Cycles of Constitutional Time,” 101 *B. U. L. Rev.* 1723 (October, 2021). These various versions of constitutional cycles all reflect an underlying understanding of legal as well as political change as occurring through “punctuated equilibrium.” Terrence McDonough, “Social Structures of Accumulation and Punctuated Embeddedness,” *American Journal of Economics and Sociology*, v. 70, no. 5 (November, 2011), pp. 1234-1247. For an analysis linking constitutional cycles to electoral realignments, see Walter Dean Burnham, “Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman’s *We the People*,” 108 *Yale L. J.* 2237 (June, 1999).
- XI Thomas Edsall, “Gut-Level Hatred Is Consuming Our Political Life,” *New York Times* (July 19, 2023) describes the concept of calcification proposed by political scientists John Sides, Chris

Tausanovitch, and Lynn Vavreck in their 2022 book, The Bitter End, as involving polarization, but “polarization plus”: increasing homogeneity within parties and distinctions between the parties, predominance of identity issues, and closely balanced competition. Neal Devins and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” 2016 Sup. Ct. Rev. 301 (2016) note that since 2010, all the justices appointed by Democratic presidents are ideologically to the left of all the justices appointed by Republicans. Such an alignment of party and ideology is unique in American history, making the legal differences among the Court’s justices unusually brittle and acerbic, because not only are questions viewed through the lens of ideology but also through partisan loyalties. As Alexis de Toqueville noted, it is not unusual for constitutional questions to be political (“There is almost no political question, in the United States, that does not sooner or later resolve itself into a judicial question,” quoted in Waldman, p. 18), but it is one thing for the Court to be political – it was designed that way, but quite another, generally considered to be improper, to be partisan. The moderately conservative political scientists Thomas Mann and Norman Ornstein, after careers of defending American governing institutions, grabbed headlines in 2014 by publishing a book called It’s Even Worse than It Looks (New York: Basic Books, 2012), arguing that U.S. government was now “dysfunctional.” The title was modified for the paperback version published in 2016 to read, It’s Even Worse Than It Was, reflecting their even more pessimistic assessment of U.S. politics.

XII Adam Winkler, We the Corporations (New York: Liveright Publishing, 2018).

XIII *Plessy v. Ferguson*, 163 U. S. 537 (1896).

XIV *Lochner v. New York*, 198 U.S. 45 (1905).

XV For a fuller portrait of the case, the arguments, the context, and later developments, see Augustus Bonner Cochran, III, Lochner x Nova Iorque: O Caso dos Padeiros Que Trabalhavam Demais (Curitiba: Editora Juruá, 2022). I would like to thank His Excellency Luis Eduardo Gunther for his kind invitation to publish this book as part of his Coleção Grande Julgamentos da História (Editora Juruá).

XVI Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court (New York: W. W. Norton & Co., 2011).

XVII Thomas Kuhn, The Structure of Scientific Revolutions (Chicago: University of Chicago Press, 1962).

XVIII Lani Guinier, Tyranny of the Majority: Fundamental Fairness in Representative Democracy (New York: Free Press, 1994).

XIX Laura Kalman, The Strange Career of Legal Liberalism (New Haven: Yale University Press, 1996), pp. 13-20. Interestingly, the battle of formalism vs. legal realism corresponds to a long-standing rift in U.S. public opinion. Decades ago, academic pollsters discovered that if questions were posed abstractly, the responses were overwhelmingly “conservative” (e.g., Americans want “less government”). But when questions are concrete, e.g., should specific programs or agencies be eliminated, the answers just as overwhelmingly “liberal.” Lloyd A. Cantril, The Political Beliefs of Americans (New York: Simon & Schuster, 1969), concluded that voters are ideologically conservative but pragmatically (or operationally) liberal. Benjamin Page and Lawrence Jacobs, Class War? What Americans Really Think About Economic Inequality (Chicago: University of Chicago Press, 2009) replicated these results more recently, indicating that this ideological/operational split is still a valid quirk of U.S. public opinion. The implications can be seen in electoral strategies, where Republicans tend to pitch their appeals at an abstract, rhetorical level, while Democrats propose concrete programs

to win votes.

XX Kalman., p. 2.

XXI Kim Fein Philips, Invisible Hands: The Businessmen's Crusade Against the New Deal (New York: W. W. Norton & Co., 2010) traces the roots of the new right back to business opponents of the New Deal.

XXII Jamie Peek, Constructions of Neoliberal Reason (New York: Oxford University Press, 2010).

XXIII During the Cold War, anti-Communism provided a common denominator for more libertarian and Burkean strands, as Communism could be seen as a threat to both liberty and tradition. Another, less consistent form of reconciliation was the tendency of conservatives to be libertarian in the economic sphere (e.g., deregulation) but classically conservative in social policies (e.g., state prohibitions on abortion or the establishment of (traditional) religion) – a reversal of the kinds of adaptations favored by liberals. Current legal conservatives seem to be still searching for a coherent combination of individual liberties and strong, traditional authority, as exhibited for instance in the idea of religious liberty.

XXIV David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform (Chicago: University of Chicago Press, 2011); Richard Epstein, The Classical Liberal Constitution: The Uncertain Quest for Limited Government (Cambridge, Harvard University Press, 2014); Randy Barnett, Restoring the Lost Constitution: The Presumption of Liberty (Princeton: Princeton University Press, 2013).

XXV See chapters 5 and 6 of Kalman. The current “revival of the revival” is typified by the publication of two new books interpreting the constitution as embodying civic republicanism, both of which have drawn great attention and generated much favorable discussion. Ganesh Sitaraman, The Crisis of the Middle-Class Constitution (New York: Alfred A. Knopf, 2017). The recent publication of Joseph Fiskin and William E. Forbath's The Anti-Oligarchy Constitution (New York: Oxford University Press, 2022) has garnered even more commentary and rethinking.

XXVI Michael Sandel, Democracy's Discontent (1997) argues that republicanism contended with liberalism throughout American history, although with diminishing force in the 20<sup>th</sup> century.

XXVII The name “republicanism,” even if modified as neo- or civic republicanism, is off-putting to many in today's political environment because of its association with the Republican Party. Ironically, in many ways the philosophy is antithetical to what the party stands for – although much of the platform of the Republican Party during its first years in the mid-nineteenth century reflected civic republican principles.

XXVIII This insight builds on the difference in Roman thought between *imperium*, political domination, and *dominium*, domination in the private sphere.

XXIX Elizabeth Anderson, Private Government (Princeton: Princeton University Press, 2017), provides an illuminating example: the 19<sup>th</sup> century law of coverture melded a wife's legal status into her husband's, leaving her no independent rights to property or citizenship. While liberals might say wives were still free – they after all had choices about who and whether to marry, and divorce, though difficult, provided an exit from the marriage, republicans would say that wives lacked liberty because of their subordinate status and domination by their husbands (even if the husband was benign and allowed some space for autonomy for his wife).

XXX See Waldman for an illuminating account of the creation of this supermajority and its ramifications. McConnell not only ensured that Trump got to appoint 33% of the Supreme Court; he also engineered the confirmation of Trump appointees as district level federal judges (constituting 20%

of the total) and appeals courts judges (with Trump judges equaling one quarter of all appellate judges by the end of Trump's term). Because Democrats have retained control of the Senate since 2020, however, President Biden, too, has enjoyed success in appointing lower courts judges as well as one justice, Ketanji Brown Jackson.

XXXI Eric J. Segall, *Originalism as Myth* (New York: Cambridge University Press, 2018), has written a detailed and illuminating explanation of these forms of originalism, including their respective claims and flaws.

XXXII *Bostock v. Clayton County*, 590 U. S. \_\_\_\_ (2020).

XXXIII The most obvious example would be the alleged right to bear arms. The second amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Should a judge analyze the whole amendment or focus exclusively on the last phrase?

XXXIV Siegal, "Memory Games." Siegel maintains that much of originalism's political appeal is that it serves to veil the substantive political values of conservatives, including opposition to *Brown* that is no longer "respectable," behind a seemingly neutral and academic legal methodology.

XXXV Karl Klare, "Judicial Deradicalization of The Wagner Act and the Origins of Modern Legal Consciousness, 1937 – 1941, 1978 *Minn. L. R.* 1732.

XXXVI *Epic Systems v. Lewis*, 584 U.S. \_\_\_\_ (2018). The Supreme Court has been encouraging arbitration, even at the expense of statutory employment rights, for decades now.

XXXVII *Janus v. American State, County, and Municipal Employees, Council 31*, 585 U.S. \_\_\_\_ (2018).

XXXVIII Samuel R. Bagenstos, "Consent, Coercion, and Employment Law," 55 *Harv. C. R.-C L. L Rev.* 409 (Summer, 2020).

XXXIX *Cedar Point Nursery v. Hassid*, 594 U.S. \_\_\_\_ (2021).

XL *Glacier Northwest v. International Brotherhood of Teamsters*, 598 U. S. \_\_\_\_ (2023).

XLI Sharon Block, *Supreme Court rules against union over strike liability*, SCOTUSblog (Jun. 2, 2023, 12:59 PM), <https://www.scotusblog.com/2023/06/supreme-court-rules-against-union-over-strike-liability/> and Jenny Hunter, "+

Is Yet Another "Could Have Been Worse" Decision That's Very Bad for Workers," Balls and Strikes Blog (June 2, 2023).

XLII James B. Atleson, *Values and Assumptions in American Labor Law* (Amherst: University of Massachusetts Press, 1983), demonstrates that despite the intentions of the authors of the NLRA, judges have long bootlegged traditional hierarchical values and common law doctrines of property and managerial rights to protect employers at the price of diluting workers' rights that federal labor law explicitly protected.

XLIII Genevieve Lakier, "Imagining An Anti-Subordination First Amendment," 118 *Columb. L. Rev.* 2117 (November, 2018)

XLIV *Citizens United v. Federal Elections Commission*, 558 U.S. 310 (2010).

XLV Amanda Shanor, "The New Lochner," 2016 *Wisc. L. Rev.* 113.

XLVI Tamara Piety, "The First Amendment and the Corporate Civil Rights Movement," 11 *J. of Busin. and Tech. L.*, 1 (2016).

XLVII *Gonzalez v. Google*, 598 U. S. \_\_\_\_ (2023) and *Twitter v. Taamneh*, 598 U. S. \_\_\_\_ (2023).

XLVIII *Counterman v. Colorado*, 600 U. S. \_\_\_\_ (2023).

XLIX *District of Columbia v. Heller*, 554 U. S. 570 (2008).

- L *Dobbs v. Jackson Women's Health Organization*, 597 U. S. \_\_\_\_ (2022).
- LI *Roe v. Wade*, 410 U. S. 113 (1973).
- LII The Supreme Court has a tradition of secret decision-making, beginning with the judicial conference in which the justices meet alone and discuss cases. and then craft opinions by circulating drafts among themselves, all in a tightly held and secretive process. The source of the *Dobbs* leak remains a mystery, despite intense investigation. Speculation at first suggested that an opponent of the decision might be the culprit, but more persuasive reasoning now centers on a theory that a supporter of overturning *Roe* might have released the draft to lock in a majority.
- LIII *Planned Parenthood of Southeast Pennsylvania*, 505 U. S. 833 (1992).
- LIV Without trying to expound a new equal protection argument to defend abortion rights, since the dissent's first line of defense was to uphold *Roe* that had based abortion rights in privacy, the dissenters could be seen as subtly conceding to some of the critics who lament *Roe*'s privacy argument and suggest that equal protection could provide a sounder foundation for abortion rights.
- LV *Regents of the University of California v. Bakke*, 438 U. S. 265 (1978)
- LVI *Grutter v. Bollinger*, 539 U. S. 306 (2003).
- LVII *Shelby County v. Holder*, 570 U. S. 529 (2013), another decision in which a majority judged that the time of explicitly anti-racist protections had run its course.
- LVIII Audrey Williams and Jacquelyn Elias, "The Supreme Court's Admissions Ruling Mainly Affects Selective Colleges. They're a Tiny slice of Higher Ed," Chronicle of Higher Education (June 30, 2023).
- LIX Christopher Caldwell, "Trump's Justices Didn't Doom Affirmative Action. Demography Did," New York Times (June 8, 2023).
- LX Rafael Walker, "What Comes After Affirmative Action? The Supreme Court's Ruling Doesn't Need to be a Setback for Social Justice," Chronicle of Higher Education (June 29, 2023).
- LXI Interestingly, these two opinions and the contrasting views they represent both can find support in the famous dissent in *Plessy* written by Justice John Marshall Harlan. Harlan opposed "separate but equal" legal segregation of the races because ". . . in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." This passage has been interpreted in diametrically opposite ways, as supporting a passive, formalistic, color-blind meaning for equal protection, or to the contrary, requiring an active, realistic, anti-subordination version. See Cass Sunstein, The Partial Constitution (Cambridge: Harvard University Press, 1998).
- LXII The Warren Court had used strict scrutiny to protect free exercise in *Sherbert v. Verner*, 374 U. S. 398 (1963), but in 1990 Scalia weakened exemptions from any valid "neutral law of general applicability." *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U. S. 872 (1990). Congress almost unanimously restored the strict scrutiny standard in passing the Religious Freedom Restoration Act in 1993, and beginning with *Church of Lakumi Babylu Aye v. Hialeah*, 508 U. S. 520 (1993), conservative judges began to protect free exercise more vigorously, even applying it to the practices of a privately held corporation in *Hobby Lobby v. Burwell*, 573 U. S. 682 (2014). During the pandemic, a series of cases tested limits on church meetings for the purpose of preventing spread of the coronavirus. At first the Court was fairly lenient toward these regulations, but reversing itself after Justice Amy Conan Barrett replaced Ruth Bader Ginsberg, conservative majorities increasingly found these limitations to infringe on free exercise.
- LXIII In 1973 the Supreme Court adopted a fairly rigorous test for establishment, the so-called

*Lemon* test. *Lemon v. Kurtzman*, 403 U. S. 602 (1971). As the Court shifted to the right, the *Lemon* test lost majority support, being repudiated even by its author, Chief Justice Burger, and the justices began to use a variety of tests instead of, or in addition to, *Lemon*. Most were less strict than *Lemon*, so that by 2014 the Court even approved explicitly Christian prayers at the beginning of a city's town council meetings. *Town of Greece v. Galloway*, 572 U. S. 565 (2014).

LXIV *Kennedy v. Bremerton School District*, 597 U. S. \_\_\_\_ (2022).

LXV Elizabeth Sepper, "Free Exercise Lochnerism," 115 *Colum. L. Rev.* 1453 (October, 2015).

The conservative view of political economy based on a pre-political, natural ordering with minimal and neutral government "interference" was devastatingly criticized by Karl Polanyi, *The Great Transformation* (New York: Farrar and Rinehart, 1944). For a recent application of Polanyi's theory to justify regulation and encourage more creative rethinking of liberal political economy, see Robert Reich, *Saving Capitalism: For the Many, Not the Few* (New York: Penguin Random House, 2016).

LXVI Leah Litman, "Disparate Discrimination," 121 *Mich. L. Rev.* 1 (October, 2022).

LXVII Phillip Rucker and Robert Costa, "Bannon Vows a Daily Fight for 'Desconstruction of the Administrative State,'" *Washington Post* (February 23, 2017).

LXVIII In *United States v. Lopez*, 514 U. S. 49 (1995) and *United States v. Morrison*, 529 U. S. 598 (2000), the Rehnquist Court held that the commerce clause could authorize national laws against traditionally local criminal offenses (guns near schools and violence against women), but in *Gonzales v. Raich*, 548 U.S. 1 (2005), even staunch conservatives Scalia and Thomas voted to uphold a national marijuana prohibition. As noted earlier, the Roberts Court refused to justify Obamacare's individual insurance mandate based on the commerce clause, but so far the expansive New Deal commerce clause has not suffered a full-scale frontal attack by conservative majorities on the Court.

LXIX *Chevron USA, Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

LXX Thomas W. Merrill, *The Chevron Doctrine* (Cambridge: Harvard University Press, 2022).

LXXI *Alabama Association of Realtors v. Dept. of Health and Human Services*, 594 U. S. \_\_\_\_ (2021)

LXXII *National Federation of Independent Business v. Occupational Health and Safety Administration*, 595 U. S. (2022). With an even flimsier textual basis, as Trump-appointed federal district judge ruled that the Center for Disease Control's mandate for mask use on planes as a public health measure lacked statutory authorization. Jackie Calmes, "Ill-Judged Ruling on Travel Mask Mandate The Product of Years of Cynical GOP Court Packing," *Los Angeles Times* (April 23, 2022).

LXXIII *West Virginia v. Environmental Protection Agency*, 597 U. S. \_\_\_\_ (2022).

LXXIV An example is the Supreme Court's decisions to allow OSHA to mandate Covid vaccines for workers in the medical field (apparently not a major issue) while striking the OSHA rule to mandate large employers to require vaccines for their employees because, at least in the eyes of the concurring conservative justices, it involved a major question.

LXXV A particularly astute example of the outpouring of criticisms and analysis of the major questions doctrine see Nathan Richardson, "Antideference: Covid, Climate, and the Rise of the Major Questions Canon," 108 *Va. L. Rev.* (April, 2022).

LXXVI *Biden v. Nebraska*, 600 U. S. \_\_\_\_ (2023).

LXXVII This sharp accusation elicited an equally contentious admonition from the Chief Justice that dissenters should limit their criticism to substance of the disputed ruling and not criticize the Court's basis for its decision, an injunction that Roberts and his fellow conservatives have themselves violate in the past when opposing rulings they felt strongly fundamentally misguided, e.g., marriage equality.



- LXXVIII For example, David Wallace-Wells, “The Supreme Court’s EPA Decision is More Gloom Than Doom,” New York Times (July 1, 2022).
- LXXIX Ezra Klein and Robison Meyer conduct an illuminating discussion the limitations of Biden’s Inflation Reduction Act as climate policy on the Ezra Klein Show podcast, July 7, 2023.
- LXXX Alison Gocke, “Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine,” 55 U. C. Davis L. Rev. 955 (December, 2021).
- LXXXI Jonathan Swan, Charlie Savage, and Maggie Haberman, “Trump and Allies Forge Plans to Increase Presidential Power in 2025,” New York Times (July 17, 2023).
- LXXXII *Shelby County v. Holder*, 570 U. S. 529 (2013).
- LXXXIII Amy Howe, “No Role for Courts in Partisan Gerrymandering,” Scotus Blog (June 27, 2019), analyzing *Rucho v. Common Cause*, 588 U.S. \_\_\_\_ (2019).
- LXXXIV Kagan charges that the majority ignore the actual words of the statute because “Section 2’s language is broad. To read it fairly is, then, is to read it broadly. And to read it broadly is to do much that the majority is determined to avoid.” *Brnovitch v. Democratic National Committee*, 594 U. S. \_\_\_\_ (2021). Matt Ford, “Sam Alito’s Boundless Contempt for Democracy,” The New Republic (July 7, 2021), notes that Alito claims a faux judicial restraint, arguing that the federal courts should defer to elected state legislatures to make electoral rules, while ignoring that the nationally elected Congress enacted the VRA precisely to ensure that state legislatures did not undemocratically restrict access to the ballot for minorities.
- LXXXV Matt Ford, Supreme Shocker: The Supreme Court Stuns Everyone by Doing Something Good on Voting Rights,” The New Republic (June 8, 2023), analyzing *Allen v. Milligan*, 599 U.S. \_\_\_\_ (2023).
- LXXXVI *Moore v. Harper*, 600 U.S. \_\_\_\_ (2023).
- LXXXVII Leah M. Litman and Katherine Shaw, “Textualism, Judicial Supremacy, and the Independent State Legislature Theory,” (June, 2022 draft, available at <https://ssrn.com/abstract=4141535>).
- LXXXVIII Richard Pildes, “The Supreme Court Rejected a Dangerous Elections Theory. But It’s Not All Good News,” New York Times (June 28, 2023)
- LXXXIX Nancy MacLean, Democracy in Chains (New York: Viking Press, 2017).
- XC William Greider, “Rolling Back the Twentieth Century: The Right’s Grand Ambition,” The Nation, v. 276, no. 18 (May 12, 2003). See Augustus Bonner Cochran, III, and João Renda Leal Fernandes, “De Volta a *Lochner*: A Ortodoxia Liberal Que Marca Novamente Tendência nos Relações de Trabalho dos EUA e do Brasil,” Revista LTr. v. 86, no. 10 (Outubro, 2022), pp. 1197 - 11217, and Cochran, *Lochner x Nova Iorque*.
- XCI Katy Lin and Carroll Doherty, “Favorable Views of Supreme Court Fall to Historic Low,” Pew Research Center (July 21, 2023).
- XCII Alison Durkee, “Here Are the Recent Controversies Supreme Court Justices Have Been Caught Up In – As Senate Committee Votes on Ethics Bill,” Blog Post, Forbes (July 17, 2023).
- XCIII Associated Press, “Justice Says Congress Lacks Power to Impose an Ethics code on Court,” Atlanta Journal-Constitution (July 30, 2022).
- XCIV Murray Edelman, The Symbolic Uses of Politics (Urbana-Champlain: University of Illinois Press, 1967).
- XCV Ryan D. Doerfler and Samuel Moyn, “Democratizing the Supreme Court,” 109 Calif. L. Rev.

1073 (October, 2021). E. E. Schattschneider, The Semi-Sovereign People (1961) emphasized the importance of defining political issues as a key factor in determining the outcomes political struggles. Beyond strategic considerations, a proper diagnosis in politics, as in medicine, is crucial for identifying the proper prescription.

XCVI Devins and Baum.

XCVII The Supreme Court's original jurisdiction is specified in Article III of the constitution, but the constitution leaves it to Congress to fill out most of the judicial structure and procedures, including the appellate jurisdiction of the Supreme Court.

XCVIII Daniel Epps and Ganesh Sitaraman, "How to Save the Supreme Court," 129 Yale L. J. 148 (October, 2019).

XCIX *United States v. Nahimi.*

C *Moore v. United States.*

CI *Consumer Financial Protection Bureau v. Community Financial Services Association of America.*

CII *Lopez Bright Enterprises v. Raimondo.*

CIII Erwin Chemerinsky, "Closing the Court House Doors," 90 Denver L. Rev. 317 (2012).