U.S. Constitutional Law I(D)

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Cases in which judgment and decrees of the highest court of a state may be examined by the supreme court, on writ of error.

Sec. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute or, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of; or by a justice or the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained or had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Proceedings on reversal.

No writs of error but as above mentioned.

The Judiciary Act of 1789, § 25, 1 Stat. 73, 85 (color coded)

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Andrew Jackson, Veto Message, July 10, 1832, *reprinted in* 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139-54 (1897)

Washington, July 10, 1832

To the Senate:

The bill "to modify and continue" the act entitled "An act to incorporate the subscribers to the Bank of the United States" was presented to me on the 4th July instant. Having considered it with that solemn regard to the principles of the Constitution which the day was calculated to inspire, and come to the conclusion that it ought not to become a law, I herewith return it to the Senate, in which it originated, with my objections.

* * *

The present corporate body, denominated the president, directors, and company of the Bank of the United States, will have existed at the time this act is intended to take effect twenty years. It enjoys an exclusive privilege of banking under the authority of the General Government, a monopoly of its favor and support, and, as a necessary consequence, almost a monopoly of the foreign and domestic exchange. The powers, privileges, and favors bestowed upon it in the origin at charter, by increasing the value of the stock far above its par value, operated as a gratuity of many millions to the stockholders.

* * *

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

But in the case relied upon the Supreme Court have not decided that all the features of this corporation are compatible with the Constitution. It is true that the court have said that the law incorporating the bank is a constitutional exercise of power by Congress; but taking into view the whole opinion of the court and the reasoning by which they have come to that

conclusion, I understand them to have decided that inasmuch as a bank is an appropriate means for carrying into effect the enumerated powers of the General Government, therefore the law incorporating it is in accordance with that provision of the Constitution which declares that Congress shall have power "to make all laws which shall he necessary and proper for carrying those powers into execution." . . .

. . . A bank is constitutional, but it is the province of the Legislature to determine whether this or that particular power, privilege, or exemption is "necessary and proper" to enable the bank to discharge its duties to the Government, and from their decision there is no appeal to the courts of justice. Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and proper in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper,* and therefore unconstitutional.

Without commenting on the general principle affirmed by the Supreme Court, let us examine the details of this act in accordance with the rule of legislative action which they have laid down. It will be found that many of the powers and privileges conferred on it can not be supposed necessary for the purpose for which it is proposed to be created, and are not, therefore, means necessary to attain the end in view, and consequently not justified by the Constitution.

* * *

It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will *always* exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society - the farmers, mechanics, and laborer - who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.

Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves - in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit. . . .

ANDREW JACKSON.

President Obama and the Supreme Court have waded again into unfamiliar and strikingly personal territory.

When Chief Justice John G. Roberts Jr. told law students in Alabama on Tuesday that the timing of Obama's criticism of the court during the State of the Union address was "very troubling," the White House pounced. It shot back with a new denouncement of the court's ruling that allowed a more active campaign role for corporations and unions.

On Wednesday, Senate Democrats followed up with pointed criticism of Roberts, and at a hearing on the decision, a leading Democrat said the American public had "rightfully recoiled" from the ruling.

The heated rhetoric has cast the normally cloistered workings of the court into a very public spotlight. Democrats hope to make the decision in *Citizens United v. Federal Election Commission* part of their strategy to portray the conservative justices as more protective of corporate interests than of average Americans.

A Democratic strategist who works with the White House said the fight is a good one for Obama, helping lay the groundwork for the next Supreme Court opening. "Most Americans have no idea what the Supreme Court does or how it impacts their lives," the strategist said. "This decision makes it crystal clear."

Senate Judiciary Committee Chairman Patrick J. Leahy (D-Vt.) opened the hearing on the ruling Wednesday by declaring that "the *Citizens United* decision turns the idea of government of, by and for the people on its head." The committee's ranking Republican, Jeff Sessions (Ala.), countered that Obama and Democrats are mischaracterizing the ruling for political gain.

"There has been too much alarmist rhetoric that has been flying around since this decision," Sessions said, advising his colleagues not to "misrepresent the nature of the decision or impugn the integrity of the justices."

The court ruled 5 to 4 in January that corporations and unions have a First Amendment right to use their general treasuries and profits to spend freely on political ads for and against specific candidates. The court overturned its own precedents and federal law in the decision, which was hailed by conservatives and a few liberals as a victory for free political speech, and was denounced by Obama, who said in his State of the Union address that it would lead to elections being "bankrolled by America's most powerful interests."

Obama's blunt criticism, while six black-robed justices sat at the front of the House chamber, set off a round of public debate about whether he was both wrong and rude, or whether Justice Samuel A. Alito Jr. violated judicial custom by silently mouthing "not true" while the president was speaking.

Presidential historians said that while other presidents have criticized Supreme Court decisions or called upon Congress to remedy them, Obama's was the most pointed and direct criticism in a State of the Union address since President Franklin D. Roosevelt took on the court for blocking his programs.

An issue of 'decorum'

Round 2 began Tuesday, when Roberts spoke at the University of Alabama law school. He did not mention *Citizens United* in his speech and declined to answer a question about criticism of the ruling.

But when asked whether the State of the Union address was the "proper venue" in which to "chide" the Supreme Court, Roberts did not hesitate.

"First of all, anybody can criticize the Supreme Court without any qualm," he said, adding that "some people, I think, have an obligation to criticize what we do, given their office, if they think we've done something wrong."

He continued: "On the other hand, there is the issue of the setting, the circumstances and the decorum. The image of having the members of one branch of government standing up, literally

surrounding the Supreme Court, cheering and hollering while the court -- according to the requirements of protocol -- has to sit there expressionless, I think is very troubling."

The White House struck back quickly -- not at Roberts's point, but at the decision. "What is troubling is that this decision opened the floodgates for corporations and special interests to pour money into elections -- drowning out the voices of average Americans," White House press secretary Robert Gibbs said in a statement. "The president has long been committed to reducing the undue influence of special interests and their lobbyists over government. That is why he spoke out to condemn the decision."

'People disagree'

White House officials said the debate helps underscore differences between the president and the conservative court and puts into relief what will be at stake when there is another opening on the bench. There is speculation that Justice John Paul Stevens, who turns 90 next month, will retire at the end of this term.

At a time when the administration is struggling to prove that it can work across political lines on a health-care overhaul and other matters, Obama officials insisted they were not seeking a partisan fight with the court. Yet they acknowledged that a debate over campaign finance fed into Obama's central campaign promise of transparency and reform. "This is really about the president's change agenda," a White House official said.

"This is the functioning of democracy at its highest," the official said. "People disagree, they discuss, they debate."

Administration officials did not question whether Roberts's comments were appropriate, noting that he had replied to a question.

But the fracas is the kind the justices usually like to avoid. Justice Clarence Thomas told a Florida law school audience last month that the controversy reinforced his decision to skip the State of the Union address. "One of the consequences is now the court becomes part of the conversation, if you want to call it that," he said. ". . . It's just an example of why I don't go."

Roberts, who has attended the event since joining the court in 2005, indicated at the Alabama event that he may now agree with Thomas.

"To the extent the State of the Union has degenerated into a political pep rally, I'm not sure why we're there," he said.

During periods of intense political debate in the U.S., the Supreme Court often becomes a target of harsh criticism. Jefferson complained of "useless judges" and described the judiciary as "a despotic branch." Lincoln suggested that allowing the Supreme Court to overrule public opinion could lead "to anarchy or to despotism." A member of Franklin Roosevelt's cabinet said that one court decision should "outrage the moral sense of the country."

Across history, the goals of such criticism have tended to be similar. The critics hope to damage the court's credibility with other political leaders and the public, making it uncomfortable for the justices to issue unpopular rulings.

Over the past few years, the cycle has started again. With Republican-appointed justices dominating the court — and pursuing an ambitious agenda that does sometimes conflict with public opinion — Democrats are denouncing the court in ways that would have been shocking not so long ago.

A classic example of the old approach was Al Gore's deference to the court, even while disagreeing with it, after the justices halted the counting of votes in the 2000 election and effectively made George W. Bush president. Examples of Democrats' new approach include:

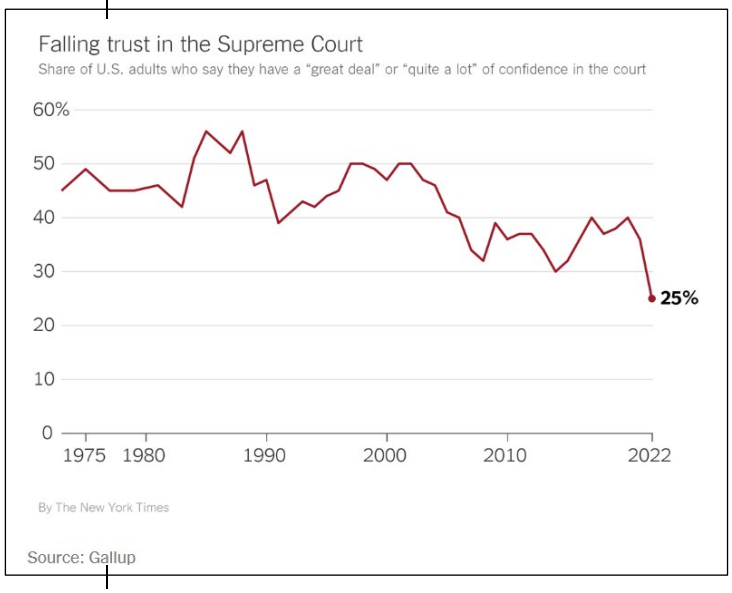
- "The problem is not that the Supreme Court is just conservative," Representative Katie Porter said on the House floor. "The problem is that it is corrupt."
- "Creepy billionaires ran an 'op' to capture the court, just like 19th-century railroad barons would capture the railroad commission that set their rates," Senator Sheldon Whitehouse of Rhode Island said.
- "This activist, extremist MAGA court faces a legitimacy crisis," Senator Jeff Merkley of Oregon said. "And a legitimacy crisis for the court is a crisis for our democratic republic."

Hardball, two ways

The criticism has three main sources. One, Republicans refused to allow Barack Obama to fill a court opening in his final year in office, only to help Donald Trump rapidly fill three seats. Two, the court has been willing to overturn precedents (in the case of abortion and other matters) and bipartisan legislation (in the case of voting rights and campaign finance law). Three, revelations about Justice Clarence Thomas's undisclosed receipt of gifts from a billionaire and Republican donor have highlighted the lack of accountability for the justices.

Partly for these reasons, the court's public standing has slipped. Last year, only 25 percent of Americans said they had a lot of confidence in the court, down from 50 percent as recently as 2002, according to Gallup.

Many Republicans view the recent criticism as unhinged and damaging to American democracy. . . . According to this view, the liberals criticizing the court are sore losers trying to subvert legitimate court decisions with which they disagree.



Jess Bravin, *Chief Justice Says Intimidation and Violence Threaten Judicial Independence*, Wall St. J., 12/31/2024

WASHINGTON—Chief Justice John Roberts closed 2024 with a warning that the judiciary, a "crown jewel" of American democracy, was under siege.

In his year-end report, published on New Year's Eve, he said threats range from politicians who denigrate judges as partisan hacks to violent attacks by disgruntled litigants.

Roberts said that criticism of court decisions was inevitable and sometimes helpful, but that acrid rhetoric by politicians and online misinformation campaigns, among other causes, not only undermined confidence in the court system but also endangered the safety of judges and their families.

"Unfortunately, not all actors engage in 'informed criticism' or anything remotely resembling it," Roberts wrote. "I feel compelled to address four areas of illegitimate activity that, in my view, do threaten the independence of judges on which the rule of law depends: (1) violence, (2) intimidation, (3) disinformation, and (4) threats to defy lawfully entered judgments."

The public should remember, he wrote, that it is "not in the nature of judicial work to make everyone happy. Most cases have a winner and a loser."

The chief justice said nothing about the Supreme Court's own actions that might have contributed to a diminished public standing, including a string of conservative decisions that independents and Democrats consider partisan rather than principled and a refusal to adopt an enforceable code of conduct despite ethical clouds surrounding some justices' behavior.

In December, a report by the Senate Judiciary Committee's Democratic staff found that the "Supreme Court has mired itself in an ethical crisis of its own making by failing to address justices' ethical misconduct for decades," citing actions by appointees of both Democratic and Republican presidents but focusing particularly on "lavish gifts" Justice Clarence Thomas and the late Justice Antonin Scalia accepted from billionaires but didn't report on financial disclosure forms.

Polls have shown a sharp decline in the court's public approval since 2020, when then-President Donald Trump cemented a conservative supermajority by appointing a third justice. In 2024, the court helped pave the way for Trump's November re-election in separate cases reversing lower court decisions that could have held him to account for actions related to the Jan. 6, 2021 attack on the U.S. Capitol by his supporters.

"The chief justice does not discuss the elephant in the courtroom, which is the profound ethics crisis which has undermined the standing of the court across the country," said Rep. Jamie Raskin of Maryland, who will be the top Democrat on the House Judiciary Committee in the next Congress.

"I like the rhetoric of enforcing the rule of law against violence, intimidation and disinformation, but the Supreme Court completely let us down in a series of cases related to the defense of the rule of law against those forces," Raskin, who served on the House Jan. 6 committee, said in reference to those cases.

Roberts's year-end statement also included words that could be read as a caution to Trump, who in the past has derided judges, including Supreme Court justices, who didn't rule his way.

Public officials "regrettably have engaged in recent attempts to intimidate judges," he wrote, by baselessly suggesting they were politically biased. Although he did not name any such officials, in 2018 Roberts rebuked Trump for complaining about an "Obama judge" who had ruled against him.

"Sorry Chief Justice John Roberts, but you do indeed have 'Obama judges,'" Trump retorted on the social-media platform then known as Twitter.

More recently, Trump has railed against the New York state judge who presided over his 2024 trial over hush money paid to an adult-film actress. Trump is appealing his conviction on multiple counts of falsifying business records.

Roberts also has chastised the Senate's Democratic leader, Chuck Schumer of New York, for warning in 2020 that two Trump-appointed justices would "pay the price" should they vote against abortion rights. Two years later, an armed man was arrested near Justice Brett Kavanaugh's home and charged with attempting his murder after reports that Kavanaugh had voted to overrule Roe v. Wade.

On Tuesday, Roberts reiterated that while public officials have a right to criticize the judiciary, "they should be mindful that intemperance in their statements when it comes to judges may prompt dangerous reactions by others." Disappointed litigants, he said, sometimes "falsely claim that the judge had it in for them because of the judge's race, gender, or ethnicity—or the political party of the President who appointed the judge."

During his 2016 campaign, Trump said a federal judge hearing civil-fraud lawsuits against Trump University was biased against him because of the judge's "Mexican heritage." The cases were settled with a $25 million payment to students who alleged they were duped by Trump's claim to teach them secrets of real-estate success in exchange for their four- and five-figure fees.

The chief justice suggested that the incoming administration might not receive a free pass from the court, despite Trump's personal success before the justices over the past year.

"Every Administration suffers defeats in the court system," he wrote, yet they have complied. "Within the past few years, however, elected officials from across the political spectrum have raised the specter of open disregard for federal court rulings," Roberts wrote.

Roberts has hit some of these themes before, but Tuesday's report was striking in its focus on foreign threats to judicial independence.

"Much more is needed—and on a coordinated, national scale—not only to counter traditional disinformation, but also to confront a new and growing concern from abroad," he wrote. He pointed to hostile foreign state actors attacking branches of government and feeding false information to the public. "For example, bots distort judicial decisions, using fake or exaggerated narratives to foment discord within our democracy," he wrote.

Meredith Lee Hill & Haily Fuchs, 'I'm for it': Johnson endorses impeachment for judges who rule against Trump, Politico, 01/21/26

Speaker Mike Johnson now supports the push inside his party to bring impeachment articles against judges perceived as antagonistic of President Donald Trump's agenda — a notable shift for the Louisiana Republican who over the summer sought to squelch such effort.

"I'm for it," Johnson told reporters at his weekly news conference Wednesday, responding to the question of whether he would endorse impeaching judges who have ruled against the administration.

A symbol of this ongoing effort has been James Boasberg, a U.S. district judge who ruled last year that the Trump administration's abrupt deportation of 137 men violated their due process rights and defied court orders to keep them in U.S. custody.

Trump allies and Hill conservatives have argued Boasberg is an activist who ought to be ousted from the bench. Johnson, over the summer, tried to tamp down the enthusiasm among hard-liners to remove him.

But judicial impeachment cries among House and Senate Republicans have flared up again in recent weeks. Sen. Ted Cruz (R-Texas) has written to Johnson urging him to take up impeachment proceedings against Boasberg, while the Judiciary committees of both chambers have held hearings on the matter broadly.

Judicial activist Mike Davis also spoke with the Republican Study Committee earlier this month about the mechanics of impeaching Boasberg. Though he acknowledged that the party does not have the votes to impeach or remove Boasberg or others, Davis advised lawmakers to put the judge through the process as a punishment.

Johnson also acknowledged Wednesday that "impeachment" would be "an extreme measure" and "we'll see where it goes."

He added, however, that "some of these judges have gotten so far outside the bounds of where they're supposed to operate [that] it would not be, in my view, a bad thing for Congress to lay down the law, so to speak, and … make an example of some of the egregious abuses."

[T]he idea of an apolitical court is a fairly recent development. For the better part of American history, the U.S. Supreme Court was a much more partisan and political institution than we remember. The justices who sat on its bench were once and future elected officials, advisers to presidents and even presidential aspirants themselves. From John McLean and Salmon P. Chase in the 19th century to William O. Douglas in the 20th, justices often kept a wandering eye on the White House. Abe Fortas had a direct phone line to the president of the United States and even wrote some of his speeches. Justices also accepted outside income and affiliated with third-party interest groups.

Whether the U.S. Supreme Court *should* keep politics at a far distance is one question. Whether it historically did is another.

In the early republic, as the framers of the new government labored to translate into practice the theoretical governing foundations they outlined in the Constitution, the Supreme Court was not understood to be removed from politics. The nation's first chief justice, John Jay, served as a close political and legal adviser to former President George Washington. He also served simultaneously on the court and as ambassador to Great Britain, in which capacity he negotiated a major peace treaty between the two nations. John Marshall, the chief justice who famously arrogated to the court the prerogative of judicial review — a right not delineated in the Constitution — was active in Federalist politics both nationally and in his home state of Virginia throughout his tenure on the bench.

To be sure, members of the court implicitly acknowledged that each branch of government was independent from the others. Although John Jay frequently provided political and policy counsel to Washington, when Thomas Jefferson, then serving as secretary of State, asked him to respond to 29 questions surrounding the legal implications of the Napoleonic wars, Jay demurred, arguing that as the judiciary and executive branches were "in certain respects checks against each other, and our being judges of a court in the last resort," there were "strong arguments against the propriety of our extra-judicially deciding the questions alluded to us." Otherwise put, Jay and his fellow justices were happy to weigh in on politics and policy. But they would not opine on the legality of their counsel in advance of potential lawsuits.

From the nation's founding through the mid-20th century, there was no expectation that justices remain aloof from partisan politics. … John P. Rank, a legal historian who spent months combing through the official and personal papers of Associate Justice John McLean concluded that "there was no day between his appointment in 1829 and his death in 1861" that McLean, a former member of Congress, "was not aspiring to be someone's choice at the next Presidential election."

The same was true of Salmon P. Chase, who served as governor of Ohio, United States senator and Treasury secretary under Abraham Lincoln. Chase was, according to Carl Schurz, a contemporary who served in the Senate and cabinet, "possessed by the desire to be President even to the extent of honestly believing that he owed it to the country and the country owed it to him." That ambition did not abate after Lincoln appointed Chase to the position of chief justice. Even while serving on the bench, he continued to seek the presidential nomination. He was hardly the last sitting Supreme Court justice to aspire to the White House. As late as 1948, Justice William O. Douglas, who had actively sought the vice-presidential nomination four years earlier, flirted with a movement to draft him in replacement of incumbent Harry Truman, whose political fortunes were then lagging.

Today, the Supreme Court is populated by career law professors and jurists. But until very

recently, politicians moved fluidly between elected office and the court, and back again. Jimmy Byrnes of South Carolina served as a congressman and senator from 1911 to 1941, then as a Supreme Court justice for a year and a half, then as secretary of State and subsequently as governor of his home state.

When the Supreme Court issued its landmark decision in the case of *Brown v. Board of Education*, four of its nine members were politicians, several of whom had never served on the federal bench: Chief Justice Earl Warren (a former governor of California); Hugo Black (a former senator from Alabama); Harold Burton (a former senator from Ohio); and Sherman Minton (a former senator from Indiana who subsequently served as federal appellate court judge).

As late as 1970, when former Supreme Court Justice Arthur Goldberg ran for governor of New York — or 1981, when Sandra Day O'Connor, a former state senator from Arizona, took her seat on the court — it was standard for people to move fluidly between judicial service and elective office. The notion that justices should be political saints, innocent of partisanship, would have been considered odd, if not risible.

Not all justices were politicians, but many of them remained close to the presidents who appointed them in ways that would be considered wildly inappropriate today. In the 19th century, Chief Justice Roger Taney continued to serve as a close adviser to Andrew Jackson well after his appointment to the bench, and David Davis — Lincoln's close friend and campaign manager in 1860 — acted as a presidential adviser even as he served as an associate justice. (Davis would later resign from the court and win election to the U.S. Senate.) And this practice extended well into the 20th century.

Louis Brandeis remained a close adviser to Woodrow Wilson after his elevation to the Supreme Court, though he preferred to receive the president at his apartment in Washington, D.C., to avoid the appearance of political impropriety. William Howard Taft, a former president who was appointed chief justice in 1921, freely advised presidents Warren G. Harding, Calvin Coolidge and Herbert Hoover. Franklin Roosevelt continued to rely on Felix Frankfurter long after he appointed the veteran Harvard Law professor to the court in 1939.

No justice in the modern era bridged the divide between politics and the bench so shamelessly as Abe Fortas, whose longtime friend, Lyndon Johnson, appointed him associate justice to the court in 1965. Even as he sat on the court, Fortas remained an informal presidential adviser. When asked privately whether LBJ should have created a firewall between himself and Fortas, Harry McPherson, LBJ's chief counsel, candidly admitted that "you couldn't find a law professor in the United States who would recommend that kind of thing."

The continued intensity of their relationship was extraordinary even by contemporary standards. LBJ went so far as to order a direct White House line installed in Fortas' home and office, enabling the president to reach him at all times of the day. From Nov. 23, 1963, when he was in private practice, until early July 1968, when the president nominated him as chief justice, Fortas met with LBJ at least 145 times in person and spoke with him on countless occasions by phone. For three of those years, he was a member of the Supreme Court. As associate justice, Fortas violated a bright red line when he knowingly shared important information with the president concerning court deliberations and weighed in on matters of policy and constitutional law. In one case, he advised the administration on a matter involving the Interstate Commerce Commission's approval of a railroad merger and then participated in a court case on the very same matter.

When Congress sent a stringent anti-crime bill to the president in November 1966, LBJ sought Fortas' counsel. While FBI Director J. Edgar

Hoover and Attorney General Nicholas Katzenbach advised the president to sign the measure, Fortas lent his backing to the White House staff, which was almost unanimous in its support of a veto. The justice believed that several provisions, including an anti-pornography title and extended authority to interrogate witnesses and suspects prior to an arraignment, were patently unconstitutional. He allowed that a section providing for mandatory sentences would likely survive judicial scrutiny, even if it was ill-advised. As usual, the president heeded Fortas' advice. The associate justice drafted the veto message, which LBJ delivered verbatim.

Harry McPherson would later recall a moment late in evening on July 24, 1967, when rioters in Detroit had exhausted the capabilities of Michigan's state police and national guard. He entered the Oval Office, only to find Fortas, then an associate justice, polishing a draft of the president's televised address to the nation, in which Johnson would announce the deployment of military personnel to restore order in Motor City. McPherson disagreed with the tenor of the draft, which he believed gave excess weight to framing the legal justification for sending troops at the expense of discussing the social and economic roots of urban riots. But he did not press the point. "I was intimidated by the stature and the brains and the judgment and the reputation and my own relationship with Justice Fortas," he explained. "I was very much the junior man and although I would have argued with the President alone about it, I didn't argue with Justice Fortas."

Fortas didn't last long on the Supreme Court. Republicans and Southern Democrats quashed his nomination as chief justice, largely out of opposition to his liberalism and Jewish heritage. But Fortas furnished conservatives with ample cause. He had entered into highly irregular business dealings with a Wall Street banker who later came under federal indictment. Their arrangement came with a $20,000 annual retainer for life. Although justices then and since accepted outside income, Fortas' deal raised the possibility that he intended to intervene on the behalf of a wealthy benefactor. Faced with likely impeachment hearings, he resigned from the court.

The Fortas imbroglio fundamentally changed the way the Supreme Court projected its image, as well as the expectations Americans placed on the court. In the wake of his resignation, justices voluntarily agreed to new limits and disclosure obligations related to outside income. They stopped advising the presidents who appointed them to the bench. After Sandra Day O'Connor, no former elected official was named to the bench.

But is the court apolitical?

Several of its members think so, and they deeply resent implications to the contrary. Justices Samuel Alito and Amy Coney Barrett recently struck back at critics who believe the Supreme Court has become another weapon in America's political wars. In a speech she delivered at the University of Louisville's McConnell Center, named for Sen. Mitch McConnell, who held a Supreme Court seat vacant for 11 months to deny Barack Obama the opportunity to fill it, Barrett said: "This court is not comprised of a bunch of partisan hacks. Judicial philosophies are not the same as political parties."

And yet, the public thinks otherwise. The controversy over Virginia Thomas is but the latest in a series of events that have led many Americans to view the court as an instrument of raw political power, rather than a disinterested arbiter of the law. Politicians bear much of the blame: highly charged confirmation hearings, Mitch McConnell's power play to deny former President Barack Obama the opportunity to fill a vacancy in 2016 and his subsequent decision to move a nominee through the confirmation process after millions of voters had cast ballots in 2020, discussions of enlarging the court — all contribute to the mounting conviction that the court is a partisan asset.

The justices also bear responsibility. The conservative majority's aggressive use of the shadow docket to make and break laws has reasonably led many Democrats and independents to wonder if the court now functions as a blunt instrument to accomplish for Republicans in the courtroom what they cannot achieve through the legislative process.

For the better part of its existence, the Supreme Court was a political institution, populated by men and women who were politicians, political advisers and politically motivated actors. Today, if polls are to be believed, few people — other than a few of the justices currently serving on the bench — seem to believe that the court is a neutral arbiter of the law. Americans from across the political divide regard the court as a political body that wraps ideology in legal garb.

There is a reasonable concern that the Supreme Court might lose its legitimacy if a majority of Americans come to perceive the institution as *of*, not *above*, politics. If the justices are simply a blunt instrument in our partisan wars, they can't be fair arbiters of the law.

But maybe that's not a bad thing. You can't address a problem until you acknowledge it exists. We have pretended over the past 50 years that the Supreme Court is an apolitical institution. It never really was, and it isn't today.

The Twenty-Seventh Amendment's history spans more than two centuries from the Colonial Era to the 1990s. Generally, the governments of Great Britain's American Colonies—and, later, the state governments—followed the "ancient" British practice of compensating legislators. Consistent with this practice, the Constitution's Framers determined that Members of the proposed bicameral national legislature would receive compensation for their services. However, at the 1787 Federal Convention, the Framers debated whether compensation for Members of Congress should be determined by the Constitution, the Members themselves, or the state legislatures. Ultimately, the Framers determined that the national government would compensate Members of Congress for their services in amounts set by congressional legislation.

The original Constitution, which took effect in 1789, did not prevent federal laws that increased or decreased Members' compensation from becoming operative before the next congressional election. Some delegates to the state conventions who met to consider the Constitution's ratification viewed the absence of an intervening electoral check on Congress's power to set its own pay as a flaw in the Constitution's design. When ratifying the Constitution, several state conventions recommended amendments to the nation's charter to address concerns that Members of Congress would abuse the power to set their pay.

Early in the First Congress, James Madison, then a Virginia congressman, introduced a series of resolutions proposing to amend the Constitution. Many of these resolutions drew from the recommendations of the state ratifying conventions. The third resolution prohibited any "law varying the compensation" of Members of Congress from becoming operative "before the next ensuing election of Representatives." On September 25, 1789, Congress proposed a similarly worded Congressional Pay Amendment. It was submitted to the states for ratification along with an amendment addressing congressional apportionment and the ten amendments that became the Bill of Rights upon their ratification in 1791.

By the end of 1791, six states had ratified the Congressional Pay Amendment. In 1873, the Ohio legislature ratified the Amendment to protest a congressional pay raise. Thereafter, the Amendment lay dormant until the late 20th century when it was rediscovered by Gregory D. Watson, then an undergraduate student at the University of Texas at Austin. Watson wrote a paper for a political science class arguing that the states could still ratify the Amendment and subsequently urged state legislatures to adopt it. From the mid-1980s to the early 1990s, more than 30 state legislatures ratified the Amendment, responding to the American public's opposition to congressional pay increases. The National Archivist proclaimed the Twenty-Seventh Amendment to have been ratified on May 7, 1992, more than two centuries after Congress had initially proposed it.

Amendment XXVII

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.

* * *

In earlier years, Congress had periodically set salaries for members of Congress pursuant to Art. I § 6 cl. 1 ("The Senators and Representatives shall receive a Compensation for their services, to be ascertained by Law, and paid out of the Treasury of the United States."). Salary increases frequently became political issues. Of the 32 states that ratified the amendment after the initial round of six ratifications when it was sent out with the amendments that became the Bill of Rights, 31 did so after a pay increase in 1977 that generated controversy. The other ratification was by Ohio, which ratified it in 1873, following a controversial pay increase that year.

The Ethics Reform Act of 1989 changed Congress's approach to determining members' salaries. It provides for an annual COLA (cost of living adjustment) to members' pay based on changes in private sector wages and salaries as measured by an Employment Cost Index. The adjustment is instituted on January 1 of each year. The congressional COLA in any given year is one-half percent less than the annual percentage increase in the ECI for the period ending December 31 of the previous year. With certain exceptions (including a provision allowing Congress to reject the pay increase), the increase goes into effect automatically.

In Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994), plaintiffs (a number of members of Congress) asserted that the automatic annual adjustment via a COLA violated the amendment: it varied salaries without a vote on a new law that adjusted the salaries, and a COLA could take effect without an intervening election.

The court rejected this claim, noting that the Ethics Reform Act specifically provided that the first adjustment would be made on January 1, 1991, after the mid-term elections to be held in November 1990. This was sufficient, the Court held, to satisfy the Twenty-Seventh Amendment (assuming it applied to a statute enacted prior to the Amendment).[11] It specifically rejected the claim that each separate COLA was a "law varying the compensation" of members of Congress.

> "Our understanding of the Madison amendment is a bit different, however; in essence it conditions the operation of a law varying congressional compensation upon an election of Representatives and the expiration of the Congress that voted for it. The law may be enacted at any time; when an election has been held the first condition is fulfilled; when the new Congress is seated the second condition is fulfilled. Therefore, the law, although duly enacted pursuant to Article I, does not "take effect" at the earliest until the new Congress has been seated. The minimum period between enactment and effect is from the first Monday in November of an even-numbered year (i.e., the Monday before an election) until the new Congress is seated the following January; but the interim could be greater, as long as it brackets an election. Accordingly, the present Congress could specify the salary of the next Congress or of any Congress after that. For example, the COLA provision became law in 1989 but the first COLA would not be made until more than a year later, on January 1, 1991 — pursuant to the Congress's decision, prior to but in the spirit of the Madison amendment, to defer implementation of the COLA

[11] Defendants (the Secretary of the Senate, Clerk of the House of Representatives, and the President) did not dispute that it so applied.

until after the 1990 congressional election. See Ethics Reform Act, § 704(b) (codified at 5 U.S.C. § 5318 note) (COLA provisions "shall take effect on January 1, 1991"). We see no reason whatsoever why the Congress cannot, for convenience, instead specify an index or formula with the same effect."

In *Massie v. Pelosi*, 590 F. Supp. 3d 196 (D.D.C.), *aff'd on other grounds*, 72 F.4th 319 (D.C. Cir. 2023), *cert. denied*, 144 S.Ct. 1005 2024), several members of United States House of Representatives filed suit against the Speaker of the House, the Sergeant-at-Arms of the House, and the Chief Administrative Officer of the House, claiming that House's face mask policy issued due to COVID-19 pandemic, and House Resolution 38 providing for enforcement of policy by fines to be deducted from members' salaries, violated the Twenty-Seventh Amendment, First Amendment, and other constitutional provisions.

The district court granted the defendants' motion to dismiss for lack of subject matter jurisdiction under the Speech or Debate Clause of Art. I § 6 cl. 1,[12] a ruling that Court of Appeals affirmed. The District Court also rejected the plaintiffs' Twenty-Seventh Amendment claim, ruling that a fine for violating House rules is not an adjustment of compensation:

"To determine the meaning of the term "compensation" as used in the Twenty-Seventh Amendment, the Court first looks to definitions of the term at the time of the drafting of the Ascertainment Clause and what would become the Twenty-Seventh Amendment. These definitions demonstrate that the meaning of "compensation" from the time of the drafting of the Ascertainment Clause and what would become the Twenty-Seventh Amendment is clear: the provision of "something equivalent[.]" Samuel Johnson, Dictionary of the English Language 181 (6th ed. 1785), id. ("Recompence; something equivalent; amends."); A New General English Dictionary 169 (14th ed. 1771), ("[T]he satisfying or making returns for any thing done, or favours received."); 1 John Ash, The New and Complete Dictionary of the English Language 111 (2d ed. 1795), ("A recompence, amends."). Therefore, by using the phrase "compensation for the[ir] services[,]" the Ascertainment Clause and the Twenty-Seventh Amendment were referencing the remuneration that Members receive in return for their "services" as Members, see U.S. Const. art. I, § 6, cl. 1; U.S. Const. amend. XXVII, which, pursuant to the Ascertainment Clause, is "ascertained by Law[ ] and paid out of the Treasury of the United States[,]" U.S. Const. art. I, § 6, cl. 1."

[12] "They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech of Debate in either House, they shall not be questioned in any other Place."

Catherine Lucy and Jess Bravin, Biden Says Equal Rights Amendment Is the 'Law of the Land, Wall St. J., 1/17/2025

WASHINGTON—President Biden moved to enshrine the Equal Rights Amendment in the Constitution, declaring that the measure to prohibit sex-based discrimination had cleared the necessary hurdles to go into effect after a half-century of debate.

The announcement came just days before Biden is set to surrender power to President-elect Donald Trump, and it was certain to face legal challenges and fierce objections from Republicans.

Supporters rallying last month in New York for the ERA to become the 28th Amendment.

"We, as a nation, must affirm and protect women's full equality once and for all," Biden said.

"I affirm what I believe and what three-fourths of the states have ratified: The 28th Amendment is the law of the land, guaranteeing all Americans equal rights and protections under the law regardless of their sex,'' he added.

A senior administration official said Biden was stating an opinion that the amendment had been ratified. It wasn't clear if Biden's statement had any legal and practical weight.

Biden's statement fell short of a request 46 Democratic senators signed in late November urging him to direct the Constitution's official custodian, U.S. Archivist Colleen Shogan, to formally publish the ERA as a ratified amendment.

Both Shogan, a Biden appointee, and her predecessor concluded the archivist lacks authority to recognize the ERA's ratification more than 40 years after a congressionally-set deadline expired.

"Ultimately this is going to be decided in court," the senior administration official said. "But I think this statement makes loud and clear this administration and this president's belief."

Still, Sen. Kirsten Gillibrand (D., N.Y.), who led the Senate push to persuade Biden to take action on the ERA before he leaves office, called the president's move "an incredible moment for reproductive freedom, and a historic day for equality."

Sen. Chuck Grassley (R., Iowa), the Senate Judiciary Committee chairman, was less enthralled. "The Equal Rights Amendment was rejected by the states during the binding period in which it was considered," he said. "The will of the American people can't be overridden by wishful thinking on a piece of paper."

Although 38 states have approved the ERA, the final three did so between 2017 and 2020, decades after a congressionally-set ratification deadline. Moreover, six of the states that initially approved the amendment subsequently passed measures rescinding their ratifications. Courts to date have upheld Congress's power to place ratification deadlines on proposed constitutional amendments, while the states' authority to rescind their ERA ratifications has yet to be tested in court.

"Biden can say whatever he wants, but it

doesn't have legal significance. You can't turn back time," said Akhil Amar, a professor at Yale Law School. Amar said he supports the ERA, "but we want to do it the right way. We don't want it to be clouded by all kinds of obfuscatory issues such as: Was it validly enacted?"

Obtaining judicial recognition of Biden's action could be difficult. A party in a case might need to argue that its position would be invalid under existing equality laws and supportable only under the ERA before a court would consider whether the amendment was part of the Constitution, legal experts said.

Moreover, any weight Biden's White House statement could carry likely will be diminished by Trump, who takes office at noon Monday. Trump's previous Justice Department issued an opinion declaring the ERA dead, and the incoming president stands against the rights that ERA supporters hope the measure could advance, such as access to abortion.

Supporters say the ERA could force governments to take steps to prevent discrimination and ensure equality between men and women, including better access to child care, preventing workplace discrimination due to pregnancy, and diminishing the gap in pay between men and women.

Some Republicans have argued the ERA is no longer needed, pointing to existing federal laws and the possibility for repercussions on other unforeseen areas related to sex. Some conservative groups have said ratification of the ERA could result in unintended consequences, such as whether jails, bathrooms and locker rooms in public buildings like schools could remain limited to one sex.

Congress passed the ERA in 1972, and its quick addition to the Constitution was expected amid a wave of progressive amendments that from 1960 to 1971 granted the District of Columbia voting rights in presidential elections, abolished poll taxes and lowered the voting age to 18. But the ERA fell three states short of the 38 needed for ratification when its seven-year time limit expired, and despite a congressionally-approved three-year extension, no other states followed by 1982. With the conservative renaissance of the Reagan era and an anti-ERA movement led by Republican activist Phyllis Schlafly, the effort largely was left for dead.

The immediate legal and practical effects of a potential ERA adoption were unclear. Other constitutional provisions have for decades been read to encompass women's equality and federal statutes have barred many forms of sex discrimination.

In the 2010s, progressives sought to resurrect the ERA by arguing that Congress lacked authority to impose the ratification deadline, and three additional states—Nevada, Illinois and Virginia—approved the amendment between 2017 and 2020. Although some legal scholars have backed that argument or some version of it, it has gone nowhere in the courts. An Illinois-led lawsuit seeking to force recognition of the ERA's adoption was dismissed by a federal appeals court in 2023.

Women's rights advocates opened a second front after President Biden took office, launching pressure campaigns on the White House and the U.S. archivist to declare the ERA ratified. Both Shogan and her predecessor refused, relying on Justice Department opinions issued during the Trump and Biden administrations advising that the deadline was valid.

Last month, Shogan and the deputy archivist, William Bosank, took the extraordinary step of issuing a public statement that the ERA "cannot be certified as part of the Constitution due to established legal, judicial, and procedural decisions," regardless of "personal opinion or beliefs."

The Constitution can be amended through a convention of the states, which has never occurred, or through resolutions passed by two-thirds votes of the House and Senate and then

approved by three-fourths of the states.

On Friday, communications staff at the National Archives referred back to the December statement, saying: “This is a longstanding position for the Archivist and the National Archives. The underlying legal and procedural issues have not changed.”

Before the 20th century, Congress placed no time limits on ratification; as a result, the 27th Amendment, proposed as part of the Bill of Rights in 1789, wasn’t ratified until more than 202 years later, when Alabama put it over the top in 1992. The relatively inconsequential provision prevents congressional pay raises from taking effect until a subsequent Congress is elected.

Lawmakers began including seven-year ratification deadlines in 1917, when Congress approved what became the 18th Amendment; many were surprised when Prohibition was adopted by three-fourths of the states barely a year later. The Supreme Court in 1921 upheld congressional authority to impose ratification deadlines, and most amendments since then have included the seven-year window.

Last August, the American Bar Association’s policymaking body approved a resolution endorsing the view that ratification deadlines are unconstitutional and that states can’t rescind ratifications once given. Biden cited that action in his statement Friday. “I agree with the ABA and with leading legal constitutional scholars that the Equal Rights Amendment has become part of our Constitution,” he said.

1. The Constitution Does Not Limit the Time for State Ratifications

… ERA opponents concede that the text of the Constitution includes no limit on the time for state ratification of a Constitutional amendment. Instead, they point to the "resolving clause" in Congress's 1972 Joint Resolution, which included legislative language providing that the proposed amendment "shall be valid as to all intents and purposes when ratified . . . within seven years" (emphasis added) – i.e., by March 21, 1979, later extended to June 30, 1982. Significantly, however, Congress has no power to unilaterally add a ratification time limit to Article V. Congress cannot impose a ratification time limit on the states except by amendment to the Constitution. And the legislative language in the "resolving clause" on which the ERA opponents rely did not amend the Constitution.

Article V establishes that amending the Constitution requires ratification by three-quarters of the states. But the legislative language on timing at issue here was not part of the text that Congress submitted to the states for a vote, because that language was included only in the Joint Resolution's "resolving clause" – not in the language of the Amendment itself. And ratification did not require the states to vote on the "resolving clause." Ratification required only that states vote on the text of the actual Amendment – i.e., the three numbered sections set forth in the second part of the Joint Resolution, including the section numbered 1 (the operative section), which states that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

Because the legislative language concerning the timing of ratification was not incorporated into the Constitution as an amendment by the vote of three-fourths of the states, the timing of the ERA ratifications by Nevada, Illinois, and Virginia is of no moment. All three states validly ratified the ERA in accordance with Article V of the Constitution and must be counted towards the 38-state threshold.

Although scholars emphasize that Constitutional amendments are effective immediately upon ratification by 38 states without any action by Congress or the Executive Branch, some members of Congress have – in the interests of clarification and expedience – proposed legislation declaring that the ERA is valid "having been ratified by the legislatures of three-fourths of the several States," without regard to any timing issues. However, some ERA opponents contend that any Congressional action to extend or eliminate the legislative language on the timing of ratification would have had to occur no later than June 30, 1982.

In essence, the ERA opponents argue that today's Congress can take no action that affects the language in the resolving clause concerning the timing of ratification. But there is nothing in Article V that can be cited to support that view. Moreover, as the U.S. Department of Justice's Office of Legal Counsel ("OLC") has pointed out, one Congress (e.g., the 1972 Congress or the 1979 Congress) has no constitutional authority to bind a subsequent Congress.

Some opponents of the ERA also argue that any legislation to extend or eliminate the June 30, 1982 date must be passed by two-thirds of each house of Congress (rather than a simple majority), because that date is an extension of the March 21, 1979 date established by Congress' original 1972 Joint Resolution, which similarly required a two thirds majority, per Article V of the U.S. Constitution.

Crucially, however, the legislative language at issue was not in the text of the proposed amendment itself. And it is the text of the proposed amendment itself that required a two-thirds majority vote of Congress. The legislative language at issue was in the "resolving clause,"

which, like most Congressional action, requires only a simple majority. Significantly, when Congress adopted H.J. Res. 638 in 1979 to substitute June 30, 1982 for the ERA's original legislative language on the timing of ratification, Congress did so by a simple majority.30

2. The Constitution Includes No Requirement of "Contemporaneity"

Quite apart from the specific language in the ERA concerning the timing of ratification, some ERA opponents contend more generally that the ratifications by Nevada, Illinois, and Virginia are ineffective because they were not sufficiently "contemporaneous" with Congress' adoption of the ERA and the ratifications by the first 35 states. According to this theory, in the time that has elapsed since Congress's adoption of the Joint Resolution and the 35 states' ratifications, the ERA has grown "stale" and can no longer be assumed to reflect the will of the people.In fact, however, the ERA enjoys enormous popular support today. Moreover, as a matter of law, there is no "contemporaneity" requirement in the Constitution.

Historic precedent further lays to rest any suggestion that concerns of "contemporaneity" preclude recognition of the ERA.33 In particular, the 27th (Madison) Amendment remained pending for ratification by the states for a period of nearly 203 years. Congress sent that amendment out to the states in 1789, but ratification by the 38th state – Michigan – did not come until May 7, 1992.34 Notwithstanding the extraordinary timing, the National Archivist had no hesitation in promptly publishing and certifying the Madison Amendment as part of the Constitution.

The ERA's pendency of 48 years pales by comparison to the nearly 203 years of the Madison Amendment and is no impediment to the recognition of the ERA as the 28th Amendment to the Constitution.

B. Purported Rescissions of Ratification

In addition to ERA opponents' arguments focusing on timing, some opponents also assert that the six states that purportedly rescinded their ratifications of the ERA – Nebraska, Tennessee, Idaho, Kentucky, South Dakota, and North Dakota – should not "count" towards the 38 states required under Article V of the Constitution.

As leading Constitutional scholars explain, however, because there is no provision for rescission of a ratification in the Constitution, the six purported rescissions of the ERA are legally null. Article V refers to ratification but says nothing about rescission, and there is no implied power to rescind. The history of the Constitution bears out this result. James Madison dismissed the notion of "conditional" ratification, emphasizing that ratification is "in toto, and for ever." Indeed, the very definition of "ratification" bars revocations.

Uniform past practice stretching back more than 150 years similarly compels rejection of the purported rescissions. In three prior cases, states that had ratified an amendment subsequently voted to rescind. Specifically, after ratifying the 14th Amendment, Ohio and New Jersey voted to rescind. Similarly, after ratifying the 15th Amendment, New York voted to rescind. And, after ratifying the 19th Amendment, Tennessee voted to rescind. Consistently, in each instance, the rescissions were ignored, and the states were treated as having ratified the respective amendments.39 So too the rescissions at issue here must be ignored and the six states – Nebraska, Tennessee, Idaho, Kentucky, South Dakota, and North Dakota – must be "counted" as having ratified the ERA.

C. Publication and Certification of the ERA

…[W]hen 38 states have ratified an amendment, that amendment automatically becomes a part of the Constitution, whether or not the amendment is so published and certified. The Archivist has no authority to judge the validity of ratifications by the states. The Archivist's role in the Constitutional amendment process is

purely “ministerial.”

Because the act of publication and certification is purely ministerial, there may be little or no legal significance to the fact that the ERA has not yet been officially published and certified. However, the practical consequences of that are very real. Publication is legal evidence of the law; and it serves notice to all branches of state and federal government for purposes of compliance, enforcement, adjudication, and further legislation. Publication carries great symbolic weight as official performance of public affirmation. By establishing the ABA’s support for the principle that time limits for ratification of Constitutional amendments are not consistent with Article V of the U.S. Constitution and the ABA’s support for the principle that Article V does not permit a state to rescind its ratification, the resolution will support publication and certification of the ERA pursuant to 1 U.S.C. § 106b.

Stephen E. Sachs, The Twelfth Amendment and the ERA: New Historical Evidence on the ERA's Invalidity, The Volokh Conspiracy (Reason Magazine), 1/23/25

[N]ew historical evidence on prior Article V amendments [shows] that Congress can and has placed legally operative language in its proposing resolutions, and not just in the proposed article text. The implication is that the ERA's seven-year time limit is valid—and that the article the ERA proposed to add is not.

Whether the Equal Rights Amendment is—*right now*—part of the Constitution is a matter of serious dispute. Thirty-eight states have sought to ratify the ERA, several of them only after the seven-year deadline in its proposing resolution. After President Biden's statement disregarding the deadline and describing the ERA as the Twenty-Eighth Amendment, its doubtful validity may provoke a minor constitutional crisis.

But there may be a legal answer. Not only in the resolution proposing the Bill of Rights, but also in those proposing the Twelfth and Seventeenth Amendments, Congress included operative language that modified the legal force of the newly proposed text. This language was deliberately chosen, was repeated by state ratifications, and seems to have been accepted as legally effective. This historical practice suggests that under Article V, *the resolution is the amendment*—the constitutional change proposed by the resolution as a whole, not just by the particular language it proposes to append.

This understanding means that certain parts of the 1788 Constitution have been repealed, not just superseded. It also means that the ERA's deadline rendered it incapable, even with thirty-eight states' assent, of making any valid change to the Constitution's text. The recent lobbying efforts on its behalf, including President Biden's statements, are therefore seriously misguided. In a divided society, losing consensus on the Constitution's text carries an especially high cost. The National Archives is the wrong place to play with fire.

* * *

If there's one thing that Americans are entitled to expect from their law professors, to paraphrase Justice Robert Jackson, it's rules of law that let them tell whether the Constitution has been amended, and if so, how. Unfortunately, whether the Equal Rights Amendment is, *right now*, part of the Constitution is a matter of serious dispute. Thirty-eight states have sought to ratify the ERA, the required number under Article V's three-fourths ratification requirement. Were these ratifications successful, the ERA would have come into effect on January 27, 2022. But three states acted only after the lapse of the ERA's seven-year deadline, which Congress put in its resolution proposing the Amendment fifty years earlier. (Four more states had purported to rescind their ratifications before the deadline expired, and a fifth did so on its expiration.) Nonetheless, in the waning hours of his term, President Biden endorsed the ERA's validity, announcing his view that it was "the 28th Amendment" and "the law of the land." Similar claims had been made by the majority of Democratic members of Congress, joined by influential scholars and groups such as the American Bar Association. To date the ERA hasn't yet been published as valid by the Archivist of the United States, whose statutory duty it would be; nor is the second Trump Administration likely to recognize it as valid. But in the meantime, or under a future Congress or Administration, the ERA's doubtful validity could provoke a minor constitutional crisis.

This makes the ERA's validity an urgent question for constitutional scholars. If its proposed text really were valid, and the seven-year deadline really were void, then officials, lawyers, and academics alike would all be obliged to proclaim them so. By contrast, if the deadline really were valid, and the proposed text really were void, then declaring the ERA as adopted might be seen as a shocking act of constitutional vandalism, one that threatens to destroy one of the last remaining areas of consensus in

American law: our agreement on the Constitution's text.

But the legal answer may be clearer than many recognize. Underappreciated historical evidence suggests that Congress was right to think it could place legally operative language in a proposing resolution, without repeating that language in a proposed article's text. Not only in proposing the Bill of Rights, but also in proposing the Twelfth and Seventeenth Amendments, Congress included operative language in the proposing resolutions that specified which changes were to be made in the Constitution, altering the legal force of the newly added text or repealing contrary language in the then-existing Constitution. Congress's language was deliberately chosen; it was repeated by states in their instruments of ratification; and it seems to have been accepted as legally effective at the time.

In other words, our earliest and longest-held understandings of Article V, on which Congress relied in the eighteenth, nineteenth, and twentieth centuries, treat proposing resolutions as legally operative. Yet despite its importance, this historical practice has gone almost entirely unnoticed by legal scholars.

This practice also suggests a different understanding of the amendment process, one that might seem novel today but that's more consistent with the actual text of Article V. The "Seventeenth Amendment" isn't just the 134 *words* that follow that heading in a standard copy of the Constitution : it's a particular *change* worked in the text of the Constitution, a change proposed by Congress in a joint resolution in 1912 and then agreed to by the states in 1913. As a legal matter, *the resolution is the amendment*. When acting under Article V, Congress isn't limited to proposing pieces of extra language to be tacked on at the end. It can make detailed edits, can delete provisions of the existing Constitution, and can include conditions for its various proposals—say, that they'll add specified language to the Constitution only "when ratified . . . within seven years." Each of these options carries the same legal force as the text of any proposed article, and each is equally immune from future legislative alteration.

This understanding of Congress's Article V powers entails that, while the text of our familiar printed Constitutions is correct, some familiar editorial notes to that text might be in error: some provisions of the Constitution of 1788 have been repealed, and not just "affected" or "superseded," by subsequent amendments. This understanding also entails rather straightforwardly that the ERA has failed to alter the Constitution's text. Whether or not states can rescind ratifications, the original deadline in Congress's resolution means that the article it proposed was never added to the Constitution, and that the only way of adding it is for another amendment to the same effect to be proposed and ratified. In other words, despite having attracted ratifications from thirty-eight different states, the ERA makes and can make no valid change to the Constitution's text, no matter how many states ratified it after the deadline or might choose to ratify in future.

Finally, this view suggests that the declarations by President Biden and members of Congress in favor of the ERA, as well as the recent lobbying efforts on its behalf, have been seriously misguided. In a deeply divided society, in which legal experts already disagree on key questions of constitutional law, losing consensus even as to the content of the Constitution's text could be quite dangerous. While the best legal account of that text may be one thing and popular belief another, any competing account needs to be supported by adequate evidence—and on the arguments presented here, this evidentiary bar is one the ERA simply can't clear. Advocates of the ERA should take note of this evidence and should identify a different path for pursuing their constitutional goals.

As Republicans prepare to take control of Congress and the White House, among the many scenarios keeping Democrats up at night is an event that many Americans consider a historical relic: a constitutional convention.

The 1787 gathering in Philadelphia to write the Constitution was the one and only time state representatives have convened to work on the document.

But a simple line in the Constitution allows Congress to convene a rewrite session if two-thirds of state legislatures have called for one. The option has never been used, but most states have long-forgotten requests on the books that could be enough to trigger a new constitutional convention, some scholars and politicians believe.

Some Democratic officials are more concerned than ever. In California, a Democratic state senator, Scott Wiener, introduced legislation on Monday that would rescind the state's seven active calls for a constitutional convention, the first such move since Donald J. Trump's election to a second term.

Mr. Wiener, who represents San Francisco, and other liberal Democrats believe there is a strong possibility of a "runaway convention." They say that Republicans could call a convention on the premise, say, of producing an amendment requiring that the federal budget be balanced, then open the door for a free-for-all in which a multitude of other amendments are considered, including some that could restrict abortion access or civil rights.

"I do not want California to inadvertently trigger a constitutional convention that ends up shredding the Constitution," Mr. Wiener said in an interview.

Representative Jodey Arrington, a Republican from West Texas and the chairman of the House Budget Committee, has been a leading convention proponent. He has introduced legislation that would require the head of the National Archives to track state applications and has said that a convention should have been called in 1979 when, he believes, enough states had requested one.

Since 2016, the year Mr. Trump was elected president the first time, nine states that had Democratic-controlled legislatures have been concerned enough that they rescinded their decades-old requests for constitutional amendments, sometimes with support from their fellow Republican legislators. They feared that they were leaving open the door for a Republican-led Congress and state legislatures to pursue a conservative revision of the laws underpinning national governance.

The founding fathers set almost no rules governing how such a constitutional convention would work. Article V of the Constitution says that the document can be amended if legislatures in two-thirds of states — now 34 out of 50 — agree to convene for the purpose. But it does not set guidelines for how the gathering would function. If the convention produces a proposed amendment, the change would still need to be ratified by three-fourths of the state legislatures.

Following last month's election, 28 state legislatures will be controlled by Republicans, 18 by Democrats and the rest will be split, according to the National Conference of State Legislatures.

The founding document does not say whether 34 states need to agree on the specific amendment topic or whether signaling that they want a convention for any reason is enough to trigger proceedings. There is no explanation of whether each state at the convention would get one vote or more, whether topics not on the agenda can be raised, whether lobbyists or special interest groups could participate, or who would referee disagreements. Constitutional

scholars are unclear how even the most basic questions would be resolved.

More than 34 states appear to have standing requests to change the Constitution, some dating back more than 150 years, according to the Article 5 Library, a bare-bones website that scholars pointed to as the best known repository of applications to change the Constitution.

The list reads like a chronicle of generational concerns. In the early 20th century, more than 20 states wanted to insert anti-polygamy laws into the Constitution. In 1949, six states wanted to create a "world federal government." Many of those applications remain active.

In more recent decades, some states have sought to install a balanced budget requirement for the federal government or give the president line-item veto authority.

At a congressional hearing focused on budget matters Wednesday, Mr. Arrington said that not holding a convention in 1979 was "a constitutional travesty" and that a convention should still be called today. At the hearing, David Walker, a former comptroller general of the United States, said that several states were planning to sue Congress for failing to call that convention.

The congressman, through a spokesman, declined to be interviewed, and Mr. Walker did not respond to a request for comment.

It is not clear how seriously Republicans would pursue a convention. Some Democrats have dismissed concerns as overblown, given the legal ambiguity around how to convene one and the fact that 38 states would have to approve any constitutional amendment — difficult to imagine in a polarized political era.

Still, Mr. Trump has said that he wants to change the 14th Amendment so that it would not automatically grant citizenship to anybody born in the United States. Rick Santorum, a former Republican senator, has pushed conservative statehouses to call for a convention, saying at a news conference on the matter last year that "Washington is never going to fix itself."

Erwin Chemerinsky, the dean of the University of California, Berkeley, School of Law and a constitutional law expert, called the concerns of Democrats "very legitimate."

"The fact that we haven't had one since 1787 leads me to believe it's unlikely to happen, but we're in an unprecedented time in American history, so it's hard to make predictions about anything," he said. "It's all uncharted territory."

In California, Mr. Wiener wants to do what he can to make sure that a convention will never take place.

California's oldest call for a constitutional convention stems from 1911, when the state supported one that would allow for a direct popular vote of senators instead of having legislatures elect them. That proposal became a reality through the other mechanism outlined in Article V: Two-thirds of both houses of Congress proposed the 17th Amendment, which was ratified by the states in 1913. That path has produced 27 amendments, the most recent of which came in 1992 to prevent members of Congress from giving themselves pay raises.

Many of California's seven calls for a constitutional convention relate to fairly mundane topics such as campaign finance reform and motor vehicle taxes. California is also among the six states that wanted to create a world federal government, a request that remains on the books.

If Mr. Wiener's legislation is enacted, California would follow the path of other Democratic-led states that have withdrawn their calls for conventions since 2016, including New Jersey, Oregon and Illinois. New York most recently did so by passing a law this spring that rescinded all of its previous applications, including one from 1789.

While most of California's proposed amendments are dated, state lawmakers did approve a

request last year by Gov. Gavin Newsom to pass a gun-control amendment. His idea would prohibit civilians from buying military-style firearms and install universal background checks on firearm purchases.

Mr. Wiener's bill would rescind Mr. Newsom's proposal, along with California's six other standing requests. Mr. Wiener said he had not yet had a discussion with the Democratic governor about the legislation, which would not require Mr. Newsom's signature.

A spokesman for the governor pointed out that his measure came with poison-pill language that would void his request if other states used it to convene a convention on another topic. None of the other 49 states have pursued an amendment similar to Mr. Newsom's, which some of the governor's critics considered politically impossible and an attempt to generate national attention.

Given the broad control that Republicans will have in Washington next year, other Democratic-led states may be motivated to rescind their constitutional convention requests. Lawmakers in Vermont, Massachusetts and Connecticut previously introduced resolutions to take back their applications, but those measures stalled.

By the count of David Super, a professor at the Georgetown University Law Center and an expert on constitutional conventions, the highest number of active requests for a convention on one specific topic is 28, for a balanced budget. But, he said, if Article V is interpreted as allowing any request to count toward convening a constitutional convention, the 34-state threshold has already been reached.

"If Congress declares under whatever crazy counting theory the convention advocates support that we've met the threshold, then we'll have a convention," Mr. Super said.

Jess Bravin, Panel Adopts Report on Supreme Court, Wall St. J., Dec. 8, 2021

WASHINGTON—A bipartisan commission appointed by President Biden unanimously adopted a report detailing controversies over the Supreme Court and assessing proposals to address them, but few expected the 294-page document to resolve political divisions concerning the judiciary that have intensified in recent years.

At Tuesday's meeting, members of the commission universally praised the report-writing process for its civil dialogue and regard for all views. However, the final report was neither designed to nor did it produce consensus or any recommendations.

Mr. Biden appointed the 36-member panel in April, after proposing it in October 2020 in response to Democratic fury over Republicans' success in entrenching a conservative majority on the Supreme Court. That process culminated in Amy Coney Barrett, a nominee of President Donald Trump, being confirmed along party lines days before the 2020 election. The commission's members included respected scholars, practitioners and former judges representing a broad ideological mix, although two conservative professors resigned without public explanation in October.

"The report is so measured in tone that it would make an excellent basis for classroom discussion, which is a mixed compliment," said University of Texas law professor Sanford Levinson. "Its obvious concern with being relatively impartial means that it is unlikely to generate any genuine political movement."

The Presidential Commission on the Supreme Court, under the leadership of former Obama White House counsel Robert Bauer and Yale law professor Cristina Rodríguez, was assigned to review the structure and practices of the Supreme Court, including proposals such as increasing the number of justices or limiting their terms, but not to make specific recommendations.

The report arrives amid a consequential Supreme Court term in which its conservative majority is weighing whether to expand access to concealed weapons, require public funding of religious schools in some circumstances and overrule Roe v. Wade, the 1973 decision recognizing women's constitutional right to end unwanted pregnancies.

The White House, having tamped down debate over the court during the commission's deliberations, now finds the issue back on its agenda. Officials declined to say when Mr. Biden would address the report or whether he will take any actions based on its assessments.

"There has never been so comprehensive and careful a study of ways to reform the Supreme Court; the history and legality of various reforms; and the pluses and minuses of each," said a liberal commissioner, Harvard law professor Laurence Tribe.

"But in voting to submit this report to the president, I am not casting a vote of confidence in the court's basic legitimacy. I no longer have that confidence," he said, citing "the dubious way some justices got there" and "the anti-democratic, anti-egalitarian direction of its decisions about matters like voting rights, gerrymandering, and the corrupting effects of dark money," all areas where conservative views prevailed. Mr. Tribe said the process had persuaded him to endorse expanding the court, a position he previously had viewed skeptically.

A conservative commissioner, Duke University law professor David Levi, offered a mirror-image position, saying he was voting to approve the report despite opposition to proposals to change the court, particularly "court-packing or expansion" and term limits.

"Each of these proposals, to some considerable degree, reduces judicial independence and therefore increases the likelihood that we will lose the freedom that judicial independence was and is designed to protect," said Mr. Levi,

a former federal judge. “All around the world aspiring democracies look to our judiciary as the model,” he said, while autocrats resort to “changing the size of their highest courts” and limiting the judicial tenure to undermine the rule of law.

Another commissioner, former acting Solicitor General Walter Dellinger, said in the current political climate, it remained unclear when “someone would have the power to invoke these reforms and what that would mean.” He took the long view, saying: “We hope that the report’s explications of the issues might be useful a century from now.”

Some experts, while praising the report’s academic quality, weren’t so sure.

“Seems to me, it misses the most important defect in our current system: the partisan process of confirmation of appointees to the Supreme Court,” said Newton Minow, a former Federal Communications Commission chairman who clerked for Chief Justice Fred Vinson in the 1951-52 term.

On the confirmation process, the commission’s report limited itself to laying out the state of affairs. “Political actors now perceive the stakes of each nomination to be exceedingly high,” it said, “Especially if confirmation is seen as likely to lead to an immediate shift in the balance of power between Court ‘liberals’ and ‘conservatives.’”

Presidential Commission on the Supreme Court of the United States, Final Report (December 2021), Chapter 4 (excerpts)

The Constitution undisputedly gives Congress power to grant and withhold the jurisdiction of the federal courts, though the precise scope of that power is much debated. Article III of the Constitution vests the Supreme Court with "original" jurisdiction in a small category of cases. Article III then specifies that "[i]n all the other Cases before mentioned, thesupreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make*." Although the scope of Congress's power under the Exceptions Clause has never been settled definitively, Congressalways has made some exceptions to the Court's appellate jurisdiction. The 1789 Judiciary Act, for example, made no provision for Supreme Court review of criminal cases tried in the lower federal courts.

The Constitution also contemplates broad congressional power to determine and adjust the jurisdiction of the lower federal courts. As the result of a deliberate compromise at the Constitutional Convention, Article III authorizes Congress to create lower federal courts but does not require it to do so. It provides instead that "[t]he judicial Power of the United States,shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This language has always been understood to authorize Congress to create or not create lower courts, and to vest the lower courts with less jurisdictionthan the maximum amount that Article III would permit.

In the 1789 Judiciary Act, Congress accepted the Constitution's invitation to create lower federal courts and gave them broad jurisdiction, but Congress also imposed significant limitations. …Following the Civil War, fearing that the Supreme Court might invalidate the Military Reconstruction Act, Congress enacted a statute depriving the Court of appellate jurisdiction over a pending habeas corpus case that presented important constitutional questions concerning Reconstruction. The Court upheld this deprivation of its appellate jurisdiction in *Ex parte McCardle*. … In another case from the Reconstruction Era, *United States v. Klein*, the Supreme Court invalidated a statute that made it harder for pardoned rebels to receive compensation from theUnited States. Formally, the statute directed both the Court of Claims and the Supreme Courtto dismiss "for want of jurisdiction" certain claims against the United States in which a partyrelied on a presidential pardon to establish proof of loyalty during the Civil War. The Court issued an opinion whose rationale, to this day, has inspired uncertainty and debate. . .

Congress enacted a small spate of legislation restricting the jurisdiction of the federal courts during the 1930s, primarily to limit the remedies lower federal courts could issue for violations of the law. The Norris-LaGuardia Act of 1932 sharply limited the capacity of "the courts of the United States" to issue injunctions "in a case involving or growing out of a labor dispute." The Supreme Court upheld that restriction. The Johnson Act of 1934 stripped the federal courts of jurisdiction to enjoin state orders fixing rates for public utilities whenever certain conditions were satisfied, including where "[a] plain, speedy and efficient remedy" for illegality was available in state court. The Tax Injunction Act of 1937 provided that "[t]he districtcourts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax underState law where a plain, speedy and efficient remedy may be had in the courts of such State."

Since at least the 1950s, members of Congress regularly have introduced legislation that would strip the Supreme Court, the lower federal courts, or both, of jurisdiction to resolve particular hotly contested and politically salient constitutional issues. Only one of these proposals, the

Military Commissions Act of 2006, has ever been enacted into law (and that statute was subsequently invalidated, as noted below). In the 1950s, Congress gave serious consideration to bills that would have restricted the Supreme Court's jurisdiction to review challenges to national-security legislation. In the 1970s, a number of proposals sought to limit federal jurisdiction to order busing as a remedy for school segregation. The 1980s witnessed repeated failed proposals to limit federal jurisdiction over challenges to abortion restrictions and school prayer. In 2004, the House of Representatives enacted bills that would have deprived both the lower federal courts and the Supreme Court of jurisdiction over suits challenging the Defense of Marriage Act, as well as over suits against laws requiring studentsto recite the Pledge of Allegiance in school. But those measures died in the Senate. In more recent years, members of Congress have introduced jurisdiction-stripping legislation involving abortion, religious liberty, and other matters.

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) withdrew the Supreme Court's certiorari jurisdiction to review decisions by the federal courts of appeals denying prisoners convicted by state courts the permission to file second or "successive" petitions for federal writs of habeas corpus. The Court upheld that limitation in *Felker v. Turpin*. In doing so, however, it emphasized that the AEDPA provision curbing the Court's certiorari jurisdiction did not deprive it of jurisdiction to consider original petitions for habeas.AEDPA would "inform" its consideration of such petitions, the Court said, but not exert a preclusive effect.

The Detainee Treatment Act of 2005, as amended by the Military Commissions Act of 2006, purported to strip all courts of the United States, including the Supreme Court, of habeas corpus jurisdiction in all cases brought by noncitizens being detained as enemy combatants. (Congress instead tried to provide a substitute for habeas corpus: providing the D.C. Circuit with limited review of detention decisions made by non-Article III military tribunals.) But theSupreme Court held in *Boumediene v. Bush* that the withdrawal of habeas jurisdiction violated the Suspension Clause of Article I, Section 9 of the Constitution, which provides that"[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases ofRebellion or Invasion the public Safety may require it." The Court did not opine on jurisdiction stripping outside of the habeas context. . .

2. Sources of Limitations on Congress's Jurisdiction-Stripping Power

For analytical purposes, it is helpful to distinguish two kinds of limitations on Congress's powers to restrict the jurisdiction of the Supreme Court, the lower federal courts, and state courts. One category includes limitations that are inherent in, or "internal" to, Article III's grant of jurisdiction-limiting powers to Congress. Another category of limitations arises fromconstitutional provisions that circumscribe congressional power by creating individual rights.In scholarly literature, such limits are often referred to as "external" limits on congressional power.

a. Limits from Within Article III

It is difficult to identify specific examples of clear and noncontroversial internal limits, because each possible limit is much debated among scholars. That said, it is easy to give general examples that illustrate the idea. In perhaps the best-known example, Professor Henry M. Hart, Jr., argued in a much-celebrated contribution to the federal courts literature that the Constitution's provision that "the judicial Power of the United States shall be vested in one supreme Court" establishes an implicit limit, internal to Article III, on Congress's power to make exceptions to the Court's appellate jurisdiction. Constitutionally authorizedrestrictions, Hart maintained, cannot go so far as to "destroy the essential role of the SupremeCourt in the constitutional plan." To offer an

illustration of this concern, a statute that limitedthe Court's appellate jurisdiction to cases presenting issues of statutory interpretation only— and thus excluded all constitutional issues—might be thought to destroy the Court's essentialrole and thus overreach Congress's power under the Exceptions Clause. We note, however, that some scholars and commentators appear unpersuaded by Hart's argument on this point.

In another controversial example, some have argued that a jurisdiction-limiting statute would exceed Congress's powers if it were enacted for constitutionally forbidden purposes, whatever those might be. Whether such an inquiry into purpose is appropriate is a subject ofdebate. *Ex parte McCardle* contains a dictum clearly precluding the inquiry. In response to theargument that Congress had withdrawn the Court's appellate jurisdiction for the forbidden purpose of preventing the enforcement of a constitutional right, the Court answered that "[w]eare not at liberty to inquire into the motives of the legislature." But there is arguably languagein *United States v. Klein* that supports the inquiry into forbidden purposes; there, the Court stated that jurisdiction-stripping legislation that is enacted "as a means to an end" that is not constitutionally valid "is not an exercise of the acknowledged power of Congress to make exceptions . . . to the appellate power." In addition, Supreme Court decisions in the twentiethand twenty-first centuries have made legislative motives relevant to the assessment of statutes'constitutional validity under a broad range of other constitutional provisions, such as the FirstAmendment. In light of those decisions, it is arguable that motive-based analysis could nowbe invoked.

b. Limits from Elsewhere in the Constitution

No one doubts that rights under some provisions of the Constitution define limits on Congress's power to restrict the jurisdiction of the Supreme Court and other courts. In *Boumediene v. Bush*, the Supreme Court affirmed that the Suspension Clause constitutes a rights-based limit on congressional power to curb jurisdiction over petitions for the writ of habeas corpus. Although *Boumediene* was decided by a narrowly divided Court, it should beuncontroversial to say that a statute stripping jurisdiction over suits brought by racial minorities or adherents of a particular religion or political party would violate constitutional guarantees against discrimination.

Henry Hart famously argued that jurisdiction-limiting legislation would violate the Due Process Clause if it removed all grants of jurisdiction and all judicial remedies through whichthose rights might be vindicated, because a law of that kind would effectively destroy constitutional rights. According to Hart, it would be "monstrous illogic" to construe Congress's power to limit jurisdiction and withhold judicial remedies as a de facto power to destroy constitutional rights. But there is little case law or other authority identifying whereexactly the lines between the permissible and the impermissible are drawn.

Hart did not believe—and the Supreme Court has denied—that the Constitution guarantees an effective remedy in court to every person whose constitutional rights have been violated. Hart's concern about the nullification of rights appears to have involved systemic effects, such as those of imagined legislation that would make it impossible for anyone ever to judicially vindicate a particular constitutional right at all. But Hart again did not attempt line drawing of his own and ultimately equivocated even with regard to the question of whetherand when a total deprivation of jurisdiction and remedies to enforce a right might violate the Constitution. "The multiplicity of remedies, and the fact that Congress has seldom if ever triedto take them all away, has prevented the issue from ever being squarely presented," he wrote.

The Advisory Opinion and the United States Supreme Court, 5 Fordham L. Rev. 94, 101-03 (1936)

The initial debate [on advisory opinions] ... occurred at the Constitutional Convention of 1787. On June 4, the delegates deleted from Edmund Randolph's resolution dealing with the power to negative acts of the legislature, a provision for joining the judiciary with the Executive in exercising this right of veto. The minority in favor of the plan displayed a certain tenacity of purpose and it was not until the proposal had been defeated on three subsequent occasions that it was ultimately abandoned. On July 21, Gorham of Massachusetts, exhibiting the influence of the constitution of his state, suggested the adoption of a provision allowing the Executive to obtain advisory opinions from the Supreme Court. There is no evidence of discussion upon this suggestion and the issue was suspended until August 20, when Charles Pinckney made a formal proposal to vest in "each branch of the legislature, as well as the Supreme Executive . . . authority to require the opinions of the Supreme Court upon important questions of law and upon solemn occasions." The proposal was referred to the Committee on Detail, but never reported on by it nor revived by Pinckney. History does not record the manoeuverings and compromises which must have attended this abrupt termination of the issue....

[The Justices'] refusal [of President Washington's request for an advisory opinion] was made in the face of an impression then prevalent in various quarters that the President had the right under the circumstances to require the advice of the Court. Professor Thayer has commented that had the questions been of a different character or been proposed at a less tense moment, the justices might well have ventured their opinion and thus erected a precedent which would materially have altered the subsequent history of the device.

An extraordinary incident occurred during the administration of Monroe. On May 4, 1822, the President had vetoed a bill which sought to extend the federal power over turnpikes within the boundaries of the states, and he had embodied his views as to the limitations of the power involved in a lengthy pamphlet, a copy of which was transmitted to each of the justices. Marshall replied, expressing his agreement in general terms with the Executive. Story answered but merely acknowledged receipt of Monroe's communication, without expressing any opinion on the question. Shortly thereafter, it appears that Justice Johnson obtained the views of his associates and with their consent actually forwarded their joint opinion to the President. Research does not disclose a single other instance in which the Court or the members thereof have acted in a similar informal capacity.

There is, however, one other occasion worthy of mention in which the justices of the Court did depart from their usual routine. The Hayes-Tilden election of 1876 had ended in such a way as to leave the result in doubt, and an Electoral Commission was created by act of Congress in 1877 with complete authority to decide the dispute which had arisen over the double returns involved. The roster of the Commission included five justices of the Supreme Court, four of whom were designated in the act, the choice of the fifth being left to the discretion of the four so specified. Curiously, no objection was ever made by the Court to the duties thus conferred. It is a matter of record that every member of the Commission favored by his vote that view which would result in adding to the electoral vote of his party. The reflection cast by such uncompromising loyalty upon the impartiality and integrity of the justices did not help the prestige of the Court.

What, if anything, does this history indicate about whether the ban on advisory opinions is necessarily a part of the Constitution?

[Parents of black children attending public schools in districts undergoing desegregation brought nationwide class action alleging that Internal Revenue Service had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. In Bob Jones University v. United States, 461 U.S. 574 (1983), the Court had held that the governing statute disqualified such schools from receiving tax-exempt status as "charities."

[According to the parents, the failure to carry out the statutory mandate (1) amounted to federal support for segregated schools and (2) fostered the organization and expansion of such schools, thus interfering with the efforts of federal agencies and courts to bring about desegregation in public school districts that had been segregated in the past. The parents did not allege that they had applied to the private schools in question but claimed instead the IRS's unlawful activities had harmed their children attending schools that were undergoing or might undergo desegregation. They claimed that by failing to deny the exemption, the IRS subsidized discriminatory private schools and thus decreased the likelihood that desegregation plans would be effective. Respondents sought declaratory and injunctive relief requiring the IRS to issue guidelines so as to deny tax exemptions to al private schools that discriminate on the basis of race. The court of appeals held in their favor.]

Justice O'CONNOR delivered the opinion of the Court.

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

Like the prudential component, the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, "distinct and palpable," and not "abstract" or "conjectural" or "hypothetical.". The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

More important, the law of Art. III standing is built on a single basic idea—the idea of separation of powers. It is this fact which makes possible the gradual clarification of the law through judicial application.

Determining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases. Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

Respondents allege two injuries in their complaint to support their standing to bring this lawsuit. First, they say that they are harmed directly by the mere fact of Government financial aid to discriminatory private schools. Second, they say that the federal tax exemptions to racially discriminatory private schools in their communities impair their ability to have their public schools desegregated.

Respondents' first claim of injury can be interpreted in two ways. It might be a claim simply to have the Government avoid the violation of law alleged in respondents' complaint. Alternatively, it might be a claim of stigmatic injury, or denigration, suffered by all members of a racial group when the Government discriminates on the basis of race.[20] Under neither interpretation is this claim of injury judicially cognizable.

This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. In Valley Forge Christian College v. Americans United for Separation of Church and State, Inc. 454 U.S. 464 (1982), we rejected a claim of standing to challenge a Government conveyance of property to a religious institution. Insofar as the plaintiffs relied simply on " 'their shared individuated right' " to a Government that made no law respecting an establishment of religion, we held that plaintiffs had not alleged a judicially cognizable injury.

Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct, ibid.

If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school. All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."

It is in their complaint's second claim of injury that respondents allege harm to a concrete, personal interest that can support standing in some circumstances. The injury they identify—their children's diminished ability to receive an education in a racially integrated school—is, beyond any doubt, not only judicially cognizable but, as shown by cases from Brown v. Board of Education, 347 U.S. 483 (1954), to Bob Jones University v. United States, 461 U.S. 574 (1983), one of the most serious injuries recognized in our legal system. Despite the constitutional importance of curing the injury alleged by respondents, however, the federal judiciary may not redress it unless standing requirements are met. In this case, respondents' second claim of injury cannot support standing because the injury alleged is not fairly traceable to the Government conduct respondents challenge as unlawful.

The illegal conduct challenged by respondents is the IRS's grant of tax exemptions to some racially discriminatory schools. The line of causation between that conduct and desegregation of respondents' schools is attenuated at best. From the perspective of the IRS, the injury to respondents is highly indirect and "results from the independent action of some third party not before the court," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S., at 42.

The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful IRS grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration. Respondents have made no such allegation. It is,

first, uncertain how many racially discriminatory private schools are in fact receiving tax exemptions. Moreover, it is entirely speculative whether withdrawal of a tax exemption from any particular school would lead the school to change its policies. It is just as speculative whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status. It is also pure speculation whether, in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools.

The links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing. In Simon v. Eastern Kentucky Welfare Rights Org., the Court held that standing to challenge a Government grant of a tax exemption to hospitals could not be founded on the asserted connection between the grant of tax-exempt status and the hospitals' policy concerning the provision of medical services to indigents. The causal connection depended on the decisions hospitals would make in response to withdrawal of tax-exempt status, and those decisions were sufficiently uncertain to break the chain of causation between the plaintiffs' injury and the challenged Government action. The chain of causation is even weaker in this case. It involves numerous third parties (officials of racially discriminatory schools receiving tax exemptions and the parents of children attending such schools) who may not even exist in respondents' communities and whose independent decisions may not collectively have a significant effect on the ability of public school students to receive a desegregated education.

The idea of separation of powers that underlies standing doctrine explains why our cases preclude the conclusion that respondents' alleged injury "fairly can be traced to the challenged action" of the IRS. That conclusion would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations. Such suits, even when premised on allegations of several instances of violations of law, are rarely if ever appropriate for federal-court adjudication.

Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."

The same concern for the proper role of the federal courts is reflected in cases like Rizzo v. Goode, 423 U.S. 362 (1976): "When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with 'the well-established rule that the Government has traditionally been granted the widest latitude in the * "dispatch of its own internal affairs."

When transported into the Art. III context, that principle, grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. We could not recognize respondents' standing in this case without running afoul of that structural principle.

The judgment of the Court of Appeals is accordingly reversed, and the injunction issued by that

court is vacated.

It is so ordered.

Justice MARSHALL took no part in the decision of these cases.

Justice BRENNAN, dissenting.

Viewed in light of the injuries they claim, the respondents have alleged a direct causal relationship between the Government action they challenge and the injury they suffer: their inability to receive an education in a racially integrated school is directly and adversely affected by the tax-exempt status granted by the IRS to racially discriminatory schools in their respective school districts. Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools.

More than one commentator has noted that the causation component of the Court's standing inquiry is no more than a poor disguise for the Court's view of the merits of the underlying claims. The Court today does nothing to avoid that criticism.

What is most disturbing about today's decision, therefore, is not the standing analysis applied, but the indifference evidenced by the Court to the detrimental effects that racially segregated schools, supported by tax-exempt status from the Federal Government, have on the respondents' attempt to obtain an education in a racially integrated school system. I cannot join such indifference, and would give the respondents a chance to prove their case on the merits.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

In final analysis, the wrong respondents allege that the Government has committed is to subsidize the exodus of white children from schools that would otherwise be racially integrated. The critical question in these cases, therefore, is whether respondents * have alleged that the Government has created that kind of subsidy.

If the granting of preferential tax treatment would "encourage" private segregated schools to conduct their "charitable" activities, it must follow that the withdrawal of the treatment would "discourage" them, and hence promote the process of desegregation.[2]

We have held that when a subsidy makes a given activity more or less expensive, injury can be fairly traced to the subsidy for purposes of standing analysis because of the resulting increase or decrease in the ability to engage in the activity.

This causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased.

Considerations of tax policy, economics, and pure logic all confirm the conclusion that respondents' injury in fact is fairly traceable to the Government's allegedly wrongful conduct. The Court therefore is forced to introduce the concept of "separation of powers" into its analysis. The Court writes that the separation of powers "explains why our cases preclude the conclusion" that respondents' injury is fairly traceable to the conduct they challenge.

The Court could mean one of three things by its invocation of the separation of powers. First, it could simply be expressing the idea that if the plaintiff lacks Art. III standing to bring a lawsuit, then there is no "case or controversy" within the meaning of Art. III and hence the matter is not within the area of responsibility assigned to the Judiciary by the Constitution. While there can be no quarrel with this proposition, in itself it provides no guidance for determining if the injury respondents have alleged is fairly traceable to the conduct they have challenged.

Second, the Court could be saying that it will require a more direct causal connection when it is troubled by the separation of powers implications of the case before it. That approach confuses the

standing doctrine with the justiciability of the issues that respondents seek to raise. The purpose of the standing inquiry is to measure the plaintiff's stake in the outcome, not whether a court has the authority to provide it with the outcome it seeks. The strength of the plaintiff's interest in the outcome has nothing to do with whether the relief it seeks would intrude upon the prerogatives of other branches of government; the possibility that the relief might be inappropriate does not lessen the plaintiff's stake in obtaining that relief. If a plaintiff presents a nonjusticiable issue, or seeks relief that a court may not award, then its complaint should be dismissed for those reasons, and not because the plaintiff lacks a stake in obtaining that relief and hence has no standing.[9] Imposing an undefined * but clearly more rigorous standard for redressability for reasons unrelated to the causal nexus between the injury and the challenged conduct can only encourage undisciplined, ad hoc litigation, a result that would be avoided if the Court straight-forwardly considered the justiciability of the issues respondents seek to raise, rather than using those issues to obfuscate standing analysis.[10]

Third, the Court could be saying that it will not treat as legally cognizable injuries that stem from an administrative decision concerning how enforcement resources will be allocated. This surely is an important point. Respondents do seek to restructure the IRS's mechanisms for enforcing the legal requirement that discriminatory institutions not receive tax-exempt status. Such restructuring would dramatically affect the way in which the IRS exercises its prosecutorial discretion. The Executive requires latitude to decide how best to enforce the law, and in general the Court may well be correct that the exercise of that discretion, especially in the tax context, is unchallengeable.

However, as the Court also recognizes, this principle does not apply when suit is brought "to enforce specific legal obligations whose violation works a direct harm," ante, at 3330. For example, despite the fact that they were challenging the methods used by the Executive to enforce the law, citizens were accorded standing to challenge a pattern of police misconduct that violated the constitutional constraints on law enforcement activities in Allee v. Medrano, 416 U.S. 802 (1974). Here, respondents contend that the IRS is violating a specific constitutional limitation on its enforcement discretion. There is a solid basis for that contention. In Norwood, we wrote: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."

Deciding whether the Treasury has violated a specific legal limitation on its enforcement discretion does not intrude upon the prerogatives of the Executive, for in so deciding we are merely saying "what the law is." Surely the question whether the Constitution or the Code limits enforcement discretion is one within the Judiciary's competence, and I do not believe that the question whether the law, as enunciated in Gilmore, Norwood, and Bob Jones, imposes such an obligation upon the IRS is so insubstantial that respondents' attempt to raise it should be defeated for lack of subject-matter jurisdiction on the ground that it infringes the Executive's prerogatives.

n short, I would deal with the question of the legal limitations on the IRS's enforcement discretion on its merits, rather than by making the untenable assumption * that the granting of preferential tax treatment to segregated schools does not make those schools more attractive to white students and hence does not inhibit the process of desegregation. I respectfully dissent.

In 2000, the Food and Drug Administration approved a new drug application for mifepristone tablets marketed under the brand name Mifeprex for use in terminating pregnancies up to seven weeks. At that time, the FDA imposed a requirement that a doctor prescribe the drug and have three in-patient visits. In 2016, the FDA deemed Mifeprex safe to terminate pregnancies up to 10 weeks, allowed nurse practitioners to prescribe Mifeprex, and approved a dosing regimen that required just one in-person visit to receive the drug. In 2019, the FDA approved a generic version of Mifeprex [mifepristone]. In 2021, the FDA announced that it would no longer enforce the initial in-person visit requirement.

Four pro-life medical associations and several individual doctors moved for a preliminary injunction that would require the FDA to rescind approval of mifepristone or rescind FDA's 2016 and 2021 regulatory actions.

The District Court enjoined the FDA's approval of mifepristone, thereby ordering mifepristone off the market. This Court ultimately stayed the District Court's order pending the disposition of proceedings in the Fifth Circuit and this Court. On the merits, the Fifth Circuit held that plaintiffs had standing. It concluded that plaintiffs were unlikely to succeed on their challenge to the FDA's 2000 and 2019 drug approvals, but were likely to succeed in showing that the FDA's 2016 and 2021 actions were unlawful. This Court granted certiorari with respect to the 2016 and 2021 FDA actions.

Justice KAVANAUGH delivered the opinion of the Court.

… The threshold question is whether the plaintiffs have standing to sue under Article III of the Constitution. … To establish standing, a plaintiff must demonstrate (i) that she has suffered or likely will suffer an injury in fact, (ii) that the injury likely was caused or will be caused by the defendant, and (iii) that the injury likely would be redressed by the requested judicial relief. *Lujan*. The second and third standing requirements—causation and redressability—are often "flip sides of the same coin." If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury. So the two key questions in most standing disputes are injury in fact and causation.[13]

First is injury in fact. An injury in fact must be "concrete," meaning that it must be real and not abstract. The injury also must be particularized. An injury in fact can be a physical injury, a monetary injury, an injury to one's property, or an injury to one's constitutional rights, to take just a few common examples. Moreover, the injury must be actual or imminent, not speculative—meaning that the injury must have already occurred or be likely to occur soon. *Clapper.* The injury in fact requirement prevents the federal courts from becoming a "vehicle for the vindication of the value interests of concerned bystanders." *Allen*. …

Second is causation. The plaintiff must also establish that the plaintiff's injury likely was caused or likely will be caused by the defendant's conduct. Government regulations that require or forbid some action by the plaintiff almost invariably satisfy both the injury in fact and causation requirements. So in those cases, standing is usually easy to establish. By contrast, when (as here) a plaintiff challenges the government's "unlawful regulation (or lack of regulation) of *someone else*," "standing is not precluded, but it is ordinarily substantially more difficult to establish." *Lujan*.

[13] Redressability can still pose an independent bar in some cases. For example, a plaintiff who suffers injuries caused by the government still may not be able to sue because the case may not be of the kind "traditionally redressable in federal court."

When the plaintiff is an unregulated party, causation "ordinarily hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan*. Yet the Court has said that plaintiffs attempting to show causation generally cannot "rely on speculation about the unfettered choices made by independent actors not before the courts." *Clapper*. Therefore, to thread the causation needle in those circumstances, the plaintiff must show that the "'third parties will likely react in predictable ways'" that in turn will likely injure the plaintiffs.

Causation inquiry can be heavily fact-dependent and a "question of degree." Unfortunately, applying the law of standing cannot be made easy, and that is particularly true for causation. That said, standing concepts have gained considerable definition from developing case law." For example, … [w]hen the government regulates parks, national forests, or bodies of water, for example, the regulation may cause harm to individual users. When the government regulates one property, it may reduce the value of adjacent property. The list goes on.

Here, [b]ecause the plaintiffs do not prescribe, manufacture, sell, or advertise mifepristone or sponsor a competing drug, the plaintiffs suffer no direct monetary injuries from FDA's actions relaxing regulation of mifepristone. Nor do they suffer injuries to their property, or to the value of their property, from FDA's actions. Because the plaintiffs do not use mifepristone, they obviously can suffer no physical injuries from FDA's actions relaxing regulation of mifepristone.

Rather, the plaintiffs say that they are pro-life, oppose elective abortion, and have sincere legal, moral, ideological, and policy objections to mifepristone being prescribed and used *by others*. The plaintiffs appear to recognize that those general legal, moral, ideological, and policy concerns do not suffice on their own to confer Article III standing to sue in federal court, [and so] advance several complicated causation theories.

The doctors contend that FDA's 2016 and 2021 actions will cause more pregnant women to suffer complications from mifepristone, and those women in turn will need more emergency abortions by doctors. The plaintiff doctors say that they therefore may be required—against their consciences—to render emergency treatment completing the abortions or providing other abortion-related treatment.

The Government correctly acknowledges that a conscience injury of that kind constitutes a concrete injury in fact for purposes of Article III. But the plaintiff doctors have not shown that they could be forced to participate in an abortion or provide abortion-related medical treatment over their conscience objections. That is because, as the Government explains, federal conscience laws definitively protect doctors from being required to perform abortions or to provide other treatment that violates their consciences. The plaintiffs have not identified any instances where a doctor was required, notwithstanding conscience objections, to perform an abortion or to provide other abortion-related treatment that violated the doctor's conscience. Nor is there any evidence in the record here of hospitals overriding or failing to accommodate doctors' conscience objections.

In addition to alleging conscience injuries, the doctors cite various monetary and related injuries that they allegedly will suffer as a result of FDA's actions—in particular, diverting resources and time from other patients to treat patients with mifepristone complications; increasing risk of liability suits from treating those patients; and potentially increasing insurance costs.

Those standing allegations suffer from the same problem—a lack of causation. To begin with, the claim that the doctors will incur those injuries as a result of FDA's 2016 and 2021 relaxed regulations lacks record support and is highly speculative. In any event, and perhaps

more to the point, the law has never permitted doctors to challenge the government's loosening of general public safety requirements simply because more individuals might then show up at emergency rooms or in doctors' offices with follow-on injuries. Stated otherwise, there is no Article III doctrine of "doctor standing" that allows doctors to challenge general government safety regulations. Nor will this Court now create such a novel standing doctrine out of whole cloth.

Consider some examples. EPA rolls back emissions standards for power plants—does a doctor have standing to sue because she may need to spend more time treating asthma patients? A local school district starts a middle school football league—does a pediatrician have standing to challenge its constitutionality because she might need to spend more time treating concussions? The answer is no: The chain of causation is simply too attenuated. And in the FDA drug-approval context, virtually all drugs come with complications, risks, and side effects.

And if we were now to invent a new doctrine of doctor standing, there would be no principled way to cabin such a sweeping doctrinal change to doctors or other healthcare providers. Firefighters could sue to object to relaxed building codes that increase fire risks. Police officers could sue to challenge a government decision to legalize certain activities that are associated with increased crime. Teachers in border states could sue to challenge allegedly lax immigration policies that lead to overcrowded classrooms.

That leaves the medical associations' argument that the associations themselves have organizational standing. Under this Court's precedents, organizations may have standing "to sue on their own behalf for injuries they have sustained." [But] … associations … cannot assert standing simply because they object to FDA's actions.

The medical associations say that FDA has "forced" the associations to "expend considerable time, energy, and resources" drafting citizen petitions to FDA, as well as engaging in public advocacy and public education. And all of that has caused the associations to spend "considerable resources" to the detriment of other spending priorities.

But an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way.

The medical associations respond that standing exists when an organization diverts its resources in response to a defendant's actions. That is incorrect. Indeed, that theory would mean that all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies.

Finally, it has been suggested that the plaintiffs here must have standing because if these plaintiffs do not have standing, then it may be that no one would have standing to challenge FDA's 2016 and 2021 actions. The "assumption" that if these plaintiffs lack "standing to sue, no one would have standing, is not a reason to find standing." Rather, some issues may be left to the political and democratic processes: The Framers of the Constitution did not "set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *Richardson.*

* * *

We reverse the judgment of the U. S. Court of Appeals for the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

The plaintiff, Newdow, was the father of a girl who attended elementary school in the Elk Grove Unified School District. Pursuant to state law, every day her teacher led the children in a group recitation of the Pledge of Allegiance. The plaintiff argued that because the pledge contains the words "under God," it constituted religious indoctrination in violation of the first amendment. The court of appeals agreed. The Supreme Court, however, reversed the court of appeals, holding that Newdow lacked standing. Justice Stevens delivered the opinion of the Court:

> "Our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement; and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.' Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses 'the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'"

He concluded that as a matter of prudence, the Court should decline to adjudicate Newdow's claim:

> "[One] of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' In re Burrus, 136 U.S. 586 (1890). [So] strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.' Ankenbrandt v. Richards, 504 U.S. 6 (1992). We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving 'elements of the domestic relationship.' [Thus,] while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." In this case, it turned out that although Newdow and Banning (the child's mother) shared legal custody of their daughter, a state-court custody order provided that Banning "makes the final decisions if the two…disagree.…Newdow's rights, as in many cases touching upon family relations, cannot be viewed in isolation. This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.
>
> "The interests of the affected persons in this case are in many respects antagonistic. Of course, legal disharmony in family relations is not uncommon, and in many instances that disharmony poses no bar to federal-court adjudication of proper federal questions. What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. [The] interests of this parent and this child are not parallel and, indeed, are potentially in conflict." The Court concluded that although, as a matter of state law, Newdow had a "cognizable right to influence his daughter's religious upbringing," that right had not been impaired by the school board's actions, since "[the] California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion.…The cases speak not at all to the problem of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party. A next friend

surely could exercise such a right, but the Superior Court's order has deprived Newdow of that status.…In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when p. 134prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court." In a footnote, the Court rejected Newdow's other asserted bases for standing: that he "at times has himself attended—and will in the future attend—class with his daughter"; that he "has considered teaching elementary school students in [the School District]"; that he "has attended and will continue to attend" school board meetings at which the Pledge is "routinely recited"; and that the school district used tax dollars to implement its pledge policy: "Even if these arguments suffice to establish Article III standing, they do not respond to our prudential concerns. As for taxpayer standing, Newdow does not reside in or pay taxes to the School District; he alleges that he pays taxes to the District only 'indirectly' through his child support payments to Banning. That allegation does not amount to the 'direct dollars-and-cents injury' that our strict taxpayer-standing doctrine requires. Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429 (1952)."

Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, argued that Newdow did have standing:

"[Here] is the Court's new prudential standing principle: 'It is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing.'…

"The Court does not take issue with the fact that, under California law, respondent retains a right to influence his daughter's religious upbringing and to expose her to his views. But it relies on Banning's view of the merits of this case to diminish respondent's interest, stating that the respondent 'wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree.' As alleged by respondent and as recognized by the Court of Appeals, respondent wishes to enjoin the School District from endorsing a form of religion inconsistent with his own views because he has a right to expose his daughter to those views without the State's placing its imprimatur on a particular religion. Under the Court of Appeals' construction of California law, Banning's 'veto power' does not override respondent's right to challenge the pledge ceremony.…

"Respondent asserts that the School District's pledge ceremony infringes his right under California law to expose his daughter to his religious views. While she is intimately associated with the source of respondent's standing (the father-daughter relationship and respondent's rights thereunder), the daughter is not the source of respondent's standing; instead it is their relationship that provides respondent his standing, which is clear once respondent's interest is properly described.…

"Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this p. 135day only—our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations."

[W]ith "notable frequency" in recent years, the Supreme Court has issued consequential decisions of a different kind: emergency relief staying the effect of a lower court ruling. Stays are part of the Court's so-called "shadow docket," the important but understudied orders and decisions issued without oral argument and with little briefing.

How should lower courts treat these stay decisions? This question is now particularly pressing. By all appearances, we are in a new era of litigation, in which securing emergency interim relief can sometimes be as important as, if not more important than, an eventual victory on the merits.

I. Stay Process and Rules

A. The Basics

The Supreme Court's power to stay the enforcement of a judgment by a lower court stems from the All Writs Act, 28 U.S.C. § 1651, and from 28 U.S.C. § 2101(f), which allow for stays of lower court judgments subject to review by the Court on a writ of certiorari.

Though it was once common for a single Justice to grant or deny a stay, the practice in recent years appears to be that non-trivial stay applications received by a Circuit Justice are referred to the full Court for consideration as a matter of course. In fact, no in-chambers opinion has been published since 2014. This trend is itself noteworthy. No formal change in Court rules seems to have caused the change. Perhaps it reflects a preference of Chief Justice Roberts or a consensus amongst the current Justices that, with the lower active caseload the Court now carries, it is no longer necessary or appropriate for individual Justices to act unilaterally on behalf of the full Court. Or it might reflect the growing public awareness of the shadow docket and the importance of the Court's emergency decisions.

B. The Standard of Review

The Supreme Court has described the standard of review for evaluating stay applications in a number of different and sometimes conflicting ways. It is therefore unclear whether the Court employs a uniform standard, complicating the question of the precedential weight of stay rulings.

In *Nken v. Holder*, the Court described the "traditional" standard that federal courts use to determine whether to grant a stay. This standard has four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." The Court noted that the "first two factors of the traditional standard are the most critical." Thus, under the traditional test for stays, the movant must make a "strong" showing that he will succeed on the merits and that he will suffer irreparable harm without a stay.

But while the *Nken* factors are regularly applied by lower courts considering stay applications, the Supreme Court has never explicitly used the *Nken* formulation in granting or denying the emergency applications it has received. Norhas the Court said that the "traditional" stay analysis does not apply.

In the stay opinions the Supreme Court has issued, the most common formulation of the standard of review is that the stay applicant must show "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay."

But there have also been other formulations. For example, some Justices have required there be a "significant possibility" that the judgment below will be reversed. When the stay request arrives at the Court following a denial by a

lower court, as is almost always the case, some Justices have said that the movant faces an "especially heavy" burden.

There are good reasons to think the Supreme Court's own stay criteria are at least as demanding as *Nken*. The Supreme Court is the final arbiter on questions of federal law and the Constitution, the ultimate court of last resort. It would be perverse and illogical for its stay decisions to be triggered by a lower standard than stays issued by the intermediate federal courts.

Regardless of the specific formulations, several themes emerge. Applicants must show that they will suffer irreparable harm absent a stay. They must also show that the Court will likely consider the merits question important enough to grant certiorari. It is unclear whether they need to demonstrate that the balance of the equities tips in their favor, but given that this factor appears in the *Nken* formulation and in several in-chambers opinions, it is likely that some showing is advisable.

The application for stay presented to Justice JACKSON and by her referred to the Court is granted in part and denied in part.

The application is granted as to the District Court's judgments vacating the Government's termination of various research-related grants. The Administrative Procedure Act's "limited waiver of [sovereign] immunity" does not provide the District Court with jurisdiction to adjudicate claims "based on" the research-related grants or to order relief designed to enforce any " 'obligation to pay money' " pursuant to those grants. And while the loss of money is not typically considered irreparable harm, that changes if the funds "cannot be recouped" and are thus "irrevocably expended." The Government faces such harm here. The plaintiffs do not state that they will repay grant money if the Government ultimately prevails. Moreover, the plaintiffs' contention that they lack the resources to continue their research projects without federal funding is inconsistent with the proposition that they have the resources to make the Government whole for money already spent.

The application is otherwise denied.

In the event certiorari is granted, the stay shall terminate upon the issuance of the judgment of the Court. The Government may raise its arguments as to the remainder of the District Court's judgments in the ordinary course.

The Chief Justice, Justice Sotomayor, Justice Kagan, and Justice Jackson would deny the application in full.

Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Kavanaugh would grant the application in full.

Justice BARRETT, concurring in the partial grant of the application for stay.

In recent months, the National Institutes of Health has worked to align its funding with changed policy priorities mandated by a series of executive orders. NIH issued internal guidance documents describing those priorities: Going forward, the agency will not fund research related to DEI objectives, gender identity, or COVID–19. Nor will it continue the practice of awarding grants to researchers based on race. After review, NIH issued numerous decisions terminating existing grants, and various plaintiffs sued, challenging the guidance documents and their individual grant terminations under the Administrative Procedure Act. The District Court declared unlawful and vacated both the guidance and the individual terminations, and the First Circuit denied the Government's request for a stay. Both courts treated NIH's termination of grants and its issuance of guidance as distinct agency actions. The Government sought a stay from this Court.

As today's order states, the District Court likely lacked jurisdiction to hear challenges to the grant terminations, which belong in the Court of Federal Claims (CFC). In my view, however, the Government is not entitled to a stay of the judgments insofar as they vacate the guidance documents.

THE CHIEF JUSTICE and Justice JACKSON maintain that because the District Court is the right forum for the challenge to the guidance, it is necessarily also the right forum for the challenge to the grant terminations. Both logic and law, however, support channeling challenges to the grant terminations and guidance to different forums. First, logic: Vacating the guidance does not reinstate terminated grants. If one simply flowed from the other, the District Court would have needed only to vacate the guidance itself. Second, law: Even if the guidance and grant terminations are linked, vacating the guidance does not necessarily void decisions made under it. The claims are legally distinct.

Of course, whether claims about the guidance in this case will succeed is another question. It

is not obvious, for instance, that NIH's guidance is final agency action. Yet the Government did not press this argument—or any other—in its stay application. Instead, its application largely ignores the guidance, which suggests that this aspect of the judgments causes it no irreparable harm. The Government has therefore failed to show that it is entitled to a stay of the judgments insofar as they vacate the guidance. Of course, it remains free to challenge the District Court's vacatur of the guidance before the First Circuit.

Chief Justice ROBERTS, with whom Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON join, concurring in part and dissenting in part.

In my view, the District Court's vacatur of the challenged directives distinguishes this case from *Department of Ed.* v. *California*, 604 U. S. 650 (2025) (*per curiam*). This relief—which has prospective and generally applicable implications beyond the reinstatement of specific grants—falls well within the scope of the District Court's jurisdiction under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* And if the District Court had jurisdiction to vacate the directives, it also had jurisdiction to vacate the "Resulting Grant Terminations." The Government has neither contended that the terminations did not result from the directives, nor contested the District Court's conclusion that the directives constituted final agency action. To the contrary, it has taken the position that the District Court's two remedies are "inseparable," Reply 5, and that the directives set forth "a uniform policy" that was "implement[ed] ... globally," Application 33. In such circumstances, the District Court was not "required ... to split [the case] into two parts."

Justice GORSUCH, with whom Justice KAVANAUGH joins, concurring in part and dissenting in part.

Lower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them. In *California*, this Court granted a stay because it found the government likely to prevail in showing that the district court lacked jurisdiction to order the government to pay grant obligations. *California* explained that "suits based on 'any express or implied contract with the United States' " do not belong in district court under the Administrative Procedure Act (APA), but in the Court of Federal Claims under the Tucker Act. Rather than follow that direction, the district court in this case permitted a suit involving materially identical grants to proceed to final judgment under the APA. As support for its course, the district court invoked the "persuasive authority" of "the dissent[s] in *California*" and an earlier court of appeals decision *California* repudiated. That was error. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."

In casting *California* aside, the district court stressed that the Court there granted only interim relief pending appeal and a writ of certiorari and did not issue a final judgment on the merits. True enough. But this Court often addresses requests for interim relief—sometimes pending a writ of certiorari, as in *California*, and sometimes after a writ of certiorari is granted. And either way, when this Court issues a decision, it constitutes a precedent that commands respect in lower courts.

Of course, decisions regarding interim relief are not necessarily "conclusive as to the merits" because further litigation may follow. But regardless of a decision's procedural posture, its "reasoning—its *ratio decidendi*"—carries precedential weight in "future cases." *California*'s reasoning was clear. There, the Court explained that "the APA's limited waiver of immunity does not extend to orders to enforce a contractual obligation to pay money .... Instead, the Tucker Act grants the Court of Federal Claims jurisdiction over suits based on any express or implied contract with the United

States." That reasoning binds lower courts as a matter of vertical *stare decisis*.

Moreover, even probabilistic holdings—such as *California*'s top-line conclusion that "the Government is likely to succeed in showing the District Court lacked jurisdiction to order the payment of money under the APA," must "inform how a [lower] court" proceeds "in like cases." If nothing else, the promise of our legal system that like cases are treated alike means that a lower court ought not invoke the "persuasive authority" of a dissent or a repudiated court of appeals decision to reach a different conclusion on an equivalent record.

For these reasons, I concur in the Court's decision to stay the district court's judgments vacating the grant terminations. If the district court's failure to abide by *California* were a one-off, perhaps it would not be worth writing to address it. But two months ago another district court tried to "compel compliance" with a different "order that this Court ha[d] stayed." Still another district court recently diverged from one of this Court's decisions even though the case at hand did not differ "in any pertinent respect" from the one this Court had decided. So this is now the third time in a matter of weeks this Court has had to intercede in a case "squarely controlled" by one of its precedents. All these interventions should have been unnecessary, but together they underscore a basic tenet of our judicial system: Whatever their own views, judges are duty-bound to respect "the hierarchy of the federal court system created by the Constitution and Congress."[14]

Justice KAVANAUGH, concurring in part and dissenting in part.

Like Justices THOMAS, ALITO, and GORSUCH, I would grant the Government's application for an interim stay in full.

First, I agree with the Government (and the Court) that plaintiffs' claims challenging NIH's grant terminations likely belong in the Court of Federal Claims, not in federal district court.

Second, I also agree with the Government that plaintiffs' challenge to NIH's guidance on grant terminations is likely unavailing. [P]laintiffs are unlikely to succeed on the merits of their arbitrary and capricious challenge to the guidance, for reasons that the Government persuasively explained in its application to this Court. See Application 29–34; *id*., at 31 ("The district court's principal objection was that the NIH never defined the term 'DEI.' ... But there is no APA rule that agencies define every term in every internal guidance document, particularly when that guidance steers highly discretionary decisions over how to allocate limited agency resources").

Finally, the harms and equities are weighty on both sides. But in my view, they tilt toward the Government because plaintiffs have not represented that they would return the grant money if the Government were to ultimately prevail in the merits litigation.

Justice JACKSON seems to suggest that we can avoid this significant (albeit interim) forum-channeling decision by simply denying the application. That is wrong. We have to decide the application. Denying the application in whole (as Justice JACKSON and three others

[14] I would also have stayed the remainder of the district court's judgments, which vacated internal agency guidance. The only injury that gave respondents standing to obtain that relief was the termination of pre-existing grants. True, respondents in this case also asserted injuries from the guidance based on the government's alleged failure to process *new* grant applications. But the district court declined to pass on those allegations, and they therefore cannot provide a basis for the judgments. So all claims on which the district court rendered judgment were "based on" respondents' contracts with the government, and those judgments were thus entered without jurisdiction.

would do) would mean that the suit belongs for now in the Federal District Court or the First Circuit. Granting the application in whole (as I and three others would do) would mean that the suit belongs for now in the Court of Federal Claims. Granting in part and denying in part (as the Court's order does) means that the challenge to the grant terminations belongs for now in the Court of Federal Claims and the arbitrary and capricious claim belongs for now in the Federal District Court or the First Circuit. For this Court, there is no way to avoid deciding the application and thereby making that interim forum-channeling decision.

Justice JACKSON, concurring in part and dissenting in part.

This past spring, as March turned to April, the Court took a mere nine days to address a difficult and nuanced legal issue: whether a federal district court or the Court of Federal Claims has statutory jurisdiction over a claim that the Government violated the Administrative Procedure Act (APA), 5 U.S.C. § 706, by arbitrarily and capriciously terminating federal grants en masse. See *California*. It chose the Court of Federal Claims. I viewed the Court's intervention then—in an emergency stay posture, while racing against a fast-expiring temporary restraining order—as "equal parts unprincipled and unfortunate."

As it turns out, the Court's decision was an even bigger mistake than I realized. The Court's reasoning in *California* was not only "at the least under-developed, and very possibly wrong," but also evidently resolved more than the jurisdictional dispute over the particular education-related grants at issue in that case. Today's decision reveals *California*'s considerable wingspan: That case's *ipse dixit* now apparently governs all APA challenges to grant-funding determinations that the Government asks us to address in the context of an emergency stay application. A half paragraph of reasoning (issued without full briefing or any oral argument) thus suffices here to partially sustain the Government's abrupt cancellation of hundreds of millions of dollars allocated to support life-saving biomedical research.

For a cautionary tale about lawmaking on the emergency docket, look no further than this newest iteration. By today's order, an evenly divided Court neuters judicial review of grant terminations by sending plaintiffs on a likely futile, multivenue quest for complete relief. Neither party to the case suggested this convoluted procedural outcome, and no prior court has held that the law requires it. But, in the view of the deciding vote, *California* compels this conclusion.

The Court also lobs this grenade without evaluating Congress's intent or the profound legal and practical consequences of this ruling. Stated simply: With potentially life-saving scientific advancements on the line, the Court turns a nearly century-old statute aimed at remedying unreasoned agency decisionmaking into a gauntlet rather than a refuge. But we have no business erecting a novel jurisdictional barrier to judicial review—especially when it appears nowhere in the relevant statutes and makes little sense. Because the Government's application should have been denied in full, I respectfully dissent in part.

I

Some background helps to clarify the character of the governmental action the Court now bends over backward to accommodate.

A

The National Institutes of Health (NIH) is the largest public funder of medical research in the world. Congress's express instructions have enabled that status: By statute, the NIH must "make grants-in-aid to universities, hospitals, laboratories, and other public or private institutions, and to individuals" to contribute to the effort to diagnose, treat, and prevent "physical and mental diseases and impairments of man."

Various statutory provisions shape the NIH's

discretion in allocating these funds, including in ways that recognize the importance of science for the study, healing, and service of a diverse Nation. For instance, Congress requires the National Cancer Institute, an institute within the NIH, to fund "community-based programs designed to assist women who are members of medically underserved populations, low-income populations, or minority groups." And it instructs another NIH-based institute, the National Institute on Minority Health and Health Disparities, to "make awards of grants ... for the purpose of ... supporting programs of excellence in biomedical and behavioral research training for individuals who are members of minority health disparity populations."

Historically, the NIH has awarded multiyear grants pursuant to established statutory criteria and objectives. Also historically, the NIH's grant selection process has been rigorously scientific. Grant terminations, meanwhile, have been rare; according to testimony in this case, the NIH terminated fewer than six grants midstream in the 13 years from 2012 to January 20, 2025.

The NIH's implementation of its grantmaking obligations changed dramatically in February 2025, after the President signed a trio of executive orders instructing the Government to stop diversity, equity, and inclusion (DEI) initiatives, "gender ideology" promotion, and COVID–19 research. In response, NIH leadership issued a series of directives ordering termination, en masse, of existing grants that the agency perceived as in tension with the new Administration's policies.

A frantic process followed. The NIH and its constituent institutes subsequently engaged in a "wholesale effort to excise grants in 8 categories over a period of less than 90 days." When the dust settled, thousands of grants had been canceled, including those supporting research into suicide risk and prevention, HIV transmission, Alzheimer's, and cardiovascular disease.

B

1

The two informally consolidated cases now before the Court were brought by, first, a group of individual researchers, doctors, and unions who depend on NIH funding for their research; and, second, a coalition of 16 States, suing on behalf of their public universities. The plaintiffs sued in Federal District Court, arguing that the NIH had implemented the executive orders in a manner that violated the APA, the separation of powers, the Spending Clause, and the Constitution's prohibition against ultra vires action.

Handling the case with dispatch, the District Court initially analyzed what has become the Government's primary contention: that the APA claim is really a breach-of-contract suit, and that the Tucker Act, 28 U.S.C. § 1491, therefore channels the case to the Court of Federal Claims rather than the District Court. As it does here, the Government took inspiration from this Court's recent order in *California*. But the District Court concluded that *California* was "somewhat different," *Bowen v. Massachusetts*, 487 U.S. 879 (1988), controlled and permitted the case to remain in district court.

The basic distinction, the court explained, is that while breach-of-contract actions for money damages go to the Claims Court, statutory actions to ensure compliance with federal law belong in district court. *California* could be conceived of as the former, insofar as it focused only on "sums awarded ... in previously awarded discretionary grants." By contrast, this action sought to prevent the NIH "from violating the statutory grant-making architecture created by Congress, replacing Congress' mandate with new policies that directly contradict that mandate, and exercising authority arbitrarily and capriciously"—wheelhouse APA contentions.

After dismissing some of the plaintiffs' claims, the District Court proceeded directly to a bench

trial on the merits. At the trial's conclusion, the District Court reserved judgment on most claims but ruled on the one it was "confident in" after "a careful review": that the challenged directives and resulting terminations were arbitrary and capricious, and so had to be set aside under the APA.

The District Court laid out its factual findings and legal conclusions in a 103-page opinion. With respect to the arbitrariness allegation, the District Court explained, among other things, that "DEI"—the central concept the executive orders aimed to extirpate—was nowhere defined, leaving individual agency employees "to arrive at whatever conclusion [they] wishe[d]." That definitional void left them applying "circular and nonsensical boilerplate language," to cancel grants without explanation or reason and in a manner that had "absolutely nothing to do with the promotion of science or research," *id.*, at 52a. In place of science, meanwhile, came something more pernicious: The court found, as a factual matter, "an unmistakable pattern of discrimination against women's health issues" and "pervasive racial discrimination"—indeed, "palpable" racial discrimination of a sort the judge had "never seen" in 40 years on the bench. The result was a policy of mass grant terminations that was "breathtakingly arbitrary and capricious." So the District Court declared unlawful and vacated the challenged directives and the "resulting ... terminations" of the plaintiffs' grants.

2

After the District Court entered partial final judgment, the Government asked that court, and then the First Circuit, to stay that judgment pending appeal. Both courts declined. In response to the Government's primary argument—the Tucker Act one—the First Circuit issued an opinion that sought to "harmonize" this Court's decisions in *Bowen*,; *Great-West Life & Annuity Ins. Co. v. Knudson*, and *California*. It concluded that those decisions permitted the District Court to enter, as it had, " 'prospective relief ' that will govern 'the rather complex ongoing relationshi[p]' between the [NIH] and grant recipients," especially because the District Court's determination did not depend on the terms of any contract.

The First Circuit's stay opinion also evaluated the relative harms and compared the balance of the equities to those in *California*. It concluded that these plaintiffs stood to lose more and the Government less: Unlike in *California*, these researchers lack the financial wherewithal to keep their programs running on their own—meaning a stay would euthanize animal subjects, terminate life-saving trials, and close community health clinics. And unlike in *California*, there is no fast-expiring temporary restraining order incentivizing a rushed drawdown of granted funds. Accordingly, the First Circuit declined to stay the District Court's partial judgment pending appeal.

C

The Government now asks us for a stay. To obtain one, the Government must make "a strong showing" that it will likely succeed on the merits, that it will be irreparably harmed absent a stay, and that the balance of the equities (including the public interest) favors a stay. Because two lower courts have already denied stays, the Government bears "an especially heavy burden" to secure one from us. *Edwards v. Hope Medi2670cal Group for W*omen, 512 U.S. 1301 (1994) (Scalia, J., in chambers).

Yet, today, without any such showing, this Court gives the Government much of what it asks for. It splits review of the grant terminations from review of the grant termination policy—thereby preserving the mirage of judicial review while eliminating its purpose: to remedy harms. The Court now holds that a plaintiff who maintains that the Government's midstream termination of promised grant funding was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," can file a claim in federal district court, seeking to set aside the unlawful agency guidance that

caused it to lose its grant. But if it wants the improperly terminated grant funding restored, a lawsuit filed in district court will not suffice; apparently, for *that* remedy, the plaintiff has to bring another legal action in a different court.

It gets worse. From the logic (such as it is) of the Court's order, it appears that a plaintiff 's pursuit of grant reinstatement in the Court of Federal Claims—where today's ruling shunts them—will be in vain, because the Tucker Act "impliedly forbids" that plainly appropriate relief. 5 U.S.C. § 702. And worse still, the viability of the initial district court action is also in doubt, since a plaintiff seeking invalidation of an unlawful grant termination policy standing alone (a posture that today's decision requires) might still flunk the APA's final-agency-action test.

It would have been much simpler for the Court to just announce that, regardless of the plain text of the APA or what Congress intended to authorize, we no longer accept that the Government's grant-termination decisions are subject to arbitrary-and-capricious review or that vacatur of an arbitrary grant-termination decision is an available remedy. At least that would have been straightforward.

Instead, as I explain below, the Court obliquely rewrites both the plaintiffs' complaint and the APA. First, it forces the plaintiffs to allege that the agency has unlawfully breached a grant contract when their actual claim is the unlawful decisionmaking cause of action that the APA plainly authorizes. Then, the Court adopts a bifurcated, ultimately ineffectual approach to seeking complete relief for the disfigured claim it has created. Today's order thus effectively extinguishes district courts' power to "set aside" arbitrary grant terminations, as that remedial power necessarily involves the concomitant restoration of the unlawfully terminated grant funding.

Part II, below, explains why the Court's order is wrong with respect to both the merits of the underlying jurisdictional question and the claim-splitting procedure it adopts. Part III demonstrates that the remaining, nonmerits factors weigh heavily against the stay, which means today's error will have grave real-world consequences. Either way, the Government's emergency application should have been denied in full.

II

A

A majority of the Court rightly rejects the Government's frontline merits position: that this whole case belonged in the Court of Federal Claims. Had it prevailed, that view would have flatly contravened seven decades of administrative law and practice. It would have also carried astonishing implications—including, by the Government's own admission, that no court would have the power to vacate or enjoin a blatantly discriminatory grant-related policy, such as a blanket ban on federal grants to Black or Catholic researchers.

Five Members of the Court reject that radical view today. So, district courts may still exercise jurisdiction over—and vacate—grant-related policies that contravene federal law, including the one here, which this District Court considered "breathtakingly arbitrary and capricious" and therefore set aside under the APA.

From there, this case should have been easy. The sole legal conclusion the District Court reached concerned the arbitrary and capricious (*i.e.,* unlawful) nature of the challenged directives. And those directives were the undisputed basis for the plaintiffs' grant terminations. Thus, in the District Court's view, as in mine, the remedy for the unlawful grant-termination directives is obvious: invalidation of the policy and reinstatement of the plaintiffs' grants. Accord, *ante,* (ROBERTS, C. J., concurring in part and dissenting in part). It is, after all, an "uncontroversial" feature of APA review "that, when a court with jurisdiction finds that the plaintiffs before it were harmed by an agency decision issued under an illegal rule, the court

should vacate that wrongful decision as a remedy."

The Court's order deviates dramatically from this ordinary, commonsense approach to APA review. Its chosen approach—splitting the directives from the grants—implies one of two things. Either the Court doubts that the grant terminations at issue here in fact resulted from the unlawful directives; or it doubts that plaintiffs who prevail in APA cases should see any benefit from their victory.

The Court's order does not own either implication—and for good reason. The District Court carefully reinstated (or, more precisely, declared unlawful the termination of) only those grants whose termination "result[ed]" from the directives. The causal chain from policy to termination is a factual question, and we are given no basis upon which to second-guess the District Court's view. Indeed, not even the Government contests—instead, it emphasizes—the fit between directive and implementation. I also do not take the Court to be revisiting, much less unsettling, the (recently reaffirmed) basic principle that a prevailing plaintiff should generally get to benefit from its victory.

B

So there must be something different about *this* context—some reason that, normal remedial principles notwithstanding, a district court cannot order the restoration of a plaintiff 's federal grants after it finds that those grants were terminated pursuant to an unlawful policy. For this, the Court turns to the Tucker Act. But the Tucker Act likely has nothing to say about this case. It certainly neither constructs the jurisdictional maze today's order sketches nor requires the result today's order presumes (*i.e.,* no relief for unlawfully short-changed grantee-plaintiffs).

The Government's jurisdictional argument lies, ironically, at the intersection of two sovereign-immunity waivers. The APA waives the Government's sovereign immunity from claims complaining of unlawful agency action and "seeking relief other than money damages." The Tucker Act waives the Government's sovereign immunity from (as relevant here) money-damages claims "founded ... upon any express or implied contract with the United States," and it sends such claims (again, as relevant here) to the Court of Federal Claims. The Government does not dispute that the APA's waiver, by its terms, applies to the claims brought in this lawsuit—it does not, for instance, argue that these plaintiffs seek "money damages." So the question is not *whether* sovereign immunity has been waived but *which* waiver applies: the APA's or the Tucker Act's.

On this point, the APA itself offers guidance by means of two intersection-navigating provisions. First and foremost, the APA makes its cause of action available only if there is "no other adequate remedy in a court." 5 U.S.C. § 704. And, notably, the Government does not argue that district court review is unavailable for failure to meet this requirement. Nor could it reasonably do so, because the Court of Federal Claims is authorized to award only money damages for contract breaches, not reinstatement of grant funding improperly terminated in violation of federal law. By its plain terms, then, § 704 permits an APA lawsuit in district court seeking the otherwise unavailable remedy of grant reinstatement.

Recognizing that *Bowen* forecloses a § 704-based argument, the Government points instead to § 702. This provision anticipates potential waiver overlap and withdraws the APA's immunity waiver when plaintiffs attempt to use the APA to obtain relief that "any other statute that grants consent to suit expressly or impliedly forbids." Section 702 thus "prevents plaintiffs from exploiting the APA's waiver to evade limitations on suit contained in other statutes."

But, of course, any statute that might preclude APA relief via § 704 (by providing an adequate alternative remedy) or § 702 (by forbidding the

remedy sought) must be "addressed to the type of grievance" the APA claim asserts. The relevant part of the Tucker Act is "addressed to" contract claims, which these are not.[15]

These plaintiffs' legal claims have nothing at all to do with individual grant contracts, nor do the plaintiffs seek "past due sums" as relief. The plaintiffs do not argue that the Government shorted any of its contractual obligations. Rather, they claim the Government flubbed its most basic statutory one: to engage in reasoned decisionmaking.[2] And they seek not damages for the Government's contract breach but a mandate that it comply with federal law over the course of the parties' "ongoing relationship." *Bowen* The plaintiffs, in other words, "asser[t] a grievance altogether different from the kind the [Tucker Act] concerns." And the grievance they assert is "a garden-variety APA claim"—which means it likely belongs in federal district court.

The analysis should end there. The Government's sole retort is that, in this context, a winning APA claim—setting aside the guidance and, consequently, vacating the resulting grant terminations—would obligate it to pay money to the plaintiffs. (This central tenet of the Government's argument, by the way, is apparently not shared by Justice BARRETT, whose deciding vote causes a winning APA claim somehow to confer no financial benefit to the injured plaintiffs.) But we have long recognized that such a mere "by-product" of APA review does not send a case to the Court of Federal Claims. Given all this, I would have concluded, at least in this preliminary posture, that the Tucker Act bears not at all on this case.

C

But whatever the Tucker Act might have to say about APA claims brought in cases like this one, it surely does not compel the bizarre claim-splitting regime the Court imposes today. After today's order, how are plaintiffs like these—federal grantees who believe their grants were terminated pursuant to an unlawful policy—to get complete relief ? The Court does not say. The answer, it seems, is they cannot.

Such a grantee can operate like the plaintiffs here did, by filing an APA claim in district court challenging the policy under which they lost their grants. Such a grantee can, like the plaintiffs here, win that claim and have the policy set aside as unlawful. And then—what? The district court that just set aside the unlawful policy apparently cannot "adjudicate claims 'based on' " the grant terminations that resulted from the policy (whatever that means after today) or "order relief designed to enforce any ' "obligation to pay money" ' pursuant to those grants." But, of course, it is the prospect of getting its wrongfully terminated grant money that brings the grantee to court in the first place. That prospect is also, one presumes, the only (or at least the primary) reason the grantee has Article III standing to sue at all.

Because past courts recognized the absurdity of such a result, we have already rejected the argument that the Tucker Act requires the District Court "to split" cases like this "into two

[15] Thus, it mischaracterizes the plaintiffs' claims to construe them as being based on a contract breach. It is simply not true that the plaintiffs' "injury and alleged right to payment stem from the government's refusal to pay promised grants according to the terms and conditions that accompany them." *Ante,* at 2664 (GORSUCH, J., concurring in part and dissenting in part). Indeed, from these plaintiffs' perspective, the terms and conditions of the promised grants, and whether or not the Government complied with them, are entirely beside the point—regardless, the Government must act (make decisions, including the decision to cancel grants) in accordance with federal law. So, as the plaintiffs' complaints and arguments consistently maintain, their injury and right to payment *actually* stem from the Government's allegedly arbitrary and capricious termination of their grant funding in violation of the APA.

parts."[16] Rather, having struck down unlawful agency action, the District Court "also had the authority to grant the complete relief " that followed. Under the rule the Court announces today, however, *no* court can reinstate the plaintiffs' grants—apparently, the Tucker Act "impliedly forbids" it. 5 U.S.C. § 702. This novel reading of the Tucker Act undermines not only *Bowen*'s holding but also the basic remedial principles underlying it. Forget *complete* relief—the reasoning of today's order might leave plaintiffs unable to obtain *any* effective relief at all.

To be specific: "Unlike the district courts, ... the [Claims Court] has no general power to provide equitable relief against the Government or its officers." This means, it seems, that the Claims Court cannot reinstate unlawfully terminated grant funding—a distinct remedy from the money damages that Justice BARRETT suggests are still available in the Claims Court. See *ante,* at 2662, n. 1. And while the Claims Court does have authority to award money damages for a breach of contract, it is not clear that it could do so here, where the right the plaintiffs seek to vindicate "is not a contract right" but a statutory one.

This result, it should be evident, is also impossible to reconcile with the Court's recent pronouncements. Not so long ago, the Court insisted that "the party-specific principles that permeate our understanding of equity" instruct courts to award "complete relief " to plaintiffs and no relief to nonplaintiffs. Today's exercise of equity flips that proposition on its head. *Non*-plaintiffs might see some benefit from district courts' vacatur of unlawful directives because agencies will not be able to rely on them to cancel grants going forward. But the plaintiffs who filed the lawsuit will see none.

In a broader sense, however, today's ruling is of a piece with this Court's recent tendencies. "[R]ight when the Judiciary should be hunkering down to do all it can to preserve the law's constraints," the Court opts instead to make vindicating the rule of law and preventing manifestly injurious Government action as difficult as possible. This is Calvinball jurisprudence with a twist. Calvinball has only one rule: There are no fixed rules. We seem to have two: that one, and this Administration always wins.

III

This Court has an obligation to balance the equities before issuing the "extraordinary" relief of a stay pending appeal, by " 'explor[ing] the relative harms to applicant and respondent, as well as the interests of the public at large.' " If the Court had bothered to do so here, the result would be plain.

At the threshold, before this Court even enter-

[16] Not only does the Tucker Act not *require* splitting the case into two; 28 U.S.C. § 1500 likely *forbids* it. That provision precludes Claims Court jurisdiction over any claim that shares "substantially the same operative facts" with a claim pending in another court, even if the claims seek different relief. *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011). So, besides the obvious inefficiency of recruiting two courts to do what one could, § 1500 likely precludes the sort of parallel-track litigation the Court seems to envision. See *ante,* at 2666 (KAVANAUGH, J., concurring in part and dissenting in part) (explaining that today's order "means that the challenge to the grant terminations belongs for now in the Court of Federal Claims and the arbitrary and capricious claim belongs for now in the Federal District Court or the First Circuit"); see, *e.g.*, *Solenex, LLC v. United States*, 163 Fed.Cl. 128, 132–133 (2022). Perhaps the district court and Claims Court actions can proceed *seriatim* rather than simultaneously, assuming the statute of limitations does not run in the meantime. But *seriatim* actions would raise tricky questions of issue and claim preclusion. Cf. *Petro-Hunt, LLC v. United States*, 862 F.3d 1370, 1385–1386 (CA Fed. 2017). The Court grapples with none of these complexities before sending plaintiffs through the labyrinth it has created.

tains the factors required for granting a stay application, it ought to ensure that the applicant faces the sort of true emergency that warrants our consideration of its request and the attendant interference with the standard review processes pending in the lower courts—what I have elsewhere called a "line-jumping justification."[17] Here, the Government does not come close to offering any reason for us to intervene. Its asserted harm—its *only* asserted harm—is that it might have to keep paying out grants it has already committed to paying for the few months it will take to appeal the District Court's decision. Those payments are incremental, and the Government does not so much as represent their cadence; it gives zero information that would enable us to ascertain how much money is on the line in the coming months.

The Government fares no better under the traditional stay factors, even if this Court's attention were warranted. As it did in *California*, the Court concludes that the Government faces irreparable harm simply because the plaintiffs do not pinky-promise to reimburse the Government if the Government ultimately prevails. Whether or not that correctly states the law of irreparable harm, the gauge by which the Court is measuring harm seems significantly off.[18] The harm that the plaintiffs and the public will suffer from a stay plainly dwarfs the purportedly irreparable injury to the Government if a stay is denied. For the Government, the incremental expenditure of money is at stake. For the plaintiffs and the public, scientific progress itself hangs in the balance—along with the lives that progress saves.

Make no mistake: Per the evidence in front of the District Court, the forward march of scientific discovery will not only be halted—it will be reversed. Because "studies and researchers cannot be held in stasis," "there is no way to recover the lost time, research continuity, or training value once disrupted." Thus, yearslong studies will lose validity. Animal subjects will be euthanized. Life-saving medication trials will be abandoned. Countless researchers will lose their jobs. And community health clinics (providing, *inter alia*, preventative treatment for infectious diseases) will close. *Ibid.*

These harms extend well beyond the plaintiffs in this case. *Amici* collectively representing the vast majority of NIH grantees detail the devastating and irrevocable damage to the "symbiotic relationship" between the Government and

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[17] We do not *have* to decide this case—not in this posture, or, really, ever. But see *ante,* at 2665 - 2666 (opinion of KAVANAUGH, J.). We exercise an enormous amount of discretion even in the ordinary course. See Supreme Court Rule 10 ("Review on a writ of certiorari is not a matter of right, but of judicial discretion"). That discretion only expands when we are presented with a request for extraordinary relief: Intervention in this posture "is not a matter of right, but of discretion sparingly exercised." Supreme Court Rule 20. Thus, Justice KAVANAUGH's suggestion that the Court has no choice but to decide the parties' relative interim status when an emergency application asks us to do so, see *ante,* at 2665 - 2666, comes from nowhere; no rule of Supreme Court procedure supports it. What is more, casting our role as compulsory when it comes to applications of this sort contradicts decades of practice. "The opinions are legion in which individual Justices, reviewing such requests in chambers, declined to intervene—reiterating that 'such power should be used sparingly and only in the most critical and exigent circumstances.' "

[18] The Government promised grant money to the plaintiffs, and now it has changed its mind. These things happen. Whether the law permits the Government to terminate these grants in this manner is the nub of the instant dispute. Even if the Government is ultimately deemed entitled to do what it has done, why is it *harmed* (in any meaningful sense) if it cannot recover the previously promised grant payments that happen to issue while a court is deciding the lawfulness of its change of heart? Far from being injurious, one might think that those interim payments are a fair price to pay for the disruption the Government's choice to abruptly renege on its promises has caused.

the Nation's research community that an abrupt cessation of funding would cause, not to mention the harm to the global primacy of American science. And, as Congress recognized when it made the NIH the world's largest public scientific funder, scientific advancement lifts all boats. The harm is not just to researchers who will lose their livelihoods; vulnerable members of our society will also lose the benefits of their research.

Notably, too, these considerations represent just the consequences of a stay *in this case*. But the Court evidently wishes to impose its cumbersome, multistep judicial-review process on any grantee that attempts to preserve its research advancements by filing a lawsuit (if indeed the Court envisions any path to full recovery for such grantees at all). So, take the aforementioned practical harms to the researchers, subjects, and institutions that have filed the instant lawsuits and multiply them—and again, and again, and again.

A stay seems like a modest step. But it is an equitable one, and equity ultimately aims to ensure fairness by reducing harm. With this deployment of our equitable powers, the Court permits precisely the sort of harm equitable discretion exists to prevent.

* * *

At a time when the Executive Branch is racing to terminate federal grants on a mass scale—and, according to too many courts to count, often unlawfully—this Court has now constructed a deeply inefficient and likely impotent scheme of judicial review for grant-related APA claims (at least until plenary review forces reconsideration). It has done so without bothering to assess whether Congress intended such a scheme, and in a manner that requires second-guessing the District Court's unchallenged factual findings, muddying basic legal principles, and unraveling valuable scientific research.

The approach the Court adopts today (which, again, no party advocated for) neither coheres legally nor operates practically. So, unfortunately, this newest entry in the Court's quest to make way for the Executive Branch has real consequences, for the law and for the public. Fortunately, at least for the law, this order is not the last word, as it is not "conclusive as to the merits." For the public's sake, one can only hope that affected grant recipients can find a way to maintain their research studies—and their legal claims—long enough to give the Court the chance to change its mind.

Nate Raymond, Judge accused by Gorsuch, Kavanaugh of defying US Supreme Court apologizes, Reuters, 9/2/2025

BOSTON, Sept 2 (Reuters) - A federal judge in Boston took the unusual step on Tuesday of apologizing to conservative U.S. Supreme Court Justices Neil Gorsuch and Brett Kavanaugh, after they accused him of defying a decision by the top court by ordering the Trump administration to reinstate hundreds of millions of dollars in research grants.

Senior U.S. District Judge William Young made the remarks at the start of the first hearing in the case since the Supreme Court on August 21 paused his order blocking the administration from canceling National Institutes of Health grants deemed to support diversity, equity and inclusion (DEI) and LGBTQ health care.

The Supreme Court in its 5-4 decision said a case like the one before Young, seeking to enforce a contractual obligation for the government to pay money, must be heard in the specialist U.S. Court of Federal Claims, not a district court like the one Young sits in.

Gorsuch and Kavanaugh joined the majority decision, and in a separate concurring opinion, opens new tab, said the court's position should have been clear to Young after the Supreme Court, in a separate case on its emergency docket in April, halted another judge's order requiring the administration to reinstate terminated Education Department grants.

Gorsuch said instead of following the April decision, Young permitted lawsuits by Democratic-led states and researchers involving similar grants to move forward in district court, even though it was "squarely controlled" by high court precedent.

"Lower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them," Gorsuch wrote.

Young, an appointee of Republican President Ronald Reagan, said that in 47 years on the bench, Gorsuch's concurring opinion marked the first time any judge had ever suggested he had defied an appellate court or Supreme Court holding.

"I really feel it's incumbent upon me to, on the record here, apologize to Justices Gorsuch and Kavanaugh if they think that anything this court has done has been done in defiance of a precedential action of the Supreme Court in the United States," he said.

Young said he never meant to run afoul of Supreme Court precedent, but at the time of his June ruling, he "simply did not understand that orders on the emergency docket were precedent," unlike opinions it issued when it hears cases on the merits.

Such orders on the emergency docket, also called the "shadow docket," are often brief, rushed and come with little explanation of the justices' reasoning.

After Young ruled, the Supreme Court in a different case in July stated that while "our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."

"Those justices, and indeed the entire court, can be assured that this court will absolutely obey and generously adhere to the precedential decisions of the Supreme Court, as I have done and tried to do throughout all my judicial service," Young said.

While the Supreme Court stayed Young's order requiring NIH to make payments on the grants, it left standing, on a separate 5-4 vote, his conclusion that an internal agency guidance on grant funding was unlawful.

Young made his comments during a hearing scheduled to prepare for a Sept. 15 trial in a second phase of the case concerning the administration's handling of applications for new NIH grants.

Pablo Das, Lee Epstein, and Mitu Gulati, Deep in the Shadows?: The Facts about the Emergency Docket, 109 Va L. Rev. 73 (2023)

The last several years have seen an explosion of commentary about the shadowy emergency docket[19] in settings ranging from academic articles to tweets, blogs, legal podcasts, news articles, and even congressional hearings.

Why? Two reasons have moved front and center. The first implicates the supposedly "shadowy" bit of the treatment of emergency applications. The accusation leveled by detractors is that the Justices are making increasing use of the emergency docket to issue consequential rulings on matters ranging from redistricting plans to immigration policy to COVID regulations, and, of course, abortion. The resulting orders, critics claim, can have precedential value--even though the Justices received only minimal briefing, did not have the benefit of oral arguments, and resolved the matter in days (not the many months that "merits" decisions receive) in orders with almost no rationale.

The complaint that judges are issuing decisions without reasons and, therefore, undermining rule-of-law values and the development of precedent is not new. But that complaint is often about judges doing less work than detractors would like them to. The claim in the shadow-docket drama is different. It is not that the Justices are being lazy. It is that the conservative Justices have devised a sneaky technique to make big decisions that end up having precedential value in secret.

Which brings us to the second explanation for the growing attention--and concern--over the shadow docket: brute politics. The division between Justices Alito and Kagan is not happenstance. Because it seems that many "emergency rulings" have favored conservative causes, liberals have decried the emergency docket as a dangerous, politically expedient tool that the conservative majority has exploited to advance its partisan and ideological commitments. To (liberal) detractors, the order upholding the Texas abortion ban is a prime example. Because the ruling contravened the then "superprecedent" of *Roe v. Wade*, critics argue that the Court should have refrained from issuing an unreasoned "emergency" order without the benefit of full briefing and arguments.

The rebuttal is straightforward: however arresting the metaphor of the "shadow docket," there is reason to be skeptical of it. As an initial matter, especially salient emergency applications, such as those over abortion and COVID, represent but a tiny fraction of the emergency docket. The vast majority of applications are far less consequential administrative requests (such as applications for deadline extensions) that do not require the Court's full consideration. These applications, the argument goes, lack a political dimension, and even for the few with political shadings (e.g., abortion and immigration), the Justices are not partisan or ideological in response; they are simply dealing with cases that "might really be emergencies."

Further, in response to accusations of nefarious behavior by the conservative Justices, it seems reasonable to point out the conservatives have a six-person majority. Do they really need to hide their reasoning in the shadows to make ultra-right-wing decisions? The conservatives have not exactly been shy in giving reasons for their decisions unmaking old precedent. One of the liberal complaints about the current Court, in fact, has been that the Court's conservative majority has thrown caution to the wind and is overturning well-respected superprecedent

[19] The emergency docket goes by various names, including the "non-merits docket," the "procedural docket," and the "shadow docket." Credit for originating the term "shadow docket" is generally given to an article by University of Chicago Law Professor Will Baude. See William Baude, Foreword: The Supreme Court's Shadow Docket, 9 N.Y.U. J.L. & Liberty 1,5 (2015).

with nary a thought. For these six Justices who are happy to do things in the open no matter what the public outcry, why work in the shadows? To return to abortion, that is hardly a matter on which the Court has tried to hide its views and sneak around via a back channel.

So which side has the better case? Is contemporary use of the shadow docket "unreasoned, inconsistent, ... impossible to defend," and politically motivated? Or is it, as Justice Alito contends, benign and apolitical, reserved only for matters that need prompt attention? To answer these related questions, we take a different approach than other commentators who have analyzed the emergency docket. Rather than base conclusions on cherry-picked highly-salient disputes, we examine a full Term's worth of emergency applications, that is, *every* application submitted to the Court in its 2021-22 Term. A caveat: our inferences are based on data from a single Term. We cannot and do not say anything about how the use of the emergency docket has changed over time in response to external factors such as the internet and recent criticism.

From the data, three findings emerge. First, the vast majority of emergency applications are requests to extend the filing time for certiorari petitions, which the individual Justices simply grant or deny. The Justices referred only 68 (of 871 total petitions) to the full Court (hereinafter "referred applications"). In other words, the individual Justices are happy to make decisions on their own for over 90% of the applications.

Second, for the referred applications, where the Justice who looks at the matter first refers it to their colleagues for more detailed analysis, standard ideological patterns emerge. The conservative Justices usually vote in favor of conservative claims. And the liberals generally vote in favor of liberal claims. Because conservatives outnumber liberals 6-3 on the current incarnation of the Roberts Court, conservative applicants and causes fare far better than liberal applicants in these consequential (referred) applications.

Third, the data unearth a restraint-activism dimension: at conservative and liberal extremes, the Justices either promote more aggressive use of the emergency docket (if they have the majority) or resist it (if they lack a majority). So, Justices Thomas, Alito, and Gorsuch (the conservative end), use the emergency docket in service of conservative interests, while the center-conservative Justices and liberal Justices resist doing so. That is the behavior we would expect out in the open sunlight, not just in the shadows.

All in all, our analysis validates claims on both sides of the debate. Most emergency applications are benign requests, lacking an obvious ideological or partisan component. But when they are not--when they involve salient matters, such as abortion, immigration, and voting rights--the conservative Court is partial to granting conservative applications.

Is there anything "shadowy" here? Not really. The voting patterns in the emergency applications docket and in the merits docket are similar. In terms of merits determinations, this is the most conservative Court in roughly a century. That that conservatism shows up in the emergency docket as well is not surprising. It is a distressing finding if one expected neutrality in this part of the docket. But why would one expect that?

Conclusion

The shadow docket has been one of the Supreme Court's most controversial features in recent years. Boiled down, however, the numbers reveal little that is particularly nefarious. The overwhelming majority of emergency applications are so trivial that they are granted by an individual Justice without consultation with the other Justices. As for the small fraction of matters that are deemed worthy of more attention, the individual Justice refers the matter to the collective for a decision by the full Court.

Once we focus in on the small subset of consequential matters on the emergency docket, the Justices behave pretty much as they do with the merits determinations. The conservatives win most of the time, at roughly the same rates as they do on the merits docket. Broken down by individual Justice, the three moderate conservatives control the outcomes and win almost all the time, whereas the three conservatives at the extreme and the three liberals lose more (the liberals lose the most). Again, the pattern that we see on the merits docket. Depressing, from a liberal or legal formalist perspective. But not particularly shadowy.

We argue that the Court's stay decisions are sortable into the following categories, representing a spectrum of precedential force: those that have little value for lower courts, those that are useful as persuasive authority, and those that are authoritative with respect to future cases considering the same legal questions, even if they might "have considerably less precedential value than an opinion on the merits." At the least, stays in the third category should be treated as strong signals from the Court about how to resolve an ambiguity in the law.

The first category includes denials of stay applications and decisions issued by a single Justice without any opinion. Stays with persuasive authority include those granted by a single Justice who issues an opinion explaining his or her views on the merits of the case. Concurrences in, dissents from, and statements respecting a decision to grant a stay also fall into this second category. The third category includes stay grants in which a majority of the Supreme Court has clearly indicated that the applicant is likely to succeed on the merits of the question(s) presented.

II. Assessing a Stay's Precedential Effects

A. Precedent Defined

[Under] the Constitution: "the judicial Power of the United States, shall be vested in *one supreme Court*, and in such inferior Courts as the Congress may from time to time ordain and establish."

Deference to the Supreme Court is warranted not because the high court is always right or because its opinions are always convincing. If this were so, no deference would be necessary. Rather, as Justice Jackson explained, "[w]e are not final because we are infallible, but we are infallible only because we are final."

[W]e believe that Supreme Court stays can--and often should--be entitled to precedential weight. The traditional model recognizes the potential for ambiguity in precedent, and that brief opinions or even orders can count as precedent:

> Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case .... [T]he lower courts are bound by summary decisions by this Court until such time as the Court informs [them] that [they] are not.[20]

To be sure, not all precedential rulings are of equal value, and a mere order or brief *per curiam* opinion may not be entitled to the same weight as full-length opinions on the merits. After all, it is a "judicial decision's reasoning--its *ratio decidendi*--that allows it to have life and effect in the disposition of future cases." But if one-line, summary affirmances can have precedential effects, why not shadow docket stays?

Beyond the various articulations of the standards of review it uses, the Supreme Court has not said much about shadow docket stays. We do not know, therefore, what the Justices intend the precedential effects of these stays to be. In the absence of such guidance, we believe that a lower court should consider three factors when determining what effect, if any, a Supreme Court stay decision should have on its own decisionmaking. These are: (1) whether the stay was issued by a single Justice or by the full Court; (2) the type of underlying merits dispute; and (3) whether the stay decision explains the Court's reasoning or provides a clear indication of the Court's view of the merits. When the lower court can conclude by assessing these factors that a majority of the Court has expressed a clear view on the merits, the lower

[20] Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).

court should defer to that view or explain why deference is unwarranted. A clear statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

B. Factors to Consider

1. Single Justice or Full Court

A decision by a single Justice to stay a lower court's order cannot have binding precedential effect. This is because individual Justices do not have the authority to revise or modify the judgments of the lower courts. Nor can they bind the Court. But these opinions certainly have value as persuasive authority. After all, if the rulings of a single district judge can have persuasive value in subsequent cases, so too can the considered opinion of a sitting Justice of the Supreme Court.

More, the Court "is a collegial institution, and its decisions reflect the views of a majority of the sitting Justices." When writing alone, then, a single Justice "bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them." In this way, a single Justice "act[s] not for [him]self alone but as a surrogate for the entire Court."

When four Justices support granting a stay, sometimes a fifth will vote to grant the stay as a courtesy. In these situations, a lower court cannot say with certainty that a majority of the Justices believe there is a significant possibility the movant will prevail on the merits of his claim. But the stay decision may nonetheless be useful as persuasive authority.

Apparently, when a Justice votes to grant a stay as a courtesy, the Justice indicates in a separate opinion that the vote is merely a courtesy. In *Arthur v. Dunn*, for example, Chief Justice Roberts made his position abundantly clear: "I do not believe that this application meets our ordinary criteria for a stay," he explained, because "the claims set out in the application are purely fact specific, dependent on contested interpretations of state law, insulated from our review by alternative holdings below, or some combination of the three." But because four Justices voted to grant a stay, the Chief Justice supplied the courtesy fifth vote "[t]o afford [the other Justices] the opportunity to more fully consider the suitability of this case for review.

Thus, … lower courts: they must consider whether any of the Justices who vote to grant a stay have done so for non-merits reasons. When that is the case, the lower courts cannot say one way or another what a majority of the Court believes with respect to the merits of the movant's case.

2. The Type of Underlying Merits Dispute

When a majority of the Supreme Court has expressed its view on a stay applicant's likelihood of success on the merits, lower courts seeking to determine the stay's precedential effect should examine the underlying merits dispute. If the stay grant makes it clear that the movant's position on a legal question is likely correct, lower courts can--and should--treat the Court's decision as precedential.

3. The Reasoning or Explanation Offered

When determining what effect to accord a Supreme Court stay grant, lower courts should evaluate any rationale or explanation the Court's opinion offers in support of its decision. In general, a thorough and well-reasoned opinion is likely more instructive than a decision with little or no analysis. This is true for all judicial opinions, in the stay context or otherwise. But ultimately, even a decision with little or no reasoning can be authoritative if it is clear from the decision that the Supreme Court has expressed a view on the merits of a question.

The more detail and clarity the Supreme Court provides about why it is granting a stay, the more confident a lower court can be in treating the Court's opinion as precedential.

What about cases in which the Supreme Court

grants a stay without any discussion of the merits? On the one hand, the absence of any substantive reasoning makes it difficult for a lower court to determine why the Supreme Court reached the decision it did. On the other hand, the standard of review makes clear that the Court will not grant a stay unless a majority of the Justices believe there is at least a "fair prospect" or a "significant possibility" that the movant will prevail on the merits. And if a lower court has first denied the movant a stay, as is the norm before the Supreme Court will entertain the application, the lower court's decision to deny the stay is "presumptively correct" and will be reversed only under "extraordinary circumstances." In other words, even without any reasoning, the decision to stay a lower court ruling is not one the Court will take without a compelling reason to do so.

More, if the *Nken* standard applies to decisions of the Supreme Court, then a stay grant means that the movant has shown a strong likelihood of success on the merits and that this showing was a critical factor in the Court's decision. And as explained above, regardless of the standard that applies, a stay grant from the Court almost certainly implies appellants have shown a significant probability of success on the merits. Thus, even stay grants without any reasoning or explanation can provide the lower courts with guidance about the Supreme Court's views on the merits.

C. Objections Considered

To be sure, weighty objections can be raised to granting precedential status to the Court's stay orders. We address some of them below.

First, in contrast to the Court's normal opinions, which issue after lengthy briefing from the parties and often *amici*, as well as oral arguments, the Court's shadow docket involves rushed briefing deadlines, and oral arguments almost never occur. Should we really be according decisions that issue from such a process precedential weight? A fair question, but principles of stare decisis are rarely grounded on the quality or timeliness of briefing and argument before the higher court. Indeed, courts--including the Supreme Court--routinely issue precedential opinions after condensed briefing schedules and without oral argument.

Consider *Bush v. Gore*, for instance, which effectively decided the 2000 presidential election. Simultaneous briefing took place the day after the petition for certiorari was granted with oral argument occurring the day after that. The Court issued its opinion the following day, just three days after the writ was originally granted. Despite this abbreviated schedule, lower courts regularly cite the decision as binding precedent.

Second, Supreme Court stay grants typically include little to no reasoning or analysis. But while a short opinion or order may sometimes be entitled to less precedential weight than a lengthier opinion, that does not mean that the Court's view of the merits of the matter is automatically unclear, nor that lower courts may simply ignore it. Inferior federal courts owe "obedience" to the Supreme Court as a matter of constitutional principle and long-recognized common law practice, not just when the Supreme Court's reasoning is pellucid or persuasive. After all, deference only when the lower court is convinced by the higher court's reasoning is no deference at all.

Third, the Court does not treat its stay orders as binding on itself, so perhaps lower courts need not treat them as precedential, either. But … the Supreme Court is always free to revisit or ignore its prior rulings, and it frequently does. This is especially true in the context of *per curiam* opinions or summary affirmances. For instance, in *John Baizley Iron Works v. Span*, the Court reversed a compensation award under the Workmen's Compensation Act of Pennsylvania for an injured employee. Justice Stone dissented, arguing that the Court should have followed *Rosengrant v. Havard*, a summary affirmance without opinion. The majority did not even acknowledge *Rosengrant* in its opinion.

But lower courts must "do as [the Court] says, not as it does." And while the Supreme Court is of course free to overrule or even ignore its prior decisions, lower courts have no such luxury. More, while it is true that the Justices themselves are not bound by their preliminary views on a case, a decision to grant a stay is at least, as we argue, a signal of their views.

Fourth, stays are by nature preliminary orders that typically maintain the status quo. But this objection overlooks the fact that appellate courts frequently issue precedential opinions on preliminary injunctions and stays, often after expedited briefing by the parties. It is not clear why a lower court's ruling on a preliminary injunction after expedited briefing should have precedential effect, but a preliminary order from the Supreme Court--which at least has the benefit of the briefing and rulings from the lower courts--should not.

Finally, one might worry that treating Supreme Court stays as precedent will unnaturally freeze the development of the caselaw and rob the Court of the benefit of conflicting lower court opinions to consider when reaching its own, ultimate determination. Judges and commentators have recognized this value in the multi-tiered structure of federal courts and suggested that the Court may use circuit splits to crystalize issues before it takes them up.

But the decision to grant a stay, an extraordinary action for the Court to take, is itself suggestive that the issue is sufficiently crystallized that a majority of the Court believes specific action by the Court is necessary.

* * *

In sum, we argue that decisions to deny a stay have no precedential value. Nor do decisions to grant a stay issued by a single Justice without an explanatory opinion. In-chambers opinions can be quite useful as persuasive authority, as can concurrences, dissents, and statements respecting stay decisions. When the full Supreme Court grants a stay application, lower courts should accord that decision great weight, unless there is compelling reason not to do so. This is true even if the stay grant features little legal reasoning, and may well be true even when there is no reasoning. Of course, any discussion of the merits of a question increases the confidence with which a lower court can act. But a statement by the full Court about the movant's likelihood of success on the merits ought not to be simply ignored or cast aside.

A final note is in order. Though we have focused only on stays, the analysis presented here applies to any order or decision from the Supreme Court's shadow docket that requires the Court to make a preliminary determination about the movant's likelihood of success on the merits. That is, we believe that any time a majority of the Court signals that a party is likely to succeed on a legal question, lower courts should carefully consider whether this determination should be accorded controlling weight by them in subsequent cases. Doing so will reduce the risk of reversal, promote confidence in the rule of law, and ensure that judicial resources are marshaled effectively and efficiently.

Supreme Court applications are increasingly controversial. Decisions concerning stays and injunctions involving issues such as abortion, election maintenance, immigration enforcement, and religious exercise have brought focused attention to what had been a relatively obscure practice area outside of the death penalty context. Press attention, congressional hearings, and discussion by a presidential commission on Court reform demonstrate heightened political awareness. Scholarly commentary on applications is proliferating, and Justices are discussing this practice area in opinions and in public.

Despite increased prominence, the applications docket remains poorly understood. The Court's plenary decisions have been thoroughly catalogued and analyzed. Empirical studies inform our understanding of topics such as agenda setting, briefing, oral argument, opinion assignment, bargaining over opinion content, opinion writing, precedent treatment, and separate opinion production. Empirical studies concerning applications are emerging, but we still lack a comprehensive understanding of this practice area.

I advance our understanding of the applications docket with original data on Court (as opposed to in-chambers) decisions from the 2003 through 2021 Terms.

Before proceeding, it is important to explain why I use the term "applications docket" rather than "shadow docket" or "emergency docket." Debating what to call this practice area may seem pedantic, or like "little more than a distraction," but discussion about applications is conceptually confused, which has deleterious consequences for conversation quality and empirical assessment. The positive case for "applications docket" is that it is unambiguous: "applications" is a term of art, and there is a distinct "docket" with submissions receiving "A" series numbers.

Aside from the positive case, "shadow docket" and "emergency docket" are misleading as applied solely to all applications. The term "shadow docket" has a broader connotation, meaning "the many things the Supreme Court does outside of the normal course of its merits docket." As originally understood, "shadow docket" was synonymous with "orders list." Applications are just one part of the shadow docket on this definition. Increasing controversy surrounding applications seems to have generated some definitional drift such that "shadow docket" is now regularly used synonymously with "applications docket." Meanwhile, however, the term continues to be used in accordance with its broader original definition.

The term "emergency docket" is generally used synonymously with "applications docket," but this is misleading. The Cambridge Dictionary defines "emergency" as "a dangerous or serious situation that happens unexpectedly and needs fast action in order to avoid harmful results." Some but not all applications involve emergencies, and the mix is an open empirical question. Moreover, an emergency need not be present to submit applications or obtain relief under the Court's rules, authorizing legislation, or applicable analytical frameworks.

Coordinating around "applications docket" also avoids persuasive-framing concerns. Justice Alito criticized the phrase "shadow docket" as a "sinister term ... used to portray the [C]ourt as having been captured by a dangerous cabal that resorts to sneaky and improper methods to get its ways," in turn "feed[ing] unprecedented efforts to intimidate the [C]ourt and to damage it as an independent institution." Preferring "emergency docket," he added: "You can't expect [emergency medical technicians] and the emergency rooms to do the same thing that a team of physicians and nurses will do when they are handling a matter when time is not of the essence in the same way." But if

"shadow docket" is problematic because it suggests the Court uses "improper methods," the opposite might be said about "emergency docket," particularly when analogizing applications practice to emergency medical treatment on people. The arguable implication is that concerns about procedural legitimacy and institutional transparency are misguided, or at least overstated, given the purported emergency posture in which the Court manages applications.

Several key findings emerge [from the study of the applications docket from the 2003 through 2021 Terms.] Contrary to conventional wisdom, dispositions declined on average. But this result masks divergent trends: among applications involving stays and injunctions, capital dispositions decreased while noncapital dispositions increased. Moreover, noncapital applications now comprise a larger share of the docket than capital applications. This shift enhances docket salience because … most capital applications are denied simultaneous to denying plenary review, while most noncapital applications are disposed of without a merits petition on file. Thus, whereas applications were once primarily subsumed by agenda setting decisions, they are now increasingly impactful in their own right. Among noncapital applications, other recent changes include more initial referrals, grants, reason giving, and written dissents. Among capital cases, requests to vacate stays of execution are increasingly common and typically granted.

VI. Implications

With plenary docket procedure as the reference point, the shadow analogy makes most sense as applied to orders list matters that have substantive impact. Several commentators have already identified substantive impact as the shadow docket's conceptual core. Summary merits decisions (usually reversals) are the most obvious examples, so it is not surprising that William Baude emphasized them when coining the term shadow docket.

Concerns about procedural legitimacy and institutional transparency are prevalent in discussions concerning applications practice. Two general principles can be derived from the empirical results and broader analysis presented here. First, debate about procedure and transparency should be grounded with specific reference to applications practice rather than reflexive reference to the plenary docket. Doing so avoids false equivalence and ensures that reform proposals are tailored to institutional reality. Second, docket complexity may caution against uniform solutions.

The Court could enhance procedural regularity and institutional transparency surrounding applications by creating an actual emergency docket. Even if all applications are time sensitive, they are not all emergencies. The Court could begin by creating default rules governing applications that extend the decision-making time horizon where warranted. Doing so would make space for reforms, again where warranted, such as more oral arguments, amicus participation, deliberation, and reason giving--all of which would enhance procedural legitimacy and institutional transparency while improving decision quality. For genuine emergencies, as defined by the Court and demonstrated by the applicant, these default rules could be overridden and decisions could be expedited.

More generally, the Court can make it easier for people to know what is going on with respect to applications. Absent press coverage, information acquisition is difficult: the typical order includes little information about the case or request, requiring anyone interested in a particular decision, after having found it on the relevant orders list, to search the docket by application number and read the filings to understand what happened. To enhance transparency, the Court could provide a more thorough summary of the matter where context would be helpful for understanding the decision. The Court could also hyperlink the docket page or create a section of the website that separately lists orders concerning applications. There is

obvious selection bias in the news we consume about orders concerning applications, but that is partly the Court's fault for making information acquisition difficult. Designing institutions that lower the transaction costs to being informed, while helping the Court manage a public image beset by selection bias, seems like a starting place for reform that may generate some agreement.

Cole Waldhauser, Unprecedented Precedent: The Case Against Unreasoned "Shadow Docket" Precedent, 37 Const. Comment. 149 (2022)

This Article examines the precedential effects of the Supreme Court's so-called "shadow docket." Specifically, I discuss the difficulties confronting lower court judges, exploring how their application of "shadow precedent" has illuminated the dangers in attributing precedential value to the Supreme Court's emergency orders. Though the Court has long issued non-merits orders for routine procedural matters, its recent application of those orders has stirred uncertainty over their precedential weight. The established consensus was that, although public, these orders were of little precedential value. Emergency orders in particular were seen as an important but temporary tool to preserve the *status quo* until a decision on the merits was reached. Today's Court, however, has upended this agreement and transformed the "shadow docket" into a new tool--one that disrupts the *status quo* and assigns its rulings precedential effect. It is because of this unprecedented *use* of the "shadow docket" that the rules must now change. And while scholars and judges have begun to sort the Court's stay decisions into categories of precedential force, these proposals have not yet been adopted as a lodestar for lower courts.

Concerns over "shadow precedent" have permeated beyond courtrooms and classrooms, taking hold of institutional bodies like the United State Senate Committee on the Judiciary (Committee) and the Presidential Commission on the Supreme Court of the United States (Commission).

The Commission, comprised of thirty-six bipartisan "experts on the Court and the Court reform debate," was formed on April 9, 2021, in accordance with Executive Order 14023. Its primary function was to produce a report for the President that summarizes the role and history of the Court and analyzes "the principal arguments in the contemporary public debate for and against Supreme Court reform."

The report ultimately advances four proposals aimed at addressing the core "shadow docket" concerns, two of which speak to the problems of the lower courts. It first proposes that the Court "explain the majority's reasoning in emergency orders involving matters of great public debate," and that the Justices disclose their votes in those cases. This, the report suggests, would provide guidance to litigants and lower courts, display each Justice's role in the decision, and reinforce decisions with the rigor and discipline of reasoned opinions. The report then briefly proposes that the Court "clarify whether emergency rulings should have any precedential effect on lower courts," or specify "which aspects of individual rulings should or should not be construed as precedent."

In other words, the Commission recommends that the Court reinforce its orders "of great public debate" with reasoning or explain whether the orders are precedential. I suggest a shift in perspective. Rather than asking the Court to self-impose a nebulous standard, we ought to start with a rule and work backward: All non-merits orders are presumed non-precedential unless they (i) contain a published rationale and (ii) are signed by each Justice. Under the Commission's proposal, the question of whether a case merits such explanations and disclosures is a matter of pure Supreme Court discretion. In contrast, a presumption of non-precedence moves the inquiry to lower courts, where judges can readily ascertain the order's effect, the operative legal standards, and most importantly, the reasoning underlying the Court's decision. The Supreme Court would still retain significant discretion under this proposal, as the clear boundaries would enable the Court to pick and choose the orders it deems precedential, albeit with some surplus ink spilled. This draws from the Commission report but builds in a more workable standard.

Since its submission to the President on December 7, 2021, the report has attracted mixed, though mostly negative, attention. Some have praised its "academic quality," while others have deemed the entire Commission an exercise in futility. Most critics seem to agree that the report's measured tone has stunted its influence. A product of the Commission's fractured ideology, its extensive disagreement left the proposals so diluted they hardly resemble any position at all. Yet, much unlike the report's other subjects, "shadow precedent" escapes the same erosion. There is a consensus that unreasoned, unsigned emergency orders should not carry precedential weight for lower courts. This unanimity signals a global understanding of the dangers in "shadow precedent" and an appetite for immediate reform.

* * *

From the perspective of trial and appellate courts, the bottom line is simple: if the Court wishes to use its non-merits orders as precedent, it should include a substantive majority opinion and outline the operative legal standards, rather than confound lower courts with opacity. Of course, asking the justices to show their work for each and every non-merits order, of which there are thousands each year, is a bridge too far. But that is not what is asked of the Court when observers call for greater transparency. To cushion the impact of unreasoned precedent, the Court need only buttress those orders it deems illustrative on the merits--all else remains cabined, procedural, and routine. These simple but critical steps can help mend a broken docket, and begin to restore the Court's clarity, consistency, and in turn, its integrity.

Thomas P. Schmidt, Orders Without Law, 122 Mich. L. Rev. 1003 (2024) (review of Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023))

If, as is sometimes said, an "institution is the lengthened shadow of one man," Professor Stephen Vladeck makes a compelling case that, when it comes to the modern Supreme Court, the shadow in question was cast by William Howard Taft. It was Chief Justice Taft, after all, who persuaded Congress in 1925 to make most of the Court's docket discretionary. Though that change may sound like the staid stuff of federal jurisdiction, in practice, the law--known as the Judges' Bill--marked a radical rethinking of the Supreme Court's role in the constitutional order. The Court would no longer sit as a supreme appellate tribunal, resolving every dispute that wended its way up. Rather, the Court's function would be (in Taft's own words) "expounding and stabilizing principles of law for the benefit of the people of the country." And the Court would pick and choose the cases that, in its discretion, best conduced to that function.

Were that reform not enough to cement Taft's place as an institution builder, he also energetically lobbied for and oversaw the construction of a grand new marmoreal home for the Court. For years the Court had met in the Old Senate Chamber in the Capitol building, making do without office space. Taft ensconced the Court behind gleaming colonnades across the street from Congress. As much as anyone, Taft made the modern Court.

The Judges' Bill bifurcated the Court's work. On the one hand, the Court would (on the surface anyway) continue to do what it had always done: decide cases on the merits through written opinions. On the other hand, many momentous decisions would now occur at the threshold through the relatively obscure process of deciding what cases to decide in the first place--by ruling on petitions for certiorari ("cert," for short). In numerical terms, decisions at the cert stage quickly came to overwhelm "merits" decisions. These days, the Court grants only about 1.5 percent of cert petitions filed, disposing of the rest through unexplained orders. Due to the importance and visibility of decisions rendered on the "merits" docket, however, cases resolved in that manner tend to dominate public perceptions of the Court.

The Supreme Court's new building reflected the bifurcation of its work. The justices were and are officially visible to the public only when they emerge, enrobed and stately, from behind the red curtains in their ornate courtroom. They are seen in their judicial capacities when engaged in merits activities: hearing oral arguments and handing down opinions orally. The Court's other activities--including, most importantly, the Court's construction of its own agenda--unfold in private behind the imposing bronze gates guarding the justices' chambers and conference room.

The broad aim of Vladeck's new book, *The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic*, is to take readers behind those bronze gates. In impressive detail, Vladeck tours the various types of decisions the justices make in private that not only shape the more public output of the merits docket but also directly impact the real world. He gathers these activities together under the capacious term "shadow docket," coined by William Baude in 2015, to describe everything the Court does *other* than the merits docket. The shadow docket encompasses decisions on certiorari petitions, emergency applications, summary reversals, so-called GVRs (short for "grant, vacate, and remand"), and more (pp. 23-24, 87-89). The "shadow" metaphor was meant to make a point about transparency: Many of the Court's shadow docket orders "lack the transparency that we have come to appreciate in its

merits cases." Baude also suggested, somewhat tentatively, that "the Court's non-merits orders do not always live up to the high standards of procedural regularity" set by the merits docket.

Vladeck argues that the Court's decisionmaking on the shadow docket--and particularly its behavior in emergency applications--has endangered its legitimacy (pp. 276-77). He is adamant that he is not driven by disagreement with conservative outcomes; rather, he targets the process by which these outcomes have been reached. Vladeck insists "that our constitutional republic *needs* a legitimate Supreme Court, even one staffed by a majority of justices with whom many of us routinely disagree" (p. 278). It is for that reason that the Court must be protected from "delegitimizing itself" (p. 277). Vladeck's book, then, is the cry of idealism betrayed, not the crowing of cynicism fulfilled.

This Review has two goals. My first goal is to propose some reforms. These proposals orbit around a central contention: Any critique of the shadow docket and any proposed solution must depend, explicitly or implicitly, on a theory of the Court--its role in the constitutional order and how it can best serve that role.

My second goal is to suggest that, in some respects, Vladeck's critique of the shadow docket does not go far enough. One of the challenges in assessing the "shadow docket" is that it is not a single thing, but an amalgam of varied practices not susceptible to a uniform prescription. Vladeck's focus is the emergency docket, and his claim, at bottom, is that the merits docket--with its signed opinions, reasoned orders, oral argument, and so on--is the paradigm of regularity to which the Court's emergency docket should aspire. [But] it is the *shadow* docket--in particular, certiorari--that has really defined the Court's institutional identity, not the merits docket (p. 276). Everything the Court does on the merits docket happens only because of a prior shadow docket decision. And when it makes those shadow decisions, the Court has virtually unbounded discretion. The merits docket, in other words, is a small, manicured island on a vast sea of discretion. I close by suggesting that public law theory often fails to confront this stubborn institutional fact. If that is right, the debate about the shadow docket will and should long outlive the present controversy over standards for emergency relief.

I. The Rise and Rise of the Shadow Docket

Responding to a "flood of emergency applications in capital cases" in the late 1970s, the Court made three changes to its internal practices that are now fixtures of the modern shadow docket. First, the Court stopped recessing over the summer, so that it could formally act as a body at any time. Second, the Court began deciding emergency applications as a body, instead of delegating authority to rule to individual justices. Finally, the Court stopped hearing oral arguments on emergency applications, ruling instead on the papers.

Capital cases remain a constant source of applications to the emergency docket. By their nature, though, capital cases often involve party- and fact-specific issues without broader legal significance to the nation. Most of Vladeck's critique of the emergency docket, as a result, concerns not capital cases but the extension of emergency procedures incubated on the capital docket to major public law disputes.

The numbers Vladeck has compiled are striking. During the sixteen years of the Bush and Obama presidencies, the Solicitor General sought emergency relief from the Supreme Court eight times. Four of those requests were denied, and seven of eight were resolved with no noted dissent (p. 144). During the four years of the Trump presidency, the Solicitor General sought emergency relief *forty-one* times. The Court granted over three-quarters of the applications on which it gave an "up-or-down decision." After the initial travel ban ruling, all but one of those grants contained no articulated

justification--meaning that policies struck down by lower courts went into effect with no explanation. Three-quarters of the Court's "up-or-down" decisions had at least one noted dissent, and ten were publicly.

The first year of the COVID-19 pandemic was the high-water mark of the Court's recent shadow docket (mis)adventures. … In its early COVID decisions, the Court seemed to heed this distinction. When the Court first confronted a free-exercise challenge to attendance caps on religious services, the Court declined to intervene when the lower courts had not. Chief Justice Roberts, in a solo concurrence, leaned on the "indisputably clear" standard and the deference owed to "politically accountable officials." But soon after Justice Barrett's appointment, with the Chief Justice now in dissent, the Court granted a writ of injunction against a New York policy limiting attendance at houses of worship. In its per curiam order in the case, the Court made no reference to the "indisputably clear" standard. Instead, it applied the traditional four-factor test for a preliminary injunction, as if it were a trial court, which requires only that the applicants show they are "likely to prevail" on their claims. Not long after, the Court issued another writ of injunction in *Tandon v. Newsom*. In its per curiam order there, the Court articulated a broad understanding of the scope of the Free Exercise Clause that seemed to redraw the doctrinal landscape.

The Court also sent a strong signal that these per curiam orders should be treated as precedential in some sense. When the Court decided *Cuomo*, another application for an injunction was pending. Rather than rule directly on the application, the Court "treated" the application "as a petition for writ of certiorari before judgment," and then granted, vacated, and remanded to the Ninth Circuit to reconsider in light of its per curiam order. This order was a strange beast indeed. The "cert before judgment" procedure is itself extraordinary. Between 2004 and 2019, the Court did not grant certiorari before judgment a single time. In *Harvest Rock*, the Court granted cert before judgment even though no party had asked, only to GVR in light of a per curiam order. The GVR procedure is typically used to send a case back to a lower court for reconsideration in light of an intervening Supreme Court merits ruling. By employing the GVR mechanism, then, the Court was signaling that its per curiam shadow docket orders had some effect in changing or clarifying the law, necessitating a lower-court redo.

II. What to Do

A. *Defining the Problem*

In what circumstances is shadow docket intervention from the Supreme Court justifiable, and how can its shadow docket procedures be improved?

Before those questions can be answered, it is important to get a handle on the scope of the problem. The "shadow docket" is a catch-all category--referring to "everything *other* than the Court's 'merits docket'" (p. xii). A single prescription is not appropriate for such a broad class of practices. It is important, then, to specify what aspects of the shadow docket are problematic.

The shadow docket breaks down into several categories of rulings: first, rulings on procedural motions, like motions for extensions of time or for divided argument; second, GVRs; third, summary reversals; fourth, decisions on certiorari petitions (including allied agenda-setting decisions, like selecting questions to decide); and finally, emergency applications.

The vast majority of applications on the shadow docket are procedural requests, like extensions of time for filing a brief. This category of shadow docket activity is uncontroversial, and there does not appear to be any impetus for reform (p. 245). GVRs similarly tend to be routine. There are a few pockets of cases where GVRs become more exceptionable--like when the Solicitor General "confesses error" in

response to a cert petition--but they are relatively rare and not a focus of Vladeck's book.

The emergency docket … is the heart of Vladeck's book--that the Court has been doing more on its emergency docket in recent years. The numbers bear this out. During Roberts's first several years as Chief Justice, the Court averaged about five grants of emergency relief per Term. In the 2019 and 2020 Terms, the Court granted nineteen and twenty emergency applications, respectively--nearly a fourfold increase. That is a major change. Indeed, with the Court now deciding roughly sixty cases per term through full written opinions, these applications form a substantial proportion of the Court's work.

Justice Alito suggested in a recent speech that this increase was not due to a change in the Court's practices but due to the increased number of applications. The problem with this explanation is that the increase in applications may be due to the Court's increased willingness to grant emergency relief. And whatever the cause, the phenomenon still warrants attention. Beyond the raw numbers, it also seems that the *type* of issue the Court is addressing on the shadow docket has changed. Whereas it used to be that emergency applications mostly dealt with impending executions (so much so that the member of the clerk's office responsible for emergency applications was known informally as the "death" clerk), shadow docket rulings increasingly deal with salient and controversial questions of public law--abortion, immigration, religious freedom, and the like. They often define our legal reality on the ground for significant stretches of time.

B. *Some Solutions*

My contention here is that to fix the emergency docket, one needs to consider the role of the Supreme Court in the judiciary and in American democracy more broadly. Without a theory of the Court's role, there is nothing against which to measure its performance on the shadow docket.

As noted above, the Judges' Bill--pushed through Congress by Chief Justice Taft--embodied a particular vision of the Supreme Court's role: It sits to answer important questions of law for the benefit of the country, rather than to resolve disputes for the benefit of the litigants. In that respect, the Supreme Court is different from lower courts who are generally obligated to decide any case brought before them. To borrow a familiar heuristic from the federal courts literature, the Supreme Court is predominantly a law-declaration court, not a dispute-resolution court.

This aspect of the Court's institutional identity makes the emergency docket anomalous. When the Court rules on emergency applications--and even when it *grants* the application--it usually issues a one-sentence order without explanation. The Court resolves a pressing dispute without "say[ing] what the law is."

There is, of course, a good reason for that reticence: Law declaration is a difficult, time-intensive process. An emergency application for relief does not afford time for the "maturing of collective thought" that is the hallmark of the Court's deliberative approach on the merits docket.

One escape from this anomaly would be simply to say that the Court should get out of the emergency motions business entirely. But that will not work. First, sometimes granting an emergency application is necessary to make law declaration possible. For a stark example, the Court may have to stay an execution in order to have time to decide a legal question presented by the case; otherwise, the execution itself would moot the case. Second, some disputes may just be too important to leave solely to lower courts, even temporarily. It may be that the Supreme Court, for all its imperfections, is the only tribunal with national legitimacy to resolve a dispute.

That said, the modern emergency docket should be understood as a small pocket of dispute resolution (or dispute *preservation*) in a

predominantly law-declaration Court. This point yields two lessons: First, emergency docket interventions should be as rare as possible. The Supreme Court could not review every decision to grant or withhold an injunction on constitutional grounds in the lower courts. It must be selective and intervene only in extraordinary circumstances. The best strategy is to consider an application in relation to the Court's Taftian role, which is embodied in its certiorari practices. Grants of emergency relief should be limited to circumstances where emergency relief is needed to preserve the Court's capacity to furnish guidance on federal law, or where the underlying case is so exceptionally important that the Court ought to lend its national prestige. In other words, the emergency docket should be reserved for cases that are cert-worthy.

Second, the emergency docket is not generally the right venue for law declaration--for "writing a rule for the ages." The circumstances of the emergency docket call for judicial minimalism--for doing less rather than more. There is not sufficient time for reflection and collective deliberation to produce a sound opinion.

That, to me, is the problem with *Tandon*. At the time the Court's brief per curiam opinion was handed down, there was a lively debate about whether a law containing exceptions for some secular conduct was also required to make exceptions for religious practices under the Free Exercise Clause. *Tandon* purported to end that debate. The *Tandon* decision has now been cited 179 times by courts, and lower courts have treated it as precedential. Even the Court seems to have treated it as precedential, GVR'ing a case out of the Ninth Circuit "in light of *Tandon*." If *Tandon* did not effect some relevant legal change, why GVR? Whatever one thinks of *Tandon* on the merits, significant renovations of existing doctrine should not occur on the emergency docket. It is not the place to advance a controversial substantive agenda. That is especially true of *Tandon*, since the Court had an opportunity the same Term to articulate its understanding of the Free Exercise Clause on the merits docket, in *Fulton v. Philadelphia*.

Unless exigency makes it infeasible, the Court should generally strive to offer some reasoning when it rules on emergency applications with significant and potentially long-lasting effects. But the obligation to give reasons must be tempered with a dose of pragmatism. It is, practically speaking, impossible for the Court to put emergency rulings through its full deliberative process. For that reason, the Court should not use emergency rulings to authoritatively declare the law in broad strokes. Sometimes, though, the Court will be impelled to say something about the merits. When it does, it should favor minimalist dispositions that respect the abbreviated procedures the Court must follow. Relatedly, any statement the Court makes about the merits at the stay stage should not be taken as gospel by lower courts and should not be regarded as precedential by the Supreme Court in the future. It should not fetter the lower courts' deliberative processes.

When the Court does grant relief on the emergency docket, it should take measures to ensure the case can come back for a full consideration on the merits. One of Vladeck's most striking findings is that, during the Trump Administration, a large proportion of cases in which the Court granted emergency relief on the shadow docket never returned (pp. 145, 158-59). As a result, the Court's grant of relief on the emergency docket, often without articulated reasons, was the only action it took in the case (p. 155). Whatever one's views of the Court's shadow docket actions when they are merely *interim* measures, it is especially problematic for the fate of important federal or state policies to hinge entirely on such abbreviated treatment. The Court can lessen the risk of this happening by granting certiorari before judgment, setting expedited briefing schedules or decision deadlines for lower courts, or convening oral argument outside its regularly scheduled sessions. These are extraordinary

measures that should be used sparingly--but when the reality on the ground will be dictated by an emergency order and nothing else, they seem warranted.

[As for transparency,] when the Supreme Court decides a case on the merits, the opinion is almost always signed by a justice, and the vote count is disclosed. When the Court rules on an emergency application, by contrast, there is no requirement or convention to disclose how the justices voted. It is up to dissenting voters to choose whether to "note" their dissenting votes in a public fashion. As a result, an order on the emergency docket that appears to be unanimous may in fact be 5-4. The same goes for votes on whether to grant certiorari (governed by the Rule of Four). For many shadow docket critics, this is a failure of transparency.

That is true, but I am not convinced it is bad. As David Pozen has argued, "transparency is not ... a coherent normative ideal" on its own; it is, rather, an *instrumental* value--"a means to other ends." And, when it comes to the Court, it cannot be taken for granted that more transparency is an improvement. Relative to the other branches, the Court is a notably nontransparent institution. Justice Frankfurter observed that nontransparency "is essential to the effective functioning of the Court." For instance, the Court's internal deliberations are secret, and the drafting and negotiation of written opinions are secret. Few would advocate for a camera in the conference room due to a justifiable fear it would harm the deliberative process.

The question should be: Is more transparency better in the context of emergency applications, and why? One argument for transparency is that disclosing vote counts would enable holding individual justices accountable for inconsistencies. For instance, if a justice treats conservative and liberal applicants differently on the shadow docket, that difference should be made conspicuous. But there is a countervailing concern. Sometimes it is appropriate for the Court to act in its *institutional* interest. In the emergency context, particularly, it may be salutary for the Court to act in a depersonalized fashion, through per curiam opinions without the exact voting lineup disclosed. Anonymity may allow the justices to vote in a manner that best serves the Court's proper institutional role (or even the role of the judicial system as a whole), rather than in a manner that best coheres with their individual views of the law. This is especially the case when any views expressed are necessarily preliminary and provisional. When justices hastily affix their name to a legal position, it may have the effect of hardening their views and making it less likely that their position will be revisited. When I was in practice, it was quite discouraging when a justice expressed a strong view on the merits at a preliminary stage; it made the merits stage of the case feel futile, at least as to that justice.

One of the beneficial features of the Court's prior shadow docket regime, where justices acted alone on emergency applications, was that it encouraged the justices to think of their role as custodians of the institution, not as proponents of their individual views. For instance, when Justice Marshall turned aside an emergency application to halt the bombing of Cambodia--despite indicating a personal sympathy for the applicants' position--he wrote: "[W]hen I sit in my capacity as a Circuit Justice, I act not for myself alone but as a surrogate for the entire Court ...." That is a healthy attitude. And nondisclosure of votes might help justices think in terms of institutional rather than personal interests

III. Taking Certiorari Seriously

By and large, Vladeck presents the merits docket as the norm to which the shadow docket should aspire: The shadow docket should become more transparent and more principled. [But] there is an irony in much of the discourse around the shadow docket: While that discourse evinces a great distrust of summary

and discretionary decisionmaking, that kind of decisionmaking is at the foundation, not the periphery, of the modern Supreme Court. Put another way, the shadow docket is not some foreign malformation that can be readily excised. The shadow docket instead reflects the discretionary power at the very center of Chief Justice Taft's vision of the Court.

As a descriptive matter, the Supreme Court has near-absolute discretion to decide what cases it will take and what questions within those cases it will resolve. Those decisions--made almost always on petitions for certiorari--are rarely explained and are not, in any meaningful sense, limited by statutory law. The Court has promulgated a rule purporting to summarize the considerations that will inform its certiorari discretion (for instance, a "conflict" between the courts of appeals). But the rule itself states that it is "neither controlling nor fully measuring the Court's discretion." Virtually everything the Court does on its merits docket stems from an act of nearly limitless discretion. No precedent is ever overruled in the Supreme Court except by discretionary choice [to grant certiorari.]

This is the paradox of formalism in the Supreme Court: Although the Court attaches itself to formalism at the level of rhetoric, the occasions for these formalist exercises (that is, judicial opinions) are only brought into being by acts of total discretion. This paradox is the bequest of William Howard Taft and the Judges' Bill: "[T]he Court would throughout the twentieth century be required to search for ways to justify its decisions despite the fact that it was selecting its own cases to serve ends extrinsic to the cases themselves." The search continues.

This is not the place to formulate a theory of cert, let alone a grand theory of how to domesticate the Supreme Court's vast discretion. In the legal process school we can discern the lineaments of one theory. It would begin, not with ever more detailed formal rules to govern certiorari, but instead with judicial role morality.

H.L.A. Hart once suggested that judges exercising discretion ought to strive to display "characteristic judicial virtues." For Hart, those were "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision." To these I would add: intellectual humility in the face of disagreement; some deference to past occupants of the office; a sense of caution born of the anomaly of judicial power in a democracy; and a custodial concern for the institutional health of the judiciary and the rule of law more broadly.