# 2025-2026 Courts Topic Paper Proposal

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# Elevator Pitch

## Why Courts? And Why Now?

### stability of actor/mechanism

First and perhaps most importantly, the courts are a stable actor–their prerogatives are limited and do not shift and they primarily exist to review the constitutionality of the actions of the politically elected branches of the federal government (with secondary functions of evaluating the clash between the states and the federal government and evaluating competing property claims of individual citizens).  Their function has remained the same since the Founding with limited expansions of power and are typically reluctant to shift their interpretation of their role–see, for example, the lag in the shift from dual to cooperative federalism in Congress vs the Supreme Court.

The courts also have doctrines which govern the mechanisms they use and the processes by which those mechanisms are put in motion; doctrines such as mootness, ripeness, and standing mean that courts generally act predictably and consistently to evaluate cases in front of them.  Contrasted with the political branches, who have historically been less predictable and in the current moment are significantly less so than usual,  the courts as an actor has significant appeal for those of us who don’t want to wake up day one of Northwestern on a foreign policy topic to learn we are no longer in NATO {or insert other nightmare scenario here}.

### Slate could dramatically limit the involvement of the executive

Some people have been concerned about the risk that Trump just ignores the Supreme Court. There is good evidence that he won’t, but it will actually not be the key solvency argument that affs can leverage. Many of the affs would not need to be enforced by the executive branch at all. Quick hits include:

* *Loper Bright* - this case is about deference that courts give to agencies it would be enforced by U.S. district courts ruling for the agency when sued.
* *Bruen* - this case is about scope of the 2nd amendment, solvency would largely be that State gun restrictions would be upheld by courts
* *SFA v. Harvard* - while Trump could still prosecute, reversing this case would mean that universities would win in court
* *Gonzales v. Raich* - solvency would be courts striking down federal laws as outside of the U.S. commerce clause power

None of these cases would be much hurt by a Trump blocks argument. Another helpful argument is that lower level federal officials will accept the ruling even if Trump does not. Lower level officials would be liable in their personal capacity for violating court orders..

### the best negative arguments vs courts are actually good this year

Cases are evaluated by courts based on the doctrine of *stare decisis* (Latin, “the decision is fixed/stable”).  The stability of past precedents and the reliance on those precedents by the political branches, lower courts, institutions such as banks and corporations, and individual citizens, is one of the primary reasons the Supreme Court is usually loathe to overturn its past decisions.  Given the instability of many other institutions in the current environment, court stability is in and of itself a negative argument.  The Supreme Court also considers institutional legitimacy of the body–for instance, whether the political branches are likely to follow their rulings–and adjusts their decision-making accordingly (see, for instance, “the shift in time that saved nine” during the FDR administration).  Finally, individual justices or groups of justices may have their own micropolitical reasons for ruling in particular ways, such as appearing moderate, resisting the current administration, avoiding the appearance of bias, or (perhaps particularly in the case of the Chief Justice) maintaining the reputation of the Roberts Court.  While these would be relevant considerations for courts at any time, the political environment of 2025-2026 means that news articles, in-depth think tank reports, and law review articles will continue to emerge arguing that the court balance its macro and micro concerns appropriately to do the most good.

### Will not be perceived as a direct call-out to the political branches

While the topic is timely and appropriate for our political climate, it is also less likely to be perceived as a direct challenge to the executive than a foreign or domestic topic because the resolution itself would compel the courts, not the executive (or legislative) branch.  In a timeline where perceived challenges to the administration or its policies result in losses of funding or other coercive action intended to silence students and faculty, this topic sidesteps the question at least for a year by focusing on the courts.  Some versions of the slate are better for this than others, and inclusion of political hot-button cases such as *Trump v US* are obviously vital points of conversation for the topic committee and the community at-large, but it would certainly be possible to craft a slate that engages students in relevant legal and political questions but sidesteps direct confrontation with the executive branch or current administration.

### critical for students to understand legal processes

What is *habeas corpus*? What due process protections are citizens and/or non-citizens entitled to?  How does a party to a legal case demonstrate standing?  Can the courts rule on a question without a case-in-controversy?  These questions used to be largely confined to 1L exam hypotheticals, but today these are critical concepts to understanding what is happening in our country and how our actions can shape outcomes.  Past arguments for legal topics often focused on our students’ robust interest in law school, which is likely as true as it has ever been; now we must also note that our students may be confronted with law enforcement agents intent on deporting them, federal constraints on their free speech or the free exercise of their religion or right to assemble, or, for our students at Navy and West Point, orders which may ask them to detain non-citizens at the border or participate in their deportation.  To be blunt, these have become issues of day-to-day survival for many Americans and we must assume that our students are among them.  While debate is (arguably) a game, it is a game intended to have significant benefits for our students.  If debaters walk away from this topic with a deeper and more robust understanding of the US legal system, how the courts work, what the constraints on them might be, and how to work within the system to protect themselves and others, we as educators can congratulate ourselves on a job well done.

## Novices

The two primary concerns for novices are: a) is core topic literature accessible to new researchers, and b) will the topic be interesting enough to engage those without deep ties to debate and encourage them to stay in the activity long-term?

The list topic construction highly encouraged (if not obligated) by the authors means that affirmatives are clearly delineated and thus basic negative strategies are obviated–there are few “surprises” on this topic at the introductory level.  While affirmatives may have multiple avenues for advantage ground and many innovative ways to execute, the predictability granted to the negative means research projects are easy to outline and assign and even brand-new researchers have the skills to construct an argument.  The topic literature will largely be law reviews (among the most easily accessed scholarly literature) and think tank pieces with some news articles on current court cases or think pieces on court outcomes.

The saliency of the Courts as a bulwark against the excesses of the executive, and the media coverage of current court cases, should insure significant interest, again coupled with our usual sense that many of our students are law-school-bound and the above-noted relevance of many issues before the court to life in the United States in 2025.  Simply put, students will be curious about the courts because the courts matter now in a way that they haven’t in at least a generation (*Brown v Board*? *Roe*?).

## Wording–Stem

### Recommended Resolution

**The United States Federal Government should eliminate at least nearly all binding precedent from one or more of the following: [insert case list].**

Other possibilities:

–The United States Federal Government should eliminate at least nearly all precedential authority from one or more of the following: [insert case list].

–The United States Supreme Court should overturn one or more of the following: [insert case list].

### Actors

#### Recommend: The United States Federal Government

Vetted: The United States Supreme Court, The United States Federal Courts, The United States

United States Federal Government includes lower federal courts (underrule counterplan doesn’t compete) and other federal processes (Constitutional amendment counterplan doesn’t compete) but preserves States counterplan and State Courts counterplan ground–a particularly robust debate within legal literature that generates negative ground and narrows an otherwise broad and somewhat affirmative-biased topic.  For this reason, USFG is recommended over the broader “the United States”.

The United States Federal Courts would exclude the underrule counterplan but allow the amendment counterplan as well as other potential Congressional counterplans–the topic committee should consider whether in the interest of balancing aff/neg ground this creates a more ideal version of the topic.

The United States Supreme Court probably swings too far in the direction of the negative and allows a word PIC/process counterplan with potentially annoying implications for the affirmative; little legal literature meaningfully considers a situation in which most or all of the federal Circuit courts challenged SCOTUS’s authority and yet the case remained unexamined by SCOTUS for the purpose of a legitimacy DA link.

### Verbs

#### Recommend: eliminate

Vetted: “overturn”, “eliminate”, “remove”

The simplest, most elegant version of the resolution would use the verb “overturn”; the term has legal meaning as a term of art and is used throughout the literature base.  However, overturn allows the distinguish counterplan with a (contrived!) legitimacy/stare decisis net benefit which would provide too much negative ground in the offense, once again, of legal literature drawing meaningful distinctions between “overturning prior precedent” and “distinguishing future cases/limiting past cases to their facts”.  Thus, we turned to the legal definition of overturn and determined that it meant to to eliminate the *stare decisis* value of the case being overturned–it would no longer be considered by courts as binding on future decisionmaking processes.

### Nouns

#### Recommend: “binding precedent”

Vetted: “precedential authority”

We also considered the distinction made by some legal scholars between “binding” legal precedent, which is the legal finding or determination made by the majority of justices and required to be applied by lower courts, and “persuasive” precedent, which is also referred to as “dicta” and can be found in majority, concurring, and dissenting opinions–persuasive precedent is non-binding and has value only in its ability to persuade future jurists of the validity of the author’s opinion.  A resolution that refers only to “precedent” could theoretically open the affirmative floodgates and allow them to eliminate persuasive precedent, at best generating strange topicality debates over the meaning of precedent.  Including the modifying adjective “binding” points affirmatives to the requirement to functionally overturn a majority holding by the Court.

“Precedential authority” also points to legal obligations in majority opinions, as only those would have “authority”, but the inclusion of “binding” more specifically and directly excludes persuasive precedent and thus seems preferable.

## Cases

**We recommend allowing the community to choose from a menu of several different lists.**

#### Strongly Recommend Inclusion:

***Citizens United v. FEC*,  558 US 310 (2010); *Loper Bright Enterprises v Raimondo*, 603 US 369 (2024); *Gonzales v Raich*, 545 US 1 (2005)**

The three cases strongly recommended for inclusion present a variety of core affirmative arguments, are legally contentious enough to generate robust case negatives, and present valuable legal issues for our students to know and understand.

#### *Citizens United v FEC*, 558 US 310 (2010)

*Citizens United* held that laws restricting the political spending of corporations and unions are inconsistent with the Free Speech Clause of the First Amendment to the U.S. Constitution; they determined that corporations functioned as “persons” under the law and thus had the same First Amendment rights to political speech. Affirmative advantage ground includes corruption and democracy with significant impacts. Negative arguments include First Amendment freedoms, an economy DA, and a FEC reform counterplan, in addition to strong links to all of the core generics.

#### *Loper Bright Enterprises v Raimondo*, 603 US 369 (2024)

*Loper* itself overturned *Chevron*, which established a standard of administrative deference in judicial review.  Under *Loper Bright*, courts are no longer required to defer to factual findings made by administrative agencies; judges are free to evaluate competing factual claims made by industry or other defendants sued for compliance by the government.  Affirmative advantage ground is rich–an inclusive but not exhaustive list implicates the environment, agriculture, food safety, labor and employment, health care, taxation, transportation, and trade.  Negative arguments include strong solvency presses on the effectiveness/accuracy of federal agency determinations in the Trump/DOGE era (or the likelihood of enforcement lawsuits at all), a significant link to the legitimacy/*stare decisis* DA given that the case was just decided in 2024, a decent federalism DA about state leadership in the absence of federal agency presence, and a variety of advantage counterplans.

#### *Gonzales v Raich*, 545 US 1 (2005)

*Raich* is a two-for-one case in the sense that it has far-reaching consequences both in the realm of federalism, where it halted the Court’s evolution away from cooperative (or perhaps coercive?) federalism towards a neo-traditional model which would give states a great deal of independence in their own spheres of concern; and in the War on Drugs and marijuana legalization, where it affirmed the right of the federal government to regulate marijuana possession and distribution via the Controlled Substances Act even in states which had chosen to legalize or decriminalize it under state law.  Affirmatives could choose to focus on the federalism side of the holding, with particular relevance in the Trump era of states as a locus of resistance to federal policy, the marijuana side of the holding, or on a mix of both.  Negative teams have a strong argument in defense of cooperative federalism and against marijuana legalization, and a counterplan to have Congress revise the CSA to remove/reschedule marijuana, as well as links to all of the off case arguments highlighted below.

#### Likely to Include: *New York State Pistol and Rifle v Bruen, Rucho v Common Cause, Shelby County v Holder, Students for Fair Admission v Harvard*

This grouping of cases seemed slightly less relevant to the current political moment but have a strong argument for inclusion based on strong affirmative advantage areas, balanced negative case debate ground, and good links to off case arguments.  A seven case list topic with the 3 “must includes” and the 4 from this section would produce a year of excellent debates; desires for smaller slates should likely include the 3 “must includes” and 1-3 of these cases.

#### *New York State Pistol and Rifle v Bruen*, 597 US 1 (2022)

*Bruen* established a “text, history, and tradition” test for the Second Amendment, meaning that gun laws must align with a historical understanding of the Second Amendment.  Particularly in *Bruen*, the Court affirmed the right to carry in public and invalidated a state law requiring that those applying for concealed carry permits show a “special need” for a weapon for self-defense to receive one.  Affirmatives have advantage ground in the area of gun control and the many social impacts that have resulted from gun violence, they could also access advantages based off of reversing a trend towards originalism in the Court.  In addition to significant links to off case arguments, negative teams could defend originalism and also argue that gun control laws are disproportionately deployed against minorities to enhance sentences.

#### *Rucho v Common Cause*, 588 U.S. 684 (2019)

*Rucho* determined that partisan gerrymandering (that is, gerrymandering on the basis of political affiliation as opposed to racial or other immutable characteristics) is a political question and thus outside of the jurisdiction of the courts.  Affirmatives could generate advantage ground from partisan gerrymandering itself or from broader reevaluation of the political question doctrine; negative arguments could include a defense of the political question doctrine in addition to the off case arguments.

#### *Shelby County v Holder*, 570 US 529 (2013)

*Shelby County v Holder* held that Section 4(b) of the Voting Rights Act, which housed the formula for determining whether states and localities were subject to preclearance before implementing changes to their voting laws, was unconstitutional due to federalism.  Affirmative advantages could be based in federalism or democratic access to the ballot.  Negative arguments could defend the Court’s interpretation of federalism in addition to the offcase arguments.

#### *Students for Fair Admission v Harvard*, 600 US 181 (2023)

*Students for Fair Admission v Harvard*held that using race as a factor in admissions violated the Equal Protections Clause of the Fourteenth Amendment, effectively ending race-based affirmative action in college admissions.  Affirmative advantage ground would be based in the value of educational diversity, corporate diversity, or other diversity programs; advantages could also be based on precedent of shifting the interpretation of the Fourteenth Amendment.  Negative arguments could include

#### Unlikely to Include: *Dobbs v Jackson, Gregg v Georgia, Trump v Hawaii, Kelo v New London, Trump v US*

These are possible inclusions on some larger lists but we are concerned about negative ground–the literature is significantly affirmative biased and we are concerned that even a fairly strong link to one of the core generics doesn’t balance it out.

*Dobbs v Jackson*held that abortion was not a constitutional right, overturning 50 years of precedent since *Roe*.  It is the first case to reverse a previously granted constitutional right. It would likely not link to the legitimacy DA (being, itself, a reversal that hurt the court’s legitimacy) though would probably link to a midterms DA and potentially a court capital/individual justice capital DA.

*Gregg v Georgia*reinstated the death penalty after a four-year hiatus after *Furman v Georgia,* with the court asserting that racial bias in executions could be resolved by applying certain guard rails to jury consideration–including aggravating and mitigating circumstances, bifurcated trial and sentencing proceedings, and consideration of similarly situated defendants’ outcomes.  Most recent studies have determined that death sentences still carry significant racial bias and that the underlying justification of deterrence has little to no effect on potential offenders.  It would likely have fairly strong links to the off case arguments but unclear if there is much of a case neg to eliminating the death penalty.

*Trump v Hawaii,* 585 US 667 (2018) held that the Immigration and Nationality Act gives the president broad authority to suspend the entry of non-citizens into the country.  The Court chose to apply rational basis review, arguing that although the countries covered were majority Muslim ones, the facts did not support an inference of religious discrimination.  Most scholarship is broadly critical of the use of rational basis review and supports the dissent’s view that the policy was in fact rooted in religious bias.

*Kelo v New London* is a takings clause case–the Court ruled that New London’s seizure of private property for use by a private developer did not violate the Fifth Amendment’s requirement that such seizures be only for “public use”.  Most commentators from across the political spectrum are critical of the decision, meaning that even a disad link might be in short supply.

*Trump v US*extended presidential immunity to all “official acts”, including absolute immunity for all actions within the exclusive purview of the President such as pardons, regulating the federal bureaucracy, enforcement of laws, and the Commander-in-Chief powers.  This case actually has a strong “strong executive power good” case negative but it conflicts with the “court key to check executive” bent of most of the core generics and thus would require an entirely separate negative strategy.

### Negative Ground

#### Legitimacy/Stare Decisis DA

This disadvantage argues that overturning established precedent makes the court appear less legitimate in the eyes of the public and the elected branches, meaning a) the decision won’t be enforced which turns case solvency and b) Congress/the President will ignore other court decisions which will destroy the separation of powers and thus democracy.

In the past this disadvantage seemed far fetched, given how few and far-between instances of court delegitimacy and violations of SOP had occurred; in the current administration the evidence seems quite good that the president is consistently on the brink of ignoring court orders or having small violations of SOP spill over into larger ones, which should provide excellent evidence on both sides of this debate.

#### Court PC DA

This disadvantage is a twist on the Legitimacy DA outlined above; instead of the link being a break with established precedent, it instead argues that the Court is saving its political capital to use to pressure the President into adhering to the Constitution.  The plan would shift the justices away from that pressure.  Impact scenarios would be similar to the Legitimacy DA–the breakdown of the Constitution/democracy.

#### Individual Justice PC

This disadvantage will likely focus on Chief Justice Roberts, who in addition to preserving his own public persona as a moderate, has a vested interest in the moderation of the Court which bears his name.  The argument posits that Roberts, in an attempt to appear moderate, will balance a liberal vote with a conservative one; thus a particular upcoming decision in front of the Court will lose on a 5-4 which it otherwise would have won.  The impact could be one of the SOP/democracy/Constitution impacts outlined above but there are also many other cases coming before the Court this term which allows for impact diversity.

#### Federalism

This disadvantage posits that the locus of resistance to the Trump administration is currently Democratic-led states; the affirmative shifts that locus to legal action in the courts which is bad.

#### Grassroots Movements DA

This disadvantage posits that the locus of resistance to the Trump administration is localized bottom-up grassroots movements and the plan shifts that locus to legal action in the courts, subverting movements that would result in more/better change than the slow, measured legal shifts of the affirmative.

#### Midterms DA

While any case may have a tenuous link to a midterms DA, some cases such as *Students for Fair Admission v Harvard, Bruen, Dobbs*, and *Gregg* may link harder due to public feeling about the outcomes of the cases.  Depending on what sorts of debates the community wants, this may be an argument for or against inclusion of more politically volatile cases.

### Critical Ground

There are a variety of critical strategies involving the courts—substantial links to afropessimism, queer theory, settlercolonialism, and capitalism all allow both negative and affirmative teams a great deal of latitude in accessing critical arguments within a broad interpretation of the resolution.

Afropessimism arguments can be rooted in Critical Race Theory, which argues that the legal system is fundamentally anti-Black and incapable of providing real justice; a courts topic allows this literature to be understood in the context in which it was originally posited.

Teams can also read settler colonialism kritiks, emphasizing that courts uphold colonial structures and erase Indigenous sovereignty, or ableism Ks, which criticize how legal standards reinforce carceral control over disabled people.

Courts are also critical agents of capitalism within our democratic structure, allowing teams to reject the law as a mechanism for protecting individual property.

On the affirmative, critical teams could reject traditional legal advocacy by deconstructing legal epistemologies, centering marginalized voices, or refusing the resolution entirely—arguing, for example, that debating court-based reform distracts from ongoing state violence.

# Appendix/Card Doc

# Wording

## Stem

### United States Federal Government

#### United States Federal Government is the central government of the United States

Ballotpedia, No Date ("Federal government", Ballotpedia, <https://ballotpedia.org/Federal_government>, DoA 4/26/2025, DVOG)

**The federal government of the United States is the central reigning governmental body of the United States,** established by the United States Constitution.[1] The federal government is **made of three branches: legislative, executive and judicial**.[1] State and local governments are modeled after the federal government. Under the Tenth Amendment, all powers not granted to the federal government are reserved for the states and the people.

#### The United States Federal Government is the legislative, executive and judiciary

Oklahoma Historical Society, No Date ("Federalism and Governments in the United States", Oklahoma Historical Society | OHS, <https://www.okhistory.org/learn/government3>, DoA 4/26/2025, DVOG)

The United States Government

**The United States is a constitutional federal republic**. The Constitution is the supreme law of the land, establishing the rules of operation for the government. “Republic” is a word that describes a representative government. “**Federal” means a national government with certain specific powers and responsibilities**, and state governments with a different set of powers and responsibilities. The federal government has limited power over the fifty states, and the state government has power within the state guided by federal guidelines. **The United States government is organized into three branches with different areas of responsibility: the legislative, the executive, and the judiciary**.

### United States Federal Courts

#### The United States Federal Courts have three levels—district, circuit, and Supreme—and are distinct from state courts

Office of the United States Attorneys, No Date ("Introduction To The Federal Court System", No Publication, <https://www.justice.gov/usao/justice-101/federal-courts>, DoA 4/26/2025)

**The federal court system has three main levels: district courts (the trial court), circuit courts which are the first level of appeal, and the Supreme Court** of the United States, the final level of appeal in the federal system. There are 94 district courts, 13 circuit courts, and one Supreme Court throughout the country.

Courts in the federal system work differently in many ways than state courts. The primary difference for civil cases (as opposed to criminal cases) is the types of cases that can be heard in the federal system. **Federal courts are courts of limited jurisdiction, meaning they can only hear cases authorized by the United States Constitution or federal statutes**. The federal district court is the starting point for any case arising under federal statutes, the Constitution, or treaties. This type of jurisdiction is called “original jurisdiction.” Sometimes, the jurisdiction of state courts will overlap with that of federal courts, meaning that some cases can be brought in both courts. The plaintiff has the initial choice of bringing the case in state or federal court. However, if the plaintiff chooses state court, the defendant may sometimes choose to “remove” to federal court.

Cases that are entirely based on state law may be brought in federal court under the court’s “diversity jurisdiction.” Diversity jurisdiction allows a plaintiff of one state to file a lawsuit in federal court when the defendant is located in a different state. The defendant can also seek to “remove” from state court for the same reason. To bring a state law claim in federal court, all of the plaintiffs must be located in different states than all of the defendants, and the “amount in controversy” must be more than $75,000. (Note: the rules for diversity jurisdiction are much more complicated than explained here.)

Criminal cases may not be brought under diversity jurisdiction. States may only bring criminal prosecutions in state courts, and the federal government may only bring criminal prosecutions in federal court. Also important to note, the principle of double jeopardy – which does not allow a defendant to be tried twice for the same charge – does not apply between the federal and state government. If, for example, the state brings a murder charge and does not get a conviction, it is possible for the federal government in some cases to file charges against the defendant if the act is also illegal under federal law.

Federal judges (and Supreme Court “justices”) are selected by the President and confirmed “with the advice and consent” of the Senate and “shall hold their Offices during good Behavior.” Judges may hold their position for the rest of their lives, but many resign or retire earlier. They may also be removed by impeachment by the House of Representatives and conviction by the Senate. Throughout history, fifteen federal judges have been impeached due to alleged wrongdoing. One exception to the lifetime appointment is for magistrate judges, which are selected by district judges and serve a specified term.

District Courts

The district courts are the general trial courts of the federal court system. Each district court has at least one United States District Judge, appointed by the President and confirmed by the Senate for a life term. District courts handle trials within the federal court system – both civil and criminal. The districts are the same as those for the U.S. Attorneys, and the U.S. Attorney is the primary prosecutor for the federal government in his or her respective area.

District court judges are responsible for managing the court and supervising the court’s employees. They are able to continue to serve so long as they maintain “good behavior,” and they can be impeached and removed by Congress. There are over 670 district court judges nationwide.

Some tasks of the district court are given to federal magistrate judges. Magistrates are appointed by the district court by a majority vote of the judges and serve for a term of eight years if full-time and four years if part-time, but they can be reappointed after completion of their term. In criminal matters, magistrate judges may oversee certain cases, issue search warrants and arrest warrants, conduct initial hearings, set bail, decide certain motions (such as a motion to suppress evidence), and other similar actions. In civil cases, magistrates often handle a variety of issues such as pre-trial motions and discovery.

Federal trial courts have also been established for a few subject-specific areas. Each federal district also has a bankruptcy court for those proceedings. Additionally, some courts have nationwide jurisdiction for issues such as tax (United States Tax Court), claims against the federal government (United States Court of Federal Claims), and international trade (United States Court of International Trade).

Circuit Courts

**Once the federal district court has decided a case, the case can be appealed to a United States court of appeal. There are twelve federal circuits that divide the country into different regions**. The Fifth Circuit, for example, includes the states of Texas, Louisiana, and Mississippi. Cases from the district courts of those states are appealed to the United States Court of Appeals for the Fifth Circuit, which is headquartered in New Orleans, Louisiana. Additionally, **the Federal Circuit Court of Appeals has a nationwide jurisdiction over very specific issues** such as patents.

Each circuit court has multiple judges, ranging from six on the First Circuit to twenty-nine on the Ninth Circuit. Circuit court judges are appointed for life by the president and confirmed by the Senate.
**Any case may be appealed to the circuit court once the district court has finalized a decision** (some issues can be appealed before a final decision by making an “interlocutory appeal”). Appeals to circuit courts are first heard by a panel, consisting of three circuit court judges. Parties file “briefs” to the court, arguing why the trial court’s decision should be “affirmed” or “reversed.” After the briefs are filed, the court will schedule “oral argument” in which the lawyers come before the court to make their arguments and answer the judges’ questions.

Though it is rare, the entire circuit court may consider certain appeals in a process called an “en banc hearing.” (The Ninth Circuit has a different process for en banc than the rest of the circuits.) En banc opinions tend to carry more weight and are usually decided only after a panel has first heard the case. Once a panel has ruled on an issue and “published” the opinion, no future panel can overrule the previous decision. The panel can, however, suggest that the circuit take up the case en banc to reconsider the first panel’s decision.

Beyond the Federal Circuit, a few courts have been established to deal with appeals on specific subjects such as veterans claims (United States Court of Appeals for Veterans Claims) and military matters (United States Court of Appeals for the Armed Forces).

Supreme Court of the United States

**The Supreme Court of the United States is the highest court in the American judicial system, and has the power to decide appeals on all cases brought in federal court or those brought in state court but dealing with federal law.** For example, if a First Amendment freedom of speech case was decided by the highest court of a state (usually the state supreme court), the case could be appealed to the federal Supreme Court. However, if that same case were decided entirely on a state law similar to the First Amendment, the Supreme Court of the United States would not be able to consider the case.

**After the circuit court or state supreme court has ruled on a case, either party may choose to appeal to the Supreme** **Court**. Unlike circuit court appeals, however, the Supreme Court is usually not required to hear the appeal. Parties may file a “writ of certiorari” to the court, asking it to hear the case. If the writ is granted, the Supreme Court will take briefs and conduct oral argument. If the writ is not granted, the lower court’s opinion stands. Certiorari is not often granted; less than 1% of appeals to the high court are actually heard by it. The Court typically hears cases when there are conflicting decisions across the country on a particular issue or when there is an egregious error in a case.

The members of the Court are referred to as “justices” and, like other federal judges, they are appointed by the President and confirmed by the Senate for a life term. There are nine justices on the court – eight associate justices and one chief justice. The Constitution sets no requirements for Supreme Court justices, though all current members of the court are lawyers and most have served as circuit court judges. Justices are also often former law professors. The chief justice acts as the administrator of the court and is chosen by the President and approved by the Congress when the position is vacant.

The Supreme Court meets in Washington, D.C. The court conducts its annual term from the first Monday of October until each summer, usually ending in late June.

#### Federal Courts—Supreme, Circuit Court of Appeals, District Courts, Bankruptcy Courts, Special Jurisdiction

Federal Bar Association, No Date (About U.S. Federal Courts", Federal Bar Association, https://www.fedbar.org/for-the-public/about-u-s-federal-courts/, DoA 4/26/2025, DVOG)

**The Federal Court system is separated into five main areas:**

*1. The Supreme Court of the United States***The United States Supreme Court consists of the Chief Justice of the United States and eight associate justices.** At its discretion, and within certain guidelines established by Congress, **the Supreme Court each year hears a limited number of the cases it is asked to decide.** Those cases may begin in the federal or state courts, and they usually involve important questions about the Constitution or federal law. For more information about the Supreme Court, [visit the Supreme Court’s official website](http://www.supremecourt.gov/).

*2. U.S. Courts of Appeals*
**The 94 U.S. judicial districts are organized into 12 regional circuits, each of which has a United States court of appeals**. A court of appeals hears appeals from the district courts located within its circuit, as well as appeals from decisions of federal administrative agencies. In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.

*3. U.S. District Courts*
**The United States district courts are the trial courts of the federal court syste**m. Within limits set by Congress and the Constitution, the district courts have jurisdiction to hear nearly all categories of federal cases, including both civil and criminal matters. Every day hundreds of people across the nation are selected for jury duty and help decide some of these cases. There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico. Three territories of the United States–the Virgin Islands, Guam, and the Northern Mariana Islands–have district courts that hear federal cases, including bankruptcy cases. See the map above or view a [Printable Circuit/District map](http://www.uscourts.gov/uscourts/images/CircuitMap.pdf) at the U.S. Courts website.

*4. U.S. Bankruptcy Courts*Each of the 94 federal judicial districts handles bankruptcy matters, and in almost all districts, bankruptcy cases are filed in the bankruptcy court. Bankruptcy cases cannot be filed in state court. Bankruptcy laws help people who can no longer pay their creditors get a fresh start by liquidating their assets to pay their debts, or by creating a repayment plan. Bankruptcy laws also protect troubled businesses and provide for orderly distributions to business creditors through reorganization or liquidation. These procedures are covered under Title 11 of the United States Code (the Bankruptcy Code). The vast majority of cases are filed under the three main chapters of the Bankruptcy Code, which are Chapter 7, Chapter 11, and Chapter 13.

*5. U.S. Courts of Special Jurisdiction*
These include the U.S. Court of Appeals for the Armed Forces, the U.S. Court of Federal Claims, the U.S. Court of International Trade, the U.S. Tax Court, the U.S. Court of Appeals for Veterans Claims, and the Judicial Panel on Multidistrict Litigation.

### Eliminate

#### “Eliminate” includes vacating and overturning

Risch and Tucker 2024 (Michael A. Risch, Vice Dean and Professor of Law, Villanova University & Lisa A. Tucker, Professor of Law, Drexel University, Canceling Appellate Precedent, 76(1) Florida Law Review 175 (2024). <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1129&context=facpubs>, DoA 4/27/2025, DVOG)

In recent years, since soon after Justice Amy Coney Barrett assumed her seat on the United States Supreme Court, **the Court has erased more than thirteen politically and legally significant opinions** written by the federal appeals courts. In deciding to vacate rather than simply deny certiorari, **the Court has eliminated**—with one sentence orders that offer no explanation—**fully briefed, argued, and reasoned opinions on issues such as abortion, the Voting Rights Act, President Trump’s travel ban, and the Emoluments Clause**. Consequently, progressive victories in those areas no longer stand.

#### “Eliminate” means no precedent is left

Risch and Tucker 2024 (Michael A. Risch, Vice Dean and Professor of Law, Villanova University & Lisa A. Tucker, Professor of Law, Drexel University, Canceling Appellate Precedent, 76(1) Florida Law Review 175 (2024). <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1129&context=facpubs>, DoA 4/27/2025, DVOG)

And **the vacation of these decisions is not merely important because the decisions themselves have been wiped off the books. Their elimination is noteworthy because no law is left in their stead; precedent has literally been erased**. The same issues are now ripe for relitigation, perhaps before different judges, perhaps with different results that will set different precedent, and now without prior precedent or circuit split in the vacuum. **Litigants who watch the Court have begun to perceive the Court’s signals that, if a lower court case does not turn out as anticipated or desired, there may well be a second bite at the apple. This pernicious turn of procedure may seem minor until examined in light of the big picture of issues such as voting rights, immigration rights, and executive power**, in which the butterfly effect of one vacated case could lead to entirely new and different branches of law made for generations.

#### Eliminating precedents functions as an overturn

Gentithes, 2020 (Michael Gentithes, Assistant Professor, University of Akron School of Law, Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare, Decisis, 62 Wm. & Mary L. Rev. 83 (2020), <https://scholarship.law.wm.edu/wmlr/vol62/iss1/3>, DoA 4/27/2025, DVOG)

Nelson admits that some may disagree that demonstrably erroneous precedents are readily identifiable; **if fewer such precedents exist, efforts to eliminate them will likely generate “false positives,” unnecessarily overruling a great many decisions and creating more practical problems than the very few erroneous precedents did in the first place**.214 He counters that, if the sources of legal decisions are so radically indeterminate that no “correct” answers can be identified and thus almost any interpretation is permissible, then precedent decisions will also be radically indeterminate to the point that subsequent Justices can reach any decision they like while claiming they are upholding the precedent.

### Overturn

#### Overturning sets aside a decision made by a prior court

McKee, 2023 (Adam J, Doc’s CJ Glossary, Professor of Criminal Justice, University of Arkansas at Monticello, “Overturn: Definition”, <https://docmckee.com/cj/docs-criminal-justice-glossary/overturn-definition/>, DoA 4/27/2025,DVOG)

The term **overturn is a legal term that describes the process of setting aside or overruling the decision of a lower court by a higher court.** In the legal system, the decision of a lower court can be challenged or appealed by a party who believes that the decision was incorrect or unjust.

**Overturning a lower court’s decision is a critical aspect of the legal system that ensures that justice is served and that the law is applied correctly**. When a decision is overturned, it means that the higher court has determined that the lower court made an error of law or fact that impacted the outcome of the case.

Overturning a decision can occur at various stages of the legal process. For example, **an appellate court may overturn a trial court’s decision, or a higher court may overturn a decision made by an intermediate court**. In some cases, **the decision may be overturned by the same court that issued the original decision but with a different panel of judges.**

**The grounds for overturning a decision can vary depending on the case** and the applicable law. Generally, **a decision can be overturned if it is found to be based on incorrect or incomplete information, if there was a procedural error, or if the decision is contrary to the law.**

Overturning a decision can have significant implications for the parties involved in a case. For example, if a criminal conviction is overturned, the defendant may be released from custody or have their sentence reduced. In a civil case, overturning a decision can impact the outcome of the case and may result in damages or other remedies for the party affected by the decision.

#### Overturn means to change or cancel a prior decision

LSD Law, No Date (<https://www.lsd.law/define/overturn>, DoA 4/27/2025, DVOG)

Term: OVERTURN

Definition: **When a decision made by a court or authority is changed or cancelled, it is called an overturn.** For example, if a rule that has been in place for a long time is suddenly changed, it can be said that it has been overturned.

A more thorough explanation:

Definition: **To change a decision or ruling so that it is the opposite of what it was before**.

Example: The [Supreme Court](https://www.lsd.law/define/supreme-court) overturned the [lower court](https://www.lsd.law/define/lower-court)'s decision and ruled in favor of the defendant.

Explanation: In this example, **the Supreme Court changed the decision made by the lower court and ruled in the opposite way.** This is an illustration of the definition of overturn.

### Overrule

#### Overruling means the precedent is no longer controlling rule of law

Cornell’s Legal Information Institute, 2020 (August 2020, “Overrule”, <https://www.law.cornell.edu/wex/overrule>, DoA 4/27/2025, DVOG)

In the second circumstance, **when an appellate court overrules a case, the appellate court overturns a precedent** . As a result, **the precedent is no longer the controlling rule of law**. For example, **in the landmark case Brown v. Board of Education , the Supreme Court ruled that segregating children in public schools solely based on race violated the Fourteenth Amendment** Equal Protection Clause . With this decision, **the Supreme Court overruled its prior decision in Plessy v. Ferguson** that separate but equal accommodations based on race did not violate the Fourteenth Amendment . Thereafter, **Brown v. Board of Education , not Plessy v. Ferguson , became the controlling rule of law** for issues on separate but equal accommodations based on race.

#### Overruling invalidates precedent

Law.com Legal Dictionary, No Date (Overruling The,"Legal Dictionary", Law Legal Dictionary, <https://dictionary.law.com/Default.aspx?selected=1425>, DoA 4/27/2025, DVOG)

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| --- |
| v. 1) to reject an attorney's objection to a question to a witness or admission of evidence. By overruling the objection, the trial judge allows the question or evidence in court. If the judge agrees with the objection, he/she "sustains" the objection and does not allow the question or evidence. 2) **to decide (by a court of appeals) that a prior appeals decision on a legal issue was not correct and is therefore no longer a valid precedent on that legal question.** |

### Precedent

#### Precedent is the legal reasoning of previous rulings applied to similar future circumstances

Moore, 2012 (Ryan M. Moore, Volume 84, No. 3, Spring 2012, “I Concur! Do I Matter?: Developing a Framework for Determining the Precedential Influence of Concurring Opinions", Temple Law Review, <https://www.templelawreview.org/comment/moore-84/>, DoA 4/17/2025, DVOG)

**Precedent**, in its literal and practical form, **is not merely a judicial creation**. As most familiar with basic legal concepts are aware, **there are, in fact, different forms of precedent**.71 **Legal rules divined by a higher-ranking court may automatically be perceived as mandatory precedents** for lower courts.72 This primarily results from the judicial system’s hierarchical structure—lower court decisions are subject to review of higher courts, whose decisions then bind those lower courts in future cases.

Alternatively, **precedents can be established over time by consistent positive subsequent treatment,** which builds strength for a legal rule.73 Before applying a precedent, however, one must first identify a precedent to apply. Generally, **courts identify legal precedents or influences through a variety of factors. One such factor is the similarity of factual circumstances between the present suit and a previous ruling**.74 **Courts apply the “precedent”—that is, the legal reasoning—of the previous ruling to ensure that similarly situated parties receive the same treatment** in like cases. For instance, a judge would most likely refrain from applying the rationale of a case involving maritime law as a precedent for a case involving arson.75

Further, societal norms or community ideologies may have an effect on how a judge views relevant facts in determining identifiable precedents.76 Once a precedent is identified, its application to a present case is generally justified in two ways. **First, there are arguments for precedent. Those arguments are readily familiar: where a set of facts was treated a certain way**, **when those facts once again appear** at a future time, because of “historical pedigree,” **we should treat those facts the same way once again.77 Second, adherence to precedent has been viewed as a “justification.” That is, a judge initially defaults to precedent and then, later, to explain his adherence to a previous mode of decision, he uses precedent to justify his decision for doing so**, claiming, “we have always done it that way,” or, “we have never done it any other way.”78 Viewing concurring opinions in light of these two concepts, adherence to a concurring opinion (as opposed to the lead opinion that concurrence is attached to) may be viewed only slightly differently: “this has been said before” or “this has been an idea percolating for many years” in circumstances with relatively similar facts.

#### Holdings create precedent, not dicta

Kozel, 2014 (Randy J. Kozel, Notre Dame Law Professor, *The Scope of Precedent*, 113 Mich. L. Rev. 179 2014, <https://repository.law.umich.edu/mlr/vol113/iss2/1>, DoA 4/17/2025, DVOG)

The classic account of precedential scope revolves around a stark dichotomy. **Judicial holdings receive deference in future cases. Dicta, by contrast, have no constraining force and are relevant only to the extent that their reasoning is persuasive.**34 Chief Justice Marshall made this point nearly two centuries ago in Cohens v. Virginia, noting that, while expressions that “go beyond the case . . . may be respected,” they do not control “in a subsequent suit when the very point is presented for decision.”35 The same principle is evident in the Supreme Court’s modern case law.36 The Court’s decisions regularly confirm the nonbinding nature of dicta.37 By way of illustration, consider the Court’s recent echo of Cohens in noting that “we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct.”38 Consider, too, Justice Scalia’s assertion that, even if dicta are “repeated” over time, they are “not owed stare decisis weight,”39 as well as his statement that dicta are “binding upon neither” the Supreme Court nor the inferior courts.40 **Whenever a court treats a proposition as undeserving of deference because it was beyond “the narrow point decided,” the holding–dicta distinction is at work.**41 **The Supreme Court has described the holding of a case as including its “final disposition” in addition to “the preceding determinations ‘necessary to that result.’”**42 Holdings must also be grounded in “the adjudicated facts”;43 hypothetical statements are the stuff of dicta. On this view, **precedential effect attaches to the application of a targeted legal rule to a discrete set of facts that were actually presented in the underlying dispute**. It is true, of course, that Supreme Court opinions are full of logical arguments and prescriptions for the future. As Justice Stevens has noted, “[v]irtually every one of the Court’s opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases.”44 Even so, it is important to recognize that the distinction between holdings and dicta would deny deference to unnecessary and hypothetical statements even when they were clearly intended to guide future courts.45 Such statements may or may not be convincing on the merits, but in no event would they warrant deference beyond their persuasive force.

#### Plurality decisions set precedent by determining parts of the opinions where a majority of justices agree and applying only those

Thurmon, 1992 (Citation. Mark Alan Thurmon, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 Duke Law Journal No 2 1992, 419-468, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3205&context=dlj>, DoA 4/17/2025, DVOG)

Traditionally, **only the results of plurality decisions were considered authoritative.** At first, this limitation was rarely questioned, as the Supreme Court rendered fewer than twenty noclear-majority decisions before 1938.4 As plurality decisions became more common, however, courts began to deviate from the traditional approach.' **Many courts simply followed plurality opinions as though they were Opinions of the Court**;6 other courts looked for a logical connection or implicit agreement between the plurality and concurring opinions;7 and still other courts remained true to the classical view, limiting plurality decisions to their resuits.' With no guidance from the Supreme Court on the propriety of these different approaches, plurality decisions frequently gave rise to "collective confusion as to what [was] held by the Court."9 Undertaking to end this confusion, **the Supreme Court adopted the "narrowest grounds" doctrine in *Marks v. United States."°***

The Court explained the doctrine as follows: “**When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds** ...”

**One way to determine the "narrowest grounds" is to look for the opinion "most clearly tailored to the specific fact situation before the Court and thus applicable to the fewest cases**, in contrast to an opinion that takes a more absolutist position or suggests more general rules. ' 12 The "narrowest grounds" doctrine will "identify as authoritative the standard articulated by a Justice or Justices that would uphold the fewest laws as constitutional" or "that... would invalidate the fewest laws as unconstitutional."13 The *Marks* rule, therefore, is intended to limit the precedential reach of plurality decisions, while ensuring that they are followed by lower courts.

#### Precedent is the *ratio decidendi*—the rationale for the decision

Thurmon, 1992 (Citation. Mark Alan Thurmon, When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions, 42 Duke Law Journal No 2 1992, 419-468, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3205&context=dlj>, DoA 4/17/2025, DVOG)

**Early legal scholars divided judicial decisions into two parts: the ratio decidendi (reason for deciding) and obiter dictum (stated by the way)." This basic distinction limits a case's authority to its ratio decidendi, which is comprised of the postulates or conclusions necessary to reach the result** in that case. This conservative position derives from the function of the common law judiciary to resolve only the dispute before the court. 9 The difficulty lies in determining what constitutes binding ratio and what is merely dictum, as judges seldom describe their rulings using these terms. A technique for finding the governing doctrine of a case was provided by Eugene Wambaugh, a prominent English legal scholar during the late nineteenth and early twentieth centuries: In order to make the test, let him first frame carefully the supposed proposition of law. Let him then insert in the proposition a word reversing its meaning. Let him then inquire whether, if the court had conceived the new proposition to be good, and had had it in mind, the decision could have been the same. If the answer be affirmative, then, however excellent the original proposition may be, the case is not a precedent for that proposition, but if the answer be negative the case is a precedent for the original proposition and possibly for other propositions also .... In short, **when a case turns ont only one point the proposition or doctrine of the case, the reason of the decision, the ratio decidendi, must be a general rule without which the case must have been decided otherwise**.

**All propositions that do not satisfy Wambaugh's test are merely dicta. Wambaugh's method, based on principles of judicial restraint, remains useful for determining which portions of a decision warrant precedential respect.**

During the first half of the twentieth century, several English legal scholars attempted to refine Wambaugh's method. The most significant and lasting contribution was made by Professor A.L. Goodhart in his important article, Determining the Ratio Decidendi of a Case. Goodhart emphasized the importance of determining which facts the judge deemed material.' According to Goodhart, **the authoritative ratio decidendi of a case is the proposition or propositions required to reach the result in that case given the facts as seen by the judge**. The judge's perspective and analysis of the facts must be used, as they formed the basis for the decision. Goodhart considered the expressed reasoning of the judge important, for this reasoning provided valuable insight into which facts the judge felt were material. However, Goodhart explained, **the judge's reasoning may not reflect the binding doctrine of the case as many important rules of law result from faulty reasoning**, and moreover, some reported decisions simply contained no reasoning.

 Goodhart's writings on ratio decidendi set off a flurry of activity among English legal scholars.' Goodhart's critics focused on his refusal to accept a judge's expressed reasoning as governing 9 Goodhart's and Goodhart's critics' approaches to determining the ratio decidendi of a case have been described, respectively, as prescriptive and descriptive? Goodhart's approach is prescriptive, because it looks for the logically necessary proposition, the rational link between the judge's view of the facts and his decision. Goodhart's critics' approach, on the other hand, is descriptive, holding that "the ratio decidendi is the rule or principle that the precedent-setting court considered to be necessary for its decision.” At least one commentator argued that the two rationes-the prescriptive and descriptive-would converge.' But a variant of Goodhart's approach seems to have prevailed: "**The ratio decidendi of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."**

#### Precedents are judicial decisions that establish rules and principles to inform future decisions

Murrill 2018 (Brandon J Murrill, Congressional Research Service, 9-24-2018, "The Supreme Court’s Overruling of Constitutional Precedent", No Publication, <https://www.congress.gov/crs-product/R45319>, DoA 4/17/2025, DVOG)

By exercising its power to determine whether federal and state government actions are constitutional,1 **the Supreme Court has developed a large body of judicial decisions, or "precedents," interpreting the Constitution**.2 **Rules and principles established in prior cases inform the Court's future decisions**.3 **The role that precedent plays in the Court's decisions on highly controversial issues has prompted debate over whether the Court should follow or overrule rules it established in prior decisions**.4 **Such questions underscore the challenges the Court faces in maintaining stability in the law by adhering to precedent under the doctrine of stare decisis so that parties may rely upon its decisions,5 while at the same time correcting prior decisions** that rest on faulty reasoning, unworkable standards, abandoned legal doctrines, or outdated factual assumptions.6

One notable example of a precedent that has prompted significant debate is the Supreme Court's 1992 decision in Planned Parenthood v. Casey.7 In Casey, a plurality of Justices reaffirmed the core aspects of the Court's earlier holding in Roe v. Wade that a woman has a protected constitutional liberty interest in terminating her pregnancy prior to fetal viability, stating that the essential holding of Roe "should be retained."8 But the plurality's opinion in Casey suggests that several Justices who voted to reaffirm Roe had significant doubts about the quality of its reasoning.9 Despite these doubts, the Casey plurality decided that other considerations required reaffirming Roe's central holding, including societal reliance on a fundamental constitutional right; concern for the Court's legitimacy as an institution; and the principle that the Court should adhere to rules in its prior decisions (i.e., stare decisis), particularly when a case implicates a highly divisive issue like abortion.10

Although the Supreme Court's decision to retain a precedent may prompt significant debate, the Court's overruling of precedent can also be controversial, as the Court's 2010 decision in the campaign finance regulation case Citizens United v. FEC illustrated.11 That case established that the First Amendment prohibits governments from restricting independent expenditures on political speech related to an election campaign by corporations, labor unions, and other organizations.12 In reaching this result, the Court overturned its decision in Austin v. Michigan State Chamber of Commerce, which had held that the government could prohibit political speech funded from a corporation's general treasury fund based on the fact that the speaker was a corporation.13 The Court's overruling of Austin in Citizens United sparked debate about whether the Court should have adhered more strictly to the principle of stare decisis.14

#### Precedent guided by the doctrine of *stare decisis*

Murrill 2018 (Brandon J Murrill, Congressional Research Service, 9-24-2018, "The Supreme Court’s Overruling of Constitutional Precedent", No Publication, <https://www.congress.gov/crs-product/R45319>, DoA 4/17/2025, DVOG)

**Stare decisis, which is Latin for "to stand by things decided,"23 is a judicial doctrine under which a court follows the principles, rules, or standards of its prior decisions or decisions of higher tribunals when deciding a case with arguably similar facts**.24 **The doctrine of stare decisis has "horizontal" and "vertical" aspects. A court adhering to the principle of horizontal stare decisis will follow its prior decisions absent exceptional circumstances (e.g., the Supreme Court following its decisions unless they have become too difficult for lower courts to apply**).25 By contrast, **vertical stare decisis binds lower courts to follow strictly the decisions of higher courts within the same jurisdiction** (e.g., a federal court of appeals must follow the decisions of the U.S. Supreme Court, the federal court of last resort).26 This report addresses how the U.S. Supreme Court determines whether to overrule its prior decisions. Thus, this report discusses only horizontal stare decisis.

**The Supreme Court applies the doctrine of stare decisis by following the rules of its prior decisions unless there is a "special justification"—or, at least, "strong grounds"—to overrule precedent**.27 In adopting this approach, the Court has rejected a more formalistic view of stare decisis that would require it to adhere to its prior decisions regardless of the merits of those decisions or the practical implications of retaining or discarding precedent.28 Instead, while the Court has stated that its precedents are entitled to respect and deference,29 **the Court considers the principle of stare decisis to be a discretionary "principle of policy" to be weighed and balanced along with its views about the merits of the prior decision and several pragmatic considerations** when determining whether to retain precedent in interpreting the Constitution30 or deciding whether to hear a case.31 **The Court may avoid having to decide whether to overrule precedent if it can distinguish the law or facts of a prior decision from the case before it or, rather, limit the prior decision's holding** so that it is inapplicable to the instant case.32

#### Precedent/stare decisis key to court legitimacy (until it isn’t!)

Murrill 2018 (Brandon J Murrill, Congressional Research Service, 9-24-2018, "The Supreme Court’s Overruling of Constitutional Precedent", No Publication, <https://www.congress.gov/crs-product/R45319>, DoA 4/17/2025, DVOG)

Reasons for the Supreme Court's Adherence to Principles of Stare Decisis

**The Supreme Court has often stated that following its prior decisions supports the legitimacy of the judicial process and fosters the rule of law**43 **by encouraging stability, certainty, predictability, consistency and uniformity in the application of the law** to cases and litigants.44 As Justice Lewis Powell once remarked, "**the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is**."45 Thus, one view is that following the carefully considered decisions of past Justices by adhering to principles of stare decisis supports the Court's role as a careful, unbiased, and predictable decisionmaker that decides cases according to the law rather than the Justices' individual policy preferences.

**Another reason for adhering to stare decisis is to save judges and litigants time by reducing the number and scope of legal questions** that the court must resolve in litigation (e.g., whether the Court may declare a federal law unconstitutional—a question settled in the 1803 decision of Marbury v. Madison).46 In a similar vein, **the Court has suggested that having a precedent established on a particular question of law allows for the quick and efficient dismissal of lawsuits that can be resolved through recourse to rules in prior decisions**, which may encourage parties to settle cases out of court and thereby enhance judicial efficiency.47

Reasons for the Supreme Court's Overruling of Precedent

Arguing against a strict adherence to the principle of stare decisis, **some Justices and legal commentators have noted that overruling incorrect precedents may occasionally be necessary to rectify egregiously wrong or unworkable decisions or to account for changes in the Court's or society's understandings of the facts** underlying a legal issue (e.g., the changed understanding of the stigmatic effect of racial segregation in public schools).48 **Critics of strict adherence to stare decisis have also argued that the Court's application of the doctrine in constitutional cases has been unpredictable, has been based on ideology, has lacked a basis in the Constitution, and has often been used to shield the Court's errors from correction, hurting the Court's legitimacy**.49 Consequently, **some Justices and scholars have argued that when a precedent conflicts with the proper understanding of the Constitution, Justices should follow the Constitution and overrule incorrect precedents** instead of adhering to mistaken interpretations by past Justices.50

#### SCOTUS considers 4 things when deciding to overturn prior precedents to preserve legitimacy—quality, workability, consistency, factual changes, and reliance

Murrill 2018 (Brandon J Murrill, Congressional Research Service, 9-24-2018, "The Supreme Court’s Overruling of Constitutional Precedent", No Publication, <https://www.congress.gov/crs-product/R45319>, DoA 4/17/2025, DVOG)

Factors the Supreme Court Considers When Deciding Whether to Overrule Constitutional Precedent

As noted, in recent decades, **the Supreme Court has often stated that a decision to overrule precedent must be based on some special justification**—or, at least "strong grounds"—that extends beyond the Court's mere disagreement with the merits of the prior decision's reasoning.69 In this vein, the Justices have expressed some concern that the Court's legitimacy might suffer if it constantly overruled its prior decisions based on such disagreements.70 Consequently, **when deciding whether to overrule a past decision in a constitutional case, the Court has historically considered several "prudential and pragmatic" factors** that seek to foster the rule of law while balancing the costs and benefits to society of reaffirming or overruling a prior holding.71 The Court's 2018 decision in Janus v. American Federation of State, County, and Municipal Employees sets forth a nonexhaustive list of these factors:

**the quality of [the precedent's] reasoning, the workability of the rule it establishes, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision**.72

This section briefly discusses examples from the Supreme Court's jurisprudence that illustrate the Court's use of each of these factors in its analysis: (1) the quality of the precedent's reasoning; (2) the workability of the precedent's rule or standard; (3) the precedent's consistency with other related decisions; (4) factual developments since the case was decided; and (5) reliance by private parties, government officials, courts, or society on the prior decision.

Quality of the Precedent's Reasoning

**The first factor that the Supreme Court may consider when determining whether to reaffirm or overrule a prior decision is the quality of the Court's reasoning in the prior case**. However, **it does not appear that the Court's disagreement with a prior case's reasoning is enough by itself to overrule that case**.73

**An example of the Supreme Court overruling precedent because it had significant disagreements with its reasoning is West Virginia State Board of Education v. Barnette**.74 In that case, the Court held that the First Amendment prohibited a state from enacting a law compelling students to salute the American flag.75 In doing so, the Court overruled its three-year-old decision in Minersville School District v. Gobitis, which had upheld a state's flag-salute requirement.76 **In Barnette, Justice Robert Jackson, writing for the majority, offered a point-by-point refutation of Gobitis' reasoning**.77 For example, in addressing the Gobitis Court's argument that legislatures rather than courts were the best forum to hear disputes over the imposition of the flag-salute requirement, the Barnette majority noted that the Bill of Rights had removed certain subjects, such as freedom of speech, from the political arena and committed resolution of disputes concerning these issues to the judiciary.78 And in rejecting the core argument of Gobitis that compelled flag salutes were necessary to achieve national unity, Jackson invoked the unique character of American constitutional government, which in contrast to authoritarian regimes, eschewed the use of government coercion as a means of achieving national unity.79 **The Court's belief that Gobitis rested on flawed reasoning thus played a key role in its overturning of that precedent.**

A case from the 2017-2018 term in which the Court overturned precedent partly because of the purportedly poor quality of its reasoning is Janus v. American Federation of State, County, and Municipal Employees.80 In that case the Court overturned its 1977 holding in Abood v. Detroit Board of Education81 by determining that a government, by requiring public employees, who were not members of a union designated to represent their bargaining unit, to pay "fair share" fees to the union, violated the First Amendment by compelling speech on matters of public concern.82 The Court in Janus rested its decision to overrule Abood on several grounds, including the unworkability of Abood's standard for distinguishing union expenditures that could be legally charged to employees from those that could not and a lack of reliance on the decision.83 However, it began its analysis with a discussion of the merits of Abood.84

Characterizing Abood as "poorly reasoned," the Supreme Court explained that the Abood decision permitting "fair share" fee arrangements improperly rested upon Court precedents involving government authorization of private sector collective bargaining agreements instead of government compulsion of public sector employees' payment of "fair share" fees.85 Moreover, the Janus Court stated, Abood accorded too much deference to the government's asserted interest in achieving "labor peace" by requiring employees to pay public sector fees and gave too little consideration to fundamental free speech rights.86 These merits-based reasons, among others, motivated the Court's decision to discard Abood.

Workability of the Precedent's Rule or Standard

**Another factor that the Supreme Court has considered when determining whether to overrule a precedent is whether a rule or standard that the prior case establishes for determining the constitutionality of a government action is too difficult for lower federal courts or other interpreters to apply and is thus "unworkable**."87

**An example of a case in which the Court overturned a precedent because its rule was unworkable is Garcia v. San Antonio Metropolitan Transit Authority**.88 In Garcia, the Court considered a key question implicating the relationship between the federal and state governments: whether Congress could impose the minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) on employees of the San Antonio Metropolitan Transit Authority, a municipally owned and operated mass-transit system.89 Garcia raised the question of whether Congress's exercise of its Commerce Clause power in FLSA unconstitutionally impinged on state sovereignty—a question the Court had attempted to answer nine years earlier in National League of Cities v. Usery.90 In Usery, the Court had developed a test for when state activities qualified for immunity from congressional regulation under the Commerce Clause, determining that Congress lacked authority to regulate state employees' working conditions when the state employees performed activities in "areas of traditional government functions."91

But **a 5-4 majority of the court in Garcia determined that Usery's test was unworkable because it was difficult for lower courts to apply consistently**.92 **The Court stated that Usery "did not offer a general explanation of how a 'traditional' function is to be distinguished from a 'nontraditional' one. Since then, federal and state courts had struggled with the task, thus imposed by the Court, of identifying a traditional function for purposes of state immunity under the Commerce Clause**."93 The Court thus discarded Usery's test and further held that Congress could, consistent with the Constitution, impose wage and hour requirements on state employees.94

As noted, more recently, in Janus, the Court overruled Abood's holding that the government could constitutionally require public employees to pay fees to a union, even if the employees were not members of the union, so long as those fees qualified as "chargeable" union expenses under a three-part test intended to balance governments' interests in "labor peace" with the First Amendment free speech rights of employees.95 The Abood test examined whether: (1) the expenses were "germane to collective bargaining"; (2) were "justified by the government's labor-peace and free-rider interests"; and (3) did "not add significantly to the burden on free speech."96 Noting that "Abood's line between chargeable and nonchargeable union expenditures has proved to be impossible to draw with precision," the Court characterized the Abood test as unworkable because the unclear standard left judges with too much discretion and resulted in unpredictable outcomes concerning the permissibility of compelled payment of union fees.97 The Abood test's unworkability was one reason that the Court chose to overrule that precedent.

Whether the Precedent Is Inconsistent with Related Decisions

**Another factor the Supreme Court may consider is whether the precedent is inconsistent with other Court decisions on similar matters of constitutional law. One manner in which a precedent may become inconsistent with related decisions is when its legal foundation, including its reasoning, principles, or rules, has been subsequently eroded by later decisions**.98 In addition, the Court has occasionally considered whether a precedent should be overruled because it is a recent outlier among the Court's decisions by examining the precedent's consistency with past decisions and determining whether overruling the case would "restore" coherency in the law.99

**An example of the Court overruling a prior decision because it had been eroded by subsequent case law is Janus's overruling of Abood**.100 In overruling Abood's determination that the government could require public employees to pay certain fees to a union, **the Janus Court noted that Abood had become inconsistent with the Court's First Amendment cases.**101 In particular, **subsequent decisions of the Court had criticized the Abood Court for failing to scrutinize a significant restriction on employees' First Amendment rights sufficiently, as required by more recent Court jurisprudence examining various laws compelling speech or association**.102 In addition, the Court determined that Abood was inconsistent with a related line of subsequent cases "holding that public employees generally may not be required to support a political party."103 Consequently, the Court deemed Abood's First Amendment analysis to have been eroded by several of its subsequent decisions.104

**In other cases, the Supreme Court may overrule a recent decision that it deems an outlier in order to restore an older line of precedents**.105 An example is Adarand Constructors, Inc. v. Peña.106 In Adarand, the Court considered whether the federal government violated a subcontractor's equal protection rights under the Fifth Amendment's Due Process Clause107 when the government provided financial incentives for prime federal contractors to award subcontracts to businesses owned by minorities, such as racial minorities.108 The Court held, contrary to its earlier decision in Metro Broadcasting, Inc. v. FCC, that the Fifth Amendment does not impose a lesser duty on the federal government than the Equal Protection Clause of the Fourteenth Amendment109 does on state governments, which meant that the federal government's racial classifications are subject to the most stringent form of review (i.e., strict scrutiny).110 The Court characterized the overruled Metro Broadcasting case as a recent departure from the equal protection principles of a long line of prior cases that stood for the principle that the same equal protection obligations apply to federal, state, and local governments.111 The majority wrote, "By refusing to follow Metro Broadcasting, then, we do not depart from the fabric of the law; we restore it."112

**Sometimes, the Justices may disagree over which line of precedents the Court should retain, and which line of precedents it should overrule or ignore. For instance, in Lawrence v. Texas, the Court struck down a Texas law that banned private, consensual same-sex sexual activity as violating the Due Process Clause of the Fourteenth Amendment**.113 In doing so, **the Court held that the concept of liberty in that clause "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct**."114

Justice Kennedy's opinion for the majority overruled a prior decision, Bowers v. Hardwick, which had upheld a Georgia law banning similar sexual conduct.115 Kennedy's opinion characterized Bowers as inconsistent with the Court's subsequent 1992 decision in Casey reaffirming abortion rights and its 1996 decision in Romer v. Evans,116 which struck down Colorado legislation removing protections for homosexuals from state antidiscrimination laws as violating the Fourteenth Amendment's Equal Protection Clause.117 Kennedy's opinion stated that the Casey and Romer decisions stood for the notion that the Fourteenth Amendment's Due Process Clause protects personal autonomy to make decisions related to "marriage, procreation, contraception, family relationships, child rearing, and education."118 The Court thus viewed Bowers as wrongly decided in part because it was inconsistent with the Court's subsequent jurisprudence. A dissenting Justice Scalia strongly disagreed, characterizing Casey and Romer as outliers whose legal foundations had been eroded by a 1997 case holding that only "fundamental rights" that are "deeply rooted in [the] Nation's history and tradition" qualified for enhanced protection under the Due Process Clause.119 The majority and dissent in Lawrence thus disagreed over whether the Court had "restored" the law or, rather, departed from it, by overruling Bowers.

Whether There Is a Changed Understanding of Relevant Facts

**The Supreme Court has also indicated that changes in how the Justices and society understand the facts underlying a prior decision may undermine the authoritativeness of a precedent, leading the Court to overrule it**.120 In Casey, the plurality opinion pointed to two major examples from the Court's twentieth-century jurisprudence that it stated had demonstrated the occasional necessity of overruling a prior decision based on subsequent factual developments.121 In the first case from 1937, West Coast Hotel v. Parrish,122 the Court effectively overturned precedents that had struck down as unconstitutional state laws instituting a minimum wage or maximum working hours for employees, reversing its prior holdings that these laws violated employers' freedom to contract guaranteed by the Fourteenth Amendment's Due Process Clause.123 Supposedly dispensing with its earlier acceptance of principles of contractual freedom, the Court in West Coast Hotel held that overruling precedent was necessary in light of the nation's struggles during the Great Depression, stating that "the economic conditions which have supervened" required consideration of the "exercise of the protective power of the state" to institute minimum wage laws.124 The Court, resting its decision in part on these recent factual developments, concluded that the state could enact legislation to address its concerns about the exploitation of "defenseless" workers with less bargaining power than their employees, as well as the burden on taxpayers to provide for workers denied a living wage.125

The Casey plurality's second example of how the Court's overruling of precedent stemmed from changes in factual understandings involved supposed social change rather than economic developments. In the 1954 case of Brown v. Board of Education, the Court held that that a state, in segregating its public school systems by race, violated the Fourteenth Amendment.126 Specifically, the Court held that the practice of "separate but equal" as applied to schools violated the Equal Protection Clause, a provision that prohibits state governments from depriving their citizens of the equal protection of the law.127 Brown rejected factual understandings underlying the Court's prior decision in Plessy v. Ferguson, which had upheld the constitutionality of a Louisiana law mandating racial segregation in railway cars, determining that "separate but equal" public accommodations did not violate Thirteenth or Fourteenth Amendment guarantees.128 The Court in Brown, relying on academic studies, pointed to changes in society's understanding of the stigmatizing effects of racial discrimination in reaching its result, noting that "[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [of racial stigma] is amply supported by modern authority. Any language in Plessy v. Ferguson contrary to this finding is rejected."129 The Court later characterized Brown as having overruled Plessy.130 Regardless of whether the Casey plurality's account of the Court's decisions in West Coast Hotel and Brown was completely accurate, it is clear that, throughout the Court's history, at least some Justices have considered changes in factual understandings to be a key element in determining whether to retain or overrule precedent.

**Factual developments also played a key role in a decision from the 2017-2018 term, South Dakota v. Wayfair, in which the Court overturned its holdings in two earlier cases**,131 **determining that the Commerce Clause does not restrict states from requiring retailers that lack a physical presence in the state, such as Internet retailers, to collect and remit taxes on sales made to state** **residents**.132 In rejecting its precedents to the contrary, **the Court noted that since deciding these cases, the economy had changed drastically, with a marked increase in the prevalence and power of Internet access and concomitant increases in retailers selling goods remotely to consumers**.133 **As a result, states faced an increased "revenue shortfall" estimated at up to $33 billion per year in sales tax revenue, allegedly traceable to the Court's prior decisions**.134 **These drastic changes in the economy required the Court to overturn two of its precedents that had prevented states from taxing such sales**.135

Reliance on the Precedent

**In contrast to the four factors above, which generally ask whether a precedent should be overruled because of some deficiency in its legal or factual underpinnings, the reliance factor asks whether the Supreme Court should retain a precedent, even if flawed, because certain parties would suffer hardship if a case were overruled**.136 This factor considers reliance on the rules and principles contained in the Supreme Court's prior decisions by individuals, companies, or organizations; society as a whole; or legislative, executive, or judicial government officials.137

Economic Reliance

**Throughout its history, the Supreme Court has often adhered to precedent because of economic reliance interests** (i.e., investment of time, effort, or money).138 **The early Court held that economic reliance by businesses or individuals on the Court's precedents should weigh against overruling precedent, particularly in matters of property or contract law**.139 By contrast, although economic reliance may counsel against overturning precedent, the Court has not given much weight to individual reliance on procedural or evidentiary rules.140

A recent example of the Supreme Court considering economic reliance when determining whether to overrule precedent is Janus, in which the Supreme Court overturned Abood v. Detroit Board of Education141 and determined that laws that require public employees to pay "fair share" fees to the union designated to represent their bargaining unit, even if the employees are not members of the union, violated the First Amendment by compelling speech on matters of public concern.142 In doing so, the Court rejected arguments that public employers and labor unions relied upon Abood allowing compelled payment of fees when negotiating and entering into collective bargaining agreements.143 The Court stated that reliance was insufficient to save Abood for several reasons, including that free speech rights were of greater importance than reliance interests; the labor contracts would expire in a few years anyway; Abood's unworkable standard for deciding when a union could charge fees to nonmembers meant that parties should not have relied upon it; and the Court had given notice in its prior decisions that Abood might be overruled by criticizing Abood's reasoning.144

Societal Reliance

**In the late twentieth century, the Supreme Court recognized that reliance could be by society as a whole.**145 **A prominent example of this type of reliance is the Court's decision in Casey, in which the plurality opinion stated that "for two decades ... people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail**."146 **The plurality indicated that societal reliance on Roe required retention of its central holding, arguing that the "ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives**."147 On the other hand, a dissenting Chief Justice Rehnquist accused the plurality of "having failed to put forth any evidence to prove any true reliance" and having instead relied "solely on generalized assertions about the national psyche, on a belief that the people of this country have grown accustomed to the Roe decision over the last 19 years and have 'ordered their thinking and living around' it."148 As is evident, arguments for retaining precedent based on societal reliance prompted strong debate among the Justices in Casey.

**An example of a majority of the Supreme Court adhering to precedent because of societal reliance is the Court's decision in Dickerson v. United States, which addressed the constitutionality of a federal statute governing the admissibility of statements made during police interrogation**, a law that functionally would have overruled the 1966 case of Miranda v. Arizona.**149 In striking down the statute, the majority opinion, authored by Chief Justice Rehnquist, declined to overrule Miranda despites doubts about the merits of its reasoning, noting that the 1966 case had "become embedded in routine police practice to the point where the warnings have become part of our national culture**."150

Although the Court's reference to societal reliance as a justification for retaining precedent may help to preserve precedents that recognize constitutional protection of an individual right,151 the notion of "cultural" or "societal" reliance has been criticized by some commentators as providing the Court with unbounded discretion to retain or overturn precedent.152 Indeed, **the Supreme Court has not provided significant guidance as to when societal or cultural reliance interests favor overruling precedent and when they do not**.153

Government Reliance

The Supreme Court's precedents may also foster government reliance. They may provide guidance for officials in the legislative, executive, and judicial branches as to what actions and practices comport with the Constitution.154 As a result, they may demarcate and illuminate the relationships between the branches of the federal government or the federal government and states.155 Government reliance has been implicated in some of the Court's most critical, long-standing precedents of major economic importance, such as decisions that adopted a broad view of Congress' power under the Commerce Clause and thereby established the foundation for the modern administrative state156 and the Court's 1870 decision in Knox v. Lee, which established the constitutionality of Congress authorizing the issuance of paper money as legal tender.157

**Some Justices have argued that legislators may rely on the Supreme Court's decisions about the constitutionality of certain types of laws when they draft legislation. For example, in Lawrence v. Texas, the Court struck down a Texas law that banned private, consensual same-sex sexual activity as violating the Due Process Clause of the Fourteenth Amendment**.158 Justice Kennedy debated a dissenting Justice Scalia over whether reliance on the Court's earlier decision in Bowers v. Hardwick, which had upheld a law criminalizing similar same-sex activities, required retaining Bowers as precedent.159 Justice Kennedy argued that there were no relevant reliance interests that counseled against overruling Bowers.160 In a vigorous dissent, **Justice Scalia argued that legislators had relied upon Bowers in enacting numerous laws regulating certain sexual behaviors deemed immoral by the governing majority**.161 **Scalia argued that Lawrence called into question the viability of these laws, and that protecting legislative reliance interests merited retention of Bowers**.162

Executive branch officials also arguably rely on Supreme Court precedents. For instance, in Arizona v. Gant, the Court held that the search-incident-to-arrest exception to the Fourth Amendment's requirement that the government obtain a warrant to search an arrestee's vehicle applied only if the arrestee could access the vehicle at the time of the search so that he could have gained possession of a weapon or destructible evidence or, alternatively, when it was "reasonable to believe that evidence of the offense of arrest might be found in the vehicle."163 Justice Alito authored a dissent in which he argued that the majority's opinion had effectively overruled New York v. Belton,164 a case that he characterized as providing police officers more certainty as to the permissibility of searching a vehicle's occupant after arrest.165 Alito wrote that law enforcement officers had relied on Benton, and that "the Benton rule has been taught to police officers for more than a quarter century. Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent."166

**And, as noted, judges often rely on precedent, both explicitly by citing to precedent in their opinions**,167 **and implicitly, by accepting principles established by precedent, such as the power of judicial review**.168

### Binding Precedent

#### Binding precedent is the legal rule or principle that must be followed

Cornell’s Legal Information Institute, No Date ("binding precedent", LII / Legal Information Institute, <https://www.law.cornell.edu/wex/binding_precedent>, DoA 4/27/2025, DVOG)

**Binding precedent is a legal rule or principle, articulated by an appellate court , that must be followed by lower courts within its jurisdiction**. Essentially, **once an appellate court reviews a case, it will deliver a written opinion. This written opinion will include the court’s determination on a question of law . This determination, known as a holding, is binding on all lower courts within the jurisdiction, meaning that lower courts must apply this decision when presented with similar facts. The lower courts are thus bound or required to follow the legal precedent** set by the higher court.

The Supreme Court, for example, is the highest court in the U.S., and so, its decisions are binding on all other courts in the U.S. Alternatively, the decisions of the highest court in New York are only binding on other New York courts, but not courts in other states.

#### Binding precedent must be followed, persuasive precedent can be considered but is not obligatory

Arnett and Arnett, 2018 (Arnett & Arnett, Arizona Attorneys at Law, Pc Feb. 15, 2018, 2-15-2018, "Judicial Precedent", No Publication, <https://www.arizonainsurancelaw.com/blog/judicial-precedent/>, DoA 4/27/2025, DVOG)

Binding Precedent

**Binding precedent refers to case law that courts have to follow. For example, the decisions of the Supreme Court of the United States are binding on all other federal courts and on all state courts.** The decisions of the highest state court are binding on all lower state courts. **A decision of a court of appeals is conclusive evidence of the law within that court’s appellate district** **and binds the lower courts within that district**. However, lower courts are not bound to follow a decision of a court of appeals of another judicial district. Where there is no direct precedent covering the case before the court, the court is free to decide the matter.

Persuasive Precedent

**Decisions by Courts of Same Rank Decisions by courts of the same rank** (for example, two Ohio courts of appeal) **can be considered by the other court but are not binding on it.** An Ohio court of appeals is not bound by the decisions of the courts of appeals of other districts in Ohio, but the decisions of such sister courts are entitled to due consideration.

Decisions of Other State Courts **The decision of another state’s courts can be followed where the reasoning is persuasive and rests on facts similar to the case being tried, but such decisions are not binding on the courts of the other state.** For example, an Ohio common pleas court is not bound by a decision of an Iowa court of appeals. However, in deciding a pending Ohio case, the Ohio court could adopt the precedent set by the Iowa court.

Decisions of Lower Courts A higher court can choose to adopt the precedent of a lower court. For example, an Indiana court of appeals (a higher state court) could use a decision of an Indiana circuit court (a lower state court) in deciding a case.

Are judges always required to follow legal precedent?

**Courts may deviate from a precedent if there is an obvious error in the earlier decision or if the principle of law established by the precedent is unreasonable. It is within a court’s discretion to overrule its own past decisions or precedents. However, the court should follow the established precedent unless there is a compelling reason for change.** Of course, higher courts can overrule decisions made by lower courts. A court can also distinguish its case from the established precedent if the facts in the case before the court are different than those in the case that set the precedent.

#### Courts are required to follow binding precedent

National Agricultural Law Center, 2022 (Micah Brown, August 9, 2022, "Procedures: Precedent and the U.S. Court System – National Agricultural Law Center", <https://nationalaglawcenter.org/procedures-precedent-and-the-u-s-court-system/>, DoA 4/27/2025, DVOG)

Common Law

The U.S. judiciary—federal and state courts—operate under a *common law* system. The common law, which originated in England, was adopted by the American colonies and ultimately developed each states’ original body of law. Common law, also known as “case law”, is the body of law created by judges through written decisions rather than from statutes or constitutions. Generally, common law courts analyze and interpret other sources of law and apply the law to specific facts of a case to make a legal decision.

**The common law system is premised on the idea of having predictable and consistent outcomes to cases with similar facts and legal issues in question.** Hence**, the defining principle of common law is *precedents*, which is the requirement that judges must follow binding legal decisions** of prior courts. Judges accomplish this requirement by interpreting the law and issuing rulings in the same manner as these earlier court decisions. **Precedents is rooted in the *doctrine of* *stare decisis*, which is a Latin phrase meaning “to stand by things decided”. Thus, in cases involving similar facts and legal disputes that have previously been resolved by courts in the same geographical boundary or “jurisdiction”, judges are generally bound to follow these past precedential decisions** and apply the same legal reasoning of those prior cases.

In certain instances, there are cases that pose distinct facts or legal issues from all prior cases within their jurisdiction and the other sources of law are either silent or ambiguous on the issue. This is known as a “case of first impression” and judges are required to make a decision on the issue even though there is no precedent binding on the case. In these cases, judges generally consider decisions from courts in other jurisdictions—if such decisions exist—that have ruled on the issue. Nevertheless, judges are not obligated to follow the same reasoning of these court decisions because ***stare decisis* principles only requires judges to follow precedential decisions that are binding on their court**.

Precedent

**There are two separate types of precedent that judges consider: *mandatory* or *binding* precedent, and *persuasive* precedent. If precedent is binding, courts are required to follow those earlier decisions.** Thus, **lawyers generally attempt to use prior cases that are binding precedent to support their client’s case because judges are required to follow these earlier decisions and rule in a similar manner**. Alternatively, **courts are not obligated to follow persuasive precedent, but they may consider it to determine how courts in other jurisdictions resolve particular legal issues**. This is also true for other sources of law. For example, a state court may consider a federal statute or regulation to resolve a state law dispute, but such federal laws are only persuasive authority on the state court.

Essentially, earlier court decisions are binding or persuasive on a court if the prior decision was decided by a higher-level court within the same jurisdiction.

### Concurrences not topical—they aren’t precedent

#### Concurrences are legal clutter, not binding precedent

Penrose, 2023 (Meg Penrose, Law Professor at Texas A&M, 31 GEO. MASON L. REV. F. 65 (2023), "Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation", George Mason Law Review, <https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/>, DoA 4/17/2025, DVOG)

Good judges are clear writers. And clear writers avoid legal clutter.[1](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) **Legal clutter occurs when judges publish multiple individually written opinions that are neither useful nor necessary**. This essay argues that **concurring opinions are the worst form of legal clutter. Unlike majority opinions, concurring opinions are legal asides**, musings of sorts—often by a single judge—**that add length and confusion to an opinion often without adding meaningful value. Concurring opinions do not change the outcome of a case**. Unlike dissenting opinions, they do not claim disagreement with the ultimate decision. Instead, **concurring opinions merely offer an idea or viewpoint that failed to garner support from the rest of the Court. They are cries for attention** that are, usually, better left unwritten. Concurring opinions are legal clutter.

This essay challenges judges—particularly Supreme Court Justices—to refrain from subjecting lawyers and law students to legal clutter. Court opinions are already too long.[2](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) They can be complex. **Distracting readers from the actual holding of a case causes unnecessary confusion, even for other judges.** Two recent examples, Justice Kavanaugh’s individual concurrence in *NCAA v. Alston*[*3*](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29)141 S. Ct. 2141, 2166 (2021) (Kavanaugh, J. concurring)*.* and Justice Thomas’s individual concurrence in *Dobbs v. Jackson Women’s Health Organization*,[4](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) illustrate the problem. Journalists and lawyers, eager to see systematic change at the NCAA, have latched on to one sentence in Justice Kavanaugh’s *Alston* concurrence—repeating lines that are neither the Court’s holding nor controlling.[5](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) Similarly, Justice Thomas’s solo concurrence in *Dobbs*suggesting the entire line of substantive due process cases should be overturned, left some wondering if overturning *Roe*was just the beginning of a stare decisis regression.[6](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) Worse still, both Justice Kavanaugh and Thomas seemingly invite new litigation to ensure that their individual viewpoints ultimately become the law.[7](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) This is the danger of concurring opinions. **Below the surface, many concurring opinions are nothing more than a latent form of judicial activism**.[8](https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/void%280%29) **On the surface they are mere legal clutter.**

#### Concurrences add no value to the majority opinion

Penrose, 2023 (Meg Penrose, Law Professor at Texas A&M, 31 GEO. MASON L. REV. F. 65 (2023), "Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation", George Mason Law Review, <https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/>, DoA 4/17/2025, DVOG)

The Alston opinion is forty-five pages long.37 That seems verbose for a unanimous opinion on a rather straightforward issue. Recall that Brown v. Board of Education was only ten pages long. **The Roberts Court is the wordiest, yet least productive, Court in the modern era.**38 Averaging less than eighty cases per Term—less than seventy over the last decade—**the Court writes lengthy, complex opinions with Justices investing far too much energy into individual opinions**.39 **This approach, issuing long and fractured opinions, means the law is less accessible** to ordinary people.40 And, despite Alston’s straightforward holding, much of the press coverage centered on Justice Kavanaugh’s unnecessary legal aside.41

Justice Kavanagh’s concurrence begins, ironically, noting that he joins “the Court’s excellent opinion in full.”42 That agreement should have been sufficient to avoid drafting a separate opinion. When a colleague’s work is admittedly “excellent,” what is left to add? What motivated Justice Kavanaugh to write? In his words, he explains that he is writing not on the issue then pending before the Court. Rather, he “add[s] this concurring opinion to underscore that the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws”—rules that were neither briefed nor argued in this appeal.43 The entire purpose of Justice Kavanaugh’s concurring opinion in Alston is to discuss issues that were not before the Court. His concurring opinion contains dicta that is nothing more than an advisory opinion inviting other student-athletes to sue the NCAA.44 Justice Kavanaugh’s concurrence makes for great sound bites but shows little judicial restraint. It is veiled judicial activism. This opinion fully illustrates what Professor Suzanna Sherry criticized as our “Kardashian Court.”45 **Modern Justices write to increase their profile at the cost of clarity and conciseness. Legal clutter.**

Justice Kavanaugh spends five unnecessary pages explaining how he will decide the next antitrust issue relating to the NCAA’s rules on student compensation.46 This explanation comes before the issue is even briefed. Kavanaugh’s concurrence is the textbook definition of dicta and feels like an advisory opinion advocating for change.47 He acknowledges that Alston “does not address the legality of the NCAA’s remaining compensation rules.”48 That is correct. And that acknowledgement should have ended any discussion on unbriefed, un-litigated matters. It didn’t.

**Perhaps the most obvious distinction between Alston’s majority opinion and Justice Kavanaugh’s concurrence is that the majority’s decision was bound by Article III to decide only the case and controversy before it**.49 **Majority opinions generally do not invite further litigation or show the Court’s hand** on how it will rule on future issues.50 **Concurrences do not appear to be equally constrained.** The point of Justice Kavanaugh’s concurrence was to move beyond the facts of the case and appeal to future litigants. He essentially provided a road map for what one Justice perceives will be the winning approach for a different, unpresented issue. This separate opinion might be helpful, if at all, for future litigants in some future case. Otherwise, these five pages took unnecessary time and energy from its readers.51

The most troubling aspect of Justice Kavanaugh’s concurrence is that it generated more attention than Justice Gorsuch’s unanimous majority opinion.52 The Roberts Court reaches true consensus far less often than predecessor courts, with more individual opinions being written by Justices agreeing on the result.53 Rarely is anything gained by writing separately. This act of going it alone when the rest of the Court was united is further proof that modern Justices prefer to write decisions rather than decide cases. Justice Kavanaugh’s unnecessary legal monologue wastes important judicial resources. **This writing squanders lawyers’ and law students’ scarce time without adding corresponding value. The concurrence portrays legal clutter, not legal value.**

#### Concurrences have no institutional value—they describe what an individual justice thinks the law SHOULD be, not what the law actually IS—if it described what the law actually WAS it would be in the majority opinion

Penrose, 2023 (Meg Penrose, Law Professor at Texas A&M, 31 GEO. MASON L. REV. F. 65 (2023), "Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation", George Mason Law Review, <https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/>, DoA 4/17/2025, DVOG)

**Dobbs was destined to be a controversial opinion. Cases that overturn settled precedent remind society that Supreme Court membership can, rather quickly, change settled expectations.**54 Even after the Dobbs opinion leaked, **the official decision caused shock waves in the United States and around the globe.** Its publication was an event unto itself. So why did three Justices in the majority feel the need to write individually, adding length and, in the case of Justice Thomas, controversy to an already seismic event? Chief Justice Roberts, Justice Kavanaugh, and Justice Thomas each published their individual thoughts in concurring opinions. Yet it was Justice Thomas’s opinion that garnered the most attention, in some ways even more attention than Justice Alito’s lengthy majority opinion.

No other Justices joined the concurring Justices’ separate opinions.55 Chief Justice Roberts, writing for himself, published a twelve-page concurrence.56 Justice Kavanaugh, also writing for himself, published a twelve-page concurrence.57 **What justifies adding one’s individual voice when no other colleague agrees to sign on to your legal monologue**? Justice Kavanaugh’s Dobbs concurrence aptly illustrates the problem: solo concurrences often fail to add valuable contribution to the law. Much like his approach in Alston, Justice Kavanaugh writes his Dobbs concurrence “to explain my additional views about why Roe was wrongly decided, why Roe should be overruled at this time, and the future implications of today’s decision.”58 In other words, this concurrence is what Justice Kavanaugh would have presented had his opinion garnered another four votes. But it didn’t. In fact, it didn’t get any other votes even though both Justices Roberts and Thomas also felt the need to write separately. Apparently, these Justices wanted to have their individual perspectives recorded. And **nothing, outside of individual restraint, stops Justices from publishing individual opinions that have no other colleagues’ support**.

It is hard to find institutional value in Justice Kavanaugh’s concurrence. His first several paragraphs are dedicated to the obvious point, stated in nearly every abortion decision since Roe—that abortion presents “a profoundly difficult and contentious issue.”59 He tries to characterize both sides of the debate and then states the oft repeated dilemma that, “[w]hen it comes to abortion, one interest must prevail over the other at any given point in a pregnancy.”60 Justice Kavanaugh then suggests that the Constitution and Court must be “neutral” on the issue.61 Even his discussion of stare decisis is unnecessary. Dobbs overruled a long-standing case. And Justice Alito’s majority decision explained the reasons for doing so, including the appreciation for stare decisis.62 **This concurrence illustrates all that is wrong with concurring opinions. It adds nothing meaningful. It adds length without substance. It doesn’t** **change the outcome or even seek to change the reasoning. It is simply an individual opinion that failed to secure four other votes. It epitomizes legal clutter.**

#### Concurrences are less institutionally valuable than dissents

Penrose, 2023 (Meg Penrose, Law Professor at Texas A&M, 31 GEO. MASON L. REV. F. 65 (2023), "Legal Clutter: How Concurring Opinions Create Unnecessary Confusion and Encourage Litigation", George Mason Law Review, <https://lawreview.gmu.edu/forum/legal-clutter-how-concurring-opinions-create-unnecessary-confusion-and-encourage-litigation/>, DoA 4/17/2025, DVOG)

**Concurring opinions are often unnecessary because they rarely become majority** **opinions**.75 **They do not seek an alternate outcome or, necessarily, provide alternate reasoning. Concurring opinions are legal asides that add individualized perspective on the Court’s opinion**. The voice of one, or a few, seek to comment on what the majority actually did. This lone Justice, or small group of Justices, may even have the gumption to tell the world what the majority opinion actually meant, suggesting that the concurring Justice views the majority opinion as incomplete or poorly written. **It is the ultimate Monday-morning quarterbacking by the back-up quarterback**. Imagine the locker room conversation going like this: “Yes, we won the game. But if I had been playing, this is what I would have done to win the game we just won.” At their core, **concurring opinions are draft opinions that were not good enough to command a majority. They are back-up opinions**. And, yet, far too many judges and journalists recite lines—or reasoning—from concurring opinions as if they were the majority.

# Citizens United v FEC

### Opinion

#### link

Kennedy, et al, 2009. “Citizens United v. Federal Election Commission, accessed 4-10-2025 via <https://www.fec.gov/resources/legal-resources/litigation/cu_sc08_opinion.pdf>

#### Notes

-- 2 CU overturned Austin, and held that corporations may engage in electioneering.

-- 1 b 1 the CU court used ‘lebron v. NRPC’ to conclude that it has authority to reverse austin since the District Court passed on the issue.

-- 1 b 3: “the parties cannot enter into a stipulation that prevents the Court from considering remedies necessary to resolve a claim that has been preserved.”

-- ‘speaker […] must ask a governmental agency for permission to speak’ chills speech

-- CU references WRTL for the ‘strict scrutiny’ standard

-- other cases give corps 1a rights (FNBB v. Bellotti)

-- cu overturned part of McConnell v. FEC

-- overturning FEC might mangle media companies?

-- CU upholds disclosure requirements on speech, but so do Buckley and McConnell

Kennedy, Roberts, Scalia, Alito on top, Thomas in except part 4, Stevens, Ginsburg, Breyer, Sotomayor only in part 4. Roberts/Alito files a full concurrence; Thomas and Stevens et al file partial concurrences.

-- Roberts/Alito are scared of spillover to other speech given an overturn – ‘Austin’s logic would apply […] to […] media corporations’

-- Roberts/Alito dislike dissent’s refusal to make constitutional ruling after dismissing narrow statutory considerations.

-- Roberts/Alito: the CU dissent expands tremendous new grounds for speech restriction – shareholder protection and anticorruption – that were not in Austin

-- Scalia goes on a deranged textualist rant, and defends the existence of the corporate form at the time of the framers.

-- Stevens et al disputes that the court may rule on grounds waived by the parties, and suggest that facial disputes should be limited.

#### Roberts/alito –

#### It’s possible to overrule CU on bidirectional grounds – i.e. an opinion that overrules disclosure requirements might be topical.

### Overview

#### There’s robust controversy in the literature

George Ford, 10-22-2024, "Citizens United V. FEC: Understanding The Debate." ACE, https://ace-usa.org/blog/research/research-democratic-governance/citizens-united-v-fec-understanding-thedebate/. Accessed 4-12-2025.

Background

Campaign finance laws are controversial and highly influential in the American election system. Before 2010, Supreme Court rulings in Austin v. Michigan State Chamber of Commerce and McConnell v. FEC upheld regulations by the Federal Election Commission (FEC) that restricted organizational political expenditures and electioneering communications, such as political advertisements. However, in 2010, a landmark case Citizens United v. FEC overturned these restrictions. The Citizens United case arose when a nonprofit organization titled Citizens United attempted to air a documentary critical of Democratic primary candidate Hillary Clinton just before the 2008 primary election. Anticipating FEC penalties due to regulations on organizational electioneering, Citizens United sued the FEC and argued that the documentary did not constitute explicit advocacy against a candidate. The case made its way to the Supreme Court, where the Court overturned its previous campaign finance rulings entirely. The majority opinion held that limiting political expenditures and electioneering communications by collective entities such as corporations, unions, and some nonprofits violates the First Amendment right to free speech.

Arguments in Favor of the Court Decision

Defending Free Speech

Those in favor of the ruling in Citizens United v. FEC argue that regulating the spending of corporations and very wealthy individuals is the equivalent of regulating their rights to free speech and is therefore unconstitutional. Advocates argue that corporations represent the opinions of the individuals within the company and therefore should not be subject to different regulations than people.

Increasing Civic Engagement

In addition, supporters argue that heavy regulations on campaign finance would reduce the dissemination of information related to political candidates, effectively reducing civic engagement among voters. They argue that allowing unlimited corporate expenditures strengthens democracy by creating opportunities for the publication of more political content and information on candidates and their policies.

Anti-Corruption

Citizens United retained regulations that forbid coordination between corporations, nonprofits, PACs, and their favored candidates or campaigns. Thus, advocates argue that there is no greater risk of corruption under Citizens United v. FEC because the changes only serve to amplify the opinions of the masses and do not allow organizations to coordinate directly with political candidates. Supporters also argue that many corporations will not want to exercise their right to participate in politics financially. The Supreme Court agreed with this logic and determined that, although certain expenditures could curry favor with a candidate, “ingratiation and access are not corruption.”

Arguments Against the Court Decision

Corruption

Citizens United v. FEC allowed for the creation of Super PACs, or political action committees that may receive and spend unlimited funding from corporations, labor unions, people, and other PACs, as long as there is no formal coordination between the PACs and the candidate’s campaign. Critics of Citizens United disagree with the notion that the case’s safeguards against coordination are sufficient in preventing corruption, as there are apparent loopholes in the system. The most prominent of these are often referred to as “dark-money” groups — 501(c)(4) and 501(c)(6) nonprofits that are not required to disclose their donors and can contribute to super PACs. Critics argue that these non-profits endanger our democracy by opening a channel for anonymous financiers and foreign actors to influence our elections. They hold that deregulating campaign finance for anonymous corporations and individuals will create a top-heavy democracy benefitting the wealthiest few.

Difficulty Verifying Compliance

While the FEC regulation against coordination is crucial for preventing quid pro quo corruption, critics argue that it is difficult to verify that coordination has not occurred between a candidate, their team, and a backer. While direct communication is prohibited, using the same consultation group as a political candidate or allowing ex-staff to attend meetings and fundraisers for a super PAC is not. Therefore, critics claim there are loopholes that allow candidates to engage in strategic communication with financiers without technically “coordinating” under FEC regulations.

Reinforcing Racial Inequalities

Opponents of the Citizens United decision also note that campaign finance structures that allow big-money influence may contribute to racial bias and underrepresentation in the campaign system, since there is a disproportionate representation of white individuals in both corporate executive roles and the affluent class of large donors. Critics argue that the financial freedom instilled by Citizens United will grant greater power to affluent individuals to serve their own interests, reinforcing the economic insecurity that people of color experience at disproportionate rates.

What’s Next?

There’s no question that political campaigns are becoming increasingly expensive. The 2020 presidential election cost roughly $3.1 billion more than that of 2012, and the midterm election in 2022 cost roughly $8.9 billion, a $4 billion increase from the 2010 election. Opponents of Citizens United blame rising campaign costs on the deregulation of corporate finance, claiming the 2010 decision rendered the cost of running for office inaccessible to the average American, while proponents of the Citizen United decision attribute rising campaign costs to inflation. Currently, a significant debate over Citizens United and its central topics endures. Groups such as End Citizens United advocate for a complete reversal of the 2010 decision and push ballot measures to reform state campaign finance laws. Some lawmakers have also tried to pass campaign finance transparency laws, such as the DISCLOSE Act. The debate over Citizens United v. FEC, and campaign finance law more generally, will undoubtedly continue to shape the future of American democracy.

### Now key

#### Vance’s cert petition is pending now – it’s the ideal test case, and both sides want cert granted!

Kalvis Golde, 3-26-2025, "In lawsuit originally filed by J.D. Vance, GOP asks court to overrule limit on campaign spending." SCOTUSblog, https://www.scotusblog.com/2025/03/in-lawsuit-originally-filed-by-j-d-vance-gop-asks-court-to-overrule-limit-on-campaign-spending/. Accessed 4-26-2025.

Nearly 25 years ago, the Supreme Court upheld a federal restriction on the amount of money political parties can spend at the direction of candidates for office. This week, we highlight petitions asking the court to consider, among other things, whether the justices should overrule that decision and hold that limits on these so-called coordinated party expenditures violate the First Amendment.

Limits on coordinated party expenditures first appeared in the Federal Election Campaign Act of 1971. Congress passed the law to create a national framework for congressional and presidential elections. The law sets specific rules for campaign spending and gives the Federal Election Commission (FEC) broad power to regulate elections under those rules.

The law also restricts the amounts of money both that individual donors can give to political parties or candidates, known as contributions, and that those parties or candidates can then spend on electoral races on their own, without cooperating, known as independent expenditures.

A series of Supreme Court decisions have weighed in on the 1971 laws campaign-spending rules. In its landmark 1976 ruling in Buckley v. Valeo, the court struck down the limits on independent expenditures but generally upheld the limits on contributions. The justices ruled that, unlike money donated to political parties or candidates which may not be spent on electoral races money spent by parties or candidates directly on elections is core political speech protected by the First Amendment.

A quarter-century later, in 2001, the court in FEC v. Colorado Republican Federal Campaign Committee upheld the 1971 laws limits on coordinated party expenditures. By a 5-4 vote, the justices ruled that Congress had a good reason to enact the restrictions: to prevent individual donors from using committees of the major political parties to circumvent the federal limits on contributions. This view rests on the theory that money donated to political parties and then spent at the direction of specific candidates is virtually the same as money donated to and then spent by those candidates themselves.

Fast-forward two decades to today, and the Colorado ruling is under siege. In 2022, then-Sen. J.D. Vance and former Rep. Steve Chabot both Republicans from Ohio and the Republican Partys national committees that coordinate spending on behalf of senatorial and congressional races went to federal court, arguing that the federal limits on coordinated party expenditures violate the First Amendment.

Under a federal law governing these types of challenges, a federal district court in Ohio oversaw the long process of compiling evidence in the case known as discovery and then sent the First Amendment issue straight to the full U.S. Court of Appeals for the 6th Circuit.

The 6th Circuit rejected the Republicans challenge. In an opinion by Chief Judge Jeffrey Sutton, the court of appeals concluded it was bound by the Supreme Courts 2001 ruling in the Colorado case. However, its members might have come to a different conclusion, Sutton wrote, if they were faced with a clear playing field unbridled by that 2001 decision.

In National Republican Senatorial Committee v. FEC, the Republican senatorial and congressional committees with now-Vice President Vance and former Rep. Chabot out of the case ask the justices to do what the 6th Circuit could not, and overrule their 2001 decision upholding the federal limits on coordinated party expenditures.

The Republican Party makes two arguments in favor of overruling. First, the party contends that the courts decisions since 2001 have narrowed the reasons Congress can restrict campaign spending to one: preventing quid pro quo corruption the idea that individual donations will be made in return for specifc political favors. By contrast, the Republican Party suggests, Congress enacted the limits on coordinated party expenditures, and the justices 2001 decision upheld them, based on an entirely different justification: preventing the circumvention of contribution limits by individual donors with party connections.

Second, the Republican Party argues that campaign spending has changed drastically in the past 25 years. The limits on coordinated party expenditures, the party contends, led to the rise of Super PACs, which today allow donors and candidates to coordinate in spending money on elections. Under the Supreme Courts landmark 2010 ruling in Citizens United v. FEC, political spending by Super PACs is virtually unlimited.

Even if the justices are unwilling to overrule the 2001 decision, however, the Republican Party insists this lawsuit is different because the federal law limiting coordinated party expenditures itself has changed. Congress amended the law in 2014, the party emphasizes, to allow parties and candidates to spend more money in coordination on several items, including presidential nominating conventions and legal fees.

In a routine move, Acting Solicitor General Sarah Harris has asked for more time to file the governments brief in response to the Republican Partys petition. Before the 6th Circuit, the Biden administration defended the federal limits on coordinated party expenditures. It remains to be seen whether Harris will do the same before the Supreme Court, or instead will join the Republican Party to defend the vice presidents former case by asking the justices to reevalute these restrictions under the First Amendment.

## CU Aff

### S: Corruption

#### Citizens United guarantees corruption – Quid-pro-quo policymaking, influence-buying, and access-buying

Matt Corley, 3-19-2024, "These criminal prosecutions show what Citizens United got wrong about corruption." CREW | Citizens for Responsibility and Ethics in Washington, https://www.citizensforethics.org/reports-investigations/crew-investigations/these-criminal-prosecutions-show-what-citizens-united-got-wrong-about-corruption/. Accessed 4-26-2025.

Voting is well underway in the fourth presidential election cycle since the Supreme Court’s Citizens United decision supersized the role of money in American elections. The impact of the court’s decision, which allowed corporations to spend unlimited sums on independent expenditures aimed at influencing elections and led to the creation of super PACs, has been on full display as super PACs and outside groups have already spent more than $320 million on the nomination fight.

In Citizens United, the majority ruled that corporate political spending that is not coordinated with a candidate or their campaign—known as “independent expenditures”—cannot be restricted, with the court concluding that such expenditures, “including those made by corporations, do not give rise to corruption or the appearance of corruption.” This determination was key to the ruling since preventing corruption – narrowly defined as just quid pro quo arrangements – was identified as the only compelling interest that could justify government constraints on political spending, which the court considers a form of First Amendment protected speech.

In the 14 years since, history has not been kind to the Supreme Court’s dismissal of the corrupting potential of money spent on independent expenditures. Despite the court’s assurances, prosecutors have since found multiple examples of money meant to support independent expenditures that they alleged played a role in actual corruption.

According to an analysis by CREW, since the Citizens United ruling the Justice Department has brought charges in at least four cases that involve allegations related to quid pro quo bribery and money tied to independent expenditures – the very scenario that the Citizens United court cast doubt upon. Regardless of their outcomes, the cases support the common sense conclusion that the majority in Citizens United found unconvincing: Even if a candidate doesn’t technically control election-influencing expenditures that benefit them, the money spent to make them can be used as part of a corrupt quid pro quo arrangement.

Bribes and independent expenditures

USA v. Householder et al.: In July 2020, then-Ohio Speaker of the House Larry Householder, along with several associates and Generation Now, a 501(c)(4) nonprofit, were indicted in a federal racketeering conspiracy involving approximately $60 million paid to Generation Now by electric utility FirstEnergy to pass and uphold a billion-dollar nuclear plant bailout. The Justice Department alleged that Householder and his allies conspired to violate the racketeering statute through honest services wire fraud, receipt of millions of dollars in bribes and money laundering. According to prosecutors, one of the purposes of the corrupt scheme was “obtaining, preserving, and expanding Householder’s political power in the State of Ohio through the receipt and use of secret payments.” One of the uses of those secret payments was to fund a super PAC through Generation Now that paid for advertisements benefiting Householder and his allied candidates ahead of Ohio’s primary elections in 2018, which helped set the stage for Householder to be elected speaker in January 2019. In July 2021, FirstEnergy agreed to pay a $230 million monetary penalty as part of a deferred prosecution agreement that also required the release of a statement calling the use of section 501(c)(4) nonprofits, which don’t have to disclose their donors, “central” to its influence effort because they allowed the company to “conceal payments for the benefit of public officials and in return for official action.” Following guilty pleas by two co-conspirators who agreed to testify in the case, Householder and former Ohio Republican Party chairman Matt Borges were found guilty in March 2023 by a jury of participating in a racketeering conspiracy.

USA v. Lindberg et al.: In March 2019, the Justice Department indicted insurance mogul Greg Lindberg and three others, including a former congressman who was then-chairman of the North Carolina Republican Party, alleging that they were part of “a bribery scheme involving independent expenditure accounts and improper campaign contributions.” According to the indictment and subsequent prosecution, Lindberg and his associates offered millions in campaign support to North Carolina Insurance Commissioner Mike Causey in exchange for the removal of an insurance commission official who oversaw Lindberg’s company. As part of his proposed deal with Causey, who cooperated with law enforcement, Lindberg agreed to support him by routing hundreds of thousands of dollars directly to Causey’s campaign through the North Carolina Republican Party and by funding outside groups that would spend money to benefit Causey’s re-election. In October 2019, former Rep. Robin Hayes (R-NC) pleaded guilty to making false statements to the FBI. Lindberg and a consultant to his company, John Gray, were found guilty by a jury in March 2020 while company executive John Palermo was acquitted. In June 2022, the 4th Circuit Court of Appeals vacated Lindberg and Gray’s convictions and ordered a new trial. The new trial is expected to take place in the Spring of 2024.

USA v. Menendez: In April 2015, the Justice Department indicted Sen. Bob Menendez (D-NJ) and Salomon Melgen, an ophthalmologist, “in connection with a bribery scheme in which Menendez allegedly accepted gifts from Melgen in exchange for using the power of his Senate office to benefit Melgen’s financial and personal interests.” The Justice Department alleged that Menendez accepted close to $1 million in gifts and campaign contributions from Melgen in exchange for using his Senate office to influence contractual and Medicare billing disputes to Melgen’s benefit and to support the visa applications of several of Melgen’s girlfriends. The government identified $751,500 in campaign contributions by Melgen to entities benefitting Menendez’s 2012 reelection effort as part of their alleged exchange for official action by Menendez. That included $600,000 in super PAC contributions Melgen made through his ophthalmology practice, which were earmarked for the New Jersey Senate race in which Menendez was running. In November 2017, the jury trial of Menendez and Melgen ended in a mistrial due to a deadlocked jury. In January 2018, the judge in the case issued an opinion stating that while Citizens United does not bar prosecutions for bribery schemes involving contributions to super PACs and that a rational juror could find that Melgen’s super PAC contributions were a thing of value under the relevant bribery statute, the government had not produced sufficient evidence to establish an explicit quid pro quo connected to Melgen’s campaign contributions. Soon after, the Justice Department announced that it would not seek to retry Menendez. Melgen was convicted in April 2017 on separate Medicare fraud charges, but was granted clemency by President Trump in January 2021.

USA v. Vazquez Garced, et al.: In August 2022, former Governor of Puerto Rico Wanda Vazquez Garced was indicted, along with two others including Julio Martin Herrera Velutini, on bribery charges related to financing her 2020 campaign. According to the indictment, beginning in 2019, a bank owned by Herrera Velutini was the subject of an examination by Puerto Rico’s Office of the Commissioner of Financial Institutions (OCIF). While the examination was active, Herrera Velutini, along with a former FBI agent, allegedly offered through intermediaries to financially support Vazquez Garced’s 2020 gubernatorial campaign in exchange for her replacement of the OCIF commissioner with someone of Herrera Velutini’s choosing. The Justice Department alleged that Vazquez Garced agreed to the deal, replacing the commissioner with a former consultant for Herrera Velutini’s bank. To support Vazquez Garced’s campaign in return, Herrera Velutini and the former FBI agent allegedly paid more than $300,000 to political consultants. According to the indictment, Herrera Velutini also conveyed to Vazquez Garced through intermediaries that he was willing to create a super PAC supporting her in exchange for the replacement of the OCIF commissioner. After Vazquez Garced lost her primary, the Justice Department alleges that Herrera Velutini conspired to bribe her successor, Pedro Pierluisi, by offering, through intermediaries, funds to support Pierluisi’s campaign in exchange for action to resolve OCIF’s audit of Herrera Velutini’s bank in a favorable manner. In the indictment, the Justice Department alleged that Herrera Velutini and his co-conspirators sought to offer bribes in the form of payments to a super PAC to support Pierluisi’s election, which ultimately resulted in a $25,000 contribution. A trial date has not been scheduled yet.

Whether the goal was to obtain favorable legislation or to shape the decisions of regulators, these cases demonstrate how the new avenues for political money opened by Citizens United can be used by special interests to bribe government officials.

Independent expenditures and influence

The Citizens United majority also dismissed the idea that buying influence and access was a form of corruption that could justify restrictions, proclaiming that “the fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.” Quoting Justice Anthony Kennedy’s own words in dissent from a prior campaign finance case, the Kennedy-led majority asserted that “[f]avoritism and influence are not…avoidable in representative politics” and “[d]emocracy is premised on responsiveness.”

As CREW’s Stuart McPhail has noted, the court’s “hair-splitting between protected ‘influence and access’ and the prohibited ‘quid pro quo’ would…come as a surprise to the Framers—and indeed every generation of American to consider the matter prior to the Court’s recent turn.” The late Justice John Paul Stevens argued much the same in the dissent he authored in the Citizens United case, referring to the majority’s position as a “crabbed view of corruption” that had previously been rejected by the Supreme Court and failed to recognize that “the difference between selling a vote and selling access is a matter of degree, not kind.” The vast majority of the American public, who believe donors and special interests have too much influence on lawmakers, would also seem to agree.

In the 14 years since the Citizens United ruling, law enforcement has also tied this different degree of corruption to funding for independent expenditures. According to CREW’s analysis, at least four prosecutions in the post-Citizens United era have highlighted how super PACs are a vector for using large contributions to seek access to and influence with elected officials.

In one case, a Mexican businessman who “sought to buy political influence” in San Diego funneled close to $600,000 in illegal foreign funds into the city’s 2012 election, including by making straw donations to super PACs.

When now-convicted Fugees rapper Prakazrel “Pras” Michel was indicted along with an infamous Malaysian financier known as “Jho Low” for conspiring to make and conceal foreign and conduit campaign contributions during the United States presidential election in 2012, including more than $1 million to a super PAC, the Justice Department described the scheme as being aimed at buying “access to, and potential influence with, a candidate, the candidate’s campaign, and the candidate’s administration.”

In another case, when former Rudy Giuliani associates Lev Parnas and Igor Fruman, along with several others, were indicted for conspiring to make conduit contributions and to violate the ban on foreign donations, the Justice Department alleged that Parnas and Fruman made contributions in the name of another to two super PACs in order to “obtain access to exclusive political events and gain influence with politicians.”

Former executives of a government contractor who were indicted for conspiring to make unlawful political contributions via straw donations to a candidate’s campaign and a super PAC supporting the campaign were described by the government as seeking to “gain favor” with the candidate.

Relying on the record developed in a prior case, McConnell v. FEC, the Citizens United majority claimed there were no “direct examples” before them of votes being exchanged for expenditures and only “scant evidence that independent expenditures even ingratiate.” It would be hard now, 14 years after Citizens United was decided, to call the evidence of both quid pro quo exchanges and ingratiation “scant.”

The examples above only address cases where prosecutors believed they could prove beyond a reasonable doubt that the law had been violated, which means they almost certainly represent just the tip of the iceberg in terms of the corruption the Citizens United decision unleashed into the American political system. Congress could fill out the record further by embarking on the type of fact-finding investigation that followed the 1996 election and highlighted the types of soft money abuses that the Bipartisan Campaign Reform Act of 2002 sought to address.

The Citizens United majority, justifying their decision to overrule Austin v. Michigan Chamber of Commerce, wrote that the Court’s previous holding had been “undermined by experience since its announcement.” But the same could be said today of that same majority’s declaration that independent expenditures “do not give rise to corruption or the appearance of corruption.” Numerous scandals, prosecutions and convictions demonstrate that independent expenditures can and do fuel corruption, exposing the majority’s conclusion as fundamentally flawed.

#### Independence requirements have no teeth

Ian Vandewalker, 10-28-2024, "Dark Money from Shadow Parties Is Booming in Congressional Elections." Brennan Center for Justice, [https://www.brennancenter.org/our-work/analysis-opinion/dark-money-shadow-parties-booming-congressional-elections. Accessed 4-12-2025](https://www.brennancenter.org/our-work/analysis-opinion/dark-money-shadow-parties-booming-congressional-elections.%20Accessed%204-12-2025).

Is dark money — spending by groups that hide their donors — a problem in our elections? Some have argued that the concern is overblown, pointing to Federal Election Commission data that appears to show spending on campaign ads by dark money groups has decreased since it peaked in 2012. The truth, however, is that many of these groups have simply redirected their spending to avenues not captured in that data. They increasingly funnel money to super PACs rather than running ads of their own. And the ads they do run are often timed to avoid triggering disclosure requirements. As a result, not only are the donors’ identities hidden, we don’t even know how much they are spending. This analysis presents a case study for this new dynamic: the growing reliance of congressional “shadow parties” on dark money that is spent in the most competitive races.

For the past decade, both major political parties have had shadow party super PACs through which they can raise unlimited amounts. Under the logic of Citizens United, super PACs are supposed to operate independently of candidates and parties, but “independence” is defined by weak rules that are almost never enforced. As a result, these groups, while nominally separate, are in practice blessed by party leaders, run by longtime party operatives, and effectively part of each party’s campaign apparatus. Shadow party groups frequently outraise their party’s official committees by tens of millions of dollars, relying mostly on donations that would be illegal for the party to take.

In theory, the sources of this funding must be disclosed. But over the last several election cycles, shadow parties have relied more and more on money from secret donors funneled through affiliated dark money groups run by the same people. Today, each super PAC tied to party leadership in the House and Senate has a designated dark money sister group that allows it to solicit funding from donors who want to stay hidden.

Dark money funneled through shadow party super PACs has risen dramatically over the years. In the 2024 cycle, the four dark money groups together have given a record-breaking $182 million to their sister super PACs through the end of September of the election year. That’s more than twice the amount they had given by this point in 2020. (These super PACs also receive dark money from other sources. Here we have tracked only funding from each group’s dark money affiliate.)

We can track this growth in giving because it flows through super PACs. But dark money groups, including those connected to shadow parties, also spend directly on ads intended to influence elections that slip past federal disclosure requirements. Those rules only cover certain television and radio ads that contain express electoral language or mention a candidate in the immediate run up to an election. Dark money groups can buy ads that don’t qualify (including ads prior to the pre-election period and most online ads) to avoid reporting to the Federal Election Commission.

Sometimes shadow parties announce this spending through the press. The two pro-Republican congressional dark money groups have claimed more than $105 million this election cycle: more than $20 million from American Action Network and $85 million from One Nation. Their pro-Democratic counterparts are reportedly far behind, with only $17 million from House Majority Forward. These amounts come on top of their super PAC contributions. However, the numbers are not verifiable: groups could change their plans, spend without publicizing it, or even make false claims.

Importantly, as has long been the case for outside spending in general (including dark money spending), shadow parties concentrate their spending on a few races they consider competitive, as they and their donors try to gain partisan control of each chamber of Congress. For example, the Senate Leadership Fund has concentrated all its $140 million in independent expenditures on just five Senate races, and almost all of One Nation’s reported $85 million in ad buys targets the same contests. This means that the voters in the states and districts that are most inundated with ads may have the least information about who is paying for those messages.

Legal loopholes will continue to allow megadonors, corporations and others to hide their giving until Congress closes them. The DISCLOSE and Honest Ads Acts, both part of a reform package that passed the House but was blocked in the Senate in the last Congress, would eliminate many current disclosure loopholes. These bills are likely to feature prominently in the ongoing push to overhaul campaign finance in the next Congress.

#### PAC coordination is easy – Only the court can solve

Alison Walter, 1-30-2023, "Super PACs Can’t Coordinate with Candidates — Here’s What Happened When One Did." Campaign Legal Center, https://campaignlegal.org/update/super-pacs-cant-coordinate-candidates-heres-what-happened-when-one-did. Accessed 4-12-2025.

Voters have a right to know who’s spending money to influence elections. That’s why federal campaign finance laws require people running for public office to declare their candidacy and file reports that disclose who their donors are and how they spend campaign funds, including political contributions.

Federal law also prohibits super PACs — organizations that are allowed to raise unlimited amounts of money from corporations and individuals — from donating to candidates and their campaigns or coordinating with them. These measures are crucial to ensuring that voters are informed about who candidates are beholden to, and to prevent a small group of wealthy special interests from commandeering elections.

Starting in 2017, then-Governor of Florida, Rick Scott, and his nascent Senate campaign engaged in a blatant scheme to circumvent these important anti-corruption and pro-transparency laws. Scott illegally delayed declaring his candidacy with the Federal Election Commission (FEC) to avoid triggering federal requirements, while co-opting New Republican, a super PAC, to raise millions of dollars outside the legal limitations, which would later be spent supporting his campaign.

In May 2017, when Scott became Chair of New Republican, the super PAC had made no independent expenditures since 2014 and had not received a contribution in over a year. Scott quickly staffed the super PAC with his political allies, declared a new mission (to support then-President Trump’s policies while rebranding the Republican Party), and ramped up fundraising operations, raising over a million dollars by the end of 2017 and a further $1.2 million in the first quarter of 2018.

Yet the super PAC did not spend any of that money on its purported new mission. Indeed, while Scott was Chair, New Republican continued to make no independent expenditures in support of any candidates, and it aired no issue ads. That all changed when Scott announced his Senate campaign in April 2018.

The day of Scott’s announcement, New Republican rolled out a new website — prepared and paid for in advance — and a new objective: electing Rick Scott. This time New Republican meant it, spending over $29 million on that objective in the 2018 election, almost all either in support of Scott or in opposition to Sen. Bill Nelson, his Democratic rival.

In August 2021, Campaign Legal Center Action (CLCA) sued the FEC on behalf of End Citizens United (ECU), after the Commission dismissed ECU’s administrative complaints alleging inappropriate coordination between Scott and New Republican, among other campaign finance violations. The district court, however, affirmed the FEC’s dismissals of ECU’s complaints. In so doing, the district court both misinterpreted the law and mischaracterized the FEC’s actions.

Consequently, CLCA — on behalf of ECU — has appealed the district court decision to the D.C. Circuit, asking the Circuit Court to correct the district court’s obvious errors.

Campaign finance laws are in place to prevent schemes like this one that hide information from voters about which wealthy special interests are spending big money to secretly influence our votes and our government. It’s time for the Court to step in and make clear that co-opting a super PAC isn’t a clever way of raising money — it’s a violation of the law.

### S: Democracy

#### Despite CU’s limits and disclosure requirements, spending causes information overload and drowns out advocacy

HLR, 2024, "Drowning Out Democracy." Harvard Law Review, 137:2386, https://harvardlawreview.org/print/vol-137/drowning-out-democracy/. Accessed 4-26-2025.

A. New Difficulties in a New Discursive Environment

When it decided Citizens United in 2010, the Court released unprecedented quantities of money into campaigns. It did so by striking down limits on independent expenditures (including spending by so-called Super PACs).23 The Court found that expenditure regulations burdened core “political speech”24 — the speech most essential to “our electoral process,” which receives heightened scrutiny protection.25 In conducting its strict scrutiny analysis, the Court also implied that most campaign finance regulations could be justified only where they were narrowly tailored to a specific set of compelling interests related to so-called “quid pro quo corruption.”26 “Taken to its logical extreme,” that framework “may limit campaign finance restrictions to not much beyond the regulation of contributions to candidates and officeholders.”27 Citizens United’s reasoning has since felled many more regulations.28 Campaign money then ballooned. The most expensive presidential election before the ruling cost about $1.8 billion;29 the 2020 presidential election cost $14 billion.30

This money enters a discursive environment unlike the one that existed ten or twenty years ago. More people now get news from social media than from print newspapers,31 and most Americans primarily obtain news online.32 Online news sources are different in kind: they are diverse and numerous, constantly available, and virtually uncontrolled. Voters are each awash in information, but nonetheless consume a less diverse array of perspectives, as information is narrowly tailored to individual preferences via “profit-maximizing algorithms seeking to capture the largest number of ‘eyeballs’ and advertising dollars.”33

This media environment sets the stage for “drowning outs” in at least three ways. First, the tailoring of information generates personalized and partisan information silos,34 making it much more difficult for any voter to ever see, much less assess, the full scope of the marketplace of ideas.35 Even a voter who seeks to escape her silo may encounter difficulty doing so, as the algorithm may only tend to feed her more of what she has already consumed.36 As such, citizens can be more easily inundated with a single perspective, and other views more easily silenced, becoming undetectable in the sea of voices. While “it was once hard to speak,” instead, “it is now hard to be heard.”37 Second, attention is commodified. Speech has become “less the circulation of ideas and opinions among autonomous individuals and more a collection of measurable data” that wealthy entities may “use to predict social behavior” and “influence” readers.38 Third, information is now less rigorously fact-checked, and the “ideal” of journalistic “objectivity” is eroded.39 This new media landscape strains and then shuts many traditional news outlets that once performed these functions,40 and misinformation spreads, undermining trust in all sources of information.41

Well-financed campaigns may exploit this increasingly siloed and factless environment by investing in tools that block competing messages, via the “flooding” of platforms or the deployment of “troll armies,”42 or by spending to target voters. Where radio or television ads could reach only general populations, online advertising is precise and individualized.43 And while radios or televisions could be turned off, our phones and computers are rarely set aside. Targeted campaign messaging can follow voters across platforms,44 and could make an idea nearly inescapable.45 New tools are likely on the horizon, too, as our speech environment continues to evolve in unforeseeable ways — for example, via the proliferation of artificial intelligence,46 a development largely unforeseeable just a few years ago.

At sufficiently high levels of spending, a campaign can use blocking and targeting tools to blitz select voters, fully saturating their personalized media environments and preventing an opponent’s messaging from breaking through. Thus, changes to campaign finance law and changes to our speech environment have coincided to generate a perfect storm. Although well-financed entities cannot literally silence every opposing speaker, they may soon be able to prevent the relevant subset of listeners from hearing the other side. And by doing so, they may effectuate a new kind of “drowning out” — eliminating the deliberative political reflection at the heart of each voter’s democratic citizenship.

B. The Emergent Risk of “Drowning Outs”

Admittedly, total silencings do not yet abound. And there are some kinds of elections where “drowning outs” are relatively unlikely to ever occur. Presidential elections and other major national campaigns seep into our culture and conversations, making the silencing of either side more difficult. Similarly, where the two major parties are highly active, their relatively equibalanced media campaigns might tend to prevent one side from fully obliterating the other’s communicative capabilities. But hundreds of other campaigns waged each year, particularly at the local or state level and via ballot initiative, remain highly susceptible to the new “drowning out” phenomenon — particularly given the hypernationalization of our politics47 and the diminution of local news.48

Partial “drowning outs” are already proliferating, as suggested by the Proposition 22 campaign discussed in the introduction.49 And Proposition 22 is not alone. For example, in a similar race in 2018, a Washington State ballot initiative designed to enact a carbon tax was defeated after opponents spent $31 million in money raised mostly from the oil industry, a record in that smaller media market.50 The initiative’s failure “seemed improbable,”51 but it lost by a wide margin.52 Tactics similar to those used in the Proposition 22 campaign — deceptive advertising and media inundation — helped corporations win this campaign, too.53

“Drowning outs” may also reach candidate elections. Massive spending already floods these campaigns.54 And indications of inundation are appearing. For instance, in Boston’s 2023 city council election, PACs spent tens of thousands in one month before the election — thirty times one candidate’s budget for that month — to bombard voters with calls, messages, and ads opposing two sitting councilors.55 The targeted incumbents did not advance, becoming the first “sitting councilor[s]” in “over four decades” to fail “to advance past the preliminary.”56

C. The Risk Posed by Money’s “Drowning Out” Potential

The risk posed by a “drowning out” differs from the other risks of unchecked political money that scholars and jurists have long recognized.57 Most clearly, the “drowning out” risk bears little resemblance to concerns over corruption: that as larger sums are needed to run successful campaigns, politicians may become beholden to the moneyed interests to whose trough they must return.58

At first glance, the concern with “drowning out” more closely resembles the other traditional concern: distortion — the worry that unlimited spending will allow the wealthiest voices to unfairly skew opinion, shifting electoral outcomes away from baseline democratic preferences.59 This distortion risk formed the basis for the Court’s opinion in Austin v. Michigan State Chamber of Commerce,60 a concern subsequently rejected in Citizens United.61

However, “drowning outs” differ from distortions not just in scale, but also in kind. The danger posed by a “drowning out” is not that political outcomes may be skewed away from some equitable ideological distribution, but rather that no political debate will occur at all.

This concern with a “drowning out” by corporate money is not entirely novel. In 1978, the appellee in First National Bank of Boston v. Bellotti62 worried that “corporations . . . [would] drown out other points of view.”63 The Bellotti Court rejected that argument, finding it unsupported by the record.64 A brief burst of post-Bellotti scholarship explored corporate money’s potential to “drown out,”65 but the argument faded in significance, as it was folded into the antidistortion rationale in Austin.66 This Note draws from that earlier “drowning out” discussion, but addresses a new version of the problem. Whatever risk of “drowning out” existed in Bellotti’s era of print journalism fundamentally differs from the risk posed in our internet era; now, it seems that a true silencing of all alternative perspectives may soon be possible.

That risk is becoming real at a particularly troubling moment, as American hyperpolarization rises67 and democracy backslides.68 In the face of democratic fragility, “drowning outs” only further erode the discourse that sustains democracy and may be required for its restoration. “Drowning outs” contribute to the sense that politics amounts to a war of all against all, incentivizing the stretching of democratic norms for partisan advantage.69 Money may contribute to the failings of our new discursive reality, or simply accelerate dynamics already at play. In either case, money’s role in the political environment has changed. And as campaigns veer closer and closer to effectuating total “drowning outs,” we are urgently in need of a remedy.

#### CU nukes democracy – Musk proves party-PAC coordination is inev, congress fails absent a fiated court action

Paul Blumenthal, 1-18-2025, "It Only Took 15 Years For Citizens United To Kill Campaign Finance Reform." https://www.huffpost.com/entry/citizens-united-campaign-finance-reform\_n\_678a9e56e4b034321f84da71. Accessed 4-26-2025.

Elon Musk, the richest man in the world with a net worth north of $400 billion, is now also the biggest donor in U.S. politics, having spent more than a quarter of $1 billion to elect Donald Trump president in 2024.

Musk made his biggest investment in America PAC, a super PAC that ran an extensive (but maybe not particularly effective) operation in swing states to get low-propensity Republican voters out to the polls. What made Musk’s efforts in 2024 different from those of past megadonors is that the super PAC operations he funded were directly coordinated with the Trump campaign.

Super PACs and other outside groups allowed to raise unlimited contributions are ostensibly meant to be independent from the political parties and candidates they support — at least, that was the rationale given by the Supreme Court in its 2010 decision in Citizens United v. Federal Election Commission, which enabled corporations and the wealthy to make such contributions.

Since then, the courts, the FEC and opportunistic political party actors have knocked down the wall of independence between the political action committees and the campaigns that the Citizens United court had presumed.

What the country is left with is the worst of all possible worlds. The political parties are hollow and weak, especially at the state level. Members of Congress spend an inordinate amount of time fundraising, for themselves and their party. Their campaigns send out endless, often deceptive solicitations for small-dollar donations. Meanwhile, nonparty actors, fueled by billionaire donations, control what should be party activities and buy themselves an amount of power and access that was previously unheard of.

It’s time to admit an uncomfortable fact: 15 years after Citizens United, campaign finance reform is dead.

This doesn’t mean that efforts to regulate money in politics no longer exist or have no future. What it does mean is that existing campaign finance laws no longer serve their stated purpose of preventing corruption and empowering the voices of ordinary citizens. Those still on the books also face an uncertain future in the face of a deeply hostile judiciary that will only get more hostile as Trump appoints even more conservative judges to the federal bench.

Campaign finance reform traces its roots to the turn of the 20th century. The enactment of civil service reform ended the old spoils system, whereby federal office-seekers and officeholders made small donations or paid a portion of their government salaries to fund their respective parties. The current system of campaign financing slowly emerged, with corporations and the very wealthy financing party efforts, until it came into full blossom under the guidance of Mark Hanna, William McKinley’s campaign manager, in the 1896 presidential election.

McKinley’s campaign was the first entirely funded outside of the political system, as Hanna raised millions from nearly every major corporation in New York City. Never before had a campaign raised so much money and from so many powerful interests, from J.P. Morgan to John D. Rockefeller’s Standard Oil, as it beat back the populist campaign of McKinley’s opponent William Jennings Bryan that threatened the power of capital. Reform efforts sprang forth to address popular fears of corruption from giant corporate monopolies and the growing ranks of the industrial oligarchy.

First came the Tillman Act of 1907, a law banning corporate donations to political parties and candidates that followed a fundraising scandal involving life insurance companies. But it had no enforcement mechanism. Reform efforts puttered along for decades until the explosion in popularity of television in the 1950s and 1960s led to ever-escalating costs for running for office.

The current campaign finance regime was born in 1971 when Congress passed the Federal Election Campaign Act, which was then expanded in 1974 following Watergate revelations about illegal campaign fundraising practices, including violations of the Tillman Act.

The law created campaign contribution limits for parties and candidates, mandatory disclosure, an enforcement body in the FEC, public financing of presidential elections and bans on certain abusive practices. A key part of the law, however, was its limits on campaign spending: These limits were meant to reduce the influence of money in politics by stopping the rise in campaign costs on the back end, while the contribution limits sought to reduce the potential for big-donor corruption on the front end.

In 1976, the Supreme Court struck down the law’s limits on campaign spending in the case of Buckley v. Valeo, on the grounds that they impinged on the First Amendment right to free speech. This came just as congressional elections were about to become much more competitive.

A campaign money arms race quickly ensued — and it hasn’t let up. Without spending limits, the push for limited campaign contributions exploded. Political party actors and ideological activists sought opportunistic advantages at every turn, through unlimited soft-money party contributions to exploiting political action committee and nonprofit loopholes.

Reformers sought to plug some of these holes with the Bipartisan Campaign Reform Act of 2002, popularly known as McCain-Feingold, which banned soft money donated to a party for spending on so-called issue advocacy and party-building efforts, limited outside spending and cracked down on wealthy, self-financing candidates. But the Supreme Court’s shift to the right that began with the appointments of Chief Justice John Roberts in 2005 and Justice Samuel Alito in 2006 has effectively neutered that law.

This started in 2007 when the court blew up the McCain-Feingold limits on corporate-funded issue ads by nonprofits, ruling that the limits violated the free speech rights of those corporations and groups. Then, in 2010, the Citizens United decision vastly expanded that to all outside spending: The court ruled that corporations could freely fund independent political spending, saying that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” A lower court extended that ruling to allow funds from individuals, which enabled the creation of the super PAC.

A wide array of outside groups immediately popped up — many with explicit connections to parties and candidates, despite the court’s supposed insistence on independence. Mitt Romney’s 2012 presidential campaign incubated the super PAC Restore Our Future before he announced his candidacy and then made it “independent” afterward.

The lines of independence continued to crumble thanks to enforcement decisions by the FEC. Candidates were allowed to appear at super PAC fundraisers so long as they did not personally ask for sums exceeding the candidate contribution limit. Super PACs could use materials and information posted online by candidates and parties, including videos, images, ad messaging and targeting strategy. In the 2016 GOP presidential primaries, single-candidate super PACs effectively took over campaign operations by hosting rallies where their candidate would appear as a “special guest.” Meanwhile, on the Democratic side, Hillary Clinton’s presidential campaign was accused of openly coordinating with the super PAC Correct the Record — and was let off the hook by the FEC.

The coup de grâce came in early 2024, after the law firm of Democratic Party lawyer Marc Elias petitioned the FEC to allow a Democratic-aligned super PAC in Texas to coordinate with candidates when engaged in voter turnout efforts. The FEC’s decision gave the thumbs-up to direct coordination between candidates, parties and super PACs on one of the most vital elements of campaigning: voter engagement and turnout.

But it wasn’t Democrats who took advantage. Republicans immediately seized the opportunity. Trump outsourced his ground game to groups like Turning Point USA and Musk’s America PAC while directly coordinating with them. Whatever lines existed between the independent spending envisioned by the Supreme Court in its Citizens United ruling and the candidates and parties backed by such groups were no more.

This, now the state of affairs in 2025, is the worst possible system for campaign funding. Political parties are husks turned into personalistic fiefdoms by conquering warlords, like the Republicans, or incapable of leadership, policy prioritization and decision making, like the Democrats. State parties are in even worse shape, needing to beg for funds from their national party, thus making it impossible for them to create an independent identity. Filling their place are outside groups, with their phony independence providing billionaires like Musk a chance to assert control.

Campaign contribution limits are effectively void now that super PACs can explicitly coordinate with candidates and parties. However, lawmakers still need to raise limited contributions on a nonstop basis for themselves and their party, leaving less time for legislating. This was made even worse by the Supreme Court’s 2014 decision in McCutcheon v. FEC that ended aggregate limits on campaign contributions, thus expanding how much a particular donor could give in one cycle. Any concerns about the corrupting influence of money in politics are only growing.

At the same time, the Citizens United decision led to a dramatic increase in the amount of campaign spending funded by undisclosed donors. The public may not know the identity of the hundreds of millions in dark money spent on elections since then, but the candidates and party actors — who, after all, can appear at their fundraisers — likely do.

And future hopes for reforming these issues are slim to none. Democrats almost passed legislation in 2022 that would have closed some of the loopholes in super PAC coordination, changed the structure of the FEC and introduced limited public financing of House elections, but were stymied by the refusal of then-Sens. Joe Manchin and Kyrsten Sinema to bypass the filibuster to do so.

Of course, that bill could not have done anything about the ultimate obstacle to fixing the death spiral of campaign finance reform: the Supreme Court. The court’s decisions in Buckley and Citizens United make it impossible to place limits on campaign spending or rein in the outside spending that is now swamping politics and empowering literally the richest man in the world. The conservative court continues to strip away existing campaign finance laws and would likely find cause to strike down elements of Democrats’ reforms if they passed.

There is also no hope for a court more amenable to campaign finance reform in the near or medium terms. The late Justice Sandra Day O’Connor was the last Republican-appointed justice to be favorable to campaign finance laws. Her replacement by Alito began reform’s death. The only hope that reformers had was for a Democrat, whether it be Clinton or Barack Obama, to appoint Justice Antonin Scalia’s replacement after he died in 2016. Mitch McConnell, known as the “Darth Vader of campaign finance reform,” made sure that didn’t happen. Then, Justice Ruth Bader Ginsburg’s untimely death gave Republicans a sixth seat on the court.

If Alito, Roberts or Justice Clarence Thomas retire during Trump’s second presidential term, the six-vote conservative supermajority will extend for at least the next few decades.

This doesn’t mean that concerns about the role of money in politics need to die with the existing system of reform. It may in fact be the one issue on which the public is almost universally united: Americans are overwhelmingly unhappy with a political system beholden to money over constituents, and broadly desire reforms that would course-correct the existing operation. Reformers, in turn, need to recalibrate what they intend reforms to accomplish away from their 1970s roots in devolving party power to the people and toward a reinvigoration of democratic parties if they are to fight against the rising tide of oligarchic wealth that outside spending represents.

Political parties, when allowed to function properly, are vital tools of democracy. Parties provide structure for democratic decision making, policy prioritization and coalition mobilization that ideological or self-interested actors cannot. Absent those structures, or undermined by the rise of and reliance on billionaire-funded super PACs and dark money, you get the personalistic rule of Trump and Musk, or the “shambolic” process that led to Joe Biden stepping aside in last year’s presidential race. Rebuilding parties can be a way to fight against the corrupting influence of so-called independent spending.

The constitutional amendment process, however far-fetched, is the only real hope for reining in money in politics. Overturning the Buckley and Citizens United decisions is the only way to actually enable reform to work. The other option is reforming the Supreme Court to bring about a different majority in this lifetime.

The reform project may be at its nadir as the corruption of big money takes the throne. That doesn’t mean it cannot reimagine what fighting the influence of money in politics means in the 21st century. But it may very well take some hard reconsideration of which reforms are beneficial — and which ones undermine the broader goal of a more equal and sustainable democracy.

#### Now is key – SCOTUS will grant cert in the Vance case, and they’ll use the opportunity to enable unprecedented dark money – Tanks democracy, guarantees corruption

Shawn Fain, 9-13-2024, "J. D. Vance Is Trying to Push Citizens United Further." No Publication, https://jacobin.com/2024/09/jd-vance-supreme-court-money. Accessed 4-26-2025.

Vice-presidential candidate Sen. J. D. Vance (R-OH) and other Republicans are spearheading a lawsuit aiming to prompt the Supreme Court to move beyond its landmark Citizens United decision and tear down some of the last remaining rules designed to prevent megadonors’ money from influencing public officials. What’s more, Vance has ties to one of the appeals judges who agreed with the effort and just helped tee up the case for Supreme Court consideration.

If the Supreme Court ends up hearing Vance’s new case, it would give the additional three President Donald Trump–appointed judges who were not on the court during Citizens United an opportunity to go even further than that landmark decision — an outcome hinted at by Justice Clarence Thomas in his Citizens United concurring opinion saying the ruling didn’t go far enough.

Experts say Vance’s lawsuit, as well as a new regulatory decision allowing a candidate to work hand in hand with a deep-pocketed outside election group, is part of a coordinated effort, decades in the making, to destroy the last vestiges of campaign finance laws designed to prevent the wealthy and the powerful from spending limitless amounts directly on candidates and demanding favors in return.

In 2010, the Supreme Court’s Citizens United v. Federal Election Commission used a relatively esoteric and narrow campaign finance dispute to issue a sweeping precedent removing restrictions on independent election expenditures as long as they were “not coordinated with a candidate.” The decision gave rise to “independent-expenditure-only committees,” or super PACs, which are political action groups that can raise and spend unlimited amounts of money on political campaigns, so long as they do not directly coordinate such expenditures with candidates for public office.

Vance’s new lawsuit — filed alongside the National Republican Senatorial and Congressional Committees, and former representative Steve Chabot (R-OH) — aims to abolish some of the last barriers separating candidates and buckets of cash from corporations and wealthy donors. In specific, the case argues for permitting megadonors to use national party committees to directly coordinate their limitless spending directly with candidates.

Though that argument lost earlier this month in the Sixth Circuit Court of Appeals in Cincinnati, Ohio, the case succeeded in prompting judges on that lower court to call for clarification from the Supreme Court.

If the high court heeds those calls and ends up hearing the case on appeal, conservative justices could agree with Vance — or use the case to issue an even more expansive set of precedents deregulating the campaign finance system.

“I think you would see party committees becoming huge conduits for big donors,” said the Campaign Legal Center’s Tara Malloy about what could happen if Vance’s lawsuit is successful.“But they would do so in a way that would really make them channels of corruption. Because unlike a super PAC, a party committee is uniquely tied to their candidates, and here they’re seeking to spend unlimited amounts of money in direct coordination with candidates.”

In his Citizens United concurring opinion, Thomas made clear that he supports no limits on campaign spending and believes disclosure requirements are a violation of the First Amendment.

“The Court’s constitutional analysis does not go far enough,” Thomas wrote about the Citizens United decision. “Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies specifically calculated to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights.”

Friends in High Places

Vance’s lawsuit was initially filed in 2022, and in their plea for the appeals court to hear the case, lawyers for Vance and his Republican colleagues asked the court that if they ruled against them, the appeals court should “promptly . . . permit Plaintiffs to seek Supreme Court review,” according to court documents filed on March 5.

That plea was heard six months later on September 5, when a sixteen-judge panel on the Sixth Circuit Court of Appeals — which hears cases from lower courts in Kentucky, Michigan, Ohio, and Tennessee — ruled against Vance and his Republican allies, stating that circuit courts do not have the power to overturn Supreme Court precedent limiting coordination between national party committees and candidates.

However, two of those judges, both appointed by Trump, issued opinions stating that they agreed with Vance’s lawsuit to overturn coordination limits, but ruled against it citing that circuit courts do not have the authority to overrule Supreme Court precedent.

“These limits run afoul of modern campaign-finance doctrine and burden parties’ and candidates’ core political rights,” wrote Judge Amul Thapar. “For the plaintiffs, however, our court is not the proper audience for these concerns.”

Thapar is the former boss of Vance’s wife, Usha Chilukuri Vance, when she worked as a law clerk in a Kentucky district court.

Jane Stranch, another judge on the panel who didn’t agree with the plaintiffs, noted in her opinion that the suit was expressly designed to allow the Supreme Court to overturn its previous ruling on national party committees coordinating with candidates.

“​​The plaintiffs filed this lawsuit to ask the Supreme Court to overrule its decision in FEC v. Colorado Republican Federal Campaign Committee, and urge us to rule against them ‘promptly’ to facilitate the higher court’s review,” wrote Stranch, who was appointed by President Barack Obama. “That posture should have made this an easy case, one we could unanimously resolve in a handful of pages. It instead produces handfuls of opinions encouraging the Supreme Court to rework campaign finance, First Amendment, and constitutional law in new and audacious ways.”

The case is the latest attempt to dismantle campaign finance laws, said Chris deLaubenfels, general counsel and legal director for End Citizens United, an advocacy group dedicated to getting big money out of politics.

“It’s a blatant power grab aimed at giving their corporate special interest and billionaire donors more power and influence over government,” deLaubenfels said in a statement to the Lever. “While we’re encouraged by the Sixth Circuit’s ruling to strike down this challenge, we have no faith in the corrupt Supreme Court majority.”

At the same time, a new Federal Elections Commission (FEC) ruling just removed one of the main firewalls stopping independent organizations like super PACs from using their unlimited pools of cash to directly work with candidates’ campaigns. The ruling was issued at the behest of Sen. Lindsey Graham (R-SC), who wished to merge his campaign committee with a super PAC to create a joint fundraising committee.

Vance’s and Graham’s moves are a part of a decades-old master plan to dismantle laws aimed at curtailing corporate influence in elections.

In 1971, soon-to-be Supreme Court justice Lewis Powell wrote a memorandum that claimed corporations were under “broad attack” and that business elites needed to come together to work on the “survival of what we call the free enterprise system.”

In the memo, Powell wrote that the Supreme Court “may be the most important instrument for social, economic and political change.” In recent years, the Supreme Court has rolled back campaign finance laws, legalized bribery, and promoted corporate interests by weakening environmental regulations, among other rulings.

Vance did not respond to a request for comment.

“The Goal Here Is to Eviscerate”

At the heart of Vance and the National Republican Senatorial and Congressional Committees’ lawsuit is a 2001 Supreme Court ruling that barred party committees like the National Republican Senatorial and Congressional Committees and the Democratic Senatorial and Congressional Committees from coordinating spending with candidates.

In the 2001 case — called FEC v. Colorado Republican Federal Campaign Committee — Colorado Republicans attempted to overturn the 1971 Federal Election Campaign Act, which limited coordinated spending between national party committees and federal candidates.

The court in 2001 rejected the Colorado state committee’s arguments that coordinated party spending limits are unconstitutional and a core part of party committees.

The court highlighted that “unlimited party coordinated expenditures would make political parties an attractive vehicle for donors seeking to circumvent the individual contribution limits in order to buy influence with candidates and officeholders,” according to the Campaign Legal Center.

“These limits are seen as a necessary check on the corporate effects of large contributions that sometimes go to and through the party committees for candidates,” said Malloy with the Campaign Legal Center. “The theory was that without these spending limits, a big donor could simply circumvent the lower amount of how much you can give to a candidate directly by giving a larger amount to the party.”

But now, Vance and his Republican allies are arguing that the Supreme Court’s views on coordinated spending and contribution limits have changed since 2001, highlighting how the court has limited campaign spending restrictions to essentially bar only blatant examples of quid-pro-quo corruption, in which donations are explicitly given in exchange for political favors.

If the lawsuit is successful and party committees are allowed to spend freely on candidates, corporate interests and wealthy donors could use the committees to circumvent remaining limits on contributions — the total amount that individuals can give directly to candidates or their affiliated committees.

The current limits for coordinated spending between national committees and candidates are $32.3 million for presidential candidates. Limits vary for Senate and House candidates by state, but in Ohio, Vance’s home state, the limits are $1,138,000 per Senate candidate and $61,800 for a U.S. House candidate.

Vance and his Republican co-plaintiffs are essentially trying to bypass these limits.

“[The Republicans’] goal here is to eviscerate the remaining and incredibly important features of campaign law that limit contributions,” said Zephyr Teachout, a professor of law at Fordham University.

As part of their argument that the high court has shifted its thinking on coordinated spending, Vance and his allies cited a 2022 Supreme Court ruling that found Sen. Ted Cruz’s (R-TX) campaign committee was allowed to repay him money he lent to the committee, plus interest.

The Republicans also referenced a 2014 Supreme Court ruling that struck down previous limits on how much an individual can donate in an election cycle, but kept in place restrictions on how much an individual can give directly to a candidate and their affiliated committees.

The Sixth Circuit Court of Appeals ruled it didn’t have the authority to overturn the 2001 Supreme Court decision limiting coordination between national parties and candidates. But buried in the decision is a potential ticking time bomb: an acknowledgment that the case could be heard by the Republican-friendly Supreme Court.

“The key reality is that the Supreme Court has not overruled the 2001 Colorado decision or the deferential review it applied to these provisions of the Act,” Chief Judge Jeffrey S. Sutton wrote in his opinion. “In a hierarchical legal system, we must follow that decision and thus must deny the plaintiffs’ First Amendment facial and as-applied challenges.”

The case was heard in front of the full sixteen-judge court, which is an unusually large forum, Malloy said. Most appeals cases are heard by three judges, according to the US Federal Courts.

Such so-called en banc procedures, in which all judges in a circuit consider arguments in a case, are usually reserved for “the most judicially significant issues,” according to a 2021 University of Cincinnati Law Review article, which added that the Sixth Circuit appears to be “not afraid to take up politically charged and newsworthy issues” in en banc procedures.

Malloy said that it was also unusual that so many of the judges suggested that the Supreme Court was the proper venue for a ruling.

“If you read the decision, the Republican Party committees are really looking to strike down these long-standing party coordinated spending limits,” Malloy said. “But in order to do so, they actually have to get either a lower court or the Supreme Court to reconsider this standing Supreme Court precedent . . . that upheld the limits.”

There could be widespread effects to campaign finance laws if the Supreme Court overturns the 2001 decision, Malloy said. Party committees would be able to raise vast sums from a single donor and direct that money to whoever the donor wishes — potentially allowing them to supersede super PACs as corporate interests’ preferred vehicle for election spending.

Multimillion-dollar donations are a common occurrence for super PACs. Earlier this year, LinkedIn cofounder and tech billionaire Reid Hoffman gave $2 million to a super PAC supporting President Joe Biden. Timothy Mellon, billionaire scion of the Mellon banking family, gave $50 million to a super PAC supporting former president Trump in May.

A Shift at the FEC

Earlier this summer, lawyers for Graham petitioned the FEC, which oversees election laws and regulations, to allow the senator’s campaign to partner with the super PAC Security Is Strength. That super PAC, which has raised nearly $20 million for election purposes since it launched in 2015, has spent more than $7.6 million supporting Graham’s failed 2015 presidential run and his Senate election efforts, data shows.

Graham’s campaign was seeking the ability to “share data,” “coordinate scheduling logistics,” and “forward contributor information” with the super PAC, the FEC noted in its opinion. In exchange, the campaign reportedly promised to not coordinate with the group on financial transactions and other campaign efforts that violate election laws.

“Team Graham states that Senator Graham, Team Graham, and their agents will not discuss the nonpublic campaign plans, projects, activities, or needs of Senator Graham or his campaign with Super PAC,” the FEC wrote.

On August 29, the FEC voted five to one to allow the arrangement, provided the resulting joint fundraising committee follows stipulations on how much money must first go to Graham’s own campaign coffers and how larger amounts will be split between Graham’s political action committee, Security is Strength, and the National Republican Senatorial Committee.

“Team Graham states that it intends to comply with all Commission regulations for joint fundraising activity, including recordkeeping, allocation, and reporting requirements,” the FEC wrote.

But FEC vice chair Ellen Weintraub, the dissenting commissioner, was skeptical of the arrangement.

In a statement outlining her dissent, Weintraub wrote that the Security is Strength PAC — the super PAC partnering with Graham’s campaign — has not disclosed what kinds of “safeguards or firewalls” would be implemented to prevent any unlawful coordination, and that granting Graham’s campaign permission to partner with the super PAC is a “classic example of not seeing the forest for the trees.”

“The super PAC would be privy to the campaign’s views on messaging and donor outreach,” Weintraub wrote. “This presupposes an ongoing relationship between two entities that are supposed to be completely independent of each other. It is hard to fathom how that necessary independence will be maintained when the super PAC is integrated into the campaign’s fundraising operations.”

Weintraub wasn’t the only person concerned about allowing Graham to coordinate with a super PAC.

In a comment letter to the FEC, the Campaign Legal Center urged the FEC to reject the proposal “because candidates, political parties, and super PACs creating a [joint fundraising committee] and working together to plan public communications is the precise opposite of the independence that federal courts require as a predicate to the very existence of super PACs.”

Likewise, the Elias Law Group, which represents the Democratic Senatorial and Congressional Campaign Committees, urged the FEC to reject Graham’s proposal, stating that if the proposal were to be granted it would “greenlight something truly extraordinary.”

“The request itself admits that the super PAC will be talking directly to Senator Graham and his campaign about paid advertisements distributed by the joint fundraising committee,” the Elias Group wrote. “These paid advertisements will directly benefit the Senator’s campaign. Collaboration on these advertisements would therefore of course involve a discussion of the campaign’s plans, projects, activities, or needs with the super PAC.”

The FEC commissioners are made up of three Democratic appointees and three Republican appointees, and the commission has been deadlocked on votes for decades. But that recently started to change thanks to Democratic appointee Dara Lindenbaum siding with Republicans to “roll back limits on how politicians, political parties, and super PACs raise and spend money,” the New York Times recently reported.

In 2022, Biden tapped Lindenbaum, a former partner at Sandler Reiff Lamb Rosenstein & Birkenstock, P. C., a Washington, DC–based law firm focused on “advising clients involved in the business of politics,” for the position. The appointment was originally applauded by the Campaign Legal Center.

“To reduce political corruption, we need a strong, effective FEC to enforce campaign finance laws and hold political candidates and their donors accountable — the nomination of qualified candidates is an essential component of a successful FEC,” the group wrote in 2022.

But since her appointment, Lindenbaum has provided the swing vote on several decisions removing safeguards designed to reduce political corruption and misbehavior. That includes allowing candidate campaigns and super PACs to jointly plan door-to-door canvassing operations; permitting federal candidates to raise limitless funds for state ballot initiatives; and reducing restrictions on mass text-messaging campaigns.

Lindenbaum also voted in favor of the Graham campaign coordinating with its super PAC.

The FEC is currently proposing to roll back donor disclosure requirements by redacting donors’ mailing addresses from FEC reports. In a comment letter on the proposal, Sen. Sheldon Whitehouse (D-RI) wrote that this could create a “disastrous loophole allowing entire political organizations to obscure their donors through a secret process.”

“Anonymous spending in elections fundamentally undermines electoral transparency, an essential element of free and fair elections,” Sheldon wrote. “The proposed directive would allow a political organization to seek a blanket exemption from publicly disclosing (or even filing with the Commission) some or all of the required information for its contributors.”

Federal regulators’ ability to prevent corruption and limit coordination between megadonors and candidates could be further constrained if Trump wins reelection.

According to Project 2025, a corporate-backed blueprint developed by the right-wing Heritage Foundation think tank to radically reshape the federal government, the new Trump administration would overhaul the FEC and gut its authority over campaign spending. The manifesto also aims to hike political contribution limits, weaken donation reporting requirements, and limit federal prosecutors’ ability to enforce election laws by forcing them to first seek charging approval from the perpetually deadlocked FEC.

Thomas, who in 2010 argued that Citizens United didn’t go far enough in abolishing campaign spending limits and nixing disclosure requirements, has deep ties to the Heritage Foundation and has been routinely praised by the group. His wife, Ginni Thomas, was paid nearly $1 million between 2001 and 2007 while employed by the think tank.

### S: Race/Gender

#### CU nukes the political careers of people of color and women – Enables donor-class biases

Chris Kromm, 1-17-2020, "Citizens United at 10: Why fighting corruption is a racial justice issue." No Publication, [https://www.facingsouth.org/2020/01/citizens-united-10-why-fighting-corruption-racial-justice-issue. Accessed 4-26-2025](https://www.facingsouth.org/2020/01/citizens-united-10-why-fighting-corruption-racial-justice-issue.%20Accessed%204-26-2025).

Ten years ago, on a narrow 5-4 vote, the Supreme Court of the United States issued a decision that has reshaped our country's democracy.

Citizens United v. FEC opened a new era in Big Money influence in politics, fueling a dramatic rise in election spending by super PACs and other shadowy outside groups: According to the Center for Responsive Politics, independent political organizations have poured $4.5 billion into federal elections since 2010, including more than $960 million in spending by groups that don't have to disclose their donors.

"In our 35 years of following the money," Sheila Krumholz, the Center's director, recently said, "We've never seen a court decision transform the campaign finance system as drastically as Citizens United."

Citizens United struck down caps on "independent" election spending by corporations, nonprofits and unions. Limiting donations made directly to candidates can be justified, the court reasoned, because donors can exert dangerous levels of influence. But the court held that political cash flowing to independent groups poses no such threat; in the words of former Justice John Paul Stevens, "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

Today, the public doesn't believe that post-Citizens United politics are free of corruption. In fact, growing concern about Big Money's corrupting influence is one of the few issues that unites voters. A 2018 survey by the University of Maryland found that 88 percent of voters want to reduce the influence of big donors over lawmakers, including 84 percent of Republicans and 92 percent of Democrats. Another 2018 poll in congressional swing districts found that 75 percent of voters believe that "ending the culture of corruption in Washington" is "very important," ranking it as a higher priority than protecting Social Security and Medicare, or "growing the economy and creating jobs."

Adding to the broad appeal of tackling political corruption is heightened awareness of how Big Money exacerbates inequality, especially along race and class lines. As a growing body of research shows, most big political donors are white and male, drowning out the voices of the country's increasingly diverse electorate. What's more, the skyrocketing cost of elections blocks many lower-income and people of color candidates from running for office.

As Daniel Weiner, an attorney at the nonprofit Brennan Center, noted:

"This is perhaps the most troubling result of Citizens United: in a time of historic wealth inequality, the decision has helped reinforce the growing sense that our democracy primarily serves the interests of the wealthy few, and that democratic participation for the vast majority of citizens is of relatively little value."

But as concern about Big Money's corrupting influence grows — including the role our money-driven political system plays in deepening inequality — reform advocates are building an inclusive movement to curb the undue influence of special interests, while connecting money in politics reform to a broader measures to strengthen democracy.

The donor class

The tidal wave of money flooding into politics has strengthened the influence of a narrow elite in our democracy: the donor class. A series of studies in recent years show that, while the voters and population of the South and country are becoming increasingly racially diverse, the class of big donors that shapes politics and policy continues to be overwhelmingly white.

In 2016, the policy think tank Demos released a report looking at the demographics of big political donors, which they defined as those giving $5,000 or more. From 2012 to 2016, 91 percent of these elite contributors to presidential campaigns were white. In the same time period, just 3 percent of high-level presidential donors were people of color; the share of non-white top contributors to congressional races was only 4 percent.

The dominance of white donors has continued into the 2020 presidential contest. An analysis by Alex Kotch and Donald Shaw for Sludge in August 2019 — when there were still 19 Democratic candidates – found that for all but three of the party's White House hopefuls (Julian Castro, Tulsi Gabbard, and Andrew Yang), more than 85 percent of donors giving $200 or more where white.

Data from the state and local level reveal similar racial disparities in the donor class. A 2015 Facing South/Institute for Southern Studies analysis of North Carolina donors to federal campaigns in 2014 and 2016 revealed that 95 percent of big donors to key races were white, in a state where non-Hispanic whites make up only 65 percent of the population. Another report by Demos found that even in Miami-Dade County in Florida, which has an established and successful Latinx community, only 12 of the 500 biggest donors in 2014 were people of color.

Who donates to elections has real consequences. Donors play a big role in picking and reinforcing which candidates run for office and get elected; a recent analysis found the better-funded candidate wins more than 90 percent of the time. But elite donors also push an agenda that often serves their interests, which is often out of step with the broader public. The 2016 Demos study, for example, found that while 53 percent of people who didn't contribute to campaigns supported the Affordable Care Act, only 44 percent of elite donors did. "Male donors are less supportive of reproductive justice," Demos found, "And white donors are less supportive of immigration reform and action on climate change."

The narrow makeup of the elite donor class also feeds another form of political inequality: who can afford to run for office. The escalating cost of campaigns represents a daunting obstacle to poor and working-class citizens interested in public service, especially women and people of color, who often struggle to gain backing from wealthy white donors. A'shanti Gholar, political director of the Democratic group Emerge America and creator of The Brown Girls Guide to Politics, noted, "Fundraising is going to be different for you because people are not going to see you as a viable candidate because of the color of your skin."

As the Movement for Black Lives concluded in their 2016 policy agenda:

"The dominance of big money in our politics makes it far harder for poor and working-class Black people to exert political power and effectively advocate for their interests as both wealth and power are consolidated by a small, very white, share of the population … Black candidates are less likely to run for elected office, raise less money when they do, and are less likely to win."

Building an inclusive reform coalition

Since the 2010 Citizens United ruling, democracy advocates and other allies have responded with a raft of proposals, some aimed at curbing Big Money's influence and others at reversing the decision itself.

As of last year, 20 states and 800 municipalities had passed resolutions calling for Citizens United to be overturned. A resolution passed in the West Virginia Senate in 2013, for example, supports an amendment to the U.S. Constitution establishing that "corporations are not entitled to the same rights and protection as natural persons," one of the underlying legal assumptions behind the court's 2010 decision. Democrats in Congress file legislation each year calling for an amendment reversing Citizens United.

Polls have routinely found the public supports such measures: A 2018 survey showed that three-fourths of voters — including 66 percent of Republicans — back a constitutional amendment overturning Citizens United. But even the most optimistic advocates confess it will be a difficult feat to achieve: Amending the Constitution requires a two-thirds vote in both the U.S. House and Senate, and ratification by three-fourths of state legislatures.

Other reform efforts are tackling key problems in the money in politics system. Since Citizens United, spending by secretive groups that don't have to disclose their donors has skyrocketed. Many states, especially in the South, have weak laws for disclosure of spending by independent groups.

In California, reformers pushed through a law that requires charitable nonprofits to confidentially disclose to state regulators all donors who give $5,000 or more. The Americans for Prosperity Foundation — the "charitable" arm of the Koch-backed political group Americans for Prosperity, which reported $17.3 million in revenue in 2018 — is challenging the law, a case that will be closely watched by other states.

In North Carolina, reformers are pushing for the state's strong disclosure laws to be expanded to online advertising on platforms like Facebook and YouTube. While candidates and groups are required to disclose their backing of political ads on television and radio, state laws haven't caught up to the new digital era. Despite bipartisan backing, a bill introduced in 2019 to close North Carolina's digital loophole was pulled after pressure from groups backed by Art Pope, a major conservative donor.

Advocates are also pushing for reforms that, while leaving Citizens United intact, amount to major overhauls of how elections are funded.

In 2017, the city council in St. Petersburg, Florida, voted to prohibit spending by foreign-influenced corporations in city elections, and placed limits on contributions to political action committees, effectively abolishing super PACs in local elections. Another 2010 court case, SpeechNow.org v. FEC, drew on Citizens United in holding that federal laws limiting PAC contributions to $5,000 per person shouldn't apply to "independent expenditures." That decision was upheld in several appellate circuits, but not the 11th U.S. Court of Appeals, which covers federal cases in Alabama, Florida, and Georgia, opening the way for the St. Petersburg ban.

As John Bonifaz, president of the group Free Speech for People, which worked with local officials to pass the ban, said at the time:

"The City of St. Petersburg is leading the way in the fight to reclaim our democracy. Today's vote by the St. Petersburg City Council marks a huge victory for the people all across the city who have stood up to demand an end to super PACs and foreign-influenced corporations threatening the integrity of their local elections. This ordinance will be a model for communities throughout the nation on how to fight big money in politics and defend the promise of American self-government."

Another key reform aims not just to curb Big Money, but to expand the power of small donors. As of 2018, 24 cities and towns and 14 states had some version of small-donor public financing programs, in which small donations from local residents are matched by public funds. North Carolina was a pioneer in small-donor election funding, with successful programs for judges, council of state races, and a pilot city program in Chapel Hill; all were eliminated when Republican lawmakers, many funded by Big Money interests hostile to public financing, took control of state politics in 2013. Experiments in small-donor public financing have been tried in Alabama, Florida, Texas, and West Virginia.

Where small-donor public financing has passed, the results have been striking. Under North Carolina's judicial public financing program from 2004 to 2012, donations by special interests plummeted from 73 percent of donations received by judges seeking office to just 14 percent. Curbing the influence of Big Money increased court diversity, too: All of the women and African-American candidates for the N.C. Supreme Court used the public financing program, leading to the state's first female-majority higher court in 2011, and the election of the judge who is now the first African-American woman chief justice, Cheri Beasley.

Across the country, public financing has increased the racial, gender, and economic diversity of both political donors and candidates, lowering the financial barriers to candidates wanting to run for office.

Anti-corruption, pro-democracy

In the wake of Citizens United, perhaps the most promising development has been efforts by democracy advocates to link anti-corruption measures with broader, pro-democracy reform.

In 2019, shortly after taking office, the new Democratic majority in Congress rolled out H.R. 1: For the People Act, a broad package of measures that The Washington Post called "perhaps the most comprehensive political-reform proposal ever considered by our elected representatives."

The bill was backed by a broad coalition including civil rights, labor, and environmental organizations, which helped build support for passage in the U.S. House, before it was blocked in the Senate. It has also been buoyed by recent polling by the group End Citizens United, which found that not only do the bill's provisions enjoy strong public support, but packaging the anti-corruption, voting rights, and ethics reform measures together in a sweeping, pro-democracy package has increased voter support for each of the individual reforms.

Inspired by H.R.1, states are looking to pass their own broad-based democracy reform agendas, drawing on public outrage over corruption to shore up support for protecting voting rights, promoting fair districts, and other measures that strengthen the voice of ordinary voters.

Rajan Narang, who runs End Citizens United's programs at the state level, says the popularity of H.R.1's approach of linking together various pro-democracy measures holds great potential for advancing reform. Through their polling and analysis, Narang says, "We found that democracy reforms perform strongest as a group. When they're mutually reinforcing, it helps voters understand that there's a broader purpose here, to fix our entire system of government."

### S: A2 “Buckley Thumps” – 2AC

#### Citizens United should be overturned – Buckley 2.0 creates election finance 2.0

Miriam Galston, 2020 “Buckley 2.0: Would the Buckley Court Overturn Citizens United?” https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1716&context=jcl. Accessed 4-10-2025. Galston is an Associate Professor at GWU Law, with a PhD from UChicago and JD from Yale.

If you read Supreme Court campaign finance cases, you will be struck by the disconnect between the lofty rhetoric used to justify the constitutional protections political speech is afforded and the impoverished sound bites and hyperbolic attack ads that dominate contemporary electoral communications. The origin of this disconnect is in large part two phenomena. First, in the last decade the Court has failed to take the factual record seriously and, as a result, has made generalizations that are belied by contemporary campaign practices. Second, it has misrepresented the content of several election law precedents so as to claim consistency with decisions at odds with its rulings. As a result, the Court has created an alternative universe that only First Amendment absolutists find credible, and it has constitutionalized an increasingly corrupt electoral landscape.

All campaign finance cases rely, in varying degrees, on Buckley v. Valeo,1 the first Supreme Court decision to evaluate the constitutionality of the Federal Election Campaign Act (“FECA”), enacted in 1971.2 Citizens United3 relied repeatedly on Buckley to reach its holding that it is unconstitutional to prevent corporations and unions from using their general business revenues for campaign spending, assuming that their actions are not coordinated with candidates and their campaigns.4 As a consequence, many critics of Citizens United believe that the real villain is the Buckley decision and, thus, that there is no way to undermine Citizens United without overturning Buckley, presumably by a constitutional amendment declaring Buckley or its key doctrines null and void.5

This Article rejects that understanding and the assumption upon which is based, namely, that Citizens United faithfully adhered to Buckley’s framework in reaching its holdings about corporate political speech. It argues instead that Citizens United can be invalidated based upon Buckley’s own doctrines and reasoning and, moreover, that were the original Buckley Court to review Citizens United, it would overturn the decision itself.

Buckley spoke very forcefully about the importance of political speech for democratic self-government. Yet the decision did not endorse an absolutist position for protecting political speech.6 Rather, Buckley can be seen as striking a balance between the free speech claims of individuals and groups, on the one hand, with other societal interests, especially the integrity of elections in a representative democracy, on the other. Although that balance has been criticized by many, the Supreme Court has so far declined to overrule the decision explicitly, preferring to modify several of Buckley’s holdings to provide support for its own groundbreaking decisions.7 As a result, the balance struck in Buckley between free-speech values and the goal of election integrity has been lost, and it has been replaced by political speech absolutism justified in pseudo-Buckley terms.

To draw out the consequences of these developments, this Article conducts a thought experiment which analyzes how the Buckley Court would decide Citizens United and its progeny, taking into account its original decision, precedents relying upon its decision, and the factual and doctrinal changes that have occurred since it issued its pioneering opinion. This thought experiment is called Buckley 2.0. Part I examines campaign practices at the time Buckley was decided and today and compares the amounts spent then and now in constant dollars. Part II moves to the doctrinal plane and analyzes how Buckley 2.0 would likely respond today to issues Buckley decided in 1976 or parallel issues arising today, taking into account contemporary empirical data and campaign finance practices and doctrines developed in the last decade.

In Part III, Buckley 2.0 considers whether the time has come to overrule Citizens United.8 It begins by reviewing the basic principles animating the original Buckley decision. It then examines the reasoning set forward in Citizens United that Congress has no legitimate interest in restricting the sources of funds that corporations and unions use to support candidates in federal elections if these organizations engage in independent spending. Based upon the analysis in Part II, Buckley 2.0 would conclude that the later case did not faithfully represent the teachings of the original Buckley. Thus, it would reject Citizens United’s claim that its reasoning is based upon Buckley. Re-assessing the validity of Citizens United’s conclusion based upon its own understanding of the Buckley principles and holdings, and in light of empirical evidence derived from contemporary campaign practices, Buckley 2.0 would conclude that unlimited spending by corporations and unions—as well as unlimited contributions to groups independent in name only—pose a threat of corruption and the appearance of corruption sufficient to justify restrictions by Congress on the sources and amounts of certain types of campaign spending.

The immediate result of Buckley 2.0’s conclusion would be to restore the provision of federal campaign finance law requiring corporations to use money raised by their political action committees (“PACs”) to fund campaign messages that urge the support or defeat of specific candidates for elective office or their functional equivalent. As the statistics in Part I make clear, prior to the changes initiated by Citizens United, spending by corporations and other business interests by means of their own PACs and the PACs of trade associations to which they contribute had increased more than eight times over their spending at the time of Buckley, calculated in constant, i.e., inflation adjusted dollars. Invalidating the holding of Citizens United would thus leave those interests still able to raise enormous sums of money to finance their campaign spending, although it would require them to raise the money following federal rules governing the funding of PACs. Moreover, business interests would continue to be able to avail themselves of the issue advocacy rules to fund without limit messages that omit express advocacy of the election or defeat of specific candidates. Thus, Buckley 2.0’s rejection of Citizens United would leave business interests able to communicate their views widely and effectively to the public using a combination of regulated and unregulated funds. A more far-reaching consequence of Buckley 2.0’s invalidation of Citizens United’s ruling would be to invalidate the holding of SpeechNow.org v. FEC,9 which relied on the analysis of part of Citizens United to hold that individuals and groups can give unlimited amounts of money to organizations that engage in independent spending, whether they are Super PACs or independent-expenditure exempt organizations, commonly known as dark money groups. As is shown in Part I, the amount of money raised by such vehicles since 2010 has been immense, has profoundly altered the financing of contemporary campaigns, and has further reduced transparency in campaign financing. Thus, by rejecting Citizens United and thereby undermining SpeechNow.org, Buckley 2.0 would roll back some of the worst excesses of contemporary campaign finance law and practice.

## CU Neg

### U: Campaign Finance Inaction Now – 2NC

#### Despite pressure, the courts will let sleeping dogs lie now

Richard Briffault, 10-9-2024, "The Surprising Survival—So Far—of the Corporate Contribution Ban." Harvard Law School Forum on Corporate Governance, https://corpgov.law.harvard.edu/2024/10/09/the-surprising-survival-so-far-of-the-corporate-contribution-ban/. Accessed 4-26-2025. Briffault is a professor at Colombia Law.

In Citizens United v. Federal Election Commission, the Supreme Court invalidated the longstanding ban on the expenditure of corporate funds in federal election campaigns. In so doing, the Court dismissed outright an argument that had long been the foundation for the restriction of corporate money in election campaigns – that, due to the “substantial aggregations of wealth amassed by the special advantages of the corporate form,” corporate money poses a distinct threat to the integrity of democracy. Instead, viewing corporations as essentially “associations of citizens,” Citizens United determined that “the First Amendment does not permit Congress to make . . . categorical distinctions based on the corporate identity of the speaker.” Citizens United’s emphatic language would appear to have doomed all special restrictions on the use of corporate money in elections – contributions as well as expenditures.

Yet, Citizens United notwithstanding, the 117-year-old federal ban on corporate campaign contributions and similar prohibitions in twenty-one states remain on the books and continue to apply. In the fourteen years since Citizens United, at least ten decisions by federal courts of appeals (from six different circuits) or state supreme courts have upheld these bans, and the Supreme Court had declined to grant certiorari in at least six corporate contribution cases since 2010.

The survival of the corporate contribution ban is an anomaly. The ban grows out of an older, pre-Buckley v. Valeo vision of campaign finance that focused on the threat that corporate wealth and power to the integrity of democratic elections, coupled with a concern for the interests of dissenting shareholders. In Federal Election Commission v. Beaumont, in 2003, the Supreme Court sustained the ban by combining continuing concerns about corporate wealth and dissenting shareholders with Buckley’s relatively deferential review of contribution – as opposed to expenditure – restrictions. Beaumont specifically endorsed the corporate ban as an appropriate means of preventing donors from circumventing constitutionally permissible limits on individual contributions by using corporations as conduits for contributions above the individual limits..

Decided seven years after Beaumont, Citizens United dismissed the idea that corporate campaign spending presents a special threat to democratic elections and rejected shareholder protection as a justification for banning corporate spending. Citizens United, however, was a spending case that did not involve contributions. The continued survival of the corporate contribution ban relies on the distinction Buckley drew between contributions and expenditures, and, especially, Beaumont’s anti-circumvention justification. Yet, in recent cases not involving corporations, the Court has sharply questioned the anti-circumvention rationale as a basis for campaign finance limits, has ratcheted up its review of contribution restrictions, and has dropped hints that it may be reconsidering the very idea that contribution limits should receive more deferential review than expenditure limits. As a result, the future of the corporate contribution ban is increasingly uncertain.

### IL O: Spending good – 1NC

#### Spending is good – Recent electoral dynamism proves

David Keating, 3-26-2025, "15 years of Super PACs." Reason, https://reason.com/2025/03/26/15-years-of-super-pacs/. Accessed 4-12-2025.

Super PACs ushered in a new era of speech freedoms and improved American democracy more than I imagined. And I should know—fifteen years ago, I created the first one.

On March 26, 2010, the District of Columbia Circuit Court of Appeals decided SpeechNow.org v. Federal Election Commission (FEC), unanimously striking down a provision of the Federal Election Campaign Act that capped individual contributions to independent expenditure-only committees at $5,000.

I'm proud to have been the lead plaintiff in that case. While Citizens United v. FEC is a watershed political speech case in its own right, commentators often incorrectly give it credit—or blame—for Super PACs. The anniversary of SpeechNow seems an appropriate time to set that record straight.

Citizens United established that corporations and unions could make independent expenditures in political campaigns. However, SpeechNow recognized individuals' First Amendment right to pool their resources for independent political speech.

Why is SpeechNow still so important 15 years later? Super PACs have fundamentally delivered on their promise to expand political speech rights guaranteed by the First Amendment.

In Buckley v. Valeo (1976), the landmark Supreme Court decision on campaign finance, the Court ruled that an individual could independently spend unlimited amounts advocating for or against a candidate. The SpeechNow decision took the next logical step. The First Amendment protects the right of two, ten, or 10,000 or more citizens to pool resources to speak as much as they want about a candidate.

What could be more American than that? Those who share a belief form a group, contribute to it, and then use the funds to speak to our fellow citizens about who should govern our nation.

This enhanced freedom has had a substantial impact, making campaigns more informative and competitive.

First, as incumbents feared, election campaigns are more hotly contested than they've been for decades by a significant measure. In 2010, Republicans gained 63 seats, the most since 1948. Democrats gained 40 seats in 2018, topped just twice since 1974. In the Senate, Democrats lost nine seats, the most flipped seats since President Ronald Reagan won in 1980. Party control of the White House changed hands three times since 2016—the last time that happened in three straight elections was between 1888 and 1896.

Super PACs also benefit voters, who get more information about candidates from campaign spending. These new groups are a significant factor in the record spending on federal campaigns, which has more than doubled since 2008, with most of the gains in congressional races. However, the roughly $16 billion spent in the last election cycle is still less than how much we spent on potato chips.

All this spending helped drive turnout, which in 2020 was the highest in over 100 years, with the 2024 election a close second. I won't claim that correlation is causation, but the critics claim the ruling threatened democracy. Those dire warnings have proven wildly off-base.

Perhaps most crucially, SpeechNow recognized that meaningful political communication requires resources. In a nation of over 330 million people, spending money to reach voters is a prerequisite for effective political discourse. By removing artificial constraints on political groups, SpeechNow liberated and bolstered political speech.

Genuinely free political speech can yield powerful results. In 1967, opposition to the Vietnam War continued building. Fortunately, there were no limits on giving money to candidate campaign committees at the time, allowing a few wealthy, anti-war liberals to fund Eugene McCarthy's challenge to President Lyndon B. Johnson. They poured over $13 million in today's money into his campaign in New Hampshire, a massive sum for one state. McCarthy didn't win, but he shocked everyone by getting 42 percent of the vote, which drove LBJ out of the race and became a turning point in political opposition to the war.

In the New York Times v. Sullivan ruling, the Supreme Court noted our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Letting incumbent politicians have the power to limit how much we can spend our funds to criticize them is an affront to this commitment.

Fifteen years after SpeechNow, it's time to recognize its essential wisdom: limiting the money we citizens can spend on political speech means limiting our free speech rights.

The experience of the past 15 years has proven that more speech, not government limits on speech, best preserves our freedoms and American democracy.

### IL O: Spending Good – 2NC

#### Spending is key to political change – Jeb! proves cash disproportionately helps outsiders

Scott Blackburn, 1-16-2020, "Citizens United After 10 Years: An Argument for Citizens United." Institute For Free Speech, https://www.ifs.org/research/citizens-united-after-10-years-more-speech-better-democracy/. Accessed 4-12-2025.

On January 21, 2010, the Supreme Court struck down a federal law that prohibited corporations and labor unions from independently voicing their support or opposition to federal candidates. That law, the Court said, violated those organizations’ First Amendment rights. In the succeeding ten years, the Court’s decision in Citizens United has engendered more discussion and disagreement among policymakers than perhaps any other case in recent history. With ten years and five election cycles of hindsight, this report examines what we can learn from the effects of Citizens United on American campaigns.

I. Since Citizens United, Politics Is More Diverse and Political Change Is Rapid.

One common prediction about Citizens United was that it would fundamentally distort our elections in favor of wealthy interests. As The New York Times wrote in their editorial following the decision, “With a single, disastrous 5-to-4 ruling, the Supreme Court has thrust politics back to the robber-baron era of the 19th century… If a member of Congress tries to stand up to a wealthy special interest, its lobbyists can credibly threaten: We’ll spend whatever it takes to defeat you.”[1]

But far from an era dominated by the wealthy, in the five election cycles since the decision, America has seen some of the most vibrant, diverse, and rapid political change in a generation. We have seen the re-election of the first black President, Barack Obama, a Democrat, over business favorite Mitt Romney. This was followed by a celebrity outsider Republican in Donald Trump beating consummate Washington insider Hillary Clinton. The House of Representatives has seen similar rapid change with both Republicans and Democrats taking the House in populist waves. This is perhaps best exemplified by major establishment power brokers Eric Cantor and Joe Crowley being bested by political neophytes and outsiders David Brat and Alexandria Ocasio-Cortez, respectively.

It is impossible to ascribe any one electoral outcome solely to Citizens United, but the prevalence of new voices in the political arena since the decision is undeniable. At the very least, it seems highly unlikely that if powerful moneyed interests were putting their finger on the scale of elections to a greater degree post-Citizens United, these are the outcomes they would have sought.

II. Incumbents and Challengers Have Both Benefited From Super PAC Support – but the Support Helps Challengers More.

Supporters of Citizens United, far from believing the decision hindered democratic ideals, regarded it as a boon to democracy by allowing political outsiders to more easily challenge incumbents and the status quo. As famed First Amendment attorney Floyd Abrams put it, “We want, for example, more Gene McCarthys and Ross Perots and individuals to come upon the scene and have a chance to build a war chest and go on out and try to reform the country as they think best.”[2] The elections since the decision have certainly seen a significant amount of new blood in Washington, many of whom benefited from super PAC spending that was not tied to the traditional levers of party power. But incumbent politicians and insiders also quickly learned to take advantage of this new tool of campaigning.

The best example of this is perhaps Right to Rise, the super PAC set up by supporters of Jeb Bush heading into the 2016 Republican primary. That group spent over $120 million peppering primary states with pro-Bush ads. But while Right to Rise bought a lot of ads, it failed to convince many voters. Super PACs supporting newcomers have had better success, as groups like Independent USA PAC[3] and Women Vote![4] were able to give key support to previously unknown candidates.

All told, the five election cycles since Citizens United saw an average of 79 freshmen members of Congress. The five cycles prior to the decision saw just 55.[5]

### IL O: Corruption – 2NC

#### CU lowered transaction costs – decreases gains from corruption!

Philip M. Nichols, 10-30-2011, "The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature." American Business Law Journal 48(1):77-118, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\_ID2568220\_code354867.pdf?abstractid=2568220&mirid=1&type=2. Accessed 4-12-2025.
CONCLUSION

The possibility of corruption poses a special threat to the democratic institutions and integrity of the United States and undermines and distorts the environment in which business operates. Both the federal legislature and the federal courts recognize this fact. Congress has enacted a plethora of legislation aimed squarely at corruption engendered through campaign contributions, and the Supreme Court has recognized the reduction or elimination of corruption as a critical goal. Yet corruption has persisted and, by most accounts, flourished following that legislation.

Understanding the decisionmaking process behind a corrupt act explains why the mechanisms implemented by federal legislation to date have failed and have in fact exacerbated the problem. A legislator who is offered a bribe consisting of a bundled campaign contribution weighs the benefit of that contribution against the costs imposed by the corrupt act. The benefit is not the aggregate amount of the contribution. The benefit to the legislator is the cost saved by not having to raise that money herself. That cost, in turn, is directly related to limits on the size of individual contributions. The smaller that size is, the larger the number of discrete transactions she would have to enter into to raise the aggregate amount of money, and the greater the transaction costs of doing so. Thus, when the rules mandate relatively small individual contributions, the value to a candidate of bundled contributions is greater than the value of exactly the same contribution would be in the absence of limits on the size of individual contributions.

Serious efforts to control corruption in the federal legislature must take consideration of this dynamic. Meaningful rules to reduce corruption will either eliminate or reduce the size of the benefit that can be offered by means of bundled campaign contributions, or they will increase the costs of accepting a bribe offer and acting corruptly.

A serious approach to corruption also entails an understanding of the perverse relationship between campaign contribution limits and corruption. Reducing the amount of money an individual can give to a campaign does not reduce the likelihood that a legislator will become corrupt. Instead, decreasing the amount of money that can be offered actually increases the likelihood of corruption in the federal legislature.

### IL O: Corruption – 2NC

#### Stats prove corruption went down!

Alec Greven, 9-3-2020, "Has Citizens United Increased Corruption? An Examination of Public Corruption Prosecutions." Institute For Free Speech, https://www.ifs.org/research/citizens-united-corruption/. Accessed 4-12-2025. Greven became a bestselling author at the age of 9, (!?!?!) and is a research fellow at the Institute for Free Speech.

Since the moment the decision was reached in 2010, Citizens United v. FEC has been one of the most controversial rulings in recent Supreme Court history. The decision, which found that corporations, including nonprofit corporations, and labor unions cannot be prohibited from spending money on independent political advocacy, is a victory for free political expression. The government cannot and should not be able to ban a political pamphlet, movie, or book, simply “based on the corporate identity of the speaker.”[1]

Nevertheless, the backlash to the decision was, and continues to be, furious. Citizens United, according to some of its detractors, paved the way for political corruption by elevating well-financed interests over regular citizens. Fred Wertheimer, longtime advocate for campaign finance regulation, epitomized the opposition to Citizens United, declaring shortly after the decision that “this opinion will not stand the test of time or history… it is completely inconsistent with the interest of the American people in having a government free from corruption.”[2]

Ten years after the decision, this report asks if such claims about Citizens United were correct. Did the Supreme Court’s ruling that corporations and unions can speak without limit and contribute unlimited amounts to finance independent political expenditures increase the amount of corruption in our democracy?

We find no evidence to support this claim. A comparison of public officials charged with corruption offenses by the U.S. Department of Justice nine years before and nine years after the Court’s decision show a decline rather than an increase in corruption. Further, states that were most affected by Citizens United saw a larger decrease in corruption than states unaffected by the decision.

Citizens United and Corruption: A National Analysis

To measure the effects of Citizens United on public corruption, this report analyzes data on independent expenditures and public officials charged with corruption in the nine years before and after the decision. The corruption data is drawn from the Public Integrity Section of the United States Department of Justice, which has cataloged federal corruption prosecutions for federal, state, and local elected officials and private citizens charged with corrupt acts.[3]

Political corruption is, by its nature, difficult to measure. For example, without acting corruptly, an elected official could push for laws that benefit their constituents, including some donors, believing such measures to be good policy. But an elected official can also, with no corrupt intent, support measures their constituents oppose, believing they are in the best interest of the country.[4] These behaviors are core aspects of our political process.

Since deciphering motives for political action is an impossible and subjective task, this study relies on public corruption prosecutions. If an official is charged criminally with an act of public corruption, then it is highly likely that they acted against both the will and best interest of their constituents.

It is important to emphasize that this data set is limited and thus imperfect. The data do not capture non-criminal “corruption” that is necessarily in the eye of the observer. The data reflect only officials charged with federal corruption and not charges by state or local authorities. Additionally, the data is based on corruption charges and not convictions. Data on corruption charges were used over convictions because the time it takes to bring a case to trial and obtain a conviction can vary considerably and take well over a year from when the actual corrupt act took place, while corruption charges are announced closer to the occurrence of the act. This decision likely overstates the amount of corruption, since individuals could be charged with corruption and later found not to have committed any corrupt act.[5] However, this data set provides a consistent mechanism for evaluating corruption levels. If corruption rises in the United States, one would anticipate a rise in corruption charges in this data set.

Data on independent expenditures nationally were drawn from the Center for Responsive Politics’ OpenSecrets website.[6] The first graph, titled “Independent Expenditures,” shows federal independent expenditures (excluding party committees) over the 18-year period from 2001-2018 by two-year election cycle. After the Citizens United decision in 2010, which legalized the ability for many speakers to fund independent expenditures, there is a predictable and sharp rise in this type of spending.

If those who argued Citizens United would usher in a new era of corruption were correct, this increase in independent expenditures would correspond with an increase in public corruption. The second graph, titled “Public Corruption Prosecutions,” shows the aggregated total federal corruption prosecutions from 2001-2018, reflecting nine years of data before and after Citizens United. In contrast to what one would expect if Citizens United truly unleashed a tidal wave of political corruption, the data show that, after peaking in 2008, there has been a relatively steady decline in corruption prosecutions over time. Citizens United appeared to have no impact on this trend.

Independent expenditures rapidly rose after Citizens United while corruption prosecutions declined. This method of analysis shows only that there is no association between federal independent expenditures and federal corruption charges. Still, the data strongly suggest there is not a positive relationship between Citizens United and increases in corruption.

Citizens United and Corruption: A Comparative State Analysis

To supplement the federal analysis above, a state by state analysis was conducted. Prior to 2010, the different campaign finance laws in the 50 states resulted in a natural experiment with only roughly half the states being affected by the Court’s decision. According to the National Conference of State Legislatures, 24 states had laws that were affected by the Court’s ruling permitting independent spending by corporations, while 26 states saw relatively little change after the Citizens United decision (usually because these states already allowed corporate and union independent expenditures).[7] This analysis separated the states into two groups: those affected and unaffected. Then, using figures from the Public Integrity Section of the United States Department of Justice, corruption convictions were aggregated across the affected and unaffected states for the nine years before and after the Court’s decision.[8]

To account for differences in population between the two groups, the per capita rate of corruption per million persons was calculated by dividing the corruption figure by the total population in each group. Population statistics were based on 2010 census population data.[9] As the midpoint of the data series and the year of the Citizens United decision, the 2010 census was used in the analysis.[10] If Citizens United contributes to an increase in corruption, then one would expect the per capita corruption rate to increase in states where the decision affected state law. One would also expect states unaffected by Citizens United to show no effect from the decision. Since campaign finance regulations are intended to prevent corruption, nullifying these laws should lead to an increase in public corruption.

As the data demonstrate, this did not happen. Per capita corruption declined for both affected and unaffected states. More interestingly, states that had banned corporate and/or union speech about candidates – ostensibly to prevent corruption and struck down by Citizens United – experienced a nearly three times larger drop in corruption than states that were not affected by Citizens United.

Conclusion

The Citizens United decision is not correlated to an increase in corruption. As independent expenditures rapidly rose on the national level, public corruption prosecutions declined. A similar trend is observed in the states. If you isolate states that were most affected by Citizens United, the data show that those states experienced a steeper decline in corruption.

These findings are in line with similar academic research. Philip Nichols argues, for example, that lowering campaign contribution limits can actually increase the likelihood of corruption.[11] By increasing transaction costs to raise money, one necessarily increases the benefits of raising money in a corrupt fashion. The legalization of independent political expenditures may have driven down transaction costs for political actors by giving the public more opportunities to legally spread political messages about candidates. It is possible that increased independent expenditures caused a decline in corruption by diminishing the benefits of acting corruptly.

Most importantly, however, there is simply no evidence of a causal relationship between Citizens United and increases in public corruption. Corruption levels are generally unaffected by independent political expenditures. Campaign finance laws, by their very nature, limit the freedom of individuals to engage in political activities. This limitation, otherwise disallowed by the First Amendment, rests on the necessity of preventing corruption. Government officials should be careful to only implement coercive laws when those laws actually target corrupt behavior. The absence of any link between independent expenditures and corruption indicates either no relationship or one where increased speech through independent expenditures actually benefits society. In light of these findings, we should be very cautious before we take any action to overturn or undermine Citizens United. Additionally, critics of Citizens United should re-evaluate their beliefs about the relationship between independent expenditures and corruption until further evidence is found.

### IL D: Corporate Spending – 1NC

#### Corporate spending is a nothing-burger

Scott Blackburn, 1-16-2020, "Citizens United After 10 Years: An Argument for Citizens United." Institute For Free Speech, https://www.ifs.org/research/citizens-united-after-10-years-more-speech-better-democracy/. Accessed 4-12-2025.

III. For-Profit Corporations Are Not Big Spenders in Campaigns.

In the immediate wake of Citizens United, the main prediction from those opposed to the decision concerned corporate spending in elections. As one commentator put it, “today’s decision does far more than simply provide Fortune 500 companies with a massive megaphone to blast their political views to the masses; it also empowers them to drown out any voices that disagree with them.”[6] Simply put, this has not happened.

Corporate political spending continues to be dwarfed by spending from other traditional sources. In the four cycles since the decision,[7] for-profit corporate political spending has averaged around 1% of spending from all sources. The following chart below shows total campaign contributions[8] to any entity – candidates, political parties, standard PACs, super PACs, and other groups) (in blue), total contributions to independent groups from any source (including individuals, PACs, corporations, and unions) (in orange), and for-profit corporate contributions to independent groups (predominantly super PACs) (in red).[9]

Even the roughly 1% of corporate contributions to super PACs each cycle likely overstates things, at least in the common understanding of Fortune 500 companies. As the Sunlight Foundation reported in 2014, “As far as we can tell, one thing the [200 largest corporations] did not do, for the most part, was take advantage of the new opportunities to spend on politics that the Citizens United decision afforded them. The 200 corporate donors gave just $3 million to super PACs, with the bulk of that amount a single $2.5 million donation from Chevron” to one particular super PAC.[10] In 2018, The Washington Post looked at the top 50 donors for that election cycle and found similar results: just four were nonpersons, and they gave just 3% of the total donations from that group.[11] Of those four corporate donors, two were nontraditional. One was a group that advocates on behalf of hospitals, and one was the company of longtime political activist Ross Perot.

No matter how you slice it, Citizens United has not led to a flood of corporate money in our elections.

IV. Money Still Can’t “Buy” an Election.

Despite a near constant drumbeat from some politicians and activist groups, in the post-Citizens United era, money cannot and does not buy elections. In fact, this is conventional wisdom among most experts. As University of Missouri professor Jeff Milyo wrote:

[T]here is something of a scholarly consensus . . . stand[ing] in stark contrast to the popular wisdom so often echoed by pundits, politicians and reform advocates that elections are essentially for sale to the highest bidder (spender). Decades of social science research consistently reveal a far more limited role for campaign spending.[12]

Since 2010, this truism has been demonstrated again and again, from the spectacular failure of deep-pocketed Jeb Bush[13] to the meteoric rise of the heavily outspent Alexandria Ocasio-Cortez.[14] It is true, both before and after Citizens United, that the candidate who spends more money usually wins, but while spending certainly helps campaigns, it does not cause the victory. Rather, candidates who attract more voters typically also attract more donors. The inability of spending to “buy” votes on Election Day is easiest to see in the almost cliché trend of rich individuals self-funding lavish campaigns and underperforming when actual votes are counted, sometimes spectacularly so.[15] As Richard Lau, Professor of Political Science at Rutgers, put it, “I think where you have to change your thinking is that money causes winning. I think it’s more that winning attracts money.”[16]

V. Most Campaign Spending Still Comes From Limited Contributions by Individuals to Candidates.

The emergence of super PACs[17] – political groups that exclusively make independent expenditures and therefore can accept contributions of any size – has been the largest and most significant innovation of the Citizens United decision. (Though technically it was a different case – SpeechNow.org v. FEC – that permitted the creation of super PACs, that unanimous decision followed the reasoning of Citizens United.[18]) And it is true that super PAC spending has been increasing, as more and more groups see the advantages of independent speech.

Nevertheless, the overall impact of super PACs has been overstated. At the time of the decision, it was argued that, “[those] players with the deepest pockets will be able to pay premium prices for as many ads as they want, easily dominating the airwaves.”[19] But significantly more political spending is funded by donors that must abide by strict contribution limits, namely those who give to candidates and political parties. Contributions to super PACs have ranged from 12% to 26% of total political contributions over the four cycles since Citizens United. Candidates and political parties continue to outspend super PACs by at least three-to-one.

It’s also worth remembering that federal law automatically gives candidates the lowest cost for a political ad on TV or radio,[20] meaning a dollar of super PAC spending buys less speech than the same dollar of candidate spending.

VI. The Government Cannot Ban Political Books or Movies.

Most forgotten in the decade since Citizens United is the actual speech the Court protected. The case was about political speech in its purest form and the government’s belief that it could regulate and prohibit that speech. Citizens United is a nonprofit corporation that, in 2008, wanted to advertise and sell on-demand a documentary critical of then-Democratic primary candidate Hillary Clinton. The Federal Election Commission said doing so would be illegal, because it was funded by a corporation, and any corporate spending that supports, opposes, or even mentions a candidate close to an election is prohibited (unless the speaker is a media corporation). In defending that position, the government went further, arguing to the Supreme Court that it could prohibit companies from publishing books that contained a single line advocating for or against a candidate.

Those were the facts before the Supreme Court Justices when they issued their ruling. A rule that bans this speech must be inconsistent with the First Amendment. As Justice Anthony Kennedy put it in the majority’s opinion: “political speech must prevail against laws that would suppress it.”[21]

Thanks to the Citizens United ruling, companies like Netflix and Amazon don’t have to worry about streaming political documentaries during election season, small publishing houses don’t have to hire a campaign finance attorney before publishing political books, and the government is one step further removed from policing political speech.

### IL D: Corporate Spending – 2NC

#### Corporate involvement is unlikely – Empirics prove backlash is strong

Richard A. Epstein, Spring 2011, "Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want" Harvard Journal of Law & Public Policy, vol. 34 no. 2, [https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2013/10/EpsteinFinal.pdf. Accessed 4-12-2025](https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2013/10/EpsteinFinal.pdf.%20Accessed%204-12-2025). Epstein is a professor at NYU law, a senior fellow at the Hoover Institution, and a senior lecturer at UChicago.

C. The Pitfalls of Corporate Participation in Electoral Politics

It turns out that these anecdotes can be systematized. Politicians respond to votes, not to causes. After my years working with the AIA I met this fellow in the airport and asked him what had become of my services as the AIA moved from New York to Washington, D.C. His reply went something like this: “When we hired you, we hired people for what they knew, and we thought you knew a lot. Now we hire people for who they know, and frankly you don’t know anybody.” The policymaking effort was to lobby quietly, but not to win election campaigns — a theme to which I will return later.

Yet, before that is done, it is worth posing some hard questions. Does an increase in size yield an increase in power over Congress? Defenders of campaign finance usually claim that dollars translate into power which translates into success.54 However, the lessons from public choice theory are far from cohesive on the issue. One key article on this point was written in the Journal of Legal Studies over twenty years ago.55 My friend Professor Fred McChesney noted that the usual story that large concentrated firms can dictate public policy was too simple by half.56 The problem, quite simply, was that in some cases this concentrated power was a liability, not an asset.57 He referred to the practice known as “milker bills,” whereby members of Congress propose new taxes or regulation on some targeted industry unless it makes the requisite political contributions to their cause.58

The game of influence is a two‐way street, which exposes an important set of corporate vulnerabilities: Size does not always translate into power; making contributions to gain influence can leave one exposed with few lines of defense; and, it is easy to punish a corporate nonentity in the press because they are hostage to their brands. It is easy to concoct anticorporate attacks that play off the slogans that companies use to promote their brands. What airline do I refer to when I say “come die with me?” What of the reworked slogans “things go worse with Coke,” or “buy IBM and crash in style”? Too easy.

The issue is clearer still when it is noted that corporations are also subject to other constraints, both legal and practical, that can easily dull their ardor to engage in political campaigning, either for general causes or for particular candidates. Corporate boards have fiduciary duties to their shareholders, and it is an open question whether particular campaign contributions could be a violation of their duties on the ground that they deal with matters unrelated to the interests of the corporation. In response, it could rightly be said that these contributions will generally not provoke legal liability because of the extensive discretion that is afforded to most corporate boards under the business judgment rule. So far so good, but this rule does not settle the dispute, because someone could allege that political activities either are not germane to corporate business or are subject to some per se rule of bad faith conduct.

The question of what issues are appropriate for corporate participation can also be challenged in other ways. Dissident shareholders and board members can force the firm to take up the matter in some board meeting in ways that could distract the firm from its ordinary business activities. Resolutions that deal with proper public statements could be presented for consideration in the press, even if there were no formal rights to have these matters taken up directly. The heat on the board could be powerful because the reputational constraints at play are extremely powerful. After all, the same corporation that pushes many levers to get its detergents on supermarket shelves does not have quite the same clout in political or information markets—it has the maneuverability of a beached whale.

Corporations invest heavily in brands, which is the way they are held hostage to the public on matters of product quality. The firm that does not defend the brand is the firm that cannot survive in the marketplace. The general view of most brand managers about any participation in politics, whether it relates to elections or anything else is, by all means keep a low profile, and by all means follow that distinguished cowardly path that you have blazed in dealing with government action. The logic is simple. Political statements will win a corporation many enemies—enemies who can then boycott your products. The same political statements may win you some friends, but not friends who will double their purchases just because you have taken a stand they find favorable. Hence, the last thing that you want to do as a corporation is get involved with election campaigns when it is clear that no candidate embodies all the positions—and only those positions—that are ideal for the firm. Entering this swamp presents a real danger, and no sensible corporation should take that risky step.

Some important signals indicate that this is indeed the case. Consider the long list of corporations that filed amicus curiae briefs at some stage in Citizens United. 59 Notice that among the dozens of amici, the filer closest to representing the corporate interest was the Chamber of Commerce, whose business is to lobby for corporations. It makes no products that are subject to market retaliation. And, in many cases, it is neutered. The Chamber of Commerce often finds itself in the odd position of having to take no stand on anything as its various members fight it out in the political and judicial arena. Thus, business versus business is a constant theme on such issues as net neutrality, where Verizon and Google duke it out; or in banking, where the big banks, little banks, and retailers all have different positions; or in drugs, where the branded companies and the generic companies are often at loggerheads. It seems extremely unlikely that corporations in these groups want to spend their precious capital on elections that concern all sorts of issues about which they hold no distinctive position. Instead, the corporations want to spend their money where it matters to them: on particular legislation where they hope to gain influence while flying well below the radar.

And well they should. We also know that once these companies do speak out on any public issue, the individuals who are said to be unable to organize often drown the corporate voices out. A few recent cases merit some general observations. Target announced a $150,000 gift to MN Forward, a pro‐ business group which incidentally also has opposed gay marriage and other issues.60 The response from MoveOn.org was instantaneous and effective.61 Target went immediately into a damage control mode, not knowing whether to demand a refund of the grant or to ride out the storm.62 Its reputation as a gay‐friendly employer was put in jeopardy. There is little doubt that it would have paid a hundred times as much as that grant to make the story disappear. Target’s political career seems short.

The same seems true for Whole Foods, whose president, John McKay, wrote a critique of the Obama health care plan, which I regarded as mild and moderate, but which generated a firestorm of protest from progressive Whole Foods customers who had rather different ideas.63 It turns out that the predictions of corporate political strength just are not credible. The Internet has changed all that, allowing cause‐based groups to lash out at corporate firms that do not toe the line. Even if such groups offend folks on the other side of the political spectrum, it is no matter because they do not survive on brand loyalty like companies do. They operate with a fundamentally different dynamic from the corporation, where it is wise to lay low. Thus the only question that they ask is whether they are in a position to rally their own base, which they are.

There are ways for corporations to stay out of the political spotlight. As a corporate board member, I would be proactive and insulate the organization from general political contributions to keep from being blackmailed by political or activist groups that would otherwise punish you for your silence in election campaigns on a whole range of issues. That is what Goldman Sachs did, because it knew just how vulnerable it was to adverse publicity when it was sued last spring. The key point in all these maneuvers rests on a relentless application of the principle of comparative advantage. Corporations are naturally concerned about issues that regulate their own industry. To spend too much on general elections is to waste money on issues not germane to the corporate welfare. It is better to look at all issues individually, so that supporting or opposing particular candidates is not in the picture. It is no accident, therefore, that Citizens United, the corporation that brought this suit, was in the political business and thus had none of the brand name or other institutional constraints. No mainstream company would touch this problem with a ten‐foot pole.

### S D: Alt Causes – 1NC

#### Citizens United is insufficient – Buckley means wealthy individuals and PACs still thump

Alan B. Morrison, 8-2-2018. “It’s Buckley Not Citizens United that Created Massive Spending,” Federalist Society. https://fedsoc.org/commentary/fedsoc-blog/liberty-month-revisited-it-s-buckley-not-citizens-united-that-created-massive-spending, accessed 4-10-2025

Among those who decry the levels of money being spent on elections, the villain is almost always Citizens United, which unleashed corporations and permitted them to make unlimited independent expenditures in support of or in opposition to candidates for elected office. I think Citizens United was wrongly decided, but more important to the situation today is that corporate treasuries are not the fountain from which most big election money is flowing.

Although the rules on disclosure do not reach money spent through social welfare organizations, there is no real evidence that the big money we are seeing already in the 2016 presidential race comes from corporations, and not super wealthy individuals. There is more than anecdotal evidence that corporations are spending money on judicial elections, where the return can often be immediate, but even there the amounts are dwarfed by what individuals are giving to SuperPacs for 2016, for which Citizens United is irrelevant.

The root of the problem can be seen from Citizens United, in which the majority held that Congress cannot discriminate against categories of speakers such as corporations, and since individuals can make unlimited independent expenditures (but only limited contributions directly to candidates and parties), corporations cannot be denied that right either. That right for individuals originated with the 1976 decision Buckley v. Valeo, in which the Court upheld contribution limits of $1000 for both the primary and general elections, but struck down a $1000 independent spending limit. Instead of simply saying $1000 was too little, and letting Congress try again, the Court said that no limits were permitted (it had just struck down candidate expenditure limits, in part because of a concern that incumbents would set them too low), and so it followed the same path of making the sky the limit. But back in 1976, the ceiling was much lower, with really big spenders such as Stuart Mott contributing several hundred thousand dollars. Even factoring in inflation, there was nothing like the tens of millions that a few super rich donors gave in 2012 and will likely repeat in 2016.

In Buckley the Court treated expenditures as pure speech and said it cannot be limited. That can’t be right. If a candidate for office blares election messages from a sound truck outside my home at midnight, a law that forbids such “speech” cannot be saved on the ground that a state cannot limit political speech. Or take another Supreme Court case where the Court held that laws banning campaigning for a candidate, including wearing buttons or t-shirts and carrying small signs, inside the polling place are valid despite the First Amendment. Most recently, the Supreme Court summarily affirmed a lower court ruling that non-citizens in the U.S. on three year visas could neither make contributions, nor spend money on political signs, because of their status as aliens. One wonders if there were a law forbidding aliens from standing on a soapbox in Farragut Square would his alienage mean that the First Amendment would not protect him. And finally there is the famous O’Brien draft card burning case, in which the Court upheld a conviction because O’Brien violated a law requiring all draft-age men to keep their card in their possession at all times.

In each of these cases, speech about elections or other political matters lost out to other interests. That was not because the speech was not protected at all or indeed not at the zenith of subject areas where the First Amendment applies. Rather, the challenger lost because there were other legitimate interests that outweighed the right to unlimited speech. The problem with Buckley and Citizens United is not that they reached the wrong conclusion after balancing the relevant interests, but that they failed to appreciate that a balance was even possible in such circumstances.

Suppose a state passed a law limiting independent expenditure to ten times the level of a permissible direct contribution on the ground that “enough is enough” and that democracy can take reasonable measures to protect against a wealthy few dominating elections and thereby controlling our government. In the end, the Court might find that interest insufficient to overcome the free speech rights of a free spending donor, but that would require a very different analysis than was done in Buckley.

#### Megadonors comparatively outweigh the plan

Ian Vandewalker, 11-1-2024, "Megadonors Playing Larger Role in Presidential Race, FEC Data Shows." Brennan Center for Justice, https://www.brennancenter.org/our-work/analysis-opinion/megadonors-playing-larger-role-presidential-race-fec-data-shows. Accessed 4-12-2025.

Wealthy donors giving at least $5 million to support a presidential candidate are spending more than twice as much as they did in 2020. That’s according to our new analysis of data from the Federal Election Commission looking at super PACs that are devoted to supporting Kamala Harris or Donald Trump. Most of that increase is attributable to the effort to elect Trump, who has outsourced much of his campaign to affiliated super PACs that have raised almost three times the amount from $5 million-plus donors relative to those boosting his last campaign.

Super PACs closely aligned with major candidates have become regular features of presidential elections. Over the years, the lines between official campaigns and these nominally independent groups have become more and more blurred, to the point where the press often treats these super PACs as a part of each party’s campaign apparatus. This attitude is understandable, given the extremely weak federal rules that supposedly limit the contacts campaigns can have with outside groups.

These entities are also increasingly relying on the biggest of big donors. This election, the biggest super PACs supporting the major party nominees for president have together taken in $865 million from donors who each gave $5 million or more. That’s more than double the amount by this point in 2020, which was $406 million. This biggest-spending category of donors has provided more than 75 percent of the funding to presidential super PACs in the 2024 election, up from 63 percent in 2020.

Both parties have increased their reliance on $5 million-plus donors, but not to the same degree. Super PACs backing Harris raised about 50 percent more from these donors than those supporting Joe Biden had by this time in 2020. Most of the growth comes from the pro-Trump camp, where donors of $5 million or more in 2024 gave $522 million, almost three times the $180 million they provided in 2020. This is a complete reversal from Trump’s first run in 2016, when he relied largely on small donors and had relatively little big money support. This year, supportive big-money super PACs are outspending the Trump campaign itself.

The vast majority of money given in donations of $5 million and up comes from individual donors, but some donors to the super PACs are groups that have raised money from others. That includes, most prominently, dark money nonprofits that do not disclose their donors, as well as corporations and unions. Although some of the original contributors of this money no doubt gave less than $5 million, we include the amounts here because the money was pooled and leveraged for political use by the groups’ leaders. Judging by occasional revelations of donations, it’s likely that large dark money groups rely heavily on megadonors.

This presidential race has so far attracted three individual donors who gave nine figures each to-date, all to support Trump: banking heir Timothy Mellon ($150 million), tech mogul Elon Musk ($119 million), and casino owner Miriam Adelson ($100 million). The largest individual donor pro-Harris groups have reported is Dustin Moskovitz, also from the tech industry, who gave $38 million. The pro-Harris super PACs’ largest donor overall, however, is Future Forward USA Action, a nonprofit that doesn’t disclose its donors and has given its affiliated super PAC $136 million to date; reportedly, $50 million of Future Forward’s money has come from Microsoft founder Bill Gates. Dark money groups are also working to elect Trump. The largest appears to be Building America’s Future, which has reportedly raised $100 million over four years, including donations from Musk.

The growing reliance of presidential campaigns on affiliated outside spending ultimately serves to undermine existing campaign contribution limits and transparency rules. This is a long-standing concern that the Federal Election Commission exacerbated this year by allowing, for the first time, campaigns and putatively independent super PACs to coordinate on get-out-the-vote activities, inviting unprecedented levels of reliance on megadonors for basic campaign functions.

Congress can help restore guardrails by strengthening the rules that limit coordination between campaigns and super PACs, as well as improving disclosure. Legislation to accomplish this came close to passing in the last Congress and is likely to be on the agenda in the next one.

## DA: Econ

### L: 1NC

#### CU’s political competition caused economic gains – Overturning caps growth!

Pat Akey, et al., July 2023, "The Impact of Money in Politics on Labor and Capital: Evidence from Citizens United v. FEC." NBER, https://www.nber.org/papers/w31481. Accessed 4-26-2025. , Tania Babina, Greg Buchak & Ana-Maria Tenekedjieva

We examine how payments to labor and capital providers changed in states affected by the 2010 Supreme Court decision Citizens United, which prompted the largest increase in political spending in the post-World War II era. We exploit the fact that the Citizens United ruling invalidated bans on independent expenditures in some states but not others and use the event as a natural experiment to identify the causal effect of increased money in politics on the economic outcomes of labor and capital. Using state-level economic data from the BEA and the IRS, we first find that output increases by roughly 2% in affected states. Labor income increases between 2–3% for up to six years following the event, and increases in capital income were economically large, though not always statistically significant. These results are robust to alternate data sources and specifications, and are unlikely to be due to differential trends between treated and control states. At a high level, these results suggest that labor outcomes improve when there is more money in politics and that this improvement does not come at the expense of capital providers.

We provide evidence that Citizens United increased political competition, which led politicians to adopt more growth-friendly economic policies. We do so by first showing that political activity increased from a broad variety of interests (and in particular amongst the smallest donors) in treated states after Citizens United, rather than increasing only in sectors that were historically politically influential. Furthermore, we find that the turnover of political incumbents increased more in treated states, and contrary to the common view, was not only driven by Republican 30 politicians replacing Democratic politicians. Indeed, we find increased within-party and acrossparty turnover both in the executive and legislative branches of state governments. Finally, we find that political polarization is lower in treated states after Citizens United, suggesting that newly elected politicians vote in favor of policies relevant for a broader set of constituents.

Once elected, we find that politicians appear to enact pro-growth policies. For example, we find evidence that the regulatory burden on firms is lower. There are fewer state-level enforcement actions (but not fewer federal enforcement actions for similar activities), suggesting that newly elected governors reduce regulatory burdens rather than that firms change their underlying behavior. This reduced regulatory burden does not come at the expense of workers, since we find no evidence of poorer health outcomes for employees. We find some evidence that tax rates are lower, although despite having large economic magnitudes, these taxation results are not generally statistically significant.

Consistent with the increased political competition mechanism, we find that these economic effects—increased hiring and wages—are not concentrated in sectors or firms to be the most politically engaged prior to Citizens United. Indeed, we find that firms across many industries that comprise a large cross-section of the economy responded. Moreover, we find no evidence that firms that were more likely to have been politically active prior to Citizens United responded more. To the contrary, we find that there were no differences in the change in growth rates of employment, wages, or payroll for firms in industries that historically made the most political contributions. Using Compustat data on publicly traded firms, we find no evidence that firms that were known to have been politically active by making campaign contributions or engaging in federal lobbying before Citizens United increased employment more than other firms. Overall, these results suggest that historically politically powerful constituencies did not drive the increased economic growth.

Finally, we examine whether increased union labor power or greater government spending could explain our results and find little evidence of these alternative possibilities.

In summary, our paper empirically studies which factors of production benefit from money in politics: labor or capital. Our results suggest that the economic outcomes of political choices are not necessarily zero-sum and that increasing the ease of political engagement can bring a broader set of interests to the table, which itself can benefit the interests of both labor and capital. However, an important caveat to our results is that one cannot conclude that more money in politics is unilaterally better for labor and capital providers from our analysis, or that it is socially optimal to deregulate money in politics. This paper does not examine the welfare consequences of increased money in politics triggered by Citizens United. Finally, it is possible that the first-best outcome would be to have a reduced scope for political influence of all forms such as lobbying or hiring from the revolving door, but once some groups have access to politicians it might be beneficial to maximize the ability of all types of agents to have access to politicians. We look forward to future research on this topic.

## DA: Unions Good

### L: CU key – 1NC

#### Citizens United is key to union involvement

Richard A. Epstein, Spring 2011, "Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want" Harvard Journal of Law & Public Policy, vol. 34 no. 2, [https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2013/10/EpsteinFinal.pdf. Accessed 4-12-2025](https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2013/10/EpsteinFinal.pdf.%20Accessed%204-12-2025). Epstein is a professor at NYU law, a senior fellow at the Hoover Institution, and a senior lecturer at UChicago.

The position of unions is really quite different on all these metrics. Unions do not sell to general public audiences. They can take powerful positions because they have only one objective: to win over the workers who can join their ranks. Thus, they are not subject to the kind of popular backlash that exists for ordinary corporations, which have to contend with broad‐ spectrum markets. In addition, unions have a far higher stake in what government does, because they represent over seven million individuals who are also public employees.64 Further‐ more, they represent these interests at a time when public union members outnumber (in absolute terms) union members in private jobs,65 and they do so at a time when public union pensions are widely deplored as budget breakers.

Citizens United, if it has an effect at all, is likely to favor labor unions over mainstream corporations. Unions have something to defend, making it more attractive for them to go after these candidates. Note the recent example of unions working hard to push Arkansas Senator Blanche Lincoln out of her seat67 for her unwillingness to toe the line on the Employee Free Choice Act.68 Union participation here was perhaps uniquely intense because the balance of power in the Senate was so tenuous. But the asymmetry of the stakes still matters in these circumstances. It is far more likely that unions will take up this privilege than will corporations.

## CP: Overturn Speechnow

### S: 1NC

#### Speechnow alone is sufficient – PACs are key!

RCFP, 2-1-2012, "Newsflash! Citizens United has been good for campaign finance transparency." Reporters Committee for Freedom of the Press, https://www.rcfp.org/journals/news-media-and-law-winter-2012/newsflash-citizens-united-h/. Accessed 4-12-2025. RCFP provides pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

No need here to rehash the debate over whether the U.S. Supreme Court got it right in Citizens United. But it frequently seems necessary to remind ardent opponents of the decision exactly to what extent the decision advanced speech rights, what campaign finance laws it upheld and what current restrictions—and freedoms—it never considered and therefore left undisturbed.

The Citizens United court overruled the 1990 decision in Austin v. Michigan Chamber of Commerce in which it had previously upheld a corporate (and union) ban on using general treasury funds for independent campaign expenditures. Expenditures are wholly controlled by the entity engaging in the speech activity and are supposed to be independent of candidate influence or coordination. In doing so, the Court also struck down the particular law at issue in the case that was previously upheld in McConnell v. FEC. That law banned “electioneering communications” or what were commonly criticized as “sham issue ads” during certain periods before an election. McConnell had relied on the anti-distortion state interest rationale accepted in Austin. More on sham issue ads later.

So what really happened? For one, the Court did not disrupt federal laws capping direct contribution limits to candidate campaigns; the quintessential perceived quid pro quo scenario. It also did not establish any individual right to make unlimited campaign expenditures. Why? Because that right was already established by the Court back in 1976 in Buckley v. Valeo. And since Buckley, corporations have established, contributed to and spoke through independent political action committees. The difference was that the funds supporting such PACs could not be taken from general corporate treasury but rather were limited to voluntary contributions from sources such as corporate employees and stockholders. The Court also did not for the first time recognize a corporate constitutional right to speak on political matters. That was already well-established with the Court’s 1978 decision in First National Bank of Boston v. Bellotti.

Moreover, the Citizens United court voted 8-1 (sigh, J. Thomas) to uphold disclaimer and disclosure provisions found in the law that require independent entities to clearly communicate who was responsible for the speech, provide contact information for the source and explain that it was not endorsed by any candidate. It further upheld the constitutionality of requiring public expenditure disclosure statements to be routinely filed with the Federal Election Commission.

Coupled with the U.S. Court of Appeals for the District of Columbia’s post-Citizens United decision in Speechnow.org v. FEC in which it held that in light of the high court’s ruling laws setting contribution limits to PACs were also unconstitutional, the “Super PAC” was born.

And with it came a greatly renewed public interest in campaign financing and who lurks behind the latest television spot in the ongoing Republican primaries. Do you ever remember a time when the average citizen has been made so aware of the sources of and motivations behind political messaging?

Super PACs have indeed been put under intense scrutiny by the media and many public interest groups. They have also been brutally criticized and mocked by the likes of Jon Stewart and Stephen Colbert. There is a wealth of information about these now all too familiar groups: Restore Our Future (a Mitt Romney supporter), Winning Our Future (a Newt Gingrich supporter), the Red White and Blue Fund (a Rick Santorum supporter) and Priorities USA (a Barack Obama supporter). Even the AFL-CIO has jumped into the fray with its pro-labor Super PAC, Workers’ Voices. As of the end of January, Workers’ Voices reportedly raised about $3.7 million. In short, we know (and care) a lot about the history and politics of who comprises these groups and their funding sources—more so than we ever did in the past.

The media and public are focusing on campaign transparency issues like never before. While often harshly criticizing the holding in Citizens United, independent groups like the Center for Responsive Politics, the Sunlight Foundation and Democracy 21 closely track Super PAC support and spending and make that information available to the media and public. Political speech that routinely occurred in the past whose source was frequently obscured by secrecy now stands at the center of the national debate.

Distorted political ads sponsored by nondescript groups obviously existed before Citizens United. Did the average American ever know that the true source of the infamous and morally depraved Willie Horton ad that helped torpedo Michael Dukakis’ 1988 presidential campaign was sponsored by a PAC, Americans for Bush? Did that group ever receive appropriate scrutiny at the time? Beyond that, did typical voters really care all that much? This cycle, you would know from a quick Google search that the man behind that ad, Larry McCarthy, is now creating ads for Restore Our Future. It has been extensively reported.

Post-Buckley, non-corporate speakers (George Soros anyone?) always had unrestricted freedom to make expenditures. Buckley’s narrow definition of what constituted an “expenditure,” a communication specifically calling for the election or defeat of a candidate, emboldened corporations to spend wildly on “issue ads” that did everything to discredit or promote a candidate just short of expressing a view on how to vote. While laws seeking to stem the proleferation of “sham issue ads” withstood a facial constitutional challenge in McConnell, issue ad regulation was partially diluted by the Supreme Court three years later in FEC v. Wisconsin Right to Life, Inc. There the Court held that as-applied challenges to the law could be sustained unless an ad could not be reasonably interpreted as anything but express advocacy urging one to support or reject a particular candidate.

During the 2000s, 527 organizations—defined by the section of the federal tax code under which they are formed as nonprofit organizations—also began to flourish. The most famous of these groups, which usually do not expressly advocate the election of a candidate and are generally not subject to FEC regulation, was the 2004 Swift Boat Veterans for Truth. Many claim it unfairly doomed John Kerry’s presidential bid.

During the 2000 election, the billionaire Wyly brothers’ mysterious 527 group, “Republicans for Clean Air,” ran millions of dollars in ads in key primary states touting then candidate George W. Bush’s claimed exemplary environmental record. These questionable ads were cited by some as instrumental in helping Bush defeat his main primary challenger, John McCain. Do you remember the Wyly brothers’ 527 group? Me neither. 527 groups were in most significant ways left wholly unregulated and, with the exception of the Swift Boaters in 2004, received relatively sparse media coverage.

It seems dishonest to therefore hold Citizens United as the sole harbinger for the monied takeover of political campaign spending—especially since even before the decision came down about half of the states did not have such restrictions on corporate spending in place. What It has certainly done is to energize the debate over money and politics. In this regard it has done the voting public a service, leaving them better educated about the finance process and more critical of political advertising.

Of equal importance, it has also exposed the critical need for much greater transparency in the campaign finance process and greater walls of separation between candidates and independent backers.

Many arguing for greater disclosure have highlighted what is commonly referred to as the “Russian doll” dilemma. While Super PACs are required to file financial disclosure statements with the FEC detailing funding sources, they are allowed to accept bulk contributions from incorporated 501(c)(4) entities that themselves are not required to disclose funding sources. This of course can allow Super PACs to shield the true identity of backers. Others have also criticized disclosure lag times where Super PACs can withhold reporting on source funding until after much messaging and voting has occurred.

Coordination with candidates is also a concern. It certainly raises an eyebrow when Foster Friess, the main backer of the pro-Santorum Red, White and Blue Fund is seen standing on stage directly behind his candidate as he gives a primary victory speech in Missouri. A pro-Rick Perry Super PAC, Make Us Great Again, was led by Texas lobbyist and longtime Perry friend and former chief of staff Mike Toomey. In addition to Larry McCarthy, key figures in the pro-Romney Restore Our Future Super PAC include the candidates former counsel Charles Spies and his 2008 campaign political director Carl Forti.

President Obama’s supporting Super PAC is no different. It is managed by well-known democratic political operatives like Paul Begala and Obama’s 2008 campaign press secretary and former White House deputy press secretary Bill Burton.

It is indeed a hard pill to swallow to believe that given their incestuous lineage these groups operate wholly independent of the candidates. We should support measures to create and enforce greater separation between candidates and independent supporters. Current initiatives such as reintroducing a version of the DISCLOSE Act to provide for greater Super PAC transparency should be supported.

Greater transparency at all levels should remain the preferred method to combat undue influence, ferret out political motive and publicly shame those who seek to pervert the election process. Government restrictions on speech imply that voters are simply too weak to assess the source and credibility of a message. That is simply paternal. We are stronger than that.

## CP: FEC reform

### S: 1NC

#### FEC is inept – Only reform can solve case

Daniel I. Weiner, 4-30-2019, "Fixing the FEC: An Agenda for Reform." Brennan Center for Justice, https://www.brennancenter.org/our-work/policy-solutions/fixing-fec-agenda-reform. Accessed 4-12-2025.

The campaign finance system charged with safeguarding our elections has itself become a threat to democracy. This is thanks not only to Citizens United, but also to a dysfunctional campaign finance agency in Washington, the Federal Election Commission. Evenly divided and perpetually gridlocked, FEC dysfunction has made it more difficult for candidates trying to follow the law, and easier for those willing to break it. Over the last decade the FEC has abandoned serious allegations of lawbreaking without investigating because its commissioners have divided along party lines. Further, the agency has often failed to provide candidates and other political actors with guidance on key issues and has neglected to update regulations to reflect major changes in the law, media, and technology.

This paper sets forth a new blueprint to make the FEC work again. It proposes reforms to curtail gridlock, foster more accountable agency leadership, and overhaul the Commission’s civil enforcement process. A number of these changes are part of H.R. 1, the historic For the People Act of 2019 that recently passed the House of Representatives. They deserve to be a bipartisan priority.

The FEC was created in 1975 to administer and enforce the system of post-Watergate campaign finance rules designed to prevent corruption. It is composed of six commissioners; no more than three can be from the same party. The Commission cannot enact regulations, issue guidance, or even investigate alleged violations of the law without four votes. While the Commission does have a nominal chair, the office rotates and carries no real power; even purely administrative matters related to budgets, staffing, and other management decisions generally require four commissioners to agree.

Today, that rarely happens on matters of significance. By long-standing practice, FEC commissioners are usually handpicked by Democratic and Republican leaders in Congress, who increasingly disagree not only about the need for new reforms but also about how to interpret existing laws. The evenly split Commission often cannot agree even on personnel and other administrative matters, with critical posts often sitting vacant for years.

Since 2010, the FEC’s partisan stalemate has allowed more than $1 billion in dark money from undisclosed sources to flood into U.S. elections. Enforcement of rules that limit cooperation between candidates and lightly regulated super PACs has been stymied, making it possible for super PACs to spend billions working hand in glove with campaigns. Presidential candidates too often have become the equivalent of racehorses backed by rival billionaires. And gridlock has prevented any meaningful FEC response to revelations that Russia sought to manipulate the U.S. electorate in 2016.

A requirement for disclaimers on the sorts of online ads that Russian operatives used to influence American voters has been stalled for more than a year. Given this history, if any of the more ambitious reforms in H.R. 1 were to be enacted, it is doubtful that FEC commissioners could effectively carry out a new mandate.

FEC dysfunction thwarts even Commission members who oppose stronger rules. They can block enforcement on an evenly divided FEC, but they do not have the votes to change rules they find irrational or outdated. For instance, a proposal to loosen rules that govern political party fundraising has languished since 2015.

For candidates and others, gridlock at the FEC creates risk and uncertainty that doesn’t need to be there. “Most political operatives, whether on the right or the left, want clarity. What can I do and what can I not do,” says former Republican commissioner Michael Toner. “They might not always be thrilled with the answers, but they want to know.” Instead, those seeking advisory opinions from the FEC on novel or controversial issues often go away empty-handed. The resulting gray areas can have real consequences: In recent years both Republican and Democratic officeholders have been accused of criminal offenses that might have been avoided with the help of clearer FEC guidance.

FEC dysfunction harms candidates and political parties, who are under the brightest spotlight and who have traditionally relied on the Commission to create clear, uniform rules. The lack of clarity is a problem even for supposed beneficiaries of Citizens United, like politically active business interests, who put a similar premium on “everyone[] playing by the same rules.” Political outsiders without the resources to hire expensive election lawyers to parse ambiguous or out-of-date regulations are particularly disadvantaged. With a paralyzed FEC, something as simple as filling out a form can be fraught, since many of the Commission’s forms and accompanying guidance are incomplete and/or out-of-date. For example, more than nine years after Citizens United, there is still no FEC form for creating a super PAC. Instead, filers must fill out the form for creating a traditional PAC, and then send the FEC a separate letter. That process is set forth in “interim” guidance the Commission issued more than seven years ago. It also would not be apparent from checking the Commission’s official guide for non-connected PACs, which was last updated in 2008.

In short, as a bipartisan group of members of Congress wrote to President Trump in February 2018, a dysfunctional FEC “hurts honest candidates who are trying to follow the letter of the law and robs the American people of an electoral process with integrity.”

Congress needs to fix this problem, but in a way that preserves safeguards against partisan abuse of the Commission’s power and bureaucratic overreach that could stifle political expression. In crafting proposals to achieve this balance, the Brennan Center consulted with more than a dozen experts who served as FEC commissioners or high-level staffers, or who have regularly advocated before or studied the agency. On the basis of their input and our own expertise (including that of the author, who worked at the FEC from 2011 to 2014), we recommend the following reforms:

Change the number of commissioners, with at least one political independent: To reduce gridlock and allow for decisive policymaking, Congress should change the Commission’s structure to give it an odd number of five commissioners, with no more than two from each of the major political parties. Congress should specify that at least one commissioner be a political independent who has neither been affiliated with nor worked for one of the two major parties or their officeholders or candidates in the five years preceding their appointment.

Establish an inclusive, bipartisan process to vet potential nominees. As an added safeguard, Congress should require the president to convene a blue-ribbon advisory panel to help vet potential nominees. The panel should have representation from both major parties. Congress should also require reasonable steps consistent with the Constitution to ensure that people of color and other underrepresented communities have a voice in the selection process.

Give the agency a real leader who is accountable to the president. To ensure clearer lines of accountability for the Commission’s management, Congress should provide that the president will designate one commissioner to serve as the agency’s chair during the president’s term. The chair would have the power to supervise Commission staff, approve its budget, and otherwise act as the agency’s chief administrator, but with sufficient checks to prevent partisan abuse of the office and ensure the Commission’s continued independence from the White House.

End the practice of allowing commissioners to remain in office indefinitely as holdovers. To ensure that the Commission has regular infusions of fresh leadership with an appropriate degree of independence, Congress should limit commissioners to two statutory terms and end the practice of letting them serve indefinitely past the expiration of their terms until a successor arrives.

Overhaul the Commission’s civil enforcement process.

Finally, Congress should take several steps to make the Commission’s civil enforcement process timelier and more effective, while maintaining safeguards to protect the rights of alleged violators. These changes should include:

Creating an independent enforcement bureau within the Commission, whose director would be selected by a bipartisan majority of commissioners and have authority to initiate investigations and issue subpoenas (subject to override by a majority of commissioners);

Providing an effective legal remedy for both complainants and alleged violators to obtain legal clarity if the Commission fails to act on an enforcement complaint within one year;

Limiting the Commission’s use of prosecutorial discretion to avoid pursuing serious violations;

Restoring the Commission’s authority to conduct random audits of political committees;

Reinforcing the Commission’s system of “traffic ticket” administrative fines for reporting violations by making it permanent and requiring the Commission to expand the program to cover all reports; and

Increasing the Commission’s budget to allow it to hire additional qualified staff to ensure timely, effective resolution of enforcement matters.

These reforms will allow an important federal agency to enforce the law as written and provide much-needed clarity on a host of issues that affect officeholders and others across the political spectrum. How much transparency does the law require for those who engage in campaign spending? How closely may candidates work with like-minded super PACs? When are certain payments — say, those made on President Trump’s behalf to the adult film star Stormy Daniels to hide an alleged affair — considered campaign contributions? How should decades-old statutory law be applied to the internet? A less-gridlocked FEC could provide real answers. And to the extent that those answers do not sit well with the American people, there will be much clearer lines of accountability than the current stalemate affords.

If there is any lesson from the FEC’s recent history, it is that while strong checks and balances are essential for any entity that regulates the political process, efforts to insulate the Commission entirely from swings of the political pendulum simply have not worked. The time has come for a different approach.

## CP: ConCon

### Compet: A2 “L2NB, Citizens United” – 2NC

#### Amendments to overturn CU are tremendously popular – it’s bipartisan

Ashley Balcerzak, 5-10-2018, "Study: Most Americans want to kill ‘Citizens United’ with constitutional amendment." Center for Public Integrity, https://publicintegrity.org/politics/study-most-americans-want-to-kill-citizens-united-with-constitutional-amendment/. Accessed 4-12-2025.

Three-fourths of survey respondents — including 66 percent of Republicans and 85 percent of Democrats — back a constitutional amendment outlawing Citizens United.

The study also indicates that most Americans — 88 percent overall — want to reduce the influence large campaign donors wield over lawmakers at a time when a single congressional election may cost tens of millions of dollars.

That most Republican and Democratic voters want to amend the Constitution to limit big money’s role in politics is notable because it’s the “most drastic step that can be taken,” said Steven Kull, director of the University of Maryland School of Public Policy’s Program for Public Consultation, which conducted the study.

The 2010 Citizens United decision specifically allowed corporations, unions and certain nonprofits to raise and spend unlimited amounts of money to advocate for and against political candidates. It also gave rise to super PACs — lightly regulated political committees that have become major weapons in both state and federal politics.

Candidates and political parties, meanwhile, may by law only accept limited contributions.

Overturning Citizens United has been many liberals’ dream for years, although it’s highly unlikely to happen. The traditional route for amending the Constitution requires a vote of two-thirds of both the House and Senate, followed by ratification by three-fourths of state legislatures. The Constitution was last amended in 1992.

Most survey respondents also support congressional action on money in politics that fell short of a constitutional amendment, such as a bill that required corporations and unions to report campaign spending to shareholders, members and the public in addition to disclosures they file with the Federal Election Commission.

Some major corporations with household names indeed keep their political practices and spending quiet, such as Expedia, Garmin and Netflix, among others, according to a study by the nonpartisan Center for Political Accountability and the University of Pennsylvania.

A recent Center for Public Integrity analysis found that Congress has little appetite for passing laws addressing campaign cash: Of more than two dozen money in politics bills introduced early in the current congressional session, lawmakers have not conducted a single formal hearing or vote on any of them.

Less than half of those surveyed consider an anti-Citizens United amendment to be an attack on free speech. More than four out of five agree with the statement that “the rich should not have more influence just because they have more money.”

David Keating, president of the Institute for Free Speech, a conservative nonprofit, questioned the survey’s findings.

“If Americans knew that repealing Citizens United would allow Congress to censor critics and make it more difficult to defeat corrupt incumbents then they’d be less likely to support it going away,” Keating said. “It’s typical for academics to tout biased polls with questions that try to undermine support for free speech.

Although Democrats typically tout reducing big money and eliminating secret money in politics, they don’t always follow their own counsel.

For example, a Center for Public Integrity investigation revealed how a big-spending Democratic super PAC used a loophole in federal law to hide the identities of its donors until after Alabama’s special U.S. Senate election in December. Democratic presidential candidate Hillary Clinton also benefited from millions of dollars worth of so-called “dark money.”

One campaign finance reform that most survey respondents dismissed? Funding presidential campaigns with public money using a federal system that’s largely fallen out of favor since the Citizens United decision. Two-thirds of respondents would prefer the federal government nix the checkbox on their tax forms that provides $3 to campaigns and instead direct the funds to other areas, such as pediatric research or deficit reduction.

Campaign finance reform isn’t the only thing voters on both sides of the aisle agree on: the University of Maryland found in a study late last year that Americans on the whole thought lawmakers should wait longer periods of time before cashing in on K Street as lobbyists.

# Loper Bright Enterprises v Raimondo

## Aff

#### Loper Bright overturns Chevron and eliminates administrative deference

Christopher J Walker, Law Professor at U of Michigan, June 28, 2024 ("What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference", Yale Journal on Regulation, <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/>, DoA 4/27/2025, DVOG)

Today, i**n Loper Bright Enterprises v. Raimondo, the Supreme Court overruled the Chevron deference doctrine** — the command from a 1984 decision that courts defer to federal agencies’ reasonable interpretations of ambiguous statutes the agencies administer. Chief Justice Roberts, writing for a 6-3 Court, concluded:

**Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority**, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it. But **courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous**.

While federal courts were already moving in this anti-deference direction in recent years, I think it’s fair to say that **Loper Bright marks the end of an era in administrative law**. Let’s unpack the separate opinions and their implications for the future of administrative law.

The Merits

On the merits, **the Court starts with core principle that courts should exercise “independent judgment” and then works through the various cases and seeks to reconcile them with that basic principle.** In some ways, this is reminiscent of the Chief Justice’s approach to presidential removal power in Seila Law LLC v. CFPB. He takes the familiar chapters of the conventional story but reorders them to flip the narrative. Here, **instead of starting with a pro-deference origin story, he starts with a pro-judiciary “independent judgment” story. And then he fits the various deference cases and developments into that narrative to conclude that there was no deference doctrine** remotely similar to Chevron before the enactment of the Administrative Procedure Act (APA) in 1946.

Accordingly, when the APA says that “the reviewing court shall decide all relevant questions of law,” it really means no deference at all. The potential background deference doctrines purported to exist in 1946 do not overcome the APA’s plain language, and the scholarly commentary to the contrary is not persuasive. For what it’s worth, I’ve always found it a close call on the scholarly debates over what judicial deference looked like before the APA’s enactment. In my view, some sort of deference existed beyond the Chief Justice’s characterization, but not the bright-line rule Chevron established.

**In concluding that Chevron deference is not consistent with the APA, the Chief Justice also rejects as misguided Chevron‘s presumption that Congress delegates by ambiguity law-interpretation authority to federal agencies:**

Perhaps most fundamentally, **Chevron’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do**. The Framers, as noted, anticipated that courts would often confront statutory ambiguities and expected that courts would resolve them by exercising independent legal judgment. And **even Chevron itself reaffirmed that “[t]he judiciary is the final authority on issues of statutory construction” and recognized that “in the absence of an administrative interpretation,” it is “necessary” for a court to “impose its own construction on the statute.”** Id., at 843, and n.9. Chevron gravely erred, though, in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. **The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency’s own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.**

Having read thousands of Chevron-related judicial decisions and interviewed and surveyed more than a hundred of agency regulatory lawyers, **some of this paragraph is hard to square with reality**. Not to mention congressional practice…. But I’ll leave that for another day.

#### Loper Bright returns to Skidmore deference

Christopher J Walker, Law Professor at U of Michigan, June 28, 2024 ("What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference", Yale Journal on Regulation, <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/>, DoA 4/27/2025, DVOG)

**In eliminating Chevron deference, a critical question is what will be the replacement standard** for courts reviewing agency statutory interpretations going forward.

In their merits briefing, **both petitioners very carefully did not say what should replace Chevron. At oral argument, however, both embraced Skidmore** deference as the replacement, **which instructs that the “weight” of an agency’s interpretation “depend[s] upon the thoroughness evidence in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors ‘which give it power to** **persuade**, if lacking power to control.” Perhaps not coincidentally, Skidmore was also the standard that Justice Gorsuch embraced in Kisor v. Wilkie to replace Auer deference to agency interpretations of their own regulations.

So many court watchers and administrative law scholars expected Skidmore — not de novo or plenary review — to replace Chevron if the Court had enough votes to overrule Chevron. In my view, the answer is not clear from the Chief Justice’s opinion. Let’s just say that the majority opinion is ambiguous, but perhaps the best interpretation is that the Court embraces de novo review — in particular, what the Court repeatedly calls “independent judgment.”

To be fair, **there are hints of Skidmore-like weight to agency experience and reasoned decisionmaking in various parts of the majority opinion** — about how Executive Branch interpretations might deserve “respect” or “inform the judgement of the Judiciary,” or how “courts may — as they have from the start – seek aid from interpretations of those responsible for implementing particular statutes.” **But the majority’s bottom line doesn’t feel much like Skidmore deference or weight**: “Careful attention to the judgment of the Executive Branch may help inform that inquiry.”

**It will be fascinating to see how lower courts, federal agencies, and litigants interpret the Court’s guidance as to the new standard for judicial review of agency statutory interpretations**. (Also on the blog today, Patrick Sobkowski seems to have a different take on whether the Court embraced a de novo standard of review in Loper Bright.)

[6/29/2024 Update: On the administrative law professor listserv, the growing consensus seems to be that the Court preserved some form of Skidmore deference. I’m still not entirely convinced, but perhaps my view is not the conventional one.

### Employment

#### Loper Bright has wide ranging impacts on employment law

Adler-Paindiris and Pryor, 2024 (Stephanie L. Adler-Paindiris & Patricia Anderson Pryor, attorneys at Jackson Lewis, 6-28-2024, "Go Fish! U.S. Supreme Court Overturns ‘Chevron Deference’ to Federal Agencies: What It Means for Employers", Jackson Lewis, <https://www.jacksonlewis.com/insights/go-fish-us-supreme-court-overturns-chevron-deference-federal-agencies-what-it-means-employers>, DoA 4/27/2025, DVOG)

Chevron’s Impact on Workplace Law

**Chevron deference has been a foundational precedent for more than 40 years**. In that time, courts have issued thousands of decisions deferring to a broad swath of regulations issued by federal agencies. **This deference has allowed agencies to shape the contours of employment laws with minimal judicial review.**

Through rulemaking, agencies have refined the meaning of the statutes they enforce and, in some cases, have broadly expanded the scope of those statutes. **For example, the DOL imposed a minimum salary requirement for application of the executive, administrative, and professional exemptions, although there is no such provision in the Fair Labor Standards Act** (FLSA). More recently, **the EEOC stretched the Pregnant Workers Fairness Act** (PWFA) **to require accommodations for** medical conditions related to **abortion.**

Since Chevron, federal agencies have routinely relied on the decision in response to challenges to these statutory interpretations. Chevron deference has allowed the agencies to survive legal challenges to similar expansive interpretations of the laws they enforce — emboldening agencies to extend their regulatory reach.

The Court’s Decision

**In Loper Bright, the Court’s majority held that courts may not defer to an agency’s interpretation of a statute merely because the statute is ambiguous. A court must exercise independent judgment in interpreting a statute and reviewing the agency interpretation of the statute**. The Administrative Procedure Act (APA), which Congress enacted to curb overzealous agencies, the Court said, prescribes how courts are to review such agency actions. The APA makes clear that agencies are not entitled to deference when interpreting statutes, the majority explained.

However, an agency’s interpretation, as reflected in a regulation or other agency action, may have some sway, the Court said. A court may look to the agency charged with enforcing a statute for guidance in interpreting its meaning. An agency’s interpretation may be “especially useful” if it was issued concurrently with the statute itself and has “remained consistent over time,” the Court observed. Further, if a statute expressly authorizes an agency to act, courts must respect that delegation of authority, but “consistent with constitutional limits,” the court must ensure the agency has acted within those limits. At bottom, though, the essential question for a reviewing court is: “Does the statute authorize the challenged agency action?”

Although it made clear that the Chevron framework is abandoned, the Court emphasized that prior decisions that relied on the Chevron framework are not overturned.

What Does This Mean for Employers?

Nothing changes today. The Supreme Court’s decision did not address a challenge to a specific employment regulation. Regulations and guidance from the EEOC, DOL, OSHA, NLRB, and other agencies will continue to exist and be in effect. Employers should continue to follow agency regulations and guidance unless and until a court rejects these interpretations.

But the **Loper Bright** decision **will make it easier to challenge regulations and thus may limit the ability of agencies to reshape labor and employment law** to the degree with which they have over the last 40 years. **The decision is likely to affect pending legal challenges to an array of federal agency rules, including:**

**EEOC regulations implementing the PWFA** (which are currently enjoined (in part) in Louisiana and Mississippi pending ongoing litigation);

**DOL rules increasing the minimum salary threshold for application of the FLSA’s “white collar” exemptions; defining “independent contractor” vs. statutory employee under the FLSA**; **limiting the amount of time tipped employees can spend doing work that is not “tip producing”; adopting sweeping revisions to Davis-Bacon and Related Act prevailing wage regulations** (recently enjoined pending a final court decision); **and implementing an executive order boosting the minimum wage for federal contractors;**

**OSHA’s new “walkaround” rule allowing union organizers to accompany OSHA inspectors on workplace inspections;**

**The NLRB’s joint-employer rule; and**

**The Federal Trade Commission’s rule barring non-compete agreements.**

Of course, just because a court has more discretion to accept or reject an agency’s interpretation does not mean the interpretation will be rejected. However, **with greater judicial discretion, a rule may be upheld in one court and invalidated in another. This could lead to a spate of inconsistent rulings throughout the country, creating jurisdictional conflicts and compliance headaches** for large employers in multiple states.

While less judicial deference to federal agencies may hold some immediate appeal for employers**, it also may bring less predictability. An uncertain regulatory backdrop and a potentially chaotic landscape of court decisions across jurisdictions can make it harder for employers to manage their workplace**, as a practical matter, and to comply with the law.

### Agriculture

#### Numerous agricultural regulations impacted by shift from Chevron to Loper Bright

Schroeder, 2024 (Brianna J. Schroeder, Agriculture Attorney, 7-2-2024, "What does the Supreme Court's Decision Overturning Chevron Have to do with Agriculture? (Hint: Everything!) — Janzen Schroeder Ag Law", Janzen Schroeder Ag Law, <https://www.aglaw.us/schroeder-ag-law-blog/2024/7/1/what-does-the-supreme-courts-decision-overturning-chevron-have-to-do-with-agriculture-hint-everything>, DoA 4/27/2025, DVOG)

**So we’ve changed from “Chevron deference” to “Loper Bright independent judgment.”** What’s the upshot for agriculture? **We can expect the balance of power to shift back toward the judiciary and legislative branches and away from the executive administrative agencies**. In theory, there should be less flip-flopping from administration to administration. In practice, from a procedural perspective, **we’ll see administrative law judges and regular courts interpret statutes using their own independent judicial discretion. Courts will no longer defer to agencies’ rationale**. Lawmakers should pass laws with more details so we don’t have these ambiguous laws that require extensive construction to apply to real world facts. The Court’s decision notes that Congress can write agency discretion into a statute, but it has to specifically say as much. Administrative judges will require additional training to prepare for their new role.

From a substantive point of view, **numerous USDA regulations could be called into question, including recent rules to strengthen the Packers and Stockyards Act. Crop insurance regulations will be revisited. Wetland determinations and recent WOTUS rules will be in the crosshairs. Pesticide regulations and the EPA’s new regulation setting limits on PFAS in water could also be challenged.** Most agricultural groups applaud the new decision, arguing Chevron had enabled administrative overreach to the detriment of farmers and ranchers. American Farm Bureau filed an amicus brief in Loper Bright and has noted the importance of this case to restore checks and balances. For those of us who practice federal administrative law, I cannot overemphasize the change Loper Bright brings to this area. Judicial review of administrative decisions is going to look wildly different from here on out as we rely on courts — not agencies — to decide what statutory language means.

### Environment

#### EPA agency regulations at risk post Loper Bright

Boxerman et al, 2024 (Samuel B. Boxerman, Jack Raffetto, Timothy K. Webster, Jim Wedeking, Riley Desper, attorneys at Sidley, 6-28-2024, "Environmental Law Implications of Loper Bright and the End of Chevron Deference", Environmental and Energy Brief, <https://environmentalenergybrief.sidley.com/2024/07/02/environmental-law-implications-of-loper-bright-and-the-end-of-chevron-deference/>, DoA 4/27/2025, DVOG)

More details on the new framework and its potential implications for future federal agency action generally can be found here. **How the decision will specifically affect actions taken by the U.S. Environmental Protection Agency** (EPA or Agency) remains to be seen.

EPA has relied less on Chevron in its rulemakings and court positions. The Agency’s approach to statutory interpretation in recent rulemakings and court filings indicates that the effect of Chevron may not be as substantial on EPA as some may suggest. Instead, EPA made a tactical shift several years ago and deemphasized the role of Chevron in many, but not all, rulemakings, placing more importance on arguing that its statutory interpretation is the best interpretation regardless of Chevron This squares with the approach taken across the government, with the Biden administration reportedly having invoked Chevron only five times in promulgating 51 major rules.[2] In a sense, much of the effect of Loper Bright has already been felt, and matters that do not involve claims of Chevron deference will not be affected by the new decision.

The Agency’s interpretation of the relevant statute will still be considered. **The Loper Bright decision does not mean EPA’s interpretation of environmental statutes will be ignored. The Supreme Court noted that an agency’s interpretation “may help inform [a court’s] inquiry” into whether “an agency has acted within its statutory authority**.”[3] Thus, while not dispositive as under Chevron, **EPA’s interpretation of ambiguous statutes may still carry weight with a court. However, EPA must now compete with opposing private litigants on equal terms** to demonstrate that the Agency’s interpretation is truly persuasive.

Loper Bright does not address the deference courts may choose to give EPA’s interpretation of its own regulations or to the Agency’s technical expertise. The decision only addresses agency interpretation of ambiguous statutes; it does not address the doctrine that applies to the agency’s interpretation of its own regulations. Guided by what is known as Auer deference, courts generally defer to an agency’s interpretation of ambiguous regulatory language unless it is plainly erroneous or inconsistent with the regulation.[4] Likewise, Loper Bright does not address the principles that courts have followed in deferring to EPA’s technical expertise on the merits of an issue or where Congress has granted broad discretion to EPA to fashion regulations.

That said, **Loper Bright likely will increase and strengthen some legal challenges to EPA action. Chevron did not insulate EPA’s actions from legal challenges** — the Agency regularly appears in court to defend its actions. Nevertheless, **following Loper Bright, the number of those challenges may increase and the legal approaches within them may change**. The Supreme Court’s direction to the lower courts is to use the entire suite of statutory interpretation tools to determine the “best” interpretation of the statute at issue. For those considering whether to challenge an agency action, Loper Bright provides a more level playing field as EPA may no longer prevail by offering only a “reasonable” or “permissible” view of a statute.

**Watch for challenges to past EPA actions, particularly under the Clean Air Act. The Court stated that it was not its intention to overturn prior judicial decisions** that relied on the [5] However, the Court just made it easier to challenge federal regulations in ruling that the six-year statute of limitations under the Administrative Procedures Act does not start ticking until a plaintiff is adversely affected by the regulation.[6] Moreover, **the Clean Air Act allows for late judicial review of agency action based on “grounds arising after the statutory period for review has expired**,”[7] and the D.C. Circuit has held that a judicial decision can constitute “grounds arising after.”[8] **Given the change wrought by Loper Bright, it is possible that some may seek to challenge prior agency actions** that were not previously litigated on the merits.

### Transportation

#### Post Loper Bright regulatory shift in transportation industry

American Road and Transportation Builders Association, 2024 (7-3-2024, "Supreme Shift: What the Chevron Ruling Means for Transportation Construction", ARTBA, <https://www.artba.org/news/supreme-shift-what-the-chevron-ruling-means-for-transportation-construction/>, DoA 4/27/2025, DVOG)

Federal agencies derive much of their power from interpreting and implementing laws passed by Congress. Named for a 1984 case, Chevron allowed agencies to interpret uncertain provisions in those laws using a two-part test: (1) determine whether Congress has already spoken on the issue; and (2) if not, decide if the statute is ambiguous or silent, and therefore open to reasonable interpretation. While supporters argued that Chevron provided necessary flexibility and applied expertise to policymaking, critics claimed it gave federal agencies too much power, leading to overreach and inconsistent enforcement.

**Many have asked me how this new ruling will alter the regulatory landscape for transportation construction.** The implications could be significant, but far from instantaneous. The ruling mainly applies to new regulations agencies will try to implement and those currently being challenged in courts on the basis of statutory interpretation. Final federal rules beyond the statute of limitations for facial challenge are unlikely to be reopened solely based on this decision.

As new and challenged rules work their way through the process, courts will no longer have to apply Chevron and its strong deference to federal agency interpretations. Judges will now scrutinize agency actions more closely using other legal tests with stricter requirements. The courts must ensure that agency policies align strictly with statutory authority.

What This Means for the Future of Federal Regulation:

Detailed explanations and justifications for rules: **Courts will not automatically accept agency interpretations, meaning agencies must be more careful and thorough in their rulemaking**.

Consistent interpretations of laws: **Frequent changes in policy or interpretation will be less likely to hold up in court, leading to more stability in regulatory policy. In other words, less “pendulum swinging” depending on who’s in office.**

Agencies must demonstrate why their interpretations are necessary and valid: **This includes showing how their rules align with the law and presenting strong arguments for their policies.**

Fewer rules that appear to push a particular political agenda: **Any new regulations will need strong, well-documented justifications to pass judicial scrutiny.**

Increased legal challenges: **With courts now playing a more significant role in interpreting laws, we might see an increase in litigation**, and more cases centered around an agency’s interpretations of the law.

Potential for more non-regulatory actions: **Agencies may attempt to regulate using methods other than notice and comment rulemaking** such as memoranda, guidance documents etc.

## Neg

#### Chevron deference morphed into Loper Bright delegation—the standard has remained the same

Vermeule, 2024 (Adrian Vermeule, Ralph S. Tyler Professor of Constitutional Law at Harvard Law School, 6-28-2024, "Chevron By Any Other Name", <https://thenewdigest.substack.com/p/chevron-by-any-other-name>, DoA 4/27/2025, DVOG)

That is what has now occurred, almost exactly. **The majority in *Loper Bright* argued, on the one hand, that “*Chevron* cannot be reconciled with the APA by presuming that statutory ambiguities are implicit delegations to agencies.” But with its other hand, the majority almost immediately took that all back. The *Loper Bright* opinion contains an enormous Monaghan-style loophole, through which most if not all of the *Chevron* regime can easily fit**. Here is the critical passage, reproduced without internal citations — except for one especially significant citation to a law review article:

“**In a case involving an agency, of course, the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes**. For example, some statutes expressly delegate to an agency the authority to give meaning to a particular term. Others empower an agency to prescribe rules to ‘fill up the details’ of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as ‘appropriate’ or ‘reasonable.’ **When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, ‘fix[ing] the boundaries of [the] delegated authority**,’ H. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 27 (1983), **and ensuring the agency has engaged in ‘reasoned decisionmaking’ within those boundaries**. By doing so, a court upholds the traditional conception of the judicial function that the APA adopts.”

What this means is that **many, most or even all of the cases that were previously called “*Chevron* deference” cases can now be relabeled as “*Loper Bright* delegation” cases.** A concrete example may be useful. In her characteristically clear-minded dissent, Justice Kagan listed a series of statutory problems, drawn from real statutory schemes, that courts confront. To shoplift one of her examples:

“Congress directed the Department of the Interior and the Federal Aviation Administration to reduce noise from aircraft flying over Grand Canyon National Park—specifically, to ‘provide for substantial restoration of the natural quiet.’ How much noise is consistent with ‘the natural quiet’? And how much of the park, for how many hours a day, must be that quiet for the ‘substantial restoration’ requirement to be met?”

**It should be obvious that a *Chevron* approach to this statutory problem can proceed almost exactly as before, just with different labeling. Interpreting the statute independently, the judges will now say that the best reading itself is that Congress has** (in the majority’s terms) “**authorized the agency to exercise a degree of discretion” in giving necessary specification and concretization to “substantial restoration,**” and so forth.

Put differently, in the terms familiar under the pre-existing and now defunct *Chevron* regime, **all *Chevron* step two cases could always have been re-labeled as *Chevron* step one cases - er, I mean, *Loper Bright* delegation cases**. That is, **cases that used to be labeled as “deference to reasonable agency interpretations of ambiguous statutes” will now be called “independent judicial interpretation that identifies a single best answer, an answer that consists of a delegation of discretionary authority to agencies within a given range.” But that relabeling changes rather little**. It’s as though [Chevron really only ever had one step](https://virginialawreview.org/articles/chevron-has-only-one-step/), so that everything that was done under *Chevron* can also be done under the rubric of independent judicial interpretation.

To be sure, one might say (as I said in the indulgent self-quotation above) that the resulting regime represents a retail rather than wholesale version of *Chevron*. **Whereas *Chevron* was**[**said**](https://scholarship.law.duke.edu/dlj/vol38/iss3/1/)**to rest on a general presumption that gaps and ambiguities represented a delegation to agencies, judges will now have to decide, statute by statute and problem by problem, whether a *Loper Bright* delegation is the best reading of the statute**. But it is also true that *Chevron* was always already a retail regime, in the sense that judges always had to decide, statute by statute and problem by problem, what decision Congress had made about the issue at hand. **At most, the *Loper Bright* majority and dissent disagree over whether agency authorization to fill in gaps and ambiguities should be understood as a general guiding presumption, or instead as a case-by-case conclusion. But as general presumptions have always had to be applied at retail in cases, it’s hard to see that the wholesale-to-retail transition will make any major difference, legally or substantively**. Even if *Loper Bright* delegation is best understood as a retail version of *Chevron*, a relabeled version of *Chevron* it remains.

The Justices in the majority also seem to think, and indeed more or less said, that the sort of discretionary-choice-within-a-reasonable-range that the Monaghan relabeling leaves to agencies is best understood as “policymaking” rather than “interpretation.” That understanding saves the appearances, as the theologians say, and allows the Justices to take themselves to be doing all the law, while the agencies only ever do policy. (In the loophole passage I have quoted from the majority opinion, the majority included references to some famous cases of arbitrariness review, doubtless due to this conceptualization of discretionary-choice-within-a-reasonable-range as “policymaking”). But, of course, as many pointed out under the *Chevron* regime, the authorized agency choice of a specifying or concretizing interpretation within a reasonable range is itself always also policymaking, within a “policy space.” Such choice by agencies is both interpretation and policymaking, 100% the one and 100% the other, in a kind of hypostatic union of the administrative state. The classical law understood this, and treated such questions under the heading of determination, rather than trying to effect a metaphysical separation of interpretation and policymaking. But if the relabeling makes the Justices feel better, and changes little of substance, who are we to complain?

If all this is correct, **why would the majority overrule *Chevron* in form and name while re-creating it, or most of it, under the guise of “independent interpretation”? It seems that the *Loper Bright* opinion “expressed a mood**,” as Justice Frankfurter once said of Congress in a somewhat different administrative law context. The mood is that “We the Judges say what the law is.” But if Monaghan is correct, and the Court very much seems to think he is, then when judges independently say what the law is, they may say that the law itself delegates discretionary choice to agencies within a reasonable range whose outer boundaries are judicially identified - which is of course the *Chevron* regime in a nutshell. The rather fractious mood the Justices have expressed is one that can rather easily be appeased with a different form of words, as in a famous [parable](https://eganphilosophy.com/zhuangzi-and-the-parable-of-the-monkeys/).

**It is perhaps not excessive or vulgar realism to point out as well that the relabeling of “*Chevron* deference” as “*Loper Bright* delegation” gives a conspicuous headline victory to the conservative-libertarian legal movement, while at the same time leaving in place the deeper institutional and structural rationales that animated *Chevron* deference** in the first place. The Chief Justice is nothing if not institutionally sensitive, and is surely aware that a regime without the Monaghan Loophole is potentially a recipe for disaster. The Court has spent much of the current Term overturning decisions from overly aggressive lower appellate courts, most conspicuously the Fifth Circuit. In that world, the combination of an apparent headline victory for legal conservative-libertarians with a relabeling that preserves much of the institutional substance of the *Chevron* regime seems an ideal recipe (on premises that, needless to say, I do not share, but merely aim to explicate here).

#### Key to separation of powers

White, 2024 (Adam White, 5-1-2024, "Constitutional Government After Chevron? – Adam White", Law & Liberty, <https://lawliberty.org/forum/constitutional-government-after-chevron/>, DoA 4/27/2025, DVOG)

Reclaiming “Interpretation” from Administration

**But interpretation is not the only thing that agencies do**. And for that reason, **the Court’s first task in reforming *Chevron* might simply be to draw clearer lines between an agency’s actual effort to interpret a statute, and the other aspects of an agency’s action.** This would help to remind agencies and their advocates that statutory interpretation is different from the other parts of *administrative* work—and part-and-parcel of *judicial* work.

As Justices Alito and Kavanaugh emphasized during oral arguments, **courts are in the business of interpreting laws, and it is not obvious why they should approach the task differently in cases involving regulatory agencies.** “[I]n cases that don’t involve an agency,” Justice Alito noted to Solicitor General Prelogar, “we never say we have exhausted all of our tools of interpretation and we just can’t figure out what this [law] means.”

For years, administrative law scholars debated “tax exceptionalism”—the notion that tax cases should be handled differently from other administrative law cases. But as Alito’s question indicates, the far more significant exceptionalism has been *administrative law exceptionalism*—the notion that administrative law needs judges to approach statutory interpretation with fundamentally different tools, presumptions, and values than it would in other kinds of cases.

**Thus a post­-*Chevron* era may require courts to think much more carefully about what an agency’s action actually comprises**—statutory interpretation, policy analysis, factual finding, or all of the above—**and to distinguish those components as much as possible, in order to give each component the proper amount of scrutiny or deference. Courts can continue to review an agency’s factual findings and policy justifications with the appropriate measure of deference**—e.g., the Administrative Procedure Act’s gentle “arbitrary and capricious” standard—**while giving much less deference to their interpretation of statutes,** as Professor Jeffrey Pojanowki detailed in his insightful 2020 article for the *Harvard Law Review*.

Justice Barrett ventured such an approach at oral argument. **A single agency action, she noted, might include both “a question of statutory interpretation” and “a question of policy for the agency.”** She did not oversimplify the distinction—asking, “Where is the line between something that would be then subject to arbitrary and capricious review and something that’s a question of law?”—but she recognized the fundamental difference.

#### Loper Bright key to nondelegation

White, 2024 (Adam White, 5-1-2024, "Constitutional Government After Chevron? – Adam White", Law & Liberty, <https://lawliberty.org/forum/constitutional-government-after-chevron/>, DoA 4/27/2025, DVOG)

But **post-*Chevron* textualism could have another ripple effect. The more judges are required to grapple with unclear texts and settle on contestable “best” readings of ambiguous laws, the more those judges may see the value of a robust nondelegation doctrine. *Chevron* itself was a corollary to the notion that modern government requires broad delegations of regulatory power to agencies.** Again, Scalia’s 1989 article captures the point well: “If Congress is to delegate broadly, as modern times are thought to demand,” then, he concluded, *Chevron* would be the right judicial approach.

If *Chevron*turns out to be untenable, then what would its failure mean for the original premise? If textualist judges find themselves spending much more time and effort looking for “best” readings of badly written statutes, and seeing how little genuine substance those statutes give (not just to judges but to agencies and the people themselves) then they may begin to believe that the costs of judicial enforcement of nondelegation doctrines—costs that caused Scalia great concern from the start—may be outweighed by a nondelegation doctrine’s benefits.

**The more that judges have to grapple with open-ended statutory language, trying to ascertain their original meaning without the escape hatch of *Chevron* deference, the more that judges will need to ascribe a highly contestable “best” meaning to the statute’s words**. Such cases will spur non-textualists to denounce *Chevron*’s decline, but they will spur textualists to think harder about the underlying constitutional problem: what does it mean for a legislature to pass laws that do nothing more than empower agencies to pass laws? Judge Kethledge pointed this out, referencing Locke’s *Second Treatise* in a keynote address at Harvard this spring: “The power of the legislative … can be no other” than “to make *laws*, and not to make *legislators*.” ***Chevron*’s end will energize and improve the nondelegation debates.**

#### Loper Bright key to constrain the executive

White, 2024 (Adam White, 5-1-2024, "Constitutional Government After Chevron? – Adam White", Law & Liberty, <https://lawliberty.org/forum/constitutional-government-after-chevron/>, DoA 4/27/2025, DVOG)

**If courts were to give agencies more deference for statutory interpretations produced genuinely from agency expertise, then agencies would need to devote more time and energy to that aspect of their work.** They would need to explain their legal interpretations as comprehensively and as credibly as possible.

*More Credibility, Less Energy?*

**Agency rulemakings already produce immense documents**, often with long legal arguments. **Post-*Chevron*, agencies may have strong incentives to make them even longer and more detailed. In those analyses, they may need to show how their statutory interpretations reflect the agency’s best expertise,** from its actual experts. So long as the judicial deference framework continues to focus on the agency’s authoritative decisionmaker—namely, the agency’s head—rather than the bureaucrats within the organizational chart, **the agency will need to show that the agency’s staff and its leader adopted this interpretation.**

Yet to the extent that the courts continue to police pretextual agency explanations, an agency head will need to walk a very fine line. Not only will he need to adopt the agency’s staff expert judgment, but he will also have to be careful not to *overstate* his reliance on the staff’s expert judgment, lest he engage in unlawful pretext. **None of this is meant to accept theories of agency “expertise” at face value—again, post-*Chevron* litigation may spur much more careful and skeptical evaluations of such theories**. But even taking agency expertise as a given, the agency’s use and description of expert judgments will become much more important, and much more fraught.

This is a decidedly mixed bag, in many respects. **Agency actions may become much more credible, detailed, and expert—all good things. But by the same token, they will become much more ponderous, verbose, and slow**—**which**, as I [noted](https://lawreview.gmu.edu/print__issues/introduction-a-symposium-for-the-administrative-procedure-acts-75th-anniversary/) in a 2021 symposium for the Administrative Procedure Act’s 75th anniversary**, is the antithesis of Publius’s “energy in the executive.”**

#### Chevron destroyed Congress and SOP—Loper Bright key to restore

White, 2024 (Adam White, 5-1-2024, "Constitutional Government After Chevron? – Adam White", Law & Liberty, <https://lawliberty.org/forum/constitutional-government-after-chevron/>, DoA 4/27/2025, DVOG)

Above all, **our constitutional system for administration rests on Congress. If Congress writes clearer laws and regularly updates them, it will be easier for the executive to faithfully administer them, and the easier it will be for the courts to accurately interpret them.**

***Chevron*proved to be part of a much broader decades-long decline in the other direction. Congress’s broad grants of discretionary power to agencies**, through poorly written statutes, **made both the executive’s and judiciary’s jobs harder.**

Indeed, **those delegations of power *deformed* the other branches. They caused the executive branch to spend less time enforcing laws and more time *making*laws in the first instance**, through regulations clarifying (or ostensibly clarifying) vague statutes—tasks more befitting of a legislature than an executive.

Similarly, **broad delegations caused courts to spend less time interpreting the laws, and more time making much more nebulous judgments about whether laws were “ambiguous” and whether statutory interpretations were “reasonable**”—prudential questions more befitting of an executive than a judge.

And at the same time, **such delegations gave Congress itself more and more reason to focus on oversight than on legislation**—retrospective judgments on matters of fact and law more befitting of a court than a legislature.

**Congress wrote laws that were more vague, not more specific. With *Chevron*deference, administrations exacerbated the legal uncertainty instead of reducing it. And through *Chevron*deference, the courts did not bring legal questions to a resolution, so much as to hold them open for perennial change after every new presidential election. Each of the three branches turned out to be doing the exact opposite of its constitutional job.**

# Gonzales v Raich

## Aff

### Progressive Federalism

#### Overturning Raich key to progressive federalism

Somin, 2006 (Ilya, Professor of Law at George Mason University, Cornell Journal of Law and Public Policy, [Vol, 15:507, 2006], <https://ww3.lawschool.cornell.edu/research/JLPP/upload/Somin-507.pdf>, DoA 4/27/2025, DVOG)

**One possible political opening for future judicial review of federalism is the reawakening of interest in constraining federal power on the political left**. Raich is one of a series of recent cases in which the Bush Administration and its conservative Republican allies have made aggressive use of federal power in pursuing conservative policy goals. Other recent examples include the 2003 federal partial birth abortion ban,214 the No Child Left Behind Act education bill,215 the campaign for a federal ban on gay marriage,216 and congressional intervention in the Terri Schiavo case.217 The battle over assisted suicide that culminated in Gonzales v. Oregon is yet another example of the administration attempting to use federal power to curb liberal policies at the state level. In each of these cases, **political liberals have found themselves in the unaccustomed position of defending state autonomy against interference by a conservative federal government.**

As a result, **some liberal scholars and political commentators have begun to believe that at least some judicial review of federalism may be justified**. Writing in the left-wing journal Dissent, Harvard Law Professor David Barron recently urged that "[**a] progressive federalism might ... embrace the Rehnquist Court's limited view of Congress' Commerce Clause power. Congress would retain its ability to regulate economic activity. It would not, however, possess a general power to regulate any matter chosen by a majority of its members."**218 Barron argues that **liberal "faith in unlimited national authority was the contingent product of liberal control of national institutions**."219 **Now that "circumstances have changed," liberals must "look at the Constitution's federalism with fresh eyes**."220

A similar argument has been advanced by liberal political commentator Franklin Foer.221 **Other left-leaning scholars and activists have advocated the use of federalism doctrine to protect gay rights** (which have achieved greater political success at the state and local level, but are opposed by conservatives in Washington),222 **and to block federal legislation restricting abortion and assisted suicide**.223 **It is also significant that two recent lower court decisions, including the Ninth Circuit ruling in Raich, striking down federal legislation on Commerce Clause grounds have been authored by liberal court of appeals judges**.224 Ironically, the Bush Administration's aggressive use of federal power, coupled with the political decline of the Democratic Party from its post-New Deal peak, have accomplished a change in liberal attitudes towards federal power that conservative and libertarian academics were never able to achieve through intellectual argument. At least for the foreseeable future, it is unlikely.

### Public Health

#### Raich allows federal health regulations on assisted suicide and abortion

Rosenbaum, 2005 (Sara, *Gonzales V. Raich*: Implications for Public Health Policy, Public Health Rep. 2005 Nov-Dec;120(6):680-2. <https://pmc.ncbi.nlm.nih.gov/articles/PMC1497769/pdf/phr00104000680.pdf>, DoA 4/27/2025, DVOG)

**Gonzales v. Raich has important implications for the power of Congress to proscribe personal, non-commercial conduct— including medical conduct—that in the absence of Congressional intervention would be considered legal under state law**. Two momentous cases involving this very principle are currently moving through the appeals process and toward the Supreme Court. **The first case involves a challenge by Oregon officials to the Bush Administration’s efforts to halt the practice of legal assisted suicides under Oregon’s Death with Dignity Act.**15 **The same Court of Appeals that struck down the CSA as applied to state-sanctioned medical marijuana use also declared that the CSA cannot be used to prohibit legal assisted suicides involving the over-prescribing of a controlled substance.**

**The second case involves the proscription of certain abortions. In July 2005, the Court of Appeals for the 8th Circuit enjoined as unconstitutional the federal Partial Birth Abortion Ban Act of 2003, because of its failure to provide for a health exception for women.**16 If the Supreme Court reverses this decision (two other cases involving the 2003 Act also are moving through the appeals system) and holds that in certain instances a health exception is not required to make the regulation of abortion Constitutional, then a federal law will criminalize certain medical procedures that may be considered perfectly legal under state law. **Beyond demonstrating the power of Congress to use its Commerce Clause authority to regulate what is considered legal medical practice under the law, Gonzales v. Raich also underscores the gap between scientific evidence and the “minimum rationality” test used to analyze the constitutionality of legislation**. There is evidence to suggest that cannabis may have useful applications and that the regulation of cannabis presents no greater a challenge than the regulation of other controlled substances. Yet Congress is free to make decisions for reasons other than those embodied in science and evidence, and regularly does so. In this regard, it is the political process itself, rather than the evidence, that acts as a check on Congressional decision-making.

Finally, **Gonzales v. Raich acts as a reminder of the power of Congress to determine public health** **policy**. In many cases, Congress achieves this goal through the “power of the purse,” that is, by enacting spending legislation aimed at inducing states to adopt certain approaches to public health problems. The Public Health Service Act’s many state grant programs are evidence of such laws, but **on occasion, Congress may intervene with a law that is directly regulatory and aimed at deterring individual conduct considered inimical to the public welfare. While Congress has no broad police powers authority to regulate directly in the name of public health, Gonzales v. Raich clarifies the extent to which Congress’ power over commerce can be used to achieve the same result.**

### Marijuana

#### Overturning Raich key to legalizing marijuana

Somin, 2024 (Ilya Somin, 8-8-2024, "The War on Drugs as a Constitutional Failure", Constitutional Law, <https://conlaw.jotwell.com/the-war-on-drugs-as-a-constitutional-failure/>, DoA 4/27/2025, DVOG) Top of Form

Looking forward, **Pozen is relatively pessimistic about future constitutional challenges to drug laws, though he still urges them to continue**. **He also advocates using constitutional arguments to attack drug prohibition in the court of public opinion and the legislative arena**.

Pozen is somewhat overly pessimistic about the potential for federalism-based challenges. **Three of the five conservative justices then on the Court dissented in *Gonzales v. Raich*, mentioned earlier. Justice Clarence Thomas, who wrote a forceful dissent in *Raich*, has more recently signaled interest in reversing that case. It’s possible there might now be a majority on the Court for doing so**. The shifting ideological valence of constitutional federalism may lead one or more liberal justices to support that position, as well. **One can potentially imagine a Supreme Court decision striking down laws banning possession and at least some types of in-state distribution of drugs**. While that would not end the War on Drugs, by any means, it would give more liberal states greater room for experimentation.

## Neg

### Amend the CSA CP

#### Congress CP Solves

Orenstein, 2022 (Daniel G. Orenstein, Visiting Assistant Professor, Indiana University Robert H. McKinney School of Law, “Federalism, Cannabis, and Public Health: Prohibition is Wrong, but Raich is Still Right”, 67 S.D. L. REV. 539 (2022). <https://red.library.usd.edu/sdlrev/vol67/iss3/12>, DoA 4/27/2025, DVOG)

**The argument that Raich remains good law is in no way an endorsement of current federal law. Cannabis prohibition has been wrong since long before the present wave of public sentiment against it.** Federal cannabis law is poorly grounded in science,204 inhibits advancement of that science,205 and remains profoundly inequitable in enforcement.206 Any of these alone would be sufficient to pronounce prohibition bad policy; together, they render it a public health disaster. Early cannabis prohibition was steeped in racism.207 **The CSA could have been a step forward toward a public health approach, as even the federal government’s own experts recognized a need for change**,208 **but those recommendations were ignored,** again due in part to racism.209 T**he War on Drugs is now widely and correctly recognized as having failed utterly in achieving its goals**210 while heaping horrific damage on minoritized communities211 and eroding public health by exacerbating disparities across a wide array of social determinants of health.212 Cannabis prohibition has played a significant role in this tragedy. **Congress should begin the process of undoing the damage of cannabis prohibition by formally amending the CSA to reschedule or deschedule cannabis**.213 **Congress could also potentially insert specific exceptions for legalizing states**,214 essentially formalizing the approach of the Cole Memos and allowing states to chart independent paths while maintaining a “backstop” of federal oversight and control.215 These would be welcome changes, but Congress has not made them as of this writing.

### Solvency

#### Raich is good law—just because Congress CAN do something doesn’t mean they SHOULD

Orenstein, 2022 (Daniel G. Orenstein, Visiting Assistant Professor, Indiana University Robert H. McKinney School of Law, “Federalism, Cannabis, and Public Health: Prohibition is Wrong, but Raich is Still Right”, 67 S.D. L. REV. 539 (2022). <https://red.library.usd.edu/sdlrev/vol67/iss3/12>, DoA 4/27/2025, DVOG)

**The federal government should not prohibit the possession or consumption of cannabis. However, to say that the federal government may not do so is an entirely different point. Commerce Clause authority is a powerful tool that should be used cautiously, but the context of its application should not dictate its constitutional propriety.** Professor Sara E. Rosenbaum, writing shortly after Raich, highlighted that **what matters is not the wisdom of Congress’s decision to regulate, only whether it has the requisite authority and provides the necessary minimally rational basis**.216 This is entirely consistent with the Court’s own view of its role, as the Wickard Court acknowledged in noting that it had no role in adjudicating the “wisdom, workability, or fairness” of Congress’s plans.217 **Even when Congress appears to buck accepted science, public opinion, or common sense, its decisions may nevertheless be valid, and the primary check on this power is the political process.**218 T**he Commerce Clause was a solution to the unworkable system of leaving regulation of commerce to the states alone** under the Articles of Confederation, historical roots that were also at the heart of Raich. 219 **The necessity of such federal power, where appropriate, has not diminished with time. If anything, an increasingly mobile and interconnected society makes it even more vital.**

# NYS Rifle and Pistol Association Inc. v. Bruen

## Case Overview

**Background of the Case**

* **Parties Involved:**
	+ **Petitioner:** *New York State Rifle & Pistol Association (NYSRPA)*, along with two individual plaintiffs, Robert Nash and Brandon Koch.
	+ **Respondent:** *Kevin P. Bruen*, Superintendent of the New York State Police (replacing the original named defendant due to a change in office).
* **Context:**
	+ At the time, New York had a law requiring individuals to show “**proper cause**” to obtain a license to carry a concealed handgun in public.
	+ This meant that beyond meeting standard eligibility (no criminal record, mental health check, etc.), an applicant had to demonstrate a **special need for self-defense**, distinguishing them from the general public.
	+ The plaintiffs challenged this requirement, arguing it violated their **Second Amendment right** to bear arms.

**Legal Question**

**Does New York’s requirement that applicants for a concealed carry license demonstrate a special need for self-defense violate the Second Amendment?**

**Majority Opinion (6-3 Decision)**

* **Authored by:** Justice Clarence Thomas
1. **Second Amendment Protects Public Carry:**
	* The Court held that the Second Amendment protects an individual’s right to carry a handgun for self-defense **outside the home**—not just within it (building on *District of Columbia v. Heller*, 2008, and *McDonald v. City of Chicago*, 2010).
2. **Historical Tradition Standard:**
	* The Court rejected the two-step scrutiny approach used by lower courts (which balanced government interests with individual rights).
	* Instead, it said courts must focus on whether the regulation is consistent with the “Nation’s historical tradition of firearm regulation.”
	* This historical test is now the new standard for analyzing Second Amendment challenges.
3. **New York's “Proper Cause” is Unconstitutional:**
	* The Court ruled that New York’s “proper cause” requirement was not rooted in the historical tradition of firearm regulation and therefore violated the Second Amendment.
	* The licensing system gave too much discretion to officials and prevented law-abiding citizens from exercising a constitutional right.

**Concurring Opinions**

* **Justice Kavanaugh (joined by Chief Justice Roberts):**
	+ Clarified that the ruling does not prevent states from imposing shall-issue licensing regimes (where objective criteria like training and background checks are used).
	+ Emphasized that the Court’s decision only struck down discretionary, subjective standards like New York's.
* **Justice Alito:**
	+ Emphasized that gun violence is a serious problem, but the Constitution takes certain policy options off the table.
	+ Rejected the idea that the Second Amendment is a “second-class” right.

**Dissenting Opinion (Breyer, joined by Sotomayor and Kagan)**

* Argued that the majority’s historical approach ignores the real-world implications of gun violence.
* Emphasized the role of public safety and the ability of governments to enact reasonable gun regulations.
* Criticized the majority for discarding the balancing test, which allowed courts to weigh the government’s interest in public safety against individual rights.

##  Controversy

#### The Supreme Court’s decision in *New York State Rifle & Pistol Association v. Bruen* has sparked intense controversy over both its legal reasoning and institutional legitimacy. By requiring that all gun regulations align with historical tradition—regardless of modern public safety needs or democratic consensus—the Court dramatically expanded Second Amendment protections while sidelining legislative authority. Critics argue that the decision imposes an unworkable and ahistorical standard, concentrating policymaking power in the judiciary. Scholars question whether *Bruen* represents principled constitutional interpretation or an ideologically driven assertion of judicial supremacy, raising broader concerns about democratic accountability and the role of the Court in shaping national policy.

Jacob Charles, 2023

The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History." Duke Law Journal, vol. 73, no. 1, October 2023, pp. 67-155. HeinOnline

https://heinonline.org/HOL/P?h=hein.journals/duklr73&i=67

"[I]n requiring courts to strike down gun regulations even when they might be narrowly tailored to accomplish the most compelling of governmental interests," Professor Khiara Bridges argues, Bruen "has rendered the right to bear arms the most protected of rights in the Constitution."5 06 The Court's historical test has the potential to significantly expand the Second Amendment's scope. No matter how compelling the state's interest, no matter how narrowly tailored its regulation, Bruen's new method appears to dictate that a modern gun law cannot stand without adequate grounding in the distant past. As one lower court said, "Bruen did not .. . erase societal and public safety concerns-they still exist-even if Bruen's new framework prevents courts from making that analysis."

Bruen continues in a line of cases that increasingly makes history decisive. 508 But it leaves fundamental questions about the basic details unanswered. Applied too stringently, it would require that tentative, nuanced, and multifaceted interpretations of the past be flattened to notch narrow, short-term litigation victories today.509 And without further revision, it is a recipe for the kind of simmering chaos already stewing in the lower courts.51 0 That should alarm Bruen's defenders. After all, according to the Supreme Court, an "important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable-that is, whether it can be understood and applied in a consistent and predictable manner. "511 Without significant refinement by the courts of appeals and a uniformity among them that seems elusive, Bruen's method will continue proving unworkable in practice. The Court itself will have an opportunity to address the problematic features of the test when it hears United States v. Rahimi.

More worrisome than its open texture, however, is the fact that the decision deems historical silence an important standard without inquiring into the reasons for legislative lacunae. Without offering justification for doing so, Bruen elevates mere unregulated conduct to the status of an inviolate constitutional right. Justice Oliver Wendell Holmes once called it "revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." 512 How much more disturbing, then, to discredit a rule of law because it was not laid down in a bygone era. Lower courts and legislators cannot alter Bruen's test, but they can adjudicate and legislate in a way that preserves a role for contemporary citizens' authority to engage in self defense through law.

Although Bruen frontloads history more than many other cases, it is not an isolated decision. The modern Supreme Court frequently invokes history as a basis for its decisions. 514 One result of the historical turn in a host of recent cases is to place greater authority in the federal courts, with the Supreme Court firmly planted at the apex of American policymaking. As Professor Mark Lemley describes, whatever the tools it has used to reach its decisions in the most recent terms, "[t]he common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court."5 1 5 Professor Lemley's conclusion suggests that Bruen's indeterminacy may not be a complete oversight. After all, the more indeterminate the test, the more authority the Court retains to reach whatever conclusion it wants. But though the Supreme Court may desire to sit as a super legislature over nationwide gun policy, lower courts, legislators, and citizens need not easily cede the people's ultimate authority

## Affirmative

#### The *Bruen* decision entrenched an extreme, ahistorical test for gun laws, requiring modern regulations to mimic 18th-century policies rather than respond to present-day threats. This ruling, applied in *Rahimi*, strips courts of the ability to weigh empirical evidence or public health concerns and replaces them with speculative historical analogies. The result is a dangerous constitutional straightjacket on gun regulation that privileges outdated framers' perspectives over democratic policymaking and modern safety needs.

Scott Burris, 2023 < *Professor of Law at Temple University and Temple’s School of Public Health.>*

“One Year On, Bruen Really is as Bas as It Reads” August 2, 2023

The Regulatory Review

https://www.theregreview.org/2023/08/02/burris-one-year-on-bruen-really-is-as-bad-as-it-reads/

Last year, the U.S. Supreme Court’s decision in [New York State Rifle & Pistol Association, Inc. v. Bruen](https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf) rejected New York’s century-old approach to gun regulation and announced a new test for Second Amendment rights. That test was constructed entirely out of a set of primary school—or maybe law school—beliefs about the simplicity and objectivity of historical analysis. It has now placed a straitjacket of historicism on regulations seeking to address the epidemic of gun violence in society today.

Coming at a time when stare decisis on the high court seemed to have taken a vacation. Bruen administered legal steroids to a right that the Court had only recently invented. Sadly, there is just no other way to say it: The *Bruen* opinion was moronic. Somehow the Court’s majority figured that judges could put themselves in the shoes of the framers and figure out that those 18th-century gentlemen had already looked at the “societal problem” of gun violence as it manifests today and decided that the best policy was unrestricted possession of arms for self-defense.

With the “method” articulated in *Bruen,* the Court felt free to decide that it was okay to “update” the Second Amendment to cover modern mass-produced, multi-shot, and automatic handguns but not to update gun policies. Although the framers surely could not have anticipated the nature and extent of gun violence today, maybe the Framers did not anticipate change to the “societal problem” of gun violence, or (the Court intuits) would not have changed their policy choice, but either way New York’s solution was out of bounds.

For purposes of using law to [advance](https://efsgv.org/learn/learn-more-about-gun-violence/public-health-approach-to-gun-violence-prevention/) public health protection, the important consequence of Bruen is that the Court placed gun control outside of any [epidemiological](https://www.uclahealth.org/news/new-research-presented-tackling-gun-violence-public-health) or other [empirically based](https://nihcm.org/publications/gun-violence-the-impact-on-public-health) arguments about the causes and consequences of gun violence. While the Bruen majority was confident that it could reason by analogy from past restrictions and social circumstances to decide the bounds of modern legislation, it saw judges—including those on the lower courts that had upheld to the New York law—as unqualified to assess empirical evidence. Leave aside that history is a systematic empirical discipline that the current justices quite evidently have not a clue about, how can it be that lawyers are now thought to be able to reason by historical analogy but not to assess empirical facts in evidence?

The Court’s historical analysis in Bruen reflects a deep professional legal insularity. This was not history based on broad and deep research on how people lived and thought in the past. Rather, the Court made arbitrary inferences about the meaning of legal events drawn from cases, statutes, and law review articles. This was [historicism](https://openyls.law.yale.edu/bitstream/handle/20.500.13051/16075/47_90YaleLJ1017_April1981_.pdf;jsessionid=5E6F1F9B03E5A4A9B5ADF351367A458B?sequence=2), not history. In the name of better predictability and administrability, the Court set up a test that actually invites selective, inconsistent, and amateur historicizing of current views—the reification of the National Rifle Association’s version of the Second Amendment down to the grammar of “[public carry](https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf#page=57)” as if it were a historical artifact.

History ostensibly mattered to the Court—but not all history. The Court treated the Second Amendment as a fixed statement of American gun policy, frozen in history at the time of the nation’s founding. But it clearly did not treat what counts as a gun to be fixed in an era when muskets prevailed. The Court was willing to evolve in its interpretation of what “arms” are, but not its interpretation of how the Second Amendment should apply to the vastly changed weapons available today. This sense of gun policy as constitutionally fixed creates a strange and jarring contrast between *Bruen* and [*Dobbs v. Jackson Women’s Health Organization*](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf). On abortion, the Court said that states should be free to decide important matters of reproductive rights. But not when it comes to gun rights.

A year down the road, we are seeing where lower courts are taking the approach laid out in Bruen. Consider the March 2023, decision by the Fifth Circuit Court of Appeals in [U.S. v. Rahimi](https://www.ca5.uscourts.gov/opinions/pub/21/21-11001-CR2.pdf). The case involved an individual who exhibited all the behavioral characteristics of someone who should not have access to a gun:

Between December 2020 and January 2021, Rahimi was involved in five shootings in and around Arlington, Texas.  On December 1, after selling narcotics to an individual, he fired multiple shots into that individual’s residence. The following day, Rahimi was involved in a car accident. He exited his vehicle, shot at the other driver, and fled the scene. He returned to the scene in a different vehicle and shot at the other driver’s car. On December 22, Rahimi shot at a constable’s vehicle. On January 7, Rahimi fired multiple shots in the air after his friend’s credit card was declined at a Whataburger restaurant.

Because Rahimi was under a domestic violence restraining order, he was [charged](https://www.law.cornell.edu/uscode/text/18/922) with violating a federal statute which prohibits anyone under such a court order from possessing a firearm.

In the Bruen era, any questions about the public interest in limiting a person’s gun possession are off the table, even in situations where there are strong indicators that someone might be prone to firing shots in a crowded theater—to [borrow](https://www.aclu.org/documents/speech-campus#:~:text=Q%3A%20But%20isn%E2%80%99t%20it%20true%20you%20can%E2%80%99t%20shout%20fire%20in%20a%20crowded%20theater%3F) from Free Speech analysis. The only question after *Bruen* is whether old-time lawmakers would have used a similar prohibition to deal with gun problems as they understood them in their day—a day of slavery, patriarchy, marital rape, and muskets.

The Rahimi court’s [explanation](https://www.supremecourt.gov/DocketPDF/22/22-915/259334/20230317174308399_Rahimi%20Pet%20-%20final.pdf#page=38) of the Bruen test makes chillingly clear how the Supreme Court’s historicism has chained us to the dead hand of a counterfactual or imaginary past:

The Supreme Court distilled two metrics for courts to compare the government’s proffered analogues against the challenged law: how the challenged law burdens the right to armed self-defense, and why the law burdens that right. “Whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry.”

As to the degree of similarity required, the Rahimi court, again quoting *Bruen,* explained that:

“Courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted.” On the other hand, “even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.” The core question is whether the challenged law and proffered analogue are “relevantly similar.”

When the challenged regulation addresses a “general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.” Moreover, “if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”

The Rahimi court held that the federal statute was unconstitutional. Rahimi’s conviction on the weapons violation was vacated.

In summarizing its decision, the Fifth Circuit noted that, in the past, courts would have taken into account the “salutary policy goals” of the federal weapons restriction—goals that were “meant to protect vulnerable people in our society.” It would have weighed those compelling goals against the Second Amendment and held “that the societal benefits … outweighed its burden on Rahimi’s Second Amendment rights.” Yet notably, the court held that “Bruen forecloses any such analysis in favor of a historical analogical inquiry into the scope of the allowable burden on the Second Amendment right.” Engaging in that “historical analogical inquiry,” the court concluded that the federal law’s “ban on possession of firearms is an ‘outlier that our ancestors would never have accepted.’”

These passages are chilling in their frank adoption of the idea that our current responses to any social ill related to gun violence is limited to those that long-dead, mostly wealthy and uniformly white men considered appropriate. Faced with a wide range of social problems never imagined by even the best minds of the 18th century, the willingness of judges to put policy in a straitjacket woven of an imaginary history is deeply unsettling. Instead of regulatory adaptation and innovation, our range of solutions to modern problems will be limited to only those [measures](https://casetext.com/case/united-states-v-rahimi-12#:~:text=risks%20endorsing%20outliers%20that%20our%20ancestors%20would%20never%20have%20accepted.%22) “our ancestors would … have accepted.”

#### Bruen’s historical test is vague, outdated, and dangerous — it weaponizes selective history, ignores modern realities, and blocks commonsense gun regulation.

Douglas Letter, Kelly Sampson, and Shira Lauren Feldman

March 17, 2023

Alliance for Justice https://afj.org/article/15-years-after-heller-bruen-is-unleashing-chaos-but-theres-hope-for-gun-regulations/

15 Years After Heller, Bruen is Unleashing Chaos, But There’s Hope For Gun Regulations

Bruen’s requirement that modern gun laws be consistent with the Second Amendment’s “historical understanding,” either on their face or via analogy, is problematic for three reasons.

First, this historical “standard” is not a standard at all. It is unclear what level of generality courts should apply when analogizing modern and early American gun laws. It is unclear what timeframe courts should consider as relevant history. And the “standard” relies on lawyers and judges pretending to be historians to determine whether we can remain safe from gun violence.

Second, requiring modern gun laws to mirror early American gun laws ignores the ways in which the country, body politic, and weapons technology have changed beyond recognition since early America. Early American governments brutalized Native Americans, enslaved Black Americans, and oppressed women, yet Bruen would empower those early governments’ judgments to “veto” today’s diverse electorate. Early American governments could not conceive of modern technology, like 3D printers that can produce guns and assault weapons that make it possible for lone shooters to commit mass murder in 90 seconds or even less. Yet Bruen would hinder today’s laws from regulating today’s technology.

Third, professional historians have explained that a fixed “historical understanding” of the Second Amendment right — or of anything else of this nature, for that matter — is a fallacy, but Justice Thomas’s majority opinion simply ignores that major problem. His opinion also ignores a historical record replete with support for robust gun regulation in the public square, conveniently explaining that “not all history is created equal,” and then discarding any history that Justice Thomas deems inconvenient in reaching his desired conclusion.

### Economy Advantage

#### Gun violence costs the U.S. economy hundreds of billions annually—estimates range from $229B to $557B per year. The *Bruen* decision weakens concealed carry laws, fueling more violence and increasing these economic burdens through higher healthcare costs, lost productivity, reduced property values, and increased law enforcement spending. As gun violence rises, the economy suffers.

Andre Gobbo, 2023

The economic costs of gun violence in the United States, Equitable Growth.org

https://equitablegrowth.org/the-economic-costs-of-gun-violence-in-the-united-states/

When it comes to understanding the costs of gun violence in the United States, many people rightfully focus on the human cost. People who are slain or take their own lives, their family members who suffer in the aftermath, and the communities afflicted by their losses are often centered in media coverage and conversations about gun violence. Yet whether caused by a mass shooting, assault or homicide, act of suicide, or police shootings, we all pay for the costs of gun violence in expected and unexpected ways.

In fact, the human toll of gun violence is so pervasive that its consequences permeate nearly every facet of U.S. society, including economics. Examining the economic consequences of gun violence, however, is not intended to put a price on human life. Rather, the aim is to provide a deeper understanding of just how extensive and ubiquitous gun violence is in the United States.

It is near impossible to sum up all of the monetary costs of gun violence in the United States. Estimates attempting to do just that have ranged from [$229 billion](https://giffords.org/blog/2019/09/we-need-to-talk-about-the-economic-toll-of-gun-violence-blog/) to [$280 billion](https://abcnews.go.com/US/bear-burden-gun-violence-costs-america-280-billion/story?id=80245349), and all the way up to [$557 billion](https://everytownresearch.org/report/the-economic-cost-of-gun-violence/) per year. Such a wide range is not much of a surprise, considering the lack of reliable data and different assumptions that go into making these calculations.

####  The *Bruen* decision weakens gun laws, fueling increased gun violence and straining the healthcare system. Medical costs for firearm injuries have surged—rising to $1.57 billion annually, driven largely by costly inpatient stays. Survivors face massive long-term expenses, including $25,000+ in the first month post-injury and high readmission rates. These costs, alongside quality-of-life losses nearing $489B, expose the devastating economic ripple effect of lax gun policy.

Andre Gobbo, 2023

The economic costs of gun violence in the United States, Equitable Growth.org

https://equitablegrowth.org/the-economic-costs-of-gun-violence-in-the-united-states/

Some of the biggest monetary costs that gun violence imposes on our society are related to healthcare. Trips to the emergency room, ambulance rides, inpatient care, physical therapy, and ongoing emotional and mental trauma that survivors must endure all add up to significant sums of money. Similar to overall estimates, the healthcare-related costs of gun violence fail to encapsulate the true costs. This is due to a variety of reasons, most notably because many survivors of gun violence face barriers to receiving the care they need—due to the cost of care or access to care—or choose not to seek medical assistance.

When looking at the topline numbers of healthcare costs, there are plenty of estimates indicating an increase in the cost of gun violence over time. One study found that U.S. hospitals spent [$630 million in medical treatment in 2010](https://www.urban.org/research/publication/hospital-costs-firearm-assaults) alone, and another showed an [average of $734.6 million per year](https://med.stanford.edu/news/all-news/2017/03/initial-hospital-costs-from-gunshot-wounds-total-6-billion-over-nine-years.html) from 2006 to 2014. A more recent study indicates more than [$1 billion in annual spending in 2016 and 2017](https://www.gao.gov/assets/gao-21-515.pdf) on initial hospital costs.

More recent estimates indicate this cost could be even higher—as much as [$1.57 billion annually](https://everytownresearch.org/report/the-economic-cost-of-gun-violence/). Yet even these studies fail to encapsulate all the costs. The average of $734.6 million per year [fails to include emergency room visits or readmissions](https://med.stanford.edu/news/all-news/2017/03/initial-hospital-costs-from-gunshot-wounds-total-6-billion-over-nine-years.html), and the $1 billion spent in 2016 and 2017 [doesn’t include physician costs](https://www.gao.gov/assets/gao-21-515.pdf). The true costs of hospitalization from these estimates are even higher—in the latter’s case adding around [20 percent to the total cost](https://www.gao.gov/assets/gao-21-515.pdf).

Inpatient stays are the main driver of healthcare costs. One recent study finds that more than [90 percent of initial hospital costs](https://www.gao.gov/assets/gao-21-515.pdf) from 2016–2017 were driven by inpatient stays, even though they are less common than those who only received treatment in emergency rooms. That same study also finds the average cost of initial treatment for a gunshot wound—either in an emergency room or inpatient care—was [more than twice the average cost](https://www.gao.gov/assets/gao-21-515.pdf) of treating other patients.

Looking at this data more closely, one study found that from 2010–2015 the average annual cost of inpatient hospitalizations for firearm injuries [exceeded $900 million](https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0209896). Another study found annual inpatient costs averaged [more than $700 million](https://www.healthaffairs.org/doi/10.1377/hlthaff.2017.0625) between 2006 and 2014. (See Figure 1.)

For fatal firearm injuries, the costs are relatively straightforward. Data from the U.S. Centers for Disease Control and Prevention from 2020 shows that fatal firearm injuries cost a [total of $290 million](https://www.cbsnews.com/news/gun-violence-medical-cost-1-billion-a-year/), with an average cost of $9,000 per patient. But for survivors of gun violence, the ongoing costs can multiply exponentially.

One recent study finds that among those who survived a nonfatal firearm injury between 2008 and 2018, medical spending increased by [$2,495 per person per month](https://www.acpjournals.org/doi/full/10.7326/M21-2812)—or 402 percent—compared to peers who weren’t exposed to gun violence. That same study finds most of this increase is within the first month after surviving a shooting, when per person costs increased by an average of $25,554. [Up to 16 percent](https://www.gao.gov/assets/gao-21-515.pdf) of those who experienced a firearm injury required readmittance, facing an average cost of $8,000 to $11,000 per patient. Between 2010 and 2015, approximately [one in six patients](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1418&context=jj_pubs) with a firearm injury was readmitted within six months, with costs exceeding a total of $500 million over that time span.

Another method used to encapsulate the ongoing cost of gun violence on people’s well-being are quality-of-life costs. The loss of quality of life represents the present value of a victim’s life that was either [cut short or permanently damaged](https://injuryprevention.bmj.com/content/28/5/405) by gun violence, and usually excludes the cost of medical care and lost work. One estimate put this cost at [$169 billion per year in 2015](https://www.motherjones.com/politics/2015/04/true-cost-of-gun-violence-in-america/), but more recent estimates indicate this number has ballooned to [approximately $489.1 billion](https://everytownresearch.org/report/the-economic-cost-of-gun-violence/).

It’s worth noting there is a lack of contemporary studies looking at the total lifetime costs of injuries caused by gun violence. Any studies that currently exist are so outdated they’re [no longer a reliable indicator](https://www.gao.gov/assets/gao-21-515.pdf) of the totality of healthcare costs due to gun violence. This highlights the need for an ongoing collection of data over time to get a more complete sense of the true scope of healthcare related costs of gun violence. (See sidebar.)

#### The *Bruen* decision worsens gun violence, costing employers $535 million annually from lost productivity, turnover, and lower customer traffic. Retail and service sectors are hit hardest, with violence linked to fewer new businesses and jobs. Fear of crime deters investment, reduces tax revenue, and limits public services—deepening cycles of poverty and economic decline in affected communities.

Andre Gobbo, 2023

The economic costs of gun violence in the United States, Equitable Growth.org

https://equitablegrowth.org/the-economic-costs-of-gun-violence-in-the-united-states/

Employers lose [approximately $535 million per year](https://everytownresearch.org/report/the-economic-cost-of-gun-violence/) in direct costs from gun violence due to lost revenue, time spent adjusting schedules to cover for lost work, and training new replacements for vacancies. Businesses that rely on customer interactions, most notably the retail and service sectors, may see their [revenues drop faster](https://journals.sagepub.com/doi/abs/10.1080/0042098042000294538) than other businesses due to patrons shopping in safer communities to avoid the threat of gun violence.

These issues are compounded by owners facing trouble hiring employees [willing to travel through or work in communities](https://www.nber.org/papers/w6613) plagued by gun violence. These factors cause many businesses to close their doors outright, but those which stay open often incur costs on items such as camera systems, bulletproof windows, motion sensor lights, barred doors, and security staff. Spending money on security measures such as these prevent entrepreneurs from [investing that money elsewhere](https://www.urban.org/sites/default/files/publication/90671/eigv_final_report_3.pdf) in their businesses or communities.

But the costs incurred by businesses exceed changes to physical infrastructure. Many entrepreneurs choose to open their businesses in safer neighborhoods, representing lost economic value in communities plagued by gun violence. Fear of gun violence also stops people from [shopping in a certain neighborhood at night](https://www.urban.org/sites/default/files/publication/90671/eigv_final_report_3.pdf), if they even decide to shop there in the first place. Other studies also found that crime and fear of crime [adversely impact retail development](https://journals.sagepub.com/doi/abs/10.1177/0891242406292465) and [limit business activity and revenues](http://usj.sagepub.com/content/41/13/2495.abstract).

Indeed, a more recent study finds that sudden surges in gun violence is associated with as much as a [4 percent reduction](https://www.urban.org/sites/default/files/publication/90671/eigv_final_report_3.pdf) in new retail and service establishments in major cities across the country. That same study also finds that one additional gun homicide in Minneapolis in a given year results in [80 fewer jobs](https://www.urban.org/sites/default/files/publication/90671/eigv_final_report_3.pdf) the next year.

This loss of revenue has broader implications beyond individual businesses. Phenomena such as enduring neighborhood segregation and increased crime lead to lower tax revenues, in turn impacting economic mobility. For instance, [one recent study finds](https://equitablegrowth.org/new-research-documents-the-high-cost-of-residential-racial-segregation-in-northern-cities-of-the-united-states/) that reduced tax revenues from property taxes reduces public safety expenditures per capita, and reduced school expenditures leads to less spending per pupil. This adds up to fewer opportunities for individuals and families living in these communities to benefit from economic mobility.

Many communities struggling with gun violence also suffer from myriad other disadvantages, many of which lay the groundwork for more gun violence to take place. Systemic lack of investment in historically underfunded neighborhoods and cities, income inequality, limited economic opportunities, concentrated poverty, underperforming schools, lack of access to food, shortage of affordable housing, and police violence all play a role in perpetuating the vicious cycle of gun violence. Indeed, 26 percent of firearm homicides in 2015 in the United States took place in U.S. Census Bureau tracts that [contained only 1.5 percent of the population](https://efsgv.org/learn/type-of-gun-violence/community-gun-violence/).

### Gun Violence Advantage

#### The *Bruen* decision forces states to drop strict concealed carry rules. A Johns Hopkins study found gun assaults rose 32% in states that removed training and background check requirements. By making it easier for untrained or violent individuals to carry guns, *Bruen* drives up violence and endangers public safety.

Johns Hopkins Bloomberg School of Public Health, November 15, 2023

Study Finds That Dropping Training Requirement to Obtain Concealed Carry Permit Leads to Significant Increase in Gun Assaults

https://publichealth.jhu.edu/center-for-gun-violence-solutions/2023/study-finds-that-dropping-training-requirement-to-obtain-concealed-carry-permit-leads-to-significant-increase-in-gun-assaults#:~:text=in%20Gun%20Assaults-,Study%20Finds%20That%20Dropping%20Training%20Requirement%20to%20Obtain%20Concealed%20Carry,loosen%20concealed%20carry%20permitting%20laws.

An analysis of 11 states that removed concealed carry licensing that mandated firearm training or proficiency requirements suggests that rates of violent gun assaults increase 32 percent, according to a new study led by researchers at the Johns Hopkins Center for Gun Violence Solutions at the Bloomberg School of Public Health.

The study examined 11 states that moved from requiring purchasers to demonstrate a need for a permit for a concealed weapon–known as shall issue laws–to permitless concealed laws. In some states, shall issue laws require permittees to undergo live firearm training, minimum hours at a firing range, or proficiency (e.g. hitting a designated target with 70 percent of their shots). Some shall issue states also prohibit those with violent misdemeanor convictions from obtaining permits.

When the 11 states with shall issue licensing laws that require safety training for obtaining a concealed carry permit went to permitless concealed carry, the annual rate of assaults with guns increased by 21 per 100,000. Some statistical models also found significant increases in assaults with guns when states dropped provisions that prohibited those convicted of violent misdemeanors from obtaining concealed carry permits.

When states made it easier for potentially untrained gun owners to carry their weapons in public, assaults with guns increased,” said Cassandra Crifasi, PhD, co-director of the Johns Hopkins Center for Gun Violence Solutions at the Bloomberg School. “While the Supreme Court’s Bruen decision is forcing some states to weaken their concealed carry permitting systems, this study shows that states can reduce the expected increase in gun assault rates by including training requirements.”

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The 11 states in the analysis are: Alaska, Arizona, Idaho, Kansas, Maine, Mississippi, Missouri, New Hampshire, North Dakota, West Virginia, and Wyoming.

The researchers used advanced statistical modeling to compare states that changed their concealed carry permitting laws with states that had not changed them. Rates of violent crime for each of the eleven states that removed requirements to obtain licenses to carry concealed guns in public in the analysis were compared to the best “synthetic controls”—predicted crime rates derived from data from other states that had restrictive permitting requirements in place throughout the study period.

Twenty-seven states currently allow for the permitless carry of a concealed weapon and 17 states issue permits on a shall issue basis. State laws have loosened over the last 40 years; as recently as 1981, 21 states prohibited any form of concealed carry.

The study comes against the backdrop of the Bruen U.S. Supreme Court decision in July 2022 that found New York’s state law requiring that permittees have a proper cause or special need to obtain a concealed carry weapons permit as unconstitutional (commonly called may issue permits). Laws with proper cause requirements in other states, including California, Hawaii, Maryland, Massachusetts, and New Jersey, have been revised or are under review. The decision is forcing states with may issue permitting to move to shall issue or permitless systems.

“This study shows that making the concealed carry permitting process more rigorous can have a major impact on public safety,” said Daniel Webster, ScD, MPH, Bloomberg Professor of American Health and Distinguished Research Scholar at the Center for Gun Violence Solutions at the Bloomberg School. “This study is unique in that it analyzes specific provisions to concealed carry laws to identify which are most effective in avoiding harmful outcomes from expanding concealed carry licensing.”

### Racialized Gendered Violence Advantage

#### Bruen empowers racialized violence and gendered domination — by expanding anticipatory armed self-defense and ignoring structural inequalities, it legitimizes white male violence while abandoning marginalized communities to state and private harm.

Mary Ann Franks, 2025

'The Supreme Court as Death Panel: The Necropolitics of Bruen and Dobbs' (2023) 98(6) New York University Law Review 1881. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/nylr98&i=1910

In Bruen, the extremist right-wing majority of the Supreme Court expanded the right to protect oneself in the home as the right to kill anywhere one goes. Because of the racialized and gendered history of gun use, this is a right that will disproportionately empower white men to terrorize and execute others based on little more than subjective fears. That the Supreme Court announced that women have no constitutional right not to be injured or killed by an actual threat contained in their own bodies the very day after it waxed poetic about the constitutional right to engage in armed anticipatory self-defense against anyone, anywhere underscores Adam Serwer's observation that the cruelty of radical conservative extremism is, indeed, the point.1 34 While the conservative majority may pay lip service in both decisions to protecting the rights of the vulnerable, those who are "[m]ost vulnerable in this new legal landscape will be people who have limited access to resources and services and inadequate protection against violence, especially those living in overburdened communities - primarily young, low-income women from historically marginalized racial or ethnic groups."1 35 The questions that philosopher Judith Butler posed nearly two decades ago while grappling with the consequences of gendered dehumanization resonate here:

Certain humans are recognized as less than human, and that form of qualified recognition does not lead to a viable life. Certain humans are not recognized as human at all, and that leads to yet another order of unlivable life .... If I am a certain gender, will I still be regarded as part of the human? If I desire in certain ways, will I be able to live? Will there be a place for my life, and will it be recognizable to the others upon whom I depend for social existence?'36

The dissenters in Dobbs aptly described the majority's decision as "its own loaded weapon." The Bruen and Dobbs decisions do not merely ignore Justice Robert Jackson's 1949 warning against converting the Bill of Rights into a suicide pact.137 By simultaneously expanding white men's right to kill and constricting women's right not to die, this Court has turned the Constitution into a homicide pact as well.

### Democracy Advantage

#### The *Bruen* decision and its aftermath, including the 5th Circuit ruling on domestic abusers and firearms, reflect the ongoing erosion of democratic safeguards in the U.S. by reinforcing unregulated gun access, further empowering far-right extremists, and enabling continued gun violence. These legal rulings, part of a broader trend of selective originalism, fail to address the systemic threats to democracy and public safety posed by unrestricted firearm access, while disproportionately affecting marginalized communities.

Richard Branscomb, 2023

Department of English Dietrich College of Humanities & Social Sciences Carnegie Mellon University. Dissertation.

Taking Aim: Rhetorical Conspiracism, Far-Right Extremism, and the Narrative Politics of Guns

https://www.proquest.com/openview/701fbae80432f36f61b212d75e626f3a/1?cbl=18750&diss=y&pq-origsite=gscholar

I’m writing this concluding chapter following the public hearings for the unprecedented assault on the democratic process at the U.S. Capitol riot on 6 January 2021. It also follows the rote responses to a brutal series of mass shootings by the end of 2022—including anti-Black terrorism at a grocery store in Buffalo, New York; another massacre of school children in Uvalde, Texas; and numerous other gun violence atrocities (Da Silva 2022). 2023 does not seem to be faring any better—why would it? The U.S. Supreme Court’s regime of selective originalism continues to override both jurisprudence and, therefore, the possibility of even considering limitations on access to firearms. Most recently, following the regressive decision in the 2022 Bruen case (see interchapter), the 5th Circuit Court of Appeals ruled that prohibiting alleged domestic abusers from owning firearms is, you guessed it, unconstitutional (M. J. Stern 2023). By the time you read this, there will have been scores of other gun-related travesties across this country, seen and unseen, reported and unreported by the news media; and, like the dozens of “Patriot Front” white nationalist extremists arrested in June 2022 before they could infiltrate a Pride event in Coeur D’Alene, Idaho (Yousef 2022), no doubt other heavily-armed far-right groups will have mobilized and likely continued their violent assault on the failing democracy of the U.S.

#### Bruen entrenches judicial overreach and obstructs racial justice — by expanding gun rights in a racially unequal society, it weakens democratic accountability and perpetuates systemic inequalities under the guise of constitutional protection.

Joseph Blocher and Reva B. Siegel, 2022

"Race and Guns, Courts and Democracy." Harvard Law Review Forum, vol. 135, no. 8, June 2022, pp. 449-462. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/forharoc135&i=450

It has been decades since the Supreme Court has demonstrated leadership in the pursuit of racial justice. The Court is ready to denounce racism of the past,5 6 but when it comes to the forms of inequality afflicting minority communities in the present, the Court too often interprets the Constitution to license inequality and to obstruct efforts to dismantle it.

It is possible that the Justices who find government discretion in gun licensing an intolerable threat to Second Amendment rights will act consistently and find the cases requiring deference to prosecutorial discretion in the criminal justice system an intolerable threat to equal protection rights.5 8 We doubt it. Instead, the Court will take another equal protection case focusing the nation's attention on affirmative action.59 Though many are slow to recognize it, in recent years it is the democratic process that has produced initiatives seeking racial justice in our criminal justice system, 60 not Article III courts, whatever story Carolene Products6 1 may tell about the courts' role in protecting minorities from prejudice in the political process.

The public defenders' brief in Bruen has undoubtedly helped focus attention on concerns of Americans who for too many years have been marginalized in courts and politics. But, the public defenders' appeal to the deregulatory Second Amendment 63 is a vote for expanding the authority of the Supreme Court and for restricting the authority of democracy. We are concerned that the Supreme Court may use claims of racism to justify expanding gun rights in ways that do not redress underlying claims of racial injustice and instead restrict the community's authority to respond to gun violence. There is a role for courts in promoting democracy; but the Roberts Court's decisions on guns and race are not democracy promoting. They embody the very forms of judicial overreach against which Carolene Products warned.

## Negative

**Bruen restores constitutional discipline — despite academic pushback, its text-and-history test limits judicial activism, protects rights, and provides a clear, principled framework for evaluating gun laws**.

J. Joel Alicea, 2025

174 U. PA. L. REV. (forthcoming 2025)

https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=5122492

Given Bruen’s methodological significance and the text-and-history approach it represents, one might have expected that the debate over Bruen would break down along familiar lines, with originalists defending Bruen and non-originalists critiquing it.7 Yet, in its brief existence, Bruen has accomplished a rare feat for a momentous Supreme Court case: producing consensus among nearly all of its commentators within the legal academy. Unfortunately for Bruen, that consensus is that Bruen’s methodology is deeply misguided. Scholars have described Bruen’s methodology as “largely ad hoc,”8 “articulat[ing] no coherent or comprehensible objective or princip[le],”9 and leading to a Second Amendment that is “historically ruined and fake.”10 Even originalists and legal conservatives have described Bruen as “lacking any apparent theoretical justification,”11 “inherently manipulable,”12 “faux-originalist,”13 and as “frequently” “not provid[ing] a persuasive reason either to uphold or invalidate a modern regulation.”14 With rare exception,15 constitutional scholars across the ideological and jurisprudential spectrum agree that Bruen was a mistake—and a “hopeless”16 one at that.

I disagree with all such criticisms of Bruen. Far from being unprincipled or baffling, Bruen’s methodology is coherent and understandable. Far from being inherently manipulable, Bruen’s methodology meaningfully guides judicial decision-making. Far from leaving us with no good reason to uphold or invalidate modern firearms regulations, Bruen’s methodology provides compelling reasons for the results it produces. Against the scholarly consensus, I argue that Bruen was right.

#### Justice Clarence Thomas’s majority opinion in New York State Rifle & Pistol Association v. Bruen (2022) reaffirmed the constitutional right of law-abiding Americans to carry handguns for self-defense in public, striking down discretionary licensing regimes. This precedent reshaped the landscape of Second Amendment jurisprudence and led to the reconsideration of multiple gun control cases nationwide.

David Kopel, 2025

 "Restoring the Right to Bear Arms: New York State Rifle & Pistol Association v. Bruen." Cato Supreme Court Review, 2021, 2021-2022, pp. 305-334. HeinOnline.

Justice Clarence Thomas's opinion for a 6-3 Supreme Court majority in New York State Rifle & Pistol Association v. Bruen vindicates the right of law-abiding Americans to carry handguns for lawful protection. That decision will directly affect three states where the right was entirely denied: New Jersey, Maryland, and Hawaii. It will also affect three other states where the right to bear arms was already respected by some local jurisdictions but denied by others: Massachusetts, New York, and California.

Perhaps even more important, Bruen announces a judicial standard of review that applies to all gun control laws throughout the United States. Gun control laws that are consistent with the history and tradition of the American right to keep and bear arms are constitutional. Gun control laws that are inconsistent with history and tradition are not.

One week after the Bruen opinion was released, the Court vacated decisions from federal courts of appeals that had upheld bans on common rifles or magazines in Maryland, California, and New Jersey. The Court remanded the cases to the lower courts and told the courts to reconsider their decisions in light of Bruen.'

#### New York State Rifle & Pistol Association v. Bruen marks a pivotal step in clarifying and stabilizing Second Amendment jurisprudence.

David Kopel, 2025

 "Restoring the Right to Bear Arms: New York State Rifle & Pistol Association v. Bruen." Cato Supreme Court Review, 2021, 2021-2022, pp. 305-334. HeinOnline.

Whatever happens in future cases, New York State Rifle & Pistol Association v. Bruen has established a more level playing field. Going forward, the personal views of judges on gun policy will matter less. Instead, judicial decisions will be based on analysis of the historical facts of the American right to keep and bear arms.

When Justice Thomas joined the Court, many fields of constitutional law were overgrown with thickets of precedent that had obscured their original public meaning. A quarter century ago, Justice Thomas called attention to the long-neglected Second Amendment, for which the Court's precedent was thin. This year, the Supreme Court of the United States affirmed the third of the three essentials of the right to arms: the right to keep (Heller), the right to bear (Bruen), and the application to governments at all levels (McDonald).

### Das

### Court Legitimacy DA

#### Link: Bruen bolsters Court legitimacy by replacing subjective interest-balancing with a clear, historically grounded standard — it demonstrates judicial restraint, curbs policy-driven rulings, and restores public trust in principled constitutional interpretation.

J. Joel Alicea, 2025

174 U. PA. L. REV. (forthcoming 2025)

https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=5122492

The debate over Bruen is one of the most consequential for the future of constitutional law in recent decades. If Bruen is an incoherent, manipulable, and unjustifiable approach to constitutional adjudication—as constitutional scholars almost unanimously claim—then its failure will resound throughout constitutional law, calling into question the viability of history-based methodologies in other areas and unintentionally reinforcing its rival, the tiers of scrutiny. That would signal a reversion to the kind of “judge-empowering interest-balancing inquiry”552 that emerged out of the Warren Court era and has remained largely unchallenged until now.553 The alternative future is one in which Bruen marks the end of one era of constitutional law and the advent of another,554 one in which history-based methodologies increasingly displace those created before the rise of modern originalism. As scholars contemplate these divergent paths, they should take seriously a possibility that they have been too quick to dismiss: Bruen was right.

#### Link: Bruen limits judicial activism by placing the burden of proof on the government and requiring historically grounded evidence — courts decide based on the record, not personal judgment, reinforcing objective, principled adjudication.

David Kopel, 2025

 "Restoring the Right to Bear Arms: New York State Rifle & Pistol Association v. Bruen." Cato Supreme Court Review, 2021, 2021-2022, pp. 305-334. HeinOnline.

The burden of proof is thus on the government, which "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." 35 This does not mean that judges bear the burden of becoming legal history researchers. As with anything else that the government must prove, the government must present persuasive legal history to the court. "Courts are thus entitled to decide a case based on the historical record compiled by the parties."

In practice, government production of historic evidence in support of gun control laws has long been outsourced to professional gun control organizations, such as Michael Bloomberg's "Everytown" or the Giffords Law Center. The groups often provide pro bono assistance to governments defending gun control laws, without formally displacing the government's own attorneys.

Sometimes, the government and its allies will win because there are many original-era laws that are twins of modern ones-for example prohibiting reckless discharge of a firearm in populated areas. Additionally, the government can prove its case by "analogical reasoning." This means "a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster."

### PTX

#### Link Bruen solidifies political support for gun rights — with 51% of Americans prioritizing gun ownership rights, the decision reflects public opinion, reinforcing conservative political power and challenging attempts at stricter gun control.

[Katherine Schaeffer](https://www.pewresearch.org/staff/katherine-schaeffer/) < Research Analyst at Pew Research Center>, 2024

Key Facts about Americans and Guns, Pew Research Center

https://www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns/

The public remains closely divided over whether it’s more important to protect gun rights or control gun ownership, according to [an April 2024 survey](https://www.pewresearch.org/politics/2024/06/06/gun-attitudes-and-the-2024-election/). Overall, 51% of U.S. adults say it’s more important to protect the right of Americans to own guns, while a similar share (48%) say controlling gun ownership is more important.

Views have shifted slightly since 2022, when we last asked this question. That year, 47% of adults prioritized protecting Americans’ rights to own guns, while 52% said controlling gun ownership was more important.

Views on this topic differ sharply by party. In the most recent survey, 83% of Republicans say protecting gun rights is more important, while 79% of Democrats prioritize controlling gun ownership.

### Federalism DA

#### Link: *Bruen* undermines federalism by imposing a rigid, historically narrow interpretation of the Second Amendment that overrides state-level firearm regulations and public safety measures. By constitutionalizing individual gun rights in a way that limits states' ability to respond to local conditions and violence, *Bruen* erodes the vertical power-sharing structure that defines American federalism—replacing state sovereignty with a top-down, judicially enforced standard that leaves little room for democratic variation or cooperative governance in criminal law and public safety policy.

Scott Sullivan and Iben Sullivan, 2024

The Empirics of Criminal Federalism." Ohio State Journal of Criminal Law, vol. 21, no. 2, Spring 2024, pp. 377-406. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/osjcl21&i=391

Federalism, the vertical power-sharing arrangement between the national federal government and the residual sovereignty possessed by state governments is a fundamental feature of U.S. constitutional law. Since the Founding, the United States, originally characterized as a relatively feeble federal government, has witnessed an explosion of federal authority eclipsing many of the "traditional" powers held by the states. Among such powers, no area has been as thoroughly affected by the growth of federal authority as criminal law. Prior to the twentieth century, criminal law "was almost exclusively the province of the state governments,"' but no longer. In contemporary America, the substantive scope of federal and state criminal law has effectively converged.2

Despite, or perhaps because of the nearly indistinguishable reach of federal and state criminal authority, identifying a workable theory describing the interaction between state and federal law-of federalism-in the criminal context has garnered substantial judicial and scholarly attention.? Yet, fitting the complexity of the issue, a comprehensive theoretical explanation has remained elusive. The increasingly indistinguishable substantive scope of federal and state criminal law has encouraged scholars to abandon efforts to draw strict lines between state and federal power in that area. Instead, "cooperative" models of federalism, emphasizing institutional, and sometimes somewhat coercive, means of effectuating federal supremacy have gained favor. However, cooperative models face their own challenges. While effectively reconciling the substantive overlap of federal and state law, they largely dismiss circumstances where states remain steadfast in their formal and informal opposition to federal policy and the potential impact of such dissent on federal actions.

## CPs

### Checks and Balances CP

#### Text: The United States federal and state governments should restructure criminal justice decision-making processes by implementing a system of diffused power and checks and balances across diverse social interests, including but not limited to victims’ advocates, public defenders, racial justice organizations, formerly incarcerated individuals, and community-based oversight boards. This restructured system should include mechanisms for democratic input and review on gun control policies.

#### Solvency: Criminal justice reform requires diffusing power across diverse social interests—not just branches of government—because current top-down structures enable carceral majorities and elite capture.

Daniel Epps, 2021

"Checks and Balances in the Criminal Law." Vanderbilt Law Review, vol. 74, no. 1, January 2021, pp. 1-84. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/vanlr74&i=10

If meaningfully diffusing and limiting state power over criminal justice is the goal, we need to start thinking about that project from a different perspective. Institutions could be structured so that decision making power is shared and diffused among different interests in democratic society, rather than among functionally distinct institutions. This conception looks to the tradition of mixed government and its later instantiation as the idea of checks and balances for a blueprint for the structure of the criminal justice system. Other scholars have recently explored modern versions of mixed government's approach of directly incorporating class into government to limit the ability of the wealthy to control the political process.26 5 A similar approach, in which power is divided among distinct social interests with competing ideas about criminal justice, could be a useful model.

At least according to leading accounts of the state of the politics of criminal justice, our system does a poor job diffusing power among distinct interests. Observers argue that voters and their elected representatives consistently choose severe policies without sufficient regard for the people who bear the costs of those policies. 266 On this account, the problem is a kind of process failure, explained by the fact that ordinary voters can imagine themselves as victims of crime but do not expect to be on the receiving end of criminal sanctions. 26 7 This common lament about the toxicity of criminal politics can be understood as an observation about the role of interests-one tough-on-crime interest holds sway over criminal justice policy given the preferences of voting majorities.

Even if this account is correct about the state of voters' preferences, however, different structural arrangements might reduce or exacerbate some of these tendencies. It is not the case that every American has identical preferences for harsh policies; instead, preferences almost certainly vary depending on numerous factors like race, class, age, gender, zip code, and previous exposure to the system. Moreover, a number of powerful and organized interests-prosecutors' organizations, prison guard unions, for-profit companies that profit off of prison labor, and so on-may amplify and reinforce tough-on-crime preferences.2 65 One could imagine alternative ways of distributing power over criminal justice policymaking authority that would mute some of these political forces and amplify interests that would push policies in the other direction.

This way of thinking about the criminal justice system understanding the distribution of power over criminal justice among social interests as an alternative strategy to the traditional separation of powers-recasts various debates. In this light, numerous seemingly distinct questions about the allocation of decisionmaking power are really separation-of-powers-type questions, of certainly no less-and likely much more-importance than whether power over criminal justice is divided between functionally differentiated institutions. Consider a few examples

#### Solvency: Local control of criminal justice empowers marginalized communities, diffuses state power, and leads to more equitable and accountable outcomes—top-down systems entrench disparities.

Daniel Epps, 2021

"Checks and Balances in the Criminal Law." Vanderbilt Law Review, vol. 74, no. 1, January 2021, pp. 1-84. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/vanlr74&i=10

But there are also more direct strategies. Interestingly, federal Indian law provides a unique model within the American system. Under a complex arrangement of tribal law, treaties, and federal statutory law, Native American tribes retain criminal lawmaking and law enforcement power for certain crimes committed by tribe members within "Indian country"304 and in some cases beyond those boundaries.30 5 Tribal autonomy over criminal justice can make a significant difference for tribe members; tribe members subject to Congress's withdrawal of such autonomy-and consequent imposition of state criminal jurisdiction-in certain regions have reported widespread dissatisfaction with criminal justice.306 While it is hard to imagine extending the Indian-law model to racial and ethnic groups given the constraints of the Equal Protection Clause, there nonetheless may be larger lessons here for the importance of autonomy among distinct groups in shaping criminal justice policy

### 28th Amendment CP

#### The United States Congress should propose, and the states should ratify, a constitutional amendment to clarify that the right to bear arms is subject to reasonable public safety regulations, including measures such as background checks, red flag laws, banning assault rifles, and prohibitions on firearm ownership for individuals convicted of domestic violence.

#### Solvency: Efforts like Governor Newsom’s proposed 28th Amendment illustrate a bottom-up constitutional strategy to counter *Bruen* by embedding public safety regulations—such as age limits, background checks, waiting periods, and assault weapon bans—directly into the Constitution. This approach challenges the dominant individualist, judicially enforced gun rights narrative and reframes gun control as a democratic, populist movement rooted in public will rather than elite legal interpretation.

[**Ben Christopher**](https://calmatters.org/author/ben-christopher/)**and**[**Alexei Koseff**](https://calmatters.org/author/alexei-koseff/)

June 8, 2023

**Will America embrace Newsom’s gun plan? 5 things to know about his bid to change the US Constitution**

**Cal Matters**

**https://calmatters.org/politics/2023/06/gavin-newsom-gun-control-amendment/**

Today the governor, who has become one of the country’s most outspoken advocates for tighter gun laws, proposed adding a 28th amendment to the U.S. Constitution to place new age limits, background check requirements and mandatory waiting periods for gun purchasers. His proposed amendment would also ban the civilian ownership of so-called assault weapons.

Most of these proposals come from California’s own lengthy list of gun laws. They’re popular here. But though Congress has yet to pass them, most public polling suggests they’re broadly popular ideas across the country.

Adding an extra amendment is extraordinarily difficult. But for Newsom, the proposal may be as much about political strategy as constitutional law.

“We want to go on the offense and be for something and build a movement that’s bottom up, not top down,” he told Politico in advance of his announcement.

### Ks

### Generic Antiblackness Links

#### Link Bruen opens doors for criminal justice reform — by challenging discriminatory policing practices and decriminalizing minority gun ownership, it empowers defense attorneys to confront systemic bias in the criminal justice system.

Marin Cogan, 2025 < Marin Cogan was a senior correspondent at Vox. She wrote features on a wide range of subjects, including [**traffic safety**](https://www.vox.com/23178764/florida-us19-deadliest-pedestrian-fatality-crisis), [**gun violence**](https://www.vox.com/the-highlight/22878920/school-shootings-survivors-columbine-mental-health), and [**the legal system**](https://www.vox.com/the-highlight/22983104/justice-forgiveness).

How a major Supreme Court case is changing how police do their jobs

https://www.vox.com/politics/392814/bruen-guns-police-crime-courts

For criminal defense attorneys and their clients, though, the uncertainty hasn’t been a bad thing. The ruling is creating new opportunities for legal defense, with some arguing that *Bruen* allows them to challenge charges that disproportionately affect Black Americans.

In the decades after *Terry*, stop-and-frisk and traffic stops became widespread, as did the criticism that they violated Americans’ Fourth Amendment right against unreasonable search and seizure. In 2013, for example, a court found that New York City’s policy of stop-and-frisk [violated citizens’ constitutional rights](https://www.nytimes.com/2024/09/23/nyregion/nypd-stop-and-frisk-report.html). Researchers have shown that the policies have been used to [disproportionately harass](https://www.tandfonline.com/doi/abs/10.1198/016214506000001040) and [incarcerate](https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/) Black and brown people.

*Bruen* now gives defendants a chance to challenge one of the most common charges that police use to try to control violent crime — criminal possession of a weapon — as well as other charges.

Some legal scholars have noted that the new precedent established by *Bruen*could provide opportunities to end long-held policing practices that have ensnared a disproportionate number of racial minorities in the criminal justice system.

“*Bruen* should be used as a tool for decriminalization of minority gun ownership,” [writes](https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1381&context=rrgc) William Jacobs-Perez in the *University of Maryland Law Journal of Race, Religion, Gender and Class*. The fact that *Bruen*makes it harder for police to justify practices like stop-and-frisk, he says, provides an opportunity to abandon the current system of punishing people for gun possession “in favor of policies that tackle the root causes of gun violence.”

#### Link Top-down approaches to criminal justice entrench inequality—local, bottom-up governance empowers marginalized communities and ensures more equitable decision-making.

Daniel Epps, 2021

"Checks and Balances in the Criminal Law." Vanderbilt Law Review, vol. 74, no. 1, January 2021, pp. 1-84. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/vanlr74&i=10

One cannot study America's criminal justice system without realizing that criminal law has very different consequences for different groups in society, and particularly different racial, ethnic, and tribal groups. African Americans in particular have borne the brunt of America's epidemic of mass incarceration, 2 95 but Hispanic 296 and Native American 297 people have also suffered disproportionately. Beyond punishment, many other aspects of criminal justice-such as traffic stops and police violence-have profoundly disparate effects across groups. 298 Any serious attempt to think about how to disperse power over the criminal justice system among discrete interests must take account of these differences.

How might such groups be better empowered to play a role in governance of criminal justice? One strategy relates back to the discussion above regarding the geographic distribution of political power. Given widespread residential racial segregation in the United States,299 placing decisionmaking power at lower, more local levels of government may better empower minority groups (who may constitute local majorities) to influence important policy decisions. Indeed, the recent rise of progressive prosecutors has been made possible by the fact that the political constituencies that elect urban prosecutors are more diverse than their states as a whole. 300 Predictably, the rise of reformer prosecutors has been met with efforts by state governments to strip some decisionmaking power from local prosecutors. 30 1 To the extent that local control-and the greater say in decisionmaking by otherwise less powerful minority groups-is seen as a powerful check on the criminal justice process, such reforms should be resisted.

### Racial Cap Link

#### The pro-gun advocacy movement, particularly through the NRA and post-*Bruen* rulings, reinforces racialized violence, perpetuating antiblackness through the historical legacy of colonialism and industrial capitalism.

Richard Branscomb, 2023

Department of English Dietrich College of Humanities & Social Sciences Carnegie Mellon University. Dissertation.

Taking Aim: Rhetorical Conspiracism, Far-Right Extremism, and the Narrative Politics of Guns

https://www.proquest.com/openview/701fbae80432f36f61b212d75e626f3a/1?cbl=18750&diss=y&pq-origsite=gscholar

This interchapter offers a very brief overview of some historical moments that are central to the grand narrative of this project, particularly as those moments contextualize far-right paramilitary extremism and “mainstream” corporatized pro-gun advocacy efforts, primarily of the NRA, which are the respective subjects of chapters 2 and 3. There is a substantial body of literature on the political and legal histories of gun rights in the U.S. Much of that scholarship, notably from commentators affiliated with pro-gun organizations (e.g., Stephen Halbrook, who has been bankrolled by the NRA), has had vested interest in maintaining the status quo of this country’s gun violence culture. Such influence will only persist following the 2022 Bruen Supreme Court decision, in which the conservative majority’s expansive (and, if I may conspire here a bit, deceptive) “originalist” re/interpretation of the second amendment further legitimized individual armament for “self-defense” not only in the home, but in public spaces (New York State Rifle & Pistol Assn., Inc. v. Bruen, Superintendent of New York State Police, et al. 2022). I don’t have the space here to comment fully on the longer social or legal histories of the violent ab/uses of the second amendment, but the interested reader can find critical counterhistories offered by scholars I have already cited, especially historians Carol Anderson (2021) and Roxanne Dunbar-Ortiz (2018), and legal commentator Elie Mystal (2022)

What I foremost want to stress, as a parallel backdrop to the westernized rhetorical conspiracism this project is concerned with, is that firearms as a socioeconomic force remain inseparable from the industrial-capitalist and racial imperialism in which such weapons of war historically originated. As Priya Satia (2019) has detailed, the violences of colonialist war-making since the industrial revolution in Britain have contributed to the international investment in a “dispersed military-industrial society” today, even amid ongoing attempts by bodies like the United Nations to quell transnational gun violence (403-404). Within that arms-saturated colonial history, Achille Mbembe (2013) tracks the formation of what he calls the “fantasy of Whiteness,” which “draws part of its self-assurance from structural violence and the ways in which it contributes on a planetary scale to the profoundly unequal redistribution of the resources of life and the privileges of citizenship” (45). Likewise, as Roxanne Dunbar-Ortiz (2018) has observed, the history of the second amendment, including contemporary advocacy for its undiminished freedoms, cannot be dissociated from U.S.-American “exceptionalism,” which has less to do with mythic, rugged (white) individualism and more to do with the systemic oppression and genocide of Indigenous communities and people of color (202). Today, gun violence culture in the U.S. has managed to distill this extended fantasy of whiteness from our military-industrial society by valorizing (white) civilian armament as a locked-and-loaded mode of individual self-assurance. Put differently, as much as pro-gun advocates laud the U.S. history of gun violence culture as a prophylactic against structural violence, what they are less keen on recognizing is how the U.S. has been historically proficient at structural violence through its gun violence culture.

### Racial/Gender K Link

#### The *Bruen* decision and its framing of self-defense reinforce gendered and racialized narratives, positioning white male sovereignty as the core of "legitimate" self-defense. This individualist self-defense rhetoric, central to the NRA’s campaign, selectively represents women and people of color, distilling their roles to victimized, heteronormative motherhood while ignoring broader victims of gun violence, particularly women of color and marginalized groups.

Richard Branscomb, 2023

Department of English Dietrich College of Humanities & Social Sciences Carnegie Mellon University. Dissertation.

Taking Aim: Rhetorical Conspiracism, Far-Right Extremism, and the Narrative Politics of Guns

https://www.proquest.com/openview/701fbae80432f36f61b212d75e626f3a/1?cbl=18750&diss=y&pq-origsite=gscholar

As I have identified in the above analyses, the focus on the individual, and the individual’s means of self-defense, is a primary rhetorical strategy of the FSP campaign, which stems from earlier traditions in U.S. gun rights advocacy. Despite the legal controversies over whether the second amendment guarantees an individual right to bear arms for self-defense, as opposed to a collective right to form civilian militias, contemporary gun rights advocacy has adhered to individualist self- R. Branscomb |108 defense both as a narrative appeal to constituents and as the primary objective of unfettered civilian armament (see Mystal 2022, chapter 3; Winkler 2011). My aim in this section is not to rehash the legal arguments for or against individual armament, particularly since the U.S. Supreme Court has insisted on individual self-defense as the basis for contemporary interpretations of the second amendment (District of Columbia v. Heller 2008; New York State Rifle & Pistol Assn., Inc. v. Bruen, Superintendent of New York State Police, et al. 2022). Instead, my concluding analysis highlights how the integration of self-defense in the FSP campaign extends the NRA’s narrative vision along tropes of postracial victimization that include the selective representation of women and people of color.

In this context, the campaign’s narrative representation of (racialized) gender politics highlights the role of women within the NRA’s narrative vision, which ultimately distills their moral virtues qua heteronormative motherhood and their capacity to be victimized.13 At the same time, this narrative framework again constitutes a mode of postracial victimization that claims a certain socioracial neutrality, while omitting the actual victims of gun violence in the U.S. whom the NRA is ostensibly advocating for—that is, white men in the American Heartland who are at disproportional risk for gun-related suicide (Metzl 2019), and, as noted, the largely nonmale-identifying victims of intimate partner violence (Squires 2016; see chapter 5). As argued above, though, this selective representation is itself mediated through a pre-existing moral code that, for the NRA, is constituted through the white supremacist doxai of armament and, perhaps most prominently, the law itself. Put differently, within this narrative vision one’s sovereign access to “legitimate” self-defense is predicated on one’s access to the sovereign status of “citizen,” the ultimate articulation of which remains centered on white manhood (Gahman 2020; Kelly 2020a; Ore 2019; see chapter 4).

# Shelby County V. Holder

## Case Overview

**The Voting Rights Act of 1965 (VRA)**

* Passed during the Civil Rights Movement, the VRA was designed to eliminate barriers to voting for African Americans, especially in Southern states with a history of voter suppression.
* **Section 5** of the VRA required certain jurisdictions with a history of discrimination to obtain *preclearance* from the federal government (either the DOJ or a federal court) before making any changes to voting laws or practices.
* **Section 4(b)** contained the formula used to determine which jurisdictions were subject to Section 5 preclearance. This formula was based on data from the 1960s and 1970s (e.g., use of literacy tests and low voter turnout).

**Shelby County, Alabama**

* Shelby County, a predominantly white county in central Alabama, challenged the constitutionality of Sections 4(b) and 5.
* The county argued that the preclearance requirement was outdated and unfairly targeted certain states and localities, violating the principle of equal sovereignty among the states and exceeding Congress’s authority under the Fifteenth Amendment.

**Main Question:**
Is the coverage formula in Section 4(b) of the Voting Rights Act still constitutional, and can Congress continue to require preclearance based on it?

**Date: June 25, 2013**

**Vote: 5–4**

**Majority Opinion by: Chief Justice John Roberts**

**Joined by: Justices Scalia, Kennedy, Thomas, and Alito**

**Holding:**

* The Court struck down **Section 4(b)** as **unconstitutional**.
* Without a valid coverage formula, **Section 5** effectively became unenforceable—because there was no way to determine which jurisdictions should be subject to preclearance.

**Reasoning:**

* **Outdated Formula**: The coverage formula relied on decades-old data and did not reflect current voting conditions.
* **Equal Sovereignty**: The Constitution requires that all states be treated equally unless there is a justified reason. The Court said Congress didn’t show that the conditions that originally justified such federal oversight still existed.
* **Congressional Authority**: While Congress has broad power under the Fifteenth Amendment to prevent racial discrimination in voting, it must use that power based on current needs, not past ones.

**Dissenting Opinion**

**By: Justice Ruth Bader Ginsburg**

**Joined by: Justices Breyer, Sotomayor, and Kagan**

**Main Points:**

* The preclearance requirement had been incredibly effective at reducing voter suppression and racial discrimination.
* Throwing out the coverage formula was like “**throwing away your umbrella in a rainstorm because you are not getting wet.**”
* Congress had reauthorized the VRA in 2006 with overwhelming bipartisan support and had compiled an extensive record justifying its continued use.

**Impact of the Decision**

**Immediate Effects:**

* States previously covered by preclearance—like Texas, Georgia, and North Carolina—were free to change voting laws without federal approval.
* Many quickly implemented laws such as strict voter ID requirements, polling place closures, and voter roll purges—measures that critics argue disproportionately affect minority voters.

**Long-Term Consequences:**

* Civil rights advocates argue that *Shelby County* severely weakened the federal government’s ability to monitor and prevent racial discrimination in voting.
* The case sparked calls for new voting rights legislation (like the John Lewis Voting Rights Advancement Act), though Congress has not passed a new preclearance formula as of now.

## Controversy

#### Shelby County v. Holder sparked major controversy—critics argue it dismantled key protections despite ongoing discrimination. While other claims the preclearance in the VRA is an outdated framework.

Democracy Explainers, June 24, 2022

Shelby v Holder: An Explainer

https://www.rockthevote.org/explainers/shelby-v-holder/

**What is Shelby County v. Holder?**

Shelby County v. Holder was a landmark U.S. Supreme Court ruling that gutted the Voting Rights Act of 1965 by eliminating critical protections from discrimination.

The decision, made on June 25, 2013, held that a key part of The Voting Rights Act of 1965 (the VRA) was unconstitutional and put it on Congress to update the legislation. Without the full protections of the VRA, state and local governments with a long history of discrimination are free to adopt election policies that they have not been able to in decades. This is part of the reason for the wave of voter suppression laws over the last several years given the Court’s decision is less than 10 years old.

**What led to the Voting Rights Act of 1965?**

The Constitution of the United States does not explicitly grant the right to vote. Rather, the 15th, 19th, and 26th Amendments prevent discrimination of citizens’ right to vote based on prior servitude, race, belief, color, ethnicity, sex, and age of those who are at least 18 years old. Basically, if voting rights are extended to one group of people, they can not be denied to other groups of people.

[The 15th Amendmentopens a new window](https://www.rockthevote.org/explainers/the-15th-amendment/?source=rtv.org-explainers) was passed in 1870 stating that the U.S. federal and state governments shall not deny the right to vote on account of race, color, or previous condition of servitude. Despite the 15th Amendment, states and local governments implemented various discriminatory practices, such as poll taxes and literacy tests, Jim Crow laws, intimidation and outright violence to prevent Black Americans from voting.

**What is the Voting Rights Act of 1965 and why is it important?**

[The Voting Rights Act (VRA)opens a new window](https://www.rockthevote.org/explainers/the-voting-rights-act-of-1965/?source=rtv.org-explainers) was signed into law by President Lyndon B. Johnson on August 6, 1965, to protect the voting rights of Black citizens. It outlawed the use of discriminatory voting practices.

It also required jurisdictions with a history of discriminatory voter suppression to seek preclearance from the federal government before creating *any* new voting practices or procedures. Essentially, state and local governments that had a history of abuse had to ask the federal government, the Department of Justice, for permission before they made any changes to the way they administered elections. [Federal Examinersopens a new window](http://www.archives.gov/legislative/features/voting-rights-1965) with the power to register citizens were also assigned to these counties.

It’s widely considered to be [the most effective pieceopens a new window](http://www.justice.gov/crt/introduction-federal-voting-rights-laws-0) of civil rights legislation in US history.

**What were the strengths of the VRA?**

While the VRA had a lot of strengths, two key parts were critical: Section IV (4b) and Section V (5).

Section 4b established a formula to determine which states and localities demonstrated a history of voting rights violations.

Section V (5) required the jurisdictions identified by this formula to obtain “preclearance” from the federal government, by way of the Department of Justice, before making any changes to their voting laws.

Congress renewed and amended the VRA after its passage five times, all with little opposition. In 2006, President George W. Bush signed the Act’s second 25-year extension. The VRA went on to include protections for voters with language barriers or disabilities.

Under the VRA states such as Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, as well as counties in California, Florida, Michigan, North Carolina, South Dakota, and New York, were obligated to submit election plans to either the Justice Department or a Federal Court to prevent voter suppression, especially on the basis of race.

**How did *Shelby County v. Holder* “gut” the VRA?**

In 2010, Shelby County, Alabama challenged the VRA’s preclearance clause in a lawsuit against the Justice Department (then led by Attorney General Eric Holder).

In a 5–4 [decisionopens a new window](https://www.oyez.org/cases/2012/12-96%22%20%5Ct%20%22_blank), the Supreme Court held that the Section IV (4b) formula used to determine which states and localities were subject to preclearance was outdated and was therefore unconstitutional. The Court concluded that the formula in Section IV (4b) was decades old and targeted practices that had been eradicated as the country had changed and the racial disparity in voter registration and turnout was no longer the case in 2013.

Without the formula, Section V (5) is unenforceable. This means that regions with a history of discrimination no longer have federal oversight before changing their voting processes.

The dissenting justices argued that discrimination and racial disparities had not disappeared. Justice Ruth Bader Ginsburg wrote in her dissent, “Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”

## Affirmative

#### Shelby County was wrongly decided—the Court ignored precedent, misused data, and weakened voting rights on false grounds.

Trisha Roy, 2022.

 *Shelby County v. Holder: A Case Study of the Supreme Court Decision that Shaped Voting Rights in the United States of America*. Diss. The Ohio State University

https://kb.osu.edu/server/api/core/bitstreams/e8e87903-e436-43a2-9928-6a525115e893/content

Shelby v. Holder’s decision is incorrect because the legal conclusions relied on inaccurate data. Not only did the Court disregard the legislative intent of the Voting Rights Act by relying on only two metrics of success, it also omitted several important pieces of data in its evaluation. Straying from the normal heavy reliance on legal precedent, the Court did not have strong legal reasonings. The broad equal sovereignty argument did not extend to voting rights and has been opposed by not only other Court Justices, but also legal scholars nationwide. The factual assumption that voter discrimination did not happen at the same rates as 1965 did not take into account the existing levels of voter discrimination and the exhaustive information presented by Congress in the 2006 reauthorization.

Shelby v. Holder acts as a case study for what factors the Court finds important to utilize when making a decision and opens up a discussion of what factors should be included. The biases of Supreme Court Justices must be evaluated, as it can drastically change the outcome of a decision. Additionally, the role of statistics should be more significant when creating and upholding factual assumptions. The correctness of factual assumptions impacts the legal conclusion, so an effort must be made to center the most correct data.

The Shelby decision coupled broad empirical statements with equally broad legal doctrines as evidence to strip one of the most important sections of the Voting Rights Act. This decision has been disastrous to voting rights across the nation and raised important questions on the capacity of the Supreme Court to make similar decision in the future. Since then, the equal sovereignty principle has increased in its usage throughout the court system, and the Supreme Court continued to whittle down on other aspects of the legislation through Section 2 litigation, evidenced by the 2021 Brnovich v. Democratic National Convention decision.

As of the fall of 2021, the Supreme Court reached an all-time low in approval polling, plummeting down to 40% (Jones, 2021). It is not unreasonable to link this lack of trust and legitimacy to the seemingly arbitrary decision making the Court has been employing. Shelby v. Holder baffled legal scholars and politicians alike and was highly criticized for politicizing an issue where the facts were clear. In order for the Supreme Court to regain the public’s trust, there needs to be a better method of reliance on data and facts. Without this, voting rights are only a small portion of fundamental rights that the Court will continue to threaten.

**Shelby County relied on short-term improvements in Black voter turnout to justify ending preclearance, but new evidence shows that without federal oversight, racial turnout disparities worsened significantly proving the Court’s logic was flawed and harmful**.

Kevin Morris and Michael Miller, January 19, 2025

Morris, K. and Miller, M., 2024. Did Shelby County v. Holder Increase the Racial Turnout Gap?. *Holder Increase the Racial Turnout Gap*.

https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=4736882

A central premise underpinning the majority’s decision in Shelby County v. Holder was that, absent evidence of continued racial disenfranchisement in covered jurisdictions, the geographic preclearance requirements could not be further justified because “things [had] changed dramatically” (Shelby County, 570 U.S. at 531) since the passage of the VRA. Writing for the majority, Chief Justice John Roberts pointed specifically to the white–Black turnout gap. “During [the time that Section 5 was operable],” he wrote, “largely because of the Voting Rights Act, voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers” (at 553). Elsewhere the Court notes that in 2012, “African-American voter turnout exceeded white voter turnout in five of the six States originally covered by §5, with a gap in the sixth State of less than one half of one percent” (at 548).

In 2012, there was some truth to what the Court said: the white–Black turnout gap in covered jurisdictions was relatively small and in line with the rest of the country. But as we have shown, the end of preclearance led to a dramatic expansion of the racial turnout gap in formerly covered jurisdictions: we estimate that, absent Shelby County, the white– Black turnout gap would have grown by about 4 or 5 percentage points by 2022; instead, it grew by 9 points. While the growing racial turnout gap outside the formerly covered regions clearly demands attention in future work, the especially rapid growth in jurisdictions formerly covered by Section 5 of the Voting Rights Act points to renewed discrimination in these areas.

In this article, we have leveraged individual-level administrative voting records dating back to 2008 to test the effect of Shelby County v. Holder on the racial turnout gap, paying special attention to the white–Black turnout gap central to the Court’s reasoning in 2013. Our findings are clear: in the average county where Shelby County freed state and, especially, local voting administrators from federal oversight, the relative participation of nonwhite Americans has worsened. Our results suggest that once they were removed from the preclearance list, counties enacted policies whose cumulative effect was to disproportionately burden minority voters. Our research design does not demand that we individually identify the policies that each county enacted — changes that collectively added up to dozens each day. Instead, we measure the effect of the totality of the changes on the racial turnout gap.

### Democracy Advantage

#### Voting rights have worsened post-Shelby—eliminating preclearance gutted federal protections and enabled widespread voter suppression.

Stephen Billings, Noah Braun, Daniel Jones, and Ying Shi, December 2022

https://www.sciencedirect.com/science/article/abs/pii/S0047272723002293

Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout

IZA Discussion Papers, No. 1582

The Voting Rights Act of 1965 outlawed discriminatory practices that aimed to prevent minoritized racial/ethnic groups from exercising their right to vote. This landmark piece of legislation marked a turning point for voting rights, which Martin Luther King Jr. positioned as central to the wider struggle for civil rights (King, 1957). The statute removed widely instituted barriers to the vote, such as poll taxes and literacy tests, and significantly expanded federal oversight of the electoral process.

Of the many provisions in the VRA, Sections 4 and 5 were among the most consequential (De Rienzo, 2022). Section 5 set forth the “preclearance” special provision, which required select jurisdictions to obtain approval from the U.S. Attorney General or a declaratory judgment from the U.S. District Court for D.C. before implementing any changes to electoral or voting procedures. Jurisdictions covered by preclearance must demonstrate that the planned change ”does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”

Section 5 came into force in combination with Section 4(b), which established a formula for identifying “covered” jurisdictions. The coverage formula targeted areas, most commonly counties, with the most pervasive and egregious discriminatory voting practices. The formula required preclearance if the jurisdiction 1) maintained a “test or device” that restricts vote access, such as literacy tests or poll taxes, or 2) less than half of individuals of voting age were registered by or voted in the November 1964 presidential election. These definitions led to coverage for the entire states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, as well as partial coverage for states such as North Carolina and Arizona.

Reauthorizations of the VRA in 1970 and 1975 led to an expansion of preclearance coverage. The 1975 VRA amended the original formula to include members of “language minority groups,” or individuals of American Indian, Asian American, Alaskan Natives or Spanish heritage. This resulted in Texas and Arizona becoming fully covered and partial coverage (at least one covered county) in several additional states.

In 2013, the U.S. Supreme Court ruled Section 4(b) as unconstitutional in the Shelby County v. Holder case, effectively invalidating the preclearance provision of the VRA and removed federal oversight from previously covered jurisdictions. The majority opinion of the Court argued that the state of contemporary voting practices does not justify the expanded federal power granted under Section 5. The decision ended nearly half a century of federal oversight, and paved the way for jurisdictions to implement new electoral practices without submitting the proposed changes for federal approval. There was wide coverage of electoral changes in the aftermath of Shelby, including the enforcement of photo ID laws in Mississippi and Alabama (Brenner Center for Justice, 2018). The U.S. Commission on Civil Rights issued a report in 2018 on changes to voting procedures post-Shelby. Jurisdictions “required strict forms of voter ID, purged voter rolls, reduced polling locations, required documentary proof of citizenship to register to vote, and cut early voting, among other contested voting changes that, on the specific facts in those states, operate to denigrate minority voting access in ways that would have violated preclearance requirements if they were still in effect.” (Lhamon, 2018). While there is existing evidence on several of these individual potential voter suppression tactics – generating mixed findings4 – our analysis can be considered an assessment of the accumulation of these state and local actions.

At the same time, any reductions in political participation resulting from the increased burden of voting may be tempered by countermobilization. A growing literature suggests emotions can be a powerful motivator in political engagement, and framing messages around efforts to restrict voting access can mobilize voters (Biggers, 2021; Biggers & Smith, 2020; Valentino & Neuner, 2017). Since countermobilization balances out the disenfranchising effects of increased voting costs, existing studies on the null or even positive participation effects of Shelby point to countermobilization as a key mechanism. Komisarchik and White (2021) use the CCES to document greater mobilization of nonwhite voters in previously covered jurisdictions, which may offset any negative participation effects accompanying the higher prevalence of strict and photo ID laws and voter removal from registration rolls. Cantoni and Pons (2021) describe similar mobilization effects using CCES data. That being said, the enfranchising effects of emotionally-driven countermobilization may be short-lived (Valentino & Neuner, 2017). As such, one may expect post-Shelby electoral changes to have increasingly negative effects as time passes. We explore this in our setting.

#### Shelby decision caused racially disparate turnout declines—suppression tactics target Black communities hardest without preclearance.

Stephen Billins, Noah Braun, Daniel Jones, and Ying Shi, December 2022

https://www.sciencedirect.com/science/article/abs/pii/S0047272723002293

Disparate Racial Impacts of Shelby County v. Holder on Voter Turnout

IZA Discussion Papers, No. 1582

This paper examines the differential impacts of the 2013 Shelby v. Holder decision, which invalidated the preclearance provision in the Voting Rights Act, on turnout across racial and ethnic groups. We aim to complement recent work (e.g., Komisarchik and White (2021)) – which documents mechanisms which might impact turnout – by drawing on a rich dataset that is well suited to identifying these differential changes. Our main analysis measures changes in turnout amongst registered voters at the Census Block level. Our estimates suggest that turnout declines by roughly one percentage point in Census blocks with a high share of Black residents relative to blocks with zero Black population. There is significant heterogeneity in our results, with a decline in turnout of two percentage points in Census blocks with a larger Black population in counties with larger Black and Hispanic populations. Such heterogeneity is consistent with the notion that voter suppression is costly to implement and more likely to be employed where the targeted group is larger in number and more politically powerful (Epperly et al., 2020).

What specific policy changes lead to the changes in turnout that we observe? As already noted, there is existing evidence of increased implementation of Voter ID laws and voter roll purges in previously covered jurisdictions (Komisarchik & White, 2021). A report from the NAACP Legal Defense Fund 9 highlights the importance of changes at the local level: “Voting changes at the local level, such as moving a polling place or switching from district-based to at-large voting, have garnered less attention, but are no less problematic. In fact, more than 85% of preclearance work previously done under Section 5 was at the local level.” In short, we expect that the turnout changes we observe are the result of the accumulation of a variety of state and local actions, many of which are difficult to observe in data, and that there is unlikely to be single primary driver. Thus, while we cannot speak to specific drivers of changes in turnout, we view our paper as providing evidence on the impacts of the accumulation of suppression tactics that have occurred in the absence of Federal oversight.

### Economy Advantage

#### The loss of the preclearance provision in *Shelby v. Holder* (2013) has led to the erosion of voting rights and negative economic consequences, disproportionately harming minority communities. Reinstituting preclearance is essential to ensuring equitable access to the political process and reversing the negative impacts on economic outcomes, such as wage disparities.

[Abhay Aneja](https://equitablegrowth.org/people/abhay-aneja/) and [Carlos Fernando Avenancio-Leon](https://equitablegrowth.org/people/carlos-avenancio/) October 16, 2020

Voting rights equal economic progress: The Voting Rights Act and U.S. economic inequality Washington Center for Economic Growth

https://equitablegrowth.org/voting-rights-equal-economic-progress-the-voting-rights-act-and-u-s-economic-inequality/

The civil rights movement, from its mid-20th century growth and successes to its current manifestations, has had a dual focus of eliminating political and social discrimination and bettering the economic lot of Black Americans, as well as that of other people of color in the United States. From the beginning, leaders of the movement and their political allies recognized the intrinsic connection between these goals. They understood that equality under the law meant little without addressing the rampant poverty in Black communities across the country.

Our [new research](https://equitablegrowth.org/working-papers/the-effect-of-political-power-on-labor-market-inequality-evidence-from-the-1965-voting-rights-act/) quantifies that direct connection, showing that the Voting Rights Act of 1965, a signature measure of the civil rights era, narrowed the wage gap between Black and White men in the areas where it was most strictly enforced. Specifically, between 1950 and 1980, the gap between the median wages of Black and White workers in the South narrowed by approximately 30 percentage points. And our study, which builds on existing research on the economic benefits of voting rights legislation, shows that the Voting Rights Act was responsible for about one-fifth of that reduction.

This issue brief first details why the Voting Rights Act delivered greater political power to Black voters. We then show that this resulted in higher wages to Black workers and narrowed the Black-White wage gap. We examine some ways the Voting Rights Act could have had this wage effect, specifically developments in public- and private-sector employment and greater enforcement of measures barring discrimination in the workplace. We close with a brief look at how the U.S. Supreme Court decision in 2013 to dramatically weaken enforcement of voting rights may be starting to reverse the wage gains we document after the enactment of the Voting Right Act.

#### The Voting Rights Act of 1965 was instrumental in reducing the wage gap between Black and White workers, highlighting the critical connection between voting rights and economic empowerment. Restoring strong enforcement of the Voting Rights Act is crucial to maintaining these economic gains.

[Abhay Aneja](https://equitablegrowth.org/people/abhay-aneja/) and [Carlos Fernando Avenancio-Leon](https://equitablegrowth.org/people/carlos-avenancio/) October 16, 2020

Voting rights equal economic progress: The Voting Rights Act and U.S. economic inequality Washington Center for Economic Growth

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Eliminating U.S. labor market discrimination was by far the most important political issue for Black Americans before the enactment of the civil rights legislation of the 1960s. It should be no surprise, then, that once Black Americans gained greater political power, it would be directed like a laser beam toward that issue. (See Figure 1.)

In our new working paper, we analyzed U.S. Census Bureau data in adjacent jurisdictions, as noted above, to estimate the specific impact of the Voting Rights Act on the gap in earnings between Black and White men. The results were clear: a 5.5 percentage point increase in Black Americans’ wages between 1950 and 1980, relative to White workers with the same characteristics and within the same geographic area.

Between 1950 and 1980, the ratio of wages for Black workers to wages for White workers increased from 55 percent to just more than 80 percent. Since the main impact of the Voting Rights Act in narrowing the Black-White wage gap 5.5 percent took place in the 5 years following its enactment, between 1965 and 1970, the measure is responsible for about one-fifth of the total convergence between Black and White wages.

We also found that the narrowing of this divide was driven primarily by a substantial increase in earnings among Black workers. Yet there was no loss of employment for Black or White workers. Employers did not hire fewer workers because wages rose, perhaps due to the favorable economic conditions of the time.

If the Voting Rights Act is responsible for one-fifth of this phenomenon, what makes up the rest? Other researchers have quantified several other factors, including the [migration](https://www.nber.org/papers/w18129) of Black workers to the North during the period of the Great Migration, improvements in [school quality](https://academic.oup.com/qje/article-abstract/107/1/151/1925804?redirectedFrom=fulltext) for Black American schoolchildren, and the effect of President Lyndon Johnson’s Great Society programs on U.S. labor force participation, caused, in part, by the increased bargaining power the support provided to Black workers.

A third source of the increase in wages among Black workers was detailed recently by economists Ellora Derenoncourt and Claire Montialoux at the University of California, Berkeley. They [find](https://equitablegrowth.org/working-papers/minimum-wages-and-racial-inequality/) that the 1966 National Labor Relations Act reforms that broadened the federal minimum wage to cover previously exempt industries, including nursing homes, hotels, and agriculture, explains more than 20 percent of the earnings gap reduction. Of course, people of color’s political power may have complemented any of these channels by strengthening enforcement of these laws.

### Antiblackness Advantagebe

#### Before the Voting Rights Act of 1965, racism in voting was not just pervasive but institutionalized through laws and violent repression. Voter eligibility was intentionally obstructed by racially discriminatory practices like literacy tests, poll taxes, and terror tactics designed to prevent Black Americans from voting. The state’s enforcement of apartheid was accompanied by violence and intimidation, including murders by white supremacist groups like the Ku Klux Klan, to maintain white political power. The brutality of this system—backed by legal structures—demonstrates how racial subjugation was maintained not just through disenfranchisement but through state-sponsored violence and terror. Shelby Co. v. Holder upholds this violence system by getting rid of the preclearance requirement.

“Shelby County v. Holder:” How the Supreme Court attacked Black voting rights

**by**[**Patricia Gorky**](https://www.liberationschool.org/shelby-county-v-holder-how-the-supreme-court-attacked-black-voting-rights/)

Dec 14, 2022

https://www.liberationschool.org/shelby-county-v-holder-how-the-supreme-court-attacked-black-voting-rights/

The list of states and localities required by Section 5 of the Voting Rights Act to receive pre-clearance for changes to their voting laws were selected based on their history of discrimination. It is especially outrageous then that the Supreme Court Challenge to the Voting Rights Act came from a small administrative division in Alabama, a state with some of the fiercest repression against the Black liberation struggle in the lead-up to the passage of the VRA.

Before the passage of the Voting Rights Act in 1965, voting rights for Black people were so restricted and repressive that the act of going to vote carried within itself a militancy that threatened white-supremacist structures. Even as voting was supposedly legal, racist legal codes paired with racist legal violence denied Black people the vote. “In order to vote in Alabama,” wrote educator and community activist C. G. Gomillion in 1957, “one is legally required to possess certain specified qualifications. One must have been a bona fide resident within the State for two years, within the county for one year, and within the precinct or ward… for three months” [5].

Black people who registered to vote had to fill out a questionnaire prepared by the Justices of the Alabama Supreme Court. Some counties’ electoral officials would make up additional questions and force Black people to read and interpret parts of the Constitution [6]. If the Black person answered the questions to the white election officials’ satisfaction, the applicant would then need to swear allegiance to the U.S. and Alabama Constitutions, and then swear they were not nor had been a member of the Communist Party. Passing interrogations and pledging fealty, however, were not enough. “[T]he applicant must produce a “duly registered, qualified elector” who lives in the same county,” and who would confirm and vouch for the applicant. “After the voucher has testified, the application is ready for review” [7]. The review itself was conducted by the same racist electoral board only too willing to deny and delay granting suffrage.

“In many cases,” noted Gomillion, “if a Negro applicant fails to answer every question, or if he makes a single mistake, the application is not approved, the applicant is not notified, and is not given an opportunity to complete or correct his application” [8]. Many states, including Alabama, additionally levied poll taxes barring Black people and poor whites alike from voting. Another exclusionary technique was demanding that African Americans guess the number of jellybeans in a large bottle, an obviously impossible task.

The state of apartheid could only be maintained through acts of state-sponsored terrorism. In addition to the many restrictions on voting, Ming wrote, “there was the hooded, but not veiled threat of the Ku Klux Klan and similar groups” [9]. By the 1960s, racist mobs had murdered more than 4,000 Black men, women, and children, in addition to some white supporters. Black communist revolutionary Harry Haywood wrote of the state-sanctioned violence: “This ruling class savagery has a purpose: to strike terror into the hearts of the oppressed Negro people so that they dare not strike out for liberation” [10]. Lynchings, explained Haywood, played a vital role in dividing workers. The state could recruit mobs of racist white workers to carry out repression in support of the state. African Americans were deprived of the right to unionize and forced into segregated and grossly inferior realms of life in public transportation, jobs, housing, healthcare, and more.

Growing internal resistance was galvanized by the wave of social revolutions exploding throughout the Global South. The heroic anti-colonial struggle and the global fight against U.S. imperialism reverberated in the consciousness of Black Americans fighting for their own self-determination. In its global class struggle with the socialist camp, the maintenance of a legalized apartheid system became increasingly untenable for the U.S. ruling class. “This nation is fighting colored peoples by arms and money in Asia and Africa,” wrote W. E. B. Du Bois of the United States in 1952, Black people “want to get out of all participation in this attempt to reduce colored folk the world over to subordination” [11].

It was the masses of people that forced apartheid in retreat. “What defeated the racists was not the Supreme Court or any branch of government, but a mass movement. Hundreds of thousands of African Americans and supporters waged a heroic struggle confronting police dogs, beatings, jailing, torture and death to bring down Jim Crow tyranny in practice” [12].

## Negative

### Solvency

#### A decade of post-decision data shows no return of discriminatory “tests or devices” or voter suppression in formerly covered states—suggesting that the Court’s decision to strike down the outdated coverage formula was justified.

Hans von Spakovsky, 2023

Tenth Anniversary of Shelby County: Cause for Celebration

LEGAL MEMORANDUM No. 345 | November 17, 2023 EDWIN MEESE III CENTER FOR LEGAL & JUDICIAL STUDIES

https://www.heritage.org/sites/default/files/2023-11/LM345.pdf

It is important to remember that the symptom of discrimination that led Congress to the original coverage formula for Section 5 was: (1) the presence of a test or device intended to prevent individuals from registering and voting; and (2) the resulting low rate of registration and turnout of voters in presidential elections (when turnout is generally higher than congressional elections) in particular states, using the benchmark of less than 50 percent.

Therefore, if the critics of the Shelby County decision were correct that formerly covered states would once again begin implementing discriminatory “barriers” to registration and voting, including “tests or devices,” then the results would be seen in decreasing registration and turnout rates and in the suppression of voter participation, particularly in comparison to the supposedly “enlightened” states that were never covered and never subject to the preclearance requirement.

This year is the tenth anniversary of the decision, and there are now registration and turnout data from two presidential elections to examine. The data clearly shows that, contrary to the doom-and-gloom predictions of the critics, Shelby County did not result in the suppression of registration and turnout of voters.

No Test or Device. First, a review of the legislative actions of the nine states that were covered by Section 5 shows that none implemented legislation effecting any type of test or device as defined in Section 4 after the issuance of the Shelby County decision. According to the statute, a test or device means: [A]ny requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.22

In addition to its inclusion in the Section 4 coverage formula, there is a separate part of the VRA, 52 U.S.C. § 10501, that specifically prohibits “any test or device” that uses the same definition. The Civil Rights Division of the U.S. Justice Department is charged with enforcing all federal voting rights laws, including the VRA and this prohibition on tests and devices. Yet no enforcement lawsuits were filed by the Obama, Trump, or Biden Justice Departments after 2013 alleging that 52 U.S.C. § 10501 was violated by any state or local government

#### Post-decision presidential elections show formerly covered states far exceeding preclearance thresholds, contradicting suppression claims and affirming the Court’s ruling.

Hans von Spakovsky, 2023

Tenth Anniversary of Shelby County: Cause for Celebration

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https://www.heritage.org/sites/default/files/2023-11/LM345.pdf

Exceeding the Registration and Turnout Threshold. Second, none of the nine formerly covered states meets the second qualification contained in the Section 4 coverage formula of registration or turnout of less than 50 percent of its population in either the 2016 or 2020 presidential elections. Those are the relevant elections since both of them obviously occurred after the 2013 Supreme Court decision voiding the preclearance requirement of changes made in state voting laws and practices by state legislatures or local governments.

There are many different sources for determining the registration and turnout rates of voters, from the records maintained by states to private sources such as the U.S. Elections Project at the University of Florida.24 However, for the purpose of determining whether the preclearance regime should be reimplemented, as critics of Shelby County urge, the most appropriate source is the surveys conducted by the U.S. Census Bureau after every federal election, since it is the Census Bureau that was given the authority by Congress to determine which jurisdictions should be covered under another provision of the VRA, Section 203. Section 203 requires states and local jurisdictions that meet minimum population requirements for certain language minorities to provide voting materials that have been translated into the language of that particular language group.25

Congress declared that the “determinations of the Director of the Census” on which political jurisdictions are covered by Section 203 are “effective upon publication in the Federal Register and shall not be subject to review in any court.”26 Moreover, numerous cases have held that U.S. data from the Census Bureau are presumed to be accurate for purposes of enforcing federal voting rights laws.

The most accurate gauge of registration and turnout is the rate of registration and turnout of citizens—not the voting age population. The voting age population contains large numbers of individuals who are not entitled to vote, such as aliens, individuals declared legally incompetent, and convicted felons whose voting rights have not been restored. The registration and turnout rates of the citizen population in the 2016 and 2020 presidential elections of the nine states previously subject to the preclearance requirement are shown in Table 1

As is clear from the Census data, not a single one of the nine formerly covered states had registration or turnout rates in either presidential election below 50 percent. The registration rate in 2016 ranged from a low of 67.5 percent in Texas to a high of 79.5 percent in Mississippi, while the turnout rate of voters in 2016 went from a low of 55.4 percent in Texas to a high of 68.2 percent in Virginia. Thus, all of the states had registration and turnout rates well above the numerical threshold originally set by Congress for preclearance coverage.

to 71.9 percent in Arizona. Again, all of these states were well above the 50 percent threshold, and their registration and turnout rates were clustered around the national voter registration and turnout rates with no significant discrepancies. It is obvious from this data that none of these states took advantage of the end of the preclearance requirement to try to “suppress” the votes of residents by implementing discriminatory laws or practices.

#### Black voter registration and turnout remained high post-2013 in formerly covered jurisdictions, often outperforming non-covered states.

Hans von Spakovsky, 2023

Tenth Anniversary of Shelby County: Cause for Celebration

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https://www.heritage.org/sites/default/files/2023-11/LM345.pdf

The registration rate of black citizen voters in 2016 ranged from a low of 68.8 percent to a high of 81.4 percent, while the turnout rate went from a low of 50.9 percent to a high of 69.1 percent. In 2020, the registration rate ranged from a low of 60.5 percent to 83.1 percent, while turnout went from a low of 53.9 percent to a high of 72.8 percent. Again, the Census data show that the rate of registration and turnout of black citizen voters in 2016 and 2020 was above the 50 percent threshold of the original Section 4 formula.

The Census Bureau reports that turnout rates in the 2020 election— seven years after the Shelby County decision—were higher “across all race groups…non-Hispanic White, non-Hispanic Black, non-Hispanic Asian, and Hispanic race and origin groups.”3

Compare the performance of the formerly covered states to that of New York,35 the home state of Senator Chuck Schumer (D–NY), who called Shelby County a “notorious” decision “gutting the Voting Rights Act.”36 In the 2016 election, the registration rate in New York, according to the Census Bureau, was 66.5 percent—lower than every one of the nine formerly covered states. Its citizen turnout rate of 57.2 percent was also lower than every one of these states with the exception of Texas, whose turnout was 55.4 percent.

At 67.6 percent, the registration rate of black voters in 2016 in New York was lower than the registration rates of black voters in Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The 2016 turnout of 58.2 percent of black voters in New York was lower tan the turnout of black voters in the formerly covered states of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.

## DAs

### Federalism DA

#### Link: The Constitution creates a shared but distinct structure of election authority between state and federal governments. While coordination exists—especially through national political parties—the states retain meaningful autonomy and have long served as laboratories of democracy, experimenting with electoral reforms and expanding political participation beyond federal baselines. Overturning *Shelby Co.* would allow federal courts to override state-led election design disrupting this balance. It would erode federalism by centralizing control over elections in the judiciary, despite states’ proven track record of managing elections and often exceeding federal protections.

James A. Gardner, 2006 <Law Professor, University of Buffalo. SUNY Distinguished Professor, Research focus Constutional Law, Election Law, and Federalism>

“Elections”

Center for the Study of Federalism

https://federalism.org/encyclopedia/no-topic/elections/

Although the Constitution thus creates a formal system of substantially intermingled state and national authority over elections, an equally significant blurring of the boundaries of intergovernmental power has occurred outside the formal legal system under the auspices of the national political parties. In a development completely unanticipated by the framers, political parties quickly emerged and then organized themselves not into distinct state and national party systems, but into a single unified system in which the major parties coordinate partisan activity at both the state and national levels for the purpose of contesting offices at all levels. In this system, state and national officeholders are often able, in their capacity as party leaders, to exert significant influence on the way elections are conducted throughout the system, even where the formal allocation of authority might seem to deny them any influence. For example, although Congress has formally left the regulation of congressional apportionment to the states, members of Congress nevertheless typically exert significant influence on the way congressional districts, and even in many cases state legislative districts, are drawn by their state legislatures.

The extensive formal and informal interpenetration of state and national authority over elections has led to a certain degree of uniformity in electoral structures and practices around the nation. Nevertheless, states still possess considerable regulatory independence in certain areas, and have occasionally used this independence to grant their own citizens more extensive rights of political participation than the U.S. Constitution grants to Americans generally. Most prominently, states typically make many more offices elective than does the national government, including state-level cabinet posts, judicial positions, and numerous local offices. Many states provide opportunities for direct democracy through the initiative and referendum, and through requirements for popular approval of state or local fiscal measures. Some states impose tighter controls over elected officials than appear on the national level through the use of term limits, rotation in office requirements, or recall procedures. States have also occasionally introduced reforms such as nonpartisanship, alternative voting systems, innovative formats for primary elections, and remote voting electronically and by mail.

#### Link: Preclearance imposes an extraordinary and unconstitutional burden on state sovereignty, disrupting the balance of federalism by placing state election law under federal control.

William S. Consovoy and Thomas R. McCarthy,2012

 'Shelby County v. Holder: The Restoration of Constitutional Order' (2012-2013) 2012 Cato Supreme Court Review

At the same time, that undeniable success came at a high cost. Preclearance deviates from our constitutional order in fundamental ways. Under our system of government, states are sovereign in the field of state and local elections. Yet preclearance deprived them of the right to self-government. It is therefore difficult to overstate just how novel preclearance is. For example, the Americans with Disabilities Act prevents state and local courthouses from denying access to the handicapped.' But it does not require state and local governments to "preclear" their architectural drawings with DOJ before breaking ground on a new building. Therein lies the difference. It is one thing to ban discrimination in voting. It is another to place an entire region of the country in federal receivership.

#### VRA violates states' rights—coverage formula imposes unequal burdens based on outdated data

Nina Totenberg, June 25, 2013

Supreme Court: Congress Has To Fix Broken Voting Rights Act

https://www.npr.org/2013/06/25/195599353/supreme-court-up-to-congress-to-fix-voting-rights-act

"In 1965, the states could be divided into two groups: those with a recent history of voting tests and low voter registration and turnout, and those without those characteristics," Roberts said. "Congress based its coverage formula on that distinction. Today, the nation is no longer divided along those lines, yet the Voting Rights Act continues to treat it as if it were."

The coverage formula therefore unconstitutionally invades the sovereignty of the covered states and, based on outdated data, imposes on them a burden that it does not impose on other states.

"Our country has changed," the chief justice said, "and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."

### Democracy DA

#### Declining public trust in the federal government undermines democratic legitimacy and effective governance. Persistent low trust—especially polarized along partisan lines—can erode democratic norms, reduce civic participation, and weaken institutional accountability.

Pew Research Center, June 24, 2024

Public Trust in Government: 1958-2024

https://www.pewresearch.org/politics/2024/06/24/public-trust-in-government-1958-2024/

When the National Election Study began asking about trust in government in 1958, about three-quarters of Americans trusted the federal government to do the right thing almost always or most of the time.

Trust in government began eroding during the 1960s, amid the escalation of the Vietnam War, and the decline continued in the 1970s with the Watergate scandal and worsening economic struggles.

Confidence in government recovered in the mid-1980s before falling again in the mid-’90s. But as the economy grew in the late 1990s, so too did trust in government. Public trust reached a three-decade high shortly after the 9/11 terrorist attacks but declined quickly after. Since 2007, the shares saying they can trust the government always or most of the time have not been higher than 30%.

Today, 35% of Democrats and Democratic-leaning independents say they trust the federal government just about always or most of the time, compared with 11% of Republicans and Republican leaners.

Democrats report slightly more trust in the federal government today than a year ago. Republicans’ views have been relatively unchanged over this period.

Since the 1970s, trust in government has been consistently higher among members of the party that controls the White House than among the opposition party.

Republicans have often been more reactive than Democrats to changes in political leadership, with Republicans expressing much lower levels of trust during Democratic presidencies. Democrats’ attitudes have tended to be somewhat more consistent, regardless of which party controls the White House.

However, Republican and Democratic shifts in attitudes from the end of Donald Trump’s presidency to the start of Joe Biden’s were roughly the same magnitude.

#### While national trust in government and elections remains low, confidence in local election processes remains high offering a critical opportunity to rebuild broader trust in democracy. Local election administration is decentralized, transparent, and secure, which voters recognize.

 [Michael Caudell-Feagan](https://www.pewtrusts.org/en/about/leadership/michael-caudell-feagan) October 17, 2024

How to Restore Trust in Elections

https://www.pewtrusts.org/en/trend/archive/fall-2024/how-to-restore-trust-in-elections

But despite that measure of concern, the Center’s poll also offers some guidance on how to rebuild trust. It found that the closer an election is held to home, the more confident Americans are: The poll found that 74% of respondents are confident that votes will be counted accurately in their community compared with 64% believing that votes would be accurately counted throughout the country.

The findings aren’t an outlier. Going into the 2022 midterm elections, Pew Research Center found that 70% of registered voters believed that elections would be well run at the national level, and that number increased to 90% when respondents were asked about their expectations on how elections in their community would be administered.

The confidence gap between how elections are conducted at the community, and national levels is an opportunity to restore trust in our elections—not just in the November elections, but in the coming years. Restoration of trust will take time.  And over that time it’ll be essential to educate voters on how—and how well—America’s election process works.

The facts show that elections are well run in the United States. Today, more than 10,000 jurisdictions accommodate more than 160 million registered voters in school gymnasiums, community centers, town halls, and houses of worship all across the country. And local election offices are overseen by trained, dedicated public servants and supported by volunteer poll workers who are neighbors of those voting.

These events happen at the community level. No single point of access exists; no grand “election office” can be hacked. Rather, numerous measures, devised by states and localities, ensure that the process is fair and accurate. It begins with registration and improved methods for removing people from the rolls when they move or otherwise become ineligible to vote, continues with testing of voting equipment and the monitoring of polls, and ends with paper trails to allow audits that ensure the results have been tabulated correctly.

Let’s look at these safeguards more closely: Every state has a process for testing the equipment used for voting and tabulation before elections to verify that it’s working. Representatives of the political parties or the public also observe the polls and monitor vote counting in many states. Election officials must follow strict chain of custody procedures to document the location of the ballots and voting equipment, with seals and signatures required at various steps. And federal law requires that the ballots and other materials be retained for 22 months should a recount or investigation be necessary—and voting systems must produce a paper record for such purposes.

## CPs

### Coverage Formula CP

#### Text: The United States Congress should enact federal legislation that updates the coverage formula under Section 4 of the Voting Rights Act of 1965. The updated formula should be based on current and ongoing data concerning voting rights violations, racial disparities in voter turnout, and patterns of discriminatory voting laws or practices nationwide. This legislation should ensure that preclearance requirements apply only to jurisdictions with recent and demonstrable histories of voter suppression in these areas:

* Recent court findings of voting rights violations,
* Disparities in minority registration and turnout,
* Passage of voting laws with racially disparate impacts.

#### Congress can fix preclearance—Court invites legislative update of VRA coverage formula

Nina Totenberg, June 25, 2013

Supreme Court: Congress Has To Fix Broken Voting Rights Act

https://www.npr.org/2013/06/25/195599353/supreme-court-up-to-congress-to-fix-voting-rights-act

Roberts noted that the court had clearly signaled this problem four years ago, when it avoided a constitutional ruling on the voting rights law. In essence, he said that the court had warned Congress it was time to update the coverage formula, and Congress did nothing.

He also noted that Congress is still free to design a new and modernized coverage formula — something that it has not done in the past largely because it was politically impossible. No new jurisdiction wants to be labeled a bad actor under a new formula. And leaders of both parties said repeatedly in 2006 that the law's existing system worked well.

Joining Roberts' opinion on Tuesday were Justices Anthony Kennedy, Samuel Alito, Antonin Scalia and Clarence Thomas. Thomas wrote separately to say that he would have struck down more than the coverage formula. He would have invalidated the concept of pre-clearance as unconstitutional, too, and he pointed to language in the chief justice's opinion that would allow the court to invalidate the pre-clearance provision even if the coverage formula is rewritten.

#### Congress can restore VRA—Shelby ruling spurred bipartisan calls for legislative fix

Nina Totenberg, June 25, 2013

Supreme Court: Congress Has To Fix Broken Voting Rights Act

https://www.npr.org/2013/06/25/195599353/supreme-court-up-to-congress-to-fix-voting-rights-act

Sherrilyn Ifill, president of the NAACP Legal Defense Fund, called the decision "a game changer" that "leaves virtually unprotected minority voters in communities all over this country." Standing outside the Supreme Court immediately after the decision was announced, she said, "We will not soft-soap it. This is a real threat, but we believe strongly Congress can fix it."

President Obama and Attorney General Eric Holder echoed that thought.

"I am hopeful that new protections can and will pass this session of Congress," Holder said. "This is not a partisan issue, it's an American issue — because our democracy is founded on ensuring that every eligible citizen has access to the ballot box."

### State Courts CP

#### Text: The 50 U.S. state governments should enact and enforce state constitutional provisions and statutes that empower state courts to proactively protect minority voting rights

#### Because the right to vote is not self-executing, state institutions are better positioned than federal courts or Congress to respond to local needs and ensure functional, equitable elections.

Wilfred U. Codrington III, 2023 < Wilfred U. Codrington III is the Walter Floersheimer Professor of Constitutional Law at Cardozo Law School. He is also a fellow at the Brennan Center for Justice. >

The State Court Report. “Voting Rights Under State Constitutions, Explained.”

<https://statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained>

**What do** state constitutions **say about elections and the right to vote?**

Quite a lot. First and perhaps foremost, they expressly confer the right to vote on their citizens. While the operative language varies some with each state, 49 of the 50 state charters recognize it in affirmative terms (e.g., citizens shall be entitled to vote). Arizona’s constitution, the outlier, frames the right more indirectly.

But these documents go beyond merely establishing the right to vote. [More than half contain clauses](https://www.ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions) mandating that elections be “free,” “equal,” or “open.” A similar number of state charters extend additional guarantees to voters, including ones that protect them as elections are underway by immunizing them from arrest while casting ballots and traveling to polling places, as well as disallowing military and civil interference with voting. [**The suffrage provision of Oklahoma’s constitution**](https://oksenate.gov/sites/default/files/2019-12/oc3.pdf), for example, possesses all three of these attributes.

Importantly, the right to vote is not self-executing: states and localities must design electoral systems and related voting infrastructure, as well as rules to govern those who run elections. State constitutions recognize this in various ways, but especially through provisions that regulate public officials, charging them with duties and granting them special authorities to operationalize and safeguard the right to vote.

State constitutions generally call for the state to institute election infrastructure. The [Illinois Constitution](https://www.ilga.gov/commission/lrb/conent.htm), for example, expressly obligates lawmakers to draft uniform laws for this purpose, including those that specify residency requirements, create and maintain registration systems, and aim to preserve ballot secrecy. In neighboring Kentucky, where the legislature is similarly required to establish a system for voter registration, the [constitution](https://legislature.ky.gov/LRC/Publications/Informational%20Bulletins/ib210.pdf) includes the added mandate to ensure those who are “illiterate, blind, or in any way disabled” are able to cast votes and have them counted. Among the tasks that the [Wyoming Constitution](https://sos.wyo.gov/Forms/Publications/WYConstitution.pdf) requires of its legislature is to enact laws “to secure the purity of elections, and guard against abuses of the elective franchise,” as well as to “designate the courts” to preside over certain election contests and claims.

Indeed, state constitutions include an array of language ordering lawmakers to engage in certain conduct aimed at promoting broad participation in elections, ensuring that they are administered on fair and equal terms, and warding off the potential for fraud ([**which is vanishingly rare**](https://www.washingtonpost.com/politics/2022/11/01/truth-about-election-fraud-its-rare/)) and other improper activity that could undermine electoral legitimacy.

Several state constitutions further complement these and other important election duties with powers that are more permissive in nature. That is, these charters authorize officials to exercise their judgment as to what is necessary to ensure that elections are run in a manner that upholds deeply embedded political values. State lawmakers in [Mississippi](https://www.sos.ms.gov/content/documents/ed_pubs/pubs/Mississippi_Constitution.pdf) and [Virginia](https://law.lis.virginia.gov/constitutionfull/), for example, are granted very broad authority over the right to vote. Their respective charters complement the legislatures’ responsibility to provide for voter registration with the authority to devise and enforce voter qualifications beyond “those set forth in [the] Constitution” and “to make any other law regulating elections not inconsistent” therewith. In other states, the grant of power is much narrower. Under the [New Jersey charter](https://www.nj.gov/state/archives/docconst47.html), for instance, the legislature may provide for absentee voting as well as the disenfranchisement of those with certain crimes.

#### Unlike the U.S. Constitution, which only implies a right to vote and relies on judicial construction and federal law like the Voting Rights Act, state constitutions explicitly and robustly protect voting rights. State charters typically include detailed suffrage provisions, guarantee fair and equal elections, and establish clear frameworks for election administration—making them a more complete and direct source of voting rights. This affirms that election law and the protection of voting rights are better handled by states, where constitutional language is more tailored, expansive, and responsive to local democratic needs.

Wilfred U. Codrington III, 2023 < Wilfred U. Codrington III is the Walter Floersheimer Professor of Constitutional Law at Cardozo Law School. He is also a fellow at the Brennan Center for Justice. >

The State Court Report. “Voting Rights Under State Constitutions, Explained.”

<https://statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained>

How do state constitutions differ from the federal Constitution with respect to the right to vote?

To a certain extent, the U.S. Constitution could not be more distinct from its state counterparts with regard to the right to vote. There is certainly some overlap, perhaps most notably the antidiscrimination provisions common to both. Like the federal Constitution, state constitutions prohibit discrimination in voting based on characteristics like race, sex, and (insofar as someone is at least 18 years old) age. But that is almost it. Even as the 50 state constitutions vary in what they say about voting rights, the differences between them collectively and the federal charter are far more vast and important.

For one, instead of setting it out explicitly, the federal Constitution [**implies**](https://www.theatlantic.com/ideas/archive/2021/09/framers-would-have-wanted-us-change-constitution/620249/) that there is a right to vote, suggesting it through provisions that guarantee a republican form of government, for example, and outlaw discrimination in elections. Importantly, the right to vote under the U.S. Constitution has been further “constructed” — or developed and elaborated on — with the enactment of important national legislation like the Voting Rights Act and through judicial decision-making in a series of landmark cases, especially from the civil rights era.

The scant provisions in the Constitution that do pertain to voting, moreover, all rely on the existence of the right to vote under state constitutions. The [Constitution incorporates voter qualifications](https://www.law.cornell.edu/constitution-conan/article-1/section-2/clause-1/voter-qualifications-for-house-of-representatives-elections) set out in state constitutions and, in general, relies on laws adopted by state legislatures — entities created by state charters — to institute and administer electoral contests throughout the country. Given that state constitutions regulate the franchise broadly, including by setting the most important terms of the right to vote in both state and federal elections, one might fairly think about the American constitutional system as fostering not federal elections, but state elections for national and state offices.

But the distinctions do not end there. There are important structural and other differences between the U.S. Constitution and its state counterparts that render the latter, in a sense, more “complete” with respect to voting rights. Whereas the language governing voting is strewn throughout the U.S. Constitution, the election provisions tend to be more consolidated in state charters. Indeed, every state constitution contains an entire article dedicated to suffrage, elections, and voting rights, and several constitutions contain multiple articles. Most crucially, state constitutions are clearer than the federal Constitution regarding their application to a range of contested issues that implicate voting rights, including elector registration, ballot secrecy and other components of election administration, electoral contests and legal disputes, political party primaries, and campaign finance. For instance, in adjudicating claims regarding the structure of primary elections, the Supreme Court relies on [interpretations of the First Amendment](https://supreme.justia.com/cases/federal/us/530/567/#tab-opinion-1960797) — a provision that speaks about political association generally. In a state like California, however, the state constitution contains provisions that govern political parties and primary elections more specifically.

Nothing in the foregoing discussion should be taken to suggest that state constitutions are the source of all constitutional voting rights protections and, conversely, that the federal charter offers none. Much to the contrary. The right to vote is guaranteed by — and can be vindicated under — each of the nation’s 51 constitutions. The extent to which federal and state constitutional protections coincide (as they sometimes do) is very contextual, dependent on the specific facts and other variables like the nature of the vote deprivation claim and the state in which the alleged injury arises. Yet, despite the overwhelming attention dedicated to it, “federal law is not the only source of the constitutional right to vote.” Indeed, as [Professor Josh Douglas argues](https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1211&context=vlr), despite the text and design of state charters, which often presents clear and unique hooks on which to stake a claim, “the scope of voting rights under state constitutions [is] an overlooked source of the right to vote.”

### Kritiks

### Racial Capitalism

#### U.S. voting rights systems are not neutral but are deeply embedded in coloniality and racialized capitalism. The historical narrative of voting rights has operated alongside voter suppression, reinforcing a system that privileges white, cisgender, heterosexual, capitalist subjects. This system marginalizes Indigenous sovereignty, excludes non-white and non-citizen voices, and perpetuates imperialism and state violence. Instead of reinforcing these exclusionary structures through electoral participation, efforts should focus on dismantling the imperial political economy that underpins the U.S. state and its governance.

V. Jo Hsu, 2020

QUARTERLY JOURNAL OF SPEECH 2020, VOL. 106, NO. 3, 269–276 https://doi.org/10.1080/00335630.2020.1785636

Voting rights, anti-intersectionality, and citizenship as containment

While many accounts of U.S. history position these developments as opposing forces— voting rights and voter suppression—they have often operated in tandem to imagine a citizenry of heterosexual, productive (and reproductive) capitalist workers. Native Americans could acquire land and citizenship if they renounced tribal ways of life. Black Americans could vote if they could prove economic and educational backgrounds characteristic of white, middle-class respectability. Immigrants were admitted based on marital ties and professional qualifications—a sentiment echoed in 2019 by President Trump’s immigration plan, which prioritizes “exceptional students and workers” who “have much to contribute.” 21 Today, U.S. territories do not have voting representation in U.S. Congress, and U.S. citizens in those territories have no electoral votes for president. This means that Puerto Rico had no say in the executive who continually denied or delayed disaster aid to the millions impacted by Hurricanes Irma and Maria in 2017 and then again by a series of earthquakes in 2019–2020.22 These policies conspire with a host of other restrictions enforced by legislated voter suppression, gerrymandering, immigration policy, law enforcement and the carceral system, as well as federal relations with Indigenous nations and unincorporated territories that suppress the voices of the governed.

In a world where state and social discrimination are responsible for uncountable premature deaths, voter mobilization and electoral reform have been used in heroic efforts to reduce harm. U.S. democracy, however, imposes (white, cisgender, heterosexual) majority rule on forcibly occupied land. It was designed in direct opposition to Indigenous sovereignty and in denial of the historic and ongoing harms required to sustain U.S. imperialism. Enjoinders like “don’t boo, vote” 23 channel justifiable anger into a limited means of change. In addition to the lessons we take from women’s suffrage about courageous leadership, mass mobilization, and unlikely alliances, I wonder what we might learn from its shortfalls—from the reinforcement of anti-intersectional vocabularies and praxis, and from the misplaced faith in a corrupt system of governance. I wonder how we can route our energies and care into actions that disrupt the authority of an imperial political economy24 and that counter coloniality’s drive to divide and disempower. As a recent immigrant to this land (someone who might be called a “settler of color,” “arrivant,” or “alien”),25 I should not be at the forefront of decisions about how to heal from these histories. As someone who inhabits and participates in these systems of governance, though, I should be here—asking questions about how we build a future that honors Indigenous sovereignty, that takes responsibility for U.S. slavery and institutionalized anti-blackness, and that foregrounds the imbrications of our oppressions and of our avenues toward healing

### Antiblackness

#### The endurance of racial caste in the U.S. is sustained by legal structures that uphold racial hierarchies. Laws have systematically undermined the promises of the Reconstruction Amendments—substituting equal protection with "separate but equal" and disenfranchising Black Americans through restrictive voting laws. Though overruling the plan may seem like a step in the right direction, it still is retrenching the system that upholds institutionalized racism.

Michele Goodwin, 'Law and Anti-Blackness' (2021) 26(2) Michigan Journal of Race & Law 261

https://heinonline.org/HOL/P?h=hein.journals/mjrl26&i=273

Today, the endurance of racial caste cannot be maintained without the structures and forces of law. Vertical, racial hierarchies reshaped laws, and in so doing, reduced the impact of the Reconstruction Amendments for more than a century. Sadly, laws rendered the Amendments virtually meaningless by replacing equal protection with "separate but equal" and voting rights with expanded, dubious requirements and restrictions. Even the Thirteenth Amendment's abolition of slavery is punctuated by a Punishment Clause, which legalizes slavery in the United States so long as an individual has been convicted of a crime. The Punishment Clause provided the foundation on which southerners committed to slavery could and did expand coerced labor. It has yet to be repealed.

# Rucho v. Common Cause

## Case Overview

* **Case Name:** *Rucho v. Common Cause*, 588 U.S. \_\_\_ (2019)
* **Date Decided:** June 27, 2019
* **Issue:** Whether claims of **partisan gerrymandering** are justiciable in federal courts under the U.S. Constitution.

**Parties:**

* **Petitioner:** Robert A. Rucho and other North Carolina legislators (Republicans).
* **Respondents:** Common Cause and the League of Women Voters of North Carolina.

**Majority Opinion (Chief Justice Roberts, joined by Thomas, Alito, Gorsuch, Kavanaugh):**

* **Held:** Partisan gerrymandering claims present **nonjusticiable political questions**. Political Question Doctrine becomes the standard here for partisan gerrymandering cases.
* Courts **cannot decide** when political gerrymandering goes too far because:
	+ **No judicially manageable standards** exist to determine the constitutionality of a partisan gerrymander.
	+ The Constitution **does not provide a clear rule** for courts to apply.
* **Remedy must come from states or Congress**—not the judiciary.
* Quoted the Court’s role as ensuring **legal fairness**, not **political fairness**.

“Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is incompatible with democratic principles does not mean that the solution lies with the federal judiciary.”- CJ Roberts

**Dissenting Opinion (Justice Kagan, joined by Ginsburg, Breyer, and Sotomayor):**

* Kagan called the decision a **failure of judicial duty**.
* She argued that **partisan gerrymanders deprive citizens of their right to participate equally in the political process**.
* Courts **can** and **should** develop manageable standards, and several lower courts already had done so.
* She warned the decision **green-lights extreme gerrymandering**, damaging the foundations of representative democracy.

**Important to note this case does distinguish the difference between partisan gerrymandering and racial gerrymandering. Racial gerrymandering is unconstitutional and can be ruled that way by the courts.**

## Controversy

#### Rucho v. Common Cause exemplifies the Roberts Court’s use of the political question doctrine to abandon judicial responsibility and legitimize anti-democratic gerrymandering.

**Emmet J. Bondurant, 2021**

https://heinonline.org/HOL/P?h=hein.journals/emlj70&i=1076

"Rucho v. Common Cause - A Critique." Emory Law Journal, vol. 70, no. 5, 2021, pp. 1049-1090. HeinOnline.

"No case shows more vividly that the conservative justices have abandoned the commitment to democracy and equality that was at the core of the Warren Court's work" than Rucho v. Common Cause. In Rucho, the Supreme Court had a perfect opportunity to end partisan gerrymandering.

Although members of the Supreme Court on both the right and the left agree partisan gerrymandering is "incompatible with democratic principles" and "leads to results that reasonably seem unjust," the Court voted along party lines and held 5-4 that the constitutionality of partisan gerrymandering is a political question that is beyond both the competency and the jurisdiction of the federal courts.

Partisan gerrymanders are based on "the idea that one group can be granted greater voting strength than another [that] is hostile to the one [person], one vote basis of our representative government." Partisan gerrymanders operate by vote dilution,"jeopardize[] the ordered working of our Republic and of the democratic process[,] . . . [a]nd amount[] to rigging elections."

In Rucho v. Common Cause, the Roberts Court's "conservative majority has taken the Court's election jurisprudence on another pro-partisanship turn." Inholding the constitutionality of partisan gerrymandering to be a political question that is beyond the jurisdiction of the federal courts, the Court reversed decisions of district courts that had declared unconstitutional partisan gerrymanders of congressional districts in North Carolina and Maryland that the Court agreed were "highly partisan by any measure" and "involve[d] blatant examples of partisanship driving districting decisions."

 In North Carolina, for example, Representative David Lewis, the Republican co-chair of the reapportionment committee, declared that "electing Republicans is better than electing Democrats" and drew the 2016 congressional map "to give a partisan advantage to 10 Republicans and 3 Democrats because . . . it [was not] possible to draw a map with 11 Republicans and 2 Democrats."

The Republican legislature in North Carolina made no attempt to defend the constitutionality of partisan gerrymandering on the merits. It did "not argue-and ha[s] never argued-that the 2016 Plan's intentional disfavoring of supporters of non-Republican candidates advances any democratic, constitutional, or public interest."

 Chief Justice Roberts, nevertheless, said "that the solution" to partisan gerrymandering does not "lie with the federal judiciary."" The Court held for the first time in recent history that the constitutionality of partisan gerrymandering is a "political question beyond the reach of the federal courts."

The majority did not stop there. Although the majority insisted that "[o]ur conclusion does not condone excessive partisan gerrymandering," the Chief Justice and the Republican majority endorsed the constitutionality of partisan gerrymandering in an advisory opinion, despite having ruled that the Court had no jurisdiction of partisan gerrymandering claims.

There is a striking contrast between the Chief Justice's opinion in Rucho and his opinion in McCutcheon v. FEC. In McCutcheon, the Chief Justice emphasized that "there is no right more basic in our democracy than the right to participate in electing our political leaders," and that "those who govern should be the last people to . .. decide who should govern."

By contrast, in Rucho, Chief Justice Roberts said that "legislatures have the authority to engage in a certain degree of partisan gerrymandering," and that voters "cannot ask for the elimination of partisanship" in redistricting. "The basic reason is that while it is illegal for a jurisdiction to depart from the oneperson, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering." The Chief Justice said that even when the predominant intent of a redistricting plan is to "secur[e] [a] partisan advantage," that intent is "permissible" and "does not become constitutionally impermissible like racial discrimination, when that permissible intent 'predominates."'

The Court's decision is a body blow that will undermine public confidence in the democratic process and republican government whose legitimacy is dependent on the consent of the governed and the fairness of our elections. Rucho will also undermine public confidence in the independence of the Supreme Court itself as an impartial and non-partisan judicial body.

#### Rucho v. Common Cause reaffirms the political question doctrine as a critical separation-of-powers safeguard that limits judicial intervention in election law.

Kate Hardiman Rose, 2022

https://heinonline.org/HOL/P?h=hein.journals/geojlap20&i=772

"Restoring the Proper Role of the Courts in Election Law: Toward a Reinvigoration of the Political Question Doctrine." Georgetown Journal of Law & Public Policy, vol. 20, no. 2, Summer 2022, pp. 755-778. HeinOnline

A distinction between legal and political questions has existed in American law for over two hundred years. In *Marbury v. Madison,* the Court recognized that "[q]uestions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court." A recognition of our tripartite structure of government, the doctrine is "primarily a function of the separation of powers."" At its historical core, the doctrine is a jurisdictional bar-it excludes certain questions from Article III review altogether (including constitutional claims) if they are within another branch's purview."

Early applications of the political question doctrine reflected a strict approach to justiciability. For example, in *Oetjen v. Central Leather Corporation,* the Court broadly held that the conduct of foreign relations "is committed by the Constitution to the Executive and Legislative-'the political'-Departments" and "is not subject to judicial inquiry or decision." The Court has also historically refused to decide cases involving questions of war or the recognition of foreign nations. On the domestic front, the Court has declined to adjudicate cases challenging the validity of federal constitutional amendments under Article V of the Constitution on political question grounds." And, most strikingly, in the period before *Baker v. Carr,* the Court "dismissed *every* constitutional challenge to state apportionment laws, usually on political question grounds," except one. The lone exception, *Gomillion v. Lightfoot,* invalidated a racial gerrymander that "single[d] out a readily isolated segment of a racial minority for special discriminatory treatment" in violation of the Fifteenth Amendment.

The political question doctrine has evolved since its earlier strict applications to reflect prudential concerns. Among them are concerns about judicial competence to address certain categories of questions and the hope that the other branches will work out political disputes, as they have done throughout history, without involving the courts. The Warren Court's preference for judicial supremacy -that judges are, and should be, supreme expositors of the Constitution-also underlies the doctrine's evolution." As the political question doctrine became more about prudence and less about the Constitution's tripartite allocation of power, judges also have more discretion to reject it. Indeed, the political question doctrine continues to be applied whole-heartedly in some contexts and hardly at all in others. It remains highly relevant to foreign affairs, war, impeachment issues, and political gerrymandering. Yet, the political question doctrine played almost no role in the myriad pre-2020 lawsuits about election procedures. Today, there are more questions about the doctrine's applicability than answers. *Baker v. Carr,* in purporting to establish the modern political question doctrine, effectively sowed the seeds of its destruction for election law disputes that do not revolve around political gerrymandering.

…..It continues…..

<omitted page 760-766 as it is discussing another election law in depth that was not decided by the PQD>

The Supreme Court recently applied and defended the political question doctrine in Rucho v. Common Cause.97 In Rucho, North Carolina and Maryland voters challenged the states' congressional district maps as unconstitutional partisan gerrymanders under the First Amendment, the Equal Protection Clause, the Elections Clause, and Article I, Section 2.98 The Court held that such partisan gerrymandering claims present nonjusticiable political questions. 99 It reasoned that the partisan gerrymandering challenge fails *Baker's* prong of "judicially discoverable and manageable standards" because the issue boils down to "determining when political gerrymandering has gone too far." 100 In other words, the Court was faced with a threshold question of fairness. As the Court acknowledged, "it is not even clear what fairness looks like in this context," and "it is only after determining how to define fairness that you can even begin to answer the determinative question: 'How much is too much?"

The Court also pointed to prudential concerns about the consequences of deciding whether partisan gerrymanders are constitutional:

The expansion of judicial authority would not be into just any area of controversy,

but into one of the most intensely partisan aspects of American political

life. That intervention would be unlimited in scope and duration-it would

recur over and over again around the country with each new round of districting,

for state as well as federal representatives. Consideration of the impact of

today's ruling on democratic principles cannot ignore the effect of the

unelected and politically accountable branch of the Federal Government

assuming such an extraordinary and unprecedented role.

And Justice Frankfurter rolls over in his grave. These concerns about the political thicket were precisely those he echoed when the Court declined to apply the political question doctrine in *Baker.* As Part V will demonstrate, Rucho's reasoning should be used to undo the Anderson-Burdick test's stranglehold on election law. Doing so will also allow for a reinvigoration of the political question doctrine in election law, aligned with the Framers' original design of our tripartite government.

## Affirmative

### Solvency

#### Rucho v. Common Cause represents a dangerous and deliberate judicial abdication—a cloaked radicalism that masks voter suppression behind the illusion of judicial restraint.

Frances Hill, 2021

"Partisan Gerrymanders: Upholding Voter Suppression and Choosing Judicial Abdication in Rucho v. Common Cause." University of Miami Law Review, vol. 75, no. 2, 2021, pp. 459-508. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/umialr75&i=468

In Rucho v. Common Cause, the Supreme Court held that partisan gerrymandering is a nonjusticiable political question and remanded the two cases before the Court to the appropriate United States district courts "with instructions to dismiss for lack of jurisdiction."' The majority opinion, written by Chief Justice John Roberts, located the issues raised by partisan gerrymanders not in the jurisprudence of voting and voting rights but in a series of narrow claims relating to what he portrayed as the inability of the federal courts to craft appropriate legal standards and remedies.2

The dissent, written by Justice Elena Kagan, focused on voters, voting, and the sovereignty of the people.3 It is grounded in constitutional values and the values of a democratic republic. 4 It is a passionate repudiation of virtually every element of the majority's opinion.5 It excoriated the majority for what the dissent concluded was the majority's failure to fulfill the duty of the federal courts to uphold the concept that in the United States the people are sovereign. 6

The majority found the issue of partisan gerrymandering technically beyond the capacity of the courts to craft legal standards, but it did not find that partisan gerrymandering posed any difficulty to the operation of the constitutional system.' The majority noted that partisan gerrymanders had been controversial from the beginning of the republic.' It concluded that the United States could continue to live with partisan gerrymandering.

The dissent focused on what it regarded as the existential threat that partisan gerrymandering posed to the sovereignty of the people. 10 It dismissed the majority's complacency based on historical experience by analyzing the changes in partisan gerrymanders over time and concluded that partisan gerrymanders both diluted the vote of individuals and undermined the constitutional structure based on the sovereignty of the people." It pointed out to the majority that "[t]hese are not your grandfather's-let alone the Framers'-gerrymanders." 1 2 These were instead stratagems for enduring entrenchment of a particular political party in power. 13 In sum, the dissent found that partisan gerrymanders, which were always a problem, had become so dangerous that the Supreme Court had a duty to craft a remedy.14 The dissent pointed out that the majority's abdication of its constitutional duty was not only wrong, but it was also unnecessary.15 Accusing the majority of failing to understand the opinions of the lower courts, the dissent claimed that the lower courts had already offered a methodology allowing courts to decide cases involving partisan gerrymanders.

Each of these opinions is complex and consequential. The majority opinion is a carefully crafted enigma that can only be described as radical. But its radicalism was carefully concealed in what it presented as technical issues relating to the definition of standards and the application of appropriate legal tests.17 It ended with an offramp for the federal courts and an unpersuasive denial that this judicial abdication left the people of the United States no access to justice relating to the vote dilution on which partisan gerrymanders are built.18 The majority reached this radical conclusion by discussing partisan gerrymanders without locating that discussion within election jurisprudence, without acknowledging the harm that partisan gerrymanders inflict on individual voters, who are only allowed to cast a diluted vote, without acknowledging the harm to democracy itself and with only occasionally referencing the constitutionality of certain partisan gerrymanders.

Efforts in the majority opinion to reconcile the reasoning with the result required a careful analysis of not only what was written but how it was written, as well as a careful consideration of what was not written. Silence played a significant role in the majority opinion. This is well-concealed radicalism undermining the very foundation of the Constitution-the principle that the people choose their government and the principle that government is accountable to the people.

The dissent offered a reminder of the role of voters and voting as the source of sovereignty under the Constitution. 20 Silence played no role in the dissenting opinion. The dissent documented the harms inflicted on individual citizens and on the democratic system through partisan gerrymandering.21 Without honest elections, the foundational premise of the Constitution has no operational meaning. Without access to federal courts, voting rights cannot be protected and voter suppression cannot be combatted. Treating the question of partisan gerrymandering as nonjusticiable imposes lasting harm without meaningful remedies on both individual voters and the democratic system. At the same time, so the majority seemed to claim, it will protect the Court from undue entanglement in contested and divisive issues." In short, the Court cast its vote for voter suppression without appearing to do so.

How did this happen? It happened because there was a majority on the Court that supported an opinion that was carefully and cleverly designed to produce the result that partisan gerrymanders are not justiciable. 23 In other words, there was a majority on the Court for this form of voter suppression. Why this was so is itself an intriguing question, but it is not the question addressed in this Article. Here, the focus is on how the majority crafted its opinion without acknowledging what it was doing.

Judicial opinions are not simply a discussion of the law as applied to the facts of a case. Opinions are constructed.24 They reflect both tactical and strategic considerations. In other words, judicial opinions reflect a conscious, intentional framework identifying the issues the opinion will and will not discuss, the facts that it will and will not acknowledge, the precedents it will rely on and past cases that it will not mention. Judicial opinions end in a manner consistent with how they begin.26 Frameworks usually include what may be called a game plan dealing with how the elements of the framework will be presented, what will be the tone of the opinion, and what kind of language will be used to present essential claims. Judicial opinions do not explicitly articulate the framework or the game plan. 28 Sometimes these frameworks, along with the embedded game plans, are obvious, and sometimes they are not.29 Sometimes it is possible to understand the reasoning in an opinion without focusing directly on the framework and the game plan. Rucho is not one of those cases.

#### Despite claiming partisan gerrymandering is a political question, the Court improperly endorsed it—making a hypocritical and unconstitutional advisory opinion.

**Emmet J. Bondurant, 2021**

https://heinonline.org/HOL/P?h=hein.journals/emlj70&i=1076

"Rucho v. Common Cause - A Critique." Emory Law Journal, vol. 70, no. 5, 2021, pp. 1049-1090. HeinOnline.

Second, although the Court concluded in Rucho "that partisan gerrymandering claims present political questions beyond the reach of the federal courts," 28 the Chief Justice and the Republican majority did not let absence of jurisdiction and judicially manageable standards prevent them from endorsing the constitutionality of partisan gerrymandering in an advisory opinion. Although the Supreme Court has never ruled on the constitutionality of partisan gerrymandering, the Chief Justice declared that state "legislatures have the authority to engage in a certain degree of partisan gerrymandering," 29 and that "constitutional political gerrymandering" is not illegal under the Constitution. 30

Not only was this endorsement of the constitutionality of partisan gerrymandering an extreme departure from established judicial norms, but it also "impermissibly inject[s] the Government into the debate over who should govern" and is a hypocritical contradiction by Chief Justice Roberts of his dictum in McCutcheon that "those who govern should be the last people to help decide who should govern." 3

"Constitutional partisan gerrymandering" is an oxymoron. There are no exceptions for partisan gerrymanders in either the First Amendment or the Equal Protection Clause that immunize partisan gerrymanders from judicial review or authorize state legislatures to engage in a "certain degree of political gerrymandering." 32 There is no more room in the Constitution for a certain degree of partisan gerrymandering than there is room for any other form of vote dilution or viewpoint discrimination-as long as the legislatures do not go too far and their discrimination is not too "extreme."

#### Rucho should be overturned—partisan gerrymandering claims are justiciable, and Roberts Court’s dismissal was a partisan misrepresentation of the law.

**Emmet J. Bondurant, 2021**

https://heinonline.org/HOL/P?h=hein.journals/emlj70&i=1076

"Rucho v. Common Cause - A Critique." Emory Law Journal, vol. 70, no. 5, 2021, pp. 1049-1090. HeinOnline.

The claims of unconstitutional partisan gerrymandering are not political questions and are justiciable by federal courts under two well-established injury theories: (1) vote dilution, which is a district-specific injury-in-fact that was explicitly recognized by the Court in Gill, and (2) imposition of an undue burden on the First Amendment rights of political parties and voters of political association.

The Court based its decision in Rucho on a Humpty Dumpty definition of partisan gerrymandering that was, as Justice Kagan pointed out, "not so." Instead, the Court misrepresented the constitutional basis of the plaintiffs' partisan gerrymandering claims and converted their claims from justiciable vote dilution claims into something else entirely-into nonjusticiable demand for proportional representation, "a 'norm that does not exist' in our electoral system."

The conclusion is inescapable that Roberts's Court is not composed, as the Chief Justice has claimed, of nine impartial umpires who merely call balls and strikes. Nor is it true that there are no Republican Justices or Democratic Justices on the Supreme Court. Too many of the Court's decisions in voting rights, campaign finance, and other election law cases have been decided by party-line votes of the Republican majorities that have dominated the Court for the last decade to make those claims credible.

Although Chief Justice Roberts acknowledged in Rucho that partisan gerrymanders are "incompatible with democratic principles," he and the current Republican majority nevertheless made it crystal clear "that the solution [does not] lie[] with the federal judiciary"-at least as long as the Supreme Court is currently composed.

The Court's decision in Rucho is profoundly anti-democratic and is a reflection of the ideological and partisan nature of the confirmation process within the Senate. Although the Rucho decision will ultimately be reversed, the solution for partisan gerrymandering is not likely to come from the Roberts Court; instead, it will come only when process for the selection and confirmation of members of the Supreme Court is reformed and becomes far less partisan than it is currently.

### I/L Democracy Advantage

#### The modern political question doctrine undermines democratic legitimacy and constitutional accountability—*Rucho*'s abdication invites deeper crisis. When elections fail due to gerrymandering and courts refuse to intervene, institutional trust erodes and political instability grows.

G. Michael Parsons, 2020

Maurer School of Law: Indiana University

Indiana Law Journal, Volume 95, Issue 4, Article 6. Gerrymandering & Justiciability: The Political Question Doctrine After Rucho v. Common Cause

https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11389&context=ilj

If the Court is worried about constitutional fidelity, popular legitimacy, and the principled exercise of judicial power, then doubling down on the modern political question doctrine is not the answer. Whether Rucho was written in good or bad faith is beside the point if it cannot be taken seriously on its own terms.563 The boundary between the branches is forever shifting and contestable, and the judiciary relies upon public trust to maintain its authority.56

When elections—the institution designed to resolve political conflicts—no longer fulfill their primary function due to partisan manipulation, we should not be surprised when that conflict moves to the courts. When the courts slam their doors shut along partisan lines as well, it is not difficult to imagine where political conflict goes next. Support for democratic institutions has been declining precipitously in recent years,565 and the Court does not advance institutional legitimacy and stability by foreclosing all avenues of democratic accountability (let alone by dismissively waving them away as “an instinct”)

The political question doctrine would have made the answers to the Court’s self-inflicted manageability conundrum clear. Judicial standards under the Equal Protection Clause and the First Amendment are “well developed and familiar,” and federal courts are more than capable of determining, “if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.”567 Gerrymandering for partisan advantage fits the bill.

When the state targets voters who hold disfavored political beliefs for electoral suppression, the controversy should be “lift[ed] . . . out of the so-called ‘political’ arena and into the conventional sphere of constitutional litigation.”568 The Supreme Court’s duty is then to interpret the Constitution, decide the cognizable case before it, and remedy the violation through the most appropriate equitable means available. Article III of the Constitution allows no more—and demands no less.

#### Rucho v. Common Cause contradicts the original intent of the Fourteenth Amendment and weakens democracy. The historical record shows that the Framers empowered federal courts to police partisan gerrymandering as an abridgment of the right to vote. By refusing to intervene, Rucho undermines constitutional protections and enables state legislatures to erode political equality—federal courts have both the authority and obligation to step in.

Barnett Harris, 2021

"Is Partisan Gerrymandering Unconstitutional? Rethinking Rucho v. Common Case." University of San Francisco Law Review, vol. 56, no. 1, 2021, pp. 35-88. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/usflr56&i=41

The historical record provides the foundation and guideposts needed for the Supreme Court to protect voting rights in accordance with the Fourteenth Amendment. The historical evidence illustrates several points to prove partisan gerrymandering claims fall within the purview of federal courts. First, the Framers did not exclude courts from policing state governments that abused redistricting under the Elections Clause. Second, the members of the Thirty-Ninth Congress understood there were more ways to discriminate against a person's political rights beyond simply prohibiting them from casting a ballot due to their race. Such ways included states using political rights to ensure those they disliked remained subservient. The Thirty-Ninth Congress then provided a mechanism for dealing with abusive state governments that abridged the right to vote in its Section Two of the Fourteenth Amendment. Third, the political question doctrine does not constitute a legitimate barrier for courts to stay out of policing partisan gerrymandering.

History also casts serious doubt on the claim that the judiciary was never meant to step in and police partisan gerrymandering claims. Congress passed many bills extending jurisdiction in federal courts to protect political rights from abridgment, such as three separate Enforcement Acts covering the gamut of political protections.2 7 8 The judiciary was long expected to police abuses by state governments, and the Framers of both the Elections Clause and Fourteenth Amendment transformed and broadened Congress's power over the states-they remade the federalism dynamic that was in place since the Founding up until the end of the Civil War. To this end, the Framers employed the power of the federal courts to give citizens redress over legislative actions (or inaction). Even under a fair review of the evidence and with the benefit of the doubt given to the courts, there is not a persuasive argument in the text, history, or original intent of the Framers compelling partisan gerrymandering claims to be committed solely to the political branches. There is far too much evidence suggesting the Framers of the Fourteenth Amendment and future Congresses understood the many ways states could abridge one's vote-and gain unfair power-and wielded the Fourteenth Amendment as a tool to help end such unjust practices. And by refusing to allow courts to police abusive state legislatures, the Court undoes "as much as possible the compromise that was reached between the House and Senate" when the Enforcement Act was crafted.

Without the right to vote, what rights do we have? The history of Section Two provides persuasive evidence that the Framers used the word "abridgment" to encompass all the ways states could harm the political process. Now, the Court should adopt a new framework and protect the political process by enforcing the penalty outlined by Section Two of the Fourteenth Amendment-reduced representation in the House as well as Electoral College if states abridge the right to vote of its citizens for partisan gain. Whether or not one agrees with the remedy, one thing remains unmistakably true: Partisan gerrymandering is an abridgment of the right to vote, and Section Two of the Fourteenth Amendment, in extremely clear terms, prohibits the states from abridging the vote in any way. 280 With this in mind, Rucho v. Common Cause was improperly decided. The federal courts would do well to move forward and consider claims of partisan gerrymandering in alignment with its constitutional mandate to avoid diluting or impeding the ever-important right to vote. Only then will all citizens' voting rights be truly protected.

### Economy Advantage

#### Partisan gerrymandering reduces access to credit and economic resources. Irregular redistricting, particularly in states where politicians control the process, lowers credit access in districts with less electoral competition. This occurs because secure politicians lose the incentive to advocate for their constituents, harming economic outcomes.

Pat Akey, Christine Dodridge, Rawley Heimer, and Stefan Lewellen, 2018

Pushing Boundaries: Political Redistricting and Consumer Credit.SSRN

https://ssrn.com/abstract=3031604

This paper studies the effect of political redistricting of congressional districts on consumers’ access to credit. We find that increases in the irregularity of political boundaries – presumably indicative of gerrymandering – cause reductions in credit access. Crucially, the effects are concentrated in states that allow elected politicians to redraw congressional district boundaries following decennial censuses, and in congressional districts that are less electorally competitive. We also find that credit access falls in states that make it more difficult for their constituents to vote.

Taken together, these results suggest that the redistricting process can be used to make elections less competitive, and as a result, constituents lose access to goods and services. This potentially indicates that when electoral outcomes become more certain and politicians gain job security, they lose incentive or the political influence needed to advocate for goods on behalf of their constituents. Though many court cases and research efforts in the political science literature have sought to determine the effects of redistricting – or partisan gerrymandering – on voter disenfranchisement, we are aware of few studies that test whether redistricting has a real effect on economic outcomes. This paper shows that redistricting can have real costs.

#### Partisan gerrymandering incentivizes representatives to prioritize party politics over serving constituents’ economic needs. Shifts in voter partisanship due to gerrymandering lead to representatives voting more along party lines and securing fewer federal transfers for their districts. This undermines economic access and harms the economy by reducing the flow of resources to constituents.

Sahil Raina and Sheng-Jun Xu, November 1 2021

The Effects of Voter Partisanship on Economic Redistribution: Evidence from Gerrymandering

Proceedings of Paris December 2019 Finance Meeting EUROFIDAI – ESSEC University of Alberta School of Business Research Paper No. 2019-505

https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3396699

In this paper, we study how voter partisanship affects distributive politics. We construct a stylized model to show that a district-level shift in voter partisan preferences toward their legislative representative’s party should incentivize the local representative to prioritize partisan politics over serving her constituents’ economic interests. Using partisan gerrymandering to identify shifts in partisan alignment, we find evidence in support of our model’s predictions. Specifically, our first-differenced RD estimator shows that representatives insulated by a favorable partisan shift vote more frequently along party lines and obtain fewer federal transfers for their constituents relative to representatives exposed to an unfavorable partisan shift.

### Healthcare Advantage

#### Gerrymandering blocks Medicaid expansion, killing access to healthcare for millions. It empowers partisan legislators to ignore public support for life-saving policies and instead pander to extremist bases. In states like North Carolina, Wisconsin, and Georgia, gerrymandering has directly prevented over 1 million people from gaining coverage and caused thousands of preventable deaths. It distorts democratic accountability and undermines public health by enabling politicians to entrench power at the cost of constituents’ lives.

**Alex Tausanovitch and Emily Gee**

<https://www.americanprogress.org/article/partisan-gerrymandering-limits-access-health-care/>

**How Partisan Gerrymandering Limits Access to Health Care**

While Medicaid enjoys strong public support, officials in a handful of states are refusing to act in the interests of their own citizens. Many of these states have failed to expand Medicaid because of partisan gerrymandering—the practice of drawing district lines to unfairly favor particular politicians or political parties.3 By gerrymandering their districts, politicians can stay in power—and keep their political parties in power—even if they lose voter support. And that means that on issues such as the expansion of Medicaid, conservative politicians can cater to the extreme right wing and oppose policies that would save lives at minimal cost to state taxpayers.

The cost of this distortion is high. In North Carolina, Wisconsin, and Georgia—three states that have not expanded Medicaid—1 million more people would have been insured and roughly 3,000 deaths would have been prevented in 2019 alone if the expansion had been fully implemented. In Michigan—another state with heavily gerrymandered districts—conservatives in control of the Legislature have attempted to limit beneficiaries’ access to Medicaid through the imposition of burdensome work requirements. Evidence shows, however, that Medicaid work requirements not only result in low-income people losing health coverage but also fail at their purported objective of boosting employment.

Gerrymandering affects everything that legislatures do by shifting who gets elected in the first place. A 2019 report from the Center for American Progress demonstrated how gerrymandering has stopped state legislatures from taking action to prevent gun violence, blocking the passage of popular, commonsense measures such as universal background checks and extreme risk protection orders.4

#### Gerrymandering entrenches partisan control, directly distorting electoral outcomes and blocking popular policies like Medicaid expansion. In states like North Carolina, Michigan, Wisconsin, and Georgia, gerrymandered maps allowed conservatives to hold legislative power despite lacking majority support, preventing nearly 1 million people from gaining health coverage in 2019 alone. This distortion of representation results in thousands of preventable deaths and shifts power away from moderates or compromise-driven legislators toward ideological extremes, undermining democratic responsiveness and worsening health inequality.

**Alex Tausanovitch and Emily Gee**

<https://www.americanprogress.org/article/partisan-gerrymandering-limits-access-health-care/>

**How Partisan Gerrymandering Limits Access to Health Care**

In recent years, recognition of gerrymandering as a serious problem in American politics has finally started to gain traction. A number of states—including California and Arizona—have adopted reforms designed to prevent politicians from drawing their own unfair districts, turning that authority over to independent commissions instead.40 In 2019, the U.S. House of Representatives passed a historic bill—H.R. 1—that would require all states to task independent commissions with drawing federal districts. However, the U.S. Senate, under Majority Leader Mitch McConnell (R-KY), has refused to consider it.41

Unfortunately, in most states, the legislature still draws district lines, which allows incumbent politicians to engage in partisan gerrymandering.42 During the last cycle of redistricting that followed the 2010 census, Republicans controlled a large majority of state legislatures.43 This means that they had more ability to gerrymander than Democrats and were able to skew state election outcomes—and therefore state policy—in a more conservative direction. According to a previous CAP analysis, in the first three federal elections of the decade—in 2012, 2014, and 2016—gerrymandering resulted in an average of 19 more Republicans being elected to the U.S. House of Representatives in each election than there would have been if districts were fairly drawn.44 If anything, that figure understates the extent of the problem, because it is the net result of gerrymanders that tilted in multiple directions—Republican gerrymanders, Democratic gerrymanders, and bipartisan gerrymanders. In bipartisan gerrymanders, states with divided control of government or redistricting commissions made up of partisan incumbents draw district lines in such a way as to prevent incumbents of both major parties from having to face electoral competition.45

All of these gerrymanders have affected policy outcomes, including state decisions about Medicaid. The most obvious impacts have been in states where unfair electoral maps have switched control of the legislature from Democrats, who have consistently favored Medicaid expansion, to Republicans, who have often favored rejecting expansion or imposing work requirements. However, even in states with a durable Republican advantage, gerrymandering can shift the balance of power from the more moderate Republican members—who may be more inclined to compromise—to members on the ideological extremes. These shifts have an effect even if they do not create Democratic majorities. Notably, every U.S. state where Democrats currently make up at least 42 percent of the members in both chambers of the legislature has expanded Medicaid.46

In each of the following four states—North Carolina, Michigan, Wisconsin, and Georgia—gerrymandering appears to have been a decisive factor in blocking more residents from receiving Medicaid. In Georgia, North Carolina, and Wisconsin alone, fully implementing the ACA’s Medicaid expansion would have reduced the number of uninsured people by nearly 1 million in 2019, according to estimates by the Urban Institute.47 (see Table 1) Moreover, by improving access to health care, Medicaid expansion can save lives. A 2017 study by Harvard researcher Benjamin D. Sommers estimated that Medicaid expansion was associated with one fewer death for every 239 to 316 people who gained insurance.48 Applying the more conservative end of this range to the projected gains in coverage from Medicaid expansion, approximately 3,000 fewer people would have died in 2019 if the three states had fully expanded Medicaid.

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## Negative

#### Judicial resolution of partisan gerrymandering is inappropriate—*Rucho* correctly identifies that there is no judicially manageable standard for fairness in redistricting. Turning political disputes over to unelected judges undermines democracy, risks entrenching regressive power structures, and delegitimizes the judiciary. The issue must be resolved through democratic processes, not judicial fiat.

Louis Michael Seidman, 2021

"Rucho Is Right - But for the Wrong Reasons." University of Pennsylvania Journal of Constitutional Law, vol. 23, no. 4, August 2021, pp. 865-878. HeinOnline.

Why, then, should we be wary of a judicial solution? Chief Justice Roberts' opinion in Rucho is wrong in many ways, but it is right in one way: Political theorists, judges, and ordinary people are divided over what makes a system "democratic" and what counts as political "fairness."45 There is no consensus about how much protection for minorities is necessary in a democratic system and about which minorities to protect. We do not agree about the extent to which popular will should be filtered through a system that protects political elites from temporary frenzy. We have no shared understanding of whether proportional representation of politically salient groups is necessary for democratic legitimacy.

These disagreements translate into disagreement about what should count as unconstitutional political gerrymandering. Consider, for example, an effort to create fairness by drawing district lines so as to minimize the "efficiency gap" between parties. On the macro-level, this districting arguably produces a fair outcome. But on the micro-level, it creates what John Hart Ely once referred to as "filler people."46 These are voters who are deliberately stranded in districts where they have no chance of prevailing. Should these voters be satisfied with the fact that the state delegation, taken as a whole, fairly represents their interests? Or are they entitled to a fair chance of electing their own representative?

Similarly, what are we to make of "safe" districts? One might argue that a fair districting plan requires such districts so that a small majority on a statewide basis does not lead to one party gaining an overwhelming majority of legislative seats. 4 But safe districts also make it less likely that the representative will take some account of the interests of voters who chose her opponent."

Finally, how should we resolve the potential conflict between fairly representing the two political parties and fairly representing other salient groups, like racial or religious minorities? Suppose, for example, that in order to create a districting plan that fairly apportions power between Democrats and Republicans, it is necessary to provide disproportionately fewer seats likely to be captured by African Americans?

There is no obvious way to resolve problems like these. To be consistent, a believer in democracy might say that disputes about political values should be resolved democratically. Unfortunately, though, disputes about what democracy entails cannot be settled democratically without first specifying the answer to the very question being debated.

But while there are no good answers to the problems, there are some bad answers. An especially bad answer is turning the question over to nine unelected and unrepresentative judges who are part of an institution that has pretty consistently defended the most regressive forces in our society.

## Das

### Federalism DA

#### Uniqueness: States like those in Pennsylvania and New Mexico have recognized their authority to hear partisan gerrymandering cases based on state constitutional provisions, such as free and equal elections or equal protection clauses. Additionally, states like Arizona, California, Michigan, and Colorado have enacted anti-gerrymandering reforms through constitutional amendments—often driven by citizen initiatives—that limit or remove legislative influence over redistricting. These efforts demonstrate that states are not only equipped but are already solving partisan gerrymandering without federal intervention.

Wilfred U. Codrington III, 2023 < Wilfred U. Codrington III is the Walter Floersheimer Professor of Constitutional Law at Cardozo Law School. He is also a fellow at the Brennan Center for Justice. >

The State Court Report. “Voting Rights Under State Constitutions, Explained.”

<https://statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained>

Finally, some state constitutions include provisions that seek to eliminate qualitative vote dilution based on political affiliation, also known as partisan gerrymandering. Importantly, the [U.S. Supreme Court ruled](https://supreme.justia.com/cases/federal/us/588/18-422/#tab-opinion-4114539) that there is no federal court jurisdiction over partisan gerrymandering claims under the U.S. Constitution and, therefore, federal judges must reject lawsuits rooted in that legal theory. Instead, the Court said that partisan gerrymandering is a matter for the states to resolve, including under their constitutions, several of which outlaw the practice.

In 2018, the [Pennsylvania Supreme Court ruled](https://caselaw.findlaw.com/court/pa-supreme-court/1888577.html) that state courts possess jurisdiction over claims of partisan gerrymandering and that a state legislative map had “clearly, plainly and palpably” violated several provisions of the state charter, including that which requires elections in the state to be “free and equal.” More recently, [New Mexico’s supreme court concluded](https://nmonesource.com/nmos/nmsc/en/522079/1/document.do) that it has jurisdiction to hear partisan gerrymandering claims and that the state’s Equal Protection Clause outlaws those that are “egregious in intent and effect.” (North Carolina’s supreme court also interpreted the Free Election Clause and other clauses in its state constitution as banning extreme partisan maps, but shortly after Republican candidates won the majority of seats on that court in 2022, [**they reversed the ruling**](https://www.politico.com/news/2023/04/28/north-carolina-supreme-court-clears-way-for-partisan-gerrymandering-00094433).) While litigation is pending in a [number of state courts](https://statecourtreport.org/our-work/analysis-opinion/status-partisan-gerrymandering-litigation-state-courts), to date the record is mixed with respect to courts recognizing that their constitution’s more general provisions establish a role for the judiciary in resolving partisan gerrymandering disputes.

Increasingly, however, state constitutions are being amended to proscribe the practice of partisan and related political gamesmanship. In addition to language explicitly disallowing map drawing that favors a particular party or incumbent and articulating standards to guide mapmaking, a number of these state charters have tried to reduce partisan gerrymandering by diminishing the state legislature’s role in the redistricting process. Some, like Virginia’s constitution, do this by creating additional layers to the process in which commissions play a large role, while others, like Arizona, California, Colorado, and Michigan, fully empower independent redistricting commissions, stripping elected lawmakers of any power to take part. Other states whose constitutions contain provisions that specifically address partisan gerrymandering include Florida, Hawaii, New York, Ohio, and Washington.

Interestingly, there is a unique relationship between state constitutions’ promotion of direct democracy and political efforts to curb gerrymandering: anti-gerrymandering provisions have generally made it into state constitutions not as a result of legislation adopted by lawmakers, but through citizen-led initiative campaigns that succeeded when the public voted for their enactment.

#### Uniqueness: Although *Rucho* was decided when few state courts addressed partisan gerrymandering under their constitutions, the decision spurred a wave of state-level jurisprudence.

Gerald S. Dickinson, 2024

"Revisiting Rucho's Dissent: Percolation and Federalization." New York University Law Review Online, 99, 2024, pp. 344-359.

https://heinonline.org/HOL/P?h=hein.journals/nyulro99&i=346

At the time of the Rucho ruling, the Court could point to only Pennsylvania and Florida, where there existed "[p]rovisions in ... state constitutions [to] provide standards and guidance for state courts to apply."7 9 These were only a few state court rulings that reviewed partisan gerrymandering claims under state constitutional provisions. Thus, Justice Kagan's call for the Court to pay greater attention to the state partisan gerrymandering doctrines may have been somewhat premature, since state court decisions were in short supply and appeared to be at a nascent stage of development. However, those rulings and subsequent cases since Rucho also suggest that there may be an emerging trend towards state courts grappling with and identifying "neutral and manageable" principles to address partisan gerrymandering. Indeed, since Rucho, there have been several high-profile state supreme court rulings that have followed the playbook of the high courts in Pennsylvania and Florida, such as Kansas, Wisconsin, and North Carolina.

In 2022, the Kansas Supreme Court reviewed a challenge to the electoral maps of the state in Rivera v. Schwab.80 The court ruled that the matter was a nonjusticiable political question, and focusing its reasoning on the fact that the state constitution lacked any language regarding gerrymandering and that the lack of judicial precedent in Kansas courts made the task of reviewing such a challenge untenable. 81

In Clarke v. Wisconsin Elections Commission, the Wisconsin Supreme Court invalidated the state's non-contiguous legislative maps as unconstitutional under the Wisconsin Constitution. 82 The court adopted "redistricting principles" that would "guide the court's process in adopting remedial maps," including compliance with population equality requirements and federal law; meeting basic requirements under the constitution; reducing municipal splits and preserving communities of interest; and consideration of the partisan impact when evaluating remedial maps.

#### Link: The Constitution creates a shared but distinct structure of election authority between state and federal governments. While coordination exists—especially through national political parties—the states retain meaningful autonomy and have long served as laboratories of democracy, experimenting with electoral reforms and expanding political participation beyond federal baselines. Overturning *Rucho* would allow federal courts to override state-led election design and redistricting efforts, disrupting this balance. It would erode federalism by centralizing control over elections in the judiciary, despite states’ proven track record of managing elections and often exceeding federal protections.

#### James A. Gardner, 2006 <Law Professor, University of Buffalo. SUNY Distinguished Professor, Research focus Constutional Law, Election Law, and Federalism>

“Elections”

Center for the Study of Federalism

https://federalism.org/encyclopedia/no-topic/elections/

Although the Constitution thus creates a formal system of substantially intermingled state and national authority over elections, an equally significant blurring of the boundaries of intergovernmental power has occurred outside the formal legal system under the auspices of the national political parties. In a development completely unanticipated by the framers, political parties quickly emerged and then organized themselves not into distinct state and national party systems, but into a single unified system in which the major parties coordinate partisan activity at both the state and national levels for the purpose of contesting offices at all levels. In this system, state and national officeholders are often able, in their capacity as party leaders, to exert significant influence on the way elections are conducted throughout the system, even where the formal allocation of authority might seem to deny them any influence. For example, although Congress has formally left the regulation of congressional apportionment to the states, members of Congress nevertheless typically exert significant influence on the way congressional districts, and even in many cases state legislative districts, are drawn by their state legislatures.

The extensive formal and informal interpenetration of state and national authority over elections has led to a certain degree of uniformity in electoral structures and practices around the nation. Nevertheless, states still possess considerable regulatory independence in certain areas, and have occasionally used this independence to grant their own citizens more extensive rights of political participation than the U.S. Constitution grants to Americans generally. Most prominently, states typically make many more offices elective than does the national government, including state-level cabinet posts, judicial positions, and numerous local offices. Many states provide opportunities for direct democracy through the initiative and referendum, and through requirements for popular approval of state or local fiscal measures. Some states impose tighter controls over elected officials than appear on the national level through the use of term limits, rotation in office requirements, or recall procedures. States have also occasionally introduced reforms such as nonpartisanship, alternative voting systems, innovative formats for primary elections, and remote voting electronically and by mail.

#### Partisan gerrymandering can restore the principles of federalism by balancing electoral authority between state and national governments. By refocusing public attention on state governments, gerrymandering may also reinvigorate local political participation, reinforcing the importance of both state and national levels of government.

Jacon Rubel, 2019

Rubel, Jacob (2019) "Is Gerrymandering Good for Democracy?," Compass: An Undergraduate Journal of American Political Ideas: Vol. 3 : Iss. 1 , Article 2.

https://digitalcommons.jsu.edu/compass/vol3/iss1/2

Another notable strength of gerrymandering is its ability to restore the principles of federalism in electoral authority. Federalism, or the balanced division of authority between the state and national government, was of paramount importance to the Founders. In Federalist 59, Hamilton argued for the importance of balance in electoral authority between state and national governments regarding congressional elections. Though the paper explains the enormous danger of granting full control of congressional elections to the states—as this would “leave the existence of the Union entirely at their mercy”—Hamilton also argues that giving the federal government complete control over congressional elections would leave the states at the mercy of the national government. Hamilton therefore argues for granting the state legislatures partial control over congressional elections, in the form of state legislatures appointing senators (a right granted by the Constitution, pre-17th amendment). Anything else, Hamilton states, “would doubtless have been interpreted into an entire dereliction of the Federal principle.” While true that Hamilton’s argument was that state legislatures would vote for the Senate (not the House), the core of Hamilton’s pursuit of “Federal principle” is that state legislatures ought to have control over one chamber, while the national government ought to have control over the other chamber. And so, by granting state legislatures the authority to influence the outcome of congressional elections, gerrymandering may be seen as a restoration of state legislative influence over national elections. Though not the same form of influence as the state legislature’s direct election of the Senate, gerrymandering is still a striking example of how Federalism in national elections may operate at least to a degree within the existing framework of the laws (Tolson 2010, 877). As the 17th amendment relinquished a significant amount of power to the federal government, gerrymandering can restore the balance of electoral authority between the national and state governments.

Similarly, gerrymandering may be valuable for federalism by refocusing the interest of the people towards state government. As voters have shifted their focus almost entirely to the national level, the state level has become overwhelmingly neglected. This phenomenon poses a difficulty for democracy and its ability to maintain public faith in government. Yet, if the public were to recognize that the composition of the national government is dependent on state government and its ability to gerrymander, voters would recognize the necessity of participating in both the state and national levels of government. While this may not lead to the restoration of the Tocquevillian township, it is nonetheless an example of how to make people revalue government that is closer to home. As it has become too common to hear that someone chooses not to vote because they feel they feel that their voice is unheard in the vast national elections, state legislative elections provide an opportunity for citizens to exercise their democratic will effectively and thereby regain faith in their government.

### Midterms DA

#### Link: Partisan gerrymandering is the only thing that might be able to save the Republic.

[Gabe Efros](https://www.michigandaily.com/author/gefros/), April 3, 2024

Gerrymandering can be a Force for Good

https://www.michigandaily.com/opinion/columns/gerrymandering-can-be-a-force-for-good/

While undemocratic in nature, gerrymandering can be used as a radical process for progressive policy. With [narrow margins](https://about.bgov.com/brief/balance-of-power-republican-majority-in-the-house/) in the house, it could very well decide who ends up with an advantage. In addition to an advantage, a larger Democratic majority would also be possible through gerrymandering, which would be advantageous for controlling what bills pass through the House. While redistricting is typically only done every [10 years](https://www.census.gov/programs-surveys/decennial-census/about.html#:~:text=Every%2010%20years%2C%20the%20U.S.,Day%2C%20which%20is%20April%201) following the U.S. Census, it can become a [long, drawn out process](https://www.pbs.org/newshour/show/how-states-are-using-legislative-privilege-to-drag-out-redistricting-lawsuits). Even if historically Democratic states cannot be gerrymandered this election cycle, maps will be redrawn eventually, giving Democrats more opportunities to control the House.

A Democratic advantage would not only be convenient for passing strong Democratic legislation, but also justified, considering the increasingly radical nature of the Republican party. In a potential [second Donald Trump](https://projects.fivethirtyeight.com/polls/president-general/) presidency, a Democratic house will provide a safeguard against any potential far-right legislation that could be passed with a Republican majority.

The Republican Party prioritizes their [loyalty](https://www.npr.org/2023/03/27/1166173049/donald-trump-investigations-republican-voters-2024-presidential-election) to Trump, even if it means subverting democracy. This commitment is worrisome, and with a possible movement to repeal the [22nd Amendment](https://www.theamericanconservative.com/trump-2028/), Republicans may have plans to keep Trump around longer than we think. As such, using gerrymandering to ensure a Democratic majority would become even more necessary.

Another way that strategic gerrymandering could help Democrats give themselves an advantage is by creating more competitive districts for Republicans. An example of this isMichigan’s [9th district](https://www.reuters.com/world/us/risky-midterm-strategy-democrats-boost-far-right-candidate-michigan-race-2022-07-26/), where, during the most recent Congressional elections, Democrats intentionally donated money and resources to a far-right wing Republican candidate during the Republican primary. As a result, the Republican candidate won his primary and went on to lose the general election. The candidate he beat in the primary was an incumbent — one of the more moderate Republicans in the House of Representatives and generally considered to be a better candidate in the general election.

This strategy, if applied in other congressional districts, can be very effective at generating a Democratic advantage in the House of Representatives from states that are not as solidly Democratic.

It’s important to clarify that gerrymandering is a transitory and temporary strategy. Democrats should use their eventual majority to get rid of gerrymandering for good. They have already proposed this bill in [Congress](https://www.congress.gov/bill/118th-congress/senate-bill/3750/committees?s=1&r=2) to do this; they just need a majority to pass it. Gerrymandering itself could help them get there.

While it may seem counterintuitive to get rid of a strategy that helped Democrats obtain control in the first place, gerrymandering does not provide any merit to our democracy. The benefit to gerrymandering is not itself, but the fact that it can give Democrats an advantage in Congress.

Opponents of this strategy would point out the fact that in order to supposedly save our country’s democratic process, you are sacrificing it. If the Democrats, in any way, manufacture a house majority in their favor, many people may not see it as legitimate or democratic. Democrats have recently [negated Republican](https://www.vox.com/22961590/redistricting-gerrymandering-house-2022-midterms) gains by using gerrymandering, and further efforts to ensure a majority for their party could be seen as undemocratic. It is written in the Declaration of Independence that a government’s power is derived from [the consent](https://www.archives.gov/founding-docs/declaration-transcript) of the governed, and using this strategy definitely corrupts this principle.

These claims do hold legitimacy, but the threat that Republicans pose goes beyond traditional principle. Employing the use of election manipulation strategies may certainly delegitimize and harm our democratic processes in the short term. However, staving off the current Republican party and thus necessitating its reform will secure our democracy in the much longer term.

While using gerrymandering for political gain seems at odds to our democratic ideals, the current threat of an increasingly radical Republican party demands radical measures. Democratic control of the House, even if achieved through such means, would act as a barrier against potential far-right actions. Moreover, forcing the Republican party to reconsider its extreme elements will allow for a more stable and accountable political outlook in the future, ultimately strengthening rather than undermining democratic principles.

### Democracy DA

#### Partisan gerrymandering can enhance democracy by restoring Founding principles. It reintroduces an aristocratic check on pure majoritarianism, reflecting the original intent of a balanced republic. By fostering a more refined form of representation that tempers populist pressures, gerrymandering can help rebalance elite and popular influence and compensate for the erosion of trustee representation caused by reforms like the 17th Amendment.

Yet gerrymandering may actually be advantageous to American democracy. Justifying gerrymandering requires a thorough examination of Founding principles, how they have been subverted since their origin, and ultimately how gerrymandering may restore such Founding principles. There are two paramount reasons for gerrymandering’s philosophical merit. Firstly, it restores an essential principle of the American republic by balancing elite and popular influence. Secondly, it also helps restore a more desirable balance between federal and local government.

It is necessary to recognize the Founders’ belief that a degree of aristocratic refinement was necessary to democracy, and thus that the country was created not as a direct democracy, but rather as a representative republic. The Founders were prudently aware of the fact that a nation founded on both individual rights and the democratic collective will could find itself in moments when these foundational principles could conflict. To rely on the unchecked will of the people (though attractive) could be a possible means of creating a majority tyranny that would destroy the more foundational individual rights that the government was created to protect. As James Madison writes in Federalist 10, “to secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed.” Madison goes on to state that “A republic… promises the cure for which we are seeking,” whereas a “pure democracy… can admit of no cure for the mischiefs of faction.” With this in mind, the view that gerrymandering is wrong solely due to how it frustrates the democratic will (the standard argument) is undoubtedly insufficient when viewed through the lens of American political thought.

The republic was initially designed so that representation would achieve a careful balance between the will of the people and the independent judgment of certain wise and ambitious elites. From the perspective of the Burkean models of delegate representation (in which representatives legislate solely based on the ideas of their constituents) and trustee representation (in which representatives are entrusted with the liberty to deliberate based on their own beliefs, with the goal of securing the common good), the Senate is based on the trustee model, and the House on the delegate model (Dovi 2017). As stated by Madison, the Senate was to be a bulwark of stability and intelligence (especially against factions) that could counter the populist tendencies manifested in the House and deliberate based on a view of the common good that was more careful and aware of long term considerations.

Yet since the ratification of the Constitution, the phenomenon of convergence between the House and Senate has eroded the careful equilibrium of trustee and delegate representation (Baker 2008, 166). Most notably, the establishment of direct elections for the Senate (the 17th amendment) is largely responsible for the loss of trustee representation. Though the amendment was made not to increase direct representation, but rather decrease the possibility of corruption, it has nonetheless resulted in the reorientation of senators’ priorities toward appealing more and more to the passionate public (Schiller 2014, 9). This includes tangible consequences, such as the fact that senators are increasingly beginning their campaign cycles earlier and earlier, and straying less and less from the views of their constituents (Baker 2008, 185). The result is an enormous gap in the original purpose of the Senate, with no proposed policy as a solution.

It is through the acceptance of certain aristocratic principles that one might view gerrymandering as a restoration of the intended balance between delegate and trustee representation that has been eroded since the Founding. By providing distance between the people and legislation in Congress, gerrymandering can be seen as a valuable measure to check the purely democratic will. It is true that gerrymandering does not function in the exact same way as the pre17th amendment Constitution did, as gerrymandering does not allow the state legislatures to elect candidates directly. This only means that refinement must come in a different form—one that acquiesces to increased deference to the will of the people as compared to Article I Section 3, while still effectively providing a means to check it.

## CPs

### Meiosis CP

#### Text: The 50 States will adopt a redistricting process modeled on genetic meiosis for congressional and state legislative districts.

#### Adopting a meiosis-inspired redistricting model—where district lines are randomly and regularly redrawn—prevents entrenched partisan manipulation. Like genetic recombination, this approach breaks patterns of demographic sorting, eliminates safe seats, and forces politicians to be responsive to broader constituencies. Randomized algorithms ensure fairness, adaptability, and resilience, undermining gerrymandered “lucky tails” and incentivizing coalition governance. This structural reform re-centers electoral competitiveness and democratic accountability.

Agren et al, 2022

“Meiosis solved the problem of gerrymandering”

Journal of Genetics 2022 101:38

https://www.ias.ac.in/article/fulltext/jgen/101/0038

How can the insights from meiosis help with the problems of gerrymandering? Inspired by the process of crossing over, district boundaries could be randomly redrawn for every election. From year to year the population size per district will be held constant, and the shape of the districts constrained. For example, in the state of Texas with a population of just under 30 million and 36 seats in the US House of Representatives, 36 ‘random’ points could be scattered throughout the state, with the distance between points reflecting local variation in the population density of voters (figure 3). Algorithms then randomly draw boundaries around each point to establish the 36 districts of equal population size. A more radical option would be to create districts composed of multiple noncontiguous sub-sampled areas and politicians could be randomly assigned to districts each election cycle. It would be interesting to model how these solutions compare to other quantitative approaches, such as Tapp (2019)

This method prevents extreme gerrymandering by rerolling the districting dice every election. Cabals of the few cannot therefore count on seeing the same ‘lucky tail’ of all possible districts (as in, for example, Wisconsin). It also breaks up districts that were organized by historical demographics, which may no longer be relevant. If a representative cannot be certain who they will have to please after the next redistricting, they will have to support positions that also will be popular in neighbouring communities, analogously to how most genes act to promote organismal fitness rather than selfishly to bias their own transmission. If there are fewer safe seats and more contested seats whose voters are continually being reshuffled, we predict that a successful long-term political career will require voting for legislation that appeals to a wider swathe of voters.

### State Courts CP

#### Text: The 50 state governments, acting through their legislatures or independent redistricting commissions, will enact laws or constitutional amendments prohibiting partisan gerrymandering in the redistricting of congressional and state legislative districts.

#### Because the right to vote is not self-executing, state institutions are better positioned than federal courts or Congress to respond to local needs and ensure functional, equitable elections.

Wilfred U. Codrington III, 2023 < Wilfred U. Codrington III is the Walter Floersheimer Professor of Constitutional Law at Cardozo Law School. He is also a fellow at the Brennan Center for Justice. >

The State Court Report. “Voting Rights Under State Constitutions, Explained.”

<https://statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained>

**What do** state constitutions **say about elections and the right to vote?**

Quite a lot. First and perhaps foremost, they expressly confer the right to vote on their citizens. While the operative language varies some with each state, 49 of the 50 state charters recognize it in affirmative terms (e.g., citizens shall be entitled to vote). Arizona’s constitution, the outlier, frames the right more indirectly.

But these documents go beyond merely establishing the right to vote. [More than half contain clauses](https://www.ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions) mandating that elections be “free,” “equal,” or “open.” A similar number of state charters extend additional guarantees to voters, including ones that protect them as elections are underway by immunizing them from arrest while casting ballots and traveling to polling places, as well as disallowing military and civil interference with voting. [**The suffrage provision of Oklahoma’s constitution**](https://oksenate.gov/sites/default/files/2019-12/oc3.pdf), for example, possesses all three of these attributes.

Importantly, the right to vote is not self-executing: states and localities must design electoral systems and related voting infrastructure, as well as rules to govern those who run elections. State constitutions recognize this in various ways, but especially through provisions that regulate public officials, charging them with duties and granting them special authorities to operationalize and safeguard the right to vote.

State constitutions generally call for the state to institute election infrastructure. The [Illinois Constitution](https://www.ilga.gov/commission/lrb/conent.htm), for example, expressly obligates lawmakers to draft uniform laws for this purpose, including those that specify residency requirements, create and maintain registration systems, and aim to preserve ballot secrecy. In neighboring Kentucky, where the legislature is similarly required to establish a system for voter registration, the [constitution](https://legislature.ky.gov/LRC/Publications/Informational%20Bulletins/ib210.pdf) includes the added mandate to ensure those who are “illiterate, blind, or in any way disabled” are able to cast votes and have them counted. Among the tasks that the [Wyoming Constitution](https://sos.wyo.gov/Forms/Publications/WYConstitution.pdf) requires of its legislature is to enact laws “to secure the purity of elections, and guard against abuses of the elective franchise,” as well as to “designate the courts” to preside over certain election contests and claims.

Indeed, state constitutions include an array of language ordering lawmakers to engage in certain conduct aimed at promoting broad participation in elections, ensuring that they are administered on fair and equal terms, and warding off the potential for fraud ([**which is vanishingly rare**](https://www.washingtonpost.com/politics/2022/11/01/truth-about-election-fraud-its-rare/)) and other improper activity that could undermine electoral legitimacy.

Several state constitutions further complement these and other important election duties with powers that are more permissive in nature. That is, these charters authorize officials to exercise their judgment as to what is necessary to ensure that elections are run in a manner that upholds deeply embedded political values. State lawmakers in [Mississippi](https://www.sos.ms.gov/content/documents/ed_pubs/pubs/Mississippi_Constitution.pdf) and [Virginia](https://law.lis.virginia.gov/constitutionfull/), for example, are granted very broad authority over the right to vote. Their respective charters complement the legislatures’ responsibility to provide for voter registration with the authority to devise and enforce voter qualifications beyond “those set forth in [the] Constitution” and “to make any other law regulating elections not inconsistent” therewith. In other states, the grant of power is much narrower. Under the [New Jersey charter](https://www.nj.gov/state/archives/docconst47.html), for instance, the legislature may provide for absentee voting as well as the disenfranchisement of those with certain crimes.

#### Unlike the U.S. Constitution, which only implies a right to vote and relies on judicial construction and federal law like the Voting Rights Act, state constitutions explicitly and robustly protect voting rights. State charters typically include detailed suffrage provisions, guarantee fair and equal elections, and establish clear frameworks for election administration—making them a more complete and direct source of voting rights. This affirms that election law and the protection of voting rights are better handled by states, where constitutional language is more tailored, expansive, and responsive to local democratic needs.

Wilfred U. Codrington III, 2023 < Wilfred U. Codrington III is the Walter Floersheimer Professor of Constitutional Law at Cardozo Law School. He is also a fellow at the Brennan Center for Justice. >

The State Court Report. “Voting Rights Under State Constitutions, Explained.”

<https://statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained>

How do state constitutions differ from the federal Constitution with respect to the right to vote?

To a certain extent, the U.S. Constitution could not be more distinct from its state counterparts with regard to the right to vote. There is certainly some overlap, perhaps most notably the antidiscrimination provisions common to both. Like the federal Constitution, state constitutions prohibit discrimination in voting based on characteristics like race, sex, and (insofar as someone is at least 18 years old) age. But that is almost it. Even as the 50 state constitutions vary in what they say about voting rights, the differences between them collectively and the federal charter are far more vast and important.

For one, instead of setting it out explicitly, the federal Constitution [**implies**](https://www.theatlantic.com/ideas/archive/2021/09/framers-would-have-wanted-us-change-constitution/620249/) that there is a right to vote, suggesting it through provisions that guarantee a republican form of government, for example, and outlaw discrimination in elections. Importantly, the right to vote under the U.S. Constitution has been further “constructed” — or developed and elaborated on — with the enactment of important national legislation like the Voting Rights Act and through judicial decision-making in a series of landmark cases, especially from the civil rights era.

The scant provisions in the Constitution that do pertain to voting, moreover, all rely on the existence of the right to vote under state constitutions. The [Constitution incorporates voter qualifications](https://www.law.cornell.edu/constitution-conan/article-1/section-2/clause-1/voter-qualifications-for-house-of-representatives-elections) set out in state constitutions and, in general, relies on laws adopted by state legislatures — entities created by state charters — to institute and administer electoral contests throughout the country. Given that state constitutions regulate the franchise broadly, including by setting the most important terms of the right to vote in both state and federal elections, one might fairly think about the American constitutional system as fostering not federal elections, but state elections for national and state offices.

But the distinctions do not end there. There are important structural and other differences between the U.S. Constitution and its state counterparts that render the latter, in a sense, more “complete” with respect to voting rights. Whereas the language governing voting is strewn throughout the U.S. Constitution, the election provisions tend to be more consolidated in state charters. Indeed, every state constitution contains an entire article dedicated to suffrage, elections, and voting rights, and several constitutions contain multiple articles. Most crucially, state constitutions are clearer than the federal Constitution regarding their application to a range of contested issues that implicate voting rights, including elector registration, ballot secrecy and other components of election administration, electoral contests and legal disputes, political party primaries, and campaign finance. For instance, in adjudicating claims regarding the structure of primary elections, the Supreme Court relies on [interpretations of the First Amendment](https://supreme.justia.com/cases/federal/us/530/567/#tab-opinion-1960797) — a provision that speaks about political association generally. In a state like California, however, the state constitution contains provisions that govern political parties and primary elections more specifically.

Nothing in the foregoing discussion should be taken to suggest that state constitutions are the source of all constitutional voting rights protections and, conversely, that the federal charter offers none. Much to the contrary. The right to vote is guaranteed by — and can be vindicated under — each of the nation’s 51 constitutions. The extent to which federal and state constitutional protections coincide (as they sometimes do) is very contextual, dependent on the specific facts and other variables like the nature of the vote deprivation claim and the state in which the alleged injury arises. Yet, despite the overwhelming attention dedicated to it, “federal law is not the only source of the constitutional right to vote.” Indeed, as [Professor Josh Douglas argues](https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1211&context=vlr), despite the text and design of state charters, which often presents clear and unique hooks on which to stake a claim, “the scope of voting rights under state constitutions [is] an overlooked source of the right to vote.”

#### Rucho opens space for state courts to reclaim adjudicative legitimacy—freed from the federal judiciary’s false neutrality and perfectionist paralysis, state judiciaries can meaningfully contest partisan gerrymandering through flexible, context-sensitive standards rooted in their distinct constitutional authority.

Chad M. Oldfather, 2023

 'Rucho in the States: Districting Cases and the Nature of State Judicial Power' (2023) 1(2) Fordham Law Voting Rights and Democracy Forum

https://heinonline.org/HOL/P?h=hein.journals/fdhmlwvt1&i=112

Rucho serves as an invitation for state courts to engage more deeply with questions concerning the nature of the judicial power they possess. With respect to the specific question of partisan gerrymandering, Rucho engaged in a perfect-as-the-enemy-of-thegood analysis pursuant to which an inability to provide a full definition of electoral fairness doomed the entire enterprise. But the claim that it is necessary to formulate a precise definition of fairness to make judgments about unfairness seems, at best, overstated. And whatever its applicability elsewhere, 72 it certainly does not fit with the practice of state judicial systems. State courts make and facilitate such determinations all the time-to take just one example, a defendant will certainly get nowhere arguing the invalidity of a disorderly conduct charge based on the contention that it is impossible to formulate a precise and comprehensive definition of orderly conduct against which to measure disorderliness. 73 And, as noted above, many state courts have long adjudicated disputes in annexation cases in which the evaluation of maps is central to their resolution.74

Indeed, even one of the great skeptics of judicial review of electoral maps, Justice Frankfurter, acknowledged that an inability to settle on a perfect middle does not preclude conclusions about the extremes. When situations fall on a continuum, most cases will present differences of degree such that "no standard of distinction can be found to tell between them, [and] other cases will fall above or below the range" to such an extent as to make for a difference in kind.75 "The doctrine of political questions," he continued, "like any other, is not to be applied beyond the limits of its own logic, with all the quiddities and abstract disharmonies it may manifest." 76 Notably, Justice Frankfurter also did not renounce the possibility that state courts could have a role to play in adjudicating the appropriateness of legislative districts. 77 He, too, contended not that the required assessment is outside the bounds of adjudication in some absolute sense, but instead that it is beyond the proper limits of the federal judicial power.

Of course, a court resolving a dispute relating to electoral maps risks being perceived as just another partisan actor and thus undermining its own legitimacy. This is certainly a factor to be accounted for in fashioning both the requirements for the successful assertion of a challenge as well as the remedies that follow. Whether it is better to attempt to fashion a comprehensive rule, as the Court in Rucho and the cases leading up to it conceived of their mission, or to proceed in a more case-by-case manner, as Justice Kagan advocated for in her dissent,7 9 may well be a question best answered with reference to the specifics of a given state. And as both Rucho and recent experience in the states suggest, the potential hit to legitimacy may be unavoidable: a court's conclusion that partisan gerrymandering claims are nonjusticiable may itself be perceived as the product of partisan motivation.

Quite apart from whether state courts have thus far made appropriate use of Rucho, these cases confirm that the nature of state judicial power is underdeveloped. It is a mistake to imagine that there is such a thing as "the judicial power" or even "the judicial power of courts in the United States." There are, undoubtedly, substantial similarities in the way such power is conceived and exercised across American jurisdictions, and the individuals who constitute and act within the various judicial systems are products of a system of legal education that ensures a rough uniformity of understanding. At a first cut, at least, it is entirely appropriate to draw inferences about the contours of state judicial power from the nature of federal judicial power. Both are instances of the umbrella category of American judicial power, and that a thing is done a certain way in one context supports a presumption that it ought to be done that way in the other as well.

## Ks

#### Rucho exemplifies the Court’s post-racial jurisprudence—by refusing to adjudicate partisan gerrymandering, the Court extends its refusal to name structural racism, reinscribing a colorblind framework that weaponizes "racism" to protect white innocence and de-legitimize claims of anti-Black subjugation. Plan doesn’t solve, because it is also structured in color-blind legal theory.

Kathryn M. Stanchi, 2021

“The Rhetoric of Racism in the United States Supreme Court” Scholarly Commons at UNLV Boyd Law

https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2359&context=facpub

The trend in usage suggests that even this narrow definition may be shrinking. The Court is less likely in modern times (post 1986) to label even the usual suspects such as the Ku Klux Klan or Jim Crow laws as racist in majority opinions. This decrease in usage combined with the sharp rise in references attacking the use of these words suggests an emerging definition of racism in which very little behavior warrants the label.

This narrow definition has been further distorted by the increasing number of usages that flip the meaning of "racism." The opinions explicitly denying or minimizing racism, coupled with the opinions using "racism" (or "racist") to refer to bias against whites, corrupt the definition of "racism" into a powerful false myth that Black people use racism to unfairly harm white people. This definition is most clearly seen when the Court's opinions use the keywords "racist" or "racism" in situations that disadvantage whites or depict whites as the truly down-trodden, depict Black civil rights leaders as the "real racists," or decry any charge of racism as uncivil.

# Students for Fair Admissions v. President and Fellows of Harvard College

## Overview

**Students for Fair Admissions (SFFA)** is an organization led by conservative legal activist **Edward Blum**, who has long opposed race-based policies in education and voting rights. SFFA filed suit in 2014 against Harvard, alleging that:

1. **Harvard discriminated against Asian-American applicants** by holding them to higher standards than applicants of other races.
2. Harvard's use of **race as a factor in admissions** violated **Title VI of the Civil Rights Act of 1964**, which bans racial discrimination by institutions receiving federal funds.

The case was part of a broader legal strategy to **challenge and dismantle affirmative action policies** in higher education.

**Legal Journey:**

* **District Court (2019):** Ruled in favor of Harvard, finding no unlawful discrimination and that Harvard's admissions process passed **strict scrutiny** — the highest constitutional standard for race-based classifications.
* **1st Circuit Court of Appeals (2020):** Affirmed the lower court’s ruling.
* **Supreme Court (2023):** The conservative-majority Court reversed the lower court rulings.

**Supreme Court Decision (June 29, 2023):**

* **Majority Opinion (6–3, Chief Justice Roberts):**
	+ Declared that **Harvard’s and UNC’s use of race in admissions violates the Equal Protection Clause** of the 14th Amendment.
	+ Concluded that race-conscious admissions programs lacked “**sufficiently measurable objectives**” and failed to provide meaningful endpoints, thus not surviving strict scrutiny.
	+ Rejected the idea that achieving "diverse" classes could justify treating applicants differently based on race.
	+ Suggested that applicants **could still discuss race** in their personal statements if related to individual experiences, but race itself **could not be used as a “plus factor”**.
* **Concurring Opinions:**
	+ **Justice Thomas** wrote a sweeping concurrence rejecting the foundations of affirmative action, arguing that all racial classifications are inherently suspect and that affirmative action harms its intended beneficiaries.
	+ **Justice Gorsuch** emphasized that race-conscious admissions violate **Title VI** of the Civil Rights Act.
* **Dissenting Opinion (Justice Sotomayor, joined by Kagan and Jackson for UNC case):**
	+ Argued the ruling **rolls back decades of precedent** and will **entrench racial inequality**.
	+ Pointed out that **universities’ ability to foster diverse learning environments** is critically impaired.

**Broader Implications:**

1. **Affirmative action is effectively ended** in college admissions, both public and private (as Title VI applies to private universities receiving federal funds).
2. Raises questions about other types of **DEI (Diversity, Equity, Inclusion) programs** in education and employment.
3. Opens the door to **new legal challenges** involving corporate diversity initiatives, scholarships, and fellowships.

## Controversy

#### *Students for Fair Admissions v. Harvard* and challenged race-conscious admissions, claiming policies unfairly discriminated against Asian American applicants. The case reignited debate over affirmative action, with critics calling it unconstitutional and supporters defending it as key to diversity.

Hoang Pham Imani Nokuri Fatima Dahir Mira Joseph December 12, 2023

Students for Fair Admissions v. Harvard FAQ: Navigating the Evolving Implications of the Court’s Ruling

Stanford Center for Racial Justice

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al. (“SFFA”) are a pair of Supreme Court cases that addressed the constitutionality of race-based affirmative action at private and public universities. The plaintiff, Students for Fair Admissions (“SFFA”), alleged that Harvard College and the University of North Carolina (“UNC”) violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 because their admissions process intentionally discriminated against Asian American applicants based on their race and ethnicity. For 45 years, the Supreme Court had accepted an applicant’s race as one of many factors that colleges and universities could consider in making admissions decisions, particularly to help it realize the educational benefits of diversity. However, SFFA claimed that under Harvard’s and UNC’s admissions scheme, despite Asian American applicants having stronger academic qualifications than other racial groups, they were admitted at lower rates. According to SFFA, this combination of factors served as evidence that the schools’ affirmative action policies discriminated against them. SFFA asked the Court to prohibit the universities “from using race as a factor in future undergraduate admissions decisions” and require them to “conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission.” Complaint at 119, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 U.S. 2141 (2014) (No. 1:14-cv-14176).

## Affirmative

### Economy Advantage

#### Affirmative action promotes economic equity and addresses systemic labor market failures.

Kate Bahn and Oluwasekemi Odumosu October 03, 2023

Social determinants of work

How Diversity Policies Shape the US Labor Market

https://www.workrisenetwork.org/working-knowledge/how-diversity-policies-shape-us-labor-market

Affirmative action, a set of race-based policy interventions designed for equity, has been instrumental in addressing historical discrimination and structural racism, aiming to correct market failures and remove barriers to mobility in the labor market. Affirmative action paves the way for individuals who have encountered systemic barriers due to their race to better access [higher education](https://journals.sagepub.com/doi/full/10.1177/0895904820961007?casa_token=KakpVFi3e9QAAAAA%3AlWav-wF6IWn66pLgFYCdkAJsiNd-tqXEfe8l_IvmZb0-GOzS4eAm1q0RsHCWkLA15xbcZrZ23J9_) and improve employment prospects, which results in placement by merit and ability rather than placement determined by biases against underrepresented minorities or lost opportunities due to otherwise insurmountable barriers. Between 1972 and 2003, an affirmative action mandate [increased the shares of employment](https://people.umass.edu/fidan/Kurtulus_IR_AA_Occ_April_2012.pdf) in technical occupations among federal contractors by 7.7 percent for Latina women and by 4.2 percent for Black men.

The current state of racial inequality indicates there is still a need for race-conscious policies in the labor market and beyond. [Recent data](https://www.americanprogress.org/article/occupational-segregation-in-america/) show that workers are often employed in different occupations by race and gender; this [employment segregation remains a significant concern](https://www.americanprogress.org/article/occupational-segregation-in-america/) for equity as it hinders career advancement and contributes to wage disparities based on race, gender, and their intersections of identity. Racial equity is worsened by the [transmission of disadvantages](https://equitablegrowth.org/race-and-the-lack-of-intergenerational-economic-mobility-in-the-united-states/) across generations and by limited access to resources and educational opportunities for children whose parents have had less success in these areas.

[Persistent segregation within the US occupational structure](https://equitablegrowth.org/factsheet-u-s-occupational-segregation-by-race-ethnicity-and-gender/) exposes certain groups to economic shocks and results in a [double pay penalty](https://equitablegrowth.org/addressing-the-double-gap-faced-by-black-women-in-the-u-s-economy/#:~:text=This%20%E2%80%9Cdouble%20gap%E2%80%9D%20is%20a,average%20earn%20less%20than%20men.) for women of color. Black workers in particular bear a [disproportionate burden of layoffs](https://read.dukeupress.edu/demography/article/47/1/227/169862/Last-hired-first-fired-black-white-unemployment) during economic downturns and face heightened scrutiny, rendering them more susceptible to termination. These ongoing negative consequences are a direct result of past discrimination, which affirmative action aims to address and rectify.

However, a [recent Supreme Court decision](https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/) struck down affirmative action in higher education, weakening an important tool in advancing racial equity at a critical stage of human capital development. This article delves into the economic effectiveness of affirmative action, exploring its achievements and critiques, as well as the implications of race-neutral policies in promoting equity in the labor market.

#### Affirmative action boosts economic growth by correcting market failures caused by systemic discrimination and unequal access to opportunity.

Kate Bahn and Oluwasekemi Odumosu October 03, 2023

Social determinants of work

How Diversity Policies Shape the US Labor Market

https://www.workrisenetwork.org/working-knowledge/how-diversity-policies-shape-us-labor-market

Affirmative action is an effective economic policy because it corrects for [market failures](https://www.investopedia.com/terms/m/marketfailure.asp) like discriminatory biases and the persistence of racially disparate outcomes. The benefits of a market economy, like maximizing economic growth, depend on minimizing barriers to opportunity. However, legacy admissions, wealth inequality by race, and obstacles faced by first-generation college students (who do not have a parent who attended college and who are disproportionately non-white) all make college less accessible for Black, Latinx, and Native American students, regardless of aptitude or interest in completing higher education.

Discriminatory outcomes persist in the labor market: in one [meta-analysis of research](https://www.pnas.org/doi/abs/10.1073/pnas.1706255114) on hiring discrimination against Black and Latinx workers, scholars found continued evidence that Black and Latinx workers are less likely to receive callbacks on their job applications compared to equivalently qualified white workers. Similarly, job applicants with names of Asian origin and other signifiers of being foreign born are [less likely to receive callbacks](https://www.aeaweb.org/articles?id=10.1257/pol.3.4.148). From college to employment, these differences in outcomes mean that equally qualified people from disadvantaged and historically excluded backgrounds face significant barriers, reducing the pool of talent and limiting the ability for people to do what they are most interested in, and would be most productive at doing, across the economy.

In a hypothetical model of the economy, if people across demographic groups have an equivalent distribution of ability but one group faces systemic disadvantages, improving the access of those facing barriers improves overall outcomes. In one [modeling simulation,](https://www.proquest.com/docview/1784157389?pq-origsite=gscholar&fromopenview=true) researchers found that when education is costly but there are many options, giving preference to those from disadvantaged groups who have fewer resources to improve further ability leads to overall positive welfare outcomes. [Review of the empirical literature](https://www.aeaweb.org/articles?id=10.1257/jel.38.3.483) reinforces this theoretical work and finds little evidence that affirmative action is inefficient. Thus, it appears in sum that affirmative action may be a useful tool for correcting for the market failures resulting from discrimination and systemic disparities by demographic group.

### Democracy Advantage

#### The Supreme Court’s ruling in the Harvard affirmative action case threatens core democratic values by weakening the pipeline of diverse graduates into key public and private institutions. Diverse educational environments enhance cognitive development, foster racial understanding, and prepare students for participation in a pluralistic democracy. Limiting race-conscious admissions jeopardizes workforce innovation, public health, and fair legal representation—ultimately eroding democratic legitimacy and equitable civic participation.

David Hinojosa and Chavis Jones, 2024

Overturning SFF turning SFFA v. Harvard

St. Mary’s Law Review on Race & Social Justice Volume 27, Issue 1

https://commons.stmarytx.edu/thescholar/

Harvard, indeed, presents a true threat to numerous democratic institutions that depend on universities to cultivate a diverse cohort of graduates.131 For example, many employers in a free market rely on a social climate and workforce in which its citizens developed tools to engage and understand one another across races and beliefs.132 Facilitating diverse classrooms where there is a free exchange of ideas and perspectives “helps to break down racial stereotypes, and enables students to better understand persons of different races.”133 These reliance interests are substantial. As the Supreme Court recognized, “[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation” is made easier by their access to and participation in higher education.134 Social science research convincingly demonstrates that student body diversity plays a vital role in preparing students to become professionals who can engage meaningfully in an increasingly diverse workforce and society.135 Research additionally demonstrates that students in diverse academic environments experience enhancements in cognitive capabilities and critical thinking skills.136 One study focused on the impact of diversity over a decade past a student’s undergraduate years and found that exposure to diversity during college positively influenced their personal development, sense of mission, capacity to recognize racism, and propensity for volunteering.

In Ramos, the Court affirmed the notion that we, as a society, share an “interest” in the “preservation of our constitutionally promised liberties.”138 These reliance interests are socially held assumptions about the law that are concrete, knowable, and important to the stability of our society and democracy.139 The potential loss of various advantages to our workforce carries profound implications for our society at large.140 For instance, studies prove that students who graduate from diverse institutions and enter the workforce demonstrate improved decision-making and problem-solving skills.141 Further, companies that implement prodiversity policies are found to be more innovative, even when the economy is down.142 In the medical field, research has unveiled that a multitude of health disparities impacting Black and Latino communities, such as Black maternal mortality rates, could be mitigated to some degree. through the enhancement of diversity in medical education and practice. 143 Within the legal profession, the prohibition of race-conscious admissions policies would affect the ability of aspiring lawyers to recognize racial bias within themselves and to eradicate stereotypes from their perceptions of the world.144 Consequently, this diminishes lawyers’ ability to participate in the legal system and public policy impartially, thereby impeding the administration of justice.145 In essence, the disruption of diversity on college and university campuses has potential material consequences for the life prospects, health, and justice outcomes of American citizens, and democracy more broadly.146 If the Court opts to overturn Harvard, it could reverse these detrimental impacts on critical industries and service providers.

### Antiblackness Advantage

#### Opposition to affirmative action is rooted in anti-Blackness, masking racial resentment through colorblind meritocracy narratives. Appeals to "hard work" and "neutral" standards ignore systemic racial disparities and reinforce white supremacy by positioning Black people as inherently less deserving of opportunity and belonging.

V. Thandi Sulé, Rachelle Winkle-Wagner, Dina C. Maramba, Abigail Sachs, 2022

When Higher Education is Framed as a Privilege: Anti-Blackness and Affirmative Action during Tumultuous Times

The Review of Higher Education, Volume 45, Number 4, Summer 2022, pp. 415-448 (Article)

https://muse.jhu.edu/pub/1/article/858479/pdf?casa\_token=iAhE08et440AAAAA:1tWNqHfYRPgzxxH-JlbZ-alkO0015-0wrFuz1UCDdG-zWHyJVlHgWzMxRvKiRprYs42tdSfCeX4

Our two emergent frames demonstrate a racially coded way of maintaining White racial privilege. Through the lens of anti-Blackness, the commenters either enacted or critiqued the assumption of Black inferiority. The implicit claims toward anti-Blackness are aligned with negative racial attitudes (Roos et al., 2019). We codified these claims as (a) Affirmative action Opposition as Racialized Meritocracy, and (b) Affirmative action Opposition as antiBlackness. The discourse accentuates unease with policies that may help Black people. In this way, the affirmative action discourse unveiled larger social Discourses about race, inequality, belonging, and citizenship, particularly through the framing of colorblind racism. The first frame, highlighting racialized meritocracy, relied on understood ideas of meritocracy and colorblindness (Bonilla-Silva, 2018), where there is an assumption that individual talent and effort results in academic achievement.

The first frame assumed consensus on what constitutes merit even if consensus does not exist in practice. Abstract liberalism (Bonilla-Silva, 2018) undergirds all of the narratives in this frame. We found many commenters did not acknowledge race as important and often mentioned hard work (defined as test scores) as true measurements of one’s worthiness to be admitted into Harvard. Most of the commenters’ appraisals of affirmative action did not acknowledge current race-conscious disparities in education, wealth, health, and other indictors of well-being (Asante-Muhammad et al., 2016; Brown et al., 2003; Center for Disease Control and Prevention, 2013; Oliver & Shapiro, 2006), not to mention how U.S. institutions were complicit in intentionally undermining the social-economic development of descendants of U.S. slavery and enacting internal colonization (Brown et al., 2003; Khalifa et al., 2016). In this line of thinking, all those who are unable to succeed by traditional markers such as standardized test scores must be somehow intellectually inferior, which relies on the notion that racialized groups are culturally deficient (Bonilla-Silva, 2018).

It was unclear what commenters meant by “working hard” when defending a meritocratic view of admissions. Perhaps the commenters were shifting the definition of “work hard” depending on how threatened they felt in their own racial/ethnic status, suggesting racial status threat (Samson, 2013; Warikoo, 2016). That is, if the commenter was White and felt threatened by another racial group (i.e., that another group might get into college), the commenter’s views on whether GPA or test scores should count toward working hard might change. The ongoing argument for race-neutral approaches is reminiscent of arguments for no preferential treatment, as proponents of this approach believe considering racial injustices and disparities when determining institutional access is inherently discriminatory against nonminoritized groups (Gamson & Modigliani, 1987). For many commenters, colorblindness is the appropriate approach to admitting students as it upholds their view of merit as measurable through standardized tests. Affirmative action, in this case, is seen as a form of racial discrimination towards White people. Also, colorblind framing captures how racially coded language by White people upholds white supremacy (Bonilla-Silva, 2018; Jayakumar & Adamian, 2017).

The second frame, affirmative action opposition as anti-Blackness, is a more blatant framing of the racialized meritocracy perspective, or the idea that meritocracy is a fallacy that is often inherently racist in practice. It represents an awareness of how people feign commitment to race-neutral admissions practices while placing Black people outside of the realm of meriting worthiness for admission. Aligned with this thinking, some commenters believe that the anti-affirmative action position of the Department of Justice and Students for Fair Admission is just a ruse to hide their disdain for Black people and anything that might benefit Black people. Though Black people may be the primary target of anti-affirmative action efforts, we contend that Asian Americans are not necessarily the beneficiaries of race exclusion practices. Furthermore, they are used to divide racially marginalized groups (Moses et al., 2019).

### Set Col Advantage

#### Affirmative action for Native Americans is uniquely justified due to the U.S. government’s historical use of education as a tool of cultural erasure and forced assimilation. Race-conscious admissions are necessary to remedy specific, education-based harms committed against Indigenous peoples, fulfilling a direct moral and legal obligation tied to federal trust responsibilities and historical injustice.

Jackson Gehrig Bednarczyk, 2024

'From Wounded Knee to Carlisle to SFFA: An Indigenous Case for Affirmative Action' (2024) 66(4) Arizona Law Review 1067

https://heinonline.org/HOL/P?h=hein.journals/arz66&i=1087

Affirmative action is controversial. Multiple current Supreme Court justices view it with suspicion, if not outright disdain,3 77 and scholars have debated whether it is even successful in increasing effective opportunities for minorities. 378 This Note has not attempted to provide a magic bullet for all criticisms of affirmative action, both normative and empirical. Instead, its purpose is twofold: (1) to highlight the problems with the Supreme Court's affirmative action jurisprudence and (2) to advance a unique Indigenous-centered case for race-conscious action in higher education admissions.

In doing so, this Note has relied on the singular history of Indigenous people in this country-a history marred by centuries of bloodshed, land theft, and forced assimilation. Specifically, it has emphasized the ways in which the federal government purposely attempted to-and to some extent did-erase Native cultures and identities through educational policy. While it is undoubtedly true that Indigenous history in its full context presents an even stronger case for affirmative action, the benefit of narrowing the aperture to education-based discrimination is that it distills the strict-scrutiny analysis to the effects of government action bearing the closest relationship to the specific method for employing affirmative action. This logic is rooted in some of humanity's earliest recorded laws-an eye for an eye379 education-based remedies for education-based sins.

Other arguments can and should be leveraged to support affirmative action for Native people. Such arguments include the federal government's trust responsibility to tribes, the Indian Commerce Clause, and Native connections and entitlements to the stolen land upon which universities are built. Future works should also attempt to craft arguments relating to how states can directly support affirmative action without relying on a federal policy. Finally, SFFA 's termination of the white-centered diversity rationale should push scholars to craft specific arguments for other racial and ethnic minorities.

## Negative

#### The Supreme Court’s decision in *Students for Fair Admissions* reaffirms that race-based admissions policies, including quotas, violate the Equal Protection Clause by discriminating against non-minority applicants. Affirmative action programs, while intended to promote diversity, can lead to counter-discrimination, reinforce stereotypes, and undermine merit-based selection—making them incompatible with constitutional principles and societal fairness.

Catherine Choi, Staff Writer, October 13, 2023

“Affirmative action was wrong from the start”

The Case Western Reserve Observer https://observer.case.edu/affirmative-action-was-wrong-from-the-start/

This summer, the United States Supreme Court decided in Students for Fair Admissions, Inc. v. University of North Carolina (UNC) that higher education institutions could no longer consider race as a factor in admissions, thus severely limiting affirmative action programs. In California v. Bakke, it was ruled that affirmative action programs must not result in harm to non-minority applicants; however, as in the cases of Harvard University and UNC, many affirmative action systems failed to meet non-discrimination requirements. White and Asian American applicants were particularly negatively affected, as colleges relied on faulty stereotypes to promote unjust discrimination. Furthermore, there is no proven correlation between enforcing racial quotas and promoting a school’s cultural diversity. So , educational institutions, employers and legislatures should put a higher emphasis on a candidate’s merit rather than promoting diversity.

Quotas are a violation of the Constitution. In the case of affirmative action, educational institutions and employers recruit qualified minorities, women, persons with disabilities and covered veterans. As a result, there is an increase in diversity, equality and social mobility. But these benefits come at the cost of discriminating against those who are not part of protected classes and violating the Equal Protection clause of the Constitution. In the case Fisher v. University of Texas (UT), UT was required to admit students with grades in the top 10% of Texas highschools. For the rest of their applicants, race was a determining factor. Abigail Fisher was one of those applicants.  Fisher claimed she was not accepted due to not being in the top 10% of her highschool and for being white. The Supreme Court ruled that such discrimination was not a violation of the 14th Amendment’s Equal Protection clause; however, admissions cannot utilize a racial quota without violating the Constitution. In that same court case, Justice Ruth Bader Ginsburg stated that race was merely one factor of many that colleges considered in admitting students. However, not all college applicants are alike: Some who are considered to be privileged applicants are not necessarily more advantaged than those considered to be minority applicants.

Considering factors irrelevant to a candidate’s merits can lead to counter-discrimination and an overall decline in an institution’s performance. Perceptions of unfairness from affirmative action programs can result in a decrease in applications, impaired work ethics and a decline in professional commitment. Schools are more likely to be successful by electing applicants with a diversity of ideas and those that can excel in their academic programs. But selecting students based on stereotypical assumptions about race, gender and disability can end up erasing the efforts of students who were fairly admitted to their school of choice, undermining the value of merit and hard work. Quotas increase the possibility of recruiting unqualified candidates, and in the case where they fail to adapt to the college atmosphere, schools can suffer from high dropout rates. In a society which values educational excellence, applicants should be evaluated based on merit to prevent unqualified applicants from taking the place of qualified ones.

Adopting quotas can, in fact, promote stereotypes and discrimination. Quotas often force recruiters to accept unqualified candidates just to fill available spots. Providing unfair advantages in areas that have a huge impact on one’s life—such as education, employment and government positions—based on criteria irrelevant to one’s skill and beyond one’s control—such as gender, race and disability—can foster the stereotype that certain applicants are incapable and can only succeed with additional help. These stereotypes can lead to workplace tension by perpetuating the thought that unqualified candidates are stealing opportunities from those who are more qualified, as well as by undermining the voices of minority candidates. We should instead focus on changing the recruitment process to exclude bias as much as possible and on providing more resources and opportunities for people to succeed.

Educational and professional requirements for acceptance into school or the work force exist for a reason. By focusing on merit, schools and companies can select the most qualified people for the position. The best method of combating discrimination is by providing more opportunities for people to succeed and to reject the social stereotypes that have hurt generations of students and workers alike.

#### Affirmative action is racist and discriminates against Asian Americans

Affirmative Action Is Racist and Therefore Wrong’

[**John Stossel**](https://reason.com/people/john-stossel/) | 7.12.2023

https://reason.com/2023/07/12/affirmative-action-is-racist-and-therefore-wrong/

The left is angry because the Supreme Court ruled race-based affirmative action unconstitutional. President Joe Biden says he "strongly disagrees."

But Chief Justice John Roberts was right to say, "Eliminating racial discrimination means eliminating all of it."

It's a victory for Students for Fair Admissions, the group that sued, thereby forcing Harvard to admit that Asians had to score 22 points higher on the SAT than whites, 63 points higher than blacks.

How did Harvard justify that? They said Americans of Asian descent score lower in personal attributes, like "likability."

"Asian Americans are boring little grade grubbers," complains the Asian American Legal Foundation's Lee Cheng, in my video on race-based admissions. "That's bullshit," he adds.

Economist Harry Holzer, who defended Harvard, says the school did the right thing.

"Asians are not interesting?" I ask. "They don't have interesting qualities?"

"Personal ratings reflect a wide range of characteristics," Holzer responds. "It's possible that some of that is anti-Asian bias, but you certainly can't prove that…. When you have a long history of discrimination based on race, you have to take race into account."

"There are many, many different ways to achieve diversity without discriminating against Asian Americans," Cheng responds. "Race-focused affirmative action helps rich people. Seventy percent of the students of every ethnic group at Harvard come from the top 20 percent of family income."

But Asians already do well in America, earning more money, on average, than other ethnic groups. Blacks have faced more discrimination. "Isn't it Harvard's job to try to make up for some of that?" I ask Cheng.

"The right path out of the history of discrimination based on race is not more discrimination," he replies.

Cheng is right. Affirmative action is racist, and therefore wrong.

### Das

### Politics DA

#### A Gallup survey shows 68% of Americans support the Supreme Court’s 2023 decision to end race-conscious admissions (*SFFA v. Harvard*), aligning with long-standing public preference for merit-based admissions. The ruling enjoys majority approval among White, Asian, and Hispanic adults—creating a strong political link for affirming the decision.

Justin McCarthy, Jan. 16, 2024

Post Affimative Action, Views on Admissions Differ by Race

https://www.luminafoundation.org/wp-content/uploads/2024/05/Post-Affirmative-Action.pdf

A Gallup Center on Black Voices survey finds that about two in three Americans (68%) say the Supreme Court’s June 2023 ruling to end the use of race and ethnicity in university admission decisions is “mostly a good thing.” Black Americans are divided in their assessment of the decision, while majorities of Asian, White and Hispanic adults view the ruling mostly positively.

The court’s decision in Students for Fair Admissions v. Harvard ended race-conscious admissions programs at colleges in the U.S., reversing decisions by the court that had permitted the practice in the past. Previous Gallup polling found similar majorities of Americans, around 70%, had consistently favored colleges deciding admissions solely on merit rather than considering a student’s racial or ethnic background.

Students currently applying to colleges are the first cohort in decades to apply without race being a possible consideration in any college’s admission decisions. Although Black adults are divided on the appropriateness of the ruling, they are much more inclined to think it will have a negative than a positive (or no) impact on higher education, generally, and for members of their own racial group. About half of Black adults say the ruling will negatively impact higher education in the U.S. (50%) and the ability of applicants of their own race to attend college (52%). However, 33% of Black adults view the decision as a positive development, saying it will positively impact higher education, while 27% say it will make it easier for Black applicants. The rest view it as one that will not bear any consequences, with 17% saying it will not impact higher education and 22% saying it will make no difference to future Black college applicants. In contrast, pluralities of Asian and White adults believe the decision will positively impact higher education in the U.S. Both groups are most likely to say the decision will make “no difference” for applicants of their own race to attend college. Hispanic adults are most likely to view the decision as positive for higher education in the U.S. but are mixed evenly in terms of the impact on applicants of their own race.

#### Affirmative Action policies are not popular with American voters.

Pew Research Center

Americans and affirmative action: How the public sees the consideration of race in college admissions, hiring

https://www.pewresearch.org/short-reads/2023/06/16/americans-and-affirmative-action-how-the-public-sees-the-consideration-of-race-in-college-admissions-hiring/

In a [survey conducted in spring 2023](https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions/), half of U.S. adults said they disapprove of selective colleges and universities taking race and ethnicity into account in admissions decisions in order to increase racial and ethnic diversity. A third of adults approved of this, while 16% were not sure.

In the same survey, 49% of Americans said the consideration of race and ethnicity makes the overall admissions process less fair, while only 20% said it makes the process fairer. Another 17% said it does not affect the fairness of the admissions process, while 13% said they weren’t sure.

Other Center surveys have also found more opposition than support for the consideration of race and ethnicity in college admissions decisions.

In the December 2022 survey, for example, 82% of U.S. adults said colleges should not consider race or ethnicity when deciding which students to accept, while only 17% said colleges should take this into account. Americans were far more likely to say that colleges should consider other factors, particularly high school grades and standardized test scores.

#### It’s enough to swing elections, Trumps win in 2024 is likely due to anti-DEI sentiment amongst American voters.

[Brit Morse](https://fortune.com/author/brit-morse/) and [Emma Burleigh](https://fortune.com/author/emma-burleigh/) November 8, 2024

Donald Trump’s election win will create a DEI reckoning that forces companies to either stand up for their policies or ‘step away’

https://fortune.com/2024/11/08/donald-trump-election-win-dei-reckoning-legal-challenges-divide-defend-policies/

This year has already seen a [growing backlash](https://fortune.com/2024/07/23/congress-conservatives-trump-assassination-attempt-secret-service-dei/) [against DEI efforts](https://fortune.com/2024/09/20/anti-dei-activist-robby-starbuck-is-everywhere-but-critics-say-his-influence-is-overstated/), and many large companies [have announced plans](https://fortune.com/2024/05/29/fortune-100-diversity-communications-comms-messaging-dei/) to alter or dismantle their [programs](https://fortune.com/2024/09/11/vc-firm-fearless-fund-ends-black-womens-grant-program-conservative-activists-lawsuit/). Ford told employees in an internal August email that it will roll back DEI policies due to the “external and legal environment related to political and social issues.” [Lowe’s](https://fortune.com/2024/08/27/lowes-followed-tractor-supply-harley-davidson-and-john-deere-in-backing-off-dei-initiatives/), [John Deere](https://fortune.com/2024/07/18/john-deere-dei-backlash-conservative-activists/), [Tractor Supply](https://fortune.com/2024/07/01/tractor-supply-dei-statement-reversal-boycott-customers-diversity/), and [Harley-Davidson](https://fortune.com/2024/08/19/harley-davidson-john-deere-tractor-supply-robby-starbuck-dei/) have all also pulled back on previous attempts to increase diversity at their organizations, with the latter two noting a desire to appeal to their more [conservative-leaning customers](https://www.cnbc.com/2024/08/28/ford-joins-list-of-companies-walking-back-dei-policies.html).

Donald Trump appointed Supreme Court justices who voted to [overturn affirmative action](https://fortune.com/2023/05/30/affirmative-action-supreme-court-students-for-fair-admissions-corporate-america/) last year. He has vowed to focus on “[anti-white feeling](https://www.reuters.com/world/us/trump-vows-fight-anti-white-feeling-us-his-allies-have-plan-2024-05-04/),” and during his previous term he [banned racial sensitivity training](https://www.npr.org/2020/09/22/915843471/trump-expands-ban-on-racial-sensitivity-training-to-federal-contractors) for federal government and contract workers. When asked if it was acceptable that multiple Republican leaders called Vice President Kamala Harris a “DEI hire,” [Trump replied](https://www.cnn.com/2024/07/31/politics/donald-trump-kamala-harris-black-nabj/index.html): “I really don’t know. Could be. Could be.”

A U.S. leader opposed to corporate diversity efforts, on top of a [pre-existing cultural backlash](https://fortune.com/2024/06/24/mei-elon-musk-alexandr-wang-anti-dei-hiring-merit-excellence-intelligence/), is no doubt dominating HR and C-suite discussions this week. Fortune spoke with academics, lawyers, and policy experts, to better understand what a Trump presidency means for [DEI efforts moving forward](https://fortune.com/2024/10/10/lawyer-neal-katyal-companies-dei-rollback-wimps/). Many said that they anticipate [legal battles](https://fortune.com/2024/10/17/robby-starbuck-fearless-fund/) will only get worse, and corporate America will become more divided. But they also emphasize that not everyone will roll back their policies because of a Trump presidency—companies just have to fundamentally understand what their position is, and be ready to defend it.

“I do think some companies are going to start to use the rhetoric we’ve heard from Trump over the last year to step away from some of these things,” Paul Wolfe author, and former CHRO at Indeed, Match.com and Conde Nast. “I think this is another thing that will only get harder for DEIB professionals and HR professionals to deal with.”

#### Voter confidence in Democrats' handling of education has collapsed to historic lows after two decades of dominance, driven by backlash over school closures, political agendas, and parental rights battles. Although Republicans haven't yet gained full trust, the erosion signals a volatile, competitive political landscape where education issues will swing key elections and destabilize traditional party advantages.

Frederick Hess, May 4, 2022

On Education, Public Confidence in Democrats Has Plummeted

https://rickhess99.medium.com/on-education-public-confidence-in-democrats-hasOn%20Education,%20Public%20Confidence%20in%20Democrats%20Has%20Plummeted-9469fa474d1

More recently, though, things may be changing. Amid debates over school closures and masking, critical race theory, parental rights, campus speech, and more, polling (like [this](https://morningconsult.com/2021/11/10/education-polling-2022-midterms/) and [this](https://www.wsj.com/articles/wsj-poll-biden-ukraine-inflation-midterms-11646975533)) suggests that the party’s close association with schools and colleges may be hurting Democrats more than helping them. In much of this, Ruy Teixeira, a political scientist at the Center for American Progress and co-author of *The Emerging Democratic Majority*, has [fretted](https://theliberalpatriot.substack.com/p/the-democrats-common-sense-problem?s=r) that, “Democrats are losing the plot relative to the median voter.”

This discussion is familiar to anyone who’s been around education of late. For instance, it was inescapable last fall after Virginia’s gubernatorial campaign gained national attention for the back-and-forth over parental rights and pandemic school policies. So, it seemed worth putting on my political science hat to see if there’s evidence of real movement in public opinion — or if this is just another overhyped media narrative.

Fortunately, since 2003, public opinion researchers New Models and Winning the Issues, both using the same pollster, have regularly asked voters, “Which party [they] have more confidence in to handle the issue of education, the Republican Party or the Democratic Party?” Together, they polled this question a total of 78 times over the past 20 years.

The time frame, uniform question, and consistent pollster make this question a terrific tool for spotting any trends. So, what do we see?

Well, as I explained the other week in a new [report](https://www.aei.org/research-products/report/democrats-have-lost-public-confidence-on-education-but-the-gop-hasnt-gained-it/), between 2003 and 2022, Democrats have consistently enjoyed a sizable advantage in public confidence on education. Between 2003 and 2022, the average Democratic lead was 15 points (51–36), and there was never a year in which Republicans led.

More recently, though, there’s been a notable shift. From 2003 to 2013, Democratic support usually hovered around 55 percent or higher.

Now? Well, the Democrats’ worst five years in the past 20 have all come since 2014, and 2022 is the only year in the last 20 in which confidence in Democrats on education has fallen below 45 percent. Given all that, it’s not too surprising that, in 2021 and 2022, the Democratic lead over Republicans fell into the single digits.

This is a remarkably poor showing for the Democrats. Prior to the pandemic, 2014 was the only year since at least 2003 when the Democratic lead touched single digits (that was at the height of the Common Core backlash).

But Democrat losses haven’t yet turned into commensurate Republican gains. Voter confidence in the GOP on education sat in the mid-30s for pretty much the whole of the past two decades, and it remains firmly in that same range now.

In short, lots of voters are saying they’ve lost confidence in the Democrats on education — but aren’t yet ready to say they have gained confidence in the Republicans.

For Democrats, this suggests there’s a real chance to win these voters back. Of course, that would be more likely if the party could check the impulses that have been causing it to bleed moderate and left-center voters.

For Republicans, there’s an opportunity to close the gap on an area of perennial weakness. That would be a whole lot more likely, though, if the GOP were doing more to offer practical solutions to meet the needs of students and families.

There’s also the question as to how permanent any of these observed shifts may be. During President Barack Obama’s second term, big Republican education gains melted away as the Common Core faded from prominence. If today’s shifts have been driven by frustration with Democratic stances on school closures or critical race theory, voters could drift back to the status quo as these fights recede.

What happens next on this count matters. That’s true not just for high-profile education fights in state capitals and Washington, but the outcome will also assuredly play a role in crucial national elections this fall — and, quite likely, in 2024.

### Public Education Confidence DA

#### Research finds Diversity, Equity, and Inclusion (DEI) initiatives in schools are counterproductive, widening achievement gaps and prioritizing political agendas over educational quality. DEI policies eliminate advanced courses, lower academic standards, and foster discrimination, causing educational decline and public outrage. The backlash threatens the legitimacy of public institutions and accelerates polarization in education policy.

Larry Sand, January 4, 2022

“Diversity, Equity, and Inclusion is Crippling Education”

https://californiapolicycenter.org/diversity-equity-and-inclusion-is-crippling-education/

Researchers extraordinaire Jay Greene and James Paul have released a series of [three carefully crafted studies](https://www.heritage.org/staff/jay-p-greene-phd) on Diversity, Equity, and Inclusion that detail many aspects of the harmful scheme. In a nutshell, the authors find DEI to be “[counterproductive and politically radical](https://jaypgreene.com/2021/10/28/dei-is-educationally-counter-productive-and-politically-radical/).”

The part of the study that examines DEI’s effects on elementary schools is particularly damning. It looks at school districts with at least 15,000 students, of which there are 554, and finds that schools with Chief Diversity Officers (CDOs) “actually have larger gaps in achievement between black and white students, Hispanic and white students, and non-poor and poor students than districts without CDOs. And those gaps are growing wider over time. This pattern holds true even after controlling for a host of other observable characteristics of those districts.”

The authors explain that the gaps occur because CDOs “are more focused on promoting a political agenda than they are on finding effective educational interventions.” And that political agenda includes advancing policies that typically exacerbate achievement gaps, such as eliminating gifted programs and advanced math classes “while selecting English and Social Studies content for its political orthodoxy rather than educational quality.”

Why would such a bad idea be such an easy sell? Because when you dress up the words, they can sound good, at least to true believers. But in reality, it’s a nightmare for all concerned, except of course for the “progressive” elites who financially benefit from the racket.

One part of the study deals with the anti-Semitic nature of DEI. Interestingly, Greene and Paul compiled Twitter feeds of 741 DEI officials at 65 universities and find “[605 tweets that bash Israel and just 28 that praise the Jewish state](https://freebeacon.com/campus/overwhelming-number-of-diversity-officers-at-us-colleges-hold-anti-israel-views-study-says/).” They add that 62% of the tweets that reference China were favorable.

When it comes to educational malfeasance, California, as usual, does its best to be the national leader. In fact, there are potholes galore on Equity Road in the Golden State. For starters State Superintendent of Public Instruction and [Indoctrinator-in-Chief Tony Thurmond](https://californiapolicycenter.org/indoctrifornia/) hired Daniel Lee as the state’s first “superintendent of equity.” But shortly thereafter, [*Politico*](https://www.politico.com/states/california/story/2021/12/11/he-was-hired-to-fix-california-schools-while-running-a-business-in-philadelphia-1398697) revealed that Lee, a psychologist, life coach and self-help author, is also a Pennsylvanian, and was given a job that was never publicly posted by the California state Education Department. Apparently being buddies with Phony Tony was enough to land Lee the $180,000 a year job. When asked if others were interviewed for the job besides Lee, Thurmond replied, “I can’t recall.” If nothing else, Thurmond is living proof that cronyism is alive and well in California.

Then there was the open letter signed by [1,500 (and counting) mathematicians and scientists](https://sites.google.com/view/k12mathmatters/home) who have expressed great alarm at the looming “equitable” California Mathematics Framework (CMF) which will become reality sometime this year. According to the concerned scholars, the working version of the framework, among other things, aims to “reduce achievement gaps by limiting the availability of advanced mathematical courses to middle schoolers and beginning high schoolers.” The idea, you see, is to dumb down curricula so it becomes more equitable. Excellence, and striving for it, have become so very passé. The academics add, “…initiatives like the CMF propose drastic changes based on scant and inconclusive evidence. Subjecting the children of our largest state to such an experiment is the height of irresponsibility.”

Also from the Golden State, the formerly world-renowned University of California announced in November that it [won’t require any admissions tests](https://calmatters.org/education/higher-education/2021/11/uc-admissions-no-tests/) for undergraduate applicants. This comes just a little more than a year after [it stopped requiring SAT and ACT scores](https://calmatters.org/education/higher-education/2020/05/uc-sat-act-standardized-test-requirements/). The reasoning is that the exams “discriminate against low-income students of color and people with disabilities.”

Left unsaid is that eliminating all tests actually guarantees unfairness, as college admissions officials get to decide which group they favor, and this of course is discriminatory. On that note, referring to Harvard’s “holistic” (read “subjective”) approach to admissions, [Glenn Reynolds](https://nypost.com/2021/12/25/harvard-and-others-nixing-standardized-tests-reinforce-privilege-and-harm-minorities/) points out it will make the Ivy League school’s already extensive discrimination against Asians easier, and harder to prove. Reynolds adds, “The Ivy League did the same thing in the first half of the last century, when it was afraid it would be overrun by Jews. It started emphasizing ‘well-roundedness,’ ‘leadership,’ athletics and things that Jewish immigrants would find harder to satisfy. Now it’s doing it again.” California seems to be following Harvard’s M.O.

#### Confidence in public education has collapsed to just 28%, with DEI-driven controversies fueling sharp partisan divides. DEI policies have triggered backlash, school board conflicts, and public distrust, directly eroding the legitimacy of schools and intensifying political polarization nationwide.

K-12 Drive, July 19, 2022

Confidence in public schools sees a sharp decline among Republicans

https://www.k12dive.com/news/confidence-in-public-schools-sees-sharp-decline-among-republicans/627523/

Just 28% of Americans say they have confidence in the nation’s public schools, down 4 percentage points from last year, [according to Gallup polling conducted in June](https://news.gallup.com/poll/394784/confidence-public-schools-turns-partisan.aspx). At the beginning of the COVID-19 pandemic in 2020, the number had jumped to 41% from just 29% in 2019.

When split across party lines, however, 43% of Democrats say they have “a great deal” or “quite a lot” of confidence in public schools, down from 48% in 2020. Only 14% of Republicans say they have “a great deal” or “quite a lot” of confidence in public schools, compared to 34% of Republicans in 2020.

The stark contrast along party lines comes amid high political polarization over education as concerns like [critical race theory](https://www.k12dive.com/news/study-anti-crt-campaigns-impact-districts-with-35-of-nations-students/617507/), [LGBTQ issues](https://www.k12dive.com/news/as-ed-dept-weighs-title-ix-changes-pressure-mounts-from-growing-state-anti/621676/), [COVID-19 precautions](https://www.k12dive.com/news/rural-schools-strained-by-covid-protocol-resistance-challenges-omicron/617506/) and more have led to intense school board debates, [threats against administrators and teachers](https://www.k12dive.com/news/districts-need-to-consider-the-safety-of-administrators-board-members-when/607818/), and the passage of polarizing laws such as [Florida’s “Don’t Say Gay” law](https://www.k12dive.com/news/more-states-jump-on-dont-say-gay-bandwagon-barring-lgbtq-topics-in-schoo/620805/).

Still, while 50% of Republicans reported having “very little” or no confidence in public schools, just 1% of Republicans identified education as the most important problem facing the country, which suggests education has limited influence on how they will vote, Gallup reports.

Notably, Americans have also historically [rated their local public schools more favorably](https://www.brookings.edu/research/why-do-americans-rate-their-local-public-schools-so-favorably/) than the nation’s public schools at large.

#### Widespread dissatisfaction with America’s public education system is at a historic high. 73% of Americans report dissatisfaction, making it one of the nation's top societal concerns. Poor curriculum, low educational quality, political bias, and failure to teach life skills drive the dissatisfaction. Bipartisan frustration signals deep systemic issues, risking collapse of public trust and worsening societal inequality.

Lauren Wagner, February 20, 2025

Satisfaction With U.S. Public Education Reaches Record Low in New Gallup Survey

https://www.the74million.org/article/satisfaction-with-u-s-public-education-reaches-record-low-in-new-gallup-survey/

Satisfaction with America’s public education system reached a record low in the latest iteration of a Gallup poll that’s been measuring opinions on U.S. society and policy since 2001.

The [Mood of the Nation survey](https://news.gallup.com/file/poll/656150/20250205SatisfactionLists.pdf) published Feb. 5 found that 73% of 1,005 adult respondents were dissatisfied with the quality of public education in the U.S. It’s the highest dissatisfaction rate since the survey began, and a 5-point increase from last year’s rate of 68%. In 2001, dissatisfaction was at 57%.

The survey’s respondents, who were polled from Jan. 2 to 15, weighed in on 31 topics including the nation’s security, race relations, gun policies and health care affordability.

People were most content with America’s military strength and preparedness, with a 63% satisfaction rate. Overall quality of life, the position of women in the nation and the opportunity for people to get ahead by working hard followed.

The quality of public education fell near the bottom of the satisfaction list. Only the nation’s moral and ethical climate and its efforts to deal with poverty and homelessness ranked lower.

Though the new poll didn’t delve into specifics, a [2022 Gallup survey](https://news.gallup.com/poll/1612/education.aspx) asked why respondents were dissatisfied with K-12 education. The top five answers were poor or outdated curriculum, poor quality education, lack of teaching basic subjects, political agendas being taught and students not learning life skills.

Previous Gallup surveys over the past two decades [have found that](https://news.gallup.com/poll/649385/americans-view-education-improves-2023-low.aspx) parents of school-aged children are much more likely to be satisfied with the quality of their own child’s education than with the nation’s education system overall. Last year, [a poll](https://news.gallup.com/poll/649385/americans-view-education-improves-2023-low.aspx) found that 70% of parents of K-12 students said they were either completely or somewhat satisfied with the education their oldest child received.

In the new poll, Americans’ average satisfaction among all the topic areas was at 38%, down from 41% in January 2021 and 48% in 2020, before the COVID-19 pandemic.

The survey found that members of both political parties were also dissatisfied with the quality of public education in the U.S. Only 16% of Republican respondents and 30% of Democrats said they were satisfied.

“Americans’ persistent low satisfaction with national conditions may be hard for the nation’s leaders to address,” [Gallup’s survey report](https://news.gallup.com/poll/656114/americans-state-nation-ratings-remain-record-low.aspx) says. “However, the rank order of concerns resulting from this poll offers [President Donald] Trump and officials at all levels of government guidance on where the public might appreciate them focusing their efforts.”

### CPs

### Congress CP

#### Text: The United States Congress should amend Title VI of the Civil Rights Act of 1964 to explicitly permit the use of race-conscious affirmative action in higher education admissions.

#### Congressional amendment of Title VI can effectively restore the legal basis for affirmative action in higher education. Since Title VI governs all federally funded institutions—including private universities—and mirrors the Equal Protection Clause, clarifying the statute to permit narrowly tailored race-conscious admissions would reauthorize such practices within federal statutory bounds. This bypasses constitutional limitations on the judiciary by legislatively reestablishing affirmative action through federal oversight and enforcement.

April Anderson, April 19, 2024

Race-Conscious Admissions and Equal Protection in Higher Education, CRS Report

https://www.congress.gov/crs-product/R48043

Though constitutional equal protection constraints generally concern public universities and their obligations under the Fourteenth Amendment, federal statutory law also plays a role in ensuring equal protection in higher education. To that end, Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding—including private colleges and universities—from, at a minimum, discriminating against students and applicants in a manner that would violate the Equal Protection Clause. Federal agencies, including the Departments of Justice and Education, investigate and administratively enforce institutions' compliance with Title VI. Accordingly, these agencies can play a role in enforcing the restrictions *Students for Fair Admissions* has placed on race-conscious action. In addition, the agencies may apply Title VI to address discriminatory policies that hinder minority student enrollment. While Congress may not alter the Supreme Court's equal protection jurisprudence, it may consider actions affecting Title VI, including amendment and oversight.

### Department of Education CP

#### Text: The United States federal government, through the Department of Education, should promote diversity in higher education by encouraging the use of race-neutral strategies, including targeted outreach to underrepresented communities, holistic admissions practices, and consideration of socioeconomic status and individual adversity in admissions decisions.

#### Race-neutral policies are an alternative to race-based preferences in education, offering legal and practical solutions to promote diversity.

Gerald A. Reynolds, March 2003
Assistant Secretary for Civil Rights
U.S. Department of Education

https://www.ed.gov/about/offices/list/ocr/raceneutralreport.html

Americans overwhelmingly agree that diversity in our schools, neighborhoods, workplaces, and community organizations is enormously positive. In the past, many educational institutions have tried to reach this important goal by giving preferences to certain individuals based on their race or ethnicity. People of goodwill have reached different conclusions about the merits of these policies. But there are serious and important reasons for educational institutions to look for new alternatives. Policies granting preferences on the basis of race and ethnicity raise constitutional questions and are increasingly being overturned in the courts. Moreover, voters in various jurisdictions have passed state and local initiatives restricting the use of racial preferences. These legal and policy trends mean that we must work together to look for new solutions.

This publication describes innovative "race-neutral" programs being implemented across the country. Educational institutions will find that there are dozens of race-neutral options available to them. They will also find that the early results from these programs are promising. Moreover, the initial positive results are only the beginning; the full advantages of many of the race-neutral alternatives described in this publication will not be fully felt until they are seriously implemented and several classes of students have been able to benefit from them.

This publication does not endorse any particular program discussed in these pages. Rather, our hope is to foster innovative thinking about using race-neutral means to produce diversity among educational institutions. The purpose of this publication is to help create a positive climate in which such race-neutral alternatives can be seriously considered.

#### Race-neutral policies can increase diversity on campuses, all while staying within the constitutional limits provided by Fair Access.

Nguyen DH Nguyen,October 30, 2023

Education Department Outlines Strategies for Promoting Diversity and Inclusion in Higher Education

https://www.higheredtoday.org/2023/10/30/education-department-outlines-strategies-for-promoting-diversity-and-inclusion-in-higher-education/

The U.S. Department of Education las month released a report that spotlights promising, evidence-based approaches that institutions can adopt to achieve the objective of increasing socioeconomic and racial diversity in colleges and universities while staying true to their missions.

Key findings from*Strategies for Enhancing Diversity and Expanding Opportunities in Higher Education*include:

**Recruitment:** To encourage applications from underserved students, institutions can consider:

* Investing in targeted outreach and K-12 pathways programs such as college access programs, dual enrollment, early college programs, and summer programs in communities with high proportions of low-income students and students of color.
* Collaborating with K-12 college counselors, college access groups, and community-based organizations to expand college advising services, thereby increasing college enrollment and completion rates.
* Admitting more transfer students by transfer pathways, common course numbering, transferable core courses, and guaranteed associate degrees for transfer students. This could be achieved by collaborating with community colleges and other institutions that are more likely to enroll underserved students.

**Admissions:** In the admissions process, universities can emphasize student adversity, resilience, and inspiration by:

* Employing effective holistic review practices to evaluate applicants based on their lived experiences and contributions to the campus. This should encompass various factors, including academic (e.g., GPA, class rank, rigor of high school coursework, and standardized test scores in the context of the high school and neighborhood of an applicant) and non-academic (e.g., extracurricular activities, caregiving, and after-school work) achievements, as well as additional race-neutral background information (e.g., family income and wealth and personal experience of hardship or discrimination).
* Reassessing admissions practices such as legacy admissions, entrance exams, and early acceptance programs that may hinder socioeconomic and racial diversity. Exploring alternative admissions approaches, like direct admissions and top percent plans, can be beneficial.

**Financial aid:** To enhance affordability for students, institutions can consider:

* Investing in more need-based aid to students.
* Implementing college promise programs or tuition-free programs.
* Advocating for more direct state funding to institutions, particularly community colleges and public regional colleges.
* Ensuring transparency and predictability throughout the financial aid life cycle, from recruitment to graduation.

**Completion and campus climate:** To cultivate a more supportive environment and provide material support to students, institutions can consider:

* Developing comprehensive support programs and employing data-driven retention and completion strategies to identify and assist students at risk.
* Providing support to students to ensure basic needs are met, including offering emergency aid for unexpected expenses.
* Increasing students’ sense of belonging by creating welcoming and supportive campuses with affinity groups; diversity, equity, and inclusion programming; and shared, accessible spaces.

### Kritiks

### Antiblackness

#### Academia is fundamentally structured by white supremacy and anti-Blackness, producing a system that dehumanizes and marginalizes Black scholars regardless of surface-level diversity efforts. Restoring affirmative action does not address these deep-rooted institutional dynamics and risks legitimizing a racist system under the guise of reform.

Myrtle P. Bell, Daphne Berry, Joy Leopold, Stella Nkomo, 2021

Making Black Lives Matter in academia: A Black feminist call for collective action against anti‐blackness in the academy. *Gender, Work & Organization*, *28*, pp.39-57.

In the editorial for the aforementioned special issue, Nkomo et al. (2019) predicted that White supremacy and Black Lives Matter would be two of the macro factors driving diversity scholarship from 2019 into the future. White supremacy is an institutional system of power that normalizes, privileges, and maintains whiteness and white advantages in all spheres of life, including higher education (Dar et al., 2020; Doharty, 2020; Gillborn, 2006). In her New York Times article, kihana ross (2020), a professor at Northwestern University, describes antiblackness as “a theoretical framework that illuminates society’s inability to recognize our humanity — the disdain, disregard and disgust for our existence.” Of course, as members of the same society, academics are subject to the same anti-black stereotypes, biases, hatred, and White supremacy that exist in that society. Media reports of faculty who have made overtly bigoted comments in class or posts on social media provide evidence of anti-blackness and White supremacy and question those professors’ previous grading practices and fitness for the professoriate (Associated Press, 2020; Fieldstadt, 2020; Francis, 2019). As just one example, the authors know a Black woman who was given a “B” as the final grade in one of her doctoral classes when she had clearly earned an A. When challenged, the professor said she “just didn’t like Black people.” The administration forced the professor to change the student’s grade, yet the professor, a White woman, remained on faculty, continuing to teach.

Clearly, people with such anti-black sentiments exist in academia; however, antiblackness in academia is more likely to manifest through actions that convey “disdain, disregard and disgust” (ross, 2020) for Black students, faculty, and our work, microaggressions, and denial of our racialized and gendered experiences in the academy (e.g., Bell & Nkomo, 1999; Dar, et al., 2020; Diep, 2020; Johnson & Joseph-Salisbury, 2018; Johnson-Bailey, Valentine, Cervero, & Bowles, 2009; Smith, et al., (2011); Shockley & Holloway, 2019; Solorzano, Ceja, & Yosso, 2000; Vega, 2014; Williams, 2019). These actions are sometimes also perpetrated by those who likely believe themselves to be liberal, progressive, and inclusive (Back, 2004; Cassese, Barnes, & Branton, 2015; Melaku & Beeman, 2020). Melaku and Beeman (2020) use the term “liberal white supremacy,” in describing ways in which supposedly progressive Whites create hostile, silencing environments for Blacks and others of color in academia. This silencing may be virtually invisible. As an example, in their responses to 6,500 email queries from prospective student applicants, academics from both private and public schools and all disciplines were more responsive to White male prospective students than to all other groups (Milkman, Akinola, & Chugh, 2015). Preferences for White men were stronger in private schools and in certain fields, including business. In fact, business was the most discriminatory discipline in the study, with queries from women and minorities being ignored nearly three times more than those from White men. As in other audit studies, those whose queries were ignored would have no way of knowing specifically of such discrepancies. However, repeated instances of being overlooked, as much as we might self-protectively attribute them in our minds to other causes, belie such excuses.

### Biopolitics

#### Educational policy reinscribes affective biopower—white supremacy’s emotional and bodily control is reproduced through normative schooling structures.

Michalinos Zembylas, 2023

Open University of Cyprus & Nelson Mandela University, S. Africa

Racism, white supremacy and Roberto Esposito’s biopolitics through the lens of Black affect studies: Implications for an affirmative educational biopolitics

Educational Philosophy and Theory 2024, VOL. 56, NO. 4, 358–370

https://doi.org/10.1080/00131857.2023.2229552

This paper has argued that there is a fundamental shift in Esposito’s framework by including a thoroughgoing interrogation of racism and white supremacy through the lens of Black affect studies and that both white supremacy studies and Esposito’s framework could work side-byside in ways that are productive for affirmative educational biopolitics. Although this paper is theoretical, it has suggested that there are important implications for schooling and biopedagogies particularly in unravelling the affective logic of white supremacy’s biopower. Educators and education scholars are offered conceptual tools to acknowledge and critique how affective biopower not only emerges as a normative force that reproduces the affective biopolitics of racism and white supremacy in schools, but also operates as an affirmative force that nurtures new and alternative affective experiences that decenter racism and white supremacy as biopolitical categories.

Although white supremacy studies have identified some of the processes and mechanisms of decentering racism and white supremacy, a key task for educators and education scholars in the next few years is to explore empirically how to forge an affirmative educational biopolitics that truly dismantles the affective biopower of racism and white supremacy. My analysis here offers a biopolitical account that builds on Esposito’s framework and Black affect studies to theorize how white supremacy’s affective biopower can be challenged, (re)routed and (re)molded in schools. For example, white students’ feelings of discomfort when confronted with their privilege or racial bias can function as a point of departure to challenge dominant beliefs and normative practices that sustain racism and white supremacy and create new affective practices that nourish affective solidarity with marginalized others (Zembylas, 2020). Acknowledging Black students’ affects and emotions, in particular, will enrich efforts to transform sedimented biopolitics of affective engagement in schools and cultivate new ways of being and feeling in the world for all students, whites and non-white alike. Thus, the interrogation of racism and white supremacy in biopolitical terms will require not just changes to the normative biopolitics of schooling, but also the creation of an affirmative biopolitics that molds students’ affective habits of sensitivity and connection with others.

# Kelo v. City of New London

## Opinion

Stevens(author), Souter, Ginsburg, Breyer, Kennedy (concurrent opinion below)

<https://supreme.justia.com/cases/federal/us/545/469/>

* The Supreme Court held that the City of New London’s use of eminent domain to take private property for economic development qualified as a “public use” under the Fifth Amendment’s Takings Clause.
* The city had created a comprehensive development plan aimed at revitalizing its distressed economy, which included creating jobs and increasing tax revenues. Most property owners sold voluntarily, but others, including the petitioners, refused, leading to condemnation proceedings.
* The Court emphasized that economic development is a legitimate public purpose and reaffirmed that “public use” includes broader “public purpose” considerations, not just literal public access.
* The Court rejected the petitioners’ argument that economic development is not a sufficient justification and declined to impose a stricter standard of proof that public benefits would materialize.
* Given the city’s thorough planning and the precedent of deference to legislative judgments in land-use matters (cases below) the Court concluded that the takings served a valid public purpose and therefore met constitutional requirements in the 5th Amendment.
	+ *Berman v Parker (1954*) government can take non-blighted land. Courts urged the importance of broader redevelopment plans- that improve the overall community. Allowed transfer of private property to another private entity if it helped the community. Expanded eminent domain.
	+ *Hawaii Housing Authority v. Midkiff (1984),* upheld Hawaii Land Reform Act, which redistributed land from large landowners to lessees. The court found the law which established more equitable distribution of resources was a valid public purpose. Private individuals getting the land was okay- as it met a positive public purpose.

Kennedy Concurrent Opinion

* Rational basis test held up on Berman and Midkiff, that the transfer of property was a net public good- was met here.
* Not all private to private transfer is okay- must be for the public good.
* Case-by case review is good, not all econ development project should be approved, nor should all be rejected.
* Must have higher scrutiny in cases which
	+ The supposed public benefit is tiny or implausible,
	+ The process is abused,
	+ Or favoritism is very likely.

Dissent

* *Calder v. Bull (1798) states* that taking property from one private individual to another violates the constitution.
* Therefore, taking from one individual to another is not public benefit, even if there is some incidental public benefit.
* Dissenters (Thomas’s opinion) believed this harmed poor and politically vulnerable populations

## Overview

#### There have been many calls to overturn *Kelo v. City of New London*,

Trevor Burrus and Sam Spiegelman

Will the Supreme Court Overturn the Infamous Takings Decision of Kelo v. City of New London?, Policy Commons. Cato Institute. United States of America. Retrieved from https://coilink.org/20.500.12592/wdv9zc on 14 Apr 2025. COI: 20.500.12592/wdv9zc.

In the infamous case of [Kelo v. City of New London](https://ij.org/case/kelo/) , the Supreme Court allowed the city of New London, Connecticut to take Susette Kelo’s little pink house (also the name of a [very good movie](https://www.imdb.com/title/tt3863632/) about the case) via eminent domain for the “public use” of furthering economic development in the town’s Fort Trumbull neighborhood. The fight in that case was over the meaning of the words “public use” in the Fifth Amendment’s Takings Clause, and whether the words provide essentially any limit on what a municipality or legislature says is “public use.” In Kelo , one of the major beneficiaries of the Fort Trumbull redevelopment plan was Pfizer, which received tax breaks from the city to build in the neighborhood. Pfizer never actually built anything, and in 2009 it [closed its New London facilities](https://ij.org/press-release/the-end-of-an-eminent-domain-error/). The land is still vacant, with some residents [using it for gardening](https://www.theday.com/local-news/20190804/group-is-planting-fruit-trees-vegetables-on-fort-trumbull-eminent-domain-land). A [community center is now planned](https://www.theday.com/local-columns/20210202/bravo-for-new-londons-community-center-plans) for the land. Kelo created an understandable backlash, as 45 states passed some sort of reforms (some toothless) to their eminent‐​domain practices in the wake of the decision. But the first backlash came from the four dissenting justices, led by Sandra Day O’Connor, who wrote that the consequences of the Court’s decision would be dire: [Fred Eychaner](https://en.wikipedia.org/wiki/Fred_Eychaner) is not exactly someone with few resources, but he still found his land in the crosshairs of Chicago officials who wanted to give it to a politically connected business. His land in the River West neighborhood was two blocks north of the Blommer Chocolate Company. According to the Eychaner’s petition to the Supreme Court, “to secure Blommer’s support for a zoning change, the City of Chicago condemned Eychaner’s property to give it to Blommer.” Stretching the broad holding of Kelo even further, the city “based the taking on a finding that the area was at risk of future blight.” Eychaner filed suit in federal court arguing, among other things, that the city’s taking of his property is not for a “public use” as the term was understood in 1791, when the states ratified the Fifth Amendment, or during the subsequent century of judicial interpretation. From the 1790s until the early 20th century, state courts took the lead on takings law and for the most part held the narrow view that “public use” meant ownership by, or access to, the public. Still, a minority of state courts during this period took the broad view that it means anything a legislature determines to be useful to the public. In the early to mid‐​20th century, however, the Court’s takings jurisprudence transformed. In 1954, in Berman v. Parker , Justice William O. Douglas upheld the District of Columbia’s confiscation of non‐​blighted property as part of a broader anti‐​blight program, declaring that “when the legislature has spoken, the public interest has been declared in terms well nigh conclusive.” Translation: whether something is for a “public use” is to be determined by the legislature, and there are very few legal avenues to challenge the claim that a taking is for the “public use.” Of course, if a legislature is free to define “public use” without a court’s exacting appraisal of its constitutionality, then, as Justice Clarence Thomas put it in his Kelo dissent, those words become essentially meaningless. This would be contrary to the Court’s longstanding view that all of the Constitution has actionable meaning, and that no words are “hortatory fluff,” as Justice O’Connor put it in her separate Kelo dissent. Berman should have been an outlier, but in 1984, in Hawaii Housing Authority v. Midkiff , the Court doubled down on the basic holding. Then, in Kelo , Justice John Paul Stevens, who later called it the “most unpopular opinion that any member of the Court wrote during” his 34‐​year tenure, misread precedent to uphold Berman and Midkiff , adding that A‐​to‐​B transfers are even permissible for the incredible “public use” of “economic development.” Cato [has filed an amicus brief](https://www.cato.org/sites/cato.org/files/2021-04/Eychaner-cert-stage.pdf) urging the Supreme Court to take Eychaner’s case and reconsider Kelo . If a legislature’s definition of “public use” is “well nigh conclusive,” then the justification for a taking need not stop at reversing existing blight or promoting economic development, but may, as Chicago argues here, extend to the apparent danger of “future blight.” This is perilous terrain, and the slippery slope is steep. There are a lot of reasons legislatures might want your property, and if they can claim mere potential blight, then no one’s property is safe. Under Kelo , as long as the taking is not pretextual or completely arbitrary, then an eminent‐​domain action that is claimed to be for public use is acceptable, even though it’s just an unconstitutional A‐​to‐​B transfer. This is anathema to both the spirit and words of the Takings Clause, and counsels overturning Kelo before the misguided Berman and Midkiff precedents become even more dangerous.

# Gregg v Georgia

## Opinion

*Gregg v. Georgia* (1976) reinstated the death penalty after a 6 year hiatus from *Furman v. Georgia* (1972)- which stated that the death penalty violated the 8th Amendment (cruel and unusual punishment).

Troy Gregg was convicted of armed robbery and murder and sentenced to death.

7-2 Ruling upheld the death penalty, overruling the hiatus from *Furman v. Georgia*.

* Death Penalty not inherently cruel and unusual
* Must be a bifurcated trial
	+ Bifurcated trials mean two- one to determine guilt/innocence, another to determine sentencing.
* Precedent that state legislatures should have the final say on criminal justice laws and sentences

## Controversy

#### Recent controversies, like the planned execution of Marcellus Williams, have reignited debate over the death penalty’s legitimacy. While supporters cite justice and deterrence, critics highlight human rights concerns, ethical issues, and practical flaws. The risk of wrongful executions, high costs, and global rejection—especially by the EU—raise serious questions about the death penalty’s place in modern society.

Safa M, The Death Penalty Debate: An Examination of Legal, Ethical, and Practical Dimensions

October 2024

https://vocal.media/criminal/the-death-penalty-debate-an-examination-of-legal-ethical-and-practical-dimensions

Recent executions and controversies have ignited a significant debate surrounding the death penalty, particularly in the United States. The case of Marcellus Williams, who was scheduled for execution on September 24 after spending two decades on death row, has highlighted the complexities of capital punishment and its relevance in today’s society. What is often presented as a means of bringing about a harmonious society has instead generated widespread controversy regarding its overall purpose and effectiveness. The death penalty, although its purpose stands, brings about complex legal and ethical queries across the world. According to Amnesty International, 144 countries in total have banned the death penalty as of 2023, yet it persists in others like the United States, China, and Saudi Arabia.

A key challenge to the legitimacy of the death penalty is the Universal Declaration of Human Rights (UDHR), particularly the right to life under Article 3. Nations that uphold the death penalty frequently invoke national sovereignty, claiming their legal systems reflect their values. Balancing national legal autonomy with international human rights requires careful consideration. For instance, the European Court of Human Rights (ECHR) denied the extradition of a German national to the U.S. in Soering v. United Kingdom because they believed long-term exposure to death row conditions would violate Article 3 of the European Convention on Human Rights, which forbids inhumane treatment. The case emphasises the conflict that exists when it comes to state sovereignty and upholding the right to life in the context of the death penalty.

In the U.S., the national legal landscape reflects ongoing fluctuations in arguments surrounding the death penalty. The significant case of Gregg v. Georgia (1976) overturned previous decisions, particularly Furman v. Georgia (1972), which temporarily halted capital punishment due to its inconsistent application violating the Eighth and Fourteenth Amendments. In contrast, Gregg established that, with the right procedures and safeguards, the death penalty could be constitutionally administered.

In contrast, the European Union (EU) has adopted a strong stance against the death penalty, prohibiting it in all circumstances. This is enshrined in Protocol No. 13 of the European Convention on Human Rights, which prohibits the death sentence, even in times of conflict. Countries seeking EU membership must abolish the death penalty. The EU views it as a breach of the right to life and a violation of the prohibition on torture, fundamental to its legal and moral frameworks.

This opposition reflects Europe's post-war trend toward prioritising human rights, with the ECHR maintaining these standards among member states.

In the Middle East and parts of Asia, the death penalty remains a commonly accepted punishment, often justified by religious or cultural reasons. Countries like Saudi Arabia and Iran impose the death penalty for various offenses, including murder and drug trafficking, with capital punishment viewed as a religious obligation under Islamic law. These practices highlight disparities in national responses to capital punishment, where religious law often takes precedence over international human rights norms.

The ethical dimensions of the death penalty center on the debate between retribution and rehabilitation. Advocates for retribution argue that capital punishment is necessary for justice, particularly for heinous crimes. Retribution is based on the belief that punishment should match the severity of the crime. For instance, Timothy McVeigh's execution in 2001 following the Oklahoma City bombing was seen as justice for victims and their families. Kant asserts that punishment is a moral necessity, stating, “The law of punishment [Strafgesetz] is a categorical imperative” (Yost, 2019).

However, Marx critiques this rationale, claiming, "It would be very difficult, if not altogether impossible, to establish any principle upon which the justice or expediency of capital punishment could be founded" (Marx, 1853). This is a clear challenge to the moral justification for the death penalty, questioning how such a punishment could be reconciled with the values of a civilised society. Rehabilitation, on the other hand, emphasises reforming offenders. Norway's justice system exemplifies this approach, as seen in the case of Anders Breivik, who, despite committing mass murder, was not sentenced to death. Instead, Norway prioritises rehabilitation and reform.

Rehabilitation advocates often question the death penalty's effectiveness, echoing Marx's assertion that "since Cain, the world has neither been intimidated nor ameliorated by punishment" (Marx, 1853). Derrida's critique of the death penalty highlights its illusion of control over death, stating that "the death penalty exerts a fascination because it offers a vision of death brought completely under the control of human calculation" (Thurschwell, 2019). However, this control is illusory, failing to eliminate the fear of death or address the ethical ambiguities of capital punishment.

Regarding practical dimensions, the effectiveness of the death penalty in preventing re-offending is a crucial consideration. Research by James Marquart and Jonathan Sorensen shows that "among those whose death sentences were commuted in 1972, only about one percent went on to kill again." This finding undermines the argument that the death penalty is necessary for public safety. Cost considerations further complicate the debate, as "Research has firmly established that a modern death penalty system costs several times more than an alternative system in which the maximum criminal punishment is life imprisonment without parole" (Radelet & Borg, 2000). This data proves that maintaining a death penalty system is not cost-effective.

Lastly, concerns about wrongful executions persist. Even proponents of the death penalty acknowledge the risk of irreversible errors, as "Death penalty retentionists now admit that as long as we use the death penalty, innocent defendants will occasionally be executed" (Radelet & Borg, 2000). This poses a significant problem, as the execution of even one innocent person raises serious moral and practical questions about the system's validity.

In conclusion, the debate over the death penalty is anything but straightforward. It touches on complex legal, ethical, and practical issues. Advocates often highlight retribution and public safety as key reasons for maintaining capital punishment. However, growing evidence indicates that alternatives, like life imprisonment without parole, could be both more effective and ethical. This ongoing discussion underscores the need for continued dialogue and thoughtful reflection on where the death penalty fits in our society today.

## Gregg v Georgia Aff

#### Despite *Gregg v. Georgia*'s promise of a fairer death penalty through guided discretion, the Court has failed to ensure its practical implementation. This history shows the Court's failure to uphold constitutional protections and highlights the urgent need for judicial re-engagement to end a system that remains cruel, arbitrary, and unconstitutional.

Hayden Thorne, 2022

https://heinonline.org/HOL/P?h=hein.journals/lwanhist9&i=168

"From Backlash to Backtrack: How the Supreme Court Reneged on the Promise of Furman v Georgia." law&history, vol. 9, no. 1, 2022, pp. 158-187.

In the years after Gregg, the Court continued to embrace the theory of 'guided discretion', but, as Schwartz argues, 'it steadfastly refused to consider how the theory works in practice - whether tightening procedures had eliminated the arbitrary and freakish sentences that were held unconstitutional in Furman'.144 There is considerable evidence to support the view that these new systems failed to address the concerns expressed in Furman that the death penalty continued to be applied in an arbitrary and discriminatory matter. The Court, for example, continued to refuse to consider evidence relating to racial or geographic factors influencing death penalty sentencing.145 Many of the justices later expressed regret over the direction that the Court had taken. Powell, following his retirement from the Court, said he regretted his decision, while Blackmun, after dissenting in the 1987 case of McClesky v Kemp, announced in Callins v Collins (1994) that, 'from this day forward, I no longer shall tinker with the machinery of death'.146 In that opinion, Blackmun accurately summed up the failings of the system, which the Court backtracked to allow in Gregg:

For more than 20 years I have endeavoured ... to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavour. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obliged to conclude that the death penalty experiment has failed ... no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

Blackmun's admission of error in Callins confirms that the Court's efforts to produce a procedurally effective death penalty regime, beginning with Gregg, had been a failure. The Court's majoritarian abandonment of the constitutional ideals that had appeared in Furman resulted in the continuation of a flawed death penalty scheme, setting back the abolition movement by decades. Close consideration of the backlash to Furman and response in Gregg supports the view that the Court generally operates as a majoritarian institution. It also strongly suggests that the Court is susceptible, through a process known as constitutional dialogue, to listening to the views of the people and the other branches of government when interpreting the Constitution.

#### The death penalty violates the Eighth Amendment despite the ruling in *Gregg v. Georgia*, which upheld its constitutionality under guided discretion. In practice, the system remains arbitrary, racially biased, and psychologically cruel. Prolonged death row isolation and painful execution methods defy evolving standards of decency. Later rulings like *Smith* and *McCleskey* have eroded the safeguards promised in *Gregg*, exposing the death penalty as incompatible with a fair and humane justice system.

Jane Paden, 2024

The Sword of Damocles in American Law: The Cruel and Unusual Nature of the Death Penalty

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The current application of the death penalty is a clear violation of the Eighth Amendment’s cruel and unusual punishment clause. The death penalty is cruel due to the psychological torture that death row inflicts on inmates. The environment in which these inmates live strips them of their humanity and further pushes them towards a state of insanity. This, in combination with the treatment they receive from guards, extreme isolation, and confined living quarters, causes many inmates to experience psychological death alongside their psychological torture. This is a cruel punishment that causes unnecessary pain and suffering, which lies in direct contrast to the defendant's protections outlined in the Eighth Amendment. The Supreme Court has been complicit in upholding this unconstitutionally cruel form of punishment by allowing for untested methods of execution to be used, even when there is a high likelihood of lingering pain and death. Their recent decision in Smith disregards the evolving standards of decency as the majority of society would reject execution caused by asphyxiation. The majority of society would also reject the imposition of the death penalty via stroke or suffocation, yet it is permissible in the eyes of the Supreme Court. Additionally, the death penalty qualifies as an unusual punishment that remains in violation of the Court’s ruling in Furman. It is “unusual” based on its arbitrary and discriminatory nature. Prosecutors and juries are given great discretion, without reason, to decide which defendants get the death penalty. Compounding this issue, the death penalty is imposed disproportionately on minorities in America. These factors conform to the definition of unusual that the Court established in the past in cases like Cadwell, Godfrey, Furman, and Greggs. The Court in McCleskey deviates from the Court’s precedent entirely and acts as a vehicle for systemic racism to persevere in the capital punishment system. This case demonstrates how the Court’s decisions have allowed the death penalty to become more unusual.

The unusual and excessive nature of the death penalty highlights a profound moral failure in our society. The infliction of unnecessary pain and psychological trauma onto its inhabitants should not be permitted to continue. Within the history of the United States, unnecessarily cruel punishments have always been admonished, and yet the modern capital punishment system has been allowed to remain standing even though these ideas are in direct conflict. Under the criminal justice system, no life should ever be treated as more valuable because of the color of one’s skin. With a penalty as finite as death, it is imperative that this not be true of the criminal justice system. Even so, numerous studies indicate that this is the current operation of the capital punishment system throughout the United States. Allowing the death penalty to continue to be administered is effectively allowing the criminal justice system to systematically value one life over another. A justice system that values all lives equally cannot coexist with a practice that perpetuates suffering, discrimination, and moral indecency. The time has come to align our legal practices with the fundamental principles of human dignity and equality, ensuring that our justice system reflects the values we claim to uphold. Only then can we begin to heal the deep wounds inflicted by this inhumane practice and strive toward a more just and equitable society.

### Advantage: Crime

#### 12 states without the death penalty have homicide rates below the national average, while many states with it have rates above. Over 20 years, states with the death penalty had 48% to 101% higher homicide rates. The data suggests the death penalty does not deter crime.

Raymond Bonner and Ford Fessenden,2000

New York Times “States With No Death Penalty Share Lower Homicide Rates”

Dealth Penalty Information Center

https://deathpenaltyinfo.org/stories/states-with-no-death-penalty-share-lower-homicide-rates

The dozen states that have cho­sen not to enact the death penal­ty since the Supreme Court ruled in 1976 that it was con­sti­tu­tion­al­ly per­mis­si­ble have not had high­er homi­cide rates than states with the death penal­ty, gov­ern­ment sta­tis­tics and a new sur­vey by The New York Times show.

Indeed, 10 of the 12 states with­out cap­i­tal pun­ish­ment have homi­cide rates below the nation­al aver­age, Federal Bureau of Investigation data shows, while half the states with the death penal­ty have homi­cide rates above the nation­al aver­age. In a state-by- state analy­sis, The Times found that dur­ing the last 20 years, the homi­cide rate in states with the death penal­ty has been 48 per­cent to 101 per­cent high­er than in states with­out the death penalty.

The study by The Times also found that homi­cide rates had risen and fall­en along rough­ly sym­met­ri­cal paths in the states with and with­out the death penal­ty, sug­gest­ing to many experts that the threat of the death penal­ty rarely deters criminals.

“It is dif­fi­cult to make the case for any deter­rent effect from these num­bers,” said Steven Messner, a crim­i­nol­o­gist at the State University of New York at Albany, who reviewed the analy­sis by The Times. ​“Whatever the fac­tors are that affect change in homi­cide rates, they don’t seem to oper­ate dif­fer­ent­ly based on the pres­ence or absence of the death penal­ty in a state.”

#### States without the death penalty, like North Dakota, Massachusetts, and West Virginia, have lower homicide rates than neighboring states with the death penalty, such as South Dakota, Connecticut, and Virginia. Demographic and economic factors, rather than the death penalty, influence homicide rates.

Raymond Bonner and Ford Fessenden,2000

New York Times “States With No Death Penalty Share Lower Homicide Rates”

Dealth Penalty Information Center

https://deathpenaltyinfo.org/stories/states-with-no-death-penalty-share-lower-homicide-rates

The homi­cide rate in North Dakota, which does not have the death penal­ty, was low­er than the homi­cide rate in South Dakota, which does have it, accord­ing to F.B.I. sta­tis­tics for 1998. Massachusetts, which abol­ished cap­i­tal pun­ish­ment in 1984, has a low­er rate than Connecticut, which has six peo­ple on death row; the homi­cide rate in West Virginia is 30 per­cent below that of Virginia, which has one of the high­est exe­cu­tion rates in the country.

Other fac­tors affect homi­cide rates, of course, includ­ing unem­ploy­ment and demo­graph­ics, as well as the amount of mon­ey spent on police, pros­e­cu­tors and prisons.

But the analy­sis by The Times found that the demo­graph­ic pro­file of states with the death penal­ty is not far dif­fer­ent from that of states with­out it. The pover­ty rate in states with the death penal­ty, as a whole, was 13.4 per­cent in 1990, com­pared with 11.4 per­cent in states with­out the death penalty.

Mr. Carlisle’s pre­de­ces­sor in Honolulu, Keith M. Kaneshiro, agrees with him about deter­rence. ​“I don’t think there’s a proven study that says it’s a deter­rent,” Mr. Kaneshiro said. Still, he said, he believed that exe­cu­tion was war­rant­ed for some crimes, like a con­tract killing or the slay­ing of a police offi­cer. Twice while he was pros­e­cut­ing attor­ney, Mr. Kaneshiro got a leg­is­la­tor to intro­duce a lim­it­ed death penal­ty bill, but, he said, they went nowhere.

### Advantage: Economy

#### The death penalty drains public resources—capital trials are vastly more expensive than life imprisonment, forcing local governments to cut essential services and raise taxes, ultimately harming economic stability and public safety.

Jeffrey Miron, 2023

CATO Institute

“The Financial Implications of the Death Penalty”

https://www.cato.org/blog/financial-implications-death-penalty

One argument for the death penalty is that the usual alternative—life in prison without possibility of parole—imposes a financial burden on taxpayers (about $60,000-$70,000 per death row inmate per year, according to a recent [**estimate**](https://susqu-researchportal.esploro.exlibrisgroup.com/esploro/outputs/journalArticle/The-Death-Penalty-vs-Life-Incarceration/991002248645405236?institution=01SUU_INST)).

Yet capital punishment is [costly](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367170), too:

Contrary to popular misconception, the expense of the death penalty does not lie in the “end less” appeals of death sentences. Although appeals do consume relatively more resources, capital trials also consume more resources than similar trials with a maximum sentence of life in prison. One early study found the additional trial costs exceeded those of appeals by a factor of four (Cook et al. 1993). Estimates of the marginal capital trial cost vary, but Collins et al. (2015) offer a middling figure of just under $1,500,000 (cf. Roman et al. 2009). The reasons for the increase are several. Attorneys spend more time preparing cases, and many states require the appointment of two defense attorneys to any defendant who cannot afford private counsel. Jury selection is more complicated. The process can take days or even weeks, partly because of the need for “death qualified” jurors, i.e., individuals who neither universally oppose nor support the death penalty. Capital cases also produce more hearings and court filings. Expert witnesses are unavoidable. Mitigation evidence, which argues for leniency in punishment, can require a significant travel budget. For these reasons and more, capital trials are uniquely expensive.

One overall [**assessment**](https://susqu-researchportal.esploro.exlibrisgroup.com/esploro/outputs/journalArticle/The-Death-Penalty-vs-Life-Incarceration/991002248645405236?institution=01SUU_INST) concludes that

In the 32 states in the Union where the death penalty is legal, as well as the federal government, the death penalty has grown to be much more expensive than life imprisonment, whether with or without parole. This greater cost comes from more expensive living conditions, a much more extensive legal process, and increasing resistance to the death penalty from chemical manufacturers overseas. These costs could even become higher, pending the outcome of various lawsuits against various states for their “botched” executions. Each death penalty inmate is approximately $1.12 million (2015 USD) more than a general population inmate.

And in at least one [**state**](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3367170), the implication of the increased expenditure is ironic:

When a local government bears the expense of trial, it must raise funds or reallocate them from other sources. In Texas, among other states, the cost of trial is borne primarily at the county level. A panel of Texas county spending over the last decade, constructed from audited financial statements, shows counties meet the expense of trial by raising property tax rates and by reducing public safety expenditure. Property crime rises as a consequence of the latter. The death penalty may therefore impede criminal deterrence if its finance is left to local, rather than centralized government.

Thus not only does the death penalty burden taxpayers; it seems to increase certain kinds of crime. Existing [**evidence**](https://deathpenaltyinfo.org/policy-issues/deterrence) suggests executions have minimal impact in [**deterring**](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=870312) violent crime like homicide.

Reasonable people might still support the death penalty, for moral reasons (“an eye for an eye”).

On consequentialist grounds, however, the case for capital punishment is weak.

#### The death penalty is fiscally unsustainable—state studies consistently show capital punishment costs millions more than life imprisonment, draining budgets and wasting public funds that could be used for more effective justice policies.

Amnesty International, 2023

June 26, 2023

“Death Penalty Facts”

https://www.amnestyusa.org/issues/death-penalty/death-penalty-facts/death-penalty-cost/

Using conservative rough projections, the Commission estimates the annual costs of the present system ($137 million per year), the present system after implementation of the reforms … ($232.7 million per year) … and a system which imposes a maximum penalty of lifetime incarceration instead of the death penalty ($11.5 million). California Commission on the Fair Administration of Justice July 1, 2008

* A 2003 legislative audit in Kansas found that the estimated cost of a death penalty case was 70% more than the cost of a comparable non-death penalty case. Death penalty case costs were counted through to execution (median cost $1.26 million). Non-death penalty case costs were counted through to the end of incarceration (median cost $740,000).
[December 2003 Survey by the Kansas Legislative Post Audit](https://www.kslpa.org/assets/files/reports/04pa03a.pdf)
* In Tennessee, death penalty trials cost an average of 48% more than the average cost of trials in which prosecutors seek life imprisonment.
[2004 Report from Tennessee Comptroller of the Treasury Office of Research](https://www.deathpenaltyinfo.org/documents/deathpenalty.pdf)
* In Maryland death penalty cases cost 3 times more than non-death penalty cases, or $3 million for a single case.
[Urban Institute, The Cost of the Death Penalty in Maryland, March 2008](https://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf)
* In California the current system costs $137 million per year; it would cost $11.5 million for a system without the death penalty.
[California Commission for the Fair Administration of Justice, July 2008](https://deathpenalty.org/downloads/FINAL%20REPORT%20DEATH%20PENALTY%20ccfaj%20June%2030.2008.pdf)

### Advantage : Institutionalized Racism

#### Death Penalty is applied in an arbitrary and statistically racist way, even post *Gregg* ruling.

Jane Paden, 2024

The Sword of Damocles in American Law: The Cruel and Unusual Nature of the Death Penalty

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In the landmark case of Furman, the Supreme Court found the application of the death penalty at the time to be unconstitutional. In the 5-4 decision, the court stated that the imposition of the death penalty constituted a violation of the Eighth and Fourteenth Amendments and remanded the case for further proceedings.

Justices Marshall and Brennan took a firm stance against the death penalty’s application, arguing its clear violation of the Eighth Amendment. In his infamous concurrence, now known as the “Marshall Hypothesis”, Justice Marshall asserted that if the general population were to know all of the facts regarding capital punishment, they would find it shocking to their conscience and sense of justice. Justice Brennan took a similar stand in his opinion, looking towards the “evolving standards of decency” principle for clarity. Death, as a punishment, has historically caused controversy in the United States. Though once a popular method of punishment, social norms have evolved to a point where society now rejects public executions. 7Justice Brennan highlighted this social shift, asserting that a given punishment is “cruel and unusual” if it does not comport with human dignity. He contends that the state denies defendants this dignity when it arbitrarily subjects its citizens to unusually severe punishments regardless of the offense. Death, in his opinion, is an unusually severe punishment due to its finality, pain, and enormity. Justice Brennen also took issue with the fact that juries could impose a death sentence wholly unguided by the standards that govern that decision. This leaves defendants largely unprotected against the haphazard exercise of the death penalty.

Taking a similar stance to Justice Brennan, Justice Stewart also took issue with this inconsistency in its application but believed the death penalty ran afoul of the Equal Protection Clause of the Fourteenth Amendment rather than the Eighth Amendment. Agreeing that the death penalty violated the Equal Protection Clause, Justice White pointed to the infrequency with which it was imposed. Due to this infrequency, there is no meaningful way to distinguish the cases in which it is applied and cases it is not, which would indicate arbitrariness. In his opinion, Justice Douglas recognized that the authors of the Eighth Amendment intended for equality in punishment, as their ancestors had long dealt with a system of discrimination from the British. During that period, the target of discrimination was placed on those who opposed an absolutist government, and capital punishment was used as a tool for vengeance. 80 Today, the discretion given to the judicial system allows courts to selectively apply the death penalty, going against what the authors had envisioned the amendment to protect. 81 In his opinion, Justice Douglas highlighted the issue that there are often prejudices against the defendant; prejudices that tend to grow if the defendant is, “poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority.” 82 He also found discretionary statutes to be unconstitutional as they were filled with discrimination; 83 it is unlawful for sentences to be harsher simply because the defendant is a minority or a member of the lower class. 84 Although the justices differed with respect to the root of its unconstitutionality, they agreed that the death penalty violated the Constitution, and as a result, their decision in Furman suspended executions until Gregg.

Following Furman, the federal government and 35 states changed their death penalty laws to avoid violating the Equal Protection Clause. Since three of the Justices rooted their opinions in the Equal Protection Clause, the door was left open for the Court to revisit its decision in Furman. Had the majority of Justices found the death penalty to violate the Eighth Amendment, the possibility of further examinations into the constitutionality of capital punishment would be effectively closed, foreclosing any further legal scrutiny on the issue. This, however, was not the case. Instead, the Court took up the issue again in Gregg when it analyzed the new Georgia statute to determine its constitutionality. The new Georgia law required the jury to consider both the circumstances of the crime and of the criminal before recommending a sentence. The statute also required the Georgia courts to review each sentence of death to determine whether the decision involved prejudice. The Court found this statute constitutional, as they believed the statute, on its face, safeguarded against the arbitrariness and capriciousness that the Court found unconstitutional in Furman. While the federal government and states may have changed their laws in order to reinstate the death penalty, the issues the Court found in Furman remain today. The death penalty has been and continues to be, applied excessively and is still disproportionately applied to minorities due to the implicit bias in the justice system and the great deference given to prosecutors and juries.

#### *Gregg v. Georgia* failed to eliminate the arbitrariness and racial discrimination condemned in *Furman*, making it constitutionally unsalvageable. The Court must overturn *Gregg* to address systemic racial bias and restore Eighth Amendment protections.

Jane Paden, 2024

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The changes to Georgia’s law that made the death penalty constitutional were merely cosmetic. The issues that the Justices found in Furman remained present post-Gregg, and are still present today. Over ten years after the decision in Gregg, legal scholars David Baldus, Charles Pulaski, and George Woodworth completed a study on death sentences in Georgia. The objective of this study was to evaluate whether the Georgia Supreme Court’s system of comparative sentence review that was analyzed by the Court in Gregg was effective. 92 The researchers set out to determine whether Georgia’s new process ensured that no person “‘sentenced to die by the action of an aberrant jury’ would actually ‘suffer a death sentence,’” because this is what the Supreme Court believed the changes in the Georgia statute would accomplish. 93 They began by looking for evidence of arbitrariness and comparative excessiveness in jury death sentencing patterns from 1973 to 1978. 94 The data revealed that despite the enactment of Georgia’s statute, juries and prosecutors still exercised considerable discretion and only chose some defendants for the death penalty. 95 The data provided by the study strongly points towards the idea that Georgia is “operating a dual system, based upon the race of the victim, for processing homicide cases.” The study concluded that cases with Black victims are prosecuted less harshly than those with White victims. Juries are willing to tolerate more aggravating factors without imposing the death penalty if the victim is Black compared to White victims. Prosecutors are no different than juries as many prosecutors will not seek the death penalty unless the level of aggravation toward Black victims is substantially greater. It is clear that Georgia, despite its statutory changes, continues to impose the arbitrary and inconsistent death sentences that were condemned in Furman. The arbitrary and capricious application of the death penalty is not merely limited to Georgia. University of Washington professor Kathrine Beckett and graduate student Heather Evans conducted a study on the role of race in capital sentencing in Washington which showed a similar effect: prosecutors and juries exercise considerable discretion, with both being more likely to discriminate on the basis of race. Prosecutors were found to be more likely to file a death notice when the case was in a county that has a large Black population. 1 In Thurston County, prosecutors sought the death penalty in 67% of aggravated murder cases, while prosecutors in Okanogan County sought the death penalty in 0% of aggravated murder cases. Thurston County has a Black population of 16,254 (around 3.6%) and Okanogan County has a Black population of 417 (around 0.9%). Juries imposed the death penalty in 64% of cases involving a Black defendant, but only 37% of cases involving White defendants. Juries were found to be four and a half times more likely to impose the death penalty on Black defendants than any other similarly situated defendant. The application of the death penalty shown in this study is arbitrary under the standard presented in Furman. The arbitrary manner in which it is imposed and the discretion given to prosecutors and juries reflect the Georgia capital punishment system that the Court originally took issue with. The pattern of arbitrary and discriminatory application of the death penalty extends to a whole host of states like Pennsylvania where legal scholars David C. Baldus, George Woodworth, David Zuckerman, and Neil Alan Weiner found that effects of race on defendant punishment decisions were substantial and consistent. 107 Comparing the proportion of Black defendants in all the death-eligible cases, with the proportion of Black defendants sentenced to death by a jury shows a 7% increase. 108 This increase indicates that Black defendants are treated more punitively than other similar defendants. An investigation into Alabama in the late 1990s yields the same conclusion. At the time, the Black population in the state was 25% while 47% of their death row inmates were Black. 110 By 1999, 65% of people who were executed in Alabama were Black. 111

 Studies that date back to the 1940s have shown that racial minorities are more likely to receive the death penalty than White defendants, even when accounting for all other factors. 112 The General Accounting Office examined studies relevant to the application of the death penalty and found that three-fourths of them determined that Black defendants are more likely to receive the death penalty. 113 This likelihood increases if the victim is White. 114 This fact has been confirmed through numerous studies done by both state and federal governments since 2000. 115 As such, the lives of Black victims are treated as less valuable than other lives by the capital punishment system. 116 Not only is the death penalty imposed on Black defendants at a higher rate, but the cases where the victim is Black are less likely to have the death penalty imposed. This is egregiously arbitrary and in itself should constitute an Eighth Amendment violation.

As has been shown by its discriminatory application across the country, the death penalty has not been changed to reconcile the issues that the Court originally found within the Furman decision. Rather, states and the federal government have constructed surface-level reforms to their laws in order to impose the same punishments more discreetly and covertly. When the race of the victim alone, or coupled with the race of the defendant, is a primary reason behind the death penalty being sought, its application is arbitrary. The death penalty still disproportionately affects people who are not White. Juries and prosecutors still maintain a great amount of discretion, and in many cases, the death penalty is imposed excessively. The Supreme Court should overturn Gregg for these reasons alone. As the Court stated in Furman, “It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, class, or if it is imposed under a procedure that gives room for the play of such prejudices.” 117 Evidence suggests that from Greggs until the present, discrimination exists against defendants because of their skin color. While changes have been made, the application of the death penalty in many states still gives room for the play of such prejudices. This discrepancy between theoretical standards and practical application raises serious questions about the constitutionality of the death penalty as envisioned by the founders. With such a prolific pattern of arbitrariness and racial bias, it becomes increasingly difficult to defend the “good-natured” origins of the death penalty and begs the question if there ever existed a reality where an application of the Eighth Amendment could have been applied with the fairness it envisioned.

## Gregg v. Georgia Neg

#### Executions offer a sense of justice for victims’ families and end the prolonged trauma of appeals, media coverage, and system delays—life without parole cannot provide the same closure.

Britannica Online, Apr 16, 2025

Death Penalty: Should the Death Penalty be Legal?

https://www.britannica.com/procon/death-penalty-debate

While some argue that there is no “closure” to be had in such tragedies and via the death penalty, victims’ families think differently. Often the families of victims have to endure for years detailed accounts in the press and social media of their loved ones’ gory murder while the murderers sit out a life sentence or endlessly appeal their convictions. A just execution puts an end to that cycle.

As Oklahoma Attorney General John O’Connor explains, “The family of each murder victim suffers unspeakable pain when their loved one is murdered. Those wounds are torn open many times during the following decades, as the investigations, trials, appeals, and pardon and parole board hearings occur. Each stage brings torment and yet a desire for justice for the heinous treatment of their family member. The family feels that the suffering and loss of life of the victim and their own pain are forgotten when the murderer is portrayed in the media as a sympathetic character. The family knows that the execution of the murderer cannot bring their loved one back. They suspect it will not bring them ‘closure’ or ‘finality’ or ‘peace,’ but there is justice and perhaps an end to the ongoing wounding by ‘the murderer and then the system.’

####  Even if not a deterrent, the death penalty permanently incapacitates murderers, preventing them from killing again—life sentences carry the risk of reoffending.

Britannica Online, Apr 16, 2025

Death Penalty: Should the Death Penalty be Legal?

https://www.britannica.com/procon/death-penalty-debate

If not a deterrent to would-be murderers, at the very least, when carried out, the death penalty prevents convicted murderers from repeating their crimes.

“Perhaps the most straightforward argument for the death penalty is that it saves innocent lives by preventing convicted murderers from killing again. If the abolitionists had not succeeded in obtaining a temporary moratorium on death penalties from 1972 to 1976, [Kenneth Allen] McDuff would have been executed, and Colleen Reed and at least eight other young women would be alive today,” explains Paul Cassell, a former U.S. district court judge for the District of Utah.

Kenneth Allen McDuff was convicted and sentenced to death in 1966 for the murders of three teenagers and the rape of one. However, the U.S. Supreme Court invalidated the death penalty nationwide in 1972 (*Furman* v. *Georgia*), leading to a reduced sentence for McDuff and to his being released on parole in 1989. An estimated three days later he began a crime spree—torturing, raping, and murdering at least six women in Texas—before being arrested again on May 4, 1992, and sentenced to death a second time. Had McDuff been executed as justice demanded for the first three murders, at least six murders would have been prevented. [[15]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-15)[[16]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-16)

Considering recidivism rates, how many more murders and such associated crimes as kidnapping, rape, and torture could have been deterred had the death penalty been imposed on any number of murderers?

#### The death penalty is a morally justified form of retribution—it restores moral balance by ensuring that the worst crimes receive the ultimate punishment.

Britannica Online, Apr 16, 2025

Death Penalty: Should the Death Penalty be Legal?

https://www.britannica.com/procon/death-penalty-debate

[Talion](https://www.britannica.com/topic/talion) law (*lex talionis* in Latin), or retributive law, is perhaps best known as the biblical notion that “Anyone who inflicts a permanent injury on his or her neighbor shall receive the same in return: fracture for fracture, eye for eye, tooth for tooth. The same injury that one gives another shall be inflicted in return.”  [[8]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-8)[[9]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-9)

The word *retribution* comes from the Latin *re* and *tribuo*, meaning “I pay back.” In order for those who commit the worst crimes to pay their debts to society, the death penalty must be employed as punishment, or the debt has not been paid. [[10]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-10)

“[Retribution](https://www.britannica.com/topic/retributive-justice) is an expression of society’s right to make a moral judgment by imposing a punishment on a wrongdoer befitting the crime he has committed,” says Charles Stimson of the Heritage Foundation. Therefore, “the death penalty should be available for the worst of the worst,” regardless of the race or gender of the victim or perpetrator.

Thus, “retributionists who support the death penalty typically do not wish to expand the list of offenses for which it may be imposed. Their support for the death penalty is only for crimes defined as particularly heinous, because only such criminals deserve to be put to death. Under *lex talionis*, it is impermissible to execute those whose crimes do not warrant the ultimate sanction,” explains Jon’a F. Meyer, a sociology professor at Rutgers University. “The uniform application of retributive punishment is central to the philosophy.” [[12]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-12)

As Robert Blecker, a professor emeritus at New York Law School, further clarifies, “Retribution is not simply [revenge](https://www.merriam-webster.com/dictionary/revenge). Revenge may be limitless and misdirected at the undeserving, as with collective punishment. Retribution, on the other hand, can help restore a moral balance. It demands that punishment must be limited and proportional. Retributivists like myself just as strongly oppose excessive punishment as we urge adequate punishment: as much, but no more than what’s deserved. Thus I endorse capital punishment only for the worst of the worst criminals.”

“Sometimes, justice is dismissing a charge, granting a plea bargain, expunging a past conviction, seeking a prison sentence, or—in a very few cases, for the worst of the worst murderers—sometimes, justice is death.…A drug cartel member who murders a rival cartel member faces life in prison without parole. What if he murders two, three, or 12 people? Or the victim is a child or multiple children? What if the murder was preceded by torture or rape? How about a serial killer? Or a terrorist who kills dozens, hundreds or thousands?” asks George Brauchler, a district attorney of the 18th Judicial District in Colorado. The nature of the crime, and the depth of its depravity, should matter.

## Das

### Federalism DA

#### Uniqueness States are handling their own death penalty procedures based off the political climate of their states, which is ever changing.

National Conference of State Legislatures

August 11, 2021,

https://www.ncsl.org/civil-and-criminal-justice/states-and-capital-punishment

Capital punishment is currently authorized in 27 states, by the federal government and the U.S. military. In recent years, New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), New Hampshire (2019), Colorado (2020) and Virginia (2021) have legislatively abolished the death penalty, replacing it with a sentence of life imprisonment with no possibility for parole. The Nebraska Legislature also abolished capital punishment in 2015, but it was reinstated by a statewide vote in 2016. Additionally, courts in Washington and Delaware recently ruled that the states' capital punishment laws are unconstitutional. States across the country will continue to debate its fairness, reliability and cost of implementation.

#### Link: Overruling Gregg v. Georgia would expand federal power over criminal law which undermines state sovereignty, leads to overreach, and erodes localized democratic control — federal criminal law increasingly intrudes on areas best handled by states.

Scott Sullivan and Iben Sullivan, 2024

The Empirics of Criminal Federalism." Ohio State Journal of Criminal Law, vol. 21, no. 2, Spring 2024, pp. 377-406. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/osjcl21&i=391

The divisions of state and federal power have been especially difficult to divine within criminal law. "Perhaps the clearest example of traditional state authority is the punishment of local criminal activity."" After all, the core of a state's police power is responsibility for the general welfare of its population and the authority to dictate and enforce rules of behavior that affect health and safety. 38 Yet there is a similar consensus that the federal government is undoubtedly empowered to engage in criminal regulation where a "truly national" interest is implicated. 39 No one doubts the legitimacy of federal criminal regulations in combatting terrorism or potential mass casualty events. 40 Even acts that facially appear to be banal in nature, such as assault, are often casually considered appropriately regulated by the federal government dependent upon the target or motive underlying such acts.41 As such, the appropriateness of federal criminal regulation often reflects a characterization of the underlying criminal acts as "genuinely" implicating federal interests that themselves are susceptible to manipulation.

Definitional issues aside, part of the difficulty in dividing state and federal power in criminal law simply flows from the tremendous expansion of federal jurisdiction over time." This expansion of federal power, supercharged in the decades following the Great Depression, provoked many scholars and jurists to lament a state of affairs in which federal criminal law has expanded into innumerable crevices that were once exclusively occupied by state regulation.4 Supreme Court decisions in cases, like Scarborough v. United States, held that even a marginal connection to interstate commerce, such as a weapon possessed by a felon having ever traveled in interstate commerce, sufficed to legitimize federal regulation." Even a renewed attention to federalism by the Supreme Court in recent decades has not precluded it from upholding federal law with similarly tenuous connections to federal interests. 46 This federal power expansion has not been matched by a contraction in state authority.

The general nature of the state police power means that states have a legitimate, and often acute, interest in the same acts likely to provoke federal interests. 47 If, as Chief Justice Roberts stated in Bond v. United States, the federal government possesses an unquestionable interest in prosecuting "acts with the potential to cause mass suffering," it seems equally unquestionable that the states possess the same interest just as acutely. 48 As a result of this convergence of federal and state interests and expanding federal authority has resulted, in the words of one scholar, we have reached a point where "federal criminal code almost entirely overlaps with state criminal law."

### PTX DA

#### The death penalty remains politically volatile—deep generational divides and shifting public support make it a flashpoint issue at both state and federal levels.

Britannica Online, Apr 16, 2025

Death Penalty: Should the Death Penalty be Legal?

https://www.britannica.com/procon/death-penalty-debate

By early 2025, 23 U.S. states had the death penalty; three had the death penalty but had imposed [moratoriums](https://www.merriam-webster.com/dictionary/moratoriums), halting executions; one had the death penalty but had imposed an unofficial moratorium until updated execution protocol is available; and 23 states and [Washington, D.C](https://www.britannica.com/place/Washington-DC)., had abolished the death penalty. The punishment, however, remains legal at the federal level. Since 2003, capital punishment of federal prisoners has been used only in 2020 and 2021, during the administration of President [Donald Trump](https://www.britannica.com/biography/Donald-Trump), when 13 men were executed. Prior to 2020 the federal government had executed three people since 1963, all under President [George W. Bush](https://www.britannica.com/biography/George-W-Bush). That group included [Oklahoma City bomber](https://www.britannica.com/event/Oklahoma-City-bombing) [Timothy McVeigh](https://www.britannica.com/biography/Timothy-McVeigh) in 2001. [[3]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-3)[[4]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-4)[[5]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-5)[[6]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-6)

According to 2022 and 2023 [Gallup](https://www.britannica.com/topic/Gallup-Organization) polls, 55 percent of Americans believed the death penalty should be legal and 60 percent saw the punishment as morally acceptable. By November 14, 2024, support had fallen to 53 percent, with a noticeable lack of support among younger generations, according to Gallup. Concerning which age groups approve of capital punishment, while a majority of the older [Silent Generation](https://www.britannica.com/topic/Silent-Generation) (62 percent), [Baby Boomers](https://www.britannica.com/topic/baby-boomers) (61 percent), and [Gen Xers](https://www.britannica.com/topic/Generation-X) (58 percent) support the death penalty, only a minority of the younger [Millennials / Gen Yers](https://www.britannica.com/topic/millennial) (47 percent) and [Gen Zers](https://www.britannica.com/topic/Generation-Z) (42 percent) support the penalty. [[7]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-7)[[119]](https://www.britannica.com/procon/death-penalty-debate/1-minute-Survey#pcref-2256612-119)

### Stare Decisis DA

#### The Eighth Amendment’s evolving standards doctrine suggests that the law should change over time, but overruling precedent would weaken this unique form of stare decisis, leading to inconsistent rulings.

William Berry III, 2025

“Eight Amendment Stare Decisis” Southern California Law Review Vol. 98, No. 2

https://southerncalifornialawreview.com/2025/04/08/eighth-amendment-stare-decisis/

In 2008, the United States Supreme Court decided Kennedy v. Louisiana, holding that the Eighth Amendment barred death sentences for the crime of child rape because such punishments were cruel and unusual. In 2023, Florida passed a statute that directly contravenes this constitutional rule. Under the Florida statute, committing sexual battery against a child is a capital offense.

In a vacuum, one might expect the Court to strike down Florida’s statute as clearly unconstitutional in violation of the Eighth Amendment based on the principle of stare decisis. Traditionally, the concept of stare decisis has referred to the obligation of the Court to follow prior precedent.

The Court’s description of the scope of stare decisis stems from its abortion cases. The Court initially explained stare decisis in Planned Parenthood of Southeastern Pennsylvania v. Casey but arguably loosened its meaning in its decision in Dobbs v. Jackson Women’s Health Organization. Indeed, the Court’s decision in Dobbs, in which it reversed the fifty-year-old precedent of Roe v. Wade and its successor Casey, suggests that the Kennedy case could face a similar fate.

But the Eighth Amendment contains substantive doctrinal characteristics that suggest it is unique with respect to stare decisis. In particular, the Eighth Amendment’s relationship to stare decisis is unusual because the premise of the underlying doctrine is that the meaning of the Amendment will change over time. Pursuant to “the evolving standards of decency that mark the progress of a maturing society,” the Eighth Amendment expands over time to bar punishments formerly constitutional but now determined to be draconian.

As such, there become two possibilities with respect to applying stare decisis under the Eighth Amendment. First, stare decisis could mean what it means in other contexts—deferring to precedent and refusing to overrule a prior decision unless it rises to the level of the test previously set forth in Casey and now articulated in Dobbs. Alternatively, stare decisis could mean following the evolving standards of decency doctrine. This approach contemplates that the Amendment would change over time, such that stare decisis would require the overruling of precedent, moving the case law in a progressive, less punitive direction.

This Article argues for the latter reading. Specifically, the Article makes the novel claim that the Eighth Amendment has its own unique stare decisis doctrine, the doctrine moves in one direction, and such a reading of the Eighth Amendment is consistent with the Court’s decision in Dobbs.

In Part I, the Article explores the origins of the unique doctrine of Eighth Amendment stare decisis. Part II examines past and future applications of this doctrine. Finally, in Part III, the Article explains why the Court’s decision in Dobbs supports Eighth Amendment Stare Decisis.

All bad precedents have originated from good measures.

## CPs

### Checks and Balances CP

#### Text: The United States federal and state governments should restructure criminal justice decision-making processes by implementing a system of diffused power and checks and balances across diverse social interests, including but not limited to victims’ advocates, public defenders, racial justice organizations, formerly incarcerated individuals, and community-based oversight boards. This restructured system should include mechanisms for democratic input and review on the continued use of the death penalty.

#### Solvency: Criminal justice reform requires diffusing power across diverse social interests—not just branches of government—because current top-down structures enable carceral majorities and elite capture.

Daniel Epps, 2021

"Checks and Balances in the Criminal Law." Vanderbilt Law Review, vol. 74, no. 1, January 2021, pp. 1-84. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/vanlr74&i=10

If meaningfully diffusing and limiting state power over criminal justice is the goal, we need to start thinking about that project from a different perspective. Institutions could be structured so that decision making power is shared and diffused among different interests in democratic society, rather than among functionally distinct institutions. This conception looks to the tradition of mixed government and its later instantiation as the idea of checks and balances for a blueprint for the structure of the criminal justice system. Other scholars have recently explored modern versions of mixed government's approach of directly incorporating class into government to limit the ability of the wealthy to control the political process.26 5 A similar approach, in which power is divided among distinct social interests with competing ideas about criminal justice, could be a useful model.

At least according to leading accounts of the state of the politics of criminal justice, our system does a poor job diffusing power among distinct interests. Observers argue that voters and their elected representatives consistently choose severe policies without sufficient regard for the people who bear the costs of those policies. 266 On this account, the problem is a kind of process failure, explained by the fact that ordinary voters can imagine themselves as victims of crime but do not expect to be on the receiving end of criminal sanctions. 26 7 This common lament about the toxicity of criminal politics can be understood as an observation about the role of interests-one tough-on-crime interest holds sway over criminal justice policy given the preferences of voting majorities.

Even if this account is correct about the state of voters' preferences, however, different structural arrangements might reduce or exacerbate some of these tendencies. It is not the case that every American has identical preferences for harsh policies; instead, preferences almost certainly vary depending on numerous factors like race, class, age, gender, zip code, and previous exposure to the system. Moreover, a number of powerful and organized interests-prosecutors' organizations, prison guard unions, for-profit companies that profit off of prison labor, and so on-may amplify and reinforce tough-on-crime preferences.2 65 One could imagine alternative ways of distributing power over criminal justice policymaking authority that would mute some of these political forces and amplify interests that would push policies in the other direction.

This way of thinking about the criminal justice system understanding the distribution of power over criminal justice among social interests as an alternative strategy to the traditional separation of powers-recasts various debates. In this light, numerous seemingly distinct questions about the allocation of decisionmaking power are really separation-of-powers-type questions, of certainly no less-and likely much more-importance than whether power over criminal justice is divided between functionally differentiated institutions. Consider a few examples

#### Solvency: Local control of criminal justice empowers marginalized communities, diffuses state power, and leads to more equitable and accountable outcomes—top-down systems entrench disparities.

Daniel Epps, 2021

"Checks and Balances in the Criminal Law." Vanderbilt Law Review, vol. 74, no. 1, January 2021, pp. 1-84. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/vanlr74&i=10

But there are also more direct strategies. Interestingly, federal Indian law provides a unique model within the American system. Under a complex arrangement of tribal law, treaties, and federal statutory law, Native American tribes retain criminal lawmaking and law enforcement power for certain crimes committed by tribe members within "Indian country"304 and in some cases beyond those boundaries.30 5 Tribal autonomy over criminal justice can make a significant difference for tribe members; tribe members subject to Congress's withdrawal of such autonomy-and consequent imposition of state criminal jurisdiction-in certain regions have reported widespread dissatisfaction with criminal justice.306 While it is hard to imagine extending the Indian-law model to racial and ethnic groups given the constraints of the Equal Protection Clause, there nonetheless may be larger lessons here for the importance of autonomy among distinct groups in shaping criminal justice policy

## Strict Scrutiny CP

#### Text:The United States federal judiciary should adopt an antisubordination framework for interpreting the Eighth Amendment, applying strict scrutiny to all criminal punishments that disparately impact historically subordinated racial groups.

#### Courts should adopt an antisubordination reading of the Eighth Amendment that applies strict scrutiny to racially disparate punishments—this would empower defendants, enforce parsimony, and reduce systemic subordination.

**Kathryn E. Miller, 2024**

**The Antisubordination Eighth Amendment." California Law Review, vol. 112, no. 6, December 2024, pp. 2065-2133. HeinOnline.**

**https://heinonline.org/HOL/P?h=hein.journals/calr112&i=2090**

Such significant doctrinal changes raise the question of how an Antisubordination Eighth Amendment strict scrutiny test would operate in practice. How exactly should a court strictly scrutinize punishment? New constitutional formulations often raise more questions than they answer, and the Court frequently leaves questions of line-drawing to percolate in the lower courts before settling on definitive parameters. Nevertheless, having proposed a new theory of Eighth Amendment interpretation, I now broadly consider the form it might take in practice to demonstrate its workability. In doing so, I acknowledge that some of my choices could benefit from a more full-throated explanation than the scope of this Article allows.

Most fundamentally, an Antisubordination Eighth Amendment would require the Court to strictly scrutinize punishments deemed "unusual" in application. Punishments that are unusual in application are those that entrench group subordination through a disparate impact on historically subordinated racial groups.

Following imposition of sentence, 391 a criminal defendant belonging to a historically subordinated racial group could make a prima facie showing of disparate impact. 392 Disparate-impact claims do not require any showing of intentionality, but instead are outcome focused.393 Evidence of disparate impact reveals that a sentencer has, intentionally or not, taken a person's subordinate status into account to impose a punishment that further fixes this status. 394 A presumption against these punishments is appropriate because an individual's subordinate status does not increase their culpability or make them more worthy of punishment.

Upon a successful showing of disparate impact, the Court would undertake a "cruelty" analysis. The government would have the opportunity to assert a compelling penological interest in the punishment.395 Then, the Court would apply strict scrutiny to the punishment at issue by determining whether it constituted the "least restrictive means" to advance the stated penological goal.

Here, the least restrictive means language encapsulates the level of constitutionally acceptable constraint on liberty. Courts must determine if the state might achieve its stated penological interest with less of an intrusion on a person's liberty than the sentencer imposed. The test is grounded in the principle of parsimony, which limits the state's power to punish to the necessary minimum. 396 Although parsimony as a sentencing principle originated with eighteenth-century philosophers, 397 the "least restrictive means" language has not appeared in Eighth Amendment jurisprudence. However, parsimony does appear in other areas of contemporary constitutional and statutory law, including criminal law. The Court has employed the concept in the Free Speech and Free Exercise contexts.

It has also appeared in statutes related to religious freedom399 and, more recently, to bail determinations, which require trial courts to set the least restrictive conditions of bail to ensure the defendant's appearance in court, to protect public safety, or both. 400 Parsimony also appears as a guideline in the U.S. sentencing code, although it is rarely enforced.

As applied to unusual punishment under an antisubordination approach, the least restrictive means standard would amount to a presumption against punishments that disparately impact historically subordinated groups. The standard would require judges to assess whether less arduous punishment or collateral consequences could reasonably achieve the government's stated compelling interest. The burden of proving that the punishment at issue is the least restrictive would fall on the government. In evaluating whether a punishment is the least restrictive, courts could consider alternative punishments that the state has authorized for the crime; past punishments; or punishments in other jurisdictions. 40 2 Punishments found to be more restrictive than necessary would be considered unconstitutionally "cruel" and subject to resentencing.

The test has the potential to reduce racially disparate sentencing both upstream and downstream. Upstream, the test might persuade some judges to exercise leniency when sentencing members of historically subordinated groups because longer sentences could be used as evidence of disparate impact. Downstream, criminal defendants who do receive racially disparate sentences like K.H., who appears in the opening paragraphs of this Article-would have meaningful recourse, even if they could not show the judge acted consciously in imposing such a sentence

#### CP Solves the harms of racial discrimination- without disrupting stare decisis/federalism/etc.

**Kathryn E. Miller, 2024**

**The Antisubordination Eighth Amendment." California Law Review, vol. 112, no. 6, December 2024, pp. 2065-2133. HeinOnline.**

**https://heinonline.org/HOL/P?h=hein.journals/calr112&i=2090**

The modern criminal punishment system perpetuates racial subordination and creates and entrenches caste. Yet these harms are not inevitable. A constitutional solution exists in the Eighth Amendment, drawing inspiration from the antisubordination principle of the Fourteenth Amendment's Equal Protection Clause. The text, history, structure, jurisprudence, and theory of the Eighth Amendment support an interpretation of the punishment clause that requires the Court to strictly scrutinize punishments that disproportionately impact Black people and other historically subordinated groups. In a world where punishment is increasingly massive and permanent, an Antisubordination Eighth Amendment is both a possible and a necessary corrective.

## States CP

#### Text The 50 U.S. states and territories should independently legislate to abolish the death penalty in their jurisdictions and bar its reinstatement, asserting their constitutional authority over criminal justice policy and punishment.

#### Solvency: State courts provide a check on arbitrary and racially biased death penalty laws—multiple rulings prove capital punishment fails constitutional standards.

National Conference of State Legislatures

August 11, 2021,

https://www.ncsl.org/civil-and-criminal-justice/states-and-capital-punishment

State courts have also had an impact. The Delaware Supreme Court issued a [decision on August 2, 2016](https://courts.delaware.gov/Opinions/Download.aspx?id=244410) striking down the state’s death penalty statute, ruling that it violated the Sixth Amendment as interpreted by the U.S. Supreme Court decision Hurst v. Florida. The Delaware attorney general announced that he will not appeal the decision of the state court and legislation would be required to reinstate capital punishment in the state. The Washington Supreme Court also recently [struck down the state's death penalty on October 11, 2018](https://www.courts.wa.gov/opinions/pdf/880867.pdf). This was the fourth time the court has ruled the state's capital punishment law unconstitutional, calling it "invalid because it is imposed in an arbitrary and racially biased manner."

The Washington Supreme court issued [a decision on October 11, 2018](https://www.courts.wa.gov/opinions/pdf/880867.pdf) striking down the state’s death penalty statute as applied. This decision was the fourth time the Washington Supreme Court has ruled the state’s capital punishment law unconstitutional. The court wrote that the “death penalty is invalid because it is imposed in an arbitrary and racially biased manner,” and found that the law as applied violates Article I, Section 14 of the state constitution because it fails to serve any legitimate penological goal.

## Ks

#### Link Top-down approaches to criminal justice entrench inequality—local, bottom-up governance empowers marginalized communities and ensures more equitable decision-making.

Daniel Epps, 2021

"Checks and Balances in the Criminal Law." Vanderbilt Law Review, vol. 74, no. 1, January 2021, pp. 1-84. HeinOnline.

https://heinonline.org/HOL/P?h=hein.journals/vanlr74&i=10

One cannot study America's criminal justice system without realizing that criminal law has very different consequences for different groups in society, and particularly different racial, ethnic, and tribal groups. African Americans in particular have borne the brunt of America's epidemic of mass incarceration, 2 95 but Hispanic 296 and Native American 297 people have also suffered disproportionately. Beyond punishment, many other aspects of criminal justice-such as traffic stops and police violence-have profoundly disparate effects across groups. 298 Any serious attempt to think about how to disperse power over the criminal justice system among discrete interests must take account of these differences.

How might such groups be better empowered to play a role in governance of criminal justice? One strategy relates back to the discussion above regarding the geographic distribution of political power. Given widespread residential racial segregation in the United States,299 placing decisionmaking power at lower, more local levels of government may better empower minority groups (who may constitute local majorities) to influence important policy decisions. Indeed, the recent rise of progressive prosecutors has been made possible by the fact that the political constituencies that elect urban prosecutors are more diverse than their states as a whole. 300 Predictably, the rise of reformer prosecutors has been met with efforts by state governments to strip some decisionmaking power from local prosecutors. 30 1 To the extent that local control-and the greater say in decisionmaking by otherwise less powerful minority groups-is seen as a powerful check on the criminal justice process, such reforms should be resisted.

# Core Generic Disadvantages

## Court Legitimacy Links

#### Torturing precedent makes the Court as political as the other branches of government

William W. **Taylor**, III, January 25, 20**23** founding partner of Zuckerman Spaeder LLP and one of the country’s foremost litigators, How The Supreme Court Is Destroying Its Own Legitimacy, Alliance For Justice <https://afj.org/article/how-the-supreme-court-is-destroying-its-own-legitimacy/> kr

The **six justices in the majority** have signaled that they intend to select and decide cases in a way that advances goals of the far right, notwithstanding the pretense of calling “balls and strikes.” They have now issued multiple decisions in which they **unashamedly torture precedent and rely upon biased recitations of history to support their desired outcome. There’s no denying this Court and its supporters care more about the results than the reasoning.**

**When justices vote on a specific case as the president who nominated them promised they would, the public justifiably perceives that this branch of government is no less political than the other two. When the explanations for their votes appear to be shallow or disingenuous, the skepticism mounts further.**

#### A headstrong Court risks losing credibility with the American people who will then defy the Court’s orders

William W. **Taylor**, III, January 25, 20**23** founding partner of Zuckerman Spaeder LLP and one of the country’s foremost litigators, How The Supreme Court Is Destroying Its Own Legitimacy, Alliance For Justice <https://afj.org/article/how-the-supreme-court-is-destroying-its-own-legitimacy/> kr

**The Supreme Court is running the risk that it will lose its credibility and its decisions will no longer be accepted by the majority of Americans.** [In an interview](https://www.washingtonpost.com/magazine/2022/08/16/supreme-court-roe-vs-wade-clarence-thomas/) last year, Professor **Laurence Tribe** put it succinctly. The danger, he **said, is that if the court “becomes so headstrong and so out of touch with modern reality and so unwilling to listen effectively to counterargument and so agenda-driven and so committed to its, really, alternative facts,” then it’s likely people will eventually “start defying what it says.” He warned that point is getting closer.**

This Court’s conservative majority is clearly committed to arriving at its preferred results. As Professor Tribe said, “when they’ve got the votes, they don’t even care about the reasoning.” It also seems that **they do not care about the decline in credibility for which they are responsible. They are imposing an agenda and feigning impartiality. In the process, they put at risk the role our Constitution envisioned for a branch of government not affected by politics — and our democracy itself.**

#### Adherence to precedent is the internal link to legitimacy,

**Harvard Law Today** 10/5/20**22**, Stare indecisis?, A panel of experts at Harvard Law School examine the Supreme Court’s fidelity to past precedents in the wake of the precedent-busting term https://hls.harvard.edu/today/does-overturning-precedent-undermine-the-supreme-courts-legitimacy/ kr

The question of the Supreme Court’s legitimacy was also recently on the minds of legal scholars speaking at a Harvard Law School panel on Monday titled “Stare Decisis and the Roberts Court.” It was the second in a yearlong lecture series examining “The Supreme Court in a Constitutional Democracy.” Introducing the panel, Harvard’s Story Professor of Law, **Richard Fallon, said that many experts, who “have argued that adherence to precedent is crucial to the Supreme Court’s legitimacy,” worry what the fallout would be “[i]f the perception broadly took hold that the Supreme Court is just another partisan institution.”**

#### If SCOTUS continues to overturn precedent, it will kill the Court’s legitimacy

Kelsey **Reichmann**, 7/8**/22,** reporter covering the Supreme Court and politics for Courthouse News Service, https://www.courthousenews.com/is-overturning-precedent-the-new-precedent-at-the-high-court/ kr Rulings from the Supreme Court hold enormous weight because unlike bills from Congress or executive orders from the president, their effectiveness is not dependent on the current officeholder. Experts say that might not be the case anymore. The court is supposed to abide by the principle of stare decisis — which literally means “to stand by things decided.” As Alexander Hamilton explained, adherence to precedent was necessary “to avoid an arbitrary discretion in the courts.” However, this term court watchers say the conservative majority is creating a new guiding principle.

**“The Supreme Court, in a way, they've set their own precedent and their own precedent is that no matter how settled stare decisis might be, it can be overturned with a blase disregard for the consequence,”** Lawrence Gostin, faculty director of the O’Neill Institute for National and Global Health Law and Georgetown Law, said in a phone interview. “If you get really progressive members of the court, they may take this same exact view and then the Supreme Court becomes nothing more than a third political chamber.” Experts have cited many instances where the majority disregards or misinterpreted its prior rulings this term, but the most egregious example they say came with the court’s decision to overrule Roe v. Wade. “It's truly an astounding decision, what I think is one of the most irresponsible decisions in the court's history,” David Cole, the national legal director at the American Civil Liberties Union, said in a phone call. Roe was decided in 1973 and reaffirmed by Planned Parenthood v. Casey in 1993. However, there are also over 20 cases that reaffirm those holdings or apply the constitutional right to abortion. A slim majority of the court decided that despite all of those precedents, Roe and Casey should be overruled. Their reasoning is that despite having respect for stare decisis, Roe was “egregiously wrong” when decided so it must be overturned. “Precedents should be respected, but sometimes the Court errs, and occasionally the Court issues an important decision that is egregiously wrong,” Justice Samuel Alito wrote. “When that happens, stare decisis is not a straitjacket.” The Supreme Court has overturned precedents in the past. The most well-known example is the court’s decision in Brown v. Board of Education which overruled Plessy v. Ferguson’s separate but equal holding. Alito cites this example in his reasoning for the court overruling Roe, however, experts note some discrepancies in this comparison. Not only was Brown a unanimous decision from the court, but it said Plessy was unconstitutional. That was not the case in Dobbs. As Justice Brett Kavanaugh notes, the court’s ruling does not make abortion unconstitutional, it allows states to make their own laws regarding its legality. Experts also note that past rulings overturning precedents have never taken away rights. “Never before in the court’s history has it overturned a prior precedent to eliminate a constitutional right central to equality and enjoyed by so many people. … Here it has eliminated a right, and that is truly an anomaly in the court's history to take away rights that have been accepted for generations and central to the equality of half of the nation,” Cole said. The three Democrat-appointed justices said the majority’s ruling “abandons” stare decisis and on that basis any precedent five justices disagree with could be in danger. “In the end, the majority says, all it must say to override stare decisis is one thing: that it believes Roe and Casey ‘egregiously wrong,’” Justices Stephen Breyer, Sonia Sotomayor and Elena Kagan wrote in a rare joint dissent. “That rule could equally spell the end of any precedent with which a bare majority of the present Court disagrees.” They continued, “The majority has overruled Roe and Casey for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law.”

**Court watchers say the majority’s disregard for precedent here ignores not only former justices but the majority of the legal community and the public.**

**“They seem to be playing to the 30% of core support for a highly conservative agenda,” Gostin said. “So I think on questions of precedent, institutional authority, incrementalism, moderation. Those are all words that don't seem to be in the vocabulary of the conservative majority.”**

**If the current court’s new precedent for ignoring precedent continues, experts say it would ultimately turn around and harm the court itself.**

**“It would destroy the legitimacy of the Supreme Court and the public trust in its decision making if you just keep getting seesaw overturning of precedent, but it's very possible,” Gostin said.**

#### Kagan says the Court hurts its own legitimacy when they overturn precedent

**CBS News**, 9/13/**22,** Justice Elena Kagan warns Supreme Court can forfeit legitimacy when overturning precedent, <https://www.cbsnews.com/news/supreme-court-elena-kagan-forfeit-legitimacy-precedent/> kr

Supreme Court Justice **Elena Kagan** on Monday **cautioned that courts look political and forfeit legitimacy when they needlessly overturn precedent** and decide more than they have to. Speaking less than three months after a five-justice conservative majority overturned Roe v. Wade's constitutional guarantee of abortion access, K**agan said the public's view of the court can be damaged** especially when changes in its membership lead to big changes in the law. She stressed that she was not talking about any particular decision or even a string of rulings with which she disagreed. Still, her remarks were similar to points made in dissenting opinions she wrote or contributed to in recent months, including in the abortion case. **"Judges create legitimacy problems for themselves ... when they instead stray into places where it looks like they're an extension of the political process or when they're imposing their own personal preferences," Kagan said** at Temple Emanu-El in New York. The event was livestreamed.

#### Big changes in the law damage Court legitimacy

**CBS News**, 9/13**/22**, Justice Elena Kagan warns Supreme Court can forfeit legitimacy when overturning precedent, <https://www.cbsnews.com/news/supreme-court-elena-kagan-forfeit-legitimacy-precedent/> kr

But **Kagan said the court risks damaging its own legitimacy when big changes in the law follow changes in the court's membership.**

**The public has a right to expect, she said, "that changes in personnel don't send the entire legal system up for grabs."** Kagan joined the court in 2010, an appointee of President Barack Obama. Three of the justices who are part of the court's conservative majority were appointed by President Donald Trump. They voted to overturn Roe, and also imposed limits on the Biden administration's efforts to fight climate change, expanded gun rights and weakened the separation between church and state.

#### Stare Decisis is key to the legitimacy of the judicial process and the rule of law

**Murrill**, Brandon J., 09/24/20**18**, Library of Congress. Congressional Research Service, issuing body.The Supreme Court’s Overruling of Constitutional Precedent <https://www.congress.gov/crs-product/R45319> kr

The **Supreme Court has often stated that following its prior decisions supports the legitimacy of the judicial process and fosters the rule of law43 by encouraging stability, certainty, predictability, consistency and uniformity in the application of the law to cases and litigants.**44 As Justice Lewis Powell once remarked, "the elimination of constitutional stare decisis would represent an explicit endorsement of the idea that the Constitution is nothing more than what five Justices say it is."45 Thus, one view is that **following the carefully considered decisions of past Justices by adhering to principles of stare decisis supports the Court's role as a careful, unbiased, and predictable decisionmaker that decides cases according to the law rather than the Justices' individual policy preferences.** Another reason for adhering to stare decisis is to save judges and litigants time by reducing the number and scope of legal questions that the court must resolve in litigation (e.g., whether the Court may declare a federal law unconstitutional—a question settled in the 1803 decision of Marbury v. Madison).46 In a similar vein, the Court has suggested that having a precedent established on a particular question of law allows for the quick and efficient dismissal of lawsuits that can be resolved through recourse to rules in prior decisions, which may encourage parties to settle cases out of court and thereby enhance judicial efficiency.47

#### Ping-ponging precedent undermines reliance on the Court and tanks its legitimacy

Michael **Gentithes**, Associate Dean of Academic Affairs University of Akron School of Law, October 20**20**, Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis, William & Mary Law Review <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3871&context=wmlr> kr

**Theories** like Nelson’s, Thomas’s, and Kavanaugh’s imply **that Justices in the majority should overrule decisions** when their own interpretive methodology suggests extreme error in prior decisions. That view **is shortsighted. What is a majority view on interpretive methodology today may be a minority view tomorrow. If the Court’s theory of precedent deems “demonstrable error” correction appropriate, Justices of all interpretive stripes are likely to seek massive changes in jurisprudential course each time they find themselves in the present majority. That will lead the Court to play jurisprudential ping-pong in its decisions over the course of history, veering between substantive legal extremes and undermining society’s reliance upon, and belief in the legitimacy of, the Supreme Court.**

#### Weak stare decisis leads to further politicization of the Court and weakens the legitimacy of the entire judicial system leading to anticipatory overruling by lower courts and instability of the court system

Michael **Gentithes**, Associate Dean of Academic Affairs University of Akron School of Law, October 20**20**, Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis, William & Mary Law Review <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3871&context=wmlr> kr

**The Supreme Court’s current stare decisis formulation may also reduce the deference that lower federal courts show for Court precedent. Today, lower court adherence to Supreme Court precedent is so consistent that rare examples of direct defiance are highly notable.232 But if the Court is willing to overrule prior cases simply because the Justices believe the decisions are poorly reasoned and hence substantively incorrect, little would constrain lower courts from taking the same tack in cases when the lower courts are confident that a majority of the Court agrees that a prior decision was poorly reasoned. Such a form of “anticipatory overruling” could become commonplace as lower courts disregard Supreme Court precedent they predict the Court itself will shortly overrule.233 Lower courts may even read cases expressing the Court’s disenchantment with a precedent**, such as Alito’s rebukes of Abood in the run-up to Janus, 234 **as a signal that such decisions are already all but eradicated and can be ignored.235 The costs of such a practice, if it became widespread, are clear. Legal stability would be significantly undermined if lower courts could act independently to change Supreme Court doctrine; legal disuniformity could proliferate as various lower courts accept different constructions of Supreme Court precedent over time;236 and the perceived legitimacy of the Supreme Court’s decisions would be significantly undermined.237**

Additionally, if Janus becomes entrenched as the Court’s leading precedent on precedent, the Court will likely become even more overtly politicized than it is today. Janus’s version of the **weak stare decisis tradition leaves Justices with almost no obligation to follow the direction of their prior brethren on the bench. If the membership of the Court is the only constraint upon doctrinal change, alterations to that membership become even more important to future decisions. Confirmation hearings will become the last opportunity to influence the new direction that the Court may take because the utility of precedent-based legal arguments in individual cases will decline precipitously. Because each subsequent Justice will have the opportunity to reverse the course of doctrine wholesale, all parties will rightly perceive that any Justice with ideological inclinations contrary to the current state of doctrine can readily implement those preferences without any constraint. The appointments process will be stuck in a one-way ratchet to further politicization and rancor. Nominees may overtly campaign for appointment by making private or public suggestions about which cases they will vote to overturn once confirmed. Without the constraint of stare decisis, the slippery slope to such judicial politicking by Supreme Court Justices is left open**

#### Precedents maintains and increases legitimacy and economic stability

Michael **Gentithes**, Associate Dean of Academic Affairs University of Akron School of Law, October 20**20**, Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis, William & Mary Law Review <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3871&context=wmlr> kr

Similarly, **the age of a precedent may be tied to perceptions of the Court’s legitimacy. When the Court sustains a rule for many decades, it gives societal stakeholders an opportunity to order their affairs accordingly.** This is especially true when the rule touches upon business or commercial interests, areas in which doctrinal stability is especially important to the national economy. **A Court that encourages citizens to trust that older decisions will remain undisturbed increases its legitimacy, both in the eyes of those citizens who come to trust the Court’s word and in the broader economic landscape in which the Court can play a steadying role**. Age may also serve as a proxy measurement of the reaffirmation of a precedent over time. Such reaffirmation lends extra weight to a precedent.262 The longer a decision has lasted, the more likely it has met with approval from legal thinkers across the ideological spectrum. Contrary cases will be readily identifiable; members of the Court may signal their disagreement with the reasoning of a precedent—much as Justice Alito’s jurisprudence that led up to Janus’s decision to overrule Abood263—offering the precedent’s supporters one final opportunity to defend it in court before reversing course.264 Absent such repeated, clear criticisms of a precedent’s validity, age again may signal that a precedent has been accepted and reaffirmed as correct over time.

#### Courts become overly political when they overturn precedent

**Gerstein**, Josh, POLITICO’s Senior Legal Affairs Reporter, 9/14/**22,** Kagan repeats warning that Supreme Court is damaging its legitimacy <https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766> kr

**Justice Elena Kagan warned** again on Wednesday that unsound reasoning and politically convenient conclusions have infected the Supreme Court’s recent opinions and are doing damage to the court’s standing with the American public. “**When courts become extensions of the political process, when people see them as extensions of the political process, when people see them as trying just to impose personal preferences on a society irrespective of the law, that’s when there’s a problem — and that’s when there ought to be a problem,”** Kagan said during an event at Northwestern University School of Law. Kagan has offered similar criticism of the high court on several occasions over the past summer, following its momentous, 5-4 decision in June overturning Roe v. Wade and wiping out a federal constitutional right to abortion that had been recognized for nearly half a century. However, the recent criticisms from Kagan, an appointee of President Barack Obama and a former Harvard Law School dean, now seem more pointed because they come just days after Chief Justice John Roberts expressed concern publicly that the court’s reputation is being unfairly battered.

#### The Court’s respect for precedent is the key to legitimacy and the functionality of the Court. Without the respect of the public the Court’s power is lost

Lincoln **Caplan**, November-December 20**22**, Justice Elena Kagan, in Dissent, <https://www.harvardmagazine.com/2022/10/feature-justice-elena-kagan> kr

Legitimacy and Democracy In July, after the term ended, at a judges’ conference in Big Sky, Montana, **Kagan spoke about the effects of the Court’s flaunting of its power: “The thing about judicial decision-making is that you can’t throw the bums out; we are there for life. And in particular with respect to our constitutional rulings, there is no way for any other branch of government to reverse them.” She went on, “But if, over time, the Court loses all connection with the public and public sentiment, that is a dangerous thing for democracy.” Her emphasis on the threat to democracy was conspicuous. Kagan was addressing the Court’s loss of trustworthiness—what Court-watchers call legitimacy. That quality is elusive and ill-defined, yet indispensable: little it decides is self-implementing, so it relies on the people’s willingness to abide its rulings to sustain its function in American democracy. The depletion of its legitimacy is a paramount concern about the Court since it has moved far to the right during the years she has been a justice.** A major reason for the Biden Supreme Court commission, which presented possible reforms like creating term limits for justices, was “the importance of protecting or enhancing the Court’s legitimacy.” James Fallows ’70, the Atlantic writer who rarely comments about the Court but recently felt compelled to, said in his newsletter that t**he majority has piled the Court’s “legitimacy into a big heap and set it ablaze.”**  Legitimacy is commonly yoked to the Court by “of”—the legitimacy of the Court. That can be misunderstood to mean the Court possesses legitimacy because it’s the Court. A line in Alito’s abortion opinion suggested he holds that view. He expressed disdain for distress about the Court’s loss of legitimacy: “We cannot allow our decisions to be affected by any extraneous influences such as concern about the public’s reaction to our work.” To him and the majority he spoke for, apparently, the plunge in public approval doesn’t matter. But i**n Kagan’s view, the public’s trust in the Court is vital, so the trustworthiness of the Court is, too. It is a reason for the judicial modesty she values: justices don’t inherit legitimacy. Legitimacy is a form of respect from the people, which the Court either fosters or fritters away by what it decides—and, critically, how. Its majority opinions must shape and command public opinion**. Story professor Richard H. Fallon’s book on the subject is Law and Legitimacy IN the Supreme Court (emphasis added): Replacing of with in underscores what Kagan highlighted: “The Court earns its legitimacy by the way it behaves.” **The American people will do what the Court says they should only if it warrants their respect. If not, people flout the Court and the rule of law, damaging the underpinning of democracy. Legitimacy ensures compliance with rulings even when they are unpopular or when a majority of the unelected justices strike down laws made by an elected body, like Congress. Legitimacy serves as the Court’s army and its treasury, since it has neither to enforce its rulings.** Kagan offered a solution to the problem, which squares with the origin of the word “legitimacy”: the Latin word “lex” for law became the root “leg-” for the Latin “legitimus,” meaning “lawful.” **She explained, “Overall, the way the Court retains legitimacy and fosters public confidence is by acting like a court”** (emphasis added). The nine justices would disagree about what advancing the rule of law entails, she recognized, but she said what she thinks that means: **“Respecting precedent…That is what prevents changes in the composition of the Court from producing changes in our law.” “Consistent application of methodologies that constrain and discipline judges….You can’t be an originalist and say originalism changes in what we look for in the way we apply it from one case to the next case.” “The scope of decision-making…Judges keep to the straight and narrow, and only decide the questions…that are before them.” She concluded, “What it means for a court to do law is follow those three things above all.**” In September, at a judicial conference, **Roberts spoke about the Court’s legitimacy crisis by poo-pooing it.** He said that “simply because people disagree with an opinion is not a basis for criticizing the legitimacy of the Court.” Alito commented to the Wall Street Journal: “saying or implying that the court is becoming an illegitimate institution or questioning our integrity crosses an important line.” In a public talk, **Kagan held her ground. “Judges create legitimacy problems for themselves,” she remarked, “when they instead stray into places where it looks like they’re an extension of the political process or when they’re imposing their own personal preferences.” The public has a right to expect that “changes in personnel don’t send the entire legal system up for grabs.”**

#### Dobbs ruling rocked the Court’s legitimacy putting in on the brink

**Gibson,** James, 2/6/20**24**, Department of Political Science, Washington University in St. Louis, Losing legitimacy: The challenges of the Dobbs ruling to conventional legitimacy theory <https://onlinelibrary.wiley.com/doi/full/10.1111/ajps.12834> kr

Extant research has established that displeasure with a Supreme Court ruling typically has negligible consequences for institutional support, largely because, as legitimacy theory's positivity bias explains, judicial decisions are invariably delivered with the accoutrements of legitimizing symbols. **The Court's ruling in *Dobbs*, abrogating a federal constitutional right to abortion services, may challenge legitimacy theory because displeasure with the ruling seems so widespread and intense.** This research aims to determine whether the ruling lessened the Court's legitimacy. The general conclusion is that ***Dobbs* produced a sizeable dent in institutional support, perhaps to an unprecedented degree, in part because abortion attitudes for many are infused with moral content and in part owing to the Court's substantial tilt to the right since 2020. Indeed, the Court's legitimacy may be at greater risk today than at any time since Franklin D. Roosevelt's 1930s attack on the institution.**

### Court Capital Links

#### Unpopular decisions deplete the political capital of the courts

**Heise, 00** [Michael, Professor of Law, Case Western Reserve University “Education and the Constitution: Shaping each other and the next century: Preliminary Thoughts on the Virtues of Passive Dialogue,” Akron law Review, 34 Akron L. Rev. 73]

**Professor Paul Tractenberg,** long active in the New Jersey school finance litigation, 81 **identifies institutional credibility as an important practical concern for courts. Tractenberg is acutely aware of the institutional stakes involved in active judicial participation,** particularly within the school finance setting. On the one hand he reasons that **an active judicial posture might provide political cover for reluctant legislators.** After all, politically accountable legislators could point to the state supreme court and suggest that the justices left them with little choice but to increase school spending. 82 Such a calculation, **Professor Tractenberg correctly notes, risks [\*87] depleting the court's limited and valuable "political capital." 83 He goes on to note that: There are only so many times that the court** [the New Jersey Supreme Court] **can be portrayed as the dictatorial villain forcing the State to do, in the name of a constitutional mandate, what a majority of its citizens disfavor before judicial credibility is undermined. 84**

#### Court capital is finite---the plan drains it and pushes them to avoid controversy

Ernest A. **Young 99**. Assistant Professor at the University of Texas School of Law. “State Sovereign Immunity and the Future of Federalism.” 1999 Sup. Ct. Rev. 1.

The opportunity cost of immunity rulings. The first reason, and the simplest, is that **the Court has limited** **p**olitical **c**apital. n261 As Dean Choper has argued, "**the federal judiciary's ability to persuade the populace and public leaders that it is right and they are wrong is determined by the number and frequency of its attempts** [\*59] to do so, the felt importance of the policies it disapproves, and the perceived substantive correctness of its decisions." n262 There is thus likely to be, at some point, a limit on the Court's ability to continue striking down federal statutes in the name of states' rights. n263 To the extent that this limit exists, then **the Court's extended adventure in aggressive enforcement of state sovereign immunity** will **trade off** with **its ability to develop a meaningful jurisprudence of process** or power federalism. If protecting state authority to regulate private conduct is the key to a viable state/federal balance, then a considered reaffirmation, explanation, or extension of Lopez may do more good than another expansion of Seminole Tribe. **"Political capital**," of course, is a pretty vague concept. It might be that the Court's ability to enforce federalism limits is more like muscles than money: it **atrophies unless it is exercised regularly**. n264 **The National League of Cities story arguably illustrates this phenomenon, in that** the Court's failure to apply the doctrine to **check federal power** in a series of subsequent cases may have helped **lead to the outright rejection** of the doctrine in Garcia. n265 The important point, however, is that the **Justices who matter most** on these issues tend to **think in terms of limited capital** and **worry about judicial actions** that may **draw down the reserves**. n266 **P**olitical **c**apital [\*60 **is thus likely to** function as an **internal constraint** on the Court's **willingness** repeatedly to **confront Congress.**]

#### Controversial constitutional questions sap the Court’s political capital

David **Lat**, 1/20**24**, legal commentator founder of Original Jurisdiction, When It Comes to Donald Trump, The Supreme Court Has One Job https://davidlat.substack.com/p/when-it-comes-to-donald-trump-the

The decision will be based on what University of Texas law professor Stephen Vladeck calls **“constitutional politics,” which is distinct from constitutional law. Constitutional law isn’t irrelevant to constitutional politics, but it’s also not controlling; constitutional politics reflects additional factors like practical consequences, prudential judgments, the reputation and legitimacy of the Supreme Court, and what the justices are willing to spend in terms of political capital.**

#### Highly political cases have big ramifications for the Court’s ability to continue its work

Steve **Vladeck**, University of Texas Law professor, 12/20**23** Bonus 58: The Law and High Politics of Disqualifying President Trump, https://www.stevevladeck.com/p/bonus-58-the-law-and-high-politics

The upshot of these cases is that t**here are moments where the Supreme Court is doing more than just “law”; it’s doing high constitutional politics. And those moments tend to involve cases in which the country would best be served by rulings that appeal across the political and/or ideological spectrum. The Court has (badly) flubbed some of these moments—see, e.g., Bush v. Gore, supra. But that only reinforces the consequences for the Court of not taking the high politics of these kinds of cases seriously.** There’s an obvious response to this, and it’s also something I’ve written about before—the idea that the law ought to be first, last, and everything in between. “Let justice be done though the heavens fall.” I get that argument, even if I disagree with it. But what complicates matters even further for the current Court is that this mantra has, in recent times, become the mantra of conservatives—who have defended originalism and other features of their contemporary judicial philosophy on grounds, however persuasive, of ideological purity and apolitical-ness. Here, in the flesh, is a powerful example of a dispute in which it will be impossible for the Court to not be perceived as “political,” and so the focus shifts to whether the Court can issue a decision that avoids being perceived as “partisan.”

#### Big decisions like Dobbs take a lot of political capital

Cami **Mondeaux**, June 24 20**22** NPR’s Nina Totenberg says Supreme Court ‘spent all its political capital,’ expansion now possible <https://www.washingtonexaminer.com/news/286638/nprs-nina-totenberg-says-supreme-court-spent-all-its-political-capital-expansion-now-possible/>

Longtime **Supreme Court reporter Nina Totenberg responded to the high court’s decision overturning Roe v. Wade** on Friday, noting the resulting outrage may lead to increased efforts to expand the number of justices. The idea of expanding the Supreme Court has long been at the center of debate between Republicans and Democrats but has never gained enough traction to clear Congress. However, Totenberg, a legal affairs correspondent for NPR, **said that may change with the country’s shifting perceptions of the Supreme Court,** spurred into overdrive by the big abortion ruling that just took place. **“In this decision, the court spent all its political capital,” Totenberg said.** “The idea of adding Supreme Court justices, which I thought didn’t have a leg to stand on, I think at some point may have traction.”

Unpopular decisions hurt job approval and political capital

Joshua **Boston and** Christopher N. **Krewson**,professors Bowling Green University and Brigham Young University, April 17, 20**24**, Public Approval of the Supreme Court and Its Implications for Legitimacy https://journals.sagepub.com/doi/abs/10.1177/10659129241243040

 In examining public evaluations of governing institutions, **are job approval and legitimacy related? This question has dominated scholarship on Supreme Court legitimacy for decades.** Conventional wisdom suggests that specific support (e.g., job approval) and diffuse support (e.g., legitimacy) are independent. Specific support captures short-term orientations based on policy alignment with the Court. Legitimacy is a long-term perspective reflecting more fundamental support for the Court as a governing institution. We challenge the paradigm that job approval and legitimacy are largely unrelated concepts. Specifically, **we** employ a variety of statistical techniques and panel data to **show that changes in legitimacy are a direct effect of changes in public approval. Salient decisions and Court vacancies directly shape approval and indirectly shape legitimacy through their effects on approval. Longitudinal analysis confirms that changes in job approval precede and predict changes in legitimacy. These results suggest that the Court needs public approval, and its public approval is rooted in outcome-oriented perceptions of its decisions and membership. Further, sustained low levels of approval will eventually erode legitimacy and limit the Court's influence over policy. Thus, like the outwardly political executive and legislative branches, it is important for the Court to build political capital through job approval.**

#### Unpopular decisions undermine the Court’s pol cap – they impact the decisions acceptance

**Gibson and Caldeira ‘1** [James L. (Sidney W. Souers Professor of Government in Department of Political Science at Washington University, St. Louis) and Gregory A. (Department of Political Science at Ohio State University); “Accepting the Objectionable: An Experiment on Institutional Legitimacy and Acquiescence”; Conference on Experimental Methods, The Center for Basic Research in the Social Sciences; www.iq.harvard.edu/NewsEvents/Conferences/ESS/May01/gibson.pdf //nick]

One of the most interesting unresolved questions in this literature has to do with the “legitimacy conferring” powers of courts. First clearly articulated by Dahl (1957), this theory asserts that a court ruling can induce people to accept the decision of another institution because the court has ratified and sanctified the decision. Since courts rarely challenge the ruling coalition (Dahl 1957), the judiciary essentially places its imprimatur on decisions, thereby encouraging citizens to accept outcomes with which they disagree. Mondak and others (e.g., Choper 1980) refer to this as **the “political capital”of courts**, and note that institutions **must husband this capital and spend it wisely if they are to be effective.** As Mondak (1992, 461) notes: “....sponsoring a policy is a type of gamble; **the possibility of negative reaction endangers the institution’s lifeblood, institutional legitimacy.” This is exactly the theory scholars are relying on when they assert that the Supreme Court wounded itself by its decision in Bush v Gore** (as in the advertisement in the New York Times on January 13, 2001, by 585 law professors condemning the Court’s decision as illegitimate). What does it mean to say that legitimacy is conferred? Extant literature addresses this issue in two distinct ways. First, some scholars focus on substantive change in attitudes – when the Court rules, people see the wisdom of its position and adjust their own views accordingly. Evidence of this effect is not particularly strong (e.g., Franklin and Kosaki 1989; Johnson and Martin 1998; Hoekstra 2000; see also Rosenberg 1991, Marshall 1989), although experimental research has been kinder to the hypothesis than survey-based research (e.g., Mondak 1991, Hoekstra 1995). A second line of research focuses not on attitude change, but rather on simply “accepting” the decision of a court (e.g., Gibson 1989, Gibson and Caldeira 1995, 2000). Here, a High Court decision seems to have a limited but not trivial effect on acceptance of an unpopular decision. Some of the strongest evidence that the U.S. Supreme Court possesses a legitimacy conferring capacity comes from experimental research. For instance, Mondak (1992) claims that attributing policies to the Supreme Court tends to persuade students to adopt or accept the Court’s position (see also Hoekstra 1995; Hoekstra and Segal 1996; Mondak 1990, 1994).6 [6On the other hand, he also concludes that **“the Court’s institutional legitimacy declines substantially when unpopular rulings are linked to the Court”** (1992, 473; see also Mondak 1991). Whether this effect can be generalized to the full population of Americans is unknown; nor do we know the rate at which the attitudes created during the experiment deteriorate or persist.] Both bodies of work agree that when legitimacy is conferred, the controversy dissipates and concludes.

#### Specific decisions can tank the court’s political capital

**Grosskopf and Mondak ’98** [Anke (Professor at the University of Pittsburg) and Jeffery J. (Professor at Florida State University); “Do Attitudes toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court”; Political Research Quarterly; September; Vol. 51, No. 3; JSTOR //nick]

The Supreme Court’s public esteem has been posited to function as a form of political capital (Choper 1980; Mondak 1992). A central implication of this thesis is that **the Court treads on dangerous ground in releasing controversial edicts, because to do so may cause erosion of public support.** Although results from laboratory experiments have shown that unpopular rulings do expend political capital (Mondak 1991, 1992), analyses of individual-level (Caldeira and Gibson 1992) and aggregate-level (Caldeira 1986) survey data suggest that the real-world link between Supreme Court decisions and subsequent public attitudes toward the Court may be modest in strength. In revisiting this issue, we have considered whether confidence in the Court’s justices was influenced by two controversial decisions in 1989, Webster and Texas v. Johnson. **Strong evidence has emerged that** response to the **rulings did yield a corresponding change in confidence, a finding that corroborates** a central tenet of **the political capital hypothesis.**

In one sense, we have offered a relatively easy test. The cases studied here received considerable public attention, bringing levels of salience well in excess of most Supreme Court rulings. Further, our measure of confidence is worded in such a way as to encourage respondents to factor contemporary events into their evaluations. Also, the structure of the surveys—with the confidence item asked following a battery of questions concerning both abortion in general, and the Webster case—likely reinforced the tendency of respondents to draw on their opinions concerning Webster when assessing the Court. Had we not found that attitudes toward Webster and Texas v. Johnson influenced respondents’ views of the Supreme Court, the viability of the political capital hypothesis would have been seriously undermined.

Despite these caveats, it would be rash to dismiss the effects identified here as the products of a liberal testing procedure. Using individual-level opinion data from national surveys, we have shown that **specific decisions do matter for what people think about the Supreme Court. At minimum, this means that the Court is not fully insulated from backlash against its most controversial actions**. Further, although Webster and Texas v. Johnson were of high salience, information about other decisions does reach the public (e.g., Franklin and Kosaki 1995) For instance, Adamany and Grossman (1983) reported that 40 percent of respondents could name at least one recent Supreme Court decision they either liked or disliked, suggesting that exposure to information about decisions is higher still.

## Movements Links

#### Courts are used as weapons against social movements potentially delegitimizing them

Siri **Gloppen 2/2013**, Professor of Comparative Politics at the University of Bergen Social Movement Activism and the Courts, https://mobilizingideas.wordpress.com/2013/02/04/social-movement-activism-and-the-courts/

**When courts damage the cause of social movements However, losing in court could also damage the cause, delegitimize it, exhaust resources, and set back the struggle both politically and internally. And court victories may turn out to be pyrrhic. For example, where liberal causes (e.g., LGBT rights, abortion, abolition of the death penalty) succeed in court in the face of strong and widespread social resistance against such liberal values, this may trigger a political back-lash** (at least in the short term; it could still contribute to long-term social change).  **Courts are also weapons used by governments to repress dissent and weaken social movements. This takes many forms, and is more overt in some societies than others. Sometimes governments present trumped-up charges against social movement activists. More commonly, charges are pressed against activists for irregularities and “victimless crimes” that otherwise rarely would go to court (“for my enemies the law” as the old saying goes).** Laws and regulations may be passed or strengthened to criminalize the ways of life and modes of action of social movements, thus increasing the chances of successful prosecution and the severity of penalties. **Even where courts eventually rule against the state, court actions tie social movements up in court for lengthy periods, forcing them to spend time and resources that could have been used to further their cause. It also sends a strong signal to others. Courts are particularly problematic for social movements where judicial independence is weak and activist risk lengthy sentences for “crimes” that never happened and actions that do not warrant prosecution. For governments, “repression by law” has advantages. While there may still be criticism, (the semblance of) a proper legal process lends credibility.**

####  Litigation deflects attention for other strategies of social change that are more effective at solving the case—this turns their case and then some:

**Van Schaack, 2004** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis, rwg) https://scholarship.law.vanderbilt.edu/vlr/vol57/iss6/7/

**Although litigation can provoke and promote other processes of social change, it can also inhibit the development of, deflect attention [\*2344] and resources away from, or even undermine other strategies for social change that may be more efficacious or durable. These alternative strategies include reparations strategies through the political process; n199 direct action; transnational advocacy in countries where abuses are prevalent; n200 grassroots educational campaigns; traditional human rights advocacy based upon fact-gathering and shaming; the development of monitoring bodies and international regulatory standards, such as environmental or labor codes of conduct for extraterritorial activities; n201 and the creation and promotion of international institutions. n202 The technical, rarified and inaccessible nature of litigation may do little to contribute to the growth of grassroots social movements in certain contexts and communities, especially where individuals are not accustomed to invoking judicial processes to bring about social change. n203 Likewise, lawyers may actually displace natural leaders within community groups, leading to the disempowerment, and even demise, of the group.** n204 In addition, litigation (and its attendant legalisms such as standing rules, statutes of limitation, or justiciability doctrines) may diffuse political or moral claims rather than empower potential political constituencies. **Indeed, litigation in the United States may ultimately contravene or undermine the strategies of local activists where it is not part of a campaign at the grassroots level in the targeted country.**

#### Human rights litigation has a flypaper effect—it attracts litigants to the courts and undermines social change:

**Van Schaack, 2004** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis) https://scholarship.law.vanderbilt.edu/vlr/vol57/iss6/7/

Indeed, **practitioners of ATCA-style litigation should be wary of espousing an overabundance of objectives for this litigation, because doing so may undermine or overshadow what these cases do accomplish for individual victims of human rights abuses. Likewise, human rights advocates should not pin their hopes on achieving these broader impacts at the expense of their clients and their clients' experience with the litigation process. I**n any case, notwithstanding the first and second order effects that have been achieved, **this Essay cautions that such litigation should not replace other forms of human rights advocacy. An overreliance on adversarial litigation, as opposed to other processes of social change, raises some of the same concerns that surface in the civil rights context about the efficacy of resorting to law and the judicial process to promote durable social change and the ability of the judicial process to address major social and economic problems. n9**

#### Litigation on human rights issues threatens to derail processes of social change:

**Van Schaack, 2004** Assistant Prof. of Law @ Santa Clara University School of Law, Vanderbilt Law Review, November, 20**04**, (Beth, 57 Vand. L. Rev. 2305; Lexis) https://scholarship.law.vanderbilt.edu/vlr/vol57/iss6/7/

**A focus on litigation here to the exclusion of other processes of social change has the potential to marginalize the voices of victims of human rights abuses and derail other potentially efficacious strategies for social change.**

#### The decisions of the Supreme Court are counterproductive—Brown v. Board of Education proves:

Robert L. **Tsai, 2005** Assistant Professor of Law, University of Oregon School of Law, March [“Sacred Visions of Law,”<http://web.lexis-nexis.com/universe/document?_m=be00e4b6d189ddb647d9365044a5571c&_docnum=3&wchp=dGLbVzb-zSkVb&_md5=9a9770a9c5b4097b9b283e0cc42a252e>, rwg]

In the second epoch, **Brown is far more likely to be thought of as holding out "a hollow hope," signifying the "limits of judicial power," or tantalizingly, representing unrealized potential. It is true, of course, that Brown remains important to academic belief systems irrespective of what judges and lawyers do - any serious theory of constitutional law labors in its long shadow, and must confront its legacy. But here again, many such treatments have a wistful and disappointed flavor.**

#### Courts undermine the effectiveness of civil rights groups

Stephen C. **Yeazell, 2004** Professor of Law, UCLA School of Law, [“*Brown*, The Civil Rights Movement, and the Silent Litigation Revolution,” [http://ssrn.com/abstract=608002](http://ssrn.com/abstract%3D608002), rwg]

**In the first half of the twentieth century one could see litigation as an agent of social change only in two areas, but it was on the side of the forces against whom the Progressives and New Dealers were working**. The first arena lay in the legislation of the New Deal. A number of its programs, especially in the early years, raised constitutional issues. A few were struck down. More were threatened. In either case, the task of these lawyers at the leading edge of social change was to defend legislative and administrative programs against judicial invalidation. Such innovations as the “Brandeis brief,” which sought to bring to judicial notice facts drawn from social science and legislative hearings, aimed at supporting with non-doctrinal arguments legislation and administrative actions that might otherwise succumb to judicial review. this area, then, litigation played an important, but defensive role. The second area involved collective bargaining and the then-growing labor union movement. As they had for decades, employers sought to use courts and the injunction as a weapon both against organizing and against strikes. For those on the union side, the question was not how to use the courts to help the movement, but how to prevent them from harming it. This point emerges most clearly in the work of Felix Frankfurter and Nathan Greene, whose study of the labor injunction concluded that courts should be stripped of jurisdiction to issue injunctive relief in labor disputes. Legislation followed. **For those who thought of themselves as social progressives, the best one could hope for from the courts was to stay out of society’s way.**

#### Courts cause backlash against social movements

Idit **Kostiner, 2003**, Jurisprudence and Social Policy Program, University of California, [“Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change”, June,<http://www.blackwell-synergy.com/doi/full/10.1111/1540-5893.3702006>, rwg]

**Following Scheingold's argument on the "myth of rights," several empirical studies were conducted to explore whether specific litigation campaigns had been successful in promoting social reform**. Focusing primarily on the direct effects of legal tactics, many of these studies revealed a substantial gap between the promises of rights litigation and its minimal impact in reality. In his well-cited book The Hollow Hope (1991), **Rosenberg concludes that major litigation campaigns for school desegregation, abortion rights, and environmental justice failed to produce significant social reform. According to Rosenberg, some of these campaigns even had negative effects on social movements, as they led to backlash reactions and the rise of reactionary social movements. Other studies of the impact of litigation campaigns conclude with similarly pessimistic accounts of the fate of legal tactics as a tool for social reform**.

#### Individual court decisions cause civil rights demonstrations to decrease

James T. **Patterson, 2001** Ford Foundation Professor of History, Brown University, [“The Troubled Legacy of Brown v. Board,” http://wwics.si.edu/topics/pubs/ACF236.pdf]

**Rosenberg and others have pointed out that one would have expected the number of civil rights demonstrations in the United States to have increased after Brown v. Board,** particularly when the South thumbed its nose at the decision as it did in the late fifties. **In fact, there were fewer civil rights demonstrations in most of the late 1950s than there had been in 1943 or in 1946, 1947, and 1948, when there was a fair amount of demonstrating** led particularly by returning black war veterans who had fought a war to save democracy but came back to a Jim Crow South. **There was no steady escalation of demonstrations during the first five or six years after the decision.**

#### Courts demobilize social protest:

James T. **Patterson, 2001** Ford Foundation Professor of History, Brown University,[“The Troubled Legacy of Brown v. Board,” http://wwics.si.edu/topics/pubs/ACF236.pdf]

**It is the force of that kind of resistance over ten years that Gerald Rosenberg makes so much of in The Hollow Hope. Michael Klarman, another leading revisionist, made many of the same points** in a very important article in the 1994 Journal of American History, **in essence agreeing that the Supreme Court made its decision, little happened, and therefore courts are often limited agents of social change. Rosenberg looks at the areas of desegregation, women’s rights, and abortion rights, and shows how little the Court actually accomplished. If the Court hadn’t involved itself, Rosenberg adds, protest might have emerged more quickly as militant demonstrations, which in fact brought forth concrete gains.**

#### Judicial rulings have little influence on social change:

**Richard Fallon, 2005** prof. of Constitutional Law @ Harvard, Harvard Law Review, Legitimacy and the Constitution, 118 Harv. L. Rev. 1787; Lexis, rwg

**To measure the authoritative legitimacy of judicial rulings, however, it does not suffice to look at the parties' responses. The effect on other officials and the broader public also matters.** In a well-known and provocative book, Gerald **Rosenberg maintains that such celebrated Supreme Court decisions as Brown v. Board of Education and Roe v. Wade proved largely ineffectual as engines of social change**. n198 Judicial declarations may not achieve much, he argues, unless other officials implement the Court's message or citizens litigate on a national scale. **Although critics have attacked both his methodology and his conclusions, n199 Rosenberg raises important issues about the broader effects of court decisions. n200 On a few points, the facts speak for themselves.** Clearly the authoritative legitimacy of judicial decisions can be relative, rather than absolute. Regional variations also can occur. For [\*1832] **at least a decade, Brown v. Board of Education met "massive resistance" through much of the South before sentiment hardened that recalcitrance should not be tolerated. n201 Years and even decades after the Supreme Court had declared officially sponsored prayer in public schools to be unconstitutional, n202 teacher-led prayers remained common in broad swaths of the country. n203**

#### litigation diverts resources from grassroots movements

**SL Carter 92.** William Nelson Cromwell Professor of Law, Yale University, 1992 SURVEY OF BOOKS RELATING TO THE LAW; I. THE COURTS AND THE CONSTITUTION: DO COURTS MATTER? +, Michigan Law Review, LN

**Rosenberg goes beyond the assertion that litigation strategies rarely if ever produce significant change. He argues, correctly, that they are often counterproductive, for they can distort perceptions about where resources are needed** (pp. 339-42). In the particular case of abortion, Rosenberg notes that "**reliance on the Court seriously weakened the political efficacy of pro-choice forces.** After the 1973 decisions, many pro-choice activists simply assumed they had won and stopped their pro-choice activity. . . . The political organization and momentum that had changed laws nationwide dissipated in celebration of the Court victory" (p. 339). The result, of course, was that **pro-choice forces abandoned the political arena to pro-life forces -- and then professed surprise when pro-life forces won important electoral victories. The current broad public support for at least some abortion rights has arisen largely because of the more recent decision of pro-choice forces to return to the grass roots -- the place, Rosenberg tells us, where real social changes take place (p. 341).**

#### courts merely join movements – they don’t produce social change

**Devins 92**Associate Professor of Law and Lecturer in Government, College of William and Mary, REVIEW ESSAY: Judicial Matters: The Hollow Hope: Can Courts Bring About Social Change? By Gerald N. Rosenberg. California Law Review, LN

Rosenberg convincingly shows that **courts cannot do it alone. Congress, the White House, the states, and interest groups also play a pivotal role. State efforts to legalize abortion before Roe, congressional and administrative efforts to eliminate dual school systems, and the civil rights and women's movements highlight a remarkable inventory of non-judicial influences identified** by Rosenberg. The Hollow Hope also does an extraordinary job of demonstrating that numerous landmark Supreme Court opinions were little known and even less discussed at the time of decision. In fact, Rosenberg's evidence of the paramount role played by nonjudicial forces is one of the strongest to date.

The Hollow Hope then offers abundant support for a more modest, more accurate, and equally important thesis: **the Supreme Court works within and hence both influences and is influenced by a larger culture of political and social interests. While severe problems in analysis still remain, this rearticulation accomplishes Rosenberg's principal objective of sobering those who endorse an active judicial role.**

#### movements solve better than the courts – inherent bias

**Zinn in 2k5**Howard, The Progressive, It’s Not Up to the Court,<http://progressive.org/mag_zinn1105>

**Still, knowing the nature of the political and judicial system of this country, its inherent bias against the poor, against people of color, against dissidents, we cannot become dependent on the courts,** or on our political leadership. Our culture--the media, the educational system--tries to crowd out of our political consciousness everything except who will be elected President and who will be on the Supreme Court, as if these are the most important decisions we make. They are not. **They deflect us from the most important job citizens have, which is to bring democracy alive by organizing, protesting, engaging in acts of civil disobedience that shake up the system.** That is why Cindy Sheehan's dramatic stand in Crawford, Texas, leading to 1,600 anti-war vigils around the country, involving 100,000 people, is more crucial to the future of American democracy than the mock hearings on Justice Roberts or the ones to come on Judge Alito.

### Federalism Link

#### Historical analysis of Court jurisprudence suggests Court action strengthens centralized federal government and constrains state and local authorities

Michael **Dichio**, University of Utah Ilya **Somin**, Antonin Scalia Law School, George Mason

University, January 20**22** Rethinking the Supreme Court’s Impact on American Federalism

and Centralization https://download.ssrn.com/22/09/29/ssrn\_id4233456\_code410506.pdf

**The long-dominant view in the literature is that the Supreme Court, on balance, promotes centralization far more than decentralization. That view, which, in modern scholarship dates at least to Robert Dahl’s path breaking article (Dahl 1957), rests on two points: first, when the Supreme Court reviews constitutional challenges to federal laws,** it overwhelmingly upholds them, doing so in 971 of 1322 cases, or 73 percent of all cases from the Founding up through 2022 (Whittington 2022).2 Second, t**he Court has often used judicial review to strike down state laws that impinge on constitutional rights (Derthick 2001).3 It is far more common for the Court to impose significant constraints on state and local governments, by striking down their laws and regulations than for it to do the same to the federal government (e.g. Somin 2017). Such decisions in turn limit state and local government autonomy in obvious ways (see e.g. Derthick 2001, 138–152). This traditional interpretation, however, obscures our understanding of the Supreme Court’s influence over centralization by overemphasizing cases in which the Court upheld state/local or federal laws. Scholars have long noted that centralization rests “at the heart” of the federalism subfield within political science, and courts are key players in these analyses** (Dardanelli et al. 2019a, 3; Aroney and Kincaid 2017). The impact of courts on federalism is also of obvious importance to legal scholars.4 In Exploring Federalism (Elazar 1987), for example, D**aniel Elazar argued that the U.S. Supreme Court was responsible for an “overwhelming majority” of centralization within the American federal system during the two decades before the publication of his book. Nearly a century before Elazar, Fred Powers (1890), L.H. Pool (1902), and Robert Scott (1909) contended that the Supreme Court played a major role in promoting centralization at the turn of the twentieth century both in the judiciary itself (Pool 1902), and with respect to the broader powers of the national government (Powers 1890; Scott 1909). Building on these findings and expanding globally, Aroney and Kincaid’s Courts in Federal Countries documented judicial institutions’ tendency toward centralization in many federal systems (Aroney and Kincaid 2017). More recently, to examine the historical development of centralization patterns, federalism scholars have built a sweeping and systemic dataset examining the centralization dynamic in federations around the world—**the “De/Centralization Dataset” (hereafter “DcD”) (Dardanelli et al. 2019a and 2019b). The DcD has uncovered five properties of dynamic centralization and decentralization—direction, magnitude, tempo, form, and instruments—as measured across two dimensions: policy and fiscal autonomy with the former comprising forty-four categories and the latter five (Dardanelli et al. 2019a, 9– 12). Thus, while t**he DcD presents sweeping data across U.S. federal government, Dardanelli et. al. also specifically highlight how the Supreme Court and its rulings are key “nonconstitutional instrument[s]” in our efforts to understand dynamic centralization and decentralization (Dardanelli et. al. 2019a, 12). As they note, “judicial decisions can have major implications” for the allocation of power between central and subnational governments when the judicial branch has substantial authority to resolve disputes (Dardanelli et al. 2019a, 13). Using the DcD, John Kincaid concludes that in the U.S. case: “federal judicial rulings occupied first place for more than a century after 1789” in driving centralization** (Kincaid 2019, 178)

# States Counterplan

# Kritikal

### Antiblackness

#### The Supreme Court weaponizes language to maintain anti-Blackness—its narrow, depoliticized definitions of “racism” and “white supremacy” erase its own complicity in racial violence, foreclose radical redress, and discipline legal discourse to uphold the settler-state’s racial order.

 Kathryn M. Stanchi, 2021

“The Rhetoric of Racism in the United States Supreme Court” Scholarly Commons at UNLV Boyd Law

https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2359&context=facpub

This Article treats the words "racism," "racist," and "white supremacy" as cultural keywords and examines the Supreme Court's significant contribution to the cultural meanings of these terms. It explores the Supreme Court's use of these terms in its opinions from the first use of the words through the present day.

The Article's premise is that the Supreme Court's ways of using these highly charged words is an authoritative pronouncement of what is and is not racist.6 It shapes the cultural and societal meaning of the terms. And because language can "reframe, reconstruct, and otherwise revise our very conception of reality," the way a powerful entity like the Court uses these terms has a significant impact on our perception of reality.

But even more than that, the Supreme Court's way of using these words also affects the behavior of others and, ultimately, the quest for racial justice. As Professor Robert Cover wrote, "[t]he judicial word is a mandate for the deeds of others" to the extent that "we expect the judges' words to serve as virtual triggers for action."8 The Court's definition of "racism" or "racist" has a profound "trickle down" effect on lower courts and legal advocates; consequently, it shapes the law's ability or inability to rectify racism.

This Article makes two interrelated arguments about the way that the Supreme Court has defined "racism" throughout history. First, since the Supreme Court started using these keywords, its rhetoric of racism has consistently distanced the Court and the law from responsibility for upholding racism and racist policies. Supreme Court opinions almost never acknowledge the Court's complicity in creating and upholding racist structures. Instead, when Court opinions use these keywords, they tend to deflect criticism away from the Court. Second, the rhetoric within the relatively few opinions that challenge racist laws and policies has become weaker over time.

The intersection of these two patterns-the rare use of these keywords to challenge racism and the weakness of the rhetoric in those rare cases constructs a narrow definition of racism as a pejorative term that encompasses only overt racism by a small number of "bad" actors.9 Not surprisingly, this definition goes hand in hand with legal doctrine, making it virtually impossible to use the law to combat racism and white supremacy.'

#### The Supreme Court enacts epistemic violence by disavowing its complicity in structural white supremacy—its jurisprudence reifies anti-Blackness through a regime of racial denial that forecloses transformative racial justice.

Kathryn M. Stanchi, 2021

“The Rhetoric of Racism in the United States Supreme Court” Scholarly Commons at UNLV Boyd Law

https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2359&context=facpub

The Court's use of "racist" and "racism" in its jurisprudence makes clear that it accepts little responsibility for racism and white supremacy in America. First, although the Court's history of upholding white supremacy and fostering racism cannot be denied, the Court majority never directly acknowledges its role by using the words "racism" or "white supremacy." The Court certainly never apologizes for its upholding and constructing racism in the law, not in Korematsu or in Dred Scott v. Sanford or in Plessy v. Ferguson.298 Second, although some Justices have called out the Court's complicity in racism or white supremacy in separate opinions, these instances are rare. The most forceful calling-out of the Court's racism, Justice Murphy's direct charge over seventyfive years ago in Korematsu that the majority opinion "legalized racism," has never been duplicated. Moreover, the rhetoric in the later calling-out opinions was typically weak or indirect, even when the Court's responsibility is indisputable. The rhetorical trend is to accuse the Court of negligence-of ignoring or overlooking racism, rather than causing it or tolerating it. This trend goes hand in hand with the Court's denial that it can fix racism, together eroding the Court's potential as a source for racial justice

Because the warped definitions of "racism" and "white supremacy" are deeply embedded in the Court's opinions and, perhaps more disturbing, have found their way into the opinions of even those Justices who support antiracist laws and policies, advocates seeking racial justice from the Court will find it increasingly difficult to effect change. Advocates attempting to make antiracist arguments face a decision-making body that does not accept anything but the narrowest and responsibility-avoidant use of the term. They also face a Court that embraces definitions of these terms that embolden claims of white innocence and encourage white fragility.

If this Article shows that the Court has fallen short in its approach to defining and identifying racism, it also stands as a challenge to those Justices who seek to fight racism: call out racism when you see it and do so directly and unequivocally. Call the Court to account for past decisions that enabled racism. Using the words is part of the hard work of fighting racism. That work can be done by the majority, but also by those who are writing separately. Important rhetorical work can be done in separate opinions. 299

When the Court takes responsibility for its role in perpetuating racism, it opens up rhetorical space for the law to become part of the solution. Calling out racism also provides a foothold (and a citation) for advocates trying to achieve racial justice. Finally, for the victims of racism, calling out the law's complicity in racism is of great significance, not just as a matter of law but as a matter of cultural and social importance.

#### The Supreme Court sustains anti-Blackness by constitutionalizing white innocence—through rulings that strike down race-conscious remedies and protections, the Court weaponizes formal equality to invalidate systemic redress, legitimizes racial capitalism, and entrenches a legal order where Black suffering is structurally ignored and politically silenced.

Thomas Kleven, 2021

'Separate and Unequal: The Institutional Racism of the Supreme Court' (2021) 12(2) Alabama Civil Rights & Civil Liberties Law Review

https://heinonline.org/HOL/P?h=hein.journals/alabcrcl12&i=286

There is an argument that the judiciary lacks the capacity to remedy the society's systemic racism and should therefore limit its role to addressing more discrete instances of racial discrimination. I agree that, due to the remedial constraints it faces, the judiciary is incapable of remedying systemic racism on its own and that curing racism demands systemic changes through the political process. Nevertheless, the Supreme Court's proper role, at a minimum, should be to declare that systemic racism is unconstitutional and to prod the legislative branch to take corrective action. However, in the past decade, the Court has done the opposite and has instead used its power to strike down legislative attempts to rectify systemic racism and the class hierarchy that contributes to systemic racism.

Four cases are significant here. In Parents Involved, the Court struck down, on equal protection grounds, race-conscious student assignment plans for the purpose of promoting integration in public schools. 48 Despite evidence of integration's educational benefits and of the validity of integrative measures to remedy intentional segregation, the Court held such measures invalid in school districts which, although in fact segregated, had never practiced or had already remedied intentional segregation. 49 The Court's rationale was that "remedying past societal discrimination does not justify race-conscious government action." 50 This holding is tantamount to saying that the on-going inequalities resulting from past race-conscious government action designed to foster white supremacy cannot be remedied through race-conscious measures even if they are the only or most viable way to do so. This holding, if taken literally, bans reparations as unconstitutional and potentially perpetuates white supremacy indefinitely.

In Shelby County, the Court struck down the criteria for identifying the jurisdictions subject to the Voting Rights Act's preclearance provision, which requires jurisdictions that historically discriminated in voting based on race to demonstrate to the Attorney General or a federal court that proposed changes in their voting practices are non-discriminatory." The impact of the decision neuters the preclearance requirement until Congress adopts revised criteria, although it seems questionable whether any criteria would satisfy the Court in light of the skepticism the opinion expresses toward the continuing need for the preclearance requirement itself.s2 The rationale for the ruling, in light of the fact that minority voter registration and turnout in covered jurisdictions now compares favorably to non-covered jurisdictions and that substantial numbers of minorities are now being elected in covered jurisdictions, was that the preclearance criteria were no longer adequately tailored to identify the jurisdictions to which the preclearance requirement could justifiably be applied. 53 But this rationale ignores evidence in the record that discrimination in the covered jurisdictions was ongoing and more severe than elsewhere, and that Congress chose to maintain the existing criteria to prevent retrogression in jurisdictions with a past history of discrimination through the adoption of newly restrictive voting laws.54 Since the decision, many of the states to which the preclearance requirement applies have adopted or implemented previously adopted restrictions that, although facially color-blind, disproportionately impede and are arguably intended to impede people of color from voting."

In Citizens United, the Court struck down as a free speech violation an act of Congress limiting corporate and union expenditures relating to candidates for federal office within several weeks preceding primary and general elections. 56 The rationale for such laws is, as many studies have shown, that moneyed interests have greatly disproportionate political power in impacting the electoral and legislative processes." Citizens United is one of a number of cases over the years in which the Court has invalidated laws attempting to ameliorate this imbalance in political power. 58 There is some question as to whether and how much the statute in Citizens United would actually have equalized political power. While the statute limited expenditures by corporations representing moneyed interests, it also limited expenditures by unions and corporate entities representing the interests of those of lesser means, and it left in place the ability of wealthy individuals and independent political action committees to spend unlimited amounts in support of or opposition to candidates for office. 59 Nonetheless, the Court's unwillingness to allow legislatures to experiment with ways to equalize political power has helped to entrench an increasingly rigid and unequal class system and to impede the ability of the less well-off, in whose ranks African Americans and other people of color are grossly overrepresented, to use the political process to bring about a more egalitarian social structure.60

### Disability

#### The Supreme Court enshrines ableist violence—by legitimizing eugenics in *Buck v. Bell* and refusing to overturn it in *Skinner*, the Court constructs disability as a social threat, upholds biopolitical control over disabled bodies, and reinforces a legal order where state-sanctioned harm against disabled people is normalized and unredressed.

Robyn M. Powell, 2021

'Confronting Eugenics Means Finally Confronting Its Ableist Roots' (2021) 27(3) William & Mary Journal of Race, Gender, and Social Justice

https://heinonline.org/HOL/P?h=hein.journals/wmjwl27&i=645

Regrettably, eugenics gained the Supreme Court of the United States' blessing in the infamous 1927 Buck v. Bell 0 decision. In this case, the Court upheld Virginia's law sanctioning state institutions to condition release upon sterilization.31 Justice Oliver Wendell Holmes, Jr., writing for the majority, found that "[i]t would be strange if [the State] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence [,]" the Court avowed that "[t]hree generations of imbeciles are enough." 32 Similar to other state sterilization laws, Virginia's statute was based on the idea that "many defective persons ... would likely become by the propagation of their kind a menace to society[.]" 33 More than 30 states enacted similar statutes, 34 and over 65,000 Americans, many of whom had disabilities, were sterilized by 1970.3

Fifteen years after Buck v. Bell was decided, the Supreme Court of the United States, in Skinner v. Oklahoma, struck down an Oklahoma law requiring that people with more than two convictions for felonious offenses be sterilized. 6 Although Skinner is often attributed as the only case to distinguish Buck v. Bell explicitly, the decision did not expressly overturn it.37 While both Skinner and Buck v. Bell concern involuntary sterilization statutes, Skinner's analysis took a narrower focus, relating only to the punitive sterilization of criminals, thereby avoiding addressing the forced sterilization of people with disabilities.38 Skinner not only evaded addressing Buck v. Bell by carefully focusing on punitive sterilization, but it also applied a more significant focus on the Equal Protection Clause of the Fourteenth Amendment.3 9 Whereas Buck v. Bell dismissed Carrie Buck's Equal Protection arguments, 40 Skinner concentrated principally on the Equal Protection issues presented, and the Court applied a more rigorous strict scrutiny test in its analysis of the Oklahoma statute.

#### The Supreme Court weaponizes disability as a justification for reproductive violence—Kavanaugh’s opinion in *Does ex rel. Tarlow* revives the logic of *Buck v. Bell*, erasing the autonomy of disabled people and legitimizing state control over their bodies. This judicial stance constructs disability as legal grounds for paternalistic domination, reinforcing a eugenic biopolitics that devalues disabled lives and sustains systemic reproductive injustice.

Robyn M. Powell, 2021

'Confronting Eugenics Means Finally Confronting Its Ableist Roots' (2021) 27(3) William & Mary Journal of Race, Gender, and Social Justice

https://heinonline.org/HOL/P?h=hein.journals/wmjwl27&i=645

Concerns about the potential of courts to undermine the reproductive rights of people with disabilities arose in 2018 during hearings for Justice Brett Kavanaugh's confirmation to the Supreme Court of the United States.7 5 Specifically, his 2007 opinion in Does ex rel. Tarlow v. District of Columbia76 demonstrated a shocking lack of respect for people with disabilities. In this case, the D.C. Circuit Court of Appeals ruled that the District had no constitutional or legal obligation to consider the preferences of people with intellectual disabilities who were in its custody before authorizing elective surgeries, including abortions.7 7 In an opinion written by then-Judge Kavanaugh, the court reasoned that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions-with harmful or even deadly consequences to intellectually disabled persons."7 In addition, then-Judge Kavanaugh held that no substantive due process claims were involved because "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.' 7 However, scholars have described then-Judge Kavanaugh's opinion as "implicitly reaffirming Buck v. Bell.""

Recent analyses of national data confirm that sterilization remains a standard procedure for many people with disabilities. For example, one study found that compared to nondisabled women, women with physical or sensory disabilities were significantly more likely to have been sterilized." Another study revealed that sterilization rates were higher among women with cognitive disabilities and physical disabilities than nondisabled women. 2 Meanwhile, another recent study found that women with cognitive disabilities had significantly higher odds of undergoing sterilization than women without disabilities, and at significantly younger ages.8 Further, another study revealed that women with multiple disabilities had a higher risk of undergoing hysterectomies than nondisabled women.8 4

#### The Supreme Court is a historical engine of systemic ableism—*Buck v. Bell* codified eugenic violence, and its legacy persists in modern legal frameworks. The Court’s willingness to sanction state control over disabled bodies reveals a jurisprudence that dehumanizes disability and legitimizes biopolitical hierarchies. Ableism is not an aberration—it’s embedded in the Court’s institutional logic and legal precedent.

Jacob Izak Abudaram, 2023

 'Disabling Lawyering: Buck v. Bell and the Road to a More Inclusive Legal Practice' (2023) 121 Mich L Rev 1163

Systemic ableism in the legal system is nothing new. Paul Lombardo's Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell'6 captures a critical and relevant part of that history, documenting the American eugenics movement that led up to Buck v. Bell, the infamous Supreme Court case in which the highest court held that a Virginia statute permitting the compulsory sterilization of disabled people was constitutional.17 Lombardo's thorough research captures both the systemic factors at play in Buck and its aftermath. It also captures the personal story of Carrie Buck, whom Virginia officials selected to serve as the plaintiff in the case and who was ultimately sterilized by the state (Lombardo, ch. 8). Three Generations, No Imbeciles also reveals critical failures in lawyering at both the trial and appellate levels, underscoring the consequences of ineffective counsel on both personal and systemic levels (Lombardo, chs. 9-12). Understanding the significance, relevance, and failings of Buck v. Bell is critical for any legal professional working with disabled clients. But that understanding cannot be a solely retrospective one: rather, legal professionals ought to consider how ableism persists today and actively work to eliminate it from their practices.?1 Enter Demystifying Disability.

#### Ableism is codified in U.S. law and sustained by a Supreme Court that continues to legitimize structural violence against disabled people. From the unchallenged legacy of Buck v. Bell to a hostile posture toward the ADA, the Court preserves legal frameworks that devalue disabled lives. Its jurisprudence not only fails to protect disabled people—it actively deters them from seeking justice, reinforcing a eugenic logic that declares some lives more worthy than others.

Jacob Izak Abudaram, 2023

 'Disabling Lawyering: Buck v. Bell and the Road to a More Inclusive Legal Practice' (2023) 121 Mich L Rev 1163

Today, the fight against ableism and the movement toward a more inclusive legal world continues. As Ladau put it, "ableism is written into the law." 0 2 The Fair Labor Standards Act still allows businesses to pay disabled employees pennies on the dollar.0 3 The ADA, while serving as a landmark civil rights law, is difficult to enforce, with costly litigation often being the only remedy disabled people can pursue.104 Its gaps have been well documented. 05 And today's Supreme Court seems hostile to disability rights, which deters plaintiffs from filing lawsuits for fear of the ADA being gutted even further.106 Buck has never been formally overturned. And with the Supreme Court's recent overruling of Roe, the line of cases that most obviously undermines Buck is severely weakened.1 07 With advancements in technology and science allowing us to know more and more about future generations,10S conversations and, potentially, legislation related to eugenics will come to the forefront. Buck's powerful expressive message, that some lives matter more than others, continues to shape public norms and legal interpretations about the humanity of Black, Indigenous, and disabled bodies.109 Disabled people remain under critical threat in our legal system, and we need lawyers prepared to be accomplices and co-conspirators to navigate the turbulent waters ahead.

### Queerness

#### The Supreme Court is structurally predisposed to preserve anti-queer norms. Rooted in a Constitution that excluded queer existence from its legal imagination, the Court's lifetime appointments, undemocratic selection process, and static composition entrench generational conservatism and heteronormativity. This institutional design marginalizes queer identities and maintains the law as a tool of normativity rather than liberation—reinforcing queer theory critiques of legal institutions as sites of regulatory violence rather than justice.

Ian Louras, 2022

“Champions and Oppressors: The Varying Roles of the Supreme Court Towards the Queer Community”

University of Chicago Thesis

https://knowledge.uchicago.edu/record/5836?v=pdf

Perhaps obviously, queer rights were not closely considered when the concept and function of the Supreme Court were being laid out in the articles of the Constitution. Nonetheless, the simple facts of its existence, domain, and administration have some significant impact on the unique position held by queerness in the legal sphere and the public consciousness. As such, it is worthwhile to examine not only some modern analysis of the Supreme Court’s purpose but also the Court’s foundational documents, including Article III of the US Constitution and later legislation that further develops the Supreme Court’s place in government.

As is evidenced by any opinion poll, older Americans tend to be more conservative when it comes to supporting queer rights and issues than younger individuals (Brewer, 2003) and this is no less true for members of government. Given the Constitutional provision that Supreme Court justices may serve for life, this anti-queer sentiment would statistically be reflected disproportionately in the demographic makeup of the Court. This is further exacerbated by the conditions and method by which new justices are appointed; candidates are selected by the presidential and legislative elements of government, as laid out in the Constitution, rather than by more direct democratic selection. Additionally, ever since the Judiciary Act of 1869, the number of justices has been hard-set at nine, thus restricting the impact of even indirect democracy on the function of the Supreme Court

#### The Supreme Court functions as a heteronormative institution that preserves dominant power structures. Even rulings like *U.S. v. Windsor* are rare exceptions in a legacy of upholding systemic bias. Through a queer theory lens, the Court’s structure—lifetime appointments, political selection, and historic hostility to queer rights—reveals it as an anti-queer institution more invested in maintaining the status quo than protecting marginalized identities.

Ian Louras, 2022

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While the Supreme Court’s apparent lack of objectivity regarding queer rights is meaningful, constitutional scholar Erwin Chemerinsky places it in the larger context of government in his book The Case Against the Supreme Court (2014). Chemerinsky argues that the upholding of justice has, in practice, been the Court’s secondary purpose; its primary function has been to maintain the status quo and contemporary power structure throughout its history. He draws from an extraordinarily wide selection of cases to support this argument. One such case, United States v. Windsor, saw Section 3 of the Defense of Marriage Act ruled as unconstitutional; however, this, according to Chemerinsky, was a relatively rare example of the Supreme Court serving the purpose of protecting minorities from majoritarian persecution. The power structure which the Court upholds is one of bigotry in countless forms, and through Chemerinsky’s framework, the Court’s presence and power can be seen as inherently hostile to the queer community under present and past conditions. The general body of literature seems to point in this direction; rather than a sacrosanct pillar of law and justice, the American Supreme Court is a body driven by conventional, contemporary American biases, and its supposed function of protecting against the tyrannical majority is not present in its treatment of the queer community, if anywhere

### Settler Colonialism

#### Federal Indian Law is shaped by the Supreme Court’s role in legitimizing and maintaining the settler colonial project. In its effort to reconcile tribal sovereignty with the demands of a settler state, the Court manufactures extra-legal doctrines and contradictory rulings. Through cases like the Marshall Trilogy and others interpreting treaties, reservations, and jurisdiction, the Court consistently reasserts U.S. dominance over Indigenous nations, revealing its function as a legal arm of settler colonialism rather than a neutral arbiter of justice.

Mia Gratacos-Atterberry, 2024

"The Impossibility of Settler Colonialism and Its Influence on the Supreme Court." Quinnipiac Law Review (QLR), vol. 42, no. 3

https://heinonline.org/HOL/P?h=hein.journals/qlr42&i=485

The field of Federal Indian Law is complex, incoherent, and inconsistent. This can initially be attributed to the fact that the Constitution does not detail the relationship between Indigenous Nations, State governments, and the Federal government.5 1 Congress, as a result, was left to write the positive law governing these relationships.52 The Supreme Court has since then "fill[ed] the gaps" left by Congress as well as attempted to resolve the complex issues that arose following the displacement of Indigenous peoples to construct the settler state.53 Beyond the lack of positive law to guide the Court, however, Federal Indian Law is incoherent because the Supreme Court manufactures extra-legal rules and illogical methods of review in order to facilitate the unachievable mission of the settler state. In order for the Court to employ these methods, it must perform the difficult task of reconciling two diametrically opposed concepts: tribal sovereignty and settler colonialism.

In 1941, Felix Cohen, an American scholar and lawyer, wrote the Handbook of Federal Indian Law to provide guidance on Federal Indian Law. 4 Cohen observed that there were three principles generally adhered to in Federal Indian Law judicial decisions: (1) prior to imposition of the settler state, Tribal Nations possessed all powers of "any sovereign state"; (2) the establishment of the settler state rendered Tribal Nations "subject to the legislative power of the United States," terminated the external powers of Tribal Nations, such as their ability to enter into treaties with foreign nations apart from the "United States," but left the internal sovereignty of the Tribal Nations intact; and (3) Tribal Nations maintained internal sovereignty "subject to qualification by treaty and by express legislation by Congress."5 5 These observed principles accept the idea that "[t]he United States resulted from a colonial process that cannot be undone at this late date" and reflect the contradictory reality of the judicial decisions regarding tribal sovereignty. 56 In other words, Cohen's principles accept that the Court is operating within the settler state, and as such, highlight that there is a limit with respect to how much sovereignty the Court can grant Indigenous Nations.

The Court first accepted and cemented colonialism into law via the Marshall Trilogy cases. 57 Then, the Court continued to normalize colonialism and employ ad hoc, manufactured rules to facilitate the settler state's mission to diminish the sovereignty of Indigenous Nations and usurp their land in cases dealing with treaty interpretation and reservation status.58 In the realm of criminal jurisdiction, the Court initially recognized that the sovereignty of Indigenous Nations excluded the federal government from exercising criminal jurisdiction over intratribal crimes but only for as long as Congress allowed. 59 While the Court's ad hoc and extra-legal approach toward Federal Indian Law was intended to suit the settler state, the presence of Indigenous peoples and tribal sovereignty has at times prompted the Court to make decisions frustrating the settler state's goals. The inconsistent results in the Court's cases regarding overall issues of tribal sovereignty-specifically in the realms of treaty interpretation, reservation status, and criminal jurisdiction-can be attributed to the impossibility of settler colonialism.

#### In *Lone Wolf v. Hitchcock*, the Supreme Court affirmed Congress's plenary power over Indigenous affairs without legal grounding, enabling land seizure during the allotment era. This decision entrenched settler colonial logic by asserting unreviewable authority rooted not in law, but in the "status quo" of colonial dominance. Though the Court gestured toward limits based on "good faith," it rendered them meaningless by presuming Congress always acts in good faith. The ruling illustrates the Court's complicity in advancing the settler state’s goals through legal fictions and unchecked power.

Mia Gratacos-Atterberry, 2024

"The Impossibility of Settler Colonialism and Its Influence on the Supreme Court." Quinnipiac Law Review (QLR), vol. 42, no. 3

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In Lone Wolf v. Hitchcock, the Supreme Court supplied Congress with plenary power over all dealings with Indigenous peoples in order to facilitate the settler state's goal to usurp Indigenous land from Indigenous Nations and peoples.' 14 The Court decided this case during the "allotment period," where the settler state took nearly two-thirds of the land belonging to Tribal Nations for the purposes of allotting land for nonindigenous settlement. 15 In 1887, after a government official deceived the Kiowa, Comanche, and Apache Tribes into signing a treaty opening up their reservation for federal allotment, the Tribal Nations argued that Congress could not divest the land promised to them in a previous 1867 treaty without following the requisite protocols prescribed in the treaty.116 The Court-in response to the Tribal Nations' argument and without providing any basis-found that Congress had plenary authority over tribal relations with Indigenous Nations and may act pursuant to that power without being subject to judicial review.'

Instead of providing a legal basis wherefrom Congress derived this plenary power, the Court rooted this power in the settler colonial status quo.' 18 The Court stated that the settler state has possessed authority over Indigenous peoples "from the beginning," this authority was "never doubted," and this authority is not subject to questioning by courts. 119 The Court did attempt to prescribe a limit to this power by stating that a court may question the settler state's actions if they are inconsistent with Congress' obligation to show good faith toward Indigenous Nations. 120 The Court, however, subsequently renders this limit useless by stating that it will be "presume[ed] that Congress acted in perfect good faith in the dealings with the Indians." 2 1 The Court's continued reliance on the settler colonial status quo to further the settler state's mission highlights the incoherent nature of its judicial methods of review.

#### In *Ex Parte Crow Dog*, the Supreme Court ruled that the federal government lacked jurisdiction over intra-tribal crimes on Indigenous land—seemingly affirming tribal sovereignty. However, the decision was steeped in racist and paternalistic reasoning. More critically, the Court still affirmed Congress’s ultimate authority to override tribal law, reinforcing the settler colonial structure. Even in ruling for Indigenous rights, the Court upheld the legitimacy and supremacy of the settler state.

Mia Gratacos-Atterberry, 2024

"The Impossibility of Settler Colonialism and Its Influence on the Supreme Court." Quinnipiac Law Review (QLR), vol. 42, no. 3

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The Court's continued reliance on racism, paternalism, and the settler colonial status quo in cases considering what governing body maintained criminal jurisdiction over Indigenous Nations and their respective lands has sanctioned the settler state's mission to "effectively ... assert authority over Indian land not ceded by treaty."

In Ex Parte Kan-gi-Shun-ca, also known as Ex Parte Crow Dog36 the Court considered whether the federal government had jurisdiction to try Kangi Shunca (Crow Dog), a member of the Bruld Lakota Nation,1 37 for a crime he committed on the reservation against another Lakota man, Sinte Gleska (Spotted Tail).1 38 After Crow Dog shot Spotted Tail in the course of a dispute, the tribal council dealt with the situation according to traditional law.139 The government officials from the Bureau of Indian Affairs, an institution of the settler state, found the tribal council's remedy inadequate, and arrested Crow Dog.1 40 The case was the perfect vehicle for the settler state to carry out its mission: to usurp criminal jurisdiction from Indigenous Nations and give it to the federal government. Surprisingly, the Court held that the federal government may not exercise criminal jurisdiction over crimes committed by a member of an Indigenous Nation against another Indigenous tribal member on Indigenous land.141 In making this decision, the Court-likely unintentionally-acknowledged the Lakota Nation's sovereign status.1 4 2 To allow for the extension of such jurisdiction, the Court stated, would be to extend federal law:

over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts of a free though savage life, from authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct....It tries them not by their pers, nor by the customs of their people, but by superiors of a different race, according to the law of a social state ...one which measures the red man's revenge by the maxims of the white man's morality.1

While the Court's conclusion secured tribal sovereignty over criminal jurisdiction, it was still based in racist, paternalistic, and settler colonial misconceptions regarding Indigenous peoples. In line with this paternalistic rationale, the Court provided that Congress could legislate to extend federal jurisdiction over Indigenous Nations if desired, notwithstanding its holding

#### Native American communities face systemic barriers to justice that go far beyond individual legal needs. The legal framework governing tribal nations—rooted in colonialism—establishes a structure in which the federal government holds plenary power over tribes and states are largely excluded unless expressly permitted. While treaties and federal law acknowledge tribal sovereignty, this "sovereignty" exists only at the discretion of the U.S. government. As a result, tribal governments and citizens must navigate a complex, often hostile legal system that perpetuates inequity and limits self-determination. Access to justice is consistently undermined by jurisdictional confusion, legal complexity, systemic racism, and the settler colonial legacy embedded in U.S. law.

Kirsten Matoy Carlson, (2024)

'Access to Justice in the Shadow of Colonialism' 29(2) Harvard Civil Rights-Civil Liberties Law Review

https://heinonline.org/HOL/P?h=hein.journals/hcrcl59&i=406

The legal needs of most Americans go unmet,' but American Indians and Alaska Natives face particular challenges in seeking access to justice. Justice in Native communities has never been about solving an individual's legal problem and sending them on their way.2 The access to justice issues faced by Native communities have always extended beyond the individual because tribal governments, in addition to their citizens, have faced incredible injustices and barriers to resolving their justiciable problems.3 Tribal leaders and advocates have always fought for justice on multiple fronts-for tribal governments and communities against federal and state oppression and for individual tribal citizens with legal issues in federal, state, and tribal courts and agencies.4

The law permeates the lives of American Indians and Alaska Natives in ways unimaginable to most Americans 5 -even in a law thick world, where the law seems to affect even the most mundane aspects of an individual's everyday life, including employment, housing, and family relationships. 6 Since its formation, the United States has dealt with American Indians by establishing legal relationships with them as separate political communities, commonly referred to as "tribes" or "nations." The United States and Native Nations entered into treaties acknowledging the tribes' preexisting and ongoing rights and governmental authority. These treaty relationships, along with the U.S. Constitution, federal legislation and Supreme Court decisions, form the basic legal framework governing Indians and tribal governments in the United States today. The foundational principles of this framework include the recognition that tribes are governments with inherent sovereign powers, not delegated or granted by the United States; the U.S. Constitution gives Congress full control or plenary power over Indian affairs-including authority to limit tribal powers; the federal government has responsibilities to Indian tribes and individual Indians known as the trust relationship; Indian Nations retain powers unless Congress has expressed clear and plain intent to abrogate them; and state governments have no authority to regulate Indian affairs absent an express congressional delegation or grant.8 Federal laws often purport to define the powers and rights of tribal governments and their citizens.9

The legacy of colonialism inherent in this legal framework complicates the access to justice issues faced by tribal governments, Native communities, and individual Natives. Access to justice is a framework for understanding and improving the experiences that people have with justice events, organizations, or institutions.1 0 Tribal governments, Native communities, and individual Natives encounter justiciable problems, or happenings and circumstances that may raise legal issues, that often involve perplexing questions of jurisdiction, Indian status under federal laws, and treaty rights." The resolution of these issues may require engagement as a community or a government with multiple governmental institutions, including agencies, courts, and even Congress.12 Similar to others facing justiciable problems, barriers, such as an inability to find a lawyer, a lack of legal knowledge, or cost, often impede their access to justice. Additional obstacles arise from the distance from Native communities to legal services, ethnic and cultural considerations, and the distinct and complex nature of their legal issues.

#### Tribal courts are constrained by settler colonial legal frameworks that undermine sovereignty and impose Anglo-American norms.

Kirsten Matoy Carlson, (2024)

'Access to Justice in the Shadow of Colonialism' 29(2) Harvard Civil Rights-Civil Liberties Law Review

https://heinonline.org/HOL/P?h=hein.journals/hcrcl59&i=406

The legacy of colonialism on tribal judicial systems is threefold."1 2 First, many tribal courts have adopted the Anglo-American adversarial model or some version of it and struggle to depart from it."' Second, federal laws limit what tribal judicial systems can do. They impose Anglo-American frameworks for individual rights on tribal justice systems and mandate the processes tribal courts have to follow to protect such rights. Supreme Court decisions have given federal courts the authority to determine tribal court jurisdiction." 4 These decisions have eroded tribal court jurisdiction, limiting the people and places under their jurisdiction. These laws and court decisions enable federal oversight of tribal courts. Third, tribal courts struggle with competing legitimacy demands." 5 They have to walk a fine line between meeting tribal citizens' expectations based on their own culture and satisfying the requirements of non-Native judicial systems."

#### The Supreme Court perpetuates settler colonialism by upholding a legal framework that limits Indigenous sovereignty, ensuring federal control over Native Nations through its interpretation of treaties, constitutional powers, and judicial decisions. The Court's decisions consistently undermine the inherent rights and self-governance of Native peoples, reinforcing colonial domination and the ongoing subjugation of Indigenous communities within the U.S. legal system.

Kirsten Matoy Carlson, (2024)

'Access to Justice in the Shadow of Colonialism' 29(2) Harvard Civil Rights-Civil Liberties Law Review

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### Capitalism

#### As wealth concentration grows and the precarity of workers increases, the legal system upholds capitalist structures by disregarding workers' rights, undermining social protections, and reinforcing state power through mass incarceration and police forces. The COVID-19 pandemic starkly exposed these contradictions, as the privileged class profited while working-class and marginalized communities faced existential risks, further deepening the contradictions of late capitalism.

If the critique of capitalism has felt unspeakable within legal circles for the past thirty years, why is it reemerging now? The obvious answer to this question is that we have reached a point where the accelerating and cascading crises of contemporary capitalism are undeniable (Harris and Varellas 2020; Britton-Purdy et al. 2019). Increased concentrations of wealth and corporate power are mirrored by growing worker precarity. One’s life choices, even one’s subjectivity, are increasingly defined and limited through various forms of debt. With the rise of information capitalism much of our experience is mitigated, surveilled, commodified, and guided by algorithms wielded by the private sector that we can neither see nor challenge. The evisceration of social welfare and the corresponding expansion of prisons and police power has positioned the carceral state as the solution to all manner of social ills, with mass incarceration positioned to capture those insufficiently disciplined by the market (Harcourt 2011). The murder of Black people by police continues with impunity. As climate scientists’ predictions become more dire and the world is ravaged by fires and floods, climate catastrophe is no longer a problem of the future but a lived reality for many. The courts are unabashedly functioning as instruments of the ruling class as they override eviction protections intended to keep working-class people in their homes (Alabama Association of Realtors v. Department of Health and Human Services) and treat hardwon rights to organize/unionize as if they are violating an employer’s property rights (Cedar Point Nursery v. Hassid).

The arrival of a global coronavirus pandemic has only made these contradictions more urgent. At a time when many were faced with losing their jobs and their homes, the top 1 percent boasted of record-breaking profits. Women were forced to leave the workforce to care for and educate their children in the wake of decades of neoliberal austerity combined with capitalism’s disregard for social reproduction (Fraser 2014; Gonsalves and Kapczynski 2020). Workers whose lives had been defined through precarity and a lack of legal protections were given the paradoxical status as both essential and disposable—millions of white-collar workers got to stay home while the working poor were expected to continue to work, oftentimes at great risk to their own health or the care and well-being of their families (see Veena Dubal, “Essentially Dispossessed,” this issue).

Yet one could reasonably note, even though the last year has cast them in stark relief, very few of these crises are new. Late capitalism has been defined by perpetual crisis, just as the Left’s politics for at least the past century have been defined by its invocation. As Lauren Berlant argued, the invocation of crisis is often an attempt to redefine an environmental phenomenon as an event in the hope of producing the agency required to address a structural problem.2 And so it is equally important to attend to the mobilizations that have grown up in response to these crises in trying to understand why this scholarly project is taking hold at this juncture.

#### The Supreme Court is a tool of capitalist domination—critical theory avoids law because legal discourse, shaped by liberalism, legitimizes capitalist power and obscures material exploitation.

Ryan D. Doerfler and Samuel Moyn, 2021

“Democratizing the Supreme Court”

California Law Review, 2021, Vol. 109, No. 5 (2021), pp. 1703-1772

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To say that law up until now has not been central to many critical theory accounts of capitalism in the humanities and social sciences is putting it mildly. It is not uncommon for “law” not even to be listed in the index of critical or social theoretical texts. There are a number possible explanations for this lack of widespread engagement within critical theory: the liminal position law has historically occupied in the Marxist tradition; an uncritical importation of an ahistorical liberal model of law from legal theory; law’s insularity, which intentionally obfuscates meaning from those not in the guild; and the nebulousness of the concept of law itself, which is used to denote politics, government, private law, and police, as well as constitutional limits on those powers. But perhaps the most powerful deterrent to engagement has been the specter of legal liberalism—the fear that to engage with law and legal discourse is to invite a backslide into liberalism. Wendy Brown and Janet Halley articulated this concern directly in their volume Left Legalism/Left Critique, writing that “absorption with legal strategies means that legal liberalism persistently threatens to defang the left, saturating it with anti-intellectualism, limiting its normative aspirations” (Brown and Halley 2002: 5).

#### The Supreme Court upholds capitalist hegemony—both parties and judges reinforce neoliberal centrism, limiting progress and preserving capitalist structures by elevating judicial power over democratic will.

Ryan D. Doerfler and Samuel Moyn, 2021

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The problem is not just that Republican presidents, as a result of a series of contingencies since Richard Nixon’s appointments first began the Supreme Court’s move right, have gotten more than their share of high court justices.11 Democrats, when they had their chance, replaced progressive jurists with centrist liberals, who often agreed over core economic and regulatory issues with their conservative opposite numbers, even as topics like abortion or affirmative action divided them.12 Both parties, and the rival sets of judges, concurred more than they differed, above all about elevating the Supreme Court, even at the price of making judicial appointments national politics by other means.13 As neoliberal centrism waxed and progressive coalitions waned, these developments seemed acceptable for a while. But by the standards of progressive ends, the Supreme Court never became much more than a sideshow about the avoidance of the most reactionary moves and preservation of the modestly beneficial precedents of the past. Sometimes it was coupled with a dream that someday the Supreme Court would return to a trajectory arrested decades before, without much reflection on why its contribution had been strictly limited in the first place.14 But events since the financial crisis of 2008, and a generational revolt against the compromises of their elders, have provided our latest reminder that progress occurs through democratic victory, and democratic victory alone.

The consequence for the discussion of Supreme Court alternatives is straightforward. It must begin with how to diminish the institution’s power in favor of popular majorities. Asking “how to save the Supreme Court” is asking the wrong question.15 Saving the Supreme Court is not a desirable goal; getting it out of the way of progressive reform is. The New Deal court reform had the chance to counteract the assumption that judicial power is hardwired out of necessity or in principle into American politics, but the reform canonized it instead. The entire point of Supreme Court reform ought to be to avoid repeating that mistake.

### Gender

#### The Supreme Court perpetuates harm to gender minorities—through complicit bias, the Court’s conservative rulings like Dobbs and Thomas’ critiques of substantive due process threaten LGBTQ and reproductive rights, undermining protections and fostering discrimination.

Michele Goodwin, 2022

 "Complicit Bias and the Supreme Court" 136:2 Harv L Rev F 119.

https://heinonline.org/HOL/P?h=hein.journals/forharoc136&i=119

Even as judges and courts serve as important safeguards and guardians against state and federal enforcement of unjust, harmful, and unconstitutional laws and discriminatory policies, they too may be fallible, weak in judgement and character, personally and professionally indifferent to systemic injustice, or corruptible.1 As history demonstrates, judges may be complicit in perpetuating harms or furthering discrimination against vulnerable people, including racial minorities, women, individuals with disabilities, and people who identify as LGBTQ. 2 In other words, judges may possess cognitive awareness of a past or present harm against a vulnerable group and yet refuse to intervene to avert the continuance of harm or discrimination.

Judges may also refuse to acknowledge glaring injustices against vulnerable groups, denying appropriate relief related to past, ongoing, or future harms. 3 Judges may inflict further harm through this purposeful inaction or silence. Ironically, legal scholarship generally sidesteps directly naming and developing theory to address these concerns.

As noted by Professor Jerry Kang: "[T]here is no inherent reason to think that judges are immune from implicit biases." 4 Highly visible United States Supreme Court cases, such as Dred Scott v. Sandford,5 Buck v. Bell,6 Korematsu v. United States,' Plessy v. Ferguson," and Bowers v. Hardwick,9 among others, clarify this point. Judges are not immune to complicit, implicit, or explicit biases in the adjudicative process. The judicial process may be corrupted by partisanship and affected by external political or associational pressures and influence. 10 Even if the rule of law operates as a safety valve to protect rights, at times it too is leaky and unreliable. Moreover, while the scholarship on implicit and explicit biases remains important, too little has been expressed about judges' complicit biases. These biases may incline judges toward advancing particular principles or causes based on their religious, political, or other beliefs and affiliations. This may happen even if the result is or appears outcome determinative, infringes on established rights, or perpetuates discrimination.

This Response takes up those concerns, building on the theory of complicit bias. As used here, complicit bias is comprised of three potentially overlapping elements. First, complicit bias can be shown where the actor is aware of a past, present, or future harm and does not intercede, with apparent knowledge that the impact will prejudice another. Second, the perpetrator shows an inclination to protect an individual or group based on relationship, affinity, or group characteristics. Third, the individual or institution furthers the harm through silence and inaction. The essay analyzes complicit bias by addressing the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization.

As Professor Khiara Bridges observes in this year's Foreword,1 2 in the Supreme Court's 2021 Term, the valves broke: the Supreme Court's conservative majority declared stare decisis inconsequential and incompatible with its evolving and conflicting originalist frameworks.13 Notably inconsistent, and lacking uniformity or coherence among themselves, the Court's conservative originalists extended their solicitude to states hungry to dismantle reproductive freedom.14 Justice Thomas warned that his aim included all privacy protections save interracial marriage,15 a feature of the Court's protection that safeguards marriages relevant to his personal life.1

According to Justice Thomas, "'substantive due process' is an oxymoron that 'lack[s] any basis in the Constitution,"' and as such, "in future cases [the Court] should reconsider all of [its] substantive due process precedents, including Griswold, Lawrence, and Obergefell."1 7 Citing his concurrences as legal authority, Justice Thomas claimed that "any substantive due process decision is 'demonstrably erroneous." 18 He urged that the Court has "a duty to 'correct the error"' established in more than 150 years of precedent. 19 Despite tepid assurances from Justice Alito's majority opinion and Justice Kavanaugh's concurrence that other fundamental privacy protections such as contraception access and marriage equality remain protected, 20 those guardrails are unreliable at best. Unfortunately, the risks for women's health are not insignificant. Nor were they unforeseeable.