VANDERBILT LAW REVIEW

VOLUME 76 APRIL 2023 NUMBER 3

ARTICLES

Reliance Interests in Statutory and Constitutional Interpretation

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People and companies rely on public law when they plan their activities; society relies on legal entitlements when it adapts to new technology, economic conditions, and social groups; legislators, administrators, and judges rely on settled law when they pass, implement, and interpret statutes (respectively). Such private, societal, and public "reliance interests" are the "dark matter" of America's law of interpretation. They underwrite most interpretive doctrine, and their perceived force broadly and deeply affects the application of doctrine.

Reliance interests anchor the constitutional bias in favor of interpretive continuity, and they provide guardrails for the leading theories of interpretation—namely—textualism or original public meaning, legal process or purposivism, and cost-benefit economic theory. Because reliance interests themselves evolve, they can also provide an orderly process for updating old norms, under whatever the predominant theory of interpretation might be.

Nonetheless, reliance interests do not always prevail. In recent statutory and constitutional decisions, the Roberts Court has applied traditional reliance interests selectively—a signal that the Court is introducing a regime change

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that may scramble reliance interests as massively as the New Deal and Brown *Courts did in the last century. Without a strong electoral endorsement of the emerging new regime, this is risky for an institution whose authority depends on its rule of law credibility, and it is doubtful that the Roberts Court will be as successful in overcoming or resetting reliance interests as the New Deal and* Brown *Courts.*

INTRODUCTION

Reliance interests are the "dark matter" of our nation's law of interpretation: unseen, underappreciated, but exercising a strong gravitational force that cuts across doctrines and methodologies.[1] People and institutions rely on contractual promises and property rights when they make plans, investments, and decisions. Private law doctrines protect these classic reliance interests.[2] This Article will demonstrate that such classic reliance interests, as well as broader societal and governmental reliance, underwrite a wide array of public law doctrines and play a big role in their application.[3]

The stakes of a proper appreciation of reliance interests are quite high because reliance interests in the Supreme Court's law of interpretation are intertwined with the legitimacy of judicial review and statutory implementation. And rarely has the legitimacy of the Supreme Court been as contested as it is today. Perhaps surprisingly, what counts as a reliance interest and how to weigh such interests have been at the heart of the Supreme Court's most intense public law decisions in the last several Terms—including the Court's most controversial moves.

The most dramatic example is *Dobbs v. Jackson Women's Health Organization*.[4] In the 2021 Term, the Court evaluated a state law outlawing abortions after fifteen weeks—well before the viability line suggested by the Court in *Roe v. Wade*[5] and elaborated as a key holding

1. For earlier deployment of the "dark matter" metaphor, see Michael Steven Green, *Law's Dark Matter*, 54 WM. & MARY L. REV. 845, 845–46 (2013); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 458–505 (1997); and D. Carolina Núñez, *Dark Matter in the Law*, 62 B.C. L. REV. 1555, 1561–65 (2021). It has long been settled that our nation has a "law of interpretation," namely, rules for construing contracts, statutes, and the Constitution. *See, e.g.*, J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, at iii–iv (1891) (because the domain of law is a "science," it was important to collect all the principles applicable to statutory construction); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017).

2. *See* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937); Avery Katz, *Reflections on Fuller and Perdue's* The Reliance Interest in Contract Damages*: A Positive Economic Framework*, 21 U. MICH. J.L. REFORM 541, 541–42 (1988); Michael B. Kelly, *The Phantom Reliance Interest in Tort Damages*, 38 SAN DIEGO L. REV. 169, 169–72 (2001); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 667 (1988).

3. *See also* Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 570–84 (2005) (family law); Daniel A. Farber, *The Reliance Interest in Trade Law,* 13 MINN. J. GLOB. TRADE 173 (2004).

4. 142 S. Ct. 2228 (2022).

5. 410 U.S. 113, 162–63 (1972).

in *Planned Parenthood v. Casey*.[6] Imploring the Court to reaffirm *Roe* and *Casey*, the abortion clinic and the Solicitor General invoked women's reliance on these precedents in making plans and structuring their lives, society's reliance on women's right to choose as it progresses toward a more egalitarian social order, and the Court's own reliance in post-*Roe* abortion cases.[7] Agreeing with the state and its pro-life amici, the Court held that these reliance interests were not sufficiently "concrete" to perpetuate what the majority considered "egregiously wrong" and harmful precedents.[8] But reliance interests were not irrelevant to the majority opinion: a due process "liberty" interest could only be recognized if it had been entrenched by long-standing legal recognition and public law reliance. In the same Term, the same majority (plus the Chief Justice) likewise ruled, in *New York State Rifle & Pistol Ass'n v. Bruen*, that a tradition-based reliance interest was the only allowable basis for state regulation of guns[9] and, in *Kennedy v. Bremerton School District*, that a government practice relying on long-standing, unchallenged tradition was immune to Establishment Clause challenges.[10]

The critical role of reliance interests is not limited to constitutional cases or stare decisis issues. In *Bostock v. Clayton County*, the Court interpreted Title VII's rule against discrimination "because of sex" to protect lesbian, gay, and transgender employees.[11] Arguing against that result, the Solicitor General observed that civil rights advocates had relied on a narrow understanding of the "sex discrimination" bar when they petitioned Congress in 1974 and subsequent years to amend Title VII to add a bar to discrimination "because of sexual orientation"; Congress relied on that settled understanding when, starting in 2009, it amended other "sex discrimination" laws to add "sexual orientation" and/or "gender

6. 505 U.S. 833, 870–71 (1992) (plurality opinion). This framework was followed as late as 2020, in *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion); *id.* at 2135 (Roberts, C.J., concurring).

7. Brief for the United States as Amicus Curiae Supporting Respondents at 18–19, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341731; Brief for Respondents at 36–42, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 4197213.

8. *Dobbs*, 142 S. Ct. at 2265, 2276–77.

9. 142 S. Ct. 2111, 2126, 2131–34 (2022) (holding that Second Amendment rights could only be abridged by a history of past regulations, revealing legislative reliance on an accepted Second Amendment exception); *see id.* at 2161–62 (Kavanaugh, J., concurring); *id.* at 2162–63 (Barrett, J., concurring).

10. 142 S. Ct. 2407, 2428 (2022).

11. 140 S. Ct. 1731, 1743 (2020).

identity" as additional grounds for protection.[12] The employees and their amici responded that these reliance interests were not reasonable in light of the ordinary meaning of the statute, confirmed and elaborated by agency and judicial precedents entrenching the statutory purpose of eliminating gender role stereotyping in the workplace.[13] Several business groups maintained that reliance interests supported the employees, as most companies believed that the nation's antidiscrimination norm should protect sexual and gender minorities, and huge majorities of Americans agreed (many thought anti-gay discrimination was already illegal).[14] Religious amici responded that many enterprises and nonprofit organizations still relied on the long-standing exclusion of sexual and gender minorities from Title VII and would have to make significant workplace changes if the Court changed the rule.[15]

Other high-stakes statutory showdowns came in the recent COVID Cases.[16] In *Alabama Ass'n of Realtors v. Health & Human Servs.* ("HHS"), the Court invalidated HHS's effort to extend a COVID-inspired national moratorium on evictions that Congress had allowed to lapse.[17] The 6-3 majority found persuasive the realtors' arguments that landlords had relied on established state law when drafting leases and reaching agreements with tenants.[18] Whatever might have justified Congress's temporary moratorium could not justify the action of HHS, an agency that had never announced an authority to regulate landlord-tenant law. In cases decided the next year, the Court followed *Alabama Realtors* to invalidate the Occupational Safety & Health Administration's ("OSHA") regulation requiring large employers to

12. Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 2–6, 14–17, 30–33, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623), 2019 WL 4014070.

13. Reply Brief for Petitioner at 2–8, *Bostock*, 140 S. Ct. 1731 (No. 17-1618), 2019 WL 4464221; Brief of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees at 4–15, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915046.

14. Brief for Business Organizations as Amici Curiae in Support of the Employees at 6, *Bostock*, 140 S. Ct. 1731 (Nos. 17-1618, 17-1623, 18-107), 2019 WL 3003458; *cf.* James Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019).

15. Brief of Amici Curiae Business Organizations in Support of the Employers at 10, *Bostock*, 140 S. Ct. 1731 (Nos. 17-618, 17-623, 18-107), 2019 WL 4054621.

16. *See* NFIB v. OSHA, 142 S. Ct. 661 (2022) (per curiam); Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam).

17. 141 S. Ct. 2485 (2021).

18. Reply in Support of Plaintiffs' Emergency Motion to Enforce the Supreme Court's Ruling and to Vacate the Stay Pending Appeal at 13–14, *Alabama Realtors*, 141 S. Ct. 2485 (No. 1:20-cv-03377), 2021 WL 4823039.

adopt COVID-preventive protocols,[19] but it upheld HHS's mandate that hospitals receiving federal funds adopt COVID-preventive protocols for their workers.[20] In all three cases, the Solicitor General argued that private and state reliance interests could be temporarily sacrificed to the national health emergency and that Congress had relied on HHS and OSHA to respond with creative solutions to public health crises.[21] That argument carried the day only in the hospital workers case.

Related to the COVID Cases, where the Court vetoed agency actions that were ambitious applications of delegated lawmaking authority in response to the COVID pandemic, was the Court's big move in *West Virginia v. Environmental Protection Agency* ("EPA").[22] Although the EPA was still working on rulemaking to address emissions from power plants, West Virginia and other coal-producing states challenged the EPA's statutory authority to develop rules capping emissions based on the generation-shifting approach it had earlier taken (and then abandoned) under the Obama EPA's Clean Power Plan ("CPP"). Citing "staggering implementation costs" the CPP would have imposed on private industry and the states, West Virginia argued that this or any similar plan were major questions well beyond the agency's delegated authority.[23] The EPA responded that the Clean Air Act's mandate requires some degree of generation shifting and, therefore, that the states and the private sector were on notice that coal production would not flourish under any regime taking air pollution seriously.[24] The 6-3 Court completely agreed with West Virginia. Chief Justice Roberts' opinion emphasized not only the "billions of dollars in compliance costs" the CPP would have imposed on the private sector and the states but also both legislative and agency reliance on the understanding that the provision EPA relied on was "an obscure, never-used section of the law."[25] Accordingly, the Court found that the EPA's ambitious interpretation was precisely the sort of "major question" that it would not assume the agency was delegated to advance.[26]

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19. *See OSHA*, 142 S. Ct. at 665–66.

20. Biden v. Missouri, 142 S. Ct. at 650.

21. Response [of the United States] in Opposition to the Applications for Stay at 50–53, Job Creators Network v. Dep't of Lab., 142 S. Ct. 892 (2021) (Nos. 21A243 et al.), 2021 WL 8945197.

22. 142 S. Ct. 2587 (2022).

23. Brief for Petitioners at 8–9, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530), 2021 WL 5921627; *see* Brief of Respondent National Mining Ass'n in Support of Petitioners at 14–16, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530), 2021 WL 5972436.

24. Brief for the Federal Respondents at 12–13, *West Virginia*, 142 S. Ct. 2587 (No. 20-1530), 2022 WL 216161.

25. *West Virginia*, 142 S. Ct. at 2601–02 (internal quotation marks omitted) (quoting congressional hearings); *id.* at 2604 ("billions of dollars in compliance costs").

26. *Id.* at 2609–14.

This Article places these recent cases in the context of three kinds of reliance interests the Court has traditionally considered:[27]

- *Private Reliance.* Political philosophers as diverse as Friedrich von Hayek and John Rawls maintain that the rule of law enables individuals and institutions to rely on a stable, predictable legal regime when they make their plans and structure their activities.[28] Issues involving property or contract rights, such as the landlords' rights in *Alabama Realtors* and the employers' rights in *Bostock*, generate claims similar to classic private reliance, where Party A makes investments based on Party B's promise. In the COVID Cases and the EPA's Power Plan case, regulated entities objected that novel federal rules disrupted their "quasi-classic" reliance on the primacy of state health and environmental regulations.[29] Quasi-classic reliance interests based upon a broader understanding of promise were prominent in *Dobbs*. The Solicitor General asserted that "every American woman of reproductive age has grown up" and planned her life and career "against the backdrop of the right secured by *Roe* and *Casey*."[30] The Court considered this "intangible" claim too distant from the "very concrete" classic reliance interests for contract and property rights.[31] The dissenters objected that the majority's reasoning "reveals how little it knows or cares about women's lives or about the suffering its decision will cause."[32]

- *Societal Reliance.* In *Dobbs*, the Solicitor General's further assertion that abortion choice "has become even more deeply woven into the Nation's social fabric" invoked societal reliance.[33] Because societal reliance reflects a higher level of generality than classic private reliance, the *Dobbs* majority dismissed it as

27. Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 452–60 (2010) (similar typology of reliance interests).

28. FRIEDRICH VON HAYEK, THE ROAD TO SERFDOM 80 (1944); JOHN RAWLS, A THEORY OF JUSTICE 207–09 (rev. ed. 2000); *accord* JOSEPH RAZ, THE AUTHORITY OF LAW 214–15 (2d ed. 2009).

29. *Cf.* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 451 (2019) (need to avoid "nonuniformity" at the federal level).

30. Brief for the United States as Amici Curiae Supporting Respondents at 4, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4341731.

31. *Dobbs*, 142 S. Ct. at 2276–77.

32. *Id.* at 2343 (Breyer, J., dissenting).

33. Brief for the United States as Amici Curiae Supporting Respondents, *supra* note 30, at 4; *accord* Kozel, *supra* note 27, at 460–64.

insufficiently concrete.[34] In earlier cases, however, the Court had affirmed that widely accepted "cultural reliance" reinforces the rule of law value of long-standing precedents, and that such reliance is especially important for "the interest we all share in the preservation of our constitutionally promised liberties."[35] Assumptions held by a social group can be just as concrete and knowable as classic private reliance, and they are potentially more important. Societal reliance also speaks to our democracy's fragile pluralism; an established accommodation respecting the dignity and rights of one or more social groups ought not be lightly disturbed, as the *Dobbs* dissenters argued.[36] Religious amici invoked societal reliance in *Bostock* and *Dobbs*: decisions disrespecting the traditions they held dear would be socially and politically unsettling.[37]

- *Public Reliance.* In addition to its grounding in the rule of law and social support, judicial legitimacy also depends on the Court playing a constructive role in the operation of our representative democracy.[38] Settled legal precepts are building blocks upon which legislatures, courts, and agencies construct or amend legal regimes. Decisions exploding these foundational assumptions might be antidemocratic (where legislators or presidents relied on those assumptions), may impair government programs or unravel well-considered policies, and will impose transition costs on private regulated entities as well as government agencies. In *Dobbs*, the Solicitor General argued that *Roe* and *Casey* were precedents foundational to the Supreme Court's privacy jurisprudence, but the Court rejected

34. *Dobbs*, 142 S. Ct. at 2277; *accord* Alexander Lazaro Mills, Note, *Reliance by Whom? The False Promise of Societal Reliance in Stare Decisis Analysis*, 92 N.Y.U. L. REV. 2094, 2111–16 (2017).

35. *E.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1406, 1408 (2020); Dickerson v. United States, 530 U.S. 428, 443 (2000). *See generally* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005) (arguing the importance of "sociological legitimacy," namely, the fragile legitimacy of judicial review as resting on the public's overall support for it).

36. *Dobbs*, 142 S. Ct. at 2344–48 (Breyer, J., dissenting); *see* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014).

37. *See, e.g.*, Brief Amici Curiae of United States Conference of Catholic Bishops and Other Religious Organizations in Support of Employers at 2–3, Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2022) (Nos. 17-1618, 17-1623), 2019 WL 4013297; Brief of Amici Curiae Christian Legal Society & Robertson Center for Constitutional Law in Support of Petitioners at 1, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 3375846; Brief of Amicus Curiae Priests for Life Supporting Petitioners at 3, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 3403941 (*Roe* "continues to tear at the fabric of our nation").

38. CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 209–10 (1960).

> the constitutional foundation for most of the leading privacy cases in the last half century[39]—thereby casting doubt on the stability of earlier rulings protecting Americans' freedom to use contraceptives, engage in nonprocreative sex, and marry persons they choose.[40] The challengers in the COVID and EPA's Power Plant Cases maintained that state and federal officials had long relied on narrower understandings of statutory provisions being applied to create national emergency mandates. Likewise, in *Bostock*, the small businesses who were defendants in the Title VII lawsuits relied on decades of lower federal court decisions excluding sexual and gender minorities from the "sex discrimination" protection of Title VII, ongoing congressional refusal to amend Title VII, and recent amendments of sex discrimination statutes to add "sexual orientation" (and twice "gender identity").[41] Employees and the American Bar Association responded that federal legislators and judges relied on the Court's precedents establishing that gender stereotyping violated Title VII; they claimed that *Bostock* was not as big a step as the employers and the Solicitor General maintained.[42]

In the closely contested "hard cases," reliance arguments usually cut both ways, and the relative weight of those interests will be influenced, often decisively, by the judge's perspective.

Conversely, the balance of reliance interests often determines which are the "hard cases" to start with. For instance, the case against constitutional marriage equality for sexual and gender minorities was an easy one in the 1990s, when no state recognized same-sex unions or marriages and most institutions structured their workplaces and programs on the normative assumption of one-man, one-woman marriage.[43] By 2015, *Obergefell v. Hodges* was possible because most

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39. *Dobbs*, 142 S. Ct. at 2244–48, 2257–59.

40. *Id.* at 2301–02 (Thomas, J., concurring); *id.* at 2319 (Breyer, J., dissenting). *But see id.* at 2309 (Kavanaugh, J., concurring) (insisting that *Dobbs* did not imperil the earlier precedents).

41. *See* Brief for Respondent at 15–17, 47–58, *Bostock*, 140 S. Ct. 1731 (No. 17-1618), 2019 WL 3942896; Brief for the Petitioner at 21–22, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018) (No. 18-107), 2019 WL 3958416.

42. Brief for American Bar Ass'n as Amicus Curiae in Support of the Employees at 19, *Bostock*, 140 S. Ct. 1731 (No. 17-1618), 2019 WL 2915036 (arguing for reliance on precedents barring rigid gender roles).

43. WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS 120–25, 134–39 (2020).

states had recognized same-sex marriages and many employers had already accommodated same-sex unions as marriages.[44]

As Part I documents, these reliance interests underwrite many important doctrines in our law of interpretation: (a) stare decisis for statutory and constitutional precedents, (b) deference to agency interpretations, (c) constitutional adverse possession, (d) the presumption of severability, (e) the powers and rights of Native American Tribes, (f) dozens of continuity canons, (g) freedom of speech and religion, (h) the right to have and carry guns, and (i) nonarbitrariness judicial review. Reliance interests are pervasive—but also subject to interpretation or even manipulation.

Driven by its revisionist view of many constitutional norms, the current Court is taking a flexible approach to legal stability in general and a selective approach to reliance interests in particular. As in *Dobbs*, one striking departure from the Court's established practice has been a tendency to reject any kind of societal or cultural reliance. Yet even as staunch a conservative as Justice Scalia opined that a rule finding "wide acceptance in the legal culture" ought to be left in place.[45] Also in *Dobbs*, the Court was reluctant to credit private reliance outside of the classic arenas of contracts and property; such reasoning presages a big move by the Court in the forthcoming affirmative action cases, where scores of colleges and universities have relied on repeated Supreme Court assurances that race-conscious admissions are allowed if they advance educational diversity.[46]

Illustrated in *Bostock* and the COVID Cases, another departure has been a tendency to ignore or dismiss legislative reliance, undervalue agency reliance, and selectively survey or consider judicial reliance. This, too, carries legitimacy and democratic accountability costs. The current Court's willingness to significantly alter the baselines for interpreting statutes—by ignoring legislative history, reading statutory texts narrowly, and creating or toughening clear statement rules—risks being an aggressive "bait and switch," with Congress as the patsy. Bait and switch is a pretty unfair little con game

44. 576 U.S. 644 (2015) (interpreting the Fourteenth Amendment to bar state marriage laws from discriminating against same-sex couples).

45. Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting); *accord* Town of Greece v. Galloway, 572 U.S. 565, 577 (2014) (stating that societal reliance ought not be disturbed through enforcement of Establishment Clause, lest the Court stir up religious divisions); Fallon, *supra* note 35, at 1795–96 (arguing that "sociological legitimacy" underwrites judicial review).

46. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., No. 20-1199 (U.S. argued Oct. 31, 2022); Students for Fair Admissions, Inc. v. Univ. of N.C., No. 21-707 (U.S. argued Oct. 31, 2022).

in general, and when the victim is Congress, it might be unconstitutional as well.[47]

The normative theme of Part I is that the current Court ought to consider these traditional reliance interests more seriously; the Court's selective invocation of such interests has not only been too stingy but also has reflected a passive-aggressive attitude unduly dismissive of the plans launched by ordinary people, social institutions, and the modern regulatory state. Specifically, reliance interests serve three values of central importance to our liberal democracy. To begin with, reliance interests serve the rule of law by inducing greater consistency and predictability in judicial decisionmaking. There is a natural tendency of citizens to doubt politically appointed judges' ability to decide contentious social and political cases impartially, and scholars fuel that cynicism with claims that legal authority and reasoning do not constrain judges.[48] Additionally, ignoring reliance interests undermines democratic accountability: elected representatives and their agents responsible for solving problems and advancing the public interest are thwarted, and their work undone, when the Court refuses to credit their reasonable beliefs that they are following the law. Finally, a jurisprudence slighting reliance interests undermines the government's ability to solve problems and imposes costs on society that require strong justification.

For the foregoing reasons, decisions like *Dobbs*, which trivialize massive reliance interests, have exploded the public's confidence in the Supreme Court.[49] In cases sweeping aside Establishment Clause problems with state favoritism toward religion and in affirmative action and privacy cases yet to be decided, the Court today risks comparison to the Old Court resisting the New Deal in the 1930s or the *Dred Scott* Court of the 1850s. Specifically, the 1850s and 1930s were the heyday of original meaning, selectively invoked as a mechanism to entrench contract- and property-based reliance interests of earlier periods and to minimize or dismiss more current societal and public reliance.[50]

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47. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 683–84 (1990) (making the bait-and-switch criticism of Justice Scalia's new textualism).

48. *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950) (arguing that precedent and canons of construction are selectively used based on the outcome the court wishes to achieve).

49. Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP NEWS (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/U7G3-WMLN].

50. *See* Dred Scott v. Sandford, 60 U.S. 393, 404–12, 450–54 (1857) (applying original public meaning to protect colonial reliance on racist assumptions about the possibility of citizenship for

To be sure, judges and scholars might argue that a stingy approach to reliance interests is required by Article III and the proper role of the judge. Indeed, revisionists on the left as well as the right might criticize the Supreme Court's traditional reliance jurisprudence as inconsistent with the right theory of statutory or constitutional interpretation. But such a critique would be unsustainable. To the contrary, as Part II will show, reliance interests not only play a key role in the leading theories of interpretation—textualism and original public meaning, legal process and purposivism, and cost-benefit analysis—but they ground each theory and provide guardrails to guide and limit the dynamic judicial activism inherent in each theory.

Part II.A starts with textualism, as articulated by the late Justice Scalia and current Justices Thomas, Gorsuch, and Barrett to entail or include the original public meaning of text. Textualism stakes its validity on its argued superiority in fostering a neutral rule of law and applying transparent rules in predictable ways; if textualism is better than other theories in this way, it also enforces the separation of powers, as judges would be more constrained (consistent with Article III) and would respect the product of the legislative process (namely, the text adopted through Article I, Section 7).[51]

But textual meaning presupposes both author(s) and an audience. Congressional authors that have relied on a particular understanding will feel betrayed if the Court dismisses their reasonable assumptions; when they have been double-crossed, democracy itself is implicated. Audiences that have relied on a particular understanding will be hostile to novel constructions or unjustified reversals. For this reason, the rule of law is not a law of rules mechanically applied—it is instead a socio-political process involving democratic accountability at all levels.[52] Hence, a textualist Court regularly upending social, private-corporate, and public understandings of statutes and constitutional provisions will be viewed as a bunch of lawless ideologues by segments of the population and government. To avoid the scenario where textualism is exposed as a Potemkin theory, shrouding partisan judgments behind a neutral façade (like the Potemkin villages in czarist Russia), Part II.A argues that reliance interests ought to moderate the

Black persons and to enforce property-based reliance interests of slaveholders—thereby exploding congressional reliance on the Compromise of 1820, which the Court invalidated); Carter v. Carter Coal Co., 298 U.S. 238, 291–96 (1936) (applying original public meaning and nineteenth-century precedents to protect vested property and contract interests against federal regulation of wages and hours, while distinguishing more recent precedents).

51. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193–95 (2017).

52. BLACK, *supra* note 38, at 209–10.

destabilizing consequences of a strong textualist majority. This claim has obvious implications for the Roberts Court, whose textualist and original public meaning decisions ignoring or slighting traditional reliance interests have eroded public confidence in the Court and, possibly, the rule of law.

Part II.B explores reliance interests under legal process theory, which has some weight with the Court's liberal minority, Chief Justice Roberts, and perhaps Justice Kavanaugh. Legal process theory stakes its validity on the ability of the Supreme Court to facilitate institutional cooperation that advances the problem-solving and purposive goals of democratic governance.[53] Judges anchored on the institutions of our representative democracy are interested in the public deliberations of elected representatives, the practicalities of statutory implementation by expert administrators, and the expectations of We the People.[54] Such theorists value legislative deliberation as ongoing and dialogic—including popular feedback and pushback. In a republic, democracy is a process by which the people, their officials, and various institutions form consensus about what a statute means—an accountable consensus that judges ought to respect and not disrupt. Because judges are institutionally risk averse, reliance interests should moderate purposive interpretation. As a normative matter, Part II.B argues that by deferring to the more accountable policy branches, unelected judges secure some degree of democratic as well as sociological legitimacy.[55]

Though not reflected on today's Supreme Court, an economic theory of interpretation, seeking the meaning with the best overall consequences, was characteristic of the nation's most eminent appellate judge, Judge Posner of the Seventh Circuit (1981–2017).[56] As Part II.C argues, an economic theory favoring interpretations whose collective benefits exceed their costs would consider private and societal reliance. Because people place special value on intangible as well as tangible benefits they enjoy under established law, the costs of disturbing an entrenched status quo are especially large and are most likely to create waste for society and political trouble for the Court. Hence, reliance

53. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 165–66 (Eskridge & Frickey eds., 1994) (tent. ed. 1958).

54. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994).

55. CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES 37–39 (1981); Fallon, *supra* note 35, at 1795–96.

56. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 105, 300 (1990), *critically reviewed by* Robert Summers, *Judge Richard Posner's Jurisprudence,* 89 MICH. L. REV. 1302, 1310–11, 1316–25 (1991).

interests exercise a braking effect on cost-benefit approaches to interpretation.

Part II also advances a normative theme: the paradox of reliance interests. On the one hand, reliance interests anchor law's status quo bias.[57] As Justice Holmes put it, "A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."[58] On the other hand, reliance interests are dynamic. Evolving reliance interests provide an orderly mechanism for judges to update statutes and the Constitution. Like legal process- and economics-minded judges, textualist and even original meaning judges interpret statutes dynamically,[59] and Part II shows how evolving reliance interests might guide and constrain that process.

Part III introduces a third normative theme: In exceptional cases of an indefensible status quo, the Supreme Court ought to trump strong reliance interests with the stronger demands of constitutional or statutory principle. This is what the Court saw itself doing in *Dobbs*. But reliance interests remain relevant, for when the Court acts against powerful reliance, the Justices should proceed cautiously. For a classic example, *Brown v. Board of Education* abrogated public school segregation and rejected southern states' massive private, societal, and public reliance.[60] The Court was confident that history would view its activism generously, as it has. One reason for the triumph of *Brown* is that its constitutional volte-face created conditions for falsification of stereotypes and predictions. Once people of different races went to school and worked together, the country changed for the better. It remains to be seen what will be the social and political consequences of *Dobbs*.

Nonetheless, reliance interests discouraged the principle-protecting Warren Court from an earlier rebuke to elementary school segregation and reemerged as critical when the Court handed down a remedy in *Brown II*.[61] Thus, even when strong reliance interests do not win out over stronger legal or moral arguments, reliance interests will and usually should influence judicial process, timing, and remedies for

57. *See, e.g.*, Stephen M. Fleming, Charlotte L. Thomas & Raymond J. Dolan, *Overcoming Status Quo Bias in the Human Brain*, 107 PNAS 6005 (2010) (demonstrating the neurological difficulties in human departure from status quo decisionmaking).

58. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1008 (1997).

59. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

60. 347 U.S. 483 (1954).

61. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955). On the intellectual background of *Brown II* and the role of Justice Frankfurter, see BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT (2022).

statutory and, especially, constitutional violations. *Dobbs* presses the limits of this practical learning.

I. RELIANCE INTERESTS & INTERPRETIVE RULES AND DOCTRINES

Reliance-based values and arguments underwrite doctrines and rules of statutory and constitutional interpretation. They not only justify such disparate doctrines as stare decisis, deference to agencies, federalism and other continuity canons, constitutional adverse possession rules, the contours of free speech and gun rights, and nonarbitrariness judicial review (each treated in a Section of this Part)—but their dark matter weight typically exercises a gravitational pull that influences judicial decisionmaking. For example, doctrine says that the Court should presumptively follow binding precedents, defer to agency interpretations, and apply federal statutes without disrupting state law. The application of those baselines depends on context—including private, societal, and public reliance interests, as the Article will demonstrate.

Overall, reliance interests play a dual role: they are important justifications for doctrine, and they influence the way doctrine is applied. Although reliance interests anchor a status quo bias in the law, when society changes (often in response to law), reliance interests themselves evolve, and their evolution helps judges understand the risks and benefits of constitutional and statutory decisions.

A. Stare Decisis

No theory of statutory or constitutional interpretation can claim legitimacy in our legal system without an account of stare decisis; namely, how firmly its own precedents bind the Supreme Court and how influential precedential reasoning is from case to case.[62] But practice is messy: the Court says it will not lightly overrule precedent almost as often as it says "stare decisis is 'not an inexorable

62. *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 139–90 (2016) (examining the role of stare decisis in our legal systems and the societal values served by serious adherence to the rule); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 747 (1988) (explaining the powerful role stare decisis played in the Supreme Court's reasoning for not revisiting *Roe v. Wade* in the decades following the decision); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 591–95 (1987) (exploring the variability in the importance of precedent based on the case at hand and external factors); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) (arguing that evolved understandings of what the Constitution requires is the primary force in constitutional interpretation).

command.' "[63] Whether a precedent survives a determined challenge heard by a friendly bench is less a function of doctrine than of context. Although policy biases play a filtering role, and a determinative one in the most politically charged cases, the main variable in the overall run of cases is the weight of reliance interests.[64]

1. Statutory Precedents

The super-strong presumption of correctness for statutory precedents places responsibility for correcting mistakes and updating statutory regimes with Congress, which until 1998 frequently overrode the Supreme Court.[65] Nonetheless, the Supreme Court overrules statutory precedents in a surprising number of cases—while the same Justices reaffirm incorrect, even goofy, precedents in the same fields of law.[66] Reliance interests represent the main normative defense of the super-strong presumption of correctness and the best theory explaining why so many precedents are overruled, while some of the oddest are not.

The best example of this thesis—and the most (in)famous application of super-strong stare decisis for statutory precedents—is *Flood v. Kuhn*.[67] The Court reaffirmed antiquated precedents exempting professional baseball from the Sherman Act. Justice Blackmun's majority opinion offered no defense of the proposition that baseball fell outside the realm of interstate commerce (the rationale of a 1922 precedent) but opined that this "aberration is an established one" whose correction should be left to Congress.[68] Five years later, Justice Blackmun joined the Court's opinion overruling a less outdated Sherman Act precedent,[69] and in recent decades, antitrust precedents have regularly been overruled.[70]

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63. *E.g.*, Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (overruling a constitutional precedent (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)); *accord* State Oil v. Khan, 522 U.S. 3, 20 (1997) (similar quotation for overruling a statutory precedent).

64. Hillel Y. Levin, *A Reliance Approach to Precedent*, 47 GA. L. REV. 1035 (2013); Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459 (2013).

65. Mathew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014).

66. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361 (1988).

67. 407 U.S. 258 (1972). Scholars have been strongly critical of Justice Blackmun's opinion and its effect on professional baseball. *E.g.*, Stephen F. Ross, *Reconsidering* Flood v. Kuhn, 12 U. MIAMI ENT. & SPORTS L. REV. 169 (1995).

68. *Flood,* 407 U.S. at 258, 282–84 (reaffirming Fed. Baseball Club v. Nat'l League*,* 259 U.S. 200 (1922)).

69. Cont'l T.V., Inc. v. GTE Sylvania Inc.*,* 433 U.S. 36 (1977).

70. *E.g.*, Leegin Creative Leather Prods. v. PSKS, Inc.*,* 551 U.S. 877 (2007) (overruling Sherman Act precedent, with sharp debate over public and private reliance interests).

Flood v. Kuhn illustrates all three forms of reliance—and they in turn provide a normative justification of a decidedly unpopular opinion. Because of the Court's 1922 decision, baseball had invested and evolved without regard to antitrust rules against market division, price-fixing, and tying arrangements.[71] Not only did the Court majority find such pervasive *private reliance* on the Court's 1922 judgment a good reason not to overrule it, but even the *Flood* dissenters were eager to accommodate that reliance; they suggested that the overruling could be prospective, so that the industry would have time to reconfigure its regime.[72] The Court insisted that its judgment would have to apply retroactively, a norm that is now black-letter doctrine.[73] Also relevant to the private reliance argument is that arbitration was a remedial option still available to players like Curt Flood in the event a Sherman Act lawsuit was not.[74]

The Blackmun opinion opened with an "Ode to Baseball,"[75] suggesting that there had been deep *societal reliance.* Americans loved baseball; our culture was saturated by baseball tales and metaphors. Anticompetitive practices such as the reserve clause that stabilized team rosters were the warp and woof of the "national pastime," integral to what Americans liked about baseball. In 1972, if you were a proud fan of those "damn Yankees," or one of "Dem Bums" who "bleed Dodger blue," you celebrated the stable collection of players and the team's history and traditions (including traditions of frustration, as with the "Curse of the Billy Goat," which haunted the Chicago Cubs for 71 years). Pesky antitrust lawsuits, Blackmun seemed to suggest, might disrupt those traditions.

Finally, Blackmun found strong *public reliance.* That the 1922 precedent had been reaffirmed in a 1953 case involving the Yankees established that the Supreme Court itself had relied on the precedent.[76] Two strikes and you're out? (Until *Dobbs*.) The force of this claim was blunted by the fact that the Court had refused to extend baseball's exemption to any other sport.[77] A better argument rested on "positive

71. Brief for Respondents at 5–23, 30–32, *Flood*, 407 U.S. 258 (No. 71-32), 1971 WL 135658.

72. *Flood*, 407 U.S. at 293 (Marshall, J., dissenting).

73. *E.g.*, Harper v. Va. Dep't of Tax'n, 509 U.S. 86 (1993).

74. *Flood*, 407 U.S. at 293–96 (Marshall, J., dissenting). A few years after *Flood*, an arbitrator ruled that the reserve clause violated the players' contracts with the league. *See* BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 318–19 (2006).

75. *Flood*, 407 U.S. at 260–64 ("The Game").

76. *Id.* at 273–74 (invoking Toolson v. N.Y. Yankees, 346 U.S. 356 (1953)).

77. *E.g.*, Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (refusing to extend antitrust immunity to football, which had not evolved under a recognized exemption).

inaction" by Congress, which had considered and rejected dozens of bills regarding application of the Sherman Act to professional sports.[78] It was significant that almost all the bills would have expanded baseball's exemption to other sports.[79] While Congress extensively deliberated the wisdom of baseball's exemption, there was only support for extending, and not overriding, the oddball 1922 precedent.

Flood v. Kuhn reflects the gravitational force of all three kinds of reliance interests. More recent Sherman Act overrulings have discarded precedents that imposed restrictive rules on business practices that the majority Justices considered efficient—and hence occurred notwithstanding the legal rules—and that the majority believed had not been relied on by policymakers.[80] Some of those overrulings claimed that the Sherman Act is a common-law statute, and so, normal stare decisis should apply, but other decisions have bent over backwards to reaffirm controversial antitrust precedents based on public or private reliance.[81]

The point of the antitrust discussion can be generalized. In *Patsy v. Board of Regents*, the Court announced that the super-strong presumption would be inapplicable where the statutory precedent itself (1) was a departure from earlier precedent or settled understandings, (2) had not generated significant private reliance, or (3) had not been the subject of legislative reliance or (even better) had been rejected in subsequent statutes.[82] Consistent with *Patsy*, the Supreme Court rarely overrules statutory precedents—no matter how misguided under current methodology—that have generated well-documented private, societal, or public reliance.[83] Conversely, statutory precedents that have generated unimpressive reliance have been vulnerable to

78. *Flood*, 407 U.S. at 283–84.

79. *Id.* at 281.

80. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 906–07 (2007) (overruling a precedent subjecting vertical market-division restraints to per se illegality, and finding that such restraints were often procompetitive and that manufacturers easily achieved the same effect through contractual workarounds); State Oil Co. v. Khan, 522 U.S. 3, 20–22 (1997) (overruling a precedent subjecting vertical price restraints to per se illegality, and finding that such restraints were often procompetitive and had been implicitly allowed by decisions narrowing the now-overruled precedent).

81. *E.g.*, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (reaffirming antitrust standing rule much criticized as obsolete but repeatedly applied by the Court); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 423–24 (1986) (relying on reliance arguments to rebuff Judge Friendly's suggestion in the court of appeals decision that another obtuse 1922 Sherman Act precedent be overruled).

82. 457 U.S. 496, 501 & n.3 (1982).

83. *E.g.*, Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951 (2021); Kimble v. Marvel Ent., LLC, 576 U.S. 446 (2015); SCALIA & GARNER, *supra* note 51, at 41, 87 (willing to follow binding precedents inconsistent with the authors' text-based methodology).

reconsideration.[84] Where reliance interests have been debatable for controversial precedents, the Court has fractured and has sometimes created a compromise, reaffirming the precedent but interpreting it narrowly.[85]

2. Constitutional Precedents

Stare decisis is less powerful in constitutional cases[86] but does protect earlier decisions that the current Justices would not have joined.[87] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[88] five Republican-appointed Justices reaffirmed *Roe v. Wade*.[89] The joint opinion delivering the judgment of the Court famously reasoned that constitutional precedents should not be overruled without considering (1) whether the rule has proved to be unworkable; (2) "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; and (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[90] The second and third factors rest entirely on private and public (judicial) reliance, and the first and fourth factors indirectly relate to reliance, as unworkable or outdated rules would usually not generate reasonable reliance. Adjusting that standard, *Dobbs* emphasized factors related to the quality of the legal reasoning

84. *E.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098 (2018); Hubbard v. United States, 514 U.S. 695, 713 (1995); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 663 & nn.5–6 (1978); *id.* at 711–12 (Powell, J., concurring).

85. *E.g.*, Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (majority skeptical of an expansive interpretation of § 1981 reaffirmed it in light of congressional reliance, but applied the precedent narrowly); Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 94 GEO. L.J. 921 (2016).

86. Knick v. Twp. of Scott, 139 S. Ct. 2162, 2177 (2019); Ramos v. Louisiana, 140 S. Ct. 1390, 1411–13 (2020) (Kavanaugh, J., concurring) (collecting landmark constitutional overrulings and noting the relative flexibility of stare decisis in constitutional cases).

87. *See* Moore v. Texas, 139 S. Ct. 666, 672 (2019) (Roberts, C.J., concurring) (siding with a majority upholding precedent despite dissenting in the case that established the precedent at issue); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 545 (1991) (White, J., concurring) (explaining how precedent set in a case the Justice originally dissented in but "now follow[s] on the basis of *stare decisis*" contributed to his decision in the case at bar).

88. 505 U.S. 833 (1992) (plurality opinion of O'Connor, Kennedy & Souter, JJ., together with concurring opinions by Blackmun & Stevens, JJ.).

89. 410 U.S. 113 (1973).

90. *Casey*, 505 U.S. at 854–55 (plurality opinion); *see also Ramos*, 140 S. Ct. at 1414–15 (Kavanaugh, J., concurring in part) (reiterating and reformulating these factors and others into a three question test for determining the elasticity of stare decisis).

in the challenged precedent and overruled *Casey*'s substantive holding in large part because the majority considered it "egregiously wrong."[91] Justice Alito's opinion also considered *Casey*'s stare decisis factors but slighted women's private reliance, rejected societal reliance more generally, and ignored the many judicial decisions following *Roe* or *Casey*.[92] Responding to the views of one concurring and three dissenting Justices, Justice Kavanaugh's concurring opinion emphasized the special nature of the debate between pro-choice and pro-life Americans and reassured the country that the lenient approach to stare decisis in *Dobbs* would not destabilize other constitutional rights.[93]

Dobbs notwithstanding, reliance interests have rescued many a controversial constitutional precedent.[94] A good example is *Dickerson v. United States,* where the Court reconsidered a controversial right long enjoyed by criminal defendants.[95] In *Miranda v. Arizona*, the Warren Court had dynamically interpreted the Sixth Amendment (as applied to the states) to require police to inform detained persons of their right to counsel and to remain silent.[96] Although much criticized as creative constitutional policy rather than well-grounded constitutional law, *Miranda* warnings have been integrated into American public culture and widely implemented by police departments.[97] To unwind the *Miranda* clock would open up police training programs and rules to acrimonious debate and revision, subject the Court to charges of partisan hackery for throwing over a widely accepted regime, and generate waves of constitutional litigation needed to develop new due process rules. Although Congress had rejected *Miranda*'s bright-line rule in a 1968 statute, the Solicitor General in *Dickerson* refused to defend the federal law because of public and societal reliance

91. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265–72 (2022) (arguing that the poor quality of reasoning and radical inconsistency with the Constitution were key reasons to overrule the precedent).

92. *Id.* at 2272–78.

93. *Id.* at 2307–09 (Kavanaugh, J., concurring).

94. *See, e.g.*, Ziglar v. Abbasi, 137 S. Ct. 1843, 1856–57 (2017) (declining to overrule *Bivens* because of substantial reliance); McDonald v. City of Chi., 561 U.S. 742, 758 (2010) (declining to overrule the *Slaughter-House Cases,* based on "many decades" of consistent constitutional analysis); Pennsylvania v. Union Gas Co., 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part) (declining to overrule Hans v. Louisiana, 134 U.S. 1 (1890), given the reliance of the courts and Congress on its holding), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 45 (1996) (following *Hans* to overrule *Union Gas*).

95. 530 U.S. 428 (2000). Dissenting Justices Scalia and Thomas argued that *Miranda* was federal common law that Congress could override. *Id.* at 444–65 (Scalia, J., dissenting).

96. 384 U.S. 436 (1966).

97. *See, e.g.*, Brief for the United States at 18–20, 29–30, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 141075 (noting the ubiquity of *Miranda* in criminal justice settings and Congress's initial distaste for the opinion).

interests.[98] Following the Solicitor General's lead, Chief Justice Rehnquist (no fan of the Warren Court's liberal protection of rights for criminal defendants) wrote the Court's opinion reaffirming the *Miranda* rule. "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."[99]

As a general matter, the Supreme Court overrules its constitutional precedents only when the majority is able to claim, without perceived embarrassment, that public, social, and private reliance interests are not significant.[100] In *Ramos v. Louisiana*, Justice Gorsuch's opinion for the Court overruled constitutional precedents allowing nonunanimous verdicts in state criminal cases.[101] His opinion minimized the reliance arguments: only two states still departed from the rule, one of those states was transitioning to unanimity, and most of the verdicts violating the rule were time-barred from challenge.[102] Finding more public reliance than the majority, Justice Alito's dissent argued that other recent constitutional overrulings did not disrupt public reliance interests nearly as much as *Ramos* did.[103] (Recall that in *Dobbs,* Justice Alito substantially ignored public reliance.)

3. Super-Precedents (and Sub-Precedents)

During John Roberts's confirmation hearings, GOP Senator Arlen Specter dubbed *Roe v. Wade* a "super precedent" that could not be overruled because it had so deeply penetrated the nation's public culture.[104] Although *Roe* was not as enduring as Specter hoped, the

98. *See id.* at 28–30, 34–38.

99. *Dickerson*, 530 U.S. at 443 (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting)).

100. *See, e.g.*, Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1499 (2019) (overruling existing precedent despite "the loss of two decades of litigation expenses" and an existing judgment in one party's favor); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2179 (2019) (concluding "no reliance interests" justify abiding by the principle of stare decisis before overturing an existing precedent); Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2484–86 (2018) (overruling precedent despite the potential reliance interest in trade-offs unions made during collective bargaining); South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2098–99 (2018) (rejecting arguments to adhere to stare decisis when illegitimate reliance interests are asserted); Pearson v. Callahan, 555 U.S. 223, 233 (2009) (noting that procedural and evidentiary rules, like those at issue, did not create sufficient reliance interests to prevent the Court from overruling precedent).

101. 140 S. Ct. 1390 (2020).

102. *Id.* at 1406–08; *accord id.* at 1419–20 (Kavanaugh, J., concurring in part).

103. *Id.* at 1438–40 (Alito, J., dissenting).

104. Michael Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1204–05 (2006) (defining super-precedents as "constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time," such that their principles "are deeply embedded into our law and lives" and "seep into the public consciousness").

holding in *Griswold v. Connecticut,* that the state cannot meddle with the romantic relations between consenting spouses,[105] remains so entrenched in our society and legal culture that post-1987 Supreme Court nominees have endorsed its principle without the equivocation they brought to cautious statements regarding *Roe v. Wade*.[106] While abortion choice remained a contentious political issue generating a variety of statutory allowances and restrictions, contraception all but vanished in political debates, and even traditionalist legislatures have shied away from regulating basic birth control. For this reason, the state in *Dobbs* celebrated *Griswold* as consistent with the nation's constitutional traditions even as it denied legitimacy to *Roe.*[107] Indeed, Mississippi argued that *Griswold*'s freedom to engage in responsible procreation through contraceptives obviated the need for abortion choice for family planning purposes.[108] *Dobbs* may trigger state regulation of contraceptives that pro-life leaders consider "abortifacients,"[109] but on the whole, *Griswold* seems safe (even though its reasoning is pretty nutty).

If *Griswold* and other decisions are super-precedents,[110] *Brown* is a super-duper-precedent, entrenched as canonical in both conservative and liberal America.[111] What is the principle for which *Brown* is canonical? In *Students for Fair Admissions, Inc. v. University of North Carolina* ("UNC"),[112] the challenge to the university's race-conscious admissions plan, both sides wrap their normative case around *Brown*: Students for Fair Admissions, Inc. reads *Brown* and *Loving*[113]

I suggested the idea to Senator Specter based on an article by myself and Ferejohn. William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); *see* Terry Eastland, *The Specter of Superprecedents*, WKLY. STANDARD, Sept. 5, 2005, at 18, 19 (describing the potential influence of the article on the Senator).

105. 381 U.S. 479 (1965).

106. Gerhardt, *supra* note 104, at 1219–20.

107. *See* Brief for Petitioners at 15–16, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3145936 (praising *Griswold* for "find[ing] grounding in text and tradition" while lambasting *Roe* for "depart[ing] from prior cases . . . unmoored from constitutional text, structure, history, and tradition").

108. *Id.* at 29–30.

109. *E.g.*, Michael Ollove, *Some States Already Are Targeting Birth Control,* PEW STATELINE (May 19, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/19/some-states-already-are-targeting-birth-control [https://perma.cc/ED46-7P5A].

110. *See also* New York v. United States, 505 U.S. 144 (1992) (Tenth Amendment); INS v. Chadha, 462 U.S. 919 (1983) (legislative veto); Washington v. Davis, 426 U.S. 229 (1976) (rejecting constitutional disparate impact liability); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule); Wickard v. Filburn, 317 U.S. 111 (1942) (broad view of the Commerce Clause).

111. Brad Snyder, *How the Conservatives Canonized* Brown v. Board of Education, 52 RUTGERS L. REV. 383 (2000); *see also* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998) (positing a theory of canonical precedents).

112. No. 21-707 (U.S. argued Oct. 1, 2022).

113. Loving v. Virginia, 388 U.S. 1 (1967).

(another super-precedent) as adopting the colorblindness principle,[114] while UNC reads the same precedents as supporting racial integration.[115] UNC buttresses its reading with quasi-classic private reliance by dozens of colleges and public reliance by public universities such as UNC and by the Supreme Court itself.[116]

The flip side of super-precedents is "sub-precedents," namely, recent precedents delivered over powerful dissents and too new or unworkable to have generated significant reliance.[117] For example, in *Montejo v. Louisiana*, Justice Scalia's opinion for the Court overruled an earlier precedent that had barred police interrogation after a defendant was represented by counsel at arraignment, even though the defendant had previously waived his *Miranda* rights.[118] The Court found the earlier precedent poorly reasoned and its rule unworkable.[119] The clinching argument was that defendants had not relied on the earlier rule, prosecutors could easily obey the more police-lenient rule, and, in any event, the overruled decision was only a few decades old and so not entrenched in the nation's social or legal culture.[120]

As in *Montejo*, the justification for considering recent decisions probationary rather than authoritative is most cogent when justified by the balance of reliance interests in favor of a volte-face. Historically, the best example starts with the Court's 1869 decision in *Hepburn v. Griswold,* which invalidated the Civil War Congress's requirement that people accept greenbacks as legal tender to pay debts.[121] *Hepburn* was overruled the next year based on strong public and societal reliance on the government's ability to set currency rules—broad interests that trumped the more classic contract-based private reliance that had

114. *See* Reply Brief for Petitioner at 8–10, 15, *Students for Fair Admissions*, No. 21-707 (U.S. Aug. 24, 2022), 2022 WL 3718526 (noting that *Brown* restored the colorblind Constitution).

115. *See* Brief for Respondent-Students at 15–17, *Students for Fair Admissions*, No. 21-707 (U.S. July 25, 2022), 2022 WL 2987152 ("Brown and its antecedents carried forward the Equal Protection Clause's anti-subordination principles, recognizing racial integration and cross-racial exchange as important elements of equal educational opportunity.").

116. *Id.* at 43–46.

117. *See* Johnson v. Transp. Agency, 480 U.S. 616, 673 (1987) (Scalia, J., dissenting); *e.g.*, Sykes v. United States, 564 U.S. 1 (2011), *overruled by* Johnson v. United States, 576 U.S. 591 (2015); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976), *abrogated by* S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985); Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

118. 556 U.S. 778 (2009) (overruling Michigan v. Jackson, 475 U.S. 625 (1980)).

119. *See id.* at 792–95 (describing the precedent at issue as "unworkable" and "superfluous").

120. *Id.* at 792–93.

121. 75 U.S. (8 Wall.) 603 (1869), *overruled by* Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870).

motivated *Hepburn*.[122] Note the contrast with *Dobbs*, which overruled precedents implemented (and frequently adjusted) by half a century of case law and which held that only classic property- and contract-based reliance interests were even cognizable.[123]

B. Judicial Deference to Agencies—or Not

Most statutory issues are settled by agency officials—through rules, adjudications, policy statements, and the like. Although agency interpretations are not binding as a matter of stare decisis, the Supreme Court has announced a complicated set of agency deference regimes—regimes that the Court has applied unevenly and in recent years has usually ignored.[124] There is a vigorous academic debate over whether the Court's deference regimes are consistent with the Administrative Procedure Act, which commands courts to overturn agency rules in violation of the law.[125] Reliance interests not only suggest a distinctive reason for courts to defer to agency interpretations under many circumstances but also suggest a practical way to rein in vacillating or excessively dynamic agency interpretations. Where a statutory directive has a range of possible meanings (because of ambiguity, vagueness, or lack of a provision), courts ought to consider reliance interests before rendering a judgment. Because agencies are usually first movers in implementing statutes, private and/or public institutions might build on initial agency views to plan their agendas

122. *Legal Tender Cases*, 79 U.S. (12 Wall.) at 529–30; *see id.* at 558–66 (Bradley, J., concurring) (discussing the power to apply government-issued securities to private and public debts and the relationship this power has to the government's existence and the interests of the citizenry).

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

124. *Compare* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008) (reporting empirical findings demonstrating that the Court's stated deference regimes are not the key variables determining whether an agency interpretation actually prevails), *and* Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1078–79 (2016) (describing Justices' varied approaches to affording agencies deference), *with* Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and* Chevron *Deference*, 70 ALA. L. REV. 733 (2019) (highlighting ways that Justices "curtail the extent of judicial deference that agencies receive").

125. *See* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J.L. & PUB. POL'Y 103 (2018) (surveying arguments in favor of eliminating and narrowing *Auer v. Robbins*, 519 U.S. 452 (1997), and *Chevron* deference). *Compare* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113 (1998) (arguing that *Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), is inconsistent with the Administrative Procedure Act ("APA")), *with* Cass R. Sunstein, Chevron *as Law*, 107 GEO. L.J. 1613 (2019) (arguing that *Chevron* and other deference regimes are permissible interpretations of the APA).

and take action.[126] Lauren Baer's and my empirical examination of the Court's deference practice found that, whatever regime (or in most cases no regime at all) the Court applied, it went along with long-standing agency interpretations nearly three-quarters of the time.[127]

Consider a classic pairing scholars use to contrast judges' ordinary interpretation and a deferential approach; reliance interests play a key role under both regimes and provide a more persuasive distinction between the cases than does deference doctrine. In *General Electric Company v. Gilbert*, the Supreme Court rejected EEOC guidelines opining that Title VII's bar to workplace discrimination "because of sex" prohibited employers from excluding pregnancy from workers' health and disability insurance.[128] Implausibly, the Court ruled that pregnancy-based discrimination was not discrimination "because of sex."[129] More plausibly, the Court invoked reliance arguments: the EEOC originally told employers pregnancy discrimination was not covered and flip-flopped eight years after the statute was enacted; the Department of Labor had consistently interpreted the Equal Pay Act to allow pregnancy-based discrimination; and the cabinet-level Equal Employment Opportunity Coordinating Council had in 1976 rejected the EEOC's view.[130] Moreover, the insurance industry had long excluded pregnancy from disability and health insurance policies—Congress was aware of that traditional practice and the Senate sponsor endorsed it, employers and unions relied on that tradition when they negotiated fringe benefits for workers, and it would have been expensive and inequitable for thousands of companies to revise their insurance, according to General Electric.[131] The nondeferential stance taken by the 6-3 majority is best

126. Zenith Radio Corp. v. United States, 437 U.S. 443, 457–58 (1978); *see* Barnhart v. Walton, 535 U.S. 212, 220 (2002) (deferring to an agency's long-standing interpretation in part because Congress's acquiescence in it suggested the interpretation was desired or at least statutorily permissible). *See also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 976–95 (2017) (arguing that almost all early deference decisions were to long-standing administrative constructions delivered soon after a law was enacted—precisely those constructions on which regulated persons and businesses would have relied).

127. Eskridge & Baer, *supra* note 124, at 1148–51.

128. 429 U.S. 125 (1976).

129. *See id.* at 129, 133–40

130. *See id.* at 142–45 (noting conflicting interpretations among the EEOC, the Wage and Hour Administrator within the Department of Labor, and the Equal Employment Opportunity Coordinating Council); Supplemental Brief for Petitioner, General Electric Company, on Reargument at 25–32, *Gilbert*, 429 U.S. 125 (Nos. 74-1589, 74-1590) (noting similar conflicts).

131. *See* Supplemental Brief for Petitioner, *supra* note 130, at 25–32, 28 n.32 (discussing factors weighing against upsetting existing insurance industry practices).

explained by their reluctance to unsettle what they considered massive corporate and public reliance interests.[132]

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a unanimous Court upheld an EPA volte-face, allowing polluters to treat their entire factory complex as a bubble within which they could trade off improvements in some areas against retrogression in others and still meet the agency's nondegradation standards.[133] Justice Stevens's opinion deferred to the agency's policy balance and its flip-flop because Congress had delegated lawmaking authority to the agency and had not provided a clear directive on the bubble issue.[134] The *Chevron* doctrine has a reliance-based foundation. If Congress has explicitly delegated lawmaking authority to an agency, legislators and administrators rely on that delegation, and regulated entities are on notice that the agency has broad power to address the statutory problem and that the agency might move the goalposts, just as Congress can change rules (usually prospectively). Most cases involving *Chevron* deference involve legislative rules that can usually be changed only through a process of notice-and-comment rulemaking,[135] where the regulated community is on notice and has a chance to persuade the agency not to make the change. In *Chevron* itself, the Reagan EPA was implementing a recent statute and was revoking the EPA's initial rule that rejected the bubble concept.[136] Having fought it tooth and nail, the industry had not relied on the previous rule, and no brief made the claim that society or the body politick had relied on rejection of the bubble concept to ensure cleaner air.

Given the utter lack of legislative consideration of anything like the bubble concept, congressional reliance on the EPA's expertise to fill in details like this one, and the weak private or societal reliance interests, the Reagan Administration's position in *Chevron* would have prevailed under the *Gilbert* standard. Conversely, the Burger Court would have ruled in favor of General Electric in *Gilbert*, even if the EEOC's guidance had been issued pursuant to a Title VII delegation of lawmaking authority. The employer and insurance reliance interests were powerful—and their treatment of pregnancy as unique was consistent with most government programs, a reliance feature that was

132. *See Gilbert*, 429 U.S. at 127, 145–46 (reversing a lower court decision and ultimately preserving existing insurance industry practices). Five years earlier, the Court had unsettled employer reliance interests when it recognized a disparate impact claim in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *Gilbert* reassured businesses that the Court would not expand upon *Griggs* when faced with strong corporate reliance. *Id.*

133. 467 U.S. 837 (1984).

134. *Id.* at 842–45, 865–66.

135. United States v. Mead Corp., 533 U.S. 218, 230 (2001).

136. 467 U.S. at 857–59.

the basis for the Court's earlier constitutional ruling in *Geduldig v. Aiello*.[137] Because the *Gilbert* Court, literally, did not believe that pregnancy exclusions discriminate "because of sex," the Court would have ruled that Congress in Title VII "directly addressed" the issue, and the EEOC's position would have lost under *Chevron* Step One. (Disagreeing with the Court on this point of law, the author of this Article considers both *Geduldig* and *Gilbert* "egregiously wrong": Discrimination on the basis of pregnancy directly harms women, and only women, and does so on the basis of a trait that is strongly gendered.[138])

Most cases where the Roberts Court has gone along with agency interpretations involved decisions supported by private or public reliance interests.[139] Conversely, agencies have usually lost when they have advanced novel constructions that upset significant private and public reliance interests, as exemplified in the recent COVID and EPA's Power Plant Cases.[140] Thus, academic fears that *Chevron* has enabled agency yo-yo'ing (flipping back and forth as administrations change)[141] are overstated. For example, the Court in *Epic Systems v. Lewis* overruled the NLRB's rule barring employers from insisting that unions agree to refer disputes to arbitration for wage and hour claims; the Court also enforced the contractual agreement that class or group claims not be allowed in arbitration.[142] The majority started with a baseline set against the agency, whose rule was a new one the Solicitor General declined to defend.[143] The employees were never able to

137. 417 U.S. 484 (1974) (upholding a state disability insurance program that excluded pregnancy-based leaves from work); *see Gilbert*, 429 U.S. at 132–35 (relying on *Geduldig*).

138. The point is not diluted by the facts that some women cannot become pregnant, and some men who were assigned female sex at birth might become pregnant. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that a race-neutral law applied overwhelmingly to Chinese merchants was unconstitutional race discrimination).

139. *E.g.*, HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2180–83 (2021); Sanchez v. Mayorkas, 141 S. Ct. 1809, 1813–14 (2021); Barton v. Barr, 140 S. Ct. 1442, 1447–48, 1454 (2020); Lorenzo v. SEC, 139 S. Ct. 1094, 1102 (2019); POM Wonderful v. Coca-Cola, 573 U.S 2228, 2237–39 (2014); *see also* Zenith Radio Corp. v. United States, 437 U.S. 443, 457–58 (1978) (invoking "substantial reliance interests" to reaffirm "longstanding administrative construction").

140. West Virginia v. EPA, 142 S. Ct. 2587 (2022); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021) (per curiam); *see also* Maine Cmty. Health Options v. United States, 140 S. Ct. 1308, 1316–19 (2020); Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222–24 (2018); FDA v. Brown & Williamson Corp., 529 U.S. 120, 143–59 (2000).

141. *See* Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92 (2021), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1083&context=dlj_online [https://perma.cc/CB8B-QC9A].

142. 138 S. Ct. 1612 (2018) (plurality opinion).

143. *Id.* at 1619–21.

surmount that anti-deference baseline, as the majority required a clear statement in the labor laws that would negate the requirements of the arbitration law. The dissenters reconciled the arbitration and labor laws differently but did not claim deference for the NLRB's interpretation.[144]

Epic Systems might also be a citation for the "major questions doctrine," where the Court presumes that Congress does not delegate authority for an agency to take initiatives that have vast social or economic consequences or fundamentally alter the statutory scheme or the regulatory regime of other statutes.[145] When the Court finds a "major question," it usually anti-defers: the agency's interpretation is rejected because regulated entities, courts, legislators, and administrators have relied on the baseline assumption that the agency could not make the big move under challenge.[146] The major questions doctrine has been applied to invalidate an innovative FCC rule substantially deregulating the nondominant carriers in the telephone industry,[147] the FDA rule breaking with decades of agency denial and regulating tobacco products,[148] the Department of Justice's unprecedented effort to preempt state laws allowing death-with-dignity,[149] HHS's surprising interpretation of public health law to impose a moratorium on evictions,[150] and the Obama EPA's Clean Power Plant Rules (although they were never implemented).[151] In *King v. Burwell*, a weak version of the major questions doctrine stripped the IRS of any claim to deference to its rule implementing the Affordable Care Act but the Court ultimately agreed with the agency, in large part to avoid "destabilizing" insurance markets that relied on the agency's interpretation.[152]

The major questions doctrine is controversial; it has not cogently been defended on textualism or originalism grounds, and its link to the nondelegation doctrine requires more explanation than has been

144. *Id.* at 1633–49 (Ginsburg, J., dissenting).

145. *Id.* at 1626–27. On the major questions doctrine, see Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); and Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777 (2017).

146. Sohoni, *supra* note 145, at 264.

147. MCI Telecomms. v. Am. Tel. & Tel., 512 U.S. 218, 231–32 (1994).

148. FDA v. Brown & Williamson Corp., 529 U.S. 120, 121–23 (2000).

149. Gonzales v. Oregon, 546 U.S. 243, 247 (2006).

150. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489–90 (2021) (per curiam).

151. West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022).

152. 576 U.S. 473, 492–93 (2015).

provided.[153] The most robust foundation for it is quasi-classic private, societal, and public reliance (precisely those interests dismissed in *Dobbs*). When Congress enacts statutes, it relies on the faithful enforcement of compromises and accommodations by agencies, to be enforced by courts if need be. Because dramatic agency expansion of regulatory regimes without legislative deliberation is considered illegitimate,[154] one can assume that regulated firms and parties rely on legislators rather than agencies to author big policy initiatives. Set against these reliance interests are the needs to adapt statutes to changed circumstances and to ensure the efficacy of the original legislative plan.

Indeed, agency initiatives involving major questions have survived when agencies can claim strong reliance credentials for their dynamic interpretations.[155] In *Babbitt v. Sweet Home Communities for a Great Oregon*,[156] for example, Justice Scalia assailed the Department of Interior for "national zoological [conscription]" victimizing "the simplest farmer" with a rule requiring private landowners to protect the habitat of endangered species.[157] Anticipating the major questions doctrine, Scalia maintained that the agency was disturbing long-established land use practices (hence, both private and state reliance interests) that had purposely been left alone in the 1973 statute, according to its sponsors' explanations (hence, congressional reliance).[158] Classic property-based reliance arguments like this would usually have prevailed in the Rehnquist Court but were undercut by the facts that the agency rule had already been in effect for more than twenty years, that Congress had relied on the rule when it amended the endangered species law to create an administrative process permitting landowners to carry out projects if they minimized habitat harm, and

153. *Compare* Sohoni, *supra* note 145, at 262–64 (criticizing the major questions doctrine as judicial activism), *with* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 168–77 (2010) (defending the major questions doctrine on the basis of the Eskridge-Frickey-Sager idea that it implements an underenforced constitutional norm).

154. *See e.g.,* Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2045–48 (2018).

155. *E.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 91–92 (2007); Kisor v. Wilkie, 139 S. Ct. 2400, 2421 (2019). *Compare* Massachusetts v. EPA, 549 U.S. 497, 530–32 (2007) (declining to apply the major questions doctrine because the agency's interpretation would not unsettle reliance interests), *with* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 323–24 (2014) (invoking the major questions doctrine because of the agency's interpretation of costs and consequential "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

156. 515 U.S. 687 (1995).

157. *Id.* at 714 (Scalia, J., dissenting).

158. *Id.* at 728–29; *cf.* Bruce Yandle, *Escaping Environmental Feudalism*, 15 HARV. J.L. & PUB. POL'Y 517 (1992) (discussing how Congress controls property rights through the EPA).

that the department was implementing the law only in a handful of compelling cases.[159] Under these circumstances, Justices O'Connor and Kennedy, westerners keenly sensitive to property rights, joined the Court's *Chevron*-deferential opinion. By 1995, reliance interests had shifted enough that even a property-protective Court was unwilling to dislodge a bold agency interpretation with significant economic consequences as a "major question" that was owed no deference.

The recent COVID Cases illustrate the interplay among *Chevron* deference, the major questions doctrine, and reliance interests. In *Biden v. Missouri*, the Roberts Court went along with HHS's COVID mandate protecting workers in hospitals receiving federal funds.[160] HHS had for decades been regulating the health and safety of hospital workers and patients. Because HHS's COVID mandate was an extension of earlier regulations, the Court dismissed the major questions argument accepted by four dissenting Justices.[161] Reliance interests cut the other way in the employer mandate case, *National Federation of Independent Businesses v. OSHA*.[162] Although OSHA was acting within the four corners of its statutory authorization when it found that the COVID-19 virus was a "toxic" agent in the workplace that posed a "grave danger" to workers' health, the 6-3 majority applied the major questions doctrine to demand a more specific congressional authorization.[163] Because OSHA had never claimed the authority to anchor a national health care campaign, the Chief Justice and Justice Kavanaugh agreed with the four *Missouri* dissenters that OHSA's mandate was "a claim of power to resolve a question of vast national significance" beyond the pay grade of the agency (and apparently the President).[164]

Although hailed as a revolutionary decision, the vaunted *Chevron* doctrine has done little work at the Supreme Court level. Before *Chevron* (prior to 1984), during its heyday (1995–2017), and after the appointment of Justice Gorsuch (2017)—when *Chevron* has become virtually uncitable—the Supreme Court's willingness to go along with agency interpretations has been driven not by deference doctrines but instead by the clarity of the statutory text and structure, the agency's comparative competence (via-a-vis the Court), and the

159. *See Sweet Home,* 515 U.S. at 700–01; Brief for the Petitioners, at 47–53, *Sweet Home*, 515 U.S. 687 (No. 94-859), 1995 U.S. S. Ct. Briefs LEXIS 288; *cf.* J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 244 (1990) (explaining that a green property law means that there is no individual absolute ownership in property because one must protect and preserve ecological and biological forms).

160. 142 S. Ct. 647, 652–53 (2022).

161. *Id.*

162. 142 S. Ct. 661 (2022) (per curiam).

163. *Id.* at 663–67.

164. *Id.* at 666; *id.* at 667 (Gorsuch, J., concurring).

nature and weight of reliance interests.[165] An agency inattentive to precise statutory language that makes a big move toward more liberal regulation disrupting private (industry) reliance is asking for trouble from the Roberts Court—worthy statutory goals such as saving the planet from meltdown notwithstanding. Regulatory moves that might succeed should be modeled on the Obama EEOC's liberal interpretation of Title VII to protect lesbian, gay, and transgender employees: the agency had good text-based and precedent-based arguments, big business not only offered no reliance-based resistance but supported the policy, and public opinion was overwhelmingly on board.[166] Note that the EEOC stance prevailed in *Bostock*, even though it was not eligible for *Chevron* deference, Trump's Solicitor General opposed it, and it potentially applied to dozens of other statutes.[167]

C. Constitutional Adverse Possession: No Surprises

Concurring in the Steel Seizure Case, Justice Robert Jackson created a classic framework for adjudicating the legality of presidential initiatives.[168] First, if the executive action relies on a congressional authorization, the "burden of persuasion would rest heavily upon any who might attack it."[169] Second, if the action is in that "zone of twilight" for possibly concurrent authority, legislative "quiescence" in repeated presidential assertions of authority could justify interpreting Article II expansively.[170] Third, if the executive action is inconsistent with a statute, "his power is at its lowest ebb," and the Court should review it carefully, lest the President disturb the constitutional "equilibrium."[171]

The Jackson framework incorporates public reliance interests into the Court's separation of powers jurisprudence.[172] In some cases, the Court has applied the Jackson framework to strike down presidential initiatives that went beyond anything the President had

165. Eskridge & Baer, *supra* note 124 (statistical analysis, 1984–2006).

166. *See* Tessa M. Register, *The Case for Deferring to the EEOC's Interpretations in* Macy *and* Foxx *to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 IOWA L. REV. 1397 (2017).

167. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

168. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); *see* Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 619–20 (2018); Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 265–66 (2010).

169. *Youngstown*, 343 U.S. at 635–37 (Jackson, J., concurring).

170. *Id.* at 637.

171. *Id.* at 637–38.

172. Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 87–90 (2002).

previously attempted, hence negating any claim of congressional "quiescence."[173] On the other hand, when the President has repeatedly acted upon an implied power, without congressional pushback, the Court has allowed adverse possession in the "zone of twilight."[174] In *NLRB v. Noel Canning*, for example, the Court sustained the President's expansive reading of the Recess Appointments Clause, justified by past presidential practice without sufficient congressional resistance.[175] The Court's practice has been subjected to cogent critique. Professors Swaine and Prakash, as leading examples, observe that the President's first-mover advantage and Congress's difficulty in passing statutes (especially those subject to presidential veto) create a one-way constitutional rachet that aggrandizes the President.[176] However the Court sets the bar, it is undeniable that public reliance, along Jackson's lines, has been a powerful reason for the expanding powers of the President.

Conversely, in congressional power cases, the Court has cast a skeptical eye on statutes that create novel limits on the President's "take Care" power to faithfully execute the law. "Perhaps the most telling indication of [a] severe constitutional problem" with a congressionally established agency structure "is [a] lack of historical precedent" for it.[177] Unprecedented arrangements that limit presidential authority over agency officials and that aggrandize Congress have been invalidated repeatedly by the Court.[178] The exception that proves the rule is *Morrison v. Olson*, which upheld a Watergate-era law authorizing the court appointment of an independent counsel to prosecute wrongdoing within the executive branch.[179] Justice Scalia's dissent defended the traditional executive monopoly on criminal prosecutions.[180] Scalia's historical reliance arguments have enjoyed a growing audience of admirers—and the

173. *See* Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2026 (2020); Medellin v. Texas, 552 U.S. 491 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 638–39 (2006) (Kennedy, J., concurring in part); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 172–73 (1999).

174. *E.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 1–16 (2015); Dames & Moore v. Regan, 453 U.S. 654, 660–62, 668–69 (1981); *see* Haig v. Agee, 453 U.S. 280, 287–88 (1981).

175. 573 U.S. 513, 538–50 (2014) (allowing recess appointments, but not in the case at hand where the Senate recessed for only three days at a time); *see also* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020).

176. SAIKRISHNA PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020); Swaine, *supra* note 168, at 269–73.

177. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 497, 505 (2010) (quoting then-Judge Kavanaugh's dissent in the D.C. Circuit opinion, 537 F.3d 667, 699 (D.C. Cir. 2008)); *see also* NFIB v. Sebelius, 567 U.S. 519, 549 (2012) (plurality opinion).

178. *E.g.*, *Seila Law*, 140 S. Ct. 2183; Bowsher v. Synar, 478 U.S. 714 (1986).

179. 487 U.S. 654 (1988).

180. *Id.* at 697–734 (Scalia, J., dissenting).

Roberts Court treats *Morrison* as an outlier precedent, to be read narrowly, if mentioned at all.[181]

The ObamaCare Case, *National Federation of Independent Business v. Sebelius*,[182] is an even more dramatic example of the constitutional bite suffered by Congress when it innovates rather than relies on established practice. At issue was whether Congress had the authority to mandate that all qualified adults secure health insurance and to cut off all Medicaid funds to states that did not expand their programs to provide significant new benefits. Chief Justice Roberts (who delivered the judgment of the Court) and four Justices in a joint dissent rejected the Commerce Clause basis for the mandate, essentially because the federal government had never, in their view, required people to enter a market so that the government could regulate it better.[183] Joined by four Justices concurring in part, Roberts delivered an opinion for the Court upholding the mandate because it could plausibly be treated as a "tax," and there were plenty of examples where Congress had acted under the Taxing and Spending Clause to tax a taxpayer's inaction or failure to do something.[184]

Reliance was even more central to the Court's treatment of ObamaCare's incentive for states to expand their Medicaid programs. Chief Justice Roberts, joined by two other Justices and agreeing with the four joint dissenters, delivered a judgment for the Court that the statute's "coercive" conditioning of all existing Medicaid funds on state expansion to Medicaid was so far removed from any conditional funding Congress had ever adopted that it "accomplishe[d] a shift in kind, not merely degree," and therefore, it was an unconstitutional surprise sprung upon the states, which could "hardly anticipate" that Congress would "transform" the program "so dramatically."[185] Justices Ginsburg and Sotomayor agreed with the Chief Justice that Congress's spending power "does not include surprising participating States with post-acceptance or 'retroactive' conditions"[186] but sharply dissented from the claim that the states were not on notice that Medicaid was subject to dramatic expansion, such as occurred with ObamaCare.[187] Notice that

181. *See Seila Law,* 140 S. Ct. at 2199–2201 (narrowly reading *Morrison*).

182. 567 U.S. 519 (2012).

183. *Id.* at 583 (Roberts, C.J.); *id.* at 647–49 (joint dissent).

184. *Id.* at 573–74 (Roberts, C.J., delivering the opinion of the Court on this issue).

185. *Id.* at 579–84 (Roberts, C.J., delivering the judgment of the Court); *id.* at 684 (joint dissent) ("[T]he offer that the ACA makes to the States . . . is quite unlike anything that we have seen in a prior spending-power case.").

186. *Id.* at 637 (Ginsburg, J., concurring in part) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24–25 (1982)).

187. *Id.* at 637–41.

the debate focused on whether state reliance interests were unduly sacrificed by the ObamaCare Medicaid conditions.

The doctrinal takeaway from the Court's disposition of the constitutional claims in the ObamaCare Case is that the states and regulated industries can plan their regulation and affairs and, in doing so, can rely on the assumption that Congress cannot engage in new forms of Commerce Clause regulation or dramatically expand upon its previous deployment of the Tax and Spending Clause. The meta-point of the case, and one that links it tightly to the Steel Seizure Case is this: No constitutional surprises!

D. Severability

The Chief Justice's plurality opinion in the ObamaCare Case concluded that the unconstitutional Medicaid condition was severable from the remainder of the statute.[188] The challengers and the joint dissent argued that the entire statute had to be invalidated once the Medicaid funding or other important features were found unconstitutional. Speaking also for the four Justices concurring in part, Roberts framed the issue as "whether Congress would have wanted the rest of the Act to stand" had it known that states would not be severely pressured to accept Medicaid expansion: "Unless it is 'evident' that the answer is no, we must leave the rest of the Act intact."[189]

As this analysis illustrates, reliance plays a double role in the Court's severability doctrine. The central inquiry is pure reliance: Did Congress rely so much on the invalidated provision(s) that it would not have wanted the statute to survive without it? How much reliance did the enacting Congress place on the invalid provision? Was it a keystone of the statute, or just bricks whose removal would leave the structure intact? The plurality felt that the enacting Congress would have been disappointed that all the states were not effectively required to participate in the Medicaid expansion but would still have wanted the statute to operate.[190]

A more subtle reliance feature is equally important. Consistent with prior case law, the Chief Justice put a thumb on the scale of the severability inquiry: Only if it were "evident" that Congress would have felt the entire effort was wasted should the Court refuse to sever the

188. *Id.* at 587–88 (Roberts, C.J., speaking for a plurality). Because Justices Ginsburg and Sotomayor did not believe the Medicaid provision was unconstitutional, there was a Court majority for the proposition that the Affordable Care Act survived.

189. *Id.* at 587 (citing Champlin Refining Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 234 (1932)).

190. *Id.* at 587–88.

unconstitutional provision.[191] This presumption favoring severability rests upon an assumed congressional intent (public reliance) and the planning that institutions and citizens had already invested in the statutory scheme (private and societal reliance).[192] ObamaCare was a once-in-a-generation statute that Congress spent the better part of two years working on—and millions of Americans and thousands of administrators had engaged with. Although reliance is rarely as pronounced as in this instance, the Court almost always finds unconstitutional provisions severable from extensive statutory regimes.

A recent exception is *Murphy v. National Collegiate Athletic Ass'n*.[193] The Professional and Amateur Sports Protection Act made it unlawful for a state to "authorize" sports gambling schemes.[194] The Supreme Court struck down this provision on the ground that it "commandeered" state legislatures in violation of the Tenth Amendment and the "dual sovereignty" embedded in the constitutional structure.[195] Because the invalid provision was the central point of the congressional scheme, the Court found it "evident" that Congress had centrally relied on this provision and would not have wanted the enfeebled law to survive.[196] Writing for three dissenters, Justice Ginsburg cast the Court's doctrine in particularly strong reliance terms: "When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation."[197]

E. Indian Law: Rights and Authority of Native Tribes

Cases interpreting statutes and treaties relating to Indigenous peoples ("Indian law") are an important, even if long-undervalued, portion of the Supreme Court's docket.[198] Because they are usually embedded in a rich and controversial history, these tend to be cases where reliance interests loom large but may be selectively invoked. For

191. *Id.*

192. Indeed, the Court has also framed the inquiry even more pragmatically: Would the statute remain "fully operative" without the offending provision? Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 509 (2010) (quoting New York v. United States, 505 U.S. 144, 186 (1992)).

193. 138 S. Ct. 1461 (2018).

194. 28 U.S.C. § 3702(1).

195. *Murphy*, 138 S. Ct. at 1475–77, 1479, 1481–82.

196. *Id.* at 1481–82.

197. *Id.* at 1489 (Ginsburg, J., dissenting).

198. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Federal Public Law*, 132 HARV. L. REV. 1787 (2019) (arguing that Federal Indian Law cases can provide an additional paradigm for public law).

example, long-standing practice usually prevails when the Court adjudicates issues involving Tribal and state jurisdiction over taxation and criminal prosecutions.[199] In *Oklahoma v. Castro-Huerta*, the issue was whether states could prosecute non-Indians for crimes committed on Native reservations.[200] The majority and dissenting opinions sharply disagreed as to which precedents had induced the deepest public as well as private reliance. At issue was what to make of Chief Justice Marshall's famous opinion in *Worcester v. Georgia*, which held that only the federal government or the sovereign Tribes could prosecute crimes committed on Tribal reservations.[201] In dissent, Justice Gorsuch argued that the relevant statute had to be read in light of *Worcester*.[202] Relying on *Worcester* as settling that issue, Congress adopted the General Crimes Act of 1834 to provide for federal prosecution of such crimes, supplementing Tribal jurisdiction.[203] For the Court, Justice Kavanaugh responded that *Worcester* had been limited by subsequent precedents that established a new reliance baseline: States have plenary authority over all land and people within their borders, except where limited by the Supremacy Clause.[204] Gorsuch replied with Supreme Court decisions following the *Worcester* rule that Tribes retain quasi-sovereign status, subject to congressional regulation, such as the General Crimes Act.[205]

Also making regular appearances on the Supreme Court's docket are cases where Tribal treaty rights are challenged. In the leading case, *Minnesota v. Mille Lacs Band of Chippewa Indians*, the State argued that the United States had abrogated an 1837 Treaty with the Chippewa Indians.[206] Under the terms of this treaty, the Tribe had ceded land in present-day Wisconsin and Minnesota to the United States, which in turn had guaranteed hunting, fishing, and gathering rights on the land to the members of the Tribe.[207] Minnesota argued

199. *E.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); *see* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 28–57, 58–63 (1999). *See generally* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006) (explaining the "characteristic[s] of settler colonialism" as including strategies to replace Indigenous communities).

200. 142 S. Ct. 2486, 2489 (2022).

201. 31 U.S. 515, 561 (1832).

202. *Castro-Huerta*, 142 S. Ct. at 2505–07 (Gorsuch, J., dissenting).

203. *Id.* at 2507; 18 U.S.C. § 1152.

204. *Castro-Huerta*, 142 S. Ct. at 2493–94 (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962), and providing several other examples).

205. *Id.* at 2513–18 (Gorsuch, J., dissenting); 18 U.S.C. § 1152.

206. 526 U.S. 172, 172 (1999).

207. *Id.* at 175–76.

that the Native persons had lost these rights through an 1850 Executive Order, an 1855 Treaty, and the admission of Minnesota into the Union in 1858.[208] A divided Court rebuffed all those arguments, essentially holding that the Chippewa were entitled to rely on treaty promises unless and until Congress explicitly revoked them.[209] As a matter of doctrine, the Court held that because Tribes relied on treaty promises, both the 1837 and 1855 treaties should be interpreted liberally in favor of Native peoples and, therefore, construed as they would have understood the treaties' terms.[210] More generally, the Court held that Congress could abrogate Tribal treaty rights but "must clearly express its intent to do so."[211]

In *Solem v. Bartlett*, for a final example, the Burger Court created a three-part test to determine congressional intent to disestablish treaty-based Tribal "reservation" rights: subsequent federal statutes, the "contemporaneous understanding" of those laws, and "the subsequent understanding of the status of the reservation and the pattern of settlement there."[212] The second and third factors explicitly entail public and private reliance interests. The Rehnquist Court invoked classic reliance by White settlers as "a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."[213]

There are fairness problems with this line of cases, which allow violent White usurpation of Tribal land to displace treaty-based rights of Indigenous peoples. Indeed, Indian law, viewed historically, is a black hole in the claim that the Supreme Court respects reliance interests, especially those classic contract-based reliance interests that *Dobbs* said were cognizable.[214] The Roberts Court, however, has disrupted this pattern and has recently imposed a stricter textual requirement before parties can prevail on a disestablishment claim.[215] In *McGirt v. Oklahoma*, the Court refused to find that Congress had disestablished

208. *Id.* at 176.

209. *Id.* at 188–208.

210. *Id.* at 200.

211. *Id.* at 202–03 (citation omitted) (citing United States v. Dion, 476 U.S. 734, 738–40 (1986)).

212. 465 U.S. 463, 470–72 (1984); McGirt v. Oklahoma, 140 S. Ct. 2452, 2485 (2020) (Roberts, C.J., dissenting) (citing *Solem*, 465 U.S. at 463, 470–472).

213. Hagen v. Utah, 510 U.S. 399, 421 (1994); *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 354–57 (1998) (reasoning that the high proportion of White settlers on the previously Indian lands indicates diminishment).

214. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2276–77 (2022).

215. Nebraska v. Parker, 577 U.S. 481, 490–94 (2016).

reservations recognized repeatedly by treaties with the Creek Nation.[216] The Chief Justice's dissenting opinion invoked decades of reneging on treaty obligations by the federal government—upending Tribal reliance with nary a peep from the Supreme Court—as a reason to unilaterally revoke the treaties altogether.[217] The Chief Justice found societal and public (state) reliance weighty—precisely the reliance interests the *Dobbs* majority dismissed.[218]

F. Continuity or Stabilizing Canons

Like constitutional interpretation, statutory interpretation presumes that the baseline is the legal status quo. Legislators voting on bills that become law, people subject to those laws, and administrators who implement them presumptively read them in light of well-established language conventions, public law norms, and statutory policies. That presumed baseline is especially powerful when people, society, and institutions have demonstrably relied on that legal status quo and flipping it would be a costly disruption.

Many interpretive canons of construction reflect a commitment to continuity in legal terms, obligations, and norms.[219] Justice Scalia and Professor Garner identified a handful of "stabilizing canons,"[220] but in fact there are dozens of "continuity canons" justified and typically applied with close attention to reliance interests. This Section will examine six clusters of continuity canons: (1) common-law canons; (2) constitutional avoidance, including the rule of lenity; (3) federalism canons, the most robust of the other constitutionally inspired clear statement rules; (4) legislative process canons; (5) whole code rules; and (6) some of the linguistic canons.

1. Common-Law Canons

"Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar

216. 140 S. Ct. 2452, 2482 (2020).

217. *See id.* at 2482–86 (Roberts, C.J., dissenting).

218. *Compare id.* at 2500–02 (dissenters arguing that recognition of the Creek reservation would unsettle a century of state and private reliance), *with id.* at 2481 (the majority's response that reliance interests remain to be demonstrated).

219. David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1390 (2005); *see also* John F. Manning, *Continuity and the Legislative Design*, 79 NOTRE DAME L. REV. 1863, 1874–81 (2004) (explaining Professor Shapiro's argument that canons serve values "inspired if not required by the Constitution").

220. SCALIA & GARNER, *supra* note 51, at 318–39.

principles."[221] These "familiar principles" are ones that people and institutions have presumably relied on for ages and that legislative drafters and staff would normally take for granted.[222] For example, in *Sekhar v. United States*, the Supreme Court invoked common-law extortion as a justification for narrowly interpreting the federal extortion law.[223] "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," Justice Scalia wrote for the Court, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word."[224]

A version of the common-law canon has played a big role in the right to privacy cases: Today, more than ever before, the Supreme Court is reluctant to find constitutional protection for "liberties" that were not protected by the common law. For examples, Justice Kennedy's opinion for the Court in the 2003 Texas sodomy case[225] and Chief Justice Rehnquist's opinion for the Court in the 1997 Washington aid-in-dying case relied heavily on the common law to define more precisely liberties that had been traditionally protected in the Anglo-American tradition.[226] More controversially, Justice Alito's opinion in *Dobbs* observed that the common law made abortion a felony after "quickening" (around the middle of a pregnancy)—but he speculated that the common law did not approve of abortions before that point.[227] Indeed, he teased out of the common law what he dubbed a "proto-felony-murder rule," whereby a physician who knowingly caused a mother to miscarry could be guilty of murder, without mention of the

221. Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)), *quoted in* Baker Botts LLP v. ASARCO LLC, 576 U.S. 121, 126 (2015); *see* Anita Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608 (2022); ESKRIDGE, *supra* note 62, at 345–50 (providing an example of the common-law canon's application and citing decisions applying the canon).

222. *See, e.g.*, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1846 n.4 (2020) (explaining that it is appropriate to look to common-law principles for statutory interpretation of certain terms); Universal Health Servs., Inc. v. United States, 579 U.S. 176, 187–88 (2016) (using common-law understandings of "fraud" to interpret the statutory meaning of "fraudulent"); ESKRIDGE, *supra* note 62, at 60–61, 431 n.185 (citing pre-2016 decisions); *see also* SCALIA & GARNER, *supra* note 51, at 320–21 ("[W]ords undefined in a statute are to be interpreted and applied according to their common-law meanings.").

223. 570 U.S. 729 (2013); Krishnakumar, *supra* note 221.

224. *Sekhar*, 570 U.S. at 733 (quoting Morissette v. United States, 342 U.S. 246, 263 (1952)).

225. Lawrence v. Texas, 539 U.S. 558, 567–70 (2003) (finding that the common-law crime against nature was not targeted at same-sex intimacy, nor did it apply to private conduct between consenting adults).

226. Washington v. Glucksberg, 521 U.S. 702, 709–14 (1997) (detailed reliance on the common law's harsh treatment of "assisted suicide"); *cf.* Cruzan v. Director, 497 U.S. 261, 276–78 (1990) (opining that the common law of informed consent would support a freedom to decline medical treatment).

227. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2249–50 (2022).

status of the fetus.[228] Because these cases and precepts were reported in Blackstone, the Court further speculated the colonies were aware of the common-law practice and prosecuted abortion cases without mention of quickening.[229] (In the author's view, the Court should be reluctant to ground constitutional analysis of women's rights on speculations and suppositions based on older common-law rules and especially those suggested by Blackstone, who famously opined that the "crime against nature," the common-law foundation for consensual sodomy laws, was of a " 'deeper malignity' than rape."[230])

Elsewhere, the role of the common law is less controversial, especially where the common law has evolved in response to modern society. In these instances, common-law doctrines—criminal law defenses, civil immunities, contract and tort rules, and so forth—are often adopted as gap-fillers to supply the details for open-textured statutory schemes.[231] Because federal statutes usually do not say whether they apply outside the United States, courts fill the gap with the common-law canon against extraterritoriality.[232] Another example is the American common-law rule against fee-shifting: Courts will not award counsel fees to the prevailing party without explicit statutory authorization.[233] The Court has applied the canon to interpret fee-shifting laws most narrowly.[234]

2. The Rule of Lenity & Constitutional Avoidance

Grounded in constitutional due process and nondelegation norms, the rule of lenity says that freedom from culpability and incarceration should be the presumptive baseline when courts interpret

228. *Id.* at 2250–51.

229. *Id.* at 2251–52.

230. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215 to support the criminalization of consensual sodomy, the modern version of the old crime against nature).

231. *See, e.g.*, Cummings v. Premier Rehab Keller, PLLC, 142 S. Ct. 1562, 1571–76 (2022) (applying contract common law to federal funding); McDonough v. Smith, 139 S. Ct. 2149, 2156 (2019) (applying common-law tort principles to an accrual question); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1398–99 (2018) (analyzing whether to allow common-law action under the Alien Tort Statute); Manuel v. City of Joliet, 580 U.S. 357, 370–71 (2017) (applying common-law tort principles to an accrual question); ESKRIDGE, *supra* note 62, at 431–45 nn.185–205 (citing pre-2016 decisions applying common-law canons).

232. SCALIA & GARNER, *supra* note 51, at 268–72; *see* ESKRIDGE, *supra* note 62, at 351–53, 432 nn.188–189 (citing recent Supreme Court decisions applying this rule).

233. *E.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270–71 (1975); ESKRIDGE, *supra* note 62, at 340–42, 433 n.197 (citing recent decisions applying the rule against fee-shifting).

234. *See, e.g.*, Baker Botts LLP v. ASARCO LLC, 576 U.S. 121, 135 (2015); ESKRIDGE, *supra* note 62, at 433 n.198 (citing pre-2015 decisions interpreting fee-shifting statutes narrowly).

criminal statutes.[235] People ought to be able to plan their lives secure in the knowledge that the criminal sanction will not be visited upon them unless the legislature has, after public deliberation, condemned their conduct and given them reasonable notice that their conduct is illegal. As in *Sekhar*, the rule of lenity sometimes interacts with the presumption of common-law meaning; the same idea underwrites the canon presuming that criminal statutes require mens rea (a culpable state of mind).[236]

The broader lesson is the one suggested by Justice Holmes: Judges will be more inclined toward lenity when a criminal law regulates malum prohibitum, namely conduct that is not widely condemned by society and institutions (as opposed to malum in se, conduct considered to violate long-standing social norms).[237] Reliance interests are relevant to the malum in se/malum prohibitum distinction. In *Van Buren v. United States,* for example, a police officer who ran a license plate search (for private gain) through his police computer was convicted of obtaining "information in [a] computer that the accesser is not entitled so to obtain."[238] Hyperfocusing on the adverb "so" and reading "entitled" generously, the Court's opinion limited the criminal sanction to accessing information specifically forbidden to the individual and not to cover accessing information the individual was not authorized to access. Although the majority pointedly declined to invoke the rule of lenity, its clinching argument was that "the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer

235. *See* Wooden v. United States, 142 S. Ct. 1063, 1081–87 (2022) (Gorsuch, J., concurring) (applying the rule and referring to it as "a means for upholding the Constitution's commitments to due process and the separation of powers"); United States v. Davis, 139 S. Ct. 2319, 2333 (2019) (applying the rule to narrow the interpretation of a criminal statute); ESKRIDGE, *supra* note 62, at 332–37, 430 n.169 (citing pre-2016 decisions applying the rule of lenity); SCALIA & GARNER, *supra* note 51, at 296–302 (describing the rule of lenity and its applications). *See generally* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

236. *See* Morissette v. United States, 342 U.S. 246, 251–53 (1952) ("[E]ven if their enactments were silent on [mens rea], their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation."); ESKRIDGE, *supra* note 62, at 350–51, 430 n.172 (citing pre-2016 decisions applying mens rea canon); SCALIA & GARNER, *supra* note 51, at 303–12 (explaining the mens rea canon and its applications by the Supreme Court).

237. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 43–44 (1881).

238. 141 S. Ct. 1648, 1649 (2021) (quoting 18 U.S.C. § 1030(e)(6)).

activity."[239] This is a super-charged version of the Holmes admonition that mala prohibita need to be clearly articulated in a punitive statute.

Van Buren also noted but declined to invoke the rule of constitutional avoidance, namely, to interpret ambiguous laws to avoid "serious constitutional difficulties."[240] This "modern" understanding of the avoidance doctrine has been widely applied by judges and almost as widely criticized by academics, on the ground that it encourages judges to engage in "stealth constitutionalism" to rewrite statutes with unjustified quasi-constitutional sentiments.[241] Moreover, congressional staff seem unaware of modern avoidance, though they do assume that the statutes they draft will not be ruled unconstitutional—the "classic" version of the avoidance doctrine, which raises fewer problems.[242]

Nonetheless, reliance interests can sometimes provide support for modern avoidance. An example is *McDonnell v. United States*, overturning the federal bribery conviction of a former governor.[243] The Court held that the governor's providing insider information, hosting meetings with officials, and lobbying in return for valuable gifts had not constituted "official acts" under the bribery law.[244] Drawing from briefs submitted by six former Virginia Attorneys General and thirteen former high-level federal officials, the Court observed that "conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time. The basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns."[245] Both constituents and their elected officers rely on a great deal of informal request-and-response that would

239. *Id.* at 1661; *accord* Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596 (2003) (anticipating the majority's policy analysis).

240. NLRB v. Cath. Bishop, 440 U.S. 490 (1979); *see, e.g.,* United States v. Palomar-Santiago, 141 S. Ct. 1615, 1622 (2021); Nielsen v. Preap, 139 S. Ct. 954, 971–72 (2019); Lucia v. SEC, 138 S. Ct. 2044, 2057–59 (2018); Jennings v. Rodriguez, 138 S. Ct. 830, 836 (2018); ESKRIDGE, *supra* note 62, at 317–22, 425–26 n.135 (citing pre-2016 decisions); SCALIA & GARNER, *supra* note 51, at 247–51.

241. Eskridge & Frickey, *supra* note 54, at 81–87; *see* Skilling v. United States, 561 U.S. 358 415, 422–24 (2010) (Scalia, J., concurring in the judgment).

242. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 948 (2013); John Copeland Nagle, Delaware & Hudson *Revisited*, 72 NOTRE DAME L. REV. 1495 (1997) (supporting classic avoidance, but sharply critical of modern avoidance).

243. *See* 579 U.S. 550 (2016).

244. *Id.* at 572–77.

245. *Id.* at 575; *see* Brief for Former Virginia Attorneys General as Amici Curiae in Support of Petitioner, at 1–2, 14–17, *McDonnell*, 579 U.S. 550 (No. 15-474), 2016 WL 878849; Brief of Former Federal Officials as Amici Curiae in Support of Petitioner at 17–22, *McDonnell*, 579 U.S. 550 (No. 15-474), 2016 WL 878849.

be unsettled by a broad reading of the bribery law. "Officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse."[246]

Notwithstanding the rule of lenity, the Supreme Court upholds most criminal convictions, especially those for conduct the majority considers malum in se. In some of the closer calls for the government, reliance interests have been decisive. In *Muscarello v. United States*, the 5-4 Court upheld the sentence enhancement for defendants who "carrie[d] a firearm" to the crime in the glove compartment and trunk of their cars.[247] Dissenters argued that "carrie[d] a firearm" should be limited to having a gun on your person, namely, "packing heat."[248] The Solicitor General responded that most state "carry-gun" laws applied to carrying in your car, and so gun owners had actually been aware of the broader interpretation.[249] Moreover, a 1986 federal law allowed people to "transport" guns across state lines (in their cars) without violating local carry-gun laws, so long as the guns originated in and ended up in states that allowed such automotive carrying.[250] Congressional reliance on carry-gun laws and the likely understanding of "carrie[d] a firearm" by gun owners constitute the best case for the *Muscarello* majority. (The author of this Article was originally persuaded that "carrying a firearm" was aptly limited to "packing heat"—until he discovered the private, societal, and public reliance points. This knowledge persuaded him that the majority was correct, albeit for reasons it did not recognize.)

3. Clear Statement Rules: Federalism Canons

Some clear statement rules assertedly rest upon public reliance interests: legislators and their staffs assume that general statutory language will not be read to disrupt established public policy.[251] Scholars have empirically refuted this assumption: congressional drafting staff cannot identify most clear statement rules, and do not

246. *McDonnell,* 579 U.S. at 575.

247. 524 U.S. 125, 127–31.

248. *Id.* at 139–50 (Ginsburg, J., dissenting).

249. Brief for the United States at 34–40, *Muscarello*, 524 U.S. 125 (No. 96-1654), 1998 WL 84393.

250. William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1797–98 (2021).

251. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

approve of giving courts a roving authority to import their concepts of public policy into statutes.[252]

The big exception to congressional ignorance or indifference is the federalism canons, which scholars have criticized for supplanting legislative policies with judicial ones.[253] Nevertheless, Legislative Counsel for the House and Senate, the Congressional Research Service, and committee staffs are aware of the federalism canons and consider them when drafting statutes.[254] Congressional reliance dovetails with state reliance to give special status to the canon against preemption: Where a statute relates to a field which "the States have traditionally occupied," the Supreme Court starts with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[255] Fields the states have traditionally occupied are precisely those fields where classic private reliance is most pronounced: property, contracts, family law, and the law of crimes.[256] As the Court put it in *Alabama Ass'n of Realtors*: "Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[257]

4. Legislative Process, Critter Canons, and Legislative Ratification

Derived from the difficult Article I, Section 7 process for enacting statutes, some canons presume that Congress does not intend larger departures from the status quo than clearly marked by the statutory

252. *See* Victoria F. Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 601–05 (2002); Gluck & Bressman, *supra* note 242, at 945–46.

253. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Shapiro, *supra* note 219, at 958.

254. JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2019); Gluck & Bressman, *supra* note 242, at 942–44.

255. Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947); *e.g.,* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); Arizona v. United States, 567 U.S. 387, 399–400 (2012); Wyeth v. Levine, 555 U.S. 555, 565 (2009); ESKRIDGE, *supra* note 62, at 322–27, 428 n.156 (citing other recent decisions); SCALIA & GARNER, *supra* note 51, at 290–94.

256. *See* Erin Smith, Legis. Couns., Tex. Legis. Council, Federal and State Preemption Basics: What Every Drafter Ought to Know, Address at the National Conference of State Legislators (July 12, 2016) (documenting antipreemption clauses in many federal statutes).

257. 141 S. Ct. 2485, 2490 (2021) (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020)); *see* McDonnell v. United States, 579 S. Ct. 550, 576 (2016); Bond v. United States, 572 U.S. 844, 860 (2014); Gonzales v. Oregon, 546 U.S. 243, 274 (2006); ESKRIDGE, *supra* note 62, at 322–27, 428 n.156 (citing pre-2014 decisions).

language, plan, and structure.[258] This process, whereby the Framers expected most problems not to result in national legislation or, at most, in moderate solutions, is the most cogent foundation for the nondelegation canons such as the rule of lenity and the major questions doctrine, both discussed earlier.[259] The constitutional meta-assumption is that Americans can rely on state and local law to regulate most of their activities, but when national regulation occurs, We the People will be on notice.

Within the Court, a less controversial continuity canon deriving from Article I, Section 7 is the strong presumption against implied repeals.[260] There is no empirical evidence that legislators dislike implied repeals, and it is not clear that this is demanded by the rule of law. The best justification is the Article I, Section 7 bias in favor of continuity, which in most instances protects against disruption of long-standing public and private reliance. The leading case is *Morton v. Mancari*, where the Court held that Title VII's antidiscrimination rule did not foreclose the long-standing statutory preference favoring Native peoples for positions with the Bureau of Indian Affairs.[261] Disruption of this preference would not only have required the Bureau to revamp its personnel policies but it also would have had ripple effects on Native persons and on the statutory scheme for Tribal self-governance.

A similar precept underwrites the less well-known "critter canons," namely, the presumption that Congress does not hide elephants in mouseholes and the canon of canine silence.[262] The former presumes that legislators don't intend for minor statutory provisions to be read to make big changes in the status quo.[263] Many legislators may want elephants in mouseholes they enact, but the Article I, Section 7 baseline blocks them. This canon is a sibling to the major questions doctrine discussed earlier.[264] A cousin is the dog-does-not-bark rule, which suggests that, if a big change in the status quo did not surface in

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258. *See* THE FEDERALIST NOS. 48–51 (James Madison); William N. Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

259. Eskridge & Ferejohn, *supra* note 258.

260. ESKRIDGE, *supra* note 62, at 323–24, 427 n.151 (citing recent Supreme Court decisions); SCALIA & GARNER, *supra* note 51, at 327–34.

261. 417 U.S. 535, 554–55 (1974). For recent cases, see, for example, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007).

262. The term comes from Christopher Lynch, who wrote a Yale Law School paper for me on the "Critter Canons."

263. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring); Gonzales v. Oregon, 546 U.S. 243, 267 (2006); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).

264. *See* Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes,* 62 ADMIN. L. REV. 19 (2010).

the legislative deliberations (the dog did not bark), it is doubtful that Congress meant to introduce a discontinuity (so no disturbance in the status quo).[265]

Most controversial today are legislative history canons, presuming that ambiguous statutes should be interpreted consistent with reliable representations made in committee reports, sponsor statements, and floor debate.[266] The Court finds it hard to deny its utility when such history demonstrates that Congress has relied on a point of law.[267] Recall *Sweet Home*.[268] Arguing that the Endangered Species Act of 1973 did not regulate private activities endangering habitats of endangered species, Justice Scalia's dissent quoted Senate and House sponsors' explanations suggesting that the enacting coalition relied on eminent domain and government program provisions to protect those habitats.[269] Justice Stevens' majority opinion replied with conference evidence that Congress relied on the administrative rule imposing habitat-protective duties on private landowners when it amended the law in 1982.[270] All nine Justices agreed that legislative history could be evidence of public reliance.

A recent example is *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[271] HUD had interpreted the Fair Housing Act of 1968 to authorize claims for rental policies having a disparate race-based impact, and the courts of appeals had upheld the rule.[272] When Congress amended the law in 1988, it not only left the relevant statutory language unchanged (weakly suggesting acquiescence) but also rejected a proposal to exclude disparate impact liability[273] and added new provisions building from the assumption of disparate impact liability,[274] actions strongly suggesting congressional

265. Chisom v. Roemer, 501 U.S. 380, 396 & n.23 (1991); Anita S. Krishnakumar, *The Sherlock Holmes Canon*, 84 GEO. WASH. L. REV. 1, 41–42 (2016); John Paul Stevens, *Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1382 (2005).

266. *See* Digit. Realty Tr. Co. v. Somers, 138 S. Ct. 767, 782–83 (2018) (Sotomayor, J., concurring); ESKRIDGE, *supra* note 62, at 191–250, 422–24 nn.113–27 (citing recent decisions); ROBERT A. KATZMANN, JUDGING STATUTES (2015). *But see* SCALIA & GARNER, *supra* note 51, at 369–91 ("exposing" these canons as "falsehoods").

267. *E.g.*, *West Virginia*, 142 S. Ct. at 2602; Wooden v. United States, 142 S. Ct. 1063, 1072–74; Unicolors, Inc. v. H&M Hennes & Mauritz, L.P., 142 S. Ct. 941, 948 (2022); *Digital Realty,* 138 S. Ct. at 776–78; Carr v. United States, 560 U.S. 438, 557–58 (2010); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901 (2011).

268. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

269. *Id.* at 727–28 (1995) (Scalia, J., dissenting).

270. *Id.* at 707–08 (Stevens, J.).

271. 576 U.S. 519 (2015).

272. *Id.* at 527–28.

273. *Id.* at 535–36.

274. *Id.* at 537–38.

reliance on and ratification of the agency rules. In contrast, *Bostock* rejected arguments based on congressional acquiescence or ratification, because the 1991 Amendments and their legislative history liberalized Title VII consistent with the EEOC and Supreme Court rule against prescriptive sex stereotyping in the workplace.[275]

As illustrated by *Bostock*, the post-2017 Roberts Court is less likely to consider legislative evidence,[276] which I believe to be a methodological mistake. In *Oklahoma v. Castro-Huerta*, the issue was whether the General Crimes Act of 1834 preempted state prosecution of non-Native persons for crimes committed on Tribal lands.[277] The 1834 Act authorized federal prosecution in such cases: Did that implicitly bar state prosecutions? Justice Kavanaugh's opinion for the 5-4 Court relied on the antipreemption and other federalism canons to negate such a negative inference—a thoughtful public reliance—based move that was apparently contrary to the law's original public meaning.[278] Justice Gorsuch wrote for the dissenters. By his account, the legislative history of the 1834 Act made clear that it was enacted in response to *Worcester v. Georgia*,[279] where the Marshall Court held that states could not prosecute crimes committed on Tribal reservations.[280] Lest non-Natives be subject to prosecution only in Tribal courts, Congress adopted the General Crimes Act of 1834 to provide for federal prosecution of such crimes.[281] *Castro-Huerta* is one of those controversies rendered a "hard case" because there were strong reliance arguments on both sides. Although it was also a case where "original public meaning" could be expected to resolve the matter, all the original public meaning jurists (except Gorsuch) who were in the *Dobbs* majority overrode it in *Castro-Huerta*.

5. Whole Code Rules

The Supreme Court sometimes resolves potential ambiguity in statutory text by considering the larger U.S. Code.[282] In *FDA v. Brown & Williamson Tobacco Corp.*, the issue was whether the FDA had

275. William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBTQ Workplace Protections*, 127 YALE L.J. 322, 368–76 (2017).

276. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

277. 142 S. Ct. 2486 (2022) (Gorsuch, J., dissenting).

278. *See id.* at 2504–05.

279. 31 U.S. 515, 561 (1832).

280. *Castro-Huerta*, 142 S. Ct. at 2505–07 (Gorsuch, J., dissenting).

281. 18 U.S.C. § 1152.

282. *See* ESKRIDGE, *supra* note 62, at 117–38, 415–16 (citing recent decisions that used whole act canons); SCALIA & GARNER, *supra* note 51, at 170–73.

statutory authority to regulate nicotine as a "drug" affecting the human body and cigarettes as a "device" delivering the drug.[283] Given the broad statutory language and a bold meta-purpose of protecting Americans against harmful drugs, it may be surprising (or just partisan voting) that the Rehnquist Court rebuffed the FDA. Justice O'Connor's opinion for the 5-4 Court can be read as an early example of the major questions doctrine: The Court should not read a broad delegation of lawmaking authority to authorize an agency to issue rules that have big effects on the nation's economy; the FDA's rule would have had a huge effect on the cigarette industry and tobacco farmers.[284]

The primary legal basis for Justice O'Connor's opinion, however, was the whole code rule—and the cogency of that application depended upon congressional reliance.[285] Although broadly phrased, the FDA's statute did not focus on tobacco products; in contrast, since 1964 Congress had repeatedly adopted disclosure-only regimes for protecting consumers against the harms of tobacco.[286] Through the most detailed and rigorous examination of congressional hearings, floor debates, and committee reports in recent memory, Justice O'Connor demonstrated that Congress relied on FDA assurances that it did not have regulatory authority over tobacco products each time Congress enacted or amended a disclosure-oriented regime.[287] This was as powerful a case of congressional reliance as the Court has delivered in the textualist era—and Justices Scalia and Thomas joined every sentence and footnote of this reliance-based synthesis of the whole code, whole act, and legislative history canons.

For a recent example, Justice Kavanaugh's *Bostock* dissent declined to apply sex discrimination protections to gay and transgender employees because both LGBTQ rights supporters and legislators themselves had relied on the contrast between "sex discrimination" and "sexual orientation" or "gender identity discrimination" when Congress amended six sex discrimination laws to add sexual orientation and two laws to add gender identity.[288] This was the strongest point made by the *Bostock* dissenters, though it is a particularly dynamic approach to the original public meaning analysis that Justice Kavanaugh, like Justices Gorsuch and Alito, was applying in that case.

283. 529 U.S. 120, 125–26 (2000).

284. *See id.* at 159–60.

285. *Id.* at 132–34.

286. *Id.* at 138–39.

287. *Id.* at 133–59.

288. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1829–30, 1829 n.5 (2020) (Kavanaugh, J., dissenting).

6. Linguistic Canons

The ordinary meaning rule is grounded on societal and private reliance interests: People and corporations are entitled to rely on the plain meaning of legal directives conferring rights or imposing duties on them.[289] (The technical or legal meaning rule, its twin, is grounded on the special audience for some statutes or the fact that people rely on lawyers or other experts to translate statutes into common parlance.)[290] The dictionary canon presumes that dictionaries reflect popular usage and that Congress relies on them when it drafts legislation. Scholars have questioned the accuracy of congressional reliance on dictionaries but have confirmed staff reliance on associated-words and other language canons.[291]

Societal and private reliance interests can also influence Justices' applications of the grammar-and-syntax canon. Recall that the crime in *Van Buren* was using one's work computer access to obtain "information in the computer that the accesser is not entitled so to obtain."[292] As a matter of grammar, did "not entitled so to obtain" include information the accesser was not downloading as part of his job? Or could it only be read to include information the accesser was prohibited from examining altogether? Both Justice Barrett's opinion for the Court and Justice Thomas's dissenting opinion claimed to apply "common parlance," but neither conducted a poll or survey of ordinary people or provided direct evidence of "common parlance."[293] Instead, Barrett relied on the definition, dictionary, and whole code canons and Thomas on the common-law canon to establish societal reliance.[294] Although citing no evidence, the majority clinched its argument with the claim that "millions" of employees relied on the convenience (and assumed legality) of using their work computers for personal emails and Google searches.[295] This was a cogent argument and illustrates how

289. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019); BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION (2015); Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 605 (2001); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018).

290. Kevin Tobia, Brian Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People,* 171 U. PA. L. REV. (forthcoming 2023).

291. Gluck & Bressman, *supra* note 242, at 938–39, 952–56.

292. 18 U.S.C. § 1030(e)(6); Van Buren v. United States, 141 S. Ct. 1648, 1652 (2021).

293. *See Van Buren*, 141 S. Ct. at 1657; *id.* at 1664–66 (Thomas, J., dissenting).

294. *Compare id.* at 1654–55, 1657–58 (2021) (Barrett, J.) (relying on several dictionaries, statutory definition, and other provisions of the statute), *with id.* at 1662–65 (Thomas, J., dissenting) (relying, in part, on basic principles of property law).

295. *Id.* at 1661–62 (Barrett, J.).

textualism requires an audience whose linguistic comprehension is relevant to statutory interpretation.

G. First Amendment Doctrine

The First Amendment's core protections are for "political" speech because of the value of political expression for personal autonomy, democratic participation, and the emergence of truth from a robust marketplace of ideas.[296] Although people may rely, to their detriment, on fake political news, the Court has determined that these speaker-based values usually dominate listeners' reliance on strict truth claims in public discourse. [297] In contrast, the First Amendment affords little or no protection to false speech in professional or commercial settings that invite private client and customer reliance.[298] Commercial ads that mislead or lie to consumers can be regulated, consistent with First Amendment principles, because consumers reasonably rely on such representations and there is a formal privity between the listener/consumer and the speaker/producer. Thus, Amanda Shanor and Sarah Light argue that "greenwashing," where companies misrepresent their contributions to improving or preserving the environment, creates an "epistemic dependence" that justifies the FTC's policing of false or misleading ads.[299]

Likewise, private reliance justifies regulation of speech that constitutes fraud, perjury, breach of fiduciary duties, and the like.[300] Consider *United States v. Alvarez*.[301] Xavier Alvarez wrongfully claimed that he had been awarded the Medal of Honor, a violation of the Valor Act. The Supreme Court held that his public lies were protected by the First Amendment, with the caveat that no one had relied on those misstatements.[302] "Where false claims are made to effect a fraud or

296. N.Y. Times v. Sullivan, 376 U.S. 254 (1964); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

297. *Sullivan,* 376 U.S. at 271–72; Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1 (2018) (providing a nuanced analysis of the general rule of First Amendment protection of false statements, together with exceptions, such as the one examined below).

298. Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 732–40 (2016); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1254–55 (1995); Daniel McNeel Lane, Jr., Note, *Publisher Liability for Material that Invites Reliance*, 66 TEX. L. REV. 1155, 1171–72, 1186–89 (1988).

299. Amanda Shanor & Sarah Light, *Greenwashing and the First Amendment*, 122 COLUM. L. REV. 2023, 2095 (2022).

300. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183 (2016); Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 350 (2018).

301. 567 U.S. 709 (2012).

302. *Id.* at 719–21.

secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."[303]

The First Amendment also protects religious freedom and bars the establishment of religion. The Supreme Court's Establishment Clause jurisprudence has required state neutrality with regard to religion—but has allowed prayers opening legislative sessions and other government events. In *Town of Greece v. Galloway*,[304] the Court explained that such prayers do not violate the Establishment Clause because they were a practice accepted by the Framers' generation and had survived scrutiny since then. "A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent."[305]

Town v. Greece is a classic example of the power of societal reliance: where a practice has been settled to the satisfaction of competing social groups and the body politic, the Court ought not disrupt the social equilibrium. The Court followed that approach in *Kennedy v. Bremerton School District*, which formally overruled prior Establishment Clause precedents resting upon the less tangible criterion of excessive entanglement of the state and religion and adopted the societal reliance approach.[306] As before, note the contrast with *Dobbs*, where the same Justices denigrated societal reliance by a much larger portion of the population.

H. Second Amendment Doctrine

The authority of long-accepted and relied-on historical practice has been a powerful theme of the Roberts Court's individual rights cases. Rejecting the claim that women have a *constitutional* liberty interest in the control of their own bodies, Justice Alito's majority opinion in *Dobbs* required a historical pattern of rights recognition reaching back to the Founding era if not further.[307] In contrast, Justice Alito's plurality opinion for the Court in *McDonald v. Chicago* found the right of self-defense through the personal possession and use of

303. *Id.* at 723; *see also id.* at 720–21 (noting that perjury can be punished, consistent with the First Amendment, because of reliance interests).

304. 572 U.S. 565 (2014).

305. *Id.* at 577 (internal citations omitted); *accord* Marsh v. Chambers, 463 U.S. 783, 795 (1983).

306. 142 S. Ct. 2407, 2428 (2022).

307. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

firearms was a constitutional liberty interest specifically recognized as fundamental in the common law and Blackstone, at the Founding, and during Reconstruction.[308] Both Alito (for a plurality) and Thomas (writing separately) maintained that the public and its representatives would have relied on the nation's traditional protection of firearms for self-defense as well as militia service when they adopted the Fourteenth Amendment.[309] As early as 2010, this suggested that the Court was prepared to apply the Second Amendment aggressively against state firearms regulation. (Both *McDonald* and the Court's earlier decision in *Heller* struck down municipal regulations.)

The Court delivered upon that implication in the same 2021 Term as *Dobbs* and *Bremerton*. The 6-3 Court held, in *New York State Rifle & Pistol Club v. Bruen*, that New York's discretionary system for firearm registration violated the Second Amendment, as applied to the states under the Due Process Clause.[310] Justice Thomas's opinion for the Court broadly reasoned that state firearms regulations were invalid unless authorities could show a long-standing pattern of public reliance on the existence of an exception to the Second Amendment.[311] A history-based condition for government regulation is an idea the Roberts Court will apply more broadly in future cases.

I. Non-Arbitrariness Review

When an agency adopts a regulation having the force of law, the Administrative Procedure Act ("APA") requires judges to set it aside if it is "arbitrary [or] capricious."[312] In *FCC v. Fox News Stations*, the Supreme Court opined that the APA requires agencies altering previously established regulations to consider "serious reliance interests" that had been generated by their prior policies.[313] In *Department of Homeland Security v. Regents of the University of California*, the Court applied that precept to invalidate the Trump Administration's effort to rescind the Obama Administration's 2012

308. 561 U.S. 742, 767–78 (2010) (plurality opinion); *accord id.* at 815–34 (Thomas, J., concurring in part and in the judgment) (agreeing with the plurality's original meaning approach but finding clearer support in the Privileges or Immunities Clause, rather than the Due Process Clause, of the Fourteenth Amendment).

309. *Id.* at 767–78 (plurality opinion); *id.* at 857–58 (Thomas, J., concurring in part and concurring in the judgment).

310. 142 S. Ct. 2111, 2131–34 (2022).

311. *Id.* at 2118–19.

312. 5 U.S.C. § 706.

313. 556 U.S. 502, 515 (2009); *accord* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016); TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 16–17 (2017).

guidance that deferred deportation of the children of undocumented immigrants.[314] The majority was influenced by staggering reliance interests: not only had 200,000 children grown up in this country under the 2012 rule but also reliance-based claims were documented by 66 health care organizations, 3 labor unions, 210 educational institutions, 6 military organizations, 129 religious groups, and 145 businesses.[315]

In *Department of Commerce v. New York*, the Court evaluated the decision of the Secretary of the Treasury to add a question to the decennial Census about every respondent's citizenship status.[316] Determining that the added question was not an arbitrary exercise of power, the Chief Justice's opinion for the Court decisively relied on the many past instances where such a question had been part of the Census. "[H]istory matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic.' "[317]

The Court's default for constitutional review has been to uphold laws drawing lines (equal protection) and/or abridging liberties (due process) so long as Justices can attribute a "rational basis" for legislative action.[318] One might say that this strong status quo baseline allows legislators and the population to rely on statutory policy judgments without undue worries about judicial disruption. In some cases, however, the Court applies rational basis with "bite," striking down plausible government policies that do not deploy a suspect classification or burden a fundamental interest—but that deeply unsettle constitutional reliance interests. A leading case is *Romer v. Evans*, where the Court invalidated a state anti-gay initiative.[319] The majority reasoned that "[d]iscriminations of an unusual character" received a closer look and seemed to agree with the ABA's concern that the initiative's sweeping discrimination disrupted societal as well as

314. 140 S. Ct. 1891, 1909–15 (2020).

315. *Id.* at 1913–15; Transcript of Oral Argument at 23–24, Dep't Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (Nos. 18-587 et al.). *See also* Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L.J. 2122, 2202–15 (2019).

316. 139 S. Ct. 2551, 2561 (2019).

317. *Id.* at 2567. For a different 5-4 majority, the Chief Justice invalidated the decision as "pretextual." *Id.* at 2573–76.

318. *See, e.g.*, FCC v. Beach Commc'ns, 508 U.S. 307, 313–15 (1993); Nicholas Walter, *The Utility of Rational Basis Review*, 63 VILL. L. REV. 79 (2018).

319. 517 U.S. 620 (1996).

public reliance interests enjoyed by sexual minorities.[320] In other cases, the Court has struck down unprecedented state policies that ran against federally recognized reliance interests.[321]

II. RELIANCE INTERESTS & THEORIES OF INTERPRETATION

The foregoing account leaves no room for doubt that private, societal, and public reliance interests play a prominent role in the Supreme Court's law of interpretation—and that *Dobbs* was flat wrong to say that only classic private (contract and property) reliance has pressed the Court to follow and not throw over long-standing precedents, rules, and legal practices. The descriptive account of the Court's doctrine has a normative edge, as the Court might rightly be criticized if it picks and chooses reliance interests that fit its result-orientation in high-profile cases. For example, the current Court might be faulted for considering and respecting reliance interests of churches, corporations, firearms dealers, cigarette manufacturers, and red states while ignoring or minimizing those of women, unions, universities, federal agencies charged with protecting public health and safety, and Tribal governments.

In turn, the outsized role played by reliance interests in the law of interpretation can be criticized in three different ways. First, the current Court might be tempted to say that reliance interests must give way to, and not detract from, the only legitimate way to interpret statutes and the Constitution—namely—application of the statutory text, perhaps as originally understood by the public that received the law. Precedents, common-law rules, and past presidential and federal practice, for example, *ought* to give way when contrary to the plain meaning of a statute or the original public meaning of the Constitution.[322] Conversely, and second, the dynamics of statutory interpretation, especially by agencies carrying out their statutory mandates, might resist the pull of reliance interests as tying the Court too much to the past or the current status quo. Legal process (New Dealsy) judges and jurists applying a dynamic purposivist or cost-benefit analysis might follow textualists in ignoring, minimizing, or

320. *Id.* at 633 (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37 (1928), *quoted and followed in* United States v. Windsor, 570 U.S. 744, 768–770 (2013); *accord* Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012).

321. *E.g.*, Arizona v. United States, 567 U.S. 387 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Plyler v. Doe, 457 U.S. 202, 225–26 (1982).

322. *E.g.*, Ramos v. Louisiana, 140 S. Ct. 1390, 1421–22 (2020) (Thomas, J., concurring).

dismissing reliance interests.[323] In short, reliance interests in the law of interpretation might be minimized or rejected upon theoretical grounds.

Methodologically, textualist and/or dynamic interpreters might pose a third, practical, objection: reliance interests—however expressed—create more room for result-oriented judges to justify interpretations that misread legal texts or undermine legal purposes. I consider this practical objection most plausible, and indeed, it swallows up the two theoretical objections. Textualist and purposivist judges alike look out over the crowd (text and legislative history, respectively) and pick out their friends.[324] Thus it is that, in most hard cases, with reliance interests on both sides, Justices will read the evidence through their own perspectives—as in the COVID Cases, the EPA Power Plant Case, *Dobbs*, and other hot-button controversies. In short, reliance interests do not eliminate judicial discretion in statutory cases and do not entirely prevent result-oriented judging.

In my view, however, reliance interests do ameliorate (even if not eliminate) the foregoing phenomenon. That is, when there are undeniable reliance interests lined up in the same direction, hard cases become easier and competing methodologies or ideologies tend to converge. For example, in *Bruen*, the Chief Justice and Justice Kavanaugh agreed that New York's discretionary "may issue" gun-permitting law was invalid for lack of a historical pedigree, but they volunteered that "shall issue" laws, governed by objective factors, were constitutional because they were widely accepted in public culture, both historically and today.[325]

Consider a thought experiment involving the legal meaning of Title VII's protection against sex discrimination in the workplace.[326] Does it protect a lesbian employee? Different theories of statutory interpretation—represented by their leading theorists Antonin Scalia (the new textualism), Stephen Breyer (legal process purposivism), and

323. *Compare* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc) (legal process/precedent-based analysis of Title VII that ignored reliance interests), *and id.* at 357–59 (Flaum, J., concurring) (strict textualist analysis of Title VII that ignored reliance interests), *and id.* at 352–57 (Posner, J., concurring) (highly dynamic, economics-inspired analysis sweeping aside reliance costs), *with id.* at 360–67 (Sykes, J., dissenting) (original meaning analysis emphasizing reliance interests).

324. ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (1997) [hereinafter SCALIA, INTERPRETATION] (making this claim against legal process judges); William N. Eskridge Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1535 (1998) (reviewing SCALIA, *supra*) (making the same claim against the new textualism).

325. New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2161–62 (Kavanaugh, J., concurring).

326. Civil Rights Act of 1964 § 703(a)-(d), 42 U.S.C. § 2000e-2(a)-(d).

Richard Posner (economic cost-benefit)—would approach this issue very differently. Yet in 1976 all three theorists would have reached the same result: No! [327] Half a century later, in 2020, leading theorists reflecting all three perspectives actually did reach the opposite answer: Yes! [328] How is that possible? My traditional answer has been that judges and adjudications are not immune to changes in society. But doctrinally the theoretical convergence on one answer and then another is better explained as a matter of law by the different array of reliance interests in 1976 and 2020. The following thought experiment reveals the critical role those interests inevitably play in each theory.

Consider the thought experiment in detail. Enacted in 1964, Title VII bars workplace discrimination "because of . . . sex."[329] The Fourteenth Amendment bars state denial of "equal protection of the law," which the Supreme Court interpreted to protect against quasi-suspect state sex discrimination.[330] In 1976, would a court interpret Title VII or the Equal Protection Clause to bar a state employer from discriminating against an out-of-the-closet lesbian?

Assume the judicial decisionmakers to be a strict textualist or originalist like a young Nino Scalia (who headed the Office of Legal Counsel in 1976), a legal process purposivist attentive to legislative history such as Steve Breyer (then a Harvard law professor), and a cost-benefit econo-pragmatist like Dick Posner (then a Chicago law professor). These three future judges would have approached this discrimination issue through the lens of different methodologies—namely—a textualism anchored in the notion of an objective, predictable rule of law (Scalia), a focus on legislative expectations grounded in institutional cooperation and democratic accountability (Breyer), and good governance based upon efficient rules (Posner). Notwithstanding their methodological diversity, all three judges would have said "no" to the lesbian employee in 1976, and their unanimity would owe much to reliance interests.[331] Conversely, Breyer, Posner, and Scalia's über-textualist successor on the Court, Neil Gorsuch, found it easy to say "yes" to lesbian/gay employees almost half a century later.[332] The driving force for their votes in both 1976 and 2020 would

327. I choose 1976 as the first date because that was when the Supreme Court first held that government sex-based classifications were subject to intermediate scrutiny under the Equal Protection Clause. Craig v. Boren, 429 U.S. 190 (1976).

328. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

329. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a).

330. Craig v. Boren, 429 U.S. 190 (1976) (invalidating a state law setting different minimum age requirements for the purchase of alcohol based on sex).

331. *See infra* text accompanying notes 340–343, 395–402, and 413–414.

332. *See infra* text accompanying notes 344–346, 403–409, and 417–420.

have been the radically different alignment of private, societal, and public reliance interests.

This thought experiment will also illustrate some deeper points about each of the three methodologies. Strict textualists consider reliance-based consequences, for predictability associated with the rule of law is a social production and a Court upsetting strong reliance interests will not be considered neutral, objective, or transparent. Because they are institutionalists, legal process jurists like Breyer give particular weight to public reliance and valorize the democratic appeal of societal and large-scale private reliance. An economics-minded judge who considers the costs and benefits of different interpretations considers reliance interests on both sides of the equation. Evidence of private, societal, or public reliance pulls all three theories toward continuity, which limits the dynamism inevitable in all these theories. Because reliance interests are also dynamic, however, they can also facilitate and ground dynamic statutory interpretation—a tendency that also affects the application of all three theories.

A. The Rule of Law & Textualism

Under the rule of law, "the coercive power of the state can be used only in cases defined in advance by the law and in such a way that it can be foreseen how it will be used."[333] The rule of law requires transparency of preexisting rules, applied objectively and predictably by neutral judges, without regard to the identity or status of the parties.[334] The new textualism is defended as the method that best fits with the judiciary's duty to apply the rule of law in individual cases: only by adhering closely to text and eschewing legislative intent can controversies be adjudicated based on objective evidence of law, transparent to the citizenry in advance of the adjudication, and neutrally applied by the decisionmaker.[335] After Justice Scalia's death, his longtime ally, Justice Thomas, and his successors on the Court, Justices Gorsuch and Barrett (a former Scalia law clerk), have carried

333. HAYEK, *supra* note 28, at 62; *accord* RAZ, *supra* note 28, at 214–15; RAWLS, *supra* note 28, at 208–09.

334. LON FULLER, THE MORALITY OF LAW 131–32 (1964); FRIEDRICH VON HAYEK, THE CONSTITUTION OF LIBERTY 208–09 (1960); Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182–83 (1989).

335. SCALIA, INTERPRETATION, *supra* note 324; SCALIA & GARNER, *supra* note 51; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65–66 (1988); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

the banner for the original public meaning of constitutional and statutory texts, to the exclusion of legislative materials.[336]

In 1976, there were excellent text-based rule-of-law arguments for saying that Title VII's bar to discrimination "because of . . . sex" might protect a lesbian employee fired for her romantic attraction to women; a male employee romantically attracted to women would not have been fired, and so the regulatory variable—the employee's feature whose alteration yielded the "discrimination," the different hiring results—is the employee's sex.[337] By analogy, a White employee fired because he was married to a Black woman would have had a Title VII claim for discrimination "because of . . . race" if a Black employee married to a Black woman would not have been fired.[338] In 2020, Neil Gorsuch would say, in his *Bostock* opinion, that penalizing a woman for dating other women treats her differently from a man who dates women, and hence is per se sex discrimination under the original public meaning of Title VII.[339]

But in 1976, Nino Scalia (and probably a young Neil Gorsuch) would, literally, have considered these textual claims off-the-wall. While the legal realist might say that his conservative, faith-inflected personal philosophy predetermined that stance, liberals such as Senator Birch Bayh (the ERA's sponsor)[340] would have agreed with Scalia as a matter of textual analysis. This would have been an easy textual case for the employers in 1976, because the nation's legal and social landscape would have embroidered the vocabulary of the law with a limited view of what could be "discrimination" and what could be "because of sex."[341] Most states made sexual intimacy between two women a crime; the armed forces and most state and local governments would not hire open lesbians.[342] The Public Health Service considered

336. Digit. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 783–84, 783 n.* (2018) (Thomas, J., concurring); Babcock v. Kijakazi, 142 S. Ct. 641, 647 (2022) (Gorsuch, J., dissenting); NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010).

337. *See* Civil Rights Act of 1964 § 703(a)-(d), 42 U.S.C. § 2000e-2(a)-(d).

338. *See id.*

339. Justice Gorsuch was following the lead of textualist Seventh Circuit Judges Easterbrook, Ripple, and Flaum. Hively v. Ivy Tech. Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc) (Easterbrook silently joining Chief Judge Wood's opinion, anticipating *Bostock*); *id.* at 357–59 (Flaum & Ripple, JJ., concurring).

340. *See* Adam Clymer, *Birch Bayh, 91, Dies; Senator Drove Title IX and 2 Amendments*, N.Y. TIMES (Mar. 14, 2019), https://www.nytimes.com/2019/03/14/obituaries/birch-bayh-dead.html [https://perma.cc/R66S-PDHB].

341. Liberal Senator Walter Mondale supported equal treatment for gay people but did not consider the exclusion of same-sex couples from "marriage" to be a "discrimination" in 1972. ESKRIDGE & RIANO, *supra* note 43, at 42–43.

342. WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861–2003, at 107 (2008).

all "homosexuals" to be "afflicted with psychopathic personality [disorder]" as a matter of law.[343] Between 1964 and 2017, every court of appeals to address the issue, without recorded dissent, refused to apply Title VII to protect lesbian and gay workers against discrimination for being a sex-based minority.[344]

By the time the Supreme Court decided *Bostock*, the relevant reliance interests had dramatically changed and created a gay-friendly framework for evaluating the statutory text. Once lesbians were no longer outlaws, and the Supreme Court deemed them fit to be in-laws, it was easier to see how sexual orientation discrimination could be a subset of sex discrimination. Indeed, the last-ditch defense of limiting marriage to one-man, one-woman unions had been that female spouses could never make women happy the way husbands could, and the children would be denied the fathers as role models they needed to flourish.[345] Because that understanding reflected rigid gender roles (women need men and only men as romantic partners) associated with "sex discrimination" bars, it was possible for both liberal and conservative Justices to see that the formal argument (employees fired for being attracted to same-sex partners would not have been fired if their sex were flipped) could fit the functional purpose of Title VII (barring employers from imposing rigid gender roles on employees). Hence, Justice Gorsuch's opinion for a 6-3 Court treated the gay employees as normal people discriminated against because of their own sex/gender or the sex of their romantic partners.[346] Justices Alito and Kavanaugh dissented, based upon their understanding of original public meaning (as Scalia would have).[347] Although Justices Gorsuch, Alito, and Kavanaugh applied different versions of original public meaning, their different treatments of reliance interests provide the sharpest angle into the intense debate among the textualist jurists.

Taking a *time-machine* approach to original public meaning, Justice Alito focused on the reliance the 1964 Congress would, in his view, have placed on the societal and linguistic distinction between protected classes characterized by biological sex (men and women), versus those characterized by sexuality (straight, bisexual, homosexual

343. Boutilier v. INS, 387 U.S. 118, 120–21 (1967).

344. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1777–78 (2020) (Alito, J., dissenting) ("Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination 'because of sex' really means?").

345. ESKRIDGE & RIANO, *supra* note 43, at 311–26, 554–59, 567–71.

346. *Bostock*, 140 S. Ct. at 1754.

347. *Id.* at 1755–57 (Alito, J., dissenting); *id.* at 1827–28 (Kavanaugh, J., dissenting).

persons) or gender role (cisgender, transgender).[348] Because Congress had relied on this sharp distinction, dozens of statutes protecting women against sex discrimination would now protect lesbians, gay men, or transgender persons.[349] In his separate dissent, Justice Kavanaugh took a more openly dynamic approach to original meaning. Following the Solicitor General, his key evidence was that gay rights advocates had since the 1970s relied on the contrast between "sex" and "sexual orientation" (or "affectional preference") when they sought, always unsuccessfully, to amend Title VII.[350] After 2008, Congress relied on these contrasting terms when it did amend five sex discrimination laws to add "sexual orientation" to the antidiscrimination protections.[351]

Justice Gorsuch followed a *cut-and-paste approach* to the text: take each word, find its 1964 definition, reassemble the words, and apply them to the current facts. His key move was to understand "*because of* sex" in "but for" terms: an employment decision would have been different if the male employee dating men had been a woman dating men, or if the female employee assigned a male sex at birth had been a male employee assigned a male sex.[352] Without citing the Supreme Court precedent on point, *Price Waterhouse v. Hopkins*,[353] he announced that discrimination "because of sex" included discrimination because of gender role.[354] The highly general language of Title VII justified its application to circumstances and social groups the 1964 Congress would not have expected.[355]

Bostock reveals at least four versions of an "original public meaning" method.[356] As a matter of "public meaning," the textualist can read sentences either by a *compositional* or a *social* method: the former takes the sentence apart, assigns an ordinary meaning to each word, and puts the sentence back together (Gorsuch); the latter understands the whole sentence as a member of society would have understood it (Alito/Kavanaugh).[357] As a matter of "original meaning," the textualist

348. *Id.* at 1755–59 (Alito, J., dissenting). For critique of Justice Alito's linguistic anachronisms, see William Eskridge Jr., Brian Slocum & Stefan Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503 (2021).

349. *Bostock*, 140 S. Ct. at 1778–83 (Alito, J., dissenting).

350. *Id.* at 1824, 1830 & n.6 (Kavanaugh, J., dissenting).

351. *See id.* at 1830–31.

352. The 1991 Amendments presumably broadened the "but for" test to include cases where one "motivating factor" would have been different. *See* 42 U.S.C. § 2000e-2(m).

353. 490 U.S. 228, 239 (1989) (plurality opinion); *id.* at 262–63 (O'Connor, J., concurring).

354. *Bostock*, 140 S. Ct. at 1741.

355. *Id.* at 1749–52.

356. *Cf.* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020) (noting that *Bostock* illustrates "at least two strands of textualism," one formalistic and one more flexible).

357. Eskridge et al., *supra* note 348, at 1519–22.

can reconstruct the history either *extensionally,* by listing the items or actions falling within the text on the date of promulgation (Alito), or *intensionally,* by defining the general category historically and then applying it to new facts (Gorsuch).[358] As the table below suggests, Justice Alito's time machine combines a social approach to public meaning with an extensional approach to original meaning, while Justice Kavanaugh's dissent combines the social approach with an intensional reading of original meaning. Like Kavanaugh, Justice Gorsuch takes a broad intensional approach to history (a focus on broad categories) but combines it with a compositional approach to public meaning, which generates Kavanaugh's charge of "literalism"[359] and Alito's "pirate ship" accusation.[360] Justice Thomas did not write, but his characteristic analysis is compositional and extensional.

TABLE 1: FOUR FACES OF ORIGINAL PUBLIC MEANING

	Extensional Originalism (Items Covered at the Statute's Birth)	**Intensional Originalism (Concepts as Defined at the Statute's Birth)**
Compositional Meaning (Cut-and-Paste)	(Thomas)	Gorsuch
Holistic Meaning (Phrase-and-Sentences)	Alito	Kavanaugh

As this exercise reveals, textualists have a choice of various methodological moves or techniques—and then they can pick and choose text and historical context to reach almost any result they want in the hard cases (where, typically, the text is vague, ambiguous, or conflicted).[361] Such a malleability in the original public meaning method suggests that the new textualism might be a methodological Potemkin village. It erects an attractive façade of mechanical application of a supposedly predictable methodology, but behind the screen are murky waters brimming with discretion, motivated choice, and manipulation.

358. *Id.* at 1525–33.

359. *Bostock*, 140 S. Ct. at 1825 (Kavanaugh, J., dissenting).

360. *Id.* at 1755 (Alito, J., dissenting).

361. *See* Eskridge & Nourse, *supra* note 250 (documenting the tendency of the leading new-textualist opinions and dissents to pick and choose text in order to reach a preferred result).

Because the rule of law is social and political as well as linguistic,[362] reliance interests may ameliorate the Potemkin scenario. Notwithstanding textual gerrymandering and discretionary choice of method, a textual analysis will be persuasively lawlike if it accords with societal opinion, has been relied on by private groups, and has been an assumed starting point for actions by legislators, administrators, and judges. In 1976, *Bostock* would have been an easy case for textualist theory—because public opinion, private practice, and legislative assumptions would all have pressed against an interpretation to Title VII to protect lesbian employees. By 2020, *Bostock* was a hard case for the next generation of textualist judges because the reliance interests were all over the place. The Alito/Kavanaugh/Gorsuch debate was a great debate not because of the textual analysis—which was anachronistic, overstated, and undertheorized—but because each Justice told a compelling reliance story.

Properly historicized, the dissenters' account was that once gay persons came out of their closets in some force, they complained of workplace discrimination against them "because of sexual orientation," and not old-fashioned discrimination "because of sex." Given such extensive reliance, by employers as well as their workers, wasn't the plaintiffs' claim beyond the statutory text adopted through the Article I, Section 7 process? Indeed, the majority's holding effectively expanded dozens of federal sex discrimination laws—a big move the Constitution vests in Congress, not the Court.

In turn, the majority's account was that society, most individuals and companies, and the political system had come to understand sex discrimination as implicating "gender" roles.[363] Upon that conceptual foundation, American public law had expanded Title VII beyond a concern for "descriptive" stereotyping (closing jobs to women or men for traits associated with being female or male) to bar "prescriptive" stereotyping (closing jobs to women or men for not being sufficiently feminine or masculine).[364] The *Hopkins* decision committed the Court to that understanding, lower courts and the EEOC had enthusiastically applied that precedent, and Congress had applauded it

362. *See* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); Tracey L. Meares, Tom R. Tyler & Jacob Gardener, *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM. L. & CRIMINOLOGY 297, 302 (2015).

363. Joan Wallach Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053 (1986).

364. Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396 (2014).

in the 1991 Amendments that liberalized *Hopkins*' procedural holding.[365]

So, rather than rendering reliance interests irrelevant, textualism underscores the importance of reliance interests, which in turn bring out of the closet the subordinated normative features of textualism. Thus it is that the Roberts Court's textualist majority writes surprisingly consequentialist opinions.[366] The new textualists-cum-originalists have often jumped through complicated linguistic hoops, only to signal that reliance interests framed and probably drove their results—from Justice Scalia's crusade to protect the "simplest" farmer's reliance on state property law against environmental socialism in *Sweet Home*,[367] as well as his rewriting the bankruptcy statute to ensure it does not disrupt state foreclosure law;[368] to Justice Thomas's massaging broad statutory language to make way for an expensive gas pipeline to pass under national forest land;[369] to Justice Gorsuch's objection to the government's effort to spread out its notice duties in immigration law (which could mislead immigrants petitioning to stay);[370] to Justice Barrett's fear in *Van Buren* that the government's theory of computer fraud would upend people's widespread assumption that it is okay to download files from their office computer for personal use;[371] to the per curiam judgment invalidating OSHA's workplace COVID rule, based on the accepted view that OSHA was not a public health agency;[372] to Chief Justice Roberts's takedown of the EPA's Clean Power Plant Rule, because it would upend the structure of

365. Eskridge, *supra* note 275, at 374–76; Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

366. Victoria R. Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court 2020–2022*, 38 CONST. COMM. 1 (2023); *cf.* Richard M. Re, *The New* Holy Trinity, 18 GREEN BAG 2D 407 (2015) (analyzing Roberts Court jurisprudence as frequently consequentialist but under cover of text).

367. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 714–25 (1995) (Scalia, J., dissenting) (quotation in text, followed by detailed analysis of text, context, and legislative history).

368. BFP v. Resolution Tr. Corp., 511 U.S. 531, 539–45 (1994) (affirming the Ninth Circuit's openly nontextualist opinion, justified along the lines of state and private reliance).

369. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1861–62 (2020) (reading "lands" not to mean the Appalachian Trail, and confirming the conclusion by reference to the unsettling of private and state property reliance interests).

370. Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021) (emphasizing "a" as a strict limit to government action, and holding that the government's reasons in a notice to appear must come in a singular document, consistent with government demands that citizens follow documentary requirements strictly).

371. Van Buren v. United States, 141 S. Ct. 1648, 1660–62 (2021) (confirming a text-based interpretation of the computer fraud statute with the private reliance argument).

372. NFIB v. OSHA, 142 S. Ct. 661 (2022) (narrowing 29 U.S.C. § 1655(c)(1) (quoted in text)).

American energy production and destroy the coal industry.[373] As these cases illustrate, original public meaning as a method is chock full of judicial discretion, which the current Court exercises primarily to protect corporate, state, and religious reliance—but it would be a mistake to think that the majority Justices are not also influenced by rule-of-law considerations that are independent of the GOP platform and go beyond the dictionary.

Specifically, choices made by textualist judges who consider themselves bound by the rule of law usually do not (and decidedly ought not to) ignore private, societal, or public reliance interests. If they cut decisively in one direction, reliance interests subserve the rule of law more obviously than judicial dictionary-shopping, grammatical analysis, and wordplay. The rule of law aspires to predictability, transparency, objectivity, neutrality, and constraint. For law to be "predictable" and "transparent," the best metric is not the views about text held by the judicial elite but rather the understanding of the law that people have assumed or invested in, or that legislators, administrators, or judges have openly relied on when they enact, implement, or interpret statutes. Relatedly, a judge's investigation into an understanding of law that people, society, and officials have endorsed or relied on is more "objective" and "constrained" than the judge's own filtering of the law through the lens of their personal experience with language, their preferred dictionaries, and their favorite canons.

The foregoing analysis of reliance interests has important lessons for the new textualists-cum-originalists. Justice Scalia once described himself as a "faint-hearted originalist" because he accepted stare decisis,[374] a doctrine rooted in a reliance-based understanding of the rule of law. Scalia rightly considered predictability a key feature of the rule of law, and path dependence as the main vehicle for predictable rules of law.[375] Path dependence is key because individuals, businesses, state and local governments, agencies, legislators, and judges rely on points of law that have been authoritatively determined. This is not a small modification to the original public meaning methodology. Between a quarter and a third of the Court's statutory interpretation cases each Term centrally turn on the Justices' application and interpretation of their statutory precedents—and even if Justices like

373. West Virginia v. EPA, 142 S. Ct. 2587 (2022).

374. Antonin Scalia, *Originalism: The Lesser Evil,* 57 U. CIN. L. REV. 849, 864 (1989); *accord* SCALIA & GARNER, *supra* note 51, at 83. *But see* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 4, 2013 (Scalia "repudiate[d]" his earlier stance).

375. *E.g.*, Clark v. Martinez*,* 543 U.S. 371 (2005) (Scalia, J.).

Scalia apply such precedents with an eye to original public meaning,[376] they do not ignore and generally do follow the precedents.

The most dedicated textualists on today's Court reveal a variety of stances toward stare decisis—all on display in *Ramos*. The Chief Justice and Justice Alito dissented from overruling the discredited jury-trial precedent based on a path-dependent understanding of the rule of law that takes state reliance seriously,[377] and Justice Kavanaugh's concurring opinion reflected a similar stance but found the reliance interests less weighty in these particular cases.[378] Justice Gorsuch's opinion for the Court revealed a greater willingness to overrule precedent and minimize reliance interests.[379] Justice Thomas's *Ramos* opinion, concurring in the judgment, repeated his view that the Court's stare decisis jurisprudence gives short shrift to its Article III duty to apply original public meaning; he would have jettisoned the Court's earlier substantive due process decisions and invalidated nonunanimous verdicts in criminal cases as inconsistent with the Privileges or Immunities Clause.[380]

The important role reliance interests play in the operation of the rule of law supports the approach to stare decisis followed by Chief Justice Roberts and Justice Kavanaugh.[381] As reflected in *Dobbs*, originalists seeking to overrule precedent will take a longer view of public reliance (looking back to Blackstone and earlier) and will focus on reliance interests closest to classic "concrete reliance" (Corporation A relies on Company B's promise to make investments).[382] Declining to overrule *Roe* and *Casey*, Justices Breyer, Sotomayor, and Kagan followed the Court's long-standing practice to consider public reliance and societal reliance—and especially the "viscerally concrete" private reliance of millions of women.[383] Chief Justice Roberts joined them in worrying that *Dobbs*'s dismissive approach to reliance interests was

376. Amy Coney Barrett, *Originalism and Stare Decisis,* 92 NOTRE DAME L. REV. 1921, 1926–28 (2017) (discussing Justice Scalia's relationship with "original public meaning").

377. Ramos v. Louisiana*,* 140 S. Ct. 1390, 1425–40 (2020) (Alito, J., dissenting).

378. *Id.* at 1419–20 (Kavanaugh, J., concurring).

379. *Id.* at 1405–08 (Gorsuch, J.).

380. *Id.* at 1421–22 (Thomas, J., concurring) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring)); *accord Martinez*, 543 U.S. at 401–04 (Thomas, J., dissenting).

381. *E.g.*, Kimble v. Marvel Ent., LLC*,* 576 U.S. 446 (2015) (Justice Kagan authored the majority opinion, joined by the liberal Justices, Justice Scalia, and Justice Kennedy).

382. *See* Dobbs v. Jackson Women's Health Org.*,* 142 S. Ct. 2228, 2275–77 (finding only "concrete" reliance relevant to stare decisis and dismissing societal and public reliance on *Roe* or *Casey*).

383. *Id.* at 2346 (Breyer, Sotomayor & Kagan, JJ., dissenting).

inconsistent with the rule of law and threatened the Court's legitimacy.[384]

B. Democracy, Legal Process & Purposivism

Justice Breyer grounded statutory interpretation on specific and general legislative intent and constitutional interpretation on the document's great purposes and principles. Updating the legal process tradition launched by Justices Brandeis and Frankfurter, developed by their academic protégés,[385] Breyer's approach to interpretation emphasized: (1) government is purposive, its point is to solve problems; (2) the Supreme Court needs to cooperate with and support, and sometimes correct, the other branches of government; (3) the institutional interaction in service of public purposes needs to take account of and be accountable to We the People.[386] He viewed state legitimacy as an ongoing dialectic between government performance and popular responses and initiatives. An Achilles heel of original public meaning jurisprudence is its inconsistency with the Court's responsibility to enforce "Our Democratic Constitution."[387]

The contrast was most striking in the COVID-19 Cases. Recall that in *NFIB v. OSHA*, the 6-3 Court halted implementation of the employer vaccine mandate.[388] The joint dissent authored by Justices Breyer, Sotomayor, and Kagan was a classic synthesis of legal argumentation (workplace proliferation of deadly COVID-19 seemed tailor-made for the statutory authorizing language) and an introductory course in the legal process.[389] The unprecedented pandemic would justify unprecedented action by all organs of government—but Breyer and his colleagues also documented the ways in which OSHA's response built upon, rather than departed from, earlier institutional

384. *See id.* at 2316–17 (Roberts, C.J., concurring in the judgment).

385. William N. Eskridge Jr. & Philip P. Frickey, *Historical and Critical Introduction* to HART & SACKS, *supra* note 53, at lxxxi–lxxxvi; JEFF ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET (2016); SNYDER, *supra* note 61. Professors Hart and Sacks, mentored by Brandeis and Frankfurter, were in turn mentors and role models for Breyer when he was a Harvard law student.

386. STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 8–9, 17–19 (2005) [hereinafter BREYER, ACTIVE LIBERTY], *reviewed by* Ken I. Kersh, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759 (2006) (sympathetically analyzing Justice Breyer's argument); Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006).

387. BREYER, ACTIVE LIBERTY, *supra* note 386; *accord* STEPHEN G. BREYER, MAKING OUR DEMOCRACY WORK (2010); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 803–21, 858–68 (2007) (Breyer, J., dissenting) (arguing that the majority's invalidation of local school integration plans disrupted the ability of governments to address racial polarization); Clinton v. City of New York, 524 U.S. 417, 470–97 (1998) (Breyer, J., dissenting).

388. 142 S. Ct. 661 (2022).

389. *Id.* at 670–77 (Breyer, Sotomayor & Kagan, JJ., dissenting).

interactions.[390] The dissent's closing paragraphs were classic Breyer: OSHA's response was occasioned by an unquestioned "grave danger" to the health of employees, grounded in impressive expertise, measured and tailored to the practicalities and text of the statute, and politically accountable.[391] Thus, the White House took ownership of the agency standard and integrated it with other big moves, including the hospitals mandate that a 5-4 Court allowed in *Biden v. Missouri*.[392] Everyone knew to blame the President for high costs or disappointing benefits. In contrast, the Court that was putting tens of thousands of workers at immediate risk was neither politically accountable nor expert in the contours of practical medicine and public health. "Without legal basis, the Court usurps a decision that rightfully belongs to others."[393]

Justice Breyer was more openly dynamic than his textualist colleagues—yet he took reliance interests super-seriously. Hence, Breyer was strong on stare decisis,[394] gave agency interpretations a deference boost when they were long-standing,[395] paid attention to congressional acquiescence in established interpretations by agencies and courts,[396] and was willing to bend constitutional texts to reflect congressional acquiescence to presidential power grabs.[397] His legal process grounding explains why he was particularly attentive to public reliance arguments; if legislative and executive department officials could not rely on the fact that most issues—including controversial ones—are at some point settled, it would be much harder for government to address crises and the citizenry's lesser problems. Breyer maintained that the legitimacy of our government rests not only on its capacity for addressing and solving collective action problems but also upon the ongoing support of We the People, who expect a neutral Court to respect social consensus, accommodate private plans, and not

390. *Id.*

391. *Id.* at 674–77.

392. 142 S. Ct. 647 (2022).

393. *OSHA,* 142 S. Ct. at 670–77 (Breyer, Sotomayor & Kagan, JJ., dissenting); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190–91 (2000) (Breyer, J., dissenting) (similar themes).

394. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008); Randall v. Sorrell, 548 U.S. 230, 243–44 (2006).

395. *E.g.*, Barnhart v. Walton, 535 U.S. 212, 219–22 (2002); Smith v. City of Jackson, 544 U.S. 228, 244 (2005) (Breyer, J., concurring in part).

396. *E.g.*, AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1351 (2021) (taking seriously, but ultimately rejecting, a party's acquiescence claim); *Sand & Gravel,* 552 U.S. at 139; Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007).

397. NLRB v. Noel Canning, 573 U.S. 513 (2014).

get in the way of democratically accountable officials.[398] For this reason, Breyer insisted that judges faithfully and not grudgingly follow precedents they don't agree with, allow agencies and state governments leeway to respond to constituent needs, respect legislative compromises, and not get too much ahead of or fall behind public opinion.

Justice Breyer's theory affords public deliberation and democratic feedback key roles in the operation of the legal process—but retains the legal process baseline of continuity and respect for reliance interests. Under this approach, Professor Breyer would not in 1976 have interpreted Title VII's bar to discrimination "because of sex" to protect employees fired because they were lesbian or gay. As a card-carrying liberal academic who worked on *Griswold* as a law clerk, he would have appreciated that federal and some state governments were reconsidering their anti-gay employment policies and that a handful of municipalities were expanding their antidiscrimination laws—but always to add "sexual orientation" or "preference" and never to redefine sex discrimination to include sexual minorities.[399]

Neither popular opinion nor government policies considered anti-gay exclusions to be "discrimination because of sex" in the same way employer policies barring women were. While Breyer's Harvard colleague Paul Freund felt the ERA's bar to state discriminations "on account of sex" would protect "homosexuals,"[400] Breyer would have noticed that Freund's logic generated *anti-reliance*: pro-ERA liberals disavowed his argument, while STOP ERA hailed it as a reason to *reject* the amendment barring sex discrimination.[401] In 1976, the legal landscape and social consensus would have framed the issue the way the ERA's sponsors did: Discrimination "because of sex" was something different than discrimination "because of sexual orientation" or "affectional preference,"[402] the terms used in proposed federal anti-discrimination legislation in 1974–1975.[403] Our democratic culture was so reliant on the demonization or erasure of gay people that a pro-gay interpretation of Title VII by the Court would have disrupted the

398. STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 33–38 (2021); BREYER, ACTIVE LIBERTY, *supra* note 386, at 33–34.

399. WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 129–32, 356–70 (1999).

400. Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 584–85 (1973).

401. Eskridge, *supra* note 275, at 349–53.

402. In 1999, I described the sex discrimination argument for gay rights in an exchange with Breyer. Like Scalia, he literally could not understand the argument at first, and when he did (on the third try) he dismissed it as off-the-wall.

403. Equality Act of 1974, H.R. 14752, 93d Cong. (1974); Civil Rights Amendments Act, H.R. 166, 94th Cong. (1975).

operation of the statutory scheme, prompted a strong popular backlash, and exposed the Court to ridicule.

Public reliance interests shifted dramatically in the next half century, and Justice Breyer played a role in that transformation, through the Court's invalidation of Colorado's anti-gay constitutional amendment, Texas's homosexual sodomy law, Congress's Defense of Marriage Act, and same-sex marriage exclusions in thirteen states.[404] By 2020, the calculus of reliance interests relating to the Title VII issue was vastly different than it had been in 1976. In public discourse, "homosexuals" or "perverts" had given way to LGBTQ persons; homosexual "marriage" had morphed into "same-sex marriage" and then to just marriage for social groups no longer publicly demonized as criminals and psychopaths. After 1996, most Fortune 500 businesses adopted domestic partnership benefits and internal antidiscrimination rules for their LGBTQ employees.[405] Reflecting dramatically different social attitudes and much-relaxed employer reliance interests, the EEOC, the Seventh Circuit, and the Second Circuit abandoned their earlier views and adopted the sex discrimination argument for LGBTQ rights under Title VII.[406] By 2020, most of the support for the *Bostock* defendants came from religious institutions, whose personnel structure relied on qualifications consistent with their faith traditions—but whose reliance interests might be protected by the Religious Freedom Restoration Act of 1993 ("RFRA") or the Free Exercise Clause, if not by Title VII.[407]

If Justice Breyer had authored the Court's opinion in *Bostock*, therefore, he might have started with Title VII's statutory history—evolving EEOC and Supreme Court interpretations, followed by periodic amendments to the law.[408] The statutory history was responsive to the evolution of the American republic—including a constant stream of LGBTQ persons out of their closets, but primarily the steady rise of women in the workplace, public culture, and politics.

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404. ESKRIDGE & RIANO, *supra* note 43, at 127–29, 265–67, 541, 609–12.

405. NICOLE C. RAEBURN, CHANGING CORPORATE AMERICA FROM THE INSIDE OUT: GAY AND LESBIAN WORKPLACE RIGHTS 2 (2004) ("[B]y the middle of the 1990s, domestic benefits had practically become a household word, given their adoption by numerous big-name companies.").

406. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc).

407. *See, e.g.*, Brief Amicus Curiae of U.S. Conference of Catholic Bishops & Other Religious Organizations in Support of Petitioner and Supporting Reversal at 8–18, 28–32, R.G. & G.R. Harris Funeral Home, Inc. v. EEOC, No. 18-107 (U.S. filed Aug. 23, 2019), 2019 WL 4013301; Brief of Amicus Curiae Christian Employers Alliance in Support of Petitioner, *Harris Funeral Home*, No. 18-107 (U.S. filed Aug. 23, 2019), 2019 WL 4167075.

408. The account in text is adapted from Vicki Schultz, *Taking Sex Discrimination Seriously,* 91 DENV. L. REV. 995 (2015); and Eskridge, *supra* note 275.

Women's voices and political muscle forced the statute to expand its vision: originally focused on opening up jobs to women, Title VII came to include claims that women, once hired, were penalized if they became pregnant, were subjected to sexual harassment, or were penalized for not conforming to traditional gender norms. The expansion of Title VII to cover sexual harassment and prescriptive stereotyping did not come by accident; it was driven by the needs of the evolving workplace and the demands of a changing electorate. In 1991, Congress amended Title VII to override restrictive Supreme Court decisions and to expand employee rights; congressional deliberations revealed wide acceptance, even among business interests, of the norm that Title VII barred discrimination against employees who did not conform to traditional gender roles.[409]

Justice Breyer's (hypothetical) opinion would have been openly evolutive, demonstrating through precedent, agency opinions, and congressional deliberations and amendment that Title VII's bar to discrimination because of sex protected employees against prescriptive as well as descriptive gender stereotyping. The power of his opinion would have rested on the dramatic shift in private, societal, and public reliance interests: social norms, church governance, corporate policies, agency rules, and statutes that were grounded on the assumption that "homosexuals" were psychopaths, criminals, and perverts in 1964 had disappeared by 2020. "Homosexual" misfits had been replaced in the public imagination by lesbians and gay men (a very different social group) who were in-laws rather than outlaws. Although Justice Gorsuch's opinion in *Bostock* purported to be originalist, its cogency owed nothing to original public meaning, very little to its cut-and-paste wordplay, and a great deal to EEOC and Supreme Court precedents applying Title VII dynamically to cover both homosexual and heterosexual harassment, prescriptive as well as descriptive gender stereotyping.[410] For both the textualist and the legal process judges, evolving reliance interests often motivate and justify dynamic statutory interpretations—while at the same time constraining them. For example, Justice Breyer, like Justice Gorsuch, would probably have acknowledged that RFRA will interact with Title VII to protect reliance interests of religious institutions beyond those included in Title VII's actual text.

409. Eskridge, *supra* note 275, at 368–76.

410. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–54 (2020).

C. Cost-Benefit Pragmatism

Professor Richard Posner's big idea was that the common law does and ought to conduce toward efficient rules—namely—those that, ex ante, create more benefits than costs.[411] Because the old Chicago School believed legislatures were dominated by rent-seeking interest groups, Posner held out little hope for statutes to be efficient in the same way the common law might be.[412] His subsequent experience as a judge (1981–2017) impelled him toward a fact-based approach that sought to reach interpretations that most efficiently carried out the project of the particular law.[413]

Reliance interests would have been important for Posner's cost-benefit analysis in 1976. As a Chicago School theorist, he would probably have considered some form of endowment effects: People demand a higher price to give up something they own than they would be willing to pay to purchase the same thing from someone else.[414] Like the endowment effect in bargaining, long-established understandings and perceived rights or duties—reliance interests—usually command intense loyalty in public law as well. For this reason, Posner in 1976 would not have taken seriously the possibility that Title VII's sex discrimination bar would protect lesbian or gay employees—still considered sexualized oddballs unfit for many occupations. Even as late as the 1990s, Judge Posner would not have been inclined to rock the boat to insist on new rights for lesbian and gay employees.[415]

His experience as a judge gave Posner an appreciation of the institutional costs of judicial innovation. In his 1997 review of my book advocating state recognition of same-sex marriages, Posner felt that there was a decent case for legislatures to take that step but rejected judge-enforced marriage rights.[416] Because American public opinion and public policy were strongly committed to the traditional one-man,

411. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 98–99 (1973); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

412. Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 765 (1975); *accord* Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987).

413. RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013).

414. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39 (1980); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193 (1991).

415. *Cf.* RICHARD A. POSNER, SEX AND REASON 312–13 (1992) (expressing a skeptical view of gay marriage claims because of what I consider far-fetched straight-people's reliance interests).

416. Richard A. Posner, *Should There Be Homosexual Marriage? If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1584 (1997) [hereinafter Posner, *Should There Be Homosexual Marriage?*] (providing a friendly but skeptical review of the arguments made in WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE (1996)).

one-woman definition, marriage equality for lesbian and gay people would be a social experiment that people would not tolerate—and risk-averse judges should not engage in such "moral vanguardism."[417] Posner's assessment of private, societal, and public reliance changed between 1997 and 2014, when he authored the Seventh Circuit opinion striking down Indiana's and Wisconsin's exclusions of same-sex couples from civil marriage.[418]

Judge Posner's thinking about marriage equality is a useful preface for his thinking about Title VII, which was reflected in a concurring opinion in *Hively v. Ivy Tech Community College*, the Seventh Circuit decision adopting the sex discrimination argument for gay rights.[419] "We now understand that homosexuals, male and female, play an essential role, in this country at any rate, as adopters of children from foster homes," wrote Posner.[420] "The compelling social interest in protecting homosexuals (male and female) from discrimination justifies an admittedly loose 'interpretation' of the word 'sex' in Title VII to embrace homosexuality: an interpretation that cannot be imputed to the framers of the statute . . . ."[421] Even a risk-averse judiciary was free to read Title VII's bar to discrimination because of sex liberally to protect sexual and gender minorities because societal reliance interests generally supported such a move, public reliance had shifted, and increasing numbers of companies had relied on nondiscrimination and wanted to expand their policies to all businesses.

Judge Posner's justification for his about-face on the case for same-sex marriage and on the sex discrimination argument for LGBTQ rights invoked the dramatic turnaround in public opinion—but I think he overemphasized opinion polls. It is not clear that most Americans were in favor of revoking separate-but-equal when *Brown* was decided, and the Gallup poll reported that only one in five Americans approved of the different-race marriages protected in *Loving v. Virginia*.[422]

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417. Richard A. Posner, *Wedding Bell Blues: Same-Sex Marriage and the Constitution,* NEW REPUBLIC (Dec. 21, 2003), https://newrepublic.com/article/67287/wedding-bell-blues [https://perma.cc/3GC7-7T3A]; Posner, *Should There Be Homosexual Marriage?*, *supra* note 416, at 1584–87.

418. Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Richard A. Posner, *Eighteen Years On: A Re-review*, 125 YALE L.J. 533 (2015) (retracting the reviewer's earlier (mild) opposition to marriage equality, based not upon new arguments but essentially upon the collapse of private and societal reliance interests inconsistent with marriage recognition).

419. 853 F.3d 339 (7th Cir. 2019) (en banc) (Posner, J., concurring).

420. *Id.* at 355.

421. *Id.*

422. 488 U.S. 117 (1967); Frank Newport, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958,* GALLUP (July 25, 2013), https://news.gallup.com/poll/163697/approve-marriage-blacks-whites.aspx [https://perma.cc/K6JC-9M4C].

Notwithstanding the polls, the *Loving* Justices were right to pay more attention to the repeal of restrictive laws everywhere outside the South and to the upward arc of public opinion. As with *Brown* a decade earlier, the Court was confident that opposition was less fierce and that its disposition would create conditions for falsification of stereotypes and negative consequences for a race narrative as old as Romeo and Juliet.

* * *

Although Richard Posner never served on the Supreme Court, as he should have, the role of reliance interests in his economics-driven approach to interpretation illustrates a central normative theme of this Part. As suggested by the endowment effect in private ownership and societal attitudes, reliance interests anchor a status quo bias in the law of interpretation. An amazing intellectual, Posner was unusually open to changing his mind about legal issues, but he persisted in his skepticism about constitutionally required marriage equality long after he admitted sympathy with it as a humane policy. Although he later conceded that my constitutional case for marriage equality was a compelling one in the 1990s, I concede that his unwillingness as a judge to impose it upon a skeptical landscape of public law was the better view in that decade. What he had not considered was the worthy lives of committed lesbian and gay couples, many raising children, but what I had not considered were overwhelming public, societal, and private reliance interests inconsistent with a revised meaning of "marriage."

At the same time, Posner's approach to marriage equality and the sex discrimination argument for gay rights reveals the dynamic potential of reliance interests. It is hard for the Supreme Court to upend or even destabilize an unjust status quo—but when the unjustness of the status quo generates societal pushback, personal counternarratives, and government experimentation that reveals productive alternatives, reliance interests will shift—sometimes rather swiftly. In my view, the success of marriage equality owes much to activists' belief that by changing the experience that companies, families, schools, communities, and even churches had with LGBTQ persons and their families, there was a path toward marriage equality.[423]

423. The argument of Eskridge & Riano, supra note 43, is that *Obergefell* was only possible because of shifts in reliance interests—namely—societal mores and public opinion; employer recognition of and success with gay and lesbian workers and clients or customers; and state as well as municipal policies recognizing and successfully implementing domestic partnership, civil union, and marriage for lesbian and gay couples.

III. RELIANCE ARGUMENTS SHOULD SOMETIMES YIELD TO JUDICIAL REVIEW—BUT SHOULD INFLUENCE PROCESS AND REMEDIES

Although reliance interests figure prominently in most Supreme Court statutory and constitutional interpretation cases, few if any judges or scholars believe they should always be decisive. Such constitutional disasters as *Dred Scott, Plessy,* and *Korematsu* were justified by strong reliance interests (while at the same time ignoring contrary reliance).[424] Constitutional principles have the potential to destabilize rotten reliance and a squalid status quo, but it is too heroic to assume that the judiciary—professionally committed to rule-of-law continuity values, institutionally risk-averse, and leery of upending endowment effects—will often defy overwhelming reliance interests.[425] The legislative and executive branches of government are much more likely to drive what Cristina Rodríguez terms "regime change" than the judicial branch.[426] Yet the Supreme Court does and should sometimes upend strong reliance interests. If not usually, when should that happen?

Judicial review overriding strong reliance arguments can best be justified and is most likely to be successful when (1) the country faces a public emergency, such as a war or pandemic, in which case judges should often defer to dynamic executive and legislative acts (COVID Cases); (2) social norms or policy consensuses have decisively changed, in which case judges should slowly update an outdated status quo (*Bostock*); and/or (3) judges are certain that the status quo is morally or socially toxic and must be destabilized (Chief Justice Warren's view in *Brown* and *Loving,* Justice Alito's view in *Dobbs*). The last is an exciting but dangerous move for the Court. Before overriding what they consider toxic reliance interests, the majority needs to be sure that their constitutional decision will transform the status quo in ways that will successfully reset reliance interests, often by empowering groups supporting the new constitutional regime and discrediting groups opposed to it.

Brown v. Board of Education illustrates my thesis. Racial segregation was entrenched in southern culture, private ordering, and

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424. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–17 (1857) (surveying state and local laws at the time of the Constitution's adoption); Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (noting segregation statutes "have been generally, if not universally, recognized" as socially accepted and lawful); Korematsu v. United States, 323 U.S. 214, 216–17 (1944) (relying on official military assurances that Japanese American citizens were security risks).

425. *See* RICHARD H. FALLON, LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018) (arguing that the Court's legitimacy rests upon a combination of sociological, moral, and legal grounds).

426. Cristina M. Rodríguez, *The Supreme Court, 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1 (2021).

public law; it took Pauli Murray more than 700 pages just to list all the laws and rules instantiating apartheid.[427] Yet the *Brown* Court stared down these powerful reliance interests and reversed the burden of inertia to launch a new regime. *Brown*'s success owes something to the facts that World War II exposed the impracticality and injustice of American apartheid, and the Cold War made it an urgent embarrassment; social norms and government policies had decisively moved away from apartheid outside the South; and judicial endorsement of the anti-apartheid principle helped transform the status quo in ways that made their decision even more admired in 1964 than it was in 1954. Nonetheless, the Justices hedged their bets. While reliance interests did not save the formal apartheid regime, they did affect (a) the timing of the Supreme Court's resolution of the issue, (b) the actual remedies directed by the Court, and (c) the Court's unwillingness to expand upon its bold holding to the legacies and evolving policy implementation of racist attitudes. These hedges provide insight into other constitutional controversies where the Court went against strong reliance interests. For each hedge, I shall discuss how the *Brown* Court used it to ameliorate the firestorm following its landmark decision, and how the Court has deployed similar hedges since *Brown*. The analysis bears some lessons for the *Dobbs* Court.

A. Passive Virtues: No Rush to Judgment

Apartheid was morally indefensible from the beginning, but it was not until the Roosevelt Administration that it became an urgent national embarrassment. In 1938, the Supreme Court struck down separate-but-unequal segregation in graduate education.[428] The nation's experience in World War II—a crusade against Nazi racism—publicized the moral rot of American apartheid, and the Cold War created international pressure on the nation to renounce segregation.[429] In 1948, the NAACP's Inc. Fund asked the Court to overrule *Plessy*, and two years later, the Solicitor General joined the Inc. Fund's petition.[430] In *Henderson v. United States*, the Solicitor General challenged segregated dining cars and maintained that this was the ideal vehicle

427. PAULI MURRAY, STATES' LAWS ON RACE AND COLOR (1950).

428. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

429. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (highlighting the pressures that the Cold War placed on the U.S. to combat racism within the country).

430. Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (NAACP); Sweatt v. Painter, 339 U.S. 629 (1950) (Solicitor General).

to overrule *Plessy* (a segregated train case), but the Court held that *Plessy*-based segregated railroad cars had already been abrogated by federal statute.[431] After more than a decade of dodges, the Court in 1953 took for review four state segregated school cases and one case from the District of Columbia. Following oral argument, where the states emphatically sounded off on the vast and pervasive reliance on the Court's repeated approval of race-based school segregation, the Court asked for new briefs and reargument.[432] *Brown v. Board of Education*[433] and *Bolling v. Sharpe*,[434] the Washington, D.C. school segregation case, were handed down in 1954.

The Court delayed action because of fears of backlash for messing with deep societal reliance. To begin with, the Justices themselves were undecided about what to do between 1938 and 1954; Justice Frankfurter in particular believed that any big move had to secure supermajority support, and the Court's initial conference on the desegregation cases revealed a badly splintered bench, with the Chief Justice inclined to reaffirm separate but equal.[435] The fragmented-bench problem was gradually solved after Governor Earl Warren became Chief Justice between the first and second *Brown* arguments; he engineered a surprising unanimity for the *Brown* and *Bolling* rulings.[436] Second, the Court's pre-*Brown* decisions were successful trial balloons, testing public attitudes while laying the doctrinal groundwork for a judgment that might broadly invalidate public school segregation. In *Gaines*, the 1938 case, the Court reasoned that even if tangible resources were equivalent, "separate" education would be "unequal" if intangible social values were taken into account.[437] Outside the South, the reaction to *Gaines* was reassuring,[438] and the press reported southern response as unenthusiastic but not vehement.[439] After the

431. 339 U.S. 816 (1950).

432. Brown v. Bd. of Educ., 345 U.S. 972 (1953).

433. 347 U.S. 483 (1954).

434. 347 U.S. 497 (1954).

435. THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 644–52 (Del Dixon ed., 2001).

436. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 668–702 (2004); MARK V. TUSHNET, *BROWN V. BOARD OF EDUCATION*: THE BATTLE FOR INTEGRATION 85–108 (1995).

437. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 348–50 (1938).

438. For editorials celebrating *Gaines*, see *For Human Rights*, N.Y. TIMES, Dec. 13, 1938, at 24; *Up to Missouri*, WASH. POST, Dec. 14, 1938, at 14; and *The Negro and the Law: Supreme Court Upholds Right to Educational Equality*, NEWSWEEK, Dec. 26, 1938, at 25.

439. *See* Edwin Camp, *South Studies a Race Issue*, N.Y. TIMES, Nov. 12, 1939, at 76; *High Court Gives NLRB New Setback*, ATLANTA CONST., Dec. 13, 1938, at 9; *Damnify Both Races*, TIME (Dec. 26, 1938), https://content.time.com/time/subscriber/article/0,33009,772192,00.html [https://perma.cc/5WEQ-BG5B].

war, the Truman and Eisenhower Administrations encouraged the Court's advances,[440] and the Report of President's Committee on Civil Rights, *To Secure These Rights* (1947), was a call to moral action. By 1953–1954, private and societal reliance cut both ways and was trending against apartheid.

Third, lower court judges and state legislatures further chipped away at reliance interests by creating conditions for falsification of racist fearmongering. In 1947, a federal court ruling and a statute supported by Governor Warren abolished school segregation in California, swiftly becoming the nation's largest state.[441] By 1954, only seventeen southern and border states and the District required segregated schools, and four left it as a decreasingly used local option.[442] These developments assured the Court that public reliance interests were localized in a quarter of the country and offered some hope that desegregation might proceed in the border states at least.[443]

Professor Bickel (who had clerked for Frankfurter during the first *Brown* Term) argued for the "passive virtues," namely, procedural mechanisms for the Court to protect itself against violent political reactions.[444] He did not emphasize the incremental case-by-case strategy followed by the *Brown* Court, but it has been a prudent strategy for Justices to follow when they have taken aim at established law endowed with significant reliance interests.[445]

The demise of *Bowers v. Hardwick*[446] illustrates a Bickelian strategy. In the face of strong reliance interests and hostile public opinion at the height of AIDS, Michael Hardwick's challenge to Georgia's consensual sodomy law was not likely to succeed—though the Court harmed itself by an aggressively uninformed majority opinion, capped off by a concurring statement that combined homophobia with misogyny.[447] When Anthony Kennedy replaced Lewis Powell in 1988,

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440. *See generally* DUDZIAK, *supra* note 429 (arguing that the Cold War facilitated desegregation).

441. Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947).

442. Arthur E. Sutherland, *Segregation by Race in Public Schools: Retrospect and Prospect,* 20 LAW & CONTEMP. PROBS. 169, 169–70 n.1 (1955). Kansas was one of the local-option states; during the *Brown* litigation, Topeka revoked its policy.

443. After *Brown,* there was immediate movement to comply in Delaware, West Virginia, Maryland, and Missouri. *Id.* at 178 n.22.

444. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111–98 (1962).

445. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

446. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

447. *Id.* at 192–93 (history of sodomy laws); *id.* at 197 (Burger, C.J., concurring) (recalling the common-law view that the crime against nature was an offense worse than rape).

there was a 5-4 majority to revisit *Hardwick*—but Kennedy and his colleagues dodged the issue in 1996 when they struck down a state constitutional amendment barring official efforts who might try to discourage anti-gay discrimination.[448] As with *Loving,* the Court waited until a large majority of states—including Georgia, the *Hardwick* jurisdiction—repealed or invalidated their consensual sodomy laws, always without strong public pushback and ultimately with an effect of encouraging more LGBTQ people to come out of their closets and participate actively in public affairs and debates. By the time the Court overruled *Hardwick* in 2003, public opinion had turned against such laws—millions of families were adamant that their LGBTQ relatives not be considered criminals, gay relationships and families were recognized in a significant minority of states, only thirteen states made consensual sodomy a crime, and the Court itself had ignored *Hardwick* in abortion and aid-in-dying cases.[449]

The Roberts Court is following an incrementalist strategy to remake constitutional law in voting rights,[450] habeas corpus,[451] the Dormant Commerce Clause,[452] Fourth Amendment *Bivens* actions,[453] and the First Amendment.[454] In *Janus v. AFSCME, Council 31*, for example, a 5-4 party-line majority held that the First Amendment bars public sector unions from imposing a union shop, together with required fees, on unwilling employees.[455] To reach that result, the Court overruled a 1977 precedent.[456] Justice Alito's opinion for the Court found that the precedent on point was a poorly reasoned outlier. The big stare decisis problem for him was that public sector unions had for decades relied on that precedent in contract negotiations, but the majority reasoned that these concrete reliance interests had been

448. *Compare* Romer v. Evans, 517 U.S. 620 (1996) (striking down anti-gay initiative and ignoring *Bowers*), *with id.* at 636–37, 640–43 (Scalia, J., dissenting) (arguing that the state initiative was not as punitive as the law upheld in *Bowers*).

449. ESKRIDGE, *supra* note 342, at 265–330.

450. In *Shelby County v. Holder*, the Court eviscerated the preclearance regime of § 5 of the Voting Rights Act, with an assurance that § 2 could handle serious violations. 570 U.S. 529, 557 (2013). The Court substantially neutered § 2 in *Brnovich v. Democratic National Committee*. 141 S. Ct. 2321, 2341 (2021).

451. *E.g.,* Bowles v. Russell, 551 U.S. 205, 214 (2007) (finishing off a habeas precedent that the Burger and Rehnquist Courts had whittled away).

452. *E.g.,* South Dakota v. Wayfair, 138 S. Ct. 2080, 2098 (2018).

453. Egbert v. Boule, 142 S. Ct. 1793, 1809 (2022) (eviscerating *Bivens* after decades of cutting back on that precedent).

454. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881–82 (2021); *see* Shay Dvoretzky & Emily Kennedy, *SCOTUS Term Marked by Unexpected Alignments and Incrementalism*, REUTERS (July 26, 2021, 10:27 AM), https://www.reuters.com/legal/legalindustry/scotus-term-marked-by-unexpected-alignments-incrementalism-2021-07-26/ [https://perma.cc/UJX2-GSF8].

455. 138 S. Ct. 2448, 2486 (2018).

456. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), *overruled by Janus*, 138 S. Ct. at 2486.

eroded by a series of Supreme Court decisions skeptical of and then hostile to the earlier precedent.[457] Dismissing classic (contract-based) private reliance arguments made *Janus* a notable departure from stare decisis, especially for Justice Alito (who valorized classic reliance in *Dobbs*). This suggests that ideology was likely decisive, but it is significant that the majority took a decade before they flatly overruled a precedent they strongly disliked.

The Court's overruling of *Roe* and *Casey* did not follow its incrementalist *Janus* strategy, thereby exposing the Court to even stronger critique. The politically controversial process by which the pro-life majority was assembled ought to have rendered the Court reluctant to overrule long-standing precedent so abruptly. In 2016 and 2020, the Court applied *Roe* and *Casey* to strike down Texas and Louisiana laws openly seeking to impose medically unjustified burdens on women's right to choose.[458] The Court's reliance on *Casey* was unbroken for a generation—and to suddenly dump the long-standing precedent, while dismissing arguments of societal and public reliance, required a much more solid basis in legal reasoning or history than the Court provided. The 2022 midterm elections revealed a political backlash against *Dobbs*,[459] and the Court's political legitimacy, legal reputation, and professionalism have all taken big hits.[460]

Through its aggressive interpretation of the Religion Clauses and RFRA, the Court will continue to chip away at *Griswold, Lawrence,* and *Obergefell,* but reliance interests will very probably save those precedents from flat, publicity-generating overrulings. Most Americans—men and women, straight and gay, rich and poor—use some form of birth control and have engaged in oral sex.[461] A Supreme Court opinion opening the door to penalizing these activities in any way would create a tsunami of public backlash, and states purporting to outlaw these activities would make a mockery of the rule of law.

457. *Janus,* 138 S. Ct. at 2484–86. *But see id.* at 2498–2501 (Kagan, J., dissenting).

458. Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016, revised June 27, 2016), *abrogated by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); June Med. Servs. LLC v. Russo, 140 S. Ct. 2103 (2020), *abrogated by Dobbs*, 142 S. Ct. 2228.

459. *Cf.* Caroline Kitchener, Kati Perry & Kevin Schaul, *Here's How Abortion Access Fared in the Midterm Elections in Nine States*, WASH. POST, https://www.washingtonpost.com/politics/interactive/2022/abortion-rights-election/ (last updated Dec. 5, 2022, 1:31 PM) [https://perma.cc/9J5A-MM48] (documenting how pro-choice groups prevailed in all the state referenda and picked up governorships and seats in the legislature in several battleground states).

460. Jones, *supra* note 49.

461. Casey E. Copen, Anjani Chandra & Gladys Martinez, *The Prevalence and Timing of Oral Sex with Opposite-Sex Partners Among Females and Males Aged 15–24: United States, 2007–2010*, NAT'L HEALTH STATS. REPS., Aug. 16, 2012, at 1 (discussing the overwhelming prevalence of oral sex).

Overruling *Obergefell* would generate less of a popular tsunami but would impose upon the judiciary the embarrassing task of adjudicating claims for the more than 1.4 million Americans in same-sex marriages who would find their legal rights negated or uncertain in a quarter of the country. [462]

B. Hedging Its Bets on Remedies

Another of Frankfurter's stakes-lowering ideas in *Brown* was to separate the substance of the case (the treatment of the equal protection issue) from the remedy (the mandate on remand to the five lower courts).[463] In the third *Brown* argument, the school districts and their state amici urged a go-slow approach to desegregation.[464] The Solicitor General opined that desegregation could proceed expeditiously in the District of Columbia, Delaware, and Kansas but would require a gradual adjustment in the deep South, where reliance interests were most powerful.[465] Hoping to reduce the expected backlash, the Court's directive on remand was for district courts to move "with all deliberate speed" to transform the dual school system of one track for Whites, another for racial minorities, into a unitary school system.[466] In short, the significant reliance interests invoked by the southern school districts did not prevent the Court from issuing a revolutionary ruling on the merits, but the same reliance interests cut back severely on the immediate and (as it turned out) medium-term implications of the earlier ruling.[467] The combination of *Brown I* and *Brown II* satisfied Frankfurter and Eisenhower but was frustrating to almost everyone else. The anger of southern segregationists grew more intense after 1955; many southerners interpreted the Court's remedy as a sign of weakness.[468] On the other hand, we do not know how violent the

462. *See, e.g.*, U.S. Census, AMERICAN COMMUNITY SURVEY, 2021 (2022).

463. KLUGER, *supra* note 436, at 687–90.

464. Brief of John Ben Shepperd, Attorney General of Texas, Amicus Curiae at 4, 13, Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955) (1954 Term, Nos. 1, 2, 3, 5), 1954 WL 72726.

465. Supplemental Brief of the United States on Reargument at 153–81, *Brown II*, 349 U.S. 294 (1954 Term, No. 1), 1953 WL 78291.

466. *Brown II*, 349 U.S. at 301; *see* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1923–24 (1991).

467. *See* ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION 185 (2003); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 609 (1983).

468. Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from* Brown v. Board of Education *and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1506–07 (2006).

southern response would have been to an order mandating immediate desegregation of the public schools.[469]

Another classic example of the remedial hydraulics of reliance arguments is *INS v. Chadha*, the Court's decision that, in effect, invalidated hundreds of legislative vetoes as inconsistent with the bicameralism and presentment requirements Article I, Section 7 imposes on the legislative process.[470] In its *Chadha* brief, the U.S. Senate reported that legislative vetoes reflected a legislative-executive understanding reached in 1940, whereby Congress would delegate a great deal of authority to the executive branch but would retain its own veto power over executive decisions by action of one or both chambers.[471] The President, senators argued, had repeatedly acquiesced in the constitutionality of the legislative veto, and Congress had relied on that understanding to adopt dozens of laws delegating massive lawmaking authority to agencies but paired with legislative vetoes.

Complementing the Senate's argument, the House brief invoked the passive virtues: If the Court invalidated the legislative veto, the entire statute would fall. Because the Attorney General's authority to allow Chadha to remain within the country rested on the invalid statute, Chadha would not benefit from judicial review and for that reason did not have Article III standing to have objected to the legislative veto.[472] In response, the Solicitor General denied that the President had "acquiesced" in the constitutionality of the legislative veto and defended the justiciability of the controversy.[473]

Overall, Congress had extremely powerful public reliance arguments. Like *Brown*, *Chadha* is the exceptional case where strong reliance interests did not save a long-standing policy from invalidation. (In my view, the normative case for disrupting half a century of congressional reliance was not nearly as persuasive in *Chadha* as it had been in *Brown*.) Like *Brown,* however, *Chadha* hedged its bets on the remedy side. Before addressing the Article I, Section 7 issue, Chief Justice Burger's opinion for the 7-2 Court ruled that the legislative veto

469. James E. Pfander, Brown II: *Ordinary Remedies for Extraordinary Wrongs*, 24 J.L. & INEQ. 47, 57–62 (2006).

470. 462 U.S. 919 (1983).

471. Brief of the United States Senate, Appellee-Petitioner at 6–7, 9–17, *Chadha*, 462 U.S. 919 (Nos. 80-1832, 80-2170, 80-2171), 1981 WL 388494.

472. Brief of the United States House of Representatives, Appellee-Petitioner at 18–19, 41–50, *Chadha*, 462 U.S. 919 (Nos. 80-1832, 80-2170, 80-2171), 1981 WL 388493.

473. Brief for Appellant-Respondent INS in Response to the Supplemental Briefs on Reargument for the United States Senate & House of Representatives at 13, *Chadha*, 462 U.S. 919 (Nos. 80-1832, 80-2170, 80-2171), 1982 WL 607268; Reply Brief for the Appellant at 11–14, *Chadha*, 462 U.S. 919 (No. 80-1832), 1981 WL 388501.

was "severable" from the remainder of the statute and, hence, that the Attorney General retained authority to grant Chadha mercy from deportation even if the veto were shorn from the law.[474] Although there was a severability clause that ought to have been dispositive, the Court's analysis started and concluded with the presumption of severability discussed above,[475] which signaled that none of the dozens of statutes with legislative vetoes would likely be voided in their entirety.[476] In the presidential-removal cases, the Roberts Court has lowered the stakes of its constitutional activism by surgically severing invalid tenure protections from the remainder of the statute.[477]

A most remarkable reliance-based remedial move came in *Northern Pipeline Construction Co. v. Marathon Pipe Line Construction Co.*, in which the Supreme Court invalidated Congress's decision to vest adjudication of bankruptcy issues with non-Article III judges.[478] This ruling would have massively disrupted private and public reliance interests—which the Court avoided by rendering its ruling prospective (taking effect after October 2, 1982), so that existing judgments would not be disturbed and Congress would have time to create a constitutional regime.[479] (Congress acting to meet a judicial deadline? Silly Justices!) At the behest of the Solicitor General, the Court granted a further stay until December 24, 1982, but denied further requests.[480] Missing the Court's timeline by almost two years, Congress fixed the problem with the Bankruptcy Amendments and Federal Judgeship Act of 1984.[481]

For a recent example, consider *McGirt v. Oklahoma*.[482] The Major Crimes Act ("MCA") provides that, within "Indian country," "[a]ny Indian who commits" certain enumerated offenses could only be prosecuted by the federal government.[483] Convicted of sex crimes in state court, Jimcy McGirt claimed that, as a Native American allegedly committing crimes on the Creek Reservation, his state conviction was

474. *Chadha,* 462 U.S. at 931–35.

475. *Id.* at 931–32, 934–35.

476. *E.g.*, Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) (also severing a legislative veto provision).

477. *E.g.*, Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2210–11 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508–10 (2010).

478. 458 U.S. 50 (1982).

479. *Id.* at 88–89 (plurality opinion); *id.* at 92 (Stevens, J., concurring). For a similar prospectivity fix, see *Buckley v. Valeo*, 424 U.S. 1, 142–43 (1976).

480. N. Pipeline Constr. Co. v. Marathon Pipe Line Constr. Co., 459 U.S. 813 (1982), *further stays denied in* 459 U.S. 1094 (1982).

481. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

482. 140 S. Ct. 2452 (2020).

483. 18 U.S.C. § 1153(a).

invalid.[484] The Supreme Court held that Tulsa, Oklahoma, was located in Indian country because Congress had never disestablished the Creek Reservation that encompassed Tulsa.[485] Oklahoma, the Solicitor General, and four dissenting Justices believed such a result was foreclosed by overwhelming reliance interests: state convictions of "thousands" of Native defendants would have to be revisited, hundreds of thousands of White Tulsans would be shocked to learn that they lived on an Indian Reservation, and numerous jurisdictional issues would immediately beset Oklahoma and the Creek Nation.[486] Justice Gorsuch's opinion for the Court suggested that a great principle was at stake: By a series of treaties the nation made serious promises to the Creek Nation, the United States cravenly reneged on a lot of those promises without accountability, and there was never going to be accountability unless the Court enforced the rule of law at some point.[487]

But Justice Gorsuch also worked hard to minimize the reliance interests. Given time bars, far fewer convictions would be affected than Oklahoma and the dissenters feared.[488] Because the Court was only addressing the MCA issue, Tulsans would not be inconvenienced, given that Oklahoma and the Creek Nation would negotiate a compact allocating jurisdictional responsibilities going forward. Two years later, the anticipated cooperation has not materialized—and this put pressure on the Court to walk back *McGirt*,[489] which the Court kind of did, by a 5-4 vote, in *Oklahoma v. Castro-Huerta*, which allowed Oklahoma to prosecute non-Indians committing crimes against Native persons on Tribal reservations.[490] (The flip from 5-4 in *McGirt* to 5-4 in *Huerta* was the result of Justice Barrett's succession to Justice Ginsburg's seat on the Court.)

The Frankfurterian lesson for the *Dobbs* Court is that it needs to curtail the excesses of the new state freedom to regulate abortion. As Mary Ziegler maintains, the central norm of the pro-life social movement that prevailed in *Dobbs* is "fetal personhood"; the fetus is a

484. *McGirt*, 140 S. Ct. at 2459.

485. *Id.* at 2482.

486. *Id.* at 2501–02 (Roberts, C.J., dissenting).

487. *See id.* at 2480 (majority opinion) ("[T]he magnitude of a legal wrong is no reason to perpetuate it.").

488. *See id.* at 2479–80 (calling the dissent's estimation of thousands of cases at risk of being overturned "speculative").

489. *See* D. Sean Rowley, *State, Tribal Judicial Measure Vetoed by Stitt*, CHEROKEE PHX. (May 15, 2022), https://www.cherokeephoenix.org/news/state-tribal-judicial-measure-vetoed-by-stitt/article_ad368cc6-d2df-11ec-a9dd-4bab94ac1b04.html [https://perma.cc/GL8J-E7TT].

490. 142 S. Ct. 2486 (2022).

constitutional "person" guaranteed due process, equal protection, and other rights.[491] Some states are tempted to penalize women traveling to other states and/or those persons and institutions that help them—but Justice Kavanaugh's concurring opinion suggests that a Court majority might block such measures, based upon a right to interstate travel and perhaps also a proper respect for federalism.[492] His opinion makes no sense if *Dobbs* is read to constitutionalize fetal personhood, for then a mother's driving her daughter to another state to secure an abortion would be part of a conspiracy to commit murder, which would trump the travel right.[493] One can also imagine state criminal assault or murder laws being applied to twelve-year-old girls seeking to terminate pregnancies caused by rape, pregnant women who abuse drugs or alcohol, and putative fathers (or Senate candidates) who pressure their girlfriends to secure abortions.

C. Caution Before Reading Landmark Decisions Expansively

In a series of summary dispositions, the Court applied *Brown* to invalidate race-based segregation in public buses, parks, and swimming pools.[494] These decisions surely stood for the proposition that race was a suspect classification that rendered those policies presumptively unconstitutional. In *Naim v. Naim*, however, the Court ducked several opportunities to strike down Virginia's law barring marriages between White persons and persons of any other race.[495] Academics were appalled that the Court left the matter to the state courts, which relied on the Bible and long-standing practice to sustain a law explicitly

491. Mary Ziegler, *The Next Step in the Anti-Abortion Playbook Is Becoming Clear,* N.Y. TIMES (Aug. 31, 2022), https://www.nytimes.com/2022/08/31/opinion/abortion-fetal-personhood.html [https://perma.cc/LYM2-V5HY].

492. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305–06, 2309 (2022) (Kavanaugh, J., concurring).

493. The Texas Heartbeat Act, adopted before *Dobbs*, authorizes private bounty hunters to sue persons or institutions that assist a woman to secure an abortion. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-171.212 (West 2021). Although the Court rejected an earlier challenge to the law's defiance of the *Roe* and *Casey* limits, this law ought to be firmly rebuffed when applied to a woman's travel to a place where she can legally secure an abortion. If the Texas courts press the law in other unusual or boundary-pushing directions, the Supreme Court would improve upon *Dobbs* by imposing strict limits on laws such as this one.

494. New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (city buses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches).

495. 350 U.S. 985, 985 (1956) (dismissing appeal from state court decision, on remand after *Brown*, reaffirming the constitutionality of its antimiscegenation statute).

grounded in notions of racial purity and White supremacy.[496] Reliance interests explain and may provide some justification for the Court's reticence. Because twenty-nine states then had statutory bans on different-race marriages, the Court kicked the can down the road, so as not to imperil *Brown*.[497] Between 1954 and 1967 all but sixteen (southern) states repealed their laws.[498] None of the repeal efforts stirred a backlash or turmoil,[499] nor did the Court's unanimous opinion striking down a race-based anti-cohabitation law in *McLaughlin v. Florida*.[500] The swift erosion of public and social reliance on the established constitutional rule allowing states to define marriage as same-race paved the way for the Court to confidently announce that such laws violated the Fourteenth Amendment in *Loving v. Virginia*.[501] In turn, the Court read its landmark decision in *Loving* pretty cautiously. It took almost half a century to apply its due process logic to extend the marriage right to same-sex couples.[502]

The Court took a cautious risk in *Furman v. Georgia*, whose per curiam opinion invalidated the death penalty on the basis of its "freakish[ ]" and arbitrary pattern of deployment, disproportionately burdening Black defendants.[503] Although no state had executed anyone since 1967, three of the five majority Justices hedged their bets with regard to relief: they refused to consider the constitutionality of the death penalty per se and only reasoned that Georgia had not ensured sufficient guidance to juries, so as to cabin their discretion.[504] Their caution may have been institutionally wise, as a large majority of states immediately enacted new death penalty laws with mitigating and aggravating factors juries had to consider before imposing this unique

496. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959) (discussing how previous Supreme Court justices relied on history to protect the court from becoming a "political institution").

497. J.R. Browning, *Anti-Miscegenation Laws in the United States*, 1 DUKE BAR J. 26 (1951).

498. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 259 (Vintage Books ed., 2004).

499. *See id.* at 258–59.

500. 379 U.S. 184 (1964); *see also* Ariela Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas: *Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165 (2006); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1503 (2004).

501. 388 U.S. 1, 2 (1967).

502. Obergefell v. Hodges, 576 U.S. 644, 647 (2015) (relying on *Loving* to require marriage equality for same-sex couples).

503. 408 U.S. 238, 239–40, 293 (1972) (per curiam).

504. *Id.* at 255–57 (Douglas, J., concurring in the judgment); *id.* at 310 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

penalty.[505] In *Gregg v. Georgia*, the Court upheld such laws,[506] and in *McCleskey v. Kemp*, a 5-4 Court rejected a challenge that documented the race-based arbitrary pattern of enforcement of the Georgia law.[507] In case after case, the Court has read *Brown* and *Loving*'s anti-racism norm narrowly when a broad application would have affronted private, societal, or public reliance interests and has read it broadly when such reliance interests were not apparent.[508]

Will the Court proceed with similar caution after *Dobbs*? Because *Dobbs*'s original meaning analysis seemed to foreclose any interpretation of the Due Process Clause that would broadly protect adults' sexual privacy, Justice Thomas opined that *Griswold, Lawrence,* and *Obergefell* should be promptly overruled.[509] The majority opinion tried to minimize the damage by insisting that abortion was a unique issue,[510] and Justice Kavanaugh's concurring opinion indicated that these precedents were not at risk, for reliance and other reasons.[511] *Dobbs* is already one of the most criticized and unpopular Supreme Court decisions in history—but even more reliance-based anger, evasion, and ridicule would be added by a decision telling married couples that the state could regulate their contraception-based family planning (*Griswold*), straight as well as gay persons that oral sex between consenting adults would now rebound as a crime in one-fifth of the states (*Lawrence*), and millions of same-sex married persons, their children, and their in-laws that their marriages and related benefits would not have to be recognized in states barring recognition of valid same-sex marriages (*Obergefell*). The Supreme Court caught overwhelming grief for *Bowers v. Hardwick*; that would pale in comparison to the mockery it would suffer if it overruled *Griswold, Lawrence,* and *Obergefell* on top of *Roe* and *Casey*. Nonetheless, the

505. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 267–70 (2002) (describing state and federal responses to the *Furman* decision); Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 46–49 (2007) (describing the same).

506. 428 U.S. 153, 207 (1976).

507. 481 U.S. 279, 320 (1987).

508. *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49 (2004) (arguing that "silent covenants" played a great role in determining the outcome in *Brown*); Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980) (arguing that *Brown* was decided in order to assure the global community and the Black community of the moral superiority of the American government); Richard Delgado, *Explaining the Rise and Fall of African-American Fortunes: Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369 (2002) (arguing that interest convergence explains the partial success of the civil rights movement).

509. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2300–04 (2022) (Thomas, J., concurring).

510. *Id.* at 2277 (majority opinion).

511. *Id.* at 2309 (Kavanaugh, J., concurring).

Dobbs majority has already started nibbling away at *Griswold*'s right to use contraceptives and *Obergefell*'s recognition of same-sex marriages.[512]

A harder question for the Court is what to do with state laws that prevent doctors from performing abortions on teenage girls who have been raped. Can the state force these pregnant girls to carry those fetuses to term? Can it make the girls' efforts a crime? Under *Dobbs*, the state might logically have that discretion, because a twelve-year-old girl lacks a fundamental liberty under the Court's reasoning and the state has a legitimate interest in protecting fetal personhood. Such a consequence seems more defensible in thirteenth-century England, the authoritative starting place under *Dobbs*, than in twenty-first-century America (or even in 1868 America, though I am not aware of a case affirmatively protecting such a victim). The inhumanity of imposing compulsory motherhood on a minor who has been raped strikes me as so morally reprehensible that the *Dobbs* majority would have to reconsider the theoretical scope of its analysis.

CONCLUSION

I conclude with lessons that this study might have for scholars, for social movement advocates, and for the Roberts Court.

1. Lessons for Scholars. Academic debates about the cogency of the new textualism or original public meaning, the relevance of legislative history, and the deference judges ought to accord executive officials and agencies are overblown relative to their importance for the nation's law of interpretation. Doctrine, dictionaries, agency views, and statutory precedents enable us to predict judicial results in the run-of-the-mill cases that give teeth to the rule of law in our polity. But if scholars want to understand the hard cases—including what makes a case hard and what makes it easy—they need to explore the dark matter of judicial interpretation—those things that drive constitutional and statutory interpretation and render doctrine either irrelevant or after-the-fact.

Traditionally, the realist variable has been politics, pure and simple. Conservative Justices appointed by Republican presidents will read doctrines to support results that favor corporations, polluters, prosecutors, churches, and state governments resisting national

512. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014) (Alito, J.) (treating some contraceptives as "abortifacients"); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1880–82 (2021) (Roberts, C.J.) (requiring a state program sometimes to discriminate against same-sex marriages).

regulation. Liberal Justices appointed by Democratic presidents will read the same doctrines to support interpretations that favor racial minorities, women, LGBTQ persons, consumers, environmentalists, and federal regulators. The cases surveyed in Part I of this Article illustrate the operation of politics, especially where reliance interests are strong on both sides of an issue—such as *Dobbs*, the COVID Cases, and the EPA's Power Plant Case that introduced this Article.

But *Bostock* and the analysis in Part II suggest that politics is not the only variable at work, even in cases where there are controversial norms at stake. While the issue of whether gay/lesbian and transgender employees are protected by the "sex discrimination" bar in Title VII remained contentious, the legal analysis of that issue dramatically changed between the 1970s—when gay-friendly liberal as well as gay-ignorant or hostile conservative theorists would have rejected the sex discrimination argument for gay rights—and the new millennium—when conservatives who found homosexuality mystifying joined gay-friendly liberals to read Title VII broadly.

As the "dark matter" metaphor suggests, I believe that reliance interests are an important and perhaps even the central feature of a realistic academic agenda for deeply understanding the operation of our law of interpretation. Other important inquiries might focus on institutional interactions between the Supreme Court and agencies, legislators, and lower courts at the state as well as federal level. How institutional roles interact with political preferences and reliance interests would be a powerful explanatory story for most landmark decisions—from *Brown* to *Bostock*.

2. Lessons for Advocates. Advocates who can demonstrate (in the record, their briefs, and the amicus briefs they can line up) the broadest and deepest array of reliance interests that would be disrupted if the other side prevailed on the interpretive issue will usually win the case or minimize the damage to their clients or their cause. Through documentation of reliance interests, social movement advocates protected or advanced minority rights in *Mancari, Sweet Home, Romer, Obergefell,* the DACA Case, and *Bostock*—all decided by conservative Courts.

From a social movement perspective, a lesson of *Brown* (as well as *Obergefell* and the DACA Case) is that grassroots activism and broad support are necessary even if not sufficient for securing enduring victories in court. Thus, reliance interests can be highly dynamic, as illustrated by the success of marriage equality. The constitutional arguments advanced in the early District of Columbia's marriage litigation (1991–1995) secured support from the first judge to find marriage equality required by the Constitution, but for the majority,

those arguments were overwhelmed by societal and public reliance interests.[513] When lesbian and gay plaintiffs prevailed in Vermont (1999–2000, civil unions) and Massachusetts (2003–2004), they did so by grassroots campaigns generating strong reliance arguments—thousands of children reared in these households relied on the strength of their parents' relationship, companies enjoyed an explosion of domestic partnerships, and even religious leaders joined the cause—while eroding some reliance arguments cutting against recognition, especially the claim that marriage as an institution depended on the exclusion of same-sex couples.[514] By the time the Supreme Court decided *Obergefell,* thirty-seven states recognized same-sex marriages. And the sky had not fallen, anywhere.

Should LGBTQ folks have had to wait two decades to enjoy equal recognition for their relationships? Should the status quo protection facilitated by reliance-based arguments have been thrown over in the 1990s? Even though I was one of the earliest advocates for marriage equality, I am not persuaded that the case for an early Supreme Court intervention has been made. The costs to the rule of law, judicial legitimacy, and social stability would have been significant had the Court ruled in favor of marriage equality during the Clinton and Bush 45 Administrations. For example, if the constitutional arguments had prevailed in the District's marriage litigation (1991–1995), it is likely that Clintonian Democrats would have joined Gingrichian Republicans in supporting a constitutional amendment, instead of the statutory Defense of Marriage Act. In addition, progressives might think twice before dissing reliance interests in constitutional and statutory interpretation. However badly the status quo needs to be reformed, the Supreme Court can make matters worse. Reliance interests, in short, may prevent backsliding and misguided change.

But, indeed, reliance interests do often stand in the way of needed reform. Business interests long ago mastered the art of reliance-based arguments, illustrated by their triumphs against strongly justified regulatory reform in *Flood, Gilbert*, *Brown & Williamson*, *Epic Systems*, *Alabama Realtors*, *NFIB v. OSHA*, and *West Virginia v. EPA.*

513. *Compare* Dean v. District of Columbia, 653 A.2d 307, 320–59 (D.C. 1995) (Ferren, J., concurring in part, and dissenting in part) (dissenting from the judgment to affirm the trial court's order granting summary judgment based on the constitutional issues raised), *with id.* at 361–62 (Terry, J., concurring in part, and concurring in the judgment) (relying on long-standing societal, legislative, and judicial understanding of "marriage" as one-man, one-woman to conclude that no constitutional equal protection issue existed in the case), *and id.* at 363–64 (Steadman, J., concurring in part, and concurring in the judgment) (same).

514. ESKRIDGE & RIANO, *supra* note 43, at 175–78, 185–95, 202–07, 235–47.

The post-Scalia Court has embraced the most antiregulatory private reliance arguments advanced by a particular segment of the business community (as in the COVID and EPA Power Plant Cases). *Dobbs* and other recent decisions threaten to transform the public reliance principle in individual rights cases by minimizing or ignoring earlier legislative, administrative, and even judicial reliance; by promoting the Court's own stealth-constitutional precedents; and by advancing a new baseline requiring gun-regulating states (*Bruen*), pregnant women (*Dobbs*), sexual and gender minorities (*Bostock* dissents) to demonstrate eighteenth- and nineteenth-century public reliance in order to secure constitutional recognition. For racial minorities, working-class persons, and women—all disenfranchised during those periods—this is an unfair and antidemocratic baseline.

3. Lessons for the Supreme Court. There is a thin line between a jurisprudential revolution and rule of law turmoil. That is the line the Roberts Court is walking. The Bush and Trump Justices see this as their constitutional moment. Their individual rights agenda is revolutionary: shift protected constitutional liberties away from women's control of their bodies and sexual freedom and toward religious freedom, rights to own and carry guns, First Amendment rights of corporations, and equality rights for White people. The Court's institutional agenda is equally revolutionary: curtail agency regulation, especially of the environment, through nondelegation canons; render Congress less relevant and the Court more relevant to the substance of public law; defer to prisons, the military, and the executive branch.

To carry out this regime-shifting agenda much further, the Roberts Court will have to overrule a lot more precedents, transform the substantive canons of interpretation, and systematically ignore or recharacterize reliance interests. *Dobbs* provides a roadmap. The Court's strategy is to confine private reliance to classic reliance on contract promises (except promises made to unions or Tribes), dismiss societal reliance (except in affirmative action cases), and marginalize prior judicial, legislative, and administrative reliance on broad regulatory precepts in order to unsettle what public officials assumed was settled law. If a Court majority follows this roadmap, it will lead the country into chaos.

Scholars lament that the Court is launching a new *Lochner* era. From the perspective of reliance interests, a closer parallel is *Dred Scott*, where the Taney Court minimized the liberty and indeed life interest of Scott and his family (long-recognized by the free territory into which he had been taken), turned the societal debate over the constitutional as well as moral legitimacy of slavery into a reason to act decisively, and configured public reliance in terms of Blackstone-era

legislation, while invalidating a generation of post-1820 public reliance.[515] This is eerily similar to *Dobbs*, where the majority opinion minimized women's long-recognized liberty and indeed life interest in abortion choice, turned the societal debate over the constitutional as well as moral legitimacy of abortion into a reason to act decisively, and configured public reliance in terms of Blackstone-era common law and Taney-era legislation, while invalidating two generations of post-1972 public reliance.

515. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–17, 450–54 (1857) (Taney, C.J.) (enslaved party), *superseded by*, U.S. CONST. amend. XIV.