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# FOREWORD: CURATION, NARRATION, ERASURE: POWER AND POSSIBILITY AT THE U.S. SUPREME COURT

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# THE SUPREME COURT
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# FOREWORD: CURATION, NARRATION, ERASURE: POWER AND POSSIBILITY AT THE U.S. SUPREME COURT

*Karen M. Tani*[*]

## INTRODUCTION

"Dead, dead, dead."[1] This quote might have referred to any number of apparent casualties of the 2023 Supreme Court Term — from the Court's decades-old approach to reviewing agency action ("*Chevron* deference"),[2] to federal prosecutors' chances of holding former President Donald J. Trump accountable for alleged interference with the 2020 presidential election,[3] to the billionaire Sackler family's bold attempt to use a corporate bankruptcy settlement to finalize their liability for the opioid crisis.[4]

The quote in fact referred to a case that Court-watchers and the media have already largely forgotten, *Acheson Hotels, LLC v. Laufer*.[5]

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[1] Transcript of Oral Argument at 19, Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18 (2023) (No. 22-429) (statement of Kagan, J.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-429_4315.pdf [https://perma.cc/P478-QVF2].

[2] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2268, 2273 (2024).

[3] *See* Trump v. United States, 144 S. Ct. 2312, 2356 (2024) (Sotomayor, J., dissenting).

[4] *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2078–79, 2086 (2024).

[5] 144 S. Ct. 18 (2023). *See, e.g.*, Jeannie Suk Gersen, *The Message of the Supreme Court's Wild Ride of a Term*, NEW YORKER (July 12, 2024), https://www.newyorker.com/news/daily-comment/the-message-of-the-supreme-courts-wild-ride-of-a-term [https://perma.cc/Y2AT-A2QF] (a Court-

At oral argument on the morning of October 4, 2023, Justice Kagan pronounced *Laufer* dead on arrival.[6] In a rare display of consensus, her most conservative colleagues appeared to agree. Article III of the U.S. Constitution constrains the Court to adjudicating only live "Cases" and "Controversies,"[7] and this one appeared "dead as a doornail," in Justice Alito's words;[8] "finished," in Justice Thomas's.[9]

Seven months earlier, when the Court agreed to hear *Laufer*, the case presumably looked alive — and useful.[10] The Court's review of this dispute promised to resolve disagreement among lower courts over whether a disabled "tester" plaintiff like Deborah Laufer had standing to enforce the Americans with Disabilities Act of 1990[11] (ADA) against a hotel that she admittedly had no intention of visiting in person.[12] By the time of oral argument, however, the facts had changed in crucial ways.[13] Laufer, who "ha[d] sued hundreds of [other] hotels" over alleged noncompliance with the ADA, learned that a district court had suspended her lawyer from legal practice, following findings of unethical behavior in prior lawsuits that Laufer had brought.[14] Following this news, Laufer "voluntarily dismissed her . . . suit[]" against Acheson Hotels, as well as all pending suits against other hotels, and "filed a suggestion of mootness" with the Supreme Court.[15] At oral argument, her appellate counsel went so far as to assure the Court that Laufer would never file an ADA lawsuit again.[16] Ultimately, the Court agreed to treat the case as moot.[17] Seven Justices joined a majority opinion warning against efforts to "evade our review" and supplementing the order of dismissal with an order of vacatur, effectively erasing the First Circuit's

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watcher not mentioning *Laufer* in a summary of the 2023 Term); *Major Cases Decided by the US Supreme Court This Term*, REUTERS (July 1, 2024, 1:26 PM), https://www.reuters.com/world/us/major-cases-before-us-supreme-court-this-term-2024-03-29 [https://perma.cc/P98Q-P4AS] (a media outlet not mentioning *Laufer* in a summary of the 2023 Term).

6 Transcript of Oral Argument, *supra* note 1, at 18–19 (statement of Kagan, J.).

7 U.S. CONST. art. III, § 2.

8 Transcript of Oral Argument, *supra* note 1, at 16 (statement of Alito, J.).

9 *Id.* at 4 (statement of Thomas, J.).

10 *See* Acheson Hotels, LLC v. Laufer, 143 S. Ct. 1053 (2023) (mem.) (granting certiorari).

11 Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 and 47 U.S.C. § 225).

12 Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 20–21 (2023); *id.* at 23 (Thomas, J., concurring in the judgment).

13 *See id.* at 23 (Thomas, J., concurring in the judgment).

14 *Id.* at 20–21 (majority opinion).

15 *Id.*

16 *See* Transcript of Oral Argument, *supra* note 1, at 70 ("Ms. Laufer . . . will not be bringing any more ADA suits . . . ."). This was likely an attempt to persuade the Justices that Laufer was acting in good faith, not trying to preempt an unfavorable ruling.

17 *See Laufer*, 144 S. Ct. at 22 (finding the case moot and noting that, although the Court could nonetheless adjudicate the standing question, it would not do so). Justice Thomas disagreed with the Court's decision not to reach the standing issue. *See id.* at 23, 27 (Thomas, J., concurring in the judgment).

standing determination.[18] No longer suitable for making law for the nation, *Laufer* would make no law at all.

Dead and disappeared, *Laufer* might be the least important decision of the 2023 Term — a Term that, in the words of one major newspaper, "[r]emade America" itself.[19] But from another perspective — that of this Foreword — *Laufer* is an ideal starting point for reflection.

Consider, first, how *Laufer* reached the Court. The Court chose it from among thousands of petitions for review, via an opaque but high-stakes process.[20] Many cases end here, with no explanation.[21] *Laufer* was instead lifted up. When the dispute later disintegrated, some Justices sounded frustrated. "[S]ignificant resources have already been invested in this case," Justice Barrett noted during oral argument.[22] "[W]e may have to come up with another case," Chief Justice Roberts remarked, referencing the need to find a different vehicle for answering the legal question *Laufer* had presented.[23] In other words, the concern

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[18] *See id.* at 22 (majority opinion). The vacatur relied on *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), which dealt with how appellate courts should approach situations where a case becomes moot while pending review. *Id.* at 39–40. This vacatur also aligned with language in the "suggestion of mootness" Laufer filed with the Court. *See* Suggestion of Mootness at 1, *Laufer*, 144 S. Ct. 18 (No. 22-429) ("Ms. Laufer recognizes that, because it was her voluntary decision to dismiss her claim that mooted the case, the favorable opinion she obtained in the court of appeals should be vacated."). In a separate writing, however, Justice Jackson faulted the Court for failing to evaluate the equities of whether to vacate the judgment below. *Laufer*, 144 S. Ct. at 29, 31 (Jackson, J., concurring in the judgment); *see also* Chapman v. Doe, 143 S. Ct. 857, 857 (2023) (Jackson, J., dissenting) ("I am concerned that contemporary practice related to so-called '*Munsingwear* vacaturs' has drifted away from the doctrine's foundational moorings."). Justice Jackson is not alone in noting the significance of this seemingly technical doctrine. *See* Steve Vladeck, *20. "*Munsingwear *Vacaturs*," ONE FIRST (Mar. 27, 2023), https://www.stevevladeck.com/p/20-munsingwear-vacaturs [https://perma.cc/V8D5-XBJH] (noting the Court's increased use of *Munsingwear* vacaturs in recent years); Pattie Millett, *Practice Pointer: Mootness and* Munsingwear *Vacatur*, SCOTUSBLOG (June 10, 2008, 1:30 PM), https://www.scotusblog.com/2008/06/practice-pointer-mootness-and-munsingwear-vacatur [https://perma.cc/L5VP-M9G6] (explaining the *Munsingwear* vacatur "rule" and documenting the Supreme Court's sparing issuance of such vacatur orders as of 2008); Lisa A. Tucker & Michael Risch, *Canceling Appellate Precedent*, 76 FLA. L. REV. 175, 175–76 (2024) (documenting the Court's increased use of *Munsingwear* vacaturs since 2017 and suggesting a correlation with "the ideological directionality of the federal appeals court opinion" that is potentially subject to vacatur, *id.* at 176).

[19] Adam Liptak, *In a Volatile Term, A Fractured Supreme Court Remade America*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/us/politics/supreme-court-term-decisions.html [https://perma.cc/4E2C-D2HY].

[20] *See* Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 390 (2004) (explaining the "secrecy" and "importance" of the Court's certiorari process). During the 2022 Term, Chief Justice Roberts reported 4,159 cases filed with the Supreme Court. JOHN G. ROBERTS, 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [https://perma.cc/YK4U-QLQ3].

[21] Cordray & Cordray, *supra* note 20, at 402.

[22] Transcript of Oral Argument, *supra* note 1, at 15 (statement of Barrett, J.).

[23] *Id.* at 45 (statement of Roberts, C.J.); *cf.* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 220–21 (1991) (noting that from the

was not only about resources already spent, but also about having to spend resources *again*, in pursuit of the same end.[24]

These comments are both mundane and profound. They are mundane because *of course* the Justices ought to be concerned about answering important legal questions of national significance. So too should they care about institutional resources. These comments are profound in revealing the constructedness of the Court's "merits docket," the assemblage of the sixty-or-so cases that the Court chooses to consider every term,[25] along with the much smaller number of cases that it must hear (where jurisdiction is mandatory).[26] The vast discretionary portion of the docket is decidedly *not* an objective representation of the legal questions that matter most to the American people.[27] If it were, it is not obvious that "tester" plaintiffs would be on the agenda (despite the important role they can play in enforcing antidiscrimination laws[28]). Nor, despite the Court's self-presentation, does the merits docket consist of legal issues that incontrovertibly *must* be decided *now* by the nation's apex court.[29] *Laufer* became part of the 2023 Term because it had the potential to resolve a "circuit split" within the appellate courts.[30] But so did other cases that the Court declined to take up during the same time frame.[31] In reality, the Court's merits docket is a highly curated collection of controversies — not unlike an archive of historical sources

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Justices' perspective, cases have a "fungibility" to them, meaning that if the Court did not end up deciding a particular case, the Justices could imagine a relevantly similar case arising again in the future, *id.* at 221).

[24] *See also* Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1709, 1765–66 (2023) (noting a similar frustration when the petitioners in a 2015 disability rights case deviated from the argument in their certiorari petition); *cf.* Aaron L. Nielson & Paul Stancil, *Gaming Certiorari*, 170 U. PA. L. REV. 1129, 1136 (2022) (describing "every grant of certiorari" as "costly to the Justices").

[25] *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC xi (2023) (describing the Court's substantial discretion over the cases it chooses to hear on the merits). Of great importance, as well, is the larger set of cases that the Court handles on an "emergency" basis (more swiftly, less publicly). *See generally id.* (emphasizing the importance of the Court's "emergency," or "shadow," docket); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015) ("[U]nderstanding the Court requires us to understand its non-merits work — its shadow docket.").

[26] *See, e.g.*, Alexander v. S.C. State Conf. of the NAACP, 144 S. Ct. 1221, 1238 (2024). Cases that the Court must hear are (1) those for which it has original jurisdiction; and (2) those for which Congress has made appeal a matter of right. PERRY, *supra* note 23, at 24–25, 24 n.8. Today, neither category produces many cases. *Id.* at 25.

[27] *See, e.g.*, Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court's Agenda — And the Nation's*, 120 HARV. L. REV. 4, 7–9 (2006) (pushing back on the notion of "government by judiciary," *id.* at 7, by observing that, in the 2005 Term, the Court's agenda overlapped only partially with the issues that "appeared to dominate the nation's public agenda and the workload of the nation's policymakers," *id.* at 9).

[28] *See* Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. ONLINE, 128, 130–31 (2024).

[29] *See infra* section I.A, pp. 14–17 (discussing the discretion that the certiorari process affords).

[30] Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 21 (2023).

[31] *See infra* note 89 and accompanying text (discussing circuit splits).

or an exhibit at a museum, but with a different function and much more formal power.

"Curation" occurs most obviously via case selection, but also at other decision points — some of which became unusually salient during the 2023 Term. In addition to deciding which cases warrant review, the Court decides when a case is most suitable for review (that is, at what stage of the litigation and on what sort of underlying record), which legal question(s) to consider, how to sequence arguments, and when to issue decisions.[32] Curation also occurs further upstream, via signals in prior decisions and oral arguments about what sort of litigants should petition for review and which questions they should raise.[33] (The same types of signals warn other litigants to steer clear of the Court if they can.[34]) To be sure, it would be hard to dispute the rightful place of some items on the Court's agenda each term, but this should not distract us from the contestable choices the Court makes when curating the vast majority of its docket.

These exercises of curatorial discretion matter in at least two ways. The first and most obvious pertains to lawmaking: In adjudicating particular cases, the Court will make the law of the land, with immediate and significant consequences for the law's subjects.[35] Whatever one thinks about the merits of the 2022 decision *Dobbs v. Jackson Women's Health Organization*,[36] for example, the Court *chose* to take that case and *chose* to decide it as it did.[37] (Court-watchers may recall that the court below had adhered, if grudgingly, to Supreme Court precedent,

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[32] *See generally* PERRY, *supra* note 23.

[33] *See infra* note 104 and accompanying text.

[34] Ezra Rosser, *Introduction* to THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 1, 4 (Marie A. Failinger & Ezra Rosser eds., 2016) (noting that "in the modern era," "antipoverty lawyers are avoiding the Supreme Court because of the likelihood of continued losses," *id.* at 4); Vanessa A. Baird, *The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda*, 66 J. POL. 755, 756 (2004) (arguing "that actors in the litigant community — parties to the cases, lawyers, or interest groups — use information about the Supreme Court's policy priorities to determine which cases to bring to the Court"); Harris et al., *supra* note 24, at 1755 (noting efforts by the disability community to keep certain legal questions away from the Roberts Court).

[35] As Professor Robert Cover famously observed, "[l]egal interpretation takes place in a field of pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted); *see also* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 730 (2001) (noting that certiorari decisions translate directly into legal rules, which will, in turn, have both governing power and agenda-setting power).

[36] 142 S. Ct. 2228 (2022).

[37] Tejas N. Narechania, *Certiorari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 608 (2023) (using the *Dobbs* example to make the same point). Another recent example is *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023). The consensus among Court-watchers was that the Court took this case because members of the Court wanted to reassess the constitutionality of race-conscious admissions policies in higher education, not because a lower court had forced the Court's hand. *See* Narechania, *supra*, at 604–06, 606 n.75.

leaving no error to correct under then-governing law.[38]) *Dobbs*'s revocation of a constitutionally protected zone of reproductive autonomy has already had a profound impact.[39]

Similarly consequential, and flowing from other discretionary judgments, was the Court's decision in *Trump v. United States*,[40] which followed from a federal grand jury's indictment of former President Trump on charges relating to his refusal to accept his defeat in the 2020 presidential election.[41] After the Court of Appeals for the D.C. Circuit rejected Trump's arguments regarding presidential immunity,[42] Trump urged the Supreme Court to weigh in.[43] But the Court was not *required* to do so. It could have denied certiorari and allowed the D.C. Circuit's decision to stand.[44] It could have issued a summary affirmance.[45] Instead, the Court accepted review and, at the very end of the Term, issued a decision that insulates wide swaths of presidential conduct from

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[38] Jackson Women's Health Org. v. Dobbs, 945 F.3d 265, 269 (5th Cir. 2019), *rev'd*, 142 S. Ct. 2228 (2022); *see* Rachel Bayefsky, *Judicial Institutionalism*, 110 CORNELL L. REV. (forthcoming 2024) (manuscript at 39) (on file with the Harvard Law School Library) (noting that "[f]rom a legal perspective, there was no immediate need to reconsider decades-old precedent").

[39] *See generally* SHEFALI LUTHRA, UNDUE BURDEN: LIFE-AND-DEATH DECISIONS IN POST-*ROE* AMERICA (2024); Maya Manian, *The Ripple Effects of* Dobbs *on Health Care Beyond Wanted Abortion*, 76 SMU L. REV. 77 (2023).

[40] 144 S. Ct. 2312 (2024).

[41] *See id.* at 2324.

[42] United States v. Trump, 91 F.4th 1173, 1180 (D.C. Cir. 2024), *vacated*, 144 S. Ct. 2312.

[43] *See* Adam Liptak & Abbie VanSickle, *Trump Asks Supreme Court to Pause Ruling Denying Him Absolute Immunity*, N.Y. TIMES (Feb. 12, 2024), https://www.nytimes.com/2024/02/12/us/politics/supreme-court-trump-immunity.html [https://perma.cc/766A-NLSF].

[44] The Court had declined earlier to "leapfrog" the circuit court's review of the case, signaling a desire to give the legal issue an airing at that level. *See* Amy Howe, *Court Won't Hear Trump Immunity Dispute Now*, SCOTUSBLOG (Dec. 22, 2023, 3:26 PM), https://www.scotusblog.com/2023/12/court-wont-hear-trump-immunity-dispute-now [https://perma.cc/J44X-X8HC].

[45] Some scholars thought Trump's arguments weak enough to merit such treatment. *See, e.g.*, Brief of Scholars of Constitutional Law as Amici Curiae in Opposition to Application for Stay of the Mandate at 4–5, 11, *Trump*, 144 S. Ct. 2312 (No. 23-939) (describing Trump's immunity arguments as historically groundless, inconsistent with the Constitution, and contrary to Supreme Court precedent); Brief of Amici Curiae Scholars of the Founding Era in Support of the Respondent at 1, *Trump*, 144 S. Ct. 2312 (No. 23A745) (finding "no plausible historical case" for former President Trump's "assert[ion] that a doctrine of permanent immunity from criminal liability for a President's official acts . . . must be inferred" from the Constitution). *But see, e.g.*, Jack Goldsmith, *Why the Supreme Court Should Grant Certiorari in* United States v. Trump, LAWFARE (Feb. 6, 2024, 10:28 PM), https://www.lawfaremedia.org/article/why-the-supreme-court-should-grant-certiorari-in-united-states-v.-trump [https://perma.cc/A8HH-XERK] (expressing agreement with the D.C. Circuit's conclusion, but advocating for Supreme Court review because of the importance of the federal question and because the D.C. Circuit's decision "contains loose reasoning that will have a potentially large collateral impact on the construction of criminal statutes to burden the Article II authorities of sitting presidents"); Lee Kovarsky, Opinion, *Trump Should Lose. But the Supreme Court Should Still Clarify Immunity*, N.Y. TIMES (Feb. 29, 2024), https://www.nytimes.com/2024/02/29/opinion/supreme-court-trump-immunity.html [https://perma.cc/RF27-TPWZ] (noting the "weakness of [Trump's] immunity arguments" and describing his sought-after immunity rule as "implausibly broad," but arguing that "the Supreme Court should seize this opportunity to develop a narrow presidential immunity in criminal cases").

criminal prosecution.[46] During the Court's consideration of this case, Trump was actively campaigning for a second term in office and also deeply embroiled in litigation ("fighting 91 felony counts, across four different jurisdictions").[47] At the time of this writing, the legal and political consequences of *Trump v. United States* continue to unfold.

Acts of docket discretion also produce a second set of consequences — even more central to this Foreword — and these are narratives.[48] Legal decisions provide opportunities to tell particular stories — about what happened and why; about what is changeable and what is fixed; about who "we" are as a people and who is not our concern.[49] *Laufer*, a standing case, was an opportunity to tell a story about injury, with all of that concept's legal and rhetorical power.[50] Like other recent standing cases, it asked what counts as an injury, how we know when injury has occurred or is likely to occur, and which injuries have legal remedies.[51] In fact, *Laufer* offered up multiple tales of injury: On one side were small business owners who felt targeted — even "violated" — by plaintiffs like Laufer;[52] on the other side, disabled Americans whose

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[46] *See Trump*, 144 S. Ct. at 2347; *infra* pp. 74–77 (discussing this case).

[47] Carrie Johnson, *Trump Appeals Immunity Ruling to the Supreme Court*, NPR (Feb. 12, 2024, 5:12 PM), https://www.npr.org/2024/02/12/1230387417/trump-appeals-immunity-ruling-to-the-supreme-court [https://perma.cc/8TUU-5XDB].

[48] *See infra* section II.A, pp. 44–49. I use the term "narrative" as Professor Anne Ralph does: as "a particular representation of a series of events: a text or other embodiment of a certain telling or treatment of a story's events." Anne E. Ralph, *Narrative-Erasing Procedure*, 18 NEV. L.J. 573, 577 (2018).

[49] *See* Ralph, *supra* note 48, at 578 ("[N]arrative is how we make sense of the world."); *id.* at 581 ("The 'impression of causation' that narrative creates is a 'powerful' way of 'suggesting normality.'" (quoting H. PORTER ABBOTT, THE CAMBRIDGE INTRODUCTION TO NARRATIVE 44 (2d ed. 2008))); JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 25 (2002) (describing how stories can "promot[e] cultural cohesion" and invite listeners to see the world in the same way); Aderson Bellergarde François, *A Lost World: Sallie Robinson, the* Civil Rights Cases*, and Missing Narratives of Slavery in the Supreme Court's Reconstruction Jurisprudence*, 109 GEO. L.J. 1015, 1015 (2021) ("The Supreme Court tells stories about who and what we are . . . ."). On the long tradition of analyzing the narratives within legal opinions, see Angela Onwuachi-Willig, *The Supreme Court, 2022 Term — Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 192–93 (2023) ("[A]s feminist legal scholars, Critical Race scholars, and law-and-humanities scholars have long asserted, legal opinions themselves can also be read as narratives, . . . constructed . . . to offer one version of the facts and the legal principles applied to them as the objective truth." (footnote omitted)); *see also* Peter Brooks, *Narratives of the Constitutional Covenant*, DAEDALUS, Winter 2012, at 43, 45 (describing the Supreme Court as the imagined "author of covenantal narratives," linking the past, the present, and the future).

[50] *See generally* INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS (Anne Bloom, David M. Engel & Michael McCann eds., 2018).

[51] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023) (explaining that "the plaintiff must have suffered an injury in fact — a concrete and imminent harm to a legally protected interest, like property or money — that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit" (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992))).

[52] Jay Weaver, *Disability Lawsuits Surge in Florida. Are They Removing Barriers or "Legal Extortion"?*, MIA. HERALD (Apr. 2, 2023, 10:22 AM), https://www.miamiherald.com/news/local/article271101667.html [https://perma.cc/7FCU-L9YA] (quoting a small business owner as saying "I

encounters with inaccessible hotels left them feeling frustrated, degraded, and invisible.[53] In treating *Laufer* as moot, the Court largely restrained itself from weaving any of these stories into an official narrative — other than to cast Laufer herself as something of a villain.[54] But the space that *Laufer* occupied on the Court's highly selective docket reminds us of the Court's power to do this crucial storytelling work.

This now "dead" case also primes us to ask questions about who, if not Laufer, benefitted from the Court's narrative-making power during the 2023 Term — and *why*. Out of a cast of characters that prominently featured masculine strivers[55] (hardworking fishermen,[56] risk-taking investment fund managers,[57] stormers of the U.S. Capitol[58]), stories

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felt extremely violated" after a disabled consumer sued his business for violating the ADA); *see also* Brief of Petitioner at 49, Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18 (2023) (No. 22-429). In journalistic coverage of access lawsuits, this is a common narrative. *See, e.g.*, Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, N.Y. TIMES MAG. (June 15, 2023), https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html [https://perma.cc/A2FT-S26F].

53 *See* Brief for Amici Curiae Disability Rights Education & Defense Fund, et al. in Support of Respondent at 2, *Laufer*, 144 S. Ct. 18 (No. 22-429); *see also* Kristen L. Popham, Elizabeth F. Emens & Jasmine E. Harris, *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 COLUM. HUM. RTS. L. REV. F. 1, 9 (2023) (chronicling the injurious effects of ADA noncompliance on disabled travelers); *cf.* Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. CHI. LEGAL F. 273, 275 (noting that "denial of service powerfully expresses that a person (or group) does not merit status as a consumer").

54 In addition to emphasizing the elusive aspects of Laufer's claimed injury (because she sued hotels where she had no concrete plans to stay), *Laufer*, 144 S. Ct. at 20, Justice Barrett suggested that Laufer may have illicitly profited from her litigiousness by taking "a cut" of the legal fees that her unscrupulous lawyer sought from defendant hotels. *Id.* at 21. Laufer denied doing so. *See* Brief for Respondent at 13, *Laufer*, 144 S. Ct. 18 (No. 22-429) (referencing a declaration by Laufer "confirming she has never received any financial benefit from her federal ADA claims").

55 As Professor Melissa Murray has noted, a "jurisprudence of masculinity" appears to run through the decisions from recent Terms. Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV 799, 799–801 (2023); *see also* Leah M. Litman, Melissa Murray & Katherine Shaw, *Of Might and Men*, 122 MICH. L. REV. 1081 (2024) (reviewing JOSH HAWLEY, MANHOOD: THE MASCULINE VIRTUES AMERICA NEEDS (2023)).

56 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2256 (2024) (entertaining a challenge to a National Marine Fisheries Service regulation by "two vessels that operate in the Atlantic herring fishery" and referring to the Petitioners as "fishermen"); Adam Liptak, *A Fight Over a Fishing Regulation Could Help Tear Down the Administrative State*, N.Y. TIMES (Jan. 15, 2024), https://www.nytimes.com/2024/01/15/us/politics/supreme-court-fisherman-chevron.html [https://perma.cc/66PE-EYXP] (treating herring fisherman Bill Bright as the public face of *Loper Bright*); Loper Bright Enterprises, Inc. v. Gina Raimondo, LOPER BRIGHT SUP. CT. CASE, https://loperbrightcase.com [https://perma.cc/F6RT-6JKN] (identifying "the fishermen" involved in the case as three men, Stefan Axelsson, Bill Bright, and Wayne Reichle, although also noting that Axelsson "hopes [his daughter] will take over the family business someday").

57 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2124 (2024) (involving an enforcement action against investment fund manager George Jarkesy, Jr.).

58 Fischer v. United States, 144 S. Ct. 2176, 2182 (2024) (involving the criminal prosecution of January 6th rioter Joseph Fischer); Jackson Katz, *White Masculinity and the January 6 Insurrection*, MS. MAG. (Jan. 5, 2022), https://msmagazine.com/2022/01/05/white-men-insurrection-january-6-masculinity-trump [https://perma.cc/H6WJ-MT3X] (noting that "[a]ccording to data compiled . . .

emerged about overzealous federal prosecutors and administrators. Sympathy also seemed to flow toward misunderstood politicians,[59] encumbered Christian believers,[60] and beleaguered local governments,[61] even if they did not get everything from the Court that they came for. From the perspective of the conservative legal movement, members of these groups have suffered under generations of liberal and progressive policies, as well as via judge-made doctrines that have tilted against them. In the 2023 Term, as in other recent Terms, the Court opened its doors to these concerns and gave them a respectful hearing.[62]

"Claims to victimhood are claims to power," communications scholar Lilie Chouliaraki has noted[63] — making it noteworthy that the narratives in principal opinions simultaneously declined to give prominent roles to several groups that media outlets had treated sympathetically. These included pregnant emergency room patients,[64] people affected by gun violence,[65] people experiencing homelessness,[66] and those endangered at the U.S. Capitol on January 6, 2021.[67] Principal opinions acknowledged individual hardships,[68] as well as challenging social realities,[69] but refused to confer the *status* of victimhood on these groups, or give them agency in describing their harms.[70] Still other groups and experiences had no place at all on the Court's docket and therefore less presumptive access to national conversations about what justice requires.[71] Victims of police misconduct, for example, were largely

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by researchers at the University of Chicago, of those arrested and charged with committing crimes at the Capitol, . . . 86 percent were men," and that "[a]mong the organized groups most involved in the planning and execution of the day's actions were cartoonishly hypermasculine groups" (citations omitted)).

59 *See, e.g.*, Trump v. United States, 144 S. Ct. 2312, 2327 (2024).

60 *See, e.g.*, FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1553 (2024).

61 *See, e.g.*, City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2211 (2024).

62 *Cf.* Melissa Murray, *Inverting Animus:* Masterpiece Cakeshop *and the New Minorities*, 2018 SUP. CT. REV. 257, 259 (2019) (noting an inversion of the victim narratives that characterized earlier eras in the Court's history).

63 LILIE CHOULIARAKI, WRONGED: THE WEAPONIZATION OF VICTIMHOOD 4 (2024).

64 *See* Moyle v. United States, 144 S. Ct. 2015, 2016 (2024) (Kagan, J., concurring).

65 *See* Garland v. Cargill, 144 S. Ct. 1613, 1627 (2024) (Sotomayor, J., dissenting).

66 *See Grants Pass*, 144 S. Ct. at 2208.

67 *See* Fischer v. United States, 144 S. Ct. 2176, 2182 (2024).

68 *See, e.g.*, United States v. Rahimi, 144 S. Ct. 1889, 1894–95 (describing the violence and threats that the defendant's former girlfriend endured at his hands).

69 *See, e.g.*, *Grants Pass*, 144 S. Ct. at 2207–08 (acknowledging a homelessness crisis in the American West and discussing the circumstances that cause homelessness).

70 *Cf.* Maybell Romero, *"Ruined,"* 111 GEO. L.J. 237 (2022) (discussing the power that judges wield when describing the experience of an injured party).

71 *Cf.* MICHAEL A. ZILIS, THE LIMITS OF LEGITIMACY: DISSENTING OPINIONS, MEDIA COVERAGE, AND PUBLIC RESPONSES TO SUPREME COURT DECISIONS 28 (2015) ("Reporters focus most of their coverage on the cases that reach the Court's docket.").

absent,[72] despite persistent calls for the Court to revisit a judge-made doctrine (qualified immunity) that has often prevented them from holding law enforcement officers accountable.[73]

In the background, meanwhile — and sometimes right on the surface — were narratives about the Court itself: whom it serves, how it relates to other governmental institutions, and how Americans ought to understand its role. Amidst what many commentators have called a legitimacy crisis,[74] these narratives illuminate how members of the Court's conservative supermajority would like to be understood — both by today's public and by the court of history.[75]

These different facets of Supreme Court decisional power — the power to decide what to decide and the power to craft and disseminate narratives — matter in different ways, but are united in at least one respect. They each produce a particular distribution of concern: an investment of time, resources, possibility, and understanding that can translate into distributions of other valuables, including power, legitimacy, opportunity, wealth, and protection.[76] Each distribution also

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[72] The most notable case in this vein was *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745 (2024), in which the Court addressed the narrow question of whether "a Fourth Amendment malicious prosecution claim" can proceed where the criminal proceeding at issue involved a valid charge as well as an allegedly baseless one. *Id.* at 1748.

[73] *See, e.g.*, JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 87 (2023); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 48–49 (2018). In the 2023 Term, the Court entertained two cases with a qualified immunity dimension, but neither decision addressed the qualified immunity issue. *See* Gonzalez v. Trevino, 144 S. Ct. 1663, 1665–66 (2024) (per curiam) (deciding the narrow question of what a plaintiff must prove in order to bring a retaliatory arrest claim); Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316, 1325 (2024) (noting that the NRA's petition for certiorari asked the Court to consider the lower court's qualified immunity ruling, but addressing only the First Amendment question the case raised).

[74] *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240 & n.1 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) ("[I]t is striking how many commentators — including prominent constitutional scholars, a former Attorney General, and current members of Congress — have recently questioned the legitimacy of the United States Supreme Court." *Id.* at 2240.).

[75] *See* Melissa Murray, *Making History*, 133 YALE L.J.F. 990, 995 (2024); *see also* MATTHEW CONNELLY, KNIGHT FIRST AMEND. INST., EMERGING THREATS: STATE SECRECY, ARCHIVAL NEGLIGENCE, AND THE END OF HISTORY AS WE KNOW IT 2 (2018) ("History has often served as the ultimate court of appeal . . . ."); David J. Barron, Madison Lecture, *The Court of History*, 98 N.Y.U. L. REV. 683, 684 (2023) (a judge "cautioning courts to attend to history's future judgment").

[76] In invoking the language of distribution, I take inspiration from recent work in Law and Political Economy, as well as from historical scholarship on the role of law in allocating resources, opportunities, and care. *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1819–20 (2020); Yochai Benkler, *The Ends of Law*, *in* THE ENDS OF KNOWLEDGE: OUTCOMES AND ENDPOINTS ACROSS THE ARTS AND SCIENCES 91, 92 (Seth Rudy & Rachael Scarborough King eds., 2023); WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 193–95, 266–67 (2022); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 1–2, 28 (2022); KATHARINA PISTOR,

translates into further concern, both from the Court and from the institutions that take direction and meaning from what the Court does, including lower courts, the media, law schools, and academia.

Drawing on insights from history — a discipline that has long grappled with the non-neutrality of the questions we seek to answer, the knowledge we produce, and the judgments we make — this Foreword is a call to see and interrogate the Court's distribution of concern, including concern for its own stature and authority. It is also a call to recognize the *choices*, recent and more distant, undergirding this distribution. Such an approach could yield insights into many eras, but the current Court has features that make this focus especially apt. These include the Court's shrinking merits docket[77] (raising the stakes of each case) and a decisional and rhetorical style that determinedly resists the kind of analysis I am asking for, by appearing to welcome limits on the Court's discretion and by eschewing talk of consequences.[78]

To explore this theme, this Foreword proceeds in three main Parts, each of which loosely analogizes the work of the Court to the work of professional historians. I do so not because of the Court's own embrace of history (although I touch on this topic). Rather, I take this approach because of how deeply historians have thought about (1) the possibility of "neutrality" — this Court's shibboleth — and (2) the power that inheres in every decision we make about how to find and convey truth.

Part I — Curation — critically examines docket construction in the 2023 Term. Dipping into the petitions for certiorari, this Part also offers glimpses of a docket that might have been, to underscore that non-wealthy people, navigating predatory economic circumstances, were available for the Court's consideration, even if they did not feature prominently on the docket. Pragmatically, this demographic may have been better off evading the Court's gaze, but the Court's apparent disinterest in their cases nonetheless raises important questions. As

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THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 2 (2019). I also use the concept of distribution in ways that draw from the Law and Humanities tradition. This tradition interrogates how law directs our attention — what it makes visible, what it hides — and invites us to see differently. *See* Simon Stern, Maksymilian Del Mar & Bernadette Meyler, *Introduction* to THE OXFORD HANDBOOK OF LAW AND HUMANITIES xxv (Simon Stern, Maksymilian Del Mar & Bernadette Meyler eds., 2019); *cf.* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1266–67 (2021) ("Beyond changing parties' material circumstances, another important role for federal judicial remedies is to express respect for parties that have suffered dignitary harm.").

[77] *See* Steve Vladeck, *79. 42(ish) Decisions to Go . . .*, ONE FIRST (May 6, 2024), https://www.stevevladeck.com/p/79-43ish-decisions-to-go [https://perma.cc/5Y4B-DBH2] (describing the October 2023 Term as "the *fifth* term in a row in which the justices [will] decide 60 or fewer cases — which is remarkable when one considers that, *before* the OT2019 Term, the last time the Court decided so few cases was in *1864*").

[78] *See, e.g.*, David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 749–50 (2021); Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy*, 38 CONST. COMMENT. (forthcoming) (on file with the Harvard Law School Library). *But see generally* Aaron Tang, *Consequences and the Supreme Court*, 117 NW. U. L. REV. 971 (2023).

Professor Erin Delaney has observed, one of the ways that the Court has "construct[ed] its legitimacy [is] through an opaque method of avoiding substantive rulings" that it does not want to make.[79] As the Court curated one set of legal questions to decide, was it evading others?

Part II — Narration — argues that we should care not only about which cases the Court chose to decide, but also about the narratives that members of the majority chose to foreground. These are as worthy of analysis as the Court's legal holdings (which other contributions to this issue discuss in depth). Particularly prominent this Term were censorious narratives about the administrative state, which appear aimed at naturalizing significant changes to administrative law. Also prominent were narratives about the Court itself — narratives that seek to convince the public of the Court's modesty, neutrality, and farsightedness.

Part III — Erasure — addresses a phenomenon that is well known to historians but less discussed by Court-watchers: the disappearance from the record of particular people and experiences, leaving a "silence" in an authoritative body of knowledge. This Part connects the themes of the 2023 Term to the disappearance over time of cases involving government support of "the most vulnerable," to borrow a phrase from one of the Term's sharpest dissents.[80] This disappearance has eased the way for decisions that empower the *least* vulnerable. These same decisions have then channeled scholars' concern, in ways that merit acknowledgment and resistance.

Part IV concludes, with reflections on the kinds of questions that can change narratives and unlock different futures.

## I. CURATION

"We work for the public," Chief Justice Roberts has remarked, "and they ought to be able to understand our product."[81] This is an admirable goal, and yet the American public almost certainly does not understand one crucial facet of the Court's work. Because the Court's mandatory jurisdiction is now vanishingly thin,[82] the Court exercises immense

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[79] Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 62 (2016).

[80] City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2228 (2024) (Sotomayor, J., dissenting). Justice Sotomayor used this phrase to critique the majority for deciding a case about homeless Americans in a way that, in her view, was ungenerous to their civil liberties concerns and overly solicitous of the local officials trying to eradicate them from public spaces. *See id.* at 2228–31.

[81] *Chief Justice Roberts Remarks at University of Minnesota Law School*, C-SPAN, at 25:25 (Oct. 16, 2018), https://www.c-span.org/video/?c4755741/user-clip-chief-justice-roberts-remarks-university-minnesota-law-school [https://perma.cc/KBP2-J2HM].

[82] Statutory reforms from the Taft Court era bear significant responsibility for this change. *See* 1 ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930, at 479–84 (Maeva Marcus ed., 2024). But at the Justices' urging, the Court's mandatory jurisdiction

control over the content of its "product," via its ability to shape its own docket. In the words of Professor Tejas Narechania, "[t]he Supreme Court has nearly unrestrained discretion to set its own agenda."[83] This Part explores how the Court used its discretion to shape the content of the 2023 Term. After providing a brisk overview of the Court's certiorari process, I draw on the concept of curation to analyze what the Court brought into view and what it left behind.

### *A. Matters of Grace*

"[U]nrestrained discretion"[84] might at first sound too strong. After all, the Court cannot invent cases and controversies to place on its docket.[85] And in granting certiorari, there are two lodestars, codified in the Court's rules: (1) importance (as to federal questions, specifically), and (2) conflict (that is, nonuniformity in judicial interpretations of federal law).[86]

But these considerations do not explain much of the *specific* content of the Court's docket. The rules leave "importance" undefined, meaning that this entryway to the docket is malleable.[87] Moreover, given how many petitions the Court receives, some matters of importance (however defined) are inevitably left behind.[88] The same is true of the conflict-related portion of the docket. The cases that the Court selects represent a fraction of the conflicts that litigants have asked the Court to review — meaning that even within this more objectively identifiable set of cases, the Court exercises significant discretion.[89] As Justice Murphy remarked in 1948, "[w]rits of certiorari are matters of grace"[90] — and as the size of the docket continues to trend downward, there is not enough

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shrunk even further in the late twentieth century. *See* VLADECK, *supra* note 25, at 64 (explaining that in 1988, "Congress all but finished Taft's work" by "convert[ing] all but one of the remaining fonts of the Supreme Court's appellate jurisdiction into discretionary review").

83 Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 924 (2022). Scholars from diverse backgrounds and approaches have used similar phrasing. *See, e.g.*, Nielson & Stancil, *supra* note 24, at 1139 ("The Justices have almost unbounded discretion in deciding *which* sixty to eighty cases to hear annually out of the thousands of petitions they receive."); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 706 (2018) ("The Supreme Court today has nearly boundless power to decide which cases it will hear.").

84 Narechania, *supra* note 83, at 924.

85 *See* SUP. CT. R. 10.

86 *See id.*; *see also* Tejas N. Narechania, *Which Splits? — Certiorari in Conflicts Cases*, CALIF. L. REV. (forthcoming 2025) (manuscript at 10) (on file with the Harvard Law School Library) ("For as long as the Court has had the ability to choose the cases it decides, that agenda-setting power has come with a tacit instruction to ensure uniformity in federal law.").

87 *See* Narechania, *supra* note 83, at 926.

88 *See* Epps & Ortman, *supra* note 83, at 708 ("[W]hile many, or even most, legal issues selected through the certiorari process are important, not all important legal issues are selected by certiorari.").

89 *See* Narechania, *supra* note 86, at 12; *see also* Deborah Beim & Kelly Rader, *Legal Uniformity in American Courts*, 16 J. EMPIRICAL LEGAL STUD. 448, 448 (2019) (finding that "one-third of intercircuit splits are resolved by the Supreme Court" and "[t]wo-thirds are not").

90 Wade v. Mayo, 334 U.S. 672, 680 (1948).

grace to go around. Indeed, a writ of certiorari does not even guarantee that a petitioner's case will receive full consideration: From among the questions asked, the Court chooses what to decide — and sometimes even "add[s] its own question that nobody had asked."[91]

As for how the Court makes these decisions, the Court has long "shrouded" its practices in a "veil of secrecy."[92] Should the Court accept a case for review, the resulting merits decision might include a cursory explanation of why the Court granted certiorari, but rarely does the Court provide meaningful information about decisions to deny review.[93] We know that the Chief Justice creates a "discuss list" of particular petitions, marking them for private discussion among the Justices (and leaving others presumptively denied).[94] And we know that four votes in favor of a grant will normally be enough to put a case on the docket[95] — meaning that on this particular Court, the conservative Justices likely have significant agenda-setting power.[96] But the discuss list is not public,[97] nor are the Justices' votes, much less the reasoning behind those votes. As for the petitions that do not make the discuss list (some ninety-seven percent), virtually no information is available in real time about how the Court has evaluated them.[98]

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[91] Benjamin B. Johnson, Essay, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 795 (2022).

[92] DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT 44 (1980); *see also* Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA. ST. U. L. REV. 787, 825 (2016) (underscoring how little the Court tells the public regarding its certiorari process).

[93] Such information about a denial would be available only in the event that a Justice published their views. *See* Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412, 413 (2010) (summarizing what is known about the Court's certiorari process and underscoring its secrecy, which has led scholars to develop complex models of judicial behavior to try to gain a better understanding); Robert M. Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J.F. 551, 552 (2014).

[94] Owens, *supra* note 93, at 413.

[95] *See* PERRY, *supra* note 23, at 43–44, 98.

[96] On a Court that often splits 6–3, a "rule of four" will not do what it was developed to do, which was "to make agenda access relatively easy and to assure that there would not be a tyranny of the majority when it comes to setting the agenda." *Id.* at 211.

[97] The Court's public list of "relists" appears to be a subset of the "discuss list." As Professor Arthur Hellman has explained, building on work by John Elwood, "[n]o case would be relisted [for discussion at conference] if it had not been first placed on the discuss list, but some of the discuss list cases may be denied at the first conference for which they are listed." Will Baude, *Arthur D. Hellman on the Supreme Court's Shrunken "Discuss List,"* REASON: VOLOKH CONSPIRACY (Nov. 21, 2023, 8:40 AM), https://reason.com/volokh/2023/11/21/arthur-d-hellman-on-the-supreme-courts-shrunken-discuss-list [https://perma.cc/NL8V-FKYG] (quoting a communication from Hellman); *see also* VLADECK, *supra* note 25, at 83–84.

[98] *See* CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 11 (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/NJQ5-LSTZ] (noting that of the Court's "approximately 5,000 to 6,000 petitions for writs of certiorari each year," "[r]oughly 97 percent . . . are denied at a preliminary stage, without joint discussion among the Justices, as lacking any reasonable prospect of certiorari review"). Hellman deserves credit for spotting this statistic. *See* Baude, *supra* note 97.

In an era where other institutions of government have become more transparent to the public, scholars have criticized this tradition of silence.[99] It likely endures because the Court's leaders have found it valuable. First, it protects the Court from a level of accountability that could be costly, in terms of reputation, time, or independence. As political scientist Doris Marie Provine has observed, "arguments that [the Court] should be consistent in applying its criteria for case selection" or that it *must* hear a "politically volatile dispute[]" have less bite when case selection practices remain obscure.[100] Second, secrecy helps "sustain the impression that even the most penurious and unsophisticated litigants can easily file appeals with the Supreme Court and get their cases reviewed on the merits if they were treated unjustly in the lower courts."[101] In other words, secrecy allows the public to imagine that in any given term, a pro se litigant like Clarence Gideon (of *Gideon's Trumpet* fame[102]) could have his case heard by the highest court in the land.[103]

There is now an ample literature on factors affecting case selection[104] and patterns across time,[105] but the simple fact of discretion suffices to

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[99] *See, e.g.*, Segall, *supra* note 92, at 828–32.

[100] PROVINE, *supra* note 92, at 44, 47; *see also* Bayefsky, *supra* note 38, at 39 ("[T]here is considerable reason to believe that the Justices sometimes deny certiorari out of a concern that putting a case on the merits docket would risk igniting public controversy."); Delaney, *supra* note 79, at 14 (noting the benefits of being able to avoid particular cases, as well as the "pragmatic, strategic, and even normative interests" that judges might have in not explaining their choices).

[101] PROVINE, *supra* note 92, at 44.

[102] *See generally* ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

[103] *See* Gideon v. Wainwright, 372 U.S. 335 (1963). Research suggests that pro se filers are significantly less likely to have their petitions granted. *See* Smith, *supra* note 35, at 755.

[104] *See generally* PERRY, *supra* note 23 (drawing on interviews with Court personnel to provide a now-classic treatment of the factors that can affect decisions to grant or deny petitions for certiorari); Michael A. Livermore, Allen B. Riddell & Daniel N. Rockmore, *The Supreme Court and the Judicial Genre*, 59 ARIZ. L. REV. 837, 858–59 (2017) (summarizing the literature on the Court's certiorari process); Ryan C. Black & Christina L. Boyd, *Selecting the Select Few: The Discuss List and the U.S. Supreme Court's Agenda-Setting Process*, 94 SOC. SCI. Q. 1124 (2013); Beim & Rader, *supra* note 89; Amanda C. Bryan, *Public Opinion and Setting the Agenda on the U.S. Supreme Court*, 48 AM. POL. RSCH. 377 (2020).

[105] Narechania, for example, has converted the Court's descriptions of its certiorari grants in "important" cases into a data set and thereby documented the Roberts Court's apparent receptivity to petitions inviting the Court to overrule precedent. Narechania, *supra* note 83, at 933–34; Narechania, *supra* note 37, at 592; *see also* Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501 (2024) (observing recent instances in which a decision to docket a particular case did ultimately result in the overruling of precedent and using the concept of remedies to explain why the Justices may have felt justified in departing from settled law). Narechania's method has also revealed the Roberts Court's apparent interest in cases involving property rights. *See* Narechania, *supra* note 37, at 592. Other scholars have pursued other methods. *See, e.g.*, PROVINE, *supra* note 92, at 5–6, 8 (using case selection memoranda and voting records to test other scholars' assertions); RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION 6–8 (1991); Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167, 168 (2018) ("set[ting] forth statistics that show a material preference for review of federal court cases over state court cases during the last dozen years"). Others have scoured the Court's decisions for

set up the next sections. Every Term, the Court curates a unique body of information — questions, disputes, facts, stories — that it will use to do things in the world.[106] Chief Justice Roberts's famous umpire metaphor (that the role of a Supreme Court Justice is simply to "call balls and strikes")[107] registers differently when one recognizes that the Court also has some ability to field the players, assign the batting order, and dictate which pitches can be thrown.

### *B. The Discretionary Docket: 2023 Term*

What did the Court choose to hear in the 2023 Term? (In section C, I will turn to what it did *not* choose.) This section borrows insights from an unintuitive source — critically minded archivists and archival theorists — to think through recent acts of docketing discretion.

To be sure, archivists and Supreme Court Justices have different roles and aims, but both confront vast bodies of information about what happened in the past, from which they must select just some for further analysis. Neither is fully in control of what comes to them,[108] but both understand that they sit at a crucial juncture in a larger process; what they discard or leave behind might lose significance, while what they embrace will have a chance of making a more lasting impression. For good reason did Justice Brennan once describe screening certiorari petitions as "second to none in importance."[109] As for archive construction, theorist Achille Mbembe described the stakes this way: It "is

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clues about the kinds of questions that particular Justices want to hear. *See generally* Richard L. Hasen, *Anticipatory Overrulings, Invitations, Time Bombs, and Inadvertence: How Supreme Court Justices Move the Law*, 61 EMORY L.J. 779 (2012) (noting the various ways in which the Justices have signaled their openness to moving the law in particular directions).

106 *Cf.* PERRY, *supra* note 23, at 3, 214 (quoting Professor David Easton for the proposition that "politics is the authoritative allocation of values," *id.* at 3, and describing "[t]he cert. process [as] political," *id.* at 214).

107 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) [hereinafter *Roberts Confirmation Hearing*] (statement of then-Judge John G. Roberts, Jr.); *see also* United States v. Rahimi, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring) (embracing the "umpire" metaphor).

108 Archivists exert significant power over the content and presentation of archived material, but they cannot manufacture "traces of the past" that do not already exist. *See* Antoinette Burton, *Introduction* to ARCHIVE STORIES: FACTS, FICTIONS, AND THE WRITING OF HISTORY 3 (Antoinette Burton ed., 2005) (defining archives as "traces of the past collected either intentionally or haphazardly as 'evidence'"). The Supreme Court faces similar constraints. Lower courts, especially appellate courts, play a crucial role in the choices that are available to the Court. *See* JBrandon Duck-Mayr, Thomas G. Hansford & James F. Spriggs II, *Agenda Setting and Attention to Precedent in the US Federal Courts*, 9 J.L. & CTS. 233, 235 (2021) (arguing that lower federal courts play a more important role in setting the Supreme Court's agenda than previous scholarship has recognized); *infra* notes 133, 183 and accompanying text (discussing the current role of the Fifth Circuit in shaping the Court's docket). Litigants, lawyers, procedural rules, and happenstance shape what goes into trial court records.

109 William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973).

fundamentally a matter of discrimination and of selection, which, in the end, results in the granting of a privileged status to certain written documents, and the refusal of that same status to others."[110] In other words, there are choices embedded in the production and maintenance of archives, and power flows through these choices.[111] Or, as critical information scholar Gracen Brilmyer has put it, the archival process involves "constructions of value, by certain people and for certain people."[112] While recognizing that archives and dockets exist for different reasons, what might we see if we think about the Supreme Court's docket through the critical archivist's lens?[113] Whom would we see privileged? For whom did the Court make its decisional power available?

A bird's-eye view of the Court's discretionary docket this Term reveals, first, a set of cases that focused heavily on the work of the federal administrative state, especially as it affected businesses.[114] One might go so far as to describe this facet of the administrative state as "hypervisible."[115] The most prominent grant of certiorari was in *Loper Bright Enterprises v. Raimondo*,[116] in which the plaintiffs invited the Court to reevaluate the federal judiciary's longstanding approach to reviewing challenges to administrative interpretations of statutes.[117] Other

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110 Achille Mbembe, *The Power of the Archive and its Limits*, *in* REFIGURING THE ARCHIVE 19, 20 (Carolyn Hamilton, Veme Harris, Jane Taylor, Michele Pickover, Graeme Reici & Razia Saleh eds., 2002); *see also* CONNELLY, *supra* note 75, at 4 ("Government archives and records centers . . . afford a glimpse of the state's inner workings. But access can be withdrawn, documents can be destroyed, and far more is hidden than what is put on display.").

111 *See* Gracen Brilmyer, *Archival Assemblages: Applying Disability Studies' Political/Relational Model to Archival Description*, 18 ARCHIVAL SCI. 95, 97 (2018) (noting "a shift . . . within archival studies" to acknowledge that archivists are not "neutral custodians of records" but are rather "active participants in archival records who shape and are shaped by history").

112 *Id.*

113 This is also, in some sense, the historian's lens. A reflectiveness about archives (an "archival turn") has been apparent in history and related disciplines since the 1970s. Yael A. Sternhell, *The Afterlives of a Confederate Archive: Civil War Documents and the Making of Sectional Reconciliation*, 102 J. AM. HIST. 1025, 1025 (2016).

114 The Court's fixation on the administrative state has cut across recent Terms. *See generally* Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Blake Emerson, *The Existential Challenge to the Administrative State*, 113 GEO. L.J. (forthcoming 2024) (on file with the Harvard Law School Library).

115 *Cf.* MARISA J. FUENTES, DISPOSSESSED LIVES: ENSLAVED WOMEN, VIOLENCE, AND THE ARCHIVE 128, 137 (2016) (documenting the "hypervisib[ility] . . . of violated enslaved bodies" in the documentary records of eighteenth-century Caribbean slavery, *id.* at 128, and calling for interpretive practices that are "attentive to this historical disfigurement," *id.* at 137).

116 144 S. Ct. 2244 (2024).

117 Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari); *Loper Bright*, 144 S. Ct. at 2255–56. The Court also granted certiorari in a nearly identical case, to be argued in tandem with *Loper Bright*. *See* Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (mem.) (granting certiorari). This allowed Justice Jackson to take part in the eventual decision. *See Loper Bright*, 144 S. Ct. at 2246 ("Justice Jackson took no part in the consideration or decision of the first case."); James P. Mcloughlin Jr. et al., *In* Loper Bright *and* Relentless*, Supreme Court*

certiorari grants involved a challenge to the funding structure of the Consumer Financial Protection Bureau (deemed unconstitutional by the Fifth Circuit)[118] and a challenge to the administrative adjudication process of the Securities and Exchange Commission (also deemed unconstitutional by the Fifth Circuit).[119] A fourth major administrative law case, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[120] teed up a procedural question with far-reaching implications for the finality of administrative action.[121] Additional docketed cases involved still other challenges to agency action, albeit ones that did not strike at core features of administrative governance.[122]

Notably, at least two of the chosen administrative law cases featured agency challengers with appealing public faces, a boon to the network of industry and antiregulatory organizations that has long supported such challenges.[123] *Loper Bright* involved a small-time commercial

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*Returns to High-Stakes Question of Viability of the* Chevron *Doctrine*, REUTERS (Nov. 7, 2023, 11:15 AM), https://www.reuters.com/legal/legalindustry/loper-bright-relentless-supreme-court-returns-high-stakes-question-viability-2023-11-07 [https://perma.cc/X7P3-DS4E] ("Because Justice Ketanji Brown Jackson previously served on the panel that decided *Loper Bright* at the D.C. Circuit, she recused herself . . . .").

118 Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023); CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 144 S. Ct. 1474, 1480 (2024).

119 Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023); SEC v. Jarkesy, 144 S. Ct. 2117, 2124–25 (2024).

120 144 S. Ct. 2440 (2024).

121 Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 478 (2023) (mem.) (granting certiorari); *Corner Post*, 144 S. Ct. at 2447–48 (involving "when a claim . . . under the Administrative Procedure Act 'accrues' for purposes of" the APA's default statute of limitations on challenges to agency action).

122 *See, e.g.*, FBI v. Fikre, 144 S. Ct. 479 (2023) (mem.) (granting certiorari); FBI v. Fikre, 144 S. Ct. 771, 775 (2024) (involving the consequences of an agency decision to place the plaintiff on the "No Fly List"); FDA v. All. for Hippocratic Med., 144 S. Ct. 537 (2023) (mem.) (granting certiorari); FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024) (involving a challenge to a series of FDA decisions regarding the drug mifepristone); Garland v. Cargill, 144 S. Ct. 374 (2023) (mem.) (granting certiorari); Garland v. Cargill, 144 S. Ct. 1613, 1617 (2024) (involving a challenge to an ATF regulation that interpreted the statutory term "machinegun" to include "bump-stock-type" devices); Order in Pending Cases, Ohio v. EPA, 144 S. Ct. 538–39 (2023) (agreeing to hear an emergency motion for stay); Ohio v. EPA, 144 S. Ct. 2040, 2048 (2024) (involving state and industry-group requests to stay an EPA plan mandating that certain states tighten their ozone emissions-control measures).

123 *See* Lydia Wheeler, *Truck Stop "Sleeper Case" Could Open Old Rules to New Lawsuits*, BLOOMBERG L. (Feb. 19, 2024, 9:00 AM), https://news.bloomberglaw.com/us-law-week/truck-stop-sleeper-case-could-open-old-rules-to-new-lawsuits [https://perma.cc/Y2PS-FA4J] (noting that "[t]he North Dakota Retailers Association and the North Dakota Petroleum Marketers Association represented by the National Retail Federation added Corner Post as a party after the federal government said the trade groups' suit was barred by a six-year statute of limitations and had to be dismissed"); Hiroko Tabuchi, *A Potentially Huge Supreme Court Case Has a Hidden Conservative Backer*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/01/16/climate/koch-chevron-deference-supreme-court.html [https://perma.cc/4YHP-MGZD] (reporting that "the lawyers who have helped to propel [*Loper Bright*] to the nation's highest court" had the "powerful back[ing]" of "the petrochemicals billionaire Charles Koch"). Investment fund manager George Jarkesy, Jr., was a less sympathetic plaintiff, but his case also benefitted from the backing of influential

fishing operation burdened by the cost of paying for federal "observers."[124] *Corner Post* featured a North Dakota truck stop and convenience store whose owners were allegedly being crushed by the "interchange fees" that a government regulation allowed the banking industry to charge merchants for debit card transactions.[125]

A second and third set of cases involved abortion and firearms regulation — longstanding targets of the conservative legal movement and ones that, in 2022, generated significant, disruptive Supreme Court decisions. The Court's decision in *Dobbs* to overrule *Roe v. Wade*[126] predictably unleashed new legal questions about reproductive rights and access to reproductive healthcare.[127] The two abortion-related cases that the Court agreed to consider in the 2023 Term — *Food and Drug Administration v. Alliance for Hippocratic Medicine*[128] and *Moyle v. United States*[129] — were, in this sense, creatures of the docketing choice that produced *Dobbs*.[130] Notably, both cases involved litigants that the Court's prior decisions emboldened. The anti-abortion advocates behind the Alliance for Hippocratic Medicine took their cues not only from *Dobbs*, but also from recent religious freedom and administrative law cases.[131] The group's lawsuit challenged FDA decisions involving the drug mifepristone; the group argued that these agency actions violated the APA, and that, because mifepristone could cause medical complications, members of the plaintiff group would become implicated in abortion provision, against their religious beliefs.[132] The Court agreed to hear the case after the Fifth Circuit upheld aspects of the preliminary

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supporters. *See* Greg Stohr, *Ex-Hedge Fund Boss Fights SEC at Supreme Court with Big Backers*, BLOOMBERG L., (Nov. 28, 2023, 5:30 AM), https://www.bloomberg.com/news/articles/2023-11-28/elon-musk-mark-cuban-back-case-to-end-sec-s-in-house-judges [https://perma.cc/SR9W-6N6E].

124 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2255 (2024); Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari).

125 *Corner Post*, 144 S. Ct. at 2440, 2448 (2024); *Corner Post*, 144 S. Ct. 478 (mem.) (granting certiorari).

126 410 U.S. 113 (1973).

127 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (noting the legal questions the majority decision would unleash).

128 144 S. Ct. 1540 (2024); FDA v. All. for Hippocratic Med., 144 S. Ct. 537 (2023) (mem.) (granting certiorari).

129 144 S. Ct. 2015 (2024); Moyle v. United States, 144 S. Ct. 540 (2024) (mem.) (granting certiorari) (paired with Idaho v. United States, 144 S. Ct. 541 (2024) (mem.) (granting certiorari)).

130 Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619, 2620 (2021) (mem.) (granting certiorari).

131 *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); 303 Creative, LLC v. Elenis, 143 S. Ct. 2298 (2023); *see infra* notes 403–06 and accompanying text (discussing the anti-administrative impulse discernible in recent Supreme Court Terms).

132 *See* All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507, 520–23 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *rev'd*, 144 S. Ct. 1540 (2024); Complaint at 85, *All. for Hippocratic Med.*, 668 F. Supp. 3d 507 (No. 22-CV-223) (asserting that "feeling . . . complicit[] in the act of an elective chemical abortion" would cause "spiritual distress among [Plaintiff] doctors").

injunction that the group had secured from the district court.[133] The second case, *Moyle*, resulted from state legislators' belief that, following *Dobbs*, they were free to legislate abortion out of existence in their jurisdictions.[134] Idaho went so far as to create an apparent conflict with the federal Emergency Medical Treatment and Labor Act[135] (EMTALA), which requires hospitals participating in the federal Medicare program to provide essential care to patients experiencing medical emergencies.[136] The Court took up the case on an "emergency" basis[137] after the Ninth Circuit, sitting en banc, declined Idaho's request to stay a district court order enjoining Idaho's law "to the extent it conflicts with EMTALA."[138] (The Court would later reverse course, taking the unusual step of deeming Idaho's petition "improvidently granted."[139] But both the Court's docketing decision and the temporary stay it issued were consequential: They affected the facts on the ground and also revealed how various Justices were inclined to think about the legal questions.)

Just as the mifepristone and EMTALA cases flowed from *Dobbs*, the Second Amendment case *United States v. Rahimi*[140] was a creature of the Court's 2022 decision in *New York State Rifle & Pistol Ass'n v.*

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133 *All. for Hippocratic Med.*, 78 F.4th at 222–23 (vacating in part and affirming in part a district court order that would have preliminarily enjoined the challenged FDA decisions from governing the availability of mifepristone); *All. for Hippocratic Med.*, 144 S. Ct. 537 (mem.) (granting certiorari). Readers will by now have noticed a pattern, familiar to Court-watchers: The Fifth Circuit currently plays a significant role in setting the Court's agenda, albeit through some of the same impulses that are visible among members of the Court's conservative supermajority. *See* Jeffrey Toobin, *Circuit Breakers*, N.Y. REV. OF BOOKS (Mar. 7, 2024), https://www.nybooks.com/articles/2024/03/07/circuit-breakers-jeffrey-toobin [https://perma.cc/4U7K-MRSR] (documenting "a new breed of judicial activist[]" on the Fifth Circuit and noting its role in shaping the Supreme Court's docket). The phenomenon of an apparently "rogue" circuit influencing the Court's agenda is not unprecedented. *See* Stephen J. Wermiel, *Exploring the Myths About the Ninth Circuit*, 48 ARIZ. L. REV. 355, 356–57 (2006) (noting that during the Rehnquist Court, cases from the Ninth Circuit "represented a disproportionate share of the Supreme Court's argument docket," *id.* at 357, although discouraging a "liberals run amok" interpretation of this pattern, *id.* at 356). But the fact that the Fifth Circuit consistently leans to the right of a right-leaning Court has created a noteworthy dynamic. *See generally* Toobin, *supra*.

134 United States v. Idaho, 623 F. Supp. 3d 1096, 1110 (D. Idaho 2022), *vacated and reh'g en banc granted*, 82 F.4th 1296 (9th Cir. 2023), *cert. dismissed sub nom.* Moyle v. United States, 144 S. Ct. 2015 (2024).

135 42 U.S.C. § 1395dd.

136 United States v. Idaho, 623 F. Supp. 3d at 1109–11. Idaho's actions prompted the Biden Administration to intervene, insisting that Idaho's law give way to EMTALA's express preemption clause and to an interpretation of EMTALA that required a broader availability of abortion than Idaho permitted. Brief for the Respondent, *Moyle*, 144 S. Ct. 2015 (Nos. 23-726 & 23-727).

137 *Moyle*, 144 S. Ct. at 2016 (Kagan, J., concurring).

138 United States v. Idaho, No. 22-cv-00329, 2023 U.S. Dist. LEXIS 79235, at *1, *9 (D. Idaho May 4, 2023); *see* United States v. Idaho, 82 F.4th at 1296; Moyle v. United States, 144 S. Ct. 540 (2024) (mem.) (granting certiorari).

139 *Moyle*, 144 S. Ct. at 2015.

140 144 S. Ct. 1889 (2024); United States v. Rahimi, 143 S. Ct. 2688 (2023) (mem.) (granting certiorari).

*Bruen*.[141] In *Bruen*, the Court had announced a new, more firearm-protective approach for evaluating government regulations that allegedly encroach on an individual's rights under the Second Amendment.[142] *Rahimi* exemplified both how quickly gun owners made use of this new test and how confusing it was for lower courts. The Court likely felt pressure to grant certiorari in *Rahimi* (which, again, was arguably a case of their own making) because declining to do so would have left in place a Fifth Circuit decision disallowing the disarmament of individuals subject to domestic abuse restraining orders.[143] Independently of *Rahimi*, however, the Court chose to consider two other gun-related cases: one involving a federal agency's (re)interpretation of the National Firearms Act of 1934,[144] the other involving a state official's alleged suppression of gun-promotion advocacy.[145] Uniting these three cases, then, was a Court-created legal environment that privileged firearms, even as public demand for gun regulation persisted.[146]

A fourth set of cases stemmed from the 2020 presidential election and ensuing efforts to thwart the peaceful transfer of power. In *Trump v. Anderson*,[147] the Court agreed to consider whether the Colorado Supreme Court correctly interpreted section 3 of the Fourteenth Amendment (regarding "disqualification from holding office" because of "engag[ement] in insurrection or rebellion")[148] in a case seeking to remove former President Donald Trump from the ballot in that state. (The state supreme court had held that, yes, he was disqualified.[149]) In *Fischer v. United States*,[150] the Court agreed to consider Trump supporter Joseph Fischer's objection to one of the federal charges leveled against him (and others) in connection with his alleged conduct on January 6, 2021, when he stormed the U.S. Capitol.[151] Fischer argued that prosecutors overreached when charging him with violating the Sarbanes-Oxley Act of 2002,[152] a law that is best remembered as a response

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141 142 S. Ct. 2111 (2022).

142 *Id.* at 2126; *see infra* notes 475–79 and accompanying text.

143 United States v. Rahimi, 61 F.4th 443, 448 (5th Cir. 2023).

144 Garland v. Cargill, 144 S. Ct. 1613 (2024); Garland v. Cargill, 144 S. Ct. 374 (2023) (mem.) (granting certiorari); 26 U.S.C. §§ 5801–5872.

145 Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 1316 (2024); Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 375 (2023) (mem.) (granting certiorari).

146 *Cf.* Katherine Schaeffer, *Key Facts About Americans and Guns*, PEW RSCH. CTR. (July 24, 2024), www.pewresearch.org/short-reads/2024/07/24/key-facts-about-americans-and-guns [https://perma.cc/6SXB-MVWN] (suggesting "broad partisan agreement on some" proposals for restricting the usage or purchase of guns).

147 144 S. Ct. 662 (2024).

148 *Id.* at 670; *see also* U.S. CONST. amend. XIV, § 3.

149 *Anderson*, 144 S. Ct. at 665–66; *see also* Trump v. Anderson, 144 S. Ct. 539 (2024) (mem.) (granting certiorari).

150 144 S. Ct. 2176 (2024).

151 Fischer v. United States, 144 S. Ct. 537 (2023) (mem.) (granting certiorari); *Fischer*, 144 S. Ct. at 2182.

152 Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

to the Enron accounting scandal[153] but includes broad language about the obstruction of "official proceeding[s]."[154] (The D.C. Circuit had rejected Fischer's argument, but not resoundingly so.[155]) A third docketed case, *Trump v. United States*, arose from a federal criminal indictment charging Trump with conspiring to overturn the results of the 2020 presidential election.[156] The specific question the Court took up was whether presidential immunity shielded Trump from this prosecution.[157] (Both the district court and the D.C. Circuit had said no.[158])

To return to the idea of curation, there was choice at work here. A narrative of inevitability can surround cases that are legally significant and politically fraught — as if every major dispute will culminate in a *Bush v. Gore*.[159] When it came to the "Trump docket," however, long-simmering suspicions of the Court,[160] combined with former President Trump's boastful statements about his role in shaping it,[161] prompted questions about why and when the Court agreed to hear these cases. *Trump v. Anderson* clearly offered an important opportunity to provide an authoritative interpretation of a newly salient provision of the Fourteenth Amendment, and the docketing decision should be understand in that light — but it also gave Trump the chance to get back on the ballot in Colorado, even though the Constitution gives states significant

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153 *See generally* Simon Constable, *How the Enron Scandal Changed American Business Forever*, TIME (Dec. 2, 2021, 1:06 PM), https://time.com/6125253/enron-scandal-changed-american-business-forever [https://perma.cc/3UVP-C3EQ].

154 18 U.S.C. § 1512(c)(2).

155 *See* United States v. Fischer, 64 F.4th 329, 335 (D.C. Cir. 2023).

156 Trump v. United States, 144 S. Ct. 2312, 2324 (2024); Trump v. United States, 144 S. Ct. 1027 (2024) (mem.) (granting certiorari).

157 *See Trump*, 144 S. Ct. at 1027 (mem.) (granting certiorari).

158 *See* United States v. Trump, 704 F. Supp. 3d 196, 219–20 (D.D.C. 2023); United States v. Trump, 91 F.4th 1173, 1180 (D.C. Cir. 2024).

159 531 U.S. 98, 100, 110 (2000) (per curiam) (adjudicating a ballot recounting dispute in Florida and thereby deciding the outcome of the 2000 presidential election).

160 These suspicions have multiple sources and are entangled with a longer-term politicization of the Supreme Court appointments process, as well as with critiques from both liberals and conservatives about "judicial activism." Regarding suspicions of the current Court, relevant factors include the Court's decision in *Bush v. Gore* and the campaign finance decision *Citizens United v. FEC*, 558 U.S. 310 (2010); the coordinated campaign by Senate Republicans (led by Senator Mitch McConnell) and influential figures in the conservative legal movement to reshape the federal judiciary, *see* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 156–58 (2019); recent Supreme Court decisions that have weakened the Voting Rights Act, such as *Shelby County v. Holder*, 570 U.S. 529 (2013); and a recent parade of news stories questioning the ethics of particular justices, *see, e.g.*, *Friends of the Court: SCOTUS Justices' Beneficial Relationships with Billionaire Donors*, PROPUBLICA, https://www.propublica.org/series/supreme-court-scotus [https://perma.cc/QR9R-52KZ].

161 *See, e.g.*, Joan Biskupic, *Donald Trump Again Is Trying to Bend the Supreme Court and Justice System to His Will*, CNN (Apr. 25, 2024, 12:06 AM), https://www.cnn.com/2024/04/24/politics/scotus-donald-trump-presidency [https://perma.cc/A6HM-V273]; Lauren Feiner & Dan Mangan, *Trump Takes Credit for End of* Roe v. Wade *After His 3 Supreme Court Justice Picks Vote to Void Abortion Rights*, CNBC (June 24, 2022, 6:59 PM), https://www.cnbc.com/2022/06/24/roe-v-wade-decision-trump-takes-credit-for-supreme-court-abortion-ruling.html [https://perma.cc/VTQ4-5EWM].

electoral authority and responsibility.[162] From this same perspective, the docketing of *Fischer* was not simply a decision to clear up the meaning of the Sarbanes-Oxley Act; it was also a decision, consciously or not, to entertain Trump's allegations of unfair treatment of his supporters.[163] The docketing of *Trump v. United States* (which all parties, at various points, had encouraged)[164] provoked perhaps the greatest number of discretion-related critiques. Commentators interrogated the timing of the Court's intervention (when to take the case, when to hear argument, when to issue a decision), and they noted the effect: Trump gained months to campaign for president unmolested by what had been a relatively fast-moving criminal prosecution (originally scheduled for trial in March 2024).[165] Readers will likely disagree about the Court's motives, but it would be hard to deny the significant allocation of Supreme Court resources and attention to Trump-related disputes.

The remainder of the docket, though harder to categorize, suggests other themes. The Purdue Pharma bankruptcy case not only had

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[162] William Baude & Michael Stokes Paulsen, *The Sweep and Force of Section Three*, 172 U. PA. L. REV. 605, 629, 640 (2024).

[163] *See, e.g.*, Andrew Solender, *Trump Says Jan. 6 Defendants "Persecuted So Unfairly" Ahead of Capitol Rally*, FORBES (Sept. 16, 2021, 4:43 PM), https://www.forbes.com/sites/andrewsolender/2021/09/16/trump-says-jan-6-defendants-persecuted-so-unfairly-ahead-of-capitol-rally [https://perma.cc/X697-F3JR ]; Marianne LeVine et al., *Trump Escalates Solidarity with Jan. 6 Rioters as His Own Trials Close In*, WASH. POST (Mar. 23, 2024, 10:20 AM), https://www.washingtonpost.com/elections/2024/03/23/trump-jan-6-rioters-rhetoric-campaign [https://perma.cc/Q2K7-6Y94]; Hannah Rabinowitz & Holmes Lybrand, *What Could Happen If the Supreme Court Sides with the January 6 Rioters,* CNN (June 19, 2024, 5:00 AM), https://www.cnn.com/2024/06/19/politics/supreme-court-january-6-rioters/index.html [https://perma.cc/X5YX-ZLWU] ("Trump is likely to take any ruling in favor of Fischer to try to further undermine the Justice Department's prosecution of his supporters who stormed the Capitol.").

[164] Amy Howe, *Supreme Court Takes Up Trump Immunity Appeal*, SCOTUSBLOG, (Feb. 28, 2024, 5:31 PM), https://www.scotusblog.com/2024/02/supreme-court-takes-up-trump-immunity-appeal [https://perma.cc/2ECZ-F7B9].

[165] *See, e.g.*, Ruth Marcus, Opinion, *Supreme Court Aids and Abets Trump's Bid for Delay*, WASH. POST (Feb. 29, 2024, 11:15 AM), https://www.washingtonpost.com/opinions/2024/02/29/supreme-court-trump-immunity [https://perma.cc/L55L-6FKQ]; Kate Shaw, Opinion, *Why the Supreme Court Should Clear the Way for a Pre-Election Trump Trial*, N.Y. TIMES (Mar. 11, 2024), https://www.nytimes.com/2024/03/11/opinion/trump-supreme-court-jack-smith.html [https://perma.cc/QV7N-2YCZ]; Aysha Bagchi, *In Trump Supreme Court Immunity Appeal, Timing of Case Could Be a Win for Ex-President*, USA TODAY (Mar. 8, 2024, 5:14 AM), https://www.usatoday.com/story/news/politics/2024/03/08/trump-supreme-court-immunity-schedule/72841364007 [https://perma.cc/56E4-VVN6]; Melissa Murray & Andrew Weissmann, Opinion, *The Supreme Court Has Already Botched the Trump Immunity Case*, N.Y. TIMES (Apr. 24, 2024), https://www.nytimes.com/2024/04/24/opinion/supreme-court-trump-immunity.html [https://perma.cc/7DHH-YQMR]. Some of these commentaries were likely informed by the Court's handling of *Trump v. Vance*, 140 S. Ct. 2412 (2020), and *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), both involving requests to access President Trump's personal papers. As Professor Josh Chafetz explains, the timing and content of the *Vance* and *Mazars* decisions helped "to ensure that the information sought by other institutional actors could not have electoral or institutional consequences for [Trump]." Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 128 (2021).

obvious significance for bankruptcy law (a lifeline for businesses)[166] but also mattered to hard-pressed local governments, which had sought compensation for opioid-related devastation.[167] The image of ravaged communities links that case conceptually to *City of Grants Pass v. Johnson*,[168] involving localities' pleas to be able to impose criminal penalties on homeless residents occupying their public spaces — a tactic that the Ninth Circuit had deemed inconsistent with the Eighth Amendment's protection against cruel and unusual punishment.[169] Absent Supreme Court review, the petitioner city argued, citizens in the West would continue to face "crime, fires, the reemergence of medieval diseases, environmental harm, and record levels of drug overdoses and deaths on public streets," and their governing officials would be unable to respond effectively.[170] Similar concerns appeared in *Culley v. Marshall*,[171] regarding what the Due Process Clause requires when government officials seize property allegedly involved in a crime and the innocent owner then seeks recovery.[172] States and localities have a strong financial interest in this question because when they retain property, or collect fees for returning it, their own coffers swell.[173]

Other cases may have secured a place on the docket because of the populations involved, the parties (or lawyers) requesting review, the nature and/or quantity of amici who chimed in at the petitioning stage, or the legal opportunities the cases offered.[174] *Acheson Hotels, LLC v. Laufer*, mentioned in the Introduction, implicated an area of law that has long concerned conservative members of the Court: private enforcement

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166 *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2079 (2024); Harrington v. Purdue Pharma L.P., 144 S. Ct. 44 (2023) (mem.) (granting certiorari). For examples of commentary emphasizing the case's importance, see Abbe R. Gluck, Elizabeth Chamblee Burch & Adam S. Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J.F. 525, 525 (2024) ("The case provides a critical opportunity to reflect on what is lost when parties in mass torts find the 'behemoth' litigation system unable to bring mass disputes to a close, when they charge multidistrict litigation as a 'failure,' and when defendants contend that sprawling lawsuits across national courts have thrown them into unresolvable crises that only bankruptcy can solve."); Daniel G. Aaron & Michael S. Sinha, *Immunity Through Bankruptcy for the Sackler Family*, W. VA. L. REV. (forthcoming 2024) (manuscript at 9–10) (on file with the Harvard Law School Library) (highlighting the important public health implications of allowing this type of bankruptcy settlement). *See also* MELISSA B. JACOBY, UNJUST DEBTS: HOW OUR BANKRUPTCY SYSTEM MAKES AMERICA MORE UNEQUAL 155–200 (2024) (noting the importance of this case and also noting similar, earlier cases).

167 *See* Gluck et al., *supra* note 166, at 545; *Harrington*, 144 S. Ct. at 2088–89 (Kavanaugh, J., dissenting).

168 144 S. Ct. 2202 (2024).

169 *See* Martin v. City of Boise, 920 F.3d 584, 615 (9th Cir. 2019); Petition for a Writ of Certiorari at 5–6, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175).

170 Petition for a Writ of Certiorari, *supra* note 169, at 5.

171 144 S. Ct. 1142 (2024).

172 *Id.* at 1146, 1153–54.

173 Brief of the Institute for Justice, Stephanie Wilson, and Gerardo Serrano as Amici Curiae in Support of Petitioners at 25, *Culley*, 144 S. Ct. 1142 (No. 22-585).

174 *See generally* PERRY, *supra* note 23.

of federal civil rights statutes.[175] That the case involved a small business owner[176] — as in the administrative law cases *Loper Bright*[177] and *Corner Post*[178] — might have also made *Laufer* appealing. As Professor Melissa Murray has observed, influential members of the current Court appear to have a particular vision of the hardworking American, and the small-scale entrepreneur has captured their imagination.[179] So, too, have some Justices shown concern for public officials accused of corruption, as Professor Ciara Torres-Spelliscy has noted.[180] This might explain the Court's interest in *Snyder v. United States*,[181] involving whether a federal law that "prohibits state and local officials from accepting bribes that are promised or given before the official act" also bars accepting gratuities for past acts.[182] The Court's demonstrated interest in the First Amendment, especially as applied to conservative viewpoints, helps explain still another cluster of cases.[183] These

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175 144 S. Ct. 18, 21–22 (2023); *see infra* section II.C, pp. 55–60 (discussing private enforcement).

176 Petition for a Writ of Certiorari at 29, *Laufer*, 144 S. Ct. 18 (No. 22-429).

177 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2244 (2024).

178 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2448 (2024).

179 Murray, *supra* note 105, at 1553–55. The same affinity may help explain the docket space given over to the actively engaged property holder (for example, the rancher, the home improver). *See, e.g.*, Devillier v. Texas, 144 S. Ct. 477 (2023) (mem.) (granting certiorari); Devillier v. Texas, 144 S. Ct. 938, 941 (2024); Sheetz v. County of El Dorado, 144 S. Ct. 477 (2024) (mem.) (granting certiorari); Sheetz v. County of El Dorado, 144 S. Ct. 893, 897 (2024).

180 Ciara Torres-Spelliscy, *Deregulating Corruption*, 13 HARV. L. & POL'Y REV. 471, 472 (2019) (noting that "[i]n a spate of recent decisions, the Supreme Court has constricted its definition of corruption in both campaign finance and criminal cases"); Ciara Torres-Spelliscy, *Elegy for Anti-Corruption Law: How the Bridgegate Case Could Crush Corruption Prosecutions and Boost Liars*, 69 AM. U. L. REV. 1689, 1690–93 (2020).

181 144 S. Ct. 1947 (2024).

182 *Id.* at 1951 (emphasis omitted); *see also* Snyder v. United States, 144 S. Ct. 536 (2023) (mem.) (granting certiorari).

183 Shay Dvoretzky & Emily Kennedy, *Among Supreme Court's Headline Cases, First Amendment Questions May Be Most Consequential for Businesses*, REUTERS (Feb. 1, 2024, 11:04 AM), https://www.reuters.com/legal/legalindustry/among-supreme-courts-headline-cases-first-amendment-questions-may-be-most-2024-02-01 [https://perma.cc/L8SH-T7RD]; *see* Lindke v. Freed, 143 S. Ct. 1780 (2023) (mem.) (granting certiorari); O'Connor-Ratcliff v. Garnier, 143 S. Ct. 1779 (2023) (mem.) (granting certiorari); NetChoice, LLC v. Paxton, 144 S. Ct. 477 (2023) (mem.) (granting certiorari); Moody v. NetChoice, LLC, 144 S. Ct. 478 (2023) (mem.) (granting certiorari); Murthy v. Missouri, 144 S. Ct. 7 (2023) (mem.) (granting certiorari); *see also* Nat'l Rifle Ass'n of Am. v. Vullo, 144 S. Ct. 375 (2023) (mem.) (granting certiorari). *Murthy v. Missouri*, 144 S. Ct. 1972 (2024), arose from First Amendment claims by "two States and five social-media users" against "dozens of Executive Branch officials and agencies"; the plaintiffs alleged that these federal government actors had pressured social media companies into censoring content relating to elections and the COVID-19 virus. *Id.* at 1981, 1984. The case ended up on the Supreme Court's docket after the Fifth Circuit affirmed a sweeping preliminary injunction and the government defendants applied for emergency relief. *Id.* at 1985. The Fifth Circuit likewise played a key role in the Court's agreement to hear *Moody v. NetChoice LLC*, 144 S. Ct. 2382 (2024), involving First Amendment–based objections to two state laws that curtailed the ability of social media companies and internet platforms to moderate content. *Id.* at 2393. The Eleventh Circuit upheld a preliminary injunction of Florida's law, but the Fifth Circuit accorded the opposite treatment to Texas's law. *Id.* at 2394. The Court granted certiorari to resolve the split. *See id.* at 2394–95. Notably, a related question arose during the 2020 Term,

docketing decisions occurred before Justice Alito faced criticism for the controversial flags that had once flown outside of his residences,[184] but it is no secret that some of the Court's conservatives have felt persecuted for their views and have worried about the delegitimization of conservative perspectives.[185]

One might argue that these cases were simply the worthiest of the Court's time. But as the themes in this section suggest, the Court's discretion has flowed along particular channels — toward issues that have preoccupied the conservative legal movement and the people that constitute it (as well as in more eccentric directions).[186] These issues then consume not only the Court's time but also the time of those who take their cues from the Court, including lower court judges, lawyers, law students, academics, and journalists. Pressing the argument from a different angle, the next section offers a glimpse into the pool of certiorari petitions that produced the 2023 Term docket[187] to show how easily

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via a case involving users of Twitter (now X) whom then-President Trump had "blocked" from accessing comment threads to his posts. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring). The Court ended up dismissing the case as moot, *id.* at 1220–21 (majority opinion), but Justice Thomas's concurrence signaled his concern about the power of social media platforms to regulate speech (Twitter had by then removed Trump's account from the platform), *id.* at 1221 (Thomas, J., concurring). On the Court's more general interest (not limited to social media) in considering legal hindrances to the free expression of conservative viewpoints, see, for example, David S. Schwartz, *Making Sense of* 303 Creative*: A Free Speech Solution in Search of a Problem* 4 (Univ. of Wis. L. Sch., Legal Stud. Rsch. Paper Series, Paper No. 1792, 2024); Murray, *supra* note 62, at 282; Kate Redburn, *The Equal Right to Exclude: Religious Speech and the Road to* 303 Creative v. Elenis, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 204) (on file with the Harvard Law School Library).

184 Jodi Kantor, *At Justice Alito's House, A "Stop the Steal" Symbol on Display*, N.Y. TIMES (May 16, 2024), https://www.nytimes.com/2024/05/16/us/justice-alito-upside-down-flag.html [https://perma.cc/W4P9-V7W7]; Jodi Kantor et al., *Another Provocative Flag Was Flown at Another Alito Home*, N.Y. TIMES (May 22, 2024), https://www.nytimes.com/2024/05/22/us/justice-alito-flag-appeal-to-heaven.html [https://perma.cc/6X2W-EVLL].

185 *See* Aaron Blake, *Samuel Alito's Provocative, Unusually Political Speech*, WASH. POST (Nov. 13, 2020, 12:04 PM), https://www.washingtonpost.com/politics/2020/11/13/samuel-alitos-provocative-unusually-political-speech [https://perma.cc/8UKZ-KU56]. Allegations of media persecution continued during the 2023 Term. *See, e.g.*, Justin Jouvenal et al., *Justice Clarence Thomas Calls Criticism of Him "Nastiness" and "Lies,"* WASH. POST (May 11, 2024, 11:30 AM), https://www.washingtonpost.com/politics/2024/05/10/kavanaugh-thomas-alito-supreme-court-speeches [https://perma.cc/M8NH-PMKV]; Jordan King, *Samuel Alito Fumes at Media Coverage of Supreme Court*, NEWSWEEK (June 12, 2024, 5:44 AM), https://www.newsweek.com/samuel-alito-supreme-court-propublica-clarence-thomas-1911622 [https://perma.cc/9LB2-6KRR].

186 *See* Julie Novkov, *Death Drop: The Roberts Court, Legitimacy, and the Future of Democracy in the United States*, 83 MD. L. REV. 77, 129 (2023) ("[The Court's] choice to insert itself into the major 'hot' issues of the day that resonate strongly with the Republican base . . . is notable in light of the percentage of the Court's active docket devoted to these issues.").

187 To approximate that pool, I searched publicly available petitions for certiorari filed between October 1, 2022, and October 31, 2023, reasoning that anything filed in this date range could have conceivably ended up on the 2023 docket. To decide on this date range, I looked at the filing dates of cases that the Court agreed to hear during the 2023 Term. Several cases that the Court heard in the spring of 2024 came to the Court's attention after October 31, 2023, but these were exceptional matters.

the Court might have taken up other cases, involving other circuit splits and other important questions.

### *C. A Counterfactual: The "Domination" Docket*

Continuing to draw on lessons from critical archival studies, this section trains our eyes on what the Court did *not* include on the docket. This is, in some sense, an old move. In 1950, legal scholar Fowler Harper and then–law student Alan Rosenthal devoted an entire article to the petitions for certiorari that the Vinson Court did *not* grant in a particular term and emerged with fascinating findings, including about that Court's reluctance to engage fully with questions of racial segregation.[188] Harper replicated this exercise in subsequent years with other coauthors.[189] More recently, Professor Joanna Schwartz and other scholars of police accountability have called attention to the Court's repeated refusals to grant certiorari in police violence cases involving qualified immunity defenses, despite pressure from "across the ideological spectrum" to reconsider this troubling judge-made doctrine.[190] In that spirit — but without Harper's ambition for comprehensiveness or Schwartz's laser focus on a broken area of law — this section profiles four rejected petitions for certiorari.

In choosing these petitions, I have used my own discretion. I have highlighted ones that (1) represent experiences of "domination," as Professor K. Sabeel Rahman has used that term[191] — of crushing debt, forced subserviency, unaffordable housing, and vulnerability to

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188 Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term — An Appraisal of Certiorari*, 99 U. PA. L. REV. 293, 309–11 (1950); *see also* Erwin N. Griswold, *Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 347 (1975) (noting how the Court's certiorari practices have led to "almost complete denial of appellate review in various aspects of the law").

189 *See, e.g.*, Fowler V. Harper & Edwin D. Etherington, *What the Supreme Court Did Not Do During the 1950 Term*, 100 U. PA. L. REV. 354, 354 (1951).

190 SCHWARTZ, *supra* note 73, at 87; *see also* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, Corbitt v. Vickers, 141 S. Ct. 110 (2020) (No. 19-679) (penned by a cross-ideological coalition calling for reform to the qualified immunity doctrine). In November 2020 and February 2021, the Court invalidated grants of qualified immunity, but did so quietly (via a summary reversal and a two-sentence follow-up order, respectively), suggesting awareness of criticisms but also reticence to confront them head on. *See* Katherine Mims Crocker, *The Supreme Court's Reticent Qualified Immunity Retreat*, 71 DUKE L.J. ONLINE 1, 4, 6, 17 (2021) (discussing *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (per curiam), and *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.)).

191 K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 13 (2016) (defining "domination" as "the accumulation of arbitrary, unchecked power over others," "manifest[ing] . . . in the concentrated private power of corporations and monopolies, or in the 'structural' domination of the market as a system").

economic predation[192] — and (2) could have plausibly made it onto the docket, applying what we know of the Court's criteria. Echoing section I.B, the overarching point is that exercises of docket discretion represent allocations of time, resources, and concern. The cases in this section contemplate different distributions, while also throwing into sharper relief the distributions the Court chose.

Readers who are critical of the Court may well emerge from this section feeling grateful that the Court *only* turned its gaze on the limited issues in section I.B and did not initiate conservative remakings of the areas of law discussed here. But this pragmatic concern should share space with two others. First, when the Court is able to act as if it *must* do what it does — as if it had no choice *but* to spend its energies reshaping administrative governance, or as if it simultaneously had no opportunity to consider the forms of domination this section highlights — the Court's true power is more obscure, and less contested, than it should be. Second, it is worth pondering what the current Court might have done with these cases. What political economic vision might have emerged, and might the public have benefited from seeing it?[193]

Turning now to the "counterfactual docket," a place to start is consumer debt, which has skyrocketed in recent decades, alongside stagnant wages and rising housing and healthcare costs.[194] Since the 1960s, as Professor Abbye Atkinson has demonstrated, policymakers have imagined that expanding access to credit could combat inequality and foster social mobility.[195] Without complementary economic interventions and social policies, however, many people simply became mired in debt.[196] Notably, much of this debt stems not from profligate consumer spending on nonessential items, but rather from medical bills and efforts to meet basic needs during times of emergency or family disruption.[197] With

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[192] *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2501 (2023) (describing "depressed wages, widespread hunger, ballooning debt, reduced life expectancy, sprawling housing insecurity, and a healthcare system that puts profits over people" as "feature[s] of life across the United States").

[193] As Professors Joseph Fishkin and William Forbath have argued, the Court's conservative majority does appear to have a "vision of constitutional political economy," which it "is working to impose," but a liberal and progressive tradition "of defending, deferring to, and trusting the Court" has limited open contestation of that vision. FISHKIN & FORBATH, *supra* note 76, at 431; *see also id.* at 432 (exploring "[s]trategies of political confrontation with the courts" that include presenting Justices with uncomfortable, exposing choices).

[194] Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146, 157–59 (2024).

[195] Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1425 (2020); Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1144–47 (2019) [hereinafter Atkinson, *Rethinking Credit*].

[196] Atkinson, *Borrowing Equality*, *supra* note 195, at 1439, 1446–47; Atkinson, *Rethinking Credit*, *supra* note 195, at 1147–52.

[197] Sara R. Collins et al., *Paying for It: How Health Care Costs and Medical Debt Are Making Americans Sicker and Poorer*, COMMONWEALTH FUND (Oct. 26, 2023), https://www.

debt has come debt collection, an $11 billion industry[198] that engages in a high volume of litigation (now "accounting for at least one-quarter of all state civil filings"[199]) and has "generate[d] more fraud reports to the [Federal Trade Commission] than any other industry."[200]

With that backdrop, consider, first, the petition for certiorari in *Pierre v. Midland Credit Management, Inc.*,[201] requesting review of a 2022 decision from the Seventh Circuit.[202] Central to *Pierre* were private companies' efforts to profit from "zombie debt": debt for which the statute of limitations has run, making it legally dead.[203] Companies like Midland Credit Management have bought this debt for pennies on the dollar and attempted to profit from it by tricking or cajoling debtors into reviving defunct obligations.[204] Plaintiff Renetrice Pierre was one of Midland's debtors.[205] In 2015, via personalized letter, Midland pitched Pierre a "discount program," through which she could save forty percent on her repayment of debt that Midland knew to be dead.[206] Surprised, confused, and fearful of possible repercussions, she contacted Midland to contest the debt.[207] Subsequently, she became the lead plaintiff in a class action, which alleged violations of the Fair Debt Collection Practices Act (FDCPA).[208] The district court granted summary judgment in favor of the plaintiff class, and a jury "awarded just over $350,000" in statutorily based damages.[209]

On appeal, however, the Seventh Circuit vacated and remanded the district court's decision, "with instructions to dismiss the case for lack of subject-matter jurisdiction."[210] Relying largely on the Supreme

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commonwealthfund.org/publications/surveys/2023/oct/paying-for-it-costs-debt-americans-sicker-poorer-2023-affordability-survey [https://perma.cc/Z45U-48A7 ] ("In 2021, there was an estimated $88 billion of medical debt on consumer credit records, accounting for 58 percent of all debt-collection entries on credit reports — by far the largest single source of debt."); PEW CHARITABLE TRS., THE ROLE OF EMERGENCY SAVINGS IN FAMILY FINANCIAL SECURITY: HOW DO FAMILIES COPE WITH FINANCIAL SHOCKS? 2 (2015), https://www.pewtrusts.org/-/media/assets/2015/10/emergency-savings-report-1_artfinal.pdf [https://perma.cc/MN5G-RR9E].

198 Renae Merle, *Zombie Debt: How Collectors Trick Consumers into Reviving Dead Debts*, WASH. POST (Aug. 7, 2019, 6:12 AM), https://www.washingtonpost.com/business/2019/08/07/zombie-debt-how-collectors-trick-consumers-into-reviving-dead-debts [https://perma.cc/A8G6-494N].

199 Engstrom & Engstrom, *supra* note 194, at 160.

200 *Debt Collection*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/topics/consumer-finance/debt-collection [https://perma.cc/J63W-JY83].

201 29 F.4th 934 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 775 (2023).

202 *See* Petition for a Writ of Certiorari, *Pierre*, 143 S. Ct. 775 (No. 22-435).

203 *See* Merle, *supra* note 198.

204 *Pierre*, 29 F.4th at 941 (Hamilton, J., dissenting) (citing Merle, *supra* note 198); *see also* Merle, *supra* note 198. These efforts, at the time of the litigation, had enabled the industry "to bring in tens of billions of dollars" per year in payments. *Id.* (internal quotation marks omitted).

205 *Pierre*, 29 F.4th at 936.

206 *Id.* at 936–37.

207 *Id.* at 937.

208 *Id.*

209 *Id.*

210 *Id.* at 936.

Court's 2021 decision in *TransUnion LLC v. Ramirez*[211] — a credit reporting case involving less sympathetic facts[212] — the court noted that "[a] plaintiff seeking money damages has standing to sue in federal court only for harms that have in fact materialized," and that a defendant's mere violation of a statute was not enough to clear that bar.[213] No harm had befallen Pierre, other than an uncomfortable "psychological state[]," and this was "insufficient to confer standing."[214]

There was a strong dissent, however — of the sort that might have caught a Justice's eye during the certiorari process. Judge Hamilton accused his colleagues on the Seventh Circuit panel of "restrict[ing] standing under consumer protection laws much more tightly than the Supreme Court itself has,"[215] "neuter[ing]" the FDCPA in the Seventh Circuit, and casting a pall over other consumer protection statutes.[216] He also noted a circuit split, with the Seventh Circuit now occupying "the far end of" one side.[217]

The Court did not grant Pierre's petition for review — for reasons that might be perfectly logical (as usual, there was no explanation), but that nonetheless reflect a choice.[218] During the 2023 Term, the Court answered other questions that had divided the lower courts — ranging from whether an insurer with financial responsibility for a bankruptcy claim is a "party in interest" for purposes of Chapter 11 bankruptcy proceedings (the Court said yes)[219] to whether a semiautomatic rifle equipped with a "bump stock" fits the statutory definition of a

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211 141 S. Ct. 2190 (2021).

212 In *TransUnion*, the plaintiffs complained about a credit-reporting process that, without due diligence, flagged individuals as a "potential match" to names on a Treasury Department list of "terrorists, drug traffickers, and other serious criminals" and then placed an "alert" in their credit files. *Id.* at 2201. All plaintiffs in the class had such alerts in their credit files, but it was not clear that many of these individuals even knew about them. *Id.* at 2208, 2212. In some cases, TransUnion had shared this information with third parties, such as a company from which a plaintiff sought to make a large purchase, and these plaintiffs were more obviously injured. *Id.* at 2208–09. But as compared to the revivification of thousands of dollars of "zombie debt," these injuries might seem minor and fleeting. *Compare id.*, *with* Pierre v. Midland Credit Mgmt., Inc., 36 F.4th 728, 736 (7th Cir. 2022) (Hamilton, J., dissenting).

213 *Pierre*, 29 F.4th at 938 (citing *TransUnion*, 141 S. Ct. at 2210–11).

214 *Id.* at 939 (citing Wadsworth v. Kross, Lieberman & Stone, Inc., 12 F.4th 665, 668 (7th Cir. 2021); Pennell v. Glob. Tr. Mgmt., LLC, 990 F.3d 1041, 1045 (7th Cir. 2021)).

215 *Id.* at 940 (Hamilton, J., dissenting). This overly restrictive approach came at a cost to the separation of powers, Judge Hamilton alleged (invoking a keen concern of the Court's conservative majority), because it impeded Congress's legitimate policy choices. *See id.*

216 *Id.*

217 *Id.* at 955.

218 *See* Pierre v. Midland Credit Mgmt., Inc., 143 S. Ct. 775 (2023) (mem.) (denying certiorari).

219 Truck Ins. Exch. v. Kaiser Gypsum Co., Inc., 144 S. Ct. 1414, 1420 (2024).

"machinegun" (the Court said no).[220] "Zombie debt," meanwhile, has continued to plague American consumers.[221]

Consider next the petition for certiorari in *Lackawanna Recycling Center, Inc. v. Burrell*,[222] seeking review of a decision from the Third Circuit.[223] This case implicated another troubling facet of American indebtedness: debt resulting from unpaid child support.[224] Such debt can lead to driver's license revocation, wage garnishment, civil contempt proceedings, and incarceration[225] — and from there to lifetimes of collateral consequences.[226] It is also widely acknowledged to be a pressing public policy problem.[227] Much of it is held by low-income individuals, many of whom belong to negatively racialized groups.[228] Lacking the ability to pay, these individuals will only become less able to earn if government officials take an aggressive approach to repayment, meaning that their families will be no better off, but racialized economic inequality will deepen.[229] *Burrell* arose from this larger context. The

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[220] Garland v. Cargill, 144 S. Ct. 1613, 1617 (2024).

[221] *See, e.g.*, Rachel DePompa & Daniela Molina, *Zombie Debt: Settled and Unearned Debts Haunt Consumer Credit Reports for Years*, WWNY NEWS (Jan. 30, 2023, 4:51 PM), https://www.wwnytv.com/2023/01/30/zombie-debt-settled-unearned-debts-haunt-consumer-credit-reports-years [https://perma.cc/5XN9-PV6J]; Chris Arnold et al., *Zombie 2nd Mortgages Are Coming to Life, Threatening Thousands of Americans' Homes*, NPR (May 18, 2024, 6:00 AM), https://www.npr.org/2024/05/10/1197959049/zombie-second-mortgages-homeowners-foreclosure [https://perma.cc/GP9H-YCNF]; Scott Morgan, *InDebted: South Carolina's Medical Debt Is 2nd-Worst in the US (and Hospitals Don't Always Make It Better)*, S.C. PUB. RADIO (Apr. 7, 2023, 5:48 AM), https://www.southcarolinapublicradio.org/podcasts/2023-04-07/indebted-south-carolinas-medical-debt-is-2nd-worst-in-the-us-and-hospitals-dont-always-make-it-better [https://perma.cc/5A43-R8LC] (noting that "22 out of every 100" South Carolinians have medical debt in collections and that "healthcare systems can and will sue you for dead debt").

[222] 143 S. Ct. 2662 (2023) (mem.).

[223] Petition for a Writ of Certiorari, *Burrell*, 143 S. Ct. 2662 (No. 22-1034); *see also* Burrell v. Staff, 60 F.4th 25 (3d Cir. 2023), *cert. denied*, 143 S. Ct. 2662.

[224] *See Burrell*, 60 F. 4th at 31.

[225] Kyle Ross, *Learning from the United States' Painful History of Child Support*, CTR. FOR AM. PROGRESS (June 17, 2022), https://www.americanprogress.org/article/learning-from-the-united-states-painful-history-of-child-support [https://perma.cc/8KLQ-XJHT].

[226] Elizabeth Cozzolino, *Public Assistance, Relationship Context, and Jail for Child Support Debt*, 4 SOCIUS, 2018, at 1, 14. The Court last considered this general issue in *Turner v. Rogers*, 564 U.S. 431 (2011), where it addressed whether the Constitution requires the government to provide counsel to an indigent person in civil contempt proceedings that could lead to incarceration. The Court said no (but did find a due process requirement of "alternative procedures that ensure a fundamentally fair determination of the critical incarceration-related question"). *Id.* at 435.

[227] *See, e.g.*, Ross, *supra* note 225.

[228] *See id.*

[229] *See, e.g.*, *id.*; Frances Robles & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat.,* N.Y. TIMES (Apr. 19, 2015), https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html [https://perma.cc/ZHB3-XX7L]; Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, WASH. POST (Oct. 18, 2015, 5:00 PM), https://www.washingtonpost.com/politics/for-men-in-prison-child-support-becomes-a-crushing-debt/2015/10/18/e751a324-5bb7-11e5-b38e-06883aacba64_story.html [https://perma.cc/3XBE-XCR8]; Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124

plaintiffs were three men in Lackawanna County, Pennsylvania, whose failure to pay child support resulted in their incarceration[230] — linking them to hundreds of thousands of other Americans incarcerated for the same reason.[231]

To begin to pay off what they owed and thereby secure their freedom, the plaintiffs sought access to paid work release, which in Lackawanna County meant "first [spending] half of their sentences" performing "community service" at a private recycling center[232] — the same center that contracted with the county to handle its recycling needs.[233] In an arrangement reminiscent of other municipalities' efforts to pay their bills at the expense of low-level criminal and civil offenders,[234] the "service" that Lackawanna County required of the plaintiffs

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AM. J. SOCIO. 1 (2018). Such critiques have prompted efforts at reform, but these have had to contend with a long tradition of encouraging families, rather than the government, to serve as the first line of defense against misfortune. *See generally* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213 (2017) (discussing the privatized and individualistic nature of U.S. familial burdens compared to those of other wealthy countries). Reform efforts have also come up against a post-1970s approach to public welfare whereby every payment made to a needy family is a payment potentially owed back to the government, with networked computer systems keeping the score. *See* Marc Aidinoff, *Computerizing a Covenant: Contract Liberalism and the Nationalization of Welfare Administration*, *in* MASTERY AND DRIFT: PROFESSIONAL-CLASS LIBERALS SINCE THE 1960S (Brent Cebul & Lily Geismer eds., forthcoming 2024) (manuscript at 1–2, 15) (on file with the Harvard Law School Library). The public welfare system is salient here because it often issues payments to children in need and then assumes the role of creditor vis-à-vis non-supporting parents. *See id.*; Will Holub-Moorman, Tough Love: Child Support Enforcement, Welfare Reform, and the US Administrative State, 1970–2000, at 1 (Apr. 5, 2024) (unpublished manuscript) (on file with the Harvard Law School Library); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927, 933 (2016); Nicole Langston, *Welfare Debt*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 3) (on file with the Harvard Law School Library) (coining the phrase "welfare debt" for "child support debt that is owed not to the custodial parent or children but to the government" and estimating that "[o]ver a million parents owe over $20 billion" of such debt).

230 *See* Burrell v. Staff, 60 F.4th 25, 31 (3d Cir. 2023), *cert. denied*, 143 S. Ct. 2662 (2023) (mem.).

231 *See* Cozzolino, *supra* note 226, at 14 (estimating "that about one in seven fathers who owe child support spends time in jail for it"); NOAH ZATZ ET AL., UCLA INST. FOR RSCH. ON LAB. & EMP., GET TO WORK OR GO TO JAIL: WORKPLACE RIGHTS UNDER THREAT 8 & nn.33–35 (2016), https://irle.ucla.edu/wp-content/uploads/2016/03/Get-To-Work-or-Go-To-Jail-Workplace-Rights-Under-Threat.pdf [https://perma.cc/AR9W-CHNJ] (calculating that "upwards of 100,000" individuals may face incarceration for child support debt in California alone). African-American men have been particularly likely to experience incarceration for this reason. *See* Zatz, *supra* note 229, at 933 (noting that "in larger U.S. cities, a shocking 15% of African-American fathers are at some point incarcerated for nonpayment of child support").

232 *Burrell*, 60 F.4th at 31.

233 Terrie Morgan-Besecker, *Trash for Cash*, THE TIMES-TRIBUNE (Scranton, Pa.) (Feb. 6, 2021), https://www.thetimes-tribune.com/news/county-solicitor-halting-of-inmate-labor-at-recycling-center-wont-impact-pending-lawsuit/article_b580afba-9998-5e74-8138-c64b1400b398.html [https://perma.cc/7VKM-UJYX] (reporting that "[t]he county has supplied inmate labor to [the Lackawanna Recycling Center] free of charge for more than a decade" and that "[i]n exchange, the company agreed not to charge any Lackawanna County municipalities for accepting their recyclables").

234 Walter Johnson, *Ferguson's Fortune 500 Company*, THE ATLANTIC (Apr. 26, 2015), https://www.theatlantic.com/politics/archive/2015/04/fergusons-fortune-500-company/390492 [https://

was "grueling" manual labor along trash-sorting conveyor belts.[235] This allegedly required the plaintiffs to endure skin rashes, wounds from handling sharp material, vomit-inducing stenches, and temperatures of 100 degrees Fahrenheit.[236] In return, the recycling company paid the plaintiffs sixty-three cents per hour.[237] Working too slowly, according to the plaintiffs, could result in food being taken away.[238]

By the time the case entered the Supreme Court's certiorari process, the narrow question was whether the plaintiffs could pursue federal claims against the county under the Trafficking Victims Protection Act of 2000[239] (TVPA) and the Fair Labor Standards Act of 1938[240] (FLSA).[241] The Third Circuit had said yes.[242] Lackawanna County hoped the Supreme Court would say no.[243]

Unlike *Pierre*, *Burrell* involved no obvious circuit split — but the petitioners could and did claim "importance," as petitioners did successfully in the First Amendment/firearms case *National Rifle Ass'n of America v. Vullo*,[244] the agency deference case *Loper Bright Enterprises v. Raimondo*,[245] and other docketed cases from the 2023 Term.[246] *Burrell* was arguably "important" because it offered the Court the

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perma.cc/2EEZ-SG73] (describing Ferguson, Missouri, site of the infamous police killing of Michael Brown, as a "cash-starved municipality" that "relies on its cops and its courts to extract millions in fines and fees from its poorest residents, issuing thousands of citations each year"); Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2286 (2018) (offering other examples).

235 *Burrell*, 60 F.4th at 34, 37.

236 *Id.* at 34.

237 *Id.* at 31.

238 *Id.* at 34.

239 Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

240 29 U.S.C. §§ 201–219.

241 Petition for a Writ of Certiorari, *supra* note 223, at i. Proceeding initially pro se, plaintiff William L. Burrell, Jr., sued the county, the recycling company, and related defendants for violations of the Thirteenth Amendment, as well as various Pennsylvania and federal laws. *Burrell*, 60 F.4th at 31–32 (noting that following a 2018 remand by the Third Circuit, Burrell "obtained counsel and filed a Second Amended Complaint," *id.* at 32, which added two plaintiffs "and significantly refined its list of defendants, its factual allegations, and its legal claims," *id.*). The district court dismissed all claims against all defendants, *id.* at 32–33, but, on appeal, the Third Circuit reinstated some of the plaintiffs' claims, including federal law claims under the TVPA and the FLSA, *id.* at 31.

242 *Burrell*, 60 F.4th at 31.

243 *See* Petition for a Writ of Certiorari, *supra* note 223, at 2. This petition built on Judge Matey's opinion concurring in part and dissenting in part. *See id.* at 3, 11–12. Judge Matey would have affirmed the district court's opinion in its entirety, reasoning that the plaintiffs' situation followed directly from their own choices, starting with the decision not to pay child support. *See Burrell*, 60 F.4th at 51 (Matey, J., concurring in part and dissenting in part) ("[T]he fact Plaintiffs' choices produced unappealing consequences does not require new definitions of torture and labor.").

244 144 S. Ct. 1316 (2024); Petition for a Writ of Certiorari at 7, *Vullo*, 144 S. Ct. 1316 (No. 22-842).

245 144 S. Ct. 2244 (2024); Petition for Writ of Certiorari at 33, *Loper Bright*, 144 S. Ct. 2244 (No. 22-451).

246 *See, e.g.*, Petition for Writ of Certiorari at 18, Trump v. Anderson, 144 S. Ct. 662 (2024) (No. 23-719); Petition for a Writ of Certiorari at 9–10, Vidal v. Elster, 144 S. Ct. 1507 (2024) (No. 22-704).

opportunity to decide how existing statutes apply to incarcerated debtors, as well as to incarcerated people more generally.[247] Notably, the TVPA question has come up before, in cases around the country involving immigrant detainees at private prisons[248] (and has arisen again recently, in an Alabama case where former inmates complained of being forced to provide cheap labor to local fast-food restaurants[249]).

Moreover, had the Court agreed with the Third Circuit that a TVPA claim on these facts was plausible, there would have been value in spreading this message throughout the legal system. Such was the outcome of the Court's 2024 decision in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*,[250] where the Court confirmed consumers' right to sue federal agencies for violating the Fair Credit Reporting Act of 1970.[251] Without discounting the importance of *Kirtz* or insisting that the Court absolutely should have taken *Burrell*, we might pause to note the result of these two docketing choices. *Kirtz*

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[247] In recent years, reports have abounded about questionable uses of incarcerated labor. *See, e.g.*, Josh Eidelson, *Corporate America Never Really Quit Forced Labor*, BLOOMBERG (May 11, 2024, 9:00 AM), https://www.bloomberg.com/news/features/2024-05-11/us-prison-labor-powers-billions-in-corporate-government-revenue [https://perma.cc/RK8K-JRJG]; Michael Sainato, "*Slavery by Any Name Is Wrong": The Push to End Forced Labor in Prisons*, THE GUARDIAN (Feb. 27, 2023, 7:12 AM), https://www.theguardian.com/us-news/2022/sep/27/slavery-loophole-unpaid-labor-in-prisons [https://perma.cc/NRH8-HU7K]; Robin McDowell & Margie Mason, *Prisoners in the US Are Part of a Hidden Workforce Linked to Hundreds of Popular Food Brands*, AP NEWS (Jan. 29, 2024, 8:03 AM), https://apnews.com/article/prison-to-plate-inmate-labor-investigation-c6foeb4747963283316e494eadfo8c4e [https://perma.cc/9TYU-NN95]; Cara McGoogan, "*You're a Slave": Inside Louisiana's Forced Prison Labor and a Failed Overhaul Attempt*, WASH. POST (Jan. 3, 2023, 11:38 PM), https://www.washingtonpost.com/nation/2023/01/01/louisiana-prison-labor-ballot-slavery [https://perma.cc/8GSJ-VB9W]. Scholars have also documented this phenomenon, while flagging broader questions about how the law should apply to work that occurs outside the formal labor market. *See, e.g.*, Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 867, 869 (2008); ERIN HATTON, COERCED: WORK UNDER THREAT OF PUNISHMENT 1, 5, 8–9 (2020); Noah D. Zatz, *The Carceral Labor Continuum: Beyond the Prison Labor/Free Labor Divide*, *in* LABOR AND PUNISHMENT: WORK IN AND OUT OF PRISON 133, 133–34 (Erin Hatton ed., 2021).

[248] Ruderman v. McHenry County, No. 22-cv-50115, 2023 WL 130496, at *1 (N.D. Ill. Jan. 9, 2023); *Settlement in Forced Labor Case Against Private Prison Company Operating Immigration Detention Center*, S. POVERTY L. CTR. (Oct. 19, 2023), https://www.splcenter.org/presscenter/settlement-forced-labor-case-against-private-prison-company-operating-immigration [https://perma.cc/T7MD-XTDM]; Michael Karlik, *Judge Green-Lights Forced-Labor Lawsuit Against Operator of Aurora Detention Center*, COLO. SPRINGS GAZETTE (Oct. 25, 2022), https://gazette.com/news/courts/judge-green-lights-forced-labor-lawsuit-against-operator-of-aurora-detention-center/article_43e4bd0a-767d-5549-b256-7f6370b1fe35.html [https://perma.cc/LJ6E-6BLQ]; *see also Kenosha County, WI: Ruderman Sues over Forced Labor Provisions*, CLASS ACTION PROSPECTOR, 2023 WLNR 37386224 (Oct. 30, 2023) (noting a similar case at a public facility in Wisconsin).

[249] Michael Levenson, *Prisoners Sue Alabama, Calling Prison Labor System a "Form of Slavery,"* N.Y. TIMES (Dec. 12, 2023), https://www.nytimes.com/2023/12/12/us/alabama-prisons-lawsuit-labor.html [https://perma.cc/LT4J-E75E].

[250] 144 S. Ct. 457 (2024).

[251] *Id.* at 467 (involving an allegation that the Agency sent inaccurate information to a credit reporting service about the status of the plaintiff's agency-issued loan).

ended up amplifying individual grievances against the federal administrative state, highlighting ways in which federal agencies harm consumers. While doing no harm to the plaintiffs, the passing over of *Burrell* allowed deeply problematic behavior by a local government and its private contractor to remain a local matter, not worth the time of the mainstream media or the attention of legal actors in other parts of the country (who may well have encountered similar behavior in their jurisdictions).[252]

If *Pierre* and *Burrell* represent lost opportunities to consider the stranglehold of debt on everyday Americans and the troubling profit-seeking that it has enabled, the petition for certiorari in *Anilao v. Spota* surfaced a different type of labor exploitation, along with a different form of public corruption: prosecutorial misconduct.[253] The backdrop for this case is the care economy and the labor conditions that characterize it. Millions of Americans require care, whether because of age, disability, or some combination.[254] And although family members (often women, often unpaid) continue to provide much of that labor, residential facilities like nursing homes are where many people receive what they need.[255] These facilities are notoriously difficult places to work, owing to low pay, poor conditions (for workers and residents alike), and business models that rely on thin staffing.[256] That is likely why Sentosa Care, LLC, the New York–based nursing home operator at issue in this case, looked to the Philippines,[257] participating in an "international nurse recruitment industry" that has helped meet labor demands but has also led to allegations of human trafficking and forced labor.[258]

The facts underlying *Anilao* suggest why this recruitment industry has come under scrutiny. The ten nurses involved each signed an

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[252] *Cf.* Snyder v. United States, 144 S. Ct. 1947, 1959–60 (2024) (interpreting a federal anticorruption law in a manner that disallowed prosecution of local officials for accepting gratuities, thereby signaling to state and local governments that broad swaths of corrupt conduct were for them to handle).

[253] *See* Petition for a Writ of Certiorari at 34, Anilao v. Spota, 143 S. Ct. 1781 (2023) (No. 22-539).

[254] Yiran Zhang, *The Care Bureaucracy*, 99 IND. L.J. 1241, 1246–47 (2024).

[255] *See id.* at 1247.

[256] *See* Allegra Abramo & Jennifer Lehman, *How N.Y.'s Biggest For-Profit Nursing Home Group Flourishes Despite a Record of Patient Harm*, PROPUBLICA (Oct. 27, 2015, 8:00 AM), https://www.propublica.org/article/new-york-for-profit-nursing-home-group-flourishes-despite-patient-harm [https://perma.cc/DTW2-4ZWF] (discussing problems with the nursing home industry and with Sentosa Care, LLC, specifically); Jordan Rau, *Understaffed Nursing Homes Are a Huge Problem, And Biden's Promised Fix "Sabotaged,"* NPR (Sept. 1, 2023, 12:54 PM), https://www.npr.org/sections/health-shots/2023/09/01/1197074873/nursing-homes-staff-ratio-biden-medicare-medicaid [https://perma.cc/5VHN-2BDX].

[257] Anilao v. Spota, 27 F.4th 855, 860 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 1781 (2023) (mem.).

[258] Aurora Almendral, *A Hidden System of Exploitation Underpins U.S. Hospitals' Employment of Foreign Nurses*, QUARTZ (Oct. 2, 2023), https://pulitzercenter.org/stories/hidden-system-exploitation-underpins-us-hospitals-employment-foreign-nurses [https://perma.cc/7B38-Q9FA] (reporting on the phenomenon of recruiting nurses from the Philippines to fill demanding positions in the healthcare industry).

employment contract with Sentosa "that required [them] to work for at least three years or face a $25,000 penalty."[259] Upon arrival in New York, however, they found that their working and living conditions were not what Sentosa promised, nor did their benefits and pay align with their contracts; technically, they did not even work for Sentosa, but rather for an employment agency.[260] Eventually, they turned to the Philippine Consulate, which referred them to attorney Felix Vinluan,[261] and they resigned from their positions at the Avalon Gardens Rehabilitation and Health Center (a skilled nursing facility for adults and children).[262] What followed was an aggressive campaign by Sentosa to impose consequences on the nurses and their lawyer. These efforts went nowhere with the New York State Department of Education (which licenses and regulates nurses) or the local police department, and likewise failed in state court (where Sentosa sought an order preventing the nurses and Vinluan from speaking to other nurses about resigning).[263] But Sentosa "found a receptive audience" in Suffolk County District Attorney Thomas J. Spota III and Assistant District Attorney Leonard Lato.[264]

As civil rights lawyer Alec Karakatsanis has underscored, "there is effectively no check on the exercise of American prosecutorial power,"[265] and in this instance, Spota and Lato used their power to charge the nurses with conspiracy, endangering the welfare of a child, and endangering the welfare of a physically disabled person; they charged Vinluan with the same, plus criminal solicitation.[266] The prosecution ended only after a state appellate court issued a writ of prohibition, following findings that no crimes had been committed and that the prosecution impermissibly infringed on the nurses' and Vinluan's constitutional rights.[267] *Anilao v. Spota* was an effort to hold the prosecutors accountable for their wrongdoing.

The petition for certiorari that reached the Supreme Court in December 2022 followed a Second Circuit ruling that Spota and Lato were entitled to absolute immunity,[268] even though a state court found that they had proceeded "without or in excess of jurisdiction."[269] Two members of the appellate court panel had felt compelled by precedent to

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[259] *Anilao*, 27 F.4th at 859–60.
[260] *See id.* at 860.
[261] *Id.* at 860–61.
[262] *Id.*
[263] *Id.* at 861.
[264] *See id.* at 859, 861.
[265] Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 873 (2019).
[266] *See Anilao*, 27 F.4th at 861. They did so even after receiving evidence that none of the nurses quit mid-shift, as Sentosa had alleged. *Id.*
[267] *Id.* at 862.
[268] *Id.* at 860.
[269] Petition for a Writ of Certiorari, *supra* note 253, at 8 (quoting Vinluan v. Doyle, 873 N.Y.S.2d 72, 77 (N.Y. App. Div. 2009)).

reach this result;[270] Judge Denny Chin had filed a lengthy dissent.[271] The plaintiffs' petition for certiorari amplified points from that dissent[272] and added others, including the need to "curtail obvious abuses of prosecutorial power" and the appropriateness of *Anilao* as a vehicle for doing so.[273]

The Court was apparently unmoved, however — even though other docketing choices from the same time frame suggested a concern about prosecutorial overreach. These include the previously noted certiorari grants in *Trump v. United States*[274] and *Fischer v. United States*,[275] as well as a grant in *Snyder v. United States*[276] (involving the prosecution of a former mayor who accepted a $13,000 "gratuity" from a company that had recently benefited from a city contract).[277] Note the possibilities that these docketing choices either created or left closed. The petitions in *Trump*, *Fischer*, and *Snyder* invited the Court to curb prosecutorial authority, but in ways that would likely only benefit the types of defendants in those cases (current and former Presidents of the United States, January 6th rioters, corrupt state and local officials).[278] A grant of certiorari in *Anilao* would presumably have produced a more general holding, applicable across all the types of cases that prosecutors pursue and encompassing many low-income, low-status defendants.[279] But that is not what transpired.[280]

Consider, last, the petition for certiorari in *Klossner v. IADU Table Mound MHP, LLC*,[281] a case that emerged from the nexus of disabled poverty and unaffordable housing.[282] The case grew out of Suellen

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270 *See Anilao*, 27 F.4th at 870.

271 *Id.* at 875–86 (Chin, J., dissenting).

272 Petition for a Writ of Certiorari, *supra* note 253, at 12, 15–16, 18.

273 *Id.* at 33, 37.

274 144 S. Ct. 1027 (2024) (mem.) (granting certiorari).

275 144 S. Ct. 537 (2023) (mem.) (granting certiorari).

276 144 S. Ct. 536 (2023) (mem.) (granting certiorari).

277 Snyder v. United States, 144 S. Ct. 1947, 1954 (2024).

278 *See* Application for a Stay of the D.C. Circuit's Mandate Pending the Filing of a Petition for Writ of Certiorari at i, Trump v. United States, 144 S. Ct. 2312 (2024) (No. 23-939); Petition for a Writ of Certiorari at 3, Fischer v. United States, 144 S. Ct. 2176 (2024) (No. 23-5572); Petition for a Writ of Certiorari at 14, *Snyder*, 144 S. Ct. 1947 (No. 23-108).

279 Perhaps this thinking is what prompted Justice Sotomayor to take the rare step of issuing a statement regarding a denial of certiorari in another prosecutorial immunity case on July 2, 2024, the day after the Court released its decision in *Trump v. United States*: "If this is what absolute prosecutorial immunity protects," wrote Justice Sotomayor (referring to an allegation that a prosecutor advised a witness to destroy exculpatory evidence, in violation of a court order), "the Court may need to step in to ensure that the doctrine does not exceed its 'quite sparing' bounds." Price v. Montgomery County, 144 S. Ct. 2499, 2499, 2501 (2024) (Sotomayor, J., statement respecting the denial of certiorari) (quoting Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993)).

280 *See* Anilao v. Spota, 143 S. Ct. 1781 (2023) (mem.) (denying certiorari).

281 Petition for a Writ of Certiorari, Klossner v. IADU Table Mound MHP, LLC, 144 S. Ct. 328 (2023) (No. 23-134).

282 Disabled poverty affects over five million non-institutionalized working-age people (ages twenty-one to sixty-four). W. ERICKSON, C. LEE & S. VON SCHRADER, CORNELL UNIV., 2022 DISABILITY STATUS REPORT: UNITED STATES 43 (2024).

Klossner's residency in a mobile-home park in Dubuque, Iowa.[283] Klossner had lived there since 2009, drawing on disability-based income support to pay her housing costs.[284] After a change in the park's ownership, however, her living situation became untenable.[285] The new corporate owner — an entity controlled by the self-proclaimed fifth-largest owner of mobile-home parks in the nation — significantly increased rent and utility charges.[286] Klossner's income did not keep pace, prompting her to seek and receive a federally funded voucher from her local housing authority to supplement her housing payments.[287] When her landlord refused to accept the voucher, Klossner sued, alleging violation of the Fair Housing Amendments Act of 1988[288] (FHAA).[289] As a person with a disability, she argued, she was entitled to "equal opportunity to use and enjoy a dwelling," which, in this context, meant that her landlord should have made the "reasonable accommodation" of accepting the voucher.[290]

The district court agreed with Klossner and granted injunctive relief, but the Eighth Circuit vacated the injunction.[291] That court interpreted a "reasonable accommodation" under the FHAA to entail "the 'direct amelioration of a disability's effect,'" not "the dissimilar action of alleviating downstream economic effects of a handicap."[292]

Klossner's petition for certiorari emphasized "a longstanding circuit split" and also made a case for importance.[293] In 2021, according to the

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[283] *See* Klossner v. IADU Table Mound MHP, LLC, 65 F.4th 349, 351 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 328 (2023).

[284] *See* Petition for a Writ of Certiorari, *supra* note 281, at 4–5.

[285] *See id.* at 5–6.

[286] *Id.* at 5.

[287] *Id.* at 5–6 (noting that by 2019, rent and utilities charges exceeded fifty percent of Klossner's income).

[288] 42 U.S.C. §§ 3601–3631.

[289] Klossner v. IADU Table Mound MHP, LLC, 65 F.4th 349, 352 (8th Cir. 2023), *cert. denied*, 144 S. Ct. 328 (2023).

[290] *Id.* (quoting 42 U.S.C. § 3604(f)(3)(B)).

[291] *Id.* at 352, 356.

[292] *Id.* at 353–54 (quoting Bryant Woods Inn, Inc. v. Howard County, 124 F.3d 597, 604 (4th Cir. 1997)).

[293] Petition for a Writ of Certiorari, *supra* note 281, at 2, 11, 18. In brief, the Eighth Circuit had aligned itself with the Seventh, which had held that landlords were required to accommodate only the physical effects of a disability, not the economic effects. *Id.* at 3; Hemisphere Bldg. Co. v. Village of Richton Park, 171 F.3d 437, 440–41 (7th Cir. 1999). The Second Circuit had agreed, Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 301–02 (2d Cir. 1998), albeit over a strong dissent, *id.* at 310 (Calabresi, J., dissenting). On the other side were the Ninth and Eleventh Circuits, which took no issue with the notion that disability might cause a resource-related inability to comply with a particular housing policy and thereby form the basis for a legitimate "reasonable accommodation" request under the FHAA. *See* Giebeler v. M & B Assocs., 343 F.3d 1143, 1144–45 (9th Cir. 2003); Schaw v. Habitat for Human. of Citrus Cnty., Inc., 938 F.3d 1259, 1272 (11th Cir. 2019). The *Klossner* petition was "distributed for conference," suggesting that it made the Court's "discuss list." *See* Klossner v. IADU Table Mound MHP, LLC, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/klossner-v-iadu-table-mound-mhp-llc [https://perma.cc/225M-9XEN].

Urban Institute, "84 percent of disabled people with low incomes in the United States — nearly 18 million people across 15.6 million households — were eligible for housing assistance but did not receive it."[294] For some disabled people in this situation, the only realistic choices may be to live without stable housing or to seek care in a large institutional setting, such as a nursing home.[295] Neither choice is good. Homelessness brings with it myriad hardships and dangers, including the risks of physical violence and inability to access government benefits.[296] Nursing homes have often proven incompatible with humane and dignified care, especially for people who are not able to afford higher-quality facilities.[297]

The Court declined to take up *Klossner*[298] — and in doing so probably prompted some advocacy groups to breathe easier[299]: The Roberts Court has been unpredictable on disability rights,[300] and the Court has previously used disability-related cases to destabilize significant areas of public law.[301] Indeed, one might raise similar concerns about all the cases this section profiled. A like-minded Justice may well have tried to keep these cases off the docket and, if so, would have been aided in this effort by the myriad factors that can make a petition arguably unsuitable for review.[302]

What I have tried to offer, however, is not the "best" hypothetical docket for a particular set of litigants, but rather a hypothetical docket that captures experiences of "domination" common to many

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[294] Susan J. Popkin et al., *People with Disabilities Living in the US Face Urgent Barriers to Housing*, URB. INST. (Oct. 21, 2022) (emphasis omitted), https://www.urban.org/research/publication/people-disabilities-living-us-face-urgent-barriers-housing [https://perma.cc/2MYF-49VT].

[295] *See* Petition for a Writ of Certiorari, *supra* note 281, at 24.

[296] *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2230–31 (2024) (Sotomayor, J., dissenting).

[297] *See* Nina A. Kohn, Adrianna Duggan, Justin Cole & Nada Aljassar, *Using What We Have: How Existing Legal Authorities Can Help Fix America's Nursing Home Crisis*, 65 WM. & MARY L. REV. 127, 134–38 (2023) (discussing a range of preventable problems at nursing homes, including maggot infestations and patient ulcers). Such places are poorly regulated, even after decades of scandals. *Id.* at 133, 137, 180–88. They have historically been "places to die," not places to thrive. *See, e.g.*, Gabriel Winant, *A Place to Die: Nursing Home Abuse and the Political Economy of the 1970s*, 105 J. AM. HIST. 96, 104, 108–13 (2018); Jordan Rau, *Care Suffers as More Nursing Homes Feed Money into Corporate Webs*, KFF HEALTH NEWS (Dec. 31, 2017), https://kffhealthnews.org/news/care-suffers-as-more-nursing-homes-feed-money-into-corporate-webs [https://perma.cc/SC6L-CADW].

[298] Klossner v. IADU Table Mound MHP, LLC, 144 S. Ct. 328 (2023) (mem.) (denying certiorari).

[299] *See* Harris et al., *supra* note 24, at 1713, 1755–62 (noting a desire by some disability rights groups to keep disability civil rights cases *off* the Court's docket).

[300] *See id.*

[301] *See generally* Katie Eyer & Karen M. Tani, *Disability and the Ongoing Federalism Revolution*, 133 YALE L.J. 839 (2024) (documenting the many situations in which the Supreme Court has used disability rights cases to advance conservative public law principles).

[302] PERRY, *supra* note 23, at 32–33.

Americans.[303] Such experiences are central to U.S. politics, with both major parties claiming to represent the concerns of struggling Americans. And, despite the many factors that limit access to the federal courts,[304] they were present in the petitions for certiorari that reached the Supreme Court. But they were largely absent from the docket.[305]

To return briefly to the archive analogy, absences have consequences. An archive's contents are by no means interpretive destiny,[306] but they nonetheless powerfully affect what we are able to know about the past and therefore what we are able to understand about the present.[307] The

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[303] *See* Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985, 1013 (2024) ("Workers have little influence over their wages, their schedules, their benefits, or their patterns of work; are often under surveillance or electronic monitoring, sometimes unable to take bathroom breaks; and have little ability to exit for a better alternative."). *See generally* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016) (providing a ground-level portrait of poor Americans' struggle to secure adequate housing); MATTHEW DESMOND, POVERTY, BY AMERICA (2023) (documenting the exploitative circumstances that prevent many poor Americans from escaping poverty); DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS (2016) (detailing how state and local governments and private companies translate vulnerable populations into valuable revenue streams).

[304] *See, e.g.*, LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 8 (2022).

[305] Housing was, of course, central to the *Grants Pass* case. *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2207–11 (2024). But the precise legal question — whether the criminalization of sleeping outdoors violated the Eighth Amendment — ensured that the focus was not on unaffordable or inaccessible housing, but rather on the problems that homeless people pose for local governments. *See id.* at 2226.

[306] Historians of slavery, colonialism, gender, authoritarian regimes, and other topics that pose archival challenges have offered compelling iterations of this point, while also pioneering creative methods for interpreting archived sources and reckoning with archival silences. *See, e.g.*, Saidiya Hartman, *Venus in Two Acts*, SMALL AXE, June 2008, at 1, 11 (explaining how the author "strain[ed] against the limits of the archive" to paint a full picture of the enslaved girls who left traces in the records, while also recognizing the impossibility of accurately representing their lives); Alyssa Mt. Pleasant, Caroline Wigginton & Kelly Wisecup, *Materials and Methods in Native American and Indigenous Studies: Completing the Turn*, 75 WM. & MARY Q. 207, 209–10 (2018) (critiquing historical scholarship that relies uncritically on colonial representations of Native and Indigenous peoples and encouraging historians of early America to broaden their understanding of what counts as evidence, to include "spoken, image-based, material-object, and Indigenous-language texts"). *See generally, e.g.*, CONTESTING ARCHIVES: FINDING WOMEN IN THE SOURCES (Nupur Chaudhuri, Sherry J. Katz & Mary Elizabeth Perry eds., 2010) (collecting scholarship that both critiques archives for their omissions of women's voices and employs creative methodologies for reconstructing the lives of women in the past); GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940 (1994) ("reconstructing" a portrait of gay life in early twentieth-century New York from unpublished documents, diaries, and legal records); SAIDIYA HARTMAN, WAYWARD LIVES, BEAUTIFUL EXPERIMENTS: INTIMATE HISTORIES OF RIOTOUS BLACK GIRLS, TROUBLESOME WOMEN, AND QUEER RADICALS (2019) (drawing creatively and sometimes speculatively on archival materials to try to recreate the understandings and experiences of young Black women in Philadelphia at the turn of the twentieth century).

[307] *See* ANN LAURA STOLER, ALONG THE ARCHIVAL GRAIN: EPISTEMIC ANXIETIES AND COLONIAL COMMON SENSE 22 (2009) (explaining how archives "pull[] on some 'social facts' and convert[] them into qualified knowledge," while rejecting other social facts and other "ways of

Court's selective docket can be understood similarly. The docket is, first, a set of cases that will shape and constrain the Court's legal interpretations, with many follow-on consequences. The docket is, second, a set of absences, representing law that the Court has chosen not to make, arguments that it has chosen not to hear, and stories that it has chosen not to tell.

What should we make of this? Supreme Court Justices are *not* archivists and they do not owe us faithful representations of the world. But if we are to understand their work, we should also contemplate their choices — and ask questions about what these choices gain and lose us. What might the Court have done in these cases, where the forces of "domination" were so clear? At a minimum, would the public have had the chance to see the Court and its commitments more clearly? Might other government actors have been spurred into motion, as sometimes only the highest court can do? As Professor Myriam Gilles has observed (quoting Professor David Luban), "[l]itigants serve as nerve endings registering the aches and pains of the body politic"[308] — making courts something like nerve endings, too; for this reason, Gilles worries about "judicial nerve endings" that appear "numb to the[] complaints" of "whole swaths of the population."[309] To be sure, the Supreme Court is an exceptional site in this metaphorical nervous system — designed, perhaps, for a different purpose. And yet who better to signal to the body to stop, to notice, and to take care?

## II. NARRATION

We turn now from docket curation to meaning making. Many other scholars, some in this volume, will analyze the *legal* meanings to emerge from the 2023 Term. This Part instead focuses primarily on "the making of *narratives*" and its close cousin, "the making of *history*." I borrow these phrases from anthropologist Michel-Rolph Trouillot, who defines "the making of *narratives*" as retrieving particular facts, so as to tell a story.[310] "[T]he making of *history*" entails attaching "retrospective significance" to what has been retrieved.[311]

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knowing"). *See, e.g.*, Sternhell, *supra* note 113, at 1026–27, 1048–49 (documenting the "postbellum nation building" origins of the most widely used compilation of primary sources on the American Civil War and connecting this archive to the production of "comforting, reunionist histories," which "marginalized the importance of emancipation and generally ignored the role of African Americans").

[308] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1539 (2016) (quoting David Luban, Essay, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2638 (1995)).

[309] *Id.*

[310] *See* MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 26–27 (1995) (using these phrases to identify the multiple points in the "process of historical production" in which "silences" might enter and to show that "not all silences are equal").

[311] *Id.* at 26.

Narratives matter because they can shape how people understand their place in the world, as well as how they relate to others. Narratives can also affect what people imagine is possible in the future and what they think is just and acceptable in the present. In the words of historian William Cronon, "narratives remain our chief moral compass in the world."[312]

The narratives we call "history" are important for the same reasons, and for others.[313] As many scholars have now noted, the current Court's formalistic approach to decisionmaking, combined with some Justices' sympathy for conservative ends, has inspired the Court to use historical narratives to decide legal questions[314] — in ways that depart from the more ordinary uses of history that have always been visible in the Court's work.[315] Court-made historical narratives can then *become law*, giving them more formal power (although not necessarily more legitimacy) than the narratives that professional historians produce.[316] Consider the historical narrative that grounded the Supreme Court's landmark decision in *District of Columbia v. Heller*.[317] Many historians disagree with *Heller*'s historical interpretation of the Second Amendment's original public meaning; many said so at the time.[318] But *Heller*'s history is now "law." In the legal sphere, that interpretation is currently unrevisable.[319] The Court's historical narratives about *itself*

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[312] William Cronon, *A Place for Stories: Nature, History, and Narrative*, 78 J. AM. HIST. 1347, 1375 (1992).

[313] The battle over "The 1619 Project" is instructive. *See* Jake Silverstein, *The 1619 Project and the Long Battle over U.S. History*, N.Y. TIMES MAG. (Nov. 12, 2021), https://www.nytimes.com/2021/11/09/magazine/1619-project-us-history.html [https://perma.cc/HBV3-GN3G]. Scholars have elaborated on these points in the context of constitutional history (broadly construed). *See* Reva B. Siegel, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19, 23 (2022). Professor Serena Mayeri has helpfully identified other ways in which historical narratives might matter, including "counsel[ing] against past errors," "highlight[ing] contingency," and "illuminat[ing] paths not taken." Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 171, 175 (2024).

[314] *See, e.g.*, JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 7 (2024).

[315] For a different perspective, see William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813–14 (2019).

[316] *See* BALKIN, *supra* note 314, at 209 ("[B]ecause judges produce precedents that later courts must work with and follow, their work imposes and solidifies a particular version of historical memory in law, even if that history is incorrect.").

[317] 554 U.S. 570 (2008).

[318] *See, e.g.*, Jennifer Tucker, *"Gundamentalism,"* 6 MOD. AM. HIST. 78, 84 (2023) (enumerating what professional historians consider "falsehoods" in the Supreme Court's history); Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688–1868*, 83 LAW & CONTEMP. PROBS., No. 3, 2020, at 73, 77 (illustrating how historical research on the Second Amendment deepened after *Heller*, but continued to diverge from *Heller*'s account).

[319] For another striking example of a flawed historical interpretation that became entrenched through law, consider Professor Maeve Glass's research on the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), the earliest Supreme Court interpretation of the Fourteenth Amendment. Maeve

can become fixed in the same manner. To borrow an example from Professor Josh Chafetz, consider the story that the Court has told about the Founding-era case *Marbury v. Madison*[320] and the role that *Marbury* marked out for the Court in our constitutional system.[321] Through years of selective quoting, the Court has turned a limited claim — something akin to "courts, too, can say what the Constitution means," in Professor Larry Kramer's paraphrasing[322] — "into a grandiose claim of judicial supremacy,"[323] which the Court regularly invokes as it aggressively polices the separation of powers.[324]

This Part explores some of the narratives of the 2023 Term — focusing, as in Part I, on the distribution of resources, privileges, and concern that these narratives effect. Section A briskly discusses the work that narratives do in the realm of law, as well as the special importance they may have to the current Court. The following sections (II.B through II.E) extract and analyze a selection of narratives from the 2023 Term. Collectively, these narratives are noteworthy for channeling power in particular directions: upward, toward well-resourced individuals and institutions, and court-ward, toward the federal judiciary.

### *A. Supreme Narratives*

Four decades ago, in his own Foreword to the *Harvard Law Review* Supreme Court issue, Robert Cover famously invited readers to consider the complex relationship between law, narrative, and our normative worlds.[325] *Nomos and Narrative* identified narrative as that which connects "the 'is,' the 'ought,' and the 'what might be.'"[326] The article also famously illuminated a world of different *nomoi*, each of which might

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Glass, Essay, *Killing Precedent: The* Slaughter-House *Constitution*, 123 COLUM. L. REV. 1135, 1175 (2023). Appropriately, the Justices based their interpretation on the events that informed the Reconstruction Amendments. *Id.* at 1171. But in crafting that history, they relied on a selective "archive" of sources — one that did not include readily available testimonies from enslaved people. *Id.* at 1169–70, 1172. The result, Glass argues, was a flawed historical interpretation (a dubious geography and temporality of slavery), *see id.* at 1170–71, and a too narrow concept of "the problem to be solved by the Reconstruction Amendments," *id.* at 1170. Historians have since produced different interpretations of the Reconstruction Amendments, but the historical narrative in the *Slaughter-House Cases* has endured in the law. *See id.* at 1137 & n.11.

320 5 U.S. (1 Cranch) 137 (1803).

321 Chafetz, *supra* note 165, at 130–31.

322 Larry D. Kramer, Marbury *and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 214 (2003).

323 Chafetz, *supra* note 165, at 131.

324 Both Chafetz and Kramer credit Professor Sylvia Snowiss's foundational work on *Marbury*. Chafetz, *supra* note 165, at 131 n.39 (citing Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of* Marbury *and* McCulloch, 33 J. MARSHALL L. REV. 973, 986–87 (2000)); Kramer, *supra* note 322, at 205 n.2 (citing SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990)).

325 Robert M. Cover, *The Supreme Court, 1982 Term — Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 5 (1983).

326 *Id.* at 10.

function as law for a particular community.[327] *Nomos and Narrative*, along with Cover's subsequent *Violence and the Word*,[328] augured a "narrative turn" in legal scholarship[329] (albeit one that prompted swift critiques[330]).

Looking back on this "turn" several decades hence, one might wonder whether there is anything more to say about narratives, or anything left to be learned from studying the Court as a narrative producer. I think there is — for reasons that become clear when we contrast the Supreme Court of forty years ago with today's.[331]

Writing in 1983, Cover described a system of prolific narrative-making, in which narratives emitting from the Supreme Court had no necessary priority. He believed that Supreme Court *edicts* had real power in the world — famously describing judges as killers, pruners of "too much law."[332] But as for narratives, "[t]hey are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence."[333] Quoting the great constitutional law scholar and legal historian Mark DeWolfe Howe, Cover went so far as to insist that although Americans were bound by the Supreme Court's legal rulings, they were "entirely free" to reject the Court's attempts at meaning-making and to derive their interpretations from "other places."[334] "[W]hichever story the Court chooses," Cover insisted, "alternative stories still provide normative bases for the growth of distinct constitutional worlds . . . ."[335]

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[327] *See id.*

[328] Cover, *supra* note 35.

[329] Greta Olson, *On Narrating and Troping the Law: The Conjoined Use of Narrative and Metaphor in Legal Discourse*, *in* NARRATIVE AND METAPHOR IN THE LAW 19, 21 (Michael Hanne & Robert Weisberg eds., 2018); *see also* Onwuachi-Willig, *supra* note 49, at 192–93 (summarizing insights from decades of work on the application of narratology to law).

[330] *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993).

[331] *Cf.* Novkov, *supra* note 186, at 133–140 (drawing on Cover's work to analyze the performative aspect of the Roberts Court).

[332] *See* Cover, *supra* note 325, at 41.

[333] *Id.* at 17; *see also* Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMANS. 17, 27 (2005) ("Cover wanted us to understand that the law of the state — and especially that pronounced by judges — was only one of many sets of laws," and "that the law of the state was in some sense less potent and less compelling than that generated through certain kinds of communities . . . .").

[334] Cover, *supra* note 325, at 19 (quoting MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 5 (1965)).

[335] *Id.* Cover made this point concrete via discussion of *Bob Jones University v. United States*, 461 U.S. 574 (1983), involving the constitutionality of the federal government's denial of a tax exemption to a private, religious school that discriminated on the basis of race. *Id.* at 579–82. In Cover's telling, the Justices made a decision (rejecting the university's argument), but failed to express any firm commitment, leaving resisters free to advance other, more compelling narratives and build other normative worlds. *See* Cover, *supra* note 325, at 66–68*; see also* Joseph Crespino,

In 2024, Cover's insights remain influential,[336] but his view of *the Court* is in tension with that institution's evolution. First, since *Nomos and Narrative*, the Court has advanced a mode of constitutional jurisprudence that not only relies on narratives about the past (as it always has done), but also invests those narratives with significant decisional power. The Court's originalist turn — which would have been but a shadow on Cover's horizon in 1983[337] — has blurred the line between what Cover called "prescription"[338] and what he called narrative, and thereby made some Supreme Court narratives harder to reject or ignore. In Professor Jamal Greene's words (borrowing Cover's terminology), "American originalism is radically *jurispathic*": It leaves no space for other interpretive methodologies, and it produces narratives about the past that make other narratives irrelevant.[339] The Court's turn to "history and tradition" — most famously in *Dobbs*, but also in other recent cases — operates similarly.[340]

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*Civil Rights and the Religious Right*, *in* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 90, 105 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (describing how Republican Party operatives seized on *Bob Jones University* to advance a particular worldview — one in which Christian Americans faced hostility from a "modern secularist enemy" and "unelected liberal elites").

336 Over the past four decades, many legal historians have illustrated the pluralism and contestation at the heart of American constitutionalism and the persistence of visions that do not accord with official pronouncements from the Supreme Court. *See generally, e.g.*, Hendrik Hartog, *The Constitution of Aspiration and "The Rights that Belong to Us All*," 74 J. AM. HIST. 1013, 1024–26 (1987); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006); SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010); TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011); RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016); MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018); KATE MASUR, UNTIL JUSTICE BE DONE: AMERICA'S FIRST CIVIL RIGHTS MOVEMENT, FROM THE REVOLUTION TO RECONSTRUCTION (2021); FISHKIN & FORBATH, *supra* note 76. Legal scholarship in the "popular constitutionalism" vein builds on some of the same insights. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 107 (2004); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 201 (2008); Christopher W. Schmidt, *Popular Constitutionalism on the Right: Lessons from the Tea Party*, 88 DENV. U. L. REV. 523, 533–35 (2011); Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109, 155 (2019); Andrias, *supra* note 303, at 1073–74.

337 *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 1 (2015). On the appeal of originalism in the 1980s and after, see Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 6–8 (2009).

338 Cover, *supra* note 325, at 5.

339 Greene, *supra* note 337, at 74 (emphasis added).

340 Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition*," 98 S. CAL. L. REV. (forthcoming 2024) (manuscript at 20–21) (on file with the Harvard Law School Library); Mayeri, *supra* note 313, at 175–76. In addition to searching for original meaning and invoking "history and tradition," the Court has also at times relied on what scholars call "historical gloss." *See* Mary L. Dudziak, *The Gloss of War: Revisiting the Korean War's Legacy*, 122 MICH. L. REV. 149, 158–162 (2023).

Second, since the publication of *Nomos and Narrative*, the Supreme Court has steadily arrogated more power to itself,[341] which appears to have made some members of the Court anxious to center the Court's most controversial decisions on compelling stories, about both the litigants and the Court. This growth of institutional power has occurred through doctrinal innovations from the Burger and Rehnquist Courts, such as the narrowing of Congress's power under the Commerce Clause, the Fourteenth Amendment, and the Spending Clause.[342] It has also occurred through similar, more recent developments, such as the rise of the major questions doctrine,[343] new restrictions on Congress's ability to create judicially enforceable rights,[344] and more generally, through an increasingly "juristocratic" vision of separation of powers, which imagines the Court as the policer of all three branches of government.[345]

Note, too, the Court's growing capacity to achieve conservative remakings of the law — leading to greater public scrutiny.[346] Before October 2018, the composition of the Court exerted some restraint on the Court's full use of its power, if only because Justice Kennedy was an unreliable ally for the Court's four more conservative members. Justice Kavanaugh's replacement of Justice Kennedy[347] brought greater coherence to the conservative majority (with all five Justices linked to the

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341 Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 650–51 (2023); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 42 (2023); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 477 (2023). Some scholars characterized the Court this way as early as the turn of the twenty-first century. *See, e.g.*, Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 137–39 (2001); *see also* Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 12 (2012) ("The current Court, in contrast to the Warren Court, combines a very robust view of its interpretive supremacy with a strikingly restrictive view of Congress's enumerated powers.").

342 *See* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 98–105 (2001); Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 2–9 (2004); Eyer & Tani, *supra* note 301, at 919 (summarizing the innovations of the "Rehnquist Revolution" and arguing that cases from the Burger Court laid the foundation for some of the more dramatic retrenchments of Congress's power).

343 *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1065–69 (2023); Nicole Huberfeld, *High Stakes, Bad Odds: Health Laws and the Revived Federalism Revolution*, 57 U.C. DAVIS L. REV. 977, 995–1000 (2023) (discussing recent elaborations of clear statement rules that operate similarly to the major questions doctrine).

344 Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 272, 290 (2021).

345 *See* Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2102 (2022); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 528–30 (2024); *cf.* Delaney, *supra* note 79, at 28 (observing, from a comparative perspective, that "the Supreme Court has developed into the world's most powerful court, rarely limited by doctrine from adjudicating tough issues should it choose to do so").

346 *See* Novkov, *supra* note 186, at 82–83.

347 Alana Abramson, *Brett Kavanaugh Confirmed to Supreme Court After Fight that Divided America*, TIME (Oct. 7, 2018, 5:11 PM), https://time.com/5417538/bett-kavanaugh-confirmed-senate-supreme-court [https://perma.cc/2R9X-E5MJ].

conservative legal movement, among other overlapping educational and professional ties).[348] After Republican appointee Amy Coney Barrett replaced Justice Ginsburg in October 2020,[349] a 6–3 conservative supermajority emerged and, with it, new possibilities — but also fiercer critiques and more frequent allegations of partisanship. These critiques have only grown sharper as the Court has overturned major precedents. Talk of a legitimacy crisis abounds,[350] as do proposals for reforming the Court.[351]

The Court today — at once emboldened and embattled — has good reason to care about narratives and to try to craft compelling ones.[352] These narratives are probably not for direct consumption by the median American (who might not be paying attention).[353] Rather, they are for the legal elite, ranging from fellow judges, to legal movement actors, to law professors, to current and future law students; for the political elite, who are in a position to leverage political power against the Court; and for the media, the gatekeeper of the Court's public image.[354] In the following sections, I offer examples from the 2023 Term. Carrying forward insights from Part I, where I emphasized the Court's agency in selecting cases, I start with the litigant narratives that the Court summoned into view. Exercising my own, contestable narrative discretion, I focus specifically on administrative law stories and private enforcement stories, both of which are crucial to how the promises of democratically elected legislatures translate into action — and are therefore crucial to American governance more generally. I then turn to the narratives that the Court constructed about *itself* as it adjudicated some of its most high-salience cases. These are, of course, not the only narratives

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348 *See* David Montgomery, *Conquerors of the Courts*, WASH. POST MAG. (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts [https://perma.cc/A8ZJ-QYVS]; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 153 (2019).

349 Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court [https://perma.cc/G25P-B4FB].

350 *See generally* Grove, *supra* note 74.

351 *See Developments in the Law — Court Reform*, 137 HARV. L. REV. 1634, 1634 n.1 (citing numerous pieces of academic and popular literature suggesting Supreme Court reform); PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 20–21 (2021).

352 *See* Novkov, *supra* note 186, at 80 ("The Court and its members have long been aware of the performative aspect of their work and seem to be increasingly conscious of how it plays.").

353 ZILIS, *supra* note 71, at 5, 79.

354 *See id.* at 41 (concluding that "Supreme Court justices exert a powerful influence on the media's coverage of law and politics"); Nathaniel Persily, *Introduction*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 9 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008) (noting that Supreme Court decisions "can elevate issues onto the national agenda through media coverage, elite discussion, and other behavior that follows in their wake"); Stephen M. Johnson, *The Changing Discourse of the Supreme Court*, 12 U.N.H. L. REV. 29, 40–43 (2014) (discussing the multiple plausible audiences for Supreme Court opinions); Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 14–15 (2008) (discussing the various audiences that Justices may seek to teach via their opinions).

that could be explored. There is more to say — and other scholars have said it well — on the stories the Court has been telling about masculinity,[355] race,[356] work,[357] and markets,[358] for example. Readers should turn to those accounts for an even fuller picture of the world the Court would have us see.

### *B. Return of the Vogons: Administrative Law Stories*

Like the rest of us, Supreme Court Justices appreciate a good story. Justice Sotomayor has referenced a childhood enjoyment of Nancy Drew mysteries.[359] Justice Kagan arrived at the Court as a reputed "literature lover who reread Jane Austen's 'Pride and Prejudice' every year."[360] In 2014, Justice Alito not only penned a landmark opinion in the religious freedom case *Burwell v. Hobby Lobby Stores, Inc.*,[361] but also wrote a foreword to the anniversary edition of Walter Murphy's *The Vicar of Christ* (the tale of a war-hero-turned-Supreme-Court-Justice-turned-Pope).[362] Chief Justice Roberts once disclosed summer plans to read up on Bob Dylan,[363] winner of the Nobel Prize for Literature and author

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[355] *See, e.g.*, Murray, *supra* note 55, at 864; Litman, Murray & Shaw, *supra* note 55, at 1092–109.

[356] *See, e.g.*, Tom I. Romero II, *The* Keyes *to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415, 417 (2015); Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2029 (2021); Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 24–25 (2022).

[357] *See* Kate Andrias, *The Fortification of Inequality: Constitutional Doctrine and the Political Economy*, 93 IND. L.J. 5, 9–10 (2018); Veena Dubal, *Chipping Away at the Right to Strike*, DISSENT (Fall 2023), https://www.dissentmagazine.org/article/chipping-away-at-the-right-to-strike [https://perma.cc/HEM5-UTAH]; SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 40–41, 71–72 (2015) (explaining how the Rehnquist and Roberts Courts turned the Federal Arbitration Act of 1925 into a vehicle for "allowing corporations to compel arbitration and to eliminate the potential for judicial review," *id.* at 71, of consumer and employee complaints).

[358] *See, e.g.*, Jedediah Purdy, Essay, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2162 (2018).

[359] *Kidspost: Meet Justice Sonia Sotomayor*, WASH. POST (Feb. 28, 2013, 6:36 PM), https://www.washingtonpost.com/lifestyle/kidspost/meet-justice-sonia-sotomayor/2013/02/28/2a32fb24-7494-11e2-95e4-6148e45d7adb_story.html [https://perma.cc/3KDK-MDXF]. Justices O'Connor and Ginsburg had similar taste. *See* The Lily News, *Nancy Drew: How the Fictional Character Inspired Girls Who Went on to Make History*, WASH. POST (Apr. 5, 2019, 2:18 PM), https://www.washingtonpost.com/gender-identity/nancy-drew-how-the-fictional-character-inspired-girls-who-went-on-to-make-history [https://perma.cc/N9KE-ADT8].

[360] Sheryl Gay Stolberg et al., *A Climb Marked by Confidence and Canniness*, N.Y. TIMES (May 10, 2010), https://www.nytimes.com/2010/05/10/us/politics/10kagan.html [https://perma.cc/XMU8-9HS3].

[361] 573 U.S. 682 (2014).

[362] Samuel Alito, *Foreword* to WALTER F. MURPHY, THE VICAR OF CHRIST, at i (35th Anniversary ed. 2014). *See generally* MURPHY, *supra*.

[363] *Supreme Court Chief Justice John Roberts Talks About Why Bob Dylan Matters*, C-SPAN, at 00:44 (June 29, 2018), https://www.c-span.org/video/?c4738427/user-clip-supreme-court-chief-justice-john-roberts-talks-bob-dylan-matters [https://perma.cc/WAV9-47WY].

of lyrics that the Chief has praised for "captur[ing] the whole notion behind standing."[364]

Perhaps most relevant to the 2023 Term, however, is a book that Justice Gorsuch referenced during his 2017 confirmation hearing ("if you have not read it, you should"): Douglas Adams's *The Hitchhiker's Guide to the Galaxy*.[365] Central to the plot is an "unpleasant" and barely evolved alien race called the Vogons — "not actually evil, but bad-tempered, bureaucratic, officious and callous."[366] As "the immensely powerful backbone of the Galactic Civil Service,"[367] the Vogons arrive on Planet Earth toward the beginning of the novel and promptly announce plans to destroy it to make way for a "hyperspatial express route."[368] Met with "[u]ncomprehending terror," the highest-ranking Vogon testily reminds the earthlings of the fifty years of notice they had already had; at any time, they might have consulted "the planning charts and demolition orders" on display some four light years away.[369]

The federal administrators that appeared in the Court's major administrative law decisions during the 2023 Term receive more generous characterizations, but the resonances with the Vogons are striking. Consider, first, *Ohio v. EPA*,[370] in which states and industry groups sought to stay an EPA plan implementing the Clean Air Act.[371] The EPA emerged from Justice Gorsuch's majority opinion looking at once plodding and hasty, arrogant and bumbling. After setting a new standard for air pollutants and thereby triggering a requirement that states design and submit new "State Implementation Plans" (SIPs), the agency spent "over two years . . . not act[ing]" on the SIPs it received.[372] Then, starting in February 2022 and continuing into that spring, the EPA announced that it planned to disapprove of twenty-three SIPs; if those disapprovals occurred as planned, the affected states would then be subject to a newly proposed "Federal Implementation Plan" (a statutory requirement when a state plan falls short).[373] At this point in the process, the EPA was required to accept comments from the public — and,

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[364] *The Nobel Prize in Literature 2016*, THE NOBEL PRIZE, https://www.nobelprize.org/prizes/literature/2016/summary [https://perma.cc/TEV3-WLGY]; Adam Liptak, *How Does It Feel, Chief Justice Roberts, To Hone a Dylan Quote?*, N.Y. TIMES (Feb. 22, 2016), https://www.nytimes.com/2016/02/23/us/politics/how-does-it-feel-chief-justice-roberts-to-hone-a-dylan-quote.html [https://perma.cc/2NWD-RDWA].

[365] *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 160 (2018) (statement of Hon. Neil M. Gorsuch, Nominee to be an Associate Justice of the Supreme Court of the United States).

[366] DOUGLAS ADAMS, THE HITCHHIKER'S GUIDE TO THE GALAXY 53 (1981).

[367] *Id.* at 47.

[368] *Id.* at 35.

[369] *Id.* at 35–36.

[370] 144 S. Ct. 2040 (2024).

[371] 42 U.S.C. §§ 7401–7671q; Ohio v. EPA, 144 S. Ct. at 2048, 2051.

[372] Ohio v. EPA, 144 S. Ct. at 2048–49.

[373] *See id.*

in Justice Gorsuch's telling, received "immediate[] . . . warn[ings] of a potential pitfall in the agency's approach" (the specifics of which do not matter here).[374] Rather than take this potential pitfall seriously, however, the EPA largely ignored it[375] — even though "hundreds of millions[,] if not billions of dollars" were on the line.[376] In short, *Ohio v. EPA* told an administrative law story in which the Agency appeared at once remote, impermeable, capricious, and powerful. Perhaps not surprisingly, given this account of the facts, the Court granted the requested stay of the EPA's plan,[377] albeit over a strong dissent and counternarrative.[378]

In a second important administrative law case, *SEC v. Jarkesy*,[379] Chief Justice Roberts's opinion for the majority largely avoided making the Agency a main character,[380] but Justice Gorsuch's lengthy concurring opinion (joined by Justice Thomas) took the opposite approach.[381] In Chief Justice Roberts's telling, the SEC pursued a congressionally authorized enforcement path, but in doing so violated the Seventh Amendment's guarantee of a jury trial.[382] Justice Gorsuch's account was more colorful. While acknowledging that investment advisor George Jarkesy, Jr., may not have been a model citizen,[383] Justice Gorsuch painted the SEC as knowingly offering a farcical version of justice to "the unpopular"[384] (as if Jarkesy was not a well-connected member of a dominant group, but rather a persecuted dissident or a religious or racial minority). Empowered by the Dodd-Frank Act[385] to "funnel cases like Mr. Jarkesy's through [the SEC's] own 'adjudicatory' system" rather than through the courts,[386] the SEC's Commissioners eagerly did so.[387] They understood — as any thinking person must, Justice Gorsuch

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374 *Id.* at 2049–50.

375 *See id.* at 2051.

376 *Id.* at 2053 (alteration in original) (quoting Transcript of Oral Argument at 96, Ohio v. EPA, 144 S. Ct. 2040 (No. 23A349), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23a349_4fb4.pdf [https://perma.cc/Y7XX-B69S]).

377 *Id.* at 2058.

378 *See id.* at 2058–70 (Barrett, J., dissenting).

379 144 S. Ct. 2117 (2024).

380 *See id.* at 2124–39.

381 *See id.* at 2139–54 (Gorsuch, J., concurring).

382 *See id.* at 2139 (majority opinion).

383 *Id.* at 2154 (Gorsuch, J., concurring). Critical commentators have not held back in pointing out Jarkesy's flaws. *See* Shirin Ali & Mark Joseph Stern, *Meet the Hedge Fund Sleazebag Who Just Got SCOTUS to Kneecap the Government*, SLATE (June 27, 2024, 4:26 PM), https://slate.com/news-and-politics/2024/06/sec-supreme-court-case-george-jarkesy-elon-musk-mark-cuban.html [https://perma.cc/ZB5A-HMEW].

384 *Jarkesy*, 144 S. Ct. at 2154 (Gorsuch, J., concurring).

385 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

386 *Jarkesy*, 144 S. Ct. at 2140 (Gorsuch, J., concurring) (citing Dodd-Frank Act, 124 Stat. at 1862–65).

387 *See id.*

implied — that the in-house administrative law judges (ALJs) were ultimately "servants" of the Agency and were likely to rule in the Agency's favor.[388] From this perspective, what happened next was predictable. The Agency's Division of Enforcement dumped the "equivalent [of] between 15 and 25 million pages of information" on the poorly equipped Jarkesy, and then the ALJ gave him a mere ten months to prepare for his hearing (Jarkesy's counsel claimed that simply reviewing the document dump would have taken decades).[389] Of course, when the ALJ herself later requested more time to issue her decision, she received it.[390] And unsurprisingly, in Justice Gorsuch's telling, that ultimate decision did not favor Jarkesy.[391] Nor did he fare better when he appealed to the Commission (a.k.a. "the same body that approved the charges"), even though the Commission took "the better part of six years to issue an opinion."[392] Justice Gorsuch closed the narrative with a whiff of intrigue, noting that while the Commission had Jarkesy's case under review, employees from the enforcement division accessed confidential memos about the appeal.[393]

In *Loper Bright* — a case that the Court docketed to reassess its longstanding approach to reviewing agencies' interpretations of statutes — the National Marine Fisheries Service (NMFS) emerged looking better than the EPA or the SEC, but still not good. Charged by statute with overseeing fishery resources, the NMFS carries out its responsibilities via fishery management plans, proposed by the Agency's regional councils and promulgated via regulations.[394] In some situations, these plans have required regulated vessels to carry "observers," who collect data related to fishery conservation and management.[395] The dispute in *Loper Bright* was over who ought to pay for those observers in the Atlantic herring fishing context — specifically, whether the NMFS had the authority to approve a plan that shifted the cost away from the Agency and onto the regulated industry.[396] The narrative that Chief Justice Roberts crafted suggested how to think about the equities (even though the Court's ultimate decision did not turn on the facts at all). The plaintiffs in this case were not large-scale operations, but "family businesses," and the observer rule threatened to "reduc[e] annual returns . . . by up to 20 percent."[397] As to these family operations, paying for observer fees might also work a particular hardship — because the

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388 *See id.*
389 *Id.* at 2141.
390 *Id.* at 2141–42.
391 *Id.* at 2142.
392 *Id.*
393 *Id.*
394 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254 (2024).
395 *Id.* at 2255 (quoting 16 U.S.C. § 1853(b)(8)).
396 *Id.* at 2255–56.
397 *Id.* at 2255.

*possibility* of catching herring is what triggers the assignment of an observer, and the ocean may not "offer[] up" herring on that particular trip.[398] In short, this was a story of hardworking people, cobbling together a living from the good graces of Mother Nature, and a large bureaucracy shifting its own costs onto the backs of the burdened just because it could. Although brief, this tale echoes other administrative law stories Chief Justice Roberts has told over the years: of a "'vast and varied federal bureaucracy' that 'wields vast power'";[399] of "hundreds of federal agencies poking into every nook and cranny of daily life."[400]

Who are such narratives for? Probably not for administrative law specialists, who are likely to see them as window dressing. As Professor Gillian Metzger observed in the 2017 version of this Foreword, members of the Court's conservative supermajority appear to share the "anti-administrative" impulse of the conservative legal movement.[401] Given that movement's role in appointing two new Justices to the Court after 2017 and the trends in the Court's decisionmaking since then,[402] the anti-administrative narratives of the 2023 Term were predictable. More likely, these narratives are (1) for people who share the conservative Justices' concerns about the administrative state and welcome affirmation, (2) for new entrants to the legal profession, who will read these cases in their public law courses and might be won over, and (3) for the court of history, which will attach retrospective significance to what this Court has done.

A particularly impressive trick, should the Court's conservatives be able to pull it off, would be to naturalize a project that is still *in medias res*. In the same way that powerful narratives of innocent schoolchildren helped deconstitutionalize racial segregation, the current Court's anti-administrative narratives might help deconstitutionalize facets of the administrative state that have long been taken for granted.[403] In 2017, when Metzger documented judicial participation in a "[s]iege" on "the [a]dministrative [s]tate," one of her key findings was the gap between "rhetorical criticism of administrative government" by some of the Justices and "bottom-line results."[404] Metzger urged readers to watch this space, however. Cases percolating through the lower courts

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[398] *Id.* at 2256.

[399] Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 67 (2020) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

[400] *Id.* (quoting City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting)).

[401] Metzger, *supra* note 114, at 3.

[402] *See* Metzger, *supra* note 399, at 2–5; Emerson, *supra* note 114 (manuscript at 3).

[403] *See* Cronon, *supra* note 312, at 1350 (noting the power of a compelling narrative to "reconstruct[] common sense" and make "the artificial seem natural"). On innocent schoolchildren and the deconstitutionalization of racial segregation, see, for example, *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). *But see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 30–31 (1971) (citing a "risk [to] the health of the children" or an "impinge[ment]" on their education as valid reasons for objecting to a remedial busing plan).

[404] Metzger, *supra* note 114, at 2, 3.

offered the prospect for more dramatic holdings and "significant administrative disruption."[405] Metzger also underscored how a steady flow of anti-administrative rhetoric could enhance the likelihood of such changes. It might do so by "undermin[ing] the administrative state's sociological and moral legitimacy,"[406] by obscuring the facets of the administrative state that might counsel against disruption, and by giving previously "off the wall" legal theories a sheen of respectability.[407]

Metzger's predictions bore out in the 2023 Term, with help from the Vogon-reminiscent narratives above. Consider one of the "key themes" that Metzger discerned in 2017: "[A] heavy constitutional overlay, wherein the contemporary administrative state is portrayed as at odds with the basic constitutional structure and the original understanding of separation of powers."[408] The administrative law cases from the 2023 Term track this theme precisely. Agency challengers advanced various theories, but the "constitutional overlay" was thick, and these arguments had traction in the lower courts. To be sure, some of the more radical constitutional arguments did not prevail. In *CFPB v. Community Financial Services Ass'n of America*,[409] the Court soundly rejected (7–2) the argument that the CFPB's funding mechanism violated the Appropriations Clause.[410] In *Loper Bright*, the Court overruled *Chevron* on the basis of that precedent's misreading of the APA, making it unnecessary to reach constitutional arguments.[411] But, these bolder arguments received respectful, encouraging treatment in some Justices' separate writings,[412] and a "juristocratic" separation of powers vision was just below the surface of majority opinions.[413] In *Loper Bright*, Chief Justice Roberts justified the Court's decision to overrule *Chevron* with strong and repeated references to the role of the judiciary in the Founders' constitutional scheme.[414] And in *Jarkesy*, where the Court ostensibly confined itself to Jarkesy's Seventh Amendment jury trial right, Chief Justice Roberts accused Congress of pulling essential judicial functions

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[405] *Id.* at 5.

[406] *Id.* at 50–51.

[407] *Id.* at 68 (quoting Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [https://perma.cc/B97W-7HUD]).

[408] *Id.* at 34.

[409] 144 S. Ct. 1474 (2024).

[410] *Id.* at 1490.

[411] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2265 (2024).

[412] *See Cmty. Fin. Servs. Ass'n*, 144 S. Ct. at 1502–06 (Alito, J., dissenting) (surveying the history of the Appropriations Clause and concluding that the CFPB's funding mechanism does not satisfy the clause); *Loper Bright*, 144 S. Ct. at 2274 (Thomas, J., concurring) (writing separately to underscore that *Chevron* deference also violates constitutional separation of powers principles).

[413] *See* Bowie & Renan, *supra* note 345, at 2024–25 (identifying a "juristocratic" understanding of the separation of powers and describing it as a modern innovation).

[414] *See Loper Bright*, 144 S. Ct. at 2257.

away from the courts.[415] These signals suggest that the Vogons will be back in future Terms, and that they may ease the path toward anti-administrative holdings that are made of stronger stuff.

### *C. Delusions of Grandeur: Private Enforcement Stories*

The administrative law stories in section II.B focused on the public enforcement of public law, an arrangement that aligns with popular understandings of how governance works (even if the Court's narratives suggested governance gone awry). Less understood is the vast realm of *private* enforcement, which Congress has incentivized by creating private rights of action (invitations to use statutes as the bases for private lawsuits) and by explicitly making available damages and attorneys' fees for individuals who succeed in court.[416] In the first decade of this century, there were approximately 1.65 million lawsuits enforcing federal laws, "spann[ing] . . . antitrust, civil rights, labor and employment, environmental, banking, and securities/commodities exchange regulation"; *ninety-seven percent were litigated by private parties*.[417] Given the conservative supermajority's suspicion of administrative agencies, we might expect to see *positive* portrayals of private enforcement. But recent cases tell a different story.[418]

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[415] *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2136 (2024).

[416] Starting in the 1960s, national legislators came to understand that major new public law initiatives often had the best chance of success if enforcement mechanisms included private lawsuits. This was for several reasons. One was political polarization, combined with the possibility of political misalignment between the law-making Congress and various law-enforcing institutions, present or future. A hostile executive branch could undermine Congress's choices, as Democratic legislators were regularly reminded during the Nixon Administration. And a Congress at odds with a previous Congress could use the appropriations power and other mechanisms to thwart the enforcement of laws that it did not like. In short, should a new statute rely entirely on public enforcement, it would be vulnerable. If private enforcement was also an option, however, the fate of a new legislative initiative did not depend on the goodwill of the executive branch or the sustained sympathy of Congress. The energy of individual citizens could make it go. Other reasons to build private enforcement mechanisms into public laws included cost consciousness and concerns for administrative bloat. Passing a law that depended significantly on public enforcement generally meant building out the administrative state, with all its attendant costs and image problems. Pairing public enforcement with private enforcement was a way to keep the administrative state relatively lean and cheap. *See generally* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010) (discussing the historical development of private enforcement of public laws in the United States); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) (documenting conservative efforts to scale back private enforcement and the success of Supreme Court procedural decisions in achieving retrenchment).

[417] FARHANG, *supra* note 416, at 10.

[418] Title VII cases brought by individuals (as opposed to class actions) are an important exception. *See, e.g.*, Muldrow v. City of St. Louis, 144 S. Ct. 967, 974 (2024) (holding that a transfer can constitute an adverse employment action for purposes of Title VII and that, although an employee must show some harm from such a transfer, there need not be a showing of serious or significant harm); Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (2020) (holding that Title VII's prohibition on discrimination because of sex encompasses discrimination on the basis of sexual orientation and gender identity).

Consider, again, Deborah Laufer, the plaintiff in *Laufer*. She was a disabled individual with a grievance against an inaccessible hotel. She was also a member of a congressionally created army of private enforcers. Specifically, she hoped to give effect to the ADA, a misunderstood[419] and underenforced statute.[420] According to interviews, she saw her many lawsuits as a public service, akin to her mother's volunteer firefighting work and her own pre-disability work as a security guard.[421] "I got into this to help people," she told the *Washington Post* as she waited for the Supreme Court to decide her case, "not to become a villain."[422]

As Laufer's fear-of-villainy comment hinted, the Supreme Court has repeatedly advanced a more skeptical view of private enforcement — going back at least to the 1990s[423] and continuing robustly in recent Terms.[424] Justice Thomas's concurrence in *Laufer* is emblematic of the most pointed critiques. Laufer emerges from his separate writing looking like a manipulative[425] and probably unhappy[426] individual with delusions of grandeur — someone who "cast[] herself in the role of a

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419 *See generally* Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383 (2019) (providing examples of how various courts have misapplied provisions of the ADA).

420 Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 6 (2006) (describing the ADA's public accommodations title as "massively underenforced"); *see also* NAT'L COUNCIL ON DISABILITY, HAS THE PROMISE BEEN KEPT?: FEDERAL ENFORCEMENT OF DISABILITY RIGHTS LAWS (PART 2) 15–16 (2019), https://www.ncd.gov/report/national-disability-policy-a-progress-report-february-1999 [https://perma.cc/H9AJ-SXUX].

421 *See* Ann E. Marimow, *High Court to Weigh Whether Disability Activists Can Sue Hotels After Online Searches*, WASH. POST (Oct. 3, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/10/03/disability-access-hotels-supreme-court-ada [https://perma.cc/ZJ4E-HBM2]; *see also* Weaver, *supra* note 52 (documenting Laufer's belief that she was helping identify "something wrong happening" and correcting it).

422 Marimow, *supra* note 421.

423 *See generally, e.g.*, Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007); STASZAK, *supra* note 357; BURBANK & FARHANG, *supra* note 416.

424 *See, e.g.*, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022) (holding that individuals suing to enforce civil rights guarantees in the Rehabilitation Act and the Affordable Care Act may not collect damages for emotional distress); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021) (holding that the defendant's violation of the consumers' statutory rights was alone not enough to confer standing; a concrete injury was necessary); *see also* Nitisha Baronia, Jared Lucky & Diego A. Zambrano, Private Enforcement and Article II, at 1–2 (May 8, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4821934 [https://perma.cc/TDH4-9S53].

425 *See* Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 24 (2023) (Thomas, J., concurring in the judgment) (accusing Laufer of using a last-minute voluntary dismissal to manipulate the Court and avoid an unfavorable decision).

426 For example, he described Laufer as "wheelchair bound," rather than as a wheelchair user or a person with a mobility impairment. *Id.* at 23; *Disability Language Style Guide*, NAT'L CTR. ON DISABILITY & JOURNALISM (Aug. 2021), https://ncdj.org/style-guide [https://perma.cc/DGA2-5YQP] (identifying "wheelchair-bound" as a term that is inaccurate and misleading, as well as impliedly dehumanizing).

private attorney general."[427] This phrasing impliedly questions the very notion of a "private attorney general" (a term coined by Judge Jerome Frank in 1943)[428] — as if it were a confabulation born from mental illness rather than a time-honored mode of enforcing public law.[429] Justice Barrett's opinion for the Court paints a similar portrait. The first sentence underscores that Laufer is a serial filer;[430] a paragraph later, the reader learns that "Laufer has singlehandedly generated a circuit split."[431] Far from a well-meaning government deputy, in other words, Laufer is a gadfly — a plague upon businesses and courts alike.

Other recent private enforcement cases have produced similarly ungenerous framings. Consider, for example, *Cummings v. Premier Rehab Keller, P.L.L.C.*,[432] where the hearing- and vision-impaired plaintiff Jane Cummings sought to enforce the antidiscrimination guarantees in the Rehabilitation Act of 1973[433] and the Affordable Care Act.[434] Premier Rehab, where Cummings sought physical therapy treatment, was undeniably subject to these laws because of its receipt of federal financial assistance.[435] Cummings also alleged treatment that fell within the laws' prohibitions: She claimed that she asked Premier Rehab to provide an American Sign Language interpreter and that the business declined, thereby depriving her of her primary means of communication and forcing her to seek services elsewhere.[436] The Supreme Court nonetheless affirmed a lower court order dismissing her suit — not because her allegation of discrimination was unsound, but because the only damages she sought were for "humiliation, frustration, and emotional distress."[437] In a dubious extension of a dubious analogy — the analogy between a contract and an agreement to accept a conditional grant of federal funds[438] — the Court reasoned that these damages were not available under the relevant statutes because, in general, contract law would not

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427 *Laufer*, 144 S. Ct. at 26 (Thomas, J., concurring in the judgment).

428 Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 188 (quoting Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943)).

429 Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 596 (2005) ("[T]he private attorney general [is] an institution with a long historical pedigree . . . .").

430 *See Laufer*, 144 S. Ct. at 20 ("Laufer has sued hundreds of hotels . . . .").

431 *Id.* at 21.

432 142 S. Ct. 1562 (2022).

433 29 U.S.C. § 794.

434 42 U.S.C. § 18116; *Cummings*, 142 S. Ct. at 1568–69.

435 *Cummings*, 142 S. Ct. at 1569.

436 *See id.*

437 *Id.* (quoting Cummings v. Premier Rehab, P.L.L.C., No. 18-CV-649, 2019 WL 227411, at *4 (N.D. Tex. Jan. 16, 2019)); *see also id.* at 1576.

438 This analogy goes back to *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981). *See* Karen M. Tani, *The* Pennhurst *Doctrines and the Lost Disability History of the "New Federalism,"* 110 CALIF. L. REV. 1157, 1187–88 (2022). On the Court's dubious extension of this analogy, see Eyer & Tani, *supra* note 301, at 924–27.

treat them as compensable, and so the case must be thrown out.[439] To hold otherwise, Chief Justice Roberts wrote, "risks arrogating legislative power."[440] To whom, exactly? The opinion later refers to the potential for judicial overreach,[441] but one could just as easily read the "arrogation" comment as a reference to Cummings herself.

This story — of a self-aggrandizing and emotionally frail woman running roughshod over Congress — helped obscure *Cummings*'s blow to private enforcement. First, the Court typically carries over interpretations of one Spending Clause civil rights statute to others, meaning that what the Court said in *Cummings* presumably applies to cases brought under Title IX of the Education Amendments of 1972[442] (involving discrimination in education on the basis of sex) and Title VI of the Civil Rights Act of 1964[443] (involving discrimination on the basis of race, color, and national origin).[444] In other words, the Court's holding is very likely not limited to the private enforcement of disability rights laws.[445] Second, there are many cases in which a federal funding recipient might violate an individual's rights and the *only* damages that the individual experiences will flow from "humiliation, frustration, [or] emotional distress."[446] To hold that these individuals may not sue to collect these damages is to withdraw from the field an entire battalion of private enforcers, while understanding that public troops cannot realistically replace them.[447]

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439 *Cummings*, 142 S. Ct. at 1571–72.

440 *Id.* at 1574 (quoting Hernandez v. Mesa, 140 S. Ct. 735, 741 (2020)).

441 *See id.* ("Cummings would have [the judiciary] treat statutory silence as a license to freely supply remedies we cannot be sure Congress would have chosen to make available.").

442 20 U.S.C. §§ 1681–1688.

443 42 U.S.C. §§ 2000d to 2000d-7.

444 *See Cummings*, 142 S. Ct. at 1578 (Breyer, J., dissenting).

445 *See, e.g.*, Reed v. Mount Carmel Area Sch. Dist., 697 F. Supp. 3d 286, 292 (M.D. Pa. 2023) (noting that "all post-*Cummings* District Court decisions within this Circuit thus far" have assumed that the holding in *Cummings* applies to Title IX cases); Rollins v. Kiffin, No. 23-cv-00356, 2024 U.S. Dist. LEXIS 16864, at *20 (N.D. Miss. Jan 31, 2024) (holding that, per *Cummings*, "reputational and emotional distress damages" were unavailable for the violations of Title VI and Title IX that the plaintiff alleged); Overdam v. Tex. A&M Univ., No. 18-cv-02011, 2024 U.S. Dist. LEXIS 4994, at *6 (S.D. Tex. Jan. 10, 2024) (noting that "nearly every court to consider the issue has concluded that" the holding in *Cummings* extends to Title IX cases).

446 *Cummings*, 142 S. Ct. at 1569 (quoting Cummings v. Premier Rehab, P.L.L.C., No. 18-CV-649, 2019 WL 227411, at *4 (N.D. Tex. Jan. 16, 2019)).

447 Karlan, *supra* note 428, at 195 (explaining that "the major effect of permitting only federally initiated lawsuits is to decrease the total amount of enforcement of valid congressional regulation" and that "[p]resumably, that will increase the number of uncorrected violations, leaving the right less completely protected"). Something similar unfolded in the consumer class action case *TransUnion LLC v. Ramirez*, which the Court decided the Term before *Cummings*. Although the Court recognized that some members of the plaintiff class had suffered a "concrete harm" and therefore had standing, Justice Kavanaugh's opinion for the majority repeatedly invoked a horde of "*unharmed*" private plaintiffs "not accountable to the people." TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021) (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992)); *see also id.* at 2214.

To be sure, the current Court has sometimes declined opportunities to undermine private enforcement — most notably in the 2022 Term's *Health & Hospital Corp. of Marion County v. Talevski*.[448] In brief, the defendant hospital system's petition for certiorari in *Talevski* invited the Court to remake its § 1983 jurisprudence and to disallow individuals from using that statute to privately enforce Spending Clause statutes.[449] This was a high-stakes request (and one that at least four Justices apparently wanted to consider). Section 1983 is a Reconstruction-era mechanism for addressing rights violations by people clothed with official power; Spending Clause statutes are the backbone of the American welfare state and also play an important role in civil rights enforcement.[450] Ultimately, after full briefing and oral argument, the Court voted to reaffirm the status quo.[451]

But *Talevski* cannot be understood apart from the Court's high-profile, disruptive decision that Term in the affirmative action context, nor apart from newcomer Justice Ketanji Brown Jackson's forceful rebuttals to conservative narratives of Reconstruction.[452] These factors may have diminished some Justices' appetite for seizing on *Talevski*'s radical potential. So, too, might have *Talevski*'s abhorrent facts: The plaintiffs in *Talevski* were not Laufer-like "gadflies," but rather the concerned family members of an elderly dementia patient; they alleged forms of nursing home abuse that were both distressing and entirely believable, including involuntary transfers and over-medication;[453] and amici implicated the defendant hospital system in an unseemly Medicaid diversion scheme, through which the defendant took federal money meant for poor, disabled people and funneled it toward other projects.[454] All in all, not good material for a story about the dangers of private enforcement.

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The opinion referred ten times to the case's "8,185 class members" and another nineteen times to the 6,332 members of that class that the Court deemed unharmed. *See id.* at 2200–14. These large numbers called to mind a vast vigilante army, deciding for themselves (or at the behest of financially motivated attorneys) how aggressively to enforce federal law and usurping the power of an imagined federal sheriff. *Id.* at 2207 ("[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys).").

448 143 S. Ct. 1444 (2023).

449 *See* Petition for a Writ of Certiorari at i, *Talevski*, 143 S. Ct. 1444 (No. 21-806).

450 *See* Nicole Huberfeld, *Medicaid, The Supreme Court, and Safe Care for Nursing Home Residents*, 329 JAMA 17, 17–18 (2023).

451 *Talevski*, 143 S. Ct. at 1450.

452 *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2264–65 (2023) (Jackson, J., dissenting); Sam Levine, "*Force to Be Reckoned With": Ketanji Brown Jackson Shines in First Week*, THE GUARDIAN (Oct. 9, 2022, 7:00 AM), https://www.theguardian.com/us-news/2022/oct/09/ketanji-brown-jackson-us-supreme-court-first-week [https://perma.cc/5FDT-ZCZL] (discussing multiple instances in the 2022 Term in which Justice Jackson displayed her knowledge of Reconstruction-era lawmaking and history).

453 *Talevski*, 143 S. Ct. at 1450–51.

454 Brief for Amicus Curiae Daniel L. Hatcher in Support of Respondent at 3, *Talevski*, 143 S. Ct. 1444 (No. 21-806).

The narrative clues in *Laufer* and other private enforcement cases, combined with the Court's recent certiorari grant in *Lackey v. Stinnie*[455] (involving attorneys' fees in the private enforcement context),[456] may provide better signals about where the Court's private enforcement jurisprudence is headed. So does action in the lower courts, where at least one circuit court has now followed a trail of breadcrumbs from Justices Thomas and Gorsuch and held that private parties may not sue to enforce section 2 of the Voting Rights Act,[457] a civil rights law that the Roberts Court has already significantly weakened.[458] The path seems to be toward a system of governance in which private enforcers of civil rights and social welfare laws merit the same distrust from the courts as the government administrators who regulate markets, construct and maintain infrastructure, and protect public health — raising questions about the practical implementation of vast swaths of federal lawmaking.

### *D. Of Umpires and Amber: Narratives of Neutrality and Ease*

As the Court told stories about the litigants of the 2023 Term, it also told stories about itself. This is, of course, a timeworn practice, engaged in by Justices of various ideologies and visible beyond formal decisions. An amusing example is the reading list "for young people" on "How to Keep and Defend Liberty" that Justice Kennedy once assembled.[459] On it, he placed famous Supreme Court opinions and dissents, alongside speeches by historical figures like President Franklin Delano Roosevelt and Martin Luther King, Jr.; classic works of political theory; and stirring snippets from novels and films. The penultimate item on the list, right before Justice Kennedy's own opinion in the LGBTQ rights case *Lawrence v. Texas*,[460] is the triumphant commencement address from the 2001 film *Legally Blonde*[461] — as if to underscore the Court's empathy for the dreams and strivings of regular people.

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455 144 S. Ct. 1390 (2024) (mem.) (granting certiorari).

456 *See* Stinnie v. Holcomb, 77 F.4th 200, 203 (4th Cir. 2023) (en banc), *cert. granted*, 144 S. Ct. 1390 (2024).

457 *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1206–07, 1216 (8th Cir. 2023); Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring) ("Our cases have assumed — without deciding — that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2." (citing City of Mobile v. Bolden, 446 U.S. 55, 60 & n.8 (1980) (plurality opinion))).

458 *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) (striking down the coverage formula of Voting Rights Act § 4(b) as "unconstitutional"); *Brnovich*, 141 S. Ct. at 2338–40; Michael Kang, *The Post-Trump Rightward Lurch in Election Law*, 74 STAN. L. REV. ONLINE 55, 57 (2022) (using *Brnovich* as an example of "how far the Court has shifted rightward on election law, in a very short time").

459 Anthony M. Kennedy, *Understanding Freedom's Heritage: How to Keep and Defend Liberty*, NINTH CIR. LIBR. (June 25, 2013), https://cdn.ca9.uscourts.gov/datastore/library/2013/06/27/AMK_ReadingList_20130625.pdf [https://perma.cc/WCR2-88XV].

460 539 U.S. 558 (2003).

461 Kennedy, *supra* note 459.

*Legally Blonde* had more than one iconic moment, of course, and a different scene comes to mind when reflecting on the Court's self-presentation in the 2023 Term. It comes from earlier in the narrative, when the ebullient protagonist Elle Woods arrives for her first day at Harvard Law School. She has enrolled solely to reconnect with her college ex-boyfriend, Warner Huntington III, who enjoyed her bubbly, "sorority sister" persona in its Southern California setting but deemed her insufficiently "serious" for the next phase of his career. Seeing that she is a fellow 1L, Warner is incredulous: "*You* got into Harvard Law?" She innocently replies, "What, like it's hard?"[462] The quip is charming and funny because getting into Harvard Law School *is* hard, but Elle made it look easy — and simultaneously took the pretentious Warner down a peg.

The Court's decision in the Second Amendment case *United States v. Rahimi* has a similar feel — and reaches a "feel-good" result (the disarmament of a domestic abuser)[463] — but is ultimately less charming. As this section explains, *Rahimi* tells readers that something *very* hard — using historical analogies to determine the bounds of constitutionally permissible firearms regulation — is not hard, either practically or morally.[464] A narrative of ease and obviousness serves the Court institutionally: This is a fraught area of law, and it will not do for the Court to seem like an inept supervisor of the lower courts, or like an actor that is doing something other than calling "balls and strikes."[465] But the narrative also has casualties: (1) It impliedly discourages further conversation about a method that is conceptually flawed and challenging to apply, and (2) it forces further underground arguments about the unprecedented ways in which gun violence affects American communities. In a Term in which the conservative supermajority chastised "a handful of federal judges" for interpreting a provision of the Bill of Rights to prevent "the American people" from "deciding 'how best to handle' a pressing social question" — homelessness[466] — we might wonder why something similar is allowable in the context of gun violence. But *Rahimi*'s narrative directs our attention elsewhere — toward stylized versions of the American past that supposedly contain all the answers we need.

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462 LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001).

463 *See, e.g.*, Adam Liptak, *Supreme Court Upholds Law Disarming Domestic Abusers*, N.Y. TIMES (June 21, 2024), https://www.nytimes.com/2024/06/21/us/politics/supreme-court-guns-domestic-violence.html [https://perma.cc/R3TT-HMEB] (characterizing *Rahimi* as a "retreat from what had been" a "vast[] expan[sion]" of gun rights).

464 *See* United States v. Rahimi, 144 S. Ct. 1889, 1897–98 (2024).

465 *Roberts Confirmation Hearing*, *supra* note 107, at 56 (statement of then-Judge John G. Roberts, Jr.).

466 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2226 (2024) (quoting Robinson v. California, 370 U.S. 660, 689 (1962) (White, J., dissenting)).

As mentioned in section I.B, the backdrop for *Rahimi* was the Court's landmark 2022 decision in *Bruen*,[467] which itself was an extension of *Heller*. In brief, *Heller* used the methodology of originalism to enshrine a reading of the Second Amendment that gave expansive protection to individual gun owners.[468] This interpretation was foreign to U.S. constitutional jurisprudence up to that point, but gun rights advocates had aggressively pushed it for some decades (a campaign that former Chief Justice Burger famously described as "one of the greatest pieces of fraud" ever attempted "on the American public").[469] A hard-fought and close decision, *Heller* ended up highlighting the originalist case for two fundamentally different interpretations of the Second Amendment (the majority's and the dissents')[470] — hinting at rich future possibilities for "liberal originalism." But *Heller* delegitimized other types of concerns that the dissent raised, such as the consequences of the majority's interpretation for legislators' ability to address urgent public safety problems.[471]

Post-*Heller*, gun rights advocates declared open season on laws regulating firearms,[472] and eventually, the lower courts consolidated around a framework for evaluating such challenges.[473] As it became clear that

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467 *See supra* notes 140–46 and accompanying text.

468 *See* Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss*," 56 UCLA L. REV. 1095, 1097 (2009) (noting that *Heller*'s supporters hailed the decision as an example of "new originalism").

469 *Watch: Special Interest Push Behind 2nd Amendment a "Fraud," Former Chief Justice Said in 1991*, PBS (Apr. 11, 2023), https://www.wpbstv.org/watch-special-interest-push-behind-2nd-amendment-a-fraud-former-chief-justice-said-in-1991 [https://perma.cc/NJ99-K6C4]; *see also* Warren E. Burger, *The Right to Bear Arms*, PARADE, Jan. 14, 1990.

470 *See* District of Columbia v. Heller, 554 U.S. 570, 601–05 (2008); *id.* at 661 (2008) (Stevens, J., dissenting) (drawing on historical sources to ground the Second Amendment in "an overriding concern about the potential threat to state sovereignty that a federal standing army would pose, and a desire to protect the States' militias as the means by which to guard against that danger"); *id.* at 683 (Breyer, J., dissenting) (drawing on colonial history to "offer[] important examples of the kinds of gun regulation that citizens would then have thought compatible with the 'right to keep and bear arms,' . . . including regulations that imposed obstacles to the use of firearms for the protection of the home").

471 *See id.* at 691–705 (Breyer, J., dissenting) (asserting that the challenged handgun regulation implicated "life-preserving and public-safety interests," *id.* at 705 (citing United States v. Salerno, 481 U.S. 739, 750, 754 (1987))).

472 Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 FORDHAM URB. L.J. 1695, 1695–96 (2012) (noting the "seemingly limitless parade of new lawsuits" that *Heller* generated). Further encouraging gun rights advocates was the Court's decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), which made clear that *Heller*'s holding also applied to the states. *See id.* at 750.

473 A court would first ask whether a challenged law burdened conduct that fell within the scope of the Second Amendment; if so, the court would then evaluate the law via some form of "heightened" scrutiny. Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 85–87 (2023). The degree of scrutiny would depend on how close the challenged law came to the "core" of the Second Amendment. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022).

many challenged laws could survive that framework, however, gun rights groups once again sought Supreme Court intervention.[474]

The Court's decision in *Bruen*, written by Justice Thomas, supplied the correction these groups desired: "[W]hen the Second Amendment's plain text covers an individual's conduct," a law regulating that conduct is unconstitutional unless "the government [can] demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[475] Elaborating on what a successful demonstration would entail, Justice Thomas emphasized inference from absence and reasoning by analogy.[476] "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment," Justice Thomas explained.[477] As for "cases implicating unprecedented societal concerns or dramatic technological changes,"[478] absence of a distinctly similar historical regulation would not be fatal — but, still, a court should not uphold a challenged law unless the government could point to a "well-established and representative historical analogue."[479]

*Bruen* left open many questions. Some were about the "when" of history. As government lawyers fought to preserve challenged laws and as courts evaluated their arguments, what historical period was relevant?[480] Should courts focus on 1791, when the Second Amendment was ratified?[481] To what extent should courts also consider evidence from before ratification and after ratification?[482] Should courts also consider evidence from the period around 1868, when the Fourteenth Amendment became part of the Constitution (and the Second Amendment thereby became applicable against the states)?[483] Should it matter that many current members of the American polity were subordinated and excluded from the formal political process in the late eighteenth and nineteenth centuries?[484]

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474 *See* Charles, *supra* note 473, at 85–86.
475 *Bruen*, 142 S. Ct. at 2126.
476 *Id.* at 2131.
477 *Id.*
478 *Id.* at 2132.
479 *Id.* at 2133 (emphasis omitted).
480 *See* Charles, *supra* note 473, at 99.
481 *See id.*
482 *See id.*
483 *See id.*
484 Similar questions about democratic representation also arose after *Dobbs*, prompting commentary that is relevant here. *See, e.g.*, Joy Milligan & Bertrall L. Ross II, *We (Who Are Not) the People: Interpreting the Undemocratic Constitution*, 102 TEX. L. REV. 305, 307–08 (2023); Mayeri, *supra* note 313, at 173 ("The idea that Englishmen who condoned witch-hunting, marital rape, coverture, and all manner of misogyny should be the arbiters of twenty-first century Americans' ability to control their reproductive lives strikes many as absurd." (footnote omitted)).

There were also questions about what courts should be looking for as they canvassed the past. Scholars quickly noted a "level of generality" ambiguity, with high stakes: If courts allowed the government to describe a challenged firearm regulation at a high level of generality, the government would likely have an easier time identifying a "well-established and representative historical analogue";[485] a more specific description might make the government's burden harder to carry.[486] Disturbingly, this ambiguity appeared to offer lower court judges a path toward whatever result they preferred.

Historians raised still other critiques. One was about the meaning of regulatory silence. Americans in the Founding era faced "no comparable societal ill to the modern gun violence problem," noted Professor Saul Cornell; the fact that they did not attempt to solve a problem they did not have would seem to say very little about their understanding of the bounds of the Second Amendment.[487] Along similar lines, Professor Laura Edwards, an expert on eighteenth- and nineteenth-century American governance, noted how unlikely it was that Americans' efforts to regulate firearms would be entirely visible in statutes, which is where many trained lawyers and judges have focused.[488] Peace bonds issued by local justices of the peace, for example, might be a better place to see some types of post-Revolutionary firearms regulation.[489] And yet many of those records no longer exist or are difficult to access.[490]

The lower court decisions that followed *Bruen* gave credence to these concerns and added others. As Judge Carlton Reeves noted, in a case challenging a federal law prohibiting a convicted felon from possessing a firearm, *Bruen* requires a type of historical analysis that judges are not trained to do and lack the resources to outsource (as yet, expert historians are not offering district courts their free services, as they do for

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485 N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133 (2022) (emphasis omitted).

486 *See* Reva B. Siegel, *The "Levels of Generality" Game, or "History and Tradition" as the Right's Living Constitution*, 47 HARV. J.L. & PUB. POL'Y (forthcoming 2024) (manuscript at 20–21) (on file with the Harvard Law School Library).

487 Saul Cornell, *Constitutional Mischiefs and Constitutional Remedies: Making Sense of Limits on the Right to Keep and Bear Arms in the Founding Era*, 51 FORDHAM URB. L.J. 25, 37–38 (2023).

488 *See* Laura Edwards, *"The Peace," Domestic Violence, and Firearms in the New Republic*, 51 FORDHAM URB. L.J. 1, 4 (2023).

489 *Id.* at 21–22.

490 *Id.* at 22. Historians of American gun culture raised related concerns. As Professor Brian DeLay has argued, *Bruen*'s test appears to assume that from the colonial era to the present, "Americans wanted and used guns for similar reasons" — making it fair to draw inferences from the presence or absence of regulation in the past. Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. (forthcoming 2025) (manuscript at 7) (on file with the Harvard Law School Library). But that continuity is a myth: "[W]hile early America was an unusually well-armed society by the standards of the day, the main reasons why it was so-well [sic] armed — slavery, settler colonialism, and inter-imperial warfare — differ profoundly from the explanations for our own superabundance of firearms." *Id.* at 11. If "bearing arms" meant something fundamentally different in 1791 — much more about "collective-offense" than "private self-defense" — the *Bruen* test seems fundamentally misguided. *See id.* at 17, 21 (emphasis omitted).

the Supreme Court).[491] The implication seems to be that judges should rely on "law office history" to determine the fate of high-stakes public safety laws — a result that would be unacceptable in other contexts.[492] Judge Reeves applied *Bruen* in good faith, but found the exercise so provoking that he penned an excoriating critique of the Court's Second Amendment jurisprudence.[493] Another judge, the Ninth Circuit's Paul Watford, reportedly retired from the bench rather than go down this path.[494] And he would have been correct in predicting substantial *Bruen*-related work. Writing in 2023, Professor Jacob Charles found that *Bruen* had spawned conflicting rulings on a range of important legal questions, such as "whether individuals with felony convictions can be prohibited from owning guns, whether those under felony indictment can be barred from acquiring new firearms, whether those subject to domestic-violence restraining orders can be disarmed [(the issue in *Rahimi*)], and whether the Second Amendment guarantees the right to a firearm with an obliterated serial number."[495] These divergences may have stemmed from the ideologies of the judges involved (which is its own critique of *Bruen*).[496] On their face, however, these conflicting decisions flowed mostly from different views "about how to apply *Bruen*'s new method."[497]

We come now to *Rahimi* and the context of armed domestic abusers. In reversing the Fifth Circuit's decision, the Court drew praise for correcting a rogue circuit court and rescuing a sensible, important firearm restriction.[498] But the story that Chief Justice Roberts really seemed to want to tell was about the Court's much-criticized use of history to decide constitutional questions — a method that was central not only to

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491 United States v. Bullock, 679 F. Supp. 3d 501, 505 (S.D. Miss. 2023).

492 *Id.* (quoting Gordon S. Wood & Scott D. Gerber, *The Supreme Court and the Uses of History*, 39 Ohio N.U. L. REV. 435, 446 (2013)). For a sophisticated exploration of these questions of historical factfinding, see generally Joseph Blocher & Brandon L. Garrett, *Originalism and Historical Fact-Finding*, 112 GEO. L.J. 699 (2024).

493 *Bullock*, 679 F. Supp. at 505.

494 *See* Rachel Weiner, *The Supreme Court Upended Gun Laws Nationwide. Mass Confusion Has Followed.*, WASH. POST (July 7, 2024, 6:00 AM), https://www.washingtonpost.com/dc-md-va/2024/07/07/gun-laws-supreme-court-bruen-rahimi [https://perma.cc/F2FV-5JYF] (reporting that "[t]he prospect of implementing [*Bruen*] helped drive Judge Paul Watford, 55, to retire from his lifetime appointment on the U.S. Court of Appeals for the 9th Circuit").

495 Charles, *supra* note 473, at 78 (footnotes omitted).

496 Rebecca Brown, Lee Epstein & Mitu Gulati, *Guns, Judges, and Trump* 12 (Univ. of. Va. Sch. of L., Pub. L. & Legal Theory Rsch. Paper No. 2024-51, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4873330 [https://perma.cc/Y4VA-WTTW].

497 Charles, *supra* note 473, at 79.

498 *See, e.g.*, Press Release, Merrick B. Garland, Att'y Gen., U.S. Dep't of Just., Attorney General Merrick B. Garland Statement on Supreme Court's Decision in United States v. Rahimi (June 21, 2024), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-courts-decision-united-states-v-rahimi [https://perma.cc/334Y-ZBVB].

*Heller* and *Bruen*, but also to *Dobbs*.[499] Faced with evidence that lower courts have struggled to apply *Bruen*, Chief Justice Roberts chalked this difficulty up to simple "misunderst[anding]."[500] He also chided those who had read the Court's precedents "to suggest a law trapped in amber," an analogy presumably meant to sound preposterous.[501] Applying the Court's methodology *correctly*, Chief Justice Roberts had "no trouble concluding that [the challenged law] survives Rahimi's facial challenge."[502]

The fact that Justice Thomas, the author of *Bruen*, argued in dissent for the opposite result might suggest a less-than-straightforward method,[503] but still, the overall impression *Rahimi* gives is one of ease. Justice Kavanaugh's concurring opinion buttresses this impression with a treatise-like discussion of "the proper roles of text, history, and precedent in constitutional interpretation" and with high praise for the neutrality that history brings to judging.[504] Justice Barrett's concurring opinion noted unresolved methodological questions, but ultimately praised the Court's "just . . . right" approach in this case, as if the Court were doing nothing more complex than making porridge.[505] Even some of the more liberal Justices — dissenters in *Bruen* — arguably participated in the narrative of ease. Justice Sotomayor, joined by Justice Kagan, spent time critiquing the *Bruen* test but also praised the "historical inquiry" the Court conducted in this case, noting that it was "calibrated to reveal something useful and transferable to the present day" and would serve as a "helpful model" for lower courts.[506] Only Justice Jackson seemed fully and robustly committed to the many critiques that *Bruen* has provoked, providing a CVS-style receipt of "pitfalls" and

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499 District of Columbia v. Heller, 554 U.S. 570, 605 (2008); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2126 (2022); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2244 (2022); *see also* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 (2022) (drawing on "historical practices and understandings" to interpret the Establishment Clause (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014))).

500 United States v. Rahimi, 144 S. Ct. 1889, 1897 (2024).

501 *Id.*

502 *Id.* at 1902; *see also id.* at 1897 (describing the challenged provision as "fit[ting] comfortably within [a] tradition" of firearms regulation that dates back to the Founding).

503 *See id.* at 1930 (Thomas, J., dissenting).

504 *Id.* at 1910 (Kavanaugh, J., concurring). Such observations would surprise professional historians, who have had endless debates over whether there is such a thing as a "true" interpretation of the past and whether any interpreter of the past can claim to be objective or neutral. A classic text, familiar to every History Ph.D. student, is Professor Peter Novick's *That Noble Dream*, in which he discusses this "objectivity question." *See generally* PETER NOVICK, THAT NOBLE DREAM (1988). Historians have also marveled at how many interpretations there can be of a particular event or phenomenon, even one that is richly documented by credible sources. *See, e.g.*, Cronon, *supra* note 312, at 1370 ("Historians may strive to be as fair as they can, but . . . it remains possible to narrate the same evidence in radically different ways.").

505 *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring).

506 *Id.* at 1904–07 (Sotomayor, J., concurring).

"unresolved questions."[507] "I could go on," she eventually wrote, "[b]ut I won't."[508]

That we will all stop "go[ing] on"[509] about the problems with *Bruen* (and *Heller*) would be one of the most worrisome outcomes of *Rahimi*. The other would be that we concede as "anti-modal"[510] arguments about the present-day societal harms of firearms. As Justice Sotomayor noted in her concurrence, there is space for these kinds of arguments in the "means-end scrutiny" that the Court regularly uses when evaluating alleged infringements of constitutional rights — but *Bruen* took that space away when it comes to the Second Amendment.[511] At a time when gun violence is a national public health crisis, with disproportionate effects on already-disadvantaged groups,[512] the shelving of these arguments should be hard, not easy.

### *E. "I Am Not Me, the Horse Is Not Mine": Narratives of Denial*

In an arresting recent essay on history, narrative, and violence, historian Joy Neumeyer invoked a "Russian saying of denial," which she encountered in Soviet-era governmental archives: "I am not me, the horse is not mine."[513] The saying asks the hearer to disbelieve what they see in front of them (an apparently guilty person) and instead accept some other version of reality.[514] The major administrative law cases of the 2023 Term, along with the monumental presidential immunity decision, offer up a narrative version of this saying — one in which the Court tells the public that the thing we see is not what we see, and also that there is no need to look any harder. Foundational precedents have been overruled, but there is no judge-made sea change in American governance. The Court has claimed powerful new roles for the judiciary, but the judiciary's power and responsibilities are only as expansive as they were at the Founding. Imperiousness is humility. Supreme confidence is modesty itself.

Consider, again, the Court's decision in *Loper Bright*, in which the Court's 6-3 conservative supermajority overturned what had been the reigning approach to judicial review of agency interpretations of

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[507] *See id.* at 1928–29 (Jackson, J., concurring).

[508] *Id.* at 1929.

[509] *Id.*

[510] Pozen & Samaha, *supra* note 78, at 731 (defining "anti-modalities" as "categories of reasoning," such as arguments based on policy, emotion, or public opinion, "that are employed in nonconstitutional debates over public policy and political morality" but not in constitutional jurisprudence).

[511] *Rahimi*, 144 S. Ct. at 1906 (Sotomayor, J., concurring).

[512] Scott R. Kegler et al., *Vital Signs: Changes in Firearm Homicide and Suicide Rates — United States, 2019–2020*, 71 MORBIDITY & MORTALITY WKLY. REP. 656, 656 (2022) (describing the disproportionate impact of firearm homicides and suicides on certain racial minorities, among others).

[513] Joy Neumeyer, *Darkness at Noon: On History, Narrative, and Domestic Violence*, 126 AM. HIST. REV. 700, 700 (2021).

[514] *See id.*

statutes.[515] By way of background, "*Chevron* deference" — named for the 1984 Supreme Court decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[516] — was a two-step framework (albeit one that, in practice, had additional steps and other nuances).[517] At "step one," it focused on whatever statutory provision the agency had interpreted and asked whether the statute's meaning was clear.[518] If so, the clear meaning controlled.[519] If, instead, the reviewing court found statutory ambiguity, *Chevron* directed the court to move on to "step two" and evaluate whether the agency's interpretation was reasonable.[520] Absent some other kind of defect, an agency's reasonable interpretation was entitled to deference (that is, it would prevail over the challenge against it).[521] Although never uncontested,[522] *Chevron* became the backdrop against which Congress enacted new laws and agencies interpreted them.[523] And for the past forty years, it was what lower courts used to evaluate many of the challenges that litigants leveled against agency action.[524]

The other key piece of background is the politics of *Chevron* deference. Courts' application of the *Chevron* framework has tended to cut in favor of agency action,[525] benefitting both Republican and

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[515] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254, 2273 (2024).

[516] 467 U.S. 837 (1984).

[517] Cary Coglianese, Chevron*'s Interstitial Steps*, 85 GEO. WASH. L. REV. 1339, 1340, 1359–68, 1374–79 (2017) (elaborating on the many "[i]nterstitial" steps within *Chevron*'s famous two-part framework and summarizing the scholarly literature on how courts have applied *Chevron*); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 835–36 (2001) (identifying ambiguity as to which scenarios trigger *Chevron* deference, as opposed to some other form of judicial review of agency action, and theorizing the content of a "step zero").

[518] *See Chevron*, 467 U.S. at 842.

[519] *See id.* at 842–43.

[520] *See id.* at 843.

[521] *Id.* at 844.

[522] Summarizing *Chevron*'s initial reception, Professor Craig Green has noted debates about "whether *Chevron* was a valid extension of older precedents about administrative deference." Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 638 (2021). Early on, some scholars also made note of the kinds of concerns that proved to be *Chevron*'s downfall. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) ("[W]e cannot embrace *Chevron*'s vision of deference as the handmaiden to separation of powers and legitimacy principles without substantially recasting those principles — a recasting in which some aspects of existing theory would have to be abandoned and others radically reformulated.").

[523] *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 1), 65 STAN. L. REV. 901, 940–41 (2013); Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 705 (2014).

[524] *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2264 (2024).

[525] *See* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441, 1444 (2018) ("Drawing on our dataset of every published *Chevron* decision in the circuit courts from 2003 through 2013, we find that agencies prevail under the *Chevron* framework 77.4% of the time.").

Democratic administrations.[526] As conservative appointees gained ground in the federal judiciary, however, conservatives in and out of government saw little cost and much rhetorical advantage in advocating for a more searching form of judicial review.[527] The challenge in *Loper Bright* was in this tradition. It followed over a decade of signals from conservative Justices (who themselves seemed to be taking cues from the conservative legal movement) about their interest in asserting greater judicial control over agency action.[528]

By the time of this Foreword, there will be abundant commentary on the Court's rationale for overruling *Chevron*. (As mentioned in section II.B, the Court's conservative supermajority cohered around a description of *Chevron* as a misreading of the Administrative Procedure Act and an abnegation of judicial duty.)[529] What is perhaps most striking, however, is the majority's insistence on characterizing its decision in *Loper Bright* as (1) reasserting utterly "ordinary," timeless, and straightforward principles, and (2) unleashing no concerning consequences, especially vis-à-vis judicial power.

On the first point: Chief Justice Roberts's opinion for the majority begins its legal analysis with supposedly elementary points about "the Framers' understanding of the judicial function," which the Court wisely "embraced" in *Marbury v. Madison*.[530] From there, the story is one of continuity. Even with the New Deal and its proliferation of agencies, Chief Justice Roberts explains, "the Court continued to adhere to the traditional understanding that questions of law were for courts to decide, exercising independent judgment."[531] In 1946, Congress codified

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[526] *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 481–83 (2022) (noting that although *Chevron* deference came to be most valuable to Democratic administrations, because of their proregulatory stances and reliance on bureaucratic innovation, conservatives in the 1980s were happy to have "a principled way to circumvent the courts" and thereby insulate the Reagan Administration's preferred approach to regulation); Green, *supra* note 522, at 639 ("Presidents from both political parties used administrative deference to steer the governmental wagon rightward or leftward . . . .").

[527] *See* Green, *supra* note 522, at 643, 657 (noting that "[f]rom 1980 to 2008, mainstream conservatives did not oppose administrative deference, much less did they claim that deference violates the separation of powers," but that this shifted "after Obama's reelection in 2012"); *id.* at 678–79 (identifying "conservative faith in federal courts" and "attacks on bureaucratic governance" as plausible causes of the relatively recent and sudden momentum behind "anti-*Chevron* critiques"); Elinson & Gould, *supra* note 526, at 539 ("[W]ith the security of a conservative Court, Republicans eager to limit the power of Democratic presidents to use the administrative state for regulatory ends are willing to do away with *Chevron*.").

[528] *See, e.g.*, Metzger, *supra* note 114, at 24 & n.124 (observing rumblings on the Supreme Court questioning the constitutionality of agency deference as early as 2013).

[529] *Loper Bright*, 144 S. Ct. at 2272 ("*Chevron* was a judicial invention that required judges to disregard their statutory duties.").

[530] *Id.* at 2257 (discussing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). This is a contestable point. *See supra* notes 320–24 and accompanying text.

[531] *Loper Bright*, 144 S. Ct. at 2258. There has, in fact, been considerable flux in how the Court and Congress have understood the role of the judiciary in reviewing agency interpretations of statutes. *See* STASZAK, *supra* note 357, at 120–23.

this "traditional understanding" in the Administrative Procedure Act when it set forth the courts' role in reviewing agency action.[532] By the time the majority opinion reaches *Chevron*, it is clear what that decision's place in the narrative will be: Yes, *Chevron* went on to become an important precedent, but it is better understood as a rupture from a deeper tradition (it "triggered a marked departure from the traditional approach").[533] Framed this way, the overruling of *Chevron* is no more than a restoration of a fundamental principle: that courts should fulfill "the basic judicial task of 'say[ing] what the law is.'"[534] It is never easy to admit a past misstep, but fortunately (in Chief Justice Roberts's telling), this Court is humble enough to do so.[535] (All of these assertions are contestable;[536] the goal here, however, is to showcase the narrative.[537])

On the second point: Chief Justice Roberts's decision is also noteworthy for insisting that *Loper Bright*'s course correction will not generate any worrisome consequences. Yes, the overruling of *Chevron* will require lower courts to change the way they review agency actions, in ways that might prove challenging, but *Chevron* and its elaborations were already causing lower courts great difficulties (asking of them not a simple, two-step analysis but a "dizzying breakdance").[538] As for regulated parties, the overruling of *Chevron* will cause no more instability and uncertainty than life under *Chevron*, in which agencies were free to change their minds about the meanings of statutes and then expect judicial deference from the courts.[539] For good measure, Chief Justice Roberts emphasized the continued validity of "prior cases that relied on

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[532] *Loper Bright*, 144 S. Ct. at 2260–61; *see also id.* at 2273 ("Judges have always been expected to apply their 'judgment' *independent* of the political branches when interpreting the laws those branches enact." (quoting THE FEDERALIST NO. 78, at 523 (Alexander Hamilton))).

[533] *Id.* at 2264; *see also id.* at 2261 (citing United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 544 (1940)) (referring to a "settled pre-APA understanding" that Congress gave no indication of departing from when it enacted the APA).

[534] *Id.* at 2271 (alteration in original) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177); *see also id.* at 2273 ("[L]egal interpretation . . . has been, 'emphatically,' 'the province and duty of the judicial department' for at least 221 years." (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

[535] *See id.* at 2272 ("[P]art of 'judicial humility' is admitting and in certain cases correcting our own mistakes, especially when those mistakes are serious." (quoting *id.* at 2294–95, 2307 (Kagan, J., dissenting)) (citation omitted)); *cf.* Kate Shaw, Opinion, *The Imperial Supreme Court*, N.Y. TIMES (June 29, 2024), https://www.nytimes.com/2024/06/29/opinion/supreme-court-chevron-loper.html [https://perma.cc/J2A4-XS5T] (noting the striking similarity between the Court's approach to precedent in *Loper Bright* and in *Dobbs*); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2262–63 (2022) (invoking celebrated decisions that, in their own time, broke from precedent).

[536] *See generally* Reuel Schiller, *A Trip to the Border: Legal History and APA Originalism*, 97 CHI.-KENT L. REV. 53 (2022).

[537] *Cf.* Kate Masur & Gregory Downs, *Designed to Ameliorate the Condition of People of Color: The Reconstruction Republicans and the Question of Affirmative Action*, 2 J. AM. CONST. HIST. 625, 658 (2024) (critiquing the Court's recent affirmative action decision for "merging disparate historical moments and controversies into a single, confident claim").

[538] *Loper Bright*, 144 S. Ct. at 2271, 2273.

[539] *Id.* at 2272.

the *Chevron* framework" to uphold "specific agency actions"; these remained "subject to statutory *stare decisis*."[540] As for accusations that the conservative supermajority was simply arrogating more power to the federal judiciary,[541] Chief Justice Roberts closed by noting that, in some cases, the best reading of a statute may well be a delegation to an agency; if the agency acted within that delegation, the agency would prevail over its challenger.[542]

As Chief Justice Roberts likely anticipated, these final points prompted some administrative law scholars to eschew dramatic characterizations of *Loper Bright*. ("Please, everyone," wrote Professor Adrian Vermeule after the decision came out, "take a deep breath . . . . [T]here is much less to *Loper Bright* than meets the eye."[543]) What Chief Justice Roberts did not address, however, are the points that should most concern the public. As Professor Nicholas Bagley has noted (invoking classic work by Professor Marc Galanter), "litigation systematically favors repeat players with the wherewithal to take fullest advantage of the courts."[544] In administrative law, those repeat players include "companies and private interests who know how to" play the game and can afford top legal talent.[545] They will be the ones who will seize

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[540] *Id.* at 2273.

[541] *Id.* at 2295 (Kagan, J., dissenting) ("A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power.").

[542] *See id.* at 2273 (majority opinion).

[543] Adrian Vermeule, Chevron *by Any Other Name*, SUBSTACK: THE NEW DIGEST (June 28, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/5PLM-AYHG]. Vermeule describes *Loper Bright* as giving "an apparent headline victory for legal conservative-libertarians," but "preserv[ing] much of the institutional substance of the *Chevron* regime." *Id.* It does so by allowing "many, most or even all of the cases that were previously called '*Chevron* deference' cases" to "be relabeled as '*Loper Bright* delegation' cases" and end up in functionally the same place. *Id.*; *see also* Daniel Deacon, Loper Bright*,* Skidmore*, and the Gravitational Pull of Past Agency Interpretations*, YALE J. ON REGUL.: NOTICE & COMMENT (June 30, 2024), https://www.yalejreg.com/nc/loper-bright-skidmore-and-the-gravitational-pull-of-past-agency-interpretations/ [https://perma.cc/75CE-U3PH] ("[W]hether we call it deference or not, the continued existence of *Skidmore* does imply that sometimes agencies' views will be outcome determinative."); Peter M. Shane, *The Roberts Court's* Chevron *Ruling and Darkening Clouds over the Administrative State*, WASH. MONTHLY (July 16, 2024), https://washingtonmonthly.com/2024/07/16/the-roberts-courts-chevron-ruling-and-darkening-clouds-over-the-administrative-state [https://perma.cc/JU22-HVDV] (expressing concern about *Loper Bright*'s "implicit procrustean view of the separation of powers, accompanied by the Court's hubristic valorization of the judicial process," but also describing *Loper Bright* as "less than revolutionary because the interpretive practice it endorses was already integral to *Chevron* Step One").

[544] Nicholas Bagley, *The Big Winners of This Supreme Court Term*, THE ATLANTIC (June 29, 2024), https://www.theatlantic.com/ideas/archive/2024/06/big-winners-supreme-court-term/678845/ [https://perma.cc/E2GG-HJG6]; *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–102, 119 (1974).

[545] Bagley, *supra* note 544; *see also* Rachel E. Sachs & Erin C. Fuse Brown, Perspective, *Supreme Power — The Loss of Judicial Deference to Health Agencies*, NEW ENG. J. MED. 2 (July 17, 2024), https://www.nejm.org/doi/abs/10.1056/NEJMp2408197 [https://perma.cc/VKT9-H5EM] (arguing

immediately on the openings that *Loper Bright* offers (and which the dissenting Justices were quick to point out): They will challenge agency interpretations that are longstanding but had not previously been challenged under *Chevron*, and they will challenge high-stakes interpretations that are presumptively safe (because of a previous deference ruling) but that could be undermined via the very types of arguments the majority marshalled against *Chevron*.[546] They will try to do all of this in judicial fora where they are likely to find sympathetic judges (for example, ones with strong ties to the conservative legal movement and a record of receptivity to these anti-administrative arguments).[547] Perhaps more troublingly, agencies will now do their work with this reality in mind — which may translate into slower, more defensive, and less creative agency actions than statutes permit and than the American people deserve.[548]

The Court's conservative supermajority deployed similar nothing-to-see-here narratives in other disruptive administrative law cases from the 2023 Term, including *Jarkesy* and *Corner Post*. Writing for the majority in *Jarkesy* — a decision that the three dissenting Justices accused

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that "[c]hallenges to government regulations will operate asymmetrically to benefit opponents of regulation, primarily regulated industries" and providing examples from the healthcare and drug safety context); K. Sabeel Rahman & Kathleen Thelen, *The Role of the Law in the American Political Economy*, *in* THE AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 76, 92 (Jacob S. Hacker, Alexander Hertel-Fernandez, Paul Pierson & Kathleen Thelen eds., 2022) (characterizing business interests as "highly resourced, repeat players" and documenting their success in "bringing repeated lawsuits in favorable jurisdictions, and by designing these interventions strategically in order to create vehicles that are most likely to reach the Supreme Court and win the support of an increasingly conservative federal judiciary").

546 *See Loper Bright*, 144 S. Ct. at 2310 (Kagan, J., dissenting); Sachs & Brown, *supra* note 545, at 2 (predicting that with regard to Medicare, "[w]ell-funded industry actors will now have an incentive to challenge every unfavorable payment rule," resulting in "greater uncertainty, more litigation, and generalist judges making consequential and often technical determinations about Medicare payment policies").

547 *See, e.g.*, Jacqueline Thomsen, *Shopping for the Judge You Want Honed to Perfection in Texas*, BLOOMBERG L. (May 9, 2024, 4:45 AM), https://news.bloomberglaw.com/us-law-week/shopping-for-the-judge-you-want-honed-to-perfection-in-texas [https://perma.cc/6H25-5GHA] (discussing tactical efforts by conservative groups to "ensure[] that their legal challenges to Biden administration policies get in front of [Judges] Kacsmaryk, or Mark Pittman or Reed O'Connor, Republican appointees who between them hear 90% of civil cases in Fort Worth"); Toobin, *supra* note 133 (describing the Fifth Circuit as "the engine room of the conservative constitutional ascendency" and noting that many Fifth Circuit judges appear to have a keen interest in delegitimizing the administrative state). *But see* Andrew Hammond, *The D.C. Circuit as a Conseil d'État*, 61 HARV. J. ON LEGIS. 81, 132 (2024) (noting "limits on the extent to which the Fifth Circuit or another court that is more ideologically aligned with the Supreme Court could help effectuate an end-run around the D.C. Circuit in administrative law matters").

548 *See* Bagley, *supra* note 544; *Congress in a Post-*Chevron *World: Hearing Before the H. Comm. on H. Admin.*, 118th Cong. 5 (2024) (statement of Josh Chafetz, Agnes Williams Sesquicentennial Professor of Law and Politics, Georgetown University Law Center) (explaining that post-*Loper Bright*, "agency officials are likely to trim their sails, issuing only regulations that they think will meet with judicial approval" — which "may . . . mean pursuing the agency's congressionally mandated mission with less vigor than Congress intended"); *see also* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 362 (2019).

of unsettling well-established expectations about the adjudication of statutory rights[549] — Chief Justice Roberts described the Court's decision in favor of Jarkesy as nothing more than a vindication of a longstanding and uncontroversial principle: that actions involving allegations of fraud require consideration by an Article III court.[550] According to Chief Justice Roberts, it was Congress that disrupted matters when it enacted the Dodd-Frank Act in 2010 and authorized agency adjudications of alleged securities fraud violations.[551] In *Corner Post*, Justice Barrett's majority opinion describes the Court's reading of the APA's catchall statute of limitations provision (that is, the one that applies to facial challenges to agency action if a more specific statute of limitations does not) as merely a vindication of a "traditional" approach, rather than a decision that unsettled the consensus view of the lower courts.[552]

As in *Loper Bright*,[553] the majority opinions in both *Jarkesy*[554] and *Corner Post*[555] also attempted to diminish the power of the dissents by casting their concerns as misplaced or overblown, and by refusing to acknowledge the political-economic realities that will dictate these decisions' real-world, distributional meanings (a tendency that has contributed to charges of "neo-*Lochner*ism"[556]). In *Jarkesy*, Chief Justice Roberts responded to Justice Sotomayor's accusation of judicial aggrandizement by casting her and her fellow dissenters as the ones advocating a dangerous concentration of power: They "would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch."[557] In *Corner Post*, Justice Barrett responded to Justice Jackson's prediction of a flood of new challenges to old regulations by suggesting that Justice Jackson was conflating challenges with

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549 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2154–55 (2024) (Sotomayor, J., dissenting).

550 *See id.* at 2123, 2127 (majority opinion) ("The SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury." *Id.* at 2127.).

551 *See id.* at 2126.

552 *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2451–52 (2024). If this all sounds familiar, that is because it is: In 2022, when the Court deployed the "major questions doctrine" in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), Justice Kagan authored a dissenting opinion accusing the majority of essentially inventing a new doctrine and "appoint[ing] itself — instead of Congress or the expert agency — the decision-maker on climate policy." *Id.* at 2644 (Kagan, J., dissenting). Writing for the majority, Chief Justice Roberts insisted that although the label "major questions doctrine" might appear new, it "refers to an identifiable body of law that has developed over a series of significant cases." *Id.* at 2609 (majority opinion).

553 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2293 (2024).

554 *See Jarkesy*, 144 S. Ct. at 2139.

555 *See Corner Post*, 144 S. Ct. at 2459–60.

556 K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1329–30 (2016); *see also, e.g.*, Jedediah Purdy, *Neoliberal Constitutionalism:* Lochner*ism for a New Economy*, LAW & CONTEMP. PROBS., 2014, at 195, 202; Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 182, 205.

557 *Jarkesy*, 144 S. Ct at 2139.

wins.[558] New plaintiffs wouldn't necessarily prevail, Justice Barrett insisted, nor would courts and agencies necessarily "need to expend significant resources to address each new suit."[559] But, again, Bagley's point is vital: Current distributions of power and resources mean that business and antiregulatory interests will seize the opportunities that these cases create — even to the point of literally creating a new company solely to challenge an old regulation.[560] This will divert the attention of administrators and courts toward the concerns of the propertied and powerful, while also potentially diminishing agencies' willingness to make robust and creative uses of their power.[561] Some of the Court's other administrative law decisions from the 2023 Term, such as *Ohio v. EPA*, may have similar consequences.[562]

At first glance, the Court's blockbuster presidential immunity decision, *Trump v. United States*, would seem to belong to an entirely different category, but the narrative it advances about the Court bears striking similarities to the majority opinions in the major administrative law cases. As in these other cases, the conservative Justices in the majority insist that the Court is dutifully carrying out its long-established role in the constitutional system, and in doing so, ensuring that other actors do so, as well. There is no "power grab."[563] There will be no crisis. Contrary characterizations are alarmist and confused.[564]

In brief, *Trump v. United States* responded to former President Trump's claims of immunity from criminal prosecution by articulating a more protective holding than even many legal conservatives believed was plausible. Dividing along ideological lines, the Court issued a majority opinion that recognized absolute immunity for actions comprising "exercise of [the President's] core constitutional powers"[565] and

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[558] *See Corner Post*, 144 S. Ct. at 2459.

[559] *Id.*

[560] *See id.* at 2470 (Jackson, J., dissenting); *see also* Bagley, *supra* note 544. This prospect raises questions about the "statutory *stare decisis*" assurance in *Loper Bright*, because it raises the possibility that an old and apparently safe regulation could be challenged on new grounds. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024); *Congress in a Post-*Chevron *World*, *supra* note 548, at 3 n.14.

[561] *See* Bagley, *supra* note 544; Noah Rosenblum, *The Supreme Court Won't Stop Dismantling the Government's Power*, THE ATLANTIC (June 28, 2024), https://www.theatlantic.com/ideas/archive/2024/06/supreme-court-jarkesy-v-sec-loper-bright-chevron-deference/678842 [https://perma.cc/RS8Q-V9GC] (predicting that, in the wake of *Jarkesy*, "[a]gencies may hesitate to bring enforcement cases against well-resourced parties . . . and may be uncertain about where they can pursue which kinds of remedies," while "[d]efendants . . . will raise new challenges to once-typical enforcement proceedings").

[562] *See* Steve Vladeck, *92. How* Ohio v. EPA *Reshapes Equitable Relief*, SUBSTACK: ONE FIRST (July 29, 2024), https://www.stevevladeck.com/p/92-how-ohio-v-epa-reshapes-equitable [https://perma.cc/QC2T-V5RK] (predicting that *Ohio v. EPA* may "tilt the scales of equitable relief radically in favor of states in most litigation with the federal government").

[563] SEC v. Jarkesy, 144 S. Ct. 2117, 2175 (2024) (Sotomayor, J., dissenting).

[564] *See* Trump v. United States, 144 S. Ct. 2312, 2346 (2024).

[565] *Id.*

"at least a *presumptive* immunity"[566] from prosecution for other "official acts";[567] the Court recognized no immunity from prosecution for "*unofficial* conduct"[568] — but in doing so, warned courts not to "inquire into the President's motives"[569] as they tried to parse official from unofficial acts, lest they "intrud[e] on the Article II interests that immunity seeks to protect."[570]

These were novel holdings, which carried the Court beyond relevant precedents and had a dubious grounding in constitutional text or tradition.[571] In addition, the Court's holdings clashed with the understandings of presidential immunity that cohered after the 1972 Watergate scandal and that some members of Trump's party referenced as recently as February 2021, when they cited Trump's nonimmunity from prosecution as grounds for voting against using impeachment as the mechanism for accountability.[572]

These holdings were also consequential. In the words of two of the decision's relatively few academic defenders, "*Trump* tears the heart out of the special-counsel prosecution of the former president for his conduct on [January 6th]" and "will have profound effects, both short- and long-term, on our constitutional order."[573]

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[566] *Id.* at 2331.

[567] *Id.* at 2327.

[568] *Id.* at 2332.

[569] *Id.* at 2333.

[570] *Id.*

[571] *See* William Baude, Opinion, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html [https://perma.cc/T9SK-3NNF] (noting the "novel[ty]" of the principles that *Trump* announced and faulting the majority's reasoning for going "well beyond any specific part of the Constitution or any determinate constitutional tradition").

[572] *See Trump*, 144 S. Ct. at 2359–60 (Sotomayor, J., dissenting) (arguing that "[a]fter the Watergate tapes revealed President Nixon's misuse of official power . . . [many government actors have] operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law"); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2158 (1998) (appearing to accept that once a President leaves office, the President may be criminally prosecuted for wrongdoing while in office); Alan Feuer & Charlie Savage, *Trump's Argument for Immunity in 2024 Is the Opposite of His Stance in 2021*, N.Y. TIMES (Jan. 10, 2024), https://www.nytimes.com/2024/01/10/us/politics/trump-impeachment-immunity-appeals-court.html [https://perma.cc/NEN5-GRDF] (referencing impeachment-related statements by Republican leader Mitch McConnell and others and noting that during Trump's impeachment trial, his lawyers "point[ed] to the criminal justice system as the legitimate remaining way to seek accountability" for Trump's role in the assault on the Capitol).

[573] Robert J. Delahunty & John Yoo, *The Supreme Court's Trump-Immunity Decision Was a Public Service*, NAT'L REV. (July 5, 2024, 6:30 AM), https://www.nationalreview.com/2024/07/the-supreme-courts-trump-immunity-decision-was-a-public-service [https://perma.cc/J5LL-HMF6]. Many other academics have criticized the decision, but agree with Delahunty and Yoo about its sweeping consequences. *See, e.g.*, Kate Shaw, Opinion, *The Supreme Court Creates a Lawless Presidency*, N.Y. TIMES (July 2, 2024), https://www.nytimes.com/2024/07/02/opinion/supreme-court-immunity-trump.html [https://perma.cc/B8NJ-URY9] (referring to *Trump v. United States* as a "radical decision" that "will rightly be understood as enormously increasing the power and

Narratively, however, Chief Justice Roberts's majority opinion strikes a very different tone. In this telling, the Court has simply adhered to the Framers' vision (of "an energetic, independent Executive"[574]) while also rejecting extreme arguments and showing humility in the face of an undeveloped factual record (thus the remand to the district court).[575] "[The dissenters] strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today," Chief Justice Roberts chided.[576]

Where the opinion *does* recognize the historical significance of the Court's decision, the narrative instead is of a sage and far-sighted Court. "[T]he political branches and the public at large" may fret about "present exigencies"[577] — an apparent euphemism for actions leading to what many called an insurrection, some labeled an attempted coup, and at least one historian cast as a "race riot."[578] The Court, however, wisely keeps its eye on "the future of our Republic" and the lurking threats of an enfeebled presidency or a "cycle" of politically motivated

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enormously reducing the accountability of the president"); Baude, *supra* note 571 (noting the breadth of the principles *Trump v. United States* announced and arguing that the decision's methodology and reasoning made it a "blemish[] on the court's performance this year"); Holly Brewer, *The Supreme Court Turns the President into a King*, NEW REPUBLIC (July 1, 2024), https://newrepublic.com/article/183357/supreme-court-turns-president-king [https://perma.cc/PPK7-V8X5] (characterizing *Trump v. United States* as "a stunning rejection of originalist interpretation" and explaining why the "vast scope of presidential immunity" that *Trump v. United States* conferred on presidents and former presidents is historically significant); *see also* Peter Stone, *Ex-Justice Department Officials Raise Alarm over U.S. Supreme Court's Immunity Ruling*, THE GUARDIAN (July 31, 2024, 9:00 AM), https://www.theguardian.com/us-news/article/2024/jul/31/supreme-court-trump-immunity-ruling [https://perma.cc/6NBH-DNXG] (capturing negative post-decision reactions by academics and alumni of the Department of Justice).

574 Trump v. United States, 144 S. Ct. at 2347.

575 *See id.* at 2346.

576 *Id.* at 2344; *see also id.* at 2346 (accusing the dissenters of "fear mongering").

577 *Id.* at 2347.

578 *See* Marc Fisher et al., *The Four-Hour Insurrection*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/graphics/2021/politics/trump-insurrection-capitol [https://perma.cc/S8SB-N3FJ] (referring to the events of January 6th as an "insurrection" and noting that the rioters' actions "rais[ed] the specter of a coup"); Jill Lepore, *What Should We Call the Sixth of January?*, NEW YORKER (Jan. 8, 2021), https://www.newyorker.com/news/daily-comment/what-should-we-call-the-sixth-of-january [https://perma.cc/Y6EZ-6WYY] ("By any reasonable definition of the word . . . what happened on January 6th was an insurrection."); *id.* ("One possibility . . . is to call the Sixth of January a 'race riot.' Its participants were overwhelmingly white; many were avowedly white supremacists."); H.R. REP. NO. 117-663, at 102, 271 (2022) (referring to the events of January 6th as an "insurrection" and also prominently quoting Judge David Carter, who described Trump's efforts to overturn the results of the 2020 presidential election as "a coup in search of a legal theory").

prosecutions.[579] We're all trying to eat the marshmallow, in other words, but the Court knows better.[580]

Fuller treatments of *Trump v. United States* will surely explore the remarkable separate writings that it produced, ranging from Justice Thomas's consequential musings on the constitutionality of Special Counsel Jack Smith's appointment,[581] to Justice Sotomayor's strongly worded refutation of nearly every aspect of the majority's opinion — culminating with "fear for our democracy."[582] But we now have enough context to return to historian Joy Neumeyer and the contemporary resonance of an old saying, from a different context: "*I am not me, the horse is not mine*."[583]

In Neumeyer's narrative, this saying drifted from the archives into her consciousness during an experience of intimate partner violence, and she was the denier.[584] After each incident of hurt, she would try "to align [her]self with [her abuser's] version of what happened."[585] Denial ultimately proved dangerous. Also dangerous were mutual acquaintances' references to the two sides to every story — as if it was impossible to adjudicate between competing narratives; as if there was no "hard backbone of truth."[586] In the most high-profile cases from the 2023 Term, the Court's conservative supermajority told a story about fealty to the Founders' vision, humility as to the judicial role, and the Court's responsibility to take a long view, untainted by the controversies and political alignments of the moment. The dissenting Justices told a radically different story, about a power-hungry Court, a debilitated and soon-to-be-chaotic administrative state, a future President that might get away with murder, and a democracy in grave peril.[587] But amidst

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[579] Trump v. United States, 144 S. Ct. at 2347 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring in the judgment and opinion of the Court)).

[580] Melissa Healy, *The Surprising Thing the "Marshmallow Test" Reveals About Kids in an Instant-Gratification World*, L.A. TIMES (June 26, 2018, 3:00 AM), https://www.latimes.com/science/sciencenow/la-sci-sn-marshmallow-test-kids-20180626-story.html [https://perma.cc/4A38-ES6Z] (explaining the findings of Stanford psychology professor Walter Mischel's famous deferred-gratification study, which involved tempting young children with marshmallows).

[581] Trump v. United States, 144 S. Ct. at 2347–48 (Thomas, J., concurring). In the immediate aftermath of *Trump v. United States*, the Florida district court judge handling Trump's classified documents–related prosecution dismissed that case, on the basis of arguments made in Justice Thomas's concurring opinion. United States v. Trump, No. 23-80101-CR, 2024 WL 3404555, at *7, *12 n.20, *33 (S.D. Fla. July 15, 2024).

[582] *See* Trump v. United States, 144 S. Ct. at 2372 (Sotomayor, J., dissenting).

[583] Neumeyer, *supra* note 513, at 700 (emphasis added).

[584] *See id.*

[585] *Id.* at 704.

[586] *Id.* at 705; *see also* Cronon, *supra* note 312, at 1372 (noting that although it is possible to craft many different interpretations of the same historical event, "our stories cannot contravene known facts about the past").

[587] *See, e.g.*, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting); Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 2481 (2024) (Jackson,

these competing interpretations and their rhetorical extremes, there is still a "hard backbone of truth."[588] Although the Court is not all-powerful, it has continued to claim more power for itself vis-à-vis other institutions of government. This is so even if some Justices believe that any enlargement of the Court's own power is simply a rightful reclamation, rather than an illicit "power grab."[589] Similarly, although the benefits of the Court's rulings might flow in any number of directions, so far, those benefits have tended to flow towards those who are already advantaged, either by wealth, status, or political position.

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A theme of Part I was silence — the silences that result from deciding not to decide; the silences surrounding those decisions. Silences are integral to this Part, as well. Although the Court offered up many compelling stories in the 2023 Term,[590] well beyond those I have emphasized, others were conspicuously absent. Perhaps most obviously, this one: On January 6, 2021, "tens of thousands" of Trump supporters gathered near the U.S. Capitol, their ire "ignited" by then-President Trump's "ongoing false assertions of election fraud"; following "a speech in which he literally exhorted his supporters to fight at the Capitol," "a large group of people forcibly entered" that building; "armed with a wide array of weapons," including ones stolen from law enforcement; "the mob repeatedly and violently assaulted police officers," "caused both the House and the Senate to adjourn," and "halt[ed] the electoral certification process."[591] That straightforward account, of events witnessed by "millions of people" on "live television," comes from the Colorado Supreme Court.[592] Briefs filed with the U.S. Supreme Court in the 2023 Term provided many additional details.[593] And yet across three relevant

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J., dissenting); SEC v. Jarkesy, 144 S. Ct. 2117, 2175 (2024) (Sotomayor, J., dissenting); Starbucks Corp. v. McKinney *ex rel.* NLRB, 144 S. Ct. 1570, 1587–88 (2024) (Jackson, J., concurring in part, concurring in the judgment, and dissenting in part) ("I am loath to bless this aggrandizement of judicial power where Congress has so plainly limited the discretion of the courts, and where it so clearly intends for the expert agency it has created to make the primary determinations . . . ."); *Trump*, 144 S. Ct. at 2372 (Sotomayor, J., dissenting).

588 Neumeyer, *supra* note 512, at 705.

589 *See Jarkesy*, 144 S. Ct. at 2175 (Sotomayor, J., dissenting).

590 In *Culley v. Marshall*, for example, Justice Gorsuch's concurrence drew on the experiences of the plaintiffs to tell a troubling and important story about law enforcement agencies' reliance on civil forfeiture. 144 S. Ct. 1142, 1153–54 (2024) (Gorsuch, J., concurring). The Eighth Amendment case *City of Grants Pass v. Johnson* featured dueling narratives about homelessness — how it occurs, whom it burdens, and what tools must be available to address it. *Compare* 144 S. Ct. 2202, 2208–09 (2024), *with id.* at 2228–31 (Sotomayor, J., dissenting).

591 Anderson v. Griswold, 543 P.3d 283, 330–34 (Colo. 2023).

592 *Id.* at 330.

593 *See, e.g.*, Brief on the Merits for Anderson Respondents at 16–18, Trump v. Anderson, 144 S. Ct. 662 (2024) (No. 23-719); Brief for the United States in Opposition at 3–4, Fischer v. United States, 144 S. Ct. 2176 (2024) (Nos. 23-32, 23-94, and 23-5572).

cases, the Court referenced these events only either obliquely[594] or bloodlessly.[595] The Court accorded similarly spare treatment to the air pollution story undergirding the regulatory action in *Ohio v. EPA*,[596] to the mass shooting in Las Vegas that set the stage for the "bump stock" case *Garland v. Cargill*,[597] and to the seismic legal shift that made access to mifepristone such a high-stakes issue in *FDA v. Alliance for Hippocratic Medicine*,[598] to offer several additional examples. One could argue, of course, that these stories were simply not relevant to the Court's tasks. As Justice Alito noted in *Cargill*, the Court's job there was simply to interpret a statute; the fact of a "horrible shooting spree," while tragic, "did not change the statutory text or its meaning."[599] But as this Part has shown, the Court has often departed from what is legally necessary and taken narrative license. As the captive audience to these narratives, when is it fair to ask for something different, something more?

Justice Thomas surfaced a similar question around a decade ago in the case of Kevan Brumfield, a death-sentenced state prisoner seeking postconviction relief.[600] A majority of the Court had held that, because of unreasonable factual findings by the state trial court as to Brumfield's intellectual ability, his Eighth Amendment claim merited further review by a federal court.[601] Justice Thomas dissented, accusing the majority of not only misapplying the law, but also misdirecting its concern.[602] "[The majority] spares no more than a sentence to describe the crime for which a Louisiana jury sentenced Brumfield to death. It barely spares the two words necessary to identify Brumfield's victim, Betty Smothers, by name. She and her family . . . deserve better."[603]

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[594] *See Anderson*, 144 S. Ct. at 665 (devoting two undetailed sentences to Trump's alleged role in thwarting the peaceful transfer of power on January 6, 2021).

[595] In *Trump v. United States*, the Court quoted language from the indictment referencing "a large and angry crowd" that "violently attacked *the Capitol* and halted the proceeding," but declined to quote language from the same document about violent attacks on law officers. 144 S. Ct. 2312, 2325 (emphasis added) (quoting Indictment at 6, United States v. Trump, 704 F. Supp. 3d 196 (D.D.C. 2023) (No. 23-257)); *see also* Indictment at 39, United States v. Trump, 704 F. Supp. 3d 196 (No. 23-257). In *Fischer v. United States*, the Court cited allegations of "forced entry" into the Capitol, "breaking windows," and "assaulting members of the U.S. Capitol Police," but mentioned Trump's name only once, and declined to elaborate on the chaotic scene detailed in the criminal complaint. *See* 144 S. Ct. at 2182 (quoting Joint Appendix at 189, *Fischer*, 144 S. Ct. 2176 (No. 23-5572)); *see also* Joint Appendix at 191, *Fischer*, 144 S. Ct. 2176 (No. 23-5572) (documenting Fischer's alleged participation in a coordinated charge on a "4 deep" line of police officers, as well as Fischer's claims that he survived "pepper balls and pepper spray[]").

[596] *See* 144 S. Ct. 2040, 2048–49 (2024).

[597] *See* 144 S. Ct. 1613, 1618 (2024).

[598] *See* 144 S. Ct. 1540, 1553 (2024).

[599] *Cargill*, 144 S. Ct. at 1627 (Alito, J., concurring).

[600] Brumfield v. Cain, 576 U.S. 305, 325–32 (2015) (Thomas, J., dissenting) (citing WARRICK DUNN & DON YAEGER, RUNNING FOR MY LIFE: MY JOURNEY IN THE GAME OF FOOTBALL AND BEYOND 37 (2008)).

[601] *Id.* at 307 (majority opinion).

[602] *See id.* at 324–25 (Thomas, J., dissenting).

[603] *Id.* at 349.

Justice Thomas went on to not only carefully detail Brumfield's crimes, but also to contrast Brumfield's poor choices with the sterling record of Warrick Dunn, Betty Smothers's son and an acclaimed former National Football League player.[604] "Though [Dunn] had turned 18 just two days before Brumfield murdered his mother," Thomas recounted, drawing on Dunn's autobiography, "he quickly stepped into the role of father figure to his younger siblings," became "a star running back," and founded his own charitable organization, among other generous endeavors.[605] "Brumfield, meanwhile, has spent the last 20 years engaged in a ceaseless campaign of review proceedings."[606]

There were, of course, other ways to tell the story. But the point is this: Even the Justices — including those in today's conservative supermajority — have acknowledged that in controlling the narrative, the Court can direct its concern in flawed ways. And concern is no small thing.[607]

## III. ERASURE

Out of the Justices' many separate writings from the 2023 Term, one of the more tragic passages came from Justice Sotomayor's dissent in *Grants Pass*, the Eighth Amendment case involving the enforcement of "camping bans" (criminal prohibitions that, in intention and effect, targeted homeless people).[608] At the end of her dissent, following a devastating recital of the consequences of homelessness,[609] Justice Sotomayor expressed "hope[] that someday in the near future, this Court will play its role in safeguarding constitutional liberties for the most vulnerable among us."[610]

There is tragedy in this passage because it seeks a distribution of concern that, as Justice Sotomayor surely knows, is out of step with the Court's recent choices. This final Part of the Foreword looks briefly backward, to document the decline of Supreme Court cases foregrounding affirmative government responsibility to people in need — that is, cases in which vulnerable people appeared not as criminal defendants, crime victims, prisoners, employees, or debtors (as in some of my examples from the "counterfactual docket"), but rather as members of a polity claiming government support.

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604 *See id.* at 325–26, 330.

605 *Id.* at 330–31 (citing DUNN & YAEGER, *supra* note 600, at 37, 71, 111, 117, 152).

606 *Id.* at 332.

607 I thank Professor Shaun Ossei-Owusu for flagging this case for me.

608 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2234 (2024) (Sotomayor, J., dissenting); *see also* Abbie VanSickle, *Supreme Court Upholds Ban on Sleeping Outdoors in Homelessness Case*, N.Y. TIMES (June 28, 2024), https://www.nytimes.com/2024/06/28/us/politics/supreme-court-homelessness.html [https://perma.cc/5E9Z-732B] (reporting that Justice Sotomayor "[read] her dissent from the bench, a rare move that signals profound disagreement").

609 *Grants Pass*, 144 S. Ct. at 2228–31.

610 *Id.* at 2244.

This pattern of evacuation is striking in and of itself, but this Part pushes further, to make two points. First, to the extent that readers agree with me so far — about the importance of noticing and analyzing the Court's discretionary choices — a longer view, encompassing a range of actors, is necessary. For decades, the Court has been able to decide major cases as if an entire tranche of governance — that of providing the basic conditions for human thriving — is exceptional rather than fundamental.[611] We should want to know how and why that happened — not because every group or experience must find its place in Supreme Court case law, but because, historically, erasures have deeply shaped our legal order.[612] Second, academics should reflect on their complicity in this story of erasure. Have too many of us allowed the Court's choices to dictate ours? What would it look like to redirect our energies?

### *A. The Welfare State in Exile*

Although the United States does not have a reputation for robust provision of social goods and services, government actors have long insulated Americans from risk, met basic needs, and facilitated social mobility. These are deeply rooted governmental functions.[613] Modern public programs include need-based income support; insurance against age- and disability-related wage losses; and unemployment compensation. Other public programs include workers' compensation; food, housing, and energy assistance; healthcare; civil legal aid; educational assistance; and disaster relief.[614]

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[611] *Cf.* Jack M. Balkin, *Constitutional Memories*, 31 WM. & MARY BILL RTS. J. 307, 308 (2022) ("What is erased from memory . . . can make no claims on us."); JILL ELAINE HASDAY, WE THE MEN: HOW FORGETTING WOMEN'S STRUGGLES FOR EQUALITY PERPETUATES INEQUALITY (forthcoming 2025) (manuscript at 2) (on file with the Harvard Law School Library) (documenting the harms of women's erasure from America's stories about itself, especially with regard to struggles for equality); Siegel, *supra* note 313, at 24 ("[O]ur case law erases women's role in building the modern constitutional order.").

[612] *Cf.* Maggie Blackhawk, *The Supreme Court, 2022 Term — Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 127 (2023); Dylan C. Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1207–09, 1211–16 (2022) (documenting Black Americans' everyday engagement with contract law and their erasure from canonical contract law cases); François, *supra* note 49, at 1024 (contending that "[l]ittle by little," the Court erased slavery from "the constitutional stories we tell, except when remembrance of its abolition serves to reaffirm the righteousness of the nation's rebirth after the Civil War").

[613] *See generally* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (rev. ed. 1996); MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE (2012).

[614] *See* Jamila Michener, Mallory SoRelle & Chloe Thurston, *From the Margins to the Center: A Bottom-Up Approach to Welfare State Scholarship*, 20 PERSPS. ON POL. 154, 160 (2022) (reviewing scholarly conceptions of the welfare state and using a "bottom-up approach" to include programs like civil legal assistance within definitions of the U.S. welfare state). *See generally* MICHAEL B.

Beneficiaries of these programs used to occupy a prominent place on the Supreme Court's docket. Dialing back a half century, to the 1973 Term, one would see major cases involving back payments for beneficiaries of a state's federally subsidized Aid to the Aged, Blind, and Disabled program,[615] sex discrimination in the administration of a state's Unemployment Compensation Disability Fund,[616] and the scope of the Bureau of Indian Affairs's general assistance program.[617] Lesser-known cases from the same Term involved workers' compensation;[618] Social Security Disability Insurance;[619] Aid to Families with Dependent Children (AFDC);[620] and indigent medical care.[621]

To be clear, it would be wrong to infer from the 1973 Term that the Supreme Court had *always* devoted its time to lawsuits involving public welfare beneficiaries.[622] But it would not be wrong to describe this class of litigants as, by then, deeply familiar to the Justices. In general, the same twentieth-century developments that opened the federal courts to racial minorities, religious dissenters, and political radicals brought public welfare beneficiaries into view.[623]

In recent years, by contrast, beneficiaries of the welfare state have had a thin presence on the Court's docket — even though many Americans continue to rely on government support.[624] Between October 2020

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KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE (2001) (describing the contours of the American welfare state as they developed over time); JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (documenting the social welfare programs that emerged from the industrial accident crisis at the turn of the twentieth century).

615 Edelman v. Jordan, 415 U.S. 651, 653, 655–56 (1974).

616 Geduldig v. Aiello, 417 U.S. 484, 486–87 (1974).

617 Morton v. Ruiz, 415 U.S. 199, 201 (1974).

618 Dillard v. Indus. Comm'n of Va., 416 U.S. 783, 784 (1974).

619 Jimenez v. Weinberger, 417 U.S. 628, 630 (1974).

620 Hagans v. Lavine, 415 U.S. 528, 530 (1974); Shea v. Vialpando, 416 U.S. 251, 252 (1974).

621 Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 251 (1974). For reference, the Terms before and after the 1973 Term also included many cases involving public welfare beneficiaries. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 678 (1973); N.J. Welfare Rts. Org. v. Cahill, 411 U.S. 619, 619 (1973) (per curiam); N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 406–07 (1973); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 529 (1973); Philpott v. Essex Cnty. Welfare Bd., 409 U.S. 413, 413–14 (1973); Ortwein v. Schwab, 410 U.S. 656, 656 (1973) (per curiam); Burns v. Alcala, 420 U.S. 575, 576–77 (1975); Fusari v. Steinberg, 419 U.S. 379, 379–80 (1975); Lascaris v. Shirley, 420 U.S. 730, 731 (1975) (per curiam); Philbrook v. Glodgett, 421 U.S. 707, 708–09 (1975); Weinberger v. Salfi, 422 U.S. 749, 752–53 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 637–38 (1975); Van Lare v. Hurley, 421 U.S. 338, 339–40 (1975); Mathews v. Diaz, 426 U.S. 67, 69 (1976).

622 *See* KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 261 (2016).

623 *See id.* at 104–06 (describing the Supreme Court's midcentury turn toward "equal treatment," *id.* at 104, and the resonances between equal protection advocacy in other contexts and in the welfare context); GOLUBOFF, *supra* note 336, at 6 (documenting the midcentury forces that channeled Supreme Court attention toward dissenters, radicals, and other "people out of place").

624 *See, e.g.*, DEP'T OF HEALTH & HUM. SERVS., HOW MANY PEOPLE PARTICIPATE IN THE SOCIAL SAFETY NET? (2023), https://aspe.hhs.gov/sites/default/files/documents/

and June 2023, the most notable decision in this vein was *United States v. Vaello Madero*,[625] involving the statutory exclusion of disabled Puerto Rican residents from the Supplemental Security Income program (a federally funded welfare program that currently supports over seven million elderly and disabled Americans).[626] Reversing the First Circuit, the Court held that this exclusion did not violate the equal protection component of the Fifth Amendment.[627] The decision attracted attention at the time because it appeared to extend the life of the dubious *Insular Cases*, reminding the American public that the United States was, and is, an empire.[628] But the case also had an exceptional quality to it. Had the First Circuit not made such a pathbreaking, consequential decision, it seems unlikely that the Court would have taken up this particular legal question; nothing about the decision implied that welfare claimants were welcome back.[629]

Looking at the 2023 Term, one has to squint to see people like Jose Luis Vaello Madero. The Court decided *Rudisill v. McDonough*,[630] where it rejected the federal government's ungenerous take on a question involving veterans' educational benefits (which scholars have recognized as part of the welfare state, even if the broader public does not).[631] The Court also considered a public welfare program in *Becerra*

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18eff5e45b2be85fb4c350176bca5c28/how-many-people-social-safety-net.pdf [https://perma.cc/PRD2-XBAG] ("In 2019 around three in 10 people, including nearly half of U.S. children participated in a safety net program."); Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 366–67 (2020) (describing the massive amount of funding that goes towards the Supplemental Nutrition Assistance Program (SNAP), Medicaid, Medicare, and Social Security and emphasizing the millions of Americans who rely on SNAP and Medicaid, in particular).

625 142 S. Ct. 1539 (2022).

626 *Id.* at 1541; *Monthly Statistical Snapshot, Aug. 2024*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/ [https://perma.cc/B76B-RS97].

627 *Vaello Madero*, 142 S. Ct. at 1541, 1544.

628 *See id.* at 1556 (Gorsuch, J., concurring); *see also* Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639, 1658 (2021); Blackhawk, *supra* note 612, at 127.

629 There are only a few other cases worth noting. *See, e.g.*, Gallardo *ex rel.* Vassallo v. Marstiller, 142 S. Ct. 1751, 1755 (2022) (holding that when a Medicaid beneficiary secures a tort recovery intended to compensate the beneficiary for future medical expenses, the state Medicaid program may seek reimbursement from that settlement for the costs of past medical care); Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (holding that the Centers for Disease Control lacked authority to promulgate a national eviction moratorium). A legal challenge involving the Trump Administration's "public charge rule" — ramping up the immigration consequences that flow from receipt of public benefits — might have brought public welfare beneficiaries indirectly before the Court during the 2021 Term, but the Biden Administration's swift abandonment of the rule prevented the Court from weighing in. *See* Robert Barnes, *Supreme Court Dismisses Republican Challenge to Immigration Rules*, WASH. POST (June 15, 2022, 5:57 PM), https://www.washingtonpost.com/politics/2022/06/15/supreme-court-trump-green-card-policy [https://perma.cc/XT9X-CJWK].

630 144 S. Ct. 945 (2024).

631 *See id.* at 958–59; *see also* JENNIFER MITTELSTADT, THE RISE OF THE MILITARY WELFARE STATE 10 (2015) (recognizing veterans' educational benefits as part of the welfare state).

*v. San Carlos Apache Tribe*,[632] where it sided with two tribes in their efforts to secure federal funding for costs incurred when, per a contract with the Indian Health Service, they administered health care to their members.[633] Notably, these were both narrow statutory interpretation cases, involving discrete and historically "deserving" groups (veterans, because of their service to the country, and Native people, because of the guardian-ward relationship established in federal Indian law).[634] *Becerra*, moreover, focused less on public welfare beneficiaries and more on service providers.[635]

Other cases on the Court's docket implicated people who, in different contexts and at different times in U.S. history, might have been welfare state beneficiaries. But that is not the role these individuals occupied in the cases the Court considered. In *Grants Pass*, for example, people without access to housing appeared not as the deserving beneficiaries of social provision but rather as nuisances — obstacles to local governments' efforts to advance the health and welfare of their communities and impediments to private businesses.[636]

What happened? This is not, for the most part, a story about the Roberts Court's discretion at the certiorari stage (as discussed in section I.C). It reflects a longer-term campaign — involving all branches of the federal government — to ensure that most public welfare beneficiaries could not or would not bother the Court with their problems.

### *B. The Great Disappearance*

Section A used the 1973 Term as a convenient reference point — a way of capturing what the Supreme Court's docket looked like a half century ago. In retrospect, however, this was also a turning point in U.S. legal and constitutional history. Just the year prior, President Richard Nixon had appointed his fourth Justice to the Supreme Court, completing what we now recognize as a conservative remaking of that institution. From the 1973 Term, one could look backwards and see a number of Warren Court precedents that showed solicitude for poor

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632 144 S. Ct. 1428 (2024).

633 *Id.* at 1445.

634 *See* MITTELSTADT, *supra* note 631, at 10, 113; FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 412 (1984).

635 *See* 144 S. Ct. at 1446 (Kavanaugh, J., dissenting). One could describe the EMTALA case, Moyle v. United States, 144 S. Ct. 2015 (2024) (per curiam), similarly. Although the case implicated government-mandated health services, the beneficiaries of those services were not themselves before the Court. *See id.* at 2016 (Kagan, J., concurring) (per curiam).

636 *See* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2209 (2024).

litigants,[637] as well as several pathbreaking "welfare rights" victories.[638] But there were already signs of a conservative turn, especially with regard to constitutional claims. In 1970, during the first Term of the Burger Court, the Court rejected constitutional and statutory challenges to a state cap on the AFDC benefits the state would issue to qualifying families, even though this policy meant that a poor child in a large family would receive less support than would a similarly needy child in a smaller family.[639] A year later, Nixon-appointee Justice Blackmun devoted his first opinion on the Court to rejecting the Fourth Amendment claim of an AFDC recipient who objected to home visits as a condition of receiving benefits.[640] And a year after that, the Court rebuffed an equal protection challenge to a system of state laws that supported needy elderly, blind, and disabled residents more generously than it supported equally needy children (via the AFDC program).[641] All of these decisions included language that impliedly warned welfare beneficiaries away.[642] A still more dispiriting message arrived in March of 1973, in

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[637] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956); Gideon v. Wainwright 372 U.S. 335, 342 (1963); Douglas v. California, 372 U.S. 353, 357 (1963); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

[638] That is, cases in which the Court entertained claims by welfare applicants or recipients against government officials and found in favor of the poor plaintiff. *See, e.g.*, King v. Smith, 392 U.S. 309, 311–12, 312 n.3 (1968) (striking down the "substitute father" regulation that Alabama had been using to weed unmarried, Black women off its AFDC rolls); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (holding unconstitutional state laws that unduly burdened the right of welfare-eligible people to move); Goldberg v. Kelly, 397 U.S. 254, 260, 266, 269 (1970) (recognizing that an individual's welfare benefits were the kind of interest to which the Due Process Clause of the Fourteenth Amendment applied and holding that the plaintiff welfare recipients were entitled to a full evidentiary hearing before the government could terminate their benefits); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973) (striking down a restriction in the federal food stamps program that discriminated against households consisting of unrelated members).

[639] Dandridge v. Williams, 397 U.S. 471, 473–74, 476, 483, 486 (1970).

[640] Wyman v. James, 400 U.S. 309, 326 (1971); Michele Estrin Gilman, *Privacy as a Luxury Not for the Poor:* Wyman v. James *(1971)*, *in* THE POVERTY LAW CANON, *supra* note 34, at 153, 161. *Wyman* is also infamous for drawing a portrait of plaintiff Barbara James that was both unflattering and reliant on a potentially biased source. *See id.* at 164. Justice Blackmun portrayed James as wanting to receive "the necessities for life" while "avoid[ing] questions of any kind." *Wyman*, 400 U.S. at 321–22. He then referenced the contents of James's (sealed) case record, including "constant and repeated demands"; "attitude toward the caseworker"; "occasional belligerency"; and signs that "all was not always well with [her infant son] (skull fracture, a dent in the head, a possible rat bite)." *Id.* at 322 n.9; *see also* Gilman, *supra*, at 160 (noting that the lower court had ordered James's case file sealed); *cf.* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 205 (2000) (analyzing the Supreme Court's decision in the death penalty case McCleskey v. Kemp, 481 U.S. 279 (1987), and noting how Justice Powell invoked the "familiar cautionary fable of the insatiate beneficiary," an "unappreciative wretch" with "the gall and greediness to ask for more").

[641] Jefferson v. Hackney, 406 U.S. 535, 536–38 (1972).

[642] *Dandridge*, 397 U.S. at 487 ("[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."); *Wyman*, 400 U.S. at 324 (analogizing the plaintiff's AFDC benefits to a taxpayer's claimed deduction on a tax return and suggesting that in neither case would the government's imposition of conditions create a constitutional question); *Jefferson*, 406 U.S. at 546 ("So long as [the legislature's] judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.").

the school funding case *San Antonio Independent School District v. Rodriguez*.[643] Via a narrow 5–4 vote (with four Nixon appointees in the majority), the Court rejected the invitation to treat wealth as a suspect classification.[644] Had the Court gone the other way, the Constitution's equal protection guarantees would have had rich possibilities for economically disadvantaged Americans. But the Court chose differently.[645]

In the 1973 Term, the Court continued to consider a relatively sizeable number of cases involving public welfare beneficiaries, and some statutory cases broke their way.[646] But the conservative turn continued apace, via holdings that not only rejected particular legal arguments but also — as in *Rodriguez* — took entire categories of claims off the table. *Edelman v. Jordan*,[647] a disability benefits case, is an important example. Citing the state's violation of federally prescribed time limits for processing applications, the plaintiffs in *Edelman* had sought and won an award of retroactive payments to all eligible claimants.[648] Reversing the lower court's ruling, the Court (again by a slim majority) used the occasion to reinvigorate the Eleventh Amendment and thereby shield

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643 411 U.S. 1 (1973).

644 *See id.* at 2–3, 28, 40.

645 *Rodriguez* and related cases also dashed antipoverty lawyers' hopes that the Court would ever discern a constitutional right to a minimum basic income — an idea that Professor Frank Michelman famously theorized in the 1969 iteration of this Foreword and that some antipoverty lawyers pursued with optimism and sincerity. *See* Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13 (1969); *see also* Edward V. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS 76–82 (Norman Dorsen ed., 1971). By 1976, the Court could not have been clearer about its antipathy towards this idea. "Welfare benefits are not a fundamental right," wrote Justice White in a case involving a New York income support program, "and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support." Lavine v. Milne, 424 U.S. 577, 579, 584 n.9 (1976).

646 *See, e.g.*, Shea v. Vialpando, 416 U.S. 251, 256–57, 264–65 (1974) (agreeing with the plaintiff AFDC recipient that a state regulation regarding the calculation of benefits conflicted with the federal Social Security Act); Mem'l Hosp. v. Maricopa County, 415 U.S. 250, 269–70 (1974) (striking down an Arizona statute that denied residents access to county-paid indigent medical care until they had established one year of county residence). During the 1973 Term, the Court also considered an equal protection challenge to a welfare law, and the plaintiffs won, but that case was not about the unequal treatment of poor Americans; rather, it was about the unequal treatment of nonmarital children vis-à-vis marital children. *See* Jimenez v. Weinberger, 417 U.S. 628, 631, 637 (1974) (finding in favor of two nonmarital children in their challenge to a Social Security Act provision that restricted which children of a disabled wage-earner parent could recover Social Security Disability Insurance benefits).

647 415 U.S. 651 (1974).

648 *Id.* at 656. Requests for retroactive benefits were common in welfare cases by 1970. *See* Nancy Duff Levy, *The Aftermath of Victory: The Availability of Retroactive Welfare Benefits Illegally Denied* (pt. 1), 3 CLEARINGHOUSE REV. 253, 253 (1970) (noting that starting around 1969, previous legal services victories had allowed attorneys to feel more comfortable pursuing retroactive benefits). By the end of 1970, federal district courts around the country had issued class-wide awards of retroactive welfare benefits. Norman B. Lichtenstein, *Retroactive Relief in the Federal Courts Since* Edelman v. Jordan*: A Trip Through the Twilight Zone*, 32 CASE W. RSRV. L. REV. 364, 369 (1982) ("Before *Edelman v. Jordan*, federal courts frequently, though not uniformly, awarded retroactive benefits in welfare cases . . . .").

state governments from having to make such payments.[649] Just like that, an entire tranche of welfare-related cases (and other cases) became worth less, because federal district courts could not order states to compensate people whom the state had wronged.[650]

Cumulatively, these cases had an effect — both on the fate of subsequent cases and on whether welfare beneficiaries would find their way into the courts at all. Equal protection challenges by poor litigants remained visible on the Court's docket for some years — as in *Maher v. Roe*[651] and *Harris v. McRae*,[652] involving poor women's unequal access to abortion — but, unless they involved a disfavored trait or circumstance *in addition to poverty*, they generally did not fare well.[653] Similarly, although the Court remained open to due process claims by aggrieved public welfare recipients, by 1976 it had adopted a balancing test[654] that was clearly a retreat from the more welcoming posture of *Goldberg v. Kelly*.[655]

But these disappointing substantive pronouncements were not the only setbacks for public welfare beneficiaries. They also confronted a series of procedural decisions that made litigating more difficult. And soon Congress would begin thwarting them, as well.

The procedural change story — now well-documented by both legal scholars and political scientists — is this: Through a suite of relatively low-salience decisions, involving standing, pleading, immunity doctrines, remedies, and so on, the Burger Court began the work of "[c]losing the courthouse doors," not only to public welfare beneficiaries but also to a range of other litigants.[656] (The Rehnquist and Roberts Courts

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649 *Edelman*, 415 U.S. at 678.

650 *See* Lichtenstein, *supra* note 648, at 397–404 (explaining this line of cases).

651 432 U.S. 464 (1977).

652 448 U.S. 297 (1980).

653 *See Maher*, 432 U.S. at 470–71; *Harris*, 448 U.S. at 316; *see also* Barbara Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367, 374–75 (1988) (noting that, because of precedents like *Dandridge*, *Jefferson*, and *Rodriguez*, "the potential for use of equal protection challenges to aid welfare recipients is negligible, at least in the federal courts"); Califano v. Westcott, 443 U.S. 76, 79–80, 89 (1979) (an example of an equal protection challenge that involved poverty plus another trait).

654 Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Hammond, *supra* note 624, at 365 (noting that *Mathews v. Eldridge* "remains the Court's leading procedural due process case").

655 397 U.S. 254 (1970). In operation, the test has invited the Court to embrace and entrench government officials' understandings of individuals' private interests rather than the individuals' own accounts. *See* John J. Capowski, *Reflecting and Foreshadowing:* Mathews v. Eldrige *(1976)*, *in* THE POVERTY LAW CANON, *supra* note 34, at 219, 227–29.

656 ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR (2017); STASZAK, *supra* note 357, at 5–6, 72; BURBANK & FARHANG, *supra* note 416, at 2–3; *see also* Alan W. Houseman, *A Short Review of Poverty Law Advocacy*, 25 CLEARINGHOUSE REV. 834, 839–40 (1991) (noting in 1991 that "[d]evelopments in the law of private rights of action, sovereign immunity, Section 1983 jurisdiction, exclusivity of judicial review, judicial review of agency actions, abstention, issue preclusion, and the like made federal practice on poverty law cases far more complex than in the 1960s and 1970s and limited the remedies that were previously available" (footnotes omitted)); Louise Weinberg, *The New Judicial Federalism*, 29 STAN. L. REV. 1191, 1203–04 (1977) (discerning this trend as early as 1977).

would follow suit.[657]) Many of these changes occurred in cases from outside the public benefits context (making their import to these cases less obvious), but not all. *Simon v. Eastern Kentucky Welfare Rights Organization*,[658] for example, produced a holding that ratcheted up the standing requirement for everyone and posed special difficulties for plaintiffs suing the government.[659] After *Simon*, there remained some room for private plaintiffs to contest enforcement inadequacies, but a range of other arguments became unavailing.[660]

Should a public benefits case clear this procedural hurdle and others, two sets of congressional enactments from the 1976–1996 period significantly reduced the chances that such a case would ever reach the Court. The first set involved the (further) shrinking of the Court's mandatory jurisdiction. In 1976, at the Court's urging, Congress reduced the availability of specially convened three-judge district courts, which carried with them the right of direct appeal to the Supreme Court.[661] Since 1910, these special courts had been the venue for federal suits against state officials challenging the constitutionality of state laws; after 1937, they were also the venue for federal suits challenging the constitutionality of federal laws.[662] But after the 1976 reform, three-judge district courts were only available for certain voting rights cases — meaning the direct-appeal right to the Supreme Court was similarly cabined.[663] Concretely, this meant that landmark welfare rights cases, such as *Goldberg v. Kelly*, were no longer ones that the Court had to hear.[664] To be sure, three-judge courts had never been the source of *all* of the Court's public

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657 STASZAK, *supra* note 357, at 1–2.

658 426 U.S. 26 (1976).

659 The plaintiffs in *Simon* were indigent people and related advocacy groups who alleged that private, nonprofit hospitals had declined to provide medical treatment to poor people, even as those hospitals used their "charitable" purpose to garner favorable tax treatment from the federal government. *Id.* at 28–29, 32–33. The plaintiffs sued the Secretary of the Treasury and the Commissioner of Internal Revenue for allowing hospitals to behave in this manner. *Id.* at 28. Justice Powell used this occasion to elaborate on the requirements of standing (two of which the *Simon* plaintiffs lacked): an "actual injury" fairly traceable to the government defendants and redressable by a decision in the plaintiffs' favor. *Id.* at 40–45. In retrospect, we can see in this case the "trifecta of injury in fact, causation, and redressability" at the core of "[c]onstitutional standing doctrine in its current form." Bayefsky, *supra* note 28, at 133. Even at the time, however, commentators recognized *Simon* as articulating "a new standing requirement with a high potential for expansion and misapplication." Note, *Standing to Challenge Administrative Action*, 90 HARV. L. REV. 205, 213 (1976); *see also* Abram Chayes, *The Supreme Court, 1981 Term — Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 18–19 (1982) (critiquing *Simon* for the "arbitrariness of the injury-in-fact test" it articulated and "the metaphysically undisciplined concept of causation" it applied).

660 Leonard Weiser-Varon, *Injunctive Relief from State Violations of Federal Funding Conditions*, 82 COLUM. L. REV. 1236, 1263–64 (1982).

661 *See* Michael E. Solimine & James L. Walker, *The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–1976*, 72 CASE W. RSRV. L. REV. 909, 917, 920–21 (2022).

662 *Id.* at 916–18.

663 *Id.* at 921.

664 397 U.S. 254, 261 (1970); *see also* Dandridge v. Williams, 397 U.S. 471, 473 (1970); Wyman v. James, 400 U.S. 309, 311 (1971); Jefferson v. Hackney, 406 U.S. 535, 536 (1972).

benefits cases; before and after 1976, cases landed on the docket because the Court granted certiorari.[665] But the 1976 reform was nonetheless liberating. In 1988, again at the Court's urging, Congress further reduced the Court's mandatory jurisdiction, marking the beginning of the modern era of near-absolute docket control.[666]

A second relevant set of congressional reforms involved the federal legal services program, which began in 1964 as part of the War on Poverty and which funded the legal talent behind many successful public benefits cases.[667] Predictably, representations of poor clients sometimes threatened government officials and businesses — which created opposition to the program.[668] California Governor Ronald Reagan was a notably outspoken foe, and he brought his antipathy with him to Washington, D.C., when he assumed the presidency in 1981.[669] Under pressure from the White House, Congress reduced the funding it had been giving to the nonprofit agency that distributed legal services money (the Legal Services Corporation, or LSC).[670] Congress also added new conditions to that funding, such as restrictions on whom LSC-funded lawyers could represent.[671] Another round of funding cuts and restrictions came in 1996, including a bar on using LSC funds to pursue class actions.[672] By that point, antipoverty lawyers were still around, but years of fighting for survival had taken a toll, as had Supreme Court

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[665] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 401–02 (1963); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268, 272 (1969); Rosado v. Wyman, 397 U.S. 397, 400–01 (1970); Edelman v. Jordan, 415 U.S. 651, 657–58 (1974); Morton v. Ruiz, 415 U.S. 199, 201 (1974); Mathews v. Eldridge, 424 U.S. 319, 326 (1976); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 35 (1976); Chapman v. Hous. Welfare Rts. Org., 441 U.S. 600, 607 (1979); Green v. Mansour, 474 U.S. 64, 67 (1985); Lukhard v. Reed, 481 U.S. 368, 371 (1987).

[666] Act of June 27, 1988, Pub. L. No. 100-352, §§ 1–3, 102 Stat. 662, 662; *see* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 742 (2001). Prior to 1988, 28 U.S.C § 1252 "allowed any party in a civil action to appeal directly to the Supreme Court from any decision of any federal court declaring a federal statute to be unconstitutional, if the United States was a party to the lawsuit"; 28 U.S.C. § 1254(2) "allowed a party to appeal to the Supreme Court from a decision of a federal court of appeals striking down a state statute as violative of the federal Constitution, treaties, or laws"; and 28 U.S.C §§ 1257(1) and (2) "allowed a party to appeal to the Supreme Court from a judgment of a state court of last resort holding either that a federal statute or treaty was invalid, or that a state statute was valid despite a challenge based on the federal Constitution, treaties, or laws." *Id.* at 751. The 1988 Act eliminated these appeal rights. *Id.*

[667] Sarah Staszak, *Constraining Aid, Retrenching Access: Legal Services After the Rights Revolution*, *in* THE RIGHTS REVOLUTION REVISITED: INSTITUTIONAL PERSPECTIVES ON THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS IN THE US 267, 274–76 (Lynda G. Dodd ed., 2018).

[668] *Id.* at 275.

[669] *Id.* at 279 & n.43.

[670] *Id.* at 279–80.

[671] *See id.* at 283. This was not entirely new: In 1974, Congress had barred LSC-funded attorneys from pursuing cases involving non-therapeutic abortions and school desegregation, among other matters. *Id.* at 278.

[672] *Id.* at 284–85.

defeats.[673] In Professor Matthew Diller's words, the lesson learned was to "avoid creating broad precedents" and to fear Supreme Court review.[674]

By the 1998 Term — equidistant from the 1973 Term and the Court's most recent Term — these developments clearly had an effect. The 1998 Term included only one welfare rights case, *Saenz v. Roe*,[675] and it broke no new ground.[676] In retrospect, the disability rights case *Olmstead v. L.C.*[677] was a second noteworthy decision from the 1998 Term, in that it gave disabled residents of state-run institutions a basis for claiming state-funded, community-based care.[678] But, notably, *Olmstead* tethered disabled citizens' rights to their states' resource limitations[679] — reinforcing exactly those concerns that animated cases from the early 1970s.

When the Rehnquist Court became the Roberts Court in 2005, Supreme Court cases about beneficiaries of public welfare programs seemed a dusty artifact of a bygone era.[680] The welfare state more generally was not one of the Court's priority areas — diverging from some high courts elsewhere in the world.[681] The most notable exceptions were those rare occasions when Congress attempted to expand public provisioning (and other actors objected)[682] or when the Court had the

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673 Hammond, *supra* note 624, at 396–97 (emphasizing that inadequate funding of legal services was an impediment to litigation on behalf of welfare applicants and enumerating the restrictions placed on those who accepted federal funding); *see* Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1418–19 (1995) (book review) (noting that by 1995, poverty lawyers had already endured "twelve years of executive branch hostility to federal funding for legal services"). *But see* Andrew Hammond, *Poverty Lawyering in the States*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 215, 224 (Ezra Rosser ed., 2019) (noting that "[b]eginning in the 1980s, state and local governments started appropriating funding for legal aid organizations" and that in that same time frame, state legislatures, courts, and bar associations instituted Interest on Lawyers Trust Accounts (IOLTA) programs through which legal aid organizations would be able to receive revenue).

674 Diller, *supra* note 673, at 1421.

675 526 U.S. 489 (1999).

676 Following the enactment of the 1996 law that created Temporary Assistance for Needy Families (replacing the beleaguered AFDC program), a state had attempted an old maneuver: treating new residents less generously than established residents. *Id.* at 492–93, 495–96. Reiterating positions from a series of landmark "right to travel" cases, the Court's 7–2 decision in favor of needy families was unremarkable. *See id.* at 498–500, 503.

677 527 U.S. 581 (1999).

678 *See id.* at 607.

679 *Id.*

680 Public interest lawyers continued to press similar cases in lower federal courts. *See* Hammond, *supra* note 624, at 388–90 (documenting post-2000 litigation involving SNAP and Medicaid). But the types of changes I document in this section also affected lower court activity. *See* Gilles, *supra* note 309, at 1536–37.

681 Schauer, *supra* note 27, at 44–45 ("Had the Court been receptive to the kind of wealth discrimination or social welfare rights claims . . . at issue in cases like [*Rodriguez* and others], we might live in a world in which our highest court — like its counterparts in South Africa, Hungary, and Poland, for example — is centrally involved in major social policy decisions about issues such as healthcare, housing, pensions, welfare, and the minimum wage." (footnotes omitted)).

682 *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 530–31, 540 (2012).

opportunity to shore up the institution of marriage (which has always been entangled with government approaches to need and dependency).[683] In 2016, when Professor Marie A. Failinger and Professor Ezra Rosser published an important collection of essays on the Supreme Court's canonical poverty law cases, they profiled only two post-2000 decisions; both represented losses for the poor litigants claiming government support.[684]

### *C. The Costs of Exile*

To return to where this Part began, some of the nation's "most vulnerable"[685] members are hardly visible in the decisions from the 2023 Term because the efforts of previous actors (presidents, judges, legislators) combined to banish the claims of public welfare beneficiaries from consideration. But why does this matter, exactly? As Professor Frederick Schauer has noted, some areas of national concern (for example, war) rarely make it onto the Court's agenda.[686] Why should we care that certain people, with a particular relationship to government, are no longer in view?

A full exploration of this question could go in any number of directions. We might ask, for example, if the regular presence of well-accepted redistributive programs on the Court's docket might have affected the fate of more controversial redistributive initiatives, ranging from affirmative action in higher education[687] to the recent efforts to

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683 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 665 (2015); United States v. Windsor, 570 U.S. 744, 752 (2013); Robin L. West, Essay, *The Incoherence of Marital Benefits*, 161 U. PA. L. REV. PENNUMBRA 179, 187, 190 (2012) (acknowledging "the federal pension benefits, social security benefits, widows' and widowers' exemptions, and health insurance benefits" that U.S. policy has traditionally awarded people "solely for the act of marrying," but also characterizing "state-recognized marriage" as, functionally, "a semi-privatized social welfare net," because it "ultimately relieves the state of some of its burden of caring for the weak, sick, unemployed, or otherwise vulnerable").

684 Rosser, *supra* note 34, at 8 (citing Turner v. Rogers, 564 U.S. 431 (2011); Dep't of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125 (2002)).

685 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2229 (2024) (Sotomayor, J., dissenting).

686 Schauer, *supra* note 27, at 44.

687 One way of understanding the race-conscious admissions policies at issue in the landmark 2023 case *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* is as elite-level attempts to incorporate fairness into distributions of educational opportunity — out of recognition that some groups historically enjoyed great access (and all the ensuing advantages) while other groups historically enjoyed much less access. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1780 (1993). This understanding aligns with how President Lyndon B. Johnson originally explained and justified the policies that came to be called "affirmative action," and why his Administration paired these policies with initiatives aimed at combatting poverty and enhancing social mobility. *See* Tomiko Brown-Nagin, *Rethinking Proxies for Disadvantage in Higher Education: A First Generation Students' Project*, 2014 U. CHI. LEGAL F. 433, 439 (describing how "[a]ffirmative action, as originally conceived, complemented the [Civil Rights Act, Economic Opportunity Act, and Voting Rights Act] in aim and effect" and noting that "[u]pward social mobility animated the design of these first affirmative action policies"). To understand affirmative

cancel student debt.[688] Would challenges to these initiatives have unfolded in the same way, or been met with the same degree of skepticism? Likewise, we might interrogate the ease with which some members of the current Court have differentiated abortion from healthcare, as if there is no necessary overlap. Would that have been possible had public welfare beneficiaries maintained a robust presence on the docket in prior decades? In the 1970s, Medicaid recipients treated the abortion/healthcare nexus as obvious and placed abortion within the set of public goods that a government might want to distribute to people in need.[689] A separate line of questions might explore how the Court has allocated the time that once flowed toward the claims of public welfare beneficiaries. Who has benefited from this reallocation?

Given the themes of this Foreword, however, the most important point to explore (briefly) is what the erasure of public welfare beneficiaries has meant for our understanding of the administrative state, the one facet of American governance that the Court has made hypervisible in recent years.

There are, of course, any number of reasons why we should not expect the Supreme Court to have a perfectly accurate picture of the administrative state, ranging from the limits that the APA places on

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action as a form of distribution that shares aspirations with Head Start, Social Security, and other programs is less intuitive now than it once was, for reasons that have much to do with the Supreme Court's earliest encounter with affirmative action in higher education. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309–10 (1978) (opinion of Powell, J.). But the idea remains intelligible — and might have been more so had redistributive programs been more visible on the docket. *See* Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 18 (2013) (lamenting the Court's diversity focus and advocating "much more redistributist" policies); Ofra Bloch, Students for Fair Admissions v. Harvard *and the Memory Wars*, 27 U. PA. J. CONST. L. (forthcoming 2024) (manuscript at 24–31), https://ssrn.com/abstract=4742160 [https://perma.cc/Z9ER-NXT5] (tracing how the diversity rationale came to take precedence and drawing on history to identify other framings).

688 When this issue came before the Court in the 2022 Term, the Court rightfully recognized debt forgiveness as a redistribution of sorts, but then went on to characterize this act as exceptional — so unusual and significant that the Court should not lightly infer congressional authorization for it. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023).

689 If healthcare was a good to be distributed fairly, as programs like Medicare and Medicaid implied, so was access to abortion. *See* Beal v. Doe, 432 U.S. 438, 451 (1977) (Brennan, J., dissenting) ("[I]t is beyond comprehension how treatment for therapeutic abortions and live births constitutes 'necessary medical services' under Title XIX, but that for elective abortions does not." (quoting 42 U.S.C. § 1396)); *id.* at 458 (Marshall, J., dissenting) (describing a Medicaid-funded nontherapeutic abortion as a "governmental benefit[]" that is "of absolutely vital importance in the lives of the recipients"); Harris v. McRae, 448 U.S. 297, 332–33 (1980) (Brennan, J., dissenting) (noting that "[i]n every pregnancy," the "medically necessary" course of treatment is either to try to bring the pregnancy to term or to terminate it, "and the poverty-stricken woman depends on the Medicaid Act to pay for the expenses associated with that procedure"). Distributive fairness was all the more important because of the economic implications of pregnancy, some Justices recognized. *See Beal*, 432 U.S. at 452 (Brennan, J., dissenting) (describing elective abortions as "one method for limiting family size and avoiding the financial and emotional problems that are the daily lot of the impoverished"); *id.* at 456–57 (Marshall, J., dissenting) (noting that when poor women are "coerce[d]" into continuing pregnancies, disadvantage and misery are likely to follow).

judicial review[690] to the "submerged" (low-visibility, low-salience) quality of much of what agencies do.[691] But existing distortions are extreme. Consider the Supreme Court's major administrative law cases from the last decade: The ones that have ended up on the docket have often involved agencies that regulate business or that otherwise place limits on the pursuit of profit. These agencies include the SEC,[692] the EPA,[693] the NLRB,[694] the CFPB,[695] the Federal Housing Finance Agency,[696] the Patent Trial and Appeal Board,[697] the Department of Labor (including the Occupational Safety and Health Administration),[698] and the Department of Commerce.[699] Contesting the work of this select group of agencies, in many of the major cases, is a particular type of regulated party: businesses.[700] Described sympathetically, these regulated parties are the engines of the American economy: creators of jobs, wealth, and prosperity. Agencies are in their way.

As for social welfare agencies, they appear to have occupied a much smaller share of the Court's administrative law docket. And in recent years, they have mostly (although not exclusively)[701] appeared on that docket in ways that either fit the pattern above (of an agency impeding

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690 *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 126 (2003); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1624 (2018) ("[F]ederal agencies regulate us in many meaningful, and sometimes frightening, ways that either evade judicial review entirely or are at least substantially insulated from such review.").

691 *See* Gabriel Scheffler & Daniel E. Walters, *The Submerged Administrative State*, 2024 WIS. L. REV. 789, 834; *see also* SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 16–17 (2011).

692 Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018); SEC v. Jarkesy, 144 S. Ct. 2117, 2124 (2024).

693 West Virginia v. EPA, 142 S. Ct. 2587, 2599 (2022); Michigan v. EPA, 576 U.S. 743, 747 (2015); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 307 (2014).

694 Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1620–21 (2018).

695 CFPB v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1478 (2024); Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020).

696 Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).

697 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1976 (2021).

698 Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 663 (2022) (per curiam); *see also* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 215, 219–20 (2016) (involving a Department of Labor regulation).

699 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2254 (2024).

700 I use "businesses" to refer not only to corporations, but also to their leaders and shareholders. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018) (involving the head of an investment company); West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (involving not only state challengers, but also two private companies); *Collins*, 141 S. Ct. at 1770 (involving shareholders of Fannie Mae and Freddie Mac); *Seila L.*, 140 S. Ct. at 2194 (involving a law firm that provided debt-relief services); *Arthrex*, 141 S. Ct. at 1978 (involving a medical devices company).

701 *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2409 (2019) (involving a veteran claiming disability benefits).

wealth creators)[702] or align with a second pattern: of an agency threatening the rights of Christian believers.[703]

What sort of administrative state would we see if public welfare beneficiaries had remained a more sizable part of the docket? As in *Kisor v. Wilkie*,[704] the rare recent Supreme Court administrative law case that featured a benefits recipient (a veteran who had claimed disability benefits from the Department of Veterans Affairs),[705] we would see that agencies distribute life-sustaining benefits and services — in ways that range from efficient to bungling and from humanizing to degrading.[706] In doing so, they also send messages about hierarchies of belonging and the content of citizenship.[707] We would also see how agencies enable profit-seeking (sometimes in dubious ways), such as by unburdening businesses of care obligations, nudging low-income people towards the workforce, and ensuring that people whom employers don't want to hire remain available as consumers of goods and services.[708]

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[702] *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam); Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896, 1899 (2022); Becerra v. Empire Health Found., 142 S. Ct. 2354, 2361 (2022); Azar v. Allina Health Servs., 139 S. Ct. 1804, 1808 (2019).

[703] This was the factual basis for *Burwell v. Hobby Lobby Stores, Inc.*, for example, where three corporations successfully contested the "contraceptive mandate" that the Department of Health and Human Services had imposed (pursuant to its authority to interpret the ACA). 573 U.S. 682, 689–90, 696, 700 (2014); *see also* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1559 (2024) (involving allegations that FDA actions threatened to burden certain doctors' consciences by involving them in abortion-related medical care). *But see* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2374–75 (2020) (involving a situation where a federal agency acted to *protect* Christian believers).

[704] 139 S. Ct. 2400 (2019).

[705] *Id.* at 2409.

[706] *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (exploring how "[t]he growth of government largess," and its administration by government bureaucrats, impacts "individualism and independence"); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 941–42 (1995) ("The sphere of privacy protected by liberal rights largely evaporates once the individual invites in state assistance." *Id.* at 941.); Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 123–24, 132 (2002) (demonstrating how the 1996 welfare reform invited state-level sexual regulation of poor women); Bijal Shah, *Administrative Subordination*, U. CHI. L. REV. (forthcoming) (manuscript at 7), https://ssrn.com/abstract=4392123 [https://perma.cc/KE8Q-KSJU] (asserting that agencies engage in behavior that subordinates the interests of vulnerable people to other institutional priorities); JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 13–14 (2018) (documenting the relationship between state-level variations in Medicaid policy and administration and recipients' ability to engage politically); PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 2 (2018) (documenting the phenomenon of administrative burdens and exploring how these burdens affect the lives of the ostensible beneficiaries of public welfare programs).

[707] *See* TANI, *supra* note 622, at 12–14; MICHENER, *supra* note 706, at 15.

[708] In the lower courts, social welfare agencies appear in many other guises. *See, e.g.*, Moriarty v. Colvin, 806 F.3d 664, 666 (1st Cir. 2015); Crow Tribal Hous. Auth. v. U.S. Dep't of Hous. & Urb. Dev., 781 F.3d 1095, 1098 (9th Cir. 2015); Draper v. Colvin, 779 F.3d 556, 558 (8th Cir. 2015); Fair Hous. Rts. Ctr. in Se. Pa. v. Post Goldtex GP, 823 F.3d 209, 213 (3d Cir. 2016); Ohio Dep't of

Going forward, our challenge is to keep this fuller portrait of the administrative state in view — resisting the urge to pattern our allocations of attention on the Court's.[709] That means focusing on what the Court's administrative law holdings will mean for neglected corners of the administrative state.[710] It also means developing affirmative visions for administrative governance, to supplement the consistently dark imagery from the Court.[711]

More generally, it means continuing to wonder about the cries and complaints that have grown fainter — not because they no longer exist, but because some of our most powerful institutions have made them harder to hear. As the great historian Hazel Carby once suggested (in the context of addressing "inequalities of power in knowledge of the past"), we can choose to bend our ears toward silence, and we can learn how to "make . . . silences speak."[712] This is one way of "lay[ing] claim to the future."[713]

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Medicaid v. Price, 864 F.3d 469, 473 (6th Cir. 2017); Cappetta v. Comm'r of Soc. Sec. Admin., 904 F.3d 158, 159 (2d Cir. 2018); Larson v. Saul, 967 F.3d 914, 917 (9th Cir. 2020); Hall v. U.S. Dep't of Agric., 984 F.3d 825, 832 (9th Cir. 2020); Hawkins v. Dep't of Hous. & Urb. Dev., 16 F.4th 147, 151 (5th Cir. 2021); Rogers v. Kijakazi, 62 F.4th 872, 874 (4th Cir. 2023); *see also* Hammond, *supra* note 624, at 361; HATCHER, *supra* note 303, at 21–23.

709 This is not to discount the important work that scholars have been doing to make sense of the Court's complex and contradictory administrative law jurisprudence. *See, e.g.*, Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511, 568 (2024); Aaron L. Nielson, Christopher J. Walker & Melissa F. Wasserman, *Saving Agency Adjudication*, TEX. L. REV. (forthcoming 2024) (manuscript at 24–25), https://ssrn.com/abstract=4563879 [https://perma.cc/T3EZ-LFUX]; Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 757 (2022).

710 *See, e.g.*, Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1816–17 (2023) (arguing that the Supreme Court's approach to administrative adjudication might eventually result in a two-tiered system, with immigrants, veterans, and elderly and disabled people relegated to high-volume administrative courts); *see also* Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. (forthcoming 2024) (manuscript at 3–5), https://ssrn.com/abstract=4694607 [https://perma.cc/9GGJ-97N8]; Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 7), https://ssrn.com/abstract=4548867 [https://perma.cc/4A3W-QF7R].

711 *See* Metzger, *supra* note 114, at 89–90; Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 461 (2020); NOVAK, *supra* note 76 (recovering a vision of "substantive democracy" that once infused progressive-era administrative governance); Emerson, *supra* note 114, at 9–10, 56; K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1676 (2018) (book review); K. Sabeel Rahman, *After* Chevron*: Political Economy and the Future of the Administrative State*, LPE PROJECT (July 23, 2024), https://lpeproject.org/blog/after-chevron-political-economy-and-the-future-of-the-administrative-state [https://perma.cc/A5L3-5TTU].

712 *See* Hazel V. Carby, *Foreword* to TROUILLOT, *supra* note 310, at xiii.

713 *Id.*

## IV. CODA: "THE BEST THAT THEY CAN GET"?

One of the most striking narratives of the 2023 Term came during oral argument in *Harrington v. Purdue Pharma L.P.*[714] The legal question the Court set out to answer was whether the Bankruptcy Code authorized a court to approve a Chapter 11 reorganization plan for Purdue that included a side deal for a nondebtor party.[715] Under the terms of the proposed plan, Purdue's controlling family and owners, the Sacklers, would secure a release of liability from any potential claims by Purdue's creditors (including the thousands of individuals and state and local governments that had already sued Purdue for opioid-related harms).[716] The "Sackler release," as this provision became known, was important to the reorganization because in return for it, the Sacklers agreed to contribute over $4 billion to the public benefit company that the reorganized Purdue would become.[717] These funds (representing a portion of what the Sacklers had taken out of the company in prior years) would largely go to opioid abatement, complementing the sparser funds already in the bankruptcy estate.[718] A bankruptcy court's approval of this plan — over objections by the U.S. Trustee and a discrete number of affected parties — set the case on a path toward the Supreme Court.[719]

The narrative that dominated the oral argument was this: Once upon a time there was a cunning and greedy family. Via their company, the family triggered an opioid crisis, which left devastation in its wake. Thousands of individuals and public entities cried out against this villainous family and sought compensation for their losses. Unfortunately, there is not enough money in the world for every victim to receive compensation. Plus, rich people are shrewd, and they know how to hide and move their money. Life is unfair like that. In a context of "not enough," the time came for lawfare, negotiations, and deals — for every interested party to walk away with as much as they could feasibly get. Eventually, after many maneuverings, a Big Deal emerged, and it was good — or at least as good as it could be. Almost everyone agreed that the victims could do no better. But then, at the eleventh hour, the Government arrived, and it stopped the Big Deal in its tracks. Was the Government a knight in shining armor, fighting for justice? Or was it Don Quixote, tilting at windmills and leaving the little people with

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714 144 S. Ct. 2071 (2024).

715 *Id.* at 2081.

716 *Id.* at 2078–79.

717 *See* Reply Brief for the Petitioner at 1, *Harrington*, 144 S. Ct. 2071 (No. 23-124); *Harrington*, 144 S. Ct. at 2079.

718 *See Harrington*, 144 S. Ct at 2079; *id.* at 2100 (Kavanaugh, J., dissenting).

719 *Id.* at 2080 (majority opinion). For the deeper backstory, see generally JACOBY, *supra* note 166, at 155–200.

nothing? The Justices spent much of oral argument searching for how to tell this part of the story.[720]

One Justice, however, seemed particularly keen to disrupt the narrative. In contrast to Justice Kagan, for example, who emphasized many parties' belief that the deal was "the best that they can get,"[721] Justice Jackson probed why the Court had to accept that framing. What seems "necessary" in this case is only "necessary" because the Sacklers made it so, Justice Jackson noted — because they "have taken the money and are not willing to give it back unless they have this condition."[722]

It was a move that harkened back to her approach to the Court's affirmative action cases in 2023, where she opened her dissent with a reference to the "[g]ulf-sized race-based gaps [in] . . . health, wealth, and well-being of American citizens" that "were created in the distant past, but have indisputably been passed down to the present day through the generations."[723] In other words, hers was a story that began in racialized slavery, not one that began several years ago, when members of the plaintiff student group contemplated applying for admission at elite universities. Justice Jackson's probing questioning in the Purdue bankruptcy case harkened back, as well, to a famous dissent from forty years earlier, in the standing/police violence case *City of Los Angeles v. Lyons*.[724] There, dissenting Justice Marshall countered the majority's brisk and sterile statement of the facts[725] with a detailed, gritty narrative of plaintiff Adolph Lyons's interaction with the Los Angeles Police Department (LAPD) — starting with officers pulling Lyons over for a burned-out taillight and ending with Lyons "lying face down on the ground, choking, gasping for air, . . . spitting up blood and dirt," and having "urinated and defecated."[726] Justice Marshall then linked Lyons's experience to those of the sixteen people who had died following the use of LAPD chokeholds in the recent past, twelve of whom were Black men.[727]

In an interesting twist, Justice Jackson's version of the Purdue Pharma bankruptcy story did not end up in a dissent. Rather, it anchored the majority opinion, authored by Justice Gorsuch. Writing for himself and Justices Thomas, Alito, Barrett, and Jackson, Justice

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[720] *See generally* Transcript of Oral Argument, *Harrington*, 144 S. Ct. 2071 (No. 23-124), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/23-124_h315.pdf [https://perma.cc/Y6BW-HXRA].

[721] *Id.* at 22 ("It's overwhelming, the support for this deal, and among people who have no love for the Sacklers, among people who think that the Sacklers are pretty much the worst people on earth, they've negotiated a deal which they think is the best that they can get.").

[722] *Id.* at 68; *see also id.* at 81.

[723] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2263 (2023) (Jackson, J., dissenting).

[724] 461 U.S. 95 (1983).

[725] *Id.* at 97–98.

[726] *Id.* at 114–15 (Marshall, J., dissenting).

[727] *Id.* at 115–16.

Gorsuch deemed the proposed bankruptcy settlement inconsistent with the best reading of the Bankruptcy Code.[728] It was a textualist opinion, but one that heavily emphasized the Sackler family's role in constructing this supposedly best possible deal. The opinion detailed the family's long-running and strategic "'milking' program,"[729] which "drain[ed] Purdue's total assets by 75%" between 2008 and 2016 and left the company in the "'weakened financial' state" that preceded its bankruptcy filing.[730] The opinion also emphasized the Sacklers' desire to achieve "[their own] goals"[731] via the bankruptcy process, by leveraging the funds that they had "milk[ed]" in prior years.[732]

There is something that feels significant about the Court's newest member, author of no "big" majority opinions in the 2023 Term, helping to shift the official narrative in a landmark case. But the broader and more important lesson comes from Justice Jackson's observations about the way that power constructs impossibility. In many contexts, we hear versions of the assertion that the deal is "the best that they can get." We are told that everyone agrees, and that although other things can be debated, this one cannot. But is all of that true? And if true, *who made it so*?[733]

Theologian Walter Brueggemann famously pursued a similar line of thought in *The Prophetic Imagination*.[734] Analyzing the Old Testament, Brueggemann found in the pharaohs, kings, and emperors of the ages a shared determination to control their subjects' understanding of the possible.[735] They would do so by making their own vision of the future "the only thinkable one."[736]

Brueggemann's ultimate interest was not kings, however, but prophets. "[T]he vocation of the prophet," Brueggemann argued, is "to keep alive the ministry of imagination" by persistently "conjuring and proposing" alternatives.[737] Consider the biblical prophet Ezekiel, who spoke of seeing a "valley . . . full of bones" — dead, dead, dead — and

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[728] *See* Harrington v. Purdue Pharma L.P., 144 S. Ct. 2071, 2081–86 (2024).

[729] *Id.* at 2078 (quoting *In re* Purdue Pharma L.P., 635 B.R. 26, 57 (Bankr. S.D.N.Y. 2021)).

[730] *Id.* at 2079 (quoting *In re* Purdue Pharma L.P., 69 F.4th 45, 59 (2d Cir. 2023)).

[731] *Id.* (alteration in original) (quoting Testimony of David Sackler at 35, *In re* Purdue Pharma L.P., No. 19-23649 (Bankr. S.D.N.Y. Aug. 18, 2021), ECF No. 3599).

[732] *Id.* at 2078 (quoting *In re* Purdue Pharma L.P., 635 B.R. at 57).

[733] Professor Martha Nussbaum has made a similar point, in the context of discussing the limits of cost-benefit analysis. "[S]ome things are exceedingly costly at the present time because of past injustice, or corruption, or laziness"; "keeping our eyes on the costs should not be permitted to deter us from asking why something that seems quite important is, or has become, terribly costly: *who has put the costs up so high?*" Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1035 (2000) (emphasis added).

[734] WALTER BRUEGGEMANN, THE PROPHETIC IMAGINATION 37 (40th Anniversary ed. 2018).

[735] *Id.*

[736] *Id.* at 40.

[737] *Id.*; *see also* Cronon, *supra* note 312, at 1369 ("[W]e use our histories to remember ourselves, just as we use our prophecies as tools for exploring what we do or do not wish to become.").

then envisioned a breath of life.[738] Or recall the modern-day prophet Dr. Martin Luther King, Jr., who amidst deep expressions of hatred, saw "justice roll[ing] down like waters, and righteousness like a mighty stream."[739]

Few of us understand ourselves as prophets, but if there is anything that this nation's "history and tradition" suggests, it is the danger of only one thinkable future, urged on us by a king. Building from this insight, we all might look closely at a Court that many commentators have now described in kingly or imperial terms.[740] And we might all reflect critically upon the *work* — of curation, narration, and erasure — that creates and empowers this "king's" particular vision. Such has been the aspiration of this Foreword.

From there, others of us might try to "think" different futures, committing ourselves to Brueggemann's "ministry of imagination,"[741] or what Professor Jerome Bruner calls the "art of the possible."[742] That project is much bigger than this Foreword, but in the spirit of Robert Cover and his intellectual forebears and descendants,[743] I celebrate its place in the American legal tradition. This Court, this Constitution, these laws, their distributions — are they the best that we can get?

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738 *Ezekiel* 37:1–10.

739 Martin Luther King, Jr., I Have a Dream Speech at the Lincoln Memorial (Aug. 28, 1963) (transcript available at https://www.npr.org/transcripts/122701268 [https://perma.cc/AM6Q-49TL]) (drawing on *Amos* 5:24).

740 *See, e.g.*, Lemley, *supra* note 341 at 113–14; Shaw, *supra* note 535.

741 BRUEGGEMANN, *supra* note 734, at 40.

742 BRUNER, *supra* note 49, at 94.

743 *See generally, e.g.*, Cover, *supra* note 325; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Rahman, *supra* note 556; Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 3 (2019); Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703 (2019); Britton-Purdy et al., *supra* note 76; Blackhawk, *supra* note 612.