CHECKS, BALANCES, AND CHALLENGES TO THE SUPREMACY OF THE SUPREME COURT

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INTRODUCTION

The Supreme Court is one of the most powerful institutions in the Federal Government, but it's quickly losing its primary source of influence. While Congress derives power from its financial control over government, and the Executive Branch derives power from its military and regulatory control over government, the Court's power to make binding legal decisions derives from its perceived legitimacy.[1] In most cases, the American public does not honor the Court's decisions because of any pressure that the Court could exert. They honor the Court's decisions because they recognize that the Constitution has delegated an essential power to the Court, and they trust that the justices are exercising that power responsibly. Unfortunately for the justices, that legitimacy has decreased markedly, with only 27% of respondents in a 2023 poll placing 'a great deal' or 'quite a lot' of confidence in the Court.[2]

A legitimacy crisis seems to be brewing in the Court, and in order to maintain their authority, the Court will need to resist acting in ways that continue to erode public confidence.[3] Even

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[1] *See* Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153 (2013). *See also* Stephen Breyer, *The Supreme Court of the United States: Power and Counter-Power*, RÉVUE EUROPÉNNE DU DROIT: GOVERNING GLOBALIZATION, Aug. 2021, at 80-87, https://geopolitique.eu/en/articles/the-supreme-court-of-the-united-states-power-and-counter-power/.

[2] *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx (last visited Oct. 27, 2024).

[3] Shortly before the writing of this article, the Court faced a wave of headlines unfavorably characterizing some of the justices' personal relationships with wealthy political donors, and chastising the justices for failing to recuse from cases that present apparent conflicts of interest. So far, at least a third of the Court has been the target of such allegations. Chief Justice Roberts was criticized for failing to recuse from a case where his wife had a close professional relationship with advocates arguing before the Court. *See* Steve Eder, *At the Supreme Court, Ethics Questions Over a Spouse's Business Ties*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/us/john-roberts-jane-sullivan-roberts.html (discussing a colleague of Chief Justice Roberts' wife Jane (a

if the justices can cure their ethical lapses, further threats to institutional legitimacy come from the other branches of government. There are numerous examples of the political branches disregarding, repudiating, or trying to avoid orders issued by the Court, dating back to the early Nineteenth Century. While these incidents were largely isolated throughout history, some anticipate a disobedient trend emerging.[4]

In fact, as of this writing, two separate governors are currently acting in direct and open opposition to very clear directives from the Court. In Florida, Governor Ron DeSantis has signed legislation that would "subject child rapists to the death penalty."[5] While a state government has considerable power to determine the penalties for state law crimes, the Court ruled in

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legal recruiter who earned six figure commissions for placing attorneys in law firms that argue before the Supreme Court) whom expressed concern to the Justice Department and Congress about potential conflicts of interest). Justice Thomas and Justice Alito have both been criticized for failing to recuse from cases where close personal friends, who had funded lavish vacations with those justices, had some stake in the resolution of cases before the Court. *See generally* Joshua Kaplan et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; *See also* Press Release, Senator Sheldon Whitehouse, Whitehouse Lodges Ethics Complaint Against Supreme Court Justice Samuel Alito (Sep. 5, 2023) (on file with author).

[4] While it may not be exhaustive, the historical research informing this Note identified two instances of disobedience between 1800 and 1900 and one instance between 1900 and 2000. An acceleration is observed when this is compared with three instances of disobedience in the 24 years since 2000. Including the following discussion of current events in Florida and Texas, there are five instances of disobedience identified since 2000. *See* Ryan Doerfler & Samuel Moyn, *We Are Already Defying the Supreme Court*, DISSENT MAGAZINE, Winter 2024, https://www.dissentmagazine.org/article/we-are-already-defying-the-supreme-court/. Accompanying this increased frequency, Republican officials have begun signaling their resistance to the Court. *See* Aaron Blake, *Republicans now say it might be okay to ignore the Supreme Court*, WASH. POST (Jan. 29, 2024), https://www.washingtonpost.com/politics/2024/01/29/republicans-now-say-it-might-be-okay-ignore-supreme-court/.

[5] Press Release, Office of the Governor of Florida, Governor Ron DeSantis Signs Third Consecutive Anti-Crime, Pro-Public Safety Legislative Package, (May 1, 2023) (on file with author).

2008 that subjecting a sex offender under similar circumstances to the death penalty violates the Eighth Amendment's protection against cruel and unusual punishment.[6] In that case, the Court ruled that the death penalty represented an excessive punishment for sex crimes unless the crime causes the victim's death.[7] The Florida government knew that their actions would disobey the Court's interpretation of the Eighth Amendment's limitations; in a press release announcing the new law, Governor DeSantis's office vowed "to overrule judicial precedents which have unjustly shielded child rapists from the death penalty."[8] Florida's enactment of this legislation was not merely an empty threat to dissuade child predation; prosecutors have already begun asking Florida courts for the death penalty in cases where the defendant is accused of non-fatal sexual battery against a child.[9]

In Texas, Governor Greg Abbott has openly violated a recent decision relating to the authority of state and federal agents over the border between the United States and Mexico.[10] In that case, Texas officials installed barbed wire on the northern bank of the Rio Grande in an area commonly used by undocumented immigrants to enter the United States, but federal agents with Customs and Border Patrol routinely cut through this fence to render medical attention to immigrants who get stuck in the river and need help.[11] While this case was working its way up the appellate system, a group of migrants

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[6] Kennedy v. Louisiana, 554 U.S. 407 (2008).
[7] *Id.* at 421.
[8] Office of the Governor of Florida, *supra* note 5.
[9] Dan Sullivan & Romy Ellenbogen, *Florida Seeks Death Penalty in Lake County Sex Abuse Case Under New Law*, TAMPA BAY TIMES (Dec. 14, 2023), https://www.tampabay.com/news/crime/2023/12/14/florida-death-penalty-child-rape-law-desantis-lake-county/.
[10] Dep't of Homeland Sec. v. Texas, 144 S. Ct. 715 (2024).
[11] *See* Mark Sherman & Paul J. Weber, *Supreme Court Allows Federal Agents to Cut Razor Wire Texas Installed on US-Mexico Border*, ASSOCIATED PRESS (Jan. 22, 2024), https://apnews.com/article/supreme-court-immigration-texas-razor-wire-9daef6bd316211b6633ece718e505187.

drowned in the area.[12] Federal officials maintain that Texas law enforcement physically prevented them from removing the wire and rendering lifesaving assistance, although this is disputed by the Texas Government, who claims that the migrants were already deceased when Federal agents arrived.[13]

Regardless of that factual dispute, the Court summarily ruled that Federal officials can remove the barbed wire while the merits of the case are litigated.[14] Like his counterpart in Florida, Governor Abbott is contesting the constitutional interpretation favored by the Court. In a statement, Governor Abbott minimized the effect of the Supremacy Clause, which federal officials argue governs the case, and instead argued that a constitutional provision "acknowledge[ing] 'the States' sovereign interest in protecting their borders" is the "supreme law of the land."[15] In both the Florida and Texas cases, officials from various executive branches seem to declare that they, rather than the U.S. Supreme Court, are correctly interpreting what the law says.

There are obvious benefits to imposing the strongest possible deterrent to child predation, and States can have legitimate sovereignty concerns about Federal immigration policy. Notwithstanding the merits of these policies, there could be significant constitutional ramifications to this sort of recalcitrance. It has long been held that it is "emphatically the province and duty of the judicial department to say what the law is."[16] However, by disobeying the Court's commands, the other

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[12] Colbi Edmonds, *3 Migrants, Including 2 Children, Drown Near Texas Border*, N.Y. TIMES (Jan. 14, 2024), https://www.nytimes.com/2024/01/14/us/migrants-drown-texas-dispute.html.

[13] *Id.*

[14] Adam Liptak, *Supreme Court Backs Biden in Dispute With Texas Over Border Barrier*, N.Y. TIMES (Jan. 22, 2024), https://www.nytimes.com/2024/01/22/us/politics/supreme-court-texas-border-barbed-wire.html.

[15] Press Release, Office of the Governor of Texas, Statement on Texas' Constitutional Right to Self-Defense (Jan. 24, 2024) (on file with author).

[16] Marbury v. Madison, 5 U.S. 137, 177 (1803); Cooper v. Aaron, 358 U.S. 1, 18 (1958); *See also* Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973); Lowe

branches assert, at least implicitly, that the Court is incorrect in their decision. How can the Court's legitimacy survive if its primary constitutional function is being disregarded by the rest of government? The system of checks and balances created by the Constitution strikes a delicate balance of federal power,[17] and removing the Court's influence from that system leads to the risk that one of the remaining branches will accumulate power excessively. By second-guessing the Court's constitutional interpretation, these governors purport to assume some judicial power in addition to and in excess of their executive power. By analyzing similar cases throughout history, this Note attempts to suggest how this power struggle will be resolved.

Part I of this Note will analyze six cases throughout American history in which clear, unambiguous commands by the Supreme Court were disobeyed, repudiated, or ignored by the entities they sought to regulate. This analysis will include the aftermath of each of these incidents, considering the effect that these incidents had on the Court and the commanded entities. In each of these cases, the political branch's disobedience was widely publicized, either in newspaper headlines, or through provocation by the disobedient officials themselves. This carries potential constitutional implications; seeing the Court as a disrespected, disobeyed institution diminishes the public's perception of the Court's legitimate authority, which in turn diminishes the Court's institutional strength.

Part II will draw a distinction between the Court's constitutional interpretation and their statutory interpretation. This Note will reach the conclusion that the Court's statutory interpretation, while worthy of deference, does not need to be the final word. Numerous examples of Congress modifying statutes to circumvent unfavorable Court opinions suggest that

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v. SEC, 472 U.S. 181, 230 (1985); Clinton v. Jones, 520 U.S. 681, 703 (1997); Georgia v. Pub. Res. Org. Inc., 590 U.S. 255, 293 (2020) (Ginsburg, R., dissenting).

[17] Aziz Huq, *Twelve Steps to Restore Checks and Balances*, BRENNAN CENTER FOR JUSTICE (Jan. 1, 2008), https://www.brennancenter.org/our-work/research-reports/twelve-steps-restore-checks-and-balances.

the Constitutional order survives even if the political branches were more direct in their statutory circumvention.

On the other hand, this Note will conclude that the Court's constitutional interpretation should be given absolute deference. Unless there is political appetite to abolish the Court through constitutional amendment, it must serve its constitutional role within the government.[18] Disregarding both the Court's constitutional and statutory interpretations could create a vacuum around the judicial power and could risk either Congress or the Executive assuming that power and accumulating a problematic volume of influence over the government. The power to resolve ambiguities in constitutional interpretation, which cannot be so easily modified by the political branches, deserves the respect of the political branches and (depending on the justices' behavior) deserves legitimacy amongst the public as well.

Part III will apply this analysis to a case that was recently decided by the Court. Taking into consideration the political, legal, and institutional impacts of prior disobedience, this section will discuss the hypothetical implications that would arise if the president were to disobey a loss at the Court. Specifically, this section will consider *Biden v. Nebraska*[19], in which the Supreme Court ruled that the Secretary of Education lacked statutory authority to enact a broad program of student loan forgiveness. Like most of the disobedient officials discussed in Part I, President Biden has staked considerable political capital on a program that was foreclosed by the Court in *Nebraska*, and this section will use past examples to analyze the impacts that such disobedience could have on the institutional legitimacy of the Court, as well as the political and

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[18] *See Marbury*, 5 U.S. at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."). Following Chief Justice Marshall's logic, Article III (which establishes the Court and grants it jurisdiction) cannot be without effect. There must therefore be a Supreme Court that exercises the judicial powers enumerated by the Constitution.

[19] 600 U.S. 477 (2023).

legal legitimacy of any student loan forgiveness taken in disobedience of the Court's decision.

I

A. Worcester v. Georgia

Early in U.S. history, a considerable amount of federal litigation involved tribal law, and the proper constitutional role for Native American tribes to occupy. The Constitution implies that Native tribes aren't categorized as States, nor are they categorized as foreign nations,[20] but it never clearly addresses what role tribes *should* play within the Constitutional system. In the early nineteenth century, Congress established the bounds of Native land and prescribed conditions governing interactions between the government and the tribes through treaties Congress then ratified.[21] That Congress defined this relationship through treaty implies that the tribes were not bound by American law; if they were, the government could compel desired conduct through statute, rather than exchanging concessions for desired conduct in consideration of a treaty.

A prominent native tribe that entered into treaties with the federal government was the Cherokee Nation, whose territory spans much of the southeastern United States, including much of Georgia. Georgia passed a law that would require non-Natives to obtain a license before living on a reservation and convicted a Vermont citizen residing in Cherokee territory for violating this law.[22]

The defendant argued that he was outside the jurisdiction of the Georgia legal system; he was a resident of the Cherokee Nation, there with the permission of the tribe and the

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[20] U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have Power . . .] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

[21] *American Indian Treaties*, NATIONAL ARCHIVES (June 22, 2022), https://www.archives.gov/research/native-americans/treaties (last visited Oct. 31, 2024).

[22] Worcester v. Georgia, 31 U.S. 515, 537 (1832).

federal government, and the Cherokee Nation enjoyed sovereignty over the territory in question.[23] The Supreme Court agreed, holding that Georgia's law violated the Cherokee Nation's sovereignty as contemplated by the Constitution and codified by treaty.[24]

This decision enraged President Andrew Jackson, who had previously informed Congress of his desire to "[open] the whole territory between Tennessee to the north and Louisiana to the south to the settlement of the whites," a swath of land that includes much of the Cherokee territory in Western Georgia.[25] Jackson, along with allies in Georgia, initially refused to enforce the ruling.[26]

Jackson's reading of the Constitution treats native tribes differently than the reading favored by the Court. The Court interprets Article I, Section 8 to confer sovereignty upon native tribes, which would necessarily mean the State of Georgia would be unable to bind the territory through its laws. Instead, the states would need to offer something to the tribes in exchange for leaving the land Jackson desired.

Jackson publicly railed against this interpretation, and some of his political allies did as well.[27] After a few years where his anger failed to move the needle on native sovereignty, the President acknowledged the Court's supreme interpretive authority and began working on Plan B.[28] Jackson's Plan B would ultimately be the Trail of Tears, under which members of the Cherokee, Muscogee, Seminole, Chickasaw, and Choctaw nations were forced to leave their land in and around Georgia. While this seems like a victory for Jackson, the program was

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[23] *Id.* at 538; *Worcester v. Georgia*, BRITANNICA (Mar. 4, 2024), https://www.britannica.com/topic/Worcester-v-Georgia.
[24] *Worcester,* 31 U.S. at 561.
[25] President Andrew Jackson, Speech to Congress on Indian Removal (Dec. 6, 1830) (transcript available in the Nat. Park Serv. Teaching with Museums Collection).
[26] *Worcester v. Georgia*, BRITANNICA (Mar. 4, 2024), https://www.britannica.com/topic/Worcester-v-Georgia.
[27] *See* Jeffrey Rosen, *Court History*, PBS (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/antebellum/history2.html.
[28] *See* Jackson, *supra* note 25.

probably costlier than Jackson would have liked. The program required the Government to offer substantial plots of land west of the Mississippi to the displaced Native tribes.[29] At the time, this territory had not acceded to the United States, but it would nevertheless provide an obstacle to the westward expansion envisioned by the proponents of Manifest Destiny, such as Jackson.

Regardless of the eventual displacement of Native Americans, the true point of disagreement in *Worcester* was whether they should be given sovereign rights. On that point, Jackson's fierce opposition to *Worcester* would ultimately prove unsuccessful. Despite his outrage at the Court's decision, Jackson stopped trying to impose U.S. law on Native tribes and listened when he was forbade from expelling Natives with no consideration for their future placement.[30]

B. Brown v. Board of Education

One of the most widely publicized Supreme Court decisions in the institution's history came at the onset of the Civil Rights Movement. Before public transit and lunch counters were desegregated, Black students sought admission to exclusively white schools.[31] Under the long-standing doctrine of 'separate but equal,' state and local governments had maintained separate schools on a racially-segregated basis that the states argued were functionally equal in quality.[32] The petitioners alleged that the schools were inherently unequal[33]

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[29] *Preludes to the Trail of Tears*, NATIONAL PARK SERVICE (Sep. 5, 2021), https://www.nps.gov/articles/000/preludes-trail-of-tears.htm.
[30] Rosen, *supra* note 27.
[31] Brown v. Bd. of Educ., 347 U.S. 483, 487 (1954).
[32] *Id*. at 483 n.1.
[33] Apart from the disparate educational outcomes between a higher quality White school and a lower quality Black school, this anti-segregation argument proceeds by outlining the psychological impacts of othering Black students at such a young, impressionable age. Citing dictum in one of the lower court decisions, Chief Justice Warren highlighted this principle most clearly in the majority opinion, writing:

and could not possibly be made equal, thereby denying students at segregated schools equal protection under the law.[34] The Supreme Court ultimately agreed, holding that segregation has no place in the field of public education[35] and that the doctrine of 'separate but equal' should be rejected.[36]

Brown was a consolidation of cases from Kansas, South Carolina, Virginia, and Delaware, but 17 states required racial segregation in public schools when the *Brown* decision was issued.[37] One of these states was Alabama, where multiple state officials sought to continue segregation, notwithstanding the Supreme Court's clear repudiation of the practice. The Alabama Board of Education noted that no Alabama schools were sued in *Brown*, so while the decision rendered segregation unconstitutional, it did not directly command Alabama to integrate their schools. Relying on this argument, Governor Seth Gordon Persons introduced a resolution to the state Board which would continue segregation until the Alabama school system itself was directly implicated in a lawsuit.[38]

After Governor Parsons' tenure had ended, subsequent governors continued his fight. Governor George Wallace[39]

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."
> *Id.* at 494.

[34] *Id.* at 488.
[35] *Id.* at 495.
[36] *Brown*, 347 U.S. at 495.
[37] P. SCOTT CORBETT ET. AL, U.S. HISTORY, at 775 fig. 28.18 (2014) (ebook).
[38] *After Brown Ruling, Alabama Education Board Votes Unanimously to Continue Enforcing Public School Segregation*, EQUAL JUSTICE INITIATIVE, https://calendar.eji.org/racial-injustice/jul/09 (last visited Oct. 31, 2024).
[39] Governor George C. Wallace, Inaugural Address (Jan. 14, 1963). Governor Wallace fiercely disagreed with Chief Justice Warren's repudiation of segregation. In his inaugural address, delivered nine years after the

staged the famous "Stand in the Schoolhouse Door," in which he personally blocked the entrance to an auditorium at the University of Alabama to prevent the matriculation of two Black students.[40]

The Alabama Legislature took another approach. State Representative Henry Beatty devised a scheme wherein Alabama's public schools would be integrated, but separate, tuition-charging private schools (referred to as segregation academies) would be established as well.[41] Under this proposal, public schools would be reserved for students who are unable to pay for private education. However, any white student who demonstrated financial inability to pay for a segregation academy could have their tuition waived.[42]

Perhaps the most widely publicized repudiation of *Brown* came from Arkansas, where nine Black students had enrolled at the all-white Central High School in Little Rock. Governor Orval Eugene Faubus publicly declared his intent to defy *Brown* and dispatched the Arkansas National Guard to block the students' entrance into the school.[43]

Brown decision, the Governor famously declared "segregation now, segregation tomorrow, segregation forever."

[40] Warren K. Leffler, *Governor George Wallace Attempting to Block Integration at the University of Alabama,* (photograph), *in* U.S. NEWS & WORLD REPORT (June 11, 1963) (on file with Libr. Of Cong.)

[41] The *Brown* decision used language that limited its holding to the public education context, so private schools were not subject to its mandate. *Brown*, 347 U.S. at 495. This was a loophole that would take a little longer to close. Runyon v. McCrary, 427 U.S. 160, 170-73 (1976) (analyzing the applicability of 42 U.S.C. § 1981 to private contracts, finding § 1981 violations when private contracts involve racial discrimination, and identifying such a violation in the discriminatory private school scheme at-issue).

[42] Marilyn Grady & Sharon C. Hoffman, *Segregation Academies Then and School Choice Configurations Today in Deep South States,* CONTEMP. ISSUES IN EDUC. LEADERSHIP 2:2 (2018), at 9.

[43] *Little Rock School Desegregation*, STANFORD UNIVERSITY: MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, https://kinginstitute.stanford.edu/little-rock-school-desegregation (last visited Oct. 31, 2024).

In the end, neither Alabama nor Arkansas' attempts to defy *Brown* were successful. Governor Wallace's Stand in the Schoolhouse Door was ultimately broken by the Army 2nd Division, which President Kennedy had sent to enforce the University's desegregation.[44] In addition, segregation in private schools was found unconstitutional in 1976, severely limiting the segregation academies' abilities to circumvent *Brown*.

In Arkansas, President Eisenhower sent the 101st Airborne Division to Little Rock to escort the Little Rock Nine into their school.[45] Enraged by this, Governor Faubus would end up closing all public schools for a short time; they were reopened (on an integrated basis) in 1960.[46]

At first, the opposition to *Brown* seems insurmountable; a locally unpopular decision was published and high-ranking state officials resisted its enforcement with every ounce of their power. The governors' intransigence was incredibly popular with local voters, providing political motivation to back up the governors' resistance. However, those governors were not the only ones responsible for enforcing the law in their states. Presidents Eisenhower and Kennedy were too devoted to the Constitution, as interpreted by the Court to guarantee the right to integrated education. They had the ability to overcome the governors' influence, and if the governors were not going to enforce *Brown* in their states, the presidents were going to do it for them.

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[44] Exec. Order No. 11,111, 28 Fed. Reg. 5709 (June 11, 1963).

[45] Lonnie Bunch, *The Little Rock Nine*, THE SMITHSONIAN INSTITUTE: NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE, https://nmaahc.si.edu/explore/stories/little-rock-nine (last visited Oct. 28, 2024).

[46] Sondra Gordy, *Empty Classrooms, Empty Hearts: Little Rock Secondary Teachers, 1958-1959*, 56 THE ARKANSAS HISTORICAL QUARTERLY, 427, 442, n.4 (1997) (expressing unhappiness with the academic disruption that accompanies a year of school closures, voters ousted segregationists from the Board of Education. The new board members voted to reopen schools, in compliance with *Brown*.)

C. Massachusetts v. EPA

Unlike the Presidents' actions following *Brown*, the Executive Branch is unlikely to force compliance through military action when that Branch is itself the target of the Court's orders. The Environmental Protection Agency (EPA) is within the Executive Branch, and during the Administration of President George W. Bush, the EPA issued a determination in which it concluded that certain motor vehicle emissions were not regulatable, arguing that they were outside the scope of the Clean Air Act.[47] State governments challenged this determination[48], and the case made its way up to the Supreme Court, who strongly disagreed with the EPA's characterization of these greenhouse gas emissions.[49] Justice Stevens' opinion held that the carbon emissions in-question were clearly within the Clean Air Act's broad definition of a pollutant. Further, even though the Congress that passed the Clean Air Act could not have foreseen the environmental impacts of greenhouse gases, there was no apparent Congressional intent to prevent the EPA from addressing global threats not contemplated by the Act's framers. Rather, Congress intentionally crafted the Act with flexibility to address unforeseen threats.[50]

The Bush Administration tried to limit the scope of the Court's holding, reframing it to argue that the decision allowed the EPA to decide whether to regulate carbon dioxide. Ultimately, the Agency would not take further action to regulate carbon dioxide.[51] In press conferences and memoranda, the Agency continued to invoke the Administrator's 'discretion' in

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[47] Memorandum from EPA General Counsel Robert E. Fabricant to Acting EPA Administrator Marianne L. Horinko (Aug. 28, 2003) (on file with author).
[48] Massachusetts v. EPA, 549 U.S. 497, 514 (2007).
[49] *Id.* at 528.
[50] *Id.* at 532.
[51] *See* Ben Lieberman, *The EPA's Prudent Response to Massachusetts v. EPA*, THE HERITAGE FOUNDATION (Mar. 28, 2008), https://www.heritage.org/environment/report/the-epas-prudent-response-massachusetts-v-epa.

enforcing the Clean Air Act, and continuously failed to consider carbon dioxide as a pollutant under the Act. Luckily for Bush Administration EPA officials, the *Massachusetts* decision came down in April 2007, and their terms were set to expire in January 2009.[52] They would most likely be gone by the time another challenge made its way to the Supreme Court. These officials ran out the clock for their remaining months until the Obama Administration took over.

Early on in his term, President Obama reversed EPA's prior determination regarding the pollutive nature (and regulatability) of carbon dioxide. Under his Administration, it was determined that carbon dioxide was a pollutant, and resources would be directed so that EPA could regulate it pursuant to the provisions of the Clean Air Act, and the commands of Justice Stevens' opinion in *Massachusetts*.[53]

Here there were no direct consequences for twisting the Court's words; both President Bush and his EPA Administrator were able to serve the remainder of their terms before leaving government on good terms. However, the effect of their actions did not last. Sometimes officials from other areas of government force compliance, as in the aftermath to *Worcester* and *Brown*.[54] In this case, the recalcitrant officials left office and their replacements corrected EPA's interpretation of the Act.[55] Once again, the law as interpreted by the Court prevails, thanks to commitment within the Obama Administration for the principles of checks and balances.

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[52] Kate Sheppard, *Bush Administration Decides to Run Out the Clock on Regulating Greenhouse-Gas Emissions*, GRIST MAG. (July 12, 2008), https://grist.org/article/countdown-to-crawford/.

[53] Lawrence Hurley & Elana Schor, *Congress Emits Half-Truths in Spin War Over* Mass. v. EPA, N.Y. TIMES (Mar. 17, 2011), https://archive.nytimes.com/www.nytimes.com/gwire/2011/03/17/17greenwire-congress-emits-half-truths-in-spin-war-over-im-12380.html?ref=earth.

[54] *Worcester,* 31 U.S. at 561; Leffler, *supra* note 40; Bunch, *supra* note 45.

[55] Hurley & Schor, *supra* note 53.

D. Allen v. Milligan

This phenomenon has recently occurred in the election context. After the 2020 census, Alabama released a newly-redistricted map, in which voters of color comprised a majority in only one of the state's seven Congressional districts.[56] Voters sued, arguing that the state's demographics could support two majority-minority districts, and any map that did not include that many majority-minority districts would violate the race-proportionality requirements in § 2 of the Voting Rights Act of 1965.[57]

In defense of its electoral maps, the State of Alabama argued that it would not consider the racial composition of its districts, since "a legislature cannot make race a 'more important thing' than race-neutral considerations "to create a majority-minority district.'"[58] Alabama read the Voting Rights Act to require states to draw congressional lines based on "principles such as maintaining communities of interest and traditional boundaries"[59] before considering race.

The Court disagreed. Writing for the majority, Chief Justice Roberts noted that communities of interest could come

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[56] Kyle Gassiott, *Court Ruling on Black Political Power in Alabama Could Affect Maps in Other States*, NPR (June 9, 2023, 5:00 AM), https://www.npr.org/2023/06/09/1181211850/alabama-redistricting-supreme-court-ruling-reaction.

[57] *See Id.* (§ 2 provides: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

[58] Emergency Application for Administrative Stay at 30-31, Merrill v. Milligan, 142 S. Ct. 879 (2022) (No. 21-1086), (citing Cooper v. Harris, 581 U.S. 285, 300 (2017)).

[59] *See* Allen v. Milligan 599 U.S. 1, 19 (2022) (citing Singleton v. Merrill, 582 F.Supp.3d 924, 1012 (N.D. Ala. 2022) (While the stay petition did not define either of these terms, the Court helpfully does so. A 'community of interest' is defined under Alabama law as an "area with recognized similarities of interest, including but not limited to ethnic, racial, economic, tribal, social, geographic, or historical identities."). *Id.* at 33 (as for 'traditional boundaries' guideline, the Court reads Alabama's evidence to suggest this refers to the preservation of municipal boundaries).

from similarities in racial identity,[60] and held that "the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[61] Under the State's proposed map, voting districts were not 'equally open' because "…minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter."[62]

Alabama's position at the Court was strengthened by a unique theory of constitutional interpretation gaining prevalence at the time. The Constitution permits state legislatures to prescribe the times, places, and manner of administering federal elections, while leaving Congress the option to make or alter such regulations.[63] Conservative legal activists advanced the Independent State Legislature Theory, under which the legislative power enumerated by the 'Times, Places and Manners' clause is plenary and insulated from judicial review.[64] Accepting this argument, it appears as though the power of the Alabama legislature is unchecked by the courts. Unfortunately for the plaintiffs, many had accepted this argument; concurrent litigation had reached the Court over the North Carolina judiciary's ability, or lack thereof, to challenge the legislature's electoral decisions.[65]

This may have emboldened Alabama. The new maps that the State produced failed to cure the racial proportionality concerns that ultimately led the original maps to be struck down.[66] A three-judge panel of the U.S. District Court for the

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[60] *See id.* at 19.
[61] *Id.* at 24-25 (citing 52 U.S.C. § 10301).
[62] *Id.*
[63] U.S. CONST. art. I, § 4, cl. 1.
[64] Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501, 511, 545 (2021).
[65] Moore v. Harper, 600 U.S. 1, 22 (2023).
[66] *See Alabama Lawmakers Refuse to Create a 2nd Majority-Black Congressional District*, NPR (July 21, 2023), https://www.npr.org/2023/07/21/1189494854/alabama-redistricting-

Northern District of Alabama refused to allow the new map to advance; this time, the court invited a special master to propose new, compliant maps.[67] The district court then selected one of these maps and ordered that the Election of 2024 be administered under the map of their choice.[68]

Related, consolidated proceedings have appealed to the Supreme Court, which refused to grant relief against the order.[69] Despite Alabama's attempts to disregard the Court's clear race-proportionality prescription, and its apparently unchecked power to do so in the electoral context, the District Court panel, and later the Supreme Court itself, forced the state back into compliance with the Voting Rights Act.

E. Dred Scott v. Sandford

While the cases explored thus far featured recalcitrant officials being reluctantly brought to compliance, that is not always how these disputes resolve. Another (albeit far less common) possibility is illuminated by *Dred Scott v. Sandford* and *Whole Women's Health v. Jackson.*

In the mid-Nineteenth Century, the most prominent legal battles were fought over the abolition or preservation of slavery. One of the most significant cases illuminating this societal discord arose when a freed slave sued a slaveholder for independence.[70] Writing for the Court, Chief Justice Taney dismissed the case for lack of jurisdiction.[71] Under Taney's reading of the Constitution, Scott was not a citizen and no state

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map-black-districts (after the Court ordered Alabama to enact a new map comprising two majority-minority districts, the new map released by the State continued to include only one such district).

[67] Singleton v. Allen, 690 F. Supp. 3d 1226, 1239 (N.D. Ala. 2023).

[68] *Id.*

[69] Singleton v. Merrill, 2021 U.S. Dist. LEXIS 243058 (N.D. Ala. 2021), *stay denied*, 144 S. Ct. 476 (2021). *See also Moore*, 600 U.S. at 22 (2023) (rejecting the expansive reading of the Independent State Legislature Theory upon which Alabama relied).

[70] *Scott v. Sandford*, 60 U.S. 393 (1857)

[71] *Id.* at 454 (1857).

law could grant him federal citizenship.[72] As such, he was not entitled to bring his claims into federal court.[73]

While he was less outwardly provocative than Jackson, President Lincoln publicly disagreed with the Court's holding in *Dred Scott*. The opinion, in Lincoln's reading, failed to recognize that the promises made by the Declaration of Independence are colorblind, and they should apply to slaves and freedmen just as they apply to White citizens.[74] Lincoln noted two separate functions that the Court serves: to settle the disputes before them, and to indicate how subsequent cases will be decided.[75] *Dred Scott*, according to Lincoln, fit firmly within the first category; the Court decided only the case immediately at bar based on the state of the law at that time, but it did not create any precedent that would bind future decisions. Lincoln argued that public officials were free "to resist wrong and harmful decisions of the Supreme Court and to seek to have them reversed and overturned. That was simply part of the Constitution's system of checks and balances."[76] In his Presidential campaign for the Election of 1860, Lincoln's rhetoric sharply disagreed with the Court's analysis, and when he became President, he began 'resisting' it in his governance.[77]

The *Dred Scott* decision aggravated the rift preceding the Civil War, by "[spurring] the Republican Party to take up the anti-slavery cause with more zeal and determination than

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[72] *Id.* at 406.
[73] *Id.*
[74] President Abraham Lincoln, Speech on the Dred Scott Decision at Springfield (June 26, 1857).
[75] *Id*.
[76] Michael S. Paulsen, *Lincoln Versus Judicial Supremacy*, WASH. POST (May 20, 2015, 8:31 A.M.), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/20/lincoln-versus-judicial-supremacy/.
[77] *See Timeline: Abraham Lincoln and Emancipation*, LIBR. OF CONG., https://www.loc.gov/collections/abraham-lincoln-papers/articles-and-essays/abraham-lincoln-and-emancipation/timeline/ (last visited Oct. 31, 2024) (initially, Lincoln patiently waited for emancipation, lobbying Senators and negotiating the terms of the Emancipation Proclamation.)

ever."[78] Before the decision, neither the Court nor Congress had conclusively declared whether freed slaves would be eventually granted citizenship, and the civil rights that follow. This ambiguity had appeased some abolitionists, who grew radicalized once Chief Justice Taney foreclosed that possibility altogether. The Chief Justice "made the question unavoidable and it is that event that forced the members of Congress, President Lincoln and then President Johnson and eventually the Supreme Court to acknowledge the political presence of millions of people and their [sic] full rights to citizenship of the United States."[79]

President Lincoln had made slavery, and his opposition to the *Dred Scott* decision, a major campaign issue in the Election of 1860. His Republican Party entered the election cycle with a pledge "to bind the nation together as a free-labor society modeled on Northern capitalism, free wage-labor, and the ultimate extinction of slavery."[80] Southern states would not accept this platform, and upon Lincoln's victory, Confederates launched attacks that would grow into the Civil War.[81] The South would attempt secession and the formation of a new nation where they could continue practicing slavery in perpetuity.[82]

After a horrifically bloody war, national debates around slavery and the South's position relative to the rest of the country had been resolved. To prevent the rift at the Mason-Dixon Line from reopening, Congress took swift, permanent action to extend Constitutional rights to former slaves. It took

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[78] Alix Oswald, *The Reaction to the Dred Scott Decision*, 4 VOCES NOVAE 169, 186 (2018).

[79] J. Robert Osborne, *The Thirteenth, Fourteenth and Fifteenth Amendments and the Dred Scott Decision: An Unlikely Stop on the Way to Citizenship*, 3 YALE-NEW HAVEN TCHRS.' INST. 1, 1 (Aug. 2014),.

[80] Michael Burlingame, *Abraham Lincoln: Campaigns and Elections*, THE MILLER CTR. AT THE UNIV OF VA., https://millercenter.org/president/lincoln/campaigns-and-elections (last visited Oct. 31, 2024).

[81] *Civil War Begins*, U.S. SENATE: HIST. HIGHLIGHTS, (Apr. 12, 1861), https://www.senate.gov/artandhistory/history/minute/Civil_War_Begins.htm.

[82] CONST. OF THE CONFEDERATE STATES of 1861, art. IV, § 3(3).

eleven years, but Lincoln's ideas of Civil Rights for all had been realized. This case is different from *Worcester*, *Brown*, *Massachusetts*, and *Allen*; in those cases, the law remained steady, and any opposition to the Court's interpretation of the law failed to result in any widespread departure from the Court's declarations.

In this case, alternatively, the law changed to meet Lincoln's position. While the Court is the ultimate interpreter of the Constitution, it could no longer be said that Lincoln's advocacy against *Dred Scott* was incorrect; the official interpretation of the Constitution had been changed to make his position the correct one. The *Dred Scott* decision had been written into obsolescence.

F. Roe v. Wade; Planned Parenthood v. Casey

In the last half of the 20th Century, the Court found that the constitutional right to privacy encompasses the right of a woman to terminate her pregnancy,[83] and heard considerable litigation on abortion. The petitioner in *Roe* had challenged a total ban on abortions in Texas[84], and the petitioner in *Casey* had challenged five abortion restrictions under Pennsylvania law.[85] The holdings in these cases were similar; *Roe* struck down prohibitions on abortion in the first trimester as presumptively

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[83] Roe v. Wade, 410 U.S. 113, 153 (1973); Planned Parenthood v. Casey, 505 U.S. 833, 845 (1992).

[84] *Roe*, 410 U.S. at 117-20 (explaining the Petitioner's challenge to TEX. CODE CRIM. PROC. ANN. arts. 1191-1194, 1196 (1925)).

[85] Those five abortion restrictions were as follows: 18 PA.C.S. § 3205 required the patient to receive informed consent before an abortion, including certain information which must be given within 24 hours of the procedure; § 3206 required the informed consent of at least one parent when a minor sought an abortion; § 3209 required married patients to sign a statement indicating that they had notified their husband of their plan to abort a pregnancy; §§ 3207(b), 3214(a), and 3214(f) collectively imposed certain reporting requirements on abortion facilities; and § 3203 defined a 'medical emergency' that could excuse compliance with §§ 3205, 3206, and 3209.

invalid[86], and *Casey* struck down regulations that would pose an 'undue burden' on the woman's abortion right before fetal viability.[87]

These were long-standing precedents; *Roe* was valid for 49 years, and *Casey* was valid for 30 years. As the Court grew more conservative, commentators worried that the future of abortion rights was uncertain, and that anxiety ballooned when the Court granted certiorari in *Dobbs v. Jackson Women's Health Organization*.[88] When the question presented in that case was limited to directly challenge *Roe* and *Casey*, it was widely speculated that *Roe* and *Casey* were doomed, and that the decision in *Dobbs* would be the final nail in their coffin.[89]

However, before *Dobbs* was decided, Texas enacted the Texas Heartbeat Act[90] (S.B. 8), which criminalized any abortion performed after the detection of a fetal heartbeat, which the State determined would occur around 6 weeks.[91] The law had an

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[86] *Roe*, 410 U.S. at 164; *Casey*, 505 U.S. at 846, 877.

[87] In *Casey*, Justice O'Connor deferred to scientific experts as to the definition of fetal viability. At the time *Casey* was decided, 23 weeks was generally considered to be the point where fetal viability began. *Casey*, 505 U.S. at 860.

[88] 597 U.S. at 234 (2022).

[89] Robin Marty, *The Supreme Court is Eyeing Roe v. Wade's End with This Mississippi Abortion Ban Case*, NBC NEWS (May 18, 2021, 4:32 AM), https://www.nbcnews.com/think/opinion/supreme-court-eyeing-roe-v-wade-s-end-mississippi-abortion-ncna1267706. The questions presented in the Petition for Writ of Certiorari asked whether pre-viability abortion restrictions were unconstitutional, asked whether doctors have third-party standing to challenge abortion restrictions, and debated the proper standard for analyzing abortion restrictions. The order granting the petition discarded these and limited its grant to the first question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." This question directly implicates the central holding of *Roe* (under which prohibitions on elective abortions were unconstitutional in the first trimester [which ends before viability begins]) and *Casey* (under which all prohibitions on elective abortions before viability are presumptively unconstitutional).

[90] TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West 2021).

[91] Bethany Irvine, *Why "Heartbeat Bill" is a Misleading Name for Texas' Near-Total Abortion Ban*, TEX. TRIB. (Sept. 2, 2021, 4:00 PM), https://www.texastribune.org/2021/09/02/texas-abortion-heartbeat-bill/.

unusual structure; state officials were explicitly prohibited from enforcing the law, but private citizens were authorized to bring an enforcement action against anyone who obtained, performed, or assisted in the administration of an abortion.[92] The law was challenged for clearly violating both *Roe* and *Casey*, which were still valid at the time.

In an opinion by Justice Gorsuch, the Court dismissed the majority of the challenge on the basis that the plaintiffs did not have standing to sue the defendants named.[93] Despite the egregious violation of Supreme Court precedent that S.B. 8 presented, the Court refused to address the merits of the challenge, since standing is a threshold issue which determines "whether the litigant is entitled to have the court decide the merits of the dispute."[94] While *Roe* and *Casey* would only remain operative for another six months, Texas was able to successfully abrogate the rights that those cases protected, in disregard of the authority that the Court possessed in deciding *Roe* and *Casey*.[95]

Jackson did not create any major Constitutional crises, probably because many assumed the Supreme Court was imminently planning to settle the issue of abortion rights for good.[96] However, polling between the issuance of *Jackson* and

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[92] TEX. HEALTH & SAFETY CODE ANN. §§ 171.207(a), 171.208(a)(2)–(3) (West 2021).

[93] Whole Woman's Health v. Jackson, 595 U.S. 30, 51 (2021).

[94] Allen v. Wright, 468 U.S. 737, 750-51 (1984).

[95] The peculiar structure of S.B. 8 led to the finding of a lack of standing. Recall that S.B. 8 deputized private citizens to bring enforcement actions. Another provision of the statute explicitly prohibited state officials from enforcing the law. Given that the Constitution applies only against the government and state actors, challenges to laws that violate constitutional rights may only be brought against a government official charged with enforcing the law. Since S.B. 8 delegated no enforcement authority to most state officials, the threshold question of standing precluded the Court from reaching the merits of the Constitutional challenge in *Jackson*. Litigation was allowed to proceed against some lower-level state officials, but *Dobbs* rendered the case moot before final judgment was issued against any officials.

[96] David G. Savage, *Supreme Court's Conservatives on the Verge of Ending Right to Abortion*, L.A. TIMES (Dec. 15, 2021),

the issuance of *Dobbs* is consistent with approval ratings that had been falling for years.[97]

This case is most analytically similar to *Dred Scott*, 60 U.S. 393 (1857). In both cases, the officials violating precedent were not brought into compliance. Instead, the law being challenged by those officials was changed in their favor. It is not unusual for someone who opposes a decision to bring a lawsuit seeking to overturn it. In those cases, the Court should explain how the law, or at least the Court's interpretation of the law, had changed such that the case should be resolved differently. Here, however, the Court gave little explanation for the inconsistent application of the law that arose from S.B.8. Instead, they dismissed the case on standing and allowed this inconsistency to further diminish their perception of impartiality. While the law was eventually harmonized by *Dobbs* (which created further issues of impartiality, even if it cured the checks and balances and federalism problems *Jackson* created), the period before its harmonization saw numerous headlines and polls that do not bode well for the Court's authoritative legitimacy.[98]

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https://www.latimes.com/politics/story/2021-12-15/supreme-courts-conservatives-on-the-verge-of-ending-right-to-abortion; Ian Millhiser, *It Sure Sounds Like Roe v. Wade is Doomed*, VOX (Dec. 1, 2021), https://www.vox.com/2021/12/1/22811837/supreme-court-roe-wade-abortion-doomed-jackson-womens-health-dobbs-barrett-kavanaugh-roberts.

[97] *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RSCH. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/.

[98] Mark Joseph Stern, *The Supreme Court Overturned Roe v. Wade in the Most Cowardly Manner Imaginable*, SLATE (Sept. 2, 2021), https://slate.com/news-and-politics/2021/09/supreme-court-overturn-roe-wade-texas.html; Barbara A. Perry, Opinion: The Supreme Court is Grievously Wounded, CNN (May 13, 2022), https://www.cnn.com/2022/05/12/opinions/supreme-court-opinion-leak-perry/index.html (noting record-low Supreme Court approval and "suggesting that unpopular decisions [including] on Texas's abortion limitations…were taking a toll."); *Majority Say Let Roe Stand; Scotus Approval Rating Drops*, MONMOUTH UNIV. (May 11, 2022), https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_051122/ (analyzing independent

II

When these cases are analyzed together, a pattern emerges. While the political branches may have initially challenged or disobeyed the spirit or the letter of the decisions they disliked, they would eventually be dragged into compliance. While the judiciary lacks effective measures to enforce its decisions, other, more forceful governmental actors usually compelled this result.

President Jackson's very loud opposition to *Worcester* would not have a permanent effect; while much of the South would end up colonized by Whites (as he desired), Congress and the Court continue to recognize Native tribes as distinct governing bodies, outside the jurisdiction of any of the United States. Laws enacted by Congress or any of the United States, like the Georgia law Jackson supported in *Worcester*, were invalid.

Similar to President Jackson's opposition, President Lincoln's opposition to the Court was largely rhetorical. Lincoln took no action during his presidency to overtly disobey *Dred Scott*, though he was public in his disagreement with the decision. Nevertheless, President Lincoln's dispute with *Dred Scott* was soon resolved by the ratification of the Fourteenth Amendment. Under that Amendment, the promises of liberty outlined in the Declaration of Independence would be made colorblind, just as Lincoln argued they should be.[99]

Brown established a very clear rule: that racial discrimination in public schools is unconstitutional.[100] Active efforts to resist this in Alabama and Arkansas were overcome by the National Guard. Notwithstanding the clarity of this notion, students in Virginia and South Carolina remained segregated until the Court outlined a clear remedy for discrimination, and a delegation of responsibilities that would facilitate the integration of schools whose segregation was deeply rooted.[101]

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polling to find that support for the Supreme Court had markedly decreased among democrats and independents).

[99] President Abraham Lincoln, *supra* note 74.

[100] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[101] Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955).

Once this supplemental decision was issued, the states remaining in disobedience quickly worked toward integration.

President Bush was more active in his non-compliance. Under his Administration, the Solicitor General of the United States argued before the Court that the question of whether a certain chemical posed an environmental threat was a policy consideration, and it was the policy of the Bush Administration that the connection between emissions and climate change was uncertain.[102] The Court's construction of the Clean Air Act, 42 U.S.C. § 4701 *et. seq.*, reached a different conclusion, instead finding that policy considerations cannot play a role in that decision, especially when the evidence of environmental harm is as conclusive as it was in this case.[103] After the decision was issued, the Administrator of the EPA creatively reframed the Court's decision, arguing instead that the decision gave him the authority to determine, irrespective of policy considerations, whether the EPA would regulate greenhouse gases.[104] Bush officials maintained this interpretation of *Massachusetts* until the end of their terms; it was a change in administration that eventually brought EPA into compliance. When President Obama assumed control of the agency, greenhouse gases were quickly determined to be pollutants and were soon enforced under CAA.[105]

The conclusion that the *Allen* court reached was also very clear: the Voting Rights Act requires states to provide an opportunity for voters to elect a congressional delegation that is roughly proportionate to the racial composition of the State.[106] It was not acceptable that Alabama's initial maps included one predominantly Black district, because the state's Black

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[102] *See* Transcript of Oral Argument at 30-31, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).
[103] *Massachusetts*, 549 U.S. at 533-34.
[104] *See* Lieberman, *supra* note 51.
[105] Press Release, U.S. EPA, Greenhouse Gases Threaten Public Health and the Environment (Dec. 07, 2009), (https://www.epa.gov/archive/epapages/newsroom_archive/newsreleases/08d11a451131bca585257685005bf252.html).
[106] Allen v. Milligan, 599 U.S. 1, 24-25 (2023).

population was large enough to warrant representation in two of the seven seats. The District Court panel refused to let Alabama proceed with elections under its unconstitutional maps.

The S.B. 8 abortion restrictions were in open violation of a considerable line of Supreme Court precedent when they were enacted, but they would only remain noncompliant for about six months.[107] In June of 2022, the Supreme Court issued a decision that explicitly overruled both *Roe* and *Casey*.[108] The Court held that the Fourteenth Amendment does not recognize the right to abortion as a privacy interest protected by substantive due process, which freed the States to individually craft abortion legislation, and allowed restrictions to be immediately passed, up to and including complete bans on all abortion.[109] With this change, there was no longer a constitutional problem with Texas' scheme, which only allowed abortions before six weeks. This case is interesting; while each of these political actors would eventually end up in compliance with the Court, that compliance usually involved the political branch reluctantly acquiescing to the Court's orders. Texas, however, stubbornly enforced the six-week limit imposed by S.B. 8. In this case, it was the Court who changed the state of the law, and they did so in a way that would allow S.B. 8 to survive without any constitutional violations.

There is a distinction that separates these cases. Recall that the oppositions to *Worcester*, *Brown*, *Roe* and *Casey*, *Massachusetts*, and *Allen* were all resolved by the political actor's

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[107] Specifically, the right to an elective abortion has been protected as a substantive due process right under the Fourteenth Amendment, as well as the Ninth Amendment's reservation of rights to the people. *See* Planned Parenthood v. Danforth, 428 U.S. 52, 60 (1976); Colautti v. Franklin, 439 U.S. 379, 386 (1979); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 775 (1986); Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[108] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

[109] Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans – Here's What Happens When Roe is Overturned*, THE GUTTMACHER INST. (June 6, 2022), https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned.

acquiescence to the Court, or by a change in the Court's composition that would subsequently vote to change the law. This pattern suggests that opposition to a Court order will eventually be reversed by a different, or subsequent, government actor.

Conversely, the controversy around *Dred Scott* and *Jackson* were resolved by intervening changes in the law itself. The *Dred Scott* Court diverted from the merits of the complaint, and instead ruled that freed slaves were not citizens and had no right to come into court at all. It is this holding that offended Lincoln, as it racially qualified the liberty promised to all by the Constitution. 11 years after *Dred Scott* was decided, the Constitution would be amended to grant citizenship to all persons born or naturalized in the United States, and to compel the equal protection of the law, regardless of race.[110] Had he lived to see the ratification of the Fourteenth Amendment, President Lincoln would not need to acquiesce to the contrary determination of the Court. Unlike Alabama's commitment to segregated schools, or Bush's commitment to selective non-enforcement of CAA, Lincoln's desire that the Constitution apply regardless of race would eventually be realized, but only because Congress amended the Constitution in a manner that vindicated that desire.

Similarly, the Texas Legislature was not ordered to change their application of S.B.8. While they stood firm in their position, the Court changed the state of abortion law to cure the Fourteenth Amendment concerns inherent in S.B.8's promulgation.

This demonstrates an important exception to the supremacy of the Court's legal interpretation. In some circumstances, if a political actor suffers a loss at the Court, they can work to change the law to circumvent the Court's concerns. It cannot be said that Lincoln's opposition is incorrect and that he will be pulled into compliance with *Dred Scott*; the Constitution was changed so that Lincoln's interpretation *is now the correct one*. The Court's mandate over the political branches

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[110] U.S. CONST. amend. XIV, § 1.

is merely to resolve disputes by declaring "what the law is," through constitutional or statutory interpretation.[111] If such a declaration is inconvenient to the political branches, they can make it so that the law interpreted by the Court is no longer in effect. If the Constitution is amended to provide citizenship rights to freedmen, the Court cannot then say that freedmen are constitutionally precluded from citizenship or its inherent rights, and any prior declaration to that effect would be nullified by the Amendment.

If a political actor's conduct is invalidated as illegal by the courts, the politician can garner political support to change the underlying law, authorizing his desired conduct. However, this presents practical challenges. From a political standpoint, it is incredibly difficult to amend the U.S. Constitution.[112] While the Fourteenth Amendment was ratified relatively quickly after *Dred Scott*, proponents for a new constitutional amendment do not have the leverage that they did after the Civil War.[113] Given the increasing political polarization in Congress and state legislatures, the likelihood of an amendment being successfully ratified is extremely low. As a result, a politician who loses at the Court will have a difficult time trying to change the Constitution to support their ideas. The Court's constitutional interpretation is nearly bulletproof.

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[111] Marbury v. Madison, 5 U.S. 137, 177.

[112] There are two methods by which the Constitution may be ratified, but either avenue presents an almost impossibly high bar. Amendments can either be proposed by a two-thirds vote of both chambers of Congress, or by a Constitutional convention empaneled by two-thirds of the States. Once an amendment is proposed, it must be ratified by the legislatures of three-fourths of the States. U.S. CONST. art. V.

[113] It was abnormally easy to ratify the Fourteenth Amendment; after the Confederate States had lost the Civil War, they needed to be readmitted to the Federal government. Congress welcomed their Confederate compatriots through a series of statutes called the Reconstruction Acts. As a condition of readmission, the Reconstruction Acts required Confederate states (who would be the most resistant to the Fourteenth Amendment) to enact the Amendment. An Act to Provide for the more efficient Government of the Rebel States, 14 Stat. 428-30, § 5 (1867).

The Court's statutory interpretation, on the other hand, is much more vulnerable, because the process for ratifying a federal statute is far less exacting.[114] Notwithstanding its polarity, Congress is able to ratify dozens of bills every year.[115] If the Court interprets a statute in a manner that draws opposition among the political branches, Congress can clarify its intent, again nullifying the unpopular opinion. If the Court interprets a statute to proscribe desired conduct or prescribe undesired conduct, Congress can pass a new statute clarifying the effect of the law. Only a simple majority would be required to challenge the Court in these ways.[116]

Moreover, the lower threshold for passing statutes affords a greater opportunity for the political branches to dispute the Court's statutory interpretation. As *Marbury* held, the Court is the final arbiter of what the law means. Therefore, the easiest way for the political branches to challenge a decision they dislike is to change the law upon which the decision relies, forcing the Court's unpopular, prior interpretation of the law's meaning into obsolescence. Given the difficulty inherent in the constitutional amendment process, the Court's constitutional interpretation would be significantly harder to challenge.

Lincoln was not alone in his opposition to *Dred Scott*; it is widely argued that slavery, whose often disputed legality was upheld by decisions such as *Dred Scott*, was the primary

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[114] To be ratified under Federal law, a statute must be approved by a majority of the Congressional committee in which it originates. Then, it must be approved by a majority of the Congressional chamber in which it originates. Then, an identical bill must be approved by a majority of the other Congressional chamber. Finally, the President must approve the bill, or two-thirds of both chambers decide to override the President's objections. *See infra* note 111.

[115] Eric McDaniel, *Congress Passed So Few Laws this Year that We Explained Them All in 1,000 Words*, NPR (Dec. 22, 2023, 5:00 A.M.), https://www.npr.org/2023/12/22/1220111009/congress-passed-so-few-laws-this-year-that-we-explained-them-all-in-1-000-words.

[116] *The Legislative Process*, U.S. HOUSE OF REPRESENTATIVES, https://www.house.gov/the-house-explained/the-legislative-process (last visited Oct. 31, 2024).

contributor to the Civil War.[117] Despite the passionate dissent against the decision, it would take eleven years before freedmen were guaranteed some of the rights and privileges of citizenship. Even after the United States had won the Civil War, and the Emancipation Proclamation took effect, officials throughout the South continued to deny the rights of citizenship to the freedmen.[118] The prevailing argument at the time held that, while the Proclamation prevents the continuation of slavery, it did not require government to honor civil rights, such as the right to litigate that Dred Scott sought.

Since *Dred Scott* held, from a Constitutional perspective, that the promises made by the Framers were categorically withheld from slaves, governments would continue to resist extending civil rights on the basis that it was not required under the Constitution. Indeed, since *Dred Scott* was a case of Constitutional interpretation, it took an amendment to the Constitution to correct it. That correction came in 1868, when Congress guaranteed birthright citizenship to all, and prohibited the States from denying the equal protection of the law to citizens.[119] Despite the strong political opposition to slavery, and its direct contribution to the recent war, no quick statutory remedy could supersede the constitutional basis for the *Dred Scott* decision.[120]

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[117] *Slavery as a Cause of the Civil War*, NAT'L PARK SERV. (Mar. 7, 2023), https://www.nps.gov/liho/learn/historyculture/slavery-cause-civil-war.htm ("Today, most professional historians agree…that slavery and the status of African Americans were at the heart of the crisis that plunged the U.S. into a civil war from 1861 to 1865").

[118] The Emancipation Proclamation was written by President Lincoln, and it abolished the legality of slavery on a national level. However, it would not go into effect until the War was won. Since the rebellious Southern States asserted that they were a separate, sovereign nation, they would not consider themselves bound by the Proclamation and would take no steps toward its enforcement. When the war had concluded, and the seceding States returned to American control, they also returned under the influence of American laws, including the Proclamation.

[119] U.S. CONST. amend. XIV.

[120] *See* Marbury v. Madison, 5 U.S. 137, 180 (1803) ("[T]he constitution of the United States confirms … that a [statutory] law repugnant to the

A case of an easily overridden statutory interpretation illuminates this principle. Consider the employment discrimination case brought by a retiree named Lilly Ledbetter in 1998.[121] Ledbetter worked at a tire plant for nearly twenty years, and upon her retirement, she accused her employer of denying her raises because of sexually discriminatory evaluations throughout her tenure.[122] She was unaware of the pay disparity until her retirement, but she filed her complaint quickly after discovering it. The Court held nevertheless that her claims were time-barred and upheld a denial of her discrimination claims.[123] The law required claims to be brought within six months of the discriminatory act, and since she was unaware of the discrimination until her retirement, she was unable to litigate the discrimination she experienced throughout her entire tenure at the tire plant. In denying her claims, Justice Alito opined that any discrimination that was not reported within the statute of limitations was "merely an unfortunate event in history which has no present legal consequences."[124]

The Court decided *Ledbetter* as primary campaigns for the Presidential Election of 2008 were organizing. Opposition to the decision was quick in the Democratic Party, which had included a pledge to overturn the decision in their 2008 platform.[125] Then-Senator Obama made *Ledbetter* an issue in his campaign, featuring the plaintiff in a campaign advertisement criticizing his political rival, Senator John McCain, on his opposition to equal pay legislation.[126] Just over a week

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constitution is void; and that the courts, as well as other departments, are bound by that instrument.").

[121] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

[122] *Id.* at 621-22.

[123] *Id.* at 642-43.

[124] *Id.* at 625-26 (citing United Air Lines v. Evans, 431 U.S. 553, 558 (1977)).

[125] *2008 Democratic Party Platform*, U.C. SANTA BARBARA: THE AM. PRESIDENCY PROJECT, (Aug. 25, 2008), https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform.

[126] Brian Montopoli, *Obama Camp Hits McCain On Equal Pay; McCain Camp Links Obama To Chavez*, CBS NEWS (Sept. 19, 2008, 5:17 PM),

into his administration, Obama signed his first piece of legislation, which eliminated the statute of limitations on discrimination claims, and overruled *Ledbetter*. Since the Court's unpopular opinion was the result of interpreting the Civil Rights Act of 1964, a federal *statute*, it could be reversed by enacting a new statute to the opposite effect.

This presents an important distinction in the power of the Court's legal interpretation. Article V of the Constitution sets a very high bar for changing the Constitution, and *Marbury* commands that the judiciary's interpretations of the Constitution cannot be rebut by statute. No legislative or executive entity has ever challenged this delegation of interpretive authority, and the Court has maintained that authority since the beginning of the Republic.[127]

Even if the Court's interpretation of a statute is accurate, Congress can reshape statutes to their liking by a simple majority. This happens regularly and has never presented a problem of legitimacy.[128] Attempting to overturn the Court's constitutional interpretation, on the other hand, would likely pose significant legitimacy concerns. The history surveyed in Part I suggests that any such attempts would not be successful in the long term (unless the law changes or the Court themselves changes their interpretation of the law). Looking to the experiences of Governors Persons and Faubus, any such attempts would likely result in temporary embarrassment and eventual, reluctant acquiescence by the disobeying official. Whatever action was taken in contradiction to the Court's orders would likely be viewed unfavorably by the Federal government, who may exert influence to bring the officials into compliance.

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https://www.cbsnews.com/news/obama-camp-hits-mccain-on-equal-pay-mccain-camp-links-obama-to-chavez/.

[127] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803); Cooper v. Aaron, 358 U.S. 1, 18 (1958); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 347 (Roberts, C.J., concurring in part and dissenting in part).

[128] *Cf.* Plaut v. Spendthrift Farms, 514 U.S. 211, 216 (1995) (judicial construction of a statute determines what the law is both before and after its interpretation by the Court; notwithstanding this principle, new law can be enacted which sidesteps some disfavored aspect of the decision).

Alternatively, if no action is taken to compel compliance with the Court, it could have serious ramifications for the public's perception of the Court. Most scholars perceive the Court to play an essential role in the Constitutional order, but if a political actor were able to successfully resist the Court's declaration of "what the law is," and no force was exerted by the legislative or executive branches to ensure compliance, then the Court might develop a reputation for inability to enforce its edicts. In that scenario, its decisions may be viewed as optional; if an official has substantial political capital invested in an invalidated policy, and the Court has no recourse for disobedience, the official will be more highly incentivized to simply proceed with their policy intentions. Every decision by the Court would essentially have the same legal force as an advisory opinion.[129]

III

During his presidential campaign preceding the Election of 2020, President Biden campaigned heavily on a policy of broad student loan forgiveness. Over 70% of college graduates were leaving school in debt, and as of 2016, the average debt balance for a new college graduate was $37,000.[130] Recognizing the need for most Americans to borrow in order to fund their higher education, and recognizing the abysmal state of the job market at the time, the President maintained his commitment to reducing the debt burden held by student loan borrowers, and

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[129] An advisory opinion has no legal force; it merely informs the parties as to how laws apply to certain situations. Federal courts are not allowed to issue advisory opinions; the judicial power that federal courts exercise does not exist unless there is a legitimate adversarial dispute that requires the judicial power for its resolution. As such, courts will not render any judgment unless it will be binding and conclusive on the parties. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948).

[130] Adam S. Minsky, *Biden Affirms: "I Will Eliminate Your Student Debt,"* FORBES (Oct. 7, 2020, 12.59 PM), https://www.forbes.com/sites/adamminsky/2020/10/07/biden-affirms-i-will-eliminate-your-student-debt/?sh=79ad69b558a7.

took certain actions in support of that goal when he entered office.[131]

On August 24, 2022, the President announced his most comprehensive proposal for student debt relief; he was directing Miguel Cardona, the Secretary of Education, to enact a three-part program to reduce the debt burdens of graduates making less than $125,000 per year. The plan proposed:

> 1. To forgive $20,000 in federal student loan debt held by Pell Grant recipients, as well as $10,000 in federal student loan debt held by non-Pell Grant recipients;
> 2. To introduce an income-driven repayment plan that would reduce the monthly payments required of borrowers, as well as loosening the eligibility requirements that borrowers had to satisfy to qualify for the Public Service Loan forgiveness program; and
> 3. To enable Americans to attend community colleges for free, while holding schools accountable for hikes in their tuition rates.[132]

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[131] At the time of President Biden's inauguration, Congress was not amenable to his proposal for broad student loan forgiveness. Democrats' thin majority in the Senate and the House of Representatives was insufficient to withstand divisions over the policy within their own caucus, notwithstanding opposition from the Republicans, Sylvan Lane, *Pelosi Disputes Biden's Power to Forgive Student Loans*, THE HILL (July 28, 2021, 2:34 PM), https://thehill.com/policy/finance/565297-pelosi-disputes-bidens-power-to-forgive-student-loans/. There were some, minor steps that the President was able to take without Congressional support. This includes directing the Secretary of Education to extend a pause on Federal student loan repayment and ensuring that these federal loans accrue 0% interest during this time, Press Release, U.S. Dept. of Educ., At the Request of President Biden, Acting Secretary of Education Will Extend Pause on Federal Student Loan Payments, (Jan. 21, 2021) (on file with author).

[132] *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need it Most*, THE WHITE HOUSE: BRIEFING ROOM (Aug. 24, 2022),

Just over a month after the White House announced their plan, a group of six states sued the President, arguing that the Secretary of Education lacked statutory authority to enact the plan as he was directed to do.[133] The President cited the Higher Education Relief Opportunities for Students Act of 2003[134] (the HEROES Act) as the legal authority for his plan.[135] That statute was enacted in response to the September 11, 2001 terrorist attacks, and gave "the secretary of education the power to 'waive or modify any statutory or regulatory provision' to protect borrowers affected by terrorist attacks."[136] In a brief filed in the Supreme Court, Solicitor General Elizabeth Prelogar argued that the Act was not limited to terrorist attacks, but instead allowed the Secretary to "respond to a 'national emergency' by waiving or modifying 'any statutory or regulatory provision' governing federal student loans," which would include the proposal in question.[137] The COVID-19 pandemic had been declared a national emergency, triggering Secretary Cardona's authority under the HEROES Act.

The Court disagreed. On June 30, 2023, the Court issued an opinion in which the forgiveness plan was framed as a fundamental change to the federal student loan scheme. While the Court conceded that the HEROES Act authorizes Secretary Cardona to waive or modify existing statutory provisions, the Secretary's actions apparently exceeded his authority under both of those provisions. In his Opinion of the Court, the Chief Justice found the forgiveness scheme would amount to a "'basic

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https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

[133] Brief for Petitioner at 11, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

[134] 20 U.S.C. §§ 1098aa-1098ee, (2003).

[135] Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 OLC Lexis 3 (2022).

[136] Adam Liptak, *What is the HEROES Act?*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/us/politics/heroes-act.html.

[137] Brief for Petitioner at 18, Biden v. Nebraska, 600 U.S. 477 (2023) (No. 22-506).

and fundamental chang[e] in the scheme' designed by Congress," rather than a mere modification.[138]

Secretary Cardona had argued that his power to 'waive' under the Act was broader than his right to 'modify,' but the Chief Justice did not think that this power allowed him to waive $10,000 to $20,000 of student debt obligations. Rather, Chief Justice Roberts interpreted this to allow the Secretary to nullify certain legal agreements, seemingly excluding student loan agreements from that arrangement.[139] President Biden had lost at the Supreme Court, and the broad student loan forgiveness program upon which he had campaigned for the Presidency was foreclosed by the Court.

After the decision was issued, President Biden signaled his disagreement, but committed nonetheless to honor the Court's authority, promising to find "other ways to deliver relief to hard-working middle-class families."[140] While the Court found his universal debt forgiveness plan to be too broad, President Biden subsequently engaged in more targeted debt forgiveness, specifically targeting borrowers in the Public Service Loan Forgiveness program, as well as borrowers whose loans were serviced through an income-driven repayment program.[141]

What if the President had followed the paths of Governors Persons and Faubus, and of the Alabama and Texas legislatures, by acting in direct opposition to the Court's unfavorable decision? Would student loan balances be reduced by the amount he pledged in the August 2022 plan? Would those balances eventually be forced back up by subsequent administrations? Based on the historical analysis in Part I, it is

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[138] *Nebraska*, 600 U.S. at 494.
[139] *Id.* at 498.
[140] Press Release, The White House, Statement from President Joe Biden on Supreme Court Decision on Student Loan Debt Relief (June 30, 2023), (on file with author).
[141] Lexi Lonas, *Biden Has Forgiven Billions in Student Loans. Who Has Gotten the Relief?,* THE HILL (Jan. 23, 2024, 6:00 AM), https://thehill.com/homenews/education/4422088-biden-forgiven-student-loans-debt-relief/.

not likely that unilateral action by the President or the Secretary of Education would suffice to reduce the debt burden of student loan borrowers. When Governors Persons and Faubus acted in contradiction to the Court, they were soon brought into compliance, largely through intervention by the executive branch of the federal government on the Court's behalf. It's unlikely that the same would happen right away in this case, since the officials working on the student loan forgiveness program are all in the upper echelons of the executive branch of the federal government. Although, just as the Obama Administration quickly reversed EPA's resistance to *Massachusetts*, the next Presidential administration would be within their rights to reverse Secretary Cardona's actions, adding the forgiven $10,000 to $20,000 back to borrower's student loan accounts. Many borrowers, whose loans would have been forgiven entirely under Biden's plan, could fall back into debt to the Department of Education and its loan servicers.

However, President Biden theoretically has better prospects to see his goal realized that did Governors Persons or Faubus. Chief Justice Roberts's vacatur of President Biden's plan was based on the theory that it required Secretary Cardona to exceed his authority under the HEROES Act. The case involved statutory interpretation by the Court, not Constitutional interpretation. Recall that an unfavorable statutory interpretation can be avoided by merely amending the interpreted statute by simple majority. Chief Justice Roberts found that the Act's grant of authority to waive or modify existing statutory or regulatory provisions could not comprise Biden's broad loan forgiveness plan, since the plan went farther than that authority would permit. However, if the political appetite existed in Congress, a Senator or Representative sympathetic to Biden's cause could introduce a bill amending the HEROES Act and adding or amending a provision to authorize broader action on student loans. Alternatively, that sympathetic congressman could also introduce a more straightforward bill designed at reducing the debt burden held by American graduates, specifically delegating that authority in an executive branch official. That would cure the legal issues

that halted forgiveness in *Nebraska*. The Court would no longer be able to say that the Secretary is exceeding his authority, since Congress would be explicitly granting him that authority.

If Congress were more productive, and less hostile to the President's student loan intentions,[142] this would be enough to cure the statutory issues that the Court presented the first time around. However, another threat comes from the Constitution. Before student loans may be accepted, student borrowers must sign contracts promising to repay the debts they are incurring.[143] This leaves debt relief vulnerable to the Contract Clause, under which the government may not interfere with the performance of contractual obligations unless it is justified by an appropriate exercise of the State's police power.[144] This proscription would require proponents of debt relief to show that, without debt relief, "vital public interests would…suffer."[145] Their relief would also be limited to a "temporary and conditional restraint" of the challenged contract provisions.[146] The requirement that relief be "temporary" would probably defeat the purpose of the debt relief program. Even if not, it's unlikely that the proponents of student debt forgiveness could carry the burden required by relevant caselaw.[147]

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[142] Bills introduced to grant broad student loan forgiveness have failed to make it out of their respective committees. *See* Student Loan Relief Act, H.R. 4797, 117th Cong. (2021).

[143] Meghan Lustig, *Student Loan Promissory Note: What to Know*, U.S. NEWS & WORLD REP. (June 17, 2022, 9:57 A.M.), https://www.usnews.com/education/blogs/student-loan-ranger/articles/student-loan-promissory-note-5-things-to-know-before-you-sign.

[144] *Manigault v. Springs*, 199 U.S. 473 (1905) ("…the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as…are necessary for the general good of the public, though contracts…may thereby be affected.").

[145] *See Blaisdell*, 290 U.S. at 440.

[146] *Id*.

[147] *Blaisdell*, 290 U.S. at 437 ("The economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."). The Court's decision against the student loan relief proposed by President Biden did not discuss any economic interests that would be harmed absent debt relief. Rather, Chief

While passing a law clearly authorizing student debt relief would easily side-step the Court's prohibitive statutory interpretation, a proscription based in the Contracts Clause would present a more insurmountable obstacle to the President's intentions. History demonstrates that officials who act in defiance of the Court's mandates generally come into compliance before fully realizing their contrary goals, and the current membership of the Court does not appear poised to recreate the two exceptions to this rule.[148]

In fact, the climate that preceded the Court's unusual approval of the defiant S.B. 8 is distinguishable from the student loan context on two grounds. First, the *Jackson* Court had already heard oral argument in a case in which a majority of the Justices agreed that "*Roe* was egregiously wrong from the start."[149] Despite the law that was officially on the books at the time, these justices did not believe that the Constitution should confer a substantive due process right to abortion. Without that right, Texas' actions were arguably not in violation of the Fourteenth Amendment.

Second, even if the Justices couldn't overtly admit that they were disregarding a precedent that they felt was incorrect, they may have known that its days were numbered. If abortion

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Justice Roberts had significant concerns for the State's economic interests *if relief occurred*. *Nebraska*, 600 U.S. 477, 496 (describing the debt relief program as one that would "[create]…$430 billion in federal debt.").

[148] The Court's orders prevailed over the interests of the contrary officials in *Worcester*, *Brown*, *Massachusetts*, and *Allen*. Lincoln's interests were brought into line with Constitutional interpretation following the ratification of the Fourteenth Amendment, and while constitutional amendment would theoretically authorize Biden's intended actions, the political landscape in Congress and state legislatures throughout the country do not indicate any hope for a proposed constitutional amendment authorizing the cancellation of student debt. The exceptions to the rule set by *Worcester*, *Brown*, *Massachusetts*, and *Allen* are the Reconstruction Amendments changing the law to render *Dred Scott* obsolete, and the Texas legislature's disobedience of *Roe* and *Casey*, which was ultimately authorized by the Court's changed Constitutional interpretation in *Dobbs*.

[149] Dobbs v Jackson Women's Health Org., 597 U.S. 215, 231. The Court heard oral argument in *Dobbs* on December 1, 2021, and the opinion in *Whole Women's Health v. Jackson* was released on December 10, 2021.

restrictions would be constitutionally permitted in a few months anyway (upon the *Dobbs* ruling), that incentivizes the Court to just allow Texas a head-start; the law surrounding abortion will be inconsistent for a few months, but that inconsistency would end as soon as the Court released its *Dobbs* decision, and it allows them to avoid disentangling the bizarre enforcement scheme that S.B. 8 created.[150]

President Biden benefits from neither of these considerations. First, the Court has already heard oral argument in a student debt relief case *and ruled 6-3 against the debt relief program*. This suggests, if anything, that any attempts by the President to resist the Court's ruling would be challenged by the Court, not tolerated.

Second, there is no case pending before the Court in which the Justices could reverse their decision in *Nebraska*. If the President were to resist enforcing the Court's decision, he could not simply wait out the clock until the Court rules for him, as the Texas Legislature did. Even if there was a case pending before the Court whose lower court record could support a reversal of *Nebraska*, there is no evidence to suggest that any of the six votes against debt relief would change their mind.

The Court has determined that the law does not currently authorize Biden's student debt relief plans. His only hope of continuing the relief program is if Congress changes the law to authorize relief. Given the unlikelihood that Congress amends this law, Biden's student loan relief program is effectively dead in the water. It appears as though the President knew, almost

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[150] Courts are supposed to resolve the legal question and do no more. There is a concern that, if the Court were allowed to rule on every aspect of a case, notwithstanding its relevance to the ultimate disposition, then judges could essentially legislate from the bench. The Judicial Power granted to courts in Article III of the Constitution enables them to resolve legal disputes, but it authorizes them no further. As Chief Justice Roberts said, "[if] it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs*, 597 U.S. at 348. If the Court dove into the merits of S.B.8, it could unintentionally raise more questions and increase uncertainty. Given these concerns, the Court found it preferable to simply toss the case on standing.

immediately, that this would be the case. The White House quickly pivoted to new, targeted forms of debt relief.[151]

The Supreme Court is deceptively powerful. At first glance, it appears to be the least powerful, most dependent branch of government. From a financial standpoint, it is entirely dependent on Congress.[152] From a security standpoint, it is dependent on the Supreme Court Police, comprised of officers of the Executive Branch working pursuant to a Congressional statute.[153] When it has faced serious resistance, it has been reliant on executive actions, such as activation of the National Guard, to give force to its decisions.

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[151] A few hours after the *Nebraska* decision was released, Secretary Cardona announced three steps that the Biden Administration was prepared to make, in apparent anticipation that they would lose the *Nebraska* case. First, the Department began the rulemaking process to promulgate greater authority to settle with loan servicers and reduce the balances on certain loans. Next, the Department rolled out the Saving on a Valuable Education (SAVE) Program, which reduces required monthly payments based on the income of the borrower, preventing borrowers from falling behind due to an inability to make the required payments. Lastly, the Department announced that, while borrowers would need to begin repaying their loans, they would be given a one-year 'on ramp' period, during which they could wean themselves back into a life where student loan payments form part of their monthly expenses. In the year after *Nebraska* was issued, the Administration had forgiven almost $138,000,000,000 in student debt from almost 3,900,000 borrowers over the course of over two dozen targeted, executive actions. *See Fact Sheet: President Biden Cancels Student Debt for More than 150,000 Student Loan Borrowers Ahead of Schedule*, THE WHITE HOUSE (Feb. 21, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-president-biden-cancels-student-debt-for-more-than-150000-student-loan-borrowers-ahead-of-schedule/. *Press Briefing by Press Secretary Karine Jean-Pierre, Secretary of Education Miguel Cardona, and Deputy Director of the National Economic Council Bharat Ramamurti*, THE WHITE HOUSE, (June 30, 2023, 4:30 PM), https://www.whitehouse.gov/briefing-room/press-briefings/2023/06/30/press-briefing-by-press-secretary-karine-jean-pierre-secretary-of-education-miguel-cardona-and-deputy-director-of-the-national-economic-council-bharat-ramamurti/; THE WHITE HOUSE, *supra* note 133.

[152] U.S. CONST. art. I, § 9, cl.7.

[153] 40 U.S.C. § 6121(a).

After his loss in *Worcester v. Georgia*, President Jackson apocryphally noted, "John Marshall has made his decision, now let him enforce it."[154] However, that taunt relies heavily on a flawed, underestimated view of the Court's influence throughout the government. Sure, John Marshall may not have any troops at his command. And, as long as the Appropriations Clause remains valid, the Court will rely on Congress for its funding. But Jackson's comments imply that the Court acts alone, and that no other state actors would go to bat for the Court. It fails to adequately consider that government officials trust and value the Constitution. In fact, most government officials must take an oath pledging to support and defend the Constitution. Supporting and defending the Constitution involve supporting all of it, whether or not one personally agrees with every word of what it says. If the Court says that Georgia cannot govern Native territory, the President could disagree with that decision. But for his disagreement to have any effect, then every single judge and prosecutor handling criminal cases in Georgia will have to agree to ignore the Court and proceed with their prosecutions. Currently, the Constitution is too popular in the United States for every responsible official to ignore the Court. Somewhere along the way, there will be a prosecutor who decides not to bring charges, or a judge who reverses convictions due to the lack of jurisdiction over Native land. Since most government officials aren't interested in violating their Constitutional oath, there will always be someone who brings the Court's wishes to fruition. There will be someone like President Eisenhower or Kennedy, activating the National Guard to integrate schools. There will always be lower court judges who refuse to approve voting maps that they find to violate the Voting Rights Act.

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[154] Justice Breyer, University of Pennsylvania Law School Commencement Remarks, (May 19, 2003).

CONCLUSION

Anxiety about the state of the U.S. government and its future is widespread and enduring. Some voters are concerned that certain politicians will assume power and disregard the democratic process.[155] Other voters are concerned that the electoral system will be manipulated to achieve certain results[156].

These concerns are not unfounded; political rhetoric has been growing more polarized, and as ideas veer toward the extreme, reverence to the institutions that would provide guardrails against those extremes is diminishing. There is a tangible sentiment that certain leaders, whose intentions would be hindered by these institutions, will be able to steamroll past any obstacles and realize their goals despite the Constitution.[157]

It can be difficult to have faith in these institutions which seem vulnerable to despotic influences. The situation feels exceptionally hopeless when those in the highest echelons of American government are echoing these institutional threats.[158] However, there was a time when President Jackson was the most powerful force occupying American government. Jackson was

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[155] Thomas Carothers & Frances Z. Brown, *Can U.S. Democracy Policy Survive Trump?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 1, 2018), https://carnegieendowment.org/2018/10/01/can-u.s.-democracy-policy-survive-trump-pub-77381; *New Poll: 81% of Voters Believe Democracy is Threatened*, GEO. U. INST. OF POLS. AND PUB. SERV. (Mar. 21, 2024), https://politics.georgetown.edu/2024/03/21/new-poll-81-of-voters-believe-democracy-is-threatened/.

[156] Vanessa Williamson, *Democratic Decline in the United States: Strategic Manipulation of Elections*, THE BROOKINGS INST. (Oct. 23, 2023), https://www.brookings.edu/articles/democratic-decline-in-the-united-states-strategic-manipulation-of-elections/.

[157] Lawrence B. Glickman, *Trump's Call to Suspend the Constitution Betrays the Lawlessness of Law and Order*, WASH. POST (Dec. 15, 2022, 6:00 AM), https://www.washingtonpost.com/made-by-history/2022/12/15/donald-trump-law-and-order/.

[158] Alex Woodward, *'Election Deniers' Are Still Running Congress Three Years After January 6*, THE INDEP. (Jan. 5, 2024, 5:34 PM), https://www.the-independent.com/news/world/americas/us-politics/election-denier-congress-jan-6-trump-b2473943.html.

fervent in his intentions for the Native territory in Georgia, and he was forceful in his opposition to the Court. Despite his power and influence, he was unable to single-handedly overcome institutional guardrails. His influence was insufficient in the face of patriotic officials, too devoted to the Constitution to capitulate to Jackson's will.

Likewise, Governors Faubus and Persons' actions were indisputably popular among their constituencies.[159] This popularity, combined with Southern notions of states' rights against federal overreach,[160] made the governors a seemingly unstoppable force. However, Presidents Eisenhower and Kennedy were too committed to the Constitution and its separation of powers to let the governors prevail over the founding document.

Likewise, under the Independent State Legislature Theory, the Alabama state legislature seemed uniquely powerful to decide the question of voting maps at the time. Once Alabama had been disabused of the notion that its electoral authority was absolute, and the Court ruled against the State in *Allen*, it became apparent that the Constitutional order would require new maps to be redrawn. Despite the strength of the Alabama State Legislature, officials were committed to that Constitutional order, and that commitment led them to begin working on new redistricting maps. The State Legislature's 'absolute' power was inadequate to persuade its own employees to continue with the old maps in defiance of the Court's orders.

While *Dred Scott* and *Roe/Casey* involved the law changing to vindicate the wishes of the challenging political official, there is nothing to indicate that Lincoln, or the Texas

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[159] Julie Ray, *Reflections on the 'Trouble in Little Rock'*, GALLUP (Feb. 25, 2003), https://news.gallup.com/poll/7867/reflections-trouble-little-rock.aspx. (Americans were polled after President Eisenhower activated the National Guard in a rebuke of Governor Faubus. Outside the South, 74% of Americans thought Eisenhower "did the right thing." Within the South, only 36% of respondents approved of Eisenhower's actions).

[160] Alan Singer, *Brown v. Board of Education of Topeka, Kansas: A Document Package with Lesson Ideas*, 4 SOC. SCI. DOCKET, no. 2, 2004 at 10, 23 ("*Brown* "climaxes a trend in the Federal Judiciary undertaking to…encroach upon the reserved rights of the States and the people.")

Legislature, would be allowed to continue their recalcitrance. At some point, an official responsible for enforcing the challenged laws would be confronted with this same choice: their loyalty to the Constitution versus their loyalty to the relevant recalcitrant official.

Every time this question has been presented, someone with sufficient authority chose the Constitution. Unless the Constitution's popularity declines significantly, it seems exceedingly unlikely that *every* responsible official would discard the Constitution. So long as that remains the case, defiance of clear Supreme Court orders will ultimately be unsuccessful.