Judicial Sanewashing: The Roberts Court's New Canon of Construction

ERIN M. CARR*

In late 2024, a new expression—"sanewashing"—began circulating in the lead-up to the presidential election. The term was used to describe the media's coverage of Donald Trump, in which journalists, in their attempt to make his often incoherent campaign and media statements seem semi-intelligible, were accused of presenting his ideas as more sensible and cogent than they actually were.

While finding its contemporary relevance primarily in politics, this Article argues that the sanewashing phenomenon is not limited to the political branches of government or the reporters who cover it. Instead, the Supreme Court, under the leadership of Chief Justice John Roberts, has played a pioneering role in sanewashing long before the term was colloquially adopted. By legitimizing specious legal theories and myopic historical interpretations of the Constitution, the Court has relied on sanewashing to reconstruct whole swaths of constitutional and statutory law.

Although the Roberts Court's early use of sanewashing was initially less pronounced, the practice has proven effective in shifting constitutional law decisively to the right and, consequently, has become increasingly prominent in the Court's decision-making. As the Court has sought to present dubious legal theories as sound, reasoned law, sanewashing has arguably become the dominant methodology for statutory interpretation and constitutional analysis under the Roberts Court.

* Assistant Professor of Law, Seattle University School of Law. I am appreciative of the support offered by Brooke Coleman, Elizabeth Ford, Alice Abrokwa, Ron Slye, and Richard and Rachel Muller. This Article also benefitted from the research assistance of Ava Ren Romano and Elaine McDaniel. I am additionally thankful to Tiffany Odom-Rodriquez, Shannon Benson, and the staff of *The University of Memphis Law Review* for their helpful edits and suggestions.

This Article scrutinizes the Roberts Court's new canon of construction—judicial sanewashing—providing an overview of the concept and its underlying methodology. This Article explains the Court's pioneering role in sanewashing, demonstrating how the Roberts Court has relied on sanewashing to transform the law by legitimating anti-democratic legal theories and advancing a spurious historical interpretation of the Constitution, driving the law radically to the right while insisting that it is simply following judicial tradition.

I. INTRODUCTION

In some ways, the fall of 2024 felt more like the season of "sanewashing" than of pumpkin spice lattes or changing foliage. During this period, the term "sanewashing"[1] quickly became

1. The term "sanewashing" is believed to originate from a 2020 Reddit page and, according to the Urban Dictionary, is defined as:

> Attempting to downplay a person or idea's radicality to make it more palatable to the general public. This is often done by claiming that the radicals are taken out of context, don't truly represent the movement, or that opponents' arguments about its severity are wrong. Oftentimes, the person doing the sanewashing isn't radical themselves—they may be doing so because they genuinely don't believe the movement to be radical, or are trying to justify to themselves how they can support a radical movement.

popularized.[2] The catchy new expression was invoked to describe the journalistic practice of making Donald Trump's ideas and pronouncements appear more sensible than they were.[3] Critics argued

Sanewashing, URBAN DICTIONARY, (last visited Dec. 14, 2024), https://www.urbandictionary.com/define.php?term=sanewashing. Parker Molloy, a journalist and media critic, is credited to have popularized the use of the phrase "sanewashing" in a fall 2024 opinion piece describing the media's attempts to rationalize and reframe President Trump's incoherence. *See* Parker Molloy, *Sanewashing? The Banality of Crazy? A Decade into the Trump Era, Media Hasn't Figured Him out*, THE ASSOCIATED PRESS (Oct. 9, 2024, 10:44 AM), https://www.usnews.com/news/business/articles/2024-10-09/sanewashing-the-banality-of-crazy-a-decade-into-the-trump-era-media-hasnt-figure-him-out.

2. *See, e.g.*, Parker Molloy, *How the Media Sanitizes Trump's Insanity*, THE NEW REPUBLIC (Sept. 4, 2024), https://newrepublic.com/article/185530/media-criticism-trump-sanewashing-problem; Jon Allsop, *Is the Press 'Sanewashing' Trump?*, COLUM. JOURNALISM REV. (Sept. 9, 2024), https://www.cjr.org/the_media_today/trump_incoherent_media_sanewashing.php; Paige Sutherland & Meghna Chakrabarti, *Is the Media 'Sanewashing' Trump?*, WBUR (Oct. 8. 2024), https://www.wbur.org/onpoint/2024/10/08/media-sanewashing-trump-voters-misinformation-election.

3. *See, e.g.*, *Sanewashing? The Banality of Crazy?*, *supra* note 1; *Rebecca Solnit: 'Sanewashing' Trump's Gibberish*, PROSPECT MAG. (Sept. 12, 2024), https://www.prospectmagazine.co.uk/podcasts/media-confidential/67833/rebecca-solnit-donald-trump-sanewashing; Matt Bernius, *Where's the Line Between Paraphrasing and "Sanewashing?"*, OUTSIDE THE BELTWAY (Sept. 6, 2024), https://outsidethebeltway.com/wheres-the-line-between-paraphrasing-and-sanewashing; Allsop, *supra* note 2. An example of "sanewashing" as applied to the 2024 media coverage of Trump, includes sanitized accounts of the President's repeated, false claims that public school children were being subjected to forced gender reassignment surgery without parental consent. At numerous public events and during several interviews, Trump suggested that schools were conducting "transgender operations." In late October 2024 on the Joe Rogan podcast, Trump expressed that, "Who would want to have—there's so many—the transgender operations? Where they're allowed to take your child when he goes to school and turn him into a male to a female without parental consent." The Joe Rogan Experience, *# 2219 – Donald Trump*, SPOTIFY (Oct. 26, 2024), https://open.spotify.com/episode/0e9ynAH6hmZIIeOx0SaGQu. An article published by *The Hill* recounting these. Ali Swenson, Moriah Balingit & Will Weissert, *Trump Questions Acceptance of Transgender People as He Courts His Base at Moms for Liberty Gathering*, THE HILL (Aug. 31, 2024, 9:45 AM), https://thehill.com/homenews/campaign/donald-trump-transgender-community-acceptance-moms-for-liberty-2024. A local news station framed the statements as *Trump Courts His Base, Lamented Acceptance of Transgender Americans*. KSDK

that reliance on standard journalism conventions to cover the presidential campaign normalized Trump's rambling, often incoherent, conspiracy-riddled statements and, in doing so, contributed to the "ero[sion] of our shared reality and threaten[ed] informed democracy."[4]

One such sanewashing example took place in early September 2024 when, while addressing the Economic Club of New York in the lead-up to the presidential election, Trump was asked a straightforward question: "If you win in November, can you commit to prioritizing legislation to make childcare affordable? And if so, what specific piece of legislation will you advance?"[5] What followed was a long, tortuous, and virtually incomprehensible response:

> Well, I would do that. And we're sitting down, you know, we had, Senator Marco Rubio and my daughter Ivanka were so impactful on that issue. It's a very important issue. But I think when you talk about the kind of numbers that I'm talking about, because childcare is childcare, it's something, you have to have it. In this country you have to have it.

News, *Trump Courts His Base, Lamented Acceptance of Transgender Americans*, YOUTUBE (Aug. 31, 2024), https://www.youtube.com/watch?v=wvKFfto7h5w.

On another occasion, at a campaign rally in Wisconsin in late September 2024, Trump went on an extended diatribe of the inherent criminality of immigrants, describing them as "animals" and insisting that "they'll walk into your kitchen, they'll cut your throat." *See* LiveNOWFOX, *Full Speech: Trump Speaks on Immigration in Battleground Wisconsin*, YOUTUBE (Sept. 28, 2024), https://www.youtube.com/watch?v=kjQPj3g_okM. In covering the rally, neither *The Washington Post* nor *The New York Times* referenced the quote, instead characterizing the comments as a typical illustration of Trump's "vilification" of immigrants. Michael Tomasky, *Oops, They Did It Again: The Mainstream Media Buries Trump's Outrage*, THE NEW REPUBLIC (Sept. 30, 2024), https://newrepublic.com/series/51/mainstream-media-sanewashing-trump-migrants.

4. Molloy, *supra* note 2.

5. Reshma Saujani, Question to President Donald J. Trump at the 767th Meeting of the Econ. Club of N.Y., 42–43 (Sept. 5, 2024) (transcript available at https://www.econclubny.org/documents/10184/109144/20240905_Trump_Transcript.pdf).

> But when you talk about those numbers compared to the kind of numbers that I'm talking about by taxing foreign nations at levels that they're not used to but they'll get used to it very quickly. And it's not going to stop them from doing business with us, but they'll have a very substantial tax when they send product into our country. Those numbers are so much bigger than any numbers that we're talking about, including childcare.
>
> We're going to have; I look forward to having no deficits within a fairly short period of time. Coupled with the reductions that I told you about on waste and fraud and all of the other things that are going on in our country. Because I have to stay with childcare. I want to stay with childcare. But those numbers are small, relatively to the kind of economic numbers that I'm talking about, including growth. But growth also headed up by what the plan is that I just told you about. We're going to be taking in trillions of dollars, and as much as childcare is talked about as being expensive, it's relatively speaking, not very expensive compared to the kind of numbers we'll be taking in.
>
> We're going to make this into an incredible country that can afford to take care of its people and then we'll worry about the rest of the world. Let's help other people. But we're going to take care of our country first. This is about America First. This is about Make America Great Again. We have to do it. Because right now we're a failing nation. So we'll take care of it. Thank you. Very good question. Thank you.[6]

Though nothing rational could be gleaned from this circuitous response, *The New York Times*, in its front-page coverage of the event, described Trump's statement as part of a broader reform that involved

6. President Donald J. Trump, Address at the 767th Meeting of the Econ. Club of N.Y., 43–44 (Sept. 5, 2024), (transcript available at https://www.econclubny.org/documents/10184/109144/20240905_Trump_Transcript.pdf).

"the creation of a government efficiency commission" to save trillions of dollars in wasteful government spending.[7] Aside from a brief reference in the article that characterized the speech as "sometimes meandering," there was little in the article to suggest that the comments were anything other than normal and easily comprehensible.[8]

The term "sanewashing" may seem relatively new, even modish, but the underlying concept is not, nor is it exclusively limited to the political branches of government or the journalists who cover it. Judicial sanewashing—similar to sanewashing's parallel effects in the political space—has allowed the Supreme Court to normalize legal distortions with deeply damaging consequences. The sanewashing of newly created constitutional and statutory doctrine has eroded accountability constraints on the Court while normalizing judicial opinions that have reversed decades of legal precedent and, with it, fundamental civil rights and established democratic norms.[9]

As the Court has sought to present dubious legal theories as sound and sensible, sanewashing has arguably become the dominant methodology for constitutional and statutory interpretation of the Court. Sanewashing—defined as attempts to minimize or "downplay . . . an idea's radicality to make it more palatable to the general public"[10]—has become a prominent, if not underappreciated, feature of the Roberts Court. For well over a decade, the Court has eroded constitutional protections for minoritized and historically disenfranchised populations while strengthening power for itself, corporations, gun owners, Christian conservatives, and state officials who owe their political sway to heavily gerrymandered districts. All this has been accomplished while the Court has sought to present itself as a neutral, non-partisan institution free from corporate interests or

7. Michael Gold & Alan Rappeport, *Trump Calls for an Efficiency Commission, an Idea Pushed by Elon Musk*, N.Y. TIMES (Sept. 5, 2024), https://www.nytimes.com/2024/09/05/us/politics/trump-elon-musk-efficiency-commission.html.

8. *Id.*

9. *See* Linda Greenhouse, *Look at What John Roberts and His Court Have Wrought over 18 Years*, N.Y. TIMES (July 9, 2023), https://www.nytimes.com/2023/07/09/opinion/supreme-court-conservative-agenda.html.

10. *Sanewashing*, URBAN DICTIONARY, https://www.urbandictionary.com/define.php?term=sanewashing (last visited Dec. 14, 2024).

policy preferences and guided solely by constitutional and democratic principles.[11] As the Court has transformed into a conservative policy-making body, it has maintained that it is merely fulfilling its constitutional mandate.[12]

This Article examines the Roberts Court's new canon of construction—judicial sanewashing—providing an overview of the concept and its underlying methodology. This Article describes the Court's pioneering role in sanewashing, demonstrating how the Roberts Court has relied on sanewashing to transform the law by legitimating anti-democratic legal theories and advancing a biased historical interpretation of the Constitution, driving the law radically to the right while insisting that it is simply following judicial tradition.

11. Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1565 (2024) [hereinafter Murray, *Stare Decisis and Remedy*] (describing how the conservative members of the Roberts Court situate the rewriting of constitutional law as a righteous, remedial project where they are cast as "as warriors in the fight for racial justice and the vindication of rights"); *see also* Serena Mayeri, *The Critical Role of History After* Dobbs, 2 J. AM. CONST. HIST. 171, 179 (2024) (recounting how the Court in *Dobbs* "falsely claims neutrality and freedom from value-driven choices in his method of constitutional interpretation" in rescinding constitutional protection for the right to abortion).

12. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (concluding that federal restrictions on the political spending of corporations are inconsistent with First Amendment's free speech guarantee); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (holding that a federal law requiring a privately owned, for-profit corporation to offer contraceptives through its employer health insurance plan in conflict with the owners' sincerely held religious beliefs was impermissible); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (invalidating a state law that required an applicant for an unrestricted license to carry a handgun outside the home for self-defense to establish "proper cause" as violating the Second Amendment); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (abandoning the Lemon Test for adjudicating Establishment Clause claims in concluding that a school district's refusal to renew the employment contract of a football coach who insisted on praying after football cases violated his First Amendment rights); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (ruling in favor of a Christian website designer who claimed her First Amendment speech rights were violated by a state antidiscrimination law that prohibits discrimination based on sexual orientation).

II. THE PHENOMENA AND PARAPHERNALIA OF JUDICIAL SANEWASHING

Judicial sanewashing is a potent, yet subtle, mechanism for making more palpable the deficient legal reasoning used to defend an emerging authoritarian constitutionalism.[13] This section identifies and analyzes the various sanewashing strategies that have been employed by the Roberts Court to reconceptualize statutory and constitutional law.

Seeking to present itself as a neutral arbiter, the Roberts Court has recycled a slew of sanewashing techniques that benefit from a sanitized reimagination of legal precedent and of the nation's history and traditions. For most of his two-decade tenure, Chief Justice John Roberts has been viewed as an institutionalist.[14] The careful construction of the Roberts Court as independent and law-bound[15] benefited the stealthiness and synergy of the deployment of multiple interlocking judicial sanewashing strategies.

A skilled writer and legal thinker, Chief Justice Roberts has sought to temper the Court's more extreme opinions by neatly cloaking decisions as fitting neatly within legal norms.[16] The contraction, and

13. Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 391 (2015) (defining "authoritarian constitutionalism" as "government that combines reasonably free and fair elections with a moderate degree of repressive control of expression and limits on personal freedom."); *see also* Roberto Niembro Ortega, *Conceptualizing Authoritarian Constitutionalism*, 49 no. 4 LAW AND POLITICS IN AFRICA, ASIA AND LATIN AMERICA 339, 339 (2016) (describing authoritarian constitutionalism as a "way in which ruling elites of not fully democratic states exercise power, such that the liberal democratic constitution, instead of limiting the power of the state and empowering those who would otherwise be powerless, is used for practical and authoritarian functions.").

14. Dahlia Lithwick & Mark Joseph Stern, *We Helped John Roberts Construct His Image as a Centrist. We Were So Wrong*, SLATE (Sept. 16, 2024), https://slate.com/news-and-politics/2024/09/scotus-john-roberts-image-fail-phony-false.html (characterizing Chief Justice Roberts' persona as "an affable centrist steward of the court's reputational interests—created largely in the press and played to the hilt by him" as a "total fiction."); *see also* Elie Mystal, *How John Roberts Went Full MAGA*, THE NATION (Sept. 17, 2024), https://www.thenation.com/article/politics/how-john-roberts-trump-maga (discussing three important cases that demonstrate how Chief Justice Roberts has "abandoned his thin veneer of nonpartisanship when it comes to Trump").

15. Lithwick & Stern, *supra* note 14.

16. *See* discussion *infra* Section II.A.

in some cases outright revocation, of constitutional protections for disfavored groups has been justified by sanitized, jaundiced characterizations of history and tradition that have been criticized as ideologically motivated and factually flawed.[17] Sweeping new interpretations of the Constitution have been rationalized with heroic narratives of "the every man" and used as coverage to camouflage the creation of new legal doctrine.[18] Democratic principles, including separation of powers and representative governance, have been eroded while being simultaneously cited in defense of judicial decisions with deeply anti-democratic results.[19] The strategically sanewashed judicial

17. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)); *see* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 947–49 (2024) (dissecting the problematic nature of the Court's "history and tradition" test, which is "highly malleable" and far from impartial); *see also* Mayeri, *supra* note 11, at 175 (describing how the *Dobbs* decision "reject[ed] the considered opinions of nearly every professional historian who has studied and published on abortion law and practice in early America").

18. *See* Melissa Murray, *Children of Men: The Roberts Court's Jurisprudence of Masculinity*, 60 HOUS. L. REV 799, 802 (2023) [hereinafter Murray, *Children of Men*] (examining *Dobbs v. Jackson Women's Health Organization*, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, and *Kennedy v. Bremerton School District* as illustrative of the Roberts Court's "commitment to an ascendant 'jurisprudence of masculinity'"); *see also* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality:* Dobbs *on Abortion's Nineteenth-Century Criminalization*, 60 HOUS. L. REV. 901, 908 (2023) [hereinafter Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality*] (using *Bruen* and *Kennedy* to support the assertion that "the Court accords men rights so powerful that they can transform public spaces into a private sphere of male prerogative").

19. *See Dobbs*, 597 U.S. at 215 (concluding that the overturning of legally recognized constitutional protections for abortion access is necessary to return the issue to "the people"). *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 717 (2019); Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010); Trump v. United States, 603 U.S. 593, 606 (2024) ("We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office."); Jodi Kantor & Adam Liptak, *How Roberts Shaped Trump's Supreme Court Winning Streak*, N.Y. TIMES (Sept. 15, 2024), https://www.nytimes.com/2024/09/15/us/justice-roberts-trump-supreme-court.html; Adam Liptak, *Echoes of* Roe v. Wade *in Decision Granting Immunity to Trump*, N.Y. TIMES (July 29, 2024), https://www.nytimes.com/2024/07/03/us/politics/supreme-court-immunity-decision.html; Trevor W. Morrison, *A Rule for the Ages, or a Rule for Trump?*, LAWFARE (July 11, 2024), https://www.lawfaremedia.org/article/a-rule-for-the-ages--

opinions that have come to characterize the Roberts Court have masked the extreme effects of the Court's decisions.

In recent terms, the Court has demonstrated a more pronounced predilection to depart from existing legal doctrine and has more frequently deviated from limits on the exercise of judicial review. The Supreme Court, considered a court of last review, has increasingly decided significant legal questions on its "shadow docket" before hearing the full merits of the case, resulting in unexplained rulings on procedural grounds with enormous consequences.[20] Similarly, *stare decisis*—a guiding principle requiring courts to honor prior judicial decisions involving the same or similar legal issues to allow for stability under the law—no longer seems to carry the deference it once held.[21] Justiciability doctrines, including the standing requirement, are increasingly treated by the Court as discretionary and malleable.[22]

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or-a-rule-for-trump (criticizing the *Trump* opinion as "badly misstate[ing] principles of separation of powers to immunize hypothetical future presidents—in service of immunity for Trump himself.").

20. For an example, see U.S. Dep't of Homeland Sec. v. D. V. D., 145 S. Ct. 2153 (2025) (issuing a shadow-docket ruling that lifted a district court's order halting the deportation of immigrants to countries that were not listed on their removal orders). Stephen I. Vladeck, *A Court of First View*, 138 HARV. L. REV. 533, 538 (2024) ("The Court is thus not just reaching the merits at very early stages of a growing percentage of cases resolved through opinions of the Court; it is doing so in many of its biggest and most legally and/or politically consequential decisions."); *see also* Jonathan Stempel, *US Supreme Court's Kagan Says Emergency Docket Does Not Lead to Court's Best Work*, REUTERS (Sept. 9, 2024), https://www.reuters.com/world/us/us-supreme-courts-kagan-says-emergency-docket-does-not-lead-courts-best-work-2024-09-09; Stephen I. Vladeck, *Roberts Has Lost Control of the Supreme Court*, N.Y. TIMES (Apr. 13, 2022), https://www.nytimes.com/2022/04/13/opinion/john-roberts-supreme-court.html; Ben Johnson & Logan Strother, *Shedding Light on the Roberts Court Shadow Docket* (Aug. 27, 2022), https://ssrn.com/abstract=4202390.

21. Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1537 (2008); *see also* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023).

22. David D. Cole, *"We Do No Such Thing":* 303 Creative v. Elenis *and the Future of First Amendment Challenges to Public Accommodations Laws*, 133 YALE L.J.F. 499 (2024), https://www.yalelawjournal.org/pdf/ColeYLJForumEssay_hgfr3cxy.pdf (noting that the *303 Creative* case, involving a free speech challenge to a state anti-discrimination law brought by a website designer who objected to making wedding websites for

Pledged fidelity to separation of powers principles and judicial restraint also increasingly present as largely lip service.[23] As the Court ignores, deconstructs, or nullifies established norms, it tells us that it is doing no such thing. This, in effect, is judicial sanewashing.

A. The Stare Decisis Sweet Talk

Part and parcel of the Roberts Court's sanitizing practices, the Court's conservative majority routinely espouses fidelity to precedent, only to devise imaginative justifications to undermine well-settled legal doctrine.[24] Under the American legal tradition of *stare decisis*, courts are bound to follow the rules of prior decisions unless there is a "special justification" or "strong grounds" to overrule precedent.[25] The doctrine, which translates from Latin to "let the decision stand," is intended to promote stability in the law.[26] Finding its origins in 18th

same-sex couples, was decided before the plaintiff had served any customers and when it remained unclear at the time of the filing whether the law would, in fact, be violated).

23. *See* Kantor & Liptak, *supra* note 19; *see also* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022); Morrison, *supra* note 19.

24. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 588 (2013) (Ginsburg, J., dissenting) ("In today's decision, the Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*. The Court does so with nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited 'significance' of the equal sovereignty principle."); Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 729 (2024) [hereinafter Murray & Shaw, Dobbs *and Democracy*] (describing the rhetorical devices utilized by the *Dobbs* majority "to lay waste to decades' worth of precedent, while rebutting charges of judicial imperialism and purporting to restore the people's voices").

25. *Stare Decisis*, BLACK'S LAW DICTIONARY (12th ed. 2014) (defining *stare decisis* as the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation); s*ee also* BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 4 (Sept. 24, 2018), https://crsreports.congress.gov/product/pdf/R/R45319; Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 309–10 (2020).

26. Murray, *Stare Decisis and Remedy*, *supra* note 11, at 1507 (explaining that the principle of *stare decisis* maintains that "a court cannot simply overrule past decisions because it believes they are wrong").

century English common law,[27] *stare decisis* was endorsed by the Constitution's Framers as foundational to the American legal system.[28] Alexander Hamilton, addressing concerns in the Federalist No. 78 about the proper role of the judiciary, reassured a skeptical public that judicial power would be constrained through the application of legal precedent, which would limit potential abuse by judges by mitigating unchecked discretion in interpreting ambiguous legal texts.[29] Former Supreme Court Justice Lewis Powell also spoke of the significance of the principle of *stare decisis*, expressing that "[t]he elimination of constitutional *stare decisis* would represent an explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is."[30]

The federal judiciary's commitment to *stare decisis* was historically been so robust that during the 34-year tenure of John Marshall—the longest-serving Chief Justice of the Supreme Court—the Court issued 1,129 decisions[31] and did not overrule a single legal

27. WILLIAM BLACKSTONE, *Introduction* to COMMENTARIES ON THE LAWS OF ENGLAND *69–70 (Oxford, Clarendon Press 1765–1769) (describing precedent as a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments).

28. *See, e.g.*, Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 664 (1999); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 9 (2001) ("[C]oncern about such discretion was a common theme throughout the antebellum period; in one form or another, it shaped most antebellum explanations of the need for *stare decisis*."); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 792 (2012) (explaining how the principle of *stare decisis* has been at the core of the American legal tradition since the nation's founding).

29. THE FEDERALIST No. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("To avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . .").

30. *With* Roe *Overturned, Legal Precedent Moves to Centerstage*, ABA (June 24, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/stare-decisis-takes-centerstage.

31. .JOEL RICHARD PAUL, WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES, 236 (2019); *see also* GARY SCHMITT & REBECCA BURGESS, MCCULLOCH V. MARYLAND AT 200: DEBATING JOHN MARSHALL'S JURISPRUDENCE 5 (2020).

precedent.[32] Comparatively, as of the 2023–2024 term, the Roberts Court had reversed 22 opinions,[33] with the number of overturned judicial decisions increasing since the Supreme Court acquired a conservative supermajority.[34] The most controversial of the decisions overturning well-established legal precedent include *Citizens United v. Federal Election Commission*,[35] *Shelby County v. Holder*,[36] *Dobbs v. Jackson Women's Health Organization*,[37] *Students for Fair Admissions, Inc. v. Harvard College*,[38] and *Loper Bright Enterprises v.*

32. BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, *The Supreme Court's Overruling of Constitutional Precedent* 27 (2018).

33. *Id.* at 27–50. The following Roberts Court decisions have resulted in overturning prior precedent: Loper Bright Enter. v. Raimondo, 143 S. Ct. 2429 (2024); Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2022); Edwards v. Vannoy, No. 19-5807 (U.S. May 17, 2021); Ramos v. Louisiana, 590 U.S. 83 (2020); Franchise Tax Bd. of California v. Hyatt, 587 U.S. 230 (2019); Herrera v. Wyoming, 587 U.S. 329 (2019); Knick v. Twp. of Scott, 588 U.S. 180 (2019); Rucho v. Common Cause, 588 U.S. 684 (2019); South Dakota v. Wayfair, 585 U.S. 162 (2018); Trump v. Hawaii, No. 17-965 (2018); Janus v. Am. Fed. of State, County, & Munic. Emps., 942 F (2018); Hurst v. Florida, 577 U.S 92 (2016); Obergefell v. Hodges, 574 U.S. 1118 (2015); Johnson v. United States, 576 U.S. 591 (2015); Alleyne v. United States, 570 U.S. 99 (2013); Citizens United v. FEC, 558 U.S. 310 (2010); Pearson v. Callahan, 555 U.S. 223 (2009); Montejo v. Louisiana, 556 U.S.778 (2009); Leegin Creative Leather Products Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Bowles v. Russell, 551 U.S. 205 (2007); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006); Roper v. Simmons, 543 U.S. 551 (2005).

34. Adam Liptak, *The Supreme Court's Mixed Record on Adhering to Precedent*, N.Y. TIMES (Jan. 29, 2024), https://www.nytimes.com/2024/01/29/us/supreme-court-precedent-chevron.html. The number of legal precedents overturned by the Roberts Court is consistent with that of the four predecessor courts, but many of those cases overruled by the Roberts Court involved "high salience" cases of socio-political and legal significance.

35. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (overruling *Austin v. Michigan State Chamber of Commerce*, an earlier decision that had permitted prohibitions on independent expenditures by corporations).

36. Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013) (invalidating a key provision of the Voting Rights Act).

37. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022) (overruling the Court's decisions in *Roe v. Wade* and *Planned Parenthood v. Casey*, which had enshrined constitutional protections for a person to terminate a pre-viable fetus).

38. Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181, 231 (2023) (effectively ending affirmative action in higher education without expressly overturning the Court's earlier precedent).

Raimondo.[39] Collectively, these precedent-shattering opinions have had far-reaching effects impacting the integrity of elections, the ability of persons to make bodily decisions in conjunction with their medical providers, equal access to higher education, and the administration of federal programs.

Importantly, the sanewashing techniques employed by the Roberts Court to nullify legal precedent have been varied and often in conjunction with each other. In some instances, the Court has defended overruling earlier decisions by describing them as "egregiously wrong" or "on a collision course with the Constitution from the day it was decided," drawing false comparisons to discredited cases with limited parallels.[40] In yet other cases, the Court has criticized the reasoning of prior decisions as deeply flawed and having "become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake."[41] Meanwhile, other legal doctrines have fallen to the wayside by virtue of having been deemed "unworkable."[42] Often, while excoriating

39. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 413 (2024) (overruling the Chevron Doctrine, a long-established framework that required courts to defer to reasonable agency interpretations of ambiguous statutes as violative of the Administrative Procedure Act).

40. *Dobbs*, 597 U.S. at 268 (analogizing *Roe* and its progeny to *Plessy v. Ferguson*, the infamous decision upholding the constitutionality of state-mandated racial segregation); *see also* Reva B. Siegel, *History of History and Tradition: The Roots of* Dobbs *'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 108 (2023) [hereinafter Reva B. Siegel, *History of History and Tradition*] (disputing the claim that *Dobbs* is like *Brown v. Board of Education*, a position asserted by the *Dobbs* Court multiple times throughout the opinion).

41. Citizens United v. FEC, 558 U.S. 310, 379 (2010) (Roberts, J., concurring) (overruling *Austin v. Michigan State Chamber of Commerce*, allowing limitations on independent expenditures by corporations, which the Court described as "'aberration' insofar as it departed from the robust protections we had granted political speech in our earlier cases"); *see also Dobbs*, 597 U.S. at 270 (describing the Court's reasoning in *Roe* as "exceptionally weak" and causing "damaging consequences"); Murray, *Stare Decisis and Remedy*, *supra* note 11, at 1514–15 ("And notably, the Roberts Court often regards an earlier decision's misalignment with the current doctrine as evidence that the earlier decision was poorly reasoned—even in circumstances where the doctrinal misalignment is the result of the Court's own decision-making").

42. *Loper Bright*, 603 U.S. at 408; *see also Dobbs*, 597 U.S. at 280 ("*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel

earlier decisions and replacing judicial and legislative judgment with its own,[43] the Roberts Court has engaged in perhaps the most performative sanewashing practice—misrepresenting its actions as a form of "judicial humility."[44]

A recurring pattern in the Roberts Court's treatment of judicial precedent is that, although the Court claims to adhere to *stare decisis*, it only binds itself to legal precedent when convenient, giving the appearance that the Court's conservative majority is developing a "personal precedent" to support outcomes that favor preferred groups and issues.[45] The Roberts Court has approached *stare decisis* as requiring the nullification of precedent, no matter how well-established or entrenched in the Court's jurisprudence, if it perceives the standard

unending adherence to *Roe*'s abuse of judicial authority"); *see also Students for Fair Admissions*, 600 U.S. at 215 ("The question whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhance[s] appreciation, respect, and empathy,' or effectively 'train[s] future leaders' is standardless. The interests that respondents seek, though plainly worthy, are inescapably imponderable.").

43. Murray, *Stare Decisis and Remedy*, *supra* note 11, at 1515 (describing the Roberts Court's rationales for overruling precedent as reflective of "an undeniably subjective tenor").

44. *See, e.g.*, *Dobbs*, 597 U.S. at 338 (Kavanaugh, J., concurring) (explaining that judicial humility demanded that the Court revoke constitutional abortion rights and return the issue to states to decide*); see also* Rucho v. Common Cause, 588 U.S. 684, 718 (2019) (justifying the Court's decision to declare partisan gerrymandering a nonjusticiable political question as necessary to avoid "an unprecedented expansion of judicial power"); Reva B. Siegel, *The Levels-of-Generality Game: "History and Tradition" in the Roberts Court*, 47 HARV. J.L. & PUB. POL'Y 539, 563–64 (2024) [hereinafter Reva B. Siegel, *Levels-of-Generality Game*] (demonstrating how constitutional memory is an "expressive role of conservative historicism" and rebutting the claim that it embodies a form of "judicial-constraint"); *Loper Bright*, 603 U.S. at 411–12; *see also Dobbs*, 597 U.S. at 261 (quoting Justice White's dissent in *Roe* in characterizing that decision as an "exercise of raw judicial power").

45. *See* Adam Liptak, *The Problem of 'Personal Precedents' of Supreme Court Justices*, N.Y. TIMES (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/us/politics/supreme-court-personal-precedents.html; s*ee also* Murray, *Stare Decisis and Remedy*, *supra* note 11, at 1506 (encouraging a view of the Roberts Court's approach to *stare decisis* as from a remedial lens motivated by an "apparent desire to remedy injuries done to Christian conservatives, working-class whites, and, more generally, white people"); Greenhouse, *supra* note 9.

as a source of racial, religious, or constitutional injustice.[46] What constitutes an injustice under these personal precedents, however, is ideologically slanted (though never outwardly acknowledged by the Court) so as to reframe legal harms from the perspective of dominant classes.[47] Though the concept of remedial *stare decisis* is not unique to the Roberts Court,[48] what is distinguishable in its modern application is its usage to nullify antidiscrimination protections and political and civil rights to reinstate white superiority in the law.[49]

The *stare decisis* sweet talk is a particularly pernicious form of judicial sanewashing, as illustrated in the Roberts Court's approach to undermining and ultimately reversing racial integration in schools. In *Parents Involved in Community Schools v. Seattle School Dist. No. 1* ("*Parents Involved*")[50] and *Students for Fair Admissions v. Harvard* ("*SFFA*")—two cases involving successful legal challenges to school integration plans—Chief Justice Roberts, writing for the Court,

46. Murray, *Stare Decisis and Remedy*, *supra* note 11, at 1506.

47. *Id.*

48. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating criminal prohibitions on interracial marriage, effectively repudiating the Court's earlier approval of state anti-miscegenation laws in *Pace v. Alabama*); Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Board of Education, 347 U.S. 483 (1954); Pace v. Alabama, 106 U.S. 583 (1883), overruled by McLaughlin v. Florida, 379 U.S. 184 (1964).

49. *See generally*, Reginald Oh, *The Roberts Court's Anti-Democracy Jurisprudence and the Reemergence of State Authoritarian Enclaves*, 12 J. RACE, GENDER & ETHNICITY 40, 48–50 (2023) (discussing the role of the Roberts Court's "anti-democracy reinforcing judicial review" that has permitted "Jim Crow authoritarian enclaves" to pursue a "white nationalist agenda"); *see, e.g.*, Liz Granderson, *Texas Gerrymandering is All About Keeping a Grip on White Power*, L.A. TIMES, (Dec. 8, 2021), https://www.latimes.com/opinion/stoy/2021-12-08/texas-gerrymandering-white-power-latino-voters; Brennan Ctr for Just., *Racial Turnout Gap Grew in Jurisdictions Previously Covered by the Voting Rights Act* (August 20, 2021), https://www.brennancenter.org/our-work/research-reports/racial-turnout-gap-grew-jurisdictions-previously-covered-votingrights; s*ee also* Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307, 1345 (2024) ("Eliminating explicit consideration of race for admissions [in *Students for Fair Admissions*] while leaving intact admissions policies known to favor White applicants and disfavor applicants of color calls into question whether Chief Justice Roberts is sincere about eliminating all racial discrimination.").

50. Parents Involved in Community Schools v. Seattle School District, No. 1, 551 U.S. 701 (2007).

invoked comparisons to *Brown v. Board of Education* ("*Brown*"), the Court's landmark school desegregation case. The Court's decisions in *Parents Involved* and *SFFA* harnessed the language and precedent of *Brown*, a decision mandating racial equality, to reason that voluntary school integration programs were racially discriminatory and unconstitutional.[51] In *Parents United*, the Chief Justice dedicated multiple pages to lauding the Court's commitment to "achiev[ing] a system of determining admission to the public schools on a *nonracial basis*" as being the vindicating purpose of *Brown*.[52] Chief Justice Roberts sanewashed the *Brown* decision so that this landmark civil rights opinion no longer stood for the repudiation of white supremacy but instead reflected the "fundamental principle" that the Constitution is colorblind and, as such, prohibits any distinction based on race or color, even for purposes of remediating the effects of *de jure* racism.[53]

Fifteen years later in *SFFA*,[54] Chief Justice Roberts again recycled his *stare decisis* sweet talk when he relied on *Brown* and other landmark civil rights cases to gut the Court's long-standing jurisprudence in support of affirmative action in higher education.[55] The *SFFA* opinion, like the *Parents Involved* opinion, mischaracterized *Brown* so that it no longer advanced the notion of racial equity under the law but instead required the invalidation of all racial distinctions—whether remedial or discriminatory—as facially unconstitutional.[56]

The Roberts Court's sanewashing of *Brown*, linguistic distortion of racial equity language, and construction of false equivalencies between Jim Crow discrimination and racially inclusive educational policies have allowed the Court to impose a new legal standard that renders race-conscious remedial measures impossible to

51. *Id.*

52. *Id.* at 743, 747–48.

53. *Id.* at 743.

54. Students for Fair Admissions v. Harvard, 600 U.S. 181

55. *Id.* at 203 (citing McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950); Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)).

56. *Id.* at 204 ("The time for making distinctions based on race had passed. *Brown*, the Court observed, 'declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional.'").

defend under the Constitution.[57] The consequence of this stealthy sanewashing strategy is the reinstitution of racial segregation and the production of outcomes antithetical to the educational equality mandate of *Brown*.

B. Sterilizing the Nation's "History and Traditions"

Sanewashing the nation's "history and traditions" has been another particularly effective practice the Court has leveraged to justify a regressive approach to constitutional protections for historically marginalized communities. The Roberts Court relies heavily on history and tradition to define constitutional rights, selectively interpreting historical precedents to support controversial rulings. This selective interpretation—what this Article terms judicial sanewashing—produces sanitized and often misleading portrayals of history that are used to advance an application of the Constitution predicated on 18th and 19th century standards dictated by a wealthy, male-dominated, Christian-centered elite. Sanewashing allows the Court to normalize dramatic doctrinal changes despite significant departures from prior legal norms. This section critiques the Roberts Court's reappraisal and elevation of the history and tradition standard, examining how the Court has used this standard to sanewash controversial legal decisions that produce absurd, inconsistent, and inequitable results.[58]

Until recently reconstituted and exalted by the Roberts Court to heightened prominence, the history and tradition standard for evaluating basic constitutional protections was but one interpretative method used by the Court.[59] Finding its origins in an extreme view of

57. *See* Chang, *supra* note 49, at 1352 ("But the Court, following a shift in Court personnel, ignored stare decisis and held that every affirmative consideration of race was equivalent and deserving of strict scrutiny. False equivalents.").

58. Chief Justice William Rehnquist, one of the two dissenters in *Roe v. Wade*, advocated for the "history and tradition" framework to examine unenumerated constitutional rights in *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). In applying this standard in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231, 237 (2022), Justice Alito rigidly interpreted the "history and tradition" test as foreclosing the recognition of constitutional protections for rights that, according to the Court, fall outside of the narrow confines of being "deeply rooted" or "implicit in the concept of ordered liberty."

59. Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 903 (1990) (discussing the increased reliance

originalism, the Supreme Court had previously repeatedly declined to adopt a history and tradition test as dispositive for defining constitutional rights, characterizing it as a "starting point but not in all cases the ending point of the substantive due process inquiry."[60] As recently as 2015, in *Obergefell v. Hodges*, the Court declined to embrace a narrow, regressive approach to recognizing privacy-based rights under the Constitution, explicitly refusing to limit the scope of inquiry exclusively to early post-colonial norms.[61]

As the composition of the Court has evolved, so too has the importance of the history and tradition inquiry in constitutional law. Over the past several terms, the Roberts Court has expanded the history and tradition test in several key areas, including in the legal standard

beginning in the 1990s on history and tradition as a method of constitutional interpretation); *see also* Emily Bazelon, *How 'History and Tradition' Rulings Are Changing American Law*, THE NEW YORK TIMES MAGAZINE (Apr. 29, 2024), https://www.nytimes.com/2024/04/29/magazine/history-tradition-law-conservative-judges.html.

60. Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). In that case, attorneys for the state of Texas—who were defending the criminalization of same-sex sexual activity amongst consenting adults—unsuccessfully argued that the Court's decision in *Washington v. Glucksburg* provided the definitive substantive due process litmus test requiring there be a history of a defined right in order for it to be recognized by the Court. *Id.* at 593 (Scalia, J., dissenting). *See also* Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition",* 98 S. CAL. L. REV. 1, 28–29 (2024) (chronicling the origins of the Court's modern history and tradition standard as originating from the 1980's conservative legal through movement, which endorsed a purely originalist approach to constitutional interpretation in believing that "[f]or conservative Christians, a history-and-tradition approach could allow attorneys to weave in beliefs about a faith-based founding without explicitly tying interpretation to natural law or religious doctrine—and without imputing a desire to enforce Christian beliefs to framers who themselves had varied views of religion.").

61. Obergefell v. Hodges, 576 U.S. 644, 664 (2015) ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."); *see also id*. ("History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present." (citation omitted)).

governing gun regulations, substantive due process rights, and Establishment Clause cases.[62] Under the Court's ever-broadening and elastic application of the history and tradition standard, rights are only entitled to constitutional protection if they are explicitly referenced in the text of the Constitution or are "deeply rooted" in American history and tradition.[63]

Judicial sanewashing has been particularly effective in the Court's use of history and tradition with respect to the reversal of constitutional protections for disfavored groups. In reversing and diluting constitutional protections for marginalized communities, the Court has often proclaimed allegiance to judicial restraint and constitutional neutrality.[64] Applying a pliable and indeterminate history and tradition standard, the Roberts Court has reversed decades of judicial support for voting rights,[65] race-conscious college

62. Franklin, *supra* note 17, at 947; *see, e.g.*, *Dobbs*, 597 U.S. at 238 (2022) (rescinding constitutional protections for abortion); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (expanding gun rights under the Second Amendment); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (holding that disciplinary action taken by a school against a high school football coach for praying after football games violated the coach's rights to free exercise and free speech under the First Amendment).

63. *See* Franklin, *supra* note 17, at 947; *see also infra* notes 79–98 and accompanying text.

64. *See, e.g.*, *Dobbs*, 597 U.S. at 228, 260, 292 (citing Justice White's dissent in *Roe v. Wade* criticizing the Court's decision in that case as an "exercise in raw judicial power" lacking "clear judicial restraints"); *see also* Trump v. United States, 603 U.S. 593, 681 (2024) (Sotomayor, J., dissenting) (criticizing the Court for departing from the fundamental principle of judicial restraint by continuing to decide questions not before us by endorsing an expansive view of Presidential immunity).

65. Shelby Cnty., v. Holder, 570 U.S. 529, 540 (2013) (striking down a key provision of the Voting Rights Act). Though the Court did not explicitly apply its history and tradition methodology in *Shelby County*, the decision rested heavily on a novel history and tradition-adjacent concept, "equal sovereignty," that the Court defended as rooted in "our historic tradition that all the States enjoy equal sovereignty."

admissions policies,[66] federal protections for accessing abortion care,[67] and modest gun regulations.[68]

The Court's expansion and reliance on a history and tradition-based inquiry to re-examine fundamental constitutional rights has been criticized as a path for the Court to engage in judgment-laden decisions, with limited accountability, that have dismantled equal protection law under a false veil of supposed impartiality.[69] Historians[70] and legal scholars[71] alike have condemned the Roberts Court's aggressive elevation of history and tradition as a dangerous distortion of constitutional interpretation. These criticisms have highlighted the Roberts Court's selective reliance on historical and legal evidence, questionable characterization of history, and inappropriate use of

66. Students for Fair Admissions, Inc. v. Harvard, 600 U.S. 181 (2023) (severely limiting the use of race-conscious considerations in college admissions).

67. *Dobbs*, 597 U.S. at 238 (2022) (overturning the right to abortion).

68. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (invalidating gun restrictions under the Second Amendment).

69. *Bruen*, 597 U.S. at 113 (Breyer, J., dissenting) (observing that "history, as much as any other interpretive method, leaves ample discretion to 'loo[k] over the heads of the [crowd] for one's friends'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 377 (2012))); *see also* Franklin, *supra* note 17, at 947–48 (illustrating how the unacknowledged equality determinations the Court makes in history-and-tradition cases spans doctrinal areas and impacts equal protection law).

70. *See, e.g.*, *History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the American Historical Association and the Organization of American Historians*, AM. HIST. ASS'N (July 6, 2022), https://www.historians.org/news-and-advocacy/aha-advocacy/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah ("The opinion [in *Dobbs*] inadequately represents the history of the common law, the significance of quickening in state law and practice in the United States, and the 19th-century forces that turned early abortion into a crime.").

71. *See generally* Franklin, *supra* note 17, at 951. *See also* MADIBA K. DENNIE, THE ORIGINALISM TRAP 90 (identifying the problematic nature of "originalism's seemingly sacrosanct usage of history to determine whether a right exists" as its adherence to the flawed premise that "if you didn't have rights in the past, you can't have rights in the present or future"); Mayeri, *supra* note 17, at 178 (describing the Court's history and tradition analysis in *Dobbs* as "both factually and methodologically flawed"); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 18, at 902 (describing how the Court's history and tradition methodology "selectively defers to the past" to provide "new justifications for enforcing old forms of status inequality").

outdated traditions to define modern liberty rights.[72] Legal scholars and even some Justices have charged that the history and tradition test is inherently subjective and prone to the personal and policy preferences of judges despite the Court's insistence on its neutrality.[73]

72. *See, e.g.*, Aaron Tang, *After* Dobbs: *History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1126–56 (2023); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1180–93 (2023) [hereinafter Reva B. Siegel, *Memory Games*]; Albert W. Alschuler, *Twilight-Zone Originalism: The Supreme Court's Peculiar Reasoning in* New York State Rifle & Pistol Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1 (2023); District of Columbia v. Heller, 554 U.S. 570, 670 (2008) (Stevens, J., dissenting) ("The Court suggests that by the post-Civil War period, the Second Amendment was understood to secure a right to firearm use and ownership for purely private purposes like personal self-defense. While it is true that some of the legislative history on which the Court relies supports that contention . . . such sources are entitled to limited, if any, weight. All of the statements the Court cites were made long after the framing of the Amendment and cannot possibly supply any insight into the intent of the Framers; and all were made during pitched political debates, so that they are better characterized as advocacy than good-faith attempts at constitutional interpretation." (citation omitted)); Transcript of Oral Argument at 18, United States v. Rahimi, 602 U.S. 680 (2024) (No. 22-915) (quoting Justice Jackson's observations of evidence in "the historical record that domestic violence was not considered dangerousness back in the day" in discussing the applicability of the history and tradition test for determining the constitutionality of gun prohibitions for individuals subject to domestic violence protective orders); *Dobbs*, 597 U.S. at 372 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("[O]f course, 'people' did not ratify the Fourteenth Amendment. Men did. So it is perhaps not so surprising that the ratifiers were not perfectly attuned to the importance of reproductive rights for women's liberty, or for their capacity to participate as equal members of our Nation."). *See also* Carole J. Petersen, *Women's Right to Equality and Reproductive Autonomy: The Impact of* Dobbs v. Jackson Women's Health Organization, 45 U. HAW. L. REV. 305, 323 (2023) (compiling critiques of *Dobbs*' historical analysis); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 18, at 906 (criticizing the Court's "selective and inaccurate account of the historical record" in *Dobbs*).

73. *See also Bruen*, 597 U.S. at 113 (Breyer, J., dissenting) (noting that "history, as much as any other interpretive method, leaves ample discretion to 'loo[k] over the heads of the [crowd] for one's friends'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 377 (2012))); *see also* Reva B. Siegel, *Levels-of-Generality Game*, *supra* note 44, at 570 ("Claims on the past in constitutional argument, whether true, false, or selective, are often value-laden, normative claims").

As noted by Professor Melissa Murray, "history is hardly a passive endeavor" but is, in fact, "an exercise of agency and judgment."[74] Relying on the history and tradition framework, the Roberts Court has exercised its authority, agency, and judgment to revise the history of the Constitution—most notably the Fourteenth Amendment from which many privacy rights are located—to rescind, remove, and recast constitutional protections for groups whose rights were not initially recognized in the nation's constitutional history and traditions. The Roberts Court has reoriented the telling of American history to shape constitutional doctrine in a backwards-facing, countermajoritarian, and ultimately anti-democratic direction.[75] Under the current Court's sanewashed, selective historical narrative, the events that necessitated the expansion of constitutional protections in the aftermath of the Civil War and again during the Civil Rights Era are presented from a pollyannish gaze that permits the Court to declare racial injustice as effectively cured.[76] The Court's emphasis on history

74. Melissa Murray, *Making History*, 133 YALE L.J. F. 990, 995 (2024) [hereinafter Murray, *Making History*]; *see e.g.*, Hugh Ryan, *No History Without the T*, SLATE (Feb. 16, 2025), https://slate.com/news-and-politics/2025/02/stonewall-monument-transgender-removal-nps-website-trump-history.html (reporting on the removal of the words "transgender" and "queer" from the National Park Service's public webpage of the Stonewall National Monument in compliance with an executive order issued on the first day of the second Trump Administration); *see also* Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 18, at 902 ("The Court's claims about the past have a politics."); Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 173 (2006) (describing the important role of courts in "developing and transmitting narratives and images of constitutional history"); Allison Detzel, *Pentagon Agency Bans Black History Month in Compliance With Trump's Anti-DEI Push*, MSNBC (Feb. 1, 2025), https://www.msnbc.com/top-stories/latest/defense-agency-bans-dei-black-history-month-rcna190211.

75. Reva B. Siegel, *Levels-of-Generality Game*, *supra* note 44, at 564 (2024) (connecting "present appeal[s] to the past as claims of judicial constraint" as a mechanism for engaging in "anti-democratic forms of living constitutionalism").

76. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 535 (2013) (narrowly focusing on the reduced racial gap in voter registration and turnout to broadly conclude that federal protections for racial discrimination in voting is no longer necessary); *see also* Students for Fair Admissions, Inc. v. President & Fellows Harvard Coll., 600 U.S. 181, 225 (2023) (reiterating that "race-based admissions programs eventually had to end" and concluding that that time was now when race-based remedial measures are no longer constitutionally justifiable).

and tradition masks a methodology guided more by desired outcomes than objective historical analysis.[77] The intended and functional result is a skewed version of the nation's history and traditions that is touted as a basis "to vindicate its particular vision of equality and equal protection—and a particular understanding of the constituencies in need of judicial solicitude."[78]

Another effective judicial sanewashing technique recycled in the Roberts Court's history and tradition cases is the manipulation of the applied level of generality to reconcile incompatible legal outcomes premised on the same legal standard.[79] By strategically toggling between narrow and broader levels of generality, the 2022–2023 Court term saw the development of the history and tradition standard in two seemingly disparate areas of constitutional law—gun rights[80] and abortion access—to reconcile otherwise incongruous results.[81] One case, *N.Y. State Rifle & Pistol Ass'n v. Bruen*,[82] saw the expansion of a constitutional right; the other, *Dobbs v. Jackson Women's Health*

77. Mary Ziegler, *The History of Neutrality:* Dobbs *and the Social-Movement Politics of History and Tradition*, 133 YALE L.J.F. 161, 164 (2023) (arguing that the modern Court's history and tradition approach is a strategic choice to prioritize certain accounts over others—not a "neutral" one as is frequently claimed).

78. Murray, *Making History*, *supra* note 74, at 1001 (describing Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 951 (2024)).

79. There is a developing body of scholarship that suggests that the level of generality employed in the Roberts Court's history and tradition analysis is not a value-neutral or inconsequential judicial determination. *See generally* Ziegler, *supra* note 77; Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F. 65 (2024); Reva B. Siegel, *History of History and Tradition*, *supra* note 40, at 99; Franklin, *supra* note 17, at 967; Murray, *Making History*, *supra* note 74, at 990; Reva B. Siegel, *Memory Games*, *supra* note 72, at 1127; Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 HARV. L. REV. F. 537 (2022). *See also* Khiara M. Bridges, *Race in the Roberts Court*, 136 HARV. L. REV. 23, 27–28 (2022) (explaining the Roberts Court's manipulation of the applied level of generality in adjudicating constitutional questions implicating racial discrimination by describing how the Court "toggles back and forth in the level of generality that it applies in assessments of whether a contemporary injury 'looks like' a pre-Civil Rights Era injury—further proof that the Court strategically deploys its racial theory to accomplish particular ends.").

80. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

81. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

82. *Bruen*, 597 U.S. 1.

Org.,[83] resulted in the elimination of constitutional protections. These opinions, issued only a day apart, arrive at different constitutional conclusions while applying the same legal standard.[84]

In *Bruen*, the Court grounded its decision to strengthen constitutional guarantees for gun owners by adopting a broad view of the nation's history and traditions with respect to the Second Amendment.[85] Putting aside historical countervailing traditions—such as the nation's lengthy, well-documented history of denying Black Americans gun rights[86]—the Court embraced a broad interpretation of the Second Amendment by expansively construing the nation's legal practices and culture with respect to gun access.[87] In contrast, in *Dobbs*, the Court defined the relevant history and traditions applied to abortion rights with a low degree of generality to conclude that privacy protections for abortion access is not a constitutionally protected fundamental right (despite reaching the opposite holding in *Roe v. Wade*[88] and repeatedly reaffirming its ruling over a nearly 50-year period).[89]

When the history and tradition standard serves groups considered unworthy of recognized rights, the Roberts Court is quick to pivot. Most recently, in *U.S. v. Rahimi*,[90] the Court declined to

83. *Dobbs*, 597 U.S. 215.

84. Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition"*, 98 S. CAL. L. REV. 1, 4 n.11 (2024) ("For example, *Dobbs* enlists history and tradition to interpret the meaning of a constitutional provision like the Due Process Clause of the Fourteenth Amendment, while *Bruen* uses that test to implement an established meaning like what counts as 'arms' under the Second Amendment, or 'keeping' and 'bearing' them.").

85. Franklin, *supra* note 17, at 967.

86. Winkler, *supra* note 79, at 537.

87. *Bruen*, 597 U.S. at 60–64.

88. Roe v. Wade, 410 U.S. 113, 116 (1973).

89. Franklin, *supra* note 17, at 953; Fox & Ziegler, *supra* note 84, at 43–44; Mayeri, *supra* note at 11, 178–79 (2024); Reva B. Siegel, *How "History and Tradition" Perpetuates Inequality*, *supra* note 18, at 901.

90. United States v. Rahimi, 144 S. Ct. 1889 (2024); *see* Daniel S. Harawa, *Between a Rock and a Gun*, 134 YALE L.J.F. 100, 103 (2024) (describing *Rahimi* as "pitt[ing] the Roberts Court's love for guns against its disdain for criminal defendants. The disdain for criminal defendants won out").

protect the gun rights of a "quintessential bad guy."[91] In that case, the defendant appealed a federal firearms conviction, demanding that the Court apply the "cold, calculating, and historical"[92] analysis required under *Bruen* to validate his rights as a gun owner. But the Court, having little sympathy for a repeat criminal offender who had been involved in five shootings in fewer than two months,[93] overturned the Fifth Circuit Court of Appeal's ruling and upheld the defendant's conviction in holding that the appellate court had "misunderstood" *Bruen*'s "methodology."[94]

Concerned about the extension of the sanewashed legal logic in *Bruen* to create virtually unlimited gun rights to populations outside of the Court's preferred orbit, the Court sanewashed its approach to the history and traditions standard in *Rahimi* only a year after issuing its opinion in *Bruen*. Writing for the majority in *Rahimi*, the Chief Justice offered vague guidance, expressing only that gun regulations are compatible with the Second Amendment under the history and tradition test provided the law "comport[s] with the principles underlying the Second Amendment."[95] The Chief Justice emphasized that a law need not necessarily be a "dead ringer" or a "historical twin" to pass constitutional muster.[96]

As demonstrated by the Court's contrasting approaches within a single year on a nearly identical constitutional issue in *Bruen* and *Rahimi*, the Court has been anything but consistent in its history and tradition cases.[97] As observed by Professor Cary Franklin, "[w]hen

91. Daniel S. Harawa, *The Second Amendment's Racial Justice Complexities*, 101 MINN. L. REV. 3225, 3239–40 (2024).

92. Appellant's Supplemental Brief at *23, United States v. Rahimi, No. 21-11001 (5th Cir. July 25, 2022), 2022 WL 3010970.

93. *See* Harawa, *supra* note 92, at 101.

94. *Rahimi*, 144 S. Ct. at 1897.

95. *Id.* at 1906.

96. *Id*. at 1898. Though the facts of *Bruen* implicated the imposition of gun restrictions on domestic violence offenders—a concept entirely absent in the nation's history and traditions and unrelated to Second Amendment principles—this fact seemingly presented no dilemma in applying the Court's malleable history and tradition standard. *See, e.g.*, Greenhouse, *supra* note 9.

97. *Compare* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 52 (2022) (stating that common law would not support a per se ban on carrying a gun, only a ban on using guns for a particular purpose), *and id*. at 70 (holding that the New York law was unconstitutional, in part because it did not match common law which only allowed

history points in unappealing directions, even traditionalist judges raise levels of generality to bring constitutional outcomes in line with 'modern sensibilities' and to avoid results that strike them as 'untenable' today."[98] The pliability of the history and tradition standard—disguised under a façade of objectivity and neutrality—is the reason the test has become one of the Roberts Court's preferred tried-and-true sanewashing techniques.

C. Constructing a Consensus Narrative

Additionally, sanewashing has been furthered through the construction of consensus narratives intended to appeal to a skeptical public. Insulated from public pressures by constitutional design, the Court is empowered to operate with minimal concern for public opinion. Nonetheless, there are strong institutional incentives to preserve the integrity of the Court.[99] Anticipating criticism of its more controversial opinions, the Roberts Court has created alternative narratives of law and history to attempt to align judicial decisions with select societal views. In reality, though, the Court's most impactful and controversial decisions have tended to be in opposition to both legal precedent and public sentiment.[100]

Throughout the nation's history, constitutional change has been achieved more commonly through judicial interpretation rather than

restricted gun use based on a specific purpose), *with Rahimi*, 602 U.S. at 691 (stating that, despite the creation of the "historical tradition" requirement in *Bruen*, courts have misunderstood the standard and the test is "not meant to suggest a law trapped in amber.").

98. Franklin, *supra* note 17, at 967 (citation omitted) (incorporating Justice Jackson's questions in the 2024 oral arguments in *United States v. Rahimi* in which she inquired about the point of "looking back hundreds of years if we know that twenty-first-century understandings actually guide the analysis in history-and-tradition cases?").

99. *See* Barry Friedman, *What It Takes to Curb the Court*, 2023 WIS. L. REV. 513, 517 (2023).

100. *See, e.g.*, Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023) (invalidating race-based affirmative action in college admissions); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Rucho v. Common Cause, 588 U.S. 684 (2019) (deeming partisan gerrymandering claims to be a nonjusticiable political question); Citizens United v. FEC, 558 U.S. 310 (2010) (holding that First Amendment speech protections extend to political spending).

textual amendment as social values and societal needs have evolved.[101] As explained by Cass Sunstein, judicially led interpretative constitutional changes have been less countermajoritarian[102] than often argued and have resulted in the expansion of constitutional protections.[103] For example, when the Court issued its landmark opinion in *Brown* striking down legalized racial segregation in schools in violation of the Fourteenth Amendment, the decision encountered regional resistance but was generally greeted with widespread national approval.[104] Likewise, the Court's election reapportionment cases[105] of the 1960s also received broad public support.[106]

Moreover, the Court's recognition of a modern privacy right for married couples to use contraceptives in *Griswold v. Connecticut*[107] occurred at a time when only two states retained bans on contraceptive access.[108] Throughout the 1960s and 1970s, the Court continued to expand the reach of privacy rights, paralleling an emergent social consensus that supported greater gender equality and civil rights.[109] When the Court concluded that sex-based gender discrimination was constitutionally impermissible in a series of decisions in the 1970s and

101. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 122–23 (2004).

102. The "countermajoritarian difficulty"—a reoccurring topic of debate among legal scholars—refers to the potential conflict in the exercise of judicial review by unelected judges in a majoritarian democracy. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

103. SUNSTEIN, *supra* note 101, at 125.

104. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (holding that the Fourteenth Amendment prohibited differential treatment based on sex).

105. Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

106. Friedman, *supra* note 102, at 206.

107. Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965).

108. SUNSTEIN, *supra* note 101, at 125.

109. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (finding that abortion is protected by the Constitution's implied right to privacy); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (establishing a constitutional right for unmarried people to use contraceptives); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating laws that allow interracial marriage bans as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

1980s,[110] the Court's position was largely aligned with popular opinion.[111] The Court's recognition of legal protections for constitutionally neglected populations continued to progress into the 1990s and 2000s, culminating in the invalidation of anti-LGBTQ laws in *Lawrence v. Texas*[112] and *Obergefell v. Hodges*.[113] Each of these landmark decisions expanding civil liberties was celebrated as a constitutionally legitimate representation of the view of political majorities of the time.[114]

In contrast, the Roberts Court's most divisive cases have generally been counter, rather than consistent, with prevailing public opinion. Spanning a range of constitutional issues, the Roberts Court has repudiated both social consensus and *stare decisis*, engaging in an aggressive recalibration of constitutional tradition that has lacked broad social support. In addition to evoking criticism from legal scholars and practitioners,[115] these decisions have also often diverged from bipartisan majority views.

One such example is the Court's 2010 opinion in *Citizens United v. Federal Election Commission*,[116] overruling *Austin v. Michigan State Chamber of Commerce*[117] and provoking criticism from

110. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (concluding that a state law that assigned the husband "master" of all marital property and allowed him to control marital property without his wife's consent was unconstitutional); Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (holding gender-based distinctions in Social Security benefits unconstitutional); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (finding unconstitutional a law that required women to assume unpaid maternity leave after their first trimester based on the presumption that pregnant women are unable to work); Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating a federal law that imposed gender-based distinctions in benefit determinations for members of the armed forces and their families).

111. SUNSTEIN, *supra* note 101, at 125.

112. Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating a state law that criminalized homosexual sex).

113. Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the constitutionally protected right to marry extends to same-sex couples).

114. SUNSTEIN, *supra* note 101, at 125.

115. *How Corporate Money Will Reshape Politics*, N.Y. TIMES, (Jan. 21, 2010, 12:45 PM), https://archive.nytimes.com/roomfordebate.blogs.nytimes.com/2010/01/21/how-corporate-money-will-reshape-politics.

116. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362–63 (2010).

117. Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 654 (1990).

both the public and members of the Court about whether the Court demonstrated appropriate deference to the doctrine of *stare decisis*.[118] The ruling reversed a century-old campaign finance restriction in locating a constitutional right under the First Amendment to unlimited political spending by corporations.[119] *Citizens United*, deeply unpopular at the time it was decided, is even more unpopular today.[120]

Conscious of the reputation of the Court, Chief Justice Roberts attempted to sanewash the decision, writing in a concurring opinion that "[*stare decisis*'] greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent."[121] These tepid assurances by the Court in rationalizing the reversal of a century of campaign finance reform law as necessary to advance constitutional ideals did little to prevent the anti-democratic effects of the decision.

More than 15 years after the Court's expansion of First Amendment free speech rights to encompass unrestricted political campaign spending, many of the dire anti-democratic predictions in the aftermath of *Citizens United* have come to fruition.[122] Within six years of the *Citizens United* decision, corporate political spending had increased by roughly 900%.[123] Political spending by corporations and

118. *See, e.g.*, *Citizens United*, 558 U.S. at 408–14 (Stevens, J., dissenting); *see also* Kenneth Vogel, *Court Decision Opens Floodgates for Corporate Cash*, POLITICO (Jan. 21, 2010, 10:25 AM), https://www.politico.com/story/2010/01/court-decision-opens-floodgates-for-corporate-cash-031786; *see also How Corporate Money Will Reshape Politics*, *supra* note 115.

119. *Citizens United*, 558 U.S. at 365.

120. Leah Field, *10 Years Later, Americans Stand Opposed to* Citizens United, THE HILL (Jan. 17, 2020, 6:30 PM), https://thehill.com/blogs/congress-blog/politics/478882-10-years-later-americans-stand-opposed-to-citizens-united.

121. *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).

122. Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 10 (2020) (criticizing the Court's campaign finance decisions as "becoming increasingly extreme over the last decade," and "hav[ing] created a political system dominated by money, which advantages Republicans who disproportionately benefit from the political spending of the most affluent Americans").

123. Adav Noti, Senior Dir., Campaign Legal Ctr., *Statement Before the H. Comm. on the Judiciary* 4 (Jan. 29, 2019),

undisclosed donors, permitted under *Citizens United*, topped $4.5 billion for the 2024 elections, setting a record high.[124] Today, a majority of Americans favor efforts to reduce the influence of wealthy donors and corporations in the political process and would support a constitutional amendment overturning *Citizens United*.[125]

Nearly a decade after the gutting of campaign finance restrictions in *Citizens United*, the Court adopted an equally unpopular and similarly anti-democratic position in *Rucho v. Common Cause*.[126] In that case, the Court concluded that partisan gerrymandering, while "incompatible with democratic principles,"[127] nonetheless constitutes a nonjusticiable political question that is not properly suited for resolution by the federal courts. Chief Justice Roberts, writing for the Court, offered a summation of the Framers' approach to political gerrymandering, acknowledging that disapproval of these practices was far from new, but nevertheless concluding that partisan gerrymandering is unavoidable[128] and not inconsistent[129] with the Founders' vision of democracy. As Chief Judge Roberts reasoned, because there are no "judicially manageable standards" upon which the federal courts can fairly and uniformly adjudicate partisan

https://campaignlegal.org/sites/default/files/2019-01/Statement%20of%20Adav%20Noti%20—%20House%20Judiciary%20%2801-29-2019%29.pdf.

124. Anna Massoglia, *Outside Spending on 2024 Elections Shatters Records, Fueled by Billion-Dollar 'Dark Money' Infusion*, OPENSECRETS (Nov. 5, 2024 2:48 PM), https://www.opensecrets.org/news/2024/11/outside-spending-on-2024-elections-shatters-records-fueled-by-billion-dollar-dark-money-infusion; *see also* Mary Louise Kelly et al., *The influence of Super PACs and Dark Money on This Year's Campaigns*, NPR ALL THINGS CONSIDERED (Nov. 5, 2024, 4:24 PM), https://www.npr.org/2024/11/05/nx-s1-5175799/the-influence-of-super-pacs-and-dark-money-on-this-years-campaigns.

125. Ashley Balcerzak, *Study: Most Americans Want to Kill 'Citizens United' with Constitutional Amendment*, CTR. FOR PUB. INTEGRITY (May 10, 2018), https://publicintegrity.org/politics/study-most-americans-want-to-kill-citizens-united-with-constitutional-amendment.

126. Rucho v. Common Cause, 588 U.S. 684, 718 (2019).

127. *Rucho*, 588 U.S. at 718.

128. *Id.* at 701 ("To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities.").

129. *Id.* at 705 ("The Founders certainly did not think proportional representation was required.").

gerrymandering challenges (even though lower district courts had been doing so for decades), the issue falls beyond the scope of the courts' jurisdiction. Declaring that the Court should embrace judicial restraint to avoid "an unprecedented expansion of judicial power," the Court announced it was powerless to address excessive partisanship in the political process.[130]

This line of reasoning allowed the Court to represent its exercise of judicial review as restrained and principled, even as it deliberately narrowed its role and distanced itself from safeguarding the electoral process.[131] Moreover, as other scholars have noted, the *Rucho* decision "failed to satisfy its own standards for principled decision-making"[132] in that the legal reasoning conflicted with earlier decisions where the Court was unconcerned with the absence of an explicit constitutional provision or established body of law on which to ground its analysis.[133]

The practical effect of declaring partisan gerrymandering to be a nonjusticiable political question has been the ossification of electoral maps that fail to represent voter preferences and disproportionately favor the Republican Party and conservative political interests.[134] By some estimates, partisan gerrymandering abuses likely accounted for as many as 19 congressional seats having been undemocratically allocated to the Republican Party in 2016, representing a significant portion of the seats Democrats would have needed to gain control of the House.[135] The conservative overrepresentation in Congress is

130. *Id*. at 718.

131. *Id.* at 721–22 (Kagan, J., dissenting); *see also* Kevin Morris, *Partisan Gerrymander Review after* Rucho*: Proof is in the Procedure*, 105 MARQ. L. REV. 787 (2022).

132. Chad M. Oldfather & Sydney Star, *Roberts, Rules, and* Rucho, 53 CONN. L. REV. 705, 709 (2022).

133. *Id*. at 725 (describing the inconsistencies in Chief Judge Roberts' legal reasoning in *Rucho* and *Shelby County*).

134. *See* Klarman, *supra* note 122, at 47. *See generally* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 102 (2018).

135. Laura Royden & Michael Li, *Extreme Maps*, BRENNAN CTR. FOR JUST., May 9, 2017, https://www.brennancenter.org/our-work/research-reports/extreme-maps.

attributable to acute partisan bias in the congressional maps of seven states, nearly all of which are swing states.[136]

Citizens United and *Rucho*, when considered in tandem, undermine the health of the nation's participatory democracy by enabling uncontrolled political spending to entrench unaccountable politicians whose tenure in office is owed to noncompetitive, partisan, gerrymandered electoral districts. Voters, irrespective of political ideology, are emphatic in their disapproval of the distortion of the political process that results from partisan gerrymandering and unregulated political campaign financing.[137]

Likewise, the Court's reversal of nearly a half-century of precedent supporting constitutional protections for reproductive rights in the 2022 *Dobbs*[138] decision is similarly controversial and countermajoritarian.[139] The sanewashed opinion, characterized by the Court as serving democratic principles by returning the issue of abortion "to the people," marked a rare instance where the Court revoked a recognized constitutional right.[140] The rejection of established legal precedent recognizing that reproductive agency is entitled to constitutional privacy protections inspired a groundswell of

136. *Id*. (identifying Michigan, North Carolina, Pennsylvania, Florida, Ohio, Texas, and Virginia as states with extreme partisan gerrymanders driving conservative overrepresentation in Congress).

137. John Kruzel, *American Voters Largely United Against Partisan Gerrymandering, Polling Shows*, THE HILL, (Aug. 4, 2021), https://thehill.com/homenews/state-watch/566327-american-voters-largely-united-against-partisan-gerrymandering-polling.

138. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

139. Mark Murray, *Poll: 61% of Voters Disapprove of Supreme Court Decision Overturning* Roe, NBC NEWS, (June 22, 2023), https://www.nbcnews.com/meet-the-press/first-read/poll-61-voters-disapprove-supreme-court-decision-overturning-roe-rcna90415; s*ee also The Harris Poll*, CAPS AT HARV. UNIV. (last visited Jan. 1, 2025), https://harvardharrispoll.com/wp-content/uploads/2022/07/HHP_June2022_KeyResults.pdf; *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR., (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade.

140. Erwin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427, 427 (2023) [hereinafter Chemerinsky, *Future of Substantive Due Process*]; DENNIE, *supra* note 71, at 137.

public support for state-level efforts to codify *Roe*.[141] Shortly following the Court's decision in the *Dobbs* decision, seven states—Arizona, Colorado, Maryland, Missouri, Montana, Nebraska, Nevada, and New York—passed ballot measures to recognize a right to abortion.[142] The majority of these initiatives were citizen-led.[143]

In both *Dobbs* and *Citizens United*, the Court sanewashed its constitutional analysis. Together, these lengthy, novella-like opinions eliminated rights for women and expanded rights for corporations, all while asserting that the constitutional issues before the Court were "straightforward."[144] In *Dobbs*, the Court rationalized the recession of a multi-generational reliance on reproductive rights[145] by

141. *See* Mikaela Lefrak, *Vermont Votes to Protect Abortion Rights in State Constitution*, NPR (Nov. 9, 2022), https://www.npr.org/2022/11/09/1134832172/vermont-votes-abortion-constitution-midterms-results; Mitch Smith & Ava Sasani, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 10, 2022), https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html; Julie Carr Smyth, *Ohio Voters Enshrine Abortion Access in Constitution in Latest Statewide Win for Reproductive Rights*, AP NEWS (Nov. 7, 2023), https://apnews.com/article/ohio-abortionamendment-election-2023-fe3e06747b616507d8ca21ea26485270; Natalie Sherman & Kayla Epstein, *Seven States Expand Abortion Protections as Florida Ballot Fails*, BBC NEWS (Nov. 6, 2024), https://www.bbc.com/news/articles/c36pxnj01xgo (Of Florida voters, 57% endorsed a ballot measure to amend the state's constitution to provide legal protection for an abortion cause, but Florida imposes a threshold of 60% for passage of a ballot measure, unlike the simple majority required by most states, the amendment was unsuccessful).

142. *Ballot Tracker: Outcome of Abortion-Related State Constitutional Amendment Measures in the 2024 Election*, KFF (Nov. 6, 2024), https://www.kff.org/womens-health-policy/dashboard/ballot-tracker-status-of-abortion-related-state-constitutional-amendment-measures.

143. *Id.*

144. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 309 (2022) (Thomas, J., concurring) ("The resolution of this case is thus straightforward. Because the Due Process Clause does not secure any substantive rights, it does not secure a right to abortion"); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 28 (2022) (describing the Court's 2008 decision in *District of Columbia v. Heller* as illustrative of the "straightforward historical inquiry" to determine when modern firearms regulations are consistent with the Second Amendment's text and historical understanding).

145. *See generally* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1846–47 (2023) (arguing that the Court's refusal in *Dobbs* to recognize

paternalistically asserting a duty to "guard against the natural human tendency to confuse what [the Constitution] protects with the Court's own ardent views about the liberty that Americans should enjoy."[146] Despite the sanewashed explanation offered by the Court and its insistence that earlier doctrine was fatally flawed, the new standards articulated in both cases have proven "unworkable"[147] and have been a source of chaos and confusion.

The construction of false consensus narratives professing to support democratic ideals and the will of the people is a powerful form of judicial sanewashing that defies ideals of representative governance and majority sentiment.[148] The issues of constitutional protection for bodily autonomy and limitations on dark money[149] in politics share

a reliance interest in the precedents protecting the right to abortion is inconsistent with the Court's prevailing *stare decisis* jurisprudence).

146. *Dobbs*, 597 U.S. at 254 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

147. *See* Matt Valentine, *Clarence Thomas Created a Confusing New Rule That's Gutting Gun Laws*, POLITICO (July 28, 2023), https://www.politico.com/news/magazine/2023/07/28/bruen-supreme-court-rahimi-00108285 (highlighting how the "[l]ower courts have wrestled with" *Bruen*); Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67 (2023) (analyzing over 300 lower federal court decisions applying *Bruen* demonstrating the test's fundamental unworkability); Clara Fong et al., *Judges Find Supreme Court's* Bruen *Test Unworkable*, BRENNAN CENTER FOR JUSTICE (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable (stating that federal judges appointed by various presidents "have all questioned the opinion, warning that history is an unworkable basis for deciding constitutional questions that pushes courts toward unreliable, unreasonable, and unjust conclusions"); *see also* Jessica Winter, *The* Dobbs *Decision Has Unleashed Legal Chaos for Doctors and Patients*, THE NEW YORKER (July 2, 2022), https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients (describing the uncertainty posed by overturning a landmark decision); Vanessa Romo, *A Year After* Dobbs *and the End of* Roe v. Wade*, There's Chaos and Confusion*, NPR (June 24, 2023), https://www.npr.org/2023/06/24/1183639093/abortion-ban-dobbs-roe-v-wade-anniversary-confusion ("[T]he health care landscape has become increasingly fragmented and complex to navigate, spawning widespread confusion.").

148. *See* Reva B. Siegel, *History of History and Tradition*, *supra* note 40, at 108 (examining the Court's interpretative methods).

149. "Dark money" is used to describe political contributions where the source is unknown or not publicly disclosed. *See Dark Money*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-

significant social, political, and legal support. Granted, democratic principles extend far beyond simply equating representative governance with majoritarianism.[150] Yet, the deceptiveness and danger of basing novel legal theories that yield anti-democratic and anti-constitutional outcomes on judicially sanewashed decisions is that it tarnishes the legitimacy of and public confidence in democratic institutions.

Moreover, fabricated judicially created narratives are destructive not only because they serve as a flawed foundation for the law and an inaccurate basis for the historical record, but also because they hold significance and symbolism in shaping social norms.[151] As illustrated by legal and historical scholars, history is an expression of power[152] and constitutional memory is political.[153] Neither is neutral or objective, yet they are depicted as self-evident and unbiased in judicially sanewashed decisions. The experiences and voices that the Court centers often represent those of individuals who are heirs to

money/dark-money (last visited May 23, 2025) (defining "dark money" as political spending by groups that do not disclose their donors).

150. Douglas NeJaime & Reva B. Siegel, *Answering the* Lochner *Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1911 (2021) (noting that "democracy requires more than majoritarianism" and that courts have an important "democracy-promoting" role in "mak[ing] majoritarian processes more democratic [by] grant[ing] rights that protect speech or enable the participation of marginalized or excluded groups"); *see also* Murray & Shaw, Dobbs *and Democracy*, *supra* note 24, at 731, 762 ("[A] functioning democracy not only reflects the popular will but does so in the face of antimajoritarian influences or devices that coexist within majoritarian institutions.").

151. *See, e.g.*, JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 7 (2024) ("Many of the most important forms of constitutional interpretation—arguments from precedent, arguments from tradition, and arguments from original meaning or understanding—involve a mixture of memory and erasure . . . . At stake in constitutional memory is which historical figures and movements will count as makers of constitutional meaning for the present.").

152. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES (Harper Perennial Modern Classics 2003) (offering a "bottom up" account of U.S. history in recognition that history is not neutral).

153. Reva B. Siegel, *History of History and Tradition*, *supra* note 40, at 101; *see also* Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 193 (2023) (explaining that judicial opinions should be understood as narratives that offer a singular, dominant version of the facts and the legal principles that are represented as an objective truth).

status and socioeconomic benefits that stem from a privileged legal standing.[154] The cycle is self-serving and reduplicating. Dominant groups dictate the law, its outcome, and its benefits. History and law are framed by those with the authority to create it, and that power, in turn, is employed to reinforce, legitimize, and maintain exclusive role in the myth-making process.

Importantly, as reflected in the Roberts Court's use of judicial sanewashing, judicially constructed narratives need not be accurate to serve as a basis for new legal precedent and be adopted as fact.[155] The dominant narrative of U.S. history, as taught in many American schools, often centers on the contributions of prominent white male figures, reflecting a particular patriotic framing of America's origins.[156] Frequently, the Roberts Court projects a historical perspective that favors traditional, elite identities—particularly along racial, gender, religious, and cultural lines—while narrowing rights protections for those outside of that framework.[157] It is, for example, the "ordinary

154. MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 6 (2019) ("The Constitution is first and foremost for white men.").

155. For example, many historians questioned the Court's flawed historical interpretation of the Second Amendment's original public meaning in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Yet, it was the basis of the Court's expansion of Second Amendment rights to include an individual right to possess guns in the home, upsetting two centuries of legal precedent. *See, e.g.*, Jennifer Tucker, *Gundamentalism*, 6 MOD. AM. HIST. 78, 84 (2023) (enumerating what professional historians consider "falsehoods" in the Supreme Court's history); *see also* Brief for Jack N. Rakove, Saul Cornell, David T. Konig, William J. Novak, Lois G. Schwoerer et al. as Amici Curiae Supporting Petitioners at 1, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 157183.

156. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES XIV (Harper Perennial Modern Classics 2003); *see also* Destinee Adams, *I Hated History—Until I Learned About Shirley Chisholm*, NPR (Mar. 22, 2024, 12:34 PM ET) https://www.npr.org/2024/03/22/1240171159/shirley-chisholm-womens-history-month. The accurate teaching of American history in schools has become such a politicized issue that roughly 75% of all school-aged children are now taught in schools that restrict the teaching of topics related to race, sex, and gender. *See* Hannah Natanson, Lauren Tierney & Clara Ence Morse, *Which States Are Restricting, or Requiring, Lessons on Race, Sex and Gender*, WASH. POST (June 13, 2024), https://www.washingtonpost.com/education/2024/education-laws-states-teaching-race-gender-sex.

157. Murray, *Children of Men*, *supra* note 18, at 815 (arguing that the Roberts Court has demonstrated a strong preference for vindicating rights that "code male" and have frequently presented male plaintiffs as "aggrieved and embattled rights

hard-working, law-abiding" male plaintiffs in *Bruen* whose Second Amendment rights require protection,[158] not the thousands of children and youth who die each year from gun violence, many in their own schools.[159] Likewise, in *Kennedy v. Bremerton School District*, it was the high school football coach—a white, male, Christian figure who actively promoted himself in the media—whose rights demanded safeguarding by the Court, not the diverse student athletes under his supervision who may not have shared his religious beliefs.[160] Similarly, in *Masterpiece Cakeshop*, the Court characterized the male, Christian baker as needing the Court's protection from "hostile" treatment by the government for his refusal to serve same-sex couples, centering his legal needs and interests over the rights of same-sex couples to be able to participate in a marketplace free of discrimination.[161]

bearers who require—and *deserve*—the Court's Protection"); *see also* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 109 (2019) (arguing that the Court's First Amendment jurisprudence "promotes a simplistic orthodoxy built around the narrative of white, male victimhood, the mythology of the free market, and populist and often patronizing clichés to ensure that the interests of white, male, often extremely wealthy men are protected above all others").

158. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 14–15; *see also id.* at 74 (Alito, J., concurring) ("Some of these people [seeking concealed carry permits] live in high-crime neighborhoods. Some must traverse dark and dangerous streets in order to reach their homes after work or other evening activities."); Transcript of Oral Argument at 67–70, *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (No. 20-843).

159. John Gramlich, *Gun Deaths Among U.S. Children and Teens Rose 50% in Two Years*, PEW RSCH. CTR. (Apr. 6, 2023), https://www.pewresearch.org/short-reads/2023/04/06/gun-deaths-among-us-kids-rose-50-percent-in-two-years; s*ee also* U.S. Dep't of Educ., Inst. of Educ. Sciences, Nat'l Ctr. for Educ. Statistics, *Violent Deaths at School and Away from School, and Active Shooter Incidents*, CONDITION OF EDUC. (July 2024), https://nces.ed.gov/programs/coe/indicator/a01.

160. *See generally* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415–16 (2022). Notably, the dissent and independent journalists have questioned if the Court misrepresented the facts of the case to justify its decision. *Id.* at 2435 (Sotomayor, J., dissenting); *see also* Ian Millhiser, *The Supreme Court Hands the Religious Right a Big Victory by Lying About the Facts of a Case,* VOX (June 27, 2022), https://www.vox.com/2022/6/27/23184848/supreme-court-kennedy-bremerton-school-football-coach-prayer-neil-gorsuch.

161. *See generally* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617 (2018).

The use of narratives artificially anchored to individuals who already reap the greatest gains from the law is a central feature of judicial sanewashing. The judicial posturing of those with the least need for legal protection as powerless and most deserving of the Court's protection is not a function of fact or reality, but rather is a creation the Court has achieved through sanewashed and strategic storytelling.

D. The Creation of Law Through Avoidance, Distortion, and Doctrinal Incoherence

Aside from the legal precedent that the Roberts Court has explicitly overruled, other more subtle sanewashing mechanisms have been employed to distort and disassemble existing doctrine and legal standards without declaring distortion as the actual result.[162] For example, one of the more noxious forms of judicial sanewashing has been enabled by what Professors Neal Katyal and Thomas Schmidt refer to as "generative avoidance."[163] Decisions rendered by the Court under a generative avoidance approach are often obscured from public view and garner less scrutiny, thereby shielding the Court from the consequences of its decisions.[164] The result, as Katyal and Schmidt explain, is that the Court creates new law without fulfilling its duty to "say what the law is."[165] The Court's reliance on generative avoidance has, according to Katyal and Schmidt, allowed the Court to circumvent established legal norms and create new constitutional standards without actually announcing a substantive change to legal doctrine.[166]

The Court's expansive ruling in *Trump v. United States*,[167] holding that a former president is entitled to presumptive, perhaps

162. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 580 (2013) (J. Ginsburg, dissenting) (arguing that the majority reversed nearly three-quarters of a century of judicial support of the Voting Rights Act and deference to Congress in legislating voting rights protections and noting that "the Court veers away from controlling precedent regarding the 'equal sovereignty' doctrine without even acknowledging that it is doing so.").

163. Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2122–23 (2015).

164. *Id.* at 2126.

165. *Id.*

166. *Id.* at 2122–23.

167. Trump v. United States, 603 U.S. 593 (2024).

absolute, immunity from prosecution for all official acts, is representative of the use of generative avoidance as a sanewashing strategy. In *Trump v. United States*, the Court characterized its expansion of presidential power as aligning with constitutional design and judicial precedent,[168] dismissing concerns that the ruling would transform the president into a "king."[169] Chief Justice Roberts' authored opinion relied on *Clinton v. Jones*,[170] a decision rejecting the argument that the President should be granted broad immunity from civil liability for conduct that occurred prior to assuming office, as well as two recent judicial opinions[171] that he authored. The law was hardly on the Court's side, but the carefully sanewashed opinion suggested otherwise.

The Court's decision in *Trump v. United States*, claiming that near-complete immunity to current and former presidents for official conduct preserves the Constitution's intent for an "energetic executive," departs from the Founders' conceptualization of executive power.[172] However, according to the conservative majority's sanewashed reasoning, bestowing the President with nearly unfettered power, free of meaningful accountability outside of an anemic impeachment mechanism,[173] is entirely compatible with separation of powers principles under the Constitution. The reinterpretation of doctrine and the implicit creation of new constitutional standards with significant political and legal consequences, as evidenced in *Trump v.*

168. Trump, 603 U.S. at 640; *see also id.* at 650 (Thomas, J., concurring) (questioning whether the special prosecutor appointed to investigate Trump constituted a separation of powers violation and arguing that "the President's immunity from prosecution for his official acts *is* the law.")

169. *Id.* at 685 (Sotomayor, J., dissenting) (lamenting that "in every use of official power, the President is now a king above the law").

170. Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring).

171. Trump v. Mazars USA, LLP, 591 U.S. 848, 868 (2020) (reaffirming that Congress has broad powers to investigate the President but applying a "balancing test" to congressional subpoenas of private presidential records with the effect of erecting barriers to the legislative branch's investigatory powers); *see* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S., 197, 223–24 (2020).

172. Trump, 603 U.S. at 610.

173. Notably, no President has ever been removed from office through the impeachment process. U.S. Senate, *About Impeachment: Impeachment Cases*, U.S. SENATE, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-list.htm (last visited Jan. 28, 2025).

United States, reflects but one of the more concerning consequences of the modern Court's judicial sanewashing.

Substantive due process is another area of constitutional law that has been particularly prone to judicial sanewashing through doctrinal distortion. Substantive due process, which finds its origins in the Fifth and Fourteenth Amendments, broadly refers to the principle that the government must have a sufficient substantive justification before it may deprive a person of life, liberty, or property.[174] Though the legal basis for the constitutional protection of many of society's most fundamental rights,[175] substantive due process has not been defined by the Supreme Court and remains one of the "most elusive" concepts in American law, leaving it particularly susceptible to sanewashing practices.[176]

Doctrinal distortion and incoherence within the Court's substantive due process decisions are illustrated in Professor Michael Louis Seidman's exploration of the Roberts Court's treatment of the Fourteenth Amendment's Due Process Clause within the context of abortion and gun rights.[177] From a purely textualist perspective, the

174. *See, e.g.*, Sacramento v. Lewis, 523 U.S. 833, 845 (1996) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (noting "'[t]he touchstone of due process is protection of the individual against the arbitrary action of government.'"); Davidson v. Cannon, 474 U.S. 344, 353 (1986); *see also* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999) [hereinafter Chemerinsky, *Substantive Due Process*]; Leah M. Litman, *The New Substantive Due Process*, 103 TEX. L. REV. 565, 572 (2025) [hereinafter Litman, *New Substantive Due Process*].

175. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that same-sex marriage is a fundamental right under the Due Process Clause); Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (recognizing a fundamental right to custody of one's children under the Due Process Clause); Loving v. Virginia, 388 U.S. 1 (1967) (holding that the freedom to marry is a fundamental right that the state cannot infringe); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a right to privacy with the due process clause of the Fourteenth Amendment protecting the right of marital couples to access contraceptives); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that liberty protected by the due process clause includes the right of parents to control the education of their children).

176. Chemerinsky, *Substantive Due Process*, *supra* note 174, at 1501.

177. Louis Michael Seidman, *Remapping Constitutional Theory*, 17 HARV. L. & POL'Y REV. 389, 436 (2023) ("For what it is worth, I once thought that judges used the power wisely enough often enough to justify libertarian activism. I no longer hold that view and am therefore more sympathetic to deferentialist criticism of libertarian activism").

Due Process Clause makes no explicit reference to either abortion or protection from state infringement of gun rights. Nonetheless, under the Roberts Court, the Due Process Clause has served as a basis to both expand gun rights *and* limit access to abortion. The Court has endorsed the view that the Due Process Clause incorporates the Second Amendment to apply to the states,[178] while concluding that it provides no parallel constitutional protections for abortion rights.[179]

Professor Leah Litman's scholarship offers further insights into the Roberts Court's "new substantive due process,"[180] which disaggregates constitutional protections based on a "freewheeling jurisprudence that centers the Justices' conceptions of liberty."[181] As examined and described by Litman, the Roberts Court has embraced a "substantive due process-like inquiry" which relies on "notions of liberty and contestable political theory about liberty, to reshape the institutions of the administrative state and to preserve the liberty of the people from what it perceives as the excesses of government."[182] While expressing skepticism to certain substantive due process liberty protections, particularly those grounded in privacy and bodily

178. *See* McDonald v. City of Chicago, 561 U.S. 742 (2010) (explaining that the Bill of Rights originally applied only to the federal government and holding that constitutional protections apply to the states only through selective incorporation via the Due Process Clause of the Fourteenth Amendment).

179. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 268 (2022); *see also* Seidman, *supra* note 177, at 437 n.246 ("Justice Alito was therefore forced to rely on the same, open-textured Due Process Clause to establish gun rights that he found inadequate to protect abortion rights").

180. Litman, *New Substantive Due Process*, *supra* note 174, at 565 (introducing the concept and term, "new substantive due process," to describe "the reemergence of a jurisprudence focused on broad, incompletely defined conceptions of liberty that examine whether laws are consistent with the Justices' political, theoretical accounts of liberty").

181. *Id.*; *see also* Chemerinsky, *Future of Substantive Due Process*, *supra* note 140, at 433 (discussing the Court's recent substantive due process decisions to conclude that the conservative members of the Court are not per se opposed to substantive due process but instead object to its application to protect certain rights, such as access to abortion).

182. Litman, *New Substantive Due Process*, *supra* note 174, at 571 (demonstrating how the Roberts Court is increasingly transferring aspects of substantive due process to novel areas of constitutional law, including presidential removal powers and the authority of non-Article III courts, threatening the functioning of administrative agencies).

autonomy, the Court has been far more receptive to a view of liberty that emphasizes protections from selective forms of governmental overreach and federal regulations.[183] The sanewashing effect of the Roberts Court's rejection of traditional substantive due process benefiting marginalized populations is found in the reorientation of substantive due process law to cater to "the people who are supposedly being disadvantaged by elite, unelected, and undemocratic bureaucrats."[184]

The doctrinal discord described by legal scholars at the core of the Roberts Court's substantive due process decisions highlights a form of legal double-speak that has enabled the quiet emergence of a new substantive due process framework that is rapidly shifting power and reshaping democratic institutions. Although the Court has not formally announced this "new substantive due process," it has embraced loosely defined notions of liberty that benefit individuals or groups least in need of enhanced judicial protection. The disruption of long-standing, traditional substantive due process principles upon which many Americans have come to rely has been subtly sanewashed, helping the Roberts Court deflect criticism, public backlash, and subvert accountability.

E. Judicial Imperialism: The Justices Have No Clothes (or Legal Precedent)

Moreover, the Roberts Court has exploited judicial sanewashing to aggrandize its own institutional power, embracing an outsized role in both judicial decision-making and legislative policymaking. The Roberts Court has been criticized as engaging in judicial imperialism by limiting or diluting the power of other democratic institutions and players—Congress, administrative agencies, lower federal courts, and select individual rights—while simultaneously augmenting its own authority.[185] Under our tripartite constitutional framework where power is to be balanced amongst three co-equal branches of

183. *Id.* at 601, 611.

184. *Id.* at 565.

185. *See* Lemley, *supra* note 23, at 97 ("The Court of late gets its way, not by giving power to an entity whose political predilections are aligned with the Justices' own, but by undercutting the ability of any entity to do something the Justices don't like.").

government, an "imperial Court" presents a substantial constitutional and democratic threat.[186] James Madison, in the *Federalist Papers 47*, cautioned that the concentration of "all powers legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[187] As the Roberts Court has relied on judicial sanewashing to deny and dismiss claims that its rulings have distorted the judiciary's constitutional role, it has accumulated a tremendous amount of power that compromises separation of powers principles.[188]

In recent years, the Roberts Court has attracted attention for decisions that reflect a more prominent and controversial role in shaping constitutional doctrine. It has departed from legal precedent, declined to defer to Congress on policy decisions, rescinded constitutional protections, overturned time-honored judicial doctrine, and prioritized cases involving high-profile and politically charged issues, even where justiciability requirements or the factual record may not have been fully developed.[189] To redirect criticism of its disregard of *stare decisis* and hubristic use of judicial power, the Court has, at times, drawn spurious comparisons between its controversial decisions and well-respected judicial opinions. By drawing parallels between its rulings and prior well-respected, landmark decisions, the Roberts Court

186. *Id.* (introducing the term "imperial Court" to describe a Supreme Court that consolidates power by weakening or overriding the authority of other branches of government, thereby posing a structural threat to the Constitution's system of checks and balances).

187. The Federalist No. 47 (James Madison), https://avalon.law.yale.edu/18th_century/fed47.asp (last visited May 23, 2025).

188. *See, e.g.*, U.S. Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153, 2633 (2025) (Sotomayor & Jackson, JJ., dissenting) (quoting United States v. Mine Workers, 330 U.S., 258, 312 (Frankfurter, J., concurring) ("'In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court . . . is the trustee of law and charged with the duty of securing obedience to it.' This Court continues to invert those principles."); Trump v. Casa, Inc., 145 S. Ct. 2540, 2597 (Jackson, J., dissenting) (2025) ("The majority cannot deny that our Constitution was designed to split the powers of a monarch between the governing branches to protect the People. Nor is it debatable that the role of the Judiciary in our constitutional scheme is to ensure fidelity to law. But these core values are strangely absent from today's decision."

189. *See* Lemley, *supra* note 23, at 115.

has attempted to reframe its imperialistic conduct as consistent with that of predecessor Courts.[190]

A conspicuous example of this form of judicial sanewashing appears in the *Dobbs* decision where the conservative majority equated its decision to the Warren Court's unanimous, landmark decision in *Brown v. Board of Education*,[191] overruling *Plessy v. Ferguson*[192] and invalidating legalized racial segregation in public schools.[193] In *Dobbs*, the Court claimed that *Roe v. Wade* was constitutionally unsound from its inception, stating that "like the infamous decision in *Plessy v. Ferguson*, *Roe* was also egregiously wrong and on a collision course with the Constitution from the day it was decided."[194] Relying on this line of reasoning, the Court asserted that both *Dobbs* and *Brown* were justified in overturning legal precedent in order to address historical injustices and protect minority rights.[195]

Even with the application of sanewashing, it is difficult to view *Dobbs* as a heroic decision. As persuasively described by the *Dobbs* dissent and further illustrated by Professor Reva Seigel,[196] the Court's decision in *Dobbs* is in fact far more similar to *Plessy* than its purported parallels to *Brown*:

> *Brown*, moreover, share[s] another feature setting [it] apart from the Court's ruling today. [It] protected individual rights with a strong basis in the Constitution's most fundamental commitments; [it] did not, as the majority does here, take away a right that individuals have held, and relied on, for 50 years. To take that action based on a new and bare majority's declaration that two

190. Murray & Shaw, Dobbs *and Democracy*, *supra* note 24, at 800; *see supra* Section II.A.

191. Brown v. Board of Education, 347 U.S. 483, 493 (1954), overruling Plessy v. Ferguson, 163 U.S. 537 (1896).

192. *Plessy*, 163 U.S. 537.

193. Murray & Shaw, Dobbs *and Democracy*, *supra* note 24, at 731.

194. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 219 (2022).

195. Reva B. Siegel, *History of History and Tradition*, supra note 40, at 108 (disputing the Court's claim that *Dobbs* is comparable to *Brown* by interrogating the history that the Court omitted); *See also* Murray & Shaw, Dobbs *and Democracy*, *supra* note 24 at 731, 800–802.

196. *See* Reva B. Siegel, *History of History and Tradition*, supra note 40, at 102.

> Courts got the result egregiously wrong? And to justify that action by reference to. . .*Brown*—a case in which the Chief Justice also wrote an (11-page) opinion in which the entire Court could speak with one voice?[197]

Another sanewashing device employed by the Court to distract from its imperious decisions is to assert that the reversal of legal precedent is necessary to preserve democratic ideals.[198] In the *Dobbs* decision, overruling a half-century of legal precedent reaffirmed in 20 subsequent rulings,[199] the Court insisted that the effect of its decision was not to dispossess half of Americans of a fundamental constitutional right. Rather, as described by the Court, it was simply returning "authority to the people"[200] to decide the "controversial"[201] issue of abortion. As explained by Professors Melissa Murray and Kate Shaw, the fallacy inherent to the Court's sanewashing efforts to portray its action as complementary, even necessary, to a functioning democracy is undeniably evident when considered in tandem with the fact the Court's gerrymandering and voting rights decisions have "ensured that the extant system is unlikely either to produce genuine deliberation or to yield widely desired outcomes."[202]

Moreover, Justice Brett Kavanaugh, in his concurrence in *Dobbs*, adopts a line of sanewashed reasoning that characterizes the Constitution—more precisely, the Court's interpretation of it—as neutral on access to abortion care.[203] According to Justice

197. *Dobbs*, 597 U.S. at 403 (Breyer, J., dissenting).

198. *Dobbs*, 597 U.S. at 232; *see also* Murray & Shaw, Dobbs *and Democracy*, *supra* note 24, at 731, 749.

199. *Dobbs*, 597 U.S. 215, 219.

200. *Id.* at 302.

201. *Id.* at 216, 221, 290. The majority and Justice Kavanaugh in his concurring opinion characterized abortion access as "controversial." The issue of abortion may evoke intense feelings, but polling data suggests it is not controversial. At the time the *Dobbs* decision was issued, more than 60% of Americans believed that abortion should be legal in all or most cases. Support for legalized abortion care has continued to rise. *Public Opinion on Abortion: Views on Abortion, 1995-2024*, PEW RESEARCH CENTER (May 13, 2024), https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion (last accessed Jan. 3, 2024).

202. Murray & Shaw, Dobbs *and Democracy*, *supra* note 24, at 731, 806.

203. *Dobbs*, 597 U.S. at 338 (Kavanaugh, J., concurring).

Kavanaugh's position, judicial humility required the recession of fundamental legal protections for the bodily autonomy of women:

> On the question of abortion, the Constitution is therefore neither pro-life nor pro-choice. The Constitution is neutral and leaves the issue for the people and their elected representatives to resolve through the democratic process in the States or Congress—like the numerous other difficult questions of American social and economic policy that the Constitution does not address.
>
> Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States.[204]

But, as the dissent notes, "[w]hen the Court decimates a right women have held for 50 years, the Court is not being 'scrupulously neutral.' It is instead taking sides: against women who wish to exercise the right, and for States (like Mississippi) that want to bar them from doing so."[205] The Court, for the first time in its history, annulled a previously recognized constitutional right and, while doing so, insisted it was constitutionally required and entirely democratic.[206] This logic—so incongruous and cognitively tortuous—can only be described as insane.

The Court employed similar pomposity and sanewashing in *Trump v. United States*.[207] In that decision, the Court was doubly criticized for its handling of the case: First, for its controversial decision to hear the case during a divided presidential election and, later, for granting broad immunity to Trump, who at the time was

204. *Id.*

205. *Id.* at 378 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

206. DENNIE, *supra* note 71, at 96.

207. Trump v. United States, 603 U.S. 593 (2024).

running for a second term amid multiple pending criminal cases.[208] But the Chief Justice—who advocated for the Court to hear the case and chose to author the opinion himself—was persuaded "his arguments would soar above politics, persuade the public, and stand the test of time."[209] Though there was no precedent for the Court to base its decision on bestowing near-limitless criminal immunity for what it termed, but failed to define, as "official presidential conduct,"[210] the Court provided a partial quote to *Nixon v. Fitzgerald*[211] in support of its ruling.[212] As pointed out by legal scholars, the misrepresented citation converted a "balancing test into a categorical command" that was used to establish a constitutionally and legally unsupportable expansion of Presidential immunity.[213]

Contrasting the Court's approach in *Dobbs* and *Trump v. United States* captures the disquieting effects of judicial sanewashing that has become endemic to an emboldened Court. In *Dobbs*, the Court rationalized overruling nearly 50 years of precedent on the basis that it was "wrongly decided."[214] In *Trump v. United States*, the Court created a "law-free zone" around the President, disrupting a constitutional

208. *See Keeping Track of the Trump Criminal Cases*, NEW YORK TIMES (Nov. 6, 2024), https://www.nytimes.com/interactive/2024/us/trump-investigations-charges-indictments.html.

209. Kantor & Liptak, *supra* note 19.

210. *Trump*, 603 U.S. 593, 619–20. Despite grounding its immunity analysis in the notion of "official presidential conduct," the Court declined to clearly define the term, leaving its contours to be inferred from context.

211. Nixon v. Fitzgerald, 457 U.S. 731, 753 (1982). The Court in *Trump* partially quoted this case—"dangers of intrusion on the authority and functions of the Executive Branch"—to support its expansion of immunity into the criminal context, despite *Nixon v. Fitzgerald* addressing only civil liability. 603 U.S. at 619–20.

212. *See* 603 U.S. at 613 (noting "that the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive" if the President was not immune from civil damages liability (quoting *Fitzgerald*, 457 U.S. at 745)).

213. Kantor & Liptak, *supra* note 19.

214. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 219 (2022) ("*Roe* was egregiously wrong from the start."); *id.* at 336 (Kavanaugh, J., concurring) (emphasizing that the Constitution is "neutral" on abortion and that the issue should be left to the people and their elected representatives).

status quo in place since the Founding.[215] In both cases, the result is the weakening of democratic governance by an increasingly imperialistic and unconstrained Court.[216]

Though the Court has denied ideological motivations or any sort of divergence from constitutional norms, a growing body of legal scholars, legislators, and members of the public regard its recent decisions differently.[217] Once considered an apolitical, independent institution grounded in reasoned application of legal doctrine, the Court is now viewed as partisan, susceptible to political and corporate interests,[218] and largely disconnected from the lived realities of most

215. *Trump*, 603 U.S. at 684 (Sotomayor, J., dissenting) (criticizing the majority for creating a "law-free zone around the President" and abandoning historical constraints on executive power).

216. *See* Adam Liptak, *Supreme Court Shields Trump from Prosecution for Official Acts*, N.Y. TIMES (July 1, 2024), https://www.nytimes.com/2024/07/01/us/politics/supreme-court-trump-immunity.html (quoting a former law clerk to Justice Scalia as stating that "[t]he Trump decision cuts voters and their elected representatives out of the picture much more completely than *Roe* did . . . . Going forward, Congress could not enact even a narrow, specific statute providing that a president lacks any federal criminal immunity for *even the most egregious official act*—such as using the military domestically to arrest and detain political opponents.") (emphasis added); *id.* (quoting Stephen R. McAllister, a law professor and former clerk to Justice Thomas, as stating that the Trump decision is "not really tied to the Constitution" and that comparing *Trump* to *Roe* is "not unfair").

217. Public dissatisfaction with the Supreme Court has hovered at historically low rates since 2021, with more than half of Americans disapproving of the institution. *See* Megan Brenan, *Approval of U.S. Supreme Court Stalled Near Historical Low*, GALLUP (July 30, 2024), https://news.gallup.com/poll/647834/approval-supreme-court-stalled-near-historical-low.aspx; *Trust in Supreme Court Continues to Sink*, ANNENBERG PUB. POL'Y. CTR. (Oct. 2, 2024), https://www.annenbergpublicpolicycenter.org/trust-in-us-supreme-court-continues-to-sink (last visited Dec 15, 2024); Adam Liptak, *Confidence in U.S. Courts Plummets to Rate Far Below Peer Nations*, N.Y. TIMES (Dec. 17, 2024), https://www.nytimes.com/2024/12/17/us/gallup-poll-judiciary-courts.html.

218. Alex Mierjeski et al., *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow; s*ee also* Alex Swoyer, *Supreme Court Justices Hid Billionaire Gifts for Decades, Ethics Investigation Finds*, WASH. TIMES (Dec. 23, 2024), https://highergroundtimes.com/higher-ground/2024/dec/23/senate-democrats-release-supreme-court-ethics-repo (last visited Jan. 2, 2025); Justin Jouvenal, *Senate Democrats Find Many Ethical Lapses by Supreme Court Justices*, WASH. POST (Dec. 21, 2024), https://www.washingtonpost.com/politics/2024/12/21/supreme-court-

Americans. The declining confidence in the Court is not in isolation.[219] Legal scholars,[220] legislators, and even some members of the current Court have also expressed alarm about the Court's conduct, cautioning that the power amassed under the Roberts Court threatens fundamental democratic principles of governance.[221]

ethics-investigation-senate-judiciary-clarence-thomas; Justin Jouvenal, *Trump Call to Alito Sparks Demands for Justice to Recuse from Sentencing Case*, WASH. POST (Jan. 9, 2025), https://www.washingtonpost.com/politics/2025/01/09/trump-alito-supreme-court-phone-call.

219. *See 'Politicians in Robes': How a Sharp Right Turn Imperiled Trust in the Supreme Court*, ANNENBERG PUB. POL'Y. CTR. (Mar. 6, 2024), https://www.annenbergpublicpolicycenter.org/politicians-in-robes-how-a-sharp-right-turn-imperiled-trust-in-the-supreme-court; *see also* Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 17, 2024), https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx (reporting that confidence in U.S. judicial system has declined more than for any other institution).

220. *See, e.g.*, Klarman, *supra* note 122 (examining the Supreme Court's contributions to the degradation of American democracy through key decisions invalidating core provisions of the Voting Rights Acts, eviscerating campaign finance laws, and greenlighting partisan gerrymandering); Reva B. Siegel, *Levels-of-Generality Game*, *supra* note 44 at 563 (arguing that the Roberts Court's reliance on history and tradition is not an interpretive method but a justification for its jurisprudential direction); Laurence H. Tribe, *How the US Supreme Court Shredded the Constitution and What Can Be Done to Repair It*, GUARDIAN (July 8, 2024), https://amp.theguardian.com/commentisfree/article/2024/jul/08/us-supreme-court-presidential-immunity; Richard H. Fallon, *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300 (2023) (criticizing the Court's attenuation of the relationship between substantive constitutional rights and rights to remedies). *See also* Vladeck, *A Court of First View*, *supra* note 20 (critiquing the Court's growing departure from its role as a "court of review" in deciding cases on their merits using truncated processes such as "certiorari before judgment" and emergency relief).

221. U.S. Dep't of Homeland Sec. v. D.V.D., 145 S. Ct. 2153, 2633 (2025) (Sotomayor & Jackson, JJ., dissenting); *see also* Abbie VanSickle, *Justice Jackson Says 'the State of Our Democracy' Keeps Her Up at Night*, NY TIMES (July 10, 2025), https://www.nytimes.com/2025/07/10/us/ketanji-brown-jackson-democracy.html. Efforts to impose term limits, a binding ethics code on Supreme Court Justices, and increase the overall size of the Court to lessen judge-based doctrine shifts have, to date, been unsuccessful because of congressional inaction. *See, e.g.*, Ruth Marcus, *The Supreme Court's 'No' to Trump Was Dangerously Close to 'Yes'*, WASH. POST (Jan. 10, 2025), https://www.washingtonpost.com/opinions/2025/01/10/trump-supreme-court-influence; Lora Kelly, *An Attempt to Check the Supreme Court's Power*, ATLANTIC (July 11, 2024),

III. CONCLUSION: RESTORING SANITY AND PUBLIC CONFIDENCE IN THE COURT

Despite the Roberts Court's best efforts to transform the legal nonsense of its precedent-shattering decisions into something resembling proper doctrine, no one should be fooled.[222] The damage that has emanated from the Court's sanewashed reconstruction of the law is plainly visible for all to see. Judicial sanewashing, no matter how sophisticated or polished, does not absolve the Court from the consequences of its harmful conduct. The landmark rights-stripping opinions of the Roberts Court are legal fallacies premised on intellectual dishonesty.[223] The judiciary has a responsibility to be mindful of its role in the nation's constitutional design, the integrity of the institution it represents, and of the real-world effects that stem from its constitutional and statutory interpretation. Judicial sanewashing is

https://www.theatlantic.com/newsletters/archive/2024/07/an-attempt-to-check-the-supreme-courts-power/678977; Andrew Stanton & Jason Lemon, *Justice Alito's Call with Trump 'Entirely Inappropriate'—Legal Analyst*, NEWSWEEK, (Jan. 10, 2025, 5:09 PM), https://www.newsweek.com/supreme-court-samuel-alito-donald-trump-call-appropriate-2013415; Dahlia Lithwick, *Sam Alito Failing to Recuse Himself from the Trump Case Would Be a Historic Farce*, SLATE (Jan. 9, 2025, 6:03 PM), https://slate.com/news-and-politics/2025/01/sam-alito-failing-recusal-trump-case-sentencing-jack-smith-farce.html; Ann E. Marimow, *Roberts Sidesteps Supreme Court's Ethics Controversies in Yearly Report*, WASH. POST (Dec. 31, 2023), https://www.washingtonpost.com/politics/2023/12/31/supreme-court-john-roberts-report; Justin Jouvenal, *Supreme Court Ethics Remain at Center Stage after Hard-Right Rulings*, WASH. POST (July 6, 2024), https://www.washingtonpost.com/politics/2024/07/06/supreme-court-ethics-public-trust; Glenn Fine, *The Supreme Court Needs Real Oversight*, ATLANTIC (Dec. 5, 2022), https://www.theatlantic.com/ideas/archive/2022/12/supreme-court-ginni-thomas-january-6-ethics-oversight/672357.

222. Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR (Aug. 8, 2024), https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low (reporting that public approval of the Supreme Court has remained low in recent years, with fewer than half of Americans holding a favorable view, following a series of high-profile and divisive rulings); *see also* Neil S. Siegel, *The Wages of Crying* Roe*: Some Realism about* Dobbs v. Jackson Women's Health Organization, 2 J. AM. CONST. HIST. 101, 101 (2024) ("The U.S. Supreme Court's reasoning in *Dobbs v. Jackson Women's Health Organization* cannot be taken seriously.").

223. Neil S. Siegel, *supra* note 222, at 101 (stating, with respect to the *Dobbs* decision, "It is not going too far to charge the Court with having acted lawlessly.").

not an appropriate canon of construction to guide the Court's judicial decision-making.

With heightening concerns that the United States is careening towards a constitutional crisis,[224] this moment requires introspection. The transformation of a President into a King,[225] unrestrained by a feeble, dysfunctional, and unrepresentative Congress, is the predictable byproduct of an emboldened Court. Through judicial sanewashing—the systematic sanitization of legally specious judicial decisions that depart from established legal and constitutional precedent—the Roberts Court has undermined and eroded democratic governance and principles.[226]

Over the last two decades and increasing in recent terms, the Roberts Court has fundamentally altered the principles and balance of power codified in the Constitution while magnifying its own influence. The deepening of the Court's power has been made possible through the tactful use of strategic sanewashing techniques. No different than bad-faith political actors, the Roberts Court has seemingly embraced

224. Adam Liptak, *Trump's Actions Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES (Feb. 10, 2025), https://www.nytimes.com/2025/02/10/us/politics/trump-constitutional-crisis.html; *see also* Robert Tait, *Trump's Illegitimate Power Grab Brings US Closer to Dictatorship*, GUARDIAN (Feb. 13, 2025, 6:00 AM), https://www.theguardian.com/us-news/2025/feb/13/trump-vance-constitutional-crisis; J.D. Vance (@jdvance), X (Feb. 9, 2025, 7:13 AM), https://x.com/JDVance/status/1888607143030391287 ("If a judge tried to tell a general how to conduct a military operation, that would be illegal. If a judge tried to command the attorney general in how to use her discretion as a prosecutor, that's also illegal. Judges aren't allowed to control the executive's legitimate power.").

225. In an interview three months into his second term, President Trump reaffirmed his desire for a third term in office despite being constitutionally prohibited from doing so. Trump insisted that he was "not joking" about his desire to remain in office and that there were "methods" to circumvent the two-term limitation imposed by the Twenty-Second Amendment. Erica L. Green, *Trump Says He's 'Not Joking' About Seeking a Third Term in Defiance of Constitution*, N.Y. TIMES (Mar. 30, 2025), https://www.nytimes.com/2025/03/30/us/politics/trump-third-term.html; *see also* Benjamin Oreskes, *'Long Live the King': Trump Likens Himself to Royalty on Truth Social*, N.Y. TIMES (Feb. 19, 2025), https://www.nytimes.com/2025/02/19/us/politics/trump-king-image.html.

226. *See generally* Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 132 (2019) (describing the Supreme Court's central role in contributing to the degradation of American democracy).

the falsity that facts are malleable and there are no universal truths.[227] Law and facts can be reshaped to serve ideological impulses provided they are sufficiently sterilized and repackaged to appear neutral or doctrinally sound. By downplaying the radical elements of its conservative and anti-constitutional decisions, the Roberts Court bears responsibility for the political precarity and resulting constitutional calamity that a second Trump Administration has invited.

Equally troubling is the Roberts Court's disdain for judicial activism "except when it serves to produce the political goals that they support,"[228] particularly in its invocation of an expanded and amorphous history and tradition standard. By selectively fixating on a singular constitutional word or phrase and examining its meaning at a customizable level of generality using strategically selected sources, the Court has successfully sanewashed its interpretation of the Constitution to support judicially preferred interests and groups.[229]

The insidiousness of judicial sanewashing lies in its ability to create, legitimate, and insulate harmful legal doctrines. Sanewashing practices are deployed to reinforce a socio-political and legal hierarchy that defines status and, with it, allocates authority to dominant groups to reify artificial, anti-democratic power dynamics. Judicial sanewashing perpetuates jurispathic effects that are deeply damaging to systemically marginalized groups.[230] Disfavored communities are relegated to the periphery of social, political, and economic life, leaving them with limited legal tools and protections. The incomplete and disingenuous judicial portrayals of communities harmed by the law have enabled the Roberts Court to misappropriate their interests and

227. Klarman, *supra* note 122, at 11 (warning that "autocrats around the world sow disinformation, undermine confidence in truth, and normalize chaos," and urging that those resisting autocracy "insist on the difference between fact and opinion," and "reject the assumptions that all stories have two sides and all political actors are basically the same").

228. Alan B. Morrison, *Selective Judicial Activism in the Roberts Court*, GWU Legal Studies Research Paper No. 35, at 3 (2022), https://ssrn.com/abstract=4155547.

229. *See generally id.* (discussing how the Roberts Court applies selectively activist interpretations, particularly in its expansion of Second Amendment rights in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022)).

230. *See, e.g.*, Elie Mystal, *The Supreme Court's Hearing on Trans Rights Was Bigotry Masquerading as Law*, THE NATION (Dec. 5, 2024), https://www.thenation.com/article/society/supreme-court-trans-rights-children-skrmetti.

lived experiences. In the process, the Court has justified diminished legal protections for these groups under a false pretense of neutrality. By embracing judicial sanewashing as its preferred canon of construction, the Roberts Court has arrogated late-acquired democratic principles that have emerged from a more equalitarian understanding of the Constitution. The dignity-denying consequences of judicial sanewashing are as deserving of rebuke as the democratic degradation that it has engendered.

Recognizing the existence and undesirability of the phenomenon of judicial sanewashing, how might we combat its deleterious and anti-democratic effects? The lack of ethical leadership from the Roberts Court does not foreclose the possibility of striving towards an ethical vision of the law. In fact, it requires it.[231]

Despite what recent sanewashed Supreme Court decisions may have us believe, we are not bound to a regressive reading of the Constitution or suspect legal standards that lead to unjust and undemocratic results. It is possible to aspire for and achieve an inclusive and transparent form of constitutionalism.[232] Applying an inclusive interpretative methodology to the Reconstruction Amendments would, for example, be consistent with the purpose of the Amendments and the principles of an egalitarian, multiracial democracy. The Reconstruction Era Amendments were intended to transform the original Constitution into a more equitable guiding document capable of responding to a multicultural democracy. As such, the Reconstruction Amendments, particularly the Fourteenth Amendment, should be understood as an antidiscrimination mandate that the Court has a constitutional responsibility to effectuate. A transparent, inclusive, and honest framing of the Constitution would support such a sensible conclusion.

Appreciating the scope and scale of the judicial sanewashing phenomenon also better situates legal scholars, practitioners, and

231. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 47 (1983) (reminding us that "[a] community that acquiesces in the injustice of official law has created no law of its own.").

232. DENNIE, *supra* note 72, at 43 (discussing the concept and possibilities of "inclusive constitutionalism," the idea that the Constitution should be interpreted in furtherance of an inclusive democracy in which courts "consider how cases may relate to systemic injustices and how different legal analyses would impact marginalized people's ability to participate in the country's political, economic, and social life").

activists who value an inclusive vision of constitutionalism and equality under the law with the means to prepare for the predictable next phase of the Court's larger sanewashing project. The weaponization of sanewashing in targeting other substantive due process-based rights is not simply a possibility; it is a virtual certainty.[233] Just as sanewashing has been an effective tool to rewrite constitutional doctrine and reinterpret antidiscrimination laws to deny protections for women and communities of color, sanewashing will likely be employed for the purpose of eradicating recent, hard-won legal gains for the LGTBQ community and to deny immigrants basic due process protections.[234] We should fully expect, for example, that the same sanewashing methods used in *Dobbs* will be recycled to legally proscribe heteronormativity by overturning key precedents such as *Lawrence v. Texas*[235] and *Obergefell v. Hodges*.[236]

The judicial decisions emanating from the Roberts Court need not rob us of our sanity or ability to discern disingenuousness. We are not beholden to the Court's false, sanewashed construction of the world or the law. We can, in fact, strive for something better, more sane, and more just.

233. *See* Chemerinsky, *Future of Substantive Due Process*, *supra* note 140, at 427 (warning that the reasoning in *Dobbs* endangers other substantive due process rights such as contraception, same-sex intimacy, and marriage).

234. At the time of this writing, *United States v. Skrmetti*, No. 23-477 (U.S. argued Dec. 4, 2024), a challenge to Tennessee's ban on gender-affirming care for trans youth, was pending before the Supreme Court. During oral argument, the Tennessee Attorney General presented a polished, sanewashed argument that the law does not discriminate based on sex and should be left to the political process—echoing *Dobbs*' claim that abortion should be "returned to the people." *See* Transcript of Oral Argument at 43–44, *United States v. Skrmetti*, No. 23-477 (U.S. Dec. 4, 2024). Justice Sotomayor responded: "[W]hen you're one percent of the population or less, [it is] very hard to see how the democratic process is going to protect you . . . . Blacks were a much larger part of the population, and it didn't protect them. It didn't protect women for whole centuries." *Id.* at 55.

235. Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating "sodomy" laws criminalizing same-sex sexual contact between consenting adults).

236. Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the fundamental right to marry cannot be denied to same-sex couples).