# Foreword

## *The Court Is All Right.*

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It's often said that big Supreme Court terms are followed by quiet ones. Not this year. Big government led to big overreach, which led to big cases and yet another year of big decisions. Because the Court can't please everyone, that inevitably led to big criticism. As a result, the Court is now mired in accusations of "overreach," "activism," and "partisanship."

Dissent is to be expected, indeed welcomed in this country—particularly when it comes to judicial decisions. Our adversarial court system and the American tradition of free debate is built on the notion that strong argumentation on both sides leads to the discovery of truth. But lately, popular dissent has shifted from "the Court is wrong" to the Court is—in the words of President Joe Biden—"not normal."[1] Those who can't win at the Supreme Court are trying to discredit it.

Does a look at the past Term bear these accusations out? Not really. Yes, there were a few big decisions, but the polarized state of our nation means that all nuance about how the Court actually operates has been lost. There were far more narrow rulings than

* I'm thrilled to be writing my first Foreword as Director of the Robert A. Levy Center for Constitutional Studies. If you would've told me a decade ago, as I pored over italicized commas and dangling gerunds as a Cato intern, that in 12 short years I'd be writing the opening piece of this journal, I'd have fallen over in libertarian-constitutional-nerd glee. This is the Center's 22nd volume of the *Cato Supreme Court Review*, an annual critique of the Court's most important decisions and a peek at the coming term. It is the first journal of its kind to be released and the only to take a classical liberal, Madisonian perspective, grounded in the principles of liberty through constitutionally limited government. We release it every year in celebration of Constitution Day, September 17.

[1] Kelly Garrity, *'This is Not a Normal Court': Biden Blasts Affirmative Action Ruling*, Politico (June 29, 2023), https://tinyurl.com/3kk3yhys.

broad ones, and most cases were statutory, not constitutional. To the extent the Court appears to be overly involved in our lives, blame the dysfunctional legislative branch, which is all too eager to violate individual rights or to allow unelected bureaucrats to do their dirty work for them. The more of our lives the government sweeps into its "impetuous vortex,"[2] the more the Court will be required to pass judgment on the constitutionality of the government's actions. That's the judiciary's job.

**An "activist" Court?**

Critics of the Court like to say that it's too involved in our lives. "In no other democracy," wrote one, "do nine unelected officials have so much power."[3]

Judges don't make policy. They're merely a check; the "least dangerous branch," as Alexander Hamilton called them in *Federalist* 78, since they have only the power of "judgment." There are, however, a swarm of unelected officials who improperly exercise executive, legislative, and judicial power: the thousands of federal employees who make up the alphabet soup of administrative agencies. These unaccountable bureaucrats regulate everything from gas stoves to Greek yogurt,[4] yet they often can't be fired by the President (or his appointees). They enjoy deference in federal court when interpreting the scope of their own authority, and they often play judge, jury, and executioner by instituting enforcement proceedings before their own in-house judges. To the extent any branch is labeled "activist" or too powerful, it should be the so-called fourth branch.

Take *Sackett v. EPA*. There, bureaucrats in the Environmental Protection Agency insisted that the Agency could require a couple to secure an expensive Clean Water Act permit before they were allowed to build. The reason, according to the EPA, was merely that their property contained wetlands, which sat across a paved road from other wetlands, which connected to a man-made ditch, which led

[2] The Federalist No. 48 (James Madison).

[3] Michael Waldman, *A Regressive Supreme Court Turns Activist: A Conservative Majority Ushers in a Radical New Era*, Brennan Ctr. for Just. (May 22, 2023), https://tinyurl.com/38jxvwk7.

[4] For more, check out the first-rate podcast *Dissed*, and in particular, the episode "Lady Justice Isn't Blind," available at https://tinyurl.com/3cxr7zhd.

to a creek, which fed into a lake that itself could be regulated by the Agency. All nine Justices agreed that the Agency had no such power.

Or take *Axon Enterprise v. FTC*, wherein the Federal Trade Commission and Securities and Exchange Commission sought to keep constitutional challenges to their authority out of court and within their own in-house proceedings. In another 9–0 opinion, the Court held that the plaintiffs had a right to go to federal court.

Or consider *Biden v. Nebraska*, wherein the Secretary of Education attempted to discharge billions of dollars in debt under a statute that authorized him to "waive or modify" certain provisions of the Higher Education Act, even after Congress affirmatively decided not to pass student-debt relief. These are far more dangerous assertions of power than the Court's mere power to interpret the meaning of the Constitution and federal statutes.

For all the claims that the Court is inserting itself into our lives, the Court is taking fewer cases than ever. In recent years, it's taken about 80 cases per term, nearly half of what it took in the 1980s.[5] The "big" cases make up a small portion of this shrinking docket. Far outnumbering controversial cases like *Biden v. Nebraska* or *303 Creative v. Elenis* are cases like *Coinbase v. Bielski* (asking whether a district court must stay its proceedings while an interlocutory appeal taken pursuant to 9 U.S.C. § 16(a) on the question of arbitrability is ongoing) or *Wilkins v. U.S.* (asking whether the Quiet Title Act's 12-year statute of limitations is jurisdictional or a claims-processing rule). The Court has wide discretion over which and how many cases it takes, and it's using that discretion to take fewer of them. That fact is hard to square with the public's perception of a purportedly imperial Court.

Even the biggest decisions of the Term were modest. Chief Justice John Roberts's opinion in *Students for Fair Admissions v. UNC* was self-consciously narrow. He framed the question in the case not as whether racial preferences can *ever* be used in the admissions process, but instead as "whether the admissions systems *used by Harvard College and UNC* are lawful." (emphasis added). His opinion likely put an end to racial preferences for the purposes of generating "the educational benefits that flow from a racially diverse student body,"

[5] Jonathan Adler, *The Restrained Roberts Court*, Nat'l Rev. (July 31, 2023), https://tinyurl.com/3xfvjnm3.

also known as the diversity rationale. But that rationale was always dubious. It's based on the pernicious assumption that a person's skin color necessarily makes them different, and not even the dissenters defended it. The Chief's opinion does not foreclose the use of race altogether, such as using narrowly tailored programs to remedy concrete instances of state-sponsored discrimination.

Or take *303 Creative*. That case did not go so far as to protect freedom of association generally. Instead, it protected people who engage in so-called "speaking professions" from being compelled to convey messages with which they disagree. Importantly, that holding protects all viewpoints. It protects not just Lorie Smith, the web designer who sued in *303 Creative*, but also a Jewish web designer who doesn't want to publish antisemitic speech. And it protects platforms like Twitter or Facebook if they don't want to host hateful or violent speech.

Many cases this term that were set to become blockbusters turned out to be nothingburgers. Despite granting certiorari and hearing arguments in *Haaland v. Brackeen*, the Court largely punted. It refused to truly reconsider the constitutionality of the Indian Child Welfare Act under the Indian Commerce Clause because, according to Justice Amy Coney Barrett, the issue wasn't briefed thoroughly enough. And it declined to address the equal protection arguments due to purported standing problems. As a result, several weighty constitutional issues that have been hinted at in previous terms went unaddressed, and ICWA was left intact.

In *Gonzalez v. Google*, the Court carefully sidestepped the hot-button issue of the scope of Section 230, which immunizes online platforms from liability for user-generated content. This is all par for the course. The Court has a long list of judge-made doctrines (standing, ripeness, mootness, abstention, deference, immunity, etc.) that it regularly invokes to avoid deciding worthy constitutional claims.

For all the talk of activism, overreach, corruption, or partisanship, several decisions were 9–0, just as they are every term. In *Tyler v. Hennepin County*, a Minnesota county seized a 98-year-old woman's home after she fell behind on her taxes. The county sold her property and kept not just what it was owed but tens of thousands of dollars in additional equity. That earned the local government the ire of pretty much everyone—including all nine Justices. Over half the cases this Term were unanimous or near-unanimous. In addition to

*Tyler*, *Sackett*, and *Axon*, all nine Justices agreed about the scope of the Lanham Act, requirements related to employers and religious exemptions under Title VII, exhaustion requirements before challenging removal orders in federal court, the ability to retry a defendant if first tried in an improper venue, certain patent validity requirements, exceptions to a statutory bar on concurrent sentences, and whether the government has to provide notice to account holders before issuing summonses to banks to collect delinquent taxes.

As in every term, there were all sorts of interesting alignments—cases that found Justice Neil Gorsuch joining Justice Sonia Sotomayor's concurrence (*Counterman v. Colorado*), Chief Justice Roberts joining Justice Elena Kagan in dissent (*Andy Warhol Foundation for Visual Arts v. Goldsmith*), and Justice Ketanji Brown Jackson joining Justice Brett Kavanaugh, Justice Samuel Alito, and the Chief Justice (*National Pork Producers v. Ross*). More than nine out of 10 cases had at least one of the so-called "liberal" Justices in the majority.[6]

And lest critics forget, the Court has recently handed several losses to political conservatives, and to the Trump administration in particular. Most notable are cases involving Obamacare's individual mandate, anti-discrimination protections for trans individuals, marriage equality, the rights of criminal defendants, the *Gingles* standard under the Voting Rights Act, Republicans' independent state legislature theory, and Trump's attempts to withhold his tax records, to block release of records related to January 6, and to challenge the 2020 election. The Court might have a majority of judicial conservatives, but it's important to distinguish that philosophy from political conservativism.

*Three cheers for judicial supremacy.*

In my view, the Court is indeed activist. But that's because it invokes judge-made doctrines to get out of tough cases, and it continues to ignore inconvenient portions of the Constitution that would require it to strike down *even more* "democratically passed" laws. In other words, it's the Court's modesty, not its usurpation of power, that's activist. The Court's abdication subverts civil rights law to this day, with the Privileges or Immunities Clause (the centerpiece of

[6] Devin Dwyer, *Supreme Court Shows Surprising Restraint in Chaotic Year of Crises: Analysis*, ABC News (July 5, 2023), https://tinyurl.com/54xvhmh.

the Fourteenth Amendment's substantive protections) having been effectively written out of the Constitution altogether.[7]

Historically the Court has been at its worst when it has deferred to the other branches under the guise of modesty.[8] And the Court has been at its best when it has engaged with the Constitution and protected political minorities of all kinds from the tyranny of the majority.[9] As far as I'm concerned, huzzah for judicial supremacy. The smallest minority is the individual.[10] Protection of liberty against majoritarianism protects us all.

In other words, though there were a few big cases this Term, it was a Term like most others—full of incrementalism, strange bedfellows, and restraint. The Supreme Court is all right.

[7] Brief for Petitioner, Newell-Davis v. Phillips, No. 22-1208 (petition for cert. filed Feb. 10, 2023), https://tinyurl.com/2p9tbp2a.

[8] *See, e.g.*, U.S. v. Cruikshank, 92 U.S. 542 (1876) (reversing convictions of those involved in the Colfax massacre); Korematsu v. United States, 323 U.S. 214 (1944) (upholding Japanese internment); Kelo v. City of New London, 545 U.S. 469 (2005) (allowing eminent domain of Suzette Kelo's little pink house).

[9] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating discriminatory enforcement of laundry law against Chinese business owners); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (recognizing the right of women to work on the terms of their choice); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating state's attempt to subvert parents' right to direct their children's upbringing); Brown v. Board of Education, 347 U.S. 483 (1954) (invalidating state-sponsored segregation in public schools), Wooley v. Maynard, 430 U.S. 705 (1977) (invalidating prosecution of Jehovah's Witness for covering up portion of state motto on license plate that violated his religious beliefs); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (invalidating zoning law used to disadvantage homes for people with intellectual disabilities); Lawrence v. Texas, 539 U.S. 558 (2003) (respecting the right of adults to engage in private, consensual conduct).

[10] Ayn Rand, Capitalism: The Unknown Ideal 61 (1966).