Too Much, Too Quickly?

Andrew Coan[*]

This Article explores the increasingly common but under-theorized claim that the Supreme Court is changing too much, too quickly. The claim is a general one, not limited to the current historical moment. But major shifts on the Court over the past three years have thrust it to the center of the constitutional conversation. This Article therefore begins by surveying prominent contemporary examples spanning abortion rights, gun rights, race, religion, and the administrative state. It then asks how we should define and measure constitutional change.

With this framework in mind, this Article proposes four ways of understanding the "too much, too quickly" critique: as an argument for across-the-board judicial gradualism, as mere sour grapes or bad faith, as unapologetic ideology, and as a call for context-sensitive gradualism specific to the current Court that nevertheless seeks to transcend ideology in the narrow-left-right sense. Each of these understandings has strengths and weaknesses, but this Article shows that all four are necessary for a complete picture. Their complex interplay illuminates the central question posed by the "too much, too quickly" critique — namely, how to balance the costs and benefits of constitutional change.

The main upshot is that moral and ideological judgment are extremely difficult and perhaps impossible to fully disentangle from any assessment of constitutional change. But neither is this assessment wholly reducible to ideology in any narrow or simple sense. Different versions of the critique can also overlap or operate in conjunction, raising complex questions about mixed

 Milton O. Riepe Chair in Constitutional Law and Associate Dean for Research, University of Arizona, James E. Rogers College of Law. For helpful comments and conversations, I thank Aaron-Andrew Bruhl, Ellen Bublick, Anuj Desai, Xiaoqian Hu, Eunice Lee, Toni Massaro, Shefali Milczarek-Desai, Richard Re, Shalev Roisman, David Schwartz, Andrew Woods, and Jordan Blair Woods.

motives that neither critics nor defenders of the Court have adequately appreciated. Meanwhile, the charge of sour grapes is significantly harder to establish than is typically supposed. The charge may still be justified in some cases, but it is most useful as a kind of stress test for critics of the Court to guard against internal inconsistency and motivated reasoning in their own thinking. Finally, different understandings of the critique will often point in different directions, with potentially profound implications for abortion rights, gun rights, affirmative action, and more.

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INTRODUCTION

Seemingly overnight, we are living in a new constitutional age. No decision is more emblematic of that age than *Dobbs v. Jackson Women's Health Organization*, which wiped clean fifty years of precedent on abortion rights.[1] But for all the *sturm und drang* that *Dobbs* understandably ignited, it has become increasingly clear that reversing *Roe v. Wade*[2] and *Planned Parenthood v. Casey*[3] was only the tip of the iceberg — or the spear, depending on one's point of view. Gun control, consumer protection, workplace safety, environmental regulation, antidiscrimination law, and affirmative action have also fallen under the Court's knife.[4] Some of these decisions have been formally statutory, rather than constitutional, under the guise of the much discussed and newly minted — if not wholly new — "major questions doctrine."[5] But that doctrine is constitutional in the small-c sense of shaping the basic structure of government and the distribution of powers between Congress, the executive branch, and the courts.[6] It also has roots in the big-C constitutional avoidance and nondelegation doctrines.[7]

These are sweeping changes in the few short years that have elapsed since Amy Coney Barrett joined the Supreme Court as the sixth member of a solidly conservative majority. The end of October Term ("OT") 2022 featured some surprising and genuinely important decisions rejecting aggressively conservative constitutional challenges.[8] *Moore v.*

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

[2] 410 U.S. 113 (1973).

[3] 505 U.S. 833 (1992).

[4] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 71 (2022); Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 237-38 (2020); Nat'l Fed'n Indep. Bus. v. Dep't of Lab., 595 U. S. 109, 120 (2022); West Virginia v. Env't Prot. Agency, 597 U.S. 697, 735 (2022); Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 232 (2023).

[5] *See, e.g.*, *West Virginia*, 597 U.S. at 697; *Nat'l Fed'n Indep. Bus.*, 595 U. S. 109.

[6] *See, e.g.*, Mila Sohoni, Comment, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022) ("[N]o one should mistake these cases for anything but what they are: separation of powers cases in the guise of disputes over statutory interpretation.").

[7] *Id.*

[8] *See, e.g.*, United States v. Texas, 599 U.S. 670 (2023) (holding that states lack a judicially cognizable interest in the federal Executive Branch's arrest or prosecution policies); Haaland v. Brackeen, 599 U. S. 255 (2023) (holding that the Indian Child

Harper, in particular, was probably the single most important decision of the term.[9] Its rejection of the radical "independent-state-legislature doctrine" sent a strong signal that the Court's conservatism does not, at least for now, amount to lawless Republican partisanship.[10] But these decisions are all more in the manner of a reprieve from execution than genuine liberal or progressive victories.[11] They do not fundamentally alter the larger trend, which has left liberals and progressives angry, bereft, and reeling.[12] Nor do decisions like *Moore* seem likely to substantially stem the torrent of liberal and progressive criticism, which now rivals or exceeds conservative criticism of the Warren Court in its intensity and scope.

This criticism comes in a variety of overlapping strains. Some liberals and progressives condemn the Court's high-handed and anti-democratic arrogation of power at the expense of more politically accountable institutions.[13] Others focus on the Court's privileging of religion over other competing interests, particularly anti-discrimination and equity interests of all kinds.[14] Still others portray the Court as a tool of oligarchic business and financial interests, twisting the law in service of a neoliberal order in which concentrated economic power translates

Welfare Act does not exceed Congress's power under Article I of the Constitution to legislate with respect to Indian affairs); Allen v. Milligan, 599 U.S. 1 (2023) (holding that a group of Black voters in Alabama were sufficiently large and geographically compact to constitute a majority in a second, reasonably configured district).

[9] *See* Moore v. Harper, 600 U.S. 1, 37 (2023) (rejecting the "independent state legislature" doctrine as bar to the ordinary exercise of judicial review by state courts).

[10] *See, e.g.*, Vikram David Amar, *The* Moore *the Merrier: How* Moore v. Harper*'s Complete Repudiation of the Independent State Legislature Theory Is Happy News for the Court, the Country, and Commentators*, 2023 CATO SUP. CT. REV. 275 ("celebrat[ing] a ruling that favored principle over politics at a time when many people accuse the Justices of being political hacks").

[11] *Id.*

[12] *Id.*

[13] *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

[14] *See, e.g.*, Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 60 (2022) (describing the current Court's "untenable jurisprudence of conservative [religious] victimization that judicially reinforces backlash against new antidiscrimination and egalitarian protections").

directly into political power.[15] Finally, many critics have condemned the Court for changing too much of American constitutional law too quickly.[16]

All of these critics raise important questions, but this Article will focus on the last group. What should we make of this "too much, too quickly" critique? A number of prominent constitutional scholars have advanced this critique in different forms, as have many of the political commentators who translate and amplify the views of those scholars for a broad public audience.[17] Indeed, the critique stands a fair chance of becoming the prevailing liberal and progressive line on the Supreme Court for the foreseeable future. But it has received no comprehensive academic treatment, and its substance remains somewhat murky. Is it just another rather opaque way of saying that the current Court is making a lot of decisions that liberals and progressives dislike? Is its opacity, in fact, a rhetorical strategy for capitalizing on status quo bias, which is more widely shared than liberal and progressive political views? Or is the critique making a distinct point about sweeping constitutional change as such? What does sweeping constitutional change mean, in any case? The reversal of long-standing precedents? The invalidation of democratically enacted laws? Is the relevant metric qualitative, quantitative, or both?

In posing these questions, I use the current Court and its critics for illustrative purposes and to make the discussion concrete. But I am not primarily interested in evaluating the persuasiveness of the "too much, too quickly" argument as a critique of the current Supreme Court. Nor am I interested in evaluating what precisely particular critics of the current Court mean when they charge this Court with changing too much too quickly. The critique is a general one that can be — and frequently has been — called into service at any moment of avulsive

[15] *See, e.g.*, Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1154 (2023) ("The Roberts Court, in sum, has disempowered egalitarian labor organizations . . . while subsidizing the influence of hierarchical, exclusionary sects closely tied to white identity and neoliberal interests.").

[16] *See* sources collected in *infra* Part I.B.

[17] *See* sources collected in *infra* Part I.B.

constitutional change effected through judicial interpretation.[18] There is nothing inherently liberal or progressive about the critique.[19] And indeed, the critique is actually more congenial to at least some forms conservatism — especially those that prize stability and tradition for their own sake.

With those caveats and clarifications, I ask again: what should we make of the "too much, too quickly" critique? There are several possibilities. This Article proposes a novel, four-part taxonomy for distinguishing them and thinking clearly about their interaction and overlap:

First, we might understand the critique as an argument for gradualism à la Alexander Bickel and his "passive virtues" approach, or Cass Sunstein's and John Roberts's "one case at a time" judicial minimalism.[20] This is a time-honored view. But it is a difficult one to square with the other commitments of contemporary liberals and progressives or with their views on prior sweeping changes in U.S. constitutional law, most notably the New Deal and Warren Court revolutions. The same would go for today's conservatives leveling this critique at past or future episodes of sweeping liberal or progressive change.

Second, we might understand the critique as mere sour grapes, hypocrisy, or bad faith. Anytime the law is shifting rapidly in either ideological direction, the other side will feel a strong temptation to reach for gradualist or incrementalist objections that they would never embrace if the shoe were on the other foot.[21] Some of these reactions might be sincere — or feel sincere in the moment. The goring of their own ox might belatedly have caused some of the Court's critics to genuinely appreciate the virtues of judicial humility. But such sincerity

[18] *See, e.g.*, ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970) [hereinafter BICKEL, IDEA OF PROGRESS]; CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 145 (1964).

[19] *See, e.g.*, BICKEL, IDEA OF PROGRESS, *supra* note 18 (making a version of the critique aimed at the Warren Court).

[20] *See infra* Part II.A.

[21] *See infra* Part II.B.

comes cheap, and the Court's defenders — and longstanding proponents of gradualism — will understandably be skeptical. Perhaps they are right to be. Yet cynicism also comes cheap, and it is worth asking if there is any way to understand the critique as more than mere sour grapes or hypocrisy.

Third, we might understand the "too much, too quickly" critique in unapologetically ideological terms. If one thinks that the Court's decisions are making the law worse, however worse is defined, then it would naturally be better for the Court to proceed in that direction more gradually and incrementally.[22] This is a perfectly coherent position, but it is not an argument about the pace of constitutional change as such. And casting it in those terms raises fair questions of candor and intellectual good faith. Again, this point is not specific to the progressive and liberal critics of the current Court. It applies to the "too much, too quickly" critique generally.

Fourth, we might understand the critique as focused on something distinctive about the radicalism of the current Court, which justifies the critics in objecting even if they would not object to all rapid constitutional change effected through judicial interpretation.[23] For example, in the present context, it might be normatively troubling for the Court to push ahead so brazenly and disruptively when at least two of the justices were appointed in violation of traditional norms governing the appointment and confirmation process. Alternatively, the problem might be the imperialist arrogation of power to the Court and contempt for other, more democratically accountable institutions that make the Court's current trajectory problematic, wholly apart from its ideological content. Or the Court's radicalism might be objectionable because its decisions are, on the whole, contrary to the preferences of substantial popular majorities. The list could, and does, go on. But these are all arguments for what we might call context-sensitive gradualism, as opposed to gradualism *tout court* or across the board. There is nothing, in principle, wrong with such arguments. But they must be evaluated carefully and taken to their logical conclusions. Different arguments are likely to point in different directions.

[22] *See infra* Part II.C.

[23] *See infra* Part II.D.

It is analytically helpful to consider each of these possibilities separately, but the best answer to the question we began with — what should we make of the "too much, too quickly" critique — is one that no critic or defender of the Court has previously considered: "All of the above." Only by considering all four possibilities together can we think clearly about how to balance the costs and benefits of constitutional change.

This is the deep question at the heart of the "too much, too quickly" critique. Every sensible argument for gradualism, whether across-the-board or context-sensitive, must acknowledge that the values served by gradualism — whatever they may be — are not the only ones that matter. At least in principle, those values can always be counterbalanced or overridden by other values. This reality creates an ever-present temptation to sour grapes, hypocrisy, bad faith, or opportunism. That temptation, in turn, creates understandable suspicion on the part of those whom the "too much, too quickly" critique urges to slow down and proceed more incrementally.

On the other hand, the necessity of balancing gradualism against other values also offers a potentially persuasive response to the charge of sour grapes. The costs of sweeping constitutional change can constitute an important reason for objecting to the Supreme Court's decisions even if those costs are not the only basis for the critics' opposition — and even if the critics might believe those costs worth bearing in some other context for some other set of constitutional goods. To make the point concrete, the costs of upending abortion rights, affirmative action, and important elements of the modern regulatory state all at once might be a substantial and important reason to proceed with greater caution. But whether those costs are a decisive reason will depend on the countervailing benefits, if any, of aggressively pursuing these results. Views on this question will predictably diverge along ideological lines, even among interlocutors operating entirely in good faith.[24]

Another benefit of considering all four understandings of the critique together is that those understandings can overlap or operate in conjunction with one another. The Supreme Court and its relation to

[24] *See infra* Part III.A.

American society are complex, and it will often be the case that sweeping constitutional change provokes multiple plausible objections simultaneously. This raises important and difficult questions about how much analytical work each version of the critique is doing and the logical implications of one version succeeding while another fails. When the unapologetically ideological version of the critique overlaps with others, this will naturally raise suspicions of sour grapes or bad faith, which deserve to be taken seriously. But those suspicions themselves raise complicated questions about mixed motives that neither critics nor defenders of the Court have adequately appreciated.[25] At the same time, taking the charge of sour grapes or bad faith seriously can help to promote internal consistency and candor among the Court's critics.[26] Finally, different versions of the critique will often point in different directions, sometimes profoundly so. For instance, some versions of the critique make it much more difficult to contend that *Dobbs* or *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* was wrongly decided.[27] Others do the same for *New York State Rifle & Pistol Association, Inc. v. Bruen*.[28] Considering all versions of the critique together clarifies what is at stake in choosing among them.[29]

Part I briefly summarizes the conservative constitutional revolution and collects prominent examples of the "too much, too quickly" critique. Its goal is to provide a sufficiently concrete context for thinking about this critique — and the important questions it raises — in more general terms. One takeaway is that the critique is frequently articulated but under-theorized. This makes it all the more important to explore the full range of possible understandings critically yet also with an open mind.

Part II considers four possible ways of understanding the critique — as an argument for gradualism across the board, as sour grapes or hypocrisy, as a purely ideological critique, and as an argument for context-sensitive gradualism. Its goal is to explore the range of analytically distinct ways of understanding the critique as a normative

[25] *See infra* Part III.B.

[26] *See infra* Part III.C.

[27] *See infra* Part III.D.

[28] *See infra* Part III.D.

[29] *See infra* Part III.D.

argument in constitutional theory or public discourse. It also considers the strengths and limitations of each understanding.

Part III argues that the possibilities canvassed in Part II are best understood as overlapping and interdependent, rather than distinct. No version of the "too much, too quickly" critique can be fully or easily disentangled from moral and ideological judgment. But neither can the critique be easily dismissed as mere sour grapes, bad faith, hypocrisy, or opportunism. Rather, these questions are more complex than either critics or defenders of the Court have appreciated. Different forms of the critique have different, and potentially antagonistic, implications. This, too, is a lesson that both critics and defenders of the Court can benefit from.

I. THE "TOO MUCH, TOO QUICKLY" CRITIQUE IN CONTEXT

The litany of decisions that have prompted critics to condemn the current Supreme Court for changing too much, too quickly is almost too familiar to recount. But this Part briefly surveys five of the most salient examples, with a particular focus on the features that have given critics the impression of sweeping constitutional change. I then collect prominent examples of liberal and progressive law professors, pundits, politicians, and activists endorsing versions of the "too much, too quickly" critique. My goal, again, is not to evaluate the persuasiveness or sincerity of these critiques, individually or collectively. It is to ground a general discussion of the "too much, too quickly" critique in the concrete factual context of the current constitutional moment. Among the fundamental questions that critique raises — which the current context illuminates — are how to define and measure constitutional change. This Part concludes with an exploration of, and tentative answer to, these questions.

A. The Litany

The Supreme Court has been moving to the right ever since President George W. Bush appointed Samuel Alito to replace Justice Sandra Day O'Connor in 2006.[30] But the pace of this trend has palpably increased

[30] *See, e.g.*, Jack M. Balkin, *Abortion, Partisan Entrenchment, and the Republican Party*, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION

with President Donald Trump's appointments of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett between 2017 and 2020.[31] Barrett's appointment, in particular, gave the conservative majority a sixth vote, depriving Chief Justice John Roberts of the power to single-handedly slow or moderate the Court's rightward trajectory to safeguard its reputation for non-partisanship.[32] For this reason, it may be more fitting to call the post-2020 Court "the Trump Court" rather than the Roberts Court.[33] But I shall simply refer to it as "the current Court."

The sharp conservative turn that followed Barrett's appointment has partly been a function of numbers and partly a function of salience. The Supreme Court has made a lot of very conservative decisions in a short span of time on some of the most hotly disputed questions in American political life — most notably abortion, guns, affirmative action, and the rights of religious believers to exemptions from public health and antidiscrimination laws. But this is not the whole story. Apart from their conservative outcomes, many of these decisions have repudiated longstanding doctrinal approaches, with potentially unsettling consequences far beyond their specific holdings. The list of examples is long, but five will suffice to make the point.

1. Abortion

Dobbs v. Jackson Women's Health Organization is obviously Exhibit A.[34] No constitutional question has been more central to modern American political life than abortion rights. And *Dobbs* handed the pro-life movement the smashing, comprehensive victory it had pursued for more than forty years without success.[35] Contrary to the expectations of many observers, the decision was confident, bordering on triumphant,

(Lee C. Bollinger & Geoffrey Stone eds., 2024) ("U.S. constitutional law has been moving to the right in several areas for a very long time, and especially in the decade following 2006 after Justice Alito replaced Justice O'Connor.").

[31] *See id.*

[32] *See id.*

[33] *See id.*

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

[35] *See, e.g.*, MARY ZIEGLER, ROE: THE HISTORY OF A NATIONAL OBSESSION (2023) (recounting the history of the pro-life movement).

with no half-measures, baby steps, or mollifying doctrinal contortions of the sort that Chief Justice Roberts advocated for in his concurrence.[36]

As important for present purposes, *Dobbs* squarely repudiated the evolutionary, "reasoned-judgment" approach to substantive due process that supplied the foundation not just for *Roe v. Wade* and *Planned Parenthood v. Casey*[37] but also for the constitutional rights to same-sex marriage,[38] same-sex intimacy,[39] contraception,[40] and arguably interracial marriage.[41] In its place, the Court endorsed the "history-and-tradition" approach of *Washington v. Glucksberg*,[42] which would limit constitutionally protected liberties to those specifically enumerated in the text or deeply rooted in the history and traditions of a country with a long history and tradition of bias in many forms.[43] Whether the Court ever carries this approach beyond abortion or calls into question other established individual liberty rights, its stated rationale for *Dobbs* straight-forwardly raises these far-reaching and radically disruptive possibilities.

2. Guns

New York Pistol & Rifle Association, Inc. v. Bruen is just as obviously Exhibit B.[44] Fourteen years after *District of Columbia v. Heller*[45] held that the Fourteenth Amendment incorporated an individual constitutional

[36] *Dobbs*, 597 U.S. at 357 (Roberts, C.J., concurring) (describing majority's wholesale overruling of *Roe* as "a serious jolt to the legal system").

[37] *See id.* at 237-40.

[38] Obergefell v. Hodges, 576 U.S. 644 (2015).

[39] Lawrence v. Texas, 539 U.S. 558 (2003).

[40] Griswold v. Connecticut, 381 U.S. 479 (1965).

[41] Loving v. Virginia, 388 U.S. 1 (1967).

[42] 521 U.S. 702, 720-21 (1997).

[43] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. at 239 (endorsing Glucksberg's "history-and-tradition" test); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism — and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1136 (2023) ("The Court justified depriving women of abortion rights by defining women's constitutionally protected liberties in terms of laws enacted in the mid-nineteenth century, a time when women were without voice or vote in the political process.").

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

[45] 554 U.S. 570 (2008).

right to bear arms in the home, *Bruen* dramatically expanded that right to encompass virtually all public spaces, with only a narrow and ill-defined exception for especially sensitive areas.[46] This decision either clearly invalidates or calls into question hundreds of gun-control laws across dozens of states, in a country where pervasive gun culture and recurrent mass shootings make gun control a perennially intense, and intensely divisive, subject of public debate.[47] Announced within a few days of *Dobbs*, *Bruen* was largely overshadowed by the huge outpouring of protest, debate, and political organizing around abortion rights.[48] But the close temporal proximity between the two decisions also reinforced the liberal and progressive impression that there was a new sheriff in town.[49] In other words, the era of Chief Justice Roberts as a moderating, institutionalist force at the center of the Court was over.[50] The iron fist that many liberals had long perceived inside Roberts's velvet glove was now laid bare for all to see.[51]

As with *Dobbs*, this impression was not merely a function of *Bruen*'s specific holding. It was also a product of the Court's repudiation of the tiered scrutiny framework that it applies to balance virtually every other individual constitutional right against countervailing governmental interests.[52] This aspect of the decision sent two chilling messages to liberals and progressives. First, the single most dangerous

[46] *Bruen*, 597 U.S at 30-31.

[47] Jacob Charles, *By the Numbers: How Disruptive Has* Bruen *Been?*, DUKE CTR. FOR FIREARMS L. (Mar. 27, 2023), https://firearmslaw.duke.edu/2023/03/by-the-numbers-how-disruptive-has-bruen-been/ [https://perma.cc/ZG35-5RD2] (explaining that *Bruen* "has been extremely disruptive, with courts declaring more laws invalid under the Second Amendment in the eight months after *Bruen* than they did in the first few *years* after *Heller*" (emphasis in original)).

[48] For an illustration of the response immediately following the *Dobbs* decision, see, for example, David Cole, *Egregiously Wrong: The Supreme Court's Unprecedented Turn*, N.Y. REV. (Aug. 18, 2022), https://www.nybooks.com/articles/2022/08/18/egregiously-wrong-the-supreme-courts-unprecedented-turn-david-cole/ [https://perma.cc/K69G-5NY8].

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022) (applying a purely historical analysis, rather than heightened scrutiny, to judge the permissibility of New York's firearms licensing regime).

constitutional right, as they see it — the right to keep and carry deadly weapons — was now apparently absolute within its sphere and unique among constitutional rights in its status as a trump, rather than a shield.[53] Second, the historical approach that the Court applied to determine the scope of the Second Amendment was highly reminiscent of the "history and tradition" test the Court announced in *Dobbs*.[54] Viewed together, these two decisions seemed to portend a broader effort to turn back the clock on constitutional rights to 1866 or 1791, in keeping with the avowed originalism of most of the conservative justices.[55]

3. Race

Like *Dobbs*, *Students for Fair Admissions v. Harvard* reversed a line of precedent stretching back nearly fifty years to hold that the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 prohibit colleges and universities from considering race in the admissions process.[56] Unlike *Dobbs*, this reversal was not entirely full-throated or unequivocal. Perhaps because Chief Justice Roberts wrote the opinion rather than Justice Alito, the Court avoided squarely overruling its earlier decisions upholding affirmative action policies in *Fisher v. Texas*[57] and *Grutter v. Bollinger*.[58] The Court also made a potentially important concession that colleges and universities *can* consider the effect of race

[53] *See, e.g.*, Darrell A. H. Miller & Joseph Blocher, *Manufacturing Outliers*, 2022 SUP. CT. REV. 49, 55 (2022) (describing Bruen as endorsing "a complete revision of how Second Amendment cases should be decided"); *cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (distinguishing between the idea of rights as trumps that absolutely defeat all competing claims and the idea of rights as shields that can be overcome by sufficiently weighty governmental interests).

[54] *See, e.g.*, Cole, *supra* note 48 (lamenting the "disastrous effect" of the Court's originalism in *Bruen* and *Dobbs*).

[55] *See id.*

[56] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 342 (2023) (Sotomayor, J. dissenting).

[57] 579 U.S. 365 (2016).

[58] 539 U.S. 306 (2003).

on the experience of particular applicants.[59] But these are fairly minor caveats. Considered as a whole, the Court's opinion strongly repudiated the use of race-based affirmative action as a means of achieving racial diversity in higher education and reaffirmed its prior rejection of every other rationale for affirmative action, including the redress of historical injustice rationale strongly advocated by the dissenters.[60] It is extraordinarily difficult to imagine the admissions policies at issue in *Fisher* and *Grutter* surviving under this analysis.[61]

Affirmative action in higher education is not as broadly salient as abortion or gun rights. Considerably less than half of American adults have graduated from college.[62] And only the most selective American colleges and universities — enrolling a tiny fraction of American college students — employ a race-conscious approach to admissions.[63] Unlike gun control and abortion rights, the consideration of race in college admissions is also broadly unpopular — with a large plurality of American adults opposing it in most surveys.[64] But questions of

[59] *Students for Fair Admissions*, 600 U.S. at 230 ("[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.").

[60] *Id.* at 333-34 (Sotomayor, J., dissenting).

[61] *Compare id.* at 253 (Thomas, J., concurring) (explaining *Grutter*'s inconsistency with the Court's analysis), *with id.* at 311-17 (Kavanaugh, J., concurring) (attempting to reconcile *Grutter* and *Fisher* with the Court's analysis).

[62] *Educational Attainment in the United States: 2021*, *Table 1. Educational Attainment of the Population 18 Years and Over, by Age, Sex, Race, and Hispanic Origin: 2021*, U.S. CENSUS BUREAU (Feb. 24, 2022), https://www.census.gov/data/tables/2021/demo/educational-attainment/cps-detailed-tables.html [https://perma.cc/69MS-FW6J] (37.9% of adults over twenty-five have completed four-year or more advanced degree).

[63] *See, e.g.*, Richard Arum & Mitchell L. Stevens, *For Most College Students, Affirmative Action Was Never Enough*, N.Y. TIMES (July 3, 2023), https://www.nytimes.com/interactive/2023/07/03/opinion/for-most-college-students-affirmative-action-was-not-enough.html ("[I]n practice, affirmative action mattered a great deal for very few and very little for most.").

[64] *See, e.g.*, Vianney Gómez, *As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions*, PEW RSCH. CTR. (Apr. 26, 2022), https://www.pewresearch.org/short-reads/2022/04/26/u-s-public-continues-to-view-grades-test-scores-as-top-factors-in-college-admissions/ [https://perma.cc/4DWQ-YLUK] ("[M]ajorities of Americans across racial and ethnic and partisan groups say race or ethnicity should *not* be factored into college acceptance decisions . . . ." (emphasis in original)); *More Americans Disapprove Than Approve of Colleges Considering Race, Ethnicity*

diversity, equity, and inclusion have been extraordinarily salient with liberal and progressive elites at least since the protests for racial justice that followed George Floyd's murder in the summer of 2020.[65] Especially but not exclusively within colleges and universities, those elites widely share Justice Ketanji Brown Jackson's perception of the *Students for Fair Admissions* decision as not just a disappointment or setback but "a tragedy for us all."[66]

4. Religion

Perhaps no single issue has received more sustained attention from the Supreme Court in recent years than burdens on the religious interests of conservative Christians — what the claimants and the Court would call "religious liberty" or "religious freedom." The sheer number of cases the Court has decided across a wide range of issues — schools,[67]

in Admissions Decisions, PEW RSCH. CTR. (June 8, 2023), https://www.pewresearch.org/politics/2023/06/08/more-americans-disapprove-than-approve-of-colleges-considering-race-ethnicity-in-admissions-decisions [https://perma.cc/32MP-DWTG] (reporting 50% disapproval and 33% approval); Monica Potts, *Most Americans Wanted the Supreme Court to End Affirmative Action — Kind Of*, ABCNEWS: FIVETHIRTYEIGHT (June 29, 2023), https://fivethirtyeight.com/features/american-opinion-affirmative-action/ [https://perma.cc/Q7AU-T399] ("[S]trong majorities of Americans agree that public (74 percent) and private (69 percent) colleges and universities should *not* be able to use race as a factor in college admissions." (emphasis in original)). *But see id.* (noting that "[q]uestions that remind respondents of the goal of affirmative action . . . tend to generate more support"); Taylor Orth, *American Attitudes on College Affirmative Action*, YOUGOV (Apr. 21, 2022), https://today.yougov.com/topics/politics/articles-reports/2022/04/21/american-attitudes-college-affirmative-action [https://perma.cc/RTN8-279L] (noting that different poll wording produces varying results).

[65] *See, e.g.*, Michael Z. Green, *(A)woke Workplaces*, 2023 WIS. L. REV. 811 (2023); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV 1 (2022).

[66] Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 411 (2023) (Jackson, J., dissenting); *see, e.g.*, Elizabeth Warren (@SenWarren), X (June 29, 2023, 9:03 AM), https://twitter.com/SenWarren/status/1674448621159305220 [https://perma.cc/76PD-BGSN] ("An extremist Supreme Court has once again reversed decades of settled law, rolled back the march toward racial justice, and narrowed educational opportunity for all.").

[67] *See, e.g.*, Carson v. Makin, 596 U.S. 767 (2022) (holding that the state tuition assistance program could not exclude religious schools).

adoptions,[68] religious observance by public employees,[69] public health,[70] and anti-discrimination[71] — is remarkable. So is the consistency with which conservative Christian plaintiffs have prevailed. Although the Court has expressly overruled few major precedents, this pattern of decisions unquestionably represents a sharp break with the recent past.[72]

The two clearest and most salient examples of this break are the Court's repeated emergency rulings against pandemic-era public health regulations that restricted religious gatherings, along with many other indoor activities,[73] and *303 Creative LLC v. Elenis*.[74] The latter, while decided as a compelled speech rather than a free exercise case, exempted a conservative Christian web designer from Colorado's public accommodations law.[75] The precise limits of this holding are unclear, but Justice Gorsuch's opinion for the Court is conspicuously uninterested in identifying those limits or reassuring those who may be concerned about its breadth.[76] The message to conservative Christians, in *303 Creative* and the Covid public health cases, seems clear: this Court is in their corner, regardless of what governmental interests might conflict with their religious interests.[77] In a perhaps telling parallel to

[68] *See, e.g.*, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (holding that the city could not constitutionally require that Catholic adoption agency certify same-sex couples).

[69] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (recognizing the constitutional right of a public high school football coach to pray on field after games).

[70] *See, e.g.*, Tandon v. Newsom, 593 U.S. 61 (2021) (per curiam) (invalidating state public health restrictions on religious observance during the Covid-19 pandemic).

[71] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (invalidating state public accommodations law on compelled speech grounds).

[72] *See, e.g.*, Lee Epstein & Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 SUP. CT. REV. 315 (2022) (documenting the shift as of 2021).

[73] *See, e.g.*, *Tandon*, 593 U.S. 61.

[74] 600 U.S. 570.

[75] *Id.* at 602-03.

[76] *See, e.g.*, Hila Keren, *Beyond Discrimination: Market Humiliation and Private Law*, 95 U. COLO. L. REV. 87 (2024) (explaining the breadth of Gorsuch's reasoning).

[77] *See, e.g.*, Zalman Rothschild, *Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause*, 131 YALE L.J.F. 1106 (2022) (describing the profound shift in the

Bruen, *303 Creative* refused to balance the plaintiff's free-speech interests against the state's concededly compelling interest in eliminating discrimination in public accommodations, as strict scrutiny would normally require. Instead, Justice Gorsuch's opinion can be read to suggest that the First Amendment categorically forbids compelled speech without regard to the state's interest.[78]

5. The Administrative State

Only hostility to the federal administrative state — specifically, the federal regulatory state — rivals religious liberty as the major preoccupation of the current Court. This hostility pervades the rhetoric of the conservative justices across statutory and constitutional cases[79] but finds its apotheosis, for the moment, in the Court's string of "major questions" cases, which collectively hold that Congress must speak with special clarity if it wishes to delegate to administrative agencies the authority to resolve questions of major political and economic significance.[80] This doctrine is sometimes explained as a special case of the canon of constitutional avoidance, necessary to avoid difficult questions about the limits of Congress's authority to delegate rule-

Court's free exercise decisions in favor of Christian plaintiffs); Epstein & Posner, *supra* note 72 (same).

[78] *See 303 Creative*, 600 U.S. at 592 ("[N]o public accommodations law is immune from the demands of the Constitution.").

[79] *See, e.g.*, Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 621 (2021) (describing this trend).

[80] *See, e.g.*, Sohoni, *supra* note 6 (summarizing and criticizing these decisions). As this Article was going to press, the Supreme Court issued three major decisions bearing on the administrative state, at least two of which rival the major questions cases in their significance. *See* Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024) (overruling *Chevron* deference); SEC v. Jarkesy, 603 U.S. __ (2024 (holding that many administrative adjudications violate the 7th Amendment right to a jury trial); Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. ___ (2024) (holding that statute of limitation on APA claims challenging agency action begins to run from the date of the claimant's injury, not the date on which agency action becomes final). There was no time to incorporate these decisions into my analysis. But individually and collectively, they clearly represent an intensification of the sweeping changes that preceded them. As such, they merely make the topic of this Article more acutely relevant.

making power to the executive branch.[81] Other times it is presented as a common-sense corollary of the basic principle that statutory text must be read "in context."[82] But either way, the major questions doctrine gives the Supreme Court an extremely potent, and functionally new, tool for imposing limits on federal regulatory power.[83]

This would be a substantial enough shift in isolation, but its impact on liberals and progressives is enhanced by four considerations that act as force multipliers. First, every exercise of regulatory authority invalidated under the newly super-charged major questions doctrine has been an important priority of a Democratic president.[84] Second, the doctrine is sufficiently malleable that it appears to give conservative judges license to invalidate almost any exercise of regulatory power they dislike on policy grounds.[85] Third, in the major-questions cases and more broadly, the conservative justices routinely employ highly ideological anti-administrative rhetoric that seems to reject the basic legitimacy of the modern administrative state.[86] Fourth, the major questions cases coincide with the Court's aggressively conservative shifts on abortion, guns, affirmative action, and religion.[87] Any one of these shifts would feel disturbing and destabilizing on its own. But the conjunction of all five has left liberals and progressives with a disorienting sense of constitutional vertigo.

B. Examples of the "Too Much, Too Quickly" Critique

The "too much, too quickly" critique is a response to this vertigo — or perhaps a distillation, or sublimation, of it. In the three years since Amy Coney Barrett's appointment, and especially since June of 2022, the critique has become ubiquitous across the liberal and progressive legal

[81] *See* Sohoni, *supra* note 6, at 290-91.

[82] *See, e.g.*, Biden v. Nebraska, 600 U.S. 477 (2023) (Barrett, J., concurring) (articulating and defending the view that the Major Questions Doctrine is a corollary to basic principles of statutory interpretation).

[83] *See, e.g.*, Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Sohoni, *supra* note 6.

[84] *See, e.g.*, *Biden v. Nebraska*, 600 U.S. 477; West Virginia v. EPA, 597 U.S. 697 (2022).

[85] *See, e.g.*, Deacon & Litman, *supra* note 83; Sohoni, *supra* note 6.

[86] *See* Sohoni, *supra* note 6.

[87] *See supra* Parts I.A.1–I.A.4.

academy, media commentary, political rhetoric, advocacy groups, and broader public discourse. The precise arguments and terminology vary, but the central idea is consistent: the current Supreme Court is moving with unprecedented and alarming speed to overhaul major areas of constitutional law with little regard for precedent, public opinion, judicial restraint, or the stability and integrity of constitutional law.

A number of prominent academics have advanced some version of the critique. Perhaps the two most widely discussed are Mark Lemley and Josh Chafetz.[88] In an influential recent article, Lemley argues that "[t]he past few years have marked the emergence of the imperial Supreme Court.[89] Armed with a new, nearly bulletproof majority, conservative Justices on the Court embarked on a radical restructuring of American law across a range of fields and disciplines."[90] Chafetz offers a similar diagnosis.[91] "[J]udicial self-empowerment," he writes, "is not a new phenomenon . . . But the judiciary has gone significantly further in recent years: with increasing frequency . . . , judges . . . are inventing out of whole cloth new principles that disempower other governing institutions and empower themselves."[92] Lemley and Chafetz focus not just on the pace and magnitude of constitutional change, but on the consolidation of power in the judiciary. Lemley particularly emphasizes the lack of a unifying theory behind the Court's arrogation of power,[93] while Chafetz emphasizes the Court's disparaging rhetoric about other governmental institutions, especially Congress and the federal executive branch.[94]

Many others have echoed the "too much, too quickly" critique in more general terms or with different normative emphases. For instance,

[88] *See* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 637 (2023); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022).

[89] Lemley, *supra* note 88, at 97.

[90] *Id.*

[91] Chafetz, *supra* note 88, at 636-37.

[92] *Id.*

[93] Lemley, *supra* note 88, at 97 ("Unlike previous shifts in the Court, this one isn't marked by debates over federal versus state power, or congressional versus judicial power, or judicial activism versus restraint.")

[94] Chafetz, *supra* note 88, at 637 (emphasizing the Court's "strikingly dismissive language about the governing capacity of other institutions and that hold up judicial procedure as a paragon of reason and rectitude").

Charles Fried writes: "The radical differences started with the Roberts Court, . . . and the best description of what they are doing is a program to repeal the twentieth century." In just the past few years, Fried notes, "the Court has overturned precedents and doctrines, understandings and practices reaching back at least to 1903. And there may be more to come."[95] Describing the current conservative majority, David Cole is similarly caustic: "[T]hese five individuals abandoned caution and exerted their newfound authority like few justices ever have. . . . Compromise, consensus, and the rule of law are out; the radical exercise of power is in."[96] In the particular context of decisions affecting the political process, Blake Emerson argues that "judges ought to exercise the 'passive virtues.' . . . The current Court is lacking in these virtues, eager to get into the game and exercise its share of political power."[97]

Jamal Greene eloquently echoes and expands on this call for judicial humility in more general terms:

> Using legal technicalities to buy time — what the legal scholar Alexander Bickel once called "the mediating techniques of 'not doing'" — isn't just a cynical ploy to run out the clock on political rivals. It's a tool for ensuring that when the court moves the law in important ways, it does so with adequate notice to, and buy-in from, the American people. . . . Time, in other words, is the tribute a court pays to diversity. It's an acknowledgment that five elite lawyers can never, and should never, be too sure that their vision of the law is right, and others wrong.[98]

A growing body of empirical and descriptive work complements these normative critiques. For instance, Lisa Schultz Bressman argues "that

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[95] Charles Fried, *The Reactionary Court*, N.Y. REV. (Nov. 24, 2022), https://www.nybooks.com/articles/2022/11/24/the-reactionary-court/ [https://perma.cc/PZ54-QJGA].

[96] Cole, *supra* note 48.

[97] Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 784 (2022).

[98] Jamal Greene, *Ketanji Brown Jackson's Confirmation Feels Both Pathbreaking and Hopeless*, N.Y. TIMES: OPINION (Mar. 25, 2022), https://www.nytimes.com/2022/03/25/opinion/sunday/ketanji-brown-jackson-kavanaugh-sotomayor-kagan.html.

the Court's self-regulatory rules are shifting and breaking down."[99] "With the change in the membership on the Court, a supermajority of Justices has a new justification for overruling prior precedent rather than adhering to stare decisis . . . ."[100] Based on computational "co-word analysis," Tejas Narechania finds that "the Roberts Court appears especially interested in cases that ask the Court to consider whether to overrule precedent . . . [T]he analysis here suggests that the Roberts Court dedicates more of its docket-setting discretion to cases seeking to upturn settled law than previous Courts."[101] Indeed, "the Roberts Court, more than any other Court in history, uses its docket setting discretion to select cases that allow it to revisit and overrule precedent."[102]

The "too much, too quickly" critique may be even more common in faculty lounges and seminar rooms than in law reviews.[103] As *Slate*'s Mark Joseph Stern breathlessly summarizes the situation: "At law schools across the country, thousands of professors of constitutional law are currently facing a court that, in their view, has let the mask of neutrality fall off completely."[104] In Stern's description, the situation came to a head with a "cascade of far-right rulings in 2022" that "confirmed that the new court is eager to shred long-held precedents it deems too liberal as quickly as possible."[105] Channeling his interview subjects, Stern emphasizes that "the problem is not that the Supreme Court is issuing decisions with which left-leaning professors *disagree*.

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[99] Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 5 (2022).

[100] *Id.*

[101] Tejas N. Narechania, *Certiorari in Important Cases*, 122 COLUM. L. REV. 923, 966-68 (2022).

[102] Tejas N. Narechania, *Certioriari in the Roberts Court*, 67 ST. LOUIS U. L.J. 587, 592 (2023).

[103] Mark Joseph Stern, *The Supreme Court Is Blowing Up Law School, Too*, SLATE (Oct. 2, 2022, 7:00 PM), https://slate.com/news-and-politics/2022/10/supreme-court-scotus-decisions-law-school-professors.html [https://perma.cc/79HF-BJN9]. My own personal, and obviously anecdotal, experience is strongly consistent with Stern's reporting. I may even have expressed similar sentiments myself in informal conversation. *Cf.* Andrew Coan, *What Is the Matter with* Dobbs*?*, 26 U. PA. J. CONST. L. 282, 318 (2024) [hereinafter Coan, *The Matter with Dobbs*].

[104] Stern, *supra* note 103.

[105] *Id.*

It's that the court seems to be reaching many of these conclusions in defiance of centuries of standards, rejecting precedent and moderation in favor of aggressive, partisan-tinged motivated reasoning."[106]

Unsurprisingly, these informal expressions of the critique are not as deeply theorized as the versions that appear in law reviews. Indeed, at times the critique can appear to be as much a prevailing mood or zeitgeist as an argument. It would be difficult to find a better distillation of that mood than the comments of Professor Tiffany Jeffers to Stern:

> It's hard to think about your own profession — the things you were taught, the things you believed in — abruptly coming to an end in rapid succession. . . . It's hard to ask a law professor to dismantle all the training they had. . . . It's not easy to upend your life's work and not trust the Supreme Court.[107]

As often happens, both mood and argument have jumped the bounds of the legal academy into popular discourse on the Supreme Court — or perhaps the causal arrow runs in the opposite direction. At the Center for American Progress, Ben Olinsky and Grace Oyenubi lament the "deeply disturbing theme" reflected in "a string of decisions": "[T]he reversal of long-standing precedents and law that will claw back the rights of Americans in a way unseen in modern times."[108] *Vanity Fair* columnist Molly Jong-Fast offers an even starker assessment: "A decade ago, the idea that a radical Supreme Court would remake our country might have seemed hyperbolic. But that's exactly what happened. . . . This Supreme Court is . . . deeply emboldened to reshape society."[109]

Politicians and activists have picked up the "too much, too quickly" critique and run with it. Predictably, their accompanying rhetoric tends to be more strident and overtly partisan. But the core idea is clearly present. An American Constitution Society report by Senator Sheldon

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[106] *Id.*

[107] *Id.* (quoting Georgetown University Law Professor of Practice Tiffany Jeffers).

[108] Ben Olinsky & Grace Oyenubi, *The Supreme Court's Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy*, CTR. FOR AM. PROGRESS (June 13, 2022), https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/.

[109] Molly Jong-Fast, *America Has a Supreme Court Problem*, VANITY FAIR (July 5, 2023), https://www.vanityfair.com/news/2023/07/supreme-court-legitimacy-crisis [https://perma.cc/A8QD-VDMU].

Whitehouse provides an unusually comprehensive and substantive example:

> When big conservative and corporate interests are at stake, the Roberts Five readily overturn precedent, invalidate statutes passed by wide bipartisan margins, and opine on broad constitutional issues they need not reach. Modesty, originalism, stare decisis, and even federalism — all supposedly conservative judicial principles — have been jettisoned when necessary to deliver these . . . partisan Republican wins.[110]

President Joe Biden's reaction to the *Students for Fair Admissions* decision is more typical: "This is not a normal Court."[111] Asked to elaborate, President Biden explained that the Court was changing too much, too quickly: "It's done more to unravel basic rights and basic decisions than any court in recent history. . . . Take a look at how it's ruled on a number of issues that had been precedent for [fifty], [sixty] years sometimes."[112] Brennan Center President Michael Waldman offers a similar, if pithier, lament: "[T]hree decades of social change — on abortion, guns, and environmental regulation — crammed into three days in June 2022."[113]

The penetration of the "too much, too quickly" critique into the popular liberal and progressive imagination is perhaps best encapsulated by a recent Linda Greenhouse column. To put the mix of liberal and conservative decisions of OT 2022 in context, Greenhouse suggests a thought experiment: "Suppose a modern Rip Van Winkle went to sleep September 2005 and didn't wake up until last week. Such a person would awaken in a profoundly different constitutional world, a

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[110] Sheldon Whitehouse, *A Right-Wing Rout: The Roberts Court's Partisan Opinions*, AM. CONST. SOC'Y (Apr. 24, 2019), https://www.acslaw.org/issue_brief/briefs-landing/a-right-wing-rout-what-the-roberts-five-decisions-tell-us-about-the-integrity-of-todays-supreme-court/ [https://perma.cc/LA84-2ZLF].

[111] Michael D. Shear, *'This Is Not a Normal Court': Biden Denounces Affirmative-Action Ruling*, N.Y. TIMES (June 29, 2023), https://www.nytimes.com/2023/06/29/us/politics/biden-supreme-court-affirmative-action.html.

[112] *Id.*

[113] Michael Waldman, *A Regressive Supreme Court Turns Activist*, BRENNAN CTR. FOR JUST. (May 22, 2023), https://www.brennancenter.org/our-work/research-reports/regressive-supreme-court-turns-activist [https://perma.cc/ZR4D-V53X].

world transformed, term by term and case by case, at the Supreme Court's hand."[114] This is the "too much, too quickly" critique in a nutshell.

Several Supreme Court justices have made comments, in their opinions or public statements, that reflect or hint at support for some version of the critique. In two recent cases, Justice Sonia Sotomayor has lamented: "What a difference five years makes."[115] In a series of public remarks and interviews, Justice Elena Kagan offered a sharper and more specific critique:

> Judges create legitimacy problems for themselves when they don't act like courts . . . The court shouldn't be wandering around just inserting itself into every hot button issue in America, and it especially, you know, shouldn't be doing that in a way that reflects one ideology or one . . . set of political views over another.[116]

Several years earlier, Justice Breyer offered a more express endorsement of the critique in his oral dissent from *Parents Involved in Community Schools v. Seattle School District No. 1*: "It is not often in the law that so few have so quickly changed so much."[117]

Like most politicians, activists, and public commentators, all three of these justices have also criticized the decisions of the current Court as legally wrong and morally and practically disastrous for the country. And none of the three has offered anything like a fully worked out version of the "too much, too quickly" critique. A handful of scholars have offered more robust and fully theorized arguments.[118] But the overall picture is one in which many observers, especially liberals and

[114] 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.

[115] 303 Creative LLC v. Elenis, 600 U.S. 570, 604 (2023) (Sotomayor, J., dissenting) (quoting Carson v. Makin, 596 U. S. 767, 810 (2022) (Sotomayor, J., dissenting)).

[116] Simon Lazarus, *How to Rein in the Supreme Court's Radical Conservatives*, NEW REPUBLIC (Sept. 27, 2022), https://newrepublic.com/article/167863/liberals-confront-supreme-court-radicalism [https://perma.cc/M5ZT-5RC4].

[117] Linda Greenhouse, *Justices Limit the Use of Race in School Plans for Integration*, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/washington/29scotus.html.

[118] *See supra* note 88; *see also infra* Parts II.A, II.D.

progressives, strongly believe that the Supreme Court is changing too much too quickly. Yet this belief rests on a wide range of different grounds which relatively few critics of the Court have thought through completely or carefully distinguished from one another — or from other critiques.

C. Defining Constitutional Change

With this picture in hand and some understanding of the context that gave rise to it, we are in a better position to consider two fundamental questions raised by the "too much, too quickly" critique: How should we measure or otherwise assess the pace and magnitude of constitutional change? And what counts as constitutional change in the first place? These questions are obviously intertwined, and both underscore the difficulty of disentangling normative from descriptive judgments in any analysis of the "too much, too quickly" critique.

To measure or otherwise assess the pace and magnitude of constitutional change, it is first necessary to define what we mean by change. Reversals of established precedents and invalidations of federal and state laws immediately suggest themselves as examples — and, in fact, quantifiable measures — of constitutional change, and they are a good starting point. But both of these examples raise further questions. The distinction between overruling a precedent and narrowing or distinguishing it is a matter of degree. At least some narrowing or distinguishing of prior precedents should probably count as changing the law, and these changes would be overlooked by an approach that simply counted express reversals of precedent.[119] On the other hand, some — and perhaps many — invalidations of federal and state laws might reflect a relatively straightforward application of settled law. At least some of these decisions should probably not count as changing constitutional law. These two problems might offset one another, but there are no guarantees.[120]

[119] On the concept of narrowing precedent, see generally Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014), and Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921 (2016).

[120] An additional question is whether to count only Supreme Court decisions or also to include lower court decisions invited by the Supreme Court (for example, the many

A much bigger problem with simply counting reversals and invalidations is that it ignores the question of magnitude or significance. To state the obvious, some reversals of precedent and invalidations of laws are much more significant than others. At a minimum, it seems necessary to consider the age of the precedents the Court is reversing, how often those precedents have been reaffirmed or relied on by other decisions, the extent and types of reliance those decisions have induced among the general public and government actors, and the extent to which their beneficiaries are equipped to adapt to a new legal regime.[121] This is to say nothing of the moral significance, salience, or popular approval of the right or governmental interest that is prejudiced by the reversal of precedent.[122]

We could easily come up with a similar list of relevant considerations for evaluating the significance of laws invalidated under newly established constitutional rules. It might involve the number of affected persons, the financial cost of complying with the statute, the budgetary impact of invaliding the statute, and the like. It might also involve an assessment of the moral significance of the statute's goals or the values ostensibly protected by its invalidation. Any judgment about the significance of a particular decision based on these factors will be contestable and arguably ideological, especially if it incorporates moral significance. But there is no plausible way to think about the pace or scale of constitutional change without accounting for the widely varying significance of different Supreme Court decisions. To pick three obvious recent examples, almost everyone would agree that *Dobbs* and *Bruen* are more significant than *Franchise Tax Board of California v. Hyatt*,[123] the

invalidations of state and local gun regulations after *Bruen*). I thank Aaron-Andrew Bruhl for this point.

[121] *See, e.g.*, Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205 (2006) (using the term "super precedent" to describe "those constitutional decisions in which public institutions have heavily invested, repeatedly relied, and consistently supported over a significant period of time" and which "are deeply embedded into our law and lives").

[122] *See id.*; *see also* Frederick Schauer, *Foreword: The Court's Agenda — And the Nation's*, 120 HARV. L. REV. 4 (2006) (noting the remoteness of most Supreme Court decisions from the cares and concerns of the American public).

[123] 587 U.S. 230 (2019).

Court's 2019 decision reversing *Nevada v. Hall*[124] and extending state sovereign immunity to proceedings in the courts of other states.[125] Any approach to constitutional change that is not capable of making this distinction is not of much use.

Closely related to the question of significance — and arguably a special case of it — is breadth. Some constitutional decisions by the Supreme Court are narrowly limited to their particular facts. Others establish broad rules or principles that sweep well beyond the facts of the case.[126] Apart from the breadth of their precise holding or *ratio decidendi*, some Supreme Court decisions rest on reasoning whose logic calls into question a much broader swath of prior decisions or existing statutes that themselves rest on similar foundations. Similarly, but more diffusely, some constitutional decisions reshape the constitutional gestalt, signaling through their rhetoric, emphasis, citations, and occasionally their express language that the horizons of constitutional possibility have shifted in important ways.[127] Like judgments of significance, any judgment concerning decisional breadth will be contestable and arguably ideological, but there is no plausible way to think about the pace or magnitude of constitutional change without making these judgments.

Dobbs and *303 Creative* are helpful examples from the current Court. The majority opinion in *Dobbs*, which reverses *Roe* and *Casey* outright, is broader than Chief Justice Roberts's opinion, which would have jettisoned only "the viability rule" from those cases, without

[124] 440 U.S. 410 (1979).

[125] I owe the example of *Hyatt* to Jonathan Adler, who attempts to use it to make nearly the opposite point. Jonathan H. Adler, *The Restrained Roberts Court*, NAT'L REV. (July 31, 2023, 2:17 PM), https://www.nationalreview.com/magazine/2023/07/31/the-restrained-roberts-court/ [https://perma.cc/BXA5-ZLHE] [hereinafter Adler, *Restrained Roberts*]. I shall return to Adler's argument below.

[126] *See, e.g.*, Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) (discussing this distinction in connection with judicial minimalism); *see also* Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1942, 1983 (2019) (discussing some of the complexities the distinction raises in identifying the controlling holding of a fractured Supreme Court).

[127] *See, e.g.*, Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 3 (2013) (defining the constitutional gestalt as "an interpretive framework that organizes our understanding of cases, theories, and narratives").

overturning the constitutional right "to choose to terminate [a] pregnancy."[128] Similarly, Justice Gorsuch's majority opinion in *303 Creative*, which endorses the plaintiff's broad compelled speech claim against Colorado's public accommodations law, is broader than the Court's earlier, fact-bound decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which invalidated a particular application of that law on free exercise grounds.[129] Both of these decisions, and *Dobbs* in particular, also illustrate several alternative forms of breadth beyond their precise holdings. The holding of *Dobbs* is expressly limited to abortion, but the "history and tradition" test the Court embraced from *Glucksberg* undermines the foundations of much of modern substantive due process.[130] The holding of *303 Creative* conspicuously lacks clear limits, raising broad questions about the future of antidiscrimination law. Both decisions contain rhetoric that might arguably be read as announcing a new constitutional gestalt. In the case of *303 Creative*, this reading is reinforced by both the rhetoric and broader pattern of the Court's other recent religion decisions.[131]

Finally, there is the deep and important question of how best to understand the object of constitutional change. Is constitutional law simply a collection of discrete rules of varying significance and breadth? Or is it better understood as a whole — more precisely, as the vector sum of political or ideological values embodied in the constitutional order? If it is the former, the pace and magnitude of constitutional change are primarily a function of the number, significance, and breadth of the constitutional rules changed over a particular span of time, without regard to their ideological valence. On this view, sweeping constitutional change might involve a sharp shift to the right, a sharp shift to the left, or a sharp shift in many rules of mixed ideological

[128] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 297-98 (2022) (Roberts, C.J., concurring).

[129] *Compare* 303 Creative LLC v. Elenis, 600 U.S. 570, 588 (2023), *with* Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 640 (2018). Technically, the two decisions involve different rights — freedom of speech and free exercise of religion, respectively. But it nevertheless makes sense to describe *303 Creative* as significantly broader.

[130] *See* Coan, *The Matter with Dobbs*, *supra* note 103, at 287-89 (explaining this point and collecting sources).

[131] *See supra* Part I.A.

valence. But if constitutional law is a vector sum of political values, the last of these three is very different from the first two. On this view, a sharp to the right or the left qualifies as sweeping constitutional change. But a sharp shift of mixed — we might say, offsetting — changes is, in an important sense, no change at all. Many rules can change without changing the vector sum of values embodied in the constitutional order as a whole.[132]

To make the point more concrete, we can compare the current Court with its two immediate predecessors — the Rehnquist and Burger Courts (bracketing the earlier incarnations of the Roberts Court). In a valuable series of blog posts, Jonathan Adler contends that the current Court has overruled precedents and invalidated laws at lower annual rates than either the Rehnquist or Burger Court.[133] Setting aside questions of significance and breadth, his analysis calls into question the conventional wisdom among liberal and progressive observers (and some enthusiastic conservatives) that we are living in a period of revolutionary constitutional change. But this is true only if one views constitutional law as a collection of discrete rules. If one instead views it as the vector sum of political values, the conventional wisdom makes more sense. The Rehnquist and Burger Courts may have overruled more precedents and invalidated more laws — in absolute terms and as a percentage of their caseloads — but, as Adler acknowledges, their decisions were significantly more ideologically balanced.[134] By comparison, the decisions of the current Court since 2017, and

[132] There is a loose parallel to Zachary Price's theory of "symmetric constitutionalism," which urges the Supreme Court "to craft a constitutional law with cross-partisan appeal." *See* Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1275 (2019). On the vector-sum view of constitutional change, symmetric constitutionalism might be understood not just as an appeal not to change constitutional law too much, too quickly.

[133] *See* Jonathan H. Adler, *Notes on "The Restrained Roberts Court*," VOLOKH CONSPIRACY (July 17, 2023, 7:15 AM), https://reason.com/volokh/2023/07/17/notes-on-the-restrained-roberts-court/ [https://perma.cc/SZ32-UKTQ] [hereinafter Adler, *Notes*]; Jonathan H. Adler, *Correcting Misconceptions About the Roberts Court*, VOLOKH CONSPIRACY (June 25, 2012, 8:17 AM), https://volokh.com/2012/06/25/correcting-misconceptions-about-the-roberts-court/ [https://perma.cc/C824-BMZY]; *see also* Adler, *supra* note 125.

[134] *See* Adler, *Notes*, *supra* note 133; Adler, *Restrained Roberts*, *supra* note 125.

especially since 2020, represent a sharp rightward shift in the vector sum of political values, with a promise of much more to come.[135]

We need not choose between these two views. They are both plausible ways of thinking about constitutional change — and they are best understood as describing different forms that sweeping constitutional change might take. In this sense, they are complements, not competitors. It is worth noting that the vector-sum view takes account of ideology, but it does not define sweeping constitutional change in overtly ideological terms. To extend the mathematical metaphor, what matters is the absolute value of the change to the vector sum of values, not the ideological sign of that change. Whether change of either form is too much, too quickly is another question, to which the next Part turns.

II. FOUR WAYS TO UNDERSTAND THE CRITIQUE

Many critics of the current Supreme Court think it is changing too much, too quickly. Some of them make detailed arguments explaining why this is a problem, which this Part will discuss. But many of them do not. Indeed, many seem to take it as obvious or axiomatic that it is problematic for the Supreme Court to impose sweeping change on the rules and doctrinal foundations of the American order in a relatively short period of time, especially when that change is all in one ideological direction. This critique is not unique to the present constitutional moment. It has been made in other periods of sweeping constitutional change and will very likely be made again in the future.[136] It is therefore worth asking, in a serious and open-minded way, what to make of this

[135] Adler also fails to consider the Court's certiorari and "shadow-docket" decisions, which significantly complicate his thesis. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (explaining the increasing importance of the Court's non-merits and summary decisions). As noted above, an important recent study by Tejas Narechania concludes that "the Roberts Court, more than any other Court in history, uses its docket-setting discretion to select cases that allow it to revisit and overrule precedent." Narechania, *supra* note 102, at 592.

[136] *See, e.g.*, BICKEL, IDEA OF PROGRESS, *supra* note 18 (stating that "the Court is not the place for the heedless break with the past").

critique — not merely as it applies to the current Court, but as a general matter.

When and why might it be a problem for the Supreme Court to change too much, too quickly? What deeper commitments, if any, are necessary for this critique to make sense? And are some deeper commitments fundamentally irreconcilable with the critique? Is the critique everywhere and always an example of hypocrisy or sour grapes advanced by critics who would celebrate sweeping constitutional change in the opposite ideological direction? Even if the answer is no, must one commit to gradualism across-the-board to endorse the critique? Or are there persuasive, context-sensitive reasons to oppose some, but not all, sweeping constitutional change?

This Part proposes a novel, four-part taxonomy for organizing the answers to these questions. The four understandings of the "too much, too quickly" critique it encompasses are all helpful, but none of those understandings is complete on its own. We must consider all four together to think clearly and carefully about how to balance the costs and benefits of constitutional change. That is the goal of this Part.

A. Across-the-Board Gradualism

This most straightforward and obvious way of understanding the "too much, too quickly" critique is as an example of the gradualism advocated by Alexander Bickel and his intellectual descendants. Bickel's cautious, prudent moderation is one of the most venerable strains of American constitutional thought. In *The Least Dangerous Branch*, Bickel famously argued that judicial review requires the Supreme Court to discern and defend the enduring principles of the nation in a way that popular majorities can live with.[137] He was concerned both with preserving representative democracy for its own sake and limiting the sort of public backlash that might render rights-protecting judicial decisions self-defeating or perverse. His chief prescription was frequent practice of the "passive virtues" — doctrines like ripeness, standing, and vagueness

[137] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) [hereinafter BICKEL, THE LEAST DANGEROUS BRANCH].

that allow the Court to avoid deciding constitutional questions that it could not possibly decide well.[138]

The best example of his theory in action is probably *Naim v. Naim*,[139] where the Supreme Court dodged the question of interracial marriage, rather than taking on such a combustible topic on top of school desegregation. By avoiding the constitutional question altogether, the Court left in place a vicious law that it lacked the practical power to invalidate, at least as Bickel saw it.[140] But it did so without creating a damaging precedent giving the Court's imprimatur to anti-miscegenation laws. This left the Court free to declare such laws unconstitutional a dozen years later in *Loving v. Virginia*.[141]

Bickel's watchwords were caution, humility, and above all, prudence. In the Civil Rights era, this struck many of Bickel's contemporaries as defeatism bordering on complicity with white supremacy.[142] But for better or worse, his influence has endured to this day, most notably in the judicial minimalism advocated by Cass Sunstein and Chief Justice John Roberts. In the late 1990s, Sunstein mounted a sustained intellectual defense of the principle that the Supreme Court should generally decide cases, especially constitutional cases, on narrow, shallow grounds that command the broadest possible agreement.[143] The idea is well captured in the title of Sunstein's book, *One Case at a Time*.[144] Like Bickel, Sunstein was concerned with representative democracy — in particular, the democratic value of overlapping consensus of persons

[138] *See id.*

[139] 350 U.S. 891 (1955), *aff'd*, 197 Va. 80 (1955), *motion to recall mandate denied and appeal dismissed*, 350 U.S. 985 (1956).

[140] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 137, at 69-70. For a contrary view, see Richard Delgado, *The Worst Supreme Court Case Ever:* Naim v. Naim, 12 NEV. L.J. 525 (2011).

[141] 388 U.S. 1 (1967).

[142] *See, e.g.*, Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3, 10-13 (1964) (describing Bickel as "cavalier" and dismissing his "passive virtue" approach as "100% insistence on principle, 20% of the time").

[143] SUNSTEIN, *supra* note 18.

[144] *Id.*

with different foundational commitments.[145] But Sunstein's focus was on *how* the Court should decide cases, rather than *when* and *whether* it should decide them.[146] He also advanced an epistemic argument for minimalism, rooted in the pragmatic traditionalism of Edmund Burke and the institutional limitations of the Supreme Court.[147] In a nutshell, the Court was less likely to make serious mistakes by ruling narrowly than by ruling broadly.[148]

In his confirmation hearings and tenure as Chief Justice, John Roberts has advocated his own brand of minimalism, incorporating elements of both Bickel and Sunstein, but with a distinctive, institutionalist twist.[149] Like Bickel, Roberts has made Article III standing — and justiciability more generally — a major point of emphasis, though as a Supreme Court justice, he is unsurprisingly more dogmatic about these limits on judicial authority and less candid about the inevitable role that prudential judgment plays in these domains.[150] Like Sunstein, Roberts emphasizes the virtues of narrow rulings and epistemic humility. This commitment is well-captured in Roberts's dictum, which he frequently re-quotes: "If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more."[151] But the major focus and apparent motivation for Roberts's minimalism is institutional. He sees narrow rulings as conducive to consensus, which he views as essential to public trust in the Court's nonpartisanship and thus its institutional

[145] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734-36 (1995).

[146] *See, e.g.*, SUNSTEIN, *supra* note 18.

[147] *See* Sunstein, *supra* note 126, at 358-59, 402, 405.

[148] *Id.* at 365. This was Sunstein's argument in broad brush, but that argument was studded with so many careful caveats that it was hard to know how much of a minimalist Sunstein really is. *See* Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1958-60 (2005).

[149] *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 158 (2005).

[150] *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

[151] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 348 (2022) (Roberts, C.J., concurring).

legitimacy.[152] Bickel, too, saw humility and prudence as essential to the Court's ability to safeguard the nation's enduring values. But for Roberts, the Court's legitimacy often seems like an end in itself.[153]

The essential thread linking Bickel, Sunstein, and Roberts is their avowed commitment to judicial caution, humility, and incrementalism — in a word, gradualism — across the board. Bickel was and Sunstein is a moderate liberal. Roberts is a conservative. But all three at least purport to favor gradualism across a wide range of constitutional issues without regard to their own personal ideological views. Thus, Bickel and Sunstein have both worried about some of the more sweepingly liberal decisions of the Warren and Burger Courts.[154] And Roberts has frequently joined the Court's liberal bloc in issuing narrow rulings against conservative legal arguments — and, less frequently, in favor of liberal or progressive arguments.[155] He has also made a strong, if frequently unsuccessful, effort to unite the Court unanimously or nearly unanimously around narrow resolutions of contentious questions.[156]

On its face, the "too much, too quickly" critique seems to be a call for exactly this sort of across-the-board gradualism. Bickel, Sunstein, and Roberts supply a number of serious arguments against sweeping

[152] *See, e.g.*, Jeffrey Rosen, *John Roberts is Just Who the Supreme Court Needed*, THE ATLANTIC (July 13, 2020), https://www.theatlantic.com/ideas/archive/2020/07/john-roberts-just-who-supreme-court-needed/614053/ [https://perma.cc/8K4W-2VJG] (quoting Roberts to this effect).

[153] Other observers would go further and dismiss Roberts's purported minimalism as sham and a con. *See, e.g.*, Eric J. Segall, *Chief Justice John Roberts: Institutionalist or Hubris-in-Chief?*, 78 WASH. & LEE L. REV. ONLINE 107, 108-09 (2021). For an interesting argument that Roberts is both a minimalist and a maximalist, see Jamal Greene, *Maximinimalism*, 38 CARDOZO L. REV. 623, 624-25 (2016).

[154] *See generally* BICKEL, IDEA OF PROGRESS, *supra* note 18; SUNSTEIN, *supra* note 18.

[155] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020) (joining with four liberal justices to reinstate President Barack Obama's Deferred Action for Childhood Arrivals program).

[156] *See, e.g.*, Fulton v. Philadelphia, 593 U.S. 522 (2021) (unanimous decision in favor of Catholic adoption agency challenging requirement that it certify same-sex couples, with several concurrences in the judgment); Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 584 U.S. 617, 640 (2018) (7–2 decision in favor of Christian baker's challenge to public accommodations law, joined by Justices Breyer and Kagan); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009) (unanimous decision granting small utility district a bailout from Voting Rights Act's preclearance requirement, with one concurrence in the judgment).

constitutional change. Such change destabilizes precedents and constitutional traditions that have stood the test of time and proved at least good enough, in the judgment of generations of decision-makers. In many cases, those precedents and traditions will also have generated substantial reliance interests that should not be lightly overturned. Certain kinds of sweeping constitutional change are also likely to trigger public backlash, particularly when the Court's decisions run contrary to contemporary public opinion and when they all cut in the same ideological direction.[157]

Public backlash not only threatens to frustrate the implementations of the Court's decisions that trigger popular opposition and resistance. It also threatens to erode the Court's reputation as an independent, nonpartisan body and thus its legitimacy, which is crucial to the Court's ability to authoritatively settle constitutional disagreements in cases where settlement is urgently necessary. Think of the 2020 election. Would a Supreme Court that was widely perceived as an arm of the Democratic Party have been able to quash Donald Trump's baseless legal challenges as effectually?[158] As Bickel would emphasize, legitimacy is also essential to the Court's ability to discern and protect the nation's most enduring values.[159]

Recently, Richard Re has mounted a gradualist critique of *Dobbs* that sounds many of these notes. In particular, he condemns Justice Samuel Alito and the *Dobbs* majority for rushing to overrule *Roe* and *Casey* prematurely, in violation of its own deliberative procedures, and for failing to give the country time to prepare for this avulsive change in the law.[160] The first of these critiques emphasizes the epistemic risks of precipitous constitutional change and the epistemic value of

[157] *See generally* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 137; SUNSTEIN, *supra* note 18; Sunstein, *supra* note 126.

[158] *See, e.g.*, William Baude, *The Real Enemies of Democracy*, 109 CALIF. L. REV. 2407 (2021) (raising this question and answering it in the negative).

[159] *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 137. Note that all of these potential costs of sweeping constitutional change depend on the significance and breadth of the Court's decisions, as well as their ideological consistency, not merely the number of precedents overturned or statutes invalidated.

[160] Richard M. Re, *Should Gradualism Have Prevailed in* Dobbs*?*, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 140 (Lee C. Bollinger & Geoffrey Stone eds., 2024) [hereinafter Re, *Gradualism in* Dobbs].

deliberation. The second emphasizes reliance interests. Both critiques are limited to a single decision, but they could easily be generalized. Indeed, Re's larger body of work — on "narrowing precedent"[161] and the "doctrine of one last chance"[162] — can be understood as a subtle and imaginative defense of across-the-board gradualism in an age of conservative dominance. Notably, Re's gradualism is a defense of incremental conservative change against its liberal critics, as well as conservative maximalists. He thinks the dissenters in *Dobbs* should have joined Chief Justice Roberts's gradualist concurrence overturning *Roe* and *Casey*'s viability rule.[163]

Across-the-board gradualism is subject to many weighty objections. It is hard to square with some of the Supreme Court's most celebrated decisions. Think of *Obergefell v. Hodges*[164] or *Brown v. Board of Education*[165] or *Gideon v. Wainwright*.[166] In at least some of its forms, gradualism will frequently provide insufficient and unclear guidance to the lower courts, creating real practical difficulties but also arbitrary differences in the resolution of individual cases.[167] In the view of some critics, the latter places gradualism in significant tension with the rule of law.[168] Gradualism may also allow the Court to escape democratic accountability while flying under the radar.[169] An example would be killing the constitutional right to abortion through a thousand tiny cuts that the public would little notice, which is an uncharitable — but plausible — description of the course Chief Justice Roberts preferred in

[161] *See* sources cited *supra* note 119.

[162] *See* Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173, 174, 179, 181 (2014); *see also* Richard M. Re, *Second Thoughts on "One Last Chance?,"* 66 UCLA L. REV. 634, 636 (2019).

[163] *See* Re, *Gradualism in* Dobbs, *supra* note 160, at 141 ("[I]f the majority had reason to moderate, the dissenters did, too — by joining a gradualist opinion like the Chief's.").

[164] 576 U.S. 644 (2015) (establishing a constitutional right to same-sex marriage).

[165] 347 U.S. 483 (1954) (holding state-mandated school segregation unconstitutional).

[166] 372 U.S. 335 (1963) (establishing a constitutional right to state-funded criminal defense).

[167] *See, e.g.*, Siegel, *supra* note 148 (raising all these objections).

[168] *See id.*

[169] *See id.*

Dobbs.[170] Other critics argue that the epistemic virtues of gradualism are greatly exaggerated and offset by the importance of bold judicial protection for constitutional rights.[171] The list could go on.[172]

Any version of the "too much, too quickly" critique grounded in across-the-board gradualism would be subject to the same objections. But for present purposes, there is a more important problem with this understanding of the critique. Put simply, many of the proponents of the critique — today and more generally — do not favor anything like across-the-board gradualism. To illustrate this point, I will focus on liberal and progressive critics of the current Court, but the point would apply equally to many conservative critics of the Warren Court or the post-1937 Hughes and Stone Courts.[173] If and when the Court regains a solidly liberal or progressive majority, the "too much, too quickly" critique will very likely be advanced by conservatives, as it has been in the past. These future critics may even include some enthusiastic defenders of the current Court's sweeping conservative constitutional change.

For now, let us focus on the present. There are, unquestionably, costs to rapid constitutional change, which all reasonable observers would acknowledge. Today's liberals and progressives have quite

[170] *See, e.g.*, Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 133 (2021) ("With some frequency, Chief Justice Roberts has shown a preference for very gradual evolution in the Court's jurisprudence that eschews radical displays in favor of a death-by-a-thousand-cuts approach to despised or maligned precedents.").

[171] *See, e.g.*, Gunther, *supra* note 142.

[172] For instance, some critics have charged Sunstein, in particular, with fighting an unprincipled, rear-guard action to protect the liberal legacies of the Warren and Burger Courts from wholescale reversal by the Rehnquist and Roberts Courts. *See, e.g.*, Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors are Wrong for America*, 106 COLUM. L. REV. 2207, 2214 (2006) (book review) ("On this view, minimalism is a rear-guard action designed to fend off the supposed conservative trajectory of the law — call it the legal academy's version of the Brezhnev doctrine."). Similarly, many critics have charged Roberts with husbanding the power and prestige of the Supreme Court for essentially self-interested reasons, rather than a commitment to rule-of-law values or individual rights. *See, e.g.*, Segall, *supra* note 153.

[173] *Compare* ROBERT BORK, THE TEMPTING OF AMERICA (1990) (advocating originalism as a shield against liberal Supreme Court decisions), *with* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609 (2004) ("The new originalism does not require judges to get out of the way of legislatures.").

understandably been highly focused on the profound reliance interests that *Dobbs* trampled on in overruling *Roe* and *Casey*.[174] But these liberals and progressives hardly think all change should be incremental or slow. The Civil War amendments were a truly revolutionary change — at least for a few years — and would have constituted a much bigger and more radical break if they had been enforced in a sustained way, as liberals and progressives certainly think they should have been.[175] The New Deal revolution of 1937 to 1942 was less profound but still highly consequential and abrupt, affecting vast swaths of social and economic policy in only a few short years.[176]

Brown v. Board of Education also effected a profound and abrupt change, or sought to, as did the Warren Court revolution more generally, especially in the contexts of race, criminal procedure, habeas corpus, freedom of speech, and the Establishment Clause.[177] In an important sense, this revolution continued into the early Burger Court with *Roe* and the sex discrimination cases of the 1970s.[178] If anything, most liberals and progressives today think the Court should have gone further and faster in these domains.[179]

More generally, many of the critics who decry the current Court's radicalism simultaneously advocate sweeping change to the American constitutional and political order in the opposite direction. "Big structural change" was not the slogan of Elizabeth Warren's presidential

[174] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 410 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting); Seana V. Shiffrin, *Reliance Arguments, Democratic Law, and Inequity*, 14 JURIS. 317 (2023); Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845 (2023).

[175] *See, e.g.*, W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA: 1860–1880 (1935); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION: 1863–77 (2d ed. 2014).

[176] *See, e.g.*, LAURA KALMAN, FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM (2022); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

[177] *See, e.g.*, LAURA KALMAN, THE LONG REACH OF THE SIXTIES: LBJ, NIXON, AND THE MAKING OF THE CONTEMPORARY SUPREME COURT (2017).

[178] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

[179] *See, e.g.*, JULIE C. SUK, AFTER MISOGYNY: HOW THE LAW FAILS WOMEN AND WHAT TO DO ABOUT IT (2023).

campaign for nothing.[180] And plenty of progressives thought Warren too moderate. Critical voices on race, gender, class, disability, and their intersection forcefully advocate revolutionary transformation — if not outright abolition — of the existing social, political, and economic order.[181] None of these positions can be easily reconciled with across-the-board gradualism in the mold of Alexander Bickel, Cass Sunstein, and John Roberts.

Of course, some of the sweeping changes favored by liberals and progressives — past, present, and future — have been, or would have to be, achieved through constitutional amendment or legislation rather than judicial review. This might serve to distinguish these historical episodes from the current Court's conservative radicalism, allowing liberals and progressives to endorse across-the-board gradualism as to judicially effected constitutional change but not to the political process. This is a plausible position. Many of the arguments for across-the-board gradualism are rooted in the epistemic and institutional limits — and democratic deficit — of the Supreme Court.[182] But that is hardly true of all arguments for gradualism. Nor does it account for the New Deal and Warren Court revolutions, which for most liberals and progressives today remain the high points in the last century of Supreme Court history.[183]

These revolutions might still be distinguished from the project of the current Court in many ways. But most of these would amount to some variation of "the New Deal and Warren Court aimed at laudable liberal and progressive values, while the current Court aims at regressive and pernicious conservative values." This claim might well be true and persuasive to liberals and progressives. But it is a repudiation of across-the-board gradualism, not an embrace of it.

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[180] *See, e.g.*, ELIZABETH WARREN, PERSIST (2021).

[181] *See, e.g.*, DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM (2021); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 44 (2019).

[182] *See supra* Part II.A.

[183] Of course, neither of these revolutions was accomplished by the judiciary alone. No constitutional revolution ever is. But both centrally involved sweeping judicial transformation of existing law.

There is another clue that most critics of the current Court are not committed to across-the-board *judicial* gradualism. It lies in liberal and progressive aspirations for the Supreme Court, as expressed on the eve of the 2016 presidential election. This was the last time it seemed plausible that liberals and progressives might imminently comprise a majority of the Supreme Court, and liberals and progressives understandably looked forward to this prospect expectantly. In a widely discussed blog post published in May 2016, Mark Tushnet advocated for something very much like the current Court's approach except in the opposite ideological direction.[184] In his view, liberals and progressives had too long embraced "[d]efensive-crouch constitutionalism, with every liberal position asserted nervously, its proponents looking over their shoulders for retaliation by conservatives."[185] If and when President Hillary Clinton filled Antonin Scalia's seat (and, perhaps in time, Anthony Kennedy's), Tushnet urged a "hard-line" approach, including the sweeping reversal of conservative precedents.[186]

Tushnet was probably to the left of most liberals and progressives in the legal academy at the time of this post.[187] But he was very far from alone in envisioning a bold and ambitious agenda for the Court's long-awaited and widely expected liberal majority. A good confirmation of this is *The Constitution in 2020* — a curated volume of essays by a broad cross-section of mainstream liberal and progressive law professors, published in 2009.[188] On issues ranging from free speech to citizenship to socioeconomic rights to voting rights and much more, the essays lay out a transformative vision for American constitutional law — one far more in the spirit of William Brennan and Thurgood Marshall than David Souter and John Marshall Harlan II.[189] If Hillary Clinton had won in 2016 and appointed two new Supreme Court justices, this vision

[184] *See* Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/Z4PN-E23E].

[185] *Id.*

[186] *See id.*

[187] This still seems likely to true today, though probably less so. Obviously, there is no easy way to measure this at either point in time.

[188] THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel, eds., 2009).

[189] *Cf.* Tushnet, *supra* note 184 ("Our models are Justices William Brennan and Thurgood Marshall, not David Souter or John Marshall Harlan.").

might well have become a blueprint for a 6–3 liberal and progressive majority.[190]

For all of these reasons, it seems safe to conclude that most proponents of the "too much, too quickly" critique today are not committed to across-the-board gradualism. Most is not all, of course. There are committed across-the-board gradualists today, and some of them are critics of the current Supreme Court. Richard Re is perhaps the most notable example.[191] His criticism, and other criticism in the same vein, deserves to be taken seriously even if it is not representative. But if most instances of the "too much, too quickly" critique cannot be explained in this way, we should ask what other explanations are available, today and more generally.

B. Sour Grapes

One answer immediately suggests itself. Perhaps the "too much, too quickly" critique is simply sour grapes or hypocrisy. On this view, liberals and progressives would love to enact sweeping constitutional change leftward and would not hesitate to do so if they controlled a majority of the Supreme Court. But denied the sweet fruit of judicial power, they hypocritically condemn its exercise for conservative ends as radical, high-handed, and illegitimate — just like Aesop's disgruntled and envious fox. Seen in this light, the critique is a convenient tool for attacking an ideologically hostile Court of the opposing ideological camp, but easily and quickly jettisoned when the ideological weather improves. We might also call this understanding of the critique "foul-weather gradualism." Fair-weather fans support a sports team only when — and because — it is winning. Foul-weather gradualists support gradualism in constitutional law only when — and because — their ideological camp is losing.

Much of the raw material supporting this understanding is already at our fingertips. If proponents of the "too much, too quickly" critique support sweeping constitutional changes they approve of, such as the Warren Court and New Deal revolutions, they cannot be opposed to

[190] In this counterfactual world, the leading advocates of the "too much, too quickly" critique would likely be conservatives.

[191] *See* sources cited *supra* notes 160, 162; *see also* Fried, *supra* note 95.

sweeping constitutional change as such.[192] We know this because, when liberals and progressives expected — or hoped — to control a majority of the Supreme Court, they laid out ambitious plans to move constitutional law leftward.[193] In retrospect, these plans look like ideological mirror images of the current Court's rightward march. If that Court's critics were sincerely troubled by sweeping constitutional change effected through judicial review, they and their ideological allies would not have advocated so much of it themselves. (Or so one might think.) On this understanding of the critique, the only logical conclusion is that its proponents are wielding the rhetoric of across-the-board gradualism as a cynical and hypocritical ploy to undermine a Court whose ideology they deplore. This might be effective political rhetoric, given the status quo bias and ideological moderation of the median American voter.[194] But it cannot and should not be taken seriously as an intellectual critique of the Court.

Put differently, we might understand the "too much, too quickly" critique as often, if not always, an example of "theoretical opportunism." Jack Balkin provides a helpful definition:

> By "theoretical opportunism," I mean unashamedly offering different and even inconsistent sets of standards or principles to justify one's actions in different contexts. Taken to its logical conclusion, it is a policy of cheerfully invoking whatever set of standards and principles justify the outcome one happens to desire. The theoretical opportunist does not feel bound to any particular set of standards or principles over time. If they become inconvenient, or lead in directions she does not like, the theoretical opportunist simply abandons them, like a set of old clothes that she has outgrown or that she no longer fancies.[195]

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[192] *See generally supra* notes 175–177 and accompanying text.

[193] *See, e.g.*, *supra* notes 186–189 and accompanying text.

[194] *See, e.g.*, *The Partisanship and Ideology of American Voters*, PEW RSCH. CTR. (April 9, 2024), https://www.pewresearch.org/politics/2024/04/09/the-partisanship-and-ideology-of-american-voters/ [https://perma.cc/TC4N-QUP7].

[195] J. M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 881 (1993).

Several conservatives and libertarians have, in fact, characterized the "too much, too quickly" critique of the current Supreme Court in these terms. The best and most thoughtful example is Jonathan Adler, whose writing on this subject I discussed in Part I. Adler's point is partly empirical and descriptive: the Roberts Court has not overruled precedents or invalidated statutes at a higher rate than its predecessors, before or after the addition of Justices Gorsuch, Kavanaugh, and Barrett.[196] But Adler also uses this descriptive claim as the basis for a normative argument that the Court's critics are behaving opportunistically and exhibiting "intellectual dishonesty":

> Few of the Court's progressive critics care about precedent as such. They were perfectly happy when Justice Anthony Kennedy wrote opinions overturning precedents they did not like, as in *Lawrence v. Texas* (which overturned *Bowers v. Hardwick*) and *Obergefell v. Hodges* (overturning *Baker v. Nelson*). . . . Accusations that the Court is vaporizing precedent and trampling democratic enactments — suggesting that it is not merely making bad decisions but doing so in an illegitimate way — are part of a broader effort to delegitimize it.[197]

David Bernstein offers a similar diagnosis in more colorful and less measured terms:

> In the past, the left could count on the Court for sporadic big victories: same-sex marriage, affirmative action, abortion. Now they cannot, so they have turned against the Court. We all know that left-leaning [law professors] would be dancing in the streets if SCOTUS were equally aggressive to the left.[198]

These are uncomfortable charges for liberals and progressives, but they demand to be taken seriously — not just for their contemporary

[196] Adler, *Restrained Roberts*, *supra* note 125; *see also* Adler, *Notes*, *supra* note 133.

[197] Adler, *Restrained Roberts*, *supra* note 125.

[198] David Bernstein, *Why Are Constitutional Law Professors Angry at the Supreme Court?*, VOLOKH CONSPIRACY (Oct. 3, 2022), https://reason.com/volokh/2022/10/03/why-are-constitutional-law-professors-angry-at-the-supreme-court/ [https://perma.cc/8SVZ-28LA]; *see also* Eugene Volokh, *A Normal Supreme Court*, 2023 WIS. L. REV. 675, 676 (2023) (defending the normalcy of the current Supreme Court and articulating a much milder version of the sour grapes charge).

relevance but for the light they shed on the "too much, too quickly" critique more generally. On the other hand, the Court's liberal and progressive critics have a number of plausible and weighty responses at their disposal.

First, liberals and progressives are not a monolithic group, and the membership of the group has changed over time for many reasons. The most significant for present purposes is cohort replacement. Some of today's leading proponents of the "too much, too quickly" critique have been around long enough to have made significant public commitments that now seem inconsistent — or at least in serious tension — with the critique. But many belong to a younger generation that is developing its jurisprudential commitments in the crucible of the present moment. Others belong to an older generation of popular constitutionalists and judicial review skeptics more broadly and have remained consistently focused on judicial overreach. The larger point is that the sour grapes charge can only be assessed retail, rather than wholesale. It might well have bite as to particular critics, perhaps many of them, but generalizations about what liberals and progressives generally support now or supported in the past are unhelpful in assessing the merits or intellectual seriousness of any particular critic.

Second, the charge of sour grapes, hypocrisy, or opportunism implies conscious bad faith, which the critics have not proven and is probably unprovable. Unproven does not mean wrong, of course. But a more charitable, and more realistic, explanation might point to the alchemy of motivated reasoning or, what amounts to the same thing, the suppression of cognitive dissonance.[199] Indeed, there are even more charitable, and arguably more plausible, explanations. Jack Balkin is again helpful:

> [T]he sincere individual who lives, as we all do, in the currents of ideological drift, does not perceive her beliefs in this way. . . . This individual has many possible responses to the tension produced by ideological drift: she may believe that she has changed her mind, that she gradually has come to understand more clearly what she always has believed, or that her principles

[199] *But see* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 945 (2016) (classifying self-deception as a form of constitutional bad faith).

> and commitments have remained constant, however much they may have been misunderstood by others in changing contexts. But in no case is she an opportunist. In each case she believes in her reasons, because she reasons through her beliefs.[200]

These thought processes should be familiar to conservatives from the well-documented transformation of originalism over the past few decades. What began as a theory of judicial restraint, formulated in response to the liberal judicial activism of the Warren Court, has evolved into a theory of "judicial engagement," formulated as a justification for the conservative judicial activism of today.[201]

It would be surprising if this evolution did not involve some hypocrisy, opportunism, and calculation. But Balkin's psychological account seems like a more plausible explanation of the phenomenology of this period – that is, the actual subjective experience of most of the conservatives who lived through it. Couple that account with cohort replacement over time and heterogeneity among legal conservatives and libertarians — there have long been some proponents of a more muscular, activist originalism — and we have a highly plausible alternative to the sour grapes, hypocrisy, opportunism charge. This alternative has significant explanatory power with respect to both the recent transformation of originalism and liberal and progressive critics of the current Court. On top of this, we can add "selection effects in the reception and recirculation of scholarly ideas."[202] As I have previously observed, these are "probably more common pathways for politics and ideology to influence the evolution of" constitutional arguments than conscious "bad faith, subterfuge, or opportunism."[203]

All of this provides good reason to hesitate before embracing sour grapes as the best understanding of the "too much, too quickly" critique, today or in general. That understanding should be taken seriously, and it is probably justified in some cases. But there are other more charitable

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[200] Balkin, *supra* note 195, at 889.

[201] *See, e.g.*, Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. ONLINE 99, 108-09 (2017) [hereinafter Coan, *Living Constitutional Theory*] (recounting these developments); *see also* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. WASH. L.J. 713, 778 (2011).

[202] Coan, *Living Constitutional Theory*, *supra* note 201, at 100.

[203] *Id.*

and psychologically plausible explanations. At a minimum, sour grapes, hypocrisy, and opportunism are not the *only* plausible explanations for the critique, and it is worth asking whether there are other ways to make sense of it that improve on, or complement, the two we have considered thus far.

At the same time, the sour grapes charge raises an important and pointed question that liberal and progressive critics of the current Court who do not embrace across-the-board gradualism — which is likely most of them — should feel obliged to answer: namely, why do these critics oppose sweeping constitutional change in some circumstances, while favoring it in others? This question applies with equal force to any proponent of the "too much, too quickly" critique in any era, who does not embrace across-the-board gradualism. There are at least two possible answers, which the next two sub-Parts discuss in turn.

C. Unapologetic Ideology

The first answer is unapologetically ideological — or, in less pejorative terms, moral, normative, or philosophical. Most critics of the current Supreme Court are, of course, liberals and progressives, just as most critics of the Warren and New Deal Court were conservatives. As liberals and progressives, today's critics would naturally prefer that the Court make fewer conservative decisions and to spread those decisions over a longer period of time. Just as naturally, most of these critics would have no objection to sweeping constitutional change in a liberal or progressive direction. To the contrary, they would welcome it. The same would presumably have been true in reverse for most of the conservative critics of the Warren Court and New Deal eras.

The point can be sharpened. It is not just that today's liberals and progressives would prefer that the Court's decisions were more aligned with their moral values. Rather, from a liberal or progressive point of view, it is those values that make the Court's decisions wrong and worthy of condemnation. By the same token, it is those values that make a deluge of conservative decisions worse and more worthy of condemnation than a trickle of such decisions. This is a straightforward

implication of the model of constitutional decision-making that liberals and progressives have embraced for decades.[204]

Virtually every liberal or progressive approach recognizes the centrality of moral judgment to constitutional decision-making. Common-law constitutionalism requires moral judgment to decide when to follow and when to deviate from established precedent — and also to apply established precedents to new circumstances.[205] Ronald Dworkin famously placed moral judgment at the center of constitutional interpretation and called on the Supreme Court to serve as a "forum of principle."[206] Garden-variety living constitutionalism requires moral judgment to adapt the Constitution to changing circumstances and to overcome the bigoted or exclusionary attitudes of previous generations.[207] Even Alexander Bickel, with his emphasis on judicial humility and the passive virtues, thought the essential role of the Supreme Court was to discern and articulate enduring moral principles.[208]

Under all of these approaches, it is central to the Court's job to make moral judgments.[209] When the Court gets those judgments wrong, it is doing its job badly. When it gets many judgments wrong in a short period of time, it is doing its job very badly. This gives liberals and

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[204] Portions of the following paragraphs are adapted from Coan, *The Matter with Dobbs*, *supra* note 103.

[205] *See, e.g.*, David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 7 (2015) ("This kind of approach — extending precedent in the direction that seems to make more sense as a matter of morality or good policy — is characteristic of the common law").

[206] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

[207] *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007) ("Legal interpretation of these open-ended provisions typically involves the expression of national values like equality, liberty, dignity, family, or faith . . . ."); Laurence H. Tribe, *Foreword: Toward A Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 14 (1973) ("The message of the Constitution is generally delphic; its application . . . will require the inescapably value laden striking of various balances among competing considerations.").

[208] *See* BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 137, at 87.

[209] *See generally* Coan, *The Matter with Dobbs*, *supra* note 103, at 284 ("Nearly all the Court's critics regard the quasi-originalist approach of *Dobbs* — which disclaims any role for moral judgment — as normatively unpersuasive.").

progressives who subscribe to these approaches a perfectly good reason for criticizing sweeping constitutional change in a conservative direction.[210] Nor could liberals and progressives easily object to conservatives criticizing sweeping change in a liberal direction.[211] They would, of course, think such an objection unsound because they reject its conservative moral premises. But they could not, without inconsistency, fault its validity.[212]

There are, of course, limits on the extent to which justices can legitimately inject their own moral views into constitutional law — and therefore limits on the extent to which they can be fairly criticized for reaching morally objectionable results.[213] Under every mainstream approach to constitutional decision-making, even Ronald Dworkin's, other legal norms constrain the role of moral judgment. Judicial decisions must have some plausible support in the accepted forms of constitutional argument — text, history, precedent, structure, etc.[214] And it would be a grave breach of legal norms for judges to make decisions primarily for partisan political advantage or on the basis of a bribe.[215] But in the sort of difficult and contested cases that make their way to the Supreme Court, the justices generally enjoy considerable discretion to bend the law toward their sincerely held moral views.[216] How they exercise that discretion is an entirely legitimate basis for criticism.

In an insightful recent paper, David Pozen and Adam Samaha identify "fundamentalist arguments that depend on deep philosophical premises or comprehensive normative commitments" as an "anti-modality" in American constitutional discourse.[217] The liberal and progressive account I have just described might seem to contradict this view. But in fact, they can be reconciled in either of two ways. First, the qualifiers

[210] *See id.*

[211] *Id.*

[212] *Id.*

[213] *See* David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 736 (2021).

[214] *See id.*

[215] *See, e.g.*, *id.* at 753.

[216] *See generally* Coan, *The Matter with Dobbs*, *supra* note 103 (collecting sources).

[217] Pozen & Samaha, *supra* note 213, at 731, 750–53.

"fundamentalist," "deep," and "comprehensive" require that the moral judgments judges make in the course of interpreting the Constitution be consistent with the tenets of political liberalism — in particular, the requirement that public officials justify their decisions in terms accessible to persons of different comprehensive views.[218] Second, Pozen and Samaha acknowledge that anti-modal arguments can be rendered permissible by attaching them to modal arguments — a process they call "modalization."[219] For example, the text of the Due Process Clause or U.S. constitutional traditions might be said to embrace an open-ended concept of liberty requiring judges to make presentist moral judgments.[220] Alternatively, such moral judgments might permissibly be invoked to resolve indeterminacy within or among the traditional constitutional modalities. Nearly all constitutional arguments incorporating moral judgments — and critiques of the Court building on them — at least arguably meet one of these criteria. Many arguably satisfy both.

For all of these reasons, it is perfectly legitimate for liberals and progressives to criticize the current Supreme Court for making many decisions in a short period of time that they disagree with for moral or ideological reasons. If liberals and progressives are right about the role of moral judgment in constitutional law, this is the single most straightforward basis to criticize sweeping constitutional change.[221] Of course, many conservatives think liberals and progressives are wrong about that role — believing instead that originalism shrinks or eliminates any discretion to exercise moral judgments.[222] But liberals

[218] The classic statement of this requirement is, of course, JOHN RAWLS, POLITICAL LIBERALISM (1993). *See generally* Coan, *The Matter with Dobbs*, *supra* note 103 (collecting sources).

[219] *See* Pozen & Samaha, *supra* note 213, at 772-79.

[220] *Id.* at 773-74.

[221] *See, e.g.*, Coan, *The Matter with Dobbs*, *supra* note 103, at 282 ("The appropriate response to decisions like *Dobbs* is to criticize the moral judgments underlying them.").

[222] This view is a common thread throughout a vast literature on originalism and frequently features in judicial opinions disclaiming any authority to make moral or ideological judgments. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 240 (2022) (condemning the "the freewheeling judicial policymaking that characterized discredited decisions like *Lochner v. New York*" and turning to the ostensibly objective guideposts of history and tradition as an alternative); *id.* at 338 (Kavanaugh, J.,

and progressives have what they take to be good and sufficient reasons for rejecting originalism. Those reasons apply with as much force to this version of the "too much, too quickly" critique as they do to any other nonoriginalist argument.

There is, however, a potentially more serious problem: most versions of the "too much, too quickly" critique are not fully open or unapologetic about their moral or ideological character. It is common to see the critique advanced alongside ideologically inflected arguments about the Court's radicalism or extremism or the terrible moral consequences of its decisions. But seldom do critics make clear that their argument is moral or ideological all the way down. Whether deliberate or inadvertent, this ambiguity makes this version of the critique vulnerable to the charge of intellectual dishonesty leveled by Adler, Bernstein, and others.[223]

This charge might be taken a step further to deny that this version of the critique has anything to do with the pace or the magnitude of constitutional change — in other words, to deny that it qualifies as an example of the "too much, too quickly" critique at all. There is something to this argument. If the critique is moral or ideological all the way down, what is wrong with the Court is precisely the sum of what is wrong with its individual decisions — no more and no less. On the other hand, the force of this version of the critique does genuinely turn on the pace and magnitude of constitutional change. More change in the wrong moral direction is genuinely worse than less change in that direction, and this is a perfectly fair basis for condemning the Court. In the end, this is mostly a question of semantics.

That is not true of the intellectual dishonesty point, however, which deserves to be taken seriously. Strategic considerations will often tempt moral or ideological critics of the Court to clothe their critiques in

concurring) ("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."). This would make it more difficult for conservative originalists to advance a truly unapologetic moral or ideological version of the "too much, too quickly" critique. But they could and did criticize the Warren Court for making too many non-originalist decisions too quickly — a critique that mostly, if not perfectly, aligned with conservative moral values.

[223] *See supra* Part I.B (collecting examples).

rhetoric of moderation or gradualism, which are often more popular than the full constitutional programs of either liberals and progressives or conservatives.[224] Such rhetoric can also make the critics appear principled or high-minded in a way that candidly acknowledging their moral disagreements with the Court would not. These might be defensible reasons for deploying this rhetoric in partisan political debate, but not in serious intellectual exchange. Even in partisan political debate, vulnerability to the intellectual dishonesty charge may make openly moral or ideological critique more effective than the rhetoric of moderation or gradualism.

The upshot is that critics of the Court who wish to advance a moral or ideological critique should do so unapologetically. More specifically, they should clearly explain the moral or ideological basis for the critique and expressly acknowledge that they would, or might, favor sweeping constitutional change in the opposite direction. But what of critics who do not wish to bite this bullet? There is yet one more way to make sense of the "too much, too quickly" critique that is neither across the board gradualist, nor sour grapes, nor unapologetically ideological.

D. Context-Sensitive Gradualism

We can call this fourth way of understanding the critique "context-sensitive gradualism." As the name implies, context-sensitive gradualism opposes some but not all sweeping constitutional change. But it does so for reasons that transcend — or seek to transcend — ideology in the narrow left-right sense. The challenge for this version of the critique is to explain what is wrong with the Court's trajectory (at any given time) apart from the ideological valence of its rulings. To distinguish context-sensitive gradualism from across-the-board gradualism, the answer to this question must be specific to the particular context in question and, at least in principle, consistent with support for sweeping constitutional change in other contexts. Critics of the current Supreme Court have offered several arguments in this vein, which helpfully illustrate what context-specific gradualism looks like and the pitfalls this version of the critique must circumnavigate.

[224] *Cf. The Partisanship and Ideology of American Voters*, *supra* note 194 (finding that the median American voter identifies as ideologically moderate).

One of the most discussed examples is the judicial self-aggrandizement critique advanced by Josh Chafetz and Mark Lemley and briefly introduced in Part I. In *The New Judicial Power Grab*, Chafetz argues that the current Supreme Court has "engaged in a remarkable power grab" across a wide range of doctrinal areas. As evidence for this claim, Chafetz emphasizes judicial rhetoric that "disparages Congress, elevates the judiciary, and suggests that the judiciary stands not only outside of the political sphere, but indeed above it."[225] Chafetz also points to decisions like *Trump v. Mazars, USA, LLP* that position the judiciary as the sole competent overseer of the presidency.[226] As he sees it, this accretion of power reflects a "project of judicial self-empowerment" cloaked in a fog of high-minded and self-flattering rhetoric extolling judicial objectivity and insulation from the crass and grubby domain of electoral politics.[227] While conservative judges have led this effort, Chafetz notes that "Democratic judges have participated as well."[228] In other words, the judicial self-empowerment project is bipartisan. Chafetz concludes that "the judges are out of control" and this consolidation of power in the Court raises serious concerns about its anti-democratic nature.[229]

In "The Imperial Supreme Court," Lemley reaches a similar conclusion for somewhat different reasons. While Chafetz focuses on the Court's disparaging and power-cloaking rhetoric, Lemley emphasizes the lack of any unifying explanation for the Court's decisions beyond maximizing its own power. The current Court's sweeping restructuring of American constitutional law is not "marked by debates over federal versus state power, or congressional versus judicial power" but rather by the Court "undercutting the ability of any entity to do something the Justices don't like."[230] As examples, Lemley cites decisions limiting Congress, federal agencies, states, and lower courts based on conflicting interpretive methodologies invoked

[225] Chafetz, *supra* note 88, at 648.

[226] *Id.* at 645-47.

[227] *Id.* at 653.

[228] *Id.*

[229] *Id.* at 635.

[230] Lemley, *supra* note 88, at 97.

opportunistically to expand judicial power.[231] Lemley argues this simultaneous withdrawal of power from other institutions "concentrate[s] power in one place: the Supreme Court."[232] Lemley concludes that the imperial Court's actions are "something new and dangerous" that demand consideration of responses like Court expansion or jurisdiction-stripping to "protect the American form of government."[233] Lemley's argument is aimed squarely at the conservative jurisprudence of the current Court, but at least in principle, its critique of judicial self-aggrandizement could also apply to sweeping constitutional change in a liberal or progressive direction.

A second possible argument for context-sensitive gradualism is suggested in a recent essay by Joshua Zoffer and David Singh Grewal.[234] Based on an empirical analysis of U.S. election results, Zoffer and Grewal argue that the current Supreme Court's democratic pedigree is unusually weak by historic standards. Specifically, Zoffer and Grewal find that "minoritarian judges" — confirmed by Senators who received fewer votes than the Senators voting against them — have become increasingly common on the Supreme Court.[235] All three of President Trump's appointees are what Zoffer and Grewal call "super-minoritarian justices," nominated by a president who lost the popular vote and confirmed by Senators who received fewer votes than the Senators who opposed them.[236] With the addition of Justice Barrett, a majority of the justices on the Supreme Court are "minoritarian" for the first time in its history, which in Zoffer and Grewal's view, creates a "legitimacy crisis" for the Court.[237] While Zoffer and Grewal do not themselves expressly make an argument for context-sensitive gradualism, their analysis could readily be marshaled to argue the current Court should proceed slowly and incrementally because of its weak democratic mandate. By contrast, sweeping constitutional change

[231] *See id.* at 98-110.

[232] *Id.* at 97.

[233] *Id.* at 98.

[234] Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 438 (2020).

[235] *Id.* at 438.

[236] *Id.* at 442-43, 455.

[237] *See id.* at 443-44.

effected by other Courts in other eras might be perfectly legitimate because those Courts possessed a stronger democratic pedigree. Variations on this claim — often emphasizing "the stolen seat" of Merrick Garland and the rushed, election-eve confirmation of Amy Coney Barrett — are a staple of liberal and progressive criticism of the current Court.[238]

A third example comes from Seana Shiffrin, who articulates an equity- and democracy-based principle for determining when reliance interests require sustaining an erroneous constitutional precedent.[239] In her view, sweeping constitutional change is normatively problematic when it would frustrate the reliance interests of a discrete, vulnerable group in a way that reinforces their inequality.[240] This principle would support adhering to precedents protecting rights to abortion, same-sex marriage, and same-sex intimacy — even if those cases were wrongly decided — because overturning them would disproportionately harm historically disadvantaged groups who have relied upon those rights over decades to structure their lives.[241] In contrast, Shiffrin argues her approach would not preclude overturning early twentieth-century precedents establishing economic rights like liberty of contract — or more recent precedents protecting gun rights.[242] She contends reliance on those decisions was more diffuse and not concentrated within a discrete, historically disadvantaged community and thus less troubling.[243] Shiffrin acknowledges that "[t]he neat fit onto ideological tracks might inspire a related suspicion that [her] argument is not really merits independent."[244] However, she defends her context-sensitive approach as reflecting democratic values that should transcend partisanship and ideology in the narrow left-right sense:

> Where the affected citizens are not routinely afforded fair consideration and fair political opportunities, whether by the

[238] *See* sources collected *supra* Part I.B.

[239] Shiffrin, *supra* note 174.

[240] *See id.* at 40.

[241] *See generally id.*

[242] *See id.* at 4.

[243] *See id.* at 22.

[244] *Id.* at 36.

> government or by the social environment, those arguments get less traction. When, further, the mistaken decision elicited reliance whose frustration will otherwise reinforce or exacerbate this disadvantage, there are special reasons to entertain a reliance argument for constancy.[245]

Each of these arguments has strengths and weaknesses, but this is not the place to analyze them. For present purposes, the important point is that all qualify as examples of context-sensitive gradualism. In other words, they share two important characteristics: they supply reasons for opposing some but not all sweeping constitutional change, and those reasons transcend — or seek to transcend — ideology in the narrow right-left sense. There are many other arguments and possible arguments that share these characteristics.[246]

In many ways, context-sensitive gradualism seems like the most promising version of the "too much, too quickly" critique. It does not commit proponents to across-the-board gradualism that few of them share. It does not boil down to ideology in any narrow sense, either openly or covertly. And the context-sensitive reasons it supplies for opposing some forms of sweeping constitutional change supply a ready riposte to charges of sour grapes or hypocrisy. In any given case, that riposte may or may not be persuasive to skeptics. But context-sensitive gradualism focuses analytical attention on the correct question: what makes some forms of sweeping constitutional change troubling and others worthy of celebration?

Nevertheless, each of the examples I have discussed highlights pitfalls that any form of context-sensitive gradualism must take care to avoid.

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[245] *Id.* at 19.

[246] For instance, a proponent of strong judicial deference might favor gradualism in any expansion of judicial power but not in its contraction. *See, e.g.*, Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012). Another possibility is that the U.S. political system is currently too unstable to cope with sweeping constitutional change, even if it might have been able to do so in other eras. *See* Andrew Coan, *Is the Supreme Court Changing Too Much, Too Quickly?*, BALKINIZATION (Jan. 11, 2023), https://balkin.blogspot.com/2023/01/is-supreme-court-changing-too-much-too.html [https://perma.cc/7LLN-NGUU]. Zachary Price's symmetric constitutionalism could also be recast as a form of context-sensitive gradualism, permitting sweeping change that is ideologically symmetric, while requiring that asymmetric change proceed incrementally. *See* Price, *supra* note 132, at 1276-77.

On the one hand, context-sensitive gradualism must follow its own principles to their logical conclusion. For critics of judicial self-aggrandizement and a minoritarian Supreme Court, this poses some difficult questions. *Dobbs*, the current Court's most notorious and avulsive decision, returns the power to set abortion policy to state legislatures and perhaps to Congress and the President.[247] Is this an example of judicial self-aggrandizement or self-abnegation? If the latter, shouldn't critics of judicial aggrandizement celebrate it?

Students for Fair Admissions may be the current Court's next most notorious decision among liberals and progressives. Like *Dobbs*, it effectively overturned precedents that had been repeatedly reaffirmed over almost fifty years.[248] Yet the American public supported the result by a wide margin.[249] Shouldn't critics of a minoritarian Court celebrate this decision? These questions are not unanswerable, by any means. But all forms of context-sensitive gradualism will face similar ones, and their credibility will depend on providing persuasive responses. The more an argument succeeds in transcending ideology in the narrow sense, the more difficult questions it is likely to pose for its proponents.

At the other end of the spectrum, context-sensitive gradualism that too closely tracks the ideology or constitutional program of either left or right threatens to collapse into simple ideology — or worse, sour grapes, hypocrisy, or theoretical opportunism. Consider Seana Shiffrin's thoughtful equity-based argument. On Shiffrin's account, the Court should avoid sweeping constitutional change in areas in which historically disadvantaged groups have relied on its decisions, while moving more aggressively to reverse constitutional errors that do not benefit such groups. But the proper degree of constitutional solicitude for marginalized groups is a principal source of ideological disagreement

[247] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 232 (2022).

[248] *See* Fisher v. Univ. of Tex., 579 U.S. 365 (2016); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[249] *See, e.g.*, Chris Jackson & Charlie Rollason, *Americans Split on Recent Supreme Court Decisions*, ABC NEWS/IPSOS (July 2, 2023), https://www.ipsos.com/en-us/americans-split-recent-supreme-court-decisions (reporting fifty-two percent approval and thirty-two percent disapproval of *SFFA* decision); *see also* sources cited *supra* note 64 (collecting polls).

in U.S. constitutional law.[250] As a result, Shiffrin's position comes very close to the ideology all-the-way-down view that the Court should embrace sweeping change to the left while eschewing sweeping change to the right. Again, this objection is hardly unanswerable. Shiffrin herself is admirably candid about the convergence between her account and the constitutional program of liberals and progressives. She also openly and forcefully defends the correctness of that program from a moral point of view.[251] This is all that proponents of an argument like hers can reasonably do. At the same time, supporters of the Court will understandably be skeptical.

III. ALL OF THE ABOVE

As we have seen, there are at least four different ways to understand the "too much, too quickly" critique. For purposes of analytical clarity, it is helpful to distinguish those understandings carefully from one another and to consider their strengths and limitations individually, just as a scientist might isolate different causal explanations in a laboratory. But the best way to make sense of the "too much, too quickly" critique is not any one of the four understandings advanced by critics and defenders of the Court in the existing literature. In an important sense, it is all of them. Only by considering those possibilities together, as this Article does for the first time, can we truly understand how to balance the costs and benefits of constitutional change.

The main upshot is that fully disentangling moral and ideological considerations from any assessment of constitutional change is quite difficult and perhaps impossible. But neither are these questions reducible to ideology in any narrow or simple sense. Different versions of the critique can also overlap or operate in conjunction, interacting in important — and sometimes surprising — ways. Meanwhile, the charge of sour grapes or bad faith is significantly more difficult to substantiate than its proponents have generally recognized. The charge may still be justified in some cases, but it is most useful as a kind of stress test, which

[250] Look no further than the starkly opposing views on this subject expressed by the various opinions in Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

[251] *See supra* notes 239–245 and accompanying text.

critics can apply to guard against internal inconsistency and motivated reasoning in their own arguments. Finally, comparing different understandings of the critique clarifies what is at stake in choosing among them. Different understandings will often point in different directions, with sometimes profound implications for blockbuster decisions like *Dobbs*, *Students for Fair Admissions*, and *Bruen*.

A. Balancing the Costs and Benefits of Change

At its core, the "too much, too quickly" critique is a claim that the costs of sweeping constitutional change outweigh the benefits, in general or in a particular context.[252] This is true of across-the-board gradualism, unapologetic ideology, and context-sensitive gradualism. One thing that gives this claim surface appeal across many different contexts is that almost everyone agrees sweeping constitutional change is costly. Settlement is an essential function of law, especially constitutional law. When the Supreme Court changes a large number of important constitutional rules in a short period of time, it not only disturbs the interests and plans of all those who have relied on those rules. It also creates uncertainty about the stability of constitutional law as a whole, making it more difficult for private citizens and other government officials to plan for the future.[253]

These costs of course vary from one context to another, and in most cases, they can only be estimated vaguely, rather than precisely quantified.[254] Nor are they entirely neutral in a moral or ideological sense. No normative assessment can be, and the simple label of "cost" implies normativity. Still, there is broad agreement across the ideological spectrum that legal instability, which is an inevitable consequence of sweeping constitutional change (if not its very definition), is costly. That is a principal reason why justices across the

[252] Costs and benefits, as I use these terms, are a shorthand for the considerations weighing in favor of sweeping constitutional change and those weighing against. Those considerations may or may not be costs and benefits in the narrow sense of those terms.

[253] *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (explaining the settlement function of law); Varsava, *supra* note 174 (exploring the importance of reliance interests).

[254] *See, e.g.*, Varsava, *supra* note 174 ("[W]e can be confident that certain interests exist without necessarily having the ability to quantify them.").

ideological spectrum have, almost without exception, professed fidelity to the doctrine of stare decisis, while disagreeing on its application to particular cases.[255]

The basic question raised by the "too much, too quickly" critique is when and whether the costs of sweeping constitutional change are too great. This is where things get tricky because the settlement and reliance costs of legal instability that almost everyone agrees on are only one of several possible costs of constitutional change.[256] Depending on the context, other costs might include public backlash, short-circuiting of democratic debate, exacerbating popular division or polarization (especially when change involves a sharp shift in the vector sum of political values), and undermining the sociological or philosophical legitimacy of the constitutional order (when changes are unpopular or when a particular Supreme Court lacks democratic legitimacy, however defined).[257] Of course, sweeping constitutional change might also be legally unjustified or likely to produce terrible injustice or practical consequences, according to the legal, moral, or ideological lights of some observers. Any or all of these costs might strengthen the argument for the "too much, too quickly" critique.

But this is only one side of the ledger. Even if there were total agreement on the costs of constitutional change, across the moral and ideological spectrum, those costs would still have to be balanced against a diverse array of possible benefits. Depending on the context, these

[255] This includes every member of the Court that decided Dobbs, even Justice Clarence Thomas — albeit to an attenuated extent. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 332 (2022) (Thomas, J., concurring) (advocating a "demonstrably erroneous" standard for reconsidering prior precedents).

[256] Even as to settlement and reliance costs, there is disagreement about which forms of reliance count as costs and which are too diffuse or merely inevitable byproducts of correcting past constitutional error. *See* Richard M. Re, *Precedent As Permission*, 99 TEX. L. REV. 907, 941 (2021) [hereinafter Re, *Precedent As Permission*] ("[D]eliberate reliance can easily be recast as ill-gotten gains."). *Compare* Varsava, *supra* note 174 (defending a broad view of the relevant reliance interests), *with Dobbs*, 597 U.S. 215 (defending a narrow view). There is also disagreement about the weight to assign to various reliance interests, as evidenced by Seana Shiffrin's suggestion that the reliance interests of disadvantaged groups should receive greater consideration. *See* Shiffrin, *supra* note 174.

[257] *See, e.g.*, BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 137 (elaborating these costs); SUNSTEIN, *supra* note 18 (same); Price, *supra* note 132 (focusing on costs of political asymmetry in Supreme Court decisions).

might include avoiding public backlash,[258] liberating the democratic process from judicially imposed constraints,[259] overturning unpopular or otherwise democratically illegitimate decisions,[260] encouraging a greater sense of constitutional responsibility by Congress and state legislatures, enhancing the representative character of the democratic process,[261] and safeguarding the rights of politically or historically disadvantaged groups.[262] Finally, and most obviously, sweeping constitutional change might also be legally obligatory or essential to promote justice or social welfare, according to the legal, moral, or ideological lights of some observers.[263]

Any thoughtful effort to strike a balance between these costs and benefits will be shot through with moral and ideological considerations. This is most obvious for the unapologetically ideological version of the critique, which focuses on the moral and ideological costs of constitutional change — for example, to reproductive freedom, racial and gender equity, public safety from gun violence, etc. But it is equally true of across-the board and context-sensitive gradualism. No proponent of across-the-board gradualism advocates total constitutional stasis. All recognize that the benefits of some

[258] The New Deal constitutional revolution might be an example. A future retreat from *Dobbs* would be another.

[259] This is clearly how the *Dobbs* majority understood its reversal of *Roe* and *Casey*. *See generally Dobbs*, 597 U.S. 215.

[260] *Students for Fair Admissions* could arguably be understood in this way. So could a potential future reversal of *Dobbs*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (invalidating the Bipartisan Campaign Reform Act), or *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating an official school prayer composed by New York state officials).

[261] This was James Bradley Thayer's main argument against stringent judicial review and a possible defense of the New Deal Revolution. *See, e.g.*, Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499 (2009) (explaining Thayer's argument and coining the term "judicial overhang" as a shorthand description).

[262] This was, of course, John Hart Ely's famous defense of the Warren Court revolution. JOHN HART ELY, DEMOCRACY AN DISTRUST: A THEORY OF JUDICIAL REVIEW (1981).

[263] Such defenses have often been made of the Warren Court and New Deal revolutions, and "common-good constitutionalists" and conservative pragmatists have produced similar defenses of the ongoing conservative constitutional revolution. *See, e.g.*, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

constitutional changes exceed their costs. Cass Sunstein goes so far as to acknowledge that the minimalism he advocates is only sometimes the best approach to constitutional decision-making. In apartheid South Africa, for example, sweeping constitutional change would obviously be the better course.[264]

Once this camel's nose is under the tent, across-the-board gradualism cannot avoid grappling with the question of when to make an exception — in other words, when do the benefits of constitutional change exceed the costs? Both Cass Sunstein and Alexander Bickel candidly acknowledge that the answer depends on prudential, which is to say moral or ideological, judgment.[265] Even gradualists who are consistently grudging in their willingness to endorse constitutional innovation are implicitly making the moral or ideological judgment that the considerations weighing against constitutional change outweigh its benefits, including those benefits that tend to produce disagreement along conventional ideological lines.[266] This is true in individual cases, but it is also true in the aggregate.

A cynic might conclude that across-the-board gradualism necessarily stems from moral or ideological satisfaction with the status quo. On this view, across-the-board gradualism is just another moral or ideological position on the spectrum of such positions — a sort of mushy centrism. It just so happens that across-the-board gradualists think the vector sum of constitutional values embodied in existing constitutional law is optimal — or close enough for government work — and oppose sweeping constitutional change for that reason. Seen in this light, across-the-board gradualism is either a form of sour grapes (opposing

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[264] Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825, 835 (2008). To this extent, Sunstein should arguably be categorized as a context-sensitive rather than across-the-board gradualist. But my focus is U.S. constitutional law and the main thrust of Sunstein's work advocates minimalism as a good rule of thumb for the contemporary U.S. constitutional decision-makers. For present purposes, I therefore classify him as an across-the-board gradualist. This is a pragmatic, not a metaphysical, classification. And it provides an opportunity to acknowledge that the distinction between across-the-board and context-sensitive gradualism is continuous rather than dichotomous.

[265] *See, e.g.*, BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 137, at 69; SUNSTEIN, *supra* note 18, at 56-57.

[266] Bickel famously thought this was true of *Brown v. Board of Education* but not later Warren Court decisions. *See generally* BICKEL, IDEA OF PROGRESS, *supra* note 18.

changes the gradualists dislike for moral or ideological reasons under the guise of neutral principle) or unapologetic ideology (a form of small-c conservatism that prizes stability or continuity above all other values).

Such cynicism is unwarranted. Across-the-board gradualism might stem purely from moral or ideological satisfaction with the status quo. But this need not be the case. Most of the considerations invoked by Bickel, Sunstein, and other gradualists are general and not grounded in the political morality of any particular constitutional status quo.[267] The constitutional order of 2023 is quite different from the constitutional order of Bickel's time, but nearly all of the arguments he advanced in favor of gradualism in 1962 might be embraced with equal plausibility (or implausibility) today. What is true, however, is that every across-the-board gradualist must make a moral and ideological judgment that the constitutional status quo is not so unjust or otherwise unacceptable as to make gradualism untenable. This is very abstract, but some examples will make the point concrete. At the level of individual cases, across-the-board gradualism requires a judgment that the governing precedent is not *Plessy v. Ferguson*[268] or *Dred Scott v. Sandford*.[269] At the level of the constitutional order, such gradualism requires a judgment that the status quo is not contemporary North Korea or apartheid South Africa. These are, unavoidably, moral and ideological judgments.

The same point applies, with the necessary changes, to the various forms of context-sensitive gradualism. No one thinks that judicial self-aggrandizement or minoritarian justices are the only relevant constitutional evils. It is not hard to imagine critics of the current Court who emphasize these considerations tolerating, or even celebrating, them in other contexts. If the hallmark of judicial self-aggrandizement is disparagement of other institutional decision-makers, such disparagement was certainly warranted during the Warren Court's dismantling of Jim Crow segregation — and state-sponsored white supremacy more broadly. Moreover, most of those who celebrate that dismantling would presumably continue to do so, for perfectly good

[267] *See, e.g.*, Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1059 (2009) (distinguishing between "trimming," a stand-in for minimalism, and "moderation").

[268] 163 U.S. 537 (1896) (upholding state-mandated segregation of railway cars).

[269] 60 U.S. 393 (1857) (holding that persons of African descent could never be United States citizens and possessed "no rights which the white man is bound to respect").

reason, even if the Warren Court were minoritarian in the sense that Zoffer and Grewal use that term.

The upshot is that moral and ideological considerations can coexist in many complex permutations with more general principles that transcend, or seek to transcend, ideology in the narrow left-right sense. In particular, it is possible for a critic of the Court to believe both of the following propositions, with perfect consistency and good faith: On one hand, the decisions of the current Court are deeply troubling for general reasons that transcend ideology narrowly conceived, such as judicial self-aggrandizement or the minoritarian Court critique. On the other hand, the Warren Court and New Deal revolutions are defensible or even worthy of celebration for some combination of moral and ideological reasons. The first of these views is gradualist, in either the across-the-board or the context-sensitive sense. The second is moral or ideological. But both are doing important work in justifying and delineating the scope and limits of the "too-much, too-quickly" critique. Critics who sincerely hold this combination of views are neither engaged in simple sour grapes nor making a purely ideological argument in the narrow sense of that term. But neither is their position entirely free of moral and ideological judgment.

Dobbs is an excellent, if localized, example. Shorn of baroque doctrinal machinery and tangential considerations, the crux of the stare decisis question in that case was whether the reliance interests generated by *Roe* and *Casey* were strong enough to save those decisions from overruling *even if they were wrongly decided as an original matter*. Predictably, the majority sought to minimize the reliance interests at stake as mostly intangible and unquantifiable, and the dissent sought to maximize them as central to the existence of millions of Americans.[270] But even if the two sides could have agreed on the nature, scope, and weight of the reliance interests at stake, this would have been insufficient to resolve the case for an obvious reason: those interests constituted only one side of the ledger — the costs of constitutional change.

[270] *See* Coan, *The Matter with Dobbs*, *supra* note 103, at 295-98 (summarizing these arguments and explaining their centrality to the stare decisis question).

To decide the stare decisis question, it was necessary to balance these costs against the benefits of overruling *Roe* and *Casey*. At a minimum, this required the Supreme Court to calculate the moral weight of correcting its earlier legal error and restoring the democratic authority of state legislatures. But this cannot be the whole story. Unless the stare decisis balance also encompasses the moral and practical value of overturning *the particular decisions* in question, the Court would have no way of differentiating between truly important mistakes and relatively minor ones.

This is where the rubber meets the road. The moral and practical value of overturning *Roe* and *Casey in particular* is impossible to separate from the political morality of regulating abortion. For a justice who believes that abortion is akin to murder or otherwise gravely wrong, it would take truly profound reliance interests to outweigh the benefits of correcting Roe and Casey's error.[271] For a justice who believes that abortion is essential to personal liberty and equal citizenship, relatively modest reliance interests would suffice, since there is so little weight on the opposite side of the scale. One might respond that the latter justice is letting her views of the merits color the stare decisis analysis. That is always possible, but it need not be the case here. Stare decisis required the *Dobbs* dissenters to assume that *Roe* and *Casey* were mistaken. But that assumption tells us little or nothing about how costly it would be to perpetuate this mistake. Only moral and ideological judgment can answer that question.

This does not mean that either side in *Dobbs* was engaged in a purely moral or ideological exercise. The concept and importance of reliance interests unquestionably transcends ideology in any narrow sense, whatever disagreements it may have generated in *Dobbs*. The same is true of the costs of constitutional change more generally. But no balancing of those costs against the countervailing benefits of

[271] Although Justice Alito's opinion does not say so outright, he hints that the majority considered the protection of fetal life an important additional benefit of overruling *Roe* and *Casey* — one specific to the abortion context that would not be served by overruling other substantive due process precedents. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 257 (2022) ("None of the other decisions cited by Roe and Casey involved the critical moral question posed by abortion.").

constitutional change can be free of moral or ideological judgment, in any individual case or more globally.

B. Overlap and Interaction

The next important point to recognize is that different versions of the "too much, too quickly" critique might be advanced simultaneously. In other words, those versions may be complements, rather than substitutes or alternatives. When this is the case, it will often raise questions about the extent of the analytical work each version of the critique is doing. Are both independently sufficient to condemn the current Court (or any other Court pursuing an agenda of sweeping constitutional change)? Or is one version merely a makeweight — or perhaps a mask for the critic's narrowly and covertly ideological motivations?

A concrete example will be helpful to illustrate these questions. Imagine a critic who embraces a type of context-specific gradualism and also advances an unapologetically ideological critique of the current Supreme Court. This critic views the Court as democratically illegitimate because a majority of its justices are "minoritarian" as Zoffer and Grewal use that term. For this reason, our critic believes the current Court ought to behave with conspicuous humility, constraint, and awareness of its lack of democratic legitimacy. In particular, the Court ought to avoid reversing popular, long-standing precedents or invalidating the actions of the federal political branches or state legislatures in any case where there are reasonable arguments supporting the government's position.

At the same time, this critic expressly criticizes the Court for making the country less just, less equal, less free, less safe, and less secular by reversing *Roe* and *Casey*, invalidating state gun control laws in *Bruen*, invalidating state public accommodations protections in *303 Creative*, and invalidating public health regulations that incidentally burden religious observance. On the critic's view, these changes all make the country worse off for roughly the same moral and ideological reasons that generally lead liberals and progressives to this conclusion. Moreover, and for the same reasons, the critic regards it as obviously

worse for such changes to happen quickly and in large numbers than it would be for them to happen slowly and in smaller numbers.[272]

What should we make of this combination of views? Does the critic's unapologetically ideological critique raise questions about the sincerity of the critic's commitment to context-sensitive gradualism? Does the critic have an intellectual obligation to clarify how much analytical work each critique is doing to support their conclusion? And if so, how might they go about doing so? If an interlocutor rejects the ideological critique, is it necessary to engage with the context-sensitive gradualism critique and vice versa? Conversely, if one critique is persuasive, is that enough to establish that the Supreme Court is changing too much, too quickly? Or must both be persuasive?

1. Necessity and Sufficiency

The elementary logical concepts of necessity and sufficiency provide one useful framework for thinking through these questions. When a critic advances multiple versions of the "too much, too quickly" critique simultaneously, we can ask whether each version is necessary to support the critic's conclusion that the Court is worthy of condemnation; sufficient to support that conclusion; both necessary and sufficient; or neither. Of course, if one claim is necessary and sufficient, the other claim can be neither. And if one claim is sufficient, the other cannot be necessary, though the two claims together might be. A claim that is neither necessary nor sufficient can still be important in combination with other considerations.

This leaves eight possible combinations.[273] It would be tedious to work through all of them individually, but three are worth highlighting. First,

[272] Obviously, this is not the only possible combination of different forms of the critique. Indeed, it is possible to imagine even more complicated permutations, though some versions of the critique are incompatible. The combination of views explored in this Section is purely illustrative.

[273] Here is a full list and explanation of the possible combinations, with the minoritarian Court critique designated "Claim A" and unapologetic ideology designated "Claim B." In each case, "necessary" means merely necessary but not sufficient, and "sufficient" means merely sufficient but not necessary:

1. **Claim A is necessary, Claim B is necessary:** Both claims need to be true for the conclusion to follow. If either claim is false, the conclusion cannot be

if both claims are necessary to the conclusion that the Supreme Court is changing too much too quickly, then the failure of either one is

true. Alone, neither claim is sufficient to establish the conclusion. Together, they might be sufficient but need not be.

2. **Claim A is necessary, Claim B is neither:** Claim A needs to be true for the conclusion to follow, but alone is not sufficient. Claim B, while not necessary or sufficient on its own, could potentially combine with other factors, including Claim A, to establish the conclusion. The combination of Claim A and B might be necessary to establish the conclusion but need not be.

3. **Claim A is neither, Claim B is necessary:** Claim B needs to be true for the conclusion to be follow, but alone is not sufficient. Claim A, while not necessary or sufficient on its own, could potentially combine with other factors, including Claim B, to establish the conclusion. The combination of Claim A and B might be necessary to establish the conclusion but need not be.

4. **Claim A is neither, Claim B is sufficient:** If Claim B is true, the conclusion follows. Claim B's truth guarantees the conclusion, but its falsity doesn't rule the conclusion out. Claim A, while not necessary or sufficient on its own, could potentially combine with other factors to establish the conclusion. It is possible that either Claim A or B must be true for the conclusion to follow, but that need not be the case.

5. **Claim A is sufficient, Claim B is neither:** If Claim A is true, the conclusion follows. Claim A's truth guarantees the conclusion, but its falsity doesn't rule the conclusion out. Claim B, while not necessary or sufficient on its own, could potentially combine with other factors to establish the conclusion. It is possible that either Claim A or B must be true for the conclusion to follow, but that need not be the case.

6. **Claim A is both, Claim B is neither:** Claim A alone determines the conclusion. If Claim A is true, the conclusion follows, and if Claim A is false, the conclusion cannot be true. Claim B's truth or falsity has no impact on the conclusion.

7. **Claim A is neither, Claim B is both:** Claim B alone determines the conclusion. If Claim B is true, the conclusion follows, and if Claim B is false, the conclusion cannot be true. Claim A's truth or falsity has no impact on the conclusion.

8. **Claim A is neither, Claim B is neither:** Neither Claim A nor Claim B is necessary or sufficient on their own to determine the conclusion. However, either or both could potentially combine with other factors to establish the conclusion. It is possible that the combination of Claims A and B might be necessary or sufficient to determine the conclusion, but that need not be the case.

sufficient to reject the conclusion. In our example, this would mean that the "too much, too quickly" critique succeeds only if the Court's decisions are *both* ideologically objectionable across a large number of cases *and* rendered by a minoritarian Court. This does not seem like an especially plausible combination of claims, but it is logically possible and might be more plausible for other versions of the critique.

Second, if both claims are independently sufficient to support the conclusion, then it is not enough for defenders of the Court to refute one. They must refute both to successfully defend the Court. In our example, this would mean that the "too much, too quickly" critique succeeds if the Court's decisions are *either* ideologically objectionable across a large number of cases *or* rendered by a minoritarian Court. This is significantly more plausible but commits the critic — on pain of inconsistency — to opposing sweeping constitutional change in the opposite direction if and when such change is rendered by a minoritarian Court.

Finally, if either claim is necessary and sufficient to support the conclusion, the truth or falsity of the other claim can have no impact on the conclusion and can be safely dismissed as irrelevant. In our example, let us suppose that the ideological claim is necessary and sufficient to support the "too much quickly" critique. If that is the case, the critique would succeed *if and only if* the ideological claim succeeds. The minoritarian Court critique would be entirely irrelevant.

This combination would make out a fair prima facie case of sour grapes or bad faith. But it is also possible, at least in theory, to imagine a critic who abhors the Court's decisions on ideological grounds but regards this as neither necessary nor sufficient to condemn the Court's decisions. As a purely logical matter, it is perfectly possible for such a critic to regard the minoritarian Court critique as necessary and sufficient to condemn the Court. This would commit the critic — again, on pain of inconsistency — to opposing sweeping constitutional change in their preferred ideological direction if and only if such change were rendered by a minoritarian Court.

Again, these are only three of eight possible combinations and quite stylized in their formulation. Moreover, many of those eight combinations are open-ended in the sense that they do not tell us whether two claims might be necessary or sufficient *in combination* with

each other or with other claims. Once we account for these and other complexities, the range of possibilities expands geometrically. For present purposes, the important point is simply that different versions of the "too much, too quickly" critique might overlap in a plethora of ways. Both critics and defenders of the Court would do well to keep this in mind, today and more generally.

2. Mixed-Motive Analysis

Another potentially useful framework is the mixed-motive analysis that courts perform in employment discrimination cases and many other legal contexts.[274] This analysis, which diverges from the necessity and sufficiency framework in crucial respects, seems likely to be especially helpful in determining when and whether the charge of sour grapes or bad faith is justified. That is a very different question than the logical consequences of one critique failing, while another succeeds, and various permutations on that scenario, which has been my primary focus to this point.

As Andrew Verstein explains in a valuable recent article, four motive standards predominate across nearly every area of law in which motive plays a significant role: primary motive, but-for motive, sole motive, and any motive.[275] Of course, the "too much, too quickly" critique is not on trial in a court of law, and the doctrinal particulars that Verstein catalogs need not trouble us here. But the charge of sour grapes or bad faith is, at bottom, a charge of illicit motivation. More specifically, it is a charge that proponents of the "too much, too quickly critique" are covertly motivated by ideology, rather than a principled commitment to across-the-board or context-sensitive gradualism. This inevitably raises the question of how much, and what kind, of ideological motivation is required to justify the charge. Courts have developed mixed-motive analysis to answer precisely this question, and that analysis provides a helpful menu of options to consider.

Transposed onto our example, the four standards that Verstein identifies cash out as follows:

[274] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[275] Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018).

- *Primary Motive:* A charge of sour grapes or bad faith is justified if and only if the ideological critique, rather than the minoritarian Court critique, constitutes *the primary motive* of our critic's condemnation of the current Court. This standard requires a comparison of the motivational strength of the ideological critique and the minoritarian Court critique. It is satisfied if the ideological critique predominates, even if that critique was neither necessary nor individually sufficient to motivate the critic's condemnation of the Court.
- *But-For Motive:* A charge of sour grapes or bad faith is justified if and only if the ideological critique constitutes *a but-for motive* of our critic's condemnation of the current Court. This standard is satisfied if the ideological critique was necessary to motivate the critic's condemnation, whether or not it would have sufficed to motivate that condemnation on its own. This standard can be satisfied even if the minoritarian Court critique is the critic's primary motivation and the ideological critique is merely the straw that broke the camel's back.
- *Sole Motive:* A charge of sour grapes or bad faith is justified if and only if ideological considerations constitute the sole motive of our critic's condemnation of the current Court. This is an extremely forgiving standard that is satisfied only if the ideological critique was necessary *and* sufficient to motivate the critic's condemnation of the Court, rendering the minoritarian critique motivationally inconsequential.
- *Any Motive:* A charge of sour grapes or bad faith is justified if ideological considerations constituted any motive at all. This is an extremely demanding standard and the mirror image of the "sole motive" standard. It is satisfied if the ideological critique played any role whatsoever in motivating the critic's condemnation of the Court. Only if the minoritarian critique is both necessary and sufficient to motivate that condemnation would the *any motive* standard not be satisfied.[276]

[276] *Id.* at 1134-43.

Which of these standards, if any, is optimal for evaluating the charge of sour grapes or bad faith is a complicated question. The sole-motive standard seems obviously too forgiving and the any-motive standard obviously too demanding. The primary and but-for motive standards are both plausible, though each has the potential to produce anomalous results. For present purposes, the important point is that charges of sour grapes or bad faith will often require some kind of mixed motives analysis. Again, both critics and defenders of the Court would do well to keep this in mind.[277]

C. Sour Grapes as Stress Test

Up to this point, the sour grapes charge has not fared especially well. As we have seen, the fundamental question raised by the "too much, too quickly" critique is how to balance the costs and benefits of constitutional change. Any thoughtful approach to such balancing will involve moral and ideological judgment in some way. But this does not mean that the critique is always and inevitably reducible to ideology in the narrow left-right sense, as the sour-grapes charge implies. To the contrary, the interplay between ideology and other considerations is quite complex, with a blizzard of different possible permutations.

The charge of sour grapes also raises complex questions of human psychology that proponents of the critique have not generally appreciated. Motivated reasoning, unconscious bias, and self-delusion all seem likely to be more common in practice than conscious intellectual dishonesty required for the charge of sour grapes to be justified. At a minimum, defenders of the Court — today and more generally — should think harder about this and the other complexities identified in this Article before leveling the charge. They should also recognize that the charge of sour grapes must be adjudicated in retail, rather than wholesale, fashion. Even if many critics of the Court are in fact guilty of sour grapes, this does not relieve the Court's defenders of

[277] Following Verstein, I have confined my attention to conscious motives. The charge of sour grapes or bad faith might also encompass cases of unconscious motivation, self-deception, or motivated reasoning, but these are deep waters I cannot wade into here. For an illuminating analysis of this topic, see Pozen, *supra* note 199, at 887-89.

the obligation to respond to committed across-the-board gradualists like Richard Re.

On the other hand, sour grapes and hypocrisy are real intellectual vices, and many examples of the "too much, too quickly" critique raise plausible suspicions along these lines. Critics of the Court should take these suspicions seriously. But more than that, they should welcome the opportunity to test the internal consistency of their own thinking and to hold themselves to the highest possible standards of candor. The charge of sour grapes functions as a kind of stress test — analogous to the stress tests performed by cardiologists on their patients or by the Federal Reserve on financial institutions. Critics can and should perform this test on their own arguments without waiting for the Court's defenders to cry sour grapes or bad faith.

A stress test of this kind serves two essential goals. First, it can help critics to satisfy themselves that their own positions are internally consistent — and to adjust those positions if they are not.[278] Second, it can help critics to communicate the role of moral and ideological judgment in their arguments as clearly and candidly as possible.

1. Internal Consistency

One way for critics to test the internal consistency of their position is to apply it across multiple historical contexts and to confirm that they are willing to endorse its conclusions in each one. For example, a progressive critic of the current Court's purported self-aggrandizement might apply their argument to the New Deal and Warren Court revolutions, both of which most progressives support. The New Deal

[278] There is a parallel to the process of reflective equilibrium, famously described by political philosopher John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 18, 40-44 (2d ed. 1999). *The Stanford Encyclopedia of Philosophy* offers this concise and helpful explanation:

> The method of reflective equilibrium consists in working back and forth among our considered judgments . . . about particular instances or cases, the principles or rules that we believe govern them . . . revising any of these elements wherever necessary in order to achieve an acceptable coherence among them.

Norman Daniels, *Reflective Equilibrium*, STAN. ENCYC. OF PHIL. (2020 ed.), https://plato.stanford.edu/archives/sum2020/entries/reflective-equilibrium/ [https://perma.cc/BP7G-SS45].

revolution would not pose any special difficulties, since the sweeping constitutional change of that period involved the Supreme Court shrinking its role and eliminating judicially imposed limits on social and economic regulation. This is clearly the opposite of judicial self-aggrandizement.[279]

The Warren Court revolution is a more interesting case. Most of the decisions that progressives celebrate from this period involved the ambitious exercise of judicial power at the expense of other governmental institutions, especially state legislatures and local police departments.[280] At first blush, this looks a lot like judicial self-aggrandizement. How should our hypothetical critic respond? One possibility, second nature to constitutional theorists and lawyers alike, would be to distinguish the Warren Court's exercise of power from the judicial self-aggrandizement of the current Court. Perhaps the problem with the current Court is its lack of a coherent theory for centralizing power in the judiciary, while the Warren Court was motivated by a consistent representation-reinforcement theory focused especially on the interests of discrete and insular minorities. Indeed, alongside the Warren Court's robust protection of civil liberties, that Court largely deferred to most government regulation of social and economic affairs.[281] Alternatively, perhaps the current Court's arrogation of power is simply more extreme. Or perhaps the essence of judicial self-aggrandizement is disparaging rhetoric toward other institutions, which the Warren Court eschewed, despite its muscular exercise of judicial power.

I cannot assess the plausibility of these distinctions here. But our hypothetical critic should consider this question carefully, alert to the temptations of motivated reasoning and, especially, the temptation of applying less stringent standards of rigor to one's own arguments. In so doing, the object should be to identify a principle behind the distinction

[279] *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2010) (recounting this episode).

[280] *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000) (offering a detailed account of this history).

[281] *See generally* ELY, *supra* note 262.

that our hypothetical critic is genuinely committed to and willing to follow to its logical conclusions.

Another possibility is that our hypothetical critic will conclude, after reflecting on the Warren Court, that a second principle is necessary to explain the problems with the current Court. Perhaps it is not judicial arrogation of power standing alone that warrants condemnation, but the *combination* of that self-aggrandizement and the current Court's minoritarian character. Since the Warren Court was not minoritarian in the sense that Zoffer and Grewal use that term, its democratic legitimacy was not impaired by a distorted appointment and confirmation process.[282] Viewed in this light, its muscular exercise of judicial power might have been unobjectionable.

This logic seems at least superficially plausible, but it raises two problems — the first serious, the second possibly fatal. The serious problem is that adopting additional principles post hoc will often reflect motivated reasoning rather than a careful and rigorous consideration of the principles in question. If our hypothetical critic does not understand the importance of the minoritarian Court critique until it becomes clear that the judicial self-aggrandizement critique applies to the Warren Court, there is a real risk that the evolution of the critic's views reflects a sort of intellectual gerrymandering. This is a risk, not a certainty. Indeed, the example of the Warren Court might operate in a different and wholly salutary way, stimulating our critic to think more deeply about what is actually wrong with the current Court. But it is all too easy to convince oneself of this pretty story out of convenience.

The possibly fatal problem is that engrafting the minoritarian Court critique onto the judicial self-aggrandizement critique seems to make the latter superfluous. The current Supreme Court is the only minoritarian Court in U.S. history. For that reason, the minoritarian critique would seem to justify condemnation of the current Court while sparing the Warren and New Deal Courts, with no help at all from the judicial self-aggrandizement critique. Whether this is actually the case depends on the relationship between the two critiques. If the minoritarian Court critique is both necessary and sufficient to justify condemnation of the Court, the judicial self-aggrandizement critique is

[282] Zoffer & Grewal, *supra* note 234, at 456.

indeed entirely superfluous. And by coupling it with the minoritarian Court critique, our hypothetical critic has rendered their initial position irrelevant in an attempt to save it.

But there is another possibility. If the minoritarian Court critique is merely necessary, but not sufficient, to condemn the Court, the judicial self-aggrandizement critique remains relevant. Indeed, the combination of the two critiques makes some intuitive sense. On this view, neither judicial self-aggrandizement nor a minoritarian critique is sufficient to condemn sweeping constitutional change on its own. Rather, a serious constitutional problem arises only when a minoritarian Court, lacking in fundamental democratic legitimacy, seeks to consolidate power in itself. The New Deal revolution involved neither judicial arrogation of power nor a minoritarian Court. And the Warren Court revolution merely involved judicial self-aggrandizement. But the current conservative constitutional revolution involves both. Therefore, it alone is worthy of condemnation.

This is a plausible view — one that may well not have occurred to our critic before performing this stress test. But it is also a convenient one. A conscientious critic should therefore think hard about their reasons for embracing it.

There is a second way for critics to test the internal consistency of their position. Rather than applying that position to historical examples, they might apply that position to a hypothetical version of the current Court with diametrically opposite ideological convictions. For example, a progressive critic of the current Court's minoritarian character might attempt to imagine a liberal or progressive Court appointed under similar circumstances. If such a Court carried out the agenda envisioned by Mark Tushnet or other liberals and progressives on the eve of the 2016 presidential election, would our critic still condemn its decisions as lacking democratic legitimacy?

This approach to stress-testing works very similarly to the historical technique I have already discussed at length, so I will make only one further point. Unlike the historical technique, this technique requires the critic to imagine a counter-factual equivalent to the decisions of the current Court. This is not a simple exercise, to put it mildly. What would be the liberal or progressive equivalent of *Dobbs* or *Bruen*? Both

approaches have problems, but this difficulty is sufficiently large that critics would probably do better with the historical technique.

2. Clarity and Candor

Stress testing for clarity and candor is in some ways more straightforward. Critics must simply think hard about the role of moral and ideological judgments in their thinking and then make every effort to explain that role clearly and candidly. But as we have already discussed at length, fully disentangling moral and ideological judgments from any assessment of constitutional change is quite difficult. Rather than belabor this difficulty any further, I will return to the stare decisis question in *Dobbs* as a concrete example. As I explained earlier, this question at its core involved balancing the costs and benefits of constitutional change in one particular case.[283] Such balancing raises the same questions of clarity and candor as the "too much, too quickly" critique in microcosm. I will focus here particularly on the dissenters whose stare decisis argument is a writ small version of the "too much, too quickly" critique.

The heart of that argument is that millions of Americans planned their lives around the right to abortion guaranteed in *Roe* and *Casey*. Some of this planning involved tangible costs, such as attending college or purchasing a house or taking a job in a state where access to abortion would be insecure without federal constitutional protection. Some of the planning was more intangible, encompassing the psychological value of knowing that abortion is available as a backstop in case of an unplanned pregnancy — and all of the additional life options that this opened up, short- and long-term.[284] The latter sort of planning, or reliance, was the main focus of the *Dobbs* dissenters.

The boundary between these two forms of reliance is hazy, and the *Dobbs* majority was unduly dismissive of both. But for present purposes, the important point is that the more intangible forms of reliance depend, at least in part, on access to abortion being a moral good. If the right that millions of Americans planned their lives around was not an

[283] *See supra* notes 270–271 and accompanying text.

[284] *See, e.g.*, Shiffrin, *supra* note 174 (explaining and emphasizing the importance of this form of reliance); Varsava, *supra* note 174 (same).

essential personal liberty but a grave moral wrong, their psychological investment in those plans would look considerably less worthy of respect.[285] The point is not that the dissenters were wrong or even that their position was debatable. In my view, they were clearly correct. But that is, in significant part, because I agree that access to abortion is a moral good.[286]

The *Dobbs* dissenters' argument turned on moral and ideological judgments in an another, more obvious respect. In balancing the costs of overruling *Roe* and *Casey* against the benefits, the dissenters assigned little, if any, apparent weight to the latter. Obviously, the dissenters did not think overruling *Roe* and *Casey* had any real benefits. They thought it a tragedy. But stare decisis doctrine required them to assume, for purposes of argument, that those cases were wrongly decided and then to weigh the benefits of correcting this error against the reliance interests I have just discussed.[287] The joint *Dobbs* dissent says almost nothing about those benefits, so it is hard to know how the dissenters thought about them. But one thing seems eminently clear: They did not view abortion as akin to murder or otherwise a grave moral wrong. Nor did they consider unshackling state legislatures from an erroneously imposed constitutional limitation to be a profoundly important political good.

Again, the point is not that the dissent was wrong. In my view, the costs of overruling *Roe* and *Casey* clearly exceeded the benefits. But that is at least in part because I do not view abortion as akin to murder. Nor do I think the democratic authority of state legislatures over abortion regulation weightier than the reliance interests cataloged by the *Dobbs* dissenters.

The role of these moral judgments in the dissent's analysis is not explained clearly or expressly — and it is not clear that the dissenting justices were conscious of it. Even if they were, the dissenting opinion in a historic Supreme Court case is subject to different standards of

[285] *Cf.* Re, *Precedent As Permission*, *supra* note 256, at 941 ("[D]eliberate reliance can easily be recast as ill-gotten gains.").

[286] Portions of this paragraph and the previous one are adapted from Coan, *The Matter with Dobbs*, *supra* note 103, at 296.

[287] I simplify to keep the example tractable. Reliance was obviously not the only relevant cost of overruling *Roe* and *Casey*.

rigor, clarity, and candor than an academic article. But in academic argument, critics have an obligation to think hard about the role of moral and ideological judgments in their arguments and to explain that role as clearly and candidly as possible. The same is true of serious intellectual exchange more generally, which of course is not limited to the academy.[288] Stress-testing for clarity of thinking and candor of expression can help critics of the Court live up to this obligation.

D. Different Arguments, Different Directions

The final point in support of considering all four understandings of the "too much, too quickly" critique together is perhaps the simplest and easiest to grasp. Comparing these understandings clarifies what is stake. Different arguments will often point in different directions, with important and sometimes profound implications. When asking whether the Court is changing too much, too quickly, it is therefore crucial to specify what precisely the problem is supposed to be.

Consider Richard Re's across-the-board gradualism. Like many critics of the current Court, Re deplores the destabilizing and procedurally slapdash character of the *Dobbs* decision. But he is almost equally critical of the dissent, arguing that both conservatives and progressives should have supported Chief Justice Roberts's gradualist approach to narrowing abortion rights in *Dobbs*.[289] This is consistent with Re's larger body of work carefully explicating and gingerly defending Roberts's incrementalist approach more broadly, including the Court's repeated narrowing of long-standing precedents and what Re dubs the doctrine of "one last chance," which produced *Shelby County v. Holder*,[290] *Citizens*

[288] How much further this obligation extends is an interesting question, which I may return to in future work. I thank Richard Re for this point.

[289] That approach would have permitted states to regulate abortion from the beginning of pregnancy, so long as they did not unduly burden the right to choose an abortion. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (Roberts, C.J., concurring in the judgment).

[290] 570 U.S. 529 (2013) (invalidating the Voting Rights Act's "preclearance requirement," which recovered jurisdictions with history of racial discrimination in voting to seek prior approval from the Justice Department before changing their voting rules or systems).

United v. FEC,[291] and *Janus v. AFSCME*.[292] These conclusions hardly follow ineluctably from Re's epistemic and stability-oriented approach. But across-the-board gradualism is, almost by definition, inconsistent with an ambitious progressive agenda.

By contrast, the judicial self-aggrandizement critique condemns many of the recent decisions that liberals and progressives deplore, including *Shelby County*, *Citizens United*, and *Janus*. Indeed, all three of these decisions are virtually paradigmatic cases of judicial self-aggrandizement. On the other hand, *Dobbs* is an awkward case for this version of the critique, surrendering regulatory authority to state legislatures and Congress rather than arrogating it to the Court. The same would be true in the unlikely event that the current Court overturned the constitutional rights to same-sex marriage and intimacy, contraceptives, or interracial marriage.

Mark Lemley awkwardly attempts to shoehorn *Dobbs* into the self-aggrandizement critique by characterizing that decision as an arrogation of "the power to overrule prior Supreme Court decisions [this Court] simply doesn't like."[293] But this is a kind of word game. For better or worse, *Dobbs* means that state legislatures and not the Supreme Court will generally decide abortion policy. This bald fact underscores a broader tension between the judicial self-aggrandizement critique and many of the constitutional decisions of the Warren and Burger Courts that liberals and progressives generally celebrate. There are various ways these decisions might be reconciled with the self-aggrandizement critique. But the tension is real. Some liberals and progressives, perhaps an increasing number, might be willing to bite this bullet. Many will not be.[294]

The minoritarian Court critique poses fewer such difficulties. The current Supreme Court is the only one with a majority of minoritarian

[291] 558 U.S. 310 (2010) (invalidating the Bipartisan Campaign Reform Act).

[292] 585 U.S. 878 (2018) (invalidating Illinois law requiring public employees to contribute to labor union's cost of negotiating a contract they benefit from).

[293] Lemley, *supra* note 88, at 110.

[294] *See, e.g.*, Erwin Chemerinsky, *In Defense of Judicial Review*, AMERICAN PROSPECT (July 18, 2022), https://prospect.org/justice/in-defense-of-judicial-review/ [https://perma.cc/NDJ3-GFXR] (defending counter-majoritarian judicial review because "those without political power have nowhere to turn for protection except the judiciary").

justices as Zoffer and Grewal use that term. Thus, by definition, it is only the decisions of the current Court whose legitimacy the critique calls into question. But this raises a number of other thorny questions that do not arise under other versions of the critique. Does the Court's minoritarian character deprive all its decisions of democratic legitimacy? Or merely those that qualify as radical or extreme? Or perhaps only those with a majority comprised exclusively of minoritarian justices? This would exempt *Bruen* and every other 6–3 decision with Chief Justice Roberts and the five other conservatives in the majority. What happens if Republicans win the popular vote for the presidency and Senate in 2024 and appoint one or two new justices? Would the "too much, too quickly" problem go away? And if not, what analytical work is the minoritarian Court critique really doing?

The list could go on, but the point should be clear. Different versions of the "too much, too quickly" critique are not merely alternate paths to the same result. There are substantial differences among them, and these differences have real consequences for the decisions that most deeply concern the Court's critics and defenders.

CONCLUSION

The current Supreme Court has reshaped U.S. constitutional law in fundamental ways within a short span of time. Under these circumstances, it is easy for critics of the Court to conclude that such changes represent an alarming and illegitimate rupture with constitutional tradition. It is equally easy for defenders of the Court to dismiss this criticism as mere sour grapes, bad faith, hypocrisy, or opportunism. This has happened before, and it is likely to happen again, with different ideological camps on different sides at different times.

It is therefore worth asking seriously, and with a genuinely open mind, what to make of the "too much, too quickly" critique. There are at least four possible answers. The critique might be understood as a call for across-the-board gradualism, as mere sour grapes, as unapologetic ideology, or as a call for context-sensitive gradualism. Each of these understandings has strengths and weaknesses, but none is uniquely correct or fully satisfying on its own. All four are necessary for a complete picture.

Ultimately, the "too much, too quickly" critique poses a deep and fundamental question: how should we balance the costs and benefits of constitutional change? Any thoughtful effort to strike this balance will implicate moral and ideological considerations. But this does not mean that the critique will always amount to sour grapes or unapologetic ideology. Moral and ideological judgment can coexist in many different configurations with general principles that transcend — or seek to transcend — ideology in the narrow left-right sense.

There are valuable lessons here for those prepared to see them. Most critics and defenders of the Court would benefit from more rigorous thinking about the role of moral and ideological judgment in their arguments. Many would also benefit from greater clarity and candor on this subject. Nearly all would benefit from a more charitable and less dismissive attitude toward those on the other side.[295] Sometimes our intellectual opponents really are dishonest or operating in bad faith. But if we begin with that assumption or slip too easily into it, we will miss much of importance.

[295] I certainly include myself in this group.