Washington Square Citizens League

Discussion Forum
7:00-8:15 pm
Monday, April 8, 2024
David Kurkowski, moderator

The Supreme Court:
What's the Legacy of the Roberts Court?

The Roberts Court, now dominated by a majority of conservative justices, seems to be increasingly involved in political decisions. In the current term, the Court must decide cases involving the power of administrative agencies, gun control, abortion, social media and former President Trump. The Court has already upended "established law" in Dobbs and more norm-changing decisions are possibly on the way. All of this is occurring while the ethics of the Court are under attack. Public opinion of the Court, formerly the most revered public institution of all, is at an all-time low. The following readings:

1. Explain some of the legal concepts governing the Court.
2. Address the issues of ethics and court reform, including term limits.
3. List the major cases still to be decided before the current term ends in June.

First, a brief history:

Article 3 establishes the judicial branch. This section is short and leaves details for Congress to fill in. The original Supreme Court had 6 justices. Since 1869 there have been nine Justices, including one Chief Justice. All Justices are nominated by the President, confirmed by the Senate, and hold their offices under life tenure. Here is Article 3:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Judicial Review

Source: Constitution Annotated (constutution.congress.gov)

One key feature of the federal judicial power is the power of judicial review, the authority of federal courts to declare that federal or state government actions violate the Constitution. While judicial review is now one of the distinctive features of United States constitutional law, the Constitution does not expressly grant federal courts power to declare government actions unconstitutional.

The Supreme Court first formally embraced the doctrine of judicial review in the 1803 case Marbury v. Madison. Since Marbury, judicial review has become a core feature of American constitutional law. While the doctrine is well established, some legal commentators

have criticized judicial review, and some who support it debate its doctrinal basis or how it should be applied.

Stare Decisis

Throughout history the Supreme Court has almost always relied on the principle of *stare decisis,* literally "let the decision stand." The following article highlights 8 important cases in which that principle was not followed:

8 Landmark Supreme Court Cases That Were Overturned

Dave Roos, October 11, 2022, History

It's extremely rare for the U.S. Supreme Court to overturn one of its own decisions. Of the more than 25,500 decisions handed down by the Supreme Court since its creation in 1789, it has only reversed course 146 times, less than one-half of one percent.

That's because the legal concept of precedent has played such a central role in common law systems for "at least 1,000 years," says David Schultz, law professor at the University of Minnesota Law School. "Precedent says that 'like cases should be decided alike.' It appeals to our notions of justice and fairness."

Judges tend to defer to precedent because it encourages uniformity, predictability and consistency in the legal system, and historically the Supreme Court only overturned decisions when the original solution proved "unworkable," or when the conditions on the ground had changed dramatically.

"Classically, you didn't overturn precedent just because you thought that a previous Supreme Court got it wrong," says Schultz, author of Constitutional Precedent in U.S. Supreme Court Reasoning. But that historic deference to precedent has decreased over the past century.

The following are some of the most pivotal and high-profile Supreme Court cases that were later overturned.

1. *Hammer v. Dagenhart* (1918) – permitted child labor – overturned by *United States v. Darby* (1941)

One of the first major reversals happened during the New Deal period, when Franklin D. Roosevelt and Congress passed sweeping economic and social reforms. One of those laws was the Fair Labor Standards Act (1938), which outlawed child labor nationwide. Prior to 1938, each state determined its own child labor laws.

2. *Minersville School District v. Gobitis* (1940) – children of Jehovah's Witnesses expelled for not reciting Pledge of Allegiance – overturned by *West Virginia State Board of Education v. Barnette* (1943)

Writing for the majority, Justice Robert Jackson wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."

3. *Plessy v. Ferguson* (1896) – "separate but equal" – overturned by *Brown v. Board of Education of Topeka* (1954)

When the Court heard Brown, it was armed with decades of social sciences research proving the damaging effects of segregation on Black schools and Black students. In a unanimous decision, the

justices ruled that the doctrine of "separate but equal" was in clear violation of the Equal Protection Clause of the 14th Amendment.

4. *Betts v. Brady* (1942) – no right to counsel in certain cases – overturned by *Gideon v. Wainwright* (1963)

This time, the justices ruled unanimously that the constitutional guarantee of a fair trial absolutely included the right to counsel for those who couldn't afford their own. Justice Black wrote the opinion, poking holes in the reasoning of Betts:

"The fact is that, in deciding as it did—that 'appointment of counsel is not a fundamental right, essential to a fair trial'—the Court in Betts v. Brady made an abrupt break with its own well-considered precedents. In returning to these old precedents… we but restore constitutional principles established to achieve a fair system of justice."

5. *Bowers v. Hardwick* (1986) – affirmed Georgia anti-homosexuality laws – overturned by *Lawrence v. Texas* (2003)

"[Gay and lesbian peoples'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government," wrote Justice Anthony Kennedy. "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

6. *Austin v. Michigan Chamber of Commerce* (1990) – upheld Michigan law prohibiting corporate contributions to political campaigns – overturned by *Citizens United v. FEC* (2010)

In a controversial 5-4 decision, the justices overturned portions of their previous decisions and ruled that campaign donations and political advertising were forms of free speech, and the government should not be in the business of censoring free speech, regardless of who pays for it.

"When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves," wrote Justice Anthony Kennedy.

7. *Baker v. Nelson* (1972) – upheld Michigan ban on gay marriage – overturned by *Obergefell v. Hodges* (2015)

"The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity," wrote Justice Anthony Kennedy. "The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex."

In his dissent, Justice Antonin Scalia called the decision "a threat to American democracy" and insisted that matters like same-sex marriage should be decided by the voters in individual states, and not "legislated" by the Supreme Court.

8. *Roe v. Wade* (1973) and *Planned Parenthood of Southeastern Pa. v. Casey* (1992) – right to abortion – overturned by *Dobbs v. Jackson Women's Health Organization* (2022)

"Stare decisis, the doctrine on which Casey's controlling opinion was based, does not compel unending adherence to Roe's abuse of judicial authority," wrote Justice Samuel Alito. "Roe was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences." [Read the next article.]

Explaining SCOTUS's Abortion Decision in *Dobbs v. Jackson Women's Health Organization*

League of Women Voters Last Updated: July 22, 2022

On June 24, 2022, the United States Supreme Court released its decision in *Dobbs v. Jackson Women's Health Organization*, overturning the constitutional right to abortion.

Writing for the majority, Justice Alito stated, "procuring an abortion is not a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history." In so doing, he and four other conservative justices turned back the clock — not only essentially sending Americans back to a time before Roe v. Wade was decided, but also looking almost exclusively at reproductive rights from the lens of the mid-1800s and earlier to determine whether the Constitution confers a right to abortion today.

Justice Alito maintained that, contrary to the fears of many civil rights advocates, this decision had no bearing on other unenumerated rights (rights not specifically spelled out in the Constitution but nevertheless recognized as fundamental) such as marriage equality, same-sex intimacy, and contraception access. However, Justice Thomas undermined this assertion by penning a concurrence calling for a new look at the decisions protecting all the above rights, and more.

Meanwhile, a joint dissent authored by Justices Breyer, Sotomayor, and Kagan argued that the Court had stripped women of all rights, thereby destroying lives, curtailing women's "status as free and equal citizens," and most negatively impacting women of color and limited means.

How Dobbs Takes Us Back In Time

The crux of Dobbs is a highly constrained and antiquated view of what constitutes a fundamental constitutional right. Specifically, Justice Alito wrote that for a right to be protected by the Constitution, it must be either explicitly spelled out in the text or "deeply rooted in [our] history and tradition."

What exactly does this mean? According to the Dobbs decision, relevant sources for gauging whether abortion is deeply rooted in history include:

- Cases and writings from 13th, 17th, and 18th century England;
- Cases and legal manuals from colonial and early 1800s America; and
- The fact that in 1868 (when the 14th Amendment was ratified), 75% of states criminalized it.

Post-1868 history is allowed one paragraph compared to approximately eight pages of pre-1868 historical analysis.

This is an incredibly troubling view of constitutional protections. By discounting history after the ratification of the 14th Amendment, the Court limited constitutional protection to only those rights that were recognized in the earliest days of this nation — before women and people of color were able to vote, own property, control their earnings, serve on juries or as lawyers, or virtually any other hallmarks of full participation in society. Under this logic, even if there were societal or legislative agreement that abortion is a constitutional right from the late 1800s to the present day, it's possible that there would still be no constitutional right to it. No amount of societal change, scientific advancement, or recognition of past injustices would allow Americans any rights beyond those that a small group of white, property-owning men explicitly awarded them 200 years ago.

There are additional nuances to the Dobbs logic that further constrain courts from recognizing constitutional rights.

First, Justice Alito argued that the fact that early-stage abortion was not criminalized in early 1800s America does not mean that society felt women should have access to it. Instead, the legislature could have criminalized it but chose not to (for some unknown reason). This logic essentially requires explicit acknowledgment by 1800s society that something was a constitutional right for it to now be protected by the Constitution. Given that records from the 1800s are naturally less accessible, early American norms discouraged the discussion of sensitive social issues, and legislatively, recognition of a right to abortion could look the same as merely declining to restrict it, this is a very tall order.

Second, Justice Alito argued that, in coming to its decision that abortion is a fundamental right, the Roe Court relied on precedents that were not similar enough — namely, none of them involved the question of prenatal life. As a result, not only did such logic doom abortion rights from the start, but were this rationale applied to other cases, it would be nearly impossible to recognize unenumerated rights because they would necessarily need to be based on a virtually identical right that has already been recognized. For example, under this logic it would be easy to say that many of the court's unenumerated rights cases are based on insufficiently similar precedents: *Obergefell v. Hodges* did not rely on precedents that were similar enough because none of them concerned the issue of same-sex marriage, *Loving v. Virginia* was not based on precedents about interracial marriage, *Griswold v. Connecticut* did not use precedents that concerned contraception, and the list goes on.

The Chopping Block: Rights Threatened by the Dobbs Decision

Lack of abortion access will have a massively dangerous impact on Americans going forward. But now that we know what a Dobbs approach does to constitutional analysis, could this method affect other aspects of people's lives? While that remains to be seen, the Dobbs logic puts many — if not all — unenumerated rights that Americans have built our lives and communities around, on very shaky ground.

Aside from the court's general skepticism of unenumerated rights writ large, there are many constitutional rights that have the same origins as the right to abortion — namely, the right to privacy and liberty. Cases establishing a right to marriage equality for same-sex couples (*Obergefell v. Hodges*), interracial marriage (*Loving v. Virginia*), contraception (*Griswold v. Connecticut*), same-sex intimacy (*Lawrence v. Texas*), and directing the upbringing of one's children (*Pierce v. Society of Sisters*) are all recognized under the umbrella of privacy and/or liberty rights.

Significantly, none of these rights were recognized, either legislatively, legally, or socially, in the 19th century United States. Instead, they are products of a more recent understanding that to deny such rights would be unjust and discriminatory.

While Justice Alito argued that these rights are not affected by Dobbs, under the Dobbs logic, they are unlikely to be protected by the Constitution. Indeed, Justice Alito even sowed seeds of doubt in the right to privacy itself, pointing out that it is not mentioned in the Constitution, and it is unclear from which Amendment it can be said to originate.

Justice Thomas' concurrence makes this danger clear. He stated that the Due Process Clause, a provision in the Constitution that protects people from the arbitrary deprivation of life, liberty, and property and is generally considered to protect many unenumerated rights, "does not secure any substantive rights." According to Justice Thomas, "any substantive due process decision is 'demonstrably erroneous,'" thus the court "should reconsider all...substantive due process precedents" to "correct the error." While this willingness to strike down constitutional protection for all unenumerated rights is even more troubling than the majority opinion, at least Justice Thomas is honest in pointing out that the grounds on which Roe was overturned jeopardize other unenumerated rights as well.

***Dobbs* and *Bruen* Combined: The Threat of Extreme Originalism to Our Fundamental Rights**

One day before releasing Dobbs, the Court published its decision in another case dealing with constitutional rights, *New York State Rifle and Pistol Association v. Bruen*, in which the Court severely restricted the ability of states to enact gun control measures.

The logic employed in *Bruen* is remarkably similar to that of Dobbs. Specifically, *Bruen* limited the relevant "historical tradition" of gun regulation to the time around the 2nd Amendment's ratification. Thus, Dobbs and *Bruen* share a focus on centuries-old conceptions of rights and social norms in defining present-day constitutional protections.

Such a preoccupation with distant history shifts the court to an extreme version of originalism, which is a theory of constitutional interpretation that argues that all statements in the Constitution must be interpreted based on how they would have been understood or intended at the time the Constitution (or relevant amendment) was adopted. In the court's new originalist world, rights are constrained (as with abortion) to their 19th-century status regardless of social change or improved scientific knowledge. At the same time, modern problems (i.e. the creation of exponentially more deadly weapons and proliferation of mass shootings) do not allow for legislative responses unless they are actions 19th-century legislators would have taken.

Yet the most important attribute shared by these opinions is the dangerous and oppressive effect they will have on countless people in this country – chiefly, people of color and those with limited means. Women of color and women who cannot afford to travel for an abortion are most at risk of losing their lives and livelihoods to abortion bans. Similarly, people of color are more likely to be victims of gun violence than white people, and communities of color have become targets for mass shooters such as those who shot and killed 10 Black individuals in Buffalo in 2022, murdered 23 Latino people in El Paso in 2019, or killed 9 Black churchgoers in Charleston in 2015.

Together, these cases demonstrate that Dobbs is not an anomaly. Instead, the court has taken a sharp turn toward depriving Americans of important constitutional rights — not just the right to obtain an abortion, but also the most basic principles on which our nation was founded — the right to life, liberty, and the pursuit of happiness. Most cruelly, its apathy for modern problems and attempts to remedy historic injustices puts people of color, lower-income individuals, and women well on their way back to a time in which they enjoyed virtually no rights whatsoever.

After Roe ruling, is 'stare decisis' dead? How the Supreme Court's view of precedent is evolving

Friday's decision eliminates a constitutional right for first time.

By Devin Dwyer, ABC News, June 24, 2022

In thousands of rulings over its storied history, the U.S. Supreme Court has broken with stare decisis, the doctrine of respecting prior decisions, just 145 times in cases requiring interpretation of the Constitution.

The overturning of Roe v. Wade, the landmark 1973 ruling that extended constitutional protection for abortion, marks one of the few times it has clawed back a right enjoyed by millions of Americans for decades.

"The court has never ever overturned a prior case extending a constitutional right," said Cardozo Law professor Kate Shaw, an ABC News legal analyst.

Standing is Required

Standing, or *locus standi*, is the capacity of a party to bring suit in court.

At the federal level, legal actions cannot be brought simply on the ground that an individual or group is displeased with a government action or law. Federal courts only have constitutional authority to resolve actual disputes (see Case or Controversy).

In *Lujan v. Defenders of Wildlife* (90-1424), 504 U.S. 555 (1992), the Supreme Court created a three-part test to determine whether a party has standing to sue:

1. The plaintiff must have suffered an "injury in fact," meaning that the injury is of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent
2. There must be a causal connection between the injury and the conduct brought before the court
3. It must be likely, rather than speculative, that a favorable decision by the court will redress the injury

Standing is the subject of the following article about an upcoming case involving mifepristone.

The Supreme Court's latest abortion case has an obvious answer

By the Washington Post Editorial Board, March 23, 2024

The Supreme Court declared nearly two years ago, when it overruled *Roe v. Wade*, that the rules on abortion were now up to the states — but as the justices hear a critical case this week regarding the pill mifepristone, reproductive rights rest yet again in their hands. The good news is, this isn't a hard one.

The court agreed to hear FDA v. Alliance for Hippocratic Medicine after two panels of judges on the U.S. Court of Appeals for the 5th Circuit ruled to impose significant restrictions on health providers prescribing mifepristone — the first part of the two-drug regimen used in more than half of all abortions in the United States. Whether patients can access mifepristone at all isn't at stake; courts have agreed that the statute of limitations is up to challenge the FDA's 2000 approval of the drug. But when and how they can do so is still challengeable: The 5th Circuit nixed changes the agency made in the past eight years that made it possible for women to obtain mifepristone more easily — later on in their pregnancies, for example, or by mail or without three separate visits to health facilities.

The Supreme Court must now consider whether to side with the 5th Circuit judges or with the doctors and scientists at the FDA on a subject about which judges generally know little and doctors and scientists a lot. But before the justices even reach that debate, they must settle another: Does the litigant in this case even have standing, the legal right to sue? Resolving this question is simpler than it sounds.

To have standing, the Alliance for Hippocratic Medicine must show existing or imminently impending injury caused by the broader availability of mifepristone. Yet they, emergency room doctors, neither use nor prescribe mifepristone. So they've settled on claiming hypothetical injury: If some unspecified member of their group has to treat patients who have taken mifepristone, that member could suffer harm. It should be no great harm to doctors, who have sworn to care for those in need, to treat those suffering side effects from any duly prescribed medication.

The speculative injury the Alliance for Hippocratic Medicine claims is even more dubious considering complications from mifepristone are exceedingly rare. For this same reason, the plaintiffs' case is weak — even if the Supreme Court does decide that they have standing to challenge the FDA. The 5th

Circuit, agreeing in part with U.S. District Judge Matthew Kacsmaryk, said the FDA violated crucial safeguards when it loosened regulations on mifepristone. The FDA says it has merely updated the approved conditions of use for a drug deemed safe and effective for almost a quarter century, and for millions of patients.

The science, unsurprisingly, is on the scientists' side. Study upon study has shown that fewer than 1 percent of mifepristone patients need hospitalization. The FDA has received reports of 28 deaths out of the 5.6 million who have used the drug between its 2000 approval and last summer, and even these can't be confidently attributed to the drug. The rest of the world has been engaged in similarly rigorous research and has come to the same conclusion. At least 94 countries have approved the pill, and increasingly they're putting it on their essential medication lists.

Indeed, patients seeking abortions are in more danger without mifepristone than with it. Terminating a pregnancy with mifepristone's usual companion pill, misoprostol, is possible — but results in more cramping and bleeding. The risk of severe complication from childbirth, meanwhile, hovers around 1.4 percent, according to the Centers for Disease Control and Prevention.

Compare the methodology underlying these conclusions, established by the global community carefully and over ample time, to the methods Judge Kacsmaryk relied on in his ruling that the 5th Circuit reviewed: Much of his data came from an antiabortion group whose very mission is to undermine the FDA's policy. To prove that "chemical abortion" provokes a "negative change" in patients, he cited a study that relied on a collection of anonymous blog posts from — yes, really — abortionchangesyou.org.

The Supreme Court pronounced less than two years ago that courts have little business meddling in democratically decided abortion rules. Now, its justices are asked to decide whether courts have any business overruling the scientific judgment of an executive agency — and, in so doing, curb patients' ability to access mifepristone regardless of their states' laws. The answer should be obvious.

Cost

The cost of filing a case with the Supreme Court is $300. However, legal fees run more than $1,000,000 and are almost always paid by large organizations.

Shadow Docket

The Supreme Court Is Hiding Important Decisions From You

A new book argues the court is undermining its credibility by rendering so many unsigned and unexplained decisions on its so-called 'shadow docket.'

By Ian Ward, Politico, May 19, 2023

As the Supreme Court begins to release its written opinions from its most recent term, much of the public's attention is focused on high-profile cases on affirmative action, election law and environmental regulation. But according to Stephen Vladeck, a professor at the University of Texas Law School, this narrow focus on the most headline-grabbing decisions overlooks a more troubling change in the High Court's behavior: The justices are conducting more and more of the court's most important business out of the public eye, through a procedural mechanism known as "the shadow docket."

Quantitatively speaking, cases arising from the shadow docket — which include everything apart from the court's annual average of 60 to 70 signed decisions — have long made up a majority of the

justices' work. But as Vladeck documents in his new book, The Shadow Docket, published this week, the court's use of the shadow docket changed dramatically during the Trump years, when the court's conservative majority used a flurry of emergency orders — unsigned, unexplained and frequently released in the middle of the night — to greenlight some of the Trump administration's most controversial policies.

"What's remarkable is that the court repeatedly acquiesced and acquiesced [to the Trump administration], and almost always without any explanation," Vladeck said when I spoke with him. "And they did it in ways that marked a pretty sharp break from how the court would have handled those applications in the past."

It wasn't just the frequency of the court's shadow docket decisions that changed during the Trump years; it was also the scope of those decisions. Whereas the justices have traditionally used emergency orders as temporary measures to pause a case until they can rule on its merits, the current court has increasingly used emergency orders to alter the basic contours of election law, immigration policy, religious liberty protections and abortion rights — all without an extended explanation or legal justification. To illustrate this shift, Vladeck points to the court's emergency order in September 2021 that allowed Texas's six-week abortion ban to take effect — a move that effectively undermined Roe v. Wade nine months before the court officially overturned it in Dobbs v. Jackson Women's Health Organization.

"It really highlights a problem that's endemic to how we talk about the court, which is that we fixate on the formality of the court's decision and explanations and downplay the practical effect of its rulings, whether or not they come with those explanations," Vladeck explained.

The shift in the justices' use of the shadow docket adds line of critique in the ongoing debate over the court's legitimacy, which has raged in recent weeks thanks to new revelations about a conservative justice's previously undisclosed relationship with wealthy Republican donor. For Vladeck, it isn't a coincidence that concerns about the shadow docket are arising at the same time as concerns over the court's ethics.

"They are both symptoms of an unaccountable court," Vladeck said. "It's emblematic of the deeper problem, which is the court's notion that Our docket is up to us, our ethics are up to us, our decision-making is up to us."

Originalism and Textualism

These two terms are like fraternal twins—similar but not identical. "Originalism" is the principle of trying to divine what the writers of the Constitution meant and then using that information to shape decisions. Conservative justices (Alito, Thomas, Kavanaugh, Gorsuch and Coney Barrett) often cite "originalism" as a guiding principle behind their opinions. "Textualism" is relying the exact text of the Constitution, as former Justice Stephen Breyer explains in the second article that follows.

On Originalism in Constitutional Interpretation

by Steven G. Calabresi, National Constitution Center

Originalism is a theory of the interpretation of legal texts, including the text of the Constitution. Originalists believe that the constitutional text ought to be given the original public meaning that it would have had at the time that it became law. The original meaning of constitutional texts can be discerned from dictionaries, grammar books, and from other legal documents from which the text might be borrowed. It can also be inferred from the background legal events and public debate that

gave rise to a constitutional provision. The original meaning of a constitutional text is an objective legal construct like the reasonable man standard in tort law, which judges a person's actions based on whether an ordinary person would consider them reasonable, given the situation. It exists independently of the subjective "intentions" of those who wrote the text or of the "original expected applications" that the Framers of a constitutional text thought that it would have.

Originalism is usually contrasted as a theory of constitutional interpretation with Living Constitutionalism. Living constitutionalists believe that the meaning of the constitutional text changes over time, as social attitudes change, even without the adoption of a formal constitutional amendment pursuant to Article V of the Constitution. Living constitutionalists believe that racial segregation was constitutional from 1877 to 1954, because public opinion favored it, and that it became unconstitutional only as a result of the Supreme Court decision in Brown v. Board of Education *(*1954) – a case in which they think the Supreme Court changed and improved the Constitution. In contrast, originalists think that the Fourteenth Amendment always forbade racial segregation—from its adoption in 1868, to the Supreme Court's erroneous decision upholding segregation in Plessy v. Ferguson (1896), to the decision in Brown in 1954, down to the present day.

Justice Breyer, Off the Bench, Sounds an Alarm Over the Supreme Court's Direction

By Adam Liptak, NYT, Reporting from Washington, March 18, 2024

In an interview in his chambers and in a new book, Justice Stephen G. Breyer, who retired in 2022, discussed Dobbs, originalism and the decline of trust in the court.

In earlier interviews, Justice Breyer could be rambling and opaque. This time he was direct. He said he meant to sound an alarm about the direction of the Supreme Court.

"Something important is going on," he said. The court has taken a wrong turn, he said, and it is not too late to turn back.

The book, "Reading the Constitution: Why I Chose Pragmatism, Not Textualism," will be published on March 26, the day the Supreme Court hears its next major abortion case, on access to pills used to terminate pregnancies.

The book devotes considerable attention to Dobbs v. Jackson Women's Health Organization, the 2022 decision that eliminated the constitutional right to abortion. Justice Breyer, who had dissented, wrote that the decision was stunningly naïve in saying it was returning the question of abortion to the political process.

"The Dobbs majority's hope that legislatures and not courts will decide the abortion question will not be realized," he wrote.

He was more forceful during the interview. "There are too many questions," he said. "Are they really going to allow women to die on the table because they won't allow an abortion which would save her life? I mean, really, no one would do that. And they wouldn't do that. And there'll be dozens of questions like that."

The book is a sustained critique of the current court's approach to the law, one that he said fetishizes the texts of statutes and the Constitution, reading them woodenly, without a common-sense appreciation of their purpose and consequences.

Textualism is a way of interpreting statutes that focuses on their words, leading to decisions that turn on grammar and punctuation. Originalism seeks to interpret the Constitution as it was understood at the

time it was adopted, even though, Justice Breyer said in the interview, “half the country wasn’t represented in the political process that led to the document.”

There are three large problems with originalism, he wrote in the book.

“First, it requires judges to be historians — a role for which they may not be qualified — constantly searching historical sources for the ‘answer’ where there often isn’t one there,” he wrote. “Second, it leaves no room for judges to consider the practical consequences of the constitutional rules they propound. And third, it does not take into account the ways in which our values as a society evolve over time as we learn from the mistakes of our past.”

Justice Breyer did not accuse the justices who use those methods of being political in the partisan sense or of acting in bad faith. But he said their approach represented an abdication of the judicial role, one in which they ought to consider a problem from every angle.

Court reform: Ethics and term limits

More than any other Court, the Roberts Court has become broiled in controversy over partisan decisions and ethical issues. As a results, there is now serious discussion of term limits.

Opinion: David Souter showed the Supreme Court how to free itself from politics

By Danielle Allen, WP, November 21, 2023

When the Supreme Court introduced a written code of ethics for itself last week, it took a small but helpful step in the direction of democracy renovation. But a bolder step awaits.

A cross-ideological supermajority of Americans thinks it’s time for Supreme Court justices to have term limits. The justices themselves could help us get there.

First, a word about what’s good in the code of ethics. Critics have noted the absence of an enforcement mechanism, but spelling out bedrock norms and publicly recommitting to them helps to rebuild the guardrails of democracy. Much like the “Chicago Principles” of free expression, the court’s code of ethics doesn’t say much that’s new. But saying things out loud matters. Publicly pledging matters.

To put it mildly, our culture is confused about basic norms for good behavior. Broadcasting those norms explicitly helps to change that. Demonstrated adherence will matter even more.

A healthy democracy cannot operate on enforcement mechanisms alone. The only way to stop sliding into a proliferation of investigative and enforcement functions — and further investigations of the investigators — is to establish robust norms for good behavior that people adhere to as a matter of their professional standing. I’m glad the court is willing to spell out its norms and take a public pledge.

But to term limits. At the end of October, the Our Common Purpose Commission that I co-chair at the American Academy of Arts and Sciences released a working group report explaining how we could achieve them for justices. While the Constitution establishes that members of Supreme Court are appointed to the federal bench for life, it would be constitutional, the study group argues, for justices to have their duties modified after 18 years to take them out of the court’s ordinary work of addressing the merits of cases. They could shift to alternative duties.

Take the case of David Souter. He was appointed in 1990 and “retired” in 2009 but continues to hear cases at the circuit-court level. Souter is the court’s George Washington.

Washington voluntarily chose not to run for reelection after two terms in office and thereby established a norm that presidents would serve only eight years. The norm held through the next 30 presidencies

and nearly 150 years, until it got busted by a world war. Franklin D. Roosevelt won a third term in 1940, and then a fourth in 1944, before dying in office. Thereafter, the 22nd Amendment formally established a two-term limit.

While Souter chose this modification of duties — and the timing permitted President Barack Obama to replace him with an ideologically similar justice in Sonia Sotomayor — the requirement that all justices shift off the court to modified duties after 18 years could be laid down by federal statute. With nine justices on staggered terms, each presidential term would carry the right to make two appointments.

The commission report spells out how we could transition to such a pattern. It also addresses the nuts and bolts of how staggered 18-year terms could work, given the role of the Senate in appointments, the possibility of midterm vacancies, and the like. There's a lot of technical detail so, suffice it to say, the working group concludes: This plan can work! And there's a strong case to be made that we don't need a constitutional amendment to do it.

The first canon of the new code of ethics is this: "A Justice of the Supreme Court of the United States should maintain and observe high standards of conduct in order to preserve the integrity and independence of the federal judiciary."

How better could our nine justices "preserve the integrity and independence of the federal judiciary" than by voluntarily embracing a practice of rotating off the Supreme Court bench to other duties after 18 years, so as to routinize the appointment process and lessen the role of politics and elections in their selection?

Oyez, oyez, oyez: Justices, hear the voice of George Washington. You, like him, have the power to set us on the right course.

Opinion | The Supreme Court Reform that Could Actually Win Bipartisan Support

It's time to impose term limits on the justices.

By Jeffrey L. Fisher, Politico, July 21, 2022

The Supreme Court's most dramatic term in decades has reignited calls for various types of court reform. Many proposals have an overt, or at least implicit, partisan slant. Progressives, after all, are searching for ways to blunt the court's sharp rightward shift.

There is one idea, though, that has longstanding bipartisan support, a proven record of success, and practical wisdom behind it: term limits. Imposing term limits on Supreme Court justices would be good for the country and the court. It would help ease the bitterness of the confirmation process and make the court more representative of the public's views. And while conservatives might currently balk in light of their 6-3 majority, it's a change that would not necessarily advantage either side over the long run.

The most common version of this reform contemplates justices serving nonrenewable 18-year terms, staggered so that one term ends every two years. This would mean that presidents would get to nominate new justices in the first and third years of their own administrations. Retirements and nominations would occur like clockwork. The result would be a court whose membership, at any given time, would reflect the selections of the past 4 1/2 presidential administrations.

Because Article 3 of the Constitution confers life tenure upon all federal judges, term limits would likely require a constitutional amendment. Yes, constitutional amendments are hard to enact. We have not amended our Constitution since 1992, and we have done so only once in the past half-century. But there is reason — even in these politically polarized times — to believe that constitutional reform is possible.

The Supreme Court Is Playing a Dangerous Game

By Jamelle Bouie, Opinion Columnist, NYT, March 22, 2024

If the chief currency of the Supreme Court is its legitimacy as an institution, then you can say with confidence that its account is as close to empty as it has been for a very long time.

Since the court's decision *in Dobbs v. Jackson Women's Health Organization* nearly two years ago, its general approval with the public has taken a plunge. As recently as the last presidential election year, according to the Pew Research Center, 70 percent of Americans said they had a favorable view of the court. In the wake of Dobbs, that number dipped to 44 percent. Twenty-four percent of Democrats, according to Pew, said they approved of the Supreme Court.

In the latest 538 average, just over 52 percent of Americans disapproved of the Supreme Court, and around 40 percent approved.

Does the court know about its precipitous decline with much of the public? It's hard to say. It's easier to answer a related question: Does it care? If the recent actions of the conservative majority are any indication, the answer is no.

Over the past month, members of that majority have effectively rewritten the 14th Amendment to functionally shield Donald Trump from the constitutional consequences of his actions leading up to and on Jan. 6. They have taken up the former president's tendentious argument that he is immune to criminal prosecution for all actions taken while in office — postponing a trial and potentially denying the public the right to know, before we go to the polls in November, whether he is a criminal in the eyes of the law.

Most recently, the court allowed the State of Texas, governed by a cadre of some of the most reactionary conservatives in the country, to carry out its own immigration policy in contravention of both federal officials and the general precedent that it's the national government that handles the national border, not the states.

It is enough to make teachers and practitioners of constitutional law wonder, as my colleague Jesse Wegman noted last month, whether there's any reason to play the table as though it were still on the level — to continue to treat the court as if it were anything other than a partisan political institution.

Here I want to raise an additional point. It's not just the recent actions of the Supreme Court — including the corrupt conduct of some of its members — that jeopardize its legitimacy and political standing but also the circumstances under which this particular court majority came into being.

There is no way to look past the fact that five of the six members of the conservative majority on the Roberts court were nominated by presidents who entered office without the winds of a popular majority. John Roberts and Samuel Alito, the author of Dobbs, were placed on the court by George W. Bush, who entered office short of a popular vote win and on the strength of a contested Electoral

College victory. The other three — Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett — were nominated by Trump, who lost the national popular vote by more than two million ballots in 2016.

The three Trump justices bring additional baggage. Each one was nominated and confirmed in a show of partisan power politics. Gorsuch was the direct beneficiary of Senator Mitch McConnell's blockade of the seat held by Justice Antonin Scalia, who died early in 2016. Republicans, led by McConnell, then the Senate majority leader, refused to give President Barack Obama's nominee, Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit, a hearing in the Senate Judiciary Committee. It was the first time the Senate had simply ignored a president's nominee for the Supreme Court.

Kavanaugh was confirmed by a narrow vote of 50 to 48 (with one abstention and one absence) in the face of a credible accusation of sexual assault. Barrett was confirmed in flagrant violation of McConnell's own rule for Supreme Court nominations. To block Garland, McConnell said that it was too close to an election to move forward; to confirm Barrett, McConnell said that it was too close to an election to wait.

There is no question that the Supreme Court's ruling in *Dobbs* was the catalyst for its poor standing with the public. But the Dobbs majority owes itself to a garish Republican partisanship that almost certainly worked to weaken the political ground on which it stood in relation to the American people.

At the risk of sounding a little dramatic, you can draw a useful comparison between the Supreme Court's current political position and the one it held on the eve of the 1860 presidential election.

It was not just the ruling itself that drove the ferocious opposition to the Supreme Court's decision in Dred Scott v. Sandford, which overturned the Missouri Compromise and wrote Black Americans out of the national community; it was the political entanglement of the Taney court with the slaveholding interests of the antebellum Democratic Party.

Six of the seven justices in the majority were Democratic appointments. The one who wasn't, Samuel Nelson, was nominated by John Tyler, who was a Democrat before running on the Whig ticket with William Henry Harrison. Five of the justices were appointed by slave owners. At the time of the ruling, four of the justices were slave owners. And the chief justice, Roger Taney, was a strong Democratic partisan who was in close communication with James Buchanan, the incoming Democratic president, in the weeks before he issued the court's ruling in 1857. Buchanan, in fact, had written to some of the justices urging them to issue a broad and comprehensive ruling that would settle the legal status of all Black Americans.

The Supreme Court, critics of the ruling said, was not trying to faithfully interpret the Constitution as much as it was acting on behalf of the so-called Slave Power, an alleged conspiracy of interests determined to take slavery national. The court, wrote a committee of the New York State Assembly in its report on the Dred Scott decision, was determined to "bring slavery within our borders, against our will, with all its unhallowed, demoralizing and blighted influences."

The Supreme Court did not have the political legitimacy to issue a ruling as broad and potentially far-reaching as Dred Scott, and the result was to mobilize a large segment of the public against the court. Abraham Lincoln spoke for many in his first inaugural address when he took aim at the pretense of the Taney court to decide for the nation: "The candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of

the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers."

As much as ours is a dire moment for the future of the American republic, we can at least rest assured that we aren't living through 1857 or 1860 or 1861. Santayana notwithstanding, history does not actually repeat itself. But this Supreme Court — the Roberts court — is playing its own version of the dangerous game that brought the Taney court to ruin. It is acting as if the public must obey its dictates. It is acting as if its legitimacy is incidental to its power. It is acting as if cannot be touched or brought to heel.

The Supreme Court is making a bet, in other words, that it is truly unaccountable.

Upcoming cases

There are many major cases on the Supreme Court's docket this year. Two of these have already been decided; the remainder will most likely be decided around June, the customary time for the Supreme Court to announce decisions.

The biggest 2024 Supreme Court rulings so far, and what's still to come

By Ann E. Marimow and Nick Mourtoupalas, March 15, 2024, WP

In a Supreme Court term that coincides with the 2024 presidential primary season, the justices are at the center of many of the nation's most politically sensitive debates. At the top of the list is former president Donald Trump's eligibility to return to the White House, and a challenge to a key element of the criminal charges against him related to his efforts to overturn Joe Biden's 2020 election victory.

Also this term, abortion is back at the court, with one case involving access to the medication mifepristone, widely used to terminate pregnancies, and another focused on emergency abortion care at hospitals. Gun rights and state laws restricting social media companies from removing certain political posts or accounts are in the mix as well.

A trio of cases challenge the power of federal agencies, long a target of conservatives concerned about what they consider unaccountable government bureaucrats.

Here's a look at the major cases we are tracking from now until the end of the Supreme Court's term in June or early July. We will update the list as each case is decided, or as arguments are held in those that have not yet been heard.

Blocking critics on social media - DECIDED

O'Connor-Ratcliff v. Garnier and *Lindke v. Freed*

What they ruled: Public officials can be liable for blocking or deleting critics from their social media accounts — but only when they are acting in an official capacity and with "actual authority" to speak on behalf of the government. In a pair of unanimous decisions issued March 15, the court said public officials are still private citizens with their own constitutional rights.

Why it matters: Lower courts have been divided over how to determine when government employees are acting in an official capacity online and are therefore bound by First Amendment restrictions on censorship, and when they are acting as private citizens, with individual free speech rights.
The Supreme Court decisions set the rules for interactions between the government and its citizens, who are increasingly relying on popular social media platforms to access public officials and critical community information.

Donald Trump ballot eligibility - DECIDED

Donald J. Trump v. Norma Anderson

What they ruled: Colorado cannot disqualify Trump from election ballots because of his actions before and during the Jan. 6, 2021, attack on the Capitol. In a decision issued March 4, the justices said the Constitution does not permit a single state to bar a presidential candidate from national office, declaring that such responsibility "rests with Congress and not the states."

Why it matters: The Colorado Supreme Court and judges or officials in a few other states had ruled that Trump could be barred from returning to office under Section 3 of the 14th Amendment to the U.S. Constitution. The post-Civil War era provision was intended to prevent Confederate leaders from returning to positions of power and has rarely been invoked in modern times. Had it been applied to Trump, who is again running for president, it would have upended the 2024 election by keeping the Republican front-runner off the ballot.

Prosecuting Trump for trying to block the 2020 election results

Trump v. United States

Oral argument: Week of April 22

What's at stake: Whether Trump is immune from prosecution for his alleged efforts to stay in power by overturning Joe Biden's election victory. Trump's unprecedented claim that presidents cannot be criminally charged for acts they took while in the White House will directly impact whether he goes on trial in D.C. on election-obstruction charges. It could also affect his separate trials in Florida and Georgia.

Charging Jan. 6 rioters and Trump with obstruction

Fischer v. U.S.

Oral argument: April 16

What's at stake: Whether prosecutors properly charged hundreds of Jan. 6 defendants and Trump using a law that makes it a crime to obstruct or impede an official proceeding — in this case, the disruption of Congress's certification of Biden's 2020 election victory.

Background: The case concerns whether a law written in the wake of the Enron scandal, which involved document-shredding by the company's accountants, can be used to prosecute some of the Jan. 6 rioters. If the court rules the law does not apply to efforts to block the election results, that probably would invalidate at least one of the charges Trump faces in his federal election-obstruction case in Washington.

Guns for suspected domestic abusers

U.S. v. Rahimi

Oral argument: Held Nov. 7

What's at stake: Whether a law disarming individuals subject to domestic-violence protective orders violates the Second Amendment.

Background: At oral argument in November, the justices seemed poised to allow the ban on gun possession for people who are subject to domestic-violence protective orders. Such a decision would be among the first to show the limits of New York State Rifle & Pistol Assoc. v. Bruen, the court's historic 2022 decision expanding the rights of gun owners. It requires the government to point to historical analogues when defending gun restrictions.

Bump stock ban

Garland v. Cargill

Oral argument: Held Feb. 28

What's at stake: Whether a federal ban on bump stocks — which, when attached to rifles, speed up how quickly bullets can be fired — is permitted under federal law.

Background: The Trump administration announced the ban after a Las Vegas gunman used the devices in 2017 to kill dozens of people in the deadliest mass shooting in modern U.S. history. The Biden administration is defending the rule, asserting that bump stocks fit the legal definition of machine guns, banned since 1986. At oral argument, several justices expressed concern about the carnage bump stocks can bring. But they were divided on whether the machine gun ban applies to the devices.

Abortion medication restrictions

FDA v. Alliance for Hippocratic Medicine

Oral argument: March 26

What's at stake: Whether to restrict access to a key abortion medication used in more than half of all U.S. abortions and first approved by the Food and Drug Administration in 2000.

Background: A lower-court ruling would make it harder to obtain mifepristone, part of a two-drug regimen used to terminate pregnancies. Abortion medication has increased in importance as more than a dozen states have restricted or banned abortion since the Supreme Court overturned Roe v. Wade in 2022.

Emergency room abortions

Idaho v. U.S.

Oral argument: April 24

What's at stake: Whether a federal law requiring emergency room care for life-threatening cases means ER doctors in states with strict abortion bans must nevertheless terminate pregnancies in certain circumstances.

Background: After the Supreme Court eliminated the nationwide right to abortion in 2022, the Biden administration turned to a Medicare law as a narrow way to challenge state-level abortion bans in federal court. The Emergency Medical Treatment and Active Labor Act requires hospitals receiving Medicare funds to treat or transfer patients with emergency medical conditions regardless of ability to pay. The case will test whether that mandate also applies to emergency abortion care.

Limits on social media posts

NetChoice, LLC v. Paxton and *Moody v. NetChoice, LLC*

Oral argument: Held Feb. 26

What's at stake: Whether the First Amendment allows states to restrict social media companies from removing certain political posts or accounts.

Background: At oral argument, justices seemed skeptical that the First Amendment permits state governments to set rules for how social media companies such as Facebook and YouTube curate content. Even as justices expressed concern about the power of the platforms over public debate, a majority appeared likely to block Texas and Florida lawspassed in 2021. The court's review of the

laws is the highest-profile examination to date of allegations that Silicon Valley companies illegally censor conservative viewpoints.

White House asking social media companies to remove misinformation

Murthy v. Missouri

Oral argument: March 18

What's at stake: Whether the Biden administration violated the First Amendment in its contacts with social media companies about public health and election misinformation.

Background: A lower court ruled it is likely that top government officials violated the First Amendment by improperly pressuring tech companies to take down what they saw as problematic posts about public health and election-related disinformation. Republican attorneys general in Louisiana and Missouri initiated the lawsuit, which raises significant and novel questions about how free speech protections apply online, with implications for how government officials interact with social media companies and communicate with the public on the popular platforms.

Power of federal agencies

Loper Bright Enterprises v. Raimondo and *Relentless, Inc. v. Dept. of Commerce*

Oral argument: Held Jan. 17

What's at stake: Whether courts must continue to defer to the reasonable interpretations of agency officials enforcing ambiguous federal statutes. Conservatives concerned about the power of the administrative state want to limit the discretion of agency officials and allow courts to interpret laws regulating the environment, the workplace, public health and financial markets.

Background: The court is being asked to overturn a long-standing precedent that set the framework for evaluating agency action known as "Chevron deference," from a 1984 case, Chevron U.S.A. v. Natural Resources Defense Council. While the Supreme Court has not invoked Chevron in recent years, lower courts still rely on it. The court's conservative majority seemed inclined during argument to overturn or significantly scale back Chevron, which could weaken the government's ability to regulate vast swaths of American life.

Consumer Financial Protection Bureau

Consumer Financial Protection Bureau v. Consumer Financial Services Association of America

Oral argument: Held Oct. 3

What's at stake: Whether the statute that provides funding to the Consumer Financial Protection Bureau violates the Constitution's Appropriations Clause.

Background: The agency was created by Congress in response to the 2008 financial crisis, putting scattered federal consumer protections under one structure. A lower-court ruling said the funding mechanism Congress adopted to ensure the CFPB's independence violates the Constitution. At oral argument, a majority of justices seemed skeptical of the broad challenge, including some conservatives who wondered if the lower court went too far.

SEC tribunals

Securities and Exchange Commission v. Jarkesy

Oral argument: Held Nov. 29

What's at stake: Whether in-house legal proceedings used by the Securities and Exchange Commission to discipline those accused of committing fraud are unconstitutional.

Background: A lower court ruled the SEC's in-house tribunals violate the Constitution's Seventh Amendment right to a jury trial, that Congress exceeded its power in allowing such tribunals and that the job security provided to administrative law judges who hear such cases infringed on the executive branch's prerogatives. A broad decision could cast doubt on the work administrative law judges do across the federal government, but the justices critical of the SEC procedures seemed to be looking for a more narrow resolution during oral argument.

Opioid lawsuit settlement

Harrington v. Purdue Pharma

Oral argument: Held Dec. 4

What's at stake: The legality of a proposed Purdue Pharma bankruptcy plan that would allocate billions of dollars to help ease the nation's opioid crisis but shield the family that owns the company from future lawsuits.

Background: The legal issue before the court is whether, according to federal bankruptcy laws, the Sackler family can be spared from future opioid-related litigation by those who do not consent to give up their rights to sue. Purdue attorneys and the vast number of parties that agreed to the deal see it as the best hope of ending years of legal disputes and recovering at least a portion of their claims. The Justice Department opposes the plan and says another settlement could be worked out that doesn't necessarily involve releases or bankruptcy.

Voting maps

Alexander v. South Carolina State Conference of the NAACP

Oral argument: Held Oct. 11

What's at stake: Whether South Carolina's redrawn congressional map is an illegal racial gerrymander.

Background: A lower court found that South Carolina's newcongressional map "exiled" 30,000 Black voters to create a district safer for a White Republican incumbent. The justices are considering whether the maps violated the Constitution's bar on using race as an unjustified and predominant factor in drawing districts.

Employment discrimination

Muldrow v. City of St. Louis

Oral argument: Held Dec. 6

What's at stake: Whether Title VII, a federal civil rights law, specifically prohibit all discrimination in job transfer decisions.

Background: The issue for the justices is whether the statute requires an additional showing in court by the employee that the involuntary move caused a significant disadvantage, such as harm to career prospects or a change in salary or rank. At oral argument, the justices seemed prepared to make it easier for workers to pursue their employment discrimination claims.

Homeless encampments in public spaces

City of Grants Pass, Oregon v. Gloria Johnson

Oral argument: April 22

What's at stake: Whether state and local officials can punish homeless individuals for camping and sleeping in public spaces when shelter beds are unavailable.

Background: A lower court declared it unconstitutional to enforce anti-camping laws against homeless individuals when they have nowhere else to sleep. Democratic leaders in cities on the West Coast say the ruling has made it more difficult to address safety and public health risks created by tents and makeshift structures. Lawyers for the homeless individuals say their clients are being punished for the involuntary status of being homeless.

Trump tax cut

Moore v. U.S.

Oral argument: Held Dec. 5

What's at stake: A challenge to a provision of Trump's 2017 tax package. Experts say invalidating the provision could destabilize the nation's tax system and preemptively block Congress from creating a wealth tax.

Background: The justices are considering whether a one-time tax on offshore earnings that helped pay for Trump's massive tax cuts is permitted under the limited powers of taxation that the Constitution grants Congress. At oral argument, justices from across the ideological spectrum seemed skeptical of the challenge brought by a Washington state couple and backed by an anti-regulatory advocacy group.

Downwind industrial pollution

Ohio v. EPA, Kinder Morgan Inc. v. EPA, American Forest & Paper Assn. v. EPA, U.S. Steel Corp. v. EPA

Oral argument: Feb. 21

What's at stake: The court is reviewing the Biden administration's plan to limit smog-forming pollutants from power plants and other industrial facilities that cause problems for their downwind neighbors in other states.

Background: At oral argument, the conservative majority seemed poised to halt the Environmental Protection Agency's effort to cut emissions from power plants and factories to reduce pollution that blows into neighboring states, a setback to an ambitious federal initiative to cut lung-damaging smog. The initiative was challenged by three Republican-governed states and industry groups, who said they could not bear the cost and questioned whether the program would work, especially because some states have been excluded by other legal challenges.