

CONSEQUENCES AND THE SUPREME COURT

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ABSTRACT—May the Supreme Court consider consequences when it decides the hard cases that divide us? The conventional wisdom is that it may not. Scholars have argued, for example, that consequentialism is a paradigmatic “anti-modal” form of reasoning at the Court. And the Court itself has declared that “consequences cannot change our understanding of the law.”¹

This Article presents evidence of a possible shift in the standard account. Although many kinds of consequentialist arguments remain forbidden, such as naked judicial efforts to maximize social utility, a particular form of consequentialism is now surprisingly common when the Supreme Court confronts hard cases. In the past few years, the Court has issued no fewer than a dozen opinions in which it expressly identifies the potential adverse consequences of its decision, predicts how losing groups may respond, and rules in a manner that ensures those losing groups will have meaningful options for avoiding their consequences after defeat. What is more, this consequentialist turn is transsubstantive, occurring in constitutional, statutory, and administrative law cases alike.

After canvassing these rulings, this Article invites debate on whether consequentialist reasoning truly ought to be categorically forbidden in the Supreme Court’s express decision-making process. Some may have the instinct that even the slightest peek through to the consequences of the Court’s decisions is impermissible, a threat to the distinctive methods and professional practices that differentiate law from raw politics. But open attention to harmful consequences—and the ways in which losing groups might avoid them—can serve salutary aims, too. In particular, a genuine concern for the consequences that its rulings threaten to inflict might help the Supreme Court make meaningful inroads against the mounting public perception that the Court is callous, elitist, and out of touch.

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¹ United States v. Davis, 139 S. Ct. 2319, 2355 (2019).

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INTRODUCTION

One of the most familiar refrains about legal reasoning at the Supreme Court is that consequences do not matter. “[R]aw consequentialist calculation,” the Court has confidently announced, “plays no role in our decision.”² Or as Justice Scalia once explained in characteristically colorful fashion, “I do not think . . . that the avoidance of unhappy consequences is adequate basis for interpreting a text.”³

The Court’s professed skepticism of consequentialist argument is visible in a pair of its most high-profile recent cases. In *Dobbs v. Jackson Women’s Health Organization*, a five-Justice majority wrote that “even if we

² *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).

³ *Nixon v. Mo. Mun. League*, 541 U.S. 125, 141 (2004) (Scalia, J., concurring).

could foresee what will happen [after overruling *Roe* and *Casey*], we would have no authority to let that knowledge influence our decision.”⁴ And in *New York State Rifle & Pistol Ass’n v. Bruen*, the Court declined to apply means–end scrutiny to New York’s public carry licensing law, precluding the state from defending its gun-safety measure on the ground that it had no meaningful alternatives to prevent the harmful effects of gun violence.⁵ It is nearly impossible to think about the debates over abortion and gun safety without considering their real-life consequences for people. Yet in both cases, that is exactly what the Supreme Court purported to do.

The belief in the impermissibility of consequentialist legal reasoning is deeply held and pervasive. In a recent article, for example, Professors David Pozen and Adam Samaha place consequentialist argument high on their list of constitutional law’s *anti-modalities*, or kinds of argument that, although relevant to disputes as a practical matter, are as a legal matter widely known to be “out of bounds by most well-trained lawyers.”⁶ For as Pozen and Samaha explain, “[r]igorous consequential inquiry would expose a constitutional decisionmaker to charges of making an illegitimate policy argument.”⁷ To be sure, jurists may occasionally try to sneak in such reasoning using “tendentious analogies” and “highly speculative or ad hoc assertions.”⁸ But they cannot “explicitly predict[] . . . the range of consequences associated with various interpretive options,” “work through the practical advantages or disadvantages” of each option, “consider[] counterfactuals,” and then choose the outcome that avoids the worst consequences.⁹ To do so, Pozen and Samaha conclude, would not only be “unheard of in constitutional law”; it would “immediately elicit suspicion that the anti-modality boundary had been breached.”¹⁰

Pozen and Samaha wisely observed that as constitutional practice shifts over time, so too should our understanding of what counts as modal or anti-modal in legal argument.¹¹ This Article presents potential evidence of one such shift. It suggests that even while the Court continues to issue periodic disclaimers to the contrary, a particular kind of overt consequentialist

⁴ 142 S. Ct. 2228, 2279 (2022).

⁵ See 142 S. Ct. 2111, 2129 (2022).

⁶ David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 739–40 (2021).

⁷ *Id.* at 734.

⁸ *Id.*

⁹ *Id.* at 750.

¹⁰ *Id.*

¹¹ See *id.* at 743 (“[T]he modalities and anti-modalities evolve.”). Note that Pozen and Samaha wrote specifically about the anti-modalities of *constitutional law*, but that they recognized the applicability of their arguments to non-constitutional reasoning too. See *infra* note 59.

argument may well have moved from “off the wall” to “on the wall” at the Supreme Court.¹² Consider a few examples from recent terms.

In *Trump v. Vance*, the Supreme Court rejected President Trump’s effort to block enforcement of a subpoena filed by the New York County District Attorney’s office seeking his financial records.¹³ The Court did not rest solely on standard modes of reasoning, such as textual, historical, and doctrinal arguments. Instead, the Court also made explicit predictions about the consequences of its ruling. The Court thus recognized that if the subpoena were enforced, the President might suffer “diversion, stigma, and harassment.”¹⁴ Conversely, if the subpoena were blocked, the district attorney could be “deprived of investigative leads” that the President’s records might yield.¹⁵ From there, the Court made a crucial move: it asked which side, if it lost, would be better able to *avoid* its harmful consequences. So, whereas the President could still avoid stigma and harassment through a range of state law and constitutional defenses, a defeat for the district attorney’s office would inescapably “hobble” its ability to identify and prosecute wrongdoers.¹⁶ The Court thus ruled for the district attorney precisely because doing so would produce more avoidable—and ultimately less harmful—consequences.

In *Niz-Chavez v. Garland*, the Court held that to trigger a statutory rule denying relief to a removable immigrant, the government must send the immigrant a single “notice to appear” document that includes all the statutorily prescribed information, not multiple documents each with just some of the information.¹⁷ The Court candidly described the consequences of a ruling in either direction. A decision against the government could “prove[] taxing over time” because “producing compliant notices” is often “administrative[] inconvenien[t].”¹⁸ Yet a ruling against Mr. Niz-Chavez would mean “someone who may be unfamiliar with English” could be sent “a series of letters” over many years, “each containing a new morsel of vital information,” all of which could be lost or misunderstood to an immigrant’s great detriment.¹⁹ The Court then reasoned that the consequences of a ruling against the government would be easier to avoid: rather than facing some “insurmountable chore,” the government could simply serve a single,

¹² See JACK M. BALKIN, *LIVING ORIGINALISM* 294, 306 (2011) (describing how constitutional understandings can move from off the wall to on the wall over time).

¹³ 140 S. Ct. 2412, 2431 (2020).

¹⁴ *Id.* at 2425–29.

¹⁵ *Id.* at 2430.

¹⁶ *Id.*

¹⁷ 141 S. Ct. 1474, 1486 (2021).

¹⁸ *Id.* at 1485.

¹⁹ *Id.*

“compliant notice to appear [and then] send a supplemental notice amending the time and place of [a] hearing if logistics require a change.”²⁰ So the Court ruled in Mr. Niz-Chavez’s favor.

In *Bostock v. Clayton County*, the Court held that Title VII forbids employers to discriminate on the basis of sexual orientation or transgender status.²¹ Much ink has been spilled on *Bostock*’s contested textualist analysis,²² but the case did not rest on textualism alone. The Court also grappled explicitly with the harmful consequences of its ruling. The Court thus acknowledged that complying with Title VII’s prohibition against sexual orientation and transgender discrimination “may require some employers to violate their religious convictions”—a possibility the Court found “deeply concern[ing].”²³ But the Court explained that employers could avoid this worrisome consequence by seeking exemptions from Title VII under the Free Exercise Clause and Religious Freedom Restoration Act—requests that would merit “careful consideration” in future cases.²⁴

In *Department of Homeland Security v. Regents of the University of California*, the Court invalidated the Trump Administration’s effort to rescind the Deferred Action for Childhood Arrivals policy (DACA) because the administration failed to “provide a reasoned explanation for its action.”²⁵ The Court recognized that this would produce harmful consequences for the Administration, undoing a significant prior policy choice.²⁶ But the Court took pains to describe how its decision left the Trump Administration “considerable flexibility” to avoid this consequence simply by rescinding DACA again with a better explanation.²⁷ Indeed, the Court even offered several examples of arguments that the Administration could make in a future rescission memo, such as reasons why DACA recipients might have been unjustified in relying on the program’s benefits.²⁸

In each of these cases (and others discussed below), the Court made a series of key consequentialist moves. First, the Court carefully identified the harmful consequences that different legal rulings would impose on losing litigants. Second, rather than directly comparing those consequences to identify a welfare-maximizing outcome, the Court predicted the various

²⁰ *Id.*

²¹ 140 S. Ct. 1731, 1737 (2020).

²² See *infra* note 163.

²³ *Bostock*, 140 S. Ct. at 1753–54.

²⁴ *Id.* at 1754.

²⁵ 140 S. Ct. 1891, 1916 (2020).

²⁶ See *id.* at 1910 (“[D]eciding how best to address a finding of illegality moving forward can involve important policy choices, especially when the finding concerns a program with the breadth of DACA.”).

²⁷ *Id.* at 1914.

²⁸ *Id.*

ways the litigants themselves might be able to respond to an adverse decision. And finally, the Court ruled in a manner consistent with these predictions, assuring itself that the losing side would possess meaningful options for avoiding its harm. A surprising number of the Court's recent decisions thus challenge Justice Scalia's truism: they treat the avoidance of unhappy consequences, *by the parties themselves*, as not merely a legitimate ground for decision, but a powerful one.

In a prior article, I identified the roots of this analytical approach in a modest set of constitutional cases dating back to the 1970s.²⁹ I called the approach "harm-avoider constitutionalism" in an attempt to capture the Court's conscious, albeit episodic effort to decide difficult cases against the side with the greatest ability to avoid its harms.³⁰ The present Article builds on harm-avoider constitutionalism in two significant respects.

First, it shows how the Court uses harm-focused, consequentialist reasoning with surprising frequency across a range of case types. As to frequency, the Court has issued roughly a dozen high-profile decisions since 2020 that engage in explicit argumentation over the likely consequences of its rulings and how losing groups may respond to avoid them.³¹ The Court's consequentialist rulings also transcend constitutional law, extending into statutory interpretation and administrative law disputes. In this sense, what I earlier called harm-avoider constitutionalism is actually just one field-specific application of a general, harm-avoider theory of legal decision-making that this Article begins the work of uncovering. I've suggested the "least harm principle" as a label for this broader theory elsewhere,³² and I use that term here too. Under this principle, the Court minimizes the harmful consequences of its decisions across constitutional, statutory, and administrative law by ensuring that the losing side possesses meaningful post-defeat options for avoiding its harm.

Second, this Article develops and responds to an important argument against the least harm principle, one that I did not fully appreciate in earlier writing. In *Harm-Avoider Constitutionalism*, I set forth a provisional

²⁹ Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1860–69 (2021) (identifying a handful of constitutional rulings starting in the 1970s that drew on arguments about the losing side's ability to avoid its harm).

³⁰ *See id.* at 1879 (recognizing that the Court's use of harm-avoider constitutionalism has been "more informal and episodic than formal and systematic").

³¹ *See infra* Part II.

³² *See* Aaron Tang, *The Simple Principle that Can Fix American Law*, ATLANTIC (Apr. 2, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/moderate-legal-philosophy-does-not-exist/618430/> [<https://perma.cc/VZ8X-YWRV>]; Aaron Tang, *(Threaten) to Pack the Courts*, N.Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-packing.html> [<https://perma.cc/LED8-WS3G>].

normative case in favor of the Court’s conscious consideration of competing litigants’ ability to avoid their harms.³³ But this approach is vulnerable to the charge of being little more than “an illegitimate policy argument,” the kind of argument that is understood to be “out of bounds in debates over constitutional meaning.”³⁴

Thus, in this Article I seek to show that harm-avoider reasoning *is* in bounds, at least if one considers the Supreme Court’s own argumentative practice to be a meaningful indicator of what is permissible within our legal community.³⁵ The Court’s practice, however, suggests harm-avoider reasoning is in bounds in a particular way: it is acceptable only in hard cases where other modes of legal argument underdetermine a law’s meaning. In this sense, the cases described in this Article suggest a possible implication for the modal–anti-modal dichotomy that Pozen and Samaha have advanced. Some forms of argument, such as the least harm principle, might be anti-modal when it comes to the first-order question of determining a law’s meaning. But once that meaning is found to be unclear, those same arguments may reenter the fray with modal status—much like how a statute’s title or legislative history may be used to resolve ambiguities in a statutory interpretation case.³⁶ The widely accepted nature of these kinds of arguments suggests the existence of *contingent modalities*, or forms of argument that are permitted to pick up only when and where first-order modes of legal interpretation run out.³⁷

³³ See Tang, *supra* note 29, at 1893–1901.

³⁴ Pozen & Samaha, *supra* note 6, at 731, 734.

³⁵ See Richard H. Fallon Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 47, 60–61 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (arguing for the significance of Supreme Court decisions to legal positivism); see also, e.g., Mark Tushnet, *Justification in Constitutional Adjudication: A Comment on Constitutional Interpretation*, 72 *TEX. L. REV.* 1707, 1709 & n.9 (1994) (observing that Professor Philip Bobbitt’s leading analysis of the modalities of constitutional argument is drawn “exclusively from an examination of Supreme Court decisions”).

³⁶ See, e.g., *Barnhill v. Johnson*, 503 U.S. 393, 401 (1992) (observing that “appeals to statutory history are well taken only to resolve statutory ambiguity” (internal quotation marks omitted) (quoting *Toibb v. Radloff*, 501 U.S. 157, 162 (1991))); *FTC v. Mandel Bros.*, 359 U.S. 385, 388–89 (1959) (“The Title of the Act . . . though not limiting the plain meaning of the text, is nonetheless a useful aid in resolving an ambiguity.”).

³⁷ Analytically, these contingent modalities may be seen as mapping on to the debate over constitutional construction within modern academic originalism. See Pozen & Samaha, *supra* note 6, at 778. Within this frame, contingently modal arguments are those that would be inadmissible (and thus anti-modal) as a first-order question of determining the Constitution’s original public meaning, but admissible in cases where original meaning underdetermines a case and a decision-maker must resort to argumentation based on normative considerations. See, e.g., Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 472–73 (2013). I argue below, however, that the concept of contingent modalities has force in hard cases decided under any interpretive theory, not just originalism.

The Article proceeds in four Parts. Part I portrays the conventional view that rigorous consequentialist argument is forbidden at the Supreme Court. Part II complicates this view, canvassing a range of recent hard cases across constitutional, statutory, and administrative law in which the Court has explicitly relied, at least in part, on careful consequentialist reasoning. To be clear, I make no specific claim about the growth or relative frequency of this kind of reasoning over time; it could well be that the cases I identify are part of a longer trend, a fact that would bolster consequentialism's place in our legal grammar. Part II then explains how this consequentialism is of a very specific type. The Court does not calculate a welfare-maximizing outcome in some strict, utilitarian sense. Instead, it carefully analyzes whether the competing groups before it would possess strategies for avoiding the harmful consequences of defeat. The Court thus consciously considers the practical consequences of its rulings and seeks out a particular kind of advantage: decisions that produce the least amount of harm because the losing groups retain options for redress.

Part III considers some open questions that arise from the Court's least harm rulings, and Part IV grapples with the implications of this form of consequentialism, both for legal theory and the Court's own practice. It accepts as a starting point the powerful critique levied by Pozen and Samaha: the subversion of important forms of argument such as consequentialism to anti-modal status creates a troubling "resonance gap" between how the Court and the public think about pressing disputes.³⁸ That gap, Pozen and Samaha convincingly argue, contributes to the public's "alienation and mystification" vis-à-vis the Court.³⁹ For example, when the Court announces in a case such as *Dobbs* that it has "no authority" even to *consider* the harmful consequences of its ruling, it should come as little surprise that the public responds with dismay and distrust.⁴⁰ Embracing the least harm principle as a contingent modality might be a plausible way to bridge this gap. For by appreciating such consequentialist reasoning's anti-modal status as a first-order legal interpretive tool, while also admitting its deep-rooted normative appeal in hard cases, the Court could purport to do "law" without ignoring the kind of practical considerations that matter to ordinary Americans.

One final point warrants mentioning at the outset. In identifying some recent opinions in which the Court relied expressly on the existence of meaningful options that losing groups may use to avoid adverse consequences, I do not mean to suggest that the Court *always* does so. Far

³⁸ Pozen & Samaha, *supra* note 6, at 769.

³⁹ *Id.* at 786.

⁴⁰ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022); *infra* note 336.

from it. *Dobbs* and *Bruen* are just two recent examples of the Court's pointed refusal to grapple with the significant consequences of its rulings. The Court has been similarly uninterested in whether losing groups can avoid the harmful consequences of an adverse ruling in the context of voting rights.⁴¹

I want to suggest that the confluence of the Court's all-time low public-approval ratings and its lack of regard for losing groups' post-defeat options in these cases may be no coincidence.⁴² And by shining a light on other cases where the Court has grappled more openly with the consequences of its decisions, this Article hopes to show how doing so might help reduce public disaffection with the Court. For at the end of the day, the Court will never be able to issue decisions in hard cases that leave both sides feeling victorious. By ensuring that defeated groups retain meaningful ways to mitigate their harmful consequences, however, it *can* deliver outcomes in which the losers have more productive responses than assailing the Court's legitimacy. The first step to doing that is for the Court to openly and consistently admit that those consequences exist—and that they have a legitimate role to play in the resolution of difficult cases.

I. A CONSEQUENCE-FREE SUPREME COURT?

In 2019, the Supreme Court struck down a federal statute that imposed enhanced prison sentences on offenders who use or possess a firearm in the commission of a violent crime.⁴³ The Court divided 5–4 on the bottom-line question of whether the statute was unconstitutionally vague. But there was no divergence over the role of consequentialist reasoning in the Court's analysis. All nine Justices agreed that “the consequences cannot change our understanding of the law.”⁴⁴ Time and time again the Court has repeated this refrain across various fields of law.⁴⁵ “[I]t is not our task,” the Court wrote in a major 2010 decision expanding Title VII disparate impact liability, “to assess the consequences of each [possible statutory reading] and adopt the one that produces the least mischief.”⁴⁶

⁴¹ See *infra* note 344.

⁴² Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/SF6L-2RTD>].

⁴³ *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

⁴⁴ *Id.* at 2335 (quoting *id.* at 2355 (Kavanaugh, J., dissenting)).

⁴⁵ See, e.g., *id.* at 2335–36 (rejecting consideration of consequences in due process vagueness challenge); *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1542–43 (2021) (refusing to “assess the consequences” in a dispute over the meaning of federal removal statutes (quoting *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010)); *Lewis*, 560 U.S. at 217 (same for civil liability under Title VII); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (same for federal immigration law).

⁴⁶ *Lewis*, 560 U.S. at 217.

By and large, the legal academy shares this descriptive assessment. Professor David Pozen has noted, for example, that “results-oriented reasoning” is “taboo in constitutional argument.”⁴⁷ In the context of statutory interpretation, Professor Jane Schacter has observed that “textualism on the books conspicuously eschews the legitimacy of consequentialism.”⁴⁸ Even retired Judge Richard Posner, the academy’s foremost proponent of consequentialist reasoning,⁴⁹ has admitted that when it comes to the Supreme Court, “concern with the consequences of its decisions does not figure largely in the Court’s decisions.”⁵⁰

The leading recent account of the impermissibility of consequentialist legal reasoning comes in a groundbreaking paper by Professors David Pozen and Adam Samaha. In *Anti-Modalities*, Pozen and Samaha describe a broader conceptual framework within which American legal culture embraces the legitimacy of certain kinds of arguments while repudiating others. The former category of arguments are constitutional law’s *modalities*, a term first deployed in this field by Professor Philip Bobbitt.⁵¹ In Bobbitt’s view, these modalities are “ways in which legal propositions are characterized as true from a constitutional point of view,” and they include historical, textual, structural, doctrinal, ethical, and prudential arguments.⁵² But as Pozen and Samaha astutely observe, “investigations into the acceptable forms of argument tell only half the story.”⁵³ “A fuller account,” they continue, must also “consider the *anti-modalities* of constitutional law—the categories of reasoning that are employed in nonconstitutional debates over public policy and political morality but are considered out of bounds in debates over constitutional meaning.”⁵⁴

Consequentialist argument is one of these anti-modalities, located within the broader anti-modal category of policy arguments. Pozen and

⁴⁷ David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 944 (2016).

⁴⁸ Jane S. Schacter, *Text or Consequences?*, 76 BROOK. L. REV. 1007, 1009 (2011). *But see id.* (arguing that “textualism in action often uses strikingly consequentialist methods”).

⁴⁹ *See, e.g.*, RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 186 (2001) (arguing in favor of “adjudication guided by a comparison of the consequences of alternative resolutions of the case”); RICHARD A. POSNER, *OVERCOMING LAW* 253 (1995) (“The pragmatist places the consequences of his decisions in the foreground.”).

⁵⁰ Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 59 (2005).

⁵¹ PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12 (1991). Other influential accounts of various modalities of constitutional argument include Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189–90 (1987), and Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 244 (2018).

⁵² BOBBITT, *supra* note 51, at 12–13.

⁵³ Pozen & Samaha, *supra* note 6, at 731.

⁵⁴ *Id.*

Samaha associate consequentialism with the forbidden notion of “results-oriented” reasoning, or reasoning in which “outcomes [are] dictated by an instrumentalist inquiry into the welfare effects or distributional implications of a disputed government action or legal rule.”⁵⁵ More specifically, they argue that “explicitly predicting, valuing, or quantifying the range of consequences associated with various interpretive options remains essentially unheard of in constitutional law.”⁵⁶ Thus, “[a]ny sustained effort to work through the practical advantages or disadvantages of a constitutional proposition,” such as by “specifying a social-welfare function, rank-ordering alternatives, running regressions, [or] considering counterfactuals . . . would immediately elicit suspicion that the anti-modality boundary had been breached.”⁵⁷ Put simply, “constitutional law does not avail itself of—indeed does not allow—rigorous consequentialist inquiry of any sort.”⁵⁸ And something similar can be said about statutory interpretation, a field in which the Court has frequently disparaged consequentialist argument.⁵⁹

Not everyone shares this bleak assessment of consequentialism, to be sure. Some disagree as a normative matter. Judge Posner, for example, has argued that a “pragmatic approach” that “asks judges to focus on the practical consequences of their decisions” may possess “certain advantages” over the existing alternatives.⁶⁰ The fervent critiques that Judge Posner’s claims have invited, however, may serve more to confirm than disrupt the anti-modal status of consequentialist legal argument.⁶¹

⁵⁵ *Id.* at 748.

⁵⁶ *Id.* at 750.

⁵⁷ *Id.*

⁵⁸ *Id.* at 734. It could be that what Pozen and Samaha find particularly anti-modal is the use of consequentialist argumentation as a tool for identifying the law’s meaning or contents, but not its use at the level of choosing or applying a given decision rule. If so, their claim to consequentialism’s anti-modal status need not conflict with my project because the least harm principle is avowedly not aimed at uncovering the law’s correct meaning. I am thankful to Mitch Berman for this important observation.

⁵⁹ See *supra* text accompanying notes 43–46. Pozen and Samaha focus on constitutional law’s anti-modalities, but they rightly recognize that “[m]ore or less standardized logics appear in various nonconstitutional fields,” such that their anti-modalities “might therefore be exported well beyond the constitutional context.” Pozen & Samaha, *supra* note 6, at 766; see also *id.* at n.181 (“[T]he field of statutory interpretation in recent decades has arguably turned away from policy argument in the form of openly consequentialist claims . . .”).

⁶⁰ Posner, *supra* note 50, at 90.

⁶¹ See, e.g., Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html> [<https://perma.cc/23YP-MYC7>] (quoting Judge Posner as declaring that under his pragmatic approach, he “pay[s] very little attention to legal rules, statutes, constitutional provisions”—an approach his critics described as “lawless”); Ronald Dworkin, *Darwin’s New Bulldog*, 111 HARV. L. REV. 1718, 1718 (1998) (critiquing Posner’s arguments as “spectacularly unsuccessful”); Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 583 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)) (arguing

Others disagree with the descriptive accuracy of the claim that the Supreme Court eschews consequentialism in its decisions. One camp argues that the Justices are surely engaged in some form of results-oriented reasoning at least *implicitly*, in the sense that subconscious cognitive biases affect us all. Professor Dan Kahan has thus argued that the Court’s efforts to display “neutrality in constitutional decisionmaking” are “routinely subvert[ed]” by “the phenomenon of motivated reasoning,” or “the tendency of people to unconsciously process information . . . to promote goals or interests extrinsic to the decisionmaking task at hand.”⁶² Taking this argument a step further, Professor Eric Segall has provocatively argued that the “Supreme Court does not function as a true court and its Justices do not decide cases like true judges” because the Court’s rulings merely “reflect the personal values of the Justices.”⁶³

These charges of implicit consequentialism no doubt ring true at some level, and they are vitally important in their own way. But I want to leave them to one side in this Article to focus on a different puzzle generated by the explicit reasons the Court offers in its rulings. For unless one adopts the view that these stated reasons are irrelevant and meaningless, always and everywhere, then the Court’s avowed rationales have implications for our legal culture and the broader public’s relationship with the Court—what Professor Richard Fallon Jr. has described as the Court’s “sociological legitimacy.”⁶⁴ There is little doubt, in other words, that the public cares about the consequences of Supreme Court rulings.⁶⁵ So we should also care if the

that Judge Posner’s “proposed methodology of constitutional pragmatism, in addition to being hard to defend as a matter of democratic legitimacy, also seems unpragmatic on its own terms”).

⁶² Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011).

⁶³ ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES*, at ix (2012). Similar arguments pervade the political science and legal-realist literature. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (arguing that Supreme Court Justices largely vote in accordance with their policy preferences); Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 50–52 (Martin P. Golding & William A. Edmundson eds., 2005) (describing the legal-realist view that courts “*really* decide cases . . . not primarily because of law, but based (roughly speaking) on their sense of what would be ‘fair’ on the facts of the case”). Professor Neal Devins has argued that some state supreme courts engage in consequentialist reasoning too, in large part motivated by a desire to avoid the backlash of unpopular rulings. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1654–55 (2010).

⁶⁴ RICHARD H. FALLON JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 21 (2018) (defining “sociological legitimacy” as “prevailing public attitudes toward governments, institutions, or decisions”).

⁶⁵ *See, e.g.*, JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 43 (2009) (arguing that “the repeated failure of an institution to meet policy expectations can weaken and even destroy that institution’s legitimacy in the eyes of disaffected groups”).

Court publicly claims that careful attention to those same consequences is truly a forbidden mode of legal decision-making.

Another camp of scholars has argued that consequentialist reasoning actually isn't forbidden. Professor Alex Aleinikoff has famously argued that the Court routinely decides constitutional cases through a process of interest balancing.⁶⁶ Under Aleinikoff's definition, this process smacks of overt consequentialism: a "balancing opinion" is one that "identif[ies] interests implicated by the case and reaches a decision" by "explicitly or implicitly assigning values to the identified interests."⁶⁷ Cases such as *Mathews v. Eldridge* and its progeny, which explicitly weigh the private and governmental interests at issue, are paradigmatic examples.⁶⁸

Professor Bobbitt's descriptive account of the Court's decision-making process is likewise in tension with consequentialism's anti-modal status. One of his accepted modalities of constitutional argument is "prudential argument," which he defines as "constitutional argument which is actuated by the political and economic circumstances surrounding the decision."⁶⁹ If Bobbitt is right about prudential argument's place within our legal culture, then it's hard to see how consequentialism could be anti-modal. For as Bobbitt argues, prudential reasoning involves a "calculation of the necessity of the act against its costs."⁷⁰

⁶⁶ T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 995 (1987) ("[B]alancing has burrowed so deeply into everyday views of the Constitution that it often is regarded as the inevitable method for deciding a constitutional case.").

⁶⁷ *Id.* at 945.

⁶⁸ 424 U.S. 319, 340 (1976); *see also, e.g.*, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981) (requiring balancing "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions"). This kind of balancing analysis is also discernible in proportionality review, an approach more common outside U.S. constitutional law. *See* JAMAL GREENE, *HOW RIGHTS WENT WRONG* 110 (2021) (describing the balancing analysis commonly called for in proportionality review's third and final step). Cost-benefit analysis is also discernible in other pockets of the law. *See, e.g.*, Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1654 (2001) (describing statutory construction rules permitting agencies to balance regulatory benefits against costs); Herbert Hovenkamp, *Antitrust Balancing*, 12 N.Y.U. J. L. & BUS. 369, 370 (2016) (describing and critiquing certain forms of balancing in antitrust cases).

⁶⁹ PHILIP BOBBITT, *CONSTITUTIONAL FATE* 61 (1982); *see also* Jamal Greene, *Interpretation*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 887, 900 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) (arguing that "[a]ttention to considerations such as the standing of the Court, the political or economic consequences for the nation, relations with foreign governments, and the like supplies reasons to interpret the Constitution in specific ways").

⁷⁰ BOBBITT, *supra* note 69, at 61. Bobbitt also celebrates the prudential "passive virtues" famously endorsed by Professor Alexander Bickel in *The Least Dangerous Branch*, virtues that include voting to deny certiorari and the use of standing, ripeness, and political question doctrines to "abstain from rendering constitutional judgment." *Id.* at 66–67 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 116 (1962)). Insofar as these

Pozen and Samaha candidly acknowledge these competing portrayals of consequentialist reasoning.⁷¹ “Even as all sides in constitutional debates disavow the anti-modalities,” they observe, “arguments that appear anti-modal in some respects crop up constantly.”⁷² But to use anti-modal arguments, Pozen and Samaha point out, forbidden rationales such as consequentialism must “return[] in diluted and disguised incarnations.”⁷³ Thus, for example, the procedural due process interest-balancing test announced in *Mathews v. Eldridge* is disguised in subsequent cases as a *doctrinal* argument that enjoys modal status rather than as an express appeal to consequentialism.⁷⁴ And instead of directly “investigating the first-order welfare implications of competing constitutional propositions,” the Court waters down its consequentialist analysis so that it merely considers secondary issues such as the “workability, administrability, and manageability” of the Court’s own rules.⁷⁵ Pozen and Samaha thus do not dispute claims that consequentialism has wound its way into the Court’s thinking. They argue instead that to protect itself from charges of naked results-oriented reasoning, the Court does consequentialist analysis on the down-low, without any kind of systematic rigor.⁷⁶

I want to suggest that Pozen and Samaha are right in part. It is true that the Supreme Court does not run regressions or propound social welfare functions to assess the first-order effects of its decisions. The Court did not purport to calculate in *Bostock*, for example, whether the world would be in some sense “better off” under a rule permitting employers to discriminate on the basis of LGBTQ status or a rule forbidding it.⁷⁷ Nor did the Court ask in

tactics are also rooted in a results-oriented desire to preserve the Court’s credibility by avoiding some controversies and deciding others indirectly, they too sound in consequentialism. But in seeking to *avoid* a declaration about the law’s meaning, this kind of consequentialism is the opposite of the kind the Court is decrying when it says “it is not our task to assess the consequences of each [interpretation of the law] and adopt the one that produces the least mischief.” *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010).

⁷¹ Pozen & Samaha, *supra* note 6, at 772–75 & n.218.

⁷² *Id.* at 772.

⁷³ *Id.*

⁷⁴ *Id.* at 774.

⁷⁵ *Id.* at 775 (internal quotation marks omitted) (first quoting David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 303 n.148 (2010); then quoting *Lehnert v. Ferris Fac. Ass’n*, 500 U.S. 507, 554 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part); and then quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019)).

⁷⁶ *Id.* at 734. The leading consequentialist Justice in recent history, Stephen Breyer, likewise advocates a consequentialism that operates through another modality—purposivism. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005) (arguing for “the importance of a judge’s considering practical consequences, that is, consequences valued in terms of constitutional purposes, when the interpretation of constitutional language is at issue”).

⁷⁷ *Cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

Vance whether social utility would be maximized by enforcing or blocking a subpoena seeking the President's tax returns.⁷⁸

But in those and some other recent cases, the Court *has* closely and explicitly analyzed the consequences of its rulings in a different sense. It has identified the harmful consequences that competing litigants would suffer after defeat. It has predicted whether these litigants would be able to avoid those consequences moving forward. And it has ruled against groups with the ability to do just that—in opinions that explicitly describe strategies the losing groups can utilize moving forward. In doing so, the Court has openly pursued a particular distributional implication, albeit at one remove. By ruling against a side with post-defeat options for redress, these recent decisions have maximized the odds that neither side will suffer lasting, painful consequences. And in the process, the Court has made several moves that were once thought to be anti-modal. It has “explicitly predict[ed] . . . the range of consequences associated with various interpretive options,” “work[ed] through the practical advantages or disadvantages of” different legal outcomes, “consider[ed] counterfactuals,” and then chosen an outcome in which undesirable consequences may still be avoided.⁷⁹ The next Part describes these cases; Part III grapples with their possible implications for legal theory and the Court itself.

II. OUR CONSEQUENTIALIST SUPREME COURT

How does the Supreme Court decide hard cases? There are many familiar answers to that question. For constitutional disputes, conventional accounts posit that “[w]e are all originalists” and that “[w]e are all living constitutionalists.”⁸⁰ When it comes to statutory cases, “we are all textualists” and “we are all purposivists.”⁸¹ Each of these claims has a kernel of truth, of

⁷⁸ Cf. *Trump v. Vance*, 140 S. Ct. 2412 (2020).

⁷⁹ Cf. Pozen & Samaha, *supra* note 6, at 750.

⁸⁰ *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Committee on the Judiciary*, 111th Cong. 62 (2010) (statement of Sen. Patrick J. Leahy) (“[W]e are all originalists.”); Jack M. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, SLATE (Aug. 29, 2005), <https://slate.com/news-and-politics/2005/08/rumors-of-the-constitution-s-death-are-exaggerated.html> [<https://perma.cc/Q3JS-PZSM>] (“We are all living constitutionalists now.”).

⁸¹ Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY 08:30 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> [<https://perma.cc/T2Z6-KTQ2>] (“We are all textualists . . .”); Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1648 n.164 (2014) (“We are all purposivists now.”).

course. The Supreme Court reports are littered with opinions that rely on original meaning, evolving precedent, statutory text, and purpose.⁸²

This Part advances a different claim. If one measure of a theory our legal culture embraces is the kind of arguments that our Supreme Court relies on routinely in its opinions,⁸³ then perhaps we are edging toward the embrace of a particular kind of consequentialist decision-making principle. For across constitutional law, statutory interpretation, and administrative law, the Court regularly justifies its decisions by pointing to the ways that losing groups can avoid the harmful consequences of an adverse ruling. The first three Sections provide examples of this form of reasoning in recent constitutional, statutory, and administrative law cases; a fourth Section synthesizes the cases with the aim of constructing an overarching framework.

A. *Avoiding Harmful Consequences in Constitutional Law*

The Supreme Court's concern for losing litigants' ability to avoid the harms wrought by an adverse ruling is most common in constitutional cases. Since 2020, the Court has issued no fewer than seven constitutional rulings in which its opinions explicitly evaluate the losing side's options for avoiding harm after defeat. I examine five of these constitutional cases presently; the Sections that follow describe the Court's reliance on similar arguments in a half dozen major statutory and administrative law cases.⁸⁴

⁸² See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–97 (2020) (relying on originalist arguments); *D.C. v. Heller*, 554 U.S. 570, 581–619 (2008) (same); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 33–97 (2010) (collecting living-constitutionalist cases); *Bostock*, 140 S. Ct. at 1738–42 (relying on textualist arguments); *King v. Burwell*, 576 U.S. 473, 492–96 (2015) (relying on purposivist arguments).

⁸³ See *supra* note 35.

⁸⁴ In the interests of space, I omit a close analysis of two 2020 constitutional rulings that also turned on least harm arguments: *Trump v. Mazars USA* and *Ramos v. Louisiana*. For a discussion of the least harm reasoning utilized in these cases, see Tang, *supra* note 29, at 1869–73 & n.165. A recent article has also identified compelling evidence of harm-avoider reasoning in the context of municipal bans on constitutionally protected activities. See Sarah L. Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831, 844–57 (2022) (describing how “courts have allowed small localities to exclude sexually oriented businesses, religious premises, and firearm facilities on the basis that the constitutionally protected use is available in a nearby jurisdiction,” whereas large cities cannot, perhaps because plaintiffs in such cases are less likely to have nearby access to the right at issue).

I also omit a full discussion of cases decided in the spring of 2022 that relied on similar least harm reasoning. See, e.g., *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 2000 (2022) (“The State retains a number of options [to refrain from funding religious education]: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own.”); *United States v. Vaello Madero*, 142 S. Ct. 1539, 1544 (2022) (holding that Congress’s exclusion of Puerto Rican residents from Supplemental Security Income benefits did not violate Equal Protection, in part because “the Solicitor General has informed the Court that the President supports [legislation extending those benefits to Puerto Rican residents] as a matter of policy”); *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1925

1. Ford Motor Company v. Montana Eighth Judicial District Court

In a nation where consumer products cause nearly thirty million injuries and more than twenty thousand deaths each year,⁸⁵ a great deal turns on where product-liability victims can sue to hold manufacturers accountable. The facts of the Supreme Court’s 2021 decision in *Ford Motor Company v. Montana Eighth Judicial District Court* are emblematic: a woman was driving her Ford Explorer in her home state of Montana when the vehicle malfunctioned and rolled into a ditch, killing her.⁸⁶ The woman’s estate sued Ford in Montana state court, but the company moved to dismiss for lack of personal jurisdiction. Ford’s argument was that the Montana court’s exercise of personal jurisdiction was proper only if the company “had designed, manufactured, or . . . sold in the State the particular vehicle involved in the accident.”⁸⁷ And because the Explorer at issue had been made in Kentucky and sold in Washington, Ford argued that it was in *those* states, not Montana, where the plaintiff should have brought suit.⁸⁸

Several lower courts had previously adopted Ford’s position,⁸⁹ which enjoyed considerable support from the business community—including the U.S. Chamber of Commerce.⁹⁰ Yet despite the closeness of the argument, the Court ruled against Ford. Writing for the majority, Justice Kagan began by describing the Court’s test for specific personal jurisdiction under which a defendant may be sued in a forum state where the defendant has “purposefully avail[ed] itself of the privilege of conducting activities” so long as “[t]he plaintiff’s claims . . . ‘arise out of or relate to the defendant’s

(2022) (Sotomayor, J., concurring) (explaining the decision to dismiss certain California labor-code claims by reference to the losing side’s ability to easily redress its defeat: “if this Court’s understanding of state law is wrong, California courts, in an appropriate case, will have the last word”); *see also* The Editorial Board, *Justice Sotomayor’s Class-Action Consolation Prize*, WALL ST. J. (June 21, 2022, 6:30 PM), <https://www.wsj.com/articles/justice-sonia-sotomayors-class-action-consolation-prize-paga-viking-river-cruises-v-moriana-11655663580> [<https://perma.cc/2BA6-QH98>] (arguing that although employers technically won in *Viking River Cruises*, Justice Sotomayor offered “unions and trial lawyers a road map to nullify it”).

⁸⁵ 105 CONG. REC. S2551 (daily ed. Mar. 19, 1997), <https://www.congress.gov/105/crec/1997/03/19/CREC-1997-03-19-pt1-PgS2551.pdf> [<https://perma.cc/NC54-88PB>].

⁸⁶ 141 S. Ct. 1017, 1023 (2021).

⁸⁷ *Id.*

⁸⁸ Ford also acknowledged that the plaintiff could have hired counsel to sue Ford in its home state of Michigan under the doctrine of general personal jurisdiction. *See id.* at 1024.

⁸⁹ *See* *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 443 P.3d 407, 415 (Mont. 2019) (“Ford’s position is supported by courts in other jurisdictions finding no specific personal jurisdiction in similar factual scenarios because of a lack of connection between the plaintiffs’ claims and the defendants’ in-state contacts.”); *id.* at 415 n.3 (collecting cases).

⁹⁰ *See* Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner, *Ford Motor Co.*, 141 S. Ct. 1017 (No. 19-368).

contacts' with the forum."⁹¹ There was no dispute that Ford had purposefully availed itself of the privilege of transacting in Montana; the question instead was whether the plaintiff's claim arose out of or related to Ford's Montana contacts.⁹²

The Court answered in the affirmative because the lawsuit was sufficiently related to Ford's contacts with the forum. More specifically, Ford "advertised, sold, and serviced" Ford Explorers in Montana "for many years"—the precise model of vehicle the plaintiff alleged malfunctioned and injured them in Montana.⁹³ That the plaintiff happened to purchase their specific vehicle in a different state was thus immaterial; there was a sufficiently "strong relationship among the defendant, the forum, and the litigation" to support Montana's exercise of specific jurisdiction.⁹⁴

The Court could have stopped there, resting its decision on the uncontroversial modality of doctrinal or precedent-based argument. But it didn't. It examined an additional consideration: what options remained available for businesses such as Ford to avoid the harmful consequences that might result from the Court's decision. The Court thus recognized that its ruling could expose corporate defendants to "the costs of state-court litigation" in forums away from their headquarters.⁹⁵ But because the Court's rule provided "clear notice" of a company's "exposure in [a forum] State to suits arising from local accidents involving its cars," the Court reasoned that companies such as Ford could easily "do something about that exposure."⁹⁶ More specifically, the Court predicted that such companies could do at least three things to "alleviate the risk of burdensome litigation" in those states: they could "procur[e] insurance, pass[] the expected costs on to customers, or, if the risks are [still] too great, sever[] [their] connection with the State."⁹⁷ Emphasizing this point, the Court later reiterated its concern for the losing side's ability to avoid harmful consequences. Because the Court's jurisdictional ruling was "predictable," the Court reasoned, it had the practical advantage of granting businesses such as Ford the ability to "structure [their] primary conduct to lessen or even avoid" costly litigation.⁹⁸

⁹¹ *Ford Motor Co.*, 141 S. Ct. at 1024–25 (first quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); and then quoting *Bristol-Myers Squibb Co. v. Superior Ct. of Cal.*, 137 S. Ct. 1773, 1786 (2017)).

⁹² *Id.* at 1026.

⁹³ *Id.* at 1028.

⁹⁴ *Id.* (internal quotation marks omitted) (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

⁹⁵ *See id.* at 1030.

⁹⁶ *Id.* at 1027.

⁹⁷ *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

⁹⁸ *Id.* at 1030 (internal quotation marks omitted) (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

The Justices recognized that individual plaintiffs, by contrast, would face a steeper climb if the case came out the opposite way. The plaintiffs would not be permitted to bring “suit in the most natural State” where they reside and where their accidents took place.⁹⁹ Rather, an adverse ruling would “send [them] packing to the jurisdictions where the vehicles in question were assembled . . . designed . . . or first sold.”¹⁰⁰ So, in part because corporate defendants such as Ford possessed superior options for avoiding the consequences they would suffer in defeat, the Court ruled in favor of the individual plaintiff.

2. Roman Catholic Diocese of Brooklyn v. Cuomo

An analysis of the potential consequences of its decision—and both sides’ ability to avoid those consequences—also featured prominently in *Roman Catholic Diocese of Brooklyn v. Cuomo*, a landmark case concerning the tension between religious exercise and public health measures enacted during the COVID-19 pandemic.¹⁰¹

Confronted with a deadly public health crisis, the Governor of New York issued an executive order that imposed a series of restrictions on an array of public gatherings.¹⁰² The Roman Catholic Diocese of Brooklyn challenged these limits, arguing that they discriminated against houses of worship in violation of the Free Exercise Clause. For example, in red zones with especially high rates of community infection, houses of worship were limited to attendance of “no more than 10 persons,” whereas “essential businesses” (including acupuncture facilities, campgrounds, and garages) could “admit as many people as they wish[ed].”¹⁰³

The Court ruled in favor of the Diocese in a 5–4 vote. Its reasoning was ostensibly rooted in the modality of doctrinal argument, or an application of settled precedent under which laws that “violate ‘the minimum requirement of neutrality’ to religion” must surmount strict scrutiny.¹⁰⁴ After finding the restrictions non-neutral “because they single out houses of worship for especially harsh treatment,” the Court analyzed whether the Governor could enact “other less restrictive rules . . . to minimize the risk” of infection.¹⁰⁵ It found one alternative especially attractive: the Governor could tie “the

⁹⁹ *Id.* at 1031.

¹⁰⁰ *Id.* at 1032 (Alito, J., concurring).

¹⁰¹ 141 S. Ct. 63 (2020) (per curiam).

¹⁰² *Id.* at 65–66.

¹⁰³ *Id.* at 66 (internal quotation marks omitted); *id.* at 72–73 (Kavanaugh, J., concurring).

¹⁰⁴ *Id.* at 66–67 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)). As Justice Sotomayor argued in dissent, however, it is far from obvious that the Governor’s order was truly non-neutral. *Id.* at 79 (Sotomayor, J. dissenting).

¹⁰⁵ *Id.* at 66–67 (majority opinion).

maximum attendance at a religious service . . . to the size of the church or synagogue.”¹⁰⁶ Writing separately, Justice Gorsuch added his view that the state retained ample flexibility to protect public health so long as it subjected houses of worship “to identical restrictions” to those enacted for essential businesses.¹⁰⁷

Had this been all of *Roman Catholic Diocese*’s reasoning, the opinion’s discussion of other ways in which New York might protect against harmful consequences to public health would have been old hat: little more than one application of strict scrutiny’s “less restrictive alternative” requirement.¹⁰⁸ But a key member of the *Roman Catholic Diocese* majority went on to explicitly consider whether the houses of worship challenging the law would have had ways to avoid their harmful consequences had *they* lost.¹⁰⁹ An assessment of alternatives available to the *plaintiffs* in constitutional cases is, of course, wholly foreign to strict scrutiny’s singular focus on the *state*’s options for securing its interests.¹¹⁰ Yet it is a hallmark of the least harm principle’s emerging brand of consequentialist analysis.

The vital language appears in Justice Gorsuch’s concurring opinion, which grappled with the single most difficult precedent that stood in the way of the Roman Catholic Diocese. In a 1905 case called *Jacobson v. Massachusetts*, the Court upheld a public health law requiring individuals to receive the smallpox vaccine.¹¹¹ Chief Justice Roberts had relied on *Jacobson* to reject a Free Exercise challenge in an earlier COVID-19 case.¹¹² Justice Gorsuch thus sought to distinguish *Jacobson* away.

The key difference in *Jacobson*, Justice Gorsuch wrote, was that under the 1905 vaccine law, “individuals could accept the vaccine, pay [a \$5] fine, or identify a basis for exemption.”¹¹³ Justice Gorsuch thus concluded that the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 69 (Gorsuch, J., concurring).

¹⁰⁸ Another alternative went unmentioned in the Court’s opinion, but became apparent within a month of the Court’s November 25 decision: the use of vaccines to slow community spread. See *FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second Covid-19 Vaccine*, FDA (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid> [<https://perma.cc/KR9E-BEBT>] (“Today, the U.S. Food and Drug Administration issued an emergency use authorization (EUA) for the second vaccine for the prevention of [COVID-19].”).

¹⁰⁹ See *Roman Cath. Diocese*, 141 S. Ct. at 69, 71 (Gorsuch, J., concurring) (arguing that the houses of worship lacked alternatives for avoiding their harms).

¹¹⁰ See generally Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326–34 (2007) (describing strict scrutiny’s less restrictive alternative requirement and its focus on government alternatives).

¹¹¹ 197 U.S. 11, 39 (1905).

¹¹² *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief).

¹¹³ *Roman Cath. Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring).

harmful consequence that Massachusetts' law inflicted upon "Mr. Jacobson's claimed right to bodily integrity . . . was *avoidable*."¹¹⁴ By contrast, the houses of worship challenging the Executive Order's attendance limits could do nothing to avoid *their* harmful consequences because "the State ha[d] effectively sought to ban all traditional forms of worship."¹¹⁵

Thus, on Justice Gorsuch's account, what made the restrictions on religious worship constitutionally problematic was not merely that the State could prevent the spread of COVID-19 via neutral restrictions moving forward. The problem was also that the Executive Order, unlike the smallpox vaccine mandate upheld in *Jacobson*, inflicted consequences for religious liberty that the plaintiffs could not avoid. Seen in this light, *Roman Catholic Diocese* is another case that turned in substantial part on the Court's careful assessment of the options each side would possess for avoiding the consequences of defeat.

3. Jones v. Mississippi

In 2012, the Supreme Court held in *Miller v. Alabama* that the Eighth Amendment prohibits states from sentencing juvenile homicide offenders to a mandatory term of life without parole (LWOP).¹¹⁶ Four years later, in *Montgomery v. Louisiana*, the Court ruled that *Miller* applies retroactively on collateral review.¹¹⁷ In the wake of these rulings, hundreds of convicted juvenile homicide offenders obtained new sentencing proceedings in which they made the case for a new sentence of life *with* the possibility of parole.¹¹⁸ The question presented in *Jones v. Mississippi* was what exactly the sentencer (typically a judge, but sometimes a jury) must do before exercising their discretion to reimpose an LWOP sentence.

¹¹⁴ *Id.* (emphasis added).

¹¹⁵ *Id.* Justice Gorsuch suggested two other distinctions between *Jacobson* and *Roman Catholic Diocese*. First, he argued that *Jacobson* involved an unenumerated liberty interest under the Due Process Clause rather than a Free Exercise claim. *Id.* at 70–71. But the Court later clarified in *Cruzan ex rel. Cruzan v. Director, Mo. Dep't of Health* that the right to refuse "unwanted medical treatment" recognized in *Jacobson* is "constitutionally protected." 497 U.S. 261, 278 (1990). Second, Justice Gorsuch argued that *Jacobson* applied "rational basis" review rather than strict scrutiny. *Roman Cath. Diocese*, at 70 (Gorsuch, J., concurring). But strict scrutiny did not emerge in the Court's jurisprudence until the 1960s. See Fallon, *supra* note 110, at 1275. And in any case, *Jacobson* held that the vaccine requirement was "necessary" to protect "public health"—language that maps on to modern-day strict scrutiny. See 197 U.S. at 27.

¹¹⁶ 567 U.S. 460, 489 (2012).

¹¹⁷ 577 U.S. 190, 213 (2016).

¹¹⁸ See *Montgomery v. Louisiana*, ASSOCIATED PRESS (July 31, 2017), <https://www.ap.org/explore/locked-up-for-life/Montgomery-v-Louisiana> [<https://perma.cc/4YL7-H3VQ>] (noting that *Montgomery* "set the stage for an unprecedented second look at hundreds and hundreds of cases" involving life without parole sentences for juvenile offenders).

The facts of the petitioner Brett Jones's case are illustrative. Jones was fifteen years old when he murdered his grandfather.¹¹⁹ After his conviction, Jones was sentenced to a mandatory term of LWOP. After *Miller* deemed that sentence unconstitutional, Jones received a new hearing. Jones presented considerable evidence of his rehabilitation,¹²⁰ but the trial judge nonetheless sentenced him to LWOP.¹²¹ Jones challenged this sentence before the Supreme Court on the ground that the judge failed to “make a separate factual finding that [Jones was] permanently incorrigible.”¹²²

The Supreme Court rejected Jones's argument in a 6–3 decision.¹²³ Writing for the majority, Justice Kavanaugh conceded that the case was difficult insofar as “good-faith disagreement” existed “over how to interpret *Miller* and *Montgomery*.”¹²⁴ Whereas the dissenting Justices focused on *Montgomery*'s declaration that *Miller* barred LWOP “for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility,”¹²⁵ the majority pointed to *Montgomery*'s dictum that “a finding of fact regarding a child's incorrigibility . . . is not required” under *Miller*.¹²⁶

For the purposes of this Article, the salient point is that the majority did not rest solely on its contested reading of *Montgomery*. It instead bolstered its ruling with several overtly consequentialist arguments—predictions, really—about what Jones and supporters of juvenile-sentencing reform could do to avoid the adverse effects of the Court's ruling. The Court thus openly recognized the significant consequence that its ruling would visit upon Jones: he would be “forced to spend the rest of his life in prison” despite significant evidence that he “is a different person now than he was when he killed his grandfather.”¹²⁷

But the Court also identified multiple ways that Jones could avoid that consequence. One option was legislative relief. “[O]ur holding today,” the Court noted, “does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder.”¹²⁸ The Court then explicitly proposed four kinds of legislative interventions states might enact: “States may categorically prohibit [LWOP]”; they may “require sentencers to make extra factual findings

¹¹⁹ Jones v. Mississippi, 141 S. Ct. 1307, 1312 (2021).

¹²⁰ *Id.* 1339–40 (Sotomayor, J., dissenting).

¹²¹ *Id.* at 1313 (majority opinion).

¹²² *Id.*

¹²³ *Id.* at 1311.

¹²⁴ *Id.* at 1321.

¹²⁵ *Id.* at 1333 (Sotomayor, J., dissenting).

¹²⁶ *Id.* at 1311 (majority opinion).

¹²⁷ *Id.* at 1323.

¹²⁸ *Id.*

before” imposing LWOP; they may “direct sentencers to formally explain on the record” why LWOP sentences are appropriate; and they may “establish rigorous proportionality or other substantive appellate review of [LWOP] sentences.”¹²⁹ And anticipating the response that these interventions might seem unlikely given juvenile offenders’ lack of political influence, the Court underscored that “many States have recently adopted one or more of those reforms,” citing an amicus brief that described the enactment of legislation abolishing all juvenile LWOP sentences in states as surprising as Texas, Arkansas, Utah, and South Dakota.¹³⁰ (Indeed, just before the Court’s ruling in *Jones*, the Republican-controlled legislature and Republican Governor of Ohio abolished juvenile LWOP, and bipartisan bills to do the same are now pending in Michigan and Wisconsin.)¹³¹

The Court’s consequentialist assessment continued. “[O]ur holding today,” the Court observed, “is far from the last word on whether Jones will receive relief from his sentence.”¹³² After acknowledging Jones’s “good record in prison” and the “moral and policy arguments” for why he might deserve clemency, the Court made clear that this was yet another way for the losing side to avoid the consequences of defeat. “Our decision,” the Court predicted, “allows Jones to present those [moral and policy] arguments to the state officials authorized to act on them, such as the state legislature, state courts, or Governor.”¹³³ Indeed, the Court pointed out that these “state avenues for sentencing relief” would not only be available to Jones immediately, but would “remain open to him for years to come.”¹³⁴ Yet again,

¹²⁹ *Id.*

¹³⁰ *Id.* (citing Brief for Former WV Delegate John Ellem et al. as Amici Curiae Supporting Respondent at 29–36, *Mathena v. Malvo*, 139 S. Ct. 1317 (2019) (No. 18–217)). That the Court would rely on an amicus brief to support its consequentialist argument is potentially illuminating in its own right: it could well be that the increased volume of amicus briefs, which often speak to social facts and arguments outside the four corners of traditional interpretive tools, is correlated with a possible rise in consequentialist argument. See generally Allison Orr Larsen & Neal E. Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 (2016) (describing an increase in amicus briefs filed with the Supreme Court).

¹³¹ *Ohio Passes SB 256, Banning Life Without Parole for Children in the State*, CAMPAIGN FOR THE FAIR SENT’G OF YOUTH (Jan. 11, 2021), <https://cfsy.org/ohio-passes-sb-256-banning-life-without-parole-for-children-in-the-state/> [<https://perma.cc/V5FY-NNUK>]; Ryan Jeltima, *Bills Would Ban Life-Without-Parole Sentences for Juvenile Offenders in Michigan*, ABC 12 (Mar. 18, 2022), https://www.abc12.com/news/state/bills-would-ban-life-without-parole-sentences-for-juvenile-offenders-in-michigan/article_bff4a7b8-a6c9-11ec-ad80-1ff45f43a1cc.html [<https://perma.cc/ZYZ4-89KU>]; Isiah Holmes, *Banning Life Sentences Without Parole for Juveniles in Wisconsin*, WIS. EXAM’R (Dec. 6, 2021, 11:55 AM), <https://wisconsinexaminer.com/brief/banning-life-sentences-without-parole-for-juveniles-in-wisconsin/> [<https://perma.cc/7DJ8-S6WP>].

¹³² *Jones*, 141 S. Ct. at 1323.

¹³³ *Id.*

¹³⁴ *Id.*

the Court’s analysis included careful predictions about the varied ways the losing side could avoid the consequences of defeat.

4. Trump v. Vance

Another powerful illustration of the Supreme Court’s consequentialist turn is *Trump v. Vance*, the landmark 2020 ruling in which the Court rejected President Trump’s effort to block a subpoena issued by the New York County district attorney.¹³⁵

Prosecutors sought President Trump’s financial records for the purpose of investigating possible state law violations by various persons affiliated with his business entities.¹³⁶ The President responded by moving to enjoin the subpoenas under “Article II and the Supremacy Clause.”¹³⁷ In ruling against the President, the Court did not rest on settled modalities such as textualist and historical arguments.¹³⁸ Instead, the Court expressly grounded its ruling in a combination of consequentialist and doctrinal arguments.¹³⁹

As should by now be familiar, the Court’s consequentialist analysis began with a prediction of the harmful effects of a ruling in either direction. Thus, if the Court were to allow the subpoenas to be enforced, the result could be three kinds of burdens for the President: “diversion, stigma, and harassment.”¹⁴⁰ (The Court even explicitly referenced the “*consequences* for a President’s public standing” in the course of describing the case’s stigmatic consequences.)¹⁴¹ A ruling against the district attorney, on the other hand, would threaten the “grand jury’s ability to acquire ‘all information that might possibly bear on its investigation,’” thus undermining the “public interest in fair and effective law enforcement.”¹⁴²

But the Court did not stop there, content to weigh the first-order importance of the competing consequences. Instead, in analysis that spanned roughly a third of its opinion,¹⁴³ the Court carefully predicted what might

¹³⁵ 140 S. Ct. 2412 (2020).

¹³⁶ *Id.* at 2420.

¹³⁷ *Id.*

¹³⁸ *See, e.g., id.* at 2429 (recognizing but declining to join Justice Thomas’s conclusion “based on the original understanding of the Constitution”).

¹³⁹ *Id.* (“Given these safeguards [against harmful consequences to the President] and the Court’s precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause.”).

¹⁴⁰ *Id.* at 2425.

¹⁴¹ *Id.* at 2427 (emphasis added).

¹⁴² *Id.* at 2430 (quoting *United States v. R. Enters.*, 498 U.S. 292, 297 (1991)).

¹⁴³ The majority opinion is just over twelve pages long; the Court closely assesses what the parties might do to avoid their harmful consequences on five of those pages. *See id.* at 2427–29 (considering ways the President might avoid stigma and harassment from the subpoenas); *id.* at 2430–31 (repeating

happen *after* it ruled in each direction, considering in particular several counterfactuals for how the parties might otherwise avoid their harms. Thus, the stigmatic consequences of an adverse ruling that the President feared could be entirely avoided because “longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates.”¹⁴⁴ And the President’s worries of diversion and harassment could be addressed through other sources of law, such as state law bans against grand jury “fishing expeditions” and subpoenas borne of “bad faith,” and even constitutional claims rooted in “subpoena-specific” challenges under Article II or the Supremacy Clause.¹⁴⁵ “Given these safeguards” against actual bad consequences, the Court explained, a ruling for the President was neither “necessary [n]or appropriate.”¹⁴⁶ Or as the Court later observed in an uncharacteristic double negative, its ruling “does not leave Presidents with ‘no real protection.’”¹⁴⁷

But the same could not be said for the consequences of a ruling against the New York County district attorney. Rejecting the State’s effort to obtain evidence relevant to an ongoing criminal investigation would “hobble” the State’s law enforcement objectives.¹⁴⁸ Moreover, the Court carefully considered an important counterfactual: the possibility that the State might avoid any harm to its investigation by simply preserving the disputed evidence “until the conclusion of a President’s term.”¹⁴⁹ But the Court predicted that this alternative would also be ineffectual, for “in the interim the State would be deprived of investigative leads that the evidence might yield, allowing memories to fade and documents to disappear.”¹⁵⁰ That, in turn, could “frustrate the identification, investigation, and indictment of third parties,” a problem that might be beyond correction given that “applicable statutes of limitations might lapse.”¹⁵¹ “More troubling,” the Court concluded, blocking the subpoenas “could prejudice the innocent by depriving the grand jury of exculpatory evidence.”¹⁵² The starkly different options that each side would enjoy for avoiding its harmful consequences

ways the President could avoid stigma and harassment and discussing New York’s limited ability to avoid harms to its law enforcement interests).

¹⁴⁴ *Id.* at 2427.

¹⁴⁵ *Id.* at 2428, 2430–31.

¹⁴⁶ *Id.* at 2429.

¹⁴⁷ *Id.* at 2430 (quoting *id.* at 2450 (Alito, J., dissenting)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* (emphasis omitted).

thus pointed in a clear direction—and so the Court ruled against the President.¹⁵³

5. June Medical Services v. Russo

A fifth major constitutional ruling displayed similar forms of consequentialist inquiry. In *June Medical Services v. Russo*, the Court considered the constitutionality of a Louisiana abortion regulation requiring abortion providers to obtain admitting privileges at a hospital within thirty miles.¹⁵⁴ The district court had found this requirement would cause four of the State's five abortion providers to close down their practices, leaving just one doctor who would in turn be unable to serve all of the State's patients.¹⁵⁵ The Supreme Court agreed with this finding and struck down the law substantially on the ground that the Court had invalidated a materially identical regulation just four years earlier.¹⁵⁶ In this sense, much of the Court's reasoning falls within the doctrinal or precedent-based modality of constitutional argument.

But not all of it. The crucial factual difference in the case, at least according to the principal dissent, was that “the record fails to show that the doctors made anything more than perfunctory efforts to obtain [admitting] privileges.”¹⁵⁷ Justice Alito thus argued over several pages that the doctors should have applied to more hospitals and sent more aggressive follow-up emails when their initial applications were denied.¹⁵⁸

In rejecting this argument, the plurality carefully explained over several of its own pages why additional efforts to obtain privileges would have been “an exercise in futility” for the doctors.¹⁵⁹ Among other reasons, several of the hospitals required a physician seeking privileges to effectively perform a certain minimum number of procedures. But because abortion is so safe and in-hospital procedures are so exceedingly rare, this requirement had the effect of precluding the providers from qualifying for privileges.¹⁶⁰

¹⁵³ *Id.* at 2431. Similar consequentialist reasoning figured prominently in *Trump v. Mazars*, a case decided the same day as *Vance*. In *Mazars*, however, the President prevailed because the subpoenaing entity—Congress—possessed greater options for avoiding its harmful consequences (namely, the inability to obtain information needed to legislate). See Tang, *supra* note 29, at 1869–73 (discussing harm-avoider reasoning in *Mazars*).

¹⁵⁴ 140 S. Ct. 2103, 2112 (2020) (plurality opinion).

¹⁵⁵ *Id.* at 2115.

¹⁵⁶ *Id.* at 2112–13.

¹⁵⁷ *Id.* at 2160 (Alito, J., dissenting).

¹⁵⁸ See, e.g., *id.* at 2162–64 (criticizing an abortion provider, “Doe 2,” for merely sending a “three-paragraph e-mail” in order to “amend his 102-page application so as to seek only courtesy privileges”).

¹⁵⁹ *Id.* at 2128 (plurality opinion).

¹⁶⁰ See *id.*

Much of the Court’s reasoning in *June Medical Services*, in other words, came down to a consequentialist assessment: would the abortion providers have *other ways* to avoid the harmful consequences of a ruling against them, in particular by trying harder to obtain admitting privileges? In carefully explaining why the physicians could not do so, the Court again grounded its ruling in a prediction about the likely consequences of its ruling: if it ruled in the State’s favor, the doctors would be unable to obtain privileges and would thus be driven out of business. By contrast, a ruling against the State would do little to harm the State’s legitimate interest in maternal health because Louisiana’s “prior law” was just as effective in that regard.¹⁶¹ So yet again, the Court ruled in the direction that would leave the losing side meaningful options for redress moving forward.

B. *Avoiding Harmful Consequences in Statutory Cases*

The Supreme Court has relied on similar consequentialist reasoning in several major statutory cases. This section describes four recent rulings.

I. *Bostock v. Clayton County*

A great deal has been written about *Bostock v. Clayton County*, a landmark ruling in which the Court interpreted Title VII’s prohibition against discrimination because of sex to reach discrimination on the basis of sexual orientation and transgender status.¹⁶² Much of the scholarly debate has focused on the contested brand of textualism that Justice Gorsuch used to reach this conclusion.¹⁶³ But Justice Gorsuch’s opinion is notable for another reason: its unmistakable concern for whether the losing side—religious employers in particular—would have ways to avoid the harmful consequences of the Court’s legal interpretation.

The dispute materialized when Clayton County, Georgia fired Mr. Bostock shortly after he began playing in a gay recreational softball league.¹⁶⁴ Mr. Bostock sued under Title VII, arguing that his termination amounted to impermissible discrimination on the basis of his sex. And the Court agreed.

¹⁶¹ *Id.* at 2131.

¹⁶² 140 S. Ct. 1731, 1754 (2020); 42 U.S.C. § 2000e-2(a)(1).

¹⁶³ See, e.g., William N. Eskridge Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1810–13 (2021) (critiquing the rise of “the new textualism and original public meaning” as “dismantling the institutional foundations for . . . a legitimate rule of law”); Mitchell N. Berman & Guha Krishnamurthi, *Bostock Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 67–68 (2021) (arguing that Justice Gorsuch’s “textualism is wrong or misguided”); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (discussing the tensions within textualism).

¹⁶⁴ *Bostock*, 140 S. Ct. at 1737–38. The opinion technically resolves two other cases as well, one of which involved a transgender employee, but I focus on the facts in Mr. Bostock’s own case for ease of exposition.

It began by discerning the “ordinary public meaning” of Title VII’s prohibition against discrimination “because of . . . sex” at the time of the statute’s enactment.¹⁶⁵ That phrase, Justice Gorsuch explained for a six-member majority, meant that “[s]o long as the plaintiff’s sex was one but-for cause of [the employer’s action], that is enough to trigger the law.”¹⁶⁶ Applying this understanding, the Court explained that discrimination on the basis of sexual orientation is inherently discrimination on the basis of sex because “it is impossible to discriminate against a person for being homosexual . . . without discriminating against that individual based on sex.”¹⁶⁷ After all, if an “employer fires [a] male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”¹⁶⁸

Yet the Court did not rest on this textual analysis alone. It also examined the potential adverse consequences of its ruling. The Court thus recognized the losing employers’ fear that compliance with Title VII’s prohibition of sexual-orientation and transgender-status discrimination “may require some employers to violate their religious convictions.”¹⁶⁹ Lingering on the severity of this consequence, the Court professed itself “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution” because “that guarantee lies at the heart of our pluralistic society.”¹⁷⁰

The Court then proceeded to identify three strategies through which religious employers could avoid this unhappy result. First, the Court noted that to the extent a religious employer is itself a religious organization, such an employer could avail itself of “an express statutory exception” in Title VII itself.¹⁷¹ Second, religious organizations could also seek exemptions from Title VII under the First Amendment’s Free Exercise Clause.¹⁷² And third, *any* religious employer might be able to avail itself of an exemption under the federal Religious Freedom Restoration Act (RFRA), a “kind of super statute” that could “supersede Title VII’s commands.”¹⁷³ Driving the point home, the Court instructed that these Free Exercise and RFRA arguments should “merit careful consideration” when advanced by “other

¹⁶⁵ *Id.* at 1738–39.

¹⁶⁶ *Id.* at 1739.

¹⁶⁷ *Id.* at 1741. The Court reached the same conclusion for discrimination on the basis of transgender status.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1753.

¹⁷⁰ *Id.* at 1754.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

employers in other cases” moving forward.¹⁷⁴ Predictions that employers could avoid the adverse consequences of *Bostock*’s pro-LGBTQ reading were thus a significant part of the majority’s reasoning.

2. *McGirt v. Oklahoma*

A second blockbuster statutory interpretation case from 2020 also turned on a consequentialist assessment of the losing side’s ability to secure its interests after defeat. The case, *McGirt v. Oklahoma*, involved an Oklahoma state prosecution of one Jimcy McGirt, a member of the Seminole Nation who had committed a series of offenses.¹⁷⁵ McGirt argued, however, that Oklahoma lacked jurisdiction to prosecute him. Under the federal Major Crimes Act, McGirt pointed out, “[a]ny Indian who commits” a covered offense within “Indian country” is triable “within the exclusive jurisdiction of the United States.”¹⁷⁶ McGirt claimed that because he committed his crimes on the Creek Reservation, the United States—not Oklahoma—had the power to punish him.

“The key question,” the Court explained, was whether McGirt did in fact “commit his crimes in Indian country.”¹⁷⁷ McGirt argued that his crimes occurred in a portion of northeastern Oklahoma that remained an Indian reservation under the terms of nineteenth-century treaties between the United States government and the Creek Indian Nation.¹⁷⁸ But Oklahoma contended that the reservation had since been disestablished.¹⁷⁹

The Supreme Court agreed with McGirt in a 5–4 decision.¹⁸⁰ Writing for the Court, Justice Gorsuch ruled that the portion of Oklahoma in which McGirt committed his crimes was still an Indian reservation “[b]ecause Congress ha[d] not said otherwise.”¹⁸¹ The decision produced immediate and significant consequences for Oklahoma, “draw[ing] into question thousands of convictions obtained by the State,” including McGirt’s own.¹⁸²

The major point to recognize is the vital rule of statutory interpretation that commanded this result. Although the dissent argued that “Congress disestablished any [Creek] reservation in a series of statutes . . . at the turn of the 19th century,”¹⁸³ the majority concluded that these enactments failed

¹⁷⁴ *Id.*

¹⁷⁵ 140 S. Ct. 2452, 2459 (2020).

¹⁷⁶ *Id.* (internal quotation marks omitted) (quoting 18 U.S.C. § 1153(a)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2460.

¹⁷⁹ *Id.* at 2463–74.

¹⁸⁰ *Id.* at 2458.

¹⁸¹ *Id.* at 2459.

¹⁸² *Id.* at 2500 (Roberts, C.J., dissenting).

¹⁸³ *Id.* at 2482.

to satisfy the requirement “that Congress clearly express its intent” in order to disestablish an Indian reservation.¹⁸⁴ And in relying on this “clear statement” rule, the majority took pains to explain how its decision would leave the losing side—a side that included not just Oklahoma but also the federal government, which had filed an amicus brief in the state’s support¹⁸⁵—straightforward options by which to avoid any untoward consequences. For one thing, the Court pointed out that the losers could lobby Congress “to supplement its statutory directions about the lands in question at any time.”¹⁸⁶ Indeed, “[h]istory shows that Congress knows how to withdraw a reservation”; the Court even provided a laundry list of ways in which prior legislation had disestablished other reservations.¹⁸⁷

The Court also discussed other actions Oklahoma could take to minimize the consequences of its loss in *McGirt*. “Oklahoma and its Tribes have proven they can work successfully together as partners,” the Court observed, implying that the State and Tribe could do the same with respect to criminal prosecutions.¹⁸⁸ The Court continued: “Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek” on matters including “law enforcement”—the very issue in dispute.¹⁸⁹ Emphasizing the losing side’s ample ability to offset the effects of “an adverse decision,” the Court remarked that it had “no shortage of tools at its disposal.”¹⁹⁰ *McGirt*’s victory was thus squarely grounded in a consequentialist assessment of the losing side’s options for avoiding its harm.

3. *Niz-Chavez v. Garland*

A third statutory interpretation decision also drew substantially on consequentialist reasoning. Federal immigration law affords the Attorney General discretion to permit otherwise removable immigrants to remain in the United States.¹⁹¹ In order to be eligible for such relief, however, the immigrant must have been “physically present in the United States for a continuous period of . . . 10 years.”¹⁹² In calculating this ten-year

¹⁸⁴ *Id.* at 2463, 2467–68 (majority opinion).

¹⁸⁵ See Brief for the United States as Amicus Curiae Supporting Respondent at 4–25, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (No. 18-9526) (arguing that Congress had already disestablished the Reservation).

¹⁸⁶ *McGirt*, 140 S. Ct. at 2481–82; see also *id.* at 2482 (“If Congress wishes to withdraw its promises, it must say so.”).

¹⁸⁷ *Id.* at 2462–63.

¹⁸⁸ *Id.* at 2481.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 2481–82.

¹⁹¹ 8 U.S.C. § 1229b(a).

¹⁹² *Id.* § 1229b(b)(1)(A).

requirement, the law provides that “any period of continuous . . . presence in the United States shall be deemed to end . . . when the [immigrant] is served a notice to appear.”¹⁹³ This is the “stop-time” rule, and it was at the center of *Niz-Chavez v. Garland*, an important 2021 case.¹⁹⁴

The crucial question in *Niz-Chavez* was “[w]hat qualifies as a notice to appear sufficient to trigger the stop-time rule?”¹⁹⁵ The relevant statutory provision defines a notice to appear as “written notice . . . specifying” the nature of the proceedings and charges against the immigrant, the legal authority for those proceedings, the fact that the immigrant may be represented by counsel, the time and place at which the proceedings will be held, and the consequences of failure to appear.¹⁹⁶ In Mr. Niz-Chavez’s case, the government sent one document containing most of the required information from this list, but not the time and place of his hearing.¹⁹⁷ Two months later, it sent him a second document with just that information. The federal government argued that the second document triggered the stop-time rule because “a ‘notice to appear’ is complete and the stop-time rule kicks in whenever [the government] finishes delivering all the statutorily prescribed information,” even if such information is spread over “as many documents and as much time as [the government] wishes.”¹⁹⁸

The Court rejected this argument in a 6–3 opinion written by Justice Gorsuch and joined by the unusual alignment of Justices Thomas, Breyer, Sotomayor, Kagan, and Barrett. Much of the opinion presented traditional statutory interpretation arguments sounding in ordinary meaning, statutory context, and statutory history.¹⁹⁹ Yet the Court supplemented this reasoning with a further line of argument: a direct assessment of the consequences each side would suffer were it to lose the case—and a prediction about which side would be best able to avoid them.

The Court began by identifying the harmful consequence the government would suffer in defeat: “producing compliant notices has proved taxing” because the government “may not know the availability of hearing officers’ schedules at the time it would prefer to initiate [removal] proceedings.”²⁰⁰ But the Court held that this harm was not “an insurmountable chore” because it was readily avoidable in at least two

¹⁹³ *Id.* § 1229b(d)(1).

¹⁹⁴ 141 S. Ct. 1474, 1478–79 (2021).

¹⁹⁵ *Id.* at 1479.

¹⁹⁶ 8 U.S.C. § 1229(a)(1).

¹⁹⁷ *Niz-Chavez*, 141 S. Ct. at 1479.

¹⁹⁸ *Id.*

¹⁹⁹ *See id.* at 1480, 1482–84.

²⁰⁰ *Id.* at 1485.

ways.²⁰¹ For one thing, “once the government serves a compliant notice to appear,” it can “send a supplemental notice amending the time and place of an [immigrant’s] hearing if logistics require a change.”²⁰² Alternatively, the government could “continue serving notices without time and place information in the first instance, only to trigger the stop-time rule later by providing fully compliant notices with time and place information once a hearing date is available.”²⁰³

The Court then contrasted the government’s options for avoiding its harm against the lack of options available to persons subject to removal—a clear effort to weigh the practical advantages and disadvantages of different outcomes. “Just consider the alternative,” the Court began.²⁰⁴ “On the government’s account, it would be free to send a person who is not from this country—someone who may be unfamiliar with English and the habits of American bureaucracies—a series of letters.”²⁰⁵ Those letters could “trail in over the course of weeks, months, maybe years, each containing a new morsel of vital information” that the individual “would have to save and compile in order to prepare for a removal hearing.”²⁰⁶ The Court’s point was evident: immigrants subjected to such a haphazard process could, despite their best efforts, be greatly injured from the resulting confusion, whether because they failed to understand the gravity of the proceedings against them or missed their hearing date altogether, thus losing eligibility for relief from removal.²⁰⁷

One final aspect of the Court’s opinion in *Niz-Chavez* stands out. After explaining how the government would be better able to avoid the consequences of defeat, the majority proceeded to criticize a separate set of policy arguments advanced by the dissent. The majority thus described the dissent’s reliance on “speculat[ion that] the government might respond to our decision by disadvantaging” immigrants, including by “ambush[ing them] with last-minute notices.”²⁰⁸ In the majority’s view, the dissent’s position was that “the best way to help [immigrants] is to rule against the[m].”²⁰⁹ But the majority deemed such speculation “beside the point.”²¹⁰ The dissent’s attempt to determine the best outcome for immigrants by balancing the

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 1486.

²⁰⁴ *Id.* at 1485.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ See 8 U.S.C. § 1229a(b)(7).

²⁰⁸ *Niz-Chavez*, 141 S. Ct. at 1486.

²⁰⁹ *Id.*

²¹⁰ *Id.*

“‘costs’ and ‘benefits’” of the Court’s ruling was immaterial, the majority reasoned, because such “raw consequentialist calculation plays no role in our decision.”²¹¹

Thus, even as the majority relied on its own explicit consideration of how the government and immigrants might *avoid the consequences* of an adverse ruling, it declared that the distinct analytical move of *directly assessing* the net welfare effects of competing outcomes was out-of-bounds. First-order utilitarian calculation of costs and benefits, in other words, remained anti-modal. And even then, perhaps only contingently so: the Court wrote that “no amount of policy-talk can overcome a *plain* statutory command.”²¹² Importantly left unspoken was whether some amount of policy talk might be relevant when a statute is ambiguous.

4. *Jam v. International Financial Corporation*

A fourth statutory case that relied on consequentialist arguments over the losing side’s ability to avoid its harm was *Jam v. International Financial Corporation*.²¹³ *Jam* involved a lawsuit filed in federal court by farmers from India after a new coal-fired power plant devastated their local environment.²¹⁴ Among the defendants in the farmers’ suit was the International Finance Corporation (IFC), an international development bank that had helped to fund the power plant.²¹⁵ The IFC argued that it was immune from the suit under the International Organizations Immunities Act (IOIA), a federal law that extends international organizations (such as the IFC) the “same immunity from suit . . . as is enjoyed by foreign governments.”²¹⁶ When the IOIA was originally enacted in 1945, foreign governments enjoyed “virtually absolute immunity from suit.”²¹⁷ But in 1976, Congress passed a new statute codifying a more restrictive version of foreign sovereign immunity. The question in *Jam* was which version of immunity should be extended to the IFC: the capacious immunity afforded to foreign governments at the time of the IOIA’s enactment in 1945, or the more restrictive version of foreign sovereign immunity created in 1976?

The Supreme Court chose the latter, ruling against the IFC. Much of the majority’s reasoning drew on standard statutory interpretive tools, including an inquiry into the “more natural reading” of the law and reliance on the

²¹¹ *Id.*

²¹² *Id.* (emphasis added).

²¹³ 139 S. Ct. 759 (2019).

²¹⁴ *Id.* at 767 (2019).

²¹⁵ *Id.* at 766–67.

²¹⁶ *Id.* at 765; 22 U.S.C. § 288a(b).

²¹⁷ *Jam*, 139 S. Ct. at 764–65.

“reference canon” of statutory interpretation.²¹⁸ (For his part, Justice Breyer argued in dissent that the Court should have focused more on statutory purpose.)²¹⁹ But the Court deemed significant another consideration: the fact that even after its defeat, the IFC had multiple easy-to-implement strategies for avoiding the adverse consequence of similar lawsuits moving forward. “To begin,” the Court pointed out, the IOIA’s immunity provisions “are only default rules.”²²⁰ “If the work of a given international organization would be impaired by restrictive immunity,” the Court explained, that organization “can always specify a different level of immunity” in its organizing charter—a path that several prominent organizations such as the United Nations and International Monetary Fund had already taken.²²¹ The Court then noted that even in the absence of a charter amendment, organizations such as the IFC could still prevail on their immunity claims under the more restrictive version of immunity adopted by the Court.²²² Just as in *Bostock, McGirt*, and *Niz-Chavez*, in other words, the losing side had alternative means to avoid any harmful consequences after the Court’s decision.

C. *Avoiding Harmful Consequences in Administrative Law*

Two of the Supreme Court’s major recent administrative law decisions also relied on arguments about the losing side’s ability to avoid the harmful consequences of defeat.

I. *Department of Homeland Security v. Regents of the University of California*

The facts of *Department of Homeland Security v. Regents of the University of California* are familiar.²²³ The Obama Administration’s Department of Homeland Security first enacted DACA in 2012, thereby promising to forbear for two years from removing law-abiding undocumented immigrants who had first arrived in the United States as children. Recipients of such deferred action would also be eligible for work authorization and certain federal benefits.²²⁴

²¹⁸ *Id.* at 769.

²¹⁹ *Id.* at 773 (Breyer, J., dissenting).

²²⁰ *Id.* at 771 (majority opinion).

²²¹ *Id.* at 771–72 (first citing Convention on the Privileges and Immunities of the United Nations art. II, § 2, Feb. 13, 1946, 21 U.S.T. 1418; and then citing Articles of Agreement of the International Monetary Fund art. IX, § 3, Dec. 27, 1945, 60 Stat. 1401).

²²² *See id.* at 772 (noting that “the lending activity of at least some development banks” such as the IFC might still warrant immunity under the 1976 Foreign Sovereign Immunities Act, and that the same law “includes other requirements” that defendants could rely on in future cases).

²²³ 140 S. Ct. 1891 (2020).

²²⁴ *Id.* at 1901.

The Trump Administration DHS attempted to revoke DACA in 2017, resting that choice on a “succinct” basis: a single sentence expressing the belief that DACA was likely unlawful.²²⁵ But the Court remanded this action back to the DHS to “consider the problem anew,” explaining that DHS had failed to “provide a reasoned explanation for its action” as required under the Administrative Procedure Act.²²⁶ In particular, DHS’s cursory analysis failed entirely to consider “hardship to DACA recipients” from its rule and the possibility of rescinding eligibility for work authorization and federal benefits while “retain[ing] forbearance.”²²⁷

In reaching this conclusion, the Court explicitly recognized the easy path it left open to the Administration for avoiding the consequences of its defeat. “All parties agree,” the Court noted, that DHS retains the power to “rescind DACA” following the Court’s ruling; indeed, “DHS has considerable flexibility” moving forward.²²⁸ Put another way, the Trump Administration could avoid its harm and accomplish exactly what it wanted—the revocation of DACA—through the simple expedient of providing a more careful explanation for its action.

The Court even described several arguments the Administration could make in a future rescission memo that would adequately account for DACA recipients’ potential reliance interests. “DHS could respond,” for example, “that reliance on forbearance and benefits was unjustified in light of the express limitations in the [original] DACA Memorandum.”²²⁹ Or DHS “might conclude that reliance interests in benefits that it views as unlawful are entitled to no or diminished weight.”²³⁰ Several other suggestions followed.²³¹ In ruling against the Administration, the Court not only ensured that the losing side would have clear strategies for minimizing its harmful consequences, it provided a working blueprint to do just that.

²²⁵ *Id.* at 1910.

²²⁶ *Id.* at 1916; *see also id.* at 1905 (rooting the “reasoned decisionmaking” requirement in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)).

²²⁷ *Id.* at 1916.

²²⁸ *Id.* at 1905, 1914.

²²⁹ *Id.* at 1914.

²³⁰ *Id.*

²³¹ *See, e.g., id.* (“Had Duke considered reliance interests, she might, for example, have considered a broader renewal period based on the need for DACA recipients to reorder their affairs. Alternatively, Duke might have considered more accommodating termination dates for recipients caught in the middle of a time-bounded commitment, to allow them to, say, graduate from their course of study, complete their military service, or finish a medical treatment regimen. Or she might have instructed immigration officials to give salient weight to any reliance interests engendered by DACA when exercising individualized enforcement discretion.”).

2. Department of Commerce v. New York

A second prominent administrative law case involved similar modes of consequentialist reasoning. In *Department of Commerce v. New York*, the Court considered whether to invalidate Secretary of Commerce Wilbur Ross's controversial decision to reinstate a citizenship question on the 2020 census questionnaire.²³² Secretary Ross had indicated in a 2018 memo that he took this action in response to a request from the Department of Justice, which supposedly sought the data in order to better enforce the Voting Rights Act (VRA).²³³ Subsequent revelations showed, however, that "the VRA played an insignificant role in the decisionmaking process" because "the Secretary was determined to reinstate a citizenship question from the time he entered office . . . and adopted the Voting Rights Act rationale late in the process."²³⁴ Indeed, confidential files discovered on a deceased GOP strategist's computer later revealed that the true goal of the citizenship question was to enable Republican state legislatures to draft "even more extreme gerrymandered maps to stymie Democrats."²³⁵

After evaluating the evidence that the Secretary's explanation was pretextual, the Court concluded that "the VRA enforcement rationale . . . seems to have been contrived."²³⁶ And that posed a problem because "[t]he reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer genuine justifications for important decisions."²³⁷ The Court accordingly ruled in the challengers' favor, remanding the matter back to the Department of Commerce.²³⁸

In a now familiar pattern, the Court's opinion expressly tracked the stark disparity between the strategies that each side would have for avoiding their respective consequences had they lost the case. On the one hand, because its ruling against the Department of Commerce was grounded in Secretary Ross's use of "a pretextual basis,"²³⁹ the Court left open the prospect that the Secretary could reinstate the citizenship question simply by providing a new, truthful explanation for that policy choice. Underscoring the point, Chief Justice Roberts wrote for the majority that "[w]e do not hold

²³² 139 S. Ct. 2551, 2561 (2019).

²³³ *Id.* at 2562.

²³⁴ *Id.* at 2574.

²³⁵ Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [<https://perma.cc/AZ74-6C2L>].

²³⁶ *Dep't of Com.*, 139 S. Ct. at 2575.

²³⁷ *Id.* at 2575–76.

²³⁸ *Id.* at 2576.

²³⁹ *Id.* at 2573.

that the agency decision here was substantively invalid.”²⁴⁰ Instead, the Court instructed: “Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.”²⁴¹ The upshot was clear: the Secretary was free to try again with a genuine, uncontrived explanation.²⁴²

By contrast, a ruling in the Department of Commerce’s favor would have caused a troubling consequence. “Accepting contrived reasons would defeat the purpose” of agency decision-making and judicial review, the Court cautioned.²⁴³ And significantly, this harm would be unavoidable. For if agencies were permitted to hide the true reasons for their policy choices, agency actions would no longer be susceptible to “scrutin[y] by courts and the interested public.”²⁴⁴ Or as the Court put it, “[i]f judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.”²⁴⁵ So yet again, the Court ruled against the side with the superior ability to avoid the consequences of defeat.

D. *A Less Harmful Consequentialism?*

The consequentialist rulings just canvassed share three significant characteristics that can be synthesized into an overarching framework. First, each case involved a hard legal question with significant societal implications. Nearly all of the cases, for example, engendered impassioned dissents taking issue with the Court’s text- and precedent-based conclusions.²⁴⁶ Most of the cases were also the subject of profound disagreement among lower court judges.²⁴⁷ I acknowledge, of course, that the presence of a dissenting opinion or lower court conflict is a crude measure for what constitutes a hard case. But it is a reasonable proxy for recognizing the possibility that none of the above cases involved

²⁴⁰ *Id.* at 2576.

²⁴¹ *Id.*

²⁴² Ultimately, the Administration declined to pursue a citizenship question on the 2020 Census likely because of the short time remaining before census forms were due to be mailed. See Michael Wines, *2020 Census Won’t Have Citizenship Question as Trump Administration Drops Effort*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/us/trump-census-citizenship-question.html> [<https://perma.cc/7EXX-RUQH>].

²⁴³ *Dep’t of Com.*, 139 S. Ct. at 2576.

²⁴⁴ *Id.* at 2575–76.

²⁴⁵ *Id.* at 2576.

²⁴⁶ See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (Alito, J., dissenting); *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (Kavanaugh, J., dissenting).

²⁴⁷ See, e.g., *supra* note 89 (recognizing lower court disagreement over the personal jurisdiction question at issue in *Ford Motor Co.*).

constitutional, statutory, or administrative law questions that were easily susceptible to a single, clear answer.

Second, the majority in each hard case did not rest its analysis exclusively on a disputed conclusion as to the one and only correct meaning of the legal provision at issue. To be sure, the Court did argue in some cases that the law could ultimately be reduced to a single right interpretation, despite the difficulty of the question presented. Take, for example Justice Gorsuch's reading of Title VII in *Bostock*.²⁴⁸ My point is that even in cases such as *Bostock*, the Court supplemented its first-order legal conclusion with additional arguments that had little to do with discerning the law's proper meaning.

Third, each case utilized the same *kind* of additional argument: an argument that the losing side would retain straightforward options for minimizing its harm after defeat. Some of those options existed in the realm of private ordering, where a losing side could safeguard its interests without legislative change. In *Ford Motor Company*, for example, the Court reminded Ford that it could avoid the costs of "burdensome litigation" in different forum states by "procuring insurance" and "passing the expected costs on to customers."²⁴⁹ In other cases, the Court focused on avenues for redress that run through the democratic process. The ability of juvenile-justice advocates to lobby state lawmakers for legislation curtailing LWOP sentences after *Jones* is one example; an agency's ability to reenact a regulation after issuing a better explanation is another.²⁵⁰

I've suggested in previous work that a surprising (if modest) set of earlier constitutional rulings issued by the Supreme Court utilized a similar kind of analytical approach.²⁵¹ I called that approach *harm-avoider constitutionalism*.²⁵² The cases I discuss make apparent, however, that today's Court engages in harm-focused, consequentialist reasoning of this sort across its nonconstitutional docket too. For this reason, I use a more encompassing label—the *least harm principle*—to capture the general mode of argument. Under this principle, the Supreme Court grounds its decisions in hard cases on more than a contested conclusion as to the law's one and only meaning. It aims also to minimize the harm that its decisions will

²⁴⁸ See, e.g., *supra* notes 163–168 (discussing *Bostock*'s textualist interpretation of Title VII). *But see* Tang, *supra* note 29, at 1873, 1870–71 (noting the lack of any attempt to ground *Vance* and *Mazars* in the text of the Constitution).

²⁴⁹ *Ford Motor Co. v. Mont.* Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1027 (2021). In earlier work, I called strategies of this sort "private avoidance." Tang, *supra* note 29, at 1883.

²⁵⁰ See *supra* Sections II.A.3, II.C.2. I've previously described these strategies as "public avoidance." Tang, *supra* note 29, at 1880.

²⁵¹ See *supra* notes 29, 32 and accompanying text.

²⁵² See *id.*

produce. And it does so in a particular way: by ensuring that the losing side will have clear options to protect its interests moving forward.

In describing what the Court has done under this consequentialist approach, it is equally important to be clear about what it has *not* done. The Court has not attempted to minimize the harm its rulings produce by directly calculating the first-order welfare effects of various outcomes, whether using statistical or other methods. The Court has not, in other words, treated these cases as a kind of Posnerian utilitarian puzzle in which the Court's responsibility is to maximize aggregate social welfare.²⁵³ Such a puzzle would be all but impossible to solve. In high-profile disputes of the sort that reach the Court, after all, the harmful consequences each side would suffer in defeat are typically value-laden and incommensurable.²⁵⁴ So attempting to quantify them directly through a kind of "raw consequentialist" assessment remains very much anti-modal, as the Court made clear in *Niz-Chavez v. Garland*.²⁵⁵ The Court has instead considered a very different kind of consequence: not the magnitude of each side's harm, but the options each side would have for *harm avoidance*.²⁵⁶

One final point bears mentioning. In describing the least harm principle's applicability only in hard cases in which first-order legal interpretive tools underdetermine the outcome, a necessary corollary is the approach's inapplicability in easy cases. When the law's application can be readily deduced using the usual tools of legal interpretation,²⁵⁷ arguments over the losing side's ability to minimize its harm simply have no role to play.²⁵⁸ I quickly admit, of course, that the line between "hard" and "easy" cases is often a blurry one, and one over which reasonable jurists will

²⁵³ See *supra* notes 49, 60 and accompanying text (describing Judge Posner's consequentialist approach).

²⁵⁴ See Aleinikoff, *supra* note 66, at 972; see also, e.g., *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 29 (1977) (rejecting appellees' "invitation to engage in a utilitarian comparison of public benefit and private loss" in order to decide a Contract Clause dispute).

²⁵⁵ See *supra* note 211 and accompanying text.

²⁵⁶ I do not claim that this indirect form of consequentialism actually maximizes social utility such that it is an effective substitute for fulsome consequentialist analysis. In fact, it is possible that in some cases, least harm reasoning may thwart direct efforts to increase aggregate general welfare. The same can be said of other decision-making approaches, however. And it is hardly clear whether judges would be effective utility maximizers even were our legal culture to permit that kind of calculation. See *infra* notes 295–296.

²⁵⁷ See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 416 (1985).

²⁵⁸ Thus, for example, the Court had no occasion to apply least harm reasoning in a case such as *Terry v. United States*, which unanimously rejected a sentence reduction for a certain class of drug offenders in light of unambiguous text. 141 S. Ct. 1858, 1864 (2021). Even then, though, Justice Sotomayor wrote a concurring opinion flagging the availability of redress for the losing side. *Id.* at 1868 (Sotomayor, J., concurring) ("Unfortunately, the text will not bear [a defendant-favorable] reading. Fortunately, Congress has numerous tools to right this injustice.").

sometimes disagree. Yet the problem this poses is not particularly special: legal theory is chock-full of interpretive rules whose application turns on contestable threshold questions.²⁵⁹

III. SOME OPEN QUESTIONS

My hope is that the preceding Part has painted the following picture: In a significant number of recent cases, the Supreme Court has resolved close questions of constitutional, statutory, and administrative law at least in part using a careful analysis of the consequences of its rulings. And in doing so, the Court has made many moves often thought to be forbidden. It has predicted the consequences that different outcomes might produce, engaged in counterfactual reasoning based on the litigants' varied options for avoiding those consequences, and ruled in a direction with a particular distributional implication—against a side with ample ability to protect its interests after defeat.²⁶⁰

This Part identifies three open questions concerning the least harm principle's application in light of the Court's own decisions. First, is least harm reasoning comparative or one-sided in nature? Second, does the Court utilize such reasoning in case-by-case or categorical fashion? And third, is the principle a genuine reason for the outcomes the Court reaches, or just an excuse?

A. *Comparative or One-Sided?*

In all the cases described in Part II, the Court argued explicitly that the losing side would retain ample options for avoiding the harmful consequences of its defeat. Yet in a number of cases, the Court went a step further. It compared the losing side's ability to avoid its harm against the winning side's ability to do the same if the Court had come out the other way. This suggests the possibility of two different kinds of harm-avoider principles. One is comparative in nature, a kind of tiebreaker that may be

²⁵⁹ See, e.g., *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984) (explaining that *Chevron* deference applies only “if . . . the court determines Congress has not directly addressed the precise question at issue,” a threshold step that is frequently contested); *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (if statutory text “is ambiguous,” the Court “must turn to the broader structure” to determine its meaning); see also *infra* notes 280–284 (discussing how the rule of lenity and canon of constitutional avoidance are applicable only where a statute is ambiguous).

²⁶⁰ To the extent the Court's harm-avoider rulings reflect an unstated desire to reach compromise outcomes in which losing groups are less injured, they may also implicate a second anti-modality discussed by Professors Pozen and Samaha: the prohibition against logrolling, or exchanging political favors. See *supra* note 6, at 764 (describing forbidden logrolling arguments as including the concept of “splitting the difference between two competing propositions for the sake of achieving compromise or settlement”). I'm thankful to Professor David Pozen for this observation.

used in hard cases. A second functions more like a reason-giving exercise that ensures losing groups in major Supreme Court rulings have meaningful options for redress. Both approaches have plausible virtues; the point of this section is to flag the conceptual differences for purposes of analytical clarity and future observation.

Trump v. Vance is an example of the comparative approach. The Court closely analyzed the options that *both* President Trump and the State of New York would have after an adverse ruling and deemed the President's options superior in light of alternative state law and constitutional defenses to truly burdensome subpoenas.²⁶¹ *Ford Motor Company* engaged in a similar comparative exercise. In that case, the Court noted both the corporate defendant's clear ability to avoid its harms (e.g., by procuring litigation insurance and passing its costs onto customers), as well as the difficulty individual plaintiffs would face if they were required to litigate their personal injury claims in far-off forums.²⁶² *Niz-Chavez v. Garland* is yet another example, as the Court explicitly compared the federal government's easy options for complying with its single-document interpretation of a "notice to appear" against the "alternative" of a ruling against removable immigrants.²⁶³

In other cases, however, the Court limited its analysis to just the losing side's ability to minimize its harm. Thus, for example, the Court in *DHS v. Regents* flagged the Trump Administration's great flexibility to rescind DACA moving forward, but it did not address whether the other side—the Dreamers who would face removal had they lost—would have had any means to avoid its harms.²⁶⁴ Neither did the Court in *Jones* discuss strategies by which states could protect their interests in criminal sentencing had that case required a formal finding of permanent incorrigibility.²⁶⁵

This divergence in approaches signifies the existence of two possible kinds of consequentialist analysis. The comparative approach used in cases such as *Vance* and *Ford Motor Company* is the stronger one in the sense that it can do more work to assist the Court in deciding hard legal questions. That is because the direct comparison of harm-avoidance strategies can serve as a kind of tiebreaker, offering a rule of decision in cases that are jump balls under traditional interpretive tools. The downside of this approach, though, is that comparing the ease of each side's harm-avoidance options may *itself*

²⁶¹ See *supra* Section II.A.4.

²⁶² See *supra* Section II.A.1.

²⁶³ See *supra* Section II.B.3.

²⁶⁴ See *supra* Section II.C.1.

²⁶⁵ See *supra* Section II.A.3.

be a difficult task that adds to, rather than reduces, the decision-making burdens that the Court faces in close cases.²⁶⁶

The one-sided approach used in *DHS v. Regents* and *Jones* is weaker, at least in the sense that it cannot offer guidance to a Court confronted by a question on which traditional interpretive modalities are in equipoise. The one-sided approach also suffers from the problem that it enables the Court to rule against a litigant in a hard case where the opposing litigant might actually possess a vastly superior post-defeat response.²⁶⁷ Yet the one-sided approach could still be valuable in cases where the legal question is close (but not a tie). After all, in such cases, the Court might be legitimately worried about the prospect that it has erred. In these instances, the one-sided least harm principle can serve a kind of salutary reason-giving function. By signaling meaningful strategies through which the (potentially erroneous) losing side may still avoid harmful consequences, the weaker, one-sided principle enables the Court to protect against error costs while still doing its best to discern the law's singular meaning.

It may well be that one of these approaches is superior to the other for normative or institutional reasons. Or perhaps both approaches can work sensibly alongside one another in response to the scalar nature of legal uncertainty, with the comparative approach preferable to help resolve cases of truly intractable difficulty and the one-sided approach ideal in close-but-not-intractable cases.²⁶⁸ I intend to return to this topic in future work; for now

²⁶⁶ For a discussion of how the least harm principle might function in cases where neither side possesses clearly superior options for avoiding its harm, see Tang, *supra* note 29, at 1901–02.

²⁶⁷ The Court's ruling in *Jones v. Mississippi* is a powerful illustration. Recall that *Jones* raised a difficult legal question over what a trial judge must do before sentencing a juvenile offender to LWOP. See *supra* Section II.A.3. In ruling against the juvenile offender, the majority pointed to the availability of state legislative reforms and clemency for the offender, without considering options the *State* would have had the Court reached the opposite outcome. Had it done so, the Court would have recognized that the *State* possessed easy and strong options—surely easier than those possessed by juvenile offenders—for avoiding its harm. After all, all *Jones* sought was a ruling requiring a trial judge to make a finding as to his incorrigibility. As Chief Justice Roberts put it at oral argument, “I have to say it [doesn't] seem like very much” for a judge to utter “one sentence” making an incorrigibility finding. Transcript of Oral Argument at 42, *Jones v. Mississippi*, 141 S. Ct. 1307 (2020) (No. 18-1259). Or as Justice Barrett asked: “So [the government's] objection here is really that it's making the *State* jump through too many hoops to put something actually formally on the record . . . ?” *Id.* at 82.

²⁶⁸ To be more specific, a case that is truly hard in the nature of a jump ball (whether because each side definitively possesses 50% of all available legal evidence or because the legal evidence itself suffers from gaps and ambiguities such that a jurist can report little confidence in choosing any winner) might be decided using a tiebreaker. The comparative form of the least harm principle can supply such a decision rule: by ruling in favor of the side with the greater ability to avoid its harms, the principle minimizes the odds that its ruling will generate permanent, harmful consequences.

But in the kind of hard case in which a candid jurist would report a slight preference for the evidence on one side, one might well deem it improper to discard a stronger legal argument (no matter how thin its

it is enough to recognize both kinds of approaches in the Court’s case law and to be aware of their possible strengths and weaknesses.

B. Case-Specific or Categorical Rules?

Another question that the Court’s recent wave of consequentialist rulings raises is whether the least harm analysis is to be performed on a case-by-case or categorical basis.

Consider the reasoning used in *Ford Motor Company v. Montana Eighth Judicial District Court*.²⁶⁹ In holding that the Due Process Clause permits Montana courts to exercise personal jurisdiction over Ford, the Court focused on the circumstances in Ford’s *own case*. “Ford,” the Court explained, could “‘structure [its] primary conduct’ to lessen or even avoid the costs of state-court litigation.”²⁷⁰ More specifically, it could procure insurance and pass the costs of litigation on to customers.²⁷¹ By contrast, the Court observed that a different defendant whose product caused a similar injury, yet who engaged in fewer and less intentional contacts with a forum state—such as a “retired guy in a small town in Maine” who carves decoys and sells them on the internet—would not have the same ability to avoid the costs of out-of-state litigation.²⁷² So, such a defendant, the Court made clear, could well prevail in a challenge to personal jurisdiction.²⁷³

Ford Motor Company is thus an example of case-by-case least harm reasoning: differently situated litigants raising identical legal claims (e.g., due process challenges to personal jurisdiction) may win or lose depending on their own individuated abilities to avoid the harmful consequences of a loss in court. This kind of approach serves benefits familiar to those who

advantage) in favor of a comparison as to each side’s ability to avoid its harms. At the same time, however, the Court might think it wise to describe options that remain available to the losing side after defeat as a way of protecting against the potential costs of error. In this sense, the distinction between comparative and one-sided forms of the least harm principle might well correlate with another distinction I flag below between the possibility that least harm arguments may be used as genuine reasons or instead excuses for a given decision. See *infra* Part III.C. That is to say, least harm arguments may be more likely to play the part of genuine, causal reasons for reaching a particular outcome where they are used in a comparative rather than one-sided fashion. I’m grateful to Professor Sophia Lee for this observation.

²⁶⁹ See *supra* Section II.A.1.

²⁷⁰ *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1030 (2021) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

²⁷¹ *Id.* at 1027.

²⁷² *Id.* at 1028 n.4 (internal quotation marks omitted) (quoting Transcript of Oral Argument at 39, *id.* (Nos. 19-368 and 19-369)).

²⁷³ See *id.* The Court thus rejected the categorical rule advanced by Ford, which would have obviated any need for case-by-case analysis of a defendant’s ability to avoid the costs of out-of-state litigation. See *id.* at 1026 (rejecting Ford’s argument that “[j]urisdiction attaches ‘only if the defendant’s forum conduct gave rise to the plaintiff’s claims’” (quoting Brief for Petitioner at 13, *Ford Motor Co.*, 141 S. Ct. 1017 (No. 19-368))).

prefer the standards side of the canonical rules vs. standards debate, such as the value of treating unlike cases unlike, and thus more fairly than under a rule.²⁷⁴ But it also has possible downsides, such as the loss of efficiency as courts are required to reason from the bottom-up in case after case.²⁷⁵

Fortunately, the Court's least harm rulings appear to reflect an awareness of this concern. In many of them, the Court has issued decisions that amount to categorical rules based on the ability of entire groups of similarly situated persons or entities to avoid the harmful consequences of defeat. *McGirt v. Oklahoma* is a good illustration. The Court recognized Congress's historic ability to disestablish Indian reservations using express statutory enactments and formed an across-the-board judgment that doing so is politically feasible.²⁷⁶ The Court then applied a categorical rule under which *any* Indian reservation will be deemed disestablished only if Congress has done so via unequivocal statutory text.²⁷⁷ It thus did not matter whether Congress would have had an easy time disestablishing the *particular* Creek Reservation at issue in the case; the rule applied without regard to the specifics of the case at hand.²⁷⁸

The wholesale clear statement rule used in *McGirt* has a number of close cousins across the field of statutory interpretation, each of which is also plausibly defended as a categorical manifestation of the least harm principle.²⁷⁹ One example is the rule of lenity, which "requires ambiguous

²⁷⁴ See Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 69 (1992).

²⁷⁵ See *id.* Indeed, the rules versus standards positions correspond roughly to an ongoing debate between me and Professors Charles Barzun and Michael Gilbert in the context of harm avoidance in constitutional cases. See Charles L. Barzun & Michael D. Gilbert, *Conflict Avoidance in Constitutional Law*, 107 VA. L. REV. 1, 26 n.71 (2021) ("We would compare the avoidance costs of the parties to the case Professor Tang would compare the costs not just of the parties, but of the groups they represent.").

²⁷⁶ See *supra* Section II.B.2.

²⁷⁷ See *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) ("Disestablishment . . . require[s] that Congress clearly express its intent to do so, commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests." (internal quotation marks omitted) (quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016)).

²⁷⁸ Though the Court strongly implies that such disestablishment would have been well within Congress's reach. See *id.* at 2462 (noting how it is "clear that Congress has since broken more than a few of its promises to the Tribe").

²⁷⁹ Scholars have argued that statutory interpretation should consider imbalances in litigants' ability to secure legislative change. See, e.g., EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 152 (2008) (arguing that courts should rule in hard statutory cases against "politically powerful group[s] with ready access to the legislative agenda" because such a result is "more likely to be corrected by the legislature"); WILLIAM N. ESKRIDGE JR., *DYNAMIC STATUTORY INTERPRETATION* 153 (1994) (suggesting that courts "ought to consider, as a tiebreaker, which party . . . will have effective access to the legislative process if it loses its case"); Cass R. Sunstein, *Interpreting*

criminal laws to be interpreted in favor of the defendants subjected to them.”²⁸⁰ The rule effectuates the Supreme Court’s categorical judgment about which side in criminal cases would be better able to avoid the harms of an adverse ruling. As the Court put it in *United States v. Santos*, the rule of lenity “places the weight of inertia upon the party that can best induce Congress to speak more clearly.”²⁸¹ “[T]he government,” Justice Gorsuch wrote in a recent concurring opinion, must “seek any clarifying changes to the law,” not the less powerful criminal defendants who remain “presumptively free persons.”²⁸² Importantly, this rule is categorical in the sense that it applies even where a specific class of criminal defendants actually *would* possess the political clout needed to convince Congress to narrow the scope of a criminal law.²⁸³ Other doctrines such as the canon of constitutional avoidance plausibly serve the same end.²⁸⁴

Administrative law offers another example of categorical least harm reasoning. In both the DACA and Census cases,²⁸⁵ the Court ruled against the Trump Administration because it failed to comply with administrative law’s “reasoned decision-making” requirement.²⁸⁶ Remanding an agency’s decision on this ground represents a defeat for the agency and the interest groups that supported it. Yet a defeat on this ground is transient because the reasoned decision-making requirement necessarily offers the losing side an easy response: the agency can reenact the challenged rule by providing the very analysis the Court deemed lacking.²⁸⁷ Again, this rule is categorical in

Statutes in the Regulatory State, 103 HARV. L. REV. 405, 483 (1989) (discussing how courts should “resolve interpretive doubts in favor of disadvantaged groups”); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 125 (1982) (arguing that courts should consider factors such as a “lack of symmetry” and differing levels of “ready access to legislative reconsideration” when making decisions).

²⁸⁰ *United States v. Santos*, 553 U.S. 507, 514 (2008).

²⁸¹ *Id.*

²⁸² *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring).

²⁸³ *See, e.g., Skilling v. United States*, 561 U.S. 358, 410 (2010) (applying the rule of lenity to reverse the conviction of Enron CEO Jeffrey Skilling).

²⁸⁴ *See Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (“[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”). This reflects least harm reasoning because a statutory interpretation that avoids a constitutional ruling can be redressed by the losing side through an ordinary legislative fix, whereas an interpretation that violates the Constitution cannot.

²⁸⁵ *See supra* Section II.C.

²⁸⁶ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). Professor Cass Sunstein would later describe this aspect of *State Farm*’s reasoning as the “hard-look doctrine” of administrative law. *See* Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 210.

²⁸⁷ *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1767 (2021) (arguing that by requiring agencies to fully explain their discretionary decisions, the Court’s reasoned-decision-making cases serve the value of enhancing political accountability).

nature because it applies even in idiosyncratic cases, when an agency's second bite at the reason-giving apple would not be so easy.²⁸⁸

On closer examination, other important administrative law doctrines can be conceptualized in terms of the same categorical brand of least harm reasoning. Take *Chevron*. The usual justifications for the doctrine are well known: by requiring courts to defer to reasonable agency interpretations of the statutes they administer, *Chevron* vests greater decision-making authority in “agencies [that] typically have greater expertise” and ensures that decisions are made by a body that is “indirectly accountable to the public through the elected President.”²⁸⁹ But notice another of *Chevron*'s virtues: if a court must choose between two reasonable statutory interpretations, a ruling that the agency's chosen interpretation is entitled to deference is less likely to inflict permanent, unavoidable harm on the losing side than a ruling that the statute has but one (and only one) correct meaning. For only under the deference rationale does the losing side have the additional harm-avoidance strategy of making its case to the agency to change its rule, rather than trying to convince Congress to rewrite the statute. Because regulations are less sticky than statutes,²⁹⁰ *Chevron* leaves losing litigants in hard cases easier options for securing their interests after defeat.

The least harm principle also offers a plausible justification for *Chevron*'s relative, the *Auer* doctrine. Under *Auer*, the Court defers to an agency's informal interpretations of its own “genuinely ambiguous regulations.”²⁹¹ Significantly, when a court rules against a given side under *Auer*, the losing side has an even lower bar to surmount if it wishes to avoid its harms. Far from being required to convince Congress to amend a statute or an agency to revise its regulations through notice-and-comment rulemaking, a group that loses on *Auer* grounds can lobby the agency to rescind its informal guidance—a step the agency can take without notice and comment.²⁹²

In sum, a number of the Court's recent consequentialist decisions draw on a categorical form of least harm reasoning. They announce broad rules

²⁸⁸ See, e.g., *supra* text accompanying note 239 (explaining how time pressures prevented the Trump Administration's Department of Commerce from providing a new explanation for its census citizenship question in time for the 2020 census).

²⁸⁹ Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L. J. 833, 866 (2001).

²⁹⁰ See Jonathan Masur, *Judicial Deference and the Credibility of Agency Commitments*, 60 VAND. L. REV. 1021, 1023–24 (2007) (describing the numerous ways agencies can adjust, adapt, and reverse prior regulatory positions); William N. Eskridge Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2061 (2006) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006)) (“It is much easier for an agency to change its interpretation of a statute than for a court to alter its own previous interpretation.”).

²⁹¹ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

²⁹² See *id.* at 2441 (Gorsuch, J., concurring in the judgment).

for like cases by considering whether the losing litigant belongs to a class of similarly situated persons or entities that would possess meaningful options to avoid the harm of defeat. And in doing so, they avoid the inefficiency that would result from requiring a new assessment of harm-avoidance options in each new case.

C. Is the Least Harm Principle a Reason or an Excuse?

A third open question is equally important, even if its answer may be ultimately unknowable: Is the Court's professed concern for litigants' ability to avoid the consequences of defeat an actual reason for the outcomes it has announced? Or is it mere window dressing offered to soften the sting of defeat?

The question arises because in each of the opinions discussed above, least harm argumentation was just one of multiple modes of reasoning the Court used to justify its decisions. The opinions thus utilized a mixture of text-based, historical, precedential, and other arguments in addition to an analysis of the losing side's options after defeat. The prominent presence of these other kinds of justifications creates the possibility that they, not the least harm principle, were the genuine reasons for the Court's rulings—leaving least harm reasoning more in the nature of a post hoc excuse.

In considering this possibility, it's important to first be clear about the scope of the question. We are talking about an explicit rationale given by the Court in a large range of its recent, important rulings, not an unwritten pattern that requires some speculative inference. To be sure, the Court has not itself announced a formal label for this rationale. But labels aside, the *United States Reports* are full of express arguments over the ways in which losing groups can avoid the harmful consequences of their judicial defeats. What is less clear is the degree to which these arguments have played a *causal role* in the Justices' votes.

One could plausibly take the view that any argument that finds its way into a published Supreme Court opinion is one that necessarily possesses some explanatory or causal force. But absent that kind of a presumption, the truth is that this question cannot be answered without an uncomfortable degree of speculation—or getting into the minds of the Justices themselves.

No matter the answer, however, I want to suggest that the presence of consequentialist analysis in these opinions matters. If the fact that the losing side has strong options for avoiding its harm is an actual reason some Justices vote against that side, well, that obviously matters as at least a partial explanatory account of Supreme Court decision-making. But even if the Court is using these arguments as more of a post hoc excuse aimed at dampening the intensity of the defeat experienced by losing litigants, that

matters too. For at a minimum, such a reason-giving exercise would suggest the Court is paying close attention to how it can maintain its public legitimacy—an important consequence of its decision-making. Indeed, the pattern of recent least harm rulings could suggest a possible belief on the part of some Justices that they may have found a way to channel the anger that losing groups suffer into more productive responses that may help to leave the Court’s public confidence intact.²⁹³ Excuses may not be reasons, in other words. But they can matter all the same.

IV. IMPLICATIONS

I have argued that in recent terms, the Supreme Court has utilized an overtly consequentialist mode of reasoning in a surprising number of its opinions. This consequentialism has been of a particular sort: not a direct effort to maximize social utility by calculating the net welfare effects of competing outcomes, but rather an effort to minimize harm by ensuring that losing litigants possess meaningful post-defeat options. And the Court has utilized this least harm approach across a range of constitutional, statutory, and administrative law disputes.

In this Part, I grapple with some of the implications of this development for legal theory as well as the Court more broadly. As to legal theory, the recent wave of consequentialist reasoning both supports and complicates existing scholarly accounts. As for the Court itself, the least harm principle could have significant implications for the Court as an institution, including for its public legitimacy. Indeed, I will argue that embracing the contingently modal nature of least harm arguments could yield benefits for the Court and its frayed relationship with the public.

A. *Implications for Legal Theory*

As noted earlier, the academy is well versed in the modalities of legal reasoning, or the categories of argument that well-trained lawyers agree are legitimate ways of establishing the truth of legal propositions.²⁹⁴ Pozen and Samaha have made an essential contribution to this debate, arguing recently that a full understanding of our legal culture requires not just attention to the *dos* of legal reasoning, but also the *don'ts*. For as Pozen and Samaha explain, “[t]he modalities have been a central focus of the constitutional literature for over thirty years”; to acquire “a deeper

²⁹³ See *infra* Section IV.B (discussing this possible virtue of least harm reasoning).

²⁹⁴ See *supra* text accompanying note 51.

understanding of constitutional argument” now, we must attend to “the ideas that constitutional decisionmakers feel they cannot talk about.”²⁹⁵

The wave of consequentialist least harm rulings described in Part II both informs and complicates the scholarly debate over law’s modalities and anti-modalities. The decisions inform the debate first by illustrating and thus confirming the fluid and dynamic nature of our argumentative terrain. Both Professor Bobbitt (in his discussion of modalities) and Pozen and Samaha (in their assessment of anti-modalities) agree that the respective targets of their analyses are susceptible to change.²⁹⁶ Indeed, Pozen and Samaha openly urge that the study of anti-modalities “must be always ongoing,” precisely because our common legal practices “evolve over time.”²⁹⁷

Recognizing the Court’s emerging reliance on consequentialist reasoning reveals certain payoffs to this ever-ongoing process of study and reflection. For judges and practicing lawyers, it would be a mistake to treat the textualist, doctrinal, and other familiar modes of reasoning taught in law school as the only legitimate grounds for argument, forever fixed in time. For if the Supreme Court is truly moved by the ability of losing groups to avoid their harmful consequences, then lower court judges and the lawyers before them would do well to consider—and make arguments concerning—the same. And the legal academy might benefit from a close assessment of this emerging approach.

To be clear, I do not mean to argue that consequentialism has moved categorically into favored territory, in all of its incarnations. The kind of consequentialism that has moved on the wall at the Supreme Court is quite particular, even limited. The Court continues to deny the permissibility of consequentialism in the classical utility-maximizing sense.²⁹⁸ But the same is not true of an assessment of competing litigants’ ability to avoid the harmful consequences of an adverse ruling.

This distinction makes sense from an institutional point of view. The case against judicial efforts to maximize social welfare sounds in respect for the particular competencies of a coordinate branch of government.²⁹⁹ It is legislatures, not courts, that possess the practical experience, democratic legitimacy, and broad fact-finding capabilities best suited to weighing

²⁹⁵ Pozen & Samaha, *supra* note 6, at 796.

²⁹⁶ BOBBITT, *supra* note 69, at 8 (“[N]ew approaches will be developed through time.”); Pozen & Samaha, *supra* note 6, at 743.

²⁹⁷ Pozen & Samaha, *supra* note 6, at 796.

²⁹⁸ See *supra* notes 205–210 and accompanying text.

²⁹⁹ See, e.g., *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”).

competing welfare demands in the course of designing our law.³⁰⁰ Indeed, this very assumption lies at the root of modern constitutional law, which rejects (or at least professes to reject) as anticanonical the *Lochner*-era Court's excessive willingness to inject itself into policy debates under the guise of judicial review.³⁰¹

Yet the question of who should bear the costs of judicial defeat in a legally difficult case is arguably different. In such cases, the law fails, by stipulation, to make an evident judgment as to who should prevail. Courts, of course, have little choice but to decide the cases before them. For the institutional reasons just mentioned, courts may lack the competence to reweigh the competing welfare demands from the ground up.³⁰² But courts *are* competent to do something quite different: determine whether a given party would possess alternative means for avoiding the costs of an unfavorable outcome.³⁰³ Indeed, judges engage in such analysis all the time across diverse areas of law. In tort and contract law, for example, courts routinely identify and rule against the "cheapest cost avoider."³⁰⁴ And in constitutional law, an assessment of a losing litigant's post-defeat alternatives for protecting its interests is a cornerstone of strict scrutiny.³⁰⁵ A judicial evaluation of these alternatives and their availability need not entail a disputed policy judgment, nor need it require a weighing of incommensurable and subjective interests held by competing litigants that are better considered by elected lawmakers.³⁰⁶

The emergence of consequentialist least harm argumentation also bolsters a second core claim in the literature: the relentless pressure that anti-modal arguments place on constitutional decision-makers for admission into

³⁰⁰ See, e.g., *Gorrie v. Fox*, 274 U.S. 603, 608 (1927) ("State Legislatures and city councils, who deal with [policy problems] from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require . . .").

³⁰¹ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 417–22 (2011). But see Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 531 (2015) (arguing that the modern conservative legal movement is on the verge of again embracing *Lochner*'s "robust judicial protection for economic rights").

³⁰² See *supra* notes 295–296 and accompanying text.

³⁰³ See Tang, *supra* note 29, at 1901–03.

³⁰⁴ *Id.* at 1856–59 n.79 (giving examples of private law cases that turn on cost-avoider analysis); Pozen & Samaha, *supra* note 6, at 749 (recognizing the same).

³⁰⁵ See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (explaining that, as part of strict scrutiny, courts ask whether a "challenged regulation is the least restrictive means among available, effective alternatives").

³⁰⁶ To be sure, it will not always be self-evident whether a given post-defeat response would avoid the losing group's harm in a satisfactory way. Indeed, deciding what truly constitutes a group's "harm" in any specific case may itself involve a difficult value judgment. I discuss this dilemma and potential solutions in Tang, *supra* note 29, at 1890–92.

our legal grammar. Even as law rules out certain categories of argument, those very arguments often remain so attractive in the ordinary course of political decision-making that they “crop up constantly” in court.³⁰⁷ They cannot be freely admitted, however, lest law as a method devolve into the same argumentative practice that characterizes standard policy debates.³⁰⁸ Pozen and Samaha thus suggest that judges are engaged in a kind of continuous tug-of-war, sometimes insisting that they are “not advancing a certain kind of argument or that an opponent is,” while at other times “enlist[ing] anti-modal reasoning indirectly” so as to “skirt the anti-modal line without quite crossing it.”³⁰⁹ The fact that the Supreme Court has explicitly predicted the harmful consequences of various decision outcomes, identified methods by which losing groups can avoid them, and ruled in conformity therewith shows that the tug of consequentialism is strong indeed.

But perhaps it is so strong that our sense of law’s argumentative terrain is in need of refinement. Perhaps, in other words, it is too basic to think of the legal profession’s argumentative ground rules in purely dichotomous terms, reflective of a singular “distinction between (included) modalities and (excluded) anti-modalities or non-modalities.”³¹⁰ Under that kind of a framework, particular forms of argument are either in or out; there is nothing in between. Pozen and Samaha offer an evocative spatial analogy: “if the modalities mark the limits of permissible constitutional argument, the anti-modalities occupy the territory just beyond those limits.”³¹¹

Yet if this were true, it isn’t entirely clear where consequentialist forms of argument such as the least harm principle would belong. On the one hand, the frequency of cases that explicitly deploy least harm reasoning suggests that perhaps the approach has breached the anti-modal boundary. Yet there seems to be something less than modal about the Court’s least harm arguments: unlike other common modalities (for example, textualist and doctrinal arguments) that can stand alone in justifying a given outcome, the Court has typically marshalled harm-avoidance arguments as supplemental

³⁰⁷ Pozen & Samaha, *supra* note 6, at 772.

³⁰⁸ See *id.* at 779 (noting that “constitutional law cannot survive as a legal discipline without the anti-modalities”).

³⁰⁹ *Id.* at 731, 772.

³¹⁰ *Id.* at 735. As Pozen and Samaha explain, non-modalities are categories of argument that “are not seriously considered at all by participants,” such that “there is nothing particularly interesting about the[ir] exclusion.” *Id.* at 739. Examples include “[a]ppeals to family ties” and arguments based on “astrology or romantic poetry.” *Id.*

³¹¹ *Id.* at 740.

reasons for particular outcomes rather than reasons that rest on their own bottom.³¹²

Pozen and Samaha suggest one possible way to thread this needle. Perhaps the Court has not embraced consequentialist arguments rooted in harm avoidance so much as it has *marginalized* them. As they define it, marginalization is a “strategy for bringing anti-modalities back into constitutional practice” by “confining their usage” to a limited range of situations, such as “when the law runs out.”³¹³

There is something intuitively appealing to this account. In many of the cases discussed in Part II, the Court comes close to outright admitting the difficulty of the legal question before it prior to engaging in a consequentialist assessment of options that losing groups would retain moving forward. In *Jones v. Mississippi*, for example, the Court candidly recognized the presence of a “good-faith disagreement with the dissent” over the best way to interpret its prior precedent on juvenile life without parole sentences, where both positions drew support from the logic and language of earlier rulings.³¹⁴ Likewise in *Trump v. Vance*, the Court appreciated that it was confronting state court subpoenas seeking the President’s records “for the first time,” such that its prior decisions were not dispositive.³¹⁵ Perhaps, in other words, the least harm principle is permissible in only a subset of cases—ones in which the usual modes of legal interpretation prove underdeterminate.³¹⁶

I do not mean to quibble with the accuracy of Pozen and Samaha’s account as an explanation of what is actually happening at the Supreme Court. What I want to press back against is the label of *marginalization* used to describe it—and all of the normative weight it carries. The Court’s reliance on least harm reasoning in hard cases strikes me as sufficiently commonplace that it may not be marginal in a quantitative sense. And that is especially true when least harm argumentation is understood alongside other forms of argument that take on a similar logical structure: forbidden as a threshold matter, but admissible once other privileged forms of argument prove inconclusive.

³¹² See *supra* Part II.

³¹³ Pozen & Samaha, *supra* note 6, at 777.

³¹⁴ 141 S. Ct. 1307, 1321 (2021).

³¹⁵ 140 S. Ct. 2412, 2424–25 (2020).

³¹⁶ In an important new paper, Professor Victoria Nourse has introduced empirical evidence that supports precisely this point. After surveying cases decided in the years 2020–2022, she finds that Justices engaged in consequentialist argument in 75% of all cases involving textualist disagreement, but only 17% of cases where the Justices agreed on the meaning of the text. Victoria Nourse, *The Promise and Paradox of a Unified Judicial Philosophy* 35–36 (Aug. 6, 2022) (unpublished manuscript), <https://papers.ssrn.com/a=4179654> [<https://perma.cc/Y3TK-QNTP>].

Consider how in statutory interpretation, a number of traditional canons of construction such as the rule of lenity and the canon of constitutional avoidance are permissible only in cases in which sufficient ambiguity exists as to a statute’s meaning.³¹⁷ Indeed, these canons are *themselves* plausibly understood as categorical rules that aim to decide close cases against the side with the greatest option to avoid the harmful consequences of defeat.³¹⁸ Yet few would argue that the inapplicability of these canons when a statute is clear renders them an impermissible effort to smuggle forbidden reasoning into cases where a statute isn’t clear. Other statutory interpretation rules follow a similar logic, such as recourse to statutory titles and legislative history—they are inadmissible (even anti-modal) unless the statute’s text is ambiguous, in which case they are suddenly relevant.³¹⁹

In constitutional law, postenactment historical practice holds a similar kind of force: it is only when a constitutional provision is indeterminate through traditional legal analysis that such practice can “liquidate” the Constitution’s meaning.³²⁰ In administrative law, the *Chevron* framework has a similar threshold inquiry: if a statute’s meaning is unambiguous, deferring to the agency’s interpretation is altogether forbidden.³²¹ Again, no one would call these familiar forms of argument marginal or shadowy; we would simply say their “modalness” is contingent upon an initial determination that the law is sufficiently unclear.

Seen in this light, perhaps these forms of reasoning—including the Court’s recent least harm arguments—are neither modal nor anti-modal, strictly speaking. Instead, perhaps they are conditionally modal, such that their place within our legal grammar turns on the first-order question of the law’s clarity using traditional interpretive tools.³²² When those tools yield a clear outcome, then least harm consequentialism (such as post-enactment historical practice, agency deference, various canons of construction, and

³¹⁷ See *supra* notes 280–284 and accompanying text.

³¹⁸ See *supra* notes 280–284 and accompanying text; see also ELHAUGE, *supra* note 279, at 152 (advancing a preference-eliciting default rule of statutory interpretation under which hard cases should be decided against powerful groups because such results are “more likely to be corrected by the legislature”).

³¹⁹ See *supra* notes 36–37 and accompanying text; see also Adam M. Samaha, *On Law’s Tie-Breakers*, 77 U. CHI. L. REV. 1661, 1708–09 (2010) (listing examples of tiebreakers in statutory interpretation).

³²⁰ See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–14 (2019) (“If first-order interpretive principles make the meaning clear in a given context, there is no need to resort to liquidation.”); THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke ed., 1961) (arguing that liquidation is needed if a provision is “more or less obscure and equivocal”).

³²¹ *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2291 n.9 (2021).

³²² See Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1522–54 (2019) (describing areas of law that turn on threshold determinations of legal clarity).

recourse to statutory titles) is anti-modal.³²³ But when text, history, structure, and doctrinal arguments fail to point up a sufficiently clear answer, those same once-forbidden categories of argument become modal—and indeed common—ways of getting to an answer.

Given the conditional nature of these arguments, I want to suggest they are better conceptualized as *contingent modalities* than marginalized anti-modalities. By contingent modalities, I mean forms of argument that hold a secondary position in legal decision-making, one that is implicated only after first-order modalities such as textualist and structural analysis prove inconclusive.³²⁴ On this view, the Supreme Court’s emerging use of consequentialist argument is neither strictly modal nor strictly anti-modal; it occupies a status somewhere in between.³²⁵

The concept of contingent modalities has the virtue of mapping on to other theoretical frameworks in our legal landscape. It corresponds, for instance, to the modern originalist concept of the “construction zone,” which Professor Lawrence Solum has defined as the domain of cases that “cannot be resolved by the direct translation of the constitutional text into rules of constitutional law that determine their outcome.”³²⁶ Recognizing a distinct category of contingently modal argument could also cohere with other leading theories of constitutional interpretation such as pluralism and common law constitutionalism.

With respect to constitutional pluralism, distinguishing between modal and contingently modal categories of argument could offer a potential solution to what Professor Richard Fallon Jr. famously described as pluralism’s “commensurability problem”—the problem of what to do when

³²³ Indeed, perhaps the Court meant to imply as much when it wrote that “no amount of policy-talk can overcome a *plain* statutory command.” *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) (emphasis added). The unspoken implication is that some amount of consequentialist analysis might be relevant if the statute were not plain.

³²⁴ See Adam M. Samaha, *If the Text Is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 157 (2018) (describing a similar approach to statutory interpretation cases); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758, 1856–57 (2010) (describing state supreme courts’ practice of “tiering” different modes of argument in statutory interpretation cases).

³²⁵ To be a bit more specific, most of the examples discussed above utilize least harm reasoning in this contingently modal fashion—but not all. In particular, the cases that turn on administrative law’s reasoned decisionmaking requirement do so as a first-order matter because the relevant statute, the Administrative Procedure Act, has been interpreted to include that requirement. But other administrative law doctrines, such as *Chevron* and *Auer* deference, occupy contingently modal status insofar as they turn on legal ambiguity. I’m grateful to Professor Nick Stephanopoulos for this observation.

³²⁶ Solum, *supra* note 37, at 472. Pozen and Samaha make a similar point. See Pozen & Samaha, *supra* note 6, at 778.

the different accepted modes of argument point in opposing directions.³²⁷ Professor Fallon argued that judges might often be able to “assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result,” thereby eliminating the incommensurability.³²⁸ Yet Fallon also recognized that in some cases, this constructivist coherence would be unattainable.³²⁹ Distinguishing between modal and contingently modal categories of argument could be one pluralist method for reasoning through such cases: in cases where first-order modal arguments such as those reliant on text, history, structure, and precedent prove indeterminate, recourse may be made to contingent tiebreakers such as value or prudential judgments.³³⁰

With respect to common law constitutionalism, one could conceptualize the distinction between following precedent and making new common law as turning on the same distinction between modal and contingently modal arguments. Thus, under Professor David Strauss’s leading account, a common law constitutionalist judge decides cases first by looking to prior court rulings and “assuming that she will do the same thing in the case before her that the earlier court did in similar cases.”³³¹ Reasoning from precedent is thus the paradigmatic modality of argument for the common law constitutionalist. But sometimes, Strauss points out, “the earlier cases will not dictate a result,” whether because of important factual distinctions or the existence of conflicting precedents.³³² In those cases—when “precedents are not clear”—it becomes permissible for the judge to engage in an entirely different kind of reasoning: the judge can “decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy.”³³³ Such direct inquiry into fairness and social policy is appropriately seen as a contingent modality of common law constitutionalism: forbidden as a first-order matter, but encouraged when a clear first-order determination proves unavailable.

³²⁷ Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1191–92 (1987).

³²⁸ *Id.* at 1193.

³²⁹ *Id.* at 1243.

³³⁰ *Id.* at 1204–05 (describing “value arguments” as a fifth and final modality of argument); *supra* note 51 and accompanying text (identifying prudential argument as sixth and final modality). Professor Richard Re has suggested another approach, one that would treat the major modalities of legal argument in the nature of *permissions*, such that judges would be required to choose from—and defend—their preferred interpretive methods in any given case. Richard M. Re, *Permissive Interpretation*, 171 PA. L. REV. (forthcoming 2023), <https://papers.ssrn.com/sol3/a=4184846> [<https://perma.cc/TJ2W-GNPP>].

³³¹ STRAUSS, *supra* note 82, at 38.

³³² *Id.*

³³³ *Id.*

Across these approaches,³³⁴ what emerges is a picture of legal argument that is nonbinary. Some modes of legal reasoning are categorically permitted (e.g., textualist argument), and others are categorically ruled out (e.g., “non-modalities” such as arguments rooted in “astrology or romantic poetry”).³³⁵ But there is a space in between inhabited by contingent modalities whose permissibility turns on an initial attempt to resolve the case using the categorically allowable arguments. If that attempt succeeds, the contingently modal arguments have no role to play; if it fails, they become fair game. Modalness, in other words, can be a function of legal clarity. And for reasons discussed next, this understanding might be a good thing for the Supreme Court and its troubled relationship with the public.

B. Implications for the Supreme Court

Today’s Supreme Court faces stark challenges. A June 2022 Gallup poll found, for example, that the public’s confidence in the Court was lower than at any point since Gallup began collecting data five decades ago.³³⁶ Perhaps relatedly, a significant number of Americans support significant structural Court reform, whether to the tenure enjoyed by its members or to its composition.³³⁷

But these externally imposed reforms are not the only way to influence public perception of the Court. The Court can also attempt to bolster its credibility *internally*, through its decisions and its decision-making approach. Using the least harm principle to decide difficult and divisive cases is one plausible strategy by which it may do so. In other words, the emergence of the consequentialist reasoning I have identified in the Court’s recent decisions has implications not just for legal theory, but for the Court itself.

³³⁴ Professor Samaha has presented an excellent and comprehensive assessment of a similar phenomenon in statutory interpretation. *See* Samaha, *supra* note 324, at 157 (“[T]oday most judges are supposed to decide whether a statute is clear using a limited set of top-tier sources and, if so, apply this meaning; if the statute remains unclear, lower-tier sources may or must be considered.”).

³³⁵ *See supra* note 310.

³³⁶ *See* Jones, *supra* note 42 (finding that just 25% of respondents possess a “great deal” or “quite a lot” of confidence in the Court).

³³⁷ Chris Kahn, *Most Americans Want to End Lifetime Supreme Court Appointments*, REUTERS (Apr. 18, 2021, 5:03 AM), <https://www.reuters.com/business/legal/most-americans-want-end-lifetime-supreme-court-appointments-2021-04-18> [<https://perma.cc/3Z8W-TWVS>] (finding 63% of respondents support term limits and 38% support adding four or more Justices).

It may be helpful to begin with a brief discussion of the reasons behind the Court's precipitous decline in public trust.³³⁸ These reasons are no doubt manifold and complex, encompassing the fallout from a series of politically disputatious confirmation battles, such as the Senate's refusal to grant a hearing to Judge Merrick Garland, the divisive confirmation of Justice Kavanaugh, and the Senate's rapid action to confirm Justice Barrett.³³⁹ The decline also plausibly stems from a disconnect between the Court's decisions and the public's deeply held views, whether with respect to the raw outcomes of major cases or the Court's reasons for arriving at them.

With respect to this last point, Pozen and Samaha powerfully argue that the kinds of lawyerly arguments on which the Court relies "appear faraway from—[and] fail to resonate with—the values and concerns of ordinary people."³⁴⁰ Thus, for example, the Court has resolved recent weighty disputes concerning reproductive autonomy, gun safety, and voting rights by relying on obscure historical and legalistic arguments. In *Dobbs*, the Court overruled *Roe* and *Casey* based on its belief that, "when the Fourteenth Amendment was adopted, three quarters of the States made abortion a crime at all stages of pregnancy."³⁴¹ At no point did the majority consider such practical concerns as whether individuals newly deprived of access to abortion care would have the ability to avoid the ruling's harmful consequences.

The Court was just as unconcerned with the real-world effects of its decision in *New York State Rifle & Pistol Ass'n v. Bruen*, which struck down a 111-year-old New York licensing regime for the public carry of firearms.³⁴² Rather than inquire whether states have other ways to prevent gun violence—the kind of question ordinary people might wonder about—the Court instead asked only whether the State had identified a sufficiently analogous regulatory tradition as of 1791 and 1868.³⁴³ And a five-Justice majority was just as opaque in its reasoning in *Brnovich v. Democratic National Committee*, a major 2021 voting rights ruling that relied on textual

³³⁸ While the Court's approval reached an all-time low in 2021, it was at a ten-year high just one year earlier, in 2020. See Justin McCarthy, *Approval of the Supreme Court Is Highest Since 2009*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316817/approval-supreme-court-highest-2009.aspx> [<https://perma.cc/9PLS-CZ3U>].

³³⁹ Intriguingly, there is reason to think the former two events, which occurred in 2016 and 2018 respectively, may have had little lasting negative effect on the Court's public image, which remained above 50% from 2018 through 2020. See *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/99L7-C2CJ>].

³⁴⁰ Pozen & Samaha, *supra* note 6, at 769.

³⁴¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43 (2022).

³⁴² 142 S. Ct. 2111, 2122 (2022).

³⁴³ *Id.* at 2138–49 (2022).

embellishments instead of actual inquiry into the problem of voter fraud and how it might be avoided.³⁴⁴

If this resonance gap between the Court's reasoning process and the public's is partly to blame for the downturn in public confidence, what can be done about it? Some scholars have argued for taking major disputes away from the Court, leaving them in the hands of politically accountable branches that can openly consider the welfare effects of their choices.³⁴⁵ That is certainly one way to reduce the resonance gap's sting, albeit one that comes with tradeoffs—such as the possibility that leaving contested decisions to the political domain will have the distributional effect of enabling society's most politically influential members to consistently come out on top.

A different option is for courts to openly embrace the kind of arguments the broader public finds normatively attractive, only in contingently modal form. Doing so would permit the Court to consider the very kind of reasoning people care about, yet only in a limited subset of cases: ones where the distinctively legal interpretive tools in which the Court specializes prove indeterminate. Such an approach could conceivably thread the needle: preserving law as a distinctive craft by ruling out consequentialism as a first-order matter, yet recognizing the deep relevance of such analytical moves in difficult cases when the law runs out.³⁴⁶

³⁴⁴ See 141 S. Ct. 2321, 2338–40 (2021) (interpreting the Voting Rights Act's use of the phrase "totality of circumstances" to require consideration of "the size of the burden imposed by a challenged voting rule," "the degree to which a voting rule departs from what was standard practice . . . in 1982," the "size of any disparities in a rule's impact on members of different racial or ethnic groups," the "opportunities provided by a State's entire system of voting," and "the strength of the state interests served by a challenged voting rule," but not an assessment of the fit between the state's law and those interests).

³⁴⁵ See, e.g., Pozen & Samaha, *supra* note 6, at 794 ("By rolling back the domain in which constitutional law and its limited menu of argument types are expected to provide definitive answers, we might open those contested first-order issues to a more diverse spectrum of value structures and knowledge bases."); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1706 (2021) (arguing that progressives should consider disempowering the Court in order to redirect disputes to the political branches); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 5 (1999) (advancing an early version of this argument).

³⁴⁶ To be clear, I do not mean to suggest that the public writ large is likely to read the Court's opinions closely, thus appreciating the Court's consequentialist concerns. The more likely mechanism is that legal elites affiliated with losing groups will read those opinions and then mobilize in pursuit of the harm-avoidance strategies that the Court identifies. For example, conservative movement lawyer Jonathan Mitchell is counsel for a religious for-profit corporation that recently won a Religious Freedom Restoration Act-based exemption from Title VII based on the harm-avoider reasoning in *Bostock v. Clayton County*. See Erin Mulvaney, *Religious Business Shielded from LGBT Bias Claims, Judge Rules*, BLOOMBERG L. (Oct. 31, 2021, 1:23 PM), <https://news.bloomberglaw.com/social-justice/religious-businesses-shielded-from-lgbt-bias-claims-judge-rules> [<https://perma.cc/5VB7-66FZ>]; Michael S. Schmidt, *Behind the Texas Abortion Law, A Persevering Conservative Lawyer*, N.Y. TIMES, (Sep. 12, 2021), <https://www.nytimes.com/2021/09/12/us/politics/texas-abortion-lawyer-jonathan-mitchell.html> [<https://perma.cc/4BW4-ZZ97>] (describing Mitchell's pedigree as a conservative lawyer).

Embracing the least harm principle in this way would raise a series of questions, to be sure. One might worry that judges who wish to engage in consequentialist argument will rush too quickly to find a legal question indeterminate on the usual textualist, historical, and doctrinal grounds such as to permit their preferred form of reasoning. Yet a competing pressure pushes in the opposite direction: judges (and Supreme Court Justices in particular) do not lack for confidence—and it is the rare case where a jurist admits that they cannot discern an answer to a question in the relevant legal materials.³⁴⁷ Perhaps inviting courts to humbly admit the limits of their knowledge could serve beneficial ends of its own.³⁴⁸

Or perhaps one may worry that allowing jurists to engage in lexically ordered reasoning will prove practically inadministrable, as judges prove unable to separate out always-permissible top-tier modes of argument from conditionally forbidden secondary forms of argument.³⁴⁹ Yet it is unclear how much this is an indictment of *openly embracing* contingently modal arguments such as the least harm principle as much as it is evidence of the anti-modalities' intuitive appeal in the first instance. After all, jurists already try to sneak consequentialism and other anti-modal arguments in through the back door.³⁵⁰ All I am suggesting is to bring a certain form of consequentialism in through the front door, openly and honestly—but only after receiving permission first, in the form of a threshold finding that a case is underdeterminate under first-order tools. For it is that very act that may help show the public that the Justices aren't merely elite lawyers who hunt for legalistic answers to deep societal disagreements. They are that. But in close cases, they can also recognize the harmful consequences their decisions can inflict—and the importance of leaving losing groups productive paths forward.

In the end, my guarded optimism about the potential of more candid recognition of the least harm principle's contingently modal role in our argumentative practice is just that: optimism, grounded in theory rather than practice. Without the benefit of experience, it is impossible to know for certain whether the benefits I've suggested will materialize (though the same

³⁴⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019) (“No one can accuse this Court of having a crabbed view of the reach of its competence.”).

³⁴⁸ See Kahan, *supra* note 62, at 59–66 (discussing the virtues of judicial *aporia*, or the open acknowledgement of uncertainty and complexity).

³⁴⁹ Professor Samaha has found modest experimental evidence of this possibility. See Samaha, *supra* note 319, at 196–209 (finding evidence that judges were improperly influenced by an inferior second-order mode of reasoning in an election law case but not in a trademark case).

³⁵⁰ See *supra* text accompanying notes 72–73.

is true of other reform proposals).³⁵¹ I've thus tried to be as evenhanded as possible in my assessment while recognizing legitimate counterarguments. I fully recognize, in other words, that the consequences of embracing this form of consequentialism are difficult to predict.

CONCLUSION

When confronted with a difficult policy choice that will create one group of winners and another group of losers, a decision-maker's natural instinct is to consider the consequences of either choice. One way to do so is to predict and weigh the magnitude of the competing consequences, choosing the outcome that maximizes overall welfare. A second way is to consider the consequences from a further remove, asking not how *severe* they are, but rather how *avoidable*. On this approach, a decision-maker may predict the ways competing groups might respond to an adverse policy and then choose the outcome with the more easily avoidable harms.

The first consequentialist approach remains forbidden at the Supreme Court. Weighing the net welfare effects of competing outcomes is the province of policymakers—and the Court continues to be clear that it “do[es] not sit as a superlegislature.”³⁵² But the Court does sit as a court. And courts all the time consider the ability of litigants to bear or avoid the consequences of adverse-decision rules, whether in contract, tort, or constitutional law.³⁵³ Not all consequentialist modes of analysis are the same, in other words. Some do not entail contested policy judgments, and for that reason may be more within the judiciary's ken.

I have argued that the least harm principle is one such version of permissible consequentialism. I've offered evidence of this in the Supreme Court's own reliance on the principle in a meaningful number of recent cases. And I've suggested that this emerging practice should give us reason to reconsider the conventional wisdom about consequentialism's place within our legal grammar—or at least a limited form of consequentialism.

³⁵¹ In other work, I've suggested a set of other potential benefits to the least harm principle, including its ability to provide losing groups responses superior to railing against the Court's legitimacy, to curb judicial partisanship, and to encourage litigants to engage in more constructive forms of argument. *See* Tang, *supra* note 29, at 1893–901.

³⁵² *Ewing v. California*, 538 U.S. 11, 28 (2003) (internal quotation marks omitted).

³⁵³ *See, e.g., Scenic Am., Inc. v. Dep't of Transp.*, 138 S. Ct. 2, 2 (2017) (Gorsuch, J., statement respecting denial of certiorari) (recognizing the traditional contract rule resolving ambiguous contracts against the drafter because “the drafter might have avoided the dispute by picking clearer terms”); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (analyzing, as part of strict scrutiny's less restrictive alternative requirement, whether a “challenged regulation is the least restrictive means among available, effective alternatives”); *Cont'l Improvement Co. v. Stead*, 95 U.S. 161, 164 (1877) (recognizing the tort law rule that wagons have the duty to stop at railroad crossings, not trains, because given a train's heavy “character and momentum,” it is easier for the wagon driver to avoid a crash).

Once we do so, the picture that emerges is not one in which arguments over the avoidability of harmful consequences are suddenly modal, on par with other favored legal interpretive tools such as textualism and doctrinal analysis. The least harm principle is instead contingently modal, permissible when the favored tools fail to yield a sufficiently clear outcome. Embracing this contingently modal form of reasoning may feel odd, even illicit given the Court's routine admonishment of consequentialism as a general practice. Yet embracing it may also generate meaningful benefits, not least the possibility of reducing law's troubling resonance gap. At a time when the judiciary's public confidence is at an all-time low, perhaps a consequentialist turn is one worth making.

