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DISFAVORED SUPREME COURT PRECEDENT IN THE LOWER FEDERAL COURTS

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There has been significant debate in recent years about the stare decisis effect of Supreme Court decisions, prompted in large part by the overturning of Roe v. Wade *and, more recently, by the overturning of* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. *Almost all of this debate has concerned whether the Court should adhere to its own decisions, a matter of "horizontal" stare decisis. But potentially even more significant is the "vertical" effect of Supreme Court precedent on the lower courts, which handle almost all of the federal*

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The *Virginia Law Review* retains a copy of the datasets on federal courts of appeals cases used in the empirical analysis in Part III. Upon request, the *Virginia Law Review* will share the underlying data for the empirical analysis.

judicial business. If the Supreme Court expressly overturns a precedent, the lower courts will of course stop following that precedent. But what happens when the Court simply suggests in some way that the precedent is in disfavor? This Article considers that question from both empirical and normative perspectives, drawing on case studies of three doctrines that lost favor on the Court: the Lemon *test for Establishment Clause claims,* Bivens *actions, and* Chevron *deference. Based on this analysis, we develop what we term a "decisional authority model," pursuant to which the lower courts should consider some disfavoring signals but not others when determining the weight to be given to a Supreme Court precedent. We provide a taxonomy of potential signals and offer guidance to lower courts on how to respond to these signals. We also highlight the trade-offs between disfavoring and overturning precedent.*

INTRODUCTION

Almost everyone agrees that the lower federal courts must follow Supreme Court decisions. But what happens when the Supreme Court itself chips away at or begins ignoring a precedent without overruling it? Although the past few terms have led scholars to focus on outright overruling, that is not the only way in which the Court can undermine or cast doubt upon its past decisions. In areas ranging from civil rights to administrative law, the Court has used various methods to put its prior rulings on seemingly thin ice.

One illustration is the *Lemon* test for Establishment Clause claims, which required a consideration of the purpose and effect of government action and whether the government had become too entangled with religion.[1] In the decades after the Court established that test in 1971, the doctrine was roundly criticized by numerous Justices and ignored in a number of decisions, yet never expressly overruled.[2] Then, in 2022, Justice Gorsuch's opinion for the Court in *Kennedy v. Bremerton School District* declared that the *Lemon* test had "long ago" been "abandoned"—without explaining precisely when or how such abandonment had occurred.[3] The implication was that the Justices had "abandoned" *Lemon* by either repeatedly denouncing or failing to apply the precedent (or both).

There are many other examples. One is the Court's decision (also from 1971) in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, which allowed private plaintiffs to bring damages claims against federal officials for constitutional violations.[4] Although the Court has never overruled *Bivens*, it has rejected *every Bivens* claim it has considered since 1980 and, in recent years, has emphasized that the remedy is "disfavored."[5]

[1] See Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[2] See infra Section III.A.

[3] 142 S. Ct. 2407, 2427–28 (2022). The dissenters understood *Kennedy* as the first official overruling of the *Lemon* test. See id. at 2434, 2447, 2449 (Sotomayor, J., dissenting).

[4] See 403 U.S. 388, 395–97 (1971).

[5] See Ziglar v. Abbasi, 582 U.S. 120, 135 (2017) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)); infra Section III.B.

Another illustration is the long-standing *Chevron* doctrine concerning judicial deference to administrative agencies.[6] Over the past decade, despite deciding a number of cases involving agency interpretations of statutes, the Court often declined even to cite *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, let alone rely on it, and some Justices openly called for the Court to overturn it.[7] When it finally did so in June 2024, the Court described *Chevron* as a "crumbling precedent[]" and colorfully observed that "all that remains of *Chevron* is a decaying husk with bold pretensions."[8]

In these examples, the Supreme Court has "disfavored" its own precedent—that is, the Court has suggested that the decision should be given less weight than what would have seemed appropriate when the decision was first issued. Through this definition of disfavoring precedent, we mean to encompass what other scholars have variously called "stealth overruling," "narrowing," and "obstructing" precedent, as well as confining a precedent to its particular factual setting.[9] Most examinations of this phenomenon have focused on whether, and under what circumstances, the Supreme Court may legitimately disfavor its own precedents, which is an important question of *horizontal* stare decisis. But our focus is different. In this Article, we consider empirical and normative questions surrounding *vertical* stare decisis—in particular, how the lower courts can and should respond to disfavoring, and how the Supreme Court can and should guide the lower courts in their responses.

When the Supreme Court disfavors a precedent, what happens in the lower federal courts, which do almost all of the federal judicial business? Do they treat a disfavored precedent as fully operative? As diminished but still in effect? As abandoned? How should they treat such precedents? These questions have become even more pressing as statements by

[6] See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844–45, 865 (1984).

[7] See infra Section III.C.

[8] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2252, 2272 (2024).

[9] See, e.g., Rachel Bayefsky, Judicial Institutionalism, 109 Cornell L. Rev. 1297, 1305 (2024) (arguing that "it can be institutionally beneficial for judges" to engage in "stealth overruling"); Barry Friedman, The Wages of Stealth Overruling (With Particular Attention to *Miranda v. Arizona*), 99 Geo. L.J. 1, 4–5 (2010) (criticizing "stealth overruling"); Daniel B. Rice & Jack Boeglin, Confining Cases to Their Facts, 105 Va. L. Rev. 865, 872 (2019) (criticizing the approach of confining a precedent to its facts); Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861, 1865–66 (2014) [hereinafter Re, Narrowing in the Court] (defending "narrowing"); Bill Watson, Obstructing Precedent, 119 Nw. U. L. Rev. 259, 263–64 (2024) (offering a limited defense of "obstructing" precedent).

concurring and dissenting Justices seem increasingly to be directed at the lower courts.[10]

This Article aims to tackle these (and related) questions. Our analysis has empirical as well as theoretical and normative components. With some notable exceptions, work by legal scholars on the relationship between the Supreme Court and the lower federal courts has tended to focus on conceptual issues about how the judicial system *should* operate.[11] This is valuable work, but any analysis of whether the system of precedent is working the way that it should—that is, whether there is an actual problem that needs correcting—requires an understanding of how it is in fact operating, which requires some empirical study.

Accordingly, we gathered and analyzed data on federal courts of appeals cases involving the three legal doctrines mentioned above: the *Lemon* test for Establishment Clause claims; *Bivens* actions; and *Chevron* deference. In each area, the Court issued a major decision, then appeared to back away from that precedent in subsequent rulings.[12] To get a sense of how the courts of appeals have responded over time to the Supreme Court's apparent disavowal of its precedent, we coded and analyzed a random sample of federal court of appeals decisions in these three areas.[13] We also qualitatively reviewed the decisions in order to get a more in-depth understanding of what the courts were doing.

This empirical information helps us better frame the theoretical and normative questions surrounding the judicial hierarchy. On the theoretical side, the existing perspectives seem to fall into one of two camps. Some scholars have claimed that a lower federal court should make a

[10] For recent examples, see Labrador v. Poe, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring in the grant of stay, joined by Thomas & Alito, JJ.) ("Lower courts would be wise to take heed."); United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring in the judgment, joined by Thomas & Barrett, JJ.) (suggesting that "lower courts should just leave that idea [of special solicitude for state standing] on the shelf in future" cases).

[11] See, e.g., Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 821–22 (1994) [hereinafter Caminker, Inferior Courts]; Evan H. Caminker, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking, 73 Tex. L. Rev. 1, 6–7 (1994) [hereinafter Caminker, Precedent and Prediction]; Tara Leigh Grove, Sacrificing Legitimacy in a Hierarchical Judiciary, 121 Colum. L. Rev. 1555, 1563 (2021) [hereinafter Grove, Legitimacy]; Henry Paul Monaghan, On Avoiding Avoidance, Agenda Control, and Related Matters, 112 Colum. L. Rev. 665, 669 (2012); Richard M. Re, Narrowing Supreme Court Precedent From Below, 104 Geo. L.J. 921, 927 (2016) [hereinafter Re, Narrowing From Below]; Thomas P. Schmidt, Judicial Minimalism in the Lower Courts, 108 Va. L. Rev. 829, 837–39 (2022).

[12] See infra Part III (describing these doctrinal changes).

[13] We describe in Part III our coding methodology for each doctrinal area.

"prediction" about how the current Supreme Court might rule in a case and act accordingly.[14] Other commentary disputes that view and suggests that lower federal courts should treat a past Supreme Court precedent as "authoritative,"[15] without speculating about what the current Court might do.[16] That is, this commentary argues for an authority model rather than a prediction model.

As we will show, the existing models do not capture the complexity of proper lower court adherence to Supreme Court precedent. With rare exceptions, lower federal courts do not seek to predict how the current Supreme Court might rule in a case—an effort that would both undermine the status of existing decisions as sources of law and be fraught with the potential for error. That is, lower courts generally follow an authority model.

But the authority model has thus far been ill-defined. Some declarations from the Supreme Court suggest that lower courts should treat an earlier decision as binding, despite later decisions that indicate that it is in disfavor.[17] On this view, lower court judges should focus only on the original meaning of the decision and ignore subsequent developments. But such an approach neither accords with lower court practice nor makes sense as a normative matter. Instead, under any viable authority model, lower courts should focus on a broader array of Supreme Court materials. Yet neither the Court nor academic commentary has identified what properly falls (and does not fall) into that broader array.

This Article offers a different understanding of vertical precedent, which we call a "decisional authority" model. Our model is based on two sets of normative goals. First, the model aims to promote the rule of law values that are typically associated with vertical stare decisis, including predictability, consistency, and judicial legitimacy. Second, as under any authority model, our model is designed to ensure that lower courts treat

[14] See infra Section II.B.

[15] We borrow the "authority" and "prediction" terms from Richard Re. See Re, Narrowing From Below, supra note 11, at 940. Evan Caminker has used the terms "precedent" and "proxy" models to embody the same basic distinction. See Caminker, Precedent and Prediction, supra note 11, at 4–6.

[16] See infra Section II.B.

[17] See, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997) (reaffirming that if "a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989))).

Supreme Court decisions as "the law," even if there are reasons to believe that this law might change.

To serve these goals, it is important to provide more analytical clarity on vertical precedent. So we offer a taxonomy of five potential signals that might indicate that a precedent is in disfavor: (1) disparaging statements in subsequent opinions; (2) decisions that distinguish or narrow an earlier decision; (3) failure to cite a precedent; (4) decisions in related areas that seem inconsistent with the earlier precedent; and (5) methodological shifts that seem to undermine the foundations of a precedent. We argue that, under a proper authority model, not every disfavoring signal from the Justices is of equal value.

Which of these signals count? Under our decisional authority model, lower federal courts should rely *only* on the first and second categories, and *only* to the extent that the Supreme Court has criticized, distinguished, or narrowed its precedent in binding decisions. By contrast, lower courts should not rely at all on the third, fourth, or fifth categories—the failure to cite a precedent, changes in other areas of law, or methodological shifts. Supreme Court silence, as well as changes in methodology or other areas of law, provide uncertain and unreliable information about the legal status of a past precedent. Nor should lower courts rely on the first category, to the extent that the disparaging statements come only from plurality, concurring, or dissenting opinions. A subset of Justices, we contend, should not be able to undermine a past decision of the Supreme Court.

Under our approach, lower courts consider different factors than the Court itself in deciding how to treat a Supreme Court precedent. Because the Court has the authority to overturn or modify its own precedents, the Court can consider, for example, whether a past decision is erroneous, but that is not a consideration open to the lower federal courts. Relatedly, the Court may take into account a variety of signals about the status of a past precedent, including its own failure to cite a decision, as well as disparaging comments in separate opinions, methodological shifts, or changes in other areas of its doctrine. These options are not, we argue, available to the lower courts.

Our decisional authority model is more nuanced than prior accounts and offers needed guidance to the lower federal courts. As noted, our empirical research suggests that lower courts generally do seek to treat Supreme Court decisions as authoritative, rather than engaging in mere prediction. But we find that there is some confusion in the lower courts as to, for example, how to treat plurality or separate opinions that attack an

earlier decision, or what to do with Supreme Court silence or methodological shifts. Our normative analysis provides guidance on which types of Supreme Court signals should matter in a scheme of vertical precedent.

This project has implications not only for the proper role of the lower federal courts but also for that of the Supreme Court. Many scholars have asserted that the Court has a leading role in overseeing how the lower courts interpret and apply federal law.[18] To the extent that one accepts that view, how can the Court best perform that role? One might assume that, if the Supreme Court aims to undermine a precedent, it should expressly overrule that precedent, rather than signal that the precedent is disfavored. Indeed, some Justices have argued as much.[19] We argue, however, that the picture is more complex. The Supreme Court may properly signal that a precedent is disfavored without overruling it, but only when it acts through binding decisions. Neither judicial silence nor disparaging statements in separate opinions should be enough to signal that a precedent has been "abandoned."

These questions are crucially important today. Although we focus on three issue areas, similar questions arise with respect to the effect of precedent concerning many other questions of federal law that are currently the subject of considerable debate, such as qualified immunity,[20] presidential removal of executive officials,[21] congressional delegations of

[18] For examples, see infra notes 28–32 and accompanying text.

[19] See, e.g., Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 636–37 (2007) (Scalia, J., concurring in the judgment) (calling for the overruling of *Flast v. Cohen*, 392 U.S. 83 (1968), rather than "beating *Flast* to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever, and yet somehow technically alive"); infra Part III (noting calls to overrule other doctrines).

[20] See, e.g., Mack v. Yost, 63 F.4th 211, 226 & n.12 (3d Cir. 2023) (noting that "the textual and policy-based underpinnings of qualified immunity have generated debate in recent years," but also observing that "whether the doctrine should continue in its current form . . . is not within [the lower courts'] purview").

[21] At the time this Article went to press, the Court had not yet overturned its precedent allowing for congressional restrictions on removal, but it had narrowly interpreted that precedent, and some Justices had called for its reversal. See, e.g., Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2211–12 (2020) (Thomas, J., concurring in part and dissenting in part, joined by Gorsuch, J.) (arguing for overruling *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and claiming that the Court has already "repudiated almost every aspect" of that decision). The Court has also stayed district court rulings that relied on *Humphrey's Executor* to prohibit President Trump from removing members of various federal agencies, including the National Labor Relations Board ("NLRB") and the Merit Systems Protection Board ("MSPB"). See Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025). In September 2025, the Court

authority to the executive branch,[22] and Article III standing.[23] Accordingly, our theoretical analysis should help guide both the Supreme Court and the lower federal judiciary in approaching disfavored precedent across a host of issue areas. We also hope to spur additional empirical study of the relationship between the Supreme Court and the lower federal courts.

Our analysis proceeds as follows. Part I describes the theories and values that underlie a scheme of vertical precedent. Part II explains the concept of "disfavored precedent" and describes our taxonomy of five approaches that the Justices may use to signal that a precedent is disfavored. Part III provides our case studies and empirical findings. Finally, Part IV builds on the theoretical framing and empirical work to argue that, under a decisional authority model, there are limits to the manner in which the Supreme Court may properly undermine its own handiwork.

I. THEORIES OF JUDICIAL HIERARCHY

To lay the groundwork for what follows, we describe in this Part the lower federal courts' obligation to follow Supreme Court precedent, and the values at stake in a hierarchical judicial system.

A. Vertical Precedent

"Horizontal stare decisis" concerns the precedential effect of a decision within the same court (such as the U.S. Supreme Court). "Vertical stare decisis" concerns the precedential effect of a decision on courts that sit

finally granted certiorari to decide whether to overturn *Humphrey's Executor*. See Trump v. Slaughter, Nos. 25A264, 25-332, 2025 WL 2692050, at *1 (U.S. Sept. 22, 2025).

[22] Compare Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2105 (2004) (noting that, despite the Supreme Court's unwillingness to enforce the nondelegation doctrine up to that point, "lower courts at irregular intervals persist in invalidating federal legislation on nondelegation grounds, resulting in a continuing trickle of cases reaching the Supreme Court"), with Am. Inst. for Int'l Steel, Inc. v. United States, 806 F. App'x 982, 990 (Fed. Cir. 2020) ("We will not project an overruling of the delegation-doctrine standard . . . .").

[23] That is true as to both state standing and private party standing. See infra Section II.A. Similar issues also arise in the context of the political question doctrine, see Curtis A. Bradley & Eric A. Posner, The Real Political Question Doctrine, 75 Stan. L. Rev. 1031, 1034 (2023) (discussing how the doctrine has had a vibrant life in the lower courts, even after the Supreme Court has been reluctant to apply the doctrine), and the Seventh Amendment, see Samuel L. Bray, Equity, Law, and the Seventh Amendment, 100 Tex. L. Rev. 467, 478–82 (2022).

below the deciding court. Our legal system makes an important distinction between the two. The Supreme Court may be influenced by its own decisions,[24] but it clearly has the power to overrule them. This was dramatically illustrated by the Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, which overruled the abortion-rights decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[25] A more recent illustration is the Court's 2024 overruling of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[26] By contrast, there is a widespread understanding that the lower federal courts must obey the Supreme Court's commands. Indeed, both judges and commentators often describe vertical stare decisis, unlike horizontal stare decisis, as absolute.[27]

For many observers, this obligation stems from the Constitution itself.[28] Article III vests the "judicial Power of the United States" in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[29] Many scholars have concluded that the

[24] There has long been debate about the extent to which the Supreme Court is influenced by its own precedent. Compare, e.g., Jeffrey A. Segal & Harold J. Spaeth, The Influence of *Stare Decisis* on the Votes of United States Supreme Court Justices, 40 Am. J. Pol. Sci. 971, 987 (1996) (finding that most Justices are not influenced by stare decisis), with Jack Knight & Lee Epstein, The Norm of *Stare Decisis*, 40 Am. J. Pol. Sci. 1018, 1019 (1996) (finding a norm on the Supreme Court favoring respect for precedent).

[25] See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279, 2284–85 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and holding that there is no fundamental right to terminate a pregnancy).

[26] 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

[27] See, e.g., Amy Coney Barrett, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1712 (2013) ("Vertical stare decisis is an inflexible rule that admits of no exception."); Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 2025 (1994) ("A lower court must *always* follow a higher court's precedents."); Randy J. Kozel, The Scope of Precedent, 113 Mich. L. Rev. 179, 186 (2014) ("[T]he Supreme Court's decisions are absolutely binding on inferior federal courts but susceptible to overruling by the Supreme Court itself."); Ramos v. Louisiana, 140 S. Ct. 1390, 1416 n.5 (2020) (Kavanaugh, J., concurring in part) ("[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.'" (quoting U.S. Const. art. III, § 1)).

[28] See, e.g., Tara Leigh Grove, The Structural Case for Vertical Maximalism, 95 Cornell L. Rev. 1, 3, 31–39 (2009) [hereinafter Grove, Vertical Maximalism] (asserting that text, structure, and history strongly suggest that "the Constitution creates a hierarchical judiciary and gives the Court a 'supreme' role in defining the content of federal law for the judiciary").

[29] U.S. Const. art. III, § 1.

Constitution thereby creates a hierarchical judiciary,[30] such that the lower federal courts are bound by the Supreme Court's articulation of federal law.[31] Indeed, even scholars who have questioned horizontal stare decisis have tended to accept vertical stare decisis.[32]

Moreover, lower court judges themselves have generally assumed that they are bound by Supreme Court precedent.[33] And a considerable amount of social science research indicates that lower courts practice what they preach: they do in fact aim to comply with the Supreme Court's rulings.[34]

[30] See, e.g., Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 668–69, 669 n.92 (1996); Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 Colum. L. Rev. 324, 362 (2006); Steven G. Calabresi & Gary Lawson, The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1007 (2007); James E. Pfander, Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals, 78 Tex. L. Rev. 1433, 1453 (2000). For a contrary view, see David E. Engdahl, What's in a Name? The Constitutionality of Multiple "Supreme" Courts, 66 Ind. L.J. 457, 503–04 (1991).

[31] See Calabresi & Lawson, supra note 30, at 1032; Caminker, Inferior Courts, supra note 11, at 865; Charles Fried, Impudence, 1992 Sup. Ct. Rev. 155, 189–90. This Article focuses on the relationship between the Supreme Court and the lower federal courts, so we set aside the issue of control over state courts.

[32] See Steven G. Calabresi & Gary Lawson, Equity and Hierarchy: Reflections on the Harris Execution, 102 Yale L.J. 255, 277 n.106 (1992) (noting Gary Lawson's view that "precedent in the federal system is problematic when applied *horizontally*" but that "precedent is a proper and important part of the judicial system when applied *vertically*").

[33] See Harry T. Edwards, Public Misperceptions Concerning the "Politics" of Judging: Dispelling Some Myths About the D.C. Circuit, 56 U. Colo. L. Rev. 619, 622 (1985); Jon O. Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 Calif. L. Rev. 200, 200 (1984); Stephen Reinhardt, The Supreme Court, the Death Penalty, and the *Harris* Case, 102 Yale L.J. 205, 206 (1992); see also J. Woodford Howard, Jr., Courts of Appeals in the Federal Judicial System: A Study of the Second, Fifth, and District of Columbia Circuits 126, 156 (1981) (asserting, based in part on interviews with judges from the U.S. Courts of Appeals for the Second, Fifth, and D.C. Circuits, that "[t]he judges . . . felt obliged to obey the Supreme Court"). Many lower court decisions recite this obligation. See, e.g., United States v. Maloid, 71 F.4th 795, 808 (10th Cir. 2023) ("We must apply Supreme Court precedent even when that precedent rests on shaky grounds.").

[34] See, e.g., John P. Kastellec, The Judicial Hierarchy, Oxford Rsch. Encyc. of Pol. (Jan. 25, 2017), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-99 [https://doi.org/10.1093/acrefore/9780190228637.013.99] (providing an overview of the literature and stating that "there is a long empirical literature in political science on compliance, and studies generally find widespread compliance by lower courts"); John Gruhl, The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts, 33 W. Pol. Q. 502, 517–19 (1980) (finding substantial lower court compliance with the Court's libel decisions); Donald R. Songer & Reginald S. Sheehan, Supreme Court Impact on Compliance and Outcomes: Miranda and New York Times in the United States Courts of Appeals, 43 W. Pol. Q. 297, 300, 306–08 (1990) (finding substantial compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966), through 1971 and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), through 1969); see also David Klein & Neal Devins, Dicta,

Accordingly, even if one doubts that vertical stare decisis is a constitutional command, a hierarchical federal judiciary is supported by long-standing historical practice.[35]

Although it has received less focus than horizontal stare decisis, vertical stare decisis is in many respects more important. The Supreme Court, after all, can review only a small fraction of the cases decided by the lower federal courts. In the 2023 Term, for example, the Supreme Court decided only about 60 cases, while the lower courts from March 2023 to March 2024 decided over 400,000 cases.[36] Accordingly, in order for the Supreme Court's own precedent to have any meaningful impact on the judicial system, the Court must rely on the lower federal courts to obey that precedent in the many cases that the Supreme Court cannot review. That is, vertical stare decisis enables the Court to perform what some have described as its "essential functions": maintaining the uniformity and supremacy of federal law.[37]

But none of this tells us what it means to obey a Supreme Court precedent. After all, as law students quickly discover, the Court's case law is not always a model of clarity. Sometimes, for example, Supreme Court doctrine is framed in open-ended standards that give the lower federal courts a good deal of room to maneuver. Alternatively, a Supreme Court decision might be framed very narrowly, leaving the lower courts to guess about whether and to what extent it has broader implications.

Schmicta: Theory Versus Practice in Lower Court Decision Making, 54 Wm. & Mary L. Rev. 2021, 2025–26 (2013) (finding, based on an empirical study, that lower courts rarely decline to rely on language in higher court decisions on the ground that it is dicta).

[35] See Ryan C. Williams, Lower Court Originalism, 45 Harv. J.L. & Pub. Pol'y 257, 273–74 (2022). For scholarship on the importance of historical practice in constitutional interpretation, including for issues relating to judicial authority, see Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 411, 412–14 (2012); Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers, 105 Geo. L.J. 255, 313 (2017); see also William Baude, Constitutional Liquidation, 71 Stan. L. Rev. 1, 4 (2019) (considering the idea of "liquidation," associated with James Madison, pursuant to which post-enactment historical practice could settle constitutional questions); Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 521–22, 527–29, 533 (2003) (explaining the idea that constitutional meaning could be "fixed" through post-enactment interpretation).

[36] See John G. Roberts, Jr., 2024 Year End Report on the Federal Judiciary 10 (2024), https://www.supremecourt.gov/publicinfo/year-end/2024year-endreport.pdf [https://perma.cc/6E94-P8JB]; Federal Judicial Caseload Statistics 2024, Admin. Off. of the U.S. Cts., https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 [https://perma.cc/G7K2-9HWY] (last visited Sept. 7, 2025).

[37] E.g., Leonard G. Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. Pa. L. Rev. 157, 161 (1960).

There may also be difficult questions about which parts of a Supreme Court decision qualify as the holding as opposed to dicta[38]—although empirical work suggests that, in practice, lower courts do not make sharp distinctions between "holding" and "dicta" and instead tend to treat as binding many different declarations from the Supreme Court.[39]

In addition to these usual uncertainties about the scope and implications of a precedent, the Court might signal in various ways that it disfavors a prior precedent, even if it has not expressly overruled the decision, making it unclear precisely what command the lower courts should obey. This Article focuses on that phenomenon, examining how the lower federal courts do (and should) respond to disfavored Supreme Court precedent. But first we consider the values at stake in a system of vertical precedent.

B. Competing Values

The regime of vertical stare decisis is thought to promote a number of important values that are closely associated with the rule of law.[40] One value is predictability. Potential litigants can assume that the law applied in the lower courts will be consistent with Supreme Court precedent and can plan accordingly. Predictability in turn promotes the settlement of disputes.[41] Another value is consistency—that is, uniformity within the federal judicial system. Vertical stare decisis helps ensure that the law will be similar in the various circuits, thus reducing unequal application of the law and the incentives for forum shopping. A third value—related to the first two—is legitimacy. Lower court decisions may be viewed as

[38] A full exploration of the difference between holding and dicta is beyond the scope of our project. For discussions, see, e.g., Michael Abramowicz & Maxwell Stearns, Defining Dicta, 57 Stan. L. Rev. 953, 1065 (2005); Dorf, supra note 27, at 1998, 2003–05; Kozel, supra note 27, at 187–97.

[39] See Klein & Devins, supra note 34, at 2025–26.

[40] For a discussion of the values associated with the rule of law, see Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 Colum. L. Rev. 1, 8–9 (1997) (offering five elements of the rule of law: predictability, efficacy, stability, supremacy of legal authority, and the need for "instrumentalities of impartial justice"); Jeremy Waldron, Stare Decisis and the Rule of Law: A Layered Approach, 111 Mich. L. Rev. 1, 3 (2012) (listing justifications for stare decisis, including stability and fairness); see also Lon L. Fuller, The Morality of Law 38–39 (rev. ed. 1969) (describing phenomena that could undermine a commitment to the rule of law).

[41] See generally George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984) (arguing that the parties' expectations of a court's likely decision affect whether they settle or litigate a case).

legitimate in part because they reflect binding rulings that have already been made by a higher tribunal.[42]

That said, it is not realistic to expect perfect uniformity in our judicial system, especially given that the Supreme Court as a practical matter can review only a small percentage of lower court decisions. After all, the Supreme Court has often not spoken to a specific legal question, so the lower federal courts must decide it in the first instance (and may do so in different ways). Moreover, even if the Court has spoken, its precedents are often sufficiently open ended as to leave room for varying lower court interpretations.

Some disagreement and disuniformity among the lower courts is thus inevitable. Such disagreement has potential benefits by enabling dialogue and reflection about the content and application of federal law.[43] Consider, for example, the Supreme Court's process for deciding whether to grant certiorari. If there were no variation among the circuits, the Court would have less information about both what issues it should decide and the competing interests at stake. The Court often allows issues to "percolate" before granting review, in part so that it has the benefit of lower court analysis, and one of the main signals that it looks for in deciding whether an issue is "cert-worthy" is whether the lower courts are in conflict.[44] Circuit conflicts are not viewed as a sign that the system has malfunctioned; they are part of the system. The lower courts in a sense serve as laboratories of analysis for the Supreme Court.[45] On this view, disagreement among the lower courts may enhance both the quality and

[42] For an account of different types of legitimacy in constitutional law, see Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 21–46 (2018) (describing legal, moral, and sociological legitimacy).

[43] For an argument questioning the importance of uniformity in the federal system, see Amanda Frost, Overvaluing Uniformity, 94 Va. L. Rev. 1567, 1626–39 (2008).

[44] See Sup. Ct. R. 10(a) (listing, as a reason to grant review, a situation in which "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits.").

[45] See Aaron-Andrew P. Bruhl, Following Lower-Court Precedent, 81 U. Chi. L. Rev. 851, 874–76 (2014); Samuel Estreicher & John E. Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N.Y.U. L. Rev. 681, 716 (1984); Doni Gewirtzman, Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System, 61 Am. U. L. Rev. 457, 482–83 (2012).

legitimacy of Supreme Court decisions by enabling the Court to make more informed decisions.[46]

Accordingly, some divergence between Supreme Court precedent and lower court decision-making is likely a feature of the system rather than a bug. And this feature may be relevant to the issue of disfavored precedent. If, for example, the Court is considering a shift away from a precedent, it may benefit from lower court experimentation with alternate approaches before committing to overturn the precedent.[47] The Supreme Court thus may not want each lower federal court to treat a "disfavored precedent" in the same way. And in some instances, the Court's disfavoring signals should be treated as lessons only for the Court itself and not designed to generate *any* lower court reaction.

II. DISFAVORED PRECEDENT

For purposes of this Article, to treat a precedent as "disfavored" means to give it less weight than what would have seemed appropriate at the time that it was issued.[48] In this Part, to give the concept more practical content, we identify various ways in which the Supreme Court may signal that a precedent is disfavored. We then discuss different conceptions of the lower courts' role in order to tee up how lower courts might respond to such disfavored precedent. This conceptual and theoretical analysis helps

[46] See, e.g., Tom S. Clark & Jonathan P. Kastellec, The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model, 75 J. Pol. 150, 151–52 (2013) (modeling "the Court's monitoring of lower court decisions about issues as a learning process in which the Court uses this information to learn about its preferred resolution of a new legal issue"); Gewirtzman, supra note 45, at 482–83 (noting that percolation allows the Supreme Court to harness the experience, diversity, and skill of lower courts to produce "optimal rules" that have "added legitimacy"). But see Michael Coenen & Seth Davis, Percolation's Value, 73 Stan. L. Rev. 363, 366–67, 369 (2021) (questioning the value of percolation).

[47] This is one of many ways in which it is too simplistic to describe the federal court system as purely "top-down." Some scholars argue that, in addition to serving as sources of information for the Supreme Court, the lower federal courts can act in ways that either reduce or increase the odds of Supreme Court review. See Aaron L. Nielson & Paul Stancil, Gaming Certiorari, 170 U. Pa. L. Rev. 1129, 1143–44 (2022).

[48] We are purposely bracketing here the question of how broadly or narrowly a precedent should be construed in the first place, a jurisprudential question that is beyond the scope of this Article. See, e.g., Kozel, supra note 27, at 187–99; Lawrence B. Solum, Legal Theory Lexicon 005: Holdings, Legal Theory Lexicon (Nov. 10, 2024), https://legaltheorylexicon.com/2003/10/legal_theory_le_2-11/ [https://perma.cc/FXW8-LRPE]. Different lower court judges might answer that question differently. But whatever their answer, this Article considers whether and to what extent that answer should *change* in light of disfavoring signals from the Supreme Court.

frame Part III, which provides our empirical examination of how lower courts have treated disfavored precedent across issue areas.

A. Supreme Court Signals

What might suggest that a Supreme Court precedent is "disfavored"? We identify here five different signals that may indicate that a precedent is on thin ice.[49]

First, the current Justices may make disparaging statements about a precedent in either majority or other opinions. For example, in its 2023 ruling in *United States v. Texas*, the Court majority suggested some "disagreement[]" with its prior decision in *Massachusetts v. EPA*, which announced that state plaintiffs enjoy "special solicitude in our standing analysis."[50] Justice Gorsuch went further in a concurrence (joined by Justices Barrett and Thomas), declaring that he had "doubts" about the special solicitude concept and further advising that "lower courts should just leave that idea on the shelf in future" cases.[51] All of this led Justice Alito to wonder, in a solo dissent, whether the Court's "monumental decision" in *Massachusetts v. EPA* had "been quietly interred."[52] As described below, both Justices and scholars likewise debated for decades whether disparaging comments about the *Lemon* test for Establishment Clause claims signaled the "interment" of that decision.[53]

[49] This Article focuses on signals that emanate from the Court itself. But we recognize that external factors may influence judicial decision-making. It is sometimes said, for example, that certain Supreme Court precedents have been overturned, not formally, but through the "court of history"—that is, through changes in U.S. values. The Court itself endorsed this idea with respect to its 1944 decision in *Korematsu v. United States*, 323 U.S. 214 (1944), which controversially allowed for the exclusion of individuals of Japanese ancestry from the West Coast during World War II. See Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (contending that *Korematsu* "has been overruled in the court of history"). But allowing history to overturn Supreme Court precedents could seriously undermine the regime of vertical stare decisis. See Daniel B. Rice, Repugnant Precedents and the Court of History, 121 Mich. L. Rev. 577, 583 (2023) ("If that command [of lower court obedience to Supreme Court precedent] need not apply to a subset of cases supposedly disavowed by the 'court of history,' it will lose much of its utility as an ironclad rule.").

[50] United States v. Texas, 143 S. Ct. 1964, 1975 n.6 (2023) ("Putting aside any disagreements that some may have with *Massachusetts v. EPA*, that decision does not control this case."); Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

[51] *United States v. Texas*, 143 S. Ct. at 1977 (Gorsuch, J., concurring in the judgment, joined by Thomas & Barrett, JJ.).

[52] Id. at 1997 (Alito, J., dissenting).

[53] See infra Section III.A.

Second, the Court may apply a precedent narrowly. For example, the Court announced a broad rule in its 1966 decision in *Miranda v. Arizona*, requiring police to give specific warnings before interrogating criminal suspects in custody.[54] Yet, as scholars have recounted, the Court subsequently restricted the scope of the *Miranda* protections in a series of cases.[55] Likewise, the Court in its 1968 decision in *Flast v. Cohen* announced a broad rule granting standing to federal taxpayers to challenge Establishment Clause violations by the federal government.[56] Thereafter, although the Court declined to overrule *Flast*, it sharply narrowed the scope of taxpayer standing.[57] And as described below, the Court also narrowed its decision in *Bivens* by rejecting many subsequent efforts to sue federal officials for constitutional violations and announcing various limiting considerations.[58]

Third, the Supreme Court may simply ignore a precedent—by failing to rely on it in cases where it would seem by its terms to apply. The Court has often given such silent treatment to the political question doctrine, such that even when a case seems to raise a delicate political issue, the Court declines to invoke its political question cases.[59] Another prominent example is *Chevron*, which we explore further below.[60] In recent years, even when a case seemed to implicate deference to an administrative agency, the Court often declined even to cite *Chevron*. Indeed, in recently explaining its decision to overturn *Chevron*, the Court noted that it had "not deferred to an agency interpretation under *Chevron* since 2016."[61]

Fourth, the Court may issue decisions in related areas of law that seem to undermine a precedent. For example, as the Court recognized in its 2023 decision in *Mallory v. Norfolk Southern Railway Co.*, many personal jurisdiction decisions were read to have cast doubt on the Court's earlier

[54] 384 U.S. 436, 444–45 (1966).

[55] See Friedman, supra note 9, at 16 (arguing that subsequent cases "ate away at *Miranda*'s rationale like termites at the foundation of a house, leaving the precedent ostensibly standing but precarious to the point of being uninhabitable").

[56] 392 U.S. 83, 102–03 (1968).

[57] See, e.g., Hein v. Freedom from Religion Found., Inc., 551 U.S. 587, 608–09, 614–15 (2007) (plurality opinion) (rejecting taxpayer standing to challenge a presidential faith-based initiative, but also rejecting the invitation in Justice Scalia's concurring opinion to overrule *Flast*); Re, Narrowing in the Court, supra note 9, at 1892–95 (arguing that post-*Flast* cases narrowed the decision).

[58] See infra Section III.B.

[59] See Bradley & Posner, supra note 23, at 1039–40.

[60] See infra Section III.C.

[61] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024).

rule on corporate consent to suit.[62] Under that rule, states could require corporations to appoint an agent for service of process as a condition of doing business in the state, and thereby ensure that the corporation would be subject to suit in that state for any alleged wrongdoing.[63] That rule seemed to be in considerable tension with the admonition of *International Shoe* and later cases that held a defendant must generally have "minimum contacts" with a state and be subject only to suits that arise out of those contacts.[64] (The Supreme Court nevertheless declined to overrule the corporate consent rule in *Mallory*.[65]) Likewise, some observers argue that the Court's increasing focus on the importance of "concrete" injuries in the Article III standing context has cast doubt on its earlier cases granting standing to "testers" in civil rights actions.[66] And as described below, scholars asserted that the Supreme Court's application of the major questions doctrine to reject federal agency action had cast further doubt on the continuing vitality of *Chevron* deference.[67]

Fifth, the Supreme Court may shift away from the methodology that underlies a precedent. Several Justices, as detailed below, have argued that the Court's refusal to imply private rights of action into federal statutes has lessons for the *Bivens* regime.[68] After all, these Justices assert, if the Court is unwilling to infer private causes of action from statutory

[62] 143 S. Ct. 2028, 2033–39 (2023) (noting that the Court had upheld consent-to-suit provisions in 1917, but that the Supreme Court of Pennsylvania found the rule was in tension with the line of cases beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

[63] Id. at 2033–38.

[64] See id. at 2055–57, 2064–65 (Barrett, J., dissenting) (asserting that consent-to-suit statutes enable states to exercise general personal jurisdiction over corporations that are not "at home" in the state); see also Shaffer v. Heitner, 433 U.S. 186, 207 (1977) (describing "the minimum-contacts standard elucidated in *International Shoe*" as the test for personal jurisdiction); *Int'l Shoe Co.*, 326 U.S. at 316.

[65] See 143 S. Ct. at 2044. Justice Alito provided the fifth vote for the majority, agreeing with the personal jurisdiction analysis but suggesting that such an exercise of jurisdiction may violate the dormant Commerce Clause. Id. at 2047, 2051–55 (Alito, J., concurring in part and concurring in the judgment).

[66] See, e.g., Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 169–70 (4th Cir. 2023) (noting the tension between *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). The Court seemed likely to address the tension between *TransUnion* and *Havens Realty* in the 2023 Term but ultimately dismissed the case on mootness grounds. See Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 22 (2023).

[67] See infra Section III.C.

[68] See infra Section III.B.

silence, it should be equally unwilling to infer private causes of action to enforce the Constitution.[69]

B. Possible Lower Court Responses

Assuming that there are signals of some sort that a Supreme Court precedent is in disfavor, how should lower courts respond? The existing literature on the relationship between the Supreme Court and the lower federal courts offers two basic approaches. One possibility is that the lower federal courts should make a "prediction" about how the current Supreme Court might rule, including by taking account of the current vibrancy of a precedent. Another possibility is that the lower federal courts should treat Supreme Court precedent as "authoritative" and not speculate about how the current Court might rule. Scholars have disagreed about which of these two models—"prediction" or "authority"—is proper for the federal court system.[70] We argue that neither model, at least as currently formulated, provides a normatively attractive vision of vertical precedent. We accordingly propose a different model, which we call the decisional authority model.

We begin by examining the prediction model—the assumption that lower courts should decide a case as they anticipate the current Supreme Court would decide it. At first glance, there are reasons to favor a prediction approach. Lower courts might understandably be inclined to speculate about the current validity or scope of a precedent, if for no other reason than to avoid being reversed.[71] Moreover, sometimes individual

[69] See, e.g., Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring, joined by Thomas, J.).

[70] Compare, e.g., Caminker, Precedent and Prediction, supra note 11, at 6 (defending the use of the prediction model under certain narrow conditions), with Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. Rev. 651, 655 (1995) (arguing that a predictive approach undermines the rule of law).

[71] There is some debate about the extent to which court of appeals judges worry about being reversed. Compare, e.g., Caminker, Precedent and Prediction, supra note 11, at 77 ("Much anecdotal evidence suggests that lower court judges dislike being reversed on appeal."), and Thomas W. Merrill, Interpreting an Unamendable Text, 71 Vand. L. Rev. 547, 571–72 (2018) (relying on work by Seventh Circuit Judge Richard Posner in asserting that "[w]e have it on good authority that judges do not like being reversed by higher courts" (citing Richard A. Posner, How Judges Think 141 (2008))), with David E. Klein & Robert J. Hume, Fear of Reversal as an Explanation of Lower Court Compliance, 37 Law & Soc'y Rev. 579, 579–80 (2003) (providing an empirical study that suggests that fear of reversal is not the principal explanation for circuit court compliance with Supreme Court decisions). See also Pauline T. Kim, Lower Court Discretion, 82 N.Y.U. L. Rev. 383, 401–02 (2007) (doubting that circuit judges worry about reversal, given the "vanishingly small" chance of Supreme Court review).

Justices have called upon the lower courts to ignore an earlier precedent. As discussed, Justice Gorsuch did so recently in advising lower courts to leave *Massachusetts v. EPA* "on the shelf."[72]

The prediction model, however, is problematic for both normative and practical reasons. The prediction model seems to deny that existing Supreme Court precedent qualifies as governing "law." Accordingly, as Michael Dorf has thoughtfully observed, the prediction model "promotes a conception of law as the sum of the views of the particular judges who happen to sit on the high court at any time, rather than a conception of law as an impersonal, ideal whole."[73] Even if one accepts (as we do) that the preferences of Justices may influence their votes in specific cases, the many doctrines developed over time by the Supreme Court as an institution—consisting of many different individuals across more than two centuries—cannot easily be reduced to the sum of individual Justices' views.

A pure prediction model, moreover, might undermine one role that is served by the lower federal courts, which is to provide reasoned analysis that the Supreme Court can consider and potentially benefit from when it eventually resolves an issue. If the lower courts merely tried to predict what the Court would do in addressing the issue, they would not be providing this sort of sounding board for the Court. It would be as if you asked a friend for advice about what to do in a given situation and they responded by merely predicting how you would act: this advice might tell you something interesting about how your friend viewed you, but it would not be very helpful advice.[74]

Whether or not one accepts our normative objections to the prediction model,[75] there are still important practical concerns. There is a danger, for example, that lower court predictions could turn out to be wrong, in part

[72] United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring in the judgment, joined by Thomas & Barrett, JJ.).

[73] Dorf, supra note 70, at 655.

[74] The situation might, of course, be more complicated than this analogy. A lower court might make a prediction that involves a mixture of its own assessment of the state of the law and a guess about what a majority of the Justices will do. Also, if there were varying predictions by the lower courts about what the Court would do, that variation might provide useful information. But the point remains that the more a lower court is engaged in prediction, the less it is offering its own account of the legal materials.

[75] Cf. Richard M. Re, Personal Precedent at the Supreme Court, 136 Harv. L. Rev. 824, 836 (2023) (suggesting in an article focused primarily on horizontal precedent that lower courts and litigants could "confidently revise their view of the law" when "the new median Justice has personal precedent squarely at odds with past Court decisions").

because it may be difficult to predict how much weight the Supreme Court will give to horizontal stare decisis.[76] There is also the challenge of the passage of time. Given the slow pace of litigation, the composition of the Supreme Court may change before a case reaches the Court. Accordingly, the lower court's prediction may be based on the "wrong" set of Justices.

A prediction model may be particularly problematic for the modern Supreme Court. From 1891 to 1988, Congress gradually expanded the Court's discretionary certiorari jurisdiction—and did so at the Justices' request—because the Court lacked the resources to review every case brought before it on appeal.[77] Since 1988, the Court has had discretionary review over virtually every case[78] and has heard only a small fraction of the hundreds of thousands of cases handled by the lower federal courts.[79] So the Court simply cannot police on a case-by-case basis "incorrect" lower court predictions. That may help explain why the Court beginning in 1989 admonished the lower courts *not* to predict future Supreme Court rulings—by, for example, engaging in anticipatory overruling.[80] Instead, the Court insisted, lower courts should follow an authority model.

[76] For example, one might have reasonably predicted from its recent decisions that the Court would depart from its precedent in *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (allowing the use of the civil rights statute 42 U.S.C. § 1983 to enforce rights-conferring regulatory statutes), and yet eight Justices adhered to the precedent in *Health & Hospital Corp. of Marion County v. Talevski*, 143 S. Ct. 1444, 1449–50 (2023); id. at 1463 (Barrett, J., concurring, joined by Roberts, C.J.); id. at 1485 (Alito, J., concurring, joined by Thomas, J.).

[77] See Tara Leigh Grove, The Exceptions Clause as a Structural Safeguard, 113 Colum. L. Rev. 929, 948–78 (2013) (describing these developments); Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1660–1704 (2000).

[78] See Act of June 27, 1988, Pub. L. No. 100-352, §§ 2–4, 102 Stat. 662, 662–63 (codified at 28 U.S.C. §§ 1254, 1257–1258).

[79] See supra note 36 and accompanying text. For discussions of how caseload concerns may impact the Court's decision-making, see Andrew Coan, Rationing the Constitution: How Judicial Capacity Shapes Supreme Court Decision-Making 2–3 (2019); Grove, Vertical Maximalism, supra note 28, at 40–50 (arguing that the modern Court can most effectively guide its judicial inferiors through broad precedents); Randy J. Kozel & Jeffrey A. Pojanowski, Discretionary Dockets, 31 Const. Comment. 221, 224–25 (2016) (arguing that the Court should consider the number of cases it takes when determining whether to issue broad or incremental precedent).

[80] See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); see also, e.g., State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). Before these admonishments, anticipatory overruling of Supreme Court precedents by lower courts appears to have been more common. See Margaret N.

The authority model avoids the normative challenges of the prediction model because it treats existing Supreme Court precedent as governing law. But the Court has been notably unclear about what the authority model means. The Court has repeatedly declared that "[i]f a precedent of this Court has direct application in a case," the lower courts should follow that precedent, even if it "appears to rest on reasons rejected in some other line of decisions, . . . leaving to this Court the prerogative of overruling its own decisions."[81] The Court thereby seems to direct lower courts to apply the original meaning of a Supreme Court decision and to ignore subsequent developments.

Yet such a vision of judicial decision-making is artificially narrow. Supreme Court doctrine consists not simply of one case, such as *Lemon*, *Bivens*, or *Chevron*, but of the entire body of precedent that applies, extends, or distinguishes an earlier ruling. Nor is it likely that the Supreme Court really means for lower courts to zero in on a single past case without regard for subsequent changes to the doctrine. The scope and effect of a precedent is not captured merely in the text of the original decision;[82] the meaning of a precedent is affected by other legal materials, including other precedents. Accordingly, lower federal courts properly take into account some subsequent developments that signal that a precedent is in disfavor.[83]

Kniffin, Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals, 51 Fordham L. Rev. 53, 53–57 (1982); see also C. Steven Bradford, Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling, 59 Fordham L. Rev. 39, 41 (1990) ("[N]ot until 1989 did the Court express a clear opinion on the validity of anticipatory overruling.").

[81] Agostini v. Felton, 521 U.S. 203, 237 (1997) (first alteration in original) (quoting *Rodriguez de Quijas*, 490 U.S. at 484); id. ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

[82] Even if statutory interpretation should focus on the original meaning of the text, the Court has repeatedly observed that interpreting a judicial precedent is fundamentally different from interpreting a statutory text. See, e.g., Brown v. Davenport, 142 S. Ct. 1510, 1528 (2022) ("This Court has long stressed that 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.'" (alteration in original) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979))); see also Margaret H. Lemos, Should Judicial Opinions Be Read Like Statutes? 4 (Duke L. Sch. Pub. L. & Legal Theory Series, Working Paper No. 2024-51, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4911985 [https://perma.cc/RX3D-HGF2] (exploring "the reasons that might support an interpretive distinction between opinions and statutes").

[83] Cf. Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) ("We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a

We are calling this broader approach the decisional authority model. Under this model, subsequent developments need to be considered along with the original precedent. But which developments count? The existing case law and commentary do not tell lower courts which Supreme Court declarations properly signal that a precedent is in disfavor, even if one accepts an authority model. Our decisional authority model, which focuses on materials contained in majority opinions, provides needed guidance.

At the outset, we assert that some potential signals are clearly out of bounds. It would be problematic under any version of the authority model, for example, for a lower court to treat a precedent as disfavored simply because the president and the Senate have used the appointments process to push for an ideological shift on the Court. Such an approach would simply revert to a prediction model—speculating about and then counting the expected votes of individual Justices—which we reject on both normative and practical grounds.[84]

But we also argue that there are important differences in the normative significance of signals stemming from the Justices themselves. Under our decisional authority model, only binding decisions that criticize, distinguish, or otherwise narrow an earlier decision should guide lower courts; this encompasses part of the first and all of the second category of our taxonomy. By contrast, Supreme Court silence, changes in related areas, and methodological shifts (the third, fourth, and fifth categories) should not be sufficient to signal that a precedent is in disfavor. The Supreme Court's failure to cite a precedent, or changes in methodology or other areas of law, offer uncertain and unreliable signals about the vitality of a precedent. Nor should disparaging statements in plurality or separate opinions (the remainder of the first category) be sufficient to signal that a Supreme Court precedent is in disfavor. A subset of the Court cannot, we argue, undermine prior law.[85]

passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling.").

[84] See Kniffin, supra note 80, at 53 (asserting that lower court predictions may look to "changes in Supreme Court membership or in particular Justices' views").

[85] We reject other signals as well, such as statements during oral argument or orders coming from the Supreme Court's emergency docket (often called the "shadow docket"). Contra Re, Narrowing From Below, supra note 11, at 942–45 (suggesting that the Justices could signal their dissatisfaction with prior precedent through summary orders or statements at oral argument). A Justice's questions during oral argument may say little about the Justice's ultimate vote in a case. And the Court's emergency decisions, such as stays of lower court

Importantly, the range of relevant materials is different for the Supreme Court itself when it considers how to treat one of its precedents. In part, this is because the precedents are binding on the Court only as a matter of horizontal stare decisis and thus potentially subject to being overruled or modified by the Court. But it is also because the Court has the authority to choose between competing lines of precedent and to consider the effect on precedent of changes in the Court's methodological commitments over time.

To what extent do lower courts adhere to the taxonomy we have outlined? And is there any disagreement among lower court judges about which pronouncements from the Justices properly signal that a precedent is in disfavor? To answer these questions, some empirical analysis is needed, which we provide below in our case studies. Once we have a better sense of how lower federal courts do in fact respond to Supreme Court signals that a precedent is "disfavored," we can offer a more informed normative assessment of how well the scheme of vertical precedent is working. The case studies also set up our analysis in Part IV, where we explain in more detail our contention that there are limits to the ways in which the Supreme Court may properly undermine its handiwork.

III. CASE STUDIES

In this Part, we offer examples from three substantive areas of law in which the Supreme Court initially issued a pathbreaking decision and then seemed to pull back from that decision in subsequent cases. With respect

orders, are, by definition, temporary and provisional, although the Court has indicated that they should inform how lower courts exercise their discretion when confronted with similar requests for interim relief. See Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) ("Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."). For an exploration of how lower courts should respond to interim orders, see Bert I. Huang, The Foreshadow Docket, 124 Colum. L. Rev. 851, 856–58 (2024) (reviewing Philosophical Foundations of Precedent (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023)).

We also disagree with Richard Re's interesting argument that lower courts may rely on such signals (or other signals) to "narrow" Supreme Court precedent—defined as "interpreting a precedent not to apply where it is best read to apply" or "interpreting a precedent more narrowly than it is best read." Re, Narrowing From Below, supra note 11, at 925–28, 932. Under any version of an authority model, lower courts should treat a Supreme Court precedent as governing "law" and at least endeavor to give the precedent its "best" reading. We recognize, of course, that there may be differing views about what that best reading entails, especially after the Court has backtracked from a decision, something we discuss further in Part IV.

to each example, we begin with a discussion of how the Court or individual Justices signaled that the earlier precedent was in disfavor. We also provide a summary of our empirical findings regarding the response over time in the federal courts of appeals. These findings help us see how lower courts do in fact respond to different signals that a precedent is in disfavor. This analysis, in turn, sets the stage for Part IV, where we evaluate how well the system of vertical precedent is currently working.

A. Lemon

1. Background

The *Lemon* test for Establishment Clause claims has had a complicated history in the Supreme Court. The test, which was crafted by Chief Justice Burger's 1971 opinion in *Lemon v. Kurtzman*, instructed courts to examine whether a government action had a secular purpose; whether the effect of the government action was to favor religion; and whether the government had somehow become too entangled with religion.[86] Although the Court relied heavily on this test in subsequent decisions, the test was from the outset subject to significant and sustained criticism.[87] Scholars and members of the Court argued that the test lacked a principled foundation, led to inconsistent and unpredictable results, and was "extraordinarily unhelpful to the lower courts."[88]

In an apparent effort to clarify the *Lemon* test, Justice O'Connor proposed a focus on "endorsement" (an approach that the Court applied in some cases).[89] Under this approach, in examining the first and second

[86] 403 U.S. 602, 612–13 (1971). In *Lemon* itself, the Court struck down two state programs that provided financial assistance to private schools, including religious institutions. Id. at 606–07, 614 (finding an "excessive entanglement between government and religion").

[87] See, e.g., Douglas Laycock, A Survey of Religious Liberty in the United States, 47 Ohio St. L.J. 409, 449–50 (1986) (noting that, since 1971, the Court had generally adhered to the three-part *Lemon* test, despite "intense scholarly criticism").

[88] E.g., Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 110 (1993); see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) (agreeing with "the long list of constitutional scholars who have criticized *Lemon*").

[89] Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring); see County of Allegheny v. ACLU, 492 U.S. 573, 578–79, 592–602 (1989) (applying the endorsement approach in holding impermissible a nativity display). Scholars have referred to the endorsement approach as the "endorsement test"—a label that may make it sound like a separate test rather than an offshoot of *Lemon*. See, e.g., Douglas Laycock, The Many Meanings of Separation, 70 U. Chi. L. Rev. 1667, 1691 (2003) (reviewing Philip Hamburger,

prongs of *Lemon* (that is, in determining the purpose or effect of a government action), one should examine whether a reasonable observer would understand the action as sending "a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[90] But the endorsement analysis was also met with considerable scholarly criticism.[91]

Given the dissatisfaction with the *Lemon* test, there were repeated predictions that the Court would overrule the formula. For example, after the Court's 1983 decision in *Marsh v. Chambers* declined to apply *Lemon* to determine the validity of legislative prayer and instead focused on historical practice,[92] some observers expected the Court to replace *Lemon* (it did not).[93] These predictions intensified following the Court's 1992 decision in *Lee v. Weisman*, where the Court held invalid a state-sponsored high school graduation prayer.[94] Although the Court declined the request of the U.S. Solicitor General and school officials "to reconsider our decision in *Lemon*," the Court applied a coercion test rather than *Lemon*.[95] In dissent, Justice Scalia insisted that the Court had in *Lee* "demonstrate[d] the irrelevance of *Lemon* by essentially ignoring it, and the interment of that case may be the one happy byproduct of the Court's

Separation of Church and State (2002)). But we follow other scholars and the Supreme Court itself in treating endorsement as a gloss on *Lemon*. See Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (discussing "*Lemon* and its endorsement test offshoot"); Richard Schragger, Micah Schwartzman & Nelson Tebbe, Reestablishing Religion, 92 U. Chi. L. Rev. 199, 221 (2025) (describing endorsement as "[a]n important gloss on *Lemon*"); Cynthia V. Ward, Coercion and Choice Under the Establishment Clause, 39 U.C. Davis L. Rev. 1621, 1629 (2006) ("Justice Sandra Day O'Connor suggested a 'refinement' of *Lemon* that has since become known as the endorsement test.").

[90] *County of Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 688).

[91] See, e.g., Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 148 (1992) ("The bare concept of 'endorsement' . . . provides no guidance to legislatures or lower courts . . . ."); Ward, supra note 89, at 1630. But see Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution 122–24 (2007) (defending endorsement).

[92] See 463 U.S. 783, 784, 786–92, 795 (1983) (upholding prayer before state legislative sessions).

[93] See, e.g., Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 2–3 (observing that after the Court in *Marsh* "[l]ook[ed] to historical practice instead of to *Lemon*, . . . the 1984 Term appeared to augur doctrinal change," but "in the end, the Court returned to *Lemon* and applied the test rigidly and emphatically").

[94] 505 U.S. 577, 580, 587, 594 (1992).

[95] Id.

otherwise lamentable decision."[96] Likewise, in the wake of *Lee*, Michael Paulsen penned an article entitled "*Lemon* Is Dead," emphasizing that "[s]ince 1989, . . . a majority of justices ha[d] gone on record as being opposed to at least some critical aspect of the *Lemon* test."[97]

But *Lemon* was not dead. Just one year after *Lee*, the Court relied on the *Lemon* test in *Lamb's Chapel v. Center Moriches Union Free School District* in concluding that allowing a religious group as well as other groups to use public school property would not violate the Establishment Clause.[98] Concurring in the judgment, Justice Scalia colorfully complained about the continuing relevance of *Lemon*: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave . . . , after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ."[99] Scalia also argued that a majority of the Court had effectively rejected *Lemon*, commenting that "[o]ver the years, . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so."[100] Writing for the majority, Justice Byron White responded in a short footnote: "[T]here is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case . . . presents no occasion to do so."[101]

In subsequent years, the Court vacillated between decisions that either relied on *Lemon* or ignored the test entirely, and by the late 1990s, some scholars again described the *Lemon* test as having met its "demise" or even as "abandoned."[102] Yet in its 2000 decision in *Santa Fe Independent School District v. Doe*, the Court again turned to the *Lemon* test and the endorsement approach in striking down a school district's policy of

[96] Id. at 644 (Scalia, J., dissenting) (citation omitted).

[97] Michael Stokes Paulsen, *Lemon* Is Dead, 43 Case W. Rsrv. L. Rev. 795, 797, 812–13 (1993).

[98] See 508 U.S. 384, 387, 395–97 (1993).

[99] Id. at 398 (Scalia, J., concurring in the judgment).

[100] Id.

[101] Id. at 395 n.7 (majority opinion).

[102] E.g., Christopher L. Eisgruber & Lawrence G. Sager, Congressional Power and Religious Liberty After *City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79, 138 (noting "the demise of" the *Lemon* test, which "has passed quietly, ignored rather than overruled"); Michael W. McConnell, Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Ease Current Confusion, 83 A.B.A. J. 46, 47 (1997) ("Many scholars think the Court already has abandoned the test.").

allowing student-led prayers at high school football games.[103] Dissenting, and joined by Justices Scalia and Thomas, Chief Justice Rehnquist complained that the Court "applie[d] the most rigid version of the oft-criticized test of *Lemon v. Kurtzman*," despite its "checkered career in the decisional law of this Court."[104]

The Court further muddied the waters in 2005 in a pair of decisions involving the Ten Commandments. In *McCreary County v. American Civil Liberties Union of Kentucky*, the Court applied *Lemon* to hold invalid Ten Commandments displays at two county courthouses.[105] Justice Souter's majority opinion rejected what he described as the counties' "seismic" and "unconvincing" argument that the Court "abandon *Lemon*'s purpose test" and concluded that the Ten Commandments displays at issue lacked a secular purpose.[106] Meanwhile, Chief Justice Rehnquist's plurality opinion in *Van Orden v. Perry*—issued on the same day as *McCreary County*—did *not* rely on *Lemon* in upholding a different Ten Commandments display on state capitol grounds.[107]

Following these 2005 decisions, for almost fifteen years, the Court said little about the *Lemon* test. But the discourse surrounding *Lemon* heated up again with the 2019 decision in *American Legion v. American Humanist Ass'n*.[108] The Court did not apply the *Lemon* test in upholding the display of a cross on public land.[109] Writing for a plurality (joined by Chief Justice Roberts and Justices Breyer and Kavanaugh), Justice Alito emphasized the "shortcomings" of *Lemon* and the endorsement approach and asserted that a historical test rather than *Lemon* should guide (at least) the evaluation of "longstanding monuments, symbols, and practices."[110] In a separate concurrence, Justice Kagan—who provided the fifth vote to uphold the cross—stated, "Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think

[103] 530 U.S. 290, 301, 312, 314–17 (2000).

[104] Id. at 319 (Rehnquist, C.J., dissenting, joined by Scalia & Thomas, JJ.).

[105] 545 U.S. 844, 859–66, 881 (2005).

[106] Id. at 859–64, 881.

[107] See Van Orden v. Perry, 545 U.S. 677, 681, 685–86, 692 (2005) (plurality opinion). Justice Breyer provided the fifth vote for the Court's holding in *Van Orden* (and was the only Justice to side with the majority in both *Van Orden* and *McCreary County*). Id. at 679; *McCreary County*, 545 U.S. at 848.

[108] 139 S. Ct. 2067 (2019).

[109] Id. at 2074, 2081–85, 2090 (plurality opinion).

[110] Id. at 2080–82 ("The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars." (footnotes omitted)).

that test's focus on purposes and effects is crucial in evaluating government action in this sphere," and thus declined to join the parts of Justice Alito's opinion that rejected *Lemon*.[111]

Concurring in the judgment, Justice Thomas announced that he "would take the logical next step and overrule the *Lemon* test in all contexts."[112] Justice Gorsuch (joined by Justice Thomas) also concurred in the judgment, arguing primarily that the plaintiffs lacked standing to challenge the cross, but further offering his view that "*Lemon* was a misadventure."[113] In a separate concurrence, Justice Kavanaugh argued that "this case again demonstrates" that "this Court no longer applies the old test articulated in *Lemon v. Kurtzman*" and thus that "the *Lemon* test is not good law."[114]

In the wake of *American Legion*, some scholars observed that the *Lemon* test was in trouble. Micah Schwartzman and Nelson Tebbe argued that "[a]lthough the Court was careful not to jettison the *Lemon* and endorsement tests explicitly," if one added up the four-Justice plurality and the concurrences by Justices Thomas and Gorsuch, "it is clear that a majority of the Justices now reject" the *Lemon* approach.[115] Michael McConnell asserted that, when one combined the plurality opinion with those two concurrences, *American Legion* had an important message for the lower courts: "The Court does not utter the magic words, that the *Lemon* test is 'repudiated' or 'abandoned' . . . , but it comes close enough that lower courts should take the hint."[116] Other scholars argued, however, that given the division among the Justices, the message from *American Legion* was unclear.[117]

[111] Id. at 2094 (Kagan, J., concurring in part).

[112] Id. at 2097 (Thomas, J., concurring in the judgment). Justice Thomas also reiterated his view that the Establishment Clause does not even apply to state governments. See id. at 2094–95.

[113] Id. at 2098–2101 (Gorsuch, J., concurring in the judgment, joined by Thomas, J.) (rejecting "[o]ffended observer standing").

[114] Id. at 2092–93 (Kavanaugh, J., concurring).

[115] Micah Schwartzman & Nelson Tebbe, Establishment Clause Appeasement, 2019 Sup. Ct. Rev. 271, 281–82.

[116] Michael W. McConnell, No More (Old) Symbol Cases, 2018–2019 Cato Sup. Ct. Rev. 91, 104 (2019).

[117] See, e.g., Marc O. DeGirolami, Cross Purposes, Pub. Discourse (June 24, 2019), https://www.thepublicdiscourse.com/2019/06/53508 [https://perma.cc/M324-Z3DC] (stating that, "[f]or those who were hoping that something clearer would emerge from this case," the failure of Justices Thomas and Gorsuch to join Justice Alito's criticism of *Lemon* is "rather exasperating. . . . Some will regard *American Legion* as a lost opportunity for the Court to say something stronger, clearer, and more far-reaching about the Establishment Clause").

That brings us to the Supreme Court's 2022 decision in *Kennedy v. Bremerton School District*.[118] The case involved a high school football coach who regularly prayed on the fifty-yard line, sometimes alongside student players.[119] Concerned about a potential Establishment Clause violation, the school district asked the coach to cease engaging in such public prayers while on duty and invited him to pray in a more private setting—out of view of students or the public.[120] When the coach brought suit, a federal district court in 2020 and the U.S. Court of Appeals for the Ninth Circuit in 2021, relying on the endorsement approach (and particularly the application in *Santa Fe* involving prayer at high school football games), ruled for the school district.[121]

In *Kennedy*, the Supreme Court reversed, holding that the school district would not violate the Establishment Clause by permitting the coach's prayer.[122] Most important for present purposes, Justice Gorsuch's opinion announced that the court of appeals "erred" by relying on the *Lemon* and endorsement approach, explaining that "the 'shortcomings' associated with [*Lemon*'s] 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause became so 'apparent' that this Court long ago abandoned *Lemon* and its endorsement test offshoot."[123]

The dissenters understood the *Kennedy* opinion as the first official overruling of the *Lemon* test. Justice Sotomayor's dissent (which was joined by Justices Breyer and Kagan) asserted that although "[t]he Court chiefly cite[d] the plurality opinion in *American Legion*" to support its approach, "[t]he only categorical rejection of *Lemon* in *American Legion* appeared in separate writings" by Justices Thomas, Gorsuch, and

[118] 142 S. Ct. 2407 (2022).

[119] See id. at 2416.

[120] See id. at 2418.

[121] See Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004, 1009–10, 1017–19 (9th Cir. 2021) (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)). Interestingly, the district court treated the endorsement test as separate from *Lemon*. See Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1237–40, 1238 n.5 (W.D. Wash. 2020) ("Kennedy argues that the *Lemon* test is disfavored and does not apply in the school. The Court need not address this because the endorsement and coercion tests are more readily applicable to the issues here and are sufficient to resolve them.").

[122] See *Kennedy*, 142 S. Ct. at 2432. The Court also held that the prayer was protected by the First Amendment's Free Speech and Free Exercise Clauses. See id. at 2421–26, 2432–33.

[123] Id. at 2427–28 (second alteration in original) (quoting Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–81 (2019) (plurality opinion)).

Kavanaugh.[124] The dissent argued, "The Court now goes much further, overruling *Lemon* entirely and in all contexts."[125]

In fact, *Kennedy* did not purport to overrule *Lemon* but instead reasoned that the decision had already been abandoned. Indeed, Justice Gorsuch's opinion chastised the court of appeals for treating the *Lemon* and endorsement approach as good law. *Kennedy* thus raises important and difficult questions about when and how (if at all) the *Lemon* test was "abandoned." These questions are challenging, in part because scholars and jurists described the *Lemon* test as "inter[red]" or "abandoned" at various points beginning in the 1990s, yet the Court repeatedly resurrected and applied the test. Moreover, in 2023, the Court cited *Kennedy*, not some prior decision, for the proposition that *Lemon* is "now abrogated."[126]

2. Quantitative Assessment

To get traction on such questions, we explore how the lower federal courts of appeals dealt with the Supreme Court's evolving attitude toward *Lemon* from 1971 to the present day—and, specifically, whether at some point prior to *Kennedy*, the lower courts treated *Lemon* as "abandoned." To assemble a list of court of appeals decisions, we ran the following search in Westlaw in "Federal Courts of Appeals": adv: SY("establishment clause") & TE(lemon). There were 366 cases in the results. We placed them in an Excel file in reverse chronological order. We coded every fifth case from 1971 to 2023. Among other things, we were interested in whether a lower court judge's willingness to apply the *Lemon* test depended at all on ideology. So we coded the political party of the president who nominated each judge on the court of appeals panel.[127]

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[124] Id. at 2449 (Sotomayor, J., dissenting, joined by Breyer & Kagan, JJ.) (citing *Am. Legion*, 139 S. Ct. at 2092, 2098, 2101–02).

[125] Id.

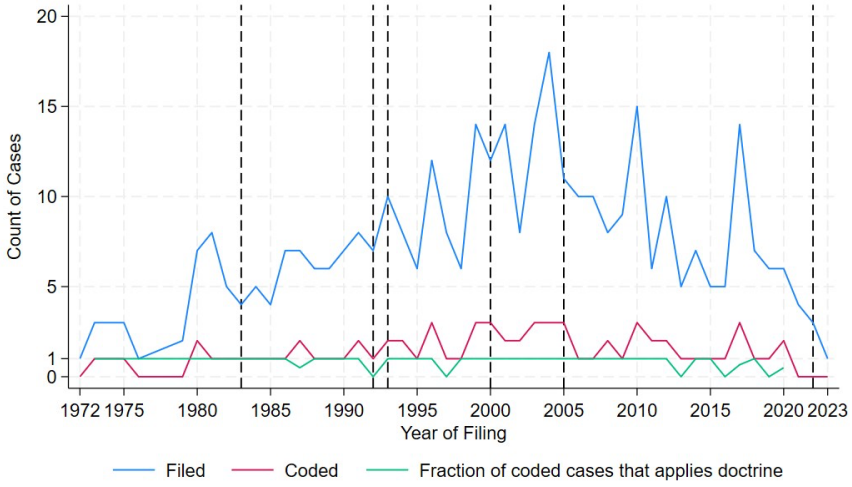
[126] Groff v. DeJoy, 143 S. Ct. 2279, 2289 & n.7 (2023) (citing *Kennedy*, 142 S. Ct. at 2427).

[127] There are different measures of judicial ideology. But one common metric is the party of the nominating president. See Adam M. Samaha & Roy Germano, Are Commercial Speech Cases Ideological? An Empirical Inquiry, 25 Wm. & Mary Bill Rts. J. 827, 830 (2017) (noting that this is a "standard metric").

We recognize that cases only reach the courts of appeals if parties take the cases there. But our focus is on trends in appellate court decision-making—that is, how courts of appeals have treated disfavored Supreme Court precedent over time, regardless of what motivated litigants to take the cases there. So litigant behavior is not central to our project. We do, however, note

Our findings significantly undermine the Court's declaration in *Kennedy* that *Lemon* was deemed "abandoned" long before 2022. The lower courts did not treat the *Lemon* or endorsement approach as abandoned, but instead as good law.[128] The following Figure 1 underscores this point. There was a steady stream of lower federal court decisions applying the *Lemon* test from the 1970s until the *Kennedy* decision. Moreover, as Figure 2 below suggests, we did not find that the courts of appeals' approach was substantially affected by ideology; judges appointed by both Democratic and Republican presidents continued to apply *Lemon*.

Figure 1. Did the Courts of Appeals Apply *Lemon*?



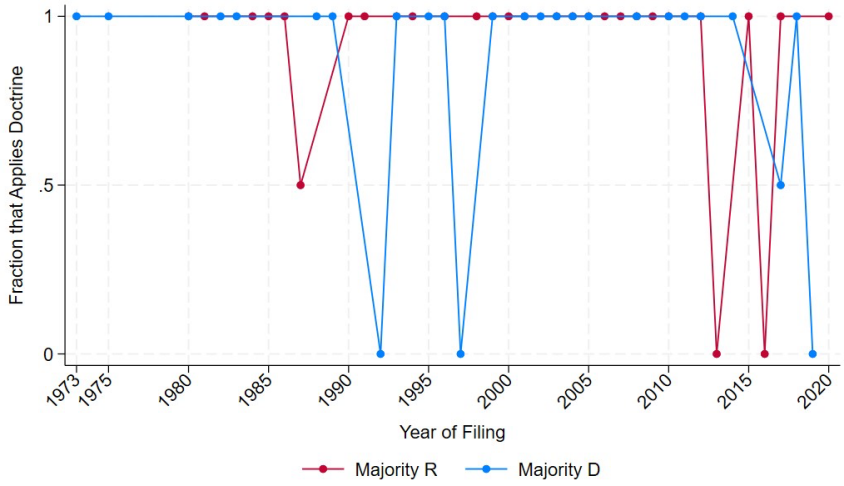
The vertical lines signify decisions that could be viewed as inflection points in the Court's Establishment Clause jurisprudence. The following cases are represented with vertical lines in Figure 1: July 5, 1983: Marsh v. Chambers, 463 U.S. 783 (1983); June 24, 1992: Lee v. Weisman, 505

when litigant behavior seems to lead to fewer cases in the courts of appeals, as was true in the case of the *Chevron* doctrine. See infra Section III.C.

[128] For prior empirical work reaching a similar conclusion, see Jennifer K. Luse, Geoffrey McGovern, Wendy L. Martinek & Sara C. Benesh, "Such Inferior Courts . . .": Compliance by Circuits with Jurisprudential Regimes, 37 Am. Pol. Rsch. 75, 92–95 (2009); Karthik Ravishankar, The Establishment Clause's Hydra: The *Lemon* Test in the Circuit Courts, 41 U. Dayton L. Rev. 261, 263, 301 (2016).

U.S. 577 (1992); June 7, 1993: Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993); June 19, 2000: Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000); June 27, 2005: McCreary County v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005); June 27, 2005: Van Orden v. Perry, 545 U.S. 677 (2005); June 27, 2022: Kennedy v. Bremerton School District, 142 S. Ct. 2407 (2022).

Figure 2. Did the Application of *Lemon* Depend on Bench Composition?



3. Qualitative Review

Our qualitative review of the case law confirms these findings. Over the years, despite the criticisms of *Lemon*, courts of appeals treated the test as binding law and applied it.[129] That is true even as the federal courts

[129] See, e.g., Knudtson v. County of Trempealeau, 982 F.3d 519, 520–21, 525, 527–29 (7th Cir. 2020) (applying the *Lemon* and endorsement approach as well as the coercion test in rejecting an Establishment Clause challenge when an employee alleged that her employer improperly pressured her to attend a funeral at a church); Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137, 1139–40, 1142–43, 1148–51 (9th Cir. 2018) (applying *Lemon* to a challenge to a prayer at a local school board meeting and declaring that "[t]he *Lemon* test remains the dominant mode of Establishment Clause analysis"); Nikolao v. Lyon, 875 F.3d 310, 313–14, 317–20 (6th Cir. 2017) (applying *Lemon* and rejecting an Establishment Clause challenge when a parent alleged government

of appeals recognized that the *Lemon* test had been subject to significant criticism and at times joined the criticism.[130] As the Tenth Circuit put it in a 2009 case involving a Ten Commandments display,

> [although] certain Supreme Court Justices have "harshly criticized" the *Lemon* test[,] . . . "[t]he *Lemon* test clings to life because the Supreme Court, in the series of splintered Establishment Clause cases since *Lemon*, has never explicitly overruled the case. While the Supreme Court may be free to ignore *Lemon*, this court is not."[131]

Nevertheless, our qualitative review did uncover some recent uncertainty in the lower federal courts about how to treat the Justices' signals that *Lemon* was in disfavor. Following *American Legion*, some lower court judges were inclined to give weight to criticisms of *Lemon* made by Justices in separate opinions—by adding up the votes of Justice Alito's plurality opinion and the concurrences of Justices Thomas and Gorsuch.[132] For example, in a case involving the display of a cross, the Eleventh Circuit, in its own words, "count[ed] heads" in *American Legion* to conclude that "*Lemon* is dead. Well, sort of. It's dead . . . at least with respect to cases involving religious displays and monuments—including crosses. We count six clear votes for that proposition."[133] Other courts of

officials had improperly pressured her to have her child vaccinated despite her religious objections).

[130] See, e.g., Barnes v. Cavazos, 966 F.2d 1056, 1062–63 (6th Cir. 1992) (per curiam) ("The *Lemon* test has received criticism from virtually every corner and we add our voices to those who profess confusion and frustration with *Lemon*'s analytical framework.").

[131] Green v. Haskell Cnty. Bd. of Comm'rs, 568 F.3d 784, 787–88, 796–97, 797 n.8 (10th Cir. 2009) (quoting Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1030 n.14 (10th Cir. 2008)).

[132] See Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1321–22, 1325–29, 1334 (11th Cir. 2020) (reconsidering, on remand following *American Legion*, the validity of a display of a thirty-four-foot cross, and adding up the votes of the plurality and concurrences to declare that "*Lemon* is dead . . . , at least with respect to cases involving religious displays and monuments"); Woodring v. Jackson County, 986 F.3d 979, 981, 987, 990–92, 995 (7th Cir. 2021) (adding up the votes of the plurality and concurrences to conclude that, after *American Legion*, a historical test, rather than *Lemon*, applied to the validity of a display of a nativity scene on government property); Freedom from Religion Found., Inc. v. County of Lehigh, 933 F.3d 275, 278–81, 282 & n.5, 285 (3d Cir. 2019) (similarly adding up the votes to conclude that a historical test, rather than *Lemon*, applied and rejecting an Establishment Clause challenge to the seventy-five-year-old use of a cross on a county seal).

[133] *Kondrat'yev*, 949 F.3d at 1326–27 ("So again, that's six Justices—Chief Justice Roberts and Justices Thomas, Breyer, Alito, Gorsuch, and Kavanaugh—who have clearly rejected the proposition that *Lemon* provides the appropriate standard for religious-display cases like this one.").

appeals also added up the votes of the plurality and concurrences to conclude that the Justices had rejected *Lemon* in the context of public displays.[134] Meanwhile, Seventh Circuit Judge Hamilton criticized this practice of "add[ing] together" the votes from different opinions in *American Legion* to reject the *Lemon* test, even in display cases.[135] He insisted that "[t]he Supreme Court itself did not go nearly that far in *American Legion*" and that "[p]erhaps the broader demise of *Lemon* is finally imminent, but *Lemon* has survived scholars' predictions of its demise for decades."[136]

One can also see some uncertainty after *American Legion* outside the context of public displays. As discussed, in *Kennedy*, the Ninth Circuit applied the endorsement offshoot of *Lemon* to hold that the school district had good reason to limit the football coach's prayer.[137] Several judges dissented from the denial of en banc rehearing in that case, declaring (with quotes from Justice Scalia's 1993 concurrence in *Lamb's Chapel*) that *Lemon* was "effectively killed" by *American Legion*, "when a majority of the Justices yet again 'personally dr[ove] pencils through the creature's heart.'"[138]

These recent examples are notable because they indicate a change from prior court of appeals practice. For decades before *American Legion*, five or more Justices had in separate opinions announced their opposition to *Lemon*—a point that Justice Scalia emphasized in separate opinions in both *Lamb's Chapel* (1993)[139] and *McCreary County* (2005).[140] Nevertheless, despite these votes, our research suggests that lower courts continued to treat the *Lemon* test as good law. Yet after *American Legion*, at least some appellate court judges were willing to "count heads" across opinions to reject a Supreme Court precedent. These examples underscore the importance of our effort to clarify which signals properly indicate that

[134] See *Woodring*, 986 F.3d at 981, 987–88, 990–92; *Freedom from Religion Found., Inc.*, 933 F.3d at 278–81, 282 n.5, 285.

[135] *Woodring*, 986 F.3d at 1002 (Hamilton, J., dissenting).

[136] Id. at 1002, 1003 n.4; see also id. at 1002 ("We need to recall that only the Supreme Court can overrule its own decisions.").

[137] 991 F.3d 1004, 1017 (9th Cir. 2021).

[138] Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 945–47 (9th Cir. 2021) (Nelson, J., dissenting from the denial of rehearing en banc) (alteration in original) (quoting Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.)); id. at 947 n.3 ("Though not formally overruled, *Lemon* is effectively (and fortunately) dead." (citation omitted)).

[139] *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in the judgment).

[140] McCreary County v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

a Supreme Court precedent is in disfavor—a point that we explore further in Part IV.

B. Bivens

1. Background

In 1971, the Supreme Court issued its watershed decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, holding that private individuals could bring damages claims against federal officials for constitutional violations.[141] *Bivens* itself involved a Fourth Amendment claim arising out of a search by drug enforcement officials.[142] Then, in 1979, *Davis v. Passman* permitted a *Bivens* claim by a former congressional staffer, alleging sex discrimination under the Fifth Amendment's Due Process Clause.[143] One year later, *Carlson v. Green* allowed an Eighth Amendment claim for failure to provide adequate medical treatment to a federal prisoner.[144]

In these cases, the Court announced an approach to *Bivens* claims. A plaintiff could bring suit for damages against a federal official to redress a constitutional violation except in two circumstances. First, the defendant official could "show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective."[145] Second, the defendant could "demonstrate 'special factors counselling hesitation in the absence of affirmative action by Congress.'"[146] *Bivens*, *Davis*, and *Carlson* thus seemed to craft a strong presumption in favor of the enforcement of constitutional claims through damages actions, with only narrow exceptions.

This new cause of action was not without controversy. For example, dissenting in *Bivens*, Justice Black argued that this judicially created cause of action violated the constitutional separation of powers: "The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress . . . ."[147] In *Carlson*, then-Justice

[141] 403 U.S. 388, 389, 395–97 (1971).
[142] See id. at 389–90.
[143] 442 U.S. 228, 229–31, 248–49 (1979).
[144] 446 U.S. 14, 18–20, 23 (1980).
[145] Id. at 18–19.
[146] Id. at 18 (quoting *Bivens*, 403 U.S. at 396).
[147] *Bivens*, 403 U.S. at 427–30 (Black, J., dissenting).

Rehnquist called upon the Court to overrule the "wrong turn" that it took in *Bivens*.[148]

The Court did not overrule *Bivens*. Yet the tide soon turned against such claims, at least in the Supreme Court. Beginning in 1983, the Court rejected *every Bivens* claim, without the strong showing that prior cases seemed to demand. First, the Court found that alternative remedies could foreclose a *Bivens* action even when Congress had not declared those remedies to be equally effective or to be substitutes for *Bivens*.[149] Second, the Justices found that an array of special factors could preclude such a damages action.[150]

Then, beginning in 2001, a few Justices mounted a frontal attack on the entire concept of a *Bivens* remedy. In *Correctional Services Corp. v. Malesko*, the Court rejected a *Bivens* claim against a private corporation that operated a halfway house pursuant to a contract with the federal Bureau of Prisons, reasoning that such a claim (against an institution, rather than an individual) would be "a marked extension of *Bivens*."[151] Justice Scalia, joined by Justice Thomas, concurred separately to challenge the *Bivens* regime. The concurrence argued that *Bivens* was "a relic of the heady days" when the Court was more willing to imply causes of action in both statutes and the Constitution.[152] Justice Scalia insisted that the Court should "abandon" that approach in the constitutional realm, as it had in statutory cases, and "limit *Bivens* and its two follow-on cases ([*Davis* and *Carlson*]) to the precise circumstances that they involved."[153]

[148] *Carlson*, 446 U.S. at 31–32 (Rehnquist, J., dissenting).

[149] See Schweiker v. Chilicky, 487 U.S. 412, 414, 417–18, 423, 425–29 (1988) (holding that the administrative procedures of the Social Security system precluded a *Bivens* claim, even though those remedies were not as comprehensive as *Bivens*); Bush v. Lucas, 462 U.S. 367, 368, 378, 388–90 (1983) (holding that alternative remedies in the civil service system precluded a *Bivens* claim).

[150] See, e.g., United States v. Stanley, 483 U.S. 669, 671, 681–84, 686 (1987) (denying a *Bivens* remedy to a former service member, who was unknowingly administered LSD by army officials, because the need to avoid interfering with military affairs qualified as a "special factor[]"); Chappell v. Wallace, 462 U.S. 296, 297, 300–05 (1983) (denying a racial discrimination claim by military service members to avoid interference with "the unique disciplinary structure of the Military Establishment").

[151] 534 U.S. 61, 63–65, 74 (2001).

[152] Id. at 75 (Scalia, J., concurring, joined by Thomas, J.).

[153] Id. (citations omitted). Concurring in *Bivens*, Justice John Marshall Harlan II defended the result in part by analogizing to the Court's broad allowance of implied causes of action under federal statutes, most notably in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 402 (1971) (Harlan, J., concurring in the judgment). But later decisions repudiated the reasoning in *Borak*,

Justices Scalia and Thomas reaffirmed this view in the 2007 case of *Wilkie v. Robbins*, where the Court rejected a *Bivens* claim involving the Fifth Amendment's Takings Clause.[154] Concurring, and joined by Justice Scalia, Justice Thomas again underscored that "*Bivens* and its progeny should be limited 'to the precise circumstances that they involved.'"[155] Meanwhile, writing separately in *Wilkie*, Justice Ginsburg, joined by Justice Stevens, defended the ongoing force of *Bivens*. She insisted,

> Some Members of this Court consider *Bivens* a dated precedent. . . . But the Court has so far adhered to *Bivens*' core holding: Absent congressional command or special factors counseling hesitation, "victims of a constitutional violation by a federal agent have a right to recover damages . . . despite the absence of any statute conferring such a right."[156]

The Court extended *Malesko* in a 2012 decision, *Minneci v. Pollard*, which rejected a *Bivens* claim under the Eighth Amendment against individual employees of a privately run prison.[157] The Court noted that, "[s]ince *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action."[158] Once again, Justices Scalia and Thomas wrote separately to argue that *Bivens*, *Davis*, and *Carlson* should never be extended beyond their factual settings.[159]

In 2017, the Court in *Ziglar v. Abbasi* made some important changes to the *Bivens* doctrine. In *Ziglar*, the Court denied *Bivens* claims brought by individuals who were detained following the September 11, 2001, attacks against high-level officials in the Department of Justice and two prison officials, alleging violations of the Fourth and Fifth

albeit without formally overruling it. See Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("We abandoned that understanding [of implied statutory rights of action] . . . and have not returned to it since.").

[154] See 551 U.S. 537, 541, 551–62, 567–68 (2007) (rejecting a *Bivens* claim alleging that federal officials improperly interfered with the plaintiff's property rights); id. at 568 (Thomas, J., concurring, joined by Scalia, J.).

[155] Id. at 568 (Thomas, J., concurring, joined by Scalia, J.) (quoting *Malesko*, 534 U.S. at 75 (Scalia, J., concurring, joined by Thomas, J.)).

[156] Id. at 576 (Ginsburg, J., concurring in part and dissenting in part, joined by Stevens, J.) (quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

[157] 565 U.S. 118, 131 (2012).

[158] Id. at 124.

[159] See id. at 131–32 (Scalia, J., concurring, joined by Thomas, J.).

Amendments.[160] Justice Kennedy's opinion for the Court announced that "expanding the *Bivens* remedy is now a 'disfavored' judicial activity."[161]

The Court in *Ziglar* modified the test for *Bivens* claims. First, a court must determine if a case presents a "new context," a concept that was defined broadly.[162] "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court," the Court stated, "then the context is new."[163] According to *Ziglar*, a case may present a new context for a host of reasons, including "the rank of the officers involved; the constitutional right at issue; . . . the statutory or other legal mandate under which the officer was operating; [or] the risk of disruptive intrusion by the Judiciary into the functioning of other branches."[164] The Court did add, however, that "[s]ome differences, of course, will be so trivial that they will not suffice to create a new *Bivens* context."[165] Second, if a case does present a new context, a court must consider whether there are "special factors counselling hesitation" in allowing a *Bivens* claim (a category that now includes any alternative remedies).[166]

Justice Kennedy's opinion in *Ziglar* went on to cast doubt on *Bivens*, *Davis*, and *Carlson*, stating that "in light of the changes to the Court's general approach to recognizing implied damages remedies, it is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today."[167] But the Court insisted that it was not abandoning those precedents:

> [T]his opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. . . . The settled law of *Bivens* . . . , and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.[168]

In the wake of *Ziglar*, Richard Fallon observed that although Justice Kennedy's opinion was "careful not to overrule *Bivens*" and "adopted a [more] measured tone" than the "earlier denunciations . . . by Justices

[160] See 582 U.S. 120, 125–26, 128–29, 140, 145, 155–56 (2017).
[161] Id. at 135 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)).
[162] Id. at 139–40.
[163] Id. at 139.
[164] Id. at 140.
[165] Id. at 149.
[166] Id. at 136–37, 140 (citation omitted).
[167] Id. at 130–35.
[168] Id. at 134.

Scalia and Thomas, . . . [a]s a practical matter, . . . it is not clear that much space exists between the Court's *Ziglar* ruling and the earlier demand . . . that *Bivens*, *Davis*, and *Carlson* 'should be limited to the precise circumstances that they involved.'"[169]

The Court applied the *Ziglar* framework in the 2020 case of *Hernández v. Mesa* to reject a *Bivens* claim brought by parents of a Mexican teenager who was tragically killed by a U.S. Border Patrol agent in a cross-border shooting.[170] Once again, Justice Thomas—now joined by Justice Gorsuch—wrote separately, but in *Hernández*, he went further and urged the Court to overrule *Bivens*. Justice Thomas declared, "The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether."[171]

In July 2021, perhaps encouraged by the *Hernández* concurrence, the petitioners in *Egbert v. Boule* invited the Court to overrule *Bivens*.[172] That case involved a Fourth Amendment claim and a First Amendment retaliation claim against a U.S. Border Patrol agent.[173] The certiorari petition emphasized that "[m]ultiple Justices have urged the overruling of *Bivens*. . . . And this is an optimal case. The Ninth Circuit extended *Bivens* to two new contexts despite this Court's strong reservations against the whole enterprise. If *Bivens* has not survived into the modern era, this Court should say so."[174]

The Court granted certiorari in *Egbert* but declined the invitation to overrule *Bivens*.[175] Instead, the Court's 2022 decision further narrowed *Bivens*, rejecting the First and Fourth Amendment claims in that case.[176]

[169] Richard H. Fallon, Jr., Bidding Farewell to Constitutional Torts, 107 Calif. L. Rev. 933, 953 (2019) (internal quotation marks omitted) (quoting Wilkie v. Robbins, 551 U.S. 537, 568 (2007) (Thomas, J., concurring, joined by Scalia, J.)).

[170] 140 S. Ct. 735, 739, 743–47, 750 (2020).

[171] Id. at 752–53 (Thomas, J., concurring, joined by Gorsuch, J.).

[172] Petition for a Writ of Certiorari at I, 9–10, Egbert v. Boule, 142 S. Ct. 1793 (2022) (No. 21-147).

[173] See *Egbert*, 142 S. Ct. at 1800.

[174] Petition for a Writ of Certiorari, supra note 172, at 24–25.

[175] The Court did not grant certiorari on that question. See 142 S. Ct. 457 (2021) (mem.) (limiting the grant of certiorari "to Questions 1 and 2 presented by the petition"). The first two questions involved whether to allow *Bivens* for First Amendment retaliation claims or for Fourth Amendment claims in the immigration setting. See Petition for a Writ of Certiorari, supra note 172, at I.

[176] See *Egbert*, 142 S. Ct. at 1804–07 (concluding that special factors and alternative remedies precluded the Fourth Amendment claim and that "there is no *Bivens* action for First Amendment retaliation").

Writing for the Court, Justice Thomas declared, "[R]ather than dispense with *Bivens* altogether, we have emphasized that recognizing a cause of action under *Bivens* is 'a disfavored judicial activity.'"[177] The Court further stated that, although the Court's cases described the *Bivens* analysis as involving two steps—whether the case involved a new context, and whether there was any other reason to deny a *Bivens* remedy—"those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy."[178]

Concurring in the judgment, Justice Gorsuch again argued that the Court should go further and expressly overrule *Bivens*. The Court's opinion, in his view, signaled that no *Bivens* claim should succeed.[179] "In fairness to future litigants and our lower court colleagues," Justice Gorsuch continued, "we should not hold out [a] kind of false hope" of a *Bivens* victory, "and in the process invite still more 'protracted litigation destined to yield nothing.'"[180] Meanwhile, dissenting from the rejection of the plaintiff's Fourth Amendment claim, Justice Sotomayor (joined by Justices Breyer and Kagan) emphasized that *Bivens* was still intact: "Although today's opinion will make it harder for plaintiffs to bring a successful *Bivens* claim, even in the Fourth Amendment context, the lower courts should not read it to render *Bivens* a dead letter."[181]

2. Quantitative Assessment

How have the lower federal courts responded to the Supreme Court's growing hostility toward *Bivens*? For the past few decades, scholars have expressed concern about the "demise" of *Bivens* or argued that the doctrine was on "life support" in the Supreme Court.[182] But there has been

[177] Id. at 1803 (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)).

[178] Id.

[179] Id. at 1810 (Gorsuch, J., concurring in the judgment) ("[I]f the only question is whether a court is 'better equipped' than Congress to weigh the value of a new cause of action, surely the right answer will always be no.").

[180] Id. (quoting Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1943 (2021) (Gorsuch, J., concurring)).

[181] Id. at 1823 (Sotomayor, J., concurring in the judgment in part and dissenting in part, joined by Breyer & Kagan, JJ.).

[182] E.g., Susan Bandes, Reinventing *Bivens*: The Self-Executing Constitution, 68 S. Cal. L. Rev. 289, 295–98, 336–39 (1995) (exploring "the demise of [the *Bivens*] principle"); Laurence H. Tribe, Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After *Wilkie v. Robbins*, 2006–2007 Cato Sup. Ct. Rev. 23, 26 (2007) (arguing, in the wake of *Wilkie*, that

only limited empirical study of the lower courts' approach to *Bivens*. The most elaborate study—by Alex Reinert—looked at federal district court cases from 2001 to 2003 in five districts in New York, Pennsylvania, Illinois, and Texas.[183] As with the other areas that we study, we are focused on the federal courts of appeals, and we are interested in decisions from all circuits from 1971 (the date of the *Bivens* decision) to the present day.

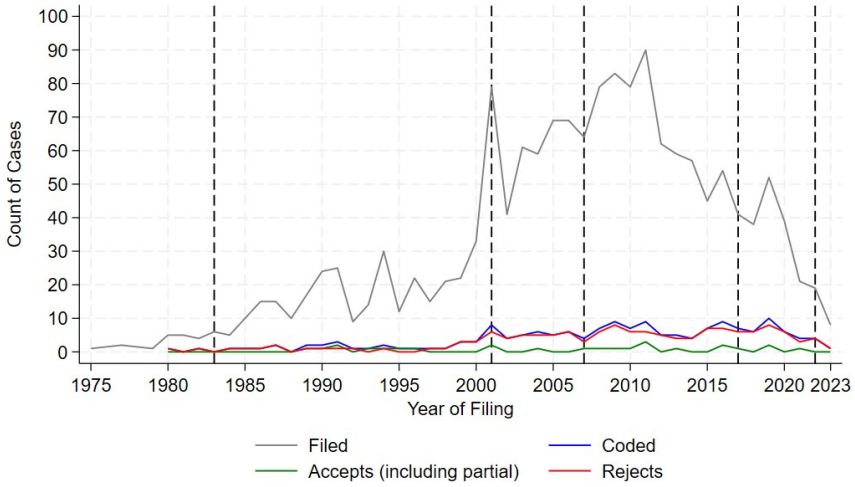
To assemble a list of cases, we ran the following search in Westlaw in "Federal Courts of Appeals": adv: SY(Bivens). There were 1,610 cases. We placed them in an Excel file in reverse chronological order. We coded every tenth case from 1971 to 2014 and, because we were especially interested in recent trends, we coded every fifth case from 2015 to 2023. We sought to determine whether there was a change over time in the courts of appeals' approach to *Bivens*, as the Supreme Court seemed to become increasingly hostile. And as with the other doctrines studied here, we were interested in whether a judge's approach to *Bivens* depended on ideology (as measured by the political party of the nominating president).

Our analysis shows that there have been important changes in the lower courts' approach to *Bivens* across time. As Figures 3 and 4 suggest (and our qualitative review confirmed), there have been essentially three different eras of activity with respect to *Bivens*. During the first era, which lasted from the 1970s until the mid-1990s, the federal courts of appeals both heard fewer *Bivens* appeals and accepted a greater proportion of *Bivens* claims. During the second era, which began in the mid-1990s and lasted for about twenty years until 2017, there was a dramatic increase in the number of *Bivens* cases and a corresponding drop in the percentage of *Bivens* claims accepted. The third era, which began around 2017, shows a significant drop-off in *Bivens* litigation. Notably, we did not find that these trends depended on ideology; in our data, as Figure 5 indicates, the party of the nominating president did not seem to explain the votes in *Bivens* cases.

"the best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery").

[183] See Alexander A. Reinert, Measuring the Success of *Bivens* Litigation and Its Consequences for the Individual Liability Model, 62 Stan. L. Rev. 809, 832 (2010); see id. at 813 (asserting that "success rates for *Bivens* suits range from 16% to more than 40%").

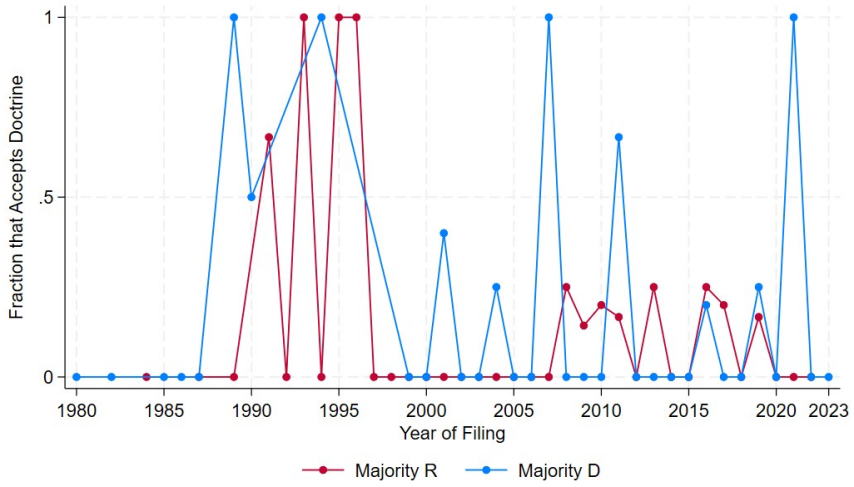
Figure 3. Flow of *Bivens* Cases in the Courts of Appeals



The vertical lines signify decisions that could be viewed as inflection points in the Court's approach to *Bivens*. The following cases are represented with vertical lines in Figure 3 and Figure 4: June 13, 1983: Bush v. Lucas, 462 U.S. 367 (1983); Nov. 27, 2001: Correctional Services Corp. v. Malesko, 534 U.S. 61 (2001); June 25, 2007: Wilkie v. Robbins, 551 U.S. 537 (2007); June 19, 2017: Ziglar v. Abbasi, 582 U.S. 120 (2017); June 8, 2022: Egbert v. Boule, 142 S. Ct. 1793 (2022).

Figure 4. Acceptance and Rejection of *Bivens* Claims in Coded Cases

Figure 5. Bench Composition in *Bivens* Cases



3. Qualitative Review

Our qualitative review enables us to offer more context. During the first era, from the 1970s until the mid-1990s, the courts of appeals accepted

claims arising under not only the Fourth, Fifth, and Eighth Amendments but also other constitutional provisions, such as the First Amendment, and in factual scenarios that differed dramatically from *Bivens*, *Davis*, and *Carlson*.[184] For example, in 1991, the Eighth Circuit allowed a former employee of the Department of Agriculture to challenge his termination as a violation of the First Amendment.[185] That same year, the Tenth Circuit allowed a federal prisoner to challenge a work assignment on equal protection grounds under the Fifth Amendment.[186] Moreover, our qualitative review of the cases suggests that, during this era, when courts of appeals rejected *Bivens* claims, they generally walked through the typical *Bivens* analysis, concluding that the claim should be barred because there were alternative remedies or special factors.[187]

The second era, which comprises the twenty-year period from the mid-1990s until around 2017, reflects a good deal more variation and uncertainty surrounding *Bivens*. As discussed, during this period, the Supreme Court repeatedly rejected *Bivens* claims but did not revise the *Bivens* framework. Meanwhile, the number of court of appeals decisions discussing *Bivens* increased dramatically. And although the courts of appeals continued to grant relief to *Bivens* claimants in a number of cases,[188] the percentage of successful *Bivens* claims dropped substantially. It is also interesting to observe the grounds upon which

[184] See, e.g., Gasho v. United States, 39 F.3d 1420, 1425–27, 1436 & n.15, 1438 (9th Cir. 1994) (permitting *Bivens* claims against U.S. Customs Service agents under the Fourth and Fifth Amendments that allege improper arrests of aircraft owners); Paton v. La Prade, 524 F.2d 862, 865–66, 869–71 (3d Cir. 1975) (permitting a *Bivens* claim under the First Amendment by a high school student against FBI agents after they investigated the student for subversive activity, which turned out to be research for a school project).

[185] Krueger v. Lyng, 927 F.2d 1050, 1051–52, 1054–57 (8th Cir. 1991) (finding the claim not precluded by the Civil Service Reform Act).

[186] Williams v. Meese, 926 F.2d 994, 995–96, 998 (10th Cir. 1991).

[187] See, e.g., Rauschenberg v. Williamson, 785 F.2d 985, 985–89 (11th Cir. 1986) (holding that alternative remedies and special factors precluded a *Bivens* claim by a former parolee against his parole officer); Vest v. U.S. Dep't of the Interior, 729 F.2d 1284, 1285–87 (10th Cir. 1984) (holding that alternative civil service remedies precluded a *Bivens* claim for retaliatory termination by a former employee of the Bureau of Land Management).

[188] See, e.g., Scinto v. Stansberry, 841 F.3d 219, 224, 228–29, 231–34 (4th Cir. 2016) (permitting a federal prisoner's Eighth Amendment claims alleging deliberate indifference in failing to provide insulin and failing to help during a medical emergency, but rejecting a claim involving the failure to provide a diabetic diet); Wilkerson v. Samuels, 524 F. App'x 776, 777–79 (3d Cir. 2013) (per curiam) (allowing a federal prisoner's First Amendment retaliation claim); Ortiz v. Webster, 655 F.3d 731, 731–32, 734–36 (7th Cir. 2011) (allowing an Eighth Amendment claim for deliberate indifference for failing to provide treatment for an eye condition).

Bivens claimants lost: when courts of appeals rejected *Bivens* claims, they did not do so simply by applying the *Bivens* test (that is, looking at alternative remedies or special factors), but often for other reasons. For example, courts dismissed many claims on the merits, without analyzing whether a *Bivens* action was cognizable,[189] or on procedural grounds, such as a failure to exhaust administrative remedies or filing beyond the statute of limitations.[190] Indeed, it seemed during this era, perhaps because of both the volume of cases and the uncertainty surrounding the Court's approach to *Bivens*, that the lower courts often preferred to avoid addressing a *Bivens* question directly.

The third era began with the Supreme Court's 2017 decision in *Ziglar v. Abbasi*, which offered a new framework for *Bivens* claims. Under *Ziglar*, courts are required to first examine whether a case presents a new context (defined broadly), and, if so, whether there are any special factors that counsel against allowing a *Bivens* claim. During this third era, as our Figures reflect, the volume of *Bivens* litigation has decreased dramatically, as has the number of successful *Bivens* claims. Moreover, our qualitative review shows that when the courts of appeals reject *Bivens* claims, they generally do so by applying the *Ziglar* framework, rather than on separate grounds.[191] But notably—and even after the *Hernández* and *Egbert* decisions in 2020 and 2022 underscored the disfavored status of *Bivens*—some *Bivens* plaintiffs still manage to succeed.[192]

[189] See, e.g., Phillips v. Smith, 429 F. App'x 905, 907 (11th Cir. 2011) (per curiam) (stating that there was no need to rule on whether there was a *Bivens* claim for deprivation of property because the plaintiff had made only conclusory allegations).

[190] See, e.g., Voneida v. Stoehr, 512 F. App'x 219, 221 (3d Cir. 2013) (per curiam) (finding a *Bivens* claim time-barred); York v. Fed. Bureau of Prisons, 379 F. App'x 737, 739–40 (10th Cir. 2010) (holding a federal prisoner failed to exhaust administrative remedies); Speight v. Sims, 283 F. App'x 880, 881–83 (3d Cir. 2008) (per curiam) (dismissing a federal prisoner's *Bivens* claims on statute of limitations or exhaustion grounds). Interestingly, only a very small number of the coded cases were dismissed on official immunity grounds.

[191] See, e.g., Marquez v. Rodriguez, 81 F.4th 1027, 1028–34 (9th Cir. 2023) (applying the *Ziglar* framework and rejecting, as a novel factual and legal context, a *Bivens* claim under the Fifth Amendment by a pretrial detainee alleging failure to protect from violence by other inmates); Strickland v. United States, 32 F.4th 311, 319–21, 371–74, 377 (4th Cir. 2022) (applying *Ziglar* and rejecting a *Bivens* claim by a former federal public defender alleging sexual harassment in violation of the Fifth Amendment); Tate v. Harmon, 54 F.4th 839, 841–43, 845–48 (4th Cir. 2022) (applying *Ziglar* and rejecting an Eighth Amendment claim alleging "'degenerate' conditions of confinement").

[192] See, e.g., Brooks v. Richardson, 131 F.4th 613, 614–16 (7th Cir. 2025) (allowing a *Bivens* claim against certain prison officials for failure to provide adequate medical treatment for appendicitis, and stating that "[a]lthough [the Supreme Court's] current approach apparently rules out novel extra-statutory claims, the Court has not overruled *Bivens*, *Davis*,

The Third Circuit's evolving treatment of one federal prisoner's claims illustrates the transition from the second to the third era. In 2011 and 2016, the court of appeals in both *Mack v. Yost* and *Mack v. Loretto* held, relying on its own circuit precedent, that the federal prisoner could bring a *Bivens* action against prison officials alleging First Amendment retaliation.[193] But things turned out very differently when the case returned to the Third Circuit in 2020. The court of appeals announced that *Ziglar v. Abbasi* "reflected a 'notable change' in the Supreme Court's attitude toward" *Bivens*: "Unless the Supreme Court has recognized the context before, the context is 'new' and a special factors inquiry is required to determine if *Bivens* expansion is appropriate."[194] Applying the two-step framework from *Ziglar*, the court of appeals rejected the First Amendment claim that it had accepted twice before.[195]

Ziglar thus significantly altered the lower courts' approach to *Bivens*. Yet there continues to be disagreement among the lower courts as to the availability of the *Bivens* remedy, as illustrated by two recent court of appeals decisions. In its 2021 decision in *Byrd v. Lamb*, the Fifth Circuit rejected a *Bivens* claim brought against a Department of Homeland Security agent, alleging that the agent used excessive force and attempted an unlawful seizure in violation of the Fourth Amendment.[196] Kevin Byrd asserted that, when he was attempting to discuss a matter with the agent's son, Department of Homeland Security Agent Ray Lamb intervened and

or *Carlson*. And we cannot see why [the plaintiff's] principal theory entails a context different from *Carlson*"); Watanabe v. Derr, 115 F.4th 1034, 1043–44 (9th Cir. 2024) (allowing a case to proceed because "[i]n all meaningful respects, [the plaintiff's] claim is functionally identical to the claim asserted in *Carlson*"); Snowden v. Henning, 72 F.4th 237, 239–40, 245–46 (7th Cir. 2023) (applying *Ziglar* and permitting a Fourth Amendment claim alleging excessive force by a Drug Enforcement Administration agent); Stanard v. Dy, 88 F.4th 811, 813–18 (9th Cir. 2023) (applying *Ziglar* and permitting a federal prisoner's Eighth Amendment claim involving the denial of treatment for Hepatitis C).

[193] Mack v. Yost, 427 F. App'x 70, 71–74 (3d Cir. 2011) (per curiam); Mack v. Loretto, 839 F.3d 286, 296–97 (3d Cir. 2016) (stating that, "[a]lthough the Supreme Court has never formally extended *Bivens* to First Amendment claims, . . . [o]ur Court . . . has explicitly recognized a *Bivens* action when a prisoner has been retaliated against for exercising his or her First Amendment right to petition"). Charles Mack, who was Muslim, alleged that he was fired from the prison commissary after complaining about mistreatment by corrections officers. See *Loretto*, 839 F.3d at 292.

[194] Mack v. Yost, 968 F.3d 311, 317 (3d Cir. 2020) (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)); id. at 319 ("*Abbasi* made clear that lower courts could no longer rely on their own prior precedents to recognize a *Bivens* remedy.").

[195] Id. at 320–25.

[196] 990 F.3d 879, 881–82 (5th Cir. 2021) (per curiam).

threatened to shoot Byrd.[197] (Agent Lamb was later arrested for his conduct during this incident.[198])

In examining whether the *Byrd* case presented a "new context," the Fifth Circuit announced that *Bivens* was limited to three distinct scenarios (the precise facts of *Bivens*, *Davis*, and *Carlson*): (1) "manacling the plaintiff in front of his family in his home and strip-searching him in violation of the Fourth Amendment"; (2) "discrimination on the basis of sex by a congressman against a staff person in violation of the Fifth Amendment"; and (3) "failure to provide medical attention to an asthmatic prisoner in federal custody in violation of the Eighth Amendment."[199] The court of appeals reasoned that the *Byrd* case was meaningfully different from those scenarios, because Agent Lamb was "prevent[ing] Byrd from leaving the parking lot . . . [,] not making a warrantless search for narcotics in Byrd's home, as was the case in *Bivens*."[200] Moreover, "Agent Lamb did not manacle Byrd in front of his family, nor strip-search him, as was the case in *Bivens*."[201] The Fifth Circuit also identified, as a "special factor," the fact that "Congress did not make individual officers statutorily liable for excessive-force or unlawful-detention claims," reasoning that the "silence of Congress is relevant."[202]

Concurring in *Byrd*, Judge Willett commented that "today's result is precedentially inescapable."[203] "For four decades now, the Supreme Court, while stopping short of overruling *Bivens*," had significantly cabined the doctrine, "even going so far as to suggest that the Court's *Bivens* trilogy was wrongly decided."[204] Judge Willett continued, "*Bivens* today is essentially a relic, technically on the books but practically a dead

[197] Id. at 880 ("Byrd alleges that Agent Lamb physically threatened him with a gun, and verbally threatened to 'put a bullet through his f—king skull' and that 'he would blow his head off.' ").

[198] Id. at 880–81 ("Agent Lamb was arrested and taken into custody for aggravated assault with a deadly weapon and misdemeanor criminal mischief.").

[199] Id. at 882 (quoting Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020)) ("Virtually everything else is a new context." (internal quotation marks omitted) (quoting *Oliva*, 973 F.3d at 442)).

[200] Id.

[201] Id.

[202] Id. (quoting Ziglar v. Abbasi, 582 U.S. 120, 143 (2017)).

[203] Id. at 883 (Willett, J., concurring).

[204] Id.

letter, meaning this: If you wear a federal badge, you can inflict excessive force on someone with little fear of liability."[205]

The Seventh Circuit, however, adopted a different approach in its 2023 decision in *Snowden v. Henning*, which allowed a *Bivens* claim under the Fourth Amendment for excessive force during an arrest.[206] The plaintiff Donald Snowden alleged that he was approached by a Drug Enforcement Administration official in a hotel lobby, who pushed Snowden to the ground and punched him in the face.[207] The defendant official insisted that the case was a new context, emphasizing that "the alleged Fourth Amendment violations took place in different locations (a hotel lobby here, a home in *Bivens*); that he had a warrant (the officers in *Bivens* did not); and that he was the only officer involved (six officers participated in the arrest at issue in *Bivens*)."[208] But, quoting *Ziglar*, the court of appeals found that "the factual distinctions [the official] emphasizes are of the 'trivial' kind that 'will not suffice to create a new *Bivens* context.'"[209] "Hotel or home, warrant or no warrant—the claims here and in *Bivens* stem from run-of-the-mill allegations of excessive force during an arrest."[210] Notably, under the *Ziglar* framework, if a case does not present a new context, the court need not conduct a special factors analysis, and thus the court of appeals "resolve[d] this case at step one of the *Bivens* inquiry."[211]

The Seventh Circuit went on to comment that "*Bivens* may one day be reexamined."[212] Indeed, the court of appeals observed, referencing Justice Thomas's concurrence in *Hernández* and Justice Gorsuch's concurrence in *Egbert*, that "two Justices have proposed that it be abandoned."[213] "But our role," the court of appeals continued, "is to apply the Court's caselaw

[205] Id. at 884. Judge Willett called upon Congress to create a statutory remedy against federal officers. See id. at 884–85; see also Rowland v. Matevousian, 121 F.4th 1237, 1241–42 (10th Cir. 2024) ("*Bivens* is now all but dead.").

[206] 72 F.4th 237, 239–40 (7th Cir. 2023).

[207] Id. at 240.

[208] Id. at 247.

[209] Id. (quoting Ziglar v. Abbasi, 582 U.S. 120, 149 (2017)).

[210] Id.

[211] Id. at 239; see, e.g., Shorter v. United States, 12 F.4th 366, 372 (3d Cir. 2021) ("If a case does not present a new *Bivens* context, the inquiry ends there, and a *Bivens* remedy is available.").

[212] *Snowden*, 72 F.4th at 247.

[213] Id. (first citing Egbert v. Boule, 142 S. Ct. 1793, 1809–10 (2022) (Gorsuch, J., concurring in the judgment); and then citing Hernández v. Mesa, 140 S. Ct. 735, 750–53 (2020) (Thomas, J., concurring)).

as it stands now. Because Snowden's claim is not meaningfully different than *Bivens* itself, it may proceed."[214]

Through *Ziglar* and subsequent decisions, the Supreme Court successfully sent a strong message that *Bivens* was disfavored and seems to have calmed much of the uncertainty and variation surrounding *Bivens* in the second era. But, even after *Hernández* and *Egbert*, there is still disagreement among the courts of appeals. We consider in Part IV the costs and benefits of disfavoring, as opposed to overruling, a prior precedent, and thereby giving such leeway to the lower federal courts.

C. Chevron

1. Background

In its 1984 decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[215] the Supreme Court set forth a two-step analysis for judicial review of an administrative agency's interpretation of a statute that it administers. First, a court was to determine whether Congress had spoken directly to the question presented by the case. If so, a court was to apply the "unambiguously expressed intent of Congress."[216] But, if the statute was silent or ambiguous with respect to the question, the court was to determine whether "the agency's answer [was] based on a permissible construction of the statute," and, if so, accept that answer even if the court would have reached a different conclusion on its own.[217]

This decision became the basis for the *Chevron* deference doctrine. *Chevron* deference, the Court explained, was premised on the idea that when Congress left gaps or ambiguities in a statute that it assigned to an administrative agency, it had in effect delegated to the agency the task of resolving those gaps and ambiguities.[218] Functionally, the doctrine was defended on the ground that agency officials are likely to have more expertise about the meaning of a statute that they administer than a reviewing court is likely to have, and they are also more politically

[214] Id.
[215] 467 U.S. 837 (1984).
[216] Id. at 842–43.
[217] Id. at 843 & n.11.
[218] See Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996); *Chevron*, 467 U.S. at 844.

accountable than judges.[219] The Supreme Court relied on the doctrine in numerous decisions, and the doctrine generated a massive scholarly literature that analyzed, among other things, the propriety and scope of the doctrine and its effect on the outcome of cases.[220]

Chevron was never free from controversy. Critics argued, among other things, that the doctrine was inconsistent with the obligation of courts to make their own determinations about the content of the law they are applying, that it allowed agencies to exercise what amounts to legislative authority, and that it conflicted with the terms of the Administrative Procedure Act.[221] Despite these criticisms, the doctrine commanded broad agreement among the Justices on the Court for a long time. The *Chevron* decision itself was unanimous (albeit with only six Justices participating),[222] and in later decisions applying the *Chevron* doctrine, liberal and conservative Justices were in agreement on the framework.[223]

Eventually, the Court moved to cabin the doctrine in various ways, but neither the majority nor the dissents initially called the basic *Chevron* framework into question.[224] More fundamental disagreements seemed to be emerging in 2013 in connection with the Court's decision in *City of Arlington v. FCC*.[225] In an opinion by Justice Scalia, the Court extended

[219] See *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field, and are not part of either political branch of the Government.").

[220] For a general account of the rise and decline of the doctrine in the Supreme Court, see generally Thomas W. Merrill, The *Chevron* Doctrine: Its Rise and Fall, and the Future of the Administrative State (2022); Cass R. Sunstein, *Chevron* as Law, 107 Geo. L.J. 1613 (2019).

[221] See, e.g., Jack M. Beermann, End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why It Can and Should Be Overruled, 42 Conn. L. Rev. 779, 782–84 (2010); John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 118, 189, 191, 193–94, 198, 201 (1998); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 456, 467–68 (1989). For defenses of the doctrine, see, e.g., Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 512, 516–17; Cass R. Sunstein, Beyond *Marbury*: The Executive's Power to Say What the Law Is, 115 Yale L.J. 2580, 2583, 2587–88 (2006).

[222] *Chevron*, 467 U.S. at 839.

[223] Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 52–59 (2011) (describing *Chevron* as the "typical" framework and stating that "[t]he principles underlying our decision in *Chevron* apply with full force in the tax context").

[224] In *United States v. Mead Corp.*, for example, the Court held that *Chevron* deference was appropriate only "when it appear[ed] that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226–27 (2001). The decision was 8-1, with only Justice Scalia arguing for a broader approach. Id. at 220–21; id. at 239–41 (Scalia, J., dissenting).

[225] 569 U.S. 290 (2013).

Chevron to agency interpretations of the scope of their regulatory jurisdiction.[226] Dissenting, Chief Justice Roberts, joined by Justices Kennedy and Alito, not only contested the holding, but also expressed general concerns about the growth of the administrative state and noted critically that "[w]hen it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal."[227] During the next several years, some Justices (and future Justices) were openly questioning *Chevron*.[228]

Some of the Justices' concerns about the *Chevron* doctrine were related to their concerns about broad delegations to the executive branch in general, and a number of them expressed interest in reinvigorating a nondelegation doctrine.[229] In the meantime, the Court began applying a "major questions doctrine" to inform how delegations were to be interpreted, which limited the space for *Chevron* deference.[230] The Court also narrowed a related deference doctrine, known as "*Auer* deference,"[231] and it failed to cite the *Chevron* decision in a number of cases in which it seemed relevant.[232] The Court pointedly noted at times that it was not *yet*

[226] Id. at 293, 301.

[227] Id. at 312, 314 (Roberts, C.J., dissenting, joined by Kennedy & Alito, JJ.).

[228] See Michigan v. EPA, 576 U.S. 743, 761–64 (2015) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring); Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2150–54 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)).

[229] See Gundy v. United States, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. & Thomas, J.); id. at 2130–31 (Alito, J., concurring in the judgment); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

[230] See, e.g., West Virginia v. EPA, 142 S. Ct. 2587, 2605, 2609 (2022); King v. Burwell, 576 U.S. 473, 485–86 (2015); see also, e.g., Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1012–14 (2023) ("The major questions doctrine originally operated within the familiar *Chevron* framework. . . . [But] after the October term 2021, the 'new' major questions doctrine operates as a clear statement rule."); Jody Freeman & Matthew C. Stephenson, The Anti-Democratic Major Questions Doctrine, 2022 Sup. Ct. Rev. 1, 1–2 ("[T]he so-called 'major questions doctrine' . . . appears to require unusually explicit statutory authorization before agencies may undertake 'major' regulatory actions."); Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 262–66 (2022) ("*Chevron* . . . has been silently ousted from its position as the starting point for evaluating whether an agency can exert regulatory authority.").

[231] See Kisor v. Wilkie, 139 S. Ct. 2400, 2415–18 (2019). *Auer* deference involves deference to an administrative agency's interpretation of its own regulations. Id. at 2411.

[232] See, e.g., Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (failing to cite *Chevron*); Babb v. Wilkie, 140 S. Ct. 1168 (2020) (same); see also Gary Lawson, The Ghosts of *Chevron* Present and Future, 103 B.U. L. Rev. 1647, 1650–51 (2023) ("In the Court's October 2021 Term, no majority opinion even cited, much less relied upon, *Chevron*. . . . This conspicuous silence about the *Chevron* doctrine was not for lack of opportunity to discuss it; cases

considering whether to overturn *Chevron*.[233] Appearing to sense the Court's lack of enthusiasm for the doctrine, counsel before the Supreme Court began de-emphasizing it.[234]

By 2015, commentators were observing that the *Chevron* doctrine was out of favor in the Supreme Court.[235] In a 2022 book on *Chevron*, Thomas Merrill referred to "the Court's de facto moratorium on applying the doctrine."[236] Also that year, Justice Gorsuch, in a dissent from the denial of certiorari, objected to what he referred to as a "maximalist reading" of *Chevron*, while also observing that perhaps that reading had "died of its own weight and is already effectively buried."[237] He also observed that "[t]he federal government itself now often waives or forfeits arguments for *Chevron* deference before this Court—and it does so even in cases that might have once seemed obvious candidates for the doctrine's application."[238] In 2023, the Court finally granted certiorari to consider whether to retain the doctrine, and it formally overturned *Chevron* in June 2024.[239]

abounded that term in which the principal issue was a federal agency's interpretation of its organic statute.").

[233] See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1629 (2018) ("No party to these cases has asked us to reconsider *Chevron* deference."); SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) ("[W]hether *Chevron* should remain is a question we may leave for another day."). Both of these decisions were authored by Justice Gorsuch.

[234] See, e.g., Transcript of Oral Argument at 58, BNSF Ry. Co. v. Loos, 139 S. Ct. 893 (2019) (No. 17-1042) (statement by counsel that "I hate to cite it, but I will end with Chevron").

[235] See, e.g., Michael Herz, *Chevron* Is Dead; Long Live *Chevron*, 115 Colum. L. Rev. 1867, 1868 (2015) ("[R]eports of *Chevron*'s death seemed to get significant confirmation at the end of the Supreme Court's 2014–2015 Term, when the Court decided three important cases that suggested that *Chevron*'s condition was, if not terminal, at least serious."); Jonathan H. Adler, Restoring *Chevron*'s Domain, 81 Mo. L. Rev. 983, 983 (2016) ("Foundational or not, *Chevron*'s domain is under siege." (footnote omitted)); Kristin E. Hickman & Aaron L. Nielson, Narrowing *Chevron*'s Domain, 70 Duke L.J. 931, 935 (2021) ("[A]lthough not (yet?) abandoned to the anticanon, the message is clear: *Chevron* is on thin ice.").

[236] Merrill, supra note 220, at 8. Despite the apparent disfavor, not all observers thought that the Court would overturn the doctrine. See, e.g., Cass R. Sunstein & Adrian Vermeule, Law & Leviathan: Redeeming the Administrative State 137 (2020) (predicting that the Court would retain *Chevron* "as an organizing framework, subject to calibrated safeguards"); Hickman & Nielson, supra note 235, at 937 ("Despite the noise, the Supreme Court is unlikely to overrule *Chevron* outright.").

[237] Buffington v. McDonough, 143 S. Ct. 14, 19, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

[238] Id. at 21.

[239] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2257, 2273 (2024).

2. Quantitative Assessment

That is the story in the Supreme Court, but the vast majority of cases involving administrative agency interpretations are resolved in the lower courts. Has the story been different there? Unlike with our other case studies, there has been fairly extensive empirical work done on how the *Chevron* doctrine has operated in the lower federal courts. These studies are useful, especially in showing that the doctrine has long had a more vibrant life in the lower federal courts than in the Supreme Court,[240] and that this vibrancy has varied among the circuits.[241] But the most extensive of these studies—by Kent Barnett and Christopher Walker—only covered lower court decisions through 2013.[242] The data in that study thus predates the strongest signals from the Court that *Chevron* was in disfavor. Isaiah McKinney conducted a more recent study for the Cato Institute, but it only covered decisions during a two-year period—in 2020 and 2021[243]—so it leaves out a number of prior years in which *Chevron* seemed to be in disfavor in the Supreme Court.

To generate empirical information more directly relevant to our project, we coded federal appellate decisions from 2013 to 2023. We ran the following search in Westlaw in "Federal Courts of Appeals": adv: SY(defer!) & TE(chevron). Narrowing the results to cases decided beginning in 2013 produced a sample size of 288 cases. We placed them

[240] For the suggestion that the *Chevron* doctrine may have *properly* operated more vibrantly in the lower federal courts as a way of helping the Supreme Court maintain the uniformity of federal law in a disaggregated judicial system, see, e.g., Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093, 1121 (1987); Kent Barnett & Christopher J. Walker, *Chevron* in the Circuit Courts, 116 Mich. L. Rev. 1, 18 (2017).

[241] See Orin S. Kerr, Shedding Light on *Chevron*: An Empirical Study of the *Chevron* Doctrine in the U.S. Courts of Appeals, 15 Yale J. on Regul. 1, 30 (1998); Peter H. Schuck & E. Donald Elliott, To the *Chevron* Station: An Empirical Study of Federal Administrative Law, 1990 Duke L.J. 984, 1041–42. The studies indicated, among other things, that the D.C. Circuit was less deferential to agencies than other circuits. Some studies also indicated that political ideology, among both Supreme Court Justices and lower court judges, affected the application of *Chevron*. See, e.g., Thomas J. Miles & Cass R. Sunstein, Do Judges Make Regulatory Policy? An Empirical Investigation of *Chevron*, 73 U. Chi. L. Rev. 823, 826–27 (2006).

[242] See Barnett & Walker, supra note 240, at 1.

[243] See Isaiah McKinney, The Chevron Ball Ended at Midnight, but the Circuits Are Still Two-Stepping by Themselves, Cato Inst. (Dec. 18, 2022), https://www.cato.org/commentary/chevron-ball-ended-midnight-circuits-are-still-two-stepping-themselves [https://perma.cc/6RF3-GN2W]. For the results of the study, see Isaiah McKinney, Circuit Court of Appeals Opinions Analyzing and Applying *Chevron* in 2020–2021, Cato Inst., https://www.cato.org/sites/cato.org/files/2022-12/Loper-App.pdf [https://perma.cc/6EAP-62Z2] (last visited Sept. 9, 2025).

in an Excel file in reverse chronological order and, with the assistance of students, we coded every fifth case. As with the other doctrines studied here, we were also interested in whether a judge's approach to *Chevron* depended on ideology (as measured by the political party of the nominating president).

As illustrated by Figures 6 and 7 below, the *Chevron* doctrine continued to be an active doctrine in the lower courts even when it seemed to observers to have lost life in the Supreme Court. The flow of cases discussing *Chevron* remained steady during most of this period (Figure 6), and courts continued to apply *Chevron* deference (Figure 7). There was a noticeable drop-off in the invocation and application of *Chevron*, but this occurred only very recently (starting around 2021), long after many observers had perceived that the doctrine was in disfavor in the Supreme Court.

Figure 6. Case Flow of Decisions Discussing *Chevron*

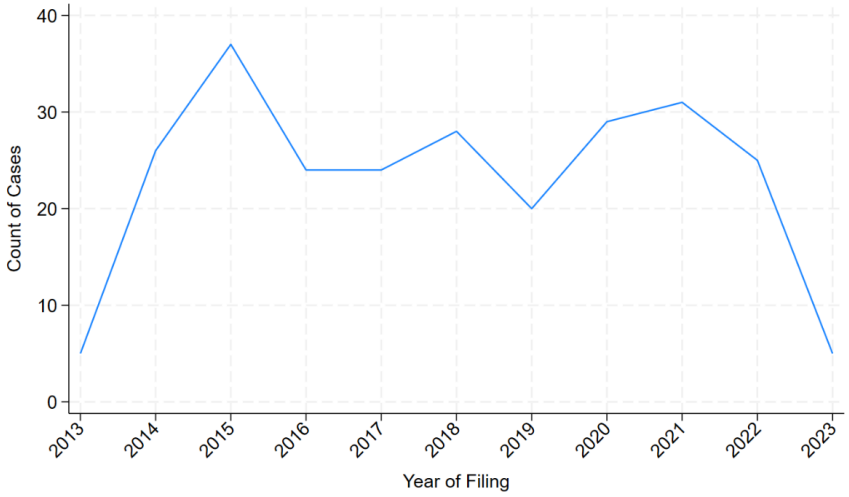
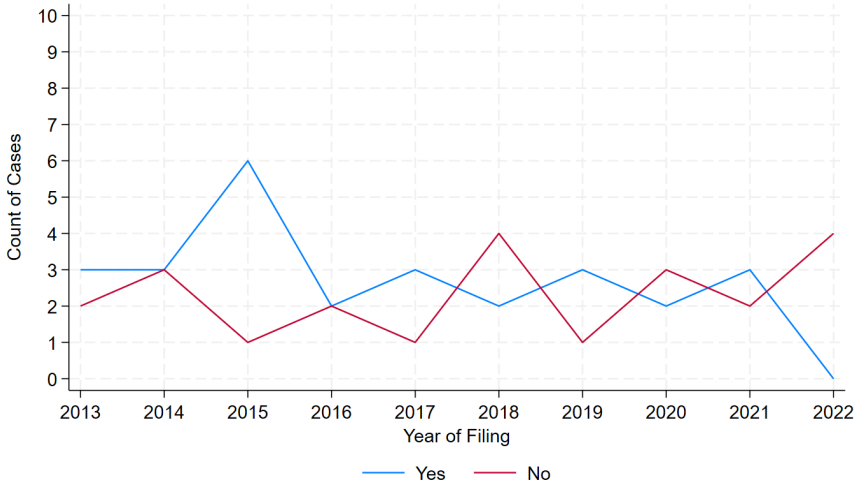
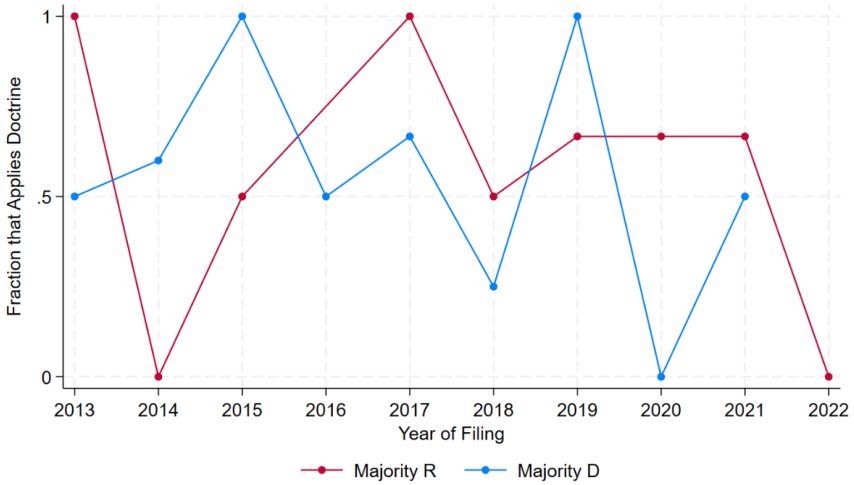


Figure 7. Did the Appellate Court Give *Chevron* Deference?



Moreover, as illustrated below in Figure 8, the application of *Chevron* during this period does not appear to have been substantially affected by ideology, at least before the recent drop-off. To the extent there was ideological variation, it did not reflect any consistent pattern.

Figure 8. Bench Composition in Decisions Involving *Chevron* Deference



3. Qualitative Review

Our qualitative review of the coded cases is consistent with these quantitative findings. Many decisions in this period simply applied *Chevron* as a matter of course.[244] To the extent that these courts took note of the controversy over *Chevron*, they typically responded like the Third Circuit did in a 2018 decision, where the court stated that "[t]he *Chevron* doctrine of deference to federal agencies is open to question, but it is the law."[245] These decisions applying *Chevron*, moreover, did not usually provoke dissents or concurrences, with a concurrence by then-Judge

[244] See, e.g., Air Transp. Ass'n of Am., Inc. v. U.S. Dep't of Agric., 37 F.4th 667, 672 (D.C. Cir. 2022) ("We review an agency's interpretation of a statute using the familiar *Chevron* framework."); Betansos v. Barr, 928 F.3d 1133, 1139 (9th Cir. 2019) (applying "*Chevron*'s familiar two-step analysis"); Sijapati v. Boente, 848 F.3d 210, 215 (4th Cir. 2017) (applying "the familiar two-step inquiry set forth in *Chevron*").

[245] S.E.R.L v. Att'y Gen., 894 F.3d 535, 554–55 (3d Cir. 2018) (citation omitted); see also, e.g., Ohio v. Becerra, 87 F.4th 759, 769–70 (6th Cir. 2023) (noting that "[t]he status of the *Chevron* deference doctrine is notoriously uncertain" but insisting that "we apply directly applicable Supreme Court precedent as it currently stands, without projecting where we think it may be headed"); Alonso-Juarez v. Garland, 80 F.4th 1039, 1054 n.8 (9th Cir. 2023) ("Although the future of the *Chevron* doctrine is uncertain, the doctrine remains good law for now." (citation omitted)).

Gorsuch being a noteworthy exception.[246] And courts declining to give *Chevron* deference typically did so based on limitations internal to the doctrine.[247] In its recent decision overturning *Chevron*, the Supreme Court seemed to be aware that the doctrine still had life in the lower courts, noting that "lower courts—bound by even our crumbling precedents—understandably continue to apply it."[248]

Our data provides some reason to think, however, that courts in the last few years began to be affected by the disfavoring signals concerning *Chevron*. Decisions discussing *Chevron* started sharply falling at that point, and there was also a noticeable drop in decisions applying the doctrine. It appears that the government was invoking the doctrine less often, perhaps because it knew that the doctrine was on thin ice in the Supreme Court. And our qualitative review suggests that at least some courts were becoming more resistant to the doctrine. An example is the Fifth Circuit's 2023 en banc decision in *Cargill v. Garland*.[249] The issue there was the meaning of "machinegun" in a criminal gun control statute.[250] The court began by noting that the government had failed to invoke *Chevron*.[251] It then reasoned that, in any event, the statutory provision was unambiguous and that *Chevron* would therefore not apply.[252] For good measure, the court proceeded to give three reasons why *Chevron* would be inapplicable even if the provision *were* ambiguous.[253] Among other things, the court stated that, contrary to the view of several

[246] See Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) ("Not only is *Chevron*'s purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well.").

[247] See, e.g., Allegheny Def. Project v. FERC, 964 F.3d 1, 11 (D.C. Cir. 2020) (en banc) ("[S]tatutory provisions addressing the jurisdiction of federal courts do not fit [within *Chevron*]."); Grosso v. Surface Transp. Bd., 804 F.3d 110, 116 (1st Cir. 2015) ("[T]he courts of appeals have been unanimous in concluding that *Chevron* deference does not apply to preemption decisions by federal agencies."); Mahn v. Att'y Gen., 767 F.3d 170, 173 (3d Cir. 2014) ("In this case, . . . *Chevron* deference is inappropriate because we are asked to review an unpublished, non-precedential decision issued by a single BIA member."). Of course, there might have been some variation among the appellate courts with respect to how strictly they applied these internal qualifications to the doctrine. See Barnett & Walker, supra note 240, at 21, 44–47 (finding such variation in the period from 2003 to 2013). The point here is simply that the courts generally purported to be applying the *Chevron* framework rather than cutting back on it.

[248] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024) (citation omitted).

[249] 57 F.4th 447 (5th Cir. 2023) (en banc), *aff'd*, 144 S. Ct. 1613 (2024).

[250] See id. at 458.

[251] See id.

[252] See id. at 458–64.

[253] See id. at 465–69.

other circuits, *Chevron* was inapplicable to criminal provisions.[254] In this decision and some other recent decisions like it, appellate courts, or concurring or dissenting judges, referenced the skepticism of particular Supreme Court Justices about the doctrine.[255]

IV. IMPLICATIONS AND PRESCRIPTIONS

We now build on our theoretical framework and empirical research to offer a normative assessment of how well the system of vertical precedent is working. We begin with lessons for the lower courts. Although we find that, in certain respects, the lower federal courts adhere to an authority model, there is notable confusion about which Supreme Court signals properly suggest that a precedent is in disfavor. This Part fleshes out what we are calling a decisional authority model, pursuant to which only certain signals—stemming from majority Supreme Court decisions—should be taken into account. This analysis not only offers guidance to the lower federal courts but also has lessons for the Supreme Court by showing how the Court can properly cast doubt on its past decisions. We also consider the trade-offs when the Court opts to disfavor, rather than expressly overrule, a precedent.

[254] See id. at 466–68. The Supreme Court subsequently affirmed that decision without reference to *Chevron*. See Garland v. Cargill, 144 S. Ct. 1613, 1619 (2024).

[255] See, e.g., *Cargill*, 57 F.4th at 457 (noting that Justice Gorsuch "wrote separately to explain his view that *Chevron* [did] not apply because (i) the Government had expressly waived its application, (ii) it does not apply to regulations bearing criminal sanctions, and (iii) the Final Rule directly contradicts the Government's previous interpretation" (citing Guedes v. ATF, 140 S. Ct. 789, 789–91 (2020) (Gorsuch, J., statement respecting denial of certiorari))); see also, e.g., Solar Energy Indus. Ass'n v. FERC, 59 F.4th 1287, 1297–98 (D.C. Cir. 2023) (Walker, J., concurring in part and dissenting in part) (citing Kavanaugh, supra note 228, at 2152) (decrying "*Chevron* maximalism" and referring to Justice Gorsuch's dissent and then-Judge Kavanaugh's law review article (quoting Buffington v. McDonough, 143 S. Ct. 14, 21 (2022) (Gorsuch, J., dissenting from the denial of certiorari))); Solar Energy Indus. Ass'n v. FERC, 80 F.4th 956, 1000 (9th Cir. 2023) (Bumatay, J., concurring in part and dissenting in part) (noting that "[i]n more recent times, the *Chevron* framework has been criticized as ahistorical and violative of the separation of powers" while also observing that "[w]hether the *Chevron* project continues is up to the Supreme Court and falls outside of our court's purview" (citing *Buffington*, 143 S. Ct. at 16–22 (Gorsuch, J., dissenting from the denial of certiorari)); Debique v. Garland, 58 F.4th 676, 686 & n.1 (2d Cir. 2023) (Park, J., concurring in the judgment) (first citing *Buffington*, 143 S. Ct. at 18–19 (Gorsuch, J., dissenting from the denial of certiorari); and then citing Kavanaugh, supra note 228, at 2153–54) (arguing against application of a prior circuit precedent that had accorded *Chevron* deference because it was decided "during an era of almost-reflexive *Chevron* deference" whereas "in recent years, the Supreme Court has taken a more rigorous approach," and citing Justice Gorsuch's dissent and then-Judge Kavanaugh's article).

A. Lessons for the Lower Courts

In some respects, the scheme of vertical precedent is working reasonably well. First, under any authority model, lower courts should not endeavor to "predict" how the current set of Justices might rule in a given case. Our empirical analysis suggests that lower courts largely act in accordance with that important principle: they generally do not follow the prediction model. Even when a Supreme Court precedent appears to be in disfavor, the lower courts do not seem to be predicting whether the Court will overturn it.

Second, and relatedly, when lower courts are uncertain about whether a precedent still has life (even in a narrow form), they should presume that it does until instructed otherwise by the Court itself. To go further involves the sort of "anticipatory overruling" that the Court has generally disapproved of and that we also reject. Again, lower courts for the most part do not engage in this practice. Our empirical and qualitative overview demonstrates that *Bivens*, *Lemon* (until 2022), and *Chevron* (until 2024) have been treated as good law.

The authority model is thus a better descriptive and normative account of lower court behavior than the prediction model, but it needs to be more precise. That is why we offer the decisional authority model. Under this model, lower courts should not confine their treatment of a precedent to its original meaning but should look to a broader array of Supreme Court decisions, including some disfavoring signals. At least at a general level, this approach accords with common sense: subsequent decisions that narrow or qualify a precedent are, after all, part of the "law" for the lower courts to apply, and it would be strange for lower courts to ignore them. Not surprisingly, therefore, we find that lower courts often adhere to the decisional approach. But there has been some important disagreement among lower court judges, particularly in recent years, about which Supreme Court signals should be considered.

This Article provides needed clarification. We have identified five ways in which the Court might signal disfavor: (1) making disparaging statements about a precedent; (2) applying a precedent narrowly; (3) ignoring a precedent; (4) issuing decisions in related areas of law that seem to undermine a precedent; and (5) shifting the methodology that underlies a precedent. We argue that not all of these signals should receive equal weight. Only the first two categories should influence lower court decision-making, and only to the extent that the signals come from binding decisions of the Court. By contrast, the lower courts should not

rely on the final three categories—Supreme Court silence, doctrinal changes in related but separate areas, or shifts in methodology—in discerning whether a precedent is in disfavor. In those situations, lower courts should continue to apply the existing precedent with full force.

1. Binding Decisions, Not Separate Opinions or Silence

Several jurists and scholars have suggested that disparaging statements in plurality, concurring, or dissenting opinions, particularly if accepted over time by five or more Justices, should be sufficient to undermine a precedent.[256] As discussed, Justice Scalia made this claim repeatedly with respect to the *Lemon* test. In 1993, concurring in *Lamb's Chapel v. Center Moriches Union Free School District* and joined by Justice Thomas, Justice Scalia argued that "[o]ver the years, . . . no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so."[257] Justice Scalia renewed this claim in 2005 in *McCreary County v. American Civil Liberties Union of Kentucky*, arguing that the *Lemon* test was "thoroughly discredited," given that "a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun '*Lemon* test.'"[258] Likewise, following *American Legion v. American Humanist Ass'n*, Michael McConnell emphasized the combined votes in Justice Alito's plurality opinion and the concurrences by Justices Gorsuch and Thomas, stating, "The Court does not utter the magic words, that the *Lemon* test is 'repudiated' or 'abandoned'" across the board, "but it comes close enough that lower courts should take the hint."[259]

[256] See, e.g., Frederick Claybrook, Should Lower Courts Continue to Apply Employment Division v. Smith?, Federalist Soc'y Blog (Mar. 12, 2025), https://fedsoc.org/commentary/fedsoc-blog/should-lower-courts-continue-to-apply-employment-division-v-smith [https://perma.cc/6GE2-AEKC] (arguing that lower courts should not continue to apply the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), because "five sitting Justices have" in separate opinions "said it was wrongly decided").

[257] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.).

[258] McCreary County v. ACLU of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

[259] McConnell, supra note 116, at 104 ("I cannot imagine a lower court thinking, after this, that the *Lemon* test is good law.").

There are rare but notable historical examples of lower courts treating such evidence as a sign that a precedent was in disfavor. A famous instance occurred in 1942 in a case challenging the constitutionality of mandatory flag salutes in public schools. The Supreme Court had upheld such mandates two years earlier in an 8-1 decision in *Minersville School District v. Gobitis*.[260] A three-judge district court nevertheless declined to follow that precedent, noting that, "[o]f the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound," and also that a majority of the Court had recently "thought it worth while to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority."[261] The district court's prediction turned out to be accurate, as the Supreme Court proceeded to overturn *Gobitis* in *West Virginia State Board of Education v. Barnette*—without commenting on the propriety of the lower court's prediction.[262]

Under the decisional authority model, this sort of prediction is inappropriate. Individual Justices, we contend, should not be able to undercut the precedential effect of a prior decision through separate opinions across cases or across time. Allowing them to do so would be inconsistent with basic assumptions and features of our federal judicial system. Although it may be true that in some respects, the Supreme Court is a "they," not an "it,"[263] only the Court as an institution has the constitutional or statutory authority to issue judgments backed by opinions. Article III vests "[t]he judicial Power" in "one supreme Court," not in individual Justices, and the statutes governing appellate jurisdiction confer such jurisdiction on "the Supreme Court."[264] Likewise, the Court's

[260] 310 U.S. 586, 598 (1940).

[261] Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 253 (S.D. W. Va. 1942). The intervening decision that distinguished *Gobitis* was *Jones v. Opelika*, 316 U.S. 584, 598 (1942). That decision was 5-4. The dissenters, who included three of the Justices who had been in the majority in *Gobitis*, made clear their disagreement with that decision. Id. at 623–24 (Black, J., dissenting, joined by Douglas & Murphy, JJ.) ("Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it also was wrongly decided.").

[262] See 319 U.S. 624, 642 (1943).

[263] Cf. Richard H. Fallon, Jr., The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science, 110 Colum. L. Rev. 352, 375–76 (2010) ("References to 'the Court' can obscure the otherwise obvious point that 'the Court' is not a monolith, but an aggregation of nine individual Justices. Each exercises personal judgment. . . . In a phrase, the Supreme Court is a 'they,' not an 'it.'" (internal quotation marks omitted)).

[264] U.S. Const. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."); 28 U.S.C. §§ 1254, 1257.

long-standing historical practice—since the early nineteenth century, when it abandoned the practice of seriatim opinions—has been to issue "opinions of the Court" only when those opinions are backed by a majority.[265]

Our system thus rests on a broad assumption that decisions of the Supreme Court should be supported by a majority of the sitting Justices.[266] Yet if lower federal courts were to treat separate opinions as effectively undermining a past precedent, that would give a single Justice or a subset of the Court considerable power over the content of federal law. Indeed, that is particularly true in the modern judiciary, where the Supreme Court can review only a fraction of lower court cases, and thus would have trouble policing such lower court conduct. Accordingly, however much one might dislike a doctrine such as the *Lemon* test, or (to take a more recent example) the special solicitude of states in the standing analysis, lower courts should not simply leave doctrines "on the shelf" because a few Justices in separate opinions have expressed their "doubts."[267]

[265] See Sylvia Snowiss, Judicial Review and the Law of the Constitution 123 (1990) ("[U]nder [Chief Justice] Marshall's leadership . . . the Court abandoned the practice of seriatim opinion writing and united behind a single opinion.").

[266] Even when some Justices are recused, the assumption is that a decision must be rendered by a majority of the Justices sitting on the case. See 28 U.S.C. § 1 (stating that six Justices are sufficient to constitute a quorum for the Court, in which case four Justices constitute a majority). There is one arguable exception: the Supreme Court has stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (1977) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)). The *Marks* rule may still be consistent with a majoritarian approach: if some Justices preferred a broader result, but they would accept at a minimum the narrower ground, that narrow ground can be deemed to have majority support. Some lower courts have applied the *Marks* rule in this fashion. See, e.g., United States v. Epps, 707 F.3d 337, 348 (D.C. Cir. 2013) (stating that "the narrowest opinion 'must represent a common denominator of the Court's *reasoning*; it must embody a position implicitly approved by at least five Justices who support the judgment'" (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc))). But there is considerable disagreement and confusion about when and how to apply the rule. For discussion, see Richard M. Re, Beyond the *Marks* Rule, 132 Harv. L. Rev. 1942, 1944–45 (2019); Ryan C. Williams, Questioning *Marks*: Plurality Decisions and Precedential Constraint, 69 Stan. L. Rev. 795, 798–801 (2017). A full exploration of the *Marks* rule is beyond the scope of this Article. Outside of merits rulings, the Court may act by less than a majority; for example, the granting of certiorari requires the support of only four Justices.

[267] Cf. United States v. Texas, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring in the judgment, joined by Thomas & Barrett, JJ.) ("[I]t's hard not to think, too, that lower courts

Of course, individual Justices are welcome to express their discontent with existing Supreme Court precedent, as they often do in concurrences and dissents. And when the Court itself considers whether to adhere to a precedent as a matter of horizontal stare decisis, it may take such criticisms into account. These criticisms may also affect litigant behavior, potentially fueling more challenges to a precedent. But lower courts should not treat such disparagement as relevant in determining the disfavored status of a precedent.

Our research demonstrates that lower court judges have often behaved consistently with our proposed approach. Despite Justice Scalia's repeated declarations about the "interment" of the *Lemon* test, the federal courts of appeals continued to apply the test. Likewise, the courts of appeals continued to apply the *Chevron* doctrine even after multiple Justices had critiqued the doctrine. That is, lower court judges did not generally "take the hint" and predict that *Lemon* or *Chevron* was dead.

Yet our research also shows that some lower court judges have recently been inclined to credit the statements of a subset of the Court. In the wake of *American Legion* in 2019, several courts of appeals opted to "count heads"—adding up votes in the plurality opinion and two concurrences—to declare that *Lemon* was "dead" in the context of public display cases.[268] Other judges added up those same votes to suggest that "the Supreme Court ha[d] effectively killed *Lemon*" across the board.[269]

Moreover, in a 2024 dissent from a decision finding a lack of appellate jurisdiction in a *Bivens* case,[270] Tenth Circuit Judge Tymkovich relied heavily on a separate opinion to announce that "*Bivens* claims are no

should just leave that idea [of special solicitude for state standing] on the shelf in future [cases]."). For similar reasons, we do not believe that lower courts should be guided by so-called "pivotal concurrences"—separate opinions by "one or more members of [the] court majority" that "undercut[] the majority's rule in the case." Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, Divide & Concur: Separate Opinions & Legal Change, 103 Cornell L. Rev. 817, 820–24 (2018) (offering an empirical study of lower court citation of such opinions).

[268] Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1326–27 (11th Cir. 2020); see supra Section III.A.

[269] Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 946–47 (9th Cir. 2021) (Nelson, J., dissenting from the denial of rehearing en banc, joined by Callahan, Bumatay & VanDyke, JJ.).

[270] In the case, a federal prisoner brought a *Bivens* action under the Eighth Amendment, alleging that he was beaten by several prison officials while other officials watched. See Mohamed v. Jones, 100 F.4th 1214, 1215–16 (10th Cir. 2024). The court of appeals majority held that a lower court's decision allowing a *Bivens* action was not an appealable collateral order when the officials did not raise a qualified immunity defense. See id. at 1234–35.

longer judicially cognizable."[271] Pointing to Justice Gorsuch's concurrence in *Egbert v. Boule*, Judge Tymkovich insisted that *Egbert* "effectively toll[ed] *Bivens*'s death knell," such that no claimant "has [a] viable *Bivens* claim[]."[272] In addition, some appellate judges during the last few years appear to have been influenced by the skepticism of *Chevron* expressed by individual Justices.[273]

We argue that lower courts should not enable a subset of the Court, in separate opinions, to change the law. Indeed, the *Lemon* case study underscores the trouble with that approach. Supreme Court precedent in this area was quite mixed. Although some Justices disparaged *Lemon* for decades, a majority of the Court continued to apply the test from 1971 through at least 2005.[274] Even as recently as the 2019 decision in *American Legion*, several Justices (including Justice Kagan, who provided the fifth vote to uphold the cross) expressed support for the *Lemon* approach.[275] Moreover, *Lemon* illustrates the difficulty of relying on disparaging statements in separate opinions. As Justice Scalia complained in *Lamb's Chapel*, the author of the majority opinion applying the *Lemon* test in that case—Justice White—had himself previously criticized *Lemon*.[276] Yet Justice White still viewed *Lemon* as good law, insisting in *Lamb's Chapel* that "there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled."[277]

Likewise, the Supreme Court's failure to cite a precedent tells lower federal courts very little about the continuing vitality of that precedent. As we have detailed, the Court for lengthy periods of time ignored the *Lemon* test, leading scholars to speculate that the test had been abandoned. But then the Court would revive and rely on the *Lemon* test. The lower federal courts thus had good reason to continue to treat the test as governing law. The story of *Lemon* helps explain why the lower courts likewise reasonably opted to continue applying *Chevron*, despite the

[271] Id. at 1235, 1237–38 (Tymkovich, J., dissenting) (citing Egbert v. Boule, 142 S. Ct. 1793, 1810 (2022) (Gorsuch, J., concurring in the judgment)).

[272] Id. at 1244.

[273] See supra Subsection III.C.3.

[274] See McCreary County v. ACLU of Ky., 545 U.S. 844, 859–66, 881 (2005).

[275] See Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring in part).

[276] See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.).

[277] Id. at 395 n.7 (majority opinion).

Supreme Court's silence about the doctrine. The Court's failure to cite a decision, even for considerable periods of time, does not necessarily signal that the precedent has been interred or abandoned.[278]

There are good reasons for lower federal courts to continue to apply such a precedent, even when it seems to have lost favor with at least some Justices. The Supreme Court may accept or desire that the lower courts continue to rely on a precedent even when the Court no longer finds it useful for its own decisions—because, for example, it obtains informational value from continued lower court applications, or it recognizes that the lower courts have different institutional capacities than it has. Along these lines, Peter Strauss has suggested that the *Chevron* doctrine may have served an institutional function for the judiciary in an era in which the Supreme Court could not review most lower court decisions on a case-by-case basis. By requiring all lower courts to defer to reasonable agency interpretations of ambiguous statutes, *Chevron* arguably helped ensure more uniformity in court of appeals decisions.[279]

Alternatively, there may simply be a lack of consensus on the Court about what to do about a precedent, either for substantive reasons or because of different weights given by the Justices to horizontal stare decisis. There was, for example, no consensus among the Justices for many years on whether to reform or dispense with the *Lemon* test. More recently, there was considerable disagreement on the Court prior to 2024 as to the proper fate of *Chevron*. In that scenario as well, the past doctrinal regime should continue to operate.

2. Not All Signals from Binding Decisions

Not all binding decisions, however, indicate that a precedent is disfavored. The fact that the Supreme Court has issued decisions in a related area that are in tension with a prior ruling, or rejected a

[278] In the litigation calling for the overruling of *Chevron*, some litigants argued that a test such as *Chevron* is a method of interpretation and not in fact binding precedent. See, e.g., Transcript of Oral Argument at 4, Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024) (No. 22-451) ("[A]t issue here is only Chevron's methodology, which is entitled to reduced stare decisis effect."). The question of how to classify *Chevron* is beyond the scope of this project. But notably, our research, along with other empirical work on *Chevron*, suggests that lower courts had long viewed *Chevron* as binding precedent.

[279] Strauss, supra note 240, at 1121.

methodology that underlay a past decision, is not sufficient to signal that a precedent is in disfavor.

Although the Supreme Court itself takes separate doctrinal changes into account in determining whether to adhere to a precedent,[280] lower federal courts should not rely on such "tea leaves." Any such reliance would be close to a prediction model and create a substantial risk of error. The recent *Mallory v. Norfolk Southern Railroad Co.* decision offers an illustration. A string of personal jurisdiction cases had called into question the Court's century-old corporate consent rule. But a majority of the Court adhered to that rule in *Mallory*.[281]

Notably, our argument here is consistent with the Supreme Court's many declarations against anticipatory overruling. The Court has repeatedly stated that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[282] Such declarations are not properly read, in our view, to instruct lower courts to focus on a single past decision and ignore subsequent developments. Instead, such declarations are consistent with our decisional authority model: changes in related areas of law are not proper signals for the lower courts. The Supreme Court alone should determine how to make sense of and reconcile discrete strands of doctrine.[283]

[280] See Agostini v. Felton, 521 U.S. 203, 235–36 (1997) ("[W]e have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law."); see also Gamble v. United States, 139 S. Ct. 1960, 1978–80 (2019) (concluding that doctrinal changes were not sufficient to support overruling the dual sovereignty doctrine of the Double Jeopardy Clause).

[281] See Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2044–45 (2023).

[282] *Agostini*, 521 U.S. at 237 (alteration in original) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); see also id. at 237–38 ("Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality.").

[283] See id. at 237 ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."). This issue arose recently in the D.C. Circuit. In early litigation over President Trump's removal of members of the National Labor Relations Board and the Merit Systems Protection Board, a federal district court held the removals unlawful, relying on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See Harris v. Bessent, 775 F. Supp. 3d 164, 172–78 (D.D.C. 2025) (MSPB) ("In *Humphrey's Executor*, the Supreme Court upheld a statutory provision identical to the one at issue here restricting removal of Federal Trade Commission ('FTC')

Nor should methodological shifts cause a precedent to be disfavored. The Court is never perfectly consistent in methodology across issue areas, so the mere lack of such consistency is not a reliable signal. Consider the argument that changes in the Court's approach to implied statutory causes of action had implications for *Bivens*. During the mid-twentieth century, the Court tended to read statutes so as to effectuate their purposes and so was relatively comfortable inferring private rights of action, at least if private enforcement seemed consistent with the overall purpose of a statutory scheme.[284] Beginning in the 1980s and 1990s, Justice Scalia urged the Court to adopt a more textual approach to statutory interpretation and, correspondingly, objected to inferring private rights of action.[285] But the transition from purposivism to textualism was not

members."); Wilcox v. Trump, 775 F. Supp. 3d 215, 226–30 (D.D.C. 2025) (NLRB). A panel of the D.C. Circuit then granted a stay of those district court decisions—thereby allowing the removals. See Harris v. Bessent, No. 25-5037, 2025 WL 980278 (D.C. Cir. Mar. 28, 2025) (per curiam). Judge Millett dissented, declaring that the panel majority seemed to "prognosticate[]" that the Supreme Court would overturn *Humphrey's Executor*, and insisting "*that is the very job the Supreme Court has forbidden us to undertake*. We are to apply controlling precedent, not play jurisprudential weather forecasters." Id. at *35 (Millett, J., dissenting). The court of appeals, sitting en banc, swiftly rejected that panel opinion—thus again prohibiting the removals—and stated that "[t]he Supreme Court has repeatedly told the courts of appeals to follow extant Supreme Court precedent unless and until that Court itself changes it or overturns it." Harris v. Bessent, No. 25-5037, 2025 WL 1021435, at *1–2 (D.C. Cir. Apr. 7, 2025) (en banc) (per curiam). Interestingly, dissenting from the en banc decision, Judge Walker (a member of the panel majority) denied that the panel had engaged in anticipatory overruling. He argued that the panel majority interpreted the governing Supreme Court precedent as having essentially "narrowed" *Humphrey's Executor*. Id. at *8 (Walker, J., dissenting) ("Each of us recognizes that a lower court cannot overrule *Humphrey's Executor*. We simply disagree about how broadly to read it."); see also *Harris*, 2025 WL 980278, at *7 (Walker, J., concurring) ("[T]he Court's recent decisions have been unequivocal: *Humphrey's* has few, if any, applications today."). The Supreme Court then stayed the district court rulings. See Trump v. Wilcox, 145 S. Ct. 1415, 1415 (2025). The Court later announced that its interim orders, such as that in *Trump v. Wilcox*, should guide lower courts in addressing similar requests for interim relief. See Trump v. Boyle, 145 S. Ct. 2653, 2654 (2025) ("Although our interim orders are not conclusive as to the merits, they inform how a court should exercise its equitable discretion in like cases."). In September 2025, the Court granted certiorari to decide whether to overturn *Humphrey's Executor*. See Trump v. Slaughter, Nos. 25A264, 25-332, 2025 WL 2692050, at *1 (U.S. Sept. 22, 2025).

[284] See J.I. Case Co. v. Borak, 377 U.S. 426, 431–35 (1964) (emphasizing the "broad remedial purposes" of the securities laws in implying a private right of action).

[285] See Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (declining to "revert" to the "*ancien regime*," when the Court would imply private rights to effectuate what it perceived to be Congress's purposes); Tara Leigh Grove, The Misunderstood History of Textualism, 117 Nw. U. L. Rev. 1033, 1070–74 (2023) ("The campaign for modern textualism began in earnest after Justice Scalia joined the Supreme Court in 1986.").

linear, nor was it across the board, even in the statutory context.[286] Moreover, the Court's approach to statutory interpretation may not translate easily into the *Bivens* context, which involves constitutional law. As a result, we argue that lower court judges should not on their own have treated changes in statutory methodology as a signal that *Bivens* was disfavored.

Our research suggests that there is some need for guidance in the lower courts on this point. For example, in *Koprowski v. Baker*, a 2016 case from the Sixth Circuit, a former federal prisoner brought suit against prison officials, alleging that they were deliberately indifferent to his serious medical needs in violation of the Eighth Amendment.[287] Koprowski had fallen off a ladder and injured his back when he was working in the prison's food service area and claimed he was denied needed medical care.[288] By a 2-1 vote, the court of appeals upheld the *Bivens* claim, reasoning that it was sufficiently similar to *Carlson*.[289] In dissent, Judge Sutton emphasized, among other things, that the majority had failed to take into account important methodological shifts in the Supreme Court: the Court had "grown wary of implied rights of action over the last three decades," and this wariness, particularly considered alongside the Supreme Court's consistent rejection of every *Bivens* action since 1980, "leaves no room for this [*Bivens*] claim."[290]

Under our decisional authority model, lower court judges should not rely on such changes in methodology to treat a precedent as disfavored. To be sure, in its binding 2017 decision in *Ziglar v. Abbasi*, the Supreme Court itself made the connection between the rejection of implied statutory causes of action and the disfavoring of *Bivens*.[291] But when a

[286] Scholars have observed that purposivism continued to play an important role in Supreme Court decisions, although it was a more text-focused purposivism. See John F. Manning, The New Purposivism, 2011 Sup. Ct. Rev. 113, 115–16; Jonathan T. Molot, The Rise and Fall of Textualism, 106 Colum. L. Rev. 1, 3 (2006). Others have argued that textualism contains important elements of purposivism. See Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1286–87, 1351–52 (2020); see also Tara Leigh Grove, Which Textualism?, 134 Harv. L. Rev. 265, 265–71, 279–90 (2020) (contrasting a more formalistic and a more flexible textualism).

[287] Koprowski v. Baker, 822 F.3d 248, 249–50 (6th Cir. 2016).

[288] Id. at 250.

[289] Id. at 249–50.

[290] Id. at 261 (Sutton, J., dissenting).

[291] 582 U.S. 120, 131–34 (2017) (drawing the connection, although also noting that "[t]he decision to recognize an implied cause of action under a statute involves somewhat different considerations than when the question is whether to recognize an implied cause of action to enforce a provision of the Constitution itself").

lower court takes into account that analysis in *Ziglar*, the lower court adheres to the binding *Ziglar* precedent and does not on its own infer that changes in methodology in another area impact an existing doctrine. There is also substantial debate about whether and to what extent the obligation of stare decisis, including vertical stare decisis, applies to methodology, and that is another reason for caution in the lower courts.[292]

3. Concluding Thoughts: Signals from Lower Courts

Disfavored Supreme Court precedent creates some understandable confusion among the lower federal courts. That is why we believe it is crucial to offer a taxonomy of signals and to explain which signals legitimately indicate that a precedent is in disfavor. But we also assert that lower federal courts can and should convey any dissatisfaction with existing Supreme Court doctrine.

When lower federal courts issue opinions, they may not only decide the case before them but also comment on the state of the law. Lower courts, for example, often acknowledged and sometimes joined in the criticism of *Lemon*, noting that applying the test was "no cakewalk."[293] Such comments invite the Justices to consider whether to revise or even formally overrule a precedent.

Another part of this relationship is for lower courts to be clear about what they understand to be the decisional scope of a disfavored Supreme

[292] Scholars have argued that the Supreme Court does not treat methodology as binding as a matter of horizontal stare decisis. See Sydney Foster, Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?, 96 Geo. L.J. 1863, 1875 (2008); Abbe R. Gluck, What 30 Years of *Chevron* Teach Us About the Rest of Statutory Interpretation, 83 Fordham L. Rev. 607, 613 (2014). And some judges apparently assume that the Court could not dictate a methodology as a matter of vertical stare decisis. See Abbe R. Gluck & Richard A. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1345 (2018) (finding that fifteen lower court judges surveyed doubted that the Supreme Court could dictate a method of statutory interpretation to lower court judges). But see Aaron-Andrew P. Bruhl, Eager to Follow: Methodological Precedent in Statutory Interpretation, 99 N.C. L. Rev. 101, 105 (2020) (arguing, based on a detailed survey, that there is "much more" methodological precedent than most recognize, particularly in the lower federal courts). In its decision overturning *Chevron*, the Court accepted that stare decisis applied but concluded that it had been overcome. See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270–73 (2024). For an analysis of the Supreme Court's power to announce interpretive method as binding precedent, see generally Tara Leigh Grove, The Power to Impose Method (Aug. 2025) (unpublished manuscript) (on file with authors).

[293] Harris v. City of Zion, 927 F.2d 1401, 1419 (7th Cir. 1991) (Easterbrook, J., dissenting); see supra Section III.A.

Court decision. Even taking into account just the first two disfavoring signals that we have outlined—binding decisions that criticize or narrow an earlier precedent—will not always be a straightforward task. With respect to the *Bivens* doctrine, for example, it is unclear to what extent it has been confined to the particular factual situations at issue in *Bivens*, *Davis v. Passman*, and *Carlson v. Green* (a point to which we return below). The lower federal courts can assist the Supreme Court in its development of precedent by clearly identifying their understanding of the current state of the law. The dialogic relationship between the Supreme Court and the lower federal courts is and should be a two-way street.[294]

B. Lessons for the Supreme Court

This Article aims to guide the lower federal courts as they seek to make sense of Supreme Court signals that a precedent is in disfavor. Our empirical and normative analysis also has implications for the Supreme Court itself.

1. Signaling Disfavor

Our taxonomy of disfavoring signals has lessons for the Supreme Court as to how it may legitimately communicate to the lower federal judiciary that a past precedent is in trouble. We have argued that the Supreme Court may properly disfavor a precedent through binding decisions that apply, criticize, or narrow a decision in the relevant doctrinal area. The Justices should not act through separate opinions or silence.

But even when the Court issues binding decisions, it will not always be clear to the lower courts how they should respond. If the Supreme Court wishes to trigger narrower applications of a precedent by the lower courts, it should make this direction as clear as possible. Our case studies suggest that one of the more effective ways to accomplish this goal is to modify the legal test governing a doctrine.

The history of *Bivens* litigation in the courts of appeals underscores this point. During the second era of *Bivens*, which lasted from approximately the mid-1990s until 2017, the Supreme Court rejected every *Bivens* claim on a case-by-case basis in binding decisions. Those decisions narrowing

[294] For an exploration of the dialogic relationship, see Neil S. Siegel, Reciprocal Legitimation in the Federal Courts System, 70 Vand. L. Rev. 1183, 1186–88 (2017).

Bivens constituted a legitimate disfavoring signal. And the lower federal courts seem to have gotten the message that *Bivens* was disfavored to some degree. As the volume of *Bivens* litigation skyrocketed, the courts of appeals rejected a larger percentage of *Bivens* claims.

But there was significant disagreement as to the continuing vitality of *Bivens*. Lower federal courts continued to accept *Bivens* claims, including those that differed dramatically from the Fourth, Fifth, and Eighth Amendment claims at issue in *Bivens*, *Davis*, and *Carlson*. For example, as illustrated by the Third Circuit's 2011 and 2016 decisions in *Mack v. Yost* and *Mack v. Loretto*, a number of courts of appeals recognized *Bivens* claims arising under the First Amendment.[295] Another sign of the uncertainty surrounding the doctrine was the effort by lower courts to find other off-ramps for *Bivens* cases: rather than conduct a *Bivens* analysis, courts of appeals would dismiss constitutional claims on the merits or on various procedural grounds.

But after the Court decided *Ziglar v. Abbasi*, there was a notable shift in the courts of appeals' approach. During the third era, which began in 2017, the courts became far more skeptical of *Bivens* actions. As the Third Circuit put it in 2020, at the time of its earlier decisions in *Mack*, it had "clearly recognized an implied right to damages to remedy First Amendment violations and had no indication from the Supreme Court that [it] should exercise restraint in expanding *Bivens* in this context."[296] But *Ziglar v. Abbasi* "reflected a 'notable change' in the Supreme Court's attitude toward" *Bivens* and "made clear that lower courts could no longer rely on their own prior precedents to recognize a *Bivens* remedy."[297] Instead, "[u]nless the Supreme Court has recognized the context before, the context is 'new' and a special factors inquiry is required to determine if *Bivens* expansion is appropriate."[298]

In some respects, *Ziglar* was not that different from prior Supreme Court decisions in *Bivens* cases. Once again, the Court heard and rejected a *Bivens* claim—in that case, one arising out of the September 11 attacks. But *Ziglar* was different in that it not only rejected the *Bivens* claim but also offered a new two-step framework. The courts of appeals have

[295] Mack v. Yost, 427 F. App'x 70, 73–74 (3d Cir. 2011) (per curiam); Mack v. Loretto, 839 F.3d 286, 296–97 (3d Cir. 2016); see supra Section III.B.

[296] Mack v. Yost, 968 F.3d 311, 316 (3d Cir. 2020).

[297] Id. at 317, 319 (quoting Ziglar v. Abbasi, 582 U.S. 120, 135 (2017)).

[298] Id. at 319.

treated this new test as a relatively clear signal that *Bivens* claims should be accepted only in the most exceptional cases.

Our other case studies also suggest the importance of the legal test governing a doctrine. Even as the Justices repeatedly criticized or ignored both *Lemon* and *Chevron*, the courts of appeals continued to apply those tests. The lower federal courts seem inclined to apply an existing legal test, however battered it may be, until the Court expressly abandons the test—as the Court finally did with respect to *Lemon* in 2022 and *Chevron* in 2024.

2. Disfavoring Versus Overturning

This Article also suggests some important trade-offs in deciding whether to disfavor a precedent or take the next step of overturning it. When the Supreme Court disfavors but does not overturn precedent, it should expect that there will be some disuniformity in the lower courts about the proper application of the precedent. This disuniformity, moreover, is likely to grow over time if the Court continues to leave the viability of a precedent in doubt. Such disuniformity has both benefits and costs.

Disagreement among the lower courts may be beneficial by providing valuable information to the Court about how to develop a doctrine and whether to retain it. In that way, disfavoring precedent serves some of the same values as percolation. As we have discussed, sometimes the Supreme Court may allow the lower courts to experiment with a doctrine so that the Court may learn from the different approaches. The second era of *Bivens* from the mid-1990s to 2017 can be seen as an era of experimentation. The lower court decisions during that era provided a lot of information—demonstrating how courts could use the existing doctrine not only to deny most claims, but also to grant *Bivens* claims beyond the Fourth, Fifth, and Eighth Amendment contexts of *Bivens*, *Davis*, and *Carlson*. The lower courts' efforts to use other off-ramps to dispose of *Bivens* cases likely also signaled to the Court the confusion and uncertainty surrounding its existing doctrine. This lower court experimentation likely informed the Court's decision in *Ziglar* to modify the test for *Bivens* claims.

Such disuniformity, however, can also undermine the predictable application of federal law, lead to unnecessary litigation, and strain judicial legitimacy. Because of these costs, it is likely that in some

contexts it would be better for the Court to simply overturn a precedent that it no longer supports rather than adhere to a precedent in name only.

This trade-off relates to a broader debate about what Cass Sunstein has labeled "judicial minimalism."[299] Put simply, courts engaging in minimalism issue narrow rather than wide rulings, deciding only what is necessary to resolve the dispute. Issuing a disfavoring signal rather than overturning a precedent could be seen as a form of minimalism.

To be sure, the distinction between minimalism and maximalism is more of a spectrum than a sharp line. A judicial decision can be more or less narrow ("minimalist"). In the same way, a disfavoring signal may be more or less informative to the lower federal judiciary. As discussed, the Court offered more guidance to the lower courts when it modified the *Bivens* test in its 2017 *Ziglar* decision than it had through case-by-case rejections of *Bivens* claims in previous decades. Yet *Ziglar* and subsequent decisions have still left room for variation among the lower courts. The Fifth Circuit in its 2021 decision in *Byrd v. Lamb* suggested that *any* factual distinction between *Bivens*, *Davis*, or *Carlson* and a new case—including the difference between a home and a parking lot—was enough to create a "new context."[300] By contrast, the Seventh Circuit in its 2023 decision in *Snowden v. Henning* described such factual distinctions—such as between a home and a hotel—as "trivial."[301]

The approach of judicial minimalism has been criticized on a number of grounds, including that it can promote disuniformity and ideological variation among the lower federal courts.[302] There may be similar risks when the Court merely disfavors rather than overturns its precedent. We should note, however, that although our study uncovered disuniformity

[299] See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court 3–6, 9–14, 19–23 (1999).

[300] See Byrd v. Lamb, 990 F.3d 879, 882 (5th Cir. 2021).

[301] Snowden v. Henning, 72 F.4th 237, 247 (7th Cir. 2023) (quoting *Ziglar*, 582 U.S. at 149); cf. Fields v. Fed. Bureau of Prisons, 109 F.4th 264, 283 (4th Cir. 2024) (Richardson, J., dissenting) (complaining that, "given even the slightest crack in the door that the Court's beleaguered precedents leave, inferior courts continue to ignore the directive to stop extending *Bivens*").

[302] See, e.g., Grove, Legitimacy, supra note 11, at 1611. For an argument that minimalism is better suited for the lower courts than the Supreme Court, see Schmidt, supra note 11, at 832–33. For a sample of other criticisms of minimalism, see James E. Fleming, Securing Constitutional Democracy: The Case of Autonomy 163–67 (2006); Neal Devins, The Democracy-Forcing Constitution, 97 Mich. L. Rev. 1971, 1984–86 (1999); Neil S. Siegel, A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar, 103 Mich. L. Rev. 1951, 2015–17 (2005).

among the lower federal courts, such as in the application of *Bivens*, we did not find substantial ideological disagreement among the lower courts with respect to any of the issue areas we examined. More study of the issue is warranted, but it may be that uncertainty and confusion among the lower courts are greater concerns than ideological variation.[303]

The Supreme Court seemed to recognize some of the trade-offs between disfavoring and overruling in its 2021 decision in *Edwards v. Vannoy*.[304] In 1989, the Court had indicated that retroactive application of newly recognized rights in habeas cases, even though normally inappropriate, would be allowed if the newly recognized right concerned a "watershed" rule of criminal procedure.[305] But, since then, it had never found any newly recognized right that would meet this standard, and it seemed unlikely that it ever would. In *Edwards*, the Court categorically ruled out this exception to non-retroactivity, explaining that "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts."[306]

But we emphasize that these trade-offs are context-dependent. Although overruling, rather than disfavoring, can lead to more uniformity in some contexts, that may not always be the case. *Chevron*, for example, was defended on institutional grounds: by requiring lower courts to defer to agency interpretations, the Supreme Court could ensure *more* uniformity in lower court decisions.[307] Conversely, the reversal of *Chevron*—and the demand that every lower court provide an independent assessment of statutory meaning—may generate a good deal of *dis*uniformity, perhaps more than we found from mere disfavoring.

[303] Another area for future empirical work would be whether and to what extent there are differences among the circuits in how they treat particular disfavored precedents. A complication in studying that issue is that circuit precedent may influence how judges in a particular circuit continue to treat a Supreme Court precedent.

[304] 141 S. Ct. 1547, 1559–61 (2021).

[305] See Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

[306] 141 S. Ct. at 1560.

[307] See supra note 279 and accompanying text. The Court in *Loper Bright* doubted that *Chevron* continued to serve this institutional function, "[g]iven [the Court's] constant tinkering with and eventual turn away" from the doctrine. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024); see also id. at 2267 ("Given inconsistencies in how judges apply *Chevron*, it is unclear how much the doctrine as a whole . . . actually promotes such uniformity." (citation omitted)). Yet some empirical studies of *Chevron*, including our own, suggest that the lower courts did not struggle to apply *Chevron*, at least not until very recently. See supra Subsection III.C.2.

The key point here is that there are trade-offs between merely disfavoring a precedent and overturning it, and the Court should consider these trade-offs in deciding what to do with precedents that it no longer supports. Sometimes, failing to take the formal step of overruling allows for helpful experimentation and feedback from the lower courts or properly accounts for institutional differences in the lower courts, but at other times it simply generates confusion and needless litigation. There is also an issue of accountability to be considered: given that the Court was responsible for generating the initial precedent, it should arguably bear some responsibility for determining the path forward, rather than continuing to send mixed signals to the lower courts.

CONCLUSION

Scholars have in recent years focused on the Supreme Court's express overruling of precedent. But there is an important separate category of *disfavored* precedent—decisions that are retained but given less weight than what would have seemed appropriate when the decision was first issued. This Article has considered the proper status of that category of precedent in the lower federal courts, and we have offered a decisional authority model to guide lower courts when dealing with disfavored precedent. Under that model, the Supreme Court may properly signal that a precedent is in trouble by issuing binding decisions in the relevant doctrinal area, but not through separate opinions, silence, or methodological shifts. While such an approach to disfavored precedent will help guide the lower federal courts, they are still likely to differ in how they approach disfavored precedent. Accordingly, to achieve uniformity in the application of federal law, the Supreme Court will sometimes need to take the more challenging step of expressly disavowing its prior handiwork.