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The Modern Executive Order's Ability to Address Civil Rights Impacted by Supreme Court Decisions

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ABSTRACT

Presidential Power has changed significantly throughout history. Despite the founders' intentions of a weak executive and strong legislature, the power of the President has become increasingly large. Presidents can utilize this power through unilateral actions. One unilateral action that has been under-researched in academic research is the executive order. Executive orders are not a power explicitly granted in the Constitution, allowing Presidents to take advantage of Constitutional vagueness and potentially cross the line between the separation of powers, becoming both a quasi-legislator and quasi-interpreter of the law. This paper aims to understand executive orders application to modern Civil Rights through case research of Supreme Court decisions. After analyzing recent unpopular Court decisions on Civil Rights, an analysis is done to see where the President acted in response to those decisions. I find that a loss in Supreme Court legitimacy over the past few years has incentivized the President to act via executive order on civil rights. This means that when a civil rights decision was unpopular, the President would respond with an executive order.

INTRODUCTION

The presidency has grown extensively in its power over the past 40 years. From the time Richard Neustadt coined the term, "The Power to Persuade" (Neustadt 1960), there have been years of unilateral policy action that seemingly go against Presidential power being the power to persuade. The limits of Presidential power have been tested time and again since Neustadt. Nearly every time, Presidential power has stretched and expanded. Congressional failure to act has compounded this Presidential power, as the legislature and the Courts are unlikely to stop a President in many circumstances (Moe 1999). This expansion of power has best been understood as the unitary executive, popularized by the Bush administration (Barilleaux 2010). The heart of the unitary executive comes from the "vesting," "oath," and, "take care" clauses of the Constitution (Barilleaux 2010). In summation, the theory states that the President has sole administrative power, prerogative power, and the ability to ignore the execution of laws they disagree with (Barilleaux 2010). It also argues that Congress cannot limit this power.

One way unitary power is used or expressed is through the executive order.
Despite this, literature of public administration "virtually ignores executive orders and proclamations." (Cooper 1986, 234). Presidential scholars have previously exclusively focused on executive orders related to wartime power, and law reviews focus on the constitutionality of specific orders, rather than their authority (Cooper 1986, 234). Presidential scholars have begun to change and explore executive orders with a broader scope, but still do not give many types of orders the attention they deserve.

This has left modern research on the President in a unique place: unexplored territory. Executive orders that are outside of the scope of wartime and fall in line with the Constitution are relatively unexplored by research. This allows Presidents to take advantage of Constitutional ambiguity (Moe 1999, 132). In the times presidents have used their executive authority to make policy on their own, they do so, "without interference from either Congress or the courts" (Mayer 1999, 445). All the while, rights in early cases have shown a paradox between well-defined, absolute rights, and rights that are ambiguous, or ill-defined by the

Courts (Ely 1993, 37). This leaves many rights, especially those that are found to be "inherent" within this area of ambiguity. Inherent rights are ones not directly stated in the Constitution but rather claimed by interpretation. They can be seen as arbitrary, and sometimes barely hang in the balance (Ely 1993, 28). One of these was the inherent right to privacy in *Roe.* This paradox between ill-defined rights and ambiguous rights has previously led to significant judicial activism (Ely 1993, 37). Recent politicization of the Supreme Court has affected the legitimacy of the Court, most recently with the leaked decision overturning of *Roe* (Gersten 2022). The President may take advantage of this ambiguity and act as a legislator or even an interpreter of the law to get his or her way.

This thesis consists of a literature review, methodology, data, analysis, findings, and considerations for future research section. The literature review focuses on major literature in presidential power, executive orders, civil rights, and Supreme Court legitimacy. The methodology explains my survey and case method approach. The data consists of compilations of Supreme Court decisions, public opinion polls, and executive orders. My analysis dives deep into those executive orders, and I conclude at the end along with some considerations for future research on the topic, including ideas on presidential rhetoric and executive orders as a bargaining tool.

LITERATURE REVIEW

Introduction

Based on the nature of this thesis, there are four major avenues of literature that can be utilized to provide a broad scope of research for a literature review. These are, presidential power and policymaking by executive order, executive orders in court, civil rights, and Supreme Court legitimacy.

Presidential Power and Policymaking by Executive Order

The Congressional Research Service provides Congress with nonpartisan research on a variety of topics, including executive orders. They write that, "Executive orders are written instruments through which a President can issue directives to shape policy," while also noting that, "Although the U.S. Constitution does not address executive orders and no statute grants

the President the general power to issue them, authority to issue such orders is accepted as an inherent aspect of presidential power…" (Gaffney 2021). The contemporary understanding amongst major policymakers is that the President can issue directives to shape policy despite no explicit authority to do so.

The modern understanding that policymakers have of executive orders is certainly not what the founders intended, nor the status quo for much of history. A large expansion of Presidential Power is the culprit. Richard Neustadt was the originator of Presidential theory by understanding the President as constitutionally occupying a position of weakness, noting that any advantage the President has is checked by another branches advantage. Within all of this, the President must find their place within the branches of government to get what they want done. This weakness led to the famous, "Presidential Power is the power to persuade" (Neustadt 1960). More succinctly, this persuasive power is simply bargaining power. A powerful President is one who can successfully bargain with the other branches to cooperate and achieve policy goals.

These ideas posited by Neustadt were, and still are, popular in studies of the presidency. However, multiple points in history have led to a shift in thoughts regarding Presidential power. As noted by Andrew Rudalevige, "successful Presidential leadership depends on arguing that 'we can't wait' on evading congressional constraint by expanding the bounds of executive power." (Rudalevige 2021, 488). The result of all of this: Presidents choosing to act on their own. Rather than the power to persuade, Presidents have moved to power without persuasion. Moe and Howell documented this power shift in 1999. They attempted to set up an undeveloped theoretical framework to understand Unilateral action in, "The Presidential Power of Unilateral Action."

Moe and Howell explain the variety of advantages the President has. Namely, they have tremendous resources, the ability to be a first mover and the ability to claim prerogative power (Moe 1999, 138-139). They also look to many constraints that a President may have. However, Moe and Howell categorize many of these constraints as weak in reality. One

constraint is Congress. However, Moe and Howell argue that the President has an incentive to act imperialistically (Moe 1999, 145) due to their resources and sole authority. Congress is unable to make these imperialistic actions since they are a body of representatives, and rarely ever have a united vision (Moe 1999, 145). The Court can restrict Unilateral power, but they have many incentives to not restrict it (Moe 1999, 152). This gives the President a significant Unilateral authority. Moe and Lewis encourage experts to move beyond the idea of Presidential power being only the "veto power" (Moe 1999, 176) and seeing the presidency as a trove of significant unilateral power. Moe and Lewis develop a strong theoretical framework, but by their own admission, it is a work in progress. Further research has been done by Moe and others to add to this framework by specifying tools of action and building upon a strong theory.

Andrew Rudalevige also documents many of the tools that Presidents have in their arsenal of unilateral powers. Rudalevige writes about executive orders as a way of controlling processes, not policymaking. He describes them as, "a formal document aimed at, and governing the actions of, government officials and agencies" (Rudalevige 2021, 480). In the eyes of Rudalevige, they are both powerful and constrained. Powerful by being the force of law but constrained by Presidential turnover and the two other branches. However, Rudalevige does note that Presidents often proceed with orders when Congress has not explicitly disapproved of a policy, and Congress and the Courts usually allow the order to remain (Rudalevige 2021, 482). These powers, when used unilaterally, are key parts of the unitary executive theory. Rudalevige hints that executive orders may have significant power despite constraints. However, he focuses much more on the other powers that Presidents utilize. Phillip J. Cooper notes that, "literature of public administration virtually ignores executive orders and proclamations." (Cooper 1986, 234). Political Scientists previously avoided looking at executive orders and are just now catching up on the research.

Cooper goes further in *By Order of the President,* explaining what he believes are dangers with executive orders. He states that, "executive orders are very important but little understood methods of governance." (Cooper 1986, 255). In slight contrast to Rudalevige,

Cooper sees executive orders as tools of public administration, and important ones. This research has been a proponent of another major school of thought: The administrative presidency. The administrative presidency understands the President as a controller of the bureaucracy. Public administration experts have long favored the idea that the President should manage the bureaucracy (Nathan 1976, 42). This bureaucracy has clearly expanded over time, and legislators can divert power to bureaucracies through their statutory authority (Gaffney 2021). The President can then utilize executive orders to carry out those laws that he or she has statutory authority over (Gaffney 2021).

The research consensus is that Presidential power has expanded in multiple ways. Executive orders and rulemaking have been underappreciated ways of utilizing Presidential power. Legal scholars have taken a greater interest in executive orders than most. However, rather than look at how far the authority of executive orders may stretch, legal scholars often seek to understand the constitutionality of an order as it relates to the policy it makes (Cooper 1986, 234). So, legal scholars look to see if an order violates the Constitution. Implicitly it appears, legal scholars are assuming that Presidents have the Constitutional authority to implement sweeping executive orders. They rather look to see if orders do not exceed presidential authority but disagree with outlined Constitutional rights. All of this puts presidential Power and executive orders in a paradox. Many assume strong presidential power that is not explicitly stated in the Constitution. This has allowed Presidents to grab power more power through executive orders.

As noted above, experts have been calling for significantly more research into executive orders and their impacts. This has been done a few times both through quantitative and qualitative analysis. Kenneth Mayer has been one of the leaders in quantitative research on executive orders. Mayer employed event-count analysis to understand when President's issue orders, and the goals they achieve through them. His 1999, "Executive Orders and Presidential Power" researched orders in different political contexts. His first conclusions were like the modern consensus. Mayer agrees that executive orders are underappreciated tools of policymaking and that the president's authority to issue orders has expanded greatly

due to the administrative state and claims of unilateral power. Mayer also finds that most claims of unilateral power come from wartime powers or national security (Mayer 1999, 462).

When looking at political context, Mayer finds some interesting trends. Most specifically, he finds that presidents' issue fewer executive orders in times of divided government, and more in times of the majority (Mayer 1999, 461). This seems to go against the conventional wisdom that Presidents take advantage of unilateral authority when they cannot go to Congress. Mayer expands on this research in 2002, by refining his analysis to what he defines as "significant executive orders." Isolating significant orders is important as it removes orders that simply rename something, provide an honor for a person, or do other remedial tasks. "Significant orders" have been used in research often, most specifically by Mayer and William Howell in *Power without Persuasion.* Mayer and Howell do not define "significant" the same. Mayer outlined separate categories that could make an order significant, varying from media press coverage to the formation of a Congressional Committee. Howell did not go as deep into this research and looked at what the order did, rather than perception of it. This may lead to different orders being accounted for in different research. Nonetheless, isolating for significance is important with the sheer number of orders that are issued, many of which do not have impacts on policymaking.

After isolating significant orders, Mayer finds a strong correlation between issuance of significant orders and presidential popularity (Mayer 2002, 379). When presidents are less popular, they issue more orders and vice versa. Mayer still finds little correlation between divided government, but once again concludes that, "the emerging literature on formal executive authority suggests that students of the American presidency should revise the prevailing view of presidential power to include the brute facts of presidents' important unilateral capacities." (Mayer 2002, 380). Mayer believes that scholars should recognize that fact: presidents have clear unilateral powers. Consistently, regardless of publication date, a call to revise the view on presidential power from executive orders continues.

William G. Howell's *Power without Persuasion* (2003) adds to significant executive order research. In *Power without Persuasion* Howell seeks to model Unilateral politics. Howell believes that Unilateral politics has not been effectively modeled with a strong theoretical framework. Howell looks at many Unilateral powers to make this framework but dedicates lots of time to executive orders. He builds off what Mayer may have been missing: fragmentation. Howell tests multiple hypotheses related to executive orders. Like Mayer, he finds that a split Congress does not affect the number of orders issued. However, when looking at fragmentation, there was an effect (Howell 2003, 89). Howell defines fragmentation as size of majority party and uses the legislative potential for policy change score (Howell 2003, 85). Both measures showed statistical significance, and more orders were issued during times with lower potential for change, and lower size of majority parties.

Howell's research has many implications for today. Although divided government shows no significance, Congress itself is more divided than ever before (Desilver 2022), and therefore more fragmented. The potential for change is low due to polarization. If Howell's theories hold, then the president's power may be at its highest right now. Howell also provides data on the effects of executive orders after implementation. He looks at both bills introduced to amend or overturn executive orders, as well as bills introduced to codify or extend executive orders since 1972. Of 45 Bills introduced to amend or overturn orders, 4 have become law (Howell 2003, 114-115). Only 5 resolutions have been passed to recommend a president issue or revoke an executive order (Howell 2003, 117). However, of 59 bills introduced to extend or codify executive orders, 37 were passed into law. Howell notes that this data is, "More illustrative than conclusive" but it is still a compelling trend. It appears that executive orders may compel Congress to simply comply with the president and they may be used as a tool of motivation.

The research of Howell, Mayer, and others does not come without criticisms. Although most view executive orders as an alternative to bargaining with legislators, there are other opinions. Matthew J. Dickinson and Jesse Gubb argue that there are limits to power without persuasion. Dickinson and Gubb critique Howell's analysis in *Power without Persuasion.* After adjusting

the model, they come to many of the same conclusions as Howell. Namely, they agree that when Congress is less able to legislate, president's issue more orders (Dickinson 2016, 69). However, they disagree on the motivations for issuing these orders. Howell would argue that the motivation for issuing orders is to bypass Congress and achieve policy goals. Dickinson and Gubb do not think it is that simple. To achieve long-term change, Dickinson and Gubb argue that presidents will always seek legislation (Dickinson 2016, 69). They see orders as a way to enact short-term change and motivate legislation in the end (Dickinson 2016, 69). This makes executive orders more of a motivator for negotiation and bargaining, and closer to what Richard Neustadt argues. Dickinson and Gubb write that orders can sometimes be, "an alternative vantage point from which to bargain." (Dickinson, 2016, 70). They also recognize that it is still early, and their theory warrants more research. This research from Dickinson and Gubb does fall in line with the data from Howell on codified executive orders. Despite this, there still has been long-term change enacted through executive orders, so their usages may vary.

Another source on presidential power and policymaking truly begins to hit the targeted goal that I have for this thesis. Ruth Morgan analyzed four different significant executive orders related to Civil Rights in her 1987 book, *The President and civil rights: policy-making by executive order.* Morgan's analysis was through a case method, where she analyzed specific orders on specific policy issues. The major issues that were looked at were equality in the armed services, fair employment practice, and fair housing. Morgan draws multiple important conclusions from this work and connects it to the future of executive orders.

Morgan concludes from these cases that a president may use executive orders to achieve a partisan political goal (Morgan 1987, 26) and to bypass Congress when there is a strong demand for legislation (Morgan 1987, 57) that persists. Morgan states that the following can force a president to act via executive order: public pressure, personal value choices, failure of departments to develop an adequate policy but still the ability to achieve the policy administratively, failure of Congress to enact legislation, and the desire to avoid congressional

controversy on an issue with the possibility of losing (Morgan 1987, 77). Many of these factors can still influence a president amongst significant division in Congress.

Finally, Morgan looks at the future of executive orders. Morgan sees orders as an instrument for policymaking to solve complex policy problems (Morgan 1987, 84). She states that the "difficult issues that rend the fabric of our society require a variety of approaches." (Morgan 1987, 84). Still though, Morgan agrees that presidents will balance executive orders with their other policy tools to achieve their goals. Morgan simply sees executive orders as a strong policymaking tool that has been used to introduce systematic change before and can do so again. Morgan does acknowledge that there was an explosion of executive orders on civil rights during the period she studied, but not much has come since.

A final source that also hits the goal I have is from Kenneth Mayer again. Mayer continues his research in his book, *With the stroke of a pen* (2002). Mayer takes both a qualitative and quantitative approach to orders in this book. Mayer began by categorizing executive orders. So far in my research, Mayer is the first to develop comprehensive categories. These were civil service, public lands, war and emergency powers, foreign affairs, defense and military policy, executive branch administration, labor policy, and domestic policy (Mayer 2002, 80). Domestic policy, according to Mayer, includes civil rights, but is not limited to it. Mayer took a random sample of 1,028 orders and found that only 3.8% of orders encompass domestic policy (Mayer 2002, 81). However, some of the categories Mayer describes may also have spillover into the civil rights sphere. Labor policy can be seen as a civil right. Defense policies may restrict civil rights, as may emergency powers. Mayer also reviews how executive orders are used over time. He notes that domestic policy orders, executive branch administration orders, and foreign policy orders have grown significantly since the 1930s (Mayer 2002, 81). Mayer continues the conversation in a discussion on civil rights and executive orders. Conventionally executive orders can be seen as weak, since if one president issues an order, the next can have the prerogative to undo it through another order (Mayer 2002, 182). Mayer challenges this notion, and states that it, "is not so simple" (Mayer 2002, 182). Mayer

contends that over time, presidents have expanded the scope of federal civil rights powers that have had substantial contemporary impacts (Mayer 2002, 182).

Affirmative action was a major case study that Mayer looked at. Originally implemented in a 1965 executive order with continuing regulations for the next five years (Mayer 2002, 183). There was concerted opposition in the 1980s and the Reagan administration (Mayer 2002, 183). Despite this, Reagan was unable to overturn affirmative action. Federal Courts did narrow the scope of it, but it still exists (Mayer 2002, 183). Mayer concludes that presidents had to rely on executive action to outmaneuver a recalcitrant Congress, secure political advantages, and advance interests (Mayer 2002, 216).

Mayer notes that these orders were not made in a "vacuum." Rather, they were, "spurred by a complicated mix of moral arguments, raw political calculations, culture and demographic shifts in the populace, and particular pressure strategies adopted by those who wanted orders issued" (Mayer 2002, 216). Without all these mixed together, the orders would not have worked. There are still limitations. Mayer does not think they can create a middle ground where one otherwise does not exist (Mayer 2002, 217). Sometimes, the path may be too small to pass a policy (Mayer 2002, 217). Other times, there may be room to make policy, but it is dependent on the circumstances.

The research on presidential power and policymaking is vast. There have been expanding theories through the administrative presidency and the unitary executive theory. These two theories combined show the reality of expansive executive power. Despite this, executive orders have gone unnoticed many times. The research that does acknowledge them as a tool of presidential power almost always sees them as one of the most powerful tools a president has. Orders have been used to further public administration, stretch the bounds of the law, and enact civil rights change throughout history (Morgan 1987). They are used more often during times of fragmentation (Howell 2003), and a president has a variety of factors to consider when issuing an order (Morgan 1987). Sometimes, these orders can be seen as a method of bargaining) for legislative change (Dickinson 2016). This story of "not enough research"

prevails through most ways of looking at executive orders, providing a unique route to research.

Executive Orders in Court

Research on executive orders in court usually reviews a few key issues. Legal research mostly seeks to analyze specific orders, and how they stack up against the Constitution (Cooper 1986, 234). Another looks to see how executive orders should be interpreted when a possible violation of the order is brought to Court (Cooper 1986, 234). A small field of research looks to understand how far the general authority of executive orders may stretch, but this mostly focuses on the inability of Court's to move beyond *Youngstown Sheet & Tube Co. V Sawyer (1952)* (Newland 2015). Given this failure to move beyond *Youngstown*, other legal scholars seek to fill in the gaps for the missing interpretive theory on executive orders. It's important to note that although scholars have ideas on how the Court should handle interpretation, it does not mean they will do so, or do anything at all.

The starting point for executive orders in Court is the *Youngstown* decision. It is also the ending point, as it is recognized as a broad decision that is lacking in interpretive theory for policymakers (Newland 2015). Essentially, *Youngstown* was the start of a judicial theory on executive order review, but nothing has changed since then, leaving no strong policy on presidential power with executive orders. Maeva Marcus analyzed the steel seizure case, documenting the build-up to the decision as well as the implications of the decision. On April 10th, 1952, then President Truman issued an executive order informing the Secretary of Commerce to take government control of the steel mills because of an ongoing labor dispute (Marcus 2012, 80). This was an unprecedented order and immediately led to a suit that found its way to the Supreme Court. The president claimed inherent power because of the ongoing emergency and dispute (Marcus 2012, 225). The Court was not convinced, as there were other legislative routes that could have been taken and the crisis was not "sufficiently grave to justify the president's assertion of power" (Marcus 2012, 225).

Marcus argues that the steel seizure case is one of the great Constitutional law cases. She is quick to acknowledge that it is one of the few that discusses the powers of the president

(Marcus 2012, 228). Marcus believes that the very act of a decision being made was landmark, since it helped rebalance powers between the three branches. Truman's claim of inherent power was based on his own interpretation, and the Court rejected the idea that any branch can interpret their own inherent power in this case (Marcus 2012, 237). This precedent was used in future wiretapping cases of American citizens. Marcus ends her analysis by stating that this case is a reaffirmation that the president, "is not above the law." (Marcus 2012, 248).

Not every expert sees the *Youngstown* decision as such a landmark decision as Marcus does. Most of this is due to the passage of time. No landmark decision has been made since *Youngstown* and even when looking at Marcus's work, *Youngstown* has not had significant impacts on how far executive orders may "stretch," especially in true times of emergency. Erica Newland conducted empirical research on what happens when executive orders do get to Court. Newland found that in the absence of new decisions, "doctrinal asymmetries that heavily favor executive power emerge." (Newland 2015, 2026). Following her research, Newland concludes that many decisions represent "disorder" and that there is no theorized way for courts to understand executive orders, their unique ability, and challenges that they bring (Newland 2015, 2035). Newland outlines multiple costs that these decisions have. They first take power away from Congress and limit their ability to limit the president (Newland 2015, 2036). Further, they simultaneously allow the president to bind citizens to the effect of law, broaden their power scope, and insulate themselves from reciprocal demands of those orders (Newland 2015, 2037). Oftentimes, a president will not even clarify where they are drawing their authority, and the order will still stand (Newland 2015, 2049). Essentially, the inaction of the courts has led to the ability of the president to act through executive orders without consequence.

The data Newland gathered is also telling. Statistics show that much of what is argued in Court is the application of an executive order, not whether it is constitutionally allowed or violates a right (Newland 2015, 2043-2044). Additionally, there is a strong deference to the Federal Government. When applicable, they win well over 70% of the time (Newland 2015,

2040). Although complicated, Newland reviews a few cases in depth. In *Rattigan v. Holder* (2011), the D.C. Circuit reviewed an executive order with Constitutional authority that conflicted with a statute and held them at the "same level" (Newland 2015, 2065). This furthers the idea that executive orders are viable a way to bypass legislation.

What has come most apparent from Newland aside from implications of presidential power, is that there is a missing interpretative theory from the courts. Tara Leigh Grove studies this interpretive theory. Grove ultimately argues for a textualist approach to interpretation of presidential directives, but an important contribution to this research comes in the form of her analysis "checks" that the president may impose on him or herself. Once again, she states that presidential orders have not received much attention in literature (Grove 2020, 884). She also believes that there is a theme emerging: presidential orders are treated just like statues (Grove 2020, 887).

Grove introduces a new part of the Constitution into her research: the Opinions Clause of Article II. Grove shows that the Opinions Clause empowers the president to seek consultation from agencies without Congressional interference (Grove 2020, 898). For purposes of the unitary executive theory, this matters not, as it would be assumed in the presidential arsenal of powers (Grove 2020, 898). Still, it ensures consultation with agencies.

Grove uses the Opinions Clause to argue for a textualist approach to interpreting executive orders, rather than one of intent. The courts have no evidence of taking this approach yet, but her reasoning for this approach is very relevant. Since presidents often seek agency advice, executive orders are modified to satisfy agency heads that they work with (Grove 2020, 927). This can lead to a directive that is a compromise with agencies to ensure the agency carries out the order. Grove and others have described this as an, "internal separation of powers" (Grove 2020, 927). Presidents still always have the option to consult agencies, or to not consult them (Grove 2020, 898). So, this internal "check" only works if the president chooses to use it, giving the president significant authority.

Presidential authority through executive orders can still be checked by the Court, but it can be hard to have the authority to check these actions. Kevin Stack outlines the weaknesses of the *Youngstown* decision in his article, "The Statutory President." *Youngstown* outlines three presumptions a court should hold when it comes to a presidential directive. When a directive is supported by statutory authority or an act of Congress, it has the strongest presumption of validity (Stack 2004, 558). In the "zone of twilight" where no authority has expressly been delegated or taken away, both branches may have concurrent power (Stack 2004, 558). Finally, when an executive action goes against Congress, it receives the lowest protections (Stack 2004, 558). The "zone of twilight" is extremely vague according to Stack. It has led to judicial decisions that nobody can untangle, and no coherent theory, like the arguments of Newland.

The research into the law and executive orders has a split. This split is between reviewing orders in a similar manner to agency rules, or like legislation. David Driesen reviews both sides of this argument in the Boston University Law Review. Driesen believes that there is a balancing act between both standards of review and requirements of the executive branch (Driesen 2018, 1044). Driesen reviews both the rational basis test as well as the arbitrary and capricious standards of review for laws and applies them to the executive branch. The balancing "act" is between the ability for a president to faithfully execute the laws and executive overreach (Driesen 2018, 1044). Driesen ultimately makes the argument for the arbitrary and capricious standard to be implemented to review executive orders. Still, it has not been implemented and courts have no coherent theory.

Legal research regarding executive orders' rationality and executive authority is slim but shows that nobody really knows what the true "standard" is. This has allowed the president to claim more power through executive order (Newland 2015, 2026). Furthermore, courts have often allowed executive orders to stand (Newland 2015, 2049). There are some ways that the president may constrain themselves through internal checks (Grove 2020, 897), but it does not mean that they must. Most of the research reveals that a president restraining themselves may be more likely than another party doing so.

Civil Rights

Civil rights have a rich history from the Bill of Rights all the way up through the Civil Rights Act. There has since been a recognized erosion of rights through Supreme Court decisions and a Constitutional counterrevolution (Henderson 2002). The power of the legislature has been restricted through these decisions, and many civil rights have been threatened. Research often looks backwards at past cases. The goal of my thesis is to look forward to the potential restrictions or implementation of civil rights that the public demand through executive order. There is less to research from this area, but it helps understand the setting we live in for later application.

There is a difference between civil rights, which I wish to focus on, and civil liberties. This, as noted by Christopher Schmidt, is drilled into American legal tradition (Schmidt 2014, 23). Additionally, proponents of civil rights ask for different things from the government than those who are proponents of civil liberties. Proponents of both can find themselves fighting for the same issues but may also be on completely opposite sides of issues (Schmidt 2014, 23). Civil liberties are commonly understood as freedom from government intervention (Schmidt 2014, 2) and civil rights are seen as guarantees made by the government. This divide has allowed society to value certain rights ahead of others (Schmidt 2014, 28). Overall, civil rights and liberties are different, demand different things, and have different legal traditions.

Focusing on Civil Rights reveals the reality that rights have eroded in recent times. *The Bill of Rights in Modern America* makes the argument for this erosion. The contributors to this book focus on public perception of rights in recent years. They argue that "Rights have come to be associated in the public mind almost exclusively with the courts of law in general and with the Supreme Court of the United States in particular." (Ely 1993, 25). This is a departure from rights being a part of an intricate constitutional system that requires protection. The authors review the current right to privacy and argue that by "finding" rights through Court dependency, rights are being eroded (Ely 1993, 26). Essentially, rights are now left to the political leanings of the Supreme Court and majority rule.

Michael Avery highlights the erosion of rights and liberties through the Supreme Court in his book, *We Dissent,* which reviewed the Rehnquist Court and decisions that subverted civil rights. Avery focuses on eight cases between 1984 and 2003. He argues that these eight cases protected the government and government officials from the people rather than protect the people from the government (Avery 2009, 1). Although mostly applicable to civil liberties, the Rehnquist Court included discrimination and other rights or social equities. The eight cases analyzed by Avery span all the way from discrimination to unreasonable search and seizure. The cases themselves are less important. Most important is the notion that civil rights have been under crisis for some time now. Most recently, the leaked draft decision overturning *Roe* is another attack on Civil Rights and has significant future implications.

Agencies and groups have understood these Supreme Court decisions as a "Constitutional Counterrevolution." (Henderson 2002, 20). Attorneys have looked for strategies on how to combat this counterrevolution. Thomas J. Henderson writes that the Supreme Court has voted to invalidate and sharply limit the ability of Congress to enact Civil Rights legislation (Henderson 2002, 20). Rigorous standards have been imposed on Congress for legislation related to Civil Rights and they do not have the ability to enforce them. Many decisions also restrict the authority of agencies or Congress to provide proper remedies for violations (Henderson 2002, 20). The result is that those who have their rights violated may have no legal remedy (Henderson 2002, 20).

Most of the research on civil rights naturally dates backwards. However, there are still demands that people have today as they relate to civil rights. World Report reports recent, through 2021, civil rights movements throughout the United States. Although this is not academic research, it is important to understand where public opinion currently lies during this time of rights erosion. There were the Geroge Floyd protests in 2020 that have led to modern anti-discrimination movements (World Report 2021). Voting reform, poverty, and crime are also issues that generations today are discussing. Overall, people are asking more of the government even amongst this rights erosion.

Supreme Court Legitimacy

Supreme Court scholars have sought to understand legitimacy in many ways, but this paper will focus on sociological legitimacy since it reflects public opinion. Sociological legitimacy is defined as the public's view of the Supreme Court. The public view is important, since the Supreme Court decisions that will be a part of my research are extremely important to the public. Tara Leigh Grove, citing Professor Richard Fallon states that, "Sociological legitimacy depends on an external perspective: Does the public view the legal system and its institutions as worthy of respect and obedience?" This external perspective is of the utmost importance. The Supreme Court has no ability to enforce its own decisions, so maintaining a level of sociological support with the public is key. Without it, Americans could simply ignore the decisions of the Court.

A key facet of maintaining sociological legitimacy is diffuse support. Diffuse support explains why Americans may disagree with certain decisions made by the Court, but they still support the Court, nonetheless. They continue this support because the Court has built up a reservoir of "goodwill" amongst the American people through beliefs that the Court is fair and reasonable (Caldeira 1992, 637). Caldeira and Gibson write about diffuse support, stating that, "Under this view, the public generally sees the Court as distinct from the political branches, trusts the Court to make reasonable decisions, and treats its decisions as authoritative, regardless of the ideological valence of a specific ruling" (Caldeira 1992, 637). This notion of diffuse support gives the Supreme Court its "teeth."

Diffuse support can also be impacted through Americans perceptions of fair decision-making procedures in the Court. Perceptions of procedure have been shown to have an indirect effect on acceptance of decisions, and citizens willingness to listen to those decisions (Tyler 1991, 627). It also impacts citizens' support of legal institutions. People regarding procedures as more fair increases the legitimacy of the Court system, and indirectly, this helps create greater compliance with those decisions. This type of support has come into play significantly over the past few years within the Supreme Court. Procedural issues have been at the forefront of the nation. These include confirmation hearings, confirmation votes, and secrecy procedures

within the Court. Most recently, the leaked *Dobbs v, Jackson Women's Health (2021)* decision has been a major procedural issue (Gersten 2022). It was unprecedented and has created some serious pause from those outside looking at the Court.

Even before the *Dobbs* decision, the legitimacy of the Court was questioned. Tara Leigh Grove questions this in her book review of Richard Fallon's *Law and Legitimacy in the Supreme Court.* Gove points to calls to rethink tenure, Court-packing, and the impeachment of justices as evidence of the Court struggling with its legitimacy. Leigh Grove notes that, "things seem to have changed----and in very short order" (Grove 2018, 2242). In her analysis of court packing, Grove notes that these calls have started in response to politicized confirmation hearings. Grove argues that, "in politically charged moments like today, the Court may face a legitimacy dilemma — one that the Justices cannot easily remedy themselves" (Grove 2018, 2245). Grove notes that this is a tension between the internal, legal legitimacy of the Court, and the external sociological legitimacy of the Court (Grove 2018, 2245). Essentially, justices feel pressure to either sacrifice their jurisprudence in favor of sociological legitimacy, or public agreement with decisions. With the Court having a greater makeup of conservative justices that conflict with public opinion, this is continuing the legitimacy issue.

RESEARCH QUESTIONS

There are a few goals that I want to achieve from this thesis. First, the idea of executive orders and Civil Rights policymaking is often seen as a "closed book." Moreover, there was a point in time where executive orders were occasionally used to develop civil rights policy, but that time has passed. I want to challenge this point given the circumstances in America today. Kenneth Mayer notes that past civil rights executive orders were, "spurred by a complicated mix of moral arguments, raw political calculations, culture and demographic shifts in the populace, and particular pressure strategies adopted by those who wanted orders issued." (Mayer 2001. 216) The question I want to ask with this is, "Do today's political circumstances lend themselves to greater executive action on social change?" Based on my research, I believe the answer is yes, and that there have already been orders that involve civil rights in recent years but have not been recognized as such. There are many questions that I can ask

from this. Many of these orders are currently grouped into an "emergency powers" category of executive orders. Ultimately, I am asking, "How might the actions of the Supreme Court on civil rights influence the executive order behavior by the president?"

This thesis both relates to current research and contributes to the existing body of knowledge. Executive order research does not effectively cover the field of civil rights policymaking and has closed the door on it. Research from Kenneth Mayer and Andrew Rudalevige has begun to shine light on this power, but no recent research has been done to evaluate today's circumstances that may lend themselves to greater authority for executive action. I believe this research can continue the conversation and reveal a category of executive orders not recognized in research. It can also contribute to a greater understanding of presidential power under different circumstances.

METHODOLOGY & LIMITATIONS

Methods

My methodology evaluated presidential response to public opinion of Supreme Court decisions. For the past three years, the New York Times and The Supreme Court Public Opinion Project (SCOTUSpoll) have tracked public opinion data on major Supreme Court decisions. The Times summarized and tracked where the Court Justices stood on a decision. SCOTUSpoll is an initiative by Harvard, Stanford, and University of Texas at Austin researchers. Each year, they conduct research on different Supreme Court decisions with a representative sample of the United States to see where the public stood. They also break down the summary statistics by party affiliation and disclose the direct questions that were asked on surveys. Their margin of error lies between 2.2 and 2.4 percentage points, depending on the year the survey was conducted. In a time where sociological legitimacy is declining (Grove 2018, 2244), the stance of the public is important. Sociological legitimacy simply means the public respect and approval of the Court (Grove 2018, 2244). If the public disagreed with a decision, and the legislature remains stagnant (which it has on major civil rights issues), then the president could have been incentivized to use an executive order without much resistance.

I evaluated the civil rights decisions that conflicted with either the majority of public opinion or the majority party in power (or both) and see if the president then acted by executive order in the past three years. A decision conflicts with the majority party in power if the decision was considered liberal while a Republican president was in power, or vice versa. Liberal decisions are those where the liberal bloc of the Supreme Court was in the majority, while the conservative bloc was in the minority. For my dataset, this typically refers to decisions where Chief Justice John Roberts or a single conservative justice joined with the liberal justices to make a 5-4 decision in the Trump era. Or, in the Biden era, this means that there was a decision along partisan lines that was 6-3 or 5-4. A 6-3 decision would indicate that all justices voted on partisan lines. A 5-4 decision usually indicates that a conservative justice (typically John Roberts), joins the liberal bloc but it is not enough to change the decision. A decision conflicts with the majority overall when more than 50% of the public surveyed disagree with the decision.

An executive order can also be issued in response to a Court decision once the party in the Presidency changes. For example, a decision made by the Court in the Trump era that was along conservative lines could then be responded to by the Biden administration in the future. All this means is that the decision was likely controversial, but along partisan lines. This would indicate that demand was always there for the president to change the decision, but the initial party in power chose not to act. Then, when the new party took over, they chose to respond because the decision conflicted with the opinion of their party.

A Supreme Court decision will be considered a decision on civil rights if it covers one of two definitions. To define civil rights, I looked towards the Department of Justice's civil rights division, and a legal dictionary. The Department of Justice says that "Our statutes aim to protect against discrimination and other civil rights violations on the basis of race, ethnicity, religion, sex, national origin, sexual orientation, gender identity, family status or disability. They also protect the civil rights of servicemembers, and individuals housed in public institutions" (United States 2022, 6). This covers mostly 14th amendment related issues. A legal dictionary defines the rest. According to *The People's Law Dictionary*, civil rights can

be defined as, "those rights guaranteed by the Bill of Rights, the 13th and 14th Amendments to the Constitution, including the right to due process, equal treatment under the law of all people regarding enjoyment of life, liberty, property, and protection. Positive civil rights include the right to vote, the opportunity to enjoy the benefits of a Democratic society, such as equal access to public schools, recreation, transportation, public facilities, and housing, and equal and fair treatment by law enforcement and the courts" (Hill 2002).

Any Supreme Court decisions that impact people and are related to these Constitutional amendments will be considered a civil rights decision. Although it is not explicitly stated in the above definition, I will also include the right to privacy in my analysis. The right to privacy has been considered a major Civil Right since the *Roe* decision and is now under threat because of *Dobbs.* Through many Constitutional theories, it has been considered a civil right. It has also been at the forefront of the Supreme Court and public opinion, making it extremely important to evaluate. I will first comb cases to determine which are civil rights related and have polling data, then I will begin to look for executive orders on the same topic. Data will include which populations (Republican, Democrat, Independent, or all), agreed with the decision made by the Court (percentage agreement), and if there was an executive order done in response to the issue.

An executive order on any of the topics above will be considered an executive order on civil rights. Additionally, to be considered a response to a Supreme Court decision, an executive order must be "significant." An executive order is significant when it receives public media attention, does something more than creating a committee, or is challenged in Court. This is a similar definition that Kenneth Mayer uses in *With the Stroke of a Pen* (2001). Essentially, significant executive orders change something about the lives of someone outside of the federal government. This means that a significant executive order on civil rights is on one of the above subject matters and meets the significance definition that is like Mayer's.
After determining which decisions conflict with public opinion, I review the Federal Register to see which executive orders were issued on the same subject matter following the date of the Supreme Court decision. This will show where the president responded to public

disagreement with the Court and chose to act. I hypothesize that as the Supreme Court has continued to lose sociological legitimacy in the years leading up to 2023 through a variety of factors, the president has decided to make more significant executive orders on civil rights. This is due to the gridlocked legislature, and the demand from the public to act. Overall, the circumstances are essentially forcing the president to act.

Limitations

Inevitably, any qualitative or quantitative method has limitations. With a sample size of executive orders that is so small, I am unable to make any statistically significant conclusions regarding the trends of executive orders on civil rights. I cannot conclude statistical causation from the data I have. Some of the executive orders reference a Supreme Court decision, which hints at causation, so that is how I chose to evaluate whether a decision spurred an executive order. Additionally, these executive orders only span two presidents within two very similar periods of time. It is possible for future research to explore the extension to the past, but my scope is inherently limited by the past two presidential terms.

Second, with a qualitative analysis, much of this analysis is subjective. It's important to be clear that there are multiple different theories of presidential power, executive orders, and civil rights. As seen in my literature review, the authority of executive orders varies with the type of theory that a scholar that is conducting the research believes in. Additionally, what is considered a civil rights executive order can vary. I stuck to my definition provided by academic sources, but there are other expert opinions and methodologies that exist. It is also possible in the future to cast a wider net for what a "response" is, or a smaller net, and yield different results.

Finally, my methodology relies on survey data, which always comes with possible limitations and biases. The sample size in each survey over the past three years is just over 2,000. Although it is representative, it is not an overly large sample. Additionally, it is possible that some of this data could be tainted based on the questions that were asked to survey participants. The researchers who conducted the survey sought to simplify the question that the Supreme Court answered. So, each question asked to survey participants is roughly one to

four sentences long and uses plain language. It's impossible to encompass every argument, question, or nuance of a Supreme Court decision in four sentences, and it's certainly not possible to expect every member of the public to understand what every word means. After reviewing the survey questions, I did not find that they were inherently biased or skewed, but it is still possible that members of the public did not understand the true meaning of the question. Regardless, I believe that is an important data point. Just because the public does not fully understand a decision does not mean that they can or can't agree with it. Public opinion matters regardless of whether there is a full understanding of the decision, as it's impossible to expect every member of the public to fully understand what is presented in front of them.

DATA

Through my methodology, I identified 20 Supreme Court cases that were related to Civil Rights and had survey questions asked to participants through SCOTUSPoll. Some of those cases had multiple questions asked to survey participants. For example, participants were both asked whether the Mississippi law in *Dobbs* should be upheld, and whether the *Roe* should be overturned (Liptak 2022). Those garnered different responses and therefore different results. Due to this, there were 23 questions asked to survey participants that were related to 20 different cases. Of those 23 questions asked, 5 of the questions involved a case where more than 50% of all demographics supported the decision made by the Court. Due to this, it could not be considered an unpopular (or even a controversial) decision. One of the questions was unpopular amongst the public, but it was also a case that President Joe Biden recently won, *Biden v. Texas* (Liptak 2022). Since the sitting president won the case, it was unlikely that he would be inclined to issue an executive order in response to his own victory.

This left 17 survey questions related to Civil Rights cases. Of those 17 survey questions:

- 9 survey questions were related to a Supreme Court case that had an executive order issued in response to the decision.
- These 9 questions that were asked to survey participants encompassed five Supreme Court cases.

- Four of those five Court cases had one executive order issued in response to it, and one of the cases had two (*Dobbs)*.
- Five of the six executive orders that were issued were issued on cases that were heard after Amy Coney Barrett was seated on the Court.

Below is a summary of all the data that I collected, including cases that were popular decisions. Decision date represents the date the decision was made public. The case typically is the docket name of the Court decision. Support indicates the percentage of a specific demographic that supported the decision made. The only demographics observed by the survey were political affiliation, but the survey is a representative sample of the United States. Public is the aggregated survey data of all respondents, regardless of political affiliation. R indicates Republican support for the decision, D indicates Democratic support for the decision, and I indicates Independent support for the decision. Under the EO column, a code of Y, N, or S is given to determine whether the president responded with an executive order. Y indicates that yes, the president did in some way. N, indicates no. S, indicates that the president somewhat did. This means that the president either modified an agency action that he was already taking in response to a decision, such as in *Biden v. Missouri (2022)* or *National Federation of Independent Businesses v. Department of Labor (2022).* These two cases were related to the Biden OHSA requirements that mandated vaccination or testing for businesses (Liptak 2022). In this case, Joe Biden had initiated executive action first, then modified it in response to a Court decision with an executive order. The only other situation where an S was indicated was in the three cases decided 6/15/2020. These cases were related to businesses discriminating based on gender identity and sexual orientation (Liptak 2020). The executive order appears to lack some significance, but also appears to be a response to the decision and could be considered significant. It is such a grey area that I chose to leave it as an S. All cases with a Y or an S are discussed in greater detail in my analysis section.

Occasionally, the Court heard multiple cases together or answered multiple questions. There were questions asked related to both sexual orientation and gender identity in the decision released on 6/15/2020. I will go into more detail regarding these cases in a breakdown of the decisions and response by the Court. There were four situations where survey participants

were asked multiple questions about one case, since the Supreme Court also answered multiple questions via one case. These were the three cases heard together in June of 2020, *California v. Texas (2021), Brnovich v. Democratic National Committee (2021), and Dobbs v. Jackson Women's Health Organization (2022).* Each of these cases appear in Figure 1 twice, as each question garnered different survey results, and different public opinion. This is an important data point, since the Court's decision to answer multiple questions can influence whether a president responds with an executive order. Specifically looking at *Dobbs,* two demographics (Republican and Independent) agreed with upholding the Mississippi law in question, or the law only question (Liptak 2022), and the minority support of 49% was within the margin of error. However, when we turn our attention to the question asked to survey participants about overturning *Roe v. Wade*, the support for the decision wanes significantly. It is no longer within the margin of error, Independent support is cut by more than 50%, and Republican support loses 10 percentage points.

Date	Case	Support				EO?
		Public	R	D	I	
6/15/2020	3 cases heard together--stats for sexual orientation	83%	74%	90%	84%	S
6/15/2020	3 cases heard together--stats for gender identitiy	79%	69%	86%	79%	S
6/18/2020	Homeland v. Regents of the University of California	61%	30%	85%	61%	N
6/29/2020	June Medical Services v. Russo	57%	39%	73%	56%	N
6/30/2020	Espinoza V. Montana Department of Revenue	63%	75%	54%	64%	N
7/8/2020	Little Sisters of the Poor V. Pennsylvania	53%	69%	34%	58%	N
4/22/2021	Jones v. Mississippi	29%	36%	23%	31%	N
6/17/2021	California v. Texas	44%	26%	62%	40%	Y
6/17/2021	California v. Texas (subsidiary Q)	53%	33%	74%	50%	Y
6/17/2021	Fulton v. City of Philadelphia	52%	65%	39%	57%	Y
6/23/2021	Mahanoy Area School District v. BL	71%	78%	64%	72%	N
7/1/2021	Brnovich v. Democratic National Committee-Q1	49%	65%	33%	56%	Y
7/1/2021	Brnovich v. Democratic National Committee-Q2	50%	73%	30%	54%	Y
11/25/2021	Roman Catholic Diocese of Brooklyn v. Cuomo	54%	76%	29%	61%	N
1/13/2022	National Federation of Independent Businesses v. Department of Labor	50%	72%	23%	57%	S
1/13/2022	Biden v. Missouri	53%	31%	76%	49%	S
3/24/2022	Ramirez v. Collier	58%	59%	59%	56%	N
5/2/2022	Shurtleff v. Boston	44%	60%	45%	31%	N
6/23/2022	New York State Rifle & Pistol Association v. Bruen	53%	77%	32%	54%	N
6/24/2022	Dobbs v. Jackson Women's Health Organization (Law only)	49%	69%	27%	52%	Y
6/24/2022	Dobbs v. Jackson Women's Health Organization (Roe)	38%	59%	21%	37%	Y
6/27/2022	Kennedy v. Bremerton School District	56%	74%	38%	59%	N
6/30/2022	Biden v. Texas	49%	20%	77%	44%	N

Figure 1-Summarized Data on Support of Supreme Court Civil Rights Decisions (Jessee 2022) & The Federal Register

The Supreme Court Public Opinion Projects notes that in each year this survey was issued, it determined that the public had a slight liberal lean regardless of party affiliation (Jessee 2022). It's important to note here that Amy Coney Barrett's first case that she heard while on the Court was *Jones v. Mississippi* (2021) (Liptak 2021). This is important, as it is the first case where the current makeup of the Court began to make decisions, and where the heavy right-leaning majority joined the Court. As seen in Figure 1, the stark divide between public support and Court decisions on civil rights really begins when Coney Barrett joins the Court. Based on the work of Tara Leigh Grove on sociological legitimacy, declines in legitimacy have come from tense confirmation hearings and subsequent Court packing (Grove 2018, 2242). This would indicate that a decline came from the tense confirmation hearing of Brett

Kavanaugh, and then again for Amy Coney Barrett. When Coney Barrett began to hear cases, the Court took an intense conservative tilt. This research implies that when she started on the Court, sociological legitimacy declined even more than it already has, and it is where the president becomes more incentivized to issue executive orders. In my Appendix I break down each case, survey question, and executive order in greater detail. The analysis section is devoted to exploring each case that I reviewed in greater detail.

ANALYSIS

This analysis is broken up into a few sections. First, I briefly review the cases and questions that had no executive order response. Then, I individually analyze each case and executive order where I determined there to be a response. A summary of all this data is in the Appendix as Figure 2. An important overall finding with this data was when the executive order was issued and made public in relation to the date of the Supreme Court decision. In some cases, an executive order on related topics was issued after oral arguments, and before the decision was final. Occasionally, executive orders were signed by the president before a Supreme Court decision was made, and then the president published the executive order after the decision was made. There could be a variety of reasons for this. It may be a strategic decision to make an executive order public before the Supreme Court decision is final to preempt it, or it may be more beneficial to issue it in response to the final decision to show strength. Publishing it later also may have political considerations that I chose not to explore in my research.

Decisions Where an Executive Order was Not Issued:

Non-Outliers

As noted in my data section, there were many decisions where an executive order was not issued. Based on my methodology and hypothesis, most times this makes sense. In *Espinoza V. Montana Department of Revenue (2020), Mahanoy Area School District v. BL (2021),* and *Ramirez v. Collier (2022),* the decisions made by the Court were popular amongst the public as a whole and amongst every demographic (Liptak 2020, 2021, 2022). In three cases regarding gender identity and sexual orientation, the decision was also popular but there was

an executive order that appeared to be related to the decision (Liptak 2020). Another decision, *Shurtleff v. Boston (2022),* was unpopular in the eyes of the public but was also a unanimous decision from the justices, indicating that it was not a split decision. The most recent decision from the Court that I evaluated, *Biden v. Texas (2022),* was a textbook unpopular split decision (Liptak 2022). However, President Biden was a party in the case, and he won, so it indicates that he would be unlikely to overturn his own victory, and no action is needed. These cases are where my hypothesis holds up well despite there being no executive order. There were a few cases where executive orders were not issued, but the decision was either less controversial than others, not in conflict with the party in the presidency, not a split decision along party lines, or had some external factor that affected whether an executive order could be issued in response to the case. The first of these was *Homeland v. Regents of the University of California (2020).* The question for the Court here was essentially whether DACA should be upheld (Liptak 2020). The Court decided to uphold it despite President Trump wanting to end DACA, with Chief Justice John Roberts joining the liberals in a 5-4 decision (Liptak 2020). Both Democrats and Independents overwhelmingly supported the decision to uphold DACA at 85% and 61% respectively, while only 30% of Republicans supported the decision (Liptak 2020). President Trump did not respond with an executive order, but he did vow at the time to follow the Supreme Court's ruling while still attempting to end DACA (Shear 2020). It appears here that the President chose to take a different action than an executive order. This was also before Amy Coney Barrett took her seat on the Court.

The next case that falls into this "No E.O. but other factors" category is *June Medical Services v. Russo (2020).* This case again had strong Independent support, strong Democrat support, and lack of support from Republicans (Liptak 2020). The case was about whether abortion providers need to have immediate hospital admitting privileges in Louisiana, and Chief Justice Roberts joined the liberals again to say that they do not (Liptak 2020). I found a unique thing from this case. Republican support was much closer to 50% than most other opinions where Republicans are in the minority for support and disagree with the other two parties. In this case, Republican support for the decision was at 39%, with all other parties and

the public over 50%. This could indicate that public support was large enough that it was not worth acting with an executive order.

Another case in this category is *Little Sisters of the Poor v. Pennsylvania (2020).* This case was about whether the regulations passed by the Trump administration on the affordable care act should stand. Specifically, the question posed was whether there could be a "moral exception" in the Affordable Care Act so employers can not cover contraception if they do not want to (Liptak 2020). The justices agreed in a 7-2 decision that the moral exception can stand (Liptak 2020). This case is unique in a few ways. First, Trump administration mandates won the day, so it is not expected for President Trump to issue an executive order on an issue he won unless it was to strengthen the decision. Second, Joe Biden issued executive orders related to both contraception and the Affordable Care Act through executive orders 14009, 14076, and 14079. However, I did not determine that those three executive orders had any relationship to *Little Sisters of the Poor v. Pennsylvania* and instead were related to other cases. This meant that implicitly, President Biden issued responses but while responding to other cases. Additionally, since these were Trump-era regulations, it would simply make the most sense to undo them rather than go through the process of an executive order.

The final case in this category was *Kennedy v. Bremerton School District (2022).* This case dealt with whether a high school football coach could lead a prayer with his players on the field before and after games. The school suspended the coach, and the Court ruled that suspending the coach violated his constitutional rights to free exercise of religion (Liptak 2022). This was a split decision (6-3 with liberals dissenting, and Democrats were at 38% support for the decision while Joe Biden was in office (Liptak 2022). However, the majority of the public supported the decision, along with both Republican and Independent demographics (Liptak 2022). 38% support is like the *June Medical Services v. Russo* case where the President also did not act. It is also the same as that case where both of the other demographics agreed with the decision.

Outliers

Other than these, there were three decisions that were somewhat outliers from the data. The first two had similar support percentages to the above two cases but were on more hot-button topics and had a full decision split. These were *Roman Catholic Diocese of Brooklyn v. Cuomo (2021)* and *New York State Rifle & Pistol Association v. Bruen (2022).* Both were along party lines, but with Chief Justice Roberts joining the liberals in *Roman Catholic Diocese of Brookyln v. Cuomo.* This gave the two cases a 5-4 decision and 6-3 decision respectively (Liptak 2021 & 2022). These cases were on restrictions to in-person worship during COVID-19 and gun control. Both technically had a majority of public support but were teetering along the margin of error at 54% and 53% respectively (Liptak 2021 & 2022). Interestingly, the common thread between these two is that they both explicitly refer to state laws with state-elected officials as parties. Cuomo was the governor of New York, and Bruen the New York police chief. It's possible that orders were not issued because the cases referred to state law and had no national implications since the decisions seemed to be narrow (Liptak 2022).

The next decision has an executive order that was issued but preempts the decision and was cause of controversy within the Court. So, it is not as clear cut as the past few. The initial issue taken up by the Court was related to an executive action that was then challenged in Court. So, there really was not a response, but it is an interesting case, nonetheless. Two questions were asked to survey participants about the Biden testing mandate (Liptak 2022). At the time, two executive agencies had vaccine or test mandates for COVID-19 for business with more than 100 employees and the federal workforce respectively. The question here was somewhat about Civil Rights (really liberty), but the question the Court really answered was whether the agencies had the authority to do this. The Court overturned the rule regarding businesses but upheld the rule with federal employees. Survey results were controversial yet again. Only 50% of the public agreed with the decision to remove the non-federal testing mandate, and only 54% agreed with upholding the Federal workforce mandate (Liptak 2022). They were also strictly along partisan lines. Republicans clearly supported removing all the mandates, while Democrats supported keeping them. President Biden's executive order

related to the decision was executive order 13999, and it initially ordered the agencies to make the policies that got challenged in Court. This action really seems to be similar to the Truman Steel seizure case, and it challenged executive action by restricting it. However, President Biden did not issue an executive order response after the Court made a decision. He just worked with what was upheld.

The final major outlier is *Jones v. Mississippi (2021).* This case was about Mississippi laws that state that a juvenile defendant does not need to be deemed incorrigible (impossible of being reformed) before being sentenced to life in prison (Liptak 2021). The Court, in a 6-3 decision along party lines, decided that criminal defendants do not need to be incorrigible to be sentenced to life (Liptak 2021). None of the demographics agreed with this decision from the poll. All parties were below 50% in the SCOTUSpoll data (Liptak 2021). However, no executive order was issued again. This was, once again, regarding a state law similar to the last two cases but was at extreme odds with the public. I was surprised to see this, but it may further my hypothesis that state laws and narrow rulings don't typically get an executive order, despite the precedent that they could create for future states.

<u>Decisions Where an Executive Order was Issued:</u>

As noted, there were five cases where an executive order was issued that was both controversial and on Civil Rights in some sort of manner. Some of these were coded as a "somewhat." And others were coded as a "yes." The five cases had a total of six executive orders issued. One case received two executive orders; *Dobbs v. Jackson's Women's Health (2022)* was the case with two orders. These five cases encompassed nine questions that were asked to survey participants about the same questions that the Court answered. These cases are reviewed in chronological order based on the date that the decision was released.

The first case reviewed is a set of cases regarding both gay and transgender rights. The court considered two cases concerning gay rights, *Bostock v. Clayton (2020)* and *Altitude Express v. Zarda (2020),* and one case concerning transgender rights, *R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission (2020)* (Liptak 2020). The major questions asked here were whether employers can fire employees based off either their gender

or sexual orientation (Liptak 2020). The Court ruled that it was illegal to fire employees based on sexual orientation and gender identity in a 6-3 decision on June 15th, 2020 (Liptak 2020). There was an executive order issued but the decision was not ultra controversial. Executive Order 13950 was published on September 28th, 2020. The order was titled Combatting Race and Sex Stereotyping (Exec. Order 13950, 2020). The order actually cited Dr. King and was focused on ensuring that people are not race or sex scapegoating (Exec. Order 13950, 2020), treating others with respect, and avoiding divisive concepts. It also ordered Federal contractors and agencies to follow specific guidelines when it came to educating on gender and sexual orientation (Exec. Order 13950, 2020). This was considered "somewhat" through my methodology. The executive order referenced similar topics, but the decision was not controversial based on the SCOTUSpoll data, nor was there a clear reference to the initial decision made by the Court (Liptak 2020). So, it appeared that there was a slightly close reference to the decision and similar topics, but nothing as clear as the other cases that I reviewed.

The second case with an executive order issued was *California v. Texas (2021).* This case was related to the Affordable Care Act (ACA). Survey participants were asked two questions that the Court answered. First, they were asked whether setting the ACA's individual mandate to $0 exceeded the government's ability to tax, and then if so, if the entire ACA would be unconstitutional if the first question were true (Liptak 2021). The Court actually sidestepped the issue entirely and ruled that the party suing did not have standing for such an action (Liptak 2021). The two questions did yield controversial survey results though. The first question on the individual mandate was unpopular amongst both Republicans and Independents, and the second was unpopular amongst Republicans and only received about 50% Independent support (Jessee 2022). Regardless, Democrats were in the presidency at the time, and President Biden issued an executive order titled Strengthening the Affordable Care Act in February of 2021 (Exec. Order 14009, 2021). This occurred before a decision was made in June but after oral arguments occurred in November of 2020 (Liptak 2021). This case is one in which an executive order was issued before the decision but after oral arguments. It indicates that the Biden administration may have been concerned about a possible result in

this case and chose to act quickly. They indicated as much in a press release related to the executive order. In it, the Biden administration stated that they issued the executive order, and other action, in relation to the "unprecedented" attacks on the ACA in recent years (United States Government, 2021). Executive order 14009 was also substantive. It offered another enrollment period for the Affordable Care Act under the rules that were in place (Exec. Order 14009, 2021). This shows a response to a decision where the Biden administration was concerned that they might not win. Ultimately, we still don't know if they truly "won" since deciding that a party does not have standing does not indicate anything about the Justice's particular stances on the legal issues of the case.

The next case with an executive order is one that was a unanimous decision by the justices, but controversial based on public opinion. This was *Fulton v. City of Philadelphia (2021).* This case was also decided in June of 2021, and an executive order was issued about a year later (Liptak 2021). The question answered by the Court was whether religious foster agencies must consider placing children with same-sex couples (Liptak 2021). This is a clear-cut civil rights case where the Court had to balance religious freedom and discrimination. The Court decided that religious freedom would win in this case, and only 52% of the public agreed with the decision (Jessee 2022). This was within the survey's margin of error, and it was also unpopular amongst Democrats. So, there was a clear-cut response with executive order 14075. Section five of this order was focused on reducing inequities for LGBTQI+ individuals. It ordered two agencies specifically to review rules to expand access to foster care for LGBTQI+ individuals and expand access for LGBTQI+ parents (Exec. Order 14075, 2022). Executive order 14075 also references another order on combatting discrimination that was issued after oral arguments in *Fulton*, but that order did not explicitly reference foster care agencies like 14075 does. This also clearly did substantive policy work, as it sought to rewrite rules.

The next case that had an executive order issued was related to voting rights. In *Brnovich v. Democratic National Committee (2021),* there was a clear indication of a partisan, controversial decision on a civil rights issue. This was also another situation where an

executive order was issued after oral arguments, but before the final decision. The Court answered two questions in this case about Arizona voting laws, and survey participants were asked about both. The Court decided that two Arizona policies were lawful. First, it was deemed that they were allowed to discard ballots from voters that vote out of precinct, even if they were eligible to vote in most elections on the ballot. Second, the Court allowed them to continue to discard drop-off ballots that were collected by third parties in early voting (Liptak 2021). The survey question specifically notes that racial minorities often rely on these third parties (Jessee 2022). Survey data showed this was a controversial decision with both policies. In the first question, 49% of the public supported the decision and 50% in the second one. Democrats disagreed with both, Independents slightly supported both, and Republicans slightly supported both by more than Independents (Jessee 2022). This was also a 6-3 decision entirely along partisan lines (Liptak 2021). President Biden did respond with an executive order titled Promoting Access to Voting. Executive order 14019 ordered agencies to expand access to voting and mail-in ballots. The order explicitly references how minority groups have been disproportionately affected by voting laws, just as the survey question did (Exec. Order 14019, 2021). This was also significant by all metrics. Multiple sources note that this executive order has the potential to empower millions of Americans to vote (Oberstaedt 2023). Agencies have been taking some time to act, but it was considered a strong action by the President.

The final case in my research where an executive order was issued in response to a decision is arguably the strongest one yet. This was the unprecedented *Dobbs v. Jackson's Women's Health (2022).* The case was about a Mississippi Law banning abortions after 15 weeks of pregnancy, and whether *Roe* should be overturned (Liptak 2022). This case was unique from the start, as a draft opinion overturning *Roe* was leaked to the public before it was final (Gerstein 2022). Then, the decision ultimately stood. The Court upheld the Mississippi Law along partisan lines and overturned *Roe* with only Chief Justice John Roberts joining the liberal bloc to dissent (Liptak 2022). The decision was both controversial and unpopular by survey metrics. Only 49% of the public agreed with upholding the Mississippi Law, and only

38% agreed with overturning *Roe* (Jessee 2022). Most importantly, both Democrats and Independents overwhelmingly disagreed with overturning *Roe* (Jessee 2022).

This led the Biden administration to issue two specific executive orders. President Biden issued executive orders 14076 and 14079, related to protecting and securing access to reproductive healthcare one month apart from each other. Both orders specifically referenced the overturning of *Roe* as a basis for issuing the executive order (Exec. Order 14076 & 14079, 2022). The first order that was issued was protecting access to abortion services, and this order was really focused on a rapid response to the decision in *Dobbs.* Agencies were ordered to find ways to expand access to contraception services immediately (Exec. Order 14076, 2022). They were also ordered to provide clear communication to the public about what was and was not legal and provide clarifications to any hospitals in affected states about what services they could provide (Exec. Order 14076, 2022). Additionally, it ordered the chair of the Federal Trade Commission to take steps to secure the privacy of individuals seeking reproductive healthcare services (Exec. Order 14076, 2022). This is a clear signal and response to *Dobbs* from the Biden administration.

The second executive order on securing access to reproductive healthcare services went a step further. Again, it referenced the *Dobbs* decision and also referenced specific effects of it, such as women being denied abortion care even in states where it is legal (Exec. Order 14079, 2022). This order directed the Secretary of Health and Human Services to attempt to provide Medicaid coverage to people who are attempting to cross state lines for an abortion (Exec. Order 14079, 2022). This was a greater step that truly sought to circumvent the Court's decision and still provide coverage for Americans where it has been stripped. These were both significant steps, and they also signaled the position of the executive branch on the decision in *Dobbs.*

FINDINGS

This data generated some important findings from my research. Most importantly, I found that executive orders can be issued in response to Supreme Court issues. They aren't just ceremonial executive orders either. Often, they have substance and importance. Executive

orders can be used to strengthen a Supreme Court decision, as seen in *California v. Texas (2021),* where the affordable care act was strengthened. They can also be used to circumvent a decision, like in *Dobbs v. Jackson's Women's Health (2022).* Although unexpected, a response to a decision can be after oral arguments but before a final decision. This was seen again in *California v. Texas (2021),* and *Brnovich v. Democratic National Committee (2021).* It appears that preempting a Court decision can happen when it appears that oral argument will lead to an unfavorable decision. Based on the data I analyzed between decisions that did have an executive order issued compared to those that did not, major campaign issues tend to have executive orders issued more. The most unpopular decision in the entire data set, *Jones v. Mississippi (2021),* was related to a function of the death penalty in one individual state and did not have an executive order issued. Meanwhile, less controversial cases on sexual orientation and foster care did. The major difference between these is that where an executive order was issued, they were on mostly national issues that implicated major campaign topics. These major campaign topics include voting rights, discrimination, and the right to privacy. This isn't enough to prove any sort of correlation or causation but is an interesting anecdotal point on where future research could go.

The implications here are important for the future of the Presidency, executive orders, and the Supreme Court. Firstly, I believe the quote by Kenneth Mayer is coming true again today. That once again there is a "complicated mix of moral arguments, raw political calculations, culture and demographic shifts in the populace, and particular pressure strategies adopted by those who wanted orders issued" (Mayer 2001). The complicated mix of moral arguments is the loss of Supreme Court legitimacy. Support of decisions has been waning since Amy Coney Barrett joined the Court to create the structure we have right now (Jessee 2022). Decisions are more controversial than before, and more major issues are being brought forward. Demographic shifts are also occurring. Despite the Court having a major conservative tilt, the Supreme Court Public Opinion project notes that on balance, their sample of the American public has a slight liberal lean (Jessee 2022). This puts the public's political tilt at odds with the Court. This is a recipe for greater loss in sociological legitimacy.

As Tara Leigh Grove notes, the Court is being faced with a conflict between their jurisprudence and public demand. It's creating a divide, and that divide is bound to continue. With these legitimacy issues, the ball falls to the President. The President has the ability, and truly the incentive, to issue these executive orders without much pushback from the Courts or the public. It is already well known in research that when the President has less ability to legislate, more orders will be issued (Dickinson 2016, 69). Additionally, partisan fragmentation leads to the same (Howell 2003, 89). We know these issues are still happening today. On top of that, the Court is now making more controversial decisions, so the President really has the authority to act on issues. If it's not the President acting, then it may be nobody at all.

I also firmly believe that the research about executive orders having true power to make change is correct. Inevitably, there are weaknesses with it as a policy. They can be revoked by any President that comes after, and they are subject to review by agencies. However, they can also do plenty of things while the same party remains in power. All legislation can be reviewed or revoked by somebody, but it is just easier to revoke through the president. However, it is also easier to issue an executive order through the president than jumping through congressional hoops. This small case study highlights how when there is demand from the public, executive orders can achieve policy goals. This is validated by public views on the executive orders as well as the orders themselves.

From a strategic perspective, this can mean a few things for the Presidency. Executive orders can have substance, so the President should always remember that they have this tool in their arsenal. Additionally, based on the small amount of public news articles I reviewed, it appears as though the theory posited by Dickinson and Gubb has merit when combined with Moe and Howell's view on executive orders. Moe and Howell emphasized unilateral action and using executive orders to achieve partisan policy goals. Dickinson and Gubb argued that for long-term change, Presidents will always seek legislation, but that they can get short-term changes done through executive orders and create an "alternative vantage point from which to bargain" (Dickinson 2016, 70) After my research, I no longer see these two theories as

mutually exclusive. Presidents will often make statements about executive orders, and from my research, significant ones make news easily. So, this can be the vantage point to bargain. The president can use these orders to throw the ball back into Congress's court and show a sign of strength while Congress appears fragmented and unable to make change. It can push Congress to do something, just as going public with an issue would. They also can achieve those substantive policy goals that Moe and Howell mention. Simply, the goal a President seeks to achieve through an executive order honestly depends on the issue, and what tools the President wants to exercise. I believe executive orders should be viewed as a two-pronged tool: to bargain, and to make change.

Considerations for Future Research

There are many places I think this research can be taken in the future. To my knowledge, this was the first time a method like this was employed on executive orders. The data I had was limited by the time frame that the Supreme Court Public Opinion project was operating. Continuing for years could create trends and quantitative data that could make for stronger findings. Additionally, I feel as though it would be worth stratifying this data more in the future. I cast a wide net in terms of cases, controversy, and support. Stratifying for more polarizing cases, specific case topics, or rulings by specific justices could glean stronger results. Expanding this research outside of civil rights may also glean different results, and potentially more executive orders issued.

In terms of the Supreme Court, a greater analysis of legitimacy is in line. Understanding the impacts of the *Dobbs* decision and the leak from the Court should be at the forefront of research from experts on the topic. This research could also be done by looking at different types of legitimacy. Research could review if a President responds to executive orders when a specific justice compromises their jurisprudence. With my data set, a potential route would be looking only where John Roberts splits from the conservative bloc of justices, or vice versa.

Finally, I think research on this topic coupled with research on presidential rhetoric may be a fruitful route. If the theory that Dickinson proposes stands, then executive orders also essentially function as a method of going public. I did my best to analyze the response of the

President in a vacuum but combining it with frequency of mentions in national news, press briefings, or press releases would be valuable. This could evaluate where a president is using their platform to show off the executive order and push Congress to do more. Looking for times where the President calls on Congress after issuing an order would show where a President is truly trying to bargain from that alternate vantage point. It would provide more merit to Dickinson's theory.

APPENDICES

Appendix A – Expanded Data

Date	Case	Question	Answer	Breakdown	Agreement				EO?	Published	Title	No.
					Public	R	D	I				
6/15/2020	3 cases heard together--stats for sexual orientation	Some people believe that it should be illegal for employees to be fired based on their sexual orientation because it is discrimination on the basis of sex. Other people think that it should be legal because it is not discrimination on the basis of sex. What do you think?	It is illegal to fire based off sexual orientation	6-3, Roberts and Gorsuch join the liberals	83%	74%	90%	84%	Somewhat	9/28/2020	Combating Race and Sex Stereotyping	13950
6/15/2020	3 cases heard together--stats for gender identitiy	Some people believe that it should be illegal for employees to be fired for being transgender because it is discrimination on the basis of sex. Other people think that it should be legal because it is not discrimination on the basis of sex. What do you think?	It is illegal to fire based off gender identity	6-3, Roberts and Gorsuch join the liberals	79%	69%	86%	79%				
6/18/2020	Homeland v. Regents of the University of California	Deferred Action for Childhood Arrivals (DACA) was created by President Obama to protect undocumented immigrants who have lived in the U.S. since childhood from deportation. President Trump wants the Department of Homeland Security to end DACA. What do you think?	DACA can remain	5-4, 4 conservatives dissent, Roberts joins liberals	61%	30%	85%	61%	No			
6/29/2020	June Medical Services v. Russo	Louisiana passed a law requiring abortion providers to be able to send patients to nearby hospitals, a practice known as "admitting privileges." This law would mean that all abortion providers in the state except for one would be forced to close. Some people believe that Louisiana's law violates women's constitutional rights. Other people believe that the law does not violate women's constitutional rights. What do you think?	Requiring abortion providers to have admitting privileges does violate Constitutional Rights	5-4, 4 conservatives dissent, Roberts joins liberals	57%	39%	73%	56%	No			
6/30/2020	Espinoza V. Montana Department of Revenue	The state of Montana has banned students from using taxpayer-subsidized scholarships to attend religious schools. Some people think this rule is an acceptable restriction. Other people think this rule violates people's constitutional rights. What do you think?	States can not be allowed to ban subsidized scholarships	5--4, all 4 liberals dissenting	63%	75%	54%	64%	No			
7/8/2020	Little Sisters of the Poor V. Pennsylvania	The Affordable Care Act requires that health insurance plans for women include coverage for contraceptives (birth control), but the Trump administration recently passed regulations that greatly expanded exceptions to this mandate to include exemptions on the basis of religious or "moral" objections. Some people think that employers should not be forced to cover contraceptives if they express either a religious or a "moral" objection. Other people think that these employers should be forced to cover contraceptives. What do you think?	They can refuse to cover (are not forced to) cover contraceptives	7--2, 2 liberals dissenting	53%	69%	34%	58%	No			
4/22/2021	Jones v. Mississippi	There are states that reserve the ability to sentence juvenile criminal defendants to life sentences without the possibility of any parole. Some people think that such juvenile defendants must be found to be incorrigible — or impossible of being reformed — before being sentenced to life without parole. Other people think that juveniles can be sentenced to life sentences without parole without states having to make such a determination. What do you think?	Juvenile defendants do not need to be considered incorrigble before being sentenced to life	6-3, along party lines	29%	36%	23%	31%	No			
6/17/2021	California v. Texas	Under the Affordable Care Act (ACA), there is a tax penalty for not buying health insurance. This is called the individual mandate. Recent legislation has set the tax penalty for not buying health insurance to $0. Some people believe that, because the tax penalty is $0, this means that the penalty is actually not a tax and it exceeds the federal government's power to tax and is unconstitutional. Other people believe that it does not exceed the federal government's power to tax and is constitutional. What do you think?	Decided there was not standing to sue (sidestepped the issue). Stats are on merits of the case	7-2, Gorusch and Alito dissenting	44%	26%	62%	40%	After Arguments, before decision	2/2/2021	Strengthening Medicaid and the Affordable Care Act	14009
6/17/2021	California v. Texas (subsidiary Q)	Under the Affordable Care Act (ACA), there is a tax penalty for not buying health insurance. This is called the individual mandate. Some people think that if the individual mandate is unconstitutional then the entirety of the ACA must also be unconstitutional. Other people disagree and think that if the individual mandate is unconstitutional, that should not affect the rest of the law. What do you think?	Not decided by the Court, stats are on agreeing with upholding the law	N/A, but law was upheld	53%	33%	74%	50%				
6/17/2021	Fulton v. City of Philadelphia	There are some religiously affiliated foster agencies that refuse to place foster children with same-sex couples. Some people think that governments can prohibit such agencies from participating in the foster care systems they operate unless the agencies allow children to be placed with same-sex couples. Other people think that doing so would violate the agencies' First Amendment rights to religious freedom. What do you think?	Requiring religious agencies to work with same-sex couples when screening foster parents violates the first amendment	9--0	52%	65%	39%	57%	Yes	6/21/2022	Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals	14075
6/23/2021	Mahanoy Area School District v. BL	Some people think that public school officials can punish students for things they say or write off campus, including on social media, without violating students' First Amendment rights to free speech. Other people think that such punishments violate students' First Amendment rights to free speech. What do you think?	Public schools cannot punish students for things they say/write off campus	8-1, Thomas dissenting	71%	78%	64%	72%	No			
7/1/2021	Brnovich v. Democratic National Committee-Q1	In Arizona, if a voter arrives at a polling place and is not listed on the voter roll for that precinct, the voter may still cast a provisional ballot. After election day, Arizona election officials review all provisional ballots to determine the voter's identity and address. If officials determine that the voter voted outside of their precinct, the ballot is discarded in its entirety, even if the voter was eligible to vote in most of the races on the ballot. Some people believe that discarding entire ballots in this manner is unlawful. Other people believe that it is lawful. What do you think?	Discarding entire ballots from voting outside of a precinct is lawful	6-3 along party lines	49%	65%	33%	56%	After Arguments, before decision	3/10/2021	Promoting Access to Voting	14019
7/1/2021	Brnovich v. Democratic National Committee-Q2	Arizona offers in-person voting at a precinct or vote center either on election day or during an early-vote period. Many voters — particularly racial minorities — who vote early rely on another person to collect and drop off voted ballots. However, the Arizona legislature made it illegal to collect and deliver another person's ballot. Some people think that voters should be able to rely on another person or third party to collect and drop off ballots. Other people think that states can forbid this. What do you think?	Voters can not rely on another person to collect and drop off ballots	6-3 along party lines	50%	73%	30%	54%				

Date	Case	Question	Answer	Breakdown	Agreement				EO?	Published	Title	No.
11/25/2021	Roman Catholic Diocese of Brooklyn v. Cuomo	Many states have prohibited large in-person gatherings due to the Covid-19 pandemic. Some people think that states cannot prohibit in-person religious gatherings because of the First Amendment right to free exercise of religion. Other people think that states can prohibit inperson religious gatherings. What do you think?	States could not prohibit in-person attendance at worship services during COVID	5-4, 5 conservatives vs the 3 liberals plus Roberts	**54%**	76%	29%	61%	No			
1/13/2022	National Federation of Independent Businesses v. Department of Labor	The federal Occupational Safety and Health Administration (OSHA) has issued a rule mandating that all employers with at least 100 employees require that their employees either be vaccinated against Covid-19 or else be tested weekly and wear masks at work. Some people think this mandate is unlawful because it exceeds OSHA's authority. Other people think this is a reasonable use of the agency's authority to protect workplace safety and health. What do you think?	The testing mandate is not lawful	6-3, along party lines	50%	72%	23%	57%	Somewhat	1/26/2021	Protecting Worker Health and Safety	13999
1/13/2022	Biden v. Missouri	The federal Department of Health and Human Services (H.H.S.) has issued a rule mandating that health care workers at hospitals and other facilities participating in Medicare and Medicaid be vaccinated against Covid-19 unless they qualify for religious or medical exemptions. Some people think this mandate is unlawful because it exceeds H.H.S.'s authority. Other people think this is a reasonable use of the agency's authority to ensure the safety of patients. What do you think?	Requiring health care owrkers at facilities receiving federal money to be vaccinated is lawful	5-4, Roberts and Kavanaugh joining the liberals	**53%**	31%	76%	49%				
3/24/2022	Ramirez v. Collier	Texas law barred a death row inmate from having his pastor in the chamber during his execution and placing his hands on him while praying out loud. Some people think that barring religious clergy from entering the execution chamber and touching death row inmates violates the First Amendment protections of the free exercise of religion. Other people think that it does not. What do you think?	Barring religious clergy from touching death row inmates in the execution chamber violates the first amendment	8-1, Thomas dissenting	**58%**	59%	59%	56%	No			
5/2/2022	Shurtleff v. Boston	Upon request, the City of Boston often flies flags of different organizations in front of its City Hall. The city refused to fly a religious organization's flag bearing a Christian cross. Some people say that Boston's refusal to fly a religious organization's flag violated the organization's First Amendment rights. Other people believe that it did not violate the organization's First Amendment rights. What do you think?	The refusal to fly flags did violate the group's first amendment rights	9--0	**44%**	60%	45%	31%	No			
6/23/2022	New York State Rifle & Pistol Association v. Bruen	New York requires a person to show a need for self-protection in order to receive a license to carry a concealed firearm outside the home. Some people think that this law violates people's Second Amendment rights. Others think it does not violate people's Second Amendment rights. What do you think?	Requiring a person to show a need for self-protection to carry a concealed weapon violates the second amendment	6-3, along party lines	**53%**	77%	32%	54%	No			
6/24/2022	Dobbs v. Jackson Women's Health Organization (Law only)	A new law in Mississippi bans nearly all abortions after 15 weeks of pregnancy. Some people think that this law is unconstitutional. Others think it is constitutional. What do you think?	Banning nearly all abortions after 15 weeks is constitutional	6-3, along party lines	**49%**	69%	27%	52%	Yes, two	8/11/2022 **and** 7/13/2022	Securing Access to Reproductive and Other Healthcare Services **and** Protecting Access to Reproductive Healthcare Services	14079 **and** 14076
6/24/2022	Dobbs v. Jackson Women's Health Organization (Roe)	Should the Supreme Court overrule Roe v. Wade, the 1973 decision that established a constitutional right to abortion and prohibited states from banning abortion before the fetus can survive outside the womb, at around 23 weeks of pregnancy?	Roe v. Wade was overturned	6-3, along party lines	**38%**	59%	21%	37%	Yes, two			
6/27/2022	Kennedy v. Bremerton School District	The football coach at a public high school led prayers with players before and after games. The school district asked him to stop, and the coach refused. He was then suspended. Some people think the school district was right to suspend the coach because of the First Amendment's separation of church and state. Other people do not think the district was right to do so because of the coach's right to free exercise of religion. What do you think?	The coach had a constitutonal right to pray after games and the school was wrong to suspend the coach	6-3, along party lines	**56%**	74%	38%	59%	No			
6/30/2022	Biden v. Texas	The U.S. Department of Homeland Security required noncitizens trying to reside in the U.S. to wait in Mexico while immigration officials process their cases. The Biden administration issued an order ending this "Remain in Mexico" program. In response, several states sued, saying that the administration did not have adequate justification in ending the program. Some people think that the Biden administration should be able to end this program. Other people think that the Biden administration should not be able to do so. What do you think?	The Biden administration can end the "Remain in Mexico" Program	5-4, Roberts and Kavanaugh joining the liberals	**49%**	20%	77%	44%	No			

Appendix B – The Executive Orders

The Links below are from the Federal Register, a database I heavily utilized to access executive order files, and these are the specific orders I write about. The entire database was used to parse through multiple files and orders from the Trump and Biden Presidency. The database is: https://www.federalregister.gov/

Title	Number	Link
Combating Race and Sex Stereotyping	13950	https://www.govinfo.gov/content/pkg/FR-2020-09-28/pdf/2020-21534.pdf
Strengthening Medicaid and the Affordable Care Act	14009	https://www.govinfo.gov/content/pkg/FR-2021-02-02/pdf/2021-02252.pdf
Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals	14075	https://www.govinfo.gov/content/pkg/FR-2022-06-21/pdf/2022-13391.pdf
Promoting Access to Voting	14019	https://www.govinfo.gov/content/pkg/FR-2021-03-10/pdf/2021-05087.pdf
Protecting Worker Health and Safety	13999	2021-01863.pdf (govinfo.gov)
Securing Access to Reproductive and Other Healthcare Services and Protecting Access to Reproductive Healthcare Services	14079 and 14076	https://www.govinfo.gov/content/pkg/FR-2022-07-13/pdf/2022-15138.pdf https://www.govinfo.gov/content/pkg/FR-2022-08-11/pdf/2022-17420.pdf

REFERENCES

Avery, M. (2009). *We dissent: Talking back to the Rehnquist Court: Eight cases that subverted civil liberties and civil rights*. New York University Press.

Barilleaux, R. J., & Kelley, C. S. (2010). *The unitary executive and the modern presidency*. Texas A & M University Press.

Bradley, C. A., & Morrison, T. W. (2013). Presidential Power, Historical Practice, and Legal Constraint. *Columbia Law Review, 113*, 1097–1152.

Caldeira, Gregory A., and James L. Gibson. (1992). "The Etiology of Public Support for the Supreme Court." *American Journal of Political Science* 36, no. 3: 635-640. https://doi.org/10.2307/2111585.

Congressional Research Service, & Gaffney, J. M., Executive orders: An introduction 1–22 (2021). Washington, D.C.; Congressional Research Service.

Cooper, J., & West, W. F. (1988). Presidential Power and Republican government: The Theory and Practice of OMB Review of Agency rules. *The Journal of Politics, 50*(4), 864–895. https://doi.org/10.2307/2131383

Cooper, P. J. (1986). By order of the president. *Administration & Society, 18*(2), 233–262. https://doi.org/10.1177/009539978601800205

Cooper, P. J. (2014). *By order of the president: The use and abuse of Executive Direct Action*. University Press of Kansas.

Corwin, E. S., & Loss, R. (1977). *Presidential Power and the Constitution: Essays*. Cornell University Press.

DeSilver, D. (2022, March 11). *The polarization in today's Congress has roots that go back decades*. Pew Research Center. Retrieved April 15, 2022, from

https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/

Dickinson, M. J., & Gubb, J. (2016). The limits to power without persuasion. *Presidential Studies Quarterly*, *46*(1), 48–72. https://doi.org/10.1111/psq.12251

Driesen, D. M. (2018). Judicial Review of Executive Orders' Rationality. *Boston University Law Review*, *98*(1), 1014–1066.

Ely, J. W., & Bodenhamer, D. J. (1993). *The bill of rights in Modern America revised and expanded*. Indiana University Press.

Exec. Order No. 13950, 3 C.F.R. (September 28, 2020)

Exec. Order No. 13999, 3 C.F.R. (January 26, 2021)

Exec. Order No. 14009, 3 C.F.R. (February 2, 2021)

Exec. Order No. 14019, 3 C.F.R. (March 10, 2021)

Exec. Order No. 14075, 3 C.F.R. (June 21, 2022)

Exec. Order No. 14076, 3 C.F.R. (July 13, 2022)

Exec. Order No. 14079, 3 C.F.R. (August 11, 2022)

Gerstein, J., & Ward, A. (2022). *Exclusive: Supreme Court has voted to overturn abortion rights, draft opinion shows*. POLITICO. Retrieved May 4, 2022, from https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473

Grove, Tara Leigh. (2018), "The Supreme Court's Legitimacy Dilemma." Harvard Law Review, 2018.

Grove, T. L. (2020). Presidential Laws and the Missing Interpretative Theory. *University of Pennsylvania Law Review*, *168*, 877–930.

Henderson, T. J. (2002). Strategies for Civil Rights Litigators Amid the Supreme Court's Constitutional Counterrevolution. *Human Rights*, *29*(3), 20–22.

Hill, G. N., & Hill, K. (2002). Civil Rights. *The People's Law Dictionary: Taking the mystery out of legal language*. MJF Books.

Howell, W. G. (2003). *Power without persuasion: The Politics of Direct Presidential Action*. Princeton University Press.

Jessee, Stephen, Neil Malhotra, and Maya Sen. 2022. "The Supreme Court Public Opinion Project"

Liptak, A., & Kao, J. (2019, June 21). *The Supreme Court's biggest decisions in 2019*. The New York Times. Retrieved March 27, 2023, from https://www.nytimes.com/interactive/2019/06/21/us/supreme-court-key-cases-2019.html

Liptak, A., & Kao, J. (2022, June 21). *The major Supreme Court decisions in 2022*. The New York Times. Retrieved March 27, 2023, from https://www.nytimes.com/interactive/2022/06/21/us/major-supreme-court-cases-2022.html

Liptak, A., & Parlapiano, A. (2020, June 15). *The Supreme Court aligned with public opinion in most major cases this term*. The New York Times. Retrieved March 27, 2023, from https://www.nytimes.com/interactive/2020/06/15/us/supreme-court-major-cases-2020.html

Liptak, A., & Parlapiano, A. (2021, June 1). *Tracking the major Supreme Court decisions this term*. The New York Times. Retrieved March 27, 2023, from https://www.nytimes.com/interactive/2021/06/01/us/major-supreme-court-cases-2021.html

Marcus, M. (2012). *Truman and the steel seizure case the limits of Presidential Power*. Duke University Press.

Mayer, K. R. (1999). Executive Orders and Presidential Power. *Journal of Politics*, *61*(2), 445–466.

Mayer, K. R., & Price, K. (2002). Unilateral presidential powers: Significant Executive Orders, 1949-99. *Presidential Studies Quarterly*, *32*(2), 367–386. https://doi.org/10.1111/j.0360-4918.2002.00225.x

Mayer, K. R. (2002). *With the stroke of a pen: Executive orders and Presidential Power*. Princeton University Press.

Moe, T. M., & Howell, W. G. (1999). The Presidential Power of Unilateral Action. *Journal of Law, Economics, & Organization*, *15*(1), 132–176.

Moe, T. M., & Howell, W. G. (1999). Unilateral action and Presidential Power: A Theory. *Presidential Studies Quarterly*, *29*(4), 850–873. https://doi.org/10.1111/1741-5705.00070

Morgan, R. P. (1987). *The president and civil rights: Policy-making by executive order*. University Press of America.

Nathan, R. P. (1976). The Administrative Presidency. In *The Public Interest* (pp. 40–54). essay, National Affairs.

Nelson, M., & Rudalevige, A. (2021). The Presidency and Unilateral Power: A Taxonomy. In *The presidency and the political system* (pp. 470–489). essay, CQ Press, an imprint of SAGE Publications, Inc.

Neustadt, R. E. (1960). The Power to Persuade. In *Presidential Power: The Politics of Leadership from FDR to Carter* (pp. 26–43). essay, Macmillan.

Newland, E. (2015). Executive Orders in Court. *Yale Law Journal*, 2026–2097.

Oberstaedt, M. (2023, March 20). *Opening doors to democracy: How executive order 14019 could empower 3.5 million new voters*. FairVote Action. Retrieved April 17, 2023, from https://fairvoteaction.org/opening-doors-to-democracy-how-executive-order-14019-could-empower-3-5-million-new-voters/

Schmidt, C. W. (2014). The Civil Rights-Civil Liberties Divide. *Kent College of Law Scholarly Commons*. Retrieved 2022, from https://scholarship.kentlaw.iit.edu/fac_schol/807/?utm_source=scholarship.kentlaw.iit.edu%2Ffac_schol%2F807&utm_medium=PDF&utm_campaign=PDFCoverPages.

Shear, M. D. (2020, June 19). *Trump says administration will try again to end 'dreamers' program*. The New York Times. Retrieved April 11, 2023, from https://www.nytimes.com/2020/06/19/us/politics/trump-daca.html

Stack, K. M. (2004). The Statutory President. *Iowa Law Review*, *90*, 539–599.

Sunstein, C. R. (1981). Cost-Benefit Analysis and the Separation of Powers. *Arizona Law Review, 23*, 1267–1282.

The United States Government. (2021, February 1). *Fact sheet: President Biden to sign executive orders strengthening Americans' access to quality, Affordable Health Care*. The White House. Retrieved April 16, 2023, from https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/28/fact-sheet-president-biden-to-sign-executive-orders-strengthening-americans-access-to-quality-affordable-health-care/ d

United States Department of Justice. (2022). *The Civil Rights Division Booklet*. Washington, District of Columbia; United Stats Government.

U.S. Constitution | Constitution Annotated | Congress.gov ... Retrieved April 18, 2022, from https://constitution.congress.gov/constitution/

Vibhhute, K., & Anyalem, F. (2009). *Legal Research Methods: Teaching Material* . Wordpress.

Waterman, R. (2009). The administrative presidency, unilateral power, and the unitary executive theory. *Presidential Studies Quarterly*, *39*(1), 5–9. https://doi.org/10.1111/j.1741-5705.2008.03654.x

World Report 2021: Rights trends in United States. Human Rights Watch. (2021, January 13). Retrieved April 19, 2022, from https://www.hrw.org/world-report/2021/country-chapters/united-states

Yackee, J. W., & Yackee, S. W. (2009). Administrative procedures and bureaucratic performance: Is federal rule-making "ossified"? *Journal of Public Administration Research and Theory*, *20*(2), 261–282. https://doi.org/10.1093/jopart/mup011