CANCELING APPELLATE PRECEDENT

Lisa A. Tucker[*] & *Michael Risch*[†]

Abstract

In recent years, since soon after Justice Amy Coney Barrett assumed her seat on the United States Supreme Court, the Court has erased more than thirteen politically and legally significant opinions written by the federal appeals courts. In deciding to vacate rather than simply deny certiorari, the Court has eliminated—with one sentence orders that offer no explanation—fully briefed, argued, and reasoned opinions on issues such as abortion, the Voting Rights Act, President Trump's travel ban, and the Emoluments Clause. Consequently, progressive victories in those areas no longer stand.

The Supreme Court used its power to "vacate" lower court rulings, which allows an appeals court to sometimes erase lower court precedents. The Court relied upon *United States v. Munsingwear* (1950), the first case to hold that when a case

* Professor of Law, Drexel University Thomas R. Kline School of Law. Professor Tucker thanks Adam Bonin for taking on the *Ritter* case, which turned into an all-things-*Munsingwear* gateway drug, and the Honorable Zachary Cohen, as well as Ginny Cohen. The authors thank Eric Berg, Sukhan Kaur, Audrey Heuser, Corrie Mitchell, and Arienne Pompei for their excellent research assistance; Madison Mull, Sandra Benjamin, and Alexis Young for coding assistance; Alexei Taylor for statistical support; and Erwin Chemerinsky, Amy Howe, Dahlia Lithwick, Adam Liptak, Linda Greenhouse, Chris Conway, Richard Lazarus, Mary-Rose Papandrea, Andy Hessick, Kelsi Corkran, Carter Phillips, Linda Mullenix, Robin Effron, Amy Landers, and Dan Filler for their interest in and support of this project. We also acknowledge Stefanie Lindquist for early consultation on this Article. This study follows a *New York Times* op ed on the same topic. Lisa Tucker & Stefanie A. Lindquist, *How the Supreme Court Is Erasing Consequential Decisions in the Lower Courts*, N.Y. TIMES (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/opinion/supreme-court-decisions-vacated.html [https://perma.cc/3ZPU-MFUG]. Preliminary results were since included in a *New York Times* article on "Imperial Supreme Court." Adam Liptak, *An 'Imperial Supreme Court' Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html [https://perma.cc/FSM5-9Z6C] and discussed in *The Morning Read for Tuesday, Nov. 29*, SCOTUSBLOG: WHAT WE'RE READING (Nov. 29, 2022, 9:17 AM), https://www.scotusblog.com/2022/11/the-morning-read-for-tuesday-nov-29/ [https://perma.cc/6U2V-YMJT]; *The Morning Read for Monday, Dec. 19*, SCOTUSBLOG: WHAT WE'RE READING (Dec. 19, 2022, 9:55 AM), https://www.scotusblog.com/2022/12/the-morning-read-for-monday-dec-19/ [https://perma.cc/F2FB-UZPV] and *What's Going on with* Munsingwear, SCOTUSBLOG: SCOTUSTALK (Jan. 30, 2023, 9:50 AM), https://www.scotusblog.com/2023/01/whats-going-on-with-munsingwear/ [https://perma.cc/7XJL-AK6T].

† Vice Dean and Professor of Law, Villanova University Charles Widger School of Law. ©2023 by the authors.

becomes moot during an appeal—thereby no longer involving a live controversy appropriate for judicial resolution—the higher court may vacate the decision of the court below. Importantly, *Munsingwear* is equitable, discretionary, fact-bound, and designed to protect parties from unfavorable rulings that were not finally appealed. Vacatur under *Munsingwear* has been extremely rare: on average, the Court vacated only one lower court precedent per year between 1994 and 2016. However, the Court vacated as many cases in the past seven years as it did between 1994 and 2016.

But the pattern did not begin with Justice Barrett; since 2017, the Supreme Court has demonstrated a seeming eagerness to nullify lower court precedents at a clip of four per year. Most of these nullifications hindered progressive objectives. In twelve of the thirteen cases since 2021 in our study, the losing party (usually the government) invoked *Munsingwear* to shield future litigants from precedential rulings that announce outcomes adverse to their political or legal interests.

This pattern of *Munsingwear* vacatur is extremely significant to litigants, political scientists, and legal scholars alike. This Article examines the previously unanalyzed rise of *Munsingwear* vacatur. It presents the history of this case; then, through statistical analysis presented in graphs and tables, this Article demonstrates how only recently the Court treats ostensibly moot cases differently, depending almost entirely on the ideological directionality of the federal appeals court opinion. Finally, this Article joins others in calling for more transparency from the Court.

INTRODUCTION

United States v. Munsingwear.[1] As Nina Totenberg has noted, "*Munsingwear* vacatur sounds like a disease."[2] Few scholars, even those immersed in the worlds of civil procedure and Supreme Court practice, can correctly define it. But this trend is changing. More and more Court watchers are starting to monitor *Munsingwear*,[3] likely because, since 2017 and especially since 2021, the Court has been using it to vacate lower court decisions that favor progressives at an alarming rate.[4] The Court is effectively removing precedent with one-line orders rather than choosing the more moderate path of denying certiorari.

The political importance of this trend cannot be overstated. The merits of these cases go to the very heart of ideological battles. Relying on *Munsingwear*, the Court (or at least five Justices of the Court) has wiped away critically important decisions that counter key Republican objectives. Two lower court rulings granted standing to plaintiffs suing former President Donald J. Trump for violations of the Emoluments Clause.[5] Gone. One ruling allowed the House Committee on the Judiciary to review grand jury materials in the Trump impeachment.[6] Gone. Another ruling invalidated a Tennessee gubernatorial order that halted abortions during COVID.[7]

---

1. 340 U.S. 36 (1950).

2. E-mail from Nina Totenberg, Legal Affs. Correspondent, NPR, to Lisa Tucker, Assoc. Professor of L., Drexel Univ. Thomas R. Kline Sch. of L. (Nov. 29, 2022, 6:13 PM) (on file with author).

3. *See, e.g.*, Steve Vladeck (@steve_vladeck), TWITTER (Oct. 12, 2021, 9:57 AM), https://twitter.com/steve_vladeck/status/1447924367548092419 [https://perma.cc/W898-ZNTJ].

4. *See infra* Section IV.

5. Citizens for Resp. & Ethics in Wash. v. Trump, 953 F.3d 178, 203 (2d Cir. 2019), *as amended* (Mar. 20, 2020), *cert. granted*, *judgment vacated*, 141 S. Ct. 1262, 1262 (2021); *In re* Trump, 958 F.3d 274, 279–80 (4th Cir. 2020), *cert. granted*, *judgment vacated sub nom.* Trump v. District of Columbia, 141 S. Ct. 1262, 1262 (2021).

6. *In re* Comm. on the Judiciary, U.S. House of Representatives, 951 F.3d 589, 591 (D.C. Cir. 2020), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 142 S. Ct. 46, 46 (2021).

7. Adams & Boyle, P.C. v. Slatery, 956 F.3d 913, 917 (6th Cir. 2020), *cert. granted*, *judgment vacated*, 141 S. Ct. 1262, 1263 (2021).

Gone. Two rulings invalidated work requirements to receive Medicaid imposed by the Trump Administration.[8] Gone. One ruling held that President Trump could not ban followers from his Twitter account.[9] Gone. One ruling allowed individuals to sue states directly pursuant to the Voting Rights Act.[10] Gone. One ruling upheld the Pennsylvania Supreme Court's decision to extend mail ballot receipt deadlines during COVID.[11] Gone. One ruling held that undated ballots could be counted during a Pennsylvania election.[12] Gone. One ruling held that the House of Representatives had standing to sue the executive branch for violations of its appropriations power in connection with President Trump's border wall.[13] Gone. One ruling prohibited the Trump Administration from returning asylum seekers to Mexico under its "Migrant Protection Protocols."[14] Gone. All these appellate court decisions are now uncitable, and future actions previously held unlawful must be litigated anew. The Court vacated as many cases between 2017 and the winter of 2023 as it did between 1994 and 2016.[15]

In most of these recent cases, a party claimed that the case had become moot on appeal because (1) President Trump lost the 2020 election and the Biden Administration thereby abandoned the policies; (2) the policies expired by their own terms; or (3) the particular election at issue came and went. And

---

8. Gresham v. Azar, 950 F.3d 93, 96 (D.C. Cir. 2020), *vacated and remanded sub nom*. Becerra v. Gresham, 142 S. Ct. 1665, 1665 (2022), *vacated and remanded sub nom*. Arkansas v. Gresham, 142 S. Ct. 1665, 1665 (2022); Philbrick v. Azar, No. 19-5293, 2020 WL 2621222 (D.C. Cir. May 20, 2020), *vacated and remanded sub nom*. *Becerra*, 142 S. Ct. at 1665, *vacated and remanded sub nom*. *Arkansas*, 142 S. Ct. at 1665.

9. Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019), *cert. granted*, *judgment vacated sub nom*. Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1220–21 (2021).

10. Ala. State Conf. of NAACP v. Alabama, 949 F.3d 647, 649 (11th Cir. 2020), *cert. granted, judgment*, 141 S. Ct. 2618, 2618 (2021).

11. Bognet v. Sec'y Commonwealth of Pennsylvania, 980 F.3d 336, 364 (3d Cir. 2020), *cert. granted*, *judgment vacated sub nom*. Bognet v. Degraffenreid, 141 S. Ct. 2508, 2508 (2021).

12. Migliori v. Cohen, 36 F.4th 153, 157 (3d Cir. 2022), *cert. granted*, *judgment vacated sub nom*. Ritter v. Migliori, 143 S. Ct. 297, 298 (2022).

13. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 4 (D.C. Cir. 2020), *cert. granted, judgment vacated sub nom*. Yellen v. U.S. House of Representatives, 142 S. Ct. 332, 332 (2021).

14. Innovation L. Lab v. Wolf, 951 F.3d 1073, 1077 (9th Cir. 2020), *vacated and remanded sub nom*. Mayorkas v. Innovation L. Lab, 141 S. Ct. 2842, 2842 (2021).

15. Data collection for our study ended in Winter 2023, although since then the Supreme Court has granted *Munsingwear* vacatur in several more cases. *See infra* Section IV.A.

admittedly, COVID and the Trump Administration spawned many lawsuits that pertained solely to those (temporary) conditions. Nevertheless, the uptick in *Munsingwear* vacatur appears to almost entirely favor one set of ideological interests over another—a claim that we empirically test in this Article. In only one of the *Munsingwear* GVRs—"grant, vacate, remand"—that we identified since 2021 did liberal interests associated with the Democratic Party lose in the court below.[16] In that same period, the Court's orders nullified liberal victories below in eleven cases.[17]

And the vacation of these decisions is not merely important because the decisions themselves have been wiped off the books. Their elimination is noteworthy because no law is left in their stead; precedent has literally been erased. The same issues are now ripe for relitigation, perhaps before different judges, perhaps with different results that will set different precedent, and now without prior precedent or circuit split in the vacuum. Litigants who watch the Court have begun to perceive the Court's signals that, if a lower court case does not turn out as anticipated or desired, there may well be a second bite at the apple. This pernicious turn of procedure may seem minor until examined in light of the big picture of issues such as voting rights, immigration rights, and executive power, in which the butterfly effect of one vacated case could lead to entirely new and different branches of law made for generations.

Some may ask what harm comes from these vacaturs given that the same judges granting them might likely reverse them on the merits. First, the lack of transparency and deliberation is a harm in itself both to the system and the gaming it invites. Second, the Court is unlikely to grant certiorari and review every single case, and, even if it did, it may well uphold some of the clearer cases on the merits upon full briefing. Third, if the Court simply denied cert, it would allow the circuit courts either all to agree with the original outcome or to percolate different theories to generate splits, both of which are preferable to the vacuum left by *Munsingwear*.

This Article seeks to explain the quite sudden spike in *Munsingwear* vacatur and identify reasons why this newly revived practice poses a threat to our system of common law, which depends upon precedent, the rule of law, and deference

16. Sw. Women's Surgery Ctr. v. Abbott, 802 F. App'x 150, 151 (5th Cir. 2020), *cert. granted*, *judgment vacated sub nom*. Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261, 1261 (2021).

17. *See supra* notes 9–16.

to lower courts. We lay out an empirical analysis of the Court's current *Munsingwear* practice, in which we show that the Court has long disfavored vacated liberal cases at a higher rate, that it is doing so much more often now, and that it is not treating like circumstances alike.

This Article contains six parts. In Part I, we explain the procedure the Supreme Court uses to GVR in cases that have become moot on their way to the Court. We then explain *Munsingwear* and *U.S. Bancorp v. Bonner Mall*,[18] the two cases that comprise the heart of the doctrine. In Part II, we describe one of the most recent cases in which the Court has granted *Munsingwear* vacatur, a fascinating toe-to-toe about voters' rights. This case provides a helpful vehicle for understanding the detrimental impact of *Munsingwear* vacatur on lower court precedent. In Part III, we review the scant literature on the Court's use of *Munsingwear* vacatur. In Part IV, we introduce our empirical study, lay out our study methodology, and provide a qualitative review of our results. In Part V, we report our results and explain why they are significant in terms of understanding the Court's current practice and hidden agendas. In Part VI, we discuss implications and questions raised by our findings.

I. GRANT/VACATE/REMAND AT THE U.S. SUPREME COURT

Since the mid-twentieth century, the Supreme Court has come to rely on the GVR procedure to grant certiorari, vacate a lower court judgment, and remand a case back to the lower court—typically before oral argument or briefing on the merits.[19] The Court usually employs GVRs in situations where an intervening event has changed the governing legal rules while the case is pending on appeal to the Court.[20] In order to ensure that the changing rules have been considered and potentially applied, the Court vacates the existing lower court opinion because the lower court was unable to apply the new legal standard.[21] Consequently, on remand, the lower court may reconsider its judgment in light of the new legal standard.[22] The Court may also GVR cases following its own announcement of

18. 513 U.S. 18, 29 (1994).

19. *See infra* Section I.B.

20. *See id.*; *see also* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 23 (1994).

21. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950); *see also Bancorp*, 513 U.S. at 23.

22. *See Munsingwear*, 340 U.S. at 39; *see also Bancorp*, 513 U.S. at 23.

a new decision, thereby sending other similar cases in the certiorari queue back to the lower court for review in light of the new and potentially relevant or controlling decision handed down by the Court.[23]

GVR opinions typically include only a single line that grants certiorari, vacates the lower court's opinion, and remands for further proceedings below.[24] GVRs may sometimes also include a specific instruction, such as requiring the lower court to reconsider "in light of" some intervening event or to dismiss a case as moot.[25] Some students of Court procedure call this type of GVR a "GVRI," or a "GVR with instructions."[26]

Because rules of decision do change as cases wind their way through the appellate process, lower court decisions before the rule changes are consequently rendered obsolete and thus worthy of vacatur.[27] The GVR procedure is consistent with the notion that, in the civil context, the Supreme Court will apply the law in effect at the time of the decision and retroactively apply any intervening changes in the rule of decision.[28] And yet,

---

23. Stephen L. Wasby, *Case Consolidation and GVRs in the Supreme Court*, 53 U. PAC. L. REV. 83, 98–99 (2021) (explaining this form of GVR as the "predominant" category of Court uses of the procedure).

24. *See, e.g.*, Escobar v. Texas, 143 S. Ct. 557, 557 (2023); Kamahele v. United States, 143 S. Ct. 556, 556 (2023); Klein v. Oregon Bureau of Lab. & Indus., 139 S. Ct. 2713, 2713 (2019).

25. *See, e.g.*, Niang v. Tomblinson, 139 S. Ct. 319, 319 (2018) (granting certiorari, vacating lower court judgment, and remanding the case "with instructions to . . . dismiss the case as moot"); United States v. Bormes, 568 U.S. 6, 16 (2012) (vacating lower court decision and remanding with instructions); Kelley v. S. Pac. Co., 419 U.S. 318, 332 (1974) (vacating lower court judgment and remanding with instructions to allow a jury to reconsider "in light of" the proper legal standard).

26. *See, e.g.*, Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs-and an Alternative*, 107 MICH. L. REV. 711, 717–18 (2009) ("I would include cases in which the Court GVRs for consideration of whether a case has become moot but would exclude—for want of the reconsideration feature—cases in which the Court determines the case actually is moot, vacates the decision below, and remands with instructions to dismiss the case."); Sena Ku, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383, 414 n.194 (2008) ("[T]he Supreme Court may GVR with instructions to dismiss where it has found the case nonjusticiable for reasons of ripeness, mootness, or lack of standing."); Wasby, *supra* note 23, at 100 ("GVRs are also used to dispose of cases, as when they are remanded with instructions to dismiss for mootness.").

27. *See* Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1213 (10th Cir. 2005) (finding vacatur appropriate where Forest Service changed rule at issue).

28. *See* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) (exemplifying that when the Supreme Court applies a rule to the parties in a case before it, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review"); Robertson v. Seattle Audubon Soc'y,

some scholars have come to see GVRs as problematic because they focus on resolution of a single case rather than the development of a fuller body of law.[29]

In recent years, the Supreme Court has made use of a specific type of vacatur far more often than it ever has before.[30] This vacatur, called "*Munsingwear* vacatur,"[31] is used not when there is new precedent, but instead when a case becomes moot on its way from the federal court of appeals to the Supreme Court.[32]

In the following Sections, we explain *Munsingwear*[33] and discuss *Bancorp*, the case that limited *Munsingwear*'s scope nearly fifty years later.[34]

A. United States v. Munsingwear

In *United States v. Munsingwear*, the United States alleged that the respondent, Munsingwear, Inc., violated a pricing regulation.[35] The first count sought injunction and the second

503 U.S. 429, 440–41 (1992) (exemplifying that when Congress amends a statute during pending litigation, any change in substantive standards must be applied in that litigation and on appeal).

29. *See, e.g.*, Bruhl, *supra* note 26, at 715 ("It may be that run-of-the-mill GVRs are regarded as unproblematic only because we know so little about them. If observers knew that the Court issued some 800 GVRs several years ago, roughly 250 GVRs in the 2006 Term, and about 200 GVRs in the 2007 Term, they might not regard the practice as so uncontroversial. . . . This realization might lead us to consider whether there is a better way.").

30. Lisa Tucker & Stefanie A. Lindquist, *How the Supreme Court is Erasing Consequential Decisions in the Lower Courts*, N.Y. TIMES (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/opinion/supreme-court-decisions-vacated.html [https://perma.cc/TGZ9-LGM2] (explaining that the Supreme Court has made heavy use of this specific type of vacatur as of late).

31. Pattie Millett, *Practice Pointer: Mootness and* Munsingwear *Vacatur*, SCOTUSBLOG (June 10, 2008, 1:30 PM), https://www.scotusblog.com/2008/06/practice-pointer-mootness-and-munsingwear-vacatur/ [https://perma.cc/Y6EL-S7GY] (calling a vacatur addressing how to deal with a court of appeals decision when the case becomes moot while pending review a "*Munsingwear* vacatur").

32. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) ("The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."); *see also* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) ("We hold that mootness by reason of settlement does not justify vacatur of a judgment under review.").

33. *Munsingwear*, 340 U.S. at 36.

34. *Bancorp*, 513 U.S. at 23–24.

35. *Munsingwear*, 340 U.S. at 37 (alleging that the corporation violated a regulation which fixed the maximum price of the commodities that the respondent sold).

count prayed for treble damages.[36] The damages count was held in abeyance pending trial for the injunction.[37] The district court dismissed the complaint, holding that the respondent's prices abided by the regulation.[38] While the United States's[39] appeal was pending in the Eighth Circuit,[40] the commodity in question was decontrolled.[41] Consequently, the respondent sought a dismissal of the pending appeal.[42] The Court granted the respondent's motion to dismiss the appeal for mootness.[43]

Following this dismissal, the respondent moved to dismiss the damages count in the district court because its unreversed judgment in the injunction suit was res judicata[44] on that matter.[45] The district court dismissed the action, and the court of appeals affirmed by a divided vote.[46] The United States Supreme Court granted the government's petition for writ of certiorari and affirmed the dismissal of the damages action below,[47] explaining that "[t]he established practice of the Court in dealing with a civil case . . . which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."[48] Under *Munsingwear*, the parties may relitigate the issues because the judgment—review of which was prevented through "happenstance"—is eliminated.[49]

Notably, *Munsingwear* did not involve the types of issues considered in the Introduction, such as changes of

36. *Id.*

37. *Id.*

38. Bowles v. Munsingwear, Inc., 63 F. Supp. 933, 938 (D. Minn. 1945).

39. Interestingly, how one punctuates the possessive of "United States" says a lot about their views of federalism.

40. *See* Fleming v. Munsingwear, Inc., 162 F.2d 125 (8th Cir. 1947).

41. *Munsingwear*, 340 U.S. at 37.

42. *Id.*

43. *Fleming*, 162 F.2d at 127–28.

44. *Munsingwear*, 340 U.S. at 38–39 (quoting S.P.R. Co. v. United States, 168 U.S. 1, 48–49 (1897)) (noting that res judicata is "[t]he general principle announced in numerous cases . . . that a right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified").

45. *Id.* at 37.

46. United States v. Munsingwear, Inc., 178 F.2d 204, 209 (8th Cir. 1949).

47. *Munsingwear*, 340 U.S. at 39–41.

48. *Id.* at 39.

49. *Id.* at 40.

behavior/policy or ending programs. Presumably those issues are quite different from those involved in *Munsingwear* because (a) they involve government action and (b) they can be gamed by including sunset provisions or voluntary cessation so that the substantive merits can never be finally litigated.

B. U.S. Bancorp Mortgage Company v. Bonner Mall Partnership

In the ensuing years, some commentators read *Munsingwear* to mean that the Supreme Court was *required* to vacate lower court decisions that became moot while an appeal was pending.[50] However, forty-four years later, after the issue percolated in the lower federal courts[51] and scholars significantly critiqued that approach,[52] the Supreme Court explicitly and drastically limited the circumstances under which vacatur for intervening mootness was proper. In *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*,[53] the bank scheduled a foreclosure sale against the respondent; the day before the sale, the respondent filed a bankruptcy petition.[54] Bancorp then moved to suspend the automatic stay that the bankruptcy statute imposed on its foreclosure.[55] The Bankruptcy Court granted Bancorp's motion but stayed its order pending appeal by the respondent.[56] When the district court reversed,[57] Bancorp appealed, and the Ninth Circuit affirmed the automatic stay.[58]

---

50. Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77, 85–86 (1955).

51. Seth Nesin, Note, *The Benefits of Applying Issue Preclusion to Interlocutory Judgments in Cases That Settle*, 76 N.Y.U. L. REV. 874, 881–82 (2001).

52. *See, e.g.*, Ruby Emberling, Note, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505, 509 (2021); Vincent Escoto, *Ignoring Administrative Decisions Through Settlement: A Holistic Approach*, 37 J. NAT'L ASS'N ADMIN. L. JUD. 891, 906 (2017); Michael J. Stephan et al., *Closing the Gap: Post-Decision, Pre-Mandate Mootness*, 7 SETON HALL CIR. REV. 287, 292 (2011).

53. Respondent Bonner defaulted on its real estate taxes associated with a commercial loan that Petitioner U.S. Bancorp Mortgage Co. had acquired from a fellow bank. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 19 (1994).

54. *Id.*

55. *Id.* at 20.

56. *Id.*

57. *In re* Bonner Mall P'ship, 142 B.R. 911, 913 (D. Idaho 1992), *aff'd*, 2 F.3d 899 (9th Cir. 1993), *cert. granted sub nom*. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 510 U.S. 1039 (1994).

58. *In re* Bonner Mall P'ship, 2 F.3d at 918.

Bancorp then petitioned for a writ of certiorari on the merits before the United States Supreme Court.[59] After the Court granted this petition, the parties entered a consensual plan of reorganization and received approval from the Bankruptcy Court.[60] The parties agreed that this plan mooted the case.[61] Bancorp then moved for the Supreme Court to vacate the judgment of the court of appeals.[62] However, the Court dismissed the case as moot, denying the petitioner's motion to vacate the judgment below.[63]

The Court explained its authority to address vacatur: "If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require."[64] Further, the Court emphasized that "vacatur must be decreed for those judgments whose review is . . . 'prevented through happenstance'"[65] or "where mootness results from the unilateral action of the party who prevailed in the lower court."[66] Finally, the Court clarified that the contested question at hand was whether courts should vacate lower court decisions when mootness results from a settlement.[67] Answering in the negative,[68] the Court held that vacatur of the judgment under review is not warranted in such cases because "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur."[69]

C. *Inconsistent Guidance:* Munsingwear *and* Bancorp

Munsingwear and *Bancorp* dictate seemingly contradictory actions, laying out ambiguous language that allows parties for

59. *See U.S. Bancorp Mortg. Co.*, 510 U.S. at 1039.

60. *Bancorp*, 513 U.S. at 20.

61. *Id.*

62. *Id.* Bonner opposed the motion. *Id.*

63. *Id.* at 29.

64. *Id.* at 21–22 (quoting Walling v. James V. Reuter, Inc., 321 U.S. 671, 677 (1944)).

65. *Id.* at 23 (quoting United States v. Munsingwear Inc., 340 U.S. 36, 40 (1950)); Karcher v. May, 484 U.S. 72, 82–83 (1987) (explaining happenstance as a situation where a controversy presented for review has become moot due to circumstances unattributable to any of the parties).

66. *Bancorp*, 513 U.S. at 23.

67. *Id.*

68. *Id.* at 29.

69. *Id.* at 25.

and against vacatur to cite each case convincingly.[70] In *Munsingwear*, the Court characterized vacatur as an "established practice" that is "commonly utilized" when a case has become moot while on appeal.[71] Nearly half a century later, however, the Court in *Bancorp* characterized vacatur quite differently, referring to the practice as an "extraordinary remedy" available in "exceptional circumstances."[72] The Court raised the vacatur bar when it stated that the party seeking vacatur was required to demonstrate "equitable entitlement" to such a remedy in order to justify disrupting an existing lower court decision.[73] Importantly, the *Bancorp* exception invalidated the use of *Munsingwear* vacatur when a case became moot due to a settlement between the parties or when the *winning* party renders the case moot.[74] While in *Munsingwear* the Court suggests that the use of vacatur is fairly commonplace, in *Bancorp* it asserts that vacatur is a prudent, infrequent, and "extraordinary" remedy.[75]

Parties invoke the language of either *Bancorp* or *Munsingwear*, depending on which one best suits each party's vacatur-related objectives.[76] The party seeking vacatur typically uses *Munsingwear* to support its position that vacatur is a routine practice of the Court.[77] The party opposing vacatur

---

70. *See* Respondent Brief in Opposition at 20, Ritter v. Migliori, 143 S. Ct. 297 (2022) (No. 22-30) (citing *Bancorp* to oppose vacatur); *cf.* Reply Brief for Petitioner at 11, *Ritter*, 143 S. Ct. 297 (No. 22-30) (citing *Bancorp* to seek vacatur).

71. United States v. Munsingwear, Inc., 340 U.S. 36, 39, 41 (1950); *see also* Alvarez v. Smith, 558 U.S. 87, 97 (2009) (referring to *Munsingwear* vacatur as an "ordinary practice" in a decision to vacate judgment of the Seventh Circuit).

72. *Bancorp*, 513 U.S. at 26, 29.

73. *Id.*

74. *Id.* at 25 ("Where mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.").

75. *Compare Munsingwear*, 340 U.S. at 41, *with Bancorp*, 513 U.S. at 29.

76. *See, e.g.*, Brief Opposing Motion to Dismiss at 11, Al-Marri v. Spagone, 555 U.S. 1220 (2009) (No. 08-368) (arguing that the Supreme Court's "'established practice' is to vacate a judgment that becomes moot while pending merits review"); Petitioners' Response to Respondents' Suggestion of Mootness at 6, Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007) (urging that when a case becomes moot while awaiting review, "the 'established practice' is to reverse or vacate the judgment and remand with a direction to dismiss").

77. *See, e.g.*, Motion to Dismiss or, in the Alternative, to Vacate the Judgment Below and Remand with Directions to Dismiss the Case as Moot at 9 n.4, *Al-Marri*, 555 U.S. 1220 (No. 08-368); Brief Opposing Motion to Dismiss, *supra* note 76, at 11 (discussing that in *Al-Marri*, both parties urged for vacatur should the Court determine the case was moot, and that in their respective briefs, both the petitioner

routinely cites to *Bancorp* to support its position that vacatur is granted only in limited and exceptional circumstances and is not appropriate where the unilateral action of the prevailing party mooted the case.[78]

Supreme Court Justices have been similarly divided over when vacatur is appropriate; they differ as to how to apply these somewhat conflicting seminal cases.[79] In *Alvarez v. Smith*,[80] for example, Justice Stephen Breyer echoed *Munsingwear* in his majority opinion when he referred to vacatur as the Court's "ordinary practice."[81] There, the Court vacated an appellate opinion in a case involving the police; the police had returned property alleged to have been taken, thus mooting the case.[82] The Court distinguished the facts in *Alvarez* from *Bancorp* in an effort to justify granting vacatur.[83] The majority found that *Alvarez* did not present the same "considerations of 'fairness' and 'equity' [that] tilted against vacatur" in *Bancorp*.[84] The majority's assertion that fairness and equity must be strong enough to overcome a default tilt toward vacatur is difficult to square with *Bancorp*'s stance that vacatur is only appropriate in extreme situations.[85]

However, in a dissenting opinion opposing vacatur in the very same case, Justice John Paul Stevens used *Bancorp* to suggest the petitioner failed to "demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur."[86] The dissent more closely aligns with *Bancorp*, finding that the primary concern is whether vacatur serves the "public interest" and concluding that "the interest is generally better served by

---

and the respondent referred to the "established practice" of the Court in granting *Munsingwear* vacatur where a case has become moot awaiting review on the merits).

78. *See* Brief for Respondent at 23, Arizonans for Off. Eng. v. Arizona, 520 U.S. 43 (1997) (No. 95-974) (writing that the *Bancorp* analysis as applied to the case "compels the conclusion that the 'extraordinary remedy of vacatur' is not justified in any regard").

79. Alvarez v. Smith, 558 U.S. 87, 99 (2009) (Stevens, J., concurring in part and dissenting in part).

80. 558 U.S. 87 (2009).

81. *Id.* at 97.

82. *Id.*

83. *Id.* at 94–95.

84. *Id.*

85. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994) (finding that the "party seeking relief from the status quo of the appellate judgment" must show "equitable entitlement to the extraordinary remedy of vacatur").

86. *Alvarez*, 558 U.S. at 99 (Stevens, J., concurring in part and dissenting in part) (quoting *Bancorp*, 513 U.S. at 26).

leaving appellate judgments intact."[87] When an opinion granting vacatur and a dissent opposing vacatur use contradictory precedential language from the two seminal cases on vacatur, that reflects the malleability, and effectively muddiness, of the relevant case law.

What is more, *Bancorp* also contains manipulable language that further confuses the matter.[88] In discussing the impact that public interest has on decisions to grant vacatur, the Court wrote, "*Munsingwear* establishes that the public interest is best served by granting relief when the demands of 'orderly procedure' cannot be honored; we think conversely that the public interest requires those demands to be honored when they can."[89] With this additional language, the Court appears to temper its tone in *Munsingwear*, shifting from one of ready reliance on vacatur to one urging more cautious use. Additionally, the *Bancorp* Court significantly championed judicial precedent by finding that lower court decisions "should stand unless a court concludes that the public interest would be served by a vacatur."[90]

For what it is worth, at least several lower courts have followed *Bancorp* in refusing to vacate precedent. This has been an issue particularly in patent law.[91] This only tells part of the story, though, as many other courts did vacate patent law. Professor Jeremy Bock found in 2013 that of seventy-nine cases seeking vacatur in settled patent cases, it was denied in only fifteen and granted in all but two of the others.[92] Of course, these results may be based on the fact-bound nature of the cases.[93]

---

87. *Id.* at 98.

88. *See Bancorp*, 513 U.S. at 27.

89. *Id.* (citations omitted); *cf.* Brief Opposing Motion to Dismiss, *supra* note 76, at 12 (arguing that "public interest and orderly operation of the federal judicial system demand vacatur").

90. *Bancorp*, 513 U.S. at 26 (quoting Izumi v. U.S. Philips Corp., 410 U.S. 27, 40 (1993) (Stevens, J., dissenting)).

91. In a non-exhaustive search by our research assistants, we found at least a dozen patent cases refusing to vacate a claim construction order after the case settled, leaving the claim construction as precedent. The latest was *Cisco Sys., Inc. v. Capella Photonics, Inc.*, No. 20-CV-01858, 2021 WL 3373292 at *1, *3 (N.D. Cal. Aug. 3, 2021), and the earliest was *Allen-Bradley Co. v. Kollmorgen Corp.*, 199 F.R.D. 316, 318–20 (E.D. Wis. 2001). Most cases relied on *Bancorp*.

92. Jeremy W. Bock, *An Empirical Study of Certain Settlement-Related Motions for Vacatur in Patent Cases*, 88 IND. L.J. 919, 938 (2013).

93. *Id.* at 938–40 (discussing the procedural posture and types of cases resulting in different rulings).

However, the lack of clarity has allowed opposing parties arguing for and against vacatur—even parties in the same case—to cite the "public interest" language in *Bancorp* to further their respective stances.[94] Because the *Bancorp* decision was decided forty-four years after *Munsingwear*, it should normally carry more weight than its predecessor.[95] However, *Munsingwear*, as the seminal case, continues to be cited more prominently; all SCOTUS orders invoke *Munsingwear* when vacating.[96] Perhaps for this reason, the "ordinary"[97] and "established practice"[98] language continues to hold water. Commentators have noted the tension present in cases where even the judges cannot agree which rule should govern.[99]

II. THE CASE OF *RITTER V. MIGLIORI*: VACATUR AGAINST VOTING RIGHTS

"Today's order means the loss of a helpful precedent."[100]

A detailed case study illustrates the challenges of applying *Munsingwear* and *Bancorp*, especially where one of the parties is the government, and mootness is due to time rather than changed circumstances. *Cohen* was supposed to be a brief engagement,[101] an hour's drive to Allentown to argue before a

94. *See supra* note 70.

95. *See Bancorp*, 513 U.S. at 23 (asserting further that the "established practice" language used to describe vacatur in *Munsingwear* was merely dictum and therefore was not binding; additionally noting that the Court had dismissed without vacatur three mooted cases during its four preceding terms, making the language of "established practice" misleading even at the time *Munsingwear* was decided).

96. Lisa Tucker & Stefanie A. Lindquist, *How the Supreme Court is Erasing Consequential Decisions in the Lower Courts*, N.Y. TIMES (Nov. 29, 2022), https://www.nytimes.com/2022/11/29/opinion/supreme-court-decisions-vacated.html [https://perma.cc/TGZ9-LGM2].

97. Alvarez v. Smith, 558 U.S. 87, 97 (2009).

98. United States v. Munsingwear, 340 U.S. 36, 39 (1950).

99. *See* Paul A. Avron, *A Primer on Vacatur of a Prior Court Order as Part of a Settlement Agreement; Recent Case Law*, FED. LAW. (Mar. 2017) at 10, 10–11, 16–17, https://www.fedbar.org/wp-content/uploads/2017/03/Litigation-Brief-pdf-1.pdf [https://perma.cc/W3D8-ULUN]; *see also* Evan A. Young, *Getting to Court and Staying There: The Supreme Court's Current Approach to Ripeness and Mootness*, 97 ADVOCATE (Texas) 11, 11–14 (Winter 2021).

100. Rick Hasen, *Supreme Court Vacates as Moot Third Circuit Decision About Counting Timely but Undated Absentee Ballots in Pennsylvania*, ELECTION L. BLOG (Oct. 11, 2022, 7:15 AM), https://electionlawblog.org/?p=132366 [https://perma.cc/S3HK-MYTD].

101. Or so we thought.

county board of elections in a windowless basement meeting room about a judicial election in a mid-sized county in Pennsylvania.[102] The only issue was whether mail-in ballots lacking a handwritten date should be counted.[103] Because these ballots had been received on time, the date on the outside of the envelope seemed immaterial,[104] even if exclusion of undated ballots seemed consistent with state law.[105]

But as is true with so many "little" cases, *Cohen* had the potential to pack a bigger punch, both for the litigants themselves and for election law nationwide. While each of the litigants wanted a personal victory, some savvy voters from both parties (eventually represented by the ACLU) recognized the dispute as having wide-ranging impact on voting rights.[106] If the courts ruled that these undated but timely submitted ballots could be counted, it would set a precedent in elections across the country for many other small, potentially insignificant voter errors to be ignored and voters to be enfranchised. However, if the courts threw out the ballots, litigants could legally support further efforts to exclude ballots based on trivial defects. Typically, strict interpretation of ballot rules weighs in favor of Republicans and often leads to voter disenfranchisement.[107] When it comes to mail-in ballots in

102. *See* Migliori v. Cohen, 36 F.4th 153, 157 (3d Cir.), *cert. granted*, *judgment vacated sub nom.* Ritter v. Migliori, 143 S. Ct. 297 (2022). Throughout the life of this case, Professor Tucker's husband, Adam Bonin, was lead counsel for Zachary Cohen, the Democratic candidate for the court of common pleas.

103. *Ritter*, 143 S. Ct. at 297; *Migliori*, 36 F.4th at 156.

104. *Migliori*, 36 F.4th at 156–57.

105. *See* 25 PA. CONS. STAT. §§ 3146.6(a), 3150.16(a) (2020) ("The elector shall then fill out, date and sign the declaration printed on such envelope."), *invalidated by Migliori,* 143 S. Ct. 297.

106. And not just the voters. Election law experts and commentators were watching the case with an eagle eye. *See, e.g.*, Tabatha Abu El-Haj, *Supreme Court Stay,* Ritter v. Migliori*, and the PA Recount*, ELECTION L. BLOG (May 31, 2022, 7:05 PM), https://electionlawblog.org/?p=129644 [https://perma.cc/UA4G-LPH6]; Hansi Lo Wang (@hansilowang), TWITTER (Oct. 11, 2022, 9:47 AM), https://twitter.com/hansilowang/status/1579830930750873600 [https://perma.cc/3747-JANU]; Rick Hasen (@rickhasen), TWITTER (May 31, 2022, 11:03 PM), https://twitter.com/rickhasen/status/1531833876720627713 [https://perma.cc/VZE5-N35S]; Kenneth Jost (@jostonjustice), TWITTER (June 9, 2022, 4:09 PM), https://twitter.com/jostonjustice/status/1534991063353638913 [https://perma.cc/8KTH-Y9GJ].

107. *See* Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1428 (2016).

particular, because Democratic voters employ them more often, stricter rules have a partisan impact.[108]

When the case began, after the initial vote count was completed, Zachary Cohen, the Democratic candidate for the Lehigh County Court of Common Pleas, was behind by seventy-one votes.[109] Those 257 sealed and undated ballots? Given the partisan tilt of mail-in ballots in his county, they had the potential to put him over the top.[110] David Ritter, the Republican candidate, was barely winning.[111] Quite predictably, Ritter did not want any more ballots opened.

That was when the lawyers—and the courts—stepped in.[112] Yes, 257 sealed envelopes in one county for one judicial seat on a ten-judge bench were about to rock election law as we knew it. And all because of one key ideological battle over a key issue in election law: What was more important? Enfranchising those 257 voters by counting their votes? Or adhering strictly to the state election code?

A. *The Beginning: State Court Litigation*

In 1964, Congress enacted the Civil Rights Act, landmark legislation that, among other things, included provisions protecting the right to vote.[113] In one subsection, Congress ensured that immaterial errors or omissions on any paper or record requisite to voting could not disqualify a voter if "such

---

108. *See, e.g.*, Amy Gardner & Emma Brown, *Republicans Sue to Disqualify Thousands of Mail Ballots in Swing States*, WASH. POST (Nov. 7, 2022, 3:38 PM), https://www.washingtonpost.com/elections/2022/11/07/gop-sues-reject-mail-ballots/ [https://perma.cc/QH6K-LXWA] ("Republican officials and candidates in at least three battleground states are pushing to disqualify thousands of mail ballots after urging their own supporters to vote on Election Day, in what critics are calling a concerted attempt at partisan voter suppression. . . . The suits coincide with a systematic attempt by Republicans—led by former president Donald Trump— to persuade GOP voters to cast their ballots only on Election Day. Critics argue that the overall purpose is to separate Republicans and Democrats by method of voting and then to use lawsuits to void mail ballots that are disproportionately Democratic.").

109. Graysen Golter, *Zachary Cohen Defeats David Ritter by Five Votes in 2021 Lehigh County Judge Race After Disputed Mail-In Ballots Counted*, MORNING CALL (June 21, 2022, 6:49 PM), https://www.mcall.com/news/elections/mc-nws-2021-judicial-race-20220616-7csm33gixveh5mf2egyjt2kkhq-story.html [https://perma.cc/TJ2B-P8NE].

110. *Id.*

111. *Id.*

112. *Id.*

113. *See generally* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (enforcing the constitutional right to vote).

error or omission is not material in determining whether such individual is qualified under State law to vote . . . ."[114] In Lehigh County, Pennsylvania, where Zachary Cohen and David Ritter were duking it out,[115] the Lehigh County Board of Elections was advised by its staff to set aside 257 mail-in ballots for failure to date the voter declaration signature on the outer envelope as required by state law.[116] However, after a public hearing, the Board ultimately decided to count those ballots.[117] While the Court of Common Pleas affirmed the Board's decision, the Commonwealth Court of Pennsylvania overturned the judgment.[118] The court held that the "shall" language was mandatory, and that "weighty interests" rendered the requirement material.[119] The Supreme Court of Pennsylvania, having issued a fractured decision on the topic barely a year prior,[120] denied discretionary review.[121]

B. *The Next Stage: Lower Federal Court Litigation*

Days after Cohen lost in state court, several mail-in voters who had cast undated ballots sued the Lehigh County Board of Elections in federal court on the grounds that (1) the missing dates were immaterial to their qualifications to vote and (2) excluding their votes on that basis violated the materiality provision in section 10101 of the Civil Rights Act.[122] David

---

114. 52 U.S.C. § 10101(a)(2)(B).

115. According to state law, the top three vote-getters would earn a seat on the court. The first two seats were won handily by Republicans Thomas Caffrey and Thomas Capehart; Ritter and Cohen were vying for the third seat. Golter, *supra* note 109.

116. Devan Cole, *Supreme Court Throws Out Lower Court Ruling that Allowed Undated Ballots to Be Counted in Pennsylvania Judicial Race*, CNN (Oct. 11, 2022, 5:42 PM), https://www.cnn.com/2022/10/11/politics/pennsylvania-undated-ballot-counting-david-ritter-supreme-court/index.html [https://perma.cc/L57H-EAG2]; 25 PA. CONS. STAT. § 3150.16(a) (2020) ("The elector shall then fill out, date and sign the declaration printed on such envelope.").

117. Peter Hall, *Here's Why Federal Court Ruled that Undated Lehigh County Mail-in Ballots Should be Counted*, MORNING CALL (May 27, 2022, 8:30 PM) https://www.mcall.com/2022/05/27/heres-why-federal-court-ruled-that-undated-lehigh-county-mail-in-ballots-should-be-counted/ [https://perma.cc/N2NY-J85T].

118. Ritter v. Lehigh Cnty. Bd. of Elections, No. 1332 C.D. 2021, 2022 WL 16577, at *10 (Pa. Commw. Ct. Jan. 3, 2022), *appeal denied* 271 A.3d 1285 (Pa. 2022).

119. *Ritter*, No. 1332 C.D. 2021, 2022 WL 16577, at *9.

120. *In re* Canvass of Absentee and Mail-in Ballots of November 3, 2020 General Election, 241 A.3d 1058, 1059 (Pa. 2020).

121. Ritter v. Lehigh Cnty. Bd. of Elections, 271 A.3d 1285, 1286 (Pa. 2022).

122. Migliori v. Lehigh Cnty. Bd. Of Elections, No. 5:22-cv-00397, 2022 WL 802159, at *1, *7 (E.D. Pa. Mar. 16, 2022).

Ritter intervened in the federal litigation, arguing that the votes should not be counted, and Cohen intervened to defend his rights as well.[123]

After the district court granted summary judgment for the defendants, the U.S. Court of Appeals for the Third Circuit reversed.[124] As matters of first impression, the court addressed the issues of whether the materiality provision could be enforced through a private right of action under 42 U.S.C. § 1983, and whether the failure to date the absentee ballots constituted a material requirement for voting under the Civil Rights Act.[125] Following full briefing and oral argument, the three-judge panel found for the plaintiffs on both issues and allowed the votes to be counted in the election.[126]

C. *The Supreme Court Litigation*

To prevent those ballots from being opened, Ritter and his Republican team sought an emergency stay of the Third Circuit's judgment from Circuit Justice Samuel Alito, who granted an administrative stay pending the full Court's consideration of the dispute on the merits.[127] Soon thereafter, however, the full Court denied the stay and vacated his order—over a dissent by Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch.[128] While conceding that his views were preliminary and did "not rule out the possibility that further briefing and argument might convince me that my current view is unfounded," Justice Alito maintained that the Third Circuit "broke new ground, and at this juncture, it appears to me that that interpretation is very likely wrong."[129] Further, the dissent warned, "If left undisturbed, it could well affect the outcome of the fall elections, and it would be far better for us to address

123. *Id.* at *1. The Lehigh County Board of Elections itself, having defended its vote to count these ballots in state court, alternated between neutrality and supporting Ritter when the case reached federal court. *Id.* at *7–9.

124. *See* Migliori v. Cohen, 36 F.4th 153, 157–58 (3d Cir. 2022).

125. *Id.* at 156–57.

126. *Id.* at 164.

127. Emergency Application for Stay at 2, Ritter v. Migliori, 143 S. Ct. 297 (2022) (No. 22-30); Ritter v. Migliori, 213 L. Ed. 2d 1013, 1013 (U.S. 2022) (mem.) (Alito, J., in chambers).

128. Order Denying Emergency Application for Stay, 142 S. Ct. 1824, 1824 (2022).

129. *Id.*

that interpretation before, rather than after, it has that effect."[130]

Justice Alito's dissent signaled clearly that at least some Justices would welcome a formal certiorari petition, expressly inviting "any petition for certiorari . . . [to] be filed expeditiously, [so that] the Court will be in a position to grant review, set an expedited briefing schedule, and if necessary, set the case for argument in October."[131] But Ritter did not petition while seeking the stay or even soon thereafter. Instead, within a week of the Court denying the stay, the 257 mail-in ballot envelopes were finally opened and counted, and Cohen defeated Ritter by five votes out of 65,333.[132] The result was certified on June 27, and Cohen received his commission and was sworn in days later.[133]

Three days after the votes were counted and without requesting a recount or other court action,[134] Ritter conceded the election, saying, "There will be no recount, nor any objections to the certification of this election. . . . For the good of Lehigh County, this election must be concluded."[135] But despite this verbal concession, Ritter's efforts were not over. Three days later, he finally petitioned the Supreme Court for certiorari,[136] claiming that the case, while worthy of the Court's review,[137] had become moot on appeal to the Supreme Court

130. *Id.* Alito was apparently referring to potentially close elections in Pennsylvania, with races for governor and U.S. senator on the ballot, in which similar voting issues might arise. *Id.*

131. *Id.*

132. Golter, *supra* note 109.

133. Brief in Opposition at 17, Ritter v. Migliori, 143 S. Ct. 297 (2022) (No. 22-30).

134. Tyler Pratt, *8 Months Later, Lehigh County Certifies 2021 General Election*, LEHIGH VALLEY NEWS (June 28, 2022, 3:31 PM), https://www.lehighvalleynews.com/lehigh-county/2022-06-28/8-months-later-lehigh-county-certifies-2021-general-election [https://perma.cc/RCQ5-KVBG].

135. *Id.*

136. Petition for Writ of Certiorari, *Ritter*, 143 S. Ct. 297 (No. 22-30).

137. Two other circuits had previously addressed similar statutory issues in the context of the Voting Rights Act (VRA), splitting on whether the VRA provided a private right of action for violation of the materiality provisions in that law. *Compare* Schwier v. Cox, 340 F.3d 1284, 1297 (11th Cir. 2003) (finding that section 1983 supported a private cause of action under the materiality provisions of the VRA), *with* McKay v. Thompson, 226 F.3d 752, 756 (6th Cir. 2000) (finding no such private cause of action authorized under those provisions in the VRA).

because the common pleas election had been certified.[138] As a result, he claimed, the Court should grant certiorari but then simply vacate the Third Circuit's opinion and remand to the district court for the case to be dismissed.[139]

Enter *Munsingwear*. Ritter based his request to vacate on the Supreme Court's precedent in *United States v. Munsingwear*,[140] in which the Court set forth the principle that vacatur may be granted as a discretionary remedy to eliminate precedents below where (1) a case would otherwise be certworthy; (2) mootness on appeal denied the appellants the ability to challenge the lower court decision; and (3) mootness was caused by factors outside of the appellants' control ("happenstance").[141] In these circumstances, allowing the lower court decision to remain on the books would compromise the appellant's rights and obligations going forward, which, but for mootness, could have been reviewed and amended on appeal to the Supreme Court.[142] As the Court in *Munsingwear* noted, vacatur in the face of mootness on appeal "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."[143]

Further, the petitioner cited *Bancorp* to support the proposition that vacatur "focuses not on any one party's interest but on 'the public interest.'"[144] In so doing, the petitioner concluded that public interest favored vacating the Third Circuit's judgment allowing election officials to count undated ballots to avoid the uncertainty that would plague future elections as a result.[145] At the same time, the respondent also turned to *Bancorp*'s focus on public interest to oppose

138. Petition for Writ of Certiorari, *supra* note 136, at 4. Ritter failed to mention, however, that the mootness was of his own making, as he had conceded the election. *See id.* Because Ritter himself mooted the case, under a strict interpretation of *Munsingwear*, the case should have been ineligible for vacatur. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 41 (1950) (holding that vacatur is inapposite where a party sleeps on her rights).

139. Petition for Writ of Certiorari, *supra* note 136, at 33.

140. *Id.* at 4–5.

141. *Munsingwear*, 340 U.S. at 40; *see also* Clarke v. United States, 915 F.2d 699, 713 (D.C. Cir. 1990) (Edwards, J., dissenting) (stating that "all of the available evidence suggests that" certworthiness is a necessary condition for the use of *Munsingwear* vacatur at the Supreme Court).

142. *See Munsingwear*, 340 U.S. at 39–40.

143. *Id.* at 40.

144. Reply Brief for Petitioner at 11, Ritter v. Migliori, 143 S. Ct. 297 (2022) (No. 22-30).

145. *See id.* at 11–12.

vacatur.[146] Unlike the petitioner, the respondent relied on *Bancorp*'s presumption against vacatur in favor of preserving judicial precedent, including its reference to "the benefits that flow to litigants and the public from the resolution of legal questions."[147]

Ritter's opponents, however, vigorously contested his claims that the case was moot through mere "happenstance" that was outside of Ritter's control.[148] Instead, the appellees claimed that Ritter had *himself* mooted the claim by conceding the election and thus had mooted his own appeal by voluntary action.[149] As a result, they argued that Ritter could not take advantage of *Munsingwear* vacatur, especially when later precedent applying *Munsingwear* clearly disallowed vacatur when mootness was in the appellant's control.[150] Moreover, the voter-plaintiffs argued that Ritter himself had no future interest in the Third Circuit's precedent because he was now a private citizen unlikely to have any stake in an upcoming election.[151]

Nevertheless, the Supreme Court granted Ritter's request for vacatur,[152] with Justices Sonia Sotomayor and Ketanji Brown Jackson dissenting.[153] In vacating the Third Circuit's decision, the Supreme Court wiped from the books precedent

146. Brief in Opposition at 32–33, *Ritter*, 143 S. Ct. 297 (No. 22-30); *see also* Brief for Respondent at 26, Ivy v. Morath, 137 S. Ct. 414 (2016) (No. 15-486) (finding "no countervailing public policy outweighs the public's interest in judicial precedent, and petitioners have failed to carry their heavy burden 'to demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur' based on mootness that they caused").

147. Brief in Opposition, *supra* note 146, at 33 (citing U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994)).

148. *Id.*

149. *Id.*

150. *Id.* at 3–4. More likely, it was the interest of national Republicans, which was not moot. Once the case reached the Supreme Court, Ritter was represented by the law firm of Consovoy McCarthy, a prominent boutique firm active in Republican electoral causes across the country. *See* Danny Hakim & Stephanie Saul, *The Rising Trump Lawyer Battling to Reshape the Electorate*, N.Y. TIMES, Nov. 4, 2020, at A26, https://www.nytimes.com/2020/06/15/us/elections/voting-william-consovoy-trump.html [https://perma.cc/46W8-H8NH] ("[I]t is [William Consovoy's] work on voting cases across the country that is drawing increasing attention in this presidential election year roiled by pandemic and protest. In recent weeks, his firm, Consovoy McCarthy, has fought against extending the deadline for mail-in voting in Wisconsin, sought to thwart felons from being re-enfranchised in Florida and sued to block California's plan to send absentee ballots to all registered voters.").

151. Brief in Opposition, *supra* note 146, at 4.

152. Ritter v. Migliori, 143 S. Ct. 297, 298 (2022) (mem.).

153. *Id.*

written by a Democratically appointed judge[154] who favored voters' rights.[155]

With the *Ritter* decision vacated, the issue of whether the date requirement violates the Materiality Provision remains unresolved. With a vacancy on the Court, the Supreme Court of Pennsylvania deadlocked on the question on the eve of the 2022 election.[156] Subsequently, two federal cases raising this question were filed in the Western District of Pennsylvania, Erie Division, and remain pending.[157] In other words, the Supreme Court's vacatur of the Third Circuit's decision in *Ritter* means that the materiality issue must now be litigated all over again, without precedent for a guide. [158]

Even if the case raised issues of first impression—as characterized by the circuit court[159]—the Third Circuit's precedent was highly unlikely to prejudice the actual litigants in the future, which is one of the primary reasons for granting vacatur.[160] But a lean toward defaulting toward vacatur ignores the actual litigants even as what constitutes the public interest is hotly debated. The *Ritter* case is therefore a useful and up-to-date tool for understanding *Munsingwear* jurisprudence.

---

154. Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022), *vacated as moot sub nom.* Ritter v. Migliori, 143 S. Ct. 297 (2022); Nomination for Court of Appeals and District Court Judges, 1 PUB. PAPERS 526 (Mar. 22, 1994).

155. Significantly, however, one of the judges on the panel was a Trump appointee; she concurred in the judgment. *See Migliori*, 36 F.4th at 164 (Matey, J., concurring); *see also* Press Release, White House, President Donald J. Trump Announces Intent to Nominate Judicial Nominees (Jan. 22, 2019), https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judicial-nominees/ [https://perma.cc/3KCR-TH2N].

156. *See* Ball v. Chapman, 289 A.3d 1, 8–9 (Pa. 2023).

157. *See* Complaint for Declaratory and Injunctive Relief at 1, Pa. State Conf. of the NAACP v. Schmidt, No. 22-cv-00339 (W.D. Pa. filed Nov. 4, 2022); Complaint for Declaratory and Emergency Injunctive Relief at 2, Eakin v. Adams Cnty. Bd. of Elections, No. 22-cv-00340 (W.D. Pa. filed Nov. 7, 2022). Professor Tucker's husband represents the *Eakin* plaintiffs.

158. Litigation over the same issue has already begun. *See* Penn. State Conf. of the NAACP v. Chapman, 1-22-cv-339 (W.D. Pa., Nov. 21, 2023), appeal pending, No. 23-3166 (3d Cir.); s*ee also* Eakin v. Adams Cnty Bd. of Elections, 1-22-cv-340 (W.D. Pa.) (cross-motions for summary judgment pending on similar issues).

159. *See Migliori*, 36 F.4th at 154 (majority opinion) (describing in the synopsis section the holding of the case as one "of apparent first impression").

160. *See* United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

III. PRIOR SCHOLARSHIP

"If you blinked at just the wrong moment last week, you might have missed that the Supreme Court erased several years of critical . . . law with just one 113-word order."[161]

A. *The (Scant) Literature on* Munsingwear

As (now) District of Columbia Court of Appeals Judge Patricia Millett wrote on SCOTUSblog in 2008, "*Munsingwear* vacatur [is] a less-than-straightforward course to navigate, and one that has occurred in Supreme Court practice only a handful of times [between 2003 and 2008]."[162] One trade journal author recently commented, "[*Munsingwear* is] a case from 1950 that will probably only be familiar to academics and the highest tier of appellate practitioners."[163] Indeed, even an avid Court-watcher need merely blink and she will miss a *Munsingwear* vacatur, buried as the orders tend to be in long lists of other Court actions.[164]

As several commentators have noted, *Munsingwear* vacatur has the effect of making cases "disappear,"[165] or be "erased,"[166] always with no explanation but that the case is moot and almost always without dissent.[167] As one commentator has noted, *Munsingwear* is a hard-to-predict doctrine because only the Supreme Court knows the motives behind wiping out the lower court decisions through this type of vacatur, when it chooses to do so.[168] Moreover, as Professor Matthew Lawrence has

---

161. Leonardo Cuello, *Now You See It, Now You Don't: Supreme Court Drops Medicaid Work Requirements Case, But Still Does Damage*, GEO. UNIV. MCCOURT SCH. OF PUB. POL'Y CTR. FOR CHILD. & FAMS. (May 2, 2022), https://ccf.georgetown.edu/2022/05/02/now-you-see-it-now-you-dont-supreme-court-drops-medicaid-work-requirements-case-but-still-does-damage/ [https://perma.cc/FYL6-LPDD].

162. Pattie Millett, *Practice Pointer: Mootness and* Munsingwear *Vacatur*, SCOTUSBLOG (June 10, 2008, 1:30 PM), https://www.scotusblog.com/2008/06/practice-pointer-mootness-and-Munsingwear-vacatur/ [https://perma.cc/XD4R-GVUF].

163. Stephen B. Edwards, *Who Decides?* Migliori v. Cohen *and Judicial Efforts to Enforce Election Fairness*, PA. LAW., Nov.-Dec. 2022, at 42, 48.

164. *See, e.g.*, Cuello, *supra* note 161; Order List, 598 U.S. (Oct. 11, 2022), https://www.supremecourt.gov/orders/courtorders/101122zor_5426.pdf [https://perma.cc/59U7-PV53].

165. *See, e.g.*, Daniel Purcell, *The Public Right to Precedent: A Theory and Rejection of Vacatur*, 85 CALIF. L. REV. 867, 878 (1997).

166. Cuello, *supra* note 161.

167. *See, e.g.*, Ritter v. Migliori, 143 S. Ct. 297, 298 (2022) (mem.).

168. Selena Simmons-Duffin, *Why the Government's Slow Move to Appeal the Mask Decision May Be a Legal Strategy*, NPR (Apr. 22, 2022, 11:07 AM),

described, "It's a very hard-to-predict doctrine. . . . But essentially, in *some* circumstances, the appellate courts will—in deciding that the case is moot—also wipe it off the books."[169] In fact, early *Munsingwear* commentators signaled, "the Supreme Court possibly could show displeasure with the lower decree by reversing or vacating it,"[170] a prescient take on the practice. And,

> [a]lthough the persuasive force of a vacated judgment likely will remain as long as a court's opinion is available to read, a vacatur order clouds and diminishes the significance of a court's holding. Subsequent litigants often find it difficult to determine if a court vacated a decision for a reason that goes to the validity of the judgment, such as reconsideration of the court's earlier legal reasoning.[171]

Perhaps because the Court does not explain its reasoning and the pattern of *Munsingwear* vacatur has changed in recent years, scholars can only speculate why the Court seems more willing—even eager—to grant vacatur under *Munsingwear*.

Professor Steve Vladeck, perhaps the leading expert on the shadow docket, agrees that there has been an uptick in *Munsingwear* vacatur that should be explained, but has not been.[172] As he tweeted in 2021, "There's a larger story here about how much more often #SCOTUS is using '*Munsingwear*' orders, which vacate lower-court rulings and order dismissal, in circumstances *beyond* *Munsingwear*—in which the

---

https://www.npr.org/sections/health-shots/2022/04/22/1094170593/why-the-governments-slow-move-to-appeal-the-mask-decision-may-be-a-legal-strateg [https://perma.cc/E4H6-TMZ7]; *see also* Daniel Epps, *Mootness and* Munsingwear *in the Travel Ban Litigation*, TAKE CARE BLOG (June 6, 2017), https://takecareblog.com/blog/mootness-and-munsingwear-in-the-travel-ban-litigation [https://perma.cc/2ZZ8-FRBL] ("[T]he Court will *sometimes* vacate a decision by a lower federal court where the dispute has become moot on the way to the Supreme Court." (emphasis added)).

169. Simmons-Duffin, *supra* note 168 (emphasis added); *see also* 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FED. PRAC. & PROC. § 3533.10 (3d ed. 2023) (describing vacatur and dismissal as required when a case becomes moot and a party requests it).

170. Comment, *supra* note 50, at 78.

171. Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229, 1243 (1993) (footnotes omitted).

172. Steve Vladeck, TWITTER (Oct. 12, 2021, 9:57 AM) https://twitter.com/steve_vladeck/status/1447924367548092419 [https://perma.cc/2CMK-ALCA].

prevailing party mooted the case while the appeal is pending."[173]

Notably, although *Munsingwear* and *Bancorp* require that the party requesting vacatur be innocent in causing the case's mootness, it is often difficult to determine which party's actions mooted the case, especially when we drift away from private parties and toward government entities.[174] Similarly, as described thirty years ago, before *Bancorp*, *Munsingwear* "provides a solution in general language that does not contemplate the vast array of procedural postures in which the vacatur issue may arise."[175] In other words, *Munsingwear* doctrine is so devoid of detailed instructions—and, to the extent that *Bancorp* includes them, they seem to conflict with *Munsingwear*—that it is virtually impossible to apply the doctrine consistently. After all, what does it mean to be "happenstance"?[176] Is a new regulation within the government's control?[177] What are "extraordinary circumstances,"[178] and,

---

173. *Id.*

174. Kimberly Strawbridge Robinson, *Trump Supreme Court Twitter Spat Highlights 'Doctrinal Puzzle*,*'* BLOOMBERG L. (Jan. 29, 2021, 4:44 AM), https://news.bloomberglaw.com/us-law-week/trump-supreme-court-twitter-spat-highlights-doctrinal-puzzle [https://perma.cc/H55X-QR8A].

175. Kipp D. Snider, *The Vacatur Remedy for Cases Becoming Moot Upon Appeal: In Search of a Workable Solution for the Federal Courts*, 60 GEO. WASH. L. REV. 1642, 1676 (1992); *see also* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1474–75 (2004) (discussing whether the practice of vacating a case that became moot in the appeals process was ever established, even pre-*Munsingwear*); Ari Cuenin, *Mooting the Night Away: Postinauguration Midnight-Rule Changes and Vacatur for Mootness*, 60 DUKE L.J. 453, 468 (2010) ("As *Bonner Mall* points out, *Munsingwear* implies that the repeal of a regulation may be 'happenstance'—within the permissible bounds of vacatur—even when the government is a litigant. But *Bonner Mall* could be read as disapproving vacatur in *Munsingwear*-like scenarios, suggesting that repealing a regulation could count as a voluntary action that would preclude vacatur. Ultimately, whether a rule rescission or change is a 'vagary of circumstance'—vacatur proper—or the voluntary action of a litigant—vacatur improper—is a question not yet definitively answered by the Supreme Court." (footnotes omitted)).

176. United States v. Munsingwear, Inc., 340 U.S. 36, 40 (1950).

177. *See* U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 23 (1994) (citing Karcher v. May, 484 U. S. 72, 82, 83 (1987)).

178. *See, e.g.*, Purcell, *supra* note 165, at 872, 873 ("[T]he meaning of 'exceptional circumstances' will probably be interpreted in light of the policy goals in the opinion: fairness to the parties and encouragement of settlement. But how should these goals be achieved? Is expense the proper yardstick? How expensive must litigation be before the court's desire to promote settlement qualifies as an 'exceptional circumstance'? *Bonner Mall* gives little guidance to lower courts faced with lawsuits that are both profoundly important and profoundly inconvenient." (footnotes omitted)).

given that *Munsingwear* GVRs are one-sentence orders,[179] how can we seek to define these terms? And what is "voluntary" versus "involuntary" dismissal?[180]

Even one Supreme Court Justice, Ketanji Brown Jackson, has expressed serious concern about the lack of transparency and need for vacatur behind the scenes, saying, "I am concerned that contemporary practice related to so-called '*Munsingwear* vacaturs' has drifted away from the doctrine's foundational moorings."[181] Justice Jackson emphasized that *Munsingwear* vacatur should be used sparingly, stating,

> [I]t is crucial that we hold the line and limit the availability of *Munsingwear* vacatur to truly exceptional cases. To do otherwise risks considerable damage to first principles of appellate review, since at least three background precepts counsel against indiscriminate vacatur of a lower court's judgment:
>
> (1) an appellate court generally does not have jurisdiction to review a moot case, much less issue an order awarding relief in the matter;
>
> (2) *Munsingwear* vacatur is an exception to the statutorily prescribed path for obtaining relief from adverse judgments (namely, appeals as of right and certiorari); and
>
> (3) our common-law system assumes that judicial decisions are valuable and should not be cast aside lightly, especially because judicial precedents "are not merely the property of private litigants," but also belong to the public and "legal community as a whole." Injudicious awards of *Munsingwear* vacatur can also incentivize gamesmanship, as it, for example, enables parties to disclaim potential mootness before the lower

179. *See, e.g.*, Ritter v. Migliori, 143 S. Ct. 297, 298 (2022) (mem.).

180. *See, e.g.*, Brandon T. Allen, Note, *A New Rationale for an Old Practice: Vacatur and the Rules of Professional Responsibility*, 76 TEX. L. REV. 661, 675 (1998) (discussing a case in which the Texas Supreme Court declined to address the "voluntary" versus "involuntary" issue); *see also Bancorp*, 513 U.S. at 24 ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action.").

181. Chapman v. Doe by Rothert, 143 S. Ct. 857, 857 (2023) (Jackson, J., dissenting) (discussing the importance of establishing which party rendered a controversy moot and using *Munsingwear* vacatur only in extraordinary circumstances).

> court, and, if unsuccessful on the merits at that stage, argue mootness on appeal to eliminate the adverse decision through vacatur.[182]

In another case later the same year, Justice Jackson drove her point home yet again, saying, "[A]utomatic vacatur is flatly inconsistent with our common-law tradition of case-by-case adjudication, which 'assumes that judicial decisions are valuable and should not be cast aside lightly.'" [183]

According to Jackson, those concerns are often ignored when a court vacates a decision under *Munsingwear*.[184] It seems clear from the language of *Munsingwear* and *Bancorp* alone that "the federal courts have significant discretion regarding vacatur. The Supreme Court has indicated that vacatur is 'rooted in equity' and therefore depends on 'the conditions and circumstances of the particular case.'"[185] Indeed, fairness concerns seem paramount, and notions of equity and required vacatur of precedent are inconsistent. Through *Munsingwear* vacatur, it is possible to "manipulat[e] precedent in specific substantive areas of the law."[186] Even commentators who

---

182. *Id.* (quoting *Bancorp*, 513 U.S., at 21, 26–27).

183. Acheson Hotels v. Laufer, 601 U.S. 1, 16–17 (2023) (Jackson, J., concurring) (internal citation omitted). Justice Jackson has been voicing her concerns about *Munsingwear* vacatur since she was a judge on the federal district court. *See* Maryland v. U.S. Dep't of Educ., No. 17-cv-2139, 2020 WL 7773390, at *1 (D.D.C. Dec. 29, 2020) (discussing dismissal of claims for mootness after vacatur of order and opinion dismissing claims for lack of standing) ("[I]t is clear beyond cavil that moot cases are to be disposed of on appeal 'in the manner most consonant to justice . . . in view of the nature and character of the conditions which have caused the case to become moot.'").

184. *Maryland*, 2020 WL 7773390, at *5–6 (explaining and emphasizing that *Munsingwear* vacatur is discretionary, not required, under *Bancorp*).

185. Greg Reilly, *The Justiciability of Cancelled Patents*, 79 WASH. & LEE L. REV. 253, 325 (2022); *see also* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 356 (9th ed. 2007) ("When a case has abated or become moot following the decision of the highest state court or the lower federal court and pending application for a writ of certiorari, the Supreme Court *often* will grant the writ, vacate the judgment, and remand the case in order that the proceedings may be dismissed . . . ." (emphasis added)); *cf.* Ruby Emberling, Note, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505, 508 (2021) (noting confusion over the *Munsingwear* standard when an appeals court reviews a decision en banc); WRIGHT, MILLER & COOPER, *supra* note 169, § 3533.10 (calling *Munsingwear* vacatur a "regular practice").

186. Loudenslager, *supra* note 171, at 1241.

subscribe to the "required remedy" interpretation of the doctrine concede this point.[187]

Most of the literature around *Munsingwear* was penned before or around the time of *Bancorp* and discussed the very issue that *Bancorp* sought to address: the prospect of vacatur as a condition of settlement.[188] Commentators had concerns about public perception of such vacatur, saying, for example, "[V]acatur upon settlement may undermine public faith in the judicial process by permitting the federal government to eliminate unfavorable case law."[189] Indeed, the balancing of the benefits of vacatur as opposed to the drawbacks of losing precedent was a topic of conversation for many years.[190] Still, some saw settlement as a desirable enough goal to allow for vacatur if the parties agreed to ask the court to vacate and judicial efficiency would ensue.[191] At least one scholar expressed surprise that the Court in *Bancorp* gave "unexpectedly cursory treatment of the public policy favoring the private settlement of disputes in its analysis of the issues

187. *See, e.g.*, WRIGHT, MILLER & COOPER, *supra* note 169, § 3533.10.1 ("The rule that a lower-court judgment should be vacated on request when the action becomes moot pending appeal yields to some measure of discretion when mootness results from a party's action. If the winner acts to moot the action courts are quite likely to vacate the judgment for fear that the winner has acted to preserve the victory as precedent or preclusion. If the loser moots the action the judgment still may be vacated, but courts are more likely to let the judgment stand.").

188. *See, e.g.*, Pether, *supra* note 175, at 1474–75.

189. Robert P. Deyling, *Dangerous Precedent: Federal Government Attempts to Vacate Judicial Decisions Upon Settlement*, 27 J. MARSHALL L. REV. 689, 690 (1994).

190. *See, e.g.*, Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 607 (1991) ("[T]he cases employ the same basic equation: measuring the cost of vacatur against the cost of denying the motion to vacate. Each court [deciding whether to vacate under *Munsingwear*] expressed a concern for the efficient use of litigant and judicial resources and attempted to balance the public costs of vacatur against the costs of forgoing a possible settlement." (footnotes omitted)); *see also* Henry E. Klingeman, Note, *Settlement Pending Appeal: An Argument for Vacatur*, 58 FORDHAM L. REV. 233, 237–38 (1989) ("Although *Munsingwear* is a tempting invitation for parties seeking vacatur, courts supporting and opposing vacatur as an element of settlement have noted that the *Munsingwear* rule is inapplicable to much litigation ended by voluntary settlement. *Munsingwear* requires vacatur when mootness is a result of uncontrollable outside circumstances. Settlement agreements, in contrast, are the result of voluntary, consensual acts, not 'happenstance.' *Munsingwear* also may not apply to cases in which the parties seek vacatur as a condition of settlement, because those cases are not necessarily moot." (footnotes omitted)).

191. *See, e.g.*, Jill E. Fisch, *The Vanishing Precedent: Eduardo Meets Vacatur*, 70 NOTRE DAME L. REV. 325, 337 (1994).

presented."[192] Another pre-*Bancorp* commentator agreed. "Courts can [and should be] explicitly recognizing the policy interest favoring settlement of disputes."[193]

Since *Bancorp*, several courts and scholars have discussed the arguments for and against *Munsingwear* vacatur, recognizing that *Munsingwear* and *Bancorp* emphasize and aim for different objectives. As Professor Michael Dorf explains, "The core idea of *Munsingwear* mootness is that a party should not be bound by an opinion in a case in which it was deprived of a right to appeal by the mere passage of time."[194] However, "[l]ike *Munsingwear* [, *Bancorp*] seeks to promote healthy development of the law by emphasizing the role of precedent. But unlike *Munsingwear*, the decision prioritizes preserving law over the concern that unreviewed lower-court rulings may contain legal defects."[195] Paul Avron describes the difference in approaches as a "balancing test" that "contemplate[s] balancing the benefits of settlements to the parties and judicial system, and, by extension, the public versus the harm to the public resulting from 'lost precedent.'"[196] Further, before *Bancorp*, "in considering motions for vacatur several circuits did not even

192. Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 35 (1996).

193. Stuart N. Rappaport, *Collateral Estoppel Effects of Judgments Vacated Pursuant to Settlement*, 1987 U. ILL. L. REV. 731, 732 (1987).

194. Michael C. Dorf, *Mask Mandate* Munsingwear *Mootness Mystery*, DORF ON L. (May 3, 2022), http://www.dorfonlaw.org/2022/05/mask-mandate-*Munsingwear*-mootness.html [https://perma.cc/BU6H-E5GM]; *see also* Selena Simmons-Duffin, *Why the Government's Slow Move to Appeal the Mask Decision May Be a Legal Strategy*, NPR (Apr. 22, 2022, 11:07 AM), https://www.npr.org/sections/health-shots/2022/04/22/1094170593/why-the-governments-slow-move-to-appeal-the-mask-decision-may-be-a-legal-strateg [https://perma.cc/FTE7-DRVZ] (noting Vladeck's thoughts that *Munsingwear* provides an opportunity for the government to wipe precedent unfavorable to progressives off the books).

195. Ruby Emberling, Note, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505, 515 (2021).

196. Paul A. Avron, *A Primer on Vacatur of a Prior Court Order as Part of a Settlement Agreement; Recent Case Law*, FED. LAW. (Mar. 2017), https://www.fedbar.org/wp-content/uploads/2017/03/Litigation-Brief-pdf-1.pdf [https://perma.cc/PC5T-DTQY] (quoting Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co., 828 F.3d 1331, 1336 (11th Cir. 2016)); *see also* Robert P. Deyling, *Dangerous Precedent: Federal Government Attempts to Vacate Judicial Decisions Upon Settlement*, 27 J. MARSHALL L. REV. 689, 694 (1994) ("The idea of 'here today, gone tomorrow' court decisions based on the will of the parties seems out of place in a judicial system based on incremental development of the law through precedent. If the courts routinely grant vacatur regardless of the parties' actions, the public may lose respect for the judiciary and the finality of judgments. Public faith in the fairness of judge-made law will likely erode." (footnotes omitted)).

bother to determine whether the opinion was likely to benefit future courts or litigants."[197]

Today, at least some federal appeals courts apply the balancing test; for example, the Eleventh Circuit recently reasoned that "the public interest is not served only by the preservation of precedent," but also:

> by settlements when previously committed judicial resources are made available to deal with other matters, advancing the efficiency of the federal courts. When proper consideration is given to the interests of the parties, the judicial system, and the public taken together, vacatur may still prove an appropriate remedy even if the public's interest in the preservation of precedent is not affirmatively advanced when considered in isolation.[198]

Particularly of concern to some scholars is the idea that the Supreme Court itself could, and does, pick and choose among its *Munsingwear* vacatur alternatives to "avoid wading into treacherous constitutional waters."[199] The decisions might be well-grounded in certain circumstances, such as to avoid preclusion[200] or "[w]hen mootness arises because of events outside the control of the parties,"[201] but the decisions may not be well-grounded in situations where neither of those circumstances exist.

At least some *Munsingwear* observers have noted that one clearer path for the Court to take would be to deny cert (and hence a request for vacatur) if the issue before the Court is less than certworthy.[202] For certworthy cases, the Court could

---

197. Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109, 111 (1995).

198. *Hartford Cas. Ins. Co.*, 828 F.3d at 1337.

199. Epps, *supra* note 168 ("A *Munsingwear* vacatur, however, could be an intriguing compromise that just might generate consensus on the Court. . . . I can't imagine many Justices are eager to address the question of how much legal weight President Trump's statements deserve, especially in light of his ill-considered tweetstorm yesterday. But it would also avoid giving the impression that the Court approved of a nationwide injunction about which the conservative Justices will, I suspect, have serious concerns.").

200. *See, e.g.*, Arthur F. Greenbaum, *Mootness on Appeal in Federal Courts: A Reexamination of the Consequences of Appellate Disposition*, 17 U.C. DAVIS L. REV. 7, 21 (1983).

201. *Id.*

202. *See, e.g.*, Note, *Collateral Estoppel and Supreme Court Disposition of Moot Cases*, 78 MICH. L. REV. 946, 953–58 (1980) (outlining a mootness proposal consistent with Supreme Court review).

vacate under *Munsingwear* to avoid preclusive effects.[203] Given the Court's uneven recognition of mootness, however, this approach would likely also be applied erratically. For example, in *Azar v. Garza*, a recent case in which a minor detained in immigration custody sought and later obtained an abortion, the Supreme Court declined to use the "capable of repetition yet evading review" standard for mootness review, which it typically uses in those types of cases.[204] The Court's wavering standard on mootness leads to murkier standards on certworthiness, only worsening the discretion problem in grant of vacatur.

B. *The Literature on Vacatur and the Value of Precedent*

"Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur."[205]

The foundational concept of common law is stare decisis, or precedent.[206] It is the stuff of the first week of law school, the

---

203. William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 299–300 (1990) ("[I]n *Velsicol Chemical Corp. v. United States*, the Solicitor General suggested an alternative approach. If the Court would have denied review in any event, it should deny review in a mooted case; if it would have granted certiorari or noted probable jurisdiction, it should vacate the decision of the court of appeals if the case is clearly moot, or remand for resolution of the mootness issue by the court of appeals if mootness is 'uncertain or disputed.' The Solicitor General's suggestion was designed to apply a *Munsingwear*-like approach by relieving parties of the collateral consequences of judgments in moot cases when the Supreme Court would have reviewed the lower court decisions, while at the same time relieving the Court's burden by allowing judgments to become final and binding when the Court would not have reviewed them.").

204. Brooke Payton, Comment, *The Supreme Mistake: When a Choice Is Really No Choice at All*, 55 UIC L. REV. 68, 89 (2022).

205. Allen, *supra* note 180, at 673 n.63.

206. *See, e.g.*, LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 57 (9th ed. 2016) ("Common law is different from . . . other forms of law because in common law cases the judges have no text to interpret. . . . Instead, they look only to cases other judges decided in the past and the doctrines that have emerged from those cases. But if judges in common law cases reason solely from earlier precedents, what were *those* precedents based on? The surprising answer is that they, too, were based on precedents, in fact on chains of precedents that stretch back into the practice of law in England well before Columbus's arrival in America." (emphasis in original)).

bedrock principle through which the rule of law is preserved.[207] And yet, through *Munsingwear* vacatur, the Supreme Court seems to be willing to sacrifice the means for the end—it disregards precedent by vacating lower court decisions in the name of preserving the public interest for judicial review, but it actually thwarts the public interest in preserving hard-earned, much-awaited progressive victories. And yet, as one scholar recently asserted, "[w]e really need a justification for stare decisis. It is not something we're entitled to neglect on the ground that it is too obvious to need spelling out."[208]

Unsurprisingly, many scholars have discussed just how and why precedent is useful and important to the public interest.[209] In *Bancorp*, Justice Antonin Scalia stated,

> To allow a party who steps off the statutory path [of appeal] to employ the secondary remedy of vacatur as a refined form of collateral attack on this judgment would—quite apart from any considerations of fairness to the parties—disturb the orderly operation of the federal judicial system . . . . [T]he public interest requires those demands [of 'orderly procedure'] to be honored when they can.[210]

Similarly, one scholar noted that,

> [v]iewing litigation simply as a means of resolving disputes between the litigants also ignores the other

---

207. WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 433 (6th ed. 2006) ("In the Anglo-American tradition, *stare decisis* exercises a tremendous influence, because a judge is supposed to follow precedent even when she would have decided the issue differently."); WILLIAM N. ESKRIDGE JR. ET AL., 2017 SUPPLEMENT TO STATUTES, REGULATION, AND INTERPRETATION, LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 61 (2017) ("A decision to upend settled precedent 'demands special justification.' That 'special justification' must *at least* begin with a convincing case that the challenged precedent is gravely wrong." (emphasis in original) (citations omitted)).

208. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 3 (2012).

209. *See, e.g.*, David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929, 946–47 (2008) (explaining that stare decisis allows for continuity and promotes only "incremental change"); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988) (asserting that stare decisis promotes the "stability of our legal system").

210. Slavitt, *supra* note 197, at 139 (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994)).

> primary function of courts: producing legal rules that guide other courts in resolving future disputes. In deciding cases, courts determine what the parties' exact legal obligations are under the specific circumstances of their dispute. Courts create narrow legal rules that other courts can apply in similar situations. However, no two controversies are factually identical. In each case, courts must decide whether to apply, extend, or reformulate relevant legal doctrines. Nevertheless, the accumulation of numerous judicial decisions can create general doctrines of law that courts may apply broadly in future cases and that in many ways have the same effect as explicit statutory rules.[211]

Therefore, as many have noted, *Munsingwear* cannot and should not stand for automatic vacatur of cases that have become moot on their way to the Supreme Court, a point emphasized by Justice Scalia in *Bancorp*.[212]

In recent months, Americans have become increasingly aware of the value of precedent, especially post-*Dobbs v. Jackson Women's Health Organization*.[213] In discussing *Dobbs* and precedent, Professor Nina Varsava notes the importance of upholding precedent, both because "[s]tability and predictability are integral to the rule of law"[214] and because "[those integral] properties . . . support [other] values . . . by encouraging and enabling us to form reasonable and reliable expectations about our future legal rights and duties."[215] Furthermore, Varsava argues, "precedents should generally be upheld as 'the policy against unfair surprise.'"[216] As she puts it,

> In legal systems like ours where courts have followed a doctrine of stare decisis throughout history and have continually and publicly

---

211. Michael W. Loudenslager, Note, *Erasing the Law: The Implications of Settlements Conditioned Upon Vacatur or Reversal of Judgments*, 50 WASH. & LEE L. REV. 1229, 1257–58 (1993).

212. *See, e.g.*, Eric J. Conn, Note, *Hanging in the Balance: Confidentiality Clauses and Postjudgment Settlements of Employment Discrimination Disputes*, 86 VA. L. REV. 1537, 1545 (2000) ("*Munsingwear* . . . do[es] not support a mandatory rule of vacatur following postjudgment settlements.").

213. *See, e.g.*, Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1868–69 (2023) (noting the ways different communities relied on *Roe* and *Casey*).

214. *Id.* at 1849.

215. *Id.*

216. *Id.* at 1851.

> announced an ongoing commitment to that doctrine, people have come to reasonably and legitimately expect substantial consistency in judicial decisions across time and to rely on that consistency. The judiciary, then, is responsible for people's reliance.[217]

Of course, in *Dobbs*, the Supreme Court actually went through the deliberative and decisional process, jumping through several hoops before actually discarding the precedent; although many Americans found themselves shocked by or in disagreement with the decision,[218] they were at least able to read the Court's reasoning for overturning fifty-year-old precedent.

This is not true for vacatur. Perhaps the biggest anathema in Supreme Court decision-making is present when the Court does not explain its decision to disregard precedent; in fact, the Court is almost required to do so when overruling its own precedential decisions.[219] But when vacating under *Munsingwear*, the Court deprives the public of the opportunity to read and understand, to analyze the propriety of the loss of precedent for themselves, to expect stability and predictability, and to rely on consistent judicial decision-making.

IV. THE EMPIRICAL STUDY

The remainder of this Article considers the full history of *Munsingwear* vacatur. Section IV.A explains data collection and provides a qualitative review of the cases. Section IV.B provides an empirical analysis of the data.

---

217. *Id.* at 1851–52.

218. *See, e.g.*, *Majority of Public Disapproves of Supreme Court's Decision to Overturn* Roe v. Wade, PEW RSCH. CTR. (July 6, 2022), https://www.pewresearch.org/politics/2022/07/06/majority-of-public-disapproves-of-supreme-courts-decision-to-overturn-roe-v-wade/ [https://perma.cc/937H-C4DC].

219. *See, e.g.*, Henry Gass, *Overruled: Is Precedent in Danger at the Supreme Court?*, CHRISTIAN SCI. MONITOR (June 25, 2019), https://www.csmonitor.com/USA/Justice/2019/0625/Overruled-Is-precedent-in-danger-at-the-Supreme-Court [https://perma.cc/2Q93-N4FJ] (explaining the four factors the Court must apply when overruling its own precedent).

A. *Gathering the Cases*

1. Identifying Cases

To create a database of cases, a team of researchers[220] searched on Westlaw and LexisNexis (Lexis) for United States Supreme Court cases decided after November 8, 1994.[221]

Westlaw divides its Supreme Court briefs into two different databases: "Briefs" and "U.S. Supreme Court Petitions for Writ of Certiorari." The team searched in both databases for cases in which any brief mentioned *Munsingwear* vacatur, using the search "MUNSINGWEAR/10 VACAT!" to catch cases in which the words "vacate," "vacated," "vacatur," "vacating," and "vacation" were used.

Lexis houses all of its Supreme Court briefs in the "Briefs, Pleadings, and Motions" database. The team searched this database for cases in which any brief mentioned *Munsingwear* vacatur, again using the search "MUNSINGWEAR/10 VACAT!" to identify cases in which the words "vacate," "vacated," "vacatur," "vacating," and "vacation" were used.

After we gathered initial results, we learned that neither Westlaw nor Lexis contains a full set of Supreme Court briefs; in other words, both services were missing some briefs, especially in early years. Through spot checking, we found that some briefs not present on Westlaw were present on Lexis, and vice versa. We communicated with a Lexis Practice Area Consultant, who advised us that

> [Lexis] consistently cover[s] 100% of post-cert briefs from 1994 to present, and most pre-cert briefs (those petitioning for certiorari) from the 1999-2000 [T]erm to current. For civil cases where cert. is denied, briefs are provided for most cases on the paid docket but are not provided for the cases on the In Forma Pauperis docket.[222]

The database for this Article thereby comprises cases culled from both Lexis and Westlaw.

---

220. The team included two law professors (Lisa Tucker and Stefanie Lindquist) and two Drexel University law students (Corrie Mitchell and Sukhan Kaur).

221. We chose this date because that was the date of the *Bancorp* decision, and all subsequent cases would therefore be relevant.

222. E-mail from Melissa Gorsline, Lexis Practice Area Consultant, to authors (Feb. 6, 2023) (on file with authors).

To be sure that we had as complete a set of briefs as possible, we called both the Supreme Court Library[223] and the Law Library at the Library of Congress.[224] Librarians at both libraries advised us that there was not, to their knowledge, an absolutely complete and searchable database of all Supreme Court briefs.[225]

We acknowledge the limitation that the existing public databases present for briefs. However, the same limitation does not exist with respect to Supreme Court orders; therefore, we are able to assert with confidence that all orders granting *Munsingwear* vacatur are included in our database. Thus, any error due to missing data will be for cases where vacatur was requested but not granted; that said, we are reasonably confident that we have all briefs since 2009, the primary period of our empirical study.

2. Coding

Once the database was complete, the research team coded the variables. We created a codebook to ensure consistency and used cases as units of analysis. Several team members worked to code the cases in the database. We coded for:

- Case name
- Citation
- Date of Supreme Court opinion
- Supreme Court Term
- Whether the Supreme Court granted vacatur
- Whether, if the Supreme Court granted vacatur, it did so under *Munsingwear*
- Whether the Supreme Court granted certiorari, either for purposes of GVR or as a decision on the merits
- Whether a Supreme Court Justice concurred or dissented from the Court's resolution of the case

223. Telephone interview with Sup. Ct. Libr. (Jan. 31, 2023).

224. Telephone interview with Law Library at the Libr. of Cong. (Jan. 31, 2023).

225. For example, the Library of Congress librarian said that pro se briefs are often not included in databases because *pro se* litigants before the Court often do not file the requisite number of copies, some of which are distributed to Supreme Court repositories. *Id.*

- If vacatur was requested, who requested it (petitioner or respondent)
- Whether at least one party cited to *Munsingwear* in its brief
- The political party of the President who appointed the lower court judge who wrote the lower court opinion
- The directionality of the lower court opinion[226]
- Whether or not the Supreme Court found the case to be moot
- Whether the parties to the case disputed whether the case was moot
- Whether the United States Solicitor General was involved in the case, either as a party or an amicus
- Whether the lower court decision was decided by an en banc panel

3. Summary Data

The collection yielded 140 cases that considered *Munsingwear* vacatur since 1994. Of those, we excluded fifteen cases in which the Court denied vacatur, granted certiorari, and ruled on the merits. These cases were nearly all before 2010. While these cases were technically denials of *Munsingwear* vacatur, they do not fall into the category of cases we are concerned about, because the court deliberated on the merits in a transparent way before either affirming or vacating the lower court ruling with its opinion deciding the issue. Overruling or affirming precedent is different from canceling precedent. We also deduplicated, removing all but one of each set of consolidated cases that were considered in the same order. Finally, we excluded one case in which two justices were recused; based on the remainder of the votes we believed that the recusals skewed the likely outcome.

Figure 1 shows the number of cases considering *Munsingwear* vacatur over time, along with the rate at which vacatur was granted.

---

226. We generally used the methodology of the U.S. Supreme Court Database for coding directionality. *See* Wash. Univ. L., *Decision Direction*, THE SUPREME COURT DATABASE, http://supremecourtdatabase.org/documentation.php?var=decisionDirection [https://perma.cc/7HFU-5B2L]. Two areas of divergence were intellectual property (pro-IP tends toward conservative) and collateral decisions (where there is an underlying political valence, but it is far removed from some other legal issue, such as standing).

Figure 1

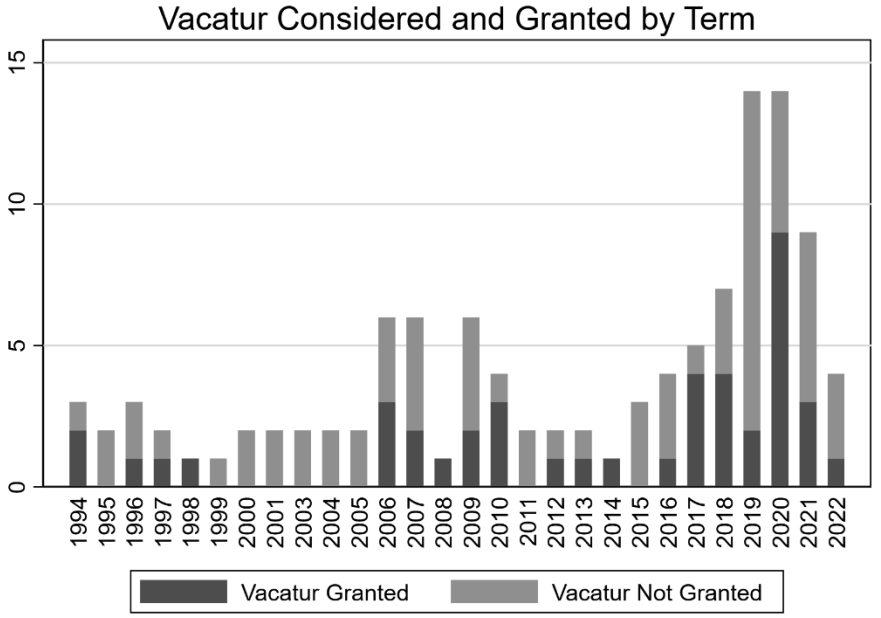


Figure 1 shows a substantial increase in both requests and grants beginning with the 2017 Term, though there was a smaller peak from 2006–2010. The remaining Sections in this Part discuss some of the primary cases and issues occurring during these time periods.

B. *Qualitative Analysis of* Munsingwear *Cases*

In 2016, two major political and judicial shifts occurred. First, Trump was elected President,[227] and the Republican Party came into power.[228] Second, early in 2017, President Trump appointed then-Judge Neil Gorsuch to the Supreme Court.[229] Justice Gorsuch was to be the first of three United States Supreme Court appointments President Trump would

227. *See, e.g.*, Carrie Johnson, *Donald Trump Clinches the Presidency in Major Upset*, NPR (Nov. 9, 2016, 2:33 AM), https://www.npr.org/2016/11/09/500716650/donald-trump-clinches-the-presidency-in-major-upset [https://perma.cc/8WM3-FB9C].

228. *See, e.g.*, Eric Bradner, *Republicans Keep Control of Congress*, CNN (Nov. 9, 2016, 3:08 AM), https://www.cnn.com/2016/11/08/politics/congress-balance-of-power-2016-election/index.html [https://perma.cc/95A9-XF8K].

229. *See, e.g.*, *The Current Court: Justice Neil M. Gorsuch*, SUP. CT. HIST. SOC'Y, https://supremecourthistory.org/supreme-court-justices/associate-justice-neil-m-gorsuch/ [https://perma.cc/9PSL-YFX2].

make, replacing a former swing Justice and a liberal Justice.[230] Since Justice Gorsuch was appointed,[231] the Supreme Court has granted certiorari in thirty cases that ostensibly became moot on their way to the Court and, thus, raised a *Munsingwear* issue.[232] In five cases the Court granted certiorari but wound up vacating for some other reason.[233] In the rest of these cases, the Court granted cert as part of a GVRI, citing to *Munsingwear* and invoking mootness.[234]

In at least nineteen of the twenty-five cases that the Supreme Court issued a GVR, Republicans lost in the circuit courts.[235] In other words, nineteen progressive circuit court victories were subsequently wiped off the books once the Supreme Court granted certiorari and vacated the decision below under *Munsingwear*. These vacated cases touched on key issues important to the progressive movement, particularly during the Trump Administration, including health care,[236]

230. *See, e.g.*, Anita Kumar, *Trump's Legacy Is Now the Supreme Court*, POLITICO (Sept. 26, 2020, 8:41 PM), https://www.politico.com/news/2020/09/26/trump-legacy-supreme-court-422058 [https://perma.cc/LM44-DFNU].

231. Neil Gorsuch took his seat on the United States Supreme Court on April 10, 2017. *See The Current Court: Justice Neil M. Gorsuch*, *supra* note 229.

232. *See, e.g.*, Ritter v. Migliori, 143 S. Ct. 297, 298 (2022) (mem.), *vacating and remanding sub nom.* Migliori v. Cohen, 36 F.4th 153 (3d Cir. 2022).

233. *See, e.g.*, Arkansas v. Gresham, 142 S. Ct. 1665, 1665 (2022) (mem.), *vacating and remanding sub nom.* Gresham v. Azar, 950 F.3d 93 (D.C. Cir. 2020).

234. *See, e.g.*, Ivy v. Morath, 137 S. Ct. 414, 414–15 (2019) (mem.), *vacating and remanding sub nom.* Ivy v. Williams, 781 F.3d 250 (5th Cir. 2015).

235. *See, e.g.*, Village of Lincolnshire v. Int'l Union of Operating Eng'rs Loc. 399, 139 S. Ct. 2692, 2692 (2019) (mem.), *vacating and remanding* 905 F.3d 995 (2018).

236. In *Gresham v. Azar*, Medicaid-eligible parties won in the D.C. Circuit when it affirmed a ruling that a state Medicaid program must primarily consider whether its requirements encourage coverage. 950 F.3d 93, 96 (D.C. Cir. 2020), *aff'g* 363 F. Supp. 3d 165 (D.D.C. 2019). However, the Supreme Court relied on *Munsingwear* to vacate this pro-Medicaid recipient would-be precedent. *Arkansas*, 142 S. Ct. at 1665–66.

immigration,[237] limitations on executive power,[238] voting rights,[239] viewpoint discrimination,[240] Congressional

237. The House sued federal agencies for violating the Appropriations Clause by misappropriating government funds to construct a wall on the southern border. U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 4 (D.C. Cir. 2020), *cert. granted*, *judgment vacated sub nom.* Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021); Respondent's Brief in Opposition at 8, *Yellen*, 142 S. Ct. 332 (No. 4219332). The Biden Administration petitioned the Court for GVR after it ostensibly mooted the case by ceasing construction of the wall. *See Mnuchin*, 976 F.3d at 4. In a challenge to President Trump's executive order banning residents of certain Muslim-majority countries from entering the United States, the Ninth Circuit handed liberals a victory by affirming a preliminary injunction. Hawaii v. Trump, 859 F.3d 741, 756 (9th Cir. 2017), *vacated and remanded*, 138 S. Ct. 377 (2017). However, when the provisions expired, the Supreme Court vacated the judgment as moot under *Munsingwear*. *Hawaii*, 138 S. Ct. at 377. In dissent, Justice Sotomayor argued the Court should have denied certiorari. *Id.* (Sotomayor, J., dissenting). When President Trump's second executive order banning entry of nationals from Muslim-majority countries and suspending a refugee admissions program was challenged, the Fourth Circuit similarly affirmed a preliminary injunction, the Supreme Court again granted *Munsingwear* vacatur, and Justice Sotomayor again dissented. Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353, 353 (2017).

238. The Supreme Court granted vacatur in yet another President Trump case, this time eliminating a Second Circuit holding that a restaurateur and hotelier could seek relief for the President's alleged violations of the Emoluments Clause. Citizens for Resp. & Ethics in Wash. v. Trump, 939 F.3d 131, 170 (2d Cir. N.Y. 2019), *cert. granted*, *judgment vacated sub nom.* Trump v. Citizens for Resp. & Ethics in Wash., 141 S. Ct. 1262 (2021); *Trump*, 141 S. Ct. at 1262; *see also In re* Trump, 928 F.3d 360, 365 (4th Cir. 2019), *on reh'g en banc*, 958 F.3d 274 (4th Cir. 2020), *cert. granted*, *judgment vacated sub nom. Trump*, 141 S. Ct. 1262 (involving whether a district court opinion granting the plaintiffs standing to bring an emoluments complaint should be reviewed on interlocutory appeal).

239. When a Republican candidate sought preliminary injunction of a Pennsylvania extension to mail-in voting deadlines due to the COVID-19 pandemic, the Third Circuit affirmed denial for lack of standing. Bognet v. Sec'y Commonwealth of Pa., 980 F.3d 336, 364 (3d Cir. 2020), *cert. granted*, *judgment vacated sub nom.* Bognet v. Degraffenreid, 141 S. Ct. 2508 (2021). The candidate petitioned the Supreme Court on the merits, but subsequently requested vacatur in response to the respondent's mootness claims. *Bognet*, 141 S. Ct. at 2508. The Supreme Court granted vacatur, erasing the Democratic victory below. *See id.*

240. After President Trump blocked antagonistic profiles from engaging with him on Twitter, the users brought claims against President Trump for viewpoint discrimination, and the Second Circuit agreed. Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019), *cert. granted*, *judgment vacated sub nom.* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021). However, once again, the Supreme Court granted *Munsingwear* vacatur, as alternatively requested by a Republican petitioner, and wiped this Democratic win off the books. *See Biden*, 141 S. Ct. at 1220–21.

impeachment power,[241] gun control,[242] labor relations,[243] and abortion rights.[244]

Of the twenty-five cases where the Supreme Court granted certiorari, four involved politically neutral issues. In two consolidated cases, *Bank of America v. City of Miami* and *Wells Fargo v. City of Miami*, the City challenged a pattern of racially discriminatory lending practices under the Fair Housing Act, claiming the City sustained tax revenue loss as a result.[245] After the banks petitioned for certiorari on the merits, the City filed

241. When the House Committee on the Judiciary wanted to access grand jury material during its impeachment investigation of President Trump, the D.C. Circuit authorized redacted disclosure. *In re* Comm. on the Judiciary, U.S. House of Representatives, 951 F.3d 589, 591 (D.C. Cir. 2020), *judgment entered*, No. 19-5288, 2020 WL 1146808 (D.C. Cir. Mar. 10, 2020), *vacated and remanded sub nom.* Dep't of Just. v. House Comm. on the Judiciary, 142 S. Ct. 46 (2021). After a change in administration mooted the case, the DOJ motioned for vacatur, and the Supreme Court granted it under *Munsingwear*. *Dep't of Just.*, 142 S. Ct. at 46. Rule 6(e) refers to FED. R. CRIM. P. 6(e)(3)(E)(i).

242. The Third Circuit upheld a federal statute prohibiting anyone who had been deemed mentally ill in the past from possessing a gun, finding it did not violate the Second Amendment. Beers v. Barr, 927 F.3d 150, 157 (3d Cir. 2019). Shortly after the judgment, the federal government passed a regulation allowing rehabilitated mentally ill individuals to possess firearms. Beers v. Barr, 140 S. Ct. 2758, 2758 (2020). Despite the government's arguments to the contrary, the Supreme Court ultimately granted *Munsingwear* vacatur in a pro-gun rights decision. *See id.* at 2759.

243. Republicans lost when the Seventh Circuit granted summary judgment in favor of a labor union and against a local right-to-work ordinance. Int'l Union of Operating Eng'rs Loc. 399 v. Vill. of Lincolnshire, 905 F.3d 995, 1009 (7th Cir. 2018). When the case was mooted by state legislative action, the Village sought vacatur, which the Supreme Court granted under *Munsingwear*, eliminating the pro-union precedent below. Vill. of Lincolnshire v. Int'l Union of Operating Eng'rs Loc. 399, 139 S. Ct. 2692, 2692 (2019).

244. The plaintiffs challenged the constitutionality of a government policy prohibiting refugee shelters from performing abortions, which caused the D.C. Circuit to issue a temporary restraining order allowing the plaintiff to obtain an abortion. Azar v. Garza, 138 S. Ct. 1790, 1791 (2018). The government petitioned the Supreme Court for vacatur, claiming mootness despite the plaintiffs' argument that the Court's "capable of repetition, yet evading review" standard should apply, especially given that *Garza* was a class action case involving other pregnant, unaccompanied immigrant minors. *Id.* at 1791–92. In a per curiam opinion, the Supreme Court vacated the circuit court order as moot under *Munsingwear*. *Id.* at 1792, 1793.

245. City of Miami v. Wells Fargo & Co., 923 F.3d 1260, 1263 (11th Cir. 2019), *vacated by* Bank of Am. Corp. v. City of Miami, 140 S. Ct. 1259 (2020), *and* Wells Fargo & Co. v. City of Miami, 140 S. Ct. 1259 (2020).

a suggestion of mootness with the Supreme Court.[246] Even though the City's unilateral action mooted the case, the Court vacated the judgment as moot under *Munsingwear*.[247] In *PNC Bank National Association v. Secure Axcess, LLC*, the Supreme Court vacated a Patent Trial and Appeal Board order, which the court of appeals held inappropriately characterized a patent under applicable federal law.[248] In *Blue Water Navy Vietnam Veterans Association, Inc. v. Wilkie*, the Federal Circuit found for Wilkie when it held that a change to the Department of Veterans Affairs' adjudication procedures was not subject to judicial review.[249] After the Court granted certiorari, both parties agreed that the Federal Circuit's decision in *Procopio v. Wilkie* mooted the case.[250] As a result, the petitioner sought vacatur, which the Supreme Court granted given that the decision below rested on an erroneous procedural theory that was proposed, but not defended, by the government.[251]

Only two cases in which the Supreme Court granted certiorari and vacated the lower court decision since 2017 involved conservative victories in the circuit courts.[252] In *In re Abbott*,[253] the Fifth Circuit held that an executive order during the COVID-19 pandemic that restricted abortions as "not

246. Brief regarding Suggestion of Mootness at 1, *Bank of Am. Corp.*, 140 S. Ct. 1259 (No. 598605); Brief regarding Suggestion of Mootness at 1, *Wells Fargo & Co.*, 140 S. Ct. 1259 (No. 598606); *Bank of Am. Corp.*,140 S. Ct. at 1259.

247. Brief regarding Suggestion of Mootness at 2, *Bank of Am. Corp.*, 140 S. Ct. 1259 (No. 598605); Brief regarding Suggestion of Mootness at 1, *Wells Fargo & Co.*, 140 S. Ct. 1259 (No. 598606).

248. Secure Axcess, LLC v. PNC Bank Nat'l Ass'n, 848 F.3d 1370, 1373 (Fed. Cir. 2017), *vacated by* PNC Bank Nat'l Ass'n v. Secure Axcess, LLC, 138 S. Ct. 1982 (2018).

249. Gray v. Sec'y of Veterans Affs., 875 F.3d 1102, 1104 (Fed. Cir. 2017), *vacated by* Blue Water Navy Vietnam Veterans Ass'n v. Wilkie, 139 S. Ct. 2740 (2019).

250. 913 F.3d 1371 (Fed. Cir. 2019) (en banc) (adopting an interpretation of the Agent Orange Act such that the petitioner had no legal or practical interest in continuing to challenge the now-abrogated interpretation that was the sole basis of the suit. Separately, the Department of Veterans Affairs and the petitioner settled the underlying benefits claim.); Supplemental Brief of Petitioner at 1, 3, Blue Water Navy Viet. Veterans Ass'n, 139 S. Ct. 2740 (No. 17-1693).

251. *Id.* (noting the government's reasoning in its motion to dismiss in Gray v. Wilkie, 139 S. Ct. 2764 (2019) (No. 17-1679)).

252. *See* Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261, 1261 (2021), *vacating by an equally divided court In re* Abbott, 954 F.3d 772 (5th Cir. 2020); Yellen v. U.S. House of Representatives, 142 S. Ct. 332, 332 (2021), *vacating by an equally divided court* U.S. House of Representatives v. Mnuchin, 142 S. Ct. 332 (2021).

253. 954 F.3d 772, 780, 787 (5th Cir. 2020), *vacated as moot, sub nom. Abbott*, 141 S. Ct. at 1261.

immediately medically necessary" could stand.[254] The petitioners' claims for injunctive relief became moot when the governor replaced the challenged executive order with one that permitted abortion providers to resume services.[255] Consequently, Planned Parenthood sought vacatur, and the Supreme Court granted it, placing a limit on the ability of states to use the pandemic as pretext for abortion-restricting legislation.[256]

Though the Court used vacatur before 2017, it did so more sparingly. For example, in *Ivy v. Morath*,[257] the lower court held for the Republican-led state education agency by not requiring it to ensure its driver education programs complied with the Americans with Disabilities Act.[258] However, before a Supreme Court ruling, the case was mooted, because the plaintiffs were no longer subject to driver education provisions.[259] Subsequently, the Court vacated the judgment under *Munsingwear*.[260] Absent its grant of vacatur, future deaf plaintiffs hoping to challenge the agency's program would have faced binding, adverse precedent.

In two other consolidated cases, *Al-Najar v. Carter* and *Amanatullah v. Obama*,[261] aliens detained as enemy combatants at a U.S. military base petitioned for writs of habeas corpus.[262] The court of appeals affirmed in part the district court grant of the government's motions to dismiss, noting that the detainees could not invoke the Suspension Clause.[263] Subsequently, these cases became moot when the government transferred the petitioners from United States

254. *In re Abbott*, 954 F.3d at 780, 787. *But see* Slatery. v. Adams & Boyle, 141 S. Ct. 1262, 1263 (2021) (vacating and remanding Adams & Boyle v. Slatery, 956 F.3d 913, 930 (6th Cir. 2020), upholding the lower court's preliminary injunction).

255. *Abbott*, 141 S. Ct. at 1261; Respondent's Brief in Opposition at 29, *Abbott*, 141 S. Ct. 1261 (No. 20-305).

256. Petitioner's Reply Brief in Support of Certiorari at 3, 6, *Abbott*, 141 S. Ct. 1261 (No. 20-305); *Abbott*, 141 S. Ct. at 1261.

257. 781 F.3d 250 (5th Cir. 2015), *vacated as moot, sub nom*. Ivy v. Morath, 137 S. Ct. 414 (2016).

258. *Id.* at 258.

259. Brief for Respondent at 15–16, *Morath*, 580 U.S. 956 (No. 15-486). The deaf petitioners had either passed the education with undue hardship; turned twenty-five, so the requirement was no longer applicable; or left Texas. *Id.*

260. *Morath*, 580 U.S. at 956

261. Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013) (consolidating both cases), *vacated as moot sub nom*. Amanatullah v. Obama, 575 U.S. 908 (2015).

262. *Id.* at 317.

263. *Id.* at 337.

custody to the custody of other nations.[264] The Supreme Court granted certiorari to GVR under *Munsingwear* after the government's unilateral action mooted the cases.[265]

Since 2017, the Supreme Court has denied requests to vacate in thirty-eight cases.[266] Of these cases where the Supreme Court denied vacatur, five involved politically neutral issues, thirteen involved liberal victories, and twenty involved conservative victories.[267]

In *Keohane v. Inch*,[268] which effectively preserved the conservative circuit court holding that a detention center did not violate the Eighth Amendment by refusing, over security concerns, to accommodate a transgender inmate, the Court denied cert.[269]

The Supreme Court's denial of certiorari in *Electronic Privacy Information Center v. Department of Commerce*[270] and *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity*[271] once again preserved lower court Republican victories. These denials kept in place circuit court holdings that the plaintiffs lacked standing to directly challenge a Department of Commerce decision to add a citizenship question to the 2020 Census[272] and to challenge an APA violation, respectively.[273]

---

264. *Amanatullah*, 575 U.S. at 908–09.

265. *Id.*

266. *See, e.g.*, Keohane v. Inch, 142 S. Ct. 81, 81 (2021); Mass. Lobstermen's Ass'n v. Raimondo, 141 S. Ct. 979, 979 (2021); Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610, 610 (2020); Comcast Corp. v. Int'l Trade Comm'n, 141 S. Ct. 133, 133 (2020); Elec. Priv. Info. Ctr. v. Dep't of Com., 140 S. Ct. 2718, 2718 (2020); Sharpe v. United States, 140 S. Ct. 959, 959 (2020), *reh'g denied*, 140 S. Ct. 2558 (2020); Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 139 S. Ct. 791, 791 (2019); Berninger v. FCC, 139 S. Ct. 453, 453–54 (2018); AT&T Inc. v. FCC, 139 S. Ct. 454, 454 (2018); Am. Cable Ass'n v. FCC, 139 S. Ct. 454, 454 (2018); CTIA-The Wireless Ass'n v. FCC, 139 S. Ct. 454, 454 (2018); TechFreedom v. FCC, 139 S. Ct. 455, 455 (2018); NCTA-The Internet & Television Ass'n v. FCC, 139 S. Ct. 474, 474 (2018); U.S. Telecom Ass'n v. FCC, 139 S. Ct. 475, 475 (2018); United Auto., Aerospace & Agric. Implement Workers of Am. Loc. 3047 v. Hardin Cnty., 138 S. Ct. 130, 130 (2017).

267. *See* cases cited *supra* note 266.

268. 142 S. Ct. 81 (2021).

269. Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1262–63 (11th Cir. 2020); *Inch*, 142 S. Ct. at 81.

270. 140 S. Ct. 2718 (2020).

271. 139 S. Ct. 791 (2019).

272. Elec. Priv. Info. Ctr. v. U.S. Dep't of Com., 928 F.3d 95, 98 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 2718, 2718 (2020).

273. Elec. Priv. Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity, 878 F.3d 371, 374–75 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 791, 791 (2019).

By denying certiorari in *Sharpe v. United States*,[274] the Supreme Court preserved a circuit court decision for Republicans when it held that the Navy did not violate the APA when the Navy awarded a basic housing allowance to a reinstated service member but denied a pay premium to a career seaman.[275] Denial of certiorari in *United Automobile, Aerospace & Agricultural Implement Workers of America v. Hardin County*[276] preserved a Sixth Circuit holding that portions of a local ordinance were not preempted by the National Labor Relations Act (NLRA).[277] Notably, in an analogous recent case, *Village of Lincolnshire v. International Union of Operating Engineers Local 399*,[278] the Supreme Court vacated a Seventh Circuit holding that a village ordinance that imposed restrictions on labor relations was preempted by the NLRA.[279]

During the same time period, the Supreme Court denied certiorari in, *Idaho Department of Correction v. Edmo*,[280] a *Munsingwear*-related case that involved a liberal victory at the circuit court.[281] In that case, the Supreme Court preserved a lower court grant of injunctive relief directing a correctional facility to provide an inmate with gender-confirmation surgery as a medically necessary treatment for gender dysphoria.[282] The Ninth Circuit opinion that remained intact held that prison authorities violated the Eighth Amendment's prohibition against cruel and unusual punishment by their deliberate indifference to the inmate's serious medical needs.[283]

---

274. 140 S. Ct. 959 (2020), *denying cert. to* 935 F.3d 1352, 1361–62 (Fed. Cir. 2019).

275. *Id.* at 959; *Sharpe*, 935 F.3d at 1361–62.

276. 138 S. Ct. 130 (2017), *denying cert. to* 842 F.3d 407, 422 (6th Cir. 2016).

277. *Id.* at 130; *Hardin Cnty.*, 842 F.3d 407, 422.

278. 139 S. Ct. 2692 (2019), *vacating as moot*, 905 F.3d 995 (7th Cir. 2018).

279. *Lincolnshire*, 139 S. Ct. at 2692. Blocked by a state legislature controlled by Democrats, the Republican governor of Illinois could not enact a full-scale "right-to-work" law in Illinois. *Int'l Union of Operating Eng'rs Loc. 399*, 905 F.3d at 1001. To overcome that obstacle, the governor encouraged municipalities to enact local right-to-work zones, and Lincolnshire did so. *Id.* That local law was in dispute in this case. *Id.* at 1009.

280. 141 S. Ct. 610 (2020).

281. Idaho Dep't of Corr. v. Edmo, 141 S. Ct. 610, 610 (2020), *denying cert. to sub nom.* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

282. *Corizon*, 935 F.3d at 767.

283. *Id.*

C. Munsingwear *Vacatur Trends in the Twenty Years After* Bancorp

The Supreme Court's use of vacatur to erase liberal aspects of circuit court holdings is not entirely new. In the two decades following the *Bancorp* decision in 1994,[284] the Court granted a total of twenty-one *Munsingwear* vacaturs.[285] Of the vacaturs the Court granted between 1994 and 2016, sixteen disposed of a lower court ruling that aligned with more liberal ideologies.[286] The Court vacated lower court decisions that advanced progressive values including: assistance,[287] anti-discrimination,[288] reparations,[289] criminal justice reform,[290] economic justice,[291] and church–state separation.[292] On the other hand, the conservative lower court holdings the Court eliminated had restricted detainee rights,[293] championed mandatory minimums,[294] and lessened protections for people with disabilities.[295] Another vacatur wiped away a lower court ruling that was more neutral, not fitting squarely within the

284. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 29 (1994).

285. *See* cases cited *infra* notes 287–96 and accompanying text.

286. *See id.*

287. Pediatric Specialty Care, Inc. v. Ark. Dep't of Hum. Servs., 551 U.S. 1142, 1142 (2007), *vacating* 443 F.3d 1006 (8th Cir. 2006); Green v. Anderson, 513 U.S. 557, 557 (1995), *vacating* 26 F.3d 95 (9th Cir. 1994); *In re* Chrysler LLC, 558 U.S. 1087, 1087 (2009), *vacating* 576 F.3d 108 (2nd Cir. 2010).

288. Seif v. Chester Residents, 524 U.S. 974, 974 (1998), *vacating* 132 F.3d 925 (3d Cir. 1997); Arizonans for Official English v. Arizona, 520 U.S. 43, 80 (1997), *vacating sub nom.* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995); Harper v. Poway Unified Sch. Dist., 549 U.S. 1262, 1262 (2007), *vacating as moot* 445 F.3d 1166 (9th Cir. 2006).

289. United States v. Samish Indian Nation, 568 U.S. 936, 936–37 (2012), *vacating as moot* 657 F.3d 1330 (Fed. Cir. 2011).

290. Alvarez v. Smith, 558 U.S. 87, 89 (2009), *vacating as moot sub nom.* Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008); Camreta v. Greene, 563 U.S. 692, 714 (2011), *vacating in part* 588 F.3d 1011 (9th Cir. 2009).

291. Radian Guar., Inc. v. Whitfield, 553 U.S. 1091, 1092 (2008), *vacating as moot* 501 F.3d 262 (3d Cir. 2007).

292. Joint Sch. Dist. No. 241 v. Harris, 515 U.S. 1154, 1155 (1995), *vacating as moot* 41 F.3d 447 (9th Cir. 1994).

293. Al-Marri v. Spagone, 555 U.S. 1220, 1220 (2009), *vacating as moot sub nom.* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008); Al-Najar v. Carter, 575 U.S. 908, 909 (2015), *vacating as moot sub nom.* Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013).

294. Claiborne v. United States, 551 U.S. 87, 87–88 (2007), *vacating as moot* 439 F.3d 479 (8th Cir. 2006).

295. Ivy v. Morath, 137 S. Ct. 414, 414–15 (2016), *vacating as moot sub nom.* Ivy v. Williams, 781 F.3d 250 (5th Cir. 2015).

typical ideology of either political party.[296] Additionally, the Court's use of vacatur during this twenty-two-year period can be grouped into four groups based on the cause of mootness: state action, inevitable circumstances, intervening court decision, and respondent withdrawal of claims.

In six post-*Bancorp* cases that became moot due to affirmative action taken by the government, the Supreme Court granted vacatur, getting rid of an even distribution of liberal and conservative lower court victories.[297] In *Chester Residents v. Seif*,[298] the Third Circuit held that private plaintiffs could sue state agencies under Title VI of the Civil Rights Act for authorizing a waste facility to be built in a predominantly black neighborhood.[299] The State later withdrew its permit, although it did so only after the waste facility withdrew its permit request, thus mooting the case.[300] The Supreme Court opted to vacate the case under *Munsingwear*, clearing the record of the liberal victory in the lower court.[301] Additionally, the Court addressed a *Munsingwear* issue in *In re Chrysler*,[302] which involved Chrysler's Chapter 11 bankruptcy sale. The Second Circuit held that the sale and release of liens on Chrysler's assets were proper.[303] However, the Supreme Court opted to GVR the case for mootness because the finalization of the sale eliminated the issue of whether the lien credit holders against Chrysler needed to provide written consent prior to the sale.[304] In so doing, it agreed with President Barack Obama's Solicitor General to eliminate the lower court's holding.[305]

In four criminal cases where the Supreme Court vacated lower court decisions—one liberal, three conservative—state

296. LG Electronics, Inc. v. InterDigital Commc'ns, 572 U.S. 1056, 1056 (2014), *vacating as moot sub nom.* Interdigital Commc'ns v. Int'l Trade Comm'n, 718 F.3d 1336 (Fed. Cir. 2013) (involving wireless cell service patents).

297. *See supra* notes 287–95 and accompanying text.

298. 132 F.3d 925 (3d Cir. 1998), *vacated*, 524 U.S. 974 (1998).

299. *Id.* at 937.

300. Suggestion of Mootness at 3, *Seif*, 132 F.3d 925 (No. 97-1620).

301. *Seif*, 524 U.S. at 974.

302. 576 F.3d 108 (2d Cir. 2009), *vacated as moot sub nom.* Ind. State Police Pension Tr. v. Chrysler, 558 U.S. 1087 (2009).

303. *Id.* at 119.

304. *Id.*

305. *Id.*

action caused the mootness.[306] *Alvarez v. Smith*[307] involved a due process challenge to a Chicago Police Department practice of not providing a post-property seizure hearing.[308] The Seventh Circuit reversed the district court's dismissal of the plaintiffs' claims, finding that "some sort of mechanism to test the validity of the retention of the property is required."[309] The City then petitioned for, and the Court granted, certiorari.[310] During oral argument, the Court raised the possibility of mootness and vacatur given that the police had returned the respondents' vehicles and/or reached settlements regarding seized cash.[311] As a result, the City, which had originally argued against mootness, changed strategy during oral argument and requested GVR.[312] In a longer opinion than usual for GVRs, the Court granted vacatur, erasing the lower court's liberal holding.[313]

In *Al-Marri v. Pucciarelli*,[314] the Fourth Circuit, sitting en banc, held simultaneously that the President has the power to detain a legal resident as an enemy combatant and that the defendant in the case was not afforded adequate process to challenge his designation as an enemy combatant.[315] The defendant petitioned the Supreme Court for certiorari, specifically seeking review of the lower court holding regarding the presidential power to detain.[316] However, the case became moot when President Obama directed the petitioner be transferred from military to civilian custody pending criminal

306. Alvarez v. Smith, 558 U.S. 87, 89 (2009), *vacating as moot sub nom.* Smith v. City of Chicago, 524 F.3d 834 (7th Cir. 2008); Al-Marri v. Spagone, 555 U.S. 1220, 1220 (2009), *vacating as moot sub nom.* Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008); Al-Najar v. Carter, 575 U.S. 908, 908–09 (2015), *vacating as moot sub nom.* Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013); Amanatullah v. Obama, 575 U.S. 908, 908–09 (2015), *vacating as moot sub nom.* Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013).

307. 558 U.S. 87 (2009).

308. *Id.* at 89.

309. Smith v. City of Chicago, 524 F.3d 834, 838 (7th Cir. 2008).

310. Petition for Writ of Certiorari at 1, *Alvarez*, 558 U.S. 89 (No. 08-351).

311. Oral Argument at 1:03:43, Alvarez v. Smith., 558 U.S. 87 (2009) (No. 08-351), www.oyez.org/cases/2009/08-351 [https://perma.cc/9VKJ-6Y2A].

312. *Id.*

313. *Alvarez*, 558 U.S. at 89.

314. 534 F.3d 213 (4th Cir. 2008), *vacated as moot sub nom.* Al-Marri v. Spagone, 555 U.S. 1220 (2009).

315. *Id.* at 216.

316. Petition for Writ of Certiorari at 1, *Spagone*, 555 U.S. 1220 (No. 08-368).

proceedings.[317] The Court later granted vacatur, eliminating a holding that was primarily conservative.[318] The Court similarly granted vacatur in the consolidated cases of *Al-Najar v. Carter* and *Amanatullah v. Obama* following the petitioners' transfer from U.S. custody to the custody of other nations, as previously discussed.[319]

In six other post-*Bancorp* cases, the Supreme Court granted vacatur where the controversy became moot due to circumstances outside of either party's control. Three of these eliminated liberal lower court wins, two erased conservative ones, and one was a bit of an outlier. In *Yniguez v. Arizonans for Official English*,[320] the respondent prevailed in the Ninth Circuit on a First Amendment challenge to a provision of the Arizona Constitution that required state business be conducted in English.[321] The Supreme Court granted certiorari on the merits, but later discovered the respondent had ceased working for the state.[322] As a result, the Court vacated the progressive lower court decision against the English-only provision.[323] Two additional cases became moot when the respective respondents, students at the time of filing, graduated and moved away.[324] In *Greene v. Camreta*,[325] the Ninth Circuit established Fourth Amendment protection for a minor student who was interviewed by a caseworker and a sheriff at school without a warrant or parental permission.[326] While the holding was technically conservative, due to qualified immunity, it was progressive in finding a violation of the Fourth Amendment.[327] The defendants petitioned for certiorari, which the Court granted on the merits before learning that the respondent was about to turn eighteen and had moved across the country.[328] In

317. Opposing Motion to Dismiss Brief for Petitioner at 2, *Spagone*, 555 U.S. 1220 (No. 08-368). Notably, after the Court granted certiorari, the administration changed from Bush to Obama, with the new administration switching course and seeking the petitioner's release from military custody, thus mooting the case. *Spagone*, 555 U.S. at 1220.

318. *Spagone*, 555 U.S. at 1220.

319. *See supra* notes 261–65 and accompanying text.

320. 69 F.3d 920 (9th Cir. 1995).

321. *Id.* at 949.

322. Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 60 (1997).

323. *Id.*

324. Camreta v. Greene, 563 U.S. 692, 698 (2011); Joint Sch. Dist. No. 241 v. Harris, 515 U.S. 1154, 1155 (1995).

325. 588 F.3d 1011 (9th. Cir. 2009).

326. *Camreta*, 563 U.S. at 698.

327. *Camreta*, 588 F.3d at 1037.

328. *Camreta*, 563 U.S. at 695, 698.

a three-paragraph order, the Court vacated because the respondent would "never again be subject to Oregon in-school interviewing practices."[329] Similarly, in *Harris v. Joint School District No. 241*,[330] the Ninth Circuit held that a school violated the Establishment Clause by including prayer in its annual high school graduation ceremony.[331] Again, the Supreme Court initially granted certiorari on the merits, but GVRed after learning that the respondent would shortly graduate and no longer be subject to the graduation practices of the school.[332]

In *Eisai v. Teva Pharmaceuticals*,[333] an intellectual property dispute, a non-party launched commercial sales of its generic pharmaceutical, triggering an exclusivity period and mooting the underlying patent dispute between the parties.[334] As a result, the Court granted certiorari to vacate the Federal Circuit's holding, which had reversed dismissal for lack of subject matter jurisdiction; this undid a somewhat politically mixed court of appeals judgment, which had favored generic drug manufacturers.[335]

Not all cases involved vacatur of progressive opinions. As previously discussed, in *Ivy v. Morath*, the Court vacated a conservative lower court judgment after the deaf plaintiffs were no longer subject to the non-ADA compliant driver education provisions at issue.[336] Additionally, in *United States v. Claiborne*,[337] the Eighth Circuit had held that a district court's fifteen-month sentence for the defendant on a drug-possession conviction was unreasonably low.[338] The Supreme Court granted certiorari on the merits and heard oral arguments, but the case became moot when the petitioner died before a decision.[339] As a result, the Court vacated the Eighth Circuit's

329. *Id.* at 698.

330. 41 F.3d 447 (9th Cir. 1994).

331. *Id.* at 458.

332. Joint Sch. Dist. No. 241 v. Harris, 515 U.S. 1154, 1155 (1995).

333. 620 F.3d 1341 (Fed. Cir. 2010).

334. Brief in Opposition at 2, Eisai Co. v. Teva Pharms. USA, Inc., 629 F. Supp. 2d 416 (D.N.J. 2009) (No. 05-0527).

335. *Eisai Co.*, 564 U.S. at 1001. *See generally* Grace Wang, Note, TEVA v. EISAI*: What's the Real "Controversy"?*, 18 MICH. TELECOMM. TECH. L. REV. 269, 269–89 (2011) (explaining the political background of the court of appeals decision and its resulting impact on pharmaceutical policy).

336. *See supra* notes 257–60 and accompanying text.

337. 439 F.3d 479 (8th Cir. 2006), *vacated as moot by* 551 U.S. 87 (2007).

338. *Id.* at 481.

339. *Claiborne*, 551 U.S. at 87.

conservative-leaning holding regarding the defendant's unreasonably low sentence.[340]

Another category of post-*Bancorp* cases is those in which court action mooted the controversy and resulted in vacatur.[341] In *Harper v. Poway Unified School District*,[342] the Ninth Circuit held a school did not violate the First Amendment by prohibiting a student from wearing a shirt that condemned homosexuality.[343] The student petitioned for certiorari, but the district court subsequently entered final judgment dismissing the petitioner's claims as moot.[344] As a result, the Supreme Court vacated the liberal Ninth Circuit holding under *Munsingwear*, writing, "We have previously dismissed interlocutory appeals from the denials of motions for temporary injunctions once final judgment has been entered."[345]

In *Green v. Anderson*,[346] the Ninth Circuit held a California statute violated the Fourteenth Amendment by treating out-of-state residents differently (read: worse) than in-state residents for purposes of receiving public benefits, and the court enjoined it.[347] However, a later Ninth Circuit decision vacated the Secretary of Health and Human Services waiver required for the state statute to operate.[348] As a result, the issue in *Anderson* became moot, and the Supreme Court vacated the lower court decision after granting certiorari and hearing oral arguments.[349]

And in *Hollingsworth v. U.S. District Court for the Northern District of California*,[350] the case was mooted when the district court withdrew its request to broadcast a Proposition 8 (Prop 8) trial as part of a pilot program allowing federal trials to be publicly broadcast.[351] On the eve of trial, the Ninth Circuit denied Prop 8 proponents' request for mandamus to prohibit

340. *Id.* at 88.

341. Four cases fall into this category, with three vacaturs undoing clear liberal precedent, and one undoing a less clear, but still more liberal than not, holding.

342. 445 F.3d 1166 (9th Cir. 2006).

343. *Id.* at 1167.

344. Harper v. Poway Unified Sch. Dist., 549 U.S. 1262, 1262 (2007).

345. *Id.*

346. 26 F.3d 95 (9th Cir. 1994), *cert. granted*, 513 U.S. 922 (1994), and *vacated*, 513 U.S. 557 (1995).

347. Green v. Anderson, 811 F. Supp. 516, 516 (E.D. Cal. 1993).

348. *See* Beno v. Shalala, 30 F.3d 1057, 1073–76 (9th Cir. 1994).

349. Anderson v. Green, 513 U.S. 557, 560 (1995).

350. 562 U.S. 801 (2010).

351. *See* Hollingsworth v. Perry, 558 U.S. 183, 183–85 (2010) (providing the background of the conflict between the parties).

broadcasting.[352] The Supreme Court then issued a temporary stay, and the district court subsequently withdrew its request to broadcast.[353] The petitioners petitioned the Supreme Court to GVR the Ninth Circuit's mandamus denial; the Supreme Court did, undoing another liberal lower court holding, which, this time, had been in favor of broadcasting as supported by the respondents, the gay and lesbian Californians who were challenging Prop 8.[354]

In *Teel v. Khurana*,[355] the Supreme Court vacated a Fifth Circuit holding, followed by another Supreme Court decision in *Beck v. Prupis*.[356] *Beck* overruled the Eleventh Circuit decision that the respondent had standing to bring a wrongful discharge claim under RICO even though the disputed act did not constitute racketeering.[357] Like the decision in *Beck*, the issue in *Teel* became moot, and the Court vacated the lower court's decision.[358]

Finally, in five post-*Bancorp* cases where vacatur was granted between 1994 and 2016, mootness resulted when the respondent withdrew the claim after winning in the lower court and the opposing party petitioned the Supreme Court for certiorari.[359] This method of mootness resulted in vacatur of one conservative and four liberal lower court holdings. In *Hoffman v. Arave*,[360] the respondent-inmate filed a motion to vacate and dismiss the judgment of the Ninth Circuit, arguing he had received ineffective assistance of counsel during plea negotiations.[361] The Court granted certiorari to rule on a circuit split[362] regarding whether Fifth and Sixth Amendment protections applied during a capital defendant's pre-sentence

352. *Id.* at 188.

353. *Id.* at 184–85.

354. *Hollingsworth*, 562 U.S. at 801.

355. 525 U.S. 979 (1998), *vacating as moot sub nom.* Khurana v. Innovative Health Care Sys., Inc., 130 F.3d 143, 150–51 (5th Cir. 1997).

356. 529 U.S. 494 (2000), *overruling* 162 F.3d 1090 (11th Cir. 1998).

357. *Id.* at 495–96.

358. *Compare Khurana*, 130 F.3d at 156 (deciding that the petitioner had no standing to bring some wrongful discharge claims under RICO), *with Beck*, 529 U.S. at 494 (holding that injury "caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO does not give rise to a cause of action").

359. *See* cases cited *supra* notes 341–58.

360. 455 F.3d 926 (2006), *vacated in part*, Arave v. Hoffman, 552 U.S. 117 (2007).

361. *Id.* at 930, 945.

362. *See* Paul J. Sampson, *Ineffective Assistance of Counsel in Plea Bargain Negotiations*, 2010 BYU L. REV. 251, 252–53 (2010) (describing the circuit split).

interview.[363] However, the respondent requested GVR and dismissal of his appeal regarding ineffective assistance of counsel, so that he could instead proceed with resentencing as ordered by the district court on remand.[364] The petitioner agreed vacatur was appropriate, and the Supreme Court granted GVR under *Munsingwear*.[365]

In *Pediatric Specialty Care, Inc. v. Arkansas Department of Human Services*,[366] the Eighth Circuit held that Medicaid recipients had an enforceable right to screenings following state actors' attempts to cut such services.[367] Before a grant of certiorari, the respondents withdrew their claims, eliminating the necessary controversy and leading the Supreme Court to grant vacatur.[368]

Similarly, in *Whitfield v. Radian Guaranty, Inc.*, the Third Circuit required an agency to provide notice of adverse action against the plaintiffs related to their low credit scores.[369] But after a petition for certiorari was filed, the respondents mooted the case by withdrawing the claim, and the Supreme Court granted certiorari purely to vacate the Third Circuit's decision.[370]

In *Samish Indian Nation v. United States*, the Federal Circuit allowed the Samish Indian Nation to seek monetary relief for funding it did not receive under the Revenue Sharing Act (RSA) because of its erroneous omission from the list of federally recognized tribes.[371] However, the Supreme Court granted certiorari to vacate the case as moot after the Tribe withdrew its claims against the government.[372]

The Court did not vacate any conservative-leaning decisions and in only one respondent-withdrawal case did the Court's GVR eliminate a lower court holding that was lacked political

---

363. *Id.* Here, the respondent's lawyer did not attend his pre-sentence interview, which he argues constituted a violation of his Fifth and Sixth Amendment rights. *Id.* at 930.

364. *Arave*, 552 U.S. at 118.

365. *Id.*

366. 443 F.3d 1005 (8th Cir. 2006), *vacated as moot sub nom.* Selig v. Pediatric Specialty Care, Inc., 551 U.S. 1142 (2007).

367. *Id.* at 1017.

368. *Selig*, 551 U.S. at 1142.

369. 501 F.3d 262, 268–69 (3d Cir. 2007), *vacated as moot* 553 U.S. 1091 (2008).

370. *Whitfield*, 553 U.S. at 1091–92.

371. 657 F.3d 1330, 1341 (Fed. Cir. 2011), *vacated in part as moot* 568 U.S. 936, 937 (2012). The RSA existed from 1972 to 1983, but the Samish Tribe was not recognized by the United States until 1996. *Id.* at 1333–35.

372. United States v. Samish Indian Nation, 568 U.S. 936, 936–37 (2012).

valence. In *InterDigital Communications, LLC v. International Trade Commission*,[373] the Federal Circuit reversed an order that terminated an investigation of LG Electronics.[374] LG petitioned the Supreme Court for review, but the respondents subsequently withdrew their claims, mooting the case, and as a result the Supreme Court vacated the judgment favoring the patent holder.[375]

V. RESULTS OF THE EMPIRICAL STUDY

Both the literature and the qualitative review of the cases suggest several hypotheses. We address each below.[376]

A. *Hypothesis 1: Between 2017 and the present, the Supreme Court both considered and granted* Munsingwear *vacatur more often than it had between 1994 and 2016.*

As Figure 1 shows, the number of cases considering *Munsingwear* vacatur increased dramatically during the 2018 Term. The increase continued through the 2021 Term with only a slight drop-off in 2022. During this time, 78% of vacatur requests came from petitioners, 4.4% came from respondents, 4.4% came from both, and 13.2% came from neither.[377] The rate of Supreme Court vacatur grants has increased somewhat as well. Because there were so many fewer cases in prior years, many had either a 100% or 0% grant rate for a very small number each Term. However, when consolidated over a period of years, the rate appears less binary. Between 2017 and 2022, 43.4% of vacaturs requested were granted compared to 33.9% between 1994 and 2016. This increase represents about a one-third increase in grants when vacatur is considered.

B. *Hypothesis 2: Between 2017 and the present, the Supreme Court was more likely to grant* Munsingwear *vacatur if the authoring judge of the lower court opinion was appointed by a Democratic President.*

Since 1994, the Supreme Court has granted *Munsingwear* vacatur more often when the judge who authored the lower

373. 718 F.3d 1336 (Fed. Cir. 2013), *vacated as moot sub nom.* LG Elects., Inc. v. InterDigital Commc'ns, LLC, 572 U.S. 1056 (2014).

374. *InterDigital Commc'ns*, 718 F.3d at 1347.

375. *InterDigital Commc'ns*, 572 U.S. at 1056.

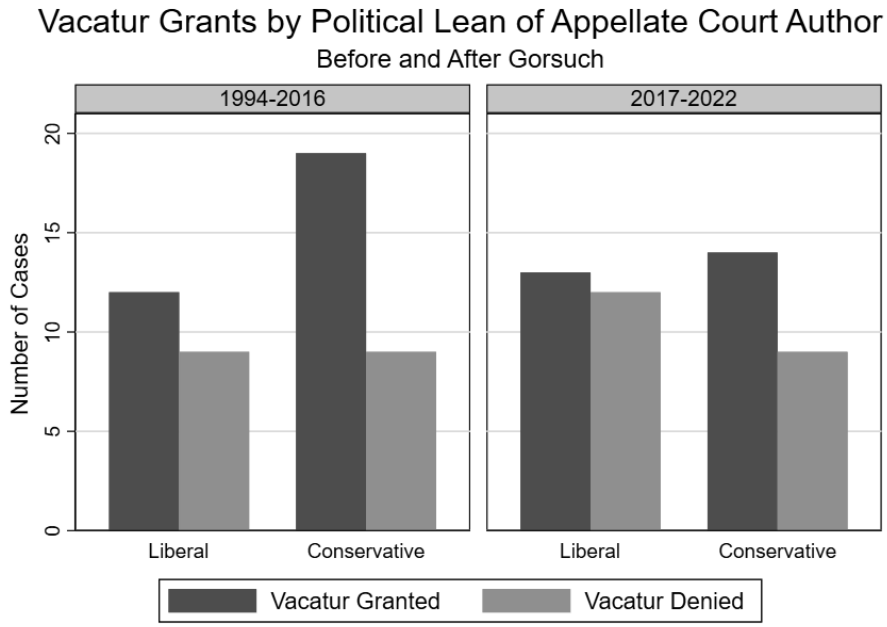
376. These hypotheses are stated positively for ease of reading but converted to null hypotheses for testing.

377. These percentages include our excluded cases because each party was technically granted the vacatur it sought (or not).

court opinion was appointed by a Democratic President (45.7%, compared to 35.3% for Republican-appointed judges). However, the political affiliation when controlling for Term year did not significantly predict whether vacatur was granted.[378] When looking only between the 2017 Term and the present, the grant rate remained similar between Democratic versus Republican President appointments (48.0% and 39.1%, respectively), which remained non-significant.[379]

The following graphs show the distribution of results based on the party of the nominating president. The first shows 1994–2016, and the second shows 2017–2022.

Figure 2



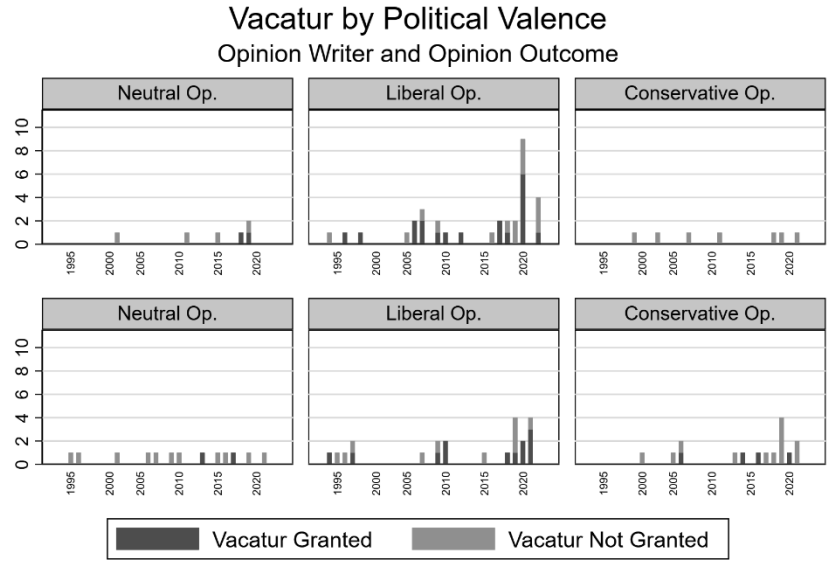
These charts do not show the breakdown of lower court outcomes or *Munsingwear* vacatur rates. The next figure does so, breaking the circuit court opinions out into liberal or conservative (and a few unknowns).

---

378. Unreported logistic regression, with vacatur granted as the independent variable and party of appointing president and term year as dependent variables. The coefficient of the presidential party was an Odds Ratio of 0.78, a 95% Confidence Interval of [0.35, 1.73], and $p = .544$ that the Odds Ratio was any different than one (a non-effect).

379. $\chi 2 = 0.4096$, $p = 0.815$

Figure 3



This chart reveals many themes discussed in this Article. First, the number of cases grew substantially after 2017, with opinions in the lower courts favoring both liberal and conservative interests. Second, there are many more granted cases among the liberal appellate court opinions. Third, the distribution of vacatur does not seem to differ between appointing president party when accounting for type of opinion. Fourth, appellate judges appointed by presidents of either party appear to write opinions favoring both liberal and conservative interests in equal measure, at least among mooted decisions.

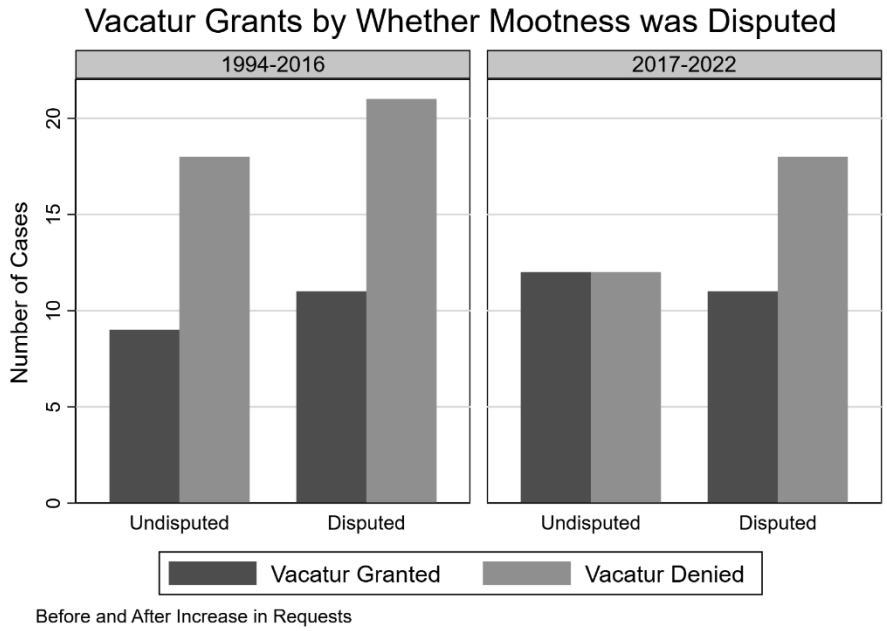
C. *Hypothesis 3: Between 2017 and the present, although often calling* Munsingwear *vacatur the "established" or "ordinary" remedy, the Supreme Court would not be consistent in granting* Munsingwear *vacatur when neither party contested the mootness of a case.*

Because the Court should theoretically only vacate opinions where a case is mooted on its way up from the court of appeals, we might expect that where mootness is disputed, the Court is less likely to vacate. At least some of the time, one party will convince the Court that the case is not moot. But where *both* parties believe that a case is moot, we would expect the Court to act consistently. Consistency does not mean decisions that all

grant or that all deny vacatur. Instead, consistency means that the rate of grant will not depend on factors unrelated to the specific facts and parties of the case. For example, if grants are more common when the lower court opinion leans a particular way politically, that might imply inconsistent treatment.

The following two graphs show the distribution of *Munsingwear* vacatur by whether parties contested mootness. The first shows 1994–2016, while the second displays 2017–2022.

Figure 4



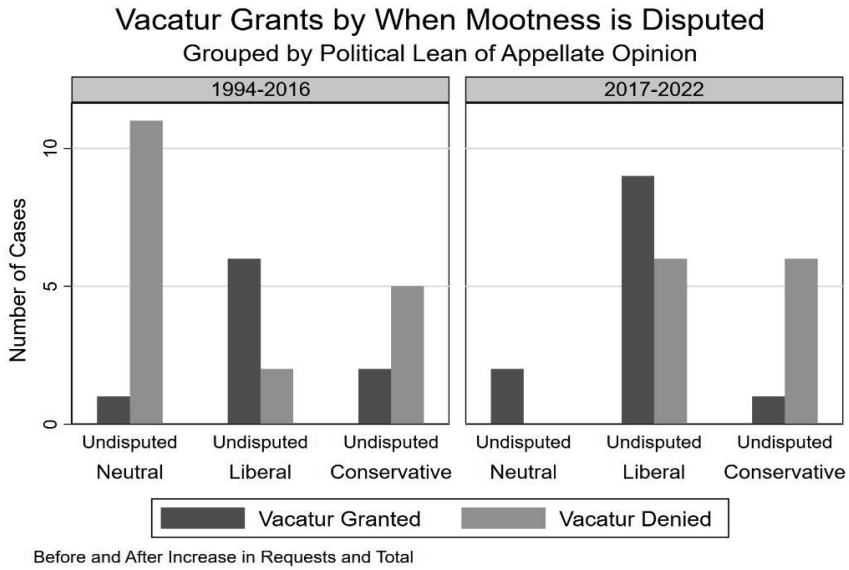
Before 2017, the Court granted vacatur at about the same rates whether mootness was disputed. The differences between the two are not statistically significant. But as the charts show, after 2017 the Court was much less likely to grant vacatur when mootness was disputed. Given the small total, these differences are not statistically significant. However, further analysis shows that the changes are not randomly distributed.

After 2017, the Court was much more likely to deny vacatur if mootness was disputed in cases with a conservative lower court opinion. The Court denied vacatur in every single case

with a conservative lower court opinion.[380] These fourteen cases are more than half of the disputed/denied group.

It appears, then, that the Court has treated disputed cases differently after 2017. But the hypothesis is further that the Court does not treat cases where mootness is *undisputed* in a consistent manner. The following chart shows vacatur results by type of lower court opinion where mootness is undisputed.

Figure 5



The graph shows marked changes between the period before and after 2017, all of which appear to disfavor liberal opinions. In cases without political valence, the Court granted vacatur more often. This may have served as a signal that the Court was willing to depart from *Bancorp*. For conservative opinions, vacatur was granted less often and denied more often. But for liberal leaning opinions, the Court went the other way, strongly favoring vacatur. This has been true since 1994 but has been exaggerated since 2017. For the entire period since 1994, a

380. An unreported logistic regression on whether vacatur is granted and the interaction of mootness disputes and political valence yields neither a statistically significant model as a whole nor a single significant coefficient. However, because mootness-disputed conservative cases perfectly predicted denial of vacatur, those data points were dropped from the model, decreasing its effectiveness.

simple chi-squared test yields $p = .0007$[381] that liberal lower court decisions were randomly vacated as often as other opinions where mootness was undisputed.

The hypothesis seeks to test whether there has been a change since 2017. This requires comparing the entire distribution of decisions in each period, which cannot be tested with a chi-squared test. The best test for this type of comparison is a nested analysis of variance (ANOVA).[382] ANOVA compares how each possible outcome differs (i.e., the variance) from what the baseline distribution shows.[383] ANOVA is useful because it does not assume equal distribution; it compares the variation between groups to the variation within each group. The analysis is nested because the test considers whether one group's results vary not only from each other but from another group's results.

Here, the two groups are the periods before and after 2017. The results are similar to the chi-squared test, with a $p = .002$[384] that these groups would have randomly had these distributions if they were truly equal. In short, even in cases where mootness is undisputed, the Court does not treat all cases the same, and those differences are tied to political valence.

It is possible, of course, that liberal leaning appellate opinions tend to have specific facts that make them more conducive to vacatur even when the parties agree that the case is moot, but this is unlikely given other data, such as the random distribution of appellate opinions among judges appointed by different presidents.

D. *Hypothesis 4: Between 2017 and the present, the Supreme Court was more likely to grant* Munsingwear *vacatur if the lower court decision was favorable to progressives.*

The analysis to this point implies that a shift occurred in 2017, in which liberal leaning appellate opinions were vacated more often than other opinions. However, graphs are insufficient to test this hypothesis, especially because there might be confounding factors. If, for example, liberal cases are also more likely to have some other feature associated with vacatur, we would want to know. The traditional way to test the

381. $\chi 2 = 9.9964$ (two degrees of freedom).

382. For an explanation of how ANOVA works, see Will Kenton, *Analysis of Variance (ANOVA) Explanation, Formula, and Applications*, INVESTOPEDIA (June 12, 2023), https://www.investopedia.com/terms/a/anova.asp [perma.cc/LT9N-RCMN].

383. *See id.*

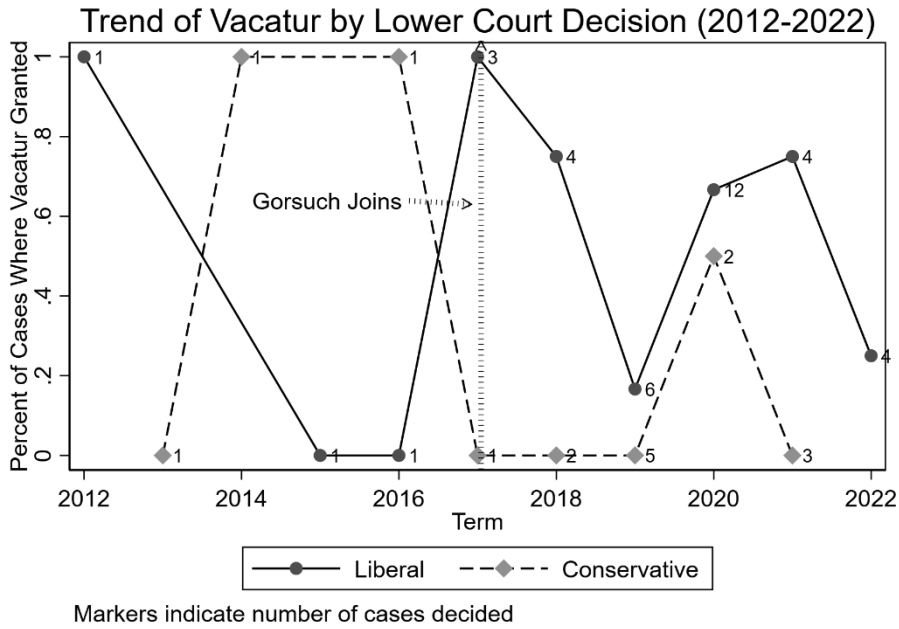
384. $F = 5.01$ (four degrees of freedom).

hypothesis, therefore, is through a regression that includes other reasons why vacatur may have been granted or denied.

A differences-in-differences regression tests whether two trends change at the occurrence of a shock. In other words, if vacatur rates trended in one direction before the random shock, but then diverged after the shock, we can infer that the shock made the difference. The trends before need not be equal, they just need to trend at the same rate.

Here, we hypothesize that the shock was the rapid growth of cases beginning in 2017. This may have occurred due to the appointment of Justice Gorsuch (who appears to favor vacatur generally) or to a larger number of moot cases associated with President Trump's oft-challenged actions, such as the travel ban.[385] It may well be a combination of the two, as we discuss below. However, we believe that the rapid rise of cases was not planned for or telegraphed prior to 2017. A graph of vacatur decision before and after 2017 bears this out.

Figure 6



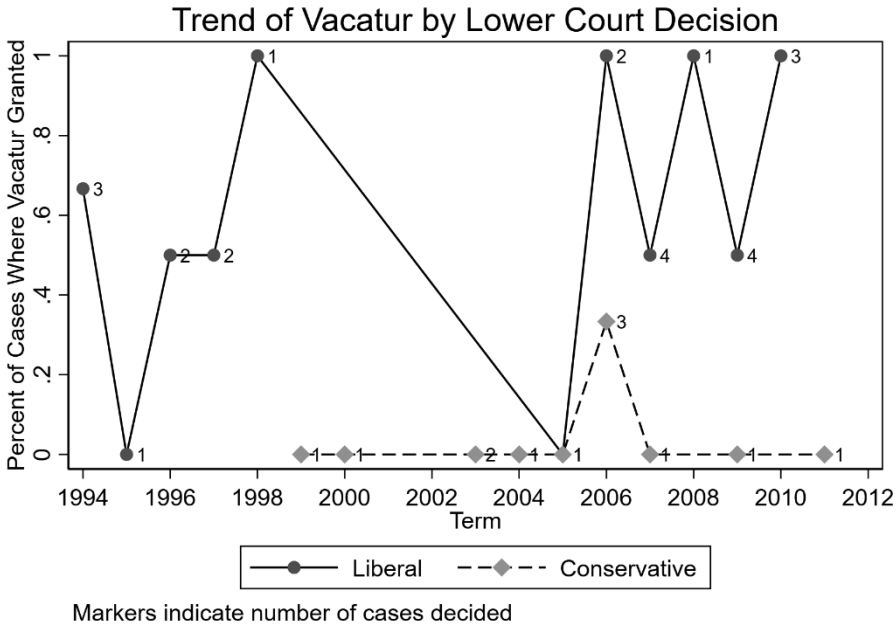
The graph shows a distinct trend in the five years before 2017—conservative decisions were vacated at a higher rate than liberal ones, though the numbers were very small—one case per year. Beginning in 2017, the trend shifts, with a higher

385. *See, e.g.*, Trump v. Hawaii, 137 S. Ct. 2393, 2404 (2018).

grant rate in liberal cases. This graph does not answer the question, of course; there may be other factors and the differences may not be statistically significant (small numbers often lead to non-significant results). However, it does support the intuition that a shock occurred in 2017.

Typically, a differences-in-differences analysis examines the time right before the shock and the time right after. The graph above, for example, shows only five or six years on each side. But here, more data must be considered. The graphs associated with the first three hypotheses imply that liberal opinions have always been vacated more often and, yet the graph above does not seem to bear that out. The following graph shows the results of vacatur decisions from 1994–2011.

Figure 7



As the graph plainly shows, before 2012, there was not a single year in which conservative opinions were vacated more often than liberal opinions. Further, the vacatur rate for conservative opinions was zero for most years.

There is one more set of data to be considered: non-political opinions. In theory, non-political opinions provide a random baseline to compare political opinions against. Because vacatur is supposed to be highly fact-bound, we would expect apolitical

cases to be distributed randomly with the backdrop of *Bancorp*'s presumption against vacatur. The test then considers whether political cases are vacated at the same rates before and after the shock.

We tested these different data concerns using four logistic regressions. The first includes apolitical cases but stops at 2012. The second excludes apolitical cases and includes all cases dating to 1994. The third excludes apolitical cases and simply compares conservative opinions to liberal ones dating back to 2012. The fourth is the same, but for all years.

The regression also includes several variables/covariates that may have affected vacatur. Each model tests whether mootness is disputed, whether the solicitor general was involved,[386] whether there were consolidated cases, and the party of the president who appointed the lower court author. Ideally, the regression would control for the Term as well, but doing so would dramatically decrease the degrees of freedom of the model given all the other covariates being tested. Additional unreported testing confirms similar results when controlling for Term.[387]

The tables below present the results of the regression. The reported results are odds ratios, meaning that increased odds of vacatur will exceed one and decreased odds will be less than one. The result sizes show a rough magnitude of effect but cannot be taken as literal percentages in a logistic differences-in-differences.[388]

---

386. *See* Stephen I. Vladeck, *The Solicitor General and the Shadow Docket Essay*, 133 HARV. L. REV. 123, 126 (2019) (suggesting that the solicitor general usually wins requested relief in non-merits orders).

387. The tests comprised a logistic regression on vacatur granted and the type of appellate opinion, with Term as an additional term. While controlling for Term year, the likelihood of having *Munsingwear* vacatur granted was significantly lower when the lower court opinion was coded as conservative compared to liberal (OR = 0.11, 95% CI [0.04, 0.30], $p < .001$), and when undetermined compared to liberal (OR = 0.21, 95% CI [0.07, 0.59], $p = .005$). Similar results were observed when examining Terms between 2017 and the present, where again while controlling for Term year, the likelihood of having *Munsingwear* vacatur granted was significantly lower when conservative compared to liberal (OR = 0.02, 95% CI [0.00, 0.13], $p < .001$), but was no longer significant when comparing undetermined to liberal (OR = 0.26, 95% CI [0.04, 1.33], $p = .114$).

388. Pinar Karaca-Mandic et al., *Interaction Terms in Nonlinear Models*, 47 HEALTH SERVS. RSCH. 255, 264–65 (2012). To put it concretely, 50% of the treatment group plaintiffs could be vacated before the treatment shock, and 55% could be vacated after the shock (55/50 = 1.1 = 10%). The same odds ratio obtains if 77% of treatment group is vacated pre-shock and 70% is vacated afterward (77/70 = 1.1 =

Logistic Regressions Testing Likelihood of Vacatur
*p<.05 **p<.01 ***p<.001

Included time/cases	Neutral	Neutral	No Neutral	No Neutral
Variables	2012-2016	1994-2016	2012-2016	1994-2016
LowerCtOpn				
Neutral	(base)	(base)		
Liberal	4.927	**48.183****	0.413	**6.575***
Conservative	6.997	6.512	(base)	(base)
Gorsuch				
Before	(base)	(base)	(base)	(base)
2017-2022	3.0366	17.026	0.037	0.303
LowerCtOpn#Gorsuch				
Neutral#Before	(base)	(base)		
Neutral#2017-2022	(base)	(base)		
Liberal#Before	(base)	(base)	(base)	(base)
Liberal#2017-2022	**0.45**	0.0502	**42.027**	2.967
Conservative#Before	(base)	(base)	(base)	(base)
Conservativ#2017-2022	0.016	**0.018***	(base)	(base)
MootnessDispute				
Undisputed	(base)	(base)	(base)	(base)
Disputed	0.422	0.381	0.567	0.437
Solicitor				
No	(base)	(base)	(base)	(base)
Yes	3.121	1.660	3.345	1.612
Consolidated				
No	(base)	(base)	(base)	(base)
Yes	3.878	5.686	0.634	2.952
Appointing Pres				
Unknown	(empty)	(base)		(empty)
Liberal	1.263	0.139	(base)	1.214
Conservative	1.983	0.213	1.263	1.709
Per Curiam	(omitted)	0.0998	1.047	(omitted)
Constant	0.108	0.254	1.266	0.196
N	64	112	52	86
chi-squared	19.442	38.003	15.973	20.506
df_m	10.000	11.000	8.000	8.000
P	0.035	0.0001	0.043	0.0086
r2_p	0.223	0.254	0.224	0.175

Some of the key results are bolded and are unsurprising given the graphical presentation. First, over the period of 1994–2022 (regression 2), liberal court opinions were vacated more

10%). In both cases, the ratio shows a 10% change in odds, but the absolute values of the rates generate different policy implications depending on which case applies. Given that vacation is relatively rare, a relatively small absolute change can yield a relatively large odds ratio.

often than apolitical cases. Over the same period, such opinions were also vacated substantially more often than conservative opinions.[389]

Second, though none of them are statistically significant, the interaction term, *Liberal#2017-2022*, is smaller when the regression includes all years (models 2 and 4) versus only 2012 to the present (models 1 and 3). Combined with the first finding, this difference implies that liberal opinions have always been more likely to be vacated and that the period of 2012–2016 is an aberration. Even though the number of cases increased in 2017, the combined rate stayed about the same compared to the history.

Third, one unbolded result that also follows from the graphical presentation is that, holding all else equal, when mootness is disputed, the Court is much less likely to grant vacatur.

Fourth, none of the other variables seemed to impact rates of vacatur. The odds ratios—even the large ones—are statistically indistinguishable from one.

While the odds ratios are not reliable estimators of probability, Stata provides postestimation commands that do calculate probabilities. The following table presents the probabilities of vacatur in each of the models tested. The table reports both probabilities for covariates standing alone as well as the differences-in-differences interaction.[390]

389. Note also that the interaction term—the differences-in-differences term—is greater than 1 for the models that exclude neutral cases, but not significant. The discussion about probabilities below addresses this.

390. Probabilities are reported by Stata's margins command. They represent probabilities at the average for all other covariates (e.g., the party of the appointing president). The margins change as you combine variables, allowing for testing of different probabilities for different categories. *See* STATA, https://www.stata.com/features/overview/marginal-analysis/ [perma.cc/3Q47-JALL].

Probability of Vacatur Given Political Valence of Lower Court Opinion
Standing Alone and Before/After 2017

**p<.05 **p<.01 ***p<.001*

Included times->	Neutral	Neutral	No Neutral	No Neutral
Variables	2012-2016	1994-2016	2012-2016	1994-2016
LowerCtOpn				
Neutral	0.3665*	0.2075*		
Liberal	0.5593***	**0.6022*** **	0.5459***	0.5735***
Conservative	0.1668*	**0.1512***	0.1435	0.1243*
Shock				
Before	0.4636*	0.3874***	0.5173*	0.4596***
2017-2022	0.4196***	0.4220***	0.4143***	0.4016***
LowerCtOpinion#Shock				
Neutral#Before	0.1996	0.0455		
Neutral#2017-2022	0.3982*	0.3889*		
Liberal#Before	0.5025	**0.6184*** **	0.4573	0.5864***
Liberal#2017-2022	0.5707***	**0.5843*** **	0.5575***	0.5620***
Conservative#Before	0.5791	0.2121	0.6506*	0.1934
Conservati#2017-2022	0.0866	**0.0829**	0.0817	0.0706
MootnessDispute				
Undisputed	0.5127***	**0.4782*** **	0.5009***	0.5229***
Disputed	0.3577***	**0.3175*** **	0.3986***	0.3632***
LowerCtOpnt#MootDisp				
Neutral#Undisputed	0.4644*	0.2764*		
Neutral#Disputed	0.2864	0.1523		
Liberal#Undisputed	0.6657***	**0.7178*** **	0.6161***	0.6827***
Liberal#Disputed	0.4757***	0.5047***	0.4897***	0.4902***
Conservat#Undisputed	0.2127*	**0.2117***	0.1748	0.1771*
Conservat#Disputed	0.1290	0.1023	0.1234	0.0899
Gorsuch#*MootDispute*				
Before#Undisputed	0.5650**	0.4765***	0.5881*	0.5565***
Before#Disputed	0.3833*	0.3176***	0.4620*	0.3869***
2017-2022#Undispute	0.5081***	0.5190***	0.4704***	0.4883***
2017-2022#Disputed	0.3490***	0.3405***	0.3719***	0.3396***

All other things being equal, liberal appellate opinions had about a 55% to 60% chance of being vacated, while conservative opinions had about a 15% chance of being vacated. This is true

across all years, whether we consider apolitical opinions or not. This is a surprising (and perhaps shocking) difference, which is statistically significant. Less surprising are the results when mootness is disputed. The results are consistent in every model—when mootness is disputed, the Court is less likely to grant vacatur.

The result for probabilities for the shock variable requires some explanation. Judging the interaction requires comparing the probability of vacatur between two interactions. For example, in model 2, the likelihood of vacatur of a liberal opinion before 2017 for all cases in all years is 61.8% and the likelihood after is 58.4%, all else equal. These differences are generally not statistically significant.[391]

Even so, the first interaction—lower court valence and the shock year—provides helpful insight into the findings. In the models that begin in 2012 on (1 and 3), there is a clear increase in the likelihood of vacatur for liberal cases after 2017, while there is a commensurate decrease in the likelihood of vacatur for conservative cases. This is not surprising given the shift during that short time. But when data from 1994 is included, the likelihood of vacatur does not change at all for liberal opinions from before or after. The conservative cases, however, are half as likely to be vacated after 2017. Certainly, these percentages are not robust and have large enough errors to limit statistical significance. But they are worth further study at least.

The second interaction—lower court valence and disputed mootness—is relatively uninteresting between models. The probabilities are fairly stable for each category. However, within each category, the results mirror the ANOVA results described in hypothesis three. Across all models, whether or not neutral opinions are included, liberal cases are substantially more likely to be vacated than conservative ones in the same category. For example, in the last model, a liberal opinion with mootness undisputed has a 68% chance of vacatur, while an undisputed conservative opinion has only a 17% chance. Further analysis not shown here indicates that beginning in 2017, these differences become more pronounced. For example, in the last model the likelihood of vacatur in undisputed liberal cases is relatively stable at 69% during 1994–2016 and 67% after 2017. The same likelihood for conservative undisputed cases drops from 27% to 10% beginning in 2017. While

391. The regression estimates indicate this as well.

interesting, the standard error is relatively large, and neither of these changes are statistically significant, primarily due to small sample size.

VI. IMPLICATIONS AND QUESTIONS

The data and model imply that *something* is happening with *Munsingwear* vacatur, but the effect is more in magnitude than likelihood. The regressions show that beginning in 2017 the Court has granted substantially more vacaturs, but the rate of grant is not statistically different than the period dating back to 1994. It seems that the Court has *always* been more likely to vacate liberal leaning appellate decisions than it was from 2012–2016. An ANOVA analysis implies that the volume of grants since 2017 is significantly more than in prior years, and that the lean is exaggerated through all the years where mootness is undisputed. Though we believe these two models show a causal effect over a long period of time, the analysis is not without limitations. The number of observations is relatively small; one might quibble with some of our choices of political lean, and one may question 2017 as the proper shock year or as a shock at all.

Nevertheless, the analysis shows that that liberal opinions have long been vacated at a much higher rate than conservative ones. Further, the *number* of cases increased dramatically beginning in 2017, meaning that *more* cases are being vacated than ever before, even if the rate is the same. And though the tables turned for a short period between 2012 and 2016, the number of cases at issue during that period remained relatively small. We are confident that, even without a causal inference, the data conclusively shows that, since 1994, the Court has been substantially more likely to vacate liberal appellate opinions, and that beginning in 2017, the number of vacatur orders increased as well even if the rate did not change. This means that the Court vacated as many cases in the last five years as the previous twenty-three.

Perhaps surprisingly, though, it appears that the Court is more concerned with the valence of the underlying opinion than with who wrote it. Decisions written by appellate judges of all political backgrounds have been vacated (or not), depending mostly on what they wrote instead of who they were.

What remains are questions about these conclusions, which we now address.

A. *Why an Increase in Cases in 2017?*

Did cases requesting vacatur increase in 2017 because the Court signaled a willingness to vacate despite *Bancorp*, or was there simply an increase in the number of mooted cases before the Court due to the times (e.g., former President Trump's executive actions, pandemic lockdown disputes, and election challenges)? Which came first, the chicken or the egg?

We theorize[392] that the Court invited more challenges, and they came. This theory is based on several data points. First, Justice Gorsuch—who clearly favors vacatur[393]—replaced Justice Scalia—who did not, as seen in his opinion in *Bancorp*.[394]

Second, the Court began with dissents from denial of certiorari in cases where a party sought vacatur, but the Court declined.[395] Our inference is that these Justices were now signaling that vacatur was on the table. This signaling leads to a snowball effect; the more opinions that are vacated, the more normalized vacatur becomes and the further removed the Court gets from *Bancorp*.[396]

Third, while politically polarized times have created more litigation since 2017,[397] it is hard to believe that there were so many more mooted cases since 2017 than at any other time since 1994. The mooting of several patent cases, for example, shows non-Trump related settlements being treated differently from before.[398] There were surely many actions in war, in recession, in impeachments, and so forth that led to mooted

392. Some might argue speculate, but we believe we are on firmer ground than that.

393. *See supra* Section IV.B.

394. U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 27 (1994) (discussing how the use of vacatur may sometimes be unfair and disturb the federal judicial system's operations).

395. *Berninger*, 139 S. Ct. at 453–54.

396. Justices Brett Kavanaugh and Amy Coney Barrett joining the Court appear to further support this snowballing. For example, Justice Barrett recently wrote an opinion dismissing a case calling the Court's *Munsingwear* jurisprudence "well settled" and explicitly declining to "reconsider" it. Acheson Hotels v. Laufer, 601 U.S. 1 (2023).

397. *See The Supreme Court's Shadow Docket: Hearing before the H. Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 117th Cong. 2–4 (2021) (statement of Stephen Vladeck, Professor, Univ. of Tex. Sch. of L.) (stating that in four years, the Trump Administration filed about five times as many requests for emergency relief from the Court as his both predecessors did in sixteen years *combined*).

398. For some examples of patent cases vacated by the Federal Circuit, see Bock, *supra* note 92, at 929 n.60.

challenges to government action during the Clinton, Bush, and Obama presidencies.[399]

Fourth, there is reason to believe that, despite the Court's apparent bias against left-leaning appellate opinions, it appears that the Biden Administration and other progressive interests continue to request *Munsingwear* vacatur as a defense mechanism to protect progressive lower court opinions from reversal in the Supreme Court on the merits.[400]

It may be that there are more mooted cases due to sunset provisions, withdrawn orders, completed elections, and other early resolutions than there were before 2017, but we believe that rather than simply dismissing the cases, one (or both) parties are more often seeking vacatur because of apparent past success.

B. *What Changed in 2012?*

The two graphs showing vacatur rates (as well as the logistic models) indicate that, during a brief five-year period between 2012 and 2016, conservative appellate opinions were vacated at a higher rate than liberal opinions. What accounts for the brief change? The number of cases during that period is relatively low, so it could be random error. But given that the annual case total was low from 1994–2011, and not one of those years involved vacatur of conservative cases more often, error does not seem likely.

We theorize—and here theory approaches speculation—that there may be two reasons. The first is the changing of Justices and their preferences. In 2010, Justice Stevens retired, and Justice Elena Kagan was appointed to replace him.[401] We know from *Alvarez* that Justice Stevens did not favor vacatur,[402] while perhaps Justice Kagan does. For example, Justice Kagan did not join Justice Sotomayor's dissent in *Ritter*.[403] Then, in 2016, Justice Scalia—who did not favor vacatur except in

399. Vladeck, *supra* note 397, at 3–4 (naming a few cases, but hypothesizing that there really were more cases since 2017).

400. *See, e.g.*, Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261, 1261 (2021) (abortion provider seeking vacatur of adverse appellate ruling); Michael Risch, *Procedural Posture and Social Choice*, 107 MINN. L. REV 1621, 1622 (2023) (arguing that "procedural posture is a form of agenda control").

401. Allison Keyes, *Kagan Sworn in as Supreme Court Justice*, NPR (Aug. 7, 2010, 2:16 PM), https://www.npr.org/2010/08/07/129050599/kagan-sworn-in-as-supreme-court-justice [https://perma.cc/D96B-WK9F].

402. Alvarez v. Smith, 558 U.S. 87, 97 (2009) (Stevens, J., concurring in part and dissenting in part).

403. Ritter v. Migliori, 143 S. Ct. 297, 297 (2022) (Sotomayor, J., dissenting).

exceptional circumstances—passed away and, a year later, was replaced by Justice Gorsuch—who does.[404] Thus, during this brief period before President Trump was elected, an additional Justice appointed by a liberal president favored vacatur, while nothing else changed.

This alone does not explain the shift during that period, however. There were still more conservative votes on the Court during this time, and they might have opposed vacatur of conservative opinions. We further suspect that there was something different in the types of cases seen. Few of our study's cases during this period involved challenges to federal legislation, executive action, speech or religion, or any of the other highly politically charged topics one might expect on the Court's docket. This could be due to chance, to the nature of the Obama presidency, or to the political times during those years. But those differences led to fewer cases, with vacatur granted almost exclusively where the result below favored conservatives.

C. *What is the Role of the Solicitor General?*

The empirical results show that the Solicitor General's involvement does not seem to make a difference. The review of briefing reveals that the Solicitor General sometimes requested vacatur and at other times opposed it. The Solicitor might want the Supreme Court to vacate for two reasons. First, it might not want binding precedent against the current or future administrations. Second, it might see vacatur as the lesser of two evils, if it is concerned that the Court will ignore mootness, decide the case on the merits, and reach an unfavorable result. The Solicitor might not want vacatur if the government won below and wants the decision to stand. Unsurprisingly, most of the Solicitor General's requests for vacatur came as petitioner and most of the oppositions came as respondent. In other words, in many cases, the government is just another party.

D. *What is the Cost of* Munsingwear *Vacatur?*

Perhaps the most important question is what this all means. There are two primary implications of our results beyond the obvious political valence of the Court's decision-making. First, they show the insidiousness of the shadow docket. Second, they

404. *See supra* Section IV; Nina Totenberg, *Senate Confirms Gorsuch to Supreme Court*, NPR (Apr. 7, 2017, 5:00 AM), https://www.npr.org/2017/04/07/522902281/senate-confirms-gorsuch-to-supreme-court [https://perma.cc/QGT5-BEQR].

point to a loss of precedent. That is, it is not just that the Court has favored one side, it is that the way that side has been favored is problematic because it remains unchallenged and potentially unchallengeable.

1. The Shadow Docket

Our results both verify the existence of and highlight the problems with the Supreme Court's shadow docket. The "Shadow Docket" is a term first coined by Professor Will Baude to describe the Supreme Court's penchant—recently increased—to summarily reverse or otherwise handle cases on its orders docket without a merit review.[405] Baude wrote his essay about the rising number of cases determined by the shadow docket as a review of the 2013 Term;[406] little did he know of the explosion of *Munsingwear* vacatur orders that would come just a few years later.

There are several problems with the shadow docket. The first is lack of procedural regularity. Merits cases proceed in an expected rhythm, with full briefing, amicus input, public debate, and other trappings of a litigated case.[407] The second is a lack of transparency. Most of the time there is no opinion explaining the outcome,[408] there is no visibility into the voting rules or who voted, and there is no future guidance.[409] Third, stay orders may actually make it easier for the underlying case to become moot, and thus subject to vacatur.[410] The merits of this, of course, depend on whether one thinks it is a good idea for the Court to avoid wading into particular issues.

---

405. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 5 (2015).

406. *Id.* at 1.

407. *Id.* at 9–10 ("Observers know in advance what cases the Supreme Court will decide, and they know how and when the parties and others can be heard.").

408. Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021, 1023 (2021) (studying "Opinions Related to Orders").

409. Baude, *supra* note 405, at 10 (differing from the Court's treatment of merits cases, where "[w]e know what the voting rule is; we know that the results of the voting rule will be explained in a reasoned written opinion; and we know that each Justice will either agree with it or explain his or her disagreement"); *see also* Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 9 (2022) (describing how the shadow docket allows the Court to enact "a wide variety of permanent, major effects without ever providing any explanation of its actions").

410. Pierce, *supra* note 409, at 2.

Our findings verify the procedural regularity and transparency concerns.[411] With respect to regularity, the decisions were not regularized. Our study found that vacatur happened in a variety of ways based on requests from different parties (and sometimes sua sponte[412]). It was usually decided at the cert petition stage before full briefing on the merits of either the case or even the effect of vacatur on the parties or the public. There are no hearings, there is no calendar, and the public does not know what to expect. Even the litigants do not know what to expect and likely game the system. They alternately cherry-pick standards from either *Munsingwear* or *Bancorp* as it suits their needs.

More important, the process is opaque. As far as we know, nobody watching the rise of the shadow docket was aware of either the rise of *Munsingwear* vacatur cases or the political lean. Because these cases are handled on the shadow docket, they are easily unnoticed; prominent observers in the Supreme Court world were astonished that they had not seen this trend.[413]

Further, because most cases result in one-line orders rather than deliberative opinions, it is difficult to understand the Court's bases for ruling. There is neither reasoning to challenge nor even a way to determine whether the Court adopted varying arguments based on *Munsingwear* or *Bancorp*. It is a trend that could continue unchecked well into the future, with little attention to the underlying political valence.

2. Losing Precedent

Vacatur also leads, by its very definition, to a loss of precedent. Here, regardless of the reason, the number of opinions vacated has grown substantially in the last five years. Part III discusses the importance of precedent, and each of those benefits is lost when an opinion is vacated. To be sure, these cases do not fit the mold of *Dobbs*, where the Court vacated fifty-year-old precedent. But there are still problems. First, whether one agreed with *Dobbs* or not, when the Court reverses a precedent on the merits, it jumps through several

411. We do not track stay orders; a future study will have to consider the role of stays in *Munsingwear* vacatur.

412. *See* Petition for Writ of Certiorari at 1, Alvarez v. Smith, 558 U.S. 89 (2009) (No. 08-351); *Alvarez*, 558 U.S. at 89.

413. Zoom Conversation between Lisa Tucker and Erwin Chemerinsky (Oct. 21, 2022); National Constitution Center, YOUTUBE (July 21, 2021), https://www.youtube.com/watch?v=7n0NTPCH0kk [https://perma.cc/VV8D-CAAV].

hoops to offer a transparent—even if unconvincing to skeptics—deliberative reason that the law should change. With vacatur, there is no such reasoning.

Second, though the precedent is new, it is still important—especially in cases that are likely to be moot in the future as well. In other words, vacating precedent forces other similarly situated litigants to retry the very same issues in similar future cases, increasing their costs to challenge what has already been ruled unlawful action and decreasing the public's ability to rely on established law. And if those types of actions are the types that will eventually be mooted, then the Court could grant serial vacatur and thus avoid ever having binding precedent on the books to allow or prohibit future actions. This would allow the losing party in each case (often the government) to repeat its behavior continuously.

Indeed, this is already playing out, albeit in a surprising way. The Biden Administration has begun to use this to its advantage. In cases where it fears the Court will not favor its interests (which is likely given the current makeup of the Court), the best strategy is to make sure the Court does not find a way around mootness, grant certiorari, and issue a binding precedent. And so, the Biden Administration has continued to emphasize mootness and seek vacatur in cases since 2020.[414] A more strategic option is to ask for vacatur. The Court can eliminate liberal precedent as it has done, and the administration can live to fight another day.

The lack of precedent and repeatability is more concerning when considering the direction of the cases vacated. Essentially, anti-liberal actions may be repeated at a much higher rate (and volume) than anti-conservative actions. Precedent is being discarded in a way that favors conservative interests and leaves major liberal issues open for relitigation. If that relitigation does not reach the same result, there will be no prior conflicting precedent to create a circuit split, allowing the Court to deny certiorari even if the case is not moot.

In sum, eliminating precedent, even new precedent, can have substantial long-term effects that both increase the cost of litigation and sway the results of future litigation.

414. *See, e.g.*, Planned Parenthood Ctr. for Choice v. Abbott, 141 S. Ct. 1261, 1261 (2021) (vacating and remanding adverse appellate ruling as sought by abortion provider).

CONCLUSION

And so, *Munsingwear* vacatur. A disease?[415] Perhaps not. But the Supreme Court's willingness over the past six years to vacate important lower court precedent rather than merely denying certiorari certainly warrants close attention, just as other aspects of the shadow docket have. Most critically, the Supreme Court's seeming disregard for lower court precedent should concern scholars and Court watchers. As long as the Court signals to litigants that it is willing to vacate appeals court precedent on request, litigants will ask for the Court to invoke *Munsingwear* to serve short-term, individual case interests, rather than the rule of law as a whole.

Especially of concern is the fact that the Court has declined to articulate or apply evenly any one standard for vacatur when a case becomes moot on its way to the Court. Without a workable test for when to deny cert and when to vacate, the Court will—at the very least—appear to be acting at whim and in service to ideological interests.

Polls show that public confidence in the Supreme Court is at a record low.[416] Critical to the legitimacy of the Court is the perception that the Court acts on principle and with neutral deliberation. By using *Munsingwear* vacatur to undo progressive-leaning lower court law, the Court seems to wield its power, winking as it disregards without explanation the work of the lower courts.

While the study described in this Article does not itself foretell the end of democracy, it does identify pressure against the bulwark of the rule of law. And while *Munsingwear* vacatur alone cannot undo the tradition of precedent altogether, it bears watching as one of many ways in which the Court may be flexing its muscles,[417] preparing for the long Constitutional battle still to come.

---

415. *See* E-mail from Nina Totenberg to Lisa Tucker, *supra* note 2.

416. *See, e.g.*, Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historic Lows*, GALLUP POLLS (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [https://perma.cc/3WDW-WT2D] (finding that "Americans' opinions of the Supreme Court are the worst they have been in 50 years of polling").

417. *See* Adam Liptak, *An 'Imperial Supreme Court' Asserts Its Power, Alarming Scholars*, N.Y. TIMES (Dec. 19, 2022), https://www.nytimes.com/2022/12/19/us/politics/supreme-court-power.html [https://perma.cc/P55H-2WZ3] (referencing additional articles, studies, and essays expounding upon the phenomenon of the "Imperial Supreme Court"). *See generally* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97 (2022) (arguing the current Supreme Court's recent decisions have the effect of increasing its own power at the expense of other political entities).