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Market Commentary
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Domestic Politics

The Supreme Court has issued three important decisions. We found it impossible to fairly discuss the decisions in a few words and so we have placed our in-depth discussion in an appendix to this commentary. Briefly, we will dwell on the consequences. First, the decisions will be extremely unpalatable to both Liberals and Progressives, and it will consolidate their support behind the Democratic party. If the next election should grant them the power, we would not be surprised to see the Democrats take vengeance on the Court – most likely by forcing a reform of its squishy ethical practices, but possibly by imposing limits on the term of a Justice's service. Second, there is broad dissatisfaction with the American education system on many bases from all across the political spectrum. Two of the Court's decision gave a big swirl to this situation without really settling the fundamental controversies. We think dissatisfaction will increase.

Also, down at the court house, a criminal indictment was filed against former President Trump by special prosecutor Jack Smith. Opinions were predictably divided. Noted defense attorney Alan Dershowitz opined that the majority of the charges could be defeated but one was practically self-proving. Trump's former Attorney General Bill Barr described the indictment as damning. For the most part Republican party leadership closed ranks behind defending Trump, but an important minority did not.

To cut through the clutter it is helpful to zero in on exactly what Trump is accused of. He is alleged to have gone off with at least 48 bankers' boxes of his former employer's paperwork, containing – in part - substantive national security secrets. He left these papers lying around in public areas of his Florida golf club. When the government came

looking for the papers, he tried to throw dust in the FBI's eyes and ordered his aide to hide the papers in a bathroom. Topping it all off, he was heard on audio tape showing one paper – apparently a memo authored by the Chairman of the Joint Chief of Staff outlining a plan to attack Iran – to biographers of his White House Chief of Staff while seemingly admitting that it was illegal for him to do so. Most of us would understand that such conduct would land us in hot water. The temperature of Trump's bath is pretty warm: 31 counts of violating the Espionage Act, each count carrying an up to ten year sentence, 5 counts of obstruction of justice, each with a maximum term of 20 years and 1 count of conspiracy to obstruct justice, also with a potential 20 year sentence and with a co-conspirator who potentially could turn state's evidence in return for lenient treatment.

Importantly, these are rather banal crimes. Instead of esoteric crimes which only a President can commit and where prior case law is undeveloped, this indictment concerns activities which thousands of Defense Department and defense industry employees are capable of committing and where more than a century of enforcement actions have developed the case law. In most of their work, Federal prosecutors achieve a better than 95% conviction rate. Given the political sensitivities of this case, we expect they would not have brought the case without feeling they had a 99% probability of prevailing on most of the charges. If Trump were to be convicted at trial, the Federal sentencing guidelines will control imposition of sentence with little room for judicial discretion. Accordingly, we think it highly likely that Trump will plea bargain rather than face imprisonment for the rest of his life. A plea bargain would likely require a clear admission of guilt, a large monetary fine and a suspended custodial sentence. Unknown at this point, but highly likely to be included in the Department of Justice's demand is Trump's cooperation in prosecuting the political operatives behind the January 6 assault on Congress. While DOJ may be prepared to show Trump some leniency in the name of putting a divisive political issue to bed, we expect DOJ to be merciless in dealing with enablers and co-conspirators of the January 6 attack.

Whatever view one may form of the law and the propriety of prosecuting Trump, it is hard to escape the conclusion that Trump has displayed a stunning absence of good judgment in landing himself in this pickle. We expect that conclusion to ultimately be decisive in ending his political career.

Currently Biden is running for re-election without serious opposition from within his own party. His popularity is currently low as inflation has reduced real wages, but that is a purely cyclical problem. By the election the business cycle will almost surely be on an upturn fueled by Federal Reserve easing of interest rates and/or relaxation of quantitative tightening. These policy changes will probably begin sometime this autumn. Biden's coalition will be cemented by a four-year track record of delivering results for his supporters and by a clear understanding among his supporters that the opposition is a threat to their interests and agenda.

Biden's main electoral deficit will be advanced age and the low credibility of his current Vice President as a potential successor. America awarded Reagan a second term even though his age was showing during the re-election campaign. Biden's age is unlikely to be decisive against him unless his health deteriorates in a dramatic fashion. Indeed, Republican overselling of the age issue could easily backfire if Biden's performance in Presidential debates exceeds the low hurdle at which Republicans are currently setting public expectations.

Biden may feel committed to Vice President Harris and capable of winning despite her low credibility as a successor. If he does not or if party power brokers persuade her to drop out of the race for the good of the party, there are several vigorous Democratic governors from among whom Biden could select a new running mate. Doing so would confront the Republicans with the near certainty of Biden's re-election and the possibility that an able successor is being selected who could potentially win a third term for the Democrats in 2028. Democratic control extending until 2032 would likely unravel Republican control of the Supreme Court and would push the green economic transition along to the point of being beyond reversal.

For their part, it is difficult to see how the Republicans can win the Presidency without a candidate that both the Trump supporters and the Romney/McCain supporters can rally behind. We do not believe Trump is that candidate. Trump's supporters are likely to demand that any Republican presidential nominee commit to pardoning Trump. The more pungent Trump's legal problems, the more difficult it will be for Romney/McCain Republicans to accept a nominee so committed to the Trump camp. It may prove impossible for a unity candidate to emerge until Trump as a political issue has passed from the scene. Possibly the threat of Biden's first term stretching into three terms of Democratic dominance will nurture the spirit of compromise within the Republican party, but at this moment tribal loyalties appear to be the controlling force.



China

China has sent airplanes and ships to harass US reconnaissance aircraft and warships operating in and over international waterways offshore of China. Harassment is not going to lead the US Navy to pull back and concede to China's attempted appropriation of littoral seas as sovereign territory. China can continue harassment until a collision occurs, either deliberately or accidentally. At that point the US Navy might announce a policy of sinking Chinese vessels that approach too closely with apparent hostile intent. One could imagine this message being delivered in such a way that the Chinese feel inclined to challenge it and the US finds itself forced to act on its policy. At this point China's government might lose control of the situation. The US Navy sinking a Chinese warship offshore, in the present climate of nationalism which the Chinese government has stoked at home, could lead the Chinese populace to spontaneously go on a murderous rampage against Westerners who happened to be in China at that moment. After such a bloodletting open

war would be likely to result, although a nuclear exchange most likely would be avoided.

While this chain of events may seem farfetched it has historical precedent. This chain of events is pretty much what happened during the Boxer rebellion. President Xi probably would be challenged to see himself as standing in the shoes of Dowager Empress Cixi. Actually, beneath her exotic finery, the Empress was the pious daughter of a senior bureaucrat. At the parental table she learned Chinese patriotism and an understanding that patriotism required selective adoption of Western methods for the good governance of the state. However, her political education in the hothouse of dynastic politics failed to couple a deep understanding of the foreigners to her policy direction. The result was an on again – off again policy that ended up creating turmoil in the state, identifying the dynasty as the problem in the minds of the more forward-thinking members of the populace and building bad relations with the foreigners. As the saying has it, history never repeats but it often rhymes.

The chain of events we have just sketched has been concerning senior US diplomats for almost a decade. The US Secretary of State Blinken recently paid a visit to Beijing. The tone of US-China relations was somewhat normalized, but neither side suggested any movement on substantive issues. The Chinese government is sitting atop a population of a billion people who have had a taste of the good life and want more. It is not going to dial back on its plan to appropriate the littoral seas. It regards as unimportant its prior adherence to the UN Law of the Seas treaty (which was supposed to resolve questions such as these and which – ironically – the US did not sign.) Blinken is an able diplomat, but diplomacy can achieve only cosmetic results if the counter party is uninterested.

The conflict between China and the US and more generally between China and the outside world is fundamental. It operates on the cultural, economic and political planes. It is not the product of one man's policy or even of one party's ideology. The conflict has been in existence for more than a century and it has generated both a succession of limited wars and also limited periods of peaceful engagement and

prosperity. One such period of engagement is clearly ending, but war is not yet the inevitable successor.



The Russia-Ukraine War

Ukraine has launched its counter-offensive. The Russians had prepared for a push down the middle of the front towards Melitopol. Such a move would have severed lines of supply to the forces occupying the Crimea and adjoining territory in the southern Ukraine. If the Ukraine succeeded in such a drive, the Russians might well be forced to abandon their Ukrainian conquests outside of the Donbas (which lies in the northern sector.) To meet this threat the Russians have prepared multiple lines of field fortifications and have organized their forces for a professionally executed defense in depth. It is also highly likely that they blew a major dam across the Dnieper at Nova Kakhovka. The resulting flooded zone protects their southern flank and allows forces to be freed up for use in the central zone. However, it also eliminates an essential source of water to the Crimea, which strongly suggests the Russians doubt their ability to retain possession of Crimea. The Russians also appear prepared to blow up the Zaporizhzhia Nuclear Power Station at Enerhodar to create a similar obstacle. The plant is Europe's largest nuclear plant with 6 reactors capable of generating a combined 5.7 Gigawatts. Currently the reactors are in cold shut down state, so blowing them might not have the same continental wide effects as the Chernobyl disaster. But it still could be provocative and reckless enough to force a direct NATO intervention in the war.

The Ukrainians have in fact made a push towards Melitopol. But they are not concentrating their forces for one mighty frontal assault on prepared defenses. Instead, they are mounting attacks all along the front, probing for weakness, while keeping a significant reserve available to exploit any breakthrough. Such a strategy is likely keeping the Russians off balance and stressing their logistic and command and

control systems. The true target of Ukrainian attack is probably not so much Russian muscle as the nervous system that deploys and directs the muscle. If they are successful in such a strategy what we are likely to see is a battlefield which remains fairly static for an extended interval and then abruptly collapses and is rapidly rolled back in chaos and confusion.

An obvious observation of the war is that Russia needs to up its military game. The country has, in fact, launched multiple initiatives to do so. One of the most obvious steps in this direction is to have a unified command structure. Part of creating that structure has been an ongoing effort to fold the various militias and irregular forces into the main military structure. In particular, the Russian Ministry of Defense has sought to nationalize the Wagner mercenary company. That move has been bitterly opposed by the company head Yevgeny Prigozhin. Tensions between him and the ministry have been increasing for months, with Prigozhin on several occasions accusing the Ministry of military attacks on his unit. Finally, Prigozhin lashed out in open revolt – seizing the headquarters of the Russian forces in the Ukraine and sending a flying column of 4,000 men racing towards Moscow. The Russian army had so stripped the interior of troops that they were not able to respond before the column was within a 4-hour drive of the Capitol. At that point the best they could mount was an inconclusive air to ground interdiction. The main point of this intervention seems to have been to inform Prigozhin that the Head of the Russian Aerospace force, Army General Sergei Surovikin - an apparently secret ally of Prigozhin, was no longer able to protect him. Putin seems to have left Moscow for St Petersburg. In any case, Putin issued a defiant speech comparing the Wagner men to the mutineers of 1917 and promising their swift punishment. He then quickly cut a deal with Prigozhin brokered by the Belarus dictator Lukashenko. Under the deal the mutineers receive an amnesty, Wagner is nationalized and Prigozhin goes into exile in Belarus. Putin is now engaged in purging the military of generals of doubtful loyalty or competence. Valery Gerasimov has apparently been withdrawn as theater commander in the Ukraine and tasked with sorting out the officer corps. Surovikin (who holds a four-star rank) has disappeared from view. The story

is being put out that the Russian secret police learned of the plot two days before its commencement and their intervention sufficiently threw it off balance as to cause its ultimate misfire. The Americans are claiming they saw Wagner stockpiling supplies for weeks ahead of time – which lends credibility to the revolt being the result of substantial plotting and not just an outburst of temper on Prigozhin's part. At this point we can be fairly confident all parties are spinning the narrative and so we will remain skeptical of any claims which show a party in a good light.

Most likely Prigozhin acted expecting support from at least part of the Russian army, but when that support failed to develop, he realized that without air cover his men were about to be massacred on the road to Moscow and so he folded his hand. In any case he delivered a massive public humiliation to Putin, who is known for ruthless murderous pursuit of his enemies. Prigozhin also painted a nice blueprint for any general ambitious to seize power in Russia. Putin is a classic KGB man, while Prigozhin is a street thug. It's not much of a choice, but the world is probably safer with Putin's finger on the Russian nuclear trigger than with Prigozhin's.

Wagner has been Russia's most successful assault unit. After the mutiny, the Defense Ministry is highly likely to break the company into smaller units and disperse it through the general force. Doing so will likely destroy its effectiveness. Malcontent in the front line can only be fed by these events. Distrust between Putin and his generals must be profound. Even before the revolt, discontent in the front line was so severe that the Russians have had to post troops behind the front to shoot any of their units that might seek to pull out of the line. Failure to supply ammunition – a continuing issue on the Russian frontline - is one reason troops might wish to withdraw en masse. While a seeming flash in the pan, the Wagner revolt is likely to weaken the Russian operation for some time.

Adding to Russian troubles the dam break has created a vast bogland which has bred a plague of mosquitoes. Unhelpful to raising morale, Kremlin propagandists are claiming the US has infected the mosquitoes with malaria. We have not heard of malaria outbreaks yet, but there are reports of cholera in the flooded settlements.



Regulation of AI

Governments have taken notice of the technical progress in AI and are rushing to join the party. This month we are publishing an extended research note on the subject. To quickly summarize our findings:

1. Each government's initial reaction has been characteristic of its basic way of being.
2. As no one claims to know where this technology is headed or at what pace initial policy making is unlikely to prove sound. In general, the US and UK seem more mindful of this fact.
3. Existing legal frameworks for dealing with technology are probably adequate to handle AI. If anything, adjustments of law are more likely to be needed to relieve AI developers of legal risk so that a useful technology can be developed commercially than to enact special restrictions on it.



The Economy

Inflation is still there, but probably cooling and definitely not accelerating. As measured by CPI-U over the last six months seasonally adjusted and compounded to an annual figure the inflation rate is 2.9%. That is much closer to the Federal Reserve's target of 2% than common awareness would have it (headline lagging twelve month inflation is in the 4.0-5.3% range depending on measure chosen.) Regional banks continue to sit atop a pile of depreciated bonds and nonperforming commercial real estate mortgages, but none have collapsed or entered into shot gun mergers this month.

The Fed continues to talk tough while sitting with folded hands waiting to see what comes next. High Tech is giddy over AI and even non-Tech is issuing press releases in an effort to convince shareholders that management is not asleep at the wheel. The Core economy is chugging along – first quarter GDP growth was recently revised upward to 2.0% from an initial estimate of 1.3%. Abroad China is struggling, while Europe and Japan are strengthening. India's Prime Minister Modi visited Washington and received a gala reception. Both the Indian economy and US-Indian relations are in an upswing.



Markets

Equity markets are doing well around the developed world. At the half year point they are solidly up: US (16%), Europe (10%), Japan (14%), UK (5%) Australia (4.5%). Emerging equity is more scattershot: China (-14%), India (4%), Emerging Asia (2.8%), Mideast (3.8%), Latin America (24%). The world seems to sense it is getting back to normal after the pandemic, its aftermath and the disruption of the Russo-Ukraine war.

In detail this month's results are in table 1. All components of US equity rose in the past month. Growth had been leading the way upward for six months but in the past month Value started to make up some lost ground. Notably Mid-Small Cap turned in the best performance among the US equity components. There has been much commentary on how the current market rally is narrowly based and driven by just seven mega cap technology stocks. This data suggests such commentary is yesterday's news and the rally is actually in the process of broadening beyond the leadership group. International equity also had a mildly up month and here too we note Emerging outperforming Developed for a change.

Fixed incomes are resolutely range trading, but there was relative strength in Medium Grade credit, preferred equity

and especially REITs. Both equity and fixed income therefore show evidence of risk on bets being placed.

The Euro remains on an upward trend as it continues to recover from the hole into which the Russo-Ukraine war pushed it. It is currently only 3.7% below its prewar value. Gold seems to have found its level for the moment. Crude oil looks to have resumed its slipping trend – probably in response to weaker growth in China than anticipated.

Table 1: Recent Market Performance

Category	Asset Class	6 month trend	3 month return	1 month return
Equity	US Large Cap	rising	8.42%	5.92%
	US Large Cap Growth	rising	10.31%	6.02%
	US Large Cap Value	rising	6.21%	6.42%
	Growth – Value	rising	4.10%	-0.41%
	US Mid/Small Cap	rising	4.62%	7.95%
	Intl Developed	rising	1.37%	2.59%
	Intl Emerging	range trading	0.25%	3.59%
Fixed Income	3-7 Year Treasury	range trading	-2.03%	-1.39%
	7-10 Year Treasury	range trading	-2.54%	-1.49%
	TIPS	range trading	-2.39%	-0.63%
	Muni	range trading	-0.94%	0.34%
	Investment Grade	range trading	-1.70%	-0.63%
	Medium Grade	range trading	-0.64%	1.30%
	Preferred	range trading	-0.93%	1.54%
Commodity	REIT	range trading	0.05%	4.69%
	Euro	rising	0.54%	1.81%
	Gold	range trading	-2.98%	-2.28%
	Oil	slipping	-6.94%	-3.16%



Advice

Investors should know where they are going in life, form realistic plans to get there and hold the portfolio consistent with those plans. Tilting away from that core position should be at most an occasional response to clear signals. Currently there is no warrant for tilts and investors should be at their core position. Investors with cash holdings over \$250,000 should familiarize themselves with the special issues such

positions raise. Our publication “Management of Liquid Reserves”, available in the guidance section of our website, addresses this issue in depth.



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In evaluating political and social developments our perspective is that of long term investors. We believe the investor's interest is best served by a stable environment in which change occurs incrementally as broadly supported policies rather than by an environment of abrupt changes and frequent U-turns driven by transient partisan advantages. Finally, our assessments should always be read as what we consider likely to occur and not as expressions of what we would like to see come about. To learn more about our firm visit us at <https://www.lloydtevis.com>.

Cover Photo

On the left a pair of the Dowager Express Cixi's shoes. High class Han (Chinese) girls had for nearly a millennium had their feet bound in childhood. At the cost of great pain, foot binding prevented the foot from growing and gave the adult woman a swaying walk considered highly sensuous and feminine. Manchu women (such as Cixi was) did not practice foot binding but instead wore shoes with a bowled heel (as here) which induced a similar swaying walk. Cixi outlawed foot binding but her edict made limited headway in changing the national custom. The shoes shown here are what she wore on informal occasions. On state occasions she wore a platform shoe which mounted the actual shoe on a pedestal which could be from 4 to 7.5 inches high. A noted fashionista, Cixi placed considerable emphasis on the quality of her shoes.

In the center we have the Chinese cloth shoe as developed by the Neiliansheng shoe store. This business was founded near the start of Cixi's reign as a purveyor of court shoes to mandarins. After the fall of the dynasty there was a reaction against restrictive clothing in general and shoes in particular. Neiliansheng developed the cloth shoe from traditional models and the business survives to this day as a fixture of the Beijing scene. Mao Tse Tung was frequently seen wearing Neiliansheng shoes.

On the right is a lace up black oxford. Xi Jinping often appears in such shoes for meetings of state. In the Chinese context the shoe signals a Western orientation and a laced up managerial style in contrast to the cloth shoe. However, Xi Jinping has been photographed buying cloth shoes and likely wears them in informal settings. A favorite quotation of Xi Jinping's is "People don't need to wear the same shoes; they should find what suits their feet. Governments don't have to adopt the same model of governance; they should find what benefits their people." (Wei Yuan, *Treatise on Scholarship and Politics*, c. 1850.) This quotation is often deployed when Xi Jinping feels it necessary to push back against the United States championing global standards on everything from human rights through maritime borders and patent rights – standards often arrived at through lengthy multilateral diplomacy.

Appendix: Analysis of Recent Supreme Court Decisions

Students For Fair Admissions, Inc vs President and Fellows of Harvard College.

The Supreme Court has issued its long-awaited decision on affirmative action in two college admission cases brought against Harvard and the University of North Carolina. The Court found by a 6-3 majority that the system of racial preferences administered by the schools violated the equal protection clause of the 14th amendment to the United States Constitution. The decision was a personal triumph for the Chief Justice Roberts, who has had a career long opposition to the policy of racial preferences in college admissions. Roberts delivered the opinion of the Court which attempted to walk the delicate line of reversing 45 years of settled practice without overturning prior rulings of the Court. Roberts argued that the Bakke decision of 1978 as extended by the 2003 decision in Grutter v Bollinger established the necessary framework. In his reading those decisions allowed a narrow exception to the blanket demand for equal protection under the Fourteenth Amendment. That exception required any system of racial preference to be 1. serving a compelling interest 2. to be subject to measurement and 3. to be temporary – i. e. limited to the time span required for the measured objective to be achieved. He found that the school's claimed objective and benefits - attainment of a racially diverse student body-failed these tests. In fact, the preference system relies on arbitrary (but widely used) racial categories, the benefit claimed is immeasurable and there is no well defined endpoint or ability to track an approach to goal. Roberts also found college admissions is an inherently zero-sum game and that any policy of racial preference is unavoidable also an impermissible policy of racial detriment. The Court's decision applied to public and private institutions of higher education but not to military academies. The Court explicitly noted a loophole to its ruling – admission processes could consider in individual cases a history of triumphing over adversity which adversity might itself be race based.

It is helpful to examine this ruling in a broader context. At the time the first affirmative action programs were instituted

there was a broad-based belief in society that certain races, most notable those of African descent, were incapable of high intellectual performance. Opening higher education to underrepresented groups and nurturing them into high performing careers served the important purpose of overturning that societal belief. Similarly, it was argued (and is still argued) that people of diverse backgrounds bring different perspectives and experiences to the table and that encouraging this diversity strengthens institutions and society. A convenient term for this nexus of ideas is “representation.” Also, at the time affirmative action was introduced, 95% of Americans of African descent were economically classified as lower class. It was inarguable that this result was the result of a painfully unequal history and that low representation in merit based elite educational institutions was in part due to the higher hurdle of inadequate primary and secondary education faced by this group and by other similarly situated groups. A case could be made for measuring applicants’ aptitude for education not against a general standard but against one reflective of their actual opportunity. The case also could be argued that against a past history of grossly unequal treatment, such affirmative action represented both individual and societal justice. This nexus of ideas is thus termed the “justice” argument. Today African Americans have attained the highest offices in the land as a matter of personal merit. The belief in intrinsic inferiority, while still held in certain quarters, is dead in the general community of discourse. Approximately one third of the minority population has moved into the middle class. These facts diminish, without quite eliminating, the force of the representation and justice arguments. In large measure the affirmative action programs have worked, but the goal of racial equality has not been totally achieved. Robert's decision against affirmative action is that it is a dangerous tool deployed in the service of a noble goal. If a race conscious thumb is to be placed on the scales of decision to counterbalance adversity and prejudice, Roberts would need to see it far more controlled than it is at present.

The case at hand was brought by an organization promoting the interests of Asian American students in higher education. Figures presented in the case showed that two of the preferenced groups (African Americans and Hispanics) were

being admitted to Harvard at 12% and 8% rates which is approximately the percentage of those groups in the general population but above their percentages in the merit based pool of applicants. Asian-Americans were being admitted at a 19% rate, which is about 6x their weight in the general population but well below their weight in the merit based pool. Harvard has stated informally that if it admitted applicants solely on the basis of academic board scores, Asian females would comprise approximately 75% of its student body. We think this statement may be a slight overstatement; we would expect Ashkenazi Jews and a few other perennial outperformers to claim more than 30% of the available seats. In any case it is objectively true that the scholastic performance of Asian women is far above the societal norm. This performance is often achieved in a setting of economic adversity, and it reflects multiple factors: strong cultural and familial emphases on academic achievement, possibly more rapid intellectual maturation of females in the teen years and less parental acceptance of teenage rebelliousness in this social group as compared to others. Robert's concern is that the zero-sum game of college admissions is injustice to the groups not preferred. In this case, the cost of affirmative action at first seems to be paid by white applicants. However, if we look at who has gained from applications not being based solely on academic merit the beneficiaries also include boys as a group and whites. If we are to look at the societal benefit of society fully mobilizing its human talent, then the seeming loss from not fully mobilizing a well qualified Asian female demographic must be weighed in the balance. The issues raised in this case are quite complex and the current decision is unlikely to be the last word on the subject.

In our view American primary and secondary education is noncompetitive against international standards and is a grave long term threat to the nation's prosperity. That America's "elite" is actually not so elite is one of the underappreciated facts of American life. We think the country could benefit from a wakeup call in this arena. We hope Harvard responds to the Court decision by moving to a straight standard of academic excellence in admissions and that it lets the demographics sort out as they will. The results will likely come as a shock to the country. That would be a

good thing. The country badly needs to look in a mirror and see the truth about itself.

Biden v Nebraska

In another 6-3 decision the Court blocked the President's proposed program to cancel a portion of outstanding student debt. The key issue at hand was a 2003 law reading.

- (1) In general. --Notwithstanding any other provision of law, unless enacted with specific reference to this section, the Secretary of Education (referred to in this Act as the ("Secretary")) may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the Act as the Secretary deems necessary in connection with a war or other military operation or national emergency to provide the waivers or modifications authorized by paragraph (2).

[Higher Education Relief Opportunities for Students Act of 2003, Section 2a].

Covid-19 was declared a national emergency by President Trump. It proved not simply a declared emergency, but also a real one – killing more Americans than all of the country's wars combined and causing economic dislocations equaled only by World War II. Relying on this act President Trump's Education Secretary (Betty de Vos) suspended debt payments for the duration of the epidemic. Biden's Secretary (Miguel Cardona) continued this policy until the end of the emergency. Then as a part of the transition back to normalcy, he proposed a partial debt forgiveness plan. Specifically, he would forgive up to \$10,000 in debt for all persons with current income below \$125,000 (98% of the debtors.) He would forgive an additional \$10,000 for those students who methods previously in place had identified as hardship cases. Given that student debt can reach into the hundreds of thousands, this plan is perhaps to be criticized as tokenism. An economically more rational plan might have relieved debtors of a set percentage of their debt rather than a set amount. That, however, was not the concern of the Court. Rather the Court found that the matter presented a major question. Scrutinizing the rather plain language of the Act the Court discovered a number of unwritten limitations on

the power so plainly granted and it concluded that the Secretary had exceeded his authority. Delivering the opinion of the Court Chief Justice Roberts wrote The “ ‘economic and political significance’ ” of the Secretary's action is staggering by any measure. *West Virginia*, 597 U. S., at ____ (slip op., at 17) (quoting *Brown & Williamson*, 529 U. S., at 160). Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers “between \$469 billion and \$519 billion,” depending on the total number of borrowers ultimately covered. App. 108. That is ten times the “economic impact” that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. *Alabama Assn.*, 594 U. S., at ____ (slip op., at 6). It amounts to nearly one-third of the Government's \$1.7 trillion in annual discretionary spending. Congressional Budget Office, *The Federal Budget in Fiscal Year 2022*. There is no serious dispute that the Secretary claims the authority to exercise control over “a significant portion of the American economy.” *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 159). [citing from *Biden v Nebraska*, Opinion of the Court, p. 21]

Our problem with this analysis is that it contains a shocking innumeracy. The principal amount of debt is an asset item, whereas the Government's discretionary spending is an income item. When you divide an apple by an orange you get a fruit frappe and not an insightful bit of analysis. Let us correct the calculation and see where it leads us. One possibility would be to divide the principal value forgiven by the public debt (since the Government borrows itself the funds which it lends to students.) Taking \$500 billion as a round estimate of the forgiven debts, the result is that it is 1.6% of the gross public debt. Alternately, one could measure debt forgiveness by the annual reduction in debt service revenue and divide that number by the annual budget revenues. Here one would recognize that debt forgiveness, like tax cuts, is a policy choice which delivers its fiscal effects incrementally over time. We estimate the annual debt service

at 9.5% of principal and find that it is slightly less than 1% of budget revenues. By either measure the effect is at the 1% level and not the 33% level (“one-third”) claimed by the Chief. This is a most unfortunate blunder on the Chief's part. It is also a critical mistake. Roberts's decision, read in full, makes it clear that his unhappiness with the Secretary's plan stems entirely from its size and not from any principle of law. [1] Perhaps if Roberts had accurately measured the impact he would have still found the use of delegated authority excessive. But he did not and the decision he presented is as a result nugatory.

But Roberts does not sit alone. He serves with eight other keen minds that might have caught this mistake while reviewing the opinion in draft, or who might have, with less collegiality, noted it in a dissent. We searched the full 77 pages of the Court's decisions, but we found no such recognition of the central problem with the Court's opinion. The closest remark we could find was an observation made by Justice Kagan (in dissent) that the cost of the Secretary's plan was small compared to the \$5 trillion in relief directly voted by Congress. As such the math error is chargeable to the Court as a whole and not just to Roberts.

We find the Court's decision wrong as a matter of logic. Ratios are basic math – first taught in third grade. Nor does it rest there. Concepts of proportionality are broadly discussed in art, literature, law and many other fields through out the entire educational experience. Here an inability to apply correctly so fundamental a concept results in the denial of benefits to 43 million people. Earlier we expressed the opinion that the American elite is not so elite as commonly believed. It is blunders such as this which inform that view.

This is the fourth Administration policy which the Court has overturned with the major questions doctrine. That doctrine remains nebulous with no standard declared by which parties can know if they are in conformity or which the Court can use to guide its reasoning about disputes. Roberts clearly, and we are prepared to admit wisely, sees the need to draw a line between Legislative and Administrative power. But the lack of a standard embeds judicial review in the ordinary policy making process and creates the impression that the

Court is delivering beauty pageant judgments. Here Congress made a broad grant of authority to be deployed in a narrow set of most exigent circumstances. Its clear intent was that emergency situations be dealt with speedily. Roberts has frustrated that goal by permitting a lengthy legal review which ends up simply confusing the Court itself. The Secretary will now go back and revise his policy and, most likely, trigger another round of review. This is no way to govern a country. We noted a long legal soliloquy penned by Justice Barrett. Perhaps this is a first step towards articulating a clear major questions standard. We hope any standard ultimately arrived at will in its definition of the term major reflect a proper understanding of proportion.

Creative LLC v Elenis

The Court's final decision was a classic matter of clashing legal principles. A web designer offering services designing websites celebrating marriages wished to publish the designer's unwillingness to celebrate nuptials for nontraditional couples as those celebrations conflicted with the designer's religious beliefs. This set up a classic conflict of principles. On the one hand is the doctrine that if you serve the public, you serve the whole public, or at least, cannot refuse to serve classes of the public which the State protects from discriminatory treatment. On the other hand, the first amendment provides broad protections for expression. Here the majority ruled for the first amendment – an unremarkable result as the first amendment usually wins these sorts of cases. The matter decided is a small one; there are plenty of more flexible web designers offering their services and no one needs a reluctant vendor involved in their nuptial celebrations. However, the Court's reputation for overturning settled law on a whim is now so firmly established that the decision is causing a great deal of consternation about what the Court might do next.

[1] The Court's textual analysis led with a discussion of the word 'modify.' As debt modification plans commonly involve adjustments of principal, interest and payment dates the Court could not seriously claim that the delegated power to modify did not extend to changes in principle. Rather it complained that the planned modification were so sweeping as to amount to replacement of the existing program and that

'modify' does not extend to 'rewrite.' But the Secretary is not making a permanent change in the plan. Rather he is making a one time adjustment in response to a particular set of circumstances. From a temporal viewpoint that is a 'modification' and not a 'replacement.' However deep into the Court's opinion one reads it comes down simply to "this is too big a change to be a modification." In other words, it is the size and not the shape of the plan that bothers the Court. Justice Barrett made this point completely clear in her concurring opinion with a homely but strange comparison to a shopkeeper restocking his apple barrel. But numbers involved in government programs are always big by the standards of daily life. The key question must be are they big by Congress's standards of government finance. That is a rather different standard. Kagan's analysis pointed towards that standard without quite getting there.