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THE SUPREME COURT
2024 TERM

FOREWORD:
TO A CONSERVATIVE WARREN COURT

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FOREWORD: TO A CONSERVATIVE WARREN COURT

*Richard M. Re**

INTRODUCTION

The Warren Court's legacy is ubiquitous.¹ With the eponymous Chief Justice Warren at the helm, the Supreme Court featured a strong majority of left-of-center jurists, and those “liberal lions” ruled (or roared) accordingly. Landmark rulings like *Brown v. Board of Education*² and *Miranda v. Arizona*³ have occupied generations of law students, but they also shaped popular culture, becoming household phrases that still frame legal debate.⁴

Yet the American legal system has steadily grown more conservative ever since the Warren Court ended in 1969. From the mid-1970s to the mid-2010s, judicial power often favored conservatives, such as when the Court sided with George W. Bush to declare him the victor of the 2000

* Professor, Harvard Law School. This essay is dedicated to Fred Schauer, author of the 2005 Term Foreword, who pursued the truth with a smile and helped others along the way. I am indebted to many commentators including Jonathan Adler, Akhil Amar, Jack Balkin, Will Baude, Rachel Bayefsky, Josh Blackman, Niko Bowie, Sam Bray, Mary Anne Case, Guy-Uriel Charles, Justin Driver, Kristen Eichensehr, Bridget Fahey, Jack Goldsmith, Tara Grove, John Harrison, Rick Hasen, Randall Kennedy, Mike Klarman, Genevieve Lakier, Tyler Lindley, Leah Litman, Hashim Mooppan, Michael Moreland, Sam Moyn, Rick Pildes, Alex Potapov, Scot Powe, Dave Pozen, Zach Price, Jed Purdy, Chris Re, Daphna Renan, Micah Schwartzman, Kannon Shanmugam, Seana Shiffrin, Reva Siegel, David Strauss, Laura Weinrib, Ted White, and participants at a conference hosted by the Constitutional Law Institute at the University of Chicago Law School. Special thanks to the *Harvard Law Review* editors as well as to Angie Cui and Dina Kuttub for brilliant research assistance. All mistakes are the author's.

¹ For recent examples, see generally GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* (2020), and MORTON J. HORWITZ, *THE WARREN COURT AND THE DEMOCRATIC CONSTITUTION* (2024) (“The Warren Court has become a powerful symbol, with almost mythological significance, for both the Left and the Right.” Erwin Chemerinsky, *Afterword to supra*, at 181).

² 347 U.S. 483 (1954).

³ 384 U.S. 436 (1966).

⁴ A Google Ngram search of scanned books from 2005 to 2022 indicates that “Warren Court” appears far more often than “Roberts Court,” even during the last ten years. Google Books Ngram Viewer Search for “‘Warren Court,’ ‘Roberts Court,’” GOOGLE, <https://books.google.com/ngrams> [<https://perma.cc/F6YM-JVSR>] (type “‘Warren Court,’ ‘Roberts Court’” in the search bar; then set the year range to “2005–2022”; then set smoothing to “0”).

presidential election.⁵ Even so, the Justices kept the Warren Court’s memory alive through major liberal decisions like *Bowmediene v. Bush*⁶ and *Obergefell v. Hodges*.⁷ The last ten or so years of this period were often called the Kennedy Court, after its pivotal “swing Justice.”

This persistent trend to the right reached a tipping point in late 2020 with the death of Justice Ginsburg. When Justice Barrett arrived, the Court acquired what myriad commentators describe as a “conservative supermajority.”⁸ The result was an avulsive shift to the right on issues like abortion⁹ and affirmative action.¹⁰ Even more importantly, the Court became almost uniformly conservative in its rulings. When the Justices issue left-of-center decisions, they are almost always narrow or consistent with prior law.¹¹ The question is no longer whether the Court will break left or right with respect to a salient legal issue. The only practical question is: “How far to the right?”

We might call this new arrangement the “Barrett Court,” given its connection to the historic Justice Barrett appointment. Yet Justice Barrett neither leads the Justices like Chief Justice Warren nor controls outcomes like Justice Kennedy.¹² The “Roberts Court” spans too wide a period to capture what is special about the last several years. Perhaps the “Trump Court” is fitting, given President Trump’s role in appointing the three key Justices who moved the Court to the right, to say nothing of his second term. But the Court that President Trump has helped create does not simply do his bidding¹³ — and is a critical counterweight to the second Trump Administration.

The best label adopts a historical, functional perspective. The present Court is a “Conservative Warren Court.”¹⁴ That is, it possesses the defining traits that the Warren Court did, but in political opposite. It has a strong majority ideological alignment. And it wields its power in

⁵ See *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam).

⁶ 553 U.S. 723 (2008).

⁷ 576 U.S. 644 (2015).

⁸ E.g., MICHAEL WALDMAN, *THE SUPERMAJORITY: HOW THE SUPREME COURT DIVIDED AMERICA* 75 (2023).

⁹ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2284 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992)).

¹⁰ See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023).

¹¹ See, e.g., *Allen v. Milligan*, 143 S. Ct. 1487, 1506 (2023).

¹² See Adam Feldman, *The Myth of the Modern Swing Vote*, LEGALYTICS (May 28, 2025), <https://legalytics.substack.com/p/the-myth-of-the-modern-swing-vote> [<https://perma.cc/PKL8-QZJE>].

¹³ See, e.g., *Kelly v. Pennsylvania*, 141 S. Ct. 950, 950 (2020) (mem.).

¹⁴ See Richard M. Re, Opinion, *A Conservative Warren Court*, WASH. POST (July 9, 2024), <https://www.washingtonpost.com/opinions/2024/07/09/roberts-supreme-court-conservative-warren> [<https://perma.cc/NNV5-C5WE>] (noting that the present Court’s similarity to the Warren Court “is uncomfortable for liberals and conservatives alike”). For related commentary, see Patrick J. Sobkowski, *The Enduring Crisis in Teaching Constitutional Law*, 74 EMORY L.J. ONLINE 48, 51 (2025); Allen C. Sumrall & Beau J. Baumann, Essay, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 31, 40 (2023); and Vertuno, *infra* note 272 (quoting Justice Kavanaugh).

pursuit of its ideological goals. Instead of being the most liberal Court in living memory, however, it is the most conservative.¹⁵ One might reach even further back in time and posit that the new Court is the “New *Lochner* Court,” but that label connotes specific ideological positions from the early twentieth century and has less resonance in our era.

The idea of a Conservative Warren Court is also helpfully jarring, combining as it does two ideas that legal culture typically treats as antonyms.¹⁶ This oxymoronic term accordingly primes us to look for differences as well as similarities. And much about our present judiciary is indeed fresh. As compared with the Warren Court, the current Court’s claim to legitimacy flows more from democracy and less from political impartiality, owing to the fact that it is the result of a generations-long legal and political movement.¹⁷ The current Justices are also more like scholars and less like statesmen. And when looking for institutional allies to promote its vision of the law, the present Court is more favorably disposed toward the states and less so toward the federal government, particularly administrative agencies.

The current Court, like its liberal predecessor, marks a turning point in the direction of legal culture — or, more accurately, in the direction of America’s two competing legal cultures. The Warren Court remains associated with dynamic decisionmaking rooted in informal considerations and an attention to fairness.¹⁸ By comparison, the current Court hews closer to originalism, textualism, and other formal modes of legal inquiry.¹⁹ Yet there is no inherent or necessary connection between liberalism and functionalism or between conservatism and formalism. These contingent connections were instead forged primarily during the Warren Court, when a strong liberal majority embraced functionalism to propound its ideology. Conservatives reacted by clinging to formalism as a mode of critique. Now, however, conservatives have the incentive to embrace functionalism, and liberals have reason to be formalist.

¹⁵ See Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, at 07:04 ET), <https://www.npr.org/2022/07/05/1109444617/the-supreme-court-conservative> [<https://perma.cc/X39X-DW3K>].

¹⁶ See, e.g., Geoffrey R. Stone, Lecture, *The Warren Court v. The Roberts Court*, 104 B.U. L. REV. 1451, 1453 (2024).

¹⁷ See WALDMAN, *supra* note 8, at 3 (“Today’s hard right supermajority was installed by a fierce and effective political drive waged over decades.”). On the conservative legal movement, see *infra* note 100 and accompanying text.

¹⁸ See MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 24–25 (1998); see, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (discussing “the concepts of equal protection and due process, both stemming from our American ideal of fairness”); Earl Warren, *The Law and the Future*, FORTUNE, Nov. 1955, at 106, 106 (drawing inspiration from a child’s “first judgment that this or that ‘isn’t fair’”).

¹⁹ See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 523 (1988) (developing a model of formalism where “the decisionmaker’s choice is limited by rules”).

The result is an emerging legal realignment with vast implications for legal culture and judicial decisionmaking.²⁰ If the battle lines over judicial politics have increasingly blurred in recent decades,²¹ they are now dramatically shifting positions. In general, conservatives are becoming enthusiastic about atextual interpretation, substantive due process, permissive rules of standing, and recourse to foreign law. At the same time, liberals are increasingly insisting on strict adherence to texts, fidelity to historical understandings, stringent justiciability rules, and other modes of judicial restraint. These repositionings have already had some dramatic implications, but their full import is still being worked out. In the meantime, legal culture should become more attuned to the virtue of personal consistency and the peril of partisan hackery.

Against that backdrop, the Conservative Warren Court is well positioned to defend the rule of law. The Justices are popular among conservative Americans.²² That popularity stems primarily from the Court's conservative orientation but also from other factors, such as the fact that President Trump has appointed three Justices. Moreover, a large supermajority of Americans believe that the executive branch should comply with court orders.²³ Finally, the Supreme Court's conservative orientation makes it likely to approve, and thereby legitimate, most (not all) of the second Trump Administration's policies.²⁴ At least at its outset, the Administration has much to gain from respecting this Court, and much to lose by crossing it.

²⁰ See Richard M. Re, Essay, *Legal Realignment*, 92 U. CHI. L. REV. (forthcoming 2025) (manuscript at 17–19), <https://ssrn.com/abstract=4937024> [<https://perma.cc/PXF4-5RKZ>]; *infra* Part II.

²¹ See, e.g., Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 604 (2004) (noting changes in conservative thought “[a]s conservatives found themselves in the majority”).

²² See *infra* note 559. Notably, conservatives are less fond of lower courts. See Benedict Vigers & Lydia Saad, *Americans Pass Judgment on Their Courts*, GALLUP (Dec. 16, 2024), <https://news.gallup.com/poll/653897/americans-pass-judgment-courts.aspx> [<https://perma.cc/SHL3-ZDZK>] (suggesting that legal cases against President Trump damaged lower courts' credibility on the right).

²³ See PEW RSCH. CTR., TRUMP'S JOB RATING DROPS, KEY POLICIES DRAW MAJORITY DISAPPROVAL AS HE NEARS 100 DAYS 4 (2025), <https://www.pewresearch.org/politics/2025/04/23/trumps-job-rating-drops-key-policies-draw-majority-disapproval-as-he-nears-100-days> [<https://perma.cc/E3GG-QEGW>] (reporting eighty-eight percent of Americans believe the President must follow a Supreme Court ruling). These and other poll results have been widely reported — and are known to the Executive. E.g., Andrew Stanton, *Majority of Republicans Say Trump Can't Defy Supreme Court: Poll*, NEWSWEEK (Apr. 24, 2025, at 15:01 ET), <https://www.newsweek.com/donald-trump-supreme-court-order-republicans-poll-2063789> [<https://perma.cc/32K8-Y7SV>].

²⁴ The push-pull, carrot-stick dynamic that has so often characterized the Court's relationship with the political branches is now unusually evident. See *infra* section III.B, pp. 67–76. Take President Trump's June 27, 2025, press conference on *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025), wherein he praised the Court's “amazing” decision and noted: “I'm grateful to the Supreme Court.” Jake Traylor, *Donald Trump Calls Supreme Court Birthright Citizenship Decision “Amazing,”* POLITICO (June 27, 2025, at 13:40 ET), <https://www.politico.com/live-updates/2025/06/27/supreme-court-rulings-decisions-today-news-analysis/donald-trump-supreme-court-injunction-birthright-00427992> [<https://perma.cc/J2JQ-YRJD>].

These conclusions have broader implications for debates regarding court reform. True, fundamental court reform would have been tempting for liberals — perhaps irresistibly so — had it been politically feasible during the Biden Administration. Yet that short-term gain would have come with a massive cost: the delegitimation of the courts as non-partisan actors, particularly in the eyes of conservatives. Had the Court been “expanded” or packed during the Biden Administration, it would now lie squarely in the political crosshairs of the second Trump Administration. With benefit of hindsight, we can see that the left had something rather large to gain by preserving the federal judiciary in its current, unreformed configuration — namely, the promise that the courts will be able to check conservative administrations such as the second Trump Administration.

Why pursue the comparison between the current Court and the Warren Court? The simplest reason is that the comparison illuminates significant truths about our law and legal system. Both the mechanisms and the directions of legal change recur throughout history, and it is worth trying to understand this partially cyclical process. A more situational reason is ethical. An us/them dynamic currently dominates our legal culture and overall political discourse. For one group of “us,” the Warren Court is nothing short of legendary; for another “us,” the current Court is largely composed of living legends. Seeing the similarities between these two starkly opposed Courts might help to convince the two groups of “us” that we have more in common than often supposed.

Most fundamentally, I aim to describe and celebrate the underlying structure of American public law. The law of the moment, important as it is, exists atop or within a deeper system that perseveres across generations, even as it accommodates change. The law’s deep structure is a constant terrain over which political winds blow and reverse, prompting legal actors to stand their ground or else reposition. This complex arrangement explains how today’s Justices can both mediate and check politics, much as they did during the comparably turbulent and convulsive years of the Warren Court. Despite its own strong ideological orientation, the Supreme Court continues to apply principles that are meaningfully distinct from the dictates of partisanship. That abiding system of law and legal change may not be ideal. But it is worth preserving.

I. AN ARC OF THE PENDULUM

“[W]e have traveled a long distance from the constitutional religion of eighty and thirty years ago, but we have traveled in an arc. On a linear plane we are not so far from where we started.”²⁵

²⁵ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 41 (1970).

The Warren Court and the present Court both occupy inflection points in the law. This Part divides over seventy years of American legal culture into three periods: the Warren Court, the Swing Justice Era, and the Conservative Warren Court. Along the dimension of politics, this historical trajectory reflects a consistent trend toward greater conservatism. Yet the arc's beginning and end have much in common, because both feature strong control by a single legal ideology. In many ways, powerful courts and their jurisprudences tend to resemble one another — ideological differences notwithstanding.

A. *The Warren Court*

During the sixteen years before Chief Justice Warren took the bench (1937–1953), the Court had been dominated by Democratic appointees. In one sense, the Court of that pre-Warren era exhibited a strong political orientation. By 1945, it was entirely composed of recent Democratic appointees.²⁶ It validated New Deal legislation. And it abandoned the signature legal doctrines of the earlier *Lochner* era. Congress's Commerce Clause power, for instance, became virtually plenary during this period.²⁷ Moreover, that general outcome — strong deference to the political branches on matters of economic regulation — was the central goal motivating President Franklin Roosevelt as he made appointments to the federal bench.²⁸

In other ways, however, Justices during and after the New Deal could be viewed as conservative. Though Chief Justice Warren arrived at a Court featuring eight Democratic appointees in 1953,²⁹ many of those jurists were still influenced by the strong tradition of judicial deference to the political branches established during the New Deal. This tradition was especially potent among Democratic Justices, such as Justices Frankfurter and Jackson, who developed their professional identities as opponents of *Lochner*-era jurisprudence.³⁰ The Justices were accordingly equivocal or inconsistent in promoting liberal goals. For instance, *Minersville School District v. Gobotis*³¹ allowed compulsory pledges in schools³² on an eight-to-one vote before *West Virginia State Board of Education v. Barnette*³³ reversed course,³⁴ over a vehement

²⁶ See *Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/RQ35-25EP>].

²⁷ See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 129 (1942).

²⁸ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 193 (2004).

²⁹ See *Justices 1789 to Present*, *supra* note 26.

³⁰ See *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting); BRAD SNYDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT* 149 (2022).

³¹ 310 U.S. 586 (1940).

³² *Id.* at 598.

³³ 319 U.S. 624 (1943).

³⁴ *Id.* at 642.

dissent by Justice Frankfurter.³⁵ Even after *Barnette*, the postwar Court leaned in favor of the deferential, restrained approach that Justice Frankfurter had long championed and that had generally characterized liberal thought during the New Deal.³⁶

Yet some Democratic appointees were becoming more comfortable flexing their judicial muscles, and new arrivals to the Court tended to harbor a more activist attitude. Perhaps the most dramatically evolving jurist was Justice Douglas, who began his lengthy career as a deferential New Dealer but ended it as the foremost liberal judicial activist of the twentieth century.³⁷ Among the new arrivals, Chief Justice Warren himself looms large. As a longtime politician, he was unburdened by any worked-out judicial philosophy and certainly had not studied at the feet of Justice Holmes.³⁸ Chief Justice Warren's arrival created a tipping point in the Court's consideration of *Brown v. Board of Education*,³⁹ the opening salvo in the activist Warren Court. And even *Brown* was tempered by Frankfurterian caution, insofar as its ultimate remedial instruction of "all deliberate speed" delayed actual school desegregation.⁴⁰

Chief Justice Warren's pivotal role in *Brown* highlights another reason why party affiliation did not strongly determine the Justices' voting patterns: Political parties were relatively heterogeneous and depolarized.⁴¹ Regional differences were responsible for much of this complexity, particularly because many Southern Democrats were more averse to racial equality than many Northern or Western Republicans.⁴² The regional divide on racial equality helps to explain why some of the Court's key liberals were non-Southern Republican appointees, including Chief Justice Warren himself (from California) and, later, Justice Brennan (from New Jersey). Moreover, federal judges formed or hailed from a legal elite whose views did not neatly track regional or party affiliation, as illustrated by Justice Black: a former Alabama Senator and member of the Ku Klux Klan who later became a champion of legally mandated desegregation.⁴³

³⁵ See *id.* at 646–71 (Frankfurter, J., dissenting).

³⁶ See SNYDER, *supra* note 30, at 74; Russell W. Galloway, Jr., *The Second Period of the Warren Court: The Liberal Trend Abates (1957–1961)*, 19 SANTA CLARA L. REV. 947, 948–49 (1979).

³⁷ For example, Justice Douglas dramatically changed his voting patterns on standing to the point that he essentially never voted against standing during the latter part of his career. See Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 596 (2010).

³⁸ See G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 225–26 (1982).

³⁹ See KLARMAN, *supra* note 28, at 302; LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 23, 28 (2000).

⁴⁰ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

⁴¹ See Nicholas Stephanopoulos, Keynote Speech, *Walking the Line: Modern Gerrymandering and Partisanship*, 52 GA. L. REV. 1009, 1019 (2018).

⁴² See POWE, *supra* note 39, at 62.

⁴³ See generally ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1994).

So the Warren Court's turn toward liberal activism was not driven by the fact that a supermajority of Justices had been appointed by the somewhat more liberal party (the Democratic Party). The Court's liberal activism instead stemmed from the declining influence of New Deal liberalism and the development of a cross-party elite consensus against practices such as Southern race segregation.⁴⁴ Notably, race equality gained national political salience only after World War II, by which time President Roosevelt's (and some of President Truman's) appointees were already on the Court.⁴⁵ Presidents selected early Warren Court Justices, in other words, with an eye to federal economic regulation — not race-equality rulings like *Brown*, much less other issues that proved legally salient in the 1960s.⁴⁶

When Justice Frankfurter left the Court in 1962, President Kennedy replaced him with Justice Goldberg,⁴⁷ who had been shaped by an era of liberal judicial dominance. Freed of Justice Frankfurter's hesitancy and energized by Justice Goldberg's activism, the Warren Court issued transformative liberal rulings like *Reynolds v. Sims* (1964),⁴⁸ *New York Times Co. v. Sullivan* (1964),⁴⁹ *Griswold v. Connecticut* (1965),⁵⁰ and *Miranda v. Arizona* (1966). The Court also began to enforce *Brown* much more forcefully in cases like *Griffin v. County School Board* (1964)⁵¹ and *Green v. County School Board* (1968).⁵² This period was the “late” or “peak” Warren Court.⁵³

The Warren Court marked a sea change not just in the law but also in broader American society. The 1960s were a time of transformation, particularly in relation to civil rights but also touching on many other social movements, involving women's rights, sexual liberalization, anti-war protests, and the rights of the poor.⁵⁴

And liberal Justices found allies in the dominant liberal political coalition. The Democratic Party enjoyed control of both Houses of Congress and the Presidency from 1961 to 1969,⁵⁵ yielding President

⁴⁴ See KLARMAN, *supra* note 28, at 209–11, 309–10.

⁴⁵ *Id.* at 288.

⁴⁶ *Id.* at 193–94.

⁴⁷ See *Justices 1789 to Present*, *supra* note 26.

⁴⁸ 377 U.S. 533 (1964).

⁴⁹ 376 U.S. 254 (1964).

⁵⁰ 381 U.S. 479 (1965).

⁵¹ 377 U.S. 218 (1964).

⁵² 391 U.S. 430 (1968).

⁵³ See Mark Tushnet, *The Warren Court as History: An Interpretation*, in *THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 1, 7, 31 (Mark Tushnet ed., 1993) (“[T]he liberals were firmly in control . . . from 1962 to 1969 . . .” *Id.* at 7.). Before 1962, the Warren Court's varied “confrontations with McCarthyism,” *id.* at 5, among other things, had left its “liberal image . . . somewhat blurred,” *id.* at 6.

⁵⁴ See generally TERRY H. ANDERSON, *THE SIXTIES* (6th ed. 2025).

⁵⁵ See *Party Government Since 1857*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government> [<https://perma.cc/45ZX-H2TC>].

Johnson's Great Society programs from 1964 to 1968.⁵⁶ Because the Court, too, was strongly controlled by liberals, this period was one of superunified governance — that is, ideological concordance across all three branches of the federal government. The Warren Court accordingly sustained, provoked, or built upon many political initiatives from the elected branches.

The Justices were also part of a multinational, even global, trend toward liberalism. With the planet largely divided into Soviet and Western powers, Western Europe in particular moved toward egalitarian reform, economic redistribution, and antiauthoritarian culture — a trend visible, for example, in the general strike in France in 1968.⁵⁷ The Court aligned with that global counterculture.

Some commentators have attempted to rebut the charge that the Warren Court was countermajoritarian by pointing out that the Justices repeatedly upheld major federal legislation, such as the Civil Rights Act of 1964.⁵⁸ Yet the Warren Court's substantial (not complete) affinity for Congress's handiwork was a natural byproduct of its ideological alignment with the elected branches of the federal government. So too was the Warren Court's relatively skeptical view of states and state laws. States sometimes broke from or obstructed federal policy, as most infamously illustrated by resistance to race integration and the vindication of civil rights for African Americans in the Deep South.⁵⁹ In other contexts, however, the states were simply the targets of the Justices' reformist ambitions, as in the school prayer and one-person, one-vote cases.⁶⁰ The Justices were looking for allies, and they often found them

⁵⁶ See ANDERSON, *supra* note 54, at 61, 66–72.

⁵⁷ See ARTHUR MARWICK, *THE SIXTIES: CULTURAL REVOLUTION IN BRITAIN, FRANCE, ITALY, AND THE UNITED STATES, C. 1958–C. 1974*, at 610 (1998).

⁵⁸ Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a to 2000h-6); see Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 274, 285 (2008). Professor Pamela Karlan has similarly argued that the Warren Court exhibited “trust” toward Congress, whereas the Roberts Court showed “disdain” toward the elected branches. Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 13, 25 (2012); see *id.* at 16, 22–29. For the reasons discussed in the main text, however, another of Karlan's expressions is more apt: The liberal Congress of the 1960s was the Warren Court's “indispensable partner.” *Id.* at 29; see also Bertrall L. Ross II, *Democracy and Renewed Distrust: Equal Protection and the Evolving Judicial Conception of Politics*, 101 CALIF. L. REV. 1565, 1586–87 (2013); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 517–18 (2000); L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 716 (2003); Archibald Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91, 106 (1966).

⁵⁹ See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁶⁰ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Engel v. Vitale*, 370 U.S. 421 (1962). The Warren Court is legendary in part because it opposed segregation relatively early in the civil rights movement, whose basic goals are now embraced by consensus. Cf. BICKEL, *supra* note 25, at 99 (arguing that “the Justices of the Warren Court placed their own bet on the future,” particularly in

nearby on the Hill. The Court was accordingly more horizontally deferential (with respect to Congress) and vertically assertive (with respect to states). The Court's structural rulings reflected its institutional affinities.

Because the liberal coalition was so ascendant during this period, it shaped the foundations of legal culture for virtually everyone. To be sure, many lawyers were critical of Chief Justice Warren's focus on what was fair⁶¹ rather than on traditional legal sources.⁶² Yet even many conservatives were (inevitably) shaped by the dominant judicial attitude of the day. The force of legal culture helps to explain why the Warren Court seemed in effect to live on for several years even after the arrival of President Nixon's four appointees, including Chief Justice Burger.⁶³ During what might be dubbed the "long Warren Court,"⁶⁴ the early Burger Court (which began in 1969) continued to issue decisions with Goldbergian flair.⁶⁵ The best-known example was the seven-to-two ruling in *Roe v. Wade*,⁶⁶ which extended *Griswold* in a way that overrode the laws of almost all states and contradicted the views of President Nixon.⁶⁷ Committing an instructive error, popular commentators have long listed *Roe* as a Warren Court ruling.⁶⁸

The long Warren Court also saw changes in the Justices' relationship with the federal government. In its final years, the Warren Court was unpopular, having issued several widely opposed rulings and become a target of Nixon's presidential campaign.⁶⁹ Once President Johnson left

Brown). When the Warren Court was in session, however, that hallowed status lay in the future. See Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 388 (2000). The experience of the current Court thus resembles the experience of the Warren Court — even if the current Court could never achieve the same retroactive legitimation.

⁶¹ See, e.g., sources cited *supra* note 18.

⁶² See, e.g., Alexander M. Bickel, *Is the Warren Court Too "Political?"*, N.Y. TIMES MAG., Sep. 25, 1966, at 30, 31, 131.

⁶³ See *Justices 1789 to Present*, *supra* note 26.

⁶⁴ See Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1363 (2012) (using this term). See generally LAURA KALMAN, *THE LONG REACH OF THE SIXTIES* (2017) (discussing changing Court dynamics in the 1960s and '70s).

⁶⁵ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

⁶⁶ 410 U.S. 113 (1973).

⁶⁷ See Mark Tushnet, Response, *Assessing Chief Justice William Rehnquist's Court*, 155 U. PA. L. REV. PENNUMBRA 1, 3 (2006) ("*Roe v. Wade* is a 'Warren Court'-like decision even though it was decided several years after Warren left the Court." (footnote omitted)); Warren Weaver Jr., *National Guidelines Set by 7-to-2 Vote*, N.Y. TIMES, Jan. 23, 1973, at 1 (describing how *Roe* "will result in broadly liberalized anti-abortion laws in 46 states," *id.* at 1, and "was at odds with the expressed views of President Nixon," *id.* at 20).

⁶⁸ Cf. MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 133 (2016) ("Ask almost anyone outside of a law school which group of Supreme Court justices decided *Roe v. Wade* and chances are very high that the answer will be the Warren Court.>").

⁶⁹ See Roger Handberg, *Public Opinion and the United States Supreme Court 1935–1981*, INT'L SOC. SCI. REV., Winter 1984, at 3, 8–9, 12 n.20. While older polls are sparser and harder to

office in favor of Nixon, the stage was set for a new alignment across the branches of government. By early 1972, the Court was — for the first time in decades — staffed by six Republican appointees.⁷⁰ That figure is misleading, however, given the abiding cultural influence of Warren Court Justices, as exemplified by President Eisenhower-appointed liberal Justice Brennan. Even so, one might reasonably have expected that a supermajority Republican-appointed Court, with the Chief Justice and three others appointed by President Nixon himself, would be sympathetic to Nixon. The Court might then develop a symbiotic relationship with the President, rather than with Congress.

Yet it was not to be. After the scandal surrounding a break-in at the Watergate complex, President Nixon became a subject of federal investigation. The President sometimes asserted strong views of executive power and even raised the possibility of defying judicial orders regarding the investigation.⁷¹ Needless to say, this position posed a threat to the judiciary's authority. Moreover, President Nixon's political position had become very weak, as many months of news stories, Senate hearings, and lower-court litigation had turned public opinion against him.⁷² In an opinion by Chief Justice Burger, the Court unanimously (with one recusal) rejected President Nixon's assertion of executive privilege, thereby requiring the President to turn over certain incriminating tapes of conversations in the Oval Office.⁷³ Nixon soon resigned. In this way, the Justices asserted their authority and prevailed in perhaps the Court's most dramatic confrontation with a President. Confirming that this episode is part of the Warren Court's legacy, Chief Justice Warren himself appears in the story: Just hours before he died, Justices Douglas and Brennan came to Warren's hospital bedside to reassure him of the Court's eventual ruling.⁷⁴

So the Warren Court's jurisprudential distinctiveness stemmed from several features. It was commanded by liberals — a coalition that included Democratic appointees who lacked New Deal-era judicial

interpret, the Warren Court faced substantial popular opposition during much of its tenure. For example, polls suggest that only 36% and 33% of the public supported the Court in 1968 and 1969, respectively. *See id.* at 8–9 (citing Gallup polls); *see also* PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* xxiii (1970) (“At the close of Warren’s tenure, both the Supreme Court and the law were at low tide so far as public reaction was concerned.” (referencing a recent Gallup poll)). The Warren Court’s most unpopular rulings included *Miranda* and the school prayer cases. *See* Handberg, *supra*, at 10; HORWITZ, *supra* note 18, at 95.

⁷⁰ *See Justices 1789 to Present*, *supra* note 26.

⁷¹ *See* Christopher H. Schroeder, *The Story of United States v. Nixon: The President and the Tapes*, in *PRESIDENTIAL POWER STORIES* 327, 352, 356 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009); *Nixon Refuses the Court’s Order, Richardson and Cox Reject Nixon’s*, N.Y. TIMES, Oct. 21, 1973 (§ 4), at 1.

⁷² *See* Schroeder, *supra* note 71, at 355. Judge Sirica played a key role as a lower court judge. *See id.*

⁷³ *United States v. Nixon*, 418 U.S. 683, 685, 713–14 (1974).

⁷⁴ *See* JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 514 (2006).

restraint as well as Republican ones, such as Chief Justice Warren himself, who shared in elite liberal opinion. The Justices found institutional allies in Congress and, during the long Warren Court, resisted a threat to judicial authority posed by President Nixon.

B. *The Swing Justice Era*

The five decades after *Roe* saw an astonishingly consistent shift away from some of the Warren Court's defining features. The Court's personnel became ever more conservative. In addition, both wings of legal culture became more formalist, in the sense of being more attuned to texts, traditional modes of legal argument, and judicial restraint. The Warren Court's open embrace of informal legal reasoning, including Chief Justice Warren's own explicit focus on fairness, fell out of favor. What explains these patterns?

Most fundamentally, national politics pivoted to the right. Presidential elections offer a measure of this trend that is crude but pertinent for federal judicial appointments. From the end of the Warren Court to Justice Barrett's appointment, a fifty-two-year period spanning 1968 to 2020, thirteen presidential elections occurred. Eight of them, over sixty percent, were won by Republicans.⁷⁵ By comparison, the fifty-two-year period before Chief Justice Warren's appointment (1901 to 1953) saw a seven-to-six split (roughly fifty-four percent) favoring Democratic Presidents.⁷⁶ To similar effect, scholars sometimes suggest that American politics in the early twentieth century was dominated by Franklin Roosevelt's presidency and in the latter by Ronald Reagan's.⁷⁷

In parallel with the turn to the right was a turn toward formalism in legal methodology. As conservative and liberal legal ideologies competed for influence on the Court and the broader judiciary, adherents to those ideologies had an incentive to place greater emphasis on the constraints attending positive law and traditional legal argument. On a closely divided bench, both the left and the right wings of legal culture often found themselves in dissent. As a result, both factions had an incentive to indulge in "the dissenter's determinacy," that is, to

⁷⁵ See *The American Presidency Project*, U.C. SANTA BARBARA, <https://www.presidency.ucsb.edu/statistics/elections> [<https://perma.cc/T8XT-CGN6>]. Disparities in judicial appointments were even more dramatic. From 1969, when Chief Justice Warren retired, to the present day, Republican Presidents appointed fifteen out of twenty Justices. See *Justices 1789 to Present*, *supra* note 26. However, this pattern was long tempered by Republicans' tendency — partly due to the check of a Democratic-controlled Senate — to appoint Justices who turned out to be moderate or even liberal. The slogan "No More Souters" has summarized Republicans' concerted efforts to bring their judicial appointments more in line with their party's democratic mandate. Lawrence Baum & Neal Devins, *Split Definitive*, SLATE (Nov. 11, 2011, at 17:27 ET), <https://slate.com/news-and-politics/2011/11/supreme-court-s-partisan-divide-and-obamas-health-care-law.html> [<https://perma.cc/35J4-JVU7>], reprinted in 2012 SUP. CT. PREVIEW 38, 40.

⁷⁶ See *The American Presidency Project*, *supra* note 75.

⁷⁷ See JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 12 (2020); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 390 (1998).

emphasize formal legal argument, determinate legal principles, and other constraints on judicial discretion.⁷⁸ Even Justice Brennan, once an influential leader of the Warren Court, increasingly found himself intoning about fidelity to precise legal texts and the risk of runaway judicial activism.⁷⁹ Conservatives, who started out in the position of Warren Court critics, soon became even more formalist, with Justice Scalia being the most salient example.⁸⁰

This fifty-year period, however, was not dominated by the likes of either Justice Brennan or Justice Scalia. Instead, the span between the Warren Court and the present Court was governed by a series of “swing Justices,” particularly Justices Powell, O’Connor, and Kennedy.⁸¹ All three of those jurists were Republican appointees selected under conditions that facilitated the identification of moderates.⁸² Because the Court was closely divided during this period, the swing Justices had an incentive to break off from their natural ideological allies on the right and chart their own paths. By doing so, those Justices could not only implement their own relatively moderate views on policy but also avoid results that would divide the nation and threaten the Court’s legitimacy or popularity.⁸³ Because this project was largely political in nature, it led to assertions of discretionary judicial power. By way of illustration, all three swing Justices generated novel constitutional rules that regulated but protected abortion and race-based affirmative action in higher

⁷⁸ See *Re*, *supra* note 20 (manuscript at 14) (suggesting this term and idea); see also BALKIN, *supra* note 77, at 102–10; Barry Friedman, *The Cycles of Constitutional Theory*, 67 *LAW & CONTEMP. PROBS.* 149, 149–50 (2004). Claims throughout this paper are adapted from *Re*, *supra* note 20. See also generally Richard M. Re, *The One Big Question* (Feb. 26, 2024) (unpublished manuscript), <https://ssrn.com/abstract=4739469> [<https://perma.cc/A2WN-7H5T>].

⁷⁹ See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 515–16 (1988) (Brennan, J., dissenting) (“The Court — unelected and unaccountable to the people — has unabashedly . . . [chosen] to legislate a rule . . .”).

⁸⁰ See Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 *YALE L.J.* 529, 530–31 (1997) (book review).

⁸¹ Other Justices, such as Justice Stevens in the early part of the period and Chief Justice Roberts in the latter part (2018–20), played lesser swing-Justice roles.

⁸² The Democratic Party dominated the Senate for much of this era, including when Justice Powell was appointed. To wit, Justices Blackmun and Kennedy were their respective Presidents’ third picks, after the first two announced nominations for each appointment had failed while Democrats controlled the Senate. See *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/ED7C-ZDXK>]. Justice O’Connor was selected pursuant to President Reagan’s pledge to appoint a woman to the highest Court, and her nomination was criticized or opposed by some leading social conservatives. See Thomas Ferraro, *Reagan Nomination Outrages Allies, Pleases Critics*, *UNITED PRESS INT’L* (July 8, 1981), <https://www.upi.com/Archives/1981/07/08/Reagan-nomination-outrages-allies-pleases-critics/7676363412800> [<https://perma.cc/Z6PV-XF9P>].

⁸³ See, e.g., EVAN THOMAS, *FIRST: SANDRA DAY O’CONNOR* 403 (quoting Justice Kagan on Justice O’Connor’s “instinct for the middle, as a centrist, with respect to every issue,” suggesting that she “would find the sweet spot where the settlement of incredibly difficult issues could be accepted”).

education.⁸⁴ By contrast, liberal Justices would have strongly protected both practices, and conservative Justices would have eliminated abortion protections while declaring race-based affirmative action to be largely illegal.⁸⁵ To some degree, the Court’s governing moderates managed divisions in national politics, as the mid- to late twentieth century saw increasing party sorting and polarization.⁸⁶ We might call the nearly half-century period from about 1974 to 2020 the “Swing Justice Era.”⁸⁷

The Swing Justice Era effectively featured a legal culture divided into three parts. Both conservative and liberal wings had an incentive to move ever farther toward formalism and judicial restraint on account of their frequent need to object to the victories of their opposite faction. Yet there was a substantial in-the-middle cohort created by swing Justices. The more moderate, discretion-oriented jurists held the key to major victories. As a result, judges, advocates, commentators, and students sought ways of appealing to those median jurists, along with their favored precedents and methodologies. That shared mission effectively forced the two opposed ideological groups to adopt a common language and mode of reasoning, at least when arguing their cases.

The Court also garnered legitimacy from its unpredictability and evenhandedness across political groups. In the early 2000s, conservatives could celebrate big wins in cases like *Bush v. Gore*,⁸⁸ *Citizens United v. FEC*,⁸⁹ and *Shelby County v. Holder*,⁹⁰ while liberals heralded the likes of *Boumediene v. Bush*, *United States v. Windsor*,⁹¹ and *Obergefell v. Hodges*. And both factions could find something to love — or loathe — in compromise rulings like *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹² and *Grutter v. Bollinger*.⁹³ The Court thus

⁸⁴ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20, 319 n.53 (1978) (opinion of Powell, J.); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

⁸⁵ See, e.g., *Bakke*, 438 U.S. at 377–78 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part); *id.* at 421 (Stevens, J., concurring in the judgment in part and dissenting in part); *Casey*, 505 U.S. at 923 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

⁸⁶ See Stephanopoulos, *supra* note 41, at 1022.

⁸⁷ See Neal Devins, *Why You Cannot Find a Swing Justice When You Really Need One*, 66 WM. & MARY L. REV. 947, 987 (2025) (using this term). I begin this era in 1974 to account for the long Warren Court’s reach into the 1970s. Choosing 1974 as the cutoff point is attractive for several reasons. It is the year Chief Justice Warren passed away. It is the year President Nixon resigned. And Justice Douglas suffered a stroke that year, leading to Justice Stevens’s appointment in 1975 — and a new balance of power. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁸⁸ 531 U.S. 98 (2000).

⁸⁹ 558 U.S. 310 (2010).

⁹⁰ 570 U.S. 529 (2013).

⁹¹ 570 U.S. 744 (2013).

⁹² 505 U.S. 833 (1992).

⁹³ 539 U.S. 306 (2003).

garnered occasional support from both major political parties, fostering its overall public legitimacy and authority.⁹⁴

Notably, the Swing Justice Era often featured assertive judicial action against both the states and the federal government. Whereas the Warren Court had enjoyed a more cooperative relationship with Congress and so favored the fruits of its work, median Justices were politically inconsistent or muddled and so found no stable institutional allies, either in federalism or the separation of powers. Partly for that reason, some scholars have characterized this era as one of heightened judicial activism across the board.⁹⁵ To use the foregoing examples, federal legislation lost out in *Boumediene*, *Citizens United*, *Windsor*, and *Shelby County*, while states largely lost out in *Casey* and *Obergefell*.

So, if one adopted the Warren Court as a baseline (as many commentators did), the shift was in favor of greater sensitivity to federalism and greater skepticism toward federal legislation.⁹⁶ Scholars accordingly proclaimed a “federalism revolution.”⁹⁷ Yet that designation masked a more complex pattern of bipartisan judicial activism with respect to states and the federal government.

In short, judicial outcomes seemed driven by something other than partisan politics, and a nonideological mode of legal argument seemed to exist and matter. This state of affairs often prompted both the left and the right to impugn the median Justices (and the important rulings they authored) as arbitrary or illegitimate.⁹⁸ But it also caused both flanks to become accustomed to pursuing big judicial victories. So, even as they ratcheted up their focus on constraining methodologies, both wings of legal culture sometimes embraced broad exercises of judicial power.

⁹⁴ See Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2250–54 (2019) (book review) (summarizing relevant political science research, including James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 206–07 (2014)); Rachel Bayefsky, *Judicial Institutionalism*, 109 CORN. L. REV. 1297, 1318 (2024) (expressing a legitimacy concern regarding “permanent losers” in the courts).

⁹⁵ See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004) (describing the Court’s “commitment to rights-based activism” and its “willingness to exercise its power on behalf of liberal as well as conservative ends,” *id.* at 285).

⁹⁶ See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995); *United States v. Morrison*, 529 U.S. 598, 602 (2000).

⁹⁷ E.g., Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 30 (2001). Some commentators did apply a more absolute standard for assessing changes to the law of federalism, instead of drawing comparisons with the Warren Court. That different perspective suggested that the asserted “revolution,” while significant, was never truly revolutionary. See, e.g., Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, Or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 370.

⁹⁸ E.g., Jeffrey Rosen, *Supreme Leader: On the Arrogance of Anthony Kennedy*, NEW REPUBLIC (June 16, 2007), <https://newrepublic.com/article/60925/supreme-leader-the-arrogance-anthony-kennedy> [<https://perma.cc/K4QU-H772>].

C. *The Conservative Warren Court*

The Conservative Warren Court came about through a series of events that call to mind the 1950s and '60s, albeit with some key elements of the story reversed or shifted around.

The Conservative Warren Court began with a strong claim to democratic legitimacy.⁹⁹ For many years, Republican politicians sought out jurists who had certain legal views amenable to conservative goals.¹⁰⁰ For instance, Republican political actors sought judges who would uphold statutes imposing abortion regulations, but also curtail race-based affirmative action, roll back the administrative state, promote the right to bear arms, and allow or protect religious practices.¹⁰¹ Every Justice associated with that general ideological program was appointed by a Republican President. And, as we have seen, that set of ideologically aligned jurists achieved a strong Court majority at the end of an historical period in which most Presidents had been Republican.¹⁰² The conservative legal movement achieved its goal through political victories and constitutional procedures. In other words, conservatives played the

⁹⁹ My claims regarding democratic legitimacy assume a relatively thin conception of democracy, wherein democratic authority travels with the results of reasonably majoritarian, inclusive elections governed by law and accompanied by basic political freedoms, such as freedom of speech. The idea of democracy is frequently used in similarly election-focused ways. *See, e.g.*, ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING* 24–25 (2021); STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 6 (2018). However, some leading theorists have offered thicker conceptions that build in related moral principles. For instance, Professor Seana Shiffrin understands democracy to mean, in part, “a political system that treats all its members with equal concern” — a view that “lends little support to the view that elections, in particular, are *the* defining characteristic of democracy.” SEANA VALENTINE SHIFFRIN, *DEMOCRATIC LAW* 20, 21 (2021). For present purposes, thicker conceptions risk conflating the distinctive force of inclusive majoritarian decisionmaking with other important interests and values, such as fairness, social equality, or the rule of law in general. *See infra* note 357. For example, the absence of a guaranteed basic income (GBI) might have adverse implications for a democracy, but successful political opposition to GBI ought not be condemned as antidemocratic.

¹⁰⁰ *See* ADAM BONICA & MAYA SEN, *THE JUDICIAL TUG OF WAR* 18 (2021); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 179 (2008) (discussing, among other things, the creation and growth of the Federalist Society); *see also* Interview by Piers Morgan with Antonin Scalia, Assoc. Just., Sup. Ct. of the U.S. (July 18, 2012), <https://transcripts.cnn.com/show/pmt/date/2012-07-18/segment/01> [<https://perma.cc/F68G-VNLX>] (Justice Scalia explaining that Presidents select judges based on the political appeal of their jurisprudences’ implications for topics like abortion).

¹⁰¹ A huge literature suggests a descriptive and/or prescriptive relationship between democratic legitimacy and Supreme Court rulings. *See, e.g.*, Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373, 375 (2007); MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 94, 149–50 (2010); Richard M. Re, *Should Gradualism Have Prevailed in Dobbs?*, in *ROE V. DOBBS* 140, 155 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024) (arguing that *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), illustrates “democratic constitutionalism”).

¹⁰² *See supra* note 75. On this view, democratic legitimacy can be a matter of degree. For instance, the 1940s Court had an even stronger claim to democratic legitimacy than the current Court. *See supra* p. 7.

“game” of constitutional politics by the rules and won. That success conveys at least some significant democratic legitimacy.

The Conservative Warren Court’s democratic bona fides are obscured by many contingent events that went into creating it.¹⁰³ Liberal critics have complained (for example) that President Obama would have been able to fill Justice Scalia’s seat but for the opportunistic obstructionism of the Republican-controlled Senate in 2016,¹⁰⁴ or that Justice Ginsburg’s death during the twilight of the first Trump Administration, rather than a few months later, was an arbitrary misfortune that favored conservatives.¹⁰⁵ These sorts of contingencies often do shape historical events. For instance, various happenstances, such as the failure of Judge Douglas H. Ginsburg’s nomination by President Reagan,¹⁰⁶ help to explain why the Conservative Warren Court did not arise even sooner, such as in 1992 when the Court was composed of eight Republican appointees¹⁰⁷ and six of the last nine presidential terms had been served out by Republicans.¹⁰⁸ Over the last several decades, however, these contingencies have mostly canceled each other out, without clearly favoring either the left or the right.

In addition, the events immediately preceding the Conservative Warren Court imbue it with a more qualitatively ascertainable form of political legitimacy. The 2016 presidential election was, to put it mildly, highly significant for American law. A potentially pivotal seat on the

¹⁰³ See Stephen E. Sachs, *Supreme Court as Superweapon: A Response to Epps & Sitaraman*, 129 YALE L.J.F. 93, 102–03 (2019). Professor Kevin McMahon has argued that the current Court is anomalous in that most of its majority-bloc members were selected by presidents who had lost the popular vote or were confirmed by senators representing a minority of Americans. See KEVIN J. MCMAHON, A SUPREME COURT UNLIKE ANY OTHER 10–12 (2024). *But see id.* at 259 (“Trump’s emphasis on the Court issue, particularly in 2016, should confer some democratic legitimacy on the Court.”). But political actors focus on the actual rules for electoral victory. If the popular vote had been determinative, then entire elections would have proceeded differently. In general, democracy is made possible and constituted by legal rules that reasonably limit it, such as eligibility rules. By detaching democratic legitimacy from reasonable electoral rules, partisans can impugn almost any election, enactment, or appointment — and they often do.

¹⁰⁴ Cf. LEVITSKY & ZIBLATT, *supra* note 99, at 162–67 (describing a downward spiral of norm-breaking by both major parties from 2008 to 2016, culminating in the Senate’s refusal to consider Merrick Garland’s nomination to the Supreme Court). One might here respond that the Senate’s role in giving or withholding advice and consent is itself part of the democratic, lawful process for selecting federal judges — as liberals often observed after the failure of Judge Bork’s nomination to the Court.

¹⁰⁵ See, e.g., Astead W. Herndon & Maggie Astor, *Ruth Bader Ginsburg’s Death Revives Talk of Court Packing*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/09/19/us/politics/what-is-court-packing.html> [<https://perma.cc/52VA-ZHHB>].

¹⁰⁶ See, e.g., Steven V. Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana “Clamor,”* N.Y. TIMES, Nov. 8, 1987, at 1. Other contingencies include President Reagan’s campaign promise to nominate a woman to the Court, or President H.W. Bush’s decision to nominate David Souter instead of Ken Starr. Justice Scalia’s passing away during the Obama Administration could have been another contingent misfortune for the right — except that politics transformed it into a conservative success. See *infra* note 109 and accompanying text.

¹⁰⁷ See *Justices 1789 to the Present*, *supra* note 26.

¹⁰⁸ See *The American Presidency Project*, *supra* note 75.

Court remained vacant after Justice Scalia's death earlier that year, and other Justices were reaching retirement age. All relevant participants in the election recognized the jural stakes, including Democratic presidential nominee Hillary Clinton.¹⁰⁹ The Court was thus “on the ballot” in a way that may be unique in the modern era.¹¹⁰ Against that backdrop, the Republican (Donald Trump) won the presidency. And the results, including the “automatic[]” overruling of *Roe v. Wade*,¹¹¹ have generally been consistent with candidate Trump's expectations. President Trump's second victory, in the wake of major decisions by the Conservative Warren Court, is plausibly viewed as confirmation of the Court's political support. Both President Biden and Vice President Harris made *Roe*'s overruling a central issue in an election cycle that saw Democrats lose the presidency and both houses of Congress.¹¹²

Yet the current Court's democratic pedigree comes with a price: a diminished ability to claim the mantle of political impartiality. The Justices' votes in major cases, on salient topics, like abortion, affirmative action, and the regulatory state, are often explainable by party affiliation alone — sometimes perfectly so.¹¹³ In that respect, the Justices resemble elected officials. By comparison, the Warren Court could draw legitimacy from the fact that its membership stretched across the proverbial aisle. Chief Justice Warren himself had been a Republican governor and Vice Presidential candidate, as well as a contender for the Republican nomination for president.¹¹⁴ Especially when it generated unanimous or near-unanimous opinions, as in *Brown*, the Court could present itself as having a nonpartisan judicial outlook. The Conservative

¹⁰⁹ See *Transcript of the Second Debate*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/10/us/politics/transcript-second-debate.html> [<https://perma.cc/UJ6Y-NTCR>] (“[The future of the Supreme Court] is one of the most important issues in this election.” (quoting Hillary Clinton)).

¹¹⁰ The closest antecedent may be the election of 1968: After Chief Justice Warren announced his retirement and Justice Fortas's nomination for Chief Justice failed in the Senate, President Nixon prevailed by campaigning against recent Warren Court case law. See KALMAN, *supra* note 64, at 124.

¹¹¹ See Clio Chang, *Trump Vows that He Will Overturn Roe v. Wade “Automatically.”* NEW REPUBLIC (Oct. 19, 2016), <https://newrepublic.com/article/137950/trump-vows-will-overturn-roe-v-wade-automatically> [<https://perma.cc/A3WB-RPMM>].

¹¹² See *Party Government Since 1857*, *supra* note 55; see, e.g., Alice Miranda Ollstein & Megan Messerly, *Harris Hoped to Ride Abortion to Another Post-Dobbs Democratic Victory. It Didn't Work.*, POLITICO (Nov. 6, 2024, at 09:01 ET), <https://www.politico.com/news/2024/11/06/abortion-trump-2024-00187825> [<https://perma.cc/B2YY-ESFM>].

¹¹³ See Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html> [<https://perma.cc/5F5A-KL4G>] (noting the Court's near-perfect ideological sorting after Justice Kennedy's retirement).

¹¹⁴ See NEWTON, *supra* note 74, at 209.

Warren Court thus gains in democratic authority but (uncoincidentally) loses in judicial impartiality.¹¹⁵

The present Court is even more starkly different from the Burger, Rehnquist, and early Roberts Courts, which were dominated by swing Justices whose rulings were often unpredictable and offered major victories to both parties. During the Swing Justice Era, the Court's democratic authority stemmed largely from the median Justices' willingness to hew to centrist political opinion. As we have seen, the median Justices fostered a "middle" position that did not neatly track either conservative or liberal ideology. Today, by contrast, one can approach many Court cases simply by counting up Rs and Ds, much as in the Senate before a floor vote. Legal culture is accordingly in danger of losing its "middle" group, leaving two polarized factions that mirror the political arena.

The Conservative Warren Court's democratic foundations might seem ironic given its personnel. Politicians and political leaders figured prominently in the history of the Warren Court, including most obviously its eponymous Chief Justice (a Governor and presidential prospect) but also Justice Black (a Senator) and Justice Douglas (invited to run for the Vice Presidency).¹¹⁶ Other Justices held senior leadership positions; for example, Justices Jackson and Clark were attorneys general, and Justice Goldberg was Secretary of Labor.¹¹⁷ And Justice Frankfurter closely advised President Franklin Roosevelt and helped staff his Administration.¹¹⁸ By comparison, the Conservative Warren Court is dominated by career lawyers. While several Justices did hold significant posts in the executive branch, particularly Justice Kagan as Solicitor General,¹¹⁹ those positions largely involved lawyers' work or policy advising, not senior leadership at the Cabinet level. Only ten former Supreme Court clerks have ever served on the Court — and six

¹¹⁵ Impartiality and accountability are in tension, and institutions often prioritize one over the other. For example, judges and juries are often thought, or hoped, to be "impartial" partly because they are not electorally accountable. See, e.g., U.S. CONST. amend. VI (providing for impartial juries); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 279 (2008) (describing concern that judicial elections undermine both "judicial impartiality" and "the appearance of impartiality").

¹¹⁶ See Tushnet, *supra* note 53, at 28; POWE, *supra* note 39, at 13.

¹¹⁷ See Tushnet, *supra* note 53, at 28.

¹¹⁸ SNYDER, *supra* note 30, at 348–49.

¹¹⁹ *The Current Court: Justice Elena Kagan*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/supreme-court-justices/associate-justice-elena-kagan> [<https://perma.cc/HX4C-5R9F>].

of those ten now staff the Conservative Warren Court.¹²⁰ Meanwhile, no Justice has held an elected office since Justice O'Connor.¹²¹

On reflection, however, the Justices' backgrounds as legal technicians, rather than political leaders, comport with the Court's new, democratically grounded role. The current Justices could be viewed as exalted functionaries, still writing memos and briefs (in the form of judicial opinions) on account of their political principals. So understood, the Justices would effectively be implementing a political vision selected elsewhere.

Also calling to mind the 1960s, the Conservative Warren Court might intensify over time. One source of change would be the arrival of new Justices. If the second Trump Administration features additional Court appointments, for instance, the jurists selected might be more aggressive and uninhibited in the pursuit of conservative goals, as compared with President Trump's first-term appointments. Of course, that sort of personnel change would be especially momentous if it corresponded with the departure of a liberal or relatively moderate conservative, as Justice Goldberg's arrival followed Justice Frankfurter's departure.¹²² But it would still matter if a Justice Ho, Oldham, or Cannon replaced a strong conservative like Justice Thomas or Alito. New appointees might be more willing to embark on their own ideological projects, consistent with the latest conservative trends. And new appointees might be less institutionalist than the jurists they replace, thereby making it difficult for the Court to speak with a majority voice, much less a unitary one.

Broader social and even global trends represent another source of juridical change. The Warren Court reflected a general surge of liberal sentiment during the 1960s. The Justices were influenced by those national and international trends and helped to sustain them. Similarly, the Conservative Warren Court is part of a turn toward populist conservatism not just in the United States but around the world.¹²³ For example, the first Trump Administration began at roughly the same time as the initiation of Brexit; and Brexit was finally accomplished in 2020,

¹²⁰ The six are: Chief Justice Roberts, Justice Kagan, Justice Gorsuch, Justice Kavanaugh, Justice Barrett, and Justice Jackson. A seventh, Justice Breyer, also served on the Conservative Warren Court, before being replaced by Justice Jackson. The other three former clerks turned Justices were Justices White, Rehnquist, and Stevens. *Frequently Asked Questions—Supreme Court Justices, Have Any Supreme Court Justices Served As Law Clerks?*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_justices.aspx [<https://perma.cc/6A8L-ZBG5>].

¹²¹ See Peter S. Canellos, *Sandra Day O'Connor Was a Politician Justice. Now the Court Is All Nerds.*, POLITICO (Dec. 1, 2023, at 15:18 ET), <https://www.politico.com/news/magazine/2023/12/01/sandra-day-oconnor-supreme-court-00129648> [<https://perma.cc/B9VT-R35T>].

¹²² See POWE, *supra* note 39, at 211; Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962–1969)*, 20 SANTA CLARA L. REV. 773, 775 (1980).

¹²³ See, e.g., Ronald F. Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* 6 (Harvard Kennedy Sch. Faculty Rsch. Working Paper Series, Paper No. RWP16-026, 2016), <https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash> [<https://perma.cc/TX2C-MTSQL>].

around the time Justice Barrett joined the Court.¹²⁴ The ascendance of this new, transformative brand of conservatism,¹²⁵ both in the United States and abroad, differentiates the Conservative Warren Court from, say, the “Nine Old Men” who stood athwart the New Deal and a political groundswell in favor of liberalism.¹²⁶ For now, at least, the current Court has the winds of history at its back.

And what institutions does the current Court look to for alliances? Unlike the Warren Court, the Conservative Warren Court has generally been misaligned with the federal government. For its first four years, Biden was President. The result was a series of rulings that rejected executive branch policies and regulations, including executive efforts to afford student debt relief in *Biden v. Nebraska*.¹²⁷ And, more fundamentally, the federal administrative state has generally been misaligned with conservative interests and, consequently, a focal target of conservative activism. *West Virginia v. EPA*¹²⁸ and *Loper Bright Enterprises v. Raimondo*¹²⁹ offer leading examples.

Given its unsupportive or antagonistic relationship with other components of the federal government, the Conservative Warren Court has so far found allies primarily among ideologically aligned states, sustaining their regulatory efforts. Most conspicuous is *Dobbs v. Jackson Women’s Health Organization*,¹³⁰ which gave states a green light to regulate abortion.¹³¹ This Term, the Justices ruled similarly in *United States v. Skrametti*,¹³² which (despite its caption) involved conservative states’ restrictions on access to gender-transition treatments for minors.¹³³ But because states are ideologically diverse, the Justices do come into conflict with ideologically misaligned “blue” states. The most salient examples involve Second Amendment challenges that have disrupted state firearms regulations, as exemplified by *New York State Rifle & Pistol Ass’n v. Bruen*.¹³⁴ This Term, *Mahmoud v. Taylor*¹³⁵ rejected a local school board’s effort, consistent with liberal political preferences, to promote tolerance and affirmation of LGBTQ+ persons.¹³⁶

¹²⁴ NIGEL WALKER, HOUSE OF COMMONS LIBRARY, BRIEFING PAPER No. 7960, BREXIT TIMELINE: EVENTS LEADING TO THE UK’S EXIT FROM THE EUROPEAN UNION 6, 75 (2021), <https://researchbriefings.files.parliament.uk/documents/CBP-7960/CBP-7960.pdf> [<https://perma.cc/URJ5-Y7YB>].

¹²⁵ The rise of populist conservatism arguably represents a kind of political realignment, scrambling some political divides, alliances, and ideological allegiances.

¹²⁶ See generally DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN (1936).

¹²⁷ 143 S. Ct. 2355 (2023).

¹²⁸ 142 S. Ct. 2587 (2022).

¹²⁹ 144 S. Ct. 2244 (2024).

¹³⁰ 142 S. Ct. 2228 (2022).

¹³¹ *Id.* at 2279.

¹³² 145 S. Ct. 1816 (2025).

¹³³ *Id.* at 1826.

¹³⁴ 142 S. Ct. 2111 (2022).

¹³⁵ 145 S. Ct. 2332 (2025).

¹³⁶ See *id.* at 2353; see also *infra* notes 372–81 and accompanying text (discussing *Mahmoud*).

At the start of the second Trump Administration, however, the Court's relationship to the political branches is markedly different. Much as the late Warren Court enjoyed superunified government in liberal hands, the Conservative Warren Court now sits within a federal government controlled by conservatives. The alignment across branches is imperfect, for even the three Justices appointed during the first Trump Administration are hardly in lockstep with the second.¹³⁷ (Interestingly, the Justices who now appear most aligned with the Administration are Justices Thomas and Alito, whom President Trump did not appoint.¹³⁸) Even so, much of what President Trump now hopes to accomplish comports with what a supermajority of Justices also desire. Examples include empowering the presidency,¹³⁹ fostering deregulation,¹⁴⁰ and eliminating race-based affirmative action, particularly in higher education.¹⁴¹ In this environment, the Court can be expected to facilitate and ratify much federal action by the President or Congress.

Yet there are crosscutting considerations that call to mind the long Warren Court and the Nixon tapes case. Most saliently, the current Justices have reason to worry about the continued authority of their own institution. Before becoming Vice President, J.D. Vance publicly suggested that, in his second term, President Trump ought to defy court orders.¹⁴² That idea was and remains startling, as overt executive branch disobedience to federal court orders is anomalous in U.S. history.¹⁴³ Moreover, Vice President Vance's suggestion calls into question not just the authority of the federal courts, but also the rule of law. And

¹³⁷ See STUART BANNER, *THE MOST POWERFUL COURT IN THE WORLD* 562 (2024) ("Trump's willingness to let the Federalist Society choose his justices [during his first term] proved fatal to his efforts to cling to power, because it ensured that even his own appointees felt allegiance to the legal system rather than to him."); Noah Feldman, *The Last Bulwark*, N.Y. REV. (May 15, 2025), <https://www.nybooks.com/articles/2025/05/15/the-last-bulwark-noah-feldman> [<https://perma.cc/D9AK-ULYF>] (discussing critical role played by conservative judges adhering to principle over party allegiance during the early second Trump Administration).

¹³⁸ That pattern may not be entirely coincidental. See *infra* notes 296–97 and accompanying text.

¹³⁹ *Trump v. United States*, 144 S. Ct. 2312 (2024).

¹⁴⁰ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

¹⁴¹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

¹⁴² See Charlie Savage & Minh Kim, *Vance Says "Judges Aren't Allowed to Control" Trump's "Legitimate Power,"* N.Y. TIMES (Feb. 9, 2025), <https://www.nytimes.com/2025/02/09/us/politics/vance-trump-federal-courts-executive-order.html> [<https://perma.cc/H6ZW-WJKJ>] (recounting in part Vance's 2021 statement during a podcast: "And when the courts — because you will get taken to court — and when the courts stop you, stand before the country like Andrew Jackson did and say: 'The chief justice has made his ruling. Now let him enforce it.'").

¹⁴³ Even so, the norm of executive branch compliance with federal court orders is regularly tested and sometimes broken. See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 491 (2018) ("Presidents have defied or credibly threatened to defy judicial rulings in the past. Presidents may do likewise in the future."); Jennifer Lee Koh, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 951–52 (2021) (noting, but also complicating, the "prevailing assumption in our legal system . . . that once a federal court issues an order, the government will obey," *id.* at 951; *infra* section III.B, pp. 67–76).

the new Administration's early months created opportunities for just this sort of defiance. Extraordinarily aggressive claims of executive authority have characterized the beginning of the new Trump Administration. Relevant areas are too numerous to list here but include: deporting persons without significant process,¹⁴⁴ terminating officials and civil service employees,¹⁴⁵ failing to transfer or spend legally committed funds,¹⁴⁶ and refusing to recognize the citizenship of the children of unlawful immigrants (among others).¹⁴⁷

So far, the executive branch has avoided overt disobedience to court orders.¹⁴⁸ Moreover, President Trump and Vice President Vance, along with executive branch officials, have lately affirmed their intention to appeal adverse court orders rather than disobey them.¹⁴⁹ Yet the executive branch's compliance with orders may be in the eye of the beholder.¹⁵⁰ And, more fundamentally, even the stated possibility of executive branch defiance must be alarming to some or all Justices. The Court's mutually supportive relationship with the second Trump Administration is tempered by a felt need to check it.

The Conservative Warren Court thus offers a new twist on an old classic. Like its predecessor, the current Court features a strong ideological alignment, wields great power, and can operate as a counterweight to the presidency. Unlike the Warren Court, however, the current Justices are more scholarly in affect than political, more rooted in democratic legitimacy than political impartiality, and more inclined toward alliances with states than with Congress.

¹⁴⁴ See Exec. Order No. 14,159, 90 Fed. Reg. 8443 (Jan. 20, 2025) (expanding use of expedited removal, permitting deportations with reduced process).

¹⁴⁵ See Devlin Barrett, *Dismissals at Justice Dept. Would Bypass Civil Service and Whistle-Blower Laws*, N.Y. TIMES (July 15, 2025), <https://www.nytimes.com/2025/07/15/us/politics/justice-department-dismissals-civil-service-laws.html> [<https://perma.cc/3VVT-DHEK>].

¹⁴⁶ Zachary S. Price, *Trumpian Impoundments in Historical Perspective*, 78 STAN. L. REV. ONLINE 19, 21 (2025).

¹⁴⁷ See Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (adopting policy of excluding from birthright citizenship certain persons whose mothers were unlawfully or temporarily in the United States).

¹⁴⁸ Some readers might believe that line has already been crossed, depending in part on what qualifies as "overt." See Daniel T. Deacon & Leah M. Litman, *Legalistic Noncompliance*, 75 DUKE L.J. (forthcoming 2026) (manuscript at 60–61), <https://ssrn.com/abstract=5241936> [<https://perma.cc/FNM3-UYG3>]. See generally *infra* section III.B, pp. 67–76.

¹⁴⁹ See, e.g., Amanda Friedman, *Trump Says He's "Not Defying the Supreme Court" Amid Stand-off Over Wrongly Deported Man*, POLITICO (Apr. 25, 2025, at 10:34 ET), <https://www.politico.com/news/2025/04/25/trump-supreme-court-deportation-00309305> [<https://perma.cc/GR8V-RYPM>] ("I never defy the Supreme Court. . . . I'm a big believer in the Supreme Court, and have a lot of respect for the justices." (quoting President Trump)).

¹⁵⁰ See Deacon & Litman, *supra* note 148 (manuscript at 3) (arguing that recent Administration actions render "the line between compliance and noncompliance fuzzier").

II. LEGAL REALIGNMENTS

[I]s it fair?

– Chief Justice Warren

[I]s it fair?

– Justice Alito¹⁵¹

The shift from the Warren Court to its present day successor illustrates how the law, especially constitutional law, changes in the U.S. legal system, even as it maintains the same underlying structure. This mix of fixity and dynamism poses challenges, both ethical and practical.

A. *The Law's Deep Structure*

We often invoke “the law” as a unitary entity, but the concept of law is ambiguous.¹⁵² We can distinguish among three interrelated levels of law, beginning with the most individualized and fluid and ending with the most interpersonally shared and constant.

At the first level are the myriad accounts of rights, interpretation, and judicial decisionmaking that heroically posit their own correctness or superiority. Someone might argue, for instance, that the text is the law, that textualism is the right way to interpret the law, and that the judges who staff the federal courts ought to be textualists. Views expressed at this level resemble first-person perspectives or opinions put forward for general acceptance. Yet they usually take the form of universal claims about an existing state of affairs. We might call these principles personal law, since they exist simply in virtue of the fact that some person — anyone from a judge to a law student — holds them.¹⁵³

At the second level is the total set of principles openly held and applied by officials, accounting for their adjudicatory authority.¹⁵⁴ Some judges are textualist, for instance, whereas others aren't. Precisely which judges are textualist matters, as various judges wield different kinds of authority within the legal system. A regime in which all members of an apex appellate court are textualist would be quite different from one in which only some or none of those judges were textualist.

¹⁵¹ See *infra* notes 202–07 and accompanying text.

¹⁵² See, e.g., Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1201–02 (2015). To use a more technical vocabulary, law is “polysemous” in that it has multiple related meanings. See Daniel J. Hemel, *Polysemy and the Law*, 76 VAND. L. REV. 1067, 1069 (2023).

¹⁵³ By here defining personal law to encompass the views of nonofficials, I adopt a somewhat different approach than in my past work, which was more focused on adjudication. See Richard M. Re, *A Law unto Oneself: Personal Positivism and Our Fragmented Judiciary*, 110 VA. L. REV. 1169, 1174, 1180 (2024) (defining personal rules as, roughly, publicly known rules held by officials).

¹⁵⁴ See *id.* at 1174. The going law is both more and less than the sum of its parts. *More* because it reflects institutional realities whose content is fixed and independent of anyone's personal law. And *less* because it is avowedly conditioned on those institutional realities, in contrast with the more timeless and universalist claims that characterize many personal views of the law.

This level reflects the law as it is currently instantiated — the going law, as it were.¹⁵⁵ At this level, the law is relatively descriptive and utilitarian, insofar as it usefully reveals the norms that are in fact at work within the legal system at a given moment.¹⁵⁶

Last is the deep structure of the law. At this level, key interests and social realities shape the views that individuals and groups maintain at any given point in time. Texts, for instance, would be recognized as critical for legal coordination and notice, but also as inherently limited in their comprehensiveness, accuracy, and coherence. This tension explains why someone might either be a textualist or reject textualism in favor of a more flexible approach. The result is a limited menu of options in which different combinations make sense at different times for different legal actors. This underlying structure leaves room for creativity, individualization, and dynamism, but it is also fixed and interpersonal. It is the playing field on which individuals develop their own personal law and, in the aggregate, the going law for the legal system. This last level can be viewed as the law of the law.¹⁵⁷

The law's deep structure can be viewed as naturalist insofar as it derives in part from basic features of human society, such as conditions of scarcity, the need for practical cooperation, and the competing benefits of rules and standards.¹⁵⁸ But the deep structure is also somewhat contingent insofar as it trades on distinctive features of the U.S. legal system, such as its size, complexity, and dependence on a political regime characterized by a two-party system.¹⁵⁹ Because the legal system implicates so many interconnected and conflicting interests, much of the law's deep structure can be mapped by marking various antinomies.¹⁶⁰

¹⁵⁵ As of today, for instance, the going law holds that abortion regulations are generally constitutional, whereas de jure race segregation is not.

¹⁵⁶ At this second level, we might also distinguish between two versions of the going law: one that accounts for each judge's views (individual positivism) and another that trains on the fundamental views held by all judges (general positivism). Adding yet another dimension to the inquiry, we might further distinguish between accurately ascertained law (omniscient law) and the law as it is presently understood by judges (actual law). Hartian positivism, for instance, can be viewed as an omniscient, general positivism: It assesses the fundamental rule of recognition generally shared by judges, and then deems as law whatever that rule actually validates. *See* H.L.A. HART, *THE CONCEPT OF LAW* 100–03, 108 (3d ed. 2012). By contrast, my “personal positivism” is more of an individual, actual positivism: It focuses on the total set of rules that each judge does in fact maintain. *See* *Re*, *supra* note 153, at 1180–81.

¹⁵⁷ *See* *Re*, *supra* note 20 (manuscript at 2) (discussing the law's “underlying” or “deeper structure”).

¹⁵⁸ *See id.* (manuscript at 2 n.11).

¹⁵⁹ I have elsewhere argued that the two-party system that characterizes American politics dictates that legal culture is similarly dualist. In brief: Each of the two political parties tends to select judges who (roughly) correspond to the party's respective preferences. *See id.* (manuscript at 2).

¹⁶⁰ *See* RICHARD A. POSNER, *LAW AND LITERATURE* 124 (3d ed. 2009) (“Law considered reflectively can be seen, in both its conceptual and its institutional aspects, as riven by a series of antinomies, such as law versus equity, rule versus discretion, positive law versus natural law,

Four interrelated antinomies are particularly relevant here¹⁶¹:

Constraint–Discretion
Text–Purpose
Precedent–Reconsideration
Deference–Independence

The tension between judicial constraint and discretion represents something of a master antinomy, in the sense that it is more abstract than the others listed.¹⁶² In other words, a court’s adherence to text,¹⁶³ fidelity to precedent, and willingness to defer to other institutions can all be viewed as constraints on the exercise of judicial power. By comparison, a court tends to be imbued with greater discretion insofar as it considers the purpose of a legal enactment, reconsiders past decisions, or decides independently, without deferring to others.

A workable legal system requires both sides of each antinomy, so neither can be entirely abandoned.¹⁶⁴ That is, the legal system requires

customary law versus enacted law, judge versus jury — even, it may be, male versus female. These antinomies give structure to jurisprudence.”); BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 4 (1928) (“The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law. ‘Nomos,’ one might fairly say, is the child of antinomies, and is born of them in travail.”); Adrian Vermeule, *Reason and Fiat in the Jurisprudence of Justice Alito*, 46 HARV. J.L. & PUB. POL’Y 875, 876 (2023) (“A proper antinomy is a standing, unavoidable polarity in law and legal practice such that both poles have their attractions under certain circumstances . . .”). Resolution of antinomies through history is often expressed in terms of pendular motion. See, e.g., Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1493–94 (2008).

¹⁶¹ Additional examples attracting scholarly attention include Stability–Progress, Reason–Fiat, Conduit–Creator, and Logic–Experience. See CARDOZO, *supra* note 160, at 7 (beginning a “study of antinomies” with “rest and motion, stability and progress”); Lon L. Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 377 (1946); Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 361 (1939) (“The antinomy at the basis of a judge’s work has been so often discussed that I can justify no more than a bare restatement of it.”); see also Aharon Barak, *The Supreme Court, 2001 Term — Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 29–30 (2002) (“The life of the law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together.” (footnote omitted)); Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 3 (2014) (noting the Formalism–Realism “tension” is “pervasive”); cf. ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 133 (1975) (noting various antinomies in critically assessing liberalism). Both legal realists and natural lawyers have attended to law’s antinomies — suggesting their deep jurisprudential foundation.

¹⁶² See Re, *supra* note 20 (manuscript at 3).

¹⁶³ Text’s relationship to constraint is complicated. When texts are indeterminate, as in key constitutional provisions, literalism can be discretion-conferring, and attention to historical purposes constraining. See Richard M. Re, *Permissive Interpretation*, 171 U. PA. L. REV. 1651, 1681 (2023). Justice Black’s constitutional literalism offers a Warren Court–era illustration. See *id.* at 1683–84; see also, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963). A related antinomy that more closely tracks Constraint–Discretion is Enactment–Aspiration.

¹⁶⁴ Theories of natural law sometimes identify qualities that the law must possess, such as publicity and generality. But what legal systems truly require is a balance of competing interests or

constraint for law to exist, but also discretion to accommodate the unexpected. It needs strict attention to text to coordinate legislation and facilitate compliance, but also awareness of purpose to avoid unintended or senseless results. It depends on precedent to promote stability and experiential learning, but also reconsideration to correct errors and update for new events. And it relies on deference to compensate for the judiciary's lack of expertise, but also independence to preserve the rule of law.¹⁶⁵

The deep structure of the law is not determinate in a way that can resolve discrete cases or even dictate the specific legal principles in force at any given time. Moreover, the law's deep structure is fundamentally descriptive and so cannot in itself provide prescriptive guidance. These limitations, however, are features, not bugs. A theory that purports to capture what makes law distinctive, as contrasted with politics, cannot possibly entail support for one political faction or perspective. The law's deep structure must therefore be substantially indeterminate or inconclusive when it comes to adjudicating among legal views and judicial philosophies.

Even so, legal actors might alter their views or behavior based on their awareness that the law has a deep structure underlying the operative principles of the day. For instance, an effort to ignore one side of an antinomy will generate practical problems. So when the legal system begins to veer off in one direction, we should expect a course correction.¹⁶⁶ Legal culture's waxing and waning commitment to textualism offers an example.¹⁶⁷

The law's deep structure also counsels that seemingly transformative developments should often be taken with a grain of salt. If a ruling purports to resolve one of the foregoing antinomies, it will probably turn

qualities — not simple compliance with a checklist. See LON L. FULLER, *THE MORALITY OF LAW* 45 (rev. ed. 1969) (“[A]ntinomies may arise within the internal morality of law itself. . . . [T]he various desiderata which go to make up [the law’s] morality may at times come into opposition with one another.”). Thus, each checklist item (such as publicity) is paired with an antonym (such as secrecy). And because the desiderata are interrelated, legal theories and systems exhibit second-order balancing across qualities. So a low degree of generality might typically be infeasible — unless there is a high degree of notice. Cf. Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 *IND. L.J.* 1401, 1403 (2017) (describing microdirectives). And a Constraint–Discretion balance can be maintained by trading down attention to text in favor of precedent or deference. See *infra* p. 37.

¹⁶⁵ The “rule of law,” another ambiguous concept, can be understood as adequate compliance with the three levels of law: officials following their personal law, an adjudicatory system exhibiting the going law’s distribution of power, and a legal system balancing antinomic tension. The rule of law is necessary, not sufficient, for values such as freedom, equality, and democracy.

¹⁶⁶ Cf. William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 *HARV. L. REV.* 26, 28–29 (1994) (describing equilibration of law’s deep tensions in institutionalist terms).

¹⁶⁷ Cf. Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 *U. CHI. L. REV.* 1819, 1854 (2016) (describing “new textualism” and its integration of “purposive considerations”).

out to be more of a recalibration than a revolution. Take *Loper Bright Enterprises v. Raimondo*, which only last year purported to overrule the once-foundational doctrine of *Chevron*¹⁶⁸ deference, that is, the notion that courts ought to defer to statutory interpretations by administrative agencies.¹⁶⁹ In the wake of *Loper Bright*, one might have expected agency deference to be out of fashion among the Justices. This term, however, the Court decided its first major administrative law decision since *Chevron*'s demise — and the new ruling emphasized “deference” nearly a dozen times.¹⁷⁰ For instance, the Court noted: “The bedrock principle of judicial review” under a particular federal statute “can be stated in a word: Deference.”¹⁷¹ This case illustrates that the deep tension between judicial independence and deference resists pat resolution.¹⁷²

Yet each side of an antinomy may be ascendant in particular legal areas, at different times, or for specific individuals. To the extent that legal thinkers, ideological groups, or courts seek intellectual coherence, they will tend to prioritize one or the other half of each antinomy. An antinomy is in some sense a logical contradiction, after all; and nobody likes to be or appear self-contradictory.¹⁷³ To illustrate, Justice Scalia, especially during his heyday, favored: constraint, text, reconsideration, and deference.¹⁷⁴ By comparison, Justice Breyer favored the opposite options: discretion, purpose, precedent, and independence.¹⁷⁵ So while Justice Scalia was relatively constrained overall, as indicated by his preferences for text and deference, he was less constrained by precedent — a form of constraint that was (in the wake of the Warren Court) more congenial to Justice Breyer's liberal ideology.

The contrast between Justice Scalia and Justice Breyer illustrates how different legal actors make choices, and set their own personal law, within boundaries set by the law's deep structure. For instance, textualism and nontextualism are both inextinguishable aspects of the legal system, but different legal actors may have reason to prioritize one or the other at different times. Most fundamental is the distinction

¹⁶⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁶⁹ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) (overruling *Chevron*).

¹⁷⁰ *Seven Cnty. Infrastructure Coal. v. Eagle County*, 145 S. Ct. 1497, 1508–18 (2025).

¹⁷¹ *Id.* at 1515 (specifically addressing judicial review under part of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370).

¹⁷² On the idea that some form of deference to administrative agencies is effectively inevitable, see Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1443 (2017); Adrian Vermeule, *Chevron by Any Other Name*, NEW DIG. (June 28, 2024), <https://thenewdigest.substack.com/p/chevron-by-any-other-name> [https://perma.cc/JD5N-UREZ].

¹⁷³ See Re, *supra* note 20 (manuscript at 30) (discussing the appeal of personal and group consistency).

¹⁷⁴ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 23–25 (1997).

¹⁷⁵ See STEPHEN BREYER, *ACTIVE LIBERTY* 82–84, 115–116 (2008).

between conservatism and liberalism — two competing legal ideologies that derive from (but are not the same as) the two parties that characterize U.S. politics.¹⁷⁶ Legal thinkers such as judges aspire to be consistent and tend to persist in their views to a greater degree than political actors. As a result, proponents of legal ideologies often “lag” behind their political counterparts, creating a gap between law and politics.¹⁷⁷ As political incentives change, however, legal conservatives and liberals engage in a dynamic if gradual process of positioning and repositioning.

The resulting pattern of ideological oscillation may seem disruptive, and it often is. But it also gives rise to a homeostatic system. Each half of the listed antinomies will always enjoy at least some natural supporters. At any given time, for example, part of legal culture will likely feel drawn to greater attention to text, and another part will not. Moreover, competing ideologies effectively take turns occupying the dominant position in legal culture, so whatever group is dominant today has some recent attachment to the views of its ideological opposites.¹⁷⁸ During the Warren Court, for example, some liberal Justices were wary of embracing substantive due process on account of their old anti-Lochnerism.¹⁷⁹ More recently, conservatives have been chary about too rapidly or dramatically sloughing off their erstwhile commitments to textualism, strict originalism, and deference.

In sum, legal culture is shaped by three distinct elements, each corresponding to a level of the law. First is the set of antinomies that establish the procedural or methodological options realistically available for various actors. This deep structure constitutes the terrain on which a wide range of legal projects may be constructed. Second is the political process, which generates substantive principles for the law to absorb as well as incentives that influence legal actors. Political forces motivate individuals and groups, including judges, to adopt or build out specific legal views — their personal law — atop the law’s deep structure. Last is the force of personal and group consistency over time, which provides

¹⁷⁶ The terms “conservative” and “liberal” are misleading insofar as conservatives seek to change existing or long-established arrangements and liberals seek to preserve them. Cf. ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* (Houghton Mifflin Harcourt 1999); Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 75 n.383 (2013) (“The ordinary, healthy operations of democratic politics supply incentives for parties, candidates, and officials to appeal to those aggrieved by change.”). “Conservative” and “liberal” might therefore be replaced with “right” and “left” to signify two sets of mostly harmonious principles that compete with one another.

¹⁷⁷ See *Re*, *supra* note 20 (manuscript at 28); Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 225 (2019).

¹⁷⁸ See Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 64 (1989).

¹⁷⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 515 (1965) (Black, J., joined by Stewart, J., dissenting) (invoking *Lochner* in grand fashion).

a counterforce checking politics. The appeal of consistency separates the going law not just from caprice and whimsy but also from the current demands of morality or partisan politics.

The result is a dynamic yet persisting system in which politics influences the law without overwhelming it. This tripartite picture of legal culture combines elements of natural law, realism, and positivism. The law's deep structure is naturalist. The motivating force of politics is realist. And the set of official views is positivist.

Appreciating that the law has a deep structure helps to explain the journey from the Warren Court to the current Court, as well as the challenges facing the legal system and rule of law today.

B. Adjustments in Power

The Warren Court was famous for pursuing a discretionary, self-empowering approach to judicial decisionmaking. Formal texts were creatively construed, while historical practices were overridden.¹⁸⁰ Judicial precedents were frequently cast aside.¹⁸¹ The courts' jurisdiction expanded.¹⁸² And the Justices made use of legal materials from other countries.¹⁸³ Meanwhile, the Justices articulated a strongly court-oriented picture of constitutional law, even as they came under political attack — first from southern states engaged in “massive resistance” and later from Nixon's law-and-order critiques during his bid for the presidency.¹⁸⁴ This constellation of views came to define legal liberalism and, to a great extent, overall legal culture.

Moreover, these views made sense for members of the political left: Because the Court was a strongly liberal institution, liberals both on and off the Court had an incentive to favor discretion-conferring methods and strong assertions of judicial power.¹⁸⁵ In general, those in power want discretion to advance their policy preferences. And they need discretion to govern in the face of unexpected problems. For equal but opposite reasons, dissident conservatives adopted the mirror-image constellation of views. That is, conservatives tended to argue for adherence to formal texts and historical practices, while criticizing strong forms of judicial authority over the political branches. These more constraining views are well suited to ideological groups out of judicial

¹⁸⁰ The twin decisions of *Brown v. Board of Education*, 347 U.S. 483, 487–88 (1954), and *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), are often taken as central examples, insofar as the former rejected decades of historical practice and the latter seemed to exceed or evade the plain text of the Fourteenth Amendment. See sources cited *supra* note 18.

¹⁸¹ See *infra* note 187.

¹⁸² See cases cited *infra* note 228.

¹⁸³ See *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Warren, C.J.) (plurality opinion).

¹⁸⁴ See KALMAN, *supra* note 64, at 121–22, 213.

¹⁸⁵ See *Re*, *supra* note 20 (manuscript at 35); see also Friedman, *supra* note 78, at 157–58; BALKIN, *supra* note 77, at 101.

power, for they allow dissidents to inveigh against the majority coalition for pursuing its own ideological ends.

But now that conservatives have seized control of the Court, the relevant incentive structure has flipped. Conservatives have reason to begin adopting discretionary principles of the kind that the Warren Court once exemplified. And liberals have an equal but opposite incentive to take up the mantle of constraint once donned by Warren Court critics. This process of reversal is taking some time to play out, and it is exhibited to varying degrees by different Justices. Both individuals and groups desire to be and appear consistent, so repositionings tend to be gradual.¹⁸⁶ And, to the extent that individuals and groups remain consistent, or try to minimize their inconsistency, a gap remains between first-order policy preferences and second-order legal views. Even so, a reciprocal transformation is already visible in many Court rulings, thereby revealing the influence of political incentives on judges' views and, ultimately, the law.

Consider the following examples:

Stare decisis. Among the most prominent criticisms of the Warren Court was that it paid precedent too little respect.¹⁸⁷ Case after case was either overruled or faithlessly distinguished away, over howls of protest from dissenters and commentators, especially conservatives.¹⁸⁸ Lately, however, the conservative Justices have tended to diminish precedent, while liberals exalt it. *Dobbs* is only the most obvious example.¹⁸⁹

Originalism. The Warren Court sometimes paid attention to the past, but its many dramatic innovations made it vulnerable to historical

¹⁸⁶ Or, at least, they are gradual until a tipping point is reached, yielding sudden realignment. See Re, *supra* note 20 (manuscript at 17–18); *supra* notes 47–53 and accompanying text (discussing Justices Goldberg and Frankfurter).

¹⁸⁷ See, e.g., Philip B. Kurland, *The Supreme Court, 1963 Term — Foreword: “Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,”* 78 HARV. L. REV. 143, 170 (1964). By some metrics, such as overrulings per year, the Roberts Court has been as or more faithful to precedent than the Warren Court. See Jonathan H. Adler, *The Restrained Roberts Court*, NAT'L REV., July 31, 2023, at 21, 22, <https://www.nationalreview.com/magazine/2023/07/31/the-restrained-roberts-court> [<https://perma.cc/SYD7-LU6U>]; Adam Liptak, *The Supreme Court's Mixed Record on Adhering to Precedent*, N.Y. TIMES (Jan. 29, 2024), <https://www.nytimes.com/2024/01/29/us/supreme-court-precedent-chevron.html> [<https://perma.cc/F59B-VES8>] (“[B]y standard political science measures, the court led by Chief Justice John G. Roberts Jr. since 2005 is not out of line with earlier courts in its treatment of precedent,” though the rate increased — still not to Warren Court levels — after 2020.).

¹⁸⁸ See Kurland, *supra* note 187, at 170; see, e.g., *Mapp v. Ohio*, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting) (“In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled.”).

¹⁸⁹ Compare *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022), *with id.* at 2317 (Breyer, Sotomayor & Kagan, JJ., dissenting).

critique.¹⁹⁰ Conservatives accordingly turned toward originalism, roughly the idea that original history strongly constrains constitutional law,¹⁹¹ as their lodestar.¹⁹² During the Conservative Warren Court, however, originalism has not become the order of the day. The Court’s scant historical arguments in major cases like *Trump v. Anderson*¹⁹³ and *Trump v. United States*¹⁹⁴ are unpersuasive makeweight — as both liberal Justices¹⁹⁵ and originalist scholars¹⁹⁶ have pointed out. Other major cases, like *Dobbs*, are traditionalist¹⁹⁷ rather than originalist in their use of history.¹⁹⁸ Some conservatives have complained about¹⁹⁹ or tried to explain away²⁰⁰ originalism’s absence from the jurisprudence of a conservative court. Meanwhile, liberal dissenters sometimes elevate history when defending longstanding practices like birthright citizenship.²⁰¹

¹⁹⁰ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (discussing, but ultimately moving on from, historical materials).

¹⁹¹ I am trying here to encompass all leading versions of originalism. For a narrower definition, see Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 269 (2017); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (coining “originalism” to mean “the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters”).

¹⁹² See, e.g., Scalia, *supra* note 174, at 38; Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL’Y 5, 10 (1988); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

¹⁹³ 144 S. Ct. 662 (2024).

¹⁹⁴ 144 S. Ct. 2312 (2024).

¹⁹⁵ See *Trump*, 144 S. Ct. at 2358 (Sotomayor, J., dissenting); *Anderson*, 144 S. Ct. at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment).

¹⁹⁶ See Mike Rappaport, *The Originalist Disaster in Trump v. Anderson*, ORIGINALISM BLOG (Mar. 5, 2024), <https://originalismblog.typepad.com/the-originalism-blog/2024/03/the-originalist-disaster-of-trump-v-andersonmike-rappaport.html> [<https://perma.cc/gJ68-6RXXF>]; William Baude & Michael Stokes Paulsen, Commentary, *Sweeping Section Three Under the Rug: A Comment on Trump v. Anderson*, 138 HARV. L. REV. 676, 680 (2025); Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, THE ATLANTIC (July 2, 2024), <https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877> [<https://perma.cc/HD77-ADR7>] (discussing *Trump v. United States*); William Baude, Opinion, *A Principled Supreme Court, Unnerved by Trump*, N.Y. TIMES (July 5, 2024), <https://www.nytimes.com/2024/07/05/opinion/supreme-court-trump.html> [<https://perma.cc/M9C7-WSGZ>] (same).

¹⁹⁷ See Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479 (2023); Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 12 (2023); Reva B. Siegel, *The Levels-of-Generality Game: “History and Tradition” in the Roberts Court*, 47 HARV. J.L. & PUB. POL’Y 563, 565 (2024). Roughly speaking, traditionalism directs attention to patterns in post-enactment history.

¹⁹⁸ See Cass R. Sunstein, *Dobbs and the Travails of Due Process Traditionalism*, in ROE V. DOBBS 129, 133–34 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024); Stephen E. Sachs, *Dobbs and the Originalists*, 47 HARV. J.L. & PUB. POL’Y 539, 541 (2024) (arguing that *Dobbs* was “originalism-compliant,” not that it was “distinctively originalist”).

¹⁹⁹ Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of Traditionism in Constitutional Interpretation*, 47 HARV. J.L. & PUB. POL’Y 745, 747 (2024).

²⁰⁰ See Sachs, *supra* note 198, at 542; Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 487 (2023).

²⁰¹ See, e.g., *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2573 (2025) (Sotomayor, J., dissenting).

Textualism. Chief Justice Warren is said to have asked startled advocates, “Is it fair?”²⁰² In contrast, post–Warren Court conservatives advocated for strict adherence to statutory texts, lest judges insert their own values into the law.²⁰³ But conservative jurists have increasingly broadened the textualism “tent,” so as to encompass what seem like paradigmatically purposivist and pragmatic arguments.²⁰⁴ Most importantly, in 2022, the Court christened an atextual “major questions doctrine” that curtails administrative agencies’ authority over important policy matters.²⁰⁵ All three liberal Justices objected to this new deregulatory precept, including on textualist grounds.²⁰⁶ The next year, while hearing a case centered on an issue of statutory interpretation, Justice Alito asked at an oral argument: “[I]s it fair?”²⁰⁷

²⁰² See sources cited *supra* note 18. Many commentators have reported this oral argument question, e.g., WHITE, *supra* note 38, at 228; *The Law: Earl Warren’s Way: Is it Fair?*, TIME (July 22, 1974, at 00:00 ET), <https://time.com/archive/6876037/the-law-earl-warrens-way-is-it-fair> [<https://perma.cc/B3UT-74X5?>], sometimes calling it a question “often” asked or “oft-repeated,” see Thomas H. Kuchel, In Memoriam, *Earl Warren*, 64 CALIF. L. REV. 3, 5 (1976) (describing it as “his oft-repeated question”); Jack Greenberg, *Earl Warren — A Tribute*, 58 CALIF. L. REV. 24, 30 (1970) (asserting that Chief Justice Warren “often asked” the question: “But is that fair?”). But I have not found a record of Chief Justice Warren asking this specific question in a Supreme Court oral argument transcript. A somewhat similar fairness-oriented exchange occurred in *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964). See Oral Argument at 1:34:30–1:48:12, *Tawes*, 377 U.S. 656 (No. 29), <https://www.oyez.org/cases/1963/29> [<https://perma.cc/5ZHS-Z28F>]. One early account suggests this “constant” question may have been posed to clerks. See Roger J. Traynor, *Chief Justice Warren’s Fair Question*, 58 GEO. L.J. 1, 4 (1969). Some sources repeat the oral argument story while noting that it could not be verified. See Joseph W. Bartlett, *Earl Warren — A Tribute*, 58 CALIF. L. REV. 17, 17 n.8 (1970) (noting, of the “supposed perennial question from the bench,” that it “was never overheard by me”); ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 317 & 558 n.317 (1997) (noting reports of the Chief Justice’s “is it fair” question but also that no one “could recall a specific oral argument in which he asked it”). Thanks to Professor Justin Driver for suggesting I track down this reference.

²⁰³ E.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 18 (2001).

²⁰⁴ See, e.g., William Baude, Speech, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL’Y 1331, 1334 (2023); Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 945 (2025); see also Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 293 & n.184 (2020) (arguing that the dissenters in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), embraced a “flexible” textualism).

²⁰⁵ See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); see also Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 263 (2022); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1014 (2023).

²⁰⁶ *West Virginia v. EPA*, 142 S. Ct. at 2626, 2628 (Kagan, J., dissenting).

²⁰⁷ See Transcript of Oral Argument at 34, *Dep’t of Educ. v. Brown*, 143 S. Ct. 2343 (2023) (No. 22-535), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/22-535_fdhk.pdf [<https://perma.cc/4CG9-98V4>] (Justice Alito repeatedly asking the Solicitor General, in a case on student loan forgiveness: “Why is it fair?”); see also *id.* at 27–28 (Chief Justice Roberts noting, “I think it appropriate to consider some of the fairness arguments” but later stating, “I may have views on the fairness of that and mine don’t count”). So Justice Alito actually asked a question that Chief Justice Warren may have posed only apocryphally. See *supra* note 202.

Deference. Particularly during the long Warren Court, the D.C. Circuit was dominated by liberal jurists who operated “as a kind of junior varsity Warren Court” in administrative law.²⁰⁸ With the Justices’ tacit acquiescence,²⁰⁹ the D.C. Circuit aggressively policed the Fourth Branch to protect the vulnerable.²¹⁰ By contrast, conservatives favored judicial restraint, culminating in Justice Scalia’s championing of a strong, rule-like principle of *Chevron* deference.²¹¹ Here, too, the roles have reversed. With conservatives now in command of the courts, judicial restraint is no longer attractive for those on the right; and activism is hardly a watchword of the left.²¹² In 2024, all six conservative Justices voted to end *Chevron* deference, while all three liberal Justices voted to retain it.²¹³

Substantive due process. Despite its antipathy toward *Lochner*,²¹⁴ the Warren Court saw substantive due process reborn in liberal dress in *Griswold v. Connecticut*.²¹⁵ Just as New Deal liberals had impugned substantive due process as a contradiction and invitation to judicial manipulation, conservatives long inveighed against the similarly amorphous and atextual reasoning in *Griswold*.²¹⁶ In the present era, however, conservatives have begun to rediscover the appeal of substantive due process, particularly in politically salient areas.²¹⁷ Examples include asserted rights against vaccine mandates²¹⁸ and in favor of

²⁰⁸ Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 394–95 (2015).

²⁰⁹ See *id.* at 397 (noting “the Court’s . . . lack of intervention during the pre-*Vermont Yankee* period”).

²¹⁰ *Id.* at 394–95.

²¹¹ See THOMAS W. MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE* 6 (2022); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2270 (2024) (noting that Scalia was an “early champion of *Chevron*” deference).

²¹² On the ideological pivot concerning *Chevron*, see generally Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022); Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619 (2021).

²¹³ See *Loper Bright*, 144 S. Ct. at 2254; *id.* at 2294 (Kagan, J., dissenting) (joined by Sotomayor & Jackson, JJ.).

²¹⁴ See *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963).

²¹⁵ 381 U.S. 479 (1965).

²¹⁶ See, e.g., Bork, *supra* note 192, at 9.

²¹⁷ See Richard M. Re, *Realigning Standing with Substantive Due Process*, RE’S JUDICATA (Dec. 20, 2024, at 07:40 ET), <https://richardresjudicata.wordpress.com/2024/12/20/realigning-standing-with-substantive-due-process> [<https://perma.cc/9ART-SN8A>] (suggesting that Justice Kagan is the new Justice Frankfurter or Justice Scalia, and Justice Alito the new Justice Douglas).

²¹⁸ *Health Freedom Def. Fund, Inc. v. Carvalho*, 104 F.4th 715, 728 (9th Cir. 2024) (Collins, J., concurring).

parents' knowledge or control regarding their children's gender transitions in public schools.²¹⁹

Foreign practice. Riding an international wave of liberalism, Chief Justice Warren looked to the “civilized nations of the world” when deciding that the Eighth Amendment barred punitive denationalization.²²⁰ From then on, liberals were associated with recourse to foreign practices, especially in Eighth Amendment cases.²²¹ Among other things, these practices supplied guidance on empirical questions, such as the psychological condition of minors.²²² Conservatives, meanwhile, vehemently objected.²²³ That pattern softened in recent years,²²⁴ and, this Term, it appears to have reversed. With conservatism on the rise worldwide, right-leaning Justices extensively discussed European materials and laws in *United States v. Skrametti*,²²⁵ which rejected an equal protection challenge to a state law ban on minors' access to sex-transition treatments.²²⁶

²¹⁹ See, e.g., *Parents Protecting Our Child, UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (Alito, J., joined by Thomas, J., dissenting from the denial of certiorari) (quoting *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion)); see also *Montana v. Planned Parenthood of Mont.*, 145 S. Ct. 2627, 2627 (2025) (statement of Alito, J., joined by Thomas, J., respecting the denial of certiorari). See generally Re, *supra* note 217.

²²⁰ *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (Warren, C.J.) (plurality opinion).

²²¹ See *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (finding “confirmation” for its holding in the fact “that the United States is the only country in the world” to authorize capital punishment for crimes committed by minors); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (using a similar method for substantive due process).

²²² See *Roper*, 543 U.S. at 575–78 (noting that “international opinion” largely reflected an understanding of “the instability and emotional imbalance of young people,” *id.* at 578).

²²³ See, e.g., *id.* at 622, 628 (Scalia, J., dissenting) (“I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.” *Id.* at 628).

²²⁴ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 & n.15 (2022) (quoting MISS. CODE ANN. § 41-41-191(2)(a) (2018)) (noting that “only six countries besides the United States ‘permit[ted] nontherapeutic or elective abortion-on-demand after the twentieth week of gestation’” (alteration in original)); Katharine G. Young, *Human Rights in the Constitutional Era of Dobbs*, COLUM. HUM. RTS. L. REV. (forthcoming 2025) (manuscript at 33) (on file with the Harvard Law School Library); see also Richard M. Re, *Some Thoughts on United States v. Skrametti*, DIVIDED ARGUMENT (June 20, 2025), <https://blog.dividedargument.com/p/some-thoughts-on-united-states-v> [<https://perma.cc/28AC-9BKD>] (exploring this comparison).

²²⁵ See 145 S. Ct. 1816, 1825–26 (2025) (discussing foreign materials and law from the United Kingdom, as well as Sweden, Finland, and Norway); see also *id.* at 1836–37 (“Recent developments only underscore the need for legislative flexibility in this area.” *Id.* at 1836. These developments included England’s National Health Service’s “prohibitions on the administration of puberty blockers to new patients under the age of 18.” *Id.* at 1837.); *id.* at 1844–45 (Thomas, J., concurring); Transcript of Oral Argument at 14–15, *Skrametti*, 145 S. Ct. 1816 (No. 23-477), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/23-477_co7d.pdf [<https://perma.cc/5TX7-VED9>] (Justice Alito asking questions about foreign practice); *id.* at 50 (Justice Kavanaugh: “If it’s evolving like that and changing and England’s pulling back and Sweden’s pulling back, it strikes me as, you know, a pretty heavy yellow light, if not red light . . .”).

²²⁶ *Skrametti*, 145 S. Ct. at 1829.

Standing. Conservatives once insisted on demanding standing requirements, thereby curtailing the power of federal courts.²²⁷ Liberals, by contrast, favored permissive access to federal courts, as illustrated by the Warren Court's endorsement of taxpayer standing in *Flast v. Cohen*.²²⁸ That basic axis — conservative standing hawks versus liberal doves — persisted for decades.²²⁹ Since 2020, however, some conservative Justices have voted for standing about as often as liberal ones.²³⁰ In *Biden v. Nebraska*, all six conservatives found standing, whereas all three liberals did not.²³¹ This shift partly reflects that cases are being brought with an eye to satisfying the conservatives' view on standing.²³² But, at least as to some issues, it appears that conservative Justices are changing tack.²³³

Again, these shifts are largely reciprocal. Liberal Justices have absorbed many of the formalist ideas that were (at the time) associated with the conservative legal movement. Perhaps the most often mentioned example today is Justice Kagan's espousal of textualism early in her tenure,²³⁴ an earlier and also much-remarked-on example is Justice Stevens's seemingly originalist dissenting opinion in *District of Columbia v. Heller*.²³⁵ These moves allowed the liberal Justices to engage with the Court's governing coalition while also entitling them to level charges of hypocrisy when the conservatives pivoted toward greater discretion. Justice Kagan has accordingly lamented the Court's break from both textualism and agency deference under the guise of the major questions doctrine.²³⁶

One might still wonder whether particular types of discretion and formalism tend to hold greater appeal for liberals or conservatives.²³⁷ For instance, historically oriented formalisms — such as originalism or, more popular today, traditionalism — seem conducive to conservatism, insofar as the march of history has tended to incorporate more

²²⁷ *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38, 41–43 (1976)).

²²⁸ 392 U.S. 83, 88 (1968); *see also* *Baker v. Carr*, 369 U.S. 186, 206 (1962).

²²⁹ *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 130 (2011).

²³⁰ *See* Richard M. Re, *Does the Discourse on 303 Creative Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67, 86 (2023).

²³¹ *See* 143 S. Ct. 2355, 2361 (2023).

²³² *See* Re, *supra* note 230, at 85 n.93.

²³³ *See, e.g.*, Re *supra* note 217 (discussing *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (Alito, J., dissenting from the denial of certiorari)).

²³⁴ *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (Justice Kagan discussing and documenting her changed views).

²³⁵ 554 U.S. 570, 678 (2008) (Stevens, J., dissenting); *cf.* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 686–87 (2009) (distinguishing Justice Stevens's purpose-driven brand of originalism from the majority's).

²³⁶ *See* *West Virginia v. EPA*, 142 S. Ct. at 2641 (Kagan, J., dissenting).

²³⁷ *Cf.* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 30 (2011); Greene, *supra* note 235, at 686–87.

recent progressive reforms.²³⁸ Determinate versions of originalism or traditionalism, therefore, may simply be nonstarters for many members of the progressive left. By comparison, liberals may find relatively recently crafted precedent and statutes more congenial to their goals — particularly if the last dominant judicial or political coalition tilted to the left.²³⁹

These relatively subtle influences may help to explain why two of the Court's great formalist dissenters in recent decades — Justices Scalia and Kagan — have emphasized different kinds of formal law. In short, the two jurists share a focus on statutory textualism, reflecting the lack of clear partisan bias in that source of law.²⁴⁰ But only Justice Scalia prioritized originalism, thereby disadvantaging unoriginalist Warren Court decisions. Justice Kagan instead promoted *stare decisis* as a firm rule, so as to preserve Warren Court and other precedents.²⁴¹

The legal realignment may be entering a period of consolidation as conditions change — and ideological incentives along with them. Of course, consolidation of one kind or another was to be expected. Part of the legal system's magic is that it has the capacity to be self-legitimizing. When there is a stable governing bloc of votes on a powerful court, then other Justices, lower courts, litigants, and government actors all have an incentive to frame their arguments in terms that the bloc will find persuasive. That “desire to be relevant” — to appeal to those in power — helps to explain why overall legal culture was functionalist when the Warren Court was in power, and also why legal culture was formalist at the dawn of the Conservative Warren Court.²⁴² So, barring a shock to the system, we should have expected that the liberal Justices on the Court would absorb and accommodate the views that are newly popular on the legal right.

Yet there is now a shock to the legal system, in the form of the second Trump Administration, and that shock will tend to accelerate the realignment's consolidation. Both wings of legal culture now face a common threat in the form of a potentially hostile Presidency and Congress, which have recently expressed interest in (for example) partisan

²³⁸ See Reva B. Siegel, *The History of History and Tradition: The Roots of Dobbs's Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 145 (2023). The point here is not that history and tradition are fully determinate or preclude discretion, but rather that those sources favor or facilitate certain results. Critics who overemphasize the discretion latent in relatively formal methods risk overlooking those methods' practical importance and political valence.

²³⁹ See *supra* p. 29.

²⁴⁰ Compare, e.g., *West Virginia v. EPA*, 142 S. Ct. at 2627–28 (Kagan, J., dissenting), with *King v. Burwell*, 576 U.S. 473, 499–500 (2015) (Scalia, J., dissenting).

²⁴¹ Compare, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008) (Scalia, J.), with *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 449 (2015) (Kagan, J.), and *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (Justice Kagan notably joining the dissent).

²⁴² See *Re*, *supra* note 20 (manuscript at 14) (emphasis omitted) (discussing the “desire to be relevant”).

impeachments.²⁴³ While some newer members of the conservative legal movement might be willing or eager to be subservient to populist political leaders, all current Justices are primarily the products of a different era. If faced with a stark choice between being an independent court and being political lackeys, the current Justices will unanimously choose the former.²⁴⁴ This shared commitment to judicial independence will foster convergence on some case outcomes, dampening conflict between conservative and liberal ideologies.²⁴⁵ A similar dynamic is playing out in the public square, as liberals are once again placing their faith or hope in the courts — especially the lower federal courts.²⁴⁶ Even the Supreme Court is garnering liberal and progressive support on occasion, as in *Noem v. Abrego Garcia*.²⁴⁷

In addition, key features of the Conservative Warren Court’s new jurisprudence now appeal to the left. The Court’s relationship to the Executive is complicated. In some areas, the Court seeks to enhance executive power, such as by facilitating the President’s ability to superintend executive agencies²⁴⁸ and by providing ex-Presidents with an immunity from criminal prosecution.²⁴⁹ In other areas, however, the Court has checked executive branch policymaking, including by overruling *Chevron* deference and establishing the major questions doctrine of

²⁴³ See Nate Raymond, *Republicans Seek Impeachment of 2 More Judges Who Stymied Trump*, REUTERS (Mar. 24, 2025, at 21:44 ET), <https://www.reuters.com/world/us/republicans-seek-impeachment-2-more-judges-who-stymied-trump-2025-03-24> [<https://perma.cc/7F97-RAMJ>].

²⁴⁴ Indeed, the Justices have already made just that choice, such as when they summarily and effectively unanimously denied meritless conservative challenges to the 2020 presidential election. See, e.g., *Texas v. Pennsylvania*, 141 S. Ct. 1230, 1230 (2020) (mem.).

²⁴⁵ Some commentators suggest a relatively subtle failure, wherein “partisan alignment and judicial self-protection will converge to a quietism that preserves the courts qua institution at the cost of the Constitution, individual rights, or the orderly functioning of democratic competition.” TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 148 (2018). The Court, in other words, might protect or promote itself at the expense of the rule of law or democracy. This risk is real. The fact that unelected courts must navigate political storms means that the judiciary could miscalibrate its responses, perhaps even catastrophically. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857). Moreover, it would be absurd to think that the federal courts and their rulings are *sufficient* to preserve democracy, individual rights, or any similar value. See, e.g., Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 575–76 (2018) (arguing that while “new autocrats,” *id.* at 575, engage in coercion, they do not infringe “rights one can successfully claim in most courts,” *id.* at 576). But, as the main text illustrates, the current Court has already demonstrated that it will not settle on simple “quietism,” in either its rulings or its off-bench commentary. And the Court can be valuable, or indispensable, even though other actors are (of course) required to defend the Constitution.

²⁴⁶ After years of liberal complaints about conservative district court judges issuing sweeping injunctive relief against the Biden Administration, liberal voices now celebrate district court judges who have similarly enjoined the Trump Administration. Cf. Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 486 (2016).

²⁴⁷ 145 S. Ct. 1017 (2025); see also *A.A.R.P. v. Trump*, 145 S. Ct. 1034 (2025) (mem.); *infra* section III.B, pp. 67–76.

²⁴⁸ See *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025) (citing *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2198–200 (2020)).

²⁴⁹ See *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024).

antideference.²⁵⁰ The common thread is that the Conservative Warren Court is hostile toward the administrative state, but more solicitous toward the presidency itself.

That “anti-administrativism,” as Professor Gillian Metzger has called it,²⁵¹ had a decidedly conservative valence during the 2010s and early 2020s. But as the second Trump Administration pursues its own ambitious regulatory agenda, it will face the same doctrines wielded against the Biden Administration. Liberals are invoking, or will invoke, *Loper Bright* as well as the major questions doctrine when litigating Trump Administration policies regarding birthright citizenship, tariffs, and still other matters yet to be unveiled.²⁵²

The shifting politics of administrative law illustrate an even broader change in the separation of powers. In recent years, Congress has frequently been too hampered by collective-action problems and the filibuster either to advance or to check partisan agendas.²⁵³ Presidents are then left with both the practical opportunity and political imperative to engage in unilateral policymaking. That hydraulic adjustment in the separation of powers raises obvious concerns about excessive executive power and the rule of law.²⁵⁴

In response, the judiciary has been increasingly assertive in checking presidential incursions into the legislative sphere. Examples include not just the major questions doctrine and the demise of *Chevron*,²⁵⁵ but also the rise of nationwide injunctions²⁵⁶ and the increasing use of emergency or summary relief at all levels of the federal judiciary, ranging from the slew of “administrative stays” by federal trial courts at the start of the

²⁵⁰ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024); *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022).

²⁵¹ See Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

²⁵² See, e.g., *V.O.S. Selections, Inc. v. United States*, 772 F. Supp. 3d 1350, 1372 (Ct. Int’l Trade 2025); Paul Sracic, Opinion, *Trump’s Tariffs Are a Major Legal Question*, WALL ST. J. (Apr. 6, 2025, at 12:40 ET), <https://www.wsj.com/opinion/trumps-tariffs-are-a-major-question-supreme-court-congress-authority-trade-policy-law-d9baf772> [<https://perma.cc/C324-LDRC>]. Liberals are also finding new utility in older conservative rulings on federalism. See, e.g., Julie Bosman, *Trump Administration Sues Illinois Leaders Over Immigration Enforcement*, N.Y. TIMES (Feb. 6, 2025) (citing *Printz v. United States*, 531 U.S. 898 (1997)), <https://www.nytimes.com/2025/02/06/us/politics/trump-immigration-chicago-sanctuary.html> [<https://perma.cc/RAU9-FX2V>].

²⁵³ See NEIL S. SIEGEL, *THE COLLECTIVE-ACTION CONSTITUTION* 447 (2024) (“Today, however, it is typically very difficult for Congress to legislate — far more difficult than one would generally expect from the operation of majority voting rules.”).

²⁵⁴ See generally SAIKRISHNA BANGALORE PRAKASH, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* (2020).

²⁵⁵ See Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 761–63 (2022).

²⁵⁶ See Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 990–91 (2022); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418–19, 476–77 (2017); Spencer E. Amdur & David Hausman, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49, 49–50 (2017).

Second Trump Administration²⁵⁷ to the sweeping 1 AM “putative” class action injunction against deportations that the Court issued in *A.A.R.P. v. Trump*.²⁵⁸ The overall effort represents a renewed assertion of judicial power capable of uniting legal conservatives and liberals.

Some recent experiments in judicial power are rightly being challenged and cabined. This Term’s ruling in *Trump v. CASA, Inc.*²⁵⁹ took a large step in that direction by holding that federal courts (likely?) lack statutory authority to issue “universal” injunctions.²⁶⁰ This ruling might at first blush seem to surrender federal judicial power to issue broad equitable relief, consistent with longtime conservative critiques of judicial supremacy. That aspect of the ruling no doubt appealed to the majority Justices, who remain somewhat tethered to twentieth-century conservative legal thought.²⁶¹ On inspection, however, *CASA* is more in the vein of a recalibration — as Justice Kavanaugh’s concurrence suggested.²⁶² The decision’s main effect is to curtail certain forms of sweeping lower court relief, while expressly leaving others open.²⁶³ When viewed in tandem with the Court’s nearly contemporaneous ruling in *A.A.R.P.*,²⁶⁴ it seems not just possible but likely that the Court is

²⁵⁷ See Christopher D. Moore, *So-Called “Administrative Stays” in Trump 2.0*, 104 TEX. L. REV. ONLINE 1, 3 (2025); Rachel Bayefsky, *Administrative Stays: Power and Procedure*, 97 NOTRE DAME L. REV. 1941, 1942–44 (2022).

²⁵⁸ 145 S. Ct. 1034, 1034 (2025) (mem.); see also *A.A.R.P. v. Trump*, 145 S. Ct. 1364, 1370 (2025) (per curiam) (explaining and issuing an injunction, among other things); Amy Howe, *Justices Temporarily Bar Government from Removing Venezuelan Men Under Alien Enemies Act*, SCOTUSBLOG (Apr. 20, 2025, at 06:36 ET), <https://www.scotusblog.com/2025/04/justices-temporarily-bar-government-from-removing-venezuelan-men-under-alien-enemies-act> [https://perma.cc/9RVQ-JN5H].

²⁵⁹ 145 S. Ct. 2540 (2025).

²⁶⁰ *Id.* at 2548. While *CASA* applied a likelihood of success standard in granting a stay, the decision’s reasoning appeared to reach a definitive — and binding — conclusion regarding the federal courts’ lack of statutory authority to issue universal relief. See *id.* at 2554–60. For another example of a seemingly decisive legal conclusion announced via a ruling on the likelihood of success, see *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025), discussed *infra* p. 54. That case held that certain parents were “likely” to succeed on the merits and so were entitled to a preliminary injunction. *Mahmoud*, 145 S. Ct. at 2342. These sorts of holdings are the result of the Court’s increasing interest in disposing of cases in postures of interim or preliminary relief.

²⁶¹ The majority loudly sounded these traditional conservative themes when responding to Justice Jackson’s solitary assertion of superstrong judicial supremacy. Contrast *CASA*, 145 S. Ct. at 2560–61, with *id.* at 2597 (Jackson, J., dissenting) (focusing on lower courts).

²⁶² See *id.* at 2567–68 (Kavanaugh, J., concurring). Pointing in the same direction, the two dissenters from *A.A.R.P.* (Justices Alito and Thomas), 145 S. Ct. at 1034 (Alito, J., dissenting), concurred to express their worry that class actions and state litigation “threaten the practical significance of today’s decision” by affording other means of obtaining broad relief. *CASA*, 145 S. Ct. at 2565 (Alito, J., concurring).

²⁶³ See *CASA*, 145 S. Ct. at 2555–58 (discussing class actions and state litigation). *CASA* was careful to leave open three major alternative forms of remediation: rule vacatur under the Administrative Procedure Act, see *id.* at 2554 n.10, class actions, see *id.* at 2555, and litigation by states, see *id.* at 2558.

²⁶⁴ The Court waited until the day after the oral argument in *CASA* to issue its opinion in *A.A.R.P.*, thereby allowing the oral argument to feature consideration of issues from both cases.

replacing formless universal injunctions with somewhat more rigorous — but functionally similar — equitable class actions.²⁶⁵

In addition, as Professor Jack Goldsmith observes, the Court “extracted a first-ever executive branch pledge of fealty to Supreme Court ‘judgments and opinions.’”²⁶⁶ In certain respects, Goldsmith points out, that result not only matched but even “went beyond *Cooper v. Aaron*,”²⁶⁷ the Warren Court’s paean to judicial supremacy, “which was about *state officials’* duty under the Supremacy Clause to comply with a Supreme Court *judgment*.”²⁶⁸ So, on balance, *CASA* preserved or even expanded the power of the federal courts — particularly the Justices’ own authority.²⁶⁹ *Cooper*’s functional reality remains as secure as ever at the Court, now that it has been translated into more formalist prose.

As these examples illustrate, a legal realignment will necessarily reshuffle allies and adversaries. What qualifies as “conservative” or “liberal” is always in flux, and doubly so in a time of realignment. Even abortion, long the defining legal issue dividing the right from left, might lose much of its salience. For decades, constitutional abortion rights operated as an ideological litmus test. If an individual were adamantly against constitutional abortion rights, that individual would likely be welcome on the legal right, but a pariah on the legal left — and vice versa. That social architecture has been called into question by the rise of the conservative legal movement and the overruling of *Roe* in *Dobbs*. Now, abortion rights are being advanced politically,²⁷⁰ and they pose just one important legal issue among others, including the Second Amendment, affirmative action, immigration, trans rights, administrative law, religious exceptions, and so on.

²⁶⁵ See Nicholas Bagley, *The Supreme Court Put Nationwide Injunctions to the Torch*, THE ATLANTIC (June 28, 2025), <https://www.theatlantic.com/ideas/archive/2025/06/supreme-court-trump-injunctions/683354> [https://perma.cc/Q4XA-MZMT] (“[*CASA*] suggests that relief tantamount to a nationwide injunction will still be available in many cases — including, in all likelihood, in the birthright-citizenship case itself.”); Mila Sohoni, *Trump v. CASA and the Future of the Universal Injunction*, SCOTUSBLOG (July 2, 2025, at 13:51 ET), <https://www.scotusblog.com/2025/07/trump-v-casa-and-the-future-of-the-universal-injunction> [https://perma.cc/4JH5-VELB] (criticizing *CASA* but also characterizing it as “eliminating one form of relief while preserving multiple pathways to achieve functionally identical results”).

²⁶⁶ Jack Goldsmith, *The Clear Winner in Trump v. CASA: The Supreme Court*, EXEC. FUNCTIONS (June 29, 2025), <https://executivefunctions.substack.com/p/the-clear-winner-in-trump-v-casa> [https://perma.cc/ZF2R-EK8J].

²⁶⁷ 358 U.S. 1 (1958).

²⁶⁸ Goldsmith, *supra* note 266.

²⁶⁹ The Court enhanced its own authority in yet other ways. It established its authority to issue stays and other equitable relief from lower court rulings whenever executive action has been enjoined — thereby strengthening its supervisory powers. See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2562 (2025). And the Court also effectively issued a thirty-day injunction against executive action based on the Solicitor General’s oral argument concession. See Goldsmith, *supra* note 266.

²⁷⁰ See, e.g., Elissa Nadworny & Ryland Barton, *Most States that Considered Abortion Rights Amendments Approved Them*, NPR (Nov. 6, 2024, at 07:06 ET), <https://www.npr.org/2024/11/06/g-s1-32962/abortion-rights-amendments-2024-election> [https://perma.cc/84GD-44T5].

In time, both the right and the left might come to view abortion as a political issue, not a constitutional one — with *Dobbs* serving as a canonical citation.²⁷¹ That sort of lasting change in the defining left/right fault line would indicate that our present legal realignment had run its course. Thanks to the dynamic process of ideological adjustment, even unpopular rulings can and have become, as Justice Kavanaugh put it, part of the “fabric of American constitutional law.”²⁷²

C. *The Ethics of Adjustment*

The discussion so far has been descriptive, insofar as it aims to explain how and why legal change and realignment take place. Yet periods of legal realignment also pose important questions of practical ethics for both the judiciary and observers. When are judges and courts justified in adjusting their legal views, and when are they properly impugned as hypocritical?

In normal times, allegations of hypocrisy or opportunism foster consistency and, ultimately, the rule of law. Of course, someone can be inconsistent but right, or consistent and wrong. So consistency in itself reveals nothing about the truth. Yet charges of hypocrisy moderate ideologically motivated swings in judicial behavior. For instance, a judge will likely feel embarrassed to have said one thing in dissent before suddenly changing his tune once the votes are there.²⁷³ Charges of hypocrisy, and the threat of launching them, deter that fickle opportunism.

And a good thing, too. During eras of national political polarization such as the present day, the Supreme Court’s most urgent role is not to curb outlier states or safeguard the rights of minority groups, as during the Warren Court.²⁷⁴ A judiciary in a polarized polity must be prepared to step forward when there has been a breakdown in the “separation of

²⁷¹ *But see* Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 806 (2024) (criticizing *Dobbs*’s purported pro-democracy reasoning and supposed effect).

²⁷² Jim Vertuno, *Justice Kavanaugh Says Unpopular Rulings Can Later Become “Fabric of American Constitutional Law,”* AP NEWS (May 10, 2024, at 17:21 ET), <https://apnews.com/article/supreme-court-kavanaugh-roe-wade-aa49e89eaf35442ee1042b5bdc9d69> [<https://perma.cc/RB34-ZBLZ>] (statement of Justice Kavanaugh) (pointing to Warren Court decisions that, though “unpopular” at the time, are “landmarks now that we accept as parts of the fabric of America, and the fabric of American constitutional law”). Kavanaugh’s identification with the Warren Court prompted alarm among some conservatives. *See* Carrie Campbell Severino, *The Warren Court Was Not a Model Court*, NAT’L REV. (May 15, 2024, at 14:03 ET), <https://www.nationalreview.com/bench-memos/the-warren-court-was-not-a-model-court> [<https://perma.cc/B7UR-DRYN>].

²⁷³ *See* Richard M. Re, Essay, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 829–30 (2023); RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 130–31 (2018); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 150 (2018) (“Consistency is a virtue, not a vice, when it comes to judicial philosophy.”).

²⁷⁴ *See* David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 862, 904–05 (2009); Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 952 (2014); POWE, *supra* note 39, at 490 (“[T]he dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region.”).

parties,²⁷⁵ as can occur when a single, unified political party commands the political branches — and all the potentially authoritarian power that comes with them.²⁷⁶ The judiciary is charged with this role almost by default, simply because it is less partisan than other similarly powerful institutions within the federal government.

In a time of legal change or realignment, however, hypocrisy charges abound — and so can become more of a problem than a solution.²⁷⁷ We have seen that legal views that are attractive for an ideology in dissent frequently become inconvenient or harmful when that ideology comes into power; and the reverse is true as well. As a result, each hypocrisy allegation invites a reciprocal complaint.²⁷⁸ Judges can be viewed as taking legal positions, not based on legitimate legal criteria, but only because of the political party with which they are affiliated. Law itself might then seem irrelevant or nonexistent. Politics would be everywhere. Uncoincidentally, 2025 has seen the publication of two legal books entitled *Lawless* — one on the left and the other on the right.²⁷⁹

The dilemma here is that while the legal system needs accusations of hypocrisy, it also needs them to sting. And a surfeit of cynicism can dull the pain of personal inconsistency. Commentators who level charges of inconsistency will probably tend to be ideologically engaged actors who are themselves painfully inconsistent, making the hypocrisy accusations themselves seem hollow, opportunistic, and, yes, hypocritical. In part because people inevitably fail to live up to their highest values, consistency may cease to be a realistic aspiration — that is, an ideal that people can in practice achieve and be recognized for.²⁸⁰ When too widespread, loud, and plausible, hypocrisy talk becomes deadening.

²⁷⁵ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2370 (2006).

²⁷⁶ See *id.* at 2368 (suggesting that “[j]udicial review may be most needed as a supplemental source of checks and balances in eras of strongly unified government,” while also contending that the courts are especially constrained by political checks during such eras).

²⁷⁷ See, e.g., Sam Baker, *Lower Courts’ Growing Power over the President*, AXIOS (Mar. 23, 2025), <https://www.axios.com/2025/03/23/trump-courts-injunctions> [<https://perma.cc/GL72-SF6T>] (quoting Professor Steve Vladeck on the “*completely shameless* amount of hypocrisy” on universal injunctions).

²⁷⁸ True, moments of mutual repositioning could in principle prompt a degree of self-awareness and tolerance, as intellectual adversaries realize that each is now expressing views once associated with the other. One even might hope that awareness of the phenomenon of legal realignment in itself would foster self-awareness and humility. In practice, however, ideological opponents often have an easier time pointing out their adversaries’ inconstancy than acknowledging their own.

²⁷⁹ LEAH LITMAN, *LAWLESS: HOW THE SUPREME COURT RUNS ON CONSERVATIVE GRIEVANCE, FRINGE THEORIES, AND BAD VIBES* (2025); ILYA SHAPIRO, *LAWLESS: THE MISEDUCATION OF AMERICA’S ELITES* (2025).

²⁸⁰ Cf. JUDITH N. SHKLAR, *ORDINARY VICES* 48 (1984) (noting, in a discussion of hypocrisy, that “the distance between the demand for sincerity and the actualities of politics can become a great distraction”). The problem of cynicism extends far beyond the law. External descriptive accounts can be accurate and useful, but they cannot engage directly with the internal reasons we act. Offering justifications would be pointless if they could always be deflected with ad hominem descriptive explanations.

The account of law and legal change that I have proposed could even contribute to these cynical views. If many judges' views of the law are largely the byproducts of an ideological strategy, whether conscious or not, why pay them any heed? The law's "deep structure" might seem like just one more legalistic mask to cast off, in favor of raw partisan conflict on matters of policy.

To navigate this dilemma, we need a more particularized account of when and how judges (and therefore courts) are justified in adjusting their legal views, particularly during a time of polarization and political conflict. While several auspicious possibilities are available,²⁸¹ I here offer a solution that is attuned to the theory of law and legal change outlined above. My proposal distinguishes among four types of judicial reason or action.

First is compliance with partisan politics — that is, the dictates of party leaders such as a president. This basis of judicial action is objectionable on its face. Among other things, it renders the courts just one more partisan institution, thereby effacing the critical difference between law and politics. For a judge to bow before partisan demands would be grossly at odds with traditional notions of judicial independence as well as legal ethics.²⁸²

Second is institutional precedent, by which I mean the recognized practices or explicit holdings of courts, pursuant to *stare decisis*. The reasons for generally approving institutional precedent are well known.²⁸³ Most relevant here, adherence to *stare decisis* creates a gap between law and politics. However, institutional precedent is never absolute and is especially unlikely to predominate in times of legal change and polarization.²⁸⁴ Different ideological groups will have their own

²⁸¹ Other scholars have proposed varied ways of grappling with partisan polarization and related contestation, including that the Court favor: (i) principles that are symmetrical across party lines and interests, see ZACHARY S. PRICE, *CONSTITUTIONAL SYMMETRY: JUDGING IN A DIVIDED REPUBLIC* 2 (2024); (ii) groups that are relatively powerless to avoid harms associated with defeat, see AARON TANG, *SUPREME HUBRIS: HOW OVERCONFIDENCE IS DESTROYING THE COURT — AND HOW WE CAN FIX IT* 156 (2023); and (iii) doctrines that give expression to the values of competing political positions, see Post & Siegel, *supra* note 101, at 430. By comparison, my approach is both less aspirational and more realistic: It allows for controversial rulings that defy each of the foregoing proposals, including because democratically elected political actors select for judges with certain personal precedents. The law is thus left more permeable to politics, even as the two remain separated.

²⁸² See, e.g., STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 52 (2021); RICHARD A. POSNER, *HOW JUDGES THINK* 61 (2008).

²⁸³ See Frederick Schauer, *Precedent*, 39 *STAN. L. REV.* 571, 599 (1987); Deborah Hellman, *An Epistemic Defense of Precedent*, in *PRECEDENT IN THE UNITED STATES SUPREME COURT* 63, 63–64 (Christopher J. Peters ed., 2013); Deborah Hellman, *The Importance of Appearing Principled*, 37 *ARIZ. L. REV.* 1107, 1109 (1995).

²⁸⁴ See Richard M. Re, *Precedent as Permission*, 99 *TEX. L. REV.* 907, 931 & n.100 (2021); Frederick Schauer, *Stare Decisis — Rhetoric and Reality in the Supreme Court*, 2018 *SUP. CT. REV.* 121, 130–32 (2019).

views of the law, and those views will necessarily conflict — and indeed ought to conflict — with much established case law.²⁸⁵

Third is personal precedent, or a particular jurist’s fidelity to her own previously expressed views.²⁸⁶ In many ways, personal precedent is the building block of institutional precedent, in that personal precedents often create majority agreement yielding precedential rulings. However, these two forms of precedent can also come into conflict, as when a judge or group of judges espouse a judicial philosophy at odds with a leading case. As compared with institutional precedent, personal precedent is often more directly linked to partisanship and ideology, insofar as political actors pick jurists with preferred personal precedents. Yet personal precedents are genuine rules or norms that operate internally on an individual judge and so (like institutional precedents) have constraining content independent of politics or the latest demands of party leaders.

Last are consensus views, that is, legal views that now garner significant agreement across partisan or ideological lines. These views are relatively nonpartisan and nonideological. Moreover, the existence of cross-ideological agreement strongly suggests that there is a legitimate reason to adopt a particular course of action, even if institutional and personal precedent are both to the contrary.²⁸⁷ Perhaps new information or conditions have come to light, or the equities of a unique case are unexpectedly compelling. *West Virginia State Board of Education v. Barnette* offers an example, as changes of heart and personnel led to a repositioning on a major constitutional issue, with supermajority support among the Justices.²⁸⁸

In short, partisan politics are distinct from (even if sometimes aligned with) three key sources of law and legal decisionmaking — namely, institutional precedent, personal precedent, and consensus views. This fundamental distinction does admit of degrees. Insofar as a judge acts in conformity with partisan imperatives and lacks a secure foothold in any of the other three concepts, the judge undermines the distinction between politics and law. A worse, more condemnable judge would

²⁸⁵ At any given time, some established case law is out of step with new technologies, legal practices, or moral views. See Re, *supra* note 284, at 931; Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2253–54 (2014).

²⁸⁶ See Re, *supra* note 273, at 845.

²⁸⁷ Cf. Re, *supra* note 163, at 1658 (discussing the permissive “golden rule” of British statutory interpretation, which attends to consensus).

²⁸⁸ 319 U.S. 624, 646 (1943). The separate opinions in *Dobbs* seemed sensitive to this point. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2316 (2022) (Roberts, C.J., concurring in the judgment) (noting that *Barnette* overruled a three-year-old case, “three Justices having had second thoughts”); *id.* at 2342 (Breyer, Sotomayor & Kagan, JJ., dissenting) (suggesting that *Barnette* “happened . . . because individual Justices changed their minds, not because a new majority wanted to undo the decisions of their predecessors”).

follow partisan dictates not just without support in, but in outright defiance of, all three nonpartisan sources of law.²⁸⁹

In addition to maintaining the distinction between law and politics, judges also advance related practical interests by keeping partisan reasons and outcomes at arm's length. Judges ought to avoid consistently aligning with a favored political party — a circumstance that, as many commentators suggest, imperils the courts' perceived legitimacy.²⁹⁰ Just as importantly, self-conscious awareness of partisanship and its allure can provide an internal check on a judge's own biases, yielding more consistent, accurate, or wise decisions.²⁹¹

This basic picture can be formalized by way of the following two principles:

Nonpartisanship Principle. In general, judges act permissibly when they adhere to institutional precedent, personal precedent, or consensus views.

Antipartisanship Principle. But judges should generally eschew the wishes of their co-partisans, absent strong support in institutional precedent, personal precedent, or consensus views.

Each of the two principles has objective and subjective aspects. That is, a judge should subjectively aspire to obey the principles; and critics of the courts can apply the principles as objective standards, based on observable behavior.²⁹²

Notably, the antipartisanship principle does not just render partisanship an invalid reason but also treats the avoidance of partisanship as a potential reason for decision. Imagine a judge who is unsure how to rule in a controversial case where both sides find some support in

²⁸⁹ The gap between law and politics can be maintained in different ways. For example, judges might be impugned to the extent that they issue partisan rulings in defiance of the three nonpartisan sources of law, whereas they might garner praise for eschewing partisanship when those sources are silent. Cf. Re, *supra* note 163, at 1675 (discussing “plaudits,” or “principles that deem certain conduct praiseworthy, without requiring or forbidding anything”); *infra* note 296 (noting praise for antipartisan adjudication).

²⁹⁰ See Grove, *supra* note 94, at 2252. The proposed principles might restore a source of legitimacy lost with the end of the Swing Justice Era. See Devins, *supra* note 87, at 995–97; Josh Gerstein, *Kagan Fears Supreme Court Losing Swing Justice*, POLITICO (Oct. 5, 2018, at 20:25 ET), <https://www.politico.com/story/2018/10/05/elena-kagan-supreme-court-kennedy-877288> [<https://perma.cc/7VN3-T8CW>] (Justice Kagan arguing that swing Justices “enabled the court to look so it was not all by one side or another and it was indeed impartial and neutral and fair” and concluding that “[a]ll of us need to be aware of that — every single one of us”).

²⁹¹ Cf. KEITH E. STANOVICH, *THE BIAS THAT DIVIDES US: THE SCIENCE AND POLITICS OF MYSIDE THINKING* 134–35, 142 (2021) (“Go ahead and be ‘inconsistent’ from your party’s point of view.” *Id.* at 142.).

²⁹² Cf. William Baude & Samuel L. Bray, *The Supreme Court, 2022 Term — Comment: Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 187–88 (2023) (distinguishing internal and external rule uses).

institutional or personal precedent. Under the nonpartisanship principle, the judge might permissibly favor either side. But, if the issue has a partisan valence and the judge is associated with a relevant political party, then the judge should err in favor of disappointing partisan expectations. Some respected federal court of appeals judges appear to have done just that.²⁹³ The lead opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* could be understood as such an effort.²⁹⁴ And some otherwise surprising votes by Chief Justice Roberts, as well as Justices Breyer and Kagan, might be viewed similarly.²⁹⁵ This antipartisan orientation also resonates with broader themes in legal culture. For instance, Justices have publicly praised their predecessors for ruling against the presidents who appointed them,²⁹⁶ with the Nixon Tapes Case from the long Warren Court being perhaps the most salient example.²⁹⁷

The antipartisanship principle does reflect a certain irony, in that it recommends awareness of politics precisely to check its influence.²⁹⁸ Judges who nearly always vote for members of their own party (or race, or religion) are probably doing something very wrong. To similar effect, Justice Barrett (among others) has recently recalled Justice Scalia's adage that judges whose votes always match their politics are bad at their

²⁹³ See JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 67–68 (2022).

²⁹⁴ 505 U.S. 833, 867 (1992) (plurality opinion) (refusing “a surrender to political pressure”); see also *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2350 (2022) (Breyer, Kagan & Sotomayor, JJ., dissenting) (praising members of the *Casey* plurality for lacking “the kind of ideological purity some court watchers want Justices to deliver”).

²⁹⁵ E.g., *NFIB v. Sebelius*, 567 U.S. 519, 530 (2012); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2074 (2019). But see Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 272 (2020). On criticism of the Chief Justice or others for being overly or clumsily strategic, perhaps at the expense of formal law, see *infra* note 484 and accompanying text.

²⁹⁶ Consider Justice Jackson’s celebrated disavowal of his own positions when in the executive branch, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring), or *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the Court ruled against a Federalist Party appointment implemented by Chief Justice Marshall himself.

²⁹⁷ See, e.g., *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 117 (2020) (statement of Kavanaugh, J.) (alluding to “one of the greatest moments in American judicial history, where Chief Justice Burger, who had been appointed by President Nixon, brought the Court together in a unanimous decision to order President Nixon . . . to disclose information”).

²⁹⁸ Professor Benjamin Eidelson has insightfully raised the possibility that judges attuned to principles of neutrality might “develop a particular taste for the experience of self-restraint,” leading to neutral-feeling decisions that are unjustified. Benjamin Eidelson, *Weak and Strong Neutrality* 31 (Mar. 19, 2025) (unpublished manuscript) (on file with the Harvard Law School Library) (discussing Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 28 (1993) (“It is a source of satisfaction to a judge to vote for the litigant who irritates him . . . for it is by doing such things that you know that you are playing the judge role . . .”)); see also SUTTON, *supra* note 293, at 67–68. But courts can reasonably accept some risk of erring in favor of neutrality and restraint, at least when so many social factors point the opposite way.

jobs.²⁹⁹ This Term, the Court itself came close to making that idea explicit, adducing a string cite of recent rulings as proof that it has been applying standing doctrine “evenhandedly.”³⁰⁰ These examples show that Justices are mindful of their decisions’ ideological valence, the better to ensure that their legal compasses are reliably pointing north.

So the antipartisanship principle is susceptible to subtle application, as judges assess patterns in their own decisions over a period of time, rather than case by case. The goal, in other words, is to construct a principled overall jurisprudence, rather than handing out wins and losses to various groups according to a quota or schedule. And that approach appears to track the thought processes of many members of the public: According to a leading political science theory, lay observers assess the Justices’ legitimacy by keeping “a running tally” of how often the Court rules either well or poorly.³⁰¹ Those lay assessments arise in a political context, so that conservative decisions score well with conservatives, and liberal ones score well with liberals.³⁰² In this way, judges’ desires for esteem, both in their own eyes and in the public’s, may point in the same antipartisan direction.

To better understand the two principles and their implications, consider a few illustrative and necessarily brief applications.

Allen v. Milligan.³⁰³ The two principles endorse the Court’s choice to preserve longstanding case law on majority-minority districting.³⁰⁴ When it came to curbing race-based districting, only one Justice had supportive personal precedent on point.³⁰⁵ Moreover, calls to abolish majority-minority districting had a conservative partisan valence. The Court thus acted properly in preserving institutional precedent, even as one member of the majority pointed to a relatively unsettled issue that might eventually offer an avenue for adjusting case law.³⁰⁶

²⁹⁹ See, e.g., Jodi Kantor, *How Amy Coney Barrett Is Confounding the Right and the Left*, N.Y. TIMES (June 18, 2025), <https://www.nytimes.com/2025/06/15/us/amy-coney-barrett-supreme-court.html> [<https://perma.cc/4PR6-T4TG>] (quoting Justice Barrett’s remarks from 2024: “Justice Scalia used to say, and I wholeheartedly agree, that if you find yourself liking the results of every decision that you make, you’re in the wrong job.” (internal quotation marks omitted)). Barrett added, even more pointedly: “You should sometimes be reaching results that you really dislike” *Id.* (internal quotation marks omitted).

³⁰⁰ See *Diamond Alt. Energy, LLC v. EPA*, 145 S. Ct. 2121, 2141 (2025) (noting Justice Jackson’s dissenting allegation “that the Court does not apply standing doctrine ‘evenhandedly’” and arguing that a “review of standing cases over the last few years disproves that suggestion”).

³⁰¹ Gibson & Nelson, *supra* note 94, at 206–07; see also Grove, *supra* note 94, at 2250–54 (collecting sources).

³⁰² See Gibson & Nelson, *supra* note 94, at 209.

³⁰³ 143 S. Ct. 1487 (2023).

³⁰⁴ See generally *Thornburg v. Gingles*, 478 U.S. 30 (1986).

³⁰⁵ See, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 294 (2015) (Thomas, J., dissenting); *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in the judgment).

³⁰⁶ See *Allen*, 143 S. Ct. at 1519 (Kavanaugh, J., concurring in part).

Loper Bright Enterprises v. Raimondo. Under the two principles, the Court permissibly overruled *Chevron*, despite the conservative partisan valence of the call to overrule. Most Justices' personal precedents favored curtailing the doctrine.³⁰⁷ Indeed, for several years the Court had conspicuously avoided relying on *Chevron*, signaling its vulnerability.³⁰⁸ So the Court honored the rule of law while also heeding ascendant deregulatory politics and reasserting the judiciary's role in the separation of powers.

United States v. Rahimi.³⁰⁹ Here too, the Court ruled permissibly. Both institutional and personal precedents supported strict originalist arguments against certain firearm regulations relating to domestic violence.³¹⁰ Yet those regulations garnered the support of a cross-ideological coalition of eight Justices and also reflected consensus views in society. The Court thus acted permissibly in both diluting its stringent originalism and (uncoincidentally) embracing greater judicial discretion.³¹¹

Dobbs v. Jackson Women's Health Organization. The two principles oppose the timing and manner of the Court's overruling of *Roe*. Institutional precedent supported abortion rights, there was no consensus in favor of eliminating them, and the Justices' personal precedents were unclear: While a few Justices had espoused overruling *Roe*, almost all had extolled *stare decisis*.³¹² The Court could have curtailed constitutional abortion rights, perhaps along the lines Chief Justice Roberts proposed.³¹³ But in leaping to follow partisan wishes without clear legalistic support, the Court unduly politicized the law.³¹⁴

³⁰⁷ See, e.g., sources cited *infra* note 327.

³⁰⁸ See, e.g., Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 297 (2022).

³⁰⁹ 144 S. Ct. 1889 (2024).

³¹⁰ The Court's recent prior Second Amendment decision appeared to adopt a stringent form of originalism. See *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022); see also *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

³¹¹ For an argument that *Bruen* has been "widely misunderstood by the bench and bar," such that *Rahimi* was not such a great shift, see William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1469 (2024). But see *Rahimi*, 144 S. Ct. at 1930 (Thomas, J., dissenting).

³¹² See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1404–05 (2020) (Gorsuch, J.); *id.* at 1408 (Sotomayor, J., concurring as to all but Part IV-A); *id.* at 1411 (Kavanaugh, J., concurring in part); *id.* at 1425 (Alito, J., dissenting). Notably, no recently appointed Justice had adopted as personal precedent a stance on abortion rights as pat as President Trump's, thereby marking a gap between politics and personal law. Cf. *supra* note 111 and accompanying text.

³¹³ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2310 (2022) (Roberts, C.J., concurring in the judgment); Re, *supra* note 101 (exploring options for gradualism in *Dobbs*).

³¹⁴ Interestingly, reporting indicates that conservative Justices did deliberately slow down the Court's decisional process, quietly postponing the decision by about a year. See Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), <https://www.nytimes.com/2023/12/15/us/supreme-court-dobbs-roe-abortion.html> [<https://perma.cc/BL3W-PWF5>].

As these examples illustrate, the antipartisanship principle will often counsel gradualism, for judges can accrete personal precedents over time through a series of decisions that do not simply hand victories to co-partisans.³¹⁵ In effect, gradualism creates temporal distance between law and politics. And judges — despite their partisan orientations — often have an incentive to foster that separation, which is essential to the judiciary’s social prestige and political authority.³¹⁶

To be clear, the two principles are not the last word on proper judicial behavior, during a realignment or otherwise. They do not even apply or offer guidance in many situations, such as when judges experimentally venture out along uncharted doctrinal paths that lack a partisan valence. And applications of the principles will inevitably generate room for debate and second-guessing. So the principles cannot possibly be followed categorically or absolutely.³¹⁷ Yet general abandonment of the principles would jeopardize the rule of law. While politics does and should influence the Court’s work, it cannot consume it, lest law cease to exist.

D. Practicalities of Adjustment

What are the prospects that the nonpartisanship and antipartisanship principles will meet with general — not perfect — adherence?³¹⁸

One auspicious consideration is that the Conservative Warren Court is scholarly in affect and background.³¹⁹ Each member of the bench arrived with or has subsequently generated a significant reservoir of thoughtful public statements regarding the law, most with fairly well worked-out judicial philosophies to boot. These individuals are substantially hemmed in by their own personal histories and are unlikely to slough off their self-conceptions and public reputations at a moment’s notice.³²⁰ Reinforcing this trend, certain professional markers of scholarly success, such as strong academic achievement, competitive

³¹⁵ In this way, the creation of personal precedent is itself constrained by the antipartisanship principle, as well as other precepts, such as the rule of party presentation.

³¹⁶ This point offers hope that the present proposals are realistic, rather than doomed by the problems they aim to solve. Cf. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

³¹⁷ Additional ethical guidance may bear on matters such as candor or gradualism. See generally Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221 (2023) (“At the very least, committed originalists should acknowledge the need for candidly-embraced premises for managing a gradual transition to what they hope will be a more pervasively originalist future.” *Id.* at 300.).

³¹⁸ Cf. Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991) (demanding not remedial perfection but “a system of constitutional remedies adequate to keep government generally within the bounds of law”).

³¹⁹ See *supra* section I.C, pp. 17–24.

³²⁰ See *Re, supra* note 273, at 830.

clerkships, and judicial or other government experience, have become customary if not obligatory.³²¹

Yet broader political forces create reason to worry. The will to judicial power is visible in many statements by prominent jurists that happened to grease the processes of their nominations and confirmations. Examples include then-Judge Ginsburg's bracing criticisms of *Roe v. Wade* before her elevation to the Supreme Court,³²² as well as then-Judge Gorsuch's well-timed brief against *Chevron* deference shortly before his final nomination.³²³ Yet the pattern in these sorts of proclamations has changed between the eras of Ginsburg and Gorsuch.

For many years, ambitious judges had an incentive to tack toward the political middle to obtain presidential nomination and Senate confirmation. Prospective nominees generally said as little as possible, or else made statements against type. Then-Judge Ginsburg illustrated these trends, as her final confirmation hearing featured many demurrals and (again) she had leveled pointed criticisms of *Roe*.³²⁴ The dominant strategy changed around 2013, with the demise of the filibuster at the circuit court level.³²⁵ From then on, simple majorities would likely suffice to generate confirmation even at the Court. And indeed they did, starting with Justice Gorsuch's confirmation in 2017.³²⁶ The year before, then-Judges Gorsuch and Kavanaugh published critiques of *Chevron*.³²⁷ A few years later, then-Judge Barrett penned an elaborate dissent defending strong Second Amendment rights.³²⁸ And then-Judge

³²¹ See *Current Members*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/U4AM-U837>].

³²² See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992); Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985).

³²³ See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

³²⁴ See, e.g., Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 920, 938 (1995) (arguing that Justices Ginsburg and Breyer “stonewalled the Judiciary Committee to great effect, as senators greeted their ‘nonanswer’ answers with equanimity and resigned good humor,” *id.* at 920).

³²⁵ As Sarah Isgur has put it: “Once the filibuster was gone for the lower-court judges, what you see is that people no longer need to get votes from the opposing party, but they need to be the most extreme version of their own party.” Sophia Cai, *Trump Judges Audition for Supreme Court*, AXIOS (Apr. 27, 2022) (quoting Isgur), <https://www.axios.com/2022/04/27/trump-judges-audition-for-supreme-court> [<https://perma.cc/3WF5-4QHE>].

³²⁶ See *Roll Call Vote 115th Congress — 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1151/vote_115_1_00111.htm [<https://perma.cc/ASY9-TZ8L>].

³²⁷ See *Gutierrez-Brizuela*, 834 F.3d at 1149 (Gorsuch, J., concurring); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMAN, *JUDGING STATUTES* (2014)).

³²⁸ See *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

Jackson quotably declared, in a case involving the first Trump Administration: “Presidents are not kings.”³²⁹

The next crop of Court nominees promises even more dramatic endorsements of partisan-approved positions, on topics ranging from birthright citizenship to the Second Amendment.³³⁰ And why not? If the presidency and Senate are not controlled by the same party, there may be no successful appointment at all, as illustrated by the failed nomination of then-Judge Merrick Garland.³³¹ And if the presidency and Senate are in the same party’s control, then the other party is irrelevant. The strategically critical audience, therefore, is each judge’s own political party. The problem is that jurists will now have less experience bucking their own political group and more experience pandering to it. The risk here is hackery, or “obedience to the current wishes of a political party or other special interest, usually for reasons of personal gain and not based on any legitimate principle.”³³² Recent developments, particularly President Trump’s evident frustration with rulings issued by his own first-term judicial appointees, suggest that a turn toward greater hackery may be in progress.³³³

And, even beyond politics, still broader social trends exacerbate the risk of hackery. Popular legal commentators are usually (not always) one-sidedly partisan in their outlook. Six Justices are depicted as either all good or all bad — and the other three are the opposite. These partisan influencers may come to operate as media gatekeepers to a judicial nomination process characterized by populism and social media appeal. Moreover, the rise in harassment and threats directed against judges and their families,³³⁴ sometimes fostered by political actors, may deter independent thinkers and generate a felt need to find protection if not sanctuary among ideological allies. For all these reasons, the risk of hack

³²⁹ Comm. on the Judiciary of the U.S. House of Representatives v. McGahn, 415 F. Supp. 3d 148, 213 (D.D.C. 2019) (Jackson, J.); see also Rachael Bade, *4 Things to Watch When Jackson Raises Her Right Hand*, POLITICO (Mar. 21, 2022, at 06:07 ET), <https://www.politico.com/newsletters/playbook/2022/03/21/4-things-to-watch-when-jackson-raises-her-right-hand-00018798> [https://perma.cc/MES4-UXU3] (positing that “Jackson famously opined that ‘presidents are not kings.’”).

³³⁰ See, e.g., Josh Blackman, *An Interview with Judge James C. Ho*, REASON: VOLOKH CONSPIRACY (Nov. 11, 2024, at 08:00 ET), <https://reason.com/volokh/2024/11/11/an-interview-with-judge-james-c-ho> [https://perma.cc/9ZJ8-5ZYW].

³³¹ See Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, at 05:00 ET), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [https://perma.cc/84LQ-KUNM].

³³² Re, *supra* note 273, at 852 n.174.

³³³ See Charlie Savage, *Trump, Bashing the Federalist Society, Asserts Autonomy on Judge Picks*, N.Y. TIMES (May 30, 2025), <https://www.nytimes.com/2025/05/30/us/politics/trump-judges-nominations.html> [https://perma.cc/JM4M-B6NV] (discussing Trump’s social media broadside against the Federalist Society and prominent conservative legal organizer Leonard Leo, noting Trump’s remark: “I am so disappointed in The Federalist Society because of the bad advice they gave me on numerous Judicial Nominations”); Raymond, *supra* note 243.

³³⁴ See Luke Barr, *Threats to Federal Judges Increasing, US Marshals Service Warns*, ABC NEWS (Mar. 21, 2025, at 10:46 ET), <https://abcnews.go.com/Politics/threats-federal-judges-increasing-us-marshals-service-warns/story?id=120019609> [https://perma.cc/6UXT-T3EJ].

judges and Justices — that is, jurists whose first principle is, effectively, that a political party’s current wishes reign supreme — is on the rise.

These challenges to judicial independence and, indeed, to the existence of law, are political and social in nature. The solutions, too, must there be found. One approach is for commentators to single out judicial inconsistency and impugn it as hypocrisy or hackery.³³⁵ These efforts might be especially important in connection with new judicial appointments, on the theory that someone used to being either politically independent or a partisan hack will continue to be so. Yet encouraging even more ad hominem indictments also carries the risk of replicating overall partisan discourse, particularly when the indictments come from regular partisan voices. Moreover, ad hominem attacks have a way of metastasizing in ways that threaten judicial independence.³³⁶ In recent years, for instance, liberal critics have impugned conservative Justices’ impartiality based on their family members’ political activities³³⁷ — a maneuver that conservatives have likewise deployed against liberal jurists.³³⁸ Tools of judicial delegitimation and intimidation, it turns out, have bipartisan appeal across eras.

An additional remedy might help to check the excesses of the first: Legal and political actors might continue insisting that federal judges exhibit certain objective indicia of accomplishment, such as long judicial service or a record of scholarly writing.³³⁹ These sorts of criteria would make it harder to appoint people whose only qualification is their pliability. And the criteria would also make it likely that judges have expressed a range of coherent views, rendering it harder for them to change course cynically.

In addition, institutionalists and other relatively nonpartisan actors must dare to speak, even amidst the swirl of partisan discourse and

³³⁵ See *Re, supra* note 273, at 855; Charles Gardner Geyh, *The Pressure Points of Professional Identity for Judges in the Modern Era*, 76 *MERCER L. REV.* 1281, 1295 (2025).

³³⁶ For a related set of worries, see Josh Blackman, *The Audition Trap*, *REASON: VOLOKH CONSPIRACY* (Mar. 7, 2025, at 13:10 ET), <https://reason.com/volokh/2025/03/07/the-audition-trap> [<https://perma.cc/KVY2-83C9>].

³³⁷ See, e.g., Devin Dwyer, *Justice Clarence Thomas Faces New Recusal Demand After Wife’s Alleged Message to Conservative Group*, *ABC NEWS* (Sep. 9, 2024, at 19:31 ET), <https://abcnews.go.com/Politics/justice-clarence-thomas-faces-new-recusal-demand-after/story?id=113528871> [<https://perma.cc/RC3U-LQ2N>].

³³⁸ See, e.g., *Judge Refuses to Recuse Himself from Same-Sex Marriage Case Over Wife’s ACLU Ties*, *LAW.COM* (Dec. 6, 2010, at 00:00 ET), <https://www.law.com/article/almID/1202475763756> [<https://perma.cc/R7SD-LYVY>]; Ann E. Marimow & Spencer S. Hsu, *Amid Attacks, Judge Boasberg Weighs Holding Trump Officials in Contempt*, *WASH. POST* (Apr. 5, 2025), <https://www.washingtonpost.com/politics/2025/04/05/judge-boasberg-trump-contempt-kavanaugh/> [<https://perma.cc/S74Y-5Y6W>].

³³⁹ Several current Justices — including Chief Justice Roberts and Justices Kagan, Kavanaugh, and Barrett — have written law review pieces that have been cited by litigants as well as the Court and that have apparently influenced the Justices’ thinking. See *Re, supra* note 273, at 846; Adam Feldman, *The Highest Cites in the Land*, *EMPIRICAL SCOTUS* (June 14, 2023), <https://empiricalscotus.com/2023/06/14/the-highest-cites-in-the-land> [<https://perma.cc/CAE8-HKY5>]. This Term, Justice Kagan innovated a new citation for this purpose: “See (sorry) E. Kagan.” *Free Speech Coal. v. Paxton*, 145 S. Ct. 2291, 2327 (2025) (Kagan, J., dissenting).

intimidation. Chief Justice Roberts has lately taken the lead in that respect, including by issuing a thinly veiled rebuke of partisan efforts to impeach judges for unwanted decisions.³⁴⁰ Roberts's 2024 year-end statement similarly took to task figures on the left and right who have recently undermined the courts.³⁴¹ But there is no guarantee that proponents of strong, independent courts will win out in this melee. And surely it is not enough for the Justices alone to defend the Third Branch.³⁴² Perhaps you, gentle readers, have a role to play, too.

On balance, the current Court is well configured to safeguard the rule of law, possessing both the motivation and the power required. But political polarization is undermining the social conditions for an independent judiciary.

III. OLD THEORIES, NEW PRACTICES

“Previously, it was the spokesmen for liberalism and majority rule . . . who denounced the Supreme Court. . . . Yet, in the Nineteen Fifties, liberal groups are defending the judiciary as a wise agency to check mass passions and to protect natural rights”³⁴³

If the law has a deep structure, then we should expect that theories capable of illuminating the Warren Court's work would also have traction today. And so they do. Here again, what seems at first blush like a radically different court is really a successor in interest. And, once more, these comparisons reveal underappreciated features of law, in both the mid-twentieth century and the present day.

³⁴⁰ See Chris Megerian, Lindsay Whitehurst & Mark Sherman, *Roberts Rejects Trump's Call for Impeaching Judge Who Ruled Against His Deportation Plans*, AP NEWS (Mar. 18, 2025, at 20:16 ET), <https://apnews.com/article/donald-trump-federal-judges-impeachment-29da1153a9f82106748098a6606fec39> [<https://perma.cc/878L-PDUP>]; see also Josh Gerstein, *Rule of Law is “Endangered,” Chief Justice Says*, POLITICO (May 12, 2025, at 19:39 ET), <https://www.politico.com/news/2025/05/12/chief-justice-roberts-speech-georgetown-00343406> [<https://perma.cc/K9C6-Q7UE>]. Other Justices have made public statements in a similar vein. See, e.g., John Fritze, *Justice Ketanji Brown Jackson Says “State of Our Democracy” Keeps Her Up at Night*, CNN (July 10, 2025, at 15:17 ET), <https://www.cnn.com/2025/07/10/politics/ketanji-brown-jackson-supreme-court-democracy-justice> [<https://perma.cc/Z9RT-6RBK>].

³⁴¹ See JOHN G. ROBERTS, JR., 2024 YEAR END REPORT ON THE FEDERAL JUDICIARY 8 (Dec. 31, 2024).

³⁴² Justice Alito raised a somewhat similar point during a season of intense criticisms of the Justices, including himself, arguing that the “organized bar” traditionally defended judges from intimidation — but did not reliably do so anymore. See David B. Rivkin, Jr., & James Taranto, Opinion, *Samuel Alito, The Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, at 13:57 ET), <https://www.wsj.com/opinion/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7> [<https://perma.cc/HB5P-XQLT>].

³⁴³ Alan F. Westin, *When the Public Judges the Court*, N.Y. TIMES, May 31, 1959, at 16, <https://www.nytimes.com/1959/05/31/archives/when-the-public-judges-the-court-there-has-been-a-striking-shift-in.html> [<https://perma.cc/87Q9-2GMQ>]; see also Friedman, *supra* note 78, at 158 n.33 (collecting this and other examples).

A. *The New Representation-Reinforcement*

Even as it bends the law in new directions, the current Court frequently operates within some of the framework ideas that the Warren Court helped to establish.³⁴⁴ Perhaps most saliently, the Justices continue to both reason and act in ways that speak to the counter-majoritarian role long associated with *United States v. Carolene Products Co.*³⁴⁵ and John Hart Ely's theory of representation-reinforcement.³⁴⁶

Scholars have sometimes invoked Ely's theory to exalt the Warren Court.³⁴⁷ But this framework theory, like most others, is malleable enough to be directed toward ends unanticipated by its creators. While redeploying old ideas in new directions could be depicted cynically as objectionable co-optation,³⁴⁸ creative thinking within a particular worldview is also how intellectual and social transformations occur. Minority protection and the channels of political change are adaptive, substantially open-ended concepts — more of a grammar or language than a set of rules or outcomes.³⁴⁹ In this sense, representation-reinforcement can itself be viewed as a kind of playing field on which more substantive ideological conflict takes place.

Representation-reinforcement is essentially the idea that the federal courts should — and, during the Warren Court, did — exercise judicial review to foster desirable modes of democratic governance.³⁵⁰ More particularly, Ely worried that the presumptively legitimate and authoritative process of democratic debate and decisionmaking might break down or that minority groups could be exploited by overbearing

³⁴⁴ See David A. Strauss, *Jorde Lecture: Polarization, Victimization, and Judicial Review*, CAL. L. REV. (forthcoming 2025) (manuscript at 2) (on file with the Harvard Law School Library) (arguing that “the *Carolene Products* approach has not disappeared; instead, it has, in a sense, mutated”); Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 6–7 (2022); see also Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 296 (“[W]hile we may think of minority status as a relatively fixed concept, in fact the question of who counts as a minority is constantly shifting and open to contest.”). Strauss argues that the approach in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), mutated as “elite consensus” deteriorated. Strauss, *supra* (manuscript at 21). Yet the approach is not changed so much as repurposed. The elites charged with applying it used to be liberal; now they are conservative.

³⁴⁵ 304 U.S. 144 (1938); see *id.* at 152 n.4.

³⁴⁶ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181 (1980). Ely is the best-known scholar of the *Carolene Products* footnote — not the only one or first one.

³⁴⁷ These scholars often draw on Ely's theory while adjusting or supplementing it. See, e.g., STONE & STRAUSS, *supra* note 1, at 175 n.2; Karlan, *supra* note 58, at 11.

³⁴⁸ See Elizabeth S. Anker, *Left Crit Theory Goes to Washington: The Anti-Liberal Ideology of the Roberts Court*, 27 U. PA. J. CONST. L. 1, 11 (2025).

³⁴⁹ Cf. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7–8 (1982) (providing a “typology” of various “types” or “styles” of constitutional argument).

³⁵⁰ See ELY, *supra* note 346, at 73 (arguing that the “constitutional decisions of the Warren Court evidence a deep structure”). Representation-reinforcement aside, Ely followed *Carolene Products* in generally favoring judicial restraint in the face of politics, barring application of an express constitutional command. See *id.* at 88, 179.

majorities.³⁵¹ The famed footnote four of *Carolene Products* had announced skeptical judicial review of restrictions on “those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,” as well as of laws that target or exploit “discrete and insular minorities” who lack political power.³⁵² In Ely’s hands, these principles could sustain major Warren Court decisions, such as rulings on: desegregation and civil rights; the one-person, one-vote principle; strong free speech rights; strong religious freedoms; and the criminal procedure revolution.³⁵³

Some important Warren Court decisions are harder to square with the Elysian or *Carolene Products* framework. Perhaps most conspicuous are *Griswold*, which established a right to contraception,³⁵⁴ and (during the long Warren Court) *Roe*, which recognized a right to abortion.³⁵⁵ These decisions coded as liberal,³⁵⁶ but they seemed to enforce substantive values directly rather than safeguarding the democratic process.³⁵⁷ Moreover, these rulings seemed to protect majority or near-majority groups, such as married persons³⁵⁸ or women,³⁵⁹ without

³⁵¹ See *id.* at 103.

³⁵² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The footnote also reserved judicial skepticism for cases involving express or “specific” constitutional rights. *Id.* Following suit, Ely recognized that the Second Amendment posed an issue of interpretation based largely on what its “language indicates.” ELY, *supra* note 346, at 94–95. While recognizing that the “point is debatable,” Ely thought it “probably correct” to construe the right in light of the Amendment’s prefatory clause. *Id.* at 95. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court effectively took the other side of that debate. *Id.* at 577–78.

³⁵³ See *supra* notes 1–3. The current Court has hardly matched the criminal procedure revolution of the 1960s, but it has issued significant decisions for criminal defendants — and sometimes found rights where the Warren Court did not. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395–97, 1404–08 (2020) (overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972), on jury unanimity); *Smith v. Arizona*, 144 S. Ct. 1785, 1796–1802 (2024) (Confrontation Clause). The Court’s substantive rulings in favor of criminal defendants sometimes manage to code conservative. See, e.g., *Fischer v. United States*, 144 S. Ct. 2176, 2181–82, 2190 (2024).

³⁵⁴ See *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965). While the Court in *Griswold* limited its holding to married individuals, see *id.* at 485–86, it extended the right of contraception to unmarried individuals in 1972. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

³⁵⁵ See *Roe v. Wade*, 410 U.S. 113, 164 (1973).

³⁵⁶ In terms of partisan politics, Democratic and Republican attitudes regarding abortion began to diverge in the early and mid-1970s. See Jonathan Bartho, *How Ronald Reagan Helped Abortion Take Over the Republican Agenda*, TIME (Apr. 12, 2024, at 09:00 ET), <https://time.com/6966056/republican-abortion-arizona-reagan> [<https://perma.cc/F6MP-TULP>]; Linda Greenhouse & Reva B. Siegel, Feature, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2034 (2011).

³⁵⁷ See ELY, *supra* note 346, at 221 n.4, 248 n.52. But see Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1933–34, 1940–42 (2021) (arguing in part that Ely’s theory ought to account for social prejudice and stigma, in which case it would support sex-based equal protection claims, as well as rights to contraception and abortion). As a conception of democracy thickens, it loses the ability to neutrally adjudicate between competing conceptions of the good — which had been representation-reinforcement’s central task, see *supra* notes 349–52 and accompanying text. On the analytic appeal of thin conceptions of democracy, see *supra* note 99.

³⁵⁸ See *Griswold*, 381 U.S. at 485–86.

³⁵⁹ See *Roe*, 410 U.S. at 163–64.

identifying or remedying any defect in the democratic process.³⁶⁰ Ely himself did not argue these holdings were representation-reinforcing.³⁶¹ Liberal constitutional thought then spent its next generation (or two) trying to justify left decisions that seemed incompatible with Ely's theory — most notably, *Roe*.³⁶²

In several important respects, the current Court hews to Ely's original vision of representation-reinforcement. Most obviously, *Dobbs* overruled *Roe*³⁶³ and so undid perhaps the long Warren Court's most glaring deviation from Ely's theory. Making this connection explicit, *Dobbs* conspicuously quoted Ely's famed castigation of *Roe*.³⁶⁴ *Dobbs* can thus be viewed as a major victory for the constitutional theory most associated with Warren Court jurisprudence.

The Court has also followed representation-reinforcement by affording exemptions to religious dissenters.³⁶⁵ In the Warren Court era, the leading Free Exercise Clause case was probably *Sherbert v. Verner*,³⁶⁶ which allowed a member of the Seventh-day Adventist Church to receive state unemployment compensation benefits despite her conscientious refusal to work on Saturday.³⁶⁷ Rights to religious exemptions later fell out of favor among the more formalist Justices and were

³⁶⁰ As a majority of the electorate, women as a group can elect virtually any candidate in free, fair, and inclusive elections. See ELY, *supra* note 346, at 164–66; see also *Frontiero v. Richardson*, 411 U.S. 677, 686 n.17 (1973) (plurality opinion) (“It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority.”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2277 (2022) (noting that “[w]omen are not without electoral or political power” and that women are often disproportionately overrepresented among registered and actual voters). Elysian counterarguments contend, in part, that social prejudices stigmatize and disempower women, as evidenced by their disproportionately low representation among elected officials. See *Frontiero*, 411 U.S. at 686 & n.17 (plurality opinion); *Murray & Shaw*, *supra* note 271, at 768–72; NeJaime & Siegel, *supra* note 357, at 1947.

³⁶¹ See ELY, *supra* note 346, at 221 n.4, 248 n.52; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 933–36 (1973); Mark V. Tushnet, *Foreword*, 77 VA. L. REV. 631, 634 (1991) (“Not even Ely contends that *Griswold* can be understood in representation-reinforcing terms.” (footnote omitted)); Ryan C. Williams, *The Paths to Griswold*, 89 NOTRE DAME L. REV. 2155, 2156 n.10 (2014). As a law clerk, Ely wrote a memo to Chief Justice Warren arguing that the state law in *Griswold* was “discriminatory in practice” as against the poor. Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 YALE L.J.F. 332, 336–37 (2015).

³⁶² See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 363–64 (Fordham Univ. Press 2001) (1994); e.g., NeJaime & Siegel, *supra* note 357, at 1939–42.

³⁶³ *Dobbs*, 142 S. Ct. at 2242.

³⁶⁴ *Id.* at 2270 (quoting Ely, *supra* note 361, at 947). While Ely later went on to oppose overruling *Roe*, his views on that point seem dependent on *stare decisis*, not (or not just) on his theory of representation-reinforcement. See JOHN HART ELY, ON CONSTITUTIONAL GROUND 304–06 (1996).

³⁶⁵ *Carolene Products* itself listed both “religious” and “racial” minorities, in the same sentence, as potential beneficiaries of judicial scrutiny. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Ely’s later work embraced Warren Court-era free exercise decisions as representation-reinforcing. See ELY, *supra* note 346, at 100. Ely may also have viewed free exercise claims as favored on interpretivist grounds, based on the First Amendment’s explicit recognition that “religion was an important substantive value.” *Id.* at 94.

³⁶⁶ 374 U.S. 398 (1963).

³⁶⁷ *Id.* at 399–402.

generally abandoned in *Employment Division v. Smith*.³⁶⁸ Yet religious exemptions are coming back in style. Cases involving the ministerial exception have chipped away at *Smith*.³⁶⁹ And, sometimes under the rubric of the Free Speech Clause, the Justices are creating room for religious exceptionalism in cases like *303 Creative LLC v. Elenis*.³⁷⁰ This Term’s Free Exercise Clause ruling in *Mahmoud v. Taylor* continues that pattern.³⁷¹

Mahmoud is especially revealing as it is probably the most “activist” ruling of the past Term, if activism is understood as judicial intrusion on the fruits of democratic politics.³⁷² The case extensively drew on *Wisconsin v. Yoder*,³⁷³ a major ruling on the freedom of religion during the long Warren Court.³⁷⁴ Whereas *Yoder* involved a request for Amish children to be exempted from attendance at public school,³⁷⁵ *Mahmoud* established a more contextual right to exemptions from public school instruction that offends religious scruples.³⁷⁶ Muslim, Catholic, and Ukrainian Orthodox parents sued to opt out of pedagogy that undermined their religious teachings regarding sexuality and marriage.³⁷⁷ Because the pedagogy at issue involved toleration and affirmance of LGBTQ+ persons and same-sex marriage, the plaintiffs coded as conservative.

But the *Mahmoud* plaintiffs’ claim sounded in representation-reinforcement: Minorities sought federal constitutional relief from majoritarian local laws.³⁷⁸ Justice Sotomayor’s dissent confirmed as much

³⁶⁸ 494 U.S. 872, 882–84 (1990); see Richard Schragger, Micah Schwartzman & Nelson Tebbe, *Reestablishing Religion*, 92 U. CHI. L. REV. 199, 246 (2025) (linking *Smith* to the fact that “[j]udicial restraint was a conservative theme in the wake of the Warren and Burger Courts”).

³⁶⁹ See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060–61, 2066 (2020).

³⁷⁰ 143 S. Ct. 2298, 2308, 2310–13 (2023).

³⁷¹ 145 S. Ct. 2332, 2350 (2025).

³⁷² See *id.* The Term’s other major rights-based rulings — namely, *TikTok Inc. v. Garland*, 145 S. Ct. 57 (2025); *United States v. Skrmetti*, 145 S. Ct. 1816 (2025); and *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025) — approved democratically enacted laws. *TikTok*, 145 S. Ct. at 72; *Skrmetti*, 145 S. Ct. at 1837; *Free Speech Coal.*, 145 S. Ct. at 2299. All three cases implicated technological or medical issues, *TikTok*, 145 S. Ct. at 72; *Skrmetti*, 145 S. Ct. at 1836–37; *Free Speech Coal.*, 145 S. Ct. at 2299, circumstances often thought to warrant judicial caution, cf. *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). *TikTok* had the added wrinkle of implicating national security, *TikTok*, 145 S. Ct. at 72, offering another Warren Court echo. See *infra* note 382.

³⁷³ 406 U.S. 205 (1972).

³⁷⁴ See *Mahmoud*, 145 S. Ct. at 2352–53; *Yoder*, 406 U.S. at 234–36.

³⁷⁵ 406 U.S. at 207–09.

³⁷⁶ 145 S. Ct. at 2353.

³⁷⁷ *Id.* at 2347–49.

³⁷⁸ See *id.* at 2360 (“[T]he Bill of Rights and the doctrine of judicial review protect individuals who cannot obtain legislative change.”). In describing the political process leading up to the case, the Court cast the local school board as hostile or insensitive to the plaintiffs’ religious views. See *id.* at 2346–47.

by echoing conservative themes from the 1960s and '70s,³⁷⁹ repeatedly insisting that the Court should defer to “democratically elected state and local decisionmakers.”³⁸⁰ For present purposes, the main difference, as compared with cases like *Sherbert* and *Yoder*, was that exempting these local minorities cut against liberal politics.³⁸¹

The current Court likewise shares the Warren Court’s focus on strong rights under the Free Speech Clause. To be sure, neither Court was absolutist about the freedom of speech,³⁸² but both nonetheless asserted speech-protective principles that even have similar content.³⁸³ For instance, Ely’s theory would seem to oppose governmental efforts to forbid public expression, especially when such expression is critical of incumbents; and Ely himself briefly criticized Burger Court campaign finance case law for diluting earlier, more robust First Amendment jurisprudence.³⁸⁴ For these reasons, the campaign finance jurisprudence associated with *Citizens United* is at least plausibly viewed as representation-reinforcing, as well as consonant with Ely’s express views on the First Amendment.³⁸⁵ In this respect, too, a core legacy of

³⁷⁹ Compare *id.* at 2396 (Sotomayor, J., dissenting) (advocating for “the primacy and importance of local decisionmaking in this area of law”), with, e.g., *Wright v. Council of Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting) (“Local control is . . . vital to continued public support of the schools . . .”).

³⁸⁰ *Mahmoud*, 145 S. Ct. at 2395 (Sotomayor, J., dissenting); see also *id.* at 2396–97 (urging deference to democratically elected bodies in education-related matters).

³⁸¹ Compare *id.* at 2343 (majority opinion), with *Sherbert v. Verner*, 374 U.S. 398, 399–401 (1962), and *Wisconsin v. Yoder*, 406 U.S. 205, 207, 209 (1972).

³⁸² This Term’s two other freedom of speech rulings echoed Warren Court precursors. First, *TikTok Inc. v. Garland*, 145 S. Ct. 57 (2025), resembled *United States v. O’Brien*, 391 U.S. 367 (1968), in that both cases involved the application of intermediate scrutiny to sustain what was pitched as a national security-related measure. See *TikTok*, 145 S. Ct. at 63, 69; *O’Brien*, 391 U.S. at 377. *O’Brien* featured prominently in the United States’s briefing, see Brief for the Respondent at 24, 28, 36, *TikTok*, 145 S. Ct. 57 (Nos. 24-656 & 24-657) (quoting *O’Brien*, 391 U.S. at 375, 383), but the published opinion focused on more recently descended precedents, see, e.g., *TikTok*, 145 S. Ct. at 66–67 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). Second, *Free Speech Coalition, Inc. v. Paxton*, 145 S. Ct. 2291 (2025), plausibly presented itself as a post-internet update of *Ginsberg v. New York*, 390 U.S. 629 (1968): Both decisions upheld what the Court regarded as reasonable efforts to insulate minors from obscene pornography. Compare *Free Speech Coal.*, 145 S. Ct. at 2299, 2316, with *Ginsberg*, 390 U.S. at 631–33, 643.

³⁸³ See, e.g., *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399–400, 2408 (2024) (quoting *Mia Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 243, 249–50, 254, 256, 258 (1974)); *O’Brien*, 391 U.S. at 377.

³⁸⁴ See ELY, *supra* note 346, at 234 n.27 (quoting *Elrod v. Burns*, 427 U.S. 347, 364 n.17 (1976) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 30 (1976)); Karlan, *supra* note 58, at 30 (quoting Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law*, 57 STAN. L. REV. 695, 699 (2004)).

³⁸⁵ See Michael C. Dorf, *WWJHED (What Would John Hart Ely Do) About Campaign Finance Regulation?*, DORF ON LAW (Sep. 29, 2014), <https://www.dorfonlaw.org/2014/09/wwjhed-what-would-john-hart-ely-do.html> [<https://perma.cc/VZL7-ZLJB>]. Here, as elsewhere, liberal commentators have sought to reclaim Ely. See Karlan, *supra* note 58, at 30–31 (agreeing “[i]t certainly is possible to defend the result in *Citizens United* as an application of process theory,” *id.* at 30, but also contending that “it is just as possible to defend campaign finance regulation as an effort to

the Warren Court has persisted or intensified in recent years, including during the decade before the Conservative Warren Court.

For one last example, consider what may be one of the Conservative Warren Court's canonical cases in the making: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*³⁸⁶ (*SFFA*). This decision could be viewed as opposed to Ely's legacy, since Ely himself explicitly defended race-based affirmative action in higher education.³⁸⁷ Yet a closer look reveals a more harmonious relationship between recent case law and representation-reinforcement. Ely's basic position was that there is "nothing constitutionally suspicious about a majority's discriminating against itself."³⁸⁸ "The function of the Equal Protection Clause," on this view, "is largely to protect against substantive outrages by requiring that those who would harm others must at the same time harm themselves."³⁸⁹

However, Ely also recognized that efforts to advantage one minority group might come at the expense of another. He therefore wrote: "Should a preferential admissions program for blacks be accompanied by an unexplained disproportionate drop in the percentage of Jews," then "the appropriate judicial response would be clear."³⁹⁰ Ely expressed little interest in choosing select minority groups for special privileges at the expense of others.

Against that backdrop, the Conservative Warren Court can be viewed as updating the Elysian tradition of constitutional adjudication to account for new events. *SFFA* specifically rejected race-based affirmative action that disadvantaged some race minority applicants while benefitting others.³⁹¹ According to the Court, that is, Harvard's admissions policies disadvantaged Asian American applicants.³⁹² If that claim is credited, then Ely's analysis counsels in favor of the Court's

clear the channels of political change by reducing the influence of wealth on electoral outcomes," *id.*). *But see* Steven G. Calabresi, *The Constitution and Disdain*, 126 HARV. L. REV. F. 13, 19 (2012).

³⁸⁶ 143 S. Ct. 2141 (2023). In making a bid for the adoption of race-blindness as a constitutionally proper means of addressing race and racism, *SFFA* elaborately invoked the precedent and legacy of *Brown v. Board of Education*. *See, e.g., id.* at 2160 (asserting "the fundamental principle that racial discrimination in public education is unconstitutional" (quoting *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 298 (1955))). This move can be viewed as an effort to specify *Brown*'s ambiguous import for later race-equality issues.

³⁸⁷ ELY, *supra* note 346, at 170–72 (footnotes omitted).

³⁸⁸ *Id.* at 172.

³⁸⁹ *Id.* at 170.

³⁹⁰ *Id.* at 171.

³⁹¹ *See SFFA*, 143 S. Ct. at 2168–69 ("College admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." *Id.* at 2169.).

³⁹² *Id.* at 2169 (quoting *Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 397 F. Supp. 3d 126, 178 (D. Mass. 2019)); *see also* Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 658, 703 (2024) (discussing the Harvard case's attention to subordination of Asian Americans). To be clear, alleged racial disadvantages were not limited to Asian Americans. *See SFFA*, 143 S. Ct. at 2169 (quoting *SFFA*, 397 F. Supp. 3d at 178).

result. Again, Ely's framework lacks the theoretical resources needed to rank competing minority group interests;³⁹³ and Ely himself opposed any such undertaking.³⁹⁴ True, Ely had a dim view of "the chances of catching" administrators who disfavor some minorities while preferencing others, given that admissions are "discretionary" in nature.³⁹⁵ But the *SFFA* majority took the position that statistical and other evidence did indeed reveal just this sort of group-preferencing pattern.³⁹⁶

More importantly, the core logic of Ely's position counsels in favor of the Court's result in *SFFA*: Only by ensuring that no minority group is treated worse for the benefit of another can the law guard against the possibility of unjustified minority-group exploitation. Put another way, any advantage received by one minority group must be borne or paid for entirely by the majority group³⁹⁷ — something that (in the Court's view) Harvard had not done.³⁹⁸ Perhaps Ely was wrong or blinkered about all this, or maybe the Justices had the wrong view of the facts. But an important portion of the Court's opinion did seem to be working within, or at least in a way consistent with, Ely's theoretical framework.

There is at least one now-salient context in which the current Court seems not to be following a representation-reinforcement approach: trans rights.³⁹⁹ Because trans individuals make up a fairly discrete,

³⁹³ See *supra* note 357.

³⁹⁴ See ELY, *supra* note 346, at 171–72.

³⁹⁵ *Id.* at 171.

³⁹⁶ See, e.g., *SFFA*, 143 S. Ct. at 2168–69 (quoting *SFFA*, 397 F. Supp. 3d at 178).

³⁹⁷ See *supra* notes 388–89 and accompanying text.

³⁹⁸ See *SFFA*, 143 S. Ct. at 2169.

³⁹⁹ Case law on voting and elections offers additional possible examples of Roberts Court rulings at odds with representation-reinforcement, particularly the theory's concern for clearing the channels of political change. See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 113–15 (2020) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)). However, the ruling that offers perhaps the strongest example, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), largely preserved the status quo ante. See *Rucho*, 139 S. Ct. at 2506–07 (holding "partisan gerrymandering claims [to] present political questions," *id.* at 2506).

Other aspects of Ely's case for clearing the channels of political change today code as conservative and resonate with recent case law. See *infra* note 554 and accompanying text (discussing *Citizens United*). For example, Ely supported a moderate nondelegation doctrine in terms that call to mind the major questions doctrine. In effect, the major questions doctrine assumes that Congress usually abides by principles of representation-reinforcement. Compare ELY, *supra* note 346, at 131–32 ("For the fact seems to be that on most hard issues our representatives quite shrewdly prefer not to have to stand up and be counted but rather to let some executive-branch bureaucrat, or perhaps some independent regulatory commission, 'take the inevitable political heat.'" (quoting Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1400 (1975))), *id.* at 132 ("Now this . . . is undemocratic, in the quite obvious sense that by refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic."), and Jonathan H. Adler, *A "Step Zero" for Delegations*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT: PERSPECTIVES ON THE NON-DELEGATION DOCTRINE* 161, 164, 174–76 (Peter J. Wallison & John Yoo eds., 2022) (quoting ELY, *supra* note 346, at 131–34) (discussing Ely's views on nondelegation, *id.* at 164, and the relationship between the nondelegation doctrine and the major questions doctrine, *id.* at 174–76), *with*

small, and historically stigmatized group, the logic of representation-reinforcement counsels in favor of their protection from targeted majoritarian legislation.⁴⁰⁰ Similar thinking might be read between the lines of *Bostock v. Clayton County*,⁴⁰¹ a largely textualist statutory decision⁴⁰² issued just before the dawn of the Conservative Warren Court.

In *Skrmetti*, however, the Court adopted a more deferential posture toward the political process with respect to trans rights — at least in connection with minors’ access to medical care relating to sex transition.⁴⁰³ In sustaining the state law at issue on the asserted ground that it regulated medical treatments,⁴⁰⁴ not sex- or trans-based classifications,⁴⁰⁵ the majority was careful not to rule out suspect-class status for trans persons.⁴⁰⁶ Some Justices went further, however, expressly concluding that trans persons are disentitled to protection under

Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023) (“Because the interpretation of the provision was ‘a question of deep economic and political significance that is central to [the] statutory scheme,’ we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect.” (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)).

⁴⁰⁰ See Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. 1405, 1428–30 (2023) (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020)). For scholarly works assessing arguments for heightened judicial scrutiny of regulations directed at gay and lesbian individuals, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 36–37 (2015) (quoting *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015)); Darren Lenard Hutchinson, “*Not Without Political Power*”: *Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1031–33 (2014); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 539–43 (1998) (quoting *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998)). See generally Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011) (using the movement for same-sex marriage to show deep tensions and ambiguities in Ely’s theory).

⁴⁰¹ 140 S. Ct. 1731, 1751 (2020) (interpreting federal workplace antidiscrimination law to protect gay and trans persons and refusing to “tilt the scales of justice in favor of the strong or popular”).

⁴⁰² See *id.* at 1738 (“[O]ur task is clear. We must determine the ordinary public meaning of Title VII’s command . . .”).

⁴⁰³ See *United States v. Skrmetti*, 145 S. Ct. 1816, 1836 (2025). Representation-reinforcing theories do not typically view special rules for minors as suspect, given the transience of minor status. See ELY, *supra* note 346, at 160. However, minor-based classifications *appeared* not to play a key role in *Skrmetti*’s reasoning.

⁴⁰⁴ The state law is better viewed as involving a variety of classifications, including a medical use classification with an embedded sex classification. The majority in effect prioritized the medical aspect of the law’s classification system over its other aspects.

⁴⁰⁵ See, e.g., *Skrmetti*, 145 S. Ct. at 1831 (concluding that a “law prohibiting the administration of specific drugs for particular medical uses does not” trigger heightened scrutiny); *id.* at 1833 (concluding that the state law “includes only two classifications: healthcare providers may not administer puberty blockers or hormones to minors (a classification based on age) to treat gender dysphoria, gender identity disorder, or gender incongruence (a classification based on medical use)”; *id.* (arguing that “our case law forecloses any such argument” that the medical-use classification “turns on transgender status”).

⁴⁰⁶ See *id.* at 1833–34. Relatedly, both the majority and Justice Barrett seemed to leave room for animus-based inquiries protective of trans rights, a mode of review that has sometimes been called “rational basis with bite.” See *id.*; *id.* at 1853 (Barrett, J., concurring) (quoting *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018)).

the logic of *Carolene Products*.⁴⁰⁷ The Court's conservative ideology offers an easy explanation for these deviations from representation-reinforcement. Again, the conservative Court has ideological allies in Republican-controlled state governments; and resistance to the trans equality movement, though widespread,⁴⁰⁸ presently codes as conservative.⁴⁰⁹ Moreover, conservatives' critical focus on trans rights intensified after *Bostock*.⁴¹⁰ So *Skrmetti* could be viewed as an instance in which the Court chose conservative ideology over representation-reinforcement.

Even here, however, there are echoes of the long Warren Court. In the 1972 case *Baker v. Nelson*,⁴¹¹ the Justices summarily brushed aside a constitutional claim for a right to same-sex marriage.⁴¹² That decision, too, was at odds with the logic of representation-reinforcement, since gay and lesbian people, like trans people, are a small, fairly discrete

⁴⁰⁷ In *Skrmetti*, Justices Barrett and Alito separately argued that trans individuals were disentitled to suspect-class status, but their arguments were unpersuasive. See *id.* at 1853 (Barrett, J., concurring) (“[T]ransgender status does not define a suspect class.”); *id.* at 1860 (Alito, J., concurring in part and concurring in the judgment) (“[N]either transgender status nor gender identity should be treated as a suspect or ‘quasi-suspect’ class.”) I will focus on Justice Barrett’s representative argument. Her concurrence cast certain traits as necessary for suspect-class status, even though existing suspect classes (particularly women) would fail to meet those criteria. Compare *id.* at 1854 (Barrett, J., concurring) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)) (quoting *Carolene Products*’s “discrete and insular minority” language (emphasis added)), with *supra* note 360. Had Justice Barrett instead reasoned affirmatively by ascertaining what rendered race and sex protected traits, excluding trans persons would have been much more difficult. Justice Barrett ultimately concluded that the group of trans individuals was not “discrete.” *Skrmetti*, 145 S. Ct. at 1855 (Barrett, J., concurring). But while just what it means to be “discrete” in this context is debatable, there is a strong argument that trans people qualify based on their identifiability, the frequent permanence of their status, and their recognized social identity as a group. See Eyer, *supra* note 400, at 1428–30 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020)); see also *supra* note 365 (discussing religious groups). Justice Barrett further concluded that there was no need to decide whether trans persons were subject to de jure discrimination. *Skrmetti*, 145 S. Ct. at 1855 (Barrett, J., concurring). However, if a minority group has been subjected to de jure discrimination based on a permanent status designation, then the group seems discrete enough. Such a group, after all, would be vulnerable to exploitation in the democratic process.

⁴⁰⁸ See Nicholas Confessore, *How the Transgender Rights Movement Bet on the Supreme Court and Lost*, N.Y. TIMES (June 19, 2025), <https://www.nytimes.com/2025/06/19/magazine/scotus-transgender-care-tennessee-skrmetti.html> [<https://perma.cc/US3H-QJ4V>] (noting that while President Biden supported trans rights and President Trump opposed them, “even most Democrats believed that doctors should not prescribe puberty blockers and hormones to minors — the treatments at the heart of the *Skrmetti* case”).

⁴⁰⁹ See Adam Nagourney & Jeremy W. Peters, *How a Campaign Against Transgender Rights Mobilized Conservatives*, N.Y. TIMES (Apr. 17, 2023), <https://www.nytimes.com/2023/04/16/us/politics/transgender-conservative-campaign.html> [<https://perma.cc/87QS-T23S>].

⁴¹⁰ See Sam Gringlas, *Republicans Seek More State Laws on Transgender People, Putting Democrats on the Spot*, NPR (May 10, 2025, at 06:00 ET), <https://www.npr.org/2025/05/10/nx-s1-5377402/republicans-democrats-transgender-sports-legislatures> [<https://perma.cc/W2U6-S3W6>] (tracking the rapid rise of antitrans rights bills since 2021).

⁴¹¹ 409 U.S. 810 (1972) (mem.), *overruled by*, *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴¹² *Id.* at 810.

group historically subject to discrimination.⁴¹³ To some extent, *Baker* — and other rulings⁴¹⁴ — may simply go to show that no theory of constitutional decisionmaking can or will be followed all the time. Even the Warren Court, in other words, did not singlemindedly track Ely’s proposed approach.⁴¹⁵

But one might worry that the Court relies on unstated ideological commitments when picking and choosing which minorities and forms of representation to protect. For instance, the Conservative Warren Court is solicitous toward Asian Americans in the university application process⁴¹⁶ but not to trans minors seeking medical care.⁴¹⁷ That concern may vindicate the longstanding critique that representation-reinforcement — a supposedly procedural theory rooted in democratic decision-making⁴¹⁸ — has always depended on an unstated account of substantive rights.⁴¹⁹ When deployed by someone with late-twentieth-century liberal commitments, that is, Ely’s approach yields something like the Warren Court. But, when the same theory is wielded by conservatives, the present pattern of jurisprudence results. Representation-reinforcement, then, does not distinguish the Warren Court from today’s Court. Instead, representation-reinforcement offers a language or mechanism for achieving legal change, including during times of legal realignment and the present turn toward the Conservative Warren Court.

Representation-reinforcement might even be recast as more of a rhetorical trope than an analytic theory. Because activist courts are unelected, they may naturally seek to present themselves as defenders of individual or minority rights, and as opponents of overbearing majoritarian interests.⁴²⁰ Before the Warren Court, the *Lochner* Court employed similar reasoning (or rhetoric) in elaborating the right to

⁴¹³ See *supra* note 400.

⁴¹⁴ See *supra* notes 352–59 and accompanying text.

⁴¹⁵ Cf. Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1107 (2012) (identifying cases wherein the Warren Court rejected plausible liberal positions).

⁴¹⁶ See *supra* notes 386–98 and accompanying text.

⁴¹⁷ See *supra* notes 399–410 and accompanying text.

⁴¹⁸ See *supra* notes 347–53 and accompanying text.

⁴¹⁹ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 131 (1981) (arguing that “most instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort”); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 735, 739–41 (1991).

⁴²⁰ Scholars have suggested other links between representation-reinforcement and political control. Professor David Strauss has advanced the potentially complementary argument that *Carolene Products* and *Brown* inadvertently created a harmful “competition for victim status” among groups seeking a kind of social prestige or legitimation. Strauss, *supra* note 344 (manuscript at 3) (discussing affirmative action, religious exemptions, and the Second Amendment); see also Litman, *supra* note 344, at 73 (criticizing the Court for having “created a jurisprudence of victimization and backlash”). And Professor Laura Weinrib has suggested that “the allure of representation reinforcement can serve to legitimate the status quo” by helping elites defend existing law. Laura Weinrib, *Breaking the Cycle: Rot and Recrudescence in American Constitutional History*, 101 B.U. L. REV. 1857, 1874 (2021).

contract.⁴²¹ Commentators often overlook that aspect of the past,⁴²² but in doing so they engage in victors' history: Unsurprisingly, the Justices of the early twentieth century did not present themselves as defenders of fat cats pouncing on the helpless masses. Similarly, the Conservative Warren Court — especially Justice Gorsuch — deploys stand-up-for-the-little-guy reasoning to, for example, roll back the administrative state.⁴²³ When critics dismiss these arguments or narratives, they are making substantive judgments about policy or morality.

Even so, Ely's theory could operate as a guide or modest constraint. Representation-reinforcement seems incompatible with a theocracy, caste system, or despotic regime.⁴²⁴ And the pull of representation-reinforcement may vary, by both case and era. Trans claimants, for instance, might fail to obtain relief when the Court intuitively views their claims as posing medical questions ripe for legislative regulation, as in *Skrmetti*.⁴²⁵ By comparison, trans claimants might continue to prevail when litigating in a more conventional antidiscrimination context, such as the statutory employment discrimination scenario presented in *Bostock*.⁴²⁶ This distinction may well prove unstable. As we have seen, *Lochner* claimed to be helping the little guy but newly prevailing views eventually made that pose implausible — at which point,

⁴²¹ See, e.g., *Lochner v. New York*, 198 U.S. 45, 56–57 (1905) (asking in part whether “it is an unreasonable, unnecessary and arbitrary interference with the right of the individual . . . to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?”). A leading defender of *Lochner* argues that the state law at issue represented anti-immigrant protectionism. See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 23, 26–27 (2011). Focusing on *Lochner* itself as representative of the “*Lochner* era” is anachronistic in that contemporaries did not view that case as the landmark that it became. See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORN. L. REV. 527, 535 (2015). For a helpful overview of the changing views toward *Lochner*, see generally *id.*

⁴²² Cf. NeJaime & Siegel, *supra* note 357, at 1939 n.187 (positing that the *Lochner* Court “invalidated laws that sought to empower vulnerable individuals and unsettle dominant power relations in the workplace,” whereas “in our modern substantive due process cases, the Court has invalidated laws that harmed vulnerable individuals and entrenched dominant power relations”).

⁴²³ See generally Adam J. White, *Justice Gorsuch: Defender of the “Little Guy,”* AM. ENTER. INST. (Sep. 16, 2024), <https://www.aei.org/op-eds/justice-gorsuch-defender-of-the-little-guy> [<https://perma.cc/S85Z-H7J9>] (detailing Justice Gorsuch’s defense of “human dignity” and “the plight of ‘the little guy’”). This motif also features in *Bostock* and in Justice Gorsuch’s Indian law opinions. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1751 (2020); see, e.g., *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2474 (2020) (arguing that the state’s position would amount to “the rule of the strong, not the rule of law”).

⁴²⁴ This conclusion pushes against Professor Michael Klarman’s proposal to eliminate consideration of discrete and insular minorities from process theory, in favor of focusing on “access” to the political process. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748 (1991).

⁴²⁵ See *United States v. Skrmetti*, 145 S. Ct. 1816, 1833 (2025).

⁴²⁶ *Bostock*, 140 S. Ct. at 1754.

the *Lochner* era came to an end.⁴²⁷ *Skrmetti*'s meaning and fate may likewise depend on a dynamic, ongoing process of social change.

B. *The Impassive Virtues*

The two Courts' deviations from Elysian principles may bespeak a larger pattern stemming from the force of a different and partially cross-cutting precept. Even in its heyday, the logic of representation-reinforcement was tempered by more prudential considerations. Perhaps most importantly, the Justices are usually chary about contradicting public opinion, and many forms of representation-reinforcement are simply unthinkable — for society at large but perhaps even for the Justices themselves — given prevailing social views. Neither *Baker* nor *Skrmetti* posed truly unthinkable possibilities, but both involved unpopular claims at the time those cases were heard.⁴²⁸ Other examples include the Warren Court's refusal to hear *Naim v. Naim*,⁴²⁹ thereby punting on the constitutionality of antimiscegenation laws in the wake of *Brown*.⁴³⁰ As Justice Clark reportedly said at the time: "One bombshell at a time."⁴³¹ So public views may mark the bounds within which representation-reinforcement can operate, offering a normative filter for identifying which forms of political process may be treated as desirable.

A felt need to economize on controversial rulings creates opportunities for discretion and ideological preferences. Which bombshells are dropped, and which are held in reserve? No pat rule or even maxim can guide this form of agenda-setting discretion.⁴³² The Warren Court made its choices, and the Conservative Warren Court is making others. As a descriptive matter, and perhaps even as a matter of self-conscious principle, what often prompts the Court to change tack is a shift in

⁴²⁷ See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (taking judicial notice of the Great Depression and noting that "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers").

⁴²⁸ See *Americans Have Grown More Supportive of Restrictions for Trans People in Recent Years*, PEW RSCH. CTR. (Feb. 26, 2025), <https://www.pewresearch.org/short-reads/2025/02/26/americans-have-grown-more-supportive-of-restrictions-for-trans-people-in-recent-years> [<https://perma.cc/F549-CWQZ>]; MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR* 20 (2013); see also Justin McCarthy, *Gallup First Polled on Gay Issues in '77. What Has Changed?*, GALLUP (June 6, 2019), <https://news.gallup.com/poll/258065/gallup-first-polled-gay-issues-changed.aspx> [<https://perma.cc/5RF2-544D>] (estimating that only 43% of Americans in 1977 believed that "gay and lesbian relations between consenting adults should be legal").

⁴²⁹ 87 S.E.2d 749 (Va. 1955), *vacated and remanded*, 350 U.S. 891 (1955) (per curiam).

⁴³⁰ See *Naim v. Naim*, 350 U.S. 985, 985 (1956) (per curiam); *Naim*, 87 S.E.2d at 751 ("[T]he only question at issue is whether the marriage of the appellant and appellee could be annulled on the ground of their racial ineligibility to marry one another."). The Court's final evasion was to decline to hear the appeal on the specious ground that the case was "devoid of a properly presented federal question." *Naim*, 350 U.S. at 985.

⁴³¹ POWE, *supra* note 39, at 72 (quoting WALTER F. MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* 193 (1964)).

⁴³² Cf. Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 722, 729 (2012).

public views.⁴³³ We have already seen how the political process and judicial appointments influence the Court's agenda while imbuing it with a degree of democratic legitimacy.⁴³⁴ And we have also seen how judicial decisionmaking ought to be sensitive to the presence of cross-ideological consensus.⁴³⁵ Consistent with that framework, social currents frequently shape not only public opinion but also the attitudes and understandings of the Justices themselves.⁴³⁶ Social changes may help explain (for example) why *Naim* gave way to *Loving* and *Baker* to *Obergefell*.⁴³⁷ In the politically opposite direction, similar shifts can explain the slide from *Bostock* to *Skrmetti*: With polls showing a recent increase in support for bans on minors' access to gender-transition treatments,⁴³⁸ some Justices may have adjusted their jurisprudential trajectory.

These observations call to mind Professor Alexander Bickel's classic study of the Warren Court's exhibition of the "passive virtues," or techniques for not deciding cases on the merits.⁴³⁹ By withholding ultimate decision on major issues, Justices could avoid legitimating problematic practices that might instead be undone through the political process.⁴⁴⁰ Rather than wasting its political or social influence on decisions that might be legally necessary but politically counterproductive (given backlash), the Court ought to await auspicious moments to rule.⁴⁴¹ In this way, Bickel set up "prudence" as a counterweight to "principle."⁴⁴² The Warren Court Justices may have failed to exhibit these virtues quite as often as Bickel would have liked, but he did find important examples to praise. These included the above-discussed refusal to hear *Naim*, as well as the "all deliberate speed" approach to remediation in *Brown*.⁴⁴³

⁴³³ See Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263–65 (2010).

⁴³⁴ See *supra* note 99 and accompanying text; *supra* section II.A, pp. 25–31 (discussing personal rules).

⁴³⁵ See *supra* note 44 and accompanying text; *supra* section II.C, pp. 43–51 (discussing cross-ideological consensus).

⁴³⁶ See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14–15 (2009).

⁴³⁷ See *id.* at 249–50 (discussing *Loving*). Driver has pointed out that, despite the roughly dozen-year delay between *Naim* and *Loving*, public opinion polls still showed strong, albeit somewhat reduced, opposition to interracial marriage. See Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 823–24 (2011).

⁴³⁸ See sources cited *supra* note 428.

⁴³⁹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 169, 200 (2d ed. 1986); Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

⁴⁴⁰ BICKEL, *supra* note 439, at 129, 132.

⁴⁴¹ See *id.* at 146.

⁴⁴² *Id.* at 133.

⁴⁴³ See *id.* at 174, 247, 253.

Both rulings were and remain controversial, even (or especially) among the Warren Court’s most devoted champions.⁴⁴⁴

But the “passive” virtues label is somewhat misleading. For one thing, the Court often has to act procedurally to be inactive substantively. Rulings may engage in avoidance by asserting novel jurisdictional principles, issuing unexplained relief, or outlining cryptic tests for later elaboration. Examples during the Roberts Court include the novel standing holding in *Hollingsworth v. Perry*,⁴⁴⁵ which deferred the holding later reached in *Obergefell*;⁴⁴⁶ the dramatic expansion of activity within the “shadow docket,” which has facilitated immediate rulings of unclear meaning or precedential effect;⁴⁴⁷ and the expressly indeterminate presidential immunity holding in *Trump v. United States*.⁴⁴⁸

At any rate, Bickel himself made the point that inaction is itself a form of action. Not doing, per Justice Brandeis, is itself a “thing we do.”⁴⁴⁹ Mere passivity is rarely a goal so much as a conscious means of achieving some other result. So we might rebrand the “passive” virtues as impassive. What Bickel called passivity is typically a means of deferral — that is, delayed or redistributed action.⁴⁵⁰ The key choice is not between action and inaction but rather between zeal and aloofness. An impassive Court is sphinx-like and indifferent, rather than confident and impassioned. It bides its time rather than running headlong into the fray.

In its 2024 Term, the Conservative Warren Court has made good use of the impassive virtues while grappling with the second Trump Administration. While the lower federal courts have played a more assertive role,⁴⁵¹ the Justices have repeatedly declined to issue sweeping rulings

⁴⁴⁴ See, e.g., JUSTIN DRIVER, *THE SCHOOLHOUSE GATE* 256 (2018) (collecting criticisms of *Brown II*); cf. Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 527 (2012) (criticizing the Warren Court’s delay in ruling on interracial marriage).

⁴⁴⁵ 570 U.S. 693 (2013).

⁴⁴⁶ See *id.* at 700–01; *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015).

⁴⁴⁷ See STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* 12–13 (2023).

⁴⁴⁸ 144 S. Ct. 2312, 2331–34, 2340 (2024); see also Richard M. Re, *Trump v. US: Anti-Canon, or Anti-Hero?*, *DIVIDED ARGUMENT* (Apr. 17, 2025), <https://blog.dividedargument.com/p/trump-v-us-anti-canon-or-anti-hero> [<https://perma.cc/3B8C-EFA6>] (arguing that the ruling signaled a willingness to check partisanship in the justice system, without passing judgment on Trump’s prosecution).

⁴⁴⁹ See BICKEL, *supra* note 439, at 71, 112 (attributing to Justice Brandeis the idea that “not doing” is “the most important thing we do”); see also Frederick Schauer, *The Supreme Court, 2005 Term — Foreword: The Court’s Agenda — And the Nation’s*, 120 HARV. L. REV. 4, 63 (2006) (“There is no reason to think that what the Court does *not* do is any less important than what it does do.”).

⁴⁵⁰ BICKEL, *supra* note 439, at 252–54.

⁴⁵¹ See *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2550 (2025) (“During the first 100 days of the second Trump administration, district courts issued approximately 25 universal injunctions.”).

and, instead, have slowed down many cases.⁴⁵² Moreover, the Justices have found ways to package their affirmative decrees that soften or obscure their implications. The Justices offered the executive branch some validation, some guidance, and an occasional menacing look — thereby moving the government closer to compliance with the law and away from defiance. At the same time, the Justices afforded lower courts substantial ability to slow or block some dramatic executive branch actions.⁴⁵³ The lower courts have also been able to develop facts and narratives bearing on controversial executive branch actions, thereby shaping public debate.⁴⁵⁴ Impassivity even offers a subtle means of implementing the duty to eschew partisanship.⁴⁵⁵ In short, the impassive virtues have facilitated the Justices' negotiated relationship with the executive branch, avoiding both an adversarial posture and passive compliance.

Consider a few salient examples:

Department of State v. AIDS Vaccine Advocacy Coalition.⁴⁵⁶ As the Administration began to dismantle the U.S. Agency for International Development, it paused the disbursements of billions of dollars to organizations abroad.⁴⁵⁷ Some of those entities sued on the ground that they had already performed in reliance on the planned payments,⁴⁵⁸ and a district court granted relief.⁴⁵⁹ The Administration sought a stay from the Court.⁴⁶⁰ Five to four, the Justices issued a one-paragraph order declining to issue a stay.⁴⁶¹ However, the Court then went on to state that “the District Court should clarify what obligations the Government must fulfill” and give “due regard for the feasibility of any compliance timelines.”⁴⁶² In this way, the Justices formally stayed out of the dispute

⁴⁵² See Jack Goldsmith, *Supreme Court Temporizing over Trump 2.0 Emergency Orders*, EXEC. FUNCTIONS (Mar. 6, 2025), <https://executivefunctions.substack.com/p/supreme-court-temporizing-over-trump> [<https://perma.cc/78YG-MG9M>]; Jack Goldsmith, *The Supreme Court Is Not Covering Before Trump on the Shadow Docket*, EXEC. FUNCTIONS (Apr. 11, 2025), <https://executivefunctions.substack.com/p/the-supreme-court-is-not-covering> [<https://perma.cc/28ZC-56MR>].

⁴⁵³ See *supra* notes 259–69 and accompanying text (discussing *Trump*, 145 S. Ct. 2540).

⁴⁵⁴ See Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (“[T]he creation of legal meaning — ‘jurisgenesis’ — takes place always through an essentially cultural medium.”); see also Karen M. Tani, *The Supreme Court, 2023 Term — Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 1, 17 n.108 (2024).

⁴⁵⁵ See *supra* section II.C, pp. 43–51.

⁴⁵⁶ 145 S. Ct. 753 (2025).

⁴⁵⁷ *Id.* at 753 (Alito, J., dissenting from the denial of the application to vacate order).

⁴⁵⁸ Opposition to Application to Vacate Order at 1, *AIDS Vaccine Advoc. Coal.*, 145 S. Ct. 753 (No. 24A831).

⁴⁵⁹ *AIDS Vaccine Advoc. Coal.*, 145 S. Ct. at 753–54 (Alito, J., dissenting from the denial of the application to vacate order).

⁴⁶⁰ *Id.* at 754.

⁴⁶¹ *Id.* at 753 (opinion of the Court).

⁴⁶² *Id.*

but nonetheless granted a form of relief to the Administration and nudged the lower court toward more restrained action.

*Trump v. J.G.G.*⁴⁶³ An asserted class argued that its members were in danger of being deported unlawfully, and a district court issued sweeping relief.⁴⁶⁴ The Administration sought review in part on the ground that the district court lacked normal civil jurisdiction over the claims,⁴⁶⁵ and the Justices agreed, dissolving the injunction issued below.⁴⁶⁶ However, the Justices also issued sweeping dicta supporting individuals' due process rights.⁴⁶⁷ This combination was quite ironic, for the Justices' dicta operated very much like the injunction that the Court had just said was improper.⁴⁶⁸ The Court gave while taking. And it nudged the executive branch in a way that avoided any dramatic stand against it.

*Noem v. Abrego Garcia.*⁴⁶⁹ The Administration had concededly deported an individual in violation of law.⁴⁷⁰ A lower court ordered the executive branch to “facilitate” and “effectuate” the wrongly deported person’s return.⁴⁷¹ After the Administration sought review, the Justices responded in a short, two-sided order.⁴⁷² On the one hand, the Justices agreed that the government must “facilitate” Kilmar Abrego Garcia’s return.⁴⁷³ But, on the other hand, the Court enigmatically requested clarification on the meaning of the district court’s order to “effectuate” return, given “the deference owed to the Executive Branch in [matters] of foreign affairs.”⁴⁷⁴ This decision enabled the Administration to save face while allowing the lower courts to continue pressing the government to act — without creating a decisive clash or opportunity for disobedience. In at least one major respect, moreover, the Court’s strategy

⁴⁶³ 145 S. Ct. 1003 (2025) (per curiam).

⁴⁶⁴ *Id.* at 1005; *id.* at 1010 (Sotomayor, J., dissenting).

⁴⁶⁵ Application to Vacate the Orders Issued by the United States District Court for the District of Columbia and Request for an Immediate Administrative Stay at 4, *J.G.G.*, 145 S. Ct. 1003 (No. 24A931).

⁴⁶⁶ *J.G.G.*, 145 S. Ct. at 1006.

⁴⁶⁷ *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 306 (1993); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950)).

⁴⁶⁸ Compare *J.G.G.*, 145 S. Ct. at 1006 (quoting *Mullane*, 339 U.S. at 313), with *id.* at 1010 (Sotomayor, J., dissenting) (“All [the order] required of the Government was a pause in deportations pursuant to the Proclamation *until the court had a chance to review their legality.*” (emphasis added)).

⁴⁶⁹ 145 S. Ct. 1017 (2025).

⁴⁷⁰ *Id.* at 1018.

⁴⁷¹ *Id.* (quoting Order Granting Preliminary Injunction at 2, *Noem*, 145 S. Ct. 1017 (No. 24A949)).

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

worked: As of this writing, Abrego Garcia has been returned to the United States.⁴⁷⁵

These rulings exhibit the kind of savvy that would make Chief Justice Marshall proud.⁴⁷⁶ The Court's summary rulings for the Administration, too, may have exhibited prudence by obscuring and qualifying the import of politically charged outcomes.⁴⁷⁷ The Warren Court acted somewhat similarly. In the most important "shadow docket" rulings in history, the Justices extended *Brown* beyond schools in a series of unexplained decisions, thereby interring *Plessy v. Ferguson*.⁴⁷⁸ Both in the 1950s and 2020s, the Court's unreasoned decisions understandably prompted criticism⁴⁷⁹ — but they also served a purpose.

Indeed, all these cases display the deep challenge posed by judicial discretion — a challenge most famously expressed by Professor Gerald Gunther's contemporaneous critique of Bickel's project as "insidious"

⁴⁷⁵ See Suzanne Gamboa, Tom Winter & Chloe Atkins, *Kilmar Abrego Garcia Has Been Returned to the U.S. to Face Federal Criminal Charges*, NBC NEWS (June 7, 2025, at 12:15 ET), <https://www.nbcnews.com/news/us-news/kilmar-abrego-garcia-was-mistakenly-deported-el-salvador-will-face-fed-rcna211514> [<https://perma.cc/58Y4-TBGP>]; Nick Miroff, *Kilmar Abrego Garcia Was Never Coming Back. Then He Did.*, THE ATLANTIC (June 6, 2025), <https://www.theatlantic.com/politics/archive/2025/06/kilmar-abrego-garcia-was-never-coming-back-then-he-did/683074> [<https://perma.cc/8NAR-7E8M>] ("[T]he Trump Administration has climbed down from the court-defying pedestal . . ."). However, Abrego Garcia's fate presently remains unclear. Alan Feuer, Jazmine Ulloa & Chris Cameron, *Abrego Garcia Detained Again After Government Signaled It Would Re-Deport Him*, N.Y. TIMES (Aug. 25, 2025), <https://www.nytimes.com/2025/08/25/us/politics/kilmar-abrego-garcia-arrested-ice-deportation.html> [<https://perma.cc/QV3L-LF5E>].

⁴⁷⁶ Or take *Trump v. Wilcox*, 145 S. Ct. 1415 (2025), a stay ruling that effectively approved the President's removing members of certain multimember agencies but also went out of its way to distinguish the Federal Reserve — thereby discouraging the President from going so far. *Id.* at 1415. As of this writing, the import of the Court's reservation remains to be seen.

⁴⁷⁷ See, e.g., *McMahon v. New York*, 145 S. Ct. 2643, 2643 (2025) (mem.).

⁴⁷⁸ 163 U.S. 537 (1896). See Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2084 (2019) ("The Court first outlawed segregated beaches, then golf courses, then buses, then parks, all by way of one-sentence pronouncements that did not even pause to cite *Brown*."); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 13 (2010) ("The series of per curiam decisions striking down segregation [elsewhere than schools] were nothing but pure fiat, a point made repeatedly in their wake."); see, e.g., *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54, 54 (1958) (per curiam) ("PER CURIAM. The judgment is affirmed.").

⁴⁷⁹ See VLADECK, *supra* note 447, at 247–48 (criticizing "rulings that are unsigned and unexplained," *id.* at 247); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 & n.6 (1957) (criticizing "the formulation of results accompanied by little or no effort to support them in reason," *id.* at 3). The Warren Court issued unexplained and seemingly arbitrary rulings in other contexts, too, yielding additional criticism. See, e.g., Albert M. Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 96, 101–03 (1954); see also Richard C. Chen, *Summary Dispositions as Precedent*, 61 WM. & MARY L. REV. 691, 703 (2020) ("The practice of issuing dispositions with no reasoning whatsoever peaked with the Warren Court . . ."). Strong Court majorities may be especially inclined toward summary adjudication, which allows the Justices to implement a shared vision of the law more rapidly. *Cf. supra* note 478 and accompanying text.

and “destructive.”⁴⁸⁰ Impassive virtues risk elevating discretion and strategy at the expense of law and candor.⁴⁸¹ That was true when the Warren Court avoided review of antimiscegenation laws in the wake of *Brown*.⁴⁸² And it is true of the Court’s recent efforts to check the Trump Administration while avoiding a head-on confrontation.⁴⁸³ For many, the Chief Justice in particular is a source of too much strategic thinking at the expense of principle or straightforward application of the law.⁴⁸⁴

Yet discretion is an essential feature of judicial decisionmaking,⁴⁸⁵ and the Court needs the impassive virtues as much today as in the 1950s (or in most any historical period, for that matter⁴⁸⁶). What has changed, once again, is the Court’s counterparty. As we have seen, the Warren Court mostly clashed with states, especially Southern states, and that tension was nowhere more evident than in connection with massive resistance to desegregation. In 1957, at a pivotal moment, the Justices received support from Republican President Eisenhower, who directed the United States military to integrate a Little Rock public school under a federal court order.⁴⁸⁷ President Eisenhower’s action placed the federal executive on the side of the Supreme Court, at least in the narrow situation where a court decree had issued under the “all deliberate speed” standard.⁴⁸⁸ The Court’s cautious efforts to implement *Brown* probably made it easier for President Eisenhower — no ardent desegregationist⁴⁸⁹ — to side with the courts. Today, by contrast, the second Trump Administration is the main source of potential disobedience to court orders.⁴⁹⁰ And there is no “super president” to appeal to if a sitting President decisively bucked the judiciary. How, then, can the federal courts buttress or assert the authority of their judgments?

⁴⁸⁰ See Gerald Gunther, *The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10 (1964); see also Grove, *supra* note 94, at 2262 (“[I]n seeking to preserve the Court’s sociological legitimacy, the Justices may sacrifice the legal (and perhaps also the moral) legitimacy of their decisions.”).

⁴⁸¹ See Grove, *supra* note 94, at 2261. Judicial candor generally demands a legally adequate explanation — not a complete one. See, e.g., Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2292–93 (2017).

⁴⁸² See *supra* notes 429–31, 443 and accompanying text.

⁴⁸³ See, e.g., *supra* note 468 and accompanying text.

⁴⁸⁴ Strategy, including judicial strategy, is often less effective when visible. Practitioners of judicial prudence who ineptly handle legal sources foil themselves. See *supra* section II.C, pp. 43–51.

⁴⁸⁵ See, e.g., Re, *supra* note 163, at 1666–69; *supra* section II.A, pp. 25–31 (on the Constraint–Discretion antinomy).

⁴⁸⁶ See Curtis A. Bradley & Neil S. Siegel, *The Supreme Court Under Threat: Early Lessons in Judicial Self-Protection* 1, 9, 14 (Sep. 23, 2025), <https://ssrn.com/abstract=5325857> [<https://perma.cc/2LPW-JRAT>].

⁴⁸⁷ See TONY A. FREYER, *LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION* 124 (2007); Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sep. 25, 1957).

⁴⁸⁸ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955); *Cooper v. Aaron*, 358 U.S. 1, 6–7, 12 (1958).

⁴⁸⁹ See KLARMAN, *supra* note 28, at 324 (discussing President Eisenhower’s behavior in this context and noting that he had “repeatedly refused to say whether he endorsed *Brown*”).

⁴⁹⁰ See *supra* notes 451–75 and accompanying text.

Another Warren Court case, *Walker v. City of Birmingham*,⁴⁹¹ points toward an answer. Over a decade after *Brown*, a narrowly divided Court sided against Martin Luther King, Jr., in a dispute about compliance with an injunction.⁴⁹² After a state court barred a civil rights protest, King and his followers marched anyway.⁴⁹³ The protestors were later convicted for their noncompliance,⁴⁹⁴ even though (as the Court majority recognized⁴⁹⁵) the underlying order was at least arguably vague and overbroad in violation of First Amendment rights.⁴⁹⁶ The decision thus offers a high-profile instance in which the Warren Court ruled impassively — that is, on formal, procedural grounds, against powerful substantive concerns rooted in both free speech and race equality.⁴⁹⁷ *Walker* remains controversial.⁴⁹⁸ But it also stands as a leading authority for the need to follow federal court orders.⁴⁹⁹ Commentators often view the decision as a sign that the Court was worried about social unrest and cooling toward the civil rights movement.⁵⁰⁰

Viewing the case at a greater remove, however, it can be understood as an opportunity for the courts to advance their own interests and, ultimately, the rule of law. The movement that King led was strongly associated with the liberal Court.⁵⁰¹ So, by using *Walker* as an opportunity to demand obedience to the courts, the Justices were able to issue a striking statement against type that garnered the approval of many usual critics of the Third Branch.⁵⁰² And, critically, the Justices' demand that the injunction be enforced would not itself be disobeyed. The prudential dimension of the decision is also discernible from its timing.

⁴⁹¹ 388 U.S. 307 (1967).

⁴⁹² *Id.* at 311, 321; *id.* at 334 (Douglas, J., dissenting); *id.* at 341 (Brennan, J., dissenting).

⁴⁹³ *Id.* at 326–27 (Warren, C.J., dissenting).

⁴⁹⁴ *Id.* at 338 (Brennan, J., dissenting).

⁴⁹⁵ *Id.* at 317 (majority opinion) (“The breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question.”).

⁴⁹⁶ *See id.*; *see also id.* at 342 (Brennan, J., dissenting).

⁴⁹⁷ *See id.* at 321 (majority opinion) (“This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets. One may sympathize with the petitioners’ impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law . . .”).

⁴⁹⁸ *See, e.g.*, Randall Kennedy, *Walker v. City of Birmingham Revisited*, 2017 SUP. CT. REV. 313, 321 (2018); Cover, *supra* note 454, at 55–56 (2018); Sheldon Tefft, *Neither Above the Law nor Below It: A Note on Walker v. Birmingham*, 1967 SUP. CT. REV. 181, 186; David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2179 (1989).

⁴⁹⁹ *See Kennedy, supra* note 498, at 321; *Cherokee Express, Inc. v. Cherokee Express, Inc.*, 924 F.2d 603, 608–09 (6th Cir. 1991); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 179 (1968); *infra* note 509 and accompanying text.

⁵⁰⁰ *See Kennedy, supra* note 498, at 332.

⁵⁰¹ *Id.* at 313.

⁵⁰² *Cf. Tefft, supra* note 498, at 185–86. Professor Kennedy found it ironic or perverse that “[o]f all the places to proclaim the civilizing hand of law, the Supreme Court chose a case that absolved judicial white supremacists and relegated to jail Martin Luther King, Jr.” Kennedy, *supra* note 498, at 336. But perhaps this paradoxical feature of the decision was relevant to its strategic effectiveness. If even these protestors had to obey a dubious court order, one might ask, how could a President fail to do so?

Walker came down on the same day as *Loving* — thereby offering the fractious public a balanced pair of rulings.⁵⁰³ In all these ways, *Walker* can be viewed alongside prudential decisions exhibiting the impassive virtues.

Walker's complex legacy is visible in recent decisions. Take *J.G.G. v. Trump*,⁵⁰⁴ in which (among other things) Chief Judge Boasberg issued an emergency order barring the executive branch from removing individuals under the Alien Enemies Act.⁵⁰⁵ In a highly publicized incident, planes full of deportees landed and deplaned in El Salvador several hours after the Chief Judge's order, raising the possibility that the order had been defied.⁵⁰⁶ Later, however, the Supreme Court ruled that Chief Judge Boasberg lacked authority to issue his emergency order in the first place.⁵⁰⁷ Undaunted, Chief Judge Boasberg then issued a memorandum opinion finding probable cause to pursue criminal contempt against "the Government."⁵⁰⁸ That opinion cited *Walker* early and often, arguing that it established "a foundational legal precept," namely, "that every judicial order 'must be obeyed.'"⁵⁰⁹

As of this writing, the record of lower court contempt proceedings is mixed, and Chief Judge Boasberg's efforts in particular came to naught in the Court of Appeals.⁵¹⁰ The Court itself has reined in some efforts to enforce compliance — much as it had previously intervened with respect to Chief Judge Boasberg's injunction.⁵¹¹ The Justices are thus reenacting their role as the impassive appellate court, both complementing and checking the lower court first responders. Moreover, the relationship between courts and Presidents is itself bidirectional. While the federal courts are checking the political branches, they are also *being*

⁵⁰³ *Loving v. Virginia*, 388 U.S. 1, 1, 12 (1967); *Walker v. City of Birmingham*, 388 U.S. 307, 321 (1967). Both came down on June 12, 1967. See *Loving*, 388 U.S. at 1; *Walker*, 388 U.S. at 307.

⁵⁰⁴ No. 25-cv-00766, 2025 WL 825115 (D.D.C. Mar. 15, 2025) (order granting class certification and temporary restraining order), *vacated*, 145 S. Ct. 1003 (2025), *appeal dismissed*, No. 25-cv-5067, 2025 WL 1772161 (D.C. Cir. June 24, 2025).

⁵⁰⁵ 50 U.S.C. § 21; *J.G.G.*, 2025 WL 825115, at *1.

⁵⁰⁶ Luke Broadwater et al., *A Judge Ordered Deportation Planes to Turn Around. The White House Didn't Listen.*, N.Y. TIMES (Apr. 8, 2025), <https://www.nytimes.com/2025/03/17/us/politics/timeline-trump-deportation-flights-el-salvador.html> [<https://perma.cc/7CL3-QYYH>].

⁵⁰⁷ See *J.G.G.*, 145 S. Ct. at 1006.

⁵⁰⁸ See *J.G.G. v. Trump*, No. 25-cv-00766, slip op. at 1 (D.D.C. Apr. 16, 2025).

⁵⁰⁹ *Id.* at 2 (quoting *Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967)).

⁵¹⁰ See *id.* A divided D.C. Circuit panel vacated Chief Judge Boasberg's probable cause order by writ of mandamus. See *J.G.G. v. Trump*, No. 25-cv-00766, 2025 WL 2264614, at *1–2 (D.C. Cir. Aug. 8, 2025) (per curiam). By comparison, Abrego Garcia's return to the United States followed a pre-contempt discovery process. See *Abrego Garcia v. Noem*, No. 25-5124, slip op. at 1–2 (D. Md. May 29, 2025) (order denying extension of document-production deadline); *supra* note 475 and accompanying text.

⁵¹¹ See *DHS v. D.V.D.*, 145 S. Ct. 2627, 2629 (2025) (rejecting civil contempt proceedings to enforce a stayed lower court injunction); *J.G.G.*, 145 S. Ct. at 1006.

checked. The ever-present risk of executive branch noncompliance focuses the judicial mind.⁵¹²

Already, however, Chief Judge Boasberg has shown how *Walker* — a precedent fashioned at the expense of civil rights protestors — can be wielded against the executive branch.⁵¹³ Courts typically state principles of judgment compliance as though they applied to all parties, while pointedly overlooking the fact that the executive branch is uniquely powerful and capable of defying a judicial order.⁵¹⁴ For reasons that Professor Nicholas Parrillo has explored, federal courts may never succeed in seeking contempt against the executive branch.⁵¹⁵ Conflicts with the political branches are disfavored, as we have seen; and the courts do not want to draw attention to the possibility, much less the fact, of non-compliance.⁵¹⁶ But, by successfully pursuing contempt against salient private parties, including sympathetic actors that the courts often support, the judiciary has so far fostered overall compliance with the rule of law, even including by the President.

C. Judicial Disempowerment

The Warren Court was widely impugned on the ground that it was simply exerting too much undemocratic power.⁵¹⁷ While that charge arose as soon as *Brown* came down,⁵¹⁸ it became even more associated with the Court's later decision in *Cooper v. Aaron*, which asserted what has come to be known as “judicial supremacy.”⁵¹⁹ That is, the Court asserted “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.”⁵²⁰ According to *Cooper*, this precept of judicial supremacy had, ever since *Marbury v. Madison*,⁵²¹

⁵¹² See Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 689 (2018); see also THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Judiciary “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”).

⁵¹³ See *supra* note 502 and accompanying text.

⁵¹⁴ Chief Judge Boasberg instead emphasized a formalist reason why the executive ought to be more compliant with court orders: “The Constitution does not tolerate willful disobedience of judicial orders — especially by officials of a coordinate branch who have sworn an oath to uphold it.” *J.G.G.*, slip op. at 2.

⁵¹⁵ See Parrillo, *supra* note 512, at 697.

⁵¹⁶ See *id.* at 701.

⁵¹⁷ See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 458 (2d ed. 1997) (first edition published in 1977, *id.* at xxi); Kurland, *supra* note 187, at 144.

⁵¹⁸ See 102 CONG. REC. 4459–61 (1956) (statement of Sen. Walter George) (“The unwarranted decision of the Supreme Court in the public school cases is now bearing the fruit always produced when men substitute naked power for established law.” *Id.* at 4460).

⁵¹⁹ See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986–87 (1987) (asserting *Cooper* to be “at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law,” *id.* at 987).

⁵²⁰ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁵²¹ 5 U.S. (1 Cranch) 137 (1803).

“been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”⁵²²

Scholars have persuasively argued that the meaning of *Marbury* and the history of constitutional interpretation are far more nuanced than *Cooper* claimed.⁵²³ And, for several decades, those complaints tended to code as conservative, given the salience of the predominantly liberal federal judiciary. Disempowering the courts seemed to be of a piece with populist cries to “Impeach Earl Warren,” curtail the federal courts’ habeas corpus jurisdiction, or legislatively override *Miranda*.⁵²⁴ Meanwhile, many left commentators routinely glorified the federal courts as defenders of liberty, equality, and democracy.⁵²⁵

As the federal courts increasingly turned conservative, however, liberal legal theory became more skeptical of judicial supremacy, and even of judicial review. Near the turn of the century, several leading constitutional theorists emphasized the role of populism or democracy in shaping or tempering judicially constructed interpretations of the Constitution, which ought to be “tak[en] . . . away from the courts.”⁵²⁶ These writers saw a divergence between the conservative drift in post-Warren Court legal doctrine and the at least potentially leftward direction of modern politics. Court-skeptics were treated as somewhat heterodox or provocative, given the still-prevailing tendency among scholars to celebrate the federal courts.⁵²⁷ And, because the Swing Justice Era was still in full swing, liberals found new causes to bring to court. Take legal challenges against the War on Terror during the Bush Administration, culminating in *Boumediene*,⁵²⁸ or the gradual

⁵²² *Cooper*, 358 U.S. at 18.

⁵²³ See Josh Blackman, *The Irrepressible Myth of Cooper v. Aaron*, 107 GEO. L.J. 1135, 1168 (2019). See generally Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003) (arguing most modern legal scholarship misinterprets the central arguments in *Marbury*).

⁵²⁴ See, e.g., KALMAN, *supra* note 64, at 3, 121.

⁵²⁵ See, e.g., HORWITZ, *supra* note 18, at 114–15.

⁵²⁶ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 7 (1999). See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). For more recent work on public constitutional empowerment, often focusing on Article V procedures, see, for example, SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 174 (2006); JILL LEPORE, *WE THE PEOPLE: A HISTORY OF THE U.S. CONSTITUTION* 569–71 (2025); David Singh Grewal & Jedediah Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 664, 691–702 (2018) (reviewing RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016)).

⁵²⁷ See, e.g., Corey Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516, 521 (2006) (referring to Professor Larry Kramer’s book as “provocative”).

⁵²⁸ *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008). For earlier decisions that led the way for *Boumediene*, see *Rasul v. Bush*, 542 U.S. 466, 484 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

expansion of rights for gays and lesbians in several important cases, particularly *Lawrence* and *Obergefell*.⁵²⁹

Once the Conservative Warren Court took root, however, the calculus shifted again. The politics of judicial disempowerment is two-sided, focusing not only on who controls the courts but also on political prospects in the elected branches. With no realistic prospect of seeing substantial liberal victories in the Supreme Court, commentators began to view the Warren Court as an anomaly and liberal wins during the Swing Justice Era as marginal.⁵³⁰ Moreover, Joe Biden had just been elected President, the Black Lives Matter movement was near its peak, and some commentators, such as Professor Jack Balkin,⁵³¹ foresaw a generational turn toward progressive politics driven partly by concerns regarding wealth inequality.

In this environment, liberals turned markedly against judicial power.⁵³² Moreover, many political observers felt that Republicans had stolen a Supreme Court seat. Though they had refused even to vote on then-Chief Judge Garland's nomination before the first Trump Administration, Senate Republicans quickly confirmed then-Judge Barrett at the end of that same Administration.⁵³³ Court packing, now rebranded as "court expansion," became suddenly popular in the same corridors where it had so recently been verboten.⁵³⁴ Other leading proposals involved jurisdiction stripping as well as curtailing judicial review.⁵³⁵

The arc of constitutional theory thus mirrors the case law's trajectory. Liberal theorists adored the federal courts, especially the Supreme Court, in the "afterglow of the Warren Court."⁵³⁶ But the commentator's mood changed during the judiciary's gradual slide to the right. And liberal sentiments became dire at the dawn of the Conservative

⁵²⁹ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

⁵³⁰ See, e.g., Fresh Air, "Supreme Inequality" Argues that America's Top Court Has Become Right-Wing, NPR, at 04:54 (Feb. 24, 2020, at 13:50 ET), <https://www.npr.org/2020/02/24/808843704/supreme-inequality-argues-that-america-s-top-court-has-become-right-wing> [https://perma.cc/XFC8-MK5S] (arguing that the Warren Court was, in fact, a historical anomaly).

⁵³¹ See BALKIN, *supra* note 77, at 168–70.

⁵³² See Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), <https://www.pewresearch.org/short-reads/2024/08/08/favorable-views-of-supreme-court-remain-near-historic-low> [https://perma.cc/92FM-KH9J] ("Just 26% of Democrats and Democratic-leaning independents view the Supreme Court favorably.").

⁵³³ See, e.g., Carl Hulse, *How Mitch McConnell Delivered Justice Amy Coney Barrett's Rapid Confirmation*, N.Y. TIMES (Nov. 3, 2020), <https://www.nytimes.com/2020/10/27/us/mcconnell-barrett-confirmation.html> [https://perma.cc/2FRJ-GYGD] (noting charges of hypocrisy against Senate Republicans for deeming then-Judge Garland's nomination, but not then-Judge Barrett's, too close to a presidential election).

⁵³⁴ See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 76, 80 (2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf [https://perma.cc/WAN5-TQUR] (documenting this abrupt change).

⁵³⁵ See *id.* at 154, 169.

⁵³⁶ Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 451 (2004).

Warren Court. A reciprocal pivot, or series of pivots, occurred among conservative legal thinkers over the last three quarters of a century. Conservatives emphasized “judicial restraint” or “strict construction” around the time of the Warren Court,⁵³⁷ later adopted a more neutral textualist stance,⁵³⁸ still later shifted to a more activist posture emphasizing liberty or the spirit of the law,⁵³⁹ and, at present, are beginning to embrace an explicitly nonpositivist jurisprudence infused with moral considerations.⁵⁴⁰

These well-timed transitions suggest that much prescriptive constitutional scholarship is shaped by the same ideological and strategic factors that operate on judicial doctrines. As we have seen, ideological groups that control the judiciary tend to smile on judges who exercise discretion, wield considerable power, and overtly consider morality. By comparison, groups that are out of step with the courts tend to insist on constraint, disempowerment, positivism, and limited or no direct consideration of morality.⁵⁴¹

⁵³⁷ See John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749–50 (2017) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997)); Balkin, *supra* note 177, at 215–16; see also Lawrence B. Solum, *Legal Theory Lexicon: Strict Construction & Judicial Activism*, LEGAL THEORY BLOG (Aug. 3, 2008, at 10:25 ET), <https://lsolum.typepad.com/legaltheory/2008/08/legal-theory-le.html> [<https://perma.cc/MJ6Q-QZVQ>] (“Nixon promised that he would appoint judges who were ‘strict constructionists’ as opposed to the ‘judicial activism’ that characterized the Warren Court . . .”).

⁵³⁸ See SCALIA, *supra* note 174, at 23; William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2226–28 (2017).

⁵³⁹ See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 22–26 (2016); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 32 (2018).

⁵⁴⁰ See generally ADRIAN VERMEULE, *COMMON GOOD CONSTITUTIONALISM* (2022) (drawing on RONALD DWORKIN, *LAW’S EMPIRE* (1986)). Common good constitutionalism and related forms of natural law are likely to play an increasing role in conservative legal culture, as evidenced by their popularity among conservative law students. See, e.g., Oren Cass, *Ahoy, (Judge) Matey!*, COMMONPLACE (June 6, 2025), <https://commonplace.substack.com/p/ahoy-judge-matey> [<https://perma.cc/LV4K-WPDV>] (quoting a now-deleted X post of Professor Patrick Deneen, which stated “the current younger generation of law students . . . crave a bolder and substantive approach to jurisprudence and constitutional law oriented to the common good and informed by natural law”); Jack Goldsmith (@jackgoldsmith), X (May 31, 2025, at 11:03 ET), <https://x.com/jackgoldsmith/status/1928829621618774467> [<https://perma.cc/3LRT-D5RU>] (characterizing Deneen’s tweet as “an accurate description of trends I see among conservative students at a number of top law schools”); see also ADVISORY OPINIONS: *Is Trump Going to War Against the Rule of Law?*, at 01:29:05–01:49:25 (Apple Podcasts, Mar. 18, 2025) (Sarah Isgur, who had once been president of Harvard Law School’s Federalist Society chapter, lamenting that the organization’s elections had recently been won by supporters of common good constitutionalism and noting: “[T]his is literally why the Federalist Society was created — . . . to stand athwart living constitutionalism. And now, 40 years later, it’s like, but what if we do living constitutionalism for the right?” *Id.* at 01:49:03.).

⁵⁴¹ Compare Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, at 13:15 ET), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/7RW5-UNLD>] (arguing, on the assumption that Hillary Clinton would win the presidency, that it was “time to stop” defensive crouch liberal constitutionalism), with Cass, *supra* note 540 (quoting Deneen’s criticism of “the pallid results of

Perhaps the most interesting feature of recent debates on judicial empowerment is their apparent contingency. One might hope for a deeper or more abstracted approach to constitutional theory, that is, a theory that can step back from these first-order prescriptions and adjudicate among them. The present Foreword takes some steps in that direction. In keeping with work by Professors Jack Balkin,⁵⁴² Barry Friedman,⁵⁴³ Laura Weinrib,⁵⁴⁴ and others,⁵⁴⁵ I have tried to describe the reciprocal processes underlying what theories tend to have currency, with what people, and at what times. I have also suggested prescriptive principles capable of guiding judicial actors through the process of realignment.⁵⁴⁶ A still deeper account would map the law's underlying structure, that is, the collections of practically available options that legal actors choose among. Such an account might also include a prescriptive dimension, illuminating the tradeoffs among these options or moves. While I cannot provide a full theory here, I do offer a few initial observations.

For one thing, the rise and fall of liberal Supreme Court hagiography is a cautionary tale. The proper lesson is not that the Court has always been undeserving of its fandom, as contemporary liberal commentators would have it,⁵⁴⁷ but rather that the legal commentariat's own lessons should be skeptically received at all times. Contemporary scholars may respond that their methods are more rigorous and informed than their predecessors'. Yet even today's scholars are not offering demonstrable proofs so much as intelligent intuitions or conjectures that trade on debatable premises. If past celebratory accounts of the Justices now seem naïve, opportunistic, and contingent, the same will likely be said about more recent critiques and lamentations. Our presumption ought to be that any pat prescriptive claim regarding constitutional decisionmaking or judicial review is really a simplification of a deeper, more complicated

defensive crouch positivist legal philosophy"). Notably, these comments reflect that each ideological wing of legal culture had been at least partially in a "defensive crouch" during the Swing Justice Era — a time when (as we have seen) both wings had reason to dissent. *See supra* section I.B, pp. 13–16.

⁵⁴² *See generally* BALKIN, *supra* note 77 (discussing how political cycles affect the work of the courts).

⁵⁴³ *See generally* Friedman, *supra* note 78 (exploring cyclical patterns in constitutional argument).

⁵⁴⁴ *See* LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* 8–9 (2016).

⁵⁴⁵ *See, e.g.,* Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577, 580 (1988).

⁵⁴⁶ *See supra* section II.C, pp. 43–51.

⁵⁴⁷ *See* Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 *VAND. L. REV.* 769, 769, 794 (2022) (arguing, in part, that "there is little historical and no theoretical basis for the belief that courts will outperform legislatures in overcoming deeply entrenched historic discrimination against deserving minorities," *id.* at 769). For important liberal celebrations of the federal courts, see Burt Neuborne, *The Myth of Parity*, 90 *HARV. L. REV.* 1105, 1115–16 (1977), and Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1, 2 (1979).

set of truths about the pros and cons of having federal courts, judicial review, and judicial supremacy. Constitutional theory must admit what it does not know.

For example, some noted commentators have tried to tally up various rulings issued by the Court and ascertain whether they are desirable, as measured by democratic or egalitarian values. So *Plessy v. Ferguson* would score as undesirable, *Brown* as desirable, and so forth. The commentators then try to identify a category of rulings where the Court's performance is poor or unreliable — and propose the elimination of cases within that category. Drawing in part on that sort of logic, Professors Nikolas Bowie and Daphna Renan have forcefully argued that judicial review of federal legislation for unconstitutionality undermines democracy and so ought to be eliminated.⁵⁴⁸ One problem here is that it is unclear how to score desirable and undesirable rulings. How many *Windsors* does it take to outweigh one *Shelby County*? But an even more intractable difficulty is that rulings often have desirable effects by preventing additional decisions from ever having to be issued in the first place. Consider *Brown*'s review of state laws under equal protection principles.⁵⁴⁹ Because the Court is also thought to have authority to review federal legislation,⁵⁵⁰ *Brown*'s holding as to state laws has influenced the statutes that Congress chooses to enact, as well as the reception of federal legislation in the lower federal courts. So it is very difficult, if not impossible, to know what federal statutes or cases would have arisen if the Court had lacked the power to review federal statutes for unconstitutionality.

Recent scholarly arguments for court reform are also problematic because they are or seem partisan. This ideological orientation is often candidly stated,⁵⁵¹ rather than concealed.⁵⁵² Whereas theorists in past generations at least purported to be making politically neutral arguments for their approaches, recent constitutional theorists in support of

⁵⁴⁸ See Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., Written Statement to the Presidential Commission on the Supreme Court of the United States 24 (2021) (arguing in part for “[e]liminating the power of courts to decline to enforce federal law”); *id.* at 8–12, 21 (“When these false negatives are compared with the false positives of cases like *Dred Scott* and *Shelby County*, it becomes pretty evident that the Court is, at best, unreliable at protecting politically marginalized groups.” *Id.* at 11.); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212> [<https://perma.cc/D6BY-ML45>] (“In the nearly 150 years since Reconstruction, the thrust of judicial supremacy has continued to be revanchist.”); Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2032 (2022).

⁵⁴⁹ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

⁵⁵⁰ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

⁵⁵¹ See Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1703, 1709 (2021) (“[T]he concern is that progressives will drop their demands for change, satisfied with a few modest judicial concessions.” *Id.* at 1703.).

⁵⁵² Cf. William Baude, Essay, *Reflections of a Supreme Court Commissioner*, 106 MINN. L. REV. 2631, 2632 (2022) (viewing both ideological and bipartisan reforms as legitimate but critically distinct).

judicial disempowerment often wear their left politics on their sleeves.⁵⁵³ The criteria for scoring Supreme Court decisions and weighing them against one another, for instance, might involve a frank evaluation of whether present-day liberal values are advanced. *Citizens United v. FEC*, then, would count as a clearly bad ruling, even though it is a freedom of speech decision that, when it was issued, had substantial liberal support, including from groups such as the ACLU.⁵⁵⁴ In some ways, an avowedly partisan case for court reform makes sense. It offers a relatively clear normative basis for evaluation, and it has a ready audience — namely, copartisans, including political actors.

Yet these traits are also serious faults. Those who argue from partisan premises and for partisan audiences may themselves be viewed as partisan advocates. And individuals who have a different political orientation are likely to take that perceived advocacy as a guide for what *not* to do. A conservative, for instance, might be open to court reform based in part on conservatives' past complaints with the courts. Or a nonpartisan proposal might gain bipartisan support, precisely because it would not have the express purpose or intended effect of tipping the scales of politics. But avowedly left-oriented arguments for judicial disempowerment are implicitly telling conservatives and other nonprogressives to oppose the reform on offer. If court reform favors the left, what else is someone on the right to think? Partisan arguments for court reform also risk presentism insofar as they assume now-prevailing ideological coalitions. But, as we have seen, what qualifies as liberal or conservative changes with time; and there is no guarantee that someone who is liberal today will agree with whatever is deemed liberal tomorrow.

Recent events have underscored the ephemeral nature of partisan court-reform arguments. For even if it were true that the judiciary objectionably tilts conservative over the long term, the federal courts might nonetheless play a crucial role in enforcing the law against far-right political interests.⁵⁵⁵ And that is in fact much the role that the federal courts are now playing during the second Trump Administration. As a result, many American liberals are learning to love the courts once again — not as champions or banner bearers but rather as sentinels or

⁵⁵³ See, e.g., Doerfler & Moyn, *supra* note 551, at 1709, 1771–72.

⁵⁵⁴ See *Amicus Curiae* Brief of the American Civil Liberties Union in Support of Appellant on Supplemental Question at 2, *Citizens United v. FEC*, 558 U.S. 310 (No. 08-205); see also *The ACLU and Citizens United*, ACLU (Mar. 27, 2012), <https://www.aclu.org/documents/aclu-and-citizens-united> [<https://perma.cc/X9AQ-RS5X>]; cf. Burt Neuborne, *Why the ACLU Is Wrong About "Citizens United,"* THE NATION (Mar. 21, 2012), <https://www.thenation.com/article/archive/why-aclu-wrong-about-citizens-united> [<https://perma.cc/SAX8-4EBE>].

⁵⁵⁵ The survival and expansion of the federal courts' power has long been connected to their ability to check partisan politics over the long term. See Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 871 (2011); sources cited *supra* note 94.

backstops.⁵⁵⁶ Conservative lawmaking and governance, with nationwide democratic support, is not merely hypothetical. Liberal reformers may suggest that conservative popular movements would not thrive in the first place if courts were disempowered,⁵⁵⁷ but that counterfactual claim is necessarily speculative. And the Republican Party’s considerable electoral success in 2024, across an array of indicators,⁵⁵⁸ undermines the notion (reassuring to the left) that democracy is systematically on the side of the liberal political party.

In hindsight, the Biden Administration’s inability or unwillingness to engage in court reform has benefitted liberals as well as the overall legal system. At the start of the second Trump Administration, the Supreme Court has supermajority support among conservative voters.⁵⁵⁹ If the Court had been packed by Democrats, however, it would now utterly lack legitimacy in the eyes of the constituency that elected not only the President but also majorities in both houses of Congress. President Trump would therefore feel much freer to undermine the judiciary, since he would suffer little or no political price for doing so. And Trump would also have little to gain from garnering the Court’s approval for his initiatives. In short, a packed or otherwise “reformed” Court would

⁵⁵⁶ See Ryan D. Doerfler & Samuel Moyn, Opinion, *Don’t Count on the Courts to Save Democracy*, WASH. POST (Mar. 20, 2025), <https://www.washingtonpost.com/opinions/2025/03/20/supremecourt-trump-democracy-crisis> [<https://perma.cc/2KFN-6LKB>] (arguing against the new trend that “[l]iberals are learning to love the courts again”). Some liberal critics of judicial power may quietly hope that the Trump Administration takes the federal courts down a peg or two. *But see id.* As noted, the lower federal courts in particular are now favored by the left. *See supra* note 246.

⁵⁵⁷ See Michael J. Klarman, *The Supreme Court, 2019 Term — Foreword: The Degradation of American Democracy — And the Court*, 134 HARV. L. REV. 1, 8 (2020) (arguing that the Court had contributed to “the recent degradation of American democracy”).

⁵⁵⁸ See Matthew Bloch et al., *Election Results Show a Red Shift Across the U.S. in 2024*, N.Y. TIMES (Dec. 17, 2024), <https://www.nytimes.com/interactive/2024/11/06/us/politics/presidential-election-2024-red-shift.html> [<https://perma.cc/WLP7-DHLW>]; Hannah Hartig et al., *Behind Trump’s 2024 Victory, A More Racially and Ethnically Diverse Voter Coalition*, PEW RSCH. CTR. (June 26, 2025), <https://www.pewresearch.org/politics/2025/06/26/behind-trumps-2024-victory-a-more-racially-and-ethnically-diverse-voter-coalition> [<https://perma.cc/6A6F-5XGK>]; Nicholas O. Stephanopoulos, Opinion, *Surprise! America Is Less Polarized than It Used to Be.*, WASH. POST (Dec. 9, 2024), <https://www.washingtonpost.com/opinions/2024/12/09/election-polarized-voters-politics> [<https://perma.cc/3F8F-26QC>].

⁵⁵⁹ The Court’s strong support among conservatives is often masked by commentary emphasizing low public support overall. *See, e.g.*, Megan Brenan, *Approval of U.S. Supreme Court Stalled near Historical Low*, GALLUP (July 30, 2024), <https://news.gallup.com/poll/647834/approval-supreme-court-stalled-near-historical-low.aspx> [<https://perma.cc/WFW6-JCZZ>] (noting that “Republicans overwhelmingly approve” of the Court). Yet even overall approval is recently on the rise, not historically so abnormal, and higher than for coordinate branches. *See* Charles Franklin, *New Marquette Law School Poll National Survey Finds Approval of U.S. Supreme Court Above 50% for First Time Since March 2022*, MARQUETTE UNIV. L. SCH. POLL (Feb. 13, 2025), <https://law.marquette.edu/poll/2025/02/13/new-marquette-law-school-poll-national-survey-finds-approval-of-u-s-supreme-court-above-50-for-first-time-since-march-2022> [<https://perma.cc/Z2JC-W5N9>]; *see also* Handberg, *supra* note 69, at 9 (discussing the Warren Court’s apparent 36% approval level in 1968).

be in the political crosshairs with precious little means of protecting either itself or the rule of law.⁵⁶⁰

The cycles and shortcomings evident in constitutional scholarship parallel challenges facing the courts. As we have seen, the Justices care about personal consistency, but they are also trying to adapt to a new world, with new incentives. Has the legal academy met the same challenge? Or have scholars invoked ideas like precedent, textualism, social movements, and judicial disempowerment — their own “judicial philosophies” — opportunistically?⁵⁶¹ As Professor Frederick Schauer sometimes asked: When was the last time you saw a scholarly work of constitutional law whose conclusions cut against the author’s policy preferences?⁵⁶²

Scholarship that separates law from policy contributes to the law’s existence and preserves the division of labor between academics and advocates. A similar virtue inheres in scholarship that cuts across conventional legal ideologies or political-party preferences.⁵⁶³ By at least sometimes going against type or tribe, scholars practice intellectual independence and eschew hackery. So perhaps scholars, too, should consider a version of the antipartisanship principle that I have suggested for the courts.⁵⁶⁴

⁵⁶⁰ See Neil Siegel, *The Trouble with Court-Packing*, 72 DUKE L.J. 71, 151 (2022) (“It seems perilous to rely on a 7–6 packed liberal Court . . .”). For a thoughtful case in favor of court reform that is both nonpartisan and non-disempowering, see generally Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019). For example, the authors propose staffing the Court with panels of court of appeals judges drawn at random periodically (but with a maximum of five Republican- or Democratic-appointed jurists). *Id.* at 181. These reforms pose their own risks, such as attenuating the Court’s connection to democracy and undermining its ability to craft a forceful, coherent jurisprudence — thereby reducing its authority and altering its social role. See Sachs, *supra* note 103, at 96–100 (responding to Epps and Sitaraman’s proposals for reform).

⁵⁶¹ For relevant discussion, see Friedman, *supra* note 78, at 149–50 and BALKIN, *supra* note 77, at 97–111.

⁵⁶² See Email from Professor Fred Schauer to author (Apr. 3, 2021, at 13:27 ET) (on file with the Harvard Law School Library) (asking a version of this question); see also Will Baude, *Further Thoughts on the Ely Challenge*, REASON: VOLOKH CONSPIRACY (Oct. 19, 2021, at 07:32 ET), <https://reason.com/volokh/2021/10/19/further-thoughts-on-the-ely-challenge> [<https://perma.cc/Z4BRL-B7N7>] (asking a similar question and offering a few potential examples).

⁵⁶³ Professor Akhil Amar has long talked of a test for scholars to apply to themselves and others, including: “Can X point to at least one topic (ideally at least one *big* topic) where X’s ‘legal’ view diverges from X’s ‘political’ preferences?” Email from Professor Akhil Reed Amar to author (July 7, 2025, at 22:06 ET) (on file with the Harvard Law School Library).

⁵⁶⁴ See *supra* notes 292–317 and accompanying text; see also Michael McConnell, *Where Credit Is Due*, HOOVER INST. (July 13, 2011), <https://www.hoover.org/research/where-credit-due> [<https://perma.cc/FNL9-A7W4>] (praising Professor Laurence Tribe for denying that President Obama could unilaterally raise the debt ceiling, noting: “This is what distinguishes a scholar from a hack: the willingness to analyze a question dispassionately and tell the truth even when it is politically inconvenient.”).

CONCLUSION: FOREWORD TO THE FUTURE

The Foreword is an odd genre, partly because each essay purports to be a prelude to discussion of the past. The genre's main function may be to chronicle what salient voices in constitutional theory had in mind at various moments in history. Each entry offers fodder for later readers curious about when the Supreme Court's stock rose or fell, at least among certain groups.

I do not have a one-sidedly positive view of the Court's recent performance. (It is perhaps the greatest compliment one can pay the Court to point out that, in fact, almost nobody is an unqualified fan of its work.) Yet I realize that I am largely a product of the current regime. Chief Justice Roberts was nominated at the start of my 1L year of law school. I clerked for then-Judge Kavanaugh, and later for Justice Kennedy. This backstory — along with my personal views — makes me sympathetic to much of the Court's recent jurisprudence. My Foreword could therefore be viewed as more defense than critique, more like Ely's than Kurland's.⁵⁶⁵ But my ambition points in a different direction, seeking a framework that encompasses the Court's critics as well as its champions — past, present, and future.

Yet change is still in the air, and I confess anxiety about the end of the present era. When the world begins to move on and new Justices take the bench, old-timers often throw up their hands.⁵⁶⁶ I am prepared to take that approach in due course — which may be sooner than I expect. In the meantime, I remain optimistic about the Supreme Court and its jurists. Today's Justices will be remembered for their landmark rulings, their historic controversies, and, above all, for their reshaping of legal culture. In all those ways, and still others, the Conservative Warren Court will resemble its liberal namesake.

⁵⁶⁵ Compare John Hart Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 6 (1978) (praising the Warren Court and characterizing much, though not all, of the Burger Court's jurisprudence as consistent with its predecessor's), with Kurland, *supra* note 187, at 144 (strongly criticizing the Warren Court).

⁵⁶⁶ Two Larrys offer illustrations. Professor Larry Tribe stopped updating his famed treatise during the late Rehnquist Court. Letter from Professor Laurence H. Tribe to Stephen G. Breyer, Assoc. J., Sup. Ct. of the U.S. (Apr. 29, 2005), in Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 292 (2005). Similarly, Professor Larry Kramer reported that he stopped teaching constitutional law after *District of Columbia v. Heller*, 554 U.S. 570 (2008). See Jesse Wegman, Opinion, *The Crisis in Teaching Constitutional Law*, N.Y. TIMES (Feb. 26, 2024), <https://www.nytimes.com/2024/02/26/opinion/constitutional-law-crisis-supreme-court.html> [<https://perma.cc/WKU8-54ND>].