

RESISTANCE THROUGH RESTRAINT: LIBERAL CAUSE LAWYERING IN AN AGE OF CONSERVATIVE JUDICIAL HEGEMONY

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Progressive cause lawyers face a defining challenge in responding to an entrenched conservative Supreme Court majority that is systematically dismantling liberal precedent. An intuitive solution—Court reform—confronts insurmountable political barriers and likely constitutional challenges from the very institution it seeks to modify. Rather than pursuing continued affirmative constitutional litigation or embracing conventional reform efforts, this Article proposes that liberal cause lawyers adopt “resistance through restraint”—a calculated disengagement from the Roberts Court and federal appeals courts aimed at denying these bodies vehicles to develop conservative constitutional and statutory doctrine.

The Article develops this theory by examining its foundations in cause lawyering history and by offering concrete guidance for implementation. Because the Court cannot initiate cases sua sponte and depends on litigants to bring justiciable controversies, strategic restraint capitalizes on a fundamental vulnerability in the Roberts Court’s ability to advance its conservative agenda. Drawing from a rich tradition of strategic forbearance, the Article identifies five key principles underlying this theory: (1) proactively evading Supreme Court review through procedural maneuvering and strategic settlement; (2) containing adverse precedent by accepting circuit-level losses; (3) delaying seemingly inevitable rulings to preserve immediate rights and build mobilization capacity; (4) leveraging incrementalism and percolation in alternative forums; and (5) avoiding the jurispathic power of paradigmatic adjudications that can kill competing constitutional visions.

This realpolitik reorientation offers a more pragmatic path forward than continued pursuit of institutional reforms or engagement with a Court engineered to reject progressive

[†] Academic Fellow, Stanford Law School. I thank the editors of the Cornell Law Review for their meticulous edits, especially Vanna Carter. For thoughtful conversation, I thank Reva Siegel, Doug NeJaime, and Robert Post, as well as the participants in the Yale Law School Public Law Workshop, and the Stanford Law Journals Discussion Group.

claims. By redirecting reformist impulses from trying to reshape an institution over which liberals have minimal structural control to reforming tactical choices over which they have complete agency, resistance through restraint provides a viable if imperfect framework for progressive constitutionalism in an era of conservative judicial dominance.

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INTRODUCTION

Today I was reading about Marie Curie:
she must have known she suffered from radiation sickness
her body bombarded for years by the element
she had purified
It seems she denied to the end
the source of the cataracts on her eyes
the cracked and suppurating skin of her finger-ends
till she could no longer hold a test-tube or a pencil

She died a famous woman denying
her wounds
denying
her wounds came from the same source as her power.

—Adrienne Rich¹

Supreme Court reform is dead. Before the 2024 election, progressive proposals to structurally reshape the nation’s highest court faced daunting odds. After Donald Trump’s return to the presidency and Republican victories securing both chambers of Congress, reform efforts have moved from the improbable to the impossible. The myriad structural changes championed by liberal advocates—from increasing the number of justices to implementing term limits—have moved from distant aspirations to closed chapters in contemporary judicial politics.

This denouement comes at a bleak moment for constitutional liberalism and the progressive cause lawyers seeking to vindicate it through impact litigation.² The Court stands as the most conservative it has been since the early twentieth century.

¹ ADRIENNE RICH, *Power*, in *THE DREAM OF A COMMON LANGUAGE* (1978), reprinted in *COLLECTED POEMS: 1950–2012*, at 443, 443 (2018).

² This Article relies on William Rubenstein’s definition of “impact litigation” as cases “brought with the intention of establishing a legal precedent that will improve a group’s social situation and thus they aim to have an effect on other pending cases or on future cases.” William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623, 1632 (1997).

In the next two years, President Trump is poised to cement this conservative control, possibly extending it for generations. Most immediately, he could entrench the Court's ideological balance by replacing its most senior conservatives, Justices Clarence Thomas and Samuel Alito, perhaps with jurists who combine their conservative credentials with a more personalist orientation toward his exercise of executive power. More dramatically, President Trump could push the institution even further to the right, should the opportunity arise to replace Chief Justice John Roberts or one of the Court's liberal justices.

The peril to liberal cause lawyers extends beyond exogenous changes to Court composition. The 2024 election delivering unified Republican federal control may be recalibrating individual justices' internal calculus concerning the pace and scope of their conservative judicial agenda.³ The Court's more center-right justices might not read these election results necessarily as a public endorsement of their conservative jurisprudence but as evidence that voters have grown resigned to the Court's conservative trajectory or at least prioritize more pressing concerns in their political decision making. This shift could embolden their efforts to reconstruct constitutional and statutory law in their ideological image.

The current crisis in liberal constitutional litigation, accordingly, runs deeper than the familiar challenge of weathering a conservative Court.⁴ Progressive movement lawyers encounter a more existential difficulty: responding to a durable and ambitious conservative supermajority—ideologically vetted for loyalty to particular modes of legal interpretation—that is hostile to their constitutional vision, insulated from mechanisms of democratic accountability, and rapidly reshaping the law through explicit and stealth reversals of precedent.⁵

In responding to this crisis, liberal cause lawyers face incentives to keep initiating affirmative cases, influenced by their professional training and the institutional culture of public interest organizations. This default approach involves continuing

³ See *infra* Part II.A.

⁴ For arguably all of the Court's institutional history, it has been some variety of "conservative." See, e.g., Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. REV. 833, 835–50 (2022) (commenting on the Supreme Court's institutional character by surveying its race jurisprudence from the pre-Civil War period to the present).

⁵ See generally Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1344–53 (2025).

to bring impact litigation, often reframing progressive objectives through originalist and textualist reasoning; seeking out sympathetic lower federal courts, despite the risks of eventual Supreme Court review; and holding onto court reform as a deferred objective while avoiding any fundamental strategic reassessment.⁶ The appeal of this approach is intuitive. Legal education conditions lawyers to view litigation as the solution to social problems, while the structure of public interest organizations creates powerful inertia toward familiar tools. Perhaps most significantly, the occasional liberal victory at the Supreme Court provides just enough positive reinforcement to sustain faith in traditional advocacy methods and in federal courts as sources of relief and law.

Early signs after the 2024 election suggest progressive cause lawyering remains on this path. Consider *United States v. Skrmetti*,⁷ the 2024-2025 term's "marquee" Supreme Court case.⁸ Less than a month after Trump's re-election, the ACLU and Biden administration argued their constitutional challenge to Tennessee's ban on gender-affirming care for minors. Despite the Court's conservative composition and clear signals before argument that its center-right justices were inclined to uphold the law,⁹ they had petitioned the Court to overturn a lower court ruling upholding Tennessee's ban.¹⁰ In so doing, they risked that the Court's majority would not just rule against

⁶ See, e.g., Transcript of Oral Argument at 73–93, *West Virginia v. B.P.J.*, No. 24-43 (U.S. Jan. 13, 2026) (ACLU attorney Joshua Block arguing the Court should uphold a favorable Fourth Circuit decision protecting transgender students in sports based on the text of Title IX); Karen Zraick, *Trump Erased a Bedrock Climate Rule. Here Come the Lawsuits*, N.Y. TIMES (Feb. 13, 2026), <https://www.nytimes.com/2026/02/13/climate/endangerment-finding-legal-court-law-suits.html> [<https://perma.cc/F4KX-6SUL>] (“[A] senior lawyer at the Sierra Club said the group was willing to take the risk that a more conservative Supreme Court might eventually uphold the Environmental Protection Agency’s decision to kill the endangerment finding.”).

⁷ 145 S. Ct. 1816 (2025).

⁸ Adam Liptak, *Supreme Court Returns to a Culture War Battleground: Transgender Rights*, N.Y. TIMES (Dec. 3, 2024), <https://www.nytimes.com/2024/12/03/us/supreme-court-transgender-rights-hearing.html> [<https://perma.cc/QCY8-QHNR>].

⁹ See, e.g., *Labrador v. Poe*, 144 S. Ct. 921, 921 (2024) (mem.) (granting a partial stay of a district court injunction of Idaho law banning gender-affirming care for transgender youth); *id.* at 921 (Gorsuch, J., concurring) (Justices Gorsuch, Thomas, and Alito concurring in the grant); *id.* at 928 (Kavanaugh, J., concurring) (Justices Kavanaugh and Barrett separately concurring in the grant).

¹⁰ Petition for Writ of Certiorari at 16, *Skrmetti*, 145 S. Ct. 1816 (No. 23-477).

the case's transgender plaintiffs but rewrite longstanding equal protection doctrine.¹¹

This Article proposes a fundamental reconsideration of the progressive cause lawyering strategy exemplified by cases like *Skrmetti*. Rather than continuing to feed ideologically salient cases into an increasingly hostile tribunal, progressive cause litigators would better serve their objectives through resistance through restraint—a calculated disengagement from the Supreme Court and federal appeals courts aimed at denying these bodies vehicles to further develop conservative constitutional doctrine. Such restraint, while requiring the painful acceptance of losses and injustices, can preserve hard-won victories embodied in existing precedent, delay the creation of adverse precedent, and give time to build political support to redress harm in non-judicial domains. This approach need not constitute legal or political surrender; instead, it creates discursive space for developing alternative venues for constitutional interpretation, while channeling limited legal resources into defensive litigation in unavoidable cases brought by conservative movement actors.

Resistance through restraint redirects reformist impulses from trying to reshape an institution over which liberals have minimal structural control to reforming tactical choices over which they have complete agency. This realpolitik reorientation offers a more pragmatic path forward than continued pursuit of quixotic institutional reforms or reflexive engagement with a Court engineered and eager to reject progressive constitutional claims. Embracing harm reduction over elimination, resistance through restraint posits that preserving hard-fought victories can be as consequential as pursuing new gains—and that the Court's inaction can be as consequential as its action.¹² At its core, this approach capitalizes on a vulnerability in the Court's ability to act: it cannot initiate cases *sua sponte* and depends on litigants to bring justiciable controversies.

The Article develops the theory of resistance through restraint in four parts. Part I examines how Court-centric

¹¹ See, e.g., Duncan Hosie, *The Liberal Litigation Trap*, VERFASSUNGSBLOG (July 9, 2025), <https://verfassungsblog.de/liberal-litigation-courts/> [<https://perma.cc/5UJL-WNUP>] ("Though women's rights were not directly at issue, the conservative justices used *Skrmetti* to undermine hard-won gender equality protections embedded in current precedent and constitutional culture.").

¹² See 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.").

resistance strategies in an era of conservative federal judicial dominance have produced conceptual and practical costs for progressive constitutionalism. On a theoretical level, the fixation on institutional reform has inadvertently reinforced judicial and Supreme Court supremacy by treating the Court as a primary source of constitutional meaning. This Court centrism marginalizes the vital roles of democratic deliberation and contestation in constitutional development. On a practical level, the focus on institutional reform has diverted scarce resources and attentional capital away from more productive avenues of constitutional change. Building on scholarship examining the relationship between judicial review and democratic constitutionalism, Part I argues that breaking free from Court centrism is essential for rebuilding progressive constitutional capacity.

Part II outlines the case for strategic disengagement from the Supreme Court and federal appellate courts, developing a framework for reorienting progressive impact litigation strategy in an era of entrenched conservative judicial power. Locating resistance through restraint within a rich tradition of legal realist cause lawyering that has situationally shunned Court engagement, it illustrates that deliberate forbearance has enabled movements to avoid adverse precedent while preserving latitude for constitutional development through other channels. Reflecting on institutional dynamics of the Roberts Court, Part II contends that the avoidance of seeking certiorari of ideologically salient cases is not enough; instead, progressive advocates should adopt a strong presumption against initiating ideologically salient cases involving key priorities of the conservative legal movement in federal courts and pursue proactive evasive tactics that reduce their volume in federal courts of appeals.

Part III applies these insights through a case study of *Brnovich v. Democratic National Committee*.¹³ It argues that progressive lawyers' strategic litigation choices—including the decision to bring litigation in the first instance—transformed a geographically limited and substantively minor burden on voting rights into a sweeping national regression. Despite numerous offramps to mitigate damage, liberal lawyers pressed forward with doomed litigation that lined up an ideal vehicle for conservative justices to effectuate self-evident jurisprudential objectives. In *Brnovich* and beyond, Part III shows that progressive impact litigation has unintentionally catalyzed and facilitated the Court's remaking of constitutional and statutory law.

¹³ 141 S. Ct. 2321 (2021).

Part IV addresses counterarguments and major challenges to implementing resistance through restraint, including coordination problems among different advocacy organizations, questions concerning the inevitability of loss and of Court review, and the difficulty of containing harmful cases brought by non-movement lawyers. Part IV also confronts moral objections to resistance through restraint, particularly concerns that refusing to legally challenge constitutional violations through maximally aggressive formal legal methods represents an unacceptable acquiescence to injustice. Through careful analysis of these challenges, it demonstrates that strategic restraint is a practically viable and ethically justified framework of opposition.

I

THE COSTS OF COURT-CENTRIC REFORM CULTURE

Part I argues that the modern progressive movement's focus on institutional reform, while seeking to address legitimate and urgent concerns about judicial overreach and constitutional distortion, has paradoxically reinforced the legal culture that enables the Supreme Court's primacy in the articulation of constitutional law. It proceeds in two parts. Subpart I.A discusses the theoretical costs of the liberal preoccupation with court reform, and subpart I.B discusses the practical harms to the actualization of progressive constitutional goals.

A. Theoretical Harms of Court Reform: Entrenching Judicial and Supreme Court Supremacy

Recent reform proposals generally fall into three categories.¹⁴ First, structural reforms seek to alter the Court's composition, whether through seat expansion,¹⁵ term limits,¹⁶

¹⁴ Some reform proposals do not neatly fall into the schematic discussed here. See, e.g., Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009) (proposing interlinked changes to structure and operations).

¹⁵ See, e.g., Aaron Belkin, *Court Expansion and the Restoration of Democracy: The Case for Constitutional Hardball*, 2019 PEPP. L. REV. 19, 24 (2020) (proposing Court expansion).

¹⁶ See, e.g., Adam Chilton et al., *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 40–63 (2021) (outlining a term limits proposal).

modified selection,¹⁷ or appointment processes.¹⁸ Second, procedural reforms target the Court's operations, including proposals for heightened voting requirements,¹⁹ recusal standards,²⁰ or ethics codes.²¹ Third, jurisdictional reforms aim to modify the scope of the Court's authority through jurisdiction stripping²² or limitations.²³

These various proposals have technical and philosophical differences. Yet they all are juricentric, and nearly all are Supreme Court-centric.²⁴ They require an official institution—normally Congress—to modify the Court's institutional authority or procedures. While some reform proposals like jurisdiction stripping nominally assert or reassert congressional authority over the Court, these approaches position constitutional reclamation through formal legislative change

¹⁷ See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181–202 (2019) (outlining the “Supreme Court Lottery” and “Balanced Bench” proposals).

¹⁸ See, e.g., Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. ECON. PERSPS. 119, 121 (2021) (proposing decoupling appointment opportunities from vacancies).

¹⁹ See, e.g., Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 954–62 (2003) (proposing a supermajority voting requirement).

²⁰ Cf., e.g., Adam Skaggs & Andrew Silver, *Promoting Fair and Impartial Courts Through Recusal Reform*, BRENNAN CTR. FOR JUST. 1–2 (Aug. 2011) https://www.brennancenter.org/media/296/download/Report_Promoting_Fair_Courts_2011.pdf?inline=1 [<https://perma.cc/23Q9-LBNN>] (proposing recusal reform to reduce “the growing perception that judges’ decisions in the courtroom are influenced by partisan political concerns”).

²¹ See, e.g., Katie Rogers, *Warning of ‘Extreme’ Agenda, Biden Calls for Supreme Court Overhaul*, N.Y. TIMES (July 29, 2024), <https://www.nytimes.com/2024/07/29/us/politics/biden-supreme-court-austin-texas.html> [<https://perma.cc/ZV7M-W5FH>] (President Biden advocating for an enforceable code as a means of pushing back against “extreme and unchecked” justices).

²² See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1744 (2021) (advocating for jurisdiction stripping statutes).

²³ See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 431–32, 580–81 nn.14–16 (2022) (analyzing similar jurisdictional changes).

²⁴ A pivot to state court constitutionalism is a rare example of a reform-adjacent strategy that is juricentric but not Supreme Court-centric. See generally Duncan Hosie, *With the Supreme Court Lurching Right, State Courts Offer Liberals Hope*, WASH. POST (Dec. 27, 2021), <https://www.washingtonpost.com/outlook/2021/12/27/with-supreme-court-lurching-right-state-courts-offer-liberals-hope/> [<https://perma.cc/KJJ4-MFVW>] (discussing “state constitutionalism as an avenue for liberals to circumvent the conservatism of the Roberts Court”).

rather than challenging deeper assumptions about interpretive preeminence.²⁵

This Court centrality manifests in both the substance of proposed reforms and the rhetoric of their proponents. Prominent advocates like former Attorney General Eric Holder characterize Court expansion as the “only option” for democratic restoration in the face of the Court’s entrenched conservative majority.²⁶ By suggesting that constitutional reclamation *requires* institutional modification of the Court, even ostensibly radical reform proposals reify the institution’s primacy. Holder’s Court expansion proposal, for example, attempts to address perceived problems of judicial overreach by accepting the centralization of interpretive constitutional authority within the Court. It doubles down on the institution’s dominance even as it aims to dismantle the exercise of that dominance by disfavored jurists.

This Court centrality reflects a pathology in progressive legal thought that misunderstands the reality of constitutional explication. The belief that the Supreme Court is the

²⁵ By addressing specific domains of judicial overreach through statutory carve-outs, jurisdiction stripping also has the potential to reinforce the Court’s dominance in the remainder of constitutional interpretation.

²⁶ The leading proponents of Court reform echoed Holder’s “only option” narrative construction. *See, e.g.*, Belkin, *supra* note 15, at 20, 23–24 (“Expansion is the only way to restore the Court.”); Russ Feingold, *This is Why ACS is Calling for Urgent and Specific Supreme Court Reforms*, AM. CONST. SOC’Y (Oct. 22, 2021), <https://www.acslaw.org/inbrief/this-is-why-acis-is-calling-for-urgent-and-specific-court-reforms/> [<https://perma.cc/UA8W-NT46>] (Statement of the president of the American Constitution Society) (“[T]he recent actions of the Supreme Court leave reform as the only option if we are to preserve the credibility of the Court and, in turn, the legitimacy of our democracy.”); Mark Sherman, *Democrats Pressed to Include Court Reforms in 2020 Platform*, AP NEWS (July 14, 2020, at 17:06 ET), <https://apnews.com/article/e6d58827e06e3d5626a7472bdca9ab1f> [<https://perma.cc/Z9QT-9X28>] (quoting Mondaire Jones, who championed Court expansion as a member of Congress, as stating that “[i]f Democrats want to do something about [the Supreme Court’s decisions], expanding the Court is our only option”); Nan Aron, *Testimony of Nan Aron, President of Alliance for Justice, Before the Presidential Commission on the Supreme Court of the United States* (July 20, 2021), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/07/Aron-Testimony.pdf> [<https://perma.cc/HR73-QL5J>] (testifying as the leader of liberal legal advocacy group that court reform “is the only option”). Other pro-reform groups use similar language. *See, e.g.*, *To Protect Our Rights and Democracy, We Must Expand the Court*, TAKE BACK THE CT. ACTION FUND, <https://www.takebackthecourt.today/court-expansion-overview> [<https://perma.cc/Z2T9-XYJY>] (last visited Dec. 21, 2024) (the primary interest group supporting Court expansion presenting Court reform as the “the only practical, proportional response to conservatives’ theft of the Supreme Court and the only way to restore its balance, integrity, and independence in order to protect our most sacred rights and freedoms” in response to the Court’s “striking blows against reproductive rights, racial justice, climate action, voting rights, and more”).

primary arbiter of constitutional meaning—and therefore that Court-focused institutional reform is the ultimate mechanism for constitutional transformation and reclamation—lacks historical support.²⁷ While the Court occasionally issues significant rulings that reshape constitutional understanding, constitutional meaning normally emerges through dynamic and disorderly interactions among the Court, other courts, political institutions, civil society, social movements, and popular culture.²⁸ “Virtually all” of its “important decisions,” as Alexander Bickel observed, have been “the beginnings of conversations between the Court and the people and their representatives,” not the termini.²⁹

More perniciously, Court reform’s juridification of constitutional culture disempowers ordinary people that have long participated in this contested conversation.³⁰ It particularly threatens what Robert Post and Reva Siegel call “democratic constitutionalism”—the idea that constitutional meaning emerges through complicated, dialogic interaction between courts, political institutions, and popular movements, “bend[ing] to the insistence of popular beliefs and yet simultaneously retain[ing] integrity as law.”³¹ Their account recognizes that justices participate in the development of American constitutional meaning,

²⁷ See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) (“Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution.”); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 5, 60–74 (2001) (critiquing the rise of judicial supremacy in constitutional interpretation as contrary to the intentions of the founders); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 2 (2003) (describing the “growing clarity” with which the Court “claim[s] to an exclusive authority to interpret the Constitution”).

²⁸ See *infra* notes 31–36 and accompanying text (discussing Post and Siegel’s framework of democratic constitutionalism); see also ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 18–21 (1992) (advancing an account of the Court as an active participant in constitutional dialogue with other political branches and society); DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 10 (2016) (surveying three different constitutional rights campaigns to situate the safeguarding of constitutional freedom with ordinary people); Robert Post, *Law Professors and Political Scientists: Observations on the Law/Politics Distinction in the Guinier/Rosenberg Debate*, 89 B.U. L. REV. 581, 582 (2009) (observing that constitutional meaning is “forged within the cauldron of political debate”).

²⁹ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 91 (1970).

³⁰ See Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence*, 89 B.U. L. REV. 539, 550 (2009) (defining “juridification” as “the substitution of law for politics” and collecting sources).

³¹ Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 376 (2007).

but are not the only important actors to do so.³² If advocates of Court reform are right that it is the “only way” to “protect our rights and freedoms against the Court’s attacks,”³³ citizens should engage exclusively in juricentric activism, not broader forms of civic, social, and democratic participation that form constitutional politics.³⁴

The Court-centricity of reform proposals creates two interconnected problems for democratic constitutionalism. First, by directing backlash energy exclusively or primarily toward the heavy lift of modifying the Supreme Court’s institutional design or decisional procedures, progressives risk neglecting the vital work of building robust constitutional arguments in other venues, like “constitutional lawmaking, electoral politics, and the institutions of civil society.”³⁵ The resulting atrophy of these alternative channels of constitutional development may ultimately prove more damaging to progressive causes than any Supreme Court decision or doctrine. Institutional reform of the Court does not “propose a vision for increased public participation in democracy”;³⁶ it offers instead a vision for changing the identity or behavior of a few powerful justices.³⁷ Reinforcing the legal profession’s aristocratic tendencies—particularly in the insular and rarefied realm of constitutional litigation before

³² See *id.* at 385–87.

³³ See TAKE BACK THE CT. ACTION FUND, *supra* note 26.

³⁴ See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004) (arguing a juricentric Constitution can cultivate judicial excess and “citizen passivity”); Duncan Hosie, *Janus and the Movement Dissent*, 65 B.C. L. REV. 371, 377, 436 (2024) (discussing pathways to “channel popular alienation into action [and] constitutional cynicism into constitutional construction” and jurisprudential tools to promote popular “constitutional ownership”).

³⁵ Post & Siegel, *supra* note 31, at 374.

³⁶ Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 56 (2008).

³⁷ See generally Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1490–1511 (2005) (rejecting Court-centric constitutionalism).

the high court³⁸—this approach shifts power from the people to the patrician “black-robed rulers.”³⁹

Second, Court centrality breeds a theoretical anemia in progressive constitutionalism that extends beyond mere institutional myopia. When progressive constitutional discourse becomes saturated by discussions of Court reform, progressive legal theorists speak desiccated vocabulary that speaks primarily in the language of institutional structure and judicial appointments rather than substantive constitutional values. The resulting dialectic—preoccupied with questions of judicial composition to elucidate those values—displaces the harder and germinal work of theorizing transformative constitutional visions.

Litigation through federal courts stacked with conservatives can narrow progressive constitutional thought itself. By repeatedly advancing arguments within the constrained but entrenched vernacular of conservative legal doctrine, progressive litigators may internalize limiting doctrinal frameworks even as they seek to invert them.⁴⁰ This dynamic helps explain why the few notable progressive victories before the current Court, like the hyper-textualist *Bostock v. Clayton County*,⁴¹ rest on relatively thin theoretical foundations that do little to advance broader projects of constitutional reclamation and rights protection through democratic mobilization.⁴² Furthermore, the

³⁸ See generally 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 321–22 (Henry Reeve trans., Schocken Books 1961) (arguing that “[a] portion of the tastes and of the habits of the aristocracy may consequently be discovered in the characters of men in the [American] profession of the law” and “[t]he aristocracy of America is on the bench and at the bar”); KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* 40–46 (1993) (statistically demonstrating that “Supreme Court lawyers are not a representative sample of the American legal profession” and instead are “an elite within an elite”); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 714–16 (1990) (reflecting on the inherently “profoundly elitist, hierarchic, and nonparticipatory” aspects of constitutional adjudication).

³⁹ *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, Council 31, 585 U.S. 878, 956 (2018) (Kagan, J., dissenting).

⁴⁰ Cf. Duncan Hosie, *Property as a Legitimizing Right*, 108 MINN. L. REV. HEADNOTES 41, 46–55 (2023) (describing how early litigators for marriage equality advanced arguments through the rhetoric of capital and property).

⁴¹ 140 S. Ct. 1731 (2020).

⁴² See, e.g., Michael E. Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 7 (1970) (analyzing the Court’s criminal procedure jurisprudence by juxtaposing a theoretical “palladium[] of liberty” with “an ornament, or golden cupola, built upon the roof of a structure found rotting and infested, assuring the gentlefolk who only pass by without entering that all is well inside”); Robert Post & Reva Siegel, *Originalism as Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV.

voluntary filing of certiorari petitions implicitly and symbolically legitimates the Court's potential as a rights protecting institution, complicating or frustrating larger projects to mount popular mobilization against it.

Moving beyond Court-centric institutional reform requires reconceptualizing constitutional change as a fluid, multi-institutional, democratically driven and dialectic process. This means investing in robust class⁴³ and identity-based⁴⁴ social reform movements and developing a constitutional vision that sees popular mobilization—not judicial reform—as the primary engine of transformation. Only by breaking free from the idea that meaningful change flows principally through federal judges can progressives begin to rebuild the infrastructure for constitutional reclamation.

B. Practical Harms of Court Reform: Diverting Political Resources and Mobilization

Beyond its theoretical costs, the left's preoccupation with Court reform has imposed significant harms to its functional capacity to build constitutional meaning. At the most basic, the intense focus on institutional change diverts scarce political resources and attentional capital away from more fruitful and executable avenues of constitutional development. While the tumultuous O.T. 2021 term, and *Dobbs* in particular, increased the importance and salience of the Court to liberal voters,⁴⁵ the progressive movement's bandwidth for constitutional politics (and that of the public) is not infinite.⁴⁶ Court reform

545, 574 (2006) (arguing progressive constitutionalism needs “more than a logical critique” of originalism but also “a vision of collective life able to generate constitutional claims of equal motive and authority, whether those claims sound in the register of restoration or redemption”).

⁴³ See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

⁴⁴ See generally William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

⁴⁵ See, e.g., Maureen Groppe & Sam Woodward, *Americans - Especially Democrats - See Supreme Court as Big Election Issue*, USA TODAY (May. 7, 2025, at 10:31 ET), <https://www.usatoday.com/story/news/politics/elections/2024/08/15/election-poll-supreme-court-issue-2024/74771816007/> [<https://perma.cc/W4HC-ZAJV>] (journalistic account of this trend); Matthew Levendusky et al., *Has the Supreme Court Become Just Another Political Branch? Public Perceptions of Court Approval and Legitimacy in a Post-Dobbs World*, SCI. ADVANCES, Mar. 8, 2024, at 1 (political scientific account of this trend).

⁴⁶ In understanding the public's stamina for deep constitutional discourse, Bruce Ackerman proposes a “dualist” framework where periods of intense

risks crowding out other civic activities that are far more likely to engage ordinary citizens.⁴⁷

Privileging institutional reform is especially troubling considering the formidable obstacles that have stalked it from its inception. Modern Court reform efforts began percolating on the left after Senate Majority Leader Mitch McConnell's blockade on President Obama's nominee to replace Justice Antonin Scalia in 2016 and accelerated after the death of Justice Ruth Bader Ginsburg in 2020.⁴⁸ Contrary to claims of Court reform supporters,⁴⁹ all Court reform proposals that would have altered the ideological makeup have confronted insurmountable practical and political barriers over this period. Even modest reforms targeting ethics would require both Democratic control of Congress and the White House, along with a fundamental shift in the positions of many Democratic lawmakers, the priorities of many coalitional constituencies within the Democratic party, and the operations of the Senate.⁵⁰

Consider the signature reform proposal, Court expansion. A decisive majority of Democratic senators and House representatives, including staunch liberals like Senator Bernie Sanders, have never supported it.⁵¹ President Biden⁵² and all but one of the candidates who sought the Democratic nomination for

constitutional deliberation are interspersed with routine political activities, acknowledging that citizens have finite capacity for sustained engagement with fundamental legal questions. *See generally* BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991).

⁴⁷ *See* RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 156–57 (2018) (commenting on the relationship between judicial aggrandizement and political culture).

⁴⁸ *See* G. Michael Parsons, *Contingent Design & the Court Reform Debate*, 23 U. PA. J. CONST. L. 795, 797–98 (2021).

⁴⁹ *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. 398, 398 (2021) (“For a brief moment in the fall of 2020, structural reform of the Supreme Court seemed like a tangible possibility.”).

⁵⁰ *See, e.g.*, Benjamin S. Weiss, *Republicans Won't Budge as Biden Details Supreme Court Reform Plan*, COURTHOUSE NEWS SERV. (July 29, 2024), <https://www.courthousenews.com/republicans-wont-budge-as-biden-details-supreme-court-reform-plan/> [<https://perma.cc/U23U-R47F>] (recent example of Speaker Mike Johnson and other prominent Republican officeholders expressing opposition to all forms of Court reform and commitment to using filibuster against it).

⁵¹ *See, e.g.*, Ginger Gibson, *U.S. Senator Bernie Sanders Against Increasing Number of Supreme Court Justices*, REUTERS (Apr. 1, 2019, at 17:37 ET), <https://www.reuters.com/article/world/us-senator-bernie-sanders-against-increasing-number-of-supreme-court-justices-idUSKCN1RD3B8/> [<https://perma.cc/X46R-D4N2>].

⁵² *See, e.g.*, Trevor Hunnicutt & Nandita Bose, *Biden: It Would be a Mistake to Expand the U.S. Supreme Court*, REUTERS (June 29, 2023, at 19:30 ET), <https://www.reuters.com/world/us/biden-calls-us-colleges-consider-adversity-during-admission-process-2023-06-29/> [<https://perma.cc/93MP-LM8C>].

president in 2020⁵³ declined to emphatically embrace it. More tellingly, this cause célèbre of the left is unpopular with a majority of voters.⁵⁴ During the 2022 and 2024 election cycles, Republican strategists successfully weaponized Court expansion against Democratic candidates, shifting judicial debates away from substantive constitutional questions like abortion rights—where conservative positions conflict with public sentiment—to institutional reforms where liberal ones do.⁵⁵

Even if Court reforms were enacted, they face two circularity problems that limit their utility. First, any reform that materially curbed conservative judicial power would provoke retaliatory—and likely escalatory—backlash from the same conservative actors responsible for what liberals view as the original norm-defying behavior, fueling an unsustainable institutional arms race.⁵⁶ Conversely, more modest reforms that could more plausibly gain political traction would do little to address the root concerns about judicial overreach that initially motivated calls for reform.⁵⁷

Second, such reforms would almost inevitably face constitutional challenges before the very institution they aim to modify: a conservative-dominated Supreme Court that has already indicated opposition to even the most modest reform measures.⁵⁸ This predicament underscores the deeper tension

⁵³ See *Where Democrats Stand: Would You Support Adding Justices to 'Pack' the Supreme Court?*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-packing/> [https://perma.cc/L3Y7-QRUC] (last visited Feb. 6, 2026).

⁵⁴ See, e.g., *How Americans View Proposals to Change the Political System*, PEW RSCH. CTR. (Sep. 19, 2023), <https://www.pewresearch.org/politics/2023/09/19/how-americans-view-proposals-to-change-the-political-system/> [https://perma.cc/C5DH-J2PG].

⁵⁵ See, e.g., Marianne Levine, *Liberal Push to Expand Supreme Court Is All but Dead Among Hill Dems*, POLITICO (Apr. 26, 2021, at 04:30 ET), <https://www.politico.com/news/2021/04/26/liberals-expand-supreme-court-democrats-484562> [https://perma.cc/8Z4Y-76FB] (documenting Republican efforts to leverage Senator Ed Markey's Court expansion proposal against Democrats despite the widespread lack of support for the proposal within the Democratic Senate and House caucuses).

⁵⁶ Mark Tushnet, *Court Reform for Progressives: A Primer on Constitutional Considerations*, 2024 WIS. L. REV. FORWARD 79, 92 (surveying "tit for tat" dynamics of any Court expansion).

⁵⁷ An exemplar is the Presidential Commission's 2021 Final Report, leaving untouched the structural concerns about judicial entrenchment that provided the impetus for the reform conversation. See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *Final Report*, 6–10 (2021).

⁵⁸ See, e.g., David B. Rivkin Jr. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, WALL ST. J. (July 28, 2023, at 13:57 ET), <https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender->

inherent in Court-centric constitutionalism. If the Court disapproved reform measures after citizens and movements expended great effort to bring them to fruition, citizens who participated in constitutional activism would understandably feel hopeless, “enervated[,] and attenuated.”⁵⁹ Rather than curbing Supreme Court supremacy, such reforms could counterintuitively reinforce it, vivifying the Court’s imperialness and preeminent standing to excavate constitutional meaning. In so doing, the likely result of Court reform would be heightened constitutional alienation and pessimism, not the sense of constitutional ownership and agency that can propel reclamation.⁶⁰

II

A THEORY OF RESISTANCE THROUGH RESTRAINT

The limits of Court-focused institutional reform underscore the need for an alternative approach, operating independently of conservative counterreaction, that deprives the Court while simultaneously addressing concerns about judicial overreach. Part II proceeds in three parts to outline the theory of resistance through restraint. Subpart II.A examines anterior precepts of the theory. Subpart II.B operationalizes the resistance through restraint framework. Subpart II.C examines the theoretical benefits of this theory, situating it within a longer tradition of movement lawyering.

A. Anterior Precepts of Strategic Restraint

The first anterior principle reasons from a modern asymmetry in the command of federal power. For the past half century, executive and legislative power has oscillated between the political parties, generating extended periods of divided federal government punctuated by ephemeral periods of unified partisan control.⁶¹ This partisan tenuity, driven by structural and cultural forces that political scientists predict will persist, “places important constraints on what the national government

precedent-ethics-originalism-5e3e9a7?st=yaf444fmb8q9vd1 [https://perma.cc/B5DM-LGNY] (discussing Justice Alito’s statement that Congress lacks the power to impose an ethics code on the Supreme Court).

⁵⁹ Post & Siegel, *supra* note 34, at 1043.

⁶⁰ See Hosie, *supra* note 34, at 436.

⁶¹ See MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 5 (2004) (identifying “divided government” as “[t]he most important feature of the modern constitutional order”).

can do.”⁶² Conversely, conservatives have consolidated power over the federal judiciary for the foreseeable future and do not face the same constraints.

Thanks to hardball and hazard, President Trump managed to appoint in his first term three justices to the Supreme Court and fifty-four federal appellate judges, just one shy of the fifty-five appellate judges President Obama appointed in his two terms and “flipping” ideological control of numerous appellate courts.⁶³ In contrast, President Biden added just one Supreme Court justice, who, unlike President Trump’s appointments of Justices Kavanaugh and Barrett, did not alter the ideological composition of the Court.⁶⁴ Biden also managed to appoint nine fewer appellate judges than President Trump, and most of his appellate appointments replaced like-minded judges.⁶⁵ As a result, Biden’s presidency ended with making “few inroads on changing the ideological balance of courts,” and Trump’s second term is already moving the prevailing order further to the right.⁶⁶

Despite the lack of an Ackermanian “constitutional moment”⁶⁷ or a decisive political realignment in constitutional culture—President Trump lost the popular vote in 2016 and narrowly won in 2024—the Supreme Court and federal appeals courts will remain resilient bastions of conservative power for decades. With conservative control over federal legislative and executive power likely transient, and the Court’s demonstrated receptivity to conservative movement litigation, Court-focused strategies will remain appealing to conservative movement actors. These structural conditions also render Court-focused

⁶² *Id.*

⁶³ See, e.g., Tierney Sneed, *Scale of Trump’s Appeals Court Overhaul Unmatched by Biden, Even as Democrats Could Approve More Total Judges*, CNN (Aug. 29, 2024, at 05:00 ET), <https://www.cnn.com/2024/08/29/politics/biden-trump-judges/index.html> [<https://perma.cc/H5BR-EKGN>]; Lawrence Hurley, *Obama’s Judges Leave Liberal Imprint on U.S. Law*, REUTERS (Aug. 26, 2016, at 10:08 ET), <https://www.reuters.com/article/world/obamas-judges-leave-liberal-imprint-on-us-law-idUSKCN1110BB/> [<https://perma.cc/5PBT-8VP2>].

⁶⁴ See generally Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164–67 (1988) (describing President Roosevelt’s “transformative” appointments and Reagan’s “aspiration” to similarly “revolutioniz[e] constitutional law by means of transformative appointments to the Supreme Court”).

⁶⁵ Jan Wolfe, *Biden Made the Judiciary More Diverse—but Not More Liberal*, WALL ST. J. (Dec. 31, 2024, at 09:00 ET), <https://www.wsj.com/politics/policy/biden-made-the-judiciary-more-diversebut-not-more-liberal-d3cf7679> [<https://perma.cc/6VJV-UPYR>].

⁶⁶ *Id.*

⁶⁷ Ackerman, *supra* note 46, at 5.

strategies for liberal substantive gains largely futile for the foreseeable future.

The second precept is straightforward: conservatives as much as liberals rely on movement lawyering to create constitutional and statutory change. For much of the twentieth century, liberal legal theorists viewed conservative movement lawyering, if they engaged with it at all, as primarily a means of status quo preservation rather than as a vehicle for affirmative social transformation.⁶⁸ These perspectives, always dubious, are especially untenable today.⁶⁹ Contemporary conservative litigation regularly seeks—and regularly secures—dramatic departures from settled precedent and established federal law.⁷⁰ It deploys movement strategies to revolutionize society, not merely to reify existing social hierarchies and conditions. As Linda Greenhouse aptly frames the inquiry, the central issue is not whether the contemporary Supreme Court acts as an “obstacle to progress” but whether it operates as “an institution bent on erasing much of the progress of the past half-century.”⁷¹

While the Court’s justices are already deploying their law-making authority to reshape the jurisprudence of the past half century, there is reason to believe they may do so more aggressively in coming terms. The *Dobbs* decision—a direct result of President Trump’s three appointments—ignited fierce public backlash in abortion plebiscites and the 2022 mid-term election,⁷² and this backlash may have tempered, even

⁶⁸ See, e.g., Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 *DRAKE L. REV.* 795, 814 (2005) (stating that “[c]ourts are not symmetrically constrained from furthering both progressive and conservative change” because “[p]rogressives are asking courts to require change while [c]onservatives are supporting the status quo”).

⁶⁹ See generally AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015) (analyzing the Federalist Society’s role in diffusing intellectual capital to the Court and convincing its conservative majority to materially change legal doctrine on the First and Second amendments, among other areas of jurisprudence).

⁷⁰ See, e.g., *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018); *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

⁷¹ Linda Greenhouse, *Social Progress & the Courts*, *N.Y. REV. OF BOOKS* (Mar. 21, 2024), <https://www.nybooks.com/articles/2024/03/21/social-progress-the-courts-hollow-hope-rosenberg/> [<https://perma.cc/7UQV-TQ73>].

⁷² See generally Jane S. Schacter, *Direct Democracy After Dobbs: Paradox, Irony and the Coming Recalibration*, 2024 *U. ILL. L. REV.* 1497, 1503–10, 1523–26 (2024).

if moderately, the jurisprudential approaches of Chief Justice Roberts, Justice Brett Kavanaugh, and perhaps most notably Justice Amy Coney Barrett in the two terms that followed.⁷³ While they continued to deliver votes for and author landmark conservative victories—including on hot-button issues like affirmative action,⁷⁴ presidential immunity⁷⁵ and the dismantling of *Chevron* deference⁷⁶—their jurisprudence as a whole reflected greater institutional restraint than those of their more ardent conservative colleagues.⁷⁷

Yet unlike the wake of 2022, when the Court felt tangible political pushback for its jurisprudence, the complex dynamics behind Democratic defeats in 2024 may embolden the more cautious conservative justices to pursue conservative legal movement goals. While polling continues to show the Court's public reputation at historic and enduring lows, driven by Democratic opposition and unprecedented polarization in perception,⁷⁸ Trump's watershed achievement of a Republican presidential popular vote victory—the first since 2004—coupled with Republican retention of the House and gains in the Senate could convey to them the Court will not pay an institutional price for the rapid imposition of its jurisprudential agenda. Following President Trump's re-election, the conservative justices have relentlessly deployed the shadow docket to protect the Administration's initiatives⁷⁹ and granted merits review in

⁷³ See, e.g., Duncan Hosie, *The Late Supreme Court Chief Who Haunts Today's Right-Wing Justices*, NEW REPUBLIC (Oct. 23, 2024), <https://newrepublic.com/article/186218/william-rehnquist-haunts-right-wing-supreme-court> [<https://perma.cc/D68A-DSHP>].

⁷⁴ *Students for Fair Admissions*, 143 S. Ct. 2141.

⁷⁵ *Trump v. United States*, 144 S. Ct. 2312 (2024).

⁷⁶ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

⁷⁷ See, e.g., *FCC v. Consumers' Research*, 145 S. Ct. 2482 (2025) (Roberts, C.J., and Kavanaugh & Barrett, JJ., joining the majority over the dissent of Gorsuch, Thomas & Alito, JJ.); *Moyle v. United States*, 144 S. Ct. 2015, 2019 (2024) (per curiam) (mem.) (Barrett, J., concurring in the dismissal as improvidently granted, joined by Roberts, C.J., & Kavanaugh, J., over the dissent of Alito, Thomas, and Gorsuch, JJ.).

⁷⁸ See, e.g., *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/X7FE-GFJ4>] (finding a fifty-one percent gap in Democratic and Republican voters approval of the Court, causing its subterranean rating); Joseph Copeland, *Favorable Views of Supreme Court Remain Near Historic Low*, PEW RSCH. CTR. (Sep. 3, 2025), <https://www.pewresearch.org/short-reads/2025/09/03/favorable-views-of-supreme-court-remain-near-historic-low/> [<https://perma.cc/7XYC-BJVR>].

⁷⁹ See generally Duncan Hosie, *The End of Equity*, N.Y. REV. OF BOOKS (Sep. 19, 2025), <https://www.nybooks.com/online/2025/09/19/the-end-of-equity/> [<https://perma.cc/JSU4-VJ64>].

a slate of *kulturkampf*⁸⁰ cases involving guns,⁸¹ gay rights,⁸² transgender athletes,⁸³ and religious freedoms,⁸⁴ as well as on animating conservative movement priorities on voting rights⁸⁵ and campaign finance.⁸⁶

The third precept sees progress worth defending in the existing constitutional and statutory law of the past half century. Left legal theorists, especially those associated with critical legal studies and critical race theory, have long condemned settled precedent and established federal law for falling short of achieving an egalitarian and just society.⁸⁷ This critique risks undervaluing legislative achievements of post-New Deal liberalism⁸⁸ and judicial achievements of the Warren Court and early Burger Court⁸⁹ when revisionist legal forces are most ascendant.⁹⁰ Recent conservative triumphs like the overturning of *Roe* and *Chevron* speak to the existence of real if incomplete liberal accomplishments. Things are never so bad that they can't get worse.⁹¹

The fourth and final precept places a diminished value of reasoned persuasion in the adjudication of controversial cases legibly implicating moral or political values. This decline stems from the ideological vetting of Supreme Court and

⁸⁰ See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (using the German word of “*kulturkampf*” to denote “culture war”).

⁸¹ *Wolford v. Lopez*, 146 S. Ct. 79 (2025) (mem.) (granting certiorari).

⁸² *Chiles v. Salazar*, 146 S. Ct. 1010 (2026).

⁸³ *Little v. Hecox*, 145 S. Ct. 2871 (2025) (mem.) (granting certiorari); *West Virginia v. B.P.J.*, 146 S. Ct. 57 (2025) (mem.) (same).

⁸⁴ *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

⁸⁵ *Louisiana v. Callais*, 146 S. Ct. 1131 (2026).

⁸⁶ *Nat'l Republican Senatorial Comm. v. FEC*, 145 S. Ct. 2843 (2025) (mem.) (granting certiorari).

⁸⁷ See generally Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

⁸⁸ See generally WILLIAM E. LEUCHTENBURG, *THE FDR YEARS: ON ROOSEVELT AND HIS LEGACY* (1995).

⁸⁹ See generally Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

⁹⁰ See, e.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1753, 1796–1800 (2008) (recognizing the meaningful protections and limits of *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), while acknowledging the possibility of more robust and egalitarian constitutional pathways to protect abortion rights).

⁹¹ I borrow here from the title of William Neuman's book on the economic and civic deterioration of Venezuela. See generally WILLIAM NEUMAN, *THINGS ARE NEVER SO BAD THAT THEY CAN'T GET WORSE: INSIDE THE COLLAPSE OF VENEZUELA* (2022).

appellate appointments, as well as polarization on the Court that tracks the party polarization and sorting among elites off the bench.⁹² By centralizing the selection and screening of appellate appointments through the Federalist Society and other movement groups, Republican administrations have changed appointment strategies and practices. Conservative movement actors now recruit, vet, and credentialize future judges long before nomination.⁹³ This elaborate infrastructure seeks to avoid jurisprudential disappointments like the dreaded “evolution” of Justice David Souter,⁹⁴ the pragmatic flexibility of Justice Sandra Day O’Connor,⁹⁵ or the “personal whimsy” of Justice Kennedy’s old-school Republicanism.⁹⁶

To put it succinctly, Republican appellate appointments now reach the highest courts in the country *because* they have demonstrated hostility to progressive constitutional values and affirmative litigation that seeks to bring them to fruition.⁹⁷ In this era of ideological impregnability, romantic beliefs about the persuasive power of legal advocacy—particularly the hubristic idea that skilled lawyers can sway judges away from their normative commitments through eloquent and reasoned argument—are detached from the epistemic baselines of new appointees and the greater predictability in the outcomes that

⁹² See generally Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301 (2016).

⁹³ See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 138–41 (2008) (discussing ideological vetting); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 141–42 (2008) (similar); HOLLIS-BRUSKY, *supra* note 69, at 154 (grounding the “expan[sion]” of “ideological gatekeep[ing]” to “lower federal courts and to the Supreme Court” in the George W. Bush administration).

⁹⁴ See generally David Remnick, *No More Souters*, NEW YORKER (Sep. 1, 2023), <https://www.newyorker.com/podcast/the-new-yorker-radio-hour/no-more-souters> [<https://perma.cc/C9WE-D7MX>].

⁹⁵ See generally NANCY MAVEETY, *JUSTICE SANDRA DAY O’CONNOR: STRATEGIST ON THE SUPREME COURT* 29 (1996) (characterizing O’Connor’s jurisprudential philosophy as “pragmatic centrism” which includes “an avoidance of ideological solutions to resolve cases”).

⁹⁶ Mitchell N. Berman & David Peters, *Kennedy’s Legacy: A Principled Justice*, 46 HASTINGS CONST. L. Q. 311, 315–16 (2019).

⁹⁷ See, e.g., Ryan C. Black & Ryan J. Owens, *Courting the President: How Circuit Court Judges Alter Their Behavior for Promotion to the Supreme Court*, 60 AM. J. POL. SCI. 30, 31–33 (2016) (analyzing judicial behavior of potential Court appointees); Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/W8LQ-RZPS>] (detailing ideological vetting and career paths of President Trump’s federal appellate appointments).

flows from these baselines.⁹⁸ In ideologically polarizing cases, Justice O'Connor, for example, was much more responsive to advocates' creative legal arguments than her successor, Justice Alito, who almost invariably votes for the position of the conservative legal movement.⁹⁹

This does not mean that progressives will always lose before federal appeals courts,¹⁰⁰ that all Republican appointees are homogenous,¹⁰¹ or that the specialization and skills crafted by bespoke appellate advocates have no value, especially in cases that are not ideologically polarizing.¹⁰² But it does mean today's Republican appointees are more inclined to consistently rule against liberal interests than their predecessors, bringing to the bench a more cohesive and motivating set of interpretive, moral, ideational, and political priors.

B. Operationalizing Strategic Restraint

Resistance through restraint represents a fundamental reimagining of progressive constitutional litigation in an era of entrenched conservative judicial power.¹⁰³ Rather than

⁹⁸ See *infra* Section IV.B (discussing the question of loss inevitability). For a defense of the value of appellate advocacy, see Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 803–04, 861–64 (1951).

⁹⁹ Compare *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (Justice O'Connor repeatedly invoking an amicus brief written on behalf of retired military generals defending affirmative action in an equal protection challenge to a public university's use of affirmative action in admissions), with *Hosie*, *supra* note 5, at 1344–45 nn.73–78 and accompanying text (summarizing how Justice O'Connor's successor, Justice Alito, "immediately began unraveling [her] functionalist jurisprudential legacy" and is fairly characterized as the Court's most consistently conservative justice). Before the Court issued an opinion implicating controversial political issues, one could not always predict where Justice O'Connor would vote; one can almost always do so with Justice Alito.

¹⁰⁰ See, e.g., *Hosie*, *supra* note 34, at 439–40.

¹⁰¹ See, e.g., Duncan Hosie, *If You Think Trump's Supreme Court Picks Were Bad, Take a Look at DeSantis' Choices*, CNN (June 27, 2023, at 13:19 ET), <https://www.cnn.com/2023/06/27/opinions/trump-supreme-court-justice-samuel-alito-thomas-desantis-hosie/index.html> [https://perma.cc/J4M8-5H4X].

¹⁰² See generally Lawrence W. Pierce, *Appellate Advocacy: Some Reflections From the Bench*, 61 *FORDHAM L. REV.* 829, 834 (1993) (commenting, as a late judge on the United States Court of Appeals for the Second Circuit, on the "persuasive" power of appellate advocacy); Owen M. Fiss, Comment, *Against Settlement*, 93 *YALE L.J.* 1073, 1077–78 (1984) (noting that "[r]esources influence the quality of [the lawyer's] presentation" but that "the guiding presence of the judge" can mediate this effect).

¹⁰³ This Article's focus is progressive cause lawyers at public interest groups that try to use impact litigation to shift the law in an ideological direction. While some of its analysis is relevant to other liberal lawyers whose practices intersect

continuing to advance “ideologically salient”¹⁰⁴ impact litigation before antipathetic federal courts, this approach calls for deliberate disengagement aimed at preserving resources, preventing adverse precedent, and participating in alternative forums for constitutional advancement. Decentering courts (and the Supreme Court in particular) as sources of relief and law, strategic restraint redirects progressive legal energies from establishing or expanding constitutional protections through the federal judiciary to preserving existing victories and developing constitutional meaning through alternate channels.

Veteran civil rights litigators have long recognized that “holding on to what they had” can be as noble and impactful a goal as “gaining new ground” through courts.¹⁰⁵ In so doing, they have situationally avoided bringing “certain cases” to the Supreme Court to deny it opportunities to “revisit decades-old decisions that tend to favor the liberal agenda.”¹⁰⁶ Resistance through restraint expands on this insight in response to current political and legal conditions, moving beyond ad hoc avoidance for a more systemic approach. Rather than selectively withholding individual cases that might produce adverse precedent, it calls for wholesale abandonment of initiating ideologically salient federal litigation except in rare, carefully circumscribed circumstances.

To implement this systemic disengagement, progressive advocates should resist the instinct to seek Supreme Court review of adverse circuit decisions absent compelling evidence that the Court’s median conservatives would rule differently. While this means accepting unjust decisions in some circuits,

with the Court, notably clinicians at law school Supreme Court clinics and federal and state appellate public defense lawyers, other lawyers face different ethical, practical, structural, and moral considerations not addressed in this Article. See Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 192–95 (2013).

¹⁰⁴ By “ideologically salient,” this Article refers to cases in which the conservative legal movement has coalesced around clear positions. These typically involve: (1) constitutional or statutory challenges that intersect with well-developed conservative jurisprudential commitments; (2) issues specifically identified as priorities by influential and legacy conservative legal intellectuals and organizations; (3) cases that align with broader Republican policy goals and cultural positions; and (4) matters where conservative judges have consistently ruled in a particular direction.

¹⁰⁵ Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2036 (2008).

¹⁰⁶ Joan Biskupic, Janet Roberts & John Shiffman, *The Echo Chamber*, REUTERS (Dec. 8, 2014, at 10:30 GMT), <https://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/LXV9-A8MB>].

it prevents or delays the nationwide constitutionalization of those unjust rules through Supreme Court affirmation—or worse, nationwide constitutionalization paired with rollbacks of existing protections. Determining whether an appeal falls into a narrow category of case warranting petitioning for certiorari requires close study of the substance of the decision with reference to the currents of the conservative legal movement, capitalizing on the fact that its judges are not “monolith[ic]” but rather represent “factions with different agendas, strategies, and levels of influence.”¹⁰⁷

Contrast Chief Judge Jeffrey Sutton, who authored the Sixth Circuit’s decision in *Skrmetti*,¹⁰⁸ with Judge James Ho of the Fifth Circuit. Both are Federalist Society members appointed by Republican presidents, following Supreme Court clerkships with conservative justices and service as Republican state solicitors general. Both are deeply conservative judges. Yet these similar pedigrees mask fundamentally different judicial tenets and relationships with the Supreme Court’s center-right nucleus.

Chief Judge Sutton stands as a comparative judicial minimalist with perceptible sway over the Court’s Republican center,¹⁰⁹ “feeding” it clerks¹¹⁰ and maintaining a close professional bond with Chief Justice Roberts.¹¹¹ The Court’s median conservatives affirm his opinions at remarkable rates, and

¹⁰⁷ Duncan Hosie, *How DeSantis Packed the Florida Supreme Court*, N.Y. REV. OF BOOKS (July 20, 2023), <https://www.nybooks.com/online/2023/07/20/how-desantis-packed-the-florida-supreme-court/> [<https://perma.cc/C2TU-5HJL>].

¹⁰⁸ *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), *aff’d sub nom.* *United States v. Skrmetti*, 145 S. Ct. 1816 (2025).

¹⁰⁹ See, e.g., Linda Greenhouse, *Never Before*, N.Y. TIMES: OPINIONATOR (Mar. 21, 2012, at 21:00 ET), <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2012/03/21/never-before/> [<https://perma.cc/8CYT-YBH2>] (noting that Chief Judge Sutton is a “star among a younger generation of Republican-appointed federal judges” whose opinions have “high visibility” and notability to the Court).

¹¹⁰ See, e.g., Howard M. Wasserman, *Academic Feeder Judges*, 105 JUDICATURE 61, 68 (2021) (finding Chief Judge Sutton to be one of the most prolific federal court judges in sending clerks to the Supreme Court).

¹¹¹ See, e.g., Grace Renshaw, *John Roberts Jr., Chief Justice of the United States, Visits VLS Sept. 10*, VAND. L. SCH. (Sep. 13, 2019, at 17:40 ET), <https://law.vanderbilt.edu/john-roberts-jr-chief-justice-of-the-united-states-visits-vls-sept-10/> [<https://perma.cc/7PC8-54L4>] (Chief Judge Sutton interviewing Chief Justice Roberts); *Chief Justice Roberts Names Ohio Judge to Judicial Conference Committee*, CT. NEWS OHIO (Oct. 23, 2012), https://www.courtnewsorio.gov/bench/2012/suttonPost_102312.asp [<https://perma.cc/2CRG-GVEY>] (Chief Justice Roberts appointing Chief Judge Sutton to an important judicial conference position).

Chief Justice Roberts¹¹² and Justices Kavanaugh¹¹³ and Barrett¹¹⁴ frequently cite him as authority.¹¹⁵ So do skilled advocates trying to persuade them; Tennessee's counsel repeatedly name dropping him during the *Skrmetti* oral argument, for example.¹¹⁶ Chief Judge Sutton's *Skrmetti* opinion, while grievously wrong in the eyes of the author of this Article, epitomizes the legal form that has garnered respect from the Court's center-right justices, faithfully applying *Dobbs* and principles of legal analysis they have articulated.¹¹⁷

In contrast, Judge Ho champions a more bellicose and provocative strand of legal conservatism aligned with a competing Federalist Society faction and increasingly with a distinct legal-MAGA world.¹¹⁸ The Court's center-right justices consistently reject his opinions for their right-wing adventurism, contributing to the Fifth Circuit's reversal rate, the highest of all circuits in recent years.¹¹⁹ Rather than invoke Judge Ho's name for authority, Chief Justice Roberts has scathingly criticized his

¹¹² See, e.g., *Elonis v. United States*, 575 U.S. 723, 738 (2015) (Roberts, C.J., citing Sutton, C.J.).

¹¹³ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (Kavanaugh, J., citing Sutton, C.J.).

¹¹⁴ See, e.g., Transcript of Oral Argument at 133–34, *NFIB v. OSHA*, 142 S. Ct. 661 (2022) (No. 21A244) (statement of Barrett, J.).

¹¹⁵ The Court's more conservative justices also regularly cite Chief Judge Sutton. See, e.g., *Pearson v. Callahan*, 555 U.S. 223, 236, 239 (2009) (Alito, J., citing Sutton, J.); *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 512–13, 515, 521 (2018) (Gorsuch, J., citing Sutton, J.); *Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 63, 67 (2011) (Thomas, J., citing Sutton, J.).

¹¹⁶ Transcript of Oral Argument at 139, 143, *United States v. Skrmetti*, 145 S. Ct. 1816 (2025) (No. 23-477) [hereinafter *Skrmetti* Oral Argument] (citations of J. Matthew Rice, Solicitor General of Tennessee).

¹¹⁷ *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 481–82 (6th Cir. 2023), *aff'd sub nom. United States v. Skrmetti*, 145 S. Ct. 1816 (2025).

¹¹⁸ See generally Hailey Fuchs & Daniel Barnes, *Inside the Split Between MAGA and the Federalist Society*, POLITICO (May 30, 2025, at 18:58 ET), <https://www.politico.com/news/2025/05/30/trump-federalist-society-leonard-leo-maga-00378303> [<https://perma.cc/8QPS-BD4C>] (describing the “conflict is openly breaking out among the constellation of conservative judicial leaders that used to operate alongside one another” at the start of Trump's second term).

¹¹⁹ See, e.g., Kelsey Reichmann, *Fifth Circuit a Testing Ground for Rightward Push at Supreme Court*, COURTHOUSE NEWS SERV. (July 11, 2024), <https://www.courthousenews.com/fifth-circuit-a-testing-ground-for-rightward-push-at-supreme-court/> [<https://perma.cc/M3T6-QZS8>] (summarizing the highest rate of reversal for O.T. 2023); Zach Schonfeld, *Supreme Court Pushes Back on 5th Circuit's Conservative Breeding Ground*, HILL (July 13, 2024, at 14:00 ET), <https://thehill.com/regulation/court-battles/4768521-supreme-court-conservative-5th-circuit/> [<https://perma.cc/68JF-7XTP>] (same for O.T. 2022).

logic.¹²⁰ Judge Ho's opinions can stylistically read like op-eds¹²¹ and substantively "start the Federal Judiciary down [an] uncharted path," to quote Justice Kavanaugh's reversal of one of them.¹²² This stark difference in judicial approach, philosophy, and reputation offers practical implications. Challenging Chief Judge Sutton's denial of progressive claims is almost certainly a doomed enterprise, while targeted appeals of Judge Ho's validation of conservative affirmative litigation might succeed.

More painfully, resistance through restraint requires progressive cause lawyers to adopt a strong presumption against initiating ideologically salient impact litigation at odds with the stated preferences of the Court's median conservative justices. While district courts face less ideological screening, appellate review constrains their latitude.¹²³ Victories before trial courts can prove pyrrhic when conservative appellate panels reverse them while articulating restrictive constitutional interpretations.¹²⁴ Liberal wins at appellate courts tee up conservative advocates to immediately seek certiorari, often from circuits that conservatives already view skeptically¹²⁵ after conservative appellate judges write dissenting opinions and dissents

¹²⁰ See, e.g., *United States v. Rahimi*, 144 S. Ct. 1889, 1903 & n.2 (2024) (stating "the error" of a Justice Ho-authored concurrence that "left the panel slaying a straw man").

¹²¹ See, e.g., *Ramirez v. Guadarrama*, 2 F.4th 506, 511 (5th Cir. 2021) (mem.) (Ho, J., concurring) (criticizing an alleged "woke Constitution").

¹²² *United States v. Texas*, 143 S. Ct. 1964, 1973 (2023).

¹²³ See Ryan J. Owens et al., *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 ILL. L. REV. 348, 381, 384 (comparing the "more routine district court nominations" with the role of "ideological considerations" in appellate nominations).

¹²⁴ See, e.g., *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1210 (11th Cir. 2023) (a panel of three Republican appointees reversing a preliminary injunction against Alabama's law banning transgender care for minors); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 609 (7th Cir. 2024) (a panel opinion of two Republican appointees vacating a district court's injunction against Indiana's law banning gender affirming care for minors); *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 464 (6th Cir. 2023) (a panel of two Republican appointees vacating a district court's preliminary injunction against Tennessee's law banning gender affirming care for minors), *aff'd sub nom. United States v. Skrmetti*, 145 S. Ct. 1816 (2025).

¹²⁵ See, e.g., Adam Liptak, *Trump Takes Aim at Appeals Court, Calling It a 'Disgrace'*, N.Y. TIMES (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/us/politics/trump-appeals-court-ninth-circuit.html> [<https://perma.cc/GQ2J-GVEW>]. This reputation of the Ninth Circuit as a liberal bastion is reductive, especially following Trump's appointments. See, e.g., Arthur D. Hellman, *Liberalism Triumphant? Ideology and the En Banc Process in the Ninth Circuit Court of Appeals*, 31 WM. & MARY BILL RTS. J. 1, 7 (2022) ("[T]he Ninth Circuit is a liberal court, but its liberalism is more nuanced and selective than the conventional depictions suggest.").

flagging individual cases that otherwise might escape scrutiny.¹²⁶ The Court's conservatives regularly draw from these dissents to write majority opinions, including multiple from Chief Judge Sutton.¹²⁷

In practice, this approach means avoiding court challenges to laws reflecting mainstream positions around which the conservative legal movement has coalesced—even ones liberals find odious. Take Tennessee's SB-1, the law at issue in *Skrametti* banning gender-affirming care for minors.¹²⁸ A top legislative priority for the state's Republican supermajorities, SB-1 passed with bipartisan support and mirrors legislation in twenty-three other states.¹²⁹ Polls show clear majorities of Americans, including eighty-two percent of Republicans, support such bans.¹³⁰ While this Article's author considers SB-1 to be unjust, it is unrealistic to expect Republican-appointed appellate judges to strike down a popular law by applying liberal interpretive frameworks.

Importantly, resistance through restraint is not synonymous with the total abandonment of federal litigation. Rather, it calls for careful husbanding of resources for defensive litigation in suits initiated by conservative movement actors where progressive advocates have no choice but to appear and contest conservative claims. It welcomes progressive impact litigators partnering with conservative groups in domains of shared agreement, initiating litigation in domains in which the conservative legal movement has not coalesced around clear positions or through interpretive frameworks credible to

¹²⁶ See, e.g., *United States v. Duarte*, 108 F.4th 786, 788 (9th Cir. 2024) (mem.) (VanDyke, J., dissenting from the grant of rehearing en banc) (Judge Lawrence VanDyke lambasting the Ninth Circuit as a lawless court where only "roughly two-fifths of our judges are interested in faithfully applying the totality of the Supreme Court's Second Amendment" and urging Supreme Court intervention).

¹²⁷ See, e.g., *NFIB v. OSHA*, 142 S. Ct. 661, 666–67, 670 (2022) (a per curiam opinion of the Court, joined by its conservative justices over the dissent of all liberal justices, that blocked the Biden Administration's vaccine mandate for large employers by adopting much of Chief Judge Sutton's dissent).

¹²⁸ TENN. CODE ANN. § 68-33-101(a) (2024).

¹²⁹ See, e.g., Amy Howe, *Supreme Court Appears Ready to Uphold Tennessee Ban on Youth Transgender Care*, SCOTUSBLOG (Dec. 4, 2024), <https://www.scotusblog.com/2024/12/supreme-court-appears-ready-to-uphold-tennessee-ban-on-youth-transgender-care/> [https://perma.cc/5D7S-TD6T].

¹³⁰ See TJ Martinell, *Poll: Majority of Voters Favor a Federal Ban on Transgender Procedures for Minors*, CTR. SQUARE (Oct. 13, 2024), https://www.thecentersquare.com/national/article_513f3242-8818-11ef-aba3-2b7497f57024.html [https://perma.cc/48KG-C8AQ].

conservative jurists as their own.¹³¹ Birthright citizenship under the Fourteenth Amendment is one contemporary example of a movement cleavage, with prominent voices like Professor John Yoo and constitutional litigator David Rivkin on one side of the debate and Judge Ho, consigliere to President Trump, on the other.¹³²

Even as progressive litigators recalibrate their role in initiating and appealing ideologically salient cases, they can employ a suite of proactive measures aimed at preventing potentially detrimental cases from reaching the highest echelons of the judiciary. Through robust monitoring and coordination systems to identify potentially problematic cases early in their life cycle, cause lawyers can intervene preventatively in cases not initiated by conservative movement actors. These tracking systems allow for alternative dispute resolution and informative conversations about larger stakes of individual cases before litigants file certiorari petitions and sometimes even before circuit splits arise.

When high-risk, ideologically salient cases reach the certiorari stage, progressive advocates should prioritize making them unsuitable for Supreme Court review. Briefs opposing certiorari that emphasize procedural defects, justiciability issues, and jurisdictional flaws are especially effective. A technical and vehicular focus avoids conveying the case's ideological valence or unintentionally raising its prominence. Following the practice of experienced Supreme Court advocates who regularly ghostwrite opposition briefs to avoid lending prestige and attention to cases,¹³³ liberal cause litigators should be willing to file briefs without attribution.

¹³¹ See, e.g., *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (a First Amendment case in which the ACLU represented the respondent and received amicus support from conservative public interest and religious rights organizations and Republican politicians).

¹³² Compare David Rivkin & John Yoo, *Op-Ed: Ignore Trump—the Issue of Birthright Citizenship Has Been Settled*, L.A. TIMES (Sep. 6, 2015, at 05:00 PT), <https://www.latimes.com/opinion/op-ed/la-oe-0906-rivkin-yoo-birthright-citizenship-20150906-story.html> [<https://perma.cc/R5C4-2YNR>] (arguing under constitutional text, structure and history, “anyone born on American territory, no matter their national origin, ethnicity or station in life, is a U.S. citizen”), with Josh Blackman, *An Interview with Judge James C. Ho*, 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/F6E8-R66E>] (Judge Ho stating “birthright citizenship obviously doesn’t apply in case of war or invasion”).

¹³³ See, e.g., Lydia Wheeler, *Ghostwriters Try Steering Supreme Court Justices Away from Cases*, BLOOMBERG L. (May 16, 2024, at 6:04 ET), <https://news.bloomberglaw.com/us-law-week/ghostwriters-try-steering-supreme-court-justices-away-from-cases> [<https://perma.cc/A9MA-5E4A>].

If the Court grants review despite these efforts, advocates should double down on making the controversy vanish—an approach this article calls “proactive evasion.” With some regularity, business groups have used post-certiorari and even post-argument mootng and settlements to avoid Court adjudication of cases that could set harmful national precedents.¹³⁴ With less frequency, and in part likely a reflection of fewer financial resources, cause lawyers have emulated their tactics, settling cases following certiorari grants that they anticipated could set back existing law.¹³⁵ While critics and even justices may characterize these maneuvers as gamesmanship¹³⁶ and wastes of judicial economy,¹³⁷ cause lawyers should view them

¹³⁴ Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1541 & n.209 (2008). This maneuvering is especially remarkable considering the Roberts Court’s extraordinary solicitude of corporate interests. *See generally* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1451–54, 1472 (2013).

¹³⁵ After the Supreme Court granted certiorari in a major libel case, see *Wilson v. Scripps-Howard Broad. Co.*, 454 U.S. 962 (1981) (mem.), First Amendment litigators settled the case to “avoid giving the justices a chance to cut back on press protections” given their “conscious agenda.” Fred Barbash, *Key Libel Case Under Review Settled Out of Court*, WASH. POST (Dec. 19, 1981), <https://www.washingtonpost.com/archive/politics/1981/12/19/key-libel-case-under-review-settled-out-of-court/4ea16d29-86e3-4da7-8c17-6cc9497fd843/> [<https://perma.cc/Z99V-C67Q>]; *see also id.* (stating that First Amendment lawyers “along with civil liberties and civil rights attorneys” believed “the further away they can keep the justices the better” and that “it is better to absorb the costs of a settlement than risk a ruling that could damage libel defendants throughout the country”); *see also infra* notes 201–03 and accompanying text (discussing the strategic mootng of *N.Y. State Rifle & Pistol Ass’n v. City of New York*); *infra* notes 188–196 (discussing the strategic mootng of multiple affirmative action cases by civil rights litigators); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 667–68 (2015) (noting strategic settlements of disparate-impact claims following *Ricci v. DeStefano*, 557 U.S. 557 (2009)).

¹³⁶ *See, e.g., N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Alito, J., dissenting) (per curiam) (“By incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced.”); Hans A. von Spakovsky, *Last-Minute Settlement Saves ‘Disparate Impact’ – Again*, HERITAGE FOUND. (Nov. 1, 2013), <https://www.heritage.org/commentary/last-minute-settlement-saves-disparate-impact-again> [<https://perma.cc/ZKY7-2KYF>] (a conservative legal commentator decrying settlements that “deprive[d] the Supreme Court of a chance to rule on the constitutionality of disparate impact” under the Fair Housing Act).

¹³⁷ *See, e.g., Honig v. Doe*, 484 U.S. 305, 330, 332 (1988) (Rehnquist, C.J., concurring) (arguing for “relaxing the test of mootness where the events giving rise to the claim of mootness have occurred after our decision to grant certiorari or to note probable jurisdiction” to conserve the Court’s “unique resources”); *Friends of the Earth, Inc. v. Laidlaw Env’t Servs., Inc.*, 528 U.S. 167, 170–71, 191–92 (2000) (Justice Ginsburg, for the Court, citing *Honig* and arguing that “by the time

as pragmatic responses to the grave perils of the current judicial climate.¹³⁸ Of note, the conservative justices themselves regularly engage in procedural “manipulation” to advance their own policy goals, from deciding sweeping questions entirely different from the ones presented by parties¹³⁹ to contorting standing doctrine.¹⁴⁰ What’s good for the goose is good for the gander.

Most importantly, progressive actors can redouble efforts elsewhere even as they withdraw from initiating litigation, attending to popular mobilization rather than judicial validation.¹⁴¹ These alternative forums not only provide vehicles for securing concrete victories but help maintain progressive constitutional discourse vibrant during periods of federal court antipathy.

C. Principles from Cause Lawyering Antecedents

By locating resistance through restraint within historical litigation ecology, subpart II.C summons varied social reform history to address the current challenges facing progressive litigators. These roots are deep. Starting in the 1880s and throughout the Progressive era, social reform movements maneuvered

mootness is an issue” before the Court that the case has been litigated for “years” and “[t]o abandon [a] case at an advanced stage” accordingly “may prove more wasteful than frugal”).

¹³⁸ Strategic mooting by public interest groups raises different considerations than strategic mooting by governments, particularly given immunity from damages. See generally Joseph C. Davis & Nicholas R. Reaves, *The Point Isn’t Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J.F. 325, 341 (2019).

¹³⁹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 396 (2010) (Stevens, J., concurring in part) (noting that the conservative justices decided “this case on a basis relinquished below, not included in the questions presented to us by the litigants” and that their “suggestion that ‘we are asked to reconsider *Austin* and, in effect, *McConnell*,’ . . . would be more accurate if rephrased to state that ‘we have asked ourselves’ to reconsider those cases”); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2310–11 (2022) (Roberts, C.J., concurring in the judgment) (objecting to his conservative colleague straying from the “one question” on which the Court granted certiorari to instead write a “dramatic and consequential ruling”).

¹⁴⁰ See, e.g., *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2225 (2021) (Kagan, J., dissenting) (arguing that the Court’s conservatives “transform[ed] standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement” to further its policy goals).

¹⁴¹ Rhode, *supra* note 105, at 2046 (noting a reduction in “filing lawsuits” can be rechanneled to other avenues that build “effective social change”); see also Post & Siegel, *supra* note 31, at 374 (listing channels of “traditions of popular engagement that authorize citizens to make claims about the Constitution’s meaning and to oppose their government”).

to shield their legislative achievements from Court review.¹⁴² Pre-New Deal lawyers similarly strategized to preserve “class-based policy reform from the punitive gaze of judicial review, exercised by a Supreme Court solicitous of corporate power.”¹⁴³ Drawing on this larger tradition, subpart II.C synthesizes five symbiotic principles undergirding resistance through restraint: proactive evasion, regional containment, strategic delay, incremental and percolative change, and the preservation of alternative constitutional futures. For each principle, it provides a movement-specific example to demonstrate resistance through restraint’s versatility across different contexts, time periods, and substantive areas of the law.

1. *Proactive Evasion*

Rather than passively accepting adverse precedent or pressing futile claims, proactive evasion calls for the development of sophisticated strategies to keep merits cases away from the Court. By leveraging procedural devices, strategic settlements, and coordinated state-level actions to moot potentially damaging cases, proactive evasion turns jurisdictional barriers and procedural rules from passive constraints into instruments of movement strategy.

Proactive evasion finds inspiration in the efforts of disability rights lawyers, who have deployed it with admirable skill over the past three decades.¹⁴⁴ Faced with the Rehnquist Court’s series of rulings that weakened, if not outright “deconstruct[ed],”¹⁴⁵ the Americans with Disabilities Act (ADA),¹⁴⁶ disability rights movement lawyers crafted a deliberate strategy to keep cases away from the Court and to take cases away from

¹⁴² See generally EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA* 14–15, 20–26 (2000).

¹⁴³ Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1566 (2017).

¹⁴⁴ See Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1676–77 (2010) (discussing an “important but less noticed contribution by disability rights cause lawyers involves their efforts to prevent cases from being heard by the [hostile Rehnquist] Court”).

¹⁴⁵ Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1287 (2003). For a similar perspective on judicial undermining of the ADA, see Linda Hamilton Krieger, *Foreword—Backlash Against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKELEY J. EMP. & LAB. L. 1, 6–9 (2000).

¹⁴⁶ 42 U.S.C. §§ 12101–12213.

it once certiorari had been granted.¹⁴⁷ By embracing “creative” methods—such as “prevail[ing]” on Democratic governors to use their administrative authority to moot cases post-certiorari and settling cases with “marginal fact patterns”—they have reduced the number of merits disability rights cases heard by the Roberts Court despite conservative movement efforts to leverage federal courts against the law and other movement interests.¹⁴⁸ Through proactive evasion, these cause lawyers have transformed what might have been a period of marked judicial retrenchment into one of relative doctrinal stability.¹⁴⁹

Even when the Roberts Court has granted certiorari in cases that could cut back disability rights, cause lawyers have savvily moved to elude merits review. Consider the procedural history of *Acheson Hotels v. Laufer*, one of the most recent disability rights cases decided by the Court.¹⁵⁰ In the fall of 2022, business groups filed a certiorari petition arguing civil rights testers under the ADA lacked Article III standing to challenge a public accommodation’s failure to provide accessibility information on its website.¹⁵¹ The Court granted certiorari on March 27, 2023,¹⁵² and the petitioner filed its opening brief roughly two months later.¹⁵³ On July 20, 2023, Deborah Laufer, the respondent and a civil rights tester, dismissed her case in the district court, voluntarily and with prejudice.¹⁵⁴ The next day, she filed a suggestion for mootness in the Supreme Court, noting that she had abandoned her claims and asking for the Court to vacate the underlying judgment and remand with instructions to dismiss.¹⁵⁵

This strategic suggestion of mootness changed the entire course of litigation. When Laufer filed her response brief on August 2, she repeated her argument that her claims were now moot and asked the Court to “simply vacate the judgment

¹⁴⁷ Stein, Waterstone & Wilkins, *supra* note 144, at 1676–77.

¹⁴⁸ *Id.*

¹⁴⁹ See generally Samuel R. Bagenstos, *The ADA and the Supreme Court: A Mixed Record*, 313 J. AM. MED. ASSOC. 2217, 2217 (2015).

¹⁵⁰ At the time of writing, the Court had not decided *Stanley v. City of Sanford*, which was argued on January 13, 2025. See 145 S. Ct. 2058 (2025).

¹⁵¹ Petition for Writ of Certiorari at 5, *Acheson Hotels v. Laufer*, 144 S. Ct. 18 (2023) (No. 22-429).

¹⁵² *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023) (mem.).

¹⁵³ Brief of Petitioner, *Acheson Hotels*, 144 S. Ct. 18 (No. 22-429), 2023 WL 390383.

¹⁵⁴ Notice of Voluntary Dismissal, *Laufer v. Acheson Hotels, LLC*, No. 20-cv-00344-GZS, 2021 WL 1993555 (D. Me. May 18, 2020), Dkt. No. 45.

¹⁵⁵ Suggestion of Mootness at 1, *Acheson Hotels*, 144 S. Ct. 18 (No. 22-429).

below on mootness grounds without addressing [the business]'s standing challenge.”¹⁵⁶ The following week, Laufer’s amicus supporters filed their briefs, amplifying her mootness argument.¹⁵⁷ At oral argument, mootness took center stage, from the first question asked by a justice¹⁵⁸ to the final moments of the petitioner’s rebuttal.¹⁵⁹ Every justice save Justice Gorsuch asked about mootness; many justices did so multiple times.¹⁶⁰

When the Court granted certiorari in *Acheson Hotels*, disability rights advocates and liberal legal scholars warned of an ideologically split ruling in favor of the business, potentially written in a way that would weaken civil rights for people with disabilities and even those of other groups protected by civil rights statutes.¹⁶¹ Instead, all justices joined Justice Barrett’s narrow opinion declaring the case moot or concurred in that judgment.¹⁶² The interjection of mootness shifted the case from what Chief Justice Roberts called at oral argument the “easy”

¹⁵⁶ Brief of Respondent at 2–3, *Acheson Hotels*, 144 S. Ct. 18 (No. 22-429); cf. Suggestion of Mootness at 4–5, *Little v. Hecox* (Sep. 2, 2025) (No. 24-38) (unsuccessfully attempting the same strategy).

¹⁵⁷ See, e.g., Brief for Amici Curiae Disability Rights Education & Defense Fund et al. in Support of Respondents at 35, *Acheson Hotels*, 144 S. Ct. 18 (No. 22-429) (“Amici agree . . . that the Court should dismiss this case as moot.”).

¹⁵⁸ Transcript of Oral Argument at 4, *Acheson Hotels*, 144 S. Ct. 18 (No. 22-429) [hereinafter *Acheson Hotels* Oral Argument] (statement of Thomas, J.) (“Respondent says that she has withdrawn her suits. So why should we decide this? . . . [I]t seems as though it’s finished.”).

¹⁵⁹ *Id.* at 102 (statement of Adam Unikowsky, counsel of record for the petitioner).

¹⁶⁰ *Id.* at 4, 5 (statement of Justice Thomas); *id.* at 6–8 (statement of Justice Sotomayor); *id.* at 8, 12–13 (statement of Chief Justice Roberts); *id.* at 9–11 (statement of Justice Jackson); *id.* at 14–16 (statement of Justice Barrett); *id.* at 16–17 (statement of Justice Alito); *id.* at 18–19 (statement of Justice Kagan); *id.* at 48 (statement of Justice Kavanaugh).

¹⁶¹ See, e.g., Sara Luterman, *The 19th Explains: The Supreme Court Case That Could Gut the Americans with Disabilities Act*, THE 19TH NEWS (Oct. 2, 2023, at 9:00 ET), <https://19thnews.org/2023/10/supreme-court-acheson-laufer-americans-with-disabilities-act/> [https://perma.cc/3L98-L75Y] (commenting on the danger *Acheson Hotels* posed to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which held a Black tester had standing to sue under Section 804 of the Fair Housing Act of 1968, 42 U.S.C. § 3604); Duncan Hosie & Susan Mizner, *Supreme Court Shouldn’t Stop Testers Enforcing Disability Rights*, BLOOMBERG (Oct. 5, 2023, at 10:43 ET), <https://news.bloomberglaw.com/us-law-week/supreme-court-shouldnt-stop-testers-enforcing-disability-rights> [https://perma.cc/T57P-CBCT] (summarizing stakes of the case).

¹⁶² *Acheson Hotels*, 144 S. Ct. at 22 (“Laufer’s case against Acheson is moot, and we dismiss it on that ground.”).

standing question unfavorable to disability rights to a robust justiciable argument favorable to it.¹⁶³

To be sure, conservative justices indicated frustration in *Acheson Hotels* with the shrewd cause lawyering that thwarted a vehicle for their pro-business jurisprudential goals. With palpable irritation, Chief Justice Roberts complained at oral argument that Laufer's "mootness papers weren't filed until after the petitioner's opening brief" and criticized an ostensible "manipulation of this Court's jurisdiction;"¹⁶⁴ Justice Thomas's concurrence bemoaned "Laufer's transparent tactic for evading our review."¹⁶⁵ But ADA testing lived to see another day.

By actively working to deny the Court opportunities for constitutional and statutory interpretation, disability rights lawyers have effectively transformed procedural and jurisdictional mechanisms from mere technical requirements into instruments of movement strategy. Their inversion—using rules designed to limit court access as shields against judicial review—reimagines traditional impact litigation practice, in which public interest organizations have historically fought against restrictive justiciability and conservative justices have imposed them to tame the remit of public interest organizations.¹⁶⁶ This theoretical reorientation demonstrates that movement lawyers can exercise meaningful agency within a forbidding judicial framework by moving from seeking expanded review to constructing its absence.

2. *Regional Containment*

Regional containment reflects a core insight of resistance through restraint: progressive cause lawyers must limit their engagement with a hostile federal judiciary to prevent the nationwide constitutionalization of conservative doctrine and the creation of catalyzing legal symbols and prototypes that inspire reactionary political actors.¹⁶⁷ Rather than viewing circuit court

¹⁶³ *Acheson Hotels* Oral Argument, *supra* note 158, at 12 (statement of Roberts, C.J.).

¹⁶⁴ *Id.* at 12–13, 45.

¹⁶⁵ *Acheson Hotels*, 144 S. Ct. at 24 (Thomas, J., concurring in the judgment) ("[W]e have needlessly invited litigants to follow Laufer's path to manipulate our docket.").

¹⁶⁶ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 565–66 (1992) (the Court tightening standing requirements by rejecting a public interest organization's broad "ecosystem nexus" theory).

¹⁶⁷ See, e.g., *Hosie*, *supra* note 5, at 1396–98 (analyzing how the Supreme Court's shadow docket order in *Whole Woman's Health v. Jackson*, 141 S. Ct.

losses as failures demanding Supreme Court intervention, this approach recognizes them as structural mechanisms of damage control.

Though formally equal, the federal circuits diverge across dimensions critical to litigation strategy: in substantive case composition and workload; in ideological composition and bodies of circuit precedent; in ideological alignment or divergence with the jurisdictions they bind; in informal reputational relationships with the Supreme Court; in jurisprudential influence and institutional pedigree; in judicial collegiality and culture; and, perhaps most significantly, in coverage of population—the First Circuit binds just eleven million people, while the Ninth covers nearly seventy million¹⁶⁸—and other geographic, economic, and demographic contexts. Understanding these variations enables cause lawyers to leverage the federal judiciary's hierarchical structure and geographic fragmentation to preserve constitutional space for alternative constitutional visions.

In addition to their varying forms of coverage, Supreme Court and circuit court opinions emerge from distinct decision-making processes and norms. Since the Judiciary Act of 1925 transformed the Supreme Court's docket, the federal circuits have functioned as the “court[s] of last resort,” resolving concrete disputes between parties through careful attention to factual records and precedential dicta.¹⁶⁹ The Supreme Court, in contrast, operates closer to a “ministry of justice,” concerned less with individual dispute resolution than with articulating broad legal principles of federal law.¹⁷⁰ For a cause lawyer, an adverse circuit opinion, anchored in specific facts, errors of the district court, and precedential circuit constraints, offers less risk than an adverse Supreme Court ruling, which can freely

2494, 2495 (2021) (mem.), validated an unusual anti-abortion statute, inspiring other states to enact similar legislation).

¹⁶⁸ See Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1212 (2022). Given population growth in certain states since the 2020 Census, the divergence between the three most populous circuits (Fifth, Ninth, and Eleventh) is likely more pronounced today.

¹⁶⁹ See generally Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1273–75 (2001) [hereinafter Post, *The Supreme Court Opinion as Institutional Practice*] (quoting Gregory Hankin, *U.S. Supreme Court Under New Act*, 12 J. AM. JUDICATURE Soc'y 40, 40 (1928)); accord ROBERT C. POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930*, at 476–501 (2023).

¹⁷⁰ Post, *The Supreme Court Opinion as Institutional Practice*, *supra* note 169, at 1274.

overturn precedent and flout limiting principles.¹⁷¹ Indeed, the very act of granting certiorari connotes a possibility of changing the law.¹⁷²

Circuit containment strategies have historical precedent in progressive cause lawyering. As the Burger Court's conservative turn became apparent in the 1970s, liberal lawyers pivoted to crafting affirmative cases in federal circuits where success seemed likely and Supreme Court review seemed improbable.¹⁷³ Drawing from this history, this Article examines a more recent example of abortion rights litigators strategically avoiding Supreme Court review to preserve reproductive rights in the pre-Trump era.¹⁷⁴

In the 2012 case of *Planned Parenthood Minnesota v. Rounds*, the Eighth Circuit, sitting en banc, upheld the constitutionality of a South Dakota statutory provision requiring abortion providers to tell women seeking abortions that the procedure causes an "[i]ncreased risk of suicide ideation and suicide."¹⁷⁵ South Dakota failed to offer scientific evidence for this inflammatory contention,¹⁷⁶ which the leading medical authorities emphatically rejected.¹⁷⁷ By requiring health care providers to affirm this dubious and demeaning proviso, the law disregarded *Casey's* requirement that enactments like South Dakota's be "calculated to inform [a] woman's free choice" to

¹⁷¹ See Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 153–54 (2011).

¹⁷² See SUP. CT. R. 10 (petitions are "granted only for compelling reasons" and not to rectify "erroneous factual findings or the misapplication of a properly stated rule of law").

¹⁷³ See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1676.

¹⁷⁴ See, e.g., Linda Greenhouse, *The Illusion of a Liberal Supreme Court*, N.Y. TIMES (July 9, 2015), <https://www.nytimes.com/2015/07/09/opinion/the-illusion-of-a-liberal-supreme-court.html> [<https://perma.cc/SHQ9-JRZQ>] ("[A]bortion rights groups have passed up numerous opportunities to bring cases to the Supreme Court, not willing to risk turning an unfavorable lower court decision into a devastating national rule.").

¹⁷⁵ 686 F.3d 889, 893–94 (8th Cir. 2012) (en banc) (quoting S.D. CODIFIED LAWS §§ 34-23A-10.1(1)(e)(i)–(ii)).

¹⁷⁶ *Id.* at 908–12 (Murphy, J., dissenting) (surveying the evidence in the record, including "volumes of deposition testimony, published medical research, and legislative reports").

¹⁷⁷ *Planned Parenthood Minn. v. Rounds*, 650 F. Supp. 2d 972, 983 (D.S.D. 2009), *rev'd en banc*, 686 F.3d 889 (8th Cir. 2012).

terminate a pregnancy rather than “hinder it.”¹⁷⁸ The law—like others South Dakota enacted based on “suspect science”¹⁷⁹—sought to thwart this autonomy.¹⁸⁰

Abortion rights litigators had extremely compelling reasons to seek certiorari of the decision, which they characterized as “the greatest intrusion by the government into the patient-doctor relationship to date.”¹⁸¹ In failing to apply the applicable legal standard, *Rounds* attacked the legitimacy of reputable medical knowledge and disrespected women’s self-determination and interests in accurate information.¹⁸² It is also plausible that the Court could have granted certiorari in *Rounds*, especially with related issues percolating in other circuits and states,¹⁸³ the novelty and extremism of South Dakota’s mandate,¹⁸⁴ and the relationship of *Rounds* to the Court’s post-*Gonzales v. Carhart*¹⁸⁵ abortion jurisprudence.

Yet they wisely chose not to seek certiorari. At the time, the Court was visibly retreating from its abortion precedents, with Justice Alito’s replacement of Justice O’Connor altering

¹⁷⁸ *Rounds*, 686 F.3d at 906 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

¹⁷⁹ See Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1680 (2008).

¹⁸⁰ Katherine Shaw & Alex Stein, *Abortion, Informed Consent and Regulatory Spillover*, 92 IND. L.J. 1, 41 (2016) (noting the law “may dissuade women from electing abortions they have determined are in their best interests” and may “make postabortion depression more likely”).

¹⁸¹ David Bailey, *Appeals Court Upholds South Dakota Abortion Law’s Suicide Advisory*, REUTERS (July 24, 2012, at 17:26 ET), <https://www.reuters.com/article/business/healthcare-pharmaceuticals/appeals-court-upholds-south-dakota-abortion-laws-suicide-advisory-idUSBRE86N1DN/> [<https://perma.cc/4DNS-2XWT>].

¹⁸² See generally Ari Ezra Waldman, *Manufacturing Uncertainty in Constitutional Law*, 91 FORDHAM L. REV. 2249, 2265–66 (2023) (analyzing *Rounds*); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 971, 989 (characterizing the relevant statutory sections as “conscript[ing] the speech of physicians in order to communicate propositions that, from the perspective of the medical profession, are false” and constituting “an egregious effort to undermine the integrity of independent medical expertise”).

¹⁸³ See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 572–73 (5th Cir. 2012) (upholding Texas requirements that abortion providers display and describe the fetus before providing the service); *N.C. GEN. STAT. § 90-21.85(a)* (2026) (a North Carolina law mandating a similar display and describe requirement).

¹⁸⁴ See generally Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1326–32 (2014).

¹⁸⁵ 550 U.S. 124 (2007).

the working majority on the issue.¹⁸⁶ This shift was especially evident in *Gonzales*, in which the Court effectively overturned *Stenberg v. Carhart*¹⁸⁷ along ideological lines to uphold the Partial-Birth Abortion Ban Act of 2003.¹⁸⁸ As Justice Ruth Bader Ginsburg noted in dissent, *Gonzales*'s substance was "alarming" in its refusal to take *Casey* "seriously" and demonstrated the raw power of a "differently composed" Court.¹⁸⁹

Confining *Rounds* to the Eighth Circuit—among the least populous of the numbered federal courts of appeal¹⁹⁰—denied the "differently composed" Court an opportunity to cut back on *Casey* nationwide and extend *Gonzales*'s troubling doctrinal evolution any further. The de facto harm of South Dakota's law paled in comparison to a potential Supreme Court's narrowing of *Casey*. South Dakota only had one abortion clinic; the state borders Minnesota, which has clinics aimed at serving women from the Dakotas operating free from mandated incantation of false ideological speech in medical care.¹⁹¹ While callous and empirically vacuous, South Dakota's law did not shut down the state's sole clinic, unlike the enactment of other targeted regulation of abortion providers (TRAP) laws from the same era that succeeded in closing clinics.¹⁹²

In not seeking certiorari, abortion rights advocates also denied the conservative legal movement an opportunity to transform *Rounds* from a cabined regional decision into a binding national precedent and a policy paradigm for other states looking to restrict abortion. The spotlight of argument at the nation's highest court and the likely judicial endorsement of South Dakota's law risked recasting it—a meddlesome intrusion but ultimately an "outlier"¹⁹³—into an exemplar for the

¹⁸⁶ See Linda Greenhouse, *Justices Back Ban on Method of Abortion*, N.Y. TIMES (Apr. 19, 2007), <https://www.nytimes.com/2007/04/19/washington/19scotus.html> [https://perma.cc/STE7-AFCM].

¹⁸⁷ 530 U.S. 914 (2000).

¹⁸⁸ 18 U.S.C. § 1531.

¹⁸⁹ *Gonzales*, 550 U.S. at 170, 191 (Ginsburg, J., dissenting).

¹⁹⁰ See McAlister, *supra* note 168, at 1212.

¹⁹¹ See K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access Is Out of Reach*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html> [https://perma.cc/NU8T-ZTVB].

¹⁹² See generally Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1432 (2016) (defining and contextualizing TRAP laws).

¹⁹³ See Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1336 (2009) (characterizing South Dakota's law as an "outlier" TRAP law); see also Post, *supra* note 182, at 940

dozens of states that wanted more restrictive abortion laws, with the Court's endorsement reducing uncertainty about legality and therefore lowering the legislative costs of pursuing enactment.¹⁹⁴

Because of the abortion rights lawyers' forbearance, conservative movement litigators had to devote resources to creating a vehicle and convincing the Court to take it. They eventually did so six years later, when the Court held in *NIFLA v. Becerra* that a California law requiring crisis pregnancy centers to disclose accurate information about family planning services, contraception, and abortion violated the First Amendment.¹⁹⁵ Substantively and stylistically, *NIFLA* mirrored *Rounds*: conceptually confused, contemptuous of *Casey*, credulous in its embrace of the anti-abortion movement's contested medical claims, discordant with First Amendment principles, split along ideological lines, and transparent in its results-oriented reasoning.¹⁹⁶ As Erwin Chemerinsky and Michele Goodwin tartly put it, *NIFLA* was "constitutional gerrymandering" imposed by "five conservative, male judges exercising their hostility toward reproductive rights."¹⁹⁷ While abortion rights litigators could not forestall this gerrymandering forever, their strategic restraint in *Rounds* shifted power in this hostile judicial architecture from five men to themselves.

3. Delay

Delay of adverse Supreme Court rulings, even when such rulings appear inevitable, is itself a concrete victory. For progressive litigators, each year delaying *Casey*'s overturning meant thousands of women retained and exercised bodily autonomy; each year without erosion of the statutory voting rights protections enabled broader democratic participation; each year without a prohibition on affirmative action allowed

(characterizing South Dakota's suicide proviso as an especially extreme measure in the "abortion wars").

¹⁹⁴ See generally Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2205–06, 2209 (2022) (discussing the mediating role of conservative institutions in promoting state legislative model bills, especially that of the American Legislative Exchange Council).

¹⁹⁵ Nat'l Inst. of Fam. & Life Advocs. v. *Becerra* (*NIFLA*), 585 U.S. 755, 766–80 (2018).

¹⁹⁶ See, e.g., *id.* at 788–94 (Breyer, J., dissenting) (objecting to *NIFLA* on many of these grounds).

¹⁹⁷ Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 95 (2019).

a cohort of students to matriculate at and diversify universities.¹⁹⁸ These tangible benefits represent real victories independent of eventual judicial outcomes.

Delay of adverse Supreme Court rulings also serves critical tactical purposes. Judicial foreclosure can buttress harmful policies and stifle social and political resistance. As Bickel noted, Supreme Court opinions have “radiating consequences” that structure the contours of constitutional and political discourse.¹⁹⁹ Its “prestige, the spell it casts as a symbol, enable[s] it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution.”²⁰⁰ His observation illuminates a critical danger of Supreme Court review suppressing social and political reform, calcifying bad law, and emboldening other political institutions to pursue more bad law.²⁰¹

Conversely, the interregnum created by delay can allow advocates to build public support for constitutional positions and develop narratives that shift the supposedly predestined contours of doctrinal development.²⁰² Such groundwork can

¹⁹⁸ In the 1990s, civil rights litigators worked to “keep affirmative action cases away from the Supreme Court in fear of an adverse ruling from the conservative court.” *Civil Rights Groups Avoid Taking Cases to Supreme Court*, JET, Mar. 22, 1999, at 38 (discussing efforts to prevent Supreme Court review of *Wessmann v. Gittens*, 160 F.3d 790 (1st Cir. 1998)); see also EDWARD DRACHMAN & ROBERT LANGRAN, YOU DECIDE!: CONTROVERSIAL CASES IN AMERICAN POLITICS 58 (2d ed. 2007) (“The Boston School Committee [in *Wessmann*] at first planned to appeal the ruling to the Supreme Court . . . however, the school committee, fearing a negative decision and the nationwide impact this would have . . . unanimously decided not to appeal.”); Linda Greenhouse, *Affirmative Action Settlement: The Overview; Settlement Ends High Court Case on Preferences: Tactical Retreat*, N.Y. TIMES (Nov. 22, 1997), <https://www.nytimes.com/1997/11/22/nyregion/affirmative-action-settlement-overview-settlement-ends-high-court-case.html> [<https://perma.cc/7A6H-UH2B>] (discussing steps taken by a “coalition of leading civil rights groups, not directly involved in [*Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996)] but increasingly concerned that a broadly worded Supreme Court decision could prove disastrous for affirmative action, agree[ing] to provide the major share of a \$433,500 settlement”).

¹⁹⁹ Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 56 (1961).

²⁰⁰ *Id.* at 48.

²⁰¹ See *infra* notes 289–298 and accompanying text (discussing *Crawford*’s emboldening of Republican state lawmakers to pursue burdensome franchise restrictions).

²⁰² Richard Lazarus provides a fascinating example of this effect in *Upper Pecos Ass’n v. Peterson*, 452 F.2d 1233 (10th Cir. 1971), *petition for cert. filed*, 40 U.S.L.W. 3434 (U.S. Mar. 6, 1972) (No. 71-1133), *vacated*, 409 U.S. 1021 (1972) (mem.). In the first National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370m-12, case on which the Court granted certiorari, the federal government “conceded the case away,” avoiding a “likely” and significant loss that

potentially constrain the Court's options and the breadth of its decision when it ultimately acts. In addition, interregnal space can be "democracy-forcing" or at least "democracy-permitting," opening the possibility for democratic deliberation among political institutions and broader society.²⁰³ Governments can enact anticipatory legislation; social movements can establish civil systems aimed at future mitigation, from legal defense funds to advocacy networks to alternative service providers to educative campaigns.²⁰⁴ These potential intercessions transform what might otherwise be damaging surprise into productive preparation.²⁰⁵ Because of the volatility and randomness of the certiorari process, periods of productive preparation can last much longer than expected.²⁰⁶

The gun control movement's sophisticated constitutional litigation strategy in *New York State Rifle & Pistol Ass'n v. City of New York* (NYSRPA) provides a rich example of the possibilities created by calculated delay.²⁰⁷ In the decade after *District*

"could have changed the history of NEPA" with an adverse baseline precedent for all subsequent Court cases. Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231, 245.

²⁰³ See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7, 9, 24–25, 38 (1996) (commenting on the "constructive uses of silence" (emphasis omitted) in constitutional adjudication, including the "democracy-forcing" nature of judicial minimalism).

²⁰⁴ The interregnum between *Friedrichs v. Cal. Tchrs. Ass'n*, 578 U.S. 1 (2016) (mem.) (per curiam), and *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878 (2018), which was created when Justice Scalia's death led the Court to deadlock on the First Amendment question in the former case, is a rich example of delay allowing for anticipatory political and popular mobilization. See Hosie, *supra* note 34, at 425–29 (discussing legislative and political organizing made possible by this interim period).

²⁰⁵ See Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1236 (2017) (noting that the Court's minimalism can "put stakeholders on notice that a substantial change in the law is coming, thereby reducing reliance interests in a gradual way").

²⁰⁶ When civil rights lawyers navigated to moot *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996), there was an expectation that the Court would hear an adverse affirmative action case imminently. See Greenhouse, *supra* note 198 ("Another affirmative action case, any of several now in the pipeline, is certain to reach the Court soon . . . [O]ther cases are bound to reach the Court soon."). In fact, it took five years for the Court to decide the next major affirmative action case, which dealt with a much narrower issue of race in university admissions. See *Grutter v. Bollinger*, 539 U.S. 306 (2003). It took twelve years to hear a more analogous case involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e–17, see *Ricci v. DeStefano*, 557 U.S. 557 (2009), and twenty-six years for the Court to ban affirmative action at colleges and universities, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

²⁰⁷ 140 S. Ct. 1525 (2020) (per curiam).

of *Columbia v. Heller*²⁰⁸ and *McDonald v. City of Chicago*,²⁰⁹ the Supreme Court rejected nearly every Second Amendment certiorari petition,²¹⁰ effectively outsourcing explication of these cases' expansive but vague proclamations to lower courts. President Trump's nomination of Justice Kavanaugh in October 2018 shifted this equilibrium. Three months after he joined the Court, the Court granted certiorari in *NYSRPA*,²¹¹ which conservative litigants hoped would build on *Heller* to establish new Second Amendment rights.

That spring—in a conscious and calculated endeavor to deny a reconstituted Court authority to hear *NYSRPA*—New York City repealed the challenged provision, a gun transport regulation that had relatively minor practical implications for public safety, and then promptly moved to moot the case.²¹² After argument and full briefing, the Court dismissed the case, over the biting dissent of Justice Alito, joined in key substantive parts by Justices Thomas and Gorsuch, arguing that lower federal courts and liberal jurisdictions had been ignoring *Heller* and *McDonald*.²¹³ The Court's unsigned order did not address Justice Alito's constitutional argument, denying a substantive win to gun rights advocates. Instead, it extracted a toll from them, who now had to create another vehicle to press their constitutional claims.

While gun rights advocates ultimately succeeded in this project in *New York State Rifle & Pistol Ass'n v. Bruen* (*Bruen*),²¹⁴ the nearly eight-hundred-day period between the adjudication of the two cases proved useful to their opponents. For over two years, around eighty-five million Americans continued to live under “may issue” systems for concealed carry permitting.²¹⁵

²⁰⁸ 554 U.S. 570 (2008).

²⁰⁹ 561 U.S. 742 (2010).

²¹⁰ Cf. *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam) (vacating a conviction for carrying a stun gun).

²¹¹ *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 139 S. Ct. 939 (2019) (mem.) (granting certiorari).

²¹² See Adam Liptak, *Fearing Supreme Court Loss, New York Tries to Make Gun Case Vanish*, N.Y. TIMES (May 27, 2019), <https://www.nytimes.com/2019/05/27/us/politics/supreme-court-gun-control.html> [<https://perma.cc/W4VW-T4QY>].

²¹³ *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527–44 (2020) (Alito, J., dissenting) (per curiam).

²¹⁴ 142 S. Ct. 2111 (2022). Notably, the *NYSRPA* and *Bruen* petitions were filed by the same counsel and consist of a substantively identical question presented.

²¹⁵ See Jonathan Lowy, *Alternate Facts, Dueling Realities, and the Second Amendment: On NYSRPA v. Bruen*, N.Y.U. L. REV. F. (Nov. 15, 2021), <https://nyulawreview.org/forum/2021/11/alternate-facts-dueling-realities-and-the-second-amendment-on-nyspra-v-bruen/> [<https://perma.cc/7XCB-9974>].

Given demonstrable social science evidence linking “shall-issue” concealed carry laws to “increase[d] total homicides, firearm homicides, and violent crime,” the interim preservation of these state regulatory frameworks likely saved hundreds of lives.²¹⁶ Over this period, lower courts also continued their post-*Heller* jurisprudence of spurning constitutional challenges to gun control laws, allowing a broader set of existing firearms regulations to remain in effect and postponing the doctrinal²¹⁷ and experiential²¹⁸ chaos that *Bruen* unleashed.

The interregnum also provided strategic clarity to gun control advocates. In *NYSRPA*, Justice Kavanaugh divulged that he “agree[d]” with Justice Alito’s precedent-redefining analysis of *Heller* and *McDonald* and urged the Court to hear a case addressing these issues “soon.”²¹⁹ Gun control supporters quickly seized on this clarifying rhetoric, conveying to their supporters that “[Justice] Kavanaugh just officially put everyone on notice that no gun safety measures are safe now that he is on the Supreme Court.”²²⁰ Throughout this anticipatory period, blue states enacted numerous gun control measures, some of which were predicated on responding to the looming adverse ruling.²²¹ They also began planning mitigation efforts. Before *Bruen*, but after *NYSRPA*, New York state and city lawmakers, governmental agencies, and stakeholders like the Metropolitan Transportation Authority, started devising potential responses.²²² When

²¹⁶ *Effects of Concealed-Carry Laws on Violent Crime*, RAND CORP. (Jan. 29, 2026), <https://www.rand.org/research/gun-policy/analysis/concealed-carry/violent-crime.html> [<https://perma.cc/9XHD-YBEK>].

²¹⁷ See generally Eric Ruben, Rosanna Smart & Ali Rowhani-Rahbar, *One Year Post-Bruen: An Empirical Assessment*, 110 VA. L. REV. ONLINE 20 (2024).

²¹⁸ See, e.g., John J. Donohue, *The Supreme Court’s Gun Decision Will Lead to More Violent Crime*, WASH. POST (July 8, 2022), <https://www.washingtonpost.com/outlook/2022/07/08/guns-crime-bruen-supreme-court/> [<https://perma.cc/6H82-XQMA>] (summarizing academic literature on the relationship between public carry and police investigatory clearance rates).

²¹⁹ *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring) (per curiam).

²²⁰ Matt Cohen, *The Supreme Court’s Punt on a Second Amendment Case Is a Short-Term Victory for Gun Control Groups*, MOTHER JONES (Apr. 27, 2020), <https://www.motherjones.com/politics/2020/04/supreme-court-guns-nra-brett-kavanaugh-second-amendment/> [<https://perma.cc/R8V9-LDVB>].

²²¹ See 2021: Year in Review, EVERYTOWN FOR GUN SAFETY, <https://www.everytown.org/year-in-review-2021/> [<https://perma.cc/GEA9-2TPA>] (last visited July 10, 2026).

²²² See, e.g., Jonah E. Bromwich, Ashley Southall & Grace Ashford, *Hochul Pledges New Legislation After ‘Shocking’ Court Decision on Guns*, N.Y. TIMES (June 23, 2022), <https://www.nytimes.com/2022/06/23/nyregion/hochul-new-york-gun-law-supreme-court.html> [<https://perma.cc/6JXD-X7Q7>].

Bruen came down, they were not caught flatfooted. Within a week of the decision, for example, the typically sluggish New York State enacted a slew of gun control measures aiming to counteract the decision, benefiting from this pre-decisional coordination and mobilization.²²³

The Supreme Court delivered *Bruen* during a period notably favorable to gun control advocates. Public support for firearm regulation reached its highest level in a decade during June 2022,²²⁴ and this strengthened position facilitated the passage of the Bipartisan Safer Communities Act—the first significant federal gun control legislation in thirty years—immediately after *Bruen*.²²⁵ Whereas the first Trump administration would have been positioned to respond to *NYSRPA*, the Biden Administration reacted to *Bruen* with modest executive actions combating gun violence.²²⁶ While serendipitous, this convergence of favorable public opinion, legislative momentum, and a supportive executive branch exemplified how even brief delay can position constitutional mitigation within a changed political landscape.²²⁷

Delay may have also shaped the substance of *Bruen* itself and legal developments that followed. Justice Breyer's *Bruen* dissent drew from scholarly work developed during this period,²²⁸ with academics having been alerted to the direction of doctrinal and methodological debates through Justice Alito's earlier dissent in *NYSRPA*.²²⁹ The federal government's posture also

²²³ See Jonah E. Bromwich & Nicholas Fandos, *N.Y. Lawmakers Respond on Guns and Abortion After Supreme Court Rulings*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/nyregion/ny-guns-abortion-supreme-court.html> [<https://perma.cc/HH5B-Y3MA>].

²²⁴ See *id.*

²²⁵ Pub. L. No. 117–159, 136 Stat. 1313 (2022) (codified as amended in scattered sections of 18 U.S.C.).

²²⁶ See, e.g., Exec. Order No. 14,092, 88 Fed. Reg. 16,527 (Mar. 14, 2023).

²²⁷ Delay also creates the possibility of excavating constitutional meaning before courts in later periods of compositional change. See Mark Tushnet, *Damage Control in the Roberts Era*, DISSENT MAG. (Aug. 19, 2025), https://www.dissentmagazine.org/online_articles/damage-control-in-the-roberts-era/ [<https://perma.cc/VM5H-B9DE>] [commenting on *Resistance through Restraint* and proposing a strategy of waiting until progressives have “take[n] over the courts” to litigate].

²²⁸ See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2163–66, 2173 (2022) (Breyer, J., dissenting).

²²⁹ *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527–44 (2020) (Alito, J., dissenting) (per curiam). For various commentary on the intellectual history of pre-*Bruen* legal scholarship, see generally, for example, Carina Bentata Gryting & Mark Anthony Frassetto, *NYSRPA v. Bruen and the Future of the Sensitive Places Doctrine: Rejecting the Ahistorical Government Security Approach*, 63 B.C. L. REV. E-SUPP. I.-60, I.-61 to I.-62 (2022) (pre-decisional

flipped between these cases. In *NYSRPA*, the Deputy Solicitor General argued in support of the petitioners; in *Bruen*, the Deputy Solicitor General did so for respondents.²³⁰ In the immediate aftermath of *Bruen*, the Department of Justice vigorously defended existing gun control laws and worked to contain the decision's damage.²³¹

In the next major gun case the Court heard, *United States v. Rahimi*,²³² Solicitor General Elizabeth Prelogar delivered a bravura oral argument advancing a narrowing read of *Bruen*,²³³ with multiple Justices' questions flowing from an analytical "framework" she had "proposed" in her opening brief on behalf of the United States.²³⁴ The Court's ultimate decision framed the case in a manner explicitly aligned with that of her brief.²³⁵ Through delay, gun control advocates gained the backing of "the country's most influential litigator"²³⁶ and her prodigious

scholarship challenging arguments ultimately advanced in *Bruen*); Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. REV. 139 (2021) (similar); Jennifer McMahon-Howard, Heidi L. Scherer & James T. McCafferty, *Examining the Effects of Passing a Campus Carry Law: Comparing Campus Safety Before and After Georgia's New Campus Carry Law*, 20 J. OF SCH. VIOLENCE 430 (2021) (similar).

²³⁰ Contrast Transcript of Oral Argument at 1, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020), with Transcript of Oral Argument at 2, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022).

²³¹ See, e.g., Supplemental Brief for the Federal Parties, *Vincent v. Garland*, 144 S. Ct. 2708 (2024) (mem.) (No. 23-683).

²³² 144 S. Ct. 1889 (2024).

²³³ See, e.g., Duncan Hosie, *Bad Facts, Bad Law*, N.Y. REV. OF BOOKS (Nov. 25, 2023), <https://www.nybooks.com/online/2023/11/25/bad-facts-bad-law-supreme-court-guns/> [<https://perma.cc/J2L6-KGU4>] (commenting on Prelogar's "savvy" presentation at oral argument); Melissa Murray & Kate Shaw, *The Conservative Supreme Court Vision That Means Inequality for Women*, N.Y. TIMES (Nov. 12, 2023), <https://www.nytimes.com/2023/11/12/opinion/supreme-court-rahimi-women.html> [<https://perma.cc/NUA4-9PN8>] (describing Prelogar's oral argument in *Rahimi* as "stirring"); Jacob Charles, *Dangerous and Irresponsible Citizens*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Nov. 10, 2023), <https://firearmslaw.duke.edu/2023/11/dangerous-and-irresponsible-citizens> [<https://perma.cc/8C54-7C8Z>] (praising Prelogar's "terrifically clear and compelling" advocacy at the *Rahimi* oral argument).

²³⁴ Ian Millhiser, *The Supreme Court Appears Poised to Rein in Its Worst Decision on Guns*, VOX: POLITICS (Nov. 7, 2023, at 13:35 ET), <https://www.vox.com/scotus/2023/11/7/23950520/supreme-court-us-rahimi-oral-argument-second-amendment-roberts-gorsuch-barrett-jackson> [<https://perma.cc/6HTT-BV3Q>].

²³⁵ *Rahimi*, 144 S. Ct. at 1894–95.

²³⁶ Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1326 (2010).

skills, including a constraining reading of *Bruen* that she and legal scholars had theorized.²³⁷

4. Incrementalism and Percolation

Legal scholars²³⁸ and justices²³⁹ normally frame incrementalism and percolation in institutional and formal terms, emphasizing their capacities to enhance the quality and finality of the Supreme Court's rulings.²⁴⁰ For movement lawyers, however, these distinct but related concepts serve a unified strategic purpose in creating channels for constitutional meaning-making outside the Court's immediate purview. While percolation provides the natural laboratories for legal experimentation,²⁴¹ incrementalism offers the tactical framework for using these spaces effectively. Like the interstitial benefits of delay, they can generate legislative and judicial outcomes that provide immediate, albeit incomplete, benefits to affected communities while laying the groundwork for more transformative legal recognition over time. Conversely, prematurely seeking Supreme Court review can short-circuit both processes, foreclosing incrementalism's

²³⁷ See, e.g., *After the Highland Park Attack: Protecting Our Communities from Mass Shootings: Hearing before the S. Comm. on the Judiciary*, 117th Cong. (2022) (written testimony of Joseph Blocher, Lanty L. Smith Professor of Law, Duke University Law School).

²³⁸ See, e.g., Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 699, 699 n.68 (1984) (listing benefits of percolation); Stephanos Bibas, *The Rehnquist Court's Fifth Amendment Incrementalism*, 74 GEO. WASH. L. REV. 1078, 1085–86 (2006) (describing “many benefits in the Rehnquist Court's incremental approach” to Fifth Amendment jurisprudence).

²³⁹ See, e.g., *DHS v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring in the grant of stay) (commenting on percolation's “airing of competing views that aids this Court's own decisionmaking process”); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2314, 2316 (2022) (Roberts, C.J., concurring in the judgment) (observing that not “overruling *Roe* all the way down to the studs” would allow the Court to rule on future abortion questions “from a more informed perspective”).

²⁴⁰ See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (“[W]hen frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4 (1999) (discussing incrementalism as a tool to “make judicial errors less frequent and (above all) less damaging” and arguing judicial “single-shot intervention can have a range of unanticipated bad [outcomes]” that protract conflict).

²⁴¹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

gradual accumulation of smaller victories and percolation's organic refinement of legal theories.

By channeling movement energy away from the Court and toward actionable reform, incrementalism provides opportunities to build sustainable and even accelerative change while avoiding premature constitutional confrontations that lock in bad law. This change can have an edifying effect on judges and the public at large, fostering greater receptivity to future constitutional claims.²⁴² Percolation, in allowing legal arguments to grow naturally across multiple jurisdictions over time, creates space for unexpected doctrinal evolution and permits the testing of new legal theories in varied contexts, including state law ones resting on independent grounds. This deliberate allowing of issues to "ripen" can yield surprising allies that unsettle ideological polarization.

The LGBTQ rights movement illustrates how these complementary strategies can work in tandem. After the devastating setback in *Bowers v. Hardwick*,²⁴³ LGBTQ movement lawyers pivoted to state courts and state law claims, prioritizing incremental gains shielded from Supreme Court scrutiny.²⁴⁴ Rather than risking high-stakes federal and state litigation with dubious prospects, advocates in the 1990s concentrated on crafting tailored state legislative reforms calibrated to the unique political and cultural dynamics of varying jurisdictions.²⁴⁵ This redirected approach created productive zones of activity outside the antagonistic terrain of the *Bowers* Court. By doing so, it enabled the movement to stay mobilized while waiting out the Court's unfavorable composition.

Over time, shifts in the Court's ideological makeup and broader cultural mores culminated in the landmark decision in

²⁴² See, e.g., Siegel, *supra* note 205, at 1230–31 (noting that a longer interim between *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015), would have allowed "a large number of same-sex marriages" to take place, and "Americans who were either opposed to or uncertain about same-sex marriage would have seen that the sky did not fall" with greater "evidence").

²⁴³ 478 U.S. 186 (1986).

²⁴⁴ Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1249 (2010) ("[After *Bowers*,] LGBT rights lawyers turned their attention to state courts and state law claims, eager to make gains they could shield from Supreme Court review."); CARLOS A. BALL, FROM THE CLOSET TO THE COURTROOM 252–54 (2011) (describing the "gradualist strategy pursued by the LGBT rights movement" that "sought to prevent Supreme Court review" of *Romer v. Evans*, 517 U.S. 620 (1996) and the virtues of resisting the overturning of *Bowers* until the proper "background conditions" were in place).

²⁴⁵ See, e.g., Cummings & NeJaime, *supra* note 244, at 1312–13.

Lawrence v. Texas overturning *Bowers*.²⁴⁶ To the degree movement lawyers deserve credit for *Lawrence*, it is not for inventing a revolutionary legal argument but rather for their calculated disengagement from federal courts post-*Bowers*. In turning to incremental reform over bold legal claims over the preceding years, they allowed the institution and society to change. Between *Bowers* and *Lawrence*, Justice Ruth Bader Ginsburg replaced Justice Byron White, *Bowers*'s author; Justice Anthony Kennedy, *Lawrence*'s author, replaced Justice Lewis Powell; Justice O'Connor came to reconsider her views after personal interactions with gay people during a period of momentous cultural and attitudinal change in views and representations of gay people;²⁴⁷ and the convergence of state court and international rulings underscored *Bowers*'s anachronistic status.²⁴⁸

The benefits of percolation emerge in unexpected outcomes that can reshape movement trajectories, legal arguments, and alliances.²⁴⁹ Consider Chief Judge William Pryor of the 11th Circuit, a prominent figure in conservative legal circles.²⁵⁰ During his confirmation hearing, then Alabama Attorney General Pryor faced sharp opposition from Democrats for his hostility to LGBTQ rights, including a provocative amicus brief in *Lawrence* that equated gay sex with pedophilia and personal decisions like canceling a family vacation to avoid a gay pride celebration.²⁵¹ Chief Judge Pryor's judicial record has largely reflected this antagonism, with rulings against LGBTQ rights

²⁴⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁴⁷ See EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR 354–55 (2019) (noting that Justice O'Connor voted with the majority in *Bowers* “[b]ut her fondness for family helped awaken her to gay rights” and discussing her relationship with Stuart Delery, a gay man who adopted a child in 2021).

²⁴⁸ See *Lawrence*, 539 U.S. at 573–77.

²⁴⁹ See Eskridge, *supra* note 44, at 2194 (noting that social movement litigators create constitutional change by “not only br[inging] cases presenting new angles on old issues, but . . . [constructing] records in those cases that provide[] justifications and factual underpinnings for new constitutional rules or exceptions to old rules”).

²⁵⁰ See, e.g., Jacqueline Thomsen & Nate Raymond, *Conservative U.S. Judge Mocks Federalist Society's Critics at Annual Convention*, REUTERS (Nov. 10, 2022, at 14:06 ET), <https://www.reuters.com/legal/government/conservative-us-judge-mocks-federalist-societys-critics-annual-convention-2022-11-10/> [<https://perma.cc/3WWX-VGXW>] (characterizing Chief Judge Pryor as a “prominent federal judge” with deep conservative legal movement ties).

²⁵¹ Neil A. Lewis, *Conservative Asserts Views Would Stay Off the Bench*, N.Y. TIMES (June 12, 2003), <https://www.nytimes.com/2003/06/12/us/conservative-asserts-views-would-stay-off-the-bench.html> [<https://perma.cc/QN8Q-YLTY>].

in most cases,²⁵² including a recent decision upholding a ban on gender-affirming care for minors.²⁵³

Yet, in an unanticipated and consequential departure, Chief Judge Pryor joined a unanimous panel in the 2011 case of *Glenn v. Brumby*, which held that employment discrimination based on gender non-conformity constitutes sex discrimination under the Fourteenth Amendment's Equal Protection Clause.²⁵⁴ Chief Judge Pryor's imprimatur offered an unexpected validation of a then protean LGBTQ legal argument.²⁵⁵ When cause lawyers invoked *Brumby* in subsequent enforcement actions and litigation, the endorsement of a key figure in the conservative legal movement—a judge that Lambda Legal once tarred as “the most demonstrably antigay judicial nominee in recent memory”²⁵⁶—legitimated and depolarized their constitutional claim.²⁵⁷ Rushing to secure immediate doctrinal pronouncements quells this sort of striking and surprising development.

²⁵² See, e.g., *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1311 (11th Cir. 2020) (Pryor, C.J., dissenting) (rejecting an equal protection challenge to a school policy that barred transgender students access to bathrooms that match their gender identity), *vacated & superseded*, 3 F.4th 1299 (11th Cir. 2021), *reh'g en banc granted and opinion vacated*, 9 F.4th 1369 (11th Cir. 2021), *on reh'g en banc*, 57 F.4th 791 (11th Cir. 2022).

²⁵³ See *Eknes-Tucker v. Governor of Alabama*, 114 F.4th 1241, 1243–47 (11th Cir. 2024) (mem.) (Pryor, C.J., concurring in the denial of *reh'g en banc*).

²⁵⁴ 663 F.3d 1312, 1316–17 (11th Cir. 2011).

²⁵⁵ See, e.g., Mark Joseph Stern, *One of Trump's SCOTUS Picks Supported a Revolutionary Pro-Trans Constitutional Ruling*, SLATE (May 19, 2016, at 12:45 ET), <https://slate.com/human-interest/2016/05/judge-william-pryor-potential-trump-supreme-court-nominee-supports-trans-rights.html> [<https://perma.cc/75L8-QVFR>] (observing that “Pryor’s decision to fully join [Judge Rosemary] Barkett’s opinion gave the ruling a sheen of bipartisanship” and contributed to *Brumby*’s importance).

²⁵⁶ *Saying William Pryor Is the ‘Most Demonstrably Antigay Judicial Nominee in Recent Memory,’ Lambda Legal Opposes Nomination to Federal Appeals Court*, LAMBDA LEGAL (Apr. 26, 2005), [<https://perma.cc/N4BE-7LDB>].

²⁵⁷ See, e.g., *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5–6 (Apr. 20, 2012) (citing *Brumby*, 663 F.3d 1312) (the first EEOC recognition that gender identity discrimination falls within sex discrimination under Title VII). Cause lawyers have frequently relied on *Brumby*, in litigation and elsewhere. See, e.g., Letter from James D. Esseks, Dir., ACLU Lesbian Gay Bisexual Transgender & HIV Project, to Sch. Principals & Superintendents (Aug. 26, 2020), https://assets.aclu.org/live/uploads/document/Prom_homecoming_court_ltr_fall_2020.pdf [<https://perma.cc/XFW4-D8AZ>] (invoking *Brumby* to provide legal guidance on schools’ obligations under Title IX and the Equal Protection Clause).

5. *Preservation of Alternative Constitutional Futures*

Strategic restraint allows for the preservation of alternative constitutional futures, a concept most eloquently articulated by Robert Cover.²⁵⁸ Cover argued that law operates within a normative universe—“*nomos*”—created through the interaction of legal rules and narrative.²⁵⁹ Across *nomoi*, “interpretive communities” cultivate their own legal understandings and rules.²⁶⁰ Through this analytical lens, progressive litigation strategy reflects more than tactical choices; it represents an exercise in world-building that can either strengthen or erode, construct or kill, alternative constitutional visions.

Strategic restraint serves not just pragmatic practical ends but preservative intellectual ones. By withdrawing from hostile federal courts, progressive advocates can maintain space for what Cover termed “jurisgenerative” activity—the creation of legal meaning through community hermeneutics and practice that bridges the divide between present reality and future vision.²⁶¹ This preservation of explicative autonomy allows ideologically marginalized groups to sustain their constitutional understanding by building a shared and communal reality outside of state systems. As Cover observed, “[t]he position that only the state creates law . . . confuses the status of interpretation with the status of political domination.”²⁶²

Cover’s insights about the violence inherent in authoritative judicial interpretation illuminate the stakes of strategic engagement.²⁶³ When the Supreme Court decisively rejects a constitutional claim, it does more than deny relief; it exercises a national “jurispathic” function through a paradigmatic

²⁵⁸ Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (describing law as operating in a “normative universe”).

²⁵⁹ *Id.* at 11–19 (elaborating on the creation of distinct legal meanings through communal interpretation).

²⁶⁰ *Id.* at 44; *see also* RONALD DWORKIN, *LAW’S EMPIRE* 413 (1986) (arguing law “is an interpretive, self-reflective attitude addressed to politics in the broadest sense,” containing “a protestant attitude that makes each citizen responsible for imagining what his society’s public commitments to principle are, and what these commitments require in new circumstances”).

²⁶¹ Cover, *supra* note 258, at 15–16 (discussing “jurisgenerative” legal processes).

²⁶² *Id.* at 43.

²⁶³ *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1603–05 (1986) (commenting on “interpretive commitments of a community which resists official law”).

legal act that can kill competing legal meanings.²⁶⁴ Strategic restraint, by denying the Court opportunities for national jurispathic acts, preserves the possibility of multiple constitutional meanings coexisting within different nomoi.²⁶⁵ This multiplicity of meaning, while perhaps temporary, maintains vital space for what Cover called the “alternity” of law, the imagination of alternative legal futures.²⁶⁶ In this way, strategic restraint operates not merely as a defensive posture but as an affirmative declaration of constitutional possibility.

The modern gun rights movement provides a compelling example of strategic restraint preserving constitutional possibility through a mediation of meaning to community. In 1939, the Supreme Court delivered a somewhat cryptic decision in *United States v. Miller* that appeared to reject an individual rights interpretation of the Second Amendment.²⁶⁷ In the seven decades that followed, gun rights advocates had numerous opportunities to challenge *Miller*.²⁶⁸ Yet instead of seeking an authoritative rejection or affirmation of their constitutional vision from the Supreme Court, the leading architects of the libertarian legal campaign behind the individual rights reading focused on building constitutional meaning in other domains.

Consider the crucial period of the late 1960s and early 1970s, when the leadership of the National Rifle Association rallied behind the contemporary individual rights understanding of the Second Amendment—a view at odds with *Miller* and more than two centuries of Second Amendment jurisprudence.²⁶⁹ Rather than look to these reigning judicial and intellectual authorities, the gun rights movement turned to the “new world[]” of its own interpretive community.²⁷⁰ It constructed an

²⁶⁴ Cover, *supra* note 258, at 40–44 (describing courts’ “characteristically ‘jurispathic’” function).

²⁶⁵ Nomoi are inherently jurispathic even as they navigate to avoid the jurispathic power of courts. See Robert C. Post, *Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in Nomos and Narrative*, 17 YALE J.L. & HUMANS. 9, 13 (2005) (“The state is not uniquely jurispathetic; every nomos exists by virtue of its exclusion and denial of competing nomoi. Jurispathology is in this sense built into the very sociology of human meaning.”).

²⁶⁶ Cover, *supra* note 258, at 9 (discussing law’s “alternity”).

²⁶⁷ 307 U.S. 174 (1939).

²⁶⁸ See, e.g., ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 216 (2011) (noting that “there was no shortage of prosecutions for gun crimes” after *Miller*, “many of which were appealed to the Court”).

²⁶⁹ Duncan Hosie & Reva Siegel, *The Remaking of the Second Amendment*, N.Y. REV. OF BOOKS (June 10, 2022), <https://www.nybooks.com/online/2022/06/10/the-remaking-of-the-second-amendment/> [<https://perma.cc/XFU3-8GJK>].

²⁷⁰ Cover, *supra* note 258, at 68.

alternative constitutional narrative around individual rights and self-defense,²⁷¹ embodying Cover's observation that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."²⁷² To bolster this distinct normative universe, it also invested in the institutionalization of interpretive methods.²⁷³

Through the 1970s and 1980s, the judiciary and legal commentariat continued to decisively reject this interpretative community and its commitments.²⁷⁴ But it nonetheless "became a shibboleth and a lodestar" to gun rights advocates, "even as it remained outside the legal mainstream."²⁷⁵ To advance this interpretive commitment, gun rights advocates embraced the essential pluralism of legal meaning, turning not to the Court but "to the law evolved by social movements and communities."²⁷⁶ This hermeneutic pluralism required constructing an alternative vision of law even as lower federal courts²⁷⁷ and individual Supreme Court Justices in extralegal commentary continued to reject it.²⁷⁸ It even required accepting a multiplicity of legal meanings within the conservative legal movement, with some

²⁷¹ See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 214–22 (2008) (detailing development of these arguments in political conflict, especially during the Reagan Administration).

²⁷² Cover, *supra* note 258, at 4.

²⁷³ See Siegel, *supra* note 271, at 240 ("Decades of mobilization inside and outside the academy forged modes of interpreting the Second Amendment that make libertarian, law-and-order concerns central to its meaning and republican concerns peripheral.").

²⁷⁴ *Id.* at 224 (stating that "[a]t the end of the 1980s, the bench and bar still did not see the Second Amendment as authorizing judicial intervention of th[e] kind" that would permit judicial invalidation of gun safety measures).

²⁷⁵ Duncan Hosie, *Gun-Rights Activists Remade the Second Amendment Over Past 40 years*, WASH. POST (June 3, 2022), <https://www.washingtonpost.com/outlook/2022/06/03/gun-rights-activists-remade-2nd-amendment-over-last-40-years/> [<https://perma.cc/6UGJ-PBM2>].

²⁷⁶ Cover, *supra* note 258, at 68.

²⁷⁷ See, e.g., *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (noting a defendant convicted of violating the Switchblade Knife Act, 15 U.S.C. § 1242 (1982), "claims to find a fundamental right to keep and bear arms in that amendment, but this has not been the law for at least 100 years" and observing that federal courts "have analyzed the [S]econd [A]mendment purely in terms of protecting state militias, rather than individual rights" (first citing *United States v. Miller*, 307 U.S. 174 (1939); then citing *United States v. Oakes*, 564 F.2d 384 (10th Cir.1977); and then citing *United States v. Warin*, 530 F.2d 103 (6th Cir. 1976))).

²⁷⁸ See, e.g., The MacNeil/Lehrer NewsHour, *Nuclear Nightmare?: First Freedoms*, at 54:45–56:55 (PBS television broadcast, aired Dec. 16, 1991), <https://americanarchive.org/catalog/cpb-aacip-507-sx6445j916> [<https://perma.cc/UBW2-ZDNM>] (interview in which then former Chief Justice Warren Burger described the individual rights reading as "one of the greatest pieces of fraud, I repeat the word

of the most prominent conservative legal thinkers continuing to reject the individual rights reading of the Second Amendment well into the 1990s.²⁷⁹

This autonomous interpretive community first “turn[ed] away from the state” before becoming “redemptive” and capturing it.²⁸⁰ This intertemporal patience bore formal fruit in *District of Columbia v. Heller*,²⁸¹ where this social movement formalized its “jurisgenesis.”²⁸² The case arrived before a receptive conservative majority, presented a maximally sympathetic set of facts—a total ban on handgun possession in the home—framed through carefully crafted originalist arguments developed over decades of scholarly and cultural work and applied with modes of interpretation the guns rights movement had fostered. Even after this landmark victory, the movement did not immediately adopt a maximalist approach to capture additional gains, reflecting Cover’s insight that “[l]aw may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative.”²⁸³

The gun rights movement’s modulated approach illustrates how strategic restraint can preserve and ultimately advance alternative constitutional visions. Avoiding the Court’s juripathic power protected nascent constitutional understandings.²⁸⁴ Rather than risking adverse precedent in the 1970s or 1980s, the movement preserved space for its individual rights interpretation to develop and gain acceptance within cultural, academic, and political mediums: conservative intellectuals, then the broader conservative political movement, then parts of broader society, and finally an ideologically changed Court.

‘fraud,’ on the American public by special interest groups that I have ever seen in my lifetime”).

²⁷⁹ See, e.g., Claudia Luther, *Lectures at UCI With Rose Bird: Bork Says State Gun Laws Constitutional*, L.A. TIMES (Mar. 15, 1989, at 00:00 PT), <https://www.latimes.com/archives/la-xpm-1989-03-15-me-587-story.html> [<https://perma.cc/75F2-4RN8>] (Bork arguing the Second Amendment’s “intent was to guarantee the right of states to form militia, not for individuals to bear arms”).

²⁸⁰ Post, *supra* note 265, at 10.

²⁸¹ 554 U.S. 570 (2008).

²⁸² See Cover, *supra* note 258, at 11.

²⁸³ Cover, *supra* note 258, at 9. After *Heller*, the Court would recognize Second Amendment incorporation against the states relatively quickly in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), but waited more than a decade before pushing for broader recognition of public carry rights in *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

²⁸⁴ See Cover, *supra* note 258, at 11; see also Guinier, *supra* note 36, at 58 n.246 (summarizing that “social and collective change are jurisgenerative” whereas courts “tend to be jurispathic”).

Periods of restraint developed the multiplication of meaning—the creation of robust interpretive communities capable of sustaining and validating alternative legal visions through scholarship, think tanks, interpretive methodologies, political constituencies, and grassroots organizations. It epitomizes how movements can pursue the unfulfilled normative aspirations of law by understanding the chasm between existing doctrine and constitutional possibility.

III

RESISTANCE THROUGH RESTRAINT AND THE ROBERTS COURT: BRNOVICH CASE STUDY

While history offers compelling examples of movements successfully implementing resistance through restraint, contemporary progressive litigation sometimes illustrates the costs of failing to do so. Gerald Rosenberg once warned that the celebration of “legal symbols” over “substance” can “limit change by deflecting claims for reform away from substantive political battles, where success is possible, to harmless legal ones where it is not.”²⁸⁵ The *Brnovich* litigation demonstrates an even graver risk: deflecting reform efforts from winnable political battles into *harmful* legal ones.

Through a case study, Part III shows that Democratic lawyers transformed what could have remained a manageable and regional setback into a vehicle for a major retrenchment of the Voting Rights Act of 1965 (VRA)²⁸⁶ and contributed to a cascade of restrictive voting laws across multiple states. Subpart III.A studies the legal and political context surrounding *Brnovich*. Subpart III.B summarizes the path the case took to the Supreme Court. Subpart III.C considers *Brnovich*’s legal, political, and cultural costs. Subpart III.D outlines alternative approaches aligned with the theory of resistance through restraint. The *Brnovich* “tragedy” illustrates how failure to exercise strategic restraint can amplify rather than ameliorate statutory and constitutional harm.²⁸⁷

²⁸⁵ Rosenberg, *supra* note 68, at 813–14.

²⁸⁶ 52 U.S.C. § 10101 (2018).

²⁸⁷ See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2351 (2021) (Kagan, J., dissenting) (“What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America’s greatness . . .”).

A. Pre-Litigation Background

Brnovich emerged from what Michael Klarman calls the Roberts Court's jurisprudence of democratic degradation.²⁸⁸ In ideologically divided decisions, its conservative Justices have systematically undercut campaign finance restrictions,²⁸⁹ upheld partisan gerrymandering,²⁹⁰ voter roll purges²⁹¹ and felon disenfranchisement,²⁹² compelled voters to risk their health to vote during the pandemic,²⁹³ and consistently deployed the shadow docket to favor Republican electoral interests.²⁹⁴ They have also demonstrated a deep and persistent aversion to the VRA and the "great ideals" it enshrines.²⁹⁵

The conservative Justices' hostility to the VRA and its principles predates many of their appointments to the high court. Chief Justice Roberts, as a young attorney in the Reagan Administration, ardently advocated for a circumscribed interpretation of the VRA.²⁹⁶ Justice Alito's well-documented skepticism of robust voting rights protections extends even further back, to his undergraduate years at Princeton University, where he became opposed to the Warren Court's democracy-reinforcing jurisprudence.²⁹⁷ Upon their ascension to the Supreme Court, both Justices brought these ideological commitments with them. Less than a year after joining the Court, Chief Justice

²⁸⁸ See Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 4, 45–66 (2020).

²⁸⁹ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 349–50 (2010); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 728 (2011); *McCutcheon v. FEC*, 572 U.S. 185, 207 (2014).

²⁹⁰ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

²⁹¹ *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756 (2018).

²⁹² *Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (mem.).

²⁹³ See, e.g., *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam); *Beals v. Va. Coal. for Immigrant Rights*, 220 L. Ed. 2d 179 (2024) (mem.) (stating order list).

²⁹⁴ See, e.g., Adam Liptak, *A More Liberal Supreme Court? Not When It Comes to Voting Rights*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/18/us/supreme-court-voting-rights.html> [<https://perma.cc/QPB8-XUKQ>] (summarizing four orders).

²⁹⁵ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting).

²⁹⁶ See generally Ari Berman, *Inside John Roberts' Decades-Long Crusade Against the Voting Rights Act*, POLITICO MAG. (Aug. 10, 2015), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222/> [<https://perma.cc/CLM9-2MYG>].

²⁹⁷ Mark F. Bernstein, *A Tiger on the Court*, PRINCETON ALUMNI WEEKLY (Mar. 8, 2006), https://www.princeton.edu/~paw/archive_new/PAW05-06/09-0308/features_alito.html [<https://perma.cc/J839-2PJN>].

Roberts, joined by Justice Alito, embraced a parsimonious reading of Section 2 and characterized its race consciousness as the “sordid business” of “divvying us up by race.”²⁹⁸

Two years later, in *Crawford v. Marion County Election Board*,²⁹⁹ the Court rejected a Fourteenth Amendment equal protection challenge to Indiana’s voter identification law. In endorsing a constricted vision of democracy, *Crawford* provided the intellectual chassis for a wave of litigation targeting the VRA and other voting rights protections.³⁰⁰ The Court’s conservative Justices have subsequently cited *Crawford* to roll back voting rights,³⁰¹ including in *Brnovich* itself.³⁰² Notably, ACLU national and affiliate lawyers pursued certiorari in *Crawford* rather than accept a more limited defeat at the Seventh Circuit.³⁰³

The Court’s antagonism toward minority voting rights, already plain, became increasingly evident through a series of doctrinally unconventional maneuvers in the ensuing years,³⁰⁴ culminating in 2013 with *Shelby County v. Holder*.³⁰⁵ The 5–4 decision, authored by Chief Justice Roberts, dismantled Section 4—and by extension Section 5—of the VRA and exhibited breathtaking judicial audacity. In eviscerating the “crown jewel” of the civil rights movement,³⁰⁶ it became the first ruling

²⁹⁸ League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 492–500, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

²⁹⁹ 553 U.S. 181 (2008).

³⁰⁰ ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 254 (2015).

³⁰¹ See, e.g., Democratic Nat’l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 31, 39 (2020) (mem.) (Kavanaugh, J., concurring) (repeatedly invoking *Crawford* to block an extension of the receipt deadline for mail ballots postmarked by Election Day during the pandemic in the face of serious administrative and delivery days). Conservative judges on lower federal courts have similarly applied *Crawford* to restrict voting rights, including in ways manifestly unsupported by the decision. See, e.g., Tex. Democratic Party v. Abbott, 961 F.3d 389, 413–14 (5th Cir. 2020) (Ho, J., concurring) (Judge Ho erroneously invoking *Crawford* for the propositions that America suffers from widespread voter fraud and “mail-in ballots are particularly susceptible to fraud”).

³⁰² Brnovich v. Democratic Nat’l Comm., 141 S. Ct. 2321, 2327–28, 2338, 2344, 2346 (2021).

³⁰³ See Petition for Writ of Certiorari at 1, *Crawford*, 553 U.S. 181 (No. 07-21).

³⁰⁴ See Hosie, *supra* note 5, at 1406 (discussing Chief Justice Roberts’s unusual majority opinion in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193, 201, 203–05 (2009), which introduced a novel “equal sovereignty” legal concept and contended there had been “dramatic improvements” in race relations in the South).

³⁰⁵ 570 U.S. 529 (2013).

³⁰⁶ Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013, at 15:50 ET), <https://slate.com/news-and-politics/2013/06/>

since the nineteenth century in which the Supreme Court struck down a civil rights law designed to protect individuals based on race³⁰⁷ and disregarded longstanding law recognizing the statute as an expression of Congress's Fifteenth Amendment enforcement authority.³⁰⁸

In the wake of *Shelby County*, Democratic party lawyers and voting rights litigators began bringing vote-denial claims that once would have been pursued under Section 5 of the VRA under Section 2.³⁰⁹ But this larger context should have punctuated the perils of aggressively pursuing these claims in vehicles that could reach the Court. Its conservative majority had demonstrated not just philosophical opposition to robust voting rights enforcement but grand revanchist ambition. It also illustrated that voting rights losses at the high court can provoke significant democratic regressions in state laws, which should have engendered further caution. Republican state lawmakers interpreted *Crawford's* endorsement of Indiana's voter identification law—the first of its kind in the nation³¹⁰—as a “green light” to enact similar and stricter voter ID laws as well as other burdens on the right to vote.³¹¹ *Shelby County* similarly spurred new voter suppression laws, reshaping the landscape of American electoral access with punishing speed.³¹²

supreme-court-and-the-voting-rights-act-goodbye-to-section-5.html?pay=1775774083822&support_journalism=please [https://perma.cc/787A-X35N].

³⁰⁷ JOAN BISKUPIC, *THE CHIEF: THE LIFE AND TURBULENT TIMES OF CHIEF JUSTICE JOHN ROBERTS* 249–50 (2019).

³⁰⁸ See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 500–03 (2014).

³⁰⁹ See generally Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 801 (2018).

³¹⁰ 2005 Ind. Acts 2005; see, e.g., David Williams, *The Supreme Court and Indiana's Voter ID Law*, 104 IND. MAG. HIST. 379, 379 (2008) (“The Indiana rule is the most restrictive in the country; every other state makes it easier to vote.”); see also *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 222 (2008) (Souter, J., dissenting) (characterizing “Indiana’s photo identification requirement [as] one of the most restrictive in the country”); *id.* at 239–41 (Breyer, J., dissenting) (comparing Indiana’s law to the two other states that had “put into practice photo ID requirements” and explaining why they are “significantly less restrictive than Indiana’s”).

³¹¹ BERMAN, *supra* note 300, at 260–61 (documenting the spread of voter ID laws and restrictions on voter registration post-*Crawford*); *id.* at 304 (noting how *Crawford* shaped North Carolina’s legal defense of burdensome changes to voting laws).

³¹² See, e.g., Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act after Shelby County*, 115 COLUM. L. REV. 2143, 2145–46 (2015).

B. Path to the Supreme Court

In 2016, the Democratic National Committee (DNC) and its affiliates sued Arizona's Republican Attorney General and Secretary of State in their official capacities, challenging two state voting policies.³¹³ The first prevented officials from counting ballots cast in the wrong precinct, while the second barred third-party groups from collecting and delivering mail-in ballots from Arizonans,³¹⁴ a practice conservative critics disparage as "ballot harvesting."³¹⁵ Represented by the Democratic stalwart Marc Elias, an attorney known for his hawkish tactics and pugnacious persona,³¹⁶ the lawsuit alleged that both policies violated Section 2 of the VRA by disproportionately burdening Arizona's Native American, Hispanic, and African American voters.³¹⁷ Additionally, the plaintiffs argued that Arizona enacted the ballot-collection restriction with discriminatory intent, further violating Section 2.³¹⁸

This case was a woefully flawed vehicle to test the limits of a Section 2 claim. The Arizona policies had plausible administrative justifications and were hardly unusual in state election administration.³¹⁹ Crucially, they were far less onerous than restrictions enacted in some states like Texas.³²⁰ From a more atmospheric vantage point, Arizona was a curious battleground for a battle royale over Section 2. While Justice Alito's repeated claims that Arizona generally makes voting "easy"

³¹³ Complaint at 1–2, *Feldman v. Ariz. Sec'y of State's Off.*, 208 F. Supp. 3d 1074 (D. Ariz. 2016) (No. 2:16-cv-01065-DLR).

³¹⁴ ARIZ. REV. STAT. ANN. § 16-1005(H) (2020).

³¹⁵ The "ballot harvesting" phrase is a favorite of Donald Trump. See, e.g., Amber Phillips, *What Is Ballot 'Harvesting,' and Why Is Trump so Against It?*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/politics/2020/05/26/what-is-ballot-harvesting-why-is-trump-so-against-it/> [https://perma.cc/6ZSU-EVZ3].

³¹⁶ Kenneth P. Vogel, *Democratic Lawyer Stymied Trump in 2020. Other Efforts Played into G.O.P. Hands.*, N.Y. TIMES (Oct. 30, 2024), <https://www.nytimes.com/2024/10/30/us/politics/democratic-lawyer-stymied-trump-in-2020-other-efforts-played-into-gop-hands.html> [https://perma.cc/AE5P-75B9].

³¹⁷ Complaint, *supra* note 313, at 40–43.

³¹⁸ *Id.* at 43–47.

³¹⁹ See *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338–39, 2344 (2018).

³²⁰ Cf., e.g., Ashley Harris, *5 Ways Texas Suppresses the Vote — and how to Make Your Vote Count*, ACLU TEX. (Jan. 17, 2022), <https://www.aclutx.org/en/news/5-ways-texas-suppresses-vote-and-how-make-your-vote-count> [https://perma.cc/87B6-KYSH] (documenting intrusive restrictions on franchise enacted by Texas over the same period).

were facile,³²¹ the state *did* make voting easier than many other states.³²² The partisan valence of the case—Democratic party and its affiliates versus Republican officeholders supported by the Republican party—anchored the case with reference to standard-fare partisan trench warfare rather than the alleged burdens faced by minority voters.

After a ten-day bench trial, the district court rejected the DNC's Section 2 argument.³²³ Its opinion, authored by Judge Douglas Rayes, an appointee of President Barack Obama, evaluated the Section 2 claims through a two-part results test that numerous circuits had developed,³²⁴ finding plaintiffs had not carried their burdens to demonstrate the challenged policies had a disparate impact on minority voters and were linked by social and historical forces that produced discrimination against minority voters.³²⁵ The DNC then appealed to the Ninth Circuit, and a divided panel affirmed the district court's findings and rejected all of the plaintiffs' claims, including the Section 2 ones.³²⁶ The DNC then petitioned to hear the case en banc,³²⁷ and the Ninth Circuit voted to do so.³²⁸

The en banc majority opinion reversed and found the Arizona electoral policies violated Section 2.³²⁹ Authored by Judge William Fletcher, a prominent liberal member of a court itself viewed as liberal by conservative legal elites,³³⁰ the opinion

³²¹ See *Brnovich*, 141 S. Ct. at 2325, 2328, 2330, 2333, 2344; *id.* at 2366 (Kagan, J., dissenting) (noting the disproportionate effect of Arizona's policies on minority voters).

³²² See, e.g., Quan Li, Michael J. Pomante II & Scot Schraufnagel, *Cost of Voting in the American States*, 17 ELECTION L.J. 234, 241 (2018). For rich discussion of quantifying comparative state performance on democratic benchmarks, see generally HEATHER K. GERKEN, *THE DEMOCRACY INDEX* (2019).

³²³ *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 863–78 (D. Ariz.), *aff'd*, 904 F.3d 686 (9th Cir. 2018), *on reh'g en banc sub nom.*, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *rev'd and remanded sub nom.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

³²⁴ *Id.* at 866–73.

³²⁵ *Id.* at 868–71, 873–75.

³²⁶ *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 723 (9th Cir. 2018). Judge Sandra Ikuta wrote the opinion, joined by Judge Carlos Bea. Chief Judge Sidney Thomas dissented. *Id.* at 732 (Thomas, C.J., dissenting).

³²⁷ Plaintiff-Appellants' Petition for Rehearing En Banc at 1, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (No. 18-15845).

³²⁸ *Democratic Nat'l Comm. v. Reagan*, 911 F.3d 942, 942 (9th Cir. 2019) (mem.).

³²⁹ *Hobbs*, 948 F.3d at 999.

³³⁰ See generally Hellman, *supra* note 125 (discussing the Ninth Circuit's historical reputation and evaluating contemporary conditions). Liberals have described Judge Fletcher as a "moderate liberal," see Erwin Chemerinsky, *The Myth*

divided neatly along ideological and presidential party-appointing lines.³³¹ Beginning with a hagiography to the Warren Court's democracy-reinforcing jurisprudence that palpably provoked the Court's conservative justices,³³² it reinstated the Section 2 claim with fairly broad logic, notably finding that the law prohibiting ballot collection was enacted with discriminatory intent.³³³ The two dissents framed the en banc Court's opinion as explicitly defying the Roberts Court's voting rights precedent generally³³⁴ and specifically with regard to *Crawford*.³³⁵

The DNC's victory was fleeting. Mark Brnovich, the Arizona Attorney General, representing both himself and the state, quickly filed a certiorari petition, joined by a separate petition from the Arizona Republican Party and other intervening private parties; the Court then consolidated and granted.³³⁶ From the moment oral argument began, the outcome seemed predetermined.³³⁷ The Court's conservative Justices emphasized the ubiquity of analogous policies in other states and defended the policy rationales for them.³³⁸ Their rhetoric—including the adoption of the pejorative Republican party shibboleth of “ballot harvesting”³³⁹—echoed conservative party and amicus briefs,

of the Liberal Ninth Circuit, 37 LOY. L.A. L. REV. 1, 3 (2003), while conservatives have derided him as a “liberal diehard,” see Ed Whelan, *Judge Fletcher's Bivens Leap*, NAT'L REV. (Sep. 6, 2023, at 14:04 ET), <https://www.nationalreview.com/bench-memos/judge-fletchers-bivens-leap/> [<https://perma.cc/A9FW-MQ78>].

³³¹ Chief Judge Thomas and Judges Marsha Berzon, Johnnie Rawlinson, Mary Murguia, and John Owens joined Judge Fletcher in full. Judge Paul Watford concurred in Judge Fletcher's discussion of the VRA's results test. *Hobbs*, 948 F.3d at 1046 (Watford, J., concurring). Judge Diarmuid O'Scannlain, *id.* (O'Scannlain, J., dissenting), and Jay Bybee, *id.* at 1060 (Bybee, J., dissenting), wrote dissents, one or both of which were joined by Judges Richard Clifton and Consuelo Callahan.

³³² *Id.* at 997–98.

³³³ *Id.* at 1042.

³³⁴ *Id.* at 1047, 1051, 1058–59 (O'Scannlain, J., dissenting); *id.* at 1062 (Bybee, J., dissenting).

³³⁵ *Id.* at 1051, 1058–59 (O'Scannlain, J., dissenting); *id.* at 1062 (Bybee, J., dissenting).

³³⁶ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 222 (2020) (mem.) (granting certiorari).

³³⁷ See, e.g., Adam Liptak, *Supreme Court Seems Ready to Sustain Arizona Voting Limits*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/03/02/us/politics/supreme-court-arizona-voting.html> [<https://perma.cc/N9LW-5NDV>].

³³⁸ Transcript of Oral Argument at 85, *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021) (No. 19-1257) (statement of Gorsuch, J.); *id.* at 86–88, 111–13 (statements of Kavanaugh, J.).

³³⁹ See, e.g., *id.* at 65–66, 96 (statements of Roberts, C.J.).

as well as the original Ninth Circuit panel opinion and the dissents on the en banc panel.³⁴⁰

C. The Costs of Court Engagement

1. Legal Costs

Rather than merely upholding Arizona's laws, the Court used *Brnovich* to severely diminish the "last remaining legal tool for protecting minority voters in federal courts" nationwide.³⁴¹ Elevating putative state interests in election integrity over evidence of discriminatory impact, *Brnovich* made it nearly impossible for plaintiffs to bring vote-denial suits under Section 2. The Court implemented this retrenchment by announcing a set of ultra vires and malleable "guideposts"³⁴² for Section 2 adjudication that practically work as a one-way ratchet to uphold voting restrictions.³⁴³ As Justice Kagan noted in dissent, these "mostly made-up factors" impose a set of "extra-textual restrictions on Section 2" that "stac[k] the deck against minority citizens' voting rights."³⁴⁴

Brnovich has decimated vote-denial litigation under the VRA. Since the decision, plaintiffs have not won a single Section 2 vote-denial case.³⁴⁵ The deck is not just stacked; it is rigged. Worse, *Brnovich* has fueled a rush of deconstructionist litigation that seeks to invalidate Section 2 in its entirety, reaching a crescendo in *Louisiana v. Callais*.³⁴⁶ Leveraging *Brnovich* with Justice Kavanaugh's concurring statements in *Allen v.*

³⁴⁰ See, e.g., *Hobbs*, 948 F.3d at 1060–63 (Bybee, J., dissenting).

³⁴¹ Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html> [<https://perma.cc/Y923-LGJF>].

³⁴² *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2336–40 (2021).

³⁴³ *Id.* at 2362 (Kagan, J., dissenting) (observing the majority's guideposts "all cut in one direction"); see also Maureen A. Edobor, *Brnovich: Extratextual Textualism*, 26 U. PA. J. CON. L. 1495, 1498 (2024); Yasmin Dawood, *The Right to Vote: Baselines and Defaults*, 74 STAN. L. REV. ONLINE 37, 39 (2022) (noting the guideposts "seriously undercut[] the reach and scope of Section 2").

³⁴⁴ *Brnovich*, 141 S. Ct. at 2362 (Kagan, J., dissenting).

³⁴⁵ Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 YALE L.J. 1673, 1686 (2025) ("There apparently has not been a single successful Section 2 vote-denial case in the lower courts since *Brnovich*.").

³⁴⁶ See *Louisiana v. Callais*, 146 S. Ct. 1131 (2026); see also Duncan Hosie, *Judicial Supremacy Has Arrived*, ATLANTIC (May 5, 2026) <https://www.theatlantic.com/ideas/2026/05/voting-rights-act-callais/687064/> [<https://perma.cc/7K25-7HSC>].

Milligan³⁴⁷ and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)*³⁴⁸ that race-conscious programs must have a temporal limitation, conservative litigants are now arguing in multiple pending cases that Section 2 is unconstitutional.³⁴⁹ Conservative litigants have also capitalized on Justice Neil Gorsuch's four-sentence *Brnovich* concurrence alleging there was an "open question" as to whether the VRA furnishes an implied cause of action under Section 2.³⁵⁰ The Eighth Circuit embraced this novel theory,³⁵¹ which, if nationalized, would end almost all Section 2 redistricting challenges given the disparity in suits brought by private parties and the Department of Justice.³⁵²

Brnovich's legal substance also risked a democratic demobilization outside of courts. Although technically a case of statutory interpretation, the Court's sweeping remaking of Section 2 foregrounded constitutional tension between the Roberts Court's muscular vision of state sovereignty in election administration and the congressional power to defend voting rights. In rejecting the "radical interpretation" of Section 2 advanced by Justice Kagan's dissent, the Court suggested that a congressional attempt to restore a robust disparate-impact standard—like the one endorsed by the dissent—could raise constitutional concerns by "depriv[ing] the [s]tates of their authority to establish non-discriminatory voting rules."³⁵³ When read in conjunction with *Shelby County*, this amorphous "state authority" principle could give the Roberts Court fodder to strike down any reparative effort by Congress.

Finally, *Brnovich* had legal implications that extend well beyond voting rights. While *Brnovich* disclaims the relevance

³⁴⁷ 143 S. Ct. 1487, 1519 (2023) (Kavanaugh, J., concurring) (asserting that Congress's "authority to conduct race-based redistricting cannot extend indefinitely into the future").

³⁴⁸ 143 S. Ct. 2141, 2224 (2023) (Kavanaugh, J., concurring) (arguing *Grutter* established an "explicit temporal limit on the use of race-based affirmative action in higher education" and stating "race-based affirmative action in higher education [cannot] extend indefinitely into the future").

³⁴⁹ See, e.g., Petition for Rehearing En Banc at 12–13, *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023) (No. 22-30333) (State of Louisiana seeking to invalidate the creation of a second minority-opportunity congressional district on the basis of the "temporal limitations" on Section 2).

³⁵⁰ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

³⁵¹ See Ark. State Conf. of NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1207–08 (8th Cir. 2023), *reh'g en banc denied*, 91 F.4th 967 (2024).

³⁵² Hasen, *supra* note 345, at 1687 n.68.

³⁵³ *Brnovich*, 141 S. Ct. at 2343.

of the disparate-impact models in other federal statutes,³⁵⁴ its constitutional approach raises constitutional questions about disparate-impact liability in other antidiscrimination statutes, including the Fair Housing Act³⁵⁵ and Title VII of the Civil Rights Act of 1964.³⁵⁶ Justice Alito, for one, had already indicated doubts about the constitutionality of disparate impact in congressionally enacted civil rights statutes.³⁵⁷ Read in conjunction with *SFFA*, *Brnovich* may be fodder for even grander revisionist projects.

2. Political and Narrative Costs

The Court decided *Brnovich*, as Justice Kagan observed in her dissent, “at a perilous moment for the [n]ation’s commitment to equal citizenship,” when “too many [s]tates and localities [were] restricting access to voting in ways that will predictably deprive members of minority groups of equal access to the ballot box.”³⁵⁸ While it can be challenging to attribute direct causality to any single legal opinion, given the long-simmering efforts to restrict voting in Republican-controlled states, the aftermath of *Brnovich* saw Republican-controlled states race to pass new restrictions on voting rights,³⁵⁹ with some critics connecting this “wave of new laws” to an emboldening effect of

³⁵⁴ *Id.* at 2340–41.

³⁵⁵ 42 U.S.C. §§ 3601–3619.

³⁵⁶ 42 U.S.C. §§ 2000e–2000e–17.

³⁵⁷ *See, e.g.*, *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 589–90 (2015) (Alito, J., dissenting). *But see* *Coal. for Tj v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 543 (2024) (mem.) (Alito, J., dissenting from denial of certiorari) (Justice Alito endorsing disparate impact in opposition to facially neutral school admissions policies designed to promote diversity).

³⁵⁸ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2356 (2021) (Kagan, J., dissenting).

³⁵⁹ *See, e.g.*, *Voting Laws Roundup: December 2021*, BRENNAN CTR. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [<https://perma.cc/4VYU-B5XP>] (surveying thirty-four restrictive voting laws enacted in nineteen states in 2021 and commenting on this “tidal wave” amounting to “more restrictive voting laws . . . than in any year” since 2011); *Voting Laws Roundup: December 2022*, BRENNAN CTR. (Feb. 1, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022> [<https://perma.cc/E5C8-X9RH>] (surveying eleven restrictive voting laws enacted in eight states in 2022); *Voting Laws Roundup: 2023 in Review*, BRENNAN CTR. (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review> [<https://perma.cc/Z24V-8NNJ>] (surveying seventeen restrictive voting laws enacted in fourteen states in 2023).

the decision.³⁶⁰ The laws include reductions on mail voting and voting periods and restrictions on drop boxes and voter registration drives.³⁶¹ In short, *Brnovich* weakened the very tools that allow citizens to push back on the Court and the conservative agenda it is advancing.

An overlooked but consequential impact of *Brnovich* lay in how it shaped progressive self-conception and political narrative. In its wake, prominent civil rights organizations and lawyers positioned themselves and their constituencies as the target of Republican lawmakers³⁶² and a rogue and ideologically-driven Court.³⁶³ Senator Ed Markey, for example, framed *Brnovich* as “another blow to voting rights” from a “conservative majority” that would “continue to rule in favor of the far-right interests” indefinitely.³⁶⁴ While this narrative correctly identified judicial and political hostility to voting rights, it obscured a crucial truth: progressive lawyers had actively enabled this outcome through their litigation and choices. The Court delivered the blow only after liberals had given it a weapon.

D. Resistance Through Restraint Alternative

Resistance through restraint offered clear alternatives to the DNC’s litigation strategy. The first and most straightforward option was avoiding litigation in Arizona entirely. The

³⁶⁰ Keyes Sumner, *Suppression Is in Session*, BROWN POL. REV. (Mar. 1, 2024), <https://brownpoliticalreview.org/suppression-is-in-session/> [<https://perma.cc/7865-5TRJ>].

³⁶¹ Nick Corasaniti & Alexandra Berzon, *Under the Radar, Right-Wing Push to Tighten Voting Laws Persists*, N.Y. TIMES (May 8, 2023), <https://www.ny-times.com/2023/05/08/us/politics/voting-laws-restrictions-republicans.html> [<https://perma.cc/NUZ3-Q3AT>].

³⁶² See, e.g., Niles Harris, *Brnovich’s Partisan Lawsuit Guts Voter Protections*, ARIZ. CAP. REPS. (July 1, 2021), <https://blogforarizona.net/wp-content/uploads/2021/07/7-1-21.pdf> [<https://perma.cc/72QY-6U6R>] (“Arizona Attorney General Mark Brnovich undermined the most important voting rights law enacted in the 20th century. . . . [I]Mark Brnovich must stop his partisan attacks on the rights of Arizonans [H]e targeted Section 2” (emphasis omitted)).

³⁶³ See, e.g., Sean Morales-Doyle, *The Supreme Court Clearly Won’t Protect Voting Rights. But Congress Can.*, WASH. POST. (July 3, 2021), <https://www.washingtonpost.com/outlook/2021/07/03/brnovich-alito-roberts-supreme-court-vra/> [<https://perma.cc/6X5L-FFTL>] (arguing the Roberts Court has left “voters of color increasingly vulnerable to efforts to exclude them from our democracy”).

³⁶⁴ Edward J. Markey, *Senator Markey Condemns Supreme Court Ruling, Calls for Passage of His Legislation to Expand the Court*, OFF. OF SEN. MARKEY (July 1, 2021), <https://www.markey.senate.gov/news/press-releases/senator-markey-condemns-supreme-court-ruling-calls-for-passage-of-his-legislation-to-expand-the-court> [<https://perma.cc/LX5C-URUL>].

challenged provisions were relatively modest compared to more oppressive voting restrictions in other states, and Arizona's political environment showed promise for democratic mobilization without judicial intervention. Arizona laws may have been bad policy, but they did not cause "the ins [to choke] off the channels of political change to ensure that they will stay in and the outs will stay out."³⁶⁵

In 2016, the year the DNC filed its suit, Arizona was a reliably Republican state. Democrats subsequently won U.S. Senate seats that Republicans held in 2018 and 2020. Joe Biden narrowly carried the state in 2020, becoming the first Democrat to win Arizona since Bill Clinton in 1996, and only the second since Harry Truman in 1948.³⁶⁶ Democrats then captured the governorship and multiple statewide offices in 2022, the first statewide election after *Brnovich*. Most notably, Democrat Kris Mayes won the attorney general race by just 280 votes out of 2.5 million cast, a victory that reoriented the office's litigation priorities, delayed enforcement of Arizona's Civil War-era abortion law,³⁶⁷ and positioned Arizona as a key state resisting the second Trump administration.³⁶⁸ Her exceptionally tight win was far more consequential to the vindication of liberal interests in Arizona than anything the DNC could have hoped for in its *Brnovich* litigation.

Rather than wasting resources on five years of risky, expensive, and protracted litigation, resistance through restraint would have redirected Democratic efforts toward voter education and political mobilization to secure razor-thin margins like Mayes's 280-vote victory. Democratic groups could

³⁶⁵ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

³⁶⁶ See, e.g., Dan Merica, *Biden Carries Arizona, Flipping a Longtime Republican Stronghold*, CNN (Nov. 13, 2020), <https://www.cnn.com/2020/11/12/politics/biden-wins-arizona/index.html> [<https://perma.cc/UVA6-SWRX>].

³⁶⁷ See, e.g., Leila Fadel, *Arizona Attorney General Says She Won't Enforce a 164-Year-Old Abortion Law*, NPR (Apr. 12, 2024, at 7:17 ET), <https://www.npr.org/2024/04/12/1244265593/arizona-attorney-general-says-she-wont-enforce-a-164-year-old-abortion-law> [<https://perma.cc/WK9J-NYUW>].

³⁶⁸ See, e.g., Morgan Fisher, *The Latest with All 42 Lawsuits Kris Mayes Has Filed Against Trump*, PHX. NEW TIMES (May 20, 2026), <https://www.phoenixnewtimes.com/news/every-lawsuit-arizona-attorney-general-mayes-filed-trump-21702348/> [<https://perma.cc/D2L5-3SE7>] (listing various suits against the Trump administration initiated or joined by Attorney General Mayes); *Attorney General Kris Mayes on Masked ICE Agents and More*, ARIZ. PBS (July 23, 2025), <https://azpbs.org/horizon/2025/07/a-conversation-with-attorney-general-kris-mayes/> [<https://perma.cc/EE2N-DLDV>] (Attorney General Mayes outlining efforts to resist against ICE abuses).

have launched education campaigns aimed at voters at risk of casting ballots in wrong precincts or of failing to properly and promptly return their ballots. More simply, Democrats could have accepted the laws as part of the baseline democratic structure, as Democrats in other states had done, and invested in standard get-out-the-vote operations targeting sporadic voters, interventions that had already demonstrated concrete success in Arizona despite the codification of the challenged policies.

By not litigating, resistance through restraint would have allowed for further lower court percolation of Section 2 vote-denial claims. While Section 2's vote dilution doctrine had been well-established when the DNC initiated its *Brnovich* litigation,³⁶⁹ its application to the growing number of post-*Shelby* vote-denial claims remained unsettled.³⁷⁰ Courts had developed differing approaches to analyzing policies that created barriers to voting under Section 2, a reflection of both the opacity of Section 2 and the relative novelty of vote-denial claims under it. To the degree there was an "emerging judicial consensus" for evaluating vote-denial claims under Section 2, it was markedly more favorable to voting rights plaintiffs than the framework established in *Brnovich*.³⁷¹

This judicial percolation sometimes produces unexpected results—including a Fifth Circuit decision generously reading Section 2³⁷²—and created real opportunities for voting rights litigators to challenge the most egregious attempts at vote denial. By abstaining from litigation in Arizona, resistance through restraint would have preserved the possibility of litigation for more compelling cases as this consensus solidified. Even if the Supreme Court had eventually addressed Section 2, delaying that confrontation would have offered tactical advantages. Maintaining Section 2 as a viable litigation threat could have discouraged the enactment of draconian vote-suppressing legislation, preserved additional election cycles with its protections, and slowed down the conservative juggernaut aiming to gut what remained of the VRA.

Resistance through restraint would have counseled accepting early defeats rather than pursuing appeals if the DNC had insisted on bringing litigation. The district court loss before a

³⁶⁹ See *Thornburg v. Gingles*, 478 U.S. 30, 77–80 (1986).

³⁷⁰ Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015).

³⁷¹ Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1575–80 (2019).

³⁷² *Veasey v. Abbott*, 830 F.3d 216, 229–65 (5th Cir. 2016) (en banc).

respected Obama appointee signaled slim chances of ultimate success. After the adverse Ninth Circuit panel decision, containing the loss within that circuit would have affected only two Republican-controlled states poised to pursue similar restrictions: Idaho and Alaska. This approach would have preserved flexibility for challenges in other circuits while preventing the nationwide entrenchment of even more restrictive standards. The panel loss also provided strong corroboration that Supreme Court median conservatives would almost certainly reject the underlying Section 2 claim.

IV

OBJECTIONS TO AND IMPLEMENTATION OF RESISTANCE THROUGH RESTRAINT

Part IV examines potential objections to and implementation challenges of resistance through restraint. It proceeds in four parts. Subpart IV.A addresses the threshold question of whether Court review of ideologically salient cases is inevitable, making strategic restraint futile. Subpart IV.B considers whether the occasional progressive victory before the Court justifies continued engagement despite long odds. Subpart IV.C explores the practical difficulties of implementing resistance through restraint within the progressive legal ecosystem, examining challenges between movement lawyers and the broader progressive movement, between movement and non-movement lawyers, within movement organizations, and among different movement lawyering groups. Finally, subpart IV.D considers moral and ethical objections to strategic restraint.

A. The Question of Review Inevitability

A critic might object to resistance through restraint by arguing that ideologically salient cases will inevitably reach the Supreme Court. Under this view, because controversial cases are destined for Supreme Court review, progressive lawyers should maintain agency by initiating litigation themselves rather than ceding control to countermovement actors who may construct less favorable records and certiorari questions, select less sympathetic plaintiffs, and otherwise negatively frame the relevant legal issues and cultural narrative. The inevitability critique might argue that strategic restraint merely alters who brings cases before the Court, not whether they arrive there.

This objection misapprehends the practical dynamics of Supreme Court review and the fundamental aims of strategic restraint. The strategy does not seek to completely prevent

Court review of contentious issues—an impossible goal—but rather reduce the volume and delay the adjudication of ideologically salient cases that threaten liberal precedents. To borrow from conservative lexicon, the goal is not to “slay” the beast but “starve” it.³⁷³ The relevant comparator is not between perfect control of the docket and no control, but between the status quo and a world where progressive movement lawyers consistently exercise greater restraint.

Several structural and institutional factors make this approach feasible. First, scarce judicial bandwidth and contemporary case selection norms create significant capacity constraints on conservative movement litigants who seek to leverage the Court for ideological change. In recent years, the Court has heard only about sixty to seventy formal cases annually from thousands of petitions,³⁷⁴ and a majority of these cases lack clear political valences and do not implicate the familiar ideological divides in judicial decision making.³⁷⁵ By seeking to reduce the overall pool of potentially certiorari-worthy cases that threaten liberal accomplishments and shift the Court’s focus to less ideologically salient cases, strategic restraint molds how the Court allocates its discretionary but limited attentional capital. This approach transforms Judge Stephen Reinhardt’s famously mischievous “they can’t catch ‘em all” mantra into a more expedient “they can’t hear ‘em all.”³⁷⁶

Second, the inherent uncertainty in the Court’s certiorari process supports strategic restraint’s efficacy. As Justice Holmes famously observed, law operates largely through prediction,³⁷⁷ yet the Court’s certiorari decisions and timelines

³⁷³ See, e.g., Edward J. McCaffery & Jonathan Baron, *The Political Psychology of Redistribution*, 52 UCLA L. REV. 1745, 1774 & n.64 (discussing the etymology of “starve the beast” in conservative legislative policymaking).

³⁷⁴ See Duncan Hosie, *The Apathetic Court*, N.Y. REV. OF BOOKS (Apr. 9, 2025), <https://www.nybooks.com/online/2025/04/09/the-apatetic-court/> [<https://perma.cc/6SYU-ZNE2>].

³⁷⁵ In the past two terms, the Court’s unanimity rate has hovered just under fifty percent, a high figure for the Roberts Court. See Adam Feldman & Jake S. Truscott, *Supreme Court Stat Review: October Term 2023-2024*, EMPIRICALSCOTUS 51 (July 3, 2024), https://empiriscotus.com/wp-content/uploads/2024/07/scotus_stat_review_ot23-5.pdf [<https://perma.cc/U8ZE-TY32>] (finding unanimity rates of 46.38% for O.T. 2022 and 45.76% for O.T. 2023).

³⁷⁶ See Andrew Manuel Crespo, In Memoriam: *Judge Stephen Reinhardt*, 131 HARV. L. REV. 2097, 2102 (2018); see also Heather K. Gerken, In Memoriam: *Judge Stephen Reinhardt*, 131 HARV. L. REV. 2097, 2110 (2018) (stating his “mantra” as “they can’t reverse them all”).

³⁷⁷ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458–61 (1897).

remain notoriously difficult to forecast. This uncertainty bolsters the resistance through restraint approach, as the Court cannot review cases that are never filed or are strategically mooted before reaching its docket. Even when the Court desires to address certain issues, its passive posture requires litigants to bring it constitutional questions in properly presented controversies. Procedural complications and suboptimal vehicles regularly forestall review.

Third, recent history provides firsthand evidence of resistance through restraint's potential impact. Perhaps responding to its dwindling public standing after *Dobbs*, the Court's more moderate conservative members have declined to hear numerous high-profile cases initiated by conservative movement actors—often over vigorous dissents from Justices Alito and Thomas—that offered vehicles to advance key movement conservative priorities.³⁷⁸ In just the past two years, the Court has rejected noteworthy certiorari petitions filed by prominent conservative movement lawyers or aligned business groups advocating for deregulation in cases involving transgender youth rights,³⁷⁹ educational policies supporting LGBTQ students³⁸⁰ and considering race in magnet school admissions,³⁸¹ affirmative action at military academies,³⁸² voter-ID laws and the rights of indigenous voters,³⁸³ blue-state economic regulation,³⁸⁴ blue-state gun control measures,³⁸⁵ blue-state

³⁷⁸ See Hosie, *supra* note 73.

³⁷⁹ See, e.g., *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 144 S. Ct. 2560, 2560 (2024) (mem.) (denying certiorari); *M.C. v. Ind. Dep't of Child Servs.*, 144 S. Ct. 1084, 1084 (2024) (mem.) (denying certiorari).

³⁸⁰ *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 145 S. Ct. 14, 14 (2024) (mem.) (denying certiorari, with Kavanaugh, J., indicating he would grant certiorari and Thomas & Alito, JJ., dissenting).

³⁸¹ *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos.*, 145 S. Ct. 15, 15 (2024) (mem.) (denying certiorari with Thomas & Alito, JJ., dissenting); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 146 S. Ct. 541, 541 (2024) (mem.) (denying certiorari, with Thomas & Alito, JJ., dissenting).

³⁸² *Students for Fair Admissions, Inc. v. U.S. Mil. Acad. at W. Point*, 144 S. Ct. 716, 716 (2024) (mem.) (denying application for writ of injunction).

³⁸³ *Jacobsen v. Mont. Democratic Party*, 145 S. Ct. 1125, 1125 (2025) (mem.) (denying certiorari).

³⁸⁴ *N.Y. State Telecomms. Ass'n v. James*, 145 S. Ct. 984, 984 (2024) (mem.) (denying certiorari).

³⁸⁵ See, e.g., *Md. Shall Issue, Inc. v. Anne Arundel Cnty.*, 145 S. Ct. 152, 152 (2024) (mem.) (denying certiorari); *Harrel v. Raoul*, 144 S. Ct. 2491, 2491 (2024) (mem.) (denying certiorari); *Wilson v. Hawaii*, 145 S. Ct. 18, 18 (2024) (mem.) (denying certiorari).

environmental laws,³⁸⁶ public land management,³⁸⁷ agency regulatory authority,³⁸⁸ government-mandated disclosures on tobacco products,³⁸⁹ and then President-elect Trump's state-court trial sentencing.³⁹⁰ The Court, or at least its median conservative justices, remains sensitive to selection pressures even as it pursues its agenda.

Fourth and most importantly, there is nothing in the Court's institutional structure or America's constitutional culture endowing it with the exclusive prerogative to hear, let alone settle, every legal and policy question.³⁹¹ The justices may act and communicate in ways that reflect an internalized embrace of judicial supremacy, but this articulation and performance does not transmute aspiration into reality. The Court has not and has never been the ultimate arbiter of all important constitutional and statutory questions. Recognizing an inevitability of Court review implicitly accepts an insidiously juricentric and Supreme Court-centric understanding of constitutional interpretation.³⁹²

B. The Question of Loss Inevitability

A critic might counter that federal courts, including the remade Supreme Court, sometimes deliver victories for progressive legal claims. Resistance through restraint, the argument would contend, forecloses these possibilities, depriving liberals of a crucial tool to check repression. David Cole, for example, posits that "[federal] courts, including the Supreme Court, . . . regularly rebuffed Trump in his first term—and they are likely to do so again" and has exhorted liberals to not "rule

³⁸⁶ *Ohio v. EPA*, 145 S. Ct. 994, 994 (2024) (mem.) (denying certiorari, with Thomas, J., indicating he would grant certiorari).

³⁸⁷ *Utah v. United States*, 145 S. Ct. 1134, 1134 (2025) (mem.) (denying leave to file a bill of complaint).

³⁸⁸ *Allstates Refractory Contractors, LLC v. Su*, 144 S. Ct. 2490, 2490 (2024) (mem.) (denying certiorari, with Gorsuch, J. indicating he would grant certiorari and Thomas, J., dissenting).

³⁸⁹ *R.J. Reynolds Tobacco Co. v. FDA*, 145 S. Ct. 592, 592 (2024) (mem.) (denying certiorari).

³⁹⁰ *Trump v. New York*, 145 S. Ct. 1038, 1038 (2025) (mem.) (denying an application for stay, with Thomas, J., Alito, J., Gorsuch, J., and Kavanaugh, J. indicating they would grant the application).

³⁹¹ Post & Siegel, *supra* note 27, at 44 ("The Court may assert that it possesses the exclusive prerogative to interpret the Constitution, but in the final analysis it shares that authority with the American people.").

³⁹² See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–32 (1999).

out the courts.”³⁹³ Why not roll the dice on *Skrmetti* with the Court that handed down *Bostock*, this critic might ask?³⁹⁴

This objection misapprehends both the empirical and theoretical underpinnings of resistance through restraint. While acknowledging inherent uncertainty in how the Court might address any individual case, the cost-benefit analysis strongly disfavors initiating ideologically salient litigation before a Court constructed to reject progressive claims. The approach capitalizes on increased clarity concerning what political scientists call the “informational constraint[s]” of seeking certiorari—the uncertainty litigants face in predicting judicial outcomes—that once could have made a more credible argument for engagement.³⁹⁵ While informational constraints once created genuine ambiguity about how the Court might respond to progressive constitutional claims, the consistency and scope of the Court’s jurisprudence and the vetting processes that shape its composition have largely resolved that uncertainty in cases involving conservative legal movement priorities.

Under an expected-value analytical framework, an occasional liberal win does not retroactively validate the tactical decision to seek certiorari in an ideologically salient case involving positions around which the conservative legal movement has coalesced.³⁹⁶ The vertiginous changes the Court has imposed on American law to entrench these conservative positions since 2020 vastly outweigh rare liberal victories. Recent terms have witnessed not just individual setbacks but systematic dismantling of progressive bedrocks: the elimination of abortion

³⁹³ David Cole, *What Could Stop Him?*, N.Y. REV. OF BOOKS (Nov. 18, 2024), <https://www.nybooks.com/online/2024/11/18/what-could-stop-donald-trump/> [<https://perma.cc/WS4S-ABC3>].

³⁹⁴ Of note, the Court has become more conservative since it decided *Bostock*, the differences between the statutory issues in it and the constitutional ones in *Skrmetti* are relevant to understanding conservative legal thought, and nondiscrimination protection under Title VII is less controversial than gender affirming care for minors. See generally Ed Whelan, *Justice Gorsuch, Bostock, and Skrmetti*, NAT’L REV. (Nov. 12, 2024, at 12:36 ET), <https://www.nationalreview.com/bench-memos/on-justice-gorsuch-bostock-and-skrmetti/> [<https://perma.cc/2WE7-VRE9>] (a prominent conservative legal commentator describing some of the differences between the cases).

³⁹⁵ See Kevin T. McGuire et al., *Measuring Policy Content on the U.S. Supreme Court*, 71 J. POL. 1305, 1308–09 (2009).

³⁹⁶ See, e.g., Margaret Talbot, *A Risky Proposal*, NEW YORKER (Jan. 7, 2010), <https://www.newyorker.com/magazine/2010/01/18/a-risky-proposal> [<https://perma.cc/HU5U-M9V4>] (quoting the “pessimistic” analysis of Professor Eskridge on a Supreme Court-focused marriage equality strategy of Theodore Olson and David Boies).

rights,³⁹⁷ evisceration of affirmative action,³⁹⁸ gutting of administrative capacity,³⁹⁹ debasement of voting protections,⁴⁰⁰ and, most recently, what Cole rightly calls the “disturbing” grant of expansive immunity to then former President Trump.⁴⁰¹ And, as I have argued elsewhere, the Court has been extraordinarily and troublingly solicitous of President Trump in his second term, even when evaluated against the baseline of its relationship to his first term.⁴⁰²

Moreover, resistance through restraint does not counsel complete disengagement from federal courts. Rather, it advocates for defensive litigation when conservative movement actors initiate cases, particularly when more aggressive judges like Judge Ho push the law further than Chief Justice Roberts and Justices Kavanaugh and Barrett may prefer. The goal is not to “rule out courts,” but rule them in thoughtfully.

C. Implementation Challenges in Liberal Cause Lawyering

1. *Between Movement Lawyers and the Progressive Movement*

Liberal legalism has long been shaped by lawyers pursuing socially constructive careers.⁴⁰³ While many law students choose the profession for its prestige and earning potential, a significant portion enter with altruistic social reform ambitions. Resistance through restraint offers an alternative approach that maintains commitment to public interest while reconsidering how some legal careers best serve progressive aims.

This “socially constructive” ethos of the liberal American lawyer traces back to Justice Brandeis⁴⁰⁴ and has deep roots in liberal constitutional theory.⁴⁰⁵ Its institutionalization into

³⁹⁷ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

³⁹⁸ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

³⁹⁹ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

⁴⁰⁰ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

⁴⁰¹ Cole, *supra* note 393; *Trump v. United States*, 144 S. Ct. 2312 (2024).

⁴⁰² See Hosie, *supra* note 79 (commenting on the Court’s shadow docket orders and decision in *Trump v. CASA, Inc.*, 145 S. Ct. 2540 (2025)).

⁴⁰³ See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 592 (1985). See generally DUNCAN KENNEDY, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (1982).

⁴⁰⁴ See generally JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET 189–92 (2016).

⁴⁰⁵ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 413 (1986) (“Law’s attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show

impact litigation gained traction in the 1970s⁴⁰⁶ following the liberal triumphs that impact litigators secured before the Warren Court and early Burger Court.⁴⁰⁷ As Nicholas Bagley has observed, the 1970s saw a generation of “idealistic young lawyers” socialized to public interest law through figures like Ralph Nader and Rachel Carson—captivating crusaders who held the government accountable—as opposed to “New Dealers who labored in agency trenches” to implement change, often anonymously or at least without great public fanfare.⁴⁰⁸

This perspective became codified into the missions of newly established legal activist organizations,⁴⁰⁹ fostering a vision of public interest service that prioritizes litigation against state action over internal government reform and action.⁴¹⁰ Bagley elaborates:

[I]f you're an idealistic, left-leaning young lawyer, you want to join the nonprofit organizations that serve the public interest. When you hear somebody describe themselves as a public interest lawyer, what they're saying is not usually, I want to join the government, which is, I would have thought,

the best route to a better future, keeping the right faith with the past. It is . . . a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have.”).

⁴⁰⁶ See Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1146 (1970) (describing the rise of a new “public interest lawyer” who “feels that the old style pro bono work, while admirable, is no longer adequate to cope with the problems we face” and instead initiates cases that “take more affirmative action and think in broader social, economic, and political terms”).

⁴⁰⁷ See generally LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 2–6 (1996) (defining “legal liberalism” and grounding its origins in the perception of social reform success of the Warren Court).

⁴⁰⁸ Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 353 (2019).

⁴⁰⁹ *Id.*; see also Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law”*, 52 UCLA L. REV. 1223, 1239–40 (2005) (noting that “[d]ozens of public interest law organizations were created in the late 1960s and early 1970s to pursue social change through courts” and were staffed by a “new breed of lawyers”).

⁴¹⁰ Transcript: *Ezra Klein Interviews Nicholas Bagley*, N.Y. TIMES: EZRA KLEIN SHOW (Feb. 7, 2023), <https://www.nytimes.com/2023/02/07/podcasts/ezra-klein-show-transcript-nicholas-bagley.html> [<https://perma.cc/M3KC-PBVN>] (noting that many of the liberal public interest legal organizations arising in the 1970s were motivated “to bring lawsuits, to bring public pressure to get the government to serve their vision of the public interest” through litigation); see also Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES (Mar. 13, 2022), <https://www.nytimes.com/2022/03/13/opinion/berkeley-enrollment-climate-crisis.html> [<https://perma.cc/68VH-VF8Z>] (commenting on the rise of an “entire branch of liberalism — and a whole universe of activist organizations and even laws — dedicated to criticizing and then suing and restraining government”).

like, a place where the public interest is directly represented. What they mean is they want to work outside the government [at organizations like the ACLU]. They want to throw stones and say, do better, government.⁴¹¹

Resistance through restraint, however, values a different approach: one that does not always involve “throw[ing] stones” at the government to compel it to act in line with an organization’s conception of the “public interest.”⁴¹² This pivot calls for shifting resources away from high-risk, low-probability constitutional litigation strategies toward other forms of advocacy and conceding many legal battles rather than “stubbornly” fighting to the end.⁴¹³

Effectuating this pivot will require cultural change within the bar and resource reallocation within the progressive movement. Supreme Court and appellate litigation occupies an especially elevated position within American law⁴¹⁴—already a comparatively high cachet and high compensation field.⁴¹⁵ Within the public interest ecosystem, constitutional impact litigation groups like the ACLU are prestigious places to work⁴¹⁶ and pay extremely well.⁴¹⁷ Yet “idealistic, left-leaning young

⁴¹¹ Transcript: Ezra Klein Interviews Nicholas Bagley, *supra* note 410; see also *id.* (Bagley stating his “wish” that “more [public-interest-minded] students” would see “[i]t is every bit as virtuous as signing up in the A.C.L.U. to protect Constitutional rights[] to join up with a federal agency to say, I’m serving the public”).

⁴¹² See *id.*

⁴¹³ Lazarus, *supra* note 202, at 245 (noting, in context of *Upper Pecos Ass’n v. Peterson*, that evading Supreme Court review departed from lawyers’ tendencies).

⁴¹⁴ See Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LITIG. 511, 523 (2010) (observing, in context of law firm economics, that “appellate practice attract[s] the finest legal talent” drawn from “top graduates of the nation’s elite law schools” because of the high “prestige associated with Supreme Court litigation”); McGuire, *supra* note 38, at 46 (“Lawyers are an elite group in American society, and those who litigate before the Supreme Court are even further elevated in the social hierarchy.”).

⁴¹⁵ Cf. Paul Campos, *Lawyers and Spoiled Identity*, 28 GEO. J. LEGAL ETHICS 73, 88 (2015) (noting “[t]he high social status attributed to lawyers within American culture is based on the assumption that being a lawyer means doing highly compensated, intellectually challenging, and socially important work” and questioning whether the differing “economic realities of legal practice” justify this broad cultural perception).

⁴¹⁶ See, e.g., Lara Bazelon, *The ACLU Has Lost Its Way*, ATLANTIC (May 11, 2022, at 14:40 ET), <https://www.theatlantic.com/ideas/archive/2022/05/aclu-johnny-depp-amber-heard-trial/629808/> [<https://perma.cc/8N8B-YYXE>] (commenting on ACLU’s status within liberal public interest universe).

⁴¹⁷ See, e.g., Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (Sep. 28, 2021), <https://www.nytimes.com/2021/06/06/us/aclu-free-speech.html> [<https://perma.cc/CD6H-Q5SY>] (noting that “some [ACLU] lawyers in senior management [make] \$400,000”).

lawyer[s]”⁴¹⁸ who now gravitate toward affirmative and appellate public interest litigation may often better serve progressive goals by turning elsewhere: to government service in federal and state agencies; to defensive work in state attorney and solicitor generals’ offices; to state legislative advocacy and political organizing; to public defense and progressive prosecution; to civil forms of direct client representation of the poor whom prevalent “hierarch[ies] of helping” put at the “bottom” of “progressive lawyering theory.”⁴¹⁹ Of note, almost all civil litigation and criminal prosecution settles before a trial and the issuance of an appealable judicial ruling.

More fundamentally, the progressive movement must question whether talented progressive advocates with “utopian or do-gooder dreams”⁴²⁰ should default to traditional legal careers at all, at least at the very high level they still do.⁴²¹ Legalistic ways of thinking and career trajectories aligned with the adversarial Naderian theory of change remain dominant in American liberalism, even when potentially corrosive to state capacity and theory of constitutionalism underpinning the New Deal.⁴²² While legal tools make intuitive sense to lawyers,⁴²³ these very tools can be counterproductive to the panorama of liberal priorities, especially in an age of captured conservative federal courts.

⁴¹⁸ Transcript: Ezra Klein Interviews Nicholas Bagley, *supra* note 410.

⁴¹⁹ Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 359 (2012).

⁴²⁰ Transcript: Ezra Klein Interviews Nicholas Bagley, *supra* note 410.

⁴²¹ See Sharpless, *supra* note 419; see also Rhode, *supra* note 105, at 2060 (commenting on the high number and “dazzling” quality of applicants to public interest legal organizations).

⁴²² See Nicholas Bagley, *The Procedure Fetish*, NISKANEN CTR. (Dec. 7, 2021), <https://www.niskanencenter.org/the-procedure-fetish/> [<https://perma.cc/E22W-SQTK>] (discussing the “lawyer problem” in American liberalism); Paul Sabin, *Environmental Law and the End of the New Deal Order*, 33 L. & HIST. REV. 965, 989–94 (2015) (discussing how elite environmental lawyers, inspired by the successes of progressive constitutional impact organizations like the ACLU and NAACP, became invested in change through courts relative to other systems of change); PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM 20–22 (2021) (commenting on adversarial legalism’s diminution in the liberal imagination and frustration of state capacity building).

⁴²³ See, e.g., Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 IOWA L. REV. 173, 173, 174 n.2 (2021) (commenting on the proverbial “[l]aw of the [h]ammer,” in which “if all you have is a hammer, everything looks like a nail”).

2. *Between Movement Lawyers and Non-Movement Lawyers*

Cause lawyers have grappled with the challenge of controlling their movements' legal trajectories before the Supreme Court. One recurring obstacle comes from outside lawyers bringing cases to the Court that might create "bad law" or disrupt carefully crafted legal campaigns.⁴²⁴ A critic of resistance through restraint might raise an objection along these lines: even if progressive cause lawyers pull back from their engagement with the Court, other lawyers may bring potentially harmful cases to it, motivated by the desire to vindicate a client's interest,⁴²⁵ the allure of a Supreme Court argument,⁴²⁶ a philosophical or tactical disagreement with movement groups,⁴²⁷ or a grandiose conception of their own legal aptitude and importance.⁴²⁸ Abstention, this critique would posit, simply cedes control to others who may handle cases with less finesse and sensitivity to movement concerns, or perhaps even countermovement forces hostile to those concerns. Movement lawyers, accordingly, should shepherd impact litigation to the Court to themselves, capitalizing on their deep investment in the underlying issue.⁴²⁹

⁴²⁴ See, e.g., Fisher, *supra* note 103, at 187–88 ("There is nothing new about the phenomenon of public interest groups worrying that attorneys outside of their fold (that is, without a singular concern for the groups' causes) will push cases to the Court that will create bad law from the groups' points of view, and sometimes even frustrate years-long litigation campaigns.").

⁴²⁵ See, e.g., Paul D. Clement, *Lawyering in the Supreme Court*, 38 HOFSTRA L. REV. 909, 924–26 (2010) (a veteran Supreme Court litigator discussing individual client representation in his practice and comparing it to organizational representation).

⁴²⁶ See, e.g., Aaron Tang, *The Ethics of Opposing Certiorari Before the Supreme Court*, 35 HARV. J.L. & PUB. POL'Y 933, 934 (2012) ("[T]he chance to argue before the Court is so highly esteemed that its value is beyond quantification, opening doors to high-paying opportunities in private practice and offering a unique opportunity to litigate issues of national significance.").

⁴²⁷ See, e.g., Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 698–703 (2012) (extensively analyzing "tactical conflict" in *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009), a federal constitutional lawsuit challenging a California state constitutional amendment barring gay marriage).

⁴²⁸ See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 430 (2d ed. 2008) (arguing self-important elite cadre of constitutional litigators believe "successfully arguing before judges is equivalent to building and sustaining political movements").

⁴²⁹ With the notable exceptions of the ACLU and Public Citizen's Supreme Court Assistance Project, most contemporary Supreme Court practitioners are not based in progressive public interest organizations. See generally MCGUIRE, *supra* note 38, at 156 (noting the ACLU's lawyers are held in "high regard" in the

The “if not us, then who?” reasoning misunderstands the role movement lawyers can play in reducing and redirecting the total flow of cases to the Supreme Court, even if they lack total control over maverick litigators. A certain class of public interest groups are repeat players at the Court,⁴³⁰ even if their agenda-setting role has declined today relative to the mid- and late-twentieth century.⁴³¹ Due to the enormous volume of certiorari petitions filed each year, petitions and cert-stage amicus briefs from them are important heuristics to busy clerks that a case might be certiorari-worthy and the assertions within the briefing are credible.⁴³² Unsurprisingly, the Court grants certiorari more frequently in this subset of cases.⁴³³

Cause lawyers need not initiate litigation to influence cases brought by others and mitigate the possibility of adverse precedent. In constitutional litigation challenging Proposition 8, California’s 2008 amendment banning gay marriage, for example, movement lawyers disagreed with the decision of powerhouse Supreme Court litigator Ted Olson and veteran trial lawyer David Boies to bring a constitutional challenge in *Perry v. Schwarzenegger*,⁴³⁴ but they nonetheless collaborated

Supreme Court bar); BARBARA HINKSON CRAIG, *COURTING CHANGE: THE STORY OF THE PUBLIC CITIZEN LITIGATION GROUP* 358 (2004) (similar for Public Citizen).

⁴³⁰ See, e.g., Adam Feldman (@adam-feldman-j-d-ph-d-48b91313), *LINKEDIN, Who Argues Before the Supreme Court [by Law School and Employer]*, (Dec. 31, 2024, at 14:11 ET), https://www.linkedin.com/posts/adam-feldman-j-d-ph-d-48b91313_who-argues-before-the-supreme-activity-7279937217328726016-C29V/ [<https://perma.cc/9QV7-6KEH>] (surveying oral arguments from 2010 to 2018 and finding that the ACLU, Public Citizen Litigation Group, the Pacific Legal Foundation, Public Justice PC, and Alliance Defending Freedom are among the firms that appear the most frequently before the Court).

⁴³¹ See Lazarus, *supra* note 134, at 1530–31.

⁴³² See, e.g., Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 189 (1995) (commenting on the rise of lawyers with a Supreme Court-focused practice and finding “the greater the degree of previous experience a lawyer has in litigating before the justices, the greater his or her credibility and likelihood of success”).

⁴³³ See, e.g., H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 127 (1991) (“When certain clerks or justices see certain people or groups as litigants, they pay closer attention. Some are obvious. When the NAACP or the ACLU is a litigant, or if their counsel is representing someone, a justice might examine the petition more closely.”); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1122 (1988) (a foundational study that found interest groups “[w]ithout question” can “have a significant and positive impact on the Court’s agenda by participating as amici curiae”); Lazarus, *supra* note 134, at 1526 (summarizing the greater attention clerks play to certiorari and amicus briefs filed by repeat players and the higher rates of certiorari grants from this sample).

⁴³⁴ Complaint for Declaratory, Injunctive, or Other Relief at 10, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW).

with them to chart strategy and maintain “a voice in the litigation.”⁴³⁵ While initially planning only to file an amicus brief and media statements while conveying their views privately, movement lawyers eventually decided to intervene in litigation when Olson and Boies made a tactical decision with which they disagreed.⁴³⁶

Cause lawyers can also engage in what Douglas NeJaime and Scott Cummings call “remonstration”—discouraging potentially harmful litigation by withdrawing institutional support, conveying disapproval in private, and publicly shaming rogue advocates.⁴³⁷ Thurgood Marshall, for example, worked to “keep local lawyers from filing certiorari petitions in racial discrimination cases that he thought could backfire in the Court.”⁴³⁸ In 1947, memorably, a St. Louis attorney named George Vaughn filed a certiorari petition in *Shelley v. Kraemer*.⁴³⁹ Marshall felt Vaughn’s record was lacking and the legal issue needed additional percolation.⁴⁴⁰ Marshall candidly conferred with Vaughn about the existing legal strategy over multiple coordinating conferences.⁴⁴¹ Or, for a more contemporary example: voting rights advocates expressed “concerns” about Elias’s general approach to litigation in “whispers,” resorting to anonymous “rumblings.”⁴⁴² They could have done so forcefully once private mediation failed.

⁴³⁵ Cummings & NeJaime, *supra* note 244, at 1300.

⁴³⁶ *Id.* at 1300–02.

⁴³⁷ *Id.* at 1311.

⁴³⁸ Fisher, *supra* note 103, at 188; *see also* NeJaime & Cummings, *supra* note 244, at 1309 (noting a long-running concern over “nonmovement lawyers, lacking the sophistication and big-picture perspective, taking cases for a fee that could result in negative precedent undermining the impact litigation campaign”).

⁴³⁹ Petition for Writ of Certiorari, 334 U.S. 1 (1948) (No. 72).

⁴⁴⁰ MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 90 (1994); *accord* Rubenstein, *supra* note 2, at 1627–28.

⁴⁴¹ TUSHNET, *supra* note 440, at 90–91. To preserve the gains Marshall helped bring to fruition, his successors at LDF and aligned organizations have exerted similar pressure on other lawyers to not bring cases to the Court. *See, e.g., Civil Rights Groups Avoid Taking Cases to Supreme Court*, *supra* note 198 (“Leonard C. Alkins, president of the Boston chapter of the NAACP, told the Baltimore Sun: ‘We lobbied very vigorously—along with NAACP Legal Defense Fund, and other groups—to persuade the school committee to reconsider their vote’ to seek Supreme Court review [of an affirmative action case.]”; Greenhouse, *supra* note 198 (detailing a different but similar pressure campaign by civil rights litigators).

⁴⁴² Rick Hasen, *Voting Rights Advocate Concerned About Elias Lawsuits*, ELECTION L. BLOG (June 11, 2015, at 16:37 ET), <https://electionlawblog.org/?p=73441> [<https://perma.cc/J6RH-P564>].

One concern expressed by Marshall—a lack of faith in Vaughn’s legal competence⁴⁴³—carries less weight today. The nation’s top law firms and Supreme Court clinics routinely offer pro bono representation for potentially certiorari-worthy cases.⁴⁴⁴ When the Court grants certiorari, skilled appellate specialists operating on a “loss leader” model compete to represent parties, complementing the subject-specific expertise of movement lawyers with knowledge about litigating before the Court.⁴⁴⁵ There are legitimate concerns that these private lawyers, “in the get-to-the-podium business,” will push cases to the Court that strategically should not be there⁴⁴⁶ and that some classes of litigants get overlooked in this order.⁴⁴⁷ But the sophistication of their representation is not in doubt. *Brnovich* was not lost because of a lack of liberal legal talent.

3. *Within Movement Organizations*

A critic might wonder how resistance through restraint could overcome entrenched organizational imperatives and incentives that favor affirmative litigation. When governments

⁴⁴³ See TUSHNET, *supra* note 440, at 90 (noting Marshall “did not have a great deal of confidence in Vaughn”); Rubenstein, *supra* note 2, at 1628 (observing that Marshall was “worried about Vaughn’s legal abilities,” especially his command of constitutional arguments).

⁴⁴⁴ See Lazarus, *supra* note 134, at 1557 (examining how an elite lawyer in the Supreme Court bar will take cases at “little or no charge so long as they can assume full responsibility for the litigation, including oral argument presentation” because they “bolster the attorney’s overall credentials as a Supreme Court practitioner for those cases that *do* have the potential for generating significant fees”).

⁴⁴⁵ See Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 470 (2012); see also Nancy Morawetz, *The Perils of Supreme Court Intervention in Previously Technical Immigration Cases*, 64 ARIZ. L. REV. 767, 797 (2022) (“Lower odds [of winning cases at the Court], even if lawyers see them as lower, are not going to alter the dynamics that generate offers of free assistance to pursue a case at the Supreme Court if there is a possibility for the Court to grant certiorari.”).

⁴⁴⁶ Adam Liptak, *Specialists’ Help at Court Can Come with a Catch*, N.Y. TIMES (Oct. 9, 2010), <https://www.nytimes.com/2010/10/10/us/10lawyers.html> [<https://perma.cc/NV96-CJMS>].

⁴⁴⁷ This model—driven by competition and lacking central coordination—can lead firms to eschew certain types of cases that pose either business reputational or conflicts risks. Lazarus, *supra* note 134, at 1560. There is a related problem of criminal defense lawyers who are reluctant to give up high court argument. See, e.g., Marcia Coyle, *Sotomayor Renews Call for Experienced Criminal Defense Advocates*, LAW.COM: NAT’L L.J. (Jan. 29, 2018, at 15:29 ET), <https://www.law.com/nationallawjournal/2018/01/29/sotomayor-renews-call-for-experienced-criminal-defense-advocates/> [<https://perma.cc/VG9S-RDK9>] (comments of Justices Sotomayor and Kagan on criminal defendants and the need for greater representation from seasoned appellate specialists).

enact harmful policies, legal organizations often face strong internal and external pressures to file lawsuits, especially from constituents who are either removed from the litigation decision making or view litigation primarily as expressive speech more than a bounded tool for particularized relief.⁴⁴⁸ Impact litigation can generate good press, motivate donors, and provide concrete metrics of organizational activity.⁴⁴⁹ The ACLU, for example, leveraged *Skrmetti* for fundraising and publicity, proudly announcing that “the [C]ourt will soon hear a landmark legal challenge brought by the ACLU.”⁴⁵⁰ It also invoked *Skrmetti* to reaffirm its substantive commitments and institutional ethos.⁴⁵¹

Resistance through restraint does require redirecting institutional resources away from impact litigation. Success metrics must likewise evolve—from measuring impact not through “landmark legal challenge[s]”⁴⁵² launched but more through adverse precedents prevented, cases strategically settled, and resources redeployed to advocacy, lobbying, defensive litigation, and political mobilization. This shift presents difficulties: while litigation wins and losses offer tangible instantiation of action, the value of an adverse precedent prevented is necessarily counterfactual and often indeterminate and elusive. It may initially challenge traditional fundraising, communication and community-building approaches. But movement lawyering

⁴⁴⁸ See generally Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 514 (2004) (noting the symbolic role initiating lawsuits can hold, including “public airing of disputes, raising issues of public concern, [and] promoting a community’s own narrative of the law”); NAACP v. Button, 371 U.S. 415, 429 (1963) (holding that “[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences” but “a form of political expression” to achieve certain “objectives of equality”).

⁴⁴⁹ See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969 (2011).

⁴⁵⁰ Gillian Branstetter, *The Supreme Court Case on Trans Health Care, Explained.*, ACLU (Sep. 5, 2024), <https://www.aclu.org/news/lgbtq-rights/the-supreme-court-case-on-trans-health-care-explained> [<https://perma.cc/8TH3-NW95>].

⁴⁵¹ See, e.g., Image posted by ACLU (@aclu-nationwide), INSTAGRAM, *We’ll always fight for trans youth*, (Sep. 28, 2023), https://www.instagram.com/aclu_nationwide/p/CxwYI74lvAy/ [<https://perma.cc/5JLE-M9XX>] (a social media image stating the “Sixth Circuit Court of Appeals rejected *our* request to block Tennessee’s ban on gender affirming care for transgender youth” and “[w]e’ll never stop fighting for trans youth and their families to get the medical care they need” and commenting that “[w]e’ll always fight for trans youth” (emphasis added)).

⁴⁵² Branstetter, *supra* note 450.

history offers historical precedents of adaptation,⁴⁵³ and public interest litigation has never been static.

A critic pondering along these lines may wonder how resistance through restraint interplays with NeJaime's influential "winning through losing" framework, questioning whether it could deprive legal organizations of the extrajudicial benefits of litigation loss.⁴⁵⁴ The Article sees resistance through restraint and winning through losing as focused on different theoretical projects and timeframes: the former on preventing and slowing down doctrinal erosion of existing legal precedent, the latter on extracting organizational benefits from litigation setbacks. Even though NeJaime's framework does not study the Supreme Court,⁴⁵⁵ both frameworks acknowledge the importance of preserving long-term goals amid hostile institutional conditions, of extrajudicial venues as productive forums for constitutional politics, and of attending to movement resource constraints and morale considerations. Both attest to the counterintuitive benefits of loss at the district and appellate court levels; for strategic restraint, in denying the Court vehicles for further review; and for winning through losing, in mobilizing, fundraising, advocacy, and organizational identity creation for an individual organization and the broader movement of which it is a part.

Where the approaches⁴⁵⁶ diverge most significantly is in their temporal assessment of movement costs in judicial engagement. While NeJaime identifies how individual loss can generate immediate mobilizing benefits, this Article sees a potential long-term demobilizing effect from repeated confrontation with an obdurate Court.⁴⁵⁷ This suggests a potential

⁴⁵³ LDF under general counsel Elaine Jones, for example, successfully convinced donors to fund strategic case settlements rather than Supreme Court appeals, demonstrating how compelling alternative metrics of achievement has the potential to resonate with donors. See Greenhouse, *supra* note 198.

⁴⁵⁴ NeJaime, *supra* note 449, at 972–83.

⁴⁵⁵ *Id.* at 973.

⁴⁵⁶ Here, "Winning Through Losing" may be taking on a meaning divorced from the specifics of and broader in scope than NeJaime's law review article. See Douglas NeJaime, *Before Losing*, 135 YALE L.J.F. 63, 65, 69–71 (2025) (observing that "at times commentators invoke the concept of winning through losing in ways that can insulate decisions about whether to litigate from critique and instead support a less cautious approach to court-based tactics" and distinguishing the "limited nature" of his "argument" from one sometimes ascribed to it).

⁴⁵⁷ See David S. Meyer & Suzanne Staggenborg, *Movements, Countermovements, and the Structure of Political Opportunity*, 101 AM. J. SOCIO. 1628, 1647 (1996) ("Losses generate support by creating alarm, but eventually they have a demobilizing effect as supporters give up hope in the absence of progress toward

synthesis: strategic restraint could help organizations curate which battles to fight, allowing them to selectively harness the mobilizing benefits of an unavoidable loss (such as one initiated by conservative movement actors) while reducing the cumulative demoralization that comes from persistent defeat. By choosing moments of engagement more carefully, movement lawyering organizations could maintain the identity-building and coalition-strengthening benefits NeJaime identifies without risking the broader movement enervation that comes from unrelenting high-profile setbacks at the Supreme Court.

4. *Among Different Movement Lawyering Organizations*

Progressive movement lawyering organizations regularly confront disagreements over movement strategy and goals. These coordination, tactical, and philosophical differences present challenges for implementing resistance through restraint, as the strategy's effectiveness depends on collective adherence across the movement ecosystem. Without consistent commitment to forbearance, individual organizations could pursue litigation that draws attention and funding to it but undermines the collective benefits of restraint, creating a textbook prisoner's dilemma.

Yet coordination need not be perfect to advance movement goals. Marshall, again, offers instructive lessons. He explicitly tried to keep other civil rights lawyers from bringing potentially damaging cases to the Supreme Court, his remonstrance carrying special authority with movement lawyers who had similarly devoted their lives to the racial justice cause.⁴⁵⁸ Through a combination of moral suasion, institutional pressure, and strategic coalition-building, Marshall worked to maintain tactical discipline even when faced with movement lawyers who disagreed with his approach.⁴⁵⁹ Marshall was also not afraid to publicly air movement differences when necessary, taking an acrimonious spat over appellate strategy with civil rights lawyer Carter Wesley directly to civil rights supporters and the

their goals."); Douglas NeJaime, *supra* note 456, at 87 ("In the end, defeats in court create meanings, which movement advocates struggle to control. . . . Under these conditions, a litigation loss may be used to confirm, rather than challenge, a group's subordination.").

⁴⁵⁸ NeJaime, *supra* note 427, at 671–73 (drawing from MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950*, at 138–58 (1987)).

⁴⁵⁹ *See id.*

press.⁴⁶⁰ The same should be done for people like Marc Elias today.⁴⁶¹

Contemporary progressive organizations arguably face even greater coordination hurdles than their civil rights predecessors. The proliferation of public interest organizations has created a crowded, decentralized ecosystem where groups must compete for limited funding and public attention. This competition can incentivize high-profile litigation as a means of demonstrating impact to donors and stakeholders. Filing lawsuits—including filing lawsuits “first”—and seeking Supreme Court review represents a particularly visible action for funders, a quantifiable organizational impact that can drive future support.⁴⁶² With finite funding sources available, organizations may feel pressure to differentiate themselves through attention-grabbing cases.

This perspective underestimates the sophistication and values-driven nature of public interest lawyering. Resistance through restraint asks liberal cause lawyers—who are predisposed to understand the dangers of the Roberts Court—to adopt the tactics pioneered by their predecessors. Unlike big-firm lawyers potentially motivated by the prestige of Supreme Court arguments, liberal public interest attorneys have deliberately made concrete financial sacrifices to further particular moral values in the law. Moreover, resistance through restraint would integrate into, rather than necessitate creation of, an existing infrastructure through which movement organizations already coordinate and collaborate.⁴⁶³

D. Moral Implications of Resistance Through Restraint

A critic might contend that resistance through restraint represents a fundamental abdication of lawyers’ moral and ethical obligations to vindicate constitutional rights and clients’ interests. Under this view, deliberately choosing not to challenge unconstitutional laws or actions privileges abstract

⁴⁶⁰ JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 181–82 (1998).

⁴⁶¹ The voting rights community has largely shied away from forthright public criticism of Marc Elias and his approach. A notable exception is Rick Hasen. See Rick Hasen, *Marc Elias Is Sometimes Counterproductive When It Comes to Protecting Voting Rights, Election Integrity, and the Interests of the Democratic Party*, ELECTION L. BLOG (Jan. 30, 2022, at 15:02 ET), <https://electionlawblog.org/?p=127270> [<https://perma.cc/RX2L-VF9U>].

⁴⁶² See Rhode, *supra* note 105, at 2068.

⁴⁶³ See Morawetz, *supra* note 171, at 166–69, 195 (detailing coordination networks and channels).

strategic considerations over immediate justice,⁴⁶⁴ effectively asking marginalized groups to bear the burden of top-down tactics while their rights are actively violated.⁴⁶⁵ The moral weight of this objection becomes particularly acute in cases like *Skrmetti*, where the choice not to litigate meant accepting grave harms to transgender youth denied medical care in Tennessee—or, more precisely, that federal courts will not remedy those harms.

This critique relates to larger debates in the legal academy over the ethics of impact litigation and movement lawyering.⁴⁶⁶ Rather than dive into this well-trodden territory, this Article responds with two observations. First, bringing cases likely to produce adverse precedent multiplies rather than alleviates harm. The immediate impulse to challenge unjust laws through hostile courts must be weighed against the perils of spreading and constitutionalizing those harms. As Chief Justice Vinson observed, Supreme Court advocacy transcends individual dispute resolution—lawyers “represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country.”⁴⁶⁷ By ruling against the transgender plaintiffs in *Skrmetti*, the Court not only validated Tennessee’s ban but inspired more severe legislation against transgender people of all ages across Republican-controlled states and the federal government,⁴⁶⁸ including bans on gender-affirming care

⁴⁶⁴ See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 482–88 (1976) (surveying various cases in which “rigid” impact lawyers “formulated [litigation strategy] without the support and often over the objection” of communities most directly impacted by school segregation and positing that “excluding [B]lack parents from meaningful participation in school policymaking” is “at least as damaging to black children as enforced separation”).

⁴⁶⁵ See, e.g., Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 STAN. L. REV. 87, 92, 129 (2022) (advocating for a model of “participatory litigation” of class-action and impact litigation in which “class members and named plaintiffs [engage] in tactical and strategic legal decision-making,” recognizing that “clients often do have a great deal of knowledge about and experience with the issues in the lawsuit and that legal strategy can benefit from more collaborative decisionmaking”).

⁴⁶⁶ See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 319–22 (1988).

⁴⁶⁷ ANTHONY LEWIS, *GIDEON’S TRUMPET* 25 (1964) (quoting Chief Justice Vinson).

⁴⁶⁸ See, e.g., Madison Pauly, *This Supreme Court Case Could Change Everything for Trans Rights*, MOTHER JONES (Dec. 2, 2024), <https://www.motherjones.com/politics/2024/12/trans-rights-supreme-court-skrmetti/> [<https://perma.cc/K9UC-BVCN>] (“The justices’ eventual decision [in *Skrmetti*] could have implications not just for gender-affirming care bans, but for future anti-trans

for adults (a concern intimated by Justice Sotomayor at oral argument and manifest to the Court's liberal litigators).⁴⁶⁹ It also weakened equal protection precedents unrelated to transgender rights.⁴⁷⁰

Second, impact lawyers' ethical duties include responsible stewardship of limited resources in service of long-term justice.⁴⁷¹ When certain litigation strategies are likely to produce bad law while consuming substantial organizational capacity, there is a compelling ethical argument for redirecting those resources to more productive forms of advocacy.⁴⁷² This is not "surrender"⁴⁷³ but pragmatic temporal redirection recognizing that the ethical imperatives in public interest representation

laws in statehouses and Congress. 'It will tell the next administration whether it's open season to continue with these attacks on trans young folks and transgender people more broadly,' says Jenny Pizer, chief legal officer of the LGBTQ civil rights organization Lambda Legal, 'or whether there's going to be some limits.'"); Duncan Hosie, *Liberals Are Going to Keep Losing at the Supreme Court*, ATLANTIC (June 30, 2025), <https://www.theatlantic.com/ideas/archive/2025/06/supreme-court-liberal-activism/683356/> [https://perma.cc/Y5MT-9Y7S] ("Politically, [the *Skrimetti* majority opinion] encourages Republican officials to pursue even more restrictive laws targeting transgender people. . . . Justice Amy Coney Barrett's *Skrimetti* concurrence—joined in full by Justice Clarence Thomas and substantively endorsed by Justice Samuel Alito—goes further in inviting discrimination against transgender people. . . . [S]he staked out a position even more extreme than the majority opinion, writing that transgender people do not qualify as a suspect or quasi-suspect class under the equal-protection clause.").

⁴⁶⁹ *Skrimetti* Oral Argument, *supra* note 116, at 128 (statement of Sotomayor, J.) ("[G]iven your argument, you're saying your state can block gender treatment for adults too?").

⁴⁷⁰ See Hosie, *supra* note 11 (discussing the revival of *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

⁴⁷¹ See, e.g., Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 464–65 (2018) (introducing the concept of "temporality" in which movement lawyers have long-term, lasting results).

⁴⁷² See generally John M. de Figueiredo & Rui J.P. de Figueiredo, Jr., *The Allocation of Resources by Interest Groups: Lobbying, Litigation and Administrative Regulation*, 4 BUS. & POL. 161, 164 (2002).

⁴⁷³ See Adam Liptak, *Suit over Firing by Trump Could Pave Way for Broader Presidential Power*, N.Y. TIMES (Feb. 6, 2025), <https://www.nytimes.com/2025/02/06/us/politics/trump-firing-labor-supreme-court.html?smid=nytcore-ios-share&referringSource=articleShare> [https://perma.cc/JE5A-LSYB] (a litigant describing not challenging President Trump's firings at the National Labor Relations Board as "surrender" despite the reality that her case "reach[ing] the Supreme Court" would likely "accomplish a major goal of the Trump administration and the conservative legal movement: to place what they call the administrative state under the complete control of the [P]resident").

requires vindicating long-term objectives by choosing contemporary battlegrounds carefully.⁴⁷⁴

CONCLUSION

Voltaire's *Candide* concludes with its most famous injunction: "We must cultivate our garden."⁴⁷⁵ After a series of well-intentioned efforts that exacerbate problems, the eponymous protagonist turns away from grand philosophical pursuits and pivots to more pragmatic and immediate action. His garden may not cure the world, but it can be something beautiful and meaningful under his control—an area he can tend to, in contrast to the chaos and cruelty beyond his reach.

This metaphor resonates with the deep challenges facing progressive cause lawyers today. Just as *Candide* learns to redirect his energies from quixotic quests to tangible improvements, progressive legal organizations must pivot from pursuing institutional reforms and risky impact litigation before a hostile Supreme Court to savvy forms of constitutional advocacy. The sowing of alternative venues for progressive constitutionalism—elections, state courts, legislative bodies, administrative agencies, civil society, citizen discourse, autonomous academic communities—requires patient, incremental work over intertemporal timescales. Yet, while less immediately and emotionally gratifying than filing headline-generating Supreme Court challenges, it offers more sustainable paths toward constitutional progress.

Resistance through restraint represents neither surrender nor acceptance of injustice. Rather, it provides the roots for preserving hard-won constitutional victories while building capacity for future ones. Like *Candide*'s garden, it may seem modest compared to grander visions of institutional transformation or new affirmative precedents. But, it offers something concrete and achievable: the preservation of existing constitutional gains and the cultivation of alternative constitutional futures. Through restraint, the source of wounds becomes the source of power.

⁴⁷⁴ See Martha L. Gómez, *The Culture of Non-Profit Impact Litigation*, 23 CLINICAL L. REV. 635, 650–51, 654 (2017) (noting the "glory" of Supreme Court arguments can impact litigators to "prioritize a loser" at the expense of client interests and "[n]othing quite brings [a tendency of impact litigators to use non-profits for career growth] out like Supreme Court arguments").

⁴⁷⁵ VOLTAIRE, *CANDIDE* 111 (The Literary Guild of Am. 1929) (1759).