ESSAY

# Legal Realignment

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*The United States is undergoing a legal realignment, in that salient legal views recently associated with the right are now being espoused by the left, and vice versa. The clearest example involves* Chevron *deference: a doctrine once championed by conservatives like Justice Antonin Scalia has now been overruled in* Loper Bright v. Raimondo*—over dissenting votes by all three of the Court's liberals. Similar points can be made about standing, stare decisis, textualism, positivism, and more. The basic reason for this transformation is straightforward: legal ideologies in power favor discretion, whereas those out of power favor constraint. Conservatives now firmly control the federal judiciary, so they are gradually abandoning their prior posture of constraint, even as liberals adopt it. As a result, the formalism that characterizes today's legal culture is coming to an end. In the meantime, the left and the right's mutual repositioning is helping to preserve both a workable legal system and a degree of shared legal culture.*

† Professor, Harvard Law School. I am grateful to many thoughtful commentators, including workshop participants at Stanford University, the University of Virginia, Wayne State University, Harvard University, and Boston College, as well as attendees at a presentation at Boston University and a panel at the AALS annual conference. This essay borrows some text and ideas from my keynote address at the 2024 National Conference of Constitutional Law Scholars. *See generally* Richard M. Re, The One Big Question (Feb. 26, 2024) (Nat'l Conf. of Const. L. Scholars Keynote Address) (available on SSRN). Many thanks to the organizers and attendees at that event. Finally, I am indebted to the editors of this journal.

## INTRODUCTION

Not so long ago, legal conservatives generally supported: judicial deference to administrative agencies, strict textualist interpretation, and demanding rules of standing.[1] Meanwhile, legal liberals generally opposed or were unenthusiastic about those same ideas.[2] Recently, however, these trends have shifted or reversed.[3] Legal positions long associated with conservatives are becoming associated with liberals, and vice versa. An ideological change of this kind can be labeled a *legal realignment*.[4]

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1 *See infra* Part II.C (discussing Justice Antonin Scalia).

2 *See infra* Part III.C (discussing Justice Stephen Breyer).

3 *See infra* Part II.C (discussing *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023)).

4 By *legal realignment*, I mean changes in the legal views espoused by conservative and liberal legal ideologies, particularly in relation to one another. These changes call to mind political party realignments; however, legal realignment has less to do with changing voting allegiances, electoral blocs, or "decisive" elections and more to do with the internal logic of legal argument, changes in judicial personnel, and rhetorical incentives. *Cf.* DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE 7–42 (2002). Some legal changes have been insightfully studied under the rubric of "ideological drift," which focuses on a legal idea and depicts it as moving across the aisle. *See* J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 871, 876–80 (1993) ("Ideological drift in law means that legal ideas and symbols will change their political valence as they are used over and over again in new contexts."). But that term risks attributing agency to ideas that idly "drift" or "change," when in fact groups of people use ideas strategically. In addition, the ideational changes in question typically involve a pair of ideas. When free speech absolutism "drifted" to the right, for instance, liberals began to espouse anti-absolutism. *See infra* note 174. Finally, the ideological valence of many interrelated ideas can flip simultaneously and for a shared reason—as is now happening.

What makes legal realignments distinctive is that they involve changes both in and among ideological groups. By comparison, more familiar legal reversals, such as the Supreme Court's abandonment of *Lochner v. New York*[5] or *Plessy v. Ferguson*,[6] operate at an institutional level. While institutional changes can come about because of legal realignments, the two pose different concerns. When a dissident ideology consistently adheres to a particular legal position and eventually implements it, one might ask whether the ideology's adherents should have instead heeded institutional values like social stability or political neutrality. The demise of *Roe v. Wade*[7] offers an example.[8] But when the same ideology changes its longtime positions upon gaining or losing power, the most immediate question is whether the ideology's adherents have been opportunistic, selecting or abandoning positions based on their strategic appeal. *Loper Bright Enterprises v. Raimondo*[9] is a recent example: though conservatives like Justice Antonin Scalia had long supported deference to administrative agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[10] the six conservative Justices all voted to overrule it—leaving the three liberals to defend one of Scalia's major projects.[11]

This Essay offers a descriptive account of the legal realignment currently taking place in U.S. law and legal culture. And that effort requires a more general account of how U.S. law is constructed and changed. My basic claim is that there is a structure underlying the law at any given moment, one that explains who has which views, when they have those views, and why.[12] The

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For these reasons, *legal realignment* more accurately captures many changes in legal ideology.

5 198 U.S. 45 (1905). *But see* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399–400 (1937).

6 163 U.S. 537 (1896). *But see* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

7 410 U.S. 113 (1973). *But see* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022). We might say that cases like *Dobbs* illustrate "ideological fulfillment," in that an ideology's consistent position wins institutionally.

8 *See* Rachel Bayefsky, *Judicial Institutionalism*, 109 CORNELL L. REV. 1297, 1336–39 (2024); Melissa Murray & Katherine Shaw, Dobbs *and Democracy*, 137 HARV. L. REV. 728, 754 (2024); *see also* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1121–51 (1995).

9 144 S. Ct. 2244 (2024).

10 467 U.S. 837 (1984).

11 *Loper Bright*, 144 S. Ct. at 2273; *id.* at 2294 (Kagan, J., dissenting); *see also infra* note 111 and accompanying text (discussing Justice Scalia's partial change of heart).

12 For related work, see generally JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020) [hereinafter BALKIN, CONSTITUTIONAL TIME] (developing a cyclical theory of

principles that govern this deeper structure could be viewed as prelegal. Or they could be viewed as the true law—the law of the law, as it were.[13] With this deeper structure in view, we can better understand our law and legal culture and also predict where they are headed next.

Here is the basic idea. U.S. law and its attendant culture have two dimensions: one political and the other methodological. The political dimension stems from the two-party system of U.S. politics. So long as the two-party system predominates, legal culture too will have members who gravitate toward political conservativism or political liberalism. In other words, legal culture always contains both a conservative ideology and a liberal ideology. The relative salience of the two ideologies changes, however, depending on their relative sway over judicial decision-making at any given time.

The methodological dimension of legal culture is different. It reflects an antinomy in the nature of law itself—namely, the paradoxical need for both constraint and discretion. For law to exist at all, something must be settled. But for law to work sensibly, there must also be room for flexible adjustments. Because sources of legal constraint tend to be formal materials (such as authoritative texts), constraint roughly corresponds to *formalism* and discretion to

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constitutional regime change grounded in theories of political regime change); Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019) [hereinafter Balkin, *Why Liberals and Conservatives Flipped*]; Elizabeth S. Anker, *Left Crit Theory Goes to Washington: The Anti-Liberal Ideology of the Roberts Court*, 27 U. PA. J. CONST. L. 1 (2025); Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149 (2004) [hereinafter Friedman, *Cycles of Constitutional Theory*]; Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819 (2016); Arthur D. Hellman, *The Supreme Court's Two Constitutions: A First Look at the "Reverse Polarity" Cases*, 82 U. PITT. L. REV. 273 (2020); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346 (2016); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) [hereinafter Vermeule, *Cycles of Statutory Interpretation*]. *Cf.* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 2 (1995) (discussing a "'pendulum swing' vision of American jurisprudential history," wherein the "pendulum of history swings back and forth . . . between formalism and realism"). For my own related work, see generally Richard M. Re, *Does the Discourse on* 303 Creative *Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67 (2023) [hereinafter Re, *Discourse on* 303 Creative]; Richard M. Re, *A Conservative Warren Court*, WASH. POST (July 9, 2024), https://www.washingtonpost.com/opinions/2024/07/09/roberts-supreme-court-conservative-warren/; Richard M. Re, The One Big Question (Feb. 26, 2024) (Nat'l Conf. of Const. L. Scholars Keynote Address) (available on SSRN).

[13] The law's underlying structure could be cast as "new" kind of natural law—not in the sense that it involves morality, but rather in the sense that it rests on natural foundations deeper than the received or positive law of the moment.

*functionalism*.[14] To some extent, these methodological opposites represent styles of legal reasoning or rhetoric.[15]

Critically, I deny any intrinsic link between the law's political and methodological dimensions.[16] At any given time, that is, the conservative or liberal ideologies may prioritize either the law's constraining aspect or its discretionary aspect. In other words, either conservatives or liberals (or both) may prioritize constraint

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[14] Formalism is a term with many, perhaps too many, meanings. On one salient view, it is "the notion that rules constrict the choice of the decisionmaker," such as when a rule is reduced to an authoritative text that precludes direct recourse to considerations of morality or good policy. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509 (1988) [hereinafter Schauer, *Formalism*]; *cf.* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177, 1179 (1989) (contrasting a "discretion-conferring approach" with one of "general rule[s]" that "constrain"). Formalism is then essentially identical to what I call constraint. On another salient view, by contrast, formalism is the idea that law has an internal logic of its own, separate from politics. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950–54 (1988) (discussing in part Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 563–76 (1983)). These two views are distinct, but each tends to foster the other: for a normative system to have an internal logic is conducive to its being constraining. I use "formalism" to mean formalism as constraint, with its opposite being "functionalism." And I treat formalism as a matter of degree. On prerealist formalism, see *infra* note 203.

[15] I argue that methodological differences—that is, prioritizing either constraint or discretion—matter for judicial behavior and many case outcomes. *See infra* text accompanying note 150. However, readers inclined to view the law as pervasively indeterminate, and therefore unconstraining, *see generally, e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983), may still be persuaded that the patterns I identify characterize the surface presentation (the mere rhetoric) of legal argument.

[16] Professor Duncan Kennedy famously argued for such a link in *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). In brief, Kennedy linked rule-based formalism to individualism and, therefore, to political conservativism. *Id.* at 1685. But Kennedy himself recognized that the formal distinction between law and politics supposedly associated with an "individualist" conception of the judicial role was perhaps most saliently espoused by the liberals who emphasized judicial restraint in opposition to *Lochner*. *Id.* at 1756–58. One possible response here is to distinguish *private law*, where Kennedy's theory may hold, from *public law*, where it may not. But, as Kennedy's critics have pointed out, formal rules are just as likely to be anti-individualist or pro-egalitarian because of their tendency to offset social inequality and advantage, their capacity to enable mass social mobilization, and their potential egalitarian content. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 420 (1985); Schauer, *Formalism*, *supra* note 14, at 542 n.91; Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935, 943–44 (1993) [hereinafter Schauer, *Political Incidence*]. These jurisprudential points also address suggestions that textualism (a formal method) "tilts toward . . . a conservative preference" by hobbling regulation. Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 23, 2012), https://perma.cc/A2F5-QZNX (discussing textualism). Both halves of this claim are dubious: again, formal methods are as conducive to regulation as not, and, in any event, many conservatives favor intrusive regulation in particular domains.

(roughly, legal formalism) or discretion (roughly, legal functionalism). So a conservative or liberal ideology may start out formalist before becoming functionalist—only to reverse course again.[17]

Because changes in law follow certain principles, patterns of change can emerge. A metaphor may help. Imagine two pendulums, each representing one of the two ever-present legal ideologies (either conservative or liberal). At any given time, each pendulum may be closer to either constraint on the one side or discretion on the other. Today, the conservative and liberal legal ideologies have both swung far toward constraint, yielding an extraordinarily formalist law and legal culture. Yet the liberal ideology is still moving toward constraint, whereas the conservative one has begun to swing back toward discretion. As a result, our highly formalist legal culture is becoming more functionalist. Even so, law will persist—not despite but because of these reciprocal ideological transformations.

## I. LAW'S STRUCTURE

I understand the law to be the set of normative principles that are accepted and applied by judges, accounting for the relative power of those judges and the particular views they hold.[18] By comparison, legal culture is the set of social views and practices that influence the law's formation and implementation.[19] Finally, the law's underlying structure is the set of descriptive principles that explains who in legal culture holds which legal views, when they have those views, and why. This Part describes the law's underlying structure in the United States. In brief, the law and legal culture are dualist, heterogeneous, and partly dependent on political contingencies.[20]

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[17] "Certain sorts of ideas may be especially susceptible to ideological drift," including because they lack "an intrinsic political valence." David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 107 (2018); *see also* Schauer, *Political Incidence*, *supra* note 16, at 942–43 (contrasting "indifferent" and "tilted" principles). Legal methodology fits that bill, as do other matters of procedure or institutional role (as distinct from substantive policy views or outcomes).

[18] *See generally* Richard M. Re, *A Law Unto Oneself: Personal Positivism and Our Fragmented Judiciary*, 110 VA. L. REV. 1169 (2024). For example, if some judges were textualist and the others purposivist, then the law would be a mix of the two methods.

[19] *Cf.* Lawrence M. Friedman, *Is There a Modern Legal Culture?*, 7 RATIO JURIS 117, 118 (1994) ("By legal culture we mean the ideas, values, attitudes, and opinions people in some society hold, with regard to law and the legal system.").

[20] Political contingencies operate within or atop the law's underlying structure, generating the specific legal rules accepted and applied by judges and others. This mix of (relative) essentiality and contingency may resemble some accounts of natural law. *See*

### A. Legal Dualism

The law is always being pulled in two directions: toward constraint, and toward discretion. To exist as law at all, substantial constraint is necessary. Only constraint, after all, can allow the law to resolve or preempt controversial first-order questions regarding topics like morality and policy.[21] A society or social practice that left everything up for grabs, or open to constant reconsideration, would not constitute a legal system so much as the lack of one. People attuned to this need for constraint will naturally favor clear positive rules, even as they oppose standards, exceptions from rules, and rules that incorporate or allow for consideration of morality.[22]

Yet not everything can have been settled, both because perfect settlement is impossible and because flexibility is often desirable. When equipped with a general rule, we might nonetheless want flexibility in light of particular facts. Or, even when equipped with relevant historical facts and perspectives as they now exist, we might want flexibility to account for newly arising developments and discoveries. The value of discretion calls for rules that create zones of permission, for standards instead of rules, and for rules to incorporate moral factors, case-specific circumstances, and other opportunities for reflection and adjustment.

The resulting tension or conflict between constraint and discretion is visible in every aspect of legal culture, including statutory law, case law, and individual adjudications. This basic tension is ineradicable in any working legal system.[23]

Almost all systematic accounts of the law exhibit some version of this dualism. The distinction between constraint and discretion arises in many guises and contexts, pervading legal thought. Most salient is the distinction between formalism and

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*generally, e.g.*, LON L. FULLER, THE MORALITY OF LAW (1964); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011).

[21] *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 197–201 (2d ed. 2009).

[22] As these examples illustrate, constraint is a property internal to a legal ideology and does not turn on how that ideology interacts with society. Constraining methods can be disruptive, insofar as determinate rules are out of step with prevailing norms or practices. And discretion can be preservationist, insofar as judges use their discretion to ratify the extant regime.

[23] These fundamentally descriptive claims have a prescriptive implication. If *ought* implies *can*, then the impossibility of categorically favoring either constraint or discretion means that advocates for doing so must be mistaken—somewhat like a debate over whether heat is better than cold.

functionalism.[24] Additional instantiations of this deep dichotomy include the distinctions between: positive law and natural law,[25] law and equity,[26] rules and standards,[27] obligation and permission,[28] text and purpose,[29] and clarity and indeterminacy.[30] All these ideas can be viewed as examples of the (even) more abstract distinction between constraint and discretion. Each half of these dyads enjoys its own champions, victories, and domains, but also its nemeses, defeats, and wildernesses. This cluster of interrelated struggles can never truly end, for there is no realistic condition in which a legal system, or even a large component of a legal system, is uniformly and permanently either one way or the other. The law simply cannot do without them both. So neither is ever abandoned.

One might think that the law's two methodological aspects would be evenly intermixed at all times, yielding a homogeneous legal system that, in its every particular, is always a bit constrained and a bit discretionary. Yet that kind of uniform moderation is exceedingly improbable. Instead, each of the law's two methodological aspects will tend to achieve dominance in particular subject areas, in different situations, and with respect to specific people. Sometimes, the appeal of constraint is high, yielding the adoption of absolute rules; or else the demand for discretion arises, giving rise to a vague standard. Legislatures or appellate courts might be confident enough to settle many future cases in one fell swoop; or they might be cautious enough to delegate decisions to the future.[31] So while a legal system as a whole will exhibit a lot of both constraint and discretion—and so will on average be a bit constrained and a bit discretionary—a different pattern will emerge within certain areas of the law. That is, a

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[24] On the meaning(s) of legal formalism, see *supra* note 14.

[25] *Compare* H.L.A. HART, THE CONCEPT OF LAW 18–20 (2d ed. 1994), *with* RONALD DWORKIN, LAW'S EMPIRE 35–37 (1986) [hereinafter DWORKIN, LAW'S EMPIRE].

[26] *See* ARISTOTLE, THE NICOMACHEAN ETHICS 1137b (J.L. Ackrill & J.O. Urmson eds., David Ryoss trans., 1998); *see also* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050, 1059–67, 1100–10 (2021); Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1766–70 (2022).

[27] *See generally* Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

[28] *See, e.g.*, RAZ, *supra* note 21, at 67, 233–34; Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1947 (2008).

[29] *Compare* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 47–68 (2012), *with* ROBERT A. KATZMANN, JUDGING STATUTES 31–35 (2014).

[30] *See, e.g.*, *Chevron*, 467 U.S. at 843.

[31] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2220 (2018).

particular constitutional provision, statute, doctrine, or judicial ruling will often lean strongly in one direction or the other. In this sense, the law is not just dualist but heterogeneous.

Moreover, individuals and groups tend to align with one or the other aspect of the law. This specialization stems from the fact that constraint and discretion are antonyms. Systematic pursuit of either one is in tension with systematic pursuit of the other. As a result, sustained or comprehensive claims about the law's proper content will tend to prioritize one half of the antinomy. Logical argument is often thought to resist contradiction.[32] And embrace of a paradox can be viewed as an embarrassing weakness, a self-serving cop-out, or a source of painful cognitive dissonance.[33] That is why constraint and discretion both tend to have their own distinctive champions.

### B. Ideological Alignment

U.S. politics, too, has a dualist structure, in that it has generally been dominated by two political parties, in contrast with the multiparty dynamics visible in many other countries. While there are several reasons for the United States' political dualism, the most salient explanation offered by political science is known as "Duverger's law."[34] In brief, electoral systems with first-past-the-post voting, meaning that the single candidate with the most votes wins, naturally tend toward two-party political organization. The key intuition is straightforward: any political organization has a powerful incentive to appeal to 50.1% of the electorate, yielding complete electoral victory. Because parties that focus on smaller or larger fractions of the electorate will be at a disadvantage, the resulting equilibrium involves just two parties

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[32] Consider the "law of noncontradiction" associated with philosophy at least since Aristotle. *See* ARISTOTLE, METAPHYSICS 1011b13–15 (J.L. Ackrill & Lindsay Judson eds., Christopher Kirwan trans., 1998) ("[T]he opinion that opposite assertions are not simultaneously true is the firmest of all."); *see also* Obergefell v. Hodges, 576 U.S. 644, 713–20 (2015) (Scalia, J., dissenting).

[33] *See, e.g.*, LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1 (1957).

[34] *See* Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2335 (2021) ("There is consensus among political scientists that single-member districts with first-past-the-post elections lead to a two-party system, thus creating special opportunities for polarization." (citing, on Duverger's law, SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1210–13 (5th ed. 2016) (citing, in turn, MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (1954))).

fighting over the median voter.[35] For these and other reasons, the United States offers perhaps the starkest instantiation of Duverger's law, as it has generally been dominated by the two-party system, with only a few significant exceptions.[36]

The dualism of U.S. politics contributes to dualism in U.S. legal ideology. In other words, each of the two major political parties will tend to generate its own legal ideology: one associated with the political right and the other associated with the political left.[37] Judicial review is a salient force in U.S. policymaking, and judges are generally appointed through politically saturated processes. As a result, each political party has a powerful interest in cultivating and selecting judges whose views of the law and judicial power substantially align with that party's political platform.[38] Of course, there are other interests at stake, such as the desire to select capable jurists or to foster a politically independent judiciary. Even so, there is little doubt that the legal views of prospective judges play an important part in the judicial selection process.[39] As a result, party affiliation is a powerful indicator of how judges decide cases.[40] These two legal cultures correspond to two organizations that often operate as avatars for the two political parties: law students, practitioners, and even judges may align with either the American Constitution Society (which codes as liberal or progressive) or the Federalist Society (which codes as libertarian or conservative). This basic division in legal culture is well-known.[41]

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35 *But see* David Schleicher, *Things Aren't Going That Well over There Either: Party Polarization and Election Law in Comparative Perspective*, 2015 U. CHI. LEGAL F. 433, 436 (2015) (arguing that Duverger's law does not hold in some countries).

36 *See* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 367–71.

37 I use "liberal" and "the left" in parallel with "conservative" and "the right." These terms are simplifications, in that each of the two parties represents a shifting coalition of different groups. What it means to be *liberal* or *conservative* is therefore both ambiguous and changing over time. For example, the conservative coalition at a particular time might contain both libertarians and social conservatives, with both finding representation among conservative-aligned jurists.

38 *See generally* ADAM BONICA & MAYA SEN, THE JUDICIAL TUG OF WAR: HOW LAWYERS, POLITICIANS, AND IDEOLOGICAL INCENTIVES SHAPE THE AMERICAN JUDICIARY (2021).

39 *See generally id.*; NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).

40 *See* LEE EPSTEIN & JEFFREY A. SEGALL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 143–45 (2005); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 168 (2009).

41 *See* AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 9–27 (2015); STEVEN M. TELES,

Less evident are the ways in which competing legal ideologies are shaped in part by the law's dualist structure. Each of the nation's two legal ideologies has an incentive, and will exhibit a tendency, to align itself with one or the other aspect of the law's dualist structure. Both ideologies will want to present their views, garner adherents, and criticize their ideological rivals. And it is generally much easier to achieve those goals if you can avoid the tension or contradiction that follows from paradoxically emphasizing both constraint and discretion. To be sure, some individuals associated with one or another legal ideology will buck overall trends or avoid picking a side at all. Still, preferences for either constraint or discretion are usually fairly evident. In the 1980s, for instance, the political right was strongly associated with a relatively constraint-focused or formalist legal ideology, whereas the political left was associated with a relatively discretion-focused or functionalist legal ideology.

What is more, the choice by each of the two legal ideologies to prioritize either constraint or discretion will depend in part on the choice of its counterpart. For example, a legal ideology that has found itself out of power may thrive best when it sharply contrasts itself with the reigning legal ideology. Pointed contrasts, after all, can allow for forceful criticisms and support a dissident counterculture. Where that oppositional relationship obtains, the two ideologies may favor starkly different methodological approaches. At the same time, the dissident legal ideology has an interest in appealing to the reigning ideology, so as to better influence events.[42] That incentive has encouraged many liberals to embrace or at least accommodate greater constraint, such as when Justice Elena Kagan declared that "we're all textualists now," in addition to being "originalists" after a fashion.[43]

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THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 6–21 (2008).

[42] *See* Katie Eyer, *Textualism and Progressive Social Movements*, U. CHI. L. REV. ONLINE (Mar. 12, 2024), https://perma.cc/8BDK-WSEY (arguing that progressives should embrace textualism and that, "where an argument is already fully institutionalized, there is likely to be far less downside for movements of embracing it—and greater costs to declining to do so").

[43] *See* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE 8:22–8:31 (Nov. 25, 2015) [hereinafter Kagan, *The 2015 Scalia Lecture*], https://www.youtube.com/watch?v=dpEtszFT0Tg; *see also The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan, Nominee, U.S. Supreme Court).

Legal ideology can thus be imagined as two parallel and partially asynchronous pendulums. Sometimes, the two pendulums are both swinging toward constraint. Sometimes, they are both swinging toward discretion. And at still other times, they are out of synch, swinging toward opposite extremes simultaneously. At all times, however, the two legal ideologies will be aligned with political opposites. In other words, one legal ideology will tend to associate itself with the political right, and the other will tend to associate itself with the political left. And that political opposition will remain regardless of whether either (or both) of the just-imagined pendulums is swinging toward constraint or discretion.

In this sense, legal ideology is bidimensional. One dimension pertains to political affiliation (conservative or liberal). The other pertains to the underlying tension in the nature of the law itself (constraint or discretion). Individual jurists can be viewed similarly. That is, some judges are relatively conservative-constrained, whereas others are more conservative-discretionary, liberal-discretionary, or liberal-constrained. Overall, legal culture today is conservative-constrained, whereas it was liberal-discretionary during the era of the Warren Court. Table 1 below illustrates the two-dimensionality of legal culture by providing illustrative jurists who are plausibly slotted into each of the various quadrants.[44]

TABLE 1: THE TWO DIMENSIONS OF LEGAL IDEOLOGY

| | | ***Political Dimension*** | |
|---|---|---|---|
| | | **Conservative** | **Liberal** |
| *Methodological Dimension* | **Constraint** (≈Formalism) | Justice Scalia | Justice Kagan |
| | **Discretion** (≈Functionalism) | Justice Alito | Justice Breyer |

[44] Legal culture's complex dualism means that today's incumbents resemble tomorrow's dissidents, and vice versa. As a result, dissidents have an interest in preserving many legal principles—whether statutes, precedents, or constitutional provisions—established before the current incumbents took over. That favorable view of the ancien régime encourages dissidents to prioritize constraint. In a more one-sided regime, by contrast, a single ideology might overwhelmingly dominate and control formal law. Dissidents might then see nothing redeemable in existing law—and have little choice but to engage in visionary, unconstrained dissent.

In some cases, constraint-oriented jurists align against discretion-oriented ones—typically when the subject matter does not strongly code as either conservative or liberal. In those circumstances, what we might call the methodological dimension of legal identity predominates over the political dimension of legal identity. Some criminal procedure cases offer examples.[45] Yet these alliances across political divides are exceptional, and their existence is consistent with the more general proposition that, when the aforementioned judges served together, conservative legal ideology was relatively formalist and liberal legal ideology was relatively functionalist. During the late twentieth century, the main axis of contention involved conservative-constraint in opposition to liberal-discretion (Justice Scalia versus Justice Stephen Breyer). Increasingly, however, the key axis is conservative-discretion versus liberal-constraint (Justice Samuel Alito versus Justice Kagan).

Many legal commentators have wondered, celebrated, or complained about the fact that conservative legal thought is organized around relatively formal principles like textualism and originalism. Why don't legal liberals find a similar methodological rallying point, despite many scholarly efforts to provide one?[46] And why have conservatives for many years converged on formal methods?[47] The law's dualist structure points toward an answer. For reasons to be explored below,[48] the legal left swung hard toward discretion during the era of the Warren Court. That diffuse flexibility lends itself to a proliferation of theory. Ever since, the left has been associated with a wide array of flexible and functionalist approaches to judging, such as moral readings,[49] living

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45 *See generally, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Apprendi v. New Jersey, 530 U.S. 466 (2000).

46 *See generally* Mitchell Berman, To Say What the Law Is: The Constitution, the Supreme Court, and the Nature of Law (2025) (unpublished manuscript) (on file with author); Ruth Marcus, *Originalism Is Bunk. Liberal Lawyers Shouldn't Fall for It*, WASH. POST (Dec. 1, 2022), https://www.washingtonpost.com/opinions/2022/12/01/originalism-liberal-lawyers-supreme-court-trap/ (arguing that "liberals have had difficulty coalescing around an easily understandable and convincing counterpoint" to originalism).

47 To be sure, there are still many ways of prioritizing texts, yielding many flavors of originalism and textualism. *See* Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1436–53 (2021).

48 *See infra* Part II.B.

49 *See* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1003–19 (1973); JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 73–97 (2015).

constitutionalism,[50] representation-reinforcement,[51] and much else.[52] By contrast, conservative legal ideology moved more decisively toward constraint, which facilitates convergence on formal methods grounded in constitutional and statutory texts. In short, conservatives emphasized constraint (yielding methodological convergence), while liberals emphasized discretion (yielding methodological divergence).

But questions remain about precisely why each of those ideologies made their respective choices. This matter must be addressed in a more contextual and historical way than the discussion has so far allowed. While fundamental, the law's underlying structure supplies only a framework in which contingent events can play out.[53] It is time to consider these sorts of contingencies.

## II. LAW'S DIRECTIONS

The law's underlying structure allows for legal change. Some changes are impossible or unlikely, while others are easy or inevitable, provided the right conditions. The main drivers of legal change are political contingencies resulting in personnel changes on the Supreme Court. For several decades, legal changes have tended to favor both conservativism and constraint. More recently, however, the law has begun to turn in another direction.

### A. The Model in Overview

What drives the two different legal ideologies toward either constraint or discretion?[54] In brief, the members of each legal ideology are influenced by three often-conflicting incentives: (1) to be

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50 *See generally* Charles Reich, *The Living Constitution and the Court's Role*, *in* HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 133 (Stephen Parks Strickland ed., 1967); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007).

51 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980).

52 For relatively functionalist approaches to statutory interpretation, see generally, for example, KATZMANN, *supra* note 29; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

53 By analogy, the natural laws of physics dictate certain consequences for architectural choices, including physical stability or collapse. Physics accordingly dictates that many designs are out of bounds, even as contingent cultural and political events give rise to a society's distinctive architectural style.

54 My focus on legal ideology and its relationship to politics indicates a focus different from scholars who show that nonpolitical dynamics can cause the law to exhibit cyclical shifts, moving for example from rules to standards and back again. *See generally* Jason Scott Johnston, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal*

consistent with their previously expressed views; (2) to foster discretion when in power; and (3) to foster constraint when out of power.

The first incentive (in favor of consistency) fosters stability, without favoring either constraint or discretion. In other words, proponents of either constraint or discretion tend to persist in their views. This pattern flows from the psychological, social, and rhetorical appeal of seeming consistent rather than a flip-flopper.

The second incentive (in favor of flexibility when in power) fosters discretion but obtains only conditionally. An ideology experiences this incentive when or to the extent that its members are in power. Why? Because those in power have both self-interested and public-regarding reasons to enhance their own discretion.

The final incentive (in favor of constraint when out of power) fosters constraint, but it too obtains only conditionally. An ideology experiences this incentive to the extent that its members lack power. This incentive is the flip side of the previous one: those out of power have an incentive to cabin the governing coalition's discretion.

These three incentives interact with political contingencies to shape the development of legal ideologies over time. The next Section develops these ideas by canvassing the law's development from the Warren Court forward.[55]

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*Form*, 76 CORNELL L. REV. 341 (1991); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

[55] I reserve whether my model is sound as applied either to earlier periods of U.S. history or to other legal regimes. Some of the model's premises, such as its understanding of the relationship between the two-party system and the federal judiciary, *see supra* notes 34, 44, may not hold when applied more broadly (and so in that sense are themselves contingent rather than universal or natural). Still, I note here two possible examples of the model's wider applicability. First, the *Lochner* era. Conservatives controlled the Court and generated discretionary doctrines involving topics like substantive due process and general common law. Leading liberals, such as Justice Oliver Wendell Holmes, Jr., responded with relatively constraining views. *See, e.g.*, *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–33 (1928) (Holmes, J., dissenting); *see also* Abrams v. United States, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (emphasizing the First Amendment's "sweeping command"); *supra* note 16; *infra* note 194 (positivism); *infra* note 196 (textualism). Second, the "Nazi period" of Germany and its aftermath. *See* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 636 & n.1, 658 n.65 (1999) (citing INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (Deborah Lucas Schneider trans., 1991) (1987)). With Nazis controlling the judiciary (indeed the entire state), "German judges rejected formalism." *Id.* at 636. The courts' "teleological" approach amounted to sweeping purposivism in support of Nazi ideology. *Id.* at 636 n.1. Reacting against that trend, the post-Nazi regime saw installation of a "formalistic, 'plain meaning' approach." *Id.* at 637.

## B. The Model Applied

For many decades, the main political contingency influencing legal ideology has been control over the federal judiciary, especially the Supreme Court. Consider that, for many participants in contemporary legal culture, One Big Question looms very large: Should judges have a lot of power?[56] Given the apex structure of the U.S. judicial hierarchy, that question often boils down to a more specific one: Should the Supreme Court have a lot of power?[57]

During the Warren Court of the 1950s and 1960s, the One Big Question had a clear answer for liberals: yes.[58] The Warren Court seemed wise and virtuous, particularly in the wake of *Brown v. Board of Education*.[59] Legal commentators and practitioners on the left accordingly heaped praise on the judiciary.[60] More than that, the legal left emphasized the law's discretionary aspect. Formal materials like enacted texts and even judicial precedents were not so important, as compared with less formal qualities, such as the practical conditions of modern society and the demands of justice.[61] This collection of views cohered very nicely.[62] Liberal politics, broad judicial power, and legal discretion all formed an appealing package against the backdrop of a judiciary securely in liberal hands. And, as though answering the One

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56 Changing behavior based on the One Big Question can be viewed as a kind of "partisan institutional flip-flop." *See* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 493 (2016).

57 Of course, the United States features many other legal actors, including Presidents, legislators, administrative agencies, and state courts. Yet recent decades have been marked not only by extensive exercises of judicial review but also by federal court interpretive supremacy. As a result, the Supreme Court has the central (not exclusive) role in shaping overall legal culture. I therefore focus on that institution and its degree of constraint or discretion.

58 The Warren Court took time to heat up, for its early Democrat-appointed jurists were heavily influenced by the constraint-oriented liberalism marshaled to resist the *Lochner* Court. Only gradually, facilitated by the arrival of new liberal jurists, did the Court switch to a strongly discretion-oriented jurisprudence. *See, e.g.*, Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962–1969)*, 20 SANTA CLARA L. REV. 773, 777–79 (1980) (emphasizing Justice Felix Frankfurter's departure).

59 347 U.S. 483 (1954); *see also infra* text accompanying note 186. Think of Professor John Hart Ely's famous dedication: "You don't need many heroes if you choose carefully." ELY, *supra* note 51.

60 Especially federal courts. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

61 *See also infra* note 164 (discussing Justice William Douglas's view on stare decisis).

62 For a similar chronology organized around "political regimes," see BALKIN, CONSTITUTIONAL TIME, *supra* note 12, at 81–96 ("By midcentury, liberals in both parties had begun to defend strong courts and judicial review, while conservatives began to denounce judicial activism and preach judicial restraint."). *See generally* Friedman, *Cycles of Constitutional Theory*, *supra* note 12.

Big Question for itself, the Warren Court in fact adopted a discretionary methodology. Rulings exhibiting as much included not just *Brown*, but also cases like *Mapp v. Ohio*,[63] *New York Times Co. v. Sullivan*,[64] *Reynolds v. Sims*,[65] and *Griswold v. Connecticut*.[66]

For similar but contrary reasons, the opposite package of general views also cohered. Conservative politics, narrow judicial power, and legal constraint all cohered for the political right. For those who did not like the political implications of Warren Court rulings, constraining judicial power made an abundant amount of sense. A relatively formal vision of the law facilitated determinate critique and separated the dissenters from more discretionary, conventional views. This strategic preference, which might be called *the dissenter's determinacy*, encouraged conservative legal thinkers to move toward legal formalism. Exhibiting that incentive, conservatives regularly complained that Warren Court rulings lacked meaningful support in constitutional text, broke from specific historical practices, and overturned long-standing case law.[67]

Still, many figures on the legal right had some reason to stay close to the governing legal ideology's approach. Conservative judges, for instance, had to think twice about breaking too sharply from dominant legal views, lest they lose influence among their colleagues and alienate members of the legal profession steeped in the reigning approach to law. And many conservatives were already used to the prevailing methods of the day, having been trained in them not only in law school but also as part of their formative practice experiences.[68] For a lawyer to break immediately and radically from prevailing discretionary approaches would have been alienating, even bizarre, and would not foretell a successful legal practice. These sorts of considerations—what we might call *the desire to be relevant*—tempered the legal right's

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63 367 U.S. 643 (1961); *id.* at 655–56.

64 376 U.S. 254 (1964); *id.* at 279–83.

65 377 U.S. 533 (1964); *id.* at 567–68; *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966).

66 381 U.S. 479 (1965); *id.* at 485–86.

67 *See, e.g.*, Philip B. Kurland, *The Supreme Court 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government"*, 78 HARV. L. REV. 143, 174–75 (1964). Relatively formalist complaints appeared also in political discourse: take the "Southern Manifesto" against *Brown*, which emphasized that the "original Constitution does not mention education." 102 CONG. REC. 4,515–16 (1956) (statement of Rep. Howard W. Smith); *see also* JAMES JACKSON KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION 105–79 (1962).

68 *See* Edmund W. Kitch, *Formative Years*, 9 GREEN BAG 2D 303, 303 (2006) (book review).

incentive to associate itself with the law's constraining aspect or, equivalently, legal formalism.

Liberal control during the Warren Court era thus established a methodological asymmetry. The left had a powerful incentive to greatly emphasize the law's discretionary aspect, and conservatives had an incentive to be at least somewhat more formalist than their liberal counterparts.

The situation became more complicated after judicial personnel changes stemming from political contingencies. After Presidents Richard Nixon and Gerald Ford appointed a spate of new jurists to the Supreme Court, most Justices were appointed by Republicans. Yet the Burger Court was hardly the Warren Court in reverse. While Chief Justice Warren Burger and Justice William Rehnquist were conservative,[69] the three other Nixon–Ford appointees are harder to categorize. Justice Lewis Powell was a Virginia Democrat.[70] And Justices Harry Blackmun and John Paul Stevens, both selected in the shadow of the Senate's potential opposition,[71] were moderates who moved to the left after their appointments.[72] So while it was clear that the Warren Court era had ended, the new regime was decidedly mixed. Particularly in its early years, the Burger Court acted much like the Warren Court, with the most polarizing example being *Roe*. In other areas, the Burger Court trimmed the Warren Court's liberal rulings without reversing them.[73] In this new environment, liberals no longer had a strong incentive to maximize discretion and so moderated on methodology. But conservatives retained an incentive

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69 As Chief Justice, Rehnquist later moderated. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1874–81 (2006).

70 *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 262 (2001).

71 Controlled by the Democratic Party, the Senate sharply checked the Burger Court era's selection of conservatives. For instance, Justice Blackmun was President Nixon's third choice after two earlier nominations failed. (Likewise, Justice Anthony Kennedy would later be President Ronald Reagan's third choice.) By comparison, all three of President Donald Trump's appointments to the Supreme Court occurred when Republicans controlled the Senate.

72 *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 235 (2005); Linda Greenhouse, *Supreme Court Justice John Paul Stevens, Who Led Liberal Wing, Dies at 99*, N.Y. TIMES (July 16, 2019), https://www.nytimes.com/2019/07/16/us/john-paul-stevens-dead.html.

73 *See* Anthony Lewis, *Foreword* to THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, at vii, viii (Vincent Blasi ed., 1983) (discussing "this extraordinary continuity of doctrine" from the Warren Court).

to emphasize constraint. The Warren Court's "afterglow"[74] (or shockwave) was still being felt.

So ideological incentives had changed. As a result, both the left and the right moved toward the law's constraining aspect, even as the left remained more associated with legal discretion. We can see this pattern in President Ronald Reagan's appointees, who included Justice Scalia, as well as in President Bill Clinton's appointees, who included Justice Ruth Bader Ginsburg. Nobody could miss that the views of Justice Scalia were more formalist than those of any recent justice, including Justice Rehnquist (appointed in the 1970s).[75] Similarly, nobody could confuse Justice Ginsburg with the liberal lions of the 1960s, even if she remained less formalist than Scalia.[76]

We should pause here to consider Justice Scalia, the most influential jurist of the last half century, in more detail. Creative, insightful, and charismatic (even if pugnacious), Scalia is sometimes depicted as an historical force in his own right.[77] But on the present account, Scalia's tremendous influence was largely situational. The incentive to adopt the dissenter's determinacy on the right meant that there was latent demand for strong conservative formalism. But the desire to be relevant meant that few would leap to provide the desired supply. Scalia was the rare lawyer who had the perfect mix of intellectual talent, political motivation, and practical opportunity (a few others did, too).[78] As a member of the Nixon and Ford administrations immediately following the Warren Court,[79] Scalia had the chance to be an intellectual entrepreneur. And he seized it. The rise of conservative formalism was not just

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

75 Chief Justice Rehnquist could be categorized as a pragmatist. *See, e.g.*, Stephanos Bibas, *Justice Scalia's Originalism and Formalism: The Rule of Criminal Law as a Law of Rules*, *in* THE LEGACY OF JUSTICE ANTONIN SCALIA: REMEMBERING A CONSERVATIVE LEGAL TITAN'S IMPACT ON THE LAW 5, 8 (2016).

76 To give just one example, then-Judge Ginsburg sharply criticized *Roe*'s reasoning as well as its sweeping holding. *See generally* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985).

77 *See, e.g.*, Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1600 (2017) ("Suffice it to say, he transformed the law."); Kagan, *The 2015 Scalia Lecture*, *supra* note 43, at 8:12–8:18 ("Justice Scalia has taught everybody how to do statutory interpretation differently.").

78 A comparably positioned figure was Robert Bork. *See generally, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

79 Scalia joined the Nixon administration in 1971 and became the head of the Office of Legal Counsel under President Ford.

the result of one or two people's personal genius. It more fundamentally sprang from the distribution of judicial power and related political incentives.[80]

This basic situation persisted in the 1980s through the early 2000s. Whereas Justice Powell was the ideologically median or "swing" Justice in the Burger Court years, Justices Sandra Day O'Connor and Anthony Kennedy came to play the same role during the Rehnquist Court and early Roberts Court.[81] In different ways, all three of these Justices were moderate or inconsistent conservatives, and they were also relatively functionalist in their jurisprudential outlook. Standing somewhat apart from the conservative ideology proper, they opted in favor of either the liberal or conservative voting bloc, giving each opposing ideology significant victories without decisively preferring either one. During this period, the Court's precedents often fostered considerable discretion—a pattern eminently consistent with the incentives of median jurists.[82] At the same time, both legal ideologies regularly found themselves in dissent, affording them an incentive to pursue the dissenter's determinacy.[83] But because conservatives began as Warren Court critics with a strong incentive to espouse judicial constraint, the right continued to lead the way in the march toward formalism. To wit, all three Justices appointed by President Donald Trump (Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett) were avowed textualists and originalists. By comparison, President Reagan's appointees included Justices O'Connor and Kennedy, and the Presidents George Bush respectively appointed Justice David Souter and Chief Justice John Roberts. On the liberal side, both of President Barack Obama's appointees, Justices Sonia Sotomayor and Kagan, emphasized points of agreement with formal methods like textualism.[84] A full generation after the Warren Court, both wings of legal culture had become far more formalist.

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80 Think of Leo Tolstoy's charge that Napoleon did not make history so much as history made Napoleon. *See* LEO TOLSTOY, WAR AND PEACE 882–83 (Amy Mandelker ed., Louise Maude & Aylmer Maude trans., Oxford Univ. Press 2010) (1867).

81 *See* EVAN THOMAS, FIRST: SANDRA DAY O'CONNOR, at xv–xvi, 318 (2019); HELEN J. KNOWLES-GARDNER, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY 199 (2009); JEFFRIES, *supra* note 70, at 266.

82 For a median jurist, the One Big Question is: "Should *I* have a lot of power?"

83 *See infra* note 211; *see also infra* Part III.

84 *See supra* note 43 and accompanying text; Michael C. Dorf, *Clarence Thomas, Sonia Sotomayor, and the Noble Lie*, FINDLAW (Feb. 10, 2010), https://perma.cc/H4SQ-76KA (describing how "Sotomayor embraced a hyper-formalism" at her confirmation hearing).

But the struggle between legal ideologies has now been settled for the foreseeable future. When Justice Kennedy retired in 2018 and was replaced by Justice Kavanaugh, the Supreme Court became clearly controlled by the conservative legal ideology.[85] And that control became domination when Justice Ginsburg passed away in 2020 and was replaced by Justice Barrett. Today, the conservative justices are all quite conservative, rendering none an obvious "swing" jurist or subject of "drift" over time.[86] In addition, the conservative bloc's three-vote advantage means that—for the first time in decades—the Court is no longer one appointment away from a major ideological flip. These events began a new legal era, one whose consequences are still being worked out. As relevant here, the ascent of conservative legal ideology has created a fundamentally new institutional situation. As the conservative ideology gained in strength, at first gradually and then suddenly in 2018, it has become increasingly subject to two interrelated incentives.[87]

The first incentive has to do with *the demands of governance*. As we have seen, constraint plays a constitutive role in the law, preventing its collapse into policy, whimsy, or hackery. Yet devotion to constraint is not always appropriate. Sometimes, legal actors must exercise discretion to respond intelligently to unforeseen problems or contextual nuances. A governing ideology therefore cannot tenably maintain an absolute or extreme focus on legal constraint. Exceptions must be made. And those exceptions will undermine the relevant coalition's ability to credibly emphasize legal constraint in general, as well as the coalition's overall credibility and integrity. A governing ideology therefore has a strong incentive to temper its association with legal constraint and, ultimately, to swing toward legal discretion. This incentive is opposite that of an ideology in exile. Dissidents can zealously operate as the loyal opposition, stridently invoking stark principles to lampoon those burdened with the responsibilities of

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85 Had Democratic candidate Hillary Clinton won the 2016 presidential election, liberals would be seizing on judicial discretion. *See, e.g.*, Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), https://perma.cc/394S-9YFR.

86 *See* Josh Blackman, *Reviewing the Three Trump Appointees:* Ex Ante *and* Ex Post, 1 TEX. A&M J.L. & CIV. GOVERNANCE 431, 449 (2025) ("For a generation, legal conservatives chanted, 'No more Souters.'"); *see also supra* note 39 and accompanying text. This change in appointment strategy helps explain why the current Court, which has six Republican nominees, is so different from the Rehnquist Court circa 1992, which had eight.

87 These incentives can be understood as implications of the One Big Question for constraint-oriented jurists (formalists) who have come to hold power.

power.[88] When the mantle of power shifts, however, there is no longer anyone to lampoon (except for oneself). In recent years, particularly from 2018 onward, legal conservatives have had to grapple with the fundamentally new institutional position of controlling the judiciary.[89] With their incentives thus reversed, legal conservatives have good reason to rediscover the virtues of legal discretion.

The second changed incentive has to do with *the temptations of governance*. When a legal ideology controls the judiciary, its members will want to change or embellish the law in order to advance their own moral and political views. Judicial power corrupts, and supermajority power corrupts absolutely. This ambition naturally comports with a preference for discretion over constraint.[90] In addition, this ambition goes well with broad views of judicial power. The more power a court has, after all, the more it can do to advance its controlling members' policy preferences. Legal conservatives started our story in the position of being an ideology in exile, standing athwart the Warren Court's exercises of discretion. Today, however, emphasizing legal constraint and limitations on judicial power has far less appeal. So, here again, the rise of legal conservatism has fostered a reversal in the directionality of conservative legal thought.

These changed incentives have reciprocal implications for the liberal legal ideology. Again, an ideology out of power will want to prioritize the law's constraints, seeking to shore up existing principles before those in power can bend or replace them in ways that

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88 Some commentators have suggested that Justice Scalia deliberately exaggerated his formalism in his "polemical" judicial opinions, despite realizing that that such strict formalism was untenable or undesirable. *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 38–43 (2002).

89 In the academy, at least, preparation for governance began much sooner. *See* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 604 (2004) ("As conservatives found themselves in the majority, conservative constitutional theory . . . needed to develop a governing philosophy appropriate to guide majority opinions, not just to fill dissents."). Professor Keith Whittington noted that conservatives mostly had not "shed their previous commitment to judicial deference and restraint." *Id.*

90 Even a hegemonic legal ideology has some use for constraint, including because strict rules can help project its own discretionary power. For example, a Supreme Court supermajority might exercise a discretionary method to create its preferred rule and then insist that lower courts adhere to strict vertical stare decisis. Or the Court might craft a determinate precedential holding with the goal of more effectively checking the political branches. *Cf.* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995) (Scalia, J.) (praising "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict"). In these situations, the Court would be exercising its own ample discretion while constraining other legal actors.

advance their own preferences. And the loyal opposition will also want to preserve or tighten strictures on judicial power, the better to hem in the controlling ideology and its discretionary pursuits. At least since 2018, the legal left has enjoyed the freedom to rail against the governing conservative ideology on stark grounds consonant with legal constraint. Liberals also have reason to emphasize limits on judicial power. In other words, the legal left is powerfully drawn toward the dissenter's determinacy. Whereas the Warren Court's left champions had little regard for precedent or stare decisis, for instance, more recent liberals have (somewhat ironically) insisted on standing by the Warren and Burger Courts' own most controversial rulings.[91] Similarly, the left has increasingly emphasized fidelity to statutory texts and need for deference to political actors—positions that cabin judicial discretion.[92]

### C. Trading Places

Let me offer a few examples of the realignment now taking place, all centering on Justices Scalia and Kagan.

First, textualism. When Justice Scalia was an insurgent force in the federal judiciary, being a textualist meant shackling the purposive judicial rulings characteristic of the 1960s and '70s.[93] In that now-bygone era, judges and Justices often seemed to deviate from the plain meaning of statutory terms to achieve desirable centrist or left-of-center policy outcomes.[94] Someone hoping to stem that liberal tide could do much worse than insist on fidelity to the text as enacted, as against implicit purposes or practical considerations that enabled judicial discretion. This basic pattern was visible as late as 2015 in *King v. Burwell*,[95] an administrative law case on a matter of national policy.[96] Justice Scalia wrote a vehemently textualist three-Justice dissent against a majority opinion by Chief Justice Roberts.[97] Fast forward seven years to

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91 *Compare* ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 96 (1971), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2317 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

92 *See, e.g.*, *infra* text accompanying note 178.

93 *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114; *see also* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 901 (2013) (discussing textualism as "a conservative brand").

94 *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979); *see also* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 628–29 (1990).

95 576 U.S. 473 (2015).

96 *See id.* at 479–84.

97 *Id.* at 498–518 (Scalia, J., dissenting).

2022, and we find *West Virginia v. EPA*,[98] another administrative law case on a matter of national policy.[99] This time, however, it was Justice Kagan writing a vehemently textualist three-Justice dissent against a majority opinion by the Chief Justice.[100] In *West Virginia* and other cases, Justice Kagan has invoked textualism to take the conservative majority to task. Meanwhile, conservative legal intellectuals are increasingly talking about moving "beyond textualism."[101] And salient conservative dissents, such as in *Bostock v. Clayton County*,[102] have echoed paradigmatically purposive arguments from *Church of the Holy Trinity v. United States*.[103]

Second, agency deference. Justice Scalia long supported judicial deference to agencies,[104] not just under *Chevron*,[105] but also under *Auer v. Robbins*.[106] That posture of judicial restraint reflected the formalist idea that, where the law runs out, judges should stay their hands.[107] But Scalia settled on those views when conservatives were a minority force on the judiciary and Reagan was President.[108] As conservatives came to command the courts,

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98 142 S. Ct. 2587 (2022).

99 *See id.* at 2600–06.

100 *Id.* at 2626–44 (Kagan, J., dissenting).

101 *See* William Baude, *The 2023 Scalia Lecture: Beyond Textualism?*, 46 HARV. J.L. & PUB. POL'Y 1331, 1341 (2023) [hereinafter Baude, *Beyond Textualism?*]; *see also* Saikrishna Bangalore Prakash, *Spirit*, 173 U. PA. L. REV. 937, 996–1005 (2025); *infra* text accompanying note 199. *But see* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 168–78 (2009).

102 140 S. Ct. 1731 (2020); *see id.* at 1754 (Alito, J., dissenting).

103 143 U.S. 457 (1892); *see also* Tara Leigh Grove, Comment, *Which Textualism?*, 134 HARV. L. REV. 265, 293 n.184 (2020) (comparing Justice Alito's *Bostock* dissent with *Holy Trinity*); *cf.* Anita S. Krishnakumar, *Textualism in Practice*, 74 DUKE L.J. 573, 588 (2024) (suggesting that "flexible textualism" isn't textualist).

104 *See* Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 2 (2004) ("Both on and off the bench, Justice Scalia has proclaimed himself a fan of *Chevron*."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516 [hereinafter Scalia, *Judicial Deference*]; Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 277 (2014).

105 Justice Scalia's vision for *Chevron* epitomized and combined three characteristic features of dissident legal thought: it was positivist, rule-like, and deferential.

106 519 U.S. 452 (1997) (Scalia, J.). But not forever. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 67–69 (2011) (Scalia, J., concurring) (explaining that he would be "receptive" to reconsidering *Auer*).

107 *See, e.g.*, *Chevron*, 467 U.S. at 865; Ryan D. Doerfler, *Late-Stage Textualism*, 2021 SUP. CT. REV. 267, 269–70; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983). That the law runs out in a significant set of cases is a staple of modern legal positivism. *See* HART, *supra* note 25, at 127.

108 *See* Joseph R. Guerra, *The Possibly Imminent—and Deeply Ironic—Demise of* Chevron *Deference*, 26 GREEN BAG 2D 303, 304 (2023).

Scalia's successors turned sharply against agency deference.[109] In *Loper Bright*, the Court's six conservative Justices finally voted to overrule *Chevron*,[110] even as they acknowledged that Scalia had been an "early champion" of the doctrine.[111] Meanwhile Justice Kagan has fought to preserve agency deference in cases like *Kisor v. Wilkie*[112] and, most recently, in *Loper Bright*.[113] In doing so, Kagan highlighted Scalia's work from the 1980s, emphasizing the importance of both "rules" and "judicial humility"—the hallmarks of constraint.[114]

Moreover, the style of argument on display in those cases was striking. A *Chevron* critic who is also an archformalist might take the view that *Chevron* was always wrong. The fact that conservatives fell in and then out of love with that doctrine would be irrelevant, or merely coincidental.[115] By contrast, a less formalist thinker might believe that *Chevron* was originally well-founded

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[109] *See* Balkin, *Why Liberals and Conservatives Flipped*, *supra* note 12, at 107–08 ("*Chevron*, once defended by conservatives, was now a conservative target."); *see also infra* note 166 and accompanying text.

[110] *Loper Bright*, 144 S. Ct. at 2273.

[111] *Id.* at 2270. The Court claimed that Justice Scalia became a "critic" of *Chevron*, apparently based on a 2015 concurrence. *Id.* at 2261, 2265 (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in the judgment)). In *Perez*, Justice Scalia worried that *Chevron* had a deep if long-overlooked "problem," given the Administrative Procedure Act's text. *Perez*, 575 U.S. at 111 (Scalia, J., concurring in the judgment). To be clear, Justice Scalia did not call for *Chevron*'s overruling even in that concurrence; he instead proposed a "solution" based on his own past writings—namely, that *Chevron* might be defended as "in conformity with the long history of judicial review of executive action." *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 243 (2001) (Scalia, J., dissenting)). So, to his last judicial writing, Justice Scalia adhered to his "personal precedent" on *Chevron*. *See* Richard M. Re, *Personal Precedent at the Supreme Court*, 136 HARV. L. REV. 824, 848 (2023) [hereinafter Re, *Personal Precedent*]. Yet a complete explanation for Justice Scalia's adjusted opinion would acknowledge that the One Big Question was eroding his personal consistency. Justice Gorsuch has suggested otherwise: "rather than cling to the pride of personal precedent," Scalia "began to express doubts over the very project that he had worked to build," thereby demonstrating "humility." *Loper Bright*, 144 S. Ct. at 2291 (Gorsuch, J., concurring). This flattering appraisal overstates Scalia's change of heart while understating the strategic timing of Scalia's pivot. Gorsuch's view would be more plausible if overruling *Chevron* had been nonpartisan, rather than a program recently heralded by conservative political officials. *See* Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 686 (2021); *see also* Gillian E. Metzger, *Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 25–27 (2017).

[112] 139 S. Ct. 2400 (2019).

[113] *Loper Bright*, 144 S. Ct. at 2294–2311 (Kagan, J., dissenting).

[114] *See id.* at 2294–95, 2310 (Kagan, J., dissenting) (citing Scalia, *Judicial Deference*, *supra* note 104, at 516–17) (naming Justice Scalia repeatedly in main text in addition to citing his work).

[115] *See, e.g.*, John O. McGinnis, *The Rise and Fall of* Chevron, LAW & LIBERTY (Feb. 8, 2024), https://perma.cc/QEZ5-6HQZ.

but contingent. The lessons of experience, perhaps, have shown that a doctrinal adjustment that worked well in the 1980s no longer fits the times—and therefore needs a sharp correction. In other words, *Chevron* was right for its time, but not for our own. That sort of interpretive dynamism has been more readily associated with legal functionalists rather than self-proclaimed textualists. Yet, in *Loper Bright*, it was the conservative textualists, not their liberal colleagues, who were receptive to this kind of claim.[116]

Finally, standing. Justice Scalia strove to tighten up standing as a way to curb liberal judicial activity. Profligate standing rules in Establishment Clause cases were perhaps his central example because they facilitated what Scalia viewed as overly vigilant restrictions on religiosity.[117] But conservative litigants now want access to the federal courts. They know that, under new case law, they can receive relief or exemptions from many regulations.[118] So it is now members of the liberal legal ideology who have an interest in enforcing or tightening up justiciability. Conservatives, by contrast, are tempted to fling open the courthouse doors. We can see early signs of this role reversal in many recent cases.[119] For instance, the Fifth Circuit recently found standing for doctors with conscientious objections to an abortion-related drug, even though their probabilistic theory of standing defied on-point Court precedent authored by Justice Scalia.[120] Meanwhile, many left-leaning commentators bemoaned the Court's willingness to find standing in *303 Creative LLC v. Elenis*,[121] even though that

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116 *See Loper Bright*, 144 S. Ct. at 2291 n.6 (Gorsuch, J., concurring) (arguing that Justice Scalia may originally have supported *Chevron* as a "cure" for atextual statutory interpretation—something no longer needed as "we're all textualists now"); Transcript of Oral Argument at 35, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 2244 (2024) (No. 22-1219); *cf. Loper Bright*, 144 S. Ct. at 2269 (arguing that "[t]he experience of the last 40 years" has "made clear that" *Chevron* "was always" at odds with the Administrative Procedure Act).

117 *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 890–93 (1983).

118 *See, e.g.*, 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2308–10 (2023).

119 *See* Re, *Discourse on* 303 Creative, *supra* note 12, at 88 (noting that Justice Alito may now be the Court's most reliable vote for standing); *see also infra* note 216. Liberals still favor more permissive standing in statutory cases for damages between private parties, in which broad public law holdings are less likely. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203–14 (2021); Thomas P. Schmidt, *Standing Between Private Parties*, 2024 WIS. L. REV. 1, 66–69.

120 *See* All. for Hippocratic Med. v. FDA, 78 F.4th 210, 227–41 (5th Cir. 2023). *But see* Summers v. Earth Island Inst., 555 U.S. 488, 498 (2009).

121 143 S. Ct. 2298 (2023).

result neatly fit within existing case law.[122] In both of these cases, the Court had little difficulty applying its preexisting case law to, respectively, reject and affirm standing.[123] Yet the tides of ideological change are already apparent when one looks to ideologically charged actors operating in the shadow of One First Street.

A single Supreme Court decision recently illustrated all three of these trends. In the student loan case *Biden v. Nebraska*,[124] several states argued that the U.S. Secretary of Education lacked statutory authority to cancel certain student debt. Three questions arose. What did the statute mean? What attitude should the Court take toward the Secretary's exercise of administrative authority? And should the states have standing to challenge the loan forgiveness measure—even though student debt relief had no direct effect on the states' treasuries? The Court divided six to three. Far from deferring, all six conservative Justices invoked the atextual "major questions doctrine" to give narrow meaning to the statutory text.[125] The conservatives also found standing on the theory that a loan service provider with no objection to the loan forgiveness plan was part of a state; therefore, the servicer's lost business gave the state standing to challenge the entire nationwide loan forgiveness program.[126]

By contrast, all three liberal Justices invoked textualism, exhibited respect bordering on deference toward the executive agency's work, and rejected standing as too attenuated and artificial to justify nationwide relief.[127] In other words, the liberal Justices were much more textualist, far more deferential to the executive branch, and markedly stricter when it came to standing than their conservative colleagues. This alignment of votes and views represents an almost complete inversion of legal debates in the 1980s.

*Biden v. Nebraska* did not directly implicate matters of constitutional interpretation, but a similar transformation is underway in that area, too.[128] Take the Second Amendment. In *New York*

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[122] *See* Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157–67 (2014); Re, *Discourse on* 303 Creative, *supra* note 12, at 83.

[123] *See* FDA v. All. for Hippocratic Med., 144 S. Ct. 1540, 1555–65 (2024) (finding no standing); *303 Creative*, 143 S. Ct. at 2308–12 (affirming standing).

[124] 143 S. Ct. 2355 (2023).

[125] *Id.* at 2374.

[126] *Id.* at 2368.

[127] *See id.* at 2384–2400 (Kagan, J., dissenting).

[128] Take *Trump v. United States*, 144 S. Ct. 2312 (2024), which fashioned a new, indeterminate presidential immunity based on a creative balancing of functional concerns.

*State Rifle & Pistol Ass'n v. Bruen*,[129] Justice Clarence Thomas wrote a majority opinion consistent with his longtime-dissident conservativism.[130] The gist of the opinion seemed to be that firearm regulations were unconstitutional unless they had clear historical antecedents.[131] That is a strict, inflexible rubric—the kind of thing that a dissenter can argue with aplomb. But it is too inflexible to be a workable way of administering the Constitution's right to keep and bear arms, as the lower courts soon revealed. In *United States v. Rahimi*,[132] the Court considered bans on firearm possession by persons under restraining orders for domestic violence.[133] No clear historical antecedent supported such a strong restriction, absent a criminal conviction.[134] The Fifth Circuit accordingly held the federal law unconstitutional.[135]

Yet the protective restriction had obvious appeal. Even if, as a matter of history, people were not generally dispossessed of their weapons based on a civil finding of dangerousness alone, that regulatory approach makes quite a bit of sense. And that sort of regulation is especially sensible in cases involving domestic violence, a legal concept that did not fully exist in the eighteenth century. In *Rahimi*, the justices accordingly added some flexibility to *Bruen*, loosening its formalism by one or two notches. In particular, the majority rested on "the principles that underpin our regulatory tradition."[136] This shift from specific historical

*See id.* at 2331 (discussing various "countervailing interests" and "competing considerations"). The liberal dissenters responded that the Court's approach was "atextual, ahistorical, and unjustifiable." *Id.* at 2356 (Sotomayor, J., dissenting). Or consider *Trump v. Anderson*, 144 S. Ct. 662 (2024), which concluded that Colorado had to include Trump on the presidential ballot. *Id.* at 671. The conservative majority opinion failed to generate a respectable originalist case for doing so. *See* Mike Rappaport, *The Originalist Disaster in* Trump v. Anderson, ORIGINALISM BLOG (Mar. 5, 2024), https://perma.cc/3LKJ-F9SC. The ruling more plausibly rested on its functional arguments.

129 142 S. Ct. 2111 (2022).

130 Though most Justices are now self-declared originalists, *Bruen* and other recent Court rulings have centered on a potentially more flexible "history and tradition" analysis. *See* Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 477 (2023) (arguing that *Bruen*'s use of the history and tradition approach is compatible with originalism, even if other recent cases may not be).

131 *See Bruen*, 142 S. Ct. at 2133.

132 144 S. Ct. 1889 (2024).

133 *See* 18 U.S.C. § 922(g)(8).

134 *See Rahimi*, 144 S. Ct. at 1930 (Thomas, J., dissenting).

135 *See* United States v. Rahimi, 61 F.4th 443, 461 (5th Cir. 2023).

136 *Rahimi*, 144 S. Ct. at 1898. The Court echoed liberals from the 1970s by denying that constitutional rights are "trapped in amber." *Id.* at 1897; *cf.* Richardson v. Ramirez, 418 U.S. 24, 76 (1974) (Marshall, J., dissenting) ("[C]onstitutional concepts . . . are not

practices to a more abstract "tradition" with implicit "principles" introduced space for judicial discretion.[137] What is more, the Court exercised that discretion by expressly relying in part on its own intuitions regarding "common sense"[138]—generating even more opportunities for discretion. Only Justice Thomas, who had by far the strongest record as a strict originalist, hewed to the more constraining approach of his own *Bruen* opinion.[139] A dissident methodology is thus adapted to the challenges of actual governance. Constraint gives ground to discretion.[140]

In all these domains, the legal right is becoming increasingly comfortable and open when it comes to judicial power and discretion, and the legal left much less so.

## III. LAW'S MECHANISMS

By what mechanism does legal culture change? Certain practices connect the law's underlying structure with the contingent conditions that influence political and legal affairs. One way to think of these mechanisms is that they are ever present, reflecting natural foundations, but contingently triggered. They are like the joint and string that enable (but do not generate) pendular motion.

### A. Consistency for Individuals

The fundamental tension between constraint and discretion plays out within legal culture at multiple levels of abstraction,

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immutably frozen like insects trapped in Devonian amber." (quotation marks omitted) (quoting Dillenburg v. Kramer, 469 F.2d 1222, 1226 (9th Cir. 1972))).

137 Justice Barrett went so far as to posit that "[h]istory is consistent with common sense"—a view that seems to render historical inquiry superfluous. *Rahimi*, 144 S. Ct. at 1926 (Barrett, J., concurring) (quotation marks omitted) (quoting Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting)).

138 *Id.* at 1901.

139 *See id.* at 1930–44 (Thomas, J., dissenting).

140 Some conservatives have criticized the current Court for diluting Justice Scalia's famous "originalism" by focusing too much on tradition. To wit, Judge Kevin Newsom has argued that "history and tradition" tests objectionably foster judicial discretion. *See* Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of Traditionalism in Constitutional Interpretation*, 47 HARV. J.L. & PUB. POL'Y 745, 753 (2025); *see also* Vidal v. Elster, 144 S. Ct. 1507, 1532 (2024) (Barrett, J., concurring); *cf.* Cary Franklin, *History and Tradition's Equality Problem*, 133 YALE L.J.F. 946, 949 (2024). In *Rahimi*, however, Justice Kavanaugh endeavored to center Scalia's traditionalism. As he put it, the case reports "are well stocked with Scalia opinions looking to post-ratification history and tradition." *Rahimi*, 144 S. Ct. at 1917 (Kavanaugh, J., concurring).

including at the levels of individuals, ideological groups, generations, and, ultimately, entire societies.

Start at the level of the individual within legal culture. People generally want to be consistent, not just in their own eyes but in the eyes of others.[141] Personal consistency is associated with many positive or desirable traits, such as determination, knowledge, courage, principle, and honesty. By comparison, inconsistency is associated with many negative or undesirable traits, such as whimsy, ignorance, cowardice, cynicism, and deception. These points reflect general features of contemporary culture and perhaps even of innate human psychology.[142] Of course, people do in fact alter their views about various things, and a resistance to doing so can be impugned as stubbornness or intransigence. But such changes of heart or mind pose challenges that have to be managed. The individual at issue will often downplay or ignore their own prior views, or else seek face-saving ways of explaining away their own prior statements.[143] These points carry over in connection with legal opinions, especially when declared by judges. Statements about law typically carry unusual formality and solemnity, and their expression by jurists often reflect personal commitments. As a result, judges resort to a small catalog of aphorisms when they openly retract their own prior positions.[144] Those expressions, and the rarity with which they are deployed, only confirm the general (not insurmountable) aversion that people, lawyers, and judges feel when it comes to being inconsistent.

The fact that individuals, particularly judges, hew to their own past views is a powerful force in favor of constraint in the law. Prospective judges are typically selected in part based on their previously expressed legal opinions. Oftentimes, these opinions are prosaic or generic, such as when judicial nominees assert that they care about the text of statutes or take seriously principles of stare decisis. Yet the banal quality of these remarks largely stems from the fact that they are widespread. Prospective

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141 *See* Re, *Personal Precedent*, *supra* note 111, at 829.

142 *See generally* Bertram Gawronski & Skylar M. Brannon, *What Is Cognitive Consistency, and Why Does It Matter?*, *in* COGNITIVE DISSONANCE: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY 91 (Eddie Harmon-Jones ed., 2d ed. 2019).

143 *See id.* at 101; *see also* Joshua M. Bentley & Taylor Voges, *Representations of Reliability: The Rhetoric of Political Flip-Flopping*, 45 PUB. RELS. REV. 1, 4–7 (2019).

144 *See, e.g.*, McGrath v. Kristensen, 340 U.S. 162, 177 (1950) (Jackson, J., concurring) ("Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion."); *see also* Re, *Personal Precedent*, *supra* note 111, at 830 n.28 (collecting sources).

judges know that they would attract undesirable attention by saying, for example, that they plan *not* to take statutory text or precedent seriously.[145] Once these individuals reach the bench, their desire to remain or seem consistent will cause them generally to abide by their own past statements, or at least avoid obvious flip-flops. And each time the now-incumbent judge invokes and applies their past statements, their incentive to be consistent is reinforced. Of course, not every prospective or incumbent jurist takes positions on all matters, and some do espouse countercultural views. These lacunae and countertrends allow for dynamism. But because judicial personnel change only gradually, even persistent trends take a while to alter case outcomes.

Having said all that, the force of individual consistency is finite and limited. Its overall strength within the legal system can be viewed as a measure of how much genuine law there is, apart from policy, politics, partisan hackery, or whimsy. We can once again repair to *Biden v. Nebraska* for an example. As a law professor, Justice Barrett had taken strongly textualist positions, and she was also skeptical of substantive canons of statutory interpretation.[146] Were those long-standing views compatible with the new major questions doctrine? Justice Kagan has suggested that they were not. For instance, Kagan once suggested that substantive canons are categorically illegitimate—an extraordinarily strict textualist position that also happened to be the very possibility that motivated one of Barrett's articles.[147] So, in the student loan case, Barrett wrote a concurrence that defended the major questions doctrine as consistent with textualism.[148] From one standpoint, Barrett's concurrence shows the fragility of individual consistency. For example, Barrett appealed directly to "common

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[145] Complaints that nominees speak in banalities at confirmation hearings, *see, e.g.*, Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 925 (1995) (book review), often overlook the importance of banality. For example, it may have seemed banal for nominees to agree that *Brown* was rightly decided, but that banality was absent when *Brown* was hotly contested. And, in recent years, some judicial nominees have declined to endorse *Brown*. *See* Ronald Turner, *Was* Brown v. Board of Education *Correctly Decided?*, 79 MD. L. REV. ONLINE 41, 59 (2020).

[146] *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 121–25 (2010). Citations to Justice Barrett's paper have exploded since she was nominated to the Seventh Circuit and, of course, the U.S. Supreme Court. For related examples involving other Justices, see generally Re, *Personal Precedent*, *supra* note 111. *See also* Jay Wexler, *Justices Citing Justices*, 26 GREEN BAG 2D 209, 218 (2023).

[147] *See* Transcript of Oral Argument at 59–60, Ysleta del Sur Pueblo v. Texas, 142 S. Ct. 1929 (2022) (No. 20-493). *See generally* Barrett, *supra* note 146.

[148] *See* Biden v. Nebraska, 143 S. Ct. at 2378–79 (Barrett, J., concurring).

sense," an atextual move.[149] Even more importantly, the "sense" that Barrett invoked was not at all "common." She instead espoused controversial intuitions about the operation of government and attributed them to the statute.[150] So Barrett failed to square her new concurrence with her prior writings.

But even so, Justice Barrett's struggle still mattered in two ways. First, Barrett's attempt to remain faithful to her earlier writings prompted her to adopt a relatively mild version of the major questions doctrine. Whereas some Justices view that doctrine as a powerful clear statement rule and give it constitutional underpinnings,[151] Barrett cast it as a relatively subtle aid to ascertaining legislative meaning.[152] So Barrett's academic backstory—her personal rules—meaningfully affected her judicial views. Recognizing as much, Justice Kagan praised Barrett's "thoughtful" concurrence and emphasized their common ground.[153] Second, Barrett's choice to write her concurring opinion illustrates that she and the other Justices want to hold coherent legal views. Barrett could have chosen to join the majority opinion without comment, as she had done in earlier major-questions cases.[154] By instead attempting to express her views in a systematic way, Barrett exposed herself to criticism, including the criticism that I have just lodged against her. Barrett's evident desire not only to remain consistent, but to demonstrate her consistency, suggests that legal reasoning continues to matter. The tension that Barrett experienced between her previously published views and her new rulings suggests that there is an abiding gap between law and politics. The desire for consistency is a frictional force discouraging judges from sliding often, far, or readily from their past views.

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149 *See id.* at 2379 (Barrett, J., concurring). Modern textualism approves commonsense readings of texts, not recourse to common sense alone. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2458–65 (2003).

150 For an empirical study, see generally Kevin Tobia, Daniel E. Walters & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1154 (2024). *See also* Biden v. Nebraska, 143 S. Ct. at 2379–81 (Barrett, J., concurring).

151 *See* West Virginia v. EPA, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

152 *See* Biden v. Nebraska, 143 S. Ct. at 2380–81 (Barrett, J., concurring) (contrasting her view with the clear-statement approach grounded in constitutional law).

153 *See id.* at 2398 n.3 (Kagan, J., dissenting).

154 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. at 2596–97 (applying the major questions doctrine without separate comment from Justice Barrett, who joined the majority).

B. Consistency for Generations

That leads to a more abstract level of legal culture: generations.[155] Because many trends in legal culture stem from broader social or political trends, the gradual transition from one generation to another provides an important mechanism for legal change. To some extent, this process is explainable in terms of individuals and trends across populations. For example, what starts out as a 99-to-1 distribution in favor of judges who think that race segregation in public education is legally unremarkable can eventually become a 99-to-1 distribution in favor of judges who believe that the very same practice is fundamentally unconstitutional. Yet generations also matter as *generations*, that is, as organizing categories in their own right. This point is often captured by cliches like "the end of an era" or "the changing of the guard." An incumbent generation on the judiciary often operates as a bloc, promoting or defending like-minded ideas, even as a similarly bloc-like insurgent generation may challenge those notions and endeavor to replace them with new ones. When enough incumbents depart, and insurgents join office, a generational transition can suddenly occur.

Generational change can be either general or ideological. A general generational change occurs when a social force has shifted the perspective of most judges, probably due to a similarly sweeping change among people in society at large.[156] The nation's changing views on race, sex, and sexual orientation offer examples, as many practices that were widely (though not universally) accepted as legitimate in earlier eras have come to be viewed as unjust and abhorrent. It is simply far less common, in society at large, to view certain types of group difference as justifications for grossly or overtly unequal treatment. And because judges are of course part of society, their views mirror overall trends. Other kinds of generational change are more ideologically particular. What qualifies as a popular view on the political right or left varies over time. These changes may reflect the march of intellectual history, as conservative or liberal thought goes through various

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155 *See, e.g.*, Balkin, *Why Liberals and Conservatives Flipped*, *supra* note 12, at 244 ("[J]udicial review will look different to successive generations of legal intellectuals.").

156 *See* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE 166 (Craig Joyce ed., 2003) ("Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus.").

refinements or fads.[157] Ideological changes can also reflect the contingencies of political self-interest. A generation on the left or right might form a view on judicial power based on who is staffing the courts during their formative years.[158]

Ideological generational shifts are quite common. For example, the death of conservative icon Justice Scalia has allowed a younger cohort of conservative jurists to disavow or throw overboard several of Scalia's signature views, such as his resistance to claims of religious exceptionalism[159] and his support for judicial deference to administrative agencies.[160] That sort of adjustment would have been much more difficult if Scalia were still on the bench, representing the prior generation's point of view. Scalia was loath to admit that he was changing his mind or abandoning his own long-held positions.[161] Meanwhile, junior conservative jurists would have been reluctant to kick dirt on their longtime leader, thereby dividing their faction, giving comfort to their adversaries, and irritating someone who still wielded great influence. Once Scalia passed away, however, the stage was set for conservative legal thought to branch out in new directions. A similar generational change may be afoot in connection with Justice Breyer's more recent retirement. By stepping off the stage, Breyer has made it easier for younger jurists, such as Justice Ketanji Brown Jackson, to represent new trends on the left with respect to topics like race equality, criminal justice, and liberal originalism.[162]

The key point is that the stickiness of personal views generates stickiness in generational views, both generally and among ideologies.[163] Again, people do not like to seem like flip-floppers.

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157 *See generally* Saikrishna B. Prakash & Cass R. Sunstein, *Radical Constitutional Change* (forthcoming) (available on SSRN) (discussing, among other modes of radical change, top-down transformations instigated by elites).

158 *See* BALKIN, CONSTITUTIONAL TIME, *supra* note 12, at 98. *See generally* Kitch, *supra* note 68.

159 *See, e.g.*, Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883, 1894 (2021) (Alito, J., concurring in the judgment) (impugning Justice Scalia's majority opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

160 *See supra* text accompanying note 111.

161 Justice Scalia did sometimes file a "Scalia culpa." Adam Liptak, *Supreme Court Justices Admit Inconsistency, and Embrace It*, N.Y. TIMES (Dec. 22, 2014), https://www.nytimes.com/2014/12/23/us/supreme-court-justices-admit-inconsistency-and-embrace-it.html.

162 *See, e.g.*, Evan Turiano, *Justice Jackson Offered Democrats a Road Map for Securing Equal Rights*, WASH. POST (Oct. 10, 2022), https://www.washingtonpost.com/made-by-history/2022/10/10/originalism-ketanji-brown-jackson-supreme-court/.

163 *See* Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 64 (1989) ("When the critics gain control, they tend

And because like-minded people often adopt and defend views with their age cohort, legal generations too tend to be somewhat stubborn. These points reflect constraint at the level of both individuals and broader legal ideology. The views that correspond with legal conservatism are not simply identical to the latest conservative politics at that moment, and the same holds true for legal liberalism. But these observations also point toward a mechanism for legal change. As legal generations turn over, so too do legal views.

### C. Intergenerational Borrowing

But individual and generational turnover alone do not tell us precisely *how* judges and other legal actors negotiate or facilitate ideological shifts. Finesse is warranted because a brazen disavowal of the past will run into the widespread desire for persons and groups to appear consistent. So newcomers often desire, and may demand, some way of softening their rejection of long-standing views held by members of the prior generation. A harsh or perfunctory dismissal of the past can be alienating or concerning; and newcomers often want to cloak themselves in the mantle of past authority. Individuals too sometimes want to adjust their own views. People in that awkward situation have reason to mitigate their flip-floppery and protect themselves from the sharp barbs of their ideological adversaries. One such technique is intergenerational borrowing.

Judges often reach back a generational cycle to find support in the long-ago statements of their present-day adversaries.[164] Judicial deference to administrative agencies offers a pat and timely example.[165] In the 1980s, judicial deference to agencies most obviously meant that the Reagan administration would have greater freedom to deregulate, and the D.C. Circuit would

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to abide by their critical rhetoric and to devise a method of judicial review that comports with their earlier attacks on the Court."). On my account, rhetoric interacts with personal and generational consistency to separate law from politics.

[164] One interesting example involves the constitutional oath and stare decisis. Near the midcentury, the liberal Justice Douglas contended that a judge "remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). That claim offers the oath as a basis for freeing judges from the shackles of case law. A long generation later, the conservative Justice Scalia borrowed Justice Douglas's aphorism with gusto. *See* South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting).

[165] We have already seen an example. *See supra* text accompanying note 111.

have less ability to preserve or insist on environmental and other regulations.[166] So it should be no surprise that salient legal thinkers on the left were chary about turning the Supreme Court's ostensibly unremarkable ruling in *Chevron* into the powerful deference doctrine that it became. Then-Judge Stephen Breyer wrote one of the most influential papers resisting the conservatives' expansive, rule-like interpretation of *Chevron*.[167] Among other things, Breyer argued that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of [a] statute's daily administration."[168] This basic idea—that courts should not expect agencies to resolve major questions—coded as liberal when it was published (in 1986, two years after *Chevron*). The argument's liberal appearance stems primarily from the fact that judicial enforcement of a major-questions principle would then have tended to empower relatively liberal courts as against a relatively conservative executive branch. In addition, the principle has a patently functionalist, informal quality, consistent with the legal left's association in this time period with legal discretion. By contrast, the legal right had become associated with formalism.

Fast forward forty years. By 2023, the conservative legal ideology had come to dominate the Supreme Court, and recent history had seen Democratic presidencies try to use the broad understanding of the *Chevron* doctrine originally championed by Justice Scalia.[169] In this new legal and political environment, judicial deference to administrative agencies coded as liberal. It offered a way for Democratic presidents to achieve policy goals through executive action, notwithstanding skeptical courts. Moreover, Justice Scalia had by this time passed away, and a new generation of conservative Justices had arrived at the Supreme Court. So the time had come for conservatives to abandon *Chevron* deference and replace it with a nearly opposite principle—namely, that courts should generally rule against agencies when they attempt to resolve major questions left open by Congress.[170]

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166 For recent, sophisticated explorations of the evolving political and legal valence of agency deference, see generally Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022); Green, *supra* note 111.

167 *See generally* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

168 *Id.* at 370.

169 *See, e.g.*, *King*, 576 U.S. at 498–518 (Scalia, J., dissenting).

170 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. at 2610, 2616; *see also* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 267–90 (2022).

This anti-deferential principle, as we have seen, traces back to then-Judge Breyer, someone who could never be confused with either a conservative or a formalist. Yet new conservatives have favorably quoted Breyer's article.[171]

Once again consider Justice Barrett's *Biden v. Nebraska* concurrence on the major questions doctrine.[172] In a key passage, Barrett wrote: "[A]s Justice Breyer once observed, 'Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration.'"[173] The effect of this passage is to quiet criticisms from liberal Justices, including Justice Kagan's pointed dissent. If Breyer supported something like the major questions doctrine, how much can liberals today really complain? But the turnaround here is mutual. One might just as easily ask how conservative textualists could find themselves in such vigorous agreement with a liberal functionalist. Both questions have the same fundamental answer. Breyer and Barrett made the same point at different times because doing so made sense for each of them at those times. Conservative legal ideology is now swinging toward the position that Breyer and liberal legal ideology occupied in 1986. And the reverse is likewise true.[174]

A similar form of generational borrowing is taking place on the left, as liberal jurists engage with formal methods with renewed enthusiasm. In other words, the legal right's willingness to invoke the 1980s Breyer is matched by the legal left's willingness to invoke the 1980s Scalia.[175] Just look again to the student

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171 For example, then-Judge Kavanaugh quoted Breyer in an influential opinion. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 416, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc).

172 Biden v. Nebraska, 143 S. Ct. at 2376 (Barrett, J., concurring).

173 *Id.* at 2380 (Barrett, J., concurring) (alteration in original) (quoting Breyer, *supra* note 167, at 370).

174 Justice Breyer, too, has engaged in intergenerational borrowing. During the 1960s and 1970s, legal conservatives were generally opposed to strong free speech rights, whereas legal liberals supported them. So, when the positions became reversed in the 2010s, Justice Breyer had occasion to quote Justice Rehnquist's words from over thirty years earlier. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 585 (2011) (Breyer, J., dissenting) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting)). For work on the political valence of the freedom of speech, see LAURA WEINRIB, THE TAMING OF FREE SPEECH 319 (2016); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1209 (2015). *See generally* Schauer, *Political Incidence*, *supra* note 16.

175 *See, e.g.*, Garland v. Cargill, 144 S. Ct. 1613, 1634 (2024) (Sotomayor, J., dissenting); *supra* text accompanying note 127.

loan case, where Justice Kagan insisted that a statute should be "read as written," lambasted the Court for failing to exhibit "judicial restraint," and twice quoted Scalia's coauthored treatise on interpretation.[176] Or take *West Virginia v. EPA*,[177] where Justice Kagan called to mind "this Court's supposedly textualist method of reading statutes" before offering the following confession and indictment:

> Some years ago, I remarked that "[w]e're all textualists now." It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards.[178]

These remarks chronicle a swing of the law's pendulum. By the time that Justice Kagan declared that "we're all textualists now," the judiciary had come to lean conservative;[179] moreover, the legal right had developed formalist principles, including textualism, as part of its critique of earlier, left-leaning tendencies. So, during Kagan's early years on the Court (which started in 2010), she and others on the left had good reason to accommodate formal methods. Doing so allowed members of the Court's typical minority to engage with the typical majority.[180] The result was a period of methodological convergence.[181]

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[176] Biden v. Nebraska, 143 S. Ct. at 2394, 2400 (Kagan, J., dissenting).

[177] West Virginia v. EPA, 142 S. Ct. at 2629–30 (Kagan, J., dissenting).

[178] *Id.* at 2641 (alteration in original) (citation omitted) (quoting Kagan, *The 2015 Scalia Lecture*, *supra* note 43).

[179] *See* Kagan, *The 2015 Scalia Lecture*, *supra* note 43, at 8:22–8:31.

[180] Another much-discussed example from that era: Justice Stevens's seemingly originalist dissent in *District of Columbia v. Heller*, 554 U.S. 570, 636–80 (2008) (Stevens, J., dissenting).

[181] Facilitating this rapprochement, some sophisticated commentators introduced greater flexibility into originalism, including by drawing a sharp distinction between a text's original meanings and the original expected applications of that meaning. The former were binding whereas the latter were not. *See generally* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Maxwell L. Stearns, *Standing at the Crossroads: The Roberts Court in Historical Perspective*, 83 NOTRE DAME L. REV. 875 (2008). This so-called "new originalism" had the potential to render originalism far more discretionary, *see* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716–36 (2011), and it consequently garnered the support of some liberal scholars, *see also* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1552–61 (2011). *See generally* JACK M. BALKIN, LIVING ORIGINALISM (2011). Yet conservative judges, who still regularly found themselves in the dissent, tended not to absorb or acknowledge the potentially discretion-conferring aspects of these theoretical shifts. In

But once conservatives claimed a greater degree of control over the judiciary as a result of new appointments, that equilibrium became unstable (starting around 2018 and accelerating in 2020). As we have seen, the conservatives increasingly qualified their formalism as part of their need and desire to exercise greater discretion.[182] Justice Kagan and her fellow travelers are thus left in the position of trying to hold the conservatives to their previously espoused formalism.

One might characterize either Justice Barrett or Justice Kagan as a borrower—or, more dramatically, as a thief. Each is taking from the intellectual storehouse of her ideological adversaries. More specifically, each is borrowing from her adversary's *previous generation*. And each of these maneuvers is sensible, from a strategic point of view.[183] Kagan's effort may be less problematic because she has personally been a fairly consistent textualist since joining the Court (and she had previously taken few relevant positions). Kagan can thus cast herself as a principled critic offensively assailing the inconstancy of the governing majority. By comparison, Barrett is trying to negotiate a personal and group pivot, forcing her and her colleagues to defensively invoke Justice Breyer.

From another standpoint, however, the majority is on the offensive. By the time of *West Virginia v. EPA* and *Biden v. Nebraska*, quite a bit of water had gone over the dam, and the majority's main pivot away from textualism (the major questions doctrine) is rapidly becoming old news. Recent institutional authority therefore supports what the majority is doing, as the Court has become accustomed to pointing out.[184] And in *Biden v. Nebraska*, it wasn't so clear that Scalian textualism actually supported the

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this respect, judges followed popular discourse in focusing on originalism's asserted simplicity. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 670–72, 709–10 (2009); *see also infra* note 211.

182 *See supra* Part II.B.

183 From a strategic standpoint, one might think that liberal dissenters should refrain from adopting the views of their opponents. To do so could seem hypocritical or insincere. And assimilating the erstwhile views of your ideological adversaries could mean passing up opportunities to generate your own authentic views. Why engage in trench warfare with the jurisprudence in power when you could fashion a visionary jurisprudence in exile, just waiting to be installed at a future time? *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 273–76; Jon D. Michaels, *The Supreme Court's Liberals Should Follow Conservative Justice Rehnquist's Lead—Dissent, Dissent, Dissent*, L.A. TIMES (July 9, 2018), https://perma.cc/3JY3-7AGH. Yet the desire to be relevant will check that impulse in most legal actors, most of the time.

184 *See, e.g.*, Biden v. Nebraska, 143 S. Ct. at 2375.

position that Justice Kagan defended.[185] Yet Kagan conjured the ghost and legacy of Justice Scalia to resist the Court. So while the majority has an obvious agenda-setting power that the dissenters lack, the repositioning here is substantially mutual, reciprocal, and independent. The intellectual resources at issue are not owned by any particular person, group, or moment in history. They are instead products of a deep legal structure, as innovatively applied and adjusted for a new occasion. Rather than borrowing or stealing, each side is trading items—or exchanging positions. Two pendulums are swinging in opposite directions and are in the process of passing one another.

A similar type of intergenerational borrowing is visible within the legal academy. When "liberal and leftist academics were still enjoying the afterglow of the Warren Court revolution," "it was simply assumed that an 'activist' court would promote social progress."[186] Constitutional theory associated with the left accordingly emphasized judicial power and discretion. As the Court turned to the right, however, liberal legal thought increasingly shifted toward judicial disempowerment,[187] whether by way of "popular constitutionalism,"[188] various forms of legislative supremacy,[189] or institutional reform.[190] Calls for jurisdiction stripping, once prevalent among conservative political actors,[191] are

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185 *See id.* at 2369 (relying on a well-known Scalia majority opinion).

186 Seidman, *supra* note 74, at 451.

187 *See* Friedman, *Cycles of Constitutional Theory*, *supra* note 12, at 162 ("We have come full circle: the early 2000s are the early 1900s all over again, and one might as well forget that the Warren Court happened in the middle."); Balkin, *Why Liberals and Conservatives Flipped*, *supra* note 12, at 261 (agreeing in large part with Professor Barry Friedman but noting that "[t]he long-term trend of both parties investing in judicial review tempers the cycling of positions between judicial review and judicial restraint").

188 *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 207–26 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 177–94 (1999).

189 *See* Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/; Nikolas Bowie, The Contemporary Debate over Supreme Court Reform: Origins and Perspectives (2021) (unpublished written statement to the Presidential Comm'n on the Sup. Ct. of the U.S.) (available on SSRN).

190 *See* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1725–28 (2021); *see also* Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 169–80 (2019).

191 *See* Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 900–10 (2011).

now saliently championed by left scholars.[192] These shifts in liberal legal views evidence the influence of the One Big Question. Yet even these examples understate the scale and depth of intellectual borrowing taking place.

Consider the legacy of Professor Ronald Dworkin, who was perhaps the most influential U.S. legal theorist of the latter half of the twentieth century. Dworkin celebrated an avowedly nonpositivist picture of the law's essential nature, in which the content of the law—or "law's empire"—flows in part from deep moral principles.[193] The result of that theoretical effort was an explicitly Herculean judiciary with a decidedly liberal outlook. During this same half-century period, conservatives were associated with legal positivism in at least three senses. They distinguished law from morality. They prioritized enacted law over, and even to the exclusion of, unwritten law.[194] And they recognized indeterminacy in legal sources.[195] Justice Scalia, who was an accomplished scholar both before and after he assumed the bench, offers an apt example.[196] And Scalia's most influential theoretical work features a sharp reply penned by Dworkin himself.[197] Today, however, conservative legal thought is markedly less positivist along all three dimensions just described. "Common good constitutionalism" is merging law and morality in avowedly Dworkinian ways.[198] Conservative scholarship on both unwritten law and

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[192] *See* Doerfler & Moyn, *supra* note 190, at 1725–28, 1756–58, 1764–68. *See generally, e.g.*, Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778 (2020).

[193] *See generally* DWORKIN, LAW'S EMPIRE, *supra* note 25.

[194] Here, too, late twentieth-century conservatives echoed Justice Holmes and early-century liberals, who championed a form of positivism. *See, e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[195] Acknowledging legal indeterminacy is sometimes thought to foster or support judicial restraint because judicial activism without any legal mandate is easily cast as antidemocratic and illegitimate. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 331 (1996); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1–14 (1962).

[196] *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997). In another instance of intergenerational borrowing, Justice Scalia prominently quoted Justice Holmes's textualist aphorisms, such as: "I only want to know what the words mean." *Id.* at 22–23 (quotation marks omitted) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (quoting an unpublished letter penned by Justice Holmes)); *see also* United States v. Wurzbach, 280 U.S. 396, 398 (1930) (Holmes, J.).

[197] *See* Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 196, at 115, 117.

[198] *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION (2022) [hereinafter VERMEULE, COMMON GOOD CONSTITUTIONALISM].

contextual interpretation is also on the rise.[199] And Dworkin's famous "one right answer" thesis[200] has found new adherents in a fresh generation of conservative legal thinkers.[201] This trend was evident in *Loper Bright*, which overruled one of Scalia's signature doctrines: *Chevron* deference.[202] Almost echoing Dworkin, the Court asserted that a statute "has a best meaning, necessarily discernible by a court deploying its full interpretive toolkit."[203]

The recent intellectual rise and now-prospective fall of positivist originalism provides complementary insights. When Justice Scalia and others began to theorize originalism in the 1970s and '80s, their project was pitched as a formalist indictment of existing legal practice. These arguments were positivist in the sense that they distinguished law from morality, but they also recognized that existing legal practice was badly out of whack with what formal law required.[204] Scalia, Bork, and other originalists in this era argued that many Supreme Court Justices were not originalist and that their opinions routinely defied originalism.[205] By 2015, however, the rise of conservative legal thought in the courts had prepared the way for originalists' posture of critique to

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199 *See, e.g.*, Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1819–23 (2012). *See generally, e.g.*, Baude, *Beyond Textualism?*, *supra* note 101; Prakash, *supra* note 101.

200 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1978). Dworkin believed that there is *in principle* one right answer, but only because legal correctness is partially determined by morality. This sort of outlook allows a court to assert legal necessity for its actions while helping itself to controversial moral views.

201 *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (book review) (emphasizing that the "best" reading should prevail); Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 915–19 (2016); John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1344 n.102 (2018). *See generally* VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 198.

202 *See Loper Bright*, 144 S. Ct. at 2273.

203 *Id.* at 2271. The Court added: "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning." *Id.* at 2266. These comments call to mind prerealist "formalism" from the nineteenth century, which held that law is almost entirely determinate. *Cf.* HART, *supra* note 25, at 129; Unger, *supra* note 14, at 564. Yet that type of formalism only obscures judicial discretion. Justice Scalia absorbed the realists' critique, *see* SCALIA, A MATTER OF INTERPRETATION, *supra* note 196, at 10, and, through doctrines like *Chevron*, crafted rules to constrain courts in areas of legal indeterminacy. *See supra* notes 106–09 and accompanying text. By contrast, *Loper Bright* empowers courts by embracing discretion-conferring inquiries (such as the multifactor *Skidmore* analysis) even as it insists that courts find the "single, best meaning." *Loper Bright*, 144 S. Ct. at 2259, 2266.

204 *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 196.

205 *See supra* note 204.

evolve into one of descriptive triumphalism. Professors Steve Sachs and Will Baude then argued that existing legal practice was *already* originalist.[206] For these theorists, no canonical precedent had ever disavowed originalism, and any separation between case law and the dictates of positive originalism reflected mistakes or *sub rosa* cheating, not a fundamental break from originalism. Those claims, while jarring to many, dovetailed with recent confirmation hearings in which (for example) Justice Kagan emphasized legal liberalism's common ground with originalism.[207] Later, Justice Barrett publicly endorsed the Baude and Sachs position.[208]

But by then the pendulum had continued to swing. And so Professor Adrian Vermeule (an influential conservative legal thinker) began to candidly argue that originalism—and, indeed, positivism in general—had served its purpose.[209] No longer either insurgent or merely majoritarian, legal conservativism is plausibly viewed as at least momentarily hegemonic in the U.S. legal system. Vermeule accordingly concluded that the time was now ripe for an openly nonpositive, Dworkinian jurisprudence *of the right*—with all the expansive judicial power and legal dynamism that comes with it.[210] In this way, a cutting-edge legal thinker of the 1980s left—this time, not Breyer but Dworkin—has become a lodestar of the conservative legal movement circa 2023.

## IV. LAW'S TRAJECTORY

Where will the law go from here? This Part outlines the law's likely future trajectory, as well as its means of persistence during a time of legal realignment.

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[206] *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2365–91 (2015) (arguing that "our current legal commitments, as a whole, [ ] can be reconciled with originalism"); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015) ("This Article presents a version of originalism—adherence to the Founders' law—that's plausibly true as a description of our law.").

[207] *See supra* note 43.

[208] *See* Dean Reuter, Thomas Hardiman, Amy Coney Barrett, Michael C. Dorf, Saikrishna B. Prakash & Richard H. Pildes, *Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 701 (2020).

[209] *See* Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (arguing that "originalism has now outlived its utility").

[210] *See id.*; *see also* VERMEULE, COMMON GOOD CONSTITUTIONALISM, *supra* note 198, at 91–94. Other nonpositivist, natural law theories have been offered in support of originalism. *See generally, e.g.*, Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97 (2016); J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1 (2022).

### A. Formalism's Coming Decline

We are probably just past peak formalism in overall legal culture. As we have seen, the conservative legal ideology trended toward formalism from roughly the 1960s into the 2010s.[211] A countermovement has begun and affected several areas, particularly administrative law, justiciability, and constitutional interpretation. But legal conservatives, especially those on the bench, still tend to emphasize constraint. And we have also seen that the liberal legal ideology has been trending in the same direction, especially since 2018. For example, liberal jurists have lately endeavored to out-textualist the Court's avowed textualists.[212] And the newest Justice, Justice Jackson, appeared at her confirmation hearing and first year on the bench as a possible source of "liberal originalism."[213] All these developments made sense. The liberal legal ideology is now out of power and so has a strong incentive to encourage the governing majority to accept constraint. So while the pendulum representing liberal legal ideology is still swinging toward constraint and its conservative counterpart has begun to reverse course, both remain far on the side of legal constraint.

What will come next? With all the caveats that such predictions necessarily bring,[214] I here assume not only the framework outlined above, but also that the Supreme Court remains controlled by a majority voting bloc of ideologically conservative jurists. Contingencies can of course alter the analysis, including a

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[211] In some ways, Justice Scalia himself became more formalist during this period. In the late 1980s, for instance, Justice Scalia famously "confess[ed]" that he might prove a "faint-hearted" originalist if he had to review flogging. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862, 864 (1989) ("[M]ost originalists are faint-hearted."). In the early 2010s, however, Justice Scalia "repudiate[d]" that self-characterization and maintained that he would deem flogging constitutional. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://perma.cc/3GZ5-82NB. This shift reflected broader trends. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006). Now that conservative formalism is in decline, faintheartedness is poised to make a comeback.

[212] *See supra* notes 175–78 and accompanying text; *see also, e.g.*, Sackett v. EPA, 143 S. Ct. 1322, 1359 (2023) (Kagan, J., concurring in the judgment) ("I would stick to the text." (quotation marks omitted) (quoting *id.* at 1369 (Kavanaugh, J., concurring in the judgment))).

[213] Some label Justice Jackson's method "progressive originalism." *See supra* note 162 and accompanying text.

[214] *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW 99 (1977) ("[N]o historian, social scientist, or legal theorist has ever succeeded in predicting anything."). The demise of conservative formalism has been predicted before. *See, e.g.*, Eric Posner, *Why Originalism Will Fade*, POSNER BLOG (Feb. 18, 2016), https://perma.cc/283V-68SC.

political shift that gives rise to court-packing or surprising appointments that shift the balance of the Court.

As it has flexed its muscles, the Court's conservative voting bloc has substantially qualified its commitment to formalism. The most salient example is probably the meteoric rise of the major questions doctrine, which represents a remarkable step away from textualism and in favor of discretionary judicial empowerment.[215] Conservatives have also begun to dust off the doctrine of substantive due process,[216] that age-old bane of formalist legal thinkers.[217] Tempering this process is the force of individual consistency, for the conservative Justices have long espoused formalist views, such as textualism. Yet each move away from formalism makes the next one easier to explain and justify. The majority may also be getting used to having its anti-formalism pointed out, and the dissenters' critiques along those lines are already growing a bit stale. This process will take time, and it may not become complete until less formalist conservatives are appointed to the

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[215] The major questions doctrine is essentially a form of conservative purposivism and invites discretionary judicial assessments of what is "major." Those facts are not necessarily indictments. Atextual, discretionary interpretation has defenders—Justice Breyer included. For critical discussion of the doctrine, see generally, for example, Sohoni, *supra* note 170; Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463 (2021); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1 (2023); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019 (2018).

[216] For example, Justice Alito has narrowly read of one of his own rulings about standing in order to facilitate enforcement of parental rights rooted in substantive due process. *See generally* Parents Protecting Our Child. v. Eau Claire Area Sch. Dist., 145 S. Ct. 14 (2024) (Alito, J., dissenting from denial of certiorari) (narrowly reading *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), in the context of a challenge to public school policies regarding students' gender transitions). By contrast, Justice Scalia generally opposed such claims. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting); Richard M. Re, *Realigning Standing with Substantive Due Process*, RE'S JUDICATA (Dec. 20, 2024), https://perma.cc/H6S7-C4NZ; *see also* Health Freedom Def. Fund, Inc. v. Carvalho, 104 F.4th 715, 728 (9th Cir. 2024) (Collins, J., concurring) (finding, in the context of vaccine mandates, a "fundamental right to refuse medical treatment").

[217] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 720 (2015) (Scalia, J., dissenting) (arguing that substantive due process "stands for nothing whatever, except those freedoms and entitlements that this Court *really* likes" (emphasis in original)); *supra* notes 16, 55. Conservative thought has lately become more supportive of unenumerated rights, particularly via the Privileges or Immunities Clause. *See, e.g.*, RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 195 (2021); *see also* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1250–51 (2024) (claiming that "decisions recognizing unenumerated constitutional rights . . . have filled in some of the general-law-shaped hole in American jurisprudence").

Court—that is, jurists who don't have so much formalist baggage to shed in the first place.[218] Even so, the conservative swing away from constraint will likely continue apace, so long as that ideology remains in power.

Liberal legal culture is partly reactive to its conservative counterpart, but it is also a source of innovation in its own right. In the short-term, the legal left will continue to insist on legal formalism, even after it has become notably more formalist than its conservative rivals. In some areas, such as administrative law, that reversal of positions has already occurred.[219] Eventually, however, playing the formalist game will no longer be worth the candle. The conservatives, especially newly appointed conservatives, will no longer be formalist enough to be meaningfully constrained by formalist arguments. A Supreme Court staffed by common good constitutionalists, for instance, would not be swayed by rigid textualist arguments, but would instead be embarking on an openly moralistic Dworkinian project.[220] The legal left would then be drawn by the desire to be relevant and so would increasingly offer its own, rival vision of morality and policy. Liberals would thus begin their own swing toward discretion, following their conservative counterparts.

These events would mirror the evolution of legal thought in the mid-twentieth century, when the legal left's domination of the judiciary corresponded with relatively functionalist thought on the legal right, too. While still more formalist than the legal left, relatively conservative jurists like Justice John Marshall Harlan II were far less formalist and far more supportive of judicial discretion than their successors.[221] In this respect, legal culture exhibits a cyclical pattern derived, but distinct, from underlying cycles of political change.

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[218] New conservative judges in the Fifth Circuit are demonstrating how that generational change might take place, as they adopt discretionary approaches in major cases. *See generally, e.g.*, Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, 51 F.4th 616 (5th Cir. 2022), *rev'd*, 144 S. Ct. 1474 (2024); *supra* note 120.

[219] *See supra* text accompanying note 170.

[220] A similar transition occurred during the Warren Court. *See supra* note 58.

[221] *Compare, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 398 (1971) (Harlan, J., concurring in the judgment), *with* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

## B. Transition and Reposition

U.S. politics is polarized, and the federal judiciary, especially at the Supreme Court, exhibits nearly perfect party sorting.[222] In other words, Republican-appointed jurists are almost always more conservative than Democrat-appointed jurists—yielding tension, conflict, and discord. Informed critics are increasingly likely to view the Court not just as a policymaker but as a cynical actor within partisan politics.[223] Yet that dissonance reflects only one dimension of legal culture. In its methodological dimension, legal culture exhibits remarkable concordance. Both the legal left and right have embraced the law's constraining aspect to a greater degree than at any time in many decades. And while that convergence is already starting to abate, it will not disappear overnight.

So a check on the judiciary's politicization remains: legal culture's extraordinary formalism. That is, convergence with respect to methodology tempers divergence with respect to politics. Dissidents like Justice Kagan may lack the votes to dictate outcomes, but they retain the ability to issue stinging critiques and prompt second thoughts.[224] More fundamentally, all nine Justices speak and reason in a formalist language, creating an incentive for litigants, commentators, law students, and many others to follow suit.[225] That pattern, or set of incentives, is part of why there is still a degree of broadly shared legal culture in the United States, despite polarization and party sorting. Liberal legal culture's assimilation of formalist ideas thus fosters sharedness at the level of methodology, rhetoric, and judicial affect. By engaging the majority ideology on its own terms, legal liberals are doing much more than trying to win individual cases. Intentionally or not, they are also doing their part to prop up a widely shared rule of law—something sorely needed in a time of political discord.

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[222] *See, e.g.*, Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html.

[223] *See, e.g.*, Michael J. Klarman, *The Supreme Court 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 45–66 (2020); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 115 (2022).

[224] Justice Kagan remains effective on the Court. For example, she apparently "stole" the majority opinion in *Moody v. Netchoice, LLC*, 144 S. Ct. 2383 (2024). Joan Biskupic, *How Samuel Alito Got Cancelled from the Social Media Majority*, CNN (July 31, 2024), https://perma.cc/H9VB-QNP2; *see also supra* text accompanying note 147.

[225] *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1443 (2022) (describing textualism as "*lingua franca*").

Legal conservatives are engaged in a similar form of service to the extent that they resist the incentive, or temptation, to qualify their longtime formalist inclinations. To be clear, the conservative majority both will and should begin to swing in favor of embracing greater discretion. Strict prioritization of legal constraint is simply infeasible when maintained by a governing coalition.[226] Recalibration is particularly warranted in cases like *Rahimi*, in which a turn toward greater discretion garnered widespread, cross-ideological support.[227] Yet the pendulum representing conservative legal ideology has arrived at the archformalist point in its arc with considerable inertia. That inertia—the force of past statements, arguments, and averments—calls for a gradual, if quickening, movement away from formalism. The pendulum's reversal will begin slowly, after a pause or moment of hanging motionless in the air. As Justice Barrett illustrated in the student loan case,[228] legal conservatives who seek to govern but also care about personal consistency must resort to sophisticated arguments and trim their ambitions. The result is a measure of political moderation as well as intellectual sophistication. When these traits abide in legal culture, so too does a gap between law and politics.[229] Here, too, the story of legal realignment is one of law's persistence through change.

## CONCLUSION

Some readers might view this essay as a recipe for apathy. Once they are revealed to be strategically convenient, legal convictions could seem like delusions, or frauds. The law's susceptibility to strategic manipulation could even be viewed as a reason to dispense with law in favor of raw partisan conflict. Yet nothing here casts doubt on either the sincerity of individuals or the stakes underlying legal disputes. And both constraint and discretion are essential aspects of the law. So rather than casting legal argument as vacuous or deceptive, the present theory offers a

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226 *See supra* text accompanying note 23 (discussing *ought* implying *can*).

227 *See supra* text accompanying note 124.

228 *See supra* Part III.A.

229 To the extent that law is valuable, we should worry about hack jurists who follow a political group's latest desires—yielding a kind of partisanship inimical to the existence of law. This concern is acute when a judge adopts a position that satisfies a political constituency but that does not accord with the judge's own past views, with institutional precedent, or with a new, cross-ideological consensus. Alas, however, the normative and prescriptive issues swirling around legal realignment merit greater attention than I can afford here—and so must await another time.

healthy perspective. Even our most deeply held legal positions are partly the products of forces beyond our control. If things had gone a bit differently, perhaps we would all be holding quite different views. Adversaries could have been allies, and each side in a major controversy might hold the opposite positions. By revealing as much, a descriptive account of legal realignment can foster respect, toleration, and humility.