# THE UNDONE BUSINESS OF THE WARREN COURT

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Professor Richard Re's Foreword pursues a comparison between the Warren Court and the current Court in the hope that "[s]eeing the similarities between these two starkly opposed Courts" will dampen the deeply polarized "us/them dynamic [that] currently dominates our legal culture and overall political discourse" and "convince the two groups of 'us' that we have more in common than often supposed."[1]

The similarities Re plumbs are fundamentally methodological: First, they lie in how the two Courts locate themselves with respect to a series of the "antinomies" that mark the "law's deep structure."[2] According to Re, Courts with ideological supermajorities have incentives to embrace (i) discretion over constraint, (ii) purpose over text, (iii) reconsideration over precedent, and (iv) independence from, over deference to, the political branches because these four choices help them move the law in their preferred direction.[3] So during the Warren Court era, that's what liberals did, over the objection of conservative dissenters who invoked the opposite value in each of the antinomies.[4] Now, there has been a "reciprocal transformation": Today's conservative supermajority elevates discretion, purpose, reconsideration, and independence while liberal dissenters insist on constraint, text, precedent, and deference.[5]

Second, in light of this deep structure, "theories capable of illuminating the Warren Court's work [will] also have traction today."[6] In particular, Re argues that the current Court "follow[s]" the "logic of representation-reinforcement" that describes many of the Warren

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In the interest of full disclosure, I note that I was involved — at some stage or another, in one way or another — in the following cases discussed in this Response: *Louisiana v. Callais*, 145 S. Ct. 2608 (2025); *Alexander v. South Carolina State Conference of the NAACP*, 144 S. Ct. 1221 (2024); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Allen v. Milligan*, 143 S. Ct. 1487 (2023); *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996); *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 581 U.S. 985 (2017); and *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 22-cv-22, 2023 WL 8004576 (D.N.D. Nov. 17, 2023), *vacated and remanded*, 137 F.4th 710 (8th Cir. 2025).

[1] Richard M. Re, *The Supreme Court, 2024 Term — Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 1, 6 (2025).

[2] *Id.* at 26.

[3] *See id.* at 27, 31–32.

[4] *Id.* at 31.

[5] *Id.* at 32.

[6] *Id.* at 55.

Court's most significant decisions.[7] And he suggests that the current Court, like the Warren Court, has exercised a "passive virtue[]" by avoiding controversial rulings that might spur outright political defiance.[8]

Re's Foreword has so many dimensions worth further exploration. But while "law's deep structure" may be one piece of the "constant terrain over which political winds blow and reverse,"[9] it is not the only piece of constant terrain for American law. The best explanation for the Warren Court lies not in structure or "logic"[10] but in experience[11]: a near-century in which the nation had failed utterly to fulfill the promise of equality the Reconstruction Amendments had made to Black Americans.[12] When Chief Justice Warren arrived at the Supreme Court in the fall of 1953,[13] "Jim Crow [still] reigned supreme."[14] Warren's first achievement as Chief Justice was to bring the Court to unanimity in *Brown v. Board of Education*.[15] Over the next decade, the Court spent much of its time confronting racial discrimination. Some of those cases

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[7] *Id.* at 62–63. I say "describes" for a reason. Many of the Warren Court's defenders fit its major achievements into this "framework theory," *id.* at 56, derived from the famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (advancing this theory and analyzing the Warren Court's use of it). But the Warren Court itself cited footnote four "only once in Warren's sixteen years" on the Court. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 489 (2000) ("If Footnote Four was the Court's Rosetta Stone, it was seldom on public display.").

[8] *See* Re, *supra* note 1, at 67–73 (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 200 (2d ed. 1986)). Re "rebrand[s]" the phrase, introduced in the title of Professor Alexander Bickel's influential Foreword, Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), as the "impassive virtues," Re, *supra* note 1, at 69, but this is a distinction without a difference since Re and Bickel are talking about the same thing — a Court that uses procedural devices as "a means of deferral" while it "bides its time" to maximize its ability to achieve its preferred ends. *Id.*; *see infra* notes 181–214 and accompanying text.

[9] Re, *supra* note 1, at 6.

[10] *Id.* at 62–64, 67 (discussing the "logic" of representation reinforcement).

[11] *Cf.* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) ("The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.").

[12] *See* Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 524 (1973) (describing a period beginning in 1957 as challenging racist voting discrimination "for the first time since the end of Reconstruction").

[13] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 302 (2004).

[14] Owen Fiss, Tribute, *A Life Lived Twice*, 100 YALE L.J. 1117, 1118 (1991) ("In the 1950's, America was not a pretty sight. Jim Crow reigned supreme.").

[15] 347 U.S. 483 (1954) (holding, in a unanimous decision, that racial segregation of public schools violates the Fourteenth Amendment, *id.* at 495). For discussions of this process, see KLARMAN, *supra* note 13, at 302–12; RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 660–703 (1975); and Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 34–44 (1979).

simply extended *Brown*'s holding to civic life more generally.[16] Beyond *Brown*, the Court's experience with voting rights[17] led it to uphold new legislation addressing Black disenfranchisement as an appropriate response to nearly a century's worth of "unremitting and ingenious defiance of the Constitution."[18] And, in a host of other areas, cases arising out of the Civil Rights Movement prompted the Warren Court's doctrinal innovation.

Part I of this Response argues that if its approach to questions of racial justice is a relevant axis on which to compare the Warren Court with the current Court, our "first blush" may be right: This *is* "a radically different court" and *not* a "successor in interest"[19] — at least not if the interest at issue is in completing the Second Reconstruction.

Part II then turns to a central aspect of representation reinforcement: the commitment to judicial intervention when "the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out."[20] The Warren Court's reapportionment cases are an epitome of this form of representation-reinforcing judicial review and, from Chief Justice Warren's perspective, its most momentous decisions.[21] What about the current Court? It has retreated from trying to prevent entrenchment in the redistricting process.[22] Moreover, its most consequential decision, so far, has been *Trump v. United States*,[23] which not only involved the most notorious example of an elected official

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16 *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877, 877 (1955) (per curiam), *aff'g*, 220 F.2d 386 (4th Cir. 1955) (per curiam) (holding that racial segregation of public beaches and bathhouses was not "a proper exercise of police powers," *id.* at 387); Gayle v. Browder, 352 U.S. 903, 903 (1956) (per curiam) (affirming lower court decision on the basis of *Brown*), *aff'g*, 142 F. Supp. 707 (M.D. Ala. 1956) (holding that statutes and ordinances requiring racial segregation on city buses violated the Equal Protection Clause, *id.* at 717); Johnson v. Virginia, 373 U.S. 61, 62 (1963) (per curiam) (holding, citing *Brown*, that a state may not segregate courtroom seating); Schiro v. Bynum, 375 U.S. 395, 395 (1964), *aff'g*, 219 F. Supp. 204 (E.D. La. 1963) (holding that racial segregation of public auditoriums violates the Equal Protection Clause, *id.* at 209–11).

17 *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 151, 153 (1965) (striking down Louisiana's use of an "understanding" test for voter registration as a device designed to enable arbitrary exclusion of Black applicants); Harman v. Forssenius, 380 U.S. 528, 543–44 (1965) (recognizing, in the course of striking down Virginia's voter registration regime, that "[t]he Virginia poll tax was born of a desire to disenfranchise the Negro" (footnote omitted)); Anderson v. Martin, 375 U.S. 399, 400–02 (1964) (striking down a Louisiana law that required a candidate's race to be put on the ballot as designed to encourage racial prejudice in voting); Gomillion v. Lightfoot, 364 U.S. 339, 341, 347–48 (1960) (striking down a redrawing of Tuskegee, Alabama's boundaries that managed to exclude all but a handful of the city's Black residents).

18 South Carolina v. Katzenbach, 383 U.S. 301, 309–10, 337 (1966).

19 *Contra* Re, *supra* note 1, at 55.

20 ELY, *supra* note 7, at 103. Re focuses more on the other prong of representation reinforcement — the one dealing with protection of vulnerable minority groups. *See* Re, *supra* note 1, at 55–56.

21 *See infra* notes 128–42 and accompanying text.

22 *See infra* notes 143–59 and accompanying text.

23 144 S. Ct. 2312 (2024).

trying to entrench himself, but also has licensed the executive branch to choke off channels of political change going forward.[24]

Finally, Part III returns to Re's discussion of a particular judicial strategy. In his influential Foreword, Professor Alexander Bickel discussed what he denominated the "passive virtues" — various tools by which the Supreme Court can avoid deciding controversial issues when it is unnecessary or counterproductive to do so.[25] In writing about the past Term and the numerous cases involving the second Trump Administration, Re praises the Court for what he (slightly) rebrands as its "impassive virtue."[26] The Court has been "savvy," he writes, in nudging the Executive Branch to comply with the law "without creating a decisive clash or opportunity for disobedience."[27] But Re may be overoptimistic about the current Court's ability to defend the rule of law through exercising this impassive virtue. The Warren Court parallel to which he points — *Naim v. Naim*[28] — suggests why.[29] *Naim* concerned the constitutionality of Virginia's ban on interracial marriage.[30] The Court dodged the question, even though it almost certainly lay within the Court's mandatory appellate jurisdiction, out of concern that it might stiffen Southern resistance to the Court's decision in *Brown*.[31] But the collateral consequences of *Naim* offer a caution against the Supreme Court's accommodating potential resistance.[32] I worry that the Court's decision in *Trump v. CASA, Inc.*,[33] may actually embolden, rather than dampen, resistance to the rule of law by the Court's "counterparty"[34] — here, President Trump.

## I. THE CENTRALITY OF RACE: A DIFFERENT ARC OF THE PENDULUM

The word "race" barely appears in Re's Foreword at all.[35] His discussion of race is limited largely to "what may be one of the Conservative Warren Court's canonical cases in the making: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*)."[36] He suggests that "the Conservative Warren Court can be viewed as updating the Elysian tradition" of protecting discrete and insular minorities because the Court based its decision striking down Harvard

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[24] *See infra* notes 172–80.
[25] *See* Bickel, *supra* note 8, at 42; BICKEL, *supra* note 8, at 146.
[26] Re, *supra* note 1, at 67, 69.
[27] *Id.* at 71–72.
[28] 350 U.S. 891 (1955) (per curiam); 350 U.S. 985 (1956) (per curiam).
[29] For Re's discussion of *Naim*, see Re, *supra* note 1, at 67–69.
[30] *See* 350 U.S. at 891.
[31] *See infra* notes 193–94 and accompanying text.
[32] *See* Richard Delgado, Naim v. Naim, 12 NEV. L.J. 525, 527 (2012).
[33] 145 S. Ct. 2540 (2025).
[34] Re, *supra* note 1, at 72.
[35] *See generally id.* (mentioning the word "race" fewer than two dozen times).
[36] *Id.* at 61 (footnote omitted); 143 S. Ct. 2141 (2023).

College's affirmative action plan, at least in part, on the assertion that the plan had led to a decrease in the number of Asian Americans admitted.[37]

As Re observes, the *SFFA* Court also "elaborately invoked the precedent and legacy of *Brown v. Board of Education*."[38] No surprise there: "Precisely because *Brown* has become the crown jewel of the *United States Reports*, every constitutional theory must claim *Brown* for itself"; otherwise, it becomes a "theory without traction."[39] But it is worth understanding that however much the current Court invokes the legacy of *Brown*, it seems bent on dismantling the Second Reconstruction of which *Brown* was one precipitating element.

The Second Reconstruction involved a suite of transformative federal statutes designed to fulfill the promises of the Reconstruction Amendments.[40] The most important of these were the Civil Rights Act of 1964,[41] whose public accommodations provisions the Court upheld in

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[37] Re, *supra* note 1, at 61 & n.391 (citing *SFFA*, 143 S. Ct. at 2168–69).

I'm not sure that fact, even if true, would be enough to render Harvard's plan unconstitutional — an odd statement because Harvard is not bound by the Constitution, *see* The Civil Rights Cases, 109 U.S. 3, 13 (1883), but the Court nevertheless chose to place Harvard, and not the University of North Carolina, in the case caption, *see SFFA*, 143 S. Ct. at 2141.

To be sure, both the district court and the court of appeals had recognized that, given the fixed number of spots, Harvard's consideration of race resulted in fewer white or Asian-American applicants gaining admission in the entering class. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (*SFFA*), 980 F.3d 157, 191 n.29 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.) (*SFFA*), 397 F. Supp. 3d 126, 178 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023). But it does not follow that the awareness of this result constitutes an intent to discriminate in the sense of having an adverse effect on a protected class — the touchstone of an equal protection violation, *see SFFA*, 980 F.3d at 195–96. Harvard also gave a preference to the children of faculty and staff, *id.* at 171 & n.13, but it would be implausible to think it adopted that policy out of a desire to reduce the number of non-faculty children at the school. As the Court declared in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), an unconstitutionally discriminatory purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (footnotes omitted) (citation omitted). So, too, here. Both lower courts agreed that Harvard did not adopt its plan for the purpose of decreasing the number of Asian Americans admitted. *See SFFA*, 397 F. Supp. 3d at 194; *SFFA*, 980 F.3d at 196. And the two-court rule (recently invoked by the Court's three most conservative Justices, *see* Murthy v. Missouri, 144 S. Ct. 7, 9 (2023) (Alito, J., dissenting from grant of application for stay, joined by Thomas & Gorsuch, JJ.) (quoting Easley v. Cromartie, 532 U.S. 234, 242 (2001))) has long restrained the Court from overturning "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Glossip v. Gross, 576 U.S. 863, 882 (2015) (quoting Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

[38] Re, *supra* note 1, at 61 n.386.

[39] Pamela S. Karlan, Lecture, *What Can* Brown® *Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1060 (2009); *see also* Justin Driver, *The Strange Career of Antisubordination*, 91 U. CHI. L. REV. 651, 661, 676 (2024) (discussing how both liberal and conservative Justices invoke antisubordination theory to justify their positions).

[40] *See* Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 2, 4–5, 8–11 (2012).

[41] Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of the U.S. Code).

*Heart of Atlanta Motel, Inc. v. United States*[42] and *Katzenbach v. McClung*,[43] and the Voting Rights Act of 1965,[44] whose suspension of literacy tests and special preclearance regime the Court upheld in *South Carolina v. Katzenbach*.[45] These statutes were critical to actually achieving the Warren Court's racial justice goals. For example, it wasn't until the Departments of Justice and Health, Education, and Welfare began to use their enforcement (and funding) authority under the 1964 Act that real school desegregation began in the South.[46] And, within five years, federal examiners authorized by the Voting Rights Act registered almost as many African Americans in six Southern states as had registered in the previous century.[47]

Moreover, race — or more precisely, a concern with the pervasive and profound exclusion and mistreatment of Black Americans — exercised a "gravitational pull" across the areas where the Warren Court transformed American law.[48] Consider just three examples: the First Amendment, federal jurisdiction, and the Reapportionment Revolution.

It is impossible to explain why the Court "change[d] a century of libel law"[49] to provide significant First Amendment protection even for false statements without recognizing that Southern officials were using state defamation law as a "formidable legal bludgeon to swing at out-of-state newspapers"[50] that reported on the activities of the Civil Rights Movement and Massive Resistance.[51] Prior to the civil rights struggle, "[t]here had been no prior hints that the justices thought libelous statements were constitutionally protected."[52] And when Justice Brennan's opinion

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42 379 U.S. 241, 242, 261 (1964).

43 379 U.S. 294, 298, 305 (1964).

44 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

45 383 U.S. 301, 334, 337 (1966).

46 *See* David L. Norman, *The Strange Career of the Civil Rights Division's Commitment to* Brown, 93 YALE L.J. 983, 985–88 (1984).

47 *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

The Warren Court also broadened the reach of several key Reconstruction-era statutes. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413, 422 (1968) (holding that 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property," *id.* at 412, forbids private discrimination without requiring proof of state action, *id.* at 413); Runyon v. McCrary, 427 U.S. 160, 168, 179 (1976) (extending the holding of *Jones* to 42 U.S.C. § 1981, which governs all private contracting (quoting *Jones*, 392 U.S. at 438, 443)); Monroe v. Pape, 365 U.S. 167, 168, 171–72 (1961) (holding that 42 U.S.C. § 1983, which provides a cause of action for deprivations of constitutional rights committed under color of state law, reaches even conduct by government officials forbidden by state law).

48 *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 60 (2011).

49 POWE, *supra* note 7, at 307.

50 *Id.* at 306 (quoting LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 83 (1991)).

51 *See id.* at 305, 309.

52 *Id.* at 491.

for the Court in *New York Times Co. v. Sullivan*[53] declared "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[54] the debate on the table was over Black citizens' claims for equality.[55] So, too, the Court's recognition of litigation as First Amendment–protected activity was a product of the Movement's "strategy of systematic litigation," and the Southern counterattack to crush the NAACP.[56]

The Warren Court's expansion of federal jurisdiction was also inflected by race. Decisions like *Monroe v. Pape*[57] (which essentially created the modern § 1983[58]) and *Townsend v. Sain*[59] and *Fay v. Noia*[60] (which each expanded the availability of federal habeas[61]) "were deeply influenced by the Court's mistrust of the willingness of state and local officials to deal fairly with racially charged issues."[62] So the Court gave the lower federal courts "front-line supervisory authority in racially charged settings over state and local institutions including criminal courts, police departments, detention facilities, highway departments, firefighters, transportation facilities, parks, public schools, and public housing authorities."[63]

Finally, for our purposes (although the list could go on and on[64]), consider the *Reapportionment Cases* (to which I return in the next section).[65] As I wrote in the Foreword a dozen years ago:

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[53] 376 U.S. 254 (1964). Several conservative jurists have suggested the Court should revisit the centerpiece of the Warren Court's holding — the imposition of an actual malice standard in cases involving public officials and public figures, *id.* at 279–80. *See, e.g.*, Berisha v. Lawson, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from the denial of certiorari) (arguing that the Court should repudiate the "actual-malice requirement"); *id.* at 2429–30 (Gorsuch, J., dissenting from the denial of certiorari) (suggesting that although *New York Times* may have sought to promote its "goal[s] as the Court saw the world in 1964" it marked a "[d]eparture[] from the Constitution's original public meaning," *id.* at 2429, and "given the momentous changes in the Nation's media landscape since 1964," the Court should at least revisit the question, *id.* at 2430); McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari) (stating that "*New York Times* and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law" that should be repudiated); Dershowitz v. Cable News Network, Inc., No. 23-11270, 2025 WL 2585986, at *7, *13 (11th Cir. Aug. 29, 2025) (Lagoa, J., concurring); Tah v. Glob. Witness Publ'g, Inc., 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman, J., dissenting in part).

[54] *N.Y. Times*, 376 U.S. at 270.

[55] *See id.* at 294 (Black, J., concurring); POWE, *supra* note 7, at 307.

[56] HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 66, 81–83 (1965).

[57] 365 U.S. 167 (1961).

[58] 42 U.S.C. § 1983; *see* Karlan, *supra* note 40, at 25–26 (discussing the impact of *Monroe* on § 1983).

[59] 372 U.S. 293 (1963).

[60] 372 U.S. 391 (1963).

[61] *See Townsend*, 372 U.S. at 297, 313; *Fay*, 372 U.S. at 398–99.

[62] Neuborne, *supra* note 48, at 67; *see id.* at 68.

[63] *Id.* at 69.

[64] For further examination of the impact of race on the Warren Court, see *id.* at 65–89.

[65] *See infra* notes 128–42 and accompanying text. These cases include *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Wesberry v. Sanders*, 376 U.S. 1 (1964). *See also infra* note 139 (collecting other cases).

> The [Warren] Court was aware that "much of its workload — particularly in the area of civil rights, where extremist politicians from underpopulated and disenfranchised 'Black Belt' regions were at the forefront of massive resistance — was an indirect consequence of malapportionment's hold on state legislatures." The Warren Court believed that democracy could be made to work better by including a broader cohort of citizens and by equalizing the weight of individuals' votes. In this reformed process, politics would likely produce better outcomes — that is, fuller realizations of the Constitution's commitment to liberty, equality, and opportunity.[66]

So what about the current Court and the Second Reconstruction? If this Court is anyone's "successor in interest"[67] in this respect, it's an heir to the Waite Court and its 1883 decision striking down a public accommodations provision whose primary sponsor saw it as "the greatest achievement of Reconstruction."[68] In the *Civil Rights Cases*,[69] the Court took the position that federal action to protect the interests of Black Americans was no longer necessary:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[70]

That theory, of course, turned out to be woefully wrong about what stage the United States was in. Within a quarter century, every state in the Deep South (where the vast majority of Black Americans then lived) adopted a new constitution containing provisions designed to disenfranchise Black citizens.[71] So much for protecting themselves through the "ordinary modes."

Many Justices on the current Court have a similar time's-up attitude.[72] Perhaps the most succinct expression of this sentiment came in Justice Alito's dissent in *Ramos v. Louisiana*.[73] There, on the way to holding that the Sixth Amendment requires unanimity before a state can convict a person of a serious offense,[74] the Court acknowledged that Louisiana's anomalous contrary rule had been adopted at an 1898

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66 Karlan, *supra* note 40, at 18 (footnotes omitted) (quoting Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1333 (2005)).

67 Re, *supra* note 1, at 55.

68 *Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm [https://perma.cc/D4QT-8XJR].

69 109 U.S. 3 (1883).

70 *Id.* at 25.

71 *See* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 139, 182 (1974); Derfner, *supra* note 12, at 536–38.

72 For more discussion of this point, see Aziz Z. Huq, *The Counterdemocratic Difficulty*, 117 NW. U. L. REV. 1099, 1162–63 (2023).

73 140 S. Ct. 1390 (2020).

74 *Id.* at 1397.

constitutional convention whose "avowed purpose" was "to 'establish the supremacy of the white race'";[75] the drafters had "sculpted" a "rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless'" even if a Black venire member were selected to sit.[76] Justice Alito responded to the Court's recognition of this history by asking: "[B]ut what does that have to do with the broad constitutional question before us? The answer is: nothing."[77] Or perhaps quite a bit: When the eponymous Evangelisto Ramos was retried before a jury that had to reach a unanimous verdict, and thus couldn't just ignore a minority viewpoint, he was acquitted and walked away a free man.[78]

Or consider *Parents Involved in Community Schools v. Seattle School District No. 1*,[79] where the Court ended the efforts of two jurisdictions to create racially integrated schools through a relatively minor level of race-conscious student assignment.[80] A plurality of the Court equated those efforts to the de jure discrimination against Black students of the pre-*Brown* regime.[81] In a warped echo of the Warren Court's 1968 declaration that "[t]he time for mere 'deliberate speed' has run out,"[82] a plurality of the *Parents Involved* Court offered the slogan that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[83] In the aftermath of the Court's

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[75] *Id.* at 1394 (quoting Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana*, 13 HARV. L. REV. 279, 292 (1899)).

[76] *Id.* (quoting State v. Maxie, No. 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018)). The only other state that permitted nonunanimous verdicts, Oregon, had a rule "trace[able] to the rise of the Ku Klux Klan and efforts to dilute the 'influence of racial, ethnic, and religious minorities on Oregon juries.'" *Id.* (quoting State v. Williams, No. 15-CR-58698 (Cir. Ct. Or. Dec. 15, 2016)).

[77] *Id.* at 1426 (Alito, J., dissenting). As a historical matter, the incorporation of the jury trial right shouldn't be hermetically sealed off from questions of racial justice. The case in which the Warren Court first held that the Sixth Amendment right to a jury trial applied in state criminal proceedings, *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968), "was positively soaked in the ugly racial strife of the 1960s," and involved Gary Duncan's defense of his two young cousins, who were attacked for attending a previously all-white school. Carol S. Steiker, Keynote Address, *The Warren Court and Criminal Justice: Some Lasting Legacies and Unfinished Business*, 49 STETSON L. REV. 223, 234–35 (2020); *see also* Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES 261, 261–65 (Carol S. Steiker ed. 2006) (discussing the background of *Duncan*).

[78] *See* Kevin McGill, *Historic Acquittal in Louisiana Fuels Fight to Review "Jim Crow" Verdicts*, AP NEWS (May 29, 2023, at 02:45 ET), https://apnews.com/article/louisiana-nonunanimous-verdicts-jim-crow-juries-bba8d37fa518b67f9a0ab81f05ed3f59 [https://perma.cc/BPC2-EASR].

[79] 551 U.S. 701 (2007).

[80] *See id.* at 710–12.

[81] *See id.* at 747 (opinion of Roberts, C.J.).

[82] Green v. Cnty. Sch. Bd., 391 U.S. 430, 438 (1968) (quoting Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 234 (1964)).

[83] *Parents Involved*, 551 U.S. at 748 (opinion of Roberts, C.J.).

decision, the percentage of Black students in Seattle's most sought-after high schools decreased.[84]

But it is with respect to voting rights, a centerpiece of both the Warren Court's representation reinforcement framework and the Second Reconstruction,[85] that the current Court has been especially destructive. In *Shelby County v. Holder*,[86] the Court struck down the formula governing the preclearance regime that required jurisdictions with a long history of discriminatory voting laws and depressed participation to show their new laws would have neither a discriminatory purpose nor a retrogressive effect before those laws could be implemented.[87] To the Court, "the conditions that originally justified" the preclearance requirement no longer existed.[88] The Justices' optimism — if it was that — was misplaced. The decision unleashed a torrent of new restrictions on voting that made it harder for minority citizens to cast their ballots.[89]

Then, in *Brnovich v. Democratic National Committee*,[90] the Court announced that "the degree to which a challenged [voting] rule has a long pedigree"[91] or was "in widespread use when § 2 [of the Voting

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[84] *See* Dahlia Bazzaz, *Why Seattle Schools Are More Segregated Today than the 1980s*, SEATTLE TIMES (May 28, 2023, at 06:00 ET), https://www.seattletimes.com/education-lab/why-seattle-schools-are-more-segregated-today-than-the-1980s [https://perma.cc/9ZQ7-XVXV]. According to the Court, three of Seattle's "oversubscribed" schools had white enrollments in the 1999–2000 school year that were more than ten percentage points higher than the district's overall white/nonwhite balance. *Parents Involved*, 551 U.S. at 712–13. These schools were Ballard, Nathan Hale, and Roosevelt. *Id.* at 713. That meant that, under the challenged plan, "more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker." *Id.* According to a "School Look-Up Tool" created by the *Seattle Times*, in the 2000–2001 school year, there were 155 Black students at Ballard, *School Look-Up Tool*, SEATTLE TIMES, https://projects.seattletimes.com/2023/seattle-schools-demographics-look-up [https://perma.cc/9FPW-7XZT] (choose Ballard High School from the dropdown menu; then click on 2000 bar under "Students of Color By Decade"); in the 2022–2023 school year, there were 37, *id.* (then click the 2022 bar). At Nathan Hale, there were 133 Black students in 2000–2001, *id.* (choose Nathan Hale High School; then click on the 2000 bar); in 2022–2023, there were 120, *id* (then click on the 2022 bar). At Roosevelt, the respective numbers were 138 and 79. *Compare id.* (choose Roosevelt High School; then click on the 2000 bar), *with id.* (then click on the 2022 bar).

[85] *See, e.g.*, *supra* notes 17–18 and accompanying text.

[86] 570 U.S. 529 (2013).

[87] *Id.* at 537, 551, 557.

[88] *Id.* at 535.

[89] Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1972–78 (2018) (discussing this "backsliding," *id.* at 1972). For a particularly salient example, consider North Carolina: "[O]n the day after the Supreme Court issued *Shelby County v. Holder*, eliminating preclearance obligations, a leader of the party that newly dominated the legislature (and the party that rarely enjoyed African American support) announced an intention to enact what he characterized as an 'omnibus' election law" that "target[ed]" voting practices used by Black voters "with almost surgical precision." N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (citation omitted), *cert. denied*, 581 U.S. 985 (2017).

[90] 141 S. Ct. 2321 (2021).

[91] *Id.* at 2339.

Rights Act of 1965] was adopted"[92] should be a factor in the rule's favor.[93] That proposition runs headlong into the reason we have Section 2 in the first place. Congress undeniably amended Section 2 in 1982 to address the use of at-large elections in jurisdictions with significant minority populations.[94] But at that time, more than three-quarters of cities in the Deep South and more than two-thirds of cities in the border states used at-large elections.[95] If the *Brnovich* proposition had been in effect, the amended Section 2 would have been dead on arrival.

The Court may now be poised to gut Section 2 as a substantive or procedural matter. Or maybe both.

First, as to substance: Following the 2020 census, Louisiana drew a congressional plan that created only one majority-Black district (out of six).[96] A district court held that that plan likely violated Section 2 by failing to draw a second district as well.[97] The state legislature responded with a new map that created a second majority-Black district.[98] This plan spurred a separate challenge alleging that the new plan was an unconstitutional racial gerrymander.[99] The challengers there, a group of self-identified "non-African American voter[s]"[100] raised arguments about why the particular remedial district was unlawful.[101] But they also argued more fundamentally that the state could not defend its new plan by invoking the Voting Rights Act and the need to remedy the dilution of Black voting strength in the old plan: Regardless whether Section 2 could once have been justified, "[i]t's time to retire the

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[92] *Id.* at 2338.

[93] *See id.* at 2339.

[94] *See* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) (explaining that Section 2 was amended in 1982 "largely [as] a response to . . . *Mobile v. Bolden,* 446 U.S. 55 (1980)"). *Bolden* had required proof of a racially discriminatory purpose to show unlawful vote dilution from the use of at-large elections. *See Bolden*, 446 U.S. at 74 (plurality opinion).

[95] *See* Mark Packer, Note, *Tracking the Court Through a Political Thicket: At-Large Election Systems and Minority Vote Dilution*, 23 URB. L. ANN. 227, 230 n.17 (1982) (providing statistics on the prevalence of at-large elections in 1979).

[96] *See* Robinson v. Ardoin, 605 F. Supp. 3d 759, 767, 830 (M.D. La. 2022). The one majority-Black district in the plan was the successor to a district created only after a prior Section 2 lawsuit had struck down a plan with no majority-Black districts. *See id.* at 848 (quoting Major v. Treen, 574 F. Supp. 325, 339–40 (E.D. La. 1983)); *Major*, 574 F. Supp. at 335, 355 (three-judge court).

[97] *Robinson*, 605 F. Supp. 3d at 766, 844–51, *aff'd in relevant part*, 86 F.4th 574, 583 (5th Cir. 2023).

[98] *See* Callais v. Landry, 732 F. Supp. 3d 574, 582 (W.D. La. 2024) (three-judge court), *prob. juris. noted sub nom*, Louisiana v. Callais, 145 S. Ct. 434 (2024).

[99] *Id.*

[100] *See* Complaint at 5, *Callais*, 732 F. Supp. 3d 574 (No. 24-CV-00122). Their decision to identify themselves this way is ironic, given their claim that the Constitution requires color-blindness in redistricting, *see id.* at 22, and the fact that the Supreme Court has never required plaintiffs in *Shaw* cases — that is, cases alleging an improper use of race in the redistricting process — to specify their race, *see* Samuel Issacharoff & Pamela S. Karlan, Commentary, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2278 (1998).

[101] *See Callais*, 732 F. Supp. 3d at 590.

assumption" that federal law could require a remedial plan that deliberately creates majority-minority districts.[102]

The Supreme Court heard oral argument this past Term.[103] But on its last day before it broke for the summer, rather than announcing a decision, the Court restored the case to the calendar for reargument.[104] Five weeks later, the Court propounded its own question for the parties to address: "Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution."[105] Justices Thomas and Gorsuch have already indicated that their answer to this question would be "yes": Two Terms ago, in a similar case from Alabama, they argued that Section 2 is unconstitutional to the extent it requires taking race into account at either the liability phase (to show that it is possible to draw a majority-minority district — a "necessary precondition[]" in a vote-dilution case[106]) or the remedy phase (to create a district in which minority voters actually have an equal opportunity to elect their preferred representative).[107] And while Justice Kavanaugh did not join them there, he floated the possibility that even if Section 2's results test once was constitutionally permissible, it is unclear whether its race consciousness can "extend indefinitely into the future."[108]

Second, even if the Court doesn't gut the substance of Section 2, it may turn the statute into a dead letter, at the very least for the time being, by eliminating the ability of voters to bring suit. In *Brnovich*, Justice Gorsuch, joined by Justice Thomas, "flag[ged]" the question,

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[102] Brief for Appellees at 36, 38, Louisiana v. Callais, Nos. 24-109, 24-110 (U.S. reargued Oct. 15, 2025).

[103] Transcript of Oral Argument at 1, *Callais*, Nos. 24-109, 24-110 (argued Mar. 24, 2025), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-109_kifl.pdf [https://perma.cc/N4B6-VRMK].

[104] Louisiana v. Callais, 145 S. Ct. 2608, 2608 (2025); Amy Howe, *Supreme Court Announces When It Will Hear Oral Argument in Several Important Cases*, SCOTUSBLOG (Aug. 12, 2025, at 14:48 ET), https://www.scotusblog.com/2025/08/supreme-court-announces-when-it-will-hear-oral-argument-in-several-important-cases [https://perma.cc/NCN9-5QJ5].

[105] Louisiana v. Callais, No. 24-109, 2025 WL 2180226, at *1 (Aug. 1, 2025) (mem.). It is unclear how the Court formulates its own questions for reargument, but it seems pretty clear the Justices don't have to be unanimous. *See* Patterson v. McLean Credit Union, 485 U.S. 617, 619–21 (1988) (Blackmun, J., dissenting, joined by Brennan, Marshall & Stevens, JJ.) (dissenting from the Court's order to parties to rebrief the case on the question whether the Court should overrule a precedent).

[106] *See* Thornburg v. Gingles, 478 U.S. 30, 50 (1986).

[107] *See* Allen v. Milligan, 143 S. Ct. 1487, 1544–45 (2023) (Thomas, J., dissenting, joined by Gorsuch, J.).

[108] *Id.* at 1519 (Kavanaugh, J., concurring in all but Part III-B-1). Section 2 actually has a built-in form of "[d]urational [m]odesty." Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 740–41 (1998). "Election practices are vulnerable to Section 2 only if a jurisdiction's politics is characterized by racial polarization," *id.* — the second and third of *Gingles*' preconditions. *See Gingles*, 478 U.S. at 51. "[T]he VRA will cease having any effect when voters no longer engage in racial bloc voting, meaning that members of all races have an equal opportunity to elect the candidates of their choice." Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2081 (2018).

raised by none of the parties, whether "the Voting Rights Act of 1965 furnishes an implied cause of action under § 2,"[109] suggesting the question might be an "open" one.[110] But the citations Justice Gorsuch offered antedate the 1982 amendments to Section 2,[111] during which Congress "reiterate[d] the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965."[112]

Nevertheless, in the face of forty years of Supreme Court cases adjudicating Section 2 claims brought by private parties, some lower courts accepted Justice Gorsuch's invitation to revisit this question. After a full trial, a district court in North Dakota held that the state's 2021 legislative redistricting plan diluted Native American voting strength in violation of Section 2.[113] But the Eighth Circuit first held that Section 2 does not provide an implied right of action[114] and then went further to hold that 42 U.S.C. § 1983, which provides an express cause of action for a state's deprivation of rights secured by the "laws" of the United States,[115] cannot be used to bring a claim that a state has denied the rights secured by Section 2.[116]

This summer, the Supreme Court stayed the court of appeals' order remanding the case to the district court with directions to dismiss the complaint.[117] But Justices Thomas, Alito, and Gorsuch stated that they would have denied the stay.[118]

In any era, Section 2 would become "an empty promise" if citizens were not "allowed to seek judicial enforcement of the prohibition."[119] But the promise would be even emptier today. The Trump

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109 Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring, joined by Thomas, J.).

110 *See id.*

111 *Id.* (citing City of Mobile v. Bolden, 446 U.S. 55, 60 & n.8 (1980) (plurality opinion); Washington v. Finlay, 664 F.2d 913, 926 (4th Cir. 1981)).

112 S. REP. NO. 97-417, at 30 (1982). The Supreme Court has treated this Report as a reliable guide to Congress's understanding of the 1982 amendments. *See Gingles*, 478 U.S. at 43 & n.7; *see also* Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248–49 (2022) (per curiam) (stating that the Court uses the "factors enumerated in the Senate Report," *id.* at 1248, to conduct "the totality of circumstances" analysis required by the text of Section 2, codified at 52 U.S.C. § 10301, *id.* at 1249 (quoting Johnson v. De Grandy, 512 U.S. 997, 1011 (1994))).

113 Turtle Mountain Band of Chippewa Indians v. Howe, No. 22-cv-22, 2023 WL 8004576, at *1, *17 (D.N.D. Nov. 17, 2023), *vacated and remanded*, 137 F.4th 710 (8th Cir. 2025).

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

115 *See* 42 U.S.C. § 1983.

116 Turtle Mountain Band of Chippewa Indians v. Howe, 137 F.4th 710, 713 (8th Cir. 2025).

117 Turtle Mountain Band of Chippewa Indians v. Howe, 145 S. Ct. 2876, 2877 (2025); *Turtle Mountain*, 137 F.4th at 721.

118 *Turtle Mountain*, 145 S. Ct. at 2877.

119 *See* Allen v. State Bd. of Elections, 393 U.S. 544, 557 (1969) (making this point with respect to Section 5 of the Voting Rights Act of 1965); *see also* Morse v. Republican Party of Va., 517 U.S. 186, 232 (1996) (opinion of Stevens, J., joined by Ginsburg, J.) (stating that Congress "extended [*Allen*'s] logic" to Section 2); *id.* at 240 (Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.) ("agree[ing] with Justice Stevens" that *Allen*'s analysis "applies with similar force" to Section 2).

Administration has taken the Justice Department's Civil Rights Division out of the business of enforcing the Voting Rights Act, pivoting its focus (for the few remaining attorneys) to preventing alleged vote fraud.[120] Most immediately when it comes to the Supreme Court, it has repudiated the Government's amicus brief in *Callais*, which had argued that Louisiana had "a strong basis in evidence to believe that it needed to draw another majority-minority district to achieve Section 2 compliance."[121]

In short, the Supreme Court has moved from being an "indispensable partner" in the Second Reconstruction[122] to being its undoer. That is why, whatever the antinomial (if that's the right adjective to refer to Re's antinomies) or methodological similarities between the Warren Court and the current Court, I remain unconvinced that "the two groups of 'us' . . . have more in common than often supposed."[123]

## II. Representation Reinforcement: Herein of Revolutions and Coups

Re uses Professor John Hart Ely's "theory of representation-reinforcement" to show how "the current Court frequently operates within some of the framework ideas that the Warren Court helped to establish."[124] He focuses on the counter-majoritarian role that theory plays with respect to judicial protection of minorities.[125] Here, I want to focus instead on the *pro-majoritarian* role that the theory plays. As to this aspect of representation reinforcement, the Warren Court and the current Court are poles apart.

Ely identified two distinct circumstances warranting greater judicial scrutiny. The one on which Re concentrates is when elected officials "are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest."[126] But Ely also argued that courts should intervene when "the ins are choking

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120 *See* Gina Feliz, *The Justice Department Is Shirking Its Responsibility to Voters*, Brennan Ctr. for Just. (June 10, 2025), https://www.brennancenter.org/our-work/analysis-opinion/justice-department-shirking-its-responsibility-voters [https://perma.cc/EY9L-SNPQ]; Matt Cohen, *DOJ Voting Section Has Just Three Lawyers Left, Watchdog Estimates*, Democracy Dkt. (May 12, 2025), https://www.democracydocket.com/news-alerts/doj-voting-section-has-just-three-lawyers-left-watchdog-estimates [https://perma.cc/FQ2E-27BV].

121 Letter from Sarah M. Harris, Acting Solic. Gen., to Hon. Scott S. Harris, Clerk of the Sup. Ct. of the U.S. (Jan. 24, 2025), https://www.supremecourt.gov/DocketPDF/24/24-109/340108/20250124140523161_letter%2024-109%2024-110.pdf [https://perma.cc/33H9-HNKE].

122 Re, *supra* note 1, at 10 n.58 (quoting Karlan, *supra* note 40, at 29).

123 *Contra id.* at 6.

124 *Id.* at 56.

125 *See id.* at 56, 59 (treating the Court's decision in Mahmoud v. Taylor, 145 S. Ct. 2332 (2025), as protecting religious dissenters "from majoritarian local laws," *id.* at 59); *id.* at 60–61 (treating the Court's decision in *SFFA* as protecting Asian American applicants against discrimination).

126 Ely, *supra* note 7, at 103.

off the channels of political change to ensure that they will stay in and the outs will stay out."[127]

The Warren Court's *Reapportionment Cases* are the most dramatic example in constitutional history of this latter form of intervention. Chief Justice Warren called *Baker v. Carr*,[128] which held that claims of legislative malapportionment were justiciable,[129] "the most important case of [his] tenure on the Court"[130] and denominated *Reynolds v. Sims*,[131] which imposed one-person, one-vote on state legislative apportionments,[132] as the most important opinion he himself wrote.[133]

Those decisions — and *Wesberry v. Sanders*,[134] which held that one-person, one-vote governed a state's drawing of its congressional districts[135] — responded to a deeply sclerotic situation in which politicians from underpopulated (usually rural and conservative) areas entrenched themselves in power as the nation became more urban and suburban.[136] The Court's announcement of one-person, one-vote had an immediate and dramatic effect. It required redrawing ninety percent of the U.S. House districts as well as "virtually every single seat in the upper houses of state legislatures and most of the seats in lower houses."[137] While much of the Court's rhetoric sounded in the timbre of individual rights,[138] the impulse behind the rule was profoundly majoritarian:

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127 *Id.*

128 369 U.S. 186 (1962).

129 *See id.* at 187–88.

130 EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

131 377 U.S. 533 (1964).

132 *See id.* at 568.

133 G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 337 (1982). The Chief Justice thought *Reynolds* "[e]nsured that henceforth elections would reflect the collective public interest — embodied in the 'one-man, one-vote' standard — rather than the machinations of special interests." *Id*. He also thought, even more optimistically, that "had reapportionment occurred" earlier, the racial issues the Court had confronted "could have been solved through the political process rather than through the courts." POWE, *supra* note 7, at 249 (quoting JACK HARRISON POLLACK, EARL WARREN: THE JUDGE WHO CHANGED AMERICA 209 (1979)). Professor John Hart Ely, who clerked for Chief Justice Warren the Term after *Reynolds*, similarly reported that Chief Justice Warren "used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary." JOHN HART ELY, ON CONSTITUTIONAL GROUND 4 (1996).

134 376 U.S. 1 (1964).

135 *Id.* at 18.

136 *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 544 (2004).

137 POWE, *supra* note 7, at 252. The Court later extended the requirement of equipopulous districting to local bodies as well. *See* Avery v. Midland County, 390 U.S. 474, 484–85 (1968) (county commissions); Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970) (educational boards).

138 *See, e.g.*, Baker v. Carr, 369 U.S. 186, 208 (1962); Reynolds v. Sims, 377 U.S. 533, 554–55 (1964).

Malapportionment undercut "democratic ideals of equality and majority rule."[139]

The enduring effect of one-person, one-vote is that it requires decennial redistricting for nearly every multimember electoral body.[140] Its impact on entrenchment has been a bit more equivocal. On the one hand, one-person, one-vote creates an automatic duty to revisit the existing allocation of political power every ten years, because existing allocations go out of compliance with the requirement of equal population districts after each census.[141] On the other hand, "the necessity of tinkering with the lines every ten years can turn into an opportunity to redraw districts to shore up incumbents who otherwise might face defeat."[142]

While the Warren Court was both anti-entrenchment and pro-majoritarian, the current Court is neither. And its lack of interest in policing redistricting comes at a time when "big data and modern technology" have reduced the constraining force of one-person, one-vote.[143] In *Rucho v. Common Cause*,[144] the Court held that although excessive partisan gerrymandering is problematic as a matter of democratic theory,[145] "partisan gerrymandering claims present political questions beyond the reach of the federal courts."[146]

The current Court's indifference to the attempts of the ins to ensure that they will stay in and the outs will stay out was on full display in *Alexander v. South Carolina State Conference of the NAACP*.[147] The South Carolina Legislature wanted to make Congressional District 1 a

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139 *Reynolds*, 377 U.S. at 566; *see id.* at 545 (emphasizing that in Alabama "only 25.1% of the State's total population resided in districts represented by a majority of the members of the [state] Senate, and only 25.7% lived in counties which could elect a majority of the members of the [state] House of Representatives"). The figures were similar in the challenges to other state legislative apportionments that the Court heard along with *Reynolds*. *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 725 (1964) (Colorado); Roman v. Sincock, 377 U.S. 695, 705 (1964) (Delaware); Davis v. Mann, 377 U.S. 678, 688–89 (1964) (Virginia); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 665–66 (1964) (Maryland); WMCA, Inc. v. Lomenzo, 377 U.S. 633, 647–49 (1964) (New York); *see also Wesberry*, 376 U.S. at 49–50 (appendix to opinion of Harlan, J., dissenting) (providing a chart of the largest and smallest congressional districts by population in each state that showed huge disparities in district populations within most states).

140 *See* Issacharoff & Karlan, *supra* note 136, at 545.

141 *See id.*

142 *Id.* at 546.

143 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2512–13 (2019) (Kagan, J., dissenting); Karcher v. Daggett, 462 U.S. 725, 733 (1983) ("The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has." (footnote omitted)).

144 139 S. Ct. 2484 (2019).

145 *See id.* at 2506 (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

146 *Id.* at 2506–07.

147 144 S. Ct. 1221 (2024).

safe seat for Republicans.[148] After the 2020 census, the existing District 1 was overpopulated by about 88,000 people, and the adjoining District 6 was underpopulated by about 85,000.[149] To comply with one-person, one-vote, the state could have transferred just the bulk of those 88,000 people.[150] Instead, it "moved nearly 200,000 people into or out of the district."[151] And it did so while making sure that the Black percentage of the district — Black voters in South Carolina overwhelmingly vote Democratic — would not increase.[152] The part of Charleston County that the legislature moved out of District 1 was disproportionately Black.[153] "Of the 11 precincts with the largest Black populations, 10 were gone."[154]

A three-judge district court, familiar with South Carolina politics, found that the configuration of Congressional District 1 was an unconstitutional racial gerrymander.[155] But the Supreme Court, in a decision written by Justice Alito, reversed.[156] In five years, the Court moved from *Rucho*'s acknowledgment that "[e]xcessive partisan[] . . . gerrymandering is 'incompatible with democratic principles,'"[157] even if federal courts can't do anything about it,[158] to a world in which a partisan desire to disadvantage a group of Black voters is evidence of legislative "good faith."[159] So much for the second strand of Elysian representation reinforcement theory.

But in a sense, all this pales next to the most significant Conservative Warren Court decision so far — a case fundamentally about a politician seeking to ensure that he will stay in and the outs will stay out no matter what: *Trump v. United States*.[160] The case concerned a criminal indictment alleging that "after losing [the 2020] election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results."[161]

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148 *Id.* at 1244; *see id.* at 1236–37 (describing how, although Republicans had traditionally held the seat, a Democrat won the seat in 2018 with 50.7% and the Republican who recaptured the seat in 2020 won only 50.6% of the votes).

149 *Id.* at 1276 (Kagan, J., dissenting).

150 *Id.*

151 *See id.* at 1268; *id.* at 1242 (majority opinion).

152 *See id.* at 1241–42.

153 *Id.* at 1242.

154 *Id.* at 1276 (Kagan, J., dissenting).

155 S.C. State Conf. of the NAACP v. Alexander, 649 F. Supp. 3d 177, 197 (D.S.C. 2023) (three-judge court) ("With the movement of over 30,000 African American residents of Charleston County out of Congressional District No. 1 to meet the African American population target of 17%, Plaintiffs' right to be free from an unlawful racial gerrymander under the Equal Protection Clause of the Fourteenth Amendment has been violated."), *rev'd in part and remanded*, 144 S. Ct. 1221 (2024).

156 *Alexander*, 144 S. Ct. at 1233, 1252 (2024).

157 Rucho v. Common Cause, 139 S. Ct. 2484, 2506 (2019) (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 791 (2015)).

158 *See id.* at 2507.

159 *See Alexander*, 144 S. Ct. at 1233, 1241.

160 144 S. Ct. 2312 (2024).

161 *Id.* at 2324.

It's hard to imagine any action more representation-undermining than that.

There are many things one might say about the Court's response to Trump's autogolpe. For example, was the Court's delay in taking the case and its "expressly indeterminate" remand decision,[162] which effectively foreclosed a criminal trial during the 2024 election season,[163] an example of Re's "impassive virtues"?[164] Or was it an intervention that, in conjunction with the Court's decision in *Trump v. Anderson*,[165] "advanced the interests of a partisan-aligned candidate — at a heavy toll to constitutional mechanisms meant to enable democracy"?[166] Either way, the decision in *Trump v. United States* has unleashed an administration that is comprehensively clogging the channels of political change.

Part of this democratic demolition may flow directly from the Court's opinion, which removed an important constraint on the President's ability to inflict pain on his political opponents.[167] Among other things, Trump was alleged to have "attempted to leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors."[168] The Court held that a President "has 'exclusive authority and absolute discretion' to decide which crimes to investigate and prosecute, including with respect to allegations of election crime."[169] And because "the President cannot be prosecuted for conduct within his exclusive

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[162] Re, *supra* note 1, at 69; *see Trump*, 144 S. Ct. at 2337.

[163] *See* Ryan J. Reilly, Daniel Barnes & Lawrence Hurley, *Supreme Court's Immunity Ruling Will Delay Trump's Jan. 6 Case Until After the Election*, NBC NEWS (July 1, 2024, at 18:47 UTC), https://www.nbcnews.com/politics/justice-department/supreme-courts-immunity-ruling-will-delay-trumps-jan-6-case-election-rcna159764 [https://perma.cc/8JZ9-WTV7].

[164] *Compare* Re, *supra* note 1, at 69 (describing the impassive virtues as involving "deferral — that is, delayed or redistributed action" and a Court's "bid[ing] its time"), *with Trump*, 144 S. Ct. at 2332–33 (stating that because the immunity issue "raises multiple unprecedented and momentous questions about the powers of the President and the limits of his authority under the Constitution," *id.* at 2332, the Court would remand most of the pivotal issues, *see id.* at 2333).

I return to the question of the passive/impassive virtues *infra* text accompanying notes 181–232.

[165] *See* 144 S. Ct. 662, 666, 671 (2024) (per curiam) (restoring Trump to the Republican primary ballot in Colorado after the state supreme court held that he was disqualified under section 3 of the Fourteenth Amendment for having engaged in insurrection against the United States). The per curiam opinion is certainly an example of Re's point that the conservative supermajority is engaged in methodological "realignment." *See* Re, *supra* note 1, at 5, 32–38; *Anderson*, 144 S. Ct. at 673 (Sotomayor, Kagan & Jackson, JJ., concurring in the judgment). As Professor Aziz Huq points out: "The Roberts Court is typically characterized as 'originalist,' 'textualist,' or 'formalist.' But the per curiam opinion is largely bereft of close historical or textual analyses"; instead it uses "structural and prudential modalities" that "are in tension with the Court's putative fidelity to originalism and textualism." Aziz Z. Huq, *The Supreme Court, 2023 Term — Comment: Structural Logics of Presidential Disqualification*, 138 HARV. L. REV. 172, 179 (2024) (footnotes omitted).

[166] *See* Huq, *supra* note 165, at 223.

[167] *See id.* at 216; *Trump*, 144 S. Ct. at 2370–71 (Sotomayor, J., dissenting).

[168] *Trump*, 144 S. Ct. at 2334 (majority opinion).

[169] *Id.* (quoting United States v. Nixon, 418 U.S. 683, 693 (1974)).

constitutional authority," Trump was "absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials."[170]

Re argues that the Court's ruling in *Trump v. United States* "signaled a willingness to check partisanship in the justice system, without passing judgment on Trump's prosecution."[171] But, at least so far, the Court has shown little appetite for checking partisanship in the justice system that doesn't touch on the prosecution of former Presidents. (I actually don't think the prosecution of President Donald Trump for his role in the events of January 6 was partisan to begin with, but that's neither here nor there.) In fact, the absolute immunity with respect to the President's role in a critical piece of the justice system — federal criminal prosecutions — may have removed, rather than imposed, a check on partisanship.

Having been reelected in 2024, President Trump, once again, is using the Justice Department's power and authority in partisan and representation-destroying ways. For example, he has repeatedly demanded the Department open investigations into, or prosecute, a long list of elected officials and public servants.[172] He has "demanded that top Democratic donor George Soros and his son, Alex, face federal racketeering charges, making an unsubstantiated claim they are backing violent protests across the country."[173] He has instructed the Justice Department to investigate ActBlue, a Democratic fundraising platform.[174] These actions "threaten to hobble Democrats' ability to compete in elections for years to come."[175]

The head of his egregious Weaponization Working Group — formed "to root out corruption and weaponization,"[176] by which the

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[170] *Id.* at 2335.

[171] Re, *supra* note 1, at 69 n.448.

[172] *See, e.g.*, Eric Tucker, *Trump 100 Days: Retribution*, ASSOCIATED PRESS, (Apr. 27, 2025, at 08:43 ET), https://apnews.com/politics/trump-100-days-retribution-00000196774 2dab7a3bfff63ee690000 [https://perma.cc/XQG3-QTPF] (listing some of the persons targeted); Joe Miller, *Donald Trump Says George Soros Should Be Charged with Racketeering*, FINANCIAL TIMES (Aug. 27, 2025), https://www.ft.com/content/8a98f49e-1df5-4619-b2ee-9a0ed9538c68 [https://perma.cc/TCV6-GVEY] (same); Donald J. Trump (@realDonaldTrump), TRUTH SOCIAL (Sep. 20, 2025, at 18:44 ET), https://truthsocial.com/@realDonaldTrump/posts/115239044548033727 [https://perma.cc/3K9C-BZUL].

[173] Patrick Svitek, *Trump Calls for Racketeering Charges Against Top Democratic Donor, Son*, WASH. POST (Aug. 27, 2025), https://www.washingtonpost.com/politics/2025/08/27/trump-calls-racketeering-charges-against-top-democratic-donor-son [https://perma.cc/5LXD-LMSJ].

[174] Tucker, *supra* note 172.

[175] Kenneth P. Vogel & Shane Goldmacher, *With Orders, Investigations and Innuendo, Trump and G.O.P. Aim to Cripple the Left*, N.Y. TIMES (Mar. 20, 2025), https://www.nytimes.com/2025/03/19/us/politics/trump-republicans-attack-democrats-actblue.html [https://perma.cc/TR94-UCCM].

[176] Memorandum from the Att'y Gen. to All Dep't Emps., Restoring the Integrity and Credibility of the Department of Justice 1 (Feb. 5, 2025), https://www.justice.gov/ag/media/1388506/dl?inline [https://perma.cc/7ZPQ-HVWM].

Administration means, among other things, the January 6 prosecutions[177] — has announced that if the Department determines that the targeted individuals can't be charged with a crime, it will nonetheless "name" them and "shame" them, "in what would amount to a major departure from longstanding Justice Department protocols."[178] The Justice Department no longer has internal checks on its use of the law to go after the President's political opponents because this Administration "has systematically and ruthlessly and successfully eliminated, with one exception . . . all internal legal resistance."[179]

Meanwhile, the mission statement for the Civil Rights Division's Voting Section has been revised so that it "barely mentions the Voting Rights Act and instead says the section will focus on preventing voter fraud — which is exceedingly rare — and helping states find noncitizens on their voter rolls (noncitizen voting is also exceedingly rare)."[180] The effects on American democracy of *Trump v. United States* and the current Court's other decisions aggrandizing presidential power may turn out to be every bit as profound as the effects the *Redistricting Cases* had.

## III. IMPASSIVE VIRTUES AND ROBUST COSTS

Much of Re's Foreword is written in an optimistic register: Like the Warren Court, the current Court is "well positioned to defend the rule of law."[181] He recognizes, however, one critical difference: "the Court's counterparty."[182] The Warren Court faced recalcitrant state and local governments.[183] And, ultimately, it could rely on the federal government

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177 *See id.* at 2 (creating this entity to look into, among other things, the January 6 prosecutions and the prosecutors who had prosecuted President Trump).

178 Ryan J. Reilly, *DOJ "Weaponization" Group Will Shame Individuals It Can't Charge with Crimes, New Head Says*, NBC NEWS (May 13, 2025, at 20:54 UTC), https://www.nbcnews.com/politics/justice-department/doj-weaponization-group-will-shame-individuals-cant-charge-crimes-new-rcna206553 [https://perma.cc/9FY8-MUD5].

179 THE UNPOPULIST, *"Liberalism at a Time of Constitutional Crisis" at Liberalism for the 21st Century*, at 00:53:51 (YouTube, Aug. 20, 2025), https://www.youtube.com/watch?v=07_yJZC5odI [https://perma.cc/3EYQ-FWYB] (statement of Professor, and former head of the Office of Legal Counsel, Jack Goldsmith).

The one exception, according to Goldsmith, is the Office of the Solicitor General, which "has quite clearly told the White House: We have to play different and play nice with the Supreme Court" in "a remarkable testament to how important the Court is seen even by the Trump Administration." *Id.* at 00:54:25. We shall see how long that lasts.

180 Sam Levine, *Trump Ally Pushes DoJ Unit to Shift Civil Rights Focus, New Messages Show*, THE GUARDIAN, (Apr. 18, 2025, at 16:13 ET), https://www.theguardian.com/us-news/2025/apr/18/justice-department-civil-rights-division-trump [https://perma.cc/E4PX-N2G7].

181 Re, *supra* note 1, at 5; *see id.* at 85 (stating that he "remain[s] optimistic about the Supreme Court and its jurists" and that in important ways, "the Conservative Warren Court will resemble its liberal namesake").

182 *Id.* at 73.

183 *See* KLARMAN, *supra* note 13, at 329.

to enforce both its judgments and its values.[184] The current Court, by contrast, faces a President whose version of the rule of law is "I have an Article II, where I have the right to do whatever I want as president."[185] His Vice President has mused about defying the courts.[186] And President Trump is seeking not to preserve the status quo, as the state and local officials who were counterparty to the Warren Court sought to do,[187] but rather to radically transform American government and civil society.[188] So he is a counterparty on a far greater scale than Southern jurisdictions once were.

Sometimes, the Court may face the prospect that issuing its preferred substantive ruling will prompt popular backlash that reduces the Court's standing with the public or, worse, will trigger defiance that reveals the Court's relative powerlessness (the "least dangerous branch" problem).[189] These risks may lead the Court to "await [more] auspicious moments to rule"[190] or "bide[] its time rather than running headlong into the fray."[191] This tactic is part of what Alexander Bickel meant by the "passive virtues" and Re rebrands (for no compelling reason in my view) the "impassive virtues."[192]

As Re recognizes, the Warren Court twice took this path when it came to questions of racial justice. First, in *Naim v. Naim*,[193] the Court disingenuously treated an appeal as somehow outside its mandatory

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184 *See, e.g.*, Exec. Order No. 10,730, 22 Fed. Reg. 7628 (Sep. 25, 1957) (sending the National Guard to desegregate the Little Rock public schools).

185 Nick Bednar, *The Meaning of Article II and "Executive Power" to Trump*, LAWFARE (Mar. 20, 2025, at 13:00 ET), https://www.lawfaremedia.org/article/the-meaning-of-article-ii-and-'executive-power'-to-trump [https://perma.cc/M9XL-WMDN] (quoting Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him "the Right to Do Whatever I Want,"* WASH. POST (July 23, 2019, at 21:46 ET), https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want [https://perma.cc/U3CJ-LK3P]) (quoting President Trump)); *see also* Maggie Haberman, Charlie Savage & Jonathan Swan, *Trump Suggests No Laws Are Broken if He's "Saving His Country,"* N.Y. TIMES (Feb. 15, 2025), https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html [https://perma.cc/S2B9-T3VB] (quoting Donald J. Trump (@realDonaldTrump), X, *He who saves his Country does not violate any Law.* (Feb. 15, 2025, at 13:32 ET), https://x.com/realDonaldTrump/status/1890831570535055759 [https://perma.cc/N55B-NAZF]).

186 *See* Brandon Drenon & Anthony Zurcher, *Vance Questions Authority of US Judges to Challenge Trump*, BBC (Feb. 10, 2025), https://www.bbc.com/news/articles/c4gx3j5k63xo [https://perma.cc/5K7X-96WF] (quoting Vice President J.D. Vance as having suggested in 2021 that a second Trump Administration should fire "every single midlevel bureaucrat, every civil servant in the administrative state, replace them with our people" — an unlawful act if ever there was one — and "[w]hen the courts stop you, stand before the country like [early US president] Andrew Jackson did and say: 'The chief justice has made his ruling. Now let him enforce it'" (second alteration in original)).

187 *See* KLARMAN, *supra* note 13, at 369.

188 *See, e.g.*, *supra* notes 172–80 and accompanying text.

189 *See* BICKEL, *supra* note 8, at 146.

190 Re, *supra* note 1, at 68.

191 *Id.* at 69.

192 *Id*. at 68 (quoting BICKEL, *supra* note 8, at 200).

193 350 U.S. 891 (1955) (per curiam), *motion to recall mandate denied*, 350 U.S. 985 (1956) (per curiam).

appellate jurisdiction, "thereby punting on the constitutionality of anti-miscegenation laws in the wake of *Brown*."[194] It did not strike down prohibitions on interracial marriage until a decade later in *Loving v. Virginia*.[195] Second, the Court's "'all deliberate speed' approach to remediation in *Brown*,"[196] which was "chiefly concerned about white opposition,"[197] left the Warren Court "largely absent without leave" when it came to actually desegregating Southern schools.[198] Between *Cooper v. Aaron*[199] and *Green v. County School Board of New Kent County*,[200] the Court let a decade go by without a major opinion, leaving the task of achieving what integration could be accomplished to the lower courts.[201]

Re argues that in October Term 2024, the Supreme Court "made good use of the impassive virtues while grappling with the second Trump Administration."[202] He provides several examples of shadow docket decisions where he sees the Court as having "nudged" the Trump Administration toward complying with the law "while avoiding a head-on confrontation."[203]

Re recognizes that uses of the passive/impassive virtues have always been controversial because they "risk elevating discretion and strategy at the expense of law and candor."[204] Most concretely, while the Court "delay[s]" action or "bides its time,"[205] real people suffer. In the Warren Court era, it meant millions of children never got to attend a desegregated school and countless couples were denied legal recognition and

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194 Re, *supra* note 1, at 67. For particularly useful accounts of the events surrounding *Naim*, see Hutchinson, supra note 15, at 62–67; Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 446–50 (2005); David Wolitz, *Alexander Bickel and the Demise of Legal Process Jurisprudence*, 29 CORN. J.L. & PUB. POL'Y 153, 178–84 (2019).

195 388 U.S. 1, 12 (1967).

196 Re, *supra* note 1, at 68 (quoting BICKEL, *supra* note 8, at 253).

197 Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 611 (1983).

198 POWE, *supra* note 7, at 292.

199 358 U.S. 1 (1958).

200 391 U.S. 430 (1968).

201 *See generally* J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961) (documenting how lower courts carried out desegregation post-*Brown*).

202 Re, *supra* note 1, at 69.

203 *See id.* at 70–73.

204 *Id.* at 73; *see, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2255, 2257–62 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (arguing that "even in our open and fluid legal practice, there is good reason to doubt the legal legitimacy," *id.* at 2255, (and perhaps the moral and sociological legitimacy) of the Court's conduct in *Naim*); Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 10–13 (1964) (criticizing Bickel's defense of *Naim*); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1709 n.392 (2000) (gathering some of the most trenchant criticisms of *Naim*).

205 Re, *supra* note 1, at 69.

protection for their relationships.[206] In the current era, it means, for example, that thousands of government employees are thrown out of their jobs, perhaps for years, while they challenge terminations.[207] Getting their jobs back, even with full backpay and retroactive seniority, won't fully compensate them for what has happened. That is why, after all, "[a]n essential principle of due process" since the days of the long Warren Court is that the government provide a hearing and an opportunity to challenge its decision *before* firing an employee.[208]

But avoidance has another vice: Instead of dampening resistance to the Court's preferred policy outcomes, it may actually embolden it.[209] I worry that the message President Trump may be taking away from this first Term back in office is that he might as well push the envelope as far as possible — and certainly with regard to orders from lower federal courts. Even if he adheres to his Solicitor General's pledge in *Trump v. CASA* to "respect the opinions and the judgments of the Supreme Court,"[210] he may count on the fact that the Court "can't reverse everything."[211]

The Court's approach in *CASA* illustrates the slipperiness of the passive/impassive virtues. The underlying cases concern an Executive Order declaring that the Fourteenth Amendment does not extend citizenship to persons "born in the United States" if neither of their parents is a U.S. citizen or lawful permanent resident.[212] The order was swiftly challenged in several suits, including one brought by eighteen states.[213]

> In each case, the District Court concluded that the Executive Order is likely unlawful and entered a universal preliminary injunction barring various

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[206] *See* Delgado, *supra* note 32, at 527–28 (discussing some of these consequences); *cf.* KLARMAN, *supra* note 13, at 340.

[207] *See, e.g.*, Shilling v. United States, 773 F. Supp. 3d 1069, 1077–78 (W.D. Wash.) (preliminarily enjoining the Government's "policy — to root out and separate every transgender service member," *id.* at 1077, regardless of their performance), *stay granted*, 145 S. Ct. 2695 (2025) (mem.); New York v. McMahon, 784 F. Supp. 3d 311, 324, 374 (D. Mass.) (preliminarily enjoining the Government from firing nearly 50% of the Department of Education's workforce), *stay granted*, 145 S. Ct. 2643 (2025).

[208] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 570 n.7 (1972)).

[209] *See* Gewirtz, *supra* note 197, at 616 n.80 (collecting sources that suggest the Court's remedial approach following *Brown* "may in fact have stimulated evasion"). Professor Paul Gewirtz also hypothesizes that "'all deliberate speed' may have had an effect on the Court itself that parallels the effect on white resistance . . . . Rationalizing delay in 1955 may have produced within the Court a frame of mind that made it easier to rationalize further and excessive delay." *Id.* at 623.

[210] Transcript of Oral Argument at 62–63, Trump v. CASA, Inc., 145 S. Ct. 2540 (2025) (No. 24A884), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24a884_c07d.pdf [https://perma.cc/K4C4-GKC9]; *see* Re, *supra* note 1, at 41–42 (discussing this episode).

[211] Heather K. Gerken, Tribute, *Judge Stories*, 120 YALE L.J. 529, 530 (2010) (quoting liberal Judge Reinhardt as saying this about the Supreme Court). *But see id.* (arguing that "deep down" Judge Reinhardt "kn[ew] that they probably *can* reverse everything").

[212] Exec. Order No. 14,160, 90 Fed. Reg. 8449 § 1, at 8449 (Jan. 20, 2025) ("Protecting the Meaning and Value of American Citizenship").

[213] *See CASA*, 145 S. Ct. at 2549; Doe v. Trump, 766 F. Supp. 3d 266, 272 (D. Mass. 2025).

> executive officials from applying the policy to *anyone* in the country. And in each case, the Court of Appeals denied the Government's request to stay the sweeping relief.[214]

The Government *could* have asked the Supreme Court to review the preliminary injunctions themselves. But that would have placed at issue the likelihood of success on the merits — that is, whether the Executive Order is inconsistent with the Fourteenth Amendment's Citizenship Clause.[215] Instead, the Government asked the Court to decide only whether federal courts have equitable authority to issue "universal injunctions" — that is, injunctions that go beyond providing full relief to the plaintiffs before them.[216] In light of the Justices' already announced skepticism about such injunctions,[217] this question was designed to give the Administration something it could spin as a win on birthright citizenship regardless of how unconstitutional its policy is.

The Court played along. It decided the remedy issue without addressing "the question whether the Executive Order violates the Citizenship Clause or Nationality Act."[218] Both during oral argument and in the several opinions, the Justices recognized that this is a question that needs to be answered.[219] Moreover, it is a pure question of law. There is no real need for percolation in the lower courts.[220] So the Court *could* have added its own question presented, as it has often done,[221] and did this past Term in *Louisiana v. Callais*.[222] But instead, it postponed the day when it should tell the President that one of his signature policies is unconstitutional.

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[214] *CASA*, 145 S. Ct. at 2549.

[215] *See id.* at 2550. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1, cl. 1.

[216] *See CASA*, 145 S. Ct. at 2548, 2550.

[217] *See id.* at 2550.

[218] *Id.* at 2550; *see id.* at 2562.

[219] *See* Transcript of Oral Argument at 50, *supra* note 210 (statement of Gorsuch, J.) ("How do you suggest we reach this case on the merits expeditiously?"); *CASA*, 145 S. Ct. at 2573 (Sotomayor, J., dissenting) (finding Government's position on the merits "impossible . . . in light of the Constitution's text, history, this Court's precedents, federal law, and Executive Branch practice"); *cf. id.* at 2561 n.18 (majority opinion).

[220] *Cf. id.* at 2584 (Sotomayor, J., dissenting) (arguing, in part, that the percolation concern is without merit "because the Citizenship Order is patently unconstitutional").

[221] For discussions of cases where the Court has recently done so, see Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 464–65, 464 n.69 (2009); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 753–54, 754 n.142 (2013); and Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 689–91 (2012).

[222] *See supra* note 105 and accompanying text. For a discussion of *Louisiana v. Callais* generally, see *supra* notes 96–108 and accompanying text.

## CONCLUSION

"[H]istory will be heard," Chief Justice Roberts insisted in his opinion in *Parents Involved*,[223] where he wrapped the decision to shut down efforts at voluntary integration in the mantle of *Brown*.[224] The title of this Response borrows from Professor Charles Black's Holmes Devise Lectures, *The Unfinished Business of the Warren Court*.[225] Black, who as a young professor worked with the plaintiffs in *Brown*,[226] described as central to the Warren Court the issue the current Court will soon have to confront: "the positive content and worth of American citizenship."[227] Black argued that this citizenship has three components: (1) "the right to be heard and counted on public affairs,"[228] (2) "the right to be treated fairly when one is the object of action by that government of which one is also a part,"[229] and (3) "the broad right to lead a private life" of one's choosing without unjustifiable government interference.[230] He showed how the Warren Court "affirmed, as no Court before it ever did, that this three-fold citizenship is to be enjoyed in all its parts without respect to race, 'as far as constitutional law can accomplish it' — the long-unhonored promise of the *Slaughter-House Cases*."[231]

Of course, the Warren Court left some of this project unfinished. But I believe, and hope, that any Court will ultimately be judged not just on whether it "operates within some of the framework ideas that the Warren Court helped to establish,"[232] but also on whether it has moved that work forward. If the current Court turns out to have undone that work, history will not remember it well.

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[223] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (opinion of Roberts, C.J.).

[224] *See id.* at 747–48 (quoting Transcript of Oral Argument at 7, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8) (statement of Robert L. Carter)).

One of the lawyers the Chief Justice quoted, Robert L. Carter (by then a federal judge), "disputed the chief justice's characterization" of his argument: "It's to stand that argument on its head to use race the way they use [it] now." Adam Liptak, *The Same Words, But Differing Views*, N.Y. TIMES (June 29, 2007), https://www.nytimes.com/2007/06/29/us/29assess.html [https://perma.cc/VJ3L-7XL5]. Another one of the lawyers who argued in *Brown*, Jack Greenberg, "called the chief justice's interpretation 'preposterous.'" *Id.*

[225] Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970).

[226] KLUGER, *supra* note 15, at 647–48.

[227] Black, *supra* note 225, at 8.

[228] *Id.*

[229] *Id.* at 9.

[230] *See id.* (emphasis omitted).

[231] *Id.* (footnote omitted) (quoting 83 U.S. (16 Wall.) 36, 72 (1873)).

[232] Re, *supra* note 1, at 56.