The Politicization of the American Judiciary: Practical and Theoretical Consequences of a Partisan Supreme Court

Tara Wilson

Thesis Submitted to the faculty of the Virginia Polytechnic Institute and State University in partial fulfillment of the requirements for the degree of

Master of Arts
In
Political Science

L. Plotica, Committee Chair
W. Moore
A. Scerri

November 10, 2022
Blacksburg, VA

Keywords: Supreme Court, Partisanship, The Federalist Society, Originalism, Robert's Court, Court Reform

The Politicization of the American Judiciary:
Practical and Theoretical Consequences of a Partisan Supreme Court

Tara Wilson

Academic Abstract

The Federalist Society, acting as a Political Epistemic Network, has effectively employed a long-term strategy to engineer a Supreme Court that propagates conservative legal ideology. The organizational structure of the Federalist Society finds, recruits, and retain members who will wield the organizational strategies of the organizations to achieve policy outcomes not just for members of the organization, but for the greater population. This thesis demonstrates a clear relationship between the long-term ideological and institutional influence of the Federalist Society and the U.S. Supreme Court. This significant relationship poses a fundamental threat to the execution of equal protection under the law and an erosion of democratic norms. This thesis proposes possible legislative and constitutional remedies to counter the increasing polarization of the Supreme Court, including proposed reforms such as term limits and restructuring the court which could make inroads to promoting neutrality on the Court and re-establishing a greater degree of public trust.

The Politicization of the American Judiciary: Practical and Theoretical Consequences of a Partisan Supreme Court

Tara Wilson

Public Abstract

The modern Supreme Court must contend with an unprecedented degree of outside influence from ideologically driven special interest groups. Since 1982, there is no outside special interest group of more consequence than the Federalist Society. Modern special interest groups can boast deeper financial reserves, decades of relationship with policy makers, and ideological motivations that are not simply deeply held, but singularly motivating. This is particularly true for the Federalist Society. The conservative legal movement has effectively employed a long-term strategy to shape the Court in its own image, minimizing a reliance on an electorate that is more diverse and historically less likely to embrace conservative principles. Above any other political ally or mechanism, that strategy and its implementation has relied on the commitment, financing, and participation of the Federalist Society. This thesis examines the breadth and consequences of the Federalist Society's influence on the modern Court and proposes theoretical reforms that could help ensure a more ideologically balanced court.

Acknowledgements

I would like to extend my most sincere acknowledgements and thanks to the many people who have supported this work.

My deepest thanks to my primary advisor, Dr. Luke Plotica. Time delays, a global pandemic, and distance did nothing to mitigate his help and generosity from the earliest days of organizing my thoughts to final defense. He offered encouragement, direction, and thoughtful edits and comments throughout. To the members of my thesis defense committee, Drs. Wayne Moore and Andrew Scerri. Despite the delays caused by the pandemic, they stuck with the project and provided critical insight which greatly benefited the final product. Additionally, I would like to thank the Virginia Tech Political Science graduate program for all their assistance over the years in navigating the challenges of remote learning.

To my parents, Robert and Constance Anderson. While they have always supported my academic pursuits and provided unconditional love, they also instilled a deep love for American history and a love of lifelong learning. Mom, think about how many presidential home and historic site visits and it took to lead to this degree and thesis? Probably, one for every vacation from 5th grade through High School. To my in-laws, Thomas and Carolyn Wilson for their many kindnesses and support of my graduate work. I can't believe my luck that I went from one set of the best parents ever, to two sets of the best parents ever.

I'd like to thank and acknowledge my brother, Trevor Anderson J.D., who might be surprised by the mention here but shouldn't be. I didn't pursue an advanced degree merely to continue a lifetime of academic competition, but it certainly didn't dissuade me. His integrity as an attorney is commendable. If only every jurist was as compassionate and capable as him.

To my husband, Samuel Wilson. From the first day I voiced an interest in going back to school he was all in. Sam made financial sacrifices, offered endless encouragement, and carved out extra time so that he could be with our little ones while I snuck away to spend weekends at the library. I love you Sam.

Finally, to the two people that made every page and paragraph worth it, my daughters, Evelyn Constance, and Louisa Gallagher. Nothing I do will ever be as great or rewarding and getting to love you and be your mother. I want you to know that working toward the common good is always right, and whether you succeed or fail you must do good where and when you can. Politics is just a tool to defend and protect the common good and it should be treated as such. I want you to believe that every single person is worthy of love, kindness, and justice. I know you'll make the world a better place. You already have.

Table of Contents

Introduction……………………..………………………………………………………….….1

Chapter 1: Conservative Engines;
The Federalist Society's Origins, Impacts, and Influence……………………………...……...7
Ideological Roots……………………………………………………...…………..7
Originalism………………………………………………………..……………….17
Founding the Federalist Society…………………………………………………….23
Impacts and Influence……………………………………………………………...25

Chapter 2: From Bottling Lighting to Manufacturing Electricity;
The Federalist Society and the Trump Administration……………………………………....29
Engineering Trump's Court………………………………………………………31
The Federalist Society and Leonard Leo…………………………………...…….34
Mitch McConnell…………………………………………………...…………40
The Trump Court………………………………………………………………….45
The Federalist Society Ascendent…………………………………….……….50

Chapter 3: The Threat of a Partisan Judiciary………………………………..…………..53
Judicial Neutrality and Why it Matters…………………………………...…53
Threat to Public Confidence…………………………………………………...…57
Response From the Left…………………………………………………………..65
Proposed Reforms…………………………………………………………..…68
1. Term Limits………………………………………………….……69
2. Expanding the Court……………………………………………………....73

Conclusion…………………………………………………………………………..….78

Bibliography…………………………………………………..………………..…83

Introduction

Among the three branches of the United States federal government, the judicial branch has enjoyed the highest degree of public approval in recent decades.[1] The men and women of the Supreme Court serve on a public stage, sometimes for decades. While serving on the Court, these unelected officials mete out decisions in cases that range from the quotidian, to the so-consequential that they shift societal paradigms and have practical impacts on daily life for millions of Americans. While many, or rather most, decisions never break through the news cycle, others are so famous or infamous that their full weight and meaning are conveyed merely by their abbreviated titles, which enter the cultural vernacular; cases such as *Obergerfell, Brown, Roe, Citizens United*, and more recently, *Dobbs*.

The popularity of the Court can most likely be explained by the perception and myth-making that the Justices are not politicians, but rather public servants who are committed to blind justice for every American citizen regardless of race, gender, or creed. However, that perception of the Court is due largely the Court's own pretense. The Court has never really existed outside of or above politics. The internet age, 24-hour news cycle, heightened political polarization, and the circus-like atmosphere of the Senate judicial confirmation hearings have revealed the reality that the Supreme Court is more of an extension of the congenital dysfunction of American public life, rather than a sacrosanct institution that is impervious to outside influence.

That myth of the Court as an institution which exists above partisan or personal influence isn't unique to the modern age. It's the Court's self-appointed mantle, and has been perpetuated and propagated by those in the legal realm who, "believe or have professed to believe, that constitutional law was a technical mystery revealing itself in terms of unmistakable precision to

---

[1] Gallup. August 24, 2022. https://news.gallup.com/poll/4732/supreme-court.aspx

those who had the key, that the Constitution was the record and the judges merely the impartial phonograph that played it, a group of men who somehow manages to stop being men when they put on their robes and would not dream of letting their subjective value judgements affect their understanding of the Constitution."[2]

Chief Justice John Roberts lent his voice to perpetuating that version of the role of the federal judges during his 2005 confirmation hearing saying,

> Judges are not politicians who can promise to do certain things in exchange for votes. I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyze the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench, and I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat.[3]

Relying less on athletic metaphor, Roberts is leaning heavily on the depiction of the Court as a truly unbiased, neutral arbiter that exists to preserve equal application of justice for every American without agenda or undue influence; just calling balls and strikes, not devising new rules to ensure a victory or loss for one team in particular. As well-meaning as this metaphor is, even the most determined and neutral jurist knows it cannot possibly be true in this simple form. Since the institutional advent of judicial review, the Supreme Court does not just call "balls or strikes." While the Court does say what the law is or isn't, by its decisions and the enforcement

---

[2] McCloskey, Robert G., and Sanford Levinson. *The American Supreme Court*. Chicago: The University of Chicago Press, 2016. 11.

[3] Roberts, John. *Hearings before the Committee on the Judiciary,* United States Senate, 109th Congress, U.S. Government Printing Office, 2005, pp 55-56.

of those decisions, the Court effectively *makes* the law as surely as Congress. As Chief Justice John Marshall put it, "it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[4]

While it is simple enough to argue that the Court has never been apolitical, the modern Court must contend with an unprecedented degree of outside influence from ideologically driven special interest groups. That being said, of what consequence could special interest influence be really; especially since influence peddling is so intertwined with political reality to begin with? Surely the Left and Right would willingly, if not surreptitiously, engage in influence peddling to further a particular political agenda. One might be led to believe that it's merely an unavoidable facet of how things are, and while one side might win the day, the tides of influence rise and fall and it's only a matter of time before the opposing ideology rises again. In this thesis I contend that is *not* an accurate depiction of the level of influence operating on the composition of the modern United States Supreme Court. It would be a serious mischaracterization to "both-sides" the effect of outside special interests on the Court, as if both conservative and liberal special interests had an equal amount of influence. When considering the Supreme Court, since 1982, there is no outside special interest group of more consequence than the Federalist Society.

While lobbying and policy advocacy are as old and American as any other facet of public life, modern special interest groups can boast deeper financial reserves, decades of relationship with policy makers, and ideological motivations that are not simply deeply held, but singularly motivating. This is particularly true for the Federalist Society.

---

[4] *Marbury* v. *Madison,* 1 Cranch 137. 1803.

While it's certain that if liberals had engineered such an effective long-term strategy as the conservative legal movement has, conservatives would be anxious to minimize the influence of that organization and strategy, that does not change the practical reality that it was, and is, the conservative legal movement that has most effectively employed a long-term strategy to shape the Court in its own image, minimizing a reliance on an electorate that is more diverse and historically less likely to embrace conservative principles, and instead planting seeds that don't just germinate over an election cycle, but over decades if need be. Above any other political ally or mechanism, that strategy and its implementation has relied on the commitment, financing, and participation of the Federalist Society.

In this thesis, I examine the breadth and consequences of the Federalist Society's influence on the modern Court. In Chapter One, I discuss the ideology at the core of the Federalist Society's mission beginning with the rise of the contemporary American conservative political movement, post-World War II and foundational thinkers such as Russell Kirk, William F. Buckley, and Barry Goldwater. Particular attention is paid to the response of conservative thinkers to the broader success of the New Deal and post-War liberalism, specifically the decisions of the Warren Court and how those successes could be countered. I demonstrate how those ideological roots and the interpretive theory of Originalism served as the bedrock for the ascendency of the conservative legal movement and the eventual creation of the Federalist Society. Here I draw upon the works of Steven Teles, Amanda Hollis-Brusky, and Michael Avery and Danielle McLaughlin, among others.

In Chapter Two, I detail the genesis of the Society from an academic club for like-minded conservative law students, to a significant professional networking organization, to beltway-power broker, to eventual gatekeeper and kingmaker for conservatives on the Supreme Court. I

explore the relationship that the Federalist Society has developed and has enjoyed with Republican presidential administrations, beginning with the Reagan administration and culminating with the Trump administration appointments of three Supreme Court Justices, vetted and recommended by the Federalist Society. In particular, I discuss how conservative media and donor networks were able to legitimize the fledgling Trump campaign with more traditional Republicans by aligning Trump with the conservative bona fides of the Federalist Society and its leadership.

In Chapter Three, I outline the risk posed by the outsized influence of such a partisan organization on the Supreme Court and how it affects the ability of the Court to function as a neutral arbiter. I will consider how to conceptualize neutrality as it pertains to the high Court to normatively assess the outsized influence of the Federalist Society beyond other special interest groups. In doing so, I will explore the fact that there is no functional counterbalance from the Left that can equal the reach and influence of the Federalist Society. I consider several exemplary decisions and statements made by members of the Court reflecting their opinions and concerns about the recent rejection of long-settled law and precedent by the conservative Justices and the mixed messaging from public statements and their divergent written opinions.

Finally, I consider possible legislative and constitutional remedies to counter the increasing polarization of the Supreme Court, including proposed reforms such as term limits and restructuring the court. Both ideas which have been advanced by both liberal and conservative scholars, which could make eventual inroads to promoting neutrality on the Court and re-establishing a greater degree of public trust.

It is the objective of this thesis to capture a moment of particular consequence in the American experiment. The issues confronting the American people today are of such

significance that those invested in the survival of a healthy democracy and robust public institutions cannot let things play out without closely examining and discussing the real and present threats they face. Hyper-polarization, the rise of nationalism and extremist movements, and lack of faith in governmental processes have already yielded unprecedented results culminating in the attack on the U.S. Capitol Building on January 6, 2020. The urgency of strengthening and preserving the mechanisms of justice for all Americans is as critical as preserving the political rights to gather, vote, and protest. Americans are owed a federal judiciary that preserves citizens' rights regardless of ideological alignment, and every day that passes without serious conversations about how to ensure that reality is a threat to the health of nation and equal protection under the law.

Chapter 1

Conservative Engines; The Federalist Society's Origins, Influences and Strategies

Ideological Roots

While no ideology, political party, or demographic metric can be treated as a monolith, particularly when considered with the lens of intersectionality, identifying recurring or shared political or social philosophy is a main indicator of party or ideological identification. America's conservative movement is no exception. Conservatism and its proponents represent a wide swath of demographic identities, philosophical commitments, and areas of policy focus, but for the purposes of framing the larger discussion, it is critical to isolate and identify core principles of agreement within the movement. To successfully claim that the Federalist Society is the conservative movement's answer to a liberalized academic legal community, it is beneficial to define conservatism, or more specifically conservatism in the United States in the second half of the 20th Century.

Discussing several key thinkers can illustrate the larger intellectual trends of modern conservatism. Influential thinkers of post WWII conservatism such as Russell Kirk, William F. Buckley, and Barry Goldwater, provide a good rubric for what conservatism was at the time and also where it was headed in the decades to follow. Taken together, it is useful to consider their influence as they provide a relatively broad approach to conservative thought and also provide "a doctrinal inventory for conservatives [that has] taught them how to think."[5] Michael Lee contends that despite variations within conservatism, it is impossible to participate in, or understand the movement, "much less be a thoughtful conservative, without a degree of

---

[5] Lee, Michael J. "The Conservative Canon and Its Uses." *Rhetoric and Public Affairs* 15, no. 1 (2012): 1–39. http://www.jstor.org/stable/41955606.

mimicry" of these foundational sources. Beyond including these individuals as a method of illustrating ideological roots and sources, it's largely in keeping with conservative tradition to lean heavily on the *existing*. That is to say, a central tenant of conservatism is not innovation or reimagining what could be, but rather depending on what has been accepted as canon as a means of preserving the status quo and societal order. This focus on preserving what *is* will be of great consequence in describing the reach and effectiveness of dominate conservative legal theory and constitutional interpretive method: originalism.

Russell Kirk is a useful place to begin as his 1953 book, *The Conservative Mind*, gives specificity to what constituted a post-War conservative worldview. In particularly romantic language, Kirk describes an ideology that is the last refuge of a classical notion of Western civilization and culture. The societal and cultural shifts that began to appear within the United States and across Europe during those years presented direct threats to the status quo. Issues such as racial integration, workers movements, the rumblings of women's liberation, and the growth of Communist and Socialist states demanded a conservative response. Kirk gives his working definition saying, "the essence of social conservatism is preservation of the ancient moral traditions of humanity. Conservatives respect the wisdom of their ancestors (…); they are dubious of wholesale alteration. They think society is a spiritual reality, possessing an eternal life but a delicate constitution. It cannot be scrapped and recast as if it were a machine."[6] Using not subtly coded religious language, Kirk depicts conservatives as seeking to preserve the higher moral order, elevating the ideology from a political perspective to an essential bulwark for humanity's soul, making the stakes of losing the battle of ideas an existential threat.[7]

---

[6] Kirk, Russell. *The Conservative Mind*. Stellar Classics, 2018. 8.

[7] Kirk's reliance on a spiritual foundation is a precursor of a debate of the modern conservative movement regarding the necessity of a common religious foundation or understanding.

Kirk then enumerates six specific "canons of conservative thought," which serve as the core principles of what constitutes conservatism. Briefly, they are 1) belief in a natural law "that rules society as well as conscience"; 2) an "affection" for the more mysterious parts of human existence, rather than the "logicalism" of liberal a society; 3) a rejection of the notion of a "classless society;" 4) a belief that "freedom and property are closely linked;" 5) faith in tradition over "sophisters, calculators, and economists," who have lost the impulse to preserve at the expense of seeking power; and 6) the belief that change for the sake of change is not necessarily a good thing as brings the potential for chaos.[8]

While Kirk's description might feel anachronistic to modern sensibilities, especially his pining for the confines of more rigid adherence to class roles and a suspicion of all revolutionary or novel thought as a potential vehicle for a corrupt intent in search of power, there is ample overlap with the principles of modern conservatism. While presented differently and occasionally with disparate levels of import, these six canons reappear within the works and philosophy of many other conservative luminaries and politicians.

1960 saw the release of the seminal *The Conscience of a Conservative*, by Barry Goldwater. In *Conscience*, Goldwater makes an aggressive defense of conservatism, not just for other existing committed conservatives, but also for a much broader audience of the greater political community and ordinary citizens alike. In it he rejects the impulse for conservatives to apologize for what liberals may perceive as a less humane philosophy, that is less invested in the practical well-being of individuals and more-so economic outcomes. To Goldwater, that is a problem of perception and clear communication from conservatives, not a failure of conservative

[8] Kirk, *The Conservative Mind*. 8-9.

philosophy. He contends that it is conservatism, not liberalism that is best positioned to address the "whole man," while liberals only manage to "look at the material side of man's nature."[9]

Reminiscent of Kirk's belief in clearly structured social order, Goldwater says, "Conservatism is not an economic theory, though it has economic implications. The shoe is precisely on the other foot: it is Socialism that subordinated all other considerations to man's material well-being. It is Conservatism that puts material things in their proper place—that has a structured view of the human being and of human society, in which economics plays only a subsidiary role."[10] This conservative take on economics, that liberals might deride as less compassionate, is merely an extension of allowing the free market, private property, and eventualities of the natural order to exist as they are without the interference of attempting to restructure economics or financial markets in a vain attempt to pursue a more egalitarian society.

This view of conservatism is a compelling indicator of the battle lines that will so clearly define conservatism in the future. What is conservatism? It can sometimes be best defined by what it is not. It is not liberalism. The forceful rejection of liberalism and government overreach will be a recurring useful rallying cry for populist and nationalist movements for years to come. The sort of cold-war antipathy for creeping communism or socialism via liberal polices never really fades, it merely evolves to act as a catch-all boogeyman for policies that don't align with conservative values.

Also similar to Kirk, Goldwater calls on more esoteric and spiritual foundations for conservative principles,

> The Conservative believes that man is, in part, an economic, and animal creature; but that he is also a spiritual creature with spiritual needs and spiritual desires. What is more, these needs and desires reflect the *superior* side of man's nature, and thus take precedence over his economic wants. Conservatism therefore looks upon the

[9] Goldwater, Barry M. *Conscience of a Conservative*. S.l.: General Press, 2021. 10
[10] Ibid. 10.

> enhancement of man's spiritual nature as the primary concern of political philosophy. Liberals, on the other hand, --in the name of a concern for "human beings"—regard the satisfaction of economic wants as the dominant mission of society. They are, moreover, in a hurry. So that their characteristic approach to harness the society's political and economic forces into a collective effort to compel "progress." In this approach, I believe they fight against Nature.[11]

Goldwater aligns conservatism with a need to preserve the natural order and the natural law that it reflects, and as a defense against forces that attempt to disrupt that order out of some sort of misplaced idea of human interest. He contends that conservatism must address those instincts by offering a fully articulated alternative. Also significant is how Goldwater's argument outright claims to be the morally superior worldview (much like Kirk and the originalists to follow), suggesting in not subtle terms that opposing worldviews are not simply different, but morally inferior and pose a danger to man's natural predispositions.

Setting the stage for a contentious relationship with the Supreme Court and the Federal Judiciary overall, Goldwater takes issue with the (liberal Warren) Court's actions which he believes undermine what he contends is an intrinsic part of conservative ideology, the preservation of states' rights. Within the context of civil rights, farmers' rights and labor Rights, Goldwater again and again takes issues with court decisions because he believes they are detrimental to the fabric of the natural social order premised upon natural law. While Goldwater was a vocal proponent of desegregation and had previously voted in favor of civil rights legislation, he famously voted in opposition to the 1964 Civil Rights Act, because of his concerns for potential government overreach pertaining to public accommodations and

[11] Ibid. 10-11.

employment regulations explaining that articles II and VII of the '64 act, "require for their effective execution the creation of a police state."[12]

The direction of this argument may feel particularly archaic to modern egalitarian sensibilities, which largely accept the premise of civil rights as an intrinsic component of human rights overall. Not so to Goldwater, who contends that the conflating of civil rights with "human rights" or "natural rights" led the Supreme Court to "creative" decisions that were not founded in legal or constitutional realities. As far as Goldwater is concerned, "a *civil* right is a right that is asserted and is therefore protected by some valid law (...) *but unless a right is incorporated in the law, it is not a civil right and is not enforceable by the instruments of that civil law*. There may be some rights –'natural,' 'human,' or otherwise—that should also be civil rights. But if we desire to give such rights the protection of law, our recourse is to a legislature or to the amendment procedures of the Constitution. We must not look to politicians, or sociologists—or the courts—to correct the deficiency."[13]

This delineation between civil rights vs. natural rights both creates and encapsulates the ongoing tensions between liberal and conservative jurists and the expectations of what a judge's duty is to the law overall. A conservative view of the court would be one that upholds "real" fully defined legal rights and rejects "interpreted" rights outright, even if there might be unpleasant immediate consequences of that decision. Congress may make a determination that pertains to a specific right, but for a Conservative Court, that approach may not be supported by their interpretation of the Constitution. This frames previous textual interpretations, and

---

[12] Goldwater, Barry. "Text of Goldwater Speech on Rights." The New York Times. The New York Times, June 19, 1964. https://www.nytimes.com/1964/06/19/archives/text-of-goldwater-speech-on-rights.html.
[13] Goldwater, *Conscience of a Conservative*. 32-33.

originalist interpretations of the Constitution that will be a core component of the Federalist Society and for conservative legal thinkers in the years to come.

This approach lends itself to the conservative tradition of promoting states' rights federalism, even when an expansion of federal power might be widely popular or achieve desirable outcomes. As mentioned before, Goldwater was largely a proponent of desegregation and civil rights reforms, but within the context of the core concept of the supremacy of state's rights, he takes issues with the decisions of such foundational cases as *Brown v. the Board of Education* (1954), claiming, "in effect, the court said that what matters is not the ideas of men who wrote the Constitution, but the Court's ideas. It was only by engrafting its own views onto the established law of the land that the Court was able to reach the decision it did."[14]

An infamous example of just how dedicated post-War conservatives were to preserving the status quo, clear social structure, and the notion of "states' rights", despite the very real practical realities of sacrificing racial equality in favor of established precedents can be found in William F. Buckley's much cited and maligned *National Review* editorial, "Why the South Must Prevail." While Buckley's views on racial equality evolved overtime, the editorial captures a moment in time when the American conservative movement did not have a winking relationship with racism, but an overt ideological overlap and alliance. Buckley argued that White Southerners have a moral duty to prevent more ignorant Blacks from voting for everyone's best interest, democracy is not as critical as the perceived moral order saying, "If the majority wills what is socially atavistic, then to thwart the majority may be, though undemocratic, enlightened. It is more important for any community, anywhere in the word, to affirm and live by civilized standards, than to bow to the demands of the numerical majority."[15]

---

[14] Goldwater. *Conscience of a Conservative*. 35.
[15] Buckley, William F. "Why the South Must Prevail" National Review. Vol. 4. pp. 148–49

It is not an insignificant point that the modern Republican party exists as it does due to the ideological realignment that occurred in the 1960s and 1970s due to Nixon's infamous southern strategy. American conservatism, and the greater Republican Party, has historically produced politicians, thinkers, and policy makers who fall somewhere on the spectrum of anti-majoritarian rule, from purely theoretical academics, to the overt racists suggesting a non-democratic minority rule as a means to further its goals. While the anti-majoritarian bent of conservatism can be tied to the overarching support of federalism, or the commitment to tradition and unchanging moral order, there is also the reality that strict conservatism has rarely been the clear popular majority choice and therefore a threat to successful implementation of conservative principles, especially when specific policies are dependent on a popular vote. This practical reality and ideological commitments naturally spilled over for conservatives sitting on federal courts.

A brief historical overview of appointments to the Supreme Court by Republican administrations following World War II demonstrates the ideological spectrum of the era, both in the manner in which those presidents referred to the judicial system and the role it should play, and in the appointments that those presidents made to fill Supreme Court vacancies.[16] An overview of Court appointments provides practical examples of how conservative ideas and theory were translated into policy and precedent as decided by the Court.[17]

Beginning a significant era of the Supreme Court, President Dwight Eisenhower made five appointments during his two terms in office. Particularly notable was his nomination of Earl Warren to serve as Chief Justice. Warren was nominally a Republican, but that was not

---

[16] Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, Inc., 2008.
[17] Yalof, David. "Confirmation Obfuscation: Supreme Court Confirmation Politics in a Conservative Era," Studies in Law, Politics, and Society 44 (2008): 141-172

guarantee of always siding with conservative causes. While Eisenhower was a Republican and a conservative, Warren led a liberal-majority court that overturned cases traditionally lauded by conservatives and set more progressive legal precedent for future courts to adhere to.[18] Significantly, in his selection of Warren, Eisenhower was unapologetic and defended his choice saying,

> "I believe that we need *statesmanship* on the Supreme Court. Statesmanship is developed in the hard knocks of a general experience, private and public. Naturally, a man occupying the post must be competent in the law--and Warren has had seventeen years of practice in *public* law, during which his record was one of remarkable accomplishment and success, to say nothing of dedication. He has been very definitely a liberal-conservative; he represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court. Finally, he has a national name for integrity, uprightness, and courage that, again, I believe we need on the Court."[19]

Through subsequent Republican administrations, there continued to be regular "consensus" appointments, or justices who were able to garner large majorities, if not unanimous consent by the Senate, but there were significant exceptions as well. Beginning with Nixon, who had the opportunity to appoint 4 Justices, including replacement of Justice Warren, two of his candidates were rejected by the Senate.

Gerald Ford made only one appointment, John Paul Stevens. Justice Stevens, a Republican, although gradually, regularly sided with the more liberal members of the Court, but Ford remained satisfied with his appointment and he, like Eisenhower defending the Warren appointment, admired what he described as Stevens' integrity and ability to make legal decisions driven by a larger ethical understanding of the law, rather than partisan allegiance.[20]

---

[18] Schwartz, Bernard. *The Warren Court: A Retrospective*. New York: Oxford University Press, 1996.

[19] https://web.archive.org/web/20120118180711/http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/460.cfm

[20] O'Brien, David M. "The Politics of Professionalism: President Gerald R. Ford's Appointment of Justice John Paul Stevens," *Presidential Studies Quarterly*. Vol. 21, No. 1 (Winter, 1991), 103-126.

The appointments by Eisenhower and Ford highlighted a missed opportunity as far as the potential impact of a more conservative Court was concerned. Rank and file party members wanted to see more consistent promotion of conservative principles and a stronger response to activist liberal decisions by federal courts. As a presidential candidate, Reagan made it clear that he would appoint judges that aligned with the greater Republican Party and conservative principles on specific and highly partisan issues such as abortion restrictions and limiting the "activist" activity of the Court. Reagan's Court nominations ranged from the unanimous Senate confirmation of Sandra Day O'Conner to the extremely controversial and failed nomination of Robert Bork. Ultimately Regan made 4 successful nominations to the court, O'Conner, Rehnquist, Scalia, and Kennedy. By any metric, these jurists would prove to be more conservative than any of Eisenhower, Nixon, or Ford's appointments.

George Bush and George W. Bush both successfully nominated two justices; Souter and Thomas, and Roberts and Alito. These appointments taken together represent four consecutive Chief Justices appointed by Republicans, and a conservative leaning majority since the 1980's.

While the Federalist Society was created specifically to address the perceived imbalance of conservative representation in law schools, rather than in response to disappointment with Republican Supreme Court appointments, by organizing more institutional, hegemonic conservative thought beginning in the early days of higher academic instruction, conservatives could better influence outcomes and prevent fewer legal curve-balls that might be thrown by an otherwise sympathetic or right-leaning judge. The practical usefulness of having conservative legal minds on the same ideological page would prove to be a unifying and natural control for preserving conservative rulings from Republican appointed jurists.[21] Beyond the shared

[21] Teles, Steven M. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton, NJ: Princeton University Press, 2012. 179.

ideological bedrock of the conservative legal movement, there was greater strategic value to be found uniting the movement behind a constitutional interpretative method, specifically, originalism. The relationship between originalism and the Federalist Society, cannot be understated. It is a central feature of the Society and absolutely critical in a fulsome understanding of modern conservative legal theory. It is through the mechanisms of the Federalist Society that an entire generation of conservative law students has been taught to "reject the conventional method of constitutional interpretation (…) and instead, adopt originalism as the only correct method of interpretation."[22]

Originalism

Textualism, as an interpretive method, is deeply rooted in Anglo-American legal tradition. Beyond merely addressing the specific language of a document (in this case the Constitution), textualism requires a faithfulness to the plain meaning of legal text. This is a natural fit for a conservative worldview as this method preserves original, existing boundaries, dissuades redefinition, creativity, and embraces judicial restraint. Originalism, as it is understood today, is a post-war refinement of textualism. It is a method of interpretation that seeks not to simply address the written word of the Constitution, but rather a fixed, original meaning when the text was authored. Both methods have been, and continue to be, embraced by different judicial conservatives, but the success and wider embrace of originalism has outpaced its predecessor because of how neatly it absorbs and represents the particular ideology and world-view that is articulated by the post-war conservatives (i.e. Kirk, Buckley, Goldwater, etc.).

---

[22] Avery and McLaughlin. *The Federalist Society: How Conservatives Took Back the Law from Liberals*. Nashville, TN: Vanderbilt University Press, 2013. 46.

When considering originalism as a theory, its best to start with the works of Robert Bork. Lauded as the "intellectual godfather of originalism" by Steven Calabresi at an event celebrating the 25th anniversary of the Federalist Society, Bork was, and remains, an intellectual luminary of the modern conservative legal movement.[23] Bork served as Solicitor General under presidents Nixon and Ford, and was appointed to the DC Circuit Court by Ronald Reagan in 1982. An early articulation of contemporary originalism can be found in Robert Bork's 1971, "Neutral Principles and Some First Amendment Problems."[24] In it, Bork bemoans a lack of a unified theory in constitutional law and does not claim to suggest any theory in particular, however, in articulating the need for a theory, he lays rhetorical groundwork for an *emerging* theory.

In his later work, *The Tempting of America*, Bork further refined his interpretive theory as "original understanding". In *Tempting* he offers a full-throated justification and definition of original understanding and argues that all other interpretive theories are baseless saying, "in truth only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the Republic."[25] As Bork describes original understanding, it is interpreting the constitution not just through the lens of the framer's intent, but specifically what the *public* intent was. It is not enough to simply call on the plain text of the original document, but the contemporaneous discourse of the framers when the text was authored. Essentially, originalists are compelled to support a close reading of the text using not just their assumptions of what the framer's might have meant, but hopefully be able to point to other material authored or spoken by the founders that supports their interpretation.

---

[23] Ibid. 9.
[24] Bork, Robert H. "Neutral Principles and Some First Amendment Problems." *Indiana Law Journal,* Vol. 47, Issue 1. Fall 1971.
[25] Bork, Robert H. *The Tempting of America*. Riverside: Free Press, 2009. 222.

In *Tempting,* Bork not only defines original understanding, he preempts criticism by enumerating challenges to the theory. Each of Bork's enumerated potential criticisms acts as an apologetics playbook for further defenders of originalism. When liberals raise the issue that the Constitution was written by all white men, many of whom owned slaves, and not a fully representative body, originalist defenders can easily reference Bork's assertion that that's an invalid criticism because Americans are always still theoretically able to add new freedoms through legislative processes (though perhaps not judicial processes) and "that argument is nothing more than an attempt to block self-government by the representatives of living men and women."[26] If liberals raise language about the value of a "living Constitution" that adapts to changing societal values, defenders can call on Bork's explanation that, that argument is a slippery slope and, "if one cannot see where in that progression in the adjustment of doctrine to protect existing value ends, and the creation of new values begins, then one should not aspire to be a judge or, for that matter, a law professor."[27] Are these defenses reductive? Yes. Are they rhetorically useful? Absolutely.

Bork concludes *Tempting* by arguing that the Constitution was written to constrain man's nature, aligning with the foundational conservative principles discussed earlier such as the need for a stable social order. While a stable social order is a reasonable motivation for the historical reality of all legal codes, there is something particularly cynical in how he phrases it saying, "those who made and endorsed our Constitution knew man's nature, and it is their ideas, rather than the temptations of utopia, that we must ask our judges to adhere."[28] Bork's interpretation reads as if societies cannot be trusted to change their priorities and enumerated protections, as if

---

[26] Ibid. 265-266
[27] Ibid. 263.
[28] Ibid. 530.

we are incapable of being more than our fallen nature and the constraints of the law need to assume lawlessness or ill-intent. If the United States tries to modify the foundational principles of the nation in pursuit of something better, we risk losing everything. We have to be satisfied with the way this *are*, not what could be. What the law *is*, not what it might *become*. The United States under the Constitution is organized in our best interests by smarter more divinely inspired men and we should trust their judgement above speculation on how it could be improved upon. That's why the Constitution needs to be interpreted via originalism. Modern minds can't provide a better interpretation of what the framers intended. It echoes back to Kirk's conservative canons, specifically, "the belief that change for the sake of change is not necessarily a good thing as it brings the potential for chaos."[29]

Also significantly, the similarities with post-war conservatism and Kirk's worldview include the overt religious language used to describe the necessity and import of preserving conservative ideology. According to Whitley Kaufman, "It has often been noted that originalism resembles religious doctrine or even mythology more than a legal theory. The very name of the theory evokes a comforting notion that we may go back to the "origin", to the beginning, a simpler time before the fall of man from original paradise."[30] Kaufman continues, "the approach of originalists to the Constitution resembles nothing so much as the approach of religious fundamentalists to sacred scripture, taken as inerrant and literally true."[31] Here we can see evidence of why traditional conservatives can so easily favor originalism. The overlap between Evangelical Christianity and modern conservatism is significant. It is unsurprising that members of Evangelical and Fundamentalist Christian traditions would be willing to interpret the

---

[29] Kirk, *The Conservative Mind*, 8-9

[30] Kaufman, Whitley. "The Truth about Originalism." *The Pluralist* 9, no. 1 (2014): 39–54. https://doi.org/10.5406/pluralist.9.1.0039. 50.

[31] Ibid. 51.

constitution with a textualist/originalist lens, when that is very much in line with how those religious groups treat foundational texts overall, particularly the Bible.

Within Bork's apologetics of the theory, there seems to be a degree of willingness to allow that there are contradictions within the Constitution, but wherever that may be the case, originalists have the obligation to align with the verbiage that best prospers overall conservative ideology. Bork's take on the 9th Amendment provides a useful example.[32] In light of its textual vagueness, speaking of unnamed rights, Bork dismisses it as an "ink blot" because it requires judges to make determinations beyond explicitly enumerated rights, which implies much more judicial leeway than simply being beholden to whatever the "original intent" was when the Constitution was ratified.[33] Despite Bork's assertion that the 9th Amendment, particularly the Privileges and Immunities Clause "has been a mystery since its adoption", there is ample historical evidence that James Madison inserted language purposefully to counter an overly narrow interpretation of rights,[34] a rather inconvenient historical reality for the limitations required by originalism.

Overall, this methodology serves as a guard-rail against most liberal decisions that are a result of justices utilizing any "creativity" in interpretation because they should be bound by the narrow confines of original meaning or intent. Beyond being a useful interpretive and rhetorical tool for pro-active conservative interpretation, originalism (more-so than textualism) benefits conservative goals not just because it creates conservative outcomes, it retroactively undermines previous liberal interpretations and decisions as unsound or unconstitutional. It takes the teeth of

[32] Ibid. 48.
[33] Farber, Daniel A., and Suzanna Sherry. *Desperately Seeking Certainty the Misguided Quest for Constitutional Foundations*. Chicago, IL: University of Chicago Press, 2004. 18.
[34] Ibid.18.

decided law and precedent away from decisions that were arrived upon through other interpretive methods and exposes those cases to real vulnerability.

Despite Bork's failed Supreme Court nomination, the legacy and promotion originalism found no greater advocate than Justice Antonin Scalia. While Bork's nomination failed largely due to his openness discussing the details of his conservative judicial philosophy, Scalia had been unanimously confirmed just a year earlier. In Scalia, originalism had a champion who would demonstrate the effectiveness of the method and leave a template for other conservative justices to follow. While Scalia did not adhere to a strict notion of "original intent," or in Bork's terminology strict "original understanding," he did self-identify as a textualist and originalist. [35] He famously claimed the method was the "lesser of two evils", the greater evil being a catch-all for a non-originalist interpretative method, and said, "[o]riginalism seems more compatible with the nature and purpose of a Constitution in a democratic system."[36]

With originalism as an interpretive method that was conceived to ultimately promote conservative ideology in the law, what remained was a way to disseminate that method most effectively to the academic legal community. A vehicle was required for conservatives to share this method widely among themselves and to promote its legitimacy to the academic community overall. That vehicle would be the Federalist Society. Armed with the effectiveness of originalism as a clearly defined legal theory, the Federalist Society can boast a rhetorical and interpretive tool to advance conservative ideals that is not matched by the liberal legal movement.

[35] Scalia, Antonin. "Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation." Speech, October 18, 1996.
[36] Scalia, Antonin. "Originalism: The Lesser Evil," University of Cincinnati Law Review. 57 (1989): 849–865.

Founding the Federalist Society

Founded in 1982 by students at the Law Schools of Yale, Harvard, and the University of Chicago, the Federalist Society was created as a direct response to an alleged ideological imbalance in the nation's law schools. Despite electoral Republican victories between the 1950's and the 1980's one should take into account the bruising the conservative brand had to deal with from the active counter-culture era of the 1960's and 70's to post-Vietnam and Watergate institutional disillusionment. The academic and youth populations were heavily aligned with more progressive movements, eschewing traditional institutions and philosophy.[37] Conservative legal theory was an unsurprising casualty in this realignment of academic and societal popularity.

Despite the larger social movements, a significant conservative legal community remained, eager to maneuver itself towards more competitive footing. Even from its first event, the Society was clearly well connected to influential conservative circles as speakers included (at the time) popular law professor Antonin Scalia, and Bork who had recently been appointed D.C. circuit judge. Both Scalia and Bork had worked in the Nixon administration.[38]

It is currently composed of over 60,000 members across 200+ law school campuses.[39] While this might seem like a relatively small number of members compared to other conservative organizations such as the National Rifle Associate (NRA) which boasts a self-reported 5.5 million members, it is worth keeping in mind that membership is largely confined to law students, practicing attorneys, and faculty, which would apply to a more concentrated and narrow population than the NRA's target membership of any American gun owner.[40]

---

[37] Schrecker, Ellen. *The Lost Promise: American Universities in the 1960s*. Chicago, IL: The University of Chicago Press, 2021.
[38] Kruse, Michael, et al. "The Weekend at Yale That Changed American Politics." *POLITICO Magazine*
[39] *The Federalist Society*, https://fedsoc.org/about-us
[40] Gutowski, Stephen "NRA Membership Dues, Contributions Rebounded In 2018." *Washington Free Beacon*, May 30, 2019.

Drawing from the ideological tradition referenced above, the Society puts its conservative philosophical stance front and center. According to the Society's own statement of purpose;

- Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.
- The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.
- This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community.[41]

There is absolute clarity in this mission statement, which can be boiled down to; 1) American Law schools are too liberal. 2) This society was founded to counter liberal principles. 3) To counter those principles the legal system must be re-ordered. 4) The society has created a "network" to spread our ideals to "all levels of the legal community".

The effectiveness of the Society's strategy and mission statement is best illustrated by the current composition of the Supreme Court. Justices Kavanaugh, Gorsuch, Thomas, and Alito are all current members and regularly participate in panels and events hosted by the society. Justice Barrett is a past member and continues to be recognized as a "Contributor" and is also a frequent speaker at events. There seems to be some debate as to whether or not Chief Justice Roberts is a member, but there is evidence of his past involvement with the Society. Modern Republican Presidents defer almost entirely to the recommendations of the Federalist Society in considering

---

[41] The Federalist Society. "About Us." https://fedsoc.org/about-us.

judicial appointments. This deference to the Society's suggestions will be explored further in Chapter Two of this thesis.

Impacts and Influence

In his book, *The Rise of the Conservative Legal Movement*, Steven Teles chronicles the ideological roots that led to the founding of the Federalist Society and its impact and legacy[42]. Teles describes the Society as proudly iconoclastic, or a "counter-network", which would respond to the perceived liberal bias of the nation's law schools. He is particularly interested in the fortunes of the Society and its lasting success and influence, when the conservative movement as a brand had failed to gain ground in greater public popularity. Teles describes the society as attempting, "to dislodge what it saw as the "hegemony" of liberalism in the key institutions of the legal profession, and as such [it] has been a critical component in the larger conservative mission scaling back liberal successes in the courts".[43]

The keys to the Society's success, as Teles describes them, are recruitment, human capital, and cultural capital.[44] Of these three, cultural capital seems to be the most incongruous with the broader public perception of the Society, particularly with liberal academics or politicians. However, it is precisely that negative perception amongst those groups that provides the sustaining cultural capital. It is beneficial to the Society to be a relative pariah to its ideological opposite. It only serves the narrative and recruitment advantage of the Society, which was formed with a specific contrarian intent. The Federalist Society's identity is just as much, if not more, *what it is not* rather than *what it is,* truly a practical example of a "counter-network".

---

[42] An important contextual caveat concerning Teles' work, it was published in 2008, and does not include the most recent Trump appointments who are also members of the Society.
[43] Teles. *The Rise of the Conservative Legal Movement*. 179
[44] Ibid. 136.

This same sort of anti-establishment fervor can be found in other more recent conservative movements or organizations such as the Tea Party or Trump-ist Populism, which thrives on the notion that they are a community of like-minded individuals who are in opposition to an 'out-of-touch' group of elites, who lack practical insight into regular citizens wants or needs.

Teles hones in on this point saying, "it has tried through its activities, to make conservative lawyers aware of each other, thereby activating latent resources for the conservative legal movement, rather than plan overall movement strategy and organizational development".[45] While I'd contend that there is certainly more than a whiff of planning "overall strategy" within the society, this idea of making conservative legal minds aware of each other creates a sense of power in numbers which can serve to embolden their convictions overall. An individual who might harbor conservative ideologies, but exist in a community where they feel isolated, or ostracized might be less likely to hold fast to those convictions or pursue them professionally. To know that one is not alone, and that they might call on peers who share opinions and beliefs makes it that much easier to move forward with those opinions and beliefs. Teles continues in that same vein, "The Federalist Society, in sum, has pursued an indirect approach to legal change, one that operates as a focal point for discussion and as a safe harbor for individuals who feel isolated from the mainstream of American legal culture".[46] It is the comfortable lure of tribal support that has helped the Society achieve such significant growth because it is a well-known beacon no matter what law school a young conservative might find himself or herself. Again, Teles assertion that the Federalist Society is more concerned with indirect action than policy direction may not capture the full scale and influence of the organization, but his point about the camaraderie that the society provides is a good one.

---

[45] Ibid. 137.
[46] Ibid. 137.

Beyond Teles' notion of a *counter-network*, Amanda Hollis-Brusky's work, *Ideas With Consequences*, explores what sets the Federalist Society apart from other similar interest groups and what specific components of its design have given it an advantage in insinuating itself as a central power-broker in American legal and political life.

Particularly useful in illustrating the Federalist's Society's reach and influence is Hollis-Brusky's depiction of the Society as a "political epistemic network (PEN)". In furthering Thomas Kuhn's description of an *epistemic community*, (EC) she articulates what sets the Society apart from other similar ideological or professional organizations. Hollis-Brusky utilizes this working definition of an EC, "a network of professionals with expertise in a particular policy area bound together by a shared set of normative and principled beliefs, shared causal beliefs, shared notions of validity, and a common policy expertise, who actively work to translate those beliefs into policy".[47] While that is a useful working characterization of the workings of the Federalist Society Hollis-Brusky's refines this notion of the Federalist Society as an EC to a PEN. This provides a useful framework for both defining its ideological center and its strategic maneuvering beyond.

The critical distinctions Hollis-Brusky identifies between a traditional EC and a PEN are where other EC's may operate from a more scientific or immutable shared body of knowledge that can be empirically proved, tested and affirmed, a PEN has more ideological mobility which benefits from the interpretive nature of law and the Constitution. So whereas a traditional EC might be bound by fact, "PENs can and do modify their beliefs so as to better achieve their normative goals and shared vision of the proper arrangement of the social and political life."

---

[47] Hollis-Brusky, Amanda. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. New York: Oxford University Press, 2019. 10.

Hollis-Brusky further defines the PEN as to be "understood as strategic and instrumental rather than sincere and objectively grounded."[48] Given the understanding of the Federalist Society as a PEN, there is room for policy or interpretive disagreements at the micro level and the debate between traditional textualists and originalists. As far as those quibbles and theories are concerned there doesn't have to be full uniform agreement or allegiance, as long as the PEN itself it working in furtherance of an over-arching goal.

With this working definition of the Federalist Society as a PEN, Teles description of the society as less interested in policy outcomes is challenged. The society seeks outcomes beyond mere social and academic connections and networking. It is precisely the organizational structure of the Federalist Society to find, recruit, and retain members who will wield the organizational strategies of the organizations to achieve policy outcomes not just for members of the organization, but for the greater population. The flexibility that comes with being a PEN and being able to modify beliefs is a hallmark of achieving desired political outcomes. In this sense the Federalist Society is not passive at all. It is an active participant in shaping policy and holding other conservatives to account to ensure that they too work towards desired outcomes.

The imbedded infrastructure that the Federalist Society has developed as a political epistemic network provides the fertile ground for what was to come post-2016, the Trump appointments to the Robert's Court. As Hollis-Brusky describes it, the "Federalist Society's army of 'citizen-lawyers' is motivated, refreshed, and poised to push the counterrevolution deeper and farther in the years and decades to come."[49]

[48] Ibid. 11.
[49] Ibid. 7.

Chapter 2

From Bottling Lightning to Manufacturing Electricity[50]; The Federalist Society and the Trump Administration

As an organization, the Federalist Society functions on multiple levels with many descriptors about the Society being true at once. It can, and does, operate as an ordinary type of colligate social club for like-minded young conservatives in law school. It is a typical professional network, not unlike any other sort of fraternity or sorority lending itself to practical career introductions and opportunities. Its most consequential function, however, is that of a dynamic, well-funded, ideological judicial engineering machine. As mentioned in the previous chapter, Hollis-Brusky describes the Federalist Society as a "Political Epistemic Network" (PEN), capable of modifying its beliefs to achieve desired outcomes by catering to particular audiences or situations.[51] Significantly, the Federalist Society is able to capitalize on the label of "Conservatism" without alienating any of the major distinct divisions within the American Right. The Society is composed of members from economic conservative circles, religious conservatives, social conservatives, and libertarians. While those groups may have significant disagreements on particular issues and policy strategies, they are remarkably aligned in advancing a conservative agenda through the legal system.[52]

From its inception to the present day, the Society's primary objective has been to seat as many of its members on the federal courts as possible. While fostering a conservative judiciary with strength in numbers is the most practical goal of the Society, it is also the most superficial.

---

[50] Ibid. xiii.
[51] Ibid. 10.
[52] Avery, Michael, and Danielle McLaughlin. *The Federalist Society: How Conservatives Took the Law Back from Liberals*. Nashville, TN: Vanderbilt University Press, 2013. 3.

The objective of that goal is to have that bench of lawmakers that make decisions in service of a conservative interpretation of the Constitution with a textual, Originalist lens, entrenching conservative policies against the threat of inevitable demographic trends of an increasingly liberal and diverse electorate. In this regard Originalism is a tool in service of greater conservative ideology, not the ideological moral lodestar that some Federalist Society members might claim it as.

So entwined are the Federalist Society and Originalism, that in his work *Originalism: A Quarter Century of Debate,* society co-founder, Steven Calabresi acknowledges that his work is in honor of the 25th anniversary of the founding of the Society and that, "for the last quarter century the Society and many of its members have promoted Originalism as the correct philosophy to use in interpreting the Constitution." Further, "the Originalism debate is of central importance to the Federalist Society's mission of promoting the rule of law, constitutional limited government and the separation of powers."[53] With little daylight between the ideological identity of the Society and the singular importance of Originalist method, Calabresi continues discussing the importance of the Federalist Society in imminent judicial appointments. The Society, as far as Calabresi is concerned, plays an essential role in shaping the "judicial philosophies" that should be baseline criteria for the nomination of all future Supreme Court justices.[54]

While the Federalist Society has grown significantly in size and influence since its creation, beginning in 2016, the Society was afforded an unparalleled opportunity to work toward its goals. The confluence of decades of established relationships with the conservative donor network, willing participation of right-wing media, Republican Congressional majorities,

[53] Calabresi, Steven G. *Originalism: A Quarter-Century of Debate*. Washington, DC: Regnery Pub., 2007. 1.
[54] Ibid. 2.

and the fledgling Trump administration provided fertile conditions to advance the Federalist Society's ambitions—to make strategic, long-lasting moves that later could withstand opposition from majority rule and popular vote. What was unknown in 2016 was just how far those ambitions would be released through not just the groundwork and efforts of the Society, but also the timing of Justice Ruth Bader Ginsburg's passing, and determination of Mitch McConnell.

Engineering Trump's Court

In 2015, candidate Donald Trump was always prepared to give an opinion on the campaign trail. As ready as his opinions were, Trump displayed a readiness to change course given the right incentives or potential alliances, demonstrating that the content or policy knowledge behind those opinions were likely not fully fleshed out. As he had been a public figure for decades, Trump was often on the record saying opinions diametrically opposite to what would become campaign tentpoles.[55] [56] Trump often auditioned policy positions to crowds, riffing on their responses to his, seemingly, off-the-cuff statements. Surely, this contributed to part of the appeal Trump had with his fans. He wasn't a politician. He didn't have years of policy experience. He went with his feelings and his gut and didn't overthink things. In fact, he vocally lauds instinct above informed decision-making saying, "I have a gut, and my gut tells me more sometimes than anybody else's brain can ever tell me."[57] Expertise was not part of the carefully cultivated and curated Trump brand, but rather instinct. In some ways, he mirrored a non-

---

[55] "A Trump Sampler: His Changing Views." The New York Times. The New York Times, May 7, 2016. https://www.nytimes.com/interactive/2016/05/08/sunday-review/a-trump-sampler-his-changing-views.html.
[56] Timm, Jane C. "141 Stances on 23 Issues Donald Trump Took during His White House Bid." NBCNews.com. NBCUniversal News Group. Accessed October 26, 2022. https://www.nbcnews.com/politics/2016-election/full-list-donald-trump-s-rapidly-changing-policy-positions-n547801.
[57] Zhang, Sarah. "Trump's Most Trusted Adviser Is His Own Gut." The Atlantic. Atlantic Media Company, October 1, 2021. https://www.theatlantic.com/politics/archive/2019/01/trump-follows-his-gut/580084/.

insignificant part of the American electorate, not versed in the bureaucracy and mechanisms of politics, nor the data that should drive policy positions, but strongly opinionated all the same.

In the early days of the Trump campaign, to say that he was a pariah among traditional candidates and the establishment would be an understatement. Dozens of high-profile Republicans went on the record to warn voters about Trump's limited understanding of government, to denounce his character, and to express how great a risk they believed he posed not just to the Republican ticket, but also the county. During the early days of the campaign, there was an unusually large number of Republican candidates running for president, and few if any of the other candidates we're willing to adopt the aggressive, confrontational style that Trump deployed, decrying it as unsuitable and disqualifying.[58] Even after Trump had likely secured the presumptive hold of the Republican ticket, *Time* magazine ran a piece enumerating a number of high profile Republicans whose responses to Trump's campaign ran from tepid non-endorsements from the likes of Paul Ryan, Ted Cruz, and Marco Rubio, to full-fledged denouncements from longtime elected officials such as Tom Ridge.[59] In May of 2016, Lindsay Graham tweeted, "If we nominate Trump, we will get destroyed….. and we will deserve it."[60]

In time, all but a few of these early detractors seemed to come around to Trump's side, but not before he took primary after primary and his place as the front runner was solidified by the Republican electorate. Taking stock of their political careers, and the fervor of the MAGA/America First base, traditional Republicans began by simply acknowledging the legitimacy of his candidacy and then they began accepting cabinet positions, jobs with the

[58] MacWilliams, Matthew C. "Trump 2016: Anomalous Outlier or Political Turning Point?" In *The Rise of Trump: America's Authoritarian Spring*, 31–41. Amherst College Press, 2016. http://www.jstor.org/stable/10.3998/mpub.10034322.13. 33.
[59] White, Daniel. "Donald Trump: What 27 Republicans Have to Say about Him." Time, May 18, 2016. https://time.com/4325178/donald-trump-republican-support/.
[60] Graham- Twitter – May 3, 2016 https://twitter.com/LindseyGrahamSC/status/727604522156228608

administration, and began to run interference with the press when the next eventual scandal broke. This all took place over months of campaigning, chipping away at resistance bit, by bit. While the populist wing of the party seemed delighted by Trump, more traditional conservative voters and moderate Republicans needed more than a little convincing and the bona fides of the Federalist Society were a useful shorthand to traditional Republicans that, as unpredictable and atypical as Trump was, the federal courts were in good hands.

While past Republican candidates and presidents had fruitful ties to the Federalist Society, a Trump presidency could mean unprecedented ability to make recommendations and appointments, all vetted and co-signed by the Society. In Trump, they had a vessel for their long-time goal, unimpeded by a candidate who might have existing relationships with certain judges or promises to keep, or particularly deeply held ideological convictions. The work of two men, in particular, would be instrumental in this plan. They shared a vision for a conservative Supreme Court. More than a vision, they were prepared to make an all-in gambit on the political risk of Trump to preserve the sort of power they might be denied at the ballot box if demographic shifts continued as predicted. Those two men were Federalist Society Executive Vice President, Leonard Leo, and Kentucky Senator, and majority leader, Mitch McConnell. While McConnell was prepared to put the authority of the Senate and his decades of political maneuvering behind Trump, immediately came the more critical behind the scenes work, mobilizing the conservative media to convince the public that Trump was the man for the job—and Leo was just the man, with just the network to achieve this.

The Federalist Society and Leonard Leo

Leo, a long-time representative of the Federalist Society, was introduced to Trump in early 2016 in a meeting orchestrated by conservative mega-donor Rebekah Mercer and Trump advisor and (at the time) Breitbart executive chairman, Steve Bannon.[61] At the time of the meeting, the state of the Supreme Court was a top-of-mind discussion point, as Justice Scalia had recently died and McConnell continued to hold out on advancing any of Obama's nominees. Within hours of Scalia's death McConnell released a statement making his position clear, "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president."[62] Of course this was a gamble by McConnell, the next president might very well be a Democrat, but withholding an appointment was his only move to prevent the current Democratic President's nominee taking a critical seat on the Court.

Leo, and prominent Federalist Society member, Don McGahn, presented Trump with a golden opportunity. They would provide him with a fully vetted list of solid conservative judges and he would benefit from the legitimacy and legacy of the Federalist Society network. McConnell himself credits Leo and McGahn's influence with Trump securing Republican confidence prior to the election citing the fact that traditional court appointments recommended by the Federalist Society was, "the single biggest issue for mainstream Republicans."[63] Additionally, while Trump did not begin his campaign with many solid policy ideas, he was very

---

[61] O'Harrow, Robert, and Shawn Boburg. "A Conservative Activist's behind-the-Scenes Campaign to Remake the Nation's Courts." *The Washington Post*. WP Company, May 21, 2019. https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/.
[62] Everett, Burgess. "McConnell Throws down the Gauntlet: No Scalia Replacement under ObamaBur." *POLITICO*, February 2, 2016. https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248.

[63] McConnell, Mitch. *The Long Game: A Memoir*. New York, NY: Sentinel, 2019. 267

receptive to Leo's long-held belief that the court should be composed of conservatives who believed in literal and Originalist interpretations of the Constitution.[64]

Leo's foothold within the Federalist Society was well-established. Even before the fraught Trump appointments of Gorsuch, Kavanaugh and Barrett, he was a controversial figure among Federalist Society critics and researchers. Steven Teles, who takes a more neutral view of the Society overall, concedes, "while the Society has limited its formal role in judicial confirmations, its task of projecting its organizational neutrality has been complicated by the increasing involvement of Leonard Leo, the Society executive vice president and director of its Lawyers Division."[65] Prior to the Trump administration, there was a time when the Society found his involvement problematic enough to try to distance themselves from his work, claiming his advocacy for appointments was on his own behalf, and not on behalf of the Federalist Society; specifically the controversial nomination of Harriet Miers. During this time, the Federalist Society still found it important to portray itself as "apolitical" as possible to further the pretense that it was by and large an academic and networking society for likeminded conservative law students.

Following the death of Chief Justice Rehnquist, John Roberts was nominated by George W. Bush to fill his seat with relatively bi-partisan support. Shortly after, when Justice Sandra Day O'Conner retired, a very different nomination process played out when Bush, with the advice of Leonard Leo, nominated Harriet Miers to fill her seat. Miers was a particularly questionable choice, as she had never served as a judge in any capacity and, by her own admission, had little understanding of constitutional law. She was met with bi-partisan

[64] O'Harrow. "A Conservative Activist's behind-the-Scenes Campaign" https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/
[65] Teles. *The Rise*. 160

disapproval, which escalated after a series of seemly poor personal interviews with Republican senators.[66] Her nomination was withdrawn and Bush instead nominated Samuel Alito with a much more successful result.

Leo's close involvement in the Miers nomination resulted in a leave of absence from the Society in an effort to try to "avoid making it seem as if the Society was actively supporting the administration's judicial choices,"[67] which it in fact was doing, and would continue to do with much more overt participation in the Republican administration that followed. While detractors would continue to raise objections to the overt political maneuverings of the Federalist Society in coordination with the Trump administration, efforts pressed on, and to the victor went three Supreme Court appointments.

Unlike the pushback seen after the failed Miers nomination, Leo, McConnell, and the Trump administration had something new working in their favor, Trump's MAGA base, which would forgive seemingly any action, no matter how unprecedented, unconventional, or morally dubious as long as it advanced the agenda of the insurgent populist movement, and "owned the libs." Trump's dive into an "us vs. them" rhetoric was efficient in creating a coalition based not solely on agreement over policy positions, but by its confrontational modus operandi that demonized traditional politicians and legacy media.[68] That was a key selling point of Trump to begin with; sticking it to the establishment, flouting convention, and betting on a transactional figure, whose moral code seemed driven by "winning" more than an ideological center and who would take what he wanted and not rely on permission from convention. The Left could

---

[66] Ibid. 161

[67] Ibid. 160

[68] Fuchs, Christian. "Trump and Twitter: Authoritarian-Capitalist Ideology on Social Media." In *Digital Demagogue: Authoritarian Capitalism in the Age of Trump and Twitter*, 197–257. Pluto Press, 2018. https://doi.org/10.2307/j.ctt21215dw.10. 225.

complain and protest all they wanted that Trump wasn't playing by the traditional rules. Ultimately, the protestations of the Left and the binary "us vs. them" effect of political polarization greatly contributed to developing and solidifying the identity of the MAGA base.[69]

While the Miers nomination resulted in the Federalist Society benching Leo for a time to create some degree of plausible deniability where it came to the Society being too influential in presidential decisions, come 2016, there was no such pretense. Occasionally there might be some attempt at lip service towards framing the Society as a group with primarily intellectual, rather than political, goals. Even now on the "About Us" section of the Federalist Society's website the claim appears, "[w]e do not lobby for legislation, take policy positions, or sponsor or endorse nominees and candidates for public service,"[70] despite the common understanding that the Federalist Society hand-picked recommendations for the Trump administration's judicial appointments.

Leo provides invaluable services to the society through his work as a partisan fundraiser and his network of conservative and libertarian orientated non-profits. And despite the Society's claims, Leo, with McGahn, handed Trump that list of individuals who were approved for lifetime appointments in public service, vetted and cosigned with the weight of the Society behind them.

Thanks to the 2010 decision of *Citizens United v. Federal Election Commission*[71] the conservative Roberts Court decided that the government largely could not restrict non-profits, unions, other corporations and associations from political contributions as a matter of the First Amendment effectively transforming campaign finance. As there could be no restrictions on

---

[69] Robertson, Derek. "How 'Owning the Libs' Became the GOP's Core Belief." POLITICO, March 21, 2021. https://www.politico.com/news/magazine/2021/03/21/owning-the-libs-history-trump-politics-pop-culture-477203.
[70] https://fedsoc.org/about-us
[71] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

these organizations like there were on individuals, campaign finance methods saw the rise of Political Action Committees and so-called Super PACs, which did not need to disclose their donors and could donate enormous, even unlimited, amounts to political campaigns. While the Federalist Society had been carefully honing its intellectual strategy for years, the legal doctrine of *Citizens United* offered a new useful tool in helping the Society advance its political goals.

In her work, *Dark Money*, Jane Mayer dissects the relationship between sometimes seemingly innocuous non-profits with the deep pockets and long-term interests of conservative mega-donors such as the Koch and Mercer families. It would be impossible to discuss the modern concept of dark money without bringing the Koch family into the discussion. Propelled by a three-part plan by libertarian businessman and academic, Richard Fink, the Koch's financed, and continue to finance, an enormous infrastructure designed to remake politics and politicians into their image. As Mayer describes it,

> The first phase required an "investment" in intellectuals whose ideas would serve as the "raw products." The second required an investment in think tanks that would turn the ideas into marketable policies. And the third phase required the subsidization of "citizens" groups that would, along with "special interests," pressure elected officials to implement the policies. It was in essence a libertarian production line, waiting only to be bought assembled, and switched on."[72]

As the Koch's were the primary financiers of this multi-armed production line of conservative and libertarian think tanks and pseudo-grassroots organizations, it was dubbed the "Kochtopus."[73] The wide-reaching effects of *Citizens United* fundamentally altered the political

[72] Mayer, Jane. *Dark Money*. New York: Doubleday, 2016. 173.
[73] Ibid. 173

fundraising landscape for both the Democratic and Republican National Committees, but also for every special interest that had the financial capabilities to take advantage of the sort of political leverage that money could buy.

The marriage of these Super PACs and non-profits and conservative media is inextricable, with many of the donors and network owners being one and the same, and with Leonard Leo tied to both. Leo is an effective fundraiser because of those relationships, "between 2014 and 2017, Leo and his associates collected more than $250 million in such donations[.] The money was used in part to support conservative policies and judges through advertising and through funding for groups whose executives appeared as T.V. pundits."[74] The overlap with Leo and these groups includes "finances, shared board members, phone numbers, addresses, back-office support" all confirmed by tax information, incorporation records and interviews.[75]

While Trump's rise is often characterized as a populist phenomenon, that fails to take into account the origin of many of the MAGA movement's core issues stemming directly from right-wing media coverage, and from the very wealthy sources funding those networks and coverage, effectively the political goals of mega-wealth and special interests disguised as populist talking points. A particularly relevant example is the founding of conservative outlet Breitbart. Likely funded by a 10-million-dollar investment by the Mercers (the same Mercers who introduced Leo and Trump), Breitbart's constant critical coverage of immigration in 2016 and 2017 drove right wing politicians' responses and further immigration messaging.[76] The

---

[74] O'Harrow. "A Conservative Activist's behind-the-Scenes Campaign" https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/
[75] Ibid.
[76] Benkler, Yochai, Robert Faris, and Harold Roberts. *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*. New York, NY: Oxford University Press, 2018. 108.

overtly nationalist bent of the Trump campaign ignited one of the most memorable and oft-heard rallying cries of the MAGA faithful, "Build That Wall."

As integral as Leo was at directing Trump towards Federalist Society picks for the Supreme Court, he proved just as integral in galvanizing a populist movement that was largely unaware that it was spurred on by the dark money of investors with deep interests in promoting pro-business, low corporate taxation, and anti-climate change legislation and court decisions. The long arms of the Kochtopus, and other similar special interests, moved to mobilize a largely lower and middle-income political base to protect the economic status quo, which ironically ultimately rarely operates in the best interests of lower-income Americans.[77]

Despite these well-established and provable relationships, and as an admitted leader of conservative legal strategy, Leo has issued a statement that as far as the financial works of these non-profits go, "I'm not particularly knowledgeable about any of it," which strains credulity. [78] Despite the Society's practical function as a PEN, to hear Leo describe Society and his relationship to it, he is merely one of many "citizen-lawyers" who help generate and promote, "important educational products"[79], and not a long-strategized fundamental transformation of the Federal Judiciary in the image of Conservative judicial philosophy.

Mitch McConnell

While Trump rose to the head of the Republican ticket as a disruptor, Mitch McConnell could best be described as perhaps as traditional of a Republican as they come. With a Senate tenure that began in 1985, McConnell not only knows the rules of legislating intimately, he's

---

[77] Mayer, *Dark Money*.
[78] O'Harrow. https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/
[79] Hollis-Brusky, *Ideas With Consequences*. 3.

authored many of them. To enact any successful policy Trump needed McConnell and with the promise of relatively little input from the White House on the specifics of legislation or policy, there began a fraught relationship that, while at times proved to be advantageous to both, soured badly.[80] From the early days of 2016 when McConnell tacitly and diplomatically recognized Trump as the presumptive nominee to the last days of the Trump administration, culminating in the fateful events of January 6, 2021, and the subsequent fall-out, the dynamics of their relationship played out in the press and on Twitter.

McConnell's strategy in Washington, and for bolstering Conservatism is best summed up by the title of his 2016 memoir, *The Long Game*. McConnell has spent 50 years choosing his battles and focused on the advancement of electing conservative Republicans. He has supported conservative appointments across all branches and levels of government, singularly focused on achieving and maintaining majorities in the House and Senate. No single cycle captures McConnell's attention. He is willing to run primaries against Republicans who are insufficiently loyal, willing to sacrifice a seat here or there if he can consolidate more electoral advantage elsewhere in the long term. Many politicians make calculations on how to best survive an election cycle; McConnell's calculations are 30,000-foot views of expanding Conservative power government-wide.

As a young man, McConnell formed his political worldview and has not waivered. Democrats were, and are, the party that put their trust in government. Republicans were, and are, the party that believed in individuals and liberty.[81] Inspired by the giants of post-WWII Conservatism discussed in Chapter One, McConnell was especially enthused by Barry

---

[80] Mayer, Jane. "How Mitch McConnell Became Trump's Enabler-in-Chief." The New Yorker, April 12, 2020. https://www.newyorker.com/magazine/2020/04/20/how-mitch-mcconnell-became-trumps-enabler-in-chief.
[81] McConnell, *The Long Game*. 28.

Goldwater and *Conscience of a Conservative*. He particularly gravitated to Goldwater's call for a more adversarial approach against liberalism, saying,

> [s]ince FDR, cowed by the success of the New Deal, Republicans had sacrificed a lot of their ideology and essentially went along with Democrats […] but here was Goldwater, moving Republicans away from the "me too" way of thinking embraced by Dewey and Eisenhower, advocating more conservative policies emphasizing the need to rail against the ever-increasing concentrations of authority in Washington.[82]

Republicans had to fight back hard against these realities and by what McConnell viewed as Democratic trickery and dirty pool. McConnell was focused on a Senate and Judiciary that would promote traditional conservatism, particularly as it related to the most fundamental meat and potatoes issue conservatives have long rallied around, Federalism, or, rather states' rights focus Federalism.

McConnell's history with the judiciary is long and includes everything from mundane quotidian judicial appointments to the most dramatic scenes that have played out in American living rooms during live broadcasts of Supreme Court nomination hearings. A natural ally to the Federalist Society, as his conservative bone fides would suggest, McConnell is a supporter of Constitutional Originalism and has consistently championed judges who embrace that philosophy.

McConnell was an enthusiastic supporter of failed Supreme Court nominee, and founding member of the Federalist Society, Robert Bork. Bork was such a staunch Originalist that he believed no objections to "original understanding (i.e. Originalism) bear examination."[83] And that Originalism was so vital to the country that it was the only viable means of preserving the

---

[82] Ibid. 28.
[83] Bork, Robert, *The Tempting of America*. 161.

intent of the Constitution, the separation of powers, and the notion of liberty wholesale.[84] McConnell was furious at the outcome of Bork's confirmation hearings, and with Bork's treatment by Senate Democrats. The event was foundational in McConnell's judicial appointment strategy going forward and forever colored his approach to embracing a highly politicized and polarized judicial nomination process, in place of the historically more bipartisan process.[85]

McConnell's approach to mobilizing conservatives closely mirrors the mission statement of the Federalist Society. A foundational part of both the Society's identity, as with Mitch McConnell's political worldview, centers on existing as a foil to liberalism and serving as a bulwark against the threat of leftist advancement. As a vocal supporter and admirer of the Federalist Society, his memoir details his thoughts about the organization and his subsequent strategizing in some detail in relation to the events surrounding Justice Scalia's death.

Musing on Scalia's legacy immediately following his passing, McConnell reflected on what his true legacy was for the Court, not just his seminal conservative and Originalist interpretations of law and the constitution, but how the "salutary effect of this philosophy is the return of the law making power to where it belongs: to the people's elected representatives,"[86] perhaps with the unspoken qualifier *within the bounds of an Originalist interpretation of what those powers might be and who gets elected*. the ambitions of Federalist Society members and conservatives as a whole, envision a political landscape that is hostile to pure democracy, and that is carefully engineered to favor Republican voting blocs more than Democratic ones.[87]

---

[84] Ibid. 159.
[85] McConnell, *The Long Game.*
[86] Ibid. 261.
[87] Millhiser, Ian. *The Agenda: How a Republican Supreme Court Is Reshaping America*. New York, NY: Columbia Global Reports, 2021. 113.

Perhaps McConnell really believed that at the time. Perhaps, more cynically, and in truth more likely, he never did. Given the evidence of his actions following the death of longtime liberal cornerstone Justice Ginsburg and the hurried confirmation of Justice Barrett that followed, rather than returning that seat to "the people's elected representatives," which had been so important and ethical only four years earlier when he held a Supreme Court seat vacant for months to do so.

In his memoir, McConnell explains further that Scalia's legacy wasn't just his conservative votes, his lectures or written works, or the archive of his influential and consequential opinions. It was also that he was "instrumental in the growth of the Federalist Society, which had encouraged and promoted scores of talented, young, conservative lawyers,"[88] a keyword being, "young." It describes a bench with long-staying power who can really capitalize on lifetime appointments, furthering conservative goals for decades.

With his passing, Scalia's seat belonged not to the voters, but to the Federalist Society as a tribute. Ultimately, even with her dying request being not to be replaced before the imminent presidential election, Justice Ginsburg's seat belonged to the Federalist Society as well. While the deaths of Scalia and Ginsburg presented similar scenarios they were treated as differently as possible because, whatever intellectual or rhetorical exercises he might use to defend his disparate actions, McConnell's goal was a conservative court and he would do whatever is in his power to ensure that outcome. In fact, his relationship with the Federalist Society and his efforts to shape the judiciary are, in his own words, his proudest legacy as in 2018 he was quoted as saying, "I think it's far and away the most consequential thing I've ever been involved in, and

---

[88] McConnell. *The Long Game*. 261.

the most long-lasting accomplishment of the current administration, by far.''[89] Not a surprising statement, considering McConnell's close ties with long-time conservative thought leaders. Former U.S. Attorney General under Ronald Reagan, Edwin Meese, expressed the importance of judicial appointments saying, "(o)ne fact is clear and compelling. No President exercises any power more far-reaching, more likely to influence his legacy, that the selection of federal judges."[90] In McConnell's interpretation of his own legacy it's clear that he feels that way not just about the role of Chief Executive, but also the Senate Majority Leader.

What better ally could the Federalist Society have had than McConnell in the Legislature? Ultimately the combination of McConnell in the Legislature and the vessel of Donald Trump in the Oval Office was a best-case scenario for the Society; a president who had no real opinions about the judiciary, willing to take the Society's suggestions without reservation or a second thought, and a Senate leader who fully embraced the core philosophies and ambitions of the organization.

The Trump Court

Supreme Courts are often identified and categorized by the name of the sitting Chief Justice, and while John Roberts was and remains the Chief Justice after all of Trump's appointments, the Court that was shaped while Donald Trump was president was drastically different that it might be best identified as the "Trump Court" rather than a continuation of the Roberts Court, of if the traditional conceit must be observed then perhaps it could also be known as, the Roberts Court 2.0.

---

[89] Freking, Kevin, and Mark Sherman. "Trump's Impact on Courts Likely to Last Long beyond His Term." AP NEWS. Associated Press, December 26, 2020. https://apnews.com/article/joe-biden-donald-trump-mitch-mcconnell-elections-judiciary-d5807340e86d05fbc78ed50fb43c1c46.

[90] Avery and McLaughlin, *The Federalist Society: How Conservatives Took the Law Back from Liberals,* 21.

Very shortly after Trump's inauguration, on January 1, 2017, Neil M. Gorsuch was nominated to fill the long vacant seat of Antonin Scalia. As a 2006 George W. Bush nominee to the 10th Circuit Court of Appeals, Gorsuch, an Originalist, served on that court for a decade. He was recognized by the ABA as 'Unanimously Well Qualified' for Trump's Supreme Court nomination. He was confirmed on April 7, 2017 with a 54-45 vote, which included three democratic Senators. While nowhere near as bi-partisan of a confirmation as other previous Supreme Court justices had enjoyed, the purfunctory confirmation of Gorsuch would seem congenial and near consensus in comparison with Trump's subsequent nomination.

Following the retirement of Justice Anthony Kennedy, Trump was ready with the recommendation of Leo and McGahn, to nominate Brett Kavanaugh. As a former clerk to Justice Kennedy, Kavanaugh seemed like a natural successor. Like Gorsuch, Kavanaugh was a George W. Bush judge who had served on the U.S. Court of Appeals for the District of Columbia since 2003. Also, like Gorsuch, he was along-time member of the Federalist Society. Also included on his resume was his significant role as a senior deputy to Ken Starr during the Clinton Impeachment hearings.[91] His longtime judicial credentials notwithstanding, Kavanaugh's nomination was nearly routed by the sexual assault allegations of Dr. Christine Blasey Ford. After contentious, and publicly televised hearings in the vein of the Clarence Thomas hearings that had been so formative to McConnell, Kavanaugh was confirmed on a nearly party line vote. Only Democratic Senator Joe Manchin voted for confirmation.

With Kavanaugh's confirmation, Trump had crafted a Court with a conservative leaning majority. Justice Kennedy's swing vote appeared to have been replaced by a more traditionally conservative Justice. It was then that the political and judicial landscape of 2020 faced another

---

[91] Ibid. 33.

shocking twist, the death of Justice Ruth Bader Ginsberg. Less than a month after her nomination, Justice Amy Coney Barrett was confirmed to the high court with a vote of 52-48. Prior to her confirmation, Justice Barrett had most recently served as a Trump appointee to the 7th Circuit U.S. Court of Appeals. Like Gorsuch and Kavanaugh before her, she was included on the Federalist Society vetted list and was a past member.

With Barrett's successful nomination, Trump had pushed an occasional 5-4 conservative majority to a more reliable 6-3 conservative majority, replacing one of the most liberal votes on the bench with another committed conservative. All told, including the three very significant Supreme Court appointments, the 4-year Trump administration saw the appointments of 226 federal judges. Among those 226 judges were 54 federal appellate judges, just one shy of the 55 President Obama had appointed during his two-term administration.[92]

The full impact of the complete Trump court would not fully crystalize until after the 2020 election and Joe Biden took office. Evidence is emerging that Trump believed his conservative majority Supreme Court could be sufficient to uphold judicial challenges to the 2020 electoral results. Trump was quoted as saying, "I think this [election] will end up in the Supreme Court. And I think it's very important that we have nine justices. Having a 4-4 situation is not a good situation."[93] Trump's hopes proved futile with the Trump campaign losing court case after court case, and the Supreme Court dismissing a related case filed by the state of Texas.[94]

---

[92] Gramlich, John. "How Trump Compares with Other Recent Presidents in Appointing Federal Judges." Pew Research Center, January 28, 2022. https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

[93] Gripas, Yuri. "WSJ News Exclusive | Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results." The Wall Street Journal. Dow Jones & Company, January 25, 2021. https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369.

[94] Ibid.

Not insignificantly, several of those lower court decisions were made by judges who are Federalist Society members and/or Trump appointees. It's more than likely that Trump took those decisions as personal affronts given his reliance and historical dependence on transactional relationships. Those decisions suggested, at least in part, that those Federalist Society judges, like Mitch McConnell, have an eye on long-term traditional conservative judicial interests and not simply serving as an extension of the Trump administration or Trumpism specifically.

That point is significant for the additional reason that while The Federalist Society in many ways legitimized and assisted Trump in his political rise, The Federalist Society and Trumpism are not interchangeable. The Federalist Society existed as an entirely formed and powerful player before Trump, exerting real and dynamic influence in both Bush administrations. As far as its institutional goals and objectives are concerned, the Society found an alliance with Trump advantageous as a means to an end. It's likely many current members of the Federalist Society think of Trump as Mitch McConnell does, a political tool that was useful to advance a greater goal.

Should Trump become the presumptive Republican nominee for 2024, with the last several years as an indicator, it's likely that the Federalist Society will once again provide all the needed counsel and support that Trump requires. However, all things being equal, the Federalist Society would probably see a greater value in a more traditional candidate, one without such a vocal disregard and contempt for the rule of law. The Federalist Society benefited from Trump and his presidency, but the Society doesn't need Trump to be in power in perpetuity.

That being said, many of the issues that traditional conservatives and the MAGA base have a particular interest in have already been heard by the court with varying degrees of satisfaction. While the court has made determinations that favor conservative principles there

have been some decisions that were met with great disappointment by the far right and more traditional conservatives alike. Apart from the rejections of Trump's election cases and continual affirmation that the 2020 election was, in reality, legitimate and not stolen, there was a 7-2 ruling in which the Trump Court rejected a challenge to the Affordable Care Act.[95] This seemed a particular betrayal as Republicans have so vocally opposed the ACA since its inception and has made overturning it a standard campaign talking point.

Also, significantly, despite the clear ideological divide of the seated justices, more often than not the Court's rulings are decided by a clear majority. In the 2020-2021 term, the Court issued 67 opinions, 43 of those had a 7-2 split or less with 24 of those opinions being unanimous with all 9 justices concurring.[96] The remaining 24 decisions that reflected a greater disagreement on the court were also not always fully reflective of strict ideological lines, although it was a fairly reliable predictor. While at first glance this might seem like there shouldn't be too great a concern about an overly partisan court, but it is in those more infrequent victories that real groundwork is laid in judicial precedent to sustain and propagate long-term conservative objectives, making them all the more significant. Areas of concurrence aside, the significant increase to the conservative majority does more than simply ensure more conservative rulings, it encourages those same jurists to make rulings that are more conservative than they might have made, had the majority been smaller, or closer to even as, "ideological tendencies are both dampened and amplified by the composition of the panel."[97]

---

[95] Stohr, Greg. "Supreme Court's Conservatives Duck 'Big Waves' as Storms Loom." Bloomberg, June 18, 2021. https://www.bloomberg.com/news/articles/2021-06-18/supreme-court-conservative-shift-hits-bump-with-moderate-rulings.

[96] https://www.supremecourt.gov/opinions/slipopinion/20

[97] Sunstein, Cass R. David Schkade, Lisa M. Ellman, and Andres Sawicki. "Conclusion: Law and Politics: A Mixed Verdict." In *Are Judges Political?: An Empirical Analysis of the Federal Judiciary*, 147–50. Brookings Institution Press, 2006. http://www.jstor.org/stable/10.7864/j.ctt12879t7.11. 150.

The full Trump Court, buoyed by Gorsuch, Kavanaugh, and Barrett, is poised to, and indeed already has shown its intent to, hear cases that align with conservative priorities. In his work *The Agenda*, Ian Millhiser identifies four specific areas that the Trump Court could make the most impact with their Court majority specifically; voting rights, administrative law, religion and forced arbitration.[98] Millhiser highlights voting rights as the most critical area of concern, describing the potential reality of a court that so heavily supports federalism, that state legislatures could invalidate their own state's governor's vetoes, or state Supreme Court decisions, leading to unfettered voting restrictions and gerrymandering. Millhiser opines, "this vicious cycle has begun, and it will be very difficult to reverse. If Democrats cannot win national elections, they cannot enact new voting rights laws, and they cannot appoint new justices who might shift the court back toward the center."[99]

The Federalist Society Ascendant

The Federalist Society and the Supreme Court, for the foreseeable future, have insulated themselves from Democratic control of the elected branches. As far as the high court is concerned the solid conservative majority may be safe for years or perhaps even a decade or more. For the next several election cycles, whatever the outcomes may be, the composition of the high court is unlikely to change significantly during that time.

As far the alliance that the Federalist Society made in 2015 with Trump and his team is concerned, it's hard to imagine a better or more fruitful outcome for the Society as it pertains to its ultimate goal of a conservative judiciary. The Society was able to direct three reliably conservative seats on the high court while McConnell was able to shepherd through hundreds of

---

[98] Millhiser, *The Agenda*, 112.
[99] Ibid. 112-113.

federal appointments to district and appeals courts across the country. These are transformative numbers, especially for a single presidential term. While there were fewer federal judicial appointments than occurred more recent administrations, as far as pace and raw numbers are concerned more than a quarter of all active judges are Trump appointees (second only to President Obama) and of those active Trump judges, most are affiliated with or outright members of the Federalist Society.[100] Not since Herbert Hoover has a one-term president appointed so many Supreme Court justices.

For all the influence and leverage that other conservative and libertarian organizations and think tanks may possess, groups such as the Heritage Foundation, The Cato Institute, the Mises Institute, and the American Enterprise Institute, it is exceeding rare, if not unheard of to have one organization with so many high-ranking members, proponents and affiliates in such influential positions. Ultimately, this is by design.

As Hollis-Brusky defines it, the Federalist Society is a *political epistemic network* (PEN*),* which is unique in its own right. But beyond Hollis-Brusky's apt description there is a more practical reason for the group's success unique amongst right-leaning organizations. Absolutely, the Federalist Society can effectively function as an opportunity for a like-minded conservative network to promote conservative ideology much as those other institutions do (Heritage, CATO, AEI, etc.), but it can also safely insulate itself from the tempest of the inflammatory rhetoric and stigma that can be associated with the culture wars, maintaining a degree of academic and intellectual credibility that the others may lack. Federalist Society judges and members don't base their actions or arguments around specific conservative issues or causes; they base their actions and arguments on shared *method*, specifically an interpretive method. The causes of

[100] Gramlich, John. "How Trump Compares with Other Recent Presidents in Appointing Federal Judges."

conservatism are taken up by Federalist Society members, but stripped from more unpopular and controversial identifiers such as hostility to civil or worker's rights, hostility to LGTB issues, climate-change denial, or corporate protectionism, and instead they are covered in the mantel of legal interpretation, the bastion of conservative legal scholarship: Originalism.

In this way the Federalist Society remains above the fray, largely protected from the dogged nature of democratic preference or majority opinion not aligning with their decisions. Textual interpretation of the law is what it is; they're bound by it. How perfect and effective that an ideology that relies on things remaining the same depends on an interpretive method that demands an understanding and acceptance of societal norms and mores from over 250 years ago. Originalism, as the Federalist Society utilizes it, brings to mind the words of Russell Kirk, "the essence of social conservatism is preservation of the ancient moral traditions of humanity. Conservatives respect the wisdom of their ancestors."[101]

As an instrument of defending the traditional moral order of conservatism and the status quo, the Federalist Society stands apart, unmatched by other right-leaning organizations and without a fully realized competitor from the left. As Hollis-Brusky describes the organization, "the Federalist Society is no longer simply bottling lightning, it is manufacturing electricity."[102]

---

[101] Kirk, Russell. *The Conservative Mind*. 8

[102] Hollis-Brusky. *Ideas With Consequences*. Xiii.

Chapter 3

The Threat of a Partisan Judiciary

Judicial Neutrality and Why it Matters

The consequences of any political movement or moment might be fleeting, or endure for generations, imprinting on the mechanisms of government and democracy. While electoral trends may shift dramatically and relatively quickly, the judicial branch operates with lifetime appointments and with the power to unilaterally make sweeping and enforceable interpretations of law. The impact and legacy of judicial review is one of the most consequential shifts in power among the branches since the nation's founding. It is in the judicial branch that decisions frame decades of precedent and legacy, that are not easily combated or altered by the ballot box. While not every Supreme Court case captures the interest or notice of everyday Americans, Americans nonetheless live day-to-day bound by the decisions of that court. The Supreme Court is uniquely designed to function outside of campaign cycles and outside of time-consuming distractions like conventional politicking and fundraising. That being said, the Court is political. In an era marked by the most polarized and divided electorate since the Civil War,[103] how is possible to move beyond that ignominious mantle when the deciding majority of the Supreme Court itself was forged in the fires and animosity of that political furnace?

There is no more iconic metaphor for the public's expectation of the justice system than the blindfolded woman, sword and scales in hand. That impartiality, that blindness to outside influence or biases is the bedrock for public confidence in the legitimacy of the judiciary.[104] But the men and women of federal judiciary, and, particularly as it pertains to this discussion, the

---

[103] Burke Robertson, Cassandra. "Judicial Impartiality in a Partisan Era". Florida Law Review. Vol. 70. Issue 4.
[104] Ibid.

men and women of the Supreme Court, are living, breathing people, not statues, and it would be impossible to assume any individual could be totally free from political allegiances or personal bias.[105] Does that mean that attempts at impartiality and neutrality should be totally abandoned? Certainly not. To work towards neutral principles is a worthy objective, even if good-faith actors "are called upon to fail in the attempt", as Herbert Wechsler describes it.[106]

In her work, "Judicial Impartiality in a Partisan Era", Cassandra Burke Robinson touches on the difficulty of "drawing the line between mere political affiliation and an inappropriate appearance of partisan bias."[107] Robinson details instances when a jurist's personal history might lead "reasonable observers" to question that jurist's impartiality and ability to make neutral rulings. Robinson enumerates examples such as past conferences they might have attended, previous public statements, political affiliations, past rulings, and even refusing recusal requests. Robinson touches on how the perception of bias and impartiality doesn't just differ between political affiliations, but among judges themselves, further preventing consensus as there is no agreement of definitions of impartiality.[108]

Supreme Court confirmation hearings post-Bork illustrate the ping-pong volley of accusations by the Left and the Right, both accusing any presumptive nominee of disqualifying bias and completely rejecting the insinuation when it is levied against a judge of their own party's nomination.[109] The very act of trying to identify what bias or neutrality entail is fraught with the very basic complication that neither political wing is operating from the same

---

[105] This follows the tradition of legal realism as found in,
Carter, Lief H., and Thomas Frederick Burke. *Reason in Law*. Chicago: The University of Chicago Press, 2016.
[106] Wechsler, Herbert. "Toward Neutral Principles of Common Law". 35
[107] Burke Robertson, Cassandra. "Judicial Impartiality in a Partisan Era". 739
[108] Ibid. 745.
[109] Stone, Geoffrey R. "Understanding Supreme Court Confirmations." *The Supreme Court Review* 2010, no. 1 (2011): 381–467. https://doi.org/10.1086/658391.

expectations or definitions. With that rhetorical impediment, why even bother with the issue of neutrality if it cannot be presumed or accepted by an opposing party at any given time? Indeed, some academics refute the notion that the law can be neutral at all because of the need for the law to pursue moral goal and outcomes; that the very nature of pursuing a moral goal excludes the practical definition of neutrality.[110] In discussing neutrality, Frederick Schauer mocks the notion that it can be achieved simply by the nature of what the law is, saying, "(r)ecognizing the empirical contingency of the relationship between legal institutions and the pursuit of moral goals may show that law itself is non-neutral," adding, "but who could ever seriously have thought otherwise?"[111]

While defining neutrality in a way that satisfies all parties may be overly ambitious, there are working definitions that can aide the conversation. Richard Zorza articulates two different versions of judicial neutrality, engaged and passive. A jurist who is "engaged" neutral; "[c]reates an environment where all the relevant facts are brought out. Engages the parties as needed to bring out these facts and their foundations. Ensures neutrality by making sure that each side gets their side fully out." A judge who is "passive" neutral, "leaves it to the parties to get their evidence and foundations before the court. Does not engage the parties, but rules on motions and objections, (and) relies on the balance of the system to ensure neutrality."[112] While being either engaged or passive neutral is a style that can be unique to a given judge, Zorza argues that neutrality ends when a judge, engaged or passive, "allows bias to cloud how evidence is admitted

---

[110] Llewellyn, Karl N., and Stewart Macaulay. *The Bramble Bush: On Our Law and Its Study*. New Orleans, LA: Quid Pro Books, 2016.
[111] Schauer, Frederick. "Neutrality and Judicial Review." *Law and Philosophy* 22, no. 3/4 (2003): 217–40. http://www.jstor.org/stable/3505106. 240.
[112] Zorza, Richard. "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications." 17 Georgetown Journal of Legal Ethics, 2004. 430.

or seen."[113] While Zorza's definitions address a more procedural rather than ideological definition of bias, his work demonstrates a good application of reasoning in creating a more defined matrix of what bias is or isn't in a practical sense.

Beyond mere neutrality, is partisan bias too entrenched to even attempt to disentangle it from the nomination process? If it is an inextricable part of individual identity, how could it ever be clear enough to determine when bias is too great so as to be disqualifying? In her interpretation of bias, Burke Robinson contends that even the appearance of partisan bias is, in effect, similar to other forms of unconscious bias, and mechanisms other than mere recusal are required to better safeguard the judicial system.[114]

While considering personal or political bias and neutrality and coming away with hard definitions or red lines stymies academics and scholars to some degree, I'd argue that murkiness ends when judges are actual members of a specifically partisan network that is designed entirely to propagate a specific political ideology, with a ready-made mechanism for defending a partisan interpretation of the law. An organization that openly acknowledges its interests in designing a conservative court. That's not an obscure delineation between an individual's innate bias or who they might vote for. It does not need to be parsed or scrutinized for a potential suggestion of how a judge may theoretically rule. It's a bright red line.

A far greater indicator of bias than political affiliation, or potential past political contributions, or existing professional or personal relationships, Federalist Society association is unique. Operating as a PEN, The Federalist Society, "shape(s) the content, direction, and

[113] Ibid. 430.
[114] Ibid. 739

character of key Supreme Court decisions,"[115] laying the groundwork for the entrenchment of conservative ideology in the legal system.

Tracing Federalist Society "network members"[116] through the pathways of the federal judiciary via lower court opinions, *amicus curiae* briefs, articles and speeches authored by Federalist Society associated scholars, and ultimately Supreme Court clerkships and membership, Hollis-Brusky demonstrates how these network members act as "cognitive baggage handlers" for the Society, its interpretive theory of originalism, and its overarching conservative principles that the (limited) *state exists to preserve freedom* and the *separation of governmental powers*. Taken on theory alone, such a framework seems as solid an ideological foundation as any, but it's when those specific conservative principles are adhered to before any other motivating factor or ideology, Federalist Society judges are compelled to put those principles above the pursuit of meting out justice and recourse for American citizens.[117] While it's certainly true there is no guarantee how a judge might vote in a particular case, modern precedent is clear, association with the Federalist Society is as strong an indicator as any.[118]

Threat to Public Confidence

Membership and participation with the Federalist Society isn't a vague signal that a justice might not be impartial, it's overtly political and signals that neutral ruling cannot be assured. The relationship between the Federalist Society and the Trump administration in

---

[115] Hollis-Brusky. *Ideas With Consequences*. 26.
[116] "network members," as Hollis-Brusky defines them, are not card-carrying members of the Federalist Society, but individuals who are "active participants in the Federalist Society network activities and programs." (24)
[117] Ibid. 26
[118] This interpretation follows the attitudinal model for explaining and predicting judicial behavior as described in, Segal, Jeffrey Allan, and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK: Cambridge University Press, 2008.

selecting and rubber-stamping Trump's Supreme Court nominees was more than sufficient to satisfy the vast spectrum of emergent right-leaning sub-groups and conventional Republicans to immediately signal how loyal and conservatively ideologically bound Trump's nominees would be. Additionally, the explicit goal of the Society has nothing to do with neutrality, but rather the advancement of substantive conservative ideology.

The past and current Justices of the Court are some of the most accomplished professional and legal minds of their generation. They cannot argue that they are unaware of the public perception of the Federalist Society, nor it's modern track record as an active political organization and exclusive vetting system and appointment vehicle solely for the Republican party. They join the Society with a clear understanding of what it could mean for them professionally. They know without being a member or associated with Society they cannot hope to attract enough attention to garner a political appointment, and without being an active enough member to prove their conservative bona-fides, they will be passed over for another judge who can demonstrate more stringent ideological alignment with the Society.

Hollis-Brusky describes how the Federalist Society acts as a "bulwark against [ideological] drift, holding members accountable for staying true to their principles."[119] Those principles, being specifically originalism and the conservative ideal of judicial restraint, "saying what the law is, not what it should be."[120] In that sense the Society does not just cultivate conservatism, it disciplines when members don't adhere strictly enough to foundational ideology. Hollis-Brusky states that in her interviews with Federalist Society network members, she found that there was a clear feedback loop in the community that was sustained across all facets of the members lives from casual events, correspondence, workplaces, conferences,

---

[119] Hollis-Bruksy, *Ideas*. 20.
[120] Ibid. 18.

academic platforming, and of course hiring practices. This feedback loop propagates the network strength and the intensity of member dedication.[121] In the same vein, Steven Teles addresses the self-sustaining nature of the Federalist Society, saying, "[t]hrough repeated contact with other conservatives, the Society's networks reinforce ideological commitment, transform general attitudes into well-formed philosophical commitments, and as a consequence make members more willing to defend their views publicly."[122] Membership or association with the Society doesn't just signal alignment with conservative principles, it demonstrates a willingness to compete with other judges for having *more* of an alignment with those principles and the Society in order to set themselves apart from and above their contemporaries, making themselves more attractive for sought after appointments.

This reality is recognized by the public and threatens public confidence in the justice system in profound and dangerous ways. Polling data shows that the public's opinion and view of the Supreme Court has followed the increasing trends of polarization and tribalism. This data indicates a distrust in outcomes, appointments, and procedure, with approval of the Supreme Court below 40% for the first time since measuring began in 2000.[123] Even if partisan Supreme Court appointments might not be a top-of-mind issue for voters (despite evidence of its growing salience), outcomes of pivotal cases may greatly surprise and infuriate an overwhelming, bipartisan majority. With a large enough conservative majority, settled case law is in play. Cases so popular that their survival feels like a foregone conclusion, can't be guaranteed. *Loving v. Virginia, Obergefell v. Hodges, Brown v. Board of Education,* cases like this that receive

[121] Ibid. 20.
[122] Teles, *The Rise*. 165.
[123] Jones, Jeffrey M. "Approval of U.S. Supreme Court down to 40%, a New Low." Gallup, September 21, 2022. https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

criticism from the right and far right would utterly transform modern society if altered or overturned.[124]

There is significant evidence that the sitting conservative justices are concerned with the public perception of a politicized court, with such evidence being provided by the conservative justices themselves. In September 2021, Justice Amy Coney Barrett gave a public address warning judges of the appearance of partisanship or allowing personal bias to affect judgments and pointedly said, "my goal today is to convince you that this court is not composed of political hacks."[125] Justice Barrett did not give these remarks in a vacuum. She was responding to the criticism from members of the media, legal community, and the public which criticized her rushed appointment. Rather than remain silent on the issue, Barrett seems to have been compelled to address it publicly, opening her up to more criticism and undermining her argument when the content and context of her statements stood in sharp relief. Barrett delivered these words after being introduced by ultimate partisan-court architect, Mitch McConnell, at the McConnell Center at the University of Louisville.

Liberal and court reform focused groups seized on the incongruous optics of this event. Advocacy group, Fix the Court, first criticized the fact that the media was unable to record the event, and of the event itself, FTC representative Gabe Roth commented, "[t]here's value in members of the high court speaking to audiences outside of Washington, but that concept is corrupted when stretched to rationalize appearing at events that look and sound like political pep rallies."[126]

---

[124] This is particularly evident with the recent ruling of Dobbs v. Jackson

[125] Naylor, Brian. "Justice Amy Coney Barrett Insists That the Supreme Court's Rulings Aren't Partisan." NPR. NPR, September 13, 2021. https://www.npr.org/2021/09/13/1036597871/supreme-court-justice-amy-coney-barrett-decries-labeling-the-court-as-partisan.

[126] Fix the Court. "FTC Laments Two Recent Deaths in Judiciary: Irony and Ethics." news release, September 13, 2021. https://fixthecourt.com/2021/09/ftc-laments-two-recent-deaths-judiciary-irony-ethics/

In other recent remarks Justice Clarence Thomas echoed these sentiments, but also criticized the role of the media in framing the Court's decisions as reflections of personal preference, saying, "I think the media makes it sound as though you are just always going right to your personal preference. So if they think you are antiabortion or something personally, they think that's the way you always will come out. They think you're for this or for that. They think you become like a politician."[127] Thomas' comments cannot be separated from the practical reality that he is consistently one of, if not *the* most conservative member of the court, nearly always siding with the greater platform of the Republican Party, most notably within the context of his own comments, on issues dealing with reproductive rights and abortion access. His record consistently demonstrates the relationship between his personal ideals and the judicial behavior he is questioning, supporting an attitudinal interpretation of his judicial strategy.[128]

Political Scientists Andrew Martin and Kevin Quinn of the University of Michigan developed a metric to capture the ideological preferences of the Supreme Court justices.[129] Following the 2019-2020 term Thomas' score was the most ideologically driven of any judge, conservative or liberal.[130] When this same metric is applied to other members of the Supreme Court, Federalist Society membership or association with the Society is unsurprisingly, a strong indicator of how conservative a particular justice may be.

Other members of the Court's conservative bloc maintain close relationships with the Society. On February 4, 2022 Justice Neil Gorsuch headlined the Federalist Society's Eighth

---

[127] Berardino, Mike, and Ann E. Marimow. "Justice Thomas Defends the Supreme Court's Independence and Warns of 'Destroying Our Institutions'." WP Company, September 17, 2021. https://www.washingtonpost.com/politics/courts_law/justice-clarence-thomas/2021/09/16/d2ddc1ba-1714-11ec-a5e5-ceecb895922f_story.html.

[128] Segal, *The Supreme Court and the Attitudinal Model Revisited*.

[129] Martin, Andrew D. and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. https://mqscores.lsa.umich.edu/measures.php.10:134-153.

[130] https://ballotpedia.org/Clarence_Thomas_(Supreme_Court)

Annual Florida Chapters Conference along with former Vice President Mike Pence, and Florida Governor Ron DeSantis. Gorsuch's remarks were scheduled for a banquet which was closed to the press. Other events scheduled during this conference were a "Fireside Chat" between Governor DeSantis and Trump Press Secretary Kaleigh McEnany, and panels on redistricting, the (at the time) potential overturning of *Roe v. Wade* and the role of federalism in preventing government overreach. While it's worth noting that Gorsuch did not sit on any of those panels, they all pertain to issues that the Supreme Court is hearing or has heard cases on in recent months, with more cases pending. In delivering his remarks he might not even have touched on the subjects of those panels or signal his opinion on them one way or another. However, there was no transparency as to what Justice Gorsuch said at this partisan ticketed event because the press banned from only the events which Gorsuch participated.[131]

Chair of Legal Ethics of the university of Houston Law Center, Renee Knake Jefferson, summarized, "the public doesn't know if Justice Gorsuch is going to disclose anything that would give some sort of indication about how he's going to rule on a case. And so whether or not he does that, you have a public perception problem."[132] The optics beg incredulity, and the perception itself is more than sufficient to feed the public mistrust of the Court.

Justices regularly attend events and conferences that are overtly political, but there are examples that strain credulity. 28 U.S.C. 455 requires that "a judge shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned."[133] Is this expectation

---

[131] Lemongello, Steven. "Reporters Barred from Gorsuch's Appearance at Orlando Federalist Society Conference." Orlando Sentinel, February 2, 2022. https://www.orlandosentinel.com/politics/os-ne-gorsuch-federalist-conference-orlando-20220202-eykyvlpkxje4fdb4qldok6fnsi-story.html.

[132] Alfaro, Mariana. https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-supreme-court/

[133] 28 U.S.C. 455, *Judicial Disqualification in the Federal Appellate Courts*

at all enforceable when polarization is so high there is no overlap between what "reasonable" people on the left and right might even agree on. What other recourse could there possibly be?

As far as convincing the public that the Court is apolitical—attempts by the conservative Justices are proving insufficient. In September 2021, Gallup recorded a record low for approval of the Supreme Court at 40%, down from 49% only two months before (Figure 1). A record 37% of respondents believe that that the court is too conservative.[134]

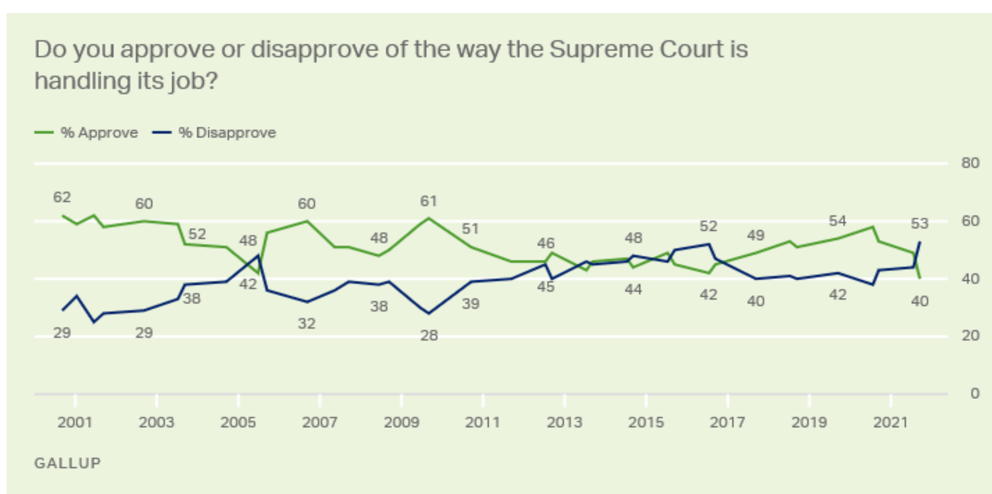

Figure 1

Like his fellow justices, Chief Justice Roberts has also made public statements pertaining to the perception of the court saying, "[w]hile many advocates on the left and right would like a Court that promotes their agenda, I do not want that and neither do the American people. What we must have, what our legal system demands, is a fair and unbiased umpire, one who calls the game according to the existing rules and does so competently and honestly every day. This is the American ideal of law."[135] The more the public perceives the conservative Roberts as a "swing

[134] Jones, Jeffrey M. "Approval of U.S. Supreme Court down to 40%, a New Low."
[135] Castillejos-Aragón, Monica. *The Roberts Court: An Unconventional 2020 U.S. Supreme Court Term*. Konrad Adenauer Stiftung, 2020, http://www.jstor.org/stable/resrep28909. 1.

vote", or at least demonstrating confidence in his rulings has improved as has his overall approval rating.

Do you approve or disapprove of the way John Roberts is handling his job as chief justice of the U.S. Supreme Court?

	Approve	Disapprove	No opinion
	%	%	%
2021 Dec 1-16	60	34	6
2013 Sep 5-8	55	34	11
2010 Jul 27-Aug 1	48	27	25

GALLUP

Figure 2

What this suggests is that when the public can find recurrent evidence that a justice is willing to buck expectations, they are more likely to be considered impartial, suggesting that impartiality is perhaps favored by the majority of the public above being a reliably partisan vote.

That perception and boost in confidence Roberts seemed to enjoy, might just be reflective of the public being lulled into a false sense of security that the court has enough capacity to withstand real assaults from the far right. Robert's words can't be taken to be reflective of anyone's feelings but his own, and his tone of moderation lacks real influence when the 6-3 conservative majority does not rely on his swing vote to achieve its ends. Could Robert's appeals to neutrality and lauding of judicial impartiality simply exist to provide cover for the practical reality of a deeply biased and influenced court? Surely Roberts is acutely aware of public perception and a need to maintain as favorable or a reputation as possible.

Public perception is not as important as the practical reality of how the court might rule, but again, perception or a lack of public trust speaks to the larger issue of faith in the judiciary as a whole and how critical it is to the acknowledging the authority of the court and the public's willingness to recognize and abiding by its rulings.

Response from the Left

The Federalist Society was founded with the intention of being an equalizing force; an opportunity for under-represented law students to counter the perceived hegemony of liberal thought in law schools. Now, 40 years on, there’s little chance any of the founders could have imagined just how successful the Society would become, nor could they have anticipated the inability of the Left to mobilize an effective counterweight to the Federalist Society model. True, liberal thought is still the majority ideology on Law School campuses and for academic circles across the country. A 2018 study found that only 15 % of law school professors compared to 35% of practicing lawyers are conservative.[136] With that being said, the Federalist Society’s power has never come purely from its number of members nor its impressive growth. Rather, it is the strategic and organizational effectiveness of being a PEN, capable of mobilizing and moving amongst the highest offices in the land with no need to hide its intentions under some veil of impartiality or legal neutrality. At this point, the Society has no need to hide its intentions behind anything other than the thinnest veils of alleged neutrality or impartiality. Simply put, the Federalist Society is peerless in the reach of its influence, but this is not to say that there has been no effort from the Left to match its effectiveness.

Ascendent on the Left is the American Constitution Society (ACS). Founded in 1999, the ACS’ primary and stated objective was to mold itself after the Federalist Society’s success. Currently, the ACS boasts a progressive network of over 45,000 members across 250 law school and lawyer chapters.[137] When visiting the ACS’s “About Us” it announces its progressive bonafides and the fact that its members “interpret the Constitution based on its text and against

[136] Bonica, Adam and Chilton, Adam and Rozema, Kyle and Sen, Maya. “The Legal Academy's Ideological Uniformity” (November 17, 2017) Northwestern Public Law Research Paper No. 17-12. 20.
[137] https://www.acslaw.org/about-us/year-in-review/2021-annual-report/our-work/

the backdrop of history and lived experience;"[138] a decidedly non-originalist method. Like the Federalist Society the ACS has enjoyed support from high profile speakers and members such as Ruth Bader Ginsburg, Hilary Clinton, Eric Holder and Harvard's Laurence Tribe.[139] Unlike the Federalist Society, there is no such thing as an ACS-vetted judge on the Supreme Court or an open-air relationship and collaboration between the ACS and the current or past Democratic presidential administrations.

While the ACS expands its footprint, one enormous hurdle comes not just from the simple fact that it is younger by decades[140] and has fewer members, but from financial realities. In 2016 ACS took in $6.5 million compared to the Federalist Society's $26.7 million. While the ACS does take in organizational donations, going head-to-head with the conservative donor network and the Kochtopus is a nearly insurmountable challenge. A conservative donor can see the fruits of the Federalist Society as there are federal courts with many Federalist Society member Judges, conversely there so no such thing as an ACS judge on the federal or Supreme Court.[141] The ACS's relative youth and funding disparity represent significant challenges, but as Professor Evan Mandery highlighted in a piece for Politico, the ACS' greatest challenge to mirroring the Federalist Society's success is… originalism.[142] As Mandery puts it;

> The Federalists' mantras are succinct and understandable: The law should be neutral. It is the duty of the judiciary to say what the law *is*, not what it should be. Whatever its theoretical weaknesses, says Columbia Law School's Jamal Greene, "originalism's

---

[138] https://www.acslaw.org/about-us/

[139] Carter, Terry. "Herding Liberals: A New But Growing Legal Group Seeks to Counter the Influence of the Conservative Federalist Society." *ABA Journal* 89, no. 12 (2003): 50–55. http://www.jstor.org/stable/27842886. (53)

[140] Fishkin, Joseph, and David E. Pozen. "Asymmetric Constitutional Hardball." *Columbia Law Review* 118, no. 3 (2018): 915–82. https://www.jstor.org/stable/26397699. (956)

[141] Mandery, Evan, et. all. "Why There's No Liberal Federalist Society." POLITICO Magazine, January 23, 2019. https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033/.

[142] Ibid.

simplicity is one of its chief selling points." And in the abstract, it's widely popular: In one study by Greene and his colleagues, 92 percent of people expressed support for the idea that a good Supreme Court judge should "uphold the values of those who wrote our Constitution two hundred years ago."[143]

Where is the progressive hook? What is the Left's answer to Originalism? Ultimately, the Left does not put forward a sufficient enough counter-method to have the recognition and acceptance of "originalism" as an ideology. The idea that the Constitution is a living document and open to interpretation is as close to a unifying principle as any, but as a concept it is too broad to be a roadmap or theory for *how* to interpret the Constitution.[144] Originalism, for all its faults provides a *why* and a *how,* which has greatly contributed to its popularity and practically universal acceptance by the conservative movement.

While the ACS may seem like an inevitable response to the Federalist Society and it's successful organization as a PEN, countering the success and the ultimate legacy of the Federalist Society does not lie in competing by the same rulebook or methodology just asymmetrically from the left, but instead by finding a way to make polarization and overt political affiliation *less* attractive to potential legal appointments, not a foregone conclusion or a precondition of a career on the federal bench or Supreme Court. Rather, a stronger ACS is not the best way to re-balance the court, but instead a greater hesitancy or inverse incentive for jurists to align with *any* overtly partisan organization.

---

[143] Ibid.

[144] Brennan, William J. *The Constitution of the United States: Contemporary Ratification*. Washington, D.C.: Georgetown University, 1985.

Proposed Reforms

The Federalist Society's role in crafting a coherent, and enduring conservative wing of the judicial branch and the majority of the Supreme Court is undeniable. While that alone is cause for concern, perhaps more worrisome is the fact that the Federalist Society has also made such significant headway in blurring the lines between the Executive branch and the Judiciary during Republican administrations. The Trump administration, in particular, demonstrated just how much access and influence the Federalist Society can have with a willing ally in the oval office. Given the effectiveness of the Federalist Society in establishing itself in the mechanisms of the legislative and Executive branches what recourse or recourses are available or theoretically possible to lessen or offset its undue influence?

The issue of undue influence on the courts is of particular interest to liberal and progressive groups at the moment due to the fact that the majority on the Court currently strongly favors conservative ideologies and has such close and productive ties to the Federalist Society. That is true for the current Trump-Roberts Court, but might not always be the case. Undue influence from either end of the political spectrum should be a long-term issue for all citizens so that as time passes and political trends ebb and flow the public can retain a degree of confidence that, politics aside, the court does act as an "unbiased umpire."

Reforms to the Supreme Court are constantly proposed to address every sort of perceived imbalance on the court, but those proposals are louder when the Court is perceived to have to great of an ideological tilt. Many of these reforms could go a long way in declawing the Society, or, at the very least transform it from king-maker, back to mere influence peddler. Most dramatically, they could ensure a more even number of appointments from both parties and prevent the brinksmanship that the Senate has displayed in the nomination process. Beyond

addressing the relatively limited concern of the influence of one partisan organization, these proposed reforms could extend a protection to the court that goes beyond partisan angling, putting mechanisms in place that act as buoys to relative neutrality.

A significant challenge to actual judicial reform is the lack of political appetite to act when the Court is not a top-of-mind flashpoint for the public. Whatever party might try to take action, it's likely that the opposing party would seize on it and try to block that reform through whatever means are available to them. That doesn't mean that there aren't realistic potential reforms that shouldn't be entertained or pursued. Two such suggestions would be changing the number of justices on the court and imposing term limits. Term limits, in particular, are particularly attractive for a number of reasons.

1. Term Limits

Some academics and legislators might dismiss this out of hand as not permitted by the Constitution, a range of legal scholars say, 'no.' Levinson believe the language in Article III, which prescribes, "the judges, both of the Superior and Inferior Courts, shall hold their offices during good behavior,"[145] is more than sufficiently vague to be open to good faith interpretation, and that it could mean, "whatever their term in service."[146] Additionally, Levinson, who is well aware of the political reality of courts points out that the idea of term limits is supported by none other than Federalist Society co-founder Steven Calabresi. As Levinson puts it, "political liberals like myself and conservatives like Calabresi are in strong agreement about the pernicious consequences of a lifetime appointment."[147]

---

[145] U.S. Const. art. III.
[146] Levinson, Sanford. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*. Oxford: Oxford University Press, 2008.
[147] Ibid.

For the Originalists like Calabresi, it's also worth considering the intent of the founders when they crafted the Good Behavior clause. In the late 18th century, there was no expectation for any politician or jurist to stay in a position for life, and if they did that life would have the natural barrier of an 18th century life-span. In Federalist Paper No. 79 Hamilton himself thought lifetime appointments would be naturally limited because, "few there are who outlive the season of intellectual vigor."[148] And moreover, Hamilton points out that while one or two judges may exceed that 'season of intellectual vigor', "how improbable it is that any considerable portion of the bench, whether more or less numerous, should be in such a situation at the same time?"[149] That was largely true in 1789… but in 2022? Not improbable at all. Judges are appointed younger and live far longer.

Roger Cramton likewise believes a statutory solution is possible, but suggests proposes another approach wherein the President could nominate up to one Justice per term of Congress. That Justice would serve an 18-year term on the Supreme Court, followed by a "lifetime service on a lower Article III court"[150], thus fulfilling every requirement of the Good Behavior Clause. He explains;

> the fundamental purpose of the Good Behavior Clause was to ensure judicial independence from control by the political branches of the federal government. An eighteen-year term of service free from any control by the executive and legislative branches would protect judicial independence as well as the system of life tenure does. And the elimination of the strategic behavior encouraged by the current system would provide more protection against improper influence by Justices, Presidents and Senators

---

[148] Federalist Paper 79. https://avalon.law.yale.edu/18th_century/fed79.asp

[149] Ibid. 79.

[150] Cramton, Roger C. "Reforming the Supreme Court." *California Law Review* 95 (2007): 1313–34. http://www.jstor.org/stable/20439154. 1324.

> than is the case now. The need for legislation to rectify the problems created by life tenure is becoming generally recognized and is long overdue.[151]

Cramton's remedy is echoed in Calabresi's term limit proposal, which concurs with an 18-year term. Additionally, Calabresi agrees that while term-limits are a goal on the Supreme Court bench, the nature of a lifetime appointment does not necessarily demand that the appointment specifically be filling a Supreme Court seat. While Cramton proposes statutory reform, Calabresi and Lindgren believe that the 18-year term model must be achieved by constitutional amendment, if it cannot be achieved by pro-actively incentivizing justices to more willingly retire after a specific term.[152] Interestingly enough, while Cramton's proposed term limits seek to ameliorate the creep of an overly conservative court, Calabresi and Lindgren argue that term limits are a fundamentally conservative principle to be pursued, saying;

> We recommend a Burkean, conservative revolution, whereby the country recommits itself by constitutional amendment to the tenure practices that held for Supreme Court Justices for most of our history. The United States Supreme Court ought not to become a gerontocracy like the leadership cadre of the Chinese Communist Party. It is high time that we imposed a reasonable system of term limits on the Justices of the U.S. Supreme Court.[153]

Beyond the benefits outlined by Cramton, Levinson, and Calabresi and Lindgren term limits for Supreme Court Justices achieves other important ends. It could lessen the extreme political pressure put on nominees during the appointment process by de-facto acknowledging the practical reality that judges have a sort of political identity by the nature of who is

[151] Ibid. 1325.
[152] Calabresi, Steven G. and Lindgren, James T."Term Limits for the Supreme Court: Life Tenure Reconsidered." Harvard Journal of Law and Public Policy, Vol. 29, No. 3. 855, 876.
[153] Ibid. 876.

nominating them and when they are nominated. This process could lower the overall heated and contentious nomination and hearing process which goes a long way to exacerbating the polarized political climate. It doesn't go so far as the overtly political route of potentially electing federal judges, and forcing them to run for office or finance a campaign, etc. continuing to insulate them from the quotidian of political life.

Additionally, imposing term limits also takes fraught "timed" retirements largely off the table. When a justice chooses to retire, it stands to reason that they would opt to retire during a presidential administration that will fill their seat with a like-minded replacement. Justices who hang on to their seats too long challenge the very nature mortality. Levinson takes aim at Justice Rehnquist deciding not to retire despite his advanced age and failing health, saying he demonstrated an, "egotistic, narcissism in putting his own all-to-human desire to retain his office ahead of the interests of the country."[154] Also, while Levinson's argument predates Justice Ginsburg's death, it's worth noting that had his recommended 18-year term limits been in effect, Justice Ginsburg would have been obligated to retire in 2011, in the middle of the Obama administration. She would have been replaced by a relatively progressive jurist, rather than a replacement who consolidated the conservative power shift of the court, likely for years to come. While it's likely the current court would still reflect a conservative majority, the long-standing ideological balance of the court would have been somewhat preserved.

While that sort of conjecture is useful in helping illustrate how it takes a given judges own self-interest or bias out of the equation, the equalizing nature of elections would march on, transferring Executive and Legislative power from cycle to cycle with no perfect way to ordain legal outcomes for either party in perpetuity.

---

[154] Levinson. *Our Undemocratic Constitution*.

In theory, this sort of dispassionate term-driven court could be an attractive bi-partisan solution as it reduces the stakes of appointments, shortens terms for all justices (conservative or liberal), and increases turnover. However, the reality is conservatives know they have designed a more conservative court, and power once achieved, is never relinquished willingly. Due to the intractable nature of political gridlock both methods proposed to achieve term limits, statutory and constitutional amendment, seem like, at best, sound theoretical exorcises rather than practical solutions in the immediate future.

2. Expanding the Court

In his work concerning potential reforms to the Supreme court, Daniel Hemel addresses the assertion that politicians often wait for critical-mass stressors to occur before theorizing, let alone seriously proposing structural changes to the court. He examines the claims that the current institutional organization and appointment process has created a "crisis" in public confidence, specifically rooted in the measurable "decline in public confidence, contentious confirmation hearings, polarized voting patterns on the court, uneven allocation of appointments between the political parties, and increasing tenure and age of the justices."[155] These factors lending themselves to a "supreme gerontocracy," which is too isolated from public opinion to make practical rulings that effect the day-to-day lives of the modern electorate.[156]

While ultimately, Hemel rejects the crisis premise, he does favor structural changes that would almost certainly increase the number of sitting justices on the Court, without the political baggage of the traditional definition of court-packing. Hemel's proposal would "decouple"

[155] Hemel, Daniel. "Can Structural Changes Fix the Supreme Court?" *The Journal of Economic Perspectives* 35, no. 1 (2021): 119–42. https://www.jstor.org/stable/27008017. 120.
[156] Ibid. 120.

appointments from vacancies. Hemel describes the process as such, "(e)ach president would have the opportunity to appoint 2 justices at the beginning of each term, regardless of how many vacancies have occurred or will occur."[157] He argues that such a solution would indeed have a modest effect on the size of the Court given current tenure patterns. Since justices would likely join at a faster rate than they would depart, there would be a few years of moderate growth until the numbers leveled out, likely in the mid-teens. Ultimately, Hemel believes that such a process would correct eras of profound imbalance, reduce the "macabre obsession with the health of individual older justices," lessen the clamor for strategic retirements and reduce the tension of the fraught appointment and confirmation process.[158] That last claim is hard to imagine, but if the nomination process became as routine as merely any other another routine political nomination or appointment at the beginning of a given administration, it's within the realm of possibility.

A similar version of Hemel's expanding the court is articulated by Daniel Epps and Ganesh Sitaramen via a method they call a "balanced bench." Epps and Sitaramen's version of an expanded court would be composed of "an equal number of Democratic-and Republican-selected judges." Their version differs with an additional justice whom is selected unanimously by the judges who sit on the court via presidential appointment. While they admit the logistical challenges of implementing reform, they contend that either a version of a "Supreme Court Lottery", or their description of a balanced bench would be, "a major improvement of the status quo."[159] Epps and Sitaramen's proposal suggests that neutralizing or lessening the influence of

---

[157] Ibid. 136.
[158] Ibid. 137.
[159] Epps, Daniel, and Ganesh Sitaraman. "How to Save the Supreme Court." Yale Law Journal 129: 148–206. 2019. 193.

the Society does not need to come from simply mirroring the Society's strategies by the Left, but rather by pursuing institutional safeguards to promote balance.

The greatest challenge to any type of reform is the governmental process. If citizens demand a judiciary that relies on a constitutional interpretation and philosophy that better represents the common interest and the neutral principles of law, perhaps there is no greater potential for reform than outside of governmental means. What the Federalist Society and to a far lesser extent the ACS recognize is the value of network and citizen activation. While founded in lofty halls, the origins of the Federalist Society are fundamentally a grassroot effort to address a perceived systemic imbalance. True, it was a grassroot issue that piqued the interest and investment of wealthy conservative mega-donors, but that's a testimony to how effective organizing and mobilizing intelligence and academic strategy can be. For those who had the ability to imagine an effective conservative counter-network taking on the liberal hegemony of American Law schools, time has proved them correct many times over.

When the rule of the day was liberal dominance and the response was a conservative counter-network, could it hold that since the rule of today is hyper-partisanship, the response should be intentional hyper-neutrality? Beyond pure theory, there is no organization that fits that bill. Even conjecture about such an organization may go beyond intellectual exercise and into the realm of wishful thinking. An organization that vigorously supports bi-partisan legal theory and practice might be a pipe-dream, but that is not to say one day there might be more will and appetite for such a solution.

There are practical dangers associated with naked ideology. The realities of the modern polarized political climate are all too real, culminating in an armed, deadly insurrection on the halls of Congress. Here lies the case and desperate need for a Court that seeks to openly refute

and reject ideological purity above dispassionate interpretation of law, or full alignment with a party or partisan organization above the notion of blind justice. Here lies the need for an Executive Branch to take the threats of stoking enmity into consideration when making a lifetime appointment, and for a Legislative Branch that sees beyond the need to preserve power at all costs. If the three branches, or even one of the three, makes the gamble that its real goal is preserving ideological power over protecting the interests of the majority, representative democracy cannot hope to withstand that assault indefinitely. The elected branches have the capacity to act to prevent such a threat.

In addressing the need for structural reform of the Supreme Court, Hemel rejects the notion that the nation is crisis, but "the absence of a crisis is a terrible thing to waste," and "periods of non-emergency—instead of inviting complacency—can offer opportunities for unrushed evaluation of institutional reforms that reduce the risk of a true crisis."[160] I'd push Hemel's assessment further. While the structures and institutions of government have held over the tumult of the past several years, the constant brinksmanship of hyper-partisanship is a crisis of its own kind. The time for intentional, deliberate reform is now. A crisis, as Hemel seems to define it, can't be as narrowly defined by some textbook definition of a Constitutional Crisis. If we wait for that to spur practical changes, the time may have past, and what once could have been an achievable goal of a more balanced court, might be lost to the deliberate and sustained efforts of one ideological wing, and one particularly influential organization, reshaping the judiciary in its own image.

If there are earnest efforts to work towards more neutral principles, both enacting term limits and expanding the court could each serve that goal. Apart from the simple fact that both

---

[160] Hemel. "Can Structural Changes…" 138.

parties have embraced these theoretical changes at different times, if enacted they would go a long way to give the public more confidence that members of the Supreme Court are not a guaranteed lifetime partisan vote. Jurists would likely feel more compelled to honor precedent as they might be dissuaded by the upheaval that could occur from dramatic reform from administration to administration.

The proposed reforms discussed in this thesis remove the challenge of identifying jurists who have no pre-existing bias or overt ideological motivations. They go a long way to recognizing the nature of the men and women of the judiciary as they are, undue biases and all, and create possible paths towards a more balanced judiciary. This more balanced Court could better absorb the impacts of third-party influence and dilute the decades of ideological skewing created by the Federalist Society.

Conclusion

This thesis has demonstrated a clear relationship between the long-term ideological and institutional influence of the Federalist Society and the U.S. Supreme Court. While the reasons that this is a significant relationship that is worthy of discussion and study are many, perhaps the most significant reasons can be distilled to the fundamental threat posed to the execution of equal protection under the law and an erosion of democratic norms, particularly as seen during Robert's Court, during and since the Trump administration.

It is by design and of critical importance that the Supreme Court exists outside of the dynamics and pressures of ordinary politics and public opinion. Its purpose is to protect the rule of law beyond electoral trends or whims. It is a critical failsafe that has grown in influence and authority since its inception due in large part to the practical implementation of judicial review. Conservatives and liberals alike have long agreed on its importance, particularly in regard to its function as a means to preserve and protect the separation of powers. While many of its rulings are often nearly unanimous and made to little notice or fanfare, merely carrying out the business of the law, some cases prove so consequential as to redefine day-to-day life for millions of Americans. Its popularity ebbs and flows with both ends of the ideological spectrum, often as a result of particularly compelling or controversial decisions, with each side celebrating friendly rulings and protesting disappointments in turn. Such is the nature of a Court that is populated by members appointed by presidents of our two entrenched, increasingly polarized parties.

The direct judicial influence and engineering of the Federalist Society has been transformative for the foreseeable future, and perhaps until there is an earnest discussion and good-faith attempt of, and good faith attempt at, judicial reform, whether by statutory or constitutional means. Beyond identifying and recommending conservative jurists to Republican

presidential administrations, the Federalist Society's operations as a political epistemic network succeeds, after such appointments, in delivering conservative rulings and subsequent policy outcomes. Significantly, it does not ensure *every* outcome will please the entire conservative community (due to the spectrum of opinions especially concerning social issues), but the rather outcomes that matter the *most* to protecting conservative ideology. With the fall of *Roe*, it is clear that even long-standing precedents that are supported by the majority of Americans could be overturned. The same conservative majority, handpicked by the Federalist Society and equipped with the interpretive theory of originalism could, in just a term, gut cases like *Griswold*, or *Obergefell*[161]. While those decisions capture a great deal of public attention, cases pertaining to voting rights should be monitored with the greatest urgency and attention. A motivated and empowered conservative Court could potentially transform Republican electoral fortunes for decades. For example, in the upcoming *Moore v Harper*, the Court is poised to hear a case that could transform voting access and democracy in America, potentially entrenching minoritarian, Republican control for decades. Should the Court rule as many conservatives hope they will, *Moore* could allow for greater partisan gerrymandering, remove constraints on voter suppression, overwhelm local and state election officials with burdensome bureaucratic requirements, and remove checks against election interference. [162]

August Comte is widely credited with coining the phrase "demography is destiny." This certainly reflects electoral trends in all democracies, but where that maxim is felt the deepest, and to whom that phrase is the most threatening, is to traditional conservatives who understand

---

[161] Thomas specifically calls for this in his Dobbs concurrence.

[162] Sweren-Becker, Eliza. "How the Radical 'Independent State Legislature Theory' Could Disrupt Our Elections." Brennan Center for Justice, October 24, 2022. https://www.brennancenter.org/our-work/analysis-opinion/how-radical-independent-state-legislature-theory-could-disrupt-our.

that a more diverse population often results in electoral results that favor more liberal outcomes. An erosion of voting rights or a reduction of access or to ease of voting poses a threat not simply to Democratic candidates or issues, but to the health and vitality of a pluralistic democracy as a whole. Since its inception, the Society has battled demography, trying to give a minority and outsized voice and control of the legal agenda and institutional apparatus. and perhaps even work to turn back the clock on what a majority of Americans might perceive as progress.

As discussed in Chapter Three mentioned earlier, there is ample evidence that both the conservative and liberal Justices feel the weight of public scrutiny particularly in light of the *Dobbs* ruling. Beyond Justices simply issuing statements that pay lip-service to a commitment to neutrality, some Justices have gone so far as to address the perceived issues of perception and legitimacy head-on. Without mentioning a specific case, Justice Elena Kagan recently said, "when courts become extensions of the political process, when people see them as extensions of the political process, when people see them as trying just to impose personal preferences on a society irrespective of the law, that's when there is a problem – and that's when there ought to be a problem."[163] In making these comments, Kagan not only acknowledges the rising public perception of the Court as too politicized, she agrees with the criticism, saying that perception is warranted.

There has been no time since the ratification of the Constitution that has been without political tumult and controversy, but the reality of America's deep fractures cannot be ignored or downplayed for the sake of preserving a carefully crafted illusion of neutrality. Members of America's far-right participated in an armed insurrection against the United States Congress. In

---

[163] Gerstein, Josh. "Kagan Repeats Warning That Supreme Court Is Damaging Its Legitimacy." POLITICO. Accessed October 25, 2022. https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766.

large part people participated in the assault on the capitol because they had been convinced by President Trump, and other right-wing politicians and pundits that the 2020 election was illegitimate and that there had been wide-spread and systemic fraud. None of that was true. It's likely many of the men and women pushing those falsehoods knew that it was untrue, but they said it then, and many continue to say it now. While these actions were largely not endorsed by mainstream conservatives, the scenes that played out that day demonstrated the seriousness of the polarized political forces at work and the direct threat they pose to our political systems. The outcome of the 2020 election and the subsequent legal challenges that arose demonstrated how critical the Supreme Court's role is when it must rule on issues that pertain to the democratic process. While that lesson was evident following *Bush v Gore*, it's important to see just how critical the Court is to both Democrats and Republicans in such instances when legitimacy and the peaceful transition of power is on the line. This illustrates the importance of taking the institutional health of and political character of the judiciary seriously.

The health and strength of our governmental institutions should be of interest and concern to every American. While an individual Supreme Court ruling might satisfy some and bitterly disappoint others, we should be able rest in the knowledge that the greater institution will continue to preserve and protect justice irrespective of overt political motivation, or ideological agendas. We are tasked with the responsibility to hold the Court and the rest of our governing engines to account where and when they fail, and endeavor to reduce and mitigate undue influence and the pervasiveness of mistrust and doubt. Without active participation and good-faith civic engagement, real threats to the union emerge. We are owed the outcomes we are

willing to participate in and work for, or rather, as Benjamin Franklin allegedly said upon the closing of the Philadelphia Convention, a Republic, if we can keep it.[164]

[164] Brockell, Gillian. "'a Republic, If You Can Keep It': Did Ben Franklin Really Say Impeachment Day's Favorite Quote?" The Washington Post, December 19, 2019. https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/.

Bibliography

Abraham, Henry J. *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II*. Lanham: Rowman & Littlefield Publishers, Inc., 2008.

Alfaro, Mariana. "Gorsuch to Headline GOP Lineup of Speakers at Federalist Society; Media Barred from His Speech." The Washington Post. WP Company, February 4, 2022. https://www.washingtonpost.com/politics/2022/02/04/gorsuch-federalist-society-supreme-court/.

American Constitution Society, "Our Work: ACS" December 20, 2021. https://www.acslaw.org/about-us/year-in-review/2021-annual-report/our-work/.

"A Trump Sampler: His Changing Views." The New York Times. The New York Times, May 7, 2016. https://www.nytimes.com/interactive/2016/05/08/sunday-review/a-trump-sampler-his-changing-views.html.

The Avalon Project : Federalist no 79. Accessed October 25, 2022. https://avalon.law.yale.edu/18th_century/fed79.asp.

Avery, Michael, and Danielle McLaughlin. *The Federalist Society: How Conservatives Took the Law Back from Liberals*. Nashville, TN: Vanderbilt University Press, 2013.

Benkler, Yochai, Robert Faris, and Harold Roberts. *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*. New York, NY: Oxford University Press, 2018.

Berardino, Mike, and Ann E. Marimow. "Justice Thomas Defends the Supreme Court's Independence and Warns of 'Destroying Our Institutions'." WP Company, September 17, 2021. https://www.washingtonpost.com/politics/courts_law/justice-clarence-thomas/2021/09/16/d2ddc1ba-1714-11ec-a5e5-ceecb895922f_story.html.

Bonica, Adam and Chilton, Adam and Rozema, Kyle and Sen, Maya."The Legal Academy's Ideological Uniformity" (November 17, 2017). Northwestern Public Law Research Paper No. 17-12.

Bork, Robert H. "Neutral Principles and Some First Amendment Problems." *Indiana Law Journal,* Vol. 47, Issue 1. Fall 1971.

Bork, Robert H. *The Tempting of America*. Riverside: Free Press, 2009.

Brennan, William J. *The Constitution of the United States: Contemporary Ratification*. Washington, D.C.: Georgetown University, 1985.

Brockell, Gillian. "'a Republic, If You Can Keep It': Did Ben Franklin Really Say Impeachment Day's Favorite Quote?" The Washington Post, December 19, 2019. https://www.washingtonpost.com/history/2019/12/18/republic-if-you-can-keep-it-did-ben-franklin-really-say-impeachment-days-favorite-quote/.

Buckley, William F. "Why the South Must Prevail" National Review. Vol. 4. pp. 148–49

Burke Robertson, Cassandra. "Judicial Impartiality in a Partisan Era". Florida Law Review. Vol. 70. Issue 4.

Carter, Terry. "Herding Liberals: A New But Growing Legal Group Seeks to Counter the Influence of the Conservative Federalist Society." *ABA Journal* 89, no. 12 (2003): 50–55. http://www.jstor.org/stable/27842886.

Calabresi, Steven G. *Originalism: A Quarter-Century of Debate*. Washington, DC: Regnery Pub., 2007.

Calabresi, Steven G. and Lindgren, James T., "Term Limits for the Supreme Court: Life Tenure Reconsidered." Harvard Journal of Law and Public Policy, Vol. 29, No. 3

Calabresi, Steven G., and James Lindgren. "Supreme Gerontocracy." Wall Street Journal, April 8, 2005. https://www.wsj.com/articles/SB111292087188301557.

Castillejos-Aragón, Monica. *The Roberts Court: An Unconventional 2020 U.S. Supreme Court Term*. Konrad Adenauer Stiftung, 2020, http://www.jstor.org/stable/resrep28909.

Carter, Lief H., and Thomas Frederick Burke. *Reason in Law*. Chicago: The University of Chicago Press, 2016.

Citizens United v. Federal Election Commission, 558 U.S. 310. 2010

"Clarence Thomas (Supreme Court)." Ballotpedia, n.d. https://ballotpedia.org/Clarence_Thomas_(Supreme_Court).

Cramton, Roger C. "Reforming the Supreme Court." *California Law Review* 95 (2007): 1313–34. http://www.jstor.org/stable/20439154.

Eisenhower, Dwight. "To Milton Stover". 9 October 1953. https://web.archive.org/web/20120118180711/http://www.eisenhowermemorial.org/presidential-papers/first-term/documents/460.cfm.

Everett, Burgess. "McConnell Throws down the Gauntlet: No Scalia Replacement under ObamaBur." POLITICO, February 2, 2016. https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248.

Epps, Daniel, and Ganesh Sitaraman. "How to Save the Supreme Court." Yale Law Journal 129: 148–206. 2019.

Farber, Daniel A., and Suzanna Sherry. *Desperately Seeking Certainty the Misguided Quest for Constitutional Foundations*. Chicago, IL: University of Chicago Press, 2004.

The Federalist Society. "About Us." https://fedsoc.org/about-us.

Fishkin, Joseph, and David E. Pozen. "Asymmetrical Constitutional Hardball." *Columbia Law Review* 118, no. (2018): 915–82. https://www.jstor.org/stable/26397699.

Fix the Court. "FTC Laments Two Recent Deaths in Judiciary: Irony and Ethics." news release, September 13, 2021. https://fixthecourt.com/2021/09/ftc-laments-two-recent-deaths-judiciary-irony-ethics/

Freking, Kevin, and Mark Sherman. "Trump's Impact on Courts Likely to Last Long beyond His Term." AP NEWS. Associated Press, December 26, 2020. https://apnews.com/article/joe-biden-donald-trump-mitch-mcconnell-elections-judiciary-d5807340e86d05fbc78ed50fb43c1c46.

Fuchs, Christian. "Trump and Twitter: Authoritarian-Capitalist Ideology on Social Media." In *Digital Demagogue: Authoritarian Capitalism in the Age of Trump and Twitter*, 197–257. Pluto Press, 2018. https://doi.org/10.2307/j.ctt21215dw.10. 225.

Gallup. "Supreme Court." Gallup.com. August 24, 2022. https://news.gallup.com/poll/4732/supreme-court.aspx.

Gerstein, Josh. "Kagan Repeats Warning That Supreme Court Is Damaging Its Legitimacy." POLITICO. Accessed October 25, 2022. https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766.

Goldwater, Barry M. *Conscience of a Conservative*. S.l.: General Press, 2021.

Goldwater, Barry. "Text of Goldwater Speech on Rights." The New York Times. The New York Times, June 19, 1964. https://www.nytimes.com/1964/06/19/archives/text-of-goldwater-speech-on-rights.html.

Gramlich, John. "How Trump Compares with Other Recent Presidents in Appointing Federal Judges." Pew Research Center, January 28, 2022. https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/.

Gripas, Yuri. "WSJ News Exclusive | Trump Pressed Justice Department to Go Directly to Supreme Court to Overturn Election Results." The Wall Street Journal. Dow Jones & Company, January 25, 2021. https://www.wsj.com/articles/trump-pressed-to-change-justice-department-leadership-to-boost-his-voter-fraud-claims-11611434369.

Gutowski, Stephen "NRA Membership Dues, Contributions Rebounded In 2018." *Washington Free Beacon*, May 30, 2019.

Hemel, Daniel. "Can Structural Changes Fix the Supreme Court?" *The Journal of Economic Perspectives* 35, no. 1 (2021): 119–42. https://www.jstor.org/stable/27008017.

Hollis-Brusky, Amanda. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. New York: Oxford University Press, 2019.

Jones, Jeffrey M. "Approval of U.S. Supreme Court down to 40%, a New Low." Gallup, September 21, 2022. https://news.gallup.com/poll/354908/approval-supreme-court-down-new-low.aspx.

Kirk, Russell. *The Conservative Mind*. Stellar Classics, 2018.

Kaufman, Whitley. "The Truth about Originalism." *The Pluralist* 9, no. 1 (2014): 39–54. https://doi.org/10.5406/pluralist.9.1.0039. 50.

Lee, Michael J. "The Conservative Canon and Its Uses." *Rhetoric and Public Affairs* 15, no. 1 (2012): 1–39. http://www.jstor.org/stable/41955606.

Lemongello, Steven. "Reporters Barred from Gorsuch's Appearance at Orlando Federalist Society Conference." Orlando Sentinel, February 2, 2022. https://www.orlandosentinel.com/politics/os-ne-gorsuch-federalist-conference-orlando-20220202-eykyvlpkxje4fdb4qldok6fnsi-story.html.

Levinson, Sanford. *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*. Oxford: Oxford University Press, 2008.

Llewellyn, Karl N., and Stewart Macaulay. *The Bramble Bush: On Our Law and Its Study*. New Orleans, LA: Quid Pro Books, 2016.

MacWilliams, Matthew C. "Trump 2016: Anomalous Outlier or Political Turning Point?" In *The Rise of Trump: America's Authoritarian Spring*, 31–41. Amherst College Press, 2016. http://www.jstor.org/stable/10.3998/mpub.10034322.13. 33.

Mandery, Evan, et. all. "Why There's No Liberal Federalist Society." POLITICO Magazine, January 23, 2019. https://www.politico.com/magazine/story/2019/01/23/why-theres-no-liberal-federalist-society-224033/.

Martin, Andrew and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999." *Political Analysis*. https://mqscores.lsa.umich.edu/measures.php 10:134-153.

Mayer, Jane. *Dark Money*. New York: Doubleday, 2016.

Mayer, Jane. "How Mitch McConnell Became Trump's Enabler-in-Chief." The New Yorker, April 12, 2020. https://www.newyorker.com/magazine/2020/04/20/how-mitch-mcconnell-became-trumps-enabler-in-chief.

McCloskey, Robert G., and Sanford Levinson. *The American Supreme Court*. Chicago: The University of Chicago Press, 2016.

McConnell, Mitch. *The Long Game: A Memoir*. New York, NY: Sentinel, 2019.

Millhiser, Ian. *The Agenda: How a Republican Supreme Court Is Reshaping America*. New York, NY: Columbia Global Reports, 2021.

Naylor, Brian. "Justice Amy Coney Barrett Insists That the Supreme Court's Rulings Aren't Partisan." NPR. September 13, 2021. https://www.npr.org/2021/09/13/1036597871/supreme-court-justice-amy-coney-barrett-decries-labeling-the-court-as-partisan.

O'Brien, David M. "The Politics of Professionalism: President Gerald R. Ford's Appointment of Justice John Paul Stevens," *Presidential Studies Quarterly*. Vol. 21, No. 1 (Winter, 1991), 103-126.

O'Harrow, Robert, and Shawn Boburg. "A Conservative Activist's behind-the-Scenes Campaign to Remake the Nation's Courts." The Washington Post. WP Company, May 21, 2019. https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/.

Roberts, John. *Hearings before the Committee on the Judiciary, United States Senate, 109th Congress,* U.S. Government Printing Office, 2005, pp 55-56.

Robertson, Derek. "How 'Owning the Libs' Became the GOP's Core Belief." POLITICO, March 21, 2021. https://www.politico.com/news/magazine/2021/03/21/owning-the-libs-history-trump-politics-pop-culture-477203.

Scalia, Antonin. "Originalism: The Lesser Evil," University of Cincinnati Law Review. 57 (1989): 849–865.

Scalia, Antonin. "Judicial Adherence to the Text of Our Basic Law: A Theory of Constitutional Interpretation." Speech at The Catholic University of America. October 18, 1996.

Schauer, Frederick. "Neutrality and Judicial Review." *Law and Philosophy* 22, no. 3/4 (2003): 217–40. http://www.jstor.org/stable/3505106.

Schrecker, Ellen. *The Lost Promise: American Universities in the 1960s*. Chicago, IL: The University of Chicago Press, 2021.

Schwartz, Bernard. *The Warren Court: A Retrospective*. New York: Oxford University Press, 1996.

Segal, Jeffrey Allan, and Harold J. Spaeth. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge, UK: Cambridge University Press, 2008.

Stohr, Greg. “Supreme Court's Conservatives Duck 'Big Waves' as Storms Loom.” Bloomberg, June 18, 2021. https://www.bloomberg.com/news/articles/2021-06-18/supreme-court-conservative-shift-hits-bump-with-moderate-rulings.

Stone, Geoffrey R. “Understanding Supreme Court Confirmations.” *The Supreme Court Review* 2010, no. 1 (2011): 381–467. https://doi.org/10.1086/658391.

Sunstein, Cass R., Schkade, Ellman, and Sawiki. *Are Judges Political?: An Empirical Analysis of the Federal Judiciary*. Brookings Institution Press, 2006. http://www.jstor.org/stable/10.7864/j.ctt12879t7.11. 150.

Sweren-Becker, Eliza. “How the Radical 'Independent State Legislature Theory' Could Disrupt Our Elections.” Brennan Center for Justice. https://www.brennancenter.org/our-work/analysis-opinion/how-radical-independent-state-legislature-theory-could-disrupt-our.

Teles, Steven M. *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. Princeton, NJ: Princeton University Press, 2012.

Timm, Jane C. “141 Stances on 23 Issues Donald Trump Took during His White House Bid.” NBCNews.com. NBCUniversal News Group. Accessed October 26, 2022. https://www.nbcnews.com/politics/2016-election/full-list-donald-trump-s-rapidly-changing-policy-positions-n547801.

U.S. Const. art. III.

Wechsler, Herbert. “Toward Neutral Principles of Constitutional Law.” *Harvard Law Review* 73, no. 1 (1959): 1–35. https://doi.org/10.2307/1337945.

White, Daniel. “Donald Trump: What 27 Republicans Have to Say about Him.” Time. May 18, 2016. https://time.com/4325178/donald-trump-republican-support/.

Yalof, David. "Confirmation Obfuscation: Supreme Court Confirmation Politics in a Conservative Era," Studies in Law, Politics, and Society 44 (2008): 141-172

Zhang, Sarah. “Trump's Most Trusted Adviser Is His Own Gut.” The Atlantic. Atlantic Media Company, October 1, 2021. https://www.theatlantic.com/politics/archive/2019/01/trump-follows-his-gut/580084/.

Zorza, Richard. “*The Disconnect Between the Requirements of Judicial Neutrality and Those of*

the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications." 17 Georgetown Journal of Legal Ethics, 423. 2004.