

Written Testimony

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Chairpersons Bauer and Rodriguez and distinguished members of this Commission, thank you for inviting me to submit this written testimony to the Commission. I am Chair of the Politics Department and Associate Professor of Politics at Pomona College. I have an MA and Ph.D. in Political Science from the University of California, Berkeley and a BA in Philosophy and Politics from Boston University. My research focuses on the Supreme Court and constitutional development, with a particular emphasis on how outside groups and legal movements exert influence on constitutional meaning over time. I have written two books and 11 articles on these and related topics.

I have been asked to address the impetus for the current debate over reforming the Supreme Court, the competing arguments for and against reform and to evaluate various proposals for court reform. In doing so, this testimony draws heavily from a forthcoming article in the *Missouri Law Review*, in which I was invited to reflect on these same questions.¹ That article, in turn, draws from work I have published on the politicization and polarization of the Supreme Court² as well as my September 22, 2020 testimony

¹ Amanda Hollis-Brusky. "Exhuming Brutus: Constitutional Rot & Cyclical Calls for Court Reform." *Missouri Law Review*. Vol. 86 (forthcoming)

² See, especially, Amanda Hollis-Brusky. "An Activist's Court: Political Polarization and the Roberts Court." in *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*. Eds. Zachary Courser, Eric Helland, Kenneth P. Miller. University Press of Kansas (2018); Amanda Hollis-Brusky and Celia Parry. "'In the mold of Justice Scalia': The Causes & Consequences of the Trump Judiciary." *The Forum*. Vol. 19, No. 1 (August 2021); Amanda Hollis-Brusky. *Ideas with Consequences: The Federalist Society & the Conservative Counterrevolution*. Oxford University Press, 2015; 2019.

before the Judiciary Committee of the United States House of Representatives: “Maintaining Judicial Independence and the Rule of Law: The Causes and Consequences of Court Capture.”³

Understanding the Impetus for Court Reform

Once upon a time, in the late eighteenth and early nineteenth centuries, the phrase “judicial independence” struck fear into the hearts of many Americans, especially those associated with the Anti-Federalist movement. Robert Yates, for example, writing under the pseudonym “Brutus” wrote with horror of the proposed independence of the judiciary:

[The Constitution has] made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.⁴

Brutus was not alone in sounding the alarm about the dangers of a truly independent judiciary.⁵ Thomas Jefferson, in a letter to Spencer Roane in 1819, referred to the Constitution as “a mere thing of wax in the hands of the judiciary” and warned that “it should be remembered as an axiom of eternal truth in politics that whatever power in any government is independent, is absolute also.”⁶

Alexander Hamilton, as persuader-in-chief of the constitutional ratification period, provided a rebuttal to these alarmist critiques of the proposed design for the federal judiciary. In an essay we now refer to as *The Federalist* No. 78,⁷ Hamilton vigorously defended the importance of judicial independence for the rule of law and for the integrity of our written Constitution. Hamilton emphasized that the judicial branch, precisely because of its structural independence was the only branch positioned to serve as the guardian of the Constitution. Constitutional rights and protections, Hamilton reasoned, would be safe – or at least safest given the alternatives – with a judiciary removed from public pressures.

³ Amanda Hollis-Brusky. Written Testimony before the Judiciary Committee of the United States House of Representatives. “[Maintaining Judicial Independence and the Rule of Law: The Causes and Consequences of Court Capture](#).” September 22, 2020.

⁴ Letters of Brutus. XV. Storing, 186-189.

⁵ See, e.g., Stephen B. Burbank, “The Architecture of Judicial Independence.” *Southern California Law Review*. 72 (1998-1999), at 321.

⁶ Letter from Thomas Jefferson to Spencer Roane 6 September 1819. Can be found [here](#) at Founders Archives.

⁷ Alexander Hamilton. *The Federalist* No. 78. *The Federalist Papers*. Eds. Clinton Rossiter. Mentor Books. New York, NY: 1999, pp. 432-440.

But there are caveats – significant ones – in Hamilton’s essay; caveats that many seem to have forgotten about. The judiciary had to exercise its power in a particular way, separated from and distinct from politics and from the political branches. If the courts were ever to become simply another arm of partisan politics, Hamilton warned, the consequences for liberty and for the rule of law would be frightful to contemplate.⁸ It stands to reason that were these Hamiltonian caveats to be realized, judicial independence would not only be threatened, it would also be threatening. That is, under certain conditions, judicial independence – as Brutus, Jefferson, and the Anti-Federalists feared – would, in fact, become dangerous for and destructive to the American constitutional system.

In *The Cycles of Constitutional Time*, Jack Balkin argues that we are currently witnessing the very conditions that make judicial independence potentially dangerous and destructive for our system. Collectively, Balkin refers to these conditions as constituting “constitutional rot.” Constitutional rot is a period marked by the visible and identifiable “backsliding in democratic and republican norms and institutions” that is usually indicative of the impending death of one constitutional regime and the birth of another.⁹ In the sections that follow, I give a bit more texture to some of these drivers of our current period of constitutional rot. Specifically, I examine polarization, partisanship, court capture, and the trend of increasing judicial supremacy and the finality of Supreme Court rulings as ingredients of constitutional rot.

These dynamics help explain and contextualize the sudden resurgence of calls for court reform on the left, especially in the wake of the jarring and sudden death of Justice Ruth Bader Ginsburg and the fevered battle to fill her seat just days before the 2020 presidential election.

Constitutional Rot: Structural & Political Factors¹⁰

In the 1830s, Alexis de Tocqueville observed something rather unique about the fledgling American democracy; namely, that “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”¹¹ Almost two centuries later, this observation rings truer than ever. With polarization and gridlock in Congress, individuals and organized interest groups are increasingly looking to the judicial branch to carry out their policy agendas. The Supreme Court, itself intensely divided along partisan lines, has demonstrated a willingness to play a more active, hands-

⁸ Hamilton. *The Federalist* No. 78., at 434.

⁹ Balkin, Jack. *The Cycles of Constitutional Time*. Oxford University Press. 2020., at 44-45.

¹⁰ Parts of this section originally appeared in Amanda Hollis-Brusky, “An Activist’s Court: Political Polarization and the Roberts Court” in *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*. Kansas University Press (2018).

¹¹ Alexis de Tocqueville, *Democracy in America*. Book I, Chapter XVI. Philips Bradley, ed. Knopf, New York, NY. 1945, p. 280

on role in politics. In the last decade, for example, the high court has issued divided and divisive rulings on voting rights,¹² campaign finance,¹³ gun rights,¹⁴ contraception,¹⁵ marriage equality,¹⁶ healthcare,¹⁷ immigration,¹⁸ abortion,¹⁹ and LGBTQ discrimination,²⁰ just to name a few.

As political scientists since Alexis de Tocqueville have observed, certain underlying features of our political system and our political culture invite lawyers and judges to play a significant role in policymaking in the United States. These features include a mismatch between our inherited political institutions, our political culture, and a politically selected, independent federal judiciary with the power of judicial review.

That our political institutions reflect a profound distrust and skepticism of concentrated power has been an implicit feature of our political culture. As James Madison famously wrote in *Federalist* No. 51: “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”²¹ Dividing and fragmenting power through federalism and the separation of powers, our Madisonian system of government was designed to reign in and prevent an overly active or energetic government.²² On the other hand, and in tension with this set of inherited political and constitutional structures, we have a political culture that increasingly seeks out and demands “total justice”²³ – that is, a set of attitudes that “expects and demands comprehensive governmental protections from serious harm, injustice and environmental dangers.”²⁴ In short, Americans increasingly want the government to protect them from harm – to ensure their airplanes and vehicles are safe, their food and water are not poisoned, and their toys are not harmful to children²⁵ – but the fragmented political institutions we have inherited on top of our lingering skepticism of “Big Government” make courts, not legislatures or bureaucracies, a much more appealing option for satisfying these demands.

¹² *Shelby County v. Holder*, 570 U.S. 529 (2013)

¹³ *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. 185 (2014)

¹⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010)

¹⁵ *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014)

¹⁶ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

¹⁷ *NFIB v. Sebelius*, 567 U.S. 519 (2012); *King v. Burwell*, 576 U.S. 988 (2015)

¹⁸ *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ____ (2020).

¹⁹ *June Medical Services v. Russo*, 591 U.S. ____ (2020)

²⁰ *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ____ (2018); *Bostock v. Clayton County*, 590 U.S. ____ (2020).

²¹ *The Federalist* No. 51, *The Federalist Papers*, ed. Rossiter, p. 290.

²² Robert Kagan, *Adversarial Legalism*. Cambridge, MA: Harvard University Press. 2001, pp 13-14. See also Thomas Burke, *Lawyers, Lawsuits and Litigation*. University of California Press. Berkeley, CA: 2004., at 7.

²³ See generally, Lawrence Friedman, *Total Justice* (Russel Sage, NY: 1994).

²⁴ Kagan, *Adversarial Legalism*, 15.

²⁵ Lawrence Friedman, *Law in America*. Modern Library Press, New York: NY. 2004., pp. 6-7.

Thomas Burke, building on the work of Robert A. Kagan, explains how and why this mismatch between our political structures and our political culture invites and encourages policymaking through litigation and courts:

First, courts offer activists a way to address social problems without seeming to augment the power of the state. . . Second, [policymaking through litigation] offer[s] a means of overcoming the barriers to activist government posed by the structures of the Constitution. . . activists [can] surmount the fragmented, decentralized structure of American government, which, (as its creators intended and James Madison famously boasted) makes activist government difficult.²⁶ An independent and politically selected judiciary makes litigation even more attractive to policy entrepreneurs; especially to those on the losing end of the political process. Political losers and political minorities turn to the independent judiciary (that is, unelected and unaccountable) in the hopes of persuading judges of claims that fail to command a majority in the legislature.

Because federal courts have the power of judicial review, interest groups and policy entrepreneurs routinely ask them to strike down federal and state statutes, or to overturn the rulings of administrative agencies. Additionally, the decentralized structure of the American judiciary actively encourages forum shopping; that is, policy entrepreneurs with resources testing their claims in multiple courts in the hopes of finding a sympathetic judge who is willing to creatively interpret existing statutory or constitutional language to advance their policy agenda (or to thwart the policy agenda of their political opponents).²⁷

The underlying structural and cultural features that have long invited judges and lawyers to play a role in American politics have been amplified over the past twenty years by political polarization in Congress, the rise of divided government, and alternating and uncertain party control of government. These developments in our legislative politics have further incentivized groups or movements seeking policy change to opt for a strategy of litigation over legislation, turning the Supreme Court into what I have elsewhere referred to as “an Activist’s Court.”²⁸

²⁶ Burke, *Lawyers, Lawsuits and Legal Rights* p. 7.

²⁷ Kagan, *Adversarial Legalism*, 16.

²⁸ Hollis-Brusky, Amanda. “An Activist’s Court: Political Polarization and the Roberts Court” in *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*. Kansas University Press (2018).

*Ingredients of Constitutional Rot: Political Polarization + A Partisan Court*²⁹

One of the primary features of constitutional rot, according to Balkin, is polarization: “[R]ot encourages polarization and it is exacerbated by polarization.”³⁰ Since 1980 – incidentally, the beginning of our current constitutional regime according to Jack Balkin – the ideological distance between the Democrat and Republican elites has grown at a remarkable rate.³¹ Prior to Ronald Reagan’s rise to power, there was “no meaningful gap in the median liberal-conservative scores of the two parties,” with both Democrats and Republicans in Congress occupying “every ideological niche.”³² Fast forward four decades, and there is currently no ideological overlap between the two parties in Congress. The most liberal Republican is still to the right of the most conservative Democrat, and vice-versa. Political scientists refer to this phenomenon as “political polarization.” Because, “the Supreme Court follows the election returns,” our polarized politics have produced a polarized, ideologically divided judiciary.

As regime politics theory details, because we have a politically selected judiciary, over time the courts will tend to reflect the values of the electoral coalition that dominates.³³ As Cornell Clayton and Michael Salamone write, “During the past 40 years, American politics has been dominated by a partisan regime that is at once more conservative than the New Deal regime it replaced, but also more closely divided and polarized than any in more than a century.”³⁴ Control of the White House and control of the Senate has vacillated between Republicans and Democrats since the early-1990s when the most senior associate justice was appointed to the Supreme Court. This pattern of alternating party dominance in national electoral politics, coupled with the rise of strategic retirements by judges and justices since President Clinton (that is, retiring under an ideologically compatible or same-party president),³⁵ has left us with a correspondingly divided and polarized Supreme Court.

The rise of divided government and alternating party control has also resulted in increasing gridlock and obstructionism in the federal government, which has further encouraged policy

²⁹ Parts of this section originally appear in Hollis-Brusky, Amanda. “An Activist’s Court: Political Polarization and the Roberts Court” in *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*. Kansas University Press (2018).

³⁰ Balkin, *Cycles*. at 151.

³¹ Devins, Neal and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court.” *William and Mary Law School Research Paper* NO. 9-276 (2016), 28

³² Devins and Baum 2016, 29

³³ See, e.g., Robert A. Dahl, “Decision Making and Democracy: The Supreme Court as a National Policy Maker,” *Journal of Public Law* 6 (1957): 279; and Howard Gillman, “Courts and the Politics of Partisan coalitions,” in *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, Daniel Keleman, and Keith Whittington (New York: Oxford University Press, 2008).

³⁴ Clayton, Cornell and Michael S. Salamone, “Still Crazy after all these years: The Polarized Politics of the Roberts Court Continue,” *The Forum* 12 (no. 4): 740 (2015).

³⁵ Bartels, Brandon L. “The Sources and Consequences of Polarization in the US Supreme Court,” in *American Gridlock: The Sources, Character and Impact of Political Polarization*, ed., James A. Thurber and Antoine Yoshinaka. N Cambridge University Press. New York: NY. 2015. at 179

entrepreneurs to use the courts rather than legislatures to advance their own policy agendas. Though pursuing a legal strategy to advance a policy agenda can be risky due to the unpredictable nature of judicial rulings,³⁶ and the various constraints that inhibit courts from easily enforcing broad and sweeping changes in policy,³⁷ groups are more attracted to litigation as a strategy under two primary conditions: when significant political and institutional barriers make litigation the only realistic option,³⁸ and when policy entrepreneurs want to insulate their policy gains³⁹ from shifting and uncertain electoral fortunes.⁴⁰ Both conditions currently exist.

Divided government, which occurs when one political party controls the presidency while the opposition controls at least one branch of Congress (and which has been the norm in American politics since 1989),⁴¹ erects barriers to policymaking through legislative channels. This is because divided government, particularly when coupled with ideologically distant parties, increases the number of potential veto points in the policymaking process, often requiring supermajorities to pass legislation. As Thomas Keck writes, “[O]n both the left and the right, legislative losers turn to the courts as a matter of course.”⁴² More veto points and more gridlock makes virtually every group a “legislative loser” and makes the courts a more attractive venue.⁴³ Instead of having to win the votes of majorities or supermajorities in the legislature, at the Supreme Court, one only needs to secure five votes.⁴⁴

Pursuing policy through the courts also allows policy entrepreneurs to “insulate” their victories from political enemies.⁴⁵ This is a particularly attractive option when partisan control of the legislature and the executive is in near-constant flux and turnover, as it has been since the 1980s. In the period from 1980-2015, for example, control of the presidency alternated between Democrats and Republicans four times, the Senate changed hands seven times, and the House of Representatives three times. And, as I detailed earlier, for the majority of this period, no single party had control of both houses of Congress and the presidency. This makes policy gains through the federal legislature a risky and uncertain bet.

³⁶ See generally, Kagan, *Adversarial Legalism*

³⁷ See generally, Rosenberg, *The Hollow Hope*

³⁸ See Silverstein, *Law's Allure*. See also, Burke, *Lawyers Lawsuits and Litigation*.

³⁹ See generally, Thomas F Burke, *Lawyers, Lawsuits and Legal Rights*.

⁴⁰ See, e.g., Frances Lee, *Insecure Majorities*. University of Chicago Press. 2016.

⁴¹ Tyler Hughes and Deven Carlson, “How party polarization makes the legislative process even slower when government is divided.” LSE American Politics and Policy. May 2015.

⁴² Keck, *Judicial Politics in Polarized Times*, 20.

⁴³ See also Balkin *Cycles*, pp 139-140.

⁴⁴ It is illustrative here to cite the late Associate Justice William Brennan’s famous Rule of Five: “Brennan liked to greet his new clerks each fall by asking them what they thought was the most important thing they needed to know as they began their work in his chambers. The pair of stumped novices would watch quizzically as Brennan held up five fingers. Brennan then explained that with five votes, you could accomplish anything” See Dawn Johnsen, “Justice Brennan: Legacy of a Champion.” *Michigan Law Review*, Vol 111 (6), at 1159.

⁴⁵ Burke, *Lawyers, Lawsuits...* pp 14-15

Even if one party does manage to secure unified government for a short period, as the Democrats did between 2009 and 2011, any policies passed – even major legislation like the Affordable Care Act – must be considered unstable and uncertain. When the Republicans took back the House and the Senate in the ensuing years, they voted more than fifty times to repeal or roll-back parts of the Act.⁴⁶ These efforts failed only because the Democrats maintained control of the presidency. Because courts are relatively independent from the rest of the political system, they can provide a “seemingly safer route” for policymaking and implementation than the political branches.⁴⁷ Moreover, because judges serve longer terms and create legal precedent with their rulings, judicial decisions tend to be stickier or more “path-dependent” than those in the political branches.⁴⁸

Not only is the Supreme Court more polarized than ever before, it is also more identifiably partisan than any time in the last 100 years. Since 2010, for example, the Supreme Court has been strictly divided along partisan lines, with every justice appointed by a Democratic president voting more liberally than every justice appointed by a Republican president.⁴⁹ Far from being the historical norm, this partisan divide is out of step with traditional patterns of voting and alignment on the Court.⁵⁰ For example, the Roberts Court has split or “sharply divided” (five-to-four, four-to-four, four-to-three, or three-to-two) on nearly one of every five decisions it has rendered, which is the highest rate of division of any court since the New Deal.⁵¹ This partisan split on the Court has produced divided and divisive five-to-four rulings on major issues such as gun control, health care, voting rights, campaign finance, and fair housing. As Brandon Bartels notes, a “vicious circle” exists between polarization on the Supreme Court and the nomination process, with each political party vying to either preserve (the Republicans) or dismantle (the Democrats) the first ideologically homogenous voting bloc on the Supreme Court since the Warren Court.⁵²

This identifiable pattern of partisan voting and behavior on the Supreme Court has invited politicians, scholars, and commentators to attack and attempt to delegitimize judicial rulings by noting that the judiciary is doing nothing more than enacting its preferred policy and voting on strictly partisan lines.⁵³ This has consequences for how the public views the legitimacy of the federal judiciary. Political science literature puts an exclamation point on this, demonstrating the damaging and corrosive effects

⁴⁶ See <http://www.washingtonexaminer.com/no-house-republicans-havent-voted-50-times-to-repeal-obamacare/article/2545733>

⁴⁷ Burke, *Lawyers, Lawsuits...* 15

⁴⁸ See Silverstein, *Law's Allure* pp. 63-70. See also Hollis-Brusky, *Ideas with Consequences*, pp. 149-151.

⁴⁹ Devins and Baum 2016, 7

⁵⁰ As Lawrence Baum and Neal Devins document, between 1937 and 2010, there was no clear partisan divide on the Court. Devins and Baum 2016, 22-24

⁵¹ Clayton and Salamone 2015, 745.

⁵² Bartels 2015, 172.

⁵³ See, e.g., James L. Gibson “The Legitimacy of the US Supreme Court in a Polarized Polity.” *Journal of Empirical Legal Studies* 4, No. 3 (2007).

these portrayals of the federal judiciary as “just another political institution” can have on the legitimacy of the courts.⁵⁴

Stephen Nicholson and Thomas Hansford write that the public’s perception of the Supreme Court as a “legal” versus a “political” institution is key to the public’s perception of its legitimacy.⁵⁵ James L. Gibson and Michael Nelson confirmed this finding with recent survey research. These scholars concluded that the single greatest threat to the Supreme Court’s legitimacy comes from its perceived politicization; that is, the belief that “judges are little more than ‘politicians in robes.’”⁵⁶ More recent research suggests how perceptions of a politicized judiciary can be exacerbated by high-profile and contentious judicial confirmation hearings.⁵⁷ This scholarship provides contemporary empirical support for what Alexander Hamilton knew to be true even in the eighteenth century⁵⁸: the judiciary’s power under our constitution – its very legitimacy – depends on the people seeing it as distinct from politics.

Ingredients of Constitutional Rot: A Captured Court⁵⁹

When courts become deeply involved in politics and policymaking, in addition to putting their institutional legitimacy on the line, they also run the risk of provoking some of the more pernicious features of our constitutional design. Policymaking through courts – that is, when judges become “the vanguard of policy change”⁶⁰ – can invite elite capture or minority tyranny and weaken the checks and balances built into the constitution. Policymaking through courts invites a handful of elite, unelected lawyers and judges to craft and shape policy, which in turn facilitates the kind of minority capture our Constitution was designed to guard against.

When policy entrepreneurs turn to courts instead of legislatures, they can effectively circumvent the various safeguards and constitutional veto points built into the legislative process (congressional committees, majority requirements, supermajority requirements, and the presidential veto). These veto points are designed to decelerate the legislative process, to ensure broad coalitions for governing, and to prevent smaller, energetic “factions” from capturing and dominating the process. As James Madison

⁵⁴ Gibson, James L. and Michael Nelson, “Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy.” *Journal of Empirical Legal Studies*. 14(3): 592-2017 (2017).

⁵⁵ Stephen P. Nicholson and Thomas G. Hansford, “Partisans in Robes: Party Cues and Public Acceptance of Supreme Court Decisions.” *American Journal of Political Science*. 58(3): 620-636 (2014).

⁵⁶ Gibson and Nelson 2017, at 595.

⁵⁷ Christopher Krewson and Jean R. Schroedel, “Public Views of the U.S. Supreme Court in the Aftermath of the Kavanaugh Confirmation.” *Social Science Quarterly*. 101(4) (2020).

⁵⁸ See generally, Alexander Hamilton, The Federalist No. 78.

⁵⁹ Parts of this section first appeared in my written testimony before the House Judiciary Committee. See Amanda Hollis-Brusky, Testimony before the Subcommittee on Courts, Intellectual Property and the Internet. Judiciary Committee of the United States House of Representatives. “Maintaining Judicial Independence and the Rule of Law: Examining the Causes and Consequences of Court Capture.” September 22, 2020.

⁶⁰ Balkin *Cycles*, 139.

wrote in *The Federalist* No. 10, among the “numerous advantages” of this model of government was its ability to “break and control the violence of faction” by “extending the sphere” and multiplying the number of competing voices and distinct interests involved in the process.⁶¹ These multiple veto points “foster more pluralistic legislative inputs and outputs” and prevent legislatures from acting swiftly and energetically.⁶²

Policymaking by lawyers and judges circumvents these checks, leaving policy in the hands of the few, unelected elite, which, if we follow Madison’s analysis in *Federalist* No. 10, facilitates tyranny of the minority, or elite capture:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

When it comes to judicial policymaking, the number of individuals with access to power and the “compass” within which they are placed are both incredibly small.

To make policy through the Supreme Court, for example, policy entrepreneurs simply need to secure five votes. And, while historically the justices of the Supreme Court have come from diverse backgrounds, education, and careers, we currently have a Supreme Court that is composed entirely of elite-educated lawyers (eight of whom attended Ivy League law schools) with no political or legislative experience.⁶³ As Mark Graber writes, the Supreme Court “[j]ustices tend to act on elite values because justices are almost always selected from the most affluent and highly educated stratum of Americans.”⁶⁴ In other words, Madison’s recipe for elite capture in *Federalist* No. 10 (a small number of people with uniform interests and backgrounds who can readily and easily concert to execute their plans) reads like a template for our current Supreme Court.

Moreover, because judicial policymaking requires lawyers to argue and bring cases to the courts (judges and justices cannot simply make cases and questions appear before them “as if by magic”),⁶⁵ the policymaking process is de facto captured and controlled by this unelected, elite group. This capture by

⁶¹ James Madison, *The Federalist* No. 10, p. 45. Kesler and Rossiter ed. Mentor Books. (New York: 1999)

⁶² Mark Graber, “Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order.” *Boston University Law Review*. Vol 94: 643 (2014).

⁶³ <http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-diversity-ivy-league-20141028-story.html>.

⁶⁴ Mark Graber, “The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making.” *Howard Law Journal*, Vol 56, No. 3, 664.

⁶⁵ See Charles Epp, *The Rights Revolution*. University of Chicago Press. Chicago, IL: 1998. See also Hollis-Brusky, Amanda. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. Oxford University Press. New York, NY. 2015, 2019.

lawyers has become even more pronounced over the past two decades, with the rise of the Federalist Society on the right and the American Constitution Society on the left. As I write in *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*, these two groups of lawyers are actively working to shape both the “supply side” of judicial policymaking (bringing cases, organizing litigation campaigns, providing intellectual support for judicial decisions) as well as the “demand side” (working to get particular kinds of judges and justices nominated and confirmed).⁶⁶ For reasons I explore in more depth in *Ideas*, only one of these groups has managed to actually achieve a “de-facto monopoly” on the “training, promotion and disciplining of lawyers and judges”⁶⁷: the Federalist Society for Law and Public Policy Studies. It’s worthwhile for that reason to spend some time examining how they achieved this “monopoly” as this could be perceived by the public as capture or at the very least politicization of the courts.⁶⁸

Launched in 1982 by a small group of conservative and libertarian law students at Yale Law School and the University of Chicago Law School, the Federalist Society was founded to provide an alternative to the perceived liberal orthodoxy that dominated the law school curriculum, the professoriate, and most legal institutions at the time. Almost 40 years later, the Federalist Society has moved beyond the law schools and has grown into a vast network of upwards of 70,000 conservative and libertarian lawyers, policymakers, legislators, judges, journalists, academics, and law students. The project of the Federalist Society was and is to create a conservative counter-elite – that is, a group of interconnected legal professionals dedicated to conservative judicial and policy positions – and to actively work to get these people into positions of power where they can push the law and push public policy in a conservative direction. Federalist Society co-founder Steven Calabresi described this project in our interview together:

I think my own goal for the Federalist Society has been . . . [to] have an organization that will create a network of alumni who have been shaped in a particular way. . . . [B]ecause many of our members are right of center and because they tend to be interested in public policy and politics, a lot of them go on to do jobs in government and take positions in government where they become directly involved in policymaking. So I think it’s fair to say that Federalist Society alumni who go into government have tended to push public policy in a libertarian–conservative direction.⁶⁹

As I detail in *Ideas with Consequences*, the Federalist Society has been incredibly successful in its project to “push public policy” and judging in a conservative-libertarian direction. I briefly outline below three

⁶⁶ See, Hollis-Brusky, *Ideas with Consequences*, pp. 165-175.

⁶⁷ Hollis-Brusky, *Ideas*, 152-155.

⁶⁸ This section borrows heavily from my previously published work. See Hollis-Brusky, *Ideas with Consequences*.

⁶⁹ Hollis-Brusky, *Ideas with Consequences*, 10.

ways the Federalist Society – now with a six-Justice super-majority on the Supreme Court – continues to exert its influence on the federal courts.

1. Judicial Selection⁷⁰

As several Federalist Society members said to me in our interviews together, “policy is people.” There is a recognition that in order for ideas to have consequences, you need to get people who share those ideas and provide them with access to the levers of power. When it comes to the federal courts, this is done first by populating White House counsel and those responsible for judicial selection under Republican administrations with Federalist Society network members. Don McGahn, former White House Counsel under President Trump and stalwart Federalist Society member, has openly and repeatedly referred to this as “in-sourcing” judicial selection to the Federalist Society.⁷¹ Those network members working within the administration then identify, vet, and select judges with identifiable and reliable ties to the Federalist Society network. In this way, as Federalist Society member Michael Greve put it in our interview together in 2008, the Federalist Society has “a de facto monopoly” on the process. Highlighting the contrast between the Federalist Society on the right and attempts to replicate its influence on the left, Greve emphasized, “on the left there a million ways of getting credentialed, on the political right, there’s only one way in these legal circles.”⁷²

2. Lobbying the Courts⁷³

Once Federalist Society judges are appointed to the federal bench, they can then be lobbied or helped by fellow network members who support them in pushing the law in a conservative-libertarian direction. Primarily, this involves Federalist Society members providing judges and their clerks with what I call “intellectual capital” to help them justify radically altering or reshaping longstanding constitutional frameworks. Because judges and Justices do not simply “vote” like legislators, but instead publish judicial opinions that outline their reasoning and provide justifications for their decisions, courts are uniquely susceptible to this kind of intellectual influence and lobbying. As I show in *Ideas*, in some of the most controversial decisions of the conservative counterrevolution currently underway on the

⁷⁰ See Hollis-Brusky *Ideas* pp. 153-155.

⁷¹ Barnes, Robert, “Federalist Society, White House Cooperation on Judges Paying Benefits,” *Washington Post*, November 18, 2017. It is worth noting that at a March 2020 [conference](#) on the future of judicial nominations at Princeton University that I attended, McGahn’s keynote doubled down on the synchronous relationship between the Republican Party and the Federalist Society, noting that he only hired Federalist Society members in his office and his office only considered Federalist Society judges because this credential signaled loyalty to the team.

⁷² Hollis-Brusky *Ideas* 152

⁷³ See Hollis-Brusky *Ideas* pp. 148-152.

Supreme Court, the Federalist Society network played a key role in providing the intellectual support and scaffolding for these judicial opinions.

3. Acting as a Vocal and Vigilant “Judicial Audience”⁷⁴

To have a serious and lasting influence on the direction of constitutional law and jurisprudence – a constitutional revolution – you need to appoint the right kinds of judges and Justices to the federal judiciary and then you need to make sure that, once appointed, they do not fall victim to “judicial drift” – that is, the observed tendency for some conservative Supreme Court appointees to moderate their beliefs during their tenure on the court. It has been well-documented that the Federalist Society influences the first half of this equation under Republican administrations – who gets appointed – but, as I show in *Ideas*, it also influences the second half of the equation by exerting social and psychological pressure to keep these judges faithful to their Federalist Society principles once on the bench.

This function is best understood in light of political scientist Lawrence Baum’s concept of a “judicial audience.”⁷⁵ In his book, *Judges and Their Audiences*,⁷⁶ Baum draws on research in social psychology to argue that judges, like all other people, seek approval or applause from certain social and professional groups and that the manner in which a judge decides cases and writes opinions may be influenced by certain “audiences” that the judge knows will be paying attention to his or her “performance.”⁷⁷ Moreover, Baum shows that of all the types of audiences for whom a judge might perform, “social groups and the legal community have the greatest impact on the choices of most judges.”⁷⁸ The Federalist Society for Law and Public Policy, as a social and professional network extending to all levels of the legal community, can be understood as a hybrid of both of these most influential referent groups for judges. I provide anecdotes from my interviews with Federalist Society members who describe approaching judges and Justices at Federalist Society conferences and dinners and meetings and telling them “face to face” that these judges and Justices erred. In fact, these members valued the opportunity, through the Federalist Society, to provide “direct feedback” to these judges.⁷⁹

4. The Trump Administration: “In-Sourcing” Federalist Society Influence

Whereas the pages of *Ideas with Consequences* chronicle the subtle, behind-the-scenes manner in which Federalist Society members worked in the Reagan, George H.W. Bush, and George W. Bush

⁷⁴ See Hollis-Brusky *Ideas* pp. 155-159.

⁷⁵ See also Balkin *Cycles*, pp. 118-121.

⁷⁶ Baum, Lawrence, *Judges and the Their Audiences: A Perspective on Judicial Behavior* (Princeton: Princeton University Press, 2006).

⁷⁷ Baum 2006, 24-49.

⁷⁸ Baum 2006, 118.

⁷⁹ See especially Hollis-Brusky *Ideas* p. 155, 157.

administrations to influence judicial selection and decisionmaking, the Trump administration has taken Federalist Society access and influence to a new zenith. Even before Trump was sworn into office, his campaign took the unprecedented step of releasing a list of twenty-one potential Supreme Court nominees – a list curated by multiple Federalist Society network members, including Vice President of the Federalist Society Leonard Leo – two months prior to the election with the aim of wooing partisan Republicans who might otherwise be loath to vote for Trump.⁸⁰

President Trump made good on his promise to appoint judges “in the mold of Justice Scalia,”⁸¹ repaying partisan Republicans and the Federalist Society network for their loyalty. With Federalist Society Vice President Leonard Leo at his side, advising him and helping to shepherd his nominees through confirmation, it is no overstatement to say that Trump has changed the face and the ideological balance of the federal judiciary, appointing young, conservative Federalist Society-type judges for lifetime terms.⁸²

Perhaps most consequentially, Trump has helped the Federalist Society secure a six-Justice super-majority on the Supreme Court for the first time in history. Newly minted Justice Amy Coney Barrett has joined Federalist Society brethren John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh,⁸³ to secure a super-majority voting bloc on the Supreme Court.⁸⁴ As I tell my students every year when I do my judicial process lecture, the late Justice William Brennan was reported to have told every incoming class of law clerks that the “Rule of Five” is the most important rule to learn in Supreme Court jurisprudence. Why? Because “with five votes, you could accomplish anything.”⁸⁵ Just imagine what the Federalist Society will be able to do with six.

⁸⁰ Hohmann, James. 2016. “Donald Trump urged to name Utah senator to high court.” *The Washington Post*. April 7, 2016; Malcolm, John. 2017. “How Trump Changed the Courts in 2017.” *Heritage Foundation*. December 27, 2017. Retrieved from <https://www.heritage.org/courts/commentary/how-trump-changed-the-courts-2017> (accessed December 10, 2018).

⁸¹ Adler, Jonathan. 2017. “How Scalia-esque will Donald Trump’s Supreme Court nominee be?” *The Volokh Conspiracy at The Washington Post*. January 26, 2017.

⁸² See Amanda Hollis-Brusky & Celia Parry. “‘In the mold of Justice Scalia’: The Causes & Consequences of the Trump Judiciary.” *The Forum*. Vol. 19, No. 1 (August 2021).

⁸³ Kruse, Michael. 2018. “The Weekend at Yale That Changed American Politics.” *Politico Magazine*. September/October. Retrieved from <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608> (accessed December 10, 2018); Grayer, Annie. 2018. “Brett Kavanaugh was concerned with his Federalist Society membership in 2001, emails show.” *CNN*. August 19, 2018. Retrieved from <https://www.cnn.com/2018/08/19/politics/brett-kavanaugh-federalist-society-emails/index.html> (accessed December 10, 2018).

⁸⁴ Feldman, Noah. 2018. “Democrats Can’t Stop Brett Kavanaugh’s Confirmation.” *Bloomberg*. September 4, 2018. Retrieved from <https://www.bloomberg.com/opinion/articles/2018-09-04/kavanaugh-hearings-federalist-society-is-so-close-to-victory> (accessed December 10, 2018).

⁸⁵ Stern, Seth and Stephen Wermeil. 2010. *Justice Brennan: Liberal Champion*. Houghton Mifflin Harcourt. New York, NY, at 196.

If we trust the political science on this matter – and I do – then the Federalist Society’s increasingly open ties to the Republican Party and specifically to the Trump administration is problematic from the standpoint of judicial independence and judicial legitimacy and is contributing to what Balkin calls “constitutional rot.” Recall that political scientists have shown empirically that when the public views the courts as “just another political institution,” their trust in and belief in the legitimacy of the courts suffers.⁸⁶ Whether the courts have, in fact, been captured by the Federalist Society is not what I am here to debate. Just as the standard in campaign finance law is not just “corruption” but also “the appearance of corruption,” our conversation needs to focus not just on “capture” but also on “the appearance of capture.”

The Federal Judicial Conference recognized this, too. Advisory opinion 117 sought to amend the Judicial Code of Conduct to bar sitting federal judges from participating in conferences and seminars sponsored by groups “generally viewed by the public as having adopted a consistent political or ideological point of view equivalent to the type of partisanship often found in political organizations.”⁸⁷ Though this advisory opinion was eventually withdrawn after intense opposition from Republican Senators and over 200 Republican-appointed judges, its objectives were consistent with what the political science literature tells us. When judges participate in organizations that are “generally viewed by the public as having adopted a consistent political or ideological point of view,” judicial legitimacy suffers; distrust in the courts increases, and, as Balkin reminds us, constitutional rot deepens.⁸⁸

Ingredients of Constitutional Rot: A More Supreme Court⁸⁹

Perhaps equally as pernicious for our constitutional design and the rule of law, political polarization in Congress effectively weakens the checks and balances built into the constitution by empowering judges to have the final say in the interpretation and implementation of policy. In short, it makes the Supreme Court even more supreme.

When political scientists discuss the checks and balances between the courts and Congress, they often point out that the courts do not necessarily have the final say in matters of statutory and

⁸⁶ Gibson and Nelson, “Reconsidering Positivity Theory: What Roles do Politicization, Ideological Disagreement, and Legal Realism Play in Shaping U.S. Supreme Court Legitimacy.” *Journal of Empirical Legal Studies*. 14(3): 592-2017 (2017).

⁸⁷ Hollis-Brusky, Amanda and Calvin TerBeek, “The Federalist Society Says It’s Not an Advocacy Organization, These Documents Show Otherwise,” *Politico*, August 31, 2019.

⁸⁸ See Balkin, *Cycles*, 151 (“Rot both produces and is caused by distrust in government institutions, especially the courts.”)

⁸⁹ Parts of this section originally appear in Hollis-Brusky, Amanda. “An Activist’s Court: Political Polarization and the Roberts Court” in *Parchment Barriers: Political Polarization and the Limits of Constitutional Order*. Kansas University Press (2018).

constitutional interpretation.⁹⁰ “The governing model of congressional-Supreme Court relations,” Richard Hasen writes, “is that the branches are in dialogue on statutory interpretation: Congress writes federal statutes, the Court interprets them, and Congress has the power to overrule the Court’s interpretations.”⁹¹

If, for instance, the courts interpret a federal statute in a way Congress does not like or agree with, the latter can pass an override that revises or fixes the statute, which is what happened when the Supreme Court narrowly interpreted the statute of limitations for filing an equal pay lawsuit regarding pay discrimination under the Civil Rights Act of 1964.⁹² Congress responded by passing the Lilly Ledbetter Fair Pay Act of 2009, which clarified that the statute of limitations resets with every paycheck affected by discriminatory action.⁹³ If the courts strike down part of a statute as unconstitutional, Congress can propose a constitutional amendment to address it, as it did with the Twenty-Sixth Amendment, which overrode the Supreme Court’s decision regarding lowering the voting age in *Oregon v. Mitchell* (1970).⁹⁴ Alternatively, Congress can rewrite the statute or part of the statute so that it aligns with the court’s understanding of the Constitution.

But when political polarization results in gridlock and paralysis in Congress, its ability to “counteract” the “ambition” of the courts is severely compromised (to return to Madison’s *Federalist* 51). Two different scholars, using different methodologies, studied congressional overrides of Supreme Court decisions and reached the same conclusion: the number of congressional overrides of court decisions has dramatically declined since 1998.⁹⁵ This means that, for all intents and purposes, the Court has the final say in matters of statutory and constitutional interpretation, which has real, practical consequences for the checks and balances between the branches. As Hasen concludes, “In a highly polarized atmosphere and with Senate rules usually requiring sixty votes to change the status quo, the Court’s word on the meaning of statutes is now final almost as often as its word on constitutional interpretation.”⁹⁶

When, for example, the Supreme Court, by a five-to-four vote, struck down Section 4 (the coverage formula) of the Voting Rights Act in *Shelby County v. Holder* (2013),⁹⁷ Chief Justice John Roberts suggested in his opinion that Congress could simply update the coverage formula and make the

⁹⁰ Baum, Lawrence and Lori Hausegger, “The Supreme Court and Congress: Reconsidering the Relationship.” Miller and Barnes, ed. *Making Policy, Making Law*, p. 107

⁹¹ Hasen, Richard L. “End of the Dialogue?” *Southern California Law Review* Vol 86: 104 (2013): 205-261.

⁹² *Ledbetter v Goodyear Tire and Rubber Co*, 550 U.S. 618 (2007).

⁹³ Lilly Ledbetter Fair Pay Act of 2009. Pub. L. 111-2, S. 181

⁹⁴ *Oregon v. Mitchell*, 400 [U.S.](#) 112 (1970).

⁹⁵ See Hasen 2013 and Eskridge, William and Matthew R. Christiansen, “Congressional Overrides of Supreme Court statutory interpretation decisions 1967-2011.” *Texas Law Review*, Vol 92: 1317 (2014).

⁹⁶ Hasen 2013, 105

⁹⁷ *Shelby County v Holder*, 570 U.S. 529 (2013).

statute constitutional: “Congress may draft another formula based on current conditions . . . Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”⁹⁸ But, as all astute political observers at the time recognized, this invitation to Congress to simply “draft another formula” would not be taken up.

In the dialogue that has traditionally characterized Court-Congress relations, Congress has effectively silenced itself through polarization and gridlock and has, as a consequence, shifted the balance of power to the courts. Practically speaking, this means that the Court has the final say in matters of statutory and constitutional interpretation, which has consequences for the checks and balances between the branches. This can mean that five men – or five men and one woman – get the final say on the most significant political questions facing our country.

Conclusion

As this written testimony has illustrated, our polarized politics have led to ideologically-motivated and partisan appointments to the federal courts, invited minority capture of the policymaking process by a small group of unelected lawyers and judges, aggravated some of the more pernicious features of our constitutional design and encouraged – even rewarded – more partisan decisionmaking by the judges and Justices on the federal bench. Political science warns us that the politicization of the federal courts has grave consequences for judicial independence. The mere perception that courts are partisan and captured – whether or not we are convinced that this is an empirical reality – can cause “we the people” to call into question the very legitimacy of the federal courts and their rulings. When we couple these problematic perceptions of the judiciary with the very real fact that the word of the courts is increasingly final and increasingly supreme on account of polarization and gridlock in Congress, then it is no overstatement to say we are at an inflection point in our constitutional democracy.

It is worthwhile to recall Thomas Jefferson’s warnings in 1819 about the unique threat judicial supremacy poses for our entire constitutional system. In his letter to Spencer Roane, Jefferson warned that making the judiciary – an unelected, unaccountable branch of government – too powerful would constitute, in his words, a “*felo de se*” (suicide) of our constitutional system:

[F]or intending to establish three departments, coordinate and independent, that they might check and balance one another, it has given according to this opinion, to one of them alone the right to prescribe rules for the government of the others; and to that one too which is unelected

⁹⁸ *Shelby County v Holder*, 570 U.S. 529. Roberts, C.J. Majority, at 24.

by, and independent of, the nation.⁹⁹

Jefferson is reminding us of the dark side of judicial independence – the possibility of an unaccountable and unchecked rule by a few over the many. And, as Brutus warns, “Men,” and I’ll add women, “placed in this situation will generally soon feel themselves independent of heaven itself.”¹⁰⁰

This is why we are talking seriously about court reform. Americans are seeing the dark, dangerous, and even destructive side of judicial independence. The fevered push by Senate Republicans and President Trump to fill Ginsburg’s seat over the late Justice’s own dying wish and the desire of millions of Americans to wait until after the presidential election is exactly the kind of episode of “constitutional hardball” that has and continues to characterize our period of constitutional rot. As Balkin notes, “Rot leads to ever more aggressive rounds of constitutional hardball; it causes politicians to believe that they should risk reprisals to force a victory now before the other side has a chance to force a victory on them.”¹⁰¹

This brazen and seemingly hypocritical political move by the Republicans in power – a move that has solidified a super-majority conservative voting bloc on the Supreme Court for the GOP into the foreseeable future – was, as it turns out, an inflection point for the left. This dramatic episode has catapulted the issue of court reform onto the political agenda for Democrats. However, some scholars and leaders within the Democratic Party are urging this Commission to proceed with caution and resist the allure of “packing the court” – that is, expanding the number of seats on the Supreme Court and lower courts so that Democrats can fill them with ideologically compatible judges and Justices. As Balkin warns, “Packing the Supreme Court by increasing its membership does nothing to promote public trust in the courts or the political branches. It encourages constitutional hardball by the other side. It is likely to increase polarization.” In short, Balkin, concludes, court packing “may make liberal Democrats feel better, but it will not address the deeper causes of rot in our constitutional system.”¹⁰²

Instead, Balkin recommends four kinds of reforms that would tend to “lower the stakes” of judicial appointments, thereby deescalating the arms race the parties have been engaged in over the Supreme Court for the last decade and a half in particular: (1) Instituting regular and predictable Supreme Court appointments; (2) creating a practical equivalent of term limits for Supreme Court Justices; (3) giving the Supreme Court less control over its own docket; and (4) using sunrise provisions that will encourage bipartisan reform.¹⁰³

⁹⁹ Letter from Thomas Jefferson to Spencer Roane 6 September 1819. Can be found [here](#) at Founders Archives.

¹⁰⁰ Letters of Brutus. XV. Storing, 186-189.

¹⁰¹ Balkin, *Cycles*, pp. 151.

¹⁰² Balkin, *Cycles*. 151.

¹⁰³ Balkin, *Cycles*. 152.

The Balkin approach – one that seeks to deescalate, disarm, take down the heat – seems to follow from the analysis and drivers of the cycles of polarization and depolarization in *The Cycles of Constitutional Time*. But it also seems illustrative of the Democrats’ tendency toward unilateral disarmament, especially when it concerns the courts. On the other hand, those advocating for immediate and dramatic escalation proportional to the Garland and Ginsburg episodes, are likely to see this as another concession from Democrats to a long-gone aspiration of civility that the Republicans have decisively abandoned in the name of constitutional hardball.

I believe this Commission could and should take a slightly different approach – one that satisfies the calls from the left for a more proportional response to the Republican Party’s escalating constitutional warfare but that would still put us on the path towards de-escalation and the regularizing of Supreme Court appointments. Introducing four or six new, term-limited seats on the Supreme Court via congressional statute could achieve the long-term goals outlined by Balkin in *The Cycles of Constitutional Time* while in the short term providing restitution or restorative justice for those on the left who believe the Republicans effectively stole two seats from them. Other scholars have provided testimony as to what this might look like operationally, so I will not rehash their recommendations here. I’ll simply close by saying that maintaining the status quo is not an option, in my opinion. It will only lead to more escalation, more hardball, and exacerbate our current condition of political and constitutional rot. President Biden and the Democratic majority in Congress have the power and, I would add, the *responsibility* to put our constitutional democracy on a different path.