A Lever Reader

JOHN ROBERTS' REVOLUTION

The Supreme Court is trying to repeal the entire 20th century. Here's how it happened — and how it can be stopped.

Table of Contents

Introduction

In 2005, a U.S. Chamber of Commerce lawyer who had helped George W. Bush steal an election was nominated to be chief justice of the U.S. Supreme Court. An archconservative lauded as "the go-to lawyer for the business community," John Roberts was confirmed by a huge bipartisan Senate vote.

Since then, Roberts has been widely billed by corporate media as a thoughtful and pragmatic "moderate" earnestly fighting against other conservative justices to preserve the court's legitimacy. But as *The Lever*'s reporting has documented, this tale is a ruse.

Roberts is no victim — behind his soft-spoken persona and his sunny smile is the perpetrator of a judicial coup that has commandeered the government. This far-reaching jurisprudential revolution is repealing the 20th century and laying waste to America.

In the first of our new *Lever Reader* series, we review four aspects of the Roberts Revolution and its judicial coup:

1. **The Corporate Court**: How the Roberts Court has turned the judicial branch into a corporate weapon crushing workers, consumers, retirees, and the environment.
2. **Legalizing Corruption**: How John Roberts legalized rampant corruption, in the process building a political system that routinely delivers the extremist laws and rulings that culminated in the judicial coup.
3. **The Roe Disaster**: How the Roberts Revolution fulfilled the American right's 50-year crusade to repeal federal protections for reproductive rights — and how Democrats have refused to use their power to counter this revolution.
4. **Countering The Roberts Revolution**: How Democrats could counter the Roberts Revolution — if they decided to use their power.

Each of these sections include *The Lever*'s original reporting that tracked the rise of the Roberts Revolution and the judicial coup. We also include Q&A discussions with key experts explaining what's happening.

NOTE: Lever Readers *are free to all supporting subscribers of* The Lever. *If you are not currently a subscriber and wish to become one, please click here.*

SECTION ONE

The Corporate Court

Almost all of the media coverage of the Supreme Court is about high-profile social issues, but in truth the court is mostly dealing with business cases. Under John Roberts, the court has methodically used those cases to empower corporations to crush workers, consumers, and retirees.

Since we first launched, *The Lever* has extensively covered the court's transformation into a corporate star chamber that delivers ruling after ruling to rig the economy against the non-rich. This is all part of John Roberts' long-term plan.

Corporate Media Camouflages The Corporate Court

Supreme Court justices are being portrayed as moderate as they rig America's laws against workers and shareholders.

Jun 24, 2021 • David Sirota

Photo credit: AP Photo/J. Scott Applewhite

This week, *The New York Times* reassured liberals that when it comes to the Supreme Court, don't worry, be happy.

"The arrival of Justice Amy Coney Barrett in October seemed to create a 6-to-3 conservative juggernaut that would transform the Supreme Court," the paper declared. "Instead, judging by the 39 signed decisions in argued cases so far this term, including two major rulings on Thursday, the right side of the court is badly fractured and its liberal members are having a surprisingly good run."

The *Times* published the rosy report about this supposed "good run" in a week that saw the high court effectively legalize American corporations' profit from child slavery abroad, shield Wall Street firms from securities laws, and limit a key form of union organizing among the nation's poorest workers.

So far in this term, the court has sided with the U.S. Chamber of Commerce — the major corporate lobby group in Washington — in seven separate cases, and only defied the Chamber in two cases.

This tracks with the current court siding with the Chamber 70 percent of the time overall, according to data compiled by the Constitutional Accountability Center.

The Supreme Court Is A Corporate Star Chamber

The Supreme Court's transformation into a corporate star chamber is rarely mentioned by an elite media owned by corporations and billionaires — but it is a story *The Lever* has been reporting on since we launched.

Business-related rulings typically are not framed on a liberal-conservative continuum, and in many cases the bloc of putatively liberal justices are siding with corporations against workers, shareholders, and anyone else in society who is not rich and powerful. Indeed, two of the three aforementioned cases this week were 8-to-1 rulings.

Even the *Times* admitted that "the court's three Democratic appointees have voted with the majority 73 percent of the time in divided cases" — although the paper casts this as proof of jurisprudential moderation rather than a reflection of corporate capture or bipartisan conservatism.

A good example of this bait-and-switch — and of how the analysis of corporate influence is written out of most legal coverage these days — was the media portrayal of the recent Affordable Care Act (ACA) ruling as alleged proof that the current Court is moderate.

That ruling, which let the ACA stand, was certainly better than the alternative. But the decision was also a win for corporate power, in that it preserved a law that fortifies and subsidizes the private insurance industry.

An Emblematic Ruling Illustrates The Long Con

When Chief Justice John Roberts was appointed to the Supreme Court almost two decades ago, he was billed as the "go-to lawyer for the business community." His appointment was enthusiastically endorsed by the Chamber of Commerce, an organization he had represented as a corporate attorney.

Since then, Roberts, his fellow conservative justices, and business interests have been playing a long game to try to shield corporations from accountability — and one of this week's rulings illustrates how that game has unfolded.

Thirty years ago, casino magnate Donald Trump helped create a dangerous legal precedent that made it far harder for investors to sue Wall Street firms when those firms use fine print to mislead them with rosy financial projections and promises. In that case — which revolved around assurances that Trump's company made to investors before they lost their money — Trump secured a landmark ruling from future Supreme Court Justice Samuel Alito.

Two decades later, Goldman Sachs was telling clients in investment documents that it has "extensive procedures and controls that are designed to identify and address conflicts of interest." But then the firm was exposed for betting against the mortgage investments it was selling its clients. During a congressional hearing on the topic, Sen. Carl Levin (D-Mich.) grilled a top Goldman executive about the fact that he had pushed investments on clients that he had referred to in an email to a colleague as a "shitty deal."

Goldman investors led by Arkansas' teachers pension fund sued — and this week, the Supreme Court effectively solidified the original Trump doctrine. In an opinion written by Justice Barrett, the high court tossed out the class action lawsuit that aimed to hold Goldman accountable.

"The plaintiffs said that when they bought Goldman shares they relied upon the bank's statements about its ethical principles and internal controls against conflicts of interest, and its pledge that its 'clients' interests always come first,'" *Reuters* reported. "Goldman argued that these 'aspirational' statements were too vague and general to have had any impact on the stock price."

The Supreme Court agreed to send the case back to a lower court — delivering a huge victory to Goldman and Wall Street firms aiming to limit their exposure to shareholder lawsuits.

The ruling was the latest in a series of decisions that don't merely side with the Chamber of Commerce, but that deny basic standing to plaintiffs that bring cases against big companies. Rather than rule on the issues at hand, the high court has often either ruled that cases cannot move forward, or that lower courts must impose higher thresholds on plaintiffs that seek redress from big companies.

As the Constitutional Accountability Center put it: "Chief Justice Roberts's legacy when it comes to access-to-courts issues will be one of closing the courthouse doors as much as possible."

In this long game, the objective is to foreclose on even the possibility of justice. After all, once the courthouse doors are nailed shut, courts throughout the judicial system won't even have to decide whether to side with corporate interests — because they won't even have to hear the complaints brought by workers, shareholders, and anyone else who doesn't have political power.

John Roberts Is Following Corporate America's Long-Term Plan

When Roberts was nominated in '05, few focused on his business fealty, but he was appointed because he represented corporate clients aiming to transform the court — which is exactly what he's doing.

Jul 2, 2020 • David Sirota

This week, the Supreme Court dutifully handed another victory to the U.S. Chamber of Commerce, siding with the corporate lobbying group by invalidating the law that protected one of the nation's chief financial regulators from White House meddling. It was another step towards making the Roberts Court the most corporate-compliant judicial body in modern American history.

In the ruling, the court struck down provisions that said a president could only fire the head of the Consumer Financial Protection Bureau for cause. The decision did preserve the agency's right to exist, but as dissenting Justice Elana Kagan put it, the ruling "wipes out a feature of that agency its creators thought fundamental to its mission — a measure of independence from political pressure."

Democratic Sen. Elizabeth Warren put it more bluntly, saying the Roberts Court "just handed over more power to Wall Street's army of lawyers and lobbyists to push out a director who fights for the American people."

The result is a hypocritical standard that favors the financial industry: a corporate president can instantly fire a CFPB chairman who assesses fines against Wall Street conglomerates that bankroll his political machine, but a future progressive president is still barred from firing a Federal Reserve chairman who doles out hundreds of billions of dollars of bailouts to corporations.

The CFPB ruling exemplifies the court's sharp shift to right — a shift that relatively few even know about because media headlines about the court typically focus on social issues.

In an age when our public memory typically lasts about 15 minutes or less, even fewer seem to remember that this society-changing judicial shift is part of a longer-term plan that Roberts and his corporate allies have been methodically catalyzing for 15 years.

That may sound like hyperbole, but it is an understatement: In 2005, Roberts was nominated and appointed to the court precisely because he was seen by the business lobby as the most likely to engineer a jurisprudential shift in favor of corporations. He earned that reputation after a career in private practice representing the Chamber and the major corporate clients that he would go on to faithfully serve as chief justice.

The Lost History of A Corporate Chief Justice

If you only followed major rulings on social issues like abortion or immigration, or if you only followed Roberts' public pronouncements, you might conclude that he is a moderate justice. But as this newsletter showed last week, he has presided over a court that is a corporate star chamber. Roberts himself reflexively sides with the U.S. Chamber in most cases that the corporate lobbying group weighs in on.

That is exactly what the Chamber had hoped for way back in 2005, when Roberts was nominated to the court by President George W. Bush. In a span of just 5 years, Roberts would go from little-known corporate lawyer pitching in on the GOP's effort to pilfer the Florida 2000 election to chief justice of the country's highest court.

Weeks before Bush plucked Roberts out of obscurity, the Chamber launched what was billed as its first campaign for a Supreme Court nomination, including paid

media, grassroots outreach, and lobbying (this kind of campaigning is now routine, and powered by a well-financed GOP machine).

The *Los Angeles Times* reported that as part of its inaugural public campaign for a Supreme Court justice, the Chamber "forwarded to the White House its review of federal judges from each circuit, with ratings of each judge based on rulings that concern business."

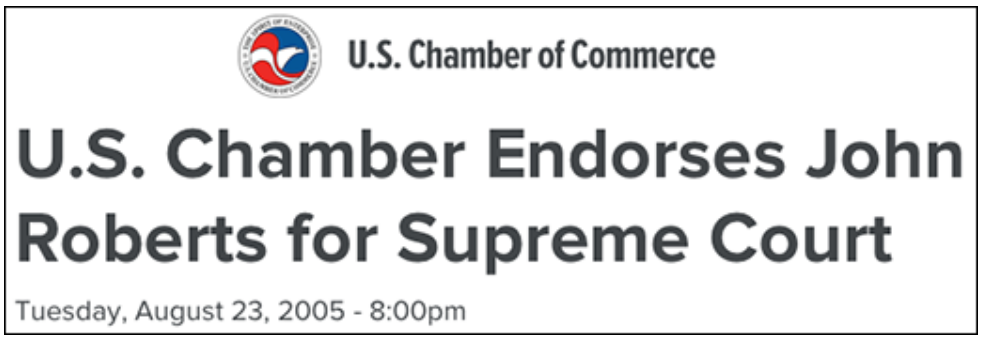
The *Times* noted that while liberals tended to focus on social issues, business groups had come to understand that the court wielded tremendous power over the economy:

> *The head of the National Assn. of Manufacturers, former Michigan Gov. John Engler, a Republican, has long argued that business should pay more attention to the courts.*
>
> *"We can't sit on the sidelines with the third branch of government" making so many decisions affecting business, he has said.*
>
> *Patrick Cleary, a vice president of the manufacturers' association, calculated that 80% of a federal judge's civil cases "concerns issues that we care about" — liability, contract and employment law.*
>
> *"All the hard-fought gains business has made in the executive and legislative branches could be lost" by the decision of a single judge, Cleary said.*

Roberts was soon nominated to the high court despite having barely two years of experience as a judge.

"He Was The Go-To Lawyer For The Business Community"

Upon Roberts' nomination, the Chamber publicly endorsed him in a glowing press release — one that notably did not mention that Roberts had represented the Chamber "in a battle over a Maine law designed to lower drug prices for state residents who lacked insurance coverage," according to the *Associated Press*.


U.S. Chamber of Commerce

U.S. Chamber Endorses John Roberts for Supreme Court

Tuesday, August 23, 2005 - 8:00pm

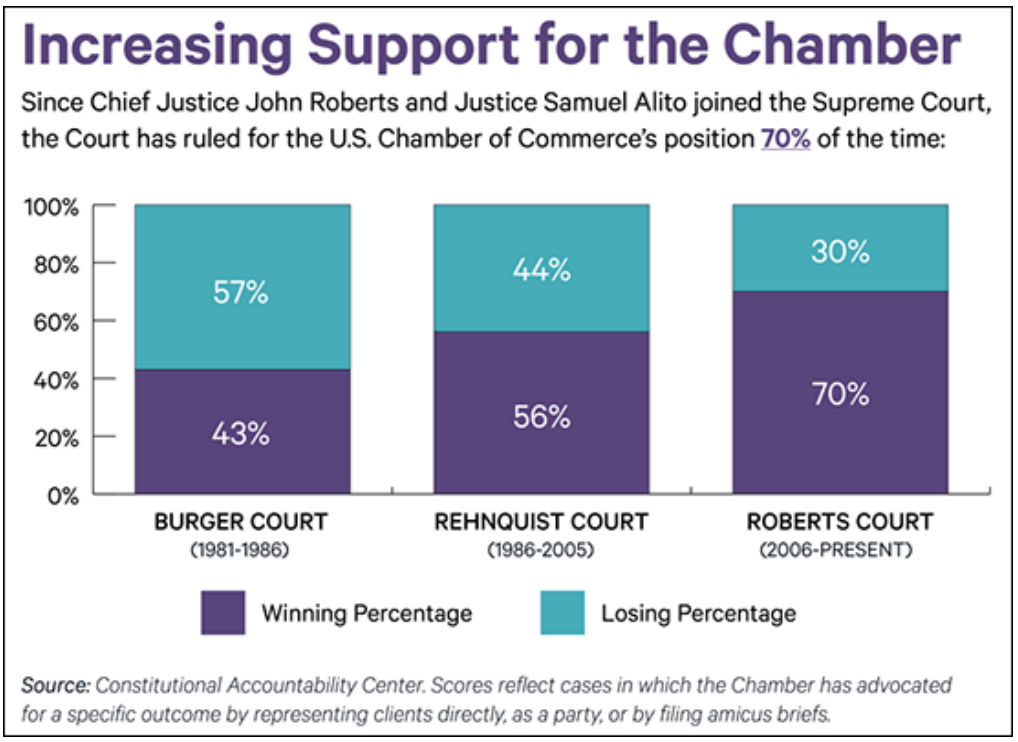
That wasn't the only Roberts client with big business before the government. In a story headlined "A Resume Strong on Business," the *Los Angeles Times* noted that "while in private practice, Roberts represented numerous companies — Chrysler Corp., Litton Systems, Toyota Motor Corp., WellPoint Health Networks, and NBC." In addition, he helped major corporations circumvent the Americans With Disability Act, the Endangered Species Act, seatbelt laws, affirmative action statutes, and antitrust strictures.

The *Times* noted that Roberts was nominated specifically because he would carry the water for corporations.

"He was the go-to lawyer for the business community. They are very comfortable with him," Washington lawyer Thomas Goldstein told the newspaper. "He definitely is a friend of the chamber. Of all the candidates, he is the one they knew best."

"Businesspeople are very enthused," added C. Boyden Gray, a former White House counsel for Republican President George H.W. Bush. "I think the reason is he understands business issues... He has been immersed in them in private practice."

Fast forward 15 years, and Roberts has delivered for his old corporate clients — his court sides with the Chamber far more than the previous two courts, which were already fairly conservative.



Of course, Roberts' understated tone and his occasional swing vote on non-corporate issues give him the patina of moderation. But it is all part of Roberts' long con. As *The Nation*'s legal analyst Elie Mystal compellingly argues, Roberts may occasionally shy away from some of the most extreme opinions of his conservative colleagues on the court, but it is only to maintain the image of judicial legitimacy as his court systematically tears up the social contract with understated-but-radical rulings that get little public attention.

"Unlike his conservative colleagues, Roberts, who is only 65 years old, understands that he will wield power for another decade or more," Mystal writes. "Roberts rules like a man who plans to be here when Donald Trump is off somewhere hawking 'America Used to Be Great' hats at the 'Donald J. Trump MOST Presidential Library and Bigly Golf Course.' His rulings do not reflect a moderation of his philosophy; they reflect an unwillingness to be caught up by the lawlessness of this moment."

Mystal rightly concludes: "John Roberts is not a failure of the conservative movement. He's not a 'squish' or a RINO. He's a rock-ribbed Republican jurist who is doing the long and patient work of defending corporate America and the white male patriarchy."

That work is not the scheme of one lone rogue jurist — it is part of a long-term blueprint crafted by the most powerful corporate forces in Washington.

The Supreme Court Just Gave Corporations A License To Steal

The courthouse door was just slammed shut on workers and retirees whose pension plans get bilked.

Jun 24, 2020 • David Sirota

In the 1987 classic film *Wall Street*, pension funds make a brief but important appearance, as Gordon Gekko hatches a plan to steal 6,000 airline workers' retirement savings. An angry Bud Fox asks Gekko: "How much is enough?" — a question warning the audience about unbridled greed and the financial vipers in our midst.

Thirty-three years after the release of *Wall Street*, it seems the U.S. Supreme Court saw the film as a guidebook rather than a cautionary tale: In a landmark ruling last week, Brett Kavanaugh and his conservative cadre undermined workers and retirees who might try to stop Gekko's scheme at their own companies.

In the process, the ruling may have short-circuited a separate case that Wall Street was fearing.

Some background: In the last two decades, class action lawsuits have forced large employers to pay out more than $6 billion in cases alleging fraud and

mismanagement of workers' retirement savings. At the same time, financial firms hired to manage that money have been skimming hundreds of billions of dollars of fees off the pension funds, while delivering subpar returns. Last week, one report found that private equity firms — which manage pension money — have raked in more than $230 billion of performance fees in 10 years, while delivering returns that did not substantially beat a low-fee stock index fund.

Preventing employers and financial firms from robbing workers' pension funds is critical, because the consequences of inaction can be devastating. The more stealing, the more fees and the more underperformance, the more pressure there is to cut millions of workers' promised benefits or have companies declare bankruptcy. In the case of public pension systems, benefits can be slashed or taxes can be raised on everyone to backfill the losses.

Enter the Supreme Court's *Thole v. U.S. Bank* ruling.

In that case, the plaintiffs were two retired employees of the bank who alleged that the company engaged in self-dealing and inappropriately invested workers' pension money in ways that allowed bank executives to pay "themselves excessive management fees... manipulate accounting rules, boost their reported incomes, inflate their stock prices, and exercise lucrative stock options to their own (and their shareholders') benefit," according to Supreme Court documents.

When the scheme produced a loss of more than $1 billion during the Great Recession, the plaintiffs sued to force U.S. Bank to pay $750 million back to the pension fund — a sum that they argued was the amount of losses that was above and beyond what a standard investment formula would have produced in the same time period.

Now here's the punchline: Rather than weighing in on the allegations of theft, Kavanaugh and the other conservative justices slammed the courthouse door on the plaintiffs and every other plaintiff like them, thereby creating the conditions for an undeterrable crime spree.

"The Court's Reasoning Allows Fiduciaries To Misuse Pension Funds"

Writing for the majority, Kavanaugh declared that "the plaintiffs themselves have no concrete stake in the lawsuit" and therefore have no standing to bring a case because they themselves did not (yet) see their own pension benefits reduced.

In other words, even if the plaintiffs can prove that the pension fund itself was illegally fleeced, the majority ruled that the plaintiffs have no right to sue unless and until they can prove their own promised retirement payments were reduced because of the wrongdoing.

This may sound superficially logical — after all, if someone's retirement benefit wasn't cut, how can they sue for losses?

But drill down a bit and you realize that in practice, the ruling creates a license for employers and financial managers to steal up to a certain level.

The court precedent effectively says that workers and retirees cannot sue for damages as long as an employer or a financial firm managing pension money steals less than an amount that totally bankrupts a pension plan to the point where current retirees get their benefits cut. They have no standing to sue, even if the theft has destabilized the pension system for the long haul.

That's like saying that if your local bank manager is slowly draining your savings account, you can't sue him until there's literally no money left in your account, because up until that point, you still at least have enough cash in there to pay your monthly bills.

"The Court's reasoning allows fiduciaries to misuse pension funds so long as the employer has a strong enough balance sheet during (or, as alleged here, because of) the misbehavior," wrote Justice Sonia Sotomayor in her dissent. "Indeed, the Court holds that the Constitution forbids retirees to remedy or prevent fiduciary breaches in federal court until their retirement plan or employer is on the brink of financial ruin."

To be sure, pension systems themselves may still be able to sue when they are bilked by third-party financial firms. The systems could still argue that they were directly harmed and therefore have standing. But the new ruling disempowers workers and retirees from taking legal matters into their own hands — which is a big deal.

In the private sector, the ruling leaves workers relying on legal action from corporate pension officials who probably aren't going to take legal action against themselves in a situation like *Thole*, which was about self-dealing. Even in cases that aren't about self-dealing, corporate pension officials also might not want to rock the boat with powerful outside investment houses that may have other relationships with their company.

In the public sector, it's a similarly bleak situation — workers whose pension funds are ripped off are now left to rely on legal action from public pension officials, some of whom may have been wined and dined by Wall Street firms, and others who may have been appointed by Wall Street-friendly politicians.

Implications For Another Case That Wall Street Fears

Sotomayor concluded that "after today's decision, about 35 million people with defined-benefit plans will be vulnerable to fiduciary misconduct."

But even beyond that, the *Thole* ruling may end up rescuing financial firms from a separate suit they've been desperately trying to halt.

In *Mayberry v. KKR*, Kentucky public workers and retirees are suing Wall Street giants including Blackstone and KKR, alleging that the companies misled their pension system about investments, and ultimately delivered losses that contributed to the financial emergency plaguing the state's retirement system. If it moves forward, the case — which was praised by the state pension system — could force the firms for the first time to let the public scrutinize high-fee hedge fund investments.

That unto itself would be a significant development, as critics say the secretive investments are ripping off investors across the country.

Wall Street firms want to keep their fee gravy train going — and they know that the only way to do that is to keep details of these black box investments concealed. And so they are doing everything they can to halt the case. Not only did they countersue the beleaguered state pension system that they already made big fees off of, they also sought to get the entire case dismissed. They are arguing that the workers do not have standing to bring the suit, because "they cannot show that their retirement benefits have been reduced because of any alleged losses caused by the hedge fund investments," as the *Lexington Herald Leader* reported.

This echoes the reasoning Kavanaugh and conservative justices on the Supreme Court just cited in dismissing the *Thole* case.

Mayberry is now pending before the Kentucky Supreme Court — and experts say that state court could now easily cite the U.S. Supreme Court precedent as its own rationale for throwing out the case.

“It would be an easy out for the Kentucky court to now take the Kavanaugh principal and deny standing to the Kentucky workers,” said Chris Tobe, a former Kentucky pension official and author of the book *Kentucky Fried Pensions*.

University of Wyoming law professor Michael Duff agreed.

“If the Kentucky Supremes were of a mind to dismiss for lack of standing they would certainly cite a recent U.S. Supreme Court opinion reaching the same outcome,” he said. “This frequently happens when unsophisticated states don’t have a great deal of their own law in areas where there is a great deal of analogous federal law.”

How Lobbyists Are Protecting The Corporate Court

Lobbying groups are fighting to protect the GOP's Supreme Court majority, which is great for business.

Dec 2, 2021 • Andrew Perez

AP Photo/J. Scott Applewhite

The U.S. Supreme Court is a corporate star chamber, and big business wants to keep it that way.

That's why corporate lobbying groups — like the Business Roundtable, the National Federation of Independent Businesses, and the U.S. Chamber of Commerce — are pressing the Biden administration not to reform the Supreme Court.

The lobbying groups warn that expanding the Supreme Court would damage perception of its legitimacy and independence. It's a ridiculous argument, given that Republicans blocked President Barack Obama from filling a Supreme Court seat in 2016, stacked the court with conservative ideologues under President Donald Trump, and confirmed Justice Amy Coney Barrett days before the 2020 election.

Some of the business organizations are even claiming that adding seats on the Supreme Court would harm the U.S. economy.

The groups' letters were filed in response to President Joe Biden's decision to set up a commission to consider court reform options, such as adding more justices as a defense against the existing corporatist supermajority. Taken together, the documents offer further proof that corporate interests will do anything to preserve a GOP-dominated court that is a boon for business, no matter how reactionary the justices may be.

So far, the Biden administration seems to be heeding some of the lobbying groups' arguments about protecting the Supreme Court's legitimacy, even as the court's conservative justices aggressively threaten abortion rights — and as Democratic senators point out that "wealthy special interests" have already captured the court.

"Harm Our Nation's Economy"

The Business Roundtable, a lobbying group that represents corporate CEOs, secured favorable headlines in 2019 when it announced that it would "push for an economy that serves all Americans," not just company shareholders.

The organization, however, has yet to do anything to fulfill that promise — and just days before the Supreme Court knocked down the Biden administration's federal COVID-19 eviction ban, the Business Roundtable argued that reforming the court isn't necessary and would actually hurt the U.S. economy.

"In our view, increasing the size of the court is not only unnecessary but would also harm our nation's economy and global competitiveness," the Business Roundtable wrote in August in a letter to the Biden administration.

"Any alteration to the Supreme Court's independence and stability — perceived or actual — would have dire economic consequences," said the organization. "If American business owners expect that their legal rights and obligations will change with the political winds, they will be less inclined to deploy capital and invest in growth and innovation. In addition, such change would weaken the conditions that make the United States such an attractive place for business and investment from around the world."

Adding seats, the Business Roundtable continued, would create "greater uncertainty and more costly litigation as lower courts struggle to sort out the court's binding instructions. This uncertainty would, in turn, place additional restraints on economic growth and innovation."

The National Federation of Independent Businesses (NFIB), a corporate lobbying group that calls itself "the voice of small business," issued a similar warning in June.

"America's small businesses depend on courts to provide stability and predictability in adjudication under the law of property, contracts, torts, insurance, employment, and other business-related matters," the NFIB wrote. "Turning federal courts, and in particular the Supreme Court of the United States, into political spoils to be seized instantly by the political party that prevails in congressional and presidential elections in a particular year would destroy the stability and predictability an effective free market economy requires."

The NFIB, however, didn't seem to be concerned about turning the federal courts into political spoils when it backed all of Trump's Supreme Court nominees, or when it opposed Obama's 2016 nominee Merrick Garland. Senate Republicans never gave Garland a vote, which allowed them to begin the process of flipping control of the court.

The Chamber, the nation's top business lobby, also demanded that the Biden commission preserve the court's independence, after previously supporting all of Trump's high court selections.

"Americans treasure the nation's dedication to the rule of law," the Chamber wrote in August. "The Supreme Court plays an important role in transforming that formal commitment into a practical reality. Interventions in its size and affairs are to a large extent absent from the historical record, and for good reason. The commission, Congress, and the country at large should not take this record for granted, nor should any citizen invite a course of action that would jeopardize the court's independence."

"Restoring The Court's Legitimacy"

Biden's court reform commission recently released draft materials debating potential Supreme Court reform options, and the documents suggest that officials will likely not recommend adding seats.

One draft document says that "the risks of court expansion are considerable, including that it could undermine the very goal of some of its proponents of restoring the court's legitimacy."

The document notes that some commission members believe that "court expansion is likely to undermine, rather than enhance, the Supreme Court's legitimacy and its role in the constitutional system, and there are significant reasons to be skeptical that expansion would serve democratic values."

However, there are good reasons to question the court's legitimacy. Republicans managed to flip the Supreme Court and build a substantial GOP majority with the support of a secretive conservative network that has been fueled by tens of millions of dollars in dark money and steered by Trump's judicial adviser, Leonard Leo.

As *The Lever* has previously reported, this conservative courts network has regularly been financed by eight-figure donations from mystery donors. The vast majority of its funding sources have never been disclosed.

Meanwhile, the Supreme Court has become a reliable bulwark for corporate interests, with justices ruling with the Chamber more than 83 percent of the time during its most recent term.

What's more, the court's newly-minted conservative supermajority recently allowed a restrictive Texas abortion law to take effect. Justices could soon allow additional limits on abortion rights — and potentially even overturn the court's landmark 1973 abortion decision, *Roe v. Wade*.

The court may also threaten environmental regulators' ability to limit carbon emissions at all amid an escalating global climate crisis.

In a recent "Captured Courts" report, Senate Majority Leader Chuck Schumer (D-N.Y.) , Sen. Debbie Stabenow (D-Mich.), and Sen. Sheldon Whitehouse (D-R.I.) wrote that "wealthy special interests have been able to successfully undermine our Constitution's promise of an independent judiciary."

Whitehouse separately wrote in a new law review journal that "the courts are becoming an arena for enacting policies by judicial decree that are too unpopular to pass through democratically elected legislatures."

Unsurprisingly, public approval of the Supreme Court has plummeted: It reached an all-time low of 40 percent approval, according to a Gallup poll released in September.

The Supreme Court Is A Corporate Star Chamber

The high court has become one of the most powerful weapons of Big Business and billionaires.

Jun 26, 2020 • David Sirota

Last week, the U.S. Supreme Court issued two commendable rulings that may have seemed off brand for a conservative judicial panel: In one case, the court prevented President Trump from deporting the children of undocumented immigrants; in another case, the court extended anti-discrimination protections to cover sexual orientation and gender identity.

Progressives rightly lauded these civil rights victories, which dominated the headlines. But amid the celebrations, the court also issued the three following rulings, which received relatively little attention:

- The court limited Securities and Exchange Commission regulators' power to punish financial firms that bilk investors.
- Justices overturned a lower court's ruling and fortified energy companies' power to steamroll environmental objections to fossil fuel infrastructure.
- The court prevented workers and retirees from suing Wall Street firms that bilk their pension systems (see this week's previous story on that here).

Once again, the high court used business cases to fortify the power of the already-powerful. I say "once again" because for all the focus on the court's rulings on important social issues, much of the justices' work is on business litigation — and in that role, the court now serves as a reliable star chamber defending corporations and the wealthy.

This is a development that is only rarely spotlighted — and it is barely part of the discourse when Supreme Court appointments are referenced in national politics. Indeed, one of the very few times corporate power became an issue in a recent Supreme Court nomination fight was when a few senators briefly asked Neil Gorsuch about his legal defense of a company's decision to fire a worker for trying to not freeze to death — but Gorsuch was confirmed anyway.

That confirmation helped the court continue to be a driving force behind the corporate takeover of our country and our democracy.

The Most Conservative Court In Modern History

Among the best ways to see the court's corporate fealty is to follow amicus briefs filed by the U.S. Chamber of Commerce, the most powerful business lobbying group in Washington.

The Chamber filed an amicus brief in all three of last week's cases — and the court fully sided with the Chamber's arguments in the fossil fuel and pension cases. In all during the current term, the Supreme Court has sided with the Chamber in 9 out of 13 cases, according to the Constitutional Accountability Center (and one of those supposed losses was the SEC case, in which the court did not comply with the Chamber's demand to fully abolish corporate punishments, but still severely limited that authority, which was a partial win for corporations).

This is part of a larger historical shift. According to the organization's 2019 report, "Since Justice Samuel Alito joined Chief Justice Roberts on the Court in 2006, the Chamber's success rate has surged: the Roberts Court has sided with the Chamber in 70 percent of its cases, diverging sharply from the Rehnquist Court (56 percent) and the Burger Court (43 percent)."

The report notes that in the last term, conservative justices followed the Chamber's demands in 77 percent of the cases in which the group filed amicus briefs. What may surprise liberals is that the four ostensibly liberal justices collectively followed the Chamber's demands almost half the time — a statistic that exemplifies how loyalty to business transcends ideology on the court.

"The Extreme, Right-Wing Leader Of An Extreme Right-Wing Majority"

Why aren't the Supreme Court's plutocratic leanings more of a story in politics? Part of it has to do with the nature of business cases — they are often esoteric and undercovered in the political media. Part of it may also have to do with how some of the business wins occur inside of cases that don't seem to be about business at all. Indeed, in a 2018 *Atlantic* report, Boston College law professor Kent Greenfield and UCLA law professor Adam Winkler argue that in cases about sports gambling, cell phone privacy, abortion, and the First Amendment, the court set new legal precedents that will likely be invoked by corporate interest to strengthen their power.

Then there is also the issue of Chief Justice John Roberts. His reputation as a bipartisan swing vote has helped deflect attention from the court's ultraconservative corporatism. But Roberts doesn't deserve that reputation.

"With the court on the precipice of a dangerous lurch rightward, polling data indicate that Democrats have a positive view of Chief Justice John Roberts, who has expressed regard for precedent and concern for the court's legitimacy, encouraging a view that he will step in to prevent partisan excess. Yet history suggests that Democrats have much to fear," wrote leaders of the advocacy group Take Back the Court in a 2019 *New York Times* op-ed.

"The chief justice is neither a swing vote among his four liberal and four conservative justices, nor a moderate," the group's leaders wrote. "Expect him to land time and again with the conservatives... The chief justice's voting record is as conservative as those of his most extreme current and former colleagues — Justices Thomas, Samuel Alito, Brett Kavanaugh, and Antonin Scalia. In all 42 split-decision cases that the chief justice has presided over involving racial minorities, immigrants, workers, and abortion, he voted for conservative outcomes 100 percent of the time."

The authors rightly conclude that far from a moderate or a centrist, Roberts "is the extreme, right-wing leader of an extreme, right-wing majority." That majority continues to use business cases to try to turn America into a full-fledged oligarchy.

Trump's Pal Just Used John Roberts' Get-Out-Of-Jail Free Card

While Roberts was being praised as a hero, his court's recent ruling just helped Wall Street giants stomp on thousands of public-sector workers and retirees in one of America's poorest states.

Jul 16, 2020 • David Sirota

Chief Justice John Roberts has created the most conservative court in modern history: In just the last few weeks, his court has helped financial firms bilk pension funds, strengthened fossil fuel companies' power to fast-track pipelines, limited the power of regulatory agencies that police Wall Street, and stealthily let Donald Trump hide his tax returns.

As a reward for Roberts' continued defense of the wealthy and powerful, much of the national media has obediently depicted him as a great hero of moderation, because he sort of seemed to snub Trump in a handful of other rulings.

The press corps is willfully covering up the Roberts Court's class war — and the cover up is happening even as the court's latest salvo is now reverberating far away from the Washington political theater out here in the actual, real world.

Indeed, one of the Supreme Court's least-noticed rulings in the last few months just helped the planet's most rapacious financial firms — and one of Donald

Trump's billionaire pals — stomp on thousands of public-sector workers and retirees in one of America's poorest states. It also helped Wall Street avoid a full public examination of schemes that fleece investors. As one industry trade publication put it: "Hedge fund managers slept a little bit easier" after the events that unfolded last week.

The Kentucky Case That Wall Street Really Feared

All of this traces back to the Supreme Court's recent *Thole* ruling, which we first reported on in June. That radical opinion — which has gone unmentioned in all the Roberts hagiographies — effectively barred retirees from suing when their employers let Wall Street firms bilk their pension funds. This was a huge win for both employers and the financial firms that drain retirement systems — and it was a victory that came at exactly the moment the SEC and FBI are sounding alarms about such firms' exorbitant fees, conflicts of interest, and secrecy.

This story could have ended there — and if you paid attention to the news (or lack thereof) you may have thought it did. However, less than six weeks after this travesty, the *Thole* ruling was just used by Kentucky judges to shut down another landmark case that Wall Street *really* feared — a case that could have forced some of the globe's most powerful financial firms to open up their secretive schemes to public scrutiny for the first time.

The Kentucky case was filed by public-sector retirees who alleged that Wall Street behemoths including KKR and The Blackstone Group misled their state pension fund into investing in "extremely high-risk, secretive, opaque, high-fee, and illiquid vehicles" that enriched the firms with excessive fees while delivering subpar returns that exacerbated the state's financial crisis. Among the named defendants was billionaire Blackstone CEO Stephen Schwarzman, a top outside adviser to President Trump.

The plaintiffs in the case argued that in order to protect the pension system, the court needed to recognize workers' standing to sue because the Kentucky pension officials who authorized the original investments would never take legal action that might spotlight their own complicity in the alleged rip-off schemes.

"The current (pension board) cannot and will not sue themselves or their alleged co-actors and any demand that they bring this suit would be a useless act," they asserted. "All (pension) trustees have been involved in the wrongdoing and will not subject themselves to suit or public exposure and scrutiny."

Preventing A Potential Pentagon Papers Moment For Wall Street

If the case went forward, KKR and Blackstone could have been compelled to turn over documents detailing all the secret fees, shell games and get-rich-quick schemes they use to profit not only off of Kentucky workers, but off of millions of public workers and retirees across the nation whose pension funds they manage. It would have been a potential Pentagon Papers moment for Schwarzman and other Wall Street billionaires.

But that's when the Kentucky Supreme Court stepped in last week to side with the Wall Street firms and shut down the case — and to do that, they relied on the Roberts Court.

In its opinion, which cited the *Thole* ruling 18 separate times, the Kentucky court asserted that the case should be thrown out because even though the Wall Street firms may have bilked the now-beleaguered pension fund, the Kentucky workers themselves had not yet seen a reduction in their promised benefits — and so therefore, the workers did not have standing to sue.

"Our decision today borrows heavily from the analysis of *Thole,*" wrote the Kentucky judges, who have their own separate, well-funded state pension system that didn't funnel money into the high-risk investments.

They noted that "the Supreme Court in *Thole* recently rejected this exact argument" that the Kentucky workers were making.

Back in Washington, none of this made any news — the press was too busy helping manufacture their saccharine fairy tale about Roberts saving the world, even as he was ruining it for millions of workers.

But despite that news blackout, you can rest assured that the most powerful people in the financial industry noticed the ruling — and are deeply grateful for a Roberts Court that lets them continue stealthily vacuuming Americans' meager retirement savings into billionaires' bank accounts.

Another Supreme Court Corporatist Would Be A Disaster

A Breyer clone would help Big Business own the court for another generation.

Jan 26, 2022 • David Sirota

Supreme Court Justice Stephen Breyer (AP Photo/Steven Senne)

Though most of the Supreme Court discourse revolves around hot-button social issues, the high court is first and foremost big business's cannon aimed squarely at the American worker and at the livable ecosystem that supports human life. The upcoming battle over Justice Stephen Breyer's replacement will only be an opportunity to start fixing this emergency if the nomination discourse, advocacy, and decision making acknowledges that this is the big judicial problem — one that has helped turn America's economy into a corporate dystopia.

On one level, Breyer reportedly retiring is welcome news because it provides a rare opportunity for lawmakers other than Republicans to put someone on the court who doesn't resemble a villain from *The Handmaid's Tale*. But with corporate America's stranglehold on policy — from health care to labor to climate — it's not enough to merely get an appointee who checks some important demographic boxes and isn't a religious zealot.

With so much of the court's day-to-day work focused on corporate cases rather than on social policy, the moment calls not merely for some younger version of Breyer, who has pretended the court is not inherently rigged in favor of corporate power — even though it quite obviously is.

Instead, this moment begs for a jurist whose life experience and record shows a commitment to prioritizing American workers and the environment — and breaking with the most powerful lobbying group in America: The U.S. Chamber of Commerce.

The Chamber's Court

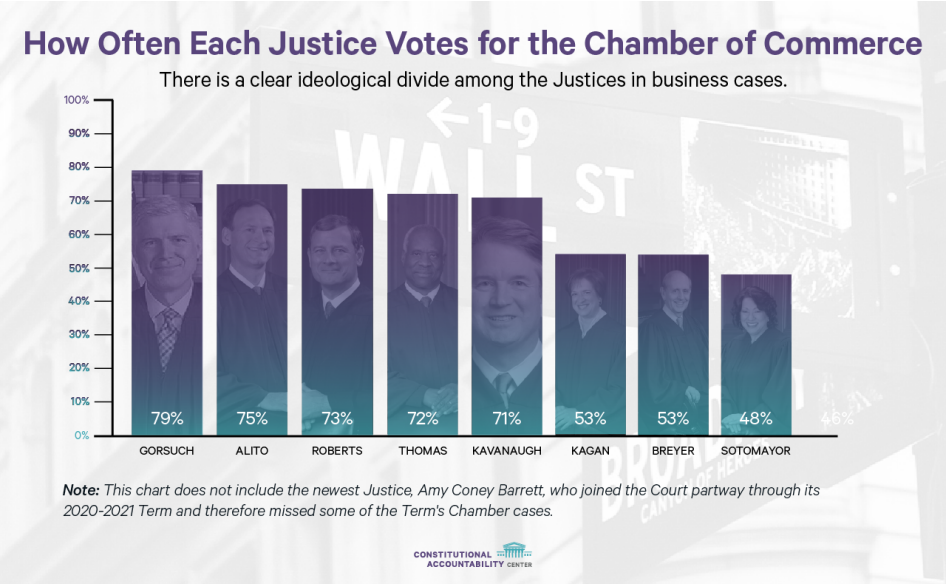
Sixteen years ago, the Chamber launched its campaign to own the Supreme Court with a bang: It got its own former lawyer, John Roberts, a seat on the panel during confirmation hearings that predictably focused on social issues and largely ignored the nominee's record as "the go-to lawyer for the business community."

Since then, the Chamber and conservative dark money groups have placed several Roberts clones on the court, and the putatively liberal minority has routinely acquiesced to the Chamber's demands. Save for an occasional anomaly, the Roberts Court has typically delivered rulings that favor capital over labor, retirees, the environment, and any other priority seen as an obstacle to private profit.

Data from the Constitutional Accountability Center (CAC) tell the story of a seismic transformation in American jurisprudence: Whereas Chief Justice Warren Burger's court sided with Chamber amicus briefs just 43 percent of the time, the Roberts Court has sided with the Chamber 70 percent of the time — including 83 percent of the time in the most recent session.

In other words, over the course of two generations, the high court went from roughly split on decisions about capital and labor to firmly on the side of capital.

Importantly, this transformation happened with the help of Breyer, a Clinton appointee billed as a liberal holdout even though he often is a conservative accomplice. Again, CAC data tells that story: Breyer has voted with the Chamber position a majority of the time.



In practice, that has meant Breyer recently voting to restrict regulators' power to punish Wall Street criminals, to empower fossil fuel companies to brush off environmental concerns, and to oppose a state mining ban. It means Breyer voting to shield companies from liability when they face allegations of human rights abuses abroad. It means Breyer voting to limit consumer debt protections. And as the progressive legal publication *Balls and Strikes* notes, Breyer's 27-year career of rulings have "protected big business privilege from antitrust lawsuits."

Balls and Strikes points out that Breyer's record as a legislative staffer and lower court judge was predictive of his corporate fealty.

That record was inappropriate for a nominee in the Clinton era, and would be completely preposterous for a replacement nominee in the present moment, when corporations have positioned their boots even more securely on the neck of the American worker.

Stop Normalizing The Court's Corporatism

For its part, the White House may understand this truism. While Biden has put forward its share of corporate-aligned judicial nominees, he also has broken with past precedent and named more court appointees with public interest backgrounds than any recent past president. Clearly, there's some spark of recognition that perhaps the Chamber path is a betrayal of everything Democrats purport to stand for.

The trouble is that the Supreme Court nomination fight is not a lower court appointment that can just imperceptibly slip through. It is the highest of high-profile battles — and the conflict-averse Biden might not be under any kind of popular pressure to name a Breyer replacement who will be judged on their economic posture, rather than only on their positions on social issues.

Without that popular pressure as a countervailing force at his back, he will be blasted by pressure from the Chamber, corporate media, and the conservative dark money machine that buys Supreme Court seats — as well as their potential Democratic allies like Sens. Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — who will all push Biden to pick a so-called "moderate" corporate-friendly justice, rather than one with a pro-worker record and outlook.

Why might there be so little voter focus on economic issues in a court nomination? Why might Biden feel no popular pressure to name a pro-worker nominee?

Because that's just not the way most people are taught to even think about the Supreme Court.

Right now, corporate media rarely ever focus on the court's corporate record. Indeed, the 2017 Neil Gorsuch nomination was notable only because it broke from precedent and focused for one second on corporate power — something that almost never happens. Most of the time, the Washington press corps often downplays, camouflages, and normalizes business rulings, portraying the high court's extremist edicts as centrist and pragmatic.

The effect of that incessant media propaganda can be seen in the most recent Gallup poll: As Roberts continues successfully shifting the court farther to the economic right, he is now the most popular federal official in America and is even viewed favorably by a majority of Democratic voters.

That's not because the public loves Roberts' esoteric court rulings that are helping corporations rip off millions of people. It's because Roberts knows how to play the game: He occasionally offers the occasional non-lunatic decision on a high-profile social issue that gets tons of headlines, all while his extremist economic rulings are either depicted as "moderate" or aren't part of the media discourse at all.

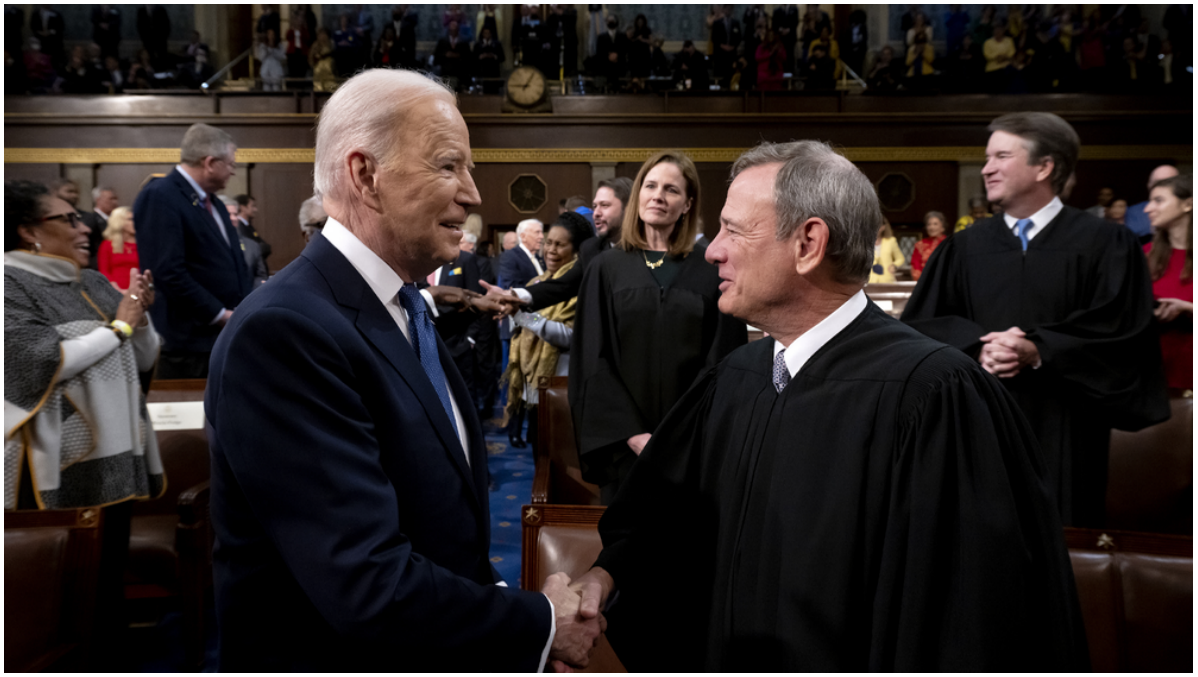
If that dynamic persists into the nomination of Breyer's replacement — if the media discourse and Democrats' rank-and-file just ignore economic issues — this will be a lost opportunity of epic proportions.

Replacing one business ally with another would further cement the court as a corporate star chamber for another generation, making America's economy even more rigged against workers, retirees, and climate justice than it already is.

Roberts Started A Revolution, Dems Enabled It

Chief Justice John Roberts is spearheading the right's judicial coup — and Democrats' worship of norms is allowing it to accelerate.

Jun 30, 2022 • David Sirota



President Joe Biden greets Chief Justice John Roberts during Biden's first State of the Union address. (Saul Loeb, AP)

As the director of the horror show that was the Supreme Court's 2022 term, Chief Justice John Roberts on Thursday opted to script his movie with the same plot twist as *Don't Look Up*. In an environmental ruling literally issued on Asteroid Day, Roberts channeled President Jeannie Orlean and aborted the government's nascent effort to halt the climate crisis imperiling the planet — a decision making it more likely that the human story will mimic the film's ending.

Amid desperate screams from scientists about the impending climate catastrophe, Roberts limited the Environmental Protection Agency's (EPA) authority to regulate carbon emissions. He declared that "capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible 'solution to the crisis of the day,' but it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme" to halt the disaster.

As *The Lever*'s reporting has shown, today's cataclysmic ruling (though slightly narrower than it could have been) is part of a larger judicial coup fueled by dark money that has bought both sides of the justice system — the petitioners and the arbiters.

This coup — which has received far less attention than the January 6 plot — features a cadre of unelected judges appointed by popular vote losers now commandeering control of the government. It has resulted in the evisceration of protections for voters, women, workers, consumers, retirees, and now every living thing on the entire planet.

All of that was engineered by the coup's puppetmaster Roberts, a former U.S. Chamber of Commerce lawyer and Bush 2000 election thief who enjoys incessant corporate media billing as a thoughtful moderate — even as his rulings legalizing corruption made this rampage possible, and even as he now threatens to considerably expand the carnage.

And yet, Roberts, Leonard Leo, and the other real-life *House of Cards* operatives of the American right are not the only reason this happened.

They were enabled by a Democratic Party and its own cast of *West Wing* characters, who in the name of bipartisanship, comity, and manners started surrendering right when the putsch began. At precisely the moment Roberts began his crusade, these Democrats constructed an entire religion of *normalism* — the worship of norms, institutions, and etiquette above every other principle or inalienable right.

There is little chance this nightmare will end unless we first understand how this religion took hold.

"Within The Mainstream"

Some could argue that Democrats' normalism began in 1991, when Joe Biden failed to block Clarence Thomas's court nomination and the Democratic-controlled Senate confirmed him to replace civil rights hero Thurgood Marshall on the Supreme Court.

But that moment was the prelude. Democrats' church of normalism really rose in the mid-2000s, when during the culmination of Aaron Sorkin's television

homage to bipartisanship, fully half of the Senate Democratic caucus voted with Republicans to install Roberts as chief justice.

Having finished up a string of disillusioning jobs in Washington, I was quoted back then in *The New York Times* for being particularly demoralized by Democrats' refusal to seriously challenge the nomination of Roberts, the Rasputin with the sunny smile who was cheerily billed as "the go-to lawyer for the business community."

But my anger was anomalous among Democratic Capitol Hill staff, liberal think tanks, advocacy groups, and political committees. Instead, the prevailing sentiment was that of a young senator named Barack Obama, who — in a preview of his White House — lashed out at those begging Democrats to do whatever they could to stop Roberts.

In a much-touted blog post that now reads both like a Jed Bartlet monologue and a terrible omen of what was to come, Obama first scoffed at the idea of Democrats wielding power in an aggressive way:

> *According to the storyline that drives many advocacy groups and Democratic activists — a storyline often reflected in comments on this blog — we are up against a sharply partisan, radically conservative, take-no-prisoners Republican party. They have beaten us twice by energizing their base with red meat rhetoric and single-minded devotion and discipline to their agenda.*
>
> *In order to beat them, it is necessary for Democrats to get some backbone, give as good as they get, break no compromise, drive out Democrats who are interested in "appeasing" the right wing, and enforce a more clearly progressive agenda. The country, finally knowing what we stand for and seeing a sharp contrast, will rally to our side and thereby usher in a new progressive era.*
>
> ***I think this perspective misreads the American people.***

He then went on to apply the argument to Court nomination fights, telling progressives to shut up and accept capitulation:

> *A majority of folks, including a number of Democrats and Independents, don't think that John Roberts is an ideologue bent on overturning every vestige of civil rights and civil liberties protections in our possession. Instead,* ***they have good reason to believe he is a conservative judge who is (like it or***

> ***not) within the mainstream of American jurisprudence**, a judge appointed by a conservative president who could have done much worse (and probably, I fear, may do worse with the next nominee)...*
>
> *Short of mounting an all-out filibuster — a quixotic fight I would not have supported; a fight I believe Democrats would have lost both in the Senate and in the court of public opinion; a fight that would have been difficult for Democratic senators defending seats in states like North Dakota and Nebraska that are essential for Democrats to hold if we hope to recapture the majority; and a fight that would have effectively signaled an unwillingness on the part of Democrats to confirm any Bush nominee, an unwillingness which I believe would have set a dangerous precedent for future administrations — **blocking Roberts was not a realistic option**.*

Obama did cast a ceremonial vote against Roberts when the confirmation was already a foregone conclusion. However, he not only helped shift the Overton Window to the hard right by casting Roberts as "mainstream," he also had made a much bigger statement about his objectives and that of his party. He was the high priest of normalism.

Appeasement, compromise, preservation of norms, and surrender to the right in the name of being "realistic" was the new priority — leading to a president who campaigned on hope and change but then reneged on his promise to codify *Roe v. Wade*, said he "regrets" trying to block Justice Sam Alito's Supreme Court nomination, praised the billionaire Koch Brothers pushing our politics far right, tried to help Republicans cut Social Security, and demanded credit for boosting the fossil fuel industry.

It also led to an administration that bailed out health insurers and banks while millions were immiserated, and a White House that berated the left as "fucking retarded" — so demoralizing Democratic voters that a reality TV star demagogue soon took over and gave Roberts the three other right-wing zealots he's now using to repeal the 20th century.

"A Man Of Honor"

After four years of Donald Trump's tenure that culminated with the installation of Supreme Court Justice Amy Coney Barrett, you might have expected Democrats to discard the appeasement strategy, especially because party leaders have been so

eager to get on cable television to cite the January 6 riot as proof that the end of democracy is nigh.

Instead, though, the opposite has happened. With swamp things like Rahm Emanuel and *Politico* hilariously promising the rise of "Biden Republicans," Biden has spent the first two years of his presidency trying to appease the GOP and delivering on the only promise he seems intent on keeping: that "nothing would fundamentally change."

Biden has not only abandoned his promised legislative agenda and declined to implement promised executive actions, he has continued to tout his "friend" Senate Minority Leader Mitch McConnell (R-Ky.) as a "man of honor" — while McConnell returns the favor by bragging about blocking Obama Supreme Court nominee Merrick Garland, who might have helped prevent Roberts' judicial coup laying waste to America.

Worse, Biden and his White House are signaling they are unwilling to wield real power to counter the Supreme Court's radical conservative supermajority in any significant way. Up until Thursday, they had steadfastly defended the filibuster. They have also rejected court expansion proposals. In the days following the overturning of *Roe*, the administration even brushed off demands that it consider using its authority to offer reproductive health services on federal lands.

"The White House is unlikely to take up the bold steps to protect women's right to have an abortion that Democratic lawmakers have called for in recent days," reported *Reuters* after the news service interviewed top administration officials. "Biden and officials are concerned that more radical moves would be politically polarizing ahead of November's midterm elections, undermining public trust in institutions like the Supreme Court."

Of course, that public trust is already gone. Gallup's most recent poll shows the public's confidence in the Supreme Court has hit an all-time low. Apparently, though, Biden and his staffers are so out of touch with reality and so devoted to normalism they don't even know that — and in exuding such a let-them-eat-cake attitude, they may have catalyzed a rage we haven't seen in generations.

The Church Of Normalism Must Fall

This gets to the silver lining in all the darkness — because things have gotten so bad and Biden is so much less charismatic than Obama, maybe more people can

see through the bullshit and stop allowing themselves to be politically anesthetized, lobotomized, and euthanized by MSNBC and every other Acela corridor elite media outlet whose mission is to ether progressives and scoff at the working class.

Maybe there is finally a critical mass that has reached that horrible, gut-wrenching disillusioning inflection point I found myself at back in the mid-2000s — that turning point in my life when House Democrats tried to get me fired for daring to criticize Biden's bankruptcy bill and then I naively wondered why almost nobody seemed bothered by Roberts' installation.

Maybe Democrats' cartoonish Neville Chamberlain act in the face of the Roberts Revolution is going to mainstream righteous anger in ways we have not seen since that kind of rage forced the party kicking and screaming to actually do the great things of history.

If that somehow happens, then there's plenty that can be done — not after the next election, not next month, not tomorrow. Right now.

For example: Democratic activists and elected officials at every level of government can demand that their leaders in Washington take a page out of the playbook of their party's most popular president in history and seriously press to expand the court. The Congressional Progressive Caucus could right now reintroduce Franklin Roosevelt's own legislation and begin the reclamation of a court that is obviously out of control.

Even if it fails like FDR's bill did, it would send a message to the court that the Roberts Revolution will no longer go unchallenged — and that was a message that successfully countered the court in Roosevelt's day.

Those same Democratic voices can demand Biden start signing the pile of executive orders gathering dust in the White House — orders that could limit the court's EPA ruling today.

Meanwhile, Democrats in Congress could also rip a page out of recent history and simply start legislatively overriding the court's most extreme rulings. As *The American Prospect* has noted, a Yale study shows that such overrides "blossomed" between 1967 and 1990, and that in 1991 alone, a civil rights bill overrode "as many as twelve Supreme Court decisions that had significantly cut back on workplace antidiscrimination protections."

A separate study found that "the 1990s was actually the golden age of overrides" — but that after 1998, "Overrides declined as dramatically as they had ascended."

Such overrides are particularly relevant in the *West Virginia v. EPA* case handed down Thursday. As journalist Amy Westervelt pointed out on our latest *Lever Time* podcast, the court was ruling on whether Congress had explicitly given the agency the power to regulate power plants' greenhouse gas emissions. That means the Democratic president and the Democratic Congress can simply pass a one-page bill making clear that yes, the EPA does have the power to try to halt the climate crisis threatening all life on the planet.

These are just a few examples of things that can be done, and it is heartening to see at least a few Democratic elected officials starting to speak up against their conservative party members who are still stuck in the Obama Era — and still enabling the Roberts Revolution.

But we should be under no illusion that countering that revolution will be pleasant or easy. And most importantly, it will not be *normal* — which is a challenge to the modern Democratic Party's ethos.

At its core, *normalism* — the worship of norms and normalcy — is the abiding religion championed by Obama and Biden, promoted by corporate media, and internalized by rank-and-file Democratic voters. It is a religion embodied in these kinds of viral tweets and explicitly articulated by former CIA agent and current conservative Democratic Rep. Abigail Spanberger of Virginia, who last year declared: "Nobody elected [Biden] to be FDR, they elected him to be normal and stop the chaos."

That statement was an admission that when the Democratic Party was most popular and powerful, it was the opposite of a normalist party. Indeed, FDR and his voters were not disciples of normalism — he spent much of his presidency pressing a New Deal that violated all sorts of outdated norms that had for too long protected a destructive Supreme Court and economic establishment. Same thing for the Great Society era of civil, human, and economic rights.

But Spanberger's comment was also a reminder that today's normie Democrats have been taught by their leaders and their media to love norms above all else — even above reproductive rights, workers' rights, consumer rights, and the long-term survival of the human species.

That shift to normalism is a big reason we are here, and why the Roberts Revolution is accelerating.

Ending that religion is the first step to stopping the chief justice's rampage — before he destroys what's left of the country.

Q&A

How A New Supreme Court Could Forever Change America

One of the nation's top legal experts says: "A Trump appointment will very much solidify the power of corporations and businesses on the Supreme Court."

Sep 23, 2020 • David Sirota

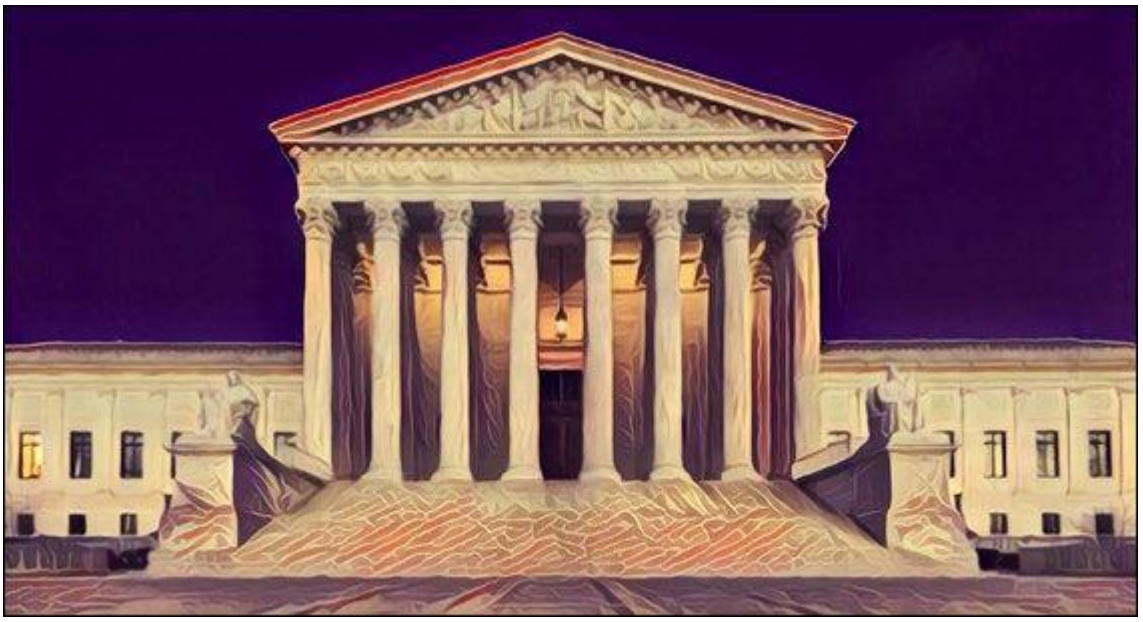


Photo Credit: Flickr

If you are a reader of this newsletter, you know we cover Supreme Court cases that are often ignored by the media — cases about corporate power, labor rights, and business regulations. These cases fill up the judicial docket and transform the American economy, but they are typically overshadowed by high-profile battles over social issues.

One huge question now is: How would adding another Donald Trump appointee to the court potentially change the judicial system's attitude towards corporate power?

Bloomberg News reports that "the prospect of Republicans increasing their majority to 6-3, after the death of liberal icon Ruth Bader Ginsburg, could make the court more favorable for business."

For a deeper look at the situation, I spoke with UCLA law professor Adam Winkler, the author of the book *We the Corporations: How American Businesses Won Their Civil Rights*. He has also written a series of articles for *The Atlantic* about corporations' winning streak at the high court.

What follows is an edited transcript of my discussion with Winkler about the current situation on the court and how the judicial system could ultimately be reformed.

David Sirota: In general, how much is the high court dealing with business and economic issues?

Adam Winkler: While the high profile, controversial cases over issues like abortion or gay rights take up all the headlines, most of the Supreme Court's docket is focused on ordinary business disputes and disputes that affect businesses and business people. They're not all corporate power cases directly in the sense that they're not like *Citizens United* (and) about whether corporations can spend money on elections, but they're issues like how do we read employment discrimination laws.

The Supreme Court just this past year narrowly read federal employment discrimination laws to make it harder for employees to bring an employment discrimination action. You don't necessarily read that when you read it in the newspaper as a corporate power issue, but it's clearly a corporate power case. It's giving powers to corporate management and corporate employers and making it easier for them to discriminate without the threat of significant legal liability.
Then there are cases that don't seem like they touch upon corporations at all, but have a huge impact on the ability of the government to regulate corporations.

So for instance, if the court has what seems like a rather esoteric case about whether Congress can structure a federal agency in a particular way so that its commissioners are appointed... there's a move afoot among conservatives to outlaw appointments so that every executive appointment should be subject to being fired by the president at the president's whim. That doesn't seem like a business case, but the effect of it is to make it harder for government agencies that regulate businesses to function.

The Consumer Financial Protection Bureau would be a good example. The director can't be fired by the president (and) serves a certain term of years. If you call that into question, it makes it easier for businesses to escape regulation by the CFPB.

You've written about the Supreme Court's rulings on speech issues that have strengthened corporate power. How does that matter to regular people in their daily lives?

One of the ways in which we restrict corporate speech is, for instance, requiring dangerous products to provide labeling that informs consumers... (If) the Supreme Court continues its trend of broadly reading commercial speech protections in the Constitution, that will make it harder for the government to force businesses to provide those warnings. We saw this, for instance, when a lower court used the commercial speech doctrine to strike down graphic warnings on cigarette labels...

The court could rule that basic securities laws that require disclosure of corporate behavior are unconstitutional as a violation of corporations' free speech rights. In that case, it (would) really affect not only stockholders, but any employee who has retirement funds wrapped up in a mutual or pension fund...

There's been a move afoot among libertarian law professors to push for the court to second guess securities laws and securities regulations that require corporations to disclose what they're doing (and) all the various kinds of activities that they're taking to shareholders... So we could see corporate speech rights expanded to make it harder for the capital markets to have the transparency needed for safe investing.

Let's assume that Trump gets his way and gets another nominee on the court ...

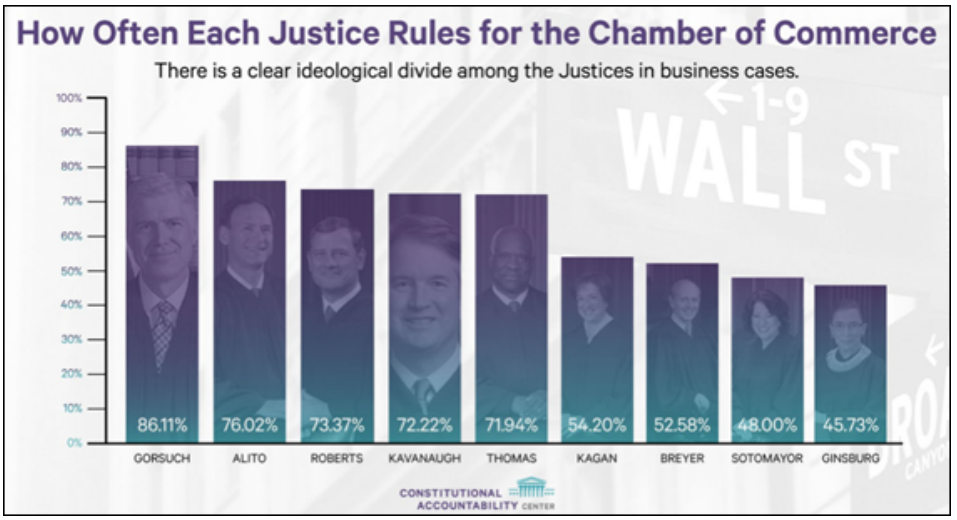
David, Trump always gets his way. Totally. Sadly, that's the state of American politics.

OK, so then how much would another Trump appointment tilt the current court? Is this a "game over" kind of moment?

I guess nothing's over in the sense that the game just keeps getting played over and over again, it's not like a baseball game or a basketball game that runs out of time or runs out of innings. Hopefully the country is going to survive another 10, 15, 20 years, but, look, a Trump appointment will very much solidify the power of corporations and businesses on the Supreme Court.

As it is, many of the Democratic appointees have been pretty pro-business over the years too. It's not just conservatives. So even your liberals are often ruling in favor of businesses and against consumers.

This would really push the court over the top. You would have a very strong 6-3 conservative majority. And unlike previous times where conservatives had most of the seats on the court, none of the conservatives on (this) court really swing liberal on business or corporate power issues. John Roberts has swung liberal on a few cases in recent years to the celebration of many but his track record is pretty unambiguous and pretty consistently pro-business and anti-consumer.



Is there anything Congress can do to reassert its power and not allow so much law to be written and determined by the Supreme Court?

There are controversial things that Congress can do that it really tends to hesitate to do. For instance, it could strip the Supreme Court of jurisdiction over certain kinds of cases. The Constitution is pretty clear that Congress can decide...

You might see that kind of aggressive approach in the next Congress depending on how this election goes, but we haven't seen that tool used very often. I do think that Congress could be more assertive in its powers in a wide variety of ways that would tend not to necessarily limit the Supreme Court's power, but do what the framers thought, which was counter power with power.

That's how the framers thought you limited power. It was in part by having a contest between different branches of government over power, which would stop power from becoming really concentrated.

What are some examples?

Being very active and passing a lot of laws (is a way for Congress to) make stronger efforts to assert itself.

When some Trump administration (official) refuses to testify before Congress, well, why doesn't Nancy Pelosi order the House marshals to go arrest the person and put the person in confinement and hold them in contempt of Congress? They have the power to do that...

What we see is that, consistently, Congress is afraid to exercise power... We don't see that same hesitancy by the Supreme Court and we don't see the same hesitancy by the president of the United States. The executive branch under any president — Democrat or Republican — has been very assertive looking to expand its power, looking to take advantage of any opportunity it has to exercise power. And we just don't see the same from Congress.

We see presidents (like) George W. Bush expansively reading presidential power to allow signing statements. They'll just ignore certain principles that are certain provisions of duly enacted legislation because of the statement (from) the president's office...

President Obama did some of the same things and did a lot of stuff through executive orders and executive action that were somewhat questionable in terms of their legality.

And of course Trump's done so many things such as refusing to allow any member of his administration to testify before Congress in recent months. Just a blanket refusal to comply with congressional subpoenas. Those are just very bold and aggressive uses of power...

Divided government makes it harder for Congress to assert its power.

Have the parties differed on using congressional power?

I think there are ways in which Republicans have been more aggressive in asserting power... There are a lot of Democrats that really feel uncomfortable with exercising power for power's sake. A lot of Democrats feel there's a right way to do something and it should be done that way, even if it hurts my own political beliefs or my own agenda.

I'm not saying every Democrat believes that. And I'm not saying that every Democrat adheres to that view. But I do think you already see it. There are already statements of Democrats expressing discomfort with the idea of packing the Supreme Court. I don't think Republicans would hesitate to pack the Supreme Court.

What is your view on adding seats to the Supreme Court? Is that a good or bad idea?

There are lots of honest arguments not to do it... Up until about up until the Merrick Garland situation — up until really the Neil Gorsuch appointment in 2017 — it was the received wisdom among liberals all across the country (that) for most part that court packing was a bad idea, no matter who did it. (The idea was) that it undermines the legitimacy of the court, it turns the court more into a political football than it's ever been before...

Obviously the opinion of many Democrats has radically changed in the last three years because of circumstances. But I think there are principled reasons. I mean, for the same (reason) why you'd want McConnell not to bring this nomination to the floor, because democracy requires norms, (and) norms require equal application by both sides. And you have a norm that was created about election year Supreme Court appointments. And it's why many people think that Congress should stick to it now...

The idea of nine people arbitrating so much of our laws seems problematic, especially when those nine people get on the court through a combination of happenstance and raw political power, rather than as a true expression of election results and the popular will. Is there a pro-democracy argument for adding seats to the court? Would that make it more representative of what the public wants?

I think there's something to be said for it, for sure. But again, I think that you want to think about these things in terms of principles. If court-packing is okay for Democrats, then it should be okay for Republicans too. And if Trump had decided to pack the court when he had the House and the Senate that would have been a disaster and it would've been wrong.

I get your point about democracy, but the Supreme Court is not supposed to be a democracy. It's not supposed to be representative of the people. That's not how it was designed and that's not really how it's ever functioned.

Is that a problem? Do you think the court should be more democratic or not?

I do think it should be, for sure. One of the great tragedies is that you've had conservative control of the Supreme Court since the 1970s. It's a half century now. It's been a long time since Nixon got four appointments (and) Carter got none. Then you had Reagan and Bush with all their appointments. There have only been four Democrats appointed to the Supreme Court since the 1960s. Over a half century there were Ginsburg, Sotomayor, Kagan and Breyer — and that's it.

Democrats have only done a little bit better than that in terms of results because they had some who crossed over like Stevens and sometimes Kennedy. The Democrats have been living by the grace of Republican appointees who tend to cross over at some point. But it's not because they've been winning.

What are some realistic ways to fix some of the problems with the Supreme Court?

The only way to fix the system is through legislation, not a constitutional amendment. I don't think that you're going to get conservative states to agree to any kind of constitutional amendment on the Supreme Court, unless things change radically. So I think something like 18-year terms for the Supreme Court justices is a mistake. It's not a bad policy. I'd love to see it as policy, but you have to get it through a constitutional amendment, (which is) not likely to happen.

But I think what you could do is increase the number of justices on the court. That's a matter of legislation. That's been done many times over the course of American history, not often since the 1860s, but before the 1860s [it] had happened all the time. And so that's something that we could do.

I think the key to doing it is not expanding the court to like 15 people and getting just enough justices so that the Democrats can respond to the Republican takeover of the Supreme Court through illegitimate means... But the answer could come in making the Supreme Court something like 40 people for a huge expansion. If you had 40 justices, any one retirement wouldn't make the big difference.

Would you have 40 judges ruling on every case?

What you probably do is what we have on the federal courts of appeals. (There are) approximately 25 justice judges on the ninth circuit court of appeals... They just randomly appoint judges (to hear cases). You can do that with the Supreme Court.

You could still even have nine justices rule on any particular case. They're selected for any particular case at random.

That's just one possible idea of how you could depoliticize the court a little bit. It makes it hard to predict who's going to rule... So it's much more likely that judges are going to respect the previous decisions of the court, because they don't know who's going to come in next and overrule them.

When you heard the news about Justice Ginsburg's death, were you feeling like this is a major turning point for the judiciary in America?

I was pretty depressed Friday night (but) it doesn't help anyone to spend a lot of time despairing over the future. You never know what the future brings.

It could be that because of this nomination, you have an incredible blue wave that sweeps the House, sweeps the Senate, sweeps the presidency, and you have the possibility of very significant Supreme Court reform and the possibility of getting significant legislation passed like a Green New Deal... So I think it doesn't pay to really get too depressed about how the future may or may not turn out.

I think now's the time to really think about what the legacy was of Ruth Bader Ginsburg, her legacy of fighting for equality, of fighting for justice and never giving up, even though the odds are stacked very highly against you...

We should learn from Ruth Bader Ginsburg who fought against doctrines of male superiority to win a measure of equality that people at the time would've thought impossible. We should be committed to fighting against injustice and recognizing that the fight is a long one, and it's going to take determined efforts, and the odds will be stacked against you, but if you want justice and equality, those are the things you have to deal with.

Q&A

The Fossil Fuel Industry Wants Its Money Back

Breaking down *West Virginia v. EPA*, the Supreme Court case that limited the government's ability to regulate carbon emissions.

By David Sirota

On the June 28, 2022 episode of *Lever Time*, David Sirota interviewed award-winning journalist Amy Westervelt about the upcoming Supreme Court case *West Virginia v. EPA*, in which a group of Republican attorneys general sued the EPA over its ability to regulate greenhouse gas emissions — and eventually won. The two also spoke about how fossil fuel companies are using shadowy international tribunals to sue international governments for monetary damages.

Below is an abridged Q&A from their discussion.

David Sirota: There are a lot of horrible rulings coming down from the Supreme Court — but one of the scariest ones is *West Virginia v. EPA*, which has gotten relatively little attention. What is it about and why is it so important?

Amy Westervelt: *West Virginia v. EPA* is another one of these where I think it sounds kind of wonky and procedural, but it has potentially huge implications. So basically, the complaint is that the EPA does not have explicit authorization in the

Clean Air Act to regulate greenhouse gas emissions, and therefore, the Clean Power Plan should not be implemented.

Now, step one, that's ridiculous because the Clean Power Plan was not implemented, nor will it ever be implemented. So really... The court should have just thrown this case out. It's totally bizarre for them to rule on a case where the issue at hand is now moot.

But it's almost as if the justices want to rule on this case and do damage, right?

Exactly. In the oral argument, Justice Amy Coney Barrett in particular kept coming back to this thing called the "major questions doctrine," which is the sort of catch-all that allows the court to engage with anything that they think is ambiguous enough that they should rule on it. And in this case, they could still come out and say, actually, we're not going to rule on this, that is still a possibility.

But I anticipate them doing a pretty broad ruling that says, you cannot regulate greenhouse gas emissions under the Clean Air Act, which would be a pretty huge ruling. It would strip whatever authority the EPA currently has to regulate greenhouse gas emissions, especially beyond the fence line of power plants. So that's kind of the gist of the argument here is like, EPA can only regulate emissions that are coming out of the smokestack and once they leave the vicinity of the power plant, EPA no longer has authority. So that's a big potential outcome here.

Explain the role of the Republican Attorneys General Association (RAGA), which *The Lever* has been reporting on.

That group was formed as a reaction to the tobacco litigation in the 1990s. Republicans looked at that situation and said, "Wow, that was a smart Democratic strategy, we should be doing that." So they worked really hard to get more Republican attorneys general elected, and over the last decade in particular, they've been working together to bring these big, constitutional challenges to try to effect structural change.

So anytime you see, like 10, or more Republican AGs on a case, that's RAGA. And they have an enormous dark money fund. We know that the Kochs are investing in that. So *West Virginia v. EPA* is a very intentional case, funded largely by the fossil fuel industry, with the intent of blocking the EPA from regulating greenhouse gasses.

Couldn't the Democratic Congress just render this case moot by passing a one-page bill explicitly saying the EPA has the authority to regulate greenhouse gasses?

That's right. The case at its core is about whether the federal government has the right to assign some of its authority to a regulatory agency. And that really gets at the broader Republican mission of getting rid of agencies. They want to say that only Congress has the power to pass any kind of regulation, and they shouldn't be handing that job over to regulatory agencies. Conservatives are arguing that agencies are not constitutional because there's no mention of agencies in the constitution.

So on top of what this could do for climate policy, it could really further that cause of gutting the powers of regulatory agencies. It's a real continuation of the anti-expertise thing that we've been seeing for so long — to just not trust the actual experts to figure this stuff out.

If the Supreme Court sides with the fossil fuel industry in this case, what comes next?

The EPA already has statutory approval to regulate particulate matter, which is created by the same thing that generates greenhouse gas emissions. It's the combustion of fossil fuels. So you will absolutely start to see the anti-air pollution regulation argument emerging from the right, especially if they're successful with *West Virginia v. EPA*.

SECTION TWO

Legalizing Corruption

An old adage in political journalism is to "follow the money" — and yet, for the most part, corporate media rarely if ever follows the trail of money that has rigged the justice system to produce the extremist decisions now laying waste to America.

Here's the truth: You cannot understand anything happening in American politics if you do not first understand John Roberts' 12-year crusade to legalize corruption for the oligarchs and corporations that now buy the presidency, the Congress, and the Supreme Court. *The Lever*'s reporting has long exposed and spotlighted this untold story.

The Lever has also worked diligently to shine a light on the conservative dark money network that built conservatives' radical 6-3 supermajority on the Supreme Court, paving the way for its judicial rampage.

Dark Money Led To This Moment

A secretive donor network built the Supreme Court's conservative supermajority, and brought them the case and arguments to overturn *Roe v. Wade*.

Jun 24, 2022 • Andrew Perez & Aditi Ramaswami

Abortion-rights protesters following Supreme Court's decision to overturn Roe v. Wade. (AP Photo/Gemunu Amarasinghe)

The Supreme Court on Friday overturned its landmark *Roe v. Wade* decision, invalidating federal protections for abortion rights. The decision will quickly limit reproductive health care access for tens of millions of people.

The decision, which is part of a barrage of devastating, precedent-setting Supreme Court rulings this term, surely has many Americans wondering how we arrived at such a dark moment. The answer is simple, even if it is rarely discussed in corporate media: It lies in a giant pile of anonymous cash that was deployed to buy Supreme Court seats, help determine justices' caseload, and shape their decisions.

A secretive, well-financed dark money network has spent years working to build the Supreme Court's radical conservative supermajority and bankrolling many of the politicians and organizations involved in the most controversial cases now before the court, including the abortion rights case decided Friday.

The public will almost certainly never know the identities of the ultra-wealthy individuals and interests who paid to stack this court and influence its decisions, but much of the credit should go to an anti-abortion zealot named Leonard Leo and his cadre of conservative activists.

The co-chairman of the Federalist Society, the conservative lawyers group in Washington, Leo is best known for serving as President Donald Trump's top judicial adviser. Leo helped select Trump's Supreme Court picks while simultaneously leading a dark money network that boosted their confirmations with TV ads and contributions to conservative groups that promoted the judges.

Leo's dark money network has also funded Republican state attorneys general and conservative nonprofits that are backing and even directly arguing some of the most contentious cases before the high court right now.

It is with these cases that the Supreme Court has ended federal protections for abortion rights, dismantled the high court precedent requiring police officers to inform people of their rights to remain silent and to an attorney when they're being detained, struck down blue-state restrictions on carrying concealed firearms, and handed conservative state lawmakers more power to chip away at Americans' voting rights.

In other upcoming decisions, the court could soon strip environmental regulators of their ability to regulate carbon emissions, and weaken tribal sovereignty.
So to fully understand how we got here, it's important to follow the money — at least to the extent that we can.

Quietly Building The Court's Conservative Supermajority

Leo and his allies first formed the Judicial Crisis Network in 2005 to help confirm George W. Bush's Justices, John Roberts and Samuel Alito — and Leo reportedly played a "decisive role" in both of their selections. The organization has grown quietly and steadily since then, and played a key role in flipping the court and building its 6-3 conservative supermajority.

In 2016, following the death of conservative Justice Antonin Scalia, the Judicial Crisis Network spent $7 million on an advertising and advocacy campaign to pave the way for Republican senators to avoid holding a vote on President Barack Obama's court pick, Merrick Garland.

Under Trump, Leo helped select Trump's Supreme Court picks, while the Judicial Crisis Network spent tens of millions of dollars on ad campaigns to confirm Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett.

The Judicial Crisis Network and its sister group, a charitable organization called the Judicial Education Project, both routinely funneled big donations to allied conservative nonprofits that helped create an echo chamber supporting the judges' nominations.

In early 2020, Leo told *Axios* of his plans to remake the Judicial Crisis Network and Judicial Education Project and expand their scope.

The Judicial Crisis Network was rebranded as the Concord Fund, while the Judicial Education Project was renamed the 85 Fund. Both organizations maintained their original names as trade names; the Concord Fund continues to run ads under the alias of the Judicial Crisis Network.

Now, both organizations have grown into financial juggernauts. The Concord Fund reported raising more than $48 million between July 2020 and June 2021, a period of time that included Barrett's confirmation. The 85 Fund brought in nearly $66 million in 2020.

Throughout their history, these organizations have done an exceptional job of keeping their donors secret, while raising giant sums from just a few contributors.

According to its most recent tax return, which was obtained by the watchdog Citizens for Responsibility and Ethics in Washington, the Concord Fund raised nearly all of its recent $48 million haul from two anonymous donors. As *The Lever* previously reported, one of those donors is the Rule of Law Trust, a nonprofit helmed by Leo, which gave the group $22 million in 2020. None of the very few and obviously ludicrously wealthy donors to the Rule of Law Trust have been disclosed.

Between 2018-19, the Concord Fund received $3 million from the 45Committee, a dark money group affiliated with the billionaire Ricketts family, which owns the Chicago Cubs.

The 85 Fund, meanwhile, received more than $20 million in 2020 from a nonprofit called Donors Trust. The latter organization has long been known as a

"dark money ATM," because billionaires use it as a pass-through vehicle to disguise their donations to conservative groups.

A Two-Pronged Attack On The Judiciary

Leo's dark money network has spearheaded a two-pronged attack on the judiciary: First it has worked to install conservative judges, then it has worked to bring those appointees specific cases designed to destroy previous precedents, along with amicus briefs, or "friend of the court" filings, offering them rationales for doing so.

In its first mission to populate the bench with right-wing ideologues, Leo and his allies have worked closely with Republican Senate leaders. In its 2020-21 tax return, the Concord Fund reported donating $9 million to One Nation, a dark money group affiliated with Senate Minority Leader Mitch McConnell (R-Ky.), who led the Republican strategy to deny Garland a vote as Obama's nominee in 2016.

At the time, McConnell justified blocking a vote on Garland's nomination by arguing that the seat should not be filled in an election year. But in 2020, McConnell led the campaign to swiftly install Barrett to the court despite Justice Ruth Bader Ginsburg's death coming just 46 days before the election. Barrett was confirmed eight days before the election.

Those maneuvers, supported with advocacy and donations from Leo's Concord Fund and 85 Fund, helped turn what could be a 5-4 Democratic majority now into a 6-3 conservative supermajority that just overturned longstanding Supreme Court precedents on abortion rights and policing, and may soon gut the government's ability to regulate greenhouse gasses and potentially much more.

As conservative judges have been installed throughout the judiciary, the Concord Fund and the 85 Fund have simultaneously financed the Republican attorneys general and nonprofits that are supporting and, in some instances, directly leading the highest-stakes cases before the Supreme Court right now. The Concord Fund has long been the top financier of the Republican Attorneys General Association (RAGA), which works to elect GOP state attorneys general, donating more than $17 million to the organization since 2014, according to *The New York Times*.

Meanwhile, other groups funded by Leo's network have been filing amicus briefs offering legal justification for some of the more destructive cases before the

Supreme Court this term. In their most recent annual tax returns, the 85 Fund reported distributing $34 million in grants to political groups and nonprofits, while the Concord Fund gave out $28 million to nonprofits.

How The Scheme Works

The playbook is now straightforward: Leo's dark-money network installs right-wing judges, then Republican attorneys general boosted by Leo's network bring cases and amicus briefs, while other groups funded by the same network file their own briefs — all to create the appearance of broad-based support for extremist rulings.

The Supreme Court's devastating *Dobbs v. Jackson Women's Health Organization* decision, handed down Friday, illustrates how the multi-faceted scheme works in practice.

Mississippi Republican Attorney General Lynn Fitch led the case to overturn *Roe*. Fitch, who benefited from $225,000 in donations and spending by the Concord Fund-backed RAGA in her 2018 race, asked the Supreme Court to uphold a Mississippi law that would ban most abortions at 15 weeks of pregnancy, even in cases of rape or incest. Eighteen Republican attorneys general filed a brief supporting Mississippi's petition, as did a dozen Republican governors. The Concord Fund has donated $1 million to the Republican Governors Association this election cycle, according to Political MoneyLine.

According to a *Lever* review of their most recent tax returns, the Concord Fund and the 85 Fund donated to a long list of groups that filed amicus briefs in the Supreme Court abortion case: the Susan B. Anthony List ($2.3 million from the Concord Fund); Former Vice President Mike Pence's Advancing American Freedom ($1 million from the Concord Fund); Concerned Women for America ($440,000 from the Concord Fund, $100,000 from the 85 Fund); the Ethics and Public Policy Center ($488,000 from 85 Fund); the Becket Fund for Religious Liberty ($150,000 from the 85 Fund); CatholicVote.org Education Fund ($50,000 from the Concord Fund to Catholic Vote Civic Action); and Family Research Council ($25,000 from the Concord Fund to Family Research Council Action).

This scheme has been consistently replicated in other cases before the high court:

- ***Carson v. Makin*** — In a 6-3 decision handed down Tuesday, the court's conservatives held that Maine must give public money to private religious

schools. The decision represents a major infringement on the notion of separation between church and state in the U.S., and threatens the concept of a secular public education.

The *Carson* decision was undergirded with an amicus brief signed by 21 Republican state attorneys general, who are generally elected with support from the Concord Fund-backed RAGA. Briefs were also filed by Advancing American Freedom and the Becket Fund for Religious Liberty, which received $150,000 from the 85 Fund in 2020.

Another brief was filed by the Independent Women's Forum and its Independent Women's Law Center. The 85 Fund donated $310,000 to the Independent Women's Forum in 2020, while the Concord Fund donated $500,000 to its sister group, Independent Women's Voice, between 2020-21.

• ***New York State Rifle & Pistol Association Inc. v. Bruen*** — The Supreme Court handed down a ruling in this major gun case on Thursday knocking down New York's concealed carry law. The ruling could invalidate most gun control laws in this country.

Twenty-six Republican attorneys general, many of whom are supported by RAGA, filed an amicus brief supporting the New York State Rifle & Pistol Association, which is fighting to weaken the state's gun laws. The Leo-backed Independent Women's Law Center also filed a brief.

• ***Vega v. Tekoh*** — This case considered whether a person's constitutional rights are violated if law enforcement officers do not inform them of their so-called *Miranda* rights — their right to remain silent and right to have legal representation when they're being detained. On Thursday, the Supreme Court gutted its 1966 *Miranda* decision, ruling that suspects cannot sue police for damages for violating these rights. Twenty-two Republican attorneys general, many of whom were elected with the help of RAGA, filed an amicus brief supporting the petitioner.

• ***Berger v. North Carolina State Conference of the NAACP*** — On Thursday, Justices ruled that state lawmakers can intervene in a lawsuit filed against North Carolina concerning the constitutionality of the state's restrictive voter ID law. Lawmakers sought to intervene in the case because they disagree with the state attorney general's handling of the matter.

The upshot of the ruling is that in states with a GOP-controlled legislature and a Democratic attorney general, Republican lawmakers will be able to defend voter suppression laws from challenges, even if the state's attorney general wanted to settle.

Nine Republican attorneys general with ties to RAGA filed a brief in the case, as did the Republican State Leadership Committee, which has received $1 million from the Concord Fund this cycle. The Honest Elections Project, an organization that's part of Leo's 85 Fund, submitted a brief in the case, too.

• ***West Virginia v. Environmental Protection Agency*** — The case could decide whether the EPA is allowed to issue rules to reduce greenhouse gas emissions, and could have significant implications for the government's ability to tackle the climate crisis, as well as for other federal agencies' rulemaking abilities. According to *The New York Times*, "the Supreme Court is expected to hand down a decision that could severely limit the federal government's authority to reduce carbon dioxide from power plants."

West Virginia Attorney General Patrick Morrisey (R) is leading the case, with 17 Republican attorneys general signing onto his petition. Kentucky Republican Attorney General Daniel Cameron offered his own amicus brief on the matter to the high court. The New Civil Liberties Alliance, which received $1 million from the 85 Fund in 2020, also filed a brief.

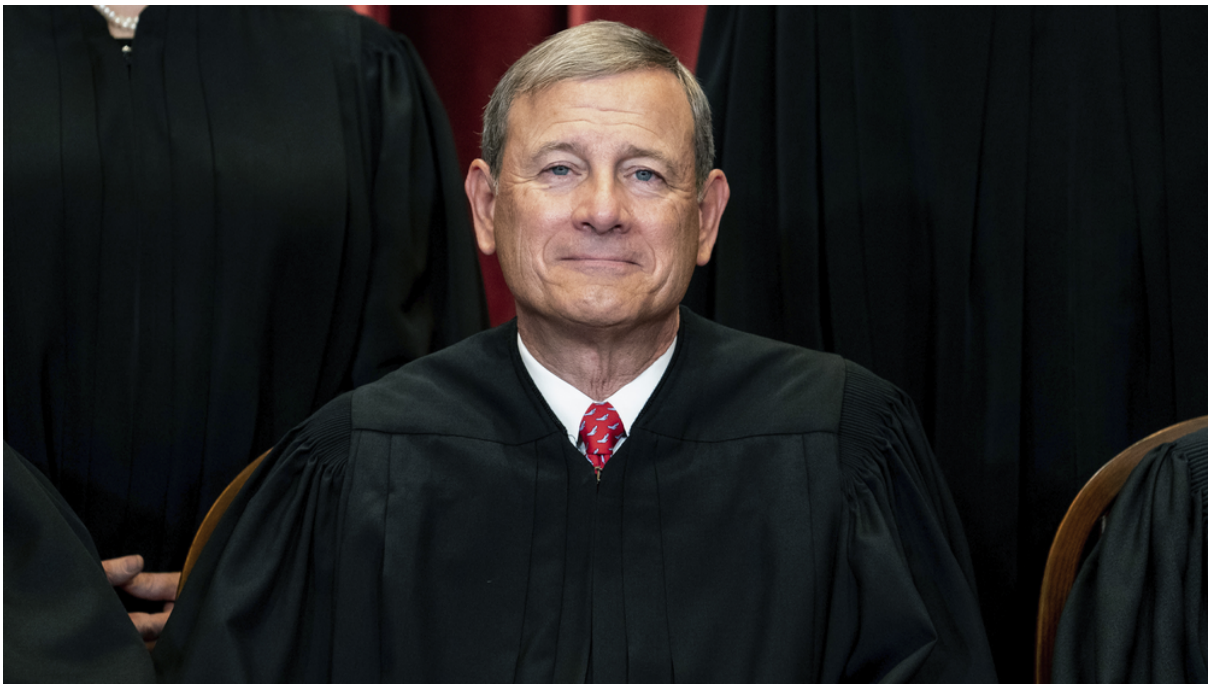
• ***Oklahoma v. Castro-Huerta*** — The case will determine whether states have the authority to prosecute non-Native Americans who commit crimes against Indigenous people on tribal lands. States currently have jurisdiction when the culprit and victim are both non-Indian. Handing states the authority to prosecute in the cases where offenders are non-Indian would have sweeping consequences for tribal sovereignty, upsetting "the balances struck between Congress, the tribes, and the states for more than a century," as *The New Republic* wrote.

Once again, RAGA members are involved. Oklahoma Attorney General John O'Connor (R) is leading the case, with five more Republican attorneys general signing on to his petition.

Roberts Is The Man Behind The Curtain

The Chief Justice's rulings legalizing corruption built the foundation of this era's extremist laws and court precedents.

Jun 28, 2022 • David Sirota



(Erin Schaff/The New York Times via AP)

Amid all the high-profile rulings dominating the headlines, a more obscure but far-reaching decision slipped through the Supreme Court, even if it was barely part of the news cycle. It is the case that culminates Chief Justice John Roberts' crusade to fully legalize corruption — and construct a political system that permanently produces all the extremist rulings now repealing the 20th century.

Cases like this new one, *FEC v. Ted Cruz For Senate*, don't get much attention because they seem esoteric and technical. But so many of the more infamous legacies of the Roberts Court — crushing workers, rescinding reproductive rights, shielding big business from accountability, restricting voting rights, eviscerating gun control, complicating the fight against climate — can be traced back to its campaign finance rulings, which equate liberty with corruption.

Roberts' doctrine has given oligarchs, corporations, and their front groups a First Amendment right to bankroll political campaigns and now — thanks to the Cruz case — directly funnel cash to politicians' personal bank accounts. The return on

such investments has been all the right-wing laws, obstructions, and judicial edicts that have spewed forth from Washington over the last decade.

Since Roberts was confirmed in 2005 with bipartisan support, corporate media has typically portrayed him as a thoughtful moderate, to the point where polls have shown a majority of Democrats like him. The media has continued venerating Roberts as an earnest victim of the court's hard-right turn rather than a perpetrator — even after he voted to uphold the extreme Mississippi law banning most abortions at 15 weeks, including in cases of rape or incest.

Left out of this hagiography is the story of Roberts as the bag man behind the curtain — the mastermind engineering the entire superstructure undergirding the court's extremism.

No matter the controversy of the day, you cannot really understand what's going on in politics unless you first understand Roberts' campaign that constructed an entire legal architecture of corruption — allowing moneyed interests to buy the presidency, Congress, and the courts.

Roberts' plot crescendoed with the *Cruz* case, but that recent decision was part of a much larger 12-year crusade with a singular objective: creating a government of, by, and for the rich.

"Does Not Mean That These Officials Are Corrupt"

Officially, the United States gets decent marks on anti-corruption indices in comparison to other countries. But that's because while there is plenty of extralegal graft in the developing world, America made corruption legal by enshrining the right to buy lawmakers and legislation.

This is the real American exceptionalism — and it started with the 1976 *Buckley v. Valeo* decision equating money with speech. That ruling created the special class of "issue ads" that front groups still swamp the airwaves with today. One group operating in this space is the conservative dark money network led by Leonard Leo, former President Donald Trump's judicial adviser, that built the Supreme Court's 6-3 conservative supermajority.

However, the normalization of corruption did not accelerate until the court was taken over by Roberts, who previously represented the U.S. Chamber of

Commerce — the organization that converts corporate money into government policy.

Under Roberts' leadership, the court has issued four landmark rulings declaring that the purchase of "influence and access embody a central feature of democracy" (that's a direct quote from the court).

It started with 2010's *Citizens United*. That ruling officially prohibited limits on so-called "independent expenditures," which not only triggered record amounts of cash flooding into elections, but also narrowed the legal concept of corruption. Under the new precedent, illegal corruption is now only cash stuffed in an envelope and exchanged for explicit favors — but not most soft forms of purchased influence and access. Industries can use super PACs and "independent expenditures" to effectively bankroll the campaigns of compliant legislators — as long as the quid pro quo is not explicitly written down.

"That [donors] may have influence over or access to elected officials does not mean that these officials are corrupt," the majority stated. "Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. And the appearance of influence or access will not cause the electorate to lose faith in this democracy... Ingratiation and access, in any event, are not corruption."

Four years later, conservative justices issued the *McCutcheon* ruling that struck down limits on aggregate amounts of cash that individual donors can funnel to candidates and political parties. Once again, the basis of the ruling was the insane idea that corruption is only explicit quid-pro-quo favors, rather than the perpetual purchase of access and influence.

"Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to such quid pro quo corruption," the majority ruled. "Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties."

A year after that, Roberts' court used the *McDonnell* ruling to legalize the very quid-pro-quo corruption it previously said was still prohibited. In that case, the court stipulated that yes, a nutritional supplement industry executive delivered "$175,000 in loans, gifts, and other benefits" to Virginia Republican Gov. Bob McDonnell in exchange for him setting up meetings with state officials to promote the company's products. However, the court insisted that such a quid pro

quo is legal, and then berated law enforcement officials for trying to uphold anti-corruption laws.

"Setting up a meeting, calling another public official, or hosting an event does not, standing alone, qualify as an 'official act,'" Roberts wrote in the unanimous opinion. "Our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the government's boundless interpretation of the federal bribery statute."

Court Declares Corruption "A Central Feature Of Democracy"

That trio of rulings was a prelude to Roberts' new *FEC v. Ted Cruz For Senate* ruling — a piece of judicial performance art designed to let big donors funnel cash not just into politicians' campaigns, but also into their personal bank accounts.

At issue was a 20-year-old law that prohibited elected officials from using more than $250,000 of post-election campaign donations to repay personal loans they give their campaigns. That may seem arbitrary, but the point of the statute was straightforward: It prevented politicians from loaning their campaigns unlimited amounts of money at profitably high interest rates knowing that favor-seeking donors would pay the lucrative vig after the election — when the politician is positioned to deliver legislative favors.

Such a scheme may seem like a far-fetched subplot from *The Distinguished Gentleman* or *Thank You For Smoking*, but it's all too real.

Two decades ago, donors helped a Democratic lawmaker rake in more than $200,000 of interest on a personal loan that she made to her own campaign. Dissenting judges in the *Cruz* case documented situations in Ohio, Alaska, and Kentucky where donors helped top state officials recoup their personal campaign loans after their elections — and those donors were then rewarded with state contracts.

One amicus brief from a campaign finance watchdog group noted that even Senate Minority Leader Mitch McConnell (R-Ky.) called post-election fundraising to recoup loans an "unethical practice of shaking down special interests."

Until now, the law was working as intended: A study found that while self-lending politicians are generally more responsive to post-election donors' legislative demands, once the $250,000 limit was created, that responsiveness decreased.

But then came the epic legal troll from Cruz, who engineered the case by purposely violating the $250,000 loan repayment limit in his 2018 Senate campaign. His cartoonishly corrupt goal: striking down the limit and in the process reaping himself a personal $545,000 windfall from past self-loans that his big donors could recoup for him.

Cruz's case was boosted by amicus briefs from fellow GOP senators (including McConnell) and the Republican National Committee. The New Civil Liberties Alliance and the Institute for Free Speech, which filed their own amicus briefs, are bankrolled by the Leo-led dark money network that helped install five of the six conservative justices currently on the Supreme Court.

And now the Texas senator's bet has paid off: The Roberts Court last month ruled that access — and favor-seeking donors funneling post-election cash to lawmakers' personal bank accounts via campaign loans is "the sort of 'corruption,' loosely conceived, that this Court has repeatedly explained is not legitimately regulated."

The Roberts-written opinion then declared that campaign donors' "influence and access embody a central feature of democracy — that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."

The *Citizens United* Era

So to review: In response to the passage of bipartisan campaign finance reforms in the early 2000s, the Roberts Court spent a dozen years dismantling those reforms and then making it legal to spend unlimited sums of money to buy public offices, give gifts to elected officials in exchange for favors, and directly funnel cash to politicians' personal bank accounts as they write legislation.

At precisely the same time, legislators delivered tax cuts, subsidies, deregulation, bailouts, and other assorted favors to the donors writing the bribe checks — all while Supreme Court justices delivered ever-more extreme rulings to the delight of the dark money network that bought them their seats.

This system of legalized corruption is now almost perfected — but Roberts and his colleagues' crusade almost certainly will not stop there. Of late, the American Right and lower courts are signaling a new attack on laws that merely require

disclosure, insisting that transparency is unconstitutional "compelled speech." If Roberts soon applies that argument to campaign finance, the buying and selling of democracy that he legalized could happen in complete anonymity.

In *Five to Four*'s recent podcast reviewing the *Cruz* case, one of the hosts noted that this is Roberts and his fellow extremists on the court screaming their ideology out loud, "literally saying, yeah, some corruption can be regulated, but light corruption, that's free speech."

And that, he argues, is why the campaign finance cases will define this judicial epoch. They have created the superstructure upon which all the other horrible laws and precedent are built — or, more precisely, bought.

"There's so much awful that the court is doing right now [but] I really do think that the stuff that's going to define this era looking back will be their campaign finance — and election-related decisions," he said. "Just like the early 1900s, we call it the Lochner Era for one of the more egregious cases of the court striking down worker-friendly regulations. I think this is going to be the *Citizens United* Era."

Why Big Money Wants Barrett On The Supreme Court

The really huge money is lined up behind Barrett because she has reliably ruled for corporate interests and against workers.

Oct 5, 2020 • David Sirota

Mitch McConnell understands that if he can place Amy Coney Barrett on the Supreme Court, his party can lose the presidential election but still win the GOP's long-term battle to shift policy to the hard right. You don't have to believe me on that — as GOP strategist Patrick Ruffini said over the weekend, "Confirming (Barrett) is probably worth more than winning the election."

That is because Barrett would fortify the Supreme Court as the government's most powerful rubber stamp for corporate interests' long-term agenda. While the confirmation fight has mostly focused on important social issues, the court deals more often with business and economic issues.

As I review in my new *Guardian* column, the big money interests lining up behind Barrett's nomination — and airing ads in support of her — want her on the court not just because of her position on abortion or religious liberty, but also because of her corporate fealty.

The question remains: Will Democrats in Congress use their power to try to stop this nomination? Read the entire *Guardian* column below to really understand what is at stake in the Barrett confirmation battle.

The Supreme Court May Soon Become Plutocracy's Greatest Defender

An Amy Coney Barrett court will push the US to new levels of pro-business cronyism.

By David Sirota

If you get your news from the political press and television ads, you might think the U.S. Supreme Court is a forum that only adjudicates disputes over the most hot-button religious and civil rights issues. What you would not know is that while the court does periodically rule on those important matters, it spends as much or more of its time using business-related cases to help billionaires and corporations rig the economy against ordinary Americans.

In light of that, Amy Coney Barrett's U.S. Supreme Court nomination must be understood as the culmination of cynical tactics that Republicans have perfected over the last two decades. The strategy is straightforward: they nominate plutocrat-compliant judges knowing that the corporate-owned media and political system will make sure confirmation battles focus on partisan wrangling and high-profile social issues — but not also on the economic issues that justices often decide.

In other words: Republican politicians rely on conflagrations over political process and social issues to mobilize their religious base in service of Republican donors' real objective — smuggling corporate cronies on to the highest court in the land. And if Barrett is confirmed, those Republican donors will not just get another business-friendly judge — in advance of the 2020 election, they will also get a third justice who worked directly on the legal team that convinced the US supreme court to hand Republicans the presidency in 2000.

To be sure, Barrett's record on social issues is extreme and worthy of scrutiny, criticism and organized opposition, especially at a time when crucial precedents may be on the line. She signed an ad criticizing *Roe v. Wade* and she has suggested that a more conservative court could accept state restrictions on abortion clinics. As a judge, she has also written dissenting opinions against limits on gun rights and in favor of a Trump administration rule to try to make it harder for low-income immigrants to enter the United States.

Those issues, however, are almost certainly not what is motivating big donors to funnel millions of dollars into groups like the Judicial Crisis Network, the oil magnate Charles Koch's network and the US Chamber of Commerce in support of Barrett's nomination. Those groups' ads and lobbying campaigns may try to focus the public debate on religion and court precedent, but such enormous sums of cash flood into judicial campaigns with one underlying goal: enriching the corporations and plutocrats that are making the donations.

These organizations know the supreme court is the place to do exactly that — and they have been wildly successful in stacking the court since 2005.

That was the year that business interests engineered John Roberts' ascension to supreme court chief justice. Back then, corporate groups launched what was their first sophisticated public campaign to install a new jurist on the court — and Roberts was the perfect pick. He had advised the Bush 2000 legal team, he represented corporate clients in private practice and he was considered "the go-to lawyer for the business community".

Roberts' business fealty was not the focus of his court confirmation hearings — and that omission is now standard practice. Indeed, other than the brief controversy over Neil Gorsuch's ruling in a workers' rights case, recent confirmation battles have rarely ever homed in on nominees' views on corporate power.

And yet, the Roberts court has been defined by its allegiance to big business. According to the Constitutional Accountability Center, 70% of the Roberts court's rulings in business cases have sided with the US Chamber — the pre-eminent business lobby group in Washington. That is the highest rate of corporate loyalty of any supreme court in 40 years, and it is a bipartisan affair: Republican-appointed judges are almost always siding with business interests, and in roughly half the cases, Democratic-appointed justices have been with them, too.

While Roberts' break with conservatives on a few cases have led liberals to see him as a sensible moderate, he has presided over a radical court that has helped transform the economy. The court has limited unions' political power, reduced workers' bargaining rights, blocked class-action lawsuits against corporate wrongdoers, strengthened fossil fuel companies' power, and emboldened big money interests to buy elections. Even rulings that don't seem to revolve around

corporate power have ended up setting precedents that help strengthen commercial interests' power over American society.

Now comes Barrett — a nominee whose confirmation battle appears to be following the same playbook. So far, the fight is focusing on religion and social issues — but not also on how she could lock in an anti-worker corporate-friendly majority.

Barrett is no moderate on economics. An analysis from the watchdog group Accountable Us found that as a circuit court judge, she "faced at least 55 cases in which citizens took on corporate entities in front of her court and 76% of the time she sided with the corporations".

Only a month before Barrett was nominated to the high court by Donald Trump, she delivered a ruling that could help corporations avoid paying overtime to gig workers. That ruling followed her other rulings limiting the enforcement of age-discrimination laws, restricting the government's power to punish companies that mislead consumers and curtailing consumers' rights against predatory debt collectors.

The UCLA law professor Adam Winkler said that if Barrett is confirmed, the consequences could reverberate for decades. "This would really push the court over the top," said Winkler, the author of the book *We the Corporations: How American Businesses Won Their Civil Rights*. "You would have a very strong 6-3 conservative majority. And unlike previous times where conservatives had most of the seats on the court, none of the conservatives on [this] court really swing liberal on business or corporate power issues. John Roberts has swung liberal on a few cases in recent years to the celebration of many but his track record is pretty unambiguous and pretty consistently pro-business and anti-consumer."

Trump and Republican lawmakers are clearly trying to steer the confirmation battle into focusing only on social and cultural issues, because they think that is their most favorable political terrain. They do not want the upcoming Senate hearings to spotlight the corporate power issues that might make rank-and-file conservative voters see Barrett's nomination as an economic betrayal of the working class.

The question now is whether or not the Senate minority leader Chuck Schumer and the House speaker Nancy Pelosi will use all of the procedural power at their disposal to slow the nomination and expose Barrett's long record of taking the side of the powerful against the people.

If Democratic leaders do pursue such a strategy, they could stall the confirmation by turning the process into a referendum on economic inequality at precisely a moment when Americans have become acutely aware of the downsides of oligarchy.

If they reject that strategy, then the court could become a corporate star chamber for the rest of our lives — which is exactly what business interests want.

How Pro-Business "Law And Economics" Interests Pushed The Courts Right

As justices consider crushing the EPA, data show a link between judges' all-expenses-paid free-market trainings and right-wing business rulings.

Mar 9, 2022 • Walker Bragman

(Erin Schaff/AP)

Last week, one day after that United Nations scientists issued another alarm about "irreversible" damage from the climate crisis, the increasingly unpopular Supreme Court began considering a landmark case that could permanently restrict the Environmental Protection Agency (EPA)'s power to regulate greenhouse gas emissions — and many of the conservative justices are already signaling they agree with climate deniers' arguments.

If the court does succumb to pressure from oil baron Charles Koch's network and defangs the EPA, it would be a monumental defeat for climate activists and the future of the planet — but it would be a culminating victory for a legal network that has successfully shifted the judiciary to the hard right.

A newly updated academic preprint details the success of the so-called "law and economics" movement, which seeks to apply free-market principles to legal analysis, and how it used all-expense-paid conferences bankrolled by corporate

interests to indoctrinate a generation of judges — particularly in cases involving regulatory agencies, like the EPA.

The data from researchers at Columbia University, ETH Zurich, and the Toulouse Institute for Advanced Studies found a direct correlation between attendance at these seminars by judges and those judges handing down conservative verdicts on an array of topics from environmental regulation, antitrust action, and even criminal justice.

"Economics-trained judges significantly shift legal outcomes in U.S. courts," the study found. "After attending economics training, participating judges use more economics language in their opinions, issue more conservative decisions in economics-related cases, rule against regulatory agencies more often, favor more lax enforcement in antitrust cases, and impose more/longer criminal sentences."

The study specifically noted that judges who attended the conferences "subsequently are more likely to vote against regulatory agencies, in particular on the labor and environmental issues that early law and economics focused on."

Researchers concluded that the conferences "could account for between a quarter and a third of the rise in (economic) judicial conservatism" over several decades.

The findings contradict the assertions of retiring Justice Stephen Breyer — a law and economics acolyte — who insisted that the high court is not inherently rigged in favor of corporate interests. The study's conclusions seem to confirm a recent poll showing many Americans believe Supreme Court justices are making decisions based on political ideology.

Those poll numbers prompted the recent publicity campaign by Supreme Court justices to defend the legitimacy of the court and insist that the panel is not influenced by politics or ideology. That theme could resurface in the upcoming confirmation hearings for President Biden's court nominee, Ketanji Brown Jackson.

Though the study's findings are stunning, they are not an anomaly — they echo separate data showing the court's shift toward siding with the opinions of the U.S. Chamber of Commerce. That powerful corporate lobby group spearheaded campaigns to install right-wing judges on the court — including Chief Justice John

Roberts, the Chamber's former attorney — which has resulted in the court issuing far more rulings in favor of Chamber amicus briefs.

Luxury Conferences For Judges

In the case the Supreme Court began considering last week, *West Virginia v. EPA,* the plaintiffs are Republican attorneys general arguing that the EPA does not have the authority to regulate planet-warming greenhouse gas emissions from the energy sector.

Though the case revolves around separation-of-powers arguments, Republican plaintiffs argued that allowing the EPA to regulate greenhouse gas emissions would impose too big a cost on society.

"If EPA is looking at the national or grid-wide level and if it's dealing with an issue as massive as climate change, it's hard to see what costs wouldn't be justified," West Virginia solicitor general Lindsay See told conservative Justice Samuel Alito, implying that preserving the EPA's authority would give it too much power to impose economic costs on the country.

That argument about cost is what the law and economics movement is all about — getting judges to consider economic cost-benefit analyses when they are ruling on legal questions.

The movement grew out of the so-called Chicago school of free market economics, first made famous by Milton Friedman. The law-and-economics outlook posits that economic tools provide the best framework for consistent legal reasoning.

One of its leading proponents was Henry Manne, who is credited with opening the door for the application of economic principles to corporate law in the 1950s and 60s. In 1976, he launched a seminar series that covered judges and their families' "expenses for a beachside hotel stay," as recounted by the researchers behind the new preprint.

From the beginning, the movement was bankrolled by corporations and powerful business interests like weapons magnate John Olin.

A 1980 *Washington Post* article found that "within the past two years alone, at least 33 of the 105 companies" funding the Manne conferences "have been involved in 59 major, not to mention minor, federal court cases." A 2013 Center for

Public Integrity study found that "between July 2008 and 2012, about 185 federal judges attended more than 100 judicial education seminars, sponsored by conservative foundations and multinational corporations like ExxonMobil, Pfizer and BP."

At the Manne conferences, lecturers like Friedman would teach jurists about free market economic principles. By the time the program ended in 1999, nearly half of federal judges in the U.S. had attended. Even prominent liberals like Justice Ruth Bader Ginsburg and Sen. Elizabeth Warren (D-Mass.) had graced the seminars. Warren actually met her husband at a Manne event.

Manne's hub of economic-focused judicial activism flourishes today at George Mason University (GMU), as part of the private school's Antonin Scalia Law School. In recent years, GMU has been heavily funded by Charles Koch and his foundations along with other business interests. Last year, GMU received more Koch money than any other school in the country.

Acolytes On The High Court

Thanks to the efforts of Manne and others, the teachings of law and economics have taken root at the heart of American jurisprudence. Law schools increasingly hired economists as faculty members. By 1990, the top law schools in North America and some in Europe employed at least one economist. Yale Law School professor Bruce Ackerman even called the law and economics movement "the most important development in legal scholarship of the twentieth century."

Advocates of the economics approach now populate the Supreme Court. Justice Clarence Thomas was a Manne Institute attendee. Justice Amy Coney Barrett was a law and economics fellow at George Washington Law School early in her legal career.

Breyer himself has been an influential adherent of law and economics throughout his career. Unsurprisingly, he repeatedly aided corporate power. In the 1970s, for example, while serving as counsel to the Senate Judiciary Committee, Breyer helped kill the Civil Aeronautics Board that set airfares and approved service routes, believing it stifled natural competition in the market. Following this "deregulation," the industry experienced turbulence, consolidation, and price increases for consumers.

George Washington University law professor and former member of the Federal Trade Commission William Kovacic once noted: "As a court of appeals judge,

Justice Breyer was instrumental in setting doctrinal trends often ascribed to the influence of the Chicago School."

In one antitrust case Kovacic was referencing, Breyer, then sitting on the U.S. Court of Appeals for the First Circuit, ruled in favor of a nuclear plant pipe systems manufacturer that had entered into a contract with a parts manufacturer after it undercut a competitor on price. The ruling cleared the path for predatory pricing, a practice by which companies lower prices to put their competition out of business.

The six conservative justices also have ties to the right-wing Federalist Society, for which law and economics movement benefactor Olin provided seed money when it was still a student group with chapters at Yale, Harvard, and the University of Chicago. At the society's first major conference in 1982, among the invitees were Judge Robert Bork of the D.C. Circuit Court of Appeals, who has been credited with introducing economic thinking to antitrust in the 1960s, and Richard Epstein, another law and economics advocate.

All of the conservative Supreme Court justices are current or former Federalist Society members. The Federalist Society's co-chairman Leonard Leo was former President Donald Trump's top judicial adviser, and leads a dark money network that has run confirmation campaigns boosting the GOP's Supreme Court picks since 2005.

Last month, Justice Neil Gorsuch headlined a Florida event for the Federalist Society. Media was not allowed at the event and it is unclear if he was financially compensated for the appearance.

Whether or not the conservative justices will apply a laissez-faire economic approach in the West Virginia case remains to be seen, but considering the intensity of the climate crisis, the stakes have never been higher.

We Still Don't Know Who Is Paying For Trump's SCOTUS Seats

The conservative front group backing Amy Coney Barrett already spent $27 million to remake the Supreme Court. We have no idea where the money came from.

Sep 29, 2020 • Andrew Perez

Having already spent tens of millions of dollars to install two of President Donald Trump's justices on the Supreme Court, a conservative dark money group now says it plans to spend millions more to confirm Trump nominee Amy Coney Barrett, who has issued rulings favorable to corporate interests.

The money raised by the Judicial Crisis Network (JCN) comes from untraceable sources — and Barrett previously rebuffed a Democratic senator's request that she ask outside groups to refrain from spending big money to try to influence a congressional review of her appellate court nomination.

JCN previously spent as much as $27 million to block President Barack Obama's 2016 Supreme Court pick and place conservative jurists Neil Gorsuch and Brett Kavanaugh on the high court. As *The Lever* previously reported, JCN received $15.9 million from a single anonymous donor between July 2018 and June 2019, the tax period covering the Kavanaugh fight.

Now, JCN says it will spend at least $10 million supporting Barrett's confirmation. That's in addition to astroturf lobbying campaigns by the Koch Network's

Americans for Prosperity and the U.S. Chamber of Commerce. The Chamber plans to encourage its members to "elevate Barrett's platform and explain why her confirmation is aligned with the business community's priorities," according to *Axios*.

JCN is the darkest of dark money groups. While nonprofits aren't required to publicly reveal their donors, some contributor names generally drip out over time — usually in tax returns filed by other nonprofits, or in voluntary political contribution disclosures by big corporations. That hasn't happened with JCN.

Despite its massive spending, the group's funding sources remain a total mystery. JCN doesn't show up in the corporate contribution database compiled by the Center for Political Accountability. A thorough review of Internal Revenue Service nonprofit data by *The Lever* did not turn up any donations to JCN, either.

Barrett Silent On Dark Money Spending

JCN is closely tied to Trump's top judicial adviser Leonard Leo, a longtime executive at the Federalist Society, the conservative lawyers network based in Washington, D.C. *The Daily Beast* reported in 2018 that Leo "effectively controls the Judicial Crisis Network." Since 2017, the group has reported paying more than $1.4 million to a Virginia LLC linked to Leo.

Shortly after Justice Ruth Bader Ginsburg's death, JCN announced it was launching a $2.2 million ad campaign calling on the Senate to "follow precedent" and "confirm the nominee," who hadn't been named yet. On Saturday, JCN said it was spending $3 million on ads promoting Trump's pick, Amy Coney Barrett, and ultimately "expects to spend at least $10 million on the effort."

JCN's first TV buy supporting Barrett is a slick candidate-style ad that makes it look like she's running for office.

In 2017, after Barrett was nominated by Trump to serve on the Seventh Circuit Court of Appeals, Sen. Dick Durbin, D-Ill., asked her: "Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?"

Barrett responded: "I am unaware of any outside groups or special interests having made donations on my behalf. I have not and will not solicit donations

from anyone. Indeed, doing so would be a violation of my ethical responsibilities as a judicial nominee."

Pressed about whether she would "discourage donors from making such undisclosed donations" or "call for the donors to make their donations public," Barrett referred Durbin to her previous answer.

In 2018, liberals formed their own dark money group, Demand Justice, to be Democrats' counterweight to JCN. Although the group has pledged to spend $10 million to block Barrett's nomination, its influence doesn't compare to the right-wing courts network.

JCN has the benefit of working with a party and conservative outside groups that are firmly committed to stacking the courts by all means necessary, while some Democratic lawmakers have signaled preemptive surrender and others appear more interested in demonstrating their respect for apolitical norms.

Durbin, for example, said on Saturday that Senate Democrats won't be able to prevent Barrett's confirmation: "We can slow it down perhaps a matter of hours — maybe days at the most — but we can't stop the outcome."

"Special Interests Scheming"

For years, much of the money raised by JCN was funneled through a dark money group called the Wellspring Committee. The group is basically another black hole — its donors are completely unknown, too. The group shut down in late 2018 and only sent $35,000 to JCN that year.

Although JCN's funding sources remain secret, it's clear that the group deals in huge dollars. The group brought in six anonymous seven-figure donations between mid-2018 and 2019, including the $15.9 million gift. In 2016, the Wellspring Committee received nearly 90 percent of its revenue from a single $28.5 million donation, and passed $23.5 million to JCN.

All of these massive, anonymous donations have been used to help install deeply conservative judges on the high court for the rest of their lifetimes. Much of the media focus on the court battles has revolved around the potential of future abortion restrictions, for good reason.

But the John Roberts-led Supreme Court has been churning out victory after victory for corporate interests since 2006, siding with the U.S. Chamber, the

nation's top business lobby, in 70 percent of cases. Corporate influence over the court will likely only become more pronounced with a 6-3 conservative majority.

"A baked-in bias within the federal judiciary for special interests scheming behind dark money front groups is a rotten situation," Sen. Sheldon Whitehouse, D-R.I., tweeted on Monday. "It inflicts long-term harm on our judiciary."

The GOP's Dark Money Court Machine

The secretive conservative group that led Amy Coney Barrett's confirmation campaign received a $14 million donation just before the court fight.

Jun 29, 2021 • Andrew Perez

Stefani Reynolds/AP

The conservative dark money group that led the campaign to fill Ruth Bader Ginsburg's Supreme Court seat with Amy Coney Barrett received more than $14 million from a single mystery donor in the lead-up to the confirmation fight, according to documents obtained by *The Lever*.

The Concord Fund is the new parent nonprofit of the Judicial Crisis Network, a secretive dark money group that has been bankrolling campaigns to install GOP judges and funding conservative advocacy campaigns around the country since 2004.

After Ginsburg's death in September last year, the Judicial Crisis Network immediately started spending millions on ads calling on Senators to "ignore the extremists, stick to precedent, and confirm the nominee," who had not yet been named. The group then spent millions more to support Barrett's confirmation after former President Donald Trump selected her to replace Ginsburg.

The Concord Fund's latest IRS tax return shows the organization raised $20.4 million between July 2019 and June 2020. While the group is not required to publicly disclose its donors, the tax return shows it received $14.3 million — nearly 70 percent of its total revenue at the time — from a single anonymous source. The group also received donations of $4 million and $1 million.

The Concord Fund is closely tied to top Trump judicial adviser Leonard Leo. In early 2020, Leo stepped away from his day-to-day role at the Federalist Society, the national conservative lawyers group, to help steer the Concord Fund. Between mid-2019 and mid-2020, the Concord Fund paid $1.6 million to a company affiliated with Leo called BH Group, LLC.

Leo and his allies rebranded the Judicial Crisis Network as the Concord Fund, turning it into a social welfare organization that fiscally sponsors other organizations. This arrangement creates additional layers of opacity, allowing a nonprofit to host or create new advocacy groups at relatively little cost that simply exist as a trade name. Judicial Crisis Network is now a fictitious name registered under the Concord Fund in Virginia.

Conservative operatives did the same thing with the Judicial Crisis Network's charitable arm, the Judicial Education Project, renaming it the 85 Fund.

Last week, the 85 Fund and the Concord Fund registered new fictitious names, Free to Learn and Free to Learn Action. A few days later, the Free to Learn Coalition, which Fox News described as an "anti-critical race theory" organization, publicly announced that it had "launched with an initial seven-figure national ad campaign of well over $1 million advocating for classrooms independent from political influence."

The Free to Learn Coalition's president, Alleigh Marré, said in the press release that the group "will provide a platform and tailored resources to those ready to take on political activism by school boards and administrators."

The Concord Fund's tax return lists big donations to the Republican Attorneys General Association ($766,000), which elects GOP attorneys general and has pushed to restrict voting rights and overturn the 2020 election, and the Republican State Leadership Committee ($1.1 million), which helps elect GOP lawmakers to state legislatures.

The Concord Fund donated to many conservative dark money groups. The group gave $1 million to FGA Action, the social welfare arm of the Foundation for

Government Accountability, which has pushed to kick millions of Americans off of food stamps.

The Concord Fund also contributed $750,000 to Stand for America, a dark money group created by former Trump ambassador and ex-South Carolina Gov. Nikki Haley. It donated $200,000 to America One Policies, a dark money group tied to Sen. Tom Cotton, R-Ark., and $250,000 to State Solutions, the dark money arm of the Republican Governors Association.

The organization made donations to several dark money groups that pushed for Barrett's Supreme Court confirmation, including the Club for Growth ($500,000), the Susan B. Anthony List ($450,000) Article III ($167,000), America Rising Squared ($150,000), Tea Party Patriots ($150,000), Concerned Women for America ($125,000), and FRC Action ($55,000).

The Judicial Crisis Network has long been one of the darkest of dark money groups, with nearly nothing known about its donors. However, tax returns show the organization has received at least $3.2 million in recent years from the 45Committee, a dark money group linked to the billionaire Ricketts family, which owns the Chicago Cubs.

How Dark Money Bought A Supreme Court Seat

While Justice Amy Barrett feigned ignorance of dark money, new documents show that cash bankrolled her Supreme Court nomination.

Dec 19, 2021 • Andrew Perez & Julia Rock

Justice Amy Barrett, Sept. 12, 2021. (Photo credit: AP)

A conservative dark money group led by former President Donald Trump's judicial adviser Leonard Leo bankrolled Amy Coney Barrett's Supreme Court confirmation campaign with nearly $22 million in anonymous cash, while another nonprofit that Leo helps steer saw a fundraising bonanza and showered cash on other organizations boosting Barrett, according to tax returns obtained by *The Lever*.

The new tax returns shed light on how Barrett's successful last-minute confirmation campaign was aided by a flood of dark money. They also reveal the rapid growth of Leo's already highly successful dark money network and its tentacles in the broader conservative movement.

Corporate interests with access to nearly unlimited money have a huge stake in tilting the court to the right. In recent years, the court has played a pivotal role not only in swaying social policy, but also in shifting economic policy and corporate regulations. In Barrett's first year, she has already sided with corporate interests

on a landmark climate case involving an oil giant that employed her father for decades, and she refused to recuse herself in a donor transparency case involving a foundation tied to a dark money group that backed her confirmation.

"I Am Unaware Of Any Outside Groups"

Leo is a longtime executive at the Federalist Society, a group for conservative lawyers. He formed the Rule of Law Trust (RLT) in 2018, and the group quickly raised nearly $80 million. RLT started spending that money in 2020, donating $21.5 million to the Judicial Crisis Network (JCN), another group steered by Leo that played a key role in Republicans flipping the Supreme Court and building a conservative supermajority.

JCN spent millions pressing Republican senators to block Obama's 2016 Supreme Court pick, Merrick Garland, and subsequently spent millions boosting each of Trump's high court nominees — Neil Gorsuch, Brett Kavanaugh, and Barrett — all while Leo was advising Trump's judicial strategy.

In 2017, when Barrett was nominated to serve on the Seventh Circuit Court of Appeals, Sen. Dick Durbin, D-Ill., asked her: "Do you want outside groups or special interests to make undisclosed donations to front organizations like the Judicial Crisis Network in support of your nomination?"

Barrett responded: "I am unaware of any outside groups or special interests having made donations on my behalf. I have not and will not solicit donations from anyone. Indeed, doing so would be a violation of my ethical responsibilities as a judicial nominee."

When Durbin asked whether she would "discourage donors from making such undisclosed donations" or "call for the donors to make their donations public," Barrett referred him to her previous answer.

The 85 Fund

Leo also helps direct the 85 Fund, a charitable organization being used to fiscally sponsor a host of conservative nonprofits, including the Judicial Education Project, which has long been JCN's sister arm.

The 85 Fund reported bringing in nearly $66 million in 2020, according to its latest tax return. That's a huge increase over the roughly $13 million the organization raised in 2019, per OpenSecrets, which found the majority of the 85

Fund's 2020 money came from DonorsTrust, a group known as a "dark money ATM," for its use as a pass-through vehicle.

The 85 Fund donated big sums last year to groups that backed Barrett's confirmation, including: Turning Point USA ($2.7 million), Job Creators Network ($500,000), Independent Women's Forum ($310,000), the Susan B. Anthony List ($175,000), Concerned Women for America ($100,000), Faith and Freedom Coalition ($100,000), and Heritage Action for America ($50,000).

The 85 Fund disclosed donating to nearly four dozen conservative groups in 2020. It made a substantial donation — $5.6 million — to the Federalist Society, where Leo is a co-chairman.

The organization also gave $1 million to the New Civil Liberties Alliance, a group that fought in court to end the Biden administration's federal COVID-19 pandemic eviction ban. It contributed another $1 million to Passages Israel, a group known as "Christian birthright" for bringing American Christian students on trips to Israel.

The 85 Fund also donated $750,000 to RealClearFoundation, a conservative nonprofit tied to the political news aggregator RealClearPolitics. And it contributed $100,000 to the CO2 Coalition, a conservative climate denial group.

Group That Led Kavanaugh Confirmation Got $15.9 Million From One Mystery Donor

Disclosure comes in new tax records.

Jul 16, 2020 • David Sirota

The conservative dark money group that led the fight to install Brett Kavanaugh on the U.S. Supreme Court received nearly $16 million from a single mystery donor, according to newly-obtained IRS documents.

The documents show that the Judicial Crisis Network (JCN) received a total of nearly $30 million of donations in between July 2018 and June 2019 — the period that covered Kavanaugh's tumultuous confirmation. In addition to the $15.9 million donation from a single donor, the group received five other 7-figure donations from anonymous sources.

JCN financed millions of dollars of ads promoting Kavanaugh. The new tax documents show the organization paid more than $12.3 million to a media buying firm during the tax year. Those documents also show that the organization funneled money to a number of other conservative groups that backed Kavanaugh's confirmation. Those include $1 million to the National Rifle Association and $600,000 to One Nation, which both aired ads supporting Kavanaugh.

Schedule B (Form 990, 990-EZ, or 990-PF) (2018)

Name of organization
Judicial Crisis Network

Part I **Contributors** (see instructions). Use duplicate copies of Part I if additional space is

(a) No.	(b) Name, address, and ZIP + 4	(c) Total contributions
1	N/A Foreign State or Province: Foreign Country:	$ 15,881,000

JCN does not disclose its donors. The group is closely linked with Trump's top judicial adviser Leonard Leo, the longtime executive vice president of the Federalist Society, which is an influential Washington-based legal network for conservatives and libertarians. JCN paid nearly $1.2 million to BH Group LLC, a company affiliated with Leo.

Kavanaugh's confirmation was hardly a sure thing — he not only had what critics called an extreme judicial record, he also faced sexual assault accusations from Stanford professor Christine Blasey Ford, as well as questions about his personal finances. The well-funded campaign behind him was pivotal in overcoming those controversies and pressuring lawmakers to approve his nomination.

Kavanaugh replaced swing-vote Justice Anthony Kennedy — and since he has joined the court, he has provided a reliably conservative vote on close 5-4 rulings. Most recently, he wrote the opinion for a 5-4 ruling that helps prevent workers from suing over allegations that Wall Street firms have bilked their retirement systems.

Koch Machine Pressing Supreme Court To Crush EPA

Dark money groups funded by the fossil fuel billionaire are lobbying justices to block the agency from limiting greenhouse gas emissions.

Feb 18, 2022 • Andrew Perez

Charles Koch (AP Photo/David Zalubowski)

Dark money groups bankrolled by billionaire Charles Koch are lobbying the Supreme Court to limit environmental regulators' power to reduce carbon emissions, according to filings reviewed by *The Lever*. The new pressure campaign follows the conservative oil tycoon using his political network to help install Donald Trump's three ultra-conservative justices on the court.

Later this month, the Supreme Court will hear oral arguments in *West Virginia v. Environmental Protection Agency*. The case could decide whether the EPA is allowed to issue rules to reduce greenhouse gas emissions — and comes at a time when scientists are warning that governments must rapidly decarbonize the planet in order to avoid catastrophic weather-related impacts from climate change.

If the court sides with the Koch groups, the chief environmental regulator in one of the world's largest carbon-emitting nations would be barred from enacting many policies to combat climate change.

The Koch network helped arrange the court's current composition — and now at least five nonprofits tied to Koch have filed amicus briefs in the *West Virginia* case pressing justices to determine that the agency does not have the authority under the Clean Air Act, the landmark 1970 air quality law, to set new limits on greenhouse gas emissions.

Fossil fuel interests are hoping that the Supreme Court will deliver "a broad rule that the EPA can't use the Clean Air Act to tackle any significant new problem without going back to Congress each time for new, and very detailed, legislation," noted David Doniger, senior strategic director of the Natural Resources Defense Council's Climate & Clean Energy program. "They're counting on lobbyists and dark money to keep Congress gridlocked, so that those new laws are impossible to pass."

There's little chance that Congress will step in to fill the regulatory void if the Supreme Court guts the Clean Air Act. Democrats spent most of last year debating and ultimately failing to pass a climate spending bill. If the party loses control of Congress this year, Democrats likely won't be able to pass any substantive new climate measures for the rest of the Biden presidency.

A Flotilla Of Amicus Briefs

Koch runs Koch Industries, the world's largest privately held fossil fuel company — and one that has a vested interest in a Supreme Court ruling that blocks the EPA from regulating greenhouse gas emissions. Koch is also among the biggest financiers of the American conservative movement — and his political network has played a significant role in shaping the nation's highest court.

The Koch network's chief political arm, Americans for Prosperity, led campaigns supporting the confirmation of all three of Trump's Supreme Court justices: Amy Coney Barrett, Brett Kavanaugh, and Neil Gorsuch. Barrett's confirmation was a particularly significant win for the fossil fuel industry — she has familial ties to Shell Oil, and refused to recuse herself in a case involving that oil giant.

Despite the Koch network spending on their confirmation battles, none of the trio decided to recuse themselves last year when the court ruled in favor of the Koch organization's charitable affiliate, the Americans for Prosperity Foundation, in a decision invalidating California's requirement that nonprofits disclose their donors to state regulators.

The Koch network isn't just interested in stacking the court with its preferred justices; it is also working to sway the court's decisions. As Sen. Sheldon Whitehouse (D-R.I.) has documented, organizations funded by Koch will often file a "flotilla of substantively similar amicus briefs" with federal courts seeking to influence judicial decisions that could impact the billionaire's financial operations.

Recently, the operation began targeting the *West Virginia* case, which is scheduled to be heard by the Supreme Court on February 28. In December, Koch's Americans for Prosperity Foundation filed an amicus brief in the case arguing that the EPA should not be permitted to "impose its will on the nation through regulatory diktat."

"It is not this court's role to choose between competing visions for how these subjects should be addressed. Instead, this case is about which branch of government, under the existing constitutional structure, is entitled to make major policy decisions of vast political and economic importance, like those at issue here, and by what process," the foundation wrote. "At the federal level, the answer is Congress, through duly enacted legislation, subject to constitutional constraints on federal power."

Several more Koch-funded dark money groups have filed similar amicus briefs in the case. That includes the Cato Institute, the New Civil Liberties Alliance, the Competitive Enterprise Institute, and the Mountain States Legal Foundation.

Koch co-founded the Cato Institute, a libertarian think tank. The Charles Koch Foundation has donated more than $11 million to the Cato Institute since 2012, while the Charles Koch Institute has contributed $2.4 million, according to IRS tax returns. Cato's brief was submitted jointly with the Mountain States Legal Foundation, which has received several five-figure donations from Koch's foundation in recent years.

Since 2017, Koch's foundation and institute have donated $3 million to the New Civil Liberties Alliance, which also helped fight the federal government's COVID-19 pandemic eviction ban as Koch's business empire was investing in residential real estate.

The New Civil Liberties Alliance also received $1 million from the 85 Fund, a charitable foundation steered by Trump judicial adviser Leonard Leo. A longtime executive at the Federalist Society, a conservative lawyers group, Leo also helps

direct the Judicial Crisis Network, a dark money group that spent tens of millions leading the confirmation campaigns for Gorsuch, Kavanaugh, and Barrett.

The Charles Koch Foundation and the Charles Koch Institute have delivered $376,000 to the Competitive Enterprise Institute since 2012, tax returns show. The organization has also received funding from oil and gas company Marathon Petroleum and the fossil fuel lobbying group American Fuel & Petrochemical Manufacturers.

Meanwhile, some Democrats want to stop dark money groups from weighing in on such cases without revealing their financial backers. Whitehouse and several progressive Democrats, including Sen. Bernie Sanders (Ind.-Vt.) and Rep. Alexandria Ocasio-Cortez (D-N.Y.), have offered legislation that would require groups filing amicus briefs to disclose their major donors.

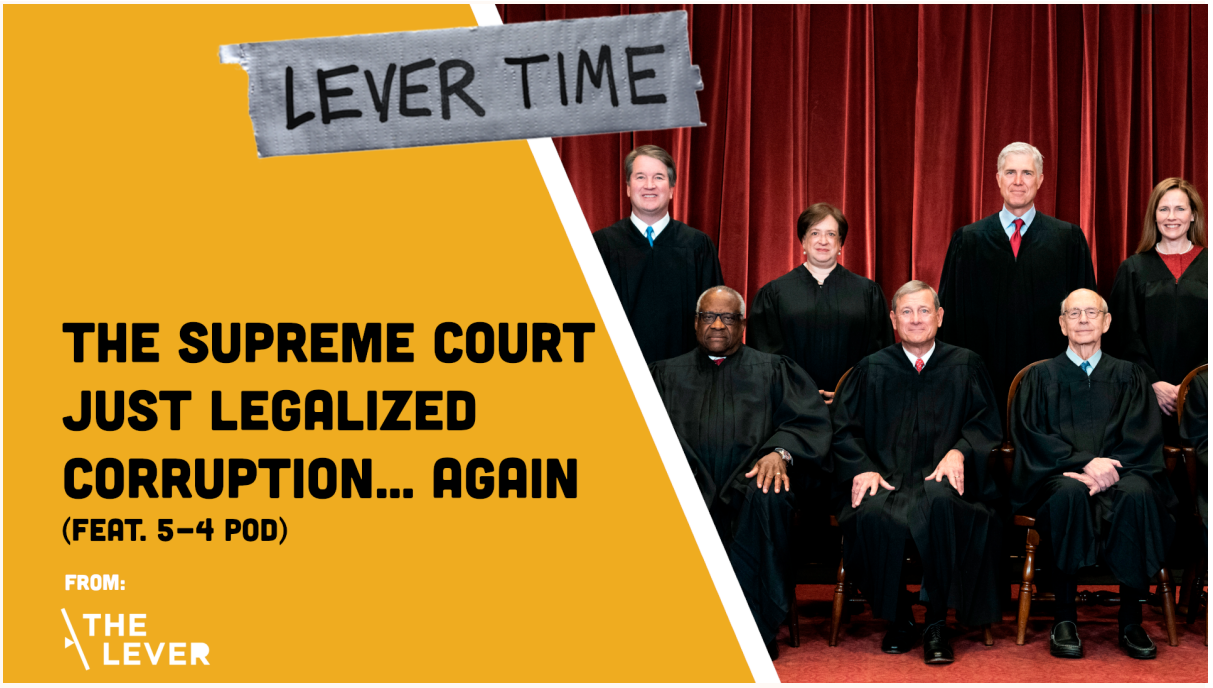
“The American people deserve to know who’s paying to influence their courts,” said Whitehouse in a press release. “If a big-money special interest has a stake in a case, everyone ought to know that, from the judge rendering the decision to the people living with the precedent the case could set.”

Q&A

The Supreme Court Just Legalized Corruption… Again

Breaking down the newest Supreme Court case legalizing corruption.

By David Sirota



On the July 6, 2022 episode of *Lever Time*, David Sirota was joined by Peter and Michael, co-hosts of *5-4 Pod*, for an in-depth conversation about the Supreme Court's history of legalizing corruption in U.S. politics, culminating in the recent decision in *FEC v. Ted Cruz* For Senate.

Below is an abridged Q&A from their discussion.

David Sirota: To start this conversation, I want to ask you both your thoughts on whether you think John Roberts is more of a *House of Cards*-style figure who's actually the mastermind of what's going on here, or whether you think he's supposedly lost control of the court.

Peter: I do think that he certainly lost control of the public perceptions of the court, something that he was very good at regulating until the arrival of Amy Coney Barrett, and maybe even until this term. And it seems pretty clear that

although he is almost certainly ideologically aligned with the rest of the court on, for example, abortion rights, that he is trying to steer for PR purposes a more "moderate" path right — and I'm really using the term "moderate" loosely there.

That said, I think that if you look at what he is looking to accomplish jurisprudentially, he's very secure and his agenda is very secure.

Michael: I'd add that the idea that he has lost control stems from the idea that there are these other justices who are even more arch-conservative than he is. And that might be the case on some issues, but in other issues, the issues that mean the most to him, he is just as extreme, if not more so than a lot of them.

In all the campaign finance cases and all the big corporate cases, all the big cases where they're taking hacks at the administrative state, he still gets to say who writes those decisions and what they say. So even if there's a sense in which he's lost control of some of the more nutty religious shit they're doing, for what he's trying to get accomplished, the dismantling of the Voting Rights Act and free and fair elections and the regulatory state, he is very much still comfortably in charge.

I really want to talk about how John Roberts has pretty quietly legalized corruption in the American political system. It started with *Citizens United v. FEC* in 2010, which basically said there is no such thing as corruption. I'll let you take it from there.

Peter: There are caps on what you can donate as an individual to a campaign. But if you're a billionaire who wants to just start a [political action committee][political action committee] and run your own ads, saying whatever you feel, the question is, how much can you spend there? Can that be capped?

In *Citizens United*, the court essentially said no, that's sort of its own thing. People can relatively freely spend their own money outside of the campaign's sphere on ads, or whatever. And the result of that has been the amount of money being spent during campaign season on political messaging is now something like tenfold what it was a decade ago.

In *Citizens United*, they kicked off this rhetorical strategy where they really center this around free speech rights and say that this is all about free expression. And wrapping the rhetoric of free speech and first amendment rights around billionaires who are trying to spend as much money as possible to influence our politics.

Michael: The story behind *Citizens United* also was one of court corruption and overreach. Citizens United wasn't even asking for this ruling. They were asking for something much smaller. And the Republicans on the court decided they're going to decide this instead and use this as an opportunity. And this is under the supposedly moderate John Roberts, getting far more aggressive than the hackish partisan Citizens United group itself in terms of what they're going to do with this case.

Let's get to *FEC v. Ted Cruz*. Why don't you lay out this case for us?

Peter: Let me put it this way: A candidate can make a loan to their campaign, and then the campaign can pay that loan back. But there was a $250,000 cap on how much money you can pay back a candidate with donations received after an election. And after an election is won, people can still donate to your campaign but it looks a little more like bribery. Because you're no longer trying to help the candidate win, you're now just trying to sort of curry favor with a candidate who probably has won.

Ted Cruz decides to challenge this law by loaning his campaign a little more than the cap. And basically says, "This infringes on my ability to get my loan repaid by my campaign and therefore infringes upon my ability to facilitate my own campaign, which is part of my free speech."

So the Court essentially rules that the cap is a violation, they go back to this free speech rule and they say the restriction on the lending of this money is a violation of the candidate's speech. Is that basically right? Or is there something more?

Michael: You loaning your campaign money is an expressive act. And if you're worried about getting it repaid, you might limit the amount of expressive money you're lending your campaign, and therefore, your speech is being restricted.

Can you explain the process by which this becomes arguably the most corrupt form of corruption possible?

Peter: But the most obvious thing is you loan your campaign a large loan, and you charge your own campaign interest. There are cases that are known of candidates charging things like 18 percent interest to their own campaigns.

And then once you win the election, a bunch of donors donate a bunch of money to your campaign, which then gets paid back out to you with interest, just after

you've already won the election. It's money straight into your pocket, out-and-out fraud and corruption.

I feel like once you build an architecture of corruption like this, then you create a permanent process of getting extremist laws and extremist court rulings. But it feels like this doesn't get the attention it deserves. Why do you think that is?

Michael: My intuition is that a lot of people take their cues from the national parties, for better or worse. The Democrats have to exist in this environment, which means they need to find their own big donors, and they need to have their own networks, so they become captured by these structures as well, even if it's a structure that in general favors one party over the other.

Peter: I think it's worth noting that when politicians have made this an issue, it's been successful. A big part of Bernie's success in 2016 is that he started talking about *Citizens United*.

But you have this whole incentive structure, and you have the Democrats who are either too captured or too scared, or just too politically stupid to to navigate it and bring it up and make it an issue. And I think those things working together have allowed elites the ability to ignore it. It was barely an issue in 2020, even though Bernie had made it a relatively big one in 2016. And it's hard to imagine that it's going to become more of an issue.

Is there anything when it comes to this Supreme Court that we can be optimistic about?

Peter: Well, I think the silver lining is that people are starting to wake up and understand the court as a political body. On campaign finance, in particular.

I will also say that what the court is doing is extremely unpopular. And there is a lot of room for a savvy politician to really take the reins here and do some damage to what the court has wrought, and lead the charge to roll these back.

I don't think we're there yet. But over the medium- to long-term, I think there's reason to think that this is an area where we could start to see wins over time.

SECTION THREE

The Roe Disaster

The culmination of the Roberts Revolution came in June 2022, when the Supreme Court discarded a half-century of of precedent and overturned the *Roe v. Wade* decision that protected abortion access for millions of Americans.

As conservatives built a movement aimed at overturning *Roe*, Democratic politicians pledged to codify *Roe* in federal law — but as *The Lever*'s reporting shows, they never actually fulfilled that promise. At times, Democratic Party leaders have actively campaigned to re-elect anti-choice politicians.

Dems Stalled Abortion Protections In A Committee

Democrats promised legislation to codify *Roe* and preempt the Texas law, but they've chosen to leave it sitting with a congressional panel.

Sep 2, 2021 • David Sirota & Andrew Perez

Photo credit: AP Photo/Alex Brandon

The Supreme Court's decision to let an extreme Texas anti-abortion law stand has touched off yet another round of outraged tweets, press releases, and declarations insinuating that while the situation is awful and while the court needs to be overhauled, there is nothing that can be done right now to halt America's inexorable lurch toward the Republic of Gilead.

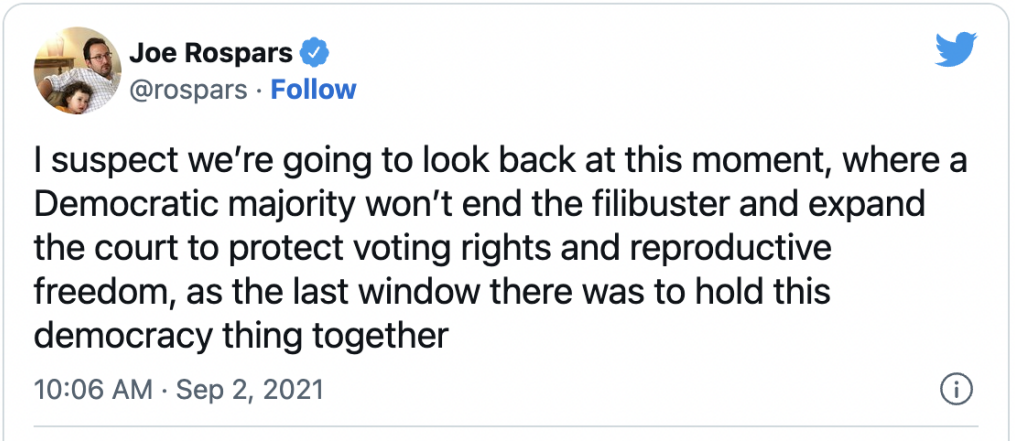
This is, in a word, garbage — and it is garbage with a pernicious purpose.

Yes, America needs presidents who appoint more sane Supreme Court justices over the next few decades. And yes, the initiatives to expand the court and time-limit judicial terms are important over the long haul. But as Texas empowers anti-abortion activists to become bounty hunters, something can be done in the here and now.

Democrats in Washington control Congress and the White House, two branches of government that have the power to preempt not only the Texas law, but also stop any copycat anti-abortion laws that other Republican states now race to pass.

This is something Democratic lawmakers can do today — this very minute — to protect women's health. They don't have to wait 18 more days until their summer vacation is over, as House Speaker Nancy Pelosi, D-Calif., suggested Thursday. They can do it right now.

And if they once again opt to cite filibuster rules they have the power to change or if they manufacture some other fake reason for inaction — then they are willfully choosing to take the side of the anti-abortion extremists.



"No Matter Where She Lives"

The reason the Democrats have the power to invalidate the Texas law goes back to the underpinnings of *Roe v. Wade*. That case legalizing abortion became the law of the land through court precedent — an inherently fragile state of affairs that has now allowed five unelected extremists on the Supreme Court to wake up one day and decide to ignore it. They can do so because *Roe*'s precedent has never been explicitly legislated as a federal statutory protection.

Yes, you read that right: Since the *Roe* decision in 1973, Democrats in Washington have never bothered to codify the precedent as a federal law, even when they have held both houses of Congress and the presidency. (Though some Democratic states have passed their own abortion protections.)

The same story has now unfolded during the first seven months of the Biden presidency, allowing Texas Republicans and Supreme Court extremists to take advantage of the negligence.

Of course, Biden campaigned on a promise to pass such a federal law — and the good news is that he and his Democratic colleagues in Congress remain in a position to actually make that happen. There is already legislation introduced in Congress to do this. It is called the Women's Health Protection Act, it already has 48 sponsors in the Senate, and its core precepts are wildly popular according to survey data.

"[The bill] creates federal protections against state restrictions that fail to protect women's health and intrude upon personal decision-making," notes a description from the bill's sponsor, Sen. Richard Blumenthal, D-Conn. "It promotes and protects a woman's individual constitutional rights, no matter where she lives."

This legislation would use federal authority to invalidate anti-abortion state laws. It makes clear no "state government shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law that conflicts with any provision of this act."

And yet as Republican legislators in states across the country have been passing laws to try to restrict abortion, Democrats didn't even introduce the latest version of this bill until June, even though there have been versions of it going back to at least 2013. And then, after Democrats finally introduced it again, the legislation has been languishing in a committee — all while Democrats have been raising money off their promises to protect a woman's right to choose.

This bill doesn't have to sit in a committee. Democrats can pass it — not next week, not next month, but today. Right now. And they could seek help from Republican Sens. Lisa Murkowski of Alaska and Susan Collins of Maine, who have both said they support *Roe* and who have both humiliated themselves by previously insisting that the Republican Supreme Court nominees they've approved would not overturn *Roe*.

No Excuses

The arguments against passing the Women's Health Protection Act are pathetic. Biden promised it, and 48 Senate Democrats are sponsors of the legislation. Avoiding this confrontation in order to appease two Democratic holdouts — Sens. Joe Manchin of West Virginia and Bob Casey of Pennsylvania — is unacceptable.

Likewise, citing arcane filibuster rules as reason for Democrats to not even have this fight is equally ridiculous.

At a time when Republican legislators and judges are laying waste to the rules protecting women's health, a change in Senate rules is the absolute least that can be done. Citing the filibuster as some sort of undebatable law of nature or immovable object is as absurd and insulting as pretending an unelected, fireable parliamentary adviser is the reason America can't get a $15 minimum wage. You have to be either a #TeamBlue zombie, a pundit on the take, or a gullible moron to accept such obvious bullshit.

Now sure, codifying *Roe* in federal law may not be a permanent solution. A new statute could be challenged in the courts and ultimately be overturned by the same Supreme Court that just allowed the Texas law. Similarly, if Republicans win back Congress and the White House, they could repeal it. One galaxy brain pundit today seemed to argue that this future possibility is reason enough for Democrats to do nothing today.

But this circular logic is a form of learned helplessness that depicts anything Democrats could do as futile just because GOP extremists might later try to dismantle it.This is not merely dumb, it is deliberate dishonesty designed to let Democrats continue raising money and running campaigns on promises to protect abortion rights while they're not actually doing anything to deliver on those promises. It lets Democrats pretend that the only things they can do are just over the horizon — after you give them your volunteer time and your money to help them win the next election and keep their cushy jobs in Washington.

You can try to come up with inane, unsubstantiated Rube-Goldberg-Machine theories blaming Ralph Nader or Susan Sarandon or Bernie Sanders or Jill Stein or anyone else for Democrats losing winnable presidential races, which then led to the Republican Supreme Court appointees who allowed a Texas law to stand.

This kind of fever dream may make Democratic partisans feel good about themselves and shirk responsibility, but here's the thing: The Democratic Party already won the elections necessary to take control of the governmental bodies that make laws and then deliver on their legislative promises. They have the power to enact a law protecting a woman's right to choose — and if they still refuse to do that in the face of the Texas insanity, then they are complicit in the Gilead-ification of America.

The Anti-Abortion Crusade For The Filibuster

Anti-abortion forces are campaigning to protect the filibuster and crush voting rights — and Democrats may be content to let them win.

Jan 13, 2022 • Andrew Perez

The nation's most prominent anti-abortion group has been leading the campaign to protect the Senate's legislative filibuster, in order to ensure that Democrats don't pass voting rights protections.

The right-wingers promoting the filibuster have been fully transparent about their goal: They want to block a federal voting rights law so they can elect more anti-choice politicians and to protect the Supreme Court's conservative supermajority that's threatening abortion rights. It's one more piece of evidence that defending the filibuster isn't about preserving a rarified legislative tradition — it's all about rigging the game to maximize conservatives' power.

So far, some Democrats seem content with allowing conservatives to win the argument and are refusing to end the filibuster — while other party lawmakers are considering weaker rule changes that might not do anything to help Democrats actually pass a voting rights bill.

Last year, the Susan B. Anthony List (SBA List) helped launch the Election Transparency Initiative, with the stated goal of blocking Democrats from passing

a national voting rights bill that would undo new Republican voter suppression laws around the country. Central to that effort: defending the filibuster, the Senate rule requiring 60 votes to advance most legislation.

In a press release announcing the initiative, the SBA List said the effort would include opposing H.R.1 — the strongest voting rights and democracy reform bill that Democrats have considered — and "mounting a vigorous defense of the filibuster and current Senate rules governing the reconciliation process, so as to prevent the worst of the pro-abortion Democrat agenda: unilaterally passing H.R.1. and expanding the Supreme Court."

According to Pew Research survey data from last year, roughly six in ten Americans believe abortion should be legal in all or most cases.

In recent months, the Election Transparency Initiative has been running ads pressuring corporate Sens. Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — the two Democrats who have publicly opposed filibuster reforms — not to allow any changes to the filibuster.

"For a century the filibuster has been a bedrock senate tool ensuring bipartisanship," says one video ad from the Election Transparency Initiative. "Ending it means more dysfunction. Thankfully, Sen. Joe Manchin pledged to protect the filibuster, despite partisan pressure to cave. If Manchin sides with liberal elites to weaken the filibuster with carve-outs for Democrats' priorities, he would violate the trust of voters. Tell Manchin: Keep your promise. Protect the filibuster."

A similar version has aired recently on West Virginia radio stations.

An Arizona ad from the group says: "Congress is broken and extreme politicians want to make it worse by abolishing the senate's 60-vote filibuster rule. Sen. John McCain knew better and pledged preservation of the filibuster to ensure bipartisan cooperation. Thankfully Sen. Kyrsten Sinema has promised to honor McCain's legacy and protect the filibuster. But if Sinema votes to eliminate or weaken the filibuster, she would be just another hypocritical politician."

Manchin and Sinema, the Democratic Party's rotating villains of choice for the Biden era, have both publicly resisted calls to end the filibuster, arguing that Senate Democrats and Republicans should learn to work together instead — a fantasy that plays into the hands of groups like the SBA List that want to eliminate abortion access and restrict voting rights as well as corporate lobbyists who want

to prevent Democrats from passing any bills that could threaten their clients' profits.

With the GOP blocking voting rights legislation all of last year, Democrats are now once again considering a number of potential filibuster reform options, with President Joe Biden imploring them on Tuesday to change the rules "whichever way they need to be changed to prevent a minority of senators from blocking action on voting rights."

It's not clear yet whether Democrats can win over Sinema or Manchin, even though the West Virginia senator backed filibuster reforms a decade ago. And some of the more limited filibuster reform ideas Democrats are discussing might not even functionally end the GOP's legislative blockade and help to pass a voting rights bill — a reminder that Democratic lawmakers are much more comfortable failing the public than the donor class and are fine with Republicans setting policy.

"A Vigorous Defense Of The Filibuster"

The SBA List last year helped create the Election Transparency Initiative, helmed by Ken Cuccinelli, a former Virginia attorney general and abortion rights opponent who served as an immigration official in the Trump administration.

While the initiative was announced as a joint effort between the SBA List and another conservative group, the American Principles Project, state incorporation records show the SBA List is acting as the group's fiscal sponsor, registering the Election Transparency Initiative as a fictitious name in Virginia.

Ad-buy filings with the Federal Communications Commission name SBA List officials — president Marjorie Dannenfelser and chairman Jane Abraham — as the leaders of the Election Transparency Initiative.

The SBA List has been extremely open about why it created the Election Transparency Initiative and why it's opposing efforts to reform or eliminate the filibuster: The organization wants to block federal voting rights legislation in order to protect new restrictive state voting laws, with the point being that it will be easier to elect more anti-abortion lawmakers.

They also want to make sure Democrats don't try to add seats to the Supreme Court, whose 6-3 conservative supermajority could soon overturn the court's landmark 1973 abortion decision, *Roe v. Wade*.

Keeping the filibuster in place so that bills can't pass by a simple majority vote would also make it impossible for Democrats to pass existing legislation to codify *Roe* as a federal law — something Barack Obama had pledged to do in his first act as president. The Women's Health Protection Act legislation currently has 48 Democratic cosponsors, with the only holdouts being Manchin and Pennsylvania Sen. Bob Casey.

To be clear, it's not as if the SBA List has any kind of ideological affection for the filibuster or Senate rules: When Republicans eliminated the filibuster for Supreme Court nominees in order to confirm Justice Neil Gorsuch, the SBA List issued a press release praising the move.

"Today the Senate voted to confirm Judge Neil Gorsuch as the next U.S. Supreme Court Justice," the organization wrote. "The vote comes one day after Majority Leader Mitch McConnell moved to change the procedural rules of the Senate and end the Democrats' filibuster of President Trump's nominee."

"The swift fulfillment of President Trump's commitment to appoint pro-life Supreme Court justices is a tremendous win for the pro-life movement," Dannenfelser added in the release.

While Manchin and Sinema pretend that keeping the filibuster encourages interparty cooperation and calling for voting rights legislation to be passed in a bipartisan manner, anti-abortion activists have already admitted their campaign to protect the filibuster is about ensuring that Democrats cannot pass a voting rights bill at all or try to undo the GOP's Supreme Court supermajority.

It's a much more honest approach than what gets said by corporate lobbying groups like the U.S. Chamber of Commerce, which has also opposed filibuster reform because the rule serves to protect business interests, but has instead insisted that the rule encourages lawmakers "to build consensus and encourage collaboration."

As the Chamber wrote last year, "Only in Washington could getting 60 out of 100 people to agree feel like an insurmountable obstacle... Issues of national importance deserve the time, thoughtfulness, and deliberation that the filibuster provides."

That's the same kind of spin you often hear from Sinema and Manchin.

"Smaller-Scale Ideas"

Although Manchin and Sinema are still making discouraging statements about the idea of reforming the filibuster, Democrats have decided they want to take another shot at passing a voting rights bill — so they are once again discussing potential filibuster reform proposals.

Unfortunately, they aren't just talking about eliminating the filibuster, which should not exist in any way.

On Tuesday, Politico reported that some of "the smaller-scale ideas" that Senate Democrats are debating "may not fully overcome the GOP's staunch opposition to the elections bill."

There is no point to Democrats spending time on an effort to modify the filibuster if it doesn't allow them to pass legislation. The whole debate over whether Democrats should end or reform the filibuster — which has gone on for an excruciating 12 years now — is proof that Democrats are afraid of being able to govern. They want to retain their excuse for continually failing to pass any promised legislation that would negatively affect their donors.

Some of the Democrats proposing more limited reforms backed stronger filibuster changes a decade ago.

For instance, *Politico* recently reported that Sen. Jeanne Shaheen (D-N.H.) "said she wants to put the onus on the minority to put up 41 votes to stop legislation rather than on the majority to find 60 votes to advance legislation. She'd also like to eliminate the ability of the minority to block bills from even being debated on the Senate floor. Those reforms probably wouldn't be enough to allow elections reform legislation to pass given unified GOP opposition, but would chip away at the minority's power."

In early 2010, however, Shaheen led an effort to fundamentally gut the filibuster — proposing that the 60-vote threshold to end debate on legislation drop to 51 votes after just a few days of debate.

The media has also completely memory-holed Manchin's own past support for filibuster reforms, even as he's emerged as the public face of Democratic opposition to changing filibuster rules.

Politico wrote Tuesday that "Manchin has voted against every rule change along party lines since he came to the Senate in 2010."

That's not accurate: In 2011, Manchin co-sponsored and voted in favor of two bills to reform the filibuster, neither of which won any Republican support.

This information is still on Manchin's Senate website — included in a press release in which Manchin declared: "West Virginians deserve a government that works for them, and they are understandably frustrated with the way things get done — or don't — in Washington."

A decade later, Democrats still can't get things done in Washington, even with full control of Congress — thanks to Manchin, Sinema, and every other party lawmaker who are keeping the filibuster in place like conservatives and anti-abortion zealots want.

Why Are Dems Boosting An Anti-Abortion Candidate?

A new super PAC run by Biden, Obama, and Sanders consultants just dropped a quarter million on pro-life Democrat Henry Cuellar.

May 9, 2022 • Andrew Perez & David Dayen

Jim Clyburn, left, attends a campaign event for Henry Cuellar on May 4. (AP Photo/Eric Gay)

Editor's note: This story was reported in collaboration between The Lever *and* The American Prospect.

A new super PAC led by consultants for Joe Biden, Barack Obama, and Bernie Sanders' presidential campaigns is diving into a Texas primary to support a conservative Democrat who opposes abortion.

Democratic leaders have come under fire for continuing to support conservative Rep. Henry Cuellar (D-Texas) in his runoff election versus progressive Jessica Cisneros, even after the leak of a Supreme Court draft opinion set to invalidate federal protections for abortion rights.

With the runoff only weeks away, Cuellar, the last remaining anti-abortion Democrat in the House, has seen little outside support from Democratic groups — until now. On April 29, America United, a super PAC formed recently to back

Latino House candidates, placed $241,000 worth of independent expenditures backing Cuellar, despite the fact his challenger is also Latina.

The effort suggests at least some Democratic operatives and donors remain willing to back an anti-abortion candidate in a state controlled by right-wingers, even though federal abortion protections could be eliminated any day now. The looming Supreme Court decision on abortion could have major implications for Texas residents, as Republicans there passed a so-called "trigger law" last year that will make it a felony to perform abortions 30 days after *Roe* is overturned.

America United told *Newsweek* last month it had already raised $2 million to support Latino House lawmakers and candidates and help improve Democrats' performance with Latino voters. The group has not filed any list of its donors yet with the Federal Election Commission, so it's not clear who is funding its ads to boost Cuellar.

According to America United's federal election filings, the organization placed the ad buys three days before the leak of the Supreme Court draft ruling overturning *Roe v. Wade*. The group's TV ads started running on May 3, one day after the draft opinion was published by *Politico*. Voters in the district report seeing the ads running.

Last month, *Newsweek* reported that America United planned to boost several Latino candidates, including Cuellar, and that Chuck Rocha, a consultant to Bernie Sanders' 2020 campaign, was involved with the group.

According to *Newsweek*, Rocha pledged that America United would be an aggressive political operation, calling it a "smash-mouth bilingual PAC." Consultant Jorge Neri added, "We're calling it 'No Bullshit PAC.'"

Reached for comment, Rocha said he is not involved with America United's efforts to boost Cuellar. "I am not working with that PAC on that race," he said. "I do some consulting work with this PAC and over 25 other PACs. But I'm not working on this race."

Nuestro PAC, a super PAC founded by Rocha, spent roughly $40,000 to boost Cisneros against Cuellar ahead of the March 1 primary earlier this year.

Neri, whose firm worked for the Biden presidential campaign and the Democratic National Committee's convention last cycle, did not respond to a request for comment.

America United reported paying Mosaic Media Strategy Group to create the ads for Cuellar.

Mosaic's website lists two lead strategists. César Blanco, the president, is a state Senator in Texas representing a district in El Paso, and was recently elected to the Democratic National Committee. Ginette Magaña Salas is a strategist who worked in the White House Office of Public Engagement and as spokesperson for the Department of Homeland Security during the Obama administration. She also worked on Obama's re-election campaign, and was a senior advisor to Michelle Obama's organization When We All Vote.

Mosaic boasts on its website that it has worked with the Biden 2020 presidential campaign and the Democratic Congressional Campaign Committee, which elects Democratic candidates to the House.

The firm has also worked with Women Vote!, the super PAC for EMILY's List, which supports pro-choice women candidates.

A request for comment sent to an email address listed on Mosaic's website bounced back.

Most of the outside spending for the Cuellar-Cisneros race has come in on Cisneros' side, including a recent $138,000 expenditure from Women Vote!. Since the start of the runoff, outside groups have spent roughly $850,000 to boost Cisneros and oppose Cuellar.

But as the runoff nears, Cuellar is seeing his share of outside spending. In addition to the $241,000 from America United, the PAC for the National Association of Realtors, a real estate industry lobbying group, spent $43,500 on online ads last week in support of Cuellar.

The Roe Disaster — And What To Do About It

Reproductive rights are on the chopping block because of dark GOP schemes and Democrats' duplicity — but this fight is not over.

May 4, 2022 • Julia Rock, Matthew Cunningham-Cook, Andrew Perez & David Sirota

Protesters gather outside the U.S. Supreme Court early on May 3. (AP Photo/Alex Brandon)

The right is on the verge of achieving what it has promised to accomplish for decades: the destruction of a federal, constitutional right to an abortion.

Democrats have for years raised small donor cash off of the perpetual conservative threat to reproductive rights, and then evaded opportunities to protect those rights, even when they had control of the White House and congressional majorities.

There are obvious lessons: Don't lose winnable presidential elections to reality TV show hosts, don't protect the ego of aging celebrity judges when it could cost liberals Supreme Court seats, don't permit billionaires to anonymously buy lifetime appointments to the high court, and don't mobilize the party's electoral apparatus in defense of anti-choice politicians.

It's also a reminder of how minoritarian the United States government is. While the vast majority of Americans support the right to an abortion in at least some

circumstances, five Supreme Court justices appointed by two presidents who lost the popular vote are positioned to overturn that right — and the judges' draft opinion scoffs at the idea that they have any responsibility to represent what the public wants.

Indeed, they declare that "we cannot allow our decisions to be affected by any extraneous influences such as concern about the public's reaction" to the end of basic reproductive freedoms.

Democrats, presumably the pro-choice party, still control the executive and legislative branches, as well as many state governments across the country. If there's one lesson to act upon right now, it's that they must actually use the power of the government to fund abortion access and protect basic freedoms — something that, incidentally, might be more encouraging to the party's base than telling them to just keep voting blue, but even harder.

The Right-Wing Dark Money Takeover

Yesterday's leaked draft opinion by Justice Samuel Alito is a radical document, based on reasoning that questions the fundamental rights to same-sex and interracial marriage, contraception, the right to not be forcibly sterilized, and more. The opinion "relies heavily on a 17th century English jurist who had two women executed for 'witchcraft,' wrote in defense of marital rape, and believed capital punishment should extend to kids as young as 14," according to reporting by *Jezebel*.

While still in draft form, these extreme legal arguments are the culmination of decades of efforts by the American right to capture the Supreme Court.

They have done so by using the shadowy money and influence network run by Trump judicial adviser Leonard Leo, an anti-abortion zealot and longtime executive at the Federalist Society, a conservative lawyers group in Washington. Leo helped select President Donald Trump's high court picks while simultaneously leading a dark money operation to boost their confirmations with TV ads and contributions to conservative groups that promoted the judges, too.

Leo and his colleagues have been building their dark money network since 2005, beginning with efforts to confirm Justices John Roberts and Alito.

In 2016, Leo's Judicial Crisis Network led a successful campaign against confirming Barack Obama's Supreme Court nominee Merrick Garland, before aiding the confirmations of Trump Justices Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. Through it all, these power brokers have been quiet and efficient — we still know very little about who's been financing Leo's network.

This might be one of the most powerful political coups in U.S. history. Leo and his anonymous donors helped flip control of the court and build an ultra-conservative supermajority that could last for decades — and they managed to accomplish this using two presidents (Trump and George W. Bush) who lost the popular vote.

Leo's success was a product of lockstep unity between his network and Republican senators. While liberals have recently built their own well-funded pressure group focused on the courts, the group has effectively no influence, because party leaders have refused to consider taking aggressive actions to counter the GOP's maximalist strategy.

For much of the past two decades, the right-wing takeover of the courts was at best ignored, and at worst aided and abetted by Democratic politicians and pundits who sanitized the reputations of radical, right-wing judges. (Of course, you never see a prominent Republican politician or talking head praising pro-choice judges.)

There was Neal Katyal, Obama's Solicitor General, making the case for "why liberals should back Neil Gorsuch." There was liberal pundit Noah Feldman declaring that "Amy Coney Barrett deserves to be on the Supreme Court." There was liberals' favorite MSNBC regular, Steve Schmidt, boasting about his work leading the Bush administration's campaign to install Alito and Roberts on the high court.

Liberal pundits also defended Justice Ruth Bader Ginsburg when she declined to retire under a Democratic president, even though it threatened to hand another Supreme Court seat to the right in the future. That is exactly what happened — and now Ginsburg's legacy has been tarnished far more significantly than it would have been by the personal sting of an early retirement.

The good news is that after a bit of preening and delaying, Justice Stephen Breyer seemed to learn the cautionary tale and decided to retire under a Democratic president. The bad news is that there were still liberals insisting that justices

shouldn't be pressured to retire when it might help the principles they purport to support.

Democrats Have Failed To Use Their Power

But the likely end of *Roe v. Wade* isn't just due to careful conservative plotting to overturn the law. It's also courtesy of Democrats' refusal on many occasions to safeguard reproductive rights from such political dismantling — despite being a party mostly comprised of pro-choice politicians.

Roe v. Wade has been the law of the land since 1973, but its standing has always been tenuous. Democrats at the national level have not prioritized codifying reproductive rights and expanding abortion access during the periods when they've controlled the presidency and both houses of Congress — just as they do now.

In 2009, when Democrats held the presidency and large majorities in Congress, Obama was eager "to straddle the abortion divide," according to reporting from *The New York Times*:

> *But even as Mr. Obama has delighted abortion rights advocates, he has dialed back some earlier ambitions. In 2007, he promised Planned Parenthood that "the first thing I'd do as president" would be to sign the Freedom of Choice Act, which effectively codifies* Roe v. Wade. *Now he says the bill is "not my highest legislative priority," as he put it at a recent news conference.*

The legislation to codify *Roe* sat in committees during that Congress, before Republicans swept the 2010 midterms.

Today, for the first time since 2010, Democrats once again control Congress and the presidency. That means they still have the power to pass legislation codifying *Roe* into federal law.

Here's the catch: They would have to end the Senate filibuster, which requires 60 votes to pass most legislation, and doing so would require them to apply real pressure on lawmakers in their own party amid the anti-choice movement's ongoing campaign to preserve filibuster rules. Democrats would need to have support from the entire Democratic caucus to end the filibuster and pass their abortion rights bill, since the Senate is split 50-50 and no Republicans are likely to

support either move, even though Republican Sens. Lisa Murkowski (Alaska) and Susan Collins (Maine) claim to be pro-choice.

After the House passed the bill to codify *Roe* last fall, Sen. Joe Manchin (D-W.Va.) in March joined every Republican senator in voting against it. Corporatist Sen. Kyrsten Sinema (D-Ariz.) says she supports codifying *Roe*, but it's all meaningless spin, since she still opposes ending the filibuster. (Manchin opposes ending the filibuster, too.)

On Tuesday, President Joe Biden — who once supported letting states overturn *Roe* — wouldn't even endorse ending the filibuster to protect abortion rights, even though he previously endorsed a plan to make an exception to the filibuster to try to pass voting rights. (As a senator, Biden diverged with his party numerous times to vote in favor of the so-called Hyde amendment, which prevents federal funds from being used to pay for abortions.)

And while Biden has been intervening in primaries against progressive candidates, he has shown no appetite for using the most powerful office in the world to pressure the corporate holdouts in his party to help him protect abortion rights. That includes anti-choice Manchin, who even recently taped an ad bragging about blocking Biden's domestic agenda.

Democrats have further sabotaged their ability to reify reproductive rights by continuing to welcome anti-abortion politicians into their caucus.

For example, Democratic House leaders — Speaker Nancy Pelosi (Calif.), Majority Leader Steny Hoyer (Md.), and Majority Whip Jim Clyburn (S.C.) are supporting the re-election bid of Texas Rep. Henry Cuellar, the last anti-choice Democrat in the House, against a progressive, pro-choice challenger. Clyburn is even scheduled to campaign with Cuellar Wednesday.

In 2017, Pelosi suggested that abortion was "fading" as a political issue, and insinuated that Democrats were too focused on the matter.

Then there's the fact that Biden has appointed a Democrat who has undermined abortion access to his own cabinet. In January 2021, he appointed former Rhode Island Gov. Gina Raimondo (D) as Secretary of Commerce. As governor, Raimondo negotiated a budget agreement which required some plans on the state insurance marketplace to exclude coverage for abortions.

"I don't think voters in Rhode Island really know what Governor Raimondo's done that has really violated the reproductive rights of women and threatened their health," former longtime NARAL Pro-Choice America leader Kate Michelman told UpriseRI about that deal. Michelman and Gloria Steinem, among other prominent abortion rights activists, endorsed Raimondo's primary opponent Matt Brown in 2018 due to her record on abortion rights.

What Can Be Done

Despite Democrats squandering opportunities to protect reproductive rights, there's no reason they can't change right now. Biden can use his executive authority to improve abortion access, blue states can move to entrench abortion rights, and Democrats can take on the minoritarian institutions that are stripping away fundamental rights against popular will.

Biden, for example, could use his sweeping executive powers to increase access to abortion. Yes, such a move could be overturned in the courts — but that development would represent an embarrassing about-face for the Roberts court.

In January, the court ruled in an unsigned opinion in *Biden v. Missouri* that the administration's vaccine mandate requirement for workers in health care settings was legal, saying: "The rule thus fits neatly within the language of the [law]. After all, ensuring that providers take steps to avoid transmitting a dangerous virus to their patients is consistent with the fundamental principle of the medical profession: first, do no harm. It would be the 'very opposite of efficient and effective administration for a facility that is supposed to make people well to make them sick with COVID-19.'"

That language could be reasonably applied to an executive order from Biden mandating that virtually all hospitals with the capability to do so provide medically necessary abortions. All Centers for Medicare and Medicaid Services providers — effectively all hospitals — could be bound by such an order. While the Hyde Amendment could present a difficulty, since it specifically bans the authorization of federal funds for abortion, nothing in its language limits the administration's ability to ensure abortion access.

Less controversially, Biden could use the powers of the Food and Drug Administration (FDA) to ensure access to the so-called "abortion pill," mifepristone. He could do so by seeking to preempt state regulations that limit access to the pill, since drug approval is the FDA's sole domain.

At the state level, meanwhile, 16 Democratic-controlled legislatures have moved to codify *Roe* into state law in recent years — but there is more they could do to expand access. Rhode Island, Delaware, and Nevada are the only three states with Democratic trifecta control or veto-proof legislative majorities that do not use state Medicaid funds to ensure abortion access. Those states could pass laws to do so, expanding coverage for low-income people seeking abortions.

Blue states that already ensure Medicaid abortion coverage could also work to expand abortion access to people who will likely soon be arriving to access abortion and reproductive health care clinics within their borders.

For example, Illinois, which is surrounded by six red states set to enact sweeping abortion restrictions, could open public abortion clinics staffed by unionized state health care workers in towns and cities across the state. It could do so by leveraging its budget surplus of $444 million.

Billionaire Illinois Gov. J.B. Pritzker (D) said Tuesday that "no matter what atrocity of an opinion the Supreme Court officially rolls out this summer in regards to *Roe v. Wade* — abortion will always be safe and legal here in Illinois. Illinois is and will remain a beacon of hope in an increasingly dark world."

Likewise, Maryland could do the same as a gateway to the South where abortion rights restrictions will be rampant. While the state has a Republican Governor, Democrats hold a supermajority in the legislature — and it has a "huge" budget surplus that is as high as $7.5 billion.

States could also provide modest assistance such as transportation, food, and lodging for those traveling from out of state to seek abortion care.

California could provide similar support along its Arizona border, as could Washington and Oregon along their shared border with Idaho.

The Lever reached out to top Democrats in California, Maryland, and Illinois to ask what steps they are willing to take to ensure access to abortion care. None returned a request for comment. In New York, meanwhile, Gov. Kathy Hochul (D) recently thwarted a proposal to increase funding for women's health centers.

Finally, there are important steps Democrats can take right now to chip away at minoritarian rule by the right. After all, if ever there was a case for expanding the Supreme Court to make it more reflective of the public's desires, this is it. The

approximately 100-member Congressional Progressive Caucus has endorsed legislation to add four seats to the high court.

Maybe the *Roe v. Wade* disaster will spur the party to action. *The Washington Post* said today that "Democrats finally have something they have lacked in this perilous midterm election year: a compelling message."

But Democrats only need a new message because Biden and Democrats have failed to deliver on so many of their ambitious 2020 election promises. That includes implementing a public health insurance option to compete with abusive corporate insurers, aggressively investing in a green economy, passing a higher minimum wage, and expanding union rights.

Even with this supposed midterm gift — one that comes with tragic consequences — Democrats face a massive uphill battle in the 2022 elections. The potential Republican rout could result in even more abortion restrictions, including in key states like Pennsylvania, where Gov. Tom Wolf (D) is the only barrier against expansive abortion restrictions proposed by the Republican legislature.

That said, giving up is not an option. The recent union organizing win at Amazon's colossal Staten Island warehouse — and the multi-century campaign for women's bodily autonomy — prove that ordinary people do have the ability to make sweeping societal changes.

Perhaps this unconscionable decision will finally wake a sleeping giant — or at least convince Democrats to come back home from brunch.

Q&A

Colorado's Opportunity To Lead On Abortion Access

In the wake of the Supreme Court overturning *Roe v. Wade*, Colorado may become a safe haven for people seeking abortions.

By David Sirota

On the June 28, 2022 episode of *Lever Time*, David Sirota was joined by Colorado Attorney General Phil Weiser and Colorado State Senator Julie Gonzales for an in-depth conversation about what the Supreme Court's *Dobbs* ruling means for millions of Americans, and what authority cities and states have to protect abortion access. They also discuss a new bill being drafted in the Colorado state legislature that would expand protections for abortion providers and reproductive health care access.

Below is an abridged Q&A from their discussion.

David Sirota: Colorado has kind of a special place in the reproductive rights saga in America. Phil, tell us a little bit of that story of why Colorado has been so important.

Phil Weiser: This is an important story. It starts with Dick Lamb, who was a state legislator, and he looked at abortion laws and asked the basic question: Abortion looks like health care — why do we criminalize it? And he passed what was the first law liberalizing access to abortions. Now, the truth was, for years, this had been happening sub rosa in different ways. Colorado passed this abortion legalization law. He was a Democrat. He was actually in the minority.

The governor at the time John Love, a Republican, talked to his daughter, who became a later Colorado Supreme Court Justice Becky Love Corliss, and asked her as a teenager, what do you think about this idea of liberalizing access to abortion? And she related to me that those conversations that Governor Love had, the conversations Dick Lamb had, were transformative because people hadn't thought about this. Colorado liberalized access to abortions in the mid-1960s early — what became a wave before we got to *Roe v. Wade*.

So Colorado was the first state to officially legalize abortion in America, in the late 1960s?

Weiser: Yes, I think it was actually the mid-1960s. Famously, California later liberalized abortion access under Governor — yes, wait for it — Ronald Reagan. That was one of the other early areas and this is an important point. We were seeing more and more states act in advance of *Roe v. Wade*.

This year in Colorado, our state legislature put in statute some protections for abortion rights. What did the legislature do? And what kinds of protections does it put in place against the ruling that came down?

Julie Gonzales: The day that Texas enacted its 6-week abortion ban, there was a rally on the west steps of the state capitol. There were a lot of people there and even a couple of my constituents, who asked me, "Julie, what are you going to do?"

So we got to work, drafting what became the Reproductive Health Equity Act to ensure that our reproductive health care decisions, including abortion, can't be interfered with by the government. And out of the 61 Democrats within the Colorado General Assembly, all 61 voted for it. Every single Republican voted against it. That was signed into law by Governor Polis back in April of this year.

It ensures that government cannot get involved if you want to access abortion care. It is a really important protection for everyone, because we saw when Texas moved forward with its policy, in light of the pending Supreme Court case, the

potential of *Roe v. Wade* falling was a real threat. So we acted, and I'm so glad to have those affirmative protections in statute.

Yet, we also know that there's still more work to do in light of the policies that we're seeing that seek to criminalize women in other states for coming to places like Colorado or the other 20 some odd states that still will allow access to abortion care, even in light of *Roe v. Wade* being overturned. The way those states are acting is dangerous and will lead to criminalization of patients and providers.

Phil, you're running for re-election here in Colorado, a blue state. The Republicans are going to try to take you out. The Republican Attorneys General Association is probably going to spend a lot of money here. What does an attorney general mean to all of this, here in Colorado and in the rest of the country?

Weiser: The attorney general is the chief legal officer of the state. When people have questions — what does this Reproductive Health Equity Act that Senator Julie Gonzalez worked on so masterfully mean in practice — it's our office that's charged with interpreting, enforcing, and defending this law.

If you had a Colorado attorney general who did not believe in *Roe v. Wade*, who did not believe in the Reproductive Health Equity Act, you could disable this law from being implemented. People could disregard and attack this law, and find the attorney general joining the attackers — not being a defender.

Too often people overlook why attorneys general matter now that *Roe v. Wade* has been overturned. The attorney general protects the people of the state, defends the laws of the state, protects people's rights. Obviously, as attorney general, I'm all in to defend reproductive rights. I'm here to protect Colorado's law and the people of Colorado. But you can have an attorney general who says, "I'm not defending reproductive rights. I'm going to seek to limit reproductive rights to make it harder for clinics to operate, to tell other states to come after anyone having an abortion in Colorado, and I'll let anyone who wants to criminalize anyone in Colorado getting health care."

For people who just heard that *Roe v. Wade* was overturned, what does it mean in practice for someone in a red state, in a blue state — how does this specific ruling actually work?

Weiser: In many states right now, the only protection for abortion rights was the Supreme Court. In all those states, that protection is gone. Instead, in states like

Texas, doctors are going to be told if you perform an abortion, you're committing a crime. And there's this other crazy law that is basically vigilante justice, where individuals can sue doctors for money damages for providing health care. So that's a reign of terror.

And the women in Texas are facing horrible choices, particularly people of color who don't have a lot of money. Do I get an illegal unsafe abortion? Am I going to bear a child against my will that will cause great mental anguish to myself? Or am I going to try to find a way to get to Colorado, which again, if you don't have a lot of means, that's not easy to do.

We just created incredible trauma for people. We just made doctors have to ask questions about their being subjected to criminal processes for trying to save lives in some cases. So we are now living in this scary world. It is no longer hypothetical. It is real. It's happening today. Not in Colorado, but in some other states like Texas.

Julie, I want to go back to the state legislature for a second. I know you are proposing an additional piece of legislation in Colorado. Tell us what that's about and what you would say to other state legislators and people wanting to pressure their state legislators about what to do.

Gonzales: We are trying to think creatively on how best to protect the patients. Whether you're in Colorado, or whether you're visiting Colorado to seek abortion care, we want to make sure that you are protected and that you are safe from harm. The same goes for providers — the doctors, nurses, all of the staff — that they are also free to do their work. As legislators, we should be putting forward those affirmative protections. And we also should be working hand in hand with our attorneys general, like Attorney General Weiser, to ensure that those laws are protecting the people in the best manner possible. That's the work ahead. In blue states, and in other states as well.

This is the opportunity for us to really lift up our voices and share our stories about what's happening on the ground. Because we've seen the very first woman to be criminalized in the state of Texas after the passage of Senate Bill 8 was a Latina woman in the borderlands of South Texas who was charged with murder following a miscarriage. That's what's at stake. And they're banking on us not telling our stories. They're banking on us being enveloped in fear and shame. This is a time for us to lift up our voices and say exactly what the impact of those laws are going to be on people.

Phil, you clerked for Ruth Bader Ginsburg. There's been this whole discussion about whether she should have retired early. Was that on her mind? Did you talk to her about the fear of this very reality? What do you say to folks who say, we're all here because RBG didn't retire at a time where she could be replaced by a Democratic president.

Weiser: We're here for a lot of reasons. And it's not really fair to pick one of them. Obviously, if Hillary Clinton won the 2016 election, we wouldn't be having this conversation. We're here because we lost Senate races, by the way, in Colorado in 2014 among them. Had the Democrats controlled the Senate, this wouldn't have happened. Just remember, in a normal world, and we didn't have normal leaders, Merrick Garland could have been on the Supreme Court.

So what I'd say to people is, there are so many lessons, and there are so many causes. We have to be honest about all of them. For one to two generations, we've been outworked. We've been outplanned, outgunned — we've been complacent. We assumed, and I understand this assumption, because the American story has been one of freedoms and equality being expanded. And what it portends is the opposite. This freedom is being rolled back. This is equality being undermined. So people in some way refused to believe this could happen.

Phil, do you think there's any legal possibility that the actions of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett rise to the level of perjury? In other words, do you think that the House Democrats should actually look at whether the justices violated the law in getting on the court by not telling the truth under oath and saying that they believed that *Roe* was settled precedent in their confirmations?

Weiser: To show perjury, you have to show that someone lied and knew they were lying when they said what they said. And the easy defense is yes, they said *Roe* was settled law. It was settled law, and they unsettled it, full stop. And so this doesn't really lend itself to a legal remedy. I just want to underscore what the remedy is. It's a political remedy. And it's a remedy at the local and state level.

What Julie said is a call to action and engagement. I recognize how broken Washington D.C. is and I recognize how disillusioned people are with what they see. But what I want people to look at is the work that Julie and her colleagues are doing to protect consumers, particularly the most vulnerable among us.

There's so much that matters at the state level. We have to demand honest answers from everybody on these issues so people can make informed decisions.

Right now there's a big question: What type of politics are we going to have? And if people show up the way Senator Julie Gonzalez shows up, we're going to have a great political future here in Colorado. But if people don't show up, that's when bad things happen.

SECTION FOUR

Countering The Roberts Revolution

Though Democratic politicians pretend they have no power, history and existing law show there are many ways to counter the Roberts Revolution.

What follows are articles that detail some of the ways that a Democratic president and a Democratic Congress can combat Roberts' judicial coup. There is also a look back at how Franklin Roosevelt confronted — and defeated — conservative justices who tried to block the New Deal.

FDR's Lesson About The Supreme Court Rampage

FDR and the Supreme Court: Extremist justices only halted their judicial coup when the president discarded norms, stopped being polite — and tried to pack the court.

Jul 8, 2022 • David Sirota

President Franklin D. Roosevelt delivers his first radio "fireside chat" in Washington in 1933 (AP Photo).

As six unelected extremists orchestrate a judicial coup to repeal the 20th century, you might be wondering: Why won't Democrats simply push to expand the court like it's been expanded before?

Why is President Joe Biden opposing court expansion and why is House Speaker Nancy Pelosi refusing to allow a vote on the idea?

Why is the Democratic Party defending a GOP-packed, corporate star chamber that polls show most Americans no longer trust?

One answer is political malpractice. Another answer: complicity. Party leaders may be sending out fundraising emails slamming the Roberts Court, but they have eschewed court expansion, halted the once-common practice of legislatively overriding justices, and declined to quickly fill lower-court vacancies before a midterm election that could eliminate their Senate majority.

But incompetence and corruption are not the whole story. Democrats have almost certainly also internalized the tale told about the party's greatest president — the one alleging that Franklin Roosevelt epically failed by challenging the Supreme Court's power in the late 1930s. In the popular telling, FDR got greedy, tried to pack the court with his ideological allies, but a court-loving public saw it as a crass power grab and unacceptable violation of norms, dooming the initiative and preserving equilibrium. Cue inspiring *West Wing* music as the republic was saved.

This cartoon has become the key cautionary tale designed to deter any challenge to a court that has been one of the establishment's last lines of defense. But here's the inconvenient fact: The story is bullshit — or at least significantly more complicated than the fable.

In truth, Roosevelt did not succeed in packing the court — but his court expansion initiative did succeed in taming the court, which is exactly what Democrats must do right now.

"A Choice Between Substantive Policy And Structural Integrity"

As recounted in *Supreme Power*, Roosevelt in 1932 ignited a firestorm when he dared to utter a taboo truth during a Baltimore speech at the end of that year's presidential campaign. He declared that Americans were being crushed by government policies spearheaded by "the Republican Party (which) was in complete control of all branches of the federal government — the Executive, the Senate, the House of Representatives and, I might add for good measure, the Supreme Court as well."

"Roosevelt Says GOP Has Had Supreme Court Control Since 1929," blared the front page of the Washington Post, in an article scandalizing the idea that the court had become a political weapon.

In the ensuing years, the court's conservative block tried to block and dismantle the New Deal program Roosevelt was elected to pursue. In 1935 and 1936, the court's five conservative justices went on a rampage.

Smithsonian Magazine wrote that the Supreme Court in that time "struck down more significant acts of Congress — including the two foundation stones, the

[National Recovery Act] and the [Agricultural Adjustment Act], of Roosevelt's program — than at any other time in the nation's history, before or since." The magazine noted that one decision "destroyed FDR's plan for industrial recovery" and another "annihilated his farm program."

Soon after he was reelected in 1936, Roosevelt decided that a direct confrontation with the court was the only way to realize his agenda. He didn't pretend that the court was some apolitical bastion of dispassionate integrity — he saw it for what it was: a political weapon literally run by a former Republican nominee for president.

In 1937, Roosevelt unveiled his plan to expand the court by allowing presidents to add new justices when any current justice declined to retire after age 70. He warned that without expansion, the Supreme Court was "coming more and more to constitute a scattered, loosely organized and slowly operating third house of the national legislature."

In history books and modern punditry, this story then simply ends with the plan dying in Congress — allegedly because Americans pulverized by the Great Depression nonetheless loved the court that was kicking them in the face.

However, a study of public opinion and the court's moves tell a much different tale of a president and his party losing a closely fought battle but winning a larger war.

The analysis from Ohio State University political scientist Gregory Caldiera shows that Gallup polls found the public was hardly enamored with the court — on the contrary, voters were closely divided on the expansion idea when Roosevelt first proposed his legislation, even as the initiative faced largely negative press coverage from The New York Times, the dominant newspaper of the time.

More important: Public support for Roosevelt's expansion initiative only truly cratered when the court's conservative majority suddenly halted its attempts to block the New Deal. In particular, the court's surprising decisions to uphold a state minimum wage and then the pro-union Wagner Act deflated public support for court expansion, as did the subsequent retirement of one of the court's most conservative justices. The court soon after declined to block Social Security.

"Evidence accumulated over the years goes against that notion of the (close) relationship between the public and the court," wrote Caldiera. "I prefer, instead, a much more straightforward account: The Supreme Court outmaneuvered the

president. Through a series of shrewd moves, the court put President Roosevelt in the position of arguing for a radical reform on the slimmest of justifications."

But here's the key point: He notes that the court's "shrewd moves" that "outmaneuvered" FDR were in practice "an important jurisprudential retreat" on policy.

"President Roosevelt in essence offered the Supreme Court a choice between substantive policy and structural integrity," he concludes. "The court wisely chose to give up on the substantive issues and preserve its structural integrity."

Buried on the Social Security Administration's website is an accurate summary of what really happened: "The debate on this [expansion] proposal was heated, widespread, and over in six months. The president would be decisively rebuffed, his reputation in history tarnished for all time. But the court, it seemed, got the message and suddenly shifted its course... the court would sustain a series of New Deal legislation, producing a 'constitutional revolution in the age of Roosevelt.'"

As Roosevelt himself put it after the fight was over: "We obtained 98 percent of all the objectives intended by the court plan."

He was also overwhelmingly reelected to a historic third term a few years after the battle.

There Is No Other Viable Choice

For Democratic politicians, voters, media outlets, and advocacy groups, the moral of the story is not that reprising FDR's court battle would repeat his failure. It is the opposite: Doing what FDR did is probably the only chance to repeat his success in beating back an out-of-control court.

The good news is that at least a few party lawmakers are finally realizing that this isn't a *West Wing* episode requiring a Jed Bartlet monologue — this is a high-stakes power struggle requiring some FDR-style tactics. Indeed, there is now Democratic legislation in Congress to add four justices to the panel. There is also legislation to impose term limits on Supreme Court justices — which is a wildly popular idea, according to survey data.

Even better: The justices are starting to worry about such pressure. In the past year, two of them delivered public speeches trying to defend the court's

legitimacy — a signal that they are concerned that public confidence in the court has hit historic lows. In fact, the entire Republican machine that packed the court full of right-wing extremists is now panicking about court expansion — which is a sign that it's precisely what needs to happen.

That said, there is no guarantee that the six archconservatives now spearheading today's judicial coup would react the same way as their predecessors during the New Deal. There may be nothing that prompts their retreat.

But in that case, public support for expansion could rise if Democrats cite the court's extremism as yet more proof that expansion is necessary. This would require them to develop some intestinal fortitude and understand that public opinion is not static — it can be moved with enough rhetorical and legislative discipline.

Of course, some Democratic voters first and foremost love norms — and they are anesthetized by a corporate media that is forever pretending the court is dispassionate and its chief justice is a venerable statesman. So an FDR-esque crusade for court expansion might offend their sense of etiquette.

But ask yourself: What is the alternative here?

Emboldened by Democratic inaction after the anti-abortion decision overturning *Roe v. Wade*, the six right-wing justices now seem well on their way to resurrecting the Lochner Era — the inhumane judicial epoch that defined the period before Roosevelt's battle with the court.

Roberts and his cronies clearly presume today's Democrats will just continue defending the judicial institution — even as the court destroys every other institution in America, from the Environmental Protection Agency, to the Consumer Financial Protection Bureau, to the Securities and Exchange Commission, and to democracy itself. In short, they expect today's Democrats to never do what Roosevelt did — which would doom the country to a dystopian future.

Other Resources

The following articles are from other outlets and are worth reading when considering how to counter John Roberts' revolution.

Impact Of Supreme Court's EPA Decision Can Be Minimized Through Decisive Executive Counteractions (Revolving Door Project) — *"Today the Supreme Court issued its long-awaited opinion in* West Virginia v. EPA, *curbing the EPA's authority to establish carbon emissions caps under Section 111 of the Clean Air Act. It is a significant blow... But it is not a lethal blow. Many tools to stave off the climate crisis and facilitate an equitable energy transition remain available to the EPA, to the White House, and to Congress."*

In The Wake Of 'Dobbs,' Biden Leans On Familiar Excuses For Inaction (The American Prospect) — *"Biden, unlike his self-proclaimed role model, thus far refuses to unabashedly employ all legal and political means to fight back, particularly if they are controversial or polarizing. The president has many options at his disposal, like declaring a national emergency, limiting the Supreme Court's jurisdiction, or providing abortions on public lands, but there is little sign they are even under consideration."*

How To Counteract The Court (The American Prospect) — *"What makes Ledbetter so unusual is that Democrats have not similarly fought equally absurd yet consequential rulings from the Court, instead throwing their hands up in despair at the unfairness of a particular decision and then moving on. But a joint review by* The Intercept *and* The American Prospect *of dozens of Court cases finds dozens of statutory rulings similar to Ledbetter's that Congress could overturn simply by tweaking the statute to remove whatever ambiguity the Court claimed to find in its text."*

Five Times Congress Overrode The Supreme Court (The Hill) — *"Despite its long odds, the effort by lawmakers to directly rebuff a disfavored Supreme Court opinion has a rich tradition in American politics, although such 'overrides' have become increasingly rare as partisan divisions have deepened... Here's a look at five big historical instances where Congress has superseded a decision by the Supreme Court."*

In Defense Of Court-Packing (Jacobin) — *"Today, such ideas smell toxic to the average Democratic elected official — recall Al Gore's surrender following* Bush v. Gore *in 2000, despite later evidence that he was the rightful winner of that election. But such deference wasn't always the norm. There's nothing in the Constitution*

specifying the number of judges, the precise organization of the federal judiciary, or even that the Court be empowered to review acts of Congress."

Court-Packing, Democrats' Nuclear Option For The Supreme Court, Explained (Vox) — *"There is nothing in the Constitution mandating that the Supreme Court have nine members, and a simple act of Congress could increase that number to 11, or 15, or even more. That effectively creates a way for a political party in control of the House, Senate, and presidency to add a large number of ideologically sympathetic justices to the Court, all at once."*

Today's Supreme Court Reformers Should Learn From The Popular Politics Of FDR's Court-Packing (Jacobin) — *"The story of Roosevelt's effort to 'pack the court' is often remembered in the popular imagination for the numerical rhyme associated with its conclusion: 'the switch in time to save nine.' But the original court fight — one of direct presidential intervention, broad resistance, impassioned liberal messaging, and an ultimate, albeit lackluster, victory for progressive interests — offers a substantive case study in a fight to restructure a branch of American government that emphasizes a connection between implementing of social democratic measures and the law."*

Democratic Strategies That Don't Court Disaster (The Forum) — *"This joint appeal — strike a symbolic "stand" with a party persuaded it's positioned on history's "right side" while also handing over a campaign donation to fund legislators often at a loss to do much beyond registering symbolic dissent — sums up the malaise afflicting liberal politics at a moment of grave democratic reckoning."*

Thank You

The Lever's work is made possible by supporting subscribers. This allows *The Lever* to remain a truly independent news outlet, working outside the influence of major donors or funding organizations.

If you are not a supporting subscriber and would like to become one, you can go to **levernews.com/membership/** now to explore membership options. If you are a supporting subscriber, we deeply thank you — feel free to share that membership link with your friends and loved ones to help us spread the word and allow us to do even more of this critical work.

Contact Us

Contact our editors at editor@levernews.com.

Send news tips to tips@levernews.com.

Send tech, subscription, and general support questions to support@levernews.com.