

POLICY ESSAY

DARK MONEY AND U.S. COURTS: THE PROBLEM AND SOLUTIONS

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“There are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”

– James Madison

I. INTRODUCTION

The Founding Fathers had many threats in mind when they crafted a constitution for our young and fragile nation. Locke, Montesquieu, and other Enlightenment thinkers offered helpful political theory, but they went only so far. Our Founders knew that patriotism could be overborne by selfish impulses and personal passions; that foreign governments and rapacious elites could exploit weak institutions; and that sharp differences divided the thirteen colonies. They planned for a lot of threats and dangers—but they did not plan for the corrupting power of corporations.

Today, corporations wield commanding power in our democracy. They do so directly, and through a network of trade associations, think tanks, front groups, and political organizations. That power too often is directed by corporate forces to dodge accountability for harms to the public; to subvert the free market to their advantage; and to protect their own political power by undermining democratic institutions.

This Article explores the expansion of that corporate power in our government, and its extension into a branch of government customarily viewed as insulated from special interest influence: the federal judiciary. I begin

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Senator Whitehouse has worked to strengthen American cybersecurity capabilities, improve resources to fight drug abuse and treat addiction in Rhode Island, and reverse the rise in prison populations and costs. He is a leading advocate for protecting access to justice, including the Seventh Amendment right to a civil jury.

In response to a series of judgments favoring powerful corporate interests, Senator Whitehouse has warned of the dangers of judicial activism and dark money influence over the judicial selection process. A strong supporter of greater transparency in the judicial system, Senator Whitehouse has introduced legislation to require Supreme Court justices and federal judges to disclose travel and hospitality perks they receive as prominent public figures, and to require the meaningful disclosure of funders of amicus curiae briefs.

In addition to Judiciary, he is a member of the Budget, the Environment and Public Works, and the Finance Committees.

with a brief historical overview of corporate influence in America and a discussion of how that influence grew after the Supreme Court's decision in *Citizens United v. FEC*.¹ I then turn to the fifty-year-long project of the corporate right to reshape both federal law and the federal bench; to the scheme's tools, particularly anonymous "dark money" and the network of front groups behind which these interests hide; and to the long-fought scheme's ultimate successes, culminating in the massive power grabs achieved in the Trump administration. The Article concludes with recommendations for legislation that would increase transparency at the Court. We must address the crisis of legitimacy the courts now face before captured courts become a national scandal.

II. CORPORATIONS, THEN AND NOW

The Federalist Papers provide an important window into the concerns that animated the Founding Era as citizens considered a new Constitution for their colonies. The concerns that Alexander Hamilton, James Madison, and John Jay addressed were the prominent ones around which debate centered and on which the public needed reassurance. The main concerns were protecting individuals against the power of government (e.g., *The Federalist* No. 51);² protecting democracy against the emergence of a new aristocracy or royalty (e.g., *The Federalist* No. 38);³ and protecting society from the power of faction—what we today call partisanship and special interest (e.g., *The Federalist* No. 10).⁴

We honor our Constitution, but it alone did not satisfy the colonial public. The Framers had to draft our Bill of Rights to protect explicitly an array of individual rights and fortify those rights with powerful defenses. Thence came freedom of speech, access to the jury, clearly delineated criminal process rights, and other protections.⁵ Together, the Constitution and Bill of Rights won the confidence of the American people and unified our country behind a single vision of federal government.

All of these efforts and robust debates reveal by omission that the Founders had a blind spot: they did not anticipate any threat to individuals from the power of corporations. It is easy to understand why not. For the Founders, corporations were not front of mind. The word "corporation" only appears in the eighty-five Federalist Papers three times, with one of those a

¹ 558 U.S. 310 (2010).

² THE FEDERALIST NO. 51 (James Madison).

³ THE FEDERALIST NO. 38 (James Madison).

⁴ THE FEDERALIST NO. 10 (James Madison).

⁵ THE DECLARATION OF INDEPENDENCE (U.S. 1776); see also Gerard N. Magliocca, *The Bill of Rights as a Term of Art*, 92 NOTRE DAME L. REV. 231, 236 (2016) (noting that "Jefferson did write one letter in 1792 that stated: '[M]y objection to the Constitution was, that it wanted a bill of rights securing freedom of religion, freedom of the press, freedom from standing armies, [and] trial by jury The sense of America has approved my objection and added the bill of rights.'").

reference to municipal corporations.⁶ The word barely registers in Madison's notes of the Federal Convention.⁷ On our American continent, the big British corporations threatened no harm: The British Hudson Bay Company operated in remote areas of Canada; the Massachusetts Bay Company had become a colony;⁸ the British East India Company had been humbled.⁹ Such smaller corporations as existed in the colonies were creations of state legislatures, and operated under the watchful eye of local political forces, usually to provide roads, canals, and other welcome infrastructure. If a corporation overstepped its bounds or harmed its local community, political authorities could revoke its charter.¹⁰ At the Founding, corporate entities were no threat to the fledgling democracy, and the idea of such non-human entities achieving a dominant role in a republic of "We the People" would have seemed fanciful.

Fast forward to the modern era where corporations are now ubiquitous and hold massive political power throughout government. Let's consider how.

One obvious exercise of that power is through corporate lobbying. Congress swarms with corporate lobbyists. In 2018 alone, corporations spent \$3.4 billion on direct lobbying.¹¹ One trade organization, the U.S. Chamber of Commerce, has spent over \$1.5 billion lobbying over the past two decades.¹² Much of its effort has been on political mischief like climate denial.¹³ Mick Mulvaney, after leaving Congress to serve as the Director of the Office of Management and Budget, said something that illustrated one aspect of the problem: he told an American Bankers Association conference that "[w]e had a hierarchy in my office in Congress, [i]f you're a lobbyist

⁶ See THE FEDERALIST NOS. 37, 45 (James Madison), No. 69 (Alexander Hamilton).

⁷ See James Madison, *Notes on the Debates in the Federal Convention*, THE AVALON PROJECT (1787), https://avalon.law.yale.edu/subject_menus/debcont.asp [<https://perma.cc/8JWU-AV3C>].

⁸ See Massachusetts Bay Colony, FLETCHER CYC. CORP, ENCYC. BRITANNICA ONLINE, S.V.

⁹ See William Dalrymple, *The East India Company: The Original Corporate Raiders*, GUARDIAN (Mar. 4, 2015), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders?CMP=share_btn_tw [<https://perma.cc/T837-FPJJD>].

¹⁰ See, e.g., Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 135 (2012) (describing how Connecticut "reserved to the legislature a power to revoke or amend" the Connecticut Medical Society's charter and how "[t]he Pennsylvania General Assembly revoked [the Bank of North America's] corporate charter" by "rel[ying] on a committee report citing the bank's inordinate power").

¹¹ Karl Evers-Hillstrom, *Lobbying Spending Reaches \$3.4 Billion in 2018, Highest in 8 Years*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 25, 2019), <https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18/> [<https://perma.cc/RKE9-WZ5K>].

¹² See *Top Spenders*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2019> [<https://perma.cc/37VK-YKZH>].

¹³ See, e.g., Corynne Cirilli, *The US Chamber of Commerce Might Not Be What You Think*, VOX MEDIA: RACKED (Oct. 2, 2017), <https://www.racked.com/2017/10/2/16370014/us-chamber-commerce-explainer> [<https://perma.cc/7UVQ-GE7F>] ("Deferring to the goals of its large corporate backers, [CEO and then-president Tom] Donohue vowed to get the Chamber involved in 'many important political battles' in Washington. And climate was one of the first things on his list.").

who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you."¹⁴

Which takes us to the next problem: corporate spending in elections. Gone are the days when the problem was trickles of corporate money flowing from corporate political action committees ("PACs") and lobbyists' checkbooks into candidates' campaign war chests. In the wake of the Supreme Court's infamous *Citizens United* decision,¹⁵ corporate interests have flooded huge sums of money into electioneering and advocacy groups, often anonymizing themselves in the process, and used this flotilla of front groups to sway election results. In the 2012 federal election cycle immediately following *Citizens United*, spending by these so-called "outside" groups surged to more than triple their political spending from the cycle before.¹⁶ By 2016, outside groups would spend over \$1.4 billion in American elections.¹⁷ Today, in major elections around the country, outside groups often outspend the actual candidates: in 2018, outside groups spent more than the candidates' campaigns in twenty-eight different federal races,¹⁸ and in Indiana during the last election cycle, dark-money and outside groups outspent the U.S. Senate candidates by nearly \$35 million.¹⁹ You don't spend this kind of money for long if you are not getting results.

Much of this spending is "dark money"—funding that cannot be traced to actual donors. In the decade since *Citizens United*, groups that don't disclose their donors have spent nearly \$1 billion in elections, compared to only \$129 million over the previous decade.²⁰ This staggering figure does not even include money spent on "issue ads," which are often just thinly veiled political attack ads, but are not reported to the Federal Election Commission.

¹⁴ Aaron Blake, *Trump's Rumored Next Chief of Staff Mick Mulvaney Admits to Selling Access a Congressman*, WASH. POST (Apr. 25, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/04/25/trumps-rumored-next-chief-of-staff-mick-mulvaney-admits-to-selling-access-a-congressman/> [<https://perma.cc/9R74-WATW>].

¹⁵ *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁶ See *Outside Spending by Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, <https://www.opensecrets.org/outsidespending/index.php?filtertype=A> [<https://perma.cc/957L-NK2L>].

¹⁷ Robert Maguire, *\$1.4 Billion and Counting in Spending by Super PACs, Dark Money Groups*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Nov. 9, 2016), <https://www.opensecrets.org/news/2016/11/1-4-billion-and-counting-in-spending-by-super-pacs-dark-money-groups/> [<https://perma.cc/T266-5PJD>].

¹⁸ *Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, <https://www.opensecrets.org/outsidespending/outvscand.php?cycle=2018> [<https://perma.cc/GW3U-XQD4>].

¹⁹ *Compare Summary Spending*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, <https://www.opensecrets.org/races/summary?cycle=2018&id=INS1> [<https://perma.cc/3LQR-DHRG>], with *Outside Spending*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, <https://www.opensecrets.org/races/outside-spending?cycle=2018&id=INS1&spec=N> [<https://perma.cc/4T4U-JPSP>].

²⁰ Karl Ever-Hillstrom et al., *More Money, Less Transparency: A Decade Under Citizens United*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 14, 2020), <https://www.opensecrets.org/news/reports/a-decade-under-citizens-united> [<https://perma.cc/9CF8-E5VA>].

Although the *Citizens United* decision imaginatively presumed a campaign finance system with “effective disclosure,”²¹ corporate interests quickly exploited loopholes to keep their spending anonymous, and the Court has conspicuously failed to police its supposed “effective disclosure.” Three loopholes have been particular favorites. Internal Revenue Code 501(c)(4) “social welfare” organizations have been allowed to spend on political activities, but need not disclose their donors to the public.²² Shell corporations (e.g., limited liability corporations that obscure their true beneficial owners²³) are a simple tool to hide donor identities. And donor-directed trusts have been subverted into massive laundering shops that strip donor identities away from contributions to politically active non-profits.²⁴ Because corporate brands and reputations are precious commodities, a broad array of trade associations, think tanks, and advocacy groups insulates corporations from the dirty practices and unpopular purposes of this vast new enterprise.

At the heart of this is money, but money alone is not the entire danger. As any politician can tell you, with the ability to spend millions of dollars in elections comes the ability to threaten or promise such expenditures. With the ability to spend millions of dollars *anonymously*, the menace of such threats darkens. Sometimes the threats or promises might be general and public;²⁵ but the greatest danger of corruption comes from threats or promises made covertly. The threat is real—a massive barrage of any-

²¹ *Citizens United v. FEC*, 558 U.S. 310, 370 (2010).

²² See 26 U.S.C. § 6033(a)(1) (2018); 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i) (2019); see also Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL’Y 59, 60 (2011) (“One way that for-profit corporations can throw their support behind, or undermine, a particular candidate after *Citizens United* is by donating money to a non-profit, which then, in turn, purchases a political ad. Under current tax law, for-profit political spending through non-profits such as social welfare organizations organized under Internal Revenue Code (IRC) Section 501(c)(4) . . . is undetectable by the public.”).

²³ Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 708 (2012) (arguing that “[t]he real disclosure issue arises when a 501(c)(4) social welfare organization, 501(c)(6) trade association, or Super PAC reports donations from a dummy or shell corporation or LLC which gets its funds from one or a small number of shareholders, or from a nonprofit that does not have a mass membership base but serves primarily as a vehicle for pooling funds from a small number of large donors and channeling them to independent spending committees”).

²⁴ Donors Trust is one of these groups, for example. See Andy Kroll, *Exposed: The Dark Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), <https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/> [<https://perma.cc/S9M3-N7YC>] (“Donors Trust is a so-called ‘donor-advised fund,’ a breed apart from a family foundation like, say, the Lynde and Harry Bradley Foundation, which helped build the conservative movement over decades with donations totaling tens of millions of dollars. The people who donate to Donors Trust don’t get final say over how their money is spent. But they get to recommend where their cash goes, and in exchange for giving up some control, they get a bigger tax write-off than they would with a family foundation. (And those who wish it get anonymity.)”).

²⁵ See Nicholas Confessore, *Koch Brothers’ Budget of \$889 Million for 2016 Is on Par with Both Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), <https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html> [<https://perma.cc/YD6E-8AJ5>].

mous campaign spending in the waning days of a campaign can leave voters with no information about who is making the attack and the target with no time to respond. An early barrage can “define” (read, mercilessly smear) a candidate before his or her campaign even gets up and running. So threats are credible, and covert threats and acquiescence is the very definition of corruption.

Dark money fouls political debate, as well. From the shelter of anonymity, corporate interests can without accountability propagate a “tsunami of slime”²⁶—the manufactured front group bears the onus for the smears and attacks, and can be disposed of like Kleenex.²⁷ And of course if just the threat of a slimy political attack is successful, it saves the special interest from actually having to spend the money. Worse, it leaves the public unaware that anything went on behind the scenes.

The policy result of unlimited special-interest spending power is unsurprising: a powerful political current bends elected officials toward the will of the special interests, even against the will of their constituents.²⁸ This weakens the political system’s response to the general population, and skews political response toward wealthy interests. Empirically, one study found:

[T]he views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third, with even larger disparities on specific salient roll call votes. Meanwhile, the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.²⁹

The problem is not just in Congress. The ability of big interests to deploy unlimited money from behind dark-money front groups into presidential races has similar effects.³⁰ But much of the corporate political effort is down at the executive agency level. Corporations have grown adept at cap-

²⁶ Joe Hagan, *The Coming Tsunami of Slime*, N.Y. MAG. (Jan. 20, 2012), <https://nymag.com/news/features/negative-campaigning-2012-1/> [<https://perma.cc/U2HR-HN8C>].

²⁷ See *id.*; see also Sheldon Whitehouse, *The Many Sins of ‘Citizens United’*, NATION (Sept. 24, 2015), <https://www.thenation.com/article/archive/the-many-sins-of-citizens-united/> [<https://perma.cc/W3WU-CH8V>].

²⁸ See, e.g., MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 70–123 (2012) (explaining that the country’s policymakers respond almost exclusively to the preferences of the economically advantaged); see also LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 143–47 (2011) (noting that dependency donors cause Congress to spend more time on issues that matter to their funders than to the general public).

²⁹ LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 253–54 (2008).

³⁰ See, e.g., Robert Maguire, *GOP Donors Too ‘Embarrassed’ to Publicly Support Trump Gave Millions to Dark Money Group*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Mar. 6, 2018), <https://www.opensecrets.org/news/2018/03/big-revenues-for-group-providing-cover-for-gop-donors-too-embarrassed-to-publicly-support-trump-in-2016/> [<https://perma.cc/RV7L-5Z2A>] (reporting that a dark money group “spent \$45 million from the run-up to the 2016 presidential election into the early days of President Trump’s administration”).

turing regulatory agencies.³¹ This involves some amount of high-powered agency lobbying, and some amount of simply outgunning ill-funded public interest advocates in administrative procedures; but more often than not it involves sending industry personnel to embed with regulators—the “revolving door.” According to an analysis by ProPublica and Columbia Journalism Investigations, the Trump administration has brought in to official positions at least 281 former corporate lobbyists, just through October 2019.³² That number increases when one includes the corporate executives embedded in the Trump administration, who may not have technically lobbied for their company but nonetheless are motivated to influence outcomes for their industry.

The result has been an unprecedented capture of regulatory agencies by the interests they should be regulating.³³ The Environmental Protection Agency (“EPA”) under the Trump administration, for example, has been overrun with officials tied closely to polluting industries. Former EPA Administrator Scott Pruitt rose to political power by raising funds for oil and gas industry groups.³⁴ Pruitt had demonstrated an unusual willingness to do the industry’s bidding; in one instance, he put fossil fuel industry text verbatim onto his official Oklahoma Attorney General letterhead and submitted it to the EPA.³⁵ Later, as EPA Administrator, Pruitt could do the industry’s

³¹ See J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1555 (2018) (arguing that “[w]hile capture can occur through corruption, it can also happen in less obvious ways, such as when a regulator receives a job offer from a company which he or she regulates, or through a ‘revolving door’ between the agency and the regulated industry”).

³² David Mora, *We Found a Staggering 281 Lobbyists Who’ve Worked in the Trump Administration*, PROPUBLICA (Oct. 15, 2019), <https://www.propublica.org/article/we-found-a-staggering-281-lobbyists-whove-worked-in-the-trump-administration> [<https://perma.cc/SCE8-NVSV>].

³³ See Lindsey Dillon et al., *The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture*, 108 AM. J. PUB. HEALTH 589, 589 (2018), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360> [<https://perma.cc/GQX6-DXRV>] (explaining that an agency is effectively captured by the private interests it regulates when its “regulation is . . . directed away from the public interest and toward the interest of the regulated industry” by ‘intent and action’ of industries and their allies”) (quoting DANIEL CARPENTER, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 73 (2014)).

³⁴ See Andrew Perez & Margaret Sessa-Sawkins, *Conservative Group Led by EPA Chief Pruitt Received Dark Money to Battle Environmental Regulations*, FAST CO. (June 7, 2017), <https://www.fastcompany.com/40428688/conservative-group-led-by-epa-chief-pruitt-received-dark-money-to-battle-environmental-regulations> [<https://perma.cc/8G8Z-7UEW>] (reporting that “[a]n organization once led by [Scott Pruitt] raised more than \$750,000 from conservative dark money groups to battle federal regulators, including officials at the agency he now leads”).

³⁵ See Letter from E. Scott Pruitt, Attorney General, Oklahoma, to Lisa Jackson, Administrator, U.S. Environmental Protection Agency (Oct. 12, 2011), <https://www.documentcloud.org/documents/3301387-Draft-and-Final-Letters-to-EPA-From-Devon-Energy.html> [<https://perma.cc/9JSM-PL9J>]; E-mail from William F. Whitsitt, Executive Vice President of Public Affairs, Devon Energy Corp., to Patrick Wyrick, Office of the Attorney General, Oklahoma (Sept. 2, 2011, 2:55 PM), <https://www.documentcloud.org/documents/3301387-Draft-and-Final-Letters-to-EPA-From-Devon-Energy.html> [<https://perma.cc/9JSM-PL9J>] (attaching draft version of letter to EPA).

bidding directly, without need for such subterfuge. Andrew Wheeler, Pruitt's successor as Administrator, had been a leading lobbyist for the coal industry.³⁶ Trump's first head of the EPA Office of Air and Radiation, Bill Wehrum, gained prominence by helping build and run an array of fossil fuel industry trade associations and front groups.³⁷

Former oil lobbyist David Bernhardt serves as Secretary of the Department of the Interior, an agency charged with administering the bulk of federal lands.³⁸ In that position, Bernhardt has a central role administering oil and gas leasing, offshore drilling, and areas of policy of interest to the oil and gas industry. Bernhardt and his predecessor, Ryan Zinke, have helped to open massive tracts of federal land to oil and gas development during their tenures.³⁹ They have also overseen suspicious delays in siting New England

³⁶ See Nihal Krishan, *Andrew Wheeler's Long History with the Energy Sector*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (July 10, 2018), <https://www.opensecrets.org/news/2018/07/andrew-wheeler-longtime-coal-lobbyist/> [https://perma.cc/NTR8-KECF] (discussing how Wheeler became "a lobbyist for the law firm Faegre Baker Daniels, where he represented energy companies such as coal producer Murray Energy, which was his best-paying client. The coal-mining company paid his firm between \$160,000–\$559,000 annually from 2009 through 2017, according to CRP's records. Murray Energy is privately owned by Robert Murray, whose company donated \$300,000 to President Trump's inauguration.").

³⁷ See Letter from Senator Sheldon Whitehouse, Senator Thomas R. Carper, Ranking Member, U.S. Senate Committee on Environment and Public Works, and Rep. Frank Pallone, Jr., Chairman, U.S. House Committee on Energy and Commerce, to Charles Sheehan, Acting Inspector General, U.S. Environmental Protection Agency, at 2 n.6 (Feb. 21, 2019), <https://www.whitehouse.senate.gov/imo/media/doc/2019-02-21%20Wehrum%20Letter%20to%20EPA%20IG%20final.pdf> [https://perma.cc/9SA7-GNP7] (explaining that one of Wehrum's former clients, the Utility Air Regulatory Group, "is not an incorporated entity and does not appear to have a staff, physical location, or presence of any sort outside of Hunton & Williams. Its membership and decision-making processes appear opaque, and it has been described as 'a front group of convenience [that] allows individual electric utility companies to shield their names and anti-public health crusades from public awareness.'" (quoting John Walke, *Is Your Power Company Fighting in Court Against Safeguards From Mercury and Toxic Air Pollution?* NAT. RES. DEF. COUNCIL (May 25, 2012), <https://www.nrdc.org/experts/john-walke/your-power-company-fighting-court-against-safeguards-mercury-and-toxic-air> [https://perma.cc/W7YW-K35K])).

³⁸ See Anthony Andragna, *Senate Confirms Bernhardt to Head Interior*, POLITICO (Apr. 11, 2019), <https://www.politico.com/story/2019/04/11/david-bernhardt-secretary-interior-department-1345662> [https://perma.cc/66HE-L2KN] ("Bernhardt, currently acting secretary, will replace Ryan Zinke, who left Interior in January in the midst of several ongoing ethical investigations. Bernhardt won bipartisan backing from the chamber despite concerns that he has conflicts of interests related to past lobbying clients, criticism that he failed to keep adequate records, and worries about the department's plans to expand offshore drilling along the Atlantic and Pacific coasts.").

³⁹ See, e.g., Coral Davenport, *Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client*, N.Y. TIMES (Feb. 12, 2019), <https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html> [https://perma.cc/3D4C-KNSN] ("As a lobbyist and lawyer, David Bernhardt fought for years on behalf of a group of California farmers to weaken Endangered Species Act protections for a finger-size fish, the delta smelt, to gain access to irrigation water. As a top official since 2017 at the Interior Department, Mr. Bernhardt has been finishing the job: He is working to strip away the rules the farmers had hired him to oppose.").

offshore wind energy projects—projects that would displace gas-fired electric generation in the region.⁴⁰

The Founders would likely have been astounded that such a commanding political force arose in our Republic, exerting such control over our executive and legislative branches. Industry lobbying distorts legislative outcomes. Post-*Citizens United* dark-money election spending constricts America's political aperture. Regulatory capture in the Trump administration has spread corruption widely through government agencies. But the most coveted prize, the pearl beyond price of influence-seeking, lies in the courts.

III. THE CORPORATE INFLUENCE MACHINE TARGETS ARTICLE III COURTS

Courts set rules. Federal courts decide what the Constitution means. Federal courts decide how laws are applied. Federal courts set the ground rules for challenges to legislation; they set rules for executive agency process and review; and they set rules that govern commercial and political activity.

The prospect of resetting all those rules to advance systematically one's own power and position makes courts an alluring target for the influence machine. At the same time, because so many judicial practices and principles are designed to keep courts honest and independent, they are a difficult target. The stalking and capture of the courts had to be measured and slow.

In 1971, prominent corporate lawyer and future Supreme Court Justice Lewis Powell wrote a secret memo to an official at the U.S. Chamber of Commerce. Powell warned that “the American economic system”—by which he seemed to mean corporate America—“is under broad attack” from academics, the media, leftist politicians, and other progressives.⁴¹ To counter the progressive spirit that had delivered the New Deal and Great Society, Powell wrote, it was time for an unprecedented influence campaign on the part of corporate America. He advised:

[I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the

⁴⁰ See Chris Martin & Jennifer A. Dlouhy, *Trump Delay Casts Doubt on First Major U.S. Offshore Wind Farm*, BLOOMBERG NEWS (Aug. 10, 2019), <https://www.bloomberg.com/news/articles/2019-08-09/u-s-is-said-to-extend-review-of-first-major-offshore-wind-farm> [https://perma.cc/39VR-QM7R] (reporting that “[t]he Trump administration cast the fate of the nation’s first major offshore wind farm into doubt by extending an environmental review for the \$2.8 billion Vineyard Wind project off Massachusetts”).

⁴¹ Confidential Memorandum from Lewis F. Powell, Jr., to Eugene B. Snyder, Jr., Chairman, Education Committee, U.S. Chamber of Commerce 1 (Aug. 23, 1971), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo> [https://perma.cc/5Q9B-RFTX].

political power available only through united action and national organizations.⁴²

Corporate forces followed this advice, and today we see how much the “political power” made available through “united action” has delivered in the executive and legislative branches. Powell also flagged the value of pro-corporate “activist” judges to shape the courts and the law, and slowly but surely corporate forces began to reshape our judiciary. Over many patient years, they produced not only pro-corporate, anti-regulatory judges and doctrines, but a coordinated array of front groups set up to effect this infiltration. Behind this network of front groups lurks a network of corporate, right-wing donors who secretly fund this “united action” in the judiciary.⁴³

There have long been competing philosophies of adjudication and legal analysis, a debate reflected over decades in different judicial philosophies from Republican and Democratic presidents’ court nominees. This exercise was different. This was about winning, not about theories. Tellingly, the record of the many “conservative” wins under Chief Justice Roberts in the Supreme Court shows more often that conservative entities are the victors than that conservative judicial principles are followed.⁴⁴ The donors behind the scheme want victories and are not fussy about philosophy.

It is slowly becoming clear how the so-called conservative legal movement has been secretly bankrolled by corporate interests which benefit from that legal movement. It is even sometimes frankly admitted. Describing his efforts to stock the federal judiciary, Donald McGahn, the former White House Counsel and early architect of the Trump administration’s judicial selection efforts, did not even try to hide the connection: “There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin.”⁴⁵ In other words, the “plan” is to groom and select judges who will then support the Republican political effort to roll back unwelcome laws passed by Congress and unwelcome regulations developed by independent agencies.

The influence machine’s efforts in the federal judiciary are particularly pernicious for government. First, unlike legislators and political appointees,

⁴² *Id.* at 11.

⁴³ See Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> [https://perma.cc/W598-ZS9B] (arguing that “[e]ven circuits that are decidedly liberal are undergoing significant changes” and that “a radically new federal judiciary could be with us long after Trump is gone”).

⁴⁴ See Sheldon Whitehouse, *A Right Wing Rout: What the “Roberts Five” Decisions Tell Us About the Integrity of Today’s Supreme Court*, AM. CONST. SOC’Y: ISSUE BRIEF (Apr. 2019), <https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf> [https://perma.cc/H5UC-NQF9].

⁴⁵ Robert Barnes & Steven Mufson, *White House Counts on Kavanaugh in Battle Against “Administrative State”*, WASH. POST (Aug. 12, 2018), https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-and-the-end-of-the-regulatory-state-as-we-know-it/2018/08/12/22649a04-9bdc-11e8-8d5e-c6c594024954_story.html [https://perma.cc/6SM7-QXNX].

federal judges receive lifetime appointments. Successfully capturing a judicial seat can reward the capturer for decades,⁴⁶ and popular umbrage cannot “throw the bum out” in the next election.

Second, in a captured court, strategic advances can be won deep in the weeds of jargon and theory, where the public is less likely to appreciate the ultimate impact; judicial decisions expanding the “unitary executive” theory⁴⁷ or limiting *Auer*⁴⁸ and *Chevron*⁴⁹ deference to administrative agency expertise are not obvious blows to the environment or public health. Mischiefs can be done outside the spotlight of popular attention.

Third, special interests can ask captured courts to do things Republican legislators wouldn’t dare vote for—like allowing unlimited and ultimately anonymous money into politics.⁵⁰ Courts are designed to make unpopular decisions in the service of justice; a captured court can deliver unpopular decisions in the service of politics.

Finally, courts have traditionally been viewed as mostly apolitical—neutral arbiters of law and fact.⁵¹ Accordingly, the political branches have treated them with deference, largely leaving it to the judiciary to set its own ground rules. As a result, the courts, and most notably the Supreme Court, operate in unusual secrecy, protected by a veneer of neutrality.

IV. THE APPARATUS OF CAPTURE

To accomplish the capture effort, special interests and their sophisticated teams of lawyers and political operatives have systematically developed an apparatus whose purpose is first to influence the selection and confirmation of judges, and then to influence the judges’ decisions in the courts.⁵² This apparatus is most visible at the Supreme Court, but it operates in lower courts, too. Here is its battle plan:

⁴⁶ See U.S. CONST. art. III, § 1 (providing for lifetime tenure of federal judges).

⁴⁷ See Ian Millhiser, *The Supreme Court Will Decide if Trump Can Fire the CFPB Director. The Implications Are Enormous.*, Vox (Oct. 18, 2019), <https://www.vox.com/policy-and-politics/2019/9/18/20872236/trump-justice-department-supreme-court-cfpb-unitary-executive> [<https://perma.cc/2SAG-6GDV>].

⁴⁸ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁴⁹ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

⁵⁰ See, e.g., Brief for U.S. Chamber of Commerce as Amicus Curiae Supporting Appellant, *Citizens United v. FEC*, 558 U.S. 310 (2010) (acknowledging that “immensely wealthy individuals play a significant role in our political process” and asking the Court to allow “corporations to spend freely on independent candidate advocacy”).

⁵¹ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (“The judiciary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment.”).

⁵² Press Release, Brennan Center, Three Nominations Reveal Contrasting Influence of Interest Groups in High Court Nomination Process (Jan. 26, 2006), <https://www.brennancenter.org/our-work/analysis-opinion/three-nominations-reveal-contrasting-influence-interest-groups-high-court> [<https://perma.cc/564L-WQQE>] (finding that “interest group spending on television ads and other lobbying tools can have a potent effect on who becomes a judge in America”).

- Select carefully vetted judges who embrace the desired pro-corporate world view.⁵³ This is done by giving a controlling role in judicial selection to an organization to which the interests give millions of dollars (the Federalist Society);
- Unleash millions in dark money supporting the nominee (or opposing him in Judge Merrick Garland’s case).⁵⁴ This is done through an organization (the Judicial Crisis Network (“JCN”)) that uses anonymous donations to fund political advertising campaigns for (or against) nominees;
- With their judges in place, tee up strategic cases and inundate courts with amicus briefs—best understood as lobbying documents. This is done through a flotilla of closely related front groups. These front groups sometimes appear as the litigant, behind a plaintiff of convenience; and sometimes among a flotilla of “amici curiae” signaling in harmony how the influence machine wants the court to decide.⁵⁵

It’s quite an investment, but it has paid stunning dividends.

The funding that fuels the judicial influence machine is difficult to expose because of its secrecy, but the coordination, tactics, and strategy of the influence machine are becoming less obscure. One case study is the outside spending group, JCN. According to tax filings, an unnamed donor gave \$17 million to JCN to help block President Obama’s nomination of Merrick Garland to the Supreme Court and support President Trump’s nomination of Neil Gorsuch to that same vacancy.⁵⁶ Then, in 2018, a donor—perhaps the same one—gave another \$17 million to JCN to support the troubled nomination of

⁵³ See, e.g., Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html [<https://perma.cc/3TJ6-WQK7>] (“The three circuit courts that have flipped to Republican majorities this year have the potential to not only change policy but also benefit Trump professionally and politically. The 2nd Circuit, with its new right-leaning majority, will decide whether to rehear a case challenging Trump’s ability to block critics on Twitter, as well as one regarding Trump’s businesses profiting while he’s in office. The 11th Circuit, which handles appeals from Georgia, Florida and Alabama, is set to take up several voting rights cases.”); Robert O’Harrow, Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/> [<https://perma.cc/GS2H-ZLMU>] (describing Federalist Society president Leonard Leo’s role in selecting Neil Gorsuch and Brett Kavanaugh).

⁵⁴ See O’Harrow & Boburg, *supra* note 53 (noting the Judicial Crisis Network spent \$10 million to support Supreme Court Justice Neil Gorsuch’s confirmation after spending \$7 million to block President Barack Obama’s Supreme Court pick, Merrick Garland).

⁵⁵ See, e.g., Brian R. Frazelle, *Corporate Clout: As the Roberts Court Transforms, the Chamber Has Another Big Term*, CONST. ACCOUNTABILITY CTR. (July 26, 2017), https://www.theconstitution.org/think_tank/corporate-clout/ [<https://perma.cc/VKM9-TUYE>] (noting that in the 2016–17 term, the U.S. Chamber of Commerce “submitted friend-of-the-court briefs in 15 cases . . . [a]nd in 12 of those cases, or 80%, the position advocated by the Chamber prevailed”).

⁵⁶ See Robert Maguire, *Group that Spent Millions to Boost Gorsuch Also Paid Mysterious Inaugural Donor*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (May 16, 2018), <https://>

Brett Kavanaugh.⁵⁷ JCN received many more anonymous multi-million-dollar donations along the way. A sophisticated media relations campaign, orchestrated by a firm CRC Public Relations interconnected in this web of dark money groups, put those millions to work on political-campaign-style advertising.⁵⁸

JCN is one of many groups working in close coordination. To understand that coordination, let's visit one prominent individual: Federalist Society Co-Chairman Leonard Leo.⁵⁹ From his perch at the Federalist Society, Leo has been the lynchpin and chief strategist of the conservative legal movement's court-packing plan for the better part of two decades.

The Federalist Society claims it is merely a not-for-profit group for like-minded aspiring lawyers seeking to discuss conservative ideas and judicial doctrine. The truth, however, is more complicated. In effect, there are three incarnations of the Federalist Society. The first is perfectly appropriate: a debating society for conservatives at law schools and in legal communities across the country to discuss traditionally conservative judicial values, like originalism and the merits of limited government. The second is familiar in Washington, D.C.: a think tank that attracts big-name conservative lawyers, scholars, politicians, and even Supreme Court Justices to events; that publishes and podcasts; and that holds galas.⁶⁰ The third role of the Federalist Society is the dangerous one: it is the vehicle for powerful interests seeking to reorder the judiciary by grooming, vetting and selecting amenable judges.⁶¹

www.opensecrets.org/news/2018/05/group-that-spent-millions-to-boost-gorsuch-also-paid-mysterious-inaugural-donor/ [https://perma.cc/M33S-9899].

⁵⁷ See Anna Massoglia & Andrew Perez, *Secretive Conservative Legal Group Funded by \$17 Million Mystery Donor Before Kavanaugh Fight*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (May 17, 2018), <https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh/> [https://perma.cc/E9AS-S763].

⁵⁸ See Press Release, Judicial Crisis Network, *Judicial Crisis Network Launches \$10 Million Campaign to Preserve Justice Scalia's Legacy, Support President-Elect Trump Nominee* (Jan. 9, 2017), <https://judicialnetwork.com/jcn-press-release/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/> [https://perma.cc/DN23-MXWT] (noting that JCN "expects to spend at least \$10 million to confirm the next justice . . . [and] CRC Public Relations — President Greg Mueller will spearhead communications and media strategy").

⁵⁹ See Jonathan Swan & Alayna Treene, *Leonard Leo to Shape New Conservative Network*, AXIOS (Jan. 7, 2020), <https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html> [https://perma.cc/8RBG-CMVT] (noting that until recently, and for the period relevant to this Article, Leo served as the Federalist Society's Executive Vice President and that it has been reported that he has limited his role in the Federalist Society in order to establish a new dark money operation focusing on the judiciary).

⁶⁰ See *2019 National Lawyers Convention*, FED. SOC'Y (Nov. 2019), <https://fedsoc.org/conferences/2019national-lawyers-convention> [https://perma.cc/5J45-8HPE] (featuring Justices Gorsuch and Kavanaugh).

⁶¹ See Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), <https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html> [https://perma.cc/W598-ZS9B] ("Trump might not have known much about the law, but he needed . . . to create the impression that he 'would be reliable in terms of conservative judges, because that would calm down and consolidate a very large bloc of his coalition.' That is, what mattered to the Federalist Society—and the Heritage Foundation—was

This Federalist Society role is the result of many years of work by Leo and his network of donors. As early as 2003, Leo was known in the Bush White House as the coordinator of “all outside coalition activity regarding judicial nominations.”⁶² In October 2006, Leo presented to students at the University of Virginia (“UVA”) School of Law an overview of the measures used to help confirm George W. Bush nominees John Roberts and Samuel Alito. According to an article about the UVA event, Leo’s strategies included the following:

- “Aggressive fundraising to hire a top media firm. About \$15 million was spent for both confirmations on earned and paid media, telemarketing, and other grassroots mobilization
- “Advance work recruiting more than 60 organizations to support the nomination and confirmation of a person committed to conservative priorities
- “Polling to figure out what the American people thought the role of the court should be so that the message could be framed in a way that resonated with the public
- “Preparation of background memos and briefing materials on every conceivable nominee
- “Research into how Justices William Rehnquist and Sandra Day O’Connor affected the vote count in controversial areas of law
- “A search of history to learn how controversial issue areas had been handled in earlier confirmations
- “Publishing white papers to paint the ground favorably when it comes to the questions that are appropriate for a nominee to answer
- “Training expert lawyers in how to talk to the media
- “Holding dozens of background, off-the-record meetings with reporters to give them information about the nomination and confirmation process”⁶³

This playbook is still in use today. In the spring of 2019, *The Washington Post* published an in-depth investigation of Leo and his present network of organizations.⁶⁴ It is massive, secretive, and lavishly funded, and its purpose is to pack and influence the courts.⁶⁵ As the *Post* found through public records and interviews, the groups in Leo’s orbit work in close coordination

that Trump take their advice on judicial nominees. In an interview with Breitbart in June 2016, Trump pledged, ‘We’re going to have great judges, conservative, all picked by Federalist Society.’”).

⁶² O’Harrow & Boburg, *supra* note 53.

⁶³ See Robin Cook, *Confirmation of High Court Justices Akin to Political Campaign, Leo Says*, UNIV. OF VA. SCH. OF L. (Oct. 2, 2006), https://www.law.virginia.edu/news/2006_fall/leo.htm [<https://perma.cc/T35W-3AJV>].

⁶⁴ See O’Harrow & Boburg, *supra* note 53.

⁶⁵ See *id.*

and are linked through multiple vectors: finances, board members, phone numbers, addresses, office support staff, and operational details.⁶⁶

Anonymous funding is the lifeblood of this network and its judicial influence campaign. Between 2014 and 2017, Leo's nonprofits collected more than \$250 million in dark-money donations.⁶⁷ Secret donors providing money at that quarter-billion-dollar scale obviously expect a robust return on their investment, and this money was used to carry out all manner of activities to achieve that return. The *Post* unearthed a list of clients of a conservative media relations firm outlining the network's role in the Garland and Gorsuch nomination battles:

Nine of the [Leo-affiliated] groups hired the same conservative media relations firm, Creative Response Concepts, collectively paying it more than \$10 million in contracting fees in 2016 and 2017. During that time, the firm coordinated a months-long media campaign in support of Trump's Supreme Court nominee, Neil M. Gorsuch, including publishing opinion essays, contributing 5,000 quotes to news stories, scheduling pundit appearances on television and posting online videos that were viewed 50 million times, according to a report on the firm's website.⁶⁸

This description tracks closely the methods outlined by Leo years before at UVA.

While the plan has been long in the making, in the Trump administration it has become open and obvious. As a member of the Senate Judiciary Committee, I have seen the dark-money-funded politicization of the judicial nomination and confirmation process emerge, climb to top political priority (it now dwarfs any legislative activity in the Senate), and pay remarkable dividends. According to an October 2019 analysis by the Senate Democratic Policy and Communications Committee, the Republican-controlled Senate had allowed less than one-sixth the number of votes on legislation and amendments compared to the Democratic-controlled House.⁶⁹ Meanwhile, as of February 2020, the Senate has confirmed 193 Article III judges during the Trump administration, including fifty-one influential appellate judges—nearly as many as President Obama appointed in his eight-year presidency (fifty-five).

The Federalist Society now counts eighty-five percent of the Trump administration's Supreme Court and circuit court nominees as members.⁷⁰ In November 2019, at his first major public event since taking his seat on the Supreme Court bench, Justice Kavanaugh spoke to a high-priced Federalist

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Analysis on file with Democratic Policy and Communications Committee.

⁷⁰ Statistic on file with Office of Senator Whitehouse.

Society gala fundraiser.⁷¹ Justice Kavanaugh thanked Federalist Society member and Trump White House Counsel Donald McGahn for his help during the confirmation process;⁷² McGahn once quipped that he had been “in-sourced” to the White House to deliver on the Federalist Society’s priorities.⁷³ Justice Kavanaugh appreciatively called McGahn his “coach.”⁷⁴

With vetted and selected judges in place comes the next step: strategically guiding the Court to desired outcomes. Again, dark money plays a role: over years, anonymously funded groups have sprung up to serve this effort. One task is to seek out cases with fact patterns that support arguments for changes in law the big interests desire, and then bring those cases before the Court. To get there, these legal organizations recruit plaintiffs, usually with the offer of free services. (Ordinarily, in real litigation, the plaintiff selects the lawyer, not vice versa.)

I saw this happen in a case I argued before the Supreme Court. The dark-money-funded Pacific Legal Foundation swept in from across the country and recruited a Rhode Island plaintiff, who agreed to let them bring his case before the Supreme Court.⁷⁵ When the Court’s decision ultimately did not get them the result they wished to achieve, they dropped him, and went on to other cases. Pacific Legal Foundation is still at it before the Court.⁷⁶

Once one of these groups gets the case up before the Court, an armada of related amici curiae (“friends of the court”) sails in to echo and amplify the corporate message. Many of these amici are funded by the same donors. In a recent amicus brief I wrote, I pointed out the common funding of many of the other amici in that very case, and how at least thirteen of those amici were funded by entities that also have funded the Federalist Society.⁷⁷ The

⁷¹ Adam Liptak, *Kavanaugh Recalls His Confirmation at Conservative Legal Group’s Annual Gala*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/us/kavanaugh-federalist-society.html> [https://perma.cc/Q5FD-6H97].

⁷² Nina Totenberg, *Kavanaugh Hailed at Federalist Society as Protesters Attempt Disruption*, NAT’L PUB. RADIO (Nov. 15, 2019), <https://www.npr.org/2019/11/15/779438921/kavanaugh-ailed-at-federalist-society-as-protesters-attempt-disruption> [https://perma.cc/BS9Q-ABEC].

⁷³ Lydia Wheeler, *White House Lawyer: ‘Completely False’ that Trump Outsources Judicial Selections*, HILL, (Nov. 17, 2017), <https://thehill.com/regulation/360981-white-house-lawyer-completely-false-that-trump-outsources-judicial-selections> [https://perma.cc/TH6X-PAG9].

⁷⁴ Robert Barnes & Ann E. Marimow, *As Trump Cases Arrive, Supreme Court’s Desire to Be Seen as Neutral Arbiter Will Be Tested*, WASH. POST (Nov. 26, 2019), https://www.washingtonpost.com/politics/courts_law/as-trump-cases-arrive-supreme-courts-desire-to-be-seen-as-neutral-arbiter-will-be-tested/2019/11/26/1d186f92-106d-11ea-b0fc-62cc38411ebb_story.html [https://perma.cc/3EZ7-8JLD].

⁷⁵ See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁷⁶ In 2019, Pacific Legal Foundation represented the petitioner in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), where the Supreme Court overruled precedent that required property owners to seek compensation for state and local property takings in state courts before seeking compensation in federal courts, *id.* at 2179.

⁷⁷ Brief for U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono as Amicus Curiae Supporting Respondents, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 (U.S. Jan. 22, 2020) https://www.supremecourt.gov/DocketPDF/19/19-7/129418/20200122115258928_19-7%20Amici%20Brief.pdf [https://perma.cc/3DHS-GF6Q].

Center for Media and Democracy noted the brief and followed up with a more robust analysis—indeed a stunning analysis—finding that “sixteen right-wing foundations gave nearly \$69 million to groups urging the Supreme Court to abolish the Consumer Financial Protection Bureau since 2014” and that the same sixteen foundations had given over \$33 million to the Federalist Society over the same period.⁷⁸

Applying the “united action” campaign to the courts required a long and patient effort, but the end result of all this investment is profound. A small group of large donors is funding the vetting and selection of judges, and funding the campaigns for their confirmation, and funding the litigants who present cases to them, and funding a swarm of front-group amici who provide amplification of the donors’ message and an illusion of broad support.

V. RESULTS AT THE COURT

Mired in dark-money influence, the Supreme Court has become a reliable ally for corporate and Republican partisan interests. Professional observers know it. As renowned *New York Times* columnist Linda Greenhouse reluctantly concluded, it is “impossible to avoid the conclusion that the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda.”⁷⁹ Her sentiment is not unique. Veteran court watcher Norm Ornstein has written that the Supreme Court “is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen.”⁸⁰ *The New Yorker*’s Jeffrey Toobin was blunt in an assessment of Chief Justice Roberts, comparing Justice Scalia, “who has embodied judicial conservatism during a generation of service on the Supreme Court,” with Chief Justice Roberts, who “has served the interests, and reflected the values, of the contemporary Republican Party.”⁸¹

The hard proof is in the numbers. As I have documented, from the 2004 through 2017 Terms, the Roberts Court issued seventy-three five-to-four partisan decisions benefiting big corporate and Republican donor interests. By partisan, I mean that it was all Republican appointees making up the five. The benefits to Republican donor groups are not hard to discern. They in-

⁷⁸ Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, CTR. FOR MEDIA & DEMOCRACY: PR WATCH (Feb. 13, 2020), <https://www.prwatch.org/news/2020/02/13540/conservative-foundations-finance-push-kill-cfpb> [<https://perma.cc/P39U-P8FG>].

⁷⁹ Linda Greenhouse, *Polar Vision*, N.Y. TIMES (May 28, 2014), <https://www.nytimes.com/2014/05/29/opinion/greenhouse-polar-vision.html> [<https://perma.cc/E8VY-XR65>].

⁸⁰ Norm Ornstein, *Why the Supreme Court Needs Term Limits*, ATLANTIC (May 22, 2014), <https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/> [<https://perma.cc/6U9E-6J4V>].

⁸¹ Jeffrey Toobin, *No More Mr. Nice Guy*, NEW YORKER (May 25, 2009), <https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy> [<https://perma.cc/6NLN-TXCV>].

clude allowing corporate interests to spend unlimited money in elections, hobbling pollution regulations, enabling attacks on minority voting rights, curtailing labor's right to organize, and restricting workers' ability to challenge employers in court.⁸² In its 2018 Term, the Court added seven more of these five-to-four partisan decisions to this tally.⁸³

In this run of now eighty partisan five-to-four cases (and counting), something else quite telling took place. The Republican majority routinely broke traditionally conservative legal principles, such as respect for precedent, "minimalism" in the scope of their decision, or "originalist" reading of the Constitution. The Justices in these bare partisan majorities even went on remarkable fact-finding expeditions, violating core traditions of appellate adjudication that leave fact-finding to lower courts.⁸⁴ (It added no luster to this effort that the facts they found were false.⁸⁵) The consistent measure across these decisions is not traditional doctrines of conservative jurisprudence; it is the interests that win.

A results-oriented judiciary is anathema to our Founders' vision. A judiciary independent of the political branches, and with justice as its end rather than political gains for factions, is fundamental to our constitutional democracy. As Montesquieu put it, "There is no liberty, if the power of judging be not separated from the legislative and executive powers."⁸⁶ But corporate and partisan special interests are purposefully eroding that fundamental ideal to win this array of victories, and the Court seems content to be shepherded down that path. Some of these victories go beyond donor interests just pocketing a win in a particular case; the most dangerous victories actually tilt the political or legal or regulatory playing fields in favor of the donor interests in ways that will enable streams of future victories.

It is perhaps not a coincidence that polls show the public's faith in the courts receding. In one poll, only thirty-seven percent responded that they have "a great deal" or "quite a lot" of confidence in the Supreme Court.⁸⁷

⁸² Whitehouse, *supra* note 44.

⁸³ See *Nielsen v. Preap*, 139 S. Ct. 954 (2019); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485 (2019); *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁸⁴ Brief for Sen. Whitehouse et al., *supra* note 77.

⁸⁵ See, e.g., *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUSTICE (Aug. 6, 2018), <https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder> [<https://perma.cc/27MK-DMMB>] (documenting new state laws restricting voting rights after *Shelby County*); Richard L. Hasen, *The Decade of Citizens United*, SLATE (Dec. 19, 2019), <https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html> [<https://perma.cc/4DE8-VYXT>] (documenting the effects of *Citizens United* on anonymous campaign spending despite the decision's endorsement of the value of disclosure requirements).

⁸⁶ CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748); accord *THE FEDERALIST* No. 78 (Alexander Hamilton).

⁸⁷ *Confidence in Institutions*, GALLUP (Feb. 29, 2020, 10:11 AM), <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/CYM6-WN49>].

By seven to one, Americans have reported in polling the belief that they are less likely before the Justices of this Court to get a fair shot against a corporation, compared to vice versa.⁸⁸ That ought to be a hazard light flashing for the Court.

VI. PROPOSED SOLUTIONS: BRINGING TRANSPARENCY TO THE JUDICIARY

Millions of dollars in dark money have no business coursing through the judicial nomination and selection process, or funding litigants and so-called “friends of the Court.” All this coordinated, anonymous funding creates an odor of rot, and it risks lasting damage to the institution of the Court. Congress can take steps to stop the erosion of confidence and restore the Court to its proper, constitutionally prescribed lane. While some have called for dramatic and sweeping structural change—like imposing term limits, or adding seats to the Court—a logical first step is to shine the light of greater transparency and accountability into the Court.⁸⁹

In the political branches, we require transparency as a safeguard. Congress and the Executive Branch have extensive reporting requirements: the Lobbying Disclosure Act provides insight into who is influencing the legislative and rulemaking processes;⁹⁰ the Federal Election Campaign Act mandates public disclosures about political campaigns;⁹¹ and the Ethics in Government Act requires financial disclosures from officials.⁹²

⁸⁸ Mark Mellman, *Winning Messages: On Judges, Guns and Owning the Constitution's Text, History & Values*, CONSTITUTIONAL ACCOUNTABILITY CTR. 9 (Feb. 29, 2020, 10:24 AM), <https://www.theconstitution.org/wp-content/uploads/2018/03/PUBLIC-Mellman-CAC-Poll-Presentation.pdf> [<https://perma.cc/BA53-DNAE>].

⁸⁹ See *Supreme Court Justice Term Limits: Where 2020 Democrats Stand*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-term-limits/> [<https://perma.cc/X7AU-WX95>] (last visited Feb. 29, 2020) (showing that several 2020 Presidential candidates support or are open to term limits for Supreme Court Justices); Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, POLITICO (Mar. 18, 2019), <https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625> [<https://perma.cc/6T65-B7JV>] (stating that “[t]he surprising openness from White House hopefuls along with other prominent Senate Democrats to making sweeping changes—from adding seats to the high court to imposing term limits on judges and more—comes as the party is eager to chip away at the GOP’s growing advantage in the courts”).

⁹⁰ Lobbying Disclosure Act of 1995, 2 U.S.C. § 1603(a)(1) (2018) (“No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives.”); Lobbying Disclosure Act of 1995, 2 U.S.C. § 1602(10) (2018) (“The term ‘lobbyist’ means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.”).

⁹¹ Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. §§ 30104(b)(1)–(8) (2018).

⁹² Ethics in Government Act of 1978, 5 U.S.C. App. § 101(f) (2018).

By comparison to the other branches, the judiciary is largely a black box. It's not just that hidden donors lurk behind amici seeking to influence courts, or that groups like JCN need not disclose the donors behind political campaigns for judges; loopholes also allow Supreme Court justices and federal judges to avoid disclosing travel and hospitality perks. Judges are nominally covered by the Ethics in Government Act, but judicial disclosures, as implemented by the regulations of the Judicial Conference, are the least comprehensive and effective.⁹³ We would never have known of Justice Scalia's all-expenses-paid hunting vacation, except that he died on that vacation so it made the news.⁹⁴

For a branch of government without either force or purse, for one that bases its authority on its legitimacy, it's a mess. If conflicts of interest lurk behind the millions of dollars in anonymous money, it could produce a reputational crisis for the Court. Legislation that I propose would go a long way to protect against those potential conflicts through the sunlight of public disclosure. Not for nothing did Supreme Court Justice Louis Brandeis say that "sunlight is the best disinfectant."⁹⁵

It is hard to predict what true transparency would disclose, but the worst scenario is that a small cabal of special interest funders anonymously pays to (a) select the Justices, (b) campaign for their confirmation, (c) have cases strategically brought before the Court, (d) flood the Court with an echo chamber of scripted amici, and (e) fund elaborate travel and hospitality for the agreeable Justices. Ample evidence suggests the worst-case scenario may not be far from reality. So here are some proposed repairs for various danger areas.

A. *Anonymous Amici Curiae*

Amicus curiae briefs, written by non-parties for the purpose of providing information, expertise, insight or advocacy, have surged in both volume and influence in the past decade. Supreme Court and circuit court opinions often adopt language and arguments from amicus briefs.⁹⁶ During the Supreme Court's 2014 term, it received 781 amicus briefs, an increase of over

⁹³ See generally CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES, Canon 4 (JUDICIAL CONFERENCE OF THE U.S. 2019).

⁹⁴ See Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), <https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html> [<https://perma.cc/J495-7X94>].

⁹⁵ Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (Dec. 20, 1913), <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v> [<https://perma.cc/2HYS-V8WE>].

⁹⁶ See Paul M. Collins Jr., Pamela C. Corley, & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 917 (2015) (finding "the justices adopt language from amicus briefs based primarily on the quality of the brief's argument, the level of repetition in the brief, the ideological position advocated in the brief, and the identity of the amicus").

800% from the 1950s and a 95% increase from 1995.⁹⁷ From 2008 to 2013, the Supreme Court cited amicus briefs 606 times in 417 opinions.⁹⁸

Amicus briefs are an increasingly powerful advocacy tool for special interest groups. When those interest groups lobby Congress, they face stringent financial disclosure requirements;⁹⁹ no similar requirements exist for this form of judicial lobbying.

*Janus v. AFSCME*¹⁰⁰ (and its precursor, *Friedrichs v. California Teachers Association*)¹⁰¹ presents a textbook example of coordinated, dark-money judicial lobbying in a case with massive political implications.¹⁰² The case garnered over seventy-five amicus briefs, including many opposing the right of public-sector labor unions to collect fees from non-union members. Many of these briefs were by amicus groups with funding from the same source: the conservative Lynde and Harry Bradley Foundation, which has a stated goal of “reduc[ing] the size and power of public sector unions.”¹⁰³ None of this information was disclosed in either case to the Court or the parties. Instead, it fell to the diligent later research of transparency groups, using what public data is available, to document this web of influence with the Bradley Foundation at its heart.¹⁰⁴ While the Court in *Friedrichs* deadlocked at four-to-four because of the death of Justice Scalia, the radical right was right away ready with a new case in *Janus*. With Justice Gorsuch confirmed, the Court by a vote of five-to-four overturned forty years of settled law and undermined public sector unions’ ability to engage in political advocacy.¹⁰⁵

⁹⁷ Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 n.3 (2016).

⁹⁸ *Id.* at 1941.

⁹⁹ Lobbying Disclosure Act of 1995, 2 U.S.C. § 1603(b)(4) (2018) (“Each registration under this section shall contain . . . the name, address, principal place of business, amount of any contribution of more than \$5,000 to the lobbying activities of the registrant, and approximate percentage of equitable ownership in the client (if any) of any foreign entity . . .”).

¹⁰⁰ 138 S. Ct. 2448 (2018).

¹⁰¹ 136 S. Ct. 1083 (2016).

¹⁰² See Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), <https://inthesetimes.com/features/janus-supreme-court-unions-investigation.html> [<https://perma.cc/K3KN-S5XS>] (noting “[i]n the past decade, a small group of people working for deep-pocketed corporate interests, conservative think tanks and right-wing foundations have bankrolled a series of lawsuits to end what they call ‘forced unionization’ . . . Most of the groups pursuing this agenda, including Bradley and SPN, are tax-exempt charitable groups”).

¹⁰³ *Free Markets: Improving Opportunity for All Citizens by Promoting Economic Growth*, BRADLEY FOUND. (Feb. 29, 2020, 10:20 AM), <https://www.bradleyfdn.org/impact/free-markets> [<https://perma.cc/8TDY-L54C>].

¹⁰⁴ Brian Mahoney, *Conservative Group Nears Big Payoff in Supreme Court Case*, POLITICO (Jan. 11, 2016), <https://www.politico.com/story/2016/01/friedrichs-california-teachers-union-supreme-court-217525> [<https://perma.cc/93MA-RWW7>] (discussing that in *Friedrichs*, “The Bradley Foundation funds the Center for Individual Rights, the conservative D.C. non-profit law firm that brought the case; it funds (or has funded) at least 11 organizations that submitted amicus briefs for the plaintiffs; and it’s funded a score of conservative organizations that support the lawsuit’s claim that the ‘fair-share fees’ nonmembers must pay are unconstitutional”).

¹⁰⁵ As Justice Kagan noted in her dissent, “The majority has overruled *Abood* [v. *Detroit Bd. of Ed.*, 431 U.S. 209 (1977)] for no exceptional or special reason, but because it never

In *Seila Law v. CFPB*,¹⁰⁶ the case in which I filed my brief disclosing the common funding of other amici, a group of common funders had (a) supported at least thirteen amici attacking the constitutionality of the Consumer Financial Protection Bureau, (b) developed and propagated the so-called “unitary executive” theory of executive power their amici supported, and (c) funded the Federalist Society’s efforts to bring on to the Court Justices who would be agreeable to this theory.¹⁰⁷

Many of the amici in both *Janus* and *Seila Law* claim status as “social welfare” organizations, and thereby keep their donor lists private.¹⁰⁸ Without knowledge of the common funding, one might consider thirteen amicus briefs to present a broad outpouring of support; once the common funding becomes apparent, it suggests an artificial echo chamber manufactured by a small cabal of self-interested entities.

Judges and parties should know who is trying to influence the outcome in their case, but disclosure rules are woefully inadequate for today’s dark-money fueled legal advocacy. Supreme Court Rule 37(6) requires only that amicus briefs:

[I]ndicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.¹⁰⁹

The Federal Rules of Appellate Procedure have a similar disclosure requirement,¹¹⁰ but these rules allow for easy evasion. A group like the Bradley Foundation can fund dozens of organizations to participate as amici in a case. As long as the money is not directed to the “preparation or submission” of a particular brief (which may be taken to mean merely printing and mailing costs), the amicus need not tell the Court where it gets its money. The real interests lie back in the shadows, while their front groups—often groups with anodyne names that belie their true purposes—create an illusory chorus of support.

Worse, the rule is inconsistently applied. In 2018, the Court rejected an amicus brief funded through a GoFundMe campaign, with most donors giv-

liked the decision Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate.” *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

¹⁰⁶ No. 19-7, 140 S. Ct. 427 (2019) (granting certiorari).

¹⁰⁷ See Brief for Sen. Whitehouse et al., *supra* note 77, at Appendix A.

¹⁰⁸ See *Bullock v. Internal Revenue Serv.*, 401 F. Supp. 3d 1144, 1159 (D. Mont. 2019) (invalidating a 2018 Internal Revenue Service rule that permitted 501(c)(4) “social-welfare” organizations to keep their donor lists private).

¹⁰⁹ SUP. CT. R. 37(6).

¹¹⁰ FED. R. APP. P. 29(a)(4)(E).

ing tens or hundreds of dollars.¹¹¹ At the same time, the Supreme Court routinely accepts amicus briefs from the United States Chamber of Commerce. The Chamber refuses to disclose its funding; indeed, the anonymity of Chamber membership is a selling point for corporations seeking to influence policy and the courts without associating their names with the often-toxic positions of the Chamber.¹¹² It is difficult to conjure any valid reason to reject one brief because an individual who donated \$50 to the effort did not disclose her identity, while accepting another whose corporate donors in the millions of dollars remain anonymous.

This discrepancy seemed so obvious that I wrote to the Supreme Court to suggest that its disclosure rule should be changed.¹¹³ Responding for the Court, Clerk of the Court Scott Harris wrote, “The language of Rule 37.6 strikes a balance While your letter suggests that non-disclosure of donor or member lists favors ‘well-heeled’ amici, it is just as likely to protect organizations that advocate for the disadvantaged or unpopular causes. *See, e.g., NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (recognizing right of NAACP not to provide membership lists where disclosure might lead to retribution and could chill group activity).”¹¹⁴

The Court’s response was troubling in two ways. First, it draws a false, if not outright offensive, equivalence between Alabama NAACP members at risk of physical violence during the Civil Rights era and large corporate interests seeking to bend the law anonymously to their advantage.¹¹⁵ Second, the Court *did require* the disclosure of the small donors, who were the ones much more comparable to the ordinary NAACP members protected in the Alabama case. The Court’s unwillingness to look behind these hidden big-money influence campaigns runs contrary to longstanding precedent that disfavors anonymity in judicial proceedings.¹¹⁶ It would not be difficult to

¹¹¹ *U.S. Supreme Court Rule Crimps GoFundMe Backed Amicus Brief*, YAHOO FIN. (Dec. 10, 2018), <https://finance.yahoo.com/news/u-supreme-court-rule-crimps-075351237.html> [<https://perma.cc/889T-RV5U>].

¹¹² Dan Dudis, *Chamber of Commerce Wages War Against Political Transparency*, THE HILL (Oct. 20, 2016), <https://thehill.com/blogs/pundits-blog/finance/302067-chamber-of-commerce-wages-war-against-political-transparency> [<https://perma.cc/T9CG-9AR2>] (stating that “Chamber President Tom Donohue has said that the Chamber is in the business of providing ‘reinsurance’ to companies that need help lobbying for positions that aren’t publicly or politically palatable. And key to the Chamber’s ability to provide this ‘reinsurance’ is the fact that it can do the dirty work for its members without them leaving their fingerprints behind”).

¹¹³ Letter on file with author.

¹¹⁴ Letter on file with author.

¹¹⁵ *See* Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 405, 433 (2012) (“[A]pplying *NAACP v. Alabama*’s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision.”).

¹¹⁶ *See, e.g., United States v. Microsoft Corp.*, 56 F.3d 1448, 1464 (D.C. Cir. 1995) (finding that a lower court erred when granting the “‘rare dispensation’ of anonymity against the world” when it allowed an amicus to file a brief anonymously, and that “the court has ‘a judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation is warranted’”); *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (“A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters

honor that precedent and fashion a rule of disclosure that allows an exception for true associational threats of violence, had the Court wished.

A legislative solution to this problem is the AMICUS (Assessing Monetary Influence in the Courts of the United States) Act. This very limited legislation would require disclosure by repeat players in the influence game—those who file three or more amicus briefs in the United States Supreme Court or the federal courts of appeals during a calendar year. Disclosure would be required only of these groups’ big-dollar funders, those who contributed three percent or more of the entity’s gross annual revenue or over \$100,000. In addition, the bill would prohibit covered amicus brief filers from making gifts or providing travel or hospitality to judges, akin to current restrictions on legislative lobbying.¹¹⁷

B. *Judicial Travel and Hospitality*

Another means of influence is the “soft” lobbying of gifts and travel. Supreme Court travel paid for by others is not infrequent. Reporting by the nonpartisan Center for Public Integrity and by the *Washington Post* revealed that the nine Supreme Court Justices received over 365 trips paid for by outside groups from 2011 to 2014.¹¹⁸ Unlike the vulgar and immediate quid pro quo exchange of a thing of value for a specific judicial outcome in a particular case, soft lobbying plays the long game of mutual habituation and good will through more decorous activities, like travel, which happen to avail access to the donors and their intermediaries. The long game is well known to Leonard Leo, his corporate cabal, and the savvy repeat players who represent them.

There are myriad unreported ways interests can cultivate the good will of the Court. Linda Greenhouse described a recent Federalist Society gala as sending a message from the corporate donor community to the Justices: “We’ve been here for you, and we expect you to be here for us. If you want to come back, don’t disappoint us.”¹¹⁹ Current judicial travel and gift disclosure requirements do not provide enough sunlight into these relationships.

While the Ethics in Government Act requires judges to provide some financial disclosure, judges and Justices are not required to identify the exact

of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff’s identity. The risk that a plaintiff may suffer some embarrassment is not enough.”); Babak A. Rastgoufard, Note, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009 (2003).

¹¹⁷ See 2 U.S.C. § 1613 (2018).

¹¹⁸ Mark Berman & Christopher Ingraham, ‘Supreme Court Justices Are Rock Stars.’ *Who Pays When the Justices Travel Around the World?*, WASH. POST. (Feb. 19, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/what-supreme-court-justices-do-and-dont-disclose/> [https://perma.cc/5QAU-KHPJ].

¹¹⁹ Linda Greenhouse, *Supreme Court Party Time*, N.Y. TIMES (Nov. 22, 2018), <https://www.nytimes.com/2018/11/22/opinion/supreme-court-federalist-society.html> [https://perma.cc/38CM-CBCN].

dollar value of the reimbursement, and they are exempted entirely from reporting any gifts in the form of “food, lodging, or entertainment received as personal hospitality.”¹²⁰ The Executive Branch personal hospitality exemption is limited to “hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or the individual’s family”;¹²¹ the Senate’s is virtually identical, and is commonly understood to be an exception for old friends and family.¹²²

The death of Antonin Scalia demonstrated the difference for Justices. Justice Scalia was a well-known traveler, reporting 258 trips paid for by private sponsors over eleven years.¹²³ The \$700-per-night accommodations at the West Texas hunting lodge where Justice Scalia died were paid by John Poindexter, owner of a corporate defendant in an age discrimination lawsuit, *Hinga v. MIC Group*,¹²⁴ that the Supreme Court the year before refused to hear,¹²⁵ to the company’s advantage.¹²⁶ This all-expenses-paid hunting trip with a litigant was treated as personal hospitality.

It seems fair to require that judges and Justices make the same disclosures that elected officials do. The Judicial Travel Accountability Act would require judicial officers’ financial disclosure statements to include the dollar amount of transportation, lodging, and meal expense reimbursements and gifts, as well as a detailed description of any meetings and events attended. It would align judicial disclosures with disclosures required in the other branches. This legislation has bipartisan support and has been introduced in both houses of Congress.¹²⁷

C. Supreme Court Transparency

The Supreme Court is such an opaque institution that the public has no idea whom the Justices meet with in their chambers. Recent reports show why that information matters.

In October 2019, Justices Alito and Kavanaugh met with representatives of the National Organization for Marriage (NOM).¹²⁸ NOM is a political advocacy group with both 501(c)(3) and 501(c)(4) not-for-profit corporate status.¹²⁹ It uses that dual status to oppose same-sex marriage ini-

¹²⁰ Ethics in Government Act of 1978, 5 U.S.C. § 102 (a)(2)(A) (2018).

¹²¹ 5 C.F.R. § 2634.105(k) (2018).

¹²² 5 U.S.C. App. § 109(14) (2018).

¹²³ Lipton, *supra* note 94.

¹²⁴ 136 S. Ct. 246 (2015).

¹²⁵ *Id.*

¹²⁶ See Lipton, *supra* note 94.

¹²⁷ Judicial Travel Accountability Act, S. 2632, 116th Cong. (2019).

¹²⁸ See Ephrat Livni, *An Unseemly Meeting at the US Supreme Court Raises Ethics Questions*, QUARTZ (Nov. 2, 2019), <https://qz.com/1740845/scotus-justices-impartiality-questioned-after-unseemly-meeting/> [<https://perma.cc/92ZQ-XQZ5>].

¹²⁹ *About Us*, NAT’L ORG. FOR MARRIAGE, <https://nationformarriage.org/about> [<https://perma.cc/MW5Y-MKNX>] (last visited Mar. 4 2020).

tiatives in federal and state legislatures and in the courts,¹³⁰ promoting “an understanding of marriage as the union of one man and one woman.”¹³¹ In this instance, NOM was an *amicus curiae* in three consolidated cases then pending, which presented the issue whether the Civil Rights Act protected against discrimination based on sexual orientation.¹³²

It is a fair question whether Justices should even take such meetings with amici.¹³³ At a minimum, those meetings should be disclosed. If the disclosures show patterns suggesting bias, or might influence a recusal motion, or appear to tread close to *ex parte* meetings, further action may be appropriate. But no disclosure is required. We know the Justices met with these advocates only because of a social media post from NOM President Brian C. Brown.¹³⁴

Most judges take great care to avoid even the appearance of an *ex parte* contact during pending litigation. To be sure, NOM was a friend of the court, not a party to the litigation. But it would seem fair for parties litigating an issue to know if their opponents among the amici are getting a special audience with two of the Justices deciding their case.

Similarly, the Associated Press recently reported that the Supreme Court can be rented for private events.¹³⁵ The Supreme Court’s website says nothing about such a service, but again thanks to social media we know that for a fee, and with the sponsorship of a Justice, the Court’s premises are available for hire. No surprise, the Federalist Society, sponsored by Justice Alito, held an event at the Court in July 2018.¹³⁶ The Court refuses to disclose either the groups that rent the Court or the sponsoring Justices. Ac-

¹³⁰ *Id.* (explaining that NOM “organiz[es] as a 501(c)(4) nonprofit organization, giving it the flexibility to lobby and support marriage initiatives across the nation” and that “[c]onsistent with its 501(c)(4) nonprofit status, NOM works to develop political messaging, build its national grassroots email database of voters, and provide political intelligence and donor infrastructure on the state level”).

¹³¹ *Our Work*, NAT’L ORG. FOR MARRIAGE, <https://nationformarriage.org/main/ourwork#navigation-bar> (last visited Mar. 4, 2020) [<https://perma.cc/DJX4-Z8A6>].

¹³² Brief for National Organization for Marriage and Center for Constitutional Jurisprudence, as Amici Curiae Supporting Respondents, *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019) (No. 17-1617).

¹³³ See, e.g., Elie Mystal, *Conservative Supreme Court Justices Are Showing Their Biases on Twitter Now*, ABOVE THE LAW (Oct. 31, 2019), <https://abovethelaw.com/2019/10/conservative-supreme-court-justices-are-showing-their-biases-on-twitter-now/> [<https://perma.cc/M5GW-63BA>] (“It’s really bad enough that conservative justices are so willing to give public aid and comfort to right-wing groups like the Federalist Society. Brett Kavanaugh, who has been credibly accused of attempted rape, has promised to take revenge on his enemies, so you can’t really claim the justice’s partisan hackery is surprising. But this meeting with the NOM is outrageous.”).

¹³⁴ Brian S. Brown (@briansbrown), TWITTER (Oct. 29, 2019, 12:12 PM), <https://twitter.com/briansbrown/status/1189213352167428096> [<https://perma.cc/6CGS-U5LY>].

¹³⁵ Mark Sherman, *Who Made the New Drapes? It’s Among High Court’s Mysteries*, AP NEWS (Nov. 29, 2019), <https://apnews.com/a1781172562243a8acd91804a5c8ad10> [<https://perma.cc/BPA7-8SG7>].

¹³⁶ The Federalist Society, FACEBOOK (2018), https://www.facebook.com/pg/Federalist.Society/photos/?tab=album&album_id=10155760987728481 [<https://perma.cc/GU8A-JE3J>].

ording to court spokeswoman Kathy Arberg, “The court does not maintain public records of organizations holding events.”¹³⁷ If a Justice were sponsoring an event for a litigant, or regularly sponsored events for particular amici curiae, it would seem that other litigants and the public ought to know.

Simple legislation would make all this information public. The official calendars of the Justices and a list of private events with sponsoring Justices could be made public by the Court after an appropriate interval. The Justices could still meet with whomever they choose, and sponsor groups for events they support, but they would do so knowing their choices will become public. For an institution whose authority is grounded in its public legitimacy, it is far better to be open with the public than not.

D. *Supreme Court Records*

Currently, no law provides for the preservation of Supreme Court Justices’ papers. The Federal Records Act specifically excludes the Supreme Court, and the Justices’ papers are considered private property rather than public records.¹³⁸ As *The New Yorker’s* Jill Lepore wrote in 2014:

The decision whether to make these documents available is entirely at the discretion of the Justices and their heirs and executors. They can shred them; they can burn them; they can use them as placemats. Texts vanish; e-mails are deleted. The Court has no policies or guidelines for secretaries and clerks about what to keep and what to throw away. Some Justices have destroyed virtually their entire documentary trail; others have made a point of tossing their conference notes. “Operation Frustrate the Historians,” Hugo Black’s children called it, as the sky filled with ashes the day they made their bonfire.¹³⁹

Given the life tenure and extraordinary power to shape American law that comes with a seat on the Supreme Court of the United States, there is a public interest in public access to Supreme Court records.

Following the model provided by the Presidential Records Act, which ensures public access to presidential records,¹⁴⁰ my Supreme Court Records Act would make Supreme Court records the public property of the United States; place the responsibility for the custody and management of records with the incumbent Justice and, upon the Justice’s retirement, the Archivist of the United States; allow an incumbent Justice to dispose of records that no longer have administrative, historical, informational, or evidentiary value,

¹³⁷ Sherman, *supra* note 135.

¹³⁸ Federal Records Act of 1950 (FRA), 44 U.S.C. § 3101 (2018).

¹³⁹ Jill Lepore, *The Great Paper Caper*, NEW YORKER (Dec. 1, 2014), <https://www.newyorker.com/magazine/2014/12/01/great-paper-caper> [<https://perma.cc/A83Z-2QLV>].

¹⁴⁰ The Presidential Records Act (PRA) of 1978, 44 U.S.C. §§ 2201–07 (2018).

subject to the approval of the Archivist; and establish a process for restriction of public access to these records.

E. DISCLOSE Act for Judicial Nominations

Judicial nominations and confirmations look more and more like political campaigns. Millions of dollars of dark money flow into social media, television, and radio advertising supporting and opposing nominees. The ads target states whose senators could be swayed on the nomination. It is political tradecraft, deployed for political purpose, and all of it ought to be regulated like the political campaign spending that it is.

Two things need to happen for effective regulation of political spending on judicial nominations. First, the Federal Election Campaign Act (FECA) needs to cover these judicial nominations campaigns so the spending is reported to the Federal Election Commission.¹⁴¹

Second, the law must deal with the post-*Citizens United* identity-laundering devices available to secretive donors. Existing FECA disclosures do not reach behind the nominal donor to give a true picture of who's behind political spending.¹⁴² So we need a remedy like the DISCLOSE (Democracy Is Strengthened by Casting Light On Spending in Elections) Act¹⁴³ to unveil the real parties behind political advertising, who are now hiding behind shell corporations, donor trusts, and 501(c)(4) organizations.

A Judicial DISCLOSE Act, which I plan to introduce, would require groups that run political advertisements supporting or opposing federal judicial nominations to disclose their biggest donors. The bill is modeled after the DISCLOSE Act, which would end the plague of dark money in our campaign finance system by requiring outside groups to disclose their donors to the FEC.

VII. CONCLUSION

We must be clear-eyed about the hurdles these reforms face. Enormous effort has been put by large and powerful interests into a fifty-year project to capture the courts. These interests seek to maintain, and indeed further entrench, the corporate-friendly outcomes into which they have invested hun-

¹⁴¹ Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. § 30101 (2018) (currently defining the term “candidate” as “an individual who seeks nomination for election, or election, to Federal office,” but not including judicial nominees).

¹⁴² Anna Massoglia, ‘Dark Money’ in Politics Skyrocketed in the Wake of *Citizens United*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 27, 2020), <https://www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united/> [<https://perma.cc/CJK8-3TQ8>] (“Dark money groups have reported nearly \$1 billion in direct spending on U.S. elections to the FEC since *Citizens United* with just 10 groups bankrolled by secret donors spending more than \$610 million of that.”).

¹⁴³ S. 1147, 116th Cong. (1st Sess. 2019).

dreds of millions of dollars. Transparency is inconsistent with their scheme. They will fight.

This is a fight worth having. Dark money is a plague anywhere in our political system. Citizens deprived of knowing the identities of political forces are deprived of power, treated as pawns to be pushed around by anonymous money and message. Dark money encourages bad behavior, creating the “tsunami of slime” that has washed into our political discourse. Dark money corrupts and distorts politics. Bad as all that is, dark money around courts is even worse. The chances of corruption and scandal explode. The very notion that courts can be captured undercuts the credibility upon which courts depend. It is surprising that the Judiciary has not come to its own defense in these matters, but that makes it our job.

As Justice Brandeis also said, “If we desire respect for the law we must first make the law respectable.”¹⁴⁴ The legislation I have proposed here would be an important—indeed necessary—first step to bringing a respectable transparency to our judiciary.

¹⁴⁴ LOUIS D. BRANDEIS, *THE BRANDEIS GUIDE TO THE MODERN WORLD* 166 (Alfred Lief ed., 1941).