

**The Company They Keep:
How Partisan Divisions Came to the Supreme Court**

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Chapter 1

Summary of Book and Argument

On September 12, 2005, Chief Justice nominee John Roberts told the Senate Judiciary Committee that “[n]obody ever went to a ball game to see the umpire. . . I will remember that it’s my job to call balls and strikes and not to pitch or bat.”¹ Notwithstanding Robert’s paean to judicial neutrality, then Senator Barack Obama voted against the Republican nominee. Although noting that Roberts was “absolutely . . . qualified,” Obama said that what mattered was the “5 percent of hard cases,” cases resolved not by adherence to legal rules but decided by “core concerns, one’s broader perspectives of how the world works, and the depth and breadth of one’s empathy.”² But with all 55 Republicans backing Roberts, Democratic objections did not matter.

Today, the dance between Roberts and Senate Democrats and Republicans seems so predictable that it now seems a given that there will be proclamations of neutrality by Supreme Court nominees and party line voting by Senators. Indeed, Senate Republicans blocked a vote on Obama Supreme Court pick Merrick Garland in 2016 so that (in the words of Senate majority leader Mitch McConnell) “the American people . . . [can] make their voice heard in the selection of Scalia’s successor as they participate in the process to select their next president.”³ And following Donald Trump’s victory and subsequent nomination of Neil Gorsuch, Senate Republicans undid a Democratic logjam by

¹ U.S. Senate, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong., 1st sess., 2005, 55.

² *Congressional Record* 151 (daily edition, September 22, 2005): S10,366.

³ Mitch McConnell and Chuck Grassley, “The American People Should Not be Robbed of Their Say,” *Washington Post*, February 19, 2016, A21.

repudiating filibuster rules intended to require supermajority support for Supreme Court nominees. The final vote on Gorsuch: 54 to 45 with every Republican supporting the nominee and all but three Democrats voting no. For his part, Gorsuch condemned those who “cynically describe” judges as “politicians in robes,” promising to be “impartial,” to “treat all who come to court fairly,” and to “seek consensus” and be “neutral and independent.”⁴

At the end of the Court’s 2016 term, the beginning of his tenure, Gorsuch voted most often with conservative Justices Clarence Thomas and Samuel Alito, prompting speculation that he will be “one of the most, or most, conservative Justices.”⁵ Whether this prediction proves correct, it is certainly true that Gorsuch is more conservative than Merrick Garland and that there is a partisan divide separating Democratic and Republican nominees on the Supreme Court.⁶

This book tells the story of how party polarization turned the Supreme Court into a partisan Court. In so doing, this book explains how the Supreme Court is shaped by the political and social environment in which the justices work. We argue that this environment has a powerful effect on the justices, but one that does not operate in the ways that most scholars and observers of the Court have assumed. We make and support three related points about the Court.

⁴ Neil Gorsuch, Associate Justice, Supreme Court of the United States, Confirmation Hearing Opening Statement (March 20, 2017).

⁵ Lola Fadulu, “Neil Gorsuch’s Early Opinions Reveal a Deeply Conservative Supreme Court Justice,” *Quartz*, June 26, 2017, <https://qz.com/1015025/neil-gorsuchs-early-opinions-reveal-a-deeply-conservative-supreme-court-justice/> (quoting Richard Hasen).

⁶ For simplicity, at some points in the book we will refer to justices simply as Republicans and Democrats, but what we mean is the nominees and appointees of Republican and Democratic presidents. Over the Court’s history some presidents have appointed justices who do not share their party affiliation; the last such justice was Lewis Powell, a Democrat appointed by President Nixon in 1971.

First, the partisan and ideological polarization of the current era, polarization that has had its greatest effects in elite segments of American society, has changed the Court in important ways. One effect has been to bring to the Court justices whose ideological views reflect the dominant views in the appointing president's party. Since 2010, and for the first time in its history, the Court has liberal and conservative blocs that fall perfectly along party lines. Correspondingly, since the 1991 appointment of Clarence Thomas, the ideological distance between Democratic and Republican appointees has grown with each new appointment to the Court. Another effect has been to give the justices stronger ties with ideologically oriented subsets of elites that reinforce their own views.

Before the mid-1980s, ideology played a less pronounced role in Supreme Court appointments. Republican presidents sometimes appointed liberals and Democrats sometimes appointed conservatives. Moreover, during the Burger and early Rehnquist Courts, some Republican appointees became more liberal—reflecting the dominant views of legal and media elites. Since 1991, however, all Republican appointees have been committed conservatives and all Democrats have been liberals. Politically polarized elite social networks have reinforced the conservatism and liberalism of Republican and Democrat appointees.

Second, the justices do not respond primarily to pressures from the other branches of government or the weight of mass public opinion. Rather, the primary influence on them is the elite world in which the justices live both before and after they join the Supreme Court. The justices take cues primarily from the people who are closest to them and whose approval they care most about, and those people are part of political, social, and professional elites.

Finally, the Supreme Court is a *court*, and the justices respond to expectations among legal elites that they will act as legal decision makers. Those expectations help to explain the frequency of unanimous or near-unanimous decisions and decisions that cut across ideological lines even in an era of high polarization. Indeed, the differences between the Court and Congress are highlighted by the differences in the ways that members of the two institutions respond to partisan and ideological polarization.

Partisan Polarization and Supreme Court Decision-Making

Since 2010, when Democratic nominee Elena Kagan replaced liberal Republican John Paul Stevens, all of the Supreme Court's Republican-nominated Justices have been to the right of Democratic-nominated Justices. Before 2010, the Court never had clear ideological blocs that coincided with party lines. Table 1.1 illustrates that change by showing the proportions of liberal votes cast by each justice during three "natural courts," periods when the Court's membership remained stable. In the first two periods, the justices nominated by Democratic presidents were more liberal than the Republican nominees as a whole, but the ideological ordering of justices did not follow party lines fully. In the last period, in contrast, there was a clear division between Republican and Democratic nominees--one that continued after the death of Justice Antonin Scalia and the appointment of Justice Neil Gorsuch. Other measures of the justices' ideological positions show similar patterns.⁷

⁷ These measures include the Martin-Quinn scores, based on analyses of interagreements between pairs of justices, and Bailey scores, based on comparisons of justices' positions on the same issues with justices who served at different times and with policy makers in the other branches of government. We will make use of both these sets of scores in later chapters. The Martin-Quinn scores are archived and described at <http://mqscores.berkeley.edu/>. A fuller description of the procedures for calculation of those scores is presented at Andrew D. Martin and Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court 1953-1999," *Political Analysis* 10 (2002): 134-153. The Bailey

Table 1.1

**Percentages of Liberal Votes Cast by Justices,
Selected Natural Courts⁸**

Terms								
1981-85			1994-2004			2010-14		
Justice	Pty	% Lib	Justice	Pty	% Lib	Justice	Pty	% Lib
Marshall	D	70.8	Stevens	R	66.5	Sotomayor	D	64.6
Brennan	R	69.3	Ginsburg	D	61.7	Ginsburg	D	63.7
Blackmun	R	55.6	Souter	R	61.3	Kagan	D	63.3
Stevens	R	54.6	Breyer	D	57.1	Breyer	D	57.7
White	D	42.4	O'Connor	R	41.3	Kennedy	R	46.2
Powell	R	37.6	Kennedy	R	41.0	Roberts	R	44.6
O'Connor	R	37.4	Rehnquist	R	33.5	Scalia	R	42.9
Burger	R	34.4	Scalia	R	31.5	Alito	R	37.7
Rehnquist	R	29.5	Thomas	R	29.6	Thomas	R	37.2

Similar trends are shown in a different way in Figure 1.1. The figure depicts the standard deviation of percentages of conservative votes by Democratic and Republican appointees per Court term over time, with terms aggregated primarily on the basis of continuing of membership. The lower the standard deviation, the greater the similarity in voting among justices of the same party. The high standard deviation for Democratic justices in the 1986-93 period was an anomaly, because the only Democratic appointees who served during that period were the very liberal Thurgood Marshall and the moderate conservative Byron White.⁹ Still, the movement in both parties toward homogeneous

scores are archived at http://faculty.georgetown.edu/baileyma/Data_AJPSIdealPoints_Oct2009.htm and described at Michael A. Bailey, "Is Today's Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences," *Journal of Politics* 75 (July 2013): 821-834.

⁸ These analyses are for cases decided after oral argument, based on data in the Supreme Court Database, archived at <http://scdb.wustl.edu/>. The criteria for coding of votes as conservative or liberal are described at <http://scdb.wustl.edu/documentation.php?var=decisionDirection>.

⁹ Thus, the mean standard deviation for the 1986-1993 terms is based only on the 1986-1990 terms, before Marshall's retirement.

voting patterns is striking: Republican and Democratic justices constitute distinct blocs in a way that they did not in past periods.

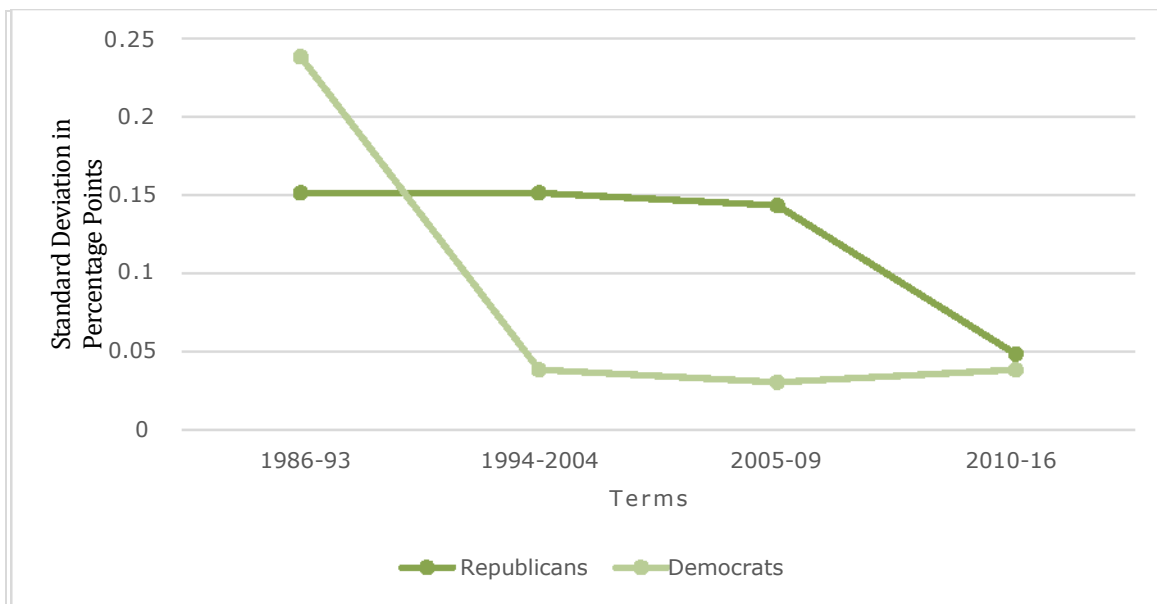


Figure 1.1. Standard deviations of conservative voting percentages among Justices of the same party, averaged across terms

The partisan divide that emerged in 2010 is now generally recognized. Senate Republicans' refusal to consider Merrick Garland, the repudiation of the filibuster to confirm Neil Gorsuch, and the rise of party line voting on Supreme Court nominees are all testament to the widely shared belief that Republican nominees will back conservative causes and Democratic nominees will champion liberal pursuits. What is not generally known is that this pattern is unique in this Court's history: never before were there competing ideological blocs that coincided with party lines.¹⁰ In the era from the

¹⁰ As we will discuss in chapter 3, there were some terms during the Stone Court of the early 1940s in which Owen Roberts (a Republican appointee) and Harlan Fiske Stone (appointed as associate justice by a Republican president and promoted to chief justice by a Democrat) stood to the right of their Democratic-appointed colleagues. But rather than standing with Roberts and apart from the Court's Democratic

beginning of the Warren Court through the early Roberts Court, there were always liberal Republicans until the retirement of Justice John Paul Stevens in 2010; before the retirement of Justice Byron White in 1993, there were always moderate or conservative Democrats.

Moreover, unlike today's partisan divide, Republicans and Democrats often came together on issues that had divided the nation. Examples abound. In the 1940s, Republicans Owen Roberts and Harlan Fiske Stone embraced an extraordinarily broad reading of Congress's Commerce Clause power.¹¹ Republican Chief Justice Earl Warren famously orchestrated the Court's unanimous 1954 ruling in *Brown v Board of Education*.¹² In the 1966 *Miranda v Arizona* decision, the majority consisted of two Republicans and three Democrats while the dissenters included two Republicans and two Democrats.¹³ *Roe v Wade* was decided 7 to 2; five of the Court's seven Republicans were in the majority, the Court's two Democrats were evenly divided.¹⁴ More recently, Republican Justices played a critical role in decisions upholding affirmative action,¹⁵ reaffirming abortion rights,¹⁶ and establishing the rights of enemy combatants.¹⁷ Between 1790 and early 2010, of 397 decisions that were designated as important by the *Guide to the U.S. Supreme Court* and that had at least two dissenting votes, only two had all the

appointees, Stone's position in those terms were close to that of the more conservative Democrats on the Court.

¹¹ Most notably, Justice Roberts and Chief Justice Stone moderated earlier views on congressional power to uphold the Agricultural Adjustment Act in *Wickard v Filburn*, 317 U.S. 111 (1942).

¹² See Dennis J. Hutchinson, Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958, *Georgetown Law Journal* 68 (October 1979): 1-96.

¹³ 384 U.S. 436 (1966)

¹⁴ 410 U.S. 113 (1973). Republicans Lewis Powell and Harry Blackmun were instrumental in *Roe*. See David J. Garrow, *Liberty and Sexuality: The Right of Privacy and the Making of Roe v Wade* (Berkeley: University of California Press, 1998), **PIN**.

¹⁵ E.g., *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Grutter v. Bollinger*, 539 U.S. 206 (2003).

¹⁶ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹⁷ *Boumediene v. Bush*, 553 U.S. 723 (2008).

justices from one party on one side and all the justices from the other party on the opposite side.¹⁸

Major decisions that do not follow party lines perfectly have not disappeared since 2010, primarily because of the continuing presence of moderate conservative Anthony Kennedy on the Court. Kennedy joined the Democrats on the Court to create 5-4 or 4-3 majorities in the Court's 2013 and 2015 decisions favoring same-sex marriage¹⁹ and its 2016 decision upholding affirmative action in university admissions.²⁰ But in contrast with the Court's history up to 2010, there have been several important decisions since then on which the justices divided along party lines.²¹

Another feature of today's partisan divide that is not widely recognized is that Republican and Democratic appointees as groups have each become more homogeneous in their ideological positions. Republican appointees have become increasingly conservative over time. Liberal and moderate Republicans are replaced by conservatives. For Democrats, moderate-liberal Democrats replace strong liberals and moderate-conservatives. More important, the average ideological position of Democratic justices has remained relatively stable, while the average ideological position of Republicans has become distinctly more conservative.

This difference between the parties is reflected in the proportions of conservative and liberal votes cast by the Court's Republicans and Democrats over time. But because the mix of cases that the Court hears changes over time, those proportions can be

¹⁸ The cases are listed in David G. Savage, *Guide to the U.S. Supreme Court* (CQ Press, 5th ed. 2010), 1276-1294.

¹⁹ *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

²⁰ *Fisher v. University of Texas*, 136 S. Ct. 2198 (2016).

²¹ We will discuss these cases in chapter 4.

misleading. Michael Bailey's ideological scores for the civil liberties field are computed in a way that minimizes that problem.²² Although the scores run only through 2011 (they are calculated for calendar years rather than Court terms), they provide a good sense of trends from the Warren Court to the Roberts Court. Those trends are shown in Figure 1.2. The time period was divided into segments based primarily on the timing of important changes in the Court's membership, with 2010 and 2011 indicating the impact of the retirements of Republicans David Souter in 2009 and John Paul Stevens in 2010. More positive scores indicate greater conservatism.

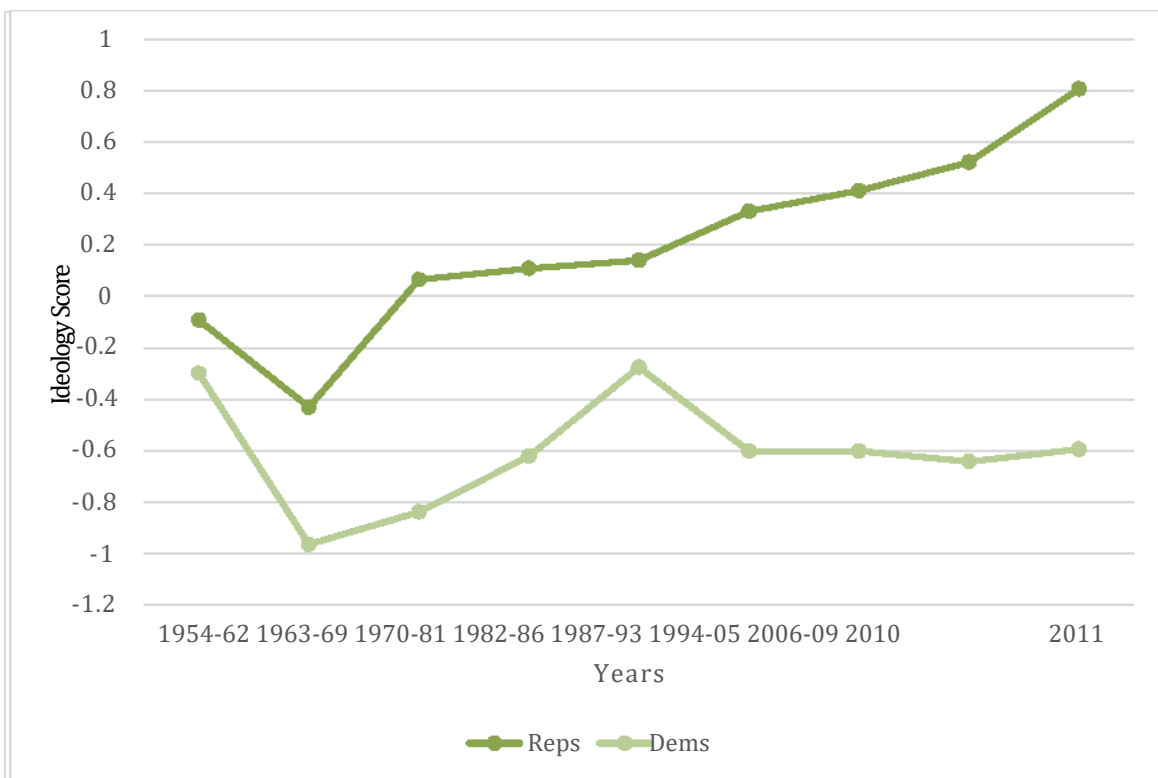


Figure 1.2. Mean Bailey ideology scores for Democratic and Republican appointees, 1954-2011

²² See Bailey, "Is Today's Court the Most Conservative in Sixty Years?"

There certainly has been fluctuation in the position of Democratic justices as a group. They became distinctly more liberal as Roosevelt and Truman appointees with relatively conservative positions on civil liberties issues left the Court, and they moved in the other direction when Byron White was one of only two Democratic appointees on the Court after 1975 (and the only Democratic appointee in 1992 and 1993). Since White's retirement, however, the Court's Democrats have been stable in their positions on the ideological scale. In contrast, the Court's Republicans as a group have become increasingly conservative since the 1960s, as very liberal Republican appointees (Earl Warren and William Brennan) left the Court and, more recently, moderate liberals Souter and Stevens retired.

Both the Bailey measure shown in the Figure and the raw proportions of conservative and liberal votes cast by the justices make it clear that the Court has seen its own partisan sorting: Republican and Democratic justices are now separated much more in ideological terms than they were in past eras. This phenomenon is consequential, and it requires explanation.

The Supreme Court and Elites

Supreme Court Justices are members of society and their decision making, over time, will reflect changes in the world that the Justices inhabit. Supreme Court Justices, as Chief Justice Rehnquist put it, cannot "escape being influenced" by their surroundings; they "go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events."²³ Consider the Court's shift on

²³ William H. Rehnquist, "Constitutional Law and Public Opinion," *Suffolk University Law Review* 20 (Winter 1986): 768.

homosexual sodomy prosecutions: In 1986, the Court upheld 5 to 4 Georgia's power to criminalize homosexual sodomy. The Court's swing Justice Lewis Powell voted with the majority. The reason, as revealed in a conversation with one of his law clerks, was that Justice Powell did not believe that he had "ever met a homosexual" and simply could not find in the Constitution a right to engage in sexual practices that he could not comprehend.²⁴ Justice Powell's replacement, Justice Anthony Kennedy, approached the gay rights issue from a much different position, and cast the fifth vote to overturn the Georgia case in 2003. Unlike Justice Powell, Justice Kennedy's world was supportive of gay rights: the Court itself was a gay-friendly workplace and Justice Kennedy (who cited the European Court of Human Rights in his decision) often hobnobbed with foreign judges and saw himself as a participant in "worldwide constitutional conversation."²⁵

In calling attention to the Justices' ties to their social networks and their interests in cultivating their reputation among those whose opinion they value, this book offers a new vantage point on the relationship between the Supreme Court, popular culture, social norms, and the political environment. In so doing, we part company with existing studies of the Court. While we recognize that elected government—principally through the appointments process—directly influences Supreme Court decisionmaking, we disagree with legal scholars and commentators who argue that the Court has largely followed popular culture, related social movements, and public opinion. By arguing that the justices are more responsive to relevant segments of the social and political elite than to the public as a whole, we take issue with an important line of thinking in legal scholarship, reflected in major books by Barry Friedman and Jeffrey Rosen. In *The Will*

²⁴ John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (New York: Fordham University Press, 2001), 521-522.

²⁵ Linda Greenhouse, "Heartfelt Words From the Rehnquist Court," *New York Times*, July 6, 2003, WK3.

of the People, Friedman took a historical approach in claiming that Supreme Court constitutional interpretation followed public opinion.²⁶ In *The Most Democratic Branch: How the Courts Serve America*, Rosen made a similar argument in broader terms, arguing for the normative desirability of popular constitutional interpretation.²⁷

We also take issue with the related work of political scientists who argue that the general public has a powerful impact on the Court.²⁸ A growing body of scholarship holds that justices respond to public opinion because of their interest in maintaining the Court's legitimacy and thus its institutional power. One important book, Tom Clark's *The Limits of Judicial Independence*, makes the same general argument as the Friedman and Rosen books from the perspective of a political scientist.²⁹ Clark analyzes the relationships among public opinion, "court-curbing" proposals in Congress, and the Court's decisions, concluding that public opinion operates through Congress to constrain the Court. We take into account the impressive analyses presented by Clark and other political science scholars while developing the reasons for our different interpretations of their findings.

Correspondingly, by emphasizing the importance of elite social networks to the Justices, we offer an alternative theory to widely accepted political science models that

²⁶ Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Strauss and Giroux 2009).

²⁷ Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* (New York: Oxford University Press, 2006).

²⁸ Examples include Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New evidence on Supreme Court Responsiveness to Public Preferences," *Journal of Politics* 66 (November 2004): 1018-1035; Christopher Casillas, Peter K. Enns, and Patrick C. Wohlfarth, "How Public Opinion Constrains the U.S. Supreme Court," *American Journal of Political Science* 55 (January 2011): 74-88; and Matthew E.K. Hall, "The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation," *American Journal of Political Science* 58 (April 2014): 352-366.

²⁹ Tom S. Clark, *The Limits of Judicial Independence* (New York: Cambridge University Press, 2010).

see justices as single-minded maximizers of their legal policy preferences. In *The Choices Justices Make*, Lee Epstein and Jack Knight embrace the external strategic actor model, arguing that the justices take potential elected government backlash into account when crafting opinions that further their legal policy preferences—so that elected government action is relevant inasmuch as elected officials might undermine the Justices’ legal policy goals.³⁰ In *The Supreme Court and the Attitudinal Model Revisited*, Jeffrey Segal and Harold Spaeth argue that Justices simply vote their policy preferences (so that elected officials influence is significant but limited to the appointments process).³¹ The external strategic actor and attitudinal models treat “judges as people whose choices are based on a very narrow set of goals. If this assumption is accurate, judges’ interest in shaping legal policy must be far stronger than other goals that might affect their decisions.”³² By calling attention to the significant role of the elite social networks that the Justices are a part of, we reject the assumption that Supreme Court Justices act solely on the basis of their legal policy preferences.

Our theory is rooted in social psychology. Unlike political science models that emphasize the single-minded pursuit of legal policy preferences, the social psychology model recognizes other goals that the Justices might pursue. These goals may include harmonious relations with other Justices as well as “power, prestige, reputation, self-respect, . . . and the other satisfactions that people seek in a job.”³³ For our purposes, it is most important to think about the motivational basis for the goals that the Justices seek to

³⁰ Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998).

³¹ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002).

³² Lawrence Baum, *Judges and their Audiences: A Perspective on Judicial Behavior* (Princeton, N.J.: Princeton University Press, 2006), 10.

³³ Richard A. Posner, *How Judges Think* (Cambridge, MA: Harvard University Press, 2008), 36.

advance. The Justices, after all, get nothing concrete from advancing favored policies; rather, they get symbolic benefits. But they get symbolic benefits from other things as well, so it is not self-evident that the Justices would devote themselves to the pursuit of favored policies.

Notwithstanding important differences in the social psychology and political science models, the two models generally converge. In particular, the social psychology model talks about the importance of personal beliefs and recognizes that individuals will not act in ways that are inconsistent with matters central to their cognitive networks.³⁴ For this reason, Justices—especially those with strong ideological predispositions—will typically cast votes that match their preferred legal policy positions.

The social psychology model veers more sharply from accounts of Supreme Court decision-making that emphasize the role of public opinion. By giving emphasis to the basic psychological motivation to be liked and respected by other people, the social psychology model focuses on the social networks Supreme Court justices interface with and, consequently, gives priority to the views of elites, not mass public opinion.³⁵ First, it is likely that Supreme Court Justices will care greatly about the esteem in which they are held. The very process by which we select Supreme Court Justices tends to favor those with a strong interest in the esteem of others. Accepting a judgeship entails accepting relatively significant constraints on personal activities and behaviors. One of the things

³⁴ See Neal Devins and Will Federspiel, “The Supreme Court, Social Psychology, and Group Formation,” in *The Psychology of Judicial Decision Making*, eds. David Klein and Gregory Mitchell (New York: Oxford University Press, 2010), 85, 90.

³⁵ See Roy F. Baumeister and Mark R. Leary, “The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation,” *Psychological Bulletin* 117 (May 1995): 497; Thomas J. Miceli and Metin M. Cosgel, “Reputation and Judicial Decision-making,” *Journal of Economic Behavior and Organization* 23 (1994): 31; Frederick Schauer, “Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior,” *University of Cincinnati Law Review* 68 (Spring 2000), 625-631.

that Justices gain in compensation (in addition to an increase in personal power) is the esteem that attaches to a position on the highest court in the country. Not everyone would find this tradeoff attractive; it would be most attractive to those who care about the esteem in which they are held.

Second, Supreme Court Justices are elites and are far more likely to care about their reputation among the elite audiences they come from and interact with than their reputation among the general public. The great majority of Justices “grew up in privileged circumstances and do not rub shoulders with hoi polloi.”³⁶ Because the Justices are “sheltered, cosseted” and “overwhelmingly upper-middle or upper-class and extremely well educated, usually at the nation’s more elite universities,”³⁷ the views of social and economic leaders are likely to matter more to the Court than to popularly elected lawmakers (who must appeal to popular sentiment in order to win elections). Even those Justices (Clarence Thomas and Sonia Sotomayor) who grew up in less affluent households attended Yale Law School and were part of elite social networks at a young age.

Correspondingly, all Supreme Court Justices are part of the elite of American society and spend a high proportion of their time with members of the elite. This includes federal and foreign judges, Supreme Court practitioners, law schools and lawyer groups, high-ranking government and corporate officials, and media elites. For example, as part of a growing trend of Supreme Court Justices making public appearances, Roberts Court

³⁶ Posner, *How Judges Think*, 306

³⁷ Michael J. Klarman, “What’s So Great About Constitutionalism?,” *Northwestern University Law Review* 93 (1998): 189..

Justices frequently speak at Harvard, Yale, and other elite law schools.³⁸ Moreover, there is a growing trend of Justices speaking to like-minded elite audiences; conservative Justices are often featured speakers before the Federalist Society and liberal Justices are headliners for the American Constitution Society.³⁹

Because they care about their reputations among elites, moreover, Supreme Court Justices also embrace the norms of judicial decisionmaking—norms that ensure that the Supreme Court operates as a court. These norms include maintaining collegiality and acting on the basis of law. These norms help explain why a high proportion of the Court’s decisions are unanimous and why the Court’s voting alignments are often unpredictable—with conservative and liberal Justices joining together in unexpected ways. These norms are also relevant in understanding why Justices, far more than members of Congress, make use of general principles that transcend the stakes for policy in particular decisions. To a meaningful degree Justices make use of similar principles of constitutional and statutory interpretation across a broad range of cases, even if that means supporting liberal outcomes in some cases and conservative outcomes in others. None of this is to say that the Justices never divide along ideological lines or that they decide cases solely on a legal basis; it is to say simply that the Justices’ personal reputations among elite audiences are tied to their adherence to collegiality and law-based decision making and, as such, the Supreme Court remains a court.

³⁸ Adam Liptak, “Justices Get Out More, but Calendars Aren’t Open to Just Anyone,” *New York Times*, June 1, 2015; Robert Barnes, *How Many Harvard Law School Grads Does it Take to Make a Supreme Court?*, Washington Post Blogs, October 26, 2017, https://www.washingtonpost.com/politics/courts_law/how-many-harvard-law-school-grads-does-it-take-to-make-a-supreme-court/2017/10/26/970e5460-baa2-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.9fe9a6dda247.

³⁹ Liptak, “Justices Get Out More, but Calendars Aren’t Open to Just Anyone.”

Sketch of the Book

In sum, we seek to offer a new vantage point on the Supreme Court and its members. By emphasizing the import of both Justices' legal policy preferences and the elite audiences they come from and interface with, we embrace a social psychology model that varies from the dominant ways that people think about the Court within its environment: that the justices act essentially without regard to that environment or that they respond strategically to the other branches of government or the public because they seek to protect the policies they make or their institutional legitimacy. Rather, we argue, the justices are attentive to elite audiences that shape their choices in important ways.

The book is organized as follows: After this introductory chapter, Chapter 2 describes and defends our social psychology model and our emphasis on elite audiences. In part, we contrast the decision-making of the justices to that of elected officials. To a considerable degree, the justices are subject to the same influences as other public officials from their political and social environments. But there are two important differences: more than elected officials in the other branches of government, the justices respond to elite groups rather than the general public; and they are influenced by a legal environment that limits and modifies the influence of the political and social environments. Contrary to the widespread assumption that the Supreme Court largely stays in line with mass public opinion, we discuss why the justices are more responsive to elites than to the mass public. The key elite audiences for justices are the legal profession, academia, news media, political groups, and personal social circles.

In addition to highlighting the profound role that elites play in defining Court decision-making, we also make use of social psychology to talk about the import of legal

elite norms like collegiality and law-based decision making. In particular, we will explain why it is that the justices have incentives both to join together in consensual decisions and to sometimes vote against their perceived ideological preferences.

Chapter 3 describes the period before 1990. We begin by laying out the multiple meanings of political polarization. Of those meanings, we have two primary concerns: partisan sorting of people by ideology, so that liberals cluster in the Democratic Party and conservatives in the Republican Party; and positive and negative affect toward ideological groups. Through most of the 20th century, partisan sorting and affective polarization were relatively limited.

Limited polarization had two effects on the Court. First, ideological divisions on the Court did not follow party lines, because presidents frequently nominated justices who did not adhere to their party's dominant ideological tendency. Second, the justices responded to elite groups that were not sharply split along ideological lines. In the early twentieth century, elites were generally conservative, embraced laissez faire economics, and were often hostile to government regulation. The so-called *Lochner* Court generally matched prevailing elite preferences. During the New Deal era, elites came to favor economic regulation, but there was no consensus among elites with respect to civil rights and liberties. Franklin Roosevelt's eight Supreme Court nominees reflected both elite consensus on economic matters and elite divisions on rights and liberties. During the mid- to late-twentieth century, these elite groups leaned to the left, especially on civil rights and liberties issues, and their influence helped to move moderately conservative justices to the left. Most notably, several Republican Justices became increasingly liberal during their tenure on the Court.

Chapter 4 considers the Court in a polarized world. The late twentieth century was a time of polarization among American political, social, and legal elites: both partisan sorting and affective polarization increased substantially. This polarization affected the Supreme Court in two ways. First, presidents increasingly chose nominees who did adhere strongly to their parties' dominant ideological tendency. The result was that by 2010, party and ideological lines on the Court matched perfectly. Second, with the rise of the conservative legal networks, the social and political environments of the justices were divided along ideological lines to a much greater extent than in the past. As a result, liberal and conservative justices both lived in worlds that reinforced their ideological positions.

However, polarization in both senses has had more limited effects on the Court than in other political institutions such as Congress, because of the justices' adherence to expectations that they act as interpreters of the law. These expectations are reflected in the Court's frequent unanimity and in decisions that divide justices along non-ideological lines. Today's Court is more apt to divide along partisan lines on the most significant cases it hears—so that norms favoring judicial independence and collegiality are most apparent in low salience cases.

Chapter 5 is a brief Conclusion—summarizing and extending our arguments. This chapter draws out the implications of the prior chapters for our understanding of the Supreme Court. We disagree with those who see the Court as essentially independent of the political world and society, but we also disagree with those who see the Court as responsive chiefly to the other branches of government and the general public. The Court is distinctive in the justices' orientation toward elite audiences, and those audiences

influence the Court in subtle but significant ways. Both the leaning of relevant elite groups toward the left in a prior era and the strong elite polarization of the current era have affected the justices' thinking and thus the Court's direction.

The Court's future depends to a considerable degree on whether there is an easing of the current political polarization. If polarization persists, we can anticipate that today's ideological divide will grow and that Justices will increasingly turn to forums outside the Court (media and other public appearances, books) to strengthen their ties with the social networks they are a part of. Correspondingly, presidential elections will play an ever-increasing role in defining the Court's direction; Republicans will appoint committed conservatives and Democrats will appoint reliable liberals. Even with strong polarization, we expect that the Court will continue to issue a substantial number of unanimous opinions and otherwise adhere to legal elite norms. But at the same time, the Court will continue to reflect the polarization that has developed in the larger elite world.

Chapter 4

The Court in a Polarized World

In chapter two, we critiqued the dominant political science models of Supreme Court decision-making and, in their place, advanced a social psychology model that would also take into account basic human motivations of power, status, and the desire to like and be liked. In chapter three, we applied that model to explain Court decision-making, including the shift of some Republican appointees to the left during the Warren and Burger Court eras. In this chapter, we consider the Rehnquist (1986-2005) and Roberts Courts (starting 2005).

Our analysis will explain how the social psychology perspective that helps to account for the earlier shift of some justices to the left also helps in understanding the partisan divide that now separates Democratic and Republican appointees to the Court. Starting with the 2010 appointment of Democrat Elena Kagan to fill the seat of liberal Republican John Paul Stevens, the Court has been divided along partisan lines. That divide was reinforced with the 2017 appointment of Republican Neil Gorsuch and is likely to persist for the foreseeable future. While this divide is generally recognized, the circumstances that propelled it and are likely to make it persist are not generally understood. In this chapter, we will analyze those circumstances.

Along with the broad effects of political polarization, we give attention to more specific developments in the legal system. One development was especially important. Starting in 1985, the Reagan administration took concrete steps to develop both a conservative perspective on legal issues and an elite network of conservative lawyers

who could assume positions of power within the government and, ultimately, become federal court of appeals judges and Supreme Court Justices. Correspondingly, the Reagan administration took steps to emphasize ideology in judicial appointments. These efforts and their long-term effects help to account for the current divide between conservative Republicans and liberal Democrats on the Court.

At the same time, we will also build on points made in chapter two to explain why partisanship on the Supreme Court is fundamentally different than partisanship in Congress. The Supreme Court is still a court and norms of collegiality and independence remain important to the Justices. A partisan Supreme Court will still issue unanimous opinions and Democrat and Republican Justices will still cross party lines to form alliances that defy party identity. Nonetheless, the frequency of party line voting is far more likely on a partisan Court, especially on those salient cases that define the Court's identity. The perspective of social psychology can help in explaining both the development of a partisan divide and the limits of partisanship on the Court.

We begin by detailing the rise of elite polarization in Congress, the media, the academy, and among the wealthy and well-educated. We then track somewhat parallel developments in the White House and the Justice Department, particularly the efforts of Republican administrations to increasingly emphasize ideology in judicial appointments and to cultivate the conservative legal movement. We will then shift our focus to Supreme Court decision-making. Initially we will document the partisan divide among Democratic and Republican appointees; we will then explain how partisanship on the Court manifests itself differently than partisanship in Congress.

The Rise of Elite Polarization

Starting in the 1980s, there has been a substantial increase in polarization in government and among political elites outside government. As we have discussed, polarization has multiple elements. Through partisan sorting, ideological views and partisan identifications are more closely related than they were at any time since Reconstruction. Through affective polarization, Democrats and Republicans increasingly see themselves as members of opposing teams and increasingly hold negative attitudes towards members of the other party. Through extremism, attitudes about issues move away from the middle of the ideological spectrum toward the two ends of that spectrum.

In the Supreme Court, the key element of polarization has been partisan sorting. As we see it, that sorting results in part from affective polarization among the justices. Partisan sorting and extremism among other political elites, including the other branches of government, have contributed to sorting on the Court through the appointment process. They have also created the conditions for affective polarization among the justices. As yet, there is no clear movement toward extremism on the Court itself,¹ though such movement may occur in the future as a result of polarization among elites as a whole.

It is inevitable that the growth in political polarization would affect the Court, both directly and indirectly. In chapter three, we examined the consequences for the Court of the relative homogeneity of elite opinion during the Warren Court and much of the Burger Court. In particular, we explained how the ideological drift of Justices towards center-left positions could be explained by the dominance of center-left elite social networks among political and social elites. In this chapter, we will consider the

¹ See note 8 in chapter 3.

ramifications of elite polarization. We start by examining the growth of polarization in government, giving primary attention to partisan sorting. We then consider polarization in the larger elite world, including media outlets, the legal profession, and the academy.

Government

The growing ideological separation between the two parties is reflected in both the federal and state governments. Democratic and Republican officials have grown more distinct and more distant from each other ideologically and more hostile towards each other.

Mapping Changes in Congress. Today's Congress is a much different place than Congress during the era of the Warren and Burger Courts. In that era differences between the two parties in median liberal-conservative scores were relatively low by the standards of the late nineteenth and early twentieth centuries.² In 1968, for example, Democrats occupied every ideological niche and there were several liberal Republicans.

Exaggerating somewhat, George Wallace justified his third-party bid for the presidency in 1968 by claiming that there was not a "dime's worth of difference between Democrats and Republicans."³

Today, however, the liberal "Rockefeller Republicans" and conservative "Southern Democrats" have given way to an era of ideological polarization in Congress. Following Reagan's victory (and building on a political realignment in the South tied to

² The parties' ideological positions over time are charted at <https://voteview.com/parties/all>. See also Sean M. Theriault, *Party Polarization in Congress* (New York: Cambridge University Press, 2008), 13-42; Steven S. Smith and Gerald Gamm, "The Dynamics of Party Government in Congress," in *Congress Reconsidered*, 10th Edition, eds. Lawrence C. Dodd and Bruce L. Oppenheimer (Washington, D.C.: CQ Press, 2013), 173.

³ Richard Pearson, "Former Alabama Governor George C. Wallace Dies," *Washington Post*, September 14, 1998, A1.

1960s civil rights reforms),⁴ the moderate-to-liberal wing of the Republican Party began to dissipate. Not only did “Ronald Reagan’s GOP” pursue a conservative agenda, but congressional redistricting also marginalized centrist voters in both the Democratic and Republican parties.⁵ By 1990, Congress was transformed, with a large and growing divide between the parties that resulted in part from the replacement of Southern Democrats by Southern Republicans.⁶

The results are striking. In every Congress since 2005, on the primary dimension of congressional voting, every Democratic senator has had a more liberal voting record than every Republican senator, and the same has been true of the House.⁷ By 2009, the ideological distance between the Democratic and Republican parties was greater than it had been at any time since Reconstruction.⁸ By 2012, the growth of the Tea Party had pushed the divide even further (as moderate senators like Texas’s Kay Bailey Hutchinson were replaced by strong conservatives like Ted Cruz).⁹

⁴ See Richard H. Pildes, “Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America,” *California Law Review* 99 (April 2011): 278-297; Jason M. Roberts and Steven S. Smith, “Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000,” *American Journal of Political Science* 47 (April 2003): 305-317 (tracking the rapid growth of Southern Republicans).

⁵ See Samuel Issacharoff, “Collateral Damage: The Endangered Center in American Politics,” *William & Mary Law Review* 46 (November 2004), 428-431; Nolan McCarty, “The Policy Effects of Political Polarization,” in *The Transformation of American Politics: Activist Government and the Rise of Conservatism*, eds. Paul Pierson and Theda Skocpol (Princeton, NJ: Princeton University Press, 2007).

⁶ See Roberts and Smith, “Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000,” 302; Theriault, *Party Polarization in Congress*, 202 (attributing rise in party polarization in 1990s to “an influx of ideologically committed conservatives into the Senate, with many of them being veterans of the highly partisan House”).

⁷ The rank orderings of House members and senators through the 113th Congress (2013-2014) are presented at https://legacy.voteview.com/HOUSE_SORT109.HTM. Plots of congressional voting along two dimensions show that, with the exception of the House in the 111th Congress (2009-2011), there has been a clear separation between all Republicans and all Democrats in each Congress since 2005. See <https://voteview.com/congress/house> and <https://voteview.com/congress/senate>.

⁸ See *Party Polarization: 1879-2010* (2013), https://web.archive.org/web/20131116022958/http://polarizedamerica.com/political_polarization.asp.

⁹ See “Common Space” *DW-NOMINATE Scores With Bootstrapped Standard Errors (Joint House and Senate Scaling)* (2015), https://legacy.voteview.com/dwnomin_joint_house_and_senate.htm.

Indeed, the dearth of moderates is one of the most striking features of today's Congress.¹⁰ By one definition, in 1980, moderates made up around forty percent of Congress; in 2015, moderates were nearly extinct, making up less than five percent of Congress.¹¹ Indeed, there is little prospect of moderates returning to the House. Computer-driven redistricting has resulted in the drawing of district lines that essentially guarantee a high proportion of safe seats for one party or the other in the House of Representatives. As such, candidates have an incentive to appeal to partisans who vote in primaries and, consequently, retiring legislators have been replaced by new ones who are both more ideological and more loyal to their party.¹²

In chapter three, we illustrated these developments through Figure 3.1, showing the ideological distance between the two parties in the House and Senate over time. That Figure underlines the sharp increase in polarization that has occurred in recent decades. Congress from the 1920s to the 1970s featured relatively limited polarization between the parties. The sharp increase in polarization that has occurred in recent decades has resulted in a Congress that is even more polarized now than the Reconstruction Congress of more than a century ago.

The Consequences of Polarization in Government. The ideological divide between Democrats and Republicans has increased steadily and substantially since 1980. In Congress, where lawmakers have little reason to appeal to moderate voters, party leaders have capitalized on the fact that lawmakers are apt to see themselves as members

¹⁰ See Richard L. Hasen, "End of the Dialogue? Political Polarization, the Supreme Court, and Congress," *Southern California Law Review* 86 (January 2013): 235-237.

¹¹ See Hasen, "End of the Dialogue?," 235-237; *The Polarization of the Congressional Parties* (2016), https://legacy.voteview.com/political_polarization_2015.htm.

¹² See Roberts and Smith, "Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000," 313.

of a party, not as independent power brokers. At the start of the Trump administration, the average House Republican backed Trump's position 98 percent of the time.¹³ More significantly, party leaders have played an ever-growing role in shaping the party's agenda through party caucuses, speaker-appointed task forces, and other techniques.¹⁴ Correspondingly, House and Senate party leaders increasingly engage in "message politics," a process by which Democrats and Republicans alike see the lawmaking process as a way to stand behind a unified party message and, in this way, to distinguish their party from the other.¹⁵

One area in which polarization in Congress and the executive branch has had a particularly powerful effect is in the process of nominating and confirming federal judges. As we will discuss later in this chapter, Ronald Reagan presided over a substantial increase in the role of ideology in judicial appointments. Since that time, presidents—especially Republican presidents—have increasingly taken ideology into account when appointing Supreme Court Justices and federal appeals court judges. Correspondingly, party polarization has dramatically impacted Senate consideration of Supreme Court and lower federal court nominees.

Polarization has transformed the process of confirming lower federal court judges, resulting in a dramatic upswing in the amount of time it takes for the Senate to confirm judges and an equally dramatic downswing in the percentage of lower court nominees whom the Judiciary Committee approves, especially when the president's party lacks a

¹³ See Harry Enten, "So Far, No One is Crossing the Aisle in the Trump Era," *FiveThirtyEight*, February 9, 2017.

¹⁴ See Susan Webb Hammond, *Congressional Caucuses in National Policy Making* (Baltimore: Johns Hopkins University Press, 1998), 87-92.

¹⁵ See C. Lawrence Evans, "Committees, Leaders, and Message Politics," in *Congress Reconsidered, 7th Edition* eds. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, D.C.: Congressional Quarterly Press, 2001), 217-219.

Senate majority.¹⁶ Before the 1990s, lower court judges waited less than two months to be confirmed, on average, and confirmation rates were well above fifty percent. Starting in the 1990s and especially after 2000, the number of failed nominees sharply increased and failed nominees for the courts of appeal typically lingered in the Senate for over a year.¹⁷ It was this change that spurred Senate Democrats in 2013 to invoke the so-called “nuclear option”—allowing for a simple up-or-down majority vote on presidential nominations to lower courts, independent agencies, and executive branch positions.¹⁸ The success of President Trump’s judicial nominees in winning confirmation during his first year in office reflects that rule change and, more broadly, the ability of a determined majority party—even one with a small majority—to unify on behalf of its agenda.

Senate voting on judicial nominees, especially Supreme Court nominees, has also become increasingly partisan. With the notable exception of Clarence Thomas, the Justices on today’s Court who were nominated prior to 2005 were all confirmed by unanimous or overwhelmingly positive votes.¹⁹ Starting with John Roberts, however, party-line voting and explicit considerations of ideology have been the norm in Senate

¹⁶ See Sarah A. Binder and Forrest Maltzman, “Advice and Consent: The Politics of Confirming Federal Judges,” in *Congress Reconsidered*, 10th edition, eds. Dodd and Oppenheimer, 265-285; Roger H. Davidson, Walter J. Oleszek, and Frances E. Lee, *Congress and Its Members* (Washington, D.C.: CQ Press, 2008), 379-387.

¹⁷ See Binder and Maltzman, “Advice and Consent: The Politics of Confirming Federal Judges,” 269-271; Elliot Slotnick, Sara Schiavoni, and Sheldon Goldman, “Obama’s Judicial Legacy: The Final Chapter,” *Journal of Law and Courts* 5 (2017): 376-380.

¹⁸ See Humberto Sanchez, “A Landmark Change to the Filibuster,” *C.Q. Weekly Report*, December 2, 2013, 1992. For tables detailing a dramatic rise in filibusters tied to judicial and other executive branch nominations, see U.S. Senate, *Senate Action on Cloture Motions*, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited December 9, 2013); Sahi Kapur, “Charts: Why the Filibuster May Soon Be Dead,” *Talking Points Memo*, November 25, 2013, <http://talkingpointsmemo.com/dc/chart-senate-democrats-filibuster-nuclear-option>.

¹⁹ Thomas was confirmed by a 52-48 vote. Stephen Breyer received nine negative votes, Ruth Bader Ginsburg three; Antonin Scalia and Anthony Kennedy were confirmed unanimously. See U.S. Senate, *Supreme Court Nominations, present-1789*, <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

confirmation votes. Consider, for example, then-Senator Barack Obama's statement (in explaining his no vote on Chief Justice Roberts) that he has "absolutely no doubt" that Roberts was qualified to sit on the Court but that he doubted "the depth and breadth" of his "deepest values," his "empathy."²⁰ Roberts, Samuel Alito, Sonia Sotomayor, and Neil Gorsuch all had unanimous support of the president's party in Congress, while one Democrat voted against Elena Kagan. Democrats split evenly in the Roberts confirmation vote; Alito, Sotomayor, and Kagan were opposed by a majority of members of the opposition party.²¹ Neil Gorsuch was opposed by all but three (out of 48) Democratic Senators.²²

In today's polarized Senate, it is unimaginable that Antonin Scalia would be unanimously confirmed or Ruth Bader Ginsburg would receive all but three (out of 43) Republican votes. Indeed, following the 2016 death of Antonin Scalia, Democrats and Republicans locked horns in a bitter partisan feud. Senate Republicans blocked any consideration of President Obama's nomination of D.C. Circuit judge Merrick Garland to fill Scalia's seat. Garland was nominated in March 2016, eight months before the November 2016 presidential elections. Garland was a highly regarded judge with a moderate-liberal voting record; he had impeccable credentials, was unanimously confirmed as a federal appeals court judge, and had been widely praised by Senate Republicans both before and after his nomination.²³ Nonetheless, Republicans claimed

²⁰ U.S. Senate, *Congressional Record* 151 (September 22, 2005): S10365-10366 (statement of Senator Barack Obama).

²¹ Hasen, "End of the Dialogue?," 246-248.

²² Audrey Carlsen and Wilson Andrews, "How Senators Voted on the Gorsuch Confirmation," *New York Times*, April 7, 2017. We count two independents who caucus with Democrats as Democrats—Bernie Sanders of Vermont and Angus King of Maine.

²³ Nina Totenberg and Carrie Johnson, "Merrick Garland Has a Reputation of Collegiality, Record of Republican Support," *National Public Radio*, March 16, 2016.

that a Supreme Court vacancy should not be filled during an election year—so that voters could decide the Court’s future direction.²⁴ Democrats claimed foul, castigating Republicans for engaging in an unprecedented assault on the Court and the rule of law. Unlike 2013 (when Democrats were in the majority and could invoke the nuclear option to break Republican filibusters of lower court nominees), Republicans were in the majority and Garland’s fate was largely in the hands of majority leader Mitch McConnell and Judiciary Committee Chair Charles Grassley.

Donald Trump’s 2017 nomination of Neil Gorsuch tells a similar story. Following a party line vote in the Senate Judiciary Committee, Senate Democrats sought to derail the nomination by filibustering Gorsuch. Democrats claimed both that Gorsuch was out of the mainstream and that the nomination rightly belonged to Merrick Garland. Republicans responded by invoking the “nuclear option,” changing Senate rules to allow for an up or down vote of Supreme Court nominees.²⁵ For Republican majority leader Mitch McConnell, "Our Democratic colleagues have done something today that is unprecedented in the history of the Senate, and unfortunately it has brought us to this point;" for Democratic leaders Chuck Schumer and Dick Durbin, Gorsuch would “enter the history books with an asterisk next to his name” and the demise of the filibuster was also “the end of a long history of consensus on Supreme Court nominees.”²⁶

Polarization and the States. State officials were not sharply polarized before 2004.²⁷ On volatile social issues like abortion, Republicans and Democrats (voters and

²⁴ Mitch McConnell and Chuck Grassley, “The American People Should Not be Robbed of Their Say,” *Washington Post*, February 19, 2016, A21.

²⁵ Astead W. Herndon, “Filibuster Broken, Gorsuch Vote is Set,” *Boston Globe*, April 7, 2017, A-1.

²⁶ Herndon, “Filibuster Broken, Gorsuch Vote is Set,” A-1; Matt Flegenheimer, “Republicans Gut Filibuster Rule to Lift Gorsuch,” *New York Times*, April 7, 2017. A1.

²⁷ See Pew Research Center, *Political Polarization in the American Public* (June 12, 2014), <http://www.people-press.org/2014/06/12/section-1-growing-ideological-consistency/#interactive>.

elected officials) held similar views until the early 1990s.²⁸ Following the 2004 presidential elections and the related rise of the Tea Party, red Republican states and blue Democratic states began to diverge.

State politics track this party divide. Most notably, Republicans sought to “gain partisan advantage” by “eviscerating liberal policies” and “entrenching the political power of the right.”²⁹ Abortion regulation is key to this effort as are voter identification laws, tax reform, and the weakening of public sector unions. On abortion, there have been dramatic changes both in the number of laws enacted and in the severity of state restrictions as Republican control of governorships and state legislatures has grown. According to the Alan Guttmacher Institute, thirteen states were hostile towards abortion in 2000; in 2010, the number was twenty-two with five considered very hostile; in 2014, twenty-seven states were considered hostile and eighteen very hostile.³⁰

Another measure of increasing polarization at the state level is the practices of state Attorneys General. Starting around 2008, state Attorneys General increasingly refused to defend laws unpopular with their political base.³¹ For example, 12 Democratic Attorneys General refused to defend state bans on same sex marriage from 2008-2014.³² For their part, Republican Attorneys General refused to defend campaign finance

²⁸ See Neal Devins, “Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government,” *Vanderbilt Law Review* 69 (May 2016): 953-962.

²⁹ Thomas B. Edsall, “The State-by-State Revival of the Right,” *New York Times*, October 8, 2014, http://www.nytimes.com/2014/10/08/opinion/the-state-by-state-revival-of-the-right.html?_r=0.

³⁰ Elizabeth Nash and Rachel Benson Gold, “In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions,” *Guttmacher Institute*, January 5, 2015, <http://www.guttmacher.org/media/inthenews/2015/01/05>.

³¹ See Neal Devins and Saikrishna Bangalore Prakash, “Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend,” *Yale Law Journal* 124 (April 2015): 2100.

³² Niraj Chokshi, “Seven Attorneys General Won’t Defend Their Own State’s Gay-Marriage Bans,” *Washington Post*, February 20, 2014.

regulations and gun control measures.³³ Equally significant, Republican and Democratic Attorneys General play an active role in seeking to check the opposition party president. Republican Attorneys General led the effort against Obamacare and successfully blocked President Obama's immigration initiative.³⁴ Democratic Attorneys General have taken aim at President Trump; the effort to repudiate President Trump's immigration orders was spearheaded by Democratic Attorneys General and Democrats too have challenged President Trump's ownership of his company after becoming president.³⁵

The Larger Elite World

Inevitably, the polarization that is so evident among elected officials has permeated the public as a whole to a considerable degree. For instance, polarization in Congress has clarified the parties' ideological positions and thereby increased party importance and salience.³⁶ 2014 polling confirmed the existence of partisan sorting: Democrats and Republicans were further apart than ever before. In 1994, 23 percent of Republicans were more liberal than the median Democrat and 17 percent of Democrats were more conservative than the median Republican; in 2014, those numbers had shrunk

³³ For an inventory of nondefenses, see Devins and Prakash, "Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend," 2177-2187.

³⁴ Dan Levine, "Republican Attorneys General Target Obama 'Dreamer' Program," *Reuters*, June 29, 2017, <https://www.reuters.com/article/us-usa-immigration-daca-idUSKBN19K334>; Dylan Scott, "Why GOP Attorneys General are Suing Obama Over Any and Everything," *Talking Points Memo*, February 19, 2015, <http://talkingpointsmemo.com/dc/republican-attorneys-general-obama-white-house-lawsuits>.

³⁵ Alexander Burns, "Democrats Appear to Find a Bulwark Against Trump: Attorneys general," *New York Times*, February 7, 2017, A9; Marilyn Geewax, "Attorneys General of Maryland and D.C. Sue Trump Over His Businesses," *National Public Radio*, June 12, 2017, <http://www.npr.org/sections/thetwo-way/2017/06/12/532635888/attorneys-general-of-maryland-and-d-c-sue-trump-over-his-hotel>.

³⁶ Marc J. Hetherington, "Resurgent Mass Partisanship: The Role of Elite Polarization," *American Political Science Review* 95 (September 2001): 619.

to 4 and 5 percent respectively.³⁷ In that year the median Republican in the general public was more conservative than nearly all Democrats (ninety-four percent).³⁸

There is also considerable evidence of affective polarization in the general public. In particular, there is a growing trend among Republicans and Democrats to view the other negatively, to see themselves in competition with the other, and to be “angry” when their “rival” wins a close election.³⁹ Correspondingly, the information that voters seek out has little to do with educating themselves; instead, information is typically sought out to back up preexisting policy preferences.⁴⁰ More telling, even when there is not sharp ideological disagreement, Americans misperceive the views of the opposing party and thereby create a false divide.⁴¹ Relatedly, partisan identity stands apart from ideology, that is, separate and apart from ideological differences, “Republicans and Democrats increasingly dislike, even loathe, their opponents.”⁴²

The level of animosity along partisan lines is suggested by the 2014 Pew survey, finding that twenty-three percent of people with consistently liberal views would be unhappy if an immediate family member were to marry a Republican, and thirty percent of their conservative counterparts would be unhappy about marriage to a Democrat.⁴³ In

³⁷ Pew Research Center, *Political Polarization in the American Public*.

³⁸ Pew Research Center, *Political Polarization in the American Public*.

³⁹ See Patrick R. Miller and Pamela Johnston Conover, “Red and Blue States of Mind: Partisan Hostility and Voting in the United States,” *Political Research Quarterly* 68 (June 2015): 232.

⁴⁰ See Ilya Somin, “Knowledge About Ignorance: New Directions in the Study of Political Information,” *Critical Review* 18 (2006): 260-262; Neal Devins, “The D’Oh! of Popular Constitutionalism,” *Michigan Law Review* 105 (April 2007), 1340-1346.

⁴¹ See Matthew S. Levendusky and Neil Malhotra, “(Mis)perceptions of Partisan Polarization in the American Public,” *Public Opinion Quarterly* 80 (2016): 378-391; Lilliana Mason, “‘I Disrespectfully Agree’: The Differential Effects of Partisan Sorting on Social and Issue Polarization,” *American Journal of Political Science* 59 (January 2015): 128-145.

⁴² Shanto Iyengar, Gaurav Sood, and Yphtach Lelkes, “Affect, Not Ideology: A Social Identity Perspective on Polarization,” *Public Opinion Quarterly* 76 (2012): 405.

⁴³ Pew Research Center, *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affects Politics, Compromise and Everyday Life* (June 12, 2014), 48,

1960, 5 percent of Republicans and 4 percent of Democrats said they would be “displeased” if an immediate family member were to marry outside of their party.⁴⁴

Perhaps more telling, 2017 research revealed that “Americans are less likely to have the kind of interpersonal contact across party lines that can dampen harsh beliefs about each other. Neighborhoods, workplaces, households and even online dating lives have become politically homogeneous.”⁴⁵ The most ideological people are the most likely to agree with their friends on social networking sites; 52 percent of the very liberal and 45 percent of the very conservative agree nearly always with their friends (as compared to 18 percent for moderates).⁴⁶

Similarly, people’s rankings of their own and the opposition party on a 100 point thermometer changed dramatically between 1980 and 2012. In 1980, voters gave their own party a 72 and the opposing party a 45 on the thermometer; in 1992, the opposing party dropped to 40; in 2012, it had fallen to 20.⁴⁷ Views of their own party held steady between 70 and 72.⁴⁸

Still, at the mass level, there is stronger evidence of some forms of polarization than others, and there is considerable disagreement about the extent of polarization that

<http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf> (hereinafter Pew, *Political Polarization*).

⁴⁴ Cass R. Sunstein, “‘Partyism’ Now Trumps Racism,” *Bloomberg View*, September 22, 2014.

⁴⁵ Emily Badger and Niraj Chokshi, “Partisan Relations Sink from Cold to Deep Freeze,” *New York Times*, June 16, 2017, A1.

⁴⁶ Lee Rainie and Aaron Smith, “Social Networking Sites and Politics,” *Pew Research Center* (March 12, 2012): 7.

⁴⁷ Ezra Klein and Alvin Chang, “‘Political Identity is Fair Game for Hatred’: How Republicans and Democrats Discriminate,” *Vox*, December 7, 2015.

⁴⁸ Klein and Chang, “‘Political Identity is Fair Game for Hatred.’”

has occurred.⁴⁹ The various forms of polarization are all evident among partisans, but not among other Americans.⁵⁰

The picture is much clearer in the world of elites, including the affluent and well-educated as a whole as well as the news media, the legal profession, and the academy. For the balance of this section, we will discuss this divide among today's elites. In the next section, we will further explore the divide within the legal profession, chronicling the rise of the conservative legal network as part and parcel of a larger Republican effort to prioritize ideology in the appointment of judges and Justices.

The Affluent and Well Educated. As we discussed in chapter 3, during the 1960s and 1970s, Democratic and Republican elites tended to agree with each other on civil rights and other social issues.⁵¹ Although the distribution of elite opinion still differs from that of the mass public on some social issues, the level of consensus in this segment of society has declined. Unlike elites in the Warren and Burger Court eras, today's elites are sharply divided along partisan lines. Polling data make clear that the political class is dominated by polarized elites and, as such, the "extremes are overrepresented in the political arena and the center underrepresented."⁵² Strong conservatives have become even more conservative and strong liberals have become even more liberal. In fact, today's Democratic and Republican elites are at opposite ends of the spectrum—

⁴⁹ Yphtach Lelkes, "Mass Polarization: Manifestations and Measurements," *Public Opinion Quarterly* 80 (2016): 392-410.

⁵⁰ Lelkes, "Mass Polarization: Manifestations and Measurements," 392.

⁵¹ See Herbert McClosky, "Consensus and Ideology in American Politics," *American Political Science Review* 58 (June 1964): 361-382; Peter Skerry, "The Class Conflict Over Abortion," *The Public Interest* 52 (Summer 1978): 69-84.

⁵² Morris P. Fiorina et al., *Culture War? They Myth of a Polarized America, 3rd Edition* (New York: Pearson Longman, 2011), 200.

Democratic elites are more liberal than other Democrats; Republican elites are more conservative than other Republicans.⁵³

These sharp divisions of opinion are more pronounced among elites than they are in the general population. 2005, 2011, and 2014 surveys by the Pew Research Group support these claims.⁵⁴ By correlating income and education to political beliefs, the Pew studies make clear that the most liberal Americans are affluent, well-educated Democrats and the most conservative Americans are affluent, well-educated Republicans.⁵⁵ “On almost every issue surveyed, the greatest percentage of respondents taking the most conservative position was from the most affluent and highly educated group of Republicans and the greatest percentage of respondents taking the most liberal positions were from the most affluent and highly educated group of Democrats.”⁵⁶ These studies also highlight growing polarization among elites.

Most significant (and tracking the hardening of the right on today’s Supreme Court), these studies call attention to dramatic changes among strong political conservatives since the 1980s. In the 1980s, conservatives divided between two groups: economic and social conservatives. By 2005, economic and social conservatives had

⁵³ See Morris P. Fiorina and Matthew S. Levendusky, “Disconnected: The Political Class versus the People,” in *Red and Blue Nation?: Characteristics and Causes of America’s Polarized Politics*, eds. Pietro S. Nivola and David W. Brady (Baltimore: Brookings Institution Press, 2006); Mark A. Graber, “The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making,” *Howard Law Journal* 56 (Spring 2013): 693-712; Geoffrey C. Layman and Thomas M. Carsey, “Party Polarization and ‘Conflict Extension’ in the American Electorate,” *American Journal of Political Science* 46 (October 2002): 789.

⁵⁴ Pew Research Center for the People and the Press, *The 2005 Political Typology*, (May 10, 2005), <http://www.people-press.org/files/legacy-pdf/242.pdf> (hereinafter Pew, *2005 Political Typology*); Pew Research Center for the People and the Press, *Beyond Red vs. Blue: Political Typology*, (May 4, 2011), <http://www.people-press.org/files/legacy-pdf/Beyond-Red-vs-Blue-The-Political-Typology.pdf> (hereinafter Pew, *2011 Political Typology*); Pew Research Center, *Beyond Red vs. Blue: The Political Typology* (June 26, 2014), <http://www.people-press.org/files/2014/06/6-26-14-Political-Typology-release1.pdf> (hereinafter Pew, *2014 Political Typology*).

⁵⁵ Pew, *2005 Political Typology*, 64-65; Pew, *2011 Political Typology*, 105, 109, 111.

⁵⁶ Graber, “The Coming Constitutional Yo-Yo?,” 697.

“coalesced into a single highly activated group of Staunch Conservatives”; indeed, the most educated and affluent Republicans were the most conservative on issues that were likely to come before courts.⁵⁷

Liberal Democrats too became even more liberal during this period. 2005 polling showed that on same-sex marriage, abortion rights, and restrictions on civil liberties tied to the War on Terror, “[m]embers of the most affluent well educated group of Democrats tended to be far more liberal on all issues than members of other Democratic groups.”⁵⁸ 2011 polling likewise showed that well educated, affluent Democrats “were more likely than any other group to favor liberal immigration laws, support health care reform, [and] maintain that racial discrimination is the main barrier to Afro-American progress.”⁵⁹

As the data in Table 2.2 showed, elite attitudes on some civil liberties issues continue to differ from those of the mass public. But there is now a divide not just between elites and non-elites but also between Republicans and Democrats. Table 4.1 shows patterns of support for the Supreme Court decisions expanding civil liberties that were covered in Table 2.2 as well as the Court’s 2012 decision upholding the mandate for certain individuals to purchase health insurance in the Affordable Care Act. The Second Amendment, gay rights, enemy combatants, the Affordable Care Act, campaign finance, and affirmative action all highlight that disjunction. Indeed, in several instances partisan differences were distinctly stronger than differences based on education.

⁵⁷ Pew, *2011 Political Topology*, 20, 109, 111.

⁵⁸ Graber, “The Coming Constitutional Yo-Yo?,” 697.

⁵⁹ Graber, “The Coming Constitutional Yo-Yo?,” 698.

Table 4.1

Relationships Between Support for Selected Supreme Court Decisions and Partisan Affiliation and Education⁶⁰

Issue	% Consistent with Supreme Court Decision			
	Democrats	Republicans	Post-Graduate Education	Bachelor Degree or Less
School prayer	13.7	12.4	41.4	14.9
Flag burning	16.8	11.2	44.1	14.3
Regulation of Internet speech	63.8	69.1	76.3	66.9
Homosexual relations	61.5	41.4	75.6	51.6
Affirmative action in school admissions	46.4	13.5	43.0	25.4
Juvenile death penalty	72.0	51.3	64.8	60.2
Rights of enemy combatants	45.0	17.4	50.0	32.7
Second Amendment	60.0	84.9	60.1	75.0
Campaign finance	13.8	28.2	21.2	19.2
Affordable Care Act ⁶¹	87.3	11.3	59.0	46.9
Same-sex	71.9	34.6	70.9	52.5

⁶⁰ Except for the Affordable Care Act, information on the decisions and surveys is provided in the notes accompanying Table 2.2. The survey on the Affordable Care Act was conducted in 2012, and “post-graduate” referred to a degree beyond an undergraduate degree. The Court’s decision was *National Federation of Independent Business v. Sebelius*, 567 U.S. 512 (2012).

⁶¹ See USA Today, USA Today/Gallup Poll: Supreme Court Healthcare Law Ruling Reaction 5 (June 28, 2012) (version distributed by The Roper Center, Cornell University), available at <https://ropercenter.cornell.edu/CFIDE/cf/action/catalog/abstract.cfm?type=&start=&id=&archno=USAIPOUSA2012-TR0628&abstract=>. The question was worded as follows: “As you may know, the U.S. Supreme Court has upheld the entire 2010 healthcare law, declaring it constitutional. Do you agree or disagree with this decision?” *Id.*

Republican-Democratic differences are also revealed in Gallup Polls on Supreme Court job approval. The 2016 election of Donald Trump and appointment of Neil Gorsuch resulted in a surge of Republican support (65 percent support in September 2017 as compared to 26 percent in 2016) and a dramatic decline in Democratic support 40 percent in 2017 as compared to 67 percent before the 2016 elections).⁶² Consequently, even though educated elites are largely liberal (probably because independent elites embrace liberal policies on issues that divide the parties),⁶³ Republican are increasingly conservative and Republican elites—as revealed in Pew surveys and other measures—are especially conservative.

In chapters 1 and 2, we explained that Supreme Court Justices are elites and are likely to be drawn from a pool of candidates that reflect prevailing attitudes among elites. As underscored by our discussion of elite homogeneity before the so-called Reagan Revolution and growing elite polarization over the past thirty years, it is little wonder that elites were able to cross party lines, often in order to expand civil liberties protections. This situation was reflected in the work of the Warren and Burger Courts. Likewise, the partisanship on today's Court reflects prevailing elite norms. Later in this chapter, we will explain the importance of elite social networks to Supreme Court decision-making. For the balance of this section, we will highlight manifestations of polarization in the social networks that the Justices come from and remain in after joining the Court and in the sectors of the elite that are especially relevant to them.

⁶² Gallup News, *GOP Approval of Supreme Court Surges, Democrats' Slides* (Sept. 28, 2017), news.gallup.com/poll/219974/gop-approval-supreme-court-surges-democrats-slides.aspx

⁶³ Michael J. Klarman, "What's So Great About Constitutionalism?," *Northwestern University Law Review* 93 (1998): 189-191 and note 245.

The Media, the Legal Profession, and the Academy. As we discussed in chapter 2, Supreme Court Justices care about their reputations among the elites they interface with, especially lawyers, legal academics, and the media.⁶⁴ In chapter 3, we showed that in the time of the Warren and Burger Courts these elite groups leaned to the left, a leaning that helps to account for the leftward movement of some justices. In this chapter, we consider dramatic shifts in the media, academy, and the bar starting in the 1980s. As we will now explain, elite polarization has fueled and been fueled by increasing polarization in the media, the academy, and the bar.

Partisanship in today's news media is a near-perfect mirror image of increasing polarization among political elites. During the Warren and Burger Court eras, moderate-to-liberal network television and daily newspapers dominated public discourse.⁶⁵ Over the past thirty years, the proliferation of cable television, the Internet, and the blogosphere has transformed the public discourse. Unlike the Warren and Burger Court eras, "it is much easier to select media consistent with one's ideology and to avoid a source whose message is opposed."⁶⁶ For example, the rise of social media sites such as Facebook and Twitter allows individuals to share "their favorite stories with hundreds of their contacts."⁶⁷ In addition to technological change, polarization was also fueled by

⁶⁴ Justices undoubtedly differ in the strength of this interest in reputation. For instance, "swing" Justices in the Court's ideological center may have less intense legal policy preferences than their colleagues and thus a stronger interest in maintaining their reputation among media and other elites. See Neal Devins and Will Federspiel, "The Supreme Court, Social Psychology, and Group Formation," in *The Psychology of Judicial Decision Making*, eds. David Klein and Gregory Mitchell (New York: Oxford University Press, 2010), 9094.

⁶⁵ David H. Weaver and G. Cleveland Wilhoit, *The American Journalist: A Portrait of U.S. News People and Their Work* (Bloomington: Indiana University Press, 1991), 28, 31; Stanley Rothman and S. Robert Lichter, "Personality, Ideology, and World View: A Comparison of Media and Business Elites," *British Journal of Political Science* 15 (1985): 36.

⁶⁶ Kathleen Hall Jamieson and Joseph N. Cappella, *Echo Chamber: Rush Limbaugh and the Conservative Media Establishment* (New York: Oxford University Press, 2008), 216.

⁶⁷ Seth Flaxman, Sharad Goel, and Justin M. Rao, "Filter Bubbles, Echo Chambers, and Online News Consumption," *Public Opinion Quarterly* 80 (2016): 298-299.

changes in federal regulatory policy, most notably the repeal of the Fairness Doctrine in 1987, and the related proliferation of conservative and liberal media outlets that allowed consumers to get their news and opinion programming from stations that reinforced preexisting ideological commitments.⁶⁸

With the repeal of the Fairness Doctrine, media consumers were increasingly “exposed to louder echoes of their own voices.”⁶⁹ And with so many media outlets, there has been a personalization of media consumption as consumers are forced to consume different media selectively. This “filter bubble” steers people towards information that appeals to their preconceptions; news outlets respond by embracing either pro-Democrat or pro-Republican positions.⁷⁰ Leaving aside stories connected with elections, one study found that the liberal *Daily Kos* featured anti-Republican stories 45 percentage points more often than anti-Democratic stories; the conservative *FreeRepublic* was 20 percentage points more likely to feature anti-Democratic stories.⁷¹

Those interested in the news are more apt to be elite, partisan, and ideologically coherent in their views. Indeed, lack of exposure to competing viewpoints augments polarization as conservatives and liberals gradually shift to the dominant viewpoint within their ideological group. As Cass Sunstein points out, “people want to be perceived favorably by other group members, and also to perceive themselves favorably. Once they

⁶⁸ Thomas W. Hazlett and David W. Sosa, “Was the Fairness Doctrine a ‘Chilling Effect’? Evidence from the Postderegulation Radio Market,” *Journal of Legal Studies* 26 (January 1997): 279-301.

⁶⁹ Cass R. Sunstein, “Deliberative Trouble? Why Groups Go to Extremes,” *Yale Law Journal* 110 (October 2000): 101-102.

⁷⁰ Eli Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think* (New York: Penguin Press, 2011).

⁷¹ Matthew A. Baum and Tim Groeling, “New Media and the Polarization of American Political Discourse,” *Political Communication* 25 (2008): 356.

hear what others believe, they often adjust their positions in the direction of the dominant position.”⁷²

This assertion is backed up by 2010 and 2014 Pew studies on news audience demographics and statistics about the voting preferences of Fox and CNN viewers.⁷³ In 2010, conservative viewers made up around seventy-five percent of the audience who watches Fox programs like Hannity and The O’Reilly Factor; these viewers overwhelmingly vote for Republican candidates.⁷⁴ In sharp contrast, seventy-five percent of the audience for NPR and MSNBC programs like Rachel Maddow and Hardball were liberals or moderates.⁷⁵ These viewers overwhelmingly vote for Democrats. In 2014, conservatives expressed distrust of 24 of 36 news sources measured by Pew; at the same time, 88 percent of conservatives trusted Fox News and half of all conservatives named Fox as their main source for news about government and politics.⁷⁶ For their part, liberals expressed trust for 28 of the 36 news sources measured by Pew, citing NPR, PBS, and the BBC as the most trusted news sources.⁷⁷

This general shift to personalized, polarized media among elites corresponds to changes in the legal academy and the leadership of the legal profession. During the Warren and Burger Court eras, as we discussed in chapter 3, these legal elites leaned to

⁷² Cass R. Sunstein, *Republic.com 2.0* (Princeton, NJ: Princeton University Press), 65.

⁷³ See Dan Bernhardt, Stefan Krasa, and Mattias Polborn, “Political Polarization and the Electoral Effects of Media Bias,” *Journal of Public Economics* 92 (2008); Pew Research Center, *Americans Spending More Time Following the News* (Sept. 12, 2010), <http://www.people-press.org/2010/09/12/americans-spending-more-time-following-the-news/> (hereinafter Pew, *Americans Following the News*).

⁷⁴ Pew, *Americans Following the News*.

⁷⁵ Pew, *Americans Following the News*.

⁷⁶ Amy Mitchell et al., “Political Polarization & Media Habits: From Fox New to Facebook, How Liberals and Conservatives Keep Up with Politics,” *Pew Research Center* (2014): 2, <http://assets.pewresearch.org/wp-content/uploads/sites/13/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf>.

⁷⁷ Mitchell et al., “Political Polarization & Media Habits: From Fox New to Facebook, How Liberals and Conservatives Keep Up with Politics,” 2.

the left.

Starting in the 1980s, conservative interests sought to transform lawyers' networks. One reflection of their efforts was the establishment of public interest law firms representing conservative positions on legal issues.⁷⁸ "Conservative lawyers learned from their liberal counterparts how to use Supreme Court litigation to advance their political agenda," including the development of "networks of personal connections that promoted coordination."⁷⁹ According to Ann Southworth, "[t]he investment in conservative public interest law groups reflected a critical strategic decision to enlist lawyers—especially idealistic and ambitious young lawyers—to help articulate the conservative agenda and lend it credibility."⁸⁰ Correspondingly, a principal outgrowth of the "success of conservative public interest law" would be the "conservative movement's improved record of recruiting elite lawyers and creating attractive career paths for them"⁸¹

At the very same time, conservative interests also helped establish a conservative beachhead in American law schools through efforts to fund and legitimize law and economics. Conservatives saw law and economics as both "a powerful critique of state intervention in the economy and a device for gaining a foothold in the world of elite law schools."⁸² In particular, the Olin Foundation provided infusions of money at elite law schools to be used for workshops, journals, student scholarships, and fellows; Olin also

⁷⁸ See Ann Southworth, *Lawyers of the Right: Professionalizing the Conservative Coalition* (Chicago: University Chicago Press, 2008), 8-40.

⁷⁹ Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton & Company, 2005), 38-39.

⁸⁰ Southworth, *Lawyers of the Right*, 13.

⁸¹ Southworth, *Lawyers of the Right*, 38.

⁸² Stevens M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, N.J.: Princeton University Press, 2008), 90.

funded programs to provide incentives for law professors to do law and economics scholarship. Through these efforts, Olin sought to legitimize law and economics and facilitate the credentialing of conservative legal academics.⁸³

Most significant, the creation and growth of the Federalist Society fueled an emerging conservative legal network at law schools and throughout the legal profession. In 1981, law students at Yale and the University of Chicago came together to provide a counterweight to the perceived liberal bias of elite law schools.⁸⁴ Initially, the Federalist Society was an attempt to bring conservative speakers to law schools to debate members of the academic left; the initial efforts were so popular that the group secured funding and chapters were established at law schools throughout the country.⁸⁵ Today, the Federalist Society serves as a reference group for conservative law students and lawyers, each with their own groups and activities under the Society's umbrella.⁸⁶ The Federalist Society is also a leading propagator of originalism, a theory of constitutional interpretation that has reshaped Supreme Court decision-making and strengthened the conservative legal movement.

Changes in the legal academy and legal profession are now reflected in the emergence of distinct career paths for conservatives and liberals in the elite segment of the legal profession. To an increasing extent, outstanding students at the most prestigious

⁸³ Teles, *The Rise of the Conservative Legal Movement*, 183-219; Erin Cady, "The John M. Olin Fellowships and the Advancement of Conservatism in Legal Academia," *Harvard Journal of Law & Public Policy* 39 (Summer 2016): 917-961.

⁸⁴ Michael Avery and Danielle McLaughlin, *The Federalist Society: How Conservatives Took the Law Back from Liberals* (Nashville: Vanderbilt University Press, 2013); Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015), 1.

⁸⁵ Hollis-Brusky, *Ideas with Consequences*, 1-2; Teles *The Rise of the Conservative Legal Movement*, 137-142.

⁸⁶ Hollis-Brusky, *Ideas with Consequences*, 13-15. For a general description, see www.fed-soc.org.

law schools move into clerkships with federal appellate judges who share their ideological orientations, and then into presidential administrations, law firms, and other institutions that also share their liberal or conservative identifications.⁸⁷ Later in this chapter, we will provide details of the pivotal role the Federalist Society played in establishing a conservative legal network that has proved to be quite important in creating today's partisan divide on the Supreme Court. We will also examine the American Constitution Society, created in response to the success of the Federalist Society, which serves a similar though less critical function for liberals.⁸⁸

Even with the development of conservative institutions in the news media and the legal profession, those sectors as a whole continue to lean to the left. A 2002 survey of journalists found that they were disproportionately liberal and Democratic, and a 2016 analysis based on campaign contributions found that professionals in the print media as a group were quite liberal.⁸⁹ The same analysis found that lawyers were not as liberal as journalists, but most of them were also on the left, and a similar analysis of law professors found them to be sharply liberal as a group--and somewhat more so at the most prestigious schools.⁹⁰ Because of the continued leaning to the left, conservatives in media and legal elites can continue to feel beleaguered despite their growing power, and

⁸⁷ See William E. Nelson et al., "The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?," *Vanderbilt Law Review* 62 (November 2009): 1775-1791. See Mike Sacks, "Former Supreme Court Clerks Find Conservative Home on Hill," *National Law Journal*, August 17, 2015, <http://www.nationallawjournal.com/id=1202734837405/Former-Supreme-Court-Clerks-Find-Conservative-Home-on-Hill?slreturn=20170824140146>.

⁸⁸ See Hollis-Brusky, *Ideas with Consequences*, 166-167.

⁸⁹ David H. Weaver, Randal A. Beam, Bonnie J. Brownlee, Paul S. Voakes, and G. Cleveland Wilhoit, *The American Journalist in the 21st Century: U.S. News People at the Dawn of a New Millennium* (Mahewh, N.J.: Lawrence Erlbaum Associates, 2007), 16-23; Adam Bonica, Adam S. Chilton, and Maya Sen, "The Political Ideologies of American Lawyers," *Journal of Legal Analysis* 8 (Winter 2016): 294.

⁹⁰ Bonica et al., "Political Ideologies of American Lawyers"; Adam Bonica, Adam Chilton, Kyle Rozema, and Maya Sen, "The Legal Academy's Ideological Uniformity," Faculty Research Working Paper Series, Harvard Kennedy School, June 2017, available at https://research.hks.harvard.edu/publications/workingpapers/Faculty_Name.aspx?PersonId=280.

that feeling strengthens the salience of organizations such as the Federalist Society to them.

Explaining the Growth in Supreme Court Polarization

As we documented in chapter 3, there was a striking lack of partisan sorting among the justices until quite recently: in no Court prior to 2010 were there substantial ideological blocs that coincided with political party. Rather, there were always appointees of Republican presidents who were on the liberal side of the Court's ideological spectrum, Democratic appointees who were on the conservative side of the spectrum, or both. In contrast, as shown in Tables 1.1 and 3.1, since President Obama's appointment of Elena Kagan in 2010, the Democratic and Republican appointees on the Court have been ideologically distinct from each other.

Before turning to the forces that perpetuate today's ideological divide, we want to reemphasize that the partisan divide is a story both about the separation of Democrats from Republicans and about ideological conformity among Republicans and Democrats. As Figure 1.1 showed, both Democratic justices as a group and Republican justices as a group have become more homogeneous in their ideological tendencies. This is primarily because, with the partial exception of Justice Kennedy, each of the two groups lacks centrists.

That growth in homogeneity came in the mid-1990s for the Court's Democrats. From the 1975 term through the 1992 term, the only Democratic appointees on the Court were the very liberal Thurgood Marshall and the moderate conservative Byron White.⁹¹

⁹¹ There were no standard deviations for the 1991-93 Terms because there was only one Democrat on the Court; Marshall retired before the 1991 Term and White before the 1993 Term.

In the long period from the 1994 Term through the 2008 Terms, in contrast, the two Democratic justices were the like-minded Ruth Bader Ginsburg and Stephen Breyer. The Court's Democrats remained similar in their voting tendencies when Ginsburg and Breyer were joined by Sonia Sotomayor and Elena Kagan.

The change came later for the Court's Republicans. The standard deviation in proportions of conservative votes among the Republican appointees remained high so long as relatively liberal John Paul Stevens and David Souter remained on the Court. After Souter retired at the end of the 2008 Term, the standard deviation fell by almost half; when Stevens retired after the 2009 Term, it again fell by half.⁹² With a more homogeneous set of Republicans on the Court, the standard deviation has remained low since then.

At the same time, the growing partisan divide is largely a story of the hardening of the right. As discussed earlier, there are no strong liberals on the Court and today's Democratic appointees (as a group) are ideologically similar to earlier groups of Democratic appointees. On the other hand, Justices Thomas, Alito, Gorsuch, and Chief Justice Roberts are among the most conservative Justices to sit on the Court, and the same was true of Justice Scalia.⁹³

The sharper divide between Republican and Democratic appointees is underlined by the Court's decisions in major cases. As we discussed in chapter 3, throughout the Court's history up to 2010 it was rare for the justices to divide along party lines in

⁹² When Stevens retired, it fell from 16.2 to 9.1 percent; when Souter retired, it fell to 4 percent.

⁹³ See Lee Epstein, William M. Landes, and Richard A. Posner, "Revisiting the Ideology Rankings of Supreme Court Justices," *Journal of Legal Studies* 44 (January 2015): S313-314 and Table 3.2 (ranking –based on percentage of conservative votes cast—Roberts, Thomas, Alito, Scalia as among 10 most conservative since 1937); Sai Prakash and John Yoo, "Gorsuch Makes a Mark on the Court," *Wall Street Journal*, June 29, 2017.

important decisions. Based on the list of such decisions in the *Guide to the Supreme Court*, among nearly four hundred important decisions in which there were at least two dissenting votes, in only two were all the justices from one party in the majority and all the justices from the other party in dissent.

The list we used for the period up to 2010 has not been updated since that time. But among the cases decided by the Court in the 2010-2014 terms, seven decisions in which the Court divided 5-4 or (in one case) 5-3 along party lines are obvious candidates for inclusion in the *Guide's* list of important decisions.⁹⁴ During the Court's 2015 term, the justices split 4-4--most likely on partisan lines--in high-visibility cases on public sector unions and on President Obama's immigration directive.⁹⁵ There were no such

⁹⁴ Those decisions are: *Burwell v Hobby Lobby Stores*, 134 S Ct 2751 (2014) (interpreting the Religious Freedom Restoration Act to protect closely held corporations from a mandate to include certain contraceptives in employee health plans); *McCutcheon v FEC*, 134 S Ct 1434 (2014) (striking down a federal statutory provision that put limited on an individual's total contributions to election candidates and candidate committees); *Shelby Cnty v Holder*, 133 S Ct 2612 (2013) (striking down Title IV of the Voting Rights Act); *Florence v Bd of Chosen Freeholders*, 132 S Ct 1510 (2012) (allowing routine strip-searches of arrestees at jails); *AT&T Mobility LLC v Concepcion*, 563 US 333 (2011) (disallowing state restrictions on contract provisions prohibiting class actions in arbitration); *Ariz Free Enter Club's Freedom Club PAC v Bennett*, 131 S Ct 2806 (2011) (striking down a state system of public funding for candidates for state offices); and *Chamber of Commerce v Whiting*, 131 S Ct 1968 (2011) (allowing sanctions on employers for hiring of undocumented aliens). In preparing this inventory of cases, we consulted with David Savage, author of the *Guide*.

⁹⁵ Those cases are *Friedrichs v California Teachers Association*, 136 S Ct 1083 (2016) (dividing 4-4 on whether mandatory fees to public sector unions violate free speech rights), and *United States v Texas*, 136 S Ct 2271 (2016) (dividing 4-4 on legality of 2014 Obama immigration directive). For news stories speculating that these 4-4 split were a Democratic-Republican split, see Adam Liptak, *Victory for Unions as Supreme Court, Scalia Gone, Ties 4-4*, NY Times (March 29, 2016) available at http://www.nytimes.com/2016/03/30/us/politics/friedrichs-v-california-teachers-association-union-fees-supreme-court-ruling.html?_r=0; Robert Barnes, *Supreme Court Won't Revive Obama Plan to Shield Illegal Immigrants from Deportation*, Wash Post (June 23, 2016) available at https://www.washingtonpost.com/politics/supreme-court-wont-revive-obama-plan-to-shield-illegal-immigrants-from-deportation/2016/06/23/6cea5f1e-3950-11e6-9ccd-d6005beac8b3_story.html. In other high profile cases (involving a religious liberty challenge to the Affordable Care Act and article III standing limits on class action lawsuits), the Justices may well have masked partisan divisions by issuing ambiguous, inconclusive opinions. See Mark Joseph Stern, *SCOTUS Misses an Opportunity to Gut Class Actions and Consumer Privacy Laws*, Slate (May 16, 2016) available at http://www.slate.com/blogs/the_slatest/2016/05/16/spokeo_v_robins_spares_class_actions_and_consumer_privacy.html; Garrett Epps, *The U.S. Supreme Court's Nonsense Ruling in Zubik*, The Atlantic (May 16, 2016) available at <http://www.theatlantic.com/politics/archive/2016/05/the-supreme-courts-non-sensical-ruling-in-zubik/482967/>

decisions in the Court's low-key 2016 term, but it would not be surprising if such decisions are common in the 2017 term and those that follow.

The separation between Democrats and Republicans is to be expected; it tracks growing polarization in the elite world and related trends in judicial appointments, particularly the rise of the conservative legal network and the growing role of ideology in judicial appointments. Consider, for example, Thomas Keck's measure of Republican-Democrat differences on four issues that divide the parties (abortion, affirmative action, gun rights, and same sex marriage). Looking at votes in Congress, on federal courts of appeals, and on the U.S. Supreme Court, Keck documented a sharp party line divide from 1993-2013. But the extent of this divide differed between branches. The average difference between Republicans and Democrats in support for liberal positions in their votes was 65 percentage points in the House and 64 percentage points in the Senate. In contrast, the average difference in the judiciary was 37 percentage points for the Supreme Court and 33 percent for the courts of appeals.⁹⁶

The growth of partisan sorting in the Supreme Court and the growth of polarization more broadly in the political system as a whole in the same era clearly is not a coincidence; changes in the Court reflect changes in its political environment. One key linkage lies in the appointment process. In chapter 3, we examined how appointment strategies before 1986 contributed to the absence of an ideological divide on the Court. We will now link changes in appointments strategies to the rise in partisanship on the Court. In documenting the growing role of ideology in presidential appointments, we will highlight the critical role played by Reagan's second term Attorney General Edwin

⁹⁶ Thomas M. Keck, *Judicial Politics in Polarized Times* (Chicago: University of Chicago Press, 2014), 149.

Meese in both grooming conservative judges and making ideology a dominant feature of Republican appointments strategies. Correspondingly, the rise of the conservative legal movement has helped fuel this phenomenon. For Democrats, ideology is one of several factors that presidents take into account when making Supreme Court nominations, but polarization has affected Democratic appointments as well.

A second key linkage stems from the development of distinct liberal and conservative segments of the political and social elite, segments that have a considerable degree of hostility toward each other. That development has affected the appointment process, but it has more direct effects on the thinking of the justices themselves. After discussing appointments, we will consider the impact of affective polarization on partisan sorting in the Court.

The Appointment Process

In nominating Supreme Court justices, presidents consider much more than the “objective” qualifications of potential nominees to serve on the Court, in terms of their legal abilities and their ethical behavior. In chapter 3, we identified several of these considerations. Presidents have also looked to advance particular policy priorities; nominations as a reward for service to the president and the president’s party; political benefits that can be gained through a nomination; and the nominee’s prospects for confirmation, which are related to considerations in the other categories.⁹⁷ Before the 1980s, however, presidents did not see Supreme Court appointments as a vehicle to advance a comprehensive ideological agenda. Franklin Delano Roosevelt appointed

⁹⁷ Lawrence Baum, *The Supreme Court*, 12th ed. (Washington, D.C.: CQ Press, 2016), 35-40.

Justices who would uphold New Deal initiatives but paid no mind to emerging civil rights and liberties issues; Richard Nixon cared about law and order but not about abortion or affirmative action.⁹⁸

Starting in the 1980s, Presidents have sought nominees who share the prevailing ideological positions of their increasingly divergent parties--reliable conservatives for Republican presidents, reliable liberals for Democratic presidents. Further, partisan sorting has resulted in greater homogeneity within each political party. Democrats are overwhelmingly liberal and Republicans conservative—so much so that credible candidates from either party are likely to reflect the ideological gap that separates the parties. All of this had helped to create a Court in which the justices appointed by Republican presidents and those appointed by Democrats are separated by ideology.

Beyond ideological conformity within each party, partisan polarization has been accompanied by a change in the ways that presidents choose Supreme Court justices. Spurred in part by fellow partisans outside government, recent presidents have given greater emphasis to the goal of selecting like-minded nominees, and they have been more careful in pursuing that goal. This trend has been especially marked for Republicans; Democrats have paid attention to ideology while also advancing diversity and rewarding constituent interests.⁹⁹ The growing emphasis on policy considerations parallels the growth in partisan polarization, and it is both a cause and effect of that polarization.

⁹⁸ C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New York: Macmillan Company, 1948); Eric A. Posner, "Casual with the Court," *New Republic*, October 24, 2011.

⁹⁹ See Adam Liptak, "Why Newer Appointees Offer Fewer Surprises from Bench," *New York Times*, April 18, 2010, Y1.

Republican Presidents. Ronald Reagan's 1980 victory set in motion the forces that have resulted in the sharp split between conservative Republicans and liberal Democrats, though the Reagan administration's departures from past practices were not fully instituted until Reagan's second term. Among other initiatives, the Reagan administration broke ranks with its predecessors by making ideological considerations "the most important criteria" in the screening of judicial candidates, seeking to reshape the face of Supreme Court decision-making by sponsoring "ardently conservative candidates to the high court."¹⁰⁰ In particular, rather than focus on a narrow band of policy issues (Roosevelt and economic regulation, Nixon and crime), Reagan sought to fundamentally transform the role of the Supreme Court.¹⁰¹

By elevating the status of the Federalist Society in the identification and grooming of its judicial appointees, for example, the administration sought to fill the bench with conservatives.¹⁰² The nominations of Antonin Scalia, Robert Bork, Douglas Ginsburg, and the elevation of William Rehnquist to Chief Justice were made to advance the conservative legal policy agenda.¹⁰³ All four had markedly conservative records on the federal appellate courts.¹⁰⁴

These Reagan initiatives were linked to the 1985 appointment of Attorney General Edwin Meese and related efforts to strengthen the burgeoning conservative legal network. In Reagan's first term and as noted in chapter three, ideology was not the only

¹⁰⁰ David Alistair Yalof, *Pursuit of Justices* (Chicago: University of Chicago Press, 1999), 134.

¹⁰¹ See Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007), **PIN**.

¹⁰² Teles, *The Rise of the Conservative Legal Movement*, 141-142.

¹⁰³ See Yalof, *Pursuit of Justices*, 142-165.

¹⁰⁴ Reflecting perceptions of those records, the four nominees all had Segal-Cover scores below .100 (Jeffrey Segal, "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012," <https://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf>).

criterion that the administration took into account. In choosing Sandra Day O'Connor, Reagan honored a campaign pledged to nominate a woman.¹⁰⁵ Moreover, when nominating Anthony Kennedy to the bench in 1987, the Reagan administration advanced a candidate who had earlier been rejected on ideological grounds.¹⁰⁶ At this time, however, the administration had failed in its efforts to put two strong conservatives on the bench—Robert Bork (rejected by the Senate) and Douglas Ginsburg (forced to resign in the wake of charges involving drug use). Consequently, rather than risk its ability to fill a Supreme Court slot before the 1988 elections, the administration thought it better to nominate a weak conservative who would easily win Senate approval.¹⁰⁷

Ideology was also the defining but not exclusive factor in the appointments of Republican presidents George H.W. Bush (1989-1993) and George W. Bush (2001-2009). The first Bush embraced the same general commitment to a conservative judiciary that had existed in the Reagan administration.¹⁰⁸ Facing a Democratic Senate, Bush paid close attention to the confirmability of Supreme Court nominees. Bush passed over federal appellate judge Edith Jones for fear of a bitter confirmation fight, even though the administration thought she was a committed conservative.¹⁰⁹ Instead, David Souter was nominated, in part, because there was little prospect of a bruising confirmation battle over

¹⁰⁵ Douglas E. Kneeland, *Reagan Pledges Women on Court; Carter Challenges Foe on Economy*, *New York Times*, October 15, 1980, A1. On the array of considerations that may have affected the choice of O'Connor, see Christine L. Nemacheck, *Strategic Selection: Presidential Nomination of Supreme Court Justices from Herbert Hoover through George W. Bush* (Charlottesville, VA: University of Virginia Press, 2008), 9-13.

¹⁰⁶ Yalof, *Pursuit of Justices*, 145-146. Kennedy's Segal-Cover score put him decidedly to the left of Bork and Ginsburg. Bork's score was .095, Ginsburg's .000, and Kennedy's .365. Jeffrey Segal, "Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012," <http://www.stonybrook.edu/polsci/jsegal/>.

¹⁰⁷ The Senate confirmed Kennedy unanimously.

¹⁰⁸ See Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Group, 2007), 87-110.

¹⁰⁹ See Yalof, *Pursuit of Justices* 191; Greenburg, *Supreme Conflict*, 100-101.

past decisions or writings. Clarence Thomas was also seen as highly confirmable, politically compelling. White House officials thought that his “southern background and humble origins would trap southern Democrats into voting for him.”¹¹⁰

But both nominees were perceived as conservative. Bush administration officials were confident that Souter was a solid conservative, and administration officials quelled the doubts of some conservatives about Souter.¹¹¹ Unlike Souter, Clarence Thomas was part of and embraced by the conservative legal movement. For example, Bush’s legal counsel C. Boyden Gray “had gotten to know Thomas socially in Washington’s conservative circles, and was struck by his adamant rejection of the principles of affirmative action.”¹¹²

By the time of the George W. Bush presidency, conservatives who were frustrated by the moderate or liberal paths of prior Republican appointees emphasized the need for great care in making nominations. That emphasis was reflected in the slogan, “No more Souters.”¹¹³ Staunch conservatives—especially those for whom abortion was a high priority—succeeded in preventing the nomination of Attorney General Alberto Gonzales.¹¹⁴ By nominating John Roberts, Harriet Miers, and Samuel Alito, Bush sought to select the “most conservative possible Supreme Court Justice.”¹¹⁵ Miers had served as both Bush’s personal attorney and White House counsel; she was a trusted personal and

¹¹⁰ Greenburg, *Supreme Conflict*, 110.

¹¹¹ Jeremy Rabkin, “The Sorry Tale of David Souter, Stealth Justice,” *Weekly Standard*, November 6, 1995, 30; James MacGregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (New York: Penguin Group, 2009), 217.

¹¹² Yalof, at 194.

¹¹³ E.g., Robert Novak, “No More Souters,” *Townhall*, February 12, 2001, http://townhall.com/columnists/robertnovak/2001/02/12/no_more_souters. See also Jason DeParle, “In Battle to Pick Next Justice, Right Says Avoid a Kennedy,” *New York Times*, June 27, 2005, A1.

¹¹⁴ Jeffrey Toobin, *The Nine* (New York: Anchor Books, 2008), 266-270.

¹¹⁵ Toobin, *The Nine*, 207.

political associate.¹¹⁶ Bush was also confident that she was strongly conservative, making her the perfect “stealth” candidate without the risk.¹¹⁷ For this reason, it is striking that well-placed conservatives who distrusted Miers were able to secure her withdrawal.

Donald Trump’s 2017 nomination of Neil Gorsuch followed a similar script. Trump sought to establish his bona fides with the conservative legal network by turning to the Federalist Society to assemble a list of potential Supreme Court nominees.¹¹⁸ Gorsuch, like Trump’s other finalists, was on that list and had strong ties to the Federalist Society. Later in this section, we will discuss the ascendancy of the conservative legal movement in general and the Federalist Society in particular, especially with respect to the grooming and vetting of Supreme Court Justices.

These changes in appointment processes and criteria should be put in a broader context. The Reagan administration did more than transform the judicial selection process; in addition to making ideology the defining criterion in judicial appointments, the Reagan administration also sought to redefine the process by which judges and Justices were vetted and nurtured. Under the leadership of his second term Attorney General Edwin Meese, Reagan took steps to groom a cadre of well credentialed conservative lawyers and, in so doing, transform constitutional discourse and judicial decision-making over an extended period of time. By using the “bureaucratic power to transform the conditions of future political conflict,”¹¹⁹ Reagan’s Department of Justice (DoJ) set in motion the processes that resulted in the appointments of Justices Scalia,

¹¹⁶ See Toobin, *The Nine*, 286-87.

¹¹⁷ See Fred Barnes, “Souter-Phobia,” *Weekly Standard*, August 1, 2005, 11-12.

¹¹⁸ See Alan Rappeport and Charlie Savage, “Trump Offers a List of Possible Supreme Court Nominees Who Reflect His Principles,” *New York Times*, May 19, 2016, A16.

¹¹⁹ Steven M. Teles, “Transformative Bureaucracy: Reagan’s Lawyers and the Dynamics of Political Investment,” *Studies in American Political Development* 23 (April 2009): 61.

Thomas, Alito, Gorsuch, and Chief Justice Roberts. In this way, the ideological divide on today's Court is very much tied to the efforts of the Reagan DoJ.

Unlike first term Attorney General William French Smith (who embraced conservative ideals but had no plan to advance those ideals), Meese sought to advance conservative goals over the long-term. Recognizing that the “project of getting the Constitution right was more than just appointing judges, and that we had to have a rhetoric that was persuasive, and an analysis that became talked about by public intellectuals,”¹²⁰ Meese—following a talk to DoJ political appointees by then D.C. Circuit Judge Antonin Scalia--formally embraced the “jurisprudence of original intent.”¹²¹ He gave speeches, organized seminars within the DoJ so that political appointees could work through the implications of originalism for their own work, and directed his Office of Legal Policy to issue *Guidelines for Constitutional Litigation* (so that DoJ attorneys would adhere to originalism in their legal analysis and arguments).¹²² In these and other ways, Meese sought to create a metric by which to measure legal arguments and judicial decisions and, in this way, “facilitate the orderly development of conservative legal ideals and their injection into the mainstream.”¹²³ Meese also recognized the importance of reaching out to the “legal profession’s elite” and “very little of this was aimed at the general public”; instead, Meese was “trying to stir up the elites,” and his target was lawyers, academics, and public intellectuals.¹²⁴

¹²⁰ Teles, “Transformative Bureaucracy,” 76 (quoting Kenneth Cribb, who served as Counselor to the Attorney General).

¹²¹ Address by Attorney General Edwin Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution* (1985). See also Teles, “Transformative Bureaucracy,” 80-81.

¹²² Teles, “Transformative Bureaucracy,” 75-82.

¹²³ Teles, *The Rise of the Conservative Legal Movement*, 136.

¹²⁴ Teles, “Transformative Bureaucracy,” 76 (quoting Meese and Department of Justice official Kevin Cribb)

Most significantly, Meese sought to staff his department with young conservative lawyers—making “ideological commitment...a credential rather than a disqualification.”¹²⁵ The recently established Federalist Society was an important component of this strategy. Meese hired the Society’s Founders as special assistants and tapped Stephen Markman, who headed the Washington, D.C. chapter of the Federalist Society, to become the Assistant Attorney General in charge of judicial selection.¹²⁶ In so doing, the Reagan DoJ sent a signal that “you could win” by identifying as a conservative and acting “on the basis of your ideals.”¹²⁷ Federalist Society co-founder and Meese special assistant Steve Calabresi put it this way: “There was a real desire to train a generation of people—a farm team—who might go on later on in future Republican administrations to have an impact and to hold more important positions.”¹²⁸ Correspondingly, the Reagan administration and Federalist Society worked in tandem to foster the conservative legal network by using the Federalist Society annual meeting as a marker of status and belonging. “[O]f the seventy-six speakers listed on the published agendas of Federalist Society national meetings from 1981 to 1988, nineteen (25%) were serving or would serve at some time in the Reagan administration.”¹²⁹

The George H.W. Bush and George W. Bush administrations followed the Reagan administration lead, staffing top executive positions with Federalist Society members and putting a premium on fealty to the conservative legal agenda when selecting judicial candidates. The first Bush administration looked to Lee Liberman Otis,

¹²⁵ Teles, “Transformative Bureaucracy,” 74.

¹²⁶ Teles, “Transformative Bureaucracy,” 68, 74.

¹²⁷ Teles, “Transformative Bureaucracy,” 74 (quoting Kenneth Cribb).

¹²⁸ Teles, “Transformative Bureaucracy,” 73.

¹²⁹ Amanda L. Hollis-Brusky, “The Reagan Administration and the Rehnquist Court’s New Federalism: Understanding the Role of the Federalist Society” (Berkeley, CA: bepress, 2008): 16.

co-founder of the Federalist Society, to lead its judicial selection process.¹³⁰ The second Bush administration tapped Society members Brett Kavanaugh and Viet Dinh to be in charge of judicial selections.¹³¹ More than that, Federalist Society executive vice president Leonard Leo (along with Federalist Society members Edwin Meese, Boyden Gray, and Jay Sekulow) provided judicial selection advice to the George W Bush administration.¹³²

In nominating judges, all three Republican administrations embraced the mantra that judicial nominees should be “committed to the rule of law and the enforcement of the Constitution and statutes as those were adopted by ‘we the people’ and their elected representatives.”¹³³ Equally significant, membership in the Federalist Society was a proxy for adherence to conservative ideology. Ronald Reagan made all three of the Society’s original faculty advisors federal court judges (and two of these three—Robert Bork and Antonin Scalia—were nominated to the Supreme Court).¹³⁴ Nine of President George H.W. Bush’s nominations to the federal court of appeals and U.S. Supreme Court were Society members (including Clarence Thomas, Samuel Alito, and John Roberts).¹³⁵ George W. Bush Supreme Court nominees Samuel Alito and John Roberts were Society members as were around half of the appointees of the second President Bush to the

¹³⁰ Hollis-Brusky, “The Reagan Administration and the Rehnquist Court’s New Federalism,” 16.

¹³¹ Michael Avery and Danielle McLaughlin, “How Conservatives Captured the Law,” *Chronicle of Higher Education*, April 15, 2013.

¹³² Avery and McLaughlin, “How Conservatives Captured the Law.”

¹³³ Stephen Markman, “Judicial Selection: The Reagan Years,” in *Judicial Selection: Merit, Ideology, and Politics*, eds. Henry J. Abraham et al. (Washington, D.C.: National Legal Center for the Public Interest, 1990), 33.

¹³⁴ Nancy Scherer and Banks Miller, “The Federalist Society’s Influence on the Federal Judiciary,” *Political Research Quarterly* 62 (June 2009): 367.

¹³⁵ Scherer and Miller, “The Federalist Society’s Influence on the Federal Judiciary,” 367; Charles Lane, “Roberts Listed in Federalist Society ’97-98 Directory; Court Director; Court Said He Has No Memory of Membership,” *Washington Post*, July 25, 2005, A1.

federal courts of appeal.¹³⁶ Three Society members appointed by Bush (Neil Gorsuch, William Pryor, and Thomas Hardiman) were the finalists to fill Justice Scalia's seat in 2017.¹³⁷

The Reagan and first Bush administrations were limited in their ability to nominate reliable conservatives. These administrations could not look to a “farm team” of conservatives who had joined the Federalist Society as law students and cut their teeth either clerking for a conservative judge or as a government attorney. The Federalist Society and, more generally, the conservative legal movement were too nascent to have groomed these individuals. “These were the days,” as Reagan DoJ official Richard Willard put it, “before the Federalist Society was really off the ground, so it was hard to find lawyers who had a conservative political outlook. At that time, the law schools and the professional associations were overwhelmingly liberal in their outlook, and so finding conservative lawyers who had the outlook, but also the professional competence, to do the job, was a challenge.”¹³⁸ Indeed, recognizing that “policy is people,” the Reagan DoJ responded to the dearth of well-credentialed conservatives by hiring young lawyers as “that’s where the talent was and that’s where the people were that agreed with our philosophy.”¹³⁹

¹³⁶ Avery and McLaughlin, “How Conservatives Captured the Law;” Scherer and Miller, “The Federalist Society’s Influence on the Federal Judiciary,” 368 (noting that around two-thirds of Bush’s first term judicial nominees were Federalist Society members).

¹³⁷ Tessa Berenson, “Here’s What to Know About President Trump’s 3 Supreme Court Finalists,” *Time*, January 31, 2017, <http://time.com/4650544/supreme-court-nominees-donald-trump/>.

¹³⁸ Teles, “Transformative Bureaucracy,” 70-71.

¹³⁹ Hollis-Brusky, “The Reagan Administration and the Rehnquist Court’s New Federalism,” 9 (quoting Reagan Office of Legal Counsel head Douglas Kmiec); *The Meese Department of Justice: Its Accomplishments and Its Relevance Today*, <http://www.fed-soc.org/multimedia/detail/the-meese-department-of-justice-its-accomplishments-and-its-relevance-today-event-audio> (quoting Meese assistant Ken Cribb).

This lack of a deep bench of vetted conservatives contributed to Ronald Reagan’s nomination of Sandra Day O’Connor and to George H. Bush’s nomination of David Souter to the Supreme Court. The decision to interview and later nominate O’Connor—then a little-known state appeals court judge—underscores the thinness of the pool of credentialed conservative women in the early 1980s. When nominating Souter in 1990, the number of well-credentialed conservatives was comparably thin and the conservative legal movement was not sufficiently entrenched to demand that Republican appointees come from the pool of vetted conservatives. Consequently, doubts about Souter’s lack of paper record were offset by the strong backing of Bush chief of staff John Sununu (who “enjoyed a particularly strong reputation among conservatives”).¹⁴⁰

By the time George W. Bush became president in 2001, the conservative legal movement dominated DoJ and judicial appointments. Not only did Federalist Society members “select [], vet[], and shepherd[] Bush’s judicial nominees,” lawyer-related jobs in the administration were overwhelmingly filled by Society members. Federalist Society member and Bush appointed counsel to the FDA Daniel Troy put it this way: “Everybody, I mean everybody who got a job who was a lawyer was involved with the Federalist Society. I mean everybody.”¹⁴¹ By 2005, moreover, the “farm team” of credentialed conservatives included John Roberts, Samuel Alito, Neil Gorsuch, and many others.

The nomination and withdrawal of Bush Supreme Court nominee Harriet Miers vividly illustrates both the power of the conservative legal movement and the depth of today’s pool of conservative Supreme Court nominees. Attacking Miers for both for her

¹⁴⁰ Greenburg, *Supreme Conflict*, 100-101.

¹⁴¹ Hollis-Brusky, *Ideas with Consequences*, 154.

lack of Federalist Society “credentials”¹⁴² and her ties to the American Bar Association (which conservatives had turned against as too liberal in its screening of judges),¹⁴³ conservatives demanded that she withdraw and be replaced by a nominee from the “deep farm team of superbly qualified and talented circuit court judges primed for this moment.”¹⁴⁴ Her replacement was Samuel Alito—a Federalist Society member and the favorite of the very conservatives who attacked Miers; *The New York Times* headline put it this way: *In Alito, G.O.P. Reaps Harvest Planted in ‘82*.¹⁴⁵

Donald Trump’s 2017 nomination of Neil Gorsuch likewise exemplifies the dominant role played by the conservative legal networks in judicial appointments, especially the Federalist Society.¹⁴⁶ Gorsuch took the seat held by Antonin Scalia, a Federalist Society stalwart. When campaigning for president in 2016, Donald Trump claimed that his judicial nominees would “all [be] picked by the Federalist Society” and then turned to the “Federalist people”—specifically the Society’s executive vice president Leonard Leo—to assemble a list of potential Supreme Court nominees.¹⁴⁷ When the society held its annual National Lawyers Convention one week after the 2016 election, nine of the twenty-one judges on that list were among the speakers and nearly all the

¹⁴² See Hollis-Brusky, *Ideas with Consequences*, 153 (quoting Federalist Society member Tony Cotto as saying “No Fed Society credential, that’s going to hurt you. It hurt Harriet Miers a lot.... We want credentials. We want to see you’ve spoken at Federalist Society conferences, we want to know you’ve been to dinners, gripping and grinning”).

¹⁴³ See “Miers v. The Federalist Society,” *Daily Kos*, October 7, 2005.

¹⁴⁴ Todd J. Zywicki, “A Great Mind?,” *Legal Times*, October 10, 2005.

¹⁴⁵ David D. Kirkpatrick, “In Alito, G.O.P. Reaps Harvest Planted in ‘82,” *New York Times*, January 30, 2006, A1. See also Greenburg, *Supreme Conflict*, 269-270.

¹⁴⁶ The Heritage Foundation, another leading conservative organization, also played a key role in the process of identifying potential Trump nominees. Edward-Isaac Dove, “The Man Who Picked the Next Supreme Court Justice,” *Politico*, January 30, 2017, <https://www.politico.com/story/2017/01/trump-supreme-court-justice-mcdonald-234352/>

¹⁴⁷ Lawrence Baum and Neal Devins, “Federalist Court: How the Federalist Society Became the de Facto Selector of Republican Supreme Court Justices,” *Slate*, January 31, 2017; Jeffrey Toobin, “Full-Court Press: The Impresario Behind Neil Gorsuch’s Confirmation,” *The New Yorker*, April 17, 2017, 27-28.

others were in attendance. And when Trump had narrowed his pool to three appeals court judges, all three were Federalist Society members who regularly spoke at Society events.¹⁴⁸ Indeed, when Senate questioners asked Gorsuch how he had come to the attention of President Trump, Gorsuch duly noted that he “was contacted by Leonard Leo.”¹⁴⁹

After the White House announced five additional names on the list of potential Supreme Court nominees in November 2017, bringing the total to twenty-five, one journalist “identified a Federalist Society connection, either membership or at least involvement with events, for all but one.” For the eighteen Trump nominees to the courts of appeals at that point, nominees’ questionnaires and other sources indicated ties to the Federalist Society for seventeen.¹⁵⁰

With four Federalist Society members now sitting on the Supreme Court, there is little question that the Society has become a “mediating institution” for the right, a network that has maintained “channels of communication through which [its members] exercise political influence.”¹⁵¹ An analysis of contacts among lawyers for conservative and libertarian causes suggested that the Federalist Society plays an instrumental role in bringing these lawyers together.¹⁵² Correspondingly, Society membership is critical to the credentialing of conservative lawyers. Michael Greve put it this way: “[O]n the left there

¹⁴⁸ See Baum and Devins, “Federalist Court.”

¹⁴⁹ Eric Lipton and Jeremy W. Peters, “Conservatives Press Overhaul in the Judiciary,” *New York Times*, March 19, 2017, A1.

¹⁵⁰ Zoe Tillman, “After Eight Years on the Sidelines, this Conservative Group is Prime to Reshape the Courts under Trump,” *Buzzfeed News*, November 20, 2017, https://www.buzzfeed.com/zoetillman/after-eight-years-on-the-sidelines-this-conservative-group?utm_term=.kpVKKQ4v4#.nsEIIW282.

¹⁵¹ Southworth, *Lawyers of the Right*, 135-141.

¹⁵² Anthony Paik, Ann Southworth, and John P. Heinz, “Lawyers of the Right: Networks and Organizations,” *Law & Social Inquiry* 32 (Fall 2007): 906-909.

are a million ways of getting credentialed; on the political right there's only one way in these legal circles.”¹⁵³

Democratic Presidents. In the years since 1992, Democratic presidents have chosen five nominees--Ruth Bader Ginsburg (1993) and Stephen Breyer (1994) by Bill Clinton and Sonia Sotomayor (2009), Elena Kagan (2010), and Merrick Garland (2016) by Barack Obama. Unlike earlier Democratic presidents, Clinton and Obama were careful to select nominees whose records gave strong evidence of liberalism. Clinton, for example, drew from a pool of “mostly liberal and Democratic candidates” and seriously considered liberal criticisms of Ginsburg’s position on abortion.¹⁵⁴ At the same time, unlike Republican nominations, ideology has not played a determinative role in Democratic selections. Instead, Clinton and Obama emphasized the pursuit of other policy objectives. Clinton, for example, thought it important that Ginsburg was championed by Senator Daniel Patrick Moynihan—who would play a critical role in his pursuit of health care legislation.¹⁵⁵ Clinton also sought to nominate a close personal friend (Richard Arnold) but did not do so because of concerns about the nominee’s health.¹⁵⁶

Clinton and Obama also disappointed strong liberals by veering away from nominees who would prompt confirmation battles and to nominees who embraced the rhetoric of judicial restraint, had rich personal histories, and were less ideological.¹⁵⁷

¹⁵³ Quoted in Hollis-Brusky, *Ideas with Consequences*, 152.

¹⁵⁴ Yalof, *Pursuit of Justices*, 196; Toobin, *The Nine*, 70-71.

¹⁵⁵ See Elizabeth Drew, *On the Edge: The Clinton Presidency* (New York: Simon & Schuster, 1994), 217-18; Toobin, *The Nine*, 70.

¹⁵⁶ Drew, *On the Edge*, 219.

¹⁵⁷ On the unhappiness of some liberals about Breyer’s appointment, see Greenburg, *Supreme Conflict* 182; Drew, *On the Edge*, 214. On Obama’s appointments, see Peter Baker, “Favorites of Left Don’t Make Obama’s Court List,” *New York Times*, May 26, 2009, A12; and Jeffrey Toobin, “Bench Press: Are Obama’s Judges Really Liberals?,” *New Yorker*, September 21, 2009, 42. The Segal-Cover scores (Segal,

When nominating Merrick Garland to fill Antonin Scalia’s seat, for example, Obama was well aware of Senate Republican threats to derail any nomination. Acknowledging that Garland was “just the right nominee during such a divisive time in our politics,” Obama selected a sixty-three year old moderate-liberal who seemed to stand a better chance of confirmation than any other candidate. More generally, Obama did not seek to use his judicial appointments to appoint young lawyers who “could make significant marks on the law.”¹⁵⁸

Reflecting Democratic norms to place interest group politics ahead of ideology,¹⁵⁹ Clinton and especially Obama also put substantial emphasis on race and gender diversity in judicial nominations, including Supreme Court appointments. Forty-two percent of Obama’s appointees to federal courts were women, compared with 21 percent for George W. Bush; 20 percent were African Americans, compared with 8 percent for Bush.¹⁶⁰ As Mark Tushnet has put it, “Democratic presidents tend to pursue a demographic strategy rather than an ideological one for Supreme Court nominations.”¹⁶¹ Correspondingly, Democrats are more likely to take patronage than ideology into account when making appointments.¹⁶² Unlike Republicans (who are more likely captured by discrete interest groups), Democrats advance the interests of a myriad pro-government coalition of

“Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012”) for these four nominees underline the difference: .680 for Ginsburg, .475 for Breyer, .780 for Sotomayor, and .730 for Kagan. In contrast, Roberts’s score was .120 and Alito’s .100.

¹⁵⁸ Jeffrey Toobin, “Obama’s Unfinished Judicial Legacy,” *New Yorker*, July 31, 2012.

¹⁵⁹ See Matt Grossman and David A. Hopkins, “Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics,” *Perspectives on Politics* 13 (March 2015): 119-139.

¹⁶⁰ Elliot Slotnick, Sara Schiavoni, and Sheldon Goldman, “Obama’s Judicial Legacy: The Final Chapter,” *Journal of Law and Courts* 5 (2017): 413. For a discussion of Clinton, see Sheldon Goldman and Matthew D. Saronson, “Clinton’s Nontraditional Judges: Creating a More Representative Branch,” *Judicature* 78 (September-October 1994): 68-73.

¹⁶¹ Mark Tushnet, *In the Balance: Law and Politics on the Roberts Court* (New York: W. W. Norton & Company, 2013), 74.

¹⁶² Matt Grossman and David A. Hopkins, *Asymmetric Politics: Ideological Republicans and Group Interest Democrats* (New York: Oxford University Press, 2016), 81-82.

interest groups. On legal policymaking, the liberal legal network is much larger than the conservative legal network and, consequently, Democratic presidents are less likely to be captured by a subset within it.¹⁶³ Accordingly, polarization has had a greater impact on the Republican Party than on the Democratic Party. Clinton and Obama had Democratic majorities in the Senate when they made their nominations, but they still chose relatively moderate nominees in order to reduce the difficulty of confirmation.

Yet the difference between the Clinton-Obama approach and the George W. Bush approach should not obscure the change that had occurred in Democratic appointment strategies as well. Clinton and Obama chose nominees who seemed relatively moderate over more liberal candidates, but they were still careful to select people whose records gave strong evidence of liberalism. One way to characterize the Clinton-Obama appointments is that, in comparison with the appointments of earlier Democratic administrations, the average ideological position has not changed a great deal but the variation has been reduced. Unlike earlier Democrats (who appointed strong liberals as well as conservatives), Clinton-Obama appointees are all moderate liberals.

An measure of the ideological positions taken by justices in civil liberties cases devised by Michael Bailey underscores this conclusion.¹⁶⁴ By this measure, 1.22 is the most conservative score that any justice received and -1.87 the most liberal.¹⁶⁵ For the Democratic appointees who served during the study period, the average of their mean

¹⁶³ See Teles, *The Rise of the Conservative Legal Movement*, 22-57.

¹⁶⁴ The scores are compiled at <http://faculty.georgetown.edu/baileyma/JOPIdealPointsJan2013.htm>. The method for creating them is discussed in Michael A. Bailey, "Is Today's Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences," *Journal of Politics* 75 (July 2013): 821-834. Because these scores were compiled only through calendar year 2011, only two terms are available for Justice Sotomayor and one term for Justice Kagan, but the stability of their voting records relative to their colleagues since that time indicates that their scores over a more extended period would be similar.

¹⁶⁵ Calculations in this paragraph were prepared by the authors based on scores compiled by Bailey.

scores across terms was $-.55$ for the Obama and Clinton appointees and $-.24$, a little less liberal, for the justices appointed by the Democratic presidents from Roosevelt to Johnson. But the Clinton and Obama appointees were clustered together, with a standard deviation of $.09$ in their scores; in contrast, their predecessors had a standard deviation of 1.03 . Of the thirteen pre-Clinton appointees, five were more liberal than any of the Clinton and Obama justices, and eight were more conservative than any of them.

Thus the Obama and Clinton appointees have contributed to partisan polarization of the Court by standing on the liberal side of the ideological spectrum, but their contribution has been limited by their adherence to moderate rather than strong liberalism. Ideological measures of Merrick Garland conform to this pattern; Garland was located smack in the middle of Clinton-Obama Democratic appointees.¹⁶⁶ More to the point, Democratic appointees to the Court do not reflect the leftward shift of Democratic elites. Instead, by valuing interest group politics as much as ideology, Clinton and Obama have not appointed strong liberals to the Court.

The Justices' World

Changes in the appointment process, especially on the Republican side, have played a key role in partisan sorting on the Court. The increased weight of ideological considerations in the selection of nominees and increased care in screening candidates for nominations have done much to end the historic pattern in which justices often deviated from the dominant ideological orientation of their party.

¹⁶⁶ See Adam Liptak and Alicia Parlapiano, "How Clinton's or Trump's Nominees Could Affect the Balance of the Supreme Court," *New York Times*, September 25, 2016, <https://www.nytimes.com/interactive/2016/09/25/us/politics/how-clintons-or-trumps-nominees-could-affect-the-balance-of-the-supreme-court.html>.

But the appointment process does not fully account for partisan sorting on the Court. After all, a significant number of justices appointed in past eras deviated from the expectations of the presidents who chose them, and these deviations sometimes appeared some time after a justice joined the Court. Republican appointment strategies in the current era are still driven by the disappointment and bitterness of conservatives about the unexpected course taken by several Republican appointees from the 1950s through the early 1990s.

As we see it, the effects of changes in presidential nomination strategies have been reinforced by changes in the justices' own perspectives. The development of more distinct conservative and liberal camps among social and political elites and the strengthening of the overlap between party and ideology have helped to bring about affective polarization. The people who become Supreme Court justices inevitably have been affected in their thinking by those trends: affective polarization has reached the Court.

Republican Appointees. In contrast with an earlier time, Republicans who have served on the Court since 2010 (with the partial but substantial exception of Justice Kennedy) have remained steadfast in their conservatism: Justices Scalia for thirty years, Justice Thomas for more than twenty-five years, Justice Alito and Chief Justice Roberts for more than ten years, and now Justice Gorsuch.

Table 3.2 presented data on change in the justices' Bailey scores for civil liberties voting between their first two terms and later periods. For both Scalia and Thomas, the scores became somewhat more conservative over time. Because the scores end in 2010, more limited information is available for Roberts and Alito. But neither Roberts nor Alito

showed much change between their first year on the Court (2005 for Roberts, 2006 for Alito) and 2010.

Table 4.2 shows the proportions of conservative votes in civil liberties cases for those four justices by two-term periods in the 2005-2016 Terms and, for comparison, voting by the most moderate liberal (Justice Breyer). Raw proportions of votes must be interpreted with caution, because the sets of cases decided in different terms are not comparable. (In contrast, the Bailey scores take changes in the mix of cases into account.) Still, the justices' voting patterns in relation to each other are instructive.

The table shows substantial declines in the proportions of conservative votes by the strongly conservative justices over this time period. In all likelihood, these declines result primarily from changes in the content of civil liberties cases.¹⁶⁷ The key fact is that the voting records of all four justices remained distinct even from Justice Breyer's record. For these justices, there was no sign of a Greenhouse effect (ideological drift to the left).¹⁶⁸

¹⁶⁷ See Brendan Nyhan, "Supreme Court: Liberal Drift v. Conservative Overreach," *New York Times*, June 25, 2015, <http://www.nytimes.com/2015/06/26/upshot/supreme-court-liberal-drift-v-conservative-overreach.html>; Kevin T. McGuire, George Vanberg, Charles E. Smith, Jr., and Gregory A. Caldeira, "Measuring Policy Content on the U.S. Supreme Court," *Journal of Politics* 71 (October 2009): 1305-1321; Richard Primus, "Senator Flake Isn't a Liberal, and Neither is Chief Justice Roberts," *Balkinization*, December 1, 2017, <https://balkin.blogspot.com/2017/12/senator-flake-isnt-liberal-and-neither.html>.

¹⁶⁸ As discussed in chapter 3, conservatives who were disappointed with the relative liberalism of some Republican appointees to the Court ascribed their movement to the left as the result of their desire to win favorable coverage by national news media, including the *New York Times*, for which Linda Greenhouse was the long-time Supreme Court reporter.

Table 4.2

**Proportions of Conservative Votes in Civil Liberties Cases,
Roberts Court, Selected Justices (Part I)¹⁶⁹**

Terms ¹⁷⁰	Justice				
	Scalia	Thomas	Roberts	Alito	Breyer
2005-06	76.0	80.0	76.4	79.6	37.3
2007-08	71.3	80.5	67.8	72.4	38.4
2009-10	55.8	65.1	57.0	69.0	43.0
2011-12	64.1	73.1	65.4	76.6	46.2
2013-14	60.0	70.0	52.9	64.3	31.9
2015-16	----	60.0	48.6	61.4	35.7

In recent terms Chief Justice Roberts' record has been less distinctly conservative than that of the Court's other strong conservatives. Indeed, he has attracted some criticism from conservatives, most visibly after his vote to uphold a key provision of the Affordable Care Act against a constitutional challenge in 2012.¹⁷¹ Ted Cruz referred to his support for Roberts's confirmation in 2005 as "a mistake," and Donald Trump attacked Roberts for writing an opinion catering to those inside the "beltway."¹⁷² On the whole, however, Roberts's record remains distinctly more conservative than those of the

¹⁶⁹ These percentages were calculated from data in the Supreme Court Database, archived at <http://sccb.wustl.edu/>. Cases were included if they were decided after oral argument. Civil liberties cases are those under issue areas 1-6 in the Database. Criteria for coding of votes as conservative or liberal are described in the documentation for the Database. Justice Alito participated in only 72 percent of the civil liberties cases in the 2005-06 Terms, so his proportion of conservative votes for those terms is not fully comparable with the proportions for the other Justices. Before his death in February 2016, Justice Scalia participated in only six civil liberties cases in the 2015 Term.

¹⁷⁰ Each entry refers to a pair of Terms. Thus, "2005-06," for instance, includes the 2005 and 2006 Terms of the Court.

¹⁷¹ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

¹⁷² *CNN Reagan Library Debate: Later Debate Full Transcript* (September 16, 2015), <http://cnnpressroom.blogs.cnn.com/2015/09/16/cnn-reagan-library-debate-later-debate-full-transcript>; Bob Egelko, "Trump, Rubio Weigh in on Supreme Court Ahead of Debate," *San Francisco Chronicle*, December 14, 2015.

the Court's liberals.¹⁷³ That conservatism is reflected in the voting records in Table 4.2.¹⁷⁴ Beyond changes in the Court's civil liberties agenda, his relatively moderate voting record in recent years is best explained by a more moderate set of conservative policy preferences and his strategic considerations as chief justice, although changes in the Court's agenda probably played a role as well.¹⁷⁵

To a degree, this difference between the voting behavior of these Republican appointees and several of their predecessors probably stems from their more deeply rooted conservatism. Those roots result in part from the development of a stronger and more distinct conservative sector among elite groups, especially the rise of the conservative legal movement. Equally telling, once these Justices joined the Court, the conservative movement could continue to serve as an important reference group for them. Unlike earlier periods (when elite social networks were dominated by liberals), conservative Justices on the Roberts Court had links with like-minded people and groups that would support and reinforce the Justices' conservative stances on issues that came before the Court.

In the case of Justice Thomas,¹⁷⁶ the elite conservative sector provided personal support during his early years on the Court, when he felt beleaguered by the criticism that he had received during the highly contentious debate over his confirmation as a Justice.

¹⁷³ Adam Liptak, "Chief Justice John Roberts Amasses a Conservative Record, and Wrath From the Right," *New York Times*, September 29, 2015, A16.

¹⁷⁴ Roberts' Martin-Quinn scores also highlight his relative conservatism as does a competing ideological ranking devised by Judge Richard Posner and William Landes.

¹⁷⁵ See Adam Liptak, "Angering Conservatives and Liberals, Chief Justice Roberts Defends Steady Restraint," *New York Times*, June 27, 2015, A13; Richard J. Lazarus, "Back to 'Business' at the Supreme Court: The 'Administrative Side' of Chief Justice Roberts," *Harvard Law Review Forum* 129 (2015), <http://harvardlawreview.org/2015/11/back-to-business-at-the-supreme-court-the-administrative-side-of-chief-justice-roberts>; Primus, "Senator Flake Isn't a Liberal, and Neither is Chief Justice Roberts."

¹⁷⁶ This paragraph draws from Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2006), 132-135.

In response, in the words of one reporter, Thomas “constructed a world apart from his critics.”¹⁷⁷ He appeared at law schools with relatively conservative orientations and focused his attention on news media with similar orientations.¹⁷⁸ He maintained, and continues to maintain, ties with conservative leaders and organizations such as the Federalist Society,¹⁷⁹ and he has acknowledged that conservatives in the legal community serve as an important reference group for him.¹⁸⁰

Thomas frequently appears at the Federalist Society annual meeting. It is noteworthy that when Thomas returned to Yale Law School in 2011, the two student groups with which he met were the Black Law Students Association and the law school’s chapter of the Federalist Society.¹⁸¹ During the 2016 Term, Thomas participated in two Federalist Society events and gave a lecture at the conservative Heritage Foundation, and those three events constituted half of the public appearances identified by one source.¹⁸² Although Thomas is generally reticent about media interviews, in 2016 he also engaged in a televised conversation with the editor of the conservative *Weekly Standard*.¹⁸³

These links are accompanied by an antipathy toward what Thomas perceives as a liberal establishment. That antipathy was reflected in a remark that one of Thomas’s law clerks reported early in his tenure about an anticipated retirement in 2034: “The liberals

¹⁷⁷ Marc Fisher, “The Private World of Justice Thomas,” *Washington Post*, September 11, 1995, B1.

¹⁷⁸ Lee Roderick, *Leading the Charge: Orrin Hatch and 20 Years of America* (Gold Leaf Press, 1994), 36970.

¹⁷⁹ Baum, *Judges and Their Audiences*, 133-134.

¹⁸⁰ Clarence Thomas, *Address Before the Federalist Society at the 1999 National Lawyers Convention* (November 12, 1999), <http://www.fed-soc.org/publications/detail/clarence-thomas-address-before-the-federalist-society-at-the-1999-national-lawyers-convention>.

¹⁸¹ Yale Law School, *Justice Clarence Thomas ’74 Visits the Law School; Meets with Student Groups, Teaches Class* (December 14, 2011), <https://www.law.yale.edu/yls-today/news/justice-clarence-thomas-74-visits-law-school-meets-student-groups-teaches-class>.

¹⁸² The source is “scotusmap,” <http://www.scotusmap.com/>, which compiles information on public appearances by the Justices.

¹⁸³ The conversation is at “Conversation with Bill Kristol,” <http://conversationswithbillkristol.org/video/clarence-thomas/>.

made my life miserable for 43 years, and I'm going to make their lives miserable for 43 years.”¹⁸⁴

As an original leader of the Federalist Society,¹⁸⁵ Justice Scalia already had deep roots in the conservative segment of the legal elite by the time he became a Justice. He maintained his ties with conservatives in that segment and others, making frequent appearances before groups with a conservative orientation. He was regularly honored by the Federalist Society¹⁸⁶ and participated frequently in the organization's events. In 2012, for instance, Scalia traveled to give speeches or lectures at five Federalist Society events.¹⁸⁷ In 2013 he traveled to Montana to speak at a lunch aimed at building support for creation of a state chapter of the Society,¹⁸⁸ and in 2014 he traveled to New York City to give a speech before a Federalist Society group.¹⁸⁹ Among his other appearances that year was a speech before a group of Hollywood conservatives called the “Friends of Abe.”¹⁹⁰ In 2011, he spoke to members of Congress about constitutional interpretation at an event organized by the Tea Party Caucus.¹⁹¹ After his death, Federalist Society

¹⁸⁴ Neil A. Lewis, “2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard,” *New York Times*, November 27, 1993, A7. See also Jeffrey Toobin, “The Burden of Clarence Thomas,” *New Yorker*, September 27, 1993, 39; Joan Biskupic, “Thomas is Bolder, Confident—Outside Court,” *USA Today*, January 31, 2001, 6A.

¹⁸⁵ Teles, *The Rise of the Conservative Legal Movement*, 141-42; Joan Biskupic, *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia* (New York: Sarah Crichton Books: 2009), 5.

¹⁸⁶ Joan Biskupic, *American Original*, 7.

¹⁸⁷ Antonin Scalia, *Financial Disclosure Report for Calendar Year 2012*, May 15, 2013, 3, http://pfds.opensecrets.org/N99999921_2012.pdf. The financial disclosure reports indicate reimbursed travel, so they do not include appearances in Washington, D.C.

¹⁸⁸ Laura Lundquist, “Supreme Court Justice is Draw for Conservative Luncheon,” *Bozeman Chronicle*, August 19, 2013, http://www.bozemandailychronicle.com/news/politics/%20article_4659375c-0957-11e3-8ea5-0019bb2963f4.html.

¹⁸⁹ Antonin Scalia, *Financial Disclosure Report for Calendar Year 2014*, May 15, 2015, 3, <http://www.documentcloud.org/documents/2157458-scalia-antonin-2014.html>.

¹⁹⁰ Antonin Scalia, *Financial Disclosure Report for Calendar Year 2014*, 3. On the Friends of Abe, see Amy Fagan, “Hollywood’s Conservative Underground,” *Washington Times*, July 23, 2008, A1.

¹⁹¹ Bill Mears, “Justice Scalia Set to Address Tea Party Caucus on Capitol Hill,” *Cable News Network*, January 21, 2011, <http://www.cnn.com/2011/POLITICS/01/21/scotus.scalia.tea.party>.

chapters throughout the country held tributes to Scalia and Justices Thomas and Alito eulogized him at the November 2016 annual convention.¹⁹²

As a court of appeals judge, Justice Alito was “particularly active at Federalist Society national meetings.”¹⁹³ He was strongly backed by conservative groups at the time of his appointment to the Supreme Court and has maintained his ties with conservative groups since his Supreme Court appointment. Those ties are reflected in his appearances, between 2010 and 2012, at three meetings of the Federalist Society outside Washington, D.C. and at the Manhattan Institute.¹⁹⁴ In 2008, Alito was the keynote speaker at the annual dinner for the conservative magazine the *American Spectator*, and his remarks included distinctly partisan content; he also appeared at the magazine’s annual dinner in 2010.¹⁹⁵ At a 2012 Federalist Society dinner, Alito took aim both at the Obama administration and critics of the *Citizens United* campaign finance decision, claiming that critics of the decision were misleading and that the Obama Department of Justice was advancing a vision of society in which the “federal government towers over the people.”¹⁹⁶ In 2014, Alito was again the featured speaker at the Federalist Society’s annual dinner. Shortly after that Federalist Society appearance, Linda Greenhouse wrote

¹⁹² “Clarence Thomas: Honor Scalia by Reining in Government,” *Chicago Tribune*, November 17, 2016.

¹⁹³ Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, 49.

¹⁹⁴ Samuel A. Alito, *Financial Disclosure Report for Calendar Year 2010*, May 12, 2010, 3, http://pfds.opensecrets.org/N99999926_2010.pdf; Samuel A. Alito, *Financial Disclosure Report for Calendar Year 2011*, August 13, 2012, 2-3 http://pfds.opensecrets.org/N99999926_2011.pdf. The Manhattan Institute for Public Policy describes its mission and activities at <https://www.manhattan-institute.org/about>.

¹⁹⁵ Jeff Shesol, “Should Justices Keep Their Opinions to Themselves?,” *New York Times*, June 28, 2011, A23. The 2010 appearance featured a confrontation with a liberal blogger who challenged Alito’s involvement in a fundraising dinner. Debra Cassens Weiss, “Blogger Loudly Questions Alito’s Dinner Attendance, Tapesirate Security Guard,” *American Bar Association Journal*, November 11, 2010, http://www.abajournal.com/news/article/blogger_loudly_questions_alitos_dinner_attendance_tapesirate_security_guar.

¹⁹⁶ See Mark Sherman, “Supreme Court Justice Samuel Alito Takes on Critics, Defends Citizens United,” *Christian Science Monitor*, November 17, 2012, <https://www.csmonitor.com/USA/Latest-News-Wires/2012/1117/Supreme-Court-Justice-Samuel-Alito-takes-on-critics-defends-Citizens-United>.

that Alito has a “base” in the conservative movement.¹⁹⁷ During the Court’s 2016 term, Alito spoke at two events of the Federalist Society as well as an event of the conservative Claremont Institute.¹⁹⁸ In the Claremont speech Alito argued for what one commentator called not just a conservative judicial agenda but “the larger conservative political agenda.”¹⁹⁹

Justice Neil Gorsuch likewise has strong ties to the Federalist Society and other conservative interests. His mother, Ann Burford, was the head of Ronald Reagan’s Environmental Protection Agency; Gorsuch identified strongly with his mother, who was subject to fierce criticism by left-leaning environmental interest groups and Democratic lawmakers.²⁰⁰ In 2005, he criticized—for the conservative *National Review*—the “left’s...dependence on constitutional litigation,” claiming it risked “political atrophy” and prompted dangerous backlash.²⁰¹ Gorsuch has long had “close ties to the Federalist network”; he delivered the 2013 Barbara Olson lecture at the Federalist Society annual meeting and has spoken at numerous Federalist Society events.²⁰²

After joining the Court, Gorsuch continued to speak to conservative groups.²⁰³ In September 2017, he was criticized for giving the keynote speech for the conservative

¹⁹⁷ Linda Greenhouse, “It’s All Right With Sam,” *New York Times*, January 7, 2015, <http://www.nytimes.com/2015/01/08/opinion/its-all-right-with-samuel-alito.html?rref=collection%2Fcolumn%2Flinda>.

¹⁹⁸ These events are reported in the compilation of the Justices’ appearances at scotusmap, <http://www.scotusmap.com/>.

¹⁹⁹ Calvin TerBeek, “Is Justice Alito a Crit (or Just a Movement Conservative?)”, *The Faculty Lounge*, May 4, 2017, <http://www.thefacultylounge.org/2017/05/is-justice-alito-a-crit.html>.

²⁰⁰ Adam Liptak et al., “For Court Pick, Painful Lesson from Boyhood,” *New York Times*, February 5, 2017, A1.

²⁰¹ Neil Gorsuch, “Liberals & Lawsuits,” *National Review*, February 7, 2005.

²⁰² Toobin, “Full-Court Press,” 28.

²⁰³ A few months after his appointment, Gorsuch also traveled with Senate Majority Leader Mitch McConnell of Kentucky for appearances at the McConnell Center at the University of Louisville and University of Kentucky. McConnell had been instrumental in preventing Senate consideration of President Obama’s Supreme Court nominee Merrick Garland and thus leaving the vacancy that Gorsuch filled. Gorsuch received some criticism for making the trip with McConnell. Charles Pierce, “So, What’s Neil

Fund for American Studies at the Trump International Hotel in Washington D.C.²⁰⁴ In November of that year he gave a featured speech at the annual meeting of the Federalist Society in which he underlined his identification with the Society; before the speech, he embraced Leonard Leo, the Society's executive vice-president who played a key role in Gorsuch's nomination to the Court.²⁰⁵ And while Gorsuch is new to the Court (so we cannot compare his early to later voting record), his early opinions strongly signal that he is a committed conservative. Linda Greenhouse of the *New York Times* dubbed him "Trump's Life-Tenured Judicial Avatar," and commentary from supporters and detractors emphasized his conservative voting record.²⁰⁶

Chief Justice Roberts's ties to the conservative movement have not been as visible as those of Alito, Scalia, and Thomas since he joined the federal judiciary, but Roberts participated in the 25th anniversary celebration of the Federalist Society in 2007.²⁰⁷ He also presented a featured lecture at the Society's annual meeting that year, as Justice Scalia had done two years earlier.²⁰⁸

The linkages between conservative justices and the conservative legal movement are symbolized by an off-hand comment by Theodore Olson, a leading advocate before the Supreme Court who supports the Barbara Olson lectures at the Federalist Society in

Gorsuch Up to These Days?", *Esquire*, September 25, 2017, <http://www.esquire.com/news-politics/politics/a12465124/neil-gorsuch-mitch-mcconnell/>.

²⁰⁴ Adam Liptak, "Neil Gorsuch Speech at Trump Hotel Raises Ethical Questions," *New York Times*, August 17, 2017.

²⁰⁵ Josh Gerstein, "Gorsuch Takes Victory Lap at Federalist Dinner," *Politico*, November 16, 2017, <https://www.politico.com/story/2017/11/16/neil-gorsuch-federalist-society-speech-scotus-246538>.

²⁰⁶ Linda Greenhouse, "Trump's Life-Tenured Judicial Avatar," *New York Times*, July 6, 2017, <https://www.nytimes.com/2017/07/06/opinion/gorsuch-trump-supreme-court.html>; Adam Liptak, "Confident and Assertive, A New Justice in a Hurry," *New York Times*, July 4, 2017, A13; Prakash and Yoo, "Gorsuch Makes a Mark on the Court."

²⁰⁷ Robert Barnes, "Federalists Relish Well-Placed Friends: President, Several Justices Help Celebrate Legal Society's 25 Years of Conservatism," *Washington Post*, November 16, 2007, A3.

²⁰⁸ *7th Annual Barbara K. Olson Memorial Lecture* (2007), <http://www.fed-soc.org/multimedia/detail/7th-annual-barbara-k-olson-memorial-lecture-event-audiovideo>.

honor of his late wife. “The lecture is always at the Mayflower [hotel], but we often have a dinner afterward...and usually a couple of the Justices come, and it’s a good time.”²⁰⁹

One other measure of the allegiance of today’s Republican Justices to the conservative legal network is the tendency for Justices to choose law clerks who share their ideological tendencies.²¹⁰ Before party polarization took hold, Justices took ideology into account only to a limited degree; most law clerks, reflecting the dominant ideology of elites, were left-leaning, even if their Justice was not.²¹¹ That is no longer true today. Conservative Justices in particular give greater weight to the ideological positions of prospective clerks.²¹² By one measure of law clerks’ positions, Chief Justice Roberts and Justices Scalia, Kennedy, Alito, and Thomas, along with Chief Justice Rehnquist, have had the most conservative sets of clerks of all justices who have served on the Court since 1960.²¹³

Similarly, justices have become increasingly prone to choose clerks who have served like-minded judges in the lower courts (primarily the federal courts of appeals). Again, this is especially true of conservative justices.²¹⁴ Table 4.3 shows the Justices’

²⁰⁹ Toobin, “Full-Court Press,” 28.

²¹⁰ Artemus Ward and David L. Weiden, *Sorcerers’ Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press 2006).

²¹¹ Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Stanford, CA: Stanford University Press, 2006), 34-37.

²¹² Amy Bach, “Movin’ on Up with the Federalist Society: How the Right Rears Its Young Lawyers,” *Nation*, September 13, 2001.

²¹³ Adam Bonica, Adam S. Chilton, Jacob Goldin, Kyle Rozema, and Maya Sen, “Measuring Judicial Ideology Using Law Clerk Hiring,” *American Law and Economics Review* 19 (April 2017): 156. By another calculation with the same measure, the sets of clerks hired by those five Justices were among the seven most conservative sets (p. 143).

²¹⁴ Corey Ditslear and Lawrence Baum, “Selection of Law Clerks and Polarization in the U.S. Supreme Court,” *Journal of Politics* 63 (August 2001): 869-885; Lawrence Baum, “Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices,” *Marquette Law Review* 98 (Fall 2014): 333-360; Adam Liptak, “A Sign of Court’s Polarization: Choice of Clerks,” *New York Times*, September 7, 2010, A1; Geoffrey R. Stone, “The Difference Between Conservative and Liberal Justices,” *Huffington Post*, November 2, 2013, http://www.huffingtonpost.com/geoffrey-r-stone/the-difference-between-co_b_4205674.html.

selection practices for the 2005-2017 Terms, the first thirteen terms of the Roberts Court. The differences between conservative and liberal Justices shown in the table are far greater than those that existed in the late 1970s and early 1980s—when the highest percentage of clerks drawn from Democratic-appointed judges was around 70 percent (for Justices Marshall and Brennan) and the lowest percentage was around 40 percent (Rehnquist).²¹⁵

Table 4.3

**Proportions of Justices' Clerks Who Had Served with
a Democratic-Appointed Lower Court
Judge, 2005-2017 Terms²¹⁶**

Justice	Percentage
Ginsburg	76.6
Souter	75.0
Kagan	67.9
Sotomayor	62.5
Stevens	60.0
Breyer	59.6
Kennedy	20.8
Roberts	19.1
Alito	5.6
Scalia	2.3
Thomas	2.1

²¹⁵ Ditslear and Baum, "Selection of Law Clerks and Polarization in the U.S. Supreme Court."

²¹⁶ These percentages were calculated from the information sheets compiled by the Court each Term, *Law Clerks—October Term [various years]: Law Schools and Prior Clerkships*, and from reports in the *Above the Law* blog, abovethelaw.com. Clerks who served only in state courts and those who served in a court of appeals with the hiring justice are excluded. For clerks who served multiple lower-court judges, the most recent clerkship is counted.

Justice Gorsuch is not included in the table because all eight of his clerks in the 2016 and 2017 terms had served with him in the Tenth Circuit. Of those eight clerks, one also served with the conservative Fifth Circuit judge Edith Jones, three with Justice Scalia, one with Justice Alito, and one with Justice Sotomayor. David Lat, "Supreme Court Clerk Hiring Watch: Meet Justice Neil Gorsuch's Clerks," *Above the Law*, April 7, 2017, <http://abovethelaw.com/2017/04/supreme-court-clerk-hiring-watch-meet-justice-neil-gorsuchs-clerks/>.

The relationship between Justice and law clerk has changed in other ways. Today's clerks are likely to wear the party and ideological affiliations of their Justice on their sleeves. Clerks who served Republican and Democratic justices are more likely today than ever before to feed into social and career networks dominated by either liberal Democrat or conservative Republican interests. Clarence Thomas's law clerks, for example, played an unusually visible role in the early Trump administration—several were nominated to federal courts of appeal and many more assumed high profile positions throughout the government.²¹⁷

Democratic Appointees. The increasing ideological distance between Democrats and Republicans on the Court is largely a story of changes that have occurred in the Republican Party. Not only are there no liberal Republicans on the Court, but today's Republican Justices are more conservative than previous Republican nominees. For their part, Democrats are more homogeneous than they were in the recent past, but as a group they are not more liberal. Unlike previous Democratic appointees (some of whom were very liberal and others who were either moderate or conservative), all of today's Democrats are somewhat but not extremely liberal.

The changing profile of Democratic nominees is tied to broader changes in the Democratic Party. Before the mid-1960s, the Democratic Party was long an uneasy alliance between Northern liberals and Southerners who were considerably more conservative.²¹⁸ The ideologically mixed character of the Democrats at that time is reflected in Democratic presidents' Supreme Court appointments. In a later era, people

²¹⁷ Dahlia Lithwick and Mark Joseph Stern, "The Clarence Thomas Takeover," *Slate*, August 2, 2017.

²¹⁸ See Richard H. Pildes, "Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America," *California Law Review* 99 (April 2011), 290.

who held views like those of Stanley Reed, Fred Vinson, Sherman Minton and Tom Clark likely would have been Republicans rather than Democrats; perhaps the same is also true of Byron White. Nor was there anything like a liberal legal establishment in that era. The leaders of the American Bar Association, for instance, were a relatively conservative group until the 1960s.²¹⁹

Following the social changes of the 1960s, a liberal legal establishment developed. The American Civil Liberties Union and the NAACP Legal Defense and Education Fund were joined by a set of new liberal public interest law firms. Legal academia and the American Bar Association took on a more liberal cast. Because there was no competing conservative legal network at that time, the liberalism of the elite world around the Justices certainly reinforced the pre-existing liberalism of Democratic judicial appointees; moreover, as we discussed in chapter three, the ideological drift of some Republican appointees from the 1950s to 1990s is linked to this then-dominant liberal elite social network.

Starting around 2000, conservative legal organizations' success in shaping law and policy has made liberals more self-conscious about the functions of elite networks. In particular, liberal lawyers and law professors perceived a need for an organization that would serve as a counterweight to the Federalist Society.²²⁰ The American Constitution Society (ACS), founded in 2001, is largely parallel to the Federalist Society in its activities and goals.²²¹ At the same time, no one group dominates the liberal legal network.

²¹⁹ Teles, *The Rise of the Conservative Legal Movement*, 28-29.

²²⁰ Crystal Nix Hines, "Young Liberal Law Group Is Expanding," *New York Times*, June 1, 2001, A17.

²²¹ Alexander Wohl, "Liberalizing the Law," *Nation*, June 16, 2003, 6; Carol D. Leonnig, "Dancing? It's Good for the Constitution: Janet Reno and Friends Try an Unconservative Approach," *Washington Post*,

Nonetheless, Democratic Justices undoubtedly see themselves as members of a different team than their Republican counterparts. The ACS accentuates and facilitates this divide. Justices Breyer, Ginsburg, and Sotomayor have all been keynote speakers at the ACS national convention, and Breyer was a featured speaker at the 2017 convention.²²² Perhaps more telling is Elena Kagan’s greeting to a national student convention of the Federalist Society when she was dean of the law school at Harvard in 2005: After telling the audience that “I love the Federalist Society,” she added, “You are *not* my people.”²²³ Indeed, a 2016 study of the Justices’ public appearances found “no record of a sitting liberal Supreme Court justice addressing the Federalist Society annual meeting.”²²⁴ Correspondingly, three of the four Democratic Justices (all but Breyer) have a clear inclination to choose law clerks who have served with judges from their party.²²⁵ To a degree, then, the Court’s Democrats have joined their Republican colleagues in building ideologically compatible teams in their chambers.

As Table 4.2 did for the current Court’s conservative Republicans, Table 4.4 provides some perspective on the ideological positions of the current Court’s Democratic

August 4, 2003, C1; Tresa Baldas, “Law School Turf War Ignites,” *National Law Journal*, April 26, 2004, 1, 12.

²²² The most recent keynote speakers were Ginsburg in 2015 and Sotomayor in 2014. See Adam Liptak, “Justices Get Out More, but Calendars Aren’t Open to Just Anyone,” *New York Times*, June 1, 2015, <http://www.nytimes.com/2015/06/02/us/politics/Justices-get-out-more-but-calendars-arent-open-to-just-anyone.html>. Breyer’s 2017 speech was noted by the Society at <https://www.acslaw.org/convention/2017>. Breyer was also keynote speaker at the banquet of the ACS national conference in 2004, see *Justice Stephen Breyer at the 2004 Annual Convention*, <http://www.acslaw.org/news/video/justice-stephen-breyer-at-the-2004-annual-convention>, and Ginsburg spoke at the first national conference in 2003, “because the Society’s mission is important to the health and welfare of our Nation,” see Ruth Bader Ginsburg, *Remarks for the American Constitution Society: Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, August 2, 2003, 1, <http://americanconstitutionsociety.org/pdf/Ginsburg%20transcript%20final.pdf>. Breyer spoke at the 2017 convention of the Society, <https://www.law.gwu.edu/associate-dean-morrison-conversation-justice-breyer>.

²²³ Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law*, 90.

²²⁴ Richard L. Hasen, “Celebrity Justice: Supreme Court Edition,” *The Green Bag*, 2d series, 19 (2016): 170-171. The study also found no record of a sitting conservative Justice speaking to the ACS annual meeting.

²²⁵ See Table 4.3.

appointees. In their civil liberties votes, all Democrats have been distinctly to the left of the most liberal Republican, Anthony Kennedy. Of course, the gap between them and the four more strongly conservative Republicans (represented in Table 4.4 by Justice Alito) is even more substantial. Although the proportions of conservative votes cast by liberal justices fluctuate over time (especially for Justice Breyer), on the whole they have remained fairly stable--in contrast with the overall decline among conservatives during the same period. Here too, changes in the Court's civil liberties agenda likely account for the temporal pattern shown in the table.

And as was true with today's Republican Justices, the convictions of Democratic Justices are undoubtedly strengthened by the liberal elite networks that they were a part of before and after joining the Court. These networks still dominate the legal academy numerically and have clear majority status in the legal profession.²²⁶ Journalists as a group continue to lean to the left,²²⁷ and that appears to be true of those journalists who cover the Supreme Court. The development of a more self-consciously liberal segment of the elite, reflected in the emergence of the American Constitution Society, provides additional reinforcement for liberal justices.

²²⁶ See John O. McGinnis, Matthew A. Schwartz, and Benjamin Tisdell, "The Patterns and Implications of Political Contributions by Elite Law School Faculty," *Georgetown Law Journal* 93 (April 2005): 1167-1212; Adam Bonica, Adam S. Chilton, Kyle Rozema, and Maya Sen, "The Legal Academy's Ideological Uniformity," 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953087; Adam Bonica, Adam S. Chilton, and Maya Sen, "The Political Ideologies of American Lawyers," *Journal of Legal Analysis* 8 (Winter 2016): 277-316.

²²⁷ Lars Willnat and David H. Weaver, *The American Journalist in the Digital Age: Key Findings* (Bloomington: School of Journalism, Indiana University, 2014), 9.

Table 4.4

**Proportions of Conservative Votes in Civil Liberties Cases,
Roberts Court, Selected Justices (Part II)²²⁸**

Terms ²²⁹	Justice					
	Ginsburg	Breyer	Sotomayor	Kagan	Kennedy	Alito
2005-06	36.0	37.3	----	----	65.3	79.6
2007-08	29.9	38.4	----	----	59.8	72.4
2009-10	39.5	43.0	36.5	37.9	53.5	69.0
2011-12	30.8	46.2	32.5	31.5	53.2	76.6
2013-14	32.9	31.9	29.0	34.8	51.4	64.3
2015-16	35.7	35.7	29.0	31.3	41.4	61.4

The Limits of Partisanship

Throughout this chapter, we have called attention to the split between Democratic and Republican Justices on the modern Supreme Court and identified the various causes of this divide. While the partisan divide is very real and very consequential, it is also important to highlight that the Supreme Court is still a court and that today's partisanship is limited by numerous factors. In chapter two, we noted that Supreme Court Justices were attentive to norms of collegiality and law-oriented decision making. These norms and the corresponding interest of the Justices in their reputations and legacies cut against out-and-out partisanship on the Supreme Court.

The difference between the legislative and judicial branches in this respect is highlighted by the findings of Thomas Keck's study of abortion, affirmative action, gun rights and same sex marriage, discussed earlier in the chapter. Republican and Democratic appointees on the Supreme Court and the federal courts of appeals differ

²²⁸ The procedures for Table 4.2 were followed in the creation of this table. Justice Kagan participated in ~~only about one-third of the civil liberties~~ cases that the Court decided in the 2009-2010 Terms.

²²⁹ Each entry refers to a pair of Terms. Thus, "2005-06," for instance, includes the 2005 and 2006 Terms of the Court.

considerably in their aggregate voting behavior on those issues, but those differences are considerably more limited than the corresponding party differences in Congress. That contrast between Congress and the courts reflect differing incentives and perspectives in the two branches.²³⁰

On the Supreme Court, these differences are highlighted by the justices' responses to the 2016 death of Justice Antonin Scalia and the events that followed. In the months after Scalia's death, Senate Democrats and Republicans were engaged in brutal partisan fights regarding the refusal to consider Merrick Garland and the repudiation of the filibuster. During that period the Justices sought to send two related messages: first, that they disapproved of the politicization of the Supreme Court by the political branches and second, that they were a collegial court. Unlike Democratic Senators (who cried foul at the Republicans' successful campaign to save the Scalia seat for a Republican appointee), Democratic Justices embraced the Court as a collegial institution that operated above the political fray. Justice Sonia Sotomayor (who had earlier complained that "the world around us has politicized what we've done") bemoaned people losing confidence in judges and spoke of the Justices' efforts to "reach consensus more."²³¹ Justice Elena Kagan likewise critiqued the perception of judicial politicization and spoke of the Justices "working very hard to reach consensus and to find ways to agree that might not have been very obvious."²³² Justice Stephen Breyer insisted that justices are not "junior-varsity politicians" and said that he was confident that an eight-member Court would not

²³⁰ Keck, *Judicial Politics in Polarized Times*, 147-162.

²³¹ Tony Mauro, "Sotomayor: Don't Blame the Justices for Politicization of Supreme Court," *Legal Times*, April 10, 2015; Ryan Lovelace, "Sonia Sotomayor Saddened by Perception of Judges as Political," *Washington Examiner*, March 10, 2017.

²³² Catherine Lutz, "Justice Elena Kagan Talks Power on the Supreme Court," *Aspen Institute*, July 18, 2017.

deadlock if there was a dispute regarding the 2016 presidential elections.²³³ Even Justice Ruth Bader Ginsburg (who called Trump a “faker” before the 2016 elections) praised Court nominee Neil Gorsuch as “easy to get along with” and called for the Senate to end the gridlock that was delaying confirmation of a ninth Justice.²³⁴

More significant, the Justices acted as a collegial Court during the two terms that they largely operated as an eight-member Court. In its 2015 term, decisions issued after Scalia’s death were “modest and ephemeral” as the Justices were “especially concerned” about reaching consensus.²³⁵ In its 2016 term, the average share of votes in support of the majority opinion was 89 percent (the highest in at least 70 years), 57 percent of decisions were unanimous, and only 14 percent of decisions were decided by a bare five-member majority.²³⁶ And while this consensus stemmed in part from the Court’s steering clear of salient issues likely to divide the Justices, it nonetheless reflects the desires of the Justices to present themselves as a collegial Court—even if it meant issuing “exceedingly narrow decisions to avoid deadlocks.”²³⁷

The 2015 and 2016 terms are striking but do not stand alone in the era of a Court that is divided along party lines. In its 2013 term, by one count, 62 percent of the Court’s decisions were by unanimous votes (the highest percentage since 1940).²³⁸ The average

²³³ Lincoln Caplan, “A Workable Democracy,” *Harvard Magazine*, March-April 2017; Ellen Powell, “Does the Supreme Court Need a Ninth Justice? Not by November, says Breyer,” *Christian Science Monitor*, October 25, 2016.

²³⁴ Joan Biskupic, “Justice Ruth Bader Ginsburg Calls Trump a ‘Faker,’ He Says She Should Resign,” *Cable News Network*, July 13, 2016; Max Greenwood, “Ginsburg: Trump Supreme Court Nominee Neil Gorsuch is ‘Very Easy to Get Along With,’” *The Hill*, February 23, 2017.

²³⁵ Adam Liptak, “A Supreme Court Not So Much Deadlocked as Diminished,” *New York Times*, May 18, 2016, A1.

²³⁶ Adam Liptak, “A Cautious Supreme Court Sets a Modern Record for Consensus,” *New York Times*, June 27, 2017, A16.

²³⁷ Liptak, “A Cautious Supreme Court Sets a Modern Record for Consensus.”

²³⁸ Cass R. Sunstein, “Unanimity and Disagreement on the Supreme Court,” *Cornell Law Review* 100 (2015), 783-784.

difference in size between the Court’s majority and dissenting coalitions between 2000 and 2016 was relatively constant—suggesting that today’s partisan divide did not result in pervasive party line voting.²³⁹ Indeed, as Table 4.5 shows, the average rate of voting agreement by term between Republican appointees and Democratic appointees in the 2010-2016 terms was 71 percent despite the substantial ideological distance between the Court’s Democrats and at least four of its five Republicans.²⁴⁰ In other words, notwithstanding the fact that the Court’s Republicans and Democrats now constitute distinct ideological groups, today’s partisan divide on the Court looks very different from the partisan divide in Congress.

²³⁹ Adam Feldman, “Crunching Data From this Past Term,” *Empirical SCOTUS*, August 20, 2017.

²⁴⁰ The comparable proportion for agreement between pairs of Democrats was 89 percent, for pairs of Republicans 84 percent. These proportions are the means of the term-level rates of agreement between all pairs of Justices within the three categories. Justice Scalia was excluded for the 2015 term and Justice Gorsuch for the 2016 term because of their limited participation in those terms. These figures were calculated from data in “Stat Pack Archive,” SCOTUSblog, <http://www.scotusblog.com/reference/stat-pack/>.

Table 4.5

**Percentages of Cases in Which Pairs of Justices Supported the Same Outcome,
2010-2016 Terms²⁴¹**

	Tho	Ali	Sca	Rob	Ken	Bre	Kag	Gin
Thomas								
Alito	87.3							
Scalia	87.7	84.1						
Roberts	82.3	88.2	87.1					
Kennedy	76.7	81.7	78.3	85.4				
Breyer	66.8	70.5	65.6	77.0	81.3			
Kagan	66.5	69.5	71.2	75.1	82.5	89.9		
Ginsburg	62.5	64.5	65.7	70.3	76.0	87.1	90.7	
Sotomayor	64.1	66.5	65.7	73.0	78.6	86.2	88.5	89.2

Mean rates of agreement:

between Democratic Justices	88.6%
between Republican Justices	83.9%
between Democrats and Republicans	71.5%

Chief Justice Roberts, in particular, has played an important role in the Court's efforts to achieve consensus. In 2006, he declared that he would "make it his priority to discourage his colleagues from issuing separate opinions."²⁴² In his view, unanimous or nearly unanimous opinions "contribute to the stability of the law...[whereas] 5-4 decisions make it harder for the public to respect the Court as an impartial institution that transcends partisan politics."²⁴³ And while the Chief Justice sided with his Republican colleagues in several high salience cases that divided the Court, his efforts contributed to

²⁴¹ The percentages were calculated from data in the "Justice Agreement--All Cases" tables in [SCOTUSblog, Stat Pack for each term](http://www.scotusblog.com/statistics/), archived at <http://www.scotusblog.com/statistics/>.

²⁴² Jeffrey Rosen, "Roberts's Rules," *The Atlantic*, January-February 2007, 104-113.

²⁴³ Rosen, "Roberts's Rules."

the Court's practice of issuing more unanimous opinions overall than past Courts.²⁴⁴

Roberts also appears to have placed institutional concerns ahead of ideology when he broke ranks with his Republican colleagues and cast the deciding vote upholding a key provision of the Affordable Care Act.²⁴⁵ Roberts, finally, has also spoken about the need for the Court to appear above politics. In an April 2017 speech, he pointed to the “real danger that the partisan hostility that people see in the political branches will affect the nonpartisan activity of the judicial branch. It is very difficult, I think, for a member of the public to look at what goes on in confirmation hearings these days...and not think that the person who comes out of that process must similarly share that partisan view of public issues and public life.”²⁴⁶

None of this is surprising. In addition to norms of collegiality and judicial independence, the Justices care greatly about their personal reputations. As discussed in chapter two, Supreme Court Justices trade off income and personal freedom for status and power. This seems particularly true of today's Supreme Court. Today's Justices are particularly likely to write books, give public speeches, and otherwise cultivate their reputations. Indeed, a study on publicly reported interviews and appearances from 1960-2014 reveals an eight-fold increase since the 1970s; more striking, all nine of the Justices

²⁴⁴ In its 2013, 2015, and 2016 terms, the Court issued a high percentage of unanimous opinions; in its 2005-2012 terms, the Roberts Court issued similar numbers of unanimous opinions than past Courts. See Sunstein, “Unanimity and Disagreement on the Supreme Court.”

²⁴⁵ See Richard Wolf, “From Chief Justice Roberts, A Liberal Dose of Independence,” *USA Today*, May 6, 2015.

²⁴⁶ Debra Cassens Weiss, “Chief Justice Says Partisan Confirmation Battles Create ‘Real Danger’ for Supreme Court,” *ABA Journal*, April 12, 2017, http://www.abajournal.com/news/article/chief_justice_says_partisan_confirmation_battles_create_real_danger_for_sup.

on the 2010-2014 Roberts Court were ranked in the top 10 on a “celebrity index” (a measure of average number of speeches and public appearances per year).²⁴⁷

Reputational concerns help to explain the willingness of Justices on the Roberts Court to speak or vote against their perceived ideological interests. In particular, today’s Justices are not simply part of conservative or liberal elite social networks. Those networks are critically important and are largely responsible for the partisan divide on today’s Supreme Court. But the Justices are also part of a community of Supreme Court advocates, law clerks, and academics who write about the Court.

This network of Court insiders places great stock in the Court’s institutional reputation as a court of law, not a court of partisans. For example, the status of Supreme Court practitioners and former Supreme Court law clerks is tied to their reputation for excellence, and that reputation is furthered when the Court acts as a court of law and not another political institution. This network, moreover, is more powerful today than ever before. In particular, Supreme Court practice is now dominated by an elite Supreme Court bar made up of former Supreme Court law clerks and alumni of the Office of Solicitor General.²⁴⁸ A 2014 study found that 66 lawyers and 31 law firms “were involved in 43 percent of cases the high court agreed to hear.”²⁴⁹ For its part, the Office

²⁴⁷ Hasen, “Celebrity Justice: Supreme Court Edition,” 159-167. As Hasen notes (pp. 167-168), it is likely that a higher proportion of all public appearances are reported and thus available for counting in the current era than in past eras. One close study of the Warren Court found about 40 percent more appearances in the 1960s than Hasen did. (This figure was calculated from listings of appearances in Robert A. (Sid) Whitaker, “Freedom of a Speech: The Speeches of the Warren Court Justices and the Legitimacy of the Supreme Court,” Ph.D. dissertation, State University of New York at Albany (2016), 311-353.) Even so, it appears that the number of appearances is considerably higher than it was in the 1960s and other periods prior to the current era. On recent justices as celebrities, see also Richard A. Posner, “The Supreme Court and Celebrity Culture,” *Chicago-Kent Law Review* 88 (2013): 299-305.

²⁴⁸ Richard J. Lazarus, “Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar,” *Georgetown Law Journal* 96 (June 2008): 1487-1564; Allison Orr Larsen and Neal Devins, “The Amicus Machine,” *Virginia Law Review* 102 (December 2016): 1901-1968.

²⁴⁹ Joan Biskupic, Janet Roberts, and John Shiffman, “The Echo Chamber,” *Reuters*, December 8, 2014.

of Solicitor General (largely made up of former Supreme Court clerks) participates in oral argument in around three-quarters of all cases.²⁵⁰ The Justices embrace this network and reinforce it, heralding its benefits in interviews and appointing former law clerks to serve as *amicus curiae* before the Court.²⁵¹

Against this backdrop, it is easy to understand why today's Justices want to present themselves as not simply partisans. And while the partisan divide is real and the affinity of Justices to ideological organizations that share their views is likewise real, it is also the case that today's Justices seek outlets to demonstrate their interest in the Court's institutional reputation. Unanimous or near unanimous opinions are the principal way that the Justices show they are a collegial body. Critical votes and speeches against perceived interests are another way. Chief Justice Roberts's vote on the individual mandate in the Affordable Care Act, for example, bolstered his own personal reputation from charges of partisan manipulation even while it greatly displeased some conservatives.²⁵² Likewise, reputational concerns may help explain the willingness of all four Democratic Justices to fight back against claims that the Supreme Court has become a partisan institution—especially in the face of the Republican Senate's failure to act on the Merrick Garland nomination.

²⁵⁰ Margaret Meriwether Cordray and Richard Cordray, "The Solicitor General's Changing Role in Supreme Court Litigation," *Boston College Law Review* 51 (November 2010): 1356.

²⁵¹ Biskupic et al., "The Echo Chamber;" Katherine Shaw, "Friends of the Court: Evaluating the Supreme Court's Amicus Invitations," *Cornell Law Review* 101 (September 2016): 1533-1595.

²⁵² See Tonja Jacobi, "Obamacare as a Window on Judicial Strategy," *Tennessee Law Review* 80 (Summer 2013): 763-845.

Conclusion

Elite polarization explains the partisan division on the modern Supreme Court. The pool of Democratic nominees is liberal; the pool of Republican nominees conservative. Moreover, ideology—especially for Republicans—has become more salient in the selection of Justices. Correspondingly, prospective Justices are groomed in elite social networks that both make them more ideological and more likely to stand firm in their ideological convictions. In particular, unlike the center-left drift of several earlier Republican nominees, today's Republican nominees have proved to be committed conservatives. The conservative legal network, especially the Federalist Society, has played a key role here—reinforcing conservative principles both before and after a nominee is selected. Democrats too are part of an elite liberal legal network. These networks have existed since the 1960s, networks that were so influential in pulling earlier Republican nominees to center-left positions. Because of the growth in affective polarization since that time, the liberal network has become even more salient to justices who are part of it.

This chapter has highlighted this partisan divide and its causes. It has also called attention to basic differences between the Supreme Court and other political actors. The Justices care greatly about their reputations among the institutional elites who are part of the Supreme Court social network; consequently, the partisan divide is tempered by the Justices' continuing adherence to norms of collegiality and judicial independence. And while the Justices will not vote regularly in ways that conflict with their sincere

preferences, they are nonetheless engaged in a juggling act between ideological and institutional elites.