TEXAS UNDERGRADUATE LAW REVIEW

AT THE UNIVERSITY OF TEXAS AT AUSTIN

VOLUME VII

ISSUE I

FALL 2018

Texas Undergraduate Law Review Journal at the University of Texas at Austin

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Special Thanks

The Texas Undergraduate Law Review thanks the University of Texas at Austin's Student Government and Senate of the College Councils for funding the publication of this journal.

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TEXAS UNDERGRADUATE LAW REVIEW
AT THE UNIVERSITY OF TEXAS AT AUSTIN
Volume VII, Issue I. Fall 2018

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Introduction

Environmental law in China is a complex system that is confined by the limits of the Chinese governmental structure. Unlike most legal systems in democratic nations, China's courts are severely restricted in scope and power. This can be highlighted in two ways. First, courts are fully subordinate to the Chinese Communist Party (CCP) and interpret cases based solely on existing legislation, not precedent. Second, courts are merely one aspect of the difficulties China faces in regard to enforcement of environmental law. Lawyers, courts, citizens, and both local and central government officials deal with a set of diverse political priorities and demands, which often require compromise on environmental issues. In particular, many scholars have focused on the issue of central-local relations in order to explain implementation challenges. This paper will provide an overview of the primary challenges facing Chinese environmental law in terms of central-local relations and briefly evaluate some possible developments following the major restructuring of environmental agencies in March 2018.

Background

Since the beginning of the national reforms in 1989 (known as *gai ge kai fang*), the Chinese government's top priority has been to generate as much economic wealth as possible. As a result of prioritizing economic development, China has seen remarkable

Gross Domestic Product (GDP) growth and improvements in quality of life for a majority of its citizens. Unfortunately, lax environmental regulation and inadequate enforcement of existing regulation has allowed many companies to engage in habitual pollution and poor waste-disposal practices. One of the most obvious results of this ongoing pollution has been the smog that covers many Chinese cities, particularly in the industry-heavy north. Additionally, toxic waste spills, deforestation, poisoned water sources and more have impacted thousands of people in predominantly non-urban areas.

The current system of environmental law in China began to emerge in 1979 with the creation of the aptly named Environmental Protection Law, a broad but unspecific piece of legislation that contained the basis for future expansion of regulations.[1] In the decades following the creation of the law, additional legislation covering various types of pollution and environmental degradation were added, including the Air and Water Pollution Laws.[2] During this period of general political stabilization, China's legal system was in the process of development and reconstruction. Although the central government remained fundamentally in control, localities were expected to create their own policies to manage environmental issues on the ground.

Today, China's legal system resembles that of any other large state in many ways. Layers of local and regional courts fall under a supreme court, which is itself subordinate

[1] Charles R. McElwee, Environmental Law in China: Mitigating Risk and Ensuring Compliance, 53 (New York: Oxford University Press, 2011)

[2] Ibid., 61-62.

to the CCP. Despite the similarities, there are several major differences. Decisions are typically made by a panel of three judges, never a jury, though special panels are sometimes convened for more politically sensitive cases.[3] Lawyers rarely argue cases in front of judges; rather, they submit their arguments in writing. According to some scholars, China's laws are incredibly complicated, technical, and difficult to understand or implement, which can result in wide variations in interpretation between judges.[4] Finally, because legal precedent does not directly shape the law, court cases must be brought against each individual polluter. Given the scale of the problem and the lack of cooperation from local governments, this seems like an insurmountable task.

It should also be noted that research on Chinese environmental law faces several inherent barriers. The Chinese government rarely encourages transparency, and the limits on data collection and on the ground reporting regarding environmental issues hinders our knowledge of the Chinese legal system. In addition, the recent structural changes within the government are so large that it is difficult to predict their consequences. As such, this paper is limited in its ability to assess the future of Chinese environmental law.

The Central-Local Dilemma

[3] Rachel E. Stern, *Environmental Litigation in China: A Study in Political Ambivalence*, 120-135 (Cambridge University Press, 2013)

[4] Paul A. Barresi, *The Chinese Legal Tradition as a Cultural Constraint on the Westernization of Chinese Environmental Law and Policy: toward a Chinese Environmental Law and Policy Regime with More Chinese Characteristics* 30 PACE ENVTL. L. REV. 1156 (2013).

In general, implementation of legislation is strongly impacted by the relationship between its central and local governments. It is clear the central government maintains control over the country; however, since the reforms of the 1990s, local governments have been granted greater discretion over their actions than during the Maoist period.[5] But while local governments are more independent, the fundamental governing structure of China has not changed. The central government's priority is to maintain ultimate control over the localities and hold the country together under CCP rule. Many scholars believe that the resulting tension between the central and local governments has had a profound effect on policy decisions and implementation.[6] This is particularly evident in the case of environmental law.

In order to comprehend the complexity of these relationships, it is important to understand the basic structure of the Chinese government. The two major legislative branches of the central government are the National People's Congress and the State Council. Leaders within the central government are generally leaders within the Chinese Communist Party as well. The National People's Congress (NPC) or its subcommittee, the Standing Committee of the NPC, meets yearly to review and pass legislation. This legislation is typically presented by the State Council with the approval of the CCP's Politburo Standing Committee. The local government system is divided into tiers, from

[5] Kenneth Lieberthal, Governing China: From Revolution Through Reform (W.W. Norton & Company, 2004).

[6] Jing Yuejin 景跃进, et al. Dangdai zhongguo zhengfu yu zhengzhi 当代中国政府与政治 [Contemporary Chinese Government and Politics]. Beijing: China Renmin University, 2015.

the provincial down to the village level.[7] This system forms a hierarchy that is referred to as the *tiao-kuai* system, with each level answering to the one above it. The provincial level is generally the most influential and serves as a conduit between the local and central governments. The central government is responsible for creating legislation and setting the tone for national environmental protection efforts. For example, since 2006, environmental goals have been included in the national Five-Year Plans.[8] However, local governments and courts take on most of the responsibility of interpreting and implementing such goals.

Chinese courts generally play a limited role in enforcing environmental law, both because their influence is limited and because legal action is not seen as a particularly accessible solution for most people. There is evidence of some surprisingly effective local cases in which individual polluters have been brought to court and sued for damages, but returns are often too low to justify taking a case to court. Victims often wait years to receive any kind of compensation, and said compensation is often split among too many claimants.[9] Additionally, both local and central government officials look at these cases with suspicion when they become too high-profile.

The Local Government

[7] Donaldson, John A., editor. Assessing the Balance of Power in Central-Local Relations in China, 10. (Routledge, 2017).

[8] Xu Guangdong and Michael Faure, *Explaining the Failure of Environmental Law in China* Columbia 29 J. ASIAN L. 1 (2016).

[9] *Id.*

The role of the local government has become one of the most emphasized facets of recent scholarly analysis. This is partially because environmental issues in China are, for the most part, seen in terms of individual polluters and incidents that fall under the purview of local authorities.[10] The central government may make the laws, but it is up to local governments to decide how and when to enforce them. Therefore, local governments have a fairly strong influence over environmental protection initiatives. In general, local governments have a plethora of priorities to balance, between supporting economic growth and prosperity in their region, implementing commands from the central government and dealing with the demands of local citizens. Many scholars have pointed out the ways in which this balancing act inhibits effective implementation of environmental protections.

The most telling aspect of this relationship is the almost uniform prioritization of economic growth at the local level. Acting on guidance from the central government, local officials will always focus on promoting economic growth. As a result, they are unlikely to take action against companies that are major employers, even if they have poor environmental practices. In some cases, local officials will cover for polluters or put pressure on claimants in order to protect companies that contribute to the local economy. Lawyers are often reluctant to take environmental cases, because they are seen as difficult to win and low-yield. Some scholars point to China's local governments' split priorities

[10] Stern, *supra* note 3, at 33.

as the main factor behind failures in environmental policy enforcement.[11] Overall, conflicting interests create a lack of local legitimacy that serves to undermine enforcement efforts.[12]

Another major difficulty is the unclear chain of responsibility for environmental protection at the local level. The local environmental protection bureaus (EPBs) are intended to serve as a primary enforcement mechanism. However, most scholars believe that EPBs are not particularly effective. An optimistic interpretation would be that EPBs simply operate within their realistic limits and are therefore influenced by "revenue, local governmental pressure, social connections and position in the hierarchy."[13] For example, many EPBs lack the funding or equipment to carry out the necessary tests to collect evidence against polluters, consequentially making the Bureau redundant.[14] Others are harsher in their assessments and point out that EPB officials have been known to cooperate with violators, allow personal connections to influence their decisions, and even accept bribes.[15] Overall, EPBs tend to operate under the influence of local leaders,

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[11] Huiyu Zhao & Robert Percival, *Comparative Environmental Federalism: Subsidiarity and Central Regulation in the United States and China,* 6 J. TRANSNTL'L L. & POL'Y 531. (2017).

[12] Benjamin Van Rooij, *Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns*. 37 DEVELOPMENT & CHANGE 57 (2006).

[13] Ma, Xiaoying, and Leonard Ortolano. *Environmental Regulation in China: Institutions, Enforcement, and Compliance.* Rowman & Littlefield, 2000., Qi, Ye, and Lingyun Zhang. "Local Environmental Enforcement Constrained by Central–Local Relations in China," Environmental Policy and Governance 24, no. 3, (May/June 2014): 205.

[14] Stern, *supra* note 3, at 28.

[15] Van Rooji, *supra* note 12, at 61.

which makes them vulnerable to the same potential conflicts of interest. Funding is clearly a serious problem that severely limits the effectiveness of the EPBs.

These trends do not indicate that local governments completely ignore environmental regulations. They are still required to carry out policies handed down from the central government. According to Kostka and Hobbs, "local government leaders conform to national directives by 'bundling' the [environmental] policy with policies of more pressing local importance."[16] For instance, local officials in Shanxi province framed environmental regulations that required them to shut down several power plants as a result of the Olympic clean-up policy implemented before the 2008 Olympic Games, which made the order more palatable to owners (and in some cases, less obvious that the order was permanent).[17] Another common technique is called "sleeping management," which involves temporarily closing a factory or power plant that is a major polluter.[18] This reduces emissions in the district while avoiding the social and economic consequences of shutting it down permanently.[19] Overall, local governments tend to prefer these methods of reaching environmental goals over uniformly enforcing the "polluter pays" principle.

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[16] Genia Kostka & William Hobbs, *Local Energy Efficiency Policy Implementation in China: Bridging the Gap between National Priorities and Local Interests*, 211 CHINA Q. 765 (2012).

[17] *Id.* at 770.

[18] *Id.* at 776.

[19] *Ibid.*

The Central Government

In some scholarship, the central government is portrayed as a distant entity that provides environmental goals but rarely pushes for real environmental protection. Although the environment is often used as a talking point, the central government is unlikely to interfere with local practices unless an incident becomes a national issue.[20] Even then, the central government has been known to protect the polluter rather than the victim, just as the local governments do. Many scholars argue that one reason behind this trend could be that the central government sees economic growth as more important than environmental protection. In other words, mixed messages from above inevitably lead to mixed results from below.

Some argue that the central government should push for better transparency regarding environmental data, or even use its power to reshape the central-local relationship.[21] Kenneth Lieberthal posits that there are three necessary preconditions for central policies to be effective: "first, top leaders agree on the need for a particular policy; second, top leaders support giving said policy high priority; and finally, compliance by lower levels of government is measurable."[22] However, further evidence indicates that this ideal outcome is unlikely to manifest. Jonathan Schwartz, for example, argues that

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[20] Stern, *supra* note 3.

[21] Ye Qi & Lingyun Zhang, *Local Environmental Enforcement Constrained by Central–Local Relations in China* 24 ENVTL. POL'Y & GOV. 21 (2014).

[22] Kenneth Lieberthal, *China's Governing System and Its Impact on Environmental Policy Implementation*, China Environmental Series (The Woodrow Wilson Center, 1997).

although the central leaders have repeatedly stated their support for environmental protection, top leaders within the local government have not been willing to make the environment a priority.[23]

Despite the clear environmental issues that China faces, the central government lacks incentive to encourage environmentalism, especially the release of environmental data. The central government is primarily concerned with party survival. While the government sees the political importance of environmental protection, it is ambivalent towards any kind of data transparency or grassroots activism. In general, the central government is wary of movements that have the potential to incite unrest or challenges against its authority. Economic growth is the safest way to maintain the "bargain" that the CCP has made with Chinese citizens to continually improve their quality of life.

Furthermore, Kostka and Nahm argue that increased centralization would not necessarily be a positive development.[24] Although there are some areas of environmental protection, such as climate change, that seem to require a centralized policy, localized damage is better dealt with at a local level. Also, the central government is not necessarily inclined to prioritize environmental concerns over economic ones. The dynamics that have been described at the local level do not disappear; rather, they are simply reinterpreted on a national scale. Regardless of the central-local split,

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[23] Jonathan Schwartz, *Environmental NGOs in China: Roles and Limits.* 77 PAC. AFF. 28, 30 (2004).

[24] Genia Kostka & Jonas Nahm, *Central–Local Relations: Recentralization and Environmental Governance in China*. 231 CHINA Q. 567 (2017).

environmental issues are more likely to be prioritized in more privileged areas, where they tend to overlap rather than conflict with economic concerns.[25] Kostka and Nahm's argument is useful in the context of much of the locally-focused literature that does not critically evaluate the challenges and attitudes of the central government. Their argument strongly resembles Stern's analysis of the "ambivalence" of the central government towards environmental policy.

Finally, the central government is wary of the courts. Although China has supported the development of its legal system, it is clear that the CCP is uninterested in fostering a truly independent judiciary. Judges are expected to hew to political expectations and will request political advice from higher-ranked judges or even party officials before making potentially sensitive decisions.[26] When an environmental case becomes too high profile, claimants may see pushback from the central government as well as local officials.[27] In some cases, claimants attempt to attract some local media attention before filing a claim, in order to reduce the likelihood that their case will be simply dismissed. Of course, restrictions on media freedom in China also limit the effectiveness of this strategy.

Recent Developments

[25] Wanxin Li & Paul Higgins. *Controlling Local Environmental Performance: An Analysis of Three National Environmental Management Programs in the Context of Regional Disparities in China*, 22 J. CONTEMP. CHINA 409, 413 (2013).

[26] Stern, *supra* note 3, at 34.

[27] Stern, *supra* note 3.

In March 2018, during the annual National People's Congress (NPC) meetings (*lianghui*), the Chinese government announced a series of sweeping governmental changes, including the replacement of the former Ministry of Environmental Protection with a new Ministry of Ecological Environment. The new Ministry will be in charge of all environment-related policy including climate change, pollution, water and ecology related divisions, which were previously housed under other ministries.[28] Presumably, the central government hopes that creating a single cohesive message from the state, combined with increased oversight from the new anti-corruption National Supervisory Committee, will counteract some of the existing implementation challenges. Several Chinese officials and environmentalists went on the record stating that the changes should strengthen environmental protection by reducing overlap between government agencies.[29]

Although there is some optimism that the restructuring will improve enforcement of environmental policy, there is also reason to be skeptical of its effect on the strength of environmental law. While consolidating responsibility is likely to improve efficiency, the move also shifts certain areas of environmental protection, such as climate change, from a more important and prestigious ministry to a less important one.[30] Finally, it is unclear

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[28] Jackson Ewing, *Tough Tasks for China's New Environment Ministry*, The Diplomat, (March 17, 2018), https://thediplomat.com/2018/03/tough-tasks-for-chinas-new-environment-ministry/.

[29] Ben Westcott & Serenitie Wang, *Xi Jinping is Making Sweeping Changes to How China is Run,* CNN (March 17, 2018, 12:48 AM) https://www.cnn.com/2018/03/16/asia/chinese-government-changes-intl/index.html.

[30] Ewing, *supra* note 28.

whether the changes will help or harm the strength of the Chinese legal system. While the introduction of the National Supervisory Committee may reduce corruption and bribery, which would potentially improve the independence of small local courts, it is still a branch of the party and has more power than the Supreme Court. It seems unlikely that any movement towards increased centralization of power will correspond to more freedom for courts in general.

A substantial amount of both Chinese and international scholarship from the mid-1990s onward has criticized the failings of environmental policy implementation in China.[31] Much of the restructuring reflects suggestions made by Chinese academics from organizations such as the Chinese Academy of Environmental Planning in Beijing, who in 2015 released a paper with recommendations for reform in environmental governance. One of their recommendations is to "establish an independent environmental law enforcement system," with improvement of local enforcement mechanisms a top priority. [32] Unfortunately, this suggestion seems to have been largely passed over.

Conclusion

Over the last several decades, central-local relations have played a major role in the implementation of Chinese environmental policy. Most literature focuses on the local government and the effect its conflicted priorities have on policy implementation.

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[31] Ibid.

[32] Wang Jinnan et al., A Design of the Reforming Scheme of Eco-environment Protection Administration System for China]. *Zhongguo huanjing guanli* 7, no. 5 (2015): 10.

However, scholars are inclined to disagree on the role of the central government, with some arguing for increased re-centralization while others believe the central government is too ambivalent towards environmental priorities for that to be effective. The courts are beholden to this relationship, which prevents them from taking an active role in environmental protection. Although there is hope that the recent governmental restructuring will assuage this issue, further research is needed to evaluate the impact of the changes.

Net Neutrality Under the Trump Administration

Since its inception in 2003 by Columbia Law School professor Tim Wu,[33] the term "net neutrality" has been used to describe rules in an order officially adopted on February 26, 2015, that govern the federally-mandated open internet.[34] While the order was praised by web-based content creators and consumers, many internet service providers (ISPs) opposed the order alongside dissenters within the Federal Communications Commission (FCC), the independent agency which published the order. Then-commissioner Ajit Pai openly opposed it, commenting, "last week's carefully managed rollout was designed to downplay the plans of a massive intrusion in the Internet economy."[35] Pai's position on the issue gained relevance later in the net neutrality debate, which started with the inauguration of President Trump in 2017. After taking office, Trump appointed Pai chairman of the FCC, a more influential role then-commissioner. Pai stated that his first goal as chairmen would be "modernizing" regulations and "removing unnecessary or counterproductive"[36] ones, arguing that these steps were necessary to allow ISPs to invest in building and upgrading their networks. Pai wanted the FCC to reign in on regulations and trust ISPs to voluntarily commit to an open

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[33] Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. Telecomm. & High Tech. L. 141 (2003).

[34] Jeff Sommer, *What Net Neutrality Rules Say*, The New York Times (Mar. 12, 2015), www.nytimes.com/interactive/2015/03/12/technology/net-neutrality-rules-explained.html.

[35] Robertson, Adi. "FCC Commissioner Ajit Pai Weighs in on net neutrality Plan: 'Worse than I Had Imagined'." *The Verge*, The Verge, (10 Feb. 2015), www.theverge.com/2015/2/10/8012929/fcc-ajit-pai-opposes-wheeler-net-neutrality-plan.

[36] Jon Brodkin, *Ajit Pai on Net Neutrality: 'I Favor an Open Internet and I Oppose Title II,'* Ars Technica (Jan. 31, 2017, 12:49 PM), arstechnica.com/tech-policy/2017/01/fcc-chair-ajit-pai-wont-say-whether-hell-enforce-net-neutrality-rules/.

internet. On May 18, 2017, the FCC voted in favor of Pai's proposal and rolled back net neutrality regulations.[37] This recent repeal is expected to have several negative implications for both content creators and consumer on the web.

Understanding the implications of the FCC decision requires understanding the original order that was rescinded. Before the order was adopted, ISPs voluntarily maintained an open internet without the threat of regulatory action, but the increasing importance of the internet in society, including the widespread use of interconnected technologies and the growth of e-commerce, enabled suspicion of ISP goodwill. The logic of the FCC order is thus that as broadband usage expands, regulations controlling it must expand correspondingly.

Title II of the Communications Act defined high-speed internet as a telecommunications service, as opposed to an information service, so FCC assumed broad power over internet providers. Under this definition, the FCC can monitor and regulate the internet as a public utility. Despite the possibility of strict control over the internet, the FCC stated there will be some "forbearance,"[38] of their authority to accommodate the economically competitive nature of the internet. As an example of this forbearance, the FCC avoids price setting, a common practice for regulating other public utilities. One primary oppositional argument from ISPs and the current chairman was that net neutrality regulations were the first step to the restrictions typically placed on public

[37] Ibid.

[38] Sommer, *supra* note 2

utilities like, most alarmingly price controls, which stifle innovation on the internet and in the economy. However, this argument against net neutrality loses its merit when considering the chief mission of net neutrality which was adopted to ensure that innovation would not be stifled by the ISPs. Additionally, the FCC board indicated its awareness that the internet cannot be treated like most other public utilities. The board only exercises authority over aspects of the internet that, if not held constant, will debilitate those who depend on the internet.

The 2015 order defined several rules for ISPs to equally deliver content from creators to online consumers. The three actions that violated these principles were termed Blocking, Throttling, and Paid Prioritization. Blocking stops access to content; Throttling slows the transmission of content; and Paid Prioritization separates broadband into multiple tiers with differing speeds, which gives priority to creators who can pay more for the faster access to consumers. An example of Net Neutrality is a competition between Netflix and Filmstruck. Netflix could not have an advantage over FilmStruck, a lesser known streaming service, by paying for more efficient broadband for their customers. These rules put new enterprises and established competitors on an even playing field and allowed new enterprises to compete with established creators. This level of competition brings new ideas to the public and encourages innovation.

One of two major results of the order's repeal gave ISPs power over terms of access to the internet. ISPs are now free to price broadband otherwise unallowed under the 2015 order, with the only requirement that the company must declare the action to the

public. For example, an ISP can block a website so long as the company discloses that action on their website or reports it to the FCC. The repeal also shifts supervision to the Federal Trade Commission (FTC), which has the primary goal of protecting consumers.

After the repeal, the FTC released a statement declaring it will oversee "customer complaints about internet service" and monitor "privacy practices of broadband providers."[39] This limited range of oversight leaves content providers on the internet vulnerable because while the FTC intends to protect consumers, it will not prioritize equal opportunity between content companies. If ISPs begin paid prioritization, larger, more established countries could garner a competitive advantage by consolidating services that make their product more appealing—yet more expensive—to consumers. Without equal access to these services, the less established content creator will have limited opportunities to present their product to consumers. This is one way present and future content companies could be negatively affected by the repeal, and it can also potentially change the economic landscape of the entire online economy.

The effect on internet consumers must also be considered among the implications of the repeal. Although the FTC plans to protect the privacy of consumers, keeping the internet open for consumers has not been presented as a primary goal of the Commission. The effects of this shortcoming can be predicted based on the state and structure of the internet in other countries without net neutrality regulations. For example, in Portugal, internet content and services have been separated into packages that resemble cable plans

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[39] Brodkin, *supra* note 4

in the United States.[40] Citizens of Portugal must pay additional fees to access services such as social networks, music, email, and video streaming. Now that net neutrality has been repealed, a system like Portugal's could become the new reality in America.

The repeal of net neutrality has united consumers and content creators in a fight to maintain their ability to efficiently connect and interact with each other. The 2015 order not only benefited each of these participants, but also the entire economy. Without net neutrality, unnecessary barriers could form between products and their consumers. These barriers would stifle innovation and slow the economic cycle. The cost of limiting ISPs is far lower than that of restricting the internet and those corporations and individuals who utilize it daily.

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[40] Glaser, April. "What the Internet Is Like in Countries Without Net Neutrality." *Slate Magazine*, Slate Magazine, 8 Dec. 2017, www.slate.com/articles/technology/future_tense/2017/12/what_the_internet_is_like_in_countries_without_net_neutrality.html.

A Moderate Masterpiece: The Value of Compromise in an Increasingly Divided Court

Oftentimes, the law produces situations in which the rights of one group directly contradict the rights of another. Some argue that such situations necessitate a radical reconciliation that holds one set of rights more legitimate than another set with equal constitutional merit. However, others argue this schism is the result of a false dichotomy, as both interests can find a middle ground. Take, for instance, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* which asks the Supreme Court of the United States how far religious liberty extends. Specifically, the case questions the whether it is constitutional for the application of the Colorado Anti-Discrimination Act to compel a religious baker to design and craft a cake that violates his religious beliefs about same-sex marriage. While the case was pending a decision, many religious freedom and civil rights advocacy groups saw it as one of the most important decisions in modern Supreme Court history. In the wake of the 2015 *Obergefell v. Hodges* decision, which legalized gay marriage, individuals across the political and cultural spectrum regarded the potential outcome *Masterpiece Cakeshop* with apocalyptic rhetoric. To some religious conservatives, an unfavorable ruling in this case threatened to end religious liberty and destroy free speech; but to some liberals, an adversarial victory meant an onslaught of new Jim Crow-esque legislation aimed squarely at lesbian, gay, bisexual, and transgender persons and other sexual minorities. Neither of these two outcomes prevailed. Rather, the result of this case was limited in scope and moderate in character. The passion surrounding this topic nevertheless requires a discussion of the facts, precedent,

arguments, and the implications of the decision made in the case.

In the summer of 2012, David Mullins and Charlie Craig entered Masterpiece Cakeshop and asked the owner, Jack C. Phillips, to design and create a cake for their upcoming wedding. Phillips denied their request, claiming that doing so would violate his religious convictions against same-sex marriage. As a result, Mullins and Craig filed claims of discrimination on the basis of sexual orientation, which violate the Colorado Anti-Discrimination Act, to the Colorado Civil Rights Commission. The Commission ruled in favor of the couple, and the decision was affirmed by the Colorado Court of Appeals. After a petition for a writ of certiorari on July 26, 2017, the question before the court was, "Does the application of Colorado's public accommodations law to compel a cake maker to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage violate the Free Speech or Free Exercise Clauses of the First Amendment?"[41]

In oral argument, the plaintiff asserted that the compulsion did violate free speech protections because the cake constituted Phillips' artistic expression. The plaintiff further argued that Phillips' action was a protected form of speech based on *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* which determined that the state could not force private citizens to include a specific speaker in a parade.[42] The plaintiff compared requiring Mr. Phillips to bake a cake for an LBGT wedding with forcing a

[41] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. __ (2018)
[42] Masterpiece, 584 U.S. __ (2018)

speaker to participate in a parade with a message they disagreed with.[43] However, this argument was undercut by the question of whether wedding cakes qualify as speech, as well as which other professions can claim First Amendment protections in order to refuse service. Justice Kagan inquired whether a makeup artist, hairstylist, florist, or chef could similarly deny service based on religious faith. The plaintiff responded by arguing that freedom of speech protections extended only to a narrow category of services but was unable to define what fell into this category. Furthermore, the ramifications of the petitioner's assertion were particularly exemplified when Justice Kennedy inquired whether Phillips' prevail could result in a bakery placing a sign on its window that reads, "We do not bake cakes for gay weddings."[44] The plaintiff responded that a baker could do so only if he stipulated that these cakes were custom made. This led Justice Kennedy to suggest that this could be seen as an affront to the rights of the gay community.

When faced with similarly difficult questions about compulsion of speech, the defendant responded that "[it] doesn't matter whether it's speech or whether it's not speech."[45] Rather, the Commission believed that the key issue in this case was discrimination on the basis of identity and highlighted this by drawing comparisons to the historical denial of service to African Americans. Citing the Commission's use of inflammatory language and imposition of anti-discrimination training upon Phillips, the Court insinuated that Phillips' sincere religious convictions were not considered in a

[43] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc, 515 U.S. 557 (1995)

[44] Masterpiece, 584 U.S. __ (2018)

[45] Hurley, 515 U.S. 557 (1995)

neutral manner. Furthermore, it was argued that a lack of neutrality could constitute a violation of Phillips' rights to free exercise. The defendant disavowed the inflammatory language but maintained that the consequences of allowing denial of service on the basis of religious belief would be unacceptable.

The Supreme Court ruled 7-2, reversing the lower court's decision. The majority opinion by Justice Anthony Kennedy found "the Colorado Civil Rights Commission's conduct in evaluating a cake shop owner's reasons for declining to make a wedding cake for a same-sex couple violated the Free Exercise Clause,"[46] because the Court perceived that they did not afford Mr. Phillips neutral treatment when considering his religious justifications. Evidence supporting this claim was anti-religious statements from commission members and their decision in a subsequent case allowing a baker to refuse to make three cakes that were requested to have anti-homosexuality messages imprinted upon them. The court did not intend to settle the question of whether it was constitutional for religious bakers to deny service to gay couples. Rather, it simply ruled that the Colorado Civil Rights Commission mishandled the treatment of Mr. Phillips' sincerely held beliefs. The court's decision implies sympathy to the plight of the LGBT community while simultaneously protecting religious rights. Justice Kennedy makes this clear by stating, "The exercise of [gay couples'] freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of

[46] Masterpiece, 584 U.S. __ (2018)

expression."[47] Furthermore, the court was not blind to the potential ramifications of a more radical decision. Kennedy notes that arbitrary denial of service to LGBT people by individuals claiming rights to religious freedom would be "inconsistent with the history and dynamics of civil rights laws."[48] However, the court also recognized that events in the case occurred before the legalization of homosexual marriage in Colorado and conceded that this adds credence to Mr. Phillips's perceived sincerity. This back and forth rhetoric represents the Court's internal struggle to appease both parties' concern towards their rights. As a result, this extraordinarily narrow ruling, spoke more towards the Colorado Civil Rights Commission's handling of the case than the facts itself.

Individuals across the political spectrum disagreed with the majority opinion. Justice Ginsburg authored a dissent joined by Justice Sotomayor, arguing the court had a substantial lack of evidence to prove the Colorado Civil Rights Commission acted in a non-neutral fashion toward Mr. Phillips' views. Furthermore, she suggested the cited evidence was weak and borderline irrelevant, explaining that the court should have ruled denial of service to an individual on the basis of identity to be a clear violation of the Colorado Anti-Discrimination Act. It wasn't just Ginsburg or people on the political left who disagreed with the rationale the court used. Right-leaning Justice Thomas issued a concurring opinion joined by Justice Gorsuch, to discuss how he felt the court's judgment on Obergefell was not sufficient to diminish Phillips' right to free speech. He discussed

[47] Masterpiece, 584 U.S. __ (2018)

[48] Masterpiece, 584 U.S. __ (2018)

his prior admonishment that the Obergefell decision would eventually conflict with religious freedom, ending with the notion that although "religious liberty has lived to fight another day," if freedom of speech were not prioritized, future cases could utilize Obergefell to vilify "Americans who are unwilling to assent to the new orthodoxy."[49] Ginsburg and Thomas demonstrate the stark divide in both the opinions of the Court and the nation at large on the clash between rights of the religious and the historically oppressed.

The decision seems evasive; the court did not make an explicit judgement on whether refusal of service on the basis of religious conviction constituted discrimination. This case presented a direct conflict between one individual's freedom of speech and religion and another couple's freedom from discrimination; moreover, the court refrained from making a decision on which rights trump others. In particular, the court did not want to put limitations on Mr. Phillips exercising his rights. However, there are already legal restrictions in the context of religious expression, especially when it is in contradiction with existing and established law. For instance, people cannot claim that their religion does not permit them to pay taxes or follow speed limits. Therefore, why should Mr. Phillips claim his religion does not permit him to follow anti-discrimination laws? On the other hand, there's the issue of compelled speech. If it becomes legal to force a religious baker to bake a cake for a gay wedding, could an African American sculptor be compelled to sculpt a cross for the Ku Klux Klan? The validity of this analogy rests on

[49] Masterpiece, 584 U.S. __ (2018)

the presumption that a wedding cake is actually art, which was heavily disputed throughout the entirety of the case. Nevertheless, questions like these demand answers, and the decision reached in *Masterpiece Cakeshop* offers little in that regard. However, it offers a compelling case for moderation in Supreme Court opinions. While the decision reached did not fully satisfy anyone, it was successful in its inability to achieve either of the two catastrophic realities envisioned by the right and left. Moreover, it took what seemed to be a strict binary decision and revealed it to be a false dichotomy. Some may argue that this decision was merely kicking the can down the road; however, when half of America feels that picking up that can could result in a massive infringement of their rights, it seems appropriate to punt it as far away as possible.

The precedent set by this case is incredibly limited, and a similar case will likely reach the court soon, requiring a more broad and definitive answer on the reach of religious liberty. Regardless of opinions about the actual decision, the Supreme Court's ability to take a case with seemingly colossal ramifications and narrow the application of it is extraordinarily impressive. In addition, this sort of compromise is useful in extremely divisive cases. With the court and the nation becoming increasingly divided, perhaps asking nine unelected lawyers in Washington D.C. to make radical decisions for the country may not be the best course of action. Decisions like the one in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* showcase the value of specificity within the Court. While liberals and conservatives on their respective fringes will likely regard this decision with contempt, it is nothing short of a moderate masterpiece.

Carpenter v. United States: Fourth Amendment Jurisprudence into the Digital Age

The Fourth Amendment of the Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[50] As a long-held tenet of American freedom, it secures the unconstitutionality of warrantless government interference into a person's livelihood with interpretations advancing alongside society to cover technological advances such as telephones, computers, and—more recently—detailed location information. The Supreme Court recently faced a Fourth Amendment case, *Carpenter v. United States*, which modernized the constitutional approach to warrantless government searches and seizures. This paper will analyze the changing nature of Fourth Amendment interpretation through *Boyd v. United States* (1886), *Olmstead v. United States* (1928), and *Katz v. United States* (1967). These cases resulted in the Supreme Court, respectively, expanding, restricting, and then expanding once more the amount of personal freedom granted under the Fourth Amendment. This paper will prove how these cases highlight the significance of *Carpenter v. United States* (2018) while analyzing two distinct judicial philosophies to address the majority decision written by Chief Justice John Roberts.

One of the first Supreme Court decisions defining searches was the 1886 case *Boyd v. United States*. The government ordered Boyd to surrender payment invoices,

[50] U.S. Const. amend. IV

which he argued was an unreasonable search and seizure.[51] The Court approached this case with a broad, as opposed to literal, interpretation, of the Fourth Amendment, ruling 7-2 in favor of Boyd. Justice Bradley stated in the majority opinion that an unreasonable search was an "invasion of indefeasible right[s] of personal security, personal liberty, and private property."[52] The Court's ruling protected individual freedom by forbidding the government, without a warrant, from ordering any person to turn in private property. This interpretation of the Fourth Amendment was used to guide rulings until *Olmstead v. United States* was argued in 1928.

In *Olmstead v. United States*, the Supreme Court refused to recognize phone conversations as personal property by allowing the government to wiretap a telephone. Roy Olmstead was a well-known West Coast bootlegger who successfully evaded capture for a prolonged amount of time. Because they were unable to find evidence with which to incriminate Olmstead, the government resorted to wire-tapping his telephone to capture his discussions of illegal activity. Upon gathering necessary proof, police arrested and subsequently prosecuted Olmstead. During his trial, Olmstead argued the government violated the Fourth Amendment with an unreasonable search of his private conversations, successfully appealing to the Supreme Court who heard his case in 1928. In a 5-4 decision, the Court ruled against Olmstead with a majority opinion by Chief Justice William Howard Taft stating that since "phone conversations… were not covered by the

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[51] Kerr, Orin S., *The Curious History of Fourth Amendment Searches* (2012 Supreme Court Review, Volume 67, 2013)/ Orin S. Kerr, *The Curious History of Fourth Amendment Searches,* 2012 Sup. Ct. Rev. 67 (2013)

[52] Boyd v. United States, 116 U.S. 616, 630, (1886).

language of the [Fourth Amendment]" and the government did not "trespass onto the property of Olmstead," the warrantless search of Olmstead's conversations was constitutional.[53] Until the case was overruled in *Katz v. United States* in 1967, the Court did not recognize electronic communication to be protected under the Fourth Amendment.[54]

In 1967, the Supreme Court heard arguments in *Katz v. United States,* a landmark ruling in Fourth Amendment jurisprudence that remains prevalent into the 21st century. Charles Katz was a gambling heavyweight who incriminated himself by discussing his illegal gambling activities into a telephone bugged by the U.S. government. He was arrested, but he successfully appealed to the Supreme Court, arguing that wiretapping his phone without a warrant was unconstitutional. The Court, in an 8-1 decision, overruled *Olmstead* and found warrantless surveillance of a phone conversation to be in violation of the Fourth Amendment. Justice Harlan's concurring opinion in *Katz* concluded that a person is protected by the Fourth Amendment when they demonstrate a reasonable expectation of privacy.[55] Protecting a person's reasonable expectation of privacy thus became the standard for Fourth Amendment interpretation.

The ruling in *Carpenter v. United States* adds clarity to the idea of a, "reasonable expectation of privacy," created in *Katz*. In 2011, Timothy Carpenter was arrested and charged with six counts of robbery for breaking into multiple RadioShack and T-Mobile

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[53] *Olmstead v. United States,* 277 U.S. 438, (1928).

[54] *Katz v. United States,* 389 US 347, (1967).

[55] Tom McInnis, *The Changing Definition of Search or Seizure,* 11 Insights on Law & Society 10, (2011).

stores. Location records, called cell-site location points (CSLI), from Carpenter's cell phone tracked his cell phone to the sites of four such robberies. These records were then brought into evidence and used against Carpenter during his trial. Carpenter appealed his subsequent conviction to the U.S. Court of Appeals for the Sixth Circuit, arguing that the cell site location information was obtained without a warrant. The Sixth Circuit ruled against Carpenter and affirmed the District Court ruling; finding that, because he shared his location information with his cell phone provider, he lacked a reasonable expectation of privacy. Carpenter successfully appealed to the Supreme Court, where his case was argued on November 29, 2017 and decided on June 22, 2018. The Court reversed the Sixth Circuit decision, ruling in favor of Carpenter.

In the majority opinion, Chief Justice Roberts describes "seismic shifts in digital technology" that require the Court's attention as the reasoning for his vote,[56] referencing the digital age and the Court's responsibility for accompanying this shift into a technology-focused society. The Chief uses this reasoning to focus on two areas of Supreme Court precedent. The first area of the precedent deals with the legal test developed in Justice Harlan's concurrence in *Katz,* determining whether a person can reasonably expect his or her whereabouts to be kept private. Roberts points out that because cell phones are usually with the user at all times, phone records could provide the government with an accurate pinpoint of a person's location. This difference sets *Carpenter* into a separate category from previous Fourth Amendment cases. In Carpenter's case, the government was able to access multiple prior phone records to trace

[56] *Carpenter* v. *United States,* 585 U. S. 1, 15 (2018)

him within the vicinity of a string of robberies. Roberts emphasized that times have changed and, because of the necessity of cell phones in the 21st century, long-term tracking is too invasive and therefore unconstitutional.

In the second area of Court precedent, Chief Justice Roberts discusses the third-party doctrine established through *United States v. Miller* in 1976 and *Smith v. Maryland* in 1979. *Miller*, which ruled bank records are not protected by the Fourth Amendment, and *Smith*, which ruled no government warrant is necessary to record phone calls, contributed to the Court's doctrine that holds people have "no legitimate expectation of privacy" when they voluntarily hand information to third-party sources.[57] This doctrine was invoked by the Sixth Circuit Court of Appeals when Judge Raymond Kethledge, who wrote for the majority, ruled against Carpenter because he shared his location information with a third-party, his wireless carrier.[58]

But upon appeal to the Supreme Court, Chief Justice Roberts argued the doctrine applied only to "limited types of personal information" as opposed to the copious amount of personal information available through a cell phone.[59] Because of the essential, daily functions of a mobile device, Chief Justice Roberts ruled that the third-party doctrine can not justify the Sixth Circuit's decision. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the Chief Justice in the majority opinion.

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[57] *Smith* v. *Maryland,* 442 U. S. 735, 744 (1979)

[58] *Carpenter* v. *United States,* 585 U. S. 1, 3 (2018)

[59] Ibid.

The ruling in *Carpenter* set an important standard for future Fourth Amendment cases. In the opinion, short-term access to location information, such as obtaining the record in real time or within a seven-day period, was placed in a different category than long-term access to location information. Furthermore, Chief Justice Roberts created a different category to deal with serious, ongoing threats to national security. In these cases, the majority put no restrictions on the government's ability to obtain cell-site location information. By specifying the difference of short-term access, real-time access, a seven-day period, and cases of national security, the Chief Justice set a precedent exclusively concerning long-term warrantless government searches that prevent access to a cell phone provider's database of customer information. This limited scope was narrow enough for the majority to agree the restraint is constitutional. Lastly, Chief Justice Roberts emphasized the uniqueness of cell-site location information in relation to the third-party doctrine and described how both the necessity and intimacy of cell phone data preclude the doctrine's authority to allow long-term searches on information given to a third party. The development of technological location tracking will likely lead a similar case involving real-time location tracking to the Supreme Court in future terms.

This case provides a thorough examination of the changing nature of the digital age. In fact, this decision utilizes a contentious judicial philosophy at the heart of disagreement in the federal judiciary, the living Constitution. The "living Constitution" refers to interpreting the founding document within the context of modern society in order to make the most fair and just decisions. By emphasizing that times have changed since the creation of the third-party doctrine in the 1970s, the Chief Justice is employing

this philosophy to guide his decision-making process. The living Constitution is at odds with the concept of originalism, which argues that the Constitution should be interpreted with consideration to the Framers' intentions. Justice Thomas, a noted originalist, wrote in his dissent that he believes the majority opinion has "no basis in the history or text of the Fourth Amendment."[60] Referencing the intentions of those who wrote the Constitution is a central argument utilized by originalists. While understanding both sides of the argument is important, originalism is ultimately too narrow of an ideology to support principled judicial decisions. Through the use of broad terms such as "unreasonable search and seizure," it's clear that the Framers were using language that may be open to future interpretation based on the development of society. Many leading scholars even doubt the legitimacy of originalism, instead understanding the philosophy to be "a pointedly political program in this guise of a purely legal, constitutional analysis"[61] These scholars point to how perfectly the ideals of modern conservatism line up with the outcome of using an originalist approach to the Constitution. For these reasons, the majority decision utilizes a fair judicial philosophy to develop a fair and just ruling.

In sum, *Carpenter v. United States* has defined the future of Fourth Amendment cases in relation to technology and privacy. The case has added clarification to the legal test created in *Katz* and loosened the power of the third-party doctrine. Additionally, the

[60] Ibid.

[61] Whitley Kaufman, *The Truth about Originalism*, 9 The Pluralist 39, __ (2014).

majority opinion relied on the idea of a living Constitution to clearly argue for updating the Court's approach to warrantless government searches of cell-site location information. *Carpenter* has defined the Court's approach towards technological privacy and will become one of the major Fourth Amendment cases that changes the judicial interpretation of an unreasonable search and/or seizure.

The Right to be Forgotten and Contemporary American Society

The right to be forgotten is an individual's right to autonomously determine their Internet identity. The right to be forgotten gives individuals the power to delete information about themselves on the Web that is no longer relevant. In 2014, the European Union implemented the right to be forgotten in its General Data Protection Regulation. In this paper, I will discuss a few inherent flaws in the right to be forgotten, how Google is affected by this right, the right's ethical implications, and how American society might be culturally affected by the right to be forgotten if it were put into law.

The right to be forgotten has sparked controversy due to its ability to blur the line between freedom of speech and right to privacy. Some, such as founder of Wikipedia Jimmy Wales, argue that the right to be forgotten in this sense is a "deep injustice and terrible danger."[62] Others contend that the right to information supersedes the rights of a data subject.[63] Questions that logically arise from this line of reasoning are: at what point does the right interfere with the right to information? Does the right to be forgotten stand a chance in modern American society?

Google Spain

In 2009, Mario Costeja Gonzalez requested a Barcelona newspaper, *La Vanguardia*, and the multinational tech company, Google, to remove records revealing his forced sale of property in order to pay off his social security debts. Met with no accommodation, Sr. Costeja brought his complaints to Spain's data protection authority,

[62] George Brock, The Right to Be Forgotten 45 (London, I.B. Tauris and University of Oxford Reuters Institute for the Study of Journalism, 2016).
[63] *Id*., 41.

which found that while the newspaper has no obligation to remove Sr. Costeja's records, Google does. In response to Spain's data protection authority, Google refused to erase Sr. Costeja's records on the basis of freedom of speech. After appealing five cases to the high court of Madrid, Sr. Costeja's case was then handed over to the Court of Justice of the European Union.

In *Google Spain v. Agencia Española de Protección de Datos, Mario Costeja González*, the EU court answered questions about the extent to which the right to be forgotten can be applied, and about Google's identity. Regarding the right's extent, the EU court explored if it is just for Google to be subject to erasing data but not third-party publications. Regarding identity, the EU court questioned if Google could be considered a data controller. Google's lawyers contended that because *La Vanguardia*'s publication about Sr. Costeja's predicament was allowed, Google's search engine should also have the same freedom because, "a search engine does not create editorial content, and they did not think that they needed to claim a 'journalistic' purpose exemption."[64] In addition, Google told the court that "to impose 'data controller' obligations on a search engine would chill free expression."[65]

Before all EU court hearings, the court hears a preliminary argument from an Advocate-General. For *Google Spain v. Agencia Española de Protección de Datos*, Finnish Advocate-General, Niilo Jääskinen, offered his opinion that Google ought to follow EU data protection law, but could not be identified as a data controller. However,

[64] *Id*., 39.
[65] *Ibid*.

according to the Data Protection Commission in Ireland, the General Data Protection Regulation (GDPR) defines data controller as, "the individual or the legal person who controls and is responsible for the keeping and use of personal information on computer or in structured manual files."[66] In response to the Advocate-General, the EU determined that Google's actions not only fell within EU law, but that Google should be considered a data controller on that basis that individuals face "threats" due to the ease Google has when processing personal data about them.[67] The court found that asking for a search engine to delete personal information entails the right to be forgotten. The conditions that must be met in order for data to be deleted from Google are defined as:

"An obligation to de-index 'may result' from the data being inaccurate but also if

> they are inadequate, irrelevant, or excessive in relation to the purpose of the processing, that they are not kept up to date, or that they are kept for longer than necessary unless they are required to be kept for historical, statistical or scientific purposes."[68]

Another relevant factor of the decision is that an individual is not required to prove a search link is prejudicial in order to have a link removed.

Objections to Google Spain

The *Google Spain* ruling has not only provoked global debate, but has also left many potential objections unanswered. The objections raised in *Google Spain* are some

[66] Are you a 'data controller'?, Data Protection Commission Ireland, available at https://www.dataprotection.ie/docs/Are-you-a-Data-Controller/y/43.htm
[67] *Supra* 1, at 39.
[68] *Id*.

of the reasons why the EU definition of the right to be forgotten must be edited in order for the United States to implement this right into law.

Firstly, some argue that the EU court did not treat Google fairly. According to City University journalism professor George Brock, the EU court treated search engines as "economic, profit-seeking organisations without any reference to any public benefit they might provide."[69] Despite the court's apparent view on search engines, the most prominent objection is the failure to consider Google's freedom of expression. As one analysis states:

"At a minimum, the CJEU [Court of Justice of the European Union] should have explicitly considered the search engine operator's right to freedom of expression and information, and should have given more attention to people's right to receive and impart information. The CJEU suggests that 'as a rule', privacy and data protection rights override the public's interest in finding information. We fear that search engine operators, data protection authorities, and national courts might therefore not adequately consider the right to freedom of expression in their delisting decisions based on *Google Spain*."[70]

Another significant objection to *Google Spain* is the vague rhetoric that the EU used when unpacking what criteria must be met in order to have a link removed from the Internet. Because the EU's criteria for having data deleted from Google includes if the

[69] *Supra* 1, at 42.
[70] Stefan Kulk & Dr. Frederik Zuiderveen Borgesius, *Freedom of Expression and 'right to be forgotten' cases in Netherlands after Google Spain*, 113 EDPL (2015).

data is relevant or not, "an objective decision on whether a link is 'relevant' is an invitation to inconsistent standards."[71] Applying rhetoric such as "relevance" and "adequacy" in American culture to determine the eligibility of a link's removal will be challenging.

The Right to Be Forgotten and the United States of America

Due to the strong support the American people generally have for the First Amendment, defamation cases are a challenge for plaintiffs. According to the Freedom Forum Institute Report of 2018, 77% of Americans are in favor of the First Amendment as it is.[72] In *Haynes v. Knopf*, plaintiff Haynes sued book author, Nicholas Lemann, for documenting the life of Ruby Lee Daniels, "who suffered greatly from her former husband Luther Haynes's alcoholism, selfishness, and irresponsible conduct."[73] The court held that a "person does not have [a] legally protected right to a reputation based on the concealment of the truth."[74] With precedent from *Haynes*, the removal of truthful statements about an individual in the public arena is held as unconstitutional in American law, even if they are sensitive or shameful. Due to American courts' valuation of the freedom of speech and expression, "most American legal experts specialising in First Amendment law think that a right to be forgotten, if attempted, would be taken to the Supreme Court and ruled unconstitutional."[75]

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[71] *Supra 1*, at 43.
[72] The Freedom Forum Institute, *The 2018 State of the First Amendment* (2018).
[73] Daniel J. Solove, *Conceptualizing Privacy*, CAL. L. REV. 1113 (2002).
[74] *Supra 11*.
[75] *Supra 1*, at 72.

Jonathan Zittrain, Bemis Chair Professor of Law at Harvard Law School and the Kennedy School of Government, stated in a National Public Radio (NPR) debate that the right to be forgotten is a poor solution to a very real problem. Zittrain also asserted that while there are privacy problems online, the only "safeguard against a correction system going wrong is open criteria for de-indexing and a reviewable process- which EU law does not provide."[76] De-indexing is when a webpage or any other Internet content is taken out of a search engine's algorithms for categorizing information. So, when some piece of content is de-indexed, it will no longer show up in search results. There seems to be no checks and balances in place to ensure that the right to be forgotten will be used correctly.

In addition, the EU's conclusion (that Google must comply with the right to be forgotten, but third party publications do not have to) seems to have an element of circular reasoning in it: if the point of the right is to delete information from the Web, then why aren't other publications forced to comply with the right? In the same NPR debate, Zittrain explicates this circularity problem in the EU's conclusion:

"At the moment when it is granted, Google notifies *The Telegraph*, for example,

> if a story on *The Telegraph* is taken out of the Google index as a result of this right. The EU is fighting that notification because it observes when *The Telegraph* puts out, 'Here's what was deleted today.'"[77]

[76] *Id.*
[77] NPR Debate: Should The U.S. Adopt The 'Right To Be Forgotten' Online? (March 2015) https://www.npr.org/2015/03/18/393643901/debate-should-the-u-s-adopt-the-right-to-be-forgotten-online.

According to *The Guardian*, this circular outcome in the right to be forgotten is like "saying the book can stay in the library but cannot be included in the library's card catalogue."[78] When Google tells *The Telegraph* what it had to delete, more media and news is created because outdated stories will be brought back into the public arena through a new article, reminding the public of a particular deleted record.

Along with Zittrain in the NPR debate, Andrew McLaughlin, a member of the White House Staff under the Obama Administration from 2009-11 and CEO of Digg and Instapaper, argued against the right as well. McLaughlin asserted that the right is merely censorship that is vague, subjective, and easy to abuse.[79] Rather than engaging in further critique, McLaughlin offers a solution: "Let's add a right to respond to a link, as opposed to a right to censor."[80] By responding, rather than burying and concealing information, politicians, public figures, and common citizens will be held accountable for their past actions.

While the right to be forgotten, in EU's terms, might be vague, subjective, and devoid of a clear standard for application, there is also an ethical concern that the right fails to address. Hannah Maslen, deputy director of the Oxford Uehiro Centre for Practical Ethics, reported that BBC News covered the details on the first right to be forgotten requests.[81] Technology reporter, Jane Wakefield, exposed the requests made to

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[78] David Drummond, *We need to talk about the right to be forgotten*, *The Guardian* (July 10, 2014) https://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate

[79] Id., 9:37, 10:06.
[80] Id., 11:28.
[81] Hannah Maslen, *On the 'right to be forgotten'*, University of Oxford (May 16, 2014), *available at* http://blog.practicalethics.ox.ac.uk/2014/05/on-the-right-to-be-forgotten/.

remove links about an ex-politician's behavior in office, a pedophile's conviction on child abuse, and a doctor's negative patient reviews.[82] These requests have raised serious concern on the ethics behind the right to be forgotten: the right allows for concealing vital and relevant knowledge for people who are facing an ethical decision (such as who to vote for, who to hire for healthcare, and who to trust with children). Because of this, Maslen explores the need for rules about how selective an individual can be when requesting information to be removed. Maslen understands the desire to want to start fresh in life after sufficient time has passed. However, "whether part of the right to be forgotten is in fact motivated by a conviction that people should be able to conceal historical negative information because they should be able to present themselves anew is thus far unclear."[83] In addition to the debate on the rhetoric of the EU's decision, there is also controversy behind what the right truly entails, in regards to character and philosophical views. The right to be forgotten is one right that implies other rights: does one also have the right to completely start life over? The rights entailed by the right to be forgotten are vague and unclear.

Other Nations

In addition to the United States, other free countries such as Hong Kong are also skeptical about the right. In the *South China Morning Post*, Alex Lo referenced Claudia Mo's claim that "the people's right to know should override the individual's right to be forgotten… To make a law to eradicate history is something else." In addition, Lo urged,

[82] Jane Wakefield, "Politician and paedophile ask Google to 'be forgotten', BBC News (May 15, 2014), *available at* https://www.bbc.com/news/technology-27423527.
[83] *Supra* 21.

"We must not follow a terribly bad decision made by a foreign court… We are not talking about links to public records that are libelous, false or in violation of copyrights or intellectual property, but those that are perfectly legitimate and accurate."[84]

In addition to Hong Kong, New Zealand has been open to the idea of a right to be forgotten, but agree with most of the right's opponents in that it lacks clarity. New Zealand's privacy commissioner, John Edwards is still open-minded to the idea of a right to be forgotten, though still believing the mere name of the right is "inaccurate, imprecise and impossible."[85] In the 1980's, American courts created the practical obscurity concept, which prohibits deleting information but does allow that information to be made harder to find. In 1986, New Zealand's high court adopted the American practical obscurity concept. Although Edwards questions the legitimacy of the right to be forgotten, he does believe in the New Zealand privacy act, which urges the privacy commission to aim for: "The protection of important human rights and social interests that compete with

> privacy,including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way."[86]

Additionally, there is immense debate about online privacy in South Korea specifically about "large-scale data leakage scandals, communications interception by intelligence agencies, and controversial privacy invasions."[87] A spokesman for The

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[84] *Supra* 1 at 65.
[85] John Edwards, *A right to be forgotten for New Zealand?*, Office of the Privacy Commissioner (July 1, 2014), https://www.privacy.org.nz/blog/right-to-be-forgotten/.
[86] *Id*.
[87] *Supra* 1*,* 67.

Korean Communications Commission commented on the right to be forgotten to the *Financial Times*, saying that, while Korea ought to follow the right to be forgotten trend, there is no obligation for them to follow the EU's lead.[88] South Korea is open to adopting the right to be forgotten, but would probably edit the right in order for it to work more efficiently in South Korean society.

Conclusion

From a cultural standpoint, it is difficult to apply the right to be forgotten in the same way the EU originally intended because what one deems as irrelevant internet data is not the same as another. The right's rhetoric is flawed in terms of its application.

In addition to the cultural dimensions the right fails to address, the right to be forgotten also has circular reasoning within it. Requesting Google to delete data opens the door to other publications documenting what Google had to delete, which defeats the purpose of deleting information in the first place. For Sr. Costeja, his efforts to conceal his financial struggles are now globally known and will continue to be remembered. Granted, the EU did not foresee a circularity issue in the right to be forgotten. If the right were to ever be implemented into American law, this issue would need to be addressed.

Furthermore, the right is at odds with American pride in relation to the First Amendment. Three in every four Americans still support a textualist approach to the First Amendment's meaning, rhetoric, and implications. The right to be forgotten might not be met with open arms in the United States, especially due to rooted American ideas regarding nationalism and individualism.

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[88] *Supra* 1, 68.

The right to be forgotten has ethical concerns as well, because it has the power to conceal vital information from the public. For example, if a doctor deletes past patient reviews simply because the doctor finds them irrelevant or inadequate, the public is deprived of necessary information when deciding which doctor they might hire. The right to be forgotten leaves room for unaccountability.

Though the right to be forgotten is believed to be largely rejected by the American courts and public due to these reasons, efforts to increase online privacy and autonomy ought to be considered. Solutions that encourage online autonomy could be welcomed in America, such as McLaughlin's proposal to grant citizens the ability to respond to a link and explain why the link is irrelevant. Not only does the right to respond to Google's listings keep individuals accountable for their past actions, but the right to respond also supports the First Amendment by encouraging further discussion in the public arena.

The Supreme Court's Legitimacy Crisis

Brett Kavanaugh's confirmation to the Supreme Court solidifies a "conservative" majority of the nine justices and places scrutiny on the implications of a politicized Court. As a result, the Court is now embroiled in a legitimacy crisis. The question of whether it is fair to assume the five conservative judges will always vote along party lines is key to the future of the Supreme Court's credibility. Further examination of the success with which the conservative agenda came to dominate the U.S. political landscape can lend insight into the current state of the Court.

The only legal guide for the nomination process exists in Article 2, Section 2 of the U.S. Constitution, which states the President shall nominate judges to the Supreme Court who must be approved by the Senate. The president works with the White House counsel's office, the vice president, the chief of staff, and the attorney general to choose a nominee. Potential nominees undergo a rigorous vetting process to avoid controversy. Nonetheless, Judge Kavanaugh's confirmation process was one of the most contentious in modern memory. The allegations of sexual assault raised against Kavanaugh raised serious questions of credibility. The nomination process also highlighted issues with arguably more grave consequences regarding the legitimacy of the Supreme Court. The previous two nominees to the Supreme Court were nominated by a president who did not receive the popular vote and confirmed by a majority of senators who garnered fewer votes in the last election than did the senators who voted against the justices'

confirmations.[89] Donald Trump won just under 46 percent of the popular vote, or 2.8 million fewer votes than Hillary Clinton. The 54 senators who voted in favor of Justice Neil Gorsuch's nomination received 56 million votes, compared to the dissenting 45 senators who received 76 million combined votes. Similarly, Clarence Thomas and Samuel Alito secured confirmations with a majority of senators who received fewer collective votes than the dissenting group. The result is a "majority-minority," confirmed by a president and Senate who do not represent the majority will of the American people. Since the Constitution apportions two Senators to every state, it should not be surprising that divided Senate confirmation votes produce skewed results in relation to the total of number of popular votes senators received.[90] It is worthy to consider, though, that this case of majority-minority has never occurred for Democrats. No Democratic president has lost the popular vote, and all four liberal justices currently serving received 63 Senate confirmation votes or more.[91] Why does this discrepancy exist, and is it a legitimate concern that the conservative majority will vote according to partisan agenda?

Kavanaugh was a largely unsurprising choice as Trump's nominee. Reflecting the expected rhetoric of a conservative judge, Kavanaugh vowed to interpret the Constitution as intended by the founders, enact policy from the bench, and respect precedent. With remarkable consistency, however, Republican appointees have delivered a pattern of rulings for corporate and special interests. When examining Roberts's decisions, there

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[89] Kevin J. McMahon, *Will the Supreme Court Still "Seldom Stray Very Far"?: Regime Politics in a Polarized America* (Aug. 9, 2018) https://scholarship.kentlaw.iit.edu/cklawreview/vol93/iss2/4
[90] *Ibid*.
[91] Supreme Court Nominations: present-1789, U.S. Senate: Contacting The Senate (2018), https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm (last visited Nov 17, 2018).

were 212 five-four or five-three decisions. In 79 of those cases, the conservative justices voted "en bloc," meaning that clear Republican interests won 92 percent of the time.[92]

On the other hand, there is no guarantee states or individuals will follow Court rulings. For instance, in the historic 1954 *Brown v. Board of Education*, Southern politicians vowed to maintain segregation in state schools.[93] Georgia Governor Herman Talmadge declared, "The full powers of my office are ready to see that the laws of our state are enforced impartially and without violence." Governor Talmadge denied the impartial and final ruling of the Supreme Court and instead implied that state laws somehow superseded the federal ruling of desegregation.[94] This exemplifies the legal reality of the Supreme Court's power; it rests on perception. Recently, senators have treated the most recent court vacancy as a political prize. For the court to be respected, the public must view it as a legal institution devoted to discerning neutral principles of law. The Kavanaugh hearing devastated this perception, posing a significant threat to the court's future legal authority.

Citizens United v. Federal Commission

In perhaps the most relevant 5-4 ruling along party lines, the Supreme Court established that the ability of corporations to spend money during local and national elections cannot be limited in *Citizens United v. Federal Commission* (2010).[95] In 2008,

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[92] The Roberts Five: Advancing Right-Wing and Corporate Interests 92 Percent of the Time (2018), https://www.whitehouse.senate.gov/imo/media/doc/Roberts_Five_5-4_Cases.pdf.
[93] Gareth D. Pahowka, *Voices of Moderation: Southern Whites Respond to Brown v. Board of Education,* The Gettysburg Historical Journal (Mar. 28, 2013), http://cupola.gettysburg.edu/ghj/vol5/iss1/6
[94] Chalmers M. Roberts, *South's Leaders Are Shocked at School Integration Ruling*, The Washington Post (May 18, 1954)
[95] Citizens United v. Federal Election Committee,08-205, U.S. x, x (2010).

Citizens United, a nonprofit corporation, released a documentary that criticized then-Senator Hillary Clinton. Citizens United sought injunctive and declaratory relief from the restrictions of the Bipartisan Campaign Reform Act, on the grounds of free speech established in the First Amendment.[96] In his opinion, Justice Kennedy argued that *stare decisis* did not compel the continued acceptance of *Austin v Michigan Chamber of Commerce* (1990), which held that political speech could be banned in the case of corporations as entities rather than individuals.[97] He continued, "We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process," establishing that campaign finance was not an arena where the government could place restrictions.[98] The decision gave power to political action committees (PACs), that can now accept unlimited donations from individuals or corporations, spend an unlimited amount of those donations, and expressly advocate for the candidates. The only restriction is that they do not coordinate with the candidates directly. PACs must also reveal their donors; however, both Democrats and Republicans have discovered loopholes. The strategy is to start a new PAC after a deadline for reporting donors and expenses, then raise and spend the money before the next report is due. Timed correctly, a PAC can operate for an entire month before revealing its donors to the public. According to FEC data, PACs have spent at least $21.5 million this election cycle before disclosing who donated the money.[99] If a

[96] *Ibid.*
[97] Citizens United v. Federal Election Committee,08-205, U.S. x, x, Op. Roberts (2010).
[98] *Ibid.*
[99] Derek Willis, Sisi Wei & Aaron Bycoffe, FEC Itemizer How States Handle Drug Use During Pregnancy (2015), https://projects.propublica.org/itemizer/filing/1233291/schedule/sa (last visited [x], 2018).

PAC launches right before an election, voters won't know the identity of the donors until after going to the polls.

Special interest groups impact not only general elections but more recently affected the nomination process of Supreme Court justices. The Judicial Crisis Network (JCN) spent $1.5 million dollars in ads supporting Judge Kavanaugh's nomination after multiple allegations of sexual misconduct.[100] The special interests behind groups like the JCN similarly fund Republican politicians. If Republican senators were to vote against a nominee who declared his intention to promote a conservative agenda, then the likelihood of receiving indirect campaign contributions for the next election cycle would be slim. In addition, a large number of corporate and special interests behind the groups lobbying for judicial nominees are unknown to the public. In May 2018, the Republican establishment launched an ad campaign against then-U.S. Senate candidate Don Blankenship. Blankenship recently served a year in prison, and the GOP feared he would destroy the party's chances of defeating a Democratic candidate. A generically named "Mountain Families PAC" aired $1.4 million in TV ads against the Democratic candidate produced by the GOP ad-making firm Mccarthy, Hennings, & Whalen. The PAC did not reveal its donor, the Senate Leadership Fund, until after the primary.[101] The PAC was promptly dissolved entirely.[102] Operating on the blind spots in campaign finance law allows

[100] How The Judicial Crisis Network Is Reacting To The Kavanaugh Hearings And Allegations, NPR(2018), https://www.npr.org/2018/09/28/652748304/how-the-judicial-crisis-network-is-reacting-to-the-kavanaugh-hearings-and-allega). (last visited [x], 2018).
[101] Derek Willis, Sisi Wei & Aaron Bycoffe, FEC Itemizer How States Handle Drug Use During Pregnancy (2015), https://projects.propublica.org/itemizer/filing/1233291/schedule/sa (last visited [x], 2018).
[102] FEC FORM 3X, Schedule E for Report FEC-1260062,http://docquery.fec.gov/cgi-bin/forms/C00674689/1233294/ (last visited [x] 2018).

interests groups to conceal millions in campaign donations so that the public is largely unaware of the role of special interests in pursuing partisan agendas.

Impartiality of the Court

In examining the way appointed nominees make decisions, the matter is not as simple as the Court deciding according to long-held ideological beliefs. Every member of the Court must be a legal scholar who believes in the larger significance of the Constitution above the individual. Subsequently, precedent provides the basis for legal decisions. Precedent ensures a level of legal stability, serving as a tool of legitimacy for the judicial branch. However, with no restraints on their ability to overrule and draw distinctions from precedent, justices can jeopardize the stability and authority of the Supreme Court. The guiding legal doctrine of precedent, or *stare decisis,* ensures that a court need not examine the legal justifications of past decisions for every new case.[103] This precedent invokes rule-of-law principles of constancy, generality, and institutional responsibility while consistently defining constitutional rights for the public and contributing to the perceived integrity of the judicial process.[104]

In a 2016 article in the Catholic University Law Review, Brett Kavanaugh explains his view on the impartiality of the law courts in relation to baseball. He argues, "In our separation of powers system, to be an umpire as a judge means to follow the law and not to make or remake the law… federal judges have to check any prior political

[103] LII Staff, Stare decisis LII / Legal Information Institute(2017), https://www.law.cornell.edu/wex/stare_decisis (last visited?).
[104] Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 Michigan Law Review (2012).

allegiances at the door," asserting the importance of statutory interpretation.[105] He continues, "Following established rules includes *stare decisis*: we follow the cases that have been decided," reinforcing his position on the importance of maintaining the status quo. However, in his testimony before the Senate Judiciary Community, he indicated a more reactionary position indicative of advancing a political agenda. He denounced attempts to impede his nomination, stating: "You have replaced advise and consent with search and destroy... there has been a frenzy on the left to come up with something, anything, to block my nomination."[106] Referring to the Senate's ability to oversee the president's constitutional power of judicial appointments, Kavanaugh phrased the hearing as nothing more than a political maneuver. Using aggressive partisan language, Kavanaugh called efforts to stop the nomination "revenge on behalf of the Clintons and millions of dollars in money from outside left-wing opposition groups."[107] However, these statements contradict Kavanaugh's rhetoric. He suggests that Democratic Senators on the Judiciary Committee questioned his character only as a political "witch hunt." This implication further undermines the impartiality of the judicial selection process. When the selection of judicial nominees becomes aligned with a particular partisan agenda, the Supreme Court no longer represents an impartial arbiter of legal truth.

<u>Special Interests at Play</u>

[105] Brett M Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 Catholic University Law Review (2016).
[106] Transcript courtesy of Bloomberg Government, Kavanaugh hearing: Transcript The Washington Post (2018). https://www.washingtonpost.com/news/national/wp/2018/09/27/kavanaugh-hearing-transcript/?utm_term=.65388550e
[107] Ibid.

Trump may represent the new conservative majority, but behind the curtains are corporate and special interest forces that are responsible for fashioning this majority. This is a long-term, incremental strategy of ideas, money, and careful planning that has gradually but dramatically altered the American legal landscape. Women's rights groups fear *Roe v. Wade* will be overturned by this new Court, yet many fail to recognize the existing pattern of conservative victories that have characterized the Supreme Court.

With both Gorsuch and Kavanaugh, Trump outsourced the process of judicial selection to the Federalist Society, an influential, nationwide corporation founded in the 1980s by a small group of conservative law students from elite law schools.[108] Coinciding with the Reagan Revolution, this group of reactionaries did not see their ideas represented in their curriculum, taking the law back from the liberal orthodoxy prevailing through the 1970s. The Federalist Society represents a nationwide coalition of lawyers and politicians dedicated to altering the legal status quo to reflect a more conservative agenda. The organization receives millions of dollars in funding from public donors such as the U.S. Chamber of Commerce, the Lynde and Harry Bradley Foundation, the Koch brothers, and the Scaife foundations.[109] Leonard Leo, executive vice president of the Federalist Society, is a White House adviser on judicial nominations who has contributed advice on

[108] Mary Louise Kelly, What Is The Federalist Society And How Does It Affect Supreme Court Picks?, NPR (2018). https://www.npr.org/2018/06/28/624416666/what-is-the-federalist-society-and-how-does-it-affect-supreme-court-picks

[109] The Federalist Society, The Federalist Society 2017 Annual Report for Law and Public Policy Studies (2017), *available at* https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/MvqGg29Q81NilIcwowGDQLsgpEPHGmkvUxyjlAys.pdf

nominating Alito, Gorsuch, and Kavanaugh.[110] Leo has been careful to highlight Trump as the primary decision maker in the nomination process. On the campaign trail, Trump announced his intent to name conservative judges to Court vacancies, but he lacked an experienced team of legal advisors. Only a few days after Trump's victory in the 2016 election, Leo was in Trump Tower, offering his advice on nominees to fill Scalia's vacant seat.[111] Thus, a notable special interest can play a direct role in selecting a nominee who could decide cases based on legal standards rather than ideological hard lines. Kavanaugh has given more than 50 speeches to the Federalist Society since becoming a circuit court judge. Of the 13 judicial nominees confirmed by Trump, 10 are involved in the Federalist Society, either as current or former members of the Federalist Society or regular speakers at its events.[112] White House Counsel Donald McGahn, an active participant in the nomination process and member of the Federalist Society, recently cut off the American Bar Association's (ABA) ability to evaluate candidates to the federal bench. The ABA has a long-standing practice of reviewing the professional qualifications of the White House's prospective nominees. However, in a letter to the ABA, McGahn made an unprecedented move to reject the ABA's nonpartisan review, stating, "We will release information regarding each nominee in a manner that provides equal access to all interest

[110] David G. Savage, *Leonard Leo of the Federalist Society is the man to see if you aspire to the Supreme Court*, Los Angeles Times, July 6 2018, at P3.
[111] *Ibid.*, at P16
[112] Lydia Wheeler, *Meet the powerful group behind Trump's judicial nominations*. The Hill, Nov. 16, 2017, at P3.

groups. But we do not intend to give any professional organizations special access to our nominees," further securing the Federalist Society's power over judicial nominations.[113]

It remains difficult to analyze Trump's own legal views. Leo, McGahn, and others have nonetheless effectively persuaded the president that their judicial philosophy of originalism and textualism is in sync with his visceral preferences that judges be "courageous" and "not weak."[114] The Federalist Society has embraced judicial activism and effectively managed to change how Washington operates, shifting power away from the executive and legislative branches and toward the courts. It also represents something of a long-term strategy by the Republican Party. The conservative majority in the Supreme Court represents more than political power, determined by elections and shifting public opinion. These judges will preside on the bench for decades.

The public pays little attention to the Supreme Court except in times of political contention. When the Court is viewed as a political entity, it loses its credibility. Its reputation of insulation from bitter partisan politics occurring in the other two branches of government is at stake. If the Court becomes a third political branch of the United States government, there will be no independent arbiter of legal truth. Instead, through judicial fiat, a conservative majority that reliably votes along party lines can achieve what the Republican Party could not through democratic means. The two recent and highly

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[113] Letter from Donald F. McGahn II, White House Counsel, to Linda Klein, President, American Bar Association.

[114] Jason Zengerle, *How the Trump Administration is Remaking the Courts*, The New York Times Magazine, Aug, 22, 2018, *available at* https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html.

contentious nominations suggest that the current Supreme Court is nothing more than a set of political actors making partisan judgements.