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Politics and Constitutional Law: A Distinction without a Difference?

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ABSTRACT

This article examines the relationship between Politics and Law in U.S. Supreme Court decision-making. It argues that three major developments in recent decades have combined to undermine the Court's status as a legal and judicial institution, and instead define it as political actor, motivated by ideology and the personal policy predilections of the Court's Justices. The first of these elements is the increasingly political and partisan nature of the Supreme Court appointment process, as witnessed by the recent Gorsuch and Kavanaugh nominations. The behaviour of the President and Senators in these controversial appointments conclusively demonstrates that the country's leading politicians view the Court as primarily a political body rather than a legal one. The second element of the assault on the Court's status as a judicial institution is the rise in influence of the behaviouralist school of Supreme Court analysis. Beginning with the work of academics such as Glendon Schubert, the behaviouralists employed new methods and theories in an attempt to debunk the Legal Model of Supreme Court decision-making and to replace it with what is known today as the Attitudinal Model. It forcibly argues that Supreme Court Justices are political in intent and decision, with legal language and arguments being no more than judicial camouflage to disguise their true nature. This applies equally to both conservative and liberal justices. The article identifies the third element of the assault on the status of the Court as a legal institution as coming from Originalist scholars, activists and judges who accuse liberal Justices of having abandoned traditional interpretive methods in favour of redefining the language of the Constitution to suit their progressive political agenda. Originalists acknowledge that their own interpretive methods may lead to results deemed unacceptable to contemporary Americans, but argue that it the duty of the political branches of government, not the courts, to modernise policy and practice. This article concludes that while Originalism has genuine appeal as a theory of interpretation, it is nevertheless both impractical and undesirable. Moreover, rather than returning the Court to the Legal Model, the Originalist campaign has only served to persuade many that the Attitudinal Model is an accurate one. However, the article also argues that the break with Originalism by the Warren Court over segregation has developed into a wholesale change in the Court's role in American government, one that ill-becomes the unelected judiciary in a representative democracy. It is argued here that the best way to restore the legal and judicial identity of the Court would be a return to the emphasis on 'judicial role', once championed by great jurists such as Learned Hand, Oliver Wendell Holmes, Louis Brandeis and John Harlan II. Judicial modesty and restraint would distinguish the Court from the political branches of American government. The Court should

* Associate Fellow, Institute of the Americas, University College, London. This paper was initially prepared as the Keynote Address for the Conference on American Politics, History and Law: A Cross-Disciplinary Dialogue, held at the Centre for American Legal Studies, Birmingham City University, 30 July, 2018.

decide less and only where the case for a decision of unconstitutionality is very clear and very compelling.

KEYWORDS

U.S. Supreme Court, Constitutional Interpretation, Judicial Role

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A 'distinction without a difference' exists where a linguistic or conceptual difference turns out to have no substantial significance and merely masks two similar, if not identical, objects. As applied to constitutional law and interpretation, it means that judges – especially the Justices of the United States Supreme Court – employ the forms and language of law, while their reasoning, motivations and goals are political. As some often say, members of the Supreme Court are properly viewed as "politicians in judges' robes".

Is this assertion accurate? The evidence of the last two nominations to the Supreme Court makes clear that politicians in the United States see constitutional law as highly politicised and critical to public policy on matters of utmost importance – abortion, freedom of religion, elections, gun ownership, race and gender equality, the powers of the Executive Branch in foreign policy and national security and the rights of States against Federal power.

I. Politics and Partisanship in Supreme Court Appointments

In February 2016, Supreme Court Justice Antonin Scalia died suddenly. The procedure for replacing him, set out in Article II, Section 2 of the US Constitution, is clear: the President is required to nominate a new Justice, but the nominee must be approved by the Senate. However, at this time, several political and partisan factors complicated the nomination and confirmation process. The Democratic President, Barack Obama, was faced with a Republican-controlled Senate. Moreover, Obama was a 'lame-duck' President, meaning he had served two terms and was constitutionally barred from seeking a third in November, 2016.

Secondly, as a result of Scalia's death, the Supreme Court was balanced on a political knife-edge. The eight remaining Justices were divided between four liberals and four conservatives, though one of the latter, Justice Kennedy, sometimes joined the liberals on issues such LGBT equality and the death penalty. If Obama succeeded in appointing another Justice, he would create a decisive and solid five-Justice liberal majority that would control decisions on the most divisive issues of the day. Moreover, Justice Scalia had been perhaps the most celebrated proponent of the doctrine of Originalism in constitutional interpretation and a conservative icon. He would be replaced by a liberal and originalism and conservatism would be dealt a grievous blow. These were the political and judicial stakes that dominated the process of replacing Justice Scalia.

On the horns of a dilemma, Republican Senate Majority Leader Mitch McConnell made an unprecedented move. He announced: "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore this vacancy should not be filled until we have a new President".[1] McConnell's attempt to cloak his gambit in democratic principle was, to say the least, ironic. After all, the Founding Fathers had set up a nomination process that deliberately excluded the American people from having a voice in the proceedings by giving the popularly-elected House of Representatives no say in the matter. Realistically, the

[1] Harper Neidig, *McConnell: Don't Replace Scalia Until After Election*, The Hill, 02/13/16 06:27 PM EST, https://thehill.com/homenews/senate/269389-mcconnell-dont-replace-scalia-until-after-election .

Republican party engaged in an entirely politically-motivated, last-ditch attempt to prevent the Supreme Court acquiring a liberal majority. Its last hope was that a Republican candidate would win the presidential election in November, 2016, and be able to replace Scalia with another conservative.

The absence of any principle in McConnell's strategy was confirmed when he reversed his argument when Justice Kennedy announced his retirement from the Court in June 2018. As noted above, Kennedy was regarded as the swing Justice who sometimes joined the four liberals on the Court to create a majority on matters such as gay rights, abortion and the death penalty, although he was usually with the conservative Justices on other issues. If President Trump succeeded in appointing Kennedy's replacement, then there would be a solid five-Justice conservative majority on the Court, thus finally fulfilling the aim of conservatives going back to the presidency of Ronald Reagan. Trump faced a Senate with a narrow Republican majority, but the upcoming mid-term elections of November 2018 could change that. So whereas he had delayed filling the Scalia vacancy for almost a year, McConnell now rushed through President Trump's nomination of Brett Kavanaugh in order to get him confirmed before the mid-term elections and the possibility of a Democrat-controlled Senate. Democrats, equally politically-motivated, did all they could to delay Kavanaugh's confirmation. This culminated in a series of accusations by women, especially Professor Christine Blasey Ford, that Kavanaugh had sexually assaulted them. In the absence of conclusive proof, Kavanaugh was eventually confirmed on an almost wholly partisan basis.[2]

The Kavanaugh hearings were distasteful to many observers. Yet they provided further evidence of the bitter and even toxic nature of the partisan battle to control the Supreme Court.[3] Anyone observing these political shenanigans could only conclude that the Supreme Court is viewed as a political, not judicial, body by the other principal actors in the American political system.

Given the sharply heightened partisanship in American politics in recent decades, one might be tempted to regard Congressional and Presidential behaviour over Supreme Court appointments as typical of politicians while telling us little about how Justices decide the cases before them. However, academic analyses of Supreme Court decision-making have increasingly concluded that constitutional law and politics are fundamentally one and the same: a distinction without a difference.

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2 One Democrat Senator, Joe Manchin of West Virginia, voted to confirm Kavanaugh. One Republican Senator, Lisa Murkowski of Alaska did not, though she 'paired' her vote with an absent Republican Senator who would have voted to confirm. Thus the final vote was 50-48 to confirm.

3 The Kavanaugh nomination was not the first in modern times to display bitter political partisanship. The defeat of Reagan nominee Robert Bork in 1987 was an epic battle. The narrow confirmation of George H. Bush nominee Clarence Thomas in 1991 involved unsavoury elements similar to those in the Kavanaugh controversy. *See*, Ethan Bronner, Battle for Justice: How the Bork Nomination Shook America (2007); Jane Mayer & Jill Abramson, Strange Justice: The Selling of Clarence Thomas (1994); Jan Crawford Greenburg, Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court (2007).

II. The Attitudinal Model and the Legal Model

Beginning in the 1960s, the behaviouralist theory pioneered by Glendon Schubert and others argued that constitutional disputes were a means by which judges could implement their preferred policy choices. Employing statistical methods, such as unidimensional scalogram analysis, Schubert 'predicted' the votes of Supreme Court Justices, although 'predict' must be placed in inverted commas, since he in fact worked backwards. Cases were retrospectively translated into policy choices and each Justice's votes on them were scaled for policy consistency.

Two things about Schubert's approach are worth emphasising here. First, he explicitly states that Supreme Court Justices are political, not legal or judicial, in their intentions. As he wrote, "The Justices themselves are goal oriented and their basic goals are the same as those that motivate other political actors".[4]

The second is that Schubert completely dismisses the written Opinions of Justices in cases and focuses exclusively on their votes. All the constitutional analysis, examination of precedents and institutional powers is irrelevant: "In our analysis, cases before the Supreme Court for decision are treated as questions before the Justices, who are respondents. The Justices respond not by the words they use in their opinions, but by the ways in which they vote".[5] For Schubert and the behaviouralists, there is no law in Supreme Court decision-making, only politics and policy preferences.

The work of the behaviouralists was taken on and developed by those who argue for the Attitudinal Model of Supreme Court decision-making. Most closely associated with this approach are Jeffrey A. Segal and Harold J. Spaeth, who wrote:

> This model holds that the Supreme Court decides disputes in the light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, (William) Rehnquist votes the way he does because he is extremely conservative; (Thurgood) Marshall voted the way he did because he was extremely liberal.[6]

Segal and Spaeth employed more, and more sophisticated, statistical methods than Schubert, but their conclusions were basically the same: politics and personal policy preference explain Supreme Court decisions. They explicitly contrast their approach with what they term the Legal Model, which they dismiss as serving "only to rationalise the Court's decisions and to cloak the reality of the Court's decision-making process".[7]

Until the mid-twentieth century, the Legal Model was the widely accepted understanding of Supreme Court decision-making as a process of Law, not Politics. A classic statement of the Legal Model's conception of constitutional interpretation was articulated by Justice Owen Roberts in *U.S. v. Butler* (1936). At the time of the

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4 Glendon Schubert, Judicial Policy-Making: The Political Role of the Courts 164 (Rev'd. ed. 1974).

5 Glendon Schubert, Quantitative Analysis of Judicial Behaviour 293 (1960).

6 Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited 86 (2002).

7 *Id*. at 53.

decision, the Court was mired in political controversy as it struck down several key measures of President Franklin Delano Roosevelt's New Deal. At issue in *Butler* was the federal Agricultural Adjustment Act of 1933, the Roosevelt administration's major initiative to regulate farm production and boost farmers' incomes. However, it was challenged before the Court as an unconstitutional exercise of Congressional power. The Tenth Amendment to the Constitution, it was argued, reserved the power to regulate agriculture to the several States and thus Congress had no power to act on the matter.

A 6-3 majority of the Justices agreed with the challenge. Justice Roberts anticipated the furore that would greet the Court's decision. He emphasised that, like all constitutional decisions, it involved no act of political will on the part of the Justices and was based on impartial, legal analysis:

> It is sometimes said that the Court assumes the power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does or can do is to announce the Court's considered judgement upon the question. The only power it has, if such it may be called, is the power of judgment, This Court neither approves nor condemns any legislative policy.[8]

Roberts' assertion of the Legal Model failed to convince the Roosevelt administration. Later that year, Roosevelt was re-elected by a landslide and set about devising the" Court-packing Plan", officially The Judicial Procedures Reform Bill (1937). Under the guise of helping ageing Justices to cope with their workload, the bill would allow the President to nominate an additional new Justice for each current Justice who was seventy or older and chose not to retire.[9] Had the bill passed, Roosevelt appointees would take over the Court and were expected to approve all the measures that had been struck down. However such a crude attempt to bend one branch of the federal government to the will of another caused great unease. Moreover, the Court signalled an about-face on the issue of government regulation of economic activity in *West Coast Hotel v. Parrish* (1937). There it reversed a recent precedent, *Adkins v. Children's Hospital* (1923), that had held a minimum wage law for women to be unconstitutional.[10] Subsequent decisions confirmed that the Supreme Court had ceased to stand in the way of government economic regulation. As a result, the Court-packing Plan quietly faded away.

The tools that Owen Roberts and his colleagues employed in exercising "judgement" are familiar to all legal professionals. They include exploration of

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8 United States v. Butler, 297 U.S. 1, 62-63 (1936).

9 William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing Plan"*, 1966 Sup. Ct. Rev. 347, 347-400 (1966).

10 300 U.S. 379 (1937); 261 U.S. 525 (1923).

the language of the Constitution and the intentions of those who wrote it; previous decisions of the courts on the same or similar issues – legal precedent; and respect for canons of judicial behaviour that ensure that courts do not not usurp powers assigned to other branches of government. In contrast to the Attitudinal model, Roberts denies that the Justices have any political or policy goals in play. Moreover, they only evaluate whether the statute fits with the Constitution and not whether it is good, effective or popular. For Roberts, the Constitution is Law and the Justices are expert legal analysts.

Fast forward some seventy years and another judge named Roberts is making the same point. In 2005, John G. Roberts, now Chief Justice of the U.S. Supreme Court, was undergoing confirmation hearings in the Senate. There he compared the role and motivations of Supreme Court Justices to umpires in a baseball game:

> Judges and justices are servants of the law, not the other way round. Judges are like umpires. Umpires don't make rules, they apply them. The role of the umpire and the judge is critical. They make sure everyone plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire … I have no agenda, but I do have a commitment. If I am confirmed, I will confront every case with an open mind. I will fully and fairly analyse the legal arguments that are presented. I will be open to the considered views of my colleagues on the bench. And I will decide every case based on the record, according to the rule of law, without fear or favour to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat.[11]

If liberal media reacted rather sceptically to Roberts' umpire analogy, it's important to note that liberal Supreme Court Justices share a similar view to Roberts of the Court's decision-making processes. Justice Stephen Breyer was appointed to the Court by President Bill Clinton in 1994 and has been a consistently liberal voter on the Court ever since. Yet he adheres to the Legal Model:

> In my experience most judges approach and decide most cases, including constitutional cases, quite similarly. They are professionals. And their professional training and experience leads them to examine language, history, tradition, precedent, purpose, and consequences. Given roughly similar forms of legal education and professional experience, it is not surprising that judges often agree about how these factors, taken together, point to the proper result in a particular case.[12]

Similarly, the most liberal Justice of the current Court, Ruth Bader Ginsburg, said at her Senate Hearings:

> Let me try to state in a nutshell how I view the work of judging. My approach, I believe, is neither liberal nor conservative. Rather, it is rooted in the place of the judiciary, of judges, in our democratic society. The

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11 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr.,).

12 Stephen G. Breyer, Active Liberty 110 (2008).

> judiciary … is placed apart from the political fray so that its members can judge fairly, impartially, in accordance with the law, and without fear about the animosity of any pressure group. As Judge Oliver Wendell Holmes counselled, 'One of the most sacred duties of a judge is not to read (her) convictions into the Constitution'. I have tried and will continue to try to follow the model Justice Holmes set in holding that duty sacred.[13]

So Ginsburg too denies the validity of the Attitudinal Model, arguing that it would entail the abandonment of a sacred duty. In fact virtually all judges and Supreme Court Justices insist they adhere to the Legal Model and, furthermore, insist that those who disagree with them on the Court also adhere to that Model. This leaves us with a predicament. If the Attitudinal Model is correct, and Law constitutes the surface form of decisions while politics is the substance, the Justices of the Supreme Court, both Liberal and Conservative, are either self-deluded or downright dishonest. And advocates of the Attitudinal Model do have ammunition for their conclusion. For whatever they say in their Opinions, Justice Ginsburg will almost always vote for a liberal result in a politically divisive case and Justice Thomas will almost always vote for a conservative result.

In fact, since the appointment of Justice Elena Kagan in 2010, the Justices of the Supreme Court divide perfectly along ideological-partisan lines. That is to say, every Justice appointed by a Democrat president has a more liberal voting record than every Justice appointed by a Republican president.[14] This has never before been true. In recent decades, there has always been a Republican appointee, such as Justices Stevens and Souter, or a Democrat appointee, such as Justice White, who deserted the partisan-ideological bloc of their appointing president. This would suggest that the Presidents and Senators who treat Supreme Court appointments as a partisan-ideological process are achieving the goals they set themselves. Faced with such evidence, doesn't it strain credulity to argue for the baseball umpire version of political neutrality in legal and constitutional interpretation? Isn't it clear that when it comes to this context, Law and Politics constitute a distinction without a difference?

III. Interpretive Theory

At this point, it is necessary to examine a more sophisticated form of the Legal Model, one that takes into account interpretive theory. For the U.S. Constitution requires interpretation and application in contexts unimagined by its Framers. The Constitution was conceived in the late eighteenth century, with key amendments being added in the Nineteenth and early Twentieth centuries. The challenge facing today's Justices can be readily illustrated by cases involving the Eighth Amendment's ban on "cruel and unusual punishments". What this meant at the time of its adoption in 1791 was unclear and Congressman Samuel Livermore of

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13 *Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court of the United States*, 103d Cong. 53-56 (1993) (statement of Ruth B. Ginsburg).

14 Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 309 (2017).

New Hampshire thought it was so vague as to be meaningless. He also added: " … it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?"[15] Livermore's words make two things clear: first, the meaning of the constitutional phrase was not clear at the time and, second, that eighteenth century notions of reasonable punishments would shock Americans two hundred years later. The search for an 'Original Meaning' is therefore difficult. More importantly, however, why would twenty-first century Americans allow themselves to be bound by an eighteenth-century definition of cruelty? The Court said as much in 1958 in *Trop v. Dulles*. There Chief Justice Earl Warren wrote that the meaning of the clause was not static and that "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".[16]

Other key phrases in the Constitution are also vague – the "liberty" protected by the due process clauses of the Fifth and Fourteenth Amendments or the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Moreover concepts of liberty and equality can change drastically over time. Such change can be rapid, as with the acceptance of gay and lesbian rights in recent years.

There is then a tension between the traditional approach of interpreting law – ascertaining and applying the original understanding and intention of those who passed a law – and the realistic need to ensure that law is free from anachronistic and unacceptable values.

This tension came fully to the fore in the Civil Rights era of the 1950s and 1960s, as politics and law became inextricable for all to see. The rights of black Americans, especially in Southern and border States, were being grossly violated by widespread de jure racial segregation. The Supreme Court had confronted this issue in *Plessy v. Ferguson* in 1896 and ruled by a vote of 8-1 that the 14th Amendment equal protection clause was not violated by "separate but equal" treatment of whites and blacks. The "equal" part of the doctrine was always honoured in the breach and the Court began to take this aspect of the practice more seriously as time passed.[17] By the time *Brown v. Board of Education*[18] came before the Court in 1954, the Justices were prepared to break with the traditional interpretation. The historical evidence is persuasive that the Framers of the 14th Amendment did not intend to prohibit racial segregation in schools.[19] Yet the practice was so obviously discriminatory and racist to many Americans and, indeed, non-Americans, that it was a badge of shame. The Congress however was in no position to act, given the ability of Southern Senators and Congressmen to thwart attempts at reform.

The Supreme Court unanimously ruled that separate facilities were inherently unequal, but it did not attempt to justify this on originalist grounds. Instead, it stated cursorily that the evidence of the intent of the Framers was "inconclusive"

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15 Furman v. Georgia, 408 U.S. 238, 262 (1972).

16 Trop v. Dulles, 356 U.S. 86, 101 (1958).

17 Missouri *ex rel*. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents 339 U.S. 637 (1950); Henderson v. United States, 339 U.S. 816 (1950).

18 347 U.S. 483 (1954).

19 Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (2d ed. 1997).

and attached more importance to the prevalence of public education for black Americans in 1954 compared to 1868. It then added some rather superficial sociological data about how segregated schools induced feelings of inferiority in black schoolchildren.

IV. The Warren Court and Social reform

While the Court made no statement regarding its change of interpretive method, a new path had been set by *Brown*. The Warren Court embarked on a series of path-breaking decisions that swept away de jure segregation. The successor Burger Court then extended its reach to de facto segregation.[20] The Warren Court also broke new ground in areas such as the rights of accused, religious observance in schools, voting rights and pornography and free speech. This new interaction between constitutional law and political, social and cultural change brought about no less than a fundamental shift in the role of the federal courts in the American political system. The legal scholar Archibald Cox identified the change in his 1968 book entitled "The Warren Court: Constitutional Decision as an Instrument of Reform". Thus the Supreme Court, an institution that usually extolled continuity with the past, became a dynamic forum for radical change in America's legal and political order.

The genesis of the *Brown* decision owed much to the efforts of the National Association for the Advancement of Colored People (NAACP). Frustrated by racism in elected branches of government, the NAACP developed a litigation strategy in the 1920s and 1930s. The perceived successes of this strategy in *Brown* and other cases led more interest groups to follow suit. As Mark Tushnet noted, "The decades after *Brown* saw a proliferation of planned litigation campaigns".[21] One of the most successful of these was that of the Women's Rights Project, founded by the American Civil Liberties Union in 1971. It achieved a series of important rulings from the Supreme Court in the 1970s and 1980s that greatly advanced the cause of women's equality. Symbolic of its importance was the appointment of one of its leading litigators, Ruth Bader Ginsburg, to the Supreme Court in 1993.

Another indicator of the new relationship between constitutional law and politics is the phenomenal increase in the number of amicus curiae briefs filed by interest groups and other political actors in the wake of *Brown*. In the decade spanning 1946-1955, there were 531 amicus briefs filed in cases granted review by the Supreme Court. By 1976-1985 that number had grown to 4,182, an increase approaching 800 percent.[22] Clearly groups with political goals were now devoting considerable resources to exploiting the judicial path to success.

The decisions of the Warren and Burger Courts were liberal, sometimes radical. It is therefore no surprise that they generated a backlash from conservative politicians. In the 1968 presidential election, Republican candidate Richard Nixon

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20 Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Milliken v. Bradley, 418 U.S. 717 (1974).

21 Mark V. Tushnet, The NAACP.'s Legal Strategy Against Segregated Education, 1925-1950 168 (1987).

22 Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 752 (2000).

criticised the Court for its decisions on criminal rights and other issues.[23] Evangelical conservatives were stirred into political action by decisions on religious rights and, above all, abortion. As the Trump campaign and presidency illustrates, it is now standard Republican strategy to attack the Supreme Court's liberal decisions and to focus on Supreme Court appointments to reverse them.

The reaction in legal circles to the Warren and Burger Court's liberalism focussed less on ideology and more on interpretive methodology. While liberal activism was the consequence of the Warren Court Justices' approach to decision-making, it was the rise of what became known as the concept of the "living constitution" that was the cause. The Warren and Burger Court Justices were slow to articulate – or perhaps confess to – the change in the way that they were approaching constitutional interpretation. Just as it was left implicit in *Brown*, so too did Justice Blackmun's Opinion for the Court in *Roe* fail to state that the Court's use of a contemporary definition of liberty was the foundation of a woman's right to abortion. Justice Douglas's Concurring Opinion, however, made clear the 1970s feminist concept that lay behind the argument that a woman's liberty must encompass a right to abortion:

> Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future. (They may have) … to endure the discomforts of pregnancy; to incur the pain, higher mortality rate and after effects of childbirth; to abandon educational plans; to sustain loss of income; to forgo the satisfactions of careers; to tax further mental and physical health in providing childcare; and, in some cases, to bear the lifelong stigma of unwed motherhood, a badge which may haunt, if not deter, later legitimate family relationships.[24]

In 1985 Justice William Brennan, a leading light of both the Warren and Burger Courts, candidly stated that the Constitution had to be interpreted through contemporary eyes:

> We current Justices read the Constitution in the only way that we can: as twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not on any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs. [25]

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[23] Kevin J. McMahon, Nixon's Court: His Challenge to Judicial Liberalism and Its Consequences, (2011).

[24] Doe v. Bolton, 410 U.S. 179, 214-15 (1973) (Douglas, J., concurring). This is the companion case to *Roe v. Wade*. 410 U.S. 113 (1973).

[25] William J. Brennan, *Constitutional Interpretation*, Address at Georgetown University, The Constitution of the United States: Contemporary Ratification (Oct. 12, 1985), reprinted in Alpheus Thomas. Mason & Donald Grier Stephenson, American Constitutional Law 607 (1987).

Echoes of the concept of a "living Constitution" go back to the Framers themselves, Thomas Jefferson, Chief Justice Marshall and Woodrow Wilson, to name but a few. In the first place, the Constitution itself contains no prescription as to how it should be interpreted. Secondly, while few questioned originalism, it was often argued that original constitutional concepts had to be applied to new socio-economic situations that the Framers had not and could not have foreseen. And then, as noted above, there was the question of whether the Framers expected future generations of judges to be bound by their own understanding of highly generalised concepts.

V. Robert Bork and Originalism

Critics of the Warren Court decried its activism. However, they abandoned judicial restraint per se as the main antidote and instead focussed on an interpretive method that they believed would enforce restraint: Originalism. Taking refuge in Originalism was, I believe, a strategic mistake. It offers an intuitive appeal, but is an impossibility to practice in the twenty-first century.

The intellectual leader of the Originalist movement was unquestionably Judge Robert Bork. In a seminal article in 1971, Bork argued that the Warren Court had not enforced values written into the Constitution, but rather had imposed its own value choices on the country. Not only could this not be squared with the presuppositions of a democratic society, but gave to the Court "an institutionalized role as perpetrator of limited coups d'etat".[26]

Bork argued that *Brown* could not rest on Warren's rationale. He nevertheless rescued it by claiming that while the intentions of the framers of the Equal Protection clause weren't clear on the issue of segregated schools, a reasonable interpretation would suggest a "no-state-enforced-discrimination rule".[27] That aside, he produced a long list of twentieth century Supreme Court cases that had been wrongly decided because they were based on the Justices' choice of values rather than those contained in the Constitution as written and conceived. These included the creation of a right to privacy in the contraception case of *Griswold v. Connecticut*.[28] As the *Griswold* privacy right also formed the basis of the right to abortion in *Roe*, then according to Bork, states could ban both contraception and abortion.

Bork said the Court also wrongly decided *Shelley v. Kraemer*.[29] Here the Vinson Court had ruled that a state could not enforce a private racial covenant which banned selling a house to a black person. Bork, however, argued that the Fourteenth Amendment didn't reach private as opposed to state discrimination. He

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[26] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 6 (1971).

[27] *Id*. at 15. I have always detected a sleight of hand in Bork's Originalist justification, since if the framers did not intend to ban segregated schools – and they didn't – then that intention should have bound the Court. However, arguing that segregated schooling is constitutional and could only be eradicated by Constitutional amendment would have severely damaged the reception of Bork's broader thesis.

[28] 381 U.S. 479 (1965).

[29] 334 U.S. 1 (1948).

then went on to attack the Warren Court's legislative reapportionment decisions[30] which resulted in the principle of 'one person, one vote' being enforced:

> Chief Justice Warren's opinions in this series of cases are remarkable for their inability to muster a single respectable supporting argument. The principle of one man, one vote was not neutrally derived: it runs counter to the text of the Fourteenth Amendment, the history surrounding its adoption and ratification, and the political practice of Americans from colonial times up to the date the Court invented a new formula.[31]

If Bork was correct, then states should be able to continue grossly mal-apportioning legislative districts unless either those same legislative districts decided to reform themselves or there was an amendment to the Constitution.

Bork offered originalism as an antidote to judicial activism, even if that meant judicial decisions that allowed policies that were unpalatable or even reprehensible to most Americans. However intellectually convincing his arguments, he was vulnerable to charges of tolerating numerous forms of racism, sexism and inequality. He paid the price for that in 1987, when President Reagan nominated him to the Supreme Court. Almost immediately Senator Edward Kennedy launched a blistering attack on the consequences of confirming Bork:

> Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are at the heart of our democracy. America is a better and freer nation than Robert Bork thinks… (President Reagan) should not be able to impose his reactionary view of the Constitution on the Supreme Court and the next generation of Americans.[32]

Given the Democrats' control of the Senate, Bork's fate was sealed. However, his ideas had already taken root in America's legal community, as witnessed by the rise of the Federalist Society. In its own words:

> Founded in 1982, the Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians dedicated to reforming the current legal order. We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and the duty of the judiciary to say what the law is, not what it should be.[33]

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30 Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).
31 Bork, *supra* note *27,* at 18.
32 100 Cong. Rec. 18,519 (1987).
33 The Federalist Society, https://fedsoc.org/about-us (last visited Feb. 6, 2019)

The Federalist Society believes that the legal profession remains dominated by an "orthodox liberal ideology" and it is this legal order that must be overthrown. The Society may still see itself as a counter-revolutionary force in the legal profession, but it has succeeded in capturing the current United States Supreme Court. All five Justices that constitute the conservative majority – Roberts, Thomas, Alito, Gorsuch and Kavanaugh – are former members.

Another important force in championing Bork's Originalist theories was President Reagan's Attorney-General, Edwin Meese. Fittingly, in a speech before the Federalist Society on November 15, 1985, Meese launched a public campaign to promote a "Jurisprudence of Original Intention".[34] Supported by other groups such as The Heritage Foundation, Meese brought considerable momentum to the Originalist cause. Of course he was also influential in identifying Supreme Court nominees and while he came to grief over the Bork nomination, a year earlier he had successfully promoted Antonin Scalia to the Court. Scalia tweaked Bork's Originalism to give greater weight to text rather than intention and blazed a trail on the Court for the next thirty years.

Scalia was an articulate and engaging advocate for his cause both on and off the Court. Like Robert Bork, he was prepared for his advocacy of Originalism to lead to results that would shock many contemporary Americans. For example, he argued that the Fourteenth Amendment's Equal Protection clause should not be read to require that women be given the vote. He approves of the fact that the battle for women's suffrage was conducted through politics and the passage of the Nineteenth Amendment. While he had no doubt that advocates of the Living Constitution would find the right of women to vote in the Equal Protection clause, that was not the language nor the intention of the clause.[35]

Given that Scalia would not read women's right to vote into the Equal Protection clause, it comes as no surprise that claims for gays and lesbians, either in Due Process or Equal Protection cases, received short shrift from him. Indeed, his dissenting Opinion in *Lawrence v. Texas* brought together the views of Robert Bork and the Federalist Society with his own. *Lawrence* held that a Texas statute criminalising same-sex sexual activity violated the Constitution. Scalia wrote:

> Today's opinion is the product of a court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct…
>
> One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is 'an invitation to subject homosexual persons to discrimination in both the public and in the private spheres'. It is clear from this that the Court has taken sides in

[34] Edwin Meese, *The Great Debate: Attorney General Ed Meese III*, The Federalist Society (Nov. 15, 1985), https://fedsoc.org/commentary/publications/the-great-debate-attorney-general-ed-meese-iii-november-15-1985.

[35] Antonin G. Scalia, A Matter of Interpretation: Federal Courts and the Law, 47 (1997).

> the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed.[36]

Scalia goes on to emphasise that he has no objection to homosexuals pursuing their goals through the democratic processes. But changes in such laws as the one at issue should be chosen by the people and "not imposed by a governing caste that knows best".[37]

VI. Impasse and a Possible Way Forward

It should be clear that the relationship between politics and law lies at the heart of the Supreme Court today as never before. Conservative Justices, championing Originalism, accuse liberal Justices of imposing their political preferences on a democratic people. Liberal Justices allege that conservative Justices are imprisoning the people in the past and failing to acknowledge the importance of political and social change.

Academic champions of the Attitudinal Model assert that both conservative and liberal Justices are dissembling and that they camouflage their decisions in legal paraphernalia, while advancing their political goals. And other actors in the political system – presidents, members of Congress, interest groups, the media – treat the Court and the Justices as thoroughly politicised.

The situation is now at an impasse and the debates are locked in. It seems inevitable that there will be more unseemly nomination battles of the Gorsuch and Kavanaugh varieties. Supreme Court retirements will be thoroughly strategic, as Justices seek to create a vacancy when a president and Senate majority will replace them with a Justice of similar ideology and approach to interpretation. Whatever else they had in mind, the Framers of the Constitution did not envisage that the Supreme Court would fall so low.

Of course, there are those who refuse to give up. A recent public spat between President Trump and Chief Justice Roberts was revealing. Trump railed against a U.S. District Court judge, Jon S. Tigar, who held that Trump could not refuse to process asylum claims by those who had entered the United States illegally. Trump accused Tigar of political bias by damning him as "an Obama judge". Chief Justice Roberts responded by saying:

> We do not have Obama or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.[38]

If the Chief Justice is to convince his various audiences, both liberal and conservative judges will need to change tack. Perhaps the best way forward for the Justices of the

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36 Lawrence v. Texas, 539 U.S. 558, 602 (2003).

37 *Id*. at 604.

38 Adam Liptak, *Chief Defends Judicial Independence After Trump Attacks 'Obama Judge'*, N.Y. Times, Nov. 21, 2018, at A1.

Supreme Court would be to return to the practice of judicial self-restraint. Theories of judicial role have been side-lined by the debate over interpretive method. However, in the twentieth century, some of those regarded as among the greatest judges in American history have argued the case for – and practised – judicial self-restraint. These "greats" include Judge Learned Hand and Supreme Court Justices Oliver Wendell Holmes, Louis D. Brandeis, Felix Frankfurter and John Marshall Harlan II.[39] In one case, Justice Brandeis developed his *Ashwander* Rules, designed to limit the scope of the Court to declare legislation unconstitutional.[40] Holmes warned Justices against reading their policy predilections into general concepts and language in the Constitution with the memorable line that: "The Fourteenth Amendment does not enact Mr Herbert Spencer's Social Statics".[41] However, while these great liberal judges advocated restraint, they did not foreclose identifying rights in the Constitution that the Framers had not intended. Justice John Marshall Harlan II, frequently a dissenter on the Warren Court, nevertheless recognised that the due process clause of the Fifth and Fourteenth Amendments could encompass new rights. His most famous elaboration of his views came in *Poe v. Ullman* in 1961. The case involved a challenge to Connecticut's statute criminalising the use of contraceptives by married couples. The Court majority dismissed the case on grounds of justiciability, but Harlan dissented and argued that the statute was unconstitutional. While he made clear that not all state morals legislation should be overturned, he held that there was an unspecified constitutional right to privacy and it was not static.[42]

Later Courts powered ahead with the right to privacy and declared rights to abortion and same-sex marriage. But liberal Justices returned to Harlan's vision in a case involving physician-assisted dying. *Washington v. Glucksberg*[43] involved a state prohibition of assisted suicide and a challenge to that ban based on a due process liberty claim. The Supreme Court unanimously upheld the statute, but concurrences by the liberal Justices held that the situation might evolve to a point where the Court might reconsider. Justice Souter, for example, cites Harlan's dissent in *Ullman* frequently and in detail, before concluding that the state ban was not arbitrary. Souter describes the claimed right to physician-assisted suicide as an 'emerging issue' and that "The Court should accordingly stay its hand to allow reasonable legislative consideration. While I do not decide for all time that respondents' claim should not be recognized, I acknowledge the legislative institutional competence as the better one to deal with that claim at this time".[44]

The value of Souter's approach in *Glucksberg* was underlined when, in 2008, the voters of Washington approved ballot initiative 1000, which became the

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39 Learned Hand was a federal judge considered twice for appointment to the Supreme Court. His contemporaries were in no doubt that he was a great judge who deserved a position on the highest court. Jerome Frank wrote: "Many who have written of Learned Hand have lamented the fact that he did not become a Supreme Court Justice, a post for which no-one else has ever been so well fitted". Jerome N. Frank, *Some Reflections on Learned Hand*, 24 U. Chi. L. Rev. 666, 669 (1957).

40 Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

41 Lochner v. New York, 198 U.S. 45, 75 (1905).

42 Poe v. Ullman, 367 U.S. 497, 522-55 (1961).

43 521 U.S. 702 (1997).

44 *Id.* at 789.

Washington Death with Dignity Act. The debate had continued after *Glucksberg*, the full political process had been invoked and the people had decided. This was surely a better outcome than if the U.S. Supreme Court had imposed its will on the people of Washington and indeed the rest of America.

If liberals Justices should hold back from taking the lead in settling controversial, emerging claims, conservatives should abandon the historic stranglehold of Originalism. It is worth reminding themselves that Originalism was first and foremost a means of preventing excessive judicial activism. There is a middle way between a rigid Originalism and 'government by judiciary'. Justice Scalia, for example, has scoffed at the *Trop* approach to adjudicating Eighth Amendment 'cruel and unusual punishments' claims: namely that the Court employ the criteria of "evolving standards of decency that mark the progress of a maturing society".[45] Yet, in the death penalty case of *Roper v. Simmons*[46] in 2005, his dissent offered a reasonable way of applying the *Trop* criteria. *Roper* involved a challenge to a Missouri statute that allowed the execution of 17 year-olds for aggravated murder. A 1988 precedent held that those under 16 years of age could not be executed. However, the following year, in *Stanford v. Kentucky*, the Court ruled that 17 year-olds could be put to death.[47]

The Missouri Supreme Court held that national opinion on juvenile execution had changed since *Stanford*. Accordingly, both Justice Kennedy's Opinion for the Court and Justice Scalia's dissent canvassed state laws on the age at which juveniles could be executed. For Scalia that canvass should have been dispositive, while Kennedy also took account of the Justices own evaluation of cruelty and international norms. The Court divided 5-4 on the issue, but that does not mean that Scalia's approach of deciding the issue based on 'objective indicia' was not a valid or, indeed, reasonable one.

There is, then, a middle ground between Originalism and Living Constitutionalism that once existed and could exist again. That would involve conservative Justices accepting that the meaning of constitutional language does change over time, as society changes. It would also involve liberal Justices staying their hand on issues and allowing the democratic process to prevail except in cases where there is a clear constitutional violation.

This is turn would change the relationship between politics and constitutional law in the United States and equally important, lower the political profile of the Supreme Court. How likely is this to happen? Chief Justice Roberts has made it very clear that he would welcome such a change, but there must be considerable doubt as to whether Justices on either side are willing to do what is required. That said, the Chief now sits in the ideological centre of the Court and is well-placed to lead it away from its current political and legal turmoil. Alternatively, he may join the other four conservative Justices and reverse many of the liberal decisions of recent decades, including abortion rights and gay rights, and in contrast promote the rights of religious adherents and big business. If he chooses the latter, the relationship between politics and law can only become ever more combustible.

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45 Scalia, *supra*, note 36, at 46.

46 543 U.S. 551 (2005).

47 Thompson v. Oklahoma, 487 U.S. 815 (1988); Stanford v. Kentucky, 492 U.S. 361 (1989).

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A Legacy Diminished: President Obama and the Courts

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ABSTRACT

A central concern for any U.S. presidential administration is its relationship with the federal judiciary. For an administration, this relationship is potentially legacy making or breaking in two ways. First, what is the imprint that the administration leaves on the judiciary? Will a president have the opportunities and institutional capacity to change the political balance of the federal judiciary? Second, how will the judicial branch respond when the administration's policy plans are, as many inevitably will be, challenged in the court system? Will the administration's policy preferences be preserved and its agenda advanced, or will court decisions stymie important initiatives and restrict that agenda? This paper examines these questions with regard to the Obama administration's record. The Obama era saw new levels of diversity in terms of judicial nominees and the courts did sometimes uphold key aspects of the Obama administration's program to the chagrin of conservative opponents. Yet, with the benefit of two years hindsight, the evidence suggests that the Obama administration's legacy with regard to both the central questions addressed in the paper was a diminished one. The administration's capacity to reorient the federal bench was thwarted by the legislative branch, notably obstruction in Senate, with the consequences of that frustration highlighted by the rapid actions taken by the Trump administration and Senate Republicans in 2017-18. Furthermore, on balance, the decisions made by the federal judiciary on matters of significant concern to the Obama White House weakened rather than strengthened the administration's legacy.

KEYWORDS

Obama, Supreme Court, Federal Judiciary, Presidential Legacy

CONTENTS

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I. Introduction

As the United States Senate completed the confirmation process and affirmed Brett Kavanaugh as a Supreme Court Justice in October 2018 Republicans were justifiably satisfied that they had locked in a conservative majority on the Supreme Court for the foreseeable future. Moreover, in addition to the nomination and confirmation of Kavanaugh and Neil Gorsuch to the Supreme Court, the Trump administration and Senate Republicans had made rapid progress in filling judgeships elsewhere on the federal bench.[1] For conservatives this raised the prospect of the judicial branch of government making supportive rulings on a range of issues, potentially including restrictions on access to abortion services; further limiting the scope of affirmative action programs; prioritizing gun rights over gun control, and placing limits on the power of labor unions. For liberals, this demoralizing narrative highlighted how, over two terms, President Obama had not been able to transform the federal bench, and particularly the Supreme Court, in a manner that they would have preferred. Furthermore, the judicial branch had sometimes thwarted key policy initiatives advanced by the Obama administration, notably with regard to expanding the Medicaid program and liberalizing immigration rules for many undocumented aliens. On the other hand, the Obama years did leave a distinct imprint on the make-up of the federal bench, notably increasing diversity, and the courts did make rulings that advanced the administration's agenda. In order to make sense of the interaction between the Obama administration and the federal judiciary this article examines that relationship in two ways, looking at Obama's legacy for the courts and also at how the judicial branch enhanced or diminished his administration's wider political and policy legacy. On both counts, the record we discuss is a mixed one and there is no clear way in which the wins and losses can be scored. However, the events in the two years following Obama's departure from office lend weight to the view that his imprint on the courts was limited and that his domestic policy legacy was diminished more than it was enhanced as a consequence of its entanglements with the judicial system.

II. Courting Liberalism

The Supreme Court's move in a conservative direction contrasted with the reputation the court had developed in the post war period. In the third quarter of the twentieth century the Supreme Court made a series of decisions that expanded rights in ways that mostly coincided with liberal preferences, even if they were not always causes that liberal political actors publicly embraced at the time. These cases ranged from civil rights in *Brown v. Board of Education* in 1954[2], to criminal rights in *Miranda v. Arizona* in 1966[3] and reproductive rights in *Roe v. Wade* in 1973.[4] This last case, of course, has remained at the center of a political storm ever since, with the pro-life

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1 Kevin Schaul & Kevin Uhrmacher**,** *How Trump is Shifting the Most Important Courts in the Country*, Wash. Post (Sept. 4, 2018).

2 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

3 Miranda v. Arizona, 384 U.S. 436 (1966).

4 Roe v. Wade, 410 U.S. 113 (1973).

movement anxious to re-litigate and over turn that ruling. Other decisions, notably *Engel v. Vitale* in 1962,[5] which effectively prevented organized prayer in public schools, also antagonized cultural conservatives.

Moreover, further reinforcing the impression that the judiciary had its finger on the liberal side of the political ledger, after its initial clashes with the Roosevelt administration, the Supreme Court had steered away from challenging the expansion of the federal administrative state. Hence a plethora of regulatory bodies arose, "composed of a diverse set of institutions-agencies, commissions, and executive departments-that, together, seem to sprawl over just about every facet of modem life".[6] The understanding that federal agencies were to be given wide discretionary authority seemed to be confirmed in 1984 in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[7] In that case, which in fact upheld a deregulatory move by the Reagan administration to reverse a rule issued by the Environmental Protection Agency during the Carter presidency, the Supreme Court ruled that executive agencies had leeway to interpret rules in cases of statutory ambiguity. At the time the Supreme Court, at least, did not see its own actions in establishing this precedent as controversial,[8] but by the end of the Obama presidency congressional Republicans saw the principle of so-called Chevron deference as a bulwark of the regulatory state that constituted a violation of the separation of powers.[9]

The importance of these decisions helped sustain the impression that the Supreme Court represented a bastion of liberalism beyond the 'sell by' date for that notion. The Supreme Court's relatively consistent, though not absolute, siding with liberal preferences in potentially divisive and politically salient cases had ended by the mid-1980s at the latest: Yet, the subsequent court, led by Chief Justice William Rehnquist did not always counterpunch in a conservative direction,[10] and some Justices, even though nominated by Republican presidents, proved less than reliably conservative. In particular, President George H. W. Bush's nominee, David Souter, was regarded as a liberal stalwart by the time he left the Court. In addition, Reagan nominee Sandra Day O'Connor was a genuine 'swing justice' in terms of siding with the liberal and conservative blocs and, even though Justice Anthony Kennedy was a more regular conservative than his reputation as a swing justice sometimes implies, he was a critical vote with liberals on matters of same sex rights in particular, as well as reproductive rights. In fact, Kennedy's time on the court does illustrate the potentially decisive role of each individual justice, showing how his or her singular views can be of major consequence. Kennedy's ascent to the Court came after Reagan's original nominee for the court's vacancy, Robert Bork, was rejected by the Senate. Bork, who later helped draw up a proposed constitutional amendment calling for marriage to be defined as a union between

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5 Engel v. Vitale, 370 U.S. 421 (1962).

6 J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & Pol. 243 (2017).

7 Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

8 Alan B. Morrison, *Chevron Deference, Mend It, Don't End It*, 32 J.L. & Pol. 293-304 (2017).

9 Paul R. Verkuil, *Properly Viewed, Chevron Honors the Separation of Powers*, The Hill, (June 26, 2016, 06/23/16 03:45 PM EDT), https://thehill.com/blogs/congress-blog/judicial/284643-properly-viewed-chevron-honors-the-separation-of-powers.

10 Robert R. Robinson, *The Relative (Un)importance of Rehnquist Court Decisions*, 38 (5) Politics & Policy, 907 (2010).

a man and a woman,[11] would certainly have been a stronger voice advocating for cultural conservatism than Kennedy.[12]

President George H W Bush's legacy in terms of Supreme Court nominees and their ideological imprint was also mixed. As well as the liberal Souter, Bush nominated Justice Clarence Thomas, who has proved to be a profoundly conservative voice. By the time the younger Bush entered the White House the conservative legal movement was thoroughly aware of the importance of getting its favorites onto the federal bench, with the Federalist Society acting as a hothouse for conservative legal minds.[13] Executive Vice-President Leonard Leo explained that a guiding priority was that the judiciary provide "structural restraints on the power of government", which laid down a challenge to the spread of the administrative state.[14]

In practical terms, the Federalist Society was determined to ensure that there were "No More Souters".[15] When Bush nominated Harriett Miers to the Supreme Court in 2005, the fact that the Federalist Society did not give her its blessing was one of the reasons why conservatives so quickly turned on her.[16] In the end, Bush's two confirmed nominees to the Court, John Roberts and Samuel Alito, were both endorsed by the Federalist Society. Hence, the Supreme Court that greeted President Obama seemed likely to be an inhospitable one should his administration choose to use federal authority in a legally questionable manner.

Before moving on to look at how the Obama administration fared when arguing its corner before the judicial branch, it is important to examine the impact the administration made on the federal bench. Did his nominees to the Supreme Court turn out to be liberal versions of Clarence Thomas or of David Souter? Further, to what extent did Obama bring change to the wider federal bench?

III. The Supreme Court

A. Justices Confirmed: Sotomayor and Kagan

Obama's worldview did not prioritize bringing change through judicial action,[17] and his administration got off to a slow start in filling vacancies on the bench.

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11 Daniel K. Williams, God's Own Party: The Making of the Christian Right (2012).

12 Joel Dodge, *Why We Live in Anthony Kennedy's America, Not Robert Bork's,* The Hill, (07/02/18 02:30 PM EDT), https://thehill.com/opinion/healthcare/395178-why-we-live-in-anthony-kennedys-america-not-robert-borks

13 Michael Avery & Danielle McClaughlin, The Federalist Society: How Conservatives Took the Law Back from Liberals, (2013); Amanda Hollis-Brusky, Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution, (2015).

14 Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court*, New Yorker, (Apr. 17, 2017).

15 Jeff Greenfield, *The Justice Who Built the Trump Court*, Politico, (July 9, 2018), https://www.politico.com/magazine/story/2018/07/09/david-souter-the-supreme-court-justice-who-built-the-trump-court-218953.

16 *Id*. at 14.

17 Risa L. Goluboff, & Richard Schragger, *Obama's Court?* in The Presidency of Barack Obama: A First Historical Assessment 78 (Julian E. Zelizer ed. 2018).

On the campaign trail he had talked of the need for judges to have "empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old —and that's the criteria by which I'll be selecting my judges." This statement was mocked by conservatives who insisted judges should apply the law rather than re-interpret it based on their own experiences,[18] but the sentiment did reflect Obama's desire to bring significantly more diversity to the federal bench. As it was, Obama quickly got the chance to make two nominations to the Supreme Court itself.

The two openings that came up, however, were never going to be transformational in terms of the Supreme Court's political and philosophical balance as both retiring justices were associated with the liberal wing of the court. This was the case even though both retirees had been nominated by Republican presidents. One was Souter and the other was John Paul Stevens. The latter had joined the court in 1975 after being nominated by President Gerald Ford, and was the third longest serving justice in court history when he retired aged 90. He described his "general politics" as "pretty darn conservative", but his jurisprudence was regarded as firmly in the liberal camp.[19] As his picks to replace these two, Obama chose only the third and fourth women to serve on the Court. First, he settled on Sonia Sotomayor, a judge serving on the U.S. Court of Appeals for the Second Circuit, and followed this by nominating Elena Kagan, who was then the administration's Solicitor-General.

Sotomayor, aged 55, became the first Latina on the Court. She had a record of acknowledging that her personal story impacted on her judicial decision-making. For example, in a public lecture in 2001 she noted, "Personal experiences affect the facts that judges choose to see", adding, "I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage."[20] She backtracked from these sentiments during her confirmation hearings, but some Republicans used such statements to revisit "empathy" wars and question whether she had an appropriate temperament for the Supreme Court. Then Senate Minority Leader Mitch McConnell of Kentucky argued, "judges are supposed to be passionate advocates for the even handed reading and fair application of the law, not their own policies and preferences".[21] Nevertheless, Sotomayor picked up a handful of Republican votes on her way to being confirmed by a margin of 68 to 31 votes.

Elena Kagan's nomination did in fact provoke some murmurs of liberal discontent from those hoping for a more radical nominee and concerned that she did not have a long paper trail of judicial decisions substantiating her liberal credentials.[22] In her confirmation hearings, however, Kagan, then aged 50, was explicit about

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18 Robert Alt, *Sotomayor's and Obama's Identity Politics Leave Blind Justice at Risk*, US News and World report, (May 27, 2009), https://www.usnews.com/opinion/articles/2009/05/27/sotomayors-and-obamas-identity-politics-leave-blind-justice-at-risk.

19 Jeffrey Rosen, *The Dissenter, Justice John Paul Stevens*, N. Y. Times Magazine, Sept. 23, 2007,, https://www.nytimes.com/2007/09/23/magazine/23stevens-t.html.

20 Sheryl G. Stolberg, *Sotomayor, A Trailblazer and a Dreamer*, N.Y.Times, May 26, 2009, https://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html.

21 Alex Isenstadt, *GOP Goes on Attack Against Sotomayor*, Politico, June 24, 2009, https://www.politico.com/story/2009/06/gop-goes-on-attack-against-sotomayor-024112?o=1.

22 Joshua Green, *Why Liberals Don't Trust Kagan*, The Atlantic, May 13, 2010, https://www.theatlantic.com/politics/archive/2010/05/why-liberals-dont-trust-kagan/56641/.

her partisanship, stating "I've been a Democrat all my life, my political views are generally progressive" though adding that "personal preferences" would not affect her decision-making.[23] In the end, she was confirmed by 63 votes to 37.

With these two choices President Obama did at least maintain the liberal presence on the Supreme Court. In some of the contentious political decisions Kagan has sided with the conservatives, notably in ruling against the Medicaid expansion as part of the Affordable Care Act in 2012 (see below) and in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2018,[24] although in the latter case she is credited with persuading the court's majority to make a narrow ruling that did not establish wide precedent.[25]

Overall, Sotomayor and Kagan have proved to be liberal picks, if reflecting the slightly different positions taken by President Clinton's two nominees to the Court, with Sotomayor tending toward the liberal lion that is Ruth Bader Ginsburg and Kagan allying with the slightly more moderate voice of Stephen Breyer. In the term that began in October 2017 Sotomayor and Kagan voted together 91% of the time. That compared with Sotomayor and Ginsburg siding together in 96% of cases and Kagan and Breyer in 93% of decisions. For context, both Sotomayor and Kagan were least likely to vote with Justice Alito at 49% and 57% respectively.[26] In addition, Sotomayor has developed a reputation for scathing dissents when on the losing side of Court decisions, with this on very public display as she railed against the majority in *Trump v. Hawaii*.[27] In sum, despite their differences, Obama's two confirmed nominees are likely to be clear and assertive voices for the liberal wing of the Court for the foreseeable future, and have given a stronger voice to women on the bench.[28]

B. A Justice Denied

Justice Scalia's death presented President Obama with the apparent opportunity to change the political balance on the Supreme Court. However, the 2014 elections had left Republicans with a majority in the Senate, and Mitch McConnell made it plain that although Merrick Garland was a relative moderate,[29] he would not get consideration in the Senate Judiciary Committee, never mind a vote on the Senate floor.[30]

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23 Ariane de Vogue & Devin Dwyer, *Hearings Give Glimpse of Kagan's Views on Hot Issues*, ABCNEWS, (June 30, 2010, 3:12 PM,), https://abcnews.go.com/Politics/Supreme_Court/elena-kagan-issues-supreme-court-hearings-give-glimpse/story?id=11052847.

24 Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 584 U.S. __ (2018).

25 Kate Shaw, *Why Did Liberals Join the Majority in the Masterpiece Case?*, N. Y. TIMES, June 5, 2018.

26 SCOTUSblog Statistics, http://www.scotusblog.com/statistics/.

27 Trump v. Hawaii, 585 U.S. __ (2018); David Fonata, *Justice Sotomayor Is Showing Her Liberal Peers on SCOTUS How to Be a Potent Minority Voice,* VOX, July 7, 2018, https://www.vox.com/the-big-idea/2018/7/6/17538362/sotomayor-kennedy-retirement-liberal-wing-dissent-travel-ban-rbg.

28 Taunya L. Banks, *President Obama and the Supremes; Obama's Legacy - The Rise of Women's Voices in the Court* 911-948, 65 DRAKE L. REV. (2017).

29 Adam Bonica et al., *New Data Shows How Liberal Merrick Garland Really Is*, WASH POST, 20 Mar. 2016.

30 Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR POLITICS, (June 29, 2018, 5:00 AM ET), https://choice.npr.org/index.html?origin=https://

The Senate rejection of Garland was made all the more crushing for the president by the fact that his nomination had deliberately been shelved when previous Supreme Court vacancies had arisen. Garland had been under consideration by the White House to replace Justice Stevens. At that point, the administration settled on Kagan, mindful that the uncontroversial Merrick Garland would be better suited for a later nomination, which seemed likely given the ages of some Supreme Court justices.[31]

If President Obama had expected a chance to replace another of the liberal Justices, notably Ginsburg, an opportunity to bring about a more dramatic change arose in February 2016 when the 'Schwarzenegger of jurisprudence' Antonin Scalia, died.[32] This was a moment of reckoning for President Obama. To adjust the balance of the court in his final year in office would be an enduring legacy, even if this meant appointing a Justice who would bring about a recalibration rather than transformation of the Court's balance of political power. Yet, even before President Obama announced his nomination, Senate Republicans had already stated that they would refuse to hold confirmation hearings on any nominee.[33] In summer of 2016 Majority Leader Mitch McConnell boasted: "One of my proudest moments was when I looked Barack Obama in the eye and I said to him, 'You will not fill this Supreme Court vacancy.'"[34] Republicans argued that there had not been a Supreme Court vacancy filled in an election year in 80 years. Scholars responded to the various claims made to the media by pointing out that this 'tradition,' as described by Ted Cruz, was misleading.[35] The reality was that the Supreme Court was too important an institution and political prize for McConnell to allow Obama to further impose his imprint on the court without using all the tools at his disposal to obstruct the sitting president.

McConnell's justification for delay was that the pick for the new justice legitimately lay with the president to be elected in 2016 and as the Supreme Court carried on with only eight sitting justices the 2016 presidential campaign picked up speed. Even before he had formally won the nomination Donald Trump soon realized how beneficial the Court vacancy was to his campaign mandate, and he encouraged wavering conservative voters to choose him if only because he would give them the Supreme Court justice they desired. In an unprecedented move he issued a list of judges that he would nominate to the Court, which proved a tempting

www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

31 Jeffrey Toobin, The Oath: The Obama White House and the Supreme Court, 220 (2012).

32 Craig Hemmens & Rolando V. Del Carmen, Criminal Procedure and the Supreme Court, 334 (2010).

33 Burgess Everett, *McConnell Throws Down the Gauntlet: No Scalia Replacement Under Obama*, Politico, (Feb. 13, 2016, 06:34 PM EST, Updated 02/13/2016 09:56 PM EST), https://www.politico.com/story/2016/02/mitch-mcconnell-antonin-scalia-supreme-court-nomination-219248.

34 Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, National Public Radio, (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

35 Linda Qui, *Fact-checking Claims About the 80-Year SCOTUS Nomination 'Tradition'*, Politifact, (Feb. 17, 2016 at 3.31 PM), https://www.politifact.com/truth-o-meter/article/2016/feb/17/misleading-notion-supreme-court-vacancy-hasnt-been/.

offer.[36] Once he took office, the Federalist Society's list of twenty-one possible names was reduced to seven. The forty-nine year old Neil Gorsuch was sworn in on April 7 2017. In his first term, he remained reliably on the ideological right in his judgments, veering mostly towards the positions taken by archconservative Justice Thomas.[37]

IV. Circuit and District Courts

As well as bringing a greater degree of gender equity to the Supreme Court, President Obama also brought more diversity to federal judgeships at the Circuit court and District court level. According to data collected by the Pew Research Center, the Obama administration saw 324 of its nominees confirmed to the federal bench. Of these, 208 were white; 58 were black; 31 were Hispanic; 18 were Asian, with 9 other non-white appointments. This meant that 36% were non-white, compared to 24% of President Clinton's appointees and 18% of President George W Bush's appointees. Obama also comfortably surpassed any previous efforts at increasing women's representation on the federal bench. 42% of his appointees were women against 28% for Clinton and 22% for Bush.[38]

Importantly, however, in terms of Obama's imprint on the federal judiciary, Congressional stonewalling did not begin and end with Merrick Garland. Mitch McConnell and Senate Republicans obstructed numerous other efforts to fill vacancies elsewhere on the federal bench. Previous Senate Majority Leader Harry Reid had effectively done away with the use of the filibuster to block lower court nominees towards the end of 2013, in a move that Republicans at the time said would come back to haunt Democrats.[39] This came to pass in 2017 when McConnell used it as precedent to get rid of the filibuster for Supreme Court nominees as well. Nonetheless, Reid's move did help Democrats confirm some judges through the following year, but when Republicans recaptured the Senate in the 2014 mid-terms the confirmation process ground almost to a halt. In the final two years, only 22 of Obama's nominees to the federal bench were confirmed.[40] When Barack Obama took office there were 53 vacancies on the federal bench and when Donald Trump

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36 Tim Hains, *Trump: I Will Produce a List of "5-10 Conservative Judges That I "Guarantee" I Will Nominate To Supreme Court if Elected*, RealClearPolitics, (Mar. 21 2016), https://www.realclearpolitics.com/video/2016/03/21/trump_i_will_produce_a_list_of_5-10_judges_that_i_guarantee_i_will_nominate_to_supreme_court_if_elected.html.

37 Oliver Roeder, *Just How Conservative Was Neil Gorsuch's First Term?*, FiveThirtyEight, (July 25, 2017, at 6: 00 AM.), https://fivethirtyeight.com/features/just-how-conservative-was-neil-gorsuchs-first-term/.

38 John Gramlich, *Trump Has Appointed a Larger Share of Female Judges than Other GOP Presidents, but Lags Obama*, PEW Research Center, (Oct. 2 2018), http://www.pewresearch.org/fact-tank/2018/10/02/trump-has-appointed-a-larger-share-of-female-judges-than-other-gop-presidents-but-lags-obama/.

39 Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees,* Wash. Post, Nov. 21 2013.

40 Russell Wheeler, *Confirming Federal Judges During the Final Two Years of the Obama Administration: Vacancies Up, Nominees Down*, Brookings Institute, (Aug. 18, 2015), https://www.brookings.edu/blog/fixgov/2015/08/18/confirming-federal-judges-during-the-final-two-years-of-the-obama-administration-vacancies-up-nominees-down/.

came in there were 112.[41] Perhaps not realizing how the nomination process could be stymied, Trump subsequently thanked Obama: "When I got in, we had over 100 federal judges that weren't appointed. I don't know why Obama left that. It was like a big beautiful present to all of us. Why the hell did he leave that … Maybe he got complacent."[42]

When looking at Obama's Court of Appeals confirmations in his final two years, compared to his recent predecessors, a Brookings Institute analysis (see below) provides evidence of Obama's relative lack of success in closing his presidency with a series of judicial appointments.

Table 1: Final-Two-Year Court of Appeals (CA) and District Confirmations.

		Eight Years	**Final Two Years**	**Percent of Total**
Reagan	CA	83	17	20%
	District	290	66	23%
Clinton	CA	66	16	24%
	District	305	57	19%
Bush 2	CA	60	10	17%
	District	261	58	22%
Obama	CA	55	2	4%
	District	268	18	7%

Source: Brookings Institute, 4 June 2018

Ronald Reagan appointed 20% of his Court of Appeals judges in his final two years, and 23% of his District Court judges. For Bill Clinton, it was 24% and 19% respectively, and for George W Bush, 17% and 22%. This puts Obama's 4% and 7% in stark perspective.[43] These numbers cannot be explained by simple institutional context as all these presidents faced a Senate controlled by the opposite party. The change was in the behavior of the majority party, the ever-elevated levels of polarization and the GOP's commitment to the conservative judicial project.

President Trump moved quickly to put his stamp on the federal judiciary, with considerable success. His nominations did meet with some resistance, as measured by the amount of Senate votes cast against them. The partisan element here is clear, as the votes (but one) against all came from Democrats or Independents, but Republicans held together and without the possibility of a filibuster the GOP

41 John Gramlich, *With Another Supreme Court Pick, Trump Is Leaving His Mark on Higher Federal Courts*, Pew Research Center, (July 16, 2018), http://www.pewresearch.org/fact-tank/2018/07/16/with-another-supreme-court-pick-trump-is-leaving-his-mark-on-higher-federal-courts/.

42 *Remarks by President Trump on the Infrastructure Initiative*, (Mar. 29, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-infrastructure-initiative/.

43 *Id*. at 40.

majority in Senate sufficed. This is in keeping with recent trends.[44] The relative speed at which President Trump has had his nominees appointed brings joy to those of his supporters who monitor such developments, which is reinforced at the relative youth of the nominees, whose average age is forty nine.[45] In addition, Trump has availed of the opportunity to move the courts to the ideological right. The majority of his appointments are white males, and clearly appointees are chosen on the basis of their adherence to a conservative agenda. Approximately 39% of his choices as of November 2018 were replacements for Democrat appointees.[46]

V. Consolidating, Advancing and Resisting Obama's Agenda

The Obama administration's win – loss record before the Court was historically low.[47] However, rather than looking at the aggregate numbers, this article concentrates on the legacy making/breaking cases. We start by looking at major Supreme Court rulings on existing law where the Obama administration took a clear position, before moving on to look at rulings the courts made on Obama era initiatives.

A. Consolidation

The administration cheered the decision in *Fisher v Texas* in 2016,[48] known as *Fisher II,* in which the Supreme Court ruled to uphold the Court of Appeals Fifth Circuit decision. The ruling that "The race-conscious admissions program in use by the University of Texas at Austin when Abigail Fisher applied to the school in 2008 is lawful under the Equal Protection Clause" met with a 4:3 favorable response from Justices Kennedy, Bader Ginsberg, Sotomayor and Breyer.[49] (Justice Scalia died prior to the ruling, and Elena Kagan recused herself from the proceedings as she had been involved with the case before it reached the bench). Clearly, this was a consolidation of the Obama administration's guidelines to universities to factor race into their admissions policies. Another contentious ruling occurred in 2016, with *Whole Women's Health v Hellerstedt.*[50] The Supreme Court ruled 5:3 against restrictions on abortion services, which were deemed unconstitutional. Justices Thomas, Alito and Roberts dissented. The case was the most dramatic ruling on

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44 John Gramlich, *Federal Judicial Picks Have Become More Contentious, and Trump's Are No Exception*, Pew Research Center, (Mar. 7 2018), http://www.pewresearch.org/fact-tank/2018/03/07/federal-judicial-picks-have-become-more-contentious-and-trumps-are-no-exception/.

45 Russell Wheeler, *Judicial Nominations in the Bush and Obama Administrations' First Nine Months*, Brookings Institute, (Oct. 23 2009), https://www.brookings.edu/research/judicial-nominations-in-the-bush-and-obama-administrations-first-nine-months.

46 Rorie Solberg & Eric N. Walternburg, *Trump's Presidency Marks the First Time in 24 Years That the Federal Bench Is Becoming Less Diverse*, The Conversation, (June 11, 2018, 11.43am BST), http://theconversation.com/trumps-presidency-marks-the-first-time-in-24-years-that-the-federal-bench-is-becoming-less-diverse-97663.

47 Lee Epstein & Eric Posner, *The End of Supreme Court Deference to the President?*, (Jan. 20, 2017), http://epstein.wustl.edu/research/PresWinRate.pdf.

48 Fisher v. Univ. of Texas,, 579 U.S. __ (2016).

49 *Id*. at 48.

50 Whole Woman's Health v. Hellerstedt, 579 U.S. __ (2016).

abortion in two decades.[51] However, the Eighth Circuit ruling in September 2018 about clinics in Missouri suggests that this was not as binding nor as categorical a victory for reproductive rights as was seen at the time.[52]

B. Admonishment

On the other hand, the administration lamented the decisions in *Citizens United* and *Shelby County*, which gutted the Voting Rights Act. Both these rulings were welcomed by conservatives and were widely interpreted as likely giving partisan advantage to Republicans in terms of fund raising and efforts to dampen voter turn-out. In its decision in *Citizens United v Federal Election Commission* the Supreme Court undid key elements of the Bipartisan Campaign Reform Act of 2002 (BCRA),[53] better known as McCain-Feingold after its two leading sponsors in the Senate. The Court, by a 5-4 margin, determined that political spending was a protected form of free speech, meaning that the government could not limit campaign spending by corporations or unions. President Obama's anger was displayed within a week of the decision when he very publicly rebuked it in his 2010 State of the Union address, with six of the court's members in attendance. Obama noted: "With all due deference to separation of powers, last week the Supreme Court reversed a century of law that, I believe, will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections".[54] This prompted Justice Alito to murmur "not true" in what was described in the *Washington Post* as "a rare and unvarnished showdown between two political branches".[55] Later in the summer, Obama urged Congress to take action to diminish the impact of the Court's decision.

> Now, imagine the power this will give special interests over politicians. Corporate lobbyists will be able to tell members of Congress if they don't vote the right way, they will face an onslaught of negative ads in their next campaign. And all too often, no one will actually know who's really behind those ads.[56]

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51 Adam Liptak, *Supreme Court Strikes Down Texas Abortion Restrictions*, N.Y.Times June 27, 2016. https://www.nytimes.com/2016/06/28/us/supreme-court-texas-abortion.html.

52 *Comprehensive Health of Planned Parenthood Great Plains v. Hawley, 903 F.3d 750 (2018).*

53 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

54 President Barack Obama, State of Union Address (Jan. 27, 2010), *Barack Obama's State of the Union Transcript 2010: Full text*, Politico (Jan. 27, 2010, 7:06 PM), https://www.politico.com/story/2010/01/obamas-state-of-the-union-address-032111.

55 Robert Barnes, *Reactions Split on Obama's Remark, Alito's Response at State of the Union*, Wash. Post, (Jan. 29, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012802893.html.

56 Jesse Lee, *President Obama on* Citizens United*: "Imagine the Power This Will Give Special Interests Over Politicians"*, the White House blog (July 26, 2010, 3:07 PM), https://obamawhitehouse.archives.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit.

Congress, however, did not act and outside group spending during campaigns has increased, including from groups who argue that they do not need to register with the Federal Election Commission.[57]

In *Shelby County v. Holder* the court again ruled by 5 votes to 4,[58] split along the established conservative – liberal fault line, to rescind central parts of the 1965 Voting Rights Act (VRA). Section 5 of the VRA prevented districts with a history of applying discriminatory practices against minority voters from altering their election laws without federal review. This was challenged by Shelby County, Alabama, but Section 5 was upheld by the U.S. Court of Appeals for the District of Columbia Circuit.[59] In reversing that decision the Supreme Court ruled that the conditions that had prevailed in the 1960s and 1970s that had justified the use of Section 5 were no longer apparent.[60]

VI. Advancing Obama's Agenda

A. A Legacy-Making Case

In a momentous decision in summer 2015, in *Obergefell* v *Hodges*,[61] the Supreme Court effectively granted a constitutional right to same sex marriage. After the ruling was announced President Obama issued a celebratory statement:

> this ruling is a victory for America. This decision affirms what millions of Americans already believe in their hearts. When all Americans are treated as equal, we are all more free.
>
> My administration has been guided by that idea. It's why we stopped defending the so-called Defense of Marriage Act and why we were pleased when the court finally struck down the central provision of that discriminatory law. It's why we ended, 'Don't Ask, Don't Tell.'[62]

Yet, in the early years of his presidency, President Obama received an array of criticism in relation to gay marriage from those who viewed his evolving stance as either politically expedient or even as evidence of homophobia.[63] As it was Obama's evolution during his presidency at least mapped onto changing public opinion. It had only been in 2004 that many pundits attributed Bush's re-election to his opposition to same sex marriage, as polls showed 60% of Americans disapproving

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57 Bob Biersack, *8 Years Later: How* Citizens United *Changed Campaign Finance*, OpenSecrets.org (Feb. 7, 2018), https://www.opensecrets.org/news/2018/02/how-citizens-united-changed-campaign-finance/.

58 Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

59 Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

60 *Shelby Cnty.,*570 U.S. 529.

61 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

62 President Barack Obama, *Transcript: Obama's Remarks on Supreme Court Ruling on Same-Sex Marriage*, Wash. Post (June 26, 2015).

63 *See* , *e.g.* Randall Kennedy, The Persistence of the Color Line (2012); or Kerry Eleveld, Don't Tell Me to Wait: How the Fight for Gay Rights Changed America and Transformed Obama's Presidency (2015).

of the idea against 31% supporting it. In 2008 this had shifted to 51% against gay marriage compared to 39% in favor. By 2012, the numbers had flipped so that a plurality then supported rather than opposed same sex marriage by 48% to 43%, and by 2015 a majority expressed support with 55% in favor against 39% opposed.[64] In this context, Obama had likely learned from the trials suffered by the previous Democratic occupant of the White House. President Clinton had lost public support early in his presidency over the issue of whether gays should be allowed to serve in the military and had ended up signing the Defense of Marriage Act into law, which allowed states to refuse acknowledgement of same-sex marriages from other states and was passed with veto proof majorities, despite his spokesperson describing that law as "gay baiting, pure and simple".[65] Despite the marriage sticking point, on the wider issue of gay rights, there is no doubt that candidate Obama had an overtly forward-thinking perspective. There are a number of key moments, particularly throughout 2010-11, when the president spoke publicly about the evolution of his thinking on gay marriage. He declared that it was "something that I think a lot about."[66]

When running for a 2004 Senate seat in Illinois, Obama had not supported DOMA and reconciling acceptance of gay marriage with religious faith was a matter he spoke and wrote about, which offered citizens some insights into his views on the matter, albeit in a managed fashion.

In 2011, President Obama instructed the Justice Department to no longer defend DOMA in court. In a statement, Attorney General Eric Holder declared, "While both the wisdom and the legality of [DOMA] will continue to be the subject of both extensive litigation and public debate, this Administration will no longer assert its constitutionality in court."[67] Clearly, the momentum was building in support of marital rights for gay Americans, and the executive was on board. Among the 50 states, progress was deeply uneven. From Washington DC signing domestic partnerships into law as far back as 1992 to Wyoming rejecting domestic partnerships and marriage as recently as 2013 and 2014 respectively, there was little coherence in efforts to move this agenda forward.

It is important to understand that the *Obergefell* case did not result from an Obama administration initiative, but came about after the U.S. Court of Appeals for the 6th Circuit had overturned trial court rulings on the legitimacy of the bans on same sex marriage in Ohio, Michigan, Kentucky and Tennessee. The trial court had supported those challenging the ban, but the 6th Circuit disagreed. When the matter reached the Supreme Court the Department of Justice filed an amicus brief in support of Obergefell case,[68] as it had also done two years earlier when asking

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64 PEW Research Center, *Changing Attitudes on Gay Marriage* (June 26, 2017), http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/.

65 Jerry Gray, *House Passes Bar to U.S. Sanction of Gay Marriage*, N.Y. Times, July 13, 1996.

66 Becky Bowers, *President Barack Obama's Shifting Stance on Gay Marriage*,' Politifact (1 May 2012, at 4:19 p.m.), https://www.politifact.com/truth-o-meter/statements/2012/may/11/barack-obama/president-barack-obamas-shift-gay-marriage/.

67 *Statement of the Attorney General on Litigation Involving the Defense of Marriage Act*, Dep't of Just. (Feb. 23, 2011).

68 Kendall Breitman, *Dems, Obama Administration Press SCOTUS on Gay Marriage*, Politico (Mar. 6, 2015), https://www.politico.com/story/2015/03/president-obama-amicus-brief-same-sex-marriage-115844.

the Court to strike down California's Proposition 8, which had banned same sex marriage in the state in a 2008 ballot measure, with reporting that Obama personally helped craft that brief.[69] Hence, it fell to the judicial branch of government to decide the wider fate of the nation's gay population in relation to their right to marry, but the administration's position was clear.

At this point, the make-up of the Supreme Court was therefore crucial in deciding the future of gay marriage across the nation. Not for the first time, the fate of progress and direction of social travel for a nation of hundreds of millions apparently sat in the lap of a single individual. Described by one lawyer (later nominated by President Trump to a federal court position) as a "judicial prostitute" the swing voter Kennedy wielded enormous power on the bench.[70] A potentially insightful explanation for the liberal position taken by Justice Kennedy, often conservative in his decision making, in *Obergefell v. Hodges*, was that he was well travelled, with annual teaching commitments in Europe dating back to 1990. Spending his summers in Austria, Kennedy was surrounded by international judges with opinions often at odds with mainstream U.S. opinion and law. Europeans tended to have a more relaxed approach to gay marriage, for example.[71] Kennedy had long since proved his socially progressive value on the court when he led a 6:3 decision in *Lawrence v. Texas* to strike down sodomy laws in the Lone Star state.[72] In the words of Jeffrey Toobin, "when he was with the liberals, he could be very liberal."[73] Those arrayed in opposition to same sex marriage included Clarence Thomas who voiced his concerns at the mandatory disclosures relating to those who contributed to Proposition 8 in California. Whilst Thomas was not a conventionally influential judge, conservative colleagues who later came to the bench offered avenues for his ideas and opinions to become law.[74] As Kennedy sided with the four liberals to endorse same sex marriage, the conservative justices, led by Chief Justice Roberts, protested, but to no avail.[75]

During his confirmation hearings, when asked for his opinion by Al Franklin on the matter, Trump-appointee Neil Gorsuch stated publicly that same-sex marriage is "absolutely settled law."[76] Gorsuch declined to share his personal views on the subject but as a religious conservative, he was unlikely to be a proponent of marriage equality, yet there seems little political momentum on the part of the conservative movement to re-litigate the *Obergefell* decision with the same intent as continuing battles over *Roe*.

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69 Richard Socarides, *Obama's Brief Against Proposition 8 Goes Far*, New Yorker (Feb. 28, 2013), https://www.newyorker.com/news/news-desk/obamas-brief-against-proposition-8-goes-far.

70 Damien Schiff, *Kennedy as the Most Powerful Justice?*, Omnia Omnibus blog (June 29, 2007, 08:35 AM), https://web.archive.org/web/20080610122330/http://omniaomnibus.typepad.com/omnia_omnibus/2007/06/index.html .

71 Toobin, *supra* note 31, at 52.

72 Lawrence v. Texas, 539 U.S. 558, 561 (2003) (Kennedy, J.).

73 Toobin, *supra* note 31, at 183.

74 *Id*. at 245.

75 Ariane de Vogue, *Roberts Issues Stern Dissent in Same-Sex Marriage Case*, CNN Pol. (June 26, 2015), http://edition.cnn.com/2015/06/26/politics/john-roberts-gay-marriage-dissent/index.html.

76 Jeremyart, *Sen. Franken Questions Judge Gorsuch*, C-Span (Mar. 21, 2017), https://www.c-span.org/video/?c4662443/sen-franken-questions-judge-gorsuch.

B. Health Care, Mixed Stories

The 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius* was reported as a relief for the administration as Chief Justice Roberts' decision to side with the liberal quartet meant that the Affordable Care Act, the centerpiece of the Obama administration's domestic policy agenda, survived the challenge brought by NFIB and 26 state attorneys general.[77] In a complicated ruling the Court determined that the so-called 'individual mandate', which required people to get insured or face a penalty, was not justified under the Commerce Clause of the Constitution, but by a 5 to 4 margin maintained that the penalty could be seen as a tax rather than a fine and was therefore constitutional. Roberts' decision to view the individual mandate in this light was critical as the four dissenting justices deemed that what they saw as the unconstitutional mandate was 'inseverable' from the legislation as a whole and therefore would have overturned the complete ACA. In the circumstances, with the stakes so high, it is understandable that the conventional wisdom saw this as a triumph for the Obama administration. Yet, it is misleading to see the Supreme Court's actions as giving the go-ahead to the administration's agenda. The law survived but, critically, the Court simultaneously unpicked another key part of the ACA.

One of the main planks of the ACA was a major expansion of the Medicaid program to cover everyone living in a household with an income below 138% of the federal poverty level. As a program run jointly by the federal and state governments, much discretion for determining Medicaid eligibility had been left to the states. The creation of a new national minimum eligibility standard, therefore, did represent a new departure for the program. The ACA proposed effectively to impose this standard on states through a two-step process. First, as an incentive, it proposed that the federal government would pay the vast majority of the costs of newly eligible enrollees in a state, making this a much more generous grant to states than applied to the existing Medicaid program. Second, as an enforcement mechanism, the ACA proposed that any state that did not join with the expansion would lose all of its existing Medicaid funding. It was this second aspect that really removed autonomy from states as to whether they wished to join the expansion. It was politically and fiscally conceivable for a state to forfeit new federal revenues, but not so to lose existing funding. In this context, the Court determined that this second aspect constituted federal over-reach and so stopped the federal government applying sanctions against states that chose not to expand. This judgment was reached on a 7 votes to 2 basis, with Justices Kagan and Breyer joining Roberts and the conservative bloc. This decision meant that the choosing to reject expansion was genuinely an option for states, whereas under the terms of the ACA expansion was effectively compulsory.[78]

Before Obama left office two other challenges to the ACA found their way to the Supreme Court. *King v Burwell*,[79] challenged the legitimacy of the Internal Revenue Service providing tax credits to people buying insurance via federally,

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77 Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

78 For further detail on how this decision impacted the implementation of the ACA, *see* Daniel Béland et al., Obamacare Wars: Federalism, State Politics and the Affordable Care Act (2016).

79 King v. Burwell, 135 S.Ct. 2480 (2015).

rather than state, organized exchange marketplaces set up by the ACA. In this case, by six votes to three, the Court upheld the ACA. In *Burwell v Hobby Lobby Stores,*[80] however, the Court sided against the administration. By a five to four majority the justices ruled that the 1993 Religious Freedom Restoration Act meant that the employers could refuse to provide insurance coverage of certain types of contraception to their workers on the grounds that the contraceptive methods in question violated the employers' religious beliefs. This ruling did not constitute an existential threat to the law, but it fostered opposition and the idea that the ACA was not the settled law of the land.

VII. Rebuking Executive Action

As the administration had failed to get Congress to legislate on key areas of its agenda, so Obama turned to his executive powers. "On the domestic front, President Obama aggressively used his office and the administrative state to create new policies in several areas such as immigration, climate change, health care, gun control, overtime rules, and minimum wage".[81] As his presidency became increasingly frustrated in its legislative ambitions by Republican control of the House and then both chambers of Congress, the Obama White House exercised its executive branch powers in a variety of ways in order to pursue its agenda. But in two key areas the courts stymied the plans.

First, with regard to immigration policy and especially the pressing question of how to treat the several million people living in the U.S. illegally, the administration saw a major part of its efforts knocked down by the courts. One major initiative did, however, survive his presidency. In June 2012, via presidential memorandum, President Obama introduced the DACA Program for 600,000 undocumented youngsters, known as DREAMers, who had been brought to the US illegally as children. The constitutionality of DACA was questioned by many,[82] but it was the subsequent DAPA initiative that provoked widespread legal challenge. In November 2014, the president gave a televised address to the nation that outlined his plans for fixing the broken immigration system. This move towards expanding the eligibility of DACA, with key points including cracking down on illegal immigration at the border, deporting felon, not families, and accountability including criminal background checks and taxation.[83]

The content of DAPA, which came in the form of executive action, was challenged in the District Court for the Southern District of Texas by Texas and 24 other Republican-led states and on February 16 2015, Judge Andrew Hanen imposed an injunction against DAPA.[84] A White House request for a stay pending

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80 Burwell v. Hobby Lobby Stores Inc, 134 S. Ct. 2751 (2014).

81 Eric Berger, *Of Law and Legacies*, 65 Drake L. Rev. 949, 949 (2017).

82 *Deferred Action for Childhood Arrivals (DACA)*, Dep't. of Homeland Security (June 23, 2018).

83 Remarks by President Obama in Address to the Nation on Immigration (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [https://obamawhitehouse.archives.gov/briefing-room/speeches-and-remarks].

84 Texas v. United States, 86 F. Supp. 3d 591 (S.D. Texas 2015) (Andrew S. Hanen, J.).

appeal was rejected by the appellate court in May 2015.[85] In November 2015, DAPA was struck down by the 5th Circuit Court in a 2:1 decision.[86] Governor Greg Abbott (who had previously filed a lawsuit challenging the policy when he was attorney general) told media outlets that "The president's job is to enforce the immigration laws, not rewrite them. President Obama should abandon his lawless executive amnesty program and start enforcing the law today."[87] The decisions against DAPA were made by Reagan appointee Jerry E Smith and Jennifer Elrod, a George W Bush appointee. Carter appointee Judge Carolyn Dineen King voted against her colleagues.[88] Between the two programs, it was estimated that they would impact approximately 4.4 million individuals. [89]

United States v. Texas offers a prime example of how the courts can, and inevitably do, engage with politically charged issues. In a SCOTUS blog post, Lyle Denniston wrote :

> In many ways, the case of *United States v. Texas* illustrates much about the current political climate in America and in the nation's capital, in particular. It reflects gridlock, partisan polarization, and the use of sometimes imaginative lawsuits to pursue political or policy agendas.[90]

The 4:4 ruling (due to the death of Justice Scalia) demonstrates how the Supreme Court was literally stuck on the issue. The empty seat, where Obama had planned Merrick Garland would sit, starkly symbolized the challenge faced by the forty-fourth president in maintaining his legacy. The administration was supported by the Migration Policy Institute with regard to how DAPA would benefit families.[91] Whilst it was clear that "the judgment is affirmed by an equally divided court,"[92] as Reuters pointed out the decision of each justice was not publicized.[93]

It had been a 2008 campaign pledge of Barack Obama's to fix America's broken immigration system. Once in power, he found his plans continuously stymied, and the promised comprehensive immigration bill in his first year did not materialize. Nor did it in subsequent years. In June 2013 the Senate, with 68 votes,

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85 787 F.3d 733 (5th Cir. 2015).

86 809 F.3d 134 (5th Cir. 2015) *aff'd* U.S. v. Texas, 136 S. Ct. 2271 (2016).

87 Julián Aguilar, *Fifth Circuit Strikes Down Immigration Program*, Tex. Tribune (Nov. 9, 2015).

88 Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

89 *The Obama Administration's DAPA and Expanded DAPA Programs*, FAQ, National Immigr. L. Ctr. (Mar. 2, 2015), https://www.nilc.org/issues/immigration-reform-and-executive-actions/dapa-and-expanded-daca-programs/.

90 Lyle Denniston, *Argument Preview: A Big, Or Not So Big Ruling Due on Immigration*, SCOTUSblog (Apr. 15, 2016, 9:07 AM), http://www.scotusblog.com/2016/04/argument-preview-a-big-or-not-so-big-ruling-due-on-immigration/.

91 Randy Capps et al, *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, Migration Pol'y. Inst. Rep. (Feb. 2016), https://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families.

92 United States v. Texas, 136 S. Ct. 2271, 2272, (2016).

93 Lawrence Hurley, *Split Supreme Court Blocks Obama Immigration Plan*, Reuters (June 23, 2016, 3:45 PM), https://www.reuters.com/article/us-usa-court-immigration-idUSKCN0Z91P4.

passed a comprehensive immigration reform package including toughened border security, but also set out pathways to legal status for several million undocumented immigrants.[94] The House, however, refused to take the matter up and nothing came from this effort, which provides some context for Obama's decision to take the executive action route. The judicial response proved as consequential as the House's inaction, as circuit court opposition developed into a nationwide DAPA injunction. Hence, President Obama's legacy aspirations to bring wide ranging reform to the country's immigration system were, to a great extent, thwarted by the courts. After the Supreme Court left the 5th Circuit's ruling in place Obama lamented: "I think it is heartbreaking for the millions of immigrants who made their lives here, who've raised families here, who hope for the opportunity to work, pay taxes, serve in our military, and fully contribute to this country we all love in an open way."[95]

The practical outcome of this meant that immigration was a hot-ticket issue in the 2016 election, and Republican candidate Donald Trump successfully tailored his campaign message to offer comfort to concerned voters. His 'Build-the-Wall' rhetoric scored continuously well, as it offered a symbolic and potentially substantive solution to those with concerns around border security. Perhaps a Clinton victory in 2016 may have presented some alternative avenues for moving the Democrat immigration agenda forward but the Trump victory ensured that restrictionist measures on immigration control would be taken at the earliest opportunity. Along with efforts to implement the controversial travel ban, President Trump veered dramatically away not only from the immigration priorities of his liberal predecessor, but also those of George W Bush. The forty-third president had made overt efforts to reach out to the US Latino community, and spoke regularly of the importance of good relations with Mexico.

Second, the courts also undermined what was known as the Clean Power Plan. This effort to reduce emissions from coal burning power plants was described by Obama as "The single most important step that America has ever made in the fight against global climate change" [96] In October 2008, Barack Obama told *Time* magazine's Joe Klein that an "Apollo project" for a new energy economy was his "top priority."[97] The issue of the environment and climate change had become an increasingly partisan one over the years as parallel narratives emerged, seemingly offering citizens a choice of either focusing on the economy or on the planet. The idea that these two priorities could be merged was lauded by candidate Obama on the 2008 campaign trail. Air pollution was an ongoing topic for concern in the U.S., along with growing awareness of the challenges involved with relying on the fossil fuel industry. Any president wanting to take action on climate change had a

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94 Seung Min Kim, *Senate Passes Immigration Bill*, POLITICO (June 28, 2013, 04:25 PM EDT,
Updated 06/28/2013 12:19 AM EDT), https://www.politico.com/story/2013/06/immigration-bill-2013-senate-passes-093530.

95 Lawrence Hurley, *Split Supreme Court Blocks Obama Immigration Plan*, Reuters (June 23, 2016), https://www.reuters.com/article/us-usa-court-immigration-idUSKCN0Z91P4.

96 Lucy Perkins & Bill Chappell, *President Obama Unveils New Power Plant Rules in 'Clean Power Plan'*, NPR (Aug. 3, 2015, 2:10 PM ET), https://choice.npr.org/index.html?origin=https://www.npr.org/sections/thetwo-way/2015/08/03/429044707/president-obama-set-to-unveil-new-power-plant-rules-in-clean-power-plan.com.

97 Joe Klein *The Full Obama Interview*, Time,Oct. 23, 2008.

number of avenues open to him. His government could participate in international agreements such as the Kyoto Protocol, or he could present legislation to Congress for consideration. Both paths were fraught with challenges as those in opposition to green plans could throw up endless roadblocks. A third possibility was to utilize agencies such as the Environmental Protection Agency (EPA).[98]

The legislative route to comprehensive reform was closed off even when Democrats controlled Congress. The House did pass substantive legislation in 2009 through the American Clean Energy and Security Act, but institutional fragmentation again proved fatal as the Senate took no similar action. It was therefore no great surprise when the EPA unveiled a Clean Power Plan (CPP) in June 2014, with a view to lowering carbon dioxide emitted by power generators. The aim was to return to 2005 levels by 2050, which involved a 32% reduction in that 25 year period. This tied in with the U.S. commitment to the Paris Climate Agreement, and was a significant demonstration of its adherence and example-setting for others.[99]

On August 3 2015, the final version of the CPP was shared by President Obama, and two months later was published in the Federal Register. It immediately faced a legal challenge by 24 states. Along with Murray Energy, the complainants called on the Court of Appeals for the District of Columbia Circuit to overturn the rule and to prevent it from coming into force while the lawsuit played out. The 24 states' attorneys general argued that the plan was unconstitutional, stating that, "The final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law."[100] In response, the White House stated that the CPP was based on sound legal footing and was consistent with the structure and history of the Clean Air Act.[101]

In early 2016, the Supreme Court issued five identical orders requiring the EPA to delay implementation of the CPP until the D.C. Circuit made a ruling on the merits of the case brought by the states against the CPP's regulations.[102] This was one of the final rulings involving Justice Antonin Scalia before his unexpected death on February 13 that year. The 5:4 decision, made along the court's ideological lines, was the first time it had ruled to stay such an item of regulation before the lower court had made its decision. This was enormously significant and caused environmentalists concern as there was potential for further such action. In addition, the Supreme Court stay would hold, whatever the DC Circuit Court ruled. The

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98 John Berg, *Obama and the Environment*, in Obama's Washington: Political Leadership in a Partisan Era 157 (Clodagh Harrington ed., 2015).

99 Fact Sheet: Clean Power Plan by the Numbers, EPA., (June 2014), https://archive.epa.gov/epa/sites/production/files/2014-06/documents/20140602fs-important-numbers-clean-power-plan.pdf

100 Gregory Korte, *24 States Challenge Obama's Clean Power Plan as Rules Go Into Effect*, USA Today (Oct. 23, 2015, 4:18 PM), https://eu.usatoday.com/story/news/politics/2015/10/23/24-states-file-legal-challenge-obamas-power-plan/74472236/.

101 Blair Beasley, *Clean Power Plan/Affordable Clean Energy Rule, Timeline of Events*, Bipartisan Pol'y. Ctr. (Oct. 2018), https://bipartisanpolicy.org/clean-power-plan-timeline-of-key-events/.

102 *See* Lyle Dennison, *Carbon Pollution Controls Put on Hold,* SCOTUSblog, (Tue, Feb. 9th, 2016 6:45 pm) https://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/(citing as illustrative Order in Pending Case, West Virginia v. EPA, 577 U.S. _(2016).

postponement could only be lifted if and when the Supreme Court decided to hear an appeal on the matter.[103]

'Friend of the Court' climate scientists warned that the Clean Power Plan was a crucial component of the United States' adherence to the Paris Climate deal. Without it, the nation did not have a climate change-driven pollution reduction strategy.[104] Scalia's death resulted in the Supreme Court left with an even 4:4 split, which meant that the decision of the lower court would prevail. In the case of the CPP, this could have meant good news, as the DC Circuit Court had a liberal slant.[105] This highly significant case offered a reminder of the consequences of a Republican Senate's refusal to consider hearings for any nominee that Obama had in mind to replace Justice Scalia. As the seat lay vacant throughout the president's final year in office, Donald Trump's election campaign promises included one to kill the CPP (as part of the Paris deal). True to his word, in March 2017, President Trump signed executive order 13783 for the EPA to review the plan, and suspend, rescind or revise as appropriate.

The Clean Power Plan had been a central component of the Obama administration's effort to tackle climate change. Donald Trump made his views on this issue crystal clear throughout his campaign, at times blaming the Chinese for fabricating the issue or lambasting liberals for creating an elaborate hoax.[106] Under the new administration, the EPA was headed by Scott Pruitt, a man not known for his green credentials. In September 2018, a second vacant Supreme Court seat was finally filled by Brett Kavanaugh after fractious Senate hearings. Swing justice Anthony Kennedy, no eco-warrior, had nonetheless in the past ruled sympathetically on key environmental cases. In *Massachusetts v. EPA* (2007) the 5:4 decision ruled that the EPA was allowed to rule on the matter of greenhouse gases (under the remit of the Clean Air Act). Judge Kavanaugh was described by Columbia University's Michael Gerrard, as more 'anti-agency' than anti-environment. [107] When Kavanaugh took his seat, the Clean Power Plan was dormant, as the Trump administration called for consultation on ways to move forward. Kavanaugh's anti-agency track record, and skepticism about the role of the administrative state, was tantamount to

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103 Bobby Magill, *The Suit Against the Clean Power Plan Explained*, Climate Central (Apr. 12, 2016), http://www.climatecentral.org/news/the-suit-against-the-clean-power-plan-explained-20234; Tracy Hester, *The Supreme Court Suspends Obama's Clean Power Plan: Changing the Law on Staying Put*, Forbes (Feb. 18, 2018, 4:42 PM), https://www.forbes.com/sites/uhenergy/2016/02/18/the-supreme-court-suspends-obamas-clean-power-plan-changing-the-law-on-staying-put/#6ba501b5726d ; Adam Liptak and Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. Times, Feb. 10, 2016.

104 Magill, *supra* note 103.

105 Susan Phillips, *What Scalia's Death Means for Obama's Clean Power Plan*, St. Impact Pa. (Feb. 15, 2016), https://stateimpact.npr.org/pennsylvania/2016/02/15/what-scalias-death-means-for-obamas-clean-power-plan/.

106 Louis Jacobson, *Yes Donald Trump Did Call Climate Change a Chinese Hoax*, Politifact (June 3, 2016, 12:00 PM), https://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/.

107 *See* Marianne Lavelle, *What Brett Kavanaugh on Supreme Court Could Mean for Climate Regulations*, Inside Climate News (Oct. 6, 2018), (quoting Michael Gerrard, Director of the Sabin Center for Climate Change Law, Columbia University): https://insideclimatenews.org/news/10072018/brett-kavanaugh-supreme-court-confirmed-climate-change-policy-environmental-law-trump.

an anti-environmental stance. Law professor Michael Livermore observed that the new justice's ascent to the Supreme Court would push Chief Justice Roberts to the center of the count on green issues. As a result, Kavanaugh's presence on the Court would make it "considerably less sympathetic to environmental protections."[108] Such a development was another body blow to the Obama era climate agenda.

VIII. Conclusion

It is hard to look away from the impact of Senate Majority Leader McConnell's power play in 2016. The death of Scalia was unexpected, but it was the rare type of contingent event that really can alter political fortunes, but McConnell ensured this was not to be. The evidence suggests that the empty Supreme Court seat motivated conservative voters more than liberals in November 2016 and was likely one factor in tipping the election to Trump.[109] So this potentially legacy making moment and opportunity in fact worked to harm Obama's legacy.

McConnell's actions in blocking the Merrick Garland nomination and then the opening 20 months of the Trump administration do expose some of the limits of progressive efforts to populate the federal judiciary. It sometimes seems as if liberals still live in the third quarter of the 20th century when judicial activism worked to advance causes liberals preferred such as in *Brown* and *Roe*. In reality, despite stand-out rulings such as in *Obergefell*, the Court has not been consistently liberal for a long time. Yet, while conservatives have developed networks such as the Federalist Society to promote conservative judicial thinking and a supply of qualified conservative minded judges, liberals have not cultivated a similar environment or encompassing philosophy. There are, of course, many liberal-minded judges, but there is not an effective equivalent to the Federalist Society that provides both intellectual ballast and practical organization. This gap was not filled during the Obama presidency. Obama's call for judges with "empathy" clearly informed the diversity of his nominees to the federal courts, but it did not provide a rationalization for why this should be a priority for Americans when electing the other branches of government.

Moreover, the evidence suggests that the courts did more to inhibit Obama's efforts at change than to enhance them. The *Obergefell* decision has changed the United States profoundly, but the Supreme Court's actions mean that millions of Americans are still not eligible for Medicaid; millions more remain as illegal immigrants, threatened by deportation and unable to live fully out of the shadows, and coal burning power plants can continue their work.

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108 Michael Livermore, *Judge Kavanaugh and the Environment*, SCOTUSblog (July 18, 2018 1:27 PM), http://www.scotusblog.com/2018/07/kavanaugh-and-the-environment/.

109 Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

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A Template For Enhancing The Impact of The National Academy of Sciences' Reporting on Forensic Science

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ABSTRACT

The National Academy of Sciences (NAS), established in 1863, is the United States' leading science and technology think-tank, with an active commitment to advising government. Over the last 150 years, the NAS has, both independently and in conjunction with the federal government, investigated and reported on various issues of importance, ranging from space exploration and biosecurity, to STEM education and immigration. Due to growing concerns about particular disciplines (and specifically their application in legal proceedings), one issue the NAS has reported on between 1992 and 2009 is forensic science. Specifically, the NAS has published six reports commenting on the status of forensic science evidence in the USA, namely DNA Technology in Forensic Science (1992), The Evaluation of Forensic DNA Evidence (1996), The Polygraph and Lie Detection (2003), Forensic Analysis: Weighing Bullet Lead Evidence (2004), Ballistic Imaging (2008), and Strengthening Forensic Science in the United States: A Path Forward (2009). The response of stakeholders (including from political, legal, and academic spheres) to these reports has varied, ranging from shifts in practice and full acknowledgement, to considerable struggles to effectuate systemic reform. Using the different experiences of two reports – Forensic Analysis: Weighing Bullet Lead Evidence (2004) and Strengthening Forensic Science in the United States: A Path Forward (2009) – as a vehicle, this article suggests how the NAS can strengthen the impact of its forensic science reporting, and how stakeholders can better harness the expertise of the NAS.

KEYWORDS

National Academy of Sciences, Forensic Science, Reporting, Stakeholder Responses.

CONTENTS

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Introduction

DNA technology – when applied properly – provides the criminal justice system with a highly reliable identification method, which can be used to both convict and exonerate individuals. At the same time, however, this capacity of DNA technology undermines various forensic science identification techniques, including tool-mark, fingerprint, and bite-mark analysis, which the criminal justice system has routinely admitted as evidence for decades.[1] Both the federal government and the National Academy of Sciences (NAS)—the United States' leading science and technology think-tank—have recognized this. In 1992 and 1996, following the introduction of DNA evidence into legal proceedings,[2] the NAS, supported by federal funding,[3] published two reports on the forensic use of DNA technology. In these reports, the NAS encouraged the criminal justice system to harness DNA technology—when conducted according to approved procedures—due to its evidence-based high reliability.[4] Subsequently, federal bodies commissioned the NAS to report on the probative value of other, non-DNA forensic science techniques.[5] This resulted in the publication of four reports: *The Polygraph and Lie Detection* (2003);[6] *Forensic Analysis: Weighing Bullet Lead Evidence* (2004);[7] *Ballistic Imaging* (2008);[8] and *Strengthening Forensic Science in the United States: A Path Forward* (2009).[9] Generally, these reports provide an examination of the reliability and validity of the relevant forensic science discipline(s), and include recommendations to the commissioning body. The response of stakeholders to these reports has varied, ranging from shifts in practice, and clear acknowledgements, to silence and considerable struggle to effectuate systemic forensic science reform.

This article, using the experiences of *Forensic Analysis: Weighing Bullet Lead Evidence* (*CBLA Report*) and *Strengthening Forensic Science in the United States: A Path Forward* (*Strengthening*) as a vehicle, explores how the NAS can strengthen the impact of its forensic science reporting, and how stakeholders can better harness the expertise of the NAS in this context. These reports have been selected because of the clearly identifiable and diverse spectrum of responses they have drawn. Part I briefly outlines the function and research portfolio of the NAS and

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1 *See, in general,* Paul C. Giannelli, *Forensic Science: Under the Microscope* 34 Ohio N. U. L. Rev. 315 (2008).

2 R v. Pitchfork [2009] EWCA (crim.) 963, [11] (Eng.); (Appeal outlines the first use of DNA evidence in 1987); Andrews v. State, 533 So.2d 841 (Fla. Dist. Ct. App. 1988).

3 Victor A. McKusick et al., DNA Technology in Forensic Science (1992); James F. Crow et al., The Evaluation of Forensic DNA Evidence (1996).

4 *Id.*

5 The report, *The Polygraph and Lie Detection* (2003) was commissioned by the United States Department of Energy, *Forensic Analysis: Weighing Bullet Lead Evidence* (2004) was commissioned by the FBI, *Ballistic Imaging* was commissioned by the National Institute of Justice, and *Strengthening Forensic Science in the United States: A Path Forward* (2009) was commissioned by Congress.

6 Stephen E. Feinberg, The Polygraph and Lie Detection (2003).

7 Kenneth O. MacFadden et al., Forensic Analysis: Weighing Bullet Lead Evidence (2004).

8 Daniel L. Cork et al, Ballistic Imaging (2008).

9 Harry T. Edwards, Constantine Gatsonis et al., Strengthening Forensic Science in the United States: A Path Forward (2009).

details the circumstances surrounding the publication of both the *CBLA Report* and *Strengthening*. This includes the findings of those reports and stakeholder responses to/associated with the reports, including those by the FBI, Department of Justice, Congress, the judiciary, state legislatures, and the White House. Part II identifies themes in the experiences of these reports, using them to shape a template that can—the authors suggest—be used to both strengthen the NAS' forensic science reporting, and enable stakeholders to better harness the expertise of the NAS. Part III concludes that the template will enable the NAS to take a lead role in increasing public confidence in the criminal justice system by facilitating cross-stakeholder collaboration, and by publicly normalizing and explaining the nature of scientific method, progress, findings, and uncertainty. This role aligns neatly with the NAS' unique history, function, and mission.

I: The National Academy of Sciences and Selected Reports on Forensic Science

This section first outlines the history and function of the NAS. It then details the circumstances surrounding the publication of the *CBLA Report* and *Strengthening,* including the findings of those reports and the responses drawn from stakeholders.

A. Function and Research Portfolio of the NAS

In 1863, the NAS was established by President Lincoln to provide "independent, objective advice to the nation on matters related to science and technology."[10] The NAS is now considered to be the United States' premier scientific research center, with a statutory mandate to report on any scientific subject when called upon by the federal government.[11] It is a "private, non-profit society of distinguished scholars,"[12] with its members elected by their peers "for outstanding contributions to research."[13] The NAS' Mission Statement states it is "committed to furthering science in America",[14] although its members are also notably "active contributors to the international scientific community."[15]

Over the last 150 years, the NAS has generated a diverse portfolio of research that reflects the culture of scientific collaboration and inquiry. This portfolio includes reporting on matters of national security and welfare during World War I;[16] exploring warfare technology in World War II;[17] mapping side

[10] National Academy of Sciences, *Mission*, http://www.nasonline.org/about-nas/mission/ (last visited Dec. 9, 2018).
[11] An Act to Incorporate the National Academy of Sciences, 36 U.S.C §251 et seq. (1863).
[12] National Academy of Sciences, *supra* note 10.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Albert L. Barrows, The Relationship of the National Research Council to Industrial Research, *in* Research: A National Resource: II: Industrial Research 365 (1940).
[17] *Id.* at 396-97.

effects of atomic warfare and participating in international scientific exchanges[18] during the Cold War;[19] and, more recently, reporting on education, population growth, climate change, and forensic science.[20] During this time, the NAS has experienced evolving, challenging and productive relationships with various stakeholders, including the federal government, states, and scholars.[21] This article focuses on stakeholder responses to two of the NAS' forensic science reports, namely the *CBLA Report* and *Strengthening*.

B. The CBLA Report and Strengthening: Report Overviews and Stakeholder Responses

i. Forensic Analysis: Weighing Bullet Lead Evidence (CBLA Report)

In the mid-twentieth century, Comparative Bullet-Lead Analysis (CBLA) was developed by the FBI as a tool to determine the source of bullet fragments found at crime scenes.[22] The technique, exclusively used by the FBI,[23] involves examiners comparing the chemical composition of a bullet fragment to suspect-related bullets.[24] Typically, examiners analyze the ratio between seven chemical elements, and find a match if the chemical make-up of the two samples is sufficiently similar.[25]

In 2002, the FBI commissioned the NAS to produce "an impartial scientific assessment of the soundness of the scientific principles underlying CBLA[26] to determine the optimum manner for conducting the examination and to establish scientifically valid conclusions."[27] This followed publication of concerns about

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18 The government also made use of the NAS through a series of scientific exchanges between both the USSR and China. This proved to be valuable for international relations, with science maintaining dialogue between nations when political relations had broken down.

19 During the Cold War period, the NAS and NRC worked on a variety of research projects for the federal government, including oceanography, studies of pacific islands and improving international scientific dialogue and cooperation. As popular interest in subjects such as the effect of atomic warfare increased, the NAS was used by the federal government to map its effects.

20 *See, e.g.,* George B. Kistiakowsky, Federal Support of Basic Research in Institutions of Higher Learning (1964); William D. McElroy, The Growth of World Population: Analysis of the Problems and Recommendations for Research and Training (1963).

21 For example, the report, Alan Leshner, Communicating Science Effectively (2017) was funded by a collection of private organizations, namely the Burroughs Wellcome Fund, the Rita Allen Foundation, the Gordon and Betty Moore Foundation, and the Hewlett Foundation.

22 MacFadden et al, *supra* note 7, at 1.

23 William C. Thompson, *Analyzing the Relevance and Admissibility of Bullet-Lead Evidence: Did the NRC Report Miss the Target*, 46 Jurimetrics 65, 66 (2005-2006).

24 MacFadden et al, *supra* note 7, at 8, 19-20.

25 *Id.*

26 Throughout the report, CBLA evidence is referred to as CABL, or comparative analysis of bullet lead.

27 MacFadden et al, *supra* note 7, at ix.

the scientific basis for CBLA.[28] This was the first time that CBLA evidence had received such scrutiny.[29]

In 2004, the NAS published its report *Forensic Analysis: Weighing Bullet Lead Evidence*. The report detailed the analytical method used by FBI examiners,[30] and criticized much of the FBI's reporting procedures for incompleteness and lack of detail.[31] Despite this, it recognized the FBI process as appropriate for determining the chemical composition of bullet lead.[32] It discussed several methods for the statistical analysis of CBLA evidence, including error rates.[33] The NAS found that the methods used by the FBI insufficiently appreciated the variability of bullets, both within the bullet population and differences in manufacturing processes.[34] The report recommended to the FBI that the statistical procedures used to assess a match should employ standard deviations and be charted regularly. It also recommended that all examiners follow official FBI protocol(s) for CBLA, including properly maintaining documentation.[35]

The NAS also found that variations in manufacturing processes could undermine the probative value of CBLA evidence and potentially result in misleading comparisons.[36] It recommended that further research be carried out to define different ranges of indistinguishable lead.[37] The NAS also identified issues relating to the interpretation of CBLA evidence.[38] This led them to recommend a more rigorous analysis process,[39] and to caution the FBI that its analytical protocol needed revision to provide more clarity.[40] The NAS, however, did not recommend that CBLA evidence be inadmissible in legal proceedings.[41]

a. Stakeholder Responses

This report primarily elicited responses from two stakeholder groups: the FBI and the judiciary.

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28 Erik Randich, Wayne Duerfeldt, Wade McLendon, William Tobin, *A Metallurgical View of the Interpretation of Bullet Lead Compositional Analysis* Forensic Science International 127, 174-191 (2002).

29 MacFadden et al, *supra* note 7, at 101.

30 *Id.* at 15.

31 *Id.* at 16.

32 *Id.* at 23.

33 *Id.* at Chapter 3.

34 *Id,* at 68.

35 *Id.* at 68-70.

36 *Id.* at 98.

37 *Id.* at 106.

38 *Id.* at 107.

39 *Id.* at 107-08.

40 *Id.* at 109-10.

41 *Id.* at 107.

FBI Response

Immediately after the report's publication, the FBI defended its use of CBLA, but expressed a willingness to undertake further research.[42] However, in September 2005, the FBI published a press release stating that "after extensive study and consideration,"[43] it would "no longer conduct the examination of bullet lead."[44] The FBI stated that it "firmly support[s] the scientific foundation"[45] of CBLA, but decided to discontinue CBLA due to costs associated with improvements, and that "neither scientists nor bullet manufacturers are able to definitely attest to the significance of an association…in the course of a bullet lead examination.[46]

At the time of the FBI's decision, over 2,500 convictions had been secured using the CBLA technique.[47] This attracted media attention (including from *60 Minutes* and the Washington Post),[48] which urged the FBI to review relevant convictions.[49] Ultimately, the FBI partnered with the Innocence Project and Department of Justice to conduct such a review,[50] stating that it was "expanding on a series of efforts initiated in 2002."[51]

Judicial Response

The *CBLA Report* has also been referenced in judicial decisions. Individuals have appealed convictions (with or without a FBI review letter)[52] on the basis that the *CBLA Report* constitutes newly discovered evidence.

Newly discovered evidence claims "usually involve some combination of showings that the new evidence could not have been discovered prior to trial with the exercise of reasonable diligence; that the evidence is relevant and not cumulative or merely impeaching; and that the new evidence creates a sufficient probability of a different result at a new trial."[53] Petitioners have used this mechanism to argue that the *CBLA Report* is new evidence capable of undermining the trial result.

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42 Charles Piller, *Report Finds Flaws in FBI Bullet Analysis, LA* Times, 2004 http://articles.latimes.com/2004/feb/11/science/sci-bullet11 (last visited Dec. 9, 2018).

43 FBI National Press Office, *FBI Laboratory Announces Discontinuation of Bullet Lead Examinations* (Sept. 1, 2005) https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-bullet-lead-examinations.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *See* CBS, *Evidence of Injustice,* YouTube (Sept. 14, 2008) https://www.youtube.com/watch?v=H4g62cpRz7M (last visited Dec. 9, 2018).

49 CBS News, *Evidence of Injustice*, 2007 https://www.cbsnews.com/news/evidence-of-injustice/ (last visited Dec. 9, 2018).

50 FBI National Press Office, *FBI Laboratory to Increase Outreach in Bullet Lead Cases* (Nov. 17, 2007) https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-laboratory-to-increase-outreach-in-bullet-lead-cases.

51 *Id*.

52 The FBI, as part of a review of CBLA cases, sent letters to individuals affected to make them aware of the limitations of the evidence.

53 Keith A. Findley, *Defining Innocence,* 74 Alb. L. Rev. 1157, 1197 (2010).

Some petitioners have succeeded in cases where CBLA evidence was the primary evidence against the petitioner. For example, in *Ward v. State,* the Court of Special Appeals of Maryland held that various pieces of evidence coming to light after trial (including the *CBLA Report*) constituted newly discovered evidence, and vacated the petitioner's conviction.[54] Similarly, in *Murphy v. State* the court also agreed that the *CBLA Report* constituted newly discovered evidence, as the report's findings were not discoverable at trial, leading the court to reverse the conviction.[55]

By contrast, other courts have determined that the *CBLA Report* is not newly discovered evidence. This has been for various reasons, including that CBLA's loss of 'general acceptance' neither affects previous decisions in the case,[56] nor renders trials fundamentally unfair.[57] Another reason is the court's conclusion that, in the individual case, the limitations of CBLA had been brought to the jury's attention during cross-examination.[58] In *More v. State,* for example, the Supreme Court of Iowa recognized the report as a "blockbuster" constituting newly discovered evidence,[59] but did not find fundamental unfairness in the trial, as the defendant did not suffer actual prejudice.[60] Similarly, the Kentucky Supreme Court in *St Clair v. Commonwealth*, determined that although CBLA evidence is no longer admissible, it does not go so far as to justify a new trial, as the CBLA expert conceded that the evidence was not infallible.[61]

Another identifiable approach in rejecting newly discovered evidence claims emerges where a conviction was supported by other, non-CBLA evidence. In such cases, judges have reasoned that, due to the presence of other inculpatory evidence, the exclusion or undermining of CBLA evidence would not have resulted in a different trial outcome. For example, the Supreme Court of Minnesota dismissed the petitioner's claim in *Gassler v. State,* deciding that the additional evidence presented to the jury at trial meant that removing CBLA evidence would have no effect on the jury's decision.[62]

ii. Strengthening Forensic Science in the United States: A Path Forward

In 2005, Congress commissioned the NAS to report on the general status of forensic science after recognizing that "significant improvements are needed in forensic science."[63] The report aimed to "chart an agenda for progress in the forensic science community and its scientific disciplines."[64] To do this, the NAS engaged in a comprehensive consultation with stakeholders and experts.[65] The evidence received

54 Ward v. State, 221 Md. App. 146 (Md. Ct. Spec. App. 2015).
55 Murphy v. State, 24 So.3d 1220 (Fla. Dist. Ct. App. 2009).
56 Commonwealth v. Kretchmar, 971 A.2d 1249 (Pa. 2009).
57 Gonzales v. Thaler, 2012 WL 5462682 (S.D. Tex. Oct 23, 2012).
58 United States v. Higgs, 663 F.3d 726 (D. Md. 2010).
59 More v. State, 880 N.W.2d 487, 509 (Iowa 2016).
60 *Id.* at 512-13.
61 St Clair v. Commonwealth, 451 S.W.3d 597 (Ky. 2014).
62 Gassler v. State, 787 N.W.2d 575 (Minn. 2010).
63 Edwards et al, *supra* note 9, at xix.
64 *Id.* at xix.
65 *Id.* at 2.

by the NAS was "detailed, complex, and sometimes controversial."[66] In its report, therefore, the NAS decided to "reach a consensus on the most important issues," and offer specific recommendations in relation to them.[67]

Strengthening was published in 2009, reporting on forensics in general and on individual forensic science disciplines in particular. The overall finding of the report was that the forensic science sector was fragmented and under-resourced,[68] which limited its potential to effectively service stakeholders.[69] The NAS recommended that Congress create an independent oversight body to monitor the implementation of the report's recommendations,[70] which were designed to improve adherence to standards and provide forensic science education.[71]

With regards to specific disciplines, the report evaluated each discipline's adherence to fundamental scientific principles.[72] This included: biological evidence;[73] drug and controlled substance analysis;[74] friction ridge analysis (fingerprints);[75] other pattern and impression evidence;[76] tool-mark and firearms identification evidence;[77] microscopic hair evidence;[78] fiber evidence;[79] document examination;[80] paint and coatings evidence;[81] explosives evidence and fire debris;[82]

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66 *Id.* at 4.

67 *Id.*

68 *Id.* at 77-78.

69 *Id.*

70 *Id.* at 80.

71 *Id.* at 217.

72 *Id.* from 112.

73 The report examines blood stain, and other biological fluid evidence, concluding that nuclear DNA analysis is the most reliable way of attributing fluids to individuals, but other DNA analysis methods are available. As DNA developed through scientific methods, analysis is highly reliable. *Id.* at 128-133.

74 The report expresses concerns that appropriate standards and recommendations are not followed, as they cover a range of drugs—it is the analyst's responsibility to decide the appropriate testing method. This is problematic as drug analysis reports are often inadequate. *Id.* at 133-36.

75 In acknowledging the utility of fingerprint analysis, the report refuted claims of a zero error rate. They found limited research supporting reliability of analysis techniques and individualization of prints, recommending further research. *Id.* at 136-45.

76 The report found that experts find it difficult to avoid bias, and that the experience-reliant nature of impression matching rendered the imposition of standards difficult. Further research to understand the rarity of characteristics was recommended. *Id.* at 145-50.

77 In concluding, the report determined that not enough is known about tool-mark variability, meaning that it is impossible to set a confidence level. They also showed concern about a lack of defined analysis process and difficulties with experts' qualitative reasoning. *Id.* at 150-55.

78 The report did not find any scientifically accepted statistics about frequency distribution of hair characteristics. *Id*. at 60. It also commented that "testimony linking microscopic hair analysis with particular defendants is highly unreliable." *Id*. at 155-161.

79 No studies were found supporting methods of matching hair fibers, leaving a determination of a match ambiguous as to its probative value. *Id.* at 161-63.

80 The report concluded that the scientific basis of document examination needs strengthening, as limited research has been carried out. *Id.* at 163-67.

81 While based on a solid foundation of chemistry, the report expressed concerns about the lack of standard practices for determining a match of two samples. *Id.* at 167-70.

82 The report supported the chemistry-based foundations of explosives evidence, but found

forensic odontology (bite-mark impressions);[83] bloodstain pattern analysis;[84] and digital and multimedia analysis.[85] The NAS found that these techniques varied in their reliability and underpinning research,[86] and that several techniques "do not contribute as much to criminal justice as they could."[87] Ultimately, the NAS concluded that "with the exception of nuclear DNA analysis… no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source."[88] This was hailed as a landmark and unprecedented conclusion.[89]

Although the NAS did not make prescriptive comments on the admissibility of forensic techniques, it discussed what it saw as inadequacies in legal admissibility standards.[90] Its findings were particularly critical of judicial decision-making under *Daubert*,[91] which requires judges— as part of their gate-keeping role—to consider error-rates, professional standards, general acceptance, testability, and peer review of disciplines to determine the admissibility of expert evidence. The NAS stated, that "the present situation… is seriously wanting"[92] and that "*Daubert* has done little to improve the use of forensic science evidence in criminal cases."[93]

a. Stakeholder Responses

Ten years post-publication, a significant body of literature discussing *Strengthening* exists.[94] Most recently, co-chairs of the committee that authored *Strengthening*, Harry T. Edwards and Constantine Gatsonis, were awarded the Innocence Network's 2018 Champion of Justice Award. The Innocence Project thanked the committee for the report, stating it "has truly transformed the state of forensic science and the involvement of the research community in service of criminal justice reform."[95] Over the last decade, the critical messages of *Strengthening*

very little research into burn patterns, leaving expert opinions unsupported. *Id.* at 170-73.

83 The reliability of bite mark evidence was refuted, with the report rejecting the methods used by analysts to identify individuals based on dental impressions. The report noted that no thorough studies have been carried out supporting the use of this technique. *Id.* at 173-76.

84 Some aspects of bloodstain pattern analysis are supported by studies, but the technique is resource intensive. *Id*. at 177-179.

85 The report acknowledges the emerging nature of this field, acknowledging its potential to collect vast amounts of information. The report noted that greater training amongst law enforcement is needed. *Id.* at 179-82.

86 Edwards et al, *supra* note 9, at 182.

87 *Id.* at 183.

88 *Id.* at 7.

89 D. Michael Risinger, *The NAS/NRC Report on Forensic Science: A Path Forward Fraught with Pitfalls,* 2010 Utah L. Rev. 225, 225-26 (2010).

90 Edwards et al, *supra* note 9, at 86-95.

91 *Id.* at 107-09.

92 *Id.* at 110.

93 *Id.* at 106.

94 A literature review searching *Strengthening Forensic Science in the United States: A Path Forward* has produced 391 results. This was carried out in 2018. This catalogue is on file with the authors.

95 The National Academies of Sciences, Engineering and Medicine, *Co-Chairs of*

have attracted various stakeholder responses, including from Congress, state legislatures, the judiciary, the Department of Justice, FBI, and White House. These are summarized below.

Congress

The report's recommendations, including the creation of the oversight body—nominally called the National Institute of Forensic Science—were naturally directed towards Congress. In 2009, the House of Representatives Committee on Science and Technology discussed how *Strengthening's* findings and recommendations would relate to the work of the National Institute of Standards and Technology.[96] The Senate Judiciary Committee discussed the report's findings in the light of a 2009 United States Supreme Court decision—*Melendez-Diaz v. Massachusetts*.[97] In that case the Court had, citing *Strengthening*, commented that forensic science was subject to "serious deficiencies."[98] Noting this comment, the Senate Judiciary Committee took evidence from various stakeholders, including the Innocence Project,[99] police,[100] academics,[101] and attorneys.[102] The discussion ultimately identified concerns about the resources required to implement reform, with post-hearing submissions highlighting the need for financial and organizational re-structuring of the forensic science sector.[103] This prompted discussion about the feasibility of reforms,[104] and to date Congressional efforts to introduce comprehensive legislative reform have faced significant challenges.[105] Despite this, existing DNA-based initiatives have continued to receive funding. For example, the Debbie Smith Act was re-authorized in 2014, providing $968 million over the 2015-2019 period to assist the Department of Justice in clearing DNA backlogs.[106] With the cost of creating and maintaining forensic science standards being a decisive factor, Congress' ability to enact meaningful systemic reform has been questioned.[107]

State Legislatures

Prior to *Strengthening,* numerous states had established bodies with the capacity to provide forensic science oversight.[108] There is evidence to suggest that the messages

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Forensic Science Report Honored by Innocence Network, Apr. 12, 2019, http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=4122019.

96 S. Rep. No. 111-8 (2009).

97 Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

98 *Id.*

99 S. Rep. No. 111-554, at 8 (2009).

100 *Id.* at 10.

101 *Id.* at 12.

102 *Id.* from 14.

103 *Id.* at 38-39.

104 *Id.* at 38.

105 See, e.g., Forensic Science and Standards Act of 2012, S. 3378, 112th Cong. (2012).

106 Debbie Smith Reauthorization Act of 2014, H.R. 4323, 113th Cong., at 5 (2014).

107 *See, e.g.,* Eric Maloney, *Two More Problems and Too Little Money: Can Congress Truly Reform Forensic Science*, 14 Minn. J. L. Sci. & Tech. 923 (2013).

108 For a summary of the New York Commission on Forensic Science, *see* Paul C. Giannelli, *Regulating DNA Laboratories: The New Gold Standard?* 69 N.Y.U Ann. Surv. Am. L.

within *Strengthening* have shaped the work of some of these bodies. For example, Texas's judicial commission that investigates public complaints about forensic science, has embraced *Strengthening*'s findings as being "at the forefront of the national dialogue on efforts to improve forensic science."[109] It has also spent time discussing challenges and improvements based on the report's findings.[110] In North Carolina, *Strengthening,* coupled with the findings of the North Carolina Innocence Inquiry Commission about forensic science practices,[111] has influenced the state legislature to reform forensic science services.[112] Reforms include renaming the State Bureau of Investigations to formally separate it from law enforcement, following *Strengthening*'s recommendations,[113] and creating a review board to oversee the work of laboratory employees.[114]

Judicial Decisions

Judicial responses to *Strengthening* are considered in two categories. First, the Supreme Court's decision in *Melendez-Diaz.*[115] Second, the general approaches of lower courts to *Strengthening.*

Shortly after *Strengthening*'s publication, the United States Supreme Court in *Melendez-Diaz v. Massachusetts* relied on the report to acknowledge that "the forensic science system… has serious problems that can only be addressed by a national commitment to overhaul the current structure."[116] In that case, the court clarified that forensic science analysts are witnesses under the Confrontation Clause, and are therefore required to testify in court and be subject to cross-examination.[117] Although described as a "straightforward application" of precedent by Justice Scalia,[118] the decision has subsequently been cited to reverse proceedings where live witnesses have not appeared.[119]

617, 628 (2013-2014).

109 Texas Forensic Science Commission, Annual Report FY2011 – Justice Through Science, 25 (2012) http://www.txcourts.gov/media/1440349/fsc-annual-report-fy2012.pdf.

110 Texas Forensic Science Commission, Second Annual Report May 2012-November 2013 – Justice Through Science, 19 (2013) http://www.txcourts.gov/media/1440350/fsc-annual-report-fy2013.pdf.

111 The North Carolina Innocence Inquiry Commission, *About,* http://innocencecommission-nc.gov/about/ (last visited April 20, 2019).

112 Kavita Pillai, *Another Competitive Enterprise: A Balanced Private-Public Solution to North Carolina's Forensic Science Program* 90 N. C. L. Rev. 253, 257 (2011-2012).

113 Edwards et al, *supra* note 9, at 23.

114 Pillai*, supra* note 112, at 258.

115 Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

116 *Id.* at 319.

117 *Id.*

118 *Id.* at 312.

119 *See e.g.,* Commonwealth v. Vasquez, 456 Mass. 350 (Mass. 2010); State v. Ward, 364 N.C. 133 (N.C. 2010).

A review of lower court case law between 2009 and 2018 shows that *Strengthening* has been cited across over 200 appeal judgments.[120] Generally, this cohort of cases shows petitioners using *Strengthening* to support a claim that—due to unreliability—particular forensic science evidence is not/should not have been admissible; and that *Strengthening* constitutes 'newly discovered evidence' capable of undermining previous outcomes. In responding to these claims, the authors have identified, in particular, five general approaches to *Strengthening.* These approaches are outlined below.

Silence

Some courts have simply been silent about the report. There are several judgments where the report has been considered in the dissent, but is absent in the majority decision. For example, the majority judgment in *Commonwealth v. Treiber* is silent with regards to *Strengthening*, but the dissenting opinion highlights the need to use *Strengthening* to address limitations of forensic science evidence.[121] The dissenting opinion in *Ex Parte Robbins* also made reference to *Strengthening*, in the absence of its mention in the majority judgment. The report was used to demonstrate the disconnect between, on one hand, the scientific method, and on the other, legal process.[122]

Strengthening as a Referencing Tool

Courts have used *Strengthening* as a referencing tool. For instance, *Strengthening* has been cited to provide an authoritative explanation of forensic science techniques, including a definition of tool-mark identification techniques;[123] an explanation of the ACE-V method used to compare fingerprint evidence;[124] and to explain the roles and to explain the roles of both the medical[125] and autopsy examiner.[126]

Strengthening is Insufficient to Undermine Regular Legal Process

Some courts have acknowledged the concerns raised in *Strengthening*, but have determined that those concerns do not fatally undermine relevant evidence because that evidence has been subject to regular legal procedures aimed at evaluating the evidence. For instance, courts have found that the challenged forensic evidence

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120 The author has undertaken a comprehensive review of cases as part of a wider study examining judicial engagement with the six forensic science NAS reports. Out of 644 cases identified, 218 referred to *Strengthening Forensic Science in the United States: A Path Forward*. This data is on file with the authors.

121 *See* Commonwealth v. Treiber, 632 Pa. 449 (Pa. 2015).

122 Ex Parte Robbins, 360 S.W.3d 446, 470 (Tex. App. 2011).

123 *See* United States v. Otero, 849 F.Supp.2d 425 (D. N.J. 2012).

124 *See* United States v. Herrera, 704 F.3d 480 (7th Cir. 2013) and People v. Luna 989 N.E.2d 655 (Ill.App.Ct. 2013).

125 *See* State v. Jaramillo, 272 P.3d 682 (N.M. Ct. App. 2011).

126 *See* Rosario v. State, 175 So.3d 843 (Fla. Dist Ct. App. 2015).

was properly considered by the trial judge,[127] lawyers, and/or jury.[128] In *United States v. Herrera,* for example, the appeal court discussed the judicial approach to fingerprint evidence. In concluding that the judge had properly approached the evidence, and that the evidence "doesn't have to be infallible to be probative,"[129] the petitioner's claim that *Strengthening* undermined fingerprint evidence was dismissed. In *Commonwealth v. Gambora*, the court undertook a lengthy discussion on the questions raised by *Strengthening* about the limitations of fingerprint individualization. They found *Strengthening's* findings to be "important, and deserv[ing] [of] consideration,"[130] but ultimately held that defense counsel had—in the process of cross-examination—emphasized the lack of individualization sufficiently.[131] Similarly, in *State v. Thomas,* the appellant argued that *Strengthening* undermined the firearm evidence presented during his trial.[132] The court, however, determined that as there had been no plain error; the report's findings contributed towards the weight of the evidence, not admissibility.[133]

Strengthening as Support for Limitations on Expert Testimony

Strengthening has seemingly informed judicial decisions to limit expert firearms testimony.[134] For instance, in *United States v. Ashburn*, the expert's testimony was curtailed to "a reasonable degree of certainty in the ballistics field," as opposed to "a "practical impossibility" that any other firearm fired the cartridges in question."[135] In making this decision, the court reviewed firearms identification, weighing AFTE practices and guidelines against the findings and recommendations of *Strengthening.* Following a review of *Strengthening,* the judge in *United States v. Taylor* also limited the expert from concluding that "there is a match to the exclusion… of all other guns."[136]

Strengthening as 'Newly Discovered Evidence'

Courts have routinely dismissed newly discovered evidence petitions that claim *Strengthening* is new evidence. Judges have reasoned that *Strengthening* does not meet the requirements of newly discovered evidence because it is merely a "newly

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127 *See, e.g.,* United States v. Herrera, 704 F.3d 480, 486 (7th Cir. 2013); People v. Jones, 2013 WL 5397389 (Cal. Ct. App. Sept. 26, 2013); People v. Morris, 997 N.E.2d 847 (Ill. App. Ct. 2013).

128 *See, e.g.,* State v. Thomas, 2016 WL 7799279 (Tenn. Ct. App. March 28, 2016); State v. Romero, 236 Ariz. 451 (Ariz. Ct. App. 2014).

129 United States v. Herrera, 704 F.3d 480 (7th Cir. 2013).

130 Commonwealth v. Gambora, 457 Mass. 715, 727-728 (Mass. 2010).

131 *Id.*

132 State v. Thomas, 2016 WL 779929, 13 (Tenn. Ct. App. March, 28 2016).

133 *Id.* at 16.

134 A noticeable pattern in judicial decisions limiting the extent of firearms testimony is evident; *see, in general,* Sarah L. Cooper & Páraic Scanlon, *Juror Assessment of Certainty About Firearms Identification Evidence*, 40 UALR L. Rev. 95 (2017).

135 United States v. Ashburn, 88 F.Supp.3d 239 (E.D.N.Y. 2015); *also see* United States v. Taylor, 663 F.Supp.2d 1170 (D.N.M 2009).

136 United States v. Taylor, *id.* at 1180.

willing source for previously known facts."[137] In *Ross v. Epps,* for example, the court found *Strengthening* did not provide any new evidence contradicting what was said at trial i.e., did not have outcome changing capacity.[138] This approach has been taken by a number of court decisions examining different forensic science techniques.[139]

However, *Strengthening* has seemingly been influential in successful newly discovered evidence claims relating to microscopic hair analysis. In *Commonwealth v. Edmiston*,[140] *Strengthening* was used as authority for the notion that there is "no scientific support for the use of microscopic hair analysis."[141] This approach was cited in *Commonwealth v. Chmiel*, in which *Strengthening* was referred to as the "tipping point" in rejecting hair analysis evidence.[142] Furthermore, in *Commonwealth v. Perrot*, the court acknowledged that *Strengthening,* (combined with the FBI's review of relevant hair cases) formed a "new consensus on the limitations and nature of hair analysis [that] constitutes newly available evidence."[143]

FBI Response

Notwithstanding the FBI's review of microscopic hair analysis cases, the FBI has been criticized for its reluctance to modify practice following the publication of *Strengthening*.[144] In particular, the FBI's public objection to *Strengthening*'s finding that the validity of fingerprinting is unknown,[145] has led to questions about the FBI's commitment to forensic science reform.[146] For instance, Cole has criticized the FBI for both creating barriers to proficiency testing,[147] and "grandfathering" longstanding forensic evidence.[148] This latter practice, it has been suggested, has led to forensic science disciplines with long-term admissibility records being sheltered from scrutiny.[149] Giannelli has criticized the actions of the FBI, arguing that their "shaping the research agenda, limiting access to data, attacking experts…, and "spinning" negative reports"[150] is preventing *Strengthening* from having a meaningful impact.

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137 Commonwealth v. Riddick, 2017 WL 6568212 (Pa. Super. Ct. 2017 Dec. 26, 2017).

138 Ross v. Epps, 2015 WL 5772196 (N.D. Miss. Sept 30, 2015).

139 *See, e.g.,* Johnston v. State, 27 So.3d 11 (Fla. 2010) (Fingerprints – *Strengthening*); Foster v. State, 132 So.3d 40 (Fla. 2013) (Ballistics Evidence – *Strengthening*); Enderle v. State, 847 N.W.2d 235 (Iowa Ct. App 2014) (Fingerprints – *Strengthening*).

140 This petition was not successful due to being time-barred.

141 Commonwealth v. Edmiston, 65 A.3d 339, 351 (Pa. 2013).

142 Commonwealth v. Chmiel, 173 A.3d 617 (Pa. 2017).

143 *See, e.g.,* Commonwealth v. Perrot, 2016 WL 380123 (Mass. App. Ct. Jan. 26, 2016).

144 Jonathan J. Koehler, *Forensic Science Reform in the 21st Century: A Major Conference, a Blockbuster Report and Reasons to be Pessimistic*, 9 Law, Prob. & Risk 1, 4 (2010).

145 Simon A. Cole, *Who Speaks for Science? A Response to the National Academy of Sciences Report on Forensic Science* 9 Law, Prob. & Risk 25, 37 (2010).

146 *See* Koehler, *supra* note 144, at 4.

147 Simon A. Cole, *Grandfathering Evidence: Fingerprint Admissibility Rulings from Jennings to Llera Plaza and Back Again*, 41 Am. Crim. L. Rev. 1189 (2004).

148 *Id.*

149 *See, e.g.,* Herbert B. Dixon, *Forensic Science Under the Spotlight,* 48 Judges J. 36, 37-38 (2009); Mark S. Bridin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. Cin. L. Rev. 867, 892-893 (2004).

150 Paul C. Giannelli, Daubert *and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research*, 2011 U. Ill. L. Rev. 53, 90 (2011).

Department of Justice

Strengthening criticized the Department of Justice (DOJ) for neglecting its role in improving forensic science, finding that "the research funding strategies of [the] DOJ have not adequately served the broad needs of the forensic science community."[151] The DOJ has been identified as a stakeholder capable of facilitating meaningful reform,[152] but its desire to make use of this capacity has been questioned. Giannelli, for example, has accused the DOJ of "sabotaging efforts"[153] to conduct research,and Lander has confronted the DOJ's resistance to the need for empirical support for evidence.[154] Barkow, however, has reasoned that conflicts exist between the DOJ's prosecuting role and the need for further research, and "when they have, prosecution interests have won out."[155]

That said, the DOJ did act when it became clear that a National Institute of Forensic Science would not materialize through an act of Congress.[156] In 2013, the DOJ collaborated with the National Institute of Standards and Technology to create the National Commission on Forensic Science (NCFS).[157] The NCFS was vested in the DOJ,[158] but designed to fulfil *Strengthening's* oversight recommendations.[159] The creation of the NCFS was welcomed,[160] and between 2013 and 2017 it engaged in a research and reform agenda.[161] On the expiration of its four-year charter, however, the NCFS was disbanded. [162] The NCFS reported that further work was necessary to enact reforms. [163] The NCFS's short tenure revived concerns about the DOJ's commitment to improving forensic science. Former NCFS member, Professor Jules Epstein, has evaluated the work of the NCFS, noting that political considerations precluded the commission from truly advancing forensic science, calling efforts "evocative of Alice in Wonderland … and not conducive to placing scientific

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151 Edwards et al, *supra* note 9, at 18.

152 Giannelli, *supra* 150, at 90.

153 *Id.*

154 The Philip D. Reed Lecture Series Advisory Committee On Evidence Rules: *Symposium on Forensic Expert Testimony,* Daubert*, and Rule 702*, 86 Fordham L. Rev. 1463, 1521-22 (2018).

155 Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 Va. L. Rev. 271, 306-07 (2013).

156 This was despite wide support from academics. *See, e.g.,* Margaret A. Berger, *Evolving Trends in Forensic Science*, 6 Tenn. J. L. & Pol'y 147 (2010).

157 National Commission on Forensic Science, Reflecting Back: Looking Toward the Future, 1 (2017).

158 NIST, *National Commission on Forensic Science,* https://www.nist.gov/topics/forensic-science/national-commission-forensic-science (last visited Dec. 9, 2018).

159 National Commission on Forensic Science, *supra* note 157, at 3.

160 Jonathan J. Koehler, John B. Meixner, Jr., *An Empirical Research Agenda for the Forensic Sciences*, 106 J. Crim. L. & Criminology 1, 8 (2016).

161 During its four-year tenure, the NCFS adopted 43 work products, requiring action from the Attorney General, 20 recommendation documents and 23 views documents. These have either explored foundational documents designed to strengthen the reliability and validity of forensic science evidence, operational work products, and relational work products. *See*, *supra* note 158.

162 The United States Department of Justice Archives, *National Commission on Forensic Science,* https://www.justice.gov/archives/ncfs (last visited Dec. 9, 2018).

163 National Commission on Forensic Science, *supra* note 157.

validity first."[164] The need for an oversight body being able to independently navigate its mission is evidently important.

The White House

As part of broader attempts to improve criminal justice, the Obama Administration reviewed *Strengthening* within a 2016 report by the President's Council of Advisors on Science and Technology (PCAST).[165] The PCAST report supported *Strengthening*'s findings,[166] but went beyond *Strengthening* by recommending that judges limit the admissibility of particular disciplines.[167] Despite this, the report's findings were dismissed by the FBI[168] and the DOJ,[169] and rejected completely by the AFTE (Association of Firearm and Tool Mark Examiners), who described the report as "lack[ing] in adequate investigation and understanding."[170] The PCAST report has been referenced alongside *Strengthening* by some courts. For example, in *United States v. Bonds*, both reports were referenced to argue that fingerprint evidence is not sufficiently reliable to be admitted into evidence.[171] While the court acknowledged PCAST's findings, the court determined that these concerns should go to the weight of evidence, not admissibility.[172] This decision has since been followed by subsequent courts, which have used *Bonds* to determine that "the PCAST report presents only advisory recommendations concerning validity,"[173] and that the issue remains one of weight, and therefore a matter for the jury to determine.

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164 Jules Epstein, *The National Commission on Forensic Science: Impactful or Ineffectual?,* 48 Seton Hall L. Rev. 743, 771 (2018).

165 Executive Office of the President, President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature Comparison Methods (2016).

166 *See, e.g.,* Geoffrey Stewart Morrison & William C. Thompson*, Assessing the Admissibility of a New Generation of Forensic Voice Comparison Testimony*, 18 Colum. Sci. & Tech. L. Rev. 326, 334 (2017); Eric S. Lander, *The Philip D. Reed Lecture Series Advisory Committee on Evidence Rules: Fixing Rule 702: The PCAST Report and Steps to Ensure the Reliability of Forensic Feature-Comparison Methods in the Criminal Courts*, 86 Fordham L. Rev. 1661 (2018).

167 Executive Office of the President, *supra* note 165, at 142-45.

168 FBI, *Comments on: President's Council of Advisors on Science and Technology* Report to the President *Forensic Science in the Criminal Courts: Ensuring Scientific Validity of Pattern Comparison Methods*, Sept. 20, 2016 https://pceinc.org/wp-content/uploads/2016/10/20160920-Response-to-PCAST-Report-FBI-.pdf.

169 Gary Fields, *White House Advisory Council Report is Critical of Forensics Used in Criminal Trials,* Wall Street Journal, Sept. 20, 2016.

170 Association of Firearm and Tool Mark Examiners, *Response to PCAST Report on Forensic Science,* Oct. 31, 2016 https://afte.org/uploads/documents/AFTE_PCAST_Response.pdf.

171 United States v. Bonds, 2017 WL 4511061 (N. D. Ill. 2017).

172 *Id.*

173 United States v. Pitts, 2018 WL 1116550, 5 (E.D.N.Y. 2018). *See also*, People v. Perez, 2019 WL 2537688 (Cal. Ct. App. 2019); State v DeJesus, 436 P.3d 834 (Wash. Ct. App. 2019).

II: A Template For Future Reporting

The various stakeholder responses to both the *CBLA Report* and *Strengthening* are informative. They provide guidance on what messages stakeholders have received and/or acted on from the two reports, but also what issues seemingly limit stakeholders in responding comprehensively to concerns raised by the reports. Based on the experiences of the *CBLA Report* and *Strengthening*, Part II presents a template i.e., ideas for the NAS to consider when reporting on forensic science. This template is suggested with a view to both enhancing the NAS' impact when reporting, and enabling stakeholders to better harness the expertise of the NAS. The template has two parts. The first part—outlined in sub-section (A)—encourages the NAS to build on existing stakeholder engagement. The second part—outlined in sub-section (B)—encourages the NAS to be more expressly sensitive to the frameworks/cultures within which stakeholders operate.

A. Building on Existing Stakeholder Engagement

Part I outlined how the selected NAS reports have attracted stakeholder engagement. This is true beyond these two specific reports.[174] Reflecting on existing traction, this subsection suggests four areas where the NAS could target its activity.

i. The NAS Reports as Referencing Tools

Case law consistently demonstrates that the NAS' reports on forensic science are used by judges as a reference tool. As pointed out in Part I, this is true of *Strengthening.*[175] The *CBLA Report* has also been used by judges as a referencing tool, such as in *United States v. Berry,* where the *CBLA Report* was used to consider how CBLA matches are declared, and an excerpt from the report was quoted to provide information about variations in reliability of CBLA, as manufacturing processes are not taken into account during analysis.[176] This is also the case beyond these two reports. For example, judges have used *DNA Technology in Forensic Science* and *The Evaluation of Forensic DNA Evidence* as authorities for explaining how DNA evidence is extracted and analyzed.[177] These two reports have also been referenced for their explanations of statistical calculations as to the significance of a DNA match.[178]

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174 There exists much legal academic literature discussing stakeholders' engagement with the six forensic science NAS reports. The authors undertook a review of each, and found 278 references for *DNA Technology in Forensic Science* (1992), 206 for *The Evaluation of Forensic DNA Evidence* (1996), 82 for *The Polygraph and Lie Detection* (2003), 68 for *Forensic Analysis: Weighing Bullet Lead Evidence* (2004), 34 for *Ballistic Imaging* (2008), and 391 for *Strengthening Forensic Science in the United States: A Path Forward* (2009).

175 *See*, *supra*, at page 13.

176 United States v. Berry, 624 F. 3d 1031, 1040 (9th Cir. 2010).

177 *See e.g.,* Harmon v. State, 908 P. 2d 434 (Alaska Ct. App. 1995); People v. Soto, 21 Cal. 4th 512 (Cal. 1999).

178 *See, e.g.,* People v. Reeves, 91 Cal. App. 4th 14 (Cal. Ct. App. 2001); People v. Pike, 53 N.E. 3d 147 (Ill. App. Ct. 2016).

This reliance on the authority of NAS reports to provide information about forensic science techniques suggests that courts see the NAS as a scientific authority, independent of parties to the trial process. To this end, the authors suggest that the NAS could maximize the impact of its reporting in this way. One suggestion for doing this is for the NAS to create a living document (reflecting that this information may change in line with the nature of scientific inquiry) on forensic science techniques. Such a document could include a definition of all examined forensic science techniques, information about methods of identification and analysis, and a summary of limitations. Through the NAS collating existing forensic science definitions, legal actors benefit from a single-source material, which will provide an independent and authoritative referencing tool about forensic science techniques.

ii. Targeting Trending Issues

Part I highlighted that the selected reports have played a role in shaping conversations around trending issues in forensic science. For example, albeit resisted at first by the FBI, the *CBLA Report* ultimately kick-started changes in FBI practices, with the FBI recognizing action was needed.[179] Further, *Strengthening* has evidently informed legal claims surrounding the reliability of several forensic disciplines.[180] Noting this, it is suggested that the NAS continues to proactively identify issues in forensic science that are receiving increased stakeholder scrutiny. For example, the NAS could target reporting on what steps might follow the FBI's collaborative review of microscopic hair analysis,[181] and/or further investigate trends in judicial decision-making as they relate to contentious forensic science evidence. In relation to the latter, for instance, there is a notable pattern in judicial decision-making with regards to the phraseology of expert testimony provided by firearm examiners.[182] The authors suggest that the NAS could target reporting on these trending issues, in order to maximize their impact and assist stakeholders as they attempt to address uncertainties.

This proactive approach would be in line with the NAS' history of taking initiative to explore pressing issues, which contribute to enabling stakeholders to resolve uncertainty. This includes issues relating to criminal justice. For instance, the 1992 report—*DNA Technology in Forensic Science*—was born from a series of conversations between the FBI and the National Research Council in 1988.[183] In the light that the FBI could not provide sufficient funds to investigate the DNA-related

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179 *See* FBI National Press Office, *supra* note 33. Following the publication of the *CBLA Report*, the FBI conducted an internal review of CBLA practices and subsequently decided to discontinue CBLA.

180 A search for cases published between 2009 and 2018 that directly reference *Strengthening* was undertaken. This produced 218 results. These materials are on file with the authors.

181 The FBI last reported on the progress of its review of microscopic hair analysis in 2016. For more information, *See,* FBI Services, *FBI/DOJ Microscopic Hair Comparison Analysis Review,* https://www.fbi.gov/services/laboratory/scientific-analysis/fbidoj-microscopic-hair-comparison-analysis-review (last visited Feb. 28, 2019).

182 *See, in general,* Cooper & Scanlon, *supra* note 134.

183 *See* archival material pertaining to DNA Technology in Forensic Science – materials are on file with the authors.

issues, the NAS reached out to private and state bodies for funds. The NAS was successful in obtaining $310,000,[184] and initiated the study in January 1990.[185]

iii. State Level Engagement

Although the CBLA and *Strengthening* reports were commissioned by federal entities, their outcomes have been harnessed by state-based institutions to bring about change at state level. As discussed in Part I, *Strengthening* has been used by the Texan legislature to underpin broader criminal justice reforms, and also in North Carolina. State courts have also harnessed NAS reports to inform their decision making. Several state courts have used the *CBLA Report* to support decisions to overturn convictions, including the Court of Appeals of Maryland in *Clemons v. State,*[186] and the Superior Court of New Jersey in *State v. Behn.*[187] Again, this state-level impact is evident beyond these two reports. For instance, judges in California have used *DNA Technology in Forensic Science* and *The Evaluation of Forensic DNA Evidence* to inform their evolving approach to DNA evidence in criminal cases.[188]

This state-level traction suggests that federally commissioned and directed NAS reports can have a significant impact at state level. States can be considered more receptive and/or able to deliver reform. Reflecting on this, and the fact that the NAS' mandate does not expressly preclude them from receiving requests about and/or focusing on state-specific issues, the authors suggest the NAS could develop a state-specific portfolio, targeting issues of specific concern to individual states or groups of states.

iv. Taking Forward National Efforts

Albeit challenging, there have been national efforts to address concerns about forensic science. The National Commission for Forensic Science (NCFS), and the 2016 President's Council of Advisors on Science and Technology (PCAST) report emerged from observations set out in *Strengthening*. As explored in Part I, the NCFS was disbanded in 2017, and the 2016 PCAST report has had a critical response and somewhat nuanced impact.[189] Some have considered this disappointing. For example, Judge Konzinski expressed his dissatisfaction following the PCAST report, showing disappointment at the "swiftness with which the U.S. Justice

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184 *Id.*

185 McKusick et al., *supra* note 3, at vii.

186 Clemons v. State, 329 Md. 339 (Md. 2006).

187 State v. Behn, 375 N.J.Super. 409 (N.J. Super. Ct. App. Div. 2005).

188 In California, the 1992 case of *People v. Barney* (8 Cal.App.4th 798 (Cal. Ct. App. 1992)) became the leading case for determining the admissibility of DNA evidence using the ceiling principle under the *Kelly* admissibility standard, with subsequent cases using *Barney* as a starting point whilst incorporating technological developments. For example, *People v. Venegas* (18 Cal.4th 47 (Cal. 1998)) confirmed the admissibility of the product rule of statistical calculations following the publication of *The Evaluation of Forensic DNA Evidence* (1996) and *People v. Reeves* (91 Cal.App.4th 14 (Cal. Ct. App. 2001)) further developed DNA case law by holding that the product rule can be used when the DNA is analyzed using the PCR method.

189 *See*, *supra*, at 16-18.

Department and FBI rejected the report on… insubstantial grounds."[190] Similarly, Professor Epstein's response to the dissolution of the NCFS demonstrates frustration at the limited impact of the body.[191] However, the authors suggest that the NAS—as an independent body—could be the appropriate body to re-energize these efforts, building on the foundations laid by the NCFS and PCAST, and using its expertise in bringing together multi-stakeholders to advance existing ideas.[192]

B. Sensitivity to the Frameworks Within Which Stakeholders Operate

A key element to building on existing stakeholders' engagement effectively would be to do so in a way that is expressly sensitive to the frameworks that stakeholders operate within. A variety of stakeholders—ranging from the FBI and DOJ, to the courts and Congress—have engaged with the *CBLA Report* and *Strengthening*. In preparing and publishing its reports, the NAS demonstrates an appreciation for its audiences and an awareness of consequences for stakeholders beyond their commissioning bodies. The same can be said in relation to the other NAS forensic science reports.[193] Part I demonstrates, however, that each stakeholder can be limited in their response by their own institutional frameworks and culture.

This point can be teased out across various examples, with individual stakeholders demonstrating particular concerns. Congress and the FBI are expressly cognizant of resource implications. Congressional committees have addressed funding and resource issues several times. For example, the House of Representatives Committee on Science and Technology has expressed concern about a congressional focus on funding for DNA evidence projects to the detriment of non-DNA evidence projects.[194] The FBI justified its discontinuation of CBLA by considering "the costs of maintaining the equipment [and] the resources necessary to do the examination."[195] Further, the FBI and DOJ are clearly placed in a difficult position when presented with reporting that undermines their institutional practices, particularly those that have been in use for a long time. Moreover, they both demonstrate a preference for remedying problems from the inside out. For example, following the publication of the *CBLA Report*, the FBI initiated an internal examination of the technique before discontinuing the practice in 2005.

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190 The Philip D. Reed Lecture Series Advisory Committee on Evidence Rules, *Symposium on Forensic Expert Testimony, Daubert, and Rule 702,* 86 Fordham L. Rev. 1463, 1492 (2018).

191 *See* Epstein, *supra* note 164.

192 The NAS has already used its position to bring together stakeholders in workshops to discuss specific issues. *See, e.g.,* Frederick L. Oswald, Personnel Selection in the Pattern Evidence Domain of Forensic Science: Proceedings of a Workshop (2017).

193 For example. *DNA Technology in Forensic Science and The Evaluation of Forensic DNA Evidence* showed appreciation for the fact that their purpose was to address judicial concerns. *DNA Technology in Forensic Science* was designed to respond to "questions concerning DNA typing... in connection with some well-publicized criminal cases," and *The Evaluation of Forensic DNA Evidence* was commissioned as "a follow-up study" to this. *See*, McKusick et al., *supra* note 3, at vii; Crow et al., *supra* note 3, at vi.

194 Committee on Science and Technology House of Representatives, *supra* note 96, at 9.

195 *See* FBI National Press Office, *supra* note 43.

Similarly, by creating the National Commission on Forensic Science within the DOJ, the DOJ was able to first look internally at its practices. Judicial decision-making, on the other hand, is naturally informed by the legal process vision i.e., guided by such concerns as the need finality, and to make decisions that give deference to institutional competences, such as the designated roles of judges, lawyers, and jurors. This is evidenced in decisions including *Commonwealth v. Joyner,*[196] *Commonwealth v. Fisher,*[197] and *State v. Romero.*[198] The courts and their actors can also be hindered in interpreting forensic science reports due to a lack of in-house scientific expertise.[199] Generally, all stakeholders are vulnerable to the political climate of the day too.

These observations are not surprising. They reflect the very nature of the functions that these stakeholders perform. Common to them all, however, is a concern about maintaining public confidence in the criminal justice system, as each of them play a role in that maintenance. The NAS reports—through reflecting progression in scientific thought and/or a new presentation of existing knowledge—naturally have the potential to destabilize public confidence. Indeed, stakeholders have expressly recognized this.[200]

With this in mind, the authors' final suggestion is that the NAS—building on its current practices—more expressly shapes its reporting to account for the concerns of its primary audiences.[201] This is not a call for the NAS to change the substance of the messages it reports, but rather a suggestion that it takes action to acknowledge more expressly the concerns of its audience(s). For example, the NAS could, within its reports:

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196 The petitioner in *Commonwealth v. Joyner,* 467 Mass. 176 (Mass. 2014) argued that the statistical significance of fingerprint evidence should be presented alongside a match, using *Strengthening* as evidence that fingerprint matches are often overstated. The Supreme Judicial Court of Massachusetts rejected this, as precedent demonstrates the long-standing admissibility of latent print evidence, leaving the weight of the evidence to be determined by the fact-finder.

197 In *Commonwealth v. Fisher,* 582 Pa. 276 (Pa. 2005), The Supreme Court of Pennsylvania held that the *CBLA Report* did not constitute new evidence, dismissing the petitioner's claim. They relied on two finality considerations for this: lack of evidence, and untimeliness of the petitioner's claim.

198 The Arizona Court of Appeals in *State v. Romero,* 236 Ariz. 451 (Ariz. Ct. App. 2014) dismissed the petitioner's claim using *Strengthening* that firearm evidence was not admissible under Rule 702 on the basis that the limitations of the evidence had been cross-examined and assessed by the jury at trial.

199 *See, e.g.,* Edward Imwinkelried, *Coming to Grips with Scientific Research in Daubert's Brave New World: The Courts' Need to Appreciate the Evidentiary Differences between Validity and Proficiency Studies*, 61 Brook L. Rev. 1247 (1995).

200 *See, e.g.,* Jennifer E. Laurin, *Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding,* 93 Tex. L. Rev. 1751 (2015), which provides examples of stakeholders' responses to several events having the potential to undermine public confidence in forensic science relied upon by these bodies. It assesses stakeholders' responses in reducing the uncertainty caused, and their efforts to maintain public confidence in the criminal justice system's reliance on forensic science evidence.

201 It is evident that the NAS does take into account the context within which its reports are situated. One such example is in *Strengthening* where the report discussed issues with the *Daubert* framework. (Edwards et al, *supra* note 9, at 110). The authors suggest that these links should be made stronger.

a. set out resources/costings options;
b. generate bite-sized steps to reform that can have a phased implementation (including short, medium, and long-term plans);
c. set out actions that stakeholders can take internally to further investigate or remedy deficiencies and initiate reforms reported on;
d. set out actions that stakeholders can undertake collectively or collaboratively; and
e. provide express points of reference for stakeholders (e.g. suggestions for findings of judicial notice; novel findings; and/or points in time at which scientific consensus could be deemed to exist).

As part of this, the NAS can take a lead role in (1) facilitating cross-stakeholder collaboration; and (2) normalizing and explaining the nature of scientific method, progress, findings, and uncertainty.

The latter practice is, in particular, crucial. This is because many stakeholders are understandably nervous about taking actions that would undermine public confidence in the criminal justice system's actors, processes, and institutions (by, for example, declaring a long-time used forensic science identification method to be unreliable or, from a court's perspective, inadmissible). Law shapes the criminal justice system, and law is known for being skeptical about change, preferring to take approaches that achieve finality, predictability and procedural regularity.[202] By contrast, science generally "embraces change."[203] The products of the scientific method are widely understood to be provisional: hypotheses are routinely revised or abandoned and replaced by new dominant theories. This methodology "motivates more and more scientific study, and is thus vital to the scientific enterprise."[204] The NAS' forensic science reports embody this culture of science, reflecting a culture of collaboration and inquiry.[205] As such, the NAS—through its reporting—can (continue to) play an important role in educating stakeholders and the wider public about the scientific method, including the normalcy of provisional findings and uncertainty. This is aligned with the NAS' role to provide independent, unbiased, and scientifically robust evidence that can inform sound public policy,[206] and its mission to "encourage education and research… [and] increase public understanding in matters of science… ."[207]

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202 Sarah Lucy Cooper, *Forensic Science Identification Evidence: Tensions Between Law and Science,* 16 J. Phil Sci. & L. 1, 4 (2016).

203 *Id.*

204 Deborah M. Hussey Freeland, *Speaking Science to Law*, 25 Geo. Int'l Envtl. L. Rev. 289, 303 (2013).

205 For example, shortly following the publication of the NAS' first DNA report, *DNA Technology in Forensic Science* (1992), the NAS, in recognition of "a period of rapid progress," revisited several issues concerning DNA evidence in their follow-up report *The Evaluation of Forensic DNA Evidence* (1996). Crow et al., *supra* note 3, at vi.

206 National Academy of Sciences, *Code of Conduct,* http://www.nasonline.org/about-nas/code-of-conduct.html (last visited Apr. 23, 2019).

207 National Academy of Sciences, *supra* note 10.

III. Conclusion

The National Academy of Sciences is the United States' leading science and technology think-tank, with an active commitment to "provide scientific advice to the government whenever called upon."[208] It has a mission to provide "independent, objective advice to the nation on matters related to science and technology",[209] and to "encourage education and research [and] increase public understanding in matters of science … ."[210]

Over the last 150 years, the NAS has generated a diverse and important portfolio of research, including six reports commenting on the status of forensic science evidence in the USA, namely *DNA Technology in Forensic Science* (1992), *The Evaluation of Forensic DNA Evidence* (1996), *The Polygraph and Lie Detection* (2003), *Forensic Analysis: Weighing Bullet Lead Evidence* (2004), *Ballistic Imaging* (2008), and *Strengthening Forensic Science in the United States: A Path Forward* (2009). These reports were fueled by growing concerns about particular forensic science disciplines (and specifically their application in legal proceedings). The response of stakeholders—including the FBI, Department of Justice, Congress, the judiciary, state legislatures, and the White House—to these reports has varied. Using the different experiences of two reports—*Forensic Analysis: Weighing Bullet Lead Evidence* (2004) and *Strengthening Forensic Science in the United States: A Path Forward* (2009)—as a vehicle, this article has suggested a template for how the NAS can strengthen the impact of its forensic science reporting, which will enable stakeholders to better harness the unique expertise of the NAS.

This two-part template first encourages the NAS to build on existing stakeholder engagement with its forensic science reporting. This includes developing referencing tools; targeting trending issues; engaging directly with states; and progressing existing national efforts. Second, the template encourages the NAS to be more expressly sensitive to the frameworks/cultures within which stakeholders operate. This may include reports setting out resources/costings options; bite-sized and phased reform plans; ideas for internal actions and external collaborations; and providing express points of reference. These suggestions will enable the NAS to take a lead role in (1) facilitating cross-stakeholder collaboration; and (2) normalizing and explaining the nature of scientific method, progress, findings, and uncertainty, so as to support stakeholders to maintain public confidence in the criminal justice system. This role aligns neatly with the NAS' unique history, function, and mission.

208 *Id.*
209 *Id.*
210 *Id.*

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The International Criminal Court, Sitting Heads of State Prosecutions, and the Paradox of the Balance of Power

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ABSTRACT

Compliance with international law is commonly accepted as strengthening inter--state relationships and, therefore, consolidating inter-state politics. This article argues that, in certain circumstances, hostility to international law can be regarded as indicative of shifts in the balance of power that undermine the enforcement of injunctions of international law. These, it will be shown, need to be addressed through inter-state dialogue. To sustain the argument proposed, the article focuses, from an international relations perspective, on the resistance to the practice of prosecuting sitting Heads of State by the International Criminal Court (ICC). The prosecution of a sitting Head of State is considered in this article as the poster--child of liberal institutionalism. The track record of the ICC in this domain is worrying: out of 3 situations (Omar al Bashir in Sudan; Uhuru Kenyatta in Kenya; and Muammar Gaddafi in Libya) the Court was unable to finalize a single one. Following theoretical plexuses derived from the English School of international relations, and particularly Hedley Bull's "Paradox of the Balance of Power", the article draws attention to the case of Gaddafi in Libya and to the international debate on the potential prosecution of Bashar al Assad in Syria. This is done to show that the transition between the two is exemplificative of a paradoxical dynamic: international law is more efficient in situations of balance of power; but violations of international law are, in specific cases, necessary to rectify it. Ultimately, the article argues, more attention should be dedicated to the resistance to the prosecutions of sitting Heads of State to understand the implications that this might have for the balance of power, and in the construction of a truly pluralist international society based on inter-state dialogue.

KEYWORDS

International Criminal Court, International Relations, English School of International Relations, Dialogue; Paradox

CONTENTS

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Introduction

The practice of prosecuting sitting Heads of State by the International Criminal Court (ICC) was designed to revolutionize international politics by claiming that there are crimes of such magnitude that the perpetrators should be punished, regardless of their status. However, the record of the implementation of this practice is worrying; out of 3 situations (al Bashir in Sudan; Kenyatta in Kenya; and Gaddafi in Libya) not even one was finalized. This article focuses on the Libyan and Syrian cases to underline how the transition between the two is exemplificative of a paradoxical dynamic. Ronnie Hjorth, in his exploration of the work of one of the founding figures of the English School of international relations, Hedley Bull, explained this paradox in these terms: "it is a 'paradox' that while the balance of power can be viewed as an 'essential condition of the operation of international law', the maintenance of the balance would 'often involve violation of the injunctions of international law.'"[1]

In other words, states would violate or oppose injunctions of international law if they perceive said injunctions to be disruptive for the balance of power. Following this consideration, this article argues that international organizations like the ICC, channel disagreement on the fundamental norms that should shape interstate relationships, acting as decompression valves for malcontent in international society.

To sustain this argument, the article proceeds in five sections. First, the introduction unpacks the distinction between primary and secondary institutions and advances the claim that international organizations can act as decompression valves for malcontent among states. Second, the article highlights the relation between the balance of power and international law. With Hedley Bull,[2] this article contends that the relationship between the two is apparently paradoxical; international law works better in situations where the balance of power is in equilibrium; but violations of international law are sometimes used to re-establish it. In the third section, a review of the Libyan case highlights how a liberal-institutionalist paradigm advanced the idea that, for particular crimes, the perpetrators should be punished regardless of their status. Then, the article explains how the sentiment that pervaded the prosecution of Gaddafi vanished in Syria; and how this is not only indicative of a 'revolt against the West'; but also a manifestation of a shifting balance of power. In the final section of the article, I urge international relations scholars to dedicate more attention to the practice of prosecuting sitting Heads of State for three main reasons: first, the growing disaffection showed by non-Western actors towards the post WWII neo-liberal project does not signal the collapse of international society but instead something quite the contrary. Second, international organizations constitute perfect *fora* to express hostility towards the norms that underpin inter-state relations. Finally, the practice of prosecuting sitting Heads of State (and perhaps more importantly the resistance to it) also unveils a blind spot in

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1 Ronnie Hjorth, *Hedley Bull's Paradox of the Balance of Power: A Philosophical Inquiry*, 33 (4) Rev. Int'l Studies 602 (2007).

2 *See* Hedley Bull, The Anarchical Society: A Study of World Order, World Politics, ch. 1 (1977).

those 'endist'[3] literatures that have infused the international relations debate since the end of the Cold War.

I. Secondary Institutions as "Decompression Valves" in International Society

One of the major contributions of the English School to international politics has been the distinction between primary and secondary institutions. Buzan ascribes two features to primary institutions: first, they are relatively fundamental and durable practices that are evolved more than designed; and second, they are constitutive of actors and their patterns of legitimate activity in relation to each other.[4] Primary institutions include anarchy, order, diplomacy, and war.[5] Secondary institutions "can make do with definitions such as those provided by Krasner and Keohane. Within such definitions there are nearly infinite possibilities for types or formal organization and regime".[6] Secondary institutions are, in other terms, those phenomenological derivations formalizing the existence of normative patterns of behavior that shape inter-state relationships. These can include international organizations, such as the ICC, or regimes, like international justice regimes.

The relationship between primary and secondary institutions is deeply related to a dialectic proposition that underpins the pluralist/solidarist debate. Bull, Jackson, and Mayall, among other pluralists, claimed that states in international society should act as functional instruments to limit and curtail the spread of excessive disorder in the ontological condition of systemic anarchy.[7] This draws mainly on neorealist and rationalist approaches to the international system and proposes that "sovereignty is about the cultivation of political difference and distinctness".[8] Pluralists believe that the promotion of 'universal' values, on which no clear consensus has been reached, can jeopardize efforts to achieve a stable international community.[9] This conceptualization of international society implies that humanitarian intervention constitutes a violation of the three principles of order in international society: sovereignty, non-intervention, and non-use of force.[10] This proposition was introduced by Bull, who contended that the need for order in ontological conditions of ethical diversity and anarchy might be undermined in the pursuance of universal ideals and norms.[11]

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3 The term 'endist literatures' refers to those approaches that argued that the collapse of the Soviet Union constituted the culmination of history and the end of ideological frictions among nations.

4 Barry Buzan, From International to World Society? 167 (2004).

5 Bull, *supra* note 2, at 3–22.

6 Buzan, *supra* note 4, at 167–68.

7 *See* Bull, *supra* note 2, at 13; Robert H. Jackson, The Global Covenant: Human Conduct in a World of States 1–22 (2003); James Mayall, Nationalism and International Society 5–35 (1990).

8 Buzan, *supra* note 4, at 478.

9 Bull, *supra* note 2, at 152–53.

10 Nicholas J. wheeler, Saving Strangers: Humanitarian Intervention In International Society 11 (2000).

11 Bull, *supra* note 2, at 153.

The solidarist strand challenges such views on the prioritization of order over justice. Solidarism "lean[s] towards the revolutionist side of rationalism".[12] As Buzan noted, "solidarism focuses on the possibility of shared moral norms underpinning a more expansive and almost inevitably, more interventionist, understanding of international order".[13] If for pluralists the prioritization of order over justice seems like a *conditio sine qua non* for the existence of international society, solidarists have focused on "the possibility of overcoming conflict developing practices that recognize the mutual interdependence between the two claims".[14] The defining character of the solidarist view of international society is one in which "[s]tates accept not only a moral responsibility to protect the security of their own citizens, but also the wider one of guardianship of human rights everywhere".[15] Linklater labels such propositions as assaults on the Westphalian order.[16]

Pluralists and solidarists seem to be divided by their different understandings of the primary institutions constituting the basis for inter-state relationships in international society. On one hand, pluralists lean towards the idea that respect for diversity grants order in international society, and so sovereignty constitutes the ultimate rational barrier to maintain a society of states transcending the competition problems of the Hobbesian international system. On the other, solidarists claim that sovereignty should be transcended in the quest for a world society. While the relationship between primary and secondary institutions has been widely debated, the notion that secondary institutions perform roles that transcend their mandates has received less attention. One of these roles is to galvanize dissent over the supremacy of certain primary institutions over others. In other terms, where the normative friction between two primary institutions is particularly pronounced, secondary institutions give dissatisfied actors a perfect, and yet rational, venue to express hostility towards the prioritization of some primary institutions over others. And this is why focusing on the resistance that emerged within the ICC sheds light not only on the institution itself, but also on the status of those norms that underpin the fabric of the society of states.

II. The Balance of Power, Bull's Paradox, and the Revolts against the West

The balance of power is a core aspect of theorization in international relations. Brooks and Wohlforth have stated that the concept, its theoretical foundations, and its applications in the works of politicians and diplomats, is the most explored one in international relations.[17] Typically associated with the works of Realists like

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12 Buzan, *supra* note 4, at 476.
13 *Id*. at 478.
14 Wheeler, *supra* note 10, at 13.
15 *Id*. at 12.
16 Andrew Linklater, *Men and Citizens in International Relations*, 7 Rev. Int'l Studies 23, 34–35 (1981).
17 Stephen G. Brooks & William C. Wohlforth, World out of Balance: International Relations and the Challenge of American Primacy (2008).

Morgenthau,[18] and structural realists like Waltz,[19] it found fertile ground also in English School approaches.[20] Recent debates varied from denying the fact that it ever operated, to articulations on its theoretical lines to include more nuanced approaches to it introducing 'soft-balancing'; 'bandwagoning';[21] and 'hegemonic declines'.[22] According to Bull, the balance of power is not inevitable but historically contingent and dependent on states' behavior.[23] In a similar vein, Butterfield argued that "an international order is not a thing bestowed by nature, but is a matter of refined thought, careful contrivance, and elaborate artifice".[24] Balance of power becomes a "conscious formulation" when "states limit their short-term objectives for the sake of long-term advantage".[25] As a consequence, international anarchy is the result of conscious and deliberate actions by actors to commit to a set of rules regulating their relationships.[26] Among these rules sovereignty and non-intervention are the most important[27] because they play a crucial role in preventing the rise of a single dominant hegemony.[28] In situations of equilibrium, states, with the exception of the ones with hegemonic aspirations, attempt to crystallize the balance of power. In situations of disequilibrium, to rectify it. This understanding gives birth to Bull's paradox, which intersects the notions of balance of power and international law.

According to Bull, international law performs three functions in international society: first, it helps identify the normative principles of it; second, it states the basic rules of coexistence between states and other actors; and third it helps to mobilize compliance with these rules.[29] Yet, Bull's attempt to include both international law and the balance of power as primary elements of international society gives rise to a tension that can be summarized in two propositions:

1) The existence of a balance of power is an essential condition for the efficacy international law;
2) The steps necessary to maintain (or restore) it often involve violations of the injunctions of international law.[30]

The formulation of these paradoxical inferences has crucial implications for the notion of international order seen by pluralists (like Wight, Bull, and Butterfield) as the result of conscious efforts to maintain the balance of power. But if international law is also one of the elements helping states behave in an orderly manner, then violations of international law should not contribute to order, but disrupt it. In

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18 Hans Morgenthau & Kenneth Thompson, Politics Among Nations, The Struggle for Power and Peace (Mcgraw-Hill Education, 2005).
19 Kenneth N. Waltz, Theory of International Politics (2010).
20 Richard Little, The Balance of Power in International Relations: Myths and Models (2007).
21 Stephen M. Walt, The Origins of Alliance (1990).
22 William C. Wohlforth, *Testing Balance-of-Power Theory in World History*, 13(2) European J. Int'l Relations 155–85 (2007).
23 Bull, *supra* note 2, at 106.
24 Martin Wight & Herbert Butterfield, Diplomatic Investigations: Essays in the Theory of International Politics 140 (1968).
25 *Id*. at 141.
26 Bull, *supra* note 2, at 13.
27 R.J. Vincent, Nonintervention and International Order (1974).
28 Wight & Butterfield, *supra* note 24.
29 Bull, *supra* note 2, at 13.
30 *Id*. *See* Hjorth, *supra* note 1.

most interpretations of this paradox, the relationship between international law and balance of power is seen as mutually reinforcing, because international law sustains the balance of power and *vice-versa*. This connotation dissipates when hegemonic powers "pose a direct challenge to the rules of co-existence and cooperation and so cannot expect to take advantage of these rules in order to satisfy [their] ambitions".[31] When this situation occurs, states recall that in the hierarchy of those norms that should facilitate coexistence, the balance of power comes second to none.

Deeply intertwined with this conceptualization is the "Revolt against the West". Ralph outlined its five defining characteristics:

> a psychological awakening in the non-Western world, a weakening of the will on the part of the Western powers to maintain their position of dominance, or to at least accept the costs necessary to do so, the rise of new powers such as the Soviet Union, a more general equilibrium of power, and a transformation of the legal and moral climate of international relations, which was influenced by the majorities of votes held by third world states.[32]

The three waves of revolt, according to Bull, challenged Western actors' "sense of self-assurance, about the durability of their position in international society and its moral purpose".[33] The latest development in this construction happened in the first decade of the 21st century, when modernization encompassed the rejection of impunity for the gravest crimes in the international arena[34] (of which global accountability is a ramification), as well as establishing patterns for justified military interventions in times of humanitarian crisis, in accordance with, for example, the Responsibility to Protect.

There is a tendency to perceive actions situating themselves in contraposition with dominant political projects as necessarily posing a threat to them. For this reason, it is important to remember that, in English School terms, revolts against the West happen within the rational boundaries of international society. This sustains English School's definitions of international society that stress the importance of intersubjective dialogue.[35] It is this confrontation that differentiates international society from the Hobbesian international system and the Kantian world society. Revolts against the West need to be perceived as moments of high intersubjectivity in which non-Western actors express dissatisfaction on some of the *diktats* permeating international society. In other terms they constitute a negative movement (or antithesis) in the dialectic process, maintaining the primacy of rationalism over realism and revolutionism.

In this sense, violations of international law, and resistance towards the institutions that are tasked with its implementation, are manifestations of a normative dissatisfaction. However, neither vetoing the referral of the Syrian situation nor

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31 Little, *supra* note 20, at 151.

32 *Id*.

33 Hedley Bull & Adam Watson, The Expansion of International Society 219 (1984).

34 Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 73 (2003); John M. Czarnetzky & Ronald J. Rychlak, *Empire of Law: Legalism and the International Criminal Court,* 79 Notre Dame L. Rev. 55 (2003).

35 Wight & Butterfield, *supra* note 24, at 268; Bull & Watson, *supra* note 33, at 1.

un-signing the Rome Statute, as Russia did in 2016[36] constitute violations of the international law *per se*. Similarly, it is unclear whether the repeated failures to comply with ICC requests, constitute violations comparable to the crimes for which the Court was set up. The main point of contention here is whether or not those who are allegedly complicit in a crime can be treated as criminals themselves.

In this article, I do not focus solely on formal violations of international law, but I draw more attention to those actions that aim at challenging a legal order associated with specific hegemonic traits. In this I am, once more, with Bull who argued that "it is wrong not merely to engage in an unlawful war, such as one that involves deliberate killing of the innocent, but also to engage in conditional preparation for it".[37] By extension, it is not only unlawful to commit genocide, war crimes, and human rights violations, but it is also unlawful to allow the perpetrators of these crimes to escape prosecution, or impede those proceedings that aim at shedding light on potential abuses of such magnitude. So, even if the Russian and Chinese vetoes, and the subsequent Russian withdrawal from the ICC, are legal, they are also hostile to a norm of international law established in the wake of WWII, the prosecution of sitting Heads of State, and its institutional poster-child, the ICC. Also, the vetoes can be read as not deterring the recurrence of the crimes committed in Libya and Syria. The point here does not concern the criminalization of African resistance or blaming Russian and Chinese diplomats for vetoing Assad's referral. This has already been done abundantly by policy-makers and academics. It is rather to set the basis to discuss the relationship between them and the balance of power.

III. Libya: The "Just Death" of Muammar Gaddafi

When, on March 3, 2011, the UN passed Resolution 1973 authorizing the establishment of a no-fly zone and the taking of all means necessary to protect Libyan civilians,[38] it was a pivotal moment for international society because, for the first time, the United Nations authorized military intervention on the grounds of a non-cooperating state.[39] The Resolution was supported by evidence of violations of international law that failed to heed the United Nations Security Council call for "utmost restraint and respect for human rights and international law'.[40]

What the international community witnessed with the referral of the Libyan situation was, to put it in Teitel's terms, an attempt to normalize extraordinary proceedings.[41]Despite early warnings about how the ICC involvement in Libya could hinder the prospects of a peaceful resolution of the conflict in African

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36 Shaun Walker & Owen Bowcott, *Russia Withdraws Signature from International Criminal Court Statute*, The Guardian (Wed. 16 Nov. 2016 14.14 GMT) https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute.

37 Bull, *supra* note 2, at 172.

38 G.A. Dec. 63/677 (Jan. 12, 2009).

39 Justin Morris, *Libya and Syria: R2P and the Spectre of the Swinging Pendulum*, 89 Int. Aff. 1271 (2013).

40 S.C. Res. 1970 (Feb. 26, 2011).

41 Teitel, *supra* note 32.

countries,[42] Western political elites showed themselves to be determined to prioritize the criminalization of Gaddafi over such concerns. William Hague, then British foreign secretary, argued that "the warrants demonstrate why Gaddafi has lost all his legitimacy and why he should go immediately".[43] Similar statements were made by French foreign minister Alain Juppé, who argued that France and the U.K. were in "perfect co-operation in Libya",[44] and received support from U.S. President Obama.[45] With the unfolding of Gaddafi's situation, which eventually led to his death, the debate on the release of the warrants of arrest focused on the relationship between the ICC, the practice of prosecuting sitting Heads of State, and regime change. In fact, at least in the West, Gaddafi's death was met with a sense of "justice achieved", evident in the American, French, and British that prioritized the removal of the leader over a trial.[46]

This consideration raises two intertwined corollaries. The first relates to the popularity of Democratic Peace Theory after the end of the Cold War, and the way in which this Kantian view of international politics is currently challenged by the Syrian situation. The second relates to Adam Watson's conceptualization of international society as moving in four hegemonic stages.[47] These corollaries can serve as analytical tools for understanding that the current international climate (sometimes described as a "New World Disorder"[48]) is neither new nor *necessarily* a disorder.

The ICC attempts to prosecute sitting Heads of State are consonant with the dominance of liberal ideas since the end of the Cold War. The emphasis of Democratic Peace theorists on the idea of a safer world through promotion of democracy also encompasses aspects of Kant's 'Cosmopolitan Law'. Kant, in fact, referred to the possibility (and necessity) of a non-statist framework of international relations designed to promote individual freedom in times of accelerated globalization.[49] As Held has noted, in fact,

> Sovereignty is an attribute of the basic democratic law, but it could be entrenched and drawn upon in diverse self-regulating associations, from states to cities and corporations, all without the illusion that each of these agents can remain entirely autonomous from a cosmopolitan legal order.[50]

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42 Simon Tisdall, *This Arrest Warrant Could Make Gaddafi More Dangerous*, The Guardian, Jun. 27, 2011.

43 *Id*.

44 Theo Usherwood, *Gaddafi Must Relinquish Power Says William Hague*, The Independent, Jul. 26, 2011.

45 Paul Adams, *Libya: Obama, Cameron and Sarkozy Vow Gaddafi Must Go*, BBC News (Apr. 15, 2011), http://www.bbc.co.uk/news/world-africa-13089758.

46 *Qaddafi's Death Met with Little Sadness*, CBS News (Oct. 20, 2011). http://www.cbsnews.com/news/qaddafis-death-met-with-little-sadness/; Luke Harding, *Gaddafi's Will Tells Libyans: We Chose Confrontation as a Badge of Honour*, The Guardian, Oct. 23, 2011.

47 *See* Adam Watson, *Systems of States*, 16 Rev. Int. Stud. 99 (1990).

48 *See, e.g*. The New Statesman Cover, *The New World Disorder*, New Statesman, Jul. 19, 2017.

49 Immanuel Kant, Perpetual Peace: a Philosophical Sketch, Third Definitive Article for a Perpetual Peace (1795). *See* Antonio Franceschet, *Popular Sovereignty or Cosmopolitan Democracy*?: *Liberalism, Kant and International Reform*, 6 Eur. J. Int. Relat. 286 (2000).

50 David Held, Democracy and Global Order: From the Modern State to Cosmopolitan Governance 234 (1995).

Although Cosmopolitan Democracy models do not wish to eliminate states, they would remove the discretion for states to exempt themselves from international law.[51] In Kant's Cosmopolitan Law people hold certain inalienable rights; and violations of such rights hinder the possibility of a democratic international environment that would eradicate the violations themselves.[52] For these reasons authors like Archibugi, while admitting Kant's failure to indicate the means whereby [this] cosmopolitan law was to be enforced, have argued that the ICC constitutes an extension of a Kantian view of international politics.[53] Does this mean that the international community has the duty to use any means necessary to promote democracy? Would this mean that in the pursuit of peace the ICC should legitimize such actions? In Libya, Western political elites seemed convinced they have an affirmative answer to both questions.

But Watson, one of the founders of the English School of international relations, has warned about a certain *hubris*, typical of those hegemonies ascending to a "dominion" stage to make such arguments. It is precisely in a stage where international society is perceived to be dominated by "hegemon-specific" norms aiming at changing the internal composition of other actors, that other states reassert the centrality of the balance of power as a tool to constrain hegemonies.[54] Violations of international law broadly conceived are often the tool that states use to rectify the balance of power. This is not only consistent with Wight's predicaments on the recurrence and repetition that characterizes international politics, and with Bull's paradox, but also with a general skepticism towards Kantianism on the part of Classical English School theorists. It is useful to note that this skepticism has to do with the fact that Kantianism has served as an ideological tool to justify the promotion of liberal-institutionalist projects since WWII and after the end of the Cold War. For this reason, Franceschet's argument that aspects of Kantianism have been prioritized to sustain liberal-institutionalist pushes becomes particularly compelling,[55] as does Onuf's claim that liberal views starting from a liberal understanding of Kant are largely misleading.[56]

The removal of Gaddafi in Libya, therefore, can be considered as the zenith of such experiments, representing a consensus for the commitment to the persecution of perpetrators of the most heinous crimes regardless of their status. This somehow confirmed that the West, led by the United States, transcended its hegemonic role towards dominion by attempting to change the internal composition of other states. The fact that the ICC has been perceived as legitimizing this transition, had important repercussions in Syria. The prolongation of the Libyan conflict and the impossibility of bringing Gaddafi to trial, coupled with the emergence of the Syrian quagmire now cast a looming shadow over the continuation of the project. The next section indicates how resistance to the ICC emerged in Africa and continued then in 2013 with the Russian and Chinese vetoes over the referral of Syria. This not only endangers the

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51 *Id*. at 233.

52 *See* Franceschet, *supra* note 49, at 295.

53 Daniele Archibugi, *A Cosmopolitan Perspective on Global Criminal Justice,* (Jan. 23, 2015). Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554996.

54 Watson, *supra* note 47, at 106–07.

55 Franceschet, *supra* note 49, at 278–80.

56 Nicholas Greenwood Ouf, The Republican Legacy in International Thought 241 (1998).

prospects of an efficient ICC prosecution of sitting Heads of State, but indicates a shift in the balance of power from the West to the Rest, consistent with Bull's Paradox.

IV. Syria and the Rectification of the Society of States

On 27 April 2011 the United Nations' Security Council discussed for the first time the deterioration of the Syrian situation.[57] By the end of 2011, France, the United Kingdom, Germany, and Portugal attempted to pass a resolution to condemn the violence of the Syrian authorities against civilians,[58] however, Russian and Chinese vetoes to a non-coercive resolution[59] suggested that the Libyan case was already in the past. Hostility towards any form of interventionism on Syrian soil by Russia and China was to continue for more than 6 years, culminating with the vetoes against a referral to the ICC.

It is necessary to acknowledge that the reasons for such vetoes respond to a complex array of factors and, as Morris has noted, "[a]ny analysis of the Syrian case must, therefore, be undertaken in full cognizance of such case-specific variables".[60] In particular, Russian interests and political ties with the regime of President Assad have infused the debates within the United Nations Security Council, with France even accusing Moscow of "merely wanting to win time for the Syrian regime to crush the opposition".[61] Syria is even more complicated because, allegedly, the Assad government has deployed chemical weapons against civilians. The use of chemical weapons has been considered unacceptable in international politics since, at least, WWI Reactions to the use of chemical weapons are, generally speaking, more forceful than for other human rights' violations. Precisely because of the magnitude of the crime, agreement on the prosecution of Assad could have been straightforward.[62] An analysis of these factors is not the aim of this section, which focuses on the narratives of justification used to legitimize the vetoes as an indication of a return to pluralism (as conceived in English School terms), a shift in the balance of power and a return to multi-polarity in international relations.

The Syrian step-back from the optimism pervading international politics with Libya was picked up, among the others, by Ainley who argued that the ICC and Responsibility to Protect 'are now in crisis, due in large part to their failure to prevent or prosecute recent acute human rights abuses in Syria'.[63] Ralph and Gallagher state: "[t]he legitimacy deficit that accrues from excluding significant parts of the Security Council's social constituency is exacerbated by the ICC's lack of progress in ending the culture of impunity",[64] which eventually results in what

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57 Rep. of the S.C., U.N. Doc. S/PV.6524 (2011).
58 Rep. of the S.C., U.N. Doc. S/2011/612 (2011).
59 Morris, *supra* note 39, at 1274.
60 *Id.* at 1275.
61 Rep. of the S.C., U.N. Doc. S/PV.6627 (2011).
62 *See*, *e.g.*, Brett Edwards & Mattia Cacciatori, *The Politics of International Chemical Weapon Justice: The Case of Syria, 2011–2017*, 39 Contemp. Sec. Pol'y 1–18 (2018).
63 Kristen Ainley, *The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis,* 91 Int. Aff. 37 (2015).
64 Jason Ralph & Adrian Gallagher, *Legitimacy Faultlines in International Society: The Responsibility to Protect and Prosecute after Libya,* 41 Rev. of Int. Stud. 566 (2015).

Hehir and Lang identified as a 'gap between law and enforcement."[65] As Morris noted "their concerns were not merely based on and restricted to an extrapolation from Libya to Syria, but rather extended to include western interventionist practices more broadly. Debate was no longer simply about specific cases, however they might be linked; it was about a wider normative agenda."[66]

If the abstention of Russia and China from vetoing United Nations Security Council Resolution 1973, which eventually "cleared the road for NATO military intervention in Libya", leads to the culmination of the liberal-institutionalist view on justice,[67] then the vetoes in 2013 demonstrate the traits of a step-back. More importantly for the scope of this article, the justifications that followed the vetoes highlight how these states sought to legitimize their actions. The analysis highlights three intertwined dynamics: first, continuous references to Libya, Russia and China exacerbate the limits of the liberal-institutionalist project and, consequently, challenge the Western domination of international politics. Second, the appeals to sovereignty as the ultimate rational barrier of international society indicate a return to pluralism after a period of solidarism which began at the end of the Cold War. And third, these factors, if framed in the context of recent events (e.g. the Russian presence in Crimea, or the exclusion of more than 700 American diplomats from Russian soil), indicate a rectification of the balance of power from the West to the Rest, and a prolongation of those revolts against the West.[68]

In the wake of the 2013 Russian and Chinese vetoes, UN Secretary General Ban Ki Moon remarked "Syria is now the biggest humanitarian and peace and security crisis facing the world, with violence reaching unthinkable levels. Syria's neighbors are bearing the increasingly unbearable humanitarian, security, political and socio-economic effects of this conflict".[69] The vetoes, of course, attracted criticism, in particular, for irresponsible behavior.[70] But while it can be easy to be sympathetic with the humanitarian pleas, Russian and Chinese resistance to intervention (referral included) can hardly be mimicked as only license to kill.[71]

In fact, this resistance followed a long-standing Russian criticism of western powers' "use of pseudo-humanitarian arguments" and China's opposition to "military intervention under the pretext of humanitarianism and externally imposed

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65 Aidan Hehir & Anthony Lang, *The Impact of the Security Council on the Efficacy of the International Criminal Court and the Responsibility to Protect,* 26 Crim. L. Forum 179 (2015).

66 Morris, *supra* note 39, at 1276.

67 Yun Sun, *Syria : What China Has Learned from Its Libya Experience,* East-West Center (Feb. 27, 2012), https://www.eastwestcenter.org/system/tdf/private/apb152_1.pdf?file=1%26type=node%26id=33315.

68 *See infra* notes 89, 90 & 91.

69 United Nations Secretary-General, *Statement Attributable to the Spokesman for the Secretary-General -- on Syria*, Un. Org (Mar.12, 2014) http://www.un.org/sg/STATEMENTS/index.asp?nid=7520.

70 Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, The Guardian, May 22, 2014; *Russia, China on Wrong Side of History: US on Syria Veto*, Rediff.Com (Jul. 20, 2012), http://www.rediff.com/news/report/russia-china-on-wrong-side-of-history-us-on-syria-veto/20120720.htm.

71 Marek Menkiszak, *Responsibility to Protect ... Itself? Russia's Strategy Towards the Crisis in Syria*, Fiia (May 28, 2013), https://www.fiia.fi/en/publication/responsibility-to-protect-itself.

solutions aimed at forcing regime change".[72] After NATO's coalition began airstrikes against Gaddafi's regime, Putin accused the United States, and generally the West, of subverting the nature of the resolution from protection of Libyan civilians to satisfaction of crusade-like actions.[73] Since 2011, Libya has become one of the cornerstones of Russia and China's justifications for vetoing Western interventionism. In 2014, for instance, Putin declared that he would not allow the UN to pass a resolution to intervene in Syria because "anything that the US touches turns into Iraq or Libya".[74] In 2016 he claimed Russia and China were just trying to prevent a reiteration of Libyan mistakes in Syria.[75]

Criticism of the Libyan situation was coupled with a broader normative argument advanced in favor of the respect of sovereignty. Wang Min, Chinese Ambassador to the UN, declared that China had serious difficulties with the draft resolution, stressing that "any action seeking referral to the International Criminal Court should be based on the premise of respect for the judicial sovereignty of States and the principle of complementarity".[76] An agreement on an immediate ceasefire was urgently needed between Syrian government and the opposition, Wang Min noted. He also warned that "forcibly referring the situation to the Court in the current environment was neither conducive to building trust nor to the resumption of negotiations in Geneva".[77] Vitaly Churkin, Russian Ambassador to the United Nations, had earlier dismissed the vote as a 'publicity stunt' and warned that passing the resolution would hinder efforts to end the country's three-year war.[78] Marek Menkiszak, Head of the Russian Department, Centre for Eastern Studies, has argued, in a briefing paper for the Finnish Institute of International Affairs, that "Moscow seems to believe this constitutes a lesser evil compared to a regime change, which would bring forces perceived as pro-Western to rule the country".[79]

While it is difficult to dissect the reasons of the vetoes, it is clear that their legitimization followed the idea that sovereignty constitutes a fundamental pillar of international society that cannot be overridden to favor dubious solidarist practices as in Libya. A claim that Russia and China only acted because of domestic interests does not explain the potential impact that their vetoes carry for the pluralism

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72 Rep. of the S.C., U.N. Doc. S/PV.6826 (2012).

73 Gleb Bryanski, *Putin Likens U.N. Libya Resolution to Crusades*, Reuters (Mar. 21, 2011 2:28 PM), http://www.reuters.com/article /us-libya-russia-idUSTRE72K3JR20110321.

74 RT, *Putin: Anything US Touches Turns into Libya or Iraq*, YouTube (Aug. 29, 2014), https://www.youtube.com/watch?v=qGwWD-VVBEc.

75 Julian Robinson, *Putin Attacks 'Imperial Ambitions' of US During Annual Marathon TV Show… and Can't Resist a Swipe at Obama by Praising His 'Strong' Decision to Admit Libya Was the Worst Mistake of His* Presidency, Mail Online (Apr. 14, 2016) https://www.dailymail.co.uk/news/article-3539704/Putin-spot-12-year-old-girl-asks-save-Turkish-Ukrainian-leaders-drowning-s-not-good-news-them.html.

76 Wang Min, *Explanatory Remarks by Ambassador Wang Min after Security Council Voting on Draft Resolution on the Referral of the Situation of the Syrian Arab Republic to the International Criminal Court*, Ministry of Foreign Affairs of The People's Republic of China (May 22, 2014), http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zwjg_665342/zwbd_665378/t1161567.shtml.

77 *Id*.

78 Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, The Guardian, May 22, 2014.

79 Menkiszak, *supra* note 73, at 9–10.

of international society. In fact, in challenging the legal basis for foreign or international military intervention against Syria, both Russia and China were also envisaging, the possibility that the West would bomb another Arab state, and the possibility of the West actually engaging militarily in Syria.[80] In this sense, Putin's response was described as being framed

> within a largely rational argument rooted in statist international law; the R2P norm is widely contested in a pluralist international system and Russia's political elite naturally seeks to shape its evolution, particularly in respect of its impact on security developments outside the solidarist security community of Western liberal democracies.[81]

Webb remark that "the veto is a technique—it is not inherently 'good' or 'bad'",[82] gains particular relevance because it lays the foundations to understand Russian and Chinese actions as a dissatisfaction on certain aspects of international law that have proven to be fallacious. At the same time, because these injunctions of international law are associated with an expansion of Western rights, such actions also reassert the centrality of sovereignty and pluralism as fundamental pillars of international society.

The realization that the Court is inherently conditioned by great power politics influenced post-Syrian narratives on the ICC as well. According to Delmas-Marty "the ICC is weakened by a policy that remains dominated by a sovereign model, despite operating in a legal framework with universal aspiration"[83] because as Gegout argued "[t]he institutional autonomy of the ICC is conditioned by the goodwill of states parties and non-party states to the ICC Statute."[84] The idea of a Court with global aspirations but dominated by power politics, raised questions about the effective legitimacy of it. Tiemessen wrote that

> politicization of the ICC is, however, not an inevitable outcome of global governance that advocates of international justice should resign themselves to. The ICC's independence and impartiality can best be assured with greater distance from the UNSC and states, and with more genuine support for the Chief Prosecutor to select situations and cases.[85]

To what extent Tiemessen's remarks remain utopic in the current international environment is beyond the scope of this article. However, the transfer of concern from Libya to Syria has confirmed that states remain the most important actors in

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80 Qu Xing*, The UN Charter, the Responsibility to Protect, and the Syria Issue*, C.I.I.S (Apr. 16, 2012) http://www.ciis.org.cn/english/2012-04/16/content_4943041.htm.

81 Derek Averre & Lance Davies, *Russia, Humanitarian Intervention and the Responsibility to Protect: The Case of Syria*, 91 Int. Aff. 813, 813-14 (2015).

82 Philippa Webb, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria,* 19 J.Conflict & Security L, 486 (2014).

83 Mireille Delmas-Marty, *Ambiguities and Lacunae: The International Criminal Court Ten Years On*, 11 J. Int. Crim. Just. 544, 553–61 (2013).

84 Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 Third World Q. 800, 801 (2013).

85 Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18. Int'l J. Hum. Rts. 391, 458 (2014).

international society and as such will be reluctant to cooperate with an international instrument that they cannot control. On this, Kaye and Raustiala suggest "[f]or all its power and promise, the ICC functions in a larger framework of global governance. At the core of this framework rests the great powers",[86] because "[t]he Court operates in a world where the commitment of states and international institutions to the underlying goal of international justice is sometimes subordinated to other political considerations".[87] The political considerations raised by Ainley, Tiemessen, Kaye, Raustiala, and others as interpreted through Bull's Paradox, suggest a view of attempts by Russia and China to rectify a balance of power that had tipped too much in favor of the West. This view is further sustained by a progressively antagonistic Russian stance adopted since the late 2010s, exemplified by the annexation of Crimea,[88] the institutionalization of Russian bases in the Eastern Mediterranean,[89] and the recent dismissal of 755 American diplomats from Russian soil.[90] On the Chinese side, their growing influence on the African continent,[91] renewed dominion on the South China Sea,[92] and the general extension of Chinese military influence across the globe[93] also sustain this analysis. These are examples of the rectification of the balance of power, but read in conjunction with the opposition to Assad's prosecution, can be considered to represent the tip of the iceberg of a much deeper shift in an international community, experience a power rebalancing with the aim of redressing past Western imperial aspirations. In fact, it is not just Russia and China currently contesting the prosecution of sitting Heads of State and the institution tasked with its implementation. Most African states are resisting the prosecutions of former President of Sudan, Omar Al Bashir and President Uhuru Kenyatta of Kenya. In conjunction with the proposal of the African Union to withdraw from the Court *en masse*, the transfer of contention from Libya to Syria does indeed suggest a manifestation of a revolt against the West.

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86 David Kaye & Kal Raustiala, *The Council and the Court: Law and Politics in the Rise of the International Criminal Court*, 94 Tex. L. Rev. 713 (2016).

87 Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence*, 12 Wash. U. Global Stud. L. Rev. 545 (2013).

88 Jonathan Marcus, *Ukraine: The Military Balance of Power*, BBC News (Mar. 3, 2014), http://www.bbc.co.uk/news/world-europe-26421703.

89 Alexander Mercouris, *Russia Just Tipped the Balance of Power in the Mediterranean*, The Duran (Aug. 15, 2016), http://theduran.com/transforming-balance-power-eastern-mediterranean-russia-makes-syrian-base-permanent/.

90 Neil MacFarquhar, *Putin, Responding to Sanctions, Orders U.S. to Cut Diplomatic Staff by 755*, N.Y. Times, (Jul. 30, 2017), https://www.nytimes.com/2017/07/30/world/europe/russia-sanctions-us-diplomats-expelled.html.

91 *China Goes to Africa*, The Economist (Jul. 20, 2017) https://www.economist.com/news/middle-east-and-africa/21725288-big-ways-and-small-china-making-its-presence-felt-across.

92 Bill Hayton, *The Week Donald Trump Lost the South China Sea*, Foreign Policy (Jul. 31, 2017), http://foreignpolicy.com/2017/07/31/the-week-donald-trump-lost-the-south-china-sea/.

93 The Economist, *The New Gunboat Diplomacy*, Facebook (Aug. 5, 2017), https://www.facebook.com/TheEconomist/videos/10155684548719060/.

V. Conclusion

The theoretical assumption of this article has been that secondary institutions like the ICC can preserve the existence of the international human rights community by acting as a decompression valve when the normative friction on primary institutions becomes too contentious. This has been examined by reference to the opposition to the potential ICC prosecution of Syrian President Assad. While ethical considerations are beyond the scope of this article, the fact that these have been deployed to preserve equality in international society cannot be disregarded. There are ethical arguments to be advanced to argue that this kind of resistance serves the ideal of preventing states from overriding the sovereign will of other states thereby ensuring that all states should be equal in international society.

Also, the prosecution of sitting Heads of States is contested for many reasons. The vetoes reflect the resistance of a number of states in international society, and the enforcement of a contested norm would contradict the principles associated with a tradition that, both on pluralist and solidarist sides, credited consensus for norm enforcement. Despite the reasons for vetoing Assad's referral, China and Russia became the unwilling champions of non-Western resistance to this practice. Without their vetoes the dissenting voices would have gone unheard and a breakdown of dialogue between Western and non-Western political elites ensued.

In English School terms, there has been abundant discussion on how norms spread and become institutionalized in international society. There seems to be a *quasi*-consequential correspondence between the establishments of hegemonic projects; the promotion of certain norms over others; the creation of secondary institutions tasked with the implementation of such norms; and the emergence of practices that sustain such institutions. This article claims that revolts against the West walk this path backwards. Actors start resisting specific practices (the prosecutions of sitting Heads of State); then criticize secondary institutions tasked with their implementations (the ICC) to question the primacy of certain norms over others (justice over order). If this analogy is relevant, it seems legitimate to assume that resistance to the prosecution of sitting Heads of State carries an implicit criticism for the liberal-institutionalist project that should not be perceived as necessarily dismantling the society of states, but perhaps at promoting a more egalitarian one.

Therefore, the early 1990s "endists" that forecasted the perpetual dominion of liberalism, the end of power politics, and the potential vanquishing of superpowers are met by the notion that the resistance to international law, the return to pluralism, and the resurgence of sovereignty indicate a "return to history" after its end. This is because, in contingency with Watson, international society is deeply rooted in its anti-hegemonic nature. The fact that in the space of two years the attitude towards the prosecution of a sitting Head of State changed dramatically seems to indicate that international law has yet to gain a constitutive status in international society. Its subservience to other constitutive elements (such as the maintenance of international anarchy through logics of balance of power) makes it susceptible to rapid changes.

However, the implications that this article has explored are not justification of the apparent lack of interest on the part of the international community toward securing a resolution for the conflict in Syria. The article does not suggest abandonning the search for a solution that can respond to the logics of renewed statehood nor does it justify violations of international law as an instrument to

pacify conflict between and among nations. The article provides an explanation of underlying dynamics that signal a return to pluralism, and a rectified balance of power more similar to pre-Cold War dynamics than to the early 2000s. Efforts to solve the Syrian conflict should be directed at non-invasive tools to create a space of dialogue between the West and the Rest.

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The Environment, A Bipartisan Issue?: Partisanship Polarization and Climate Change Policies in the United States

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ABSTRACT

Responding to climate change presents significant challenges on both international and domestic fronts. The current U.S. federal government disclaims a connection between climate change, and human activity, and embraces an environmental program that includes withdrawal from the Paris Climate Change Agreement at international level and retrenchment from regulation domestically. This Article comments on the rollback of Obama-era environmental regulations now taking place at federal level and locates these policies in the context of the domestic polarization and partisanship that now characterizes U.S. politics. It notes that environmental regulation divides the Republican and Democratic Parties but that the response of individual party members may be more nuanced, particularly amongst younger voters. The Article comments on state level initiatives to counteract the effects of climate change that have gathered bipartisan support but are now subject to partisan actions by the federal government designed to limit their effectiveness. The Article concludes with the observation that as the combination of an aging demographic and alignment with a declining fossil fuel industry shrinks the GOP traditional constituency, it is to be hoped that far-sighted politicians from both parties will embrace credibility on this issue as a key component of enhancing their own as well as the planet's survival.

KEYWORDS

Environmental Partisanship, U.S. Withdrawal from the Paris Climate Change Agreement, State-level Bipartisan Initiatives, Environmental Federalism

CONTENTS

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I. Introduction

Climate Change is a global problem that can no longer be ignored. A special report prepared by the Intergovernmental Panel on Climate Change (IPCC) warns that global temperatures are likely to reach 1.5°C above pre-industrial levels between 2030 and 2052 if they continue to increase at the current rate, that global warming is closely associated with human activity and that it poses significantly increased risks to health, livelihoods, food security, water supply, human security, and economic growth.[1] In the 2017/2018-year period the global surface temperature was the fourth highest since the introduction of instrumental measures at the Goddard Institute for Space Studies (GISS)[2] and +1.7°C warmer than the average temperatures for the time period 1880/1920, an appropriate base period for an estimate of 'pre-industrial temperature' in part because this was the earliest period with appropriate and substantial instrumental measurements and in part because unusually high volcanic activity off-set warming from human-made greenhouse gas activity.[3]

The results of a warming planet were felt the world over with higher than usual temperatures that led to record rainfalls, wildfires and, droughts. Thus, even if the target goal of 1.5°C of warming were achievable and achieved, leading climate scientists agree that climate change is transforming our planet in ways beyond their initial scientific estimates. Mitigation and adaptation require a global coordinated response[4] but this can pose significant challenges at the domestic level. For the United States, "with its love of big houses, big cars and blasting air conditioners,"[5] the challenges are particularly severe; the United States and China together account for approximately 45% of global greenhouse gas emissions. The federal legislation that put in place the Environmental Protection Agency (EPA) and gave it the legislative framework to enable it to do its job remains more or less in place but fifty years on, an updated response to the contemporary climate change challenge is thwarted by the polarization of partisan politics.

This Article considers current U.S. administration responses to environmental regulation from the perspective of political polarization. In Part One, we identify U.S. international climate change obligations and comment on the rollback of Obama-era environmental regulations now taking place at federal level. In Part Two, we locate these policies in the context of the growth of political polarization and partisanship that now characterizes U.S. politics. We note the recommendations of the American Political Science Association (APSA) published in 1950 to the effect that too little party differentiation and an absence of clear political identity are inimical to a two-party system democracy, but suggest that the results of

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1 Intergovernmental Panel on Climate Change, Global Warming of 1.5°C (2018), http://www.ipcc.ch/report/sr15/ (last visited Mar. 4, 2019).

2 James Hanson et al., *Global Temperature in 2018 and Beyond,* Earth Institute, Columbia University (Feb. 6, 2019), http://csas.ei.columbia.edu/2019/02/06/global-temperature-in-2018-and-beyond/. *See also,* James Hansen et al., *Global Surface Temperature Change*, 48 Reviews of Geophysics (2010).

3 *Id.*

4 *See, e.g.* World Meteorological Organisation, WMO Statement on the State of the Global Climate in 2018 (2019).

5 Justin Gills & Nadia Popovitch, *The U.S. Is the Biggest Carbon Polluter in History: It Just Walked Away from the Paris Climate Deal*, N.Y. Times (June 1, 2017).

implementation have not been as predicted; contemporary hyper-partisanship indicates that the pendulum has now swung too far the other way.

In Part Three, we note that environmental regulation now divides the Republican and Democratic Parties but comment on research that suggests that, at the level of individual party members, support for a more positive response to tackling climate change may cross party lines. To the extent that party affiliation and loyalty are now matters of personal identity, political agendas at the level of national politics can mask or conceal internal contradictions and inconsistencies and this, we suggest, is the case here.

In Part Four, we note that state level initiatives to counteract the effects of climate change have gathered bipartisan support but are subject to partisan attempts by the federal government to preempt their effectiveness. We note in particular the Trump Administration's attacks on California and the multi-state lawsuit initiated in response to the withdrawal of California's vehicle emissions waiver. We note that, although described as non-partisan, the states involved are predominantly Democrat or Democrat-leaning and consider the suggestion that these disputes are primarily about delineating the boundaries of state and federal government authority. We conclude with the observation that, indicators of healthy federalism or not, for a younger generation of voters, these are disputes that concern the existential issue of the age. If for that reason alone, all politicians sooner rather than later will have to respond.

II. The United States and the Challenge of Climate Change

The United Nations Framework Convention on Climate Change (UNFCCC) adopted on 9 May 1992 and opened for signature at the Earth Summit in Rio de Janeiro a month later, represented the first international treaty attempt to respond to the threat of climate change.[6] It entered into force on 21 March 1994 and today has 197 signatories, including the United States.[7] The UNFCCC called for stabilizing "greenhouse gas concentrations at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system. ... within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner."[8] The Kyoto Protocol which entered into force on 16 February 2005 implemented this objective with a principle of common but differentiated responsibilities, putting the burden of reducing greenhouse gas emissions on the 37 industrialized countries with historic responsibility for high levels of atmospheric pollution and exempting more than 100 developing countries, including China and India.[9] For this reason

6 United Nations Framework Convention on Climate Change (adopted May 9, 1992, entered into force March 21, 1994) 1771 U.N.T.S. 107.

7 The UN Framework Convention on Climate Change was signed by President George H.W. Bush on behalf of the United States and subsequently ratified by the Senate.

8 UNFCC, *supra* note 6.

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted Dec. 11, 1997, entered into force Feb. 16, 2005) 2303 U.N.T.S. 161.

the United States did not ratify the treaty and the Bush Administration withdrew in 2001.

By contrast, the Paris Climate Agreement which opened for signature on 22 April 2016 and entered into force on 4 November 2016, required nearly every country in the world to commit to lowering their greenhouse gas emissions with a universal accounting system for emissions, and a requirement for individual countries to monitor emissions, and create a plan for emissions reduction.[10] The effect "for the first time—[brought] all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to assist developing countries to do so."[11] As such, the Agreement represented "a new course in the global climate effort."[12]

The long-term goal is to substantially reduce the risks and effects of climate change by keeping the increase in global average temperature to below 2 °C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[13] Greenhouse gas emissions (GGE) contribute to climate change by trapping heat and making the planet warmer.[14] Signatories to the Paris Climate Agreement agreed to reach "global peaking of greenhouse gas emissions as soon as possible" with 20/20/20 targets: 20% reduction of greenhouse gas emissions, 20% increase in the use of renewable sources of energy and 20% increase of energy efficiency (with a 20 % reduction of energy consumption). As of May 2019, 197 states and the European Union (EU) have signed the Agreement.[15] 185 states and the EU, representing more than 88% of global greenhouse gas emissions, have ratified or acceded to the Agreement, including three of the largest producers of greenhouse gas emissions: China, the United States and India.[16] The United States became a signatory to the Paris Agreement in April 2016 and accepted it by executive signature in September 2016, thereby obviating the need for ratification by Congress.[17] President Obama committed the United States to contributing US$3 billion to the Green Climate Fund, an initiative within the United Nations Framework on Climate Change that seeks to helps developing countries limit or reduce their greenhouse gas (GHG) emissions and adapt to climate change.[18]

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10 UN Framework Convention on Climate Change Conference of Parties, Twenty-First Session, *Adoption of the Paris Agreement* (12 Dec. 2015) UN Doc FCCC/CP/2015/L.9/Rev.1 [hereinafter referred to as 'Paris Agreement'].

11 https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement.

12 *Id.*

13 http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf.

14 EPA, *Sources of Greenhouse Gas Emission*, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Oct. 17, 2019).

15 Paris Agreement, United Nations Treaty Collection. 8 July 2016.Status as at: 09-07-2019 05:00:39 EDT, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

16 China: 30%; US: 15%; India: 7%; Russia 5%; Japan: 4%.

17 *See* Tanya Somander, *President Obama: The United States Formally Enters the Paris Agreement* (Sept. 3, 2016, 10.41 AM ET), https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement.

18 Green Climate Fund, https://www.greenclimate.fund/who-we-are/about-the-fund (last accessed Oct. 20, 2019).

The United States and China together account for approximately 45% of global greenhouse gas emissions. The U.S.-China Joint Presidential Statement on Climate Change issued on March 31, 2016, confirmed that both countries would sign the Paris Agreement and signaled U.S. intentions to take a full leadership role in tackling the global problem of climate change.[19] On September 3, 2016, as the United States and China deposited with U.N. Secretary-General Ban Ki-Moon their respective joining documents, President Obama uttered these remarks:

> We have a saying in America—that you need to put your money where your mouth is. And when it comes to combating climate change, that's what we're doing, both the United States and China. We're leading by example. As the world's two largest economies and two largest emitters, our entrance into this agreement continues the momentum of Paris, and should give the rest of the world confidence—whether developed or developing countries—that a low-carbon future is where the world is heading.[20]

Early in his presidency, President Barack Obama had identified tackling climate change as a key priority. In his first address to the United Nations he pledged "a new day, a new era" to address a climate change challenge that was serious, urgent and growing: "Our generation's response to this challenge will be judged by history; for if we fail to meet it boldly, swiftly and together, we risk consigning future generations to an irreversible catastrophe."[21] His 2013 Climate Change Plan announced ambitious plans for curbing carbon pollution and agency support for local investment to help vulnerable communities on the domestic level. Internationally it committed to leading and expanding existing global climate change initiatives, including those with China, India and other major emitting countries and called for the end of U.S. government support for public financing of new coal-fired power plants overseas.[22]

However, following the mid-term elections which saw the House flipped and Senate Democratic numbers reduced, the domestic ambitions of Obama's second term fell victim to political partisanship. With the loss of its legislative majority, the Administration fell back on the power of the presidency to in effect bypass Congress.

Achievements of the second term, including fuel economy standards for light-duty vehicles (passenger cars and trucks),[23] restrictions on methane emissions and other pollutants, and updating energy efficiency standards for home appliances,[24]

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19 The White House, Office of the Press Secretary, *U.S.-China Joint Presidential Statement on Climate Change*, (March 31, 2016) https://obamawhitehouse.archives.gov/the-press-office/2016/03/31/us-china-joint-presidential-statement-climate-change.

20 President Obama, reported by Somander, *supra* note 17.

21 President Barack Obama at UN Climate Change Summit, Energy.Gov. https://www.energy.gov/videos/president-barack-obama-un-climate-change-summit.

22 The White House, Office of the Press Secretary, *Fact Sheet: President Obama's Climate Action Plan* (June 25, 2013).

23 *2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards*, 49 C.F.R. 523, 531, 533, 536, 537 49.

24 *See* Marianne Lavelle, *2016, Obama's Climate Legacy Marred by Triumphs and Lost Opportunities*, Inside Climate News, Dec. 26, 2016, https://insideclimatenews.org/news/23122016/obama-climate-change-legacy-trump-policies.

were effected in the main by executive orders and regulations, "the tools of the administrative presidency,"[25] leaving them vulnerable to reversal by an incoming regime.[26] The Clean Power Plan[27] unveiled August 23, 2015 was arguably the "most visible" of the Obama's climate initiatives.[28] The Plan sought to tackle carbon dioxide emissions from existing fossil fuel burning power plants, the largest source of climate pollution in the United States, by requiring a 32% reduction from 2005 levels by 2030. It was immediately challenged by a coalition of Attorneys-General from more than 24 Republican states, was stayed by the Supreme Court, pending a ruling by a lower federal court and has never come into effect. [29]

The 2016 election victory of Donald J. Trump as 45th President of the United States barely four months after U.S. accession to the Paris Agreement, signaled a change of pace in American leadership on climate change policy on both domestic and international fronts.[30] In the intervening period, there have been no significant U.S. initiatives to combat climate change. On the contrary, Obama's key domestic and international measures have been systematically attacked. [31] On June 1, 2017, President Trump announced his intention to withdraw the United States from the Paris Agreement, thereby signaling a step back from international leadership on environmental issues. On the domestic front, "[t]he Trump Administration's tumultuous presidency has brought a flurry of changes—both realized and anticipated—to U.S. environmental policy."[32]

President Trump's first actions on taking office included the appointment as head of the EPA of Scott Pruitt, a 'climate change denier' who has refused to acknowledge the connection between climate change and human activity and lost little time in initiating the roll-back of Obama era achievements and regulations that now characterizes this Administration.[33] Under the leadership of his successor

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25 David M. Konisky & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 Publius 345, 356 (2018).

26 William F. Grover & Joseph G. Peschek, The Unsustainable Presidency: Clinton, Bush, Obama, and Beyond (2014).

27 Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule , 40 C.F.R. 205 (Oct 23, 2015). *See* The White House, Office of the Press Secretary, *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants* (Aug. 03, 2013).

28 Joshua Linn et al., *The Supreme Court's Stay of the Clean Power Plan: Economic Assessment and Implications for the Future*, 46 Envtl. L. Rep. News & Analysis 10859 (2016).

29 West Virginia v. EPA, No. 15-1363 (D.C. Cir. Jan. 21, 2016); West Virginia v. EPA, No. 15A773 (U.S. Feb. 9, 2016).
See Paul Nolette, *The Dual Role of State Attorneys General in American Federalism: Conflict and Cooperation in an Era of Partisan Polarization*, 47 Publius 342 (2017).

30 *Id.*

31 Douglass F. Rohrman, *Senator Obama and the Environment*, 6 Frontiers in Ecology & Env't 450 (2008).

32 Michael Greshko et al., *A Running List of How President Trump Is Changing Environmental Policy*, National Geographic (May 3, 2019) https://www.nationalgeographic.com/news/2017/03/how-trump-is-changing-science-environment/.

33 *See* S. Suresh, *Climate Change Denial Is a War on Humanity*, Fair Observer (Feb.13, 2018), https://www.fairobserver.com/region/north_america/donald-trump-scott-pruitt-climate-change-epa-news-13421/.

Andrew Wheeler, a former coal industry representative and lobbyist,[34] the EPA has replaced the Clean Power Plan[35] and announced a replacement of the WOTUS (Waters of the United States) rule with the likely effect that polluters will no longer need a permit to discharge potentially harmful substances into many streams and wetlands.[36] Rules regarding fracking on public lands and coal leases on federal land have been repealed;[37] restrictions on automobile tailpipe[38] and methane emissions[39] are to be relaxed and against the advice of its own scientists and lawyers the EPA has failed to ban new uses of asbestos when "many developed countries ... including the United Kingdom, Japan, South Korea, France, Italy, Spain, Australia, Germany, the Netherlands and Finland" have already done so and Brazil has recently voted to do the same."[40] Pesticide safety rules have been rolled back or eliminated on the basis that the data supporting objections to the use of the pesticide was "not sufficiently valid, complete or reliable."[41]

The change of pace has happened primarily at federal level; at State level, by contrast, numerous actions have been implemented to counteract the effects of climate change and initiatives promoted for a more responsible use of natural

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34 Steven Mufson, *Scott Pruitt's Likely Successor Has Long Lobbying History on Issues Before the EPA,* Wash. Post (July 5, 2018).

35 On June 19, 2019, EPA issued the final Affordable Clean Energy rule (ACE) replacing the CPP with a rule that "restores rule of law, empowers states, and supports energy diversity." The ACE rule establishes emission guidelines for states to use when developing plans to limit carbon dioxide (CO_2) at their coal-fired electric generating units (EGUs). The EPA made the announcement on September 19, 2019.

36 The Administration is likely to base the new rule on Justice Scalia's dissent in *Rapanos v. United States*, 547 U.S. 715 (2006) limiting the definition of navigable waters within the jurisdiction of the Clean Water Act to "relatively permanent" waters and wetlands with a continuous surface connection to larger rivers and streams. *See* David Koniskey & Neal D. Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 Publius 345, 348-50 (2019) (suggesting that the change "may lead to a loss of protection for in the region of two million miles of streams and 20 million acres of wetlands which is potentially significant since as many as one in three Americans get their drinking water from a source that may not qualify for EPA protection under Scalia's definition). *Id*. at 361.

37 Chelsea Harvey, *The Coming Battle Between Economists and the Trump Team over the True Cost of Climate Change*, Wash. Post (Dec. 22, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/12/22/the-coming-battle-between-the-trump-team-and-economists-over-the-true-cost-of-climate-change/.

38 *See* EPA 40 CFR Parts 85 and 86 DOT, NHTSA, 49 CFR Parts 531 and 533 *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program* (Sept. 27, 2019).

39 *See* EPA *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review*, 40 CFR 60 (Aug. 28, 2019).

40 Memorandum from Richard Mednick Region10 Office of Regional Counsel et al. to Robert Courtnage, National Program Chemicals Division ,Office of Pollution Prevention and Toxics *Comments on the Proposed Rule, Asbestos, Significant New Use Rule (RIN2070-AK45),FRL9978-76,EPA-HQ-OPPT-2018-00159*, (May 31, 2018), available at https://int.nyt.com/data/documenthelper/815-e-p-a-memos-on-asbestos/12c87a96be998db10048/optimized/full.pdf#page=1(last visited Oct.17, 2019.)

41 EPA Chlorpyrifos, 40 CFR 180 (July 18, 2019) (Final Order Denying Objections to March 2017 Petition Denial Order).

resources.[42] What is clear, however, is that environmental regulation is very much a partisan issue. President Trump, himself a climate change denier,[43] campaigned on a platform of deregulation so that, as from day one, as Larsen and Herndon put it, the CPP was a "dead reg walking". [44]

This has not always been the case; the current framework of environmental legislation was put in place under a Republican administration and in a spirit of general environmental concern. As his first official act President Richard Nixon signed the U.S. National Environmental Policy Act (NEPA) into law on January, 1970. The Clean Air Act of the same year received no opposition in the Senate and only one hostile vote in the House.[45] President Nixon's support at the signing ceremony was effusive:

> As we sign this bill in this room, we can look back and say, in the Roosevelt Room on the last day of 1970, we signed a historic piece of legislation that put us far down the road toward a goal that Theodore Roosevelt, 70 years ago, spoke eloquently about: a goal of clean air, clean water, and open spaces for the future generations of America.[46]

George H.W. Bush, as Republican candidate, campaigned on an environmental program and as President signed into law the Clean Air Act Amendments of 1990. The cap-and-trade system that it introduced to cut power plant pollution and reduce acid rain was described by the New York Times as a "model for updating in the 1990s the other 1970s-era statutes that form the foundation of the nation's environmental program."[47] By 2013 however, the Boston Globe was commenting on a change: "Republicans no longer seriously contest the environmental vote; instead, they have run from it. Largely as a result, national environmental policy-making has become one-sided, polarized, and stuck."[48] Environmentalism had become a partisan issue:

> Environmentalists exacerbated the Republican shift away from environmental issues by allying forcefully with the Democratic Party.

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42 Dana R. Fisher, Joseph Waggle & Philip Leifeld, *Where Does Political Polarization Come From? Locating Polarization Within the U.S. Climate Change Debate*, 57 American Behavioral Scientist 70–92 (2013).

43 *See* Chris Cillizza, *Donald Trump Buried a Climate Change Report Because "I Don't Believe It"*, CNN Politics, Updated 1557 GMT (2357 HKT) Nov. 27, 2018, https://edition.cnn.com/2018/11/26/politics/donald-trump-climate-change/index.html.

44 *Id.*

45 *Id.*

46 *See* Jaime Fuller*, Environmental Policy Is Partisan; It Wasn't Always*, Wash. Post (June 2, 2014 at 11:30 a.m. GMT+1) https://www.washingtonpost.com/news/the-fix/wp/2014/06/02/support-for-the-clean-air-act-has-changed-a-lot-since-1970/.

47 *See* Paul Sabin, *The Decline of Republican Environmentalism*, Boston Globe (Aug. 31, 2013, 12:00 AM), https://www.bostonglobe.com/opinion/2013/08/30/the-decline-republican-environmentalism/P6lEmA4exWFamGnkQLOQlL/story.html.
See also, Marshall Shepherd, *The Surprising Climate and Environmental Legacy of President George H.W. Bush*, Forbes, (Dec. 1 2018, 07:58 AM) https://www.forbes.com/sites/marshallshepherd/2018/12/01/the-surprising-climate-and-environmental-legacy-of-president-george-h-w-bush/#2fda7124589c.

48 Sabin, *supra* note 47.

> Environmental groups gave Bush little credit for his accomplishments. When they denounced Bush for his failings, and allowed Democrats to claim the environmental mantle exclusively for themselves, environmentalists helped to drive both parties to the extremes. The Democrats veered toward warning of environmental apocalypse, while Republicans went to the other pole, denying the threat of environmental problems.[49]

For President Obama the result was political deadlock: "Republican politicians mostly deny the threat of climate disruption and block legislative solutions, while President Obama tries to go it alone with a shaky patchwork of executive actions. A middle ground on environmental policy remains a mirage."[50] For President Trump, rejection of climate change science is largely in pursuit of a political agenda of deregulation that now characterizes Republican Party ideology. [51]

III. Partisanship and Polarization in U.S. Politics

President Barack Obama famously remarked that "[t]his country (the United States) is founded on compromise.[52] The horizontal division of powers that is built into U.S. constitutional arrangements "forces national leaders to seek cooperation from an array of independent actors, all with their own bases of political power and formal authority" [53] and requires "exceptional skill at negotiation and conciliation." Currently, however, as Professor Bullman-Pozen observes, the "rise of ideologically coherent, polarized parties means that partisanship matters more for the competition it generates than for the cooperation it inspires."[54] Partisanship and polarization give Americans political representatives "who struggle to cooperate across party lines at an unprecedented rate, resulting in high profile fiscal and policy battles, government shutdowns, and an inability to resolve problems or enact legislation that guides the nation's domestic and foreign policy."[55]

If political polarization, is now the defining feature of early 21st century politics,[56] partisanship in U.S. politics is hardly a new phenomenon. [57] George

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49 *Id.*

50 *Id.*

51 Brian Helmuth et al., *Trust, Tribalism and Tweets: Has Political Polarization Made Science a "Wedge Issue"?*, 3 Climate Change Responses (2016), http://climatechangeresponses.biomedcentral.com/articles/10.1186/s40665-016-0018-z (last visited Feb. 28, 2019).

52 Barack Obama, Press Conference, White House, (Dec. 3, 2010), available at https://www.youtube.com/watch?v=koZkFQ-_SK4.

53 Frances E. Lee, *How Party Polarization Affects Governance*, 18 Annual Review of Political Science 261, 262 (2015).

54 Jessica Bulman-Pozen, *Partisan Federalism*, 127 Harv. L. Rev. 1077, 1081 (2014).

55 Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10(4) PLoS ONE e0123507 (2015), https://doi.org/10.1371/journal.pone.0123507.

56 Carroll Doherty, *7 Things to Know About Polarization in America*, Opinion Today (June 12, 2014) http://opiniontoday.com/2014/06/12/7-things-to-know-about-polarization-in-america/

57 David W. Brady, Hahrie Han & Jeremy C. Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 Legislative Studies Quarterly 79–105 (2007).

Washington in his farewell address of 1796 warned against partisanship, condemning parties as: "[d]ivisive, disruptive, and the tools of demagogues seeking power.*"*[58] Washington feared that partisanship would lead to a "Spirit of Revenge" in which politicians would not govern for the good of people, but only to obtain and maintain their grip on power.[59] As a result, he warned Americans to guard against would-be despots who would use parties as "Potent engines ... to subvert the power of the people and to usurp for themselves the reins of government".[60] Despite this warning, as historians have noted, much, if not most, of U.S. political history has been characterized by high levels of partisanship with a post war interval of muted party conflict representing something of an exception.[61]

Partisanship in the sense of loyalty and polarization in the sense of division are not the same and the one does not necessarily imply the other. In contemporary U.S. politics however the position seems to be that they do. American parties, in general terms, have become progressively more programmatic, cohesive and, ideologically distinct.[62] An increase in party distinctiveness has been accompanied by a measurable rise in party conflict.[63] Van Houweling reports that an increasing proportion of Congressional votes—more than 90%—involves parties voting against the other. [64] And when party conflicts do occur, both Representatives and Senators exhibit more loyalty to their parties than they did in the past.[65] This tallies with the results of other studies of Congressional voting behavior to the effect that between the 1950s and the 1970s only 60% voted on party lines, but this figure rose to over 70% in the 1980s and continues to rise to today's levels. [66]

In 2018, the Washington Post identified a potential culprit: a "little-known report" that "keeps popping up in commentary on the state of American politics," and its authors blamed for contemporary political gridlock.[67] The report in question,

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58 Washington's Farewell Address 1796, http://avalon.law.yale.edu/18th_century/washing.asp.

59 *Id.*

60 *Id.*

61 *See* Brady et al., *supra* note 59. *See also* Joanne Freeman, Affairs of Honor: National Politics in the New Republic 269-72 (2001) (noting that Federalists and Jeffersonians-Republicans were polarized over tariffs, the national bank, and, more generally, federal versus state and citizen power in the 1790s. Similar battles were fought between the Whigs and the Democrats in the 1830s and 1840s and again in 1850s and then the 1890s as Democrats and Republicans split over slavery and then agrarian and currency issues).

62 Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 Party Politics 483–503 (2006).

63 Edward G. Carmines & Michael W. Wagner, *Political Issues and Party Alignments: Assessing the Issue Evolution Perspective*, 9 Annual Review of Political Science 67–81 (2006).

64 Robert Parks Van Houweling, An Evolving End Game: The Partisan Use of Conference Committees in the Post-Reform Congress 47 (2003).

65 *Id.*

66 Marcus E. Ethridge & Howard Handelman, Politics in a Changing World (7th ed. 2014); Eric A. Posner & E. Glen Weyl, *Voting Squared: Quadratic Voting in Democratic Politics*, 68 Vand. L. Rev. 441 (2015).

67 Mark Wickham-Jones, *This 1950 Political Science Report Keeps Popping up in the News. Here's the Story Behind It*, Wash. Post (July 24, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/24/this-1950-political-science-report-keeps-popping-up-in-the-news-heres-the-story-behind-it/.

Toward a More Responsible Two-Party System,[68] written in 1950 for the American Political Science Association (APSA) was the product of a four-year inquiry into how governmental processes designed "for an untried federal republic in an undeveloped corner of the eighteenth-century world" might best be adapted to meet contemporary needs. [69] Specifically the report was critical of what it saw as the major weakness of the 1950s political framework: the parties were too similar to each other and lacked the necessary structures to operate effectively at national level. Moreover they were too unwilling to engage in conflict. Clearer ideological distinctions and "meaningful national programs" were needed to provide voters with real political choices, and thereby ensure democratic accountability:

> The fundamental requirement of accountability is a two-party system in which the opposition acts as the critic of the party in power, developing, defining and presenting the policy alternatives which are necessary for a true choice in reaching public decisions. The opposition most conducive to responsible government is an organized party opposition.[70]

APSA was not the first to lament the absence of clear party identifications. Such complaints can be traced as far back as the 1830s when Alexis de Tocqueville complained: "What I call great political parties are those more attached to principles than to consequences, to generalities rather than to particular cases, to ideas rather than to personalities. America has had great parties; now they no longer exist".[71]

Fifty years later Viscount James Bryce, a Scot, wrote of the differences between "intelligent Republicans" and "intelligent Democrats":

> Neither party has, as a party, anything definite to say on these issues; neither party has any clean-cut principles, any distinctive tenets. Both have traditions. Both claim to have tendencies. Both have certainly war cries, organizations, interests enlisted in their support. But those interests are in the main the interests of getting or keeping the patronage of the government. Distinctive tenets and policies, points of political doctrine and points of political practice, have all but vanished. They have not been thrown away, but have been stripped away by time and the progress of events, fulfilling some policies, blotting out others. All has been lost, except office or the hope of it. [72]

APSA's fear was that, absent its recommended reforms, there was a danger that repeated "demonstrations of ineffectiveness" would lead to voter alienation and an

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68 APSA, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44(3) Am Pol. Sci. Rev. (1950) (Johnson Reprint Corp. 1973).

69 Philip Levy, *Toward a More Responsible Two-Party System. A Report of the Committee on Political Parties of the American Political Science Association* 65 Harv. L. Rev. 536, 536 (1952).

70 APSA, *supra* note 68, at 1-2, 17-19.

71 Alexis de Tocqueville , Democracy in America 161 (1994)(1835).

72 2 Viscount James Bryce, The American Commonwealth, with an Introduction by Gary L. McDowell (Indianapolis: Liberty Fund, 1995) (1888), https://oll.libertyfund.org/titles/697#Bryce_0004-02_51.

"unbridgeable political cleavage" which would fragment the two-party system and destabilize American political life:

> *If the two parties do not develop alternative programs that can be executed, the voter's frustration and the mounting ambiguities of national policy might also set in motion more extreme tendencies to the political left and the political right*. This again, would represent a condition to which neither our political institutions nor our civic habits are adapted. *Once a deep political cleavage develops between opposing groups, each group naturally works to keep it deep.* [73]

Ironically from where we now stand, the report concluded that accentuation of party difference was the way this cleavage would be avoided:

> *Orientation of the American two-party system along the lines of meaningful program*s, far from producing an unhealthy cleavage dividing the electorate, *is* actually *a significant step toward avoiding the development of such a cleavage*. It is a way of keeping differences within bounds. It is a way of reinforcing the constitutional framework within which the voter may, without peril exercise his freedom of political choice.[74]

The changes in party organization and programmatic agendas that have since taken place have been documented by political historians and are beyond the present scope of this Article.[75] Professor Rohde has suggested that the assumption by the APSA committee was that by providing more ideological distinction among the parties, clarity and responsibility would follow suit.[76] Today, the results are all too plain. Parties have certainly become more distinctive but the results are not what APSA intended. With the benefit of hindsight, the exact opposite has occurred; clarity of ideology has hindered rather than promoted what the APSA committee hoped for namely, a "more reasonable discussion of public affairs."[77] As the Pew Research Center reported in 2014, Republicans and Democrats "are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades."[78] Polarization and partisan allegiance as features of U.S. political life are at an all-time high. They have produced what

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73 *Id*. at 95 (emphasis in the original).

74 *Id*. at 95-96 (emphasis in the original).

75 *See, e.g.,* Alan I. Abramowitz, The Disappearing Center (2010); John H. Aldrich, Why Parties? A Second Look 163-323 (2011); Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 Ann. Rev. Pol. Sci. 83 (2006); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 Calif. L. Rev. 273 (2011).

76 David W. Rohde, Parties and Leaders in the Postreform House (1991).

77 Philip Levy, *supra* note 69.

78 *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Policy, Compromise and Everyday Life*, Pew Research Centre (June 12, 2014), https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/.

has been termed the most ideologically polarized Congress in modern history;[79] political gridlock has become an accepted feature of contemporary U.S. politics. [80]

While the causes of the current "hyper-partisanship"[81] are complex, it is undoubtedly the case that political factionalism at the national level is closely tied to and mirrors an intensification of ideological polarization at the level of the electorate.[82] It has been suggested that structural practices such as the district boundary gerrymander and the presidential primary can bear some responsibility. Low-turnout primaries, it is said, permit extremist positions to prevail over the center. [83] Gerrymandering of congressional districts by reference to party allegiance further limits the influence of moderate voters. [84] In this connection the recent decision of the U.S. Supreme Court in *Rucho*, which puts partisan gerrymandering

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79 *See* Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 Notre Dame L. Rev. 2323, 2370 (2014). *See also* Edward G. Carmines & Matthew Fowler*, The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 Ind. J. Global Legal Stud. 369, 370–71 (2017) (referring to the 114th Congress); Geoffrey C. Layman et al., *Party Polarization In American Politics: Characteristics, Causes, and Consequences*, 9 Annual Review of Political Science 83–110 (2006).

80 Clio Andris et al., *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10(4) PLoS One e0123507 (2015), https://doi.org/10.1371/journal.pone.0123507; Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 Party Politics 483–503 (2006); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L. J. 1663–1750 (2004).

81 Thomas E. Mann, *We Must Address Gerrymandering*, Time (Oct. 13, 2016), https://time.com/4527291/2016-election-gerrymandering/.

82 *See* Andris et al., *supra* note 80, at 1-2 (flagging up "the stratifying wealth distribution of Americans, boundary redistricting, activist activity at primary elections, changes in Congressional procedural rules political realignment in the American South, the shift from electing moderate members to electing partisan members, movement by existing members towards ideological poles; and an increasing political, pervasive media"), (citing Olympia J. Snowe, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 Harv J. Legis. 21 (2013));
Nolan McCarty et al., Polarized America: The Dance of Ideology and Unequal Riches (2006); Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives* 35Am. Pol. Res. 878 (2007); Steven J. Rosenstone & John Mark Hansen, Mobilization, Participation, and Democracy in America (1993); Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12 Party Politics 483 (2006), Jason M. Roberts & Steven Smith, *Procedural Contexts, Party Strategy and Conditional Party Voting in the U.S. House of Representatives 1971–2000*, 47 Am. J. Pol. Sci. 305 (2003); Jeffrey A. Jenkins, *Examining the Bonding Effects of Party: A Comparative Analysis of Roll-Call Voting in the U.S. and Confederate Houses.* 43 Am. J. Pol. Sci. 1144 (1999).

83 Elaine C. Kamarck, *Increasing Turnout in Congressional Primaries*, Center for Effective Public Management at BROOKINGS (July 2014) https://www.brookings.edu/wp-content/uploads/2016/06/KamarckIncreasing-Turnout-in-Congressional-Primaries72614.pdf.

84 Fred Dews, *A Primer on Gerrymandering and Political Polarization* Brookings (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/.

beyond the reach of the federal judiciary is unfortunate.[85] Historically, of course, as the Chief Justice remarked, the practice is not new[86] and is not confined to one party,—*Rucho* itself concerned both the Republican map in North Carolina and a Democratic map in Maryland.[87] The point should not however be overstated; what seems to be happening is what the Chief Justice called a "natural" gerrymander;[88] as Kamarck explains "in recent years Americans seem to have "sorted themselves" into like-minded communities."[89] Brookings researchers Galston and Mann agree:

> Because people increasingly prefer to live near others who share their cultural and political preferences, they are voting with their feet and sorting themselves geographically. … Many more states and counties are dominated by one-party supermajorities than in the past. Contrary to widespread belief, reducing the gerrymandering of congressional districts would make only a small dent in the problem. [90]

The effect, put succinctly is partisan concentration: "In recent years, red states have gotten redder, blue states bluer and the same holds for counties." [91]

Underlying this is the continuing rise of identity politics; as political theorists and psychologists confirm,[92] affiliation to a political party and the values that it promotes have become important indicators of personal and social identity with the result that politics now lends itself to be conducted in terms of tribes and tribalism rather than specific issues.[93] In the words of Professor Appiah "American politics ... is driven less by ideological commitments than by partisan identities—less by what

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85 Rucho v. Common Cause, 139 S. Ct. 2484 (2019): "Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."(Roberts, C.J.).

86 *Id*. at 2494.

87 *See* Zack Beauchamp, *The Supreme Court, Gerrymandering and the Republican Turn Against Democracy*, Vox, (June 27, 2019, 2.30 pm EDT): "In 2010, Republican strategist Karl Rove wrote an op-ed in the Wall Street Journal advocating a significant Republican push to gerrymander legislative districts after that year's midterm elections. Rove's idea manifested as Project REDMAP, a dark-money campaign to support Republican candidates for state legislature and then help them redraw House districts after the 2010 census.".

88 *Rucho*, 139 S. Ct. 2484 , 2501 (Roberts, C.J., posing the hypothetical: "Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.").

89 Kamarck, *supra* note 83.

90 William A Galston & Thomas E. Mann, *Republicans Slide Right: The Parties Aren't Equally to Blame for Washington's Schism,* BROOKINGS (May 16, 2010) https://www.brookings.edu/opinions/republicans-slide-right-the-parties-arent-equally-to-blame-for-washingtons-schism/.

91 Dews, *supra* note 84.

92 *See, e.g*., Donald Green et al., Partisan Hearts and Minds (2002); Nancy L. Rosenblum, On the Side of the Angels (2008) (arguing that Party identification is an important part of social identification). .

93 Brian Helmuth et al., *Trust, Tribalism and Tweets: Has Political Polarization Made Science a "Wedge Issue"?*, 3 Climate Change Responses (2016), http://climatechangeresponses.biomedcentral.com/articles/10.1186/s40665-016-0018-z (last visited Feb. 28, 2019).

we think than by what we are. Identity precedes ideology."[94] Or—as the headline writer put it—"all politics is identity politics."[95] Yet, as Appiah also points out, "the collective identities they spawn" can be riddled with contradictions.[96] Nowhere is this more true than in relation to the environment.

IV. Partisanship and the Environment

In terms of demographic, research identifies a Republican core constituency that is predominantly white, attends church regularly, has a conservative mindset on social issues such as immigration, same-sex marriage and racially equality, and responds to anti- abortion and gun control cues. [97] Top priorities, according to a Pew Research Center report, are terrorism and the economy.[98] Democratic voters on the other hand are racially and ethnically diverse, are socially liberal, see their top policy priorities in terms of reducing health care costs, improving education, protecting the environment and securing Medicare and are universally opposed to President Donald Trump. [99] "None of these," states the report, "is among the five leading top priorities for Republicans and Republican-leaning independents (Medicare and health care costs rank sixth and seventh, respectively)."[100] On global climate change the partisan gap is particularly wide: "two-thirds of Democrats and Democratic leaners identify global climate change as a top priority, while just 21% of Republicans and Republican leaners say the same."[101]

Another report published seven months later concluded that the percentage of Americans who regard global climate change as a "major threat" to the well-being of the United States grew from 40% in 2013 to 57% in 2019 but the rise in concern is mainly on the part of Democrats; opinions among Republicans on this issue remain "largely unchanged".[102] In terms of voting behavior, a 2018 Pew

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94 Kwame Anthony Appiah, *People Don't Vote for What They Want; They Vote for Who They Are*, Wash Post, (Aug. 30, 2018) https://www.washingtonpost.com/outlook/people-dont-vote-for-want-they-want-they-vote-for-who-they-are/2018/08/30/fb5b7e44-abd7-11e8-8a0c-70b618c98d3c_story.html. *See also* Kwame Anthony Appiah, The Lies That Bind: Rethinking Identity (2018).

95 Appiah, *People Don't Vote, supra* note 24.

96 *Id.*

97 Michele F. Margolis, *How Politics Affects Religion: Partisanship, Socialization, and Religiosity in America*, 80 Journal of Politics 30–43 (2018).

98 Bradley Jones, *Republicans and Democrats Have Grown Further Apart on What the Nation's Top Priorities Should Be*, Pew Research Center (Feb. 5, 2019), https://www.pewresearch.org/fact-tank/2019/02/05/republicans-and-democrats-have-grown-further-apart-on-what-the-nations-top-priorities-should-be/.

99 J. Baxter Oliphant, *6 Facts About Democrats as the Party Holds Its Presidential Debates*, Pew Research Center, (June 26, 2019) https://www.pewresearch.org/fact-tank/2019/06/26/facts-about-democrats/.

100 Jones, *supra* note 98.

101 *Id.*

102 Brian Kennedy & Meg Heffaron, *U.S. Concern About Climate Change Is Rising but Mainly Among Democrats,* Pew Research Center (Aug. 28, 2019), https://www.pewresearch.org/fact-tank/2019/08/28/u-s-concern-about-climate-change-is-rising-but-mainly-among-democrats/.

survey found that for Democrats seeking party nomination, climate change is now "centre stage" with 82% of registered Democrats agreeing that environmental issues would be "very important" to their vote, an increase from 69% since 2016. Amongst registered Republicans the figure was 38%, roughly unchanged since 2008.[103] The Report concludes that the role of environmental issues in the general election "remains unclear."

Both constituencies are now easily and directly targetable via social media and can be, and are, mobilized by the respective party organizations in support of an identified party agenda. Party platforms however, come in packages of specific goals and priorities that do not necessarily mirror the priorities of the individuals who are prepared nevertheless to vote for them. As Pew researcher Drew DeSilver reminds us, both parties need to be seen in terms of coalitions united less by the specifics of party agendas but more by perceptions of common values and shared understandings.[104]

Thus in terms of party behavior, there is no doubt that the thirty years since the environmental legislation of the 1970s, have seen the partisan divide on environmental issues in Congress grow "exponentially more bitter and ideological."[105] Equally, research also supports the view that Republicans are more likely than Democrats to be skeptical of climate change science.[106] Nevertheless a Pew Research Center survey conducted in March/April 2018 rather surprisingly found that, after a year of Trump Administration change in climate and energy regulation policies, "pockets of partisan agreement" could be found:

> majorities of Americans said the federal government is doing too little to protect key aspects of the environment including water (69%), air quality (64%) and animals and their habitats (63%). And two-thirds of Americans (67%) said the government is doing too little to reduce the effects of climate change.[107]

Partisan agreement was closest in relation to increasing the use of renewables but furthest away over increasing fossil fuels through such methods as coal mining, hydraulic fracturing and offshore drilling for oil and natural gas.[108] However what was dividing the partisans most keenly was the issue of regulation. In terms of the population as a whole:

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103 *Id.*

104 Drew DeSilver, *A Closer Look at Who Identifies as Democrat and Republican*, Pew Research Center (July 1, 2014), https://www.pewresearch.org/fact-tank/2014/07/01/a-closer-look-at-who-identifies-as-democrat-and-republican/.

105 David W. Case, The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication, 25 Duke Envtl. L. & Pol'y F. 49, 60 (2014).

106 Brian Helmuth et al., *Trust, Tribalism and Tweets: Has Political Polarization Made Science a "Wedge Issue"?*, 3 Climate Change Responses (2016),

107 Pew Research Center, *Majorities See Government Attempts to Protect the Environment as Insufficient* (May 14, 2018) https://www.pewresearch.org/science/2018/05/14/majorities-see-government-efforts-to-protect-the-environment-as-insufficient/.

108 *Id.*

> On balance, most U.S. adults (56%) agree with the statement "Government regulations are necessary to encourage businesses and consumers to rely more on renewable energy sources." Meanwhile, 42% back the statement "The private marketplace will ensure that businesses and consumers rely more on renewable energy sources, even without government regulations."[109]

Broken down by party, however the partisan divide is revealed:

> Some 74% of Republicans and independents who lean Republican believe it is possible to cut regulations and protect the quality of air and water, compared with 35% of Democrats and Democratic leaners who say the same.[110]

The explanation, as Professor Case suggests, is an underlying ideological concern that has less to do with the environment but everything to do with regulation; what is currently in play is a pushback against the reach of the administrative state and an expansion of federal regulatory authority that has been described as "quasi-constitutional in scope."[111] From this perspective environmental regulation is a "political lightening rod […]" and the role of the EPA a symbol of "excessive and heavy handed regulation."[112]

V. The Environment, the States and the Federal Government.

"The history of the American administrative state" asserted then law professor Elena Kagan, is the history of competition among different entities for control of its policies[…]. We live today in an era of presidential administration."[113] President Obama's environmental initiatives by-passed Congress and were largely implemented using the tools of the administrative presidency, namely executive orders and agency rulemaking. The Trump Administration uses the same methods to reverse these initiatives, thereby contributing to what may be termed the "ebb and flow" of forty years of U.S. environmental policy, the underlying issues of which relate directly to the dynamics of federal-state relations. The twist in the saga is that the actions of the current administration are apparently less about federalism and more about political point-scoring and the personal animosity of

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109 *Id.*

110 *Id*.

111 Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environment*, 150 U. Pa. L. Rev. 85, 97-98 (2001). *See* David W. Case, *The Lost Generation: Environmental Regulatory Reform in the Era of Congressional Abdication*, 25 Duke Envtl. L. & Pol'y F. 49 (2014).

112 Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 Ind. L. J. 1239, 1257 (2014). *See* Daniel A. Farber, *Trump, EPA and the Anti-Regulatory State*, Regulatory Review, (Jan 24, 2018) https://www.theregreview.org/2018/01/24/farber-trump-epa-anti-regulatory-state/.

113 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001).

the President towards environmentally conscious states, specifically the state of California.

Experience under the Trump Administration, comments Professor Farber, suggests "industry capture or reflexive ideological opposition to regulation—or both."[114] The EPA may be a "central instrument of the modern regulatory state" but, as the Environmental Council of the States points out, cooperative federalism, in the sense of power-sharing between the 50 states of the union and the federal government, is built into the framework of U.S. environmental regulation.[115] The EPA sets standards at national level which are implemented at state level by state agencies with EPA authorization to carry out federal programs.[116] States can negotiate opt-outs, *i.e.* authorization to set their own standards which can be higher but not lower than the federal base line. This is a model that applies across most environmental statutes, including the Clean Air Act, the Clean Water Act, Safe Drinking Water Act, and the Resource Conservation and Recovery Act.[117] It presupposes a collaborative approach but where states and federal government share the same regulatory terrain but their political priorities diverge, states can and do argue that the federal government is exceeding its authority. Federal environmental regulation then becomes the battleground on which the divisive issue of the respective boundaries of state and federal authority can once again be played out.

President Obama's policy of environmental regulation with its emphasis on national rules and uniform standards, shifted the balance of authority back from the states to the federal government; President Trump's agenda reverses this, pulling back from federal regulation, and shifting responsibility back to the states.[118] From one perspective, this is broadly in line with a long-term pattern of U.S. environmental federalism whereby the federal role strengthens and diminishes in line with partisan political ideology. Republican President Ronald Reagan, for example, took office with an agenda aimed at freeing up businesses from the burden of excessive regulation.[119] From another perspective the current nature of intergovernmental relations appears to be shaped less by traditional divisions of political ideology and partisanship and more by a states pushback against an executive that in the words of the Environmental Council of the States, is damaging the "[c]onstructive, collaborative, and respectful engagement between state and federal governments [that] is an essential element in the protection of [the] nation's public health and environment."[120]

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114 Farber, *supra* note 112.

115 *See* Envtl. Council of the States (ECOS), *Co-operative Federalism 2.0: Achieving and Maintaining a Clean Environment and Protecting Public Health*, (July 2017) https://www.ecos.org/wp-content/uploads/2017/06/ECOS-Cooperative-Federalism-2.0-June-17-FINAL.pdf.

116 *See* Koniskey & Woods, *supra* note 36, at 348-50 (2019); Bulman-Pozen, *supra* note 54, at 1082–83 (2014); Neal D. Woods, *Primacy Implementation of Environmental Policy in the U.S. States*, 36 Publius 259 (2006); Patricia McGee Crotty, *The New Federalism Game: Primacy Implementation of Environmental Policy*, 17 Publius 53 (1987).

117 *See* Koniskey & Woods, *supra* note 36, at 348-49 (pointing out that the Endangered Species Act and the Superfund program are notable exceptions).

118 *Id*. at 354.

119 *See* Jefferson Decker*, Deregulation*, *Reagan-Style*, The Regulatory Review (Mar.13, 2019) https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/.

120 ECOS, *supra* note 115.

The Environmental Council of the States is a non-profit, non-partisan association whose membership comprises all 50 states plus the District of Columbia and Puerto Rico.[121] It notes that the states have assumed more than 96% of the delegable authorities under federal law and is committed to a model of cooperative federalism which sees the states rather than the federal government as the primary implementers of environmental protection statutes.[122] In a recent letter sent to EPA Administrator Andrew Wheeler, ECOS expressed concern about EPA unilateral actions, lack of discussion and absence of advance consultation with the states that violate the principles of cooperative federalism and calls on the EPA "to return to the appropriate relationship with the states as coregulators under our nation's environmental protection system."[123] This "unusually bold move"[124] is not a complaint about partisanship—most of the group's current cabinet members are Republicans[125]—but about federalism; states "across the country from Kentucky to Alaska," California Environmental Agency Protection Agency Secretary, Jared Blumenfield, told Bloomberg Environment "are all alarmed at the tenor of the U.S. EPA."[126]

What seems to have provoked the ECOS response is what looks like a politically- motivated attack on "the nation's left-most state" that may be designed to energize the President's base[127] but as an example of federal overreach is having the effect of bringing the states together in a spirit of environmental solidarity. In the space of days, the Trump administration mounted three separate attacks against California. In reverse order, on 26 September, 2019 (the same day as the ECOS letter) EPA administrator Andrew Wheeler sent a letter to the Governor of California accusing the state of allowing untreated human waste matter to pollute its water and expressing concern "that California's implementation of federal environmental laws is failing to meet its obligations" under the federal Clean

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121 *Id*.

122 *Id*.

123 Letter from ECOS to Andrew Wheeler, Administrator, EPA (Sept. 26, 2019), https://www.ecos.org/wp-content/uploads/2019/09/ECOS-Sept-26-2019-Letter-to-Adminstrator-Wheeler.pdf.

124 *See* Stephen Lee, *States Demand Wheeler Explains EPA's Stance on Federalism* (*2*), Bloomberg Environment (Sept. 27, 2019, updated 10.03 PM), https://news.bloombergenvironment.com/environment-and-energy/states-demand-wheeler-explain-epas-stance-on-federalism (quoting California Environmental Protection Agency Secretary Jared Blumenfeld).

125 *Id*. (quoting "a career EPA water official who left the agency in 2017, [and] called the ECOS letter "a shocker" because most of the group's cabinet members are Republicans.).

126 *See* Lee, *supra* note 124 (quoting Blumenfeld).

127 Todd S. Purdum, *Trump's Attacks on California Are Shortsighted*, The Atlantic (Sept. 28, 2019),
https://www.theatlantic.com/politics/archive/2019/09/attacking-california-easy-trump-bait/598915/.
On October 23, 2019, the Trump Administration launched yet another attack on California, this time in the form of a lawsuit challenging the state's cap-and-trade agreement with Quebec for limiting carbon dioxide emissions. The lawsuit, filed in the U.S. district court for the Eastern District of California, argues the state has entered into an international agreement in contravention of the U.S. Constitution which bars state treaties or compacts with foreign powers. *See* United States of America v. State of California et al., Case 2:19-cv-02142-WBS-EFB (Oct. 23, 2019, E.D. Cal.).

Water Act and Safe Drinking Water Act.[128] The letter requested a written response within 30 days outlining in detail how California intends to address the concerns and violations and demonstrating that the state has "the adequate authority and capability to address these issues."[129]

Two days previously, Andrew Wheeler had sent another letter to the California Air Resources Board, complaining that California had the "worst air quality in the United States," had filed incomplete plans for fighting air pollution, and had "failed to carry out its most basic tasks" under the federal law.[130] The letter threatened sanctions, including cuts to federal highway funding, a substantial penalty for a state that receives more federal highway funding than any other state in the Union.[131]

Four days before that, on September 20, the EPA formally announced it was withdrawing California's waiver under the Clean Air Act to set its own vehicle emissions standards.[132] This move was not unexpected. The EPA and Department of Transportation (DOT) signaled this intention in the notice of proposed rulemaking (NPRM)—the Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks (SAFE Vehicles Rule)—in August 2018.[133] According to the agencies' press release the aim was to "give the American people greater access to safer, more affordable vehicles that are cleaner for the environment."[134] DOT secretary, Elaine L. Chao, claimed the federal action "meets President Trump's commitment to establish uniform fuel economy standards for vehicles across the United States, ensuring that no state has the authority to opt out of the nation's rules and no state has the right to impose its policies on the rest of the country."[135] Critics point up the inconsistency of requiring the state to take action to combat air pollution while removing its main mechanism for tackling the problem. They say the waiver which has been in operation since 2013, has enabled California and 13 other states to set standards above those of the national rule, including a zero-vehicle emission (ZEV) mandate[136] and has been the foundation

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128 Letter from Andrew R. Wheeler to Hon. Gavin C. Newsom (Sept. 26, 2019), https://src.bna.com/LIZ.

129 *Id*.

130 Letter from Andrew R. Wheeler to Ms. Mary D. Nichols, Chair, California Air Resources Board, (Sept 24, 2019), available at https://www.sacbee.com/news/politics-government/capitol-alert/article235397887.html (last visited Nov. 2, 2019).

131 According to the Department of Transportation, California is projected to receive more than $19 billion from the Federal Highway Administration between fiscal years 2016 and 2020. *See* U.S. Dept of Transportation, *Fixing America's Surface Transportation Act or "Fast Act,"* https://www.fhwa.dot.gov/fastact/funding.cfm (last visited Nov. 2, 2019).

132 Betsy Lillian, *Feds Officially Move to Withdraw California's Clean Air Act Waiver,* NGT News (Sept. 20. 2019) https://ngtnews.com/feds-officially-move-to-withdraw-californias-clean-air-act-waiver.

133 DOT & EPA, *Proposed California Waiver Withdrawal* (Aug. 2, 2018), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100V26M.pdf.

134 EPA, *U.S. EPA and DOT Propose Fuel Economy Standards for MY 2021-2026 Vehicles*, (Aug. 2, 2018) https://www.epa.gov/newsreleases/us-epa-and-dot-propose-fuel-economy-standards-my-2021-2026-vehicles.

135 Lillian, *supra* note 132.

136 https://ww2.arb.ca.gov/sites/default/files/2019-03/177-states.pdf.

for California to become an environmental leader in reducing greenhouse gas emissions and improving air quality.[137]

On September 20, California, 23 other states,[138] the District of Columbia, New York City, and Los Angeles filed a lawsuit in the federal district court for the District of Columbia. The states asserted that the preemption regulation exceeded the NHTSA's authority, that the regulation contravened the Energy Policy and Conservation Act of 1975 and the Clean Air Act, and that NHTSA failed to consider the regulation's environmental impacts as required by the National Environmental Policy Act. [139] The states have the support of nine nonprofit organizations that have filed a similar lawsuit.[140]

The states involved, are, broadly speaking, those signed up to ECOS which calls itself non-partisan but in terms of its membership is almost entirely Democrat or Democrat-leaning.[141] The same is true, again broadly speaking, of other "bipartisan" state climate change coalitions. Led by the Governors of California, Washington and New York, the same State Governors plus the Governor of Puerto Rico have come together to form the *United States Climate Alliance*, a "bipartisan" coalition with a commitment to uphold the objectives of the 2015 Paris Agreement within their borders, "by achieving the U.S. goal of reducing greenhouse gas (carbon dioxide equivalent) economy-wide emissions 26–28% from 2005 levels by 2025and meeting or exceeding the targets of the federal Clean Power Plan."[142] Representing 55 percent of the U.S. population and an $11.7 trillion economy "an economy larger than all countries but the United States and China" the Alliance is committed to a program of climate leadership at home and international engagement across borders. Above all it seeks to refute the argument that action on climate change and positive economic growth are not compatible:

> The climate and clean energy policies in Alliance states have attracted billions of dollars of new investment and helped create more than 1.7 million clean energy jobs, over half the U.S. total. Independent analysis highlighted in the Alliance's 2018 Annual Report shows that Alliance States are not only outpacing non-Alliance states in reducing their emissions, they are also growing their economies at a faster pace. Between 2005 and 2016, Alliance States reduced their emissions by 14 percent compared to the national average of 11 percent. In that same time period, the combined economic output of Alliance states grew by

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137 Anna M. Phillips, *Trump Plans to Revoke a Key California Environmental Power; State Officials Vow to Fight* L.A. Times (Sept. 17, 2019, 2.24 PM) https://www.latimes.com/environment/story/2019-09-17/trump-revokes-california-environmental-authority-auto-deal.

138 California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin.

139 California v. Chao, No.19-cv-02826 (D.D.C. Filed 09/20/ 2019).

140 Envtl. Defense Fund v. Chao, 19-cv-02907 (D.D.C. Filed 09/27/2019).

141 *See* California v. Chao, No.19-cv-02826 (D.D.C. Filed 09/20/ 2019).

142 http://www.usclimatealliance.org/. Members include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virginia, Washington, Wisconsin.

> 16 percent while the rest of the country grew by only 14 percent. The Alliance is demonstrating that climate leadership and economic growth go hand-in-hand. [143]

From one perspective these alliances feed a narrative of "partisan federalism" that Professor Bulman-Pozen regards as the norm for the turn of the twenty-first century.[144] Partisan federalism, she argues, has been fueled by the transfer of power from the states to the federal government and the rise of ideologically cohesive, polarized parties: "[t]he states challenge the federal government, as doctrine and scholarship assume they will, because some number of them are governed by members of the political party out of power at the national level." but tension between the states and the federal government is both deeply rooted in the nation's history and critical to an understanding of contemporary American federalism. [145] Cross-state engagement of the kind outlined above, she suggests, represents "powerful evidence" of a process whereby states present "a vision of the national will different from that offered by the federal government" and thereby "participate in nationwide controversies on behalf of people both inside and outside their borders."[146]

From another perspective, a different narrative emerges. Faced with a situation of legislative gridlock, states and cities have put aside partisan differences and come together with businesses and civil society to form bipartisan coalitions with a shared commitment to reducing emissions within their communities. *America's Pledge*, an initiative spearheaded by former New York Mayor and U.N. Special Envoy Michael Bloomberg and California Governor Jerry Brown, recently published a report detailing how growing coalitions of states, cities, colleges, businesses, and other "real economy" actors are working together with climate change initiatives, despite the Trump Administration's announced intention to take the United States out of the Paris Agreement and commitment to reviving the coal industry.[147] As Paul Bodnar, managing director at the clean-energy-promoting Rocky Mountain Institute and a co-author of the report, told the Guardian newspaper:

> There have been—cities working together, states working together, businesses working together. What's changed in the last year and what's new is this cross-cutting perspective. When states pass laws that help cities' [emissions] strategies, or when states' renewable portfolio standards are designed to help businesses—that's really where we're seeing really interesting, high-impact results." [148]

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143 *See* http://www.usclimatealliance.org/: "The Alliance is engaging internationally to inspire others to make progress towards the goals of the Paris Agreement. Alliance States are working across borders to share best practices and further drive down emissions, including through regional initiatives, such as the North America Climate Leadership Dialogue."

144 Bulman-Pozen, *supra* note 54, at 1145.

145 *Id*. at 1145.

146 *Id.* at 1136, 1145.

147 *Fulfilling America's Pledge: How States, Cities and Businesses Are Leading the United States to a Low-Carbon Future*, Bloomberg Philanthropies (2018), https://www.bbhub.io/dotorg/sites/28/2018/09/Fulfilling-Americas-Pledge-2018.pdf.

148 *See* Liza Ramrayka, *US Activists Launch Climate Change Initiatives in Absence of Federal Leadership*, The Guardian (Sept. 12, 2018, 3:34 PM).

Other bipartisan initiatives include *We Are Still In*, a 'bottom-up network', that began in June with a "promise to world leaders that Americans would not retreat from the global pact to reduce emissions and stem the causes of climate change" and now includes over 3,500 representatives from all 50 states, spanning large and small businesses, mayors and governors, university presidents, faith leaders, tribal leaders, and cultural institutions coalition. [149] As of October 2019, 12 U.S. cities have joined *C40*, a global network of cities committed to the Paris Agreement and decreasing emissions.[150] Nine New England and Mid-Atlantic states have formed a *Regional Greenhouse Gas Initiative* (RGGI), "the first mandatory market-based program in the United States to "cap and reduce CO2 emissions from the power sector,"[151] while four-hundred U.S. mayors have joined together as "*Climate Mayors*," a bipartisan peer-to-peer network committed to joint action to demonstrate leadership on climate change.[152]

At Congressional level too there are indications that environmental concerns can cross the partisan divide. Both chambers of Congress have established bipartisan Climate Solutions Caucuses. The House Climate Solutions Caucus, chaired by Ted Deutch (D-FL-22) and Francis Rooney (R-FL-19). currently comprises 23 Republicans and 41 Democrats. The Senate Climate Change caucus is a very recent initiative announced by Senator Michael Braun (R-IN) and Senator Chris Coons (D-DE). They are currently its only members but have plans for equal numbers of Republicans and Democrats yet to be announced.[153]

In an interview for NBC News, Rep. Rooney welcomed the Senate initiative, but said that efforts to get more Republicans interested in climate change have been challenging.[154] Moreover the work of Niskanen Center researcher, Professor David Karol suggests that the profile of the GOP Climate Solutions Caucus is unlikely to be typical of the wider party. [155] Nevertheless these developments may be straws in the wind. As Professor Karol reminds us, there is a "generation gap in the GOP on environmental issues, especially on the subject of climate change" with 57% of Republican and Republican-leaning millennials believing there is "solid evidence" of climate change.[156] To quote Karol again:

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149 https://www.wearestillin.com/about, last visited Oct. 10, 2019.

150 Austin, Boston, Chicago, Houston, Los Angeles, New Orleans, New York, Philadelphia, Portland, San Francisco, Seattle, Washington, D.C. *See* https://www.c40.org/cities, last visited Oct. 10, 2019.

151 Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. *See* https://perma.cc/5XEJ-QAPV, last visited Oct. 10, 2019.

152 *See* http://climatemayors.org/, last visited Oct. 10, 2019.

153 Julie Tsirkin, *Senators Launch Bipartisan Climate Change Initiative*, NBC News (Oct.23, 2019 5:11PM BST) , https://www.nbcnews.com/politics/congress/senators-launch-bipartisan-climate-change-initiative-n1070286.

154 *Id.*

155 David Karol, *Party Polarization on Environmental Issues*, Niskanen Center (May 2018), https://www.niskanencenter.org/wp-content/uploads/old_uploads/2018/05/Party-Polarization-on-Environmental-Issues.pdf.

156 *Id*. *See* Carroll Doherty et al., *The Generation Gap in American Politics*: *Wide and Growing Divides in Views of Racial Discrimination*, Pew Research Center 32 (March 1st, 2018), file:///C:/Users/Anne/Downloads/03-01-18-Generations-release2.pdf.

> [t]he role of present-day coalitions in determining politicians' preferences will only hold as long as political costs remain small. If political costs were to rise, then coalitional allies would likely follow Members of Congress to more pro-environmental positions. Anticipating such a shift, some Republicans may take forward positions on environmental issues to gather a reputation for issue leadership and distinguishing media attention.[157]

As the combination of an aging demographic and alignment with a declining fossil fuel industry shrinks the GOP traditional constituency it is to be hoped that, if only for their own political advantage, "far-sighted Republicans might see an advantage in building credibility on the issue."[158] At the present and from where we stand, the prospects for closing the partisan gap remain small and the horizon unclear. However, there is no doubt that environmental concern is now a defining, if not the defining issue of our age to which politicians of every persuasion will have to respond.

[157] Karol, *supra* note 155.
[158] *Id.*

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