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The Federalist Society and Constitutional Interpretation: Who Gets to Say What the Constitution Says

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The Federalist Society and Constitutional Interpretation: Who Gets to Say What the Constitution Says

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Abstract

The Federalist Society was organized in 1982 by conservative law students to counteract what they perceived to be a liberal bias in law schools, the courts, and government administration. Forty years later there is an acknowledgement of a rightward turn in the Supreme Court which scholars have attributed in part to the efforts of the Federalist Society. However, there is still little understanding of just how that change came about. This dissertation takes a step toward understanding that question. Viewing the Federalist Society as the center of a network of lawyers, think tanks, and legal institutions, I examine the influence the Federalist Society Network has on voting rights and public sector unionization. I analyzed these cases - *South Carolina v. Katzenbach*, 383 U.S. 301, *Northwest Austin Municipal Utility District No. 1 v. Holder*, 557 U.S. 193, and *Shelby County v. Holder*, 570 U.S. 529 (2013) to assess the Federalist Society Network's influence on voting rights. I also examined these additional cases - *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Knox v. Service Employees International Union*, 567 U.S. 298, (2012), *Harris v. Quinn*, 573 U.S. 616,(2014), and *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. (2018) to assess the impact the Federalist Society Network has on public sector union agency fees. I use content analysis to compare the themes asserted in petitioners' and amicus curiae briefs with the themes expressed in the majority opinions in these cases. I find that the Federalist Society Network has influenced the majority opinions in these cases.

Keywords: Federalist Society; Supreme Court; Constitution; voting rights; labor rights; network

Chapter 1

Introduction

Over the past four decades a transformation in legal jurisprudence has taken place. The Federalist Society has shifted American constitutional law in a conservative direction.[1] The Federalist Society is the hub of a network that reaches all levels of the legal community providing them many access points to spread conservative and libertarian constitutional principles into law.[2] The creation of the Federalist Society of Public Policy at elite law schools established a meeting ground for legal conservatives previously loosely connected and scattered around the nation. The activist hub created by the Federalist Society consists of conservative and libertarian law students, lawyers, law professors, and faculty members, conservative and libertarian judges and law clerks, as well as conservative and libertarian law firms and think tanks.[3] The Federalist Society ("FS" or Federalist Society throughout) is the institution that links and drives this vast network through assembling conservative and libertarian minds for a common cause in a setting that inspires intellectual discussions and theory formation to advance a conservative viewpoint. By establishing a presence in law schools, recruiting students, hosting activities, debating first principles, and creating academic scholarship and many other activities, the Federalist Society created the "conditions" ripe for constitutional change.[4] Additionally, by achieving acceptance of their once deemed radical legal ideas from those authoritative voices

[1] Avery and McLaughlin 2013; Beutler 2015; Cokorinos 2003; Hollis-Brusky 2015; O' Harrow Jr., et al. 2019; Riehl 2007; Scherer and Miller 2009; Teles 2008; 2009; Zengerle 2018
[2] Avery and McLaughlin 2013; Beutler 2015; Cokorinos 2003; Hollis-Brusky 2015; Riehl 2007; Scherer and Miller 2009; Teles 2008; 2009
[3] Rosen 2005; Hollis-Brusky 2015; Teles 2008
[4] Hollis-Brusky 2015

that determine "what the law is and should be or what the proper legal ideas and theories are"[5] the Federalist Society created the "intellectual capital for Supreme Court decision makers" to institute constitutional change.[6]

The conditions readied for transformation, the Federalist Society altered the direction of constitutional law from the course of the Civil Rights Movement and the Rights Revolution.

The Federalist Society transformed the law by building a conservative network to counter the liberal legalism they saw embedded in all of society's legal institutions. The Federalist Society is a "society of ideas"[7] united around shared principles and shared grievances. It also functions as a talent agency that recruits and educates young lawyers in conservative/libertarian philosophy and as an employment agency that matches its best and brightest with conservative judges and elite conservative lawyers to keep the conservative pipeline flowing.[8] The Federalist Society is also a network that keeps conservative and libertarian intellectuals connected to continue developing their ideas and encouraging activism among its members to disperse and implement its conservative view.[9] The Federalist Society has something for everyone: Student Chapters, Faculty Chapters, Lawyers Chapters, and even specialized legal Practice Groups. The Society has its own academic law journal, distributes newsletters to keep members informed, and includes a speaker's bureau. The Federalist Society's many facets help to maintain continued

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[5] "The judges need scholarship and arguments extending Federalist principles into new areas. Where new legal theories depart from the status quo, they need them to be vetted and legitimized through public debate. They require targeted cases raising questions that provide an opening to move the law. Without professors and lawyers in the network filling that demand, Teles says, 'you're not going to maximize what you got through the electoral process.'" (Montgomery 2019)

[6] Hollis-Brusky 2015, 4; Teles 2008, chap. 5

[7] Montgomery 2019

[8] Avery and McLaughlin 2013; Beutler 2015; Hollis-Brusky 2015; Montgomery 2019; Riehl 2007; Scherer and Miller 2009; Southworth 2008; Teles 2008

[9] Hollis-Brusky 2015; Montgomery 2019; Riehl 2007; Southworth 2008, 134; Teles 2008

interactions between students, lawyers, judges and other legal professionals to keep them engaged while simultaneously acting as a check against ideological drift.[10]

The Federalist Society provided the "foot soldiers," the intellectual legal rationale, and importantly, the medium where ideas and strategies are debated and stripped of their defects. They have been key in selecting judicial nominees for Republican presidents beginning with Ronald Reagan, and their influence has only increased in subsequent Republican administrations. Membership in the Federalist Society has simplified judicial selection for Republican Administrations by indicating conservative *bona fides* while also providing members a conservative career "pipeline."[11] This career track was established very early as the first generation of Federalist Society members graduated from law schools during President Ronald Reagan's first term in office and were quickly scooped up for key positions in the Administration. Their influence and involvement in the Reagan Department of Justice was so profound it was said to be a "Federalist Society shop."[12] By 2000, the Federalist Society had an ample pool of ideological conservative law graduates ready to be appointed by President George W. Bush.

Significance of this Study

The consequences of decades of the Federalist Society's legal activism are becoming more apparent and more widespread.[13] The Society's legal activism is ongoing, leaving many areas of settled law susceptible to upheaval with unknown consequences and implications for

[10] Hollis-Brusky 2015; Teles 2008
[11] O'Harrow Jr., et al. 2019; Toobin 2018
[12] Hollis-Brusky 2008
[13] Beutler 2015; Quinn 2018; Toobin 2018; Zengerle 2018

everyone.[14] Supreme Court decisions extend beyond the individual litigants in a particular case. These decisions set principles that carry over to subsequent legal matters. They guide lower court rulings and shape the rules we live under.[15] Supreme Court decisions affect people's lives in ways we understand and in ways we may not.[16] Additionally, Supreme Court decisions have distinct impacts on different segments of the population.[17] Therefore, the ability of an ideological organization such as the Federalist Society to insert principles into Supreme Court decisions has widespread repercussions for a society based on democratic rule. Not only are there important implications for a democracy, but this also raises important questions in a purported equal society that bases social mobility on merit, but through its laws, maintains an economic status quo.[18]

One of the ways the Federalist Society has been able to influence the shape and trajectory of the laws that guide our lives is through the top court in the nation. The Federalist Society has successfully inserted its principles of law into Supreme Court decisions. This has resulted in a halting of the Rights Revolution and limiting the power of the federal government to remedy society's failures and in particular those failures that impact certain segments of society.

The Federalist Society's control over Republican presidents' judicial nominees' places power in the hands of one organization comprised of social and economic elites, based on an agreed conservative viewpoint, concentrated in one political party, and an aligned majority on

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[14] Avery and McLaughlin 2013; Beutler 2015; Cokorinos 2003; Hollis-Brusky 2015; Riehl 2007; Scherer and Miller 2009; Teles 2008; 2009
[15] Feldman 2017
[16] less obvious effects are rulings on federal agency regulations, state licensing, regulations on corporate advertising
[17] Gilman 2014; Schorpp, Hoffmann and Kassow 2017 (for example criminal justice decisions are far more consequential for those in the lower-income brackets just as abortion decisions disproportionately affect access for low-income women.)
[18] Baldwin 2008; Gilman 2014; Nice 2008

the Supreme Court. This would appear to contradict the very concentration of power conservatives claim to fear. It certainly diminishes the "Advise and Consent" role of the Senate in confirming nominees. It also indicates that the Federalist Society may not truly believe that judges in practice merely "say what the law is, not what it should be."[19]

Purpose

The Federalist Society as the "facilitator" has created a vast conservative/libertarian legal network that has altered the trajectory of the law. Its aim, which has been largely successful, was to reshape the entirety of legal culture. One part of its strategy has been to develop the intellectual basis for conservative and libertarian constitutional theory that could be adopted by justices in Supreme Court opinions, thereby transferring theories into law. Since these decisions affect individuals' lives, it is important to understand the mechanisms for transference as well as the principles guiding its ideology. This project will explore the path of idea diffusion, the underlying principles of these ideas, and the impact on the Supreme Court. This will entail an examination of the Supreme Court as a collective unit through majority opinions. Previous research has revealed the Federalist Society's impact on campaign finance regulations,[20] federalism and state sovereignty,[21] and also on affirmation action and remedial programs.[22] To this scholarship, I add the Federalist Society's impact on voting rights and union organizing through its influence on Supreme Court majority opinions.

[19] Our Background | The Federalist Society https://fedsoc.org/about-us#Background
[20] Hollis-Brusky 2015; Southworth 2018; Teachout 2014
[21] Hollis-Brusky 2015; Teachout 2014
[22] Avery and McLaughlin 2013; Cokorinos 2003; Cummins and Belle Isle 2017

Background

The Federalist Society

"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 duty of the judiciary to say what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities."[23]

When the founders of the Federalist Society entered law school in 1980, they faced what they believed to be a liberal dominance in legal education "which advocates a centralized and uniform society." [24] The aim was to insert conservative principles into legal education based on the Federalist Society's core founding principles. These principles were (and still are) "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 duty of the judiciary to say what the law is, not what it should be." [25] These conservative law students believed the Constitution strictly limited the powers of Congress to those enumerated in Article I Section 8 and also constrained judges to interpret the text.[26] The Court, they believed, had been derelict in its duties to adhere closely to the text by finding rights not explicitly written, and therefore judges were

[23] Our Background | The Federalist Society https://fedsoc.org/about-us#Background
[24] Id. "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law"
[25] Id.
[26] Avery and McLaughlin 2013; Hollis-Brusky 2015; Devins and Baum 2017; Teles 2008

saying “what it [the law] should be” i.e., implementing a social agenda. In the preceding decades the Court had been taking a more active role in desegregation and protecting the rights of criminal defendants. In addition, the so-called conservative Burger Court had granted the right of privacy, which allowed women to obtain an abortion. Therefore, conservatives saw liberal reformers, aided by the Supreme Court, using the Courts to expand rights not explicitly stated in the Constitution and contrary to the conservative viewpoint. This was being done in the name of social justice, a role not within the Court's jurisdiction and contrary to their vision of the Constitution, which primarily protects property rights and upholds *individual* rights, not *group* rights.[27] The conservatives’ complaint was that the civil rights and civil liberties granted to African Americans, women, and criminal defendants were based on group membership, not due to a personal harm or a current and direct violation. The Constitution, they argued, was not meant to address disparities due to discrimination based on group status, but rather intentional discrimination of a specific individual.

It was with this view of the current environment that the Federalist Society for Law and Public Policy Studies was formed to challenge legal liberalism and insert a conservative understanding of constitutional law into legal education. The Federalist Society aimed to create a space for and legitimize conservative legal thought and to interject into legal discourse conservatives’ view of proper constitutional interpretation. This began with the establishment of student chapters in law schools throughout the nation. The first student chapters were founded at Yale Law School and the University of Chicago School of Law, but quickly spread to others. Law students across the country created student chapters to teach and learn conservative legal

[27] Avery and McLaughlin 2013; Cokorinos 2003; Riehl 2007

theories and maintain connections to these ideas throughout their legal education. The Federalist Society was also supported by high profile conservative professors, big-money conservative donors, and conservative political leaders. This support served to endorse the Society and aided in recruiting other conservative professors, faculty and legal theorists to build student, lawyer, and faculty chapters throughout the nation. What began as a conference to connect fellow conservatives found an audience and soon became the nexus for legal change.[28]

A large-scale change in legal culture meant starting where the law is taught, and legal theories are formed, that is, in elite law schools.[29] The Federalist Society Student Law School Chapters quickly increased following the success of the first symposium. Spreading across many campuses, the student chapters recruit law students to educate on conservative principles and groom the next generation of legal professionals. This training arms graduating members with the legal tools to carry forth and disperse as they enter their legal career.[30] The student chapters assure a steady supply of new lawyers ingrained with the same conservative principles ready for appointments in Republican administrations or selection as judicial clerks.[31] The on-campus chapters are an essential first step in attracting students at the start of their legal training, starting from the ground level, grooming the students throughout their legal education and at completion supplying credentialed conservative lawyers ready to put what they learned into action.[32]

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[28] Avery and McLaughlin 2013; Beutler 2015; Cokorinos 2003; Hollis-Brusky 2015; Riehl 2007; Scherer and Miller 2009; Teles 2008; 2009
[29] Aron 1994; Landay 2000; Teles 2008
[30] Aron, 1994; Avery and McLaughlin 2013; Cokorinos 2003; Hollis-Brusky 2015; Root 2010; Teles 2008
[31] Hollis-Brusky 2008; Scherer and Miller 2009; Teles 2009, 140, 179
[32] Hollis-Brusky 2008; Rosen 2005; Scherer and Miller 2009; Teles 2008

Lawyer divisions were added in 1986 "to bring together attorneys, business and policy leaders, judges and others interested in examining and improving the state of the law."[33] There are currently ninety lawyer chapters across the nation. The lawyer divisions function to keep alumni wedded to the Federalist Society's principles while building a network of conservative practicing lawyers who could "coordinate conservative activity within the ABA [American Bar Association]" and other facets of legal culture.[34]

In 1995, the Federalist Society created its Practice Groups to counter the perceived liberal bias of the American Bar Association's "Sections" and the absence of discussions of traditional legal values in existing bar organizations.[35] The Practice Groups were organized by legal topic, which paralleled those in the ABA, to allow conservative lawyers to coordinate with others in their specialty to develop legal arguments and legal strategies, and to be intellectually armed and ready to take advantage of political and legal opportunities that arise.[36] The Practice Groups connect conservative lawyers by "mutual interest" to develop alternative conservative legal arguments to "counterbalance negative trends that are developing due to government action, judicial overreaching, or leftward pressures by the organized bar."[37] The Practice Groups were also designed to impact public policy by allowing conservative lawyers to network with public policy leaders within their area of expertise and focus on specific policy issues.[38] The practice

[33] Lawyers Division | The Federalist Society https://fedsoc.org/divisions/lawyers
[34] Teles 2008, 167-168
[35] Id. at 169-170
[36] Aron 1994; Bach 2001; Teles 2008, 172
[37] Teles 2008, 169-170)
[38] Teles 2008, 172

groups also promote pro-bono opportunities through connecting Federalist Society lawyers in private practice to the various conservative public interest law firms.[39]

The Faculty Division was started in 1999 with its own inaugural event and a mission similar to the other groups, connecting "…law professors interested in limited government, the separation of powers, constitutional theory, the original understanding of the Constitution, and the importance of property rights and free markets."[40] The Federalist Society's Faculty Conferences encourage professors to "advance traditional legal principles in the legal academy and beyond." Additionally, since the Federalist Society perceives legal academia as mired in political correctness, the Faculty Conferences would also "energize those professors most dedicated to offering students a strong counter to political correctness."[41]

Of special importance to the conservative and libertarian movement is the Federalist Society's role in identifying individuals who shared core legal principles. Membership signals information about the content of, the quality and ideological validity of an individual and aided in identifying those who would more likely maintain true Federalist Society principles throughout their legal career. This was especially helpful in the second term of the Reagan Administration as they looked for potential judicial nominees and confronted a short supply of ideologically compatible prospects. Ideological drive and shared principles were essential to maintaining the long-term commitment necessary to displace the post-New Deal legal consensus and the institutions that supported "legal liberalism."[42] Federalist Society credentials coexist with a set of

[39] Teles 2008, 169-170
[40] Faculty Division | The Federalist Society https://fedsoc.org/divisions/faculty
[41] The Federalist Society Annual Report 2006
[42] Riehl 2007, 45; Teles 2008, 70

principles conservative judges and Republican administrations want in their officials and judges and clerks. An example of the significant strength of this credentialing power was the ability of the opposition led by the Federalist Society to replace a nonmember's (Harriet Miers') nomination to the Supreme Court with the nominee they favored, Samuel Alito. The Federalist Society questioned the conservative credentials of President George W. Bush's nominee because she had not been "certified" by membership in the Federalist Society.[43] Miers' replacement by Alito was a defining moment of their power over judicial appointments. The Federalist Society asserted itself as the "de facto monopoly on credentialing of rising stars…on the political right."[44]

Constitution Interpretation

Central to the influence of the Federalist Society itself and the Network has been the ability to insert its preferred method of constitutional interpretation, "*Originalism,*" into the mainstream. "*Originalism*" as a fully articulated legal theory had not yet been conceived prior to the 1980s. It was not until 1985 that the name "original intention" was given to the ideas being expressed by conservatives as they openly and frequently attacked the jurisprudence of the Supreme Court in the Civil Rights era. Thus, the principles of *Originalism* developed throughout the 1960s, 1970s and into the 1980s as conservative opposition to the Supreme Court's jurisprudence.[45] Increasingly, critics of the courts began to invoke "strict construction," history, and the framers' intention in reactions to the decisions upholding affirmative action,

[43] Teles 2008, 1-2
[44] Hollis-Brusky 2015, 152
[45] Teles 2009 ("Conservatives needed an idea that could provide intellectual legitimacy for those areas where conservatives thought that the courts should not simply defer to the elected branches of government, as well as those where it should. While conservatives were becoming increasingly interested in, for example, putting teeth in the Fifth Amendment's Takings Clause, judicial restraint pointed in the opposite direction. Even more important, conservatives needed an idea that could be taken seriously by legal intellectuals and the profession as a whole, a task for which judicial restraint did not measure up.")

desegregation measures, abortion rights, and the rights of the criminally accused.[46] "Strict construction" was not defined but recognized as a position of opposition to the Warren and Burger Court's jurisprudence grounded in the understanding of the Constitutional framers.[47] Both Richard Nixon and Ronald Reagan elevated the Courts to a priority on the conservative agenda, campaigning for "strict construction," "law and order" and "judicial restraint."[48] These phrases guided conservatives as they developed a more sophisticated legal philosophy in the 1970s and 1980s.

A 1971 journal article by Robert Bork is viewed as the origin of a framework for organizing these loose ideas into a principle of constitutional interpretation.[49] Bork's call for a "neutral principle" to determine a "valid theory" for constitutional interpretation laid the groundwork to guide the development of a formal concept of originalism.[50] It was not until 1985, in a highly publicized speech to the American Bar Association (ABA), that Attorney General Edwin Meese's announcement that the Reagan Administration's legal policy had "…been and will continue to be… a jurisprudence of original intention" gave a name to the developing

[46] O'Brien 2008, 73; Teles 2009; Whittington 2004
[47] Whittington 2004
[48] Riehl 149; Teles 2009
[49] Teles 2009 ("Originalism, an idea that had been either created or resurrected (depending on one's point of view) in the 1970s, seemed to admirably serve both goals Starting with Robert Bork's 1971 "Neutral Principles and Some First Amendment Problems," and accelerating with Raoul Berger's *Government by Judiciary*, scholars critical of the Warren Court began to develop a critique of the courts that rested on an essentially historical methodology, arguing that the legitimacy of the judicial role rests on the original understanding of specific constitutional provisions. Until the scholarly interventions of Bork, Berger, and their successors, conservatives lacked an intellectual framework in the law that was as rigorous as those they had developed in political philosophy or economics.")
[50] Greene 2009; Solum 2011; Geinapp 2017; Hollis-Brusky 2015, 19; Teles 2009

theory.[51] Justice Brennan's subsequent counter to Meese's view kicked off the "Great Debate" over the role of the Supreme Court and constitutional interpretation.

Conflict over the role of the Supreme Court in the American Constitutional system is as old as the Constitution itself, beginning shortly after the constitutional convention ended and the state ratifying conventions began.[52] However, unlike the debates of today, the central conflicts were over the Constitution's creation, structure, and distribution of powers. The Anti-Federalists and the Federalists were sharply at odds over the powers vested in the new federal government including those granted to the one Supreme Court created by the Constitution. The power of the Supreme Court divided Anti-Federalist advocates and Federalist adherents. The power of the judiciary, judicial review itself, and who is the final authority on the law remained in dispute even after *Marbury v. Madison* appeared to provide an answer.[53] Rather than disagreements over interpretative methods, the debates concerned the fundamental questions of governing, i.e., the distribution of power and the structure of government that had been created.[54] The question was not *how* but rather *who* should interpret the Constitution, and even if judicial review itself, is a rightful power of the Court. These differences that divided the Federalists and the Anti-Federalist groups evolved into the United States' first two political parties, the Federalist Party and the Democratic-Republican Party.[55]

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[51] Teles 2008, 145 ("Ed Meese at this time had originated not the idea, but the nomenclature of original intent jurisprudence. This was later refined, refined I believe in a very useful way to original meaning jurisprudence, but remember at this time the stuff of debate was still kind of the old Nixonian terminology of strict constructionism and law and order jurisprudence…language of interpretivism or textualism or original meaning jurisprudence—these things were all aired and the subject of a great deal of discussion at Federalist Society meetings" quoting Stephen Markman author OLP reports, head OLP, director Federalist Society D.C. lawyer's chapter)
[52] O'Brien 2008, 23-39
[53] O'Brien 2008, 31-32
[54] O'Brien 2008, 66
[55] O'Brien 2008, 23-27

The interpretative method was not the concern because most agreed with the legal theory of the times, which viewed judges as acting mechanically and neutrally to simply apply the law as written to the facts of the case.[56] There was no perceived danger of a judge's interpretation in line with his preference, for judges "may truly be said to have neither FORCE nor WILL, but merely judgment;" that is they merely declare the law.[57] This theory expressed by Hamilton in *The Federalist*, No. 78, was generally accepted by both the Federalist Party and the Democratic-Republicans.[58] Therefore, constitutional interpretation simply followed a "plain meaning rule" articulated by Chief Justice John Marshall in which "the spirit [of a constitution] is to be collected chiefly from its words."[59] Plain meaning was derived from a commonsense understanding "according to the sense of the terms and the intentions of the parties."[60]

The idea that judges simply discover the law without preference or context was challenged in the late nineteenth century most notably by Justice Holmes and further contested in the early twentieth century by the appearance of the "American legal realist."[61] In contrast to the prior legal formalism, legal realism posited that judges in the process of interpretation do make laws and look to norms in their current context rather than at the time of the original authors. In this way, "the Court … has shaped the living Constitution to the needs of the day as it felt them." This "jurisprudence of a living Constitution" gained adherents on the Supreme Court in the early part of the twentieth century by both legal progressives and legal conservatives.[62] It was in

[56] O'Brien 2008, 66-67
[57] Hamilton 1788
[58] O'Brien 2008, 67
[59] Chief Justice John Marshall in *Sturges v. Crowninshield* 17 U.S. 122 (1819)
[60] Justice Joseph Story in O'Brien 2008, 67
[61] O'Brien 2008, 71
[62] O'Brien 2008, 71

reaction to the idea of a living Constitution and the belief that judges were construing new rights beginning in the late1950s that conservatives began to articulate the features that would develop into a theory of originalism.[63]

Meese's 1985 speech to the ABA was followed by the same speech at the Federalist Society D.C. Lawyers Chapter. Meese's meaning was clear: DOJ legal policy "will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."[64] The clear implication of the language of "resurrection" was that the Court had strayed far from the "original meaning" that the authors intended and instead were substituting their own meaning or preferred social values.[65] Meese's speech articulated the position of movement conservatives on constitutional interpretation and claimed anything other than this interpretation was an illegitimate insertion of subjective social values. This early version of "originalism was designed to promote judicial restraint and criticize the judicial innovations of liberal judges in the 1950s, 1960s, and 1970s."[66] The ideas that undergird "originalism" began in response to the Warren and Burger Courts to express opposition to the Courts' decisions. Conservatives charged the court with straying from the "original intent" or "original meaning" of the framers and raised objections to decisions by calling for a "strict construction" of the constitution to contrast with the flexibility they viewed in the current jurisprudence. Originalism became a successful political tool to mobilize conservatives in the electorate and also to unite conservatives of different philosophical bents under the Federalist Society.[67]

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[63] Whittington 2004
[64] Riehl 2007, 149
[65] Riehl 2007, 149
[66] Balkin 2005
[67] Greene 2009; Southworth 2008, 106-107

The Federalist Society Network ("the Network" or "the Federalist Society Network throughout) unite around the philosophy of "*Originalism*" as the only valid method of constitutional interpretation. The doctrine of originalism can refer to "Original Intent" or a form that came later "Original Meaning." "Original Intent" is a method of constitutional interpretation that calls on judges to look to what the framers *meant* or intended when they wrote the text. "Original Meaning" is related but differs in that the standard is the common understanding of the words written in the author's time. Holding this view naturally compels looking to historical documents, some written centuries ago, or historical meanings to apply to the world as it exists today. The purpose is ostensibly to limit a judge to merely "say what the law is, not what it should be."[68] A key component of original intent as initially formulated was "judicial restraint." Since conservatives were opposed to the Supreme Court's actions, calling for "restraint" aptly expressed opposition to the court's overturning state and federal laws to expand civil rights and civil liberties. Restraint could be contrasted with its opposite, "judicial activism." What conservatives called "judicial activism" was the overturning of laws as unconstitutional in keeping with principles of social justice instead of prioritizing the protection of individual rights, property rights, and economic rights.[69]

Over time, the debates within the Federalist Society revealed *intent* was problematic. The Network members increasingly recognized the difficulty in interpreting a person's intent. The *meaning* of the text arose as an alternative method of interpretation introduced by then D. C. Circuit Judge Antonin Scalia at a D.C. meeting of the Federalist Society Lawyers' Division.[70]

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[68] Our Background| The Federalist Society
[69] Beutler 2015; Rosen 2005; Siegal 2004
[70] Teles 2008, 145

Original intent then evolved into original meaning. Original meaning brought with it a "distinctively" different conception of judicial of restraint.[71] Conservatives had long been calling for "judicial restraint," however, the younger generation believers were not so inclined. They were graduating at a time when Reagan was in the White House and conservative ideas were ascending. For them, this was not a time for judicial restraint but a time for judicial activism. The founding generation of the Federalist Society worked to convince the older generation that the traditional conservative doctrine of judicial restraint had to be revised to suit current realities.[72] What has been referred to as "new originalism" as distinct from the older version developed in order "to defend the innovations of an empowered conservative judiciary."[73] The younger conservative members of the Federalist Society were much more accepting of judicial "activism" as necessary, but only *their* type of activism.[74] They contended it was not "judicial activism" if a judge was returning to the original principles that were ignored by previous judges in their opinions but still an exercise of judicial restraint.[75] The "old" original intent and "old" judicial restraint faded into the background as a "new" original meaning emerged and was paired with an updated judicial restraint armed with a justification to overturn previous decisions.[76] Gradually, this "new" originalism became the preference of most of the Network including affiliated Supreme Court justices. The Network redefined judicial restraint to serve conservatives' goals once assuming governmental power.[77] Judicial activism, under the guise of "judicial

[71] Balkin 2005; Whittington 2004
[72] Hollis-Brusky 2015, 23; 148; Scherer and Miller 2009; Teles 2009; Whittington 2004
[73] Balkin 2005; Whittington 2004; Greene 2009
[74] Southworth 2008, 108; Stone 2012
[75] Southworth 2008, 108; Stone 2012
[76] Balkin 2005
[77] Hollis-Brusky 2015; Southworth 2008; Stone 2012

restraint," was the justification that allowed them to claim they were the true holders of the values of the U.S. Constitution.

Today, the Network has accomplished a sleight of hand.[78] A call for "judicial restraint" came in handy for an opposition movement's attack on the perceived "judicial activism" of the Supreme Court. However, once in control of the federal government, conservatives found that judicial restraint would not support an agenda to reverse decisions of the Warren Court and return to a pre-New Deal legal environment.[79] This agenda to radically change standing law would require overturning numerous precedents and thus called for an active judiciary, precisely what conservatives had opposed for five decades.[80] The new generation of conservative lawyers, whose legal careers began during the advent of the Federalist Society in the 1980s, were not tied to the older generation's "judicial restraint." Now that justices aligned with the Federalist Society were beginning to be placed on the courts, conservatives were now in a position to "turn back" the Warren Court[81] and Burger Court decisions.[82] In the mid- 80s, some members began making an explicit call for "judicial activism." The Federalist Society members and law professors, Richard Epstein and Randy Barnett, were among the first. Clint Bolick,[83] Chip Mellor and also Michael Carvin[84] were also early advocates and formed conservative public interest law firms to

[78] Balkin 2005; Riehl 2007, 16
[79] Rosen 2005; Southworth 2008
[80] Rosen 2005; Southworth 2008, 107-108
[81] *School District of Abington Township, Pennsylvania v. Edward Schempp; Murray, et al. v. Curlett, et al., Constituting the Board of School Commissioners of Baltimore City* 374 U.S. 203 (1963)
[82] *Roe v. Wade*, 410 U.S. 113 (1973)
[83] Clint Bolick is now an Arizona Supreme Court judge, in 2013 wrote a brief for *Shelby County v. Holder*
[84] Michael Carvin authored briefs for *Northwest Austin, Shelby County, Knox, Harris,*and *Janus*

argue this in the courts.[85] These figures made their arguments at Federalist Society events and were influential in the acceptance of a "new originalism."[86]

Following the election of Ronald Reagan, the doctrine of judicial restraint became inconvenient for conservatives. Now in charge of government, conservatives were no longer in opposition, therefore restraint did not fulfill movement conservative goals. With Reagan in the White House, conservatives' goals shifted from defense (halting and narrowing liberal legalism's advancement) to offense (reversing legal liberalism) and setting precedents for a set of "counter-rights" that appealed to conservatives.[87] This would require overturning precedents and established doctrines, practices consider "judicial activism" and long condemned by conservatives. Once Reagan was able to appoint judges, overturning decisions such as *Roe* v. *Wade*[88] and *Engel* v. *Vitale*[89] was thought to be within reach. However, it was first necessary to counter entrenched liberal legal doctrine by opening a space and ultimately securing acceptance for conservative legal theory among the legal elites. The Federalist Society was central to the development of a fully matured conservative doctrine that could challenge legal liberalism and also provide a conservative understanding of law.[90] Beyond the development of a coherent theory, these new conservative legal ideas had to gain acceptance with the legal community's intellectual elites before judges could reference these novel ideas in judicial opinions.[91] In general, any new theory in law must be vetted and accepted as legitimate by the profession's

[85] Avery and McLaughlin 2013 9-10, 54, 64, 72; Rosen 2005; Teles 2008, 80
[86] Beutler 2015; Hollis 2015, 19-20; Whittington 2004
[87] Teles 2009
[88] *Roe v. Wade*, 410 U.S. 113 (1973)
[89] *Engel v. Vitale*, 370 U.S. 421 (1962)
[90] Avery and McLaughlin 2013; Hollis-Brusky 2015; Teles 2008; 2009
[91] Avery and McLaughlin 2013; Baum and Devins 2010; Hollis-Brusky 2013; 2015; Teles 2008

elites. In the legal realm, this was largely done through law schools and professional bar associations. Law schools are the most influential in shaping the culture of law through controlling the education process. Universities are the entryway into a legal career. Universities recruit and determine admission policies thereby determining who enters. Universities also control the hiring of professors and faculty who directly shape legal thought through their selection of teaching materials. Professors and faculty decide what legal theories to teach and, just as important, what is not chosen to teach. In this way, universities can design the norms of legal thought for the profession (Hollis-Brusky 2015; Teles 2008). When the founders of the Federalist Society entered law schools, these institutions were dominated by legal liberalism that accepted the jurisprudence of the Warren Court. Therefore, the aim was not only to focus on students but to thoroughly reform higher legal education from within the academy by attacking it at its root.

The Network also includes lawyers who must introduce these arguments in court briefs to produce a legal record. The Network's associated conservative public interest law firms (CPILF) would select specific cases that would address a perceived egregious legal doctrine to frame it in a way that foregrounded the conservative argument. Network lawyers, either when winning or losing their cases, established a record of conservative and libertarian legal arguments that aided in instituting these ideas. Once established in case law, arguments can be used by future litigants and be incorporated as the rationale for judicial decisions.

In general, judicial opinions explain, in various degrees of detail, the principles and rationale used to reach their decision. A court ruling that departs from established law in

particular is expected to provide a justification for the decision.[92] Movement conservatives once in charge of government power intended to disestablish prevailing doctrine disrupting existing law.[93] Therefore, conservative justices needed a conservative constitutional rationale that could justify a sharp departure from the legal status quo to the legal establishment.[94] These legal arguments were provided by The Federalist Society.[95] Providing conservative lawyers and judges with the necessary constitutional arguments to reach conservative decisions may be the Network's most important function.[96]

Providing the intellectual language for Supreme Court opinions conceals much of the Network's influence, which is not as readily apparent as changing a justice's vote in a court case. The Federalist Society relies on its members to do the work to influence government, judges, lawmakers, or in proposing doctrine. The Federalist Society itself is the conduit through which the necessary components for revolutionary change are developed. The Federalist Society enabled constitutional change through creating the ideas that underlay departures from established doctrine and creating the network that could reach into all areas of the legal and political establishment to legitimate and promulgate these new ideas until they were ultimately accepted.

The Network's reach meant members were positioned to take advantage of access points in the legal system: a brief submitted by a Network member as litigator, an amicus submitted by a Network member in support of a position, an opinion in a lower court written by a Network

[92] Hollis-Brusky 2015, 148; Teles 2008
[93] Teles 2009
[94] Hollis-Brusky 2015, 23; 148; Riehl 2007; Scherer and Miller 2009
[95] Hollis-Brusky 2015, 23; 142; 148; Riehl 2007; Teles 2008, chap. 5; 2009
[96] Hollis-Brusky 2015, 142

member judge, or publishing in academic journals.[97] Through these methods and others, the Federalist Society has been successful in shaping the substance of legal decisions. The Federalist Society was also essential in uniting all factions of the conservative movement by advocating for the broader areas of agreement and disenchantment with the current legal status quo. Also critical was their construction of a newer "judicial restraint" distinct from the traditional "judicial restraint," that could justify overturning specific decisions or laws while maintaining that judges must not interpret the law in their own social vision but strictly "say what the law is."[98] Many Supreme Court decisions now contain the language of the Network.[99] This is where their influence is most meaningful and where it affects all citizens. By limiting interpretation by text and time, the judge will not be applying anything outside the "four corners" of the written words, such as current norms, to the law.

In a majority of cases, this endorses a constitutional interpretation that is tied to the world of a new nation with a population of approximately 4 million people, confined to the eastern seaboard, and a world view 300 years old.[100] Furthermore, this also confines interpretation to what was at the time an untested and unique system of government. Also, when we look to "public meaning" at the time the Constitution was written, the "public" was only understood to be a small segment of the population: Anglo-Saxon, male, owners of property including land, slaves, and wives, educated and Protestant. Another one of the Federalist Society's core founding principles: "that the state exists to preserve freedom" is as narrow as is it malleable. "Freedom" generally revolves around property rights, economic freedom, and free markets. Further, by

[97] Hollis-Brusky 2015, 23
[98] Our Background | The Federalist Society
[99] Hollis-Brusky 2015, 23
[100] Ginsburg et al. 2019

“reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law,” the Society simultaneously defines the content of "individual liberty" and "traditional values" by limiting judges to the "public meaning" in the framers' generation and allowing only historical sources in the time written for interpretation. The Federalist Society also decides what is “premium"” as it pertains to the “rule of law.” These interpretations and definitions of constitutional principles are extremely important when making legal decisions. However, while “new originalism” may be dominant, some conservative political and legal leaders still claim to stand for “restraint.” Perhaps, this is because they have redefined what is considered “activism.” Indeed, there is evidence that justices affiliated with the Federalist Society have adopted the redefined “judicial restraint.”[101]

Through the Network, conservative and libertarian principles of constitutional interpretation made their way into Supreme Court opinions. By 2020, six Supreme Court justices were known members of the Federalist Society; that was not always the case. Additionally, legal change does not operate in a straight line from ideas to law. New legal ideas must first go through a process of legal vetting in order to gain acceptance and be deemed legitimate by those who are respected as legal authorities to be of use in judicial decisions. The legitimacy of the Supreme Court requires its opinions to be accepted as valid reasoning. This dissertation emphasizes the importance of new ideas and how they move through the Network to alter the trajectory of legal rights and legal remedies in our society through laws.

An external support network can also watch for and act upon “insiders” signals. In the legal arena, outside activists are always vigilant to signals justices may send to them in court

[101] Stone 2012; Hollis-Brusky 2015

opinions alerting readiness to move the law new direction. The Network must be ready to present the right case, with the right facts, and framed in a suitable way to allow that movement. *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. __ (2018) presents a clear example of a response to Alito's signal to Network members that he was ready to review and likely overturn a 40-year-old precedent. Similarly, before *Shelby County v. Holder, 570 U.S.* 529 (2013), Roberts signaled his willingness to revisit the constitutionality of the Voting Rights Act. In both instances, the Network was ready to respond to those signals. Their response resulted in the two cases central to this dissertation, *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S.__ (2018) and *Shelby County v. Holder, 570 U.S.* 529 (2013).

"The Federalist Society" versus "The Federalist Society Network"

The Federalist Society is the unique institution that connects conservative lawyers, students, professors, and conservatives of various professions, along with the diverse ideologies within the conservative movement: social conservatives, libertarians, and business conservatives.[102] The Federalist Society is the center of a "Network" where these factions meet, interact, and plan legal strategy. Through its various activities, the Federalist Society creates a network of conservative activists throughout the U.S. acting in different roles to spread influence broadly. The Federalist Society is not shy about revealing the existence of its network. This is stated proudly on its website: "In working to achieve these goals, the Federalist Society has created a conservative and libertarian intellectual network that extends to all levels of the legal

[102] Southworth 2008

community."[103] What is notable about this network is its expansiveness. It truly does reach to "all levels of the legal community" and has nearly complete control over Republican presidents' judicial nominees.

Therefore, throughout this dissertation, I will refer to the Federalist Society ("FS" or "Federalist Society" throughout) and the Federalist Society Network ("Federalist Society Network" or the "Network"). The use of the Federalist Society or FS refers to the specific activities of the group itself or actions taken by an executive in the name of the Federalist Society. Federalist Society primarily refers to its formative period before the "Network" as such coalesced into the institution it is today. The Federalist Society Network or the Network consists of individuals that have repeated associations with or have participated in more than one sponsored activity as a speaker. Additionally, since the Federalist Society does not publish a membership list, I will include and augment previous research that has identified key actors associated with the Federalist Society.[104] Network members have been identified in prior work either through their participation as speakers at Society events[105] or media references.[106] The *Harvard Journal of Law and Public Policy* publishes the speakers and speeches from the annual National Student Symposium in the year following the event. It is considered a high honor to be a presenter at this annual conference. Presenters are considered to be the "true believers."[107]

Describing individuals active in the Federalist Society as Network members rather than members of the Federalist Society conveys the extensive reach and the high volume of

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[103] "...seek[ing] to promote awareness of these principles [of limited government] and to further their application through its activities" (About Us| The Federalist Society)
[104] Hollis-Brusky 2015; Scherer and Miller 2009
[105] Hollis-Brusky 2015
[106] Scherrer and Miller 2009
[107] Hollis-Brusky 2015, 24

participants involved.[108] It also conveys the wide range of activities conducted by the conservative legal network that are facilitated by the existence of the Federalist Society. I aim to capture the changes enabled by the Federalist Society itself. Therefore, the emphasis is placed on activities and participation rather than being a "card-carrying" member.[109]

Overview of Methods and Research Questions

The Federalist Society has an enormous influence on our whole legal system. Previous research has deemed the Network as the supplier and transmitter of the "intellectual capital" necessary for the conservative turn in Supreme Court jurisprudence.[110] This dissertation adds to this salient issue by documenting how the Federalist Society has meticulously coordinated the conservative legal structures necessary to narrow the protections afforded by Congressional legislation under The Voting Rights Act and The National Labor Relations Act. These two pieces of legislation were passed to aid the disempowered members of our society.

Chapter 1 introduced the Federalist Society, its institutions, and its Network. The Federalist Society's theory of originalism is also described in this chapter. Chapter 2 reviews previous research on the Federalist Society and reveals its significant influence. Chapter 3 presents the research question and the Supreme Court cases I have chosen. In particular, I focus on the legal doctrine surrounding the Voting Rights Act and the National Labor Relations Act. Chapter 4 explains the methodology, content analysis, underlying the examination of the Federalist Society's influence on our current jurisprudence. Chapter 5 explores *Shelby County*

[108] Hollis-Brusky 2015
[109] Hollis-Brusky 2015
[110] Avery and McLaughlin 2013; Hollis-Brusky 2015; Riehl 2007; Scherer and Miller 2009; Southworth 2008, Teles 2008

and the cases that spawned it and presents the content analysis I use to compare the Supreme Court majority opinions and Network members' amicus briefs and Network members' petitioner briefs. Chapter 6 examines *Janus* and the cases that generated it and also presents the content analysis comparing the Supreme Court majority opinions to the Network members' amicus briefs and Network members' petitioners' briefs. This comparison shows how the ideas of the Federalist Society are dispersed and incorporated into Supreme Court opinions and thus into law. I focus on the Supreme Court majority decision, comparing the opinions to the amicus briefs and petitioners' briefs of members of the Network identified through their participation at National Conferences and other Federalist Society events. It is their scholarship that is compared with the majority opinions.

I analyze two recent Supreme Court cases that overturned long-standing precedents. *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. __ (2018), in eliminating "agency fees" assessed by public sector unions, struck down what was a forty-year precedent set in *Abood*, cutting off an important source of financial resources for unions and it is presented in Chapter 5. *Shelby County v. Holder,* 570 U.S. 529 (2013) held unconstitutional the formula used to implement the protections afforded by the Voting Rights Act of 1964, a law passed by Congress more than four decades earlier and reauthorized with bipartisan support ever since.[111] This decision eliminated the main mechanism for preventing voting changes that had discriminatory effects and is presented in Chapter 6.

Both cases were controversial at the time of their decisions; both cases were narrowly decided (5-4) along what is considered ideological lines; and both cases overruled long-

[111] Berman 2015

established precedents. Also, in both cases the Network members worked for decades to limit the reach of the legislation involved in each case: legislation passed by Congress to expand protections to voters and workers. Additionally, both decisions directly implicate a particular demographic of society. Elections, and participation in elections, are key to upholding democracy.[112] The Civil Rights Movement, which included access to the ballot, was a long and hard-fought battle.[113] Unionization too has been a long, often violent struggle.[114] Collective bargaining between unions and employers aims to equalize power by providing workers with knowledgeable and experienced negotiators to offset the employer's power.

These decisions were victories for the Network. This was not an abrupt change but rather a protracted struggle. In both cases, these victories were part of a comprehensive long-term plan to transform the whole of legal liberalism. It was a case-by-case incremental change that took decades to come to full fruition and required a team of committed ideologically driven, and properly trained network members. Tracing the line of cases prior to *Shelby County* v. *Holder* and *Janus* shows the legal strategy that produced the outcome that the Supreme Court eventually handed down. This project will outline that process to reveal the strategy.

Most importantly, as others have emphasized, specifically to the Federalist Society[115] and more generally in reference to interest groups[116] is the importance of ideas. Essential to these decision outcomes are the ideas or "intellectual capital" that underlay the decisions that, *if not for*, made the doctrinal changes possible. This dissertation picks up that emphasis on ideas and

[112] Levitsky and Ziblatt 2018, 3-6
[113] Berman 2015
[114] Phillips-Fein 2009
[115] Teles 2008; 2009; Hollis-Brusky 2015
[116] Blythe 2002

follows the road taken by the “intellectual capital” produced in the Network. As others have demonstrated, I will show that replacing judges alone is not adequate to explain changes in jurisprudence direction.

Chapter 2

Literature Review

The Impact of the Federalist Society on Law

The Federalist Society's interpretation of the United States Constitution has been fundamentally adopted into law, which transformed what had once been established doctrine. Academic writings and the language of Network members have frequently been called upon by justices to support the legal rationale of Supreme Court decisions.[117] This influence has reshaped the relationship between the federal government and the states, the relationship between the federal government and its citizens[118] and fundamentally changed the position of corporations in American society under the First Amendment.[119] The "Network's legal theory undergirded the Supreme Court's transformation of the traditional understanding of the Second Amendment as a collective right to an individual right "to keep and bear arms"[120] Additionally, Network-affiliated law firms have won cases that have reversed long-established judicial doctrine regarding labor

[117] Avery and McLaughlin 2013; Cummins and Belle Isle 2017; Hollis-Brusky 2008; 2013; 2015; Hutchison 2017; Scherer and Miller 2009; Teles 2008; 2009
[118] *NFIB et al. v. Sebelius* states can opt-out of the Medicaid expansion
[119] *Citizens United v. FEC* (2010) elevated the speech rights and *Burwell v. Hobby Lobby* (2014) elevated religious practices of non-human persons equal to that of human persons
[120] *District of Columbia v. Heller* (2008) Second Amendment guarantees an individual right to possess a handgun; *McDonald v. City of Chicago* (2010) applied *Heller* to state, local and federal government

unions[121] and voting rights.[122] The transformation of anti-trust[123] law and frequent use of cost-benefit analysis in federal court opinions is a result of the work of Federalist Society affiliated *Law and Economics Scholars*.[124]

In addition to idea diffusion, the Federalist Society has impacted the shape of law in other ways. The Network members have taken a significant role in the selection, confirmation, and ideological fortitude of judicial nominees. Starting with the Reagan Administration, this role has only strengthened in each subsequent Republican administration and has expanded to include publicity campaigns organized through conservative judicial advocacy groups.[125] The Network has also transformed legal education and public discourse.[126] Network members have been successful in legitimizing their preferred constitutional method of interpretation, *Originalism*, in legal circles and have likewise effectively inserted *Originalism* into mainstream discourse. Supreme Court justices and even the media often respond to constitutional questions through the framework of *Originalism*.[127] The shift in focus from the intent of lawmakers or constitutional authors to the text of the Constitution or statutes[128] can also be attributed to the influence of the

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[121] *Harris v. Quinn* (2014) (collecting agency fee from home health care workers who do not want to join or support a union violates free speech); *Janus v. AFSCME* (2018) (collecting agency fee from public sector employees who do not want to join or support a union violates the First Amendment); *Epic Systems* Corp. *v. Lewis* (2018) (upheld arbitration agreements containing class and collective action waivers over "concerted activity" protections under federal and state labor law

[122] *Shelby County v. Holder* (2013) (Section 4 of the Voting Rights Act unconstitutional); *Husted v. A. Philip Randolph Institute* (2018) (Ohio's process for removing voters from voter rolls did not violate the National Voter Registration Act)

[123] Judge Richard Posner, a leader in the Law and Economics movement, has spoken at 3 national conferences including the founding symposium (Hollis-Brusky 2015, 2, 58, 197 f135; Teles 2008, 188-189).

[124] Ash and Naidu 2018; Hutchison 2017

[125] Ringhand and Collins Jr. 2018; O'Harrow and Boburg 2019

[126] Riehl 2007; Teles 2008

[127] Hollis-Brusky 2015, 86-88; Scherer and Miller 2009

[128] The shift from Congress's intent to the plain text of the law can be seen in the oral arguments in *Young v. UPS* 575 US _ (2015) regarding the Pregnancy Discrimination Act of 1978. The Act states pregnant employees cannot be treated differently from other employees who are "similar in their ability, or inability, to work." The oral arguments centered on the meaning of the words and not what Congress intended. Young argued Congress's intent was to bar

Federalist Society.[129] In fact, it may not be too far of a stretch to say that an originalist framework dominates most constitutional discourse and that in some ways, as Justice Kagan stated in her confirmation hearing, "…we are all originalists."[130]

Ideas Need a Network

The Federalist Society has mostly operated out of the public's view. As legal scholars, lawyers, judges, and political actors, Network members do not act on behalf of the Society, but rather in their professional capacity. To the outside, this gives the appearance of dispersed, unconnected groups in the legal sphere, and hides the meticulous coordination that goes on behind the scenes. However, researchers are now beginning to understand that at the center of these conservative and libertarian legal activists sits the Federalist Society creating the conditions for conservative legal change.[131] The news media and journalists have done extensive reporting on the Federalist Society's involvement and the influence it has exerted on legal culture. Scholars have also begun to note the weight the Federalist Society carries in legal circles. However, legal change is hard to attribute to the Society directly since it insists it does not take policy positions itself and is merely facilitating the activism of its members.[132] Additionally, durable legal transformation is more complex than simply replacing the courts with ideological cohorts. Before new legal interpretations are adopted by judges, they must gain credibility within

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discrimination against pregnant women in the workplace, the Justices kept returning to the words "similarly situated" and "similar in their ability or inability to work" to inquire how other employees who could not perform their job duties were treated. Employers argued that to treat pregnant women differently than a similarly situated male employee would be preferential treatment (Martin 2015).

[129] Martin 2015; Riehl 2007, 215-223; Teles 2008, 145-146

[130] Confirmation Hearing on the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 62 (2010)

[131] Avery and McLaughlin 2013; Hollis-Brusky 2013; 2015; Southworth 2018; Teles 2008; 2009

[132] Teles 2008

the legal profession. Judges must remain committed to the new philosophical vision and not stray from core principles. Additionally, a single justice in the U.S. Supreme Court is only one of at least five needed to form a majority. The change wrought by the Network is not discrete, rather, the Network has succeeded in implementing a comprehensive change in legal culture, which complicates direct attribution. As founder David McIntosh readily admits, "There are going to be untold ways in which notions of *Originalism*, of limited government, of the rule of law, are being implemented in thousands of decisions at various levels of government and the community outside of government."[133]

To overcome the difficulty of linking *the organization* the Federalist Society to Supreme Court opinions, scholars have introduced variants of network theory to explain the institutional structure of the legal community and the networks that support those institutions. Recognizing the importance of "support structures" to legal change, scholars have begun to understand the reach that the Federalist Society has throughout the conservative legal movement.[134] Thus, scholars have begun to regard the Federalist Society as the hub of a network of conservative *legal* activists and ideas, a sort of fueling station for conservative ideas. In the area of economics, recent research has stressed the importance of ideas and how status quo beliefs can be disrupted during times of uncertainty.[135] To understand the influence of the Federalist Society, we must trace how new ideas are developed, spread, and ultimately become the foundation of a Supreme Court majority opinion. However, before these radical new ideas can be used to displace the status quo, they must first gain acceptance within the community of elites. In other words, ideas

[133] Hollis-Brusky 2008
[134] The term "conservative legal movement" as used in this dissertation is meant to include both conservatives and libertarians.
[135] Blythe 2002; Mirowski 2013; Jones 2012

that were once considered "off-the-wall" must first move to "on-the-wall."[136] The goal of this dissertation is to explain the movement of ideas from "radical" to law. Therefore, this dissertation builds on recent scholarship that has examined the pathways and consequences of ideas.

The Federalist Society as the Conservative Legal Movements' "Facilitator"

A variety of scholars have begun "connecting the dots" to demonstrate the many ways that the Federalist Society drives the conservative legal movement. The Federalist Society connects conservative and libertarian legal educators, students, lawyers, members of the judiciary, activist law firms, and other conservative think tanks and advocacy groups to create the opportunity for its members to make constitutional change and shape the language and content of legal opinions.[137]

Teles (2008) describes the obstacles conservatives faced in their attempt to deinstitutionalize the legal network that coalesced to support the liberal consensus that followed the New Deal and continued through the Civil Rights Era. Teles draws on Charles Epp's work to demonstrate that transformative legal change requires more than a changeover of justices but also needs the backing of a strong "support structure" that can displace the existing paradigm and sustain the new one. In addition to judges on the courts, Teles notes, this support structure consists of legal elites who validate legal theory, i.e., law professors and members of bar organizations, as well as the gatekeepers to the legal practice and its intellectual substance such as law school faculty, staff, and again the professors who teach law. This structure also includes

[136] Balkin 2005
[137] Avery and McLaughlin 2013; Hollis-Brusky 2015; Southworth 2008; Teles 2008

litigants that advance legal issues in court framed in a specific way. Also important are ideologically compatible funders willing to forgo immediate rewards for the larger conservative and libertarian goals.[138]

Teles argues that the Federalist Society is this organizing structure for the conservative legal movement. As he claims, the Federalist Society is the "network linking conservatives in advocacy organizations, government, private practice, the Republican Party, legal academy, and courts."[139] Teles considers the Federalist Society's most critical contribution to the conservative legal movement is not direct involvement in policy, but its focus on "facilitating the activism of its members and influencing the character of intellectual debate."[140] This narrow mission has been instrumental in creating the critical "support structure" needed to instigate legal transformation. The Federalist Society is the central clearinghouse for conservative ideas and the link between the dispersed components of legal conservativism. By connecting the parts, the Federalist Society facilitates opportunities for conservatives to politically active to serve the conservative cause.[141] Through its many activities and divisions, the Federalist Society keeps legal conservatives connected, engaged, and ready to act and work at various levels to insert themselves in a variety of portals to diffuse information broadly.[142] In short, Teles sees the Federalist Society's mission as "fostering debate to actively organizing conservatives for political and legal activism."[143] While the Society itself does not advocate for a particular policy

[138] Teles 2008, 11-14
[139] Teles 2009
[140] Teles 2008, 136
[141] Riehl 2007
[142] Scherer & Miller 2009; Southworth 2008; Teles 2008
[143] Teles 2008, 156-157

or candidate, it does ally itself closely with conservative and libertarian organizations that are directly involved in political and legal advocacy.[144]

Teles' (2008) framework describes the Federalist Society's role in creating the support structure for the conservative legal movement. First, the Federalist Society recruits law students and attorneys, and second invests in the "human capital" of those it has recruited. Also, he indicates that the Federalist Society through its activism, created the cultural capital and social capital necessary to sustain the movement.[145] Of course, all movements need people who share similar interests and are trained and educated to aptly articulate those interests. In sum, Teles' framework enables an understanding of the many distinct strands of the conservative movement that are connected through the Federalist Society and how information spreads. Expanding on the support-structure framework, Hollis-Brusky (2013; 2015) focuses on the flow of ideas, or "intellectual capital," beginning within the Network and ending in Supreme Court opinions. Hollis-Brusky (2013; 2015) characterizes the Federalist Society as a "political epistemic community" that shares principles and normative beliefs about how society should organize, how that society is realized, and shares a common understanding of political disputes.[146] These features unite the movement behind a uniform objective and a uniform legal language while giving individual members the freedom to tackle divergent issue all in service of toppling legal legalism.

By following individual members' activities, Hollis-Brusky (2013; 2015) reconstructs the pathways taken by the Federalist Society's intellectual resources and traces how

[144] Teles 2008, 153
[145] Teles 2008, 136
[146] Hollis-Brusky 2015, 13-16

these conservative interpretations are transferred by members into the legal process and ultimately into law. Hollis-Brusky (2013; 2015) shows how legal theories, having been vetted within any number of Federalist Society activities, are ready for usage by the conservative public-interest law firms (CPILFs) and other network lawyers in their private practices. Hollis-Brusky explains how Network-affiliated members transfer the arguments constructed within Federalist Society activities throughout the legal community via case briefs, oral arguments, amicus briefs, classrooms, and academic journals.[147]

Since Teles (2008; 2009), other scholars have placed the Federalist Society at the center of the conservative legal movement.[148] The decision by the Society's founders to organize around legal debate and unite under broad principles rather than issues has been the key to the Federalist Society's success.[149] Likewise, Southworth (2008) describes the Society as an important "mediator group" that functions to unite the different strands of conservatism: social conservatives, libertarians, and business interest. Other authors note that the early recognition received from important conservative legal and political figures as well as conservative foundations was instrumental to its success.

The Power of Persuasion

Similar to other research, Jonathan Riehl's (2007) study of the Federalist Society demonstrates "how conservatives have translated theory into practice" through educating members on shared principles and aiding career placement to ensure results.[150] However, Riehl

[147] Hollis-Brusky 2013; 2015
[148] Avery and McLaughlin 2013; Hollis-Brusky 2013; 2015; Southworth 2008; 2018
[149] Teles 2008; 2009
[150] Riehl 2007, 9

(2007), distinctively takes the view of a rhetorical critic and looks directly at what previous scholars only viewed indirectly. Riehl (2007) views the Federalist Society's influence through the rhetorical strategies employed by the Society in their quest to persuade others. As a rhetorical critic, he looks at the communication style of the Federalist Society and the text, the words, the symbols, and the images used to connect to their audience with the intent to persuade. His method points to the importance of rhetoric as an approach of the conservative movement in general as it attempted to persuade two different audiences: the mass public as well as intellectual elites. Viewing the Federalist Society as the institution for intellectual legal persuasion, Riehl discusses its use of words, language, and symbols of American ideals to construct a narrative that resonated with its audience. Like Southworth (2008) and Teles (2008), Riehl (2007) reveals how the Federalist Society was able to bridge conservative factions through constructing a narrative about shared grievances and the same broad principles. Riehl argues that law by its nature is rhetorical. Riehl claims that law is part persuasion; and judges must justify and explain their decision as authoritative to an audience of similarly situated legal elites.[151] He contends that the emphasis the Society puts on debate is a rhetorical tool, as a way of listening and including its audience in the enterprise of change. The Federalist Society created a group of independent thinkers socialized in debate to serve a political ideology.[152] Riehl argues that choosing to structure itself around debate was an extension of its goal of persuasion because debate engages with alternative perspectives and forces one to listen. Listening allows the Federalist Society to frame its argument in ways that resonate with opponents and reshape

[151] Riehl 2007, 19; chap.1
[152] Riehl 2007, 8

popular conventions.[153] As Riehl states, "Skillfully deployed rhetoric has allowed conservatives to reshape the terms of the debate in our national political life, enacting policy that has literally changed our lived realities."[154]

Like the other scholars, Riehl shows that language and ideas matter, and conservatives have been very adept at reframing legal common sense. They have delegitimized liberal ideas and legitimize conservative ideas and have made "activist judges" and "legislating from the bench" common language.[155] Riehl explains that the Federalist Society operates at the intellectual side of the rhetorical continuum, rather than the bombastic polemics of radio and television pundits. Thus, the Network has upended the liberal consensus in part through its ability to persuade. He reasons that the Federalist Society is built on persuasion through reasoned debates and arguments, attacking their opponents through the engagement of ideas.[156] Riehl states, "Like the profession of law, the Society is an institution built on debate and argument—but plugged into a network of political conservatism. Like *NR* [*National Review*], the Federalists function as a forum, the debating chamber of the right. And as with Buckley's magazine, the Federalists operate their debating chamber for the benefit of a politically and ideologically interested project."[157]

The Pathway of Ideas

In line with the aforementioned scholarship emphasizing the power and necessity of ideas along with their consequences, this dissertation also highlights the ideas behind the conservative

[153] Riehl 2007, 16-18
[154] Riehl 2007, 19
[155] Riehl 2007, 146
[156] Riehl 2007, 59
[157] Riehl 2007, 59

turn in constitutional interpretation. As these studies have demonstrated, ideas need networks to be dispersed and implemented. Ideas also need to be framed in a way that will resonate with a target audience. In other words, people are necessary, but people must be armed with ideas and supported by a structure that gives legitimacy to the people and their ideas. This structure must also connect ideas to their audience, move people and ideas throughout the professional institutions it seeks to transform and a structure to hold the people and their ideas to account. Finally, the support structure is also necessary to maintain the new ideas and institutions once implemented.

The Federalist Society was aware that true transformative change would take more than just placing the "right" people on the courts. The legal "gatekeepers," such as legal professionals and judges, would have to accept their radical new ideas.[158] Therefore, the Federalist Society provided the venue for intellectual debate for the development of conservative and libertarian thought with which to educate and socialize its members and constructed a network to disperse its ideas and its legal actors throughout the legal, political and social systems. The Federalist Society's many activities foster continuous interaction between members within the academy, government, and society to work together to ready the intellectual resources required for a drastic legal change. These intellectual resources are then carried by members into academia and litigation. Network affiliated professors teach these principles in law schools and Network affiliated lawyers transfer these arguments to judges through case briefs, oral arguments, and amicus briefs.[159] In short, the Federalist Society has created a network of legal conservatives that promote idea production, continuous interaction, engagement, and

[158] Avery and McLaughlin 2013; Hollis-Brusky 2015; Southworth 2018; Teles 2008
[159] Avery and McLaughlin 2013; Hollis-Brusky 2013; 2015; Southworth 2018; Teles 2008

disciplined activists to be ready to take advantage of political and legal opportunities that appeared.

Components of the Network

The (the Right) People, (The Right) Ideas, and (the Right) Results The "Right" People: Judicial Nominations.

Appointing judges and legal policy officials who maintain a dedication to shared beliefs about the Constitution are crucial to reshaping legal culture. As many scholars demonstrate, the Federalist Society has been successful in keeping its members faithful to the mission. Teles (2008) contends that the Federalist Society's decision to commit to broad concepts of agreement rather than specific issues maintains unity between the conservative factions. He further argues the Federalist Society moniker also creates bonds of knowledge and trust among associates in the network based on ideological commitment. Hollis-Brusky (2015) posits this pledge to principles over issues not only unites factions but also reinforces the core beliefs in individual members and enables members to serve as a "check" on judicial appointees to also commit to these principles once appointed to the bench. Scholars also argue that Federalist Society credentials signify a specific judicial philosophy and reduce uncertainty in the search for ideological hires.[160] Ringhand and Collins Jr. (2018) describe how through this reduction in uncertainty, the Network has changed the content of judicial confirmation hearings while Scherer and Miller (2009) provide evidence that member judges exhibit more conservative voting behavior.

[160] Hollis-Brusky 2015; Teles 2008

Journalists have also dug into the effect the Network has had on legal culture. *Washington Post* reporters, O'Harrow and Boburg (2019) report that five out of nine of the current Supreme Court justices are closely associated with the Federalist Society. In fact, Toobin (2018) attributes the confirmation of the last four Republican presidents' nominees,[161] to Leonard Leo, the Executive Vice President of the Federalist Society. Both scholars and journalists have noted that Justice Clarence Thomas has been and continues to be a frequent speaker and supporter of the Federalist Society.[162] Not coincidentally, as Devins and Baum demonstrate, these five are more conservative than previous conservative justices.

The philosophical assuredness provided by Network membership along with the Network's monopoly on selecting Republican judicial nominees threatens the "Advise and Consent" role of the Senate according to Ringhand and Collins Jr. (2018). Leonard Leo is not shy about acknowledging the Society's role in stacking the judiciary with ideological judges when he states, "You know, the hearings matter so much less than they once did. We have the tools now to do all the research. We know everything they've written. We know what they've said. There are no surprises."[163] In their studies of the Supreme Court confirmation process, Ringhand and Collins Jr. (2018) note that hearings for justices have been vital in revealing information about a nominee's stance on important legal questions. Hearings function to publicly "affirm our shared constitutional commitments" and are crucial "in providing public validation of previously contested, but now well-settled constitutional cases and controversies."[164] The selection of judicial nominations from the ranks of the Federalist Society has put this function to

[161] Justice Samuel Alito, Chief Justice John Roberts, Justice Neil Gorsuch, and Justice Brett Kavanaugh
[162] Hollis-Brusky 2015, 3; O'Harrow and Boburg 2019
[163] Toobin 2018
[164] Ringhand and Collins Jr. 2018

the test. Given Federalist Society's credentials, the nominee's adherence to certain conservative principles and a specific understanding of the Constitution are already known, therefore, the need for vetting by Republican Senators is significantly diminished. Ringhand and Collins Jr. (2018) describe the changes that have taken place since the Federalist Society has taken over the role of vetting. In general, all judicial nominees refuse to answer some questions but do answer others. These authors indicate that the trend has been an increase in willingness to answer Senators' questions. However, Neil Gorsuch, President Donald Trump's Federalist Society selected nominee for the Supreme Court, broke from that pattern aided by the Senate Republicans. Ringhand and Collins Jr. (2018) note that Republican Senators' opening statements indicated they were not going to push Gorsuch on questions of substance, and Gorsuch readily followed their lead. The Republican majority in the Judiciary Committee gave Gorsuch a pass allowing him to refuse to answer questions on heretofore mainstream case law,[165] refusing to answer more questions than any previous nominee.[166] Collins Jr. reports that Democrats could not even manage to get a firm response on an iconic case such as *Brown* v. *Board of Education.* Even though Gorsuch failed to "offer much of anything of substantive value" and little to no new information was gained in his confirmation hearing, his Federalist Society credentials provided all that was needed.[167]At the same time, these credentials elicited concern and prompted probing questions from Democratic Senators, which were mostly left unanswered.

As Ringhand and Collins Jr. describe, confirmation hearings have become lopsided partisan events with the non-nominating party asking tough questions, and the president's party

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[165] "Gorsuch stands out quite a bit in the sense that he really got a pass from the Republicans on the Senate Judiciary Committee in terms of what he was allowed to refuse to answer" (Collins; Grossman 2018).
[166] Grossmann 2018
[167] Grossmann 2018

asking the so-called "softballs." They warn that by allowing judicial nominees to bypass answers concerning foundational case law "we lose an important tool in ensuring that the individuals selected to serve on the Supreme Court accept the constitutional settlements reached by each generation of Americans."[168] Balkin (2005) explains that many of our "constitutional settlements" are not shared by all Federalist Society members. Therefore, Collins Jr. contends that this non-responsiveness is "hiding the fact that these are extremely conservative justices that have been vetted by an interest group that is incredibly good at what it does."[169]

The "Right" People: Law clerks

Before the formation of the Federalist Society, conservative judges were limited in their selection of law clerks. Nevins and Baum (2017) find that since law clerks emerge from the same law schools that were perceived to be predominantly liberal, law clerks were also perceived to be predominantly liberal. The Federalist Society changed this situation as well. The student chapters now provide conservative justices with a supply of potential clerks trained in conservative legal principles. Clerkships often lead to low-level government jobs and ultimately a federal judgeship or other influential positions inside the government.

Baum (2014) demonstrates how this change impacted the selection of law clerks. Since the 1970s, the selection of law clerks by the Supreme Court has become increasingly tied to ideology. The ideology links between the Justices and their clerks have grown even stronger starting in the early 1990s. The percentage of clerks selected from lower court judges of the same party appointing president has increased substantially over time and is greatest for the Roberts

[168] Ringhand and Collins Jr. 2018
[169] Grossman 2018

Court's justices.[170] Baum also shows that conservative justices almost exclusively select clerks based on ideology (2014). Justice Antonin Scalia and Justice Samuel Alito did not hire any clerks from judges appointed by a Democratic president from 2010 to 2014. One hundred percent of Justice Scalia and Justice Alito's clerks came from Republican-appointed judges compared with 70 percent for Kagan and Sotomayor the most among Democratic-appointed justices.[171] In fact, Bach (2001) reports that some conservative judges have considered Federalist Society membership as a "plus" in their consideration for clerks in that it signals "a particular philosophy" and these judges "tend to give an edge to people I agree with philosophically." From the beginning, the Federalist Society has served as a conservative career "pipeline."[172] Employment, based on group membership, as Bach (2001) noted "smacks of affirmative action for conservatives," the very practice that conservatives have attacked for decades. Even more ironic, conservatives still view themselves as a long-suffering minority fighting the dominant liberal majority for a place and influence in legal society.[173]

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[170] Baum 2014

[171] Percent of Law Clerks from Democratic-appointed Judges: 1975–80 Justice Marshall highest 68.2%; Justice Rehnquist 37.5% lowest; 1981–85 Justice Brennan 73.7 %; Burger 40.0%; Percent of Law Clerks from Republican-appointed judge: 2005- 2015 Justice Thomas 97.9%; Ginsburg 23.4% (Devins and Baum 2017). 2010–2014: 32.1% Law Clerks from Republican-appointed judge for four liberal Justices; 8.0% of the clerks for the five conservative Justices came from Democratic judges; Kennedy 20% Roberts 15% Thomas 5% (0 until 2013) Alito 0.0 Scalia 0.0; Sotomayor 70.0 Kagan 70.0 Ginsburg 68.4 Breyer 63.2 (Baum 2014). 2013 - 2014 Terms, 32.3% of the clerks for the four liberal Justices came from Republican judges, 10.0% of the clerks for the five conservative Justices came from Democratic judges; 90 % clerked prior year for Republican-appointed judge. Ginsburg, Breyer, Sotomayor, Kagan, 9 of the 16 or 56 % clerked prior year for Democratic-appointed judge (Baum 2014 footnote 20; Stone 2014) https://abovethelaw.com/2018/10/supreme-court-clerk-hiring-watch-justice-kavanaughs-history-making-class-of-clerks/?rf=1. https://abovethelaw.com/2019/06/supreme-court-clerk-hiring-watch-the-return-of-the-tiger-cub/

[172] "The key was to figure out how to develop what I call a 'pipeline'—basically, where you recruit students in law school, you get them through law school, they come out of law school, and then you find ways of continuing to involve them in legal policy. So you have these chapters, you have practice groups, you have a pro-bono network, you have a media program—you find ways of engaging these lawyers so that they can still be involved." Leonard Leo Vice President Federalist Society (Toobin 2018)

[173] Baum 2014

The "Right" Ideas: Spreading Ideas to Influence Policy

The Supreme Court's written opinion establishes the law for the parties to the case but also future litigants. Feldman (2017) tells us that the language of a Supreme Court decision is important because these words give direction to the lower courts, the other two branches of government, as well as other legal and political actors. Feldman further notes that opinions also signal to interested parties outside of the court what issue or issue dimension the court would be receptive to for future cases or a framing that would gain a favorable opinion. The content of concurring and dissenting opinions is also vital. Rice (2017) finds that dissents force the majority to respond to issues raised in the dissenting opinion broadening the scope of the decision. Thus, both of these scholars provide evidence that court opinions contain much that future judicial participants consider valuable and are fertile grounds for interest groups to influence the direction of law. By examining the language and the content of majority opinions, we can discover the influence of the Network on court decisions.

Interest Groups and The Supreme Court

The Federalist Society is explicit in its mission of "reforming the current legal order" according to its own set of principles.[174] Absent a Supreme Court majority of Federalist Society affiliated justices, reform is only possible through persuading the justices of the validity of their arguments. Hollis-Brusky (2015) demonstrates in detail how the Network members aggressively lobbied the Supreme Court to adopt the constitutional interpretation they put forward. She also

[174] "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 duty of the judiciary to say what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities" (Our Background| The Federalist Society).

describes how the Network members' campaign to persuade entailed the submission of *amicus curiae* briefs along with a litigation strategy pursued by its associated lawyers. Thus, one way that interest groups attempt to shape the law through judicial opinions by submitting *amici curiae*. What is more, as reported by Collins Jr., (2018), amicus briefs do have an impact on case outcomes and justice's votes.

Early studies of the influence of *amicus curiae* on judicial behavior focused on the number of submissions and what types of cases were correlated with a larger number of *amicus curiae*. Collins Jr.'s (2018) survey of the literature reports that types of cases receiving the largest number of *amicus curiae* are those carrying the potential for substantial impact, those involving judicial review, and those addressing important issues regarding civil rights, civil liberties or constitutional law. He indicates that amicus briefs may also be used to supplement information in cases argued by a relatively inexperienced attorney, a resource-poor litigant, or when the legal question(s) before the court is more complex. A large number of amicus briefs signify the importance of the case to the justices, the public and the media. Likewise, cases with a larger number of amicus briefs are more likely to have concurring and dissenting opinions. Litigants also benefit from the number of briefs submitted for their cases. Collins Jr. (2018) notes that the side with the larger number of briefs is more likely to win their case and the number of amicus is a key factor in the granting of *certiorari*. Collins Jr., (2018) further notes that *amicus curiae* is also widely used to counter the arguments of opponents and to call attention to the legal actions of groups to aid with fundraising and gaining other support. This was the early strategy of the conservative public interest law firms.[175] Finally, Collins Jr. notes that briefs

[175] Decker 2016; Teles 2008

signal to the justices as to which societal interest is aligned with one side or the other and which group or groups will be affected by the outcome.[176]

Box-Steffensmeier, Christenson, and Hitt (2013) step away from the traditional study of the number of amici to examine the role interest group power plays in shaping federal judicial policy. As to "who" participates, many different types of organizations file amicus briefs, and while each participates at different rates, no single *type* of group dominates. Moreover, Box-Steffensmeier, Christenson, and Hitt (2013) find that both liberal and conservative positions have a relatively equal number of advocates participating and most cases have a balanced number of amicus briefs submitted on each side. They also demonstrate that amicus briefs signal ideological direction to the justices, increasing the probability justices will decide in a liberal (conservative) direction as the quantity of liberal (conservative) amicus briefs' submissions increase.

However, participation may be relatively democratic, but when it comes to outcomes, powerful interest groups have an advantage in both case outcomes and the content of opinions. Box-Steffensmeier, Christenson, and Hitt (2013) find that not only do justices respond more favorably to high-power interest groups in general, but the ideological leaning of interest groups also affects the direction of the justices' votes. The justices are more likely to vote in the liberal direction in cases when the liberal interest groups have more power compared to the conservative interest groups. The alternative scenario is true also, justices are more likely to vote in the conservative direction when the power of the conservative interests are higher.[177] Box-

[176] Collins Jr. 2018

[177] Dependent Variable is Probability Justice will Support Liberal Litigant. Interest group power does not influence a justice's vote when one side has a larger number of amicus briefs compared to the other but is significant when both sides are equal in the number of amicus briefs. When liberal groups are more powerful, justices are more likely to vote with the liberal litigant and when conservative groups are more powerful, justices are less likely to vote for liberal litigant (Box-Steffensmeier, Christenson, and Hitt 2013).

Steffensmeier, Christenson, and Hitt (2013) further find that the ideological preference of a justice is determinative of a justice's decision, independent of interests involved.[178] That is, a conservative justice is less likely to find in favor of liberal litigant while, a liberal justice is more likely to vote favorably for a liberal litigant. Interestingly, Box-Steffensmeier, Christenson, and Hitt (2013) also find that the impact the interaction between interest group power and justice's ideology has on the behavior of justices is not uniform across ideologies. All else equal, the presence of a powerful liberal interest group increases the probability a liberal justice will vote in the liberal direction, while decreasing the probability that conservative justices will vote in favor of a liberal litigant.[179] However, a liberal justice facing more powerful conservative groups relative to liberal power also *decreases* the probability that a liberal justice will vote in favor of the liberal position. Box-Steffensmeier, Christenson, and Hitt (2013) note this finding appears to indicate that conservative justices and liberal justices respond to interest group signals in distinct ways.

Content of Opinions

Quite a few studies have applied plagiarism detection software to compare the language of the majority opinion to that of the documents submitted by parties to the case,[180] friends of the

[178] Justice ideology is independently significant in both cases of heavy advantage and small liberal advantage
[179] The probability a conservative justice will vote liberal decreases as the liberal interest group's power increases. When liberal interest group power is low, a conservative justice has a 46% probability of voting liberal while a liberal justice has a 74% probability of voting liberal. When liberal interest group power is at its max, conservative justice's probability decreases to 39%, a liberal justices' predicted probability increases to 83%. There is a tradeoff effect for liberal interest groups, increase probability from liberal justice but decrease conservative. No tradeoff for conservative interest groups. The most liberal justice when conservative interest group power increased still *reduces* the probability of a liberal vote by 2.5% (Box- Steffensmeier, Christenson, and Hitt 2013).
[180] Just initial briefs on the merits, plagiarism software, % of majority opinion from parties' brief (Corley 2008)

court,[181] and lower court decision,[182] and to compare all three sets of documents together.[183] When it comes to the content of amicus briefs, about 33 percent of *amici curiae* simply reiterate the legal argument of the litigant it supports, about 25 percent contain new information and 42 percent are a combination of both repetition and new information.[184] Corley (2008) finds that majority opinions borrow the most language, 9.8 percent, from party briefs.[185] Corley, Collins and Calvin (2011) find majority opinions borrow 4.3 percent from lower federal courts opinion and Collins Jr., Corley, Hammer (2015) report that an average of 2.7 percent language comes from *amicus curiae,* while only about 1.1% language from cases cited in the opinion.[186] Collins Jr., Corley, Hammer (2015) additionally find that the Supreme Court majority opinion borrows the most language from an amicus brief that repeats the arguments in the litigant's brief,[187] followed by those that reiterate the lower court opinion and finally those that repeat the language found in other *amici curiae*.[188] Collins Jr., Corley, and Hamner (2015), also discovered justices borrow a greater proportion of language from amicus briefs that are ideologically compatible, are high quality, i.e., clearly written and written in plain language, are filed by the solicitor general's

[181] Dependent Variable: % of language majority opinion adopted from amicus brief (Collins Jr., Corley and Hamner 2015)
[182] Corley, Collins, and Calvin 2011
[183] Feldman 2017
[184] About 25 percent of amicus exclusively provide new information, 33 percent exclusively repeat arguments of litigants and 42 percent of amicus briefs contain a mix of additional new information and a reiteration of litigants' arguments (Collins Jr. 2018).
[185] 9.5 % opinions borrow from respondents' briefs, 10.1 % appellant brief, average of 9.8% (Corley 2008)
[186] Corley 2008
[187] Majority opinion adopts more language from amicus that repeat arguments made by other parties: litigant briefs (30%) lower court (9%), other amici (5%). An increase in an amicus brief's repetition of the litigant brief it supports produces a 30% increase in language the majority opinion incorporates from the amicus brief. Increase in an amicus brief's repetition of lower court opinion results in a 9% increase in language adoption; 5% increase from those that repeat other amicus briefs on the same side.
[188] Majority opinions rely most on the arguments of the parties to the case then lower court opinions before amicus curiae. When the court does rely on amicus curiae those have mostly reiterated the arguments made by the litigant the amicus is supporting.
Thus, it appears parties and amicus working in tandem have the potential to impact the court opinion and thus the law substantially (Collins Jr., Corley, Hammer 2015).

office, or filed by an elite interest group.[189] However, they also found that majority opinions adopt less language from *amici curiae* if a case is considered salient as measured by the number of words spoken at oral arguments by the justices.

When it comes to how much language the Supreme Court majority opinion borrows from the merit briefs, Corley (2008) found the majority opinion will adopt more language from either parties' brief[190] that is represented by the more experienced attorney, filed by the solicitor general's office, and ideologically compatible with the Court.[191] A lower percentage of adoption from a party's brief results for a political salient case.[192]

Similarly, Corley (2008) sought to examine to what extent the Court relied more on an appellant's merit brief over a respondent's brief.[193] Corley discovered that the Court is more likely to adopt a larger percentage of language from the appellant's merit brief when written by the solicitor general, or a more experienced lawyer than the respondent's lawyer. An appellant's brief that is ideologically compatible with the Court also increases the probability the Court's majority opinion will adopt more language from appellant's brief.[194]

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[189] Majority opinion adopts 135% more language from Solicitor General, 13% more from state government; Ideological match to the position in the brief 4% increase in language adoption; 24% more language adopted from elite interest group

[190] Dependent Variable percentage "plagiarized." Independent Variable: Respondents vs. Appellant Attorneys Experienced, Solicitor General as counsel of record, Attorney from a private firm in Washington, D.C. (Corley 2008)

[191] Ideologically compatibility measured by comparing the ideological direction of the lower court decision with the appellant's brief, then matching the brief's ideology with the ideological direction of the Supreme Court's opinion (Corley 2008)

[192] Political salience measured by whether the case was covered on the front page of the New York Times the day after the decision (Corley 2008)

[193] This measures the probability the court will adopt a larger percentage. The dependent variable is binary (1,0). The other measures were what percentage of the document the majority will be adopted. The dependent variable was the percent adopted in the majority opinion.

[194] There is a 98 percent probability that the majority opinion will incorporate a higher percentage of the appellant's merit brief rather than the respondent's when the appellant's merit brief is: 1) written by an attorney from solicitor general's office, 2) the appellant's merit brief is ideologically compatible with the Court, 3) appellant is represented

Recently, Adam Feldman (2017), also using plagiarism software, compared the overlap in the number of words in the majority opinions written by the Roberts Court compared to the words in merit briefs, amicus briefs and lower court opinions. Overall, with an increase in *amici curiae,* majority opinions will share less language with lower court opinion and party briefs, but more language from amicus briefs. However, when it comes to the number of *amici* filed, Collins et al. discovered, more is not necessarily better if your goal is to have your particular argument adopted. Collins et al. (2015) found that the justices adopt less language from one particular brief as the number of submissions increase.[195] Relatedly, Feldman (2017) noted that less language is shared between party briefs and the majority opinion in cases that are politically salient[196] and in cases regarding a question about civil liberties.[197] Conversely, in legally salient cases, those that overrule a precedent or rule a federal law unconstitutional, majority opinions borrow more from amicus curiae.

In sum, as Corley (2008) reported for litigant briefs, Corley, Collins and Calvin (2011) discovered for lower court decisions and Collins Jr., Corley, Hammer (2015) for *amici curiae*, Supreme Court majority opinions do incorporate language from the different information it receives albeit in varying degrees: merit briefs foremost, followed by lower court opinions, then

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by the more experienced attorney and 4) the respondent's brief is not written by an elite firm in Washington D.C. The 98 percent probability of using more of the appellant's merit brief compares to 59 percent probability leaving all independent variables at their means (Corley 2008).

[195] "increase in the number of amicus briefs filed in a case produces a 19 percent decrease in the amount of information the justices integrate from any one amicus brief"

[196] Political salience: opinions share less language with parties' briefs in politically salient, the front page of *New York Times*

[197] Increase amicus filings lead to less overlap with parties' briefs, less lower court overlap, more amicus overlap. More party filings decrease words shared with amicus briefs; less language from party briefs in politically salient cases and civil liberties cases; more words from amicus in legally salient cases

amicus briefs. Each of these, is a potential portal for an interest group's influence. Additionally, as there is more language overlap between the majority opinion and *amicus curiae* that repeat that language of the merit briefs, Collins Jr., Corley, and Hammer (2015) conclude there is ample opportunity for litigants to influence the substance of Supreme Court opinions through their briefs and in coordination with other *amici*.

Ideology also plays an important role in judicial decisions. Collins Jr. (2018) indicates in his review of the literature, that both merit briefs and *amici curiae* are influential when ideologically compatible with the Court or an individual justice. Further, Collins Jr. (2018) reports that the ideology of the litigants or amicus signatory sends a signal to justices about the interests involved and can serve as another portal of influence for ideologically motivated interest groups. Additionally, he also finds that large numbers of *amici curiae* for one side increases that side's likelihood of being granted *cert* or receiving a favorable outcome. Box-Steffensmeier, Christenson, and Hitt (2013) show that among interest groups that submit *amici curiae* the most influential interest groups that are those with more relative power. Finally, Feldman (2017) discovers that more language is adopted from amici curiae in legally salient cases. Thus, the court system features many opportunities for an ideological network of interest groups, lawyers, law firms, professors, and "friends of the court," among others to exert their influence.

(The Right) Results: Supreme Court Decisions

The previous section reviewed the literature to demonstrate how interest groups participate in the judicial process to sway judges toward a particular position. This next section will explore some of the ways, through its participation in legal cases, the Network has changed the shape of the law.

Avery and McLaughlin (2013), Teles (2008;2009) and Hollis-Brusky (2008; 2013; 2015) have demonstrated that the Network's influence on the courts works indirectly through developing legal theories that judges use to justify an opinion and also through fostering relationships between other conservative legal actors. The Network's influence can also be exerted directly through the appointment of Federalist Society affiliated judges as demonstrated by Scherer and Miller (2009) for appeals courts' judges. The goal, of course, was to have the law match their legal vision, which meant acquiring legitimacy for the conservative and libertarian interpretation of the Constitution on the courts as well as outside the court and ultimately adopted by the Justices in their majority decisions. "Ideas need networks through which they can be shared and nurtured, organizations to connect them to problems and to diffuse them to political actors, and patrons to provide resources for these supporting conditions."[198] The next section will discuss how ideas have flowed through the Network to become the basis for a judicial opinion.

Hollis-Brusky (2008; 2013; 2015) examines the impact of the Network in areas of law that have seen large doctrinal transformations in the past decade. She traces the Network's "intellectual capital" as it moves from members' written texts and speeches through the Network into Court decisions to become law. Network members make their arguments for legal transformation to the broader legal academy and the legal community through published scholarship in academic journals, and they present their arguments to other network members in speeches given at national symposiums, individual chapter events, speaker series, and other Federalist Society events. They also attempt to influence the legal community including their

[198] Teles 2008, 4

members through Federalist Society newsletters and other publications. Finally, members attempt to get their views adopted into law through the submission of amicus briefs and litigants' briefs in court cases.

These written and spoken words are all expressions of members' constitutional interpretation. Federalist Society members share foundational beliefs, and these common principles unite the conservative factions. The texts and speeches of Network members can, therefore, be considered representative of the shared underlying principles held by the broader network and a documentation of their viewpoint. Hollis-Brusky (2013; 2015) applies content analysis to measure the level of reliance on ideas expressed by the Network in the Supreme Court majority and concurring opinions. Scores range from "High," to "Medium," or "Low" to describe the degree of idea diffusion from Network to opinions.[199] Comparing the content between Network members' writings and speeches and Supreme Court decisions under the Second Amendment, the First Amendment's speech clause, and federalism, Hollis-Brusky finds the largest amount of idea diffusion comes when "doctrinal distance is greatest." That is, in a line of cases, that case in which the Supreme Court makes a significant break from established constitutional doctrine, the justices are more reliant on Network legal reasoning. This was evident in the cases that resulted in abrupt jurisprudential shifts for the Second Amendment, *District of Columbia v. Heller* (2008), for the Commerce Clause, *United States v. Lopez* (1995) and the First Amendment, *Citizens United v. Federal Election Commission* (2010).

[199] Hollis-Brusky 2013

Reviewing the Network activity around the First Amendment, Hollis-Brusky (2015) traces many of the theories underlying the majority and concurring opinions' rationale in *Citizens United* directly to the Network.[200] *Citizens United* built on previous cases to expand what constitutes speech as well as who or *what* is granted protection under the First Amendment.[201] Hollis-Brusky (2015) reveals, that the Network spent nearly two decades writing, arguing, and speaking against financial regulations of election spending.[202] She discovers that Justice Kennedy's majority opinion as well as Chief Justice Roberts' concurring opinion, were formulated with resources courtesy of the Network.

The Supreme Court's decision upholding the Michigan Campaign Finance Act in *Austin* v. *Michigan Chamber of Commerce* (1990)[203] combined with Congress's attempt to pass campaign finance reform propelled the Network members into action. Hollis-Brusky found that Network members began litigating cases to challenge the constitutionality of campaign finance legislation while simultaneously boosting their arguments in conference panels,[204] academic writings, and newsletter.[205] They rejected the decision in *Austin* and a subsequent case upholding a federal campaign finance law, *McConnell v. Federal Election Commission* (2010),[206] and urged the justices to abandon *stare decisis,* and overrule these two decisions. They called for a

[200] Hollis-Brusky 2015, chap 3.
[201] According to the majority, corporations must speak as freely and without restriction in political discourse just as human citizens. To not allow corporations the same freedom of speech constitutes a type of discrimination (Brown 2015, 155-156, 164-166; Teachout 2014)
[202] Hollis-Brusky 2015, chap 3.
[203] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) Supreme Court upheld a state law that banned corporate independent expenditures in support or in opposition to a state candidate.
[204] Since 2000, the Federalist Society Free Speech and Election Law Practice Group has hosted a panel at the annual National Lawyers Convention (Hollis-Brusky 2015, 67).
[205] First Newsletter: *Free Speech and Election Law Practice Group Newsletter* - Volume 1, Issue 1, Fall 1996
[206] *McConnell v. Federal Election Commission* 40 U.S. 93 (2003) Supreme Court upheld Bipartisan Campaign Reform Act (BICRA) Network member Ted Olsen was counsel in *McConnell*; *Citizens United*

return to the Court's 1976 ruling in *Buckley* v. *Valleo* that first expanded First Amendment protections to campaign expenditures and from that starting point expand First Amendment protections to other areas of campaign finance laws and corporate spending. This casting aside of *stare decisis* was not deleterious judicial activism but rather necessary to return campaign finance laws to core First Amendment principles. Hollis-Brusky finds substantial network members' participation including lead counsel,[207] in the campaign finance case *FEC v. Wisconsin Right to Life* (2007). She reports that the majority opinion adopted the Network's *amici's* argument to overrule Section 203 of BCRA as applied only to the specific type of issue ads in this case. However, Federalist Society mentor, Justice Scalia's concurrence (joined by Justice Kennedy and Justice Thomas) went further and adopted lead counsel James Bopp's argument to overrule *McConnell* and abandon *stare decisis* as "unworkable."[208] As Hollis-Brusky points out, Justice Roberts and Justice Alito opted to maintain the traditional definition of judicial restraint reflecting the debate still between conservative and libertarian factions of the Federalist Society. However, Justice Alito did indicate in a separate opinion his willingness to readdress *McConnell* if later proved to be "unworkable."[209]

Hollis-Brusky theorizes that by the time of *Citizens United* (2010), [210] Federalist Society affiliated justices Alito and Roberts were ready to join the other Federalist Society affiliated

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[207] Network participation: James Bopp Jr. lead counsel for *Wisconsin Right to Life* (2007), argued to overrule Section 203 of BCRA. Ten additional Network members argued to overrule Section 203 as applied; Charles Cooper, Thompson, Erik Jaffe, Jan Witold Baran, Jay Alan Sekulow, Laurence Gold, Joel Gora, Steven J. Law, Steven Shapiro, Theodore Olsen. District Court Judge David Sentelle joined lower court's opinion in favor of WRTL; 12 law clerks: Roberts (majority opinion), Thomas and Scalia wrote separately. (Hollis-Brusky 2015, 78-80)
[208] Network member James Bopp lead counsel for *Wisconsin Right to Life* (2007), *FEC v. The Christian Coalition*, No. 96-1781 (D.D.C. Aug. 2, 1999); *FEC v. Beaumont* (2003); *Randall v. Sorrell* (2006) (Hollis-Brusky 2015, 81).
[209] Hollis-Brusky 2015, 81
[210] Network participants: James Bopp lower court, Ted Olsen at Supreme Court. 13 others in amicus, Meese, Bradley A. Smith, Charles Cooper, David H. Thompson, Floyd Abraham, James Bopp Jr., Joel Gora, John Eastman, Laurence Gold, Steven J. Law, Steven Shapiro, Reid Allen Cox, Alison Hayward; 11 clerks (Hollis-Brusky 83).

justices in full abandonment of judicial restraint in a decision that overturned a century of precedent.[211] The Network's intellectual capital was presented to the Court by thirteen members via *amicus curiae* and as counsel for the petitioner, Citizens United.

Justice Anthony Kennedy, writing for the majority, adopted the Network's arguments expressed in the litigant brief and echoed in three other *amicus curiae*.[212] As Hollis-Brusky also reveals, in addition Justice Kennedy relied on academic articles written by Network members to justify the Court's reasoning[213] to dispel the common understanding that regulating corporate speech was based in historic practice.[214] Justice Roberts[215] wrote "separately to address the important principles of judicial restraint and stare decisis implicated in this case…" echoing Network members' priority of maintaining fidelity to the Constitution over precedent. Hollis-Brusky (2015) concludes that Chief Justice Roberts had come to fully embrace the Federalist Society version of judicial restraint, which favors principle over process.[216] Additionally, Hollis-Brusky argues that the dueling between Justice Scalia's concurrence and Justice Stevens' dissent

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[211] Hollis-Brusky 2015, 87

[212] Ted Olsen argued to overrule *Austin* because wrongly decided. His brief cited *First National Bank v. Bellotti* (1980) 12 times; Kennedy cited *Bellotti* 24 times to argue *Austin* wrong and departed from First Amendment principles, Ruled First Amendment protects speech no matter the speaker (Hollis-Brusky 84).

[213] Richard H. Fallon *Judicially Manageable Standards and Constitutional Meaning* 2006 cited by Kennedy to justify ruling on the larger issue rather than the narrow issue initially stated by the parties,

[214] Bradley A. Smith *Unfree Speech* and Brief Amici Curiae of Seven Former Chairmen and One Former Commissioner of the Federal Election Commission (James Bopp Jr., counsel of record; also signed by Smith) cited twice; Allison Hayward "Revisiting Campaign Reform" *Harvard Journal of Leg* 2008 cited twice and Brief of Amicus Campaign Finance Scholars in Support of Appellant, Citizens United (Alison Hayward, Counsel of Record) (Hollis- Brusky, 2015 85)

[215] "I write separately to address the important principles of judicial restraint and stare decisis implicated in this case…stare decisis is not an end in itself… Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent" (Roberts *Citizens United*)

[216] Hollis-Brusky 2015, 86, 148-9

under an *Originalism* framework, signals another victory for the Federalist Society in mainstreaming their legal theory.

The Federalist Society declares that it "is dedicated to the principle[s] that…the separation of governmental powers is central to our Constitution."[217] Accordingly, the Supreme Court's jurisprudence under federalism and the Commerce Clause has been the subject of sharp criticism by the Network. Hollis-Brusky (2013, 2015)[218] outlines the high priority afforded the subject of federalism (the topic of the first National Student Symposium) within the Network and highlights the many subsequent Federalist Society conferences and Network members' academic papers dedicated to the Court's failure to protect the states from federal encroachment and bypassing the Tenth Amendment.[219] Since the 1930s, the Supreme Court had established a cooperative federalism between the states and federal government and granted Congress broad authority to regulate under the Commerce Clause. Hollis-Brusky (2013; 2015) argues that when the Supreme Court shifted to enforce a federalism in favor of the states, the rationale for this clear doctrinal turn in federalism jurisprudence was provided by the Network.[220] She notes two prior cases first laid the ground before the abrupt move in *United States v. Lopez,*[221] which struck

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[217] fedsoc.org
[218] Hollis-Brusky (2013; 2015, chap 4)
[219] Network alleges that the Court has aided the expansion of the Federal government to the detriment of state sovereignty and have shifted away from the text and original understanding of the Commerce Clause (Hollis-Brusky 2015, 97). Barnett (2001), Epstein (1987) claim the original meaning i.e., the correct understanding of the Commerce Clause limits federal power, not enable its growth (Hollis-Brusky 2015, 99). Originalist claim manufacturing and agriculture are not commerce (Buetler 2015; Hollis-Brusky 2015, 96-102; Rosen 2005). This view "exist mostly in the speech acts and scholarship of Federalist Society actors" (Hollis-Brusky 2015, 107).
[220] Hollis-Brusky 2013; 2015, 103-107; 149
[221] *Gregory v. Ashcroft*, 501 U.S. 452 (1991) limited Commerce Clause power; *New York v. United States*, 505 U.S. 144 (1992) revived the Tenth Amendment, both bases on federalism and originalism scholarship of the Federalist Society. *Gregory* and *New York* relied on Michael W. McConnell, a Federalist Society member and a recommended authority on Federalism. Michael W. McConnell, "Federalism: Evaluating the Founders' Design", 54 U.Chi.L.Rev. 1484, 1491-1511 (1987). *New York* also cited J. Elliot, Debates on the Federal Constitution 197 (2d ed. 1863); The Federalist No. 42, p. 268 (C. Rossiter ed. 1961) and Records of the Federal Convention of 1787, p. 21 (M. Farrand ed. 1911).

down, for the first time in nearly sixty years, a federal statute as an overextension of Congress's commerce power.[222] Further, Hollis-Brusky finds not only were the Network's intellectual resources central to the rationale of the majority opinion, but also were particularly relied upon by the two separate concurring opinions. Similarly, these two cases smoothed the way for an abrupt shift in another area of heretofore settled Supreme Court doctrine under the Tenth Amendment in Federalist Society affiliated Justice Scalia's majority opinion in *Printz v. United States* (1997). Hollis-Brusky (2013; 2015) demonstrates that these decisions that display the greatest "doctrinal distance" between this new interpretation and the previous interpretation but also exhibits the highest degree of diffusion of ideas from Network.[223]

Hollis-Brusky (2013; 2015) has demonstrated through content analysis how the "intellectual capital" produced by the Network became important to the rationale of Supreme Court decisions regarding federalism and state sovereignty.[224] Hollis-Brusky (2013) rates *New York*[225] (1992), which laid the groundwork for the distinct shifts in court doctrine as "medium" for idea diffusion from Network members. Hollis-Brusky (2013) rates *Lopez* (1995)[226] and

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[222] Lens 2001; O'Brien 2008, 588 Volume 1

[223] Justice Rehnquist's majority quoted *Federalist 45*, a favorite Federalist Society source of originalism. Justice Kennedy and Justice O'Connor also referred to originalist sources the Federalist Society views as authoritative. Justice Kennedy and Justice O'Connor's concurrence and Justice Thomas' separate concurrence argued for dual based on FS Network principles. Federalist Society-affiliated Justice Thomas's federalism argument invoked prominent Federalist Society member professor Richard Epstein's article and Originalism to advocate for "the original understanding the Commerce Clause" (Hollis-Brusky 2013; 2015, 108-110; Rosen 2005).

[224] Hollis-Brusky 2013; 2015

[225] *New York v. United States*, 505 U.S. 144 (1992). The majority opinion was written by Justice O'Conner. Medium diffusion via scholarship (Michael McConnel 1987). Network participation: 2 clerks, 2 Justices: Thomas, Scalia

[226] *United States* v. *Lopez* high diffusion via scholarship, low network participation: 4 *amici* curiae-Randy Barnett, Henry Mark Holzer, Daniel Polsby, Charles E. Rice *Academics for the Second Amendment* brief- 1 litigator Carter Phillips, 8 clerks, 2 Justices Scalia, Thomas. Rehnquist majority "We start with first principles. The Constitution creates a Federal Government of enumerated powers" benefits of federalism and limited government cites *Gregory v. Ashcroft*.

Printz (1997)[227] as "high" in idea diffusion[228] in which Network intellectual resources were central to the rationale of the opinion. As was the case with *Lopez* for the Commerce Clause, *Printz* brought an abrupt change in the Tenth Amendment doctrine.

However, importantly, once these new doctrines had displaced what was once settled law, the Court could rest on its own precedents in subsequent cases. Indeed, as Hollis-Brusky (2015) demonstrates, when the Supreme Court invalidated the Violence Against Women Act under the Commerce Clause in *Morrison v. United States* (2000), it relied heavily on its own ruling in *Lopez* which, of course, had been formulated with the Network's intellectual tools.[229] By this time, the Network's ideas were well embedded in earlier decisions to allow the Supreme Court to rest upon its own precedents to overturn the law.[230] Likewise, Hollis-Brusky (2015) also shows how once Justice Scalia incorporated the Network's coercive federalism into his opinion to create an "anti-commandeering" doctrine, it was later successfully employed by Federalist Society affiliated lawyers to challenge the Affordable Care Act's Medicaid expansion in *National Federation of Independent Business* v. *Sebelius* 567 U.S. 519 (2012).[231] The Court was then able to cite these earlier cases (*New York* and *Printz*) to support its ruling in *Sebelius*. Chief Justice Roberts' majority opinion adopted the "anti-commandeering" framework that had been constructed based on the Network's scholarship to explain that the ACA's Medicaid Expansion was coercive to state sovereignty.[232]

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[227] *Printz v. United States* low network participation; high FS network idea diffusion via published scholarship
[228] Medium (*New York*) high (*Lopez, Printz*), low (*Morrison*)
[229] Hollis-Brusky (2015, 113)
[230] Hollis-Brusky 2013; 2015, 113
[231] Brusky 2015, 139
[232] Hollis-Brusky 2015, 133-138

The Federalist Society, formed in 1982, hit the ground running. Teles (2009) explains that senior members in President Ronald Reagan's Administration, including high-ranking officials in the Department of Justice, immediately saw the value of the Federalist Society to the newly elected Reagan's project of realigning the Courts. Teles (2009) further demonstrates that the Department of Justice and the White House hired many graduated members of the Federalist Society, including the founders,[233] who worked closely with top officials to push the President's legal agenda. Hollis-Brusky (2008) reviews the speeches, op-eds, and policy prescriptions written by Society members for senior attorneys in the DOJ and finds that the Network members were able to spread their judicial philosophy throughout the Reagan Administration from their positions as assistants to the Assistant Attorneys in the Department of Justice. Additionally, Hollis-Brusky (2008) points to a series of reports to the Attorney General[234] outlining the guidelines for DOJ policy, which are the same principles espoused by the Federalist Society, principles such as federalism, limited government, state sovereignty, and constitutional

[233] Lee Liberman Otis, Special assistant to the assistant attorney general, civil division, Department of Justice, 1984-1986; deputy associate attorney general, DOJ, 1986; associate deputy attorney general, DOJ, 1986; law clerk to Justice Antonin Scalia, Supreme Court, 1986-1987; assistant professor of law, George Mason U., Arlington, VA, 1987-1989; associate counsel to President George W. Bush, Executive Office of the President, 1989-1992; associate, Jones, Day, Reavis & Pogue, Washington, 1993-1994; chief judiciary county, Sen. Spence Abraham, 1995-1996; chief counsel subcommittee on immigration, Committee on the Judiciary, United States Senate David McIntosh, Reagan administration as special assistant to Attorney General Edwin Meese III, and as special assistant to President Reagan for Domestic Affairs. George W. Bush executive director of the President's Council on Competitiveness and assistant to the Vice President, co-founder of the Federalist Society for Law and Public Policy and serves on the Board of Directors. He remains active with several free market and conservative think tanks and grassroots organizations. David has also had stints at the Hudson Institute and as a Professor of Economics at Ball State School of Business. Stephen Calabresi Chairman since 1986 of the Federalist Society's Board of Directors, worked in the West Wing of President Ronald Reagan's White House; was a Special Assistant for Attorney General Edwin Meese III; clerked for Justice Antonin Scalia on the Supreme Court and Judges Robert H. Bork and Ralph K. Winter on the federal courts of appeals.

[234] Report to the Attorney General: *Original meaning jurisprudence: a sourcebook / Office of Legal Policy. [Washington, D.C.]: U.S. Dept. of Justice, Office of Legal Policy, [1987] http://hdl.handle.net/2027/mdp.39015019842932;* Report to the Attorney General: *Redefining Discrimination: "Disparate Impact" and The Institutionalization of Affirmative Action*.[Washington, D.C.]: U.S. Dept. of Justice, Office of Legal Policy:1988]http://hdl.handle.net/2027/mdp.39015015460879; Report to the Attorney General: *The Constitution in the Year 2000: Choices ahead in Constitutional Interpretation* / Dept. of Justice, Office of Legal Policy. United States. [Washington, D.C.] [1988] http://hdl.handle.net/2027/mdp.39015014943511;

interpretation based on originalism. Beginning in the Reagan Administration, the Federalist Society graduates were already making their mark, especially in the area of Civil Rights.

Cokorinos (2003) has argued that many of the "veteran opponents of civil rights and the young trainees of the 'permanent revolution'" were hired by the Reagan Administration,[235] "many of whom would go on to lead the attack on civil rights over the next two decades." Other scholars have documented that Civil Rights was a key area for judicial overhaul in the Reagan Administration.[236] Berman (2015) details the Civil Rights Division's, under William Bradford Reynolds and Attorney General William French Smith, objection to the reauthorization of the Voting Rights Act in 1982. The special assistant to the attorney general that Reynolds and Smith put in charge to lead the opposition to reauthorization was John G. Roberts,[237] future Chief Justice and the author of one of the Supreme Court opinions this dissertation examines. Another notable Reagan DOJ alumnus is Associate Justice Samuel Alito,[238] the author of the second

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[235] Senior level: Edwin Meese, William French Smith, Ted Olsen, William Bradford Reynolds, Charles Cooper, Terry Eastland (Cokorinos 2003, 7). "Reagan Justice Department benefited from a large cadre of bright conservatives, many of them in their 20s and 30s." Assistant attorney general level - John Bolton and Henry Habicht. Below assistant AG - James M. Spears, Carolyn Kuhl, Michael McConnell, Roger Clegg, Michael Carvin, Mark Disler, John Harrison, Gregory Walden, Steve Matthews, Gary McDowell, Steven Calabresi, Robert Syncar, Patricia Bryan, Fred Nelson, and Lee Liberman. "No department in the administration had such a large number of able, committed young people, and none was as important in the administration-wide effort to implement the president's social and political philosophy" (Cokorinos 2003, 8, quoting Eastland, Terry from "Reagan Justice: Combating Excess, Strengthening the Rule of Law" Policy Review; Fall 1988; 0, 46; pg. 16)

[236] Avery and McLaughlin 2013; Cummins and Belle Isle 2017

[237] 2005 - Present: Chief justice, Supreme Court of the United States; 2003-2005: Judge, United States Court of Appeals for the District of Columbia Circuit; 1993-2003: Partner, Hogan & Hartson LLP; 1989-1993: Principal deputy solicitor general, United States Department of Justice; 1986-1989: Attorney, Hogan & Hartson; 1982-1986: Associate counsel to the president, White House Counsel's Office; 1981-1982: Special assistant to Attorney General William French Smith, United States Department of Justice (https://ballotpedia.org/John_Roberts_(Supreme_Court); Decker 2016, 134). 1980-1981: Law clerk, Hon. William Rehnquist, Supreme Court of the United States

[238] 2006 - Present: Associate justice, Supreme Court of the United States; 1990-2006: Judge, United States Court of Appeals for the 3rd Circuit; 1987-1990: United States Attorney, District of New Jersey, 1985-1987: Deputy assistant attorney general, United States Department of Justice, 1981-1985: Assistant to the United States Solicitor General, United States Department of Justice (Ballotpedia https://ballotpedia.org/Samuel_Alito
Samuel Alito cosigned the brief in *Wygant v. Jackson Board of Education* 476 US 267 (1986); Brief for the United States as Amicus Curiae Supporting Petitioners, *Wygant v. Jackson Board of Education* 476 US 267 (1986) (No. 84-1340), 1985 WL 669739 (Avery and McLaughlin 2013, 111; 255 footnote 66)

Supreme Court case under study in this dissertation. These two men exemplify the "pipeline" begun by the relationship between Reagan Administration and Federalist Society.[239] Avery and McLaughlin (2013), Cokorinos (2003), and Cummins and Belle Isle (2017)[240] argue that the Federalist Society legal work to limit Civil Rights and affirmative action programs began in conjunction with the Reagan Administration Department of Justice. Cummins and Belle Isle (2017) trace the Society's influence in Civil Rights to an Office of Legal Policy report written by a young Federalist Society affiliated lawyer in the Department of Justice. The report opposed the Supreme Court's "disparate impact" standard for discrimination cases.[241] Following the guidelines in this and other OLP Reports, DOJ lawyers argued in *amici curiae* that a showing of intent or purpose was the only appropriate standard to apply to discrimination cases. Many of the cosigners from Reagan's Solicitor General Office were Federalist Society graduates, future leaders of a Federalist Society Practice Group and future Board Members.[242] Cummins and Belle Isle (2017) demonstrate that the Supreme Court ultimately did adopt the Network's

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[239] Avery and McLaughlin 2013, 111; Berman 2015

[240] Avery and McLaughlin 2013, 121-127, Cokorinos 2003; Cummins and Belle Isle 2017

[241] *Report to the Attorney General: Redefining Discrimination: "Disparate Impact" and the Institutionalization of Affirmative Action*" (1987) discriminatory act must be narrowly defined as intent and not merely statistical disparities (CY2002 1988 ch.5).

[242] Charles Cooper (https://fedsoc.org/contributors/charles-cooper); Roger Clegg *Amici curiae* filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Assistant Attorney* General; Clint Bolick, Jerald L. Hill, and Mark J. Bredemeier filed a brief for the Center for Civil Rights as *Amicus Curiae.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 644, 109 S. Ct. 2115, 2118, 104 L. Ed. 2d 733 (1989)
Ted Olson, former Federalism and Separation of Powers practice group *Hopwood v. Texas* ended affirmative action at the University of Texas; former head of the Office of Legal Counsel under Reagan 1981-1985, replaced by Charles Cooper (Cokorinos 2003, 60). 2012 Executive Committee of the Civil Rights Practice Group included Roger Clegg (Center for Equal Opportunity), William Maurer (Institute for Justice), Curt A. Levy (Committee for Justice), Sharon L. Browne (Pacific Legal Foundation), and Todd F. Gaziano (Heritage Foundation) (Avery and McLaughlin 2013, 121); Michael Carvin, chairman-elect Civil Rights practice group *Reno* v. *Bossier Parish School District* limited DOJ's ability to create majority-minority districts, restricted use of race in local redistricting (Bach 2001; Teles 2008, 220). Carvin 1983 to 1985 Reagan Justice Department as special assistant to Charles Cooper, deputy assistant attorney general in Civil Rights Division, moved to OLC with Cooper in 1985 as his deputy assistant attorney general in OLC (Cokorinos 2003, 60); William Bradford Reynolds (Board Member)

positions invalidating disparate impact and replacing it with an intent standard in two cases decided in 1989.[243]

Avery and McLaughlin (2013) further show that the Network has continued to attack affirmative action programs in public education[244] and public universities,[245] and have also destabilized the validity of "diversity" as a goal in public higher education.[246] The Center for Individual Rights (CIR), a network affiliated law firm that includes former Vice Chairman of the Federalist Society's Civil Rights Practice Group, Michael Roseman[247] has successfully challenged affirmative action in higher education admission in three precedent-setting cases:

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[243] *Wards Cove Packing Co. v. Atonio* (1989) Briefs of *amici curiae* urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Clegg, Richard G. Taranto, David K. Flynn, and Lisa J. Stark; for the American Society for Personnel Administration by Lawrence Z. Lorber and J. Robert Kirk; for the Chamber of Commerce of the United States by Glen D. Nager, Andrew M. Kramer, David A. Copus, Patricia A. Dunn, and Stephen A. Bokat; and for the Equal Employment Advisory Council by Robert E. Williams, Douglas S. McDowell, and Edward E. Potter.
Clint Bolick, Jerald L. Hill, and Mark J. Bredemeier filed a brief for the Center for Civil Rights as *Amicus Curiae.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 644, (1989)
City of Richmond v. Croson Co. (1989). Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Assistant Attorney General Reynolds, Deputy Solicitor General Ayer, Deputy Assistant Attorney General Clegg, Glen G. Nager,* and *David K. Flynn;* for the Mountain States Legal Foundation by *Constance E. Brooks;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley;* for the Southeastern Legal Foundation, Inc., by *G. Stephen Parker;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 475, 109 S. Ct. 706, 713, 102 L. Ed. 2d 854 (1989)

[244] Harry J.F. Korrell, for Petitioner; Paul D. Clement, for the United States as amicus curiae, by special leave of the Court, supporting the Petitioner; Harry J. F. Korrell, Daniel B. Ritter, Eric B. Martin, Davis Wright Tremaine LLP, Seattle, WA, for Petitioner. Teddy B. Gordon, Louisville, Kentucky, for Petitioner Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 707 (2007)

[245]*Coalition for Economic Equity v. Wilson,* 122 F.3d 692 (9th Cir. 1997*); Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996)*; Grutter v. Bollinger,* 539 U.S. 306 (2003) *Gratz v. Bollinger,* 539 U.S. 244 (2003) *Fisher v. University of Texas*, 579 U.S.__(2016)

[246] *Hopwood v. Texas,* 78 F.3d 932 (5th Cir. 1996) ended the use of affirmative action in all states in the Fifth Circuit (Teles 2008, 220)

[247] CIR 1998; Michael Rosman is general counsel at CIR, won a challenge to Violence Against Women Act in *United States v. Morrison* (2000). Rosman argued the VAWA which allowed sexual assault victims to sue in federal court exceeded Congress' commerce power. CIR's stated long term strategy is to change the law "by building precedent on precedent (its own [CIR'] accomplishments, and those established by others)…in addition to the *Hopwood* "clones" in Washington and Michigan, CIR's role as plaintiffs' counsel in *DynaLantic Corp. v. U.S. Department of Defense*, an attack on federal race-based contracting set-asides, seeks to apply and extend the Supreme Court's 1995 decision in *Adarand v. Pena*, which held that race-based set asides are virtually always unconstitutional" ((CIR) Annual Report 1997 – 1998). Mostly focuses Politically correct speech, affirmative action, religious liberty Religious liberty landmark case *Rosenburg* v. *Rector and Visitors of the University of Virginia*

Hopwood (1996),[248] *Gratz v. Bollinger* (2003),[249] *Grutter v. Bollinger* (2003).[250] Avery and McLaughlin (2013, 110-112) detail how Network arguments[251] enabled Chief Justice Roberts, to end the school district's use of race in school assignments, which were instituted to attempt to balance the underrepresentation of minority students due to racial housing segregation.[252] The

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[248] Michael E. Rosman, Vincent A. Mulloy, Ctr. for Individual Rights, Washington, DC, for Cheryl Hopwood et al. Theodore B. Olson, Washington DC, Michael E. Rosman, Ctr. for Ind. Rights, Washington, DC, Joseph A. Wallace, Elkins, West VA, for Hopwood and Douglas W. Carvell. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)

[249]Kirk O. Kolbo, Minneapolis, MN, for petitioners. Theodore B. Olson, Great Falls, VA, for the United States as amicus curiae, by special leave of the Court, supporting the petitioners; Michael E. Rosman, Hans Bader Center for Individual Rights, Washington, D.C., Kerry L. Morgan, Pentiuk, Couvreur & Kobiljak, P.C., Wyandotte, MI, David F. Herr, Counsel of Record, Kirk O. Kolbo, R. Lawrence Purdy, Michael C. McCarthy, Kai H. Richter, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, MN, for petitioners Gratz v. Bollinger, 539 U.S. 244, 247–48, (2003). *Gratz* limited affirmative action usage in undergraduate admission at Michigan University (Teles 2008, 220).

[250] Kirk O. Kolbo, Minneapolis, MN, for petitioner; Theodore B. Olson, for United States as amicus curiae, by special leave of the Court, supporting the petitioner; Michael E. Rosman, Hans Bader Center for Individual Rights, Washington, D.C., Kerry L. Morgan Pentiuk, Couvreur & Kobiljak, P.C., Wyandotte, MI, Kirk O. Kolbo, Counsel of Record, David F. Herr, R. Lawrence Purdy, Michael C. McCarthy, Kai H. Richter, Maslon, Edelman, Borman & Brand, LLP, Minneapolis, MN, for petitioner Grutter v. Bollinger, 539 U.S. 306, 310, 123 S. Ct. 2325, 2331, 156 L. Ed. 2d 304 (2003). *Gutter* challenged affirmative action usage in law school admission at Michigan University, only onvote away from winning a majority (Teles 2008, 220).

[251] Harry Korrell represented the Parents association in litigation and argued the case to the U.S. Supreme Court with Daniel Ritter, both are partners in the Seattle office of the national law firm Davis, Wright, Tremaine, LLP. Harry J.F. Korrell "Civil Rights No Big Surprise: A Review of the Seattle Schools Case" *Engage Volume 8, Issue 4, October 2007* "Equal protection rights are individual, personal rights, (*Grutter,* 539 U.S. at 326 ("the Fourteenth Amendment 'protect[s] persons, not groups'") (emphasis in original, quoting *Adarand*, 515 U.S. at 227). Therefore, each student affected by the operation of the preference suffered an injury under traditional equal protection analysis: an infringement of her personal right to be free from race-based decision-making by government, and the denial of an otherwise generally available benefit (the opportunity to choose her high school) solely because of her race. The en banc majority abandoned this bedrock principle of constitutional law and treated equal protection rights as group rights This group rights analysis was contrary to the established understanding of the right to equal protection as a personal right (*Grutter*, 539 U.S. at 326; *Miller v. Johnson*, 515 U.S. 900, 911 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual, or national class." (internal quotation marks omitted)); *Adarand*, 515 U.S. at 230 ("any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."); *Loving v. Virginia*, 388 U.S. 1 (1967) ("the fact of equal application [of a miscegenation statute] does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.") (16 Engage Vol. 8, Issue 4)

[252] Avery and McLaughlin 2013, 110-112 citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, (2007) "…our precedent, which makes clear that the Equal Protection Clause 'protect[s] *persons*, not *groups*,' *Adarand*, 515 U. S., at 227 (emphasis in original). See *ibid* '[A]ll governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' *Hirabayashi v. United States* (1943) should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed" *Metro Broadcasting* (Kennedy, J., dissenting) ("[O]ur Constitution protects each citizen as an individual, not as a member of a group" *Bakke* (Powell, J.) (The Fourteenth Amendment creates rights "'guaranteed to the individual. The rights established are personal rights'"). This fundamental principle

Supreme Court majority opinion in *Parents Involved in Community Schools v. Seattle School District No. 1, et al.,* (2007) written by Chief Justice Roberts adopted the Network's stance that the only legitimate use of racial criteria is to counter intentional and specific discrimination not to remedy historical or societal discrimination.[253] Roberts also adopted the Federalist Society Network's redefinition of Civil Rights leaders' concept of "colorblindness."[254]

Summary

The Federalist Society's founding mission is to reform the law. To accomplish this, it has invested in a long-term strategy that entails training judges and justices, lawyers, clerks, *amicus curiae*, scholars, and many others to contribute their individual part to the Network's drive for legal change. Teles (2008) assembled the pieces of the conservative legal network and positioned the Federalist Society as the "facilitator." Scherer and Miller (2009) demonstrated how Federalist Society member judges in the Appeals Court are uniquely more conservative in comparison to nonmember judges. Avery and McLaughlin (2013), Cummins and Belle Isle (2017), Hollis-Brusky (2008; 2013; 2015) and Hutchison (2017) focused on a specific area of law and traced the impact of the Network. Avery and McLaughlin (2013) examined the legal rulings in "takings clause" cases and property rights as well as affirmative action. Cummins and

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goes back, in this context, to *Brown* itself. See *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown II*) ("At stake is the *personal* interest of the plaintiffs in admission to public schools ... on a nondiscriminatory basis" Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 742–43, (2007).

[253] Avery and McLaughlin 2013, 110-112; Cummins and Belle Isle 2017

[254] Avery and McLaughlin 2013, 99; Berman 2015; Riehl 2007. For an opposing view on the Court see Justice Ginsburg's dissent in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 829–30 (2007). ("There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together…Although the Constitution almost always forbids the former, it is significantly more lenient in respect to the latter … I can find no case in which this Court has followed Justice Thomas' 'color-blind' approach. And I have found no case that otherwise repudiated this constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races.")

Belle Isle (2017) documented the opposition to the "disparate impact" standard held by Federalist Society members that was revealed in their work for the Reagan Department of Justice. Hollis-Brusky (2008; 2013; 2015) and Hutchison (2017) each dug in further to analyze the content of Supreme Court majority opinions to reveal the overlap in language borrowed from members of the Network. Hollis-Brusky (2015) documented the relationship between the Network's legal ideas as adopted in the language of the Court under the "Commerce Clause" and federalism along with state sovereignty (2013). Hutchison (2017) applied a content analysis to reveal the connection between *Law and Economic* scholars and the change in anti-trust doctrine that occurred in the 1980s. As this literature review outlines, scholarly research substantiates that the Network's legal language has been incorporated into many judicial decisions.[255] More importantly, the Network's conservative interpretations having been adopted, have changed the law and in doing so, changed the relationships between individuals and the federal government, individuals to each other, and individuals to the state.[256]

Additionally, prior research reveals that interest groups frequently attempt to transform the law by challenging specific issues and by writing amici curiae to convince the justices to adopt their perspective in the opinion.[257] Box-Steffensmeier, Christenson, and Hitt (2013) demonstrated that interest groups can and do hold influence through the submission of *amicus curiae,* while Corley (2008) finds that the Court also relies on litigant briefs in writing its opinion. Teles (2008) also shows us that the members of the Network have been and continue to be actively involved in litigating before the courts and in writing *amicus curiae*. In sum,

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[255] Cummins and Belle Isle 2017; Hollis-Brusky 2013; 2015; Hutchison 2017
[256] Avery and McLaughlin 2013, 115; Cokorinos 2000; Cummins and Belle Isle 2017; Hollis-Brusky 2013; 2015; Hutchison 2017; Southworth 2018
[257] Box-Steffensmeier, Christenson, and Hitt 2013; Collins Jr. 2018; Corley 2008; Feldman 2017

submitting *amicus curiae* and challenging specific laws in court, provides an opportunity for the Network to exert influence on the law through Supreme Court opinion, either working alone but especially in coordination with Federalist Society affiliated interest groups and law firms.

This chapter reviewed the literature on interest group participation and influence in the judicial process. I also discuss the impact of the Network in specific areas of law such as federalism, the "Commerce Clause," and Civil Rights to begin developing the thesis that the Network, through *amicus curiae* and litigation, has been influential in shaping the law in key areas. This dissertation builds on these two areas of judicial policy research. Following the scholars reviewed in this chapter, I show the Federalist Society as an incubator of conservative and libertarian ideas and the mechanism for their diffusion. The Federalist Society, per se, claims not to weigh in on issues but instead has created a Network to connect its members to carry out this function.

Judicial policy research primarily focuses on the winners and losers in cases rather than on the legal rules established. It is important to consider not only ***who*** is affected by the Court's decision but *how* those groups are affected. The answer to ***how*** a group is affected is not always clear by knowing who wins and who loses. The Supreme Court may rule narrowly on an issue, rendering a ruling that applies only to the actual litigants and not as broad policy. Conversely, the Court may issue a ruling that applies broadly to large swaths of people. Knowing only who won and who lost does not tell us how far the effects of the decision spread. Secondly, the outcome does not tell us ***how*** the ruling will be implemented, or how the law is affected and does not alert observers to the presence of "time bombs" within the opinion that may be employed in a later

case.[258] Additionally, outcomes do not reveal if the decision contains dicta which can be seized by a future justice or litigant. For this information, we must look to the language of the opinion. For example, the language stated in *dicta* in *Northwest Austin* became the rationale for the decision in *Shelby County v. Holder,* 570 U.S. 529 (2013) while the language in the opinions just prior to *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. (2018) clearly indicates a majority of the Court was ready to review its earlier precedent. In both instances, this language is missed when only focusing on winners and losers. Finally, if the Network has an outsized influence on judicial opinions, this is relevant to the language of the law and implicates the rule by the people in a republic. This dissertation expands the research of interest group activity on Supreme Court decisions by focusing on the substance of its decisions rather than on the outcome of these decisions.

Scholars have provided evidence of the Network's influence on the legal community and other scholars have documented a shift to the right in the Court's jurisprudence. While acknowledging a rightward shift in court doctrine, most judicial studies concentrate on justices' "votes" (liberal vote or conservative vote) or the winner and loser (business winner or individual winner) in a case rather than on the new or different ideas presented in the language of the opinion. Thus, it is well recognized that the Court has lurched rightward in a broad sense prompted by the replacement of the more liberal justices with a more conservative cohort. However, beyond the changeover in personnel resulting in more consistent "conservative" outcomes, to what extent has the substance of the law changed? Does a "conservative" decision mean the same thing that it meant in the past? For example, are all of the Court's current justices

[258] Hasen 2014

- appointed by Democratic and Republican presidents alike - more conservative than those justices were in past Courts?[259] The Republican appointees have moved much further to the right than their earlier cohorts. What a more conservative court with an even more conservative majority means for the actual language of the law is less examined. What does this more strident conservatism under justices that have now adopted the Network's version of judicial restraint tied to *Originalism* mean for the substance of the law now and in the future?

Recently, scholars have begun to connect the Network with the Federalist Society as its hub to the rightward shift in the courts. Scholars and the media alike are beginning to understand just how far the Network reaches. However, it is even more recently that we are beginning to recognize that the Federalist Society is not merely replacing judges but is also developing the legal rationale for unsettling established law. In order to dig deep into the extent of the Society's influence, researchers are increasingly focusing on specific areas of the law it is influencing. Avery and McLaughlin (2013) examine five different areas of the law in which the Network has had significant impact, and while they provide valuable insight, they give a general overview but do not dive deeply into overlapping language between the Network's provided arguments and Supreme Court opinions. Hutchison's (2017) content analysis of anti-trust law does compare the language of Supreme Court opinions with *Law and Economic* scholarship but is specific to antitrust and he does not connect his research with the Federalist Society. To date, it appears that Hollis-Brusky (2013; 2015) may be the only scholar to do a deep analysis of the conservative turn in law that is tied to the Federalist Society and based on the language of the opinion in

[259] Devins and Baum 2017

comparison to the writings of Network members. Her study was limited to the areas of federalism, campaign finance, and the Second Amendment.

I examine two areas of law that have been transformed but not yet connected to the Network. Neither the challenges to Voting Rights Act nor challenges to unions' funding mechanisms have been studied in connection to the Network. This dissertation expands the scope of legal areas impacted by the Network. Additionally, I expand on the emerging judicial studies that apply content analysis to Supreme Court opinions. However, rather than plagiarism software often employed, I use *atlas.ti* which allows for a deeper analysis of text documents. The next chapter will elaborate on these points further as I develop my research questions.

Chapter 3

Research Questions and Cases Introduction

The central question of this dissertation is to what extent has the Federalist Society impacted the laws of the United States of America. The specific hypothesis is that the Network has influenced the direction and articulation of the law on voting rights and unionizing. For four decades, the Network has promoted conservative and libertarian interpretations of the Constitution in an attempt to have those principles accepted by judges, legal educators, the legal community as well as the media.[260] Network members also initiated litigation and participated as *amici curiae* to directly influence judges' decisions. Their activism has paid off. Chapter 2 reviewed the literature demonstrating that the Supreme Court has indeed adopted the positions put forth by the Network generally. This dissertation aims to expand the realm of studied legal areas to voting rights and union organizing. I focus on the extent to which the Supreme Court has adopted the language, the rationale, and the principles of the Network in two distinct lines of cases one of which culminated with *Shelby County v. Holder,* 570 U.S. 529 (2013) and the other in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. __ (2018). I apply a content analysis of these two Supreme Court majority opinions and the preceding cases upon which they built to ascertain the influence of the Network. This chapter

[260] Avery and McLaughlin 2013, 5; Deparle 2005; McCauley 2017. The Federalist Society hired a public relations group Creative Response Concepts (CRC) in 2005. CRC represented Swift Boat Veterans for Truth, the group that attacked Democratic nominee Senator John Kerry's war record in the 2004 Presidential campaign. "The Federalist Society hired the firm, Mr. Meyer said, to train members and place them on television shows during the confirmation process. He said the goal was to educate the public on the role of judges and courts" (Deparle 2005).

explores this process further, explains how I identify Network members, and also introduces the two Supreme Court cases I have chosen to analyze.

Changes in constitutional jurisprudence develop gradually over time through the combined actions of political, legal and social movements. Balkin (2005)[261] argues that what is understood as "off-the-wall" or "on-the-wall" in Constitutional jurisprudence changes through the combined actions of the courts, educators, politics, and elections, as well as social movements and the legal culture. Social and/or legal conventions may deem prior practice as outdated or no longer acceptable and the courts adapt.[262] Judicial studies acknowledge a shift in the Supreme Court from a "liberal" era to a "conservative" era starting around the mid to late 1970s.[263] To explain this shift, researchers initially focused on the presidential appointments and the replacement of a Supreme Court justice with a more/less liberal/conservative.[264] These studies generally focus either on individual justices' "votes" to classify as liberal or conservative or the overall outcome, which party won/loss, which is labeled as liberal or conservative. For instance, Segal and Spaeth (2005) demonstrated the link between a justice's ideological preference and his or her ruling in a case. Other studies focus on the ideological direction of the case's outcome[265] or which side wins.[266] Coates III (2015) examines outcomes to find that

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[261] Balkin 2005, 2, "…the conventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is "off-the-wall" change over time in response to changing social, political, and historical conditions. Although at any point in time legal materials and the internal conventions of constitutional argument genuinely constrain lawyers and judges, these materials and conventions are sufficiently flexible to allow constitutional law to become an important site for political and social struggle. As a result, legal materials and conventions of constitutional argument change in response to the political and social struggles waged through them. The internal norms of good constitutional legal argument are always changing, and they are changed by political, social, and historical forces in ways that the internal norms of legal reasoning do not always directly acknowledge or sufficiently recognize"

[262] Balkin and Siegel 2003

[263] Baum 2010, 125-129

[264] Segal and Spaeth 2005

[265] Epstein, Parker and Segal 2017

[266] Coates III 2015; Epstein, Landes, and Posner 2013; 2017

business and corporations are the biggest winners under the First Amendment displacing individuals and group rights. Ash, Chen, and Naidu (2018) find that after attending a judicial seminar hosted by *Law and Economics* scholars, "judges significantly increase their use of economic language…render conservative verdicts in economic-relevant cases…are more likely to rule against regulatory agencies."[267] Further, attendance at a *Law and Economics* seminar "is associated with harsher prison sentences imposed."[268] What's more, attending judges circulate these economic analyses throughout the judiciary. Ash, Chen, and Naidu (2018) find that non-attending colleagues also begin to use more economic language in their opinions.[269]

However, while the influence of ideology on a justice's decision and who wins and who loses is important, it does not tell the whole story. A focus on ideological direction of decisions or the winners and losers does not further our understanding of how legal theories once deemed radical or "off-the-wall" became not only acceptable and legitimate but were elevated to serve as the legal foundation for a Supreme Court decision. Nor does this focus explain how a justice constructs an opinion or what resources are influential on that judge. As Feldman (2017) explains, the judicial behavior literature "often does not inquire into the written decisions or more specifically into the justices' range of options for how these decisions are constructed."[270] The content of the majority opinion aids in our understanding of the intellectual thought and intellectual influences behind the law. "The 'construction' of an opinion is said to be 'the core of appellate judging.' '[W]hat judges say is even more important than how they vote. A case's legal reasoning 'can have more far reaching consequences [than the outcome] by altering the existing

[267] Ash, Chen and Naidu 2018, 3
[268] Ash, Chen and Naidu 2018, 3
[269] "with economic ideas moving from regulatory cases to subsequent criminal ones" (Ash and Naidu 2018, 1)
[270] Feldman 2017, 192

state of legal policy and thus helping to structure the outcomes of future disputes.'"[271] Since "it is the content of the opinion that 'constitutes the core of the Court's policy-making process'… it is important to examine the language of Supreme Court decisions and not just the ideological direction of their results."[272]

Content analysis has been increasingly applied to studies in public law. A content analysis can compare two sets of documents to measure their similarity and the overlap in language and principles. Applied in this dissertation, content analysis comparing documents from the Network with majority opinions can reveal that the ideas of the Federalist Society have migrated into Supreme Court opinions and ultimately became law. Laver, Benoit, and Garry (2003) introduced an approach to analyzing the content of texts that used words as data. Their technique differed from previous approaches "by treating texts not as discourses to be read, understood, and interpreted for meaning…but as collections of word data containing information about the position of the texts' authors on predefined policy dimensions."[273]

One of the earliest to apply content analysis to Supreme Court opinions was McGuire and Vanberg's 2005 study. McGuire and Vanberg (2005) applied Wordscore to examine the ideological content of opinions regarding the First Amendment's religion clauses and Fourth Amendment search and seizure guarantees. Wordscore does not interpret the meaning of text but counts the occurrence of words in texts to look for similarities. Cross and Pennebaker (2014) measured not the content but the linguistic style of the Roberts Court opinions using Linguistic Inquiry and Word Count (LIWC). They looked to assess the sentiment expressed in Court

[271] Cross and Pennebaker 2014, 4
[272] Cross and Pennebaker 2014, 4
[273] Laver, Benoit, and Garry 2003, 312

opinions. Cross and Pennebaker found that concurring and dissenting opinions have more words of certainty than do majority opinions, but the three types of opinions demonstrated little difference in use of anger or positive words. Rice (2017)[274] employed content analysis to study the strategic use of dissents to shape the content of the majority opinion. Rice found the presence of dissents increases the number of topics addressed by the majority forcing the majority to address an alternative issue. As reviewed in Chapter 2, scholars have increasingly applied plagiarism software to analyze the similarity between the language in court opinions and legal resources. [275]In general, however, text analysis is still relatively new in the study of court opinions.

While the language contained in Supreme Court opinions is increasingly being examined, less attention has been given to the intellectual thinking that underlies the decisions or where the ideas originate. Hidden is the conservative turn of the Court is the Federalist Society. The Federalist Society itself claims to be nonpartisan and nonpolitical. However, scholars have demonstrated that it is the networking structure for the conservative legal movement[276]. Moreover, as the statement of principles declares, the Federalist Society was clearly created to advance the conservative and libertarian ideology.[277] Much of the Court's movement to the right of the ideological spectrum has its foundation in the theories developed by the Federalist Society.[278]

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[274] topic models use a probability distribution of the words in a text grouped into "topics."
[275] Corley 2008; Feldman 2017
[276] Teles 2008
[277] "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… The Society seeks to promote awareness of these principles and to further their application through its activities" (Our Background | The Federalist Society, fedsoc.org/our-background).
[278] Avery and McLaughlin 2013; Hollis-Brusky 2015; Scherer and Miller 2009; Southworth 2018; Teles 2008

Identifying the Federalist Society Network

I compare the briefs written by members of the Network to the majority opinions in *Shelby County v. Holder,* 570 U.S. 529 (2013) and *Janus v. American Federation of State, County, and Municipal Employees, Council* 31 585 U.S. (2018). Specific members are identified as some of the most active participants at the annual National Conferences, prolific writers in Federalist Society publications, and those who are involved in one or more of the Federalist Society Practice Groups. To identify Network members, I search the Federalist Society's activities to locate members who are frequent participants. I review the list of speakers at the national meetings, those who regularly contribute to the practice groups' newsletters, and participants in the practice groups' forums, the student chapters' talks, and lawyer divisions' meetings. The goal is to reveal the Supreme Court's adoption of Network principles in these two opinions.

There are a few sources that were used to identify the members of the Network. Each year, the Federalist Society hosts its National Student Conference and its National Lawyers Conferences. Invited speakers signal the top tier in the Federalist Society hierarchy -- the "'rock stars'…of the network."[279] These members are usually those most active among the Network in their legal activism and hold elite positions in academia, the legal profession, government or the judiciary.[280] Since 1982, the National Student and the Lawyers Conferences publish their programs annually in the *Harvard Journal of Law and Public Policy* along with other various

[279] Hollis-Brusky 2015, 24

[280] 37% of conferences speakers are academics, 13% are from a think tank or interest group, 13% are in private practice, 13% federal judges, 10% worked in the Executive Branch, 4% corporate 4% other, 3% Media, 3% state politicians, 2% legislative branch (Hollis-Brusky 15-16, 24)

legal academic journals. The program includes a list of that year's speakers. I identify members by examining the list of speakers at each event between 1982 and 2013. I chose 2013 as the final year since that is the year each case was heard. The Practice Groups organize discussion panels in its legal specialty at the annual National Lawyers Convention. The Practice Groups particularly pertinent to this dissertation are the Labor and Employment Practice Group and the Free Speech and Elections Practice Group. Therefore, in ascertaining members, I pay particular attention to events which concentrate on labor and union activity and on voting rights.

Practice Groups also publish a biannual journal that updates members on legal developments by practice group area and contains articles written by members of the Practice Groups.[281] First called the Practice Groups Newsletter (1996-2000), it became *Engage: The Journal of the Federalist Society's Practice Groups* (2001-2015) and today is called *The Federalist Society Review* (2016- present). Additionally, individual Practice Groups host in person events and Teleforums, and members write blog posts and speak at student chapters across the nation. These Practice Group events feature the most high-profile leaders in the Network. These events are listed on the Federalist Society's website and further aid in identifying members of the Network. The above sources serve as a guide to determine the members of the Network. From these sources, I identify the writers of the *amici curiae* and attorneys in the cases as Network members.

Having identified which brief writers are Network members, I turn to the legal arguments presented to the Court. I review the legal briefs filed by network members as a litigant to the case and also as *amicus curiae* on behalf of an interest group, a think tank or conservative public

[281] Teles 2008, 172

interest law firm connected to the Federalist Society. It is here where Network members present arguments to the Court in an effort to persuade. I note individual members' participation as *amicus curiae,* litigant or lawyers, a Supreme Court law clerk and even as a Supreme Court justice.

A Network member may participate as either a Supreme Court justice, a Supreme Court clerk, a lower court judge, *amicus curiae,* a litigator or as an academic source cited in the majority opinion. In all of these ways, ideas travel from inception to judicial outcome through a legal network. As previous research substantiates, the Network has applied this strategy with much success.[282] Identifying Network members' activity in the judicial process highlights *how* their ideas are transferred; a content analysis demonstrates the diffusion itself through noting the incorporation of the Network's language, principles, core concepts and ideas by the Supreme Court majority opinion writer.

The Majority Opinion

The majority opinion is the written explanation of the Supreme Court's ruling, its justifications and a statement of the law henceforth. The majority opinion explains the ruling to the public and is binding on future actors. It contains the underlying constitutional and legal principles that justify the ruling. Therefore, the language and the legal justifications chosen are important in understanding the ruling as well as its origins and how or if, the basis of law has evolved.[283] The Supreme Court's majority opinion reveals the ideas behind the legal rationale. Given its influence on the law in the United States, this dissertation focuses only on the majority

[282] Avery and McLaughlin 2013, 115; Cokorinos 2000; Cummins and Belle Isle 2017; Hollis-Brusky 2013; 2015; Southworth 2018
[283] Box-Steffensmeier, Christenson, and Hitt 2013; Collins Jr. 2018; Corley 2008; Hollis-Brusky 2015

opinion. As such, I apply a content analysis just to the majority rulings in *Shelby County v. Holder* and *Janus v. AFSCAME* and the main cases each opinion cites as the basis of its decision.

Supreme Court Cases Selected

One of the ways The Network changed the shape of law was to instigate test cases to present their legal theories in court. Through these cases, and the arguments presented in their briefs and oral arguments, the Network created a legal record that could be employed in later cases and eventually relied on by judges. By establishing their legal theories in both case law and garnering legitimization in legal academia, these legal arguments could then "safely" be adopted by the Supreme Court as the core reasoning of their decisions. As Hollis-Brusky (2013; 2015) demonstrates, once the Court adopted these theories the justices had established a new precedent giving the Court the ability to later quote itself. In this way, the Network provides the arguments the Supreme Court can use to ground their decisions when reshaping doctrine while creating new precedents to later cite and reinforce in law.

This process is exhibited in the Supreme Court decisions *Janus v. American Federation of State, County, and Municipal Employees, Council 31*[284]and *Shelby County v. Holder*.[285] *Janus* struck down what was a forty-year precedent that allowed public sector unions to collect "agency fees" to cover costs associated with collective bargaining from nonunion workers. Union work, such as contract negotiation and grievance resolution benefited all workers, including nonunion members that do not pay union fees. "Agency fees" were a compromise between paying full

[284] 585 U.S._(2018)
[285] 570 U.S. 529 (2013)

union dues and "free riding" workers. *Janus* struck down this middle position which cut off an important source of union funds.

Shelby County struck down the formula used to implement the protections afforded by the Voting Rights Act (VRA) of 1965, thus rendering the VRA impotent.[286] The most recent iteration of the VRA was passed by Congress in 2006 and reauthorized for another 25 years. For over four decades and including the 2006 reauthorization, the VRA was passed with bipartisan support. However, beneath the external bipartisanship shown in the congressional vote was growing opposition to the VRA within a segment of the Republican Party.[287]

I chose these two cases to study for a few reasons. First, neither outcome was sudden, rather both of these cases were the result of a protracted struggle. The Network had been attempting for decades to limit the reach of the VRA and The National Labor Relations Act (NLRA). Both cases are one piece of a comprehensive plan to transform legal liberalism. Even before the formation of the Federalist Society, the VRA and NLRA were targets of conservatives.[288]

Second, these two cases were controversial at the time of the decision, both cases were narrowly decided (5-4 split), and both cases overruled long established precedents. Additionally, each majority opinion was authored by a Federalist Society affiliated justice. These two cases were not chosen because the authors of the opinions are close associates of the Federalist Society. I chose these two cases because of the disruptive nature of the decisions and the polarized reaction to each. The celebration on the right and the mourning on the left mirrors the

[286] Berman 2015
[287] Hasen 2014; Persily 2007; Tucker 2007
[288] Berman 2015; Blyth 2002; Phillips-Fein 2009; Shermer 2012

close split on the court and the spirited dissents each case elicited. That both were authored by a Federalist Society affiliated justice can be looked upon as random chance or perhaps more properly as the inevitable outcome given the forty-year mission of the Federalist Society to appoint conservative/libertarian justices and overturning what they considered legal liberalism gone too far.

Furthermore, each case also contradicts the still popular notion of conservative justices as practitioners of judicial restraint and deferring to the elected branches. These cases and their surrounding narratives also demonstrate the ability of conservative political and legal leaders to maintain that they alone are upholding the true Constitution while doing the very same thing they lambasted the Warren Court for doing, i.e., overturning legislation passed by elected representatives.[289] Conservatives and the Federalist Society specifically have justified their actions by reformulating an entire doctrine, *Originalism*. The two cases epitomize the new judicial "restraint." The Supreme Court in *Janus* overruled its precedent set 41 years ago in *Abood v. Detroit Board of Education*,[290] which upheld the collection of "agency fees" by unions from nonunion and otherwise non-dues paying employees who still benefit from union contracts. In *Janus*, the abandonment of *stare decisis* was justified based on *Originalism*, which was developed within the Federalist Society. *Shelby County* ruled unconstitutional the formula that covered specific jurisdictions that were guilty of the most egregious voting suppression following the Civil War. Further, since its initial passage in 1965, each subsequent VRA reauthorization by Congress had been with bipartisan support.[291]

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[289] Stone 2012
[290] 431 U.S. 209 (1977)
[291] Berman 2015

Another notable feature is that each majority opinion writer had "signaled" in an earlier opinion a willingness to review the established precedent for these issues. Justice Alito sent his "signal" in 2012 in his majority opinion in *Knox v. Service Employees International Union*[292] that he was ready to review and likely overturn *Abood*. The answer to Alito became *Janus*, which is a clear example of Network members' response to Alito's signal. Similarly, Roberts signaled in his 2009 majority opinion in *Northwest Austin Municipal Utility District Number One v. Holder*[293] his willingness to revisit the constitutionality of the Voting Rights Act. As Teles (2008) demonstrates, one of, if not the most, important role of the Federalist Society itself is its creation of the Network and its function to facilitate the preparation of the legal intellectual ideas and the individuals well situated to pounce and take advantage of these legal opportunities. This dissertation will show that as planned, in both instances, when those signals were sent, the Network was well-prepared to respond. The result was the two cases central to this dissertation.

The Supreme Court's majority opinion is also important to interest groups because ultimately, the majority opinion sets judicial policy. Interest groups not only want to win their case, they also want to have their own reasoning adopted into law to direct future legislation and court decisions. Interest groups try to influence judicial decision makers by bringing challenges to court and by writing *amicus curiae*.[294] Interested parties frame issues in a specific way in an attempt to convince the justices to adopt their perspective in the opinion.[295]

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[292] 567 US 298 (2012)
[293] 557 U.S. 193 (2009)
[294] Box-Steffensmeier, Christenson, and Hitt 2013; Collins Jr. 2018; Corley 2008
[295] Feldman 2017; Rice 2017

Like other interest groups, the Federalist Society disseminates its legal arguments through petitions to the Court and *amicus curiae,* but does so through its members in their capacity as a scholar, lawyer, or a Network connected organization, a think tank, or law firm.[296] Teles (2008) describes the Federalist Society's interest and mission to change the law and to prepare the people and ideas necessary to do so. Additionally, as Chapter 2 reviewed, previous research demonstrates the Network's influence in a variety of legal areas.[297] However, as Teles (2008) explains, the Federalist Society's goal was a complete change in legal culture, thus not limited to these areas. Currently, there is a lack of scholarship that looks specifically at the Society's influence on voting rights and union organizing, however there is reason to believe this research is a worthwhile endeavor.

Shelby County v. Holder encompassed two principles important to the network: state sovereignty and coercive federalism. [298]In seminar speeches and law review articles network members characterized federal programs as coercing the states and consistently argued that the Court should apply a more robust Tenth Amendment to protect state sovereignty.[299] The Supreme Court adopted Network members' argument and transformed federalism while creating an "anti-commandeering" doctrine supported by the arguments and scholarship of Network members.[300] Justice Scalia's "anti-commandeering" doctrine was later employed by Federalist

[296] Avery and McLaughlin 2013; Hollis-Bruksy 2015, 26-27; Riehl 2007; Scherer and Miller 2009; Southworth 2008
[297]Avery and McLaughlin 2013; Cummins and Belle Isle 2017; Hollis-Brusky 2008; 2013; 2015
[298] Hollis-Brusky 2013; 2015
[299] Hollis-Brusky 2015,121-122
[300] Justice Scalia cited scholarship by four separate Network members to argue for state sovereignty against "Federal commandeering of state governments…" and employed the Federalist Society's recommended originalist sources (Hollis-Brusky 2013; 2015).

Society affiliated lawyers to successfully challenge the Affordable Care Act's Medicaid expansion.[301]

Janus implicates the First Amendment, another area of frequent Federalist Society activity. In particular, the Network was heavily invested in freedom of speech as applied to campaign finance.[302] Members of the Network have criticized agency fees, at issue in *Janus*, as violating the free speech rights of non-union members. Network members assert that forcing employees who choose not to join the union to pay an agency fee for services rendered is equivalent to compelling the employees to "speak" in favor of the union which the non-union workers did not support. In fact, the 1998 Practice Group newsletter referred to the "Use of Union Dues for Political Spending" as number three on the "'top ten' list of federal government efforts to suppress free speech" in 1997 – 1998 term.[303] Linking union dues to political spending and equating money with speaking is a similar connection that the Network made in the campaign finance cases we saw earlier. Furthermore, the abandonment of *stare decisis* in *Janus* was justified as returning to fundamental First Amendment principles, an argument developed within the Federalist Society.[304]

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[301]Hollis-Brusky 2015, 135-137, 139, 149, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) Federalist Society Network participation 40 total: 24 members signed 15 of 56 amicus (Richard Epstein, Edwin Meese, Charles Cooper); plus 16 others with Federalist Society connections. Eight counsel including 2 counsel of record & oral arguments: states Paul Clement plus 4 other FSM on Florida counsel brief, Michael Carvin, Barnett, and Katsas signed NFIB Counsel brief; Scotus 4 justices and 4 clerks.

[302] Hollis-Brusky 2015

[303] "Workers in twenty-four states by law must join unions (union shops) or at least pay full union dues, to keep their jobs" Francis J. Menton, Jr. and Matthew Peterson, "Top Ten Government Efforts to Suppress Free Speech, 1997-1998" Free Speech & Election Law Practice Group Newsletter Volume 2, Issue 2, Summer 1998 Sponsors: Free Speech & Election Law Practice Group Francis J. Menton, Jr. and Matthew Peterson are attorneys for the New York law firm of Willkie, Farr & Gallgher

[304] Hollis-Brusky 2015

Thus, the first question is: Has the Federalist Society through its Network influence the law in the area of voting rights and union financing? This question is tested by the following hypotheses:

Hypothesis 1: *The Federalist Society Network has influenced the Supreme Court majority opinion in Shelby County v. Holder,* 570 U.S. 529 (2013)

Hypothesis 2: *The Federalist Society Network has influenced the Supreme Court majority opinion in Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. (2018)

The Federalist Society diffuses its "intellectual capital" through its vast Network. Ideas are developed and debated within the Federalist Society, distributed by Network members throughout the broad legal community, and presented to the Court in an attempt to influence the justices. Network members attempt to influence the Supreme Court majority opinion via amicus curiae. Network members also attempt to influence the Supreme Court majority opinion by challenging particular laws or legal opinions. Members of the Network have been very active in both *amici curiae* submissions and in bringing litigation before the courts.[305] Further, the Federalist Society created its Practice Groups to connect lawyers in the same legal area so that they could develop strategies and arguments to challenge laws and legislation they viewed as illegitimate.[306] Additionally, as reviewed previously, interest groups are influential on Supreme Court opinions through *amicus curiae* and case briefs. Therefore, the second question is: have Network members been successful in their attempt to influence Supreme Court majority opinions

[305] Avery and McLaughlin 2013; Hollis-Brusky 2015; Teles 2008
[306] Teles 2008, 172

through participation in litigation and *amici curiae*? In particular, has this activism been influential in the area of voting rights and union organizing?

Hypothesis 3: *The Federalist Society Network influenced the Shelby County decision through its amici curiae*

Hypothesis 4: *The Federalist Society Network influenced the Janus decision through its amici curiae*

Hypothesis 5: *The Federalist Society Network influenced the Shelby County decision through its litigant brief.*

Hypothesis 6: *The Federalist Society Network influenced the Janus decision through its litigant brief.*

In testing these six hypotheses, I aim to demonstrate the significant impact the Network has on U.S. voting laws and union laws. Specifically, this dissertation explores the influence of the Network on two Supreme Court cases: *Shelby County* v. *Holder* 570 U.S. 529, (2013) and *Janus v. American Federations of State County and Municipal Employees, Council 31* 138 (2018). Using the content analysis software ATLAS.ti, I compare these two Supreme Court majority opinions to the amici curiae and litigant briefs written by the Network.

Chapter 4

Methodology

The aim of this dissertation is to explore the extent of the Federalist Society's influence on the law. Previous studies have revealed the Network's influence on the U.S. law regarding federalism and state sovereignty, the Commerce Clause, the Second Amendment,[307] disparate impact doctrine,[308] and affirmative action.[309] All the preceding areas of law have experienced major disruptions in established doctrine. One goal of this dissertation is to expand our understanding of the areas of legal doctrine that have experienced major disturbance in the past few decades. That goal also entails demonstrating that this disturbance, too, is attributed to the Network. In this dissertation, I specifically address the Network's influence on laws regarding voting and union financing.

The second purpose of this dissertation is to expand the body of research that conducts detailed content analysis of Supreme Court opinions. Rather than focus on the outcome of the case as prior studies have overwhelmingly done,[310] this dissertation focuses on the content of the majority opinions and the briefs submitted to the Supreme Court. I examine the *amicus curiae* submitted and the majority opinions in *Shelby County* and *Janus*. I also analyze the *amicus curiae* and the majority opinions in the cases that the majority opinion cites as the basis for the decision. Rather than examine influence based on the percent of overlapping language between court opinions and court filings, this study highlights the effect of language adoption itself on the

[307] Hollis-Brusky 2015
[308] Cummins and Belle Isle 2017
[309] Avery and McLaughlin 2013
[310] Coates III 2015; Epstein, Landes, and Posner 2013; 2017; Epstein, Parker and Segal 2017

substance of U.S. law. This chapter describes the qualitative methods uses to examine the influence of the Network on Supreme Court majority opinions, in particular, the Network's ability to shape voting laws and union funding laws. I compare these opinions to the writings of Network members to explore their influence on these two opinions.

Content Analysis

The methodology in this dissertation is a content analysis using ATLAS.ti. ATLAS.ti enables a researcher to compare sets of documents to gauge their similarity. Thus, using ATLAS.ti I will compare the Supreme Court majority opinion in *Shelby County* and *Janus* with a set of documents emanating from the Network around each of these areas. The purpose of the comparison is to determine the influence of Network members on these two Supreme Court opinions and thus their impact on the law. The Network's influence is measured as the amount of overlap in language and in principles between the majority opinions and the briefs of the Network members. To explore the sharing of language and principles, an analysis of the content of all associated documents is required. I expect this content analysis to reveal that both of the Supreme Court majority opinions under examination have adopted the principles articulated by the Network to substantiate its rulings, thus illustrating the Network's influence on the Court and U.S. law.

In my search for the methods and software used to conduct content analysis, ATLAS.ti is the most common one used and is available to this researcher so that will be used for this dissertation. I also extensively searched *Westlaw, LexisNexis* and *HeinOnline* for studies that detailed the steps taken in conducting the content analysis but was unable to find anything that granular. I also discovered that content analysis comparing the principles in Supreme Court opinions to *amicus curiae* and litigants' briefs is nascent.

Data Analysis

ATLAS.ti is a qualitative analysis software that enables a researcher to analyze text, pdfs, graphics, video, and audio data.[311] All of these sources of information can be imported into ATLAS.ti and segmented for coding. The purpose of coding data is to explore the relationships within the data using these codes. To facilitate this exploration, ATLAS.ti reports frequencies to assess how often a particular concept occurs within and across documents. These concepts are then grouped into themes to reveal the overarching pattern in the data and to explore the relationship contained within the data. ATLAS.ti also contains tools that allow the researcher to create networks to visually display the relationships contained within the data.[312] These are the tools used to look for principles and language shared between documents.

Specifically, I will use thematic coding.[313] This approach allows patterns to emerge from the data rather than selecting codes *a priori*. When reviewing the documents, my aim is to look for and identify trends and patterns in the court cases and allow themes to develop rather than select them before reading the text. I am comparing two sets of documents for each individual court case. One set is the Supreme Court majority opinions and the other is from the Network, which includes court briefs and scholarly publications. In both cases, I am looking for patterns in their writing, allowing trends to emerge. Finding and identifying the major themes in these two sets of documents allow me to code segments and passages of the documents according to those

[311] Friese 2019, 9
[312] Id.
[313] Gibbs 2010

themes and to compare the opinions to text written by members of the Network.[314] Through analyzing the themes, I can construct the relationships across opinions and Network documents.

Most Supreme Court cases are one of a series of cases that build on each other over time. This is the process of *stare decisis.* In fact, what makes these two cases unique and worthy of study is that they disrupted the pattern of cases that preceded them. Therefore, I also review cases previous to *Shelby County* and *Janus*. I begin with the cases that set the precedent they overturn (*Shelby County: South Carolina v. Katzenbach*, 1966; *Janus*: *Abood v. Board of Education*, 1977). I include the previous cases in which the majority opinion alerted judicial observers it was ready to reconsider its earlier precedents. In *Northwest Austin Municipal Utility District Number One v. Holder (2009)*, the Court questioned the constitutionality of the VRA. And in *Knox v. Service Employees International Union (2012)*, the Court expressed serious doubts about the correctness of its prior ruling on agency fees. I examine the main cases the majority opinion cited in *Shelby County* and *Janus* as guiding its decision. For instance, the *Janus* opinion references *Harris v. Quinn (2014)* and *Friedrichs v. California Teachers Ass'n (2016)*, along with *Abood v. Board of Education (1977)*. These three cases will therefore be included in the content analysis. In addition to the cases, I include documents representing the Network's ideas. Specifically, I conduct a content analysis of the *amici curiae* and litigant briefs submitted to the Supreme Court by Network members. I separate the documents into two main groups (*Shelby* and *Janus*) to examine each case individually. I analyze the *Shelby County* and *Janus* case documents separately, completing the reading, coding and memo writing for one case

[314] Id.

before I begin on the second case. Within each main group I further group the cases by name. This will allow me to analyze and report the results sequentially over time.

I am following the steps presented by Graham R. Gibbs on Thematic Coding in a series of lessons on YouTube: *Grounded Theory-Open Coding Part 1 to 4* June 19, 2010- June 20, 2010, *Grounded Theory- Line by Line Coding* June 19, 2010, *Grounded Theory-Axial Coding* June 20, 2010, and *Grounded Theory- Selective Coding* June 20, 2010 *Coding Part 1: Alan Bryman's 4 Stages of qualitative analysis* October 24, 2011, *Coding Part 2: Thematic Coding, Coding* October 24, 2011, *Part 3: What Can Codes be About* October 24, 2011, *Coding Part 4: What is Coding For?* October 24, 201, and *Coding Part 5: The Code list or Code Hierarchy* October 24, 2011. I begin with an initial reading of each document that pertains to the main case to get a general idea of the content and main themes. This first read is an introduction to the text, looking for the major themes, jotting down notes and highlighting portions of the text. After the initial read, I create a "memo" in ATLAS.ti summarizing major points or initial thoughts and comments for that document.[315] The process described below applies separately to each case group with its own set of documents.

Once I complete the initial reading of all the documents within one main group, I read the documents a second time coding segments of the text in ATLAS.ti. I create the first round of codes based on themes I have identified in the first reading. I also create memos that define each code. I use a system of "open coding," based on a thematic approach to content analysis. I do not

[315] Contreras, PhD 2020

create codes in advance of reading, rather I let the themes emerge from the reading and develop the codes based on these themes.

After the initial coding, I clean and organize the codes. I combine duplicate and similar codes into a single code and group related codes by category. Some codes may fall into more than one code group. A third reading checks the coding process for errors by making sure the proper codes have been applied to all documents. Once I have reviewed the documents and codes, I look for the themes by combining related codes or code groups into broader categories. Grouping narrows the concepts identified into broader themes across documents.

Using the reporting tool in ATLAS.ti and the themes I have created, I can view the various themes contained in a single quotation or how many quotations are linked to a specific theme and the frequency of each theme per document as well as the usage of a particular theme across documents and across time. These reports thus reveal the main themes in each document, the most frequently used themes, and which documents share themes.[316]

This will allow me to determine the patterns of similarity or dissimilarity between court opinions and the writings of the Network. Supreme Court majority opinions can be compared for likeness to each case's *amicus curiae* and to academic writings by Network members. The similarity between Supreme Court, majority opinions, and Network writing can be viewed for increase or decrease over time. Themes can be followed as they are introduced into academic journals or into the court record and picked up or discarded by other *amici* and the Court. Additionally, I can view which themes change overtime through time. In sum, I create codes that

[316] Contreras, PhD 2020

represent concepts contained within text. I then assembled these codes into broader themes, which are then linked to the majority opinion and Network writings to compare for commonality. After assessing the relationships between the Network's legal writings and the majority opinion, I report the findings and interpret the results. I describe the themes I find and how these themes relate to the principles espoused by the Network. I compare my results to previous studies reviewed in the previous chapters. I also reveal any surprises I may find and what these results mean future research.

Expected Findings

This dissertation is a content analysis that compares the principles expressed by the Network and two Supreme Court opinions handed down within the last decade. The aim is to determine whether the majority opinion adopted the arguments expressed by Network members at Federalist Society activities and in their briefs submitted to the Court. I anticipate that comparing the ideas communicated by the Network to the majority opinions will show a strong similarity in language. The similarity will demonstrate that the ideas developed within the Federalist Society have been incorporated in the Supreme Court's majority opinions in *Shelby County* and *Janus*. Further, this reveals that the Federalist Society through its Network has had significant impact on current U.S. law. Exerting significant influence is exactly what the Federalist Society planned. The Federalist Society was designed with the purpose of changing the legal order and that is exactly what these two court opinions accomplished.

State sovereignty and federalism are key principles that unite the Federalist Society. These two concepts were also at the core of the decision in *Shelby County. v. Holder*. Indeed, federalism and the separation between state and federal spheres were a priority within the

Network.[317] In seminar speeches and law review articles, members of the Network consistently argued that the Court should apply a more robust Tenth Amendment to protect state sovereignty and characterized federal programs as coercing the states.[318] The Supreme Court first transformed federalism in *United States v. Lopez* (1995) supported by Network members' arguments. Two years later, in *Printz v. United States* (1997) Federalist Society, faculty advisor and supporter, Justice Scalia, appealed to state sovereignty while constructing the "anti-commandeering" doctrine with the aid of Network scholarship. Justice Scalia's "anti-commandeering" doctrine was later employed by Federalist Society affiliated lawyers to successfully challenge the Affordable Care Act's Medicaid expansion.[319] *Shelby County* make numerous overtures to a strong doctrine of state sovereignty that echo the opinions of these earlier federalism cases that were written with the support of Network principles. [320]Numerous times, Chief Justice Roberts calls attention to the "extraordinary measures" of the Voting Rights Act and the "substantial federalism costs" imposed by Section 5. The Chief Justice also highlights to disparage the different treatment received by those states covered under Section 5's preclearance requirement. In his majority opinion, Chief Justice Roberts repeatedly references a previous opinion he wrote to make the claim that "equal sovereignty" was a part of "our historic tradition" and to emphasize that the VRA was "a drastic departure from basic principles of federalism."[321] Yet, the concept of "equal sovereignty" appears nowhere in the Constitution and was not used in such a context until Chief Justice Roberts did in his 2009 opinion in *Northwest*

[317] Hollis-Brusky 2013; 2015
[318] Hollis-Brusky 2015
[319]Hollis-Brusky 2015, 139, 149
[320] Hollis-Brusky 2013; 2015, 142
[321] *Shelby County, Ala. v. Holder*, 570 U.S. 529, 535, (2013)

Austin.[322] The preceding forms the basis for my expectation that the language in *Shelby County* will closely echo Network arguments about federalism and state sovereignty.

Janus also entails two principles of high import within the Federalist Society, the suppression of First Amendment rights to free speech and individual freedom.[323] Network members and also lawyers for the National Right to Work Legal Defense Foundation tied public sector agency fee's to campaign spending. Beginning with the first newsletter from the Federalist Society's Free Speech & Election Law Practice Group union fees were described as "probably the single largest element of unreported political spending."[324] The same article referred to union fees as "compulsory" and the collection of "forced dues from individual employees as a condition of employment" impinging on individual freedom.[325] As reviewed in Chapter 2, campaign finance and the First Amendment was an area of high Network legal activity.

Additionally, Alito's justification for overturning precedent in this case was the same as the new version of *Originalism* that originated within the Network. The previous decision has erred in holding the First Amendment has not been violated by public-agency shop arrangements and the doctrine of *stare decisis* was not a hindrance to correcting it. This same argument regarding a First Amendment violation and when it is appropriate to abandon *stare decisis* was used by Federalist Society members in their challenges to campaign finance laws and also articulated by Chief Justice Robert's concurrence in *Citizens United* (Hollis-Brusky 2015). The

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[322] Litman 2016; Miller 2004
[323] Hollis-Brusky 2015
[324] Free Speech & Election Law Practice Group Newsletter - Volume 1, Issue 1, Fall 1996 "Big Labor's Tyranny of the Minority: Forced Union Dues in Politics" Edith Hakola was first legal director of the National Right to Work Legal Defense Foundation, Inc., (Lee 2012), and at the time of writing was General Counsel; W. James Young is a staff attorney for the National Right to Work Legal Defense Foundation, Inc. https://fedsoc.org/commentary/publications/big-labor-s-tyranny-of-the-minority-forced-union-dues-in-politics
[325] Hakola and Young 1996

majority opinion in *Janus* also cites *Citizens United*, as justification for overruling precedent. *Citizens United* was a case with significant Network participation and influence. *Originalism*, the First Amendment, and political spending were all topics of Federalist Society conferences and scholarship of Network members.[326] I expect to find a strong similarity between the arguments made by the Network members and that of the Supreme Court majority opinion in *Janus*.

[326] Hollis-Brusky 2015

Chapter 5

Janus v. American Federation of State, County, and Municipal Employees

The Pre-Janus Cases

The goal of this section is to explore the evolution of the arguments presented in *Janus* through three prior cases regarding the collection of agency fees by public sector unions and the First Amendment's protection of speech and association. The arguments in the majority decisions will be compared to the arguments in the amicus briefs with a focus on those of the Network.

***Abood v. Detroit Board of Education*, 431 U.S. 209. (1977)**

Abood upheld the Michigan Public Employment Relations Act (PERA) thereby allowing public sector collective bargaining agreements to include an agency shop provision. This provision allowed a public sector union elected by a majority of the workers to be certified as its exclusive representative and to collect fees from nonmembers. The fees would be to offset "the incentive that employees might otherwise have to become 'free riders' and refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[327] The Court did not accept petitioners' and *amicus curiae's* argument that agency fees per se compelled association in violation of the First Amendment and also rejected petitioners' and *amicus curiae's* charge of a violation of the "unconstitutional conditions" doctrine that was applied to state action. *Abood* petitioners and *amicus curiae* alleged that since the failure to pay agency fees resulted in a worker being discharged, the agency shop was an

[327] *Abood* at 221-222

unconstitutional condition on public employment by forcing the worker to surrender his First Amendment rights. The *Abood* Court rejected this argument. The Court stated that even though *Hanson* involved the private sector, it did find government action was involved but the First Amendment had not been violated. Therefore, the Court asserted "[t]he appellants' reliance on the 'unconstitutional conditions' doctrine" was "misplaced." [328] The Court was also not persuaded by petitioners' claim that "public sector collective bargaining itself is inherently 'political,' and that to require them to give financial support to it is to require… 'ideological conformity.'"[329] However, the Court did find the use of agency fees for political activities did unconstitutionally compel association, so the Court prohibited the use of fees for union political activities.

Abood recognized that the First Amendment protected freedom of association which included freedom to not associate. Additionally, the Court recognized that monetary contributions to a political organization constitute speech protected by the First Amendment and also included the right to not contribute. The Court cited its decision the previous year which held "that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "'(m)aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals.'"[330] *Abood* also acknowledged that agency fees compelled association and impacted the First Amendment but that the First Amendment is not an absolute right such that other interests could not be legitimate.[331] Therefore, while recognizing a First Amendment impact, the Court determined that

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[328] *Abood* at 227
[329] *Id.* at 226
[330] *Id.* at 234 quoting *Buckley v. Valleo* 424 U.S. 1, 22 (1976).
[331] *Id.* at 222

the state has a legitimate interest in peaceful relations between labor and management and avoiding free riders. The Court understood agency fees "to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become 'free riders' to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees."[332] Without the ability to collect fees from nonmembers, the Court ruled, union members would be forced to cover the expense of nonmembers who, regardless of nonpayment, would still receive the union's negotiated benefits.

The Court conceded that there was an ongoing debate about the private sector as a model but deferred to the state's assessment that labor stability justified some interference with First Amendment rights.[333] The Court recognized the responsibilities that unions carried as the exclusive representatives of a work unit. The Court stated that "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money … The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required."[334] Noting the costs associated with the representation of all workers, members and nonmembers alike, the Court upheld the collection of agency fees from nonmembers who would also receive the benefits.[335]

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[332] *Id.* at 221-222
[333] *Id.* at 229
[334] *Id.* at 222
[335] *Id.* at 222

The *Abood* Court acknowledged that public sector collective bargaining has political aspects but at the same time recognized that unions perform multiple tasks in representing their members outside of collective bargaining. Therefore, it allowed agency fees for collective bargaining activities but ruled that it could not be used for political purposes. While also recognizing the majority of workers have a right to organize and to support political causes they favor, the Court seemed to balance the rights of nonmembers to not associate with the rights of unions to associate and acknowledged the right of the dissenting minority to not have their money spent on political causes they do not wish to support. The Court found that "those union members who do wish part of their dues to be used for political purposes have a right to associate to that end 'without being silenced by the dissenters.'"[336] The Court noted, "But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."[337] The Court also addressed the appellants' charge that because of the inherently political nature of public sector bargaining as opposed to private sector bargaining, a different First Amendment question arose.[338] This was due to the differences between the public and private sectors. The Court acknowledged the differences but described a more complex political framework than simply one on one negotiations of a *quid pro quo* contract as petitioners described. Policy decisions involved different levels and branches of government, a variety of agencies and departments, and distinct constituencies, making it unlikely government officials in their role as public employers have the ability to "act as a

[336] *Id.* at 238 quoting *Street* 367 U.S. 740, 772-773, (1961)
[337] *Id.* at 222-223
[338] *Id.* at 227

cohesive unit" as "managers in private industry."[339] In addition, officials are limited in negotiations by laws, reliance on higher ups for approval and the budget process.[340] The Court recognized not one single person or organization influences the decision-making process. Responsiveness to union depends on a confluence of factors that also include the influence of the electorate which consists of government employees, taxpayers, and users of service.[341] Public employees as part of the electorate have political influence over the same employers. Possibly public sector employees have more influence than private ones.[342]

Additionally, the *Abood* Court viewed workers in the public sector and private sector as similarly situated with the same rights. *Abood* held that the First Amendment applied equally to private and public sector workers. Public sector employees' interest "in not being compelled to contribute to the costs of exclusive union representation" was no greater or less.[343] Maintaining labor peace and avoiding free riders were also equally necessary in the public sector as in the private sector. Hence, while collective bargaining differences between public and private sectors are real, and the employer contexts may be different, this case did not create a greater First Amendment infringement for public employees.[344]

Finally, public employees opposing a union's positions can still participate in all other political and civic activities and even express opposition to their union in a public forum. Exclusive representation does not "muzzle" dissenting workers. Nonmembers still have the same rights as all citizens to express their view in a public forum. The majority also held that

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[339] *Id.* at 228
[340] *Id.* at 228
[341] *Id.* at 228
[342] *Id.* at 228-229
[343] *Id.* at 229
[344] *Id.* at 229-230

characterizing public sector union's actions as political does not elevate the "ideas and beliefs of public employees onto a higher plane than the ideas and beliefs of private employees."[345] The Court held that although the central purpose of the First Amendment may have been to protect political speech, that does not elevate political speech over other types of speech. The First Amendment protects all speech equally. In sum, the Court majority in *Abood* seemed to balance the rights of the dissenting workers, the rights of union members, and the interests of the state government. The Court saw a role for each party and found a space to accommodate each party's rights.

***Knox v. Service Employees International Union*, 567 U.S. 298 (2012)**

Abood largely remained intact until the Roberts Court came into being with the addition of Chief Justice John Roberts and Associate Justice Samuel Alito (both well known to the Network) to the Court. Justice Alito was nominated by George W. Bush in 2005, after a FS led opposition campaign forced President Bush to withdraw his initial nominee, Harriet Miers, and replaced her with the FS's choice Samuel Alito. Seven years later, Justice Alito began articulating a rationale for overruling *Abood.* Justice Alito's first clear signal of his skepticism of the *Abood* ruling was in *Knox* (2012). *Knox* questioned the constitutionality of agency fees, strengthened the attachment of agency fees to First Amendment, and maintained that the substance of public sector collective bargaining affected public policy and thus concerned the public sphere. These assertions weakened *Abood*.

[345] *Id.* at 231

The three National Right to Work Legal Defense Fund (NRTWLDF) attorneys representing the challengers in *Knox* were members of the Network. The amicus brief jointly filed by the Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute was the only one submitted on behalf of the petitioners in *Knox*. This brief included three Network members from two different Network affiliated organizations.[346] The case was decided 5-4. Network member Justice Alito wrote the majority opinion, joined by Network members Justice Thomas and Justice Scalia, Network Affiliated Chief Justice Roberts, and Justice Kennedy. Network participation in *Knox* totaled eleven: three as attorneys, [347] four as *amici curiae*, and four as Supreme Court Justices.

Knox petitioners challenged a one-time fee imposed by the Service Employees International Union (SEIU) specifically to support SEIU's campaign against an upcoming California ballot proposition.[348] The fee was in addition to the union's annual fee assessment. *Knox* petitioners and *amicus curiae* charged that the public sector union had violated nonmembers' First Amendment rights of speech and association by collecting the special fee

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[346] Brief Amicus Curiae of Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute in Support of Petitioners Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, (2012) (No. 10-1121), 2011 WL 4352228

[347] see NRTWLF's website. The lead attorney was W. James Young Counsel of Record, Milton L. Chappel, Esq., William L. Messenger, Esq. Attorneys for Petitioner, Lead attorney W. James Young is a Staff Attorney with the National Right to Work Legal Defense and Education Foundation, founded and was the first president of Emory's FS chapter, is a member of the FS Labor & Employment Law Practice Group; Engage: The Journal of the FS's Practice Groups Volume 5, Issue 1 April 2004 Young, James W. "Making Windows into Litigants' Souls: The Pernicious Potential of Gilpin v. AFSCME" https://www.nrtw.org/foundation-litigators/

[348] Brief of Respondents at 49-50, Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, (2012) (No. 10-1121), 2011 WL 5908951 ("'Proposition 76 would have effectively permitted the Governor to abrogate the Union's collective bargaining agreements under certain circumstances, undermining the Union's ability to perform its representation duty of negotiating effective collective bargaining agreements.' Pet App. 7a n.2. Lobbying against abrogation of a union's agreements is certainly '*relate[d]* … to the … implementation of' those agreements, since an agreement that is abrogated will no longer be 'implement[ed].' *Lehnert*, 500 U.S. at 520 (emphasis added). Moreover, giving the Governor authority to abrogate Respondent's agreements would have interfered with Respondent's *current* ability to fulfill its statutory obligation to negotiate the *next* agreement … As such, the Proposition 76 expenditures meet *Lehnert*'s "germaneness" test.").

without sending out a new notice and without providing an opportunity to "opt-out" of the fee.[349] They also claimed that public employees were being forced by the state as a condition of employment to surrender their fundamental First Amendment rights.[350] The Court agreed and held that public sector unions must issue a new notice for any special assessments or increase in dues.

The Court also raised eyebrows when it ruled that unions thereafter must obtain nonmembers' affirmative consent before deducting special fees or dues increases. The majority opinion written by Justice Alito stated that "requiring objecting nonmembers to opt out of paying the nonchargeable portion of union dues—as opposed to exempting them from making such payments unless they opt in—represents a remarkable boon for unions."[351] The majority held that default should be the "probable preference of most nonmembers" and replaced the traditional opt-out system with a system that required an affirmative consent before the union could collect fees from nonmembers.[352] However, an opt-in argument had not been addressed by the petitioners' brief or in oral arguments. They asked only for an opportunity to opt out of the special fee as had been standard practice by relying on the declaration that "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee."[353]

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[349] Brief for Petitioners at 5-6, 10 Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, (2012) (No. 10-1121), 2011 WL 4100440
[350] Brief for Petitioners at 10 Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, (2012) (No. 10-1121), 2011 WL 4100440
[351] *Knox* at 312
[352] *Id.*
[353] *Machinists v. Street*, 367 U.S. 740, 774, (1961)

This was noted by Justice Sotomayor's concurrence,[354] by Justice Breyer's dissent,[355] and in the Respondent's brief.[356] The majority declared "by allowing unions to collect any fees from nonmembers and by permitting unions to use opt-out rather than opt-in schemes when annual dues are billed, our cases have substantially impinged upon the First Amendment rights of nonmembers."[357] The majority asserted its decisions authorizing agency fees and an opt-out system were dangerously close to allowing the First Amendment to be violated.[358] In the present case the Court saw no reason to continue such an impingement and declared that "individuals should not be compelled to subsidize private groups or private speech." The majority ended the longtime practice for special assessments and its vague wording suggested the constitutionality of any opt out system for annual fees was also in doubt. As Justice Sotomayor pointed out "While the majority's novel rule is, on its face, limited to special assessments and dues increases,

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[354] Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, 323, (2012) ("I concur only in the judgment, however, because I cannot agree with the majority's decision to address unnecessarily significant constitutional issues well outside the scope of the questions presented and briefing. By doing so, the majority breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our system of separated powers").

[355] *Id.* at 342 (Breyer, J. dissenting) "the Court, which held recently that the Constitution *permits* a State to impose an opt-in requirement, see *Davenport*, 551 U.S., at 185, 127 S.Ct. 2372, has never said that it *mandates* such a requirement. There is no good reason for the Court suddenly to enter the debate, much less now to decide that the Constitution resolves it. Of course, principles of *stare decisis* are not absolute. But the Court cannot be right when it departs from those principles without benefit of argument in a matter of such importance."

[356] Brief for Respondent footnote 10, Knox v. Service Employees International Union, Local 1000, (2011) (No. 10-1121), 2011WL 5908951 ("The union respondents remarked on the brief Amici Pacific Legal Foundation, *et al.*, urge the Court to abandon this rule and to require instead that nonmembers affirmatively authorize the use of their fees for nongermane purposes. Brief Amicus Curiae of Pacific Legal Foundation, *et al.*, at 17. This Court, however, does not consider a claim 'raised by an amicus curiae where the petitioner has not pursued that claim in the petition for certiorari.' … Considering such a claim would be particularly inappropriate here because amici ask this Court to both overrule well-established precedent and hold unconstitutional the California state laws authorizing Respondent's opt-out system. *See* Cal. Gov't Code §§3515, 3515.7, 3515.8. Amici offer no compelling justification for this Court to abandon its decision just four years ago that the First Amendment permits states to adopt *either* an opt-in *or* an opt-out system. *Davenport v. Wash. Educ. Ass'n,* 551 U.S. 177, 181, 185 (2007). Amici's concerns about 'non-conforming' employees are particularly misplaced in this case, which involves a sizable class of nonmembers, not a lone dissenter.").

[357] *Knox* at 321

[358] *Id.* at 314

the majority strongly hints that this line may not long endure."[359] The open-ended nature was noted by Justice Breyer as well. While dissenting, he argued that the opinion's language suggested the ruling could pertain to all assessments. Justice Breyer contended, "each reason the Court offers in support of its 'opt-in' conclusion seems in logic to apply, not just to special assessments, but to ordinary yearly fee charges as well."[360] Justice Breyer continued that although the Court had recently ruled "the Constitution *permits* a State to impose an opt-in requirement," the Court "has never said that it *mandates* such a requirement" as *Knox* now seemed to suggest.[361] Without being briefed and for the first time, the majority opinion held the Constitution mandated an opt-in system for special fees or dues increases and insinuated that the Constitution required this new arrangement for all fees.[362]

The Network members' brief *did* urge the Court to replace the current opt- out policy with a mandate to opt-in. This topic had been the focus of the jointly written amicus brief from the Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute[363] which included three Network members. The brief alleged that the Constitution mandated that workers were presumed to dissent. The Network members claimed an opt-out policy defied the Court's traditional presumption of unconstitutionality for any law violating a fundamental right[364] and conflicted with the principle that the Court does not

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[359] *Id.* at 327
[360] *Knox* at 340
[361] *Id.* at 342
[362] *Id.* at 342
[363] Brief Amicus Curiae of Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute in Support of Petitioners at 18-19 Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, (2012) (No. 10-1121), 2011 WL 4352228
[364]Brief Amicus Curiae of Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute in Support of Petitioners at 18, Knox v. Service Employees International Union, Local 1000, 567 U.S. 298 (2012) (No. 10-1121), 2011 WL 4352228.

assume an individual willingly relinquishes a right.[365] The focus of the brief from the Network members was a strident argument for individual rights and the rights of the dissenting public employees. They argued that inherent in the text of the Constitution was a "presumption of liberty" that the opt-out system violated and should be abandoned to protect the dissenters' First Amendment rights.[366] They claimed the rule "originated in dicta" and "warrants no *stare decisis* effect." [367] The majority adopted their argument including the assertion that the opt-out policy had become the court doctrine more as a "historical accident than through the careful application of First Amendment principles."[368] The majority also suggested that a ballot proposition that would have required an affirmative consent prior to charging agency fees "would have bolstered nonmember rights." Therefore, the majority opined, nonmembers had been compelled "to subsidize a political effort designed to restrict their own rights." [369]

The majority made other assertions that question the constitutional validity of the agency shop in general. The majority stated that public sector collective bargaining included many topics such as wages, pensions, and other items which implicated public spending thus making them important to the general public. This made the speech in collective bargaining a type of political speech protected by the First Amendment and the agency fees required to fund the bargaining was compelled speech also protected by the First Amendment.

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[365] Brief Amicus Curiae of Pacific Legal Foundation, Center for Constitutional Jurisprudence, Mountain States Legal Foundation, and Cato Institute in Support of Petitioners at 18-19, Knox v. Service Employees International Union, Local 1000, 567 U.S. 298 (2012) (No. 10-1121), 2011 WL 4352228. Referring to opt out and "presumption of conformity"
[366] Id. at 21
[367] Id. at 27
[368] *Knox* at 312
[369] *Knox* at 315-316

Knox made explicit that just as the First Amendment prohibited compelled speech and compelled association, "compelled *funding* of the speech of other private speakers or groups" was also protected by way of an analogy to commercial speech.[370] The opinion announced as a "general rule" that "individuals should not be compelled to subsidize private groups or private speech." The opinion also "made it clear" that compelling subsidies for another group or person's speech required high First Amendment scrutiny and the government must provide a compelling interest and the law must be applied in the least restrictive means.[371]

The majority also stated that an agency shop that required workers to pay union fees, "as a condition of employment" forced an employee who did not want to join the union to "support financially an organization with whose principles and demands he may disagree."[372]

The opinion asserted that *Abood* was an "anomaly" and that "compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.' "[373] After twice announcing this "impingement" had been "tolerated," the majority suggested the Court should "revisit" whether prior cases "have given adequate recognition to the critical First Amendment rights at stake."[374] The majority repeatedly called attention to the "impingement" imposed, twice in reference to the opt out schemes and three times for agency fees, which suggested that the Court's tolerance was waning, and they were open to revisiting this issue in the future. The Court opined this arrangement had licensed a substantial infringement of the First Amendment rights of nonmembers. The opinion concluded

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[370] *Id*. at 309 (2012) ("Closely related to compelled speech and compelled association is compelled funding of the speech of other private speakers or groups").
[371] *Id.* at 309-310
[372] *Id.* at 310
[373] *Id.* at 310-311
[374] *Id.* at 311

by stating that unions and dissenting employees both have the same rights to express their political and social views in an open forum free of government obstruction. However, when public workers are forced to pay agency fees to a union, the state is upsetting that balance. According to the majority, the state was granting an advantage to the union in the political debate at the expense of the nonmembers' First Amendment rights. Agency fees gave unions "the 'extraordinary' benefit of being empowered to compel nonmembers to pay for services that they may not want and in any event have not agreed to fund."[375]

Knox also narrowed which union expenses could be considered chargeable as related to collective bargaining. The majority rejected the union's claim that member representation included an array of activities outside of collective bargaining or that campaigning against a ballot initiative that would hamper union contracts was chargeable in contrast to earlier Court decisions.[376] The majority claimed that the union's understanding of chargeable expenses was much too broad and campaigning against a ballot initiative was essentially political campaigning not different than supporting or opposing a candidate. The majority contended that to allow a measure that affected the state budget to be a chargeable expense would void any limits on what is chargeable. This was due to the fact, according to the majority, that much of the content of collective bargaining involves the state budget. The majority again connected collective

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[375] *Id.* at 321

[376] Brief of Respondents at 51-52 Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, (2012) (No. 10-1121), 2011 WL 5908951 (Under California law, these representational services extend beyond negotiating at the bargaining table with the state employer (the Governor or the Governor's representative) to include lobbying the Legislature (or, in the case of an initiative, the electorate, which is the legislative decisionmaker in that context, see California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003)). Indeed, under California law, such lobbying is not only within the statutory scope of Respondent's representation, but within the statutory scope of chargeable expenses…. Because under California law Respondent represents the bargaining unit in such lobbying, and because all bargaining unit members share in the benefits of this representation, requiring them to contribute their fair share of the cost of this representation is "justified by the government's vital policy interest in labor peace and avoiding 'free riders.' " Lehnert, 500 U.S. at 519.").

bargaining to the state budget and public policy making it a public concern. The opinion also attributed at least part of the state deficit to "powerful public-sector unions."[377]

The majority declared avoiding free riders was the "primary purpose" agency fees had been upheld while at the same time rejecting that justification as adequate to override First Amendment rights.[378] The majority contended that many private organizations have free riders that the government does not force to financially compensate. Thus, unions did not deserve special treatment.[379] The majority only recognized labor peace and free riders as justifications for an agency shop but also claimed neither reason was compelling in the public sector. In sum, the majority's ruling in *Knox* was limited in fact to specific circumstances. However, it was the Court's undermining of key facets of *Abood's* holding that not only weakened the precedent but also provided guidance for outside groups to plan their strategy. The Network members quickly took advantage of the opportunity the Court had just produced.

***Harris v. Quinn* 573 U.S. 616 (2014)**

Harris v. Quinn was also initiated by the NRTWLDF and argued by three Network members. *Harris* was also a 5-4 Supreme Court ruling against the union written by Network member Justice Alito. He was joined by Federalist Society members Justice Thomas and Justice Scalia, Network affiliated Chief Justice Roberts, and Justice Kennedy. Seven *amici curiae* were submitted on behalf of the petitioners and twelve in support of respondents. Of the seven *amici curiae* for the petitioners, only one appeared to have no connection to the Federalist Society.[380]

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[377] *Knox* at 303
[378] *Id.*at 311
[379] *Id.* at 311
[380] Brief of Amici Curiae Family Child Care Inc., et al., in Support of Petitioners Michael E. Avakian Center on National Labor Policy Attorney for Amicus Curiae Harris v. Quinn 573 US 616, (2014) (No. 11-681), WL 6248443

Therefore, I was unable to conclude whether this person was a member of the Network. Network participation in *Harris* totaled twenty-two: one attorney,[381] seventeen as *amici curiae,* and four as Supreme Court Justices.

Direct criticism and calls to overturn *Abood* began with *Harris.* While *Knox* concerned a specific special fee, *Harris* challenged an agency shop clause for homecare providers. One Network member as an attorney for the petitioners in *Harris* described *Abood* as a "radical expansion of the government's ability to compel its employees to associate with a union" and urged the Court to overturn *Abood*.[382] The Center for Constitutional Jurisprudence, Pacific Legal Foundation, and Atlantic Legal Foundation similarly urged the Court to overrule *Abood* because "[t]here is no government basis, compelling or otherwise, that justifies the interference with fundamental First Amendment liberties that occurs win (*sic*) dissenting public employees are compelled to finance the political activities of public employee unions."[383] The brief for the Cato Institute and National Federation of Independent Business charged *Abood* had "circumvent[ed] employees' fundamental First Amendment rights to be free of coerced speech and association, to exercise the freedom of speech, and to petition the government. Aberrant and offensive, it should be overruled."[384]

Petitioners alleged a state law violated their right to petition the state on a public program by authorizing an agency shop. Stating that the First Amendment protected the right not to be compelled to subsidize speech on policy matters by a union that an individual did not want to

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[381] William L. Messenger lists himself as a "member" of the FS in his bio on the NRTWLF's website.
[382] Brief for Petitioners at 21, Harris v. Quinn 573 US 616, (2014) No. 11-681
[383] Brief Amicus Curiae of Center for Constitutional Jurisprudence, Pacific Legal Foundation, and Atlantic Legal Foundation in Support of Petitioners at 3 Harris v. Quinn 573 US 616, (2014) (No. 11-681), 2013 WL 6213227
[384] Brief of the Cato Institute and National Federation of Independent Business as Amici Curiae in Support of Petitioners at 21-22 Harris v. Quinn 573 US 616, (2014) No. 11-681 2013 WL 6248441

support or join, *Harris* ruled in favor of the petitioner.[385] The majority opinion stated that as a "bedrock principle" a right to not "be compelled to subsidize speech by a third party that he or she does not wish to support." *Harris* reiterated *Knox*'s assertion that *Abood* was an "anomaly" among First Amendment cases and reaffirmed the claim that the main reason agency fees had been allowed to be collected from nonmembers was to avoid free riders. However, avoiding free riders was not sufficient to override the First Amendment.[386]

Harris was a lengthy criticism of the *Abood* decision. The opinion described the analysis in *Abood* as "questionable" and as having "seriously erred."[387] Although, the Court noted that *Abood* was correct when it "recognized that forced membership and forced contributions impinge on free speech and associational rights," the decision veered off track and, in the end, had not gone far enough to strike down the law.[388] Specifically, the majority alleged that *Abood* was wrong to base its decision on two private sector cases, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956) and *International Association of Machinists v. Street* 367 U.S. 740 (1961) since neither case had been a constitutional case and neither had based its decision on the First Amendment. In *Hanson*, the Court had upheld a union shop under the Commerce Clause. In *Street*, the Court ruled on a statutory and not a constitutional issue. The *Harris* majority asserted that neither of the cases properly examined the First Amendment issue and it appears that *Abood*, relying on these cases, followed suit.

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[385] *Harris* at 620
[386] *Harris* at 627
[387] *Harris* at 635
[388] *Id.* at 633

In addition, the majority claimed that *Abood* did not grasp the difference between government *permission* to enact agency fees in the private sector as in *Hanson* and the public sector in which government itself compelled the payments as in *Abood*.[389] This difference was significant to the majority and also meant that *Hanson* had not concluded that labor peace overrode the First Amendment to justify compelled political association or compelled conformity.[390] The majority's point was that *Hanson* and *Street* had not "settled" the First Amendment issue of compelled agency fees payments to a public sector union and *Abood* was incorrect to conclude otherwise.[391]

The majority also criticized the *Abood* decision for not drawing a clear divide between collective bargaining in the private sector and collective bargaining in the public sector. [392] In the public sector, the majority asserted, collective bargaining discussions touch on matters of public concern, such as wages and pensions, that impact state spending and budgets unlike in private sector bargaining. According to the majority, just looking at the explosion in state spending on public employees' wages and pensions since *Abood* made that clear.[393] Additionally, the majority ruled that, public sector union spending for collective bargaining cannot be distinguished from money spent on political advocacy because both activities are aimed at the government whereas in the private sector collective bargaining was with a private employer.[394] Ultimately, the *Abood* Court, the majority claimed, missed that public sector unions were always steeped in politics. Thus, the majority opined, any payments made to the union were supporting

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[389] *Id.* at 633.
[390] *Id.* at 631
[391] *Id.* at 633
[392] *Harris* at 635-636
[393] *Id.* at 636
[394] *Id.* at 636-637

political speech. The majority held that, in contrast to *Abood*'s holding, the difference between the public and private sectors is stark and have implications for the First Amendment. The majority also rejected the notion by the dissent and the United States' brief that the union speech was not a matter of public concern.[395] As stated in *Knox,* the majority further claimed, union wages affected state budgets and state budgets are important matters of interest to the public. In addition, in practice, the Court's attempts to clarify chargeable and nonchargeable expenses has met with little success and the process for workers to challenge fees has become too burdensome for dissenting workers.

Furthermore, the majority, as in *Knox*, criticized labor peace and the problem of free riders, working to delegitimize these justifications for agency fees. "Agency-fee provisions unquestionably impose a heavy burden on the First Amendment interests of objecting employees."[396] The majority further emphasized that, since agency fees implicated political speech, it must pass a heightened scrutiny crafted for the First Amendment. However, labor peace and free rider were not a compelling government interest for public sector agency fees and did not pass even a lower standard of scrutiny. The majority then stated that unions' labor peace defense for an exclusive representative was irrelevant because petitioners are not attempting to form another union or even oust the current one. All the workers wanted was to not pay fees. In addition, the majority argued, unionization in the federal government absent an agency shop requirement demonstrated that exclusive representation was not dependent upon agency fees thus neither was labor peace.[397] The union also had not demonstrated that agency fees were necessary

[395] *Id.* at 653
[396] *Harris* at 655
[397] *Id.* at 649

to obtain the workers' benefits and like other organizations, the dues collected from voluntary memberships should be sufficient to cover the union's needs. Under the weight of these "unsupported" and "unwarranted assumption[s]" *Abood*'s foundation began to crumble.[398] The majority concluded that exclusive representation was not dependent on fees from nonmembers which meant labor peace was not compelling interests to compel fees. [399] The majority also continued the argument from *Knox* that "free rider arguments…are generally insufficient to overcome First Amendment objections."[400] There are many advocacy groups whose members benefits from their lobbying efforts, but do not share in the costs. These groups rely on voluntary fees and no one has suggested all their beneficiaries should be made to pay.[401] Unions should not get special treatment. Thus, based on the majority opinion, *Harris* seemed to undermine the principles that had upheld the agency shop for 40 years.

Evidenced by statements on the NRTWLDF's website, *Harris* sent a clear signal to the Network that the Court had serious misgivings regarding the agency fee system in general. The discussion of the *Harris* decision on NRTWLDF's website optimistically stated, "Significantly, much of the Court's opinion details how the '*Abood* Court's analysis is questionable on several grounds.' Among other things, the majority recognized that the 'core issues' in public-sector collective bargaining, 'such as wages, pensions, and benefits are important political issues.' This criticism of *Abood* suggests that, if a case involving actual public employees comes before the

[398] *Id.* at 638
[399] *Id.* at 649
[400] *Id.* at 627
[401] *Id.* at 651

Court, a majority of the Justices would be willing to overrule *Abood* and hold that public-sector forced fee requirements are unconstitutional."[402]

Janus v. American Federation of State, County, and Municipal Employees

Janus v. American Federation of State, County, and Municipal Employees, Council 31 585 U.S. (2018), like *Knox* and *Harris* had been initiated by Network members from the NRTWLDF. Also, like *Knox* and *Harris*, the decision was a 5-4 split. Justice Alito again wrote the majority opinion joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch. *Janus* struck down a state law which allowed public sector unions to collect "agency fees" from nonunion employees to compensate the union for expenses accrued for collective bargaining which benefited all workers, including nonmembers that do not pay union fees. "Agency fees" were a compromise between paying full union dues and "free riding" workers. In striking down the law, the Court overruled a precedent that had stood for forty years.

The Court held in *Janus* that forcing public employees "to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities… violated the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern."[403] The finding that all agency fees were coercing the subsidization of political speech meant *Abood* had been wrong when it concluded public sector unions were more than just political organizations. *Abood*, the majority opinion held, had been "poorly reasoned," resulted in "practical problems and abuse" by unions,

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[402] National Right to Work Legal Defense Foundation, Foundation Supreme Court Cases https://www.nrtw.org/foundation-supreme-court-cases

[403] *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, 2460 (2018)

was "inconsistent with other First Amendment cases and had been undermined by more recent decisions," and experience following *Abood* "shed new light" on the functioning of agency fees.[404]

The *Janus* majority opinion tied up the loose ends from *Knox* and *Harris*, drawing a line between workers in the private sector and those in the public sector, while erasing the line drawn by the *Abood* Court between chargeable expenses for collective bargaining and nonchargeable expenses for the union's political activities. Additionally, *dicta* in *Knox* such as assertions about the unconstitutionality of the opt-out arrangement, the innate political nature of public sector bargaining, the non-distinguishable nature of public sector union expenses, and affiliating oneself with the union message through fee requirements became the rulings in *Janus*. The majority opinion written by Justice Alito was a strident assertion that *any* agency fees paid to a public sector union were equivalent to being compelled to associate oneself with and promote the union's political message -- a message the Court and *amici curiae* assumed the nonmember might totally oppose. In the decision, the Court held that requiring these nonmember public sector employees to pay a "fair share" (in exchange for collective bargaining benefits) violated their First Amendment rights. An additional part of the ruling was that unions are political entities by design thus, any fees paid to the union funded speech about public policy. The majority also maintained that because unions are innately political groups, union expenditures could not be divided into nonpolitical expenditures and political expenditure. In the opinion, the majority often compared unions to political parties.

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[404] *Id.*at 2460

In sum, *Janus* held that the First Amendment protects the individual right of the public sector worker to not pay agency fees to a union. The Court found that agency fees required as a condition of public employment, forced workers to associate with a union they did not wish to join. These agency fees coerced nonmembers of the union to support and affiliate themselves with the union's message. Additionally, the majority held that public sector unions were political organization in toto and therefore the message spoken by the union was political speech. Further, because political speech "occupies the highest rung of the hierarchy of First Amendment values" this violated public employees' free speech rights.[405] Simply stated, the Court opined, agency fee requirements in the public sector are unconstitutional as it forced an individual to subsidize the political views of a union she chose not to join and whose views she opposes. The majority position was that all public sector agency fee requirements violated First Amendment rights of public employees to be free from compelled speech and compelled association.

Agency Shops Compel Association and Compel Speech

The petitioners and *amicus curiae* in *Janus* began their arguments against agency fees based on violations of the First Amendment and a combination of the freedom of association, the freedom of speech and the freedom to petition government. Included in those freedoms is the right to be free from compelled association and compelled speech. The majority opinion also began its ruling with the assertion that the First Amendment protects the right to speak and not speak as well as the right to associate and not associate. The Network members as petitioners and *amici* argued that an agency shop violated the First Amendment rights of individual workers by compelling speech and compelling association. They claimed that the First Amendment protects

[405] *Janus* at 2476

"the decision of both what to say and what not to say."[406] They contended that "compelling speech and prohibiting speech are equally offensive to the Constitution."[407] Thus, an agency shop violated these First Amendment principles because the government decided what an individual would say, would not say, or how to say it instead of allowing the individual to choose. To the Network, agency fees undoubtedly compelled speech and therefore, struck at the very core of the Bill of Rights, representative democracy, and self-expression.

Many briefs easily extended the First Amendment protections against compelled speech to being compelled to subsidize another's speech. Therefore, it was natural that agency fees, which are compelled payments to an organization were also compelled speech and compelled association. The majority also endorsed this view, that being forced to financially support another's speech inflicted the same constitutional harm as compelling speech.[408] The majority stated as a matter of fact that the compelled funding of speech "seriously impinges on First Amendment rights."[409]

The Network members' briefs equated agency fees with government pushing a certain agenda. One brief warned of the "grave danger…whenever a government decides that everyone must support a favored political agenda as a condition of public employment."[410] Another brief claimed that when a public employer allowed an agency shop in the workplace, that government

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[406] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc*., 487 U.S. 781, 782 (1998)
[407] Brief of California Public-School Teachers, the Christian Educators Association International, and the Center for Individual Rights as Amici Curiae in Support of Petitioners at 16 Harris v. Quinn 573 U.S. 616 (2012) (No. 11-681), 2013 WL 6213227
[408] *Janus* at 2464
[409] *Id.*
[410] Brief for California Public-School Teachers as Amici Curiae in Support of Petitioner at 14, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6054679

was tilting the scales toward speech it favored and jeopardizing individual rights.[411] Agency fees were also considered by *amici curiae* to be equivalent to government elevating one party's speech at the expense of the other. *Janus* petitioner described the process as such: "Agency fees transform employee advocacy groups into artificially powerful factions, skewing the 'marketplace for the clash of different views and conflicting ideas' that the 'Court has long viewed the First Amendment as protecting.' "[412] Another brief asserted that the union's "speech is transformed from that of a subgroup, offering one viewpoint among many, into the *only* employee voice an employer need listen."[413] According to a third brief, this was antithetical to the First Amendment, whose purpose "is to allow meritorious ideas and association with those ideas to rise and fall without the government placing its thumb on the scale in favor of one idea or another."[414] Another brief which included two very prominent Network members claimed an agency shop was the government substituting its own view of the worker's best interest. It stated, "The First Amendment generally does not allow the government to force someone to subsidize speech with which he disagrees simply because the government thinks that it benefits him."[415] *Janus* petitioner also argued, "[T]he government cannot force nonmembers to pay for union

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[411] Brief of Jason R. Barclay and James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois, as Amici Curiae in Support of Petitioners at 5-6, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6311777

[412] Brief for the Petitioner at 17, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674

[413] Brief of Employees of the State of Minnesota Court System as Amici Curiae in Support of Petitioner *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6336281

[414] James Madison Institute *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205798

[415] Brief for California Public-School Teachers as Amici Curiae in Support of Petitioner at 4, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6054679

advocacy based on the 'paternalistic premise' that it is 'for their own benefit.' "[416] The majority opinion adopted a similar position stating, "[T]he First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay."[417]

Political Speech

The Network members as *Janus* petitioners and *amicus curiae* argued that agency fee requirements forced a dissenting public sector employee "to underwrite union advocacy."[418] They claimed that in essence, "Compulsory agency fees force public employees to engage in political speech they disagree with and to associate with political associations they oppose in violation of their First Amendment rights. This is true regardless of whether those fees fund a union's advocacy and lobbying activities or its negotiation efforts with government employers. Both types of activities are inherently political."[419] Unions were viewed as singularly political organizations. The Network members argued there was no distinction in the substance of a union's speech when negotiating over working conditions and when lobbying the government. Both of these acts targeted the government and therefore both acts involved public policy. The Network members claimed a public sector union's work "is quintessential lobbying: meeting and speaking with public officials, as an agent of parties, to influence public policies that affect those

[416] Brief for the Petitioners at 52, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[417] *Janus* at 2467
[418] Brief of Amicus Curiae 1851 Center for Constitutional Law in Support of Petitioner at 6 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6336280
[419] Brief of Employees of the State of Minnesota Court System as Amici Curiae in Support of Petitioner *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6336281

parties."[420] A majority of amicus briefs claimed that for the public sector union, lobbying and collective bargaining were both intrinsically political. Additionally, according to many of the briefs, public sector workers' wages, pensions, and benefits were not private economic matters between employer and employee or employer and union representative. Instead, public sector worker's wages, pension, and any other benefits received were viewed by *amici* and the majority as policy issues that impacted the state or local budget.

Amici repeatedly argued that public sector collective bargaining is inherently political, therefore, any form of union activity would constitute political speech. Agency fees paid to a union can be equated with supporting the politics of the union, thus subsidizing the union's political speech or speech on public matters. For example, the petitioner in *Janus* argued that "[b]argaining with the government over non-financial policies is equally political. Union demands for policies that restrict how the government can retain, place, manage, promote, and discipline employees can affect the quality of services the government provides to the public."[421] The brief submitted by the United States on behalf of the *Janus* petitioner was an about face from where the Solicitor General had stood in *Harris*. The United States' *Janus* brief assuredly declared, "Given that public-sector bargaining inherently involves public issues, compulsory agency fees in government employment necessarily involve public employees' speech as citizens on matters of public concern."[422] Another brief similarly stated "in the public sector both labor and management are government employees, both labor and management sit on the same side of

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[420] Brief for the Petitioner at 11, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[421] Brief for the Petitioner at 14, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[422] Brief for the Petitioner at 10, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674

the table and bargain with taxpayers' money. Such bargaining inherently affects the political priorities of public spending, making every bargaining decision an act of public policymaking."[423] Therefore, since public sector unions engaged in politics, the speech that the agency fees forced the dissenting members to support was political speech. Most simply stated in one brief, "Compelling an individual to subsidize public-sector union speech compels that individual to subsidize core political speech."[424] Paying agency fees meant "non-members are subsidizing the political preferences of members"[425]

As the decision indicated, "[t]he core collective-bargaining issue of wages and benefits" were political issues connected to public funds and the government could not compel the nonmember to "speech" on these issues through the payment of agency fees.[426] The Court also adopted this public policy view of unions. The majority agreed with *amici* that agency fees paid to a union significantly impinged First Amendment rights because unions "take[] many positions during collective bargaining that have powerful political and civic consequences."[427] The majority described the situation in similar language as the amicus briefs. The majority asserted that agency fees force a public sector worker to fund a union "even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities." The Court ruled that agency fees, by compelling a nonmember to fund a third party's speech in

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[423] Jason R. Barclay and James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois at 6, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6311777
[424] Brief of Rebecca Friedrichs and Fellow Teachers and Miranda Thorpe and Fellow Caregivers as Amici Curiae in Support of the Petitioners at 28-29, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6311778
[425] Brief of Madison Institute at 34, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205798
[426] *Janus* at 2472
[427] *Id* at 2464 quoting *Knox* at 310-311

collective bargaining that may affect public issues, violate the nonmember's right to free speech.[428]

To demonstrate that collective bargaining affects public funds, the majority pointed to the "severe budget problems" in some states.[429] The majority considered the increase in state budgets and deficits as a post-*Abood* "development" that "eroded the decision's underpinnings."[430] The majority also noted the variety of *amici curiae* submitted on the union's behalf to illustrate the many issues of public concern that unions may speak about in bargaining.[431] The majority "squarely rejected" the premise that collective bargaining speech could simply be private speech. The majority maintained that a public sector union's speech during collective bargaining regarding public employees' wages and benefits affected public spending and thus, must be "a matter great public concern."[432] They argued "to suggest" otherwise "is to deny reality."[433]

In addition to compelled speech and association, *amici* asserted that agency fees were government compulsion to support the union's political viewpoint while silencing the worker's own voice. The state, by allowing an agency shop and exclusive representation, suppressed the dissenting worker's viewpoint. The nonmember was barred from expressing their views to their public employer. One brief described the situation as one in which bargaining for working conditions was "artificially tilted in favor of empowering the union and gagging dissenting

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[428] *Id.*at 2459-2460
[429] *Id.* at 2474-2475
[430] *Id.* at 2482
[431] *Id.*at 2475 ("[U]nion speech in collective bargaining addresses many other important matters. As the examples offered by respondents' own amici show, unions express views on a wide range of subjects—education, child welfare, healthcare, and minority rights, to name a few. See, e.g., Brief for American Federation of Teachers as Amicus Curiae 15–27; Brief for Child Protective Service Workers et al. as Amici Curiae 5–13; Brief for Human Rights Campaign et al. as Amici Curiae 10–17; Brief for National Women's Law Center et al. as Amici Curiae 14–30. What unions have to say on these matters in the context of collective bargaining is of great public importance")
[432] *Id.* at 2474
[433] *Id.* at 2475

nonmembers."[434] Another brief maintained not only were the nonmembers silenced by public sector collective bargaining, union members who disagree with union leaders were being silenced as well as taxpayers.[435] The brief from the California Public School Teachers claimed that "compulsions to speak are worse still, because they force the citizen to affirmatively contradict his own views, both violating his conscience and artificially enhancing the voice of the opposing side."[436]

Agency fees made an already speech repressive situation worse because dissenting workers were both silenced and forced to promote a political view which conflicted with their own and could even be damaging. As petitioner stated, "Compelled fees exacerbate the constitutional and other harms that employees suffer as a result of the government forcing them to accept an unwanted representative.[437] The Center for Constitutional Jurisprudence explained that *Abood* had authorized "the designation of a single organization as exclusive representative of a segment of the public before legislative and executive officials on a matter of public interest." In addition, according to the Center for Constitutional Jurisprudence, the *Abood* Court sanctioned the infringement on the First Amendment based on an unsubstantiated notion that an exclusive representative served a compelling government interest greater than nonmembers' free

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[434] Brief of Amicus Curiae 1851 Center for Constitutional Law in Support of Petitioner at 4, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6336280

[435] Brief Amicus Curiae of Pacific Legal Foundation, Goldwater Institute, The Fairness Center, Empire Center for Public Policy, Inc., Pioneer Institute, Inc., Reason Foundation, Individual Rights Foundation, and Yankee Institute for Public Policy in Support of Petitioner at 16, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6033572

[436] California Public School Teachers at 16, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6054679

[437] Brief for the Petitioner at 48, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674;Brief of Jason R. Barclay and James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois, at 29-30, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6311777

speech and free association rights.[438] Another brief asserted that agency fees "forc[ed] workers to fund speech that violates their consciences, their beliefs, their political commitments, and their principles."[439] A third brief which included two prominent Network members argued that an exclusive representative silenced nonconsenting public employees while agency fees force them to subsidize the false information the union provided the government.[440]

The same brief continued:

> The voice of the individual is lost when state or federal law compels him to support a political organization he opposes. This compulsion is an effective censor of individual opinion. Instead of being drowned out by many genuine voices, the individual is forced to boost the voice of those he opposes or even despises. He is forced to pay for the counterfeiting of public opinion, distorting democracy, and losing his freedom in one fell swoop.[441]

According to this brief an agency shop silenced workers, elevated false public opinion and distorted representation. The majority opinion was less animated in its descriptions but still held a similar position. The majority argued that agency fees were dangerous because

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[438] The Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at 18, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801

[439] Competitive Enterprise Institute as Amicus Curiae in Support of Petitioner at 4, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6054676

[440] Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioner at 13, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801

[441] Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioner at 14-15, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801

"[c]ompelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command" that government cannot deny an individual the freedom to think for themselves and form their own beliefs.[442] The majority stated that free speech was fundamental to representative democracy and the pursuit of truth. The majority reasoned that, "Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends."[443] The majority went further and asserted that in addition to undermining democracy and truth, compelled speech forced individuals to betray their beliefs.[444] The majority then cited *West Virginia Bd. of Ed. v. Barnette*, a case in which the Court ruled that school children could not be (directly) compelled to recite the Pledge of Allegiance against their religious beliefs. It noted, "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence."[445]

Next, the majority opinion asserted that compelled speech and "[c]ompelling a person to subsidize the speech of other private speakers" amounts to the same under the First Amendment. To emphasize that money paid to an organization supported that organization's viewpoint, the majority quoted Thomas Jefferson from *A Bill for Establishing Religious Freedom*: "As Jefferson famously put it, 'That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical.'" The majority claimed

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[442] *Janus* at 2463
[443] *Id.* at 2464
[444] *Id.* at 2464
[445] *Id*. at 2464

this demonstrated that Jefferson and other Founders would denounce laws mandating public employees to support viewpoints they opposed.[446]

Abood was Wrong and Should Be Overruled

The *Janus* Court directly confronted the *Abood* decision after nipping at its edges in *Knox* and *Harris*. *Amici curiae* began the direct calls to overrule *Abood*. *Amici* argued for overruling *Abood* based on violations of the First Amendment and "extensive and pernicious infringements on the core constitutional rights of millions of people for the last 40 years."[447] One argument made by critics for overruling *Abood* was that it had not applied the proper First Amendment scrutiny. The critics argued that this made the decision inconsistent with First Amendment precedent and unreconcilable with other cases regarding compelled association, compelled speech, and regulations on expenditures for political speech.[448] *Amici* also stated *Abood* directly conflicted with the more recent decisions in *Harris* and *Knox*. They urged the Court to overrule *Abood* and bring cohesiveness back to the First Amendment. The call to overrule *Abood* needed to contend with the doctrine of *stare decisis* and explain why the Court should not "stand by things decided."

***Stare decisis* and Consistency**

Perhaps the most visible influence of the Network was the Court's use of "new *Originalism*" in its justifications for not adhering to precedent. The core Network doctrine of

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[446] *Id.* at 2471
[447] Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment at 32-33, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[448] Brief for the Petitioner at 18-19, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674

"new *Originalism*" coupled with the new judicial "restraint" that developed within the FS provided the majority with the necessary rationale to overrule *Abood* and abandon *stare decisis*. The FS insisted on an original meaning interpretation of the Constitution. According to the doctrine of "new *Originalism*" whenever a court ruling was deemed to conflict with the original meaning of the Constitution it was necessary to right that error and return the law to align with the Constitution's original meaning. The Network argued the needed court action of overturning a precedent and forsaking *stare decisis* to further the cause of "new *Originalism*" would not be judicial activism in its derogatory sense but instead was demanded.

Three *amici* as well as the petitioners, all of which included Network members, began to address the doctrine of *stare decisis* as they called to overrule *Abood*. One brief for *Harris* that included four Network members insisted the time was now to overrule *Abood* and return coherence to First Amendment jurisprudence. They claim that *Abood* met all the criteria that determined when to overturn a precedent.[449] The brief added that Abood departed so far from First Amendment principles that *stare decisis* should not be considered a constraint on the Court. [450] Rather, they argued, *stare decisis* must yield when necessary to "erase [an] anomaly."[451] After a discussion of *Abood*'s divergence from First Amendment principles a second brief noted that, "'This Court has not hesitated to overrule decisions offensive to the First Amendment'" (quoting

[449] California Public-School Teachers, the Christian Educators Association International, and the Center for Individual Rights at 29-30, Harris v. Quinn 573 US 616, (2014) (No. 11-681), 2013 WL 6213227
[450] California Public-School Teachers, the Christian Educators Association International, and the Center for Individual Rights at 8, Harris v. Quinn 573 US 616, (2014) (No. 11-681), 2013 WL 6213227
[451] California Public-School Teachers, the Christian Educators Association International, and the Center for Individual Rights at 6, Harris v. Quinn 573 US 616, (2014) (No. 11-681), 2013 WL 6213227

Citizens United v. FEC, 558 U.S. 310, 363 (2010) (internal citation omitted). [452] This same theme was echoed by the Brief of Petitioners.

In *Janus,* arguments against *stare decisis* based on the doctrine of "new Originalism" came from four separate briefs: the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment, the American Center for Law and Justice's brief, the United States' brief, and the Petitioner's brief. The amicus brief from the American Center for Law and Justice (ACLJ) which included Network member Jay Alan Sekulow[453] succinctly summed up the philosophy in explaining why *stare decisis* did not preclude the Court from overruling *Abood.* As the brief explained *stare decisis* does not bind the Court to prior incorrect interpretations of the Constitution. The Network member's briefs stated that to uphold an incorrect precedent would be to elevate judicial interpretation of the Constitution over the actual Constitution. This elevation of judicial constitutional interpretation contradicts the Supremacy Clause and the Justices' oath of office.[454] The brief asserted this followed from *Marbury v. Madison,* 5 U.S. 137 (1803) which stated that the Supreme Court could overrule legislation that was offensive to the Constitution. The amicus brief reasoned that since the Constitution is the supreme law and judicial precedents are secondary,[455] the Court was

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[452] The Cato Institute, and the National Federation of Independent Business at 21 Harris v. Quinn 573 US 616, (2014) (No. 11-681) 2013 WL 6248441

[453] See Avery and McLoughlin 2103; Hollis-Bruksy 2015, Jay Alan Sekulow, Nov. 2008 National Security: International & National Security Law Sponsors: Regent Student Chapter; Nov. 2007 Annual National Lawyers Convention, The FS's Free Speech & Election Law Practice Group: Restricting Parental Speech Sponsors: Washington DC Lawyers Chapter https://fedsoc.org/contributors/jay-sekulow

[454] Amicus Brief of the American Center for Law and Justice in Support of Petitioner at 1-2, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*(No. 16-1466) 2017 WL 6054678

[455] Amicus Brief of the American Center for Law and Justice in Support of Petitioner at 14, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*(No. 16-1466) 2017 WL 6054678

not bound by *stare decisis* to an improper interpretation of the Constitution.[456] They concluded that the Court's duty is "fidelity to the Constitution over fidelity to its own contrary precedent."[457]

The lengthiest arguments against *stare decisis* based on "new *Originalism*" appeared in the brief from the Cato Institute et al. which included three or four Network members. Like the brief above, they also claimed that the Court was not bound to *stare decisis* and should adhere to the Constitution over judicial interpretation of the Constitution. This brief claimed that in constitutional cases *stare decisis* had less hold over the Justices due to the difficulty in amending the Constitution. Due to the difficulty of amending judicial precedent, they reasoned that in contrast to statutory cases where stability was preferred, in constitutional cases correct interpretation was more valuable even if this meant sacrificing stability.[458] The same brief also maintained that the proper understanding and application of *stare decisis,* "not only allows for the abandonment of a precedent so thoroughly repugnant to our Constitution, it demands it."[459] The *amici* conveyed that "public-sector workers deserve, at long last, to have their First Amendment liberties restored." [460]

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[456] Amicus Brief of the American Center for Law and Justice in Support of Petitioner at 12, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*(No. 16-1466) 2017 WL 6054678
[457] Amicus Brief of the American Center for Law and Justice in Support of Petitioner at 16, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*(No. 16-1466) 2017 WL 6054678
[458] Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment as Amici Curiae in Support of Petitioner at 4 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[459] Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment as Amici Curiae in Support of Petitioner at 32 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[460] Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment as Amici Curiae in Support of Petitioner at 32 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296

A clear example of the influence of the FS and their reach is the Brief for the United States as Amicus Curiae Supporting Petitioner in *Janus.* The U.S. government explained that in their amicus briefs submitted for *Harris* (2012) and *Friedrichs* (2015), their position had been that *Abood* was correct and remained good law. They asked the Court to reaffirm *Abood*'s holding. However, in 2017 there was a new administration and a new Solicitor General, Noel J. Francisco, who was a member of the Network. Upon reexamination under the direction of Solicitor General Francisco and President Donald J. Trump the government changed their position and now opposed reaffirming *Abood.* The government took an *Originalist* approach to the First Amendment. Accordingly, the stated reason for the change was the influence of the Court's decisions in *Harris* and the arguments in *Friedrichs*. After these two cases the government realized they previously had not given sufficient attention to the public employees' free speech rights when workers objected to subsidizing the union's speech on public policy with which they disagreed. This time, the government alleged that *Abood* departed from and could not be reconciled with existing First Amendment precedent and thus called for *Abood* to be overrule.[461] In line with originalist tenets, the government's stated reasoning was that Abood was misaligned with the Constitution and needed to be corrected.[462]

A fifth brief from the Center for Constitutional Jurisprudence, which included two Network members made their "*Originalism*" argument against *Abood* under the heading "*Compelling Public Employees to Pay Agency Shop Fees for "Bargaining" Is Contrary to the*

[461] Brief for the United States as Amicus Curiae Supporting Petitioner at 11, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205805
[462] Brief for the United States as Amicus Curiae Supporting Petitioner at 32, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205805

Original Understanding of the First Amendment." The Federalist Society often invokes the founders and the framers as evidence for the tenets of "new Originalism." However, in this brief Network members conceded that the original intentions of the founding generation regarding free speech was "scarce, at best."[463] Therefore, any attempt to assert the founders' intention was to reject compelled speech, they claimed quoting Federalist Society *member* and frequent speaker Justice Clarence Thomas, must look to "the practices and beliefs of the Founders in general."[464] The brief then quoted Thomas Jefferson and separately James Madison regarding religious toleration. They explained that the Court had easily adopted these statements concerning compelled religious payments to compelled funds for political speech.[465] Next the brief claimed that Jefferson and Madison had believed that public opinion was essential for representation in a government in which leaders must respond to the public and to protect individual liberty.[466] An exclusive representative censored the nonmember's opinion which therefore, never reached the

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[463] Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at 12, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801

[464] Brief Amicus Curiae of Center for Constitutional Jurisprudence, Pacific Legal Foundation, and Atlantic Legal Foundation in Support of Petitioners at 4, *Harris v. Quinn* 573 U.S. 616 (2014) (No. 11-681) 2013 WL 6248440 (quoting *McIntyre v. Ohio Election Comm'n,* 514 U.S. 334, 361 (1995) (Thomas, J., concurring).)
Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at 12, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466),2017 WL 6205801 (quoting *McIntyre v. Ohio Election Comm'n,* 514 U.S. 334, 361 (1995) (Thomas, J., concurring).)

[465] Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at 12-13, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801
(" 'That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.' Thomas Jefferson, A Bill for Establishing Religious Freedom (1779), in 5 The Founders' Constitution, University of Chicago Press (1987) at 77; quoted in Keller v. State Bar, 496 U.S. 1, 10 (1990); Chicago Teachers Union v. Hudson, 475 U.S. at 305 n.15; Abood, 431 U.S. at 234-35 n.31.")
(" 'Who does not see…[t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?' James Madison, Memorial and Remonstrance Against Religious Assessments, in 5 The Founders' Constitution at 82; quoted in Chicago Teachers Union, 475 U.S. at 305, n.15; Abood, 431 U.S. at 234-25 n.31. 16.").

[466] Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at 14, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801

government employer, while agency fees created false opinion by substituting the union's opinion for the individual's opinion. Their point was that an agency shop disrupted the flow of information to the government. Worse yet an agency shop fed the government "counterfeited opinion" through an exclusive representative who claimed "to represent the voice of *all* the employees - even those that refuse to join the union"[467] Agency fees, and more subtly, the entire agency shop was antithetical to Jefferson and Madison's understanding of the republic they were forming.

The majority's ruling also followed the guidelines of "new *Originalism*." The majority started by stating, "Fundamental free speech rights are at stake."[468] Therefore, the Court had to first compare the holding in *Abood* against other First Amendment decisions to determine whether *Abood* was consistent with the standard bearers for First Amendment values.[469] The majority concluded *Abood* was inconsistent with the principles of the First Amendment. They also concluded that public sectors workers' First Amendment rights were violated by the agency shop. The majority then addressed *stare decisis* stating it was the preferred course, although "not an inexorable command," and not required when the Court had "very strong reasons" to overrule a prior decision.[470] The majority determined *stare decisis* was not an obstacle to overruling *Abood* since there were "very strong reasons" to overrule *Abood*.[471] The majority adopted the same constitutional argument that appeared in briefs from the Network members regarding *stare decisis*. The majority claimed, as had the amicus briefs, that *stare decisis* is less relevant for a

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[467] The Brief Amicus Curiae of Center for Constitutional Jurisprudence at 13, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801
[468] *Janus* at 2440
[469] *Id.* at 2463
[470] *Id.* at 2478
[471] *Id.*

Constitutional issue because overturning a Court's decision can only be done with a Constitutional amendment or by the Court itself. The majority also asserted, as many briefs had, *stare decisis* applied least of all to cases that involved the First Amendment, and the Court would "not hesitated to overrule decisions offensive to the First Amendment."[472] The majority summarized the principal factors of *stare decisis* with the following:

> Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood* 's reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that stare decisis does not require us to retain *Abood*.[473]

There was similar language in the petitioner's brief.

> The Court will overturn a constitutional decision if it is badly reasoned and wrongly decided, conflicts with other precedents, has proven unworkable, or is not supported by valid reliance interests… *Abood* should be overruled for all of these reasons.[474]

The brief submitted by the United States also contained similar language.

> Although this Court reconsiders its precedents with caution, *stare decisis* does not warrant preserving *Abood*'s error. *Stare decisis* considerations are weakest in constitutional cases, and this Court has therefore been willing to overrule precedents that

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[472] *Id.* at 2478
[473] *Id.* at 2479
[474] Brief for the Petitioner at 10, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674

> have been undermined by subsequent legal developments…Court has twice characterized *Abood* as an anomaly, and *Abood*'s incompatibility with the reasoning of *Harris* and *Knox* is a sufficient justification for its overruling … overruling *Abood* would resolve a conflict between two contradictory lines of precedent and clarify First Amendment law.[475]

After examining *Abood*'s ruling against the criteria for *stare decisis,* the majority concluded they were not bound to preserve *Abood*.[476] One of the Court's justification for overruling a 40-year-old precedent was that *Abood* conflicted with established First Amendment principles and recent decisions had weakened its reasoning.[477]

Abood's Quality of Reasoning

Besides the constitutional validity of *Abood, amici* and petitioner challenged specific aspects of the *Abood* ruling. Specifically, they challenged the use of *Hanson* and *Street* as controlling,[478] the *Abood* Court's mistaken assumption that these two cases settled the constitutionality of compelled public sector fees, and the failure of the *Abood* Court to distinguish between the public sector and the private for the First Amendment. They also criticized *Abood* for the consequences of applying the wrong test of validity for a constitutional case. The justifications used to defend the necessity of agency shops, maintaining labor peace and avoiding free riders, were deemed illegitimate as government's interest in the public sector.

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[475] Brief for the United States at 10-11, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205805
[476] *Janus* at 2479
[477] *Id.* at 2440
[478] *Railway Employees' Dept. v. Hanson,* 351 U.S. 225 (1956); *International Association of Machinists v. Street* 367 U.S. 740 (1961)

Network members questioned the necessity of agency fees to labor peace at all and doubted that *free* riders even existed since there was nothing "free" and no benefits were gained when forced to join a union one opposed. Petitioner Mark Janus stated his objections to being called a free rider as that implied that he benefited from union representation. Rather, the petitioner's brief characterized nonmembers as "forced riders," that are "forced by the government to travel with a mandatory union advocate to policy destinations they may not wish to reach."[479] The majority noted Janus' complaint saying, "he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[480]

The *Janus* petitioner (and *Harris* petitioners) and the *Janus* brief (and *Harris* brief) from the Cato Institute, National Federation of Independent Business Small Business Legal Center and the Center of the American Experiment further criticized the Court for relying on two private sector cases and thus concluding that the First Amendment rights of public sector workers were the same as private sector workers. Their argument was that those two cases had only upheld the government's authorization of private sector agency shop provisions not whether the "government may *directly compel* association with or support of a union."[481] These specific points were adopted by the majority in *Harris* and again by the *Janus* majority. *Janus* petitioner and the brief submitted jointly by the Cato Institute, the National Federation of Independent Business Small Business Legal Center, and the Center of the American Experiment[482] also highlighted that *Hanson* concerned the Commerce Clause. As such, *Hanson* offered no First

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[479] Brief for the Petitioner at 53, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[480] *Janus* at 2466
[481] Brief of the Cato Institute and National Federation of Independent Business as Amici Curiae in Support of Petitioners at 12, *Harris v. Quinn* 573 U.S. 818 (2014) (No. 11-681) 2013 WL 6248441
[482] As did the *Harris* petitioners and the brief submitted by the Cato Institute and NFIB

Amendment analysis. Both briefs harshly criticized the *Abood* Court for wrongly appropriating labor peace, a commerce doctrine which only necessitated rational scrutiny to an issue as important as the First Amendment. These two specific themes were echoed again by the majority in *Harris* and in *Janus.* The majority quoting *Harris* stated, "*Abood* went wrong at the start when it concluded that two prior decisions, [Hanson and Street],[483] 'appear[ed] to require validation of the agency-shop agreement before [the Court]' "[484] This was incorrect, according to the majority; instead, "[b]oth cases involved Congress's '*bare authorization*' of *private-sector* union shops."[485] The *Janus* majority also incorporated the critique that *Hanson* was a Commerce Clause decision and had dismissed the First Amendment question without an analysis.[486]

The final critique of relying on *Hanson* and *Street,* two private sector precedents, was that neither case had ruled on the First Amendment; in fact, neither case rested on a constitutional question. The Landmark Legal Foundation argued that *Abood'*s fundamental failure was that it had not analyzed Michigan's union shop law under strict scrutiny which is the correct standard for the First Amendment. They claimed, "The *Abood* Court simply used the justifications found in *Hanson* and *Street.*"[487] This was also noted in the United States' brief alleging that *Abood* wrongly "viewed the constitutionality of public-sector agency fees as controlled by private-sector precedents, which did not involve the same First Amendment concerns."[488] More briefs made this First Amendment argument against *Hanson* and *Street* than had referred to the

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[483] *Railway Employees v. Hanson,* 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), and *Machinists v. Street,* 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961)
[484] *Janus* at 2479
[485] *Id.*
[486] *Id.*
[487] Brief of Amicus Curiae Landmark Legal Foundation in Support of Petitioner at 9, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6311776
[488] Brief for the United States at 9, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205805

Commerce Clause or the permission vs. compulsion aspect. The *Janus* majority agreed with *amici* that the *Abood* Court was wrong to rely on *Hanson* and *Street* due to neither case analyzing the First Amendment with strict scrutiny.[489] Yet, based on these two cases, the Court upheld the agency shop challenged in *Abood.* The lack of First Amendment scrutiny was a significant disqualifier for the majority as it was for *amici* and petitioner.[490] The majority opined that had *Abood* applied strict scrutiny they may have recognized that labor peace did not depend on agency fees.[491] The government's interest in labor peace and the free rider problem were both widely rejected by *amici* for the public sector and also by the majority. Again, the briefs and the majority turned to the cases *Abood* relied on as the starting point of its misdirection. The majority claimed that *Abood*'s reliance on *Hanson* and *Street* led the Court to incorrectly apply a lower scrutiny standard to assess public sector agency fees against First Amendment rights. However, according to the majority, this "deference to legislative judgments is inappropriate in deciding free speech issues." [492]

Amici broadly labeled *Abood* as "badly reasoned,"[493] "wrongly decided,"[494] and as having "serious First Amendment flaws."[495] These critiques were incorporated by the majority into an

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[489] *Janus* at 2479
[490] *Id.* at 2479 ("*Abood* nevertheless took the view that *Hanson* and *Street* "all but decided" the important free speech issue that was before the Court…As we said in *Harris,* "[s]urely a First Amendment issue of this importance deserved better treatment").
[491] *Id.* at 2480
[492] *Id.* at 2480
[493] Brief for the Petitioner at 10, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674; Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment as Amici Curiae in Support of Petitioner, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[494] Brief of Petitioner at 10 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[495] Madison Center for Free Speech at 16 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5508778

analysis of *Abood*'s underlying reasoning. Quoting the *Harris* opinion, the majority declared, "*Abood* was poorly reasoned."[496] The majority referred to *Abood*'s reasoning as weak and explained that "the quality of [a precedent's] reasoning" is highly significant when deciding whether to overrule a precedent. The majority criticized the *Abood* Court for not understanding the rulings in *Hanson* and *Street*, and not recognizing the difference between the State allowing an agency shop in the private sector and the State negotiating an agency shop with a union in the public sector.

The majority asserted that this distinction made all the difference for the First Amendment.[497] In the private sector it was the private employer requiring agency fees from its employees but in the public sector it was a government mandating agency fees from its employees. The fact that *Abood* involved a public employer elevated the First Amendment stakes for the public employees.[498] The majority claimed the *Abood* Court wrongly determined that public sector and private sector workers had the same rights against compelled speech. This misunderstood the political nature of collective bargaining in the public sector. As described above, according to the majority and many of the amicus briefs, the issues discussed during collective bargaining by definition were "important political issues."[499] Therefore, agency fees in the public sector compelled a worker to subsidize political speech whereas in the private sector employee pay and benefits were not public policy issues. The majority declared *Abood* had missed this point and thus "as detailed in *Harris*, *Abood* was not well reasoned."[500]

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[496] *Janus* at 2460, 2479
[497] *Janus* at 2479 ("a very different First Amendment question arises when a State *requires* its employees to pay agency fees. See Harris, supra, at ——, 134 S.Ct., at 2632").
[498] *Janus* at 2480
[499] *Id.* at 2480 quoting *Harris* ("core issues such as wages, pensions, and benefits are important political issues.").
[500] *Id.* at 2480-2481

Abood was Unworkable

Another argument made by many *amici* leading up to *Janus* was that because public sector unions were organized as political entities, all union expenditures were also political speech. According to the Network members, this made *Abood*'s distinction between union spending that is "chargeable" i.e., nonpolitical expenses, and union spending that is "nonchargeable" i.e., political expenses, unrealistic. In other words, the amicus briefs asserted that it was impossible to distinguish between a union's collective bargaining acts and political acts. Further, the amicus briefs asserted, the impracticality of the *Abood* distinction was demonstrated by the numerous times the Court was called upon to determine which side of the line union expenses fell on. The difficulty in separating expenses and the continually disputed nature of the rule made it unworkable.[501] As one brief explained *Abood*'s "validity is so hotly contested that it cannot reliably function as a basis for decision in future cases."[502] *Amici curiae* asserted that when precedent has become unworkable or is constantly debated this is justification for the Court to overturn the precedent. Another brief claimed that "the Court overturns poorly-reasoned applications of the United States Constitution when that application has proven unworkable"[503] The petitioner's brief claimed, "*Abood* is thus unworkable in the sense that

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[501] The Cato Institute and National Federation of Independent Business Small Business Legal Center and Center of the American Experiment at 11, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296 ("Because public-sector unions are inherently political, their collective bargaining and political action are practically indistinguishable.").
[502] The Cato Institute and National Federation of Independent Business Small Business Legal Center and Center of the American Experiment at 11 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[503] Brief of Amicus Curiae 1851 Center for Constitutional Law in Support of Petitioner at 27-28, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 6336280

matters most: in safeguarding employee First Amendment rights."[504] The general consensus among the amicus briefs was that *Abood*'s rule was "unworkable" in practice and that justified overturning the decision without concern for *stare* decisis.[505]

The majority opinion adopted *amici's* analysis stating, "Another relevant consideration in the *stare decisis* calculus is the workability of the precedent in question … and that factor also weighs against Abood."[506] Quoting *Harris*, the *Janus* majority, asserted that "*Abood* 's line between chargeable and nonchargeable union expenditures had proved to be impossible to draw with precision."[507] The Court attempts to distinguish chargeable expenditures from nonchargeable expenditures had failed and thus the majority concluded this only proved that "*Abood* has proved unworkable."[508]

In sum, the majority adopted many of the rationales provided by the amicus briefs in its decision to overturn *Abood.* The overarching principle put forth by the majority and many of the amicus briefs was that the Court should approach any encroachment on the First Amendment as presumptively unconstitutional.[509] The amicus briefs and the Court viewed *Abood* as a 40-year-long violation of free speech.[510]

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[504] Brief for the Petitioner 31-32 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[505] Brief for the Petitioner 31-32 *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[506] *Janus* at 2481
[507] *Id.* at 2481
[508] *Id.* at 2481-2482
[509] Cato Institute, National Federation of Independent Business Small Business Legal Center and the Center of the American Experiment 5-6, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[510] *Janus* at 2640

Content Analysis of the *Janus* Decision

There were 24 total submission for petitioners in *Janus*. Of the 24, I was able to identify at least one Network member in all but three briefs. However, the number of Network members varied from brief to brief and their participation in Federalist Society's events also varied considerably. For example, in the filed brief by The Rutherford Institute, I found only one event at a law school chapter listed for one of the attorneys, so I decided not to include that brief as a Network brief. Many other briefs included highly active members of the Network and leaders of the Practice Groups. The Brief for the Petitioner included three active participants in the Federalist Society. There was a total of 46 Network members participating in *Janus*, 38 as *amicus curiae*, five Supreme Court Justices, and three of the six attorneys for Mark Janus.

The Agency Shop as Compelled Association and Compelled Speech

One argument made by the Network in their briefs for *Janus* was paying an agency fee to a public sector union forces an individual to support political ideas that he or she objects to and contradict his own beliefs. Network members viewed agency fees in the public sector as compelled association and compelled speech that violated the First Amendment rights of individual workers whose preference was not to associate with the majority elected union. Using the content analysis software *atlas.ti* to code the briefs shows that 12 of the 24 briefs submitted on behalf of the petitioners asserted that the First Amendment protected against compelled association and 11 of these 12 were written by Network members. Additionally, 14 briefs expressed that the First Amendment protected against compelled speech, of which 13 were written by Network members. Content analysis also reveals that 17 of the 24 submitted briefs asserted that agency fees compelled speech and association in violation of the First Amendment. This theme was mentioned 38 times across the 17 briefs. The 17 briefs included 15 submitted by

members of the Network. This was the underlying holding of the majority opinion. The Court ruled that agency fees compelled speech in violation of the First Amendment.

Table 1. Content Analysis Results *Janus* Theme 1: Compelled Speech and Association

	Number of briefs mentioning	**Number of Network briefs mentioning**	**Number of mentions in *Janus* opinion**
Agency fees compel speech and association	17	15	1
First Amendment: Gov't Cannot Compel to Speech	14	13	2
First Amendment: Gov't Cannot Compel to Associate	12	11	1

The majority concluded that public employees' right to free speech was violated by an agency shop which forced public employees to "subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities."[511] Content analysis shows that 12 briefs mentioned a total of 18 times that the First Amendment barred the government from compelling one to subsidize speech they opposed and this included 9 briefs signed by Network members. Fifteen briefs, all of which included at least one Network member, argued 29 times that agency fees compelled a nonmember to associate with a union that the public employee did not want to join. Six *amici curiae,* four of which were

[511] *Janus* at 2460

Network members made this point quoting the same Thomas Jefferson line from *A Bill for Establishing Religious Freedom* that the majority later cited twice.[512]

Table 2. Content Analysis Results *Janus* Theme 2: Agency Fees Forced to Promote Ideas Oppose.

Agency Fees Forced to Promote Ideas Oppose	**Number of briefs mentioning**	**Number of FS Network briefs mentioning**	***Janus* opinion**
Agency fees forced to support speech oppose	12	9	1
Agency fees forced to associate with union did not want to join	15	15	1
Thomas Jefferson quote	6	4	1

Public Sector Unions Bargaining is Political Speech and Lobbying

The central assertion of the majority in *Janus* was that the negotiations during public sector collective bargaining were political speech unlike the same negotiations in the private sector. The majority thus concluded agency fees violated the First Amendment of public employees. The majority reasoned that agency fees force workers who do not want to join the union nonetheless support the union's speech in public sector collective bargaining. The majority also stated the substance of public sector collective bargaining,[513] issues such as working conditions, benefits, and wages affected the public spending which made what the union's words of interest to the public. The Court rejected the contention that unions' bargaining

[512] *Janus* at 2464 (" 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.' " quoting Thomas Jefferson A Bill for Establishing Religious Freedom, in 2 Papers of Thomas Jefferson 545 (J. Boyd ed. 1950)).
[513] *Janus* at 2460

concerned purely private matters and did not appear to imagine any scenario where the union was not acting politically or that collective bargaining concerned private negotiations between employer and employee. Content analysis indicates that the majority discussed collective bargaining as political speech 8 times and specifically mentioned 6 times that "core issues such as wages, pensions, and benefits" discussed in public sector collective bargaining "are important political issues."[514]

The Network also argued since the union is bargaining over wages, pensions, and other worker benefits and conditions with the government, the union's bargaining positions will necessarily affect public policy and state budgets. Therefore, whatever speech or activities that a union engages in, is naturally political speech. Content analysis shows that 19 out of the 24 *amici curiae* submitted on behalf of the *Janus* petitioners asserted that collective bargaining concerned political issues. This topic was talked about 86 times and 17 of the briefs were written by Network members. It also shows that all 16 briefs that argued 47 times that collective bargaining was "inherently political" were from Network members as were nine of the ten briefs which argued 26 times that collective bargaining and lobbying are the same. Thirteen briefs, all from the Network members stated 43 times that collective bargaining issues such as wages, pensions and other employee benefits are matters of public policy. Since such a large proportion of the briefs discussed the political nature of public sector unions, I looked a little deeper into the documents to see which of these briefs devoted a section to the issue. Of the 19 briefs that mentioned that public sector bargaining speech is a political activity, 10 had a section with a title

[514] *Id.* at 2481

to that effect. All of these were written by Network members. While many briefs may mention this theme, the discussions are mostly within the Network briefs.

Collective bargaining was also discussed as it related to public spending and state budgets. The impact of collective bargaining on state budgets was discussed in 10 amicus briefs and mentioned 37 times. Nine of these briefs included at least one Network members. The majority discussed state budgets in relation to public sector collective bargaining seven times. Six amicus briefs linked the increase in public sector unions to fiscal crises and municipal bankruptcies across the nation. All six amici curiae included at least one Network member. Two of these Network members' briefs were cited by the majority. The majority claimed that the increase in public spending due in substantial part to collective bargaining contracts and the public debate over government debt had led to collective bargaining's rise as a salient political issue.[515]

[515] *Id.* at 2483 ("These developments, and the political debate over public spending and debt they have spurred, have given collective-bargaining issues a political valence that Abood did not fully appreciate.").

Table 3. Content Analysis Results *Janus* Theme 3: Political Speech

Theme: Public Sector Collective Bargaining is Political	**Number briefs mentioning**	**Number Network briefs mentioning**	***Janus* opinion**
Public sector collective bargaining concerns political issues	19	17	8
Public sector collective bargaining is inherently political	16	16	0
Public sector collective bargaining is lobbying	10	9	0
Core bargaining issues of wages, benefits are political issues	13	9	6
Section discussing political speech	10	10	n/a
Public sector collective bargaining concerns state budgets	10	9	7
Public sector collective bargaining causes fiscal crisis	6	6	1

Another part of the Network members' argument was that these "nonmembers" or "dissenting" public employees who chose not to join the union were forced to pay agency fees which compelled them to support political speech that they oppose in violation of the First Amendment. The content analysis shows that 20 briefs argued a total of 74 times that agency fees compelled the subsidization of a political view the dissenting worker opposed. Nineteen of these briefs included members of the Network. This was also discussed in the majority opinion four times.

The majority related agency fees to a First Amendment right to be free from government deciding how individuals must think. The majority held, "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command, and in

most contexts, any such effort would be universally condemned."[516] Content analysis can trace this same theme of connecting agency fees to betrayal of conscience to five briefs written for Janus, all of which were by Network members and one brief written by Network members for *Harris.* These five briefs from the Network also claimed compelled fees were worse because "government employer intrudes upon its employees' liberty more seriously when it requires them to support political positions they do not favor (for example, by forcing them to pay union fees) than when it restricts their speech in order to improve workplace functioning and job performance."[517]

Table 4. Content Analysis Results *Janus* Theme 4: Betraying beliefs

Theme: Public Sector Collective Bargaining is Political	**Number briefs mentioning**	**Number Network briefs mentioning**	***Janus* opinion**
Compelled to support political speech that they oppose	20	19	4
Agency fees forced to betray beliefs	5	5	2

Stare Decisis

Twenty-one of the briefs called to overrule *Abood* in their *Janus* briefs. While almost all the briefs submitted on petitioner's behalf argued for overruling *Abood* based on the First Amendment, not all approached the subject of *stare decisis*. Based on content analysis, mentions

[516] *Id.* at 2463
[517] Brief for California Public-School Teachers as Amici Curiae in Support of Petitioner at 16, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6054679

of the word "*stare decisis*" tallied 55 mentions in just five briefs. The proper use of *stare decisis* was most extensively discussed by the jointly-written brief of the Cato Institute, National Federation of Independent Business Small Business Legal Center and the Center of the American Experiment which accounted for 25 of the 55 (46%) of the mentions. The brief from the United States which mentioned *stare decisis* seven times and accounted for 13% also included a discussion of *stare decisis* proper role. Next in the number of mentions was the brief from American Center for Law and Justice which mentioned *stare decisis* six times (11%) of the total mentions. Janus petitioners mentioned *stare decisis* five times accounting for 9% of the mentions, and the brief from the Madison Institute which mentioned *stare decisis* 3 times or 5.5% of the total mentions. The subject of *stare decisis* was most extensively discussed by four briefs: the jointly-written brief mentioned above, and the United States' brief, the American Center for Law and Justice's brief and the brief by the Janus petitioners. The fifth brief merely mentioned the term once, and it was not a theoretical discussion of the principles of *stare decisis*.

Table 5. Mentions of *Stare Decisis*

***Amicus Curiae* in Support of Petitioner**	**Mentions**	**Percent of Total**
Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment	25	46%
Brief for the United States	7	13%
Amicus Brief of the American Center for Law and Justice	6	11%
Brief for the Petitioner	5	9%
Brief of Amicus Curiae James Madison Center for Free Speech	3	5.6%
Janus Opinion	8	14%

The main justification by these *amici* which all included Network members was that *stare decisis* principles properly understood were less binding in constitutional cases. *Abood* fits the category. Content analysis shows the majority and two briefs, the jointly-written brief by three entities and the Brief for the United States, all quoted the line "*stare decisis* is 'not an inexorable command.'"[518] The majority and three briefs, the petitioner's brief, the jointly-written brief by the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment and the Brief for the United States[519] all quoted, "This Court has not hesitated to overrule decisions offensive to the First Amendment."[520] The majority and the same three briefs, plus an additional brief from American Center for Law and Justice all quoted, "*stare decisis* 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'"[521] The arguments against *stare decisis* based on "new Originalism" came from four separate briefs: the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment, the American Center for Law and Justice's brief, the United States' brief, and the Petitioner's brief. These amicus briefs

[518] Brief from the Cato Institute, National Federation of Independent Business Small Business Legal Center and the Center of the American Experiment at 3, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 5564296; Brief for the United States as Amicus Curiae Supporting Petitioner at 29-30, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 6205805; *Janus* at 2478 "*stare decisis* is 'not an inexorable command.'"

[519] Cato Institute and National Federation of Independent Business Small Business Legal Center and Center of the American Experiment at 5, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 5564296 ; Brief for the United States as Amicus Curiae Supporting Petitioner at 29-30, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 6205805; *Janus* at 2478

[520] *Janus* at 2478

[521] Cato Institute and National Federation of Independent Business Small Business Legal Center and Center of the American Experiment at 4, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 5564296 (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997))

summarized in the language of "new *Originalism*" why the doctrine of *stare decisis* did not preclude the Court from overruling *Abood.* Content analysis demonstrates these four briefs, all of which included at least one member of the Network framed their Constitutional arguments to dismiss adhering to precedent in this case in the same language. Content analysis also demonstrated the majority incorporated this same language in their opinion. These members of the Network and the five conservative majority agreed on these points regarding *stare decisis*: The doctrine while important can be excused, it is laxer for cases that involve a Constitutional issue, and finally, in cases concerning the First Amendment is exceptionally pliant. According to the majority and *amici* "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights."[522]

Table 6. Content Analysis Results *Janus* Theme 5: "New *Originalism*"

	"Not an inexorable command"	**Weakest for Constitution**	**Least of all for First Amendment**
Number of briefs	3	4	3
Cato Institute, et al.	1	12	2
United States	1	2	2
Petitioner	1	1	1
American Center for Law and Justice	0	4	0
The Madison Institute	0	0	0
Janus opinion	1	2	1

[522] *Janus* at 2478; also see Cato Institute and National Federation of Independent Business Small Business Legal Center and Center of the American Experiment at 1, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466) 2017 WL 5564296

Legal Consistency and Legal Developments

These quotes comported with the "new *Originalism*" argument made in the Network members' brief that *Abood* was not consistent with standard First Amendment principles. They argued this was because the Court had not applied heightened scrutiny to compulsory fees that was mandated for a First Amendment case. The Network also asserted decision conflicted with later precedents that did apply a stricter standard such as *Harris* and *Knox.* In short, *Abood* "departed spectacularly from settled First Amendment law."[523] Thus, according to the Network, another legal factor worthy of consideration when contemplating *stare decisis* was whether the older precedent remained consistent with newer precedents; whether the precedent has departed from similar cases; or whether the precedent has become outdated and unreconcilable with other precedents.[524] Petitioner's brief called to overrule *Abood* because its ruling was contrary to constitutional precedents that existed at the time and to constitutional precedents that followed.[525] Similarly, the brief from the United States reasoned that precedents may also be overturned when ensuing cases have weakened the precedent's foundation.[526] They asserted that *Abood* had been undermined by the Court's later decisions in *Knox* and *Harris* and therefore should be overruled.[527] According to the Cato Institute et al., a precedent can be overruled when

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[523] (Brief for the Cato Institute, National Federation of Independent Business Small Business Legal Center, and Center of the American Experiment as Amicus Curiae Supporting Petitioner at 22, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296
[524] Brief for the Petitioner at 34, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[525] Brief for the Petitioner 25-26, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674
[526] Brief for the United States as Amicus Curiae Supporting Petitioner at 30-31, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205805
[527] Brief of the United States at 10-11, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205805 ("this Court has twice characterized *Abood* as an anomaly, and *Abood*'s incompatibility with the reasoning of *Harris* and *Knox* is a sufficient justification for its overruling…overruling *Abood* would resolve a conflict between two contradictory lines of precedent and clarify First Amendment law.").

it is an outlier among other similar cases. This may be due to new facts that have come to light, the way the law has developed, or perhaps the precedent itself was decided "incorrectly."[528] The majority also indicated that a precedent's inconsistency with similar decisions was one of the factors the Court considered in determining whether to overrule an earlier decision.[529] Among the reasons the majority cited for not following *stare decisis* was that since the decision conditions surrounding public sector unions had changed and experience had exposed concerns with agency fees.[530] The majority stated, new facts and legal developments had weakened the decision making it an outlier relative to other First Amendment cases. [531]

In the content analysis we see that nine briefs, all of which were written by Network members, mention that when a precedent was deemed inconsistent with similar cases and more recent rulings, *stare decisis* was not required. Two briefs contained a lengthy discussion of inconsistency as reason to overrule *Abood*. Those two were the petitioner's briefs with 12 mentions and the joint brief from Cato Institute, et al. with nine mentions. The brief from the United States had five mentions, Jason R. Barclay and James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois's brief had four, the California Public School Teachers' brief had three, the Madison Center for Free Speech's brief had two mentions, and the last three briefs had a single mention.

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[528] Cato Institute and National Federation of Independent Business Small Business Legal Center and Center of the American Experiment at 10, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5564296 ("This can occur either 'if the precedent under consideration itself departed from the Court's jurisprudence,' or if the law has afterward 'so far developed as to have left the old rule no more than a remnant of abandoned doctrine'").
[529] *Janus* at 2479 ("be taken into account in deciding whether to overrule a past decision … its consistency with other related decision")
[530] *Id.* at 2460
[531] *Id.* at 2483

Only three *amici* discussed changes in the law as developments that made it necessary to overrule *Abood* and justified under the Network's *stare decisis* doctrine. The content analysis also shows this was discussed 10 times. The two briefs submitted with Network members accounted for 40% of the mentions. Cato Institute et al.'s brief and United States' brief each accounted for 20% of the mentions. One brief, which did not include a Network member, accounted for 10% and did not mention *stare decisis* at all nor theorize about its justification, but did reference overruling *Abood* because of new facts. The majority opinion accounted for 50% of the mentions discussing both the issue of *stare decisis* as it related to precedents and also new developments since *Abood* as they related to precedents. The two briefs from the Network members and the majority opinion all discussed "new developments" in conjunction other factors relating to *stare decisis* considerations.

Table 7. Content Analysis Results *Janus* Theme 6: Factors to weigh *stare decisis*

	Number of briefs	**Network briefs**	**Janus Opinion mentions**
Consistent with other cases mentions	9	9	3
New developments mentions	3	2	5

Quality of Reasoning

The *Janus* majority declared, "An important factor in determining whether a precedent should be overruled is the quality of its reasoning, … and as we explained in *Harris, Abood* was

poorly reasoned."[532] The petitioners' brief in *Harris*, specifically referred to *Abood* as "not well reasoned" as a justification to invalidate agency fees.[533] The majority opinion in *Harris* characterized *Abood*'s ruling as "questionable on several grounds" which had "become more evident and troubling in the years since then."[534] In *Janus*, the petitioners mentioned *Abood*'s poor reasoning four times but contained a detailed review of what the specific aspects of that reasoning was and why that allowed a precedent to be overturned. The brief from the Cato Institute et al. also asserted a precedent that "was badly reasoned and produces erroneous results" was enough to overturn *Abood*. The Cato Institute et al. referred to the bad reasoning of the *Abood* decision three times. The *Janus* majority based overturning Abood on its flawed and poor reasoning 10 times.

Referring to the "quality of reasoning" was how the majority bundled what the Court and *amici* perceived as flaws with *Abood*. Falling under the "quality of its reasoning" was criticism that *Abood* wrongly concluded that two prior private sector cases, *Hanson* and *Street,* required the Court to validate the agency shop. However, according to the majority both cases were narrow decisions that simply upheld "Congress's '*bare authorization*' of *private-sector* union shops under the Railway Labor Act."[535] This meant, as the Court had already discussed in *Harris*, that "*Abood* failed to appreciate that a very different First Amendment question arises when a State *requires* its employees to pay agency fees."[536] The petitioners in *Harris,* whose attorney was a Network member, twice discussed that *Hanson* and *Street* were the wrong

[532] *Janus* at 2479
[533] Brief for Petitioners at 34, *Harris v. Quinn* 573 US 616, (2014) (No. 11-681),
[534] *Harris* at 635
[535] *Janus* at 2479
[536] *Id.*

precedents to rely on because both had merely permitted the agency shop. Cato Institute and National Federation of Independent Business's *Harris* brief, which included five Network members, mentioned this theme four times and California Public-School Teachers, the Christian Educators Association International, and the Center for Individual Rights' *Harris* brief mentioned this once. The *Harri*s majority adopted this position and had two mentions. In *Janus* the Cato Institute et al.'s brief repeated that *Hanson* and *Street* had merely permitted agency shops in the private sector four times. The petitioner's brief for *Janus* cited the majority from *Harris* to simply state Abood had "'fundamentally misunderstood' earlier cases concerning laws authorizing private sector compulsory fees."[537]

Another flaw the majority found in *Abood*'s reasoning was its use of a Commerce Clause doctrine, labor peace, to uphold what should have been a First Amendment analysis. Therefore, *Hanson* was not applicable to the facts of *Abood.* This concept also appeared in the *Harris* briefs from the petitioner which mentioned this five times, and the Cato Institute and National Federation of Independent Business's brief seven times. The majority mentioned this once in the opinion. Three briefs - the petitioner's brief, the brief from the Cato Institute et al. and the Landmark Legal Foundation's brief claimed *Abood* was mistaken to rely on *Hanson* and *Street.* These briefs also argued that *Hanson* and *Street* had only discussed labor peace in relation to the Congress's Commerce Clause power and not as a Constitutional issue. Cato Institute et al.'s brief mentioned *Hanson* and *Street* had been Commerce Clause cases eight times, the Landmark Legal

[537] Brief for the Petitioner at 3, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 5952674

Foundation three times, and the petitioner's brief once. The majority opinion mentioned this twice.

Another reason the *Abood* Court had been wrong to base their decision on *Hanson* and *Street* according to the majority was due to the absence of any First Amendment analysis. "*Abood* failed to appreciate that a very different First Amendment question arises when a State requires its employees to pay agency fees… Moreover, neither *Hanson* nor *Street* gave careful consideration to the First Amendment."[538] Six briefs criticized *Abood* for relying on *Hanson* and *Street* because neither was a First Amendment decision. All six briefs included members of the Network. The Cato Institute et al.'s brief mentioned this nine times, the Landmark Legal Foundation's brief mentioned this six times, James Madison Center for Free Speech mentioned this four times, James Madison Institute mentioned this three times, the United States mentioned this four times, *Janus* Petitioner mentioned this three times, and the majority opinion mentioned this three times.

Workability

Amici curiae claimed that *Abood*'s attempt to separate union expenses into chargeable nonpolitical expenses and nonchargeable political expenses was a fool's errand. This fact made *Abood*'s rule unworkable and ripe to be overturned. The majority agreed with *amici curiae* that the distinction was "impossible to draw" and therefore also considered the precedent unworkable.[539] Accordingly, another factor the majority considered when determining whether to

[538] *Janus* at 2479
[539] *Janus* at 2481

overturn a precedent was "the workability of the rule it established."[540] The majority declared this twice more.

Another relevant consideration in the stare decisis calculus is the workability of the precedent in question…and that factor also weighs against *Abood*.[541] The workability of the precedent applied to its practical application since the decision and according to the majority *Abood* "has led to practical problems and abuse" [542] Specific references to the "workability" of a precedent as it applied to *stare decisis* were mentioned in five briefs for *Janus* and only one brief from *Harris*. The following are the number of times each brief discussed that a precedent should be overruled if its rule was unworkable: The petitioner's brief mention this six times, the Cato Institute et al.'s brief mentioned four times, 1851 Center for Constitutional Law's brief mentioned seven times, Jason R. Barclay[543] and James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois's brief mentioned five times, Jane Ladley and Christopher Meier's brief mentioned three times.

In the *Harris* set of briefs, the only one to mention the unworkability of precedent as a determinant for *stare decisis* was the jointly-written California Public-School Teachers, the Christian Educators Association International, and the Center for Individual Rights' brief which mentioned workability four times.

More briefs discussed the impossibility of separating union expenses without a specific mention to *stare decisis*. In *Harris,* the impossibility of separating expenses was asserted by four

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[540] *Id.*
[541] *Id.*
[542] *Id.* at 2460
[543] Jason R. Barclay is a member of the FS's James Madison Club for donating $1,000 to $1,9999 annually to the FS (2012, The FS Annual Report)

briefs all of which included at least one Network member. The California Public-School Teachers et al.'s brief mentioned this three times, Center for Constitutional Jurisprudence, et al.'s brief mentioned it twice, Albert Contreras et al.'s brief one time, and the Illinois Policy Institute's brief one time. In *Janus* there were ten briefs that discussed non-distinction between union spending for collective bargaining and one for lobbying. One brief summed up this theme in the statement, "This is because when a public employee union bargains for higher wages and other benefits, it is arguing for a public policy that devotes more resources to programs staffed by its members at the expense of other programs."[544] The petitioner's briefs mentioned this five times, United States' brief mentioned this three times, the Center for Constitutional Jurisprudence mentioned this theme two times, Pacific Legal Foundation et al.'s brief mentioned this two times and Jason R. Barclay and James S. Montana, Jr., Former General Counsel to Governors of the State of Illinois' brief mentioned this twice. The five other briefs each mentioned this once.[545]

[544] The Brief of Amicus Curiae Center for Constitutional Jurisprudence in Support of Petitioner at 9, *Janus v. American Federation of State, County, and Municipal Employees Council 31* 138 S. Ct. 2448, (2018) (No. 16-1466), 2017 WL 6205801

[545] 1851 Center for Constitutional Law's brief once, Competitive Enterprise Institute one time, Rebecca Friedrichs and Fellow Teachers and Miranda Thorpe and Fellow Caregivers' brief once The James Madison Institute once, and Employees of the State of Minnesota Court System one time.

Table 8. Content Analysis Results *Janus* Theme 7: *Abood* was wrong and should be overruled

	Number of briefs mentioning	**Number of Network briefs mentioning**	**Number of mentions in *Janus* opinion**	**Number of briefs mentioning**	**Number of Network briefs mentioning**	**Number of mentions in *Harris* opinion**
Quality of Reasoning and *stare decisis*	3	3	10	1	1	2
Workability and *stare decisis*	5	5	6	1	1	0
Commerce Clause	3	3	2	2	2	1
Hanson and *Street* No First Amendment analysis	6	6	3	3	3	7
Hanson only authorized	2	2	1	3	3	2

Conclusion

My hypothesis is that the FS influenced the Supreme Court majority in its decision in *Janus*. *Janus* held that agency fees violated public employees' free speech rights because it forced workers to subsidize political speech. The majority's position was that all public sector agency fees requirements compelled speech in violation of the First Amendment. Thus, the First Amendment now protects the right not to pay agency fees to a union.

As explained earlier the language in the Network briefs discussed public sector unions as political entities and collective bargaining as issues of public importance. The Network further argued this scenario unconstitutionally compelled the workers to support information the

government received which were opposed by nonmembers. The Network contended this distorted the political process. The majority opinion seemed to have adopted this framework. The majority held that a law in which public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities…violate[d] the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern.[546]

The majority was echoing the ideas that had been asserted by *amici* from the Network when it described public sector collective bargaining as speech that concerned the public issues, concerned the citizenry, and speech that involve public spending. [547] The Network was represented in all but three briefs. In Section 3, content analysis shows that the concept of public sector unions as political entities was addressed by many briefs. Almost all of the briefs submitted by the petitioner and *amici curiae* mentioned that public sector bargaining involved political issues. Looking deeper into the number of mentions showed a clearer picture. In the Network members' briefs, the idea that public sector collective bargaining was inherently political speech was more than a mention, it guided the Network's argument. This is also seen in the content analysis. The Network's briefs contained longer discussion of the issue as seen by the larger number of mentions. In addition, the briefs that dedicated a section to this theme were also all written by the Network.

This was not a novel argument in 2018. The counsel for *Abood* petitioners had asserted way back in 1976 that "public-sector collective bargaining is inherently and unalterably political

[546] *Janus* at 2460
[547] *Id.* at 2460 ; 2476, 2464

in character.[548]" It was a novel assertion in 1976 and it was initiated by the counsel for *Abood,* but it was an argument the Court did not find compelling. The Court in *Abood* recognized some aspects of union activity involved politics and disallowed agency fees for those acts but also recognized collective bargaining as an economic act. The *Abood* Court did not hold a singular view of public sector unions as did the Network. Nor did the Abood Court focus singularly on protecting the dissenters' rights or the rights of the minority of workers as did the Network. Quoting Justice Douglas' concurrence in *Street,* the *Abood* Court reasoned,

> But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy"[549]

The principles expressed in this passage vividly illuminate the change in the Court since the 1970s. For, it is the ideas expressed in this passage: a common cause, a collective identity bringing mutual benefit, the importance of unions in employer-employee relations, the deference

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[548] Brief for the Appellants at 62, *Abood v. Detroit Board of Education* 431 U.S. 209 (1977) (No. 75-1153), 1976 WL 181666).

[549] Abood at 222-223 ("But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy. If that were allowed, we would be reversing the Hanson case, sub silentio.' " Machinists v. Street, 367 U.S., at 778, 81 S.Ct., at 1805. (Douglas, J., concurring).

to Congress' judgement, and a First Amendment that is balanced among rights, that the Network and eventually a five Court majority expressly sought out to reject.[550] The Court in *Abood* explicitly spoke of the rights of the majority of workers who had elected the union as well as the protections of the minority of workers. Nothing remotely similar would appear in *Janus*. The *Abood* Court, although at the precipice of the "the money is speech" doctrine,[551] did not take an absolutist view of the First Amendment or introduce the possibility of denying an individual's ability to think for themselves if the Court allowed agency fees to continue.[552] The seeds were present in the *Abood* petitioner's brief and in Justice Powell's dissent, but it would take four decades to cultivate a majority on the Court.

The Network never let up challenging *Abood* in the lower courts and the Supreme Court with this argument in case after case. These arguments were advanced at FS annual meetings, at Lawyers Chapter events and Students Chapter events by the same lawyers arguing the cases in court and by other Network members. Many of these members began submitting separate briefs

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[550] No better illustration of this attack is the language in Cato Institute and National Federation of Independent Business' brief which said, "Mixing and matching from different parts of the Court's opinion in *Hanson*, and paraphrasing when even that was insufficient to its ends, *Abood* cobbled together an entirely new doctrine of First Amendment law …And this new doctrine, it held, recognized no distinction between Congress's authorization of private-sector union-shop agreements, as at issue in *Hanson* and *Street*, and the government compelling its own employees to associate with and support a union. Finding no actual support for this proposition in either precedent, it could only cite Justice Douglas's attempt to refashion *Street's* narrow holding into a broad principle that collective action overrides the individual rights expressly guaranteed by the First Amendment: 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.' *Id.* at 222-23 (quoting *Street*, 267 U.S. at 778 (Douglas, J., concurring)). At the time, Justice Douglas's *dismissive approach* to the First Amendment had garnered the support of no other justice; in *Abood*, the Court accepted it as *Hanson's* central holding and therefore settled law." Amici Curiae in Support of Petitioners Brief of the Cato Institute and National Federation of Independent Business as Amici Curiae in Support of Petitioners at 14-15, *Harris. v. Quinn* 573 US 616, (2014) (No. 11-681), 2013 WL 6248441

[551] *Buckley v. Valeo* 424 U.S. 1 (1976)

[552] The *Abood* petitioner expressly introduced this idea ("This is a conflict not between "competing rights", but between liberty and tyranny–between freedom of self-determination in belief, expression, and association on the one hand; and political thought-control, on the other.") Brief for the Appellants at 97, *Abood v. Detroit Board of Education* 431 U.S. 209 (1977) (No. 75-1153), 1976 WL 181666).

in support of this argument. In briefs submitted to the Court prior to *Knox*, *Harris* and *Janus*, this argument remained the same; public sector unions are involved in politics. Their actions and speech impact public funds and public policies. The Network insisted that *Abood* wrongly believed unions could perform tasks that were not political and that was an irredeemable flaw. The Network continued to challenge *Abood* in the courts until they were able to create the right circumstances. They finally made headway in the 2012 *Knox* decision in which the Court conceded, "Because a public-sector union takes many positions during collective bargaining that have powerful political and civic consequences the compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights.'"[553] An essential element was obtaining the right justices on the bench. This did not happen until decades later with the addition of Justice Alito and Justice Roberts to the Court, which also was in large part due to the influence of the FS. It was a combination of continuously initiating cases, dispersing their arguments to a wider audience through Federalist Society events, and readying themselves and their responses to the Court's signals, along with a change in Supreme Court members that finally allowed a change in Court doctrine in *Janus*.

The topic of *stare decisis* is where we can see the influence of the Federalist Society Network more clearly. Section 2 shows the overlap in language between the Network briefs and the majority opinion. The Network's doctrine of "new *Originalism*" and its principles surrounding *stare decisis* provided the Court with the rationale behind overturning *Abood.* Section 3 then show that of 24 briefs submitted only five briefs even mentioned the words "*stare decisis*" all of which are written by Network members. In addition, only four of these briefs had

[553] *Knox* at 311

a meaningful discussion of the theory that allowed certain precedents to be expendable. Once again, all four included Network members. None of the other briefs that argued overturning *Abood* developed the "new *Originalist*" reasoning adopted by the Court.

The brief from the American Center for Justice and Law which included two Network members also provided the historical portion of "new *Originalism*" rooted in the founding generation thus appealing to the justices that it was their duty to right their own wrong committed in *Abood*. The Cato Institute et al.'s brief which included three Network members also discussed the Originalist justification for ignoring precedents and outlined each of the factors the Court considers when deciding whether or not to overturn a precedent. The petitioners, with three Network members, and the United States' brief, with three Network members, also discussed the same determinants as the Cato Institute et al. in the decision to overturn a precedent. All four briefs that discussed *stare decisis*, did so relying on the same "new *Originalism*" principles promulgated by the Federalist Society. In their own discussion of *stare decisis*, the majority listed these very same factors as the previous briefs which the Court thought "should be taken into account in deciding whether to overrule a past decision." The most important ones were "the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[554] Each of those five factors had been discussed in detail by Network members' briefs.

When we look at the specific criticism that made up *Abood*'s "questionable reasoning" or flaws in the analysis, we again see the criticism of *Hanson* and *Street*'s as controlling precedents

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[554] *Janus* at 2478-2479

for *Abood* discussed exclusively by Network members. The criticism of the Court in applying private sector precedents to public sector labor unions, using a Commerce Clause doctrine for the First Amendment, and not applying the proper standard of review for a First Amendment question all came from Network briefs. These same criticisms of Abood later appeared in the majority opinion.

What is also notable about the *Janus* case is the Network presence overall in the *amici curiae* submitted. There is at least one Network member present on 87.5% of the briefs and a total of 41 Network members. In *Knox*, there was two *amici curiae* with seven Network members and three Federalist Society affiliated organizations. In *Harris*, there were seven *amici curiae* with 18 Network members and 10 FS affiliated organizations. *Janus* had 21 *amici curiae* with 41 Network members and 24 different FS affiliated organizations. Network participation in *Knox* totaled 11 - three as attorneys, four as *amici curiae*, and four as Supreme Court Justices. Network participation in *Harris* totaled 22 - one attorney, 17 as *amici curiae*, and four as Supreme Court Justices. Network participation in *Janus* totaled 46 – three as attorneys, 38 as *amicus curiae*, and five Supreme Court Justices. That in itself shows the reach and growth of the FS over time.

Table 9. Federalist Society Network Participation in *Janus*

Case	Total briefs including petitioner	Network briefs including petitioner	Network attorney for petitioner	*Amici Curiae*	Network affiliated organizations	Supreme Court Justices	Total FS Network participation
Abood	2	n/a	n/a	n/a	n/a	n/a	n/a
Knox	2	2	3	4	3	4	11
Harris	8	7	1	17	10	4	22
Janus	24	21	3	38	24	5	46

Lastly, the Federalist Society is also known for a strict individualist view of Constitutional rights. In general, the Federalist Society see little if any rights that are attached to groups. That view is definitely evident in its writings for *Janus.* The *Abood* opinion acknowledged collective bargaining has political aspects but also addressed the rights of unions to associate, as well as the decisions of a majority of workers and government interest in labor peace and free riders. None of the *amici curiae* written by the Network members or any of the majority opinions reflected on the role of collective associations in representative government as positive. Instead, the focus was always on individual dissenters isolated from their colleague majority workers. Likewise, the three majority opinions discussed in this dissertation showed little consideration for the workers' right to associate or that a majority of workers elected to unionize through a democratic process. The Network members and the majority always portrayed unions and collective interest as suppressive. As the majority declared,

> We recognize that the loss of payments from nonmembers may cause unions to experience unpleasant transition costs in the short term and may require unions to make adjustments in order to attract and retain members. But we must weigh these

> disadvantages against the considerable windfall that unions have received under *Abood* for the past 41 years. It is hard to estimate how many billions of dollars have been taken from nonmembers and transferred to public-sector unions in violation of the First Amendment. Those unconstitutional exactions cannot be allowed to continue indefinitely[555]

Neither the majority in *Janus* nor the Network as *amici* could imagine any benefits a nonmember may have received as a result of the union's collective bargaining. The individual's choice was either with the union or against it.

[555] *Janus* at 2485-2486

Chapter 6

Shelby County v. Holder

The Pre- Shelby County Cases

The goal of this section is to describe Voting Rights Act signed into law on August 6, 1965, (VRA or the Act) [556] and the circumstances that led to its passage. I then examine the first legal challenge to the Act, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). Following *Katzenbach*, I next examine *Northwest Austin Municipal Utility District Number One v. Holder* 557 U.S. 193 (2009) which led to *Shelby County, Alabama v. Holder.* 570 U.S. 529 (2013).

The Voting Rights Act of 1965

In the words of the Supreme Court, the Voting Rights Act was passed "to banish the blight of racial discrimination in voting" that had "infected" mainly Southern states since the end of the Civil War.[557] The Voting Rights Act of 1965 was passed in response to the Civil Rights Movement and the violence enacted upon the Civil Rights demonstrators demanding states and local officials recognize African-Americans' right to vote as guaranteed by the Fifteenth Amendment. It was Congress's intent to put the force of the federal government behind the Fifteen Amendment.[558] By 1965 Congress recognized that relying on the judicial process to eliminate unconstitutional obstacles to voting "case-by-case" had not been enough to stay ahead of crafty southern officials. Section 2 of the Fifteenth Amendment gave Congress "the power to

[556] Public Law 89-110
[557] *South Carolina v. Katzenbach* 383 U.S. 30, 308 (1966).
[558] Chandler 1992, 14-17

enforce this article by appropriate legislation."[559] It was time for Congress to exercise its enforcement power and instigate direct federal intervention. That was what the Voting Rights Act was passed to accomplish. Section 2,[560] echoing the language of the Fifteenth Amendment, prohibited the denial or abridgment of the right to vote based on race or color.[561] It allowed plaintiffs to challenge in court voting practices as racially discriminatory. However, the burden of proof was placed on the plaintiff.[562] Section 2 was permanent and applied nationwide.

In contrast to Section 2, Section 4 and Section 5 targeted certain jurisdictions that had the most egregious practices of voting discrimination. Section 4 included the triggering formula which defined which geographic areas would be required to comply with Section 5 of the Act. Section 4 eliminated literacy tests and other prerequisites for voting in those states and counties in which either the voter registration rate or the voter turnout rate was under 50% of the voting-age population in the 1964 presidential election.[563] The states and counties that were captured by Section 4's formula would then be subject to Section 5's "preclearance" conditions. Section 5 prohibited those "covered" states and counties from implementing new voting rules or practices until approved by the Attorney General. There were six southern states subject to preclearance directly following the passage of the Act.[564] Proposed voting rules could not have as their

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[559] U.S. Const. amend. XIV, § 2.
[560] 1982 reauthorization: Section 2 of the Voting Rights Act of 1965 is amended to read as follows: SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color (Grofman and Davidson, Editors 1992, 319).
[561] Chandler 1992, 17
[562] Berman 2015, 133
[563] Chandler 1992, 18.
[564] Alaska and parts of North Carolina were also covered areas in addition to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, 24 counties in North Carolina, 1 county in Arizona, plus Alaska were the original covered jurisdictions. Later in 1965 and 1966 more counties in North Carolina (total of 40) and Arizona were added, plus one county in Hawaii and one in Idaho. Alaska was able to "bail out" from coverage in the 1960s. It is the 6 southern states plus the 40 out of 100 counties in North Carolina that are generally thought of as the original covered states (Chandler 1992, 18-19).

purpose nor have as its effect the denial or abridgment of the right to vote based on race or color. Section 5 was a temporary preemptive measure that allowed the Attorney General to block discriminatory voting laws or requirements prior to being implemented.[565] This was a significant change from filing lawsuits after the fact and allowed the federal government to gain control of enforcing the right to vote through prevention. Three additional sections (Section 6, 7, and 8) allowed the Attorney General to assign federal examiners to covered jurisdictions to oversee voter registration and elections. Section 11 prohibited the intimidation or denial of the right to vote to any qualified person and banned the refusal to count any qualified vote cast.[566]

The Voting Rights Act enabled the federal government to be proactive in enforcing the Fifteenth Amendment in those states that were covered by Section 4's formula. The preclearance conditions and federal oversight were controversial from the start because these provisions did allow the federal government to intrude in state election laws. The Voting Rights Act allowed the federal government to monitor state elections, reject electoral changes deemed discriminatory and covered a broad array of electoral changes.[567] Sections 4, 5, and part of 6 were challenged immediately after passage.[568] The first challenge that reached the Supreme Court was *South Carolina v. Katzenbach* 383 U.S. 301, (1966). South Carolina challenged parts of the Voting Rights Act as an unconstitutionally intruding on state power.

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[565] Berman, 2015 133
[566] Chandler 1992, 19-20
[567] Berman 2015, 7; Chandler 1992, 18-19
[568] Voting Rights Act of 1965 was signed on August 6, 1965 (Public Law 89-110). On August 11, 1965, A.P. (Tim) Gallinghouse, Registrar of Voters of Orleans Parish (hereinafter sometimes referred to as the 'Registrar') announced that his office would begin complying with the Voting Rights Act; at the same time he filed suit challenging the constitutionality of that act Gallinghouse v. Katzenbach, Civil Action #15863-C (E.D.La.) (Davis v. Gallinghouse, 246 F. Supp. 208, 210 (E.D. La. 1965).

***South Carolina v. Katzenbach* 383 U.S. 301, (1966)**

A little over a month after President Lyndon B. Johnson signed the Voting Rights Act into law, South Carolina filed a motion with the Supreme Court to challenge certain provisions of the Act. The Supreme Court accepted the case under its original jurisdiction pertaining to a controversy between a State and a citizen of another state.[569] The Court also invited the other 49 states to participate in the case as *amici curiae*. Alabama, Georgia, Louisiana, Mississippi, and Virginia also captured by the coverage formula submitted briefs in support of South Carolina. South Carolina had to abide by Sections 4 which eliminated their literacy test, Section 5 which required preclearance of any voting changes, and 6(b)'s allowance of federal examiners in local elections. South Carolina claimed these provisions surpassed Congress's power to enforce the Fifteenth Amendment's ban on race-based voting obstructions.

South Carolina argued that constitutional provisions must be interpreted as each provision related to the "whole compact." Therefore, Congress's enforcement power, according to South Carolina, should be understood in its relationship to the constitutional structure of a limited government and federalism. The petitioner's brief further explained that each of the Constitution's guarantees including the Amendments were equal to others. There was no constitutional provision that stood above or below the others nor did any one provision work in isolation. Even the provisions that granted power and those that limited powers did not cancel each other out but rather worked together in "harmony."[570] Thus, when judging the constitutionality of an exercise of the enforcement power it must be interpreted "not only in light

[569] *Katzenbach* at 307
[570] Brief of the Plaintiff at 6**,** *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083

of the Fifteenth Amendments which it purportedly enforces but also against the background of the entire Compact."[571] The gist of the petitioner's argument was that under a constitutional framework of limited government and a federal structure, if an Act's scope extended beyond the purpose of the right it was meant to enforce, it cannot be appropriate. In the petitioner's view, the Fifteenth Amendment's "sole purpose" was to prevent racial discrimination in voting. Therefore, Congress's enforcement power was limited to upholding the ban on discriminatory practices. The VRA exceeded this singular purpose by interfering with other constitutional guarantees and as such was not appropriate.[572]

Specifically, South Carolina challenged Section 4 and Section 5 of the VRA as unconstitutionally commandeering the reserved powers of states to regulate their own electoral process. According to the petitioner, the federal government was taking over the state's role in determining voter qualifications for its state elections per Section 4 which eliminated the literacy test and other voter qualifications.[573] Section 5's preclearance provision allowed the federal government to regulate all future election processes in covered states. By taking over this duty, the federal government nullified Article I, Section 2[574] of the Constitution (which stated that any person qualified to vote in state elections was also qualified to vote in congressional elections) and Article I, Section 4 which allowed the states to regulate their election procedures.[575] South Carolina asserted that the Court must take account of these other constitutional provisions, the

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[571] Id. at 6-7**,** *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083
[572] Id. at 7**,** *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083
[573] Id. at 10-12**,** *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083
[574] U.S. Constitution, Article I, Section 2 ("the Electors in each State shall have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature.").
[575] U.S. Constitution, Article I, Section 4 ("The Times, Places and Manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may . . . alter such regulations.)

limited federalist government created by the Constitution, and the intentions of the framers. The brief also pointed to prior Court decisions holding that states had the exclusive right to organize their electorate and elections as long as the laws were race neutral.[576]

In addition, South Carolina claimed that by only subjecting some states to specific sections of the Act, Congress was violating "the Constitutional principle of Equality of Statehood."[577] South Carolina claimed this principle meant that all the States were equal under the Federal government which meant that each state in the union had the same constitutional rights and the same authority in relation to the other states. The Voting Rights Act's selective application violated this doctrine.

The *Katzenbach* Majority

The *Katzenbach* majority rejected the petitioner's challenges. The majority referred to Section 4 and Section 5 as the "[t]he heart of the Act." The Court acknowledged that the remedies it enacted were "stringent" but also noted the Act was targeted to "areas where voting discrimination has been most flagrant."[578] The majority narrowed the question before them simply to whether the challenged sections were an appropriate exercise of Congress's enforcement powers under the Fifteenth Amendment as it relates to the States.[579] The Court answered yes, the VRA, as enacted, was properly suited "to banish the blight of racial

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[576] Brief of the Plaintiff at 13**,** *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083
[577] Id. at 5-6**,** *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083 ("The Act, in suspending voter literacy tests in South Carolina, while leaving similar tests in effect in other states, violates the Constitutional principle of Equality of Statehood, as implied in Article IV, Sections 2 and 4 and in the Fifth Amendment.").
[578] *Id.* at 315
[579] *Katzenbach* at 324

discrimination in voting."[580] The majority found the automatic triggering formula was justified to address the "widespread and persistent discrimination in voting" that overwhelmed any attempt at "case-by-case litigation."[581] The Court also ruled that "after nearly a century of systemic resistance to the Fifteenth Amendment…the specific remedies prescribed were an appropriate means of combatting the evil."[582] The majority declared the coverage formula's use of "test and devices" legitimate since literacy tests and poll taxes had a historical connection to voting discrimination. The Court also held as valid the coverage formula's inclusion of the voting rate in the 1965 presidential election as an indicator of systemic disenfranchisement. The Court also determined that the suspension of tests in certain jurisdictions and the deployment of federal examiners at the Attorney General's request justified enforcing the Fifteenth Amendment. In reference to reviewing new electoral laws before going into effect, the Court declared, "This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measure not otherwise appropriate."[583] The majority further ruled that in relation to the States' reserved powers, "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."[584]

The majority also addressed the petitioner's claim that parts of the VRA violated the "principles of Equality of Statehood" with one simple statement.[585] The majority held "The doctrine of equality of States, invoked by South Carolina, does not bar this approach, for that

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[580] *Katzenbach* at 308
[581] *Id.* at 328
[582] *Id.*
[583] *Id.* at 334
[584] *Id.*
[585] Brief of the Plaintiff at 15, *South Carolina v. Katzenbach* 383 U.S. 301, (1966) (No. 22), 1965 WL 130083

doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[586] That one sentence and one other mention at the beginning of the opinion stating that the petitioner had invoked "Equality of Statehood" was the only role state equality played in *Katzenbach.* The Voting Rights Act of 1965 was upheld as constitutional by an 8-1 vote. The majority opinion was written by Chief Justice Earl Warren. The Court established that Congress rightfully had "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting" and noted this power had been used by Congress many times previously.[587] The Court's final conclusion held "that the sections of the Act which are properly before [them] are an appropriate means for carrying out Congress's constitutional responsibilities and are consonant with all other provisions of the Constitution."[588]

***Northwest Austin Municipal Utility District Number One v. Holder* 557 U.S. 193 (2009)**

Northwest Austin Municipal Utility District Number One was a municipal utility district formed through Texas state law. The district was attempting to "bailout" of Section 5 of the VRA's preclearance requirements but had been denied by the district court. The Utility District appealed to the Supreme Court claiming that it was a "political subdivision" eligible for bailout under the Court's broader definition.[589] In lieu of a finding for the utility district on its bailout request, the utility district also asked the Court to determine the constitutionality of Section 5.

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[586] *Katzenbach* at 328-329
[587] *Id.* at 326
[588] *Id.* at 308
[589] Appellant's Brief at 5, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246

The first issue subsequently became overshadowed by the constitutional issue and was the subject of most of the *amici curiae* submitted on the district's behalf.

One of the attorneys for Northwest Austin Municipal Utility District Number One was Greg Coleman, a member of the Network. Mr. Coleman previously clerked for Supreme Court Justice Clarence Thomas from 1995-1996 and for Judge Edith Hollan Jones at the U.S. Court of Appeals Fifth Circuit from 1992-1993.[590] A second attorney, Christian J. Ward, is also a member of the Network and was a past president of FS's Austin Lawyers Chapter.[591] Mr. Ward, while in college had been on the editorial staff of the *Harvard Journal of Law and Public Policy*, the official journal of the FS. In addition to the appellant's briefs, there was a total of six *amici curiae* submitted on behalf of the petitioner.

The VRA was set to expire in 2007, 25 years after the last reauthorization. After holding numerous hearings Congress passed and President George W. Bush signed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. Eight days after the reauthorized Act was signed into law, a utility district in Texas filed a federal lawsuit. The district's suit was funded by an organization called the Project on Fair Representation (PFR) which was started in 2005 by Edward Blum specifically to challenge the 2006 reauthorization. The utility district, Northwest Austin Municipal Utility District Number One, was the only plaintiff as no other covered district joined the case.[592] In keeping with the Project on Fair Representation's mission, the case challenged the reauthorization of the

[590] https://www.yettercoleman.com/profiles/gregory-s-coleman/
[591] https://www.yettercoleman.com/profiles/christian-j-ward/
[592] Berman 2013; Project on Fair Representation, https://www.projectonfairrepresentation.org/cases funded by Donor's Trust like National Right to Work Legal Defense Foundation.

Act,[593] particularly Section 4, which detailed the coverage formula and the "bailout" process, and Section 5, the preclearance provision. The Voting Rights Act had been reauthorized four times since 1965. The first was in 1970 for five years, then 1975 for seven years, in 1982 for 25 years and the last time was in 2006. The coverage formula had been updated in 1970 and in 1975 but not in 1982 or 2006. In 2006 when Congress passed the Act, the coverage formula remained as established in 1975 which extended to jurisdictions with a voting test in effect and a voter registration or turnout under 50 percent in 1972.

Petitioner's statement began by explaining how much America had changed in the 44 years since the passage of the VRA. Although almost every aspect of voting rights had improved, what had not changed, the utility district charged, was Section 5 of the VRA. The "original emergency has now passed," the petitioner argued, yet Section 5 persisted in its "unparalleled federal intrusion."[594] For these reasons, the utility district declared Section 5 now exceeded Congress's enforcement powers and Congress could no longer justify its "intrusive inversion of our federal structure."[595] The utility district asserted that in its current form, Section 5 "sweeps far past purposeful discrimination to ensnare and preempt" presumptively constitutional state voting laws.[596] Section 5, therefore, was no longer constitutional.[597]

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[593] Pub. L. No. 109-246, §2, 120 Stat. 577
[594] Appellant's Brief at 1-2, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246
[595] Appellant's Brief at 1, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246
[596] Appellant's Brief at 38, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246
[597] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), WL 526207 (2009)
Sharon L. Browne Counsel of Record, Ralph W. Kasarda, Joshua P. Thompson Pacific Legal Foundation

Petitioner claimed, along with *amici curiae* that Congress should have ended or modified Section 4 and Section 5 but chose not to do so. The Act as reauthorized in 2006, without changes, was beyond the scope of Congress's enforcement powers granted by the Fourteenth and Fifteenth Amendments.[598] According to the district and the amici briefs, Section 5 had been a response to an emergency in which a very specific and pervasive problem had been identified.[599] They further asserted that the Court in *Katzenbach* held the VRA constitutional *only* due to the "unique circumstances" and "exceptional" conditions found.[600] The petitioner's brief and *amici* declared that the impetus behind Section 5 was that state and local officials continuously and purposefully shirked the federal courts' ruling upholding constitutional guarantees against race-based discrimination.[601] Congress in 1964 had found the practice so prevalent that litigating each case could not keep up with the infractions.[602] Furthermore, argued the briefs and the district, in its original application Section 5 was targeted to particular jurisdictions that Congress had documented a history of ignoring the constitutional guarantees of the Reconstruction Amendments and intentionally discriminating against African Americans.[603] However, according

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Sharon L. Browne Executive Committee for the Federalist Society's Civil Rights Practice Group https://obamawhitehouse.archives.gov/realitycheck/the-press-office/president-obama-announces-more-key-administration-posts-121709

[598] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 526207

[599] Appellant's Brief at 27, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246

[600] Mountain State Legal Foundation at 17, in Support of Appellant *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 526208
Southeaster Legal Foundation at 8-11, in Support of Appellant *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL

[601] Appellant's Brief at 7, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246

[602] Appellant's Brief at 27, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246

[603] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 526207

to the briefs and petitioner, that was the past. In 2006 Congress was attempting to solve old problems that no longer existed.

The utility district noted that minority voter registration, minority voter turnout, and the election of black candidates had all dramatically increased since the 1960s. The utility district also highlighted the recent election of Barack Obama, the first black president to suggest Section 5 was obsolete.[604] This theme was repeated by many of the briefs submitted supporting the utility district. In their briefs opposing the 2006 reauthorization of Section 5, many of the *amici curiae* including the petitioner adopted a that-was-then-this-is-now attitude towards racial discrimination by the states. All six *amici curiae* plus the petitioner, alleged that state discrimination and disenfranchisement of voters based on race had been eliminated. They claimed that without evidence of persistent and widespread discrimination, a renewal of Section 5 could not be justified. A brief written by a longtime and active member of the Network, Michael Carvin (for three other longtime Network members Dr. Abigail Thernstrom, William Bradford Reynolds, and Hans A. von Spakovsky), alleged that Section 5 was not an appropriate response to the current situation because "the evil presented now is but a shadow of that rampant in the 1960s South."[605] Another longtime active Network member contended in his brief for the Scharf-Norton Center for Constitutional Litigation Goldwater Institute that state discrimination was "all but extinct."[606] The Pacific Legal Foundation (which included a former member of the

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[604] Appellant's Brief at 1-2, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 453246

[605] Brief of Dr. Abigail Thernstrom and Former Justice Department officials as Amici Curiae in Support of Appellant at 36, *Northwest Austin Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), 2009 WL 507025

[606] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 10, Northwest Austin Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024 ("Active state-sponsored invidious discrimination against protected classes is all but extinct.").

Executive Committee for the Federalist Society's Civil Rights Practice Group) also claimed, "Changes in the social and political landscape cast doubt on, not only Section 5's relevance but its constitutionality. These changes show that the justifications for Section 5's remedial measures no longer exist."[607]

Congress's 2006 reauthorization was described by petitioners as based on an obsolete coverage formula using outdated data that was not relevant to the current era. The evidence Congress had gathered to justify the reauthorization did not convince the petitioner nor *amici curiae* that Section 5 was still necessary. The petitioner and *amici curiae* judged the relevancy of Congress's evidence against the original tactics used by some states to intentionally ignore federal court rulings by instituting new obstruction devices as soon as the old device was outlawed. They claimed that Section 5 had been designed only to address obstruction tactics of the type employed during Jim Crow and only based on evidence that demonstrated a pattern of state discrimination that was intentional. The utility district contended Congress's evidence concerned "discrimination in general,"[608] not specific discrimination equivalent to what had been gathered by Congress in the 1960s and 1970s. Furthermore, the utility district charged, Congress had collected data with the intention of demonstrating that discrimination had not been eliminated while ignoring that discrimination was no longer of the same purposeful type faced

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[607] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant at 5, Northwest Austin Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 526207 ("For instance, when the Act was enacted in 1965 there were few, if any, black elected officials in the South. But now black elected politicians make up an appreciable percentage of many state governments of the Deep South. Forty years ago the drafters of the Act understood that widespread and persistent intentional discrimination in voting occurred predominantly in the jurisdictions targeted, and typically entailed the willful misuse of tests and devices which Section 5 was specifically designed to remedy. But modern allegations of discrimination in voting may arise equally in both covered and noncovered jurisdictions and involve a completely different array of problems which Section 5 is ill-suited to resolve.").

[608] Appellant's Brief at 40, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246

prior to the passage of VRA.[609] This was also alleged by the brief submitted from the Southeastern Legal Foundations which included at least one Network member.[610] Southeastern LF joined the case to emphasize that the evidence presented by Congress to justify the need to reauthorize Section 5 was not comparable to the type of evidence gathered by the 1965 Congress. According to Southeastern LF, this made the VRA's 2006 reauthorization constitutionally troubling. Their brief claimed the record Congress compiled did not demonstrate any instances of states using the same or similar types of practices that had been employed in the past to systematically disenfranchise African Americans. A second brief from the Scharf-Norton Center for Constitutional Litigation Goldwater Institute declared, "the days of the literacy test are long over" and "minority political progress is no longer 'modest and spotty.'"[611] Additionally, the Southeastern LF and petitioner faulted Congress for failing to provide any evidence to support their claim that without Section 5 as a deterrent, the covered jurisdictions would resort to their old habits of voting discrimination and ignoring federal laws and court orders.[612] These two briefs argued that Section 5 simply presumed the covered jurisdictions were determined to pass new discriminatory voting laws to evade the Fifteenth Amendment.[613] Preclearance, according to the utility district, unfairly presumed states were still engaged in "resolute intransigence and

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[609] Appellant's Brief at 6, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246

[610] Brief Amicus Curiae of the Southeastern Legal Foundation in Support of Appellant *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322) hereafter referred to as "Southeastern LF"

[611] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 5, Northwest Austin Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024

[612] Brief Amicus Curiae of the Southeastern Legal Foundation in Support of Appellant at 6, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322)

[613] Appellant's Brief at 39, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246; Brief Amicus Curiae of the Southeastern Legal Foundation in Support of Appellant at 20, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322)

endemic discriminatory animus."[614] Thus, the evidence collected had not demonstrated a need to continue Section 5's burdensome intrusion into state sovereignty.[615]

A showing of general or incidental racial discrimination was not enough to excuse violating state sovereignty. Petitioner and *amici curiae* were specific in what they viewed as constitutionally compliant evidence. Petitioner summed it up stating that Congress must demonstrate "a systematic pattern of covered jurisdictions recently engaging in concerted efforts to game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable (or at least a meaningful demonstration that jurisdictions would have reverted to those practices had Section 5 not been reenacted)."[616] *Amici curiae* and petitioner also argued that systemic state discrimination in voting had all but disappeared and criticized Congress for its failure to either eliminate or modify Section 5 accordingly.[617] *Amici curiae* and the petitioner all declared the Constitution required Congress to establish an ongoing systemic pattern of voting discrimination based on race by the

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[614] Appellant's Brief at 2, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246

[615] Brief Amicus Curiae of the Southeastern Legal Foundation in Support of Appellant at 6, *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322)

[616] Appellant's Brief at 39-40, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246 (

[617] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant at 21, Northwest Austin Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 526207 ("Today, however, the unconscionable and deliberate vote suppression tactics that were implemented by governments in the Deep South in 1965, and which were the sole justification for the temporary intrusiveness of Section 5, have been eradicated. The Jim Crow inspired barriers to voting, such as intentionally discriminatory literacy tests and poll taxes, are no longer in use, and the numbers of minority officeholders are at historically high levels, as are levels of minority electoral participation.").
Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 4, Northwest Austin Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024 ("Given the absence of significant evidence of active state-sponsored invidious discrimination in Arizona and other covered states, § 5 preclearance violates the Fourteenth Amendment because "practical experience" dictates there is no longer extraordinary justification for the racialism preclearance systematically promotes.").

covered states and then design Section 5's remedies to match that specific violation. They contended that anything short of that did not pass the constitutional test.

In sum, the claims by the utility district and *amici curiae* alike, Section 5's original purpose was narrow and precise. For them, Section 5 worked for a specific time in history, in a certain geographic location place, and because the remedies enacted were closely connected to a concrete problem. The VRA's 2006 reauthorization, on the other hand, attempted to solve a problem that no longer existed. They insisted that Section 5's provisions extended well beyond purposeful discrimination. It was no longer a temporary emergency measure targeted only to locations with evidence of contemporary discrimination.[618] Two briefs went further to allege the reauthorized Section 5 put pressure on states to engage in race conscious districting.[619] According to these two briefs, the real race-based policies were preclearance itself. One brief insisted that Section 5's preclearance requirement advanced state racial discrimination by encouraging states to construct districts by separating or combining individuals based on their racial group. According to the brief, "preclearance systematically promotes an obsession with racial politics."[620] Furthermore, preclearance violated the equal protection clause of the Fourteenth Amendment and conflicted with the colorblind society the Fourteenth Amendment was passed to secure. A second brief asserted that in its reauthorized form, Section 5 "is an affirmative requirement for States to create racial classifications of the sort that presumptively

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[618] Appellant's Brief at 12-13, 38-39, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246 (2009)
[619] Brief of Dr. Abigail Thernstrom and Former Justice Department officials as Amici Curiae in Support of Appellant at 2, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (No. 08-322), WL 507025
[620] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 6-7, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024

violate the Fourteenth Amendment."[621] The same brief also declared that the Court had warned Congress that the Department of Justice's (DOJ) broad interpretation of Section 5 raised "serious constitutional concerns." Despite this warning Congress in 2006 reauthorized the DOJ's standard.[622]

Federalism

The second issue addressed by the utility district and *amici curiae* was the topic of federalism and state sovereignty. The utility district contended, supported by *amici curiae*, that the 2006 reauthorization of Section 5 altered the Constitution's federalism structure and reconfigured the separation of state and federal powers.[623] Section 5 was described by the petitioner as an "unparalleled federal intrusion on the contemporary generation in certain parts of the country"[624] and "the most intrusive inversion of our federalist structure."[625] Petitioner also described Section 5 as "unprecedented," "unparalleled,"[626] the "most severe intrusion on state sovereignty in federal law"[627] and "the most serious compromise of our federalist structure on the statute books." The Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 exemplified other *amici curiae* by stating that Section 5 was a "federally intrusive law" that

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[621] Brief of Dr. Abigail Thernstrom and Former Justice Department officials as Amici Curiae in Support of Appellant at 5, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (No. 08-322), WL 507025
[622] Brief of Dr. Abigail Thernstrom and Former Justice Department officials as Amici Curiae in Support of Appellant at 10
[623] Appellant's Brief at 30, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246
[624] Appellant's Brief at 2, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246
[625] Id.
[626] Appellant's Brief at 3, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246
[627] Appellant's Brief at 42, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246

directly inserts the federal government into state and local policymaking and prevented states from enacting their own elections laws which was a constitutionally reserved power of the states."[628] All agreed that Section 5 extorted high federalism costs which could be justified only for a "real, specific problem."[629] The utility district and *amici curiae* further insisted that Congress must demonstrate a compelling need to continue such extreme remedies above and beyond the VRA's general prohibition on denying "the right of any citizen of the United States to vote on account of race or color."[630]

The brief for the Scharf-Norton Center for Constitutional Litigation Goldwater Institute declared that "preclearance commandeers state sovereign power" and was neither suited nor related to the problem of "active state-sponsored invidious discrimination."[631] The brief further stated that preclearance allowed Congress to ignore the Tenth Amendment in favor of the Fifteenth Amendment setting a "dangerous precedent."[632] The Goldwater Institute's brief also proclaimed that preclearance stood in opposition to "equality under the law and federalism" and

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[628] Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant at 20 *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009) (No. 08-322), WL 526207; Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 13, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024

[629] Appellant's Brief at 42, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 453246

[630] Section 2 of the Voting Rights Act of 1965 as amended in 1982 states "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in* a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" (Grofman and Davidson, Editors 1992, 319).

[631] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 4, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024

[632] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 5, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) (No. 08-322), WL 507024

therefore should be struck down.[633] The brief also called "to liberate covered jurisdictions to exercise their sovereign powers in a manner that treats citizens as unique individuals, rather than protected class cogs."[634]

The Majority Opinion

The majority opinion was written by Justice Roberts with seven of the other Justices joining. Justice Thomas wrote a separate partial concurrence in the judgment and partial dissent. The Court chose to avoid the constitutional question regarding Section 5 and thus ruled on the statutory question of defining eligibility for a bailout. The majority held that the utility district was eligible for a bailout.[635] The majority could have simply ended there and not asserted a new conception of federalism. Thus, *Northwest Austin* could have stood for a simple interpretation of what constituted a political district for purposes of bailing out under Section 5. Instead, the majority engaged the question of Section 5's constitutionality as posed by the petitioner, which was also unnecessary, unless the purpose was to force a response.

The majority opinion began with a review of the history of the VRA. The majority noted, "[T]he historic accomplishments of the Voting Rights Act are undeniable"[636] and announced that "[t]hings have changed in the South."[637] The majority repeated the same information as regarding improvements in racial gaps in voter registration and voter turnout in covered States

[633] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 5-6, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) WL 507024
[634] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 5-6, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009) WL 507024
[635] *Northwest Austin* at 196
[636] *Id.* at 201
[637] *Id.*

and further noted that the gap was even smaller in states originally covered than nationwide.[638] The majority also echoed *amici curiae* and petitioner's claims that blatant state discriminatory practices were now rare and that minorities had been elected at "unprecedented levels."[639]

The majority observed that

> "[t]hese improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success." However, coinciding with its "historic" achievements, Section 5 also "imposes substantial 'federalism costs' " by authorizing "federal intrusion" into state and local policymaking.[640]

Some Justices, the majority continued, have expressed doubt about the constitutionality of Section 5 based on significant costs to federalism the Act imposed.[641] The majority also stated, as *amici curiae* had that the mandate that all voting changes be precleared by the Department of Justice pushed beyond merely enforcing the Fifteenth Amendment.[642]

In addition, echoing *amici curiae* briefs, the majority noted the data used for the coverage formula was outdated and there was evidence that suggested the formula did not explain the contemporary political context. The majority then proposed that "[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance." And in support of this claim, the majority cited the same report by Ed Blum of the Project on Fair

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[638] *Id.* at 203-204
[639] *Id.* at 203-204
[640] *Id.* at 202
[641] *Id.*
[642] *Id.*

Representation and co-author Lauren Campbell[643] as had the briefs from Southeastern LF and Scharf-Norton Center for Constitutional Litigation Goldwater Institute. The majority then conveyed its own skepticism about the constitutionality of preclearance stating that "[p]ast success alone, however, is not adequate justification to retain the preclearance requirements."[644] The majority conceded that these achievements may be insufficient, and preclearance was still needed. But, they again expressed skepticism and maintained, "the Act imposes current burdens and must be justified by current needs."[645] The majority concluded that under the test put forth by the petitioner and its *amici curiae*, the "congruent and proportional test" from *Boerne* or the rational basis test as called for by the respondents, the result would the same. Each test raised significant constitutional concerns.[646] However, the majority did not establish which standard the Constitution mandated.

The majority called forth a doctrine of "equal sovereignty" that to this point had not been used as a way to compare the treatment of states by federal legislation. The majority declared, "The Act also differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'"[647] The majority then quoted *Katzenbach* in which the Court had declared the equality of the States was not an obstacle for Sections 4 and 5 but omitted the part wherein the Court limited equality of the States to admitting new States to the Union. The line in *Katzenbach* stated, "The doctrine of equality of States, invoked by South Carolina, does not bar this approach, *for that doctrine applies only to the terms upon which States are admitted to the*

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[643] E. Blum & L. Campbell, Assessment of Voting Rights Progress in Jurisdictions Covered Under Section Five of the Voting Rights Act 3–6 (American Enterprise Institute, 2006).
[644] *Northwest Austin* at 202
[645] *Id.* at 203
[646] *Id.* at 204
[647] *Id.* at 203

Union, and not to the remedies for local evils which have subsequently appeared."[648] The majority quoted, "The doctrine of the equality of States ... does not bar ... remedies for *local* evils which have subsequently appeared."[649] This omission seems to suggest that the majority wished to ignore the *Katzenbach* Court's limitation of equal sovereignty to *only* state admissions. Further, the emphasis on "*local* evils" appears to suggest that the majority wanted to focus on the localized targeted aspects of Section 4 and 5. Highlighting the word "local" fuels the next line in the opinion which states, "But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[650] In hindsight, this passage and slight changes appear to be setting the foundation for *Shelby County's* ruling.

Justice Thomas, concurring in the judgment in part and dissenting in part, also asserted an inherent federalism tension existed in preclearance. Justice Thomas noted that striking a balance between the Fifteenth Amendment's prohibition on discriminatory voting practices and the Tenth Amendment's grant of reserved powers meant "the constitutionality of § 5 has always depended on the proven existence of intentional discrimination so extensive that elimination of it through case-by-case enforcement would be impossible."[651] Justice Thomas, similar to the *amici curiae* would have declared Section 5 unconstitutional due to "the lack of current evidence of intentional discrimination with respect to voting."[652] Notably, there was little difference in the

[648] *Katzenbach* at 328-329
[649] *Northwest Austin* at 203 quoting Katzenbach, supra, at 328–329, 86 S.Ct. 803 (emphasis added).
[650] *Id.* at 203
[651] *Id.* at 225
[652] *Id.* at 216

conclusions of the majority opinion and Justice Thomas' concurrence other than Justice Thomas was ready to overrule Section 5 right then.

This was the extent of the discussion of equal sovereignty; a total of about four lines in the majority opinion. It was a very short passage for a concept of equal sovereignty that had to that point been only used in cases regarding the admission of new states into the United States. Nor was equal sovereignty relevant to the Court's holding. However, the majority opinion, in combination with Justice Thomas' dissent, suggested a new judicial direction for voting rights.

Shelby County, Ala. v. Holder

Shelby County, Alabama v. Holder was argued in the Supreme Court by Bert W. Rein of Wiley Rein LLP[653] for the petitioners, *Shelby County*. Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. argued the case for the respondents[654]. The case was decided 5-4. Chief Justice Roberts wrote the majority opinion, joined by Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito. Justice Thomas also wrote a separate concurrence. Justice Ginsburg authored a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan. There were 19 *amici curiae* submitted in support of Shelby County, AL which included *amici curiae* from Republican attorney generals from the states of Alabama, Alaska, and Texas

[653] Bert W. Rein, for Petitioner. Shelby County., Ala. v. Holder, 570 U.S. 529, 532, (2013) Bert W. Rein, Washington, D. C. https://www.wiley.law/people-BertRein
July 20, 2012 Petition for a Writ of Certiorari Bert W. Rein, Counsel of Record, William S. Consovoy, Thomas R. McCarthy, Brendan J. Morrissey, Wiley Rein LLP, Attorneys for Petitioner. Shelby County v. Holder, 2012 WL 3017723 (U.S.)
[654] Donald B. Verrilli, Jr., Solicitor General, for Federal Respondent. Shelby County., Ala. v. Holder, 570 U.S. 529, 532, (2013)

with each writing a separate brief and a joint brief from Arizona, Georgia, South Carolina, and South Dakota.[655] There were 29 total briefs submitted in support of the respondent.

Shelby County continued where *Northwest Austin* left off. The majority in *Northwest Austin* raised "serious constitutional issues" concerning the Voting Rights Act and had declared, "Past success alone … is not adequate justification to retain the preclearance requirement."[656] Sensing an opportunity, Ed Blum pursued Shelby County's lawyer and convinced him to challenge the constitutionality of Section 5. Mr. Blum also hired and paid for Mr. Rein to represent the county. Shelby County, Alabama was a jurisdiction covered under the Voting

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[655] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6759406; Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771850; Brief of Former Government Officials as Amici Curiae in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 122634; Brief of the American Unity Legal Defense Fund As Amicus Curiae Supporting Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 75419; Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689; Brief of Amicus Curiae Cato Institute In Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 75423; Brief amicus curiae of Justice and Freedom Fund as Amicus Curiae in support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771851; Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 6771849; Brief amicus curiae of National Black Chamber of Commerce as Amici Curiae in Support of the Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 50691; Brief of Amicus Curiae Southeastern Legal Foundation Supporting Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 12355744; Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and American Civil Rights Foundation in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50689; Brief for Reason Foundation as Amicus Curiae in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 75287; Brief amicus curiae of Landmark Legal Foundation Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50687; Brief amicus curiae of Project 21 Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 98692; Brief Amicus Curiae of Abraham Lincoln Foundation for Public Policy Research, Inc., America's Prayer Network, Christians Reviving America's Values, U.S. Justice Foundation, and Conservative Legal Defense and Education Fund in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 75422; Brief of Arizona, Georgia, South Carolina, and South Dakota as Amici Curiae in Support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50688; Brief amicus curiae of Texas as Amicus Curiae in Support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96),2013 WL 355763; Brief amicus curiae of Alabama as Amicus Curiae supporting Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 98691; Brief of Amicus Curiae the State of Alaska in Support of Petitioner Shelby County, Alabama, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 75286

[656] *Northwest Austin* at 202

Rights Act. The County challenged the constitutionality of the coverage formula (Section 4) and the preclearance requirement (Section 5) of the Voting Rights Act as reauthorized by Congress in 2006.[657] Shelby County had not sought a bailout. In fact, quite the opposite, the Attorney General had recently rejected the county's proposed voting changes. The County quoted *Northwest Austin* to claim the "coverage formula 'differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.' "[658] Shelby County contended that "Section 5 exacts a heavy, unprecedented federalism cost by forbidding the implementation of all voting changes."[659]

That was Then, This is Now

The general consensus among the briefs submitted to support petitioner, Shelby County, was that the Voting Rights Act in its original form passed in 1965, reauthorized in 1970 and 1975 was an intrusive act that was given a constitutional "pass" due to the urgent need. The briefs almost all unanimously asserted that Section 4 and Section 5 had only been granted constitutionality due to the extraordinary determination of Southern lawmakers to deny African Americans their constitutional rights. During the century following the Civil War Southern lawmakers had become quite skilled at evading the Fifteenth Amendment. Just as soon as the federal courts struck down a discriminatory practice, state and local leaders quickly enacted a new discriminatory scheme. Thus, in certain jurisdictions lawmakers were always "one step ahead" of the federal courts.[660] This made enforcement of the Fifteenth Amendment through

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[657] Brief for Petitioner at 18, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[658] Brief for Petitioner at 18, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[659] Brief for Petitioner at 18, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[660] Appellant's Brief at 40, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009)(No. 08-322), 2009 WL 453246; Brief of Amicus Curiae Georgia Governor Sonny Perdue in Support of Appellant at 26, Northwest Austin Municipal Utility District Number One v. Holder, 557 U.S. 193 (2009))(No. 08-

"case-by-case" litigation ineffective.[661] Shelby County and *amici curiae* asserted that it was those unique and specific conditions that allowed Section 5 to withstand constitutional scrutiny. *Amici curiae* and Shelby County described the situation at the time as "exceptional," "uncommon," and "unique" but declared that was all in the past. The Act, the briefs declared, was an inordinate intrusion into the sovereignty of the states that was *only* appropriate for narrow circumstances. The Voting Rights Act was an extreme measure meant for an extreme time. What made Section 4 and Section 5 acceptable *then,* were the circumstances on the ground, the formula was targeted to specific locales, and it was temporary.

According to *Shelby County* and *amici curiae* what made the present Voting Rights Act problematic, was those "exceptional conditions" that allowed Section 5's invasive remedies, "no longer exist."[662] Since Section 5 was applicable *only* for those particular circumstances, preclearance was no longer valid, and Section 5 was an overreach of Congressional enforcement power. In 2006, Congress had reauthorized the Voting Rights Act without changing the coverage

322), 2009 WL 526209; Brief of State of Alabama as Amicus Curiae Supporting Petitioner at 6, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98691;Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 6, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689; Brief For Petitioner at 28, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130

[661] Brief of The National Black Chamber of Commerce as Amici Curiae in Support of the Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50691, Brief of Amicus Curiae Southeastern Legal Foundation Supporting Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 50690; Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 6759406; Brief For Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130; Brief of Amicus Curiae Cato Institute In Support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 75423; Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689; Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771850 Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771849

[662] Brief for Petitioner at 28, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130; Brief of The National Black Chamber of Commerce as Amici Curiae in Support of the Petitioner at 3, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 50691

formula in Section 4 and continued preclearance under Section 5. However, as petitioner and *amici curiae* contended, voting discrimination had sharply decreased since 1965, the formula was irrelevant. They argued that the formula still being used in the 2006 reauthorization was based on 1975 registration and turnout rates and so not relevant to the present.

In its brief, Shelby County reviewed the voting achievements since the passage of the Voting Rights Act. Many of the briefs also cited the same evidence to tout the vast improvements that made the Voting Rights Act no longer necessary. The briefs referenced the increased registration rates and voter turnout rates among African Americans and also noted that in some of the covered districts, African Americans' rates were higher than whites' rates.[663] Many of the briefs agreed with Shelby County's sentiment that widespread voting discrimination was a thing of the past and it was only the exceptional circumstances that made "preclearance an appropriate enforcement remedy."[664] However, in the present, they claimed that was no longer true. Shelby County and many of the *amici curiae* were ready to declare mission accomplished and this evidence showed that Section 5, based on old voting records was no longer justified.[665]

For example, the brief from the Judicial Education Project emphasized Section 5 was originally designed to be temporary and only meant "to address the conditions that prevailed at

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[663] Brief for Petitioner at 10, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[664] Brief for Petitioner at 24, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[665] Brief For Petitioner at 23, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130; Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 25, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689; Brief of Former Government Officials as Amici Curiae in Support of Petitioner at , Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 122634; and Brief of Amicus Curiae Cato Institute In Support of Petitioner at 19, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130 ("Because the burdens imposed by Section 5 are not justified by 'current needs,' they fail to satisfy this Court's requirements for 'appropriate' enforcement legislation as required by the Fourteenth and Fifteenth Amendments, and Katzenbach.").

the time. It has ably served that purpose."[666] Petitioner and *amici curiae* argued that to be constitutional, Section 5 preclearance must be based on "current burdens" and related to "current needs" and limited in geographical scope. Many of the briefs cited the standard articulated in *City of Boerne v. Flores*, 521 U.S. 507, (1997) for remedial legislation which said, "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[667] This was related to Section 5, according to the Judicial Education Project because "[i]t was congruent and proportional at the time; it is no longer so. Its work done, the time has come to praise its considerable accomplishments, and declare that its extraordinary requirements are no longer appropriate means to enforce the Fifteenth Amendment."[668] Likewise, the brief from The National Black Chamber of Commerce asserted that in its present form, Section 5 was not a valid means to enforce the guarantees of the Fourteenth and Fifteenth Amendments.[669]

Shelby County and *amici* asserted that the Voting Rights Act had a grand noble mission when enacted, but that Sections 4 and 5 were very narrowly tailored to remedy the specific violations of barriers to accessing the ballot. In line with its specific mission, Shelby County and *amici* insisted that Section 5 was limited to abolishing "deliberate racial discrimination" that blocked minorities from the ballot.[670] The discrimination must be "purposeful or intentional

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[666] Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner at 29, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771850
[667] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)
[668] Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner at 29, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771850
[669] Brief of The National Black Chamber of Commerce as Amici Curiae in Support of the Petitioner at 6, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50691
[670] Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and American Civil Rights Foundation in Support of Petitioner at 16 Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50689

discrimination,"[671] "pervasive discrimination and legislative gamesmanship,"[672] or "systemic and widespread"[673] Additionally, Congress must present a "history and pattern of unconstitutional [action] by the States…at the time the challenged law was passed."[674] Shelby County and several other briefs argued Congress had failed to show that a pattern of discrimination remained in the covered jurisdictions and emphasized that Section 5 was a relic of the past and did not capture current conditions.[675] Since the literacy test, poll taxes, and the other old devices that kept minorities from the polls were banned, *amici* and Shelby County asserted that Section 4 and Section 5's provisions could not be justified. Furthermore, since there was no longer a pattern of systemic purposeful discriminatory acts there could be no legitimate reason to continue usurping states' powers. The briefs faulted Congress for its reauthorization of Section 5 despite its failure to find evidence of "purposefully discriminatory state action."[676] At best, the record collected by Congress demonstrated "isolated incidents"[677] which was not enough to continue such intrusive

[671] Landmark Legal Foundation at 11, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 50687
[672] Brief of Former Government Officials as Amici Curiae in Support of Petitioner at 27, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 122634
[673] Brief of Amicus Curiae Cato Institute in Support of Petitioner at 26, Brief of Former Government Officials as Amici Curiae in Support of Petitioner at , Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 75423
[674] Brief for Reason Foundation as Amicus Curiae in Support of Petitioner at 3, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 75287
[675] Brief for Petitioner at 21, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[676] Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 16, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689; Brief of Amicus Curiae Cato Institute in Support of Petitioner at 25, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130; Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and American Civil Rights Foundation in Support of Petitioner at 12, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 50689
[677] Brief of Amicus Curiae Cato Institute in Support of Petitioner at 10, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130

practices.[678] They also criticized Congress for continuing to use the same formula and targeting the same jurisdictions without acknowledging that,

> the South they remember is gone (and the discrimination that existed there never did in Alaska, Arizona, Manhattan, etc.). Widespread disfranchisement is ancient history, as unlikely to return as segregated water fountains. America is no longer a land where whites hold the levers of power and minority representation depends on extraordinary federal intervention, consistent with the Constitution only as an emergency measure. Today, southern states have some of the highest black voter-registration rates in the nation; over 900 blacks hold public office in Mississippi alone.[679]

Preclearance's purpose was to prevent a jurisdiction from adopting "tests and devices" that obstructed access to voting.[680] The current evidence Congress provided was a different kind. The evidence Congress presented was so-called "second-generation barriers." Gone from the evidence were literacy tests, poll taxes, and the barriers of the past, and in its place was vote dilution. According to *amici* and Shelby County, these practices were not the same and had nothing to do with the old practices.[681] The brief from Center for Constitutional Jurisprudence argued that "second-generation barriers" … are nothing like the unconstitutional first-generation

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[678] Brief of Former Government Officials as Amici Curiae in Support of Petitioner at 6, Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner at 27, Brief for Reason Foundation as Amicus Curiae in Support of Petitioner at 12-14, Brief for Petitioner 31-32, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130

[679] Brief of Amicus Curiae Cato Institute in Support of Petitioner at 12, *Shelby County, Alabama v. Holder* 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6759406 (citing Abigail Thernstrom, Voting Rights - and Wrongs, 11).

[680] Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 8, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689

[681] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner at 22-23, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6759406

barriers that jurisdictions were using decades ago, and they cannot sustain Section 5."[682] Shelby County and the Mountain States Legal Foundation echoed that view and stated that these practices were not blocking access to the polls, rather these are concerned with the "weight of a vote once cast."[683] *Amici* further claimed vote dilution was not a Fifteenth Amendment violation.[684] As the petitioner claimed, "Preclearance is not an appropriate remedy for practices that affect the weight of votes cast."[685] *Amici* and the petitioner all expressed that Section 5 cannot be based on evidence of vote dilution and other "second-generation barriers." The difference between the federal government banning voting barriers and ending vote dilution was significant. The brief written for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom explained that banning vote dilution "necessarily entails limiting opportunities for non-minorities, because group representation is a zero-sum game." On the other hand, the brief continued, eliminating barriers to access "expands opportunities for all individuals, minorities and nonminorities alike." [686] Several other briefs also described Section 5 in its 2006 iteration as a racial classification policy that was itself violating the "Constitution's nondiscrimination guarantees."[687] Project 21's brief insisted that when applied to redistricting Section 5's primary focus was on racial sorting that required "jurisdictions to segregate voters by race in order to concentrate minority votes and supposedly increase the weight of such votes."[688] Another brief

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[682] Brief amicus curiae of Center for Constitutional Jurisprudence at 8, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2013 WL 98689
[683] Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioner at 4, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6771849
[684] Brief for Petitioner 31-32, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[685] Brief for Petitioner at 19, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96) 2012 WL 6755130
[686] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner at 22-23, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 6759406
[687] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner at 22-23, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 6759406
[688] Brief for Project 21 as Amicus Curiae in Support of Petitioner at 24, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2013 WL 98692

warned that Section 5 now included "an unconditional mandate to avoid diluting minorities' opportunities for 'electable' legislative seats regardless of the reasons for dilution." This placed a "cap on non-minorities' opportunities to exceed that guaranteed 'racial balanc[e].'" [689]

Federalism and Equal Sovereignty

Underlying the arguments against Section 4 and Section 5 was a strict view of federalism, the Tenth Amendment, and unequal treatment of the states. Several briefs noted that the Court had acknowledged the federalism conflicts embedded in Section 5 in prior decisions regarding the Voting Rights Acts.[690] However, these cases continued to uphold the Act as a rational exercise of enforcement power. The mission of the challengers to the Voting Rights Act was to demonstrate that Sections 4 and 5 were no longer related to the problem it was meant to remedy and therefore was simply intruding on state sovereignty. Shelby County and the *amici* argued that preclearance treaded on the states' authority to control their elections. They claimed that preclearance pushed the limits of Congress's power to enforce the Fifteenth Amendment because all electoral changes had to be approved. Many *amici* referred to preclearance as a "prior restraint" that exacted high federalism costs and usurped state and local policymaking.[691] Preclearance, according to *amici* and petitioner, commandeered a state's reserved power to regulate its own local elections.[692]

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[689] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner at 22-23, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 6759406

[690] Brief for the Judicial Education Project at 23, Brief for Petitioner at 24, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130

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[691] Brief for Petitioner at 25, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130

[692] Brief for the Judicial Education Project at 23, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6771850

Several briefs noted the "substantial federalism costs" that resulted from Section 5. The requirement that all electoral changes had to gain approval from the Department of Justice prior to enactment was seen by *amici curiae* and Shelby County as too high of a federalism cost. According to the Judicial Education Project, the fact that "even the most minor of changes to state voting laws and procedures - for even the smallest of subdivisions of covered jurisdictions - only amplifies the intrusiveness of the statute."[693] A few of the covered states submitted briefs and complained about increased federalism burdens and an outdated formula. The brief submitted by Texas stated that their federalism costs had increased rather than decreased as the need for preclearance declined.[694] Arizona, Georgia, South Carolina, and South Dakota in their brief also claimed, "the DOJ has exacerbated the VRA's federalism costs by broadening its interpretation of Section 5 and denying preclearance to an ever-widening array of sovereign state prerogatives."[695] The brief submitted from the Cato Institute pointed to two ways preclearance violated federalism. One was simply the need for prior approval which preempted state election law. According to the Cato Institute's brief, the Center for Constitutional Jurisprudence's briefs, and Shelby County's brief, preclearance served as a "prior restraint" on all new election rule suggested by a covered jurisdiction. Additionally, preclearance treaded on a power reserved to the States.[696] The second way preclearance violated federalism principles was to "undermine[]

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[693] Brief for the Judicial Education Project at 23, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6771850

[694] Brief of the State of Texas as Amicus Curiae in Support of Petitioner at 3, *Shelby County, Al. v. Holder* (2013) (No. 12-96) WL 355763

[695] Brief of Arizona, Georgia, South Carolina, and South Dakota as Amici Curiae in Support of Petitioner at 7, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2013 WL 50688

[696] Brief of Amicus Curiae Cato Institute In Support of Petitioner 15, *Shelby County, Al. v. Holder* (2013) (No. 12-96) 2013 WL 75423; Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 25, *Shelby County, Al. v. Holder* (2013) (No. 12-96) 2013 WL 98689

the 'fundamental principle of equal sovereignty' by 'differentiating between the states' with a coverage formula that is now unsubstantiated and, therefore, completely arbitrary."[697]

Shelby County and the other states' briefs contended that Section 5, by treating the covered states differently than noncovered states, violated the principle that all states are granted "equal sovereignty." Although, an exception was made for this violation when it was enacted, "the United States is a different country than it was forty-seven years ago."[698] The brief from the covered states of Arizona et al. contended, "No Covered Jurisdiction uses discriminatory tests or devices, and many have higher voter turnout or lower disparity in minority voter turnout, than numerous uncovered jurisdictions. The Covered States, therefore, are denied the fundamental principles of equal sovereignty and equal footing."[699] Requiring only certain jurisdictions to preclear all of their voting changes was seen by another brief writer as an "extraordinary reversal of the normal presumption of legitimacy afforded to sovereign enactments."[700]

As mentioned previously, *Northwest Austin* was the first time the Court invoked the issue of "equal sovereignty" outside of admitting a new state. The *Northwest Austin* majority's statement that the Voting Rights Act "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty,'"[701] allowed Shelby County to confidently declare, when Congress exercises its enforcement power, the "Court must ensure that Congress

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[697] Id.
[698] Brief of Arizona, Georgia, South Carolina, and South Dakota as Amici Curiae in Support of Petitioner at 17, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2013 WL 50688
[699] Brief of Arizona, Georgia, South Carolina, and South Dakota as Amici Curiae in Support of Petitioner at 4, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2013 WL 50688
[700] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner Michael E. Rosman and Michael Carvin at 2, Shelby County, Ala. v. Holder, 570 U.S. 529, (2013) (No. 12-96), 2012 WL 6759406
[701] *Northwest Austin* at 203

is reacting to constitutional violations and has appropriately addressed them without intruding into matters reserved to the States under the Tenth Amendment or unjustifiably denying equal State sovereignty."[702] *Amici* also repeated Shelby County's declaration the "coverage formula 'differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.'"[703] The briefs were unanimous in claiming that the violation of equal sovereignty rendered Section 4 unconstitutional.[704]

The Majority Opinion

The *Shelby County* majority opinion relied heavily on *Northwest Austin Municipal Utility District Number One v. Holder* 557 U.S. 193 (2009), also written by Chief Justice Roberts. The majority explained its *Northwest Austin* decision as having "expressed serious doubts about the Act's continued constitutionality."[705] The majority also noted *Northwest Austin* had "explained that §5 'imposes substantial federalism costs' and 'differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.'"[706] The Court also noted *Northwest Austin* determined " '[t]hings have changed in the South.'"[707] Minority turnout and registration had increased and "blatantly discriminatory evasions of federal decrees are rare." [708] The majority also wondered "whether the problems that §5 meant to address were still 'concentrated

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[702] Brief for Petitioner at 17, Shelby County., Ala. v. Holder, 570 U.S. 529, 540, (2013) (No. 12-96), 2012 WL 6755130
[703] Brief for Petitioner at 18, Shelby County., Ala. v. Holder, 570 U.S. 529, 540, (2013) (No. 12-96), 2012 WL 6755130
Brief of Amicus Curiae Cato Institute In Support of Petitioner at 15, Shelby County., Ala. v. Holder, 570 U.S. 529, 540, (2013) (No. 12-96), 2013 WL 75423
[704] Brief of Amicus Curiae Southeastern Legal Foundation Supporting Petitioner at 2, Shelby County., Ala. v. Holder, 570 U.S. 529, 540, (2013) (No. 12-96), 2013 WL 123557444
[705] Shelby County., Ala. v. Holder, 570 U.S. 529, 540, (2013)
[706] *Shelby County* at 540
[707] *Id.*
[708] *Id.*

in the jurisdictions singled out for preclearance.'"[709] In short, according to the majority, the VRA was stuck in the past.

The majority repeatedly referred to the VRA as "extraordinary" and "unprecedented"[710] to point out that Section 5 was appropriate only for a special and specific time, and that time had passed. The majority again referred to its *Northwest Austin* ruling which emphasized "a statute's 'current burdens' must be justified by 'current needs.' "[711] This led the Court to conclude in *Northwest Austin* that "'coverage formula raise[d] serious constitutional questions.'"[712] The majority again noted the dramatic achievements made in eliminating the blatantly discriminatory practices and decreasing the stark voting disparities.[713] Yet, the VRA continued as if nothing had changed. The majority commented that problems still exist, but more to the point, it is undeniable that "due to the Voting Rights Act, our Nation has made great strides."[714] Despite these dramatic improvement Congress did not loosen Section 5's restrictions or reduce the sweep of Section 4's coverage. The majority claimed that Congress had reauthorized the Voting Rights Act in 2006 making Sections 4 and 5 more stringent and turned a temporary measure into one with more permanence.[715]

The majority, just like the briefs, called out Congress for neglecting to update the coverage formula to fit "current conditions."[716] The majority criticized Congress for keeping the

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[709] *Id.*
[710] *Id*
[711] *Id.* at 550-551
[712] *Id.* at 550
[713] *Id.* at 547
[714] *Id.* at 549
[715] *Id.*
[716] *Id.* at 554

old "formula based on 40-year-old facts having no logical relation to the present day."[717] The majority also dismissed "second-generation barriers,"[718] such as vote dilution claims, as irrelevant to a formula that was based on devices that denied access to the ballot. Vote dilution, in contrast, was "electoral arrangements that affect the weight of minority votes." The majority rejected that the preclearance requirement as currently formulated could include changes that pertain to anything other than gaining access.[719] Nor did the majority contend that deference should be given to Congress in the decision of the relevancy of the coverage formula. The "second-generation barriers" were some of the "current conditions," that needed their own "current burdens" and were unrelated to the past.[720]

The majority also chastised Congress for expanding Section 5 after the Court had explicitly narrowed its scope and even warned Congress that to broaden the coverage of Section 5 "would 'exacerbate the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality.'"[721] The Court in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier II*), had limited preclearance to only redistricting plans that regardless of a discriminatory purpose would not "worsen[] the position of minority groups."[722] Redistricting could not be denied preclearance "if the intent was

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[717] *Id.*
[718] *Id.* at 563 ("First-generation-barriers" are devices and test used to block minority access to the vote such as white primaries, literacy tests, poll taxes, etc. "Second-generation barriers" do not bar access to the poll but attempt to "reduce the impact of minority votes" or to dilute the minority vote through racial gerrymandering, annexation, at large districts, etc.)
[719] *Id.* at 554
[720] *Id.* ("requirements as targeting such efforts simply highlights the irrationality of continued reliance on the §4 coverage formula, which is based on voting tests and access to the ballot, not vote dilution. We cannot pretend that we are reviewing an updated statute, or try our hand at updating the statute ourselves, based on the new record compiled by Congress. Contrary to the dissent's contention, see post, at 23, we are not ignoring the record; we are simply recognizing that it played no role in shaping the statutory formula before us today."
[721] *Id.* at 549
[722] *Id*. at 548

'discriminatory but nonprogressive.'"[723] The 2006 reauthorization responded to the Court and expanded Section 5 to include prohibiting redistricting with "a discriminatory purpose."[724] Congress had also responded to the Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003) by essentially overruling it. The majority criticized this move by Congress which expanded Section 5 to bar any voting law that intentionally or effectually diminishes the ability of any citizen, on account of race or language minority, "to elect their preferred candidates of choice."[725]

Treating State Unequally and Equal Sovereignty

In *Shelby County,* the majority justified striking down the formula in Section 4 of the VRA as violating "the principle that all States enjoy equal sovereignty."[726] The principle of equal sovereignty had until now applied only in instances of admitting new states.[727] According to Stanford law professor Michael W. McConnell, the expanded meaning the majority attributed to equal sovereignty seems to have been "made up." McConnell continued, "There's no requirement in the Constitution to treat all states the same. It might be an attractive principle, but it doesn't seem to be in the Constitution."[728] Nonetheless, the majority repeatedly referenced *Northwest Austin* in *Shelby County* to support the principle of equal sovereignty of the states which held that Congressional legislation cannot treat states differently.[729]

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[723] Brief for the Respondents in Opposition at 6, Shelby County., Ala. v. Holder, 570 U.S. 529, 540, (2013) (No. 12-96) WL 4459597
[724] Shelby County at 549
[725] *Id.* at 549; Section 1973c(b)
[726] *Id.* at 535
[727] Litman 2016; Miller 2014
[728] Totenberg 2013
[729] *Shelby County* at 544, ("despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties").

Combined with state equal sovereignty, the majority expressed a strict version of dual federalism. The majority claimed the Voting Rights Act conflicted with the Constitution's federalist structure.[730] The majority described Section 5's preclearance as "a drastic departure," and an " 'extraordinary departure,'" from the traditional State-Federal relationship.[731] Section 5 was a " 'federal intrusion into sensitive areas of state and local policymaking'"[732] that was "unfamiliar to our federal system."[733] The majority described Section 4's coverage formula, which selected the states to be precleared as "an equally dramatic departure from the principle that all States enjoy equal sovereignty."[734] The majority also referenced *Northwest Austin's* statement that " 'a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets.'"[735]

Thus, the majority in *Shelby County* based its Constitutional argument on a principle that cannot be found in the text of the Constitution. Not only is it not found in the Constitution, but the majority attributed a meaning to equality sovereignty divorced from its original context in case law. The majority based its decision on dicta from *Northwest Austin*. *Northwest Austin* had

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[730] *Id.* at 545 "Act 'authorizes federal intrusion into sensitive areas of state and local policymaking,' Lopez, 525 U.S., at 282, 119 S.Ct. 693, and represents an 'extraordinary departure from the traditional course of relations between the States and the Federal Government,' Presley v. Etowah County Comm'n, 502 U.S. 491, 500–501, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). As we reiterated in Northwest Austin, the Act constitutes "extraordinary legislation otherwise unfamiliar to our federal system.")

[731] *Id.* at 534 ("But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.")

[732] *Id.* at 545

[733] *Id.* at 545

[734] *Id.* at 534; *Id.*at 540 ("We explained that § 5 "imposes substantial federalism costs" and "differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty."); *Id.* at 542 ("a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."); *Id* at 556 ("the dissent refuses to consider the principle of equal sovereignty, despite *Northwest Austin* 's emphasis on its significance")

[735] *Id.* at 542

created a new meaning for the principle of equal sovereignty. In its original application equal sovereignty or equality of States was applied only to the terms of the admission of new States to the Union.[736] This point had been made in *Katzenbach,* which the majority noted but then glossed over to add that equal sovereignty also applied as a follow-up metric once states have been admitted. The majority took a principle out of context and gave it a new application. The majority cited cases in which equal sovereignty had only been applied to the admission of new states, recognized that was *Katzenbach*'s reading of equal sovereignty but then overrode it and tacked on a new notion of equal sovereignty that was simply stated in *Northwest Austin* as dicta. The majority stated,

> "*Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a bar on differential treatment outside that context. 383 U.S., at 328–329, 86 S.Ct. 803. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States."[737]

Justice Ginsberg called attention to this move in her dissent. Justice Ginsberg stated that the majority "ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of Katzenbach." Justice Ginsberg further charged the majority's abandonment of the *Katzenbach* precedent came without "nary an explanation of why it finds *Katzenbach* wrong, let alone any discussion of whether *stare decisis* nonetheless counsels adherence to *Katzenbach*'s ruling on the limited 'significance' of the equal

[736] *Katzenbach* at 328-329; see also Littman 2014
[737] *Id.* at 544

sovereignty principle." Rather, the majority spent much of the decision invoking an "unprecedented extension of the equal sovereignty principle" that Justice Ginsburg argued was at best taken "outside its proper domain" or at worst as others argued, "made up."[738]

Content Analysis of the *Shelby* Decision

The content analysis below demonstrates how often and across how many briefs the different themes discussed above were mentioned. In total, twenty briefs were examined, at least seventeen of which included a member of the Network. There was a total of 46 Network members participating in *Shelby County*, 39 as amicus curiae, four Supreme Court Justices, and three of the four attorneys for Shelby County.

Table 10. Federalist Society Network Participation in *Shelby County*

Case	Total briefs including petitioner	Network briefs including petitioner	Network attorney for petitioner	*Amici Curiae*	Network affiliated organizations	Supreme Court Justices	Total FS Network participation
South Carolina	1	n/a	n/a	n/a	n/a	n/a	n/a
Northwest Austin	7	6	3	17	7	4	24
Shelby County	20	17	3	39	13	4	46

An "Extraordinary" Act for an "Extraordinary" Time

The content analysis revealed that many of the amicus briefs asserted that the Katzenbach Court had only upheld the constitutionality of Sections 4 and 5 of the VRA due to the

[738] Miller 2014; Litman 2016; Totenberg 2013

"extraordinary conditions" and "unique circumstances" of the Jim Crow South. Eleven amicus briefs, ten of which included a member of the Network, referred to the "exceptional conditions"[739] that surrounded the passage of the VRA which thus allowed the Court to uphold Sections 4 and 5 in *Katzenbach.* Ten amicus briefs, nine of which included a Network member, noted the "unique circumstances" at the time. Twelve of the amicus briefs, quoting *Katzenbach*, stated that Sections 4 and 5 were an "uncommon exercise of congressional power."[740] Ten of these briefs included at least one member of the Network. Eight briefs mentioned that this scale of enforcement power in any other situation would not be appropriate. Nine separate briefs described Section 5 as an "extraordinary remedy" and nine briefs called it "extreme." The use of the descriptive "extraordinary" or other superlatives was intended to demonstrate that from the first challenge the Court acknowledged Section 5 "was even then an extreme remedy only to tackle a virtually intractable problem which had defied lesser measures."[741] The majority opinion also defined the VRA as an "uncommon exercise of congressional power" that was "not otherwise appropriate,"[742] but was justified by "exceptional conditions."[743] The majority also stated that these were "extraordinary measures to address an extraordinary problem."[744]

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[739] *Katzenbach* at 334. ("Preclearance "may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate.").
[740] *Id.* at 335.("Congress knew that some of the States covered by s 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.").
[741] Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner at 25-26, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6771850
[742] *Katzenbach* at 335.
[743] *Shelby County* at 545
[744] *Id.* at 535

The amicus briefs further claimed Sections 4 and 5 had been constructed to meet a specific need at a specific time and in a specific place. According to the amicus briefs, Section 4 and 5 depended on the existence of those conditions to remain constitutional. Content analysis also provides other results. Fourteen briefs argued that *Katzenbach* upheld Sections 4 and 5 because it was targeted only to jurisdictions with the most atrocious practices. Twelve of the fourteen amicus briefs included at least one Network member. Thirteen amicus briefs stated that these two sections had also been deemed constitutional because the racial discrimination it targeted was widespread and tenacious. Eleven of these briefs included a Network member. Ten amicus briefs pointed out that *Katzenbach* had upheld the VRA because litigation could not keep up with the speed with which old disenfranchisement laws were replaced with new laws. Five briefs noted that less intrusive remedies had been unsuccessful allowing more intrusive remedies to be implemented. Four of these briefs contained at least one Network member. Ten briefs noted that in the original version of the VRA, Sections 4 and 5 were only meant to be temporary. They complained the latest iteration attempted to make them permanent. Eight of these included a Network member. Nine briefs claimed the coverage formula was only meant to target the specific voting obstacles related to post-Reconstruction and Jim Crow such as literacy test and poll taxes.

Table 11. Content Analysis Results *Shelby County* Theme 1: Section 5 special conditions

	Total briefs	**Network briefs**	**Shelby Opinion**
Sec. 5 targeted specific states	14	12	6
Sec. 5 racial discrimination widespread	13	11	8
Sec. 5 justified: Case by case enforcement impossible	10	9	2
Sec 5. temporary	10	8	3
Sec 5. justify specific barriers to & equal access to vote	9	8	2

Section 4's Coverage Formula No Longer Connected to Reality

From the content analysis, one sees that the coverage formula received a lot of criticisms by the amicus briefs. Many briefs criticized Congress for not adjusting the coverage formula to reflect the present state of discrimination. Fourteen of the amicus briefs claimed the relationship between the constitutional violation and the remedy must pass the standard as established by *Boerne*, that is, the remedy must be "congruen[t] and proportional[]" to the problem.[745] Eleven of these briefs included at least one member of the Network. Eighteen amicus briefs, or 90 percent, used the majority's language from *Northwest Austin*, to assert that the current burdensome coverage formula was not aligned with "current needs."[746] Fifteen of these briefs included at least one member of the Network. This theme was one of the more popular themes in the briefs which was mentioned a total of 81 times across the Shelby County briefs and nine times in the *Shelby County* opinion. Shelby County's brief mentioned this theme thirteen times; the brief from the States of Arizona, et al. mentioned the theme ten times; and the brief from the Cato Institute mentioned this theme nine times. The brief from John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom had seven mentions; the Southeastern Legal Foundation's brief had five mentions; the brief from the Landmark Legal Foundation mentioned it four times; Judicial Education Project mentioned it thrice; and the other ten briefs stated the 2006 coverage formula was not capturing current conditions either once or twice. Four of the seven amicus briefs (57%) plus the

[745] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)
[746] *Shelby County* at 536

majority opinion in *Northwest Austin* also mentioned 31 times that the current coverage formula did not represent current conditions.

Twelve briefs adopted another of the majority's statements from *Northwest Austin* to make the assertion that if the coverage formula was going to treat some states differently, then it must be "sufficiently related" to a constitutional violation that was unique to those locations.[747] Ten of the briefs included at least one Network member. The majority in *Shelby County*, reiterated their *Northwest Austin* position "that a statute's disparate geographic coverage" must be "sufficiently related to the problem that it targets."[748] Nine amicus briefs, eight of which included at least one Network member, declared the coverage formula must be fitted to the specific problem of voting discrimination. The majority also adopted the position that to be constitutional, the coverage formula must align with "current needs."[749] The majority referred to their *Northwest Austin* opinion to reiterate that "and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'"[750] The majority concluded the coverage formula no longer met that requirement.

Congress's Evidence

The crux of *amici curiae*'s argument regarding the coverage formula was that the evidence gathered by Congress must replicate the evidence demonstrated by the 1965 Congress. If today's evidence did not meet that standard, then *amici curiae* insisted, the older coverage formula was not applicable. In *amici curiae*'s view the record presented by Congress in 2006 had

[747] *Northwest Austin* at 203
[748] *Shelby County* at 542
[749] *Id.* at 550
[750] *Id.* at 551

not met that standard. In additions, to their own detriment, Congress neglected to update the formula to meet the current environment. Therefore, the reauthorized Section 4 could not justify the reauthorization of Section 5 due to the "serious mismatch between the formula's triggers for coverage and the purported constitutional basis for reauthorization of preclearance."[751] Fifteen briefs criticized Congress for not updating the coverage formula. Thirteen briefs claimed that the evidence gathered by Congress had not demonstrated state discrimination that was either widespread, pervasive, or intentional like the type that upheld the original Act. All but one of these briefs contained a Network member. Eight briefs asserted the Court's previous cases had established that Congress must demonstrate a pattern of unconstitutional discrimination in order to activate the enforcement power of the Fifteenth Amendment which the briefs alleged Congress had not done. Six of these briefs included at least one member of the Network. Ten briefs claimed that "second generation barriers" or vote dilution was not evidence of the kind of purposeful discrimination that allowed Section 5's intrusive methods. Eight of these briefs included at least one Network member.

The majority also saw a fundamental problem with Congress's evidence. However, rather than criticize the *kind* of evidence Congress claimed justified the reauthorization of Section 4's coverage formula as it was, the majority criticized Congress for not using the evidence it did collect as the basis for a new coverage formula.[752] The majority also took the position, like the eleven amicus briefs, that second-generation barriers to voting could not justify keeping Section 4 intact. The majority's reasoning was also the same. Second-generation barriers such as vote dilution were "not impediments to the casting of ballots, but rather electoral arrangements that

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[751] Brief for the Petitioner at 21-22, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130
[752] *Shelby County* at 550

affect the weight of minority votes."[753] Allowing a coverage formula designed for "voting tests and access to the ballot" to now apply to "vote dilution" through Court inaction would be to "pretend that we are reviewing an updated statute, or [to] try our hand at updating the statute ourselves, based on the new record compiled by Congress."[754] Because Congress had failed to update the coverage formula, the majority concluded, their only choice was "to declare §4(b) unconstitutional."[755]

Table 12. Content Analysis Results *Shelby County* Theme 2: Coverage formula

	Total briefs	**Network briefs**	***Shelby* Opinion**
Coverage formula not congruent and proportional	14	11	
Coverage formula does not reflect current conditions	18	15	9
disparate geographic coverage must be sufficiently related to the problem that it targets	12	10	4
Coverage formula must be related to discrimination	9	8	6
Coverage formula not updated	15	12	11
Not evidence of intentional, widespread discrimination	13	12	2
Need evidence of a pattern	8	6	0
Not for second generation barriers	10	8	2

[753] *Shelby County* at 550
[754] *Id.*
[755] *Id.* at 557

The South Has Changed

Another common theme that content analysis revealed was that the VRA was necessary and proper in its day but decades later the nation had mostly eliminated any systematic discrimination. In other words, "the VRA had worked!"[756] The amicus briefs and the majority opinion shared the same statistical data. Eleven briefs noted the significant decrease in the gap between black and white registered voters and between black and white voting turnout. Ten of these briefs included at least one Network member. Eight of those eleven briefs also noted an increase in the election of black candidates. The majority also noted the decreased disparity in registration and turnout numbers and cited *Northwest Austin* which had also mentioned this theme.[757]

Twelve amicus briefs argued that the VRA had been justified back in the day but could not be justified today. Eleven of these twelve included at least one Network member. Sixteen briefs claimed the Voting Rights Act had been successful and it was time to declare victory. These sixteen briefs claimed the rampant discrimination by the state was part of the past and it was time to move on. The conclusion reached by these briefs was that Section 5 should be eliminated as well. The Cato Institute's brief summed up the theme for all sixteen briefs, "[t]he South has changed, America has changed, and it's time for this Court to change constitutional understandings regarding Section 5 as well."[758] The Cato Institute repeated that message ten times in its brief. Similarly, the brief from the Pacific Legal Institute twice offered the view that

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[756] Brief amicus curiae of Cato Institute in Support of Petitioner at 11, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 75423

[757] *Shelby County* at 535 (citing Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U. S. 193, 203–204 (2009)).

[758] Brief of Amicus Curiae Cato Institute in Support of Petitioner at 13 Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 75423

"[t]he deplorable conditions that once justified Section 5's extraordinary measures are no longer present in the South (or the United States generally)."[759] Shelby County's brief declared "mission accomplished" four times.[760] Likewise, this theme was stated by the brief from Former Government Officials six times and from the Justice and Freedom Fund's brief three times. Problems solved was also stated twice by the State of Texas's brief, the Landmark Legal Foundation's brief, the Southeast Legal Foundation's brief, and the American Unity's brief. This theme was mentioned at least once in the remaining six briefs. As the Judicial Education Project put it, "The sins of history are no basis for modern policy."[761] *Northwest Austin* has already declared "[t]hings have changed in the South" and the majority in Shelby County proclaimed, "There is no denying … that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."[762] The majority also criticized Congress for not adjusting Sections 4 or 5 to suit the times. The majority also chastised Congress for making the provisions of Section 5 more stringent not less. The majority stated that Section 5's amendments "exacerbate[d]] the substantial federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about §5's constitutionality."[763]

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[759] Pacific Legal Foundation at 4, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130
[760] Brief for Petitioner at 23, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130 ("Sections 5 and 4(b) have accomplished their mission.")
[761] Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner at 27, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6771850
[762] *Shelby County* at 542
[763] *Shelby* at 549, citing *Reno v. Bossier Parish School Bd*., 528 U.S. 320, 336 (2000) (*Bossier* II).

Table 13. Content Analysis Results *Shelby County* Theme 3: That was then, this is now.

	Total briefs	Network briefs	Shelby Opinion
Turnout and registration increased	11	10	9
Increase in election of Black candidates	8	7	6
Justified then, not now	12	11	23
VRA successful, the South or U.S. has changed	16	14	10

Equal Sovereignty and Federalism

Shelby County challenged Section 4 and Section 5 of the VRA as a violation of the Tenth Amendment and a violation of a State's right to equal treatment under the law. First, Shelby County claimed Section 5's preclearance mandate usurped the power reserved to the States to control its own elections. Second, Shelby County challenged Section 4's coverage formula as a violation of the principle of equal sovereignty that the Court had recently articulated in *Northwest Austin*. The logic was that since the coverage formula only required certain states to submit their voting changes to federal preclearance, not all states were being treated the same under the VRA.[764] This was the argument also made by most of the amicus briefs. The brief written by frequent FS speakers Michael A. Carvin and Michael E. Rosman for another frequent Network member and outspoken opponent of the VRA, Dr. Abigail Thernstrom summed up *amici'*s argument regarding Section 5. This brief claimed that Section 5's preclearance requirement exceeded the allowable scope of the Fourteenth and Fifteenth Amendment because

[764] Brief for Petitioner at 19, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130

it prejudged all electoral changes by certain jurisdictions as invalid until given federal clearance. According to the Network member this was "an extraordinary reversal of the normal presumption of legitimacy afforded to sovereign enactments." [765]

The amicus briefs, including petitioner Shelby County, contended that since the coverage formula was no longer valid and preclearance was no longer necessary as shown in the above section, these actions by the federal government were now viewed as exceeding their enforcement authority. [766] All twenty briefs claimed that Congress had exceeded their enforcement power when it reauthorized Section 5. Further, the resulting "federalism costs" could no longer be excused.[767] Eighteen briefs used the words from a 1999 Supreme Court decision[768] to describe Section 5's impact as having "substantial federalism costs."[769] The "federalism costs" referred to their belief that the federal government had commandeered the state's authority to enact legislation to regulate elections within their state. Preclearance was viewed as "an intrusive remedy with substantial federalism costs."[770] The briefs claimed this power had been given to the States in the Tenth Amendment and the requirement to gain permission from the federal government before enacting any election legislation violated state

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[765] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner at *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2012 WL

[766] Brief for Petitioner at 18, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130

[767] Id. at 22-23, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130 ("Sections 5 and 4(b) have accomplished their mission and their encroachment on Tenth Amendment rights and the constitutional principle of equal sovereignty is no longer appropriate.")

[768] *Lopez v. Monterey Cnty*. 525 U.S. 266 (1999)

[769] The term "federalism costs" came from a decision written by Justice Anthony Kennedy in *Miller v. Johnson*, 515 U.S. 900, 926 (1995) ("But our belief in *Katzenbach* that the federalism costs exacted by §5 preclearance could be justified by those extraordinary circumstances does not mean they can be justified in the circumstances of this case. And the Justice Department's implicit command that States engage in presumptively unconstitutional race based districting brings the Voting Rights Act, once upheld as a proper exercise of Congress's authority under §2 of the Fifteenth Amendment, *Katzenbach*, *supra*, at 327, 337, into tension with the Fourteenth Amendment.").

[770] Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 2, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2013 WL 98689

sovereignty. According to ten amicus briefs, the federalism costs had only increased with the 2006 reauthorization. Eleven briefs mentioned the Tenth Amendment as granting powers to the States and eight amicus briefs mentioned that elections were specifically reserved to the states. Seven of the seven briefs included a member of the Network. Fourteen briefs referred to preclearance as an intrusion into state sovereignty and twelve of those briefs included at least one Network member. Nine briefs described preclearance as a drastic departure from federalism principles. Seven of the briefs included at least one Network member.

A majority of the briefs asserted that a second constitutional violation was that Section 4 and Section 5 did not apply to all states and thus did not treat each state equally. The amicus briefs thus claimed that Sections 4 compromised the equal sovereignty principle. The application of the concept of "equal sovereignty" to federal legislation came directly from language in the *Northwest Austin* decision."[771] Sixteen briefs asserted that preclearance and the coverage formula violated the principle of equal sovereignty of the states because some states were treated differently. The briefs all cited the Court's *Northwest Austin* decision for establishing this principle. The brief from the States of Arizona, et al. contended that keeping the coverage formula intact would mean the "the *amici* States will very likely continue to be unequal sovereigns until at least 2031, despite an utter lack of evidence that such treatment is justified."[772] While the brief from the Judicial Education Project claimed, "It is "axiomatic that the States of the union are equal, such equality being inherent in the very ideal of a union." The Judicial Education Project further contended that "The VRA is the sole exception from this ideal,

[771] *Northwest Austin* at 203
[772] Brief of Arizona, Georgia, South Carolina, and South Dakota as Amici Curiae in Support of Petitioner at 16, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2013 WL 50688

and this unequal treatment has raised concerns from the very outset.[773] The brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom written by frequent Federalist Society speakers Michael A. Carvin and Michael E. Rosman remarked that Section 5's "extraordinary preclearance regime is gratuitous and its selective imposition is unjustified discrimination among sovereigns entitled to equal treatment."[774]

Nine briefs also spoke of Section 5's disparate treatment of the states apart from equal sovereignty. These briefs noted that a similar law to one passed in a non-covered jurisdiction could be rejected in a covered district. To these nine briefs, this different treatment "created two different classifications of States: covered and uncovered."[775] Additionally, the different treatment "demeans the dignity of the States, and it is not a valid use of Congress's Fifteenth Amendment enforcement power."[776]

The majority framed *Shelby County* as a question of the VRA's continued constitutionality given its "extraordinary measures" and "disparate treatment of the States."[777] The majority repeatedly returned to their decision in *Northwest Austin* to support its holdings in *Shelby*. The majority even stated that the guiding principles for its decision in *Shelby* came directly from the majority opinion in *Northwest Austin.*[778] The *Shelby County* Court repeated its first principle, as stated in *Northwest Austin*, that "the Act imposes current burdens and must be

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[773] Brief of the Judicial Education Project as Amicus Curiae in Support of Petitioner at 8-9, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2012 WL 6771850
[774] Brief for John Nix, Anthony Cuomo, and Dr. Abigail Thernstrom as Amici Curiae in Support of Petitioner at 2-3, *Shelby County v. Holder*, 570 U.S. 529 (2013) (12-96), 2012 WL 6759406
[775] Brief of Arizona, Georgia, South Carolina, and South Dakota as Amici Curiae in Support of Petitioner at 1, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2013 WL 50688
[776] Amicus Curiae Brief of the Center for Constitutional Jurisprudence in Support of Petitioner at 25, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2013 WL 98689
[777] *Shelby County* at 536 ("whether the Act's extraordinary measures, including its, continue to satisfy constitutional requirements.")
[778] *Id.* at 542

justified by current needs."[779] As shown above, this line from *Northwest Austin* guided some of the arguments that then appeared in the briefs submitted to *Shelby County*. The second principle as articulated in *Northwest Austin* was that

> "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[780]

This line also guided many authors of the amicus briefs. As previously stated, the principle of equal sovereignty does not appear in the Constitution and up until *Northwest Austin* had only been used by the Supreme Court to refer to the admission of new states into the Union.[781] Interestingly, only two briefs attempted to discuss any foundation for this new application of "equal sovereignty" to federal legislation beyond citing *Northwest Austin.* Also notable was the majority's curt response to the dissent for its refusal to accept the majority's use of equal sovereignty, "despite *Northwest Austin's* emphasis on its significance."[782] Notably, South Carolina's challenge to the VRA had invoked a principle of "equality of statehood." Even though the Court rejected South Carolina's articulation of the doctrine as applied to federal legislation, at least South Carolina based the doctrine on the Constitution's Article IV, Section 2 and 4 and the Fifth Amendment. Equality of statehood, or as it became known "equal sovereignty" made its first appearance post-*Katzenbach* in the VRA line of cases in *Northwest Austin*. In *Northwest Austin*, the majority explicitly left out part of the *Katzenbach* quote which

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[779] *Id.*
[780] *Id.*
[781] Littman 2014; Price 2013
[782] *Shelby* at 556

stated the doctrine was limited to the admission of new states and thus did not restrict the use of preclearance or a coverage formula. From that point onward, equal sovereignty as applied to equal treatment of states under federal law appeared to be taken as a matter of fact by the petitioner, the *amici*, and the Court.

Table 14. Content Analysis Results *Shelby Theme* 4: Federalism and equal sovereignty

	Total briefs	**Network briefs**	**Shelby Opinion**
Federalism costs	18	16	2
Federalism costs increased	10	8	8
Tenth Amendment reserved powers	11	8	4
Elections reserved to states	8	7	1
Intrusion state sovereignty	14	12	1
Drastic departure federalism	9	7	8
Violated equal sovereignty	16	13	12
Disparate treatment of states	9	7	11

Conclusion

In *South Carolina v. Katzenbach*, the first case analyzed, South Carolina's arguments were centered on the powers reserved to the States and the equal treatment of States under federal law. South Carolina based its argument regarding election matters reserved to the States on Article 1, Section 2 and Section 4 of the Constitution and the Seventeenth Amendment. South Carolina also alleged "equality of statehood" was implied by the Constitution in Article IV,

Sections 2 and and in the Fifth Amendment.[783] South Carolina alleged Sections 4 and 5 abrogated their right to set voter qualifications and election procedures by banning literacy tests and other qualification tests and also treated the covered states differently from non-covered states. The *Katzenbach* majority acknowledged the focus of Sections 4 and 5 of the Voting Rights Acts was applied to only a few states but rejected that the principle of "equality of States … bar[red] this approach." Importantly, the Court did not stop there but continued, "for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[784] As shown above, the majority in *Northwest Austin*, omitted via ellipses that portion of the quote and unlike the *Katzenbach* majority emphasized "*local* evils."[785]

The content analysis draws out these themes in a way that can be summarized across the cases. A total of seven briefs were submitted on behalf Northwest Austin Municipal Utility District One including the petitioner's brief.[786] Only one of the seven did not include a Network member. In *Northwest Austin* some of the arguments from South Carolina's brief reappeared but

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[783] Brief of the Plaintiff at 5, South Carolina v. Katzenbach 383 U.S. 301, (1965) (No. 22) 1965 WL 130083
[784] *South Carolina v. Katzenbach* 383 U.S. 301, 328 (1965)
[785] *Katzenbach* at 203
[786] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant, (No. 08-322.) 2009 WL 507024 attorneys Clint Bolick and Nicholas C. Dranias
Brief of Amicus Curiae Georgia Governor Sonny Perdue in Support of Appellant Anne W. Lewis Special Attorney General (No. 08-322.), 2009 WL 526209
Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Appellant (No. 08-322.), 2009 WL 526207 Sharon L. Browne Counsel of Record, Ralph W. Kasarda, Joshua P. Thompson.
Brief Amicus Curiae of the Southeast Legal Foundation in Support of Appellant (No. 08-322.), Shannon Lee Goessling Counsel of record, Bert W. Rein Thomas R. Mccarthy, Brendan j. Morrissey Stephen J. Obermeier Wiley Rein LLP
Brief of Dr. Abigail Thernstrom and Former Justice Department officials as Amici Curiae in Support of Appellant 2009 WL 507025 Michael A. Carvin Counsel of Record Ryan D. Newman David J. Strandness Tara M. Stuckey Jones Day
Amicus Curiae Brief of Mountain States Legal Foundation in Support of Appellant 2009 WL 526208 J. Scott Detamore Mountain States Legal Foundation

this time in numerous amicus briefs. Amicus briefs discussed the costs to federalism that preclearance imposed, what they viewed as the clear and significant departure from federalism principles, and the intrusion into state sovereignty. One brief submitted on behalf of the utility district was particularly emphatic in its quest "to liberate covered jurisdictions to exercise their sovereign powers in a manner that treats citizens as unique individuals, rather than protected class cogs. The Court should strike down Section 5 preclearance as incompatible with principles of equality under the law and federalism."[787] Content analysis also reveals other themes in the *Northwest Austin* briefs that later appeared in the *Shelby County* opinion. Those themes were that Sections 4 and 5 had been upheld for a specific purpose and specific situation i.e., those Sections were justified because of the widespread voting discrimination that continued to occur, that the coverage formula only applied to the specific type of voting barriers in use at the time, that Section 5 was only meant for a five-year period of time, and targeted specific states with an obvious pattern of documented discrimination. The *Northwest Austin* briefs also agreed that the VRA was an extraordinary policy meant for extraordinary conditions that imposed a significant federalism burden on some states that was necessary at the time. However, according to the amicus briefs, boosted by the VRA, the South and the nation had remedied its systemic discrimination and thus, such intrusions into state sovereignty were no longer justified or constitutional. The emergency had passed. The briefs also argued that when Congress passed the reauthorization in 2006, it had not updated the formula and the old formula Congress kept was not "congruent and proportional" to the present situation.

[787] Brief of Amicus Scharf-Norton Center for Constitutional Litigation Goldwater Institute in Support of Appellant at 5-6, (No. 08-322) 2009 WL 507024

The ruling in *Northwest Austin* was a statutory ruling. However, the majority expressed the same federalism concerns as the amicus briefs. The majority stated that the "federal intrusion" authorized by Section 5 and the "substantial 'federalism costs'" that resulted caused the Court to question its continued constitutionality.[788] The majority, like the amicus briefs, also conveyed that the coverage formula was irrelevant to "current political conditions."[789] According to the briefs and suggested by the majority, this lack of congruence may be a fatal flaw.

Northwest Austin also introduced a concept of equal sovereignty that had been rejected in *Katzenbach*. The majority claimed an "historic tradition" of equal sovereignty whose history appeared to have begun after *Katzenbach.* This idea of equal sovereignty does not appear to have come from the briefs in the VRA cases discussed in this dissertation.

The decision in *Northwest Austin* provided a template for opportunistic legal activists to follow and the Network was ready to respond. The petitioner's brief stated its specific challenge by citing and directly quoting *Northwest Austin*.[790] Following the signals sent by the majority, the Network members crafted their responses this time in sixteen separate briefs. The arguments in the amicus briefs were similar to those in *Northwest Austin* but were more numerous. For example, instead of six briefs arguing that the remedy imposed was not "congruent and proportional" to the problem it aimed to fix, eighteen briefs argued that the coverage formula and Section 5's "current burdens" did not meet the day's "current needs." And instead of five briefs

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[788] *Northwest Austin* at 202
[789] *Northwest Austin* at 203
[790] Brief for Petitioner at 18, Shelby County v. Holder, 570 U.S. 529 (2013) (12-96), 2012 WL 6755130 ("Shelby County challenges the reauthorization until 2031 of Section 5's preclearance obligation and Section 4(b)'s coverage formula. Section 5 exacts a heavy, unprecedented federalism cost by forbidding the implementation of all voting changes in jurisdictions identified by Section 4(b) until federal officials are satisfied that the changes do not undermine minority voting rights. Nw. Austin, 557 U.S. at 202. And Section 4(b)'s coverage formula 'differentiates between the States, despite our historic tradition that all the States enjoy equal sovereignty.' Id. at 203").

claiming that Sections 4 and 5 were for a special place and time, it was ten or more in *Shelby County*. And of course, the arguments for a strong version of federalism also multiplied. There were five briefs submitted in *Northwest Austin* arguing against the VRA intrusion into the states' domain. In *Shelby County*, the number of briefs making that same argument was fourteen.

The amicus briefs also expanded their states' right claims to include the concept of equal sovereignty. Picking up on the majority's declaration of this "historic tradition," nearly all of the briefs submitted for *Shelby County* mentioned equal sovereignty at least once. This language from the majority also seemed to have spurred a discussion from several of the briefs about the disparate treatment of states under preclearance. As mentioned above, this concept of equal sovereignty appears to have come into the VRA cases from the outside. The concept of equal sovereignty aligns with the Federalist Society's strong version of Tenth Amendment rights and strict dual sovereignty not explicitly discussed in this dissertation. It is not too difficult to see how a strong version of state sovereignty can lead to the further view of equal treatment under the law for states. However, these ideas do align with the Network's ideology and influence in other areas of the law. As other scholars have shown, the Network had been instrumental in the adoption of the "New Federalism" under Chief Justice William Rehnquist.[791] In particular, Hollis-Brusky has demonstrated the influence of the Network on the Supreme Court's federalism cases, separation of powers cases and the Tenth Amendment.[792] *Shelby County* and its strong statement for state's rights and equal treatment for states under the law aligns with the Network's ideas and influence in those areas.

[791] Hollis-Brusky 2008
[792] Hollis-Brusky 2013; 2015

The majority also articulated a structural view of the Constitution that also connects to the Network's understanding of Federalism and state sovereignty.[793] The Constitution created a government based on limited powers, federalism, and separation of powers. The Constitution simultaneously granted power while it limited power but neither the grant nor the limit canceled the other out. Rather all powers work in harmony within the structure of the Constitution. [794] Recall, this was also South Carolina's depiction of the Constitution in *Katzenbach.* South Carolina's brief described the Constitution and the Amendments as all being equal in importance, no one provision is superior or inferior to another. Each grant of power i.e., the Fifteenth Amendment, had to be considered "in light of" the limit on power, i.e., the Tenth Amendment.[795] South Carolina had stated, "it is proper to judge the 'appropriateness' of this legislation not only in light of the Fifteenth Amendment which it purportedly enforces, but also against the background of the entire Compact."[796]

According to the *Shelby County* majority, although the Supremacy Clause states that federal law is supreme to state law, the federal government does not have veto power over state laws or the right to preclear laws prior to enactment.[797] The majority balanced the Supremacy Clause with the Tenth Amendment to assert that states were autonomous in their sphere to create and shape their own government and enact their own agendas.[798] The majority next quoted a line

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[793] Id.
[794] Id.
[795] Brief of the Plaintiff at 7, *South Carolina v. Katzenbach* 383 U.S. 301, (1965) (No. 22). 1965 WL 130083
[796] Id.
[797] *Shelby County* at 543 ("the supreme Law of the Land." U.S. Const., Art. VI, cl. 2).
[798] *Id.*

from a 2011 opinion authored by Justice Anthony Kennedy to state that federalism allocated powers in a way that "preserves the integrity, dignity, and residual sovereignty of the States."[799]

The majority continued with a quote that captures quintessential Federalist Society philosophy regarding federalism,[800] "But the federal balance "is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."[801] Calling on the Framers as the Network likes to do and as their written amicus briefs had, the majority claimed it had been the intention of the Framers for the states to retain authority over elections.[802]

The *Shelby County* majority reprised the declaration of a " a 'fundamental principle of equal sovereignty' among the States." It aligned that concept with the structure of the Constitution itself when it stated, "Indeed, 'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.' "[803] This time, the majority acknowledged the quote was from a case that concerned admitting new states. However, the language was still rather ambiguous, and the majority's next statement substantially downplayed the Court's rejection that the concept applied outside of admitting new states. The majority stated, "*Katzenbach* rejected the notion that the principle operated as a bar on differential treatment outside that context." But recall, what *Katzenbach* said was in full: "The

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[799] *Id.*
[800] Hollis-Brusky 2015
[801] *Shelby County* at 543 ("This 'allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States.' Bond v. United States, 564 U.S. ——, ——, 131 S.Ct. 2355, 2364, 180 L.Ed.2d 269 (2011). But the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (Bond quoting New York v. United States, 505 U. S. 144, 181 (1992) (quoting Coleman v. Thompson, 501 U. S. 722, 759 (1991) (Blackmun, J., dissenting)).
[802] *Id.* at 543
[803] *Id.*

doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[804] The majority continued and boldly asserted, "At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States." [805] The majority simply asserted this doctrine without a textual connection to the Constitution. The strongest support for equal sovereignty came from the Court's own dicta in *Northwest Austin*. The only connection the majority appeared to provide was based on the structural arrangements of federalism, state sovereignty, and the Tenth Amendment. Furthermore, it was on this basis that the 5-4 majority overruled Section 4, the coverage formula of the VRA, which by all accounts, was a tremendous benefit for not only for African Americans specifically but for *all* Americans. Equal treatment under the law for States won at the expense of legislation with a proven record of providing equal treatment under the law for people. As Justice Ginsburg explained in her dissent, the majority "suggest[ed] that dictum in *Northwest Austin* silently overruled *Katzenbach's*[806] limitation of the equal sovereignty doctrine to 'the admission of new States.'" A suggestion Justice Ginsburg found "untenable."[807]

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[804] *Katzenbach* at 328-329
[805] *Shelby County* at 544
[806] *Katzenbach at 328-329* ("The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared. See Coyle v. Smith, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853, and cases cited therein.").`
[807] *Shelby County* at 588

Chapter 7

Conclusions

My hypothesis is that the Federalist Society Network has influenced the Supreme Court majority opinion in *Shelby County v. Holder,* 570 U.S. 529 (2013) and *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. (2018). I demonstrate the Network's influence through a comparison of the litigant briefs and amicus briefs submitted by Network members with the majority opinions in two cases leading up to and including *Shelby County* and three cases leading up to and including *Janus.* This dissertation demonstrates that the Network has indeed influenced the majority opinions in *Shelby County* and *Janus.*

Ideas Diffusion to Janus

My first set of hypotheses was that the Federalist Society Network has influenced the Supreme Court majority opinion in *Janus v. American Federation of State, County, and Municipal Employees, Council 31* 585 U.S. (2018) through its amicus briefs and through the petitioners' briefs. Examining the litigants' briefs and amicus briefs in four cases, three leading up to *Janus* and *Janus* itself, reveals that the Network has influenced the *Janus* majority opinion.

The Network was involved in *Knox, Harris,* and *Janus* as attorneys for the petitioners, as *amici curiae,* and four Supreme Court Justices in *Knox* and *Harris* and five Supreme Court Justices in *Janus.* In their role as petitioners and *amici curiae,* the Network argued that agency fees were compelled speech in violation of the First Amendment rights of workers and that unions fees were political speech. The Network also asserted that union fees forced an individual to support ideas she did not believe and deny ideas she did believe. The 5-4 majority adopted all

of these arguments in its ruling. The Network's briefs made these arguments in each of the three cases examined after the establishment of the Federalist Society as an institution. When *Abood* was heard in 1977, the organization was still five years away from its formation in the law schools of Yale and Chicago. The Network's unified arguments began *comparatively* muted with *Knox*, gained numbers and strength in *Harris,* and again increased their numbers and fine-tuned their arguments in *Janus*. Even the few briefs not directly affiliated with the Network had also argued that agency fees compelled speech and union speech was political. This exemplifies how the Network's influence has spread. The fundamental argument made by the Network was that *all* agency fees compelled speech and thus violated the First Amendment. As this study demonstrates, this was the underlying holding in *Janus.* For 40 years, the pre-*Janus* status quo held that only *some* agency fees, those used for explicitly political activities, violated the First Amendment rights of workers.

This theme connects to the next Network argument which was the inherent political nature of public sector collective bargaining. The Network members claimed that agency fees funded political speech because when a public sector union is speaking it is to a public employer. According to the Network, this context structurally made the content of the speech political. In its various briefs and arguments, the Network connected agency fees to public policy, state taxes, state budgets, and state financial woes, concluding that *all* public sector union speech concerned the public interest. This argument formed the core of the majority opinion in *Janus,* which held all public sector union speech was political in nature.

A related but frequent theme in the Network's briefs portrayed agency fees as a suppression of free speech. An individual employee made to pay fees to a union, for a service the union provides but the individual does not want to pay for, was thus cast as a victim of the

majority. The Network members analogized agency fees to forced silence, forced support of ideas one opposes, or forced betrayal of one's own beliefs. The Network advocated on behalf of the dissenting employee without a voice to speak to their government employer. In contrast to this supposed coercion, the fact that a public employee maintains all of the rights of citizenship and in that capacity can still petition government as a citizen, received no mention whatsoever in any briefs or written arguments advanced by the Network. Indeed, the Network expanded their claims further arguing in *Janus* that because a worker had rights as a citizen to speak to the government, the right extended to the workplace too. The majority accepted this assessment in their ruling and held that agency fees forced a worker, over her objections, to associate with and actively support a union whose ideas she opposes. According to the majority, similar to compelled speech, when individuals are compelled to subsidize an organization's speech essentially, "individuals are coerced into betraying their convictions."[808] This idea was elaborated most forcefully in the briefs whose authors included members that are considered most influential among the Network.

Ideas Transmission to Shelby County

My second set of hypotheses is that the Federalist Society Network has influenced the Supreme Court majority opinion in *Shelby County v. Holder*, 570 U.S. 529 (2013). The flow of influence examined was through its litigant briefs and amicus briefs. This study found evidence of the Network's influence in *Shelby County.* Like *Janus,* content analysis showed ideas flowed from the amicus briefs to the majority. The Network was involved in *Northwest Austin* and *Shelby County* as attorneys for the petitioners, as *amici curiae,* and as four Supreme Court

[808] *Janus* at 2464

Justices. The petitioner's brief and the amicus briefs all contained similar ideas and echoed each other's reasoning. The main theme that was emphasized across a majority of the briefs was that the VRA had been passed in 1965 to address an urgent situation that no longer existed. The Network further asserted that Section 4's coverage formula was outdated and unjustly punished states that no longer obstructed ballot access. The Network stated that Section 4 and 5 had outgrown its relevance. The Network members stated that the VRA was meant to address *only* a specific type of discrimination that was prevalent in the 1960s that had grown beyond the federal government's control. For this reason, only, drastic anti-federalism measures were justified. The Network further claimed that Sections 4 and 5 had become far removed from the original goal of combatting the intentional discrimination committed by state and local officials which made the costs of the anti-federalism measures too heavy to bear. Moreover, the Network contended that the evidence Congress presented to justify the 2006 reauthorization of the VRA did not demonstrate the widespread and purposeful discrimination presented in 1965. The Network concluded that it was time to end the intrusion on state sovereignty allegedly inflicted by the VRA's preclearance requirements. The majority agreed with all points and incorporated them into the *Shelby County* opinion. Although this principle of equal sovereignty entered the Voting Rights Act line of cases as a simple statement of fact by the majority in *Northwest Austin*, it can also be traced to the Network through a different line of cases. Tracing that lineage is beyond the scope of this dissertation as my focus is limited to cases that challenged the VRA. However, other scholars have tracked the strengthening of the doctrine of state sovereignty, state immunity, and states' rights to the Network through cases concerning those topics. It appears that the federalism cases may be the origin of a state sovereignty doctrine that was seamlessly transferred

to equal sovereignty in cases concerning the VRA. Pursuing the connection between these two lines of cases while not examined here would be beneficial as a future project.

Federalist Society's Founding Principles in *Janus* and *Shelby County*

The Federalist Society was founded on the principles of limited government, individual liberty, dual federalism, and originalism. Starting with the principles expressed by the Federalist Society itself, the amicus briefs and the majority opinion in *Janus* exemplify the Federalist Society's first stated principle: "the state exists to preserve freedom."[809] This theme ran throughout the amicus briefs submitted in *Janus* set of cases. The briefs charged the state with intruding on individual rights by allowing an agency shop empowered to compel fees from its employees through paycheck deductions. To the Network, this arrangement represented a worst-case scenario of Big Government infringing upon individual liberties. The Network further asserted that agency fees reflected the government putting its thumb on the scale in favor of the unions, rather than functioning in an impartial manner. The Network demanded that government stay out of the way and let the free market of ideas functioned as the Network envisioned it was intended by the framers of the First Amendment. This reasoning aligns with the Federalist Society's stated principle of the state's limited role in preserving individual liberty and having rather than promoting social equality. Political speech provided the rationale, but at its core, the Network's argument purported to offer an unregulated, free market vision of the First Amendment. According to the Network, the free market and limited government is the best way

[809] 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 duty of the judiciary to say what the law is, not what it should be. The Society seeks to promote awareness of these principles and to further their application through its activities https://fedsoc.org/our-background

to enhance liberty. In the three majority opinions studied here, the *Knox* majority most vividly expressed the free market version of the First Amendment.

Even as it eroded federal supports for public sector unions, the Network's legal activism also seriously weakened federal protections for minority voting rights. *Shelby County* showcases another of the Federalist Society's founding principles which states "the separation of governmental powers is central to our Constitution."[810] Separation of powers here refers to the separation between federal and state governments. This principle is expressed in *Shelby County* through the Network advocating for dual federalism, a robust state sovereignty, and against intrusive federalism. As reviewed in Chapter 2, Hollis-Brusky (2013; 2015) demonstrated that federalism and distinctly separate spheres for state and federal action were a priority within the Federalist Society Network. Members of the Network consistently characterized federal programs as coercing the states in seminar speeches, law review articles, and interviews.[811] As discussed, an especially strong version of this principle appeared in *Northwest Austin* from Network member Justice Alito. It is not hard to imagine the strong version of states' rights becoming the equal sovereignty the majority brings to *Northwest Austin.*

However, a states' rights analysis was completely absent in *Janus* or even *Harris* and *Knox.* The state as a sovereign entity empowered by the Tenth Amendment with the powers not explicitly granted to the federal government was not discussed by either the amicus briefs, the petitioners, or any of the majority opinions. The right of a state to enact its own laws without interference from the federal government in the absence of an enumerated power was nowhere to

[810] https://fedsoc.org/about-us
[811] Interviews conducted by Hollis-Brusky (2015,121-122)

be found. The Network did not wish to allow the states to decide their own public sector labor laws. The pre-*Janus* status quo for 40 years had left that choice to the states.

Similarly, in *Shelby County*, a strong individual rights argument is missing. An individual right to vote is completely absent from the case analysis. There is no recognition as Justice Ginsburg noted that the "right to vote" is mentioned in five places in the Constitution: the Fourteenth, Fifteenth, Nineteenth, Twenty–Fourth, and Twenty–Sixth Amendments.[812] In *Shelby County*, states' rights dominate over an individual's rights to vote. While in *Janus,* individual First Amendment rights supersedes a state right to enact their own laws. This is not surprising but only shows the ability of the Network to pick and choose its arguments to suit its purposes. One can imagine the Network would be ready with counter arguments as to why this may be the case. While inconsistency is hardly limited to the Federalist Society or the Network, it should be troublesome to an organization that prides itself on adhering to principles.

The influence of the Network is also visible in the justices themselves. The authors of the majority opinions, Justice Roberts and Justice Alito, were both members of the Federalist Society. Particularly in the case of Justice Alito, the Federalist Society itself had enormous influence on his selection. Likewise in 2005, the Network led the campaign to confirm Chief Justice Roberts to the bench. Justice Gorsuch, the fifth vote to overturn *Abood*,[813] was literally on a list of approved nominees by the then Executive Vice President of the Federalist Society and current Co-Chairman of the Board of Directors.

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[812] *Shelby County* at 594fn2. (Ginsburg, J. dissenting)
[813] O'Harrow Jr. and Boburg 2019; https://fedsoc.org/contributors/leonard-leo

New Life to Old Ideas

A key finding was that many of the arguments that appeared in the Network's briefs originated with the losing side in the original case. In *Janus*, most of the arguments can be traced to the *Abood* petitioners' attorney. The attorney for *Abood,* Sylvester Petro[814] was considered far outside the mainstream in the 1970s and his ideas radical even for Republican appointed judges.[815] The connections between Petro's ideas and the Network is further illustrated by the description of Petro as Federalist Society frequent speaker, "Richard Epstein on steroids."[816] Petro's ideas were picked up and transmitted through the Network and have now won over a 5-4 majority. Likewise, in *Shelby County* culminated many arguments that first appeared in *Katzenbach*. South Carolina argued that the VRA's covered states were treated unfairly under Section 4 and 5 and the doctrine of equality of statehood should override the federal government's protection of equality in voting. This argument was rejected by the Court along with many states' rights arguments in the 1960s. Indeed, the Federalist Society was formed precisely to articulate, normalize, and popularize legal doctrines that had fallen out of favor during the heyday of liberal jurisprudence in the 1960s and 1970s. The two sets of cases examined in this dissertation fit with the description of the Federalist Society as the reprocessing center of conservative ideas that had only a small circle of adherents and were cast out of the legal mainstream. As Teles (2008) explains these conservative ideas needed to be consolidated

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[814] Sylvester Petro began his teaching career in 1950 at New York University School of Law (1950-1972), where Ludwig Von Mises was a professor. He moved to Wake Forest University School of Law (1972-1978), where he found the Institute for Labor Policy Analysis (McCartin 2018). Petro's social circle included influential libertarian thinkers Friedrich Hayek and Ludwig Von Mises. Both men were influential to Petro's thinking. His 1957 book, *The Labor Policy of a Free Society* earned him an invitation to join the exclusive free-market organization, the Mont Pelerin Society, in 1958.

[815] McCartin 2018

[816] Pulliam 2018, Richard Epstein is a frequent speaker at Federalist Society National events and is one of the more popular thinkers in the Network.

and polished to appeal to a wider audience. When the Federalist Society was founded the conservative ideas that eventually won a majority in both *Janus* and *Shelby* had been rejected by the Court.

Future Research

As previously mentioned, connecting the federalism cases to the VRA cases would be another feature to help understand the Network's influence. It is also important to understand how Network ideas spread to different areas of law and how these ideas overlap. Another area for future research is understanding the influence of the different amicus briefs. It appears that the majority relied on some briefs in these cases more than others. It also appears that these are the briefs with the more active and those more in leadership roles in the Network. In the future it would be interesting to explore that angle.

Limitations

In conclusion, there are a few limitations within this study. The documents I used to examine the Networks' ideas were limited to the petitioners and amicus briefs. It would be fruitful to examine the scholarly writing and speeches presented at the Federalist Society events itself to strengthen the relationship between the Network and the majority opinions. The Federalist Society hosts thousands of events annually and it is during these events that new ideas are fleshed out. It would be interesting to see the evolution of their ideas as they are refined within the Federalist Society.

The content analysis I performed was a learn-as-you-go experience. Since I was learning coding as I coded the cases, I learned some "tricks of the trade" late in the coding process which meant I had to double back quite a bit to recode. I have a lot of codes that I did not use because I

did not have time to check the accuracy of the codes once I had recoded. In the end, these codes were mostly codes that may have added more detail to the analysis, and I may have been able to include more subtle themes throughout the briefs. Adding that information in the future would be an interesting touch as it could draw out subtleties in the arguments. Another tip I picked up a bit too late was that it may also be possible to code the themes in "layers" which would then allow an analysis of which codes co-occur with each other and which themes are connected.

Final Conclusion

The Federalist Society was organized to normalize and spread conservative ideas that had been cast aside during the Civil Rights Era. The Federalist Society's mission was to grow legal conservatism while turning back legal liberalism. In 1982, conservative law students formed the Federalist Society with a strategy to populate the courts, law profession, and government administrations with young lawyers well versed in conservative legal principles. In the 1980s conservative ideas had success in the political arena with the election of President Ronald Reagan. As this dissertation demonstrates, the conservative legal movement has now caught up with the political success. The Federalist Society Network has populated the legal arena with its people and its ideas. Specifically in the area of agency fees for union and voting right this mission was accomplished. Arguments that were once rejected by the courts, and by society were pushed into the mainstream by the Federalist Society Network.

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Vita

Deborah L. Toscano was born and raised in New Orleans, Louisiana. She received her Bachelor's degree in Economics from the University of New Orleans in 1992. Deborah was the owner of a music booking agency which she opened in New Orleans in 1995, then moved the agency to Los Angeles and later to Austin before returning to New Orleans in 2013 to continue her studies. From 2013 to 2018 Deborah also continued her music agency business while pursuing her degrees.

In 2015, Deborah presented her work at the Southern Political Science Association as well as the Midwest Political Science Association Conferences, and obtained her Masters Degree in Political Science from the University of New Orleans. Since 2015, Deborah has been a member of Pi Sigma Alpha University of New Orleans Chapter. She was Vice President of Activities, Pi Sigma Alpha, 2017-2019 and Co-President 2019-2021. She is also a member of The Honor Society of Phi Kappa Phi and Vice President of the University of New Orleans Political Science Graduate Student Association 2016-2020.

While pursuing her Ph.D. she was a Research Assistant at the UNO Survey Research Center Fall 2015 - Spring 2016 and taught U.S. Government and Politics from Fall 2016 to Spring 2021 at the University of New Orleans. In Fall 2018, Deborah taught Methods of Political Research at the University of New Orleans and Spring 2019 taught Comparative Politics at Tulane University. She also was a Participating Instructor in Political Science Overview at the University of New Orleans. This coming Fall semester she will continue teaching U.S. Government and Politics and also Courts and Judges and at the University of New Orleans as an Adjunct in the Department of Political Science.

She successfully defended her dissertation in April 2021 earning her Ph.D. in Political Science with a concentration in American Government and Politics from the University of New Orleans.