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Farm-Raised Trout

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Introduction

The title of this essay, a polemic against federalism, comes courtesy of *New York Times* writer Jennifer Senior, who likened the succession of fresh-faced Federalist Society members who have been gaining appointment to the federal bench—often only a few years after graduating from law school—to “so many farm-raised trout.”¹

We were among the first to call attention to the formation of the Society with its ambition to reform the country’s system of law and politics.² In a 1996 book, we noted the group’s founding by a small cadre of intrepid students at Yale, Harvard, and the University of Chicago.³ We also noted that it was only one of a number of youth-oriented organizations backed by conservative money as an investment in capitalism’s future,⁴ and predicted that the endowment would reap dividends in increased influence on American life and leadership in the years ahead.⁵ We observed that America worked best when it received an equal infusion of ideas from the left and the right, and predicted that the balance would tilt rightward in the near future.⁶

Much of what we wrote then has come true. Years later, the Society’s founders, and many of their successors, have graduated and gone on to take their places in large-firm practice, where most of them became partners and have helped line the pockets of their corporate clients.⁷ Some

¹ Jennifer Senior, *America’s Aspiring Autocrat Is in the Home Stretch. How Worried Should We Be?*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/opinion/trump-autocrat-barr.html>.

² JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA’S SOCIAL AGENDA 110-11 (1996).

³ See Ralph G. Neas, *Federalist Society: From Obscurity to Power*; PEOPLE FOR THE AMERICAN WAY 1, 1-5 (2001), <https://files.pfaw.org/uploads/2017/01/federalist-society-report.pdf>, for a discussion of the role of some of these founders.

⁴ Other youth-oriented organizations that came into existence around this time were the Olin Foundation, Leadership Institute, Intercollegiate Institute, and Young America’s Foundation. STEFANCIC & DELGADO, *supra* note 2, at 63, 64, 111, 113, 116-17. Accuracy in Media took aim at liberal university professors and programs. *Id.* at 121-24.

⁵ See *id.* at 114-24 (discussing some of these youth-oriented programs).

⁶ *Id.* at 3-5 (noting the hopes of the sponsors).

⁷ See Dylan Matthews & Byrd Pinkerton, *The incredible influence of the Federalist Society, explained*, VOX (June 3, 2019), <https://www.vox.com/future-perfect/2019/6/3/18632438/federalist-society-leonard-leo-brett-kavanaugh>; see also Sheldon Whitehouse, *The Third Federalist Society*, U.S. SENATE (March 27, 2019), <https://www.whitehouse.senate.gov/news/speeches/the-third-federalist-society>.

became law professors.⁸ A few even turned somewhat liberal or reversed course on positions they formerly embraced unequivocally.⁹ And to the great satisfaction of their backers, many went on to become judges.¹⁰ Those who did participated in a wave of decisions strengthening the hold of religion,¹¹ corporate power,¹² and authoritarian politics in American life.¹³

The Society is, in effect, three organizations. One is a debating society that brings interesting programs to law schools and is the version that many readers will have encountered. A second “is the parent organization of the campus debating society. . . a sort of highbrow think tank seeking to further conservative and libertarian judicial principles . . . convenes fancy forums with conservative legal luminaries, from Supreme Court Justices to big-name politicians to renowned legal scholars . . . issues newsletters and produces podcasts and policy recommendations . . . to reorder priorities within the legal system, and create a network of members that extends to all levels of the legal community.” A third body operates behind the scenes as “the nerve center for a complicated apparatus that does not care much about conservative principles like judicial restraint, or originalism, or textualism, . . . is the vehicle for powerful interests, which seek not to simply reorder the judiciary, but to acquire control of [it] to benefit their interests. This third Federalist Society understands the fundamental power of the federal judiciary to rig the system in favor of its donor interests and . . . is willing to go to drastic lengths to secure that power.” *Id.*

⁸ Matthews & Pinkerton, *supra* note 7.

⁹ See Matt Perez, *Cofounder of Conservative Federalist Society Calls for President Trump to be Impeached*, FORBES (July 31, 2020), <https://www.forbes.com/sites/mattperez/2020/07/30/cofounder-of-conservative-federalist-society-calls-for-president-trump-to-be-impeached/#17940b02a018> (discussing the angry reaction of Federalist co-founder Steven Calabresi). Eric Posner, a sometimes fellow-traveler, wrote *THE DEMAGOGUE’S PLAYBOOK* (2020); see also Eric Posner, *What a Second Trump Term Would Look Like*, N.Y. TIMES, July 14, 2020, at A25 (deploring the excesses of the Trump administration). Adrian Vermeule, an influential figure in the Society, began writing about “common good” constitutionalism. See Adrian Vermeule, *Beyond Originalism*, ATLANTIC (March 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/> (sounding themes that would resonate with many readers of a leftist persuasion). Theodore Olson, a founding member of the organization, in mid-life litigated an important gay rights case. Nina Totenberg, *Ted Olson: Gay Marriage’s Unlikely Warrior*, NAT’L PUB. RADIO (Dec. 6, 2010), <https://www.npr.org/2010/12/06/131792296/ted-olson-gay-marriage-s-unlikely-legal-warrior>.

¹⁰ Matthews & Pinkerton, *supra* note 7.

¹¹ *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (permitting religious exemption from a uniform rule).

¹² *E.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (permitting large political contributions from corporations or the rich).

¹³ See, *e.g.*, Adam Liptak, *A More Liberal Supreme Court? No, When It Comes to Voting Rights*, N.Y. TIMES, (last updated July 21, 2020),

These decisions abetted partisan gerrymandering,¹⁴ weakened environmental regulations,¹⁵ and diminished protections for consumers, workers, and the poor.¹⁶ They have also greatly strengthened presidential power.¹⁷

But we write not merely to call attention to the conservative surge, or even deplore it, which many others have done.¹⁸ Instead, we posit that the advent of a new generation of young conservative judges is not a cause of celebration even for those judges themselves. Instead, like trout in a fish farm, they may breed a harvest that even they, and some of their supporters, may end up regretting.¹⁹

Part I illustrates our point with the aid of a famous play, Goethe's *Faust*.²⁰ Part II explains how the Constitution's extravagant protection of

<https://www.nytimes.com/2020/07/18/us/supreme-court-voting-rights.html?searchResultPosition=16>; Senior, *supra* note 1.

¹⁴ *E.g.*, *Rucho v. Common Cause*, 588 U.S., 139 S. Ct. 2484 (2019).

¹⁵ See Lisa Friedman, *Nonpartisan Report Says Trump's Climate Metrics Undervalue the 'Social Cost of Carbon'*, N.Y. TIMES, July 15, 2020, at A19; Rebecca Leber, *Trump Slashed a Major Environmental Rule: That's Only the Beginning*, MOTHER JONES (July 15, 2020), <https://www.motherjones.com/environment/2020/07/trump-is-rushing-to-slash-every-last-obama-era-environmental-rule/>; Nadja Popovich et al., *Trump Is Reversing 100 Environmental Rules: Here's the Full List*, N.Y. TIMES (last updated July 15, 2020), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html>.

¹⁶ See, e.g., Jan Kruse, *Supreme Court Weakens Independence of Consumer Watchdog*, NAT'L CONSUMER LAW CTR. (June 29, 2020), <https://www.nclc.org/media-center/supreme-court-weakens-independence-of-consumer-watchdog.html> (describing the political ramifications of striking down for-cause removal protection for the director of the Consumer Finance Protection Bureau).

¹⁷ See Ilya Somin, *The Risks of the Unitary Executive*, CATO INST. (Aug. 31, 2018), <https://www.cato.org/publications/commentary/risks-unitary-executive> (noting the increasing loss of oversight and proper checks and balances as to presidential power).

¹⁸ *E.g.*, PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* (2009); PAUL KRUGMAN, *ARGUING WITH ZOMBIES: ECONOMICS, POLITICS, AND THE FIGHT FOR A BETTER FUTURE* (2020) (exalting liberal democracy and deploring its recent losses).

¹⁹ In short, finding themselves harvested and eaten. See Ishaan Tharoor, *Coronavirus Has Weakened the West's Nationalists*, WASH. POST: TODAY'S WORLD VIEW (July 17, 2020), <https://www.washingtonpost.com/world/2020/07/17/trump-bolsonaro-populism-coronavirus/> (noting that Trump's America First approach to politics is beginning to weaken as nations across the world are beginning to work together to restore international travel and the airline industry, plan to share a coronavirus vaccine once one or more becomes available, and want to resume trade with each other).

²⁰ JOHANN WOLFGANG VON GOETHE, *FAUST* (1831), reprinted in 2 *THE WORLD IN LITERATURE* 498 (George K. Anderson and Robert Warnock, eds., 1951).

the right of property (real and personal) set the country on a course that led to economic inequality and a series of crises, of which the latest is only the most recent. Part III suggests that the conservative harvest, exemplified by the Federalist Society and its crop of new judges, is apt to produce dividends for a few rich corporations, but hardly anyone else. Part IV suggests that these young judges need to broaden their understanding of American history and politics, or the penalty they stand to pay in history's eyes will be great, and that paid by much of the country's population even greater. The reward for destroying much of what made America great will ebb, and, like a school of farm-raised trout, the newly appointed members of the judiciary will find themselves on the back shelf of America's freezers when the nation's culinary tastes change under a more progressive administration.

I. Goethe's *Faust*.

In *Faust*, Doctor Faust, a middle-aged, alienated scholar down on his luck, receives a visit from Mephistopheles, who offers him a bargain: If he agrees to part company with his soul, Mephistopheles will grant him extraordinary powers, enabling him to get essentially anything he wants for a set term of years.²¹ Invested with newly gained powers and charm, Faust seduces and impregnates an innocent maiden, Gretchen, who comes to a tragic end.²² The tale of the disaffected autodidact forms the plotline of countless stories, plays, and novels,²³ of which the most renowned is the two-part play by Johann Goethe. Considered by many to be one of the greatest works of fiction ever written,²⁴ *Faust* tells a story that rings true to educated and average readers alike. Mephistopheles is a thinly disguised stand-in for the Devil.²⁵ Faust is Anyman. He represents the part of us that could be tempted by the lure of easy money or fame.²⁶

²¹ THE WORLD IN LITERATURE, *supra* note 20, at bk. 1, sc. 27; *see also* ELIZA M. BUTLER, THE FORTUNES OF FAUST (1952) (tracing the work to Christian mythology and the practice of magic by powerful, wise figures [magi]).

²² THE WORLD IN LITERATURE, *supra* note 20, at sc. 21 (in despair, she drowns the child and is executed).

²³ *See* Alberto Manguel, *Faust: The Dealmaker*, N.Y. TIMES (1999), <https://archive.nytimes.com/www.nytimes.com/library/magazine/millennium/m5/album-faust.html> (describing the many other versions, including a novel of the same title by Thomas Mann).

²⁴ *See* THE WORLD IN LITERATURE, *supra* note 21, at 496 (describing the play's celebrity, comparing it to works by Homer, Dante, and Shakespeare).

²⁵ *See id.* at 497 (noting this parallel).

²⁶ *See id.* at 497-98 (noting Faust's universal appeal and applicability).

The tale so captured the imagination of centuries of readers that it has appeared in innumerable other forms, going back to at least the seventh century.²⁷ Goethe's version sold well,²⁸ was translated into many languages,²⁹ and is widely rated one of the masterpieces of European literature, on a par with Dante's *Inferno*, Cervantes' *Don Quixote*, and Shakespeare's plays.³⁰ Literary critics attribute its appeal to the manner in which it deploys a number of powerful literary tropes or devices, including *irony*,³¹ in which a character produces the exact opposite of that which he or she aims through oversight or miscalculation. It is also said to serve as an *object lesson* and comment on human frailty—namely greed in the face of temptation.³² It is also said to have achieved universal appeal by reason of addressing a *metaphysical dilemma* inherent in the human condition—we are always and forever poised between good and evil, between acceding to temptation and staying on a true and virtuous course.³³

How are young Federalist Society upward climbers like Doctor Faust? Many of them accepted law-school scholarships through organizations like the Olin Foundation, which promised lucrative checks in return for summer study at law-and-economics institutes located in attractive settings, followed by a single law school class, usually the

²⁷ See, e.g., *id.* (Christopher Marlowe published a predecessor version with the same title in 1704).

²⁸ See *About: Goethe's Faust*, DBPEDIA, http://dbpedia.org/page/Goethe's_Faust (last visited October 26, 2020) (asserting that the play had the highest audience numbers of any in the German language).

²⁹ See *Goethe's Faust: Translations*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/Goethe%27s_Faust#Translations (last visited October 5, 2020) (noting that the work was translated into many languages).

³⁰ See *Masterpieces of World Literature: Johann Wolfgang von Faust, Appraisal*, all-art.org, http://www.all-art.org/world_literature/goethe1.htm (last visited October 5, 2020) (comparing *Faust* to other great works of literature).

³¹ See *Irony*, LITERARY DEVICES, <http://www.literarydevices.com/irony> (last visited Oct. 25, 2020).

³² See IRENA A. NABEGOJ, *LONGING, WEAKNESS AND TEMPTATION* 8-9 (Jason Blake & Alenka Blake, trans., 2009) (explaining that many literary texts take the form of a morality tale about resisting greed or excessive ambition).

³³ See *Manichaeism*, ENCYCLOPEDIA.COM (last updated Nov. 14, 2020) (last visited Oct. 16, 2020), <https://www.encyclopedia.com/philosophy-and-religion/ancient-religions/ancient-religion/manichaeism> (explaining the belief that life consists of a battle between two ethical poles, the good and the evil).

succeeding year, devoted to the law-and-economics view of life and law.³⁴ Others joined the organization in hopes of forming contacts and mentors sympathetic to their views, who could help them win internships, summer jobs, and postgraduate positions in business-oriented law firms or clerkships with conservative judges.³⁵

Many of them accepted these gains avidly, with little or no felt sacrifice of basic principle. They were conservative youth hoping to get ahead by affiliating with others of a similar disposition. But many others, like Doctor Faust, signed on for the worldly gains they expected to reap.³⁶ And, as in the mythical tale, many of the gains did materialize, at least for a time.³⁷

We direct none of our criticism at federalism itself. Our target is not the system of shared governance, with separation of powers and a system of checks and balances.³⁸ As the reader will see, it is the group of young upstarts who named themselves after Madison and Hamilton's brainchild and blithely went on to corrupt it.³⁹

II. Constitutional (Over)protection of Property.

The United States Constitution, a world-famous document, captured the spirit of the times.⁴⁰ It provided for limited government⁴¹ and, some years later, protection of the rights of minorities and persons charged with

³⁴ See Dylan Mathews & Byrd Pinkerton, *How Charitable Donations Remade Our Courts: The Olin Found. Funded the Federalist Soc'y, Seminars for Judges, and Much More*, Vox (May 29, 2019), <https://www.vox.com/future-perfect/2019/5/29/18629799/federalist-society-brett-kavanaugh-olin-foundation-jane-mayer>.

³⁵ Mathews & Pinkerton, *supra* note 7 (describing the appeal of networking and access to circles of power and influence).

³⁶ See sources cited and accompanying text *supra* notes 34-35 (describing the hoped-for gains).

³⁷ See David Montgomery, *Conquerors of the Courts*, WASH POST MAG. (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts> (citing the many judicial appointments the graduates reaped).

³⁸ See *Federalism*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/united-states-and-canada/us-history/federalism> (last visited Oct. 25, 2020).

³⁹ See *infra* parts II, III.

⁴⁰ See, e.g., ALEXANDER TESIS, *CONSTITUTIONAL ETHOS: LIBERAL EQUALITY FOR THE COMMON GOOD* (2017) (discussing the history of equality-enforcing provisions of the Constitution).

⁴¹ See *supra* part II (Ethos and Maxims).

crime.⁴² A few notable flaws included several provisions that allowed (expressly or implicitly) for ownership of human capital—that is, chattel slavery.⁴³ The Constitution also protected private property and wealth—taking the form of including the slaves owned by many of the Framers—so thoroughly that banks, railroads, plantations, and large corporations were soon wielding outsized influence on the young, developing nation.⁴⁴ This zealous protection of the right of property was to lead to the rising inequalities visible in today’s society.⁴⁵ It created easy pickings for millionaires and afforded good-sized corporations opportunity to further

⁴² ALEXANDER TESIS, *WE SHALL OVERCOME: A HISTORY OF CIVIL RIGHTS AND THE LAW* (2008) (describing enactment of Bill of Rights and its protection of minorities and others from official oppression).

⁴³ See DAVID WALDSTREICHER, *SLAVERY’S CONSTITUTION: FROM REVOLUTION TO RATIFICATION* (2008) (discussing the many flaws in the original document); see also Richard Delgado, *About Your Masthead: A Preliminary Inquiry into the Compatibility of Civil Rights and Civil Liberties*, 39 HARV. C.R.-C.L. L. REV. 1, 11 (2004).

⁴⁴ See, e.g., *Santa Clara Cnty. v. S. Pac. R.R.*, 118 U.S. 394 (1886); *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); see also, e.g., DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 35, 37 (2d ed. 1980) (noting that the Fourteenth Amendment at first benefited corporations even more than it did African Americans); ARCHIBALD MACLEISH, *CORPORATE ENTITY* (1926) (alluding, in a poem, to Oklahoma Ligno and Lithograph Co.’s purchasing power and corporate wealth), reprinted in MacLeish, *Apologia*, 87 HARV. L. REV. 1505, 1507 (1972):

The Oklahoma Ligno and Lithograph Co
 Of Maine doing business in Delaware Tennessee
 Missouri Montana Ohio and Idaho
 With a corporate existence distinct from that of the
 Secretary Treasurer President Directors or
 Majority stockholder being empowered to acquire
 As principal agent trustee licensee licensor
 Any or all in part or in parts or entire
 Etchings impressions engravings engravures prints
 Paintings oil-paintings canvases portraits vignettes
 Tableaux ceramics relievos insculptures tints
 Art-treasures or masterpieces complete or in sets.
 The Oklahoma Ligno and Lithograph Co
 Weeps at a nude by Michel Angelo.

⁴⁵ See, e.g., Lola Falulu, *Study Shows Income Gap Between Rich and Poor Keeps Growing, With Deadly Effects*, N.Y. TIMES (Sept. 10, 2019), <http://www.nytimes.com/2019/09/10/us/politics/gao-income-gap-rich-poor.html> (citing top economists and Sen. Bernie Sanders’ campaign); see also *infra* source cited and text accompanying note 58 et seq. (passim).

pad their bottom lines.⁴⁶ And, for a time at least, it enabled a few hundred eager young conservative law students to feel important and upward-bound.

How did all this happen? We shall only summarize the story here. Over time, unions rose and attempted valiantly to advance workers' interests against their employers, and largely failed.⁴⁷ Liberal legislators proposed, and in some cases succeeded, in enacting controls on corporate power, usury, environmental depredation, rent-gouging, and the marketing of dangerous products.⁴⁸ Conservative business-oriented courts and legislators put the brakes on all these movements by enacting a "conscienceless capitalism,"⁴⁹ a low minimum wage,⁵⁰ and relatively few job benefits.⁵¹ Today, the U.S. has a flimsier safety net than practically any other advanced society⁵² and weaker protection for consumers, minorities, and unions.⁵³ Cases like *Citizens United v. Federal Elections*

⁴⁶ See *infra* source cited and text accompanying note 58 et seq (passim).

⁴⁷ See, e.g., Editorial Board, Opinion, *The Jobs We Need*, N.Y. TIMES, July 5, 2020, § SR, at 2 (discussing the imbalance between workers and their bosses), <https://www.nytimes.com/2020/06/24/opinion/sunday/income-wealth-inequality-america.html>.

⁴⁸ Cf. Robert B. Reich, Opinion, *Sharing the Wealth*, N.Y. TIMES, July 5, 2020, § SR, at 9, <https://www.nytimes.com/2020/06/25/opinion/sunday/corporate-profit-sharing-inequality.html>.

⁴⁹ See Darren Walker, Opinion, *Uncomfortable Questions*, N.Y. TIMES, July 5, 2020, § SR, at 4, <https://www.nytimes.com/2020/06/25/opinion/sunday/black-lives-matter-corporations.html>.

⁵⁰ See David Leonhardt & Yaryna Serkez, Opinion, *The U.S. Is Lagging Behind Many Rich Countries*, N.Y. TIMES, July 2, 2020, § SR, <https://www.nytimes.com/interactive/2020/07/02/opinion/politics/us-economic-social-inequality.html>.

⁵¹ See generally Jeneen Interlandi, Opinion, *Employer-Based Health Care, Meet Massive Unemployment*, N.Y. TIMES, June 29, 2020, § SR, <https://www.nytimes.com/2020/06/29/opinion/sunday/coronavirus-medicare-for-all.html>.

⁵² See Editorial Board, Opinion, *America Needs Some Repairs. Here's Where to Start.*, N.Y. TIMES, July 2, 2020, § SR, <https://www.nytimes.com/2020/07/02/opinion/sunday/income-inequality-solutions.html> (noting that the U.S. has one of the weakest safety nets of any advanced nation and that its economy would benefit greatly if it strengthened the one it has, especially in the areas of health care and education); see generally Nicholas Kristof, Opinion, *We Interrupt This Gloom to Offer ... Hope*, N.Y. TIMES, July 16, 2020, § SR, <https://www.nytimes.com/2020/07/16/opinion/sunday/coronavirus-blm-america-hope.html>.

⁵³ See Paul Krugman, Opinion, *Why Do the Rich Have So Much Power?*, N.Y. TIMES, July 1, 2020, § SR, <https://www.nytimes.com/2020/07/01/opinion/sunday/inequality-america-paul-krugman.html> (noting that these weaknesses increase the gap between the well-to-do and the rest of the populace and depress the economy at large).

Commission,⁵⁴ which permitted very large corporate donations to political parties and candidates, and gerrymandering decisions like *Rucho v. Common Cause*⁵⁵ and *Benisek v. Lamone*⁵⁶ enhanced the power of corporations and entrenched interests. The Constitution, as construed and interpreted by conservative judges, aided in all these developments.

The new conservative judges played a part in them as well.⁵⁷ The United States has long been a capitalist country, dominated by a relatively small number of very large corporations run by a rich managerial class.⁵⁸ But in recent years, the concentration of wealth and influence has increased to the point where a very small number of rich people dictate the terms of life for the remaining 99 percent.⁵⁹

III. Trout in a Fish Farm.

The conservative harvest thus produced, in a series of rapidly escalating steps, a striking increase of inequality in a country that, until recently, has made a pretense of encouraging universal education,⁶⁰ a basic social welfare safety net,⁶¹ and a modicum of upward mobility from one generation to the next.⁶² We have often had strong leaders.⁶³ The Trump

⁵⁴ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (permitting large political contributions from corporations or the rich).

⁵⁵ *Rucho v. Common Cause*, 588 U.S. ___, 139 S. Ct. 2484 (2019) (ruling that challenges to partisan gerrymandering are ordinarily nonjusticiable).

⁵⁶ *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), vacated by *Rucho v. Common Cause*, 588 U.S. ___ (2019).

⁵⁷ See *About Us*, THE FEDERALIST SOCIETY, <https://fedsoc.org/about-us> (last visited Sep. 28, 2020) (stating that the organization has reordered their priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law).

⁵⁸ See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard University Press 2014) (discussing the rise, fall, and modification of free market capitalism over time).

⁵⁹ See, e.g., Falulu, *supra* note 45.

⁶⁰ See *Equity of Opportunity*, U.S. DEP'T EDUC., <https://www.ed.gov/equity> (last visited Sep. 28, 2020) (conceding that although America is not yet the country it strives to be, by providing world-class education we can improve educational inequality).

⁶¹ See Taylor Kate Brown, *How U.S. Welfare Compares across the World*, BBC NEWS (Aug. 26, 2016) (explaining the legislative U.S. overhaul of "welfare" and the eventual impacts that such legislation has had on our safety net), <https://www.bbc.com/news/world-us-canada-37159686>.

⁶² See Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879 (2007) (noting that the U.S. prides itself in offering almost unlimited social mobility but exhibits very little for those who begin life at or near the bottom).

⁶³ E.g., Abraham Lincoln, Frederick Delano Roosevelt, John Kennedy, and Ronald Reagan.

administration has merely exaggerated and laid bare the country's trend toward oligarchy—rule by the rich—and autocracy—rule by a single all-powerful individual, abetted by a few fawning courtiers.⁶⁴

What the newcomers may have failed to notice, however, is that if the U.S. continues on this course, fewer and fewer such courtiers will be necessary. Once in place, autocracy will continue almost by itself—in the new era of heightened Executive power, judges will be much less powerful, almost irrelevant.⁶⁵ The attorney general and Department of Justice will do the President's bidding, assuring that only cases that conform to the President's agenda are brought before the judiciary (or any other branch of government, for that matter) for determination.⁶⁶ If the court system makes the mistake of convicting one of his friends, the President will pardon them or commute their sentence.⁶⁷ If a liberal prosecutor or congressional committee seeks to exercise oversight, such as by issuing a subpoena attempting to compel witnesses to come before them and answer questions, the President will merely order the witnesses not to appear.⁶⁸ The Supreme Court's docket will continue to shrink as public interest lawyers begin to realize that their cases are doomed to lose and perhaps make bad law in the

⁶⁴ See Senior, *supra* note 1; Posner, *supra* note 9; David Leonhardt, Opinion, *It's 2022. What Does Life Look Like*, N.Y. TIMES, (July 10, 2020), <https://www.nytimes.com/2020/07/10/opinion/sunday/coronavirus-economy-two-years.html> (noting a trend toward rule by oligarchy).

⁶⁵ E.g., Chantal Da Silva, *Trump Administration Accused of Defying Supreme Court Order to Reorder DACA Program*, NEWSWEEK (July 16, 2020) (discussing how even after the Supreme Court ruled to block the Trump Administration from ending the DACA program, the Department of Homeland Security refused to reopen for applications or make changes in accordance with this ruling), <https://www.newsweek.com/trump-admin-accused-defying-supreme-court-order-reopen-daca-program-1518215>.

⁶⁶ E.g., William Weiser et al., *Inside Barr's Effort to Undermine Prosecutors in N.Y.*, N.Y. TIMES, (June 25, 2020), <https://www.nytimes.com/2020/06/25/nyregion/geoffrey-berman-william-barr-michael-cohen.html>.

⁶⁷ E.g., Katy Rogers et al., *Trump Adds Stone to His List of Pardons and Commutations*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/article/trump-pardons-commutations.html>.

⁶⁸ Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight over Powers*, N.Y. TIMES (April 24, 2019), <https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html>.

bargain.⁶⁹ Immigration judges, at the bottom of the federal hierarchy, have been the first to notice their demotion, and have complained mightily.⁷⁰

In former days, federal judges wielded real power and commanded wide respect. Being nominated and confirmed was widely regarded as an honor and the capstone to a distinguished legal career.⁷¹ Now, judges, including conservative ones, such as those drawn from the new crop of Federalist Society members, are becoming practically useless ornaments, performing increasingly empty symbolic functions, much like their counterparts in many Latin American countries.⁷² The slightest departure from orthodoxy will bring a scathing rebuke by the President,⁷³ who seems to regard the Supreme Court as a group of errand boys,⁷⁴ and close scrutiny from one's colleagues and *en banc* panels, if not prompt reversal from an appellate court.⁷⁵

⁶⁹ See Ryan J. Owens and David J. Simon, *The Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012) (referencing a study done by Richard Lazarus on 'expert practitioners' increasing influence on the Supreme Court's docket and persuasion thereof, towards issues that are not 'truly the most important for the nation.')

⁷⁰ Stephen Franklin, *The Revolt of the Judges*, AMER. PROSPECT (June 23, 2020) (discussing the response by the National Association of Immigration Judges to political pressures from the Trump Administration to decertify or delegitimize their union), <https://prospect.org/justice/revolt-of-the-immigration-judges/>.

⁷¹ See generally *The Public, the Political System and American Democracy*, PEW RESEARCH CENTER (April 26, 2018) (suggesting that recently there is doubt as to whether judges' decisions are truly driven by independence rather than politics), <https://www.pewresearch.org/politics/2018/04/26/the-public-the-political-system-and-american-democracy>.

⁷² See Leonardo Morlino et al., *The Quality of Democracies in Latin America*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, 63-70 (2016) (discussing judicial inadequacy in Latin America).

⁷³ See Eli Rosenberg, *The judge Trump disparaged as 'Mexican' will preside over an important border wall case*, THE WASH. POST (Feb. 5, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/02/05/the-judge-trump-disparaged-as-mexican-will-preside-over-an-important-border-wall-case>.

⁷⁴ See Elaina Plott, *Why Trump's Attacks on John Roberts Aren't Working With Some Conservatives*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/18/us/politics/trump-john-roberts-indiana.html> (discussing Trump's outward frustration with Supreme Court rulings that Chief Justice Roberts sided with the liberal justices on, rather than with conservatives).

⁷⁵ See, e.g., Linda Qiu, *Does the Ninth Circuit Have the Highest Reversal Rate in the Country?*, N.Y. TIMES (Nov. 26, 2018) (detailing the Supreme Court's percentage probability of reversing circuit court decisions), <https://www.nytimes.com/2018/11/26/us/politics/fact-check-trump-ninth-circuit.html>.

IV. Waiting for the Next Cargo Shipment.

The new judges may wonder, what happened? Their formerly enviable positions are morphing, right before their eyes, into pointless sinecures. We believe that the first step, lasting for a few years, will be a stage of denial, reminiscent of poor villagers or islanders awaiting another cargo shipment.

Earlier, one of us—Delgado— explained the mechanism.⁷⁶ Imagine a remote Pacific Island that has had very little contact with the outside world. One day, a number of very large ships arrive, spewing hordes of uniformed men and tons of supplies.⁷⁷ They set up camp, perform many wondrous deeds, and depart as quickly as they had arrived, leaving behind water, food, Jeeps⁷⁸, radios, and other miraculous things, which the natives are happy to put to use.⁷⁹ Aside from a few booms and flashes from over the horizon, the islanders see no more of the mysterious visitors, but keep a close lookout for them in hopes of receiving a second installment of gifts.⁸⁰

On the other side of the world, a similar scene may play out. An impoverished fishing village on the rugged coast of Ireland or Scotland realizes that once or twice a generation, a ship will run aground on offshore rocks during a storm.⁸¹ When this happens, the villagers run to the beach to retrieve barrels of flour, trunks full of cloth, and other merchandise before the shipping line can reclaim them.⁸² Ignoring the cries of the drowning crew, the villagers, who are very poor, feast on the misfortune of the shippers.⁸³ Of course, the villagers could have constructed a light-house to avoid such tragedies or opened a hotel for tourists interested in walking in the scenic, rocky area.⁸⁴ But, as with the South Sea Islanders, it is easier to wait for a second boon from the gods of fortune. The islanders do not know that the wartime campaign has moved on, that the invading force that

⁷⁶ See Richard Delgado, *Rodrigo's Equation: Race, Capitalism, and the Search for Reform*, 49 WAKE FOREST L. REV. 87 (2014) (describing cargo-cult behavior and its limitations).

⁷⁷ See *id.* at 117.

⁷⁸ Jeeps were rugged, inexpensive vehicles commonly used by the U.S. military to transport people and light goods in war zones and elsewhere.

⁷⁹ Delgado, *supra* note 76.

⁸⁰ See *id.*

⁸¹ *Id.* at 117-119 (describing such a village).

⁸² *Id.* at 117-118 (describing the rush to retrieve the cargo).

⁸³ *Id.* at 117 (describing how they ignore the crew of the sinking ship).

⁸⁴ *Id.* at 117-119 (describing some of these better alternatives the villagers ignored).

camped temporarily on their island has now moved on to a new theatre of operation, never to return.⁸⁵ The Irish villagers, slightly more advanced, know from cultural memory that a new shipwreck happens from time to time and to keep close watch on the horizon during unusually wild storms.⁸⁶

Anthropologists use the term “cargo cult” to describe both kinds of behavior.⁸⁷ Young Federalist Society judges, draped in black robes and waiting in their back rooms for something to happen, are exhibiting much the same form of behavior. The job brings the same salary as ever, but much less prestige. Even the docket is smaller than it was last year,⁸⁸ and fewer law graduates—except for fellow Federalist Society members—seem to want to be their clerks. One shipwreck—the Reagan administration—brought them to power.⁸⁹ Perhaps another can restore the luster of their appointment once again. Much like farm-raised trout, they hope that comfortable life in the tank will last forever.

But it does not; indeed something unnerving looms. A new generation seems likely to vote the King out of office and set the country on a radically different course.⁹⁰ A new administration could easily enact broad social measures that provide education, even the legal kind, for all.⁹¹ Judges of minority and lower-class background, all with brilliant academic records, could increasingly join the very benches on which the Federalist Society judges, now middle-aged, have been sitting. New history books will begin treating the Federalist ascendancy as an aberration similar to the backlash

⁸⁵ *Id.* at 117 (noting that the campaign has moved on).

⁸⁶ *Id.* at 118 (noting that from experience the villagers know that this happens from time to time).

⁸⁷ *Id.* at 117. In social science, the term refers to the unrealistic expectation, usually on the part of a primitive society, that a great boon will arrive as though by the favor of the gods or through the intervention of a superhuman, poorly understood force.

⁸⁸ See *supra* notes 68-69 and accompanying text (noting that the Supreme Court’s docket is shrinking).

⁸⁹ See *Federal Judges Nominated by Ronald Reagan*, BALLOTPEDIA, https://ballotpedia.org/Federal_judges_nominated_by_Ronald_Reagan (listing Reagan’s 402 appointees, the largest number in recent history).

⁹⁰ Mike Dorning and Mario Parker, *Trump’s Chance to Win Is Fading with Little Time Left to Recover*, BLOOMBERG (Oct. 9, 2020), <https://www.ergbloomberg.com/news/articles/2020-10-09/trump-s-chance-to-win-is-fading-with-little-time-left-to-recover>; Maggie Haberman and Jonathan Martin, *Trump’s Re-Election Chances Suddenly Look Shakier*, N.Y. TIMES (Mar. 12, 2020), <https://www.nytimes.com/2020/03/12/us/politics/trump-vs-biden.html>.

⁹¹ See, e.g., *Education*, DEMOCRATIC NAT’L COMM., <https://democrats.org/where-we-stand/the-issues/education/>.

the South mounted to Reconstruction after the Civil War ended.⁹² Their own children will begin asking why they ruled as they did in certain cases.⁹³ Their old colleges and law schools will begin honoring newcomers at reunions and other ritual occasions over them. They will begin meeting with each other, outside of work, and reminiscing about the good old days.

Conclusion

A few recent developments suggest that the tide is already beginning to turn. At least one commentator has called attention to the way Trump's America-First approach to politics is beginning to weaken as countries, even ones that fell under new-right autocrats, are starting to work together to restore international travel and tourism.⁹⁴ They are cooperating on plans to create and share a vaccine to the coronavirus once one becomes available.⁹⁵ They are also eager to resume trade with each other, with or without the participation of the United States.⁹⁶ Countries that have a better safety net have proved more able to withstand the coronavirus.⁹⁷ The limits of free-market approaches to such conservative staples as "law and order" policing and a vast prison-industrial complex are beginning to attract notice.⁹⁸ Immigration judges are already complaining about poor working conditions and an unfair system of rules requiring that they give short shrift

⁹² See generally ERIC FONER, *RECONSTRUCTION UPDATED EDITION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (2014) (discussing this period in history).

⁹³ See Roy S. Johnson, "How Did They Allow Him to Be Re-elected?", and Other Things We Hope They Don't Say About Us in 2030, *AL.COM* (July 17, 2020), <https://www.al.com/opinion/2020/07/johnson-how-did-they-allow-him-to-be-re-elected-and-other-things-we-hope-they-dont-say-about-us-in-2030.html> (contemplating the questions that future generations may ask about the events and policy decisions of the present).

⁹⁴ See Tharoor, *supra* note 19.

⁹⁵ *Id.*

⁹⁶ See *id.*

⁹⁷ See Katherine Harmon Courage, *The Stark Differences in Countries Coronavirus Death Rates, Explained*, *VOX* (Apr. 22, 2020), <https://www.vox.com/2020/4/1/21203198/coronavirus-deaths-us-italy-china-south-korea> (noting the role of a robust public health system and ample medical resources in limiting the spread of the disease).

⁹⁸ See, e.g., JONATHAN SIMON, *MASS INCARCERATION ON TRIAL* (2014) (noting how a vast prison-industrial complex is failing to control crime).

to urgent human complaints and needs.⁹⁹ A few conservative jurists are surprising their backers by ruling in favor of LGBT equality or other mainstays of a progressive, inclusive agenda.¹⁰⁰

An old saying holds that once the tide turns, one is able to appreciate how deep the water once was and notice what flotsam and jetsam lay at the bottom.¹⁰¹ Ultra-right federal judges, now enjoying perches that came their way through the careful planning of prior regimes should take note. America is historically and by choice an egalitarian society that values everyone's humanity. Those who abuse power in derogation of this commitment will fare poorly in future judgment.

⁹⁹ See Franklin, *supra* note 70 (detailing judges' complaints about new quotas, which force them to hear more cases and fail to account for the needs and complex problems faced by individual defendants).

¹⁰⁰ See Michelle Goldberg, Opinion, *Surprise! Justice on L.G.B.T. Rights from a Trump Judge*, N.Y. TIMES, June 16, 2020, at A31 (observing that: "The whole point of the Federalist Society judicial project, the whole point of electing Trump . . . was to deliver Supreme Court victories to social conservatives. . . If they can't deliver anything that basic, there's no point for either. The damage is incalculable."), <https://www.nytimes.com/2020/06/15/opinion/lgbt-supreme-court-gorsuch.html>.

¹⁰¹ A modern version, attributed to Warren Buffet, notes that only then can one see who has been swimming naked. See *The Swimming Naked Awards*, THE ECONOMIST (Dec. 16, 2008), <https://www.economist.com/business/2008/12/16/the-swimming-naked-awards>.