

THE NEW YORKER

The Conservative Pipeline to the Supreme Court

April 17, 2017

By Jeffrey Toobin

With the Federalist Society, Leonard Leo has reared a generation of originalist élités. The selection of Neil Gorsuch is just his latest achievement.



The Supreme Court confirmation hearings for Neil Gorsuch, which were held last month, in Washington, D.C., quickly fell into a pattern. Democratic senators unsuccessfully sought to pin down Gorsuch's views on issues such as campaign finance, while Republicans made gentle inquiries that seemed designed to run out the clock. In this vein, toward the end of Gorsuch's testimony, Ben Sasse, a Republican from Nebraska, asked Gorsuch his opinion about the Declaration of Independence. Gorsuch took the opportunity to deliver a patriotic lecture about the heroism of the Founders. "No one remembers who John Hancock was," Gorsuch said. "But they know that that's a signature because he wrote his name so bigly . . ." Gorsuch's invocation of one of Donald Trump's trademark utterances, apparently accidental, prompted an explosion of laughter from the audience.

Seated toward the back of the hearing room, Leonard Leo smiled. "There's one sound bite," he whispered to me, then added, "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." Gorsuch had committed no real gaffes, caused no blowups, and barely made any news—which was just how Leo had hoped the hearings would unfold.

Leo has for many years been the executive vice-president of the Federalist Society, a nationwide organization of conservative lawyers, based in Washington. Leo served, in effect, as Trump's subcontractor on the selection of Gorsuch, who was confirmed by a vote of 54–45, last week, after Republicans changed the Senate rules to forbid the use of filibusters. Leo's role in the nomination capped a period of extraordinary influence for him and for the Federalist Society. During the Administration of George W. Bush, Leo also played a crucial part in the nominations of John Roberts and Samuel Alito. Now that Gorsuch has been confirmed, Leo is responsible, to a considerable extent, for a third of the Supreme Court.

Leo, who is fifty-one, has neither held government office nor taught in a law school. He has written little and has given few speeches. He is not, technically speaking, even a lobbyist. Leo is, rather, a convener and a networker, and he has met and cultivated almost every important Republican lawyer in more than a generation. At the Gorsuch hearings, which took place in the Hart Senate Office Building, Leo acted as the unofficial mayor of the room. Sometimes he sat in the back, so that he could kibbitz with reporters, and sometimes he sat up front, behind Trump Administration officials. (Leo has been on leave from the Federalist Society to work full time on Gorsuch's confirmation.) "When Leonard walks in that room, everyone knows who he is," Carrie Severino, the chief counsel of the Judicial Crisis Network, another conservative organization that worked on Gorsuch's behalf, said. "If you care about the conservative legal movement, you always take note of Leonard."

Leo is at ease in the role of impresario. His grandfather was a vice-president of Brooks Brothers, and he instilled in young Leonard a taste for the *bella figura*. Leo wears tailored suits, often with contrasting waistcoats, and a double-length gold fob attached to a 1935 train conductor's pocket watch. ("The most accurate watch in the United States until the fifties," he said.) In lieu of office meetings, Leo prefers to chat over breakfast

(just bacon, no eggs) at the Hay-Adams Hotel, across from the White House. As his friend Boyden Gray, the White House counsel under George H. W. Bush, puts it, “He knows the best restaurants in every major city in the world, and the best wines. He has a wide-ranging, inquiring mind, and he can and will talk about any subject under the sun.”

Leo’s role in the judicial nominations has drawn fierce criticism from liberals. Nan Aron, who is the longtime president of the Alliance for Justice, which advocates for a progressive judiciary, told me, “The Federalist Society has for years been singularly focussed on building a farm team of judicial nominees who subscribe to a philosophy that is hostile to the advancement of social and economic progress in the country. Behind the scenes, during Republican Administrations, they are very engaged in identifying and recruiting for judges candidates who are ultra-conservatives—who are opposed to our rights and liberties across the board, whether it’s women, the environment, consumer protections, worker protections.” Gorsuch is likely to be only the first of Leo’s Trump Administration appointees: he is preparing for yet more vacancies on the Supreme Court, and also finding candidates for some of the hundred-plus vacancies on the lower courts, deepening his imprint on the judiciary.

Leo’s life has been shaped as much by Catholicism as by conservatism. He was born on Long Island, and his father died, of cancer, when he was a preschooler. When Leo was five, his mother got remarried, to an engineer, and the family moved to central New Jersey, where Leo spent most of his childhood. His grandfather emigrated to the United States from Italy when he was fourteen and became a tailor before working his way up at Brooks Brothers. “He understood America as being a land of opportunity, understood the value of capitalism, the value of hard work, personal responsibility,” Leo told me. “My grandparents were deeply religious people, they were daily Mass attendees. So I got all of that.”

Leo went to college at Cornell, where he studied with a group of conservative professors in the government department. That led to internships in Washington during Ronald Reagan’s Presidency—notably for Senator Orrin Hatch, who was then, as now, a member of the Judiciary Committee. Leo went on to law school, also at Cornell, after which he returned to Washington and clerked for a federal appellate judge, A. Raymond Randolph, on the D.C. Circuit.

In the meantime, he had married his high-school sweetheart, Sally Schroeder. In 1992, they had their first child, Margaret, who was born with spina bifida, which confined her to a wheelchair and led to other medical complications. “She was a real miracle, despite having a really serious handicap, and many other issues, too,” Leo said. “She was extraordinarily vivacious, talented, simple. She had a great way with people.” Clarence Thomas, Leo said, still keeps her drawings under glass on his desk.

Margaret’s example deepened Leo’s Catholic faith. She encouraged him to go to daily Mass, though he found keeping up attendance difficult. During a family vacation in 2007, when Margaret was fourteen, Leonard promised her that he would resume the practice. On the morning after they returned, Leo got up early to go to Mass. He looked in on Margaret. Then, as he was walking down the hall, she started gasping for

breath. She died shortly afterward. “I will always think that she did her job,” Leo told me. “She did her job.”

The Leos have six other children, including an eight-year-old son who also has spina bifida. A friend of Leo’s said, “Leonard comes to his pro-life views out of a place of incredible sincerity. They always treated Margaret throughout her life like any other child.” According to Leo, the vast majority of abortions are a consequence of voluntary, consensual sexual encounters, an opinion that influences his view of the procedure. “We can have a debate about abortion,” he told me. “It’s a very simple one for me. It’s an act of force. It’s a threat to human life. It’s just that simple.”

In the light of Leo’s perspective, the possibility that he would put forward a Supreme Court nominee who would turn out to support abortion rights seems nonexistent. Roberts and Alito have voted against reproductive rights; so, in all likelihood, will Gorsuch. As Edward Whelan, a prominent conservative legal activist and blogger, wrote recently, “No one has been more dedicated to the enterprise of building a Supreme Court that will overturn *Roe v. Wade* than the Federalist Society’s Leonard Leo.”

Leo was a close friend of Antonin Scalia, who instilled in him an affinity for the judicial philosophies known as originalism and textualism. In rough terms, these approaches hold that judges should interpret the Constitution according to its original meaning. If the Framers did not think they were establishing, say, a right to abortion, then contemporary judges should not recognize one, either. “What’s the best way to preserve the dignity and worth of the human person?” Leo asked me one day over breakfast. He answered, “You assure all that freedom by establishing limitations on the power of the state.”

Freedoms are best protected, Leo believes, not by the assertion of rights but by the structure of separation of powers. “I was drawn to the Federalist Society because it, in my view, understood that ‘it’s the structure, stupid,’ ” Leo told me. “Scalia used to say this all the time. Scalia said tyrannies had long lists of rights. What they didn’t have was structural restraints on the power of government. I was smitten by that.” Of course, Leo wants to see the power of government restrained in some ways but not in others. As he put it, “If you look at the areas where a true conservative is willing to tolerate restrictions on the individual, by dint of government power, it’s generally fraud, force, and threats to human life and security.”

Translated from the language of abstraction, Leo has an even broader conservative agenda than simply limiting rights unknown to the Framers, such as gay rights. “What people in the Federalist Society mean when they talk about ‘structure’ is limiting the regulatory power of the state,” Samuel Issacharoff, a professor at New York University School of Law, said. “They believe that the text of the Constitution strictly limits what Congress and judges can do. So they embrace a whole series of doctrines that say Congress can’t do anything unless it’s specifically authorized in the Constitution. And then administrative agencies can’t do anything unless Congress has specifically authorized it by law. For decades, judges thought it was permissible to fill in the gaps left by the ambiguities in the Constitution and laws. But the current

conservatives have an activist agenda to peel back the power of government.”

On November 15, 2007, nearly two thousand people filled the great hall of Washington’s cavernous Union Station for a black-tie celebration of the twenty-fifth anniversary of the Federalist Society. President George W. Bush attended, Chief Justice John Roberts sent a video salute, and three other sitting Justices—Antonin Scalia, Clarence Thomas, and Samuel Alito—appeared in person to pay tribute. Scalia and Thomas spoke about the group’s origins, a story that is critical to its mythology.

The Federalist Society was founded in 1982 by three law students, at the University of Chicago and at Yale. Scalia was the group’s first faculty adviser at Chicago, where he was then a professor; the adviser at Yale was Robert Bork, who was later nominated to the Supreme Court by Ronald Reagan. As the Federalists see it, the society’s founders were scrappy outsiders who were waging a lonely struggle against the pervasive liberalism of America’s law schools. Scalia said at the anniversary party, “We thought we were just planting a wildflower among the weeds of academic liberalism, and it turned out to be an oak.” Elaborating on this point, Thomas said, “I look at this huge audience . . . and I can only imagine the courage of a few young people who came up with yet one more idea: let’s start something. Let’s start an organization where we can actually talk about ideas, where we can actually talk about the Constitution and its structure, and how that structure is to protect our liberty. . . . Can you imagine the courage that these young people had?”

The students did start the Federalist Society from scratch, but it is less clear that tremendous courage was required. Within just a few years, the group was embraced and funded by a number of powerful, wealthy conservative organizations, which eventually included foundations associated with John Olin, Lynde and Harry Bradley, Richard Scaife, and the Koch brothers. “The funders all got the idea right away—that you can win elections, you can have mass mobilizations, but unless you can change élites and the institutions that are by and large controlled by the élites, like the courts, there are limits to what you can do,” Amanda Hollis-Brusky, a professor of politics at Pomona College and the author of “Ideas with Consequences,” a study of the Federalist Society, said. “The idea was to train, credential, and socialize a generation of alternative élites.”

In the late eighties, the Federalist Society was known primarily as an organization for law students, with few opportunities for members to stay involved after they left school. Leo founded the Federalist chapter at Cornell Law School before he graduated, in 1989, but then decamped for D.C. “When I was in the midst of my clerkship, the society came to me and said, ‘Hey, we’re not sure the lawyers’ division of the Federalist Society is working,’ ” Leo told me. “ ‘And so would you be interested in coming to work for us?’ ” Leo started at the society in 1991.

From the beginning, there were limits on how the society could attempt to change the legal and political environment. As a nonprofit organization, it had to raise its own money and could not endorse candidates. Nevertheless, Leo set himself a clear goal. “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,” he said. “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.”

“It’s a network, not a hierarchy, with Leonard Leo at the center,” Steven Teles, a professor of political science at Johns Hopkins University and the author of “The Rise of the Conservative Legal Movement,” said. “The formal activities of the society are important—the chapter meetings at law schools, the national conferences in Washington—but the most important thing they do is give conservatives a chance to meet one another and check one another out. All that activity lets people bubble up. It creates a chance for people to develop reputations. And the one thing all the lawyers have in common is that they all know Leonard, and he knows all of them.” Non-members also attend and speak at Federalist Society events, so the group’s web of influence (and the scope of Leo’s contacts) extends well beyond the members and affiliates, who currently number about seventy thousand.

The annual convention of the Federalist Society, held every November at the Mayflower Hotel, in Washington, has become an important event on the political calendar. “The primary reason people go to the convention is not for the panels. The main action at the convention is always in the grand hallway of the Mayflower,” Josh Blackman, a professor at South Texas College of Law, in Houston, and a well-known blogger, said. “Everyone is talking and meeting in that big hallway.”

In 2008, after the election of Barack Obama, the convention was a downbeat affair, not least because Michael Mukasey, the outgoing Attorney General, passed out while he was giving a speech. (He recovered.) The following November, as Obama was going through a difficult patch as President, there was more optimism in the air. That year, Blackman was chatting with his friend Todd Gaziano, who worked at the Heritage Foundation, when they were approached by Randy Barnett, a professor at Georgetown University Law Center and a leading libertarian theorist. A version of the Affordable Care Act had passed in the House a few days earlier. “Todd asked me what I thought about the constitutionality of the individual mandate,” Barnett told me, referring to the part of the law that required individuals to buy health insurance. “I said that I wasn’t really sure, that I hadn’t really looked into it yet. He said, ‘Do you want to do something about it?’ I said, ‘Yes.’ He said, ‘Whatever we do, we have to do it quickly.’ ” Blackman later wrote, with only some hyperbole, that “this conversation, though it started out innocently enough, would change the fate of the constitutional challenge to Obamacare.” Gaziano and Barnett collaborated with another colleague on one of the first articles challenging the constitutionality of Obamacare, and remained at the center of the fight over the law for the next three years. Blackman would refer to their fateful meeting as the “Mayflower compact.”

The compact illustrates the strength and the potential of the society’s network: the society can exercise enormous influence without playing a direct role. The nature of the legal claims against the health-care law also reflected precisely the

kind of “structural” arguments that Leo puts at the heart of his legal philosophy. In the first case, *National Federation of Independent Business v. Sebelius*, the plaintiffs asserted that the law was unconstitutional because the Commerce Clause of the Constitution does not authorize Congress to impose the individual mandate. In the second case, *King v. Burwell*, the plaintiffs argued that the text of the act did not permit the operation of insurance marketplaces. Ultimately, the Obama Administration won both cases. But it seems more than likely that Gorsuch, or any other Justice supported by Leo, would have voted for the losing side.

It can take a while even for Republicans to understand the breadth of the Federalist Society’s influence in Washington. Alberto Gonzales, George W. Bush’s first White House counsel, told me, “When I came to Washington, being an outsider from Texas, I knew that I would have to have some weapons in my arsenal to reassure conservative groups that I wasn’t some crazy guy from Texas. I was familiar with the Federalist Society, but I’d never been active with it.” Gonzales’s lack of connection with the group drew suspicion from the conservative legal community in Washington. “Truth be told, maybe some of the more influential members, I think they were concerned about me going on to the Supreme Court,” Gonzales said.

Tim Flanigan, who was Gonzales’s deputy in the White House, told me, “The talk started to irritate Al, who was very proud of being a conservative. He comes to Washington, and suddenly he feels like this group that he’s never heard of is attacking him, and he’s told that this group is very important to his judicial nominations. We used to have a staff meeting of about a dozen lawyers, and at one of the early meetings Al started to vent a little bit about the Federalist Society, saying, ‘Who is this Federalist Society?’ And, finally, he’s getting frustrated, and he says, ‘How many of you here are members of the Federalist Society?’ And every hand in the room went up, except for Al’s and mine.”

Gonzales was never nominated to the Supreme Court; in 2005, Bush chose Harriet Miers, Gonzales’s successor as White House counsel, and another Texan, to replace Sandra Day O’Connor. Like Gonzales, Miers had a nonexistent profile in Federalist Society circles. “By the time of the Miers nomination, the Federalist Society had created a signalling mechanism within the conservative movement,” Hollis-Brusky said. “The message Leonard and others had sent was: If you want to rise through the ranks, we need to know you. And that’s what they were all saying about Miers—‘We don’t know her. She is not one of us.’”

It’s long been difficult to separate Leo’s conservative political activism from his role in the putatively nonpartisan Federalist Society, and the Miers nomination put those positions into conflict. Leo had taken a leave from the society to help the White House fill the Court vacancy, so he was obligated, at least initially, to support the Miers choice. “I made it clear to people in the White House that I thought her nomination was going to be a heavy lift,” Leo said. “My feeling was that the conservative community was not going to probably weigh in in favor of her until after the hearings, because they wouldn’t have enough information about her, so that there would be a wait-and-see approach. And I was somewhat mistaken about that—they ended up coming after her a lot sooner. As

opposed to simply being skeptical or agnostic, they became very hostile to the idea soon after the nomination.” The criticism from conservatives of Miers’s lack of a clear ideological stance grew so intense so quickly that she withdrew less than a month after Bush nominated her. Samuel Alito, one of Leo’s judicial darlings, was nominated and confirmed instead. “I had always been a big Alito fan,” Leo told me.

One day last spring, Leo received an invitation to join Donald Trump for lunch at a law firm’s offices in Washington. Trump was getting closer to clinching the Republican nomination, but his political history still provoked wariness among Party ideologists. Trump, it turned out, wanted Leo to compile a list, which the campaign would make public, of Trump’s likely nominees to the Supreme Court, in the event that he won the election. As Leo recounted their conversation, Trump said, “People don’t know who I am on these issues, and I want to give people a sense of that.” No campaign in history had put out such a list. Leo recalled, “I said, ‘That’s a great idea—you’re creating a brand.’”

The question, then, became on what basis Leo should select the candidates. What was Trump looking for in his nominees? Throughout the campaign, Trump had said that he would appoint pro-life Justices to the Supreme Court. But Leo told me that his conversations with Trump focussed elsewhere. “The President was very clear about what he wanted,” Leo said. “What he said in very explicit terms was he wanted people who were exceptionally well qualified, quote, ‘respected by all, not weak’—those are his words, ‘not weak’—and somebody who was going to, quote, ‘interpret the Constitution the way the Framers meant it to be.’” The statement was, in effect, a call for an originalist.

The distinction between Trump’s blunt campaign promise on abortion and his cagier instructions to Leo (if Leo’s account is complete) illustrates one of the political calculations of modern Supreme Court selection. Candidates can be frank about their litmus tests, but Presidents, and their judicial nominees, are supposed to be more circumspect—though everyone knows the likely result is the same. Leo told me that abortion, for example, “never came up in conversations with me, and that’s maybe because of the way I ask questions and the way I provide answers.”

Leo, in other words, knew how to play the game—how to find a nominee who met Trump’s ideological requirements as well as his own, while observing the proprieties expected for judicial nominees. And finding potential candidates, Leo told me, “is easy, in the sense that when you’ve been working in this vineyard for twenty-five years you know everybody.” On May 18th, Trump released Leo’s list of eleven judges as his possible nominees. In September, Trump put out another ten names, in a group that included Gorsuch.

The winnowing process began the week after Trump’s unexpected victory. “The questions in our interviews were very different from the questions from the senators at the confirmation hearing,” Leo said. “They’re always trying to get at the results a judge is going to reach, and I pay more attention to their methodology, approach, and understanding of a well-defined judicial role.”

Gorsuch has long had close ties to the Federalist network. He acknowledged as much in his Senate questionnaire, writing, “I have attended and spoken at some of the organization’s gatherings. I have also sometimes spoken to individual Federalist Society chapters at various law schools.” This understates the depth of the connection. Theodore B. Olson, the prominent Washington lawyer and former Solicitor General in the George W. Bush Administration, supports an annual lecture at the Federalist Society, to honor his late wife, Barbara, who died in the 9/11 terrorist attacks. Gorsuch gave the Olson lecture in 2013, delivering a politically anodyne plea for civility in the legal profession. “No doubt we have to look hard in the mirror when our profession’s reflected image in popular culture is no longer Atticus Finch but Saul Goodman,” he said, referring to a character on the TV show “Breaking Bad.” But, as is frequently the case with the Federalist Society, the social dimension of the Olson lecture is as important as the official program. “The lecture is always at the Mayflower, but we often have a dinner afterward, always at a good restaurant, and usually a couple of the Justices come, and it’s a good time,” Olson told me. “Leonard is always responsible for selecting the wines.”

Democrats finally noticed the rise of the Federalist Society after the Supreme Court’s decision handing the Presidency to George W. Bush. “Bush v. Gore was the ‘Aha!’ moment,” Caroline Fredrickson, a liberal attorney, said. “We had let conservative forces come to dominance on the Court. They had had success in seeding the federal courts with people who shared their ideological views, as well as in propagating an approach to understanding the Constitution that conveniently always led to conservative outcomes.” A group of liberal-leaning lawyers and funders soon created the American Constitution Society as an explicit counterpart, and counterweight, to the Federalist Society. Fredrickson is the group’s current president.

Like the Federalists, A.C.S. has chapters in law schools and holds a big annual meeting in Washington at which favored judges speak. (Ruth Bader Ginsburg and Sonia Sotomayor have spoken at A.C.S. conventions.) Just as the Federalists often invite a liberal to fill out their panel discussions, A.C.S. events sometimes feature conservatives. But the budget of the Federalist Society is about twenty million dollars; A.C.S.’s is about six million. That difference doesn’t just reflect the greater abundance of deep pockets on the right. “Liberals have siloed policy interests—the environment, civil rights, gay rights—and there are pretty distinct networks and groups for each one,” Teles said. “And conservatives have more networks that cut across these policy domains. Most conservatives are more identified by their particular ideological stripe—like social conservatives—rather than any specific issue.”

More to the point, conservatives, as a group, have cared more about judicial selection than liberals have. As Fredrickson puts it, “We still struggle to get people to recognize that the courts are one of the most important battlegrounds for public policy. Democrats make hundreds of thousands of calls about Jeff Sessions and far fewer about Judge Gorsuch, but the stakes are so much higher. Judge Gorsuch will leave his fingerprints on the Constitution a lot longer than Jeff Sessions will.”

Gorsuch’s confirmation once again gives the Supreme Court a majority of Republican appointees, as it had before Scalia’s death, last February. But Ginsburg (who was appointed by Bill Clinton) is eighty-four; Anthony Kennedy (the Court’s swing vote, appointed by Reagan) is eighty; and Stephen Breyer (a Clinton appointee) is seventy-eight. If Trump has the opportunity to replace any of these three, much less all of them, the ideological balance of the Court will be transformed for at least a generation.

Other recent Presidents, when given a chance for a second nomination, have returned to the remaining names on their original list. If Trump follows this pattern, the next nominee will come from Leo’s pipeline, too, giving him a fourth Justice on the Court. Some of these prospective nominees—who include the federal appeals-court judges Thomas Hardiman and William H. Pryor, Jr., as well as the federal district-court judge Amul Thapar, a favorite of Mitch McConnell, the Senate Majority Leader—are even closer to the Federalist Society than Gorsuch is. Pryor, who serves on the Eleventh Circuit, has spoken at least eighteen times at Federalist Society events. And, when Leo returns to the Federalist Society, he will find it thriving. He says that he isn’t even worried about recruiting new members. “We don’t really care about those membership numbers,” Leo said. “We’re not a club. We’re a movement.”