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JURISPRUDENCE

# The Truly Scary Part of the \$1.6 Billion Conservative Donation

It's not about the legality. It's about the loop.

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The US Supreme Court is seen in Washington, DC on July 24, 2022. Mandel Ngan/Getty Images

On Monday, the New York Times broke the news that last year conservative mastermind Leonard Leo had obtained control over \$1.6 billion through something called the “Marble Freedom Trust” to further his deeply conservative political and legal agenda. While much of the follow up reporting so far has focused on the unusual but apparently legal means by which the donor of the money—an elderly electronics magnate named Barre Seid—

structured the transaction to avoid paying at least \$400 million in taxes, the longer-term implications for a democracy as we understand it in America are far more dire.

Over the last three decades, Leo brilliantly created an interconnected series of institutions and firms designed to fundamentally reshape the American judiciary and in turn American society. This new infusion of over one billion dollars is going to solidify this effort in a way that will be hard for anyone to counter, in part thanks to new election law rules created by the Leo-shaped judiciary.

The success of Leo's empire has long depended upon compartmentalizing and bootstrapping. It begins with the Federalist Society, an idea factory and conservative farm team which Leo led for a long time and where he continues to exert influence. He remains co-Chairman of its board of directors. The Federalist Society—which styled itself a “debate society” long after it ceased to be anything of the sort—has been the incubator for conservative ideas championed by the late Justice Antonin Scalia and others to create jurisprudential theories such as originalism and textualism that, at least in the hands of ideologically conservative people, often leads to deeply conservative results. Even though the organization's leadership has been deeply conservative if not reactionary, it maintains that it is simply a neutral forum for airing competing ideas. This ostensible neutrality provides cover so that sitting judges and Supreme Court Justices can speak at Federalist Society events and use the network to recruit judicial clerks who can come into the pipeline to help further conservative ideas ever without running afoul of rules barring judges from engaging in partisan political activities. It's also a showcase to vet and prep future judges.

But an idea factory alone would not have been enough to make fundamental changes in society. Which is why Leo also has run an extensive political operation to elevate conservative judges and justices onto the bench and to block liberal nominees whenever possible. This includes the organization that used to be known as the “Judicial Crisis Network” (now called the Concord Fund) headed by former Clarence Thomas clerk Carrie Severino. The Concord Fund runs advertising and essentially operates as a political entity that, among other things, defends FedSoc judicial nominees such as Neil Gorsuch and Amy Coney Barrett. The same operation, which does not disclose its donors, also uses its platform to successfully oppose Democratic appointees such as Merrick Garland, whom Barack Obama nominated to fill Justice Scalia's Supreme Court seat after Scalia's death, and whose nomination was successfully scuttled.

Leo's judicial operation also includes a public relations firm, CRC Advisors, to run the public relations campaign for judges he wants to promote. An earlier iteration of CRC

teamed up with former Scalia clerk Ed Whelan to advance a “half baked” alibi for then-Supreme Court nominee Brett Kavanaugh when Christine Blasey Ford came forward to share a story of how he sexually attacked her when the two were teenagers. The alibi was that Ford had been attacked, but it had been by someone else, and it was complete with a Kavanaugh doppelganger and floor plans of Virginia homes. (Whelan later apologized for advancing the argument and took a temporary leave from his perch at Ethics and Public Policy Center where Leo, naturally, sits on the board.)

The Whelan debacle aside, getting those judicial nominees on the bench would not be possible without Republicans controlling the Senate and the presidency. Which explains why Leo has been very active as a fundraiser and disseminator of money supporting the election of these candidates, often raising money and directing the contributions without full disclosure of the ultimate source of the money.

The same congressional Republicans that Leo's empire tries to get into Congress help to perpetuate Leo's political power. For years, they have hobbled the IRS's ability to limit the political activities of “social welfare” groups organized as 501(c)(4) organizations, such as Leo's new Marble Freedom Trust. This has proven effective: According to Pro Publica's investigation this week, “The creators of the Marble Freedom Trust shrouded their project in secrecy for more than two years. The group's name does not appear in any public database of business, tax or securities records. The Marble Freedom Trust is organized for legal purposes as a trust, rather than as a corporation. That means it did not have to publicly disclose basic details like its name, directors and address.”

And yet, Leo's groups have been raising almost incredible sums of money. A Washington Post analysis found Leo and his allies raised \$400 million between 2014 and 2017 from undisclosed donors, not counting this new Marble Freedom Trust money. Leo justifies the secret millionaire donors that support him with claims that this is good for democracy. As he once told the Washington Post:

Let's remember that in this country, the abolitionist movement, the women's suffrage movement, the American Revolution, the early labor movement, the civil rights movement of the 1950s and 1960s were all very much fueled by very wealthy people, and oftentimes wealthy people who chose to be anonymous. I think that's not a bad thing. I think that's a good thing.

But Leonard Leo isn't just hellbent on reshaping the federal judiciary. His fingerprints (and the obligatory dollar signs) are all over state court races, too. One of Leo's dark money groups, the one formerly known as the Judicial Crisis Network reportedly “has given RSLC

at least \$5.24 million since 2014, when RSLC launched what it calls the 'Judicial Fairness Initiative' (JFI) to spend money in state judicial elections. According to its own site, by launching JFI, 'RSLC became the only national political organization focused exclusively on the electoral process of judicial branches at the state level.'" These efforts will fundamentally reshape state judicial races by infusing them with unusual levels of cash. The recipients of these funds will help advance the same causes pushed by Leo's federal judges.

Here's where the bootstrapping comes in. The very same conservative judiciary that Leo helped create has been central to crafting new legal rules which help elect more Republicans to office. Cases like *Citizens United* and *Speech Now* have opened the floodgates to fund large outside political groups such as Super PACs. Cases like *Americans for Prosperity Foundation v. Bonta* are making it easier for that large money to be contributed anonymously or through entities that can mask the identity of those who are pulling the strings, providing an easier path to influence without giving voters valuable information about who is trying to influence them and elected officials.

Plus, voting rights cases such as *Shelby County* and *Brnovich v. DNC* have seriously weakened the protection for minority voters under the Voting Rights Act, providing the path for white Republicans to gain ever more influence. The upcoming *Milligan v. Merrill* case that the Supreme Court will hear this term threatens to further weaken minority voting power in the redistricting process. Leo's organizations seed the judiciary with jurists who advance the very theories that undermine core democratic principles from voting rights to financial disclosure rules. As doom loops go, it's a successful operation in making sure that minorities have fewer and fewer protections while judges arrogate to themselves power to say more and more.

This term, the Supreme Court will hear *Moore v. Harper*, a case that stands to empower Republican state legislators against Democratic-majority state supreme courts that have been enforcing voting rights protections contained in state constitutions. Not coincidentally, the Leo-backed (and Orwellian-named) "Honest Elections Project" has been involved in efforts to get the Court to embrace a theory in *Moore* of the "independent state legislature" that would rob state courts of the power to protect voters' rights. (They've tried the same approach in other cases, including one supporting the Republican Party's attempt to disqualify some 2020 ballots in Pennsylvania.)

These election law rulings are just a means to an end. The end includes rulings like *Dobbs* on abortion, the loosening of gun laws, the paring back of affirmative action, and reading the religion protections in the First Amendment in ways that will serve not only to put



religion into public schools but also to provide a path for anti-LGBTQ discrimination. The new Supreme Court supermajority also has begun hobbling the administrative state and erecting new barriers for the federal government to protect the public through covid vaccines and measures to limit climate change. The end is, and has always has been, to ensure that wildly unpopular ideas and policies can be put into effect by a life-tenured judicial branch that represents a well-funded conservative minority.

The \$1.6 billion donation reported by the Times this week will supercharge Leo's empire. On the tax form published this week by the *Times*, Leo had described the mission of his new Marble Freedom Trust as a project "to maintain and expand human freedom consistent with the values and ideals set forth in the Declaration of Independence and the Constitution of the United States." The freedoms he is touting here have primarily served to make the wealthy more wealthy, and efforts at vote suppression more robust. People can debate whether or not the funds transferred to Leo were strictly legal or not, but that debate entirely misses the point: No one person should have this much say in the makeup of the judicial branch or in the theories these judges entertain and then enshrine in law. But the dark money and election restrictions ensure that it's Leonard Leo's world and we all just live in it. They should be seen for what they are: Mechanisms that will entrench that world for some time to come. 📌

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