**Introduction**

This U.S. Programs portfolio review is divided into the three phases that have defined USP’s work to support a progressive understanding of the U.S. Constitution. Section I describes OSF’s decision to create and fund progressive legal infrastructure in the wake of the Supreme Court’s decision in *Bush v. Gore*; Section II discusses the impact of the election of Barack Obama in 2008 on the composition and ideology of the federal courts; and Section III explores the progressive malaise of 2010-12, during which funders played a key role in a strategic shift to elevate the courts’ importance in political dialogue and increase pressure to prioritize judicial nominations.

In this review of the Constitution and the Courts portfolio, I will reflect on two related aspects of the work:

(1) OSF’s role in the creation of and continued support for progressive legal organizations that counter dominant conservative legal thought, where I explore OSF’s efforts to mirror the Federalist Society and other conservative infrastructure, and ask how we should evaluate and compare progressive achievements with conservative ones; and

(2) OSF’s decision to seed state-level federal judicial nominations advocacy, where I ask whether our state-based judicial nominations strategy has improved the climate for nominations, and to what extent that strategy has affected the number and quality of judicial nominees.

As it now exists, this portfolio fosters the development, dissemination, and acceptance of progressive constitutional (and other legal) ideals that counter conservative Constitutional thought in courts, in practice, and in popular opinion. We support a field[[1]](#footnote-1) of grantees that meet these goals by generating ideas, building networks, advocating on judicial nominations, litigating, and using strategic communications to share their ideas with both elites and the general public.

As we think about how to build a vibrant, democratic, inclusive and more just society in the United States, the U.S. Constitution is a source of rights important across all four U.S. Programs goals. While the Constitution and the courts that enforce its promises are insufficient to make change alone, USP’s work on criminal justice, full equality, an equitable economy, and a strong and inclusive democracy can be undone by courts that are motivated by an understanding of the Constitution that is antagonistic to open society values.[[2]](#footnote-2) Because of this cross-cutting importance, OSF has, for at least the last 13 years, had a strategy on the Constitution and the courts.

1. **Pushing Back: Creating progressive legal infrastructure (2002-2008)**

Since 2002, in the wake of the Supreme Court’s decision in *Bush v*. Gore, OSF has been at the forefront of funding the creation of a legal and judicial infrastructure developed to counter that of the right wing. Conservatives provided an attractive model to follow: their now-30-year-old investment in the Federalist Society has created a seamless continuum from conservative law student, taught by conservative faculty, to conservative practitioner, and finally to conservative judge or justice. The movement was fueled, in part, by the [Powell Memo](https://prospect.org/article/legend-powell-memo), which set out a roadmap to change constitutional understandings to become more business-friendly, and which was in turn modeled on the successes of Nader’s Raiders and the ACLU. The right’s long-term investments in the courts and in judges through the Federalist Society have yielded [significant policy dividends](http://www.nytimes.com/2015/01/04/us/politics/gop-turns-to-the-courts-to-aid-agenda.html): for evidence of their continuing successes in the federal courts, look no further than the fight against the Affordable Care Act, both incremental and frontal attacks on reproductive freedoms and voting rights, the remarkable reworking of our Second Amendment jurisprudence, and the overall attack on the regulatory state, from worker safety and organizing to the environment. The Federalist Society combined (a) a deeply connected network of committed law students, professors and practitioners (remember [Monica Goodling](http://www.nytimes.com/2007/05/12/washington/12monica.html?pagewanted=all&_r=0)?), (b) large, consistent, diverse foundation and corporate funding, (c) disciplined issue and message adherence, and (d) a deep understanding of the courts’ importance by the conservative base and political elites alike.

John Kowal, USP Program Officer for this portfolio at the time, wasn’t the only one thinking about imitating the right’s successes: in the days after the *Bush v. Gore* decision, progressive lawyers and law students began to counter-organize on the East and West coasts (more below). USP considered the fact that while there were many existing issue-based legal organizations, none organized across progressive issue areas, with student capacity and long-term movement building as goals. For Kowal, and others at OSF, the Bush ascension—and the Supreme Court’s role in it—made clear the danger in being “for neutral principles in judicial selection, but … naïve about a process that threatens open society values.”[[3]](#footnote-3) In 2003, Kowal and then USP Director Gara LaMarche formed a progressive infrastructure portfolio to begin to address the asymmetry between conservative and progressive legal movements.

Two new organizations emerged as possible competitors to the Federalist Society, and USP provided seed funding for both: the Equal Justice Society (EJS), headquartered in the Bay Area and led by Eva Paterson, and the American Constitution Society (ACS), which started at Georgetown University School of Law. USP funded these organizations as part of a strategy to challenge dominant conservative Constitutional norms, in part by creating a network of the kind enjoyed by Federalist Society since the 1980s to discuss, debate and embrace progressive constitutional argument. No less important, Kowal funded the organizations in an effort to advance the substantive issues OSF cared about, by mobilizing lawyers, students, law professors, activists and judges to develop a rights-based Constitutional jurisprudence compatible with open society values. The groups were not divided only by geography: from its early days, ACS had a more ivory-tower, less diverse reputation, and EJS not only had a more explicit racial justice focus, but also included litigation in its programs. Ultimately, ACS established significant campus presence, with 100 law student chapters by 2005—a key part of the plan—while EJS faced funding and leadership challenges. Within three years, and with urging from OSF, the organizations’ programs differentiated, and ACS assumed a clear role as the left’s counterpart to the Federalist Society. EJS survived, emerging as a west coast-based civil rights advocacy organization.

But it would be a mistake to look at these organizations in isolation. One key to the Federalist Society’s success is its situation within a constellation of conservative organizations: the American Legislative Exchange Council drives state and local legislative efforts; the Heritage Foundation, Cato Institute and American Enterprise Institute take the lead on policy development; and the Washington Legal Foundation, Pacific Legal Foundation, and U.S. Chamber of Commerce Litigation Center are among the right’s strongest litigators. Of course, particularly in the economic realm, the Federalist Society also enjoys funding support from corporate law firms, whose clients’ interests are aligned in litigation. And the Judicial Crisis Network ([called, until 2010, the Judicial *Confirmation* Network](http://www.rightwingwatch.org/content/rebirth-judicial-confirmation-network)) operates to push conservative judges and obstruct judicial nominees seen as insufficiently faithful to the cause.

OSF arranged its funding in mirror image. In 2003, OSF began to fund the Constitutional Accountability Center (CAC), which describes itself as a “think tank, law firm and action center,” and which works broadly across issues to turn the text and history of the Constitution into a progressive sword, embracing the Constitution to make arguments supporting environmental regulation, civil rights laws, and access to justice, supplementing the wide variety of traditional progressive legal organizations that litigate in these specific issue areas. Kowal also began to provide support for the Brennan Center that was designed to transform it from a traditional legal organization to one with complementary think tank and communications capacities. In an effort at pluralism, the Brennan Center work explored use of the “living constitution” theory—a competitor to CAC’s text and history approach. And in 2005, OSF made its first courts-related grants to the Center for American Progress, founded in 2003 to provide a progressive counter the conservative policy shops.

Recognizing the need for continued pushback on conservative judicial nominees, OSF also began to fund organizations that had been active on nominations since the Robert Bork hearings of the 1980s (principally, the Alliance for Justice, People for the American Way Foundation, and the Leadership Conference for Civil and Human Rights (LCCHR), which together led a Beltway-based judicial nominations partnership, with periodic activation in the states around Supreme Court and other especially critical nominations).[[4]](#footnote-4) Here Kowal made what he calls a “significant intervention,” elevating the LCCHR to a central role[[5]](#footnote-5) because he perceived that Wade Henderson might provide a positive moral center to a field that needed a more principled set of messages than those in constant rotation since the Bork years.

Three other contextual matters deserve mention as we consider these parallel structures. **First,** the Federalist Society began at Yale Law School, but grew with significant support from the Reagan White House. Attorney General Edwin Meese, whose “[focus was on the future](http://www.fed-soc.org/publications/detail/the-philosopher-in-action-a-tribute-to-the-honorable-edwin-meese-iii)—how Americans would view the Constitution, and how the courts would apply it, well after President Reagan left office,” took special interest. By contrast, the progressive legal infrastructure described here came into being during a period of opposition, while there were few opportunities to exercise affirmative legal muscle, either through seating allies on the courts, or by holding power and making policies in the Executive branch. **Second,** the Federalist Society drew upon a movement that viewed the courts as important, partially as a backlash against the perceived excesses of the Warren Court, and partly as tools of a conservative revolution. The strength of this feeling was reflected in comments by David Keene, former president of the National Rifle Association, at a 2014 OSF event, when he attributed the NRA’s successes in changing the law of the Second Amendment to conservative activists’ deeply-felt belief that it was their job to *restore* the Constitution to its original meaning.[[6]](#footnote-6) **Last,** but certainly not least, the Federalist Society has always enjoyed a substantial funding advantage in both number of funders and total contributions. Based on the 2013 990s for ACS and the Federalist Society, the Federalist Society continues to enjoy a **4:1** funding advantage.

1. **Obama Elected: Smoother sailing? (2008-09)**

With a left-leaning constitutional law professor in the White House, and a filibuster-proof Democratic majority in the Senate, many in the progressive legal movement were eager to dust off the policies and legal theories created over the past eight years, and to remake the federal courts with progressive judges. Many progressive legal advocates [took positions in the executive branch,](http://legaltimes.typepad.com/blt/2008/11/acs-executive-director-named-obamas-staff-secretary.html) including Lisa Brown, then-Executive Director at ACS. But a variety of factors (the failing economy, competing priorities like passage of a comprehensive health care law, and perhaps more inherent disinterest in the courts) put legal and judicial development toward the bottom of the Administration’s long to-do list.

But it wasn’t just the White House that had a role in the slow movement on judges. Judicial nominees faced unparalleled obstruction from Senate Republicans, who refused to turn in the blue slips[[7]](#footnote-7) that permit nominees to receive a Judiciary Committee hearing, and who threatened to filibuster nominees who would have once sailed through the process. Where once these tools were reserved for especially contentious Circuit Court nominees, more and more District Court seats were caught up in the gamesmanship. Senate Democrats slowed the process as well, failing to turn in blue slips in a timely manner. Furthermore, Senate Democratic leadership did not devote the floor time necessary to call the Republicans’ bluff on the filibuster threat. By November 2009, *The New York Times* [decried the Obama Administration’s slow pace in nominations](http://www.nytimes.com/2009/11/17/opinion/17tue1.html), comparing it unfavorably to the George W. Bush Administration.

At the same time, USP was reorganizing, which involved closing some portfolios and rearranging others. In part because federal judicial nominations work was deemed (correctly) likely to continue even in the absence of OSF project funding, USP’s federal nominations portfolio closed with a tie-off grant to AFJ.[[8]](#footnote-8)

1. **The Honeymoon Ends: Course correction (2010-11)**

By 2010, there was a growing feeling that the hopes and expectations people had for an Obama Administration that would swiftly transform federal policies and courts would not be met. Republicans regained the House and ended the Democratic filibuster-proof majority in the Senate. Even with Democrats controlling the White House, Senate and House, a traditional inside-the-Beltway approach had not worked to ensure either progressive victories on judicial and executive branch nominations, or a robust embrace of the progressive policies OSF’s infrastructure groups had been proposing while in exile. Staff at OSF had virtually no faith in the existing judicial nominations coalition, viewing them as lacking creativity and resilience, and stuck in a combative and unproductive mode. ACS members complained that the organization was unable to deliver positions in the Administration or on the Hill with power similar to the Federalist Society. In the midst of this angst, in 2011, OSF undertook a full analysis of ACS’s strengths and weaknesses (the OSF Report) in an effort to understand the impact of OSF’s investment in the organization and the field at the nearly 10-year mark.

In the preceding year, Laleh Ispahani and Tom Hilbink brought the Wyss Foundation in as a new funder to this work, and developed relationships with existing funder the Sandler Foundation. With few other partners in this area, the three foundations began to work together to determine what could be done to foster a more effective field. Based on early discussions with the consultant coordinating the OSF Report, it became clear that member engagement was an area of weakness. That preliminary feedback, together with initial conversations among the funder group, led the Sandler Foundation to jump ahead, insisting--without coordinating with OSF or Wyss--that ACS make changes to its organizational structure that would focus resources to better engage members and coordinate activities in its chapters. Later in 2011, after OSF shared the OSF Report with ACS, we further conditioned grant renewal on attention to membership, evaluation, mission and engagement—a negotiated general support grant before we used that term.

In 2010, the year leading up to the OSF’s Report’s commission, the Wyss Foundation made big, new investments in a co-funded federal judiciary program involving ACS, CAC and CAP. [[9]](#footnote-9) The Wyss Foundation judicial nominations program grant provided ACS an experiment in how to engage its membership in a more direct and reciprocal way, which meant that when the OSF Report of 2011 suggested that engagement was a necessary component of meaningful membership, ACS had some track record on which to build. In the ACS/Legal Progress/CAC collaboration, the principals of each organization worked together to pursue an inside game—sometimes working within the existing nominations group, and sometimes outside it—to increase pressure to up the pace of nominations. The project engaged ACS’s grasstops members as vocal advocates with the White House and Senators;[[10]](#footnote-10) CAP’s research, communications and Washington influence; and CAC’s litigation and research shop to develop and defend the judicial philosophy of nominees and potential nominees.[[11]](#footnote-11) These efforts received largely positive feedback from the White House and Senators, and the concerted grasstops engagement had real payoffs in building political momentum for more aggressive nominations. Not surprisingly, the traditional nominations groups felt the deep criticism that was reflected in the Wyss project and in OSF’s turn to a new judicial nominations strategy (discussed below). Indeed, in some cases the Wyss coalition was able to achieve behind-the-scenes progress by adopting a less aggressive public posture than the traditional groups, and being somewhat more willing to accept deals and accommodations than were groups where a single issue might be at play. In some instances, the White House and Senators may have been able to triangulate, pitting the new coalition against the old one.

With new non-OSF funding available for federal judicial nominations work, OSF could focus on long-range change and infrastructure. The Wyss Foundation prioritized immediate measures of progress and was not particularly interested in funding progressive infrastructure. Wyss and Sandler were both more prescriptive in their approaches with grantees, as well; they made direct interventions in grantees’ organizations that would have been unusual within OSF’s grantmaking culture.

Meanwhile, at OSF there was robust staff-level internal debate about whether courts-related work in the states might also help to “unstick” the nominations process. In 2012, Tom Hilbink began funding a diverse group of organizations to experiment with organizing grassroots courts activists—a project no existing coalition organization had been willing to take on. The Infinity Project [worked](http://www.startribune.com/a-push-for-federal-court-diversity/287727351/) ([successfully](http://www.klobuchar.senate.gov/public/2015/2/klobuchar-franken-recommend-wilhelmina-wright-for-federal-district-court-judge)) [to get women](http://minnlawyer.com/2013/03/01/klobuchar-recognizes-infinity-in-senate-hearing/), and particularly women of color, on the bench in the 8th Circuit; the National Council of Jewish Women engaged in League of Women Voters-style local organizing through their chapters and coalition partners in key states (including Ohio and Pennsylvania); and the People for the American Way Foundation began to develop “Why Courts Matter” curricula for use with their Young People For and Young Elected Officials projects. In a somewhat different and complementary model, Legal Progress began to focus on state work as well, making regrants to state coalitions, tying state actions to what was happening at the federal level, and providing CAP’s signature communications support to state grassroots organizers working on nominations issues. They developed [shareables](http://whycourtsmatter.org/issues/) that placed nominations in the context of constitutional issues people care about. These four groups continue to work together today, in conjunction with national groups.

1. **Where Are We Now?**

By the end of 2014, Obama’s [confirmation rate exceeded the rates](http://www.brookings.edu/blogs/fixgov/posts/2014/12/19-obama-lame-duck-judicial-confirmation-success-wheeler) of the Clinton and George W. Bush administrations. What changed? Most commentators point to filibuster reform—an effort OSF chose not to fund. But even after filibuster reform, Republicans continued to obstruct confirmations by refusing to permit voice votes and delaying the return of blue slips. With grasstops and grassroots pressure, and no viable threat of filibuster, Senate Majority Leader Reid finally [committed the floor time](http://www.huffingtonpost.com/2014/05/21/senate-filibuster-reform-obama-nominees_n_5358863.html) to confirm 27 judicial nominees during the 2014 lame duck session (where they were [frequently almost unanimously confirmed](http://www.huffingtonpost.com/2014/12/17/obama-judicial-nominees_n_6328390.html)).

When Congress returned to session in January, Republicans took control of the Senate, making Iowa Senator Chuck Grassley the Chair of the Senate Judiciary Committee. As of this writing, two judicial nominees have been confirmed during his tenure, and the number of judicial emergencies has risen from 12 to 24. Few expect significant progress in the remaining years of this Administration—especially if a Supreme Court vacancy arises. Few inroads have been made to cultivate Republican champions of up or down votes for nominees. Organizations working on nominations are now developing alternative strategies for 2016 that address the role of the movement if the White House changes hands. In the next section, I will pivot to our related work to promote a progressive constitutional understanding, and explore its connection to the field’s work on nominations.

1. **Connecting Nominations and Constitutional Values**

Jeffrey Toobin calls President Obama’s legacy on judges “[symbolically rich but substantively hazy](http://www.newyorker.com/magazine/2014/10/27/obama-brief).” Speaking broadly, nominees’ have been ideologically moderate. While there has been [remarkable progress](https://www.whitehouse.gov/share/judicial-nominees) in the diversity of the federal bench, f[ew of the new judges come from the public defender, civil rights or other public interest backgrounds](http://www.afj.org/reports/professional-diversity-report)—professional experience we might view as especially important to open society values—and most come from corporate law firms. If it’s not the inspiring nature of the nominees, it seems likely that the uptick in activism is at least partially responding to the particularly disastrous and [unpopular](http://www.gallup.com/poll/4732/supreme-court.aspx) decisions of the Roberts Court. Senators report that they are hearing from constituents about the importance of the courts for the first time, but it is at this early stage in the state-based experiment, it is difficult to untangle the causes and effects in this area.

Nevertheless, these new judges have benefitted from the advice and support OSF grantees provided during their confirmation processes, and have been substantially more open to participating in on- and off-the-record events with ACS and other organizations. There is some evidence that the new judges are having a [marked effect on jurisprudence](http://www.nytimes.com/2014/09/14/us/politics/building-legacy-obama-reshapes-appellate-bench.html?_r=0). And senior judges long associated with progressive legal thought are speaking up to connect the act of judging with matters of serious Constitutional and policy concern (e.g., see Judge Jed Rakoff’s recent response to a Brennan Center publication on mass incarceration, [here](http://www.nybooks.com/articles/archives/2015/may/21/mass-incarceration-silence-judges/)).

In the past two years, the field has also displayed an increased focus on the message discipline for which the Federalist Society is known. This was apparent most recently in the Affordable Care Act case, where CAC, CAP and the public relations firm SKDK worked together to: (a) develop and manage an amicus strategy that made sure all necessary arguments would be seen by the Justices, and that ample consideration was given throughout the amici to swing Justices’ particular attitudes, (b) develop public messaging for the campaign, and (c) enforce message discipline among the participating groups. But constitutional responses are still issue-based and ad hoc, and while CAC has had some success addressing its arguments to a majority of the current Supreme Court Justices, we are little closer to a popular articulation of progressive legal theory that would have the same resonance as “strict construction” and “originalism” seem to have.

But perhaps a single coherent theory (or the appearance of one) is not an absolutely necessary marker of progress: recent polling suggests that about half of Americans reject originalism and say that the Supreme Court’s decisions should be based on what the Constitution “[means in current times](http://blogs.findlaw.com/supreme_court/2011/07/pew-poll-how-should-scotus-interpret-the-us-constitution.html).” These opinions align closely with partisan affiliation. Even without agreed upon magic words, progressives respond to Constitutional arguments that address modern contexts—whether it’s through CAC’s “whole constitution” approach, or through a “living Constitution” lens. Perhaps we can live with pluralism, while still building a movement that cares about—and changes—what happens in the courts and who sits on them.

As a final note, the pool of funders for this work has been static for several years now, and money for this work is not increasing, either within OSF or externally. This raises several questions included below.

1. **Conclusion**

We are now 13 years into an experiment that Federalist Society started over 30 years ago with vastly more financial support, and material and strategic support from within the White House. As I reflect on this portfolio and think about its future, some of my questions include:

* *Did OSF identify the right starting point for the creation of the national legal infrastructure field, or did the effort suffer because it was not built upon the necessary grassroots progressive infrastructure that valued the courts?*
* *Was emulation of the Federalist Society structure the right approach?*
* *Did pluralism in progressive legal thinking make it hard for the field find a clear direction forward when its members became office holders, policymakers, judges, and what could/should we have done differently to enable a more coherent field?*
* *How (and when) do we evaluate the success of organizations whose purposes are inherently long-term?*
* *Have we achieved the right balance between state and federal projects for judicial nominations? Can the state-based strategy be seen as an attempt to infill grassroots passion for the courts that existed in conservative circles* prior *to the Federalist Society’s founding?*
* *Have we achieved the right balance between c3 and c4 grantmaking for judicial nominations? Are there other tools we should be using in this work?*
* *Would a push toward issue-based approaches help draw new funders? If it would, must it be at the expense of attention to a more overarching constitutional narrative?*
* *What did we learn from the Wyss/Sandler experiences that might inform our outreach to new funders in this area?*

1. I refer to this as a “field” portfolio in its current state, but acknowledge that the portfolio originally may have been what we now refer to as a foundation concept. Conversely, OSF’s original investments in judicial nominations projects provided support to an existing field, and the 2010-12 change in strategy had elements of a concept, since we created a new sub-field: state-based judicial nominations advocacy. [↑](#footnote-ref-1)
2. This portfolio review focuses only on the federal courts. OSF’s work on issues concerning state courts is in a related but independent portfolio. *However, the focus and methods of USP’s work on state and federal courts issues are converging somewhat, and we are closely monitoring the shifts to evaluate whether the institutions should remain in separate portfolios.* [↑](#footnote-ref-2)
3. Telephone interview with John Kowal, 5/11/15. [↑](#footnote-ref-3)
4. Progressive counters to ALEC have proven more elusive. OSF has funded Progressive States Network, the Center for Policy Alternatives (now defunct), and the Center for State Innovation, among others, to fill this gap. While no organization has been able to put all the pieces together, OSF is currently considering support for the State Innovation Exchange, formed by the merger of PSN, CSI and an anti-ALEC project of CSI called “ALICE.” [↑](#footnote-ref-4)
5. While other organizations received some funding for their work on nominations, Kowal funded the coalition’s operations, including a staff person, through LCCHR. [↑](#footnote-ref-5)
6. Full audio of this conversation, which considered the marriage equality and gun rights movements, [here](http://www.opensocietyfoundations.org/events/guns-marriage-and-constitution). [↑](#footnote-ref-6)
7. For an explanation of the blue slip tradition, see [here](http://talkingpointsmemo.com/dc/how-republicans-can-still-block-obama-judges). [↑](#footnote-ref-7)
8. After a final project grant for judicial nominations work in 2009, LCCHR became an anchor grantee, with continued multi-year general support. LCCHR now considers itself “unfunded” for its nominations work, but continues to play a central role in the coalition. Other grantees that had begun to work on judicial nominations, but which operated outside the judicial nominations portfolio, received general operating support and include CAC, CAP, and ACS (which held a 5-year $5 million general operating grant from 2006-11, and which became an anchor grantee in 2011). [↑](#footnote-ref-8)
9. OSF began funding Legal Progress in 2012, after a 6-month start-up period funded by the Wyss Foundation. Wyss focused on inside the Beltway approach; OSF supports its efforts to organize non-lawyer grassroots courts activists in key states. [↑](#footnote-ref-9)
10. In addition, as part of its Wyss-funded work, ACS began to work not only with grasstops, but with rank and file chapter members around the country to develop the “Why Courts Matter” programming arc and to engage its rank and file members as courts activists. [↑](#footnote-ref-10)
11. In the same timeframe, OSPC made complementary c4 grants for judicial nominations advocacy to groups including the Committee for a Fair Judiciary. [↑](#footnote-ref-11)