

### Conversations with Bill Kristol

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**I. On the Supreme Court Today (0:15 – 44:19)**

KRISTOL: Hi, I'm Bill Kristol. Welcome to CONVERSATIONS. I'm joined by my friend, Adam White, who has recently moved from The Hoover Institution to The American Enterprise Institute, where you're – what's your distinguished title there? Visiting? Resident Scholar?

WHITE: Resident Scholar.

KRISTOL: Did you have the same high title at Hoover, or was it just a visiting scholar? You were a resident scholar there. [Laughter]

WHITE: I felt appreciated at Hoover too.

KRISTOL: That's good, yes. Anyway AEI has a new program in Social, Cultural and Constitutional Studies, which is great and you're going to be a key part of that. You've obviously been a very – a lawyer and a commentator on all matters legal, judicial, the courts and the administrative state for *The Weekly Standard* and many other journals. And we had a conversation previously about the courts and the administrative state, before the Trump administration began I guess, I think – right?

WHITE: Yeah.

KRISTOL: But today we're going to talk about the Judiciary. Kind of an important topic, a key talking point of Trump supporters, and maybe legitimately so. And I guess I'd like to begin with sort of 30,000 feet.

I mean if you studied American politics, there was the Warren Court era, and then there was maybe more ambiguously the Burger Court era, which seemed to be sort of the Warren Court stopped doing its thing, but there wasn't much of a counter-reaction either. And then maybe the Rehnquist Court, I don't know. Or the Anthony Kennedy Court when he was the swing vote. And certain things happened – marriage equality, and certain other things didn't happen. You know, and there was it seemed like a somewhat coherent era, I guess, in terms of the jurisprudence.

Where are we? I mean, what's the moment? Where have we been recently, where are we going? What are some of the alternative futures? Let's talk some about that.

WHITE: Well, for the first time it really is the Roberts Court. With the departure of Kennedy and the arrival of Kavanaugh replacing him, it's the first time that the Court really is under the control of the Chief Justice. The first time in a long time actually. Even before Roberts was on the court you had Sandra Day O'Connor was the swing vote on the court.

KRISTOL: That's true.

WHITE: And Kennedy after her. So even with Rehnquist and then Roberts as the chiefs, the court really did belong to that swing central justice.

And as you noted, for a long, long time we've always identified the court with the chief justice, who really had control. Whether it was Warren with a really sort of pretty unified block of New Deal era appointees, and then Burger, a little bit more moderated but still moving in a sort of a general direction. This really is the first time that Roberts has the opportunity to put his stamp on the court and I think he's going to affect it in some important ways.

KRISTOL: Yes, so let's talk about that. I mean sort of big picture – what is – I mean Trump supporters, and Trump opponents on the left, are very taken by the notion that this is a major consequence one way or the other, of Trump being president. There are all these judges who are being appointed, justices of the Supreme Court, and I guess judges to lower courts too.

How big – is that a lot of inside baseball, lawyers thinking that who becomes a judge is very important? And if you, again, looked at it from 30,000 feet you would say, how much is it really going to affect most of these trends in American life? Or is this actually – are we having an important change in the direction of the institution, and how important is that institution, I guess?

WHITE: Well, as our friend Gary Schmidt once told *The New York Times*, the Constitution is too important to be left just to the judges and the lawyers.

So we don't want to overstate this. But it is important, and especially for those of us who are critical of President Trump as a candidate and now as president, it is, I think, important to concede that he's appointed a lot of judges. Not just the two Supreme Court nominees; he's appointed dozens and dozens of judges to the lower Courts of Appeals, which are really, really important – we can get back to that – and then a lot of trial judges as well.

The most important thing is that the Supreme Court, the departure of Kennedy and the arrival of Kavanaugh, means that if nothing else, the sort of steady progression, expansion of rights with respect to abortion, that's probably been halted. I'm skeptical that it's going to be rolled back any time soon. But sort of, this court, I think, will be more sort of solicitous towards state health and safety regulations on abortion. There'll be more room for that kind of regulation.

I think this court will be a little bit more moderate on the growth of the expansion of same-sex rights, same-sex marriage rights, at least with their intersection with religious liberty, and other things, although Kennedy himself sort of began that moderation towards the end of his time on the court.

We'll see some changes in those areas of law. We shouldn't overstate it, though. I think the key areas are probably religious liberty, affirmative action. We'll see some on another issue I care about a lot, the administrative state. Those are probably where we'll begin to see actual significant changes.

KRISTOL: So let's talk about those. And of course, we don't know, I mean Trump could have a second term and be followed by another Republican. Elizabeth Warren could be the next president, followed by two Democrats. And so we – what's really at stake?

It sounds like from what you're saying that on the famous, the social issues, about which the courts in discussion of which, and the resolution in which the courts were so central over the last few decades,

and which is so much of the debate about the courts has preoccupied. I don't know. It feels to me, I'm no expert, that not much is going to change one way or the other. I mean presumably same-sex marriage is here to stay.

WHITE: Right.

KRISTOL: There are some issues around the fringes of sort of how far to go on some further things.

WHITE: Who's going to be forced to bake a cake for whom, and that kind of thing.

KRISTOL: Right. And then on abortion or the right to life issue, I guess Roe could be overturned, but even if it were, some number of states would keep abortion legal. So in the real world it seems to me of let's say sexual morality and gender roles, it doesn't sound to me like the courts are going to be major players over the next five, ten, twenty years. Is that – ?

WHITE: Well that could be. If that's true, that's a change in and of itself, right?

KRISTOL: So that they've stopped being a sort of major force in one direction.

WHITE: Yeah. I think that's extremely important. And I wrote – one of the last pieces I wrote for *The Weekly Standard* actually, it was about the fact that the departure of Kennedy, as I called it, 'The End of Justice Kennedy's Camelot' – it wasn't that we'd see a rollback of these rights, but the left could no longer count on Justice Kennedy as a pretty reliable sort of leader of the court in a steady leftward direction.

So we'll see, like I said, we'll see the court sort of put some limits on some things, open the door up to more federalism on issues like public health and safety regulation. But then we'll also see sort of a counter-move. Groups that would normally challenge state abortion laws in federal court under the federal constitution, they will probably start to look more at state courts and state constitutions.

I think one of the biggest changes in the next twenty years is going to be a pretty big rediscovery on the left of state constitutional law. This is something that actually Justice Brennan called for, I think, in the early '80s. We're going to see a return to that. I think suddenly we'll see a strange new respect for federalism when it comes to state constitutions and state courts.

We saw that actually not long ago from my home state, Iowa, the state passed some new laws regarding abortion. And the challengers, they stayed out of federal court, they didn't invoke the U.S. Constitution. They went to state court –

KRISTOL: The laws were restricting –

WHITE: That's right, they were restricting abortion. And the challengers – I think it was the ACLU and Planned Parenthood, I might be wrong – they went to state court under the state constitution. And I think we'll see more of that, especially on issues like abortion.

Where if the left is convinced – and again so much depends on what happens in the next election and the next few years of judicial appointments – but the more that the left becomes convinced that the courts are no longer a hospitable forum for the issues they wanted to make progress on, the more they're going to move to state court under state constitutions whenever possible.

KRISTOL: I mean that's interesting. We're seeing how ironic they are – well not ironic, but the effect that of red states becoming more red state-like perhaps. Because presumably those courts directly if they're elected or indirectly if they're appointed by governors, you know, reflect the politics of those states. The red states becoming more red state-ish, and blue states becoming more blue state-ish in terms of even the courts. Right? I mean then you could actually have different jurisprudences sort of in different parts of the country on some of these issues, I suppose.

WHITE: Now even in red states when it comes to state supreme court selection, oftentimes the selection process is really tied in to the bar or the court infrastructure itself. So it might – actually, red states might be less red when it comes to state constitutional law, and that could be a real advantage for the left when they go into court. Now, a lot of issues will stay in the U.S. Supreme Court of course.

KRISTOL: Right. So let's go through the ones you mentioned. So I mean, religious liberty seems to be one that is very – was very front and center of the late Obama administration, a couple of very big cases.

WHITE: Right.

KRISTOL: Certainly very big in the rhetoric of 2016 with Trump, and more muted I guess on the other side. And a lot of strong feelings about that. Where does that go, do you think?

WHITE: So in the last few cases under we'll say the old court, we saw the fights over – I guess it was Masterpiece Bakeshop. The bakery that was being required by the State of Colorado to bake cakes for a same-sex wedding. And then we saw the collision of Obamacare and religious liberty a couple of years earlier.

And so, that's a matter of religious liberty. It's under, at least at the federal level, what we call the Religious Freedom Restoration Act. That was supposed to strike a balance, restrike the old balance between religious liberty and just general neutral state or federal regulations.

We saw an interesting move coming from Justice Ginsburg and others in these cases, where they wanted to interject a new consideration of the balancing test. They really wanted to put front and center the impact of somebody's religious beliefs on the rights or interests of third parties. So that the baker who didn't want to bake a cake was, in effect, imposing his religious beliefs on the personal moral beliefs of the couple that wanted to get the cake, at least that was the argument.

I'd say that the arrival of the new justices means that argument is probably unlikely to prevail now, which I think is important. It would have been a significant recalibration of religious liberty and the Religious Freedom Restoration Act to add in this special new focus, sort of a trump card on religious liberty claims, any time some third party's rights were affected. Whether it was an employee who wanted contraceptive coverage in their insurance, or it was a couple that wanted a cake for a same-sex wedding, or anywhere else where somebody is invoking religious liberty sort of in the marketplace.

KRISTOL: So you think religious liberty gets more thoroughly protected –

WHITE: Yes.

KRISTOL: No one's going to make priests or rabbis do things they don't want to do in terms of marriage, or doctors do things they don't want to do in terms of procedures in the hospitals and so forth.

WHITE: Yeah.

KRISTOL: But I mean the tilt will be more towards respecting people's religious views and wishes to not do A, B, or C.

WHITE: Right. And it might seem like a small thing, but it's actually very important. I think it had a lot to do – so a lot of the energy from conservatives in 2016 who weren't big fans of Trump, but who thought the court with the Justice Scalia seat open, was an incredibly important issue to vote on.

KRISTOL: Right.

WHITE: You saw just a year or two earlier, in the same-sex marriage litigation, where President Obama's Solicitor General, he was asked in a Supreme Court case, if we recognize a federal constitutional right to

same-sex marriage, does that mean that non-profit organizations that are critical of or opposed to same-sex marriage, will they lose their tax-exempt status?

And the Solicitor General, who surely was asked this question in prep sessions, kind of shrugged and said, “Oh, I don’t know, that’s a really good question.” That terrified a lot of people. And I think the reassurance that there’s going to be – that the court will be more hospitable towards free exercise of religion claims, the rights of non-profits that are critical of some of these rights. I think that is going to be a significant shift in where the court could have gone under president Hillary Clinton.

KRISTOL: I mean I suppose the – not exactly counter-argument, but the qualification of that might be, again if you’re sort of more of a political scientist or social observer let’s just say, and not a econ law specialist, is, that sounds right, and that will certainly moderate. It’s certainly different from the way it would have gone with a Democratic president.

But big picture, again, 30,000 feet, status of religion in America – does it really – these court decisions do seem in some cases to be – maybe this is a little misleading, but they seem to be sort of on the margins. And it’s one private company which doesn’t want to provide this insurance and one bakery. You know, we’re not talking about the big picture kind of religion in the public – but maybe we are. I guess that’s the question.

WHITE: Well, we could be talking about Catholic hospitals, Catholic adoption agencies. That whole sort of infrastructure of social services in cities, towns, states, that has sort of existed under government regulation, but has very strong moral components especially, again, the church-affiliated organizations.

KRISTOL: And you think those will tend to be protected.

WHITE: Yeah.

KRISTOL: Even if – okay, that’s interesting.

WHITE: Yeah, I really think –

KRISTOL: I mean they may choose under social pressure and cultural pressure I suppose, to not insist on certain things, obviously.

WHITE: Right. I mean, more than anything I think one of the things that fuel the sort of Flight 93 election fears of a lot of people on the right was this concern about using the federal administrative state, fueled by a particular progressive ideology, to really come down heavily on institutions like private companies, non-profits, who are just out of step with those cultural –

KRISTOL: Colleges.

WHITE: Colleges.

KRISTOL: So how much is those – I’ll take colleges and universities, which I know a little bit about. I mean there the federal administrative state came down heavily, I would say, on one side, with Title IX regulations in that letter of 2011.

WHITE: Right. Yeah, you know, the “Dear Colleague” letter.

KRISTOL: Yes. Now, is it unreasonable for the right though to think that – I mean is it reasonable for them to think, we do need to control the Education Department to prevent such letters from being sent, and to get them somewhere rescinded, as has happened under Trump? Or, can they say, “well the courts will probably stop that kind of stuff from happening”?

That is, how much will the courts affirmatively step in as opposed to simply allow a Republican appointee to not go as far as a Democratic appointee?

WHITE: Well, just to be very clear, when the Obama administration sent out those letters to colleges saying you need to recognize these rights on victims of sexual assault, people who want to use the bathroom of their choice, the government was – the administration was pushing on an open door there. Right? The colleges were very happy to comply with these things. And the change of administrations, change of courts, isn't going to change that.

And I'd say in the future the next Democratic administration, if they want to pursue those policies, they'll do it I think – they'll do it in a smarter way procedurally. I don't think there's a whole lot the courts are going to do to intervene there.

KRISTOL: So in that respect, big social trends don't get stopped by a few judges.

WHITE: That's right, that's right. The court doesn't create social trends, although it sometimes can help them along the way. It doesn't stop social trends, it just can moderate and modulate the ways in which they actually are achieved through public policy.

KRISTOL: So moving through some of the other big areas –

WHITE: Like affirmative Action.

KRISTOL: So, race and affirmative action. So if you write a history of the Supreme Court over the last 75 years you would say, race has been a major, both achievement and controversy and so forth, of the federal courts.

Where do you – now the question I suppose is less further advances of civil rights. I mean to use – I don't mean to demean it, I'm just saying from one point of view. As opposed to moving back in the other direction towards color-blindness and so forth. Where does that go, do you think?

WHITE: So, for the last several decades in the Supreme Court the affirmative action question has always been up for grabs. Case after case it wasn't clear where the court was going to come down, in large part because of Justice Kennedy. This is an area where his departure makes a real difference. If his replacement, Justice Kavanaugh, turns out to be a steadier hand on either side of the issue, I think at least we'll get some more predictability.

And it comes at an important time. As you know, your *alma mater*, Harvard University, is facing a significant federal lawsuit over its affirmative action policies, its treatment of Asian American students and student applicants. And the –

KRISTOL: Didn't you go to Harvard Law School? I mean it's like suddenly it's *my* alma mater when they're getting sued for, you know, for bad behavior – but that's okay, that's okay [laughter]. But it was the college I suppose.

WHITE: Well, but I'm – Harvard Law School is –

KRISTOL: It's not really Harvard. Got it.

WHITE: It's a few – and you'd be the first to point that out. [Laughter]

KRISTOL: Totally.

WHITE: But so Harvard is facing a tough case there. The record in the case is really ugly. The documents that have come out from inside the admissions policy. They're really – proponents of affirmative action really could not have – they couldn't have a worse case.

I think this is going to be an incredibly important case. Who knows how the trial judge is going to rule? It's been pending for a little while. Who knows how the court of appeals is going to rule? But this really does seem like a vehicle to make significant change on affirmative action law.

And specifically whether the 14<sup>th</sup> Amendment's protection of equal protection of laws – whether that blocks this sort of treatment of Asian Americans in the admissions process, and perhaps pushes us further towards what Chief Justice Roberts called for, a color-blind Constitution on university admissions policy. So that, I think, could be a very significant change.

KRISTOL: So despite all the social – it seems to me – social and cultural momentum towards diversity, which is what affirmative action sort of morphed into in some ways, in other ways it's its own thing.

WHITE: Right.

KRISTOL: But you think the courts really could move against that, at least where it clearly is disadvantaging people partly based on race or ethnicity.

WHITE: Yeah, I think so. Especially when some of the documents that came out from Harvard were just so really eyebrow raising, really astonishing, in how Asian American students were being disadvantaged. I think that we'll see at least significant movement on the treatment of Asian Americans in this process. But once you begin that conversation, it's hard to see where you draw lines without really moving towards a color-blind Constitution.

KRISTOL: And do we move towards that and not just for the public sector, but like I suppose Harvard is the private sector, but for the private sector not just for universities but for hiring and other things?

WHITE: That I think will become murkier. But definitely with universities and their obligations under federal laws, in addition to state universities under the federal Constitution, I think we'll see some movement.

KRISTOL: Interesting. Where else would you sort of put a spotlight? I mean the other issues that have been so big over the last several decades, or what? There's crime – I mean that was very big in my youth. Law and order, judges – I have the vague sense there's not that much being resolved one way or the other. That criminal justice policy is not centered in the federal courts anymore and that it's pretty – am I wrong about that?

WHITE: Well, you're seeing some criminal justice issues in the form of search and seizure and new technologies. Right? What does it mean for the police to obtain your cellphone records of your location from your cellphone company, tracking car movements? That kind of thing.

I will say, on these issues of criminal law, this is an area where the conservative coalition on the Supreme Court really breaks down in interesting ways. Justice Gorsuch seems much more libertarian. He has moved with the liberals on the court to declare a couple of criminal laws unconstitutional, because the laws are too vague – it's called 'void for vagueness.' It's kind of a criminal version of the non-delegation doctrine. We've seen Gorsuch move there, where other conservatives weren't.

Justice Alito meanwhile has always been sort of more deferential to the practical needs of law enforcement; having been a federal prosecutor before, I suppose that's no surprise. So that'll be a place where you could get some interesting coalitions between the right and left on some decisions.

But I agree with you, criminal law is probably less important. What I would point to next, my other area of focus, is the court and the administrative state.

KRISTOL: So let's talk about that because the administrative state went from being something that you and Chris DeMuth and twelve other people have argued about at George Mason Law School and AEI

and Hoover and Hudson think tanks, to a kind of a big term thrown around in 2016. I'm not sure if people really knew what they meant by it. And so what – will the courts curb the administrative state? Will they – are they part of the – will the increasingly – Well, explain what's likely to happen there, and what has happened there I guess?

WHITE: Well, the first thing that's happened is the appointment of two Supreme Court Justices. And if you look at Kavanaugh and Gorsuch, it's pretty clear their main qualifications in terms of their record for getting on the Supreme Court, was their focus on the administrative state. Both of them, Kavanaugh on the D.C. Circuit, Gorsuch on the 10<sup>th</sup> Circuit out West, both issued a number of opinions where they were critical of some Supreme Court doctrines of deference to administrative agencies, broad delegations of power from Congress to the agencies.

Now when you're on the lower courts you're not in a position to change the doctrines; although you can sort of hem them in a little bit. And I think both of them were picked in large part because of their views on the administrative state. And by the way that's also true of a lot of the lower court nominees.

The selection process for the justices and judges really was centralized this time in the White House with White House Counsel Don McGahn. This has been a major issue for him, the administrative state. He used to run the Federal Elections Commission, so he's seen it up close.

And so I think we'll see some significant changes on – well on issues like deference where we saw in the last Supreme Court term a little bit of recalibration on that. There's going to be questions about this doctrine, I won't bore our audience with it but it's called "Chevron deference."

KRISTOL: Yeah, I've always been a big fan of publishing articles at *The Weekly Standard* on Chevron deference.

WHITE: I've published a few of those, yeah.

KRISTOL: We had to change the headline though, so people might actually read them, you know. You think really, are we deferring to some oil company? That was a case where it was a Chevron versus someone, I suppose. I can't remember who they were suing, or were they being sued?

WHITE: Well, no it was the EPA got sued or the EPA got involved in a lawsuit against Chevron. Yeah, deference to oil companies, that was actually the Bush foreign policy, right?

KRISTOL: Good point, yeah. And so the deference was – but just to clarify, the administrative law issue really at its heart is –

WHITE: Yes. The issue is, when Congress writes –

KRISTOL: What constraints are there on the Executive Branch, or the administrative agencies, in just broadly interpreting laws, broadly administering them, changing their mind, being arbitrary. This whole gamut of things that a big government can do, and sometimes does, right?

WHITE: Right. When Congress writes a vague statute, and that's almost all statutes, the question is, who's going to decide what that statute means? A judge? Or the federal agency that administers it? Now for a long time, dating back to the '80s, the conservative view, the Scalia view, was, we needed judges to be deferential to the agencies to leave room for the elected president and his appointees to make policy within the limits of the statutes.

KRISTOL: And Congress could step in to fix it, or the elected representatives or someone could fix it. And so this was sort of, of a piece with judicial restraint of a certain kind.

WHITE: That's totally what it was. And about eight years ago you had folks like Justice Thomas, scholars like Philip Hamburger, even Justice Scalia a little bit towards the end, saying maybe the deference thing



has gone overboard. I mean Thomas and Hamburger and others said that it's definitely gone overboard, it's inherently illegitimate, judges shouldn't defer to anybody.

But even conservatives who were proponents of deference thought maybe this stuff's gone overboard. And so, I think there will be – there's definitely a movement among conservative judges and law scholars to recalibrate these things, make judges – as my new colleague at AEI Peter Wallison says, we need more judicial fortitude, a line from *Federalist 78*. That judges need to decide more and defer less.

Another question, and this was also the subject of a case that's going to come back up soon, I think, another case involving what we call the non-delegation doctrine. If Congress passes a statute that really is open-ended and doesn't really put any limits on an agency, is the statute unconstitutional? Has Congress just given away its legislative power? That doctrine has been floated for about 200 years. It's really only succeeded in a small handful of cases, most of them about 80 years ago. But we're now seeing sort of a resurgence of that doctrine, and a call from judges and scholars and lawyers to revisit this.

The next case that's going to come up involving this is actually a challenge to President Trump's national security tariffs. There's a law professor at George Washington, Alan Morrison, definitely not a conservative, who's saying that those statutes violate the non-delegation doctrine and they should be struck down.

KRISTOL: Because Trump gets to say anything's "national security," and then he slaps a tariff on something that doesn't seem like it's a classic national security emergency, right?

WHITE: Yeah, right, right.

KRISTOL: So many cars are coming from Germany or something.

WHITE: And then in addition to the things like deference and delegation, there's just the process of agency law making. That's something where you could see the court becoming more skeptical, requiring agencies to be more transparent. The court could say that laws like the Administrative Procedure Act actually require more of the agencies than the agencies are now doing.

KRISTOL: Not just some vague – if there's any excuse for it, it's legit – what's that called – the rational basis –

WHITE: Yeah. Rational basis.

KRISTOL: Insisting on more of an actual basis, you might say.

WHITE: Right, and more participation in the process, real notice and comment rule making and so on. So it's pretty procedural stuff. And again it's not that they're going to strike down a lot of policies, they're going to block a lot of policies. It is just recalibrating the pace at which policy can be made.

Which is important in a time when the public is pretty divided politically. And in every presidential election there's a chance that the other party might regain control of the White House and Congress isn't legislating that much.

It means that every administration you have this race to do as much as you can in policy through executive orders, through agency rule makings and so on. And so agencies have more and more incentive, more and more political need, to move quickly.

And so this changing of the guard at the Supreme Court and the lower courts where a lot of the nominees or the appointees were focused on these issues, I'd say it could have a significant effect on the pace of policymaking and really slow things down.

KRISTOL: But not so much it sounds like on the actual size of government and the administrative state.

WHITE: Right.

KRISTOL: We're not talking about, thanks to the conservative appointments on the court, this big government's going to shrink a lot.

WHITE: Right, they're not going to –

KRISTOL: The way it functions could be more orderly, more predictable, more in accord. Some things might get – Congress might be forced to specify certain things and make choices as opposed to simply toss the ball over to some agency and so forth, right?

WHITE: Yeah. When Steve Bannon said that they were going to deconstruct the administrative state, and then it deconstructed him. It's not deconstructed; it's still there. I see it outside my window every day and the court isn't going to take it away.

KRISTOL: Congress could do that, but not the Court, right?

WHITE: Yeah, that's right.

KRISTOL: In theory they could do it.

WHITE: Yeah. I think some people would love to see the Court suddenly declare the FTC and the Department of Education and the Federal Reserve unconstitutional. It's not going to happen.

KRISTOL: It sounds to me listening to you though, that the debates I grew up on, and were still very vigorous when I was in college and grad school, judicial activism versus judicial restraint – those are very huge terms and really made it all the way into the mainstream political discourse, obviously.

That that doesn't seem to capture the current moment. That this conservative, quote conservative position, is, sometimes for restraint. You know, don't oppose, I don't know, national social mores. On the contrary, let state legislatures govern.

But sometimes for a kind of activism, you know, don't just step aside and let these agencies do what they want. In the religious liberty case, I'm not sure if it's activism or restraint. It's sort of activism on behalf of religious plaintiffs against, let's say, the state, be it the legislatures or pure administrative agencies that are sort of ignoring certain rights. Am I right, that the restrained activism thing is not the line anymore, or is it still a fundamental sort of distinction?

WHITE: Well in some ways it's flipped. After a few decades of the Warren Court, the Burger Court, and the Anthony Kennedy Court making law, the calls for judicial restraint come increasingly from the left. Calling on conservative judges to respect precedent, to not strike down too many laws. So really calls for judicial restraint of a sort come a lot from the left these days.

On the right there's a pretty interesting debate happening now among a large segment of conservative lawyers and conservative judges who call for what they call judicial engagement. They avoid the term activism – judicial engagement. The idea being that courts should be much more assertive in either recognizing unenumerated rights, rights that aren't spelled out specifically in the Constitution, but that their advocates say are contained within the Constitution's protections of liberty.

Or you see related to that, people who say it's not so much about rights, it's more about judges needing to be much more assertive in forcing the government to justify its policies. To show more facts that support the policies, show how the facts really are tightly connected to the policy or the outcome the policy purports to achieve. Sort of to put the political branches of government on trial every day and have them prove their innocence.

As you can suspect the way I teed it up, I'm skeptical of this. I think that that's asking too much of judges, too much of courts, and making a lot of the same mistakes that the left made with courts. But I'd say right now in the conservative legal movement, a lot of – most of the intellectual energy is on the side for more judicial engagement, less deference to Congress, less deference to agencies, less deference to even city councils and so on, and putting judges front and center on reviewing the work of the political branches.

KRISTOL: And do you think that that moves from the law schools to the actual judges and justices who have been appointed?

WHITE: Yeah.

KRISTOL: Or do they shy away from that once they are actually on courts and they sort of look around and think, am I supposed to get in the middle of this fight?

WHITE: Well hopefully the experience of being put on a court will moderate them a little bit in that respect. There are plenty of judges who really do embrace the idea of judicial engagement. Justice Thomas doesn't use the term, but I think he is probably the ideal in this respect, a very strong originalist, and very confident of the court's work in overturning old precedents that don't line up with his reading of originalism.

Whereas other justices like Scalia, might have left more room for precedent. Or Alito might leave a little bit more room for experimentation at the state or local level. Justice Thomas seems to be the most confident in originalism and the least patient with precedent.

There are some lower court judges, Don Willett on the 5<sup>th</sup> Circuit, one of Trump's appointees, has been a leader on this and there are others. I'd say very few judges are going to wave a flag that says 'judicial engagement.' But I do think there are judges, a lot of the ones who have been appointed, who are more – who are interested in reengaging the courts on some issues where they might have been more deferential.

KRISTOL: I suppose originalism, when that became the kind of banner as opposed to restraint – under which conservatives are marshalled against liberal activism – always had the potential to go in this direction, right? Because if you're interpreting the original meaning, then you can overturn a lot of precedents that misunderstood the original meaning even if they've been going on a long time.

WHITE: Right. The old speeches by Ed Meese in the '80's when he was attorney general, they were about original intention as a tool of judicial restraint, as a shield for the political branches to actually make policy and govern, and not be governed by judges.

At some point the shield becomes a sword, and you start to look around and say, well, what state laws, what federal laws should be struck down? And now of course that's not new, that started in the '90s really, in the federalism cases where they were striking down some federal statutes as being unconstitutional. I think we'll see more and more of it. And I think, again, we'll see judges, this new generation of judges is less patient with some of the deference doctrines that kept judicial review a little bit more moderated.

KRISTOL: I guess one other area where there are disputes between right and left, but I guess within right and left too to some degree, is some of these more directly political areas. Where the courts have been called on recently and have actually had cases on things like redistricting and reapportionment.

Which I think people would have thought once was like, "ooh, the courts can't really get involved in that," or many people would have thought. But now there's some sentiment on, it seems to me, a broader sentiment maybe that the courts need to step in where the political process is somehow just dysfunctional, or tilted in one way, or for some structural reason –

WHITE: Yeah. So there have been cases in the last few years over things like the Voting Rights Act, and the Justice Department's power under that law, to sort of govern the states' redistricting process. But the most significant case, it was just decided at the end of the last term, had to do with gerrymanders. Not gerrymanders based on race or other things, but gerrymanders based on – these were just partisan calculation.

In a day when people who draw all these districting maps, they can get out their computers and draw districts that are perfectly drawn to maximize the advantage of the political party that's drawing the map. There was real frustration with this. If you're in a red state there's frustration on the left, and if you're in a blue state there's frustration on the right.

And so, in the last Supreme Court case there were a couple of cases that went up. This last Supreme Court term there were a couple of cases that went up calling for the Supreme Court to strike down what they called partisan gerrymanders. And the court said no. The court said this looks like a real problem for democracy, but it's not the kind of problem that the court can fix because there isn't a rule in the Constitution that we can apply.

The challengers in those cases were calling for standards, almost mathematical equations. That if a party's power in the legislature grew, if its majority in the legislature grew too big beyond its just voting majority among the voters, that at some point the court should draw a line and say that's the result of a partisan gerrymander. And the majority of the court just said, no, we can't do this. There's no rule for us to apply.

In a way I'll say there's an interesting connection between that and the issue of non-delegation. In non-delegation, conservatives look at the issue and they say, Congress isn't doing its job anymore, it's given away all of its powers. Congress itself won't fix the problem. We need the courts to come in and draw a line between statutes that are just kind of broad and statutes that are unconstitutionally broad. And conservatives made that argument, and the court has consistently said, that might be a problem, but it's not a problem we can solve. There's no line we can draw.

I think the gerrymandering issue is the same thing. It's the left's version of the non-delegation doctrine. Complaining about this, it's a breakdown in the redistricting process, the fact that partisan state legislatures are never going to fix the problem themselves – they are the problem. And so the court needs to intervene and draw a line.

And the left was disappointed in those cases. The court's answer was the one that the court has given to conservative advocates of non-delegation: This is a problem, but it's not a problem within a line for us to draw.

KRISTOL: And some lower courts did step in, right? And so I suppose maybe there's more appetite, you know. They can do some of that if – I guess they can get appeal to the Supreme Court, but – and maybe those are state courts in one or two cases? I can't remember. Pennsylvania or something, but anyway.

WHITE: I can't remember. It's maybe a mix.

But the – What's been an interesting theme in and of itself for the last few years has been the federal trial courts, federal trial judges jumping out quickly on issues like redistricting, or Trump executive orders on the travel ban and things like that. And the Supreme Court time and time again has told the courts, the lower courts, to calm down. The court's even sometimes issued orders blocking the enforcement of lower court orders until the Supreme Court could review the things.

KRISTOL: So which is the wave of the future there, the Supreme Court telling them to calm down, or some lower court saying, yes, we can't permit this travel ban? I mean it did seem for a while there early in the Trump administration that judicial activism was back, like it or not, like the travel ban or not.

WHITE: Yeah.

KRISTOL: It was certainly kind of back in spades. Some district judge no one – I had never heard of – is suddenly stopping nationwide something the President wanted to do, you know?

WHITE: Yeah, I think – I mean who knows what's going to happen with the lower courts? I think the Supreme Court in its current state, and of course a good change, and I'm sure we'll talk about that. This court seems to be of a mind of having the lower courts slow down on these things.

And you've even seen Justice Thomas and others call for maybe rethinking this nationwide injunction issue. How is it that one trial judge can just get a federal lawsuit before him and just issue an order blocking policy nationwide, even on something like immigration?

So far the court has been skeptical of those moves. Even where the lower court might be right on the merits of an issue, the Supreme Court has really counseled for patience. And I think that's actually probably a good thing.

KRISTOL: And do you think the lower court – I mean, how important are all those lower court appointments? They don't get the headlines that a Kavanaugh or a Gorsuch does, do, but there are a lot of them, right?

WHITE: Yeah, this is hugely important. President Trump so far in his first three years has appointed something like almost 80 federal appellate judges and there's only a couple of hundred appellate judge seats in the country. He's had a huge –

KRISTOL: How important are the lower courts? You know, we talk so much about Kavanaugh and Gorsuch and of course "is it a Roberts Court?" and all, and that's very important. But some people say, look – look at what's happening at the appellate level and the district court level, that's really a big change.

WHITE: This is hugely important actually. President Trump's been in office now almost three years. In addition to his two Supreme Court nominees, he has appointed over 40 judges to the federal courts of appeals, and dozens and dozens of judges to the federal trial courts. There's only a couple of hundred federal appellate judge seats in the country. He's already changed about 20 percent of the judges. He far outpaced his predecessors in these court of appeals seats.

KRISTOL: And I guess having a Republican Senate helped, and a Republican Senate that blocked President Obama in the last couple of years, right?

WHITE: And a Republican Senate who inherited from Harry Reid the elimination of the judicial filibuster.

KRISTOL: Good point. Yeah, yeah.

WHITE: But so what's the point of having these judges, or what's the impact? It's huge, for a few things. One is, the courts of appeals are effectively the Supreme Court for most cases. Most cases don't go to the U.S. Supreme Court, so the federal court of appeals is the last word on some significant issues.

Second, even for the cases that go up to the Supreme Court, they first percolate through the lower courts. And in that process, having good, thoughtful judges, originalist judges chewing on these issues, refining the issues, finding the best arguments and sort of embracing and endorsing those arguments, the best version of those arguments, is going to improve the quality of advocacy in the Supreme Court. I think it's going to improve the quality of Supreme Court decisions just because the issues will be improved by the process below.

And then last, but not least, these judges appointed to the federal bench in the courts of appeals, they become the bench for future Supreme Court nominees.

And so the quality of judges that Trump has appointed has been really incredible. Some of the judges on these courts, people like – my friend and your former employee, Naomi Rao on the D.C. Circuit. Randy [Andrew] Oldham in Texas or Amy Coney Barrett from Notre Dame who is now on the 7<sup>th</sup> Circuit. These are judges who now are in a position to not just decide cases and further sort of elaborate and refine originalism; they could be the next Supreme Court justices. And it's a great bench to choose from.

KRISTOL: So let's look ahead now. Trump and McConnell played this card in 2016. They've governed as they said they would, and great accolades from the conservative, parts of the conservative legal community. Great worries from a lot on the left.

Do we now expect for every four years for the courts to be even – I mean, they already were front and center, but to be even more front and center? And especially, I suppose, in 2020 where it does seem like two terms of Trump would make an awful lot of difference as opposed to one term with Trump.

WHITE: You know, the 2016 election really was the perfect storm. The court wasn't just divided, but you had the passing of Justice Scalia in the middle of the election process. It's hard to imagine the court being more front and center than it was that time. That said, I think –

KRISTOL: And you had Obamacare and same sex marriage within the last four years, both genuinely major headline grabbing moments for the Supreme Court, both 5-4 I suppose.

WHITE: Yeah, and conservatives very worried about what the next wave of cases was going to bring on issues like the collision of same sex marriage and religious liberty.

President Trump's use of a list or lists of possible Supreme Court nominees, that innovation, it will be interesting to see what comes of it. I think among conservatives it's hard to imagine that not being a sort of a new institution in our politics, Republican nominees coming up with lists of the judges that they would appoint.

It would be interesting to see whether the Democrats do that. They obviously haven't done it so far in the primary process. Maybe the politics aren't quite the same for them in not pre-announcing their judges, I don't know. But I do think that that move by President Trump is going to have real ramifications for Republican candidates and for conservative judges.

KRISTOL: And for judges, don't you think?

WHITE: Yeah.

KRISTOL: Because it feels to me like one reason for that was that conservatives have been so disappointed by some of the Republican presidential appointments.

WHITE: Yes.

KRISTOL: Justice Souter most famously, but others as well. Justice O'Connor to some degree, the attempt to have Justice Harriet Miers become a Supreme Court Judge. So, I guess the left doesn't get disappointed that often so maybe they don't feel as much need to have an actual –

Because I think one point of the list wasn't it, was to let, to reassure The Federalist Society and everyone else who was interested in this, that "you don't have to trust me, Donald Trump." He could have some flakey idea about putting someone on. That "here's the list that basically you guys submitted to us, with a couple of emendations and we'll pick from it."

And he has picked from it. And it seems like he's – I don't think there were literal lists for the lower courts, but he's basically, wouldn't you say, done the same thing? I mean he's followed the – let's call it The Federalist Society consensus closely. Close enough in most cases, as to who would be the appropriate people to put on the different circuit courts and so forth.

WHITE: There's always with judicial appointees, especially the lower courts and the trial courts, a lot of it is always going to be based in large part on the senator for that state, the senators having sort of their favored candidates and a local bar, and so on.

KRISTOL: But less so I think with Trump, right?

WHITE: Well, I'd say –

KRISTOL: Appellate level, I would say, those people are more national stamp of approval from conservative law professors than the kind of traditional local big shot who was head of the local bar association and is a good friend of the senator. That would be the old-fashioned way.

WHITE: Yeah, we conservative law professors wield immense power. [Laughter].

No, I'd say it was Trump and Trump's first White House Counsel Don McGahn. I think that's key, that Don McGahn cared about this issue. He brought the judicial appointment process out of the Justice Department, out of the Office of Legal Policy and really put it in the White House Counsel's office. So you had much closer sort of centralized review of nominees.

Now it is true, I think, that this crop of judicial nominees definitely includes people who were well-known in Federalist Society circles, conservative legal circles. So I do agree, I think that this crop of judges is of a more sort of national standard. And that's important – I think that's important.

## **II: The Conservative Legal Movement (44:19 – 1:21:17)**

KRISTOL: But anyway, in 2020 – so what is the – so I guess the conservative, assuming Trump's the nominee, it'll be, "I'll do more of the same."

WHITE: I'll do more of the same. And he'll say, don't let them pack the court.

KRISTOL: And so what will the left say, what is the left saying? What are – I think we all know what Democratic candidates are saying, which is not that much in detail yet. But what are influential legal academics, the equivalent of their Federalist Society, saying about this? What's their vision going forward, I mean I guess both in terms of actual appointment nominations, but also then in terms more philosophically in terms of what's the liberal court agenda?

WHITE: Well, so the reason why I paused there was that I don't know what the sort of consensus is. I don't get invited to many of their meetings. But there are loud voices in those circles calling for Congress – the next Democratic President with a Democratic House and Senate to expand the court as payback for blocking the Merrick Garland nomination under Obama. Payback for confirming Kavanaugh in light of the allegations against him. And reclaiming the court, least it lose – and the way they would frame it as, "we need to do this to maintain the court's legitimacy".

And maybe we'll get back to that, the argument over the court's legitimacy I think is important.

But you're seeing calls on the left to expand the court. And I have to admit, I look at that and I wonder if they're trying to repeat 2016. I said a minute ago that Scalia's passing was – I think I said a minute ago that Scalia's passing put the issue front and center in 2016?

KRISTOL: And McConnell keeping the seat open.

WHITE: And McConnell keeping the seat open. Well, if 2020 is an argument over whether Democrats will create three or five new seats, it puts the court front and center once again, and creates a plausible – I hate to say it, but "Flight 93" election narrative in the hands of the Trump campaign, who will say, "You

elected us to protect Scalia's seat; now you need to protect us from the three or five seats that would go to – and then just fill in the blanks of five left-wing judges or law professors.”

It's unfathomable to me first of all, why the left would toy with this idea, as just a matter of policy. But second, why they would do it so openly in a campaign year. It seems totally self-destructive.

KRISTOL: Well, they're competing among themselves.

WHITE: They're trying to outbid each other, that's right, that's right.

KRISTOL: Yeah but you'd think, the way to win back reluctant Trump voters will be to, in effect, they're not quite saying it this way, “Look you did get some reassurance on the court. These people aren't going anywhere, most of these conservative appointees, they're pretty young. So we're going to have a balanced court, obviously if an ultimately liberal judge dies a Democratic president is going to appoint – or retires or resigns – a Democratic president is going to appoint a liberal, but it's not going to fundamentally flip everything over one way.”

That would be a reassuring message to swing voters you would think, but it's not what the activists want to hear. And it's not what they believe really, I would say. There's a fair amount of indignation about McConnell holding the seat open and other aspects of – the Kavanaugh hearing obviously, The Federalist Society's role, the whole thing.

WHITE: Yeah, there is sort of a, “remember the Alamo” aspect to all of this, the Garland seat especially, that what McConnell did was fundamentally illegitimate and it de-legitimized the Gorsuch appointment, Gorsuch who ultimately filled that seat. And then when you add on top of that just all of the controversy around the Kavanaugh nomination, I think they see this as a matter of principle.

And I'll say though, even if they tried to reassure – even if a Democratic nominee tried to reassure moderates about this, the fact is that soon conservatives will start to look at Justice Thomas the way that liberals look at Ruth Bader Ginsberg: a great Justice who probably needs to step down on their own terms before health takes over. Justice Thomas has been on the court for a very long time, and I hope he's there for a very long time. But at some point you'll start to see calls on the right for Justice Thomas to step down so that a Republican president can appoint his successor.

KRISTOL: And of course these things are unpredictable.

WHITE: Exactly.

KRISTOL: Justice Scalia was a friend of ours, and was in good health, and had a heart attack. And so, no one expected there to be an open seat in 2016, and then McConnell succeeded in keeping it open.

And I do think that's underestimated as a – I don't know if it's a real reason – a rationale at least for very reluctant swing Republicans, moderate Republicans, upper middle class Republicans, who didn't like a lot about Trump to sort of swallow hard and vote for Trump. If it hadn't been an open seat, you still could have theoretically said, well, it's going to be very important over the next four years. There'll surely be an appointment or two. But having the seat there front and center is so dramatic.

And of course that – who knows about people's health and all that, but of course that could happen this year; or someone could step down as you'd say, and on either side. And so, you could have the court really in the middle of the political fray and pretty quickly actually.

WHITE: And again, even if there isn't an open seat –

KRISTOL: It's been so central in the last few years, don't you think? Yeah, people don't forget about it.

WHITE: Right, but also a proposal to pack the court creates three open seats. Right?



KRISTOL: Right, but even without that, don't you think, it's been so headline grabbing. Gorsuch, Kavanaugh, these decisions – I mean it will be more of an issue I would guess in the presidential debates. It's more they're all going to get a question: What's your vision for the court, what's your vision for a good justice?

Than – maybe they always got that question, it was sort of routine, it was kind of, half the time it was kind of pro forma almost, you're supposed to ask a presidential candidate what criteria he would use for appointing Supreme Court judges, justices because that's what presidents do.

WHITE: Right.

KRISTOL: But I do feel like now you'll actually have it raised in speeches by Trump, if he's the Republican nominee, and whoever the Democratic nominee is, as a kind of affirmative agenda item for each of them, which has been less common I would say.

WHITE: Right. And Trump is going to be able to say, I will continue to appoint Judges like Kavanaugh and Gorsuch. The Democratic nominee, I don't know how he or she answers that question, right? Do they say, I will appoint somebody like Ruth Bader Ginsberg?

KRISTOL: Yeah.

WHITE: Do they? Do they say – my guess is they'll say, I'll appoint somebody like Elena Kagan, who has been a little more moderated, who has –

KRISTOL: I think you're too close to that. I mean I think she's a total heroine on the left, I mean justly or unjustly.

WHITE: Oh, I wouldn't disagree with that, but I don't think she's seen –

KRISTOL: And not just on the left, but even among sort of independent types. But who knows? We're talking about what they say; the point is how much will they promise that the court can do, I suppose. That's the interesting question for me on the left. So let's talk about the left a little bit.

Did they have – I mean, if you're an intelligent, we can ask them, and I have asked them, but from your point of view, if you're a thoughtful person who believes in various liberal causes, income distribution, strict interpretations of gender equality, diversity, worried about various aspects of American history and life and making up for that, how much are you counting on the courts to help resolve these issues in your favor? How much are you just counting on the courts just not stopping you from doing certain things?

I mean, where would you say the courts stand in the liberal imagination today? Certainly when I was in college and grad school, they were front and center. Earl Warren was a hero and Justice Brennan – and they did a ton. So it's not like, that was not a crazy thing after *Brown v. Warren* and everything else in the '60s and '70s.

What do you think about that today? Do you think that's not – do we go back to a version of that or is it more just the courts at least should get out of the way and let liberals govern?

WHITE: Before he was president, Barack Obama in an interview or two, sort of criticized his friends on the left a little bit for putting too much sort of, too much emphasis on the courts when it came to social justice, expecting too much out of the courts. I'd say that comes closer to where we are now. It's not so much calls for the courts to sort of get into the inequality fights, right? That somehow the courts would invoke the 14<sup>th</sup> Amendment or something as a basis for new law on inequality.

Basically I think what, the way they see it and the way they'll frame it politically is we need the courts to not do any harm. Not do any harm to existing precedents over the last 40 years, so the courts should

take a strong role in defending *Roe v. Wade* and so on. And the courts should do no harm when it comes to experimentation at the federal or state level in the legislatures, or in the agencies in creating policy.

I'd say right now the real engine of progressive policy seems to me administrative agencies more than anything else. And so making sure that the courts stay out of the way of that, stay out of the way of legislatures will probably be pretty key for them.

KRISTOL: Right, it seems like that would be the liberal message. When you elect me, my Education Secretary will insist on colleges and universities behaving appropriately in terms of Me Too related issues on campus and so forth. And diversity, we're not going to stand in the way of colleges pursuing diversity in a good way. And our Justice Department is going to enforce the Voting Rights Act and not going to be on the side of litigants *against* colleges and universities that try to rectify historical injustices, et cetera, et cetera.

More than I'm going to appoint judges who are going to, I don't know, equalize wages across the country, right? That's more of a legislative or an administration agenda item, I guess. But I don't know, these things could change, I suppose, and a decision or two could bring things front and center.

WHITE: They could change. And a swift change in the courts – if Hillary Clinton had been elected president and Gorsuch weren't on the court, Kavanaugh weren't on the court, two liberal judges were on the court, you could see them making some moves on this.

But I'd say with the addition of those two young justices, it becomes harder to sort of formulate a policy of judicial policymaking. And yet, it has to be more judicial restraint in the face of old precedents and new statutes and regulations.

KRISTOL: Yeah, that's interesting. Absent, unless they really go all the way with the court expansion.

WHITE: That's right.

KRISTOL: And is that really the one main proposal? I guess it is, on different versions of court expansion, right? Sometimes we're talking about mandatory retirement ages, or three of them, or different ways of appointing them or 20 year terms. But it seems like it's somehow or another, to dislodge what they fear is a semi-permanent or a lasting or at least lasting for a while, you know, conservative majority on the federal courts up and down. And that seems to be what they're worried about.

WHITE: Yeah, I think they're worried about conservatives having a court that the left had for the last several decades, right? Not extremely liberal, but reliably liberal on the issues that matter to them. I think that's what they worry about with conservatives is not that the court is going to just become monolithically conservative.

In fact, if you look at the stats for the last year, even with Justice Kavanaugh now on the court, the court was often split. There are actually more sort of clearly, this is according to Scotus blog, the best website on these things. I think 45 percent of 5-4 decisions were really liberal outcomes and far less than that were clear conservative outcomes. And it's not hard to see that continuing when you've got a reliable block of four liberal judges and the conservatives sort of splitting up amongst themselves in interesting ways.

Again, I don't think the left fears that the courts will be monolithically conservative, but that it'll be reliably conservative on some issues that they care about, like abortion, like affirmative action, like skepticism of the administrative state. And so I think what they'll do is call for the court to just do less. Be a judicial minimalist – 'minimalist' is a term you often hear. I think that will be the way they frame it.

And again, that's why I think if they wanted to pick their ideal justice, it wouldn't be somebody – a candidate wouldn't say Ruth Bader Ginsberg, even though she's a hero to the left and they make movies

about her. And any time she has a health scare, the whole news media, everybody just stops dead in their tracks.

For as much as they lionize her, I think politically the better character to look to is Kagan, who has been a little bit more moderated on a couple of things. Who is, though, in general pretty reliably liberal. Who comes across temperamentally as very moderated. She's very sort of likable. I think that's who they'll sort of put forth as their ideal justice, in part because she is so deferential, or she is more deferential to the political process in some ways.

KRISTOL: I mean, this conversation is making me wonder whether, it comes out the reverse almost. Where conservatives at some point look up and say –this has been a lot of hoopla about Kavanaugh and Gorsuch and it's all exciting. But at some point do we get a conservative saying, as the author of the Flight 93 manifesto said, all of these conservative victories were sort of meaningless. Marriage equality is not going anywhere. Let's just assume for a minute, and I'm going to come back and maybe ask you about that. Roe v. Wade isn't going anywhere, if that were the case. The administrative state isn't really going anywhere.

Religious liberty, good, nice, obviously it's great from the conservative, pro-religious liberty point of view that an orthodox rabbi is not going to have to perform same sex marriages if they don't want to. But at the end, that's more of a defensive, protective thing and the culture could keep changing in the way it's changing.

And could you imagine that? I mean, in a funny way, Trump almost gets, wins let's say, gets reelected and two years later everyone is saying – well that was all very nice, but that didn't really do what we wanted done.

WHITE: Well, sure. I mean, the judicial nominations are not always going to be front and center of our politics, and I hope that's the case, right? The presidential elections should not be an election to pick the person who picks the people who actually govern us. That's not how it should be.

I'd say in the short to medium term, I think that the court will remain front and center in part because people can remember where they thought the court might go. But as we get further from that political moment, sure, maybe the court will recede in importance.

But right now I think, to get back to an earlier point, I think right now the intellectual energy among the conservative legal movement, which is not the same as conservative voters, is for courts to do more and more or judges to do more and more. And who knows how that will play out? It'll be interesting to see how that plays out. That could change the stakes of the political fight. I wouldn't make any predictions past two presidential elections from now.

KRISTOL: Even one, even zero.

WHITE: But just even in terms of predicting the salience of the judges issues. We just, the memories of the most recent sort of judicial regime are too fresh and we don't know what's going to happen in terms of how this current generation of judges is going to play out, or how the Democratic response is going to be.

KRISTOL: No, and I actually was sort of going the opposite way from the way you took it, I think it wasn't clear which is – you took what I'm saying. Which is, let's assume Trump reelected, Roe gets presented to the court fairly clear, which could happen, right, in 2021 or 2022?

WHITE: Right.

KRISTOL: Maybe there's been a change in personnel and there's another conservative appointment, even. And the court *doesn't* overrule Roe.

At that point I think you could have a situation where the scare of it being overruled has got the left even more up, obviously, in arms than they are today, if that's possible. And the right suddenly goes into a kind of, I'm just making this up, obviously, in the competition to succeed Trump in the primaries, some people on the right are going to say "we didn't go far enough."

WHITE: Right.

KRISTOL: You know, "we got suckered again by the establishment."

We just – and so you could imagine more polarization and more confrontation on the courts. Even if Trump is reelected, and I think if a Democrat wins and let's just assume, even if it's a Democrat doesn't seek to be particularly confrontational on the court, they're going to make liberal appointments, as Clinton did and as Obama did. And then issues are going to be close on some of these religious liberty issues and so forth.

I guess I'm a little, it could be that the courts recede, which I think would be somewhat healthy. But I guess the more I think about the different scenarios, and of course there's almost an infinite number, so you can't really – who knows which of these justices retire or don't and so forth.

I mean, you could write a lot of scenarios where they remain front and center in a way that might be unfortunate for our politics. But it might just reflect a certain reality, right?

WHITE: Yeah. I guess, this is intriguing. The Roy Moore scenario, right, where he runs saying, "Trump was a wimp, he didn't give us –" And again, I pick on Moore not just because it's Roy Moore, because of Alabama, which has had some of the new restrictions on abortion.

KRISTOL: I mean, what about *Roe v. Wade*? Because you've mentioned, I think in passing and I took it further than maybe you intended. That you thought, it seemed to me you said you thought it might not be overturned or even if it were, that it – leaving aside whether, if it were, it would have, what the actual real world effects it would be.

Do you actually think that that's the case? That even in a, let's say, a court where there's another Trump appointee, you think that there would be a majority to contain it, constrain it in certain ways, but not flat out overrule an actual right to an abortion?

WHITE: So here's why I'm skeptical that the Supreme Court is going to overturn *Roe v. Wade*. Let's just play this out. The first thing it takes is a state that passes a law that doesn't just sort of thoughtfully or cleverly restrict abortion, but not sort of claim to overturn *Roe* –

KRISTOL: Right.

WHITE: You need a law that actually gets passed and enacted in a state that cuts to the heart of *Roe v. Wade*. Then you need someone to challenge that law who won't take it to a state court. Your first move might be go to a state court, the state Supreme Court, say this is so clearly unconstitutional, even under our own constitution. They have to check that.

Then they go to a federal district court that's going to almost surely say, whether the judge likes *Roe v. Wade* or not, this is clearly against *Roe v. Wade*.

And then it's going to go to a court of appeals, which is going to almost certainly strike down the law. Because whether the judges like *Roe v. Wade* or not, if it's a law that's so clearly cuts to the heart of *Roe v. Wade*, the lower court is not going to uphold the law. And that could be the end of the case.

Then you have to get the Supreme Court to take the case. And it would be one thing if the case got up to the Supreme Court and they had to decide it. First they have to decide whether they're going to decide the issue at all. And it's not clear to me there's the appetite on the court to take that.

KRISTOL: It takes four justices.

WHITE: It takes four justices, and it's not clear to me that if the court decides not to hear the case, that the public would rise up in a way that's sort of the worst case scenario would be.

But in any event, the first step is the most important. I don't see many states doing these things that cut to the heart of *Roe v. Wade*.

KRISTOL: See, I think the way you formulate it, which I think is very intelligent and I agree with actually. I think is, for some people would say that in itself is very revealing, that you're some kind of "inside the Beltway sellout who wants to duck this controversial issue, which is really at the core of all the bad jurisprudence of the last 50 years." Which is like a crazy point of view, maybe. Is it 50 already? I mean, I guess it is, almost 50.

"And they don't need to have a case that cuts to the core of it. They can have a case that cuts to part of it and then just say, 'and incidentally, *Roe* was wrongly decided. There's no real basis for it and this was only a third trimester or second trimester abortion case, or this was only a various regulations case. But while we're at it, we're just going to tell you –"

You think there's very little chance, I assume, the court would reach to strike down *Roe* sort of gratuitously given, though people might urge it to, given the character of the Chief Justice and some of the justices or just the political constraints on the court?

WHITE: Well, first of all, I'd say the scenario I sketched out, it's not just counting on like a wishy washy Supreme Court. It's just counting on the fundamental moderation of the people in the states, right? It's that even the reddest of red states, the legislature is not going to go that far. They might aggressively regulate abortion in ways that tee up litigation, but even then, it's not going to go to the heart of the *Roe v. Wade* issue.

And when a statute short of that comes to the Supreme Court, the justices don't need to reach the *Roe v. Wade* issue. I think that this court will actually do a lot to uphold lower, state laws that regulate the health and safety, the safety of abortions, the health of the mother, the health of the unborn child.

They don't need to reach that issue. And institutionally, the court is moderated – it always has been or should have always been – by norms of not reaching issues you don't have to. And this is a place where the Chief Justice plays a big role, but the court as a whole, all the justices, they're sort of in almost like a, I'd say this is one way in which the justices are still very Tocquevillean, whatever their political bent. You know, Tocqueville said that judges would be moderated, they'd be careful in what they do and quiet in what they do. And for the most part, that is still true, at least when it comes to an individual case where the judges have to decide how far to go.

Now the last step is, of course, the Chief Justice. He has a real say in how far a court will go in a case. First of all, because this Chief Justice is the central vote. So he gets to pick what the majority is, whether he's on the right or the left. And then he gets to pick how broad the majority is, whether it's a 5-4 majority or a 6 to 3, 7 to 2 majority. And so he can moderate the court that way.

And those two factors, the Chief Justice Roberts's power to vote, and his power to sort of assign himself the opinion or assign the opinion to somebody else, but in a way that he knows how the opinion is going to be calibrated. He has a real say in how fast the court's going to move on issues and how far it's going to move on issues.

KRISTOL: It seems to me what you're saying is that the Obamacare precedent of 2012, is to some degree going to be the future. That is to say, a court that doesn't quite go as far as it might in really making major decisions that would, on the one hand, please a lot of conservatives, but on the other hand

really disrupt either a bill that was passed after a huge amount of debate and signed by a president, or in the case of Roe, almost 50 years of precedent.

And I guess some conservatives might say, “Really? I thought we were talking about – The courts is why I voted for Trump. And I thought we were really going to change, get religion back in the public square. And I thought we were really going to address the administrative state. And I thought we were really going to deal with these issues and not just have a kind of John Roberts sort of statesmanlike, Alex Bickel like, I guess you would say maybe, right?”

WHITE: I don't know if I'd say that. I wish I could say that. I don't know that he's going to be Bickelean.

KRISTOL: Is that right? But I mean, sort of “prudence and moderation on the court.” I mean, do you think actually – I mean I guess leaving aside what we would like – do you think that's the more likely scenario? Even with a preponderance of conservative appointees over the next, let's say, couple of terms, couple of presidential terms?

WHITE: The Obamacare case is the one that people think of the most, it's so controversial. But there are a lot of areas where the Chief, and he's been Chief now for what, almost 15 years.

KRISTOL: Yeah, it's amazing.

WHITE: A lot of cases where he would start small and he'd assemble a broad coalition on things like interpreting the Voting Rights Act. On the collision of public sector unions and the First Amendment. And other areas where the first time that kind of controversy comes to the court, Roberts would assemble a pretty broad coalition to have a very narrow sort of fact-based decision. And then maybe the issue returns again in a slightly more extreme way and the majority gets a little smaller, right, and the court moves a little further. Roberts has done a lot of that.

The Obamacare case, obviously that's a big and controversial example. Even some of the, like the little technical issues like the deference thing. When the Supreme Court, there was a case last year where it really went to the heart of how much deference agencies should get from courts. And Roberts ended up siding with the left. He assigned the opinion to Elena Kagan. She wrote a pretty moderate opinion, one that really lined up with the Trump Justice Department's argument that sort of reformed the doctrine, moved it rightward. Not as far as a lot of people would have liked to see it go, but I think a good movement.

Those sorts of cases, I think, are the way we ought to think about this. And it's not that Roberts is emulating somebody, like some law professor, like Alex Bickel who, as you know, is my hero.

It's more the Chief Justice is acting like a chief justice in an era where once again, a chief justice is in charge of the court. Rehnquist did this sort of thing sometimes. You look back, you even look at somebody like John Marshall who obviously was no shrinking violet. Obviously had a particular direction he wanted to move the court in. But he was careful about how he did these things. He was careful to cobble together strong majorities, unanimous majorities when possible.

That really is, if you look at the history of the court, the chief justice has often been – not always, but has often been a moderating force. Even when the chief justice has a vision of where he wants the court to go – and I think that's an interesting, it's something that interests me more and more, actually.

It's the way in which, and we're all familiar with this Madisonian idea of ambition counteracting ambition. But the interests of a man being attached to the Constitutional rights of the place, nowhere is this more true than of a chief justice. More than any other justice on the court, more than almost anybody else in government where the presidency and the Congress, they identify with their political parties. The chief justice is in a position to more closely identify with his institution than anybody else in government. I think is in a position to be, not just form his institution, but be formed or reformed by his institution – some would say deformed by his institution.

And I think that's a dynamic that will be very interesting to watch with the chief for the remainder of his term, assuming he stays in the middle of the court, and for his successor, whoever that'll be.

KRISTOL: And conservatives who are watching this, that are listening to it and who are more ambitious for what a conservative court might do, would say "well, that's just typical. The conservatives are going to be prudent and moderate and do step by step things. And the left, the moment they get five votes will do something huge, like marriage equality. And that, we want to do the same thing with redistricting, we want to do the same thing with various issues of, I don't know, race, gender, equality even, administrative state. And working, we want to sanction states and maybe the Congress being extremely aggressive in some of these areas."

Do you think the left also, in other words, let's say this president Elizabeth Warren and she gets a couple of appointments. I mean, do you think they all – and that would argue for a sort of a muting of "the court wars." But it's not clear that the left is onboard for muting – some of the right might not be onboard for it, either. Is the mainstream left even onboard for this kind of muting?

WHITE: Probably not.

KRISTOL: It might be in the sense that they don't think the courts are there, are key to achieving their aims. They just need a kind of restraint by the courts, I suppose.

WHITE: Yeah, yeah, I think so.

In terms of Republican frustration. I mean, the downside of being a capital "R" Republican who believes in lower case "r" republicanism, is that you don't count on the courts to change the world. You count on the courts to maintain the ground rules for the political process and to protect rights, but to be mindful of the crucial, but limited role of courts in our country. And so yeah, if you're dissatisfied with that, I'm sorry.

But I'll say Justice Scalia – I teach at the Scalia Law School, I teach a seminar on Scalia. And in the last class before this taping, we read one of his original Law Review articles where he has a line, he says, "A cynic could say that with five votes, anything is possible."

And he didn't say who he was talking about. He was talking about William Brennan. Brennan, the Eisenhower appointee, but swung hard to the left, famously said, "With five votes, anything is possible." And that might be a Brennan-esque view of the world, but it's not a Scalia-esque view of the world. And Scalia was right.

KRISTOL: Well, we'll see. He may have been right intellectually, but does that control the future?

I guess we'll finally just close with that. Let's talk about the right and the left in terms of the doctrine a little bit and your understanding. So originalism, you think is the dominant strain among conservative constitutionalists in jurisprudence.

WHITE: Right.

KRISTOL: And that we fight about kinds of originalism and extent of how much it overwhelms deference to tradition and so forth?

WHITE: Yeah, it's a fight over – all conservatives are basically now originalists of a sort. The argument is over how far should originalism go to trump precedent, to trump judicial precedence. When should originalist analysis sort of yield to established precedents and frameworks.

The second way, and I think this is the interesting fight that's playing out now, is how aggressively should judges scrutinize laws passed by legislatures? Should they, again, force the state legislature to prove that a policy that's been enacted will actually solve the problem it purports to solve and that it's narrowly

tailored? How far also should judges go in reading into the 14<sup>th</sup> and 5<sup>th</sup> Amendments broad references to liberty, specific protections of economic liberty and so on?

Those fights, in some ways they're old, in some ways they're renewed again. And I'd say a lot of the intellectual energy on the right is in favor of the more libertarian approaches, but that really is the fight within the right.

On the left, I mean I think the best evidence of originalism's success is the fact that you see Justice Kagan and others say we're all originalists now. And that a lot of cases, I mean of course all cases are argued in terms of both precedent and text. I think you see a greater effort by advocates, even liberal advocates to make originalist-ish arguments for their cases and for judges to justify their decisions with a form of originalism.

Of course not quite the same as the right, and I think the left is much more eager to move to things like liberty protecting human dignity. That was a key buzzword in a lot of the marriage and gay rights cases, and in abortions, is it's about dignity and equality. But you do see a move to the left to try to, in some ways, claim originalism or a version of originalism.

KRISTOL: And not so much of a full-throated living Constitution, we have to adjust to the times, we can't be constrained by these people from 200 years ago when things were so different.

WHITE: Or when you argue for what looks like a living Constitution, you're framing it in originalist terms. The "original understanding was that this part of the Constitution would evolve over time. And it would accommodate sort of the progress of human knowledge, and the belief in human rights and so on."

So I think that's the big fight. It would have been fascinating, I'm glad we didn't see it, but it would have been fascinating to see who President Hillary Clinton would have appointed. Because it's not hard to imagine, if they hadn't been chastened by the Trump election and the appointment of Gorsuch and Kavanaugh, how far left they would have gone to replace Scalia.

Garland, he was not an ideologue, he was not a radical. I don't know if they would have – if Hillary Clinton would have nominated Garland or somebody like him. They might have picked somebody who looked a lot more Ruth Bader Ginsberg.

KRISTOL: Yeah, and finally in constitutionalism and all of this, I guess if one scenario plays out, you could argue a pretty good kind of a comeback for constitutionalism, right? That both left and right in a certain way at least of trying to appeal to the Constitution. Respect constitutional norms, try to not break the balance of the Constitution. But one could also imagine scenarios where it's sort of Trump-ism on steroids on the right, and Bernie Sanders-ism.

I mean, it is sort of striking, are you not struck? And I'm not one who thinks the Democrats necessarily going that far left, and you should take every campaign speech as gospel in what they're going to do.

WHITE: Right.

KRISTOL: Having said that, they are rather cavalierly promoting and promising things that are like very questionable constitutionality, right?

WHITE: Oh, yeah.

KRISTOL: They're going to order the whole country to do this, they're going to have a mandatory buy back. I mean some of it is framed as congressional legislation, but some of it isn't. Some of it is sort of the Executive Branch is suddenly going to be doing all these things that – like what law justifies that? And what about liberty rights, and what about the Second Amendment, what about other amendments?



WHITE: Yeah. I'm not whistling past the graveyard here. I'm less worried about the court than I am about American constitutionalism in general. Oftentimes the people are a very moderating force on the court. Right now, I'm not sure. One of the things that, you know, I've recently joined AEI, and our program is on social, cultural and constitutional studies. And I like the way that you all Yuval – my new colleague has framed it that way, to remind us that it's not sort of constitutional law, in the courts, exclusive property of the courts, but it's a constitutionalism that's rooted in our society and our culture.

And I think one of the real costs of the rise of judicial activism and the Warren Court, for all the good of the Warren Court did on a lot of things, it really took the Constitution and made it something that courts think about, and made it sort of the stuff of political theory, of law school theory. But not something that's really rooted in the American people and that the people themselves know they have to tend to, and that our leaders sort of remind the people that they need to attend to.

That where our leaders both, not just the president, but members of Congress, members of the court, in the way they go about their work sort of exemplify the republican virtues that we need for this whole framework to succeed. All the doctrines we have been talking about, they sort of rest on top of this much deeper sort of mesh of values.

That's the real Constitutional debate that we need to be having right now is, is our society sustaining those virtues and values that are necessary to make the court stuff work? So Yuval and I and my colleagues will be busy.

KRISTOL: You will be busy. And we'll see a lot, we'll learn a lot, I suppose, about the broader society and culture in the next couple of years, on both sides of the presidential campaign, and in Congress. And as you say, it's not just the judges who swear an oath to uphold the Constitution. Right? I mean every elected official and in some ways every citizen is supposed to be thinking in a constitutional way in some way, right?

WHITE: I think it was Ralph Lerner, years ago he wrote that the early federalist judges were republican schoolmasters, which is a little heavy handed. But the idea that the judges, as they rode circuit, and appeared in those days in different towns, they had an opportunity to not just decide cases, but in the way they went about their work, explain and exemplify the doctrines and the values that this new government, this new Constitution was supposed to embody.

I don't like being lectured to by my government officials, but I think there's something to be said for demanding that the members of the court, the president, and members of Congress do their jobs in a way that not just make policy, and don't just talk about these values, but actually exemplify these values, because it's the only way that we're going to sustain the foundation under the court and the rule of law.

KRISTOL: I look forward to us reconvening in a couple of years, and discussing both the narrower, the narrow issues of the court makeup and Constitutional decisions of common law. But as you say, it really does come down to the broader questions of – what does Harvey Mansfield call it? America's Constitutional Soul, really – and how does that stand? And how committed are we to it? And how well do we understand it? And so forth.

So we'll have that conversation soon. But thank you, Adam White, for this conversation, which I found very, really instructive and thought-provoking. And I'm sure our viewers have done so as well.

And thank you for joining us on CONVERSATIONS.

[END]