

## American Constitution Society

### What Donors Need to Know

The American Constitution Society was founded in 2001 by law professor Peter Rubin as an attempt to fight the growing influence of conservative judges and right-wing legal ideas in American courts. Often described as a “liberal Federalist Society,” ACS follows its conservative counterpart in attempting to influence legal ideas while building a “pipeline” for progressive law students and attorneys to climb the professional ladder and become high-level government lawyers and judges. Both organizations seek to achieve this goal by creating membership groups where lawyers in various stages of their careers are able to network and talk about legal ideas.

During ACS’s 20-year history, Republican presidents have stacked the federal courts at every level with conservative jurists and right-wing legal thinkers have successfully evangelized for their view of the law. Recent actions by Republicans to fill three open Supreme Court seats with ideologically extreme jurists, solidifying their control of the judicial branch, have inspired a new wave of liberal anger and energy when it comes to the courts. A number of new groups have popped up in recent years hoping to beat back this trend, with calls for previously unthinkable reforms like expanding the Supreme Court.

ACS is one of very few progressive legal organizations that both pre-dates the Trump presidency and focuses primarily on the courts (groups like the ACLU and NAACP Legal Defense Fund work on judicial nominations, but spend the majority of their resources on litigation and other work). Unfortunately, ACS’s record to date has been disappointing. It has not yet emerged as a powerful force that advances a compelling vision for progressive jurisprudence, nor has it made much of an impact in shaping the courts. In 2020, former Wisconsin Sen. Russ Feingold was named president of the organization, and during his short time, he has helped to change ACS’s direction in a positive way.

Blue Tent believes that ACS’s issues and work are of **high priority** and that the group is moving in a positive direction. However, because of the organization’s track record, lack of consistent ideas, possible funding conflicts, and the emergence of newer, more effective legal groups, at this time, we advise donors only to **consider** funding ACS. ([Explore our methodology.](#))

The following brief answers key questions about ACS, drawing on independent research and

reporting. This included conversations with ACS's leadership and staff, as well as discussions with other progressive leaders focused on the courts and legal issues.

### **Is it a top leader in its space—or have the potential to be?**

Yes. ACS is one of the largest and most well-funded progressive legal organizations focused on ideas, networking and “pipeline” building. Numbers that ACS spokespeople cite in support of its success and leadership in the legal space include:

Some 52 working groups across 39 states, which focus on helping progressive lawyers navigate the path to becoming a judge.

More than 200 student and lawyer chapters across the country, which serve as networking spaces and host events about “progressive legal priorities.”

“Hundreds” of names recommended to the White House just this year for executive and judicial appointments, “dozens” of whom “have already been appointed or nominated.”

More than 200 “ACS-connected people” working in the Biden administration.

As this brief will explore in more detail, many critics on the left strongly disagree with ACS's strategies, legal philosophy and partnerships. That being said, no progressive organizations currently rival ACS's scale when it comes to progressive legal thought leadership, networking and pipeline building.

### **Does it have a persuasive theory of change and a realistic strategy?**

The ACS vision for change in the courts and the law closely mirrors that of the Federalist Society, its conservative counterpart, but the organization's strategies have proven scattered and ineffective. For much of its existence, ACS has lacked clear direction aside from mimicking its right-wing opponents. While embracing the right's approach may be effective, ACS has failed to do this in the all-important area of jurisprudence. Conservatives put forth a broad, uniform ideology around the law, which is embodied on the right by the twin pillars of originalism and textualism. And they have successfully marketed these as objective frames for interpreting the law, often labeling liberal judges as “activists” driven by politics and ideology. ACS has never advanced a similarly powerful ideology.

An organization like ACS should be at the forefront of knocking down conservative legal doctrines as reactionary and self-serving while advancing a clear and easy-to-understand vision of their own. Instead, ACS has spent the majority of its existence overly focused on “pipeline building”—the creation of networks between law students, lawyers, judges and political figures that help its members advance their careers. This is the sort of work for which the Federalist Society became infamous on the left, helping conservative lawyers connect to one another and climb the ranks of the legal profession. But this “pipeline building” only succeeded on the right because the Federalist Society rallied its members around evangelizing for a new legal philosophy, giving meaning to their career advancement. Without a vision for the law of its own, ACS’s work amounts to little more than ladder-climbing for liberal-leaning lawyers.

According to organization President Russ Feingold, ACS’s chief goal is to convince the American people to care about the makeup of the courts as much as they care about congress and the presidency. Concurrent to this work, Feingold said, is communicating a new vision of the law as something that has real impact on people’s lives, while creating a judiciary that “reflects the public they serve.” In his interview with Blue Tent, Feingold outlined the organization’s strategy as a three-pronged approach, focused on the proliferation and debate of progressive legal ideas; maintenance of “the largest grassroots network of lawyers in the country”; and activism and advocacy on policy and human rights issues.

Feingold’s description of ACS’s mission is a welcome move to a more aggressive, politically minded posture for the group. However, it is still unclear how ACS leaders and members define progressive legal ideas or even progressive legal work, calling into question the organization’s “grassroots network.” Likewise, the need for a group dedicated to convincing liberal voters to prioritize the courts and judges has been somewhat usurped by circumstance. Thanks to Republican overreach in essentially stealing judicial appointments that should have been filled by Democrats, not to mention a series of increasingly radical Supreme Court rulings, liberal voters have become far more focused on judges.

### **Is there strong evidence of its impact?**

No. In the last two decades, conservative legal theories have come under scrutiny, but the ideas of originalism and textualism have also become [baked into wider legal thought](#) thanks to [aggressive evangelizing](#) by conservative lawyers and judges. Conservatives judges have also come to dominate the federal court system.

ACS does not bear primary responsibility for these losses. But as an organization that claims the mantle of “the country’s foremost progressive legal organization,” it has shown a limited capacity to push back against the right or maximize progressive gains during periods of opportunity. ACS and other liberal legal organizations were unable to marshal adequate opposition to the right’s ascendancy during the Bush and Trump administrations and failed to convince Democratic leaders to act more forcefully on judges during the Obama presidency.

Feingold has acknowledged this failure by Democrats on numerous occasions, including during his interview with Blue Tent. “We were caught off guard by the rise of the Federalist Society, both its potential power and its ruthlessness,” he said. But Feingold insists that there is a new sheriff in town when it comes to the courts. As he recently told *The Atlantic*, “the era of chumpness is over.”

When asked for proof of impact, an ACS spokesperson cited: President Biden’s appointment or nomination of “dozens” of names the organization recommended; its regular consultation with lawmakers and government officials on issues of law and policy; its state attorneys general project, which facilitated “conversations and exchanges of information” between state attorneys general regarding COVID-related litigation and regulation; and its role in shaping legal debates, particularly via its 200-plus student and lawyer chapters around the country. In response to a question about ACS’s achievements before the current administration, an ACS spokesperson cited the group’s work training and encouraging members to take part in the federal regulations process, as well as partnering with Time’s Up and National Women’s Law Center to partner student law volunteers with attorneys working on sexual harassment cases.

The accomplishments cited above are either unimpressive or, in the case of shaping legal debates, exaggerated. It would be difficult to assign ACS credit for any recent changes at the courts and in liberal legal thinking. These changes have been fueled in large part by [liberal fears over the Supreme Court](#), with [newer progressive legal groups](#) often taking [center stage](#) over ACS. In less than 10 months, the Biden administration has confirmed as many public defenders to circuit court judgeships as President Obama did during eight years in office, six of which included a Democratic senate majority. ACS may be able to claim some credit for the progress under Biden, but it must also be recognized for its shortcomings in the previous 19 years.

### **Does it have a plan to achieve future impact?**

Much of ACS’s programming revolves around building networks and spreading ideas, especially

among younger lawyers and law students. These networks, mentioned above, are built in part to mobilize grassroots supporters when needed, as well as to give a sense of community and ideological connectivity to members in the long term. These networks also include working groups devoted to finding and grooming progressive lawyers for judgeships and other federal appointments.

During 2021, ACS has devoted itself to a focus on race and the constitution, during which its programming has focused on pointing out the structural racism embedded in both the constitution and the broader legal system. Part of this work has led ACS to begin advocating for a truth, racial healing and transformation commission, a goal it plans to continue pursuing over the next several years.

ACS would not share a copy of its strategic plan with Blue Tent, nor did the organization share any details of the plan.

### **Does it have strong leadership and governance?**

ACS president Russ Feingold spent three terms in the United States Senate from 1993 to 2011, giving him close relationships with current policymakers in both congress and the White House. In his short time leading ACS, Feingold has helped to refocus the organization to take more active steps regarding judicial appointments and court reform measures, including thorough reviews of the ACS working groups responsible for incubating potential nominees.

Feingold likewise appears to have a strong understanding of ACS's place as a big-tent organization at the center of the progressive world. He spoke positively of newer, more explicitly progressive and hardline groups like Demand Justice, saying they've worked well together and are focused on "not getting involved in infighting and making sure we raise each other up."

Members of ACS's board of directors include a wide array of practitioners, scholars and educators, including progressive luminaries as well as attorneys at major corporate firms. The coziness between ACS and big business has long been a point of criticism for the group, and came to a head in 2021 when Andrew DeVore, a labor and employment lawyer for Amazon and a board member at ACS, [resigned his seat](#) during the company's high-profile union battle in Bessemer, Alabama. A number of progressive groups previously called for ACS to remove DeVore. ACS has previously listed Amazon as a corporate sponsor. ACS also dragged its feet on issuing a statement criticizing

Amazon’s conduct during the union drive, which included actions that [may have violated federal labor laws](#).

Asked about the controversy regarding DeVore and Amazon, an ACS spokesperson told Blue Tent that “ACS has never censored or suppressed its activities due to its board or its members. ACS issued several statements relative to the union vote in a timely fashion, including in the [days before the union vote](#) and [soon after the vote](#).”

A number of ACS’s remaining board members are partners at corporate firms, and many of its listed sponsors are major tech companies facing renewed scrutiny from the progressive legal movement, such as Facebook and Google. On its website, ACS has published commentary criticizing Amazon’s treatment of workers, as well as articles calling for stronger protections as a whole for workers during COVID. However, none of the group’s listed “[projects](#)” explicitly focus on economic justice or reducing corporate power, issues that have become central to the progressive movement.

Asked about avoiding conflicts of interest with corporate donors, an ACS spokesperson said, “We have a number of sponsors who engage in or take positions on many of the same issues as ACS. We make clear with every donor and sponsor that financial contributions to ACS do not and will not influence the positions that ACS takes on issues or our messaging,” quoting from and linking to a [disclaimer](#) about sponsors on ACS’s website.

### **Is it diverse and culturally competent?**

When asked about diversity and cultural competency, an ACS spokesperson told Blue Tent that “ACS employs a diverse and culturally competent staff and promotes both diversity and cultural competency within our network. We also know we can do better and continue to prioritize both in our hiring and network.”

Spencer Overton, president of the Joint Center for Political and Economic Studies and a former member of the ACS board of directors, recalled past criticisms of the organization centered on race and legal education.

“I think there was a criticism of the organization not being sufficiently focused on people of color and those who are graduates of law schools outside of the top 20,” Overton wrote in response to a

series of questions from Blue Tent. “This is a problem in progressive legal circles generally. Conservative U.S. Supreme Court Justices, for example, seem to be more likely to hire clerks from schools outside of Yale, Stanford and Harvard than progressive Justices.” (Overton added that he trusts ACS has appropriately addressed these issues.)

In describing the working groups ACS relies upon to identify potential judicial nominees, Feingold told Blue Tent that a major part of their process is going into the communities those judges will oversee and hearing from people there about who they would like serving in the courts. As mentioned above, ACS has also devoted a significant amount of its energy and future plans to issues surrounding structural racism in the law, including its endorsement of a truth, racial healing and transformation commission.

### **Is its financial house in order?**

Yes. ACS typically had [annual revenues](#) between \$3 million and \$7 million between 2011 and 2018, with an increase to more than \$8 million in 2019. ACS’s funding comes from a diverse array of sources, including progressive foundations, advocacy organizations and corporate sponsors. Feingold told Blue Tent that though ACS saw a hit in funding during the pandemic, it has since experienced a major funding increase. Combined with the group’s lowered costs thanks to COVID, Feingold says ACS is in very strong financial positioning. Feingold attributes this to his prioritization of small donors (as opposed to the group’s usual bread and butter of donations from lawyers), which he says have increased exponentially in the last two years.

Compared to its counterpart on the right, the Federalist Society, ACS has been consistently outgunned in terms of funding. Federalist Society budgets are often triple that of ACS, which doesn’t even begin to account for the massive amounts of money raised and spent by other courts-focused conservative groups on confirmation fights and elections. That being said, Federalist Society leadership is also much more [intimately involved](#) in such battles, whereas ACS has traditionally kept out of politics.

### **Does it collaborate well with other organizations and have strong partnerships?**

Yes. ACS maintains a number of active relationships with progressive legal organizations, including civil rights groups, plaintiff’s lawyers, and court reform organizations. When asked about partnerships, an ACS spokesperson cited a long list of organizations, including Campaign Legal Center, ACLU, Common Cause, Center for Reproductive Rights, Everytown for Gun Safety,

Chicago Justice Project and others. The spokesperson also referred to ACS's many student and lawyer chapters across the country, as well as its presence in "an array of coalition and partner tables." As mentioned above, Feingold clearly sees ACS as a vital member of a broader coalition and is positive about other progressive legal groups like Demand Justice.

### **Does it have the support of key funders?**

Yes. ACS is supported by a number of major funder collaboratives and foundations, including Tides, Open Society Foundations and Democracy Alliance, among others. ACS also accepts donations from a number of "sponsors," including advocacy groups, bar associations, unions, law firms and corporations.

ACS's funding sources remain a major point of contention for many of the group's public and private critics. As mentioned above, their connections to Amazon came under scrutiny in the past year (Amazon no longer appears on ACS's online [list of sponsors](#)) while the status of groups like Facebook, Google and Microsoft as top sponsors raise further concerns. ACS's connection to major corporate law firms, through both funding and members of its board of directors, are also of serious concern.

Confronting the concentrated power of corporations and the wealthy must be a centerpiece of any successful progressive movement, particularly through worker organizing and consumer protections. In the legal world, this has very specific implications: Progressive lawyers should not make a living fighting unions, nor should they help corporations avoid regulations, deflect lawsuits or force their workers and/or consumers to waive their right to sue. ACS did not respond to questions about potential conflicts with firms engaged in such practices, nor did the group provide a breakdown of its funding from corporate sources. Given ACS's actions regarding Amazon, it isn't clear the group is willing to spurn their wealthy donors.

Speaking about ACS, People's Parity Project Executive Director Molly Coleman said, "Where your funding comes from matters."

"If you agree the legal system is rigged," she added, "you can't take money from people doing the rigging." (In her interview with Blue Tent, Coleman was also positive about ACS's network building.)



Given the embarrassing series of events surrounding Amazon, it's reasonable to believe that ACS has been influenced in some way by its corporate sponsors. These conflicts not only present a credibility problem for ACS, but could serve to fuel the sort of ideological squishiness that has always hindered the organization's work. Moreover, ACS's defensive response to questions about potential conflicts implies a lack of introspection. At the absolute least, ACS should have accepted responsibility and acknowledged the group was working to prevent similar conflicts down the road. The continued attempts to deflect only serve to reinforce doubts about ACS's new leadership and direction.

### Conclusion

Liberal energies are more focused on the courts than at any time in decades. But this positive development has only emerged due to the historic failures of organizations like ACS, not their successes. In the two decades of ACS's existence, efforts to proliferate liberal legal ideas and staff the courts with progressive lawyers have floundered, while attempts to prevent a total judicial takeover by the right have been equally hapless. A new urgency has struck many progressives in and out of the legal world, many of them advocating ideas like packing the Supreme Court and denying prosecutors and corporate attorneys judgeships on principle.

ACS has not been a leader in this movement, and its track record of impact is sparse. The leadership of Feingold—who has responded more deftly to the demands of the moment—is encouraging, and ACS works on issues that are a **high priority** for progressives. (See our strategy brief: [Shaping the Federal Courts: How Donors Can Make a Difference](#).) But Blue Tent finds that donors should only **consider** the American Constitution Society at this time.

Progressives face a major uphill climb in overcoming the right's substantial financial and organizational advantage on work aimed at influencing the courts and jurisprudence. Funding on the left in this area has historically been limited—which means that donors must be especially thoughtful with their dollars in this area. We believe that [other organizations](#) seeking to shape the federal courts have done a better job of adapting to current realities of hyper-polarization and the GOP's readiness to shatter longstanding norms in the pursuit of judicial dominance.

**You may also want to check out:**

- [Center for Progressive Reform: What Donors Need to Know](#)
- [Center on Budget and Policy Priorities: What Donors Need to Know](#)
- [Demand Justice: What Donors Need to Know](#)
- [Public Citizen: What Donors Need to Know](#)

