

Q & A with MICHAEL AVERY & DANIELLE MCLAUGHLIN,

co-authors of THE FEDERALIST SOCIETY
How Conservatives Took the Law Back from Liberals



Question: Why did you write **THE FEDERALIST SOCIETY**?

Michael & Danielle: The Federalist Society is an organization with enormous power and influence over law and public policy, but most Americans know very little, if anything, about it. We thought it was important to try to explain how they became so powerful, and how they exercise their power.

Q: Who are the members of the Federalist Society?

M&D: The Federalist Society is an organization that includes a wide variety of conservative lawyers, including economic conservatives, libertarians, social conservatives, members of the religious right, and others. They often disagree with each other about particular issues, but generally support small government and a free market. They tend to prefer states' rights over action by the federal government, and tend to believe in American Exceptionalism.

Q: Constitutional interpretation is a key part of the Federalist Society. What is the general difference between interpretations that embrace “originalism” versus “the living Constitution”?

M&D: “Originalism” is a method of constitutional interpretation that attempts to apply constitutional provisions according to what their terms meant to the eighteenth century framers who wrote it and citizens who adopted it. Those who believe in a “living Constitution” think that its provisions should be applied after taking into account the changes in society that have occurred in the last two hundred years. They would argue that the framers of the Constitution often used broad and imprecise terms, for example, “due process,” just so later generations would be able to apply them to changing circumstances.

Q: Who started the Federalist Society and why?

M&D: Conservative law students started the Federalist Society in the early 1980's because they were unhappy with what they believed was the dominance of liberal ideas in legal education, the law, and public policy. They were alienated from the legal culture at that time, and organized a movement to change that culture.

Q: How is the Federalist Society organized and what does membership involve?

M&D: The Federalist Society is a national organization with lawyers' chapters in every major city in the country and in every accredited law school in the United States, as well as some chapters in foreign countries. The national organization supports the chapters by providing speakers and materials for programs, organizing debates, publishing a law review and other periodicals, maintaining an active website with multimedia materials about various areas of law and pressing legal issues, and in many other ways. The Federalist Society has “practice groups” that focus their attention on particular areas of the law. It is easy to join and one could either be a passive member or become very active in one of the chapters or practice groups.

Q: Is the Federalist Society a think tank, a social group, a legal network, a political action committee, a lobbying organization or something else altogether?

M&D: The Federalist Society is actually all of those things. More precisely, it is a network whose members engage in all of those activities. Although the organization itself does not take positions on individual issues, its members do. The organization supports their activities through its meetings, debates, publications and website. Its leading members occupy positions of considerable power and authority in academia, the legal establishment, and the government.

Q: Is there a pivotal event or moment in time, a tipping point that demonstrates when the tide of legal thought changed from Liberal to Conservative?

M&D: There is no single moment that we would call a “tipping point.” The election of President Ronald Reagan, however, was a crucial development in opening the door to the later development of conservative legal thought. Edwin Meese, first as Counselor to the President in the White House, and then as Attorney General in the Department of Justice, gave young Federalist Society members and other conservatives unparalleled opportunities to develop their ideas and their network, and to influence public policy.

Q: Is there a Liberal equivalent to the Federalist Society?

M&D: Yes, there are two organizations we should mention. The American Constitution Society is a liberal organization with a national presence and chapters for lawyers and students across the country, but it has not yet developed the same level of resources or influence as the Federalist Society. The National Lawyers Guild is a more progressive organization, much smaller, with a long history of representing social justice activists.

Q: Members of the Federalist Society are a relatively diverse group from across the conservative spectrum. With the inevitable differences of opinion that diversity entails, how are they still able to get things done?

M&D: Members of the Federalist Society agree to disagree with each other on particular issues. The organization itself does not take public positions, which avoids internal struggles to control the organization’s positions. Also, the leadership of the organization has remained pretty much in the same hands since it was founded and the members appear to be content with that.

Q: Does the Federalist Society take public positions on policy issues, legislation, Supreme Court cases, or judicial appointments?

M&D: No, but its members do and the Federalist Society provides a platform and multiple vehicles for publicizing their work.

Q: The Federalist Society has been described as “quite simply the best-organized, best-funded, and most effective legal network operating in this country.” Where does their funding come from?

M&D: Wealthy conservative philanthropists fund the Federalist Society with large annual gifts. The vast bulk of these donations are unrestricted funds, which allows the organization to use the money to develop its network and to provide programming to the membership as it sees fit. Their donors have not insisted on measurable short-term outcomes, but are funding the more long-term goal of sustaining a legal conservative movement. In this respect, conservative philanthropists have understood something that liberal philanthropists appear to have missed – the importance of building institutions.

Q: What are some of the current top issues the Federalist Society is pushing?

M&D: The Society is active in many areas. To mention a few, it continues to focus on the issue of federalism – the division of power between the national government and the states – as was reflected by the participation of leading Federalist Society members in the Supreme Court proceedings on *Obamacare*. It continues to oppose race conscious affirmative action measures, which are again before the Supreme Court in connection with the University of Texas program. Federalist Society members also continue to be active opposing various forms of governmental regulation of the economy, which were taken up in several panels at its most recent convention.

Q: What is the most high profile triumph for the Federalist Society?

M&D: One could come up with various answers, but one would certainly be the decision in *Citizens United*, in which the Supreme Court ruled that First Amendment protections extended to corporate-funded independent political broadcasts (and led to the creation of the ubiquitous Super PACs). This was a huge victory for the Society, whose members have long worked to advance corporate free speech, and who shepherded this particular case through the lower courts and argued it before the Supreme Court.

In addition, we would have to add the large swath of ultra-conservative judges who now populate the federal judiciary, including the fact that the Supreme Court of the United States has four current or former members of the Society on the bench.

Q: What laws and policies has the Federalist Society been least effective in changing?

M&D: The Federalist Society has been least successful in defending “traditional” marriage and in stopping the advance of gay rights, such as same sex marriage.

Q: How has the principle of American Exceptionalism influenced the Federalist Society’s push for international policy?

M&D: “American Exceptionalism” can be defined in many ways. The Federalist Society’s view of American Exceptionalism, as expressed by leading members such as John Bolton and Jeremy Rabkin, constitutes a rejection of international institutions and much of international law as infringing on America’s sovereignty and Constitutional values.

Q: The Federalist Society and the Tea Party movement share a goal of limiting big government and preserving individual rights, but overall are they more or less alike?

M&D: Although the Federalist Society and the Tea Party share views about so-called strict adherence to the constitution, limited government and individual rights, their organization, members and strategy are different. The Tea Party is a populist movement, which by definition tends to be a voice of “the people” rather than “the elite.” The Federalist Society has certainly railed against what it considers the “liberal elite,” but its members are lawyers, judges, politicians and law students. Also, while the Tea Party’s output tends to be focused on protest and involvement in political discourse, the Federalist Society’s output consists of debates, scholarship and conferences.

Q: You describe your book has an examination of the power of ideas, but it seems ideas and power are inevitably linked to money. Can the war of ideas be won without winning the war for money?

M&D: The success of the Federalist Society demonstrates that philanthropists who donate funds without expecting short-term success or attainment of measurable goals, but who instead believe in ideas and

institution-building, are vital to the growth of an effective movement. The war of ideas is won by investing in those ideas in a grand sense.

Q: What does the future hold for the Federalist Society? Do you see significant changes on the horizon? What are likely goals for the near future and for the long-term?

M&D: The Federalist Society has changed its name in the last few years, to an organization named to advance “studies,” rather than policy. At this point, however, it appears that this is a change in name only. Fundamentally, the group serves as a powerful network for the exchange of ideas, for supporting members engaged in litigation and lobbying, and for placing members in influential positions in government and the private sector. This has all resulted in real law and policy change. Its most senior members have committed to further institutionalizing an originalist view of the Constitution, seen in the creation of text books for law schools. The Society has also begun reaching out to citizens of other countries, and organizing groups around the ideas of limited government and state sovereignty, with a view to reinforcing those same values domestically within the USA.

Q: What can liberals learn from the rise and current power of the Federalist Society?

M&D: Liberals can learn the value of ideas in politics and the value of encouraging debate about ideas. Liberals tend to be a little afraid of controversial ideas because of their concern about political correctness. The Federalist Society has not been afraid to invite the other side to their debates and they have benefitted from testing and developing their ideas against liberal speakers. Liberals could also learn how to maintain the big tent, and the importance of not confusing your friends with whom you disagree on some issues with your enemies.

Q: What do you most want people to take away from reading **THE FEDERALIST SOCIETY**?

M&D: We want people to understand that the courts make law, and they do not do so spontaneously or accidentally. Judges do not simply apply settled legal principles to the facts of individual cases. The development of the law can be, and has been, influenced by well-organized groups of like-minded people pursuing conscious strategies to make change. The fact that American constitutional law has moved significantly in a conservative direction in the last thirty years is a result of many factors. But high on the list is the success of the Federalist Society in training a new generation of conservative lawyers, placing very conservative judges on the bench, and promoting conservative legal theories in academia, publications, conferences and debates for practicing lawyers and judges, and in the public marketplace of ideas.

THE FEDERALIST SOCIETY
How Conservatives Took the Law Back from Liberals
by Michael Avery and Danielle McLaughlin

VANDERBILT UNIVERSITY PRESS

Publication date: April 2013

Pages: 292 pages

ISBN: 978-0-8265-1877-4

\$35.00 hardcover

To schedule an interview, please contact: Gene Taft at 301/593-0766 or GeneTaftPR@gmail.com