Introduction

> Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the legal community have dissented from these views, no comprehensive conservative critique or agenda has been formulated in this field. This conference will furnish an occasion for such a response to begin to be articulated.—*Steven Calabresi, Lee Liberman, and David McIntosh, statement of purpose for "A Symposium on the Legal Ramifications of the New Federalism"*[1]

> You are more likely to convince people of your viewpoint if they feel the other side has been given a fair hearing.—*Liberman and McIntosh, in an early Federalist Society guide on how to establish campus chapters*[2]

In 1980, Steven Calabresi, Lee Liberman [Otis], and David McIntosh were young, conservative law students—Calabresi at Yale, and Liberman and McIntosh at the University of Chicago—alienated from the prevailing political orientation of their classmates and their schools. Their professors' ideologies, for the most part, reflected the dominance of liberal politics in the sixties and seventies. The New Deal, the civil rights movement, and the Great Society antipoverty programs had led to widespread faith that government could and should supply the solutions to the country's social, political, and economic problems. Calabresi, Liberman, and McIntosh disagreed, believing that big government posed a fatal threat to individual rights and the sanctity of private property. In their view, the liberals had distorted important constitutional principles. The three law students started to raise questions.

Over the next thirty years, the questions they and their conservative colleagues would raise identified many of the crucial issues of twentieth-century America. What is the appropriate balance between an individual's right of self-determination and the powers and responsibilities of government? Should Americans pursue collective or individual solutions to social problems like poverty, care of the elderly, and education? How much regulation of private property and economic behavior is appropriate in a capitalist, free-market country? Is racial and gender diversity in education and employment an appropriate goal for government to pursue and what means are acceptable for achieving it? In the face of increasing economic and social globalization, what is more important—protecting national sovereignty or establishing international norms? Should judges interpret the U.S. Constitution to keep pace with the moral, economic, and social tenor of the times, or should they read the text in the light of its eighteenth-century meaning unless it has been formally amended?

The law students not only began to ask these questions, they began to answer them. And they began to organize. Chief Justice John Roberts's law clerk, George Hicks, described the conservative students at Harvard Law School in the early

eighties as "ideological outliers who struggled to gain credibility in class and acceptance on campus."[3] Soon enough, however, they got help from conservative professors who were themselves struggling with the prevailing liberal ideology of their colleagues. Professors Ralph K. Winter and Robert Bork helped Calabresi start the Federalist Society at Yale, and Professors Antonin Scalia, Richard Epstein, Richard Posner, and Frank Easterbrook were advisors to Liberman and McIntosh at Chicago. A couple of years earlier, Spencer Abraham and Steven Eberhard, students at Harvard Law School, had started the *Harvard Journal of Law and Public Policy* as a vehicle for conservative ideas. Eventually this would become the official law journal of the Federalist Society.

The Federalist Society's first major event was a symposium on federalism in April 1982. It was cosponsored by the Yale and Chicago law school groups, the *Harvard Journal of Law and Public Policy*, and a similar group at Stanford Law School, the Stanford Foundation for Law and Economic Policy. The Institute for Educational Affairs, the Olin Foundation, and the Intercollegiate Studies Institute funded the conference.[4] The seminar was a huge success, and the Yale and Chicago law students soon began assisting conservatives on other campuses with the organization of their own Federalist Society chapters. At the time of the society's inception, conservative law students felt isolated in an academic world dominated by a liberal mindset; the fledgling Federalist Society provided "a social club for students to come comfortably out of the political closet."[5]

Within one year of the first symposium, there were seventeen Federalist Society chapters, all on law school campuses.[6] The society grew continuously over the next several years. By 2000, former federal appellate judge Abner Mikva, a liberal, would say, "Where so many of the nation's leaders are groomed, the Federalists manipulate the landscape. It was once held that liberals ran the law schools. The liberals had the name but the Federalists own the game. For students on the go, there is nowhere else to go."[7] At that point, the society had 25,000 members, lawyers chapters in 60 cities, and law school chapters on 140 campuses.[8]

Today the Federalist Society for Law and Public Policy Studies claims that over 45,000 conservative lawyers and law students are involved in its various activities. There are only approximately 13,000 dues-paying members, however.[9] Four Supreme Court justices—Antonin Scalia, Clarence Thomas, John Roberts, and Samuel Alito—are current or former members of the Federalist Society.[10] Every single federal judge appointed by President George H. W. Bush or President George W. Bush was either a member or approved by members of the society. During the Bush years, young Federalist Society lawyers dominated the legal staffs of the Justice Department and other important government agencies. The dockets of the federal courts are brimming with test cases brought or defended by Federalist Society members in the government and in conservative public interest firms to challenge government regulation of the economy; roll back affirmative action; invalidate laws providing access to the courts by aggrieved workers, consumers, and environmentalists; expand state support for religious institutions and programs; oppose

marriage equality; increase statutory impediments to women's ability to obtain an abortion; defend state's rights; increase presidential power; and otherwise advance a broad conservative agenda.

There are Federalist Society lawyers chapters in every major city in the United States, and in London, Paris, Brussels, and Toronto. It has established student chapters at every accredited law school in the country (as well as at a handful of unaccredited law schools, and at the business schools at Harvard and Northwestern). It has also recently launched law school alumni chapters, to enable alumni to better reconnect. With revenues of $9,595,919 in 2010, the 75 lawyers chapters sponsored nearly 300 events for more than 25,000 lawyers, and the society sponsored 1,145 events at law schools for more than 70,000 students, professors, and community members.[11] The Federalist Society's membership includes economic conservatives, social conservatives, Christian conservatives, and libertarians, many of whom disagree with each other on significant issues, but who cooperate in advancing a broad conservative agenda. As professors on the faculties of law schools, its members have succeeded in gaining respect and traction for conservative legal ideas, which stem in large part from an originalist interpretation of the Constitution. Academics associated with the Federalist Society have not only educated a new generation of conservative law students but played a role in the rise of openly conservative law schools such as Pepperdine and George Mason. The high point for Federalist Society influence in government was the second term of George W. Bush. By the time President Bush left office, what had begun as a counterestablishment movement had become the establishment.

The Federalist Society has been described as "quite simply the best-organized, best-funded, and most effective legal network operating in this country."[12] Although its leaders have described the group as an intellectual forum, operating above the fray of government, the academy, and the private sector, there can be no doubt that many of its members have wielded extraordinary influence in all these arenas.[13] Professor Jerry Landay's account of the 1999 Federalist Society National Lawyers Convention at the Mayflower Hotel in Washington, D.C., gives us some flavor of the organization at that time:

> Tonight at the Mayflower you get a sense of just how powerful and far-reaching the Society is. There are stars from every corner of the Republican establishment in the room. From snippets of conversation, one concludes that they are joined not only at the ideological hip but by a collective hatred for President Clinton—perhaps more for standing in the way of their Revolution than for any moral or legal lapses. Members of Starr's old team like constitutional law advisor Ronald Rotunda (who counseled Starr that he could indict a sitting president) rub shoulders with old-timers from the Reagan administration—former Attorney General Edwin Meese, Solicitor General Charles Fried, and Civil Rights commissioner Linda Chavez—and with former Bush White House Counsel C. Boyden Gray. The room bulges with partners from among the most powerful law firms in the land. . . . And then there

> are the judges. No fewer than eight federal judges, most of whom are still active on the bench, will sit on panels or speak from the podium during this three day affair.[14]

This book describes how the Federalist Society grew from a small student organization into a dominant force in law and politics. Primarily, this book is about the power of ideas. Analyzing five substantive areas of the law, it identifies ideas about the Constitution, government, and individual rights that were created, adopted, and proliferated by the Federalist Society and its members. It demonstrates how those ideas have taken hold in the mainstream of legal thought and contributed to the creation of law and policy. The society's success is due to the extraordinary network it has created, the support it receives from wealthy conservative patrons (whose agendas it advances), and the intellectual work that its members have done. The Federalist Society has created an interdependent network of conservative think tanks, public interest law firms, prominent lawyers, elected representatives, judges, and law professors. To fuel this network, the leading Federalist Society members publish prolifically. The sheer output of speeches and the number of conferences and debates at which they promote their views is staggering.

Their success demonstrates the truth of Sidney Blumenthal's argument that "ideas themselves have become a salient aspect of contemporary politics."[15] The adoption of the ideas of Federalist Society members in briefs, court opinions, foreign policy, and municipal, state, and federal legislation has been unprecedented in speed and scope. Former vice president Dick Cheney has said that the Federalist Society "changed the debate."[16] Abner Mikva has characterized the society as a once-small "band of legal conservatives" whose ideas, at the time they began organizing, were "scorned by academics, ignored by judges and unknown to the public" but who ultimately succeeded, persevering to "build a powerful movement and reshape our world according to their notions."[17]

Yet the critical role that the Federalist Society has played in the resurgence of conservatism is largely unknown to the general public and has only recently become the object of academic study. Even in law schools, for the most part students study Supreme Court cases and legal doctrine without considering who filed the cases, who paid to litigate them, and whether the ideology of the judges who presided over them had an effect on the outcome. The fact is that much of what may have appeared as a haphazard or spontaneous legal development to a casual observer over the past two decades has been the result of deliberate tactics and a finely honed strategy to move the law in a conservative direction.

This book does not take the position that the law is the product of secret conspiracies. Nonetheless, the influence of the Federalist Society is often difficult for the general public to discern. The society itself does not take public positions on policy issues, legislation, the outcome of Supreme Court cases, or judicial appointments. Articles are written, briefs are filed, and cases are brought by individual members or by sister organizations, such as conservative public interest law firms. This allows the society to maintain a "big tent" that promotes cooperation among

conservatives with different views by avoiding internal battles over official policies. It also avoids visibility for much of what the Federalist Society accomplishes. For example, Lee Liberman Otis, one of the founders, vetted judicial nominees during the administration of George H. W. Bush. Although the Federalist Society does not formally endorse judicial nominees, it would be highly artificial to consider her influence on judicial selection as the business of a single member.

The society, however, is keenly aware of the power of branding and rhetoric. Named for the Federalists and "the principles of the American Founding," its magazine is named the *Federalist Paper.*[18] The bust of its founders' hero, James Madison, serves as the society's logo. Madison was in fact given a nose job by Robert Bork's son, Charles, who remarked that the original silhouette was "too ugly" to adorn a brochure.[19] From 2001 to 2010, the amount that the society spent on its public relations firm, Creative Response Concepts, grew as reflected in Table 1.

TABLE 1. Annual Expenditures for Creative Response Concepts

Year	Amount (in dollars)
2001	$ 0
2002	0
2003	0
2004	214,500
2005	324,878
2006	536,134
2007	728,622
2008	557,922
2009	710,916
2010	917,705

Source: Federalist Society for Law and Public Policy Studies, Form 990, 2001–2010.

The society's publications and projects currently include the following: *ABA Watch, Bar Watch Bulletin, State Court Docket Watch, Class Action Watch*, and *State AG Tracker. NGO Watch*, a Federalist Society project in collaboration with the American Enterprise Institute, also features *UN Treaty Watch.* These titles place the society firmly in the role of defender of the ideals on which it asserts the republic was founded—ideals supposedly eroded by the individuals and organizations the society keeps watch over. For example, consider the explanation for founding the *State AG Tracker*; "There has been increasingly pronounced discussion concerning the appropriate role of state Attorneys General. Some argue that state AGs have overstepped their role by prosecuting cases and negotiating settlements that have had extraterritorial effects, and sometimes even national effects. Others argue that state AGs are simply serving the interests of their own citizens and, at times, appropriately filling a vacuum left by the failure of others (for example, federal agencies)

to attend to these issues."[20] Although the situation is characterized as a debate, it is clear that the views of the society align with the first proposition.

The society is aware of its tremendous potential to move law and policy in a conservative direction after training, within its first thirty years, "two generations of lawyers" who actively participate at various levels of government and in the community outside of government, promoting originalism, limited government, and the rule of law.[21] David McIntosh has stated that "[p]utting them in place means we'll have fifty years of seeing what that actually means for impact."[22]

Among other tactics, leading Federalist Society members are prolific authors of amicus (friend of the court) briefs. The initiative for filing such briefs may come from individual Federalist Society members or conservative groups with which they have ties. On other occasions, parties before a court may solicit amicus briefs from organizations they believe will support their position, in order to put arguments before the court that the parties either do not want to make themselves or simply do not have space to address in their briefs. This is a common practice, used by all parties, irrespective of ideology. The chapters that follow will demonstrate how effective Federalist Society members have been in using amicus briefs to move the law in a conservative direction.

The fifteen practice groups and nine special projects of the Federalist Society both support and publicize the work of its members. The conservative network that the society has fostered provides a platform for the projects of its members, even though the Federalist Society name is not formally associated with them.

Another element of the Federalist Society network is an online pro bono center that pairs lawyers with opportunities for conservative public interest pro bono work.[23] Its mission is to "match lawyers nationwide with opportunities for pro bono service in the cause of individual liberty, traditional values, limited government and the rule of law." The executive director is Margaret ("Peggy") A. Little, a Stamford, Connecticut, lawyer engaged in commercial litigation, a Yale Law graduate, and a former clerk to federal judge Ralph K. Winter. Federalist Society member Ilya Somin lauds the center as a means of addressing the need for lawyers to conduct follow-up litigation to enforce favorable precedents obtained by conservative public interest law firms, a problem that he described as a key weakness of conservative public interest law.[24]

The Liberal Establishment

As noted above, when the founders of the Federalist Society began law school in the early nineteen eighties, they found themselves in institutions dominated by liberal ideas. Professor Steven Teles, who has studied the conservative legal movement, has analyzed the dominance of the liberal legal network at that time.[25] The foundation of liberal dominance was the New Deal. The work of the NAACP Legal and Defense Fund, the American Civil Liberties Union, the National Lawyers Guild, and other advocacy organizations contributed to the preeminence of liberal legal thought and action. During the sixties and seventies, there were several significant

developments, including the Supreme Court's decision in *Gideon v. Wainwright*, which mandated court-appointed counsel for criminal defendants; a subsequent explosion in the numbers of legal services lawyers and programs; an expanded interest on the part of the American Bar Association in legal aid programs; the growth of clinical education in law schools; the development of liberal public interest law; and crucial support from the Ford Foundation for many of these initiatives.[26] Furthermore, in the late sixties and early seventies, there was enormous growth in the size of law faculties in the United States, just as "the law students who would fill those positions were moving decisively to the left."[27] The new generation of liberal law professors "sought to legitimize the expanded role of the judiciary ushered in by the Warren Court," as compared with the previous generation, who had "cut their teeth on legal realism and judicial restraint."[28]

Fundamentally, in the post–civil rights movement era, individual rights were identified as crucial to achieving equality and social justice. Sanctioned by federal government programs and the decisions of the Supreme Court, the claims and arguments of legal liberals who sought to achieve those ends seemed "identical to morality, progress and common decency" and "a part of elite common sense."[29] From a progressive point of view, however, the liberal legal network achieved only qualified success. In fact, according to many progressives, liberal legal goals were never more than partially realized. Social and racial justice remained elusive in significant and enduring respects, and prevailing corporate interests were never seriously compromised. Structural and political forces, and the limitations of the liberal ideology itself, curbed the success of legal liberalism.

The Conservative Renaissance

Although the predominant values when Calabresi, McIntosh, Liberman, and Abraham arrived in law school were liberal, a wave of conservative political resurgence was reaching its crest as the students began to organize. The election of Ronald Reagan as president in 1980 has been described as a triumph of the new conservative "Counter-Establishment" movement that had slowly been gathering strength over the preceding thirty years.[30] The role of ideas and ideology in the development of this movement was critical. Friedrich von Hayek's *The Road to Serfdom* (1944) and the ex-communist Whittaker Chambers's *Witness* (1952) were seminal publications that influenced the conservative resurgence. It was William F. Buckley's journal *National Review*, which appeared in 1955, and Buckley's subsequent personal celebrity, however, that "cover[ed] the conservative movement with the mantle of respectability."[31] Buckley introduced the concept of the conservative "Remnant"—what Blumenthal calls "the last defenders of the old values against modern liberal decadence."[32] Barry Goldwater's run for the presidency in 1964 and Ronald Reagan's California gubernatorial campaign in 1966 moved the conservatives actively into the world of electoral politics. By 1980, conservatism was in full bloom. Buckley's "Remnant" had become an ideological movement, consisting of

institutes, think tanks, and publications that nurtured and promoted the ideas of conservative intellectuals, lawyers, and policymakers. And the Reagan presidency created a powerful platform—in all three branches of government—for the members of that movement.[33]

So when the young Federalist Society lawyers burst onto the scene, there was a political apparatus waiting to put them to work. After law school, Calabresi clerked for Judges Bork and Scalia on the Court of Appeals for the D.C. Circuit. He then worked in the White House and the Justice Department from 1985 to 1990. McIntosh became a special assistant to President Reagan and to Attorney General Meese. Liberman clerked for Scalia on the Court of Appeals, then served as an assistant attorney general under Attorneys General William French Smith and Edwin Meese. When Scalia was appointed to the Supreme Court, she clerked for him there. Later she worked in the White House with C. Boyden Gray when George H. W. Bush was president and was in charge of vetting judicial nominees.

A large number of young conservative lawyers joined the Federalist Society founders in government. Charlie Savage describes the Justice Department under Meese as "a giant think tank where these passionate young conservative legal activists developed new legal theories to advance the Reagan agenda."[34] Professor Ann Southworth, who has written extensively about conservative lawyers, reports that many of the people she interviewed found jobs in the Reagan administration. One of them observed that "[t]he credentialing of lawyers during the Reagan [years] is probably the single biggest factor, along with the selection of conservative judges, in . . . really launching the [conservative law] movement into a more prominent and successful role."[35] During the Reagan administration, membership in the Federalist Society was a passport to career opportunities. The same has remained true with Republican presidents since then.

The young lawyers from the Federalist Society were far more extreme than the older conservatives in the Justice Department. Charles Fried, the solicitor general under Reagan from 1985 to 1989, described the speeches they wrote for Meese as containing "extreme positions such as questioning the constitutionality of independent agencies or suggesting that the president need not obey Supreme Court decisions with which he disagrees."[36] Many of these older lawyers retired by the time George W. Bush was elected president, and the Federalist Society lawyers in his administration were able to put into practice some of the theories they had developed during the Reagan years.

The society's promotion of originalism as the only legitimate method of constitutional interpretation was given a solid beginning in the Reagan Justice Department under the stewardship of Meese. Meese has described originalism as the notion that "judges should issue rulings based on the original understanding of the authors and ratifiers of the Constitution and the Bill of Rights, rather than on outcomes that reflect the judges' own biases or policy preferences."[37] Meese became interested in the subject while serving in Reagan's California administration and made it a national priority while serving as attorney general.

Meese launched his originalism campaign in a speech to the American Bar Association in July 1985.[38] It evoked harsh criticism from the liberal establishment. Supreme Court Justice William J. Brennan Jr., in an address at Georgetown University just months later, called attempts to divine the intent of the framers as "arrogance cloaked in humility." According to Brennan, it was "arrogant to pretend from our vantage we can gauge accurately the intent of the framers on application of principle to specific, contemporary questions."[39] Meese responded a few months later in a speech before the Federalist Society's lawyers division in Washington, D.C.; the society's current executive vice president, Leonard Leo, attended the meeting and described it as "a heady moment for me as a student."[40] To preserve the momentum of what would come to be known as the "great debate," Meese scheduled breakfast and lunch lectures on originalism at the Justice Department, and he promoted originalism as applied to issues such as civil rights and criminal justice in a series of seminars with conservative groups.[41] These groups included the fledgling Federalist Society.

Twenty years after the debate began so publicly, Harvard professor Lawrence Tribe said that Meese was "successful in making it look like he and his disciples were carrying out the intentions of the great founders, where the liberals were making it up as they went along. It was a convenient dichotomy, very misleading, with a powerful public relations effect."[42] What Meese sought to achieve with originalism—with considerable success to date, not least because of the endeavors of the Federalist Society—is what the Federalist Society itself has achieved with a broader base of conservative legal principles. Charles Cooper, who worked under Meese in the Office of Legal Counsel, described it thus: "Ed really brought it out of the pages of law review articles and the rarified atmosphere of faculty lounges and academic debates and made it a highly important and visible public policy debate."[43]

Calabresi published many of the important speeches and panel discussions on the debate about originalism in a single volume in celebration of the twenty-fifth anniversary of the Federalist Society.[44] Calabresi labels Robert Bork as the "intellectual godfather" of originalism. Yet he criticizes Bork on one point that has become a crucial development in the doctrine. Bork spoke of the need to interpret the Constitution's provisions "according to the intentions of those who drafted, proposed, and ratified them." Calabresi argues that it is the *words* of the Constitution that are the law, not the *intentions* of its authors.[45] The prevailing thought in the Federalist Society today, exemplified by the jurisprudence of Justice Scalia, is that to interpret the Constitution, one must search for the original meaning of its provisions, not the original intent of the framers. The argument is that the original meaning of words may be objectively determined by recourse to historical sources that reveal how the words were used at the time, whereas determining the intent of the framers is subjective and speculative.

The doctrine of originalism continues to develop, and there continue to be disagreements and debates among Federalist Society members and other conservatives about the correct approach. One current issue is the difference between

"interpretation" and "construction" in determining what the Constitution requires in individual controversies. Professor Randy Barnett explains that discovering the original semantic meaning of the Constitutional text, i.e., "interpretation," is not always sufficient to resolve a case.[46] One must also engage in "construction," i.e., applying that meaning to particular factual circumstances. Some of the terms in constitutional provisions are vague. For example, the Fourth Amendment requires that searches be "reasonable," but what does "reasonable" mean in the context of a specific case? The text of the Constitution "does not say everything one needs to know to resolve all possible cases and controversies." When the information provided by interpretation "runs out," as Barnett puts it, one must turn to construction. Here is the rub—the rules for construction "are not found in the semantic content of the written Constitution." Thus, originalists will disagree among themselves about how to engage in constitutional construction partly because of "their differing normative reasons for favoring originalist interpretation."[47]

Ted Olson maintains that originalists are not motivated by "the desire to achieve any particular political outcome or result." "What drives originalists is nothing more, and nothing less, than the noble pursuit of a coherent and principled approach to interpreting and implementing the various provisions of our written Constitution."[48] Nonetheless, the doctrine of originalism does lead to some fairly predictable conservative outcomes. Calabresi closes the introduction to his collection of originalist documents by noting "some good consequences that would flow from adopting originalism":

> This country would be better off with more federalism and more decentralization . . . with a president who had more power to manage the bureaucracy . . . if we did not abort a million babies a year as we have done since 1973 . . . if students could pray and read the Bible in public school and if the Ten Commandments could be posted in public places . . . if citizens could engage in core political speech by contributing whatever they wanted to contribute to candidates for public office . . . if we could grow wheat on our own farms without federal intrusion . . . if criminals never got out of jail because of the idiocy of the exclusionary rule . . . if our homes could not be seized by developers acting in cahoots with state and local government . . . [and] if state governments could not pass laws impairing the obligations of contracts.[49]

Growth and Influence

Federalist Society members have thoroughly infiltrated the executive and judicial branches, but have not been as successful in getting elected to public office. The historic 1994 election resulted in a fifty-four seat swing from Democrats to Republicans and gave Republicans a majority in the House for the first time since 1954. The new Republican majority included Federalist Society founder David McIntosh, elected as a representative from Indiana. Federalist Society members in the House formed a caucus called the New Federalist, "aimed in part at reducing

the number of federal agencies in the government and restoring the balance of power between the federal government and the States." Rep. McIntosh reported, "Every day, as I travel to and from my committee meetings and the House floor, I seem to run into someone I originally met at a Federalist Society conference."[50] Nonetheless, the 1994 election sent only fifteen Federalist Society members to the House and Senate. McIntosh served six years in the House, and then ran for governor of Indiana in 2000, losing to Democrat Frank O'Bannon.

The membership and the financial resources of the Federalist Society have grown steadily from its inception. Between 2004 and 2010, for example, the number of members involved in local and national programs grew from 35,000 to over 45,000, and the number of members paying dues to the national organization went from under 8,000 to approximately 13,000. In the same period, the number of programs offered increased from approximately 900 to nearly 1,400. Over those six years, annual revenue more than doubled, from somewhat over four million dollars to more than nine million.[51] There are now more than three hundred student, faculty, lawyer, and alumni chapters in the United States and abroad.

The society has also begun to expand beyond the borders of the United States, with chapters in London, Brussels, Paris, and Toronto. In 2010, the society's International Law Project reached out to leaders of European public policy organizations "friendly to free markets and rule of law principles" and assisted European lawyers in starting groups modeled on the Federalist Society's lawyers and student chapters, all of whom are collectively termed the "European Sovereignty Network."[52] In 2010, the society anticipated participating with groups in Bulgaria, Macedonia, Serbia, Estonia, Latvia, and Lithuania.[53]

Federalist Society members reached the height of their political influence in the George W. Bush administration. Vice President Cheney, addressing the Federalist Society at its national convention in 2001, underlined the close ties between the society and the administration: "There are many members of the Federalist Society in our Administration. We know that because they were quizzed about it under oath. We're especially proud to have two of your founders at the Department of Energy—the general counsel, Lee Liberman Otis, and Secretary Spence Abraham."[54]

In 2001, three cabinet members were either Federalist Society members or active participants: Energy Secretary Spencer Abraham, Interior Secretary Gale A. Norton, and Attorney General John D. Ashcroft. Federalist Society stalwart Ted Olson was the solicitor general. Five of the eleven lawyers in the White House Counsel's Office were members.[55] Sidney Blumenthal took a dim view of the influence of Federalist Society members: "On every issue, from the gutting of the civil rights division of the Justice Department, where 60 percent of the professional staff was driven out and not a single discrimination case was filed, to the implementation of the so-called 'war paradigm,' including abrogation of Article Three of the Geneva Convention against torture, (which then White House counsel Alberto Gonzales termed 'quaint' in a memo to the president), Federalist Society cadres were at the center."[56]

The appointments of Chief Justice Roberts and Justice Alito doubled the Federalist Society influence on the Supreme Court. The *Wall Street Journal* noted: "[T]he Alito-Roberts ascendancy also marks a victory for the generation of legal conservatives who earned their stripes in the Reagan Administration. The two new justices are both stars of that generation—many others are scattered throughout the lower courts—and they are now poised to influence the law and culture for 20 years or more. *All those Federalist Society seminars may have finally paid off. Call it Ed Meese's revenge.*"[57]

A few examples suffice to illustrate the ideological content of the Roberts Court's jurisprudence. Professor Jeffrey Rosen describes the current direction of the court as "exceptionally good for American business."[58] In Chief Justice Roberts's first two terms, the court heard seven antitrust cases, compared to less than one per year during the Rehnquist Court.[59] The court resolved them all in favor of the corporate defendants and in the process overruled an almost one-hundred-year-old precedent holding minimum price restraints to be per se anticompetitive.[60] Consumers lost when the court held that regulatory action by a federal agency preempted a state tort action against an allegedly defective medical product in one case, and in another when the court afforded insurance companies a good faith defense for a mistaken reading of a regulatory statute.[61] The court has continued to protect corporate defendants against large punitive damage awards.[62] Environmental claims have had mixed success, with parties favoring regulation winning some procedural victories, but losing on the merits in other cases.[63] In a sharp departure from a decision just seven years earlier, the court upheld a law criminalizing abortion by means of intact dilation and evacuation, despite the fact that the statute made no exception for the need to protect the health of the mother.[64] Important decisions on the Fourth Amendment have run against criminal defendants.[65] The court struck down as unconstitutional voluntarily adopted school integration efforts in Seattle, Washington, and Louisville, Kentucky, over a passionate dissent by the moderate justices.[66] In a failure to follow what was arguably a controlling precedent, the court held that taxpayers had no standing to bring an establishment clause challenge to a federal agency's use of federal money to fund conferences to promote the president's faith-based initiatives.[67]

In one of the more controversial decisions handed down in recent memory, the court held in *Citizens United v. Federal Election Commission* that First Amendment protections extended to corporate-funded independent political broadcasts.[68] This case had been shepherded through the lower courts by society member James Bopp, and was argued before the court by Ted Olson. Common Cause, a reform group, subsequently argued that Justices Scalia and Thomas should have declined to participate in the case because they had associated with corporate leaders whose political aims were advanced by the ruling. Those corporate leaders included David and Charles Koch, staunch supporters—and funders—of the Federalist Society. Further media fallout highlighted both justices' personal ties to the Federalist Society.

In 2012, the Supreme Court decided one of the most politically charged cases in recent years, ruling on the constitutionality of provisions of the Patient Protection and Affordable Care Act of 2010, popularly known as "Obamacare."[69] In *National Federation of Independent Business v. Sebelius*, twenty-six states, together with private individuals and business organizations, filed suit seeking to have the statute declared unconstitutional. Questions concerning two provisions of the statute were before the court: (1) whether Congress had the power to require individuals to purchase and maintain health insurance (the "individual mandate"), and (2) whether Congress had the power to give the secretary of health and human services the authority to penalize states that chose not to participate in the statute's expansion of the Medicaid program. The court held that the individual mandate could be justified under the power of Congress to lay and collect taxes, treating the penalty for not purchasing health insurance as a tax. In addition, the court in effect upheld a penalty provision in connection with the expansion of Medicaid, although it narrowed the scope of the penalty. In practical terms, the result was a victory for President Obama and liberals who supported the health care reform measure. At the same time, the underlying rationale of the decision was a significant legal victory for conservatives, and advanced constitutional principles important to the Federalist Society.

Federalist Society members, including many the reader will encounter frequently in this book, were heavily involved in the case. Paul Clement represented the states that challenged the law and Michael A. Carvin represented the National Federation of Independent Business and the individual private challengers. Clement and Carvin participated in the oral argument at the Supreme Court. Karen R. Harned and Professor Randy Barnett also represented the private challengers. Some commentators described Barnett as the "key legal thinker" behind the challenge to the individual mandate.[70] Several influential Federalist Society members and allies authored amicus briefs on behalf of organizations supporting the challenge to the law.[71] Leading Federalist Society members fanned out across the country to speak at lawyers and student chapters both before and after the decision. The Federalist Society set up a dedicated webpage on which it hosted video from debates at Federalist Society chapters around the country discussing the act and its constitutional implications, as well as scholarly articles and podcasts by Federalist Society members.[72]

As we discuss in greater detail in the chapters that follow, members of the Federalist Society favor constitutional principles that limit the size of the federal government, protect states' rights, and protect private property from government regulation. Congress's power to enact legislation is limited by its constitutionally enumerated powers. As relevant here, in the late nineteenth and early twentieth centuries, the Supreme Court took a very narrow view of what Congress could do under the power given to it by Article I of the Constitution to regulate interstate commerce—the "commerce clause." During the Depression and in response to New Deal legislation, however, the court changed its philosophy and began to read

the commerce clause extremely broadly. This continued through the civil rights era, when federal antidiscrimination statutes were passed under the commerce clause. Between 1937 and 1995, the Supreme Court did not strike down any federal legislation on the ground that Congress had exceeded its power under the commerce clause. This has been of ongoing concern to conservatives because it extended the reach, scope, and size of government. On two occasions, the Rehnquist Court held that legislation enacted by Congress exceeded its power under the commerce clause, striking down as unconstitutional the federal Gun-Free School Zones Act in 1995 and the civil remedy provision of the Violence against Women Act in 2000.[73] The court reasoned that the relationship between guns in school zones or domestic violence and interstate commerce was too attenuated. The decisions suggested that the commerce clause did not justify the regulation of non-economic activity based on its cumulative effect on interstate commerce. The effect of those decisions on the scope of the commerce clause, however, has been more limited than conservatives hoped.[74]

In *Sebelius*, Federalist Society lawyers argued that the health insurance individual mandate was unconstitutional under the commerce clause, in part because it *created* commerce rather than regulating it, and because it regulated *inactivity* (failing to purchase health insurance) rather than activity. Chief Justice Roberts's opinion accepted that argument, concluding, "The Framers gave Congress the power to *regulate* commerce, not to *compel* it."[75] It is too early to tell how many future laws the "inactivity" limitation on the commerce clause may invalidate, but the net result of the decision, although the act was upheld, was the creation of a new principle limiting Congress's power under the commerce clause. Following the decision, Randy Barnett blogged, "Who would have thought that we could win while losing?" Barnett stated the court had "accepted all of our arguments about why the individual insurance mandate exceeded the commerce power," and that the court had reaffirmed the "first principle" from *Lopez v. United States*, that "the federal government is one of limited and enumerated powers."[76]

In addition, the court held that the provision penalizing states that refused to participate in the expansion of Medicaid was unconstitutional under the spending clause. In earlier cases, the Supreme Court had read that clause to give Congress the power to condition federal grants on whether the recipient states met certain requirements. In this case, the court held for the first time that the requirements were too onerous and amounted to coercion, rendering the penalties provided by the statute unconstitutional.[77]

Thus, although the Supreme Court for the most part upheld the health care reform legislation, conservatives succeeded in establishing two important constitutional principles that they will be able to use in future cases. These doctrinal victories may, in the long run, prove to be more important than the fate of a single program.

Justices Scalia, Thomas, and Alito make no secret of their close connection to the society. The justices are highly prized and relatively frequent attendees at the

society's major events. Justice Alito, hosted by the society's Paris chapter, traveled to France in December 2010 to participate in a panel discussion regarding judicial review and separation of powers with Judge Jean-Claude Bonichot of the European Court of Justice.[78] Justice Scalia was advertised as a copresenter at a September 2011 Continuing Legal Education (CLE) session sponsored by the society's Federalism and Separation of Powers Practice Group.[79] The CLE was held at the Ritz-Carlton in Lake Tahoe and was open to Federalist Society members only.

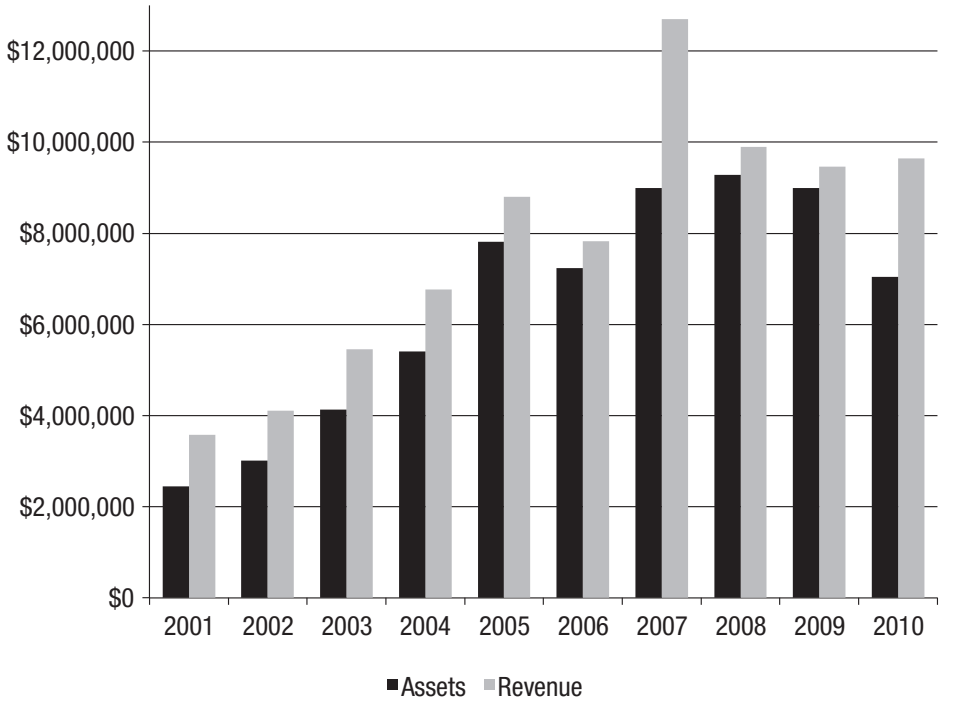
Scalia and Thomas attracted negative press just two months later as guests of honor at the fundraising dinner associated with the society's 2011 National Lawyers Convention, held at the Omni Shoreham Hotel in Washington, D.C. (Alito was also present, but was not an honoree).[80] Media outlets and various liberal groups decried the appearance of the justices at the gathering, in view of its temporal proximity to the court's decision as to whether it would hear the challenge brought by twenty-six states to President Obama's health care law (the conference in chambers was held the day of the dinner, and in conference, the justices decided to hear the case). The critics also pointed out that society member Paul Clement, who would likely argue the case before the court (and subsequently did), would not only be in attendance, but that Clement's firm was one of the nearly two dozen firms sponsoring the dinner. Jones Day, a firm that represented one of the trade associations that challenged the law, was another sponsor, as was Pfizer, the pharmaceutical giant, who would be greatly affected by the court's decision to hear the case.

Some federal judges and many lawyers are less public about their ties to the Federalist Society. Michael Mukasey was a judge on the Second Circuit Court of Appeals and was named attorney general by President George W. Bush after Alberto Gonzales resigned. Mukasey spoke about the war on terror and military commissions at the 2009 Federalist Society National Lawyers Convention. Earlier that morning, President Obama had announced that he intended to try several Guantanamo detainees in civilian courts in the United States, and Mukasey was harshly critical of the proposal. He said, "One of the benefits of leaving public service is that I got to be a member of this organization. Given today's announcement I can't think of anywhere else I would rather be. I felt uncomfortable being here when I was on the bench and when I was AG, but I don't criticize those who are on the bench or in public service who are members."[81] Of course, Mukasey had the same views about law and politics when he was a judge and attorney general as he did after he left public service—he simply did not acknowledge his affinity for the Federalist Society. Now he is on the organization's board of directors.

Financial Support

The Federalist Society's success is in great part due to the willingness of conservative philanthropists to make very large contributions year after year and to do so, for the most part, in unrestricted funds. In the first decade of the twenty-first century, the financial base of the society grew enormously, as illustrated in Table 2.

TABLE 2. Financial Base of the Federalist Society



Source: Federalist Society for Law and Public Policy Studies, Form 990, 2001–2010.

Table 3 lists the five largest Federalist Society funders as of 2010 and shows their cumulative contributions as of that time and the amounts that constituted unrestricted funds.

The society is the beneficiary of a cohesive and strategic approach to shaping public policy by philanthropy, begun in earnest by conservatives in the 1960s.[82] The John Olin Foundation, for example, which Steven Calabresi described in the early years of the society as "absolutely number one in terms of foundation support," gave financial support to the idea of the society before it came into existence.[83] The 1982 national symposium happened, in part, because of Olin monies that were used for grants to enable out-of-state law students to travel to Yale. That same year, Olin had donated $6,000 to the *Harvard Journal of Law and Public Policy.* Of those early years, Calabresi would say that Olin was "indispensable."[84] Olin's most significant contribution to the society was the creation and support of the John M. Olin Lectures in Law series. This program of debates, sponsored on campuses around the country, has since 1983 been the backbone of the Federalist Society's programming in law schools.[85] The debates, often structured as a conversation between a liberal and a conservative on an issue of law or particular case, allowed the society to air conservative views in a neutral environment. Olin's funding also meant that the Federalist Society exposed law students

TABLE 3. Cumulative Contributions as of 2010

Funder	Total Contributions[a]	Unrestricted Funds[b]
John M. Olin Foundation	$5,657,000	$1,268,000
Lynde and Harry Bradley Foundation	4,965,000	4,592,000
Sarah Scaife Foundation	4,405,000	4,405,000
Claude R. Lambe Charitable Foundation (Koch Family)	1,431,500	971,500
Charles G. Koch Charitable Foundation (Koch Family)	862,499	378,200
Total	$17,320,999	$11,614,700

a. Federalist Society for Law and Public Policy Studies, Form 990, 2005–2010; *Federalist Society: Funders,* Media Matters Action Network, *mediamattersaction.org/transparency/organization/Federalist_Society_for_Law_and_Public_Policy_Studies/funders* (last visited Feb. 25, 2012) (financial data prior to 2005).

b. *Id.* Any grant indicating a dual purpose for general support and another use was treated as a grant for general support unless specific amounts were indicated for each type of use.

to very high-profile conservatives, including Supreme Court justices, in a way no organization before it had.

As Table 3 demonstrates, other than Olin, the principal benefactors of the Federalist Society made unrestricted grants. As compared to grants that are earmarked for a specific project or program, and therefore require grantees to justify the details of specific expenditures and meet specific benchmarks, unrestricted funds give recipients the freedom for long-term goal setting and institution building.

Conservative philanthropists understood much earlier than their liberal counterparts that what they were seeking to win was a war of ideas, and that winning that war requires patience. James Piereson, who led the Olin Foundation for more than twenty years, has discussed the stylistic difference in grant making between conservative and liberal foundations. He noted that liberal foundations tended to stay with things "less for the long haul than we do." The idea that funded programs should become self-sustaining was not an idea that Olin subscribed to.[86] Perhaps because they are conservative by nature, Piereson said, conservative donors have fewer grand expectations about their work than their liberal counterparts—"they know that the world is going to be changed in increments, by and large."[87] The Olin funds were granted to the ambitious law students with little or no expectation—with some skepticism, even—but the society came to be one of Olin's great successes: a "significant voice in the national political debate."

Organizational Principles

The Federalist Society's success is also due in large part to decisions its leaders have made about organizational policies. As noted above, the Federalist Society itself does not take formal policy positions on legal or political questions. Teles analyzes this as the organization's approach to "boundary maintenance."[88] The members of

the Federalist Society represent a broad range of conservative and libertarian viewpoints and may disagree about particular legal issues. The society sponsors frequent debates on legal issues, openly exploring disagreements among its members. By avoiding contests about which positions the organization should adopt, however, it avoids disputes that might drive some members away.[89]

Disagreements among conservative lawyers may reflect significant differences in their basic values. For example, conservative public interest firms eventually moved away from representing business interests toward litigation that reflected libertarian values. Federalist Society member Ilya Somin finds it surprising that "it took so long for right of center public interest lawyers to realize that business interests weren't necessarily their friends." He notes that many conservative economists recognized that whether business supports expansion of government depends on whether it serves their interests.[90]

Professor Ann Southworth's empirical research shines a light on the "striking differences" among the lawyers who represent conservative causes, both with respect to their political views and their social and educational backgrounds.[91] For example, "social conservatives are at odds with business elites, who are generally uncomfortable with the Republican Party's association with Protestant fundamentalism, pro-life advocacy, prayer in the schools, and traditional 'family values.' . . . Social conservatives tend to dislike big business and tax policies that favor the wealthy."[92] With respect to their backgrounds, "[r]eligious conservatives usually come from rural and less economically privileged environments, and many of them openly invoke God as a source of inspiration and guidance. Lawyers for libertarian groups also generally come from modest backgrounds, but they are less religious and more enamored with markets and personal liberty. Most of the business representatives come from economically secure circumstances and describe their advocacy for business-oriented causes as work rather than activism."[93] Southworth characterizes the Federalist Society and the Heritage Foundation as "mediator organizations" that have successfully established common ground among the various conservative constituencies and their lawyers.[94] Ed Meese directs the foundation's efforts to keep conservative legal principles alive in public debate and discourse.

The Federalist Society provides organizational, financial, political, intellectual, and social support that is crucial to the empowerment of conservative lawyers, scholars, and judges. For example, debates organized by the Washington, D.C., chapter have created networks that are "especially valuable in overcoming the intrinsic informational challenges of coordinating action across the executive branch."[95] The debates are also crucially important, of course, because as Teles explains, "ideas do not develop in a vacuum. Ideas need networks through which they can be shared and nurtured, organizations to connect them to problems and to diffuse them to political actors, and patrons to provide resources for these supporting conditions."[96] The debates and symposia offer many lawyers the opportunity to engage in intellectual discussion and analysis, which is rare in post–law school practice.

Teles identifies the problems conservatives faced in mobilizing against liberal control of crucial legal networks and institutions as fundamentally *organizational*.[97] The conservative legal movement challenged the entrenched liberal legal polity through the development of an "alternative governing coalition."[98] Of necessity, such a coalition must comprise "*intellectual, network*, and *political entrepreneurs*, and the *patrons* that support them."[99] All of these pieces came together for the Federalist Society.

The Federalist Society has been so successful that organizations outside the field of law and policy have adopted its model for their own ends. The Benjamin Rush Society, launched in 2008, was formed in reaction to the prevailing liberal bias in medical school curricula. It seeks to educate medical students on free-market solutions to health care, and to question government intervention in the relationship between physicians and patients.[100] The Alexander Hamilton Society, dedicated to foreign, economic, and national security policy, was founded in 2010. The group believes that foreign and domestic policy must be shaped to defend the principles of individual liberty, limited government, economic freedom, the rule of law, human dignity, and democracy.[101] The Adam Smith Society was formed very recently to achieve in business schools what the Federalist Society achieved in law schools, exposing students to the philosophical and moral underpinnings of capitalism.[102] All three groups are building institutions based on student chapters. All three groups subscribe to principles of individual liberty, limited government, and free markets.

The American Constitution Society for Law and Policy (ACS) was founded by Georgetown Law School professor Peter Rubin in 2001 as a counterweight to the Federalist Society. Rubin told the *New York Times* that year that the Federalist Society "has been extraordinarily successful in taking, in some cases, extreme views, views outside of the mainstream, and moving them into the center stage of American law."[103] Rubin's goal was to "emphasize legal values like compassion, equality and respect for human dignity," values he believed "have largely been read out of American law through the ascendancy of various strands of legal thought over the last 20 years."[104] The ACS shares many institutional features with the Federalist Society: a nationwide network of student and lawyers chapters, an official journal (the *Harvard Law and Policy Review*), sponsorship of debates and conferences as a means to proliferate its ideas and ideology, and an annual convention featuring legal luminaries with liberal and progressive leanings. The ACS motivates its members by citing the humble beginnings of its rival: "ACS's goals are ambitious but attainable. Those who would despair of our success need only think of the small band of legal conservatives of twenty-five years ago—their ideas then scorned by academics, ignored by judges and unknown to the public—who persevered to build a powerful movement and reshape our world according to their notions. If you seek their works, look around you. Our work is just beginning. Don't just stand there—join us."[105] Justice Ginsburg addressed the 2012 ACS national convention as a featured speaker.

The Federalist Society's membership includes many brilliant and sincere theorists who raise important and interesting issues. Their intellectual endeavors, their

creativity, and their willingness to discuss and debate controversial ideas are admirable. They argue that their answers to fundamental political and legal questions preserve the essence of the American constitutional system. On the other hand, their critics say that the overall impact of Federalist Society thought is reactionary. Critics argue that by glorifying private property, demonizing government intervention (particularly at the federal level), insisting that originalism is the only legitimate method of constitutional interpretation, embracing American Exceptionalism, and advocating related policies, the Federalist Society advocates a form of social Darwinism that has been discredited by the mainstream of American legal thought since the 1930s.

The chapters that follow describe and analyze the thinking and writing of influential Federalist Society members in specific areas of law. We track their views as they are planted as intellectual seeds in law journals, germinate in legal briefs, and eventually blossom in court opinions, legislation, and public policy. A measure of the success of the Federalist Society is that the current Supreme Court can generally be relied on to protect business interests against legislation designed to protect workers, consumers, and the environment; to halt the judicial expansion of personal liberty interests while expanding judicial protection of property interests; to interpret a "colorblind" Constitution by rolling back affirmative action and school desegregation plans; to restrict access to the courts through a variety of procedural and substantive doctrines; and to weaken the boundaries between church and state.