

The paper attached is Chapter 1 of Amanda's first book: Ideas with Consequences

It helps lay out the theoretical framework she uses. Most of her talk will focus on her new book project which builds on this work and that is where we can best help her with feedback. If you have time to skim the chapter that would be great, but Amanda's current focus is on her brand new work which she'll be talking about.

David

## <1> Chapter One

### <2> Understanding Federalist Society Network Influence

[The Federalist Society has] trained, now, two generations of lawyers who are active around the country as civic leaders. Implicit in that is the Tocquevillian notion of lawyers being important for the community and society and so that's going to be untold ways in which notions of Originalism, of limited government, of the rule of law, are being implemented in thousands of decisions at various levels of government and the community outside of government. Putting them in place means we'll have fifty years of seeing what that actually means for impact.

- David McIntosh, Co-Founder of the Federalist Society<sup>1</sup>

The Federalist Society for Law and Public Policy Studies does not fit comfortably into any of the social science boxes that students of American politics traditionally use to study the impact of civic groups on law and politics. Unlike a Public Interest Law Firm, it does not find, finance, or staff litigation campaigns (though its individual members do). Dissimilar from an interest group, it does not lobby Congress, support judicial or political candidates, or officially participate in litigation as *amici curiae* (though its individual members do). Moreover, unlike a think tank, it does not have a full-time staff of residents paid to publish position papers designed to advance or endorse a particular policy position (though its members do this, too). What the Federalist Society *does* do, as the excerpt from Co-Founder David McIntosh above alludes to, is educate and train its members through sponsored events and conferences, to shape and socialize them intellectually and professionally in a particular way, and to encourage them to draw on this training as they carry out their work as legal professionals, academics, judges, government officials, and civic leaders. It is important to note that the Federalist Society Executive Office would not claim credit for how its members or alumni apply the intellectual training it offers.

This, as Steven M. Teles noted, has been an important part of the organization's strategy of "boundary maintenance" (Teles 2008, 152). At the same time, its founding and core members do not *disclaim* credit for what Federalist Society network actors and alumni do outside the walls of Conferences and events. There are thousands of "untold ways" in which these individuals go on to shape legal doctrine and policy in accord with organizational principles and priorities. For example, Co-Founder Steven Calabresi described the Federalist Society's core purpose and impact to me in precisely these terms:

I think my own goal for the Federalist Society has been ... [to] have an organization that will create a network of alumni who have been shaped in a particular way... [B]ecause many of our members are right of center and because they tend to be interested in public policy and politics, a lot of them go on to do jobs in government and take positions in government where they become directly involved in policy making. So I think it's fair to say that Federalist Society alumni who go into government have tended to push public policy in a libertarian - conservative direction.<sup>2</sup>

It is this peculiar dynamic – the oft-blurred line between what the organization does and what its members do – that has made the Federalist Society for Law and Public Policy Studies so resistant to the labels and boxes developed by students and observers of American politics and has prompted several of its own members to classify it as "*sui generis*."<sup>3</sup>

While I take seriously the claim that the Federalist Society might be "*sui generis*," this description of what the Federalist Society network is and what it does bears a strong resemblance to what scholars of International Relations have referred to as an *epistemic community* (EC). A close cousin of Thomas Kuhn's concept of a "scientific paradigm" (Kuhn 1970) and Ludwig Fleck's idea of a "thought collective" (Fleck 1979), an EC has been defined as a network of professionals with expertise in a particular policy area bound together by a shared set of normative and principled beliefs, shared causal beliefs, shared notions of validity, and a common

policy enterprise, who actively work to translate these beliefs into policy (Haas 1992, 3; Cross 2012, 20). Initially developed in the International Relations literature to understand the influence of technocrats and scientific experts on the development and coordination of international policy (see, e.g., Haas 1992; Sebenius 1992; Yee 1996; Cross 2012), the EC construct is a good fit in some ways for understanding the influence of the Federalist Society network, but not in others.<sup>4</sup> Structurally, an EC and what I am calling a *political epistemic network* (PEN) look nearly identical: an interconnected network of experts with policy relevant knowledge who share certain beliefs and work to actively transmit and translate those beliefs into policy. This is why, as I explain in a few paragraphs, the research design and logic of the EC model is still appropriate for investigating PEN influence on policy development.

The primary distinctions to be drawn between the EC and PEN models have to do with the kinds of knowledge networks each concept seeks to model (scientific/technocratic versus legal/constitutional). Law is not like science and lawyers and judges are not like technocrats. Claims to legal knowledge are non-refutable, always politically contested, and depend more on the authority and power of the speakers and their institutional positions than they do on the persuasiveness or objective truth of the knowledge itself (see, e.g., Fish 1980; 1990; Balkin and Levison 2000). A scientific or technocratic EC can be proven wrong empirically and their knowledge claims refuted. Such evidence would not guarantee but would certainly increase the likelihood that EC's could supplant one another. As Haas writes in his seminal theoretical article on epistemic communities, "If confronted with anomalies that undermined their causal beliefs," ECs "would withdraw from policy debate, unlike interest groups" (Haas, 1992, 18; Toke 1999, 99). This is not the case with a PEN, whose knowledge claims and authority are derived from contested interpretations of political texts and meanings, such as those found in the Constitution.

A PEN temporarily can be displaced and rendered powerless by the emergence of a rival PEN whose members more effectively have infiltrated positions of political power and decision making. However, that PEN can continue to contest from the outside; working to adapt and better legitimate and market its own knowledge claims while still actively trying to place its own network members into positions of power and authority. This also means that PENs can and do modify their beliefs so as to better achieve their normative goals and shared vision of the proper arrangement of social and political life - another important distinction between a PEN and an EC. Thus, beliefs (“principled,” “causal,” and notions of “validity”) in the PEN model should be understood as strategic and instrumental rather than sincere and objectively grounded, as they are often characterized in the EC model (Haas 1992; Gough and Shackley 2001, 331-332; Dumoulin 2004, 595). What makes the PEN’s beliefs widely held and shared amongst network members is acknowledged and agreed upon political value. The addition of “political” to the PEN model recognizes this and highlights the heightened political dimensions of legal knowledge and authority. Moreover, the dropping of “community” in favor of “network” in the definition signifies the important role the PEN plays in actively and consciously credentialing and placing its members into positions of political power – a function I examine in greater length in Chapter Six.

With those small but important conceptual distinctions noted, because of the structural similarities between the PEN and the EC, the basic logic of the EC approach and the general research design developed in the International Relations literature to investigate EC influence are still appropriate and translatable to the American legal-political context. The logic is straightforward: as decision-makers face an increasing number of difficult or complex policy decisions, they will tend to seek support from experts as sources of authoritative knowledge. This

opens the door for well-coordinated groups of knowledgeable experts, ECs or PENs, with formal or informal ties to decision makers to frame, filter, or shape the outcome of the decision-making process according to their own shared beliefs, principles, or values (Sundstrom 2000, 4). In this way, both ECs and PENs can be understood as "channels through which new ideas circulate from societies to governments" with their individual members acting as "cognitive baggage handlers" whose activities and movements inside and outside of government make that transmission possible (Haas 1992, 27).

Importing this logic and applying it to the American legal-political context, we can see certain institutional and political characteristics that might facilitate inroads for PENs in the judicial policymaking process. As Steven M. Teles argues in the context of his own work on the rise of the conservative legal movement, "complex, technical, and professionalized" the American legal enterprise has "proven acutely sensitive to the increasing significance of ideas, information, networks, [and] issue framing" (Teles 2008, 9-10). Thus, to carry out their work, legal and judicial decisionmakers often rely on the broader legal community for intellectual support. This is particularly so in the case of judicial decisionmakers whose written opinions and decisions need to persuade legal elites and, through them, the public at-large to be considered authoritative. Legal scholar Martin Shapiro famously referred to this as the "giving reasons requirement" (Shapiro 2002). Unlike legislators who simply vote according to their policy preferences, judges and Justices are required to issue written opinions explaining, supporting, and defending their decisions in the language of the law. In order to persuade an audience of similarly educated and trained lawyers and politicians that their decisions are legitimate, these opinions must situate the given decision within a line of established precedent – i.e., within an accepted constitutional framework – or, alternatively, they must provide a convincing argument

for why that framework should either be ignored, altered, or reconstructed entirely (Silverstein 2009, 64; Hollis-Brusky 2013, 165). Thus, the importance of the persuasive function of the court is heightened in cases where the Supreme Court is altering or reconstructing existing constitutional frames; cases where *doctrinal distance* is greatest.

By working to legitimize a set of ideas in the legal profession, PENs make it easier for judicial decisionmakers who share these beliefs to articulate them in their opinions without the fear of being perceived as illegitimate. In this way, the PEN provides an important kind of “cultural capital” within the broader legal and political community (Teles 2008, 136). At the same time, the goal of the PEN is political infiltration; as a PEN consolidates its power within government by placing its members in key positions as advisors or as decisionmakers, it stands to institutionalize its influence and ideas. As legal scholar Jack M. Balkin wrote, “[t]he more powerful and influential the people who are willing to make a legal argument, the more quickly it moves from the ‘positively loony’ to the ‘positively thinkable,’ and ultimately to something entirely consistent with ‘good legal craft’” (Teles 2008, 12; Balkin 2001, 1444-45). This has the related consequence of making competing sets of beliefs, values, and techniques - which, at one point might have been dominant within the legal profession - seem illegitimate. This function is particularly important in the context of law and legal interpretation, where the meaning and dominant understandings of texts like the Constitution are politically contested in perpetuity and subject to interpretation. Hence, as I wrote earlier, authority cannot and does not derive simply from the objective meaning or truth of a PEN’s claim, but rather from the position, power, and influence of the persons articulating that claim and translating it into policy and governing rules.

### <3> **The Federalist Society as a Political Epistemic Network (PEN)**

By modifying Peter M Haas' definition of an EC (see Table 1.1), a PEN can be defined as an interconnected network of professionals with expertise or knowledge in a particular domain, bound together by the following four characteristics: a shared vision of the proper arrangement of social and political life (shared principled and normative beliefs); shared beliefs, largely instrumental, about how to best realize that vision (shared causal beliefs); shared interpretations of politically contested texts (shared notions of validity); and a common policy project, broadly defined. In the paragraphs that follow, I demonstrate how the Federalist Society network realizes each of these criteria.

Who are the 40,000 plus conservative and libertarian legal actors currently affiliated with and connected through the Federalist Society's burgeoning professional network? About one-fourth of these individuals, 10,000 total, are law students and select other undergraduate and professional students participating in one of 200 Student Chapter groups. With financial and programming assistance from the National Office, these chapters host on average 1,000 events annually that draw close to 48,000 students across the various campuses. The Lawyers Division of the Federalist Society, with its 75 Chapters in all major cities, 15 professional Practice Groups, Faculty Division spin-off, and Speakers Bureau, is home to the other 30,000 members. As Steven M. Teles described, with the exception of its two national meetings, all of the Federalist Society's supported activities and events are conducted in its "student chapters (in law schools), lawyer chapters (by city), and practice groups (organized by functional interest)" (Teles 2008, 148).

As the Federalist Society website claims, their network of conservative and libertarian actors "interested in the current state of the legal order" presently "extends to all levels of the



legal community."<sup>5</sup> Evidence gathered from speaker lists at Federalist Society National Meetings from 1982 to 2011 provides a more descriptive picture of what this network actually looks like. By coding the speaker lists for occupation and aggregating the results, we get a sense not only of the range of representation from different levels of the legal and political community at Federalist Society National Meetings but also of the relative rates of participation by conservative and libertarian actors occupying different career roles within the legal-political complex.<sup>6</sup>

[INSERT FIGURE 1.1 HERE]

Figure 1.1 provides a visual illustration of the results and corroborates the statement of the Executive Office as well as the impressions excerpted in the beginning of this chapter by Co-Founder Dave McIntosh that the Federalist Society network, indeed, extends to all levels of the legal and political community. For an organization that started in 1982 as a small group of law students situated in what they perceived to be a "hostile institution, America's law schools" (Teles 2008, 137) the fact that Academics still account for more than a third (37%) of presenters at Federalist Society National Meetings is unsurprising. The next four largest groups are legal and political actors representing a think tank or interest group (13%), Federal Judges (13%), lawyers in private practice (13%), and individuals working in the Executive Branch of government (10%). Finally, as can be seen from the graphic, Federalist Society National Meetings draw a much smaller but consistent number of actors representing corporate America

(4%), conservative and libertarian press and media (3%), state or local politics (3%), and the federal Legislative Branch (2%).

On a very basic structural level, the Federalist Society for Law and Public Policy certainly satisfies the PEN criterion of being an interconnected network of professionals with expertise or knowledge in a particular domain; in this case, the law. With members situated throughout the legal-political community, including the relatively large number of participants representing the federal Judiciary and the Executive Branch of government, the Federalist Society would seem to be in a good position to have the kind of functional PEN impact described earlier in this chapter. Indeed, when I asked member and frequent participant Gail Heriot to locate the source of the Federalist Society's influence, she simply responded: "like Verizon, it's the network."<sup>7</sup> Showing that the Federalist Society has the requisite number of well-positioned "boots on the ground," as Federalist Society network member Michael Greve articulated it, is only the first step.<sup>8</sup> The more important task is to demonstrate that actors within this network are shaped by a set of normative and causal beliefs that would inform the actions and decisions of network members as they carry out their work as legal professionals.

The most logical place to start looking for evidence of shared beliefs among network members is the Federalist Society's official statement of principles: [The Federalist Society] is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.<sup>9</sup> This sentence, co-authored by Co-Founders Lee Liberman Otis, David McIntosh, and Steven Calabresi in 1982 when the organization was still in its infancy, represents a short but powerful statement of conservative and libertarian legal principles. By unpacking this statement, we can see how it incorporates

several important normative, principled, and causal beliefs shared by Federalist Society network members. Additionally, it alludes to the existence of a shared notion of interpretive “validity,” which is yet another critical criterion for the existence of a PEN.

The first belief listed in the Federalist Society's statement of principles, that the "state exists to preserve freedom," represents a fusionist<sup>10</sup> understanding of the role and responsibility of government vis-à-vis the individual. The philosophical father of fusionism - and the biological father of Federalist Society Executive Director Eugene Meyer - Frank S. Meyer, was a "staunch individualist" who, believing that individual freedom was the primary end of political action, argued that "the State" had only three, limited functions "national defense, the preservation of domestic order, and the administration of justice between individuals" (Edwards 2007, 2). This belief in a necessary but necessarily limited role for government, some conservatives have argued, was a principal concern of James Madison's; the same Founding Father whose silhouette graces the Federalist Society for Law and Public Policy's logo. Madison's fusionist understanding of the role of government, founded on "a profound mistrust of man and of men panoplied as the state" (Edwards 2007, 3) is articulated most famously in *The Federalist 51* (Rossiter ed. 1961): If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. This is also, perhaps unsurprisingly given the canonical status of James Madison among Federalist Society members, one of the most oft quoted and referenced passages from *The Federalist* among Federalist Society participants.<sup>11</sup>

Placed in the context of this first principled belief, the second principle listed in the Federalist Society's statement, that "the separation of governmental powers is central to our Constitution," can be understood as a causal or instrumental belief derived from this fusionist understanding of the role of government. In other words, members of the Federalist Society believe that the separation of powers is the best and perhaps only condition under which their shared principled belief in limited government and individual freedom can be properly realized. Federalist Society participant and co-author of the Society's Conservative and Libertarian Annotated Bibliography, Roger Clegg, articulated the relationship between these beliefs in the following manner: "One of the things [Federalist Society members] have in common is a strong belief in individual liberty and that's the reason we have the separation of powers and division of powers, federalism, is to protect individual rights and liberties."<sup>12</sup> Evidence of a strong concern for the preservation of the separation of powers is not difficult to find among other Federalist Society members. In questioning just over 40 key actors about the principles or priorities that unite members of the Federalist Society, a concern for the "separation of powers" received 13 mentions.<sup>13</sup> Articulated as a concern for the preservation of "federalism" or the "federal structure," this principle received another 23 mentions in interviews.<sup>14</sup>

[INSERT TABLE 1.1 HERE]

The organ of government that has historically policed the boundaries between the separate branches of government is the subject of the final principled belief listed in the Federalist Society's short statement: "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." Echoing familiar language from Chief Justice John

Marshall's famous opinion in *Marbury v. Madison*,<sup>15</sup> this statement reflects the belief among members that unelected judges, who incorrectly interpret constitutional and statutory text, exercise the lawmaking functions of elected legislators and run dangerously afoul of the separation of powers. This is also popularly referred to in shorthand among Federalist Society members as a concern with "judicial activism" or, conversely, a belief in "judicial restraint." For instance, when asked what attracted him to the Federalist Society in its fledgling years, former Reagan Justice Department official Charles J. Cooper responded that it was the Federalist Society's "belief in a restrained judiciary... the belief that the Constitution... should be interpreted to mean what it was intended to mean. I was and still am very concerned about judicial activism and its consequences."<sup>16</sup> This principled concern with judicial activism was expressed more than 20 times in interviews with key Federalist Society actors.<sup>17</sup> Additionally, the nature of the judicial role has been the headlining topic at no fewer than eight Federalist Society National Conferences throughout the years.<sup>18</sup>

The debate about the proper role of the judiciary is very old and it gets to the heart of what the PEN believes to be a valid exercise of judicial power and how they go about making that determination. For members of the Federalist Society, the answer to what makes an act of judicial power valid is consistent with the other normative and causal beliefs explored in this section. The relationship between these beliefs and shared understanding by members of what makes judicial interpretation valid, was articulated by Federalist Society Board member and mentor the late-Robert H. Bork, whose 1971 *Indiana Law Journal* article was cited multiple times by interviewees<sup>19</sup> as an important influence on their own beliefs:

The requirement that the Court be principled arises from the resolution of the seeming anomaly of judicial supremacy in a democratic society. If the judiciary really is supreme,

able to rule when and as it sees fit, the society is not democratic. The anomaly is dissipated, however, by the model of government embodied in the structure of the Constitution, a model upon which popular consent to limited government by the Supreme Court also rests. This model we may...call 'Madisonian'... it follows that the Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution... If it does not have such a theory but merely imposes its own value choices, or worse if it pretends to have a theory but actually follows its own predilections, the Court violates the postulates of the Madisonian model that alone justifies its power. (Bork 1971, 2-3)

The "valid theory" Bork refers to in his article, the one that solves the "Madisonian" dilemma, would later become known throughout the legal community as the theory of Originalism.

Scholar Jonathan O'Neill has provided a good working definition of this theory:

Originalism is best understood as several closely related claims about the authoritative source of American constitutional law, that is to say, what it means to interpret the Constitution and what evidence interpreters may legitimately consult to recover meaning... originalism holds that although interpretation begins with the text, including the structure and relationship of the institutions it creates, the meaning of the text can be further elucidated by... evidence from those who drafted the text in convention as well as from the public debates and commentary surrounding its ratification. (O'Neill 2005, 1-2)

Long-time Federalist Society member Loren A. Smith, now a Judge on the U.S. Court of Federal Claims, explained the relationship between Originalism and judicial restraint: "The more basic formulation [of Originalism] was the result of some of the actions of the courts...of the fifties and sixties and seventies where the judge was making the decision based on what the judge's view of social policy was." Smith continued that while the idea that "judges should stick to the Constitution" was not "original to Originalism," the theory articulated more clearly, "why it was important to democracy to follow the text as [the] controlling principle that controls judges from going off and doing whatever they want."<sup>20</sup>

Executive Director Eugene Meyer commented that while they did not start the discussion of Originalism, the Federalist Society has worked hard to nurture and develop it over the past two and a half decades: "Specifically, when you talk about Originalism... our student chapters and our lawyers chapters and all our activities have fostered that to a great degree and I don't think the debate and discussion would be where it is were it not for us."<sup>21</sup> In addition to having the topic of "Originalism" headline two of its National Conferences,<sup>22</sup> institutional efforts to promote this theory within the Federalist Society include the web-published Annotated Bibliography of Conservative and Libertarian Legal Scholarship, which relies heavily on Originalist scholarship and sources,<sup>23</sup> an online debate series called *Originally Speaking* that typically pits one Originalist against one non-Originalist on a given legal or political topic of currency, and a recently published collection of Federalist Society debates edited by Co-Founder Steven Calabresi (with a foreword by Justice Antonin Scalia) entitled *Originalism: A Quarter-Century of Debate*.<sup>24</sup>

My interview data also corroborates the degree to which actors in the Federalist Society network have adopted Originalism. When I asked about the principles or priorities that unify members of the Federalist Society network, Originalism received 31 mentions, the most of any principle listed.<sup>25</sup> For example, as Federalist Society member Daniel Troy explained in our interview, "what the Federalist Society offers is an opportunity to interact with people who at least share your point of view about constitutional interpretation... people who have shared views about Originalism."<sup>26</sup> Similarly, Federalist Society member John Yoo emphasized in our interview that if he had to identify the single most important thing that the Federalist Society stood for, it would be "a commitment to Originalism."<sup>27</sup>

Originalism also provides a standard or metric by which other network members can keep judges and fellow members in the network in check; i.e., to mitigate what conservative commentators and others have come to refer to as the “Greenhouse Effect” (Baum 2006, 139-145). The “Greenhouse Effect,” named after *New York Times* Supreme Court reporter Linda Greenhouse, refers to the propensity of Supreme Court Justices to seek approval – through their decisions – of the liberal media and the left-leaning “Georgetown set” (Baum 2006, 139). Several conservative commentators when discussing Republican nominees John Paul Stevens, Harry Blackmun, Potter Stewart, David Souter, and even Anthony Kennedy in part attribute the leftward drift of these Justices to their desire for approval from the Washington, D.C. elite circles (Baum 2006, 140-141). In helping to build a conservative and libertarian counter-elite around a shared belief Originalism as the only valid mode of constitutional interpretation, the Federalist Society acts as a bulwark against this kind of judicial drift, holding members accountable for staying true to their principles. In the course of my interviews with key Federalist Society members, it became clear that they engage in this kind of feedback-loop with the Justices frequently – at Federalist Society conferences, barbeques, through personal correspondence, and through scholarly publications.

As Federalist Society Co-Founder Steven Calabresi said in our interview, the growth of a conservative and libertarian counter-elite through the Federalist Society has “absolutely” helped keep Justices such as Scalia, Thomas, Roberts, and Alito in check:

I think it absolutely helps keep them in check. When one tries to think about what kinds of checks exist on officials as powerful as Supreme Court Justices I think the check of criticism by law schools, journalists and conservative think tanks like the Federalist Society, criticism from those quarters is something that they notice. They may or may not be persuaded by it but I think they know it’s out there and I think it is something of a check on them. Some of them may care more about being consistent than others. I think Scalia actually cares a lot about being consistent. He’s no wallflower so if you criticize him he’s not necessarily going to wilt under the criticism; he may conclude that he was



right and stand up for the position he originally articulated but I think he notices things like that and I think in general other conservative and libertarian judges and public officials notice things like that as well and I think it can have an effect on them.<sup>28</sup>

In this way, the Federalist Society elite is able to act as an effective “judicial audience” (Baum 2006), vocalizing their approval and disapproval of the decisions or the legal reasoning of fellow network members on and off the Supreme Court. As Lawrence Baum has written judges, like people, are motivated and driven to act for many reasons. One of which, he argues, has to do with their desire to win approval from various “audiences” whose approval is valued both strategically (as a means to promotion, selection to higher courts) but also “as an end in itself.” For example, Baum writes in *Judges and Their Audiences*, people are not “interdependent solely because they want to get concrete things from each other. Rather, people’s identities, their conceptions of themselves, rest fundamentally on their relations with each other. And the need for others to validate people’s self-conceptions... continues throughout life” (Baum 2006, 26). Working under this assumption, Baum argues, even a Supreme Court Justice who has reached the pinnacle of his or her career cares about and would have incentive to seek approval from people whom he or she respects and with whom he or she is personally and politically connected. Because interpretations of inherently subjective texts like the Constitution will always be politically contested (unlike scientific knowledge that can be refuted), the “validity” criterion within the PEN functions more as a barometer for how closely aligned a judicial decision or its reasoning is with the PEN’s normative and principled beliefs about the proper arrangement of social and political life.

The final definitional characteristic of actors within a PEN is that they also share a common policy project to which they can apply their shared beliefs and interpretive

understandings of politically contested meanings or texts. The Federalist Society lists as an institutional goal, the desire to chip away at the dominant liberal ethic espoused in the Academy, legal institutions, and the legal community at large by "reordering priorities within the legal system" and "restoring the recognition of the importance of [conservative and libertarian principles] among lawyers, judges, law students, and professors."<sup>29</sup> This multi-faceted, ambitious policy project - which really comes down to an effort to reorient the legal culture - is, to recall the excerpt from Co-Founder David McIntosh, carried out in "untold ways" when conservative and libertarian principles are implemented by network actors and alumni in "thousands of decisions" at various levels of government and the legal profession. The Federalist Society's effort to reorder the priorities within the legal system involves not only shaping its members intellectually but also credentialing them professionally so that they might be in a position to have the kind of impact on the legal culture that the Federalist Society is trying to bring about. In our interview, former Federalist Society member and legal academic Thomas Smith recalled hearing the co-founders (including Calabresi) tell him very early on that it was "crucial to credential young conservatives...

...and to build an alternative elite because [at] Yale Law School... and other elite schools, it's quite true that it wasn't just a point of view, it was a way of life; it was a network, it was a group of people, it was a way to talk, it was a set of books to read.... On the other hand, the conservatives didn't have that. They were this sort of rag-tag group of people from lots of different odds and ends and I think [within the Federalist Society] there has been a very conscious effort to sort of build up an elite, and I think really quite remarkably successful."<sup>30</sup>

Federalist Society members recognize that this common policy project of restoring the recognition of conservative and libertarian principles in America's legal institutions requires the

sustained efforts of thousands of network actors operating at some times collectively and others separately, at different levels of government and the legal profession. After all, as one interviewee recalled hearing repeatedly at Federalist Society meetings of the effort to tear down the liberal orthodoxy permeating the legal profession and institutions of government, "Rome wasn't burned in a day."<sup>31</sup>

While on a very general level, the Federalist Society for Law and Public Policy satisfies the basic criteria of a PEN, it is perhaps more accurate to say that the Federalist Society network is comprised of *multiple* PENs. The various coalitions and divisions within the Federalist Society reflect those manifests within the conservative legal movement more generally (see, e.g., Paik, Southworth and Heinz 2007; Southworth 2008). While the Federalist Society has managed to successfully navigate and “mediate” (Southworth 2008) these fissures within the conservative movement, it would be a bold claim indeed to say that all 40,000 members agreed on all the constitutional issues I examine in this book. Acknowledging the limitations of this approach – i.e., the non-generalizability of what I detail to the entire network membership – I believe that the framework is still extremely useful for examining the influence of the various smaller PENs that have cohered within the Federalist Society network around key doctrinal areas – the Second Amendment, the First Amendment, Federalism, and State Sovereignty. The next section lays out, in detail, my research approach for this work.

### **<3> Tracing the Influence of the Federalist Society on the Conservative Counterrevolution**

In terms of conceptualizing influence, the PEN framework is consistent with the post-positivist tradition in social science.<sup>32</sup> As law and society scholar Michael McCann has put it, this tradition “begin[s] from the assumption that no contextual factor alone is determinative or

autonomous, and, indeed, the conceptualization of factors as independent forces only impedes understanding of both their dynamic interactions and their cumulative significance over time for the subjects we are trying to understand” (McCann 1996, 462). Understood in this sense, is that the Federalist Society network influence is not defined as its power to change the votes of Supreme Court justices in key cases. Rather, influence, as it is deployed in the PEN analysis, captures and chronicles the subtle, complex, and dynamic ways in which this network and its ideas helped shape the content, direction, and character of key Supreme Court decisions. It is also plausible, for reasons I explore in greater detail in this book’s final chapter, that the Federalist Society network, working systematically over the course of several decades, made it easier for the Justices to make the difficult decision to change constitutional course in the first place; that they helped foster an environment conducive to constitutional change.

The research techniques for demonstrating the influence of PENs on policy development are identical to those prescribed for the EC framework. The process involves "identifying community membership, determining the community members' principled and casual beliefs, tracing their activities and demonstrating their influence on decision makers at various points in time" (Haas 1992, 34). I should note that within the PEN framework, it does not matter whether or not these individuals are card-carrying and dues-paying Federalist Society “members” (in the same way one is a member of a gym or a country club). What matters instead is the extent to which these individuals are active participants in Federalist Society network activities and programs. Thus, I refer to them in the pages of this book as “network members” rather than “members” of the Federalist Society. Because of this emphasis on activity versus membership (and because, from a practical standpoint, the Federalist Society maintains a strict policy against publishing their membership lists), I relied on speaker agendas for Federalist Society National

Conferences (Student and Lawyers) from 1982 to 2012 to establish network affiliation. These speaker agendas furnished a list of 1,190 different individuals who have presented at Federalist Society National Conferences. In one respect, this data set is over-inclusive for determining PEN membership. It includes several speakers who are sometimes referred to as the "token liberals," such as Cass Sunstein, Louis Michael Seidman, Walter Dellinger, and Laurence Tribe. These individuals do not tend to share the Federalist Society's beliefs, notions of validity, or general policy project. For this reason, I have filtered them out of the subsequent case studies where I track network influence. In many respects, however, this list is highly *under*-inclusive. National Student and Lawyer Conferences account for just two out of the thousands of events the Federalist Society sponsors nationally each year, including local student chapter meetings, local lawyer lunches and speaker events, student leadership camps, regional colloquia and symposia, faculty conferences, professional practice group meetings, and campus debates.<sup>33</sup> Further, this list does not take into account the tens of thousands of members who attend Federalist Society events each year but are not on the program. These constraints notwithstanding, I have found that these National Conferences attract some of the most high profile Federalist Society participants, including leaders in the Academy, in the legal profession, and decisionmakers in government and on the judiciary.

While, for some network actors, the number of appearances at Federalist Society National Conferences is in the double-digits, even an appearance on the program at one National Conference, as several interviewees confirmed, is viewed as an important credential and a great honor within the Federalist Society network – a signal of “true believership.”<sup>34</sup> As evidence, in the context of discussions with former Federalist Society Student Chapter Presidents, presenters at National Conferences were referred to as the “rock stars” and the “Mick Jagers” of the

network.<sup>35</sup> Thus, though this network list represents less than 3% of the 40,000 members the Federalist Society boasts, these 3% can be understood as constituting the thought leaders of the network. Additionally, given the high profile of these conferences, these 3% are also likely to be among the most prominent and active “citizen lawyers,” to refer to Leonard Leo’s term, within the network. Table 1.2 provides some evidence of this by listing the 13 most frequent participants at Federalist Society National Conferences and detailing their positions within the legal-political community.

[INSERT TABLE 1.2 HERE]

In determining these network members' beliefs about the constitutional doctrines examined in this book, I relied on several different expressions of these beliefs, both institutional (transcripts of Federalist Society conference speeches and panels, Federalist Society Practice Group newsletters and articles, The Federalist Society’s *Bibliography of Conservative and Libertarian Legal Scholarship*, Federalist Society-hosted online Debates, Practice Group Teleforum calls and Podcasts) and non-institutional (law review articles and other scholarly publications, newspaper articles, archival data, and interview data).<sup>36</sup> I work to establish these beliefs in the beginning of each chapter, detailing the major Federalist Society members contributing to the PEN’s dialogue on that particular set of doctrines while providing evidence of these beliefs from the sources just mentioned.

As the model in Figure 1.2 illustrates, ideas can be diffused from the PEN to Supreme Court decision makers through several pathways. The dotted lines represent network actors as

“cognitive baggage handlers,” (Haas 1992, 27) carrying the ideas of the Federalist Society into their roles as legal professionals including judges, academics, executive branch officials, litigators, or friends of the court. Of course, the most direct mechanism of transmission is through political infiltration. In this case, political infiltration is achieved when network members have secured positions as Supreme Court decision makers and, to a lesser extent, Supreme Court clerks.<sup>37</sup> However, network ideas can reach decision makers by several other paths. In Figure 1.2, these external paths of idea transmission are represented by solid lines. For example, ideas might travel through a lower court opinion authored by a Federalist Society network-member judge, a brief submitted by network-member litigator(s) and/or *amici curiae* (“friends of the court”), or through published scholarship authored by Federalist Society affiliated scholars. Federalist Society network participation in all these capacities – as a Supreme Court decision maker, Supreme Court clerk, lower court judge, *amicus curiae*, and litigator(s) – was catalogued in each of the cases examined in this book. Realizing that the reader will not have access to my complete database of Federalist Society network participants, the first time I identify a member of the network I have endeavored to make it clear in either the body of the text or with an endnote (or both) exactly how he or she is connected to the Federalist Society network (e.g., conference participation, Practice Group membership, affiliated scholar, etc). Finally, the respective opinions and briefs were coded using Atlas.ti Scientific qualitative data management software.<sup>38</sup> Using references to Federalist Society scholarship and to the shared canon of Originalist sources as my primary indicators, I examined the extent to which Supreme Court Justices relied on the expressed intellectual capital of Federalist Society members in constructing their written opinions in each case.<sup>39</sup>

[INSERT FIGURE 1.2 HERE]

As I wrote in the introduction, the constitutional areas examined in this book were selected because of the distinct conservative turn each has taken over the past thirty years; a turn that is very much in line with the kinds of arguments conservatives and libertarians have been making at Federalist Society meetings since the 1980s. As my previous work on the Federalist Society suggested, it is in these kinds of revolutionary Supreme Court cases, those in which the degree of *doctrinal distance* is greatest (Hollis-Brusky 2013), that the extent of reliance on outside intellectual capital should in fact be highest. Additionally, unlike the various cross-cutting issues that tend to routinely divide the conservative coalition and its lawyers (see, e.g., Southworth 2008), this book examines areas of constitutional law about which there seems to be – if not perfect agreement – a clear and identifiable consensus among the most prominent and active members of the Federalist Society network in terms of the kinds of arguments being made and how those arguments are being supported.

The next two chapters examine Federalist Society network influence on two constitutional areas that reflect the organization's first shared principle: *the state exists to preserve freedom*. Subsequent chapters examine network efforts, consistent with their second principled belief in the centrality of *the separation of governmental powers*, to reign in the federal commerce power and bolster state sovereignty, respectively. The final chapter aggregates insights from these narratives of influence and situates them in a broader literature on the dynamics of constitutional change and judicial policy development. In short, it shows how and why the Federalist Society network has been so successful in *saying what the law is*.



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1. David McIntosh, (Partner, Meyer, Brown and Platt; Member of Congress (1995-2001); Co-Founder, Federalist Society) in discussion with the author, January 25, 2008.

2. Steven Calabresi, (Professor of Law, Northwestern University; Co-Founder, Federalist Society) in discussion with the author, April 3, 2008.

3. See, for example, interview with Carter Phillips (Managing Partner, Sidley Austin, LLP.) in discussion with the author January 30, 2008: "*Sui generis* is probably as good of a description as you can come up with in terms of what that organization is."; interview with Gregory Maggs (Senior Associate Dean for Academic Affairs and Professor of Law, George Washington University Law School) in discussion with the author, January 22, 2008: " I think it is really *sui generis* and if you think about why it was formed you sort of understand why that is"; interview with Michael Carvin (Partner, Jones Day; Deputy Assistant Attorney General, Civil Rights Division (1985-1987); Deputy Assistant Attorney General, Office of Legal Counsel (1987-1988)) in discussion with the author, January 28, 2008: "... it's got characteristics of [a think tank and an interest group] but I would call it a think tank slash debating society... their contribution to the marketplace of ideas comes a lot more from these structured conferences and their speakers... so I would think they're *sui generis* in that respect."; interview with Richard K. Willard (Partner, Steptoe and Johnson, LLP; Assistant Attorney General, Civil Rights Division under President Ronald Reagan) in discussion with the author, January 31, 2008: "I think it's pretty *sui generis*..."

4. I have actually called the Federalist Society an “epistemic community” in earlier writing on the subject (see Hollis-Brusky 2010; Hollis-Brusky 2013). I figured that even if it did not work perfectly, the research approach and logic of the epistemic community model was right for investigating Federalist Society influence. However, various reviewers, scholars, and

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epistemic community theorists have persuaded me since that early time that instead of stretching the epistemic community construct to fit the Federalist Society network, I ought to acknowledge the very important ways in which the model does not fit and perhaps develop a related construct that can be applied to networks like the Federalist Society with a strong political valence. That is what this section attempts to accomplish.

5. See Federal Society Organization About Us page, accessed February 16, 2009, [www.fed-soc.org/aboutus](http://www.fed-soc.org/aboutus).

6. I coded the speaker lists for the entire set of presenters at Federalist Society National Meetings from 1982-2011. Speakers were coded for their occupation at the time they were participating in the event. For instance, Kenneth Starr, who participated in nine Federalist Society National Meetings, was coded three different ways during three periods of his career history: as Executive Branch (U.S. Solicitor General); Private Practice (Kirkland & Ellis); and Academic (Dean Pepperdine Law School). For some, the speaker's current occupation was listed on the program agenda or in the footnote section of the reprinted transcript of their talk. For others, I had to investigate. If it was unclear as to what the speaker was doing at the exact time of his or her talk, a very small set of instances, I coded the individual for the occupational role I could find that was closest to the tenure of the talk. Of the 1,957 speakers coded, the breakdown of raw data with percentages (rounded up to nearest whole number) was as follows: Legal Academics (717 or 37%); Think Tank or Interest Group (253 or 13%); Federal Judge (247 or 13%); Private Practice (249 or 13%); Executive Branch (187 or 10%); Corporate or Corporate Counsel (73 or 4%); Other (73 or 4%); Press and Media (58 or 3%); State or Local Politicians (55 or 3%); and Legislative Branch (45 or 2%).

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7. Interview with Gail Heriot (Professor of Law, University of San Diego; Commissioner, United States Commission on Civil Rights) in discussion with the author, March 18, 2008.

8. I borrow the phrase "boots on the ground" from Federalist Society member and American Enterprise Institute Scholar Michael Greve. Interview with Michael Greve (Director of the Federalism Project, American Enterprise Institute) in discussion with the author, February 12, 2008.

9. See Federal Society Organization About Us page, accessed February 16, 2009, [www.fed-soc.org/aboutus](http://www.fed-soc.org/aboutus).

10. Fusionism, sometimes described as "libertarian means to conservative or traditional ends," is a philosophy of American conservatism most closely associated with conservative intellectual and *National Review* editor Frank S. Meyer, the father of Federalist Society Executive Director Eugene Meyer. In his book, *In Defense of Freedom: A Conservative Credo* (1962) Meyer outlined what he understood to be a uniquely American variant of conservatism that blended traditional conservative emphases on values and virtue with a libertarian focus on freedom and political liberty.

11. Based on content analysis of a sample of just over 200 speech acts from Federalist Society National Meetings from 1982-2008, *The Federalist Papers* were the most often cited authoritative source, receiving 173 specific mentions. Within that sample, Federalist 10, Federalist 78, and Federalist 51 received the most mentions by name.

12. Roger Clegg (President and General Counsel, Center for Equal Opportunity; Assistant Attorney General, Civil Rights Division (1987-1991); Assistant to the Solicitor General (1985-1987)) in discussion with the author, January 29, 2008.

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13. See, for example, Interview with Douglas Kmiec (Professor of Law, Pepperdine University; Office of Legal Counsel under Presidents Ronald Reagan and George H. W. Bush) in discussion with the author, March 14, 2008: "...during the Reagan Administration we cared a lot about the separation of powers [and] part of the Federalist Society is to defend the separation of powers and the... horizontal structure of the Constitution."; Interview with John Yoo (Professor of Law, University of California, Berkeley Law School; Former Law Clerk to Judge Laurence H. Silberman and Justice Clarence Thomas; General Counsel, U.S. Senate Judiciary Committee (1995-1996); Deputy Assistant Attorney General, Office of Legal Counsel (2001-2003)) in discussion with the author, January 16, 2008: "I could tell you the Federalist Society [stands for] Originalism and the strict separation of powers."; Interview with Steven Calabresi (Professor of Law, Northwestern University; Co-Founder, Federalist Society) in discussion with the author, April 3, 2008: "The Society has always been consistently interested in promoting... a greater respect for the separation of powers."

14. See, for example, Interview with Charles J. Cooper (Founding member and Chairman of Cooper & Kirk, PLLC; Assistant Attorney General for the Office of Legal Counsel (1985-1988)) in discussion with the author, June 2, 2008: "I am among those [in the Federalist Society] who prefer a consistent and principled view towards state sovereignty... I believe that the principles of federalism are robust enough to stand up for decisions I don't like as well as those I do."; Interview with Carter Phillips (Managing Partner, Sidley Austin, LLP.) in discussion with the author, January 30, 2008: "I've always viewed the federalism part of [the Federalist Society] as the most significant... I always thought that respect for states' rights was one of the original driving forces of it."; Interview with Loren Smith, (Judge, U.S. Court of Federal Claims; Chairman, Administrative Conference of the United States (1981-1985)) in discussion with the

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author, January 24, 2008: "I guess that would be one element of federalism that unifies [the Federalist Society]... another idea that federalism connotes to me is a certain concern that states have a legitimate role in the federal system and that centralization in Washington is not the system that the Framers sought... it infringes too much on individual liberties."

15. *Marbury v. Madison*, 5 U.S. 137 (1803) was a landmark Supreme Court decision that established the principle of judicial review. In his majority opinion, Chief Justice John Marshall famously wrote: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule of particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

16. Interview with Charles J. Cooper (Founding member and Chairman of Cooper & Kirk, PLLC; Assistant Attorney General for the Office of Legal Counsel (1985-1988)) in discussion with the author, June 2, 2008.

17. See, for example, Interview with Douglas Kmiec (Professor of Law, Pepperdine University; Office of Legal Counsel under Presidents Ronald Reagan and George H. W. Bush) in discussion with the author, March 14, 2008: "So, it would be the standard things like federal-state relations and the separation of powers, the nature of the judicial function, [these are the] stand-bys."; Interview with Gail Heriot (Professor of Law, University of San Diego; Commissioner, United States Commission on Civil Rights) in discussion with the author, March 18, 2008: "One thing, the most unifying... is that the judiciary's job is not to make law but to say what the law is. That is something that just about everyone agrees with up to a point."; Interview with Laurence Claus (Professor of Law, University of San Diego; former John M Olin Fellow at Northwestern University School of Law) in discussion with the author, March 18, 2008: "I just don't think that judges should be pretending the constitution says something about them when it

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doesn't; that unelected judges should be trumping majorities in areas where the law doesn't give them a mandate to do it."; Interview with Lee Liberman Otis (Office of Legal Counsel, George H.W. Bush Administration; General Counsel (2001-2005); Co-Founder, Federalist Society) in discussion with the author, June 4, 2008: "...the main feeling was that the courts are deciding a lot of questions without reference to anything that the American people had authorized them to decide and that is not what should be happening."; Interview with Lillian BeVier (Professor of Law, University of Virginia Law School). in discussion with the author, February 1, 2008: "... the over-arching principle is the rule of law... being necessary to restrain the Court who seemed to think that they could make it up."; Interview with Michael Carvin (Partner, Jones Day; Deputy Assistant Attorney General, Civil Rights Division (1985-1987); Deputy Assistant Attorney General, Office of Legal Counsel (1987-1988)) in discussion with the author, January 28, 2008: "I started reading these opinions and realized they were intellectually bankrupt and started getting firmer in my views about the need for a limited judiciary. So I was probably typical of the people who were attached to the Federalist Society in the beginning." Interview with Michael Rappaport (Professor of Law, University of San Diego Law School; Special Assistant, Office of Legal Counsel under President Ronald Reagan) in discussion with the author, March 17, 2008: "If you come from a libertarian slash conservative perspective... you would never believe that judges should be able to rewrite the law to pursue their policy objectives. I mean, the law was the limit on the state. You would never allow the state to rewrite it."

18. See, 1984 National Student Conference: "A Symposium on Judicial Activism: Problems and Responses"; 1987 National Lawyers Conference: "Changing the Law: The Role of Lawyers, Judges, and Legislatures"; 1993 National Student Conference: "Symposium on Judicial Decision Making"; "Symposium on Judicial Decisionmaking: The Role of Text, Precedent, and

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the Rule of Law” (Transcript reprinted in *Harvard Journal of Law and Public Policy*, 17, no. 1 (1994); 1999 National Lawyers Conference: "The Rule of Law, Modern Culture, and the Courts at Century's End"; 2001 National Lawyers Convention: "Judicial Decision-Making"; 2008 National Lawyers Convention: "The People and the Judiciary"; 2008 National Student Conference: "The People and the Courts."

19. See, for example, Interview with Daniel Troy, January 30, 2008: "So I'm sure that sometime during my second year [of law school]... I read Judge Bork's seminal *Indiana Law Journal* article... So I quickly became a Borkean not only because I was clerking for judge Bork but because it really spoke to me. And he really sort of articulated my dissatisfaction [with the courts]."; Interview with Daniel Ortiz, February 6, 2008: "... there had been articles, very influential articles, written in law reviews before that time [on Originalism]. The most famous was probably Bork's piece in the *Indiana Law Journal*."; Interview with Lee Liberman Otis (Office of Legal Counsel, George H.W. Bush Administration; General Counsel (2001-2005); Co-Founder, Federalist Society) in discussion with the author, June 4, 2008: "I think initially probably an awful lot of us started out with Bork's critique of the courts as usurping democracy."; Interview with Lillian BeVier (Professor of Law, University of Virginia Law School). in discussion with the author, February 1, 2008: "... when I first started teaching in 1970 and I started reading law scholarship and I was interested in constitutional theory, in constitutional structure and the legitimacy of decision-making by the Court in particular, the idea that the Supreme Court can overstep its constitutional boundaries by making things up, making constitutional rights up. I just became interested in that idea... [and], at some point I must've read Robert Bork's 1971 *Indiana Law Journal* piece."; Interview with Michael Carvin (Partner, Jones Day; Deputy Assistant Attorney General, Civil Rights Division (1985-1987); Deputy Assistant

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Attorney General, Office of Legal Counsel (1987-1988)) in discussion with the author, January 28, 2008: "I read Bork's *Indiana Law Journal* article just sort of by accident and it made unbelievable sense to me. And, as I said, part of me becoming more and more conservative was reading these opinions and they were just not intellectually coherent and if you want[ed] some meat you were drawn to people like Bork and Scalia who were making coherent arguments and they were brilliant men and... incredibly persuasive writers. So it just made a lot more sense to me."

20. Interview with Loren A. Smith (Judge, U.S. Court of Federal Claims; Chairman, Administrative Conference of the United States (1981-1985)) in discussion with the author, January 24, 2008.

21. Interview with Eugene Meyer (President, Federalist Society) in discussion with the author, February 8, 2008.

22. See 1995 National Student Conference: "Originalism, Democracy, and the Constitution" and 2005 National Lawyers Convention: "Originalism."

23. Co-Authored by members Roger Clegg and Michael DeBow, the web-published Annotated Bibliography of Conservative and Libertarian Legal Scholarship explains its selection of sources and scholarship in the following manner: "As to what is 'conservative' or 'libertarian' we relied most heavily on the Founders' ideals for guidance. With respect to constitutional law, for example, we searched for works that endeavored to interpret the Constitution according to its text and original meaning."

24. This edited volume, published by Regnery Press (2007) and available on the Federalist Society's online store, contains excerpts from five select panel debates on Originalism from Federalist Society Conferences. It also features an introduction by Co-Founder Steven



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Calabresi, a Foreword by Supreme Court Justice Antonin Scalia, and an Epilogue by former Solicitor General Theodore B. Olson and includes famous speeches about Originalism by former Attorney General Edwin Meese, III, Judge Robert H. Bork, and President Ronald Reagan. The website's promotional blurb, see [www.fed-soc.org/store/id.471/default.asp](http://www.fed-soc.org/store/id.471/default.asp), reads: "What did the Constitution mean at the time it was adopted? How should we interpret today the words used by the Founding Fathers? In *Originalism: A Quarter-Century of Debate*, these questions are explained and dissected by the very people who continue to shape the legal structure of our country."

25. See, for example Interview with Edwin Meese, III (U.S. Attorney General under President Ronald Reagan (1985-1988); Fellow, Heritage Foundation) in discussion with the author, February 5, 2008: "I think [the Federalist Society represents] a commitment to the rule of law and a commitment to the Constitution, and from that kind of a body of philosophical principles - Originalism is a part of that."; Interview with Eugene Meyer (President, Federalist Society) in discussion with the author, February 8, 2008: "So those are the two things I think more than anything else that we have done; Originalism and helping to create a broader debate in the law schools and ultimately the legal community at large."; Interview with Michael Rappaport (Professor of Law, University of San Diego Law School; Special Assistant, Office of Legal Counsel under President Ronald Reagan) in discussion with the author, March 17, 2008: "So, now, for example on Originalism there's a good deal of stuff outside of the Federalist Society being done on Originalism but, for a long time, there wouldn't have been so it allows there to be an intellectual interest in the ideas."; Interview with Randy Barnett (Professor of Legal Theory, Georgetown University Law School) in discussion with the author, June 10, 2008: "Once I made the move to Originalism, and not only that, became one of the leading theoretical spokespeople

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and defenders of the method we had a lot more in common and my relationship to the Federalist Society became much closer after that."; Interview with Richard K. Willard (Partner, Steptoe and Johnson, LLP; Assistant Attorney General, Civil Rights Division under President Ronald Reagan) in discussion with the author, January 31, 2008: "I think there are probably many different viewpoints on a lot of issues within the Society but I would think that most members would believe in Originalism as a school of thought."; Interview with Michael Greve (Director of the Federalism Project, American Enterprise Institute) in discussion with the author, February 12, 2008: "Obviously the one thing that Originalism as a theory did for the Federalist Society was it gave them an agenda and a platform."

26. Interview with Daniel Troy (Attorney, Sidley Austin, LLP; Special Assistant, Office of Legal Counsel (1984-1988)) in discussion with the author, January 30, 2008 (Washington, D.C.).

27. Interview with John Yoo (Professor of Law, University of California, Berkeley Law School; Former Law Clerk to Judge Laurence H. Silberman and Justice Clarence Thomas; General Counsel, U.S. Senate Judiciary Committee (1995-1996); Deputy Assistant Attorney General, Office of Legal Counsel (2001-2003)) in discussion with the author, January 16, 2008 (Berkeley, CA).

28. Interview with Steven Calabresi (Professor of Law, Northwestern University; Co-Founder, Federalist Society) in discussion with the author, April 3, 2008 (Chicago, IL).

29. See Federal Society Organization About Us page, accessed February 16, 2009, [www.fed-soc.org/aboutus](http://www.fed-soc.org/aboutus).

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30. Interview with Thomas Smith (Professor of Law, University of San Diego Law School; Senior Counsel, President Reagan's Council of Economic Advisors) in discussion with the author, March 19, 2008.

31. Ibid.

32. See, e.g., Brigham 1987; McCann 1994, 1996; Sarat and Kearns 1998; Scheingold 2004.

33. See [www.fed-soc.org/events](http://www.fed-soc.org/events) for a small sampling of all the events the Federalist Society sponsors each year.

34. See, for example, personal interview with Michael Greve (Director of the Federalism Project, American Enterprise Institute) in discussion with the author, February 12, 2008 (calls Federalist Society Conferences important for the "credentialing of rising stars"); Interview with former Student Chapter President Tony Cotto (Former Student Chapter President at George Washington University Law School, the Federalist Society) in discussion with the author, January 31, 2008 (in the context of why the Federalist Society stalwarts did not accept Harriet Myers as a Supreme Court nominee: "She's not a true believer...[The Federalist Society stalwarts] want credentials, they want to see you've spoken at Fed Society conferences, they want to know you've been at dinners and luncheons, gripping and grinning").

35. Participant observations at a Federalist Society Student Chapter Happy Hour, Recessions Bar, Washington D.C., February 12, 2008.

36. Sources exhaustively examined include transcripts of National Student Conferences reprinted in the *Harvard Journal of Law and Public Policy*; audio and written transcripts of National Lawyer Conferences; scholarly articles and books recommended in the Federalist Society's *Conservative and Libertarian Legal Scholarship: An Annotated Bibliography*, accessed

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May 23, 2012 at <http://www.fed-soc.org/resources/page/conservative-libertarian-legal-scholarship-annotated-bibliography>; scholarly articles and books published by Federalist Society members; Federalist Society Practice Group Newsletters (1996-2000); *Engage* Journal of the Federalist Society Practice Groups (2002-2012); Federalist Society White Papers; relevant other multimedia from events accessible through the Federalist Society's online archive ([www.fed-soc.org](http://www.fed-soc.org)). In determining network members' shared beliefs, I also relied on data gathered from personal interviews with Federalist Society members in 2008 and archival data gathered from the Ronald Reagan Presidential Library in Simi Valley, CA in 2008.

37. Individuals clerking for a Supreme Court Justice are not likely to appear at a Federalist Society National Conference as a speaker prior to or concurrent with their clerkship. However, given the important role clerks play in the researching and writing of Supreme Court opinions (*see, e.g.*, Peppers 2006; Ward and Weiden 2006), I did note their presence as a possible conduit for idea diffusion if the clerk would later go on to become a prominent member of the Federalist Society (John C. Yoo, Sakrishna Prakash, and Paul Cassell, for example are individuals who were involved with the society prior to clerking but would not be invited to speak at a National Conference until later on in their careers) or if they had previously clerked for a lower court judge who is a prominent Federalist Society member (J. Michael Luttig and Lawrence Silberman, for example).

<sup>38</sup> See <http://www.atlasti.com/index.html>

39. To clarify, it was not enough to show that the Supreme Court opinion was in some general sense "Originalist." To count in terms of influence, these Originalist sources, references, or lines of argumentation required proof that they were in fact diffused through a Federalist Society member participating in the litigation and/or through Federalist Society members'

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published scholarship. If the idea could not be traced to an identifiable source of Federalist Society member scholarship and/or through a brief or lower court opinion authored by a Federalist Society member, it was not considered an indicator of influence.