The Federalist Society

How Conservatives Took the Law Back from Liberals

Michael Avery *and* Danielle McLaughlin

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For my children, Katherine, David, and Samantha.

My love for them knows no bounds.

—Michael Avery

For my parents, Adam and Patti McLaughlin,

who taught me that anything is possible.

—Danielle McLaughlin

PREFACE

This is a book about the power of ideas. The Federalist Society has been extremely effective over the past thirty years in translating the intellectual capital of its members into law and policy. We have traced the development of the ideas of society members from articles, books, panels, and debates into legislative proposals, citizen referenda, legislation, legal briefs, court opinions, and White House policy. We have followed key Federalist Society members from law schools into private practice, public interest law firms, the Department of Justice, and the White House, as well as onto the bench. Our narrative is primarily based on what the subjects of our study have said and written, the ideas they have propagated and embraced, and the ideas that they have rejected.

We wrote this book to shine a light on the forces at play in the making of law and policy in the United States. There is much that citizens from all points on the ideological spectrum can learn from the story of the Federalist Society. We also hope, as the story unfolds, that our readers will stop to think about what they believe the Constitution stands for, how it should be interpreted, and its influence on their lives.

To do justice to the ideas and the considerable scholarship of our subjects, it is necessary to discuss in some detail political philosophy, Supreme Court jurisprudence, and legal doctrine. We have tried to explain the law and the history of legal doctrine in the Supreme Court in a common-sense way, and have tried to steer a middle course between the lengthy footnotes that legal writing demands and the dearth of footnotes often found in popular publications. To assist the reader further, we provide an explanation of how legal citations work in Appendix A.

Many of the members of the Federalist Society who have had great influence over law and politics are relatively unknown to members of the general public. We supply an alphabetical list and basic information about important Federalist Society members and allies in Appendix B.

We conducted the research by reviewing the voluminous written work of Federalist Society members and allies, transcripts and recordings of panels and symposia, legal briefs and court opinions, government reports, contemporary published accounts of the activities of the Federalist Society, and existing scholarship regarding the conservative legal movement. We also attended Federalist Society conferences and meetings. The society posts a great deal of the output of its members on

its website (*fed-soc.org*), including videos of speeches and panels. We have based our analysis on the public record rather than on private interviews, with the exception of some statements that Federalist Society members have made to other researchers.

This book consists of chapters on substantive areas of law where Federalist Society members have been active, including property law, international law, privacy, race and gender discrimination, and access to legal remedies. We also discuss the success the Federalist Society has enjoyed in getting its members and other conservative lawyers appointed to influential positions in government. There are many more areas of law for which a similar analysis would yield interesting results, such as administrative law, intellectual property law, and criminal law, but we leave those for others to investigate.

We are grateful to the many people who supported and assisted us in the preparation of this book. Margaret Hagen, Brett Haywood, Katie Powell, Rebekah Provost, Dave Samuels, and Charu Verma were students at Suffolk Law School who conducted invaluable research. David Avery assisted with cite checking. Suffolk Law School legal reference librarians Diane D'Angelo, Steve Keren, and Susan Sweetgall were very helpful in providing research advice and obtaining necessary materials and resources. We appreciate the critical insights provided by the lawyers and professors who read drafts of some of the chapters, including Nan Aron, Marie Ashe, Mark Brodin, Barry Brown, Lee Cokorinos, Sara Dillon, Steven Ferrey, Robert Friedman, Sheldon Goldman, Page Kelley, David Murphy, Natsu Saito, Elizabeth Trujillo, and Hazel Weiser. Helene Atwan, director of Beacon Press, and attorney Ike Williams read early drafts of the manuscript and generously gave us advice about how to proceed with our project.

Suffolk Law School provided Michael Avery with a sabbatical semester and summer writing stipends to do much of his work on the project. The staff at the Harvard Law School Library provided Danielle McLaughlin with invaluable research resources. Chip Berlet and his colleagues at Political Research Associates made their superb library available to us. We are extremely grateful for the support, assistance, and advice from our families, friends, and colleagues, who are too many to name, but to some we are especially indebted. Michael Avery would like to thank the many students in his constitutional law classes over the years whose interest in the subject was a principal motivation for doing this book. Danielle McLaughlin would like to thank Brendan Hall for his unfailing encouragement and support. Any mistakes that remain in this work are entirely our responsibility.

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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