

IDEAS WITH CONSEQUENCES



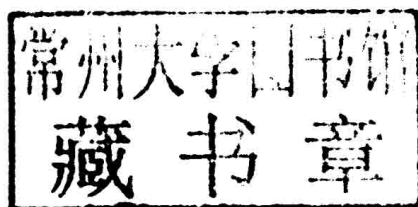
THE FEDERALIST SOCIETY
AND
THE CONSERVATIVE
COUNTERREVOLUTION

AMANDA HOLLIS-BRUSKY

Ideas with Consequences

The Federalist Society and the
Conservative Counterrevolution

Amanda Hollis-Brusky



OXFORD
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Oxford University Press is a department of the University of Oxford.
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Published in the United States of America by
Oxford University Press
198 Madison Avenue, New York, NY 10016

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Library of Congress Cataloging-in-Publication Data
Hollis-Brusky, Amanda, author.

Ideas with consequences : the Federalist Society and the conservative counterrevolution /
Amanda Hollis-Brusky.

pages cm

ISBN 978-0-19-938552-2 (hardback)

1. Federalist Society for Law & Public Policy Studies (U.S.) 2. Law—Political aspects—
United States. 3. Judicial review—United States. 4. Conservatism—United States.

I. Title.

KF294.F43H65 2015

349.7306—dc23

2014011196

987654321

Printed in the United States of America
on acid-free paper

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Dedicated to Nelson W. Polsby (*in memoriam*),
who brought this book to life with ten words.

ACKNOWLEDGMENTS

Origin stories about big scholarly projects can be difficult to tell. Scholars struggle to recount the nebulous beginnings, pinpoint the multiple sources of inspiration, and identify the major moments of transformation and revision. The origin story of this book, on the other hand, is rather easy to tell. In April 2006, I presented a paper to faculty and fellow graduate students at a mini-conference held on the University of California–Berkeley’s campus. Inspired by a course I had taken with Shannon Stimson, the paper grappled with Stanley Fish’s concept of an “interpretive community” as it applied to judges and constitutional interpretation. I wondered how one might operationalize the concept of an interpretive community—how was it bounded, what might it look like, how could we identify its influence? After the presentation, Nelson Polsby waved me over to his seat and uttered the magical words every graduate student longs to hear: “I have a dissertation topic for you.” I was all ears. “You should study the Federalist Society as an epistemic community.” I nodded, thanked him, and scribbled a note to myself to look up “Federalist Society” and “epistemic community” when I got home. Less than an hour of Internet searching and reading that evening confirmed that, as usual, Nelson Polsby was on to something big and important. Though he passed away less than a year later, this project benefited immensely from his insight, wisdom, and his approach to studying politics and people. The best parts of this book, I am confident, are a reflection of him.

Of course, the project has evolved in significant ways since those early days of graduate school due, in large part, to the helpful advice and suggestions I received from reviewers, conference discussants, and colleagues over the past eight years. In the project’s earliest stages, several established scholars took the time to give this fledgling graduate student advice, comments, and encouragement. In particular, I want to thank Jeb Barnes, Thomas Keck, Carol Nackenoff, Lawrence Solum, Ann Southworth, Laura Hatcher, Howard Erlanger, Steve Teles, Cornell Clayton, Mitch Pickerill, Kevin McMahon, Mark Graber, Jonathan Simon, Malcolm Feeley, and Chuck Epp. I am forever grateful and I promise to pay it

forward. In transforming this project from dissertation to article to book, I also received helpful comments and suggestions from Austin Sarat, Michael McCann, Laura Beth Nielsen, Jill Weinberg, Josh Wilson, Neil Devins, David Fontana, and Rick Hasen.

I want to thank the Charles and Louise Travers Department of Political Science at UC Berkeley as well as the Phi Beta Kappa Alpha Chapter of Northern California for their financial support. I am also deeply indebted to two important centers at UC Berkeley—the Institute for Governmental Studies and the Center for the Study of Law and Society. The Institute for Governmental Studies provided a home for me as an advanced graduate student and an accelerated education (almost through osmosis) about American politics. In particular, I want to thank my fellow carrel-inhabitants who taught me so much and made the Institute a vibrant and dynamic place to work: Dave Hopkins, Matt Grossman, Jill Greenlee, Rebecca Hamlin, Alison Gash, John Hanley, Mike Salamone, Ben Krupicka, John Henderson, Devin Caughey, Lee Drutman, Andrew Kelley, Chloe Thurston, Adrienne Hosek, Loan Le, Bruce Huber, Alex Theodoridis, Abby Wood, and Matt Wright. I was also fortunate to be awarded the Institute's Mike Synar Fellowship for Research in American Politics, which provided financial assistance for the researching of this book.

The Center for the Study of Law and Society was an invaluable resource for me throughout all stages of this project. Its workshops provided me with a crash course in socio-legal research approaches, ethnography, and interviewing—skills on which I relied heavily in carrying out the research for this book. The Center also gave me training in Atlas.ti, the qualitative data management program that I used to manage, code, and analyze the thousands of primary sources I gathered for this project. Finally, through the Center's Visiting Scholars program, I was able to spend my post-doctoral year on campus revising the dissertation, collecting additional data for the book, and connecting with scholars doing fascinating work in socio-legal studies. I want to say a special thanks to the Center's Executive Director Rosann Greenspan for continuing to support my affiliation with the Center, as well as to Calvin Morrill and Laurie Edelman for the education they provided me.

Beyond the institutional support I received at UC Berkeley, I owe an immeasurable debt to the faculty and fellow graduate students with whom I shared the campus. Shannon Stimson and Mark Bevir introduced me to material and readings that profoundly shaped my thinking about this project in critical ways early on. I am particularly grateful to Shannon for being such a wonderful advisor and strong professional role model. Daniel Farber's enthusiasm for the project gave me confidence that I was doing something important, and his connections helped open doors for

me in the research process. I also benefited from comments and conversations with Jack Citrin, Terri Bimes, Eric Shickler, and Sean Farhang. Interactions with my fellow graduate student colleagues influenced this project in more ways than I can acknowledge. In particular, I want to thank my friend and colleague Veronica Herrera, who gave up so many late nights with her family to talk with me about this project and whose advice and suggestions always made it better.

When it comes to UC Berkeley, I am obliged here to single out and acknowledge two people who gave more to me and to this project than I could ever possibly have expected—Gordon Silverstein and Robert A. Kagan. Though they occupy different corners of the Public Law world, each of them has had a profound and identifiable impact on my thinking, my work, and my professional development. Studying under Gordon and Bob, I first discovered my love of constitutional law and legal institutions, respectively. I also learned the importance of thinking about law and politics together, rather than separately. As their teaching assistant, I learned how to be an engaged and dedicated teacher and mentor of students. As dissertation advisors, they were a perfect complement to one another—yin and yang. Bob, who has become legendary for his marginalia and detailed and thorough draft comments, gave an almost super-human amount of attention to the details of the thesis and challenged me to more rigorously support every claim I made. Meanwhile, Gordon encouraged me to think big and helped me pull my head out of the weeds long enough to recognize how my case studies informed broader themes and dynamics in American politics and constitutional development. I can say with absolute confidence that this is a vastly better book because I had the opportunity to work with both of them.

I also want to acknowledge my wonderful colleagues at the Claremont Colleges, in particular, David Menefee-Libey, Rachel Van Sickle-Ward, Heidi Haddad, and Pam Bromley, who took time out of their schedules to read drafts, provide suggestions, and act as ever-present sounding boards, and Susan McWilliams, whose mentorship and friendship has helped me navigate all things professional and political at Pomona College. And then there are my ever-impressive and inspiring students—I am so fortunate to be able to work with and learn from some of the best and brightest young men and women in the country. I owe a special thanks to all my research assistants (“Go Team HB!”) who spent their summers and spare hours throughout the semester gathering and coding data for this book: Tommy Conkling, Danny Hirsch, Ethan Grossman, Larkin Corrigan, Evan Slovak, Sarah Laws, Christina Tong, and Joanmarie Del Vecchio. I also want to thank Pomona College, the Sponsored Research office, and the Summer

Undergraduate Research Program for generously funding all of these students to work on this project for the past three years.

My editors at Oxford University Press, David McBride and Sarah Rosenthal, handled the manuscript with care, respect, and professionalism at all stages of the process. I also want to thank the series editor Steven Teles for his careful attention to the manuscript, his responsiveness to requests and questions, and for seeking out and selecting terrific reviewers. Their suggestions and comments improved the manuscript by leaps and bounds, especially Chapter 1. I also have to take time to thank the Federalist Society and American Constitution Society members in Berkeley, Washington, D.C., Chicago, and San Diego who agreed to be interviewed as part of this project. In addition to giving me their valuable time, they entrusted their stories to me. I have done my best throughout the book to honor that trust and repay it through accurate and careful accounts. In particular I want to thank Steven Calabresi, David McIntosh, Randy Barnett, Chuck Cooper, Doug Kmiec, Michael Greve, Eugene Meyer, Edwin Meese, Robert Post, and Goodwin Liu for being so generous with their time and for making themselves available for follow-up questions after the initial interview.

Finally, I have to acknowledge my family. This book belongs to them as much as it does to me. My working-class parents inspired in their daughter grit, tenacity, a strong work ethic, and the ambition to pursue a college education. They lived beyond their means to keep me in good public schools and encouraged me every step of the way. I am also humbled and inspired by my brother, Staff Sergeant Jonathan Hollis, whose courage and service help me keep a perspective on the things that matter, and by my grandmother, Lee Hollis, whose strength and resilience never cease to impress me. Lastly, I am grateful for my husband, Sean, whose patience with and unwavering support for me and my career has made all of this possible, and for my brilliant daughters, Annabelle and Eloise, who fill me with pride and infuse everything I do with a profound sense of purpose and meaning.

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Introduction

In 1948, conservative intellectual Richard S. Weaver published a 200-page treatise on the decline of Western civilization. He entitled this treatise *Ideas Have Consequences*.¹ Though the book's contributions to modern conservative thought were modest, the phrase "ideas have consequences" became an important and oft-repeated mantra for a group of young ideological lawyers who came to Washington, D.C., in the 1980s to help carry out the "Reagan Revolution." There, working alongside the attorney general and others, these young lawyers helped lay the intellectual groundwork for what would become the "conservative counterrevolution" in the law. Thirty years later, as a conservative majority on the Supreme Court ushers in an era of "conservative renaissance" (Avery and McLaughlin 2013, 7), the phrase "ideas have consequences" continues to be the calling card of the organization founded and led by this same group of lawyers to help bring that counterrevolution about—the Federalist Society for Law and Public Policy Studies.

Launched in 1982 by a small group of conservative and libertarian law students at Yale Law School and the University of Chicago Law School, the Federalist Society was founded to provide an alternative to the perceived liberal orthodoxy that dominated the law school curriculum, the professoriate, and most legal institutions at the time (Teles 2008, 138). Two of the principal founders—Steven Calabresi and Lee Liberman Otis—had worked on the Reagan campaign before coming to law school, and they had identified a profound mismatch between the conservative and libertarian views that had achieved political and electoral ascendancy and their elite law school campuses, which were still very left-wing and openly hostile to these ideas. It was in response to this frustration, and in the hopes of facilitating a friendlier environment for conservative and libertarian law students and ideas, that the first Federalist Society Student Chapters were organized. With modest funding and organizational

support from a few other right-leaning law student groups, the chapters hosted a national symposium at Yale in the spring of 1982. The symposium brought together top conservative intellectual luminaries such as Robert Bork, Richard Posner, Charles Fried, Ralph Winter, Michael W. McConnell, and Antonin Scalia (at that time a law professor at the University of Chicago). The preface to the transcript, which reads like a call to arms for embattled conservatives and libertarians, is indicative of the tenor of the event: “At a time when the nation’s law schools are staffed largely by professors who dream of regulating from their cloistered offices every minute detail of our lives. . . the Federalists met—and proclaimed the virtues of individual freedom and of limited government” (Hicks 2006, 652). *National Review* magazine—one of the leading conservative publications of the time—covered the event, which spurred phone calls from dozens of students at law schools across the country inquiring about how to set up their own chapter of the Federalist Society.

The founders of the Federalist Society Student Chapters quickly realized that they had tapped into a high-demand market. As Steven Teles describes it, “[c]onservative law students alienated in their home institutions, desperate for a collective identity, and eager for collective activity provided a ripe opportunity for organizational entrepreneurship” (Teles 2008, 139). Within the first decade of founding the national organization, the number of Student Chapters at law schools grew to just over 150, while the operating budget of the Federalist Society increased from roughly \$100,000 to \$1.6 million. Over the course of its second decade, responding in part to its law student alumni who had graduated and entered the legal profession, the organization actively extended its reach beyond the law schools. During that time, the Federalist Society established practicing Lawyers Chapters in every major city, launched its Practice Group program, and increased its operating budget to just over \$6 million (Teles 2008, 148–149). As it enters its fourth decade, the Federalist Society has matured into a nationwide network of more than 40,000 academics, practitioners, judges, politicians, and law students dedicated to reshaping America’s institutions to reflect conservative and libertarian values. With annual revenues around \$10 million and with the continuing support of prominent conservative and libertarian foundations and donors such as John Olin, Lynde and Harry Bradley, Richard Scaife, and the Koch family (Avery and McLaughlin 2013, 16–17), the Federalist Society has constructed a formidable conservative and libertarian counter-elite—a network of individuals shaped by a common set of beliefs, a canon of shared texts, and a desire to reformulate the law and legal institutions in accordance with these beliefs.

To wit, at the Federalist Society’s Thirtieth Anniversary Convention in 2012, Vice President Leonard S. Leo took stock of all that the

conservative legal movement had accomplished since the 1980s, and the important role that the Federalist Society network had played in that movement. Reflecting on three decades of the Federalist Society, he remarked that its success could be attributed to the tens of thousands of members who “choose to be citizen-lawyers by taking up service in government or in the judiciary, by becoming active in pro bono litigation or public policy activity, by teaching, or simply by helping to generate this institution’s important educational products.”² A glance at the program for the Thirtieth Anniversary Convention confirms the prominence and prestige of many of the Federalist Society “citizen-lawyers” to whom Leo referred in his address. Among those donning tuxedos and gowns at the event were Supreme Court Justice Samuel Alito, United States Senators Ted Cruz (R-TX) and Mike Lee (R-UT), twenty United States Court of Appeals judges, one former solicitor general, and dozens of leading libertarian and conservative intellectuals. While not featured on the 2012 program, Supreme Court Justices Antonin Scalia, Clarence Thomas, and John G. Roberts, Jr., also have well-documented and long-standing ties to the Federalist Society network.³

While the list of prominent and powerful participants has prompted journalists and politicians on the left to refer to the Federalist Society as a “vast right-wing conspiracy,” the Federalist Society itself actually does very little in terms of direct legal and political engagement. Animated by the belief that ideas *can* and *do* have consequences, the Federalist Society’s focus has been on training and shaping its members through intellectual engagement, networking conservative and libertarian legal elites, and facilitating opportunities for members to put their shared legal principles into practice as “citizen-lawyers.” Because of this, Steven M. Teles has argued that the Federalist Society should be understood as a “provider of public goods for the conservative legal movement” (Teles 2008, 136), while Ann Southworth has described it as a “mediator organization” for various crosscutting coalitions within the movement (Southworth 2008, 130–148). While journalists, social scientists, lawyers, and politicians universally agree that the Federalist Society is an important organization, its method of indirect versus direct influence—training, education, and networking versus lobbying, litigating, and endorsing political candidates—has made the scope of its influence difficult to pinpoint.

The social scientific framework that I develop in the pages of this book represents an innovative effort to capture and chronicle the kinds of influence that the Federalist Society network exerts and, further, to identify and explore the conditions that have enabled it to do so. It respects the fluid, network structure of the Federalist Society, as described in great detail in Southworth’s work. It also provides a clear methodology and research

agenda for investigating how particular Federalist Society members used the “goods” or “capital” (Teles 2008) generated by the Society to influence Supreme Court decisions in concrete cases. Additionally, it highlights the Federalist Society’s role as a vocal and effective “judicial audience” (Baum 2006), keeping judges and Justices from drifting from their conservative and libertarian principles once on the bench. In so doing, this book provides a valuable framework for understanding the influence of the Federalist Society for Law and Public Policy Studies as well as similar organizations or networks—past, present, and future.

Ideas with Consequences extends previous work I have published on this topic (Hollis-Brusky 2013) that analyzed the conditions under which Federalist Society network members had been successful in diffusing ideas or *intellectual capital* to Supreme Court decision makers in federalism and separation of powers cases. The following chapters apply the same kind of analysis but expand the scope of the study to include cases on the Second Amendment (“the right to keep and bear arms”), and the First Amendment (“the freedom of speech”), as applicable to campaign finance regulations. My selection of these constitutional areas follows from the principal finding of my earlier work, which is that the Federalist Society network was most influential in cases where the Supreme Court took a big step away from their established constitutional framework; that is, cases where *doctrinal distance* was greatest (Hollis-Brusky 2013). Similarly, I find that in each of the landmark cases I examine in this book—cases that represent “critical junctures” (Pierson 2000) in constitutional jurisprudence—members of the Federalist Society functioned as active conduits for idea transmission. The intellectual capital they supplied through their legal briefs and written scholarship helped the Supreme Court majority justify these revolutionary constitutional decisions in their written opinions. As I argue, how these written opinions are crafted and justified is critically important for law and policy development because these opinions shape, constrain, and direct the behavior of future courts, lower courts, legislators, and other policy entrepreneurs in the American political system (Shapiro 2002; Silverstein 2009). Additionally, in Chapter 6, I show how the Federalist Society network helped foster and facilitate a climate conducive to constitutional change. In other words, not only did it take advantage of these critical junctures in constitutional jurisprudence by providing intellectual capital to decision-makers when they were ready to revise or reconstruct constitutional frameworks, this network also actively worked to bring about those critical junctures in the first place.

Chapter 1 details my research approach and lays out an argument for why a slightly modified version of the epistemic community framework—what I am calling a *political epistemic network* (PEN)—is the

most appropriate for understanding and investigating Federalist Society influence. I argue that while the epistemic community framework captures the fluid network structure of the Federalist Society and places an appropriate emphasis on the ideas and shared language of its members as the means of tracing network connections and influence, it does not adequately account for the politically constructed dimensions of legal knowledge, legal authority, and the path-dependent nature of legal precedent. Further, the epistemic community model, as it has been developed and deployed, does not account for the Federalist Society's role as a powerful and vocal "judicial audience" (Baum 2006)—a role that has been important in keeping judges and Justices aligned with the network's views and shared beliefs once on the bench. Because of the path-dependent nature of law and the non-refutable disposition of legal and constitutional interpretations, this has also had the additional effect of further entrenching the network's shared beliefs. This added dimension of influence is more fully developed and captured in the PEN model. Chapter 1 also demonstrates how the Federalist Society is bound by a simple but powerful set of 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.*⁴ I use these same principles to structure and organize the narratives of Federalist Society network influence contained in the book.

THE STATE EXISTS TO PRESERVE FREEDOM

Chapters 2 and 3 examine the role that the Federalist Society network and its members have played in fundamentally redefining the constitutional relationship between the person (human or corporate) and the state in two important areas. These areas include the Second Amendment and the right to keep and bear arms (*District of Columbia v. Heller* (2008); *McDonald v. City of Chicago* (2010)), and the First Amendment and restrictions on political speech (*FEC v. Wisconsin Right to Life* (2007); *Citizens United v. FEC* (2010)). While dealing with different constitutional questions and issues, what binds these together for members of the Federalist Society network is a forceful critique of the role of the state vis-à-vis the person and the perceived erosion of freedom from strangling regulation. Chapter 2 details the decades-long campaign to lobby the Supreme Court to, for the first time in history, adopt a personal rights view of the Second Amendment's guarantee of the right to keep and bear arms. As the chapter illustrates in detail, the Federalist Society and its members helped support and sustain the campaign to reinterpret the Second Amendment in

a radical manner, even when this interpretation was deemed “loony” or “off the wall” by many within the mainstream legal academy. Similarly, Chapter 3 examines how Federalist Society network members helped build the path that led to the revolutionary decision in *Citizens United* to extend First Amendment protections to corporations in the area of political speech—a decision that seriously weakened existing campaign finance regulations and opened the floodgates for money in elections.

THE SEPARATION OF GOVERNMENTAL POWERS IS CENTRAL TO OUR CONSTITUTION

Chapters 4 and 5 shift focus from the relationship between the state and the individual to constitutional concerns about the relationship between the federal government and the states. These chapters examine Federalist Society influence on one aspect of the “separation of governmental powers”—federalism. Federalist Society network members view our system of divided government in general, and of dual federalism in particular, as one of the most important safeguards for individual liberty built into the structure of our Constitution. In these chapters, I examine the extent to which the Federalist Society network has reshaped the Supreme Court’s understanding of the federal commerce power (*New York v. United States* (1992); *United States v. Lopez* (1995); *United States v. Morrison* (2000)) and state sovereignty (*Printz v. United States* (1997); *NFIB et al. v. Sebelius* (2012)). Chapter 4 examines how key network members provided the intellectual capital for some of the most important cases in the Supreme Court’s “New Federalism” revolution—cases that resulted in a meaningful narrowing of the federal commerce power for the first time in fifty years. Chapter 5 describes how many of these same network members helped fabricate out of whole cloth a new Tenth Amendment doctrine—the “Anti-Commandeering Doctrine”—that has had the practical effect of limiting the scope and reach of federal power to regulate the implementation of background checks for gun purchases and the expansion of Medicaid through the 2010 Affordable Care Act.⁵

IT IS THE DUTY OF THE JUDICIARY TO SAY WHAT THE LAW IS, NOT WHAT IT SHOULD BE

The final chapter of this book, Chapter 6, aggregates insights drawn from preceding chapters but also expands the scope of the analysis to situate