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Proof of the power of persuasion

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Sometimes ideas do matter. The history of the Federalist Society, which got its start shortly before I started law school and is now finishing its 30th year, is proof of that.

While Barack Obama talks about audacity, hope and change, there are few things in American legal history as audacious as the Federalist Society's hopeful effort to change the legal environment. And the change that has happened, often at the Federalist Society's instigation, has been dramatic indeed.

Although Ronald Reagan had been sworn in as president the year before, in the legal world of 1982 the ideas of Earl Warren and William Brennan continued to hold sway. The Second Amendment was a joke -- Chief Justice Warren Burger called claims that it protected an individual right a "fraud" -- and the standard definition of the Commerce Clause was that "Congress can do whatever it wants."

There was serious talk that receipt of welfare might be a constitutional right, that "equality" might trump Bill of Rights guarantees and that affirmative action might be mandated by the Constitution. Advocates of limited-government principles, of the Constitution's protection of economic liberty and of a traditional division of power between the states and the federal government were scarce and marginalized.

Those brave enough to argue for such principles in law school classrooms were even scarcer, and even more marginalized. But it was against this background that students from Yale Law School, Harvard Law School and the University of Chicago Law School organized the beginnings of what is now a nationwide organization with over 200 chapters, over 10,000 student members and extensive faculty and lawyer divisions.

Federalist Society chapters organize debates, speaking events and conferences -- at which, in marked contrast to some others, contrary views are welcome. Through publications, Web pages and more, the society has taken a major place at the national table, and vastly broadened debate beyond the deep-liberal consensus of 30 years ago.

Legal doctrine has shifted, too -- not as much as some people would like, but in directions almost unimaginable when the Federalist Society was founded. The Second Amendment is now recognized -- not only by the Supreme Court, but by most in the legal community -- as an individual right, enforceable against the states. Limits on Congressional power are not fully established, but Supreme Court decisions over the past couple of decades have begun to rein Congress in, and the legal challenges to ObamaCare in progress today probably wouldn't have even been attempted back then. And law schools are a far friendlier environment for right-leaning students than they were in my student days.

Most impressively, these changes have occurred largely through the power of persuasion. The Federalist Society doesn't muster the kind of mass-market power that, say, the AARP has. It has gotten as far as it has through the lawyer's art of advocacy, not brute-force politics.

This approach has been a shrewd one, since generally speaking the Federalist Society's ideals are shared by many Americans. If the debate is opened up, small-government, pro-liberty ideas tend to do very well. (That, of course, is why people on the left are so often found trying to shut the debate down.)

In many ways, the Federalist Society folks -- along with other groups like the Cato Institute and the Institute For Justice -- have provided the intellectual foundation for things like the Tea Party movement. And though right-leaning politics in America looks likely to involve less talk and more action between now and November 2012, that action is informed by a background of deep thought about the Constitution and the role of government, thought that the Federalist Society has played a major role in making possible.

Not bad for a club started by a handful of law students three decades ago.

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