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How Conservatives Captured the Law

By: Michael Avery and Danielle McLaughlin – April 15, 2013

With a Democratic president beginning his second term in the White House, swinging a more liberal bat than he had in his first term, the conservative legal movement in academe is upping its game.

In January the Legal Studies Institute, a program of the Fund for American Studies, in Washington, solicited law professors across the country to nominate top students for summer internships. The institute's program and board feature leading members of the Federalist Society for Law and Public Policy Studies, including Peter Redpath, vice president and director of the society's Student Division. LSI's elegantly designed brochure features photographs of federal and state judges and leading conservative academics in earnest conversations with law students. The institute guarantees an internship, reminds students that "who you know does matter," and offers a course, "Originalism and the Federalist Papers." Past speakers include Justice Antonin Scalia.

In early February, the libertarian Cato Institute sent law professors an e-mail inviting them to subscribe to periodic notices about potential course materials, like *Liberty of Contract*, *Gun Control on Trial*, and the institute's annual *Supreme Court Review*. Later that month, the Federalist Society sent a brochure to law professors, touting the benefits of membership in its Faculty Division and the variety of programs for law faculty, including the Olin-Searle-Smith Fellows in Law, which offers "top young legal thinkers" a year with an office at an elite law school to pursue their research, a \$60,000 stipend, and health benefits. The inside cover of the brochure shows Justice Scalia speaking at the Federalist Society's 25th-anniversary gala, regaling the audience with an exultant metaphor: "We thought we were just planting a wildflower among the weeds of academic liberalism, and it turned out to be an oak."

The history of the Federalist Society is a story of how disaffection, bold ideas, commitment to principle, and enlightened institution-building have created a significant conservative shift in the legal, policy, and political landscape of America over the past 30 years. The society reports that more than 45,000 lawyers and law students are involved in its various activities, with approximately 13,000 dues-paying members. With a national budget of about \$10-million, in 2010 its 75 lawyer 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 others. Through conferences, debates, publications, litigation, education, and by holding key positions in government and the judiciary, the society has changed law and policy in areas like property rights, access to courts, affirmative action, privacy rights including abortion and same-sex marriage, and the influence of international law on the domestic legal system.

The Federalist Society's membership includes many brilliant and sincere theorists who raise important and interesting issues. On the other hand, the society's critics say, its

overall impact is reactionary. By glorifying private property, demonizing government intervention (particularly at the federal level), insisting that originalism is the only legitimate method of constitutional interpretation, embracing American exceptionalism as a reason to remain apart from global governance, and pushing related policies, these critics say, the society advocates a form of social Darwinism that has been discredited by mainstream American legal thought since the 1930s.

Membership includes economic conservatives, social conservatives, Christian conservatives, and libertarians, many of whom disagree with one another on significant issues, but who cooperate in advancing a broad conservative agenda. They generally support individual rights and a free market, and prefer states' rights to action by the federal government.

Members have held senior policy making positions in the Reagan, George H.W., and George W. Bush administrations; have a commanding presence on the federal bench; and, as private lawyers, advocates in public-interest law firms, and government lawyers, challenge laws that are anathema to their worldview. The dockets of the federal and state courts (including the Supreme Court) are brimming with test cases brought or defended by Federalist Society members 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; and otherwise advance conservative ideas.

Academics associated with the Federalist Society have educated a new generation of conservative law students, played a role in the rise of openly conservative law schools like Pepperdine's and George Mason's, and succeeded in gaining respect and traction for conservative legal ideas. Those stem in large part from an originalist interpretation of the Constitution, exemplified by the jurisprudence of Justice Scalia. That view posits that to interpret the Constitution, one must search for the original meaning of its provisions. 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, and that the original meaning is the only legitimate method of interpreting the document.

In 1980, Steven Calabresi, Lee Liberman, and David McIntosh were young conservative law students at Yale and the University of Chicago. They were alienated from the prevailing liberal political orientation of their classmates and their schools. The New Deal, the civil-rights movement, and the Great Society antipoverty programs had led to widespread faith that government could and should solve the country's social, political, and economic problems. Calabresi, Liberman, and McIntosh thought otherwise, believing that big government posed a fatal threat to individual rights and the sanctity of private property. In their view, liberals, in pursuit of their social agenda, had distorted important constitutional principles.

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