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The Federalist Society and the “Structural Constitution:”
An Epistemic Community At Work

by

Amanda Lee Hollis-Brusky

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requirements for the degree of

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in

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in the

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of the

University of California, Berkeley

Committee in charge:

Professor Robert A. Kagan, Co-Chair
Professor Shannon C. Stimson, Co-Chair
Professor Gordon Silverstein
Professor Daniel A. Farber

Spring 2010

The Federalist Society and the “Structural Constitution:”
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by Amanda Lee Hollis-Brusky

Abstract

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Doctor of Philosophy in Political Science

University of California, Berkeley

Professor Robert A. Kagan, Co-Chair
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This thesis contributes to an understanding of the pathways of civic influence into the least dangerous branch of American politics – the Judicial Branch. Specifically, this thesis examines the influence of the Federalist Society for Law and Public Policy – a conservative and libertarian legal network of more than 40,000 members – on twelve of the most salient Supreme Court decisions concerning federalism and the separation of powers over the last three decades. As a special case, it also examines Federalist Society influence on a subset of controversial Executive Branch policies issued under George W. Bush. To understand the unique nature of this civic group’s influence, it establishes the Federalist Society for Law and Public Policy as a kind of epistemic community; i.e., a network of legal professionals and civic leaders bound together and shaped by a set of beliefs about law, the nature of government, and constitutional interpretation. Using this framework, it proceeds to demonstrate how individual members of the Federalist Society acted as “cognitive baggage handlers,” carrying these shared ideas into their roles as legal professionals (judges, academics, litigators, government officials). Finally, it evaluates the extent to which these actors were successful or not in diffusing their ideas into law and policy. It finds that while there is substantial evidence of Federalist Society influence in the areas of federalism and separation of powers, overall the results have been mixed. The final chapter examines why that was and speculates as to the conditions that might facilitate and frustrate epistemic community influence more generally.

This thesis is dedicated to:

The late Nelson W. Polsby, who brought it to life with ten little words (*you should study the Federalist Society as an epistemic community*);

Robert A. Kagan, Gordon Silverstein, Shannon C. Stimson, and Daniel A. Farber, who shepherded me through various stages of its development;

My family on the east coast who keep me grounded;

Sean, for his unwavering support, patience, and optimism;

And

Annabelle, whose laughter and smiles sustained me through the homestretch.

Table of Contents

List of Tables and Figures	iii
Introduction	1
The Federalist Society as an Epistemic Community	6
Separation of Powers I: The Unitary Executive Theory in Court, 1983 – 1988	25
Separation of Powers II: The Non-Delegation Doctrine in Court, 1989 – 2001	46
Separation of Powers III: The Unitary Executive Theory in the Executive Branch, 2001 – 2008	67
Federalism I: The Commerce Clause in Court, 1992 – 2000	90
Federalism II: State Sovereignty in Court, 1996 – 1999	115
An Epistemic Community at Work on the “Structural Constitution”	140
Conclusion	166
Appendix (List of Interviews)	172
References	175
Notes	181

List of Tables and Figures

Table 2.1	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>INS v. Chadha</i> (1983)	33
Table 2.2	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Bowsher v. Synar</i> (1986)	37
Table 2.3	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Morrison v. Olson</i> (1988)	40
Table 3.1	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Mistretta v. United States</i> (1989)	55
Table 3.2	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Clinton v. City of New York</i> (1998)	58
Table 3.3	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Whitman v. American Trucking</i> (2001)	62
Table 4.1	Federalist Society Network Participants As Documented Signatories on Office of Legal Counsel Memos, 2001-2008	76
Table 4.2	Catalogue of Citations to Federalist Society Scholarship and Originalist Sources in Federalist Society Network Actor-Authored Office of Legal Counsel Opinions Authorizing the War on Terror, 2001-2003	78
Table 5.1	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>New York v. United States</i> (1992)	100
Table 5.2	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>United States v. Lopez</i> (1995)	104
Table 5.3	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>United States v. Morrison</i> (2000)	109

Table 6.1	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Seminole Tribe v. Florida</i> (1996)	124
Table 6.2	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Printz v. United States</i> (1997)	128
Table 6.3	Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in <i>Alden v. Maine</i> (1999)	134
Table 7.1	Number of Federalist Society Network Participants as Amici, Counsel, and Judicial Decision-Makers in <i>Chadha</i> (1983) through <i>American Trucking</i> (2001)	142
Table 7.2	Number of Sources of Federalist Society Scholarship Cited by Amici, Counsel, and Judicial Decision-Makers in <i>Chadha</i> (1983) through <i>American Trucking</i> (2001)	146
Table 7.3	Number of Citations to the Originalist Canon by Amici, Counsel, and Judicial Decision-Makers in <i>Chadha</i> (1983) through <i>American Trucking</i> (2001)	150
Table 7.4	Overall Impact of Federalist Society Network Ideas on Supreme Court Majority and/or Concurring Opinions in <i>Chadha</i> (1983) through <i>American Trucking</i> (2001)	153
Table 7.5	Relationship Between Federalist Society Network Participation and Degree of Impact of Federalist Society Network Ideas in Majority and/or Concurring Opinions in <i>Chadha</i> (1983) through <i>American Trucking</i> (2001)	155
Figure 1.1	Participation at Federalist Society National Meetings By Professional Occupation, 1982-2008	10

Figure 1.2	The Federalist Society As An Epistemic Community	13
Figure 1.3	Most Active Federalist Society Participants in Conservative Media Discussions of The Structural Constitution, 1981-2008	19
Figure 1.4	Top Twenty-Eight Most Frequent Participants at Federalist Society National Conferences, 1982 – 2008	21
Figure 1.5	Epistemic Community Framework Applied to Judicial Branch and Executive Branch	23
Figure 4.1	Mentions of the “Unitary Executive” in Executive Branch Public Papers, 1981-2008	69
Figure 4.2	Number of Presidential Signing Statements Issued from Presidents Reagan to Bush II including Number and Percentage of Statements that Raised a Constitutional Objection	83

Introduction -----

In just a quarter-century, the Federalist Society has transformed itself from a student organization into a vital, national institution... I share your devotion to the Constitution and I'm proud to be standing here with you tonight. I'm proud to be in such distinguished company as Justice Antonin Scalia... proud to be here with Justice Clarence Thomas... Justice Sam Alito... [and] Justice John Roberts. I appreciate the Secretary of Labor Elaine Chao joining us and she kindly brought her husband, Senator Mitch McConnell. From the great state of Alabama, Senator Jeff Sessions. I appreciate the attendance of former Attorney General Ed Meese, former Attorney General Bill Barr [and] how about your Master of Ceremonies, my good friend Ted Olson?

- President George W. Bush, Address before the Federalist Society, November 15, 2007.¹

How does the interpretation and application of the United States Constitution change over time? What role, if any, do civic actors play in that process? In 1994 a group of legal scholars submitted an *amicus curiae* (friend of the court) brief to the United States Supreme Court in *United States v. Lopez*, a case that successfully challenged the Gun Free School Zones Act. Though *Lopez* did not in fact raise a Second Amendment challenge, the brief laid out an argument, citing contemporary scholarly work, for why the Constitution's right to bear arms should be interpreted as an individual, not a collective right. Three years later, Justice Clarence Thomas referenced the exact same sources of scholarship in his concurring opinion in *Printz v. United States* (a case that also did not implicate the Second Amendment) and mused hopefully that "perhaps, at some future date this Court will have the opportunity" to align its Second Amendment jurisprudence with this "growing body of scholarly commentary."² More than a decade later, in 2008, Justice Antonin Scalia relied on this same scholarship to construct the Supreme Court's majority opinion in *District of Columbia v. Heller*, a revolutionary decision that held for the first time that the Second Amendment's right to bear arms was indeed an individual, not a collective right, and one of the most recent installments of what's being called the "conservative counterrevolution" in Supreme Court jurisprudence.

This opening vignette is illustrative of two things. First, it illustrates that law and constitutional development is a long-term game. Secondly, it shows that ideas need agents or networks of actors to transmit them from civil society to decision-makers in government. In this case, the four legal academics who signed onto the *amicus curiae* brief in *Lopez*, the Supreme Court Justice who highlighted their brief in his concurring opinion in *Printz*, and four of the five Justices who relied on their scholarship to support the majority opinion of the Supreme Court

fourteen years later in *Heller* were all connected through a very important civic and professional network – the Federalist Society for Law and Public Policy.

Founded by a group of conservative and libertarian law students at the University of Chicago and Yale Law School in 1982, the Federalist Society has matured into a nationwide network of more than 40,000 academics, practitioners, judges, politicians and law students dedicated to reshaping the legal culture and restoring conservative and libertarian legal values to America's institutions.³ Though it is acknowledged by both friend and foe as an organization of extraordinary consequence in the contemporary American political context, the Society itself does very little in terms of direct legal and political engagement (Teles 2008). It does not lobby. It does not sponsor or participate in litigation and it does not endorse political candidates or take official policy positions. Its focus instead has been on creating a conservative and libertarian counter-elite, training and shaping its members through intellectual engagement in conferences, luncheons, practice groups, and debates and on networking like-minded civic leaders and facilitating opportunities for them to put their shared legal principles into practice.

Because of its role as the intellectual and professional hub of the American legal-right, the Federalist Society has quite rightly been characterized as the “cross-roads of the conservative movement” and an important part of the “support structure” for legal and constitutional change (Southworth 2008, 148; Teles 2008, 11-12). It has trained and credentialed now two generations of practicing lawyers and served as an informal job placement network to place its members in positions of power and political influence. It has encouraged the development of conservative public interest law by facilitating cooperation among elites with shared views and similar policy goals and has supported right-leaning legal academics whose ideas about the law were considered by the American legal elite to be “off the wall” as of the early-1980s. In doing so, the Federalist Society has helped to create a deep bench of conservative legal talent; a farm team of current and future civic leaders, academics, judges, litigators, and lawmakers dedicated to the Society's ambitious mission of reshaping American law and legal culture in accordance with the principles of the legal-right.

But aside from being a phenomenon of socio-legal interest, has all this investment in building a counter-elite, a “support structure,” paid dividends? The opening vignette would suggest that it has. I mentioned that four Federalist Society affiliated legal academics provided a good portion of the legal argument and rationale for the individual rights view of the Second Amendment articulated by the majority of the Supreme Court in *Heller*. I also mentioned that four of the five Supreme Court Justices who voted with the majority in *Heller* were also Federalist Society members, including Justice Antonin Scalia who authored the majority opinion. The two D.C. Circuit judges who decided the case at the Circuit Court level were also Federalist Society stalwarts, Thomas B. Griffith and Lawrence Silberman. Additionally, the case was constructed and financed by frequent Federalist Society participant Robert A. Levy. Apart from simply having the Federalist Society credential, however, the more important observation is that each of these participants in the *Heller* litigation articulated a shared understanding of the Constitution, rooted in the theory of Original meaning, expressed in a very particular language

and constructed through a shared canon of sources. It is this intellectual network in action that this thesis examines.

Specifically, this thesis examines the extent to which and the conditions under which the Federalist Society network has been effective in diffusing certain shared beliefs about federalism and the separation of powers – the “twin doctrines” of the “structural constitution”⁴ – into judicial opinions and Executive branch policies. It looks at twelve Supreme Court cases decided over the last three decades as well as a sub-set of Executive Branch policies (memos and signing statements) issued under the George W. Bush Administration. It then draws out, in far greater detail, the kinds of network links I briefly sketched out with the *Heller* case. In doing so, it provides one set of answers to the question of Federalist Society influence; of what kind of dividends its investments in intellectual engagement and social networking have paid in terms of impact on Supreme Court opinions and Executive branch policies. Put another way, if we understand the Federalist Society as a network that generates certain kinds of “capital” for the conservative legal movement (Teles 2008), then this thesis asks: how have individual network members spent that Federalist Society “intellectual capital” and, moreover, what have the returns on their investments been?

To frame this inquiry, I use a conceptual framework rooted in the sociology of knowledge and applied most frequently in Political Science by scholars in the field of International Relations - that of the *epistemic community*. As I demonstrate in great detail in the following chapter, an epistemic community refers to a network of professionals who demonstrate a shared set of principled and causal beliefs and who direct their expertise toward a common set of policy problems (Haas 1992, 3). While not a perfect analog, the construct of the epistemic community most accurately captures the fluid network structure of the Federalist Society while placing a strong and appropriate emphasis on the ideas and shared language of its members as the means of tracing network connections and impact. To use an anatomical metaphor, within the epistemic community framework the Federalist Society network becomes the circulatory system that connects the various parts of the body politic with the organs of government, and the ideas the blood that circulates between them. By tagging and tracing some of these ideas this thesis provides a novel look at how ideas, which are the lifeblood of the legal-judicial enterprise, have circulated from civil society, through the veins and arteries of the Federalist Society network, into judicial opinions and Executive branch policies.

Apart from its opening vignette, this thesis traces ideas about the “structural constitution.” As I explain in the following chapter, the “structural constitution” is understood within the Federalist Society network as encapsulating a set of beliefs about the nature of limited government, federalism, and the separation of powers. As I demonstrate with reference to evidence from personal interviews, conference transcripts, and media searches, beliefs about constitutional structure represent both the most fundamental and the most fusionist (bringing together various strands of conservatives and libertarians) beliefs within the Federalist Society network. Perhaps because of this, they have also been the most frequently discussed ideas at Federalist Society meetings and conferences. Apart from being the most unifying and most

salient beliefs within the Federalist Society network, there is another important reason the “structural constitution” makes for a good case study. There have been large shifts in the Supreme Court’s understanding of these doctrines over the last twenty-five years, more or less coinciding with the Federalist Society’s rise to prominence. This thesis will examine some of these decisions and show that members of the Federalist Society network did, in fact, have a hand in shaping and supporting some of the most controversial decisions of the so-called “conservative counterrevolution.”

Chapter 1 sets the stage by introducing the construct of the epistemic community and explaining the framework it provides for understanding the impact of networks of professionals and their ideas on law and policy. It then provides evidence from interviews, Federalist Society conferences and other sources that these actors can be understood as a kind of legal epistemic community. Finally, it demonstrates how the community understands and defines the "structural constitution" and how it relates to certain principled and causal beliefs about the nature of political power, constitutional interpretation, and the American system of government.

Moving into the heart of the study, Chapters 2 through 6 present the empirical evidence of this epistemic community at work on different aspects of the "structural constitution." Chapters 2 and 3 look at six of the most salient Supreme Court decisions implicating the horizontal separation of powers since the founding of the Federalist Society in the early 1980's.⁵ The first group of cases, *INS v. Chadha*, *Bowsher v. Synar*, and *Morrison v. Olson*, treats the separation of powers doctrine as it implicates Executive power and the Unitary Executive theory while the second group, *Mistretta v. United States*, *Clinton v. City of New York*, and *Whitman v. American Trucking* deals with Congressional delegations of legislative power and the non-delegation doctrine. Chapter 4 shifts gears briefly from the courts to the Executive Branch to examine the efforts of Federalist Society network actors, working principally during the George W. Bush Administration, to implement their beliefs about Executive power through the use of signing statements and legal memos.

Chapters 5 and 6 shift the conceptual focus from the horizontal to the vertical separation of powers and examine six of the most salient Supreme Court cases to treat the constitutional questions of federalism and state sovereignty over the past three decades. The first three cases, *New York v. United States*, *United States v. Lopez*, and *United States v. Morrison* specifically involve Congress' power to regulate interstate commerce under the Commerce Clause while the final three, *Printz v. United States*, *Seminole Tribe v. Florida*, and *Alden v. Maine* implicate the doctrine of state sovereignty more generally. Chapter 7 takes stock of this epistemic community at work and analyzes some of the conditions that seemed to both foster and frustrate the diffusion of ideas about the “structural constitution” from the Federalist Society network into Supreme Court opinions and Executive branch policies. It finds that *doctrinal distance* – the size of the step the Supreme Court majority is taking away from its established constitutional framework in a given case – best explained the degree of epistemic community impact across the twelve cases under study. It explains this finding with reference to the nature of the American judicial enterprise, path-dependence, and the problem of judicial authority. Drawing on this finding, the

conclusion suggests an agenda for future research on the role of epistemic communities in the processes of constitutional change.

This is a thesis about the Federalist Society for Law and Public Policy. It is also a thesis about idea diffusion. Focusing on idea diffusion as a measure of influence involves a recognition that law and constitutional development, as I alluded to in the beginning of this introduction, is a long-term, iterative game (Silverstein 2009). The “intellectual capital” invested in one case might bring immediate returns – and in the pages that follow we will see plenty of evidence of this – or, as we saw with *Heller*, the pay-off might be more long-term. This is why I have chosen to call this study of the Federalist Society and the “structural constitution” *An Epistemic Community At Work*. I fully recognize that the impact of the efforts and activities I chronicle in these pages might not be felt for another five, ten or fifteen years (or might not ever be felt at all). On the other hand, I realize that many of its victories could subsequently be eroded or reversed by future decisions. I look forward to revisiting this work in the future and re-evaluating, with the benefit of hindsight, the import of its findings for the continuing development of law and policy. After all, as one scholar has recently observed, when it comes to effecting and supporting legal change, it seems as if “an epistemic community’s work is never done.”⁶

Chapter One -----

The Federalist Society As An Epistemic Community

"[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, Jan. 25, 2008

"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... We have alumni of our chapters working in law firms all over the country and working in government jobs and the goal is to try to have the cultural impact ... that Harvard or Yale have basically. That being said, because 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 in the way that Yale Law School alumni who've become judges have tended to push judging in a legal realist direction."

- Steven Calabresi, Co-Founder of the Federalist Society, Apr. 3, 2008

The Federalist Society for Law and Public Policy does not fit comfortably into any of the social science boxes that students of American politics are accustomed to using to study the impact of civic groups on law and politics. It does not lobby Congress, sponsor litigation, or advance legal arguments in court cases as a "friend of the court" like a wide variety of political and legal interest groups. Unlike a think tank, it does not have a full-time staff of academics paid to publish position papers designed to advance or endorse a particular policy position. It also does not provide accreditation, evaluations or official endorsement of candidates for federal judgeships, like a professional association such as the American Bar Association. What it *does* do, as the excerpts from Co-Founders David McIntosh and Steven Calabresi allude to, is attempt to educate and train its members through its sponsored events and conferences, to shape them intellectually in a particular way, and 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 and this, as Steven M. Teles has noted, has been an important part of the organization's strategy of "boundary maintenance"

(Teles 2008, 152). However, its founding and core members do not *disclaim* credit for what Federalist Society network actors and alumni do outside the walls of the Mayflower Hotel in Washington, D.C.⁷ - the thousands of "untold ways" in which these individuals go on to shape legal doctrine and policy in accord with organizational principles and priorities. It is this peculiar dynamic that has made the Federalist Society for Law and Public Policy 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."⁸

While I take seriously the claim that the Federalist Society is, truly, "sui generis" and I do return to further evaluate it in later chapters, I have found the construct of the epistemic community to be a useful heuristic for conceptualizing the fluid, network structure of this group of conservative and libertarian actors and for thinking about the nature and mechanisms of its impact on the Court's understanding of the "structural constitution." That being the case, a brief theoretical foray into scholarship on the epistemic community followed by a more detailed narrative of how the Federalist Society for Law and Public Policy fits into this framework is this chapter's first order of business. I then proceed to examine in greater detail the community's shared beliefs and understanding of the "structural constitution," explaining why this is an important set of doctrines for Federalist Society members and why it makes a good case study. The chapter closes with a discussion of the research agenda and techniques for demonstrating the impact of this epistemic community on the "structural constitution."

What is an Epistemic Community?

The most accessible and useful theoretical exploration of the concept of the epistemic community in the social sciences can be found in Peter M. Haas' 1992 introduction to a collection of journal articles in *International Organization* on the topic of "Knowledge, Power, and International Policy Coordination" (Haas 1992). Specifically, Haas has defined an epistemic community as a network of professionals with expertise in a particular policy area bound together by four general characteristics: a shared set of normative and principled beliefs; shared causal beliefs; shared notions of validity; and a common policy enterprise (Haas 1992, 3). Articulated in this manner, the construct of the epistemic community is partially indebted to a number of precursors in the sociology of scientific knowledge such as Ludwig Fleck's concept of the "thought collective" and Thomas Kuhn's definition of a "paradigm" (Fleck 1979; Kuhn 1970). What all these constructs have in common, Haas observes, is a definitional emphasis on the community members' or practitioners' shared "faith" in the validity and applicability of certain beliefs, values, and professional techniques (Haas 1992, 3).

While Haas frames his discussion of epistemic communities in the context of understanding and explaining the mechanisms of international policy coordination, the working definition and framework he develops in this article have become important touchstones for

social scientists exploring the impact of these communities on everything from domestic fishery policy to the No Child Left Behind Act to evolving conceptions of higher education in developing countries.⁹ The appeal of the epistemic community approach across the social sciences, as one scholar has noted, has to do with its straight-forward logic: as national decision-makers face an increasing number of difficult or complex policy decisions, they will tend to seek out support from experts as sources of authoritative knowledge. This opens the door for well-coordinated groups of knowledgeable experts, epistemic communities, 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). Put another way, if we are persuaded by Herbert Simon that all decision-makers engage in some form of "satisficing" in the policymaking process, then under certain conditions a particular epistemic community might be in a position to influence the outcome in a number of ways (Haas 1992, 16).

Haas and others have theorized that epistemic communities become important players in the policymaking process when decision-makers are confronted with a problem or set of problems that prompts them to solicit information in the form of advice or authoritative interpretations from one or more knowledge-based experts (Haas 1992; Sebenius 1992; Yee 1996). The opportunities for any given epistemic community to impact the decision-making process and imprint upon it its own shared principles, interpretations, and values increase as more and more of its members gain access to decision-makers in government. As Haas writes, "it is the political infiltration of an epistemic community into governing institutions which lays the groundwork for a broader acceptance of the community's beliefs and ideas about the proper construction of social reality" (Haas 1992, 27). In this way, epistemic communities can be understood as "channels through which new ideas circulate from societies to governments" with its individual members acting as "cognitive baggage handlers" whose activities and movements inside and outside of government make that transmission possible (Haas 1992, 27).

In the American legal-political context, we can see certain institutional and political characteristics that might facilitate inroads for epistemic communities in the legal or judicial policymaking process. The American legal enterprise, as it has become more complex, technical, and professionalized, 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 decision-makers often rely on the broader legal community for intellectual support. This is particularly so in the case of judicial decision-makers whose written opinions and decisions need to persuade legal elites and, through them, the public at large to be considered authoritative. After all, as Alexander Hamilton famously remarked in *Federalist 78*: "the judiciary... has no influence over either the sword or the purse... it may be said to have neither FORCE nor WILL but merely judgment" (Rossiter ed. 1961). The courts' only power is their ability to persuade an audience of similarly educated and trained lawyers that their decisions are legitimate and well-reasoned. Groups of individuals who are in a position to

develop and legitimate legal ideas, with footholds in the legal academy, in the legal profession, in think tanks, and in the institutions of government can thus become valuable resources for legal and judicial decision-makers looking to legitimate or support their decisions (Teles 2008, 12-13).

Given this dynamic, it is not difficult to imagine how a particular epistemic community with members well-situated throughout the legal community might find itself in a position to frame or shape the arguments of a particular judicial decision, how it is articulated and how it is supported intellectually. By working to legitimate a particular set of ideas in the legal profession, epistemic communities make it easier for judicial decision-makers who share these beliefs, values, and techniques to articulate them in their opinions without the fear of being perceived as illegitimate. At the same time, returning to Haas' observation, the goal of the epistemic community is political infiltration; as a community consolidates its power within government by placing its members in key positions as advisors or as decision-makers, it stands to institutionalize its influence and its ideas.¹⁰ 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. The specific ways in which this might occur and how to demonstrate the impact of a legal epistemic community on judicial decisions and executive branch policy (which I examine in Chapter Four) will be explored in greater detail toward the end of the chapter. First, I turn my attention to the critical question of how the Federalist Society for Law and Public Policy fits into this epistemic community framework.

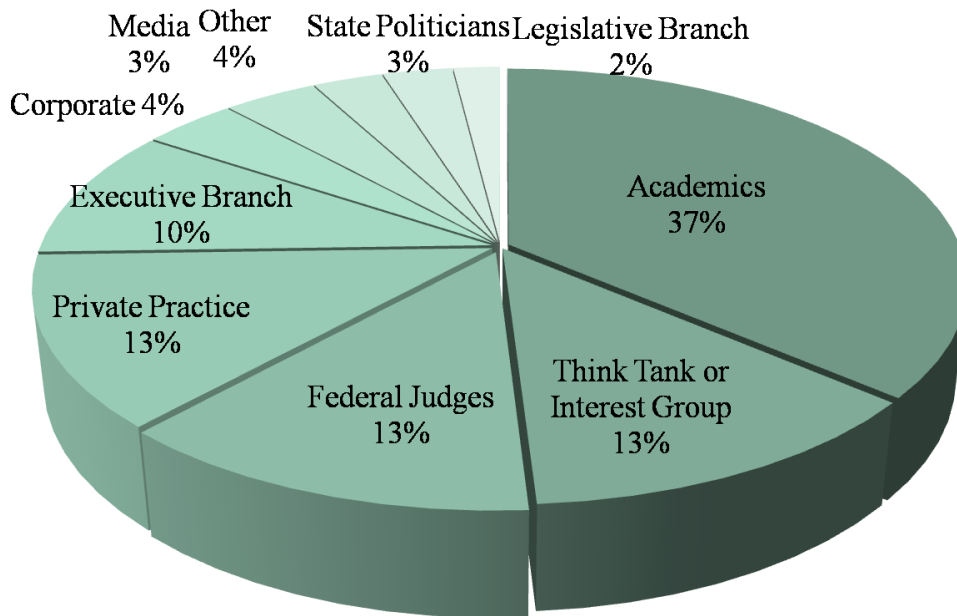
The Federalist Society as an Epistemic Community

Relying on Peter M. Haas' working definition throughout this section, I show how the Federalist Society for Law and Public Policy, as a network of conservative and libertarian legal professionals dedicated to reforming the legal order, can be understood as a kind of legal epistemic community bound together by a broad set of principled and normative beliefs, causal beliefs, notions of validity, and a common policy project.

Who are the 40,000 plus conservative and libertarian legal actors currently affiliated with and connected through the Federalist Society's burgeoning professional network?¹¹ 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 around 1,000 events annually that draw close to 48,000 students in attendance across the various campuses. The Lawyers Division of the Federalist Society, with its 60 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 has described, with the exception of its two national meetings, all of the Federalist Society's supported activities and events are conducted in its

Figure 1.1

Active Participation in FS National Meetings By Professional Occupation, 1982-2008



* Percentages based on a total of 1,957 presenters at Federalist Society National Student Conferences and Lawyers Conferences from 1982-2008

"student chapters (in law schools), lawyer chapters (by city), and practice groups (organized by functional interest)" (Teles 2008, 148).

As the Federalist Society's 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."¹² Evidence gathered from speaker lists at Federalist Society National Meetings from 1982 to 2008 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.¹³ 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-Founders Dave McIntosh and Steven Calabresi, 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 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, each accounting for around one-tenth of presenter population, 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, then, the Federalist Society for Law and Public Policy certainly satisfies the epistemic community 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 epistemic community 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 impact, she simply responded: "like Verizon, it's the network."¹⁴ Showing that the Federalist Society has the requisite number of well-positioned "boots on the ground," however, is only the first step.¹⁵ The more important task is to demonstrate that actors within this network are shaped by a set of shared beliefs. Returning to Haas' definition of an epistemic community, these would include certain shared principled, 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 principled, normative and causal beliefs among network members is the Federalist Society for Law and Public Policy'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.¹⁶

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 it, 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 validity which, according to Haas, is yet another critical criterion for the existence of an epistemic community.

The first belief listed in the Federalist Society's statement of principles, that the "state exists to preserve freedom," represents a fusionist¹⁷ 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. M. Stanton Evans has written that it was "neither the 'authoritarian' ideas of Hamilton nor the 'libertarian' ideas of Jefferson" that "dominated the Constitutional Convention" but rather the "'fusionist' ideas of Madison" (Edwards 2007, 3). 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 most famously articulated 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 which is 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.¹⁸

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 best be understood as a causal belief derived from the fusionist understanding of the role of government expressed, again, in Madison's *Federalist 51*. The separation of powers between the coordinate branches of the federal government and between the state and the federal governments, Madison argued, was the constitutional structure most suited to safeguarding the people's freedom by guarding against tyranny: "Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself" (Rossiter ed. 1961). In other words, members of the Federalist Society believe, as did James Madison, that the separation of powers is the best condition, and perhaps the 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."¹⁹ Evidence of a strong concern for the preservation of the

Figure 1.2

Haas Definition of <i>Epistemic Community</i>	Network of Professionals with Expert Knowledge	Shared Principled/ Normative Beliefs	Shared Causal Beliefs	Shared Notions of Validity	Common Policy Enterprise
The Federalist Society for Law and Public Policy	The Society's chapter-based membership network, at 40,000 strong, extends to all levels of the legal community	The State exists to preserve freedom; the role of the judiciary is to say what the law is, not what it should be	The separation of governmental powers is central to the Constitution and a precondition for individual liberty	Originalism and its prescribed method of judicial interpretation is the only mode consistent with a proper understanding of the nature of government and the structure of the Constitution	To promote an awareness of conservative and libertarian legal principles and to further their application throughout all levels of the legal community

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.²⁰ Articulated as a concern for the preservation of "federalism" or the "federal structure," this principle received another 23 mentions in interviews.²¹

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." Taken in its immediate context, this principle can be understood as articulating another important aspect of the constitutional separation of powers. Echoing familiar language from Chief Justice John Marshall's famous opinion in *Marbury v. Madison*,²² this statement reflects the belief among members that unelected judges who, by incorrectly interpreting 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 short-hand 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."²³ This principled concern with judicial activism was expressed more than 20 times in interviews with key Federalist

Society actors.²⁴ Additionally, the nature of the judicial role has been the headlining topic at no fewer than seven Federalist Society National Conferences throughout the years.²⁵

The debate about the proper role of the judiciary is a very old one, indeed and it gets to the heart of what the legal community 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 principled and causal beliefs explored in this section. The relationship between these beliefs and members' shared understanding of what makes judicial interpretation valid was perhaps best articulated by Federalist Society Board member Robert H. Bork, whose 1971 *Indiana Law Journal* article was cited five times by interviewees²⁶ 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. First, originalism holds that ratification was the formal, public, sovereign, and consent-conferring act which made the Constitution and subsequent amendments law. Second, originalism holds that interpretation of the Constitution is an attempt to discover the public meaning it had for those who made it law. Third, 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).

As it is understood by Federalist Society members, Originalism embodies their shared principled and causal beliefs about individual freedom and the importance of the separation of powers and, additionally, prescribes a particular method of judicial interpretation; a means by which network actors can gauge whether or not judges are dutifully saying "what the law is" or, instead, what the law "should be." Long-time Federalist Society member Loren A. Smith, now a Judge on the U.S. Court of Federal Claims, explained the normative difference between the two modes of

judicial interpretation: "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."²⁷

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."²⁸ In addition to having the topic of "Originalism" headline two of its National Conferences,²⁹ 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,³⁰ 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*.³¹ One rough measure of the degree to which Federalist Society network members have adopted the theory of Originalism and embraced its interpretive methodology is the extent to which participants at events cite or refer to Originalist sources in their speech-acts. To that end, a content analysis I performed of a sample of just over 200 speeches from Federalist Society National Conferences revealed 268 distinct references to Founding Documents and other Originalist sources by participants in their talks.³² 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.³³

A shared faith in and reliance on Originalism within the Federalist Society network as a preferred method of judicial interpretation and a means for identifying and delineating valid exercises of judicial power from invalid ones meets Haas' fourth criterion for an epistemic community - a shared notion of validity. The fifth and final definitional characteristic of actors within an epistemic community is that they also a common policy project to which they can apply their shared beliefs and shared notion of validity. The Federalist Society lists as its institutional goal 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."³⁴ 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" as 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 the Federalist Society is trying to bring about. In our interview, former Federalist Society member and legal academic Thomas Smith recalled Co-Founder Steven Calabresi telling 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."³⁵

Federalist Society members recognize that this common policy project of impacting the legal culture and reordering the priorities within the legal system, 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 times collectively, and at times 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."³⁶

While I return to the question of whether the Federalist Society for Law and Public Policy should most accurately be described as a kind of legal epistemic community in later chapters, for now it appears to satisfy at least Peter M. Haas' five definitional criteria of an epistemic community (see figure 1.2). Leaving this question for the moment, I turn next to examine Federalist Society network actors' understanding of the "structural constitution," explaining why, given the shared principled and causal beliefs this section worked to establish, it represents an important set of doctrines for members and, further, why it makes a good empirical case study.

The Federalist Society on the 'Structural Constitution'

On January 30, 1987 Pat Buchanan sent an urgent, last-minute memo to President Ronald Reagan's Chief of Staff about the President's scheduled call to the fledgling Federalist Society that night: "Ken Cribb called from Justice to say Ed Meese is asking 'as a personal favor' that the Chief of Staff make the added point in his phone call to the Federalist Society tonight --about the structural tensions inside the Constitution."³⁷ The memo provoked anger and annoyance from

the President's Chief of Staff, but because it was framed as a favor to Meese, he agreed and added the talking point.³⁸ Two of Attorney General Meese's Special Assistants named on the Telephone Message Request, who undoubtedly had a hand in drafting the language for the last-minute addition to the President's talking points, were Federalist Society Co-Founders David McIntosh and Steven Calabresi.³⁹ The additional talking point that Attorney General Ed Meese, long time Federalist Society supporter and participant, and his Special Assistants felt so strongly about including in President Reagan's phone call to the Federalist Society read as follows:

The structure of government designed by the Framers protects individual liberty by ensuring against the concentration of power in any one branch or level of government. This is accomplished through a carefully-crafted system of checks and balances, which rests on the twin Constitutional doctrines of Federalism and separation of powers. Because the purpose of the Constitution is expressed in the structure it creates, we must respect each of its parts as essential to the meaning of the whole. All three branches of the federal government - executive, legislative, and judicial - have a special obligation to maintain fidelity to these ideals, as expressed and embodied in our written Constitution - the supreme law of the land. This Bicentennial Year represent an opportunity for us all to affirm and strengthen our adherence to those ideals.⁴⁰

Though, as we have seen Frank S. Meyer and other fusionists argue, this language about and emphasis on preserving the Constitutional "structure" can be traced back to James Madison and the Constitutional Convention, the conservative and libertarian legal discourse about "structure" really seemed to gain currency in the Reagan Justice Department in the late-1980's where, incidentally, several fledgling Federalist Society members were working as Special Assistants.⁴¹

The Presidential talking point excerpted above neatly and articulately encapsulates how Federalist Society members understand Constitutional structure, sometimes referred to as the "structural constitution,"⁴² and why it is so important to them. The protection of freedom, or "individual liberty," as established earlier in this chapter is the key normative and principled belief of Federalist Society members. Recalling the earlier discussion of causal beliefs, network members believe that the structure of the Constitution as designed by Madison and the Framers, best preserves freedom through the "twin Constitutional doctrines of Federalism and separation of powers." In an interview with me, Reagan Justice Department alumni and Federalist Society member Charles J. Cooper articulated the relationship between network members' beliefs (principled, causal and notions of validity) and the emphasis the Federalist Society places on Constitutional structure:

I also thought that the Federalist Society placed a fresh... and a novel emphasis on the structural provisions of the Constitution - federalism itself, the separation of powers, and the notion of a federal government limited by and confined to its enumerated powers. Those are all, I mean if one believes in Originalism, then it follows that one has a strong belief in the constitution's structural protections and is opposed to seeing them eroded.⁴³

Federalist Society Executive Director Eugene Meyer also emphasized to me that it is the Constitutional structure, not the Bill of Rights, that ultimately provides for the protection of and preservation of individual liberty: "The Constitution protects freedom in a number of ways. The Bill of Rights is one of them but... not the major one. Remember, the framers didn't put the Bill of Rights in initially... [because] the number one protection was the structure itself."⁴⁴

In our interview, Federalist Society Co-Founder Steven Calabresi also confirmed that a concern with Constitutional structure has been a consistent theme throughout the Federalist Society's two and a half decade tenure: "The Society has always been consistently interested in promoting... a greater respect for the separation of powers and a more limited role for the judiciary, federalism... protection of Presidential power from incursions by Congress and things of that kind." Those concerns, Calabresi continued, "are ones that we have continued to host conferences about and events about for the last twenty-five years."⁴⁵ Evidence from Federalist Society National Conference Transcripts corroborates this impression. If we define the "structural constitution" as network actors do; i.e., as encompassing concerns with federalism, the separation of powers, the role of the judiciary, and as deriving from certain beliefs about Originalism, then of the 48 National Student Conferences the Federalist Society held between 1982 and 2008, a total of 18 (38%) have dealt with some aspect of the "structural constitution" as their headlining themes.⁴⁶ This count includes a 1998 National Student Symposium dedicated in its entirety to "Reviving the Structural Constitution."

While concerns with Constitutional structure do not encompass the full range of views, principles, and priorities held by Federalist Society network members, they are the beliefs that were cited most frequently by interviewees as the most fundamental, essential and unifying; those about which conservatives and libertarians within the Federalist Society tend to have the most agreement. When I asked 40 key Federalist Society participants about the principles or priorities that unify members of the Federalist Society, for instance, a belief in constitutional structure got 19 mentions, the separation of powers 13 mentions, federalism 23 mentions, the role of the judiciary 25 mentions, and a commitment to Originalism 31 mentions. Indeed, when I asked him to describe the Federalist Society in a few sentences, Federalist Society member and former Reagan Justice Department official, Doug Kmiec responded that he'd classify it as "a group of people who believe that the structure of our Constitution is enormously important for our individual liberty and who were convinced prior to its own existence that the structure was not well-understood."⁴⁷

In addition to the institutional efforts sponsored by the Federalist Society designed to rectify that failing through its programming, network actors have taken it upon themselves to promote these same beliefs and concerns with the "structural constitution" to the legal community at large via conservative print and media. For instance, a LexisNexis query of four conservative media publications from 1981 to 2008 - *The Wall Street Journal*, *American Spectator*, *Weekly Standard*, and *National Review* - for the term "federalism" produced 185

Figure 1.3

Most Active Federalist Society Participants in Conservative Media Discussions of The Structural Constitution, 1981-2008

Name	Sep. of Powers	Federalism	Total
L. Gordon Crovitz	34	4	38
Terry Eastland	10	16	26
Douglas Kmiec	7	9	16
Jonathan Adler	3	12	15
Jeremy Rabkin	4	11	15
Richard Epstein	6	9	15
John McGinnis	4	9	13
Roger Pilon	5	4	9
David B. Rivkin	9	0	9
Robert A. Levy	5	4	9
Michael Rubin	1	7	8
Lee A. Casey	4	4	8
Steven Calabresi	3	4	7
Hadley Arkes	3	4	7
Kenneth Starr	2	5	7
Randy Barnett	2	4	6
Robert Nagel	1	5	6
John Yoo	3	3	6

articles authored by participants in Federalist Society National meetings. A second query using the same criteria but searching instead for the other twin-doctrine of the structural constitution, the "separation of powers," yielded 154 articles authored by Federalist Society network actors. Those numbers are each just shy of 20% of the total number of articles returned under the respective searches, indicating that nearly one out of every five articles appearing in these conservative publications on "federalism" or "separation of powers" has been authored by someone active in the Federalist Society network.⁴⁸ Figure 1.3 highlights the most active Federalist Society participants in these media discussions.

The "structural constitution," understood as encompassing the "twin-doctrines" of federalism and the separation of powers, represents both a highly salient and fundamentally important set of legal and political concerns for Federalist Society network actors. As established earlier in this section, it encapsulates many of their shared principled, normative, and causal beliefs about individual freedom, the nature of government and the role of the judiciary. Even more importantly, however, there have been observable shifts in the Supreme Court's understanding of these doctrines over the past two and a half decades, more or less coinciding with the Federalist Society's rise to prominence on the legal-political scene. With a few exceptions, the litany of decisions scholars routinely cite as forming the heart of this conservative counterrevolution in law and legal principle all deal with the twin structural

doctrines of federalism and the separation of powers.⁴⁹ How and to what extent Federalist Society network members' shared ideas and beliefs about the "structural constitution" have contributed to these shifts in constitutional understanding, then, constitutes both a timely and important subject of inquiry. The final task of this chapter is to demonstrate how I use the epistemic community framework to tag and trace these ideas about the "structural constitution" as they have moved from the Federalist Society through particular network members into law and policy.

Tracing the Impact of the Epistemic Community on the "Structural Constitution"

The research techniques for demonstrating the impact of epistemic communities on the policymaking process are, according to Peter M. Haas, "straightforward but painstaking" (Haas 1992, 34). They involve, "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).

Because the Federalist Society for Law and Public Policy maintains a strict policy against publishing their membership lists, I relied on speaker agendas for Federalist Society National Conferences from 1982 to 2008. These 49 speaker agendas furnished a list of 1,075 different individuals who have been active in Federalist Society National Conferences. In one respect this data set is over-inclusive for determining epistemic community membership. It includes several speakers who are sometimes referred to as the "token liberals," such as Cass Sunstein, Louis Michael Seidman, Nadine Strossen, Walter Dellinger, and Akhil Amar.⁵⁰ These individuals do not tend to share the Federalist Society's principled and causal beliefs or notions of validity. For this reason, I have filtered them out in the subsequent case studies where I track epistemic community impact. 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 annually, including local student chapter meetings, local lawyers' lunches and speaker events, student leadership camps, regional colloquia and symposia, faculty conferences, professional practice group meetings, and campus debates.⁵¹ Further, this list does not take into account the tens of thousands of members who attend Federalist Society events in anonymity. Nonetheless, 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 decision-makers in government and on the judiciary. In other words, though this list represents less than 3% of the 40,000 members the Federalist Society boasts, these 3% are likely to be the most active participants in Supreme Court litigation, either as litigators, *amici curiae*, or as decision-makers themselves. Further, these high-profile actors are also the ones who are most likely to be involved in fashioning legal policy for the Executive branch. Figure 1.4 illustrates this point by listing the twenty-eight most active participants in

Figure 1.4

Top Twenty-Eight Most Frequent Participants at Federalist Society National Conferences 1982 - 2008

Name	Number National Conf's	Occupation(s)	Name	Number of National Conf's	Occupation(s)
Frank Easterbrook	30	<i>Federal Judge</i>	Charles Fried	11	<i>Exec. Branch, Academic</i>
Richard Epstein	22	<i>Academic</i>	C. Boyden Gray	11	<i>Exec. Branch, Priv. Pract.</i>
Lino A. Graglia	18	<i>Academic</i>	John Baker, Jr	11	<i>Academic</i>
Edwin Meese, III	18	<i>Exec. Branch, Think Tank</i>	Cass Sunstein**	11	<i>Academic</i>
Thomas Merrill	17	<i>Academic</i>	D. O'Scannlain	11	<i>Federal Judge</i>
Steven Calabresi	17	<i>Academic</i>	W. Dellinger	11	<i>Exec. Branch, Priv. Pract.</i>
A. Raymond Randolph	16	<i>Federal Judge</i>	Alex Kozinski	11	<i>Federal Judge</i>
John McGinnis	16	<i>Exec. Branch, Academic</i>	M.W.McConnell	11	<i>Academic, Fed. Judge</i>
John C. Yoo	14	<i>Exec. Branch, Academic</i>	N. Strossen**	11	<i>Interest Group</i>
Theodore Olson	14	<i>Exec. Branch, Priv. Pract.</i>	Steph. Williams	10	<i>Federal Judge</i>
Lillian BeVier	14	<i>Academic</i>	David Sentelle	10	<i>Federal Judge</i>
Charles J. Cooper	12	<i>Exec. Branch, Priv. Pract.</i>	Jerry Smith	10	<i>Federal Judge</i>
William H. Pryor	12	<i>State Pol., Federal Judge</i>	Robert Bork	10	<i>Fed. Judge, Think Tank</i>
Akhil Amar**	12	<i>Academic</i>	Kenneth Starr	9	<i>Exec. Branch, Academic</i>

** Asterisks indicate that individual is one of the "token liberals" frequently invited to Federalist Society National Conferences

Federalist Society National Conferences from 1982 to 2008 and detailing their positions in the legal-political community.

As I briefly explained in the introduction, in determining these network actors' beliefs about the "structural constitution" I have relied on several different expressions of these beliefs, both institutional (transcripts of Federalist Society talks) and non-institutional (law review articles and other scholarly publications, media publications, archival data, and interview data). I work to establish these beliefs in the beginning of each empirical chapter, detailing the major Federalist Society network actors contributing to the epistemic community's dialogue on that particular set of doctrines while providing evidence of these beliefs from the variety of sources just mentioned. Examining the diffusion of these beliefs into judicial doctrine and, in one case, into Executive branch policy is the principal task of the empirical chapters. Before I detail how this was accomplished, however, it is important to pause and consider why idea diffusion should be the subject of a Political Science thesis at all. In focusing on idea diffusion this thesis builds on a long tradition of scholarship in Public Law that views law and constitutional development as a long-term game; that is, a series of complex interactions between the courts, political actors, and civic actors (Shapiro 1968). In this game, the reasons judges give for their decisions in written opinions (not just their "votes") are important because they shape, constrain and

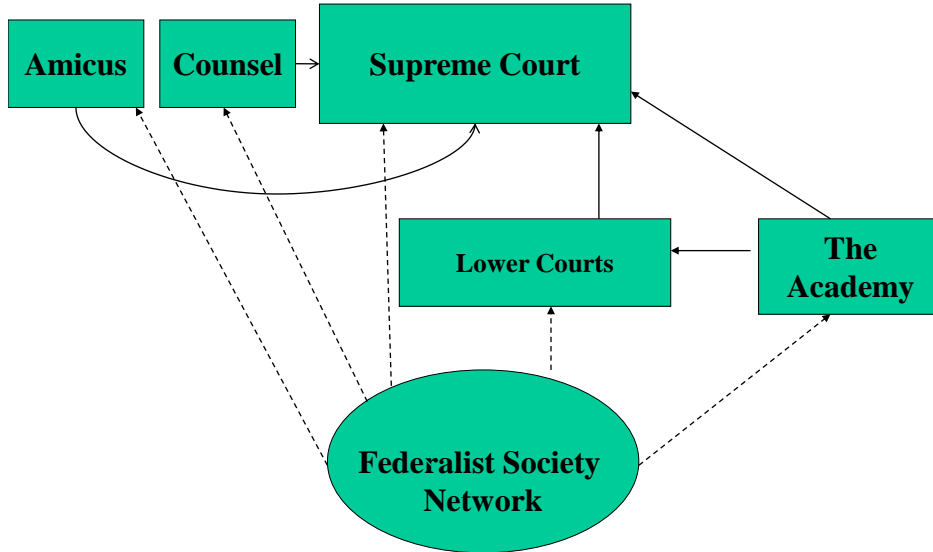
influence the decision-making of future courts, lower courts, and other political actors (Silverstein 2009).⁵² So, how a decision is articulated, how it is supported and how it is justified become important variables in understanding the development of law and legal policy in the American legal-political system.

Understood in this broader sense, then, an epistemic community can influence the manner in which legal policy is articulated by facilitating the diffusion of ideas, or “intellectual capital,” that decision-makers can use to support, legitimate and justify their rulings. As Figure 1.5 illustrates, there are several ways ideas can be diffused through the Federalist Society network to decision-makers. 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 – as judges, academics, executive branch officials, litigators, or “friends of the court.” Of course, the most direct mechanism of transmission is through “political infiltration” (Haas 1992, 4); that is, network members infiltrating the relevant decision-making institution and drawing on shared network beliefs to construct legal policy. However, there are several other important paths by which network ideas can reach decision-makers. In Figure 1.5, these external paths of idea transmission are represented by solid lines. In terms of the judicial branch, for example, ideas might travel through a lower court opinion authored by a Federalist Society network-affiliated judge, a brief submitted by network-affiliated litigating counsel and/or amici curiae (“friends of the court”) or, as Figure 1.5 illustrates, through published scholarship authored by Federalist Society affiliated academics. Federalist Society network participation in all twelve cases, in all these capacities – as Supreme Court decision-maker, lower court decision-maker, amicus curiae, and litigating counsel – was catalogued and the respective opinions and briefs thoroughly examined. Using citations to Federalist Society scholarship and citations to the shared canon of Originalist sources as my primary indicators, I examined the extent to which Supreme Court Justices relied on the “intellectual capital” of the Federalist Society network in constructing their written opinions in each case.

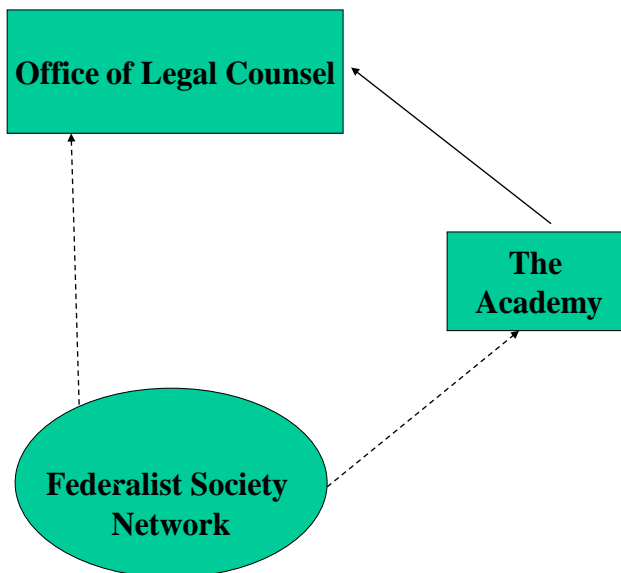
Though Chapter 4 on the Executive branch deals with a different kind of written product, Office of Legal Counsel opinions and signing statements, the methodology remained more or less the same. Because the Office of Legal Counsel is more of a closed institution than is the Supreme Court (meaning there are fewer inroads through which the epistemic community might diffuse ideas), the task was a bit simpler. I identified Federalist Society network actors working in the Office of Legal Counsel during the George W. Bush Administration, linked them to specific opinions and memos and engaged in a content analysis of their work products. In addition to illustrating when and how these decision-makers relied on their own “intellectual capital” as Federalist Society network members, I also documented citations to Federalist

Figure 1.5

Epistemic Community Pathways of Influence on Judicial Branch



Epistemic Community Pathways of Influence on Executive Branch



----- Influence via political/ institutional infiltration
_____ Influence via legal argument in briefs/ scholarship

Society scholarship and to the Originalist canon as evidence of epistemic community idea diffusion.

Taking all the evidence of idea diffusion into consideration, each of the following empirical chapters closes with a qualitative evaluation of the extent to which the judicial doctrine or Executive branch policy examined in that chapter reflects the shared beliefs of the Federalist Society as an epistemic community. In other words, it looks at the extent to which the Supreme Court and/or the Executive branch has adopted (or not) the shared language and beliefs of Federalist Society network actors in its official policies. What follows in the next five chapters is a narrative of an epistemic community at work. An evaluation of how successful it has been to date, in addition to an analysis of why it has been more or less successful in certain cases is reserved for the final few chapters.

Chapter Two -----

Separation of Powers I: The Unitary Executive Theory in Court, 1983 - 1988

*So, it was only at the [Reagan] Justice Department and at the Federalist Society that I was exposed to arguments about the President, a **unitary executive**, and the President having control of the entire executive.*

- Federalist Society member Michael Rappaport discussing his tenure in the Reagan Justice Department's Office of Legal Counsel as a Special Assistant from 1986 to 1988⁵³ (bold emphasis added)

*That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish -- so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted... To repeat, Article II, § 1, cl. 1, of the Constitution provides: "The executive Power shall be vested in a President of the United States." As I described at the outset of this opinion, this does not mean some of the executive power, but all of the executive power... The purpose of the separation and equilibration of powers in general, and of the **unitary Executive** in particular, was not merely to assure effective government but to preserve individual freedom.*

- Justice Scalia, Dissenting Opinion in *Morrison v. Olson* (1989) (bold emphasis added)

To recall last chapter's discussion of the beliefs that held the Federalist Society network together as an epistemic community, one of the most important shared causal beliefs of actors and one prominently featured in their statement of principles, is that the separation of governmental powers is critical to the preservation of individual freedom. Just a few years after drafting the language of this statement in 1982, the three Federalist Society Co-founders - Lee Liberman, Steven Calabresi, and David McIntosh - all went to work in the Justice Department as Special Assistants to Attorney General Edwin Meese, III. Like Michael Rappaport, cited above, and a number of other young Federalist Society members working in the Reagan Justice Department,⁵⁴ these actors came to believe that a critical part of defending the separation of powers and thereby protecting individual liberty was in the protection and preservation of the Unitary Executive.

Simply put, the theory of the Unitary Executive is derived from a formalist reading of Article II, section I, clause 1 of the Constitution which reads: "The executive Power shall be vested in a President of the United States." As Federalist Society mentor and former advisor Justice Scalia wrote in the dissenting opinion excerpted above, proponents of the Unitary Executive read this to mean not just "some of the executive power, but all of the executive power." The phrase Unitary Executive itself was coined sometime in the 1980's, inspired by

language in the *Federalist Papers* referring to the importance of "unity" in the executive branch (Spitzer 2008, 93). In the *Federalist 70*, for example, Alexander Hamilton argues for the importance of an "energetic executive" as essential "to the security of liberty" and discusses the dangers inherent in destroying the "executive unity" that facilitates this energy (Rossiter Ed. 1961, 391-392). Charles Fried, former Solicitor General in the Reagan Justice Department and frequent Federalist Society participant (see Figure 1.4) distilled Hamilton's concerns for the relationship between executive "unity" and the "security of liberty" in the following way:

Celebrations of executive power are not simply yearnings for efficiency. [John] Locke and Hamilton craved clarity. They saw in a muddle about power the threat of chaos, and so a threat to liberty... In a unified executive we look through the legalisms of power to a person. Since we know whom to hold responsible, that person can take responsibility, and there is a greater chance for liberty. Where the focus of responsibility is diffused and blurred - the firing squad as the ultimate manifestation of bureaucracy - the threat to liberty is great (Fried 1991, 154).

In translating Hamilton's theory of executive power, Fried and other proponents of the Unitary Executive believe there are two principal separation of powers threats to the President maintaining "unity" in the executive branch: the proliferation of independent regulatory agencies in the post-New Deal administrative state that are, in large part, unaccountable to the President and interference from the coordinate branches, principally Congress, with the manner in which the President chooses to execute his constitutional duties per Article II, section I.

Though neither group of actors can take exclusive credit for inventing the theory of the Unitary Executive, the Federalist Society and the Reagan Justice Department, a network that overlapped almost entirely in the 1980's, each nurtured and developed it in important ways. The following section details the efforts of actors connected with the Federalist Society for Law and Public Policy's network to promulgate, through their conference activities and their scholarship, the Unitary Executive theory of Presidential power. The chapter then proceeds to illustrate how this theory and the beliefs that undergird it were picked up (or not) by judicial decision-makers in three separation of powers cases spanning the tenure of the Reagan Administration, *INS v. Chadha* (1983), *Bowsher v. Synar* (1986), and *Morrison v. Olson* (1988). The narrative then closes with a qualitative evaluation of the extent to which actors connected with the Federalist Society have been successful and/or frustrated in their attempts to diffuse ideas the Unitary Executive to decision-makers on the Supreme Court.

Federalist Society Network Actors on The Unitary Executive Theory

The topic of Executive power, sometimes subsumed under discussions of the constitutional role of the President vis a vis the coordinate branches of the federal government,

has been the featured topic at two Federalist Society National Conferences.⁵⁵ All told, since the early-1980s, no fewer than eight panels featuring over thirty high-profile speakers, including former George W. Bush Administration Solicitor General Theodore Olson and current Supreme Court Justice Samuel A. Alito, have been dedicated to this issue at National Conferences.⁵⁶ Federalist Society participants have also been energetic discussants of Presidential power outside organizational boundaries with some of the most widely-read and prolific scholars on the Unitary Executive, such as John Yoo, Steven Calabresi, Jeremy Rabkin, and Geoffrey Miller active among network ranks.⁵⁷ A handful of others have also made their views known outside the Academy, penning their thoughts about the Unitary Executive in the conservative media.⁵⁸ The following section examines these actors' beliefs about Presidential power and the Unitary Executive as expressed at Federalist Society meetings and in their scholarship. As I show, separation of powers arguments on behalf of the Unitary Executive tend to group themselves into three kinds: (1) textual and structural arguments targeting the administrative state, derived from a formalist reading of Article II of the Constitution, for Presidential control of the entire Executive branch; (2) Originalist arguments that cite Hamilton's concerns for energy and accountability, supported by *Federalist 70* and other historical sources, as means to maintain the rule of law and preserve liberty; and (3) arguments, relying on Madison's essays from *Federalist 47* to *Federalist 51*, about the balance of powers generally with attendant complaints about the tendency of the Legislative branch to enlarge its own power and sphere of influence at the Executive branch's expense.

Network Actors at the Federalist Society on the Unitary Executive Theory

Frank Easterbrook, the most frequent Federalist Society participant at National Conferences (see Figure 1.4) and Seventh Circuit federal judge, opened his remarks on the separation of powers at the 1989 National Lawyers Conference with the following lament: "... we have ten minutes for these talks. In the Seventh Circuit ten minutes is the amount of time we give appellants with hopeless cases." Easterbrook continued, "I hope that this is not a reflection on what I am about to say. I will try to persuade you that the allocation of time should have been greater."⁵⁹ While Federalist Society participants cannot possibly, in ten minutes, flesh out all their beliefs about Executive power, a survey of these speech-acts nonetheless provides a sketch of the general shape and contours of the beliefs underlying the Unitary Executive theory; beliefs that many of these actors go on to develop more fully in their scholarship, which I examine in the next section.

At the 1998 Federalist Society National Student Symposium, participant Cynthia Farina defined the "unitary executive thesis" as the "structural constitutional argument that most of the regulatory enterprise represents the exercise of 'executive power' which, under Article II, can

legitimately take place only under the control and direction of the President."⁶⁰ One of the thesis' strongest proponents is former George W. Bush Solicitor General and frequent Federalist Society participant (see Figure 1.4) Theodore Olson and one of his biggest bugaboos, the development of the administrative state as a "fourth branch" of government. As he remarked at the 1992 National Lawyers Conference, "that the Framers intended control of the execution of the laws and, therefore, control of the administrative state to be vested in the President is, to me, a simple and straightforward proposition." As he argues, "the most obvious reason derives from the words and structure of the Constitution which created three governmental branches... Article II declares in simple terms that the executive power shall be vested in a President." In other words, Olson continued, "The Constitution does not provide for four branches, independent agencies, control by congressional committee chairmen or anything even remotely similar to these entities."⁶¹ Olson spoke out against the existence of independent agencies a few years earlier at the 1989 National Lawyers Conference, emphasizing that per Article II "the President is the person the framers of the Constitution designated to enforce the laws, not a group of relatively anonymous, 'independent' commissioners accountable to no one."⁶²

Olson's concerns about the problem of political accountability, discussed most famously in Hamilton's *Federalist 70* have been echoed by other prominent voices at Federalist Society meetings. Also in front of an audience at the 1989 National Lawyers Conference, Judge Frank Easterbrook reiterated that "consistency and accountability were principal arguments for a unitary executive in 1787." He elaborated that a "unitary executive" prevents "chaos" by holding one person politically accountable for the execution of laws instead of "a hydraheaded" plurality of persons.⁶³ Federalist Society participant Burt Neuborne, at the 1998 National Student Conference, also addressed the problem of decision-making by "politically unaccountable institutions" such as administrative agencies, linking this to a lax enforcement "over the last thirty years" of the "unitary executive." As he remarked, this failure to respect and seriously enforce the separation of powers as contemplated by the Framers, specifically by Hamilton in *Federalist 70*, is "a large part of the problem that we have with American democratic life today."⁶⁴

Other Federalist Society participants have expressed concerns with the fracturing of the unitary executive in more general terms, citing Madison's essays in *The Federalist* about the importance of maintaining the checks and balances between branches so that "ambition" can effectively "counteract ambition" (Rossiter Ed. 1961, 290). Former Attorney General for President Nixon and Federalist Society participant Dick Thornburgh paraphrased Madison's language as "ambition confronting ambition" in expressing his deep concern about the erosion of the "structural check" against "Congress' increasing tendency to encroach upon the power of the executive branch." In his address, Thornburgh provided a laundry list of ways in which the Congress is "increasingly attempting to micromange the executive branch." He cites, for example, the insertion of "substantive provisions in appropriations bills" which render them in practice "veto-proof," resolutions impairing the President's "internal deliberations" about foreign

policy, and Congress' "growing penchant for delegating executive power to persons not controlled by the President."⁶⁵ Judge Easterbrook also remarked in his talk referenced earlier about the potential harm done to the separation of powers by "legislative finagling" around the President's veto.⁶⁶ Moreover, both speakers painted these issues in terms of a serious threat to the Madisonian system of checks and balances and thus to individual liberty, which members of this epistemic community firmly believe the system was designed to preserve.

Network Actors' Scholarship on the Unitary Executive Theory

Stephen Markman, founder and former President of the D.C. Lawyers Chapter of the Federalist Society articulated an early version of the aforementioned formalist reading of the separation of powers in a 1986 *Pace Law Review* article, arguing per his textualist reading of Articles I-III that "Our Constitution contains explicit directions regarding the organization of the federal government, dividing the responsibilities of government among three separate branches, and enumerating the specific powers each branch is to exercise" (Markman and Burns 1986, 575). At the time he and his co-author penned these thoughts, Markman was working in the Justice Department as the Assistant Attorney General heading up the Office of Legal Policy. There, he put together a now well-known departmental report called *The Constitution in the Year 2000* where he addressed the Unitary Executive theory in greater detail and implicated the Constitutionality of the post-New Deal administrative state.⁶⁷ As the report states, "The executive power under Article II - including the power to 'take care that the Laws be faithfully executed' - was intentionally vested in a single individual or 'unitary' Executive."⁶⁸ This reading of Article II, the report continues "provides a basis to question the viability of 'independent' agencies in their present form." It further argues that under a "Madisonian view... the Constitution vests *all* executive power in *a* President [emphasis in original]" and thus "Congress may not give executive power to agencies that are not under the President's control."⁶⁹ Another Reagan Justice Department alum and Federalist Society Co-Founder Steven Calabresi, the most prolific scholar of the Unitary Executive currently publishing in law reviews, has since developed these textualist arguments in a series of law review articles. For instance, in a 1994 *Yale Law Journal* article published with legal scholar and Federalist Society participant Saikrishna Prakash, Calabresi argued that "...the textual case for the theory of the unitary Executive is as free of ambiguity as the textual case that the President must be at least thirty-five years old" and that "the constitutional text does not permit historical arguments for the existence of a fourth inherent, unenumerated administrative power of government." Mobilizing textual and historical evidence for their claims, the Federalist Society affiliated authors concluded that "the administrative power, if it exists, must be a subset of the President's 'executive Power' and not of one of the other two traditional powers of government" (Calabresi and Prakash 1994, 559, 566, 569).

One of the earliest, and most frequently cited, scholarly treatments of the Unitary Executive theory was by Federalist Society affiliate and legal scholar Peter Strauss. While Strauss would not be described as a Federalist Society “true believer” by most network insiders, his work on administrative agencies has become canonical within the Federalist Society network as it resonates with and supports a view of the separation of powers that network members find sympathetic. He has also been invited to present these views in front of the Federalist Society network at three National Conferences.⁷⁰ Strauss’ defense of a unitary executive, published in the 1984 *Columbia Law Review* draws explicitly on Hamilton's concerns about "energy" and "accountability" in the Executive branch: "...the Convention was clear in its choice of a single executive - and its associated beliefs that such a person might bear focused political accountability for the work of law-execution and serve as an effective political counterweight to Congress." After citing directly from the *Federalist 70*, Strauss emphatically continued that "however the executive power is defined... it must be in ways that respect this quite fundamental structural judgment" of the Framers (Strauss 1984, 573). While Strauss was perhaps the first to translate Hamilton's concerns for unity in the Executive branch into a contemporary argument for a Unitary Executive, Federalist Society Co-Founder Steven Calabresi has articulated this relationship most clearly and developed it most fully. In one of his few solo-authored law review articles on the Unitary Executive, Calabresi spent eight pages distilling Hamilton's arguments for energy, accountability, and unity in the Executive branch (Calabresi 1995, 37-45). As Calabresi explained [emphasis in original]:

Thus, ironically, Hamilton asserted that a unitary executive would *both* cause power and energy to accrue to the office *and* facilitate public accountability for and control over how that power and energy was exercised. Thus, whereas a plural executive would both dilute executive energy and popular accountability and control, a unitary executive would lead to the opposite result. Executive energy would be enhanced and so would the likelihood that it would be used *in conformity with the interests of the nation* (Calabresi 1995, 44-45).

A unitary executive, according to Calabresi, "would thus be an accountable executive: a 'tamed prince' whose actions would promote the general welfare" (Calabresi 1995, 45).

As was noted in the previous section, the final set of arguments underlying the Unitary Executive theory draw on the separation and balance of powers' arguments developed by Madison in the *Federalist*. As Calabresi explained in his solo-authored article on the Unitary Executive, "in his four papers, from *The Federalist 47* to *The Federalist 51*, James Madison forcefully defended the normative desirability of a system of constitutionally separated and shared powers... to ensure that 'ambition [will] be made to counteract ambition'" (Calabresi 1995, 45). Peter Strauss had also mobilized Madison's arguments for the balance of powers on behalf of the Unitary Executive theory in his 1984 law review article, specifically addressing the relationship between the separation of powers and individual liberty that Federalist Society network actors believe so firmly in: "[the balance of power] among the branches would protect liberty by preventing the irreversible accretion of ultimate power in any one. As Madison wrote

in the *Federalist* papers, the essence lay in 'giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of others'" so that "ambition [could] be made to counteract ambition" (Strauss 1984, 603, 604). Both Strauss and Calabresi mobilize Madison's arguments in the *Federalist* to highlight, in particular, the Framers' concerns with checking the "otherwise to be feared authority of Congress" (Strauss 1984, 602; Calabresi 1995, 32-33). Recalling Dick Thornburgh's address at the 1989 Federalist Society National Lawyers Conference, Stephen Markman and his co-author, in their article cited earlier, detailed at least three categories of legislative encroachment on Executive branch power, each of which, they argued, disrupted and threatened this Madisonian balance of powers: "legislative vetoes" (Markman and Burns 1986, 590-593), "management restrictions" on budgets and spending (Markman and Burns 1986, 593-598), and "congressional oversight" through inquiries and investigations (Markman and Burns 1986, 586-590).

All three categories of legislative encroachment on Executive power cited in the Markman article and echoed three years later by Dick Thornburgh in front of a Federalist Society audience as existing threats to the maintenance of a Unitary Executive would be addressed by the Supreme Court in three cases, all litigated during the course of the Reagan Administration, and all featuring Federalist Society network actors participating as *amici curiae* (friends of the court), counsel, and/or judicial decision-makers.

The Unitary Executive Theory in Court, 1983-1988

In the Reagan Justice Department's Office of Legal Policy report cited earlier, *The Constitution in the Year 2000*, Stephen Markman et. al laid out "two quite different roads" the Supreme Court might take in its jurisprudence on separation of powers cases generally, and on cases implicating the Unitary Executive specifically. The "pragmatic road" would be consistent with past Supreme Court decisions, the report insisted, in *Thomas v. Union Carbide Agricultural Products Co.*⁷¹ and *CFTC v. Schor*,⁷² in which the Court was described as "functional" in its separation of powers approach, often times "fusing aspects of the executive and legislative branches" or executive and judicial branches to accommodate "greater efficiency" at the expense of a more "Madisonian" approach that would more effectively police the boundaries between branches, no matter what the costs might be to political expediency.⁷³

Three cases during the tenure of the Reagan Administration presented the Supreme Court with the opportunity to implement the "Madisonian" vision of Executive power and the separation of powers that had been laid out in this Reagan Justice Department report and, as we

have seen, discussed in the early years of the Federalist Society: *INS v. Chadha* (1983), *Bowsher v. Synar* (1986), and *Morrison v. Olson* (1988).⁷⁴

INS v. Chadha (1983)

As Congressional scholar Louis Fisher has documented, the legislative veto, the constitutionality of which was at stake in *INS v. Chadha*, was a political invention of the 1930s; a compromise between the Executive and Legislative branches borne of the former's desire to broaden its "discretionary authority" and the latter's insistence on implementing some sort of "control mechanism" over this discretion (Fisher 1997, 141). The legislative veto allowed Presidents and administrators to "make proposals that would become law unless Congress disapproved by simple resolution of either House (a one-House legislative veto) or by concurrent resolution (a two-House veto)" (Fisher 1997, 141). This case, involving a resolution by the House of Representatives to invalidate the decision by the executive branch to suspend the deportation of a subset of six immigrants, presented the most direct challenge to the constitutionality of the legislative veto on separation of powers grounds since its inception.

After his visa had expired, exchange student Jagdish Chadha petitioned the executive branch to suspend deportation proceedings pursuant to the Immigration and Nationality Act.⁷⁵ After his suspension was granted, the House of Representatives passed a resolution invalidating Chadha's suspension, along with five others' and ordered the six aliens deported. Chadha appealed to the Ninth Circuit Court of Appeals in 1980, arguing that the House was without the constitutional authority to order his deportation because the provision of the Act granting the legislative veto power to Congress (244(c)2) violated the separation of powers doctrine. The Ninth Circuit agreed, holding that the legislative veto violated the separation of powers "and intruded impermissibly upon the executive and judicial branches" and suspended the deportation proceedings (Fisher 1997, 151). Congress appealed to the Supreme Court seeking a reversal of the Court of Appeals judgment. The Supreme Court granted cert and first heard argument in February of 1982. The case was subsequently reargued in December of that same year and the decision, affirming the Ninth Circuit's core holding, was handed down in June of 1983.

By the numbers, the fledgling Federalist Society network was minimally represented in this early judicial test of the separation of powers doctrine, with only five total network actors participating as *amici curiae* and counsel. That being said, overall participation and interest in this case by outside parties was also minimal, with only three total parties filing amicus briefs. The two network actors catalogued in Figure 2.1 as *amici curiae* were all listed on one brief, that of the American Bar Association. So, though small in terms of raw numbers, Federalist Society

Table 2.1

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *INS v. Chadha* (1983)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Richard E. Wiley, Antonin Scalia	Theodore Olson, Rex Lee, David A. Strauss	
Citations to Federalist Society Actor Scholarship	Roderick M. Hills, Symposium, 1976 Bicentennial Institute -- Oversight and Review of Agency Decisionmaking, <i>28 Ad. L. Rev.</i> 569, 581 (1976), Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, <i>81 Harv. L. Rev.</i> 1439, 1445-46 (1968),		Circuit Court: Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause, 40 Law & Contemp. Prob. 102 (Spring 1976),
Citations to Originalist Sources	Federalist 47, Federalist 48 (II), Federalist 62	Elliot's Debates on the Federal Constitution, J. Elliot, ed. 5 vols. (1836) (IV), M. Farrand, The Records of the Federal Convention of 1787 (XVIII), Federalist 22, Federalist 47(IV), Federalist 51 (V), Federalist 73 (III), Federalist 48 (II), Federalist 33, Federalist 75 (III), (8th ed. 1927) , Federalist 62 (IV), Federalist 63 (II), Federalist 66 (III), Federalist 64 (II), Federalist 65, Federalist 68, Federalist 69, Federalist 71, Federalist 77, J. Story, Commentaries on the Constitution of the United States 611 (3d ed. 1858) (II), J. Madison, Notes of Debates in the Federal Convention of 1787, at 63 (Ohio Univ. Press. 2d. 1966), T. Cooley, A Treatise on Constitutional Limitations 266, W. Blackstone, Commentaries 142-143 (1979)	Supreme Court (maj): M. Farrand, The Records of the Federal Convention of 1787 (V), J. Story, Commentaries on the Constitution of the United States 611 (3d ed. 1858) (III), Federalist 73 (II), Federalist 51 (II), Federalist 62 , Federalist 64, Federalist 66, Federalist 75, Federalist 47, Federalist 48 (III), D. Malone, Jefferson the President: Second Term, 1805-1809, pp. 304-305 (1974) Supreme Court (diss): Federalist 47; Federalist 48; Federalist 50; Elliot's Debates on the Federal Constitution, J. Elliot, ed. 5 vols. (1836) Circuit Court: Federalist 47 (II), Federalist 48, Federalist 49, T. Jefferson, Notes on the State of Virginia 120 (1955), Federalist 51 (II), Federalist 62 (II), Federalist 71 (II), Federalist 73, William Blackstone, Commentaries 146-47, T. Jefferson, The Writings of Thomas Jefferson 424-25 (P. Ford ed. 1894) (Letter to E. Carrington, Aug. 4, 1787), M. Farrand, The Records of the Federal Convention of 1787 (II), J. Story, Commentaries on the Constitution of the United States 611 (3d ed. 1858)

participation still represented one third (33%) of the total participation by amici in *Chadha*. The three Federalist Society network participants listed as counsel were all Justice Department

officials representing the United States - Theodore Olson, Rex Lee, David A. Strauss - arguing to affirm the Ninth Circuit's decision. In terms of the final category of direct participation, this is the one case, of all the cases examined in this thesis, that did not include a Federalist Society affiliated judicial decision-maker. Future Supreme Court Justice Antonin Scalia, who at this point in his career was an academic and advisor to the fledgling Federalist Society, was merely a friend of the court in *Chadha*. Cites to Federalist Society scholarship were also predictably scant with one cite in one amicus brief - the ABA brief (33%) - and one other by the Ninth Circuit Court of Appeals in its decision. Cites to the Originalist canon, the last category of participation, were surprisingly well-represented both in the counsel briefs and the Circuit and Supreme Court decisions. While amici only cited the canon four times in one brief (33%), the two counsel briefs urging to affirm the Circuit Court's ruling cited Originalist sources sixty-one times in support of their arguments. The two parties arguing for reversal did not cite these sources at all. As illustrated in Table 2.1, the Ninth Circuit decision cited historical sources seventeen times, while the Supreme Court cited the Originalist canon twenty-one times in its decision.

Though it does not frame the issue in terms of the Unitary Executive, the Ninth Circuit opinion, authored by Judge Anthony Kennedy, does mobilize one of the three principal separation of powers arguments proffered by proponents of the Unitary Executive theory. In doing so, it relies on many of the same Originalist sources and adopts the same separation of powers logic as both the Federalist Society affiliate-authored ABA amicus brief and the Justice Department brief. Relying on Madison's essays in the *Federalist*, the Circuit opinion warns of the dangers of combining the "legislative and executive powers,"⁷⁶ and discusses the tendency of Congress, viewed by the Framers as the most dangerous branch, to enlarge its own power through "encroachments" on the other branches.⁷⁷ In making the former point, all three speech-acts cite Madison's *Federalist* 47 ("When the legislative and executive powers are united in the same person or body... there can be no liberty").⁷⁸ In discussing the penchant of Congress to enlarge its own power, all three cite *Federalist* 48 ("The legislative department... can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments").⁷⁹ Finally, in arguing for the importance of the bi-cameral requirement as a safeguard against this tendency of Congress to encroach on the other branches, all three speech-acts authoritatively cite the *Federalist* 62 ("... this complicated check on legislation may... be injurious as well as beneficial... But... as the facility and excess of law-making seem to be the diseases to which governments are most liable... this part of the constitution may be more convenient in practice than it appears").⁸⁰ In particular, the Ninth Circuit opinion's section on the bi-cameral requirement is strikingly similar to that of the Justice Department, represented on brief by three Federalist Society network actors, drawing on six of the same historical sources in addition to citing the same law review article.⁸¹

The majority opinion in the Supreme Court version of *Chadha*, affirming that the legislative veto violated both the bi-cameral and presentment clauses of the Constitution, was written by Chief Justice Burger and joined by Justices Brennan, Marshall, Blackmun, Stevens

and O'Connor. Justice Powell filed a concurring opinion, while Justices White and Rehnquist wrote in dissent. The critical sections of the majority opinion, given the grounds on which the legislative veto was declared unconstitutional, are the sections on *The Presentment Clauses* and *Bicameralism*.⁸² In constructing its argument in these two sections, the majority opinion borrows heavily from the Justice Department's brief. In fact, the Burger opinion does not introduce one single historical source or citation not relied upon by the Justice Department in its Federalist Society affiliate authored brief.⁸³ As a result, with a bit of rearranging, the majority's argument in these two critical sections of *Chadha* reads almost identically to that of the Justice Department, as does its conclusion, excerpted below and followed by an excerpt from the Justice brief:

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. See *id.*, at 99-104. It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.⁸⁴

Thus, the intent of the Framers underlying the constitutional provisions at issue confirm what is manifest from the text of the Constitution itself: Congress cannot exercise its legislative powers through one or both of its Houses by means of a legislative veto of Executive decisions. By incorporating the principles of bicameralism and Presidential review of the exercise of the legislative power into the Constitution, the Framers intended to erect formidable and enduring checks against improvident legislative action and congressional encroachment upon the Executive. Such fundamental protections cannot be waived or dispensed with by mere legislation passed by the very branch of government whose powers were sought to be restrained...⁸⁵

So, while the majority opinion did not frame the constitutional issue at stake in *Chadha* explicitly in terms of the Unitary Executive theory, like the Ninth Circuit opinion it did specifically address the concern of legislative encroachments on executive power. Further, as we have seen, it did so by relying on the same authoritative sources and using the same formalist separation of powers logic Federalist Society network actors, like those working in the Reagan Justice Department at the time, would mobilize in support of their arguments for the Unitary Executive.

To recall Federalist Society participant Stephen Markman's language from the Justice Department's Office of Legal Policy report referenced earlier, the Supreme Court's opinion in *Chadha* clearly represented a big first step away from the "pragmatic" approach that had elevated political convenience and flexibility in governance over the more Federalist-friendly "Madisonian" approach that aimed to more vigorously police the boundaries between legislative and executive power. It also indicated that the Supreme Court would be more receptive to

formalist arguments in the future, giving the Federalist Society-populated Justice Department more incentive to develop and propose its theory of the Unitary Executive. As it turned out, these actors would not have to wait long for the opportunity to test their arguments on behalf of the Unitary Executive in court.

Bowsher v. Synar (1986)

This case challenged the constitutionality of the federal Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings (GRH) Act.⁸⁶ This Act, borne out of a "political stalemate" between President Reagan and Congress over the federal budget, was an attempt to direct both the Executive and Legislative branches to meet "specified targets for the federal deficit, gradually lowering it to zero by fiscal 1991" (Fisher 1997, 209-210). To accomplish this, GRH vested in the Comptroller General the authority to initiate automatic, across-the-board cuts in federal spending if, in any fiscal year, either branch failed to meet their deficit targets. As Louis Fisher has explained, this transfer of power to the Comptroller General raised constitutional issues implicating the separation of powers, for even though he was appointed by the President, the Comptroller General was subject to removal by Congress, raising the question of whether an agent of the Executive branch, presumably under the President's control, could be removed by Congress (Fisher 1997, 210).

After the Act was signed into law, twelve members of Congress, led by Oklahoma Congressman Mike Synar (D-OK) filed complaints in the United States District Court for the District of Columbia, as did the National Treasury Employees Union, complaining that its members were injured by the Act's automatic spending reduction provisions. The three judges for the District Court, including then-Circuit Court Judge Antonin Scalia, issued a per curiam opinion in February of 1986 in favor of Synar et. al, holding that the role of the Comptroller General in the deficit reduction process indeed violated the constitutional separation of powers. The Supreme Court granted cert, heard the appeal in April of that same year and issued its opinion affirming the District Court's core holding in July of 1986.

As illustrated in Table 2.2, overall participation by Federalist Society network actors increased from *Chadha* to *Bowsher*, from five to six. The one actor participating as amicus, Laurence Gold, represented one out of eight total *amici* briefs (13%). The four network actors listed under counsel appeared on the brief of the United States arguing the Justice Department's position, including one of the Federalist Society Co-Founders, Lee Liberman. Unlike in *Chadha* the Federalist Society did have one judicial decision-maker participating in *Bowsher*, Judge Antonin Scalia. Cites to Federalist Society scholarship increased in *amici* briefs, with seven total citations in three briefs (38%). Five of these seven citations were to Peter Strauss' 1984 law review article examined in the beliefs section of this chapter. Counsel briefs did not cite

Table 2.2

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Bowsher v. Synar* (1986)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Laurence Gold	Charles Fried, Richard K. Willard, Carolyn Kuhl, Lee Liberman	D.C. Circuit: Judge Scalia
Citations to Federalist Society Actor Scholarship	Peter Strauss, <i>The Place of Agencies in Government: Separation of Powers and the Fourth Branch</i> , 84 Colum. L. Rev. 573, 633-40 (1984) (V), David Schoenbrod, <i>The Delegation Doctrine: Could the Court Give It Substance?</i> , 83 Mich. L. Rev. 1223 (1985), 1 K. Davis, <i>Administrative Law Treatise</i> § (2d ed. 1978)		District Court: Peter Strauss, <i>The Place of Agencies in Government: Separation of Powers and the Fourth Branch</i> , 84 Colum. L. Rev. 573, 633-40 (1984)
Citations to Originalist Sources	Federalist 47, Federalist 48, Federalist 51 (II), Federalist 70, Federalist 31 (III), Federalist 30 (II), Federalist 36, Federalist 34, Federalist 79	M. Farrand, <i>The Records of the Federal Convention of 1787</i> (XII), Federalist 41, Elliot's <i>Debates on the Federal Constitution</i> , J. Elliot, ed. 5 vols. (1836), Federalist 65, Federalist 66 (III), Federalist 68, Federalist 70 (IV), Federalist 72, Federalist 47 (IV), Federalist 76	Supreme Court: Federalist 47, M. Farrand, <i>The Records of the Federal Convention of 1787</i> District Court: Federalist 48

Federalist Society scholarship, but the District Court per curiam opinion also relied on the Peter Strauss article. As illustrated in Table 2.2, there were thirteen total cites by amici to the Originalist canon, populating two of the eight (25%) amicus briefs, and an impressive thirty cites to these sources in counsel briefs. Finally, Table 2.2 confirms that cites to Originalist sources by judicial decision-makers dropped dramatically from *Chadha* to *Bowsher* with only one cite in the District Court opinion and two in its Supreme Court counterpart.

Particularly noteworthy is the brief submitted by the United States which, unlike its predecessor in *Chadha*, frames the constitutional issue in terms of both general separation of powers concerns and, specifically, the theory of the Unitary Executive. As the Justice Department's authors - four of whom, again, were active Federalist Society network participants - wrote in the opening summary of their argument:

The Framers deliberately settled upon a unitary Executive in order to promote a sense of personal responsibility and accountability to the people in the execution of the laws -- and thereby to ensure vigorous administration of the laws and protection of the liberty, property, and welfare of the people. *The Federalist No. 70* (A. Hamilton) (C. Rossiter ed. 1961)... A division between the President and the Comptroller General of authority over the administration of the laws throughout the Executive Branch cannot be reconciled with this considered judgment by the Framers.⁸⁷

In developing their argument, the authors used the language "unity" or "unitary" sixteen times. It is important to recall that, despite all the references to Originalist sources in *Chadha*, this language of the Unitary Executive did not once appear in any document submitted to the Court in that earlier case. Moreover, with the subject occupying more than twenty pages of legal argument in the United States brief, all three arguments reviewed in earlier sections on behalf of the Unitary Executive were articulated, developed and supported with dozens of references to the Originalist canon.⁸⁸

Though both the District and Supreme Courts ruled in favor of the United States in *Bowsher*, none of the language attendant to the Unitary Executive theory spotlighted in the Justice Department brief found its way into either judicial opinion. The per curiam opinion issued by the District Court, like the Supreme Court opinion in *Chadha*, relied instead on a more general separation of powers argument in striking down the relevant portions of the Gramm-Rudman-Hollings Act. The opinion, joined by Federalist Society affiliate Judge Scalia, cited both Montesquieu and Madison's *Federalist 48* in concluding that "giving such power over executive functions to Congress violates the fundamental principle expressed by Montesquieu upon which the theory of separation of powers rests."⁸⁹ The District Court does, however, make a passing reference to Federalist Society affiliate Peter Strauss' 1984 *Columbia Law Review* article - cited several times in network actor Laurence Gold's amicus brief - in its discussion of the scope of the Supreme Court's separation of powers holding in *Chadha*.⁹⁰ The District Court does not, however, cite the relevant portions of this article reviewed in the previous section on network actor scholarship; those that specifically treat the Unitary Executive.

The Supreme Court majority opinion in *Bowsher*, authored by Chief Justice Burger and joined by Justices Brennan, Power, Rehnquist and O'Connor, relied on the separation of powers logic articulated in *Chadha*, principally derived from Madison's essays in *Federalist 47* through *Federalist 50*. Though the opinion only makes explicit reference to two Originalist sources (see Table 2.2), it relies on the Court's previous handiwork in *Chadha* to support its holding that "the powers vested in the Comptroller General... violate the command of the Constitution."⁹¹ To once again recall the language of the Justice Department's Office of Legal Policy report discussed earlier, the majority opinion made a point of reiterating its commitment to what Markman had termed a "Madisonian" approach to the separation of powers, even while acknowledging the political costs of such an approach:

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government. . . ." *Chadha, supra, at 944*.⁹²

The majority also, in the course of its opinion, reiterated the importance of maintaining the "structural" protections the Framers put in place to safeguard the separation of powers, and once again made specific reference to the dangerous tendency of the Legislative branch to "aggrandize itself" at the expense of the Executive branch.⁹³

In sum, while none of the language of the Unitary Executive, developed at length in the Justice Department's brief in *Bowsher* was adopted by judicial decision-makers, the Supreme Court did reaffirm its commitment to enforcing a formalist approach to the separation of powers doctrine. In doing so, it relied as it had in *Chadha* on one of the three principal arguments undergirding the Unitary Executive theory; that a "pragmatic" approach to the separation of powers disrupts the carefully crafted balance of powers the Framers designed and exacerbates the latent tendency of Congress to enlarge its own sphere of influence at the expense, usually, of the Executive branch. The next case, the last of its kind to be argued by the Federalist Society network actors working in the Reagan Justice Department, would be the greatest test of the extent to which the Supreme Court would be willing to embrace the formalist, or "Madisonian," approach to the separation of powers generally, and Executive power in particular.

Morrison v. Olson (1988)

This case challenged the Independent Counsel provisions of the Ethics in Government Act of 1978, which provided for the appointment of Independent Counsels to investigate and prosecute a subset of high-ranking government officials for federal criminal law violations.⁹⁴ As described by Reagan Administration Solicitor General Charles Fried, who would bring the challenge on behalf of the Justice Department, the Independent Counsel law "had been enacted as a response to the 'Saturday Night Massacre,' when Richard Nixon fired Special Prosecutor Archibald Cox in an unsuccessful attempt to derail a criminal investigation into Watergate" (Fried 1991, 133-134). As Fried has explained, the litigation in *Morrison* grew out of a politically charged dispute between Theodore Olson, frequent Federalist Society participant and then-head of the Office of Legal Counsel, and "two Democratic congressional barons," Peter Rodino and John Dingell, over access to certain Environmental Protection Agency (EPA) records (Fried 1991, 135). On Olson's recommendation, the EPA Administrator had denied the congressmen access to the records, citing Executive privilege. This action led Congressman Rodino to invoke the Ethics in Government Act, which subsequently forced Attorney General Edwin Meese III to ask for the appointment of an Independent Counsel "to investigate Olson for criminally defying Congress" (Fried 1991, 135).

Table 2.3

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Morrison v. Olson* (1988)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Laurence Gold, David A. Strauss, Charles Fried, John Bolton		Supreme Court: Justice Scalia D.C. Circuit: Judge Silberman, Judge Williams
Citations to Federalist Society Actor Scholarship	Peter Strauss, <i>The Place of Agencies in Government: Separation of Powers and the Fourth Branch</i> , 84 Colum. L. Rev. 573, 633-40 (1984) (VII), Geoffrey P. Miller, <i>Government Lawyers' Ethics In A System Of Checks And Balances</i> , 54 U. Chic. L. Rev. 1293, 1296 (1987), Geoffrey Miller, <i>Independent Agencies</i> , 1986 Sup. Ct. Rev. 41, 68-69.		Circuit Court: Peter Strauss, <i>The Place of Agencies in Government: Separation of Powers and the Fourth Branch</i> , 84 Colum. L. Rev. 573, 633-40 (1984), Kenneth Culp Davis, <i>ADMINISTRATIVE LAW</i> (1958)
Citations to Originalist Sources	Federalist 65 (IV), Federalist 69, Federalist 70 (III), Federalist 51 (IX), Federalist 68, Federalist 70, Federalist 72 (V), Federalist 10, Federalist 15, Federalist 47 (III), Federalist 48 (II), Federalist 74, Federalist 76 (II), Federalist 77 (II), Federalist 78, Federalist 81, Federalist 84, M. Farrand, <i>The Records of the Federal Convention of 1787</i> (XI), J. Elliot, <i>The Debates in the Several State Conventions on the Adoption of the Federal Constitution</i> 480 (1836) (IV), J. Wilson, <i>Works, Lectures on Law</i> 294-295 (1791), J. Story, <i>Commentaries on the Constitution of the United States</i> (3d ed. 1858)		Supreme Court (maj): M. Farrand, <i>The Records of the Federal Convention of 1787</i>), J. Story, <i>Commentaries on the Constitution of the United States</i> (3d ed. 1858) Supreme Court (diss): Massachusetts Constitution of 1780, Federalist 47 (II), Federalist 49, Federalist 51 (IV), Federalist 73, Federalist 78, Federalist 81, Circuit Court: J. Story, <i>Commentaries on the Constitution of the United States</i> (3d ed. 1858) (II), Federalist 42, Federalist 47 (III), Federalist 48 (II), Federalist 70 (IV), Federalist 76 (II), Federalist 77 (II), M. Farrand, <i>The Records of the Federal Convention of 1787</i> (V), M. Farrand, <i>The Records of the Federal Convention of 1787</i>),

The Independent Counsel caused a grand jury to issue subpoenas to Olson and two other Justice Department officials, who moved in the United States District Court for the District of Columbia to have the subpoenas quashed on the grounds that the Independent Counsel provisions violated the appointments clause, the separation of powers doctrine and impermissibly interfered with the President's duty to execute the laws under Article II, Sec.3 of the Constitution. The District

Court upheld the constitutionality of the Act but, on appeal, the Court of Appeals for the District of Columbia reversed and declared the Independent Counsel provisions unconstitutional in a sweeping opinion issued in January of 1988 and authored by Federalist Society participant Judge Laurence Silberman. The Supreme Court heard argument in the appeal in April and issued an opinion on June 29, 1988 reversing the Circuit Court decision and upholding the constitutionality of the Independent Counsel provisions of the Ethics in Government Act. The decision was 7-1, with Justice Anthony Kennedy not taking part and with Federalist Society participant and mentor Justice Antonin Scalia in lone dissent.

Federalist Society network participation in *Morrison* increased overall from *Bowsher* with a total of seven actors participating in two out of the three categories (see Table 2.3). The four network actors listed as *amici* represented four of the twelve parties (33%) participating as friends of the court in this case. All four - Laurence Gold, David Strauss, Charles Fried and John Bolton - were arguing to affirm the Circuit Court decision. Further, the network had three judicial decision-makers on the bench in *Morrison*, Justice Antonin Scalia, Judge Laurence Silberman, and frequent Federalist Society participant (see Figure 1.4) Judge Stephen F. Williams. *Amici* in this case cited three sources of Federalist Society scholarship a total of nine times in their briefs while the Circuit Court cited two sources once each. In terms of reliance on the Originalist canon, four total amicus briefs (33%) - three with Federalist Society participants as signatories - mobilized these sources no less than fifty-five times in their *Morrison* briefs. The Circuit Court opinion, authored by Silberman and joined by Williams, drew on these sources twenty-one times in its argument, while the Supreme Court opinion cited the Originalist canon thirteen times. It is interesting to note that with no Federalist Society actors directly representing the litigating parties in *Morrison*, there was not a single cite to either Federalist Society scholarship or the Originalist canon in counsel briefs.

Once again, the United States, participating as a friend of the court and represented on brief by Solicitor General and frequent Federalist Society participant (see Figure 1.4) Charles Fried and participant John Bolton, framed its argument in terms of the Unitary Executive theory. While the language "unity" and "unitary" appeared just six times in this brief (as opposed to sixteen in the *Bowsher* brief), Fried et. al drew even more heavily on the Originalist canon than they did in the *Bowsher* brief and this time around enlisted the help of two other network actors, Peter Strauss and Geoffrey Miller, whose scholarship further supports and develops the idea of a Unitary Executive. For example, the brief cites Strauss' now-familiar 1984 *Columbia Law Review Article* to support its claim that the Framers intended to have "the whole of the executive power... vested in the President: the purpose was to create a unitary, vigorous, and independent Executive responsible directly to the people."⁹⁵ Additionally, in arguing for the importance of "unity" as a "structural principle" to facilitate Executive "energy," the brief references an article by network actor Geoffrey Miller alongside Hamilton's *Federalist 70*.⁹⁶ After nearly seventy pages of Originalist analysis, the brief's authors conclude their condemnation of the Independent Counsel as unconstitutional and destructive of Executive unity with a general indictment of the

"pragmatic" approach to the separation of powers: "There is no warrant after 200 years of experience under the Constitution for the independent counsel statute's extra-constitutional means of addressing a problem that the Constitution itself furnishes ample means to address, through properly accountable institutions of government."⁹⁷

The opinion for the D.C. Circuit Court of Appeals in *Morrison* has been described by its principal author, Federalist Society participant Judge Laurence Silberman, as the "high water mark" and the "apogee" of the Unitary Executive theory - and with good reason.⁹⁸ In a sweeping analysis that spanned nearly forty pages and mobilized several Originalist sources (see Table 2.3), the majority opinion systematically argued the case for the importance of a Unitary Executive, specifically mentioning the concept by name ten times, in concluding that the Independent Counsel Act "as a whole jettisons traditional adherence to constitutional doctrines of separation of powers and a unitary executive, and in so doing, seriously weakens constitutional structures that serve to protect individual liberty."⁹⁹ Moreover, the opinion relied on all three categories of argument Federalist Society network actors have used in support of the Unitary Executive: that the Constitution vests all the Executive power in the Executive branch;¹⁰⁰ that "unity" in the Executive branch facilitates energy and accountability;¹⁰¹ and that the Constitution put certain structural checks in place to preserve the balance of power and, in particular, to guard against the dangerous encroachments of Congress on the powers of the other branches.¹⁰² Finally, like the authors of the United States brief, the Circuit opinion also enlists the help of Peter Strauss as supporting scholarship.¹⁰³

The Supreme Court's majority opinion in *Morrison*, authored by Chief Justice Rehnquist and joined by Justices Brennan, White, Marshall, Blackmun, Stevens and O'Connor, argued that, contrary to what the Circuit Court opinion had held, the Ethics in Government Act's Independent Counsel provisions did not violate the Constitution's appointments clause or the separation of powers doctrine and did not impermissibly interfere with the President's Article II duties. The majority did mobilize two historical sources in its opinion, Joseph Story's *Commentaries* and Max Farrand's *Records of the Federal Convention*, but did so to support the claim that the Framers' understanding of the appointments clause was at best muddled and thus not authoritative.¹⁰⁴ In lone dissent in *Morrison*, former Federalist Society advisor Justice Antonin Scalia penned one of his most memorable opinions and the one that Federalist Society network actors still recite to this day:

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish -- so that "a gradual concentration of the several powers in the same department," Federalist No. 51, p. 321 (J. Madison), can effectively be resisted. Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.¹⁰⁵

In discussing the particular threats posed by the Independent Counsel to the "unitary Executive," Scalia's dissent relied on a brief authored by fellow Federalist Society participant and University of Chicago Academic, David A. Strauss, referencing it explicitly in the text of the dissent.¹⁰⁶ Overall, the Scalia dissent, citing eight different Originalist sources,¹⁰⁷ covering all three categories of beliefs underlying the Unitary Executive theory reviewed earlier,¹⁰⁸ and twice using the phrase the "unitary Executive" in the course of his argument,¹⁰⁹ represented the most direct and clear articulation of the theory of the unitary executive *qua* Unitary Executive theory in Supreme Court doctrine before or since. In the end, however, Scalia's manifesto on the importance of the Unitary Executive, and his warnings of the threats posed by the Independent Counsel to the separation of powers doctrine, a proverbial "wolf" to the separation of powers doctrine's sheep, failed to persuade a single one of his Supreme Court colleagues in *Morrison*.

If the Circuit Court opinion in *Morrison*, authored by Laurence Silberman, represented the "apogee" for the theory of the Unitary Executive in court, then for Federalist Society network actors (especially those hard at work in the Justice Department) the Supreme Court majority opinion issued just months afterward represented a significant step backward from that "Madisonian" or formalist approach they had developed over eight years. As former Solicitor General and frequent Federalist society participant Charles Fried wrote in his memoir of *Morrison*, the Reagan-era "battle to rearrange government power" was "soundly defeated" (Fried 1991, 133). That being said, the network of actors who participated in *Morrison* and before that in *Bowsher* had been successful in transmitting the language of and arguments supporting the Unitary Executive to prominent judicial decision-makers on both the Court of Appeals and the Supreme Court, lending at least some authority and weight to the theory and the beliefs undergirding it. Moreover, while it was not a victory for the separation of powers doctrine, the Independent Counsel Act that was the subject of the *Morrison* litigation – the wolf in wolf's clothing, as Scalia had written – was allowed to expire without a political fight on June 30, 1999. After politically charged investigations by Independent Counsels Lawrence Walsh and Kenneth Starr, both Republicans and Democrats had witnessed firsthand how "an independent counsel can cause political havoc" and neither party was willing to try to fix what both sides viewed to be a seriously flawed statute.¹¹⁰

Evaluating Federalist Society Network Impact on the Unitary Executive

After *Morrison*, the question remains, on constitutional questions of Executive branch power, to what extent did the Supreme Court's separation of powers opinions embody beliefs

about the Unitary Executive? To recall the opening section of this chapter, I grouped these beliefs into three related categories: (1) arguments targeting the administrative state, derived from a formalist reading of Article II of the Constitution, for Presidential control of the entire Executive branch; (2) Originalist arguments that cite Hamilton's concerns for energy and accountability, supported by *Federalist 70* and other historical sources; and (3) arguments, relying on Madison's essays from *Federalist 47* to *Federalist 51*, about the balance of powers generally with attendant complaints about the tendency of the Legislative branch to enlarge its own power and sphere of influence at the Executive branch's expense.

Reviewing the three cases examined in this chapter, judicial decision-makers were certainly far more receptive to this third category of argument in their decisions; arguments derived from a "Madisonian" reading of the *Federalist* and supporting a more formalist approach to the separation of powers in cases involving a tug-of-war between the Executive and Legislative branches. From Judge Kennedy's Ninth Circuit opinion in *Chadha* to the Supreme Court's decision in this same case to both the District and Supreme Court opinions in *Bowsher*, Federalist Society network actors in the Reagan Justice Department and beyond saw the courts embracing not only their separation of powers arguments but also the underlying beliefs and authoritative sources supporting those arguments. *Morrison*, as we have seen, represented a short-lived victory for proponents of the Unitary Executive theory with two Federalist Society affiliated Circuit Court judges, Laurence Silberman and Stephen F. Williams, explicitly relying on all three categories of argument to strike down the Independent Counsel provisions of the Ethics in Government Act. And while these beliefs subsequently all found their way into the Supreme Court version of *Morrison*, it was in the solitary, dissenting opinion of Justice Scalia.

The let-down in *Morrison* could not have been predicted by looking at Federalist Society network participation alone. Overall participation increased from *Bowsher* to *Morrison* and, indeed, increased threefold in the one category that should have the greatest impact on the outcome of judicial opinions; network participation as judicial decision-makers. The one significant change was the lack of representation as direct counsel to a litigating party, with the United States Justice Department - populated by Federalist Society network actors - arguing instead as a friend of the court in *Morrison*. A better predictor, however, might have been the pace of change itself. After moving relatively swiftly from a "pragmatic" to a "Madisonian" approach to the separation of powers in both *Chadha* and *Bowsher*, the Supreme Court was simply unwilling, as Charles Fried explained in his memoir, to subscribe wholesale to the theory of the Unitary Executive with all its implications for restructuring inter-branch and intra-Executive branch relations (Fried 1991, 158 - 160). The Supreme Court decision in *Morrison*, Fried noted in his memoir, was probably foreshadowed in an exchange with Justice O'Connor during oral argument in *Bowsher*. After the Senate Counsel had laid out the implications of the Justice Department's position on the unitary executive - namely, that embracing this theory would result in the dismantling of all independent regulatory agencies - Fried, arguing as Solicitor General, assured the Justices that these were just "scare tactics," to which Justice

O'Connor replied: "Well, Mr. Fried, you certainly scared me" (Fried 1991, 160). While the Court had ruled in favor of Fried and other Federalist Society network actors in *Bowsher*, the sweeping opinion by the D.C. Circuit Court in *Morrison* had forced its hand and confirmed that it was unwilling to fully incorporate the Unitary Executive theory into its separation of powers jurisprudence.

Federalist Society network actors, especially those having served in the Reagan Administration, were not optimistic after *Morrison* about the prospects of the Supreme Court embracing the Unitary Executive theory. I have already alluded to Judge Silberman's remarks at the 1989 Federalist Society National Lawyers Conference, in which he compared his opinion in the Circuit version of *Morrison v. Olson* to "Pickett's Charge:"

Asking me to speak on the doctrine of the unitary executive is very much like asking General George Pickett to speak on the future of the Confederacy after the Battle of Gettysburg. For just as historians love to point to Pickett's Charge as the high water mark of the South's effort to secede, some legal scholars have labeled my opinion, in which my colleague Steve Williams joined and collaborated, as the brief apogee of a constitutional lost cause.¹¹¹

A year earlier, just a few months after the *Morrison* decision, Charles Fried had opened his remarks at the Federalist Society National Lawyers Convention with a similar lament: "I will state my interest. I am the man who lost *Morrison v. Olson*." During his talk he confessed that he was "very troubled about *Morrison*" because, in his assessment, the opinion had "left very little securely standing" in terms of separation of powers jurisprudence.¹¹² Future Supreme Court Justice and Federalist Society participant Samuel A. Alito, who introduced Fried at the 1988 meeting, expressed a similar sentiment: "As I am sure all of you are aware, in...the independent counsel case, the Supreme Court hit the doctrine of separation of powers about as hard as heavy weight champ Mike Tyson usually hits his opponents."¹¹³ Frequent Federalist Society participant Theodore Olson, the subject of the litigation in *Morrison*, opened his remarks at the 1989 National Lawyers Conference with a simple apology to the Federalist Society audience: "I also feel like I should apologize for the *Morrison v. Olson* case. I do not know what else to say about it, but I am sorry."¹¹⁴ Though many other network members undoubtedly shared Judge Silberman's sentiment post-*Morrison* that trying to get the Supreme Court to adopt the Unitary Executive theory was a "lost constitutional cause," there was still one other front on which this battle could and would be waged - the Executive branch itself. Before jumping ahead to that story, which takes place primarily during the George W. Bush Administration, the thesis continues chronologically but shifts gears slightly to examine Federalist Society network actors' litigating efforts on a different but related separation of powers issue - judicial enforcement of the non-delegation doctrine.

Chapter Three -----

Separation of Powers II: The Non-Delegation Doctrine in Court, 1989 - 2001

More importantly, the current conventional wisdom has departed from the collective wisdom of the Founders. Both the Federalists and the Antifederalists agreed that a system of separated powers was essential to the preservation of liberty. Both cited the French political philosopher Montesquieu for the proposition that the "accumulation of all powers, legislative, executive and judiciary in the same hands... may justly be pronounced the very definition of tyranny."... As Madison assured his colleagues in proposing the Bill of Rights, nothing in it would alter the structure of the Constitution... [which has] achieved a balance among the goals of preventing tyranny and maintaining state autonomy under a single body.

-John S. Baker, Jr. "Constitutional Architecture," Talk given at the 1992 Federalist Society Student Symposium¹¹⁵

Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (C. Rossiter ed., 1961). So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary... It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance.

- Justice Kennedy Concurring Opinion in *Clinton v. City of New York* (1998)¹¹⁶

Though many Federalist Society network actors were waxing gloom and doom about the separation of powers doctrine post *Morrison v. Olson*, there was still one other road - admittedly, a road less travelled - that network actors could try to coax the Supreme Court down that would shore up the "Madisonian" view of the separation of powers. Federalist Society participant Stephen Markman described this road, and its alternative, in the 1988 Justice Department's Office of Legal Policy report, *The Constitution in the Year 2000*:

Though not frequently litigated in the modern era, another [separation of powers] issue... is the extent to which Congress may delegate rulemaking authority to others... Relying on separation of powers principles, the Supreme Court [had] stated in dictum that Congress could not delegate its legislative power. At most, however, the Court only attempted to enforce the more limited proposition that "Congress cannot delegate any part of its legislative power except under a limitation of a prescribed standard" and it did this only in a few early New Deal cases. Other than in those cases, the Court has virtually ignored even this limitation, and not surprisingly, the legislative standards governing such delegations have often been very broad and imprecise... under a strict Madisonian concept of separation of powers, the Court conceivably could hold that the Congressional delegation of rulemaking functions to the Executive branch or to independent agencies violates the separation of powers... [or] under a pragmatic approach, the Court could continue to hold that delegation of rulemaking authority does not offend the separation of powers doctrine.¹¹⁷

Thus, even after the decision in *Morrison v. Olson*, Justice Department and Federalist Society network actors remained somewhat hopeful that the Supreme Court, if it could be persuaded to resurrect the non-delegation doctrine, might deliver another victory for the "Madisonian" or formalist view of the separation of powers.

As Philip Kurland has described it, "the concept of invalid delegation of legislative power is phoenixlike in its appearance in American judicial history, burning fiercely from time to time, turning to ash, then reviving" (Kurland 2005, 257). Plainly stated, the non-delegation doctrine represents the principle that Congress, being vested with all legislative powers by Article I, section 1 of the Constitution, cannot re-delegate this authority to other branches of government without threatening the safeguards of liberty provided for under the structural division of governmental power. As Chief Justice Taft wrote in his 1928 Supreme Court opinion in *J.W. Hampton Jr & Co. v. United States*, the non-delegation doctrine is grounded in the "well-known maxim 'Delegata potestas non potest delegari' ['No delegated powers can be further delegated']."¹¹⁸ While many Supreme Courts opinions have paid lip service to the importance of this principle over the last two hundred years, only three times has the Court actually invalidated legislation on the grounds of the non-delegation doctrine. Moreover, all three of these decisions - *Panama Refining Co. v. Ryan* (1935), *Schechter Poultry Corp. v. United States*, (1935), *Carter v. Carter Coal Co* (1936) - were handed down in the mid-1930's, when the Supreme Court was rapidly disabling President Roosevelt's New Deal legislation.

By the 1980's, the non-delegation doctrine had more or less turned to "ash." As I mentioned in the opening paragraph to this chapter, it had become the road less travelled for separation of powers enthusiasts. I might have more aptly described it as a mountain road; an uphill climb made more difficult with every successive decision the Supreme Court handed down permitting the expansion of the modern regulatory state since the mid-1930's. In addition to the doctrinal difficulties and problems of precedent, non-delegation represented a series of political challenges. After all, the modern framework of administrative agencies and congressional delegation had been created and supported by "decades of well-documented public opinion insisting that the federal government [should solve] environmental, health and safety, educational, and other core problems" (Farina 2010, 96-97). Even in the face of all these challenges, however, there had been one recent attempt to resurrect the non-delegation doctrine in the 1980 *Benzene* case, which involved a broad delegation from Congress to the Secretary of Labor under the Occupational Safety and Health Act of 1970 to set standards regulating the occupational exposure to benzene.¹¹⁹ Concurring in the judgment, Justice Rehnquist argued that the Court ought to have explicitly relied on the non-delegation doctrine to strike down this broad delegation of legislative authority: "we ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the New Deal era."¹²⁰ But, as his former law

clerk and Federalist Society member Charles J. Cooper commented, Justice Rehnquist was the "lone ranger" in this endeavor.¹²¹

The following section details the efforts of actors connected with the Federalist Society for Law and Public Policy's network to resurrect this "phoenixlike" doctrine and to help pave the road for the climbers facing this uphill battle. The chapter then proceeds to examine three Supreme Court decisions that treat the non-delegation doctrine either directly or indirectly, *Mistretta v. United States* (1989), *Clinton v. City of New York* (1998), and *Whitman v. American Trucking* (2001), cataloguing Federalist Society network participation and looking for evidence of idea diffusion. Finally, it closes with a qualitative evaluation of the extent to which these actors have been successful and/or frustrated in their attempts to restore the recognition of the importance of this separation of powers principle in Supreme Court doctrine. It finds that while their efforts have, up to this point, mostly been frustrated, proponents of non-delegation have grounds to be optimistic that the campaign to diffuse their beliefs to judicial decision-makers might yield some success at the Supreme Court in the long-run.

Federalist Society Network Actors on The Non-Delegation Doctrine

The non-delegation doctrine, while certainly not the sexiest of structural issues, has nevertheless generated enough interest among network actors to be a headlining panel topic at two Federalist Society National Conferences.¹²² Additionally, in the context of participant discussions of separation of powers issues generally, a content analysis I performed revealed that concerns with legislative delegation have been expressed by network actors at National Conferences in twenty-four distinct speech-acts.¹²³ Federalist Society participants have also been active discussants of issues of legislative delegation outside institutional boundaries. For example, Federalist Society network actors have written about the non-delegation doctrine eight times in a sub-set of conservative media publications over the past two and a half decades.¹²⁴ While this count does not seem like a lot, it constitutes over half of the total articles (with by-lines) that have discussed the non-delegation doctrine in these mainstream conservative media outlets. Further, a number of the most prolific scholars writing in law reviews and other scholarly publications about the non-delegation doctrine, such as David Schoenbrod and Michael Rappaport, are also active Federalist Society participants.¹²⁵ This section examines these network actors' beliefs about the non-delegation doctrine as expressed at Federalist Society meetings and in their scholarship. These beliefs can be summed up in the context of the following three broad arguments against legislative delegation: (1) legislative delegation threatens individual freedom by stripping the people of the right to make policy decisions and hold their representatives accountable for those decisions; (2) delegation disrupts the Framers' constitutional architecture by concentrating too much power in the hands of one branch of government at the expense of another; (3) legislative delegation facilitates "rent-seeking" by

special interests, thereby making national policy more susceptible to the "mischiefs of faction" that Madison sought to guard against in *Federalist 10* (Rossiter Ed. 1961, 46).

Network Actors at the Federalist Society on the Non-Delegation Doctrine

Legal Scholar and three-time Federalist Society National Conference participant Martin H. Redish began his presentation at the 1992 National Lawyers Convention with the following words: "In discussing the legislative role in the American Republic, I believe that we must return to an examination of first principles."¹²⁶ The "first principles" Redish is referring to are the same shared principled and normative beliefs examined in Chapter One's discussion of the Federalist Society as an epistemic community. Namely, that the state exists to preserve the freedom of the individual to, among other things, govern his or her own life. Redish subsumes this principle under the notion of popular sovereignty: "... the first principle of American political theory is the notion of popular sovereignty - the idea that people have an inherent right to govern their lives." As Redish describes it, the Supreme Court's non-enforcement of the non-delegation doctrine was tantamount to ignoring the principle of popular sovereignty by denying the people the right to make "fundamental policy choices" through their elected representatives about how they wish to be governed. When Congress delegates this legislative responsibility away to administrative agencies, the logic of this argument proceeds, it denies the people the right to hold their representatives accountable for the resulting policy decisions. This concern with the relationship between liberty and popular sovereignty perfectly describes the source of Federalist Society participant Burt Neuborne's frustration with the 1984 Federal Sentencing Commission Act, which he articulated at the 1998 National Student Symposium: "Perhaps the most novel and egregious example of congressional delegation we have witnessed in recent decades was the establishment of ... the Federal Sentencing Guidelines." Neuborne reasoned that "among the most important democratic judgments a society can make is how long people should go to jail for particular acts; it is, after all, a decision to strip away a person's liberty." He added that "when Congress is allowed to get away with [that] kind of delegation... the voters have no opportunity to pass judgment on its decisions" and thus the people are denied their popular sovereignty.¹²⁷

Another core concern network actors express with legislative delegation is best articulated by one of the most prolific legal scholars on the subject, Federalist Society participant David Schoenbrod. Schoenbrod argued in his presentation to the 1989 National Lawyers Convention that "to the Framers, Congress giving away its power, as well as Congress taking the President's power, threatened the same evil: too much power in too few hands. With delegation, that concentration of power has occurred on a massive scale."¹²⁸ Relying on the same rationale, former Solicitor General Paul M. Bator declared that the "tremendous tradition [of] allowing the legislative branch to delegate [away] its legislative powers" was the most "problematic" and

concerning constitutional issue from a "separation of powers viewpoint."¹²⁹ In the context of his discussion of legislative delegation, Federalist Society participant Jeremy Rabkin reminded his audience at a 1987 Symposium of Madison's belief, articulated in *Federalist 47* that "no political truth is certainly of greater intrinsic value... than the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct."¹³⁰ Jonathan R. Macey, in his 1992 presentation at the National Lawyers Conference, echoed these same concerns about Congress delegating away its power and responsibility with reference to "the Framers" design and a concern for preserving their "constitutional structure." Before he articulated this view, however, he provided a very telling disclaimer about the extent to which most Federalist Society members in the audience would have heard it before: "Admittedly, this view is itself a ritualistic incantation at these Federalist Society events, but it is a view worth repeating."¹³¹ Ultimately, this oft-recited view is but another iteration of Federalist Society network members' shared causal beliefs, explored in Chapter One, about the separation of powers as being critical to the preservation of individual freedom.

Several other members discussed the practical and political consequences of tinkering with the Framers' structural design through legislative delegation. As former Solicitor General Theodore Olson described it at the 1989 National Lawyers Convention, "excessive delegation by Congress is deplorable... it undermines accountability for the laws enacted and results in vague laws and capricious regulations."¹³² At the 1997 National Student Symposium, legal scholar John O. McGinnis explained from a Public Choice perspective why legislative delegation produces such "vague" and "capricious" laws. Delegation eliminates one of the structural protections the Framers put into place to make "rent-seeking" by special interests, or what Madison referred to as "factions" more difficult; i.e., the requirement that legislation receive the endorsement of two houses of Congress as well as of the President. As McGinnis described it, "Once the power [is] delegated [from Congress to Executive agencies] interest groups ha[ve] only to pass over one hurdle - that of the agency." McGinnis continued that this problem with rent-seeking has been further exacerbated by the courts which, as he explained, had "discarded the non-delegation doctrine that had once policed these blank checks."¹³³ At the 1998 National Student Symposium Richard B. Stewart discussed one particular example of "the worst sort of factional rent-seeking" the country had ever seen in the New Deal's National Recovery Administration. As he reminds his audience, this act was "appropriately struck down by the Supreme Court" in the 1930's in one of the three cases in which the Court had seen fit to strike down legislation on the grounds of the non-delegation doctrine.¹³⁴

Network Actors' Scholarship on the Non-Delegation Doctrine

As discussed in the previous chapter, for many network actors, Federalist Society meeting panels are not where discussions of issues like the separation of powers and the non-delegation doctrine begin and end. Invited panel discussants have often published on these

topics before their "ten minutes" of fame in front of a Federalist Society audience and many continue to write on these same topics afterward, whether in academic publications or in the mainstream conservative media.¹³⁵ That being the case, a look at some of the scholarship Federalist Society network actors have produced on the non-delegation doctrine should provide a more robust understanding of the shared concerns surveyed in the previous section and a better understanding of how these relate to the shared principled and causal beliefs of the epistemic community.

One of the scholarly figures most-cited by interviewees as an intellectual inspiration for their own beliefs about law and the nature of government was 20th century Austrian economist and philosopher Friedrich Hayek.¹³⁶ In fact, the Federalist Society's most strongly held principled belief explored earlier, that "the state exists to preserve freedom," was, according to Co-Founder Steven Calabresi, deeply influenced by Hayek's writings in social and political philosophy.¹³⁷ It is not that surprising, then, that two of the most widely read Federalist Society-affiliated scholars on non-delegation, David Schoenbrod and Marci A. Hamilton, would cite Hayek in their discussions of the relationship between this doctrine and the preservation of individual liberty. As Schoenbrod writes in his article, "The Delegation Doctrine: Could the Courts Give It Substance?," Hayek linked the preservation of individual liberty with the state's obligation to promulgate general rules "rather than empower itself to issue *ad hoc* commands in furtherance of governmental goals" (Schoenbrod 1984, 1250). This Hayekian requirement of being governed by "general rules" as a precondition for liberty is often referred to in short-hand by members of the Federalist Society as "the rule of law." Thus, Schoenbrod argues, Hayek's scholarship provides a framework for judging the constitutionality of legislative delegations which, more often than not, compromise this requirement for general law-making by placing the legislative power in the hands of "unaccountable" Executive branch agencies who are more apt to issue "ad hoc commands" (Schoenbrod 1984, 1250). Marci A. Hamilton, also citing Hayek, made this same argument in a law review article over a decade later, explaining that "The nondelegation doctrine in this scenario is crucial to liberty, because it prohibits general lawmaking from occurring in a structure both capable of arbitrary action and removed from the national scrutiny to which both Congress and the President are exposed by the constitutional structure" (Hamilton 1999, 821). By delegating legislative powers to another branch, Schoenbrod explained in another article, "members of Congress have evaded [their] responsibility" to issue general rules as prescribed within Hayek's framework and, as a result, the rule of law is compromised and individual freedom "suffers" (Schoenbrod 1999, 732).

Federalist Society members' concerns about legislative delegation as disrupting the balance of power established by the Framers' constitutional design are borne of an intense appreciation of, in the words of Executive President Eugene Meyer, "the problem the Framers faced and their heroic effort to deal with it."¹³⁸ Marci Hamilton, in her article, "Representation and Nondelegation" articulates this problem in her defense of the non-delegation doctrine: "The Framers assumed that every individual exercising power would be tempted to misuse that power

either by underutilizing it or by using it overly aggressively." Because of their abiding mistrust of men and of social institutions, Hamilton continues, "the Framers' debates focused on finding the appropriate balance of power" so that it would neither be exercised "ineffectually" nor "tyrannically" (Hamilton 1999, 809, 810). To return to Eugene Meyer, the Madisonian solution to this dilemma, as he understood it, was to "set ambition against ambition."¹³⁹ In this way the branches of government, in particular the Executive and Legislative, might check one another "and thus render the balance necessary to forestall tyranny" (Hamilton 1999, 812). Thus, as Hamilton concludes, legislative delegation whether to an Executive agency or to the President disrupts this carefully crafted constitutional balance and ignores the "hard-learned political insights" of James Madison and the other Founders (Hamilton 1999, 813).

Richard B. Stewart relies on Public Choice theory in his scholarship to explain how legislative delegation has, as an institutional arrangement, contributed to "Madison's Nightmare: a faction-ridden maze of fragmented and often irresponsible micro-politics within government" (Stewart 1990, 342). Legislative delegation, as Stewart describes it, facilitates rule by special interests by "sidestepping the already weakened... separation of powers safeguards against factions...:

Rather than offsetting each other through mechanisms of countervailing power, as Madison envisaged, these [interest] groups have instead divided power among themselves. This parceling of power has been accomplished through congressional delegations of authority to functionally specialized bureaucracies. Each of these new power centers is dominated by the officials of the agency in question and the small number of legislators and private groups interested in that agency's decisions... This has subverted the very premises of Madisonian politics (Stewart 1990, 341-342).

Marci Hamilton also discussed legislative delegation as attenuating one critical structural safeguard the Framers instituted to guard against the mischief of faction politics; namely, the system of Congressional representation and the legislative process itself: "The legislative branch serves the people by filtering the factions in the society... positions must be funneled through a large number of ports before becoming governing law. Congress, thus filters the multitude of interests in the society" (Hamilton 1999, 814). This process of filtering is compromised, Hamilton continued, when Congress delegates its legislative responsibilities to the President, who can act unilaterally and in his own interest, or to administrative agencies whose power and discretion, politically unchecked, "is left to expand in the unlimited universe" (Hamilton 1999, 819, 821).

With a better understanding of Federalist Society network actors' concerns with legislative delegation, expressed both in cliff-notes version at National Conferences and at greater lengths in members' scholarship, I turn now to three Supreme Court cases in which the issue of legislative delegation was raised as a constitutional issue, either by judicial decision-makers themselves or by parties participating in the cases as counsel or *amici curiae*.

The Non-Delegation Doctrine in Court, 1989-2001

When the Justice Department's Office of Legal Policy issued its 1988 report describing legislative delegation as one potential constitutional controversy the Supreme Court could address over the next few decades, the non-delegation doctrine had for all intents and purposes, to recall Philip Kurland's language from the previous section, become a pile of doctrinal "ash." Still, many Federalist Society network actors hoped that with the appointment to the bench of Justice Antonin Scalia, one of the earliest faculty advisors to the fledgling Federalist Society and a firm defender of what former Reagan Administration Solicitor General Charles Fried has described as a "geometric view" of the separation of powers (Fried 1991, 141), the non-delegation doctrine could once again burn brightly as it did briefly during the New Deal.

Three cases over the next twelve years presented the Supreme Court with the opportunity to resurrect the "Phoenixlike" non-delegation doctrine and to articulate something closer to a Madisonian, or "geometric" and formalist vision of the separation of powers doctrine: *Mistretta v. United States* (1989), *Clinton v. City of New York* (1998), and *Whitman v. American Trucking* (2001).¹⁴⁰

Mistretta v. United States (1989)

This case, sometimes referred to as the Sentencing-Guidelines case (Fried 1991, 161), challenged the constitutionality of the Sentencing Reform Act of 1984 (SRA).¹⁴¹ Described as "the most broad reaching reform of federal sentencing in this century," the SRA sought to remedy the problem of "unfettered judicial discretion" (Nagel 1990, 883) by creating an independent commission within the judicial branch of the Federal Government that would be vested with the power to establish binding sentence guidelines for all categories of federal offenses. The result of the Act, the United States Sentencing Commission, was to be composed of seven members appointed by the President, three of whom had to be federal judges, and who would be subject to removal by him for good cause (Stith and Koh 1993, 279-280). John Mistretta, who had been indicted in federal district court in Missouri on charges relating to a cocaine sale, moved to have the guidelines ruled unconstitutional "on the grounds that the Sentencing Commission constituted both a violation of the separation of powers doctrine and an excessive delegation of authority by Congress" (Nagel 1990, 906). Mistretta filed simultaneous appeals to the Eight Circuit and the Supreme Court. The Supreme Court, noting the "'imperative public importance' of the issue" due to the "disarray among the lower courts," granted Mistretta's petition before the Circuit court could hear the case (Nagel 1990, 907).

As told by scholars Kate Stith and Steve Y. Koh, the Sentencing Reform Act (SRA) was "long in gestation" and made for particularly interesting political bedfellows (Stith and Koh 1993, 223). Conceived by "liberal reformers as an anti-imprisonment and antidiscrimination measure" and championed by the likes of Senator Ted Kennedy, the United States Sentencing

Commission was ultimately "born as part of a more conservative law-and-order crime control measure" (Stith and Koh 1993, 223). While the Act had massive political support, passing with large majorities in both the House and the Senate, the Justice Department was split on the constitutionality of the guidelines. As then-Solicitor General and Federalist Society participant Charles Fried stated in his memoir, "the guidelines represented a tough policy on crime, but they also played fast and loose with separation-of-powers principles" (Fried 1991, 161). While recognizing the very real threat the Act proposed to the separation of powers, Fried as Solicitor General made the more pragmatic decision to try to save the guidelines as a victory for the law and order bloc of the Reagan Administration (Fried 1991, 167). This decision, as Fried describes it, was based in large part on the Supreme Court's holding in the 1988 Independent prosecutor case *Morrison v. Olson*, which I explored at length in the previous chapter. From that case, a frustrating and disappointing defeat from the Justice Department's perspective, Fried and his colleagues at Justice concluded that "the Department's separation-of-powers initiative was dead" and that this case was unlikely to result in its Lazarus-like resurrection (Fried 1991, 167).

Thus the United States, represented on brief by Federalist Society participants Charles Fried and John Bolton, weighted law and order concerns over the separation of powers issues at stake in this case and argued for the constitutionality of the Sentencing Guidelines. As detailed in Table 3.1, apart from Justice Scalia, only two other Federalist Society network actors participated in this case. Perhaps making the same calculation that the Solicitor General had made, Paul Bator and Michael Davidson each signed onto briefs as *amici curiae* in support of the United States arguing for the constitutionality of the Sentencing Guidelines. In fact, of the four parties participating as friends of the court in *Mistretta*, only one - the National Association of Criminal Defense Lawyers - argued that Congress had violated the separation of powers by making an excessive delegation of legislative authority to the Sentencing Commission. Ironically, this group of liberal stalwarts' brief was the only amicus brief to draw on the canon of Originalist scholarship in its argument, twice citing the Federalist Papers in its defense of the separation of powers.¹⁴² As would be expected, however, with no network actors arguing on behalf of the non-delegation doctrine, there were no cites in any of the briefs, *amici* or counsel, to Federalist Society scholarship. Moreover, of the total of six parties submitting briefs to the Supreme Court in *Mistretta*, only two (33%) drew on the Originalist canon in their arguments. Neither one of these parties was represented by a Federalist Society network actor.

Table 3.1

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Mistretta v. United States* (1989)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	<i>Paul M. Bator, Michael Davidson</i>	<i>Charles Fried, John Bolton</i>	Supreme Court: Justice Scalia
Citations to Federalist Society Actor Scholarship			
Citations to Originalist Sources	Federalist 47 (II), Federalist 81,	Federalist 47, Federalist 69, Federalist 73	Supreme Court (maj): Federalist 47 (II), Federalist 51, M. Farrand, The Records of the Federal Convention of 1787 Supreme Court (diss): Federalist 47

* *Italics indicate Federalist Society network participant arguing against strict separation of powers position*

The Supreme Court ruled 8-1 in favor of the United States with long-time Federalist Society patron and participant Justice Antonin Scalia in lone dissent. In its consideration of both the separation of powers and legislative delegation issues, the Court's majority opinion, authored by Justice Blackmun, begins by announcing its respect for the Madisonian constitutional design and its role in preserving liberty: "This Court has consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of powers... is essential to the preservation of liberty."¹⁴³ However, the Court's opinion then proceeds to articulate a more "flexible understanding of the separation of powers"¹⁴⁴ which, it insists, inheres in this Madisonian design. To support this argument, the majority draws on three different sources from the Originalist canon: The *Federalist 47*, The *Federalist 51*, and Max Farrand's *Records of the Federal Convention*. While acknowledging the importance of the "Constitution's structural protections," the majority concludes that in creating the United States Sentencing Commission "Congress neither delegated excessive legislative power nor upset the constitutionally mandated balance of powers among the coordinate branches."¹⁴⁵

Justice Scalia's dissent in *Mistretta*, which Charles Fried referred to in his memoir as "one of his finest" (Fried 1991, 169), relies on similar language and at least one of the same Originalist sources to articulate a very different vision of the Framers' constitutional architecture. Where the majority opinion called for a "flexible" approach to the separation of powers, Scalia's

opinion insists that only a "rigorous" approach will preserve "the Constitution's structural restrictions" that safeguard liberty and popular sovereignty.¹⁴⁶ Echoing the concerns, explored in earlier sections, of many Federalist Society members with the relationship between legislative delegation and popular sovereignty, Scalia's dissent states:

It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members of Congress could not, even if they wished, vote all power to the President and adjourn *sine die*.¹⁴⁷

Arguing that despite what the majority has reasoned, the Sentencing Commission represents the creation of "a new Branch altogether, a sort of junior varsity Congress," with very real and consequential lawmaking powers, Scalia closes his dissent by lamenting the tendency of the Court's separation of powers jurisprudence "to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much." He further chastises the majority for using Madison's reasoning in the *Federalist 47* to support its flexible view of the separation of powers: "[Madison] would be aghast, I think, to hear those words used as justification for ignoring that carefully designed structure so long as, in the changing view of the Supreme Court from time to time, 'too much commingling' does not occur."¹⁴⁸

Charles Fried concludes his discussion of the *Mistretta* case with the following hypothetical: "If by sacrificing the guidelines Justice Scalia's opinion could have been made to become the opinion of the Court, it would have been worth it... instead [*Mistretta*] was bound to become another nail in the coffin of a rigorous view of the separation of powers" (Fried 1991, 170). The former Solicitor General's logic, along with his pragmatic calculation that the "rigorous" view of the separation of powers would not carry the Court after *Morrison v. Olson*, could explain the lack of Federalist Society network participation in this case and the hesitancy on the part of actors partial to law and order legislation to argue on its behalf. In the end, the proponents of non-delegation hoping to resurrect this Phoenixlike doctrine, though largely absent from this case, would have to settle for a burning ember in Justice Scalia's strong but losing defense of a rigorous separation of powers in *Mistretta*.¹⁴⁹ It would be almost ten years before the issue of legislative delegation would come before the Supreme Court again. This time around, the Federalist Society would have perhaps its greatest and most consistent champion on the bench alongside Justice Scalia, President George H.W. Bush appointee Clarence Thomas.

Clinton v. City of New York (1998)

This case challenged the constitutionality of the Line Item Veto Act, which was signed into law by President Clinton on April 9, 1996.¹⁵⁰ The Line Item Veto Act (LIVA) gave the President the authority to cancel certain spending and tax benefit measures after he had signed such measures into law. Passed by the Republican-led Congress with strong bi-partisan support, LIVA "seemed to be the perfect solution in the midst of an election year to show both parties' commitments to work together to balance the budget" (Gerhardt 1997, 233). In hopes of preventing the President from using the line-item veto, a group of six Senators led by Robert Byrd (D-WV) and Mark Hatfield (R-OR) brought suit in the United States District Court for the District of Columbia. The Senators received a summary judgment from the District Court that the Line Item Veto Act violated the Presentment Clause (Art. 1, S.7, cl.2) and constituted an unconstitutional delegation of legislative power to the President.¹⁵¹ Shortly thereafter the Supreme Court, on appeal in *Raines v. Byrd*, remanded and held that that the parties lacked standing to bring the suit, because the "President had not yet used the Act's cancellation authority" and that the parties could not sue for anticipated damages. As such, in *Raines v. Byrd*, the Supreme Court refused to rule on the merits or the constitutionality of the Line Item Veto Act.

Within a few months of this decision, however, the President began to exercise his authority under LIVA to cancel certain measures including provisions of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997, the result of which materially affected several parties including the city of New York, two hospital associations, two unions representing health care employees, and a potato farmers' cooperative. These parties brought suit in the District Court for the District of Columbia, which consolidated the cases and held on February 12, 1988 that: at least one party in each case had standing to sue, that LIVA violated the Constitution's Presentment clause specifically, and the doctrine of the separation of powers more generally.¹⁵² The Supreme Court, on direct and expedited appeal, considered these same questions and, in a rather messy opinion, affirmed the judgment of the District Court on June 25, 1998.

By the numbers, the Federalist Society network was relatively well-represented in *Clinton v. City of New York*. Of the six parties filing briefs as friends of the court, the four Federalist Society network actors listed in Table 3.2 represented three (50%) of those parties. The appellees in this case, the City of New York and the Snake River Potato Farmers, were represented by two Federalist Society network actors: Charles J. Cooper, and David H. Thompson. Moreover, with the exception of Thomas B. Griffith arguing as legal counsel for the United States Senate as *amici curiae*, all participating network actors were arguing that the Line Item Veto Act be declared unconstitutional. And, of course, the Federalist Society network had on the bench in this case alongside Justice Scalia one of its most consistent allies in Supreme

Table 3.2

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Clinton v. City of New York* (1998)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Michael Davidson, Marci A. Hamilton, David Schoenbrod, <i>Thomas B. Griffith</i>	Charles J. Cooper, David H. Thompson	Supreme Court: Justice Scalia, Justice Thomas
Citations to Federalist Society Actor Scholarship	Michael Rappaport, Veto Burdens and the Line Item Veto Act, <i>91 Nw. U. L. Rev.</i> 771 (1997); Lawrence Lessig, Lessons from a Line Item Veto Law, <i>47 Case W. Res. L. Rev.</i> 1659, 1663 (1997); David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation 30-33 (1993);		District Court: Robert Destro, <i>Whom Do You Trust? Judicial Independence, the Powers of the Purse & the Line Item Veto</i> , 44-Jan. Fed. Law. 26, 29 (1997).
Citations to Originalist Sources	Declaration of Independence, M. Farrand, The Records of the Federal Convention of (1787) (VII), The Works of James Wilson 406 (Andrews ed. 1896), Federalist 51 (III), Federalist 48, Federalist 58 (II), Federalist 33, Federalist 62, Federalist 9, Federalist 46, D. Webster, Second Reply to Hayne (Jan. 26 & 27, 1830), Federalist 73 (II), J. Story, Commentaries on the Constitution (1833), The Writings of George Washington (1940)	Declaration of Independence, M. Farrand, The Records of the Federal Convention of (1787), Federalist 22 (II), Federalist 51 (II), Federalist 73, Debates in the Several State Conventions on the Adoption of the Federal Constitution, Jonathan Elliot ed. 1836	Supreme Court: J. Story, Commentaries on the Constitution of the United States (1833), W. Blackstone, Commentaries (1783), The Writings of George Washington (1940), Federalist 47 (II), Federalist 84; District Court: Federalist 47, Federalist 51, W. Blackstone, Commentaries (1783), The Writings of George Washington (1940)

* *Italics indicate that Federalist Society network actor was arguing against strict separation of powers position*

Court Justice Clarence Thomas.¹⁵³ In terms of Federalist Society scholarship, two of the six amicus briefs (33%) make use of network actor scholarship in their arguments. Not surprisingly, these two amicus briefs were written by the three Federalist Society actors - David Schoenbrod, Marci A. Hamilton, and David H. Thompson - and all argued that LIVA be declared unconstitutional. As illustrated in Table 3.2, these same two amicus briefs draw extensively from the Originalist canon in their arguments, as do the counsel briefs for the appellees, worked on by the three other Federalist Society network actors listed above. It should be noted that none of the briefs filed on behalf of appellants in this case made reference to the canon of Originalist scholarship.

The District Court opinion, authored by Judge Thomas F. Hogan, adopted in good measure both the logic of and the authoritative sources referred to in the amicus brief submitted by Senators Byrd et. al, with Federalist Society participant Michael Davidson as counsel on record.¹⁵⁴ Both the District Court opinion and the Davidson brief, for instance rely on *The Writings of George Washington* in support of their claims that LIVA violates the bi-cameral and presentment requirements of Article I, section 7 of the Constitution.¹⁵⁵ Further, in their discussion of the separation of powers doctrine, both rely on Blackstone's *Commentaries*¹⁵⁶ and the *Federalist 51*¹⁵⁷ to underscore the importance of the balance of powers among the three branches of government. And though they cite different scholars in support of different parts of their arguments, both of these speech-acts authoritatively cite Federalist Society scholarship on the line item veto.¹⁵⁸ As Davidson's friend of the court brief urged, the District Court opinion authored by Hogan concluded that the Line Item Veto Act "impermissibly" attempted to "transfer non-delegable legislative authority to the Executive Branch" and was therefore in violation of "Article I, section 7 of the United States Constitution and the separation of powers doctrine."¹⁵⁹

In contradistinction to the clear, concise opinion that emerged from the District Court, the Supreme Court's opinion in *Clinton v. City of New York*, in affirming part of the judgment, was much more hydra-like in its analysis. The majority opinion, authored by Justice Stevens, and joined in pertinent part by Justices Rehnquist, Kennedy, Souter, Thomas and Ginsburg, held that the Line Item Veto Act violated the Constitution's presentment clause (Art 1, sec 7) but did not address the separation of powers or non-delegation questions. Nevertheless, in constructing its argument, the majority opinion incorporates verbatim three distinct references to the Originalist canon from the Davidson amicus brief: 3 J. Story, *Commentaries on the Constitution of the United States* § 1555, p. 413 (1833) (Art. II, § 3, enables the President "to point out the evil, and to suggest the remedy");¹⁶⁰ Our first President understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (J. Fitzpatrick ed., 1940);¹⁶¹ 1 W. Blackstone, *Commentaries* ("The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses").¹⁶²

Justice Kennedy wrote separately to address the separation of powers question. Citing both the *Federalist 47* and the *Federalist 84* (see opinion excerpt at the beginning of this chapter) Kennedy's opinion is a strong and concise defense of the separation of powers and the "Constitution's structure" which, as he insists, was designed to "transcend the convenience of the moment."¹⁶³ While Justice Kennedy's defense of the separation of powers as the key structural protection of liberty certainly resonates with many of the Federalist Society members' shared beliefs, it did not specifically address the non-delegation doctrine. In fact, the question of legislative delegation was broached by only one member of the Court, Federalist Society patron Justice Scalia. Writing in dissent and joined in part by Justice O'Connor, Scalia argued the following:

When authorized Executive reduction or augmentation is allowed to go too far, it usurps the nondelegable function of Congress and violates the separation of powers. It is [the non-delegation] doctrine, and not the Presentment Clause... that is the issue presented by the statute before us here... I turn, then, to the crux of the matter: whether Congress' authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch.¹⁶⁴

In a surprising departure from his strongly-worded defense of a "robust" application of the non-delegation doctrine in *Mistretta* just a decade earlier, Justice Scalia concluded that the Line Item Veto Act did not, in fact, constitute an undue delegation of legislative power.

The victory for proponents of the non-delegation doctrine, savored momentarily after Judge Hogan's opinion for the District Court for the District of Columbia, and the hope that the Supreme Court majority might resurrect the non-delegation doctrine were both short-lived. Within months of the District Court opinion, the Supreme Court had referred to the separation of powers issue only briefly and in a concurring opinion while one of its apparent champions, Justice Scalia, had resurrected the non-delegation doctrine in his dissent only to argue that the Line Item Veto Act did not offend it. Nevertheless, while the Supreme Court's reasoning in *Clinton v. City of New York* had not been ideal from a Federalist Society perspective, the opinion had struck down the Line Item Veto Act and had done so with at least some attention to separation of powers principles and, as I noted earlier, a fair amount of reliance on Originalist sources. After *Mistretta*, this would have to be considered progress for proponents of non-delegation and the separation of powers. The next major test for the non-delegation doctrine would involve what almost all Federalist Society network actors agree is the worst possible kind of legislative delegation from a separation of powers standpoint; that from Congress to an allegedly unaccountable Executive Branch agency, like the Environmental Protection Agency (EPA).

Whitman v. American Trucking (2001)

This case challenged the constitutionality of two sections of the Clean Air Act (CAA), which delegated to the Administrator of the Environmental Protection Agency (EPA) the authority to set and update national ambient air quality standards (NAAQS).¹⁶⁵ After a 1993 lawsuit challenging the EPA's failure to review and revise the NAAQS per the statute's requirement, the EPA issued a set of updated guidelines in 1997 that were far more stringent in regulating ozone and particulate matter concentrations (Clark 2000, 640). Even before the standards were proposed, as Craig Oren has detailed, interest groups were gearing up for "the mother of all environmental fights" (Oren 2006, 18). The National Association of Manufacturers formed an "Air Quality Standards Coalition," co-chaired by Federalist Society participant C.

Boyden Gray, which brought together “five hundred corporate leaders” to oppose the air quality standards (Oren 2006, 18). As Oren describes it, “the battle also raged on Capitol Hill” with opponents showing up at hearings wearing “fake glasses, lab coats and tangled wigs” with signs reading “‘EPA- Show Me the Science’ while nearby proponents changed ‘I want to breathe – dirty air stinks!’” (Oren 2006, 20). After losing the congressional battle, opponents of the air quality standards turned to the courts. The day the new standards were published, the American Trucking Associations and other industry groups filed suit. Eventually, “over ninety organizations” challenged the new standards in the District of Columbia Circuit Court of Appeals, many of whom argued that the Clean Air Act unconstitutionally delegated legislative power to the EPA (Oren 2006, 28).

The D.C. Circuit heard the case as *American Trucking Ass'ns v. EPA* and issued a *per curiam* opinion on May 14, 1999 in favor of the petitioners, ruling that the EPA's interpretation of the pertinent sections of the CAA had rendered them unconstitutional delegations of legislative power.¹⁶⁶ The court remanded to the agency, "giving the EPA an opportunity to save the statute by formulating an interpretation" that would be consistent with the non-delegation doctrine (Clark 2000, 641). The EPA petitioned the D.C. Circuit Court for rehearing en banc that same October but was denied. The Supreme Court granted cert and on February 27, 2001 handed down a unanimous and much-anticipated opinion, authored by Justice Scalia, reversing the D.C. Circuit Court's decision and ruling that the pertinent sections of the CAA did not unconstitutionally delegate legislative authority to the Environmental Protection Agency.

In terms of participation, of all the separation of powers cases examined in this thesis, Federalist Society network actors made their strongest showing in *American Trucking*. The twenty network actors participating as *amici curiae*, listed in Table 3.3, represented seven (27%) of the total twenty-six parties to file briefs as friends of the court. Further, all seven amicus briefs submitted by Federalist Society network actors in this case argued to affirm the D.C. Circuit Court decision. Additionally, three Federalist Society participants served as representative counsel for litigants in the case – Charles Fried, Jeffrey Clark and Edward Warren – and all three sought to affirm the lower court ruling. Moreover, six of the thirteen judicial decision-makers (46%) deciding the case at the Circuit and Supreme Court levels - Justice Scalia, Justice Thomas, Judge Williams, Judge Ginsburg, Judge Tatel, and Judge Silberman - were Federalist Society affiliates. Federalist Society scholarship was also extremely well-represented in this case with nine different amicus briefs (35%) citing eight distinct sources (see Table 3.3). Cites to the Originalist canon were less frequent in this case than those to Federalist Society scholarship, with just four amicus briefs (15%) relying on these sources in their arguments.

As at least one observer noted, the D.C. Circuit opinion in *American Trucking*, composed in pertinent part by frequent Federalist Society participant (see Figure 1.4) Judge Stephen F. Williams, applied a "weak" form of the non-delegation doctrine (Clark 2000, 645-

Table 3.3

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Whitman v. American Trucking* (2001)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Christopher Demuth, Milton Friedman, James C. Miller, III, W. Kip Viscusi, Theodore Olson, C. Boyden Gray, Carter G. Phillips, Orrin Hatch, Lloyd Cutler, Clint Bolick, Roger Pilon, Ronald Rotunda, Timothy Lynch, Robert A. Levy, David Schoenbrod, Marci A. Hamilton, Thomas W. Merrill, E. Donald Elliot, James E. Krier, Paul Clement	Charles Fried, Jeffrey B. Clark, Edward W. Warren	Supreme Court: Justice Scalia, Justice Thomas; DC Circuit Court: Judge Williams, Judge Ginsburg, Judge Tatel, Judge Silberman
Citations to Federalist Society Actor Scholarship	Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, <i>Duke Law Journal</i> 511, 514 (1989), David Schoenbrod, Power Without Responsibility (1993) (III), David Schoenbrod, The Nondelegation Doctrine from Constitutional and Policy Perspectives, 20 <i>CARDOZO L. REV.</i> 731(1999), David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 <i>Mich. L. Rev.</i> 1223, 1262-63 (1985), Antonin Scalia, "The Legislative Veto: A False Remedy for System Overload," <i>REG.</i> , Nov.-Dec. 1979 (II), Marci A. Hamilton, Representation and Nondelegation: Back to Basics, 20 <i>CARDOZO L. REV.</i> 807, 822 (1999) (II), Randall Lutter and Christopher DeMuth, "Ozone and the Constitution at EPA" American Enterprise Institute (July 1999), Edward Warren & Gary Merchant, "More Good Than Harm," 20 <i>ECOL. L. Q.</i> 379 (1993).		
Citations to Originalist Sources	Federalist 51, Federalist 47 (III), J. Story, Commentaries on the Constitution (1891), James Madison, Notes of Debates in the Federal Convention of 1787 272 (Koch ed., 1966), Thomas Jefferson, Notes on the State of Virginia, (Peterson, ed., 1975)		

646). The opinion more or less states as much, admitting that by remanding the statute to the EPA for re-interpretation instead of forcing the legislature to make the fundamental policy choices, the court does not apply "the strong form of the non-delegation doctrine voiced in Justice Rehnquist's concurrence" in the *Benzene* case over two decades earlier.¹⁶⁷ Judge Williams believed the Circuit Court was effectively carving out a middle path between two versions of judicial activism: going against precedent by resurrecting a strong version of the non-delegation doctrine or being forced, as unelected judges, to make a "policy decision" in finding an intelligible principle among several possible interpretations of an ambiguous statute.¹⁶⁸ Judge Williams had expressed a strong concern with judicial activism in a talk he had given at the 1994 Federalist Society National Conference, entitled "Hayek on the Bench." While expressing the same concerns other network actors had about the importance of individual liberty and the danger of arbitrary rules and standards, most famously articulated by Friedrich Hayek, Williams nonetheless concluded that "no central committee of Hayekians can [dictate those standards] even if they wear black robes and are dubbed a court."¹⁶⁹

In addressing the issue of delegation, the Supreme Court's majority opinion, written by Justice Scalia and joined in pertinent part by the eight other Justices,¹⁷⁰ found that the "scope of discretion" delegated from Congress to the EPA in the statute under consideration was "well within the outer limits" of the Court's "nondelegation precedents." It further held that Judge Williams' and the Circuit court's middle-path remedy ("that an agency can cure an unconstitutionally standardless delegation of power") was "internally contradictory" and inconsistent with past applications of the doctrine.¹⁷¹ Federalist Society member and hero Justice Thomas, while agreeing with both these holdings, wrote separately to announce his willingness to seriously reexamine "on a future day... the question of whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers." Thomas' concurrence openly lamented the fact that the parties who submitted briefs in *American Trucking* had given "barely a nod to the text of the Constitution" and that none had asked the Court to "reconsider [its] precedents on cessions of legislative power."¹⁷² As illustrated by Table 3.3, Justice Thomas is correct in that none of the counsel's briefs engaged in Originalist analysis. On the other hand, four of the *amicus curiae* briefs submitted in this case rely on Originalist sources and give at least a "nod" to the constitutional text in their discussions of the non-delegation doctrine. Further, at least two of these briefs, both authored by Federalist Society network actors, suggested in no uncertain terms that the Court should revisit its rulings on legislative delegation.¹⁷³

Even though Judge Williams and the D.C. Circuit Court had relied on an admittedly "weak" version of the non-delegation doctrine in their *American Trucking* opinion, members of the Administrative Law and Regulation Practice Group of the Federalist Society were optimistic enough about the decision to host a panel at the 1999 National Lawyers Conference featuring many of the network participants in the case including David Schoenbrod, Edward Warren, and C. Boyden Gray, which they enthusiastically titled "The Non-Delegation Doctrine Lives!"¹⁷⁴

Not fifteen months after this conference, however, the Supreme Court ruling had, if not quashed entirely, at least dampened this spirit of optimism about the vitality of the non-delegation doctrine. As one legal scholar writing shortly after the Supreme Court decision commented, "... if not dead and buried, the nondelegation doctrine is on life support..." (Neuman 2001, 262). Similarly, Federalist Society member Cynthia Farina observed in the *Harvard Journal of Law and Public Policy*, that "if Academy Awards were given in constitutional jurisprudence, nondelegation claims... would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case" (Farina 2010, 87). Nevertheless, just days after the decision was handed down frequent Federalist Society participant Richard Epstein articulated a tempered optimism about the prospects for the doctrine in a *Wall Street Journal* article: "... when the dust has settled, my friend Edward Warren, who masterminded the truckers' litigation strategy, should not be so disappointed with the outcome."¹⁷⁵ Moreover, a few years after the decision in *American Trucking*, two Federalist Society affiliated scholars, Larry Alexander and Saikrishna Prakash, penned a strong constitutional defense of the non-delegation doctrine in their aptly titled law review article, "Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated" (Alexander and Prakash 2003). With Justice Thomas' concurrence indicating a willingness to seriously reconsider legislative delegation, and with the addition of two other Federalist Society network actors to the Supreme Court since the decision in *American Trucking* - Justice Samuel Alito and Chief Justice John Roberts - actors in the Federalist Society network don't seem either ready or willing to pull the plug on the non-delegation doctrine just yet.

Evaluating Federalist Society Network Impact on the Non-Delegation Doctrine

How closely does the current state of Supreme Court doctrine on legislative delegation mirror the beliefs of Federalist Society network actors? To recall the discussion of network actors' beliefs on the non-delegation doctrine from the opening section of this chapter, I noted that these beliefs can be understood as falling into three broad categories of concerns with legislative delegation: (1) it threatens individual freedom by stripping the people of the right to make policy decisions and hold their representatives accountable for those decisions; (2) disrupts the Framers' constitutional architecture by concentrating too much power in the hands of one branch of government at the expense of another; and (3) it facilitates rent-seeking by special interests, thereby making national policy more susceptible to the mischiefs of faction.

The short answer to this question is, not very closely at all. Justice Scalia's dissent in *Mistretta* and Justice Kennedy's concurring opinion in *Clinton v. City of New York* are each a close reflection of one or more of these beliefs but, as has been noted earlier, neither one gained enough support to become the authoritative opinion of the Supreme Court. The Federalist Society network did, however, win some important battles at the lower court levels in terms of

how these courts articulated their separation of powers arguments. Recall that District Judge Thomas Hogan, in declaring the Line Item Veto Act unconstitutional, relied in good measure on the language and rationale of network actor Michael Davidson's *amicus curiae* brief, which, in short, provided a clear statement of the second set of separation of powers concerns articulated above. Further, Circuit Judge and Federalist Society participant Stephen F. Williams had done his best to resurrect some form of the non-delegation doctrine in the D.C. Circuit's opinion in *American Trucking* in the hopes that it might once again function as a structural protection, albeit a weak one, against - to recall Hayek's language cited by network actors in explicating the first category of concerns listed above - the application of "arbitrary" rules and standards.¹⁷⁶

The Federalist Society network's lack of success at the Supreme Court level is certainly not explained by lack of effort or participation. Comparing Tables 3.1, 3.2, and 3.3, we can see that in terms of raw numbers overall participation by Federalist Society network actors in all categories (as amici, counsel, and decision-makers) increased steadily from *Mistretta* (1989) to *Clinton* (1998) to *American Trucking* (2001). There was also a dramatic increase in citations to Federalist Society scholarship by amici in their briefs to the Supreme Court, from zero in *Mistretta* to three in *Clinton* to a total of twelve in *American Trucking*. Citations to the Originalist canon also increased across all three categories of participants from *Mistretta* to *Clinton* but dropped again from *Clinton* to *American Trucking*. This is all to illustrate that in these three cases, each separated by about a decade, more and more of the epistemic community's ideas about separation of powers and the non-delegation doctrine are being diffused to judicial decision-makers. While these beliefs have yet to gain a majority's acceptance on the Supreme Court, they are in the Court's dialogue and, as we have seen in several instances, are being taken seriously by some key decision-makers.

This explains, as I alluded to before, some members' unwillingness to pull the plug on the non-delegation doctrine even after one of the great patron saints of the Federalist Society, Justice Scalia, handed, in the words of Richard Epstein, "the defenders of the large state" and "liberal defenders of the status quo" a "significant victory" with his opinion in *American Trucking*.¹⁷⁷ Recognizing that their continued participation in Supreme Court cases is working towards "changing the climate" of ideas and debate, Federalist Society network actors seem willing to be patient and persistent. As Federalist Society member Michael Rappaport, who has written on the non-delegation doctrine, remarked in an interview: "You want to change the world, you have to be patient."¹⁷⁸ Federalist Society advocates and supporters of the next set of structural doctrines to be examined in this thesis, federalism and state sovereignty, would not have to be as patient as those attempting to resurrect the non-delegation doctrine. The six cases examined in Chapters Five and Six testify to the fact that real, serious doctrinal change is possible and help explain, in part, the continued efforts of epistemic community members in doctrinal areas, like the separation of powers, where they have yet to see parallel success in the courts. Before moving on to the vertical separation of powers, however, the next chapter of the thesis wraps up the horizontal separation of powers narrative by focusing on the efforts of Federalist Society

network actors, particularly those in the George W. Bush Administration, to implement the theory of the Unitary Executive in the Executive branch; a campaign that has been, by many measures, far more successful than either of the two previously examined separation of powers campaigns network actors have waged in the courts.

Chapter Four -----

Separation of Powers III: The Unitary Executive Theory in the Executive Branch, 2001-2008

*Today I have signed into law H.R. 3199, the "USA PATRIOT Improvement and Reauthorization Act of 2005"...The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 199, in a manner consistent with the President's constitutional authority to supervise the **unitary executive** branch and to withhold information the disclosure of which could impair... the performance of the Executive's constitutional duties.*

- George W. Bush, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, Mar. 9, 2006¹⁷⁹ (bold emphasis added)

*If Article II enables the President to shield his office from enforcing or executing unconstitutional laws, then the particular entity within the executive branch that is charged with enforcing this shield is the Department of Justice... more specifically, the **Office of Legal Counsel**.*

- Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* (Kelley 2003, 27) (bold emphasis added).

*One of the things about the Federalist Society is, because it's a small network of conservative lawyers, people help each other get jobs, people recommend each other... the interesting thing is to look at who's been in [the George W. Bush] Administration. Because, now we're all grown-ups, right, and everybody, everybody who got a job who was a lawyer was involved in the Federalist Society... [T]he people who were in the Justice Department, who were in the **Office of Legal Counsel**... all those people were Federalist Society types. I mean all of them.*

- Daniel Troy, Federalist Society member, Jan. 30, 2008¹⁸⁰ (bold emphasis added)

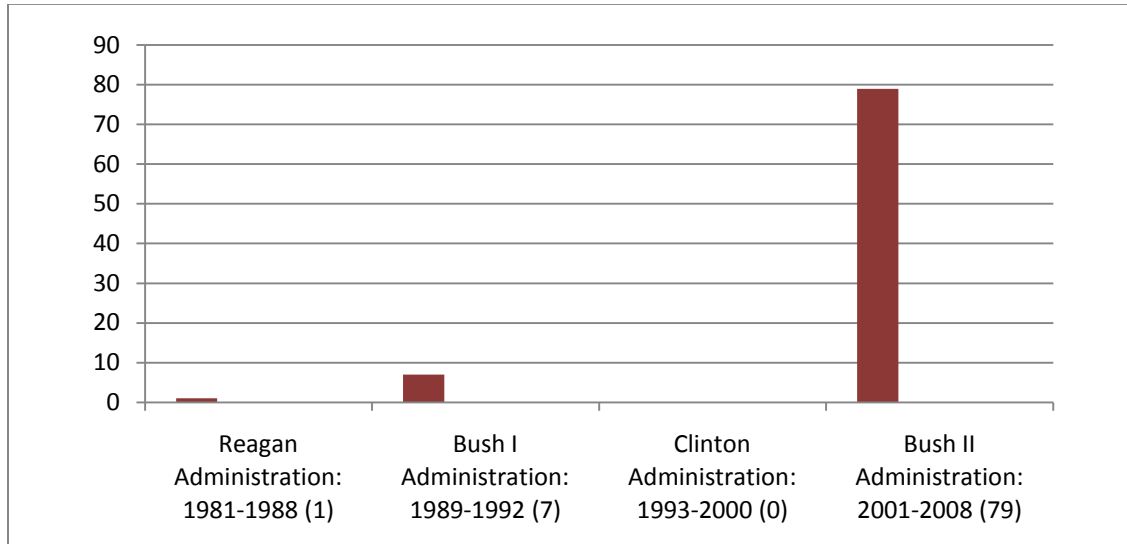
As we have seen, the Federalist Society network's battle to advance a more "Madisonian" approach to the separation of powers in the federal courts from *Chadha* through *American Trucking* had resulted in modest and incremental gains at best. This chapter shifts the focus of the narrative briefly from the courts to the Executive branch to demonstrate how coordinate efforts to implement these separation of powers principles in Executive branch policy yielded a series of short-lived but quite remarkable victories for proponents of the Unitary Executive. This Executive branch campaign to insinuate the principles of the Unitary Executive into law and policy, like its counterpart in the federal courts, was conceived in the Reagan Justice Department and supported and nurtured by members of the fledgling Federalist Society network. While I do

describe some of the early efforts by network actors in both the Reagan and Bush I Administrations to realize these beliefs in Executive branch policy, the crusade to implement the Unitary Executive theory was most vigorously pursued and had the greatest impact in the George W. Bush Administration. After all, as member Daniel Troy alluded to in the excerpt at the beginning of the chapter, the fledgling Federalist Society types working as assistants in the Reagan and first Bush Administrations were "all grown up" by 2001 and in a position to effect serious change. Figure 4.1 on the next page provides a crude illustration of this impact. It compares the number of times the language of the "unitary executive" provided explicit grounds for Executive action in the George W. Bush Administration relative to prior Administrations. As we see, even from the first Bush Administration, the use of the language "unitary executive" in Executive Branch public papers increased from seven mentions to a remarkable seventy-nine mentions.

As the excerpt from scholar Christopher Kelley at the beginning of the chapter explains, the Justice Department's Office of Legal Counsel (OLC) is the primary entity responsible for weighing legal and constitutional principles against Executive branch policy and advising the President accordingly. As such, there are two principal mechanisms by which OLC actors can shape legal policy: the drafting of Presidential signing statements and the issuance of authoritative memos that provide legal and constitutional justification for Executive branch action. Presidential signing statements, official statements issued by the President upon signing a bill into law, have been used since the early 19th century for a variety of purposes: to advance the President's interpretation of statutory language, to assert constitutional objections to the provisions of a bill, and to declare that certain provisions of a law will be executed in a manner consistent with the "President's constitutional prerogatives" (Halstead 2007, i). Though used with considerable frequency by every President since the Reagan Administration, the Presidential signing statement became a critical vehicle in the George W. Bush Administration for implementing OLC's views on the Unitary Executive. The legal opinions issued by the Office of Legal Counsel represent an even more potent source of influence these actors maintain over the articulation of Executive branch policy. As scholar Cornell Clayton has explained of OLC, "because this office is routinely asked to develop legal positions to support the administration's policy initiatives," it is often described as one of the "most politicized units" in the Justice Department (Clayton 1992, 34). As the excerpt from Daniel Troy at the beginning of this chapter alluded to, during the George W. Bush Administration this highly "politicized" office was densely populated with Federalist Society network actors. These actors would take full advantage of their institutional roles at OLC to develop legal and constitutional positions on the War on Terror and Executive privilege deriving from and supported by the theory of the Unitary Executive.

Figure 4.1

**Mentions of the "Unitary Executive" in Executive Branch Public Papers
1981-2008**



Source: The American Presidency Project, University of California, Santa Barbara¹⁸¹

Before detailing the specific efforts of actors at the Office of Legal Counsel, however, the next section reviews the beliefs of the Federalist Society network on the Unitary Executive. It focuses on how the general arguments on behalf of the Unitary Executive explored in Chapter Two translate into specific beliefs about the President's War Powers, Executive Privilege, and the coordinate role of the Executive branch in statutory and constitutional interpretation. The chapter then examines the work products of Federalist Society affiliates at OLC - opinions and signing statements - as empirical evidence of the impact of the network's beliefs about the Unitary Executive on some of the most controversial policies of the George W. Bush Administration. Finally, taking all the evidence into account from the Judicial and Executive branches, the chapter closes with a reevaluation of the extent to which these actors have succeeded in diffusing beliefs about the Unitary Executive theory into law and policy. It concludes that while the separation of powers campaign carried out by network actors in *Chadha* through *American Trucking* was far less impressive than its counterpart in the Executive branch in terms of the scope and immediacy of its intellectual impact, the few victories in the federal courts, though partial and incremental, have been more long-lasting.

Federalist Society Network Actors on the Unitary Executive and the Executive Branch

This section surveys some of the beliefs expressed by Federalist Society network actors, both at National meetings and in outside scholarship, on the Unitary Executive theory's functional relationship to the exercise of three important aspects of Executive branch power: the Commander in Chief (CIC) power, Executive Privilege, and the President's role in law-making and interpretation. As I show, variations on the general arguments supporting the Unitary Executive catalogued in Chapter Two have been drawn on by Federalist Society affiliated actors to support (1) a robust understanding of Executive power in War and foreign relations, (2) a justifiable policy of Executive privilege, and (3) a strong role for the Executive branch in statutory and constitutional interpretation. For organizational purposes, I explore the first two in tandem, explaining how these policy arguments derive from a similar interpretation of both Article II of the constitution and from Hamilton's arguments in the *Federalist*. I then examine the set of network actor beliefs, which are more Madisonian in nature, supporting a coordinate role for the President in legislative interpretation.

Network Actors on The Unitary Executive Theory: War Powers and Executive Privilege

Speaking at the 2006 Federalist Society National Lawyers Conference, controversial University of California, Berkeley law professor, former George W. Bush Administration OLC appointee, and frequent Federalist Society participant (see Figure 1.4) John Yoo described two kinds of arguments that support a strong view of presidential power in response to war and emergency: "formalist" and "functionalist."¹⁸² The "formalist" argument situates the President's textually described Article II powers in historical perspective, arguing that the Framers imbued the terms "Commander in Chief," and the "executive power" with a "broad catalogue" of "power and duties" when it came to war (Yoo 1996, 198, 202). Roger Pilon, Cato Institute fellow and Federalist Society participant, has also articulated this "formalist" argument for a robust conception of Presidential war powers, citing the Framers' understandings of the "executive power" as evidence:

...the dispute boils down in the end to the simple question of whether the President is the nation's principal agent in matters of war and peace and, if so, whether Congress has the authority to try to micromanage the exercise of that power. Madison, Jefferson, Hamilton, and most others in the founding generation were quite clear on the point. Here is Madison: "All powers of an Executive nature, not particularly taken away must belong to that department," with Jefferson adding, "Exceptions are to be construed strictly." A rare point of agreement between Jefferson and Hamilton.¹⁸³

The "functionalist" argument in favor of a broad understanding of Presidential war powers is also familiar from the overview of the Unitary Executive theory provided in Chapter Two. It draws on Hamilton's *Federalist 70* to emphasize the functional or operational advantages of allocating the war powers to the Executive branch. As Yoo described it, the "functionalist" argument is based on "the idea that the Executive Branch would be the one that was most effective at waging war because it had unity, secrecy, and the ability to act with decision."¹⁸⁴ More than a decade prior to being elected Vice President for George W. Bush, Richard Cheney articulated the same argument on behalf of a broad understanding Presidential war powers, citing Hamilton's *Federalist 70* in front of a Federalist Society audience at the 1989 National Lawyers Conference: "The Presidency...was designed as a one-person office to ensure that it would be ready for action. Its major characteristics, in the language of *Federalist Number 70*, were to be "decision, activity, secrecy, and dispatch."¹⁸⁵

Additionally, the "functionalist" argument for Presidential war powers cites the Framers' mistrust of Congress, a large deliberative body, to maintain the secrecy necessary for the execution of war. Federalist Society participant Robert F. Turner, in a Federalist Society sponsored online debate, catalogued the concerns of Benjamin Franklin, John Jay and others with the inability of Congress to keep secrets:

The Founding Fathers understood both from theory and practice that large deliberative assemblies could not be relied upon to keep secrets. As early as 1776, the Committee of Secret Correspondence unanimously concluded it could not inform the rest of the Continental Congress about a sensitive French covert operation assisting the American Revolution, because (as Benjamin Franklin put it) "We find by fatal experience that Congress consists of too many members to keep secrets." In *Federalist No. 64*, John Jay explained that valuable foreign intelligence might be obtained "if the persons possessing it can be relieved from apprehensions of discovery." Since many would not trust Congress to keep secrets, Jay explained, the Constitution had left the President "able to manage the business of intelligence in such a manner as prudence may suggest."¹⁸⁶

The importance of secrecy and intelligence gathering and the need for swift and unified action in a time of war, have all been cited by Federalist Society network actors as functional arguments, grounded in the views of the constitutional Framers, for the President's constitutional right to ignore Congressional requests for consultation and notification per the War Powers Resolution of 1973. For instance, former Federalist Society Board Member Robert H. Bork argued in his special address to the 1989 National Lawyers Conference that the timetables Congress had prescribed via the War Powers Resolution violated "the President's constitutional authority as Commander-in-Chief and main actor in our foreign policy" to conduct war and the Act was therefore "unconstitutional."¹⁸⁷ More recently, these same arguments have been mobilized by Federalist Society affiliates to justify the President's right to sidestep certain provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA) which require that surveillance and wiretapping of United States citizens be conducted with a warrant. Roger Pilon, for example, has referred to FISA as another attempt by Congress to "micromanage" the Executive branch's

execution of its constitutionally granted war powers, adding that in a post- "9/11" world "we can't afford that kind of micromanagement - nor does the Constitution permit it."¹⁸⁸

Four-time Federalist Society National Meeting participant David A. Rivkin has used this same functionalist logic to support the assertion of Executive Privilege in response to requests by Congress for other, non-war related documents or testimony that the President may deem sensitive: "The decision to invoke the executive privilege is by its very nature a policy decision, which lies at the very heart of the President's constitutional responsibilities." Rivkin has argued that the invocation of privilege "is always done not only to protect a particular set of internal Executive Branch deliberations or communications, but to protect future Presidencies." Further, in defending President Bush's decision to invoke privilege against Congressional requests for testimony from Executive branch officials about the controversial firing of eight United States Attorneys, Rivkin echoed Roger Pilon's frustrations with Congress' unconstitutional attempts to "micromanage" the Executive branch.¹⁸⁹ Other Federalist Society network actors have mobilized a "formalist" argument, similar to the one deployed in defense of the Commander-in-Chief power, for the President's right to assert Executive privilege. For instance, at the 1996 National Lawyers Conference Theodore Olson cited Article II's Take Care clause to argue that legislative oversight of the Executive branch was "unconstitutional" to the extent that "it is taking away the power of the President to 'take care that the laws are faithfully executed.'"¹⁹⁰

At the 1989 National Lawyers Conference, journalist and Federalist Society participant L. Gordon Crovitz combined the "formalist" and "functionalist" arguments for a Unitary Executive in his defense of the use of Executive privilege that would eventually lead to the legal proceedings, described in Chapter Two, in *Morrison v. Olson*:

Today's innumerable hearings clearly interfere with any efficient running of executive departments. As Terry Eastland said yesterday, separation of powers issues must be judged in part on whether a congressional practice saps the "energy" the founders intended would reside in the executive branch. The language involved - "oversight," for example - confusingly creates the illusion that Congress oversees the executive branch. Indeed, it is more accurate, constitutionally speaking, to say that if one branch has explicit oversight powers it must be the executive branch. It is the President who has the constitutional duty to "take Care that the Laws be faithfully executed."¹⁹¹

As we have seen, relying on arguments for the Unitary Executive familiar from Chapter Two's overview, Federalist Society actors have used both a "formalist" interpretation of the President's Article II powers and a "functionalist" reading of Hamilton and other Founders' speech-acts to support broad interpretations of the Commander-in-Chief and Executive powers as well as the implied constitutional right of the President to assert Executive privilege against Congressional requests for information or testimony. The next set of broad arguments supporting a greater role for the Executive in law-making and interpretation draw on variations of these same approaches but more directly implicate a third set of Unitary Executive beliefs; those articulated in Madison's essays in *Federalist 47* through *Federalist 51*.

Network Actors on The Unitary Executive Theory and Executive Branch Interpretation

In a series of public and now-notorious speeches delivered between 1985 and 1986, Federalist Society participant Edwin Meese III used the Attorney General's bully pulpit to address and defend "the prerogative of the president to independently interpret the constitutionality of law" (Kelley 2006, 79). Relying on Madison's logic in *Federalist 49*, Meese's speeches stressed the importance of "maintaining the constitutional equilibrium of government" and challenged the notion that the Judicial branch was the sole expositor of the Constitution (Rossiter ed. 1961, 283). In one of these speeches, given before the D.C. Lawyers Chapter of the Federalist Society, Meese couched his argument in now-familiar separation of powers principles: "The great genius of the constitutional blueprint is found in its creation and respect for spheres of authority and the limits it places on governmental power. In this scheme the Framers did not see the courts as the exclusive custodians of the Constitution."¹⁹² In perhaps his most famous speech, reprinted in the *Tulane Law Review*, Meese referred to the *Federalist 51* as well as Madison's later writings to support the view that all "three branches of government are coordinate and equally bound to support the Constitution" and continuing in James Madison's own words, that "each must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it" (Meese 1986, 982, 988).

Attorney General Meese's public campaign to garner support for the Justice Department's push to broaden the role of the Executive in constitutional interpretation coincided with a much quieter initiative within the Executive branch that Federalist Society Co-Founder Steven Calabresi would later refer to as "the signing statement initiative."¹⁹³ As Calabresi has testified, he was the "staffer to Attorney General Meese who originally came up with the idea of the signing statement initiative," which included a successful proposal to have West Publishing Company publish the president's signing statements alongside the Legislative History of a statute so that courts might refer to it as an additional, authoritative and co-equal interpretation of a bill.¹⁹⁴ Unlike Attorney General Meese, who relied in his speeches on Madison's separation of powers logic to defend a robust role for Executive branch interpretation vis a vis Congress and the Judiciary, Calabresi has instead supported the use of signing statements by referring to the "vesting clause" of Article II as a grant of power that empowered a "unitary executive" to control the entire Executive branch:

... presidential signing statements ought to be treated as having legal significance... because of the theory of the unitary executive. This theory holds that the Vesting Clause of Article II is a grant of all of the executive power in the country to the president... Because the Article II Vesting Clause vests ALL of the executive power in only one person - the president - all other executive branch officials exercising executive power must do so by the implicit delegation of the President... Signing statements allow the President to provide authoritative guidance to his subordinates in the executive branch as to how they should carry out and execute the law... So viewed, signing statements serve a vital function in making the executive branch function in practice the way Article II says it should function in theory.¹⁹⁵

In light of this view, Calabresi has argued, President George W. Bush "ought to be praised" for his frequent use of signing statements "since they underline his resolution to fully and vigorously carry out his responsibilities under Article II of the Constitution."¹⁹⁶

Several other Federalist Society network actors have advocated the use of Presidential signing statements as a critical component to putting the Unitary Executive theory into practice. At the 1989 National Lawyers Conference, for example, Theodore Olson described Presidential signing statements as an important element of statutory interpretation, on par with "the legislative history," as tools for courts to use in interpreting the law.¹⁹⁷ As a participant on that same panel, frequent Federalist Society participant Frank Easterbrook explained that the President's "signing statements are entitled to the same kind of weight as, say, a statement in the Senate by the responsible committee that is sending forward a piece of legislation."¹⁹⁸ More recently, on the heels of a report issued by the American Bar Association (ABA) critiquing President George W. Bush's use of Presidential signing statements, a group of eight Federalist Society network actors - Edwin Meese III, Gary Lawson, John S. Baker, Lee A. Casey, Charles J. Cooper, Steven Calabresi, David Rivkin, Jr., and Robert F. Turner - responded with a statement, published on the Federalist Society website, defending the constitutionality of signing statements.¹⁹⁹ Citing the President's constitutional responsibility under the Take Care clause of Article II of the Constitution, the signatories argued that "The President has an obligation to not enforce unconstitutional parts of statutes (and not to interpret them in ways that would render them unconstitutional)." In addition to defending the constitutionality of signing statements, the group illustrated the practicality of this option with reference to appropriations bills:

Sadly, all too many bills that reach the President's desk include one or more unconstitutional provisions. For example, virtually every appropriations bill contains a provision that violates the Supreme Court's holding in *INS v. Chadha*. Imagine the result if the President were required to veto every such appropriations bill... Given that the President has a duty under the Constitution not to enforce an unconstitutional provision of a bill, he ought to identify the unconstitutional portion... In specifying his intentions at the outset, he is not only meeting his constitutional obligation, he is doing so in the most transparent way possible.²⁰⁰

The three-page defense of Presidential signing statements concluded with a clear and simple message for its readers: "On so many levels, the ABA task force has simply gotten it wrong."

Having provided some sense of how the theory of the Unitary Executive has been used by Federalist Society network actors in their speech-acts to support a broad interpretation of the Commander-in-Chief power, a justifiable policy of Executive privilege, and the use of Presidential signing statements, the next task of this chapter is to examine how and to what extent these beliefs were translated into Executive branch policy by Federalist Society affiliated actors working at the Office of Legal Counsel (OLC) during the George W. Bush Administration.

The Unitary Executive Theory in the Executive Branch, 2001-2008

To recall the excerpt at the beginning of this chapter from scholar Christopher S. Kelley, the body within the Executive branch that is principally responsible for providing the legal and constitutional justification for the President's policies is the Justice Department's Office of Legal Counsel (OLC). During the eight years of the George W. Bush Administration, there were at least twelve active Federalist Society network participants working at the Office of Legal Counsel.²⁰¹ These twelve individuals all drafted and signed at least one published OLC opinion between 2001 and 2008 (see Table 4.1). Based on an inventory of all publicly available opinions published during that time frame, these Federalist Society network actors represented 44% of all signatories on OLC memos and, even more impressively, network actor-authored opinions accounted for 63% of the Office of Legal Counsel's total published production under the George W. Bush Administration.²⁰² This quantitative count of Federalist Society affiliated actors at OLC is important because it confirms what the excerpt from Daniel Troy at the beginning of this chapter alluded to; that there was indeed a strong Federalist Society network presence within this vital decision-making organ of the Executive branch. A qualitative analysis of the work-products of these actors - beginning with a set of controversial OLC opinions and moving on to Presidential signing statements - will show how and in what ways this Federalist Society network presence actually translated into impact on Executive branch policy.

Office of Legal Counsel Opinions: the Justification for the War on Terror

Initial evidence of just how deeply the theory of the Unitary Executive had penetrated the very new George W. Bush Administration can be found in a series of legal memos issued by the Office of Legal Counsel in the aftermath of the September 11th attacks. Five memos, issued between September of 2001 and March of 2003 and authored by Federalist Society participants John Yoo and Jay Bybee (see Table 4.2), provided the legal grounds for two controversial policies guiding the conduct of the War on Terror: the justification for conducting war domestically, which included the use of warrantless surveillance programs, and the policies on torture and interrogation based on legal judgments concerning the applicability of international rules and treaties. Relying on dozens of Originalist sources and mobilizing arguments familiar from this chapter's examination of speech-acts relating to the Unitary Executive, these Office of Legal Counsel memos provide some rather striking evidence of this epistemic community at work in the Executive branch.

Table 4.1

Federalist Society Network Participants As Documented Signatories on Office of Legal Counsel Memos, 2001-2008

Name	FS National Meeting Appearances	# OLC Memos Authored	Name	FS National Meeting Appearances	# OLC Memos Authored
John C. Yoo	14	8	Jay S. Bybee	1	10
Paul Clement	4	1	Noel J. Francisco	1	4
Randolph D. Moss	3	4	Joseph R. Guerra	1	3
M. Edward Whelan	2	27	Michael Mukasey	1	3
Vicki C. Jackson	2	1	Joan L. Larsen	1	2
Steven G. Bradbury	1	25	Jack Goldsmith	1	1

The first of these memos was circulated just two weeks after the terrorist attacks of September 11, 2001.²⁰³ Authored by frequent Federalist Society participant John Yoo, the opinion provided the legal and constitutional grounds for the Bush Administration to unilaterally reinterpret the Foreign Intelligence Surveillance Act (FISA) to include a broad-scale program of domestic surveillance and intelligence gathering. The opinion's legal reasoning, grounded in the "text, structure and history of the Constitution," reinforced the Unitary Executive theory's broad understanding of the President's constitutional Commander-in-Chief power: "...the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary foundation that enables the President to carry out that authority."²⁰⁴ Relying on six different Originalist sources (see Table 4.2), the Yoo-authored memo showcased both the formalist and functionalist arguments for Presidential war powers detailed in the previous section. For example, citing the Constitution's "Vesting Clause" as well as the "Commander in Chief Clause," the opinion argued that the Constitution "vests in the President the power to deploy military force in the defense of the United States" and, therefore, that "Intelligence operations such as electronic surveillance may well be necessary and proper for the effective deployment and execution of military force against terrorists."²⁰⁵ This grant of

constitutional authority, the memo continued, is further bolstered by a series of functionalist arguments, articulated by members of the Founding generation, advocating a strong role for the President in military and intelligence gathering operations:

As Alexander Hamilton explained in *The Federalist* No 74 "[o]f all the cares or concerns of government the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand... And James Ledell (Later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that "[f]rom the nature of the thing the command of armies ought to be delegated to one person only. The secrecy, dispatch, and decision, which are necessary in military operations, can only be expected from one person." Debate in the North Carolina Ratifying Convention, Jonathan Elliot, *The Debates in the Several States...* See also 3 Joseph Story, *Commentaries on the Constitution...* in military matters, unity of plan, promptitude, activity and decision are indispensable to success, and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power.²⁰⁶

The Yoo-authored memo established these constitutional grounds for amending FISA to cover domestic surveillance programs but was careful to point out that "FISA itself is not required by the Constitution" and that intelligence gathering activities conducted for purposes of national security "need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations." In other words, the memo concluded, once the President's constitutional war powers are triggered, the "calculus" that protects citizens against unreasonable searches and seizures under the Fourth Amendment "shift[s]" and national security considerations take precedence over individual liberties.²⁰⁷

A follow-up memo, circulated less than a month after this first and co-authored by John Yoo and Special Counsel Robert J. Delahunty, expanded the arguments mobilized in the FISA Memo to provide justification for a broad arsenal of domestic activities - beyond just intelligence gathering - designed to combat the threat of terrorism within the United States.²⁰⁸ As Table 4.2 illustrates, this memo drew on fourteen different Originalist sources to constitutionally justify the use of military force within the United States and to establish the President's power "to use military force, whether at home or abroad, in response to a direct attack upon the United states."²⁰⁹ This opinion expanded the formalist analysis of Article II's Vesting and Commander in Chief Clauses offered in the FISA Memo, and made an even stronger case for a broad interpretation of the President's constitutional war powers under the Unitary Executive theory:

... Article II vests in the President the Chief Executive and Commander in Chief Powers. The Framers' understanding of the meaning of "executive" power confirms that by vesting that power in the President, they granted him the broad powers necessary to the proper functioning of the government and to the security of the nation. Article II, Section I provides that "[t]he executive Power shall be vested in a President of the United States." By contrast, Article I's Vesting Clause gives Congress only the powers "herein granted" *Id.* art. I., S. 1. This textual difference indicates that Congress' legislative powers are limited to the list enumerated in Article I, Section 8, while the President's powers include *all* federal executive powers unenumerated in the Constitution... Thus, an executive power, such as the power to use

Force in response to attacks upon the nation, not specifically detailed in Article II, Section 2, must remain with the President.²¹⁰

Table 4.2

Catalogue of Citations to Federalist Society Scholarship and Originalist Sources in Federalist Society Network Actor-Authored Office of Legal Counsel Opinions Authorizing the War on Terror, 2001-2003

Subject of OLC Opinion	Title and Date	Federalist Society Network Author	Citations to Federalist Society Actor Scholarship	Citations to Originalist Sources
Domestic Surveillance	"Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the 'Purpose' Standard for Searches," Sept. 25, 2001	John C. Yoo		Federalist 23; Federalist 34; Federalist 41; Federalist 74 (II); J. Elliot, <i>The Debates</i> (II); J. Story, <i>Commentaries</i> (II)
Domestic Surveillance and Enemy Combatants	"Authority for Use of Military Force to Combat Terrorist Activities Within the United States," Oct. 23, 2001	John C. Yoo		<i>The Papers of James Madison</i> ; M. Farrand <i>Records of the Federal Convention of 1787</i> (IV); Federalist 36; Federalist 23; Federalist 24 (II); Federalist 25 (II); Federalist 26; Federalist 34; Federalist 28 (II); Federalist 41; <i>The Papers of Alexander Hamilton</i> (II); Federalist 74; Federalist 69; W. Blackstone, <i>Commentaries</i>
Enemy Combatants	"Re: The President's Power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations," Mar. 13, 2002	Jay S. Bybee		The Articles of Confederation; J. Story, <i>Commentaries</i>
Enemy Combatants	"Re: Standards of Conduct for Interrogation under 18 U.S. C. SS 2340-2340A," Aug. 1, 2002	Jay S. Bybee	Curtis A. Bradley, <i>Universal Jurisdiction and U.S. Law</i> , 2001 U. Chi. Legal R. 323; Michael S. Moore, <i>Torture and the Balance of Evils</i> , 23 Israel L. Rev. 280 (1989)	Federalist 23 (II)
Enemy Combatants	"Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States," Mar. 14, 2003	John C. Yoo	Michael S. Moore, <i>Torture and the Balance of Evils</i> , 23 Israel L. Rev. 280 (1989) (II)	Federalist 74; W. Blackstone, <i>Commentaries</i>

Once again, Yoo and his co-author supplemented their formalist argument with a functionalist one, drawn from Alexander Hamilton's reasoning in the *Federalist*: "Using the military to defend the nation requires action and energy in execution... 'and the power of directing...the common strength forms a[n]...essential part in the definition of the executive authority' *The Federalist* No. 74."²¹¹ Finally, like in the FISA Memo, the OLC opinion's authors concluded that the Fourth Amendment's protections against unreasonable searches and seizures would not be enforceable against programs and activities carried out in connection with the War on Terror. As the memo reads, "in light of the well-settled understanding that constitutional constraints must give way... to the exigencies of war, we think that the better view is that the Fourth Amendment does *not* apply to domestic military operations designed to deter and prevent further terrorist attacks" (emphasis in original).²¹²

Three additional memos issued between 2002 and 2003 built on the legal reasoning established in these earlier Office of Legal Counsel opinions and explained how the broad war powers allocated to the President under the Unitary Executive theory applied to the capture, transfer and interrogation of suspected terrorists.²¹³ Central to the arguments of all three opinions authored by Federalist Society network actors was the belief that the Executive's constitutionally granted war powers, examined in detail in prior OLC opinions, could not be cabined or constrained by either statutes or treaties. For instance, the March 13th memo, authored by Jay S. Bybee, argued that in light of the President's broad grant of constitutional authority in times of war, neither the Geneva Conventions nor the Torture Conventions forbade "the transfer of members of the Taliban militia, al Qaeda, or other terrorist organizations" under the control of the United States military to other countries:

Those treaties that purport to govern the transfer of detained individuals generally do not apply in the context of the current war against al Qaeda and other terrorist groups. Even if those treaties were applicable to the present conflict, however, they do not impose significant restrictions on the operation of the President's Commander-in-Chief authority... To the extent that these treaties would cabin presidential freedom to transfer detainees, they could not constrain his constitutional authority... This view of the President's war powers is supported by the Constitution's text and a comprehensive understanding of its structural allocation of powers, but also by an unbroken chain of historical practice dating back to the Founding era. In tandem, these factors conclusively demonstrate that the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts.²¹⁴

Relying on similar interpretive logic, the OLC opinion issued in August of 2002 and signed by Jay Bybee, since declassified and popularly referred to as "the Torture Memo," found that provisions of the Congressional statute enacted pursuant to the Conventions Against Torture that criminalized torture "may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers" because "enforcement of the statute would represent an unconstitutional infringement on the President's authority to conduct war."²¹⁵ To further support this view, the Bybee-authored opinion twice cited Hamilton's *Federalist* 23 and mobilized the scholarship of fellow Federalist Society network

actors Curtis A. Bradley and Michael S. Moore.²¹⁶ Finally, in the now-declassified March 2003 memo, author John Yoo relied explicitly on these prior OLC opinions to defend the sweeping conclusion that "any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."²¹⁷

These five Federalist Society network actor-authored opinions, issued in the wake of the September 11th attacks, had a swift and profound impact on the manner in which the Bush Administration conducted the War on Terror. As we've seen, network actors John Yoo and Jay Bybee drew on the Unitary Executive theory to provide the legal and constitutional rationales for warrantless domestic surveillance programs, the capture and transfer of suspected terrorists to prisons outside the United States, and for harsh and severe interrogation programs. As I explain in the concluding section of this chapter, political pressure generated by the discovery of many of these controversial programs led to the subsequent withdrawal of four of these five OLC opinions by the Bush Administration. In the meantime, however, the Office of Legal Counsel was able to draw on these and other beliefs underlying the Unitary Executive theory to shield certain Executive branch officials from disclosing information to Congress about the equally controversial midterm dismissal of seven U.S. Attorneys by the Department of Justice in 2006.

Office of Legal Counsel Opinions: Executive Privilege

Two additional Federalist Society participant-authored OLC memos drafted during George W. Bush's second term provide evidence of another set of beliefs associated with the Unitary Executive theory at work in the Executive branch; the same set of beliefs network actors have routinely mobilized to justify the assertion of Executive privilege. These two memos, authored by Federalist Society participants Paul Clement and Steven G. Bradbury, relied on now-familiar separation of powers principles to argue that the President had the constitutional right to assert Executive privilege against five Congressional subpoenas demanding documents and testimony related to the politically controversial and unprecedented mid-term firing of seven U.S. Attorneys in December of 2006.²¹⁸ As an internal investigation conducted by the Office of the Inspector General later confirmed, on December 7, 2006, at the "direction of senior Department of Justice" officials, seven United States Attorneys "were told to resign from their positions." When the removal of these and two other U.S. Attorneys became public in January of 2007, "Congress began to raise questions and concerns about the reasons for the removals."²¹⁹ In the months that followed, after hearing testimony from former Attorney General Alberto Gonzales and other top Justice Department officials that appeared to be contradictory or misleading, the Senate Committee on the Judiciary and the House Committee on the Judiciary issued subpoenas for certain "internal White House documents" and for the testimony of two "key witnesses," former White House Counsel Harriet E. Miers and former Deputy Assistant to the President, Sara Taylor.²²⁰

In response to these subpoenas, the White House solicited the advice of the Office of Legal Counsel. On June 27, 2007 OLC responded with a memo signed by four time Federalist

Society participant Paul Clement, who advised the President that "Executive privilege may properly be asserted over the documents and testimony concerning the dismissal and replacement of United States Attorneys that have been subpoenaed by congressional committees."²²¹ While Clement did not make explicit reference to Originalist sources or the Unitary executive theory, the legal analysis supporting the assertion of Executive privilege in the memo was noteworthy in a few respects. First, in supporting the claim that throughout history Presidents have refused "to provide information related to the decision to remove Executive Branch officials, including a U.S. Attorney," the memo relied authoritatively on a 1982 Office of Legal Counsel opinion, authored by Federalist Society actor Theodore Olson.²²² In this memo and in a follow up memo issued in January of 1983, Olson linked the practice of Executive privilege to a formalist reading of the Take Care Clause, as he would years later in front of a Federalist Society audience:

[the historical evidence] demonstrates convincingly that throughout this nation's history, the Chief Executive and those who assist him in "tak[ing] care that the laws be faithfully executed," have on certain occasions exercised their constitutional obligation to refrain from sharing with the Legislative Branch information the confidentiality of which was vital to the proper constitutional functioning of the Executive Branch... This general principle is neither new nor novel, and represents no departure from past practice; to the contrary, the assertion of such responsibility has been a consistent theme throughout our constitutional existence.²²³

The Clement memo also referenced a 2001 letter from three-time Federalist Society participant and former Attorney General John Ashcroft that described the potentially damaging effects Congressional oversight could have on the separation of powers and individual liberty.²²⁴ Recalling the Federalist Society statement of principles, the Ashcroft letter argued that, "Legislative branch pressure" on Executive branch decision-making "is inconsistent with the separation of powers and thereby threatens individual liberty."²²⁵

A second OLC memo issued on July 10, 2007 and authored by Federalist Society network actor Steven G. Bradbury responded specifically to the question of whether Congress could legally compel former White House counsel Harriet Miers to provide testimony about the forced resignations of the U.S. Attorneys.²²⁶ As the opinion reasoned, "the same separation of powers principles that protect a President from compelled congressional testimony also apply to senior presidential advisers."²²⁷ The Bradbury-authored memo relied on still another Office of Legal Counsel opinion authored by network actor Theodore Olson to articulate a version of the Madisonian separation of powers argument Federalist Society network actors have frequently mobilized in support of the Unitary Executive theory:

The rationale for the immunity is plain. The President is the head of one of the independent Branches of the federal Government. If a congressional committee could force the President's appearance, fundamental separation of powers principles - including the President's independence and autonomy from Congress - would be threatened. As the Office of Legal Counsel has explained, "[t]he President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) ("*Olson Memorandum*").²²⁸

To further support the view that Executive privilege extends to the President's advisers, Bradbury relied again on the "Olson Memorandum," arguing that subjecting Harriet Miers, an agent of the Unitary Executive, to the congressional subpoena power "would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned functions."²²⁹ Legal reasoning that suggested otherwise, the memo concluded, would violate the "doctrine of the separation of powers" and the Executive would become, as Madison feared, "a mere arm of the Legislative Branch of Government."²³⁰

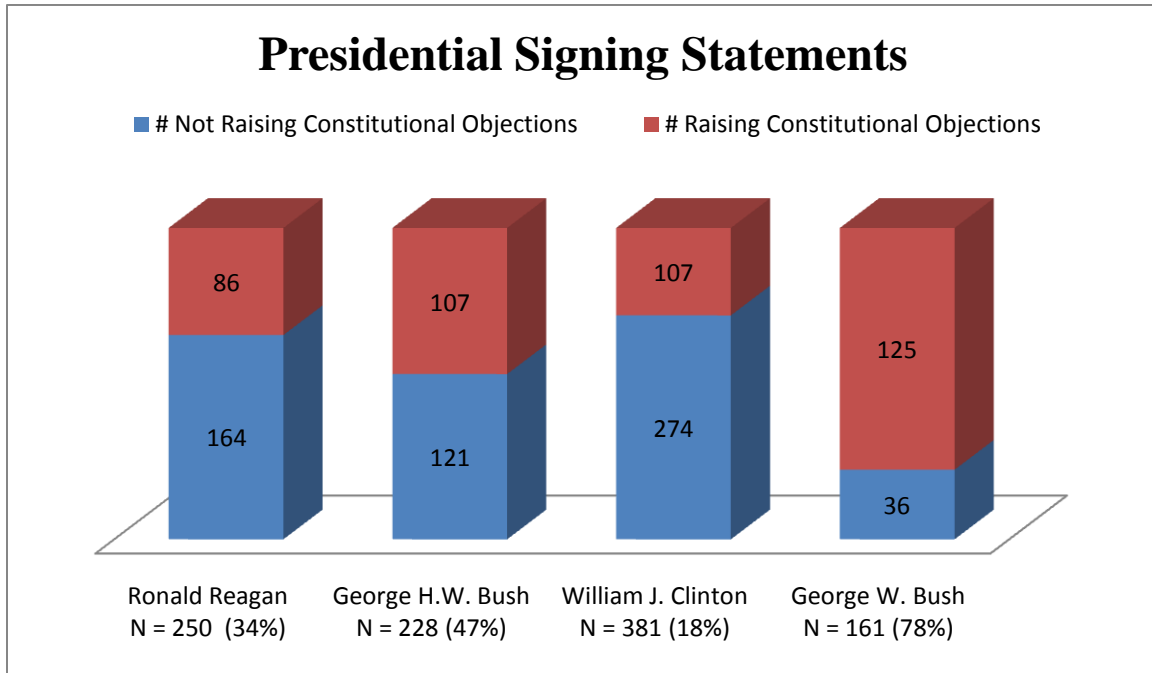
While not as rich in citations to Originalist scholarship or as explicit in their reliance on the Unitary Executive theory as the set of OLC opinions supporting the War on Terror, the memos justifying the assertion of Executive privilege nonetheless embodied important separation of powers beliefs. They reinforced a belief in the Executive's need, first articulated by Hamilton, for unity and secrecy in its internal deliberations and also cited the potential dangers and the threat to liberty, discussed by several network actors in the previous section, that would result from allowing Congress to "micromanage" the Executive through oversight and hearings.

Presidential Signing Statements: Foreign Affairs and Violations of Chadha

In addition to legal memos and opinions, Federalist Society network actors working at the Office of Legal Counsel under George W. Bush made frequent use of one other institutional tool to diffuse ideas about the Unitary Executive into the Executive branch policy: the Presidential signing statement. The impact of the Unitary Executive theory is not evidenced by the quantity of signing statements issued under George W. Bush but rather by the quality of the statements and the language in which they are articulated. For instance, a Congressional Research Report found that even though President Clinton issued more than twice as many statements as President George W. Bush (see Figure 4.2), only 18% of Clinton's statements raised a constitutional objection to the legislation in question as compared with 78% of those issued under Bush.²³¹ Further, more than a third of Bush's signing statements (41%) grounded their constitutional challenges in the President's authority to supervise "the unitary executive branch."²³² While scholars have identified up to seventeen different categories of constitutional objections raised by George W. Bush in his signing statements, this section will focus on two categories that directly implicate beliefs examined in this and the previous chapter on the Unitary Executive: statements objecting to provisions of bills that infringe on the President's power over foreign affairs, including his War Powers, and those challenging provisions that constitute a legislative veto in

Figure 4.2

Number of Presidential Signing Statements Issued from Presidents Reagan to Bush II including Number and Percentage of Statements that Raised a Constitutional Objection



Sources: Congressional Research Service and the American Presidency Project²³³

accordance with the Supreme Court's ruling (explored at length in Chapter Two) in *INS v. Chadha*.²³⁴

This chapter opened with an excerpt from President George W. Bush's *Statement on Signing the USA PATRIOT Act*, which highlighted the Administration's reliance on the theory of the Unitary Executive to assert its constitutional authority to withhold certain information about the War on Terror from Congress. Here is a slightly lengthier excerpt from that same statement that provides a bit more context on how the Unitary Executive theory was mobilized:

The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. The executive branch shall construe

section 756(e)(2) of H.R. 3199, which calls for an executive branch official to submit to the Congress recommendations for legislative action, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.²³⁵

Provisions 106A and 119, two of the three identified as constitutionally problematic, are audit provisions, consistent with the Foreign Intelligence Surveillance Act (FISA), that require the Executive branch to report to the Inspector General on its intelligence gathering activities.²³⁶ Here, as in the Office of Legal Counsel "FISA Memo" examined earlier, the Unitary Executive theory provided a constitutional justification for the Administration to reinterpret legislation in a manner consistent with the President's national security responsibilities.

While this signing statement attracted significant media attention, it is actually quite typical of dozens of other Bush Administration statements issued before and after it. Citing the President's constitutional authority to "supervise the unitary executive branch," the Office of Legal Counsel routinely deployed this language in signing statements to push back against what it perceived to be Congressional "micromanagement," to recall a favorite phrase of the Federalist Society network, of the Executive branch's constitutional responsibilities.²³⁷ Perhaps the most striking example of statements of this kind was President Bush's *Statement on Signing the Intelligence Reform and Terrorist Prevention Act of 2004*.²³⁸ The phrase "unitary executive" was used four times to raise Executive branch objections to perceived encroachments on the President's war powers:

Many provisions of the Act deal with the conduct of United States intelligence activities and the defense of the Nation, which are two of the most important functions of the Presidency. The executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation's foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch, which encompass the authority to conduct intelligence operations.

It should be noted that the use of the term "Many" here constitutes something of an understatement. The signing statement drew on the Unitary Executive theory to articulate constitutional challenges to more than forty provisions of the law.

Less controversial but equally as important in terms of the separation of powers doctrine was a set of thirty-three signing statements issued by the George W. Bush Administration that relied on the Unitary Executive theory to object to provisions that constituted a legislative veto as understood by the Supreme Court in *INS v. Chadha*.²³⁹ As examined in Chapter Two, the 1983 Supreme Court case, an early separation of powers victory for the Federalist Society network, held that the one-house legislative veto was unconstitutional. While limited in scope, some observers - including the group of Federalist Society actors who signed the open letter supporting the constitutionality of signing statements - interpreted the principle of the ruling to

extend to all provisions, including mandatory reporting and audit provisions in appropriations bills, that could be construed as a functional legislative veto over the Executive's power to "take care" that the laws be faithfully executed.²⁴⁰ When confronted with such a provision, these actors insisted, the Executive branch was constitutionally obliged, under the Take Care Clause, to identify the unconstitutional provisions via the Presidential signing statement and not enforce them.

In the eight years under George W. Bush, the Office of Legal Counsel recorded nearly the same number of *Chadha* objections in its signing statements as it had the seventeen years prior.²⁴¹ These Bush Administration statements, most of which accompany appropriations bills, are also noteworthy because they often bolstered the *Chadha* claim with explicit reference to the language of the Unitary Executive theory. President Bush's *Statement on Signing the Energy and Water Development Appropriations Act of 2002* provides a good example of this marriage of authorities:

Section 303 of the bill purports to require congressional approval before executive branch execution of aspects of the bill. I will interpret such provisions to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*. Provisions of H.R. 2311 that purport to remove my authority to oversee the activities of the Army Corps of Engineers will be construed consistent with my constitutional authority to supervise the unitary executive branch.²⁴²

Another exemplary statement, the Executive branch's *Statement on Signing the Department of Homeland Security Appropriations Act of 2005* relied both on *Chadha* and on the Constitution's Vesting Clause, cited by multiple Federalist Society actors in support of the Unitary Executive theory, to reinterpret certain provisions of the bill requiring Congressional approval for Executive branch action as "advisory rather than mandatory:"

The executive branch shall construe as calling solely for notification the provisions of the Act that purport to require congressional committee approval for the execution of a law. Any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*... Decisions on deployment and redeployment of law enforcement officers in the execution of the laws are a part of the executive power vested in the President by Article II of the Constitution. Accordingly, the executive branch shall construe the relocation provision as advisory rather than mandatory.²⁴³

In challenging a section of the same appropriations Act that mandated Congressional "access to classified national security information," the statement echoed language from the 2004 Terrorism Prevention Act Statement examined in the previous paragraph. It once again mobilized the President's authority "as head of the unitary executive branch and as Commander in Chief" to shield the Executive branch from sharing information with Congress and, in doing so, asserted itself as the branch with the "exclusive authority" to "classify and control access to national security information."

While this brief survey of two categories of Presidential signing statements issued by the Office of Legal Counsel under George W. Bush is nowhere near exhaustive, it does provide some sense of how this tool was used, in conjunction with the OLC memos, to reshape the constitutional understanding of Executive power in accordance with certain important precepts of the Unitary Executive theory. In particular, these two sections show how Federalist Society affiliated actors working in the Office of Legal Counsel relied upon the language, sources, and scholarship associated with the Unitary Executive theory to provide constitutional leverage against Congress and to gain an advantage in the ongoing tug-of-war, forecasted in Madison's writings in *Federalist 47* through *Federalist 51*, between the Executive and Legislative branches. The closing section of this chapter will evaluate the impact of all these efforts to implement the theory of the Unitary Executive in the Executive branch during the George W. Bush Administration and compare them with the earlier campaign, examined in Chapter Two, to insinuate these same principles into Supreme Court doctrine.

Reevaluating Federalist Society Network Impact on the Unitary Executive

How much of an impact did the beliefs underlying the Unitary Executive theory, nurtured and developed by individuals connected to the Federalist Society network, have on Executive branch policy during the George W. Bush Administration? In Chapter Two, I showed how these beliefs are often aggregated to support three kinds of Unitary Executive arguments: (1) those derived from a formalist reading of Article II of the Constitution's Take Care Clause, Vesting Clause, and Commander-in-Chief Clause; (2) those mobilizing Alexander Hamilton's functionalist argument for unity and energy in the Executive branch; and (3) arguments citing the general separation of powers concerns articulated in James Madison's essays in the *Federalist*.

A review of the five Federalist Society actor-authored Office of Legal Counsel opinions pertaining to the War on Terror revealed a heavy reliance on these first two categories of argument; what network actor and now infamous OLC memo author John Yoo classified as the "formalist" and "functionalist" arguments supporting a broad interpretation of the Executive power in wartime. Relying on two dozen Originalist sources and citing Federalist Society actor scholarship four times, these five memos provided the legal grounds for two controversial policies guiding the conduct of the War on Terror: the justification for conducting war domestically, which included the use of warrantless surveillance programs, and the policies on torture and interrogation based on constitutional judgments concerning the applicability of international rules and treaties. That being said, four of these five controversial memos were subsequently withdrawn, in whole or in part, by the Office of Legal Counsel before President Bush left office. That these opinions were to be considered officially "withdrawn" or "superseded" as the authoritative views of the Office of Legal Counsel was confirmed in a memo issued on January 15, 2009 and signed by Federalist Society network actor Steven G. Bradbury:

The purpose of this memorandum is to confirm that certain propositions stated in several opinions issued by the Office of Legal Counsel in 2001-2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office. We have previously withdrawn or superseded a number of opinions that depended upon one or more of these propositions. For reasons discussed herein, today we explain why these propositions are not consistent with the current views of OLC, and we advise that caution should be exercised before relying in other respects on the remaining opinions identified below. The opinions addressed herein were issued in the wake of the atrocities of 9/11, when policy makers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the Nation. In the months following 9/11, attorneys in the Office of Legal Counsel and in the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure... Mindful of this extraordinary historical context, we nevertheless believe it appropriate and necessary to confirm that the following propositions contained in the opinions identified below do not currently reflect, and have not for some years reflected, the views of OLC. This Office has not relied upon the propositions addressed herein in providing legal advice since 2003, and on several occasions we have already acknowledged the doubtful nature of these propositions.²⁴⁴

The only opinion examined in this chapter to survive this last minute Bush Administration recant was the John C. Yoo-authored memo issued on October 23, 2001 justifying the "Authority for Use of Military Force to Combat Terrorist Activities Within the United States." This opinion was noteworthy not only for its reliance on fourteen different Originalist sources, but also for the bold claims it made on behalf of the President's broad grant of constitutional authority, consistent with the Unitary Executive theory, "to use military force, whether at home or abroad, in response to a direct attack upon the United states."²⁴⁵ It remains to be seen whether or not the Obama Administration's Office of Legal Counsel will treat this opinion as authoritative guidance on the War on Terror, ignore it, or take steps to formally withdraw it.

The second set of memos examined in this chapter relied on all three Unitary Executive arguments to construct a shield of Executive privilege around documents and testimony relating to the politically controversial midterm firing of more than seven U.S. Attorneys. These memos, authored by Federalist Society actors Paul Clement and Steven G. Bradbury, relied on the work of former Reagan Administration OLC appointee and frequent Federalist Society participant Theodore Olson to justify the constitutional right of certain Executive branch officers to ignore Congressional subpoenas. While the legal reasoning of these opinions and the separation of powers principles embodied therein remain in force and authoritative within the Office of Legal Counsel, recent reports suggest that the Obama Administration has brokered a deal with the former Bush Administration officers in exchange for their testimony in what is still an ongoing Congressional investigation.²⁴⁶ This suggests that while these memos represent a victory in principle for the Executive branch's constitutional capacity to shield itself, per the Unitary Executive theory, from Congressional investigations into its internal deliberations, the political costs of not cooperating with the investigation might have finally outweighed the constitutional benefits of maintaining Executive privilege.

Finally, more so than the three previous Administrations combined, the George W. Bush Administration's Office of Legal Counsel used the Presidential signing statement to showcase the

theory of the Unitary Executive and to raise an unprecedented number of constitutional objections to provisions of legislation that it interpreted as encroaching on its power. But while the rhetoric of many of these statements has attracted significant public attention and scrutiny, a report issued by the Government Accountability Office found no compelling evidence that the Bush Administration had, in practice, refused to execute provisions of bills it had singled out in its statements as unconstitutional and unenforceable.²⁴⁷ Moreover, a study conducted by the Congressional Research Service found that the federal courts have not supplemented their examinations of the legislative history of statutes with a consideration of the Presidential signing statement, as Attorney General Meese, Steven Calabresi and other Federalist Society participants working in the Reagan Administration had hoped.²⁴⁸ Indeed, in the 2006 Supreme Court case *Hamdan v. Rumsfeld*, former Federalist Society advisor Justice Antonin Scalia chided the majority in his dissent for "wholly ignor[ing]" President Bush's signing statement that interpreted provisions of the Detainee Treatment Act as precluding the federal courts from hearing detainees' petitions of writs of habeas corpus.²⁴⁹ Further, within his first few months of taking office, President Obama issued a memo to the heads of executive branch departments and agencies urging them to consult with the new Attorney General, Eric Holder, before relying on any Bush Administration signing statements "as the basis for disregarding, or otherwise refusing to comply with, any provision of a statute."²⁵⁰

I wrote in the introduction to this chapter that Federalist Society network actors' efforts to implement separation of powers principles in the Executive branch under George W. Bush yielded a series of remarkable but short-lived victories for proponents of the Unitary Executive. These victories were remarkable because they demonstrated the power of an epistemic community to effect a swift ideological overhaul of government policy when a critical mass of its members holding shared beliefs are able to insinuate themselves into positions of influence and decision-making. But, as this concluding section has confirmed, these victories were also short-lived. This is because, as the saying goes, elections have consequences. The same institutional features that make the Executive branch permeable to dramatic ideological change also make it susceptible to frequent change, particularly when a new Administration is elected to office. This is not the case with the Judicial branch. Change in legal doctrine happens slower and is considerably more difficult to bring about. At the same time, because the courts are conservative institutions and are hesitant to overthrow legal precedent, when shifts in legal doctrine do occur they often enjoy more longevity than their policy analogs in the Executive branch. Thus, while the separation of powers campaign carried out by Federalist Society network actors in *Chadha* through *American Trucking* was far less impressive than its counterpart in the Executive branch in terms of the scope and immediacy of its intellectual impact, its few victories in the federal courts, though partial and incremental, have been more long-lasting.

The next chapter takes a step backward chronologically, beginning in the early 1990's, and returns the focus of the narrative of this epistemic community at work to the federal courts.

It also marks a shift in the conceptual focus of the thesis from the horizontal separation of powers to the second "twin doctrine" of the structural constitution, federalism. As I alluded to in Chapter Three, the six federalism cases examined over the next two chapters resulted in a number of considerable changes in the Court's doctrinal understanding of the vertical distribution of power between the federal and state governments; changes, as I will show, that embodied to a significant extent the shared principles and beliefs of members of the Federalist Society network.

Chapter Five -----

Federalism I: The Commerce Clause in Court, 1992 - 2000

*Three important advantages of decentralized decision making emerge from an examination of the founders' arguments and the modern literature. **First, decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation** . **Second, allocation of decision making authority to a level of government no larger than necessary will prevent...attempts by communities to take advantage of their neighbors.** **And, third, decentralization allows for innovation and competition in government.***

- Federalist Society member Michael W. McConnell, excerpt from 1987 Law Review Article "Federalism: Evaluating the Founders' Design."²⁵¹ (bold emphasis added)

*This federalist structure of joint sovereigns preserves to the people numerous advantages. **It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government;** and it makes government more responsible by putting the States in competition for a mobile citizenry.*

- Justice O'Connor, majority opinion in *Gregory v. Ashcroft* (1991), cited again in *New York v. United States* (1992)²⁵² (bold emphasis added)

More than any other structural doctrine examined in this thesis, the Supreme Court's role as umpire of the "federalist structure of joint sovereigns," to borrow Justice O'Connor's phrase, has often been a source of "ideological tension" and "high political drama" (Scheiber 2005, 322). The principal constitutional clause around which this federalist "political drama" has unfolded is the Commerce Clause (Art. 1, Sec. 8, clause 3).²⁵³ This clause, which grants Congress the power to regulate commerce "among the several states," became the primary vehicle through which the federal government extended its regulatory reach into the states throughout the latter half of the twentieth century. And, for this, Congress had the Supreme Court to thank. After a series of controversial decisions in the early 1930's that had enforced strict limits on Congress' commerce power and had all but crippled President Roosevelt's New Deal plan, the Supreme Court signaled that it would no longer view the Commerce Clause as a strict limit on congressional regulatory power.²⁵⁴ This new doctrinal approach reached its fullest expression in a 1946 decision, *American Power & Light v. SEC*, in which the Supreme Court declared that Congress' commerce power was "'as broad as the economic needs of the nation' required" (Scheiber 2005, 327). Needing to prove only the slightest connection between the activity being regulated and

interstate commerce, Congress had used this power to pass legislation regulating everything from intrastate labor relations to wheat grown for personal consumption to private restaurants serving interstate travelers.²⁵⁵

The Supreme Court's broad interpretation of Congress' Commerce Power was grounded in and supported by a theory of flexible federalism (or what came to be known as "political safeguards federalism" after Justice Harry Blackmun's majority opinion in *Garcia*) that viewed the primary checks against the excessive accumulation of federal power as political ones, not legalistic or judge-centric ones (Kramer 2000). In other words, proponents of this theory believed that the boundaries of state and federal power could be negotiated politically, rather than decided legalistically through a narrow interpretation of "commerce" (Choper 1980). Additionally, in contradistinction to the more rigid view endorsed by the Supreme Court in the pre-New Deal era, proponents of political safeguards federalism viewed the Constitution as a broad blueprint that ought to be interpreted in light of the changing needs and politically expressed desires of society. So, rather than embracing a static, 18th century constitutional understanding of "commerce," advocates of the more flexible federalism approach argued that Congress' Commerce Power should be interpreted in light of the ever more complex and interdependent nature of national markets. Under this doctrinal approach, as I alluded to earlier, the Supreme Court decided that any activity "affecting interstate commerce" was within the scope of Congress' regulatory power under the Commerce Clause.

This theory and the Supreme Court's resulting hands-off approach to the Commerce Clause had been cause for political concern with Republicans from the Barry Goldwater campaign onward (Clayton and Pickerill 2004, 94-107). As Political Scientists Cornell Clayton and J. Mitchell Pickerill have shown, discussions of the Tenth Amendment, state sovereignty, and limited federal power began to appear with some frequency in Republican Party platforms as early as 1976 and increased steadily from 1980 to 1988 (Clayton and Pickerill 2004, 96). Moreover, the discourse of "limited government" became something of a mantra during Ronald Reagan's Presidential campaign. In his first inaugural address, President Reagan announced his New Federalism Initiative, in which he promised to "curb the size and influence of the federal government" and to restore "the distinction between the powers granted to the federal government and those reserved to the states, or to the people."²⁵⁶ Public opinion also reflected the pro-federalism ethos of the Reagan era. For example, a Gallup Poll conducted in February of 1982 showed that more respondents believed that President Reagan's New Federalism program sounded like "a good idea" (49.42%) as opposed to a "poor idea" (37.79%). And of the arguments respondents cited in favor of the New Federalism initiative, giving "power back to the states" received the most mentions (30.37%).²⁵⁷

In line with this political pro-federalism push, conservative and libertarian legal elites began discussing the issue of federalism with a renewed sense of urgency in the 1980's. For example, in the 1988 Reagan Justice Department report *The Constitution in the Year 2000*,

principal author and Federalist Society participant Stephen Markman wrote that "for those who view federalism as a serious concern of the Constitution, the current state of the Supreme Court's law in this area is troubling." The report goes on to suggest that in the "1990's" the Supreme Court might "reconsider its doctrines granting Congress virtually limitless powers under the Commerce Clause" and, based on the "structure of the Constitution," it might "reverse its current course and place judicial limits" on Congress' commerce power.²⁵⁸ Prior to the cases examined in this chapter there had been one recent but short-lived attempt to enforce meaningful limits on Congress' commerce power. In the 1976 decision *National League of Cities v. Usery*, the Supreme Court relied in part on the Commerce Clause to invalidate federal wage and hour restrictions on state and government employees.²⁵⁹ This precedent and the principle of limited federal power it embodied, however, was overturned within the span of a decade in *Garcia v. San Antonio Metro Transit Authority* prompting Justice Rehnquist to predict in dissent that it would not be long before the Supreme Court would have another stand-off over Congress' commerce power.²⁶⁰

The next section catalogues some of the beliefs expressed by Federalist Society network actors about the Supreme Court's Commerce Clause jurisprudence and the relationship between the interpretation of this clause and the preservation of one of the "twin doctrines" of the structural constitution, federalism. The chapter then moves on to examine network participation in three cases that, consistent with Justice Rehnquist's prediction in *Garcia*, forced the Supreme Court to seriously revisit the limits on federal power via the Commerce Clause: *New York v. United States* (1992), *United States v. Lopez* (1995), and *United States v. Morrison* (2000). Finally, it closes with a qualitative evaluation of how closely these decisions and the principles embodied therein mirror certain shared beliefs within the Federalist Society network about the importance of constitutional federalism and its relationship to individual freedom. It finds that, in articulating its more "formalistic" Commerce Clause jurisprudence, the Supreme Court relied in several important instances on Federalist Society network scholarship and other "intellectual capital" provided by network actors.

Federalist Society Network Actors on The Commerce Clause

Judicial enforcement of Congress' commerce power has been a salient topic at Federalist Society National Conferences. From the Society's very first meeting in 1982, dedicated in its entirety to the topic of "Federalism," discussions of the Supreme Court's interpretation of the Commerce Clause and its ramifications for federalism have become something of a permanent fixture of the Federalist Society dialogue. For example, of the 207 speech-acts I coded from Federalist Society National Conferences (1982-2008) that dealt with some aspect of the "structural constitution," forty-one of these (20%) made specific mention of the Commerce

Clause.²⁶¹ Network actors have also been active in discussions of Congress' commerce power outside of Federalist Society conferences. As I detailed in Chapter One, a media search for "federalism" revealed that nearly one in five articles published in a subset of conservative media outlets on this topic were authored by Federalist Society network actors.²⁶² While most of these authors expressed their federalism concerns in more general terms, thirty-nine (21%) of them did specifically address Congress' commerce power.²⁶³ Additionally, several of the conservative and libertarian voices dominating the scholarly discussion of the Commerce Clause, such as Richard Epstein and Randy Barnett, are also active Federalist Society participants.²⁶⁴ This section surveys Federalist Society network actors' expressed beliefs about the Commerce Clause and its relationship to federalism and the structural constitution more generally. As in other chapters, I've identified these beliefs as falling into three general categories of argument: (1) textual arguments supporting an originalist interpretation of the phrase "commerce...among the several states;" (2) structural arguments relying on Madison's *Federalist 45* that emphasize the relationship between limited governmental powers and individual freedom; and (3) functionalist arguments for less federal regulation derived from economic theories supporting competition and free markets.

Network Actors at the Federalist Society on the Commerce Clause

Several Federalist Society actors have expressed frustration with the Supreme Court for half a century of lax enforcement of the constitutionally prescribed limits on Congress' commerce power. For example, at the 1988 National Lawyers Convention, scholar William Van Alstyne lamented that "'the power to regulate commerce among the states'" had been interpreted by the Supreme Court as "the power 'to regulate' period, whether or not it is commerce, whether or not it is among the states."²⁶⁵ Similarly, Federalist Society participant Lynn Baker referred to the Commerce Clause in her talk as the "Hey, you-can-do-whatever-you-feel-like Clause."²⁶⁶ In their speech-acts, Federalist Society participants have tended to focus their discussions at national meetings on the second and third categories of argument I outlined in the previous section. The one exception seems to be a passing reference from Richard Epstein at the 1998 Student Conference to the "textual arguments" supporting an originalist interpretation of the commerce clause as being "strong enough to carry the day in their own right."²⁶⁷ He does not proceed to develop these textual arguments in the course of his talk but, as we will see in the next section, these textualist-originalist arguments distinguishing "commerce" from "manufacture and production" are more fully developed in Federalist Society network scholarship.

The structural argument on behalf of a more limited interpretation of Congress' commerce power seems to be the most frequently-cited argument by participants at Federalist Society national meetings. Often supported with reference to Madison's *Federalist 45*, this

argument is also most closely connected to the epistemic community's shared beliefs about the relationship between limited government and individual freedom. Charles J. Cooper articulated this relationship at the 1992 National Student Conference:

... individual rights and enumerated powers are opposite sides of the same coin... By delegating legislative power over certain subjects to the federal government, the people consented to abide by the laws enacted by the federal government which pertained to those subjects. However, as to those subjects over which the federal government had no delegated legislative power, the people retained the right vis-a-vis the federal government to act any way they pleased.²⁶⁸

At the same conference, former state legislator and Federalist Society participant Pete Du Pont referred to the "Commerce Clause" as "the most notable" of the "structural devices" the Founders included in the Constitution "to restrain the government." In supporting a reading of the Commerce Clause that provided only "limited power" to Congress, du Pont made specific reference to Madison's *Federalist 45*. In this essay, Madison proclaimed that "The powers delegated by the proposed Constitution to the federal government are few and defined" whereas "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State" (Rossiter ed. 1961, 260-261).²⁶⁹ Finally, legal academic and frequent Federalist Society participant Lino A. Graglia also mobilized language from Madison's *Federalist 45*, but did so in an attempt to show that the Framers' structural effort to limit the government, and in particular the federal power over commerce, was doomed to fail:

The national government's enumerated powers might have been described as "few," but they were hardly "defined," as Madison claimed; they were obviously vast and potentially all-embracing, and no attempt was made to limit their scope. For example, Congress was given the unlimited power to "Regulate Commerce . . . among the several States," not merely the power to remove state-imposed impediments to interstate trade, which was the primary problem that led to the convention.²⁷⁰

Graglia situated the Supreme Court's Commerce Clause jurisprudence as part of a long trend that had led to the "demise of federalism" and, unlike the group of Federalist Society participants I'll turn to next, believed there to be no prescription for its recovery.

While several of the Federalist Society network actors' Commerce Clause arguments begin with this historical and structural insight about the relationship between limited government and individual freedom as important in its own right, they do not all end up there. For instance, at the 1998 Student Conference participant Lynn Baker argued for supplementing these more formalist or "historical insight[s]" about federalism and the Commerce Clause with a "functionalist originalism" derived from the economic logic of Public Choice theory.²⁷¹ As articulated by former Federalist Society advisor Antonin Scalia at the Society's first national meeting in 1982, this argument is derived from the conservative belief that "the free market has the ability to order things in the most efficient manner, and generally should be allowed to

operate free of government intervention."²⁷² This "functionalist" argument for federalism is perhaps best represented in the speech-acts and scholarship of legal academic and frequent Federalist Society participant Richard Epstein. At the 1989 National Lawyers Convention Epstein explained the relationship between federalism and public choice theory, many of whose adherents advocate competition and open markets:

The bottom line, therefore, is that separation of powers, checks and balances, should be treated as a means to an end. The only way that this end can be rightly understood is with a healthy dose of public choice theory, which should animate your coming and your going in public life. When most outputs of Congress are redistributive, then the best way to make government work is to see that its wheels grind slowly so that as little harm as possible is done. And that spells a great appreciation for the now neglected virtues of separation of powers.²⁷³

Similarly, at the 1998 National Student Conference, Epstein used this same logic to argue that "the courts should reverse the limitless reading of the Commerce Clause and reject the implicit economic logic that underlies the vast expansion of federal power."²⁷⁴ Former Solicitor General and Federalist Society participant Charles Fried used the same functionalist logic at the 1982 National Conference to argue that the Supreme Court's Commerce Clause jurisprudence, and its complicit role in the centralization of governmental power, had the practical effect of facilitating greater government spending: "... special interests can get a stronger hold at the federal level than they can at the state level; all one needs at the federal level is to find a few skillful congressmen and one senator, and one is assured a billion or so annually in the federal budget."²⁷⁵ Legal scholar and participant John McGinnis echoed the same concern, relying explicitly on public choice theory's concept of "rent-seeking" to explain the inherent dangers of the Supreme Court's Commerce Clause post-1940's jurisprudence:

The advantage of federalism under this view is that a properly designed dual system of government can limit the total amount of rent-seeking by such interest groups more than can a unitary state. Rent-seeking from the national government is limited by giving it only limited powers, including limited powers, of taxation. Rent-seeking from state government is limited by putting those governments in competition with one another for capital, including human capital. The bridge between the two mechanisms is that the limited powers of the national government sustain the conditions for competition among the state governments.²⁷⁶

As McGinnis went on to explain at the 1997 National Student Conference, "by the early 1940's the United States Supreme Court had abandoned the constitutional limitations that prevented the federal government from directly regulating manufacturing and the conditions of labor, thereby greatly increasing special-interest power to obtain regulatory rents." Similarly, Epstein has repeatedly called for a return to a "pre-1937" approach to the Commerce Clause, insisting that the Supreme Court's jurisprudence was "more intellectually coherent" and consistent with the important precepts of public choice theory as understood by these network actors.²⁷⁷

Network Actors' Scholarship on the Commerce Clause

As I mentioned in the previous section, Federalist Society network actors have also mobilized a textualist-originalist argument in favor of a more restrictive interpretation of Congress' commerce power. These arguments tend to focus on drawing a distinction between "commerce" and "manufacture" and/or "agriculture." For instance, in his 1987 *Virginia Law Review* article, "The Proper Scope of the Commerce Power," Richard Epstein argued that the content assigned to "commerce" must make sense with respect not only to the economic relationship between Congress and the states but also with respect to "foreign nations" and the "Indian tribes." As Epstein argued rhetorically, "What possible sense does it make as a matter of ordinary English to say that Congress can regulate 'manufacturing with foreign nations, or with Indian tribes'...?" (Epstein 1987, 1393-1394). Legal scholar and Federalist Society participant Randy Barnett engaged in an extensive textualist-originalist exploration of the term "commerce" in his 2001 law review article, "The Original Meaning of the Commerce Clause." Relying on evidence from 18th century dictionaries, James Madison's notes from the Constitutional Convention, the *Federalist Papers*, and the Ratification debates, Barnett concluded that the founding generation understood "commerce" as being confined to "trade" or "exchange" which did not, as Epstein had insisted, include other commercial activities such as manufacture and agriculture (Barnett 2001, 112-125). Offering further intellectual support for a more restrictive reading of the Commerce Clause, Federalist Society participant and Pepperdine academic Douglas W. Kmiec argued in his 2001 law review article, "Rediscovering a Principled Commerce Power," that the most "historically informed" definition of "commerce" was a relatively narrow one linked to certain principles articulated in the "Virginia Resolutions of 1787" (Kmiec 2001, 560-565).

The structural argument for a more narrow judicial interpretation of Congress' commerce power has also found its way into some Federalist Society network scholarship. In his 1987 law review article referenced earlier, Richard Epstein considered the Commerce Clause in light of the "overall constitutional structure" and concluded that when the "federal government received delegated powers from the states and the individuals within the states... there was clearly no sense that either grantor conferred upon the Congress the plenary power to act as a roving commission" that would be empowered to "do whatever it thought best for the common good" (Epstein 1987, 1395-1396). In light of this original understanding of a limited government empowered by "We the People," Epstein continued, any judicial interpretation that reads "the commerce clause" as "allow[ing] the government to regulate anything that even indirectly burdens or effects commerce does away with the key understanding that the federal government has received only enumerated powers" (Epstein 1987, 1396). Frequent Federalist Society participant John Yoo also articulated a structural argument for a government of limited and

enumerated powers, recalling the oft-cited language from Madison's *Federalist 45* to argue against the "broad sweep given to the Commerce Clause" by the "modern Court" (Yoo 1998, 2). Citing several other essays from the *Federalist*, Yoo's article recalled the Framers' beliefs linking limited federal government and a robust conception of state sovereignty with "greater liberty for the people" and emphasizes the structural role of the judiciary in enforcing these constitutional limits (Yoo 1998, 32).

The "functionalist" argument for a limited reading of the Commerce Clause, at times relying exclusively on the language of public choice theory and at other times blending this logic with a "functionalist originalism," as network participant Lynn Baker referred to it, has appeared with the most frequency in Federalist Society scholarship. Richard Epstein's 1987 article is an example of the former type, arguing from a pure public choice perspective that a "system of limited government keeps local governments in competition with each other" and that this "sensible institutional arrangement was wholly undermined by Congress' decision, in the teeth of the commerce clause, to subject all employment markets to nationally uniform regulation (Epstein 1987, 1444-1445). Referring to "markets" as "powerful instruments for human happiness and well-being," Epstein's article proceeds to describe how the Supreme Court's Commerce Clause jurisprudence had "frustrate[d] markets," reduced "social output," and facilitated the seeking of "economic rents" (Epstein 1987, 1453). Another article published the same year by Federalist Society network actor Michael McConnell blended this public choice logic with an Originalist perspective to argue on behalf of the functional benefits of federalism. In "Federalism: Evaluating the Founders' Design," McConnell described how the American system of "dual sovereignty," preserved through a narrow reading of the Commerce Clause, was designed promote three "complementary objectives: (1) 'to secure the public good,' (2) to protect 'private rights,' and (3) 'to preserve the spirit and form of popular government'" (McConnell 1987, 1492). Engaging in an extensive "examination of the founders' arguments and the modern literature," the McConnell piece catalogued the functional benefits of federalism:

... decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation . Second, allocation of decision making authority to a level of government no larger than necessary will prevent...attempts by communities to take advantage of their neighbors. And, third, decentralization allows for innovation and competition in government (McConnell 1987, 1493).

Federalist Society participant John Yoo has also argued that "the framers' understanding" of federalism and limited government "anticipated some of the concerns raised in recent scholarship" by "Public choice scholars" (Yoo 1998, 37). As he wrote in a 1998 law review article, "put in public choice terms, federalism and the maintenance of a federal government of limited, enumerated powers may be a positive externality that no individual state acting individually or collectively fully internalizes." However, the Yoo article maintained that the Framers also built "deliberate inefficienc[ies]" into the system to protect individual liberty and

that these checks and balances can be seen to be "at odds with the public approach to federalism" because they do not maximize efficiency (Yoo 1998, 41-42, 43-44).

While certainly not all-inclusive or exhaustive, this sample of speech-acts and published scholarship on the Commerce Clause represents some of the Federalist Society network's shared beliefs, first outlined in Chapter One, about limited government, individual liberty, and the role of the judiciary in enforcing and policing certain provisions of the "structural constitution." The next task of this chapter will be to examine how and to what extent these beliefs about federalism and the Commerce Clause were picked up by judicial decision-makers in three decisions handed down by the Supreme Court beginning in the early-1990's.

The Commerce Clause in Court, 1992-2000

Recall from the introductory section of this chapter that the Supreme Court had, for the first time in almost half a century, flirted with a more limited interpretation of Congress' commerce power in its 1976 *National League of Cities* opinion. To the chagrin of many conservatives and libertarians, chief among them Justice Rehnquist, this decision was overturned just nine years later in *Garcia*. Justice Rehnquist, who would be elevated to Chief Justice the following year, was nonetheless "confident" that the principle of limited federal power embodied in *National League of Cities* would "in time again command the support of a majority of this Court."²⁷⁸ With three more conservative appointments to the Supreme Court over the next five years, two of whom were very active Federalist Society affiliates, the odds of Rehnquist's bold prediction panning out were certainly much more favorable as of 1991.

Three cases over the course of the next decade would present the Supreme Court with the opportunity to vindicate (or not) its recently-elevated Chief Justice's powers of prognostication: *New York v. United States* (1992), *United States v. Lopez* (1995), and *United States v. Morrison* (2000).²⁷⁹

New York v. United States (1992)

This case challenged the constitutionality of the Low-Level Radioactive Waste Policy Amendments Act.²⁸⁰ An effort to ease the burden on states such as Washington, South Carolina and Nevada that up until 1980 had been accepting all of the nation's low-level radioactive waste, the original legislation mandated that each state in the union be responsible for developing a method of disposing of its waste by 1986. States were given the choice of either building their own disposal sites or joining an interstate compact. When it became clear that states were not

complying, Congress passed the Amendments Act, which extended the deadline for another seven years and included three types of provisions to encourage compliance with the Act: "monetary incentives" that authorized states to collect a surcharge for accepting waste, "access incentives" that authorized states to charge multiple surcharges to states not in compliance and to deny access altogether, and a "take title" provision that would hold a state liable for all damages incurred as a result of its failure to take possession or take title of its waste in a timely manner.²⁸¹

The state of New York had not joined a regional compact but instead had identified five potential intrastate dumping sites for its waste in Allegany County and Cortland County. After intense opposition from the residents of these counties to the state's plan, New York and the two counties decided to file suit against the United States in the Northern District Court of New York on the grounds that the Amendments Act violated the Tenth Amendment, the Eleventh Amendment and the Constitution's Guarantee Clause (Art IV, 4).²⁸² The District Court dismissed the case and the Second Circuit Court of Appeals affirmed the lower court's ruling. New York and its counties appealed to the Supreme Court, which granted cert and heard the case on March 30, 1992. The Supreme Court decision, handed down in June, affirmed in part and reversed in part, holding that of the three provisions in question, only the "take title" provision exceeded Congress' enumerated powers under the Commerce Clause and thus violated the doctrine of state sovereignty as protected by the Tenth Amendment.

Of the six parties filing amicus curiae briefs in *New York*, two (33%) were represented on brief by Federalist Society network actors. Virginia Seitz and Laurence Gold argued on behalf of the AFL-CIO, while Carter Phillips and Rex Lee represented the Rocky Mountain Low-Level Radioactive Waste Compact. As indicated by the italics in Table 5.1, however, both these parties were arguing to affirm the lower court ruling. Also urging the Supreme Court to affirm the lower court ruling and uphold the constitutionality of the Waste Amendments, the United States was represented on brief by Federalist Society participant Kenneth W. Starr. Lastly, the network was represented by two judicial decision-makers in *New York*: Justice Scalia and Justice Thomas. The Phillips-Lee amicus brief cited two pieces of scholarship by Federalist Society network actors, as did the Petitioner's Brief for the State of New York (see Table 5.1), which was not authored by a Federalist Society network participant. One of these sources, the 1987 Michael McConnell law review article referenced in the previous section, also found its way into the Supreme Court's majority opinion in *New York*. In terms of reliance on the Originalist canon, amici in *New York* cited ten different historical sources a total of thirteen times. While three of the six (50%) amicus briefs make use of these sources, the Phillips-Lee brief accounts for ten of these thirteen citations. The Brief of Respondent States Washington, Nevada and South Carolina referred to the Originalist canon twice to argue affirmance of the lower court's holding, while the Supreme Court cited ten different historical sources a total of twenty times in its opinion. It

Table 5.1

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *New York v. United States* (1992)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	<i>Rex Lee, Carter Phillips, Virginia Seitz, Laurence Gold</i>	<i>Kenneth W. Starr</i>	Supreme Court: Justice Scalia, Justice Thomas
Citations to Federalist Society Actor Scholarship	Michael McConnell, <i>Federalism: Evaluating the Founders' Design</i> , 54 <i>U. Chi. L. Rev.</i> 1484 (1987); Richard Posner, <i>Economic Analysis of Law</i> 600 (3d ed. 1986)	Robert F. Nagel, <i>Federalism as a Fundamental Value: National League of Cities in Perspective</i> , 1981 <i>S.Ct. Rev.</i> 81; William Van Alstyne, <i>The Second Death of Federalism</i> , 83 <i>Mich. L. Rev.</i> 1709 (1985)	Supreme Court: Michael McConnell, <i>Federalism: Evaluating the Founders' Design</i> , 54 <i>U. Chi. L. Rev.</i> 1484 (1987)
Citations to Originalist Sources	Federalist 7; Federalist 22; Federalist 28; Federalist 42 (III); Federalist 45; Federalist 51; Federalist 80; Letters of James Madison (Ketchum ed. 1986)(II); M. Farrand, <i>Records of the Federal Convention</i> .	Federalist 28; Federalist 51;	Supreme Court: Federalist 15; Federalist 16; Federalist 20; Federalist 39; Federalist 42 (II); Federalist 51; Federalist 82; J. Story, <i>Commentaries</i> ; M. Farrand, <i>Records of the Federal Convention</i> (VI); J. Elliot, <i>Debates on the Federal Constitution</i> (V)

**Italics indicate that the Federalist Society actor did not argue on behalf of Federalism or States' Rights in the Case*

worth mentioning that the Kenneth Starr-authored brief for the United States does not make use of either Federalist Society scholarship or Originalist sources in arguing to affirm the lower court's ruling.

As I mentioned earlier, both the District Court of Northern New York and the Second Circuit Court of Appeals dismissed the State of New York's case against the Waste Amendments. Relying on the Supreme Court's opinion in *Garcia*, the decision that had overturned in dramatic fashion the briefly resurrected principle of limited federal power articulated in *National League of Cities*, the Second Circuit majority provided a brief discussion of the tension that exists between Congress' commerce power under the Commerce Clause and the doctrine of state sovereignty embodied in the Tenth Amendment: "It is self-evident that virtually every congressional exercise of power under the *commerce clause* will limit state power over that commerce and, to that extent, will invite state objections under the *Tenth Amendment*."²⁸³ In determining where the balance lay between these two constitutional provisions, the Appeals Court cited *Garcia's* flexible, process-based framework that elevated the "national political process" over "the courts" as the ultimate arbiter of the limits of federal power and protector of state sovereignty:

The fundamental limitation that the constitutional scheme imposes on the *Commerce Clause* to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of *Commerce Clause* powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."²⁸⁴

Discounting the nine years during which *National League of Cities* was considered authoritative precedent, this process-based framework or, as many Federalist Society network actors would understand it, this abdication of judicial responsibility, had provided Congress with wide-ranging regulatory power under the Commerce Clause for half a century. As long as *Garcia* and the laundry list of prior Supreme Court decisions consistent with its framework remained in force, legislation like the Waste Amendments would unquestionably continue to "pass constitutional muster" in the lower courts.²⁸⁵

While the Supreme Court majority opinion in *New York*, authored by Justice O'Connor, did not overturn the *Garcia* framework, it did represent a bold departure from these prior cases by explicitly relying on a more "formalistic" approach to enforcing the constitutional boundaries between federal and state sovereignty:

Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. The shortage of disposal sites for radioactive waste is a pressing national problem, but a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse.²⁸⁶

The Supreme Court's analysis in *New York* relied heavily on historical or Originalist sources to support its understanding of the structural boundaries between federal and state authority (see Table 5.1) and to reinforce the principle, often articulated in similar language by Federalist Society network actors, that "State governments are neither regional offices nor administrative agencies of the federal Government."²⁸⁷ In sketching out the "constitutional line between federal and state power," the majority opinion referred to several essays from the *Federalist* in addition to numerous excerpts from the *Records of the Federal Convention* and Elliot's *Debates*.²⁸⁸ More importantly, the majority also cited Federalist Society network scholar Michael W. McConnell's article, "Evaluating the Founders' Design" as an authoritative statement on "the benefits of this federal structure."²⁸⁹ This article, and its functionalist-originalist defense of federalism detailed in the prior section, had been cited almost verbatim in the Supreme Court's 1991 majority opinion in *Gregory v. Ashcroft*.²⁹⁰ The excerpts below, first from the McConnell article and second from the majority opinion in *Gregory*, illustrate this overlap in logic and language:

Three important advantages of decentralized decision making emerge from an examination of the founders' arguments and the modern literature. First, decentralized decision making is better able to reflect the

diversity of interests and preferences of individuals in different parts of the nation . Second, allocation of decision making authority to a level of government no larger than necessary will prevent...attempts by communities to take advantage of their neighbors. And, third, decentralization allows for innovation and competition in government.²⁹¹

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsible by putting the States in competition for a mobile citizenry.²⁹²

Because the benefits of federalism had "been extensively catalogued" with the help of the scholarship of McConnell in *Gregory*, the majority in *New York* merely gestured to that opinion as additional support for its application of a more "formalistic" federalism framework.²⁹³

The three challenged provisions of the Waste Amendments, detailed earlier in this section, were considered in light of this more "formalistic" framework derived from and supported by Originalist sources and Federalist Society network actor scholarship. Of the three provisions, the majority ruled that only the "take-title" provision constituted an "unconstitutionally coercive regulatory technique...lying outside Congress' enumerated powers" which made it "inconsistent with the federal structure of our Government established by the Constitution."²⁹⁴ The Act stood as constitutional, with this provision being severable from the rest of the Amendments. However, the principle of limited federal power that had up until this point existed mostly in the speech-acts and scholarship of Federalist Society actors had been articulated and defended by a majority on the Supreme Court for only the second time in half a century. Relying not on the logic and arguments of the five Federalist Society participants as *amici curiae* and counsel but instead on the canon of Originalist sources and select Federalist Society scholarship, the majority's opinion represented a sign of hope for individuals frustrated with the Supreme Court's long history of employing a hands-off, political process-based approach to federalism. The question remained, however, whether the Supreme Court would be persistent in policing the boundaries between state and federal power based on a more "formalistic" understanding of federalism or whether *New York* would become the *National League of Cities* of the 1990's, swiftly swept aside and overturned in favor once again of a more deferential and pragmatic approach to federal regulatory power. Observers would not have long to speculate about where the Supreme Court was headed with its federalism jurisprudence. Just two years after the opinion was handed down in *New York v. United States*, the Supreme Court would hear oral argument in another case that implicated in no uncertain terms the limits of Congress' powers to pass legislation under the Commerce Clause.

United States v. Lopez (1995)

This case subjected the Gun-Free School Zones Act to constitutional scrutiny, raising the question of whether the Act constituted a valid exercise of Congress' power to regulate interstate commerce under the Commerce Clause. Enacted as part of the Crime Control Act of 1990, The Gun-Free School Zones Act made it a crime for any individual to knowingly possess a firearm within 1,000 feet of a school.²⁹⁵ Co-sponsored by Senators Joe Biden (D-DE) and Strom Thurmond (R-SC) and signed into law by President George H.W. Bush, the Gun-Free School Zones Act had received strong bi-partisan support in both the House and the Senate. The issue of gun possession near schools had received some national attention after a gun attack outside of a Stockton, CA elementary school in January of 1989 had killed five children between the ages of six and nine.²⁹⁶

High School senior Alfonso Lopez, Jr. had been charged with violating the Gun-Free School Zones Act for having carried a concealed revolver into his high school in San Antonio, Texas. His counsel moved to have the case dismissed in District Court for the Western District of Texas on the grounds that the Act exceeded Congress' congressional power to regulate under the Commerce Clause. The District Court denied the motion to dismiss the case, concluding that the Act was a constitutional exercise of Congress' commerce power, and subsequently convicted Alfonso Lopez, Jr. On appeal to the United States Court of Appeals in September of 1993, the Fifth Circuit reversed the conviction, holding that the Gun-Free School Zones Act did indeed exceed Congress' authority pursuant to the Commerce Clause. The Supreme Court granted cert, heard oral argument on November 8, 1994 and issued a 5-4 split decision affirming the Fifth Circuit Court's holding the following April.

Though the raw numbers remained the same, the Federalist Society network was actually less well-represented by percentage in the *Lopez* case than it had been in *New York*. The four Federalist Society actors participating as *amici curiae* represented just one of the ten total parties (10%) filing friend of the court briefs. That being said, unlike in the *New York* case, all four Federalist Society actors participating as *amici* in this case were arguing to affirm the Fifth Circuit's holding of a more limited reading of Congress' commerce power. Network representation as judicial decision-makers remained consistent, with Justices Scalia and Thomas on the bench. One category that saw a dramatic increase from *New York* to *Lopez* was citations to Federalist Society network scholarship by *amici curiae*. In total, four *amicus* briefs (40% of total *amicus* briefs) cited six pieces of Federalist Society scholarship a total of ten times in their briefs (see Table 5.2). Carter Phillips' brief on behalf of Antonio Lopez, Jr. also cited an article by Federalist Society participant Martin H. Redish. While network insiders do not characterize Phillips as a Federalist Society "true believer," he has been described as an excellent advocate.²⁹⁷ His participation in Federalist Society events and his connections to network members undoubtedly benefited his ability to make a strong federalism argument on behalf of his client.²⁹⁸ The other categories that increased significantly from *New York* to *Lopez* were citations to

Table 5.2

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *United States v. Lopez* (1995)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Randy E. Barnett, Henry Mark Holzer, Daniel Polsby, Charles E. Rice	Carter Phillips	Supreme Court: Justice Scalia, Justice Thomas
Citations to Federalist Society Actor Scholarship	William Van Alstyne, "The Second Amendment and the Personal Right to Arms", <i>43 DUKE L. J.</i> 1236 (1994)(III); Nelson Lund, "The Second Amendment, Political Liberty and the Right to Self-Preservation", <i>39 ALA. L. REV.</i> 103 (1987); James L. Buckley, Introduction -- Federalism and the Scope of the Federal Criminal Law, <i>26 Am. Crim. L. Rev.</i> 1737(1989); Richard A. Epstein, The Proper Scope of the Commerce Power, <i>73 U. VA. L. REV.</i> 1387 (1987) (III); William Van Alstyne, Dual Sovereignty, Federalism and National Criminal Law: Modernist Constitutional Doctrine and the Nonrole of the Supreme Court, <i>26 AM. CRIM. L. REV.</i> 1740 (1989); Raoul Berger, FEDERALISM: THE FOUNDERS' DESIGN 123 (1987)	Martin H. Redish & Karen L. Drizin, Constitutional Federalism and Judicial Review: The Role of Textual Analysis, <i>62 N.Y.U. L. REV.</i> 1, 42 (1987)	
Citations to Originalist Sources	J. Story, <i>Commentaries</i> (1833); Federalist 7; Federalist 10 (II); Federalist 17; Federalist 22; Federalist 33; Federalist 42; Federalist 44; Federalist 45 (V); Federalist 46; Federalist 51; Federalist 52; Federalist 84; Elliot, Debates on the Federal Constitution (V)		Supreme Court: Federalist 4; Federalist 7; Federalist 12; Federalist 17 (II); Federalist 21; Federalist 24; Federalist 33 (II); Federalist 34; Federalist 36; Federalist 40; Federalist 42; Federalist 44; Federalist 45 (II); Federalist 46 (II); Federalist 51 (II); Federalist 78; Pamphlets on the Constitution of the United States (P. Ford ed 1888) (II); J. Elliot, <i>Debates on the Federal Constitution</i> (VII); Documentary History of the Ratification of the Constitution (M. Jensen ed. 1978) (VII) Circuit Court: Federalist 45

**Italics indicate that the Federalist Society actor did not argue on behalf of Federalism or States' Rights in the Case.*

Originalist sources by *amici curiae* and Supreme Court decision-makers. Four amicus briefs (40%), all submitted on behalf of the respondent Alfonso Lopez, Jr. cited Originalist sources a total of twenty-three times. Even more impressively, the Supreme Court opinion in *Lopez* mobilized nineteen sources from the Originalist canon and referred to these sources thirty-seven separate times (see Table 5.2).

The Fifth Circuit majority opinion in *Lopez*, written by Reagan Appointee Judge William Garwood, opened with a citation to Madison's *Federalist 45*. As we have seen, this essay is frequently mobilized by Federalist Society network actors to defend their belief in limited government and a more narrow reading of the scope of Congress' commerce power:

The United States Constitution establishes a national government of limited and enumerated powers. As James Madison put it in *The Federalist Papers*, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, at 292 (C. Rossiter ed. 1961). Madison's understanding was confirmed by the *Tenth Amendment*. It is easy to lose sight of all this in a day when Congress appropriates trillion-dollar budgets and regulates myriad aspects of economic and social life. Nevertheless, there are occasions on which we are reminded of this fundamental postulate of our constitutional order. This case presents such an occasion.²⁹⁹

Beyond its citation to James Madison in this rather dramatic opening paragraph, the Fifth Circuit majority opinion did not engage in its own historical analysis of the origins and scope of Congress' commerce power. It relied instead on the rationale expressed in the Supreme Court's recent decisions in *Gregory* and *New York* which, as I detailed earlier, cited both Originalist sources and Federalist Society scholarship to defend and apply a more "formalistic" federalism framework.³⁰⁰ Applying this same framework, the Fifth Circuit majority concluded that in enacting the Gun-Free School Zones Act Congress had "stretch[ed] its commerce power so far as to intrude upon state prerogatives" and that absent explicit findings linking gun control to interstate commerce, the states' and the people's "Tenth Amendment interests" to be free of unwarranted federal regulation would necessarily prevail.³⁰¹

The Supreme Court majority opinion in *Lopez*, written by Chief Justice Rehnquist, opened with a recitation of the same excerpt from Madison's *Federalist 45* and also repeated some of the benefits of the dual federal structure as catalogued, with the help of Federalist Society network actor Michael W. McConnell, in *Gregory*:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of

power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."³⁰²

Like its Fifth Circuit predecessor, Rehnquist's majority opinion did not proceed to engage in any deep or historical theorizing about federalism and the limits of Congress' commerce power. These tasks were, however, taken on by three other Justices in two separate concurring opinions in *Lopez*. Justices Kennedy and O'Connor's joint concurring opinion consisted of a thoughtful exploration, supported by numerous Originalist sources and couched in Federalist Society-friendly language, of the importance of "federalism" as one "of the various structural elements in the Constitution" and the Supreme Court's attendant "authority and responsibility" to "review" and at times strike down "congressional attempts to alter the federal balance."³⁰³

Federalist Society network actor Justice Thomas also wrote separately to articulate what he believed to be "the original understanding of the *Commerce Clause*."³⁰⁴ Notably, in his defense of a more limited reading of "commerce," Justice Thomas incorporated frequent Federalist Society participant Richard Epstein's argument from "The Proper Scope of the Commerce Power" almost verbatim. While Thomas does not cite the 1987 Epstein article the similarity in language and logic is unmistakable. I excerpt first from the Epstein article, and next from Justice Thomas' concurring opinion:

Similarly, one does not want a meaning of the term commerce which renders any one of these three heads of the commerce power redundant or unnecessary. The modern view which says that commerce among the several states includes all manufacture and other productive activity within each and every state...violates this constraint... What possible sense does it make as a matter of ordinary English to say that Congress can regulate 'manufacturing with foreign nations, or with the Indian tribes,' or for that matter 'manufacturing among the several states,' when the particular fabrication or production takes place in one state, even with the goods purchased from another?... It is worth noting that this view of commerce as trade is consistent with the other prominent mention of the word commerce in the Constitution. Article I also states that '[n]o preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.' The term "commerce" is used in opposition to the term 'revenue,' and seems clearly to refer to shipping and its incidental activities...³⁰⁵

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles. The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According to that Clause, "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." *U.S. Const., Art. I, § 9, cl. 6*. Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.³⁰⁶

Thomas also mobilized several essays from the *Federalist*, excerpts from Elliot's *Debates*, and evidence from an edited volume called *A Documentary History of the Ratification of the Constitution* to implore the other members of the Supreme Court to "reconsider" its broad understanding of commerce and, "at an appropriate juncture," to "modify" its "Commerce Clause jurisprudence" to conform to the "original understanding" of the Constitution. For the time being, however, the Justice admitted that it would suffice "to say that the [Commerce] Clause does not empower Congress to ban gun possession within 1,000 feet of a school."³⁰⁷

The majority and concurring opinions in *Lopez* made it quite clear that the Supreme Court's new "formalistic" federalism framework, introduced in *Gregory* and *New York* a few years prior, would not be a *National League of Cities*-like blip on the constitutional radar screen. Indeed, the post-*Lopez* optimism that change was afoot with the Supreme Court's Commerce Clause jurisprudence was particularly evident among Federalist Society network actors. Federalist Society Co-Founder Steven Calabresi wrote in a law review article that the *Lopez* decision marked "a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers" and that it "must be recognized as an extraordinary event" for having "shattered forever the notion that, after fifty years of Commerce Clause precedent, we can never go back to the days of limited national power" (Calabresi 1995, 752). Similarly, John C. Yoo wrote a few years after the *Lopez* decision that "Federalism is back, with a vengeance" (Yoo 1998, 27). The Federalist Society itself responded to this post-*Lopez* optimism by organizing its 1998 Student Conference around the topic "Reviving the Structural Constitution," at which speakers discussed and debated the rebirth of federalism, undoing the New Deal, and the advantages and disadvantages of a return to the formalist framework applied in *Lopez*.³⁰⁸ As it turned out, Federalist Society network actors would not have long to wait to see whether or not all this optimism surrounding a more permanent return to the "formalistic" federalism framework announced in *New York* and *Lopez* was misplaced or in fact warranted.

United States v. Morrison (2000)

The constitutional challenge in this case involved a provision of the Violence Against Women Act (VAWA), enacted pursuant to Congress' Commerce Clause authority and its remedial power under the Fourteenth Amendment. The law provided a federal civil remedy for victims of gender-motivated violence.³⁰⁹ VAWA was drafted by Senator Joe Biden (D-DE) and signed into law by President Bill Clinton as part of the Violent Crime Control and Law Enforcement Act of 1994.³¹⁰ The federal legislation was supported by groups like the National Organization for Women (NOW) and viewed by proponents as an important supplement to the patchwork of state legislation in place at that time, much of which was seen as providing inconsistent and unsatisfactory remedies for victims of gender-motivated violence. For instance, under Virginia state law, rape is a "crime with a remarkably wide range of sanctions, from five

years to life imprisonment" with the choice being left to "the discretion of the court or the jury" (Noonan 2002, 123).

In early 1995 Christy Brzonkala, a Virginia Tech freshman, filed a report to the University complaining that she had been raped by two members of the school's football team, Antonio Morrison and James Crawford (Noonan 2002, 121). When, after a series of hearings, the University failed to appropriately sanction the two football players, Brzonkala filed suit against Morrison and Crawford in the U.S. District Court for the Western District of Virginia for damages under the Violence Against Women Act (VAWA). The United States intervened to defend the constitutionality of VAWA but to no avail. The District Court dismissed the complaint, ruling that Congress had lacked the authority to enact VAWA under either the Commerce Clause or its Fourteenth Amendment remedial power. A panel of the United States Court of Appeals for the Fourth Circuit initially reversed the District Court's ruling but upon rehearing en banc, affirmed in 7-4 decision. The Fourth Circuit majority opinion issued on March 5, 1999, was written by Federalist Society participant Judge Michael Luttig. The Supreme Court heard the appeal from the United States on January 11, 2000 and affirmed the Fourth Circuit's ruling in a 5-4 decision issued the following May.

Federalist Society network participation in *Morrison* reflected these actors' post-*Lopez* excitement about the Supreme Court's recent federalism revival. Eleven Federalist Society participants signed on to five of the eighteen (28%) *amicus curiae* briefs submitted in *Morrison*. Moreover, every one of these briefs was urging affirmance of the Luttig-authored Fourth Circuit majority decision. Two of the three network actors listed as counsel in this case - Michael Rosman and Charles Fried - were also arguing for affirmance of the lower court's decision. Federalist Society participation as judicial decision-makers doubled in terms of raw numbers from *New York* and *Lopez* to *Morrison* with four network actors - Justices Scalia and Thomas and Judges Luttig and Wilkinson - represented between the Fourth Circuit and the Supreme Court. Citations to Federalist Society scholarship dipped from *Lopez* with amici making use of just one source (See Table 5.3). The one category that increased significantly from both *New York* and *Lopez* was citations to the Originalist canon by *amici curiae*. Seven of the eighteen parties filing as amicus (39%) made use of at least one of these sources in their briefs. In total, amici in *Morrison* mobilized twenty-five different historical sources and referred to these authorities sixty-six times through the course of their arguments. It should be noted that all of these briefs were submitted on behalf of the respondent, Morrison, and were urging affirmance. There were three total cites to the canon in counsel's briefs but none of these appeared in the briefs represented by Federalist Society network actors. Finally, in a clear shift from *New York*

Table 5.3

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *United States v. Morrison* (2000)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	William Pryor, Jeffrey Sutton, John Eastman, Edwin Meese III, Phyllis Schlafly, Richard A. Epstein, Clint Bolick, Timothy Lynch, Roger Pilon, Robert A. Levy, Mary Ann Glendon,	<i>Carter Phillips</i> , Michael Rosman, Charles Fried	Supreme Court: Justice Scalia, Justice Thomas Circuit Court: Judge Luttig, Judge Wilkinson
Citations to Federalist Society Actor Scholarship	Jay Bybee, <i>Insuring Domestic Tranquility: Lopez, Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause</i> , 66 <i>GEO. WASH. L. REV.</i> 1, 3-4 (1997)		
Citations to Originalist Sources	James Madison, <i>Journal of the Federal Convention</i> (E.H. Scott ed, 1893) (VII), J. Elliot, <i>Debates on the Federal Constitution</i> (1863) (XIX); <i>The Founders' Constitution</i> (P. Kurland and R. Lerner, eds 1987) (II); <i>The Works of James Wilson</i> (McCloskey ed 1967); W. Blackstone, <i>Commentaries</i> ; M. Farrand, <i>Records of the Federal Convention</i> (III); <i>The Complete Anti-Federalist</i> (Storing ed. 1981); J. Story <i>Commentaries</i> (1833) (II); W. Blackstone, <i>Commentaries</i> (1783); <i>The Virginia Declaration of Rights</i> (1776); <i>The Portable Thomas Jefferson</i> (Peterson ed 1979); Federalist 14; Federalist 17 (III); Federalist 22; Federalist 28; Federalist 33; Federalist 39; Federalist 42; Federalist 44; Federalist 45 (V); Federalist 46; Federalist 47 (II); Federalist 51 (IV); Federalist 78 (II); Federalist 84 (II)	Federalist 17; Federalist 45; J. Elliot, <i>Debates on the Federal Constitution</i> (1863)	Circuit Court: Federalist 40, Federalist 45,

**Italics indicate that the Federalist Society actor did not argue on behalf of Federalism or States' Rights in the Case*

and *Lopez*, neither the Fourth Circuit majority opinion nor the Supreme Court opinion in *Morrison* contained a single cite to Federalist Society network scholarship or to the Originalist

canon. The concurring opinion in the Fourth Circuit opinion does, however refer to the *Federalist* twice.

Federalist Society affiliate and Fourth Circuit Judge Michael Luttig introduced the majority's opinion in *Morrison* with a strong and dramatically worded defense of limited government, bringing into sharp relief the shared structural belief of Federalist Society actors that the division of power between the States and the federal government is a precondition for individual liberty:

We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves... These simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.³¹¹

The majority proceeded to justify its conclusion that the provision of VAWA in question "simply cannot be reconciled with the principles of limited federal government upon which this Nation is founded" with reference to a string of recent decisions, like *New York* and *Lopez*, in which the Supreme Court had "incrementally, but jealously, enforced the structural limits on congressional power that inhere in Our Federalism."³¹² Reaffirming the impressions of several Federalist Society network actors, the majority noted that the *Lopez* decision was indeed the "Supreme Court's most significant recent pronouncement on the Commerce Clause" and that while it did not explicitly overturn "the precise holdings" of *Garcia* and past precedents like it, *Lopez* effectively "renounced or limited some of the most sweeping reasoning and dicta of [the Supreme Court's] Commerce Clause opinions."³¹³

Fourth Circuit Judge and Federalist Society participant J. Harvie Wilkinson wrote separately to add his own thoughts on the recent Commerce Clause decisions that had resurrected a role for the courts in enforcing the structural boundaries between federal and state power. He considered *Morrison* and past decisions like *New York* and *Lopez*, cases that "pit the obligation to preserve the values of our federal system against the imperative of judicial restraint," in light of other periods of judicial intervention or "Judicial activism."³¹⁴ Wilkinson's concurrence echoed concerns that many Federalist Society network actors share; concerns which, in fact, he himself had addressed in his talk at the 1988 Student Conference. In that talk, Wilkinson warned that regardless of what the original meaning dictated, the Supreme Court should not attempt to enact swift and broad changes to the constitutional landscape all at once: "the fortuities of uneven constitutional development must be respected, not cast aside in the illusion of reordering the landscape anew."³¹⁵ In *Morrison*, Judge Wilkinson observed that these recent Commerce Clause decisions all shared a common "interest in reviving the structural guarantees of dual sovereignty" and that by playing the role of "structural referees," the court in these cases had

"validate[d]... federalism" as an important "structural principle found throughout the Constitution."³¹⁶ That being the case, Wilkinson concluded that these decisions did indeed strike a proper balance between the obligation of judges to uphold and defend the Constitution and the obligation of judges to be measured and cautious in striking down popularly enacted legislation:

Our decision will assuredly be characterized as unjustifiable judicial activism. And just as assuredly, that characterization will miss the mark. It is true that our holding is "activist" in the sense that one provision in a federal statute is declared unconstitutional (the remainder of the Violence Against Women Act remains in effect)... The holding here vindicates the structural values of government by reaffirming the concept of enumerated powers. And it vindicates the role of the judiciary in maintaining this structural balance. Finally, it vindicates the textual values of the Constitution by refusing to assign a meaning to "commerce" that is nowhere comprehended by the term.³¹⁷

Finally, Wilkinson noted that his "fine colleagues" in dissent might not share his views but that their Commerce Clause jurisprudence would in effect "sweep the role of the judiciary and the place of the states away," and amount to an attempt to "rewrite[] the Constitution" to their particular "taste."³¹⁸ Wilkinson also warned judges against this tendency, what he described as the truly damaging kind of judicial activism, in his 1988 Federalist Society talk: "[this] holds special hazards for judges who are mindful that the proper task is not to write their personal views of appropriate public policy into the Constitution."³¹⁹

The Supreme Court's majority opinion, written by Chief Justice Rehnquist, relied on its holdings in *Lopez* and *City of Boerne v. Flores* to conclude that the federal civil remedy provided for under VAWA could not be sustained as a constitutional exercise of Congress' authority under either the Commerce Clause or the Fourteenth Amendment.³²⁰ The majority opinion in *Morrison* did not engage in any novel analysis, but merely reinforced the principle of limited federal power that had been articulated most recently in *Lopez*: "*Lopez* emphasized... that even under our modern, expansive interpretation of the *Commerce Clause*, Congress' regulatory authority is not without effective bounds."³²¹ Federalist Society actor Justice Thomas added a four-sentence concurring opinion that reiterated his view, expressed in *Lopez*, that the Supreme Court ought to align its Commerce Clause jurisprudence "with the original understanding of Congress' powers" if it does not wish to "continue to see Congress appropriating state police powers under the guise of regulating commerce."³²² The dissenting opinion, composed by Justice Souter and joined by Justices Stevens, Ginsburg, and Breyer, chastised the majority for its reliance on a "new" kind of "categorical formalism" in enforcing the boundaries of federalism which, in their view, had no such "constitutional warrant."³²³

Evaluating Federalist Society Network Impact on the Commerce Clause

After *Morrison*, the question remains, then, to what extent does the Supreme Court's Commerce Clause jurisprudence reflect the shared beliefs of actors in the Federalist Society network? To recall the discussion from the beginning of this chapter, I identified these expressed beliefs as falling into three general categories of argument: (1) textual arguments supporting an originalist interpretation of the phrase "commerce...among the several states;" (2) structural arguments relying on Madison's *Federalist 45* that emphasize the relationship between enumerated and limited governmental powers and individual freedom; and (3) functionalist arguments for less federal regulation derived from economic theories supporting competition and free markets.

In terms of network actors' textualist-originalist arguments advocating a more limited understanding of "commerce," we saw that in *Lopez* Justice Thomas' concurrence engaged in an extensive Originalist defense of this narrow reading of "commerce," relying in part on the logic and language of fellow Federalist Society network actor Richard Epstein's 1987 law review article. While this understanding has yet to gain acceptance by a majority of the Supreme Court, Thomas reiterated in *Morrison* his intent to continue to push his colleagues to reconsider their Commerce Clause jurisprudence in light of this evidence. The structural argument linking limited federal power to individual freedom, on the other hand, has been adopted and articulated by majorities of decision-makers on both the federal circuit and the Supreme Court. Recall that both the Fifth Circuit and Supreme Court majority opinions in *Lopez* opened with citations to Madison's *Federalist 45* to justify what Rehnquist referred to as a return to "first principles" in their Commerce Clause jurisprudence. Similarly, in his Fourth Circuit concurring opinion in *Morrison*, an opinion littered with references to the importance of constitutional "structure" and "structural principles," Federalist Society participant J. Harvie Wilkinson also relied on Madison's *Federalist 45* to support the position that the "federal commerce power" had "identifiable and judicially enforceable boundaries."³²⁴ Finally, while the Supreme Court has yet to consider the benefits of federalism from a pure public choice perspective as some network actors like John O. McGinnis and Richard Epstein have, it did in both *Gregory* and *New York* rely explicitly on Michael W. McConnell's functionalist-originalist defense of federalism to catalogue the many benefits of the constitution's dual structure of sovereignty.

The Supreme Court's adoption of a more "formalistic" Commerce Clause jurisprudence cannot, of course, be explained with exclusive reference to Federalist Society network participation. After all, in the first of these Commerce Clause cases, *New York v. United States*, all five network actors participating in the case as non-decision makers were urging the Supreme Court to uphold the congressionally enacted Waste Amendments. And, as I noted before, while all Federalist Society network actors in *Lopez* were arguing for a more limited understanding of the commerce power, overall network representation actually decreased in terms of the

percentage of total amicus briefs submitted. Further, unlike in prior separation of powers cases, there was little to no evidence that the Supreme Court had paid any significant attention to network actor-authored *amicus* or counsel briefs in any of the three cases examined. What judicial decision-makers clearly were paying attention to in their arguments, however, was the Originalist canon and Federalist Society network scholarship. As I mentioned at the outset, one cannot strictly equate reliance on the Originalist canon with Federalist Society influence. Nonetheless, it is illuminating to compare these “New Federalism” opinions with the handful of other Supreme Court opinions that articulated a more narrow understanding of the Commerce Clause. For instance, in each of the two New Deal rulings that invalidated legislation as exceeding Congress’ commerce power, *Schechter Poultry Corp v. United States* (1935) and *Carter v. Carter Coal* (1936), there is not one single citation or reference to a historical source in either the majority or concurring opinions of the Supreme Court.³²⁵ The rulings following the Supreme Court’s adoption of a more flexible, hands-off approach to the Commerce Clause that upheld broad Congressional power, *NLRB v. Jones & Laughlin Steel* (1937), *Wickard v. Filburn* (1942), and *Heart of Atlanta Motel v. United States* (1964) also did not support their decisions with what would now be considered Originalist sources.³²⁶ The only other case to strike down legislation on Commerce Clause grounds prior to those examined in this chapter, the 1976 ruling in *National League of Cities*, also did not feature a single reference to sources associated with the Originalist canon.

While, again, the number of citations to the Originalist canon in any given case is not a strict measure of Federalist Society network influence, it is telling of how successful this epistemic community has been in changing the terms of the debate by nurturing and developing a particular kind of legal argument supported by a canon of authoritative sources, and diffusing these ideas and these sources to judicial decision-makers. As we saw, these Originalist authorities and Federalist Society scholarship were particularly important in *New York* and *Lopez*, where the Supreme Court had yet to develop its own authoritative pronouncements on a more limited reading of the Commerce Clause. In *Morrison*, while Federalist Society network participation as *amici*, counsel and citations to Originalist sources all increased dramatically, the Supreme Court had built up a body of its own written work to support its holding and thus no longer needed to rely on these outside sources. It is important to remember, however, that the framework, language and logic of those holdings in *Gregory*, *New York*, and *Lopez* were all constructed with substantial reliance on sources in the Originalist canon and select Federalist Society scholarship, both of which embodied important shared beliefs of Federalist Society network actors.

Taken together, the trilogy of Commerce Clause cases examined in this chapter were viewed by federalism proponents in the Federalist Society as serious victories for the principle of limited government. As Federalist Society participant Jeremy Rabkin wrote in *The Weekly Standard* just weeks after the Supreme Court rounded out its constitutional reconsideration of Congress’ commerce power in *United States v. Morrison*, the “remarkably unflinching” and

"brusque" opinion in *Morrison* "show[ed] [that] the Court is not rattled by such [liberal scare] tactics" and that "for the Court's current majority, the Constitution really does mean something."³²⁷ Several days earlier in the *Wall Street Journal*, network actor Charles Fried had also applauded the majority in *Lopez* and *Morrison* for its successful "attempt to breathe life into the federalism doctrine" and chastised the dissenting Justices for their refusal to draw any meaningful limits between "the national and the local."³²⁸ Network actor Randy Barnett took the opportunity of Chief Justice Rehnquist's passing half a decade later to positively evaluate "the New Federalism" and the Supreme Court's "revival of the ideas that the judiciary should protect the role of the states within the federal system and enforce the textual limits on the powers of Congress."³²⁹

While the cases examined in this chapter certainly represented a long-awaited victory for the proponents of a more limited understanding of congressional commerce power, as a number of scholars have noted, the Supreme Court has refrained from targeting legislation at the heart of either party's political agenda and thus has not effectively limited the power of the federal government in any meaningful way (Whittington 2001; Shroeder 2001; Clayton and Pickerill 2004). In areas of importance to Republicans, such as drug control and federal preemption of state law, for example, the Supreme Court has "conspicuously shied away" from curbing Congress' regulatory power (Clayton and Pickerill 2004, 91). For example, in *Gonzales v. Raich* (2005) the Supreme Court upheld the federal government's power under the Commerce Clause to ban the personal use of medical marijuana contrary to the will of the California voters.³³⁰ And in *Watters v. Wachovia* (2007), the Supreme Court (at that point populated by four Federalist Society affiliated Justices)³³¹ handed another victory to the federal government in ruling that Congress had the power to regulate operating subsidiaries of national banks and, under the Commerce Clause, could preempt state regulations.³³²

Nevertheless, after half a century of being on the losing end of Commerce Clause decisions, the advocates of limited government had reason to be optimistic. But the Commerce Clause cases constituted only half of the story of the "triumph of federalism" Rabkin and several other Federalist Society network actors have celebrated in the media and in law review articles.³³³ The other half of this "constitutional revolution" in federalism, as Steven G. Calabresi has labeled it, would involve what Justice O'Connor referred to in *New York* as the "mirror image" of inquiries into the limits of federal power under the Commerce Clause.³³⁴ The three cases examined in the next chapter, all decided by the Supreme Court under Chief Justice Rehnquist in the 1990's, focus on the doctrine of State sovereignty as articulated by the Constitution's Tenth and Eleventh Amendments.

Chapter Six -----

Federalism II: State Sovereignty in Court, 1996 - 1999

In the Federalist [No. 33], Alexander Hamilton similarly argued that... "The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded..." The Tenth Amendment declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." This provision expressly confines the national government to its delegated sphere of jurisdiction... [any] law that regulates subjects outside Congress' enumerated powers is not "proper" and therefore not constitutional. The Tenth Amendment, as with the rest of the Bill of Rights, is thus declaratory of principles already contained in the unamended Constitution...

- Federalist Society Co-Founder Gary Lawson³³⁵ and Patricia Granger, "The Proper Scope of Federal Power," 43 Duke L. J. 267, 299, 330 (1993) (bold emphasis added)

When a [law] violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier... it is not a "Law . . . proper..." and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 297-326, 330-333 (1993)... [The dissent's] argument also falsely presumes that the Tenth Amendment is the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions... and not only those, like the Tenth Amendment, that speak to the point explicitly.

- Justice Scalia, Majority Opinion in *Printz v. United States* (1997)³³⁶ (bold emphasis added)

In Supreme Court doctrine the "principle of state sovereignty," as Justice Scalia referred to it in the excerpt from *Printz*, has surfaced from time to time as a structural safeguard, protecting the states from certain kinds of federal interference including but not limited to regulations stemming from Congress' Commerce Power. Sometimes referred to as the "doctrine of state sovereignty," its proponents maintain that after the American Revolution the sovereignty of the English Crown was "transferred" directly to the "individual states" (Nash 2005, 969). These states were then authorized to act as sovereign decision-makers except in those areas where they had, through the ratification of the Constitution, explicitly authorized the federal government to act instead. This "geometric" or formalist view of federal-state relations thus divides sovereignty into two separate spheres, with "each government" understood as "supreme in its respective sphere" (Nash 2005, 969). In terms of the constitutional text, the doctrine of

state sovereignty finds its most authoritative expression in the Tenth Amendment. The Tenth Amendment, the principal legacy of the Anti-Federalists fearful of the concentration of power, declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."³³⁷ As chronicled in the previous chapter, prior to Justice O'Connor's passing mention of the importance of the Tenth Amendment in *New York*, the state sovereignty doctrine had been on the losing end of a half a century long battle with the Commerce Clause. The view that the Tenth Amendment was nothing more than "a truism" with no substantive meaning, first articulated by Justice Stone in the 1941 case *United States v. Darby*, had more or less reduced the state sovereignty doctrine to empty rhetoric; an ineffective protection against federal incursion into what some would consider states' rights.³³⁸

A close relative of the state sovereignty doctrine, the doctrine of "state sovereign immunity" has also been discussed as a critical component of the federalism battle to revitalize states rights. Derived textually from the Eleventh Amendment, which states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subject of any Foreign State, " the principle of sovereign immunity can be traced back to the English common law, which "declared that the king was immune from suit by his subjects" (Merkel 2005, 943). In practice, prior to the Rehnquist Court decisions discussed in this chapter, the doctrine had been interpreted rather narrowly by the Supreme Court to protect states against lawsuits brought by private citizens of other states and by foreign sovereigns (Orth 2005, 290). In fact, the Supreme Court had ruled as recently as 1989 in *Pennsylvania v. Union Gas Co* that the federal commerce power essentially trumped the states' sovereign immunity protections and that Congress could abrogate the states' Eleventh Amendment immunity if it expressly intended to do so.³³⁹ Federalist Society mentor Justice Scalia, writing in dissent, declared that the "Court's holding" in *Pennsylvania v. Union Gas Co.* should "be applauded only by those who think state sovereign immunity" is "constitutionally insignificant" and further warned that the fractured decision constituted "an unhappy" and "unstable victory" for the proponents of federal power. Channeling Justice Rehnquist's prophetic dissent in *Garcia*, Scalia predicted that the principle embodied in *Union Gas* was "too much at war with itself to endure" and would undoubtedly be revisited by the Supreme Court in the not-so-distant future.³⁴⁰

Before moving on to see whether or not Justice Scalia's powers of prognostication rival those of Chief Justice Rehnquist's, the next section will briefly review some of the Federalist Society network actors' articulated beliefs about state sovereignty and states' rights. Because almost all of these actors subscribe to the "geometric" or formalist understanding of dual sovereignty, their beliefs about state sovereignty do appear to "mirror," to recall Justice O'Connor's language from *New York*, their beliefs about the limits of federal power as embodied in the Commerce Clause. After a brief review of these beliefs, I then examine three cases decided by the Rehnquist Court that explicitly addressed the doctrines of state sovereignty and

state sovereign immunity as embodied in the Tenth and Eleventh Amendments, respectively: *Seminole Tribe v. Florida* (1996), *Printz v. United States* (1997), and *Alden v. Maine* (1999). Like in previous chapters, I follow this up with a qualitative look at how closely these decisions track with Federalist Society network actors' expressed beliefs about state sovereignty.

Federalist Society Network Actors on State Sovereignty

As I indicated in the previous chapter, discussions of the constitutional and functional merits of limiting the federal government's power through judicial interpretation of the Commerce Clause have become something of a permanent fixture of the Federalist Society dialogue. The "mirror image" of these discussions, those focusing specifically on state sovereignty and states' rights, seem to be equally well-represented at Federalist Society National Conferences. For example, coding the same sample of speech-acts I referred to in the previous chapter revealed thirty-eight (18%) combined mentions of the "Tenth Amendment," the "Eleventh Amendment" and "state sovereignty" as compared with forty-one (20%) mentions of the Commerce Clause.³⁴¹ My media analysis of politically conservative newspapers and magazines confirmed that Federalist Society affiliated-actors have also been discussants of state sovereignty outside national conferences, with one of every fifteen of the network-authored "federalism" articles mentioning at least one of the three terms cited above.³⁴² The next section examines some of the beliefs Federalist Society network actors have expressed about the doctrine of state sovereignty as embodied in the Constitution's Tenth and Eleventh Amendments. As I mentioned before, because these beliefs tend to be derived from a formalist understanding of federalism and the structure of dual sovereignty, there is significant overlap between arguments calling for a limited interpretation of federal power and arguments calling for a recognition of the proper sphere of state sovereignty. Those that specifically address the constitutional provisions referenced above, however, tend to be of two kinds: (1) Originalist arguments, relying on the Anti-Federalists and evidence from the Founding Era, that push back against the notion that the text of the Tenth Amendment merely states a "truism"; and (2) structural arguments situating the Eleventh Amendment's promise of sovereign immunity in a broader constitutional and historical context of states' rights and state sovereignty.

Network Actors at the Federalist Society on State Sovereignty

Legal scholar Martin Redish opened his remarks at the 1996 Federalist Society National Lawyers Convention with the following satirical comment on the Supreme Court's century-long track record of policing the boundaries between federal and state power:

Well, I have decided to entitle my talk, "The Supreme Court and Constitutional Federalism: A 100 Year How-Not-To-Do-It Manual." If the Supreme Court was to have one of those Bob Vila fix-it shows about constitutional federalism - maybe we could call it "This Old House and Senate" - and people were to call in and ask questions, and the Supreme Court was to give advice, you would want to do the exact opposite of what they said.³⁴³

Redish attributed the Supreme Court's poor track record on federalism in part to the fact that it had felt at liberty to continually "ignore or disregard" the Tenth Amendment as an "unimportant" and "superfluous truism." Referring to the historical record, Redish argued that the Tenth Amendment instead should be understood as a "political exclamation point" on the federal government's limited enumerated powers. Several other network actors have expressed a similar unwillingness to accept the view that the Tenth Amendment, as Justice Stone famously wrote in *United States v. Darby*, communicates a mere truism. Current D.C. Circuit Judge David Sentelle confessed to an audience at the 1988 National Lawyers Conference that he "ha[d]n't gotten the word and perhaps never will... that the Tenth Amendment was intended to create an empty set." Sentelle continued, surmising that if "today" scholars and others see the Tenth Amendment "as an empty set, it is because we are not looking to see what is there" but rather what has resulted from "an improper treatment of the constitutional division of the powers of rule."³⁴⁴ Along the same lines, at the 1992 National Student Conference Pete du Pont lamented the fact that the Supreme Court in *Darby* had "reduc[ed] the Tenth Amendment to a truism" and had subsequently "disavowed any judicial role in protecting the states from federal intrusion, leaving the states to fend for themselves and the national bull free to rampage through state china shops."³⁴⁵ Finally, Ninth Circuit Judge Alex Kozinski introduced a panel at the 1998 National Student Conference with a discussion of how the "rebirth of federalism" embodied in *New York* and *Lopez* would hopefully challenge the view held by "most scholars" that the Tenth Amendment was "'a mere truism' that left the states only such power as Congress chose not to exercise."³⁴⁶

As I mentioned earlier, many of these Federalist Society network actors support their more robust understanding of Tenth Amendment state sovereignty protections with reference to founding documents. For instance, in her presentation before a Federalist Society audience at the 1998 National Student Conference, Lynn Baker relied on the "Framers' intent" and "history" to support her conclusion that "the states' ratification of the federal Constitution was predicated on the preservation of a sphere of autonomy for the states" and thus that "the Tenth Amendment" was intended "to serve as [a] real constraint on the exercise of federal power rather than as meaningless rhetoric."³⁴⁷ Six years earlier at the 1992 Federalist Society Student Conference, Charles J. Cooper had relied on the papers of the Anti-Federalists and the records from the Federal Convention to point out just how far the Supreme Court had deviated from the original understanding of the Tenth Amendment. Cooper referred to the Tenth Amendment as one of the "forgotten" amendments that, unfortunately, had "not had the constraining influence on the federal government's appetite for power that the Founders, especially the Anti-Federalists, had

hoped." After mobilizing this historical evidence, Cooper asked the Federalist Society audience rhetorically:

When was the last time the Supreme Court upheld a State's claim that a congressional enactment encroached on the State's sovereign authority in violation of the Tenth Amendment? That has happened only once in over fifty years... [i]n the 1976 case *National League of Cities v. Usery*... That modest, almost insulting, concession to state sovereign authority did not last long, however... Now even the pathetic limit on federal power recognized in *Usery* is gone, and the Supreme Court will no longer go through the charade that it had for fifty years of pretending to inquire into the scope of congressional legislative powers.³⁴⁸

Expressing a similar sense of frustration with the state of constitutional federalism over a decade earlier at the 1982 National Conference, Federalist Society actor Theodore Olson looked to Madison's *Federalist 39* as evidence that the Founders had intended a more robust protection of the "spheres of sovereignty" with the addition of the Tenth Amendment.³⁴⁹ The *Federalist 39*, which links the Constitution's authority to "the assent and ratification of the several States, derived from the supreme authority in each State - the authority of the people themselves," was also cited by participant John S. Baker, Jr at the 1992 Federalist Society Student Conference in his discussion of the Tenth Amendment's protections against "a newly energetic central government" that "could infringe on the powers of the states and the liberties of its citizens."³⁵⁰

The Eleventh Amendment has appeared considerably less frequently in Federalist Society National Conference dialogue than has either the Commerce Clause or the Tenth Amendment. Most of the actors who have mentioned it at National Conferences have done so only in passing.³⁵¹ Perhaps due to its complicated relationship to federalism and the doctrine of state sovereignty more generally, the Federalist Society actors who have discussed it have taken to the law reviews to fully flesh out their beliefs about the Eleventh Amendment. That being said, state sovereign immunity has been a topic of discussion in at least two different articles published in *Engage*, the journal of the Federalist Society's Practice Groups.³⁵² While these network actors disagree about how the Supreme Court should go about applying the doctrine of state sovereign immunity, both express the belief that sovereign immunity is an important structural value in the Constitution, not necessarily limited to the text of the Eleventh Amendment, and that it is deeply rooted in our "legal tradition[s]."³⁵³ For example, opening his discussion of sovereign immunity with Madison's *Federalist 51* ("If angels were to govern men, neither external nor internal controls on government would be necessary"), Steven Tepp referred to the "doctrine of sovereign immunity" as "an ancient legal principle, dating back to feudal Europe" and as an "unquestionable... component of our legal tradition, and indeed our Constitution."³⁵⁴ Similarly, providing a structural analysis of the doctrine, William Thro wrote that "although the lay public and many lawyers may view sovereign immunity as unjust, the principle is a constitutional value" and that "when the State acts consistent with the other constitutional values, then the constitutional value of sovereign immunity should prevail."³⁵⁵ These same beliefs about the Eleventh Amendment, articulated in cliff-notes version in these short Federalist Society Practice

Group articles, are more fully developed in network actor scholarship, which I examine in the next section.

Network Actors' Scholarship on State Sovereignty

In his 1987 law review article, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, Federalist Society network actor and legal scholar William Van Alstyne argued that the sort of "enumerated-power nominalism" that had characterized the Supreme Court's protection (or lack thereof) of states' rights ran afoul of the original understanding of both the Tenth Amendment and the notion of state sovereignty embedded within the body of the Constitution itself (Van Alstyne 1987, 769). Referring to the ratification debates, Madison's notes on the Constitutional Convention, and several essays from *The Federalist*, Van Alstyne concludes that the doctrine of state sovereignty "antedates" the "Bill of Rights and in several respects grants greater space [for state sovereignty] than does the Bill of Rights" (Van Alstyne 1987, 772). Just as participant Martin H. Redish referred to the Tenth Amendment as an "exclamation point" on protections the Constitution already afforded the states, Van Alstyne wrote that the Tenth Amendment should be understood as "an express, precautionary bookend" to "make the matter textually explicit - to designate expressly in whose favor powers not 'delegated' to the United States were reserved" (Van Alstyne 1987, 772). Recommended reading on the Federalist Society's web-published *Conservative and Libertarian Bibliography*, Charles J. Cooper's 1988 article, *The Demise of Federalism* offers even more historical evidence in support of a more robust understanding of state sovereignty under the Tenth Amendment. Cooper situated James Madison's promise in *Federalist 39* that the states would retain "a residuary and inviolable sovereignty" in the context of the laundry list of fears and concerns articulated by the Antifederalists which, as he explained, ultimately "led directly to the proposal and adoption of the Bill of Rights, including the tenth amendment" (Cooper 1988, 239). This protection of state sovereignty, Cooper explained, was critical to the ratification of the Constitution:

In almost every state's ratifying convention, opponents of the Constitution - the 'Antifederalists' - echoed the concern expressed by George Mason of Virginia: '[T]he general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former... So great was the fear that the new national government would eventually consume the states that proponents of the Constitution were compelled to make assurances that a bill of rights... would be considered by the First Congress. Eight states voted for the Constitution only after proposing amendments to be adopted after ratification. All eight of these included among their recommendations some version of what later became the tenth amendment" (Cooper 1988, 239-243).

In other words, Cooper's article used Originalist and historical sources to argue that the Tenth Amendment and its promise of state sovereignty, far from being a mere "truism," was a

precondition of the states' acceptance of the new Constitution and was designed to "ensure the continued strength of the states vis-a-vis the national government" (Cooper 1988, 244).

Two other Federalist Society network-authored articles demonstrate these actors' shared desire to give some meaningful content and broader constitutional support to the doctrine of state sovereignty articulated in the Tenth Amendment. In his article, *Sounds of Sovereignty: Defining Federalism in the 1990s*, John C. Yoo argued that "instead of looking at the limits of the Commerce power," the Supreme Court could better enforce the Framers' constitutional design with an analysis that turned on the positive powers granted to the states under the Tenth Amendment: "Since the Court has experienced great difficulty in finding the outer limits of the Commerce Clause, a more useful inquiry would look to those areas that the framers understood to be wholly within state jurisdiction" in order to determine "what the framers believed they were protecting when they placed state sovereignty under the aegis of judicial review" (Yoo 1998, 30). Examining the history of the Bill of Rights, the ratification debates, and essays from *The Federalist*, Yoo argued that "the continued existence of states as quasi-independent sovereigns" was believed to be "crucial to the preservation of individual liberty" (Yoo 1998, 37). An article published the same year by Federalist Society participant and legal scholar Michael Rappaport reveals a very similar original understanding of states as entities "that had complete sovereignty" (Rappaport 1998, 829). Rappaport's article, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions* is an attempt to give the Tenth Amendment's doctrine of state sovereignty stronger constitutional and textual moorings by examining the 18th Century understanding of the word "State" as it appears throughout the Constitution:

In 1789, the principal meaning of the term [State] in this context was an independent nation or country that had complete sovereignty. That the Framers chose to describe the states as countries rather than as provinces or districts indicates that they intended and believed that the states retained a significant amount of sovereignty. Although the states obviously did not retain all the powers of independent countries, inferences from structure, purpose and history suggest that they did retain immunities against some of the most intrusive exercises of federal power" (Rappaport 1998, 829-830).

The Rappaport article used several other historical sources to furnish a laundry list of traditional state functions and "immunities" that, he argued, would be consistent with this understanding of 'State' (Rappaport 1998, 838-848). Interpreting the Tenth Amendment within this framework, Rappaport argued, preserves "a significant degree of state sovereignty" that is "consistent with the remainder of the Constitution" while providing for immunities against distinct forms of federal intervention including "taxation," "regulation" and "commandeer[ing]" of state governments and state officials (Rappaport 1988, 838).

Commenting on decisions that will be explored later in this chapter, Rappaport's article also addressed the Supreme Court's interpretation of the Eleventh Amendment: "The problems with the Supreme Court's jurisprudence for state immunities... are mirrored in the Court's state

sovereign immunity jurisprudence" (Rappaport 1998, 868). Like with the Tenth Amendment, Rappaport attempted to ground the Eleventh Amendment's doctrine of state sovereign immunity in other textual clauses of the Constitution, arguing in fact that the doctrine actually predated the adoption of the Eleventh Amendment: "... the original Constitution protected state sovereign immunity in federal courts before the passage of the Eleventh Amendment" (Rappaport 1998, 871). The Rappaport framework locates the textual basis for the doctrine of sovereign immunity in "the history, structure, and purpose" of Article III's "Judicial Power Vesting Clause"³⁵⁶ and, again, in the Framers' original understanding of "State" (Rappaport 1998, 868). Similarly, Federalist Society participant Caleb Nelson, in his article *Sovereign Immunity As A Doctrine of Personal Jurisdiction*, situated the doctrine of sovereign immunity within "the overall structure of the governmental system that the Constitution established (Nelson 2002, 1580-1581). This article, which is also recommended reading on the recently-revised Federalist Society's *Conservative and Libertarian Bibliography*, devotes forty pages to exploring "The Founders' Framework for Sovereign Immunity," arguing, like Rappaport, that elements of this doctrine predated the adoption of the Eleventh Amendment (Nelson 2002, 1567- 1608). Also like the Rappaport piece, the Nelson article linked the concept of sovereign immunity to state sovereignty more generally, explicitly mobilizing Madison's *Federalist 39* in support: "[t]he federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residual and inviolable sovereignty over all other objects" (Nelson 2002, 1582).

Finally, in an article that predates both these Eleventh Amendment commentaries by about a decade, Federalist Society network actor Vicki C. Jackson articulated her thoughts about the state of the Supreme Court's sovereign immunity jurisprudence in an article entitled *One Hundred Years of Folly: the Eleventh Amendment and the 1988 Term*. Reviewing its decisions on the Eleventh Amendment, Jackson chastised the Supreme Court for its "inability... to agree on a coherent theory of the eleventh amendment" and wrote that its 1989 decision in *Union Gas*, which I briefly examined earlier in this chapter in the context of Justice Scalia's forward-looking dissent, appeared to be a "purely political accommodation to the symbolism of judicial federalism" (Jackson 1990, 103). Because of its contradictory holding, Jackson echoed Scalia's prediction about *Union Gas*' expiration date: "It may be worth noting that not only the breadth but the duration of the Court's constitutional holding in *Union Gas* may be in doubt" (Jackson 1990, 75). The next section will reveal whether or not Justice Scalia and Vicki Jackson were indeed correct in their predictions. Like in previous chapters, the next section also examines the extent to which Federalist Society network actors' beliefs about the Tenth and Eleventh Amendments were picked up and utilized by judicial decision-makers in three cases implicating these constitutional provisions.

State Sovereignty in Court, 1996-1999

By mid-decade the Rehnquist Court had already signaled, through its Commerce Clause opinions in *New York* and *Lopez*, that it was both willing and capable of enforcing the limits on federal power in order to protect and preserve the individual states' rights to exercise sovereign decision-making in those "area[s] to which States lay claim by right of history and expertise."³⁵⁷ Still, the Tenth Amendment had been a second consideration in *New York*, as the majority's opinion and analysis turned instead on the limits of Congress' commerce power, while the Supreme Court had not considered an Eleventh Amendment case since *Union Gas*, which - much to Justice Scalia's chagrin - had given Congress the ability to abrogate states' sovereign immunity as long as it explicitly intended to do so.

Three cases in three years, *Seminole Tribe v. Florida* (1996), *Printz v. United States* (1997), and *Alden v. Maine* (1999),³⁵⁸ would test whether the Rehnquist Court's Commerce Clause decisions were, in the words of Ninth Circuit Judge and Federalist Society participant Alex Kozinski, a "blip on the historical screen" or "the beginning of something truly wonderful";³⁵⁹ i.e., a full-blown federalism revolution complete with a revitalization of the state sovereignty doctrine.

Seminole Tribe v. Florida (1996)

This case challenged the constitutionality of a provision of the federal Indian Gaming Regulatory Act (IGRA) of 1988.³⁶⁰ Sponsored by Senators Daniel K. Inouye (D-HI) and John McCain (R-AZ) and Representative Morris K. Udall (D-AZ), the IGRA represented "an attempt by Congress to strike a balance between the rights of tribes to engage in activities generally free of state jurisdiction" and the "interests of states in regulating gaming activities within their boundaries."³⁶¹ In the context of providing a legislative basis for the operation of Indian gaming in the several states, the Act explicitly provided Indian tribes with the right to bring a lawsuit against a state in federal court in order to compel the state to cooperate in forming a compact governing gaming activities.

Pursuant to the IGRA, in 1991 the Seminole Indian Tribe sued the state of Florida and its governor in the District Court of the Southern District of Florida, alleging that the parties had violated the good-faith negotiation requirement of the Act.³⁶² The state of Florida and its governor moved to dismiss the suit based on the Eleventh Amendment's doctrine of sovereign immunity which protected states from being sued in federal court. After the District Court denied the motion to dismiss, the parties appealed to the United States Court of Appeals for the Eleventh Circuit, which in 1994 reversed the District Court's judgment and directed the lower court to dismiss the suit on the grounds that they could find no compelling evidence that Congress had intended to abrogate the states' sovereign immunity when it enacted the IGRA, a

Table 6.1

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Seminole Tribe v. Florida* (1996)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	Gale Norton, Daniel Lungren;		Supreme Court: Justice Scalia, Justice Thomas
Citations to Federalist Society Actor Scholarship		Vicki C. Jackson, "One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term," 64 S. Cal. L. Rev. 51 (1990)	
Citations to Originalist Sources	Federalist 6; Federalist 39; Federalist 42 (III); Federalist 81 (II); <i>Journals of the Continental Congress</i> (III); M. Farrand, <i>Records of the Federal Convention of 1787</i> (II); J. Elliot, <i>Debates</i> (II); <i>Papers of James Madison</i>	Federalist 17; Federalist 42; Federalist 46; Federalist 81;	Supreme Court (majority): Federalist 81 (III); J. Elliot, <i>Debates</i> (II); Supreme Court (dissent): Federalist 32 (IV); Federalist 46; Federalist 81 (V); Federalist 82; W. Blackstone, <i>Commentaries</i> ; J. Elliot, <i>Debates</i> (VII); M. Farrand, <i>Records of the Federal Convention</i> (III); <i>Papers of Alexander Hamilton</i> (Syrett ed. 1965); <i>Writings of James Madison</i> (G. Hunt ed. 1904); <i>Sources and Documents of United States Constitutions</i> (Swindler ed. 1975) (VII)

standard required by the holding in *Union Gas*.³⁶³ The Seminole Tribe appealed the decision to the Supreme Court which granted cert and heard the case on October 11, 1995. In a 5-4 decision handed down in March of the following year, the Supreme Court affirmed the ruling. Moreover, the majority expressly overruled *Union Gas* and held that Congress could not use its power under the Commerce Clause to abrogate the states' Eleventh Amendment sovereign immunity even if there was clear intent to do so.

Looking at Table 6.1, Federalist Society network participation in the *Seminole Tribe* case was minimal. Given that the Eleventh Amendment had not necessarily been a hot topic of discussion at Federalist Society Conferences, perhaps this is not surprising. Only two network actors, State Attorneys General Gale Norton and Daniel Lungren, participated as *amici curiae*. Their brief, submitted on behalf of various states in support of the State of Florida, represented just one of the nine total (11%) amicus briefs submitted in *Seminole Tribe*.³⁶⁴ The only other two

network participants were Justices Scalia and Thomas on the Supreme Court bench. Neither the amici nor the judicial decision-makers in *Seminole Tribe* made use of Federalist Society scholarship in their analyses. Curiously enough, the petitioner's brief in support of the Seminole Tribe of Florida did make use of the Vicki C. Jackson article I examined in the previous section. It cited this network actor-authored article to support the claim that the Framers intended for the commerce power, as it applies to Indian tribes, to trump state sovereignty.³⁶⁵ The more interesting puzzle emerges as we look not just at the quantity of citations to the Originalist canon in *Seminole Tribe* but at how these were used and by whom. All in all, five of the nine total (56%) parties submitting amicus briefs made reference to Originalist sources, but four of these briefs were filed on behalf of the Seminole Tribe of Florida. Counsel to parties in *Seminole Tribe* only mobilized the canon four times total, and three of these citations appeared on the petitioner's brief. The Supreme Court majority opinion, authored by Justice Rehnquist, relied on two sources a total of five times while the dissent, arguing on behalf of Congress' constitutional authority to abrogate the states' sovereign immunity, mobilized ten different historical sources a total of thirty-three times. This co-opting of the Originalist canon by non-Federalist Society network actors is a trend that will continue throughout the next two cases and one which I'll explore at some length in the final section of this chapter.

While the links to the Federalist Society network in this case are not particularly compelling, two aspects of the Supreme Court's opinion in *Seminole Tribe* merit further attention. First off, just as former Federalist Society mentor Justice Scalia had predicted in dissent and just as network actor Vicki C. Jackson had forecasted in her 1990 law review article on the Eleventh Amendment, the majority in *Seminole Tribe* indeed reconsidered and overruled the holding of *Union Gas*. In justifying this ruling, Chief Justice Rehnquist's majority opinion endorsed the legal rationale of network actors and State Attorneys General Gale Norton and Daniel Lungren in the *amicus curiae* brief submitted on behalf of the various states.³⁶⁶ The States' brief argued in no uncertain terms that *Union Gas* was "constitutionally unsound" and thus "should be overturned:"

In 1989, this Court, in a splintered and ambiguous plurality decision, decided that the power granted to the Congress in Article I of the Constitution to regulate interstate commerce was also a limitation on the sovereign immunity of a State, thereby allowing Congress to subject States to suit in federal court by private citizens. *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). The premise of *Union Gas* was that Congress' power to regulate interstate commerce would be incomplete if Congress could not subject the States to suit in the federal courts. Amici States contend the *Union Gas* decision is constitutionally unsound and its rationale effectively eviscerates the Eleventh Amendment... [this decision] ha[s] done serious damage to the fundamental balance of authority between the State and federal governments inherent in the structure of the Constitution.³⁶⁷

Of the two amicus briefs arguing on behalf of the State of Florida Et Al, the States' brief is the only one that openly called for *Union Gas* to be overturned. Further, the Brief of Respondents, in raising the same point, actually referred the Supreme Court to the States' brief: "If this Court concludes that it cannot limit *Union Gas* to the uniqueness of the Interstate Commerce Clause...

then *Union Gas* should be reconsidered and overruled. For a full discussion of this point, see Brief of amicus, States, which we adopt here by reference.³⁶⁸ The majority in *Seminole Tribe*, perhaps in part influenced by the network actor-authored States' brief and perhaps in part influenced by Federalist Society mentor Justice Scalia's sharply worded dissent six years prior, did overrule the holding in *Union Gas*. Concluding that the holding in that case represented a "solitary departure from established law" and from the "established understanding of the Eleventh Amendment," the majority felt "bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled."³⁶⁹

The Supreme Court opinion in *Seminole Tribe* is also noteworthy for the open confrontation between the majority and the dissent, both relying on the Originalist canon, over the original meaning of the Eleventh Amendment and the reach of the state sovereign immunity doctrine. The majority in *Seminole Tribe*, for instance, chastised the dissent for disregarding "our case law in favor of a theory cobbled together from law review articles and its own version of historical events."³⁷⁰ In another place, Rehnquist accused the dissent of mischaracterizing "the views of Marshall, Madison, and Hamilton" and of "quot[ing] selectively from the Framers' statements that it references."³⁷¹ Finally, and most damningly, the majority argued that "in putting forward a new theory of state sovereign immunity, the dissent develops its own vision of the political system created by the Framers" that is "exaggerated both in its substance and in its significance."³⁷² For its part the dissenting opinion, authored by Justice Souter, defended its analysis of a more limited reading of state sovereign immunity with reference to a plethora of historical sources (see Table 6.1) and offered its own critique of the majority's use of those same sources:

Thus, the Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided. The Court's difficulty is far more fundamental, however, than inconsistency with a particular quotation, for the Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' enterprise. An enquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.³⁷³

While we certainly saw evidence of this kind of interpretive battling over the authoritative meaning of historical sources in earlier cases examined in this thesis, for reasons I'll discuss in the concluding section of this chapter, the effort by both sides of the Supreme Court to wrap themselves in the flag of Constitutional history and to ground their arguments in the words of the Framers was particularly evident in this series of Tenth and Eleventh Amendment cases.

Having overruled *Union Gas* within the span of a decade and having seriously limited the ability of the federal government to create private rights of action against states in federal court, the Supreme Court would revisit the Eleventh Amendment's doctrine of state sovereign immunity just three short years after *Seminole Tribe* to consider whether this same doctrine could be applied to shield states from private suits in their own state courts. In the meantime, however,

it would turn its attention to state sovereignty of the Tenth Amendment variety. This next case, decided on the heels of *New York* and *Lopez*, would test whether the Supreme Court would be willing, as it had indicated in dicta in *New York*, to use the Tenth Amendment as a serious boundary against federal incursions into state sovereignty.

Printz v. United States (1997)

This case challenged an interim provision of the Brady Handgun Violence Prevention Act (Brady Act) that required law enforcement officers of certain states to carry out background checks on individuals attempting to purchase a handgun.³⁷⁴ Initially proposed to Congress in 1987, the Brady Handgun Violence Prevention Act was spear-headed by Sarah Brady, the wife of President Reagan's press secretary, James S. Brady, who was shot in the assassination attempt on President Reagan in 1981 and permanently disabled. After initial setbacks and opposition, attributed to the intense lobbying efforts of the National Rifle Association (NRA), the Brady Act found a champion in President Clinton, who helped move the bill through the Senate, and signed it into law in 1993. The Brady Act mandated the establishment, by November 30, 1998, of a national system for instant criminal background checks of proposed handgun transferees in order to ensure that handguns were not being sold to a subset of violent criminals, fugitives, illegal aliens, and mentally ill persons. In the interim, in states that did not provide for handgun permits or instant background checks, the Brady Act ordered the state's chief law enforcement officers (CLEO) to personally carry out a background check within five days of all handgun purchases and, in some cases, to provide a written report containing the reasons for authorizing or not authorizing a handgun purchase.³⁷⁵

In separate suits filed in the U.S. District Courts of Montana and Arizona, Sheriffs Jay Printz and Richard Mack, the CLEOs for their respective counties, challenged the interim provisions of the Brady Act, arguing that Congress could not constitutionally compel state officers to execute federal laws. Both District Courts agreed that the interim provisions of the Brady Act were unconstitutional but severable from the rest of the Act, leaving a voluntary system of background checks and the five day waiting period intact. On consolidated appeal, the Ninth Circuit Court of Appeals reversed the District Court decision and held, in an opinion handed down in September of 1995, that the Tenth Amendment did not prohibit Congress from enlisting the states to help carry out certain federal requirements.³⁷⁶ The Supreme Court granted cert and heard the appeal on December 3, 1996. In another 5-4 decision handed down in June of the following year, the majority reversed the Ninth Circuit's holding and struck down the interim provisions of the Brady Act as violating the structural principles of federalism and dual sovereignty.

Table 6.2

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Printz v. United States* (1997)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	<i>Laurence Gold</i> ; Gale A. Norton; Timothy Tymkovich		Supreme Court: Justice Scalia, Justice Thomas
Citations to Federalist Society Actor Scholarship	Martin Redish, "Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation," 21 <i>Hastings L.Q.</i> 593 (1994); R. Levy, "New York v. United States: An Essay on the Uses and Misuses of Precedent, History, and Policy in Determining the Scope of Federal Power," 41 <i>Kan. L. Rev.</i> 493 (1995); R. Rotunda, "The Doctrine of Conditional Preemption and Other Limitations on Tenth Amendment Restrictions," 132 <i>U. Pa. L. Rev.</i> 289, 312 (1984) (II); Saikrishna B. Prakash, "Field Office Federalism," 79 <i>Va. L. Rev.</i> 1957 (1993) (II); Van Alstyne, "The Second Amendment and the Personal Right to Arms," 43 <i>Duke L. J.</i> 1236 (1994)	Saikrishna Prakash, "Field Office Federalism," 79 <i>Va. L. Rev.</i> 1957 (1993); Gary Lawson and Granger, "The Proper Scope of Federal Power," 43 <i>Duke L. J.</i> 267 (1993)	Supreme Court (majority): Saikrishna Prakash, "Field Office Federalism," 79 <i>Va. L. Rev.</i> 1957 (1993); Calabresi and Prakash, "The President's Power to Execute the Constitution," 104 <i>Yale L. J.</i> 541 (1994); Gary Lawson and Granger, "The Proper Scope of Federal Power," 43 <i>Duke L. J.</i> 267 (1993); David Schoenbrod, "The Delegation Doctrine: Could the Court Give It Substance?" 83 <i>Mich. L. Rev.</i> 1223 (1985); Van Alstyne, "The Second Amendment and the Personal Right to Arms," 43 <i>Duke L. J.</i> 1236 (1994)
Citations to Originalist Sources	Federalist 16 (V); Federalist 27 (III); Federalist 36 (VI); Federalist 39; Federalist 42; Federalist 45 (IX); Federalist 46 (IV); Federalist 27; Federalist 51; M. Farrand, <i>The Records of the Federal Convention</i> (VI); <i>The Complete Anti-Federalist</i> (Storing ed. 1981) (II); J. Elliot, <i>Debates</i> ; J. Story, <i>A Familiar Exposition of the Constitution of the United States</i> (1840);	Federalist 15 (II); Federalist 16; Federalist 27 (II); Federalist 31; Federalist 36; Federalist 39; Federalist 44; Federalist 45 (III); Federalist 47; <i>Documentary History of the Ratification</i> (M. Jensen ed 1976); J. Story, <i>A Familiar Exposition of the Constitution of the United States</i> (1840); J. Elliot, <i>Debates</i> ; <i>Debate on the Constitution</i> (B. Bailyn ed. 1993) (X);	Supreme Court (majority): <i>Debate on the Constitution</i> (B. Bailyn ed. 1993); Federalist 15 (II); Federalist 20; Federalist 27 (III); Federalist 28; Federalist 33 (II); Federalist 36 (II); Federalist 39 (III); Federalist 44 (II); Federalist 45 (II); Federalist 51; Federalist 70 (II); Story, <i>Commentaries on the Constitution</i> (1851); M. Farrand, <i>Records of the Federal Convention</i> (II); <i>The Essential Antifederalist</i> (Allen and Lloyd ed. 1986); <i>Documentary History of the Ratification</i> (M. Jensen ed 1976); Supreme Court (dissent): Federalist 15; Federalist 20; Federalist 27 (VII); Federalist 36 (II); Federalist 42; Federalist 43; Federalist 44 (IV); Federalist 45 (II); <i>Debate on the Constitution</i> (B. Bailyn ed 1993); J. Elliot, <i>Debates on the Federal Constitution</i> (2d ed. 1891) (III)

* *Italics indicate that Federalist Society network actor did not argue on behalf of state sovereignty in the case*

In terms of participation, Federalist Society network representation remained more or less constant from *Seminole Tribe* to *Printz*. Three network actors filed amicus briefs, but one of those actors - Laurence Gold - was defending the constitutionality of the Brady Act. In total, Federalist Society amici were listed on two of the total thirteen (15%) friend of the court briefs filed in *Printz*. There were no Federalist Society actors listed on Counsels' briefs but the two network-affiliated judicial decision-makers, Justices Scalia and Thomas, each wrote opinions in the decision. The most dramatic increase from *Seminole Tribe* to *Printz* was in citations to Federalist Society scholarship. Five of the thirteen (38%) amicus briefs filed in *Printz* cited Federalist Society scholarship in their arguments. Counsel briefs referred to two articles by network actors while the majority and concurring opinions of Supreme Court decision-makers used five different sources of Federalist Society scholarship to help construct their analyses. Continuing the trend of heavy citation to the Originalist canon, eight of the thirteen (62%) amicus briefs mobilized historical sources but, like in *Seminole Tribe*, five of those eight briefs were arguing for the constitutionality of the Brady Act. Even more interestingly, only three of the twenty-five citations listed under the "Counsel for Litigant(s)" column of Table 6.2 belonged to the Petitioner's brief. The remainder were mobilized in the United States' brief, which was authored by frequent Federalist Society participant and token-liberal Walter Dellinger.³⁷⁷ Finally, the Supreme Court decision-makers writing in the majority and concurring opinions referred to sixteen sources from the Originalist canon a total of twenty-seven times, while the dissent made use of ten historical sources a total of twenty-five times.

Both of the District Court opinions relied on Justice O'Connor's analysis in *New York*, examined in the last chapter, in concluding that the interim provisions of the Brady Act violated the Tenth Amendment.³⁷⁸ Reminding his audience that analyses concerning Congress' commerce power and the Tenth Amendment are "mirror images of each other," Judge Charles C. Lovell, writing for the District Court of Montana, concluded that even though the decision in *New York* did not necessarily turn on the Tenth Amendment, the "language in the opinion made clear that the constitutional principles of state sovereignty restrict the federal government not only from compelling the states to enact a federal regulatory program, but also from administering such a program."³⁷⁹ The Ninth Circuit Court of Appeals, however, found no violation of the Tenth Amendment, arguing that the District Courts' reading of *New York* was overly broad: "Mack and Printz...contend that...the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program. We do not read *New York* that broadly."³⁸⁰ Accordingly, the Ninth Circuit found that there "would appear to be nothing unusually jarring to our system of federalism" in the Brady Act's interim provisions.³⁸¹ The Supreme Court majority, represented on record by Federalist Society network actor Justice Scalia, would come to a very different conclusion.

Justice Scalia's majority opinion in *Printz*, joined by Chief Justice Rehnquist and Justices Thomas, O'Connor, and Kennedy - the same five Justices that made up the majority in *Lopez*,

Morrison, and *Seminole Tribe* - is grounded not in the "text of the Constitution" but rather "in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence" of the Supreme Court.³⁸² As would be expected, in order to tease out the historical understanding and practice, Scalia refers to several essays from *The Federalist*, as well as excerpts from the *Records of the Federal Convention*, and Joseph Story's *Commentaries*.³⁸³ Finding that the history is not "conclusive," Scalia's opinion turned next to consider "the structure of the Constitution" in order to "discern among its 'essential postulates'... a principle that controls the present cases."³⁸⁴ In supporting the majority's opinion that the interim provisions of the Brady Act violated principles of federalism and the structure of dual sovereignty embodied in the Constitution and made explicit in the Tenth Amendment, Scalia relied on articles authored by three different Federalist Society network actors: Saikrishna Prakash, Gary Lawson, and Steven Calabresi.³⁸⁵ He also mobilized one additional source of Federalist Society network scholarship, familiar from Chapter Three's discussion of the Non-delegation Doctrine, in order to complicate the relationship between "policymaking" and "implementation:"

The Government's distinction between "making" law and merely "enforcing" it, between "policymaking" and mere "implementation," is an interesting one. It is perhaps not meant to be the same as, but it is surely reminiscent of, the line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority for federal separation-of-powers purposes... This Court has not been notably successful in describing the latter line; indeed, some think we have abandoned the effort to do so. See ...Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?* 83 *Mich. L. Rev.* 1223, 1233 (1985). We are doubtful that the new line the Government proposes would be any more distinct.³⁸⁶

Relying, as we have seen, on scholarship from four Federalist Society network actors in addition to a variety of sources from the Originalist canon, the majority concluded that the provisions of the Brady Act "offend[ed]" the "very principle of state sovereignty" and "compromise[d] the structural framework of dual sovereignty" to such an extent as to render them unconstitutional.³⁸⁷ Scalia closed the majority's analysis by echoing Justice O'Connor's defense of the Supreme Court's "formalistic" approach to federalism, first acknowledged in *New York* and later employed in both *Lopez* and *Morrison*.³⁸⁸

Though they join with the majority opinion, Justices O'Connor and Thomas both write separately to bring attention back to the Tenth Amendment, the constitutional provision that had played a mere supporting role in Justice Scalia's majority opinion.³⁸⁹ Justice Thomas also used his concurring opinion to pen some thoughts about the original meaning of the Second Amendment's right to "keep and bear arms," musing hopefully that "perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered as the palladium of the liberties of a republic.'"³⁹⁰ In support of this claim, Thomas' concurring opinion made reference to "a growing body of scholarly commentary" that indicated that the right to bear arms was, in fact, a personal

right. The string-cite of scholarship Thomas refers to was, in fact, borrowed from an amicus brief submitted in *Lopez*, on which no fewer than four Federalist Society network actors were signatories: Charles E. Rice, Daniel Polsby, Henry Mark Holzer, and Randy Barnett.³⁹¹ I excerpt first from the *Lopez* brief and then from Thomas' concurring opinion in *Printz*:

In contrast, articles accepting the Amendment as an individual right are published on their own merits and in top rank law reviews... Van Alstyne, "The Second Amendment and the Personal Right to Arms", 43 *DUKE L. J.* 1236 (1994), Amar, "The Bill of Rights and the Fourteenth Amendment", 101 *YALE L. J.* 1193, 1205-11, 1261-2 (1992); ... Cottrol & Diamond, "The Second Amendment: Toward an AfroAmericanist Reconsideration", 80 *GEORGETOWN L.J.* 309 (1991)...Levinson, "The Embarrassing Second Amendment", 99 *YALE L. J.* 637 (1989)...Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment", 82 *MICH. L. REV.* 203 (1983)... S. Halbrook, "THAT EVERY MAN BE ARMED": THE EVOLUTION OF A CONSTITUTIONAL RIGHT (1984). See generally, J. Malcolm, *TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT* (Harvard U. Press, 1994), ch. 8.³⁹²

Marshaling an impressive array of historical evidence, a growing body of scholarly commentary indicates that the "right to keep and bear arms" is, as the Amendment's text suggests, a personal right. See, e.g., J. Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* 162 (1994); S. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984); Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 *Duke L. J.* 1236 (1994); Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L. J.* 1193 (1992); Cottrol & Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 *Geo. L. J.* 309 (1991); Levinson, *The Embarrassing Second Amendment*, 99 *Yale L. J.* 637 (1989); Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *Mich. L. Rev.* 204 (1983).³⁹³

While neither the *Lopez* decision nor the *Printz* decision addressed the Second Amendment question, this is further evidence of how the ideas of Federalist Society network actors are indeed on the radar of judicial decision-makers, especially one like Justice Thomas whose ties to the network are very prominent. As I mentioned in the introduction to this thesis, this scholarship would feature prominently in Justice Scalia's landmark opinion in *District of Columbia v. Heller* (2008) over a decade later and help to justify the Supreme Court's individual rights interpretation of the Second Amendment.³⁹⁴

Finally, it should be mentioned that *Printz* continued the trend of the majority and dissent openly quarreling over the authoritative interpretation of historical sources. Mobilizing ten sources from the Originalist canon twenty-five times, Justice Stevens argued in dissent that given the long tradition of cooperation between the federal government and state and local officers "we are far truer to the historical record by applying a functional approach" to federalism that relies on the political process to safeguard the division between national and local than the majority whose decision relies on "empty formalistic reasoning of the highest order." Stevens further asserted that "perversely," the majority's ruling "seems more likely to damage than to preserve" federalism by creating incentives for the federal government "to aggrandize itself" in lieu of

enlisting the help of the states.³⁹⁵ Finally, referring to Justice Scalia's methodical attempts to cast doubt on the dissent's argument and interpretation of historical sources, Stevens wrote:

Indeed, despite the exhaustive character of the Court's response to this dissent, it has failed to find even an iota of evidence that any of the Framers of the Constitution or any Member of Congress who supported or opposed the statutes discussed in the text ever expressed doubt as to the power of Congress to impose federal responsibilities on local judges or police officers. Even plausible rebuttals of evidence consistently pointing in the other direction are no substitute for affirmative evidence. In short, a neutral historian would have to conclude that the Court's discussion of history does not even begin to establish a prima facie case.³⁹⁶

For its part the majority of the Supreme Court, represented by Justice Scalia, also did its best in *Printz* to counter the dissent's use of "sources we have usually regarded as indicative of the original understanding of the Constitution," by referring to these interpretations in various places as "a mighty leap," "untrue," "most implausible," and "most peculiar."³⁹⁷

While the sheer number of Federalist Society network participants in *Printz* did not rival that of last chapter's *Morrison* case, for example, the amount of reliance on Federalist Society scholarship across the board - by amici, counsel, and judicial decision-makers - in this case was truly impressive. Aided and supported by this scholarship and these ideas, Federalist Society network actor Justice Scalia was able to construct a state sovereignty argument that reinforced the "formalistic" federalism framework we first witnessed in last chapter's examination of *New York*. Moreover, fellow network actor Justice Thomas seized the opportunity to write a short sales pitch, supported by scholarship marshaled by four Federalist Society participants, for why the Supreme Court ought to reconsider its Second Amendment doctrine - something it would do over ten years later in a controversial case that successfully challenged provisions of the District of Columbia's handgun ban.³⁹⁸ The next case examined in this chapter, however, returns the focus to the Eleventh Amendment's doctrine of sovereign immunity. As I alluded to in the concluding section of *Seminole Tribe*, this case would be a test of just how far the Supreme Court would be willing to extend the shield of sovereign immunity and, further, how it would justify such an extension.

Alden v. Maine (1999)

This case involved an Eleventh Amendment challenge to two provisions of the congressionally enacted Fair Labor Standards Act (FLSA) of 1938. The FLSA authorized a private right of action in federal or state court for individuals hoping to recuperate unpaid overtime and assorted other damages and, additionally, authorized the United States Secretary of Labor to sue for damages on behalf of employees in federal or state court.³⁹⁹

In 1992, ninety-six current and former probation and parole officers sued the State of Maine in the U.S. District Court for the District of Maine on the grounds that the state, their employer, had failed to pay overtime as required by the FLSA (Braveman 2000, 637). While the suit was pending, however, the Supreme Court held in *Seminole Tribe* that the Eleventh Amendment prohibited private suits against states in federal court. Relying on the Supreme Court's holding in *Seminole Tribe*, the State of Maine moved to dismiss the case and both the District Court and the First Circuit Court of Appeals agreed that *Seminole Tribe* required that the federal lawsuit be dismissed (Braveman 2000, 638). The officers then proceeded to file the same FLSA complaint in the Superior Court of Maine in August of 1996. Despite "the clear statutory language authorizing a state court action under FLSA, the Superior Court dismissed the lawsuit on the basis of the state's sovereign immunity" (Braveman 2000, 638). In a split-decision handed down on August 4, 1998 the Supreme Judicial Court of Maine affirmed the lower court's decision, concluding that if Congress could not subject the states to private suits in federal courts, it similarly could not compel the states to defend themselves against private suits in their own courts.⁴⁰⁰ The Supreme Court granted cert and heard argument in *Alden v. Maine* on March 31, 1999. The same five Justice majority that had decided four of the five federalism cases examined in this thesis thus far decided to affirm the holding of the Supreme Judicial Court of Maine.

Looking at the numbers, in terms of participation the Federalist Society network was about equally represented in *Alden* as it had been in *Seminole Tribe*, the other Eleventh Amendment case examined in this chapter. Of the total five *amicus curiae* briefs submitted in the case, two Federalist Society affiliated signatories - State Attorneys General William H. Pryor and John Cornyn - appeared on one brief (20%).⁴⁰¹ Network participant Laurence Gold represented the Petitioners John Alden et. al, and judicial decision-makers Justice Scalia and Justice Thomas heard the case from the Supreme Court bench. Representing a dramatic shift from *Printz*, there were no citations to Federalist Society scholarship by amici, counsel, or judicial decision-makers in *Alden*. As for the Originalist canon, four of the five (80%) *amicus* briefs made use of these sources with all four arguing on behalf of the State of Maine. Laurence Gold's Petitioner Brief made just two references to historical sources in its argument. The Supreme Court majority opinion relied on nine Originalist sources a total of twelve times, while the dissent mobilized seven sources sixteen times.

As in *Seminole Tribe*, the links to the Federalist Society network in this Eleventh Amendment case do not, on their own, constitute a clear case for network influence. Even still,

Table 6.3

Participation by Federalist Society Network Actors, Citations to Federalist Society Scholarship, and Citations to Originalist Sources in *Alden v. Maine* (1999)

	<i>Amici Curiae</i> (friends of the Court)	Counsel for Litigant(s)	Judicial Decision-Makers
Federalist Society Network Participation	William H. Pryor, John Cornyn	<i>Laurence Gold</i>	Supreme Court: Justice Scalia, Justice Thomas
Citations to Federalist Society Actor Scholarship			
Citations to Originalist Sources	Federalist 27; Federalist 33 (II); Federalist 39; Federalist 45; Federalist 51 (II); Federalist 78; Federalist 81 (VI); <i>The Debate on the Constitution, Federalist and Anti-Federalist Speeches</i> (B. Bailyn ed 1993); J. Elliot, <i>Debates</i> (IX); <i>Anti-Federalists versus Federalists</i> (J. Lewis ed. 1967) (II)	Federalist 81; J. Elliot, <i>Debates</i> ;	Supreme Court (majority): Federalist 15; Federalist 20; Federalist 33; Federalist 39 (II); Federalist 81; M. Farrand, <i>Records of the Federal Convention of 1787</i> ; W. Blackstone, <i>Commentaries</i> ; J. Elliot, <i>Debates</i> (III); <i>Papers of Alexander Hamilton</i> (Syrett and Cooke eds 1969) Supreme Court (dissent): Federalist 15; Federalist 39; Federalist 81; J. Story, <i>Commentaries</i> (ed. 1891); <i>Sources and Documents of United States Constitutions</i> (Swindler ed. 1975) (II); W. Blackstone, <i>Commentaries</i> (IV); J. Elliot, <i>Debates</i> (VI)

*Italics indicate that Federalist Society network actor did not argue on behalf of state sovereignty in the case

Justice Kennedy's majority opinion in *Alden*, relying on numerous sources from the Originalist canon, articulates the same kind of structural argument for a broad reading of the Eleventh Amendment that we saw some Federalist Society network actors, such as Michael Rappaport, endorse in their scholarship. While the Kennedy-authored majority opinion does not appear to rely on Rappaport's 1998 law review article, it does incorporate some of the same sources and logic of Federalist Society amici William J. Pryor and John Cornyn in extending the doctrine of sovereign immunity to shield states from private suits in their own courts. Like the Scalia-authored majority opinion in *Printz*, the majority in *Alden* anchored its argument not to the text of the Eleventh Amendment specifically but instead in the original understanding of "the Constitution's structure and its history."⁴⁰² To support its claim that "the generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity," for instance, the Supreme Court majority relied on the same sources

mobilized in the Federalist Society network authored amicus brief - the Ratification Debates and Hamilton's *Federalist 81*. I excerpt first from the amicus brief and then from Kennedy's opinion in *Alden*:

The spirit of the anti-Federalists' views on this subject was well captured in a letter published in the February 21, 1788 edition of the New York Journal from New York delegate Robert Yates (under the pseudonym "Brutus"), who decried the proposed Article III provision as "improper" "because it subjects a state to answer in a court of law, to the suit of an individual... The Federalists' response resounded with a central theme: that the Constitution did not affect the States' right not to be sued in any court without their consent. Addressing a similar objection made by George Mason at the Virginia convention, James Madison in June of 1788 stated that "it is not in the power of individuals to call any state into court." J. Elliot, 3 THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (1888 ed.) ("Elliot's Debates"). After Patrick Henry disputed Madison's assertions, stating that they would "pervert the most clear expressions" of Article III of the proposed Constitution, *id.* at 543, John Marshall took the floor, first expressing the "hope that no gentleman will think that a state will be called at the bar of the federal court," and then asking "is there no such case at present?" *Id.* at 555. Emphasizing that "it is not rational to suppose that the sovereign power should be dragged before a court," *id.*, Marshall maintained that "the intent is, to enable states to recover claims of individuals residing in other states," *id.*, and that "I see a difficulty in making a state defendant, which does not prevent its being plaintiff." *Id.* at 556. During the same time frame in which the Virginia debates took place, Alexander Hamilton published a paper in New York, under the pen name "Publius," stressing that ratification of the Constitution would not divest the States of their immunity: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. . . . There is no color to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." The Federalist No. 81, at 487-88 (C. Rossiter ed. 1961) (emphasis in original).⁴⁰³

The ratification debates, furthermore, underscored the importance of the States' sovereign immunity to the American people. Grave concerns were raised by the provisions of Article III which extended the federal judicial power to controversies between States and citizens of other States or foreign nations... The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity. One assurance was contained in The Federalist No. 81, written by Alexander Hamilton: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . . There is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."... At the Virginia ratifying convention, James Madison echoed this theme: "Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. . . . 3 J. Elliot, Debates on the Federal Constitution 533 (2d ed. 1854) (hereinafter Elliot's Debates). When Madison's explanation was questioned, John Marshall provided immediate support: "With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope no Gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose, that the sovereign power shall be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say

they, there will be partiality in it if a State cannot be defendant . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff." 3 *id.* at 555.⁴⁰⁴

As evidenced by the overlapping language and sources contained in these lengthy excerpts, the Supreme Court majority did draw on the intellectual capital provided by at least two Federalist Society network actors in supporting its broad reading of the doctrine of state sovereign immunity.

The opinion in *Alden* is also noteworthy for continuing the trend I've noted throughout these Tenth and Eleventh Amendment cases of the open struggle between the majority and the dissent over the authoritative interpretation of history and historical sources. For instance, after marshalling historical evidence supporting the majority's interpretation of sovereign immunity, Justice Kennedy's opinion addressed the dissent's version of history: "Although the dissent attempts to rewrite history to reflect a different original understanding, its evidence is unpersuasive."⁴⁰⁵ And, in closing, Kennedy's words amounted to a thinly veiled attack on the political safeguards approach to federalism that the more "formal" approach embraced by the majority had displaced: "We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the founders must yield to the politics of the moment."⁴⁰⁶ Once again in response for the dissent, Justice Souter engaged in his own historical analysis which he hoped would supplant the majority's "anomalous versions of history and federal theory."⁴⁰⁷ In his closing remarks, Souter mobilized his own sharply-worded attack on the majority's state sovereign immunity jurisprudence by comparing it with *Lochner*-era judicial activism:

The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in *laissez-faire*, the one being as unrealistic as the other, as indefensible, and probably as fleeting.⁴⁰⁸

Like in *Seminole Tribe* and *Printz*, however, the dissent's interpretation of history in *Alden* could not command that critical fifth vote and it was thus, once again, the majority's interpretation of the Originalist canon along with its more "formalistic" federalism framework that became the legal canon for lower courts considering Tenth and Eleventh Amendment questions of state sovereignty and state sovereign immunity.

Evaluating Federalist Society Network Impact on the State Sovereignty Doctrine

At the "close" of "the century," then, after *Seminole Tribe*, *Printz* and *Alden*, how closely does the Supreme Court's state sovereignty and sovereign immunity doctrines resemble Federalist Society network actors' expressed beliefs about the Tenth and Eleventh Amendments? Concerning the Tenth Amendment, these actors had used historical evidence from the Founding to push back against the notion that the Amendment could be reduced to a mere "truism," and where they did discuss the Eleventh Amendment and sovereign immunity, Federalist Society participants sought to broaden the understanding of the doctrine by using structural arguments relying on other text and provisions of the Constitution.

Beginning with the Tenth Amendment, we saw how Scalia's majority opinion in *Printz* did not hang its entire analysis on this one Amendment. Instead, he looked at the history, traditions, and structure of the Constitution to conclude that the relevant provisions of the Brady Act violated the background principles of state sovereignty embodied in the Constitution and recognized throughout the founding era. In doing so, however, this former Federalist Society mentor relied on several sources of network actor scholarship to support the majority's analysis of the role of the states in the constitutional structure of "dual sovereignty" that has come to represent the Supreme Court's more "formalistic" understanding of federalism. While Justices O'Connor and Thomas, in their concurring opinions, both stated that the decision in *Printz* had turned on the Tenth Amendment, it is clear that the Amendment had played a mere supporting role in the majority's much more sweeping constitutional analysis. As I mentioned earlier, the Eleventh Amendment has not been a particularly salient topic of discussion at Federalist Society national events. Nevertheless, the Supreme Court did, both in *Seminole Tribe* and *Alden*, rely on the intellectual capital provided by Federalist Society affiliated *amici* - mostly in the form of sources from the Originalist canon - to extend the shield of sovereign immunity to protect states from private suits of action in both federal courts and in their own state courts.

One additional way in which we can evaluate the Federalist Society network's impact on these Tenth and Eleventh Amendment cases is the extent to which actors on both sides of the issue relied on sources from the Originalist canon to frame and support their arguments. As I mentioned in Chapter One, one of the goals of the founders of the Federalist Society was to have their ideas about Originalism legitimated by other members of the legal profession. These network actors' beliefs about Originalism, with its attendant mode of constitutional analysis and canon of authoritative historical sources, would have been considered "off the wall" as late as the early 1980's. As Federalist Society member Charles J. Cooper described it to me, "in 1981 Originalists were being viewed as alien beings and were ridiculed" because the legal community, in his words was "monotheistic" in that it "knelt before the altar" of liberal legal analysis.⁴⁰⁹ To that end, an Eleventh Amendment case decided just prior to the founding of the Federalist Society provides an interesting point of comparison for the cases examined in this chapter. In *Edelman v. Jordan* (1974), a sharply divided Supreme Court ruled 5-4 that the Eleventh Amendment's doctrine of state sovereign immunity prohibited a federal court from compelling a

state to pay funds withheld from its citizens unconstitutionally. Neither the “conservative” majority opinion, written by Justice Rehnquist and joined by Justices Burger, Stewart, White and Powell, nor the “liberal” dissenting opinions written by Justices Douglas, Brennan, and Marshall (joined by Blackmun) relied on a single source that would be considered an Originalist authority in their respective opinions.⁴¹⁰

Not two decades later, as we saw throughout this chapter, *amici*, counsel, and judicial decision-makers on both sides of these state sovereignty issues were framing their arguments in Originalist terms and battling over the authoritative interpretation of a shared canon of historical evidence. And evidence suggests this trend is continuing. In a more recent Eleventh Amendment case, *Central Virginia Community College v. Katz* (2006), a 5-4 “liberal” majority joined by Justice O’Connor, held that the Constitution’s Bankruptcy Clause (Article I, Sec. 8, Cl.4) gave Congress the power to abrogate the sovereign immunity of the states.⁴¹¹ In doing so, however, the majority opinion, written by Justice Stevens, engages in a lengthy historical analysis of colonial Bankruptcy law and practices to support the claim that “the Framers... plainly intended to give Congress the power... to subordinate state sovereignty.”⁴¹² The dissenting opinion, authored by Federalist Society hero Justice Thomas and joined, notably, by two other network members – Justices Roberts and Scalia – attacks the majority’s opinion for “greatly exaggerate[ing] the Framers’” intent and insists that the proper reading of Founding Era history “refutes rather than supports” the majority’s argument.⁴¹³ This clear shift in the terms of debate, so to speak, has not gone unnoticed by Federalist Society network actors. Charles J. Cooper described Originalism as now being the “dominant voice in the courts.” Similarly, frequent Federalist Society participant John Yoo noted that in his “professional lifetime the debate, the dialogue, about constitutional law has shifted much more towards Originalism” and that “even liberals on the court take it seriously or will even criticize the majority for not being faithful enough.” Yoo emphasized that he believed the Federalist Society has had “an amazing impact and influence” in this regard.⁴¹⁴

So while Federalist Society network participation in *Seminole Tribe*, *Printz* and *Alden* was not as high as in other cases, these actors’ impact on the doctrines of state sovereignty and sovereign immunity manifested itself through important citations by judicial decision-makers to Federalist Society scholarship and, in a more diffuse manner, through the widespread use and thereby authoritative recognition of sources from the Originalist canon. Though few participated in the actual litigation efforts, many Federalist Society network actors took the time after the fact to comment the Supreme Court’s decisions in these state sovereignty cases. In a February, 2000 *Weekly Standard* article, network actor Timothy Lynch applauded the Supreme Court “bl[owing] the dust off the Tenth Amendment” and “helping to restore the idea that the Constitution created a government of limited and enumerated powers.”⁴¹⁵ Similarly, Randy Barnett praised the Rehnquist Court majority for its federalism decisions that “cabined *Garcia’s* laissez-faire approach toward Congressional power with a series of Tenth Amendment cases” and served to “carv[e] out islands of sovereignty in a sea of federal power.”⁴¹⁶ Federalist Society participant

Jonathan Adler wrote approvingly in a 2001 *National Review* article about the Rehnquist Court's "aggressive protections" of "state sovereign immunity."⁴¹⁷ By the turn of the century, the Supreme Court's federalism revolution was believed by many conservatives to be in full swing. Not only had a majority of the Court limited Congress' commerce power in *New York*, *Lopez* and *Morrison*, but it had breathed new life into the Tenth Amendment - at least symbolically - in *Printz* and had relied on a broad interpretation of the Eleventh Amendment to limit the ability of the federal government to create private rights of action against the states in *Seminole Tribe* and *Alden*.

The final chapter of this thesis considers all the evidence of this epistemic community at work on the "structural constitution." It examines trends and patterns that have emerged from the preceding five chapters and offers some tentative conclusions as to the variables that seem to facilitate and frustrate epistemic community idea diffusion. Finally, it examines these conclusions in the context of what we know about law and the American legal and judicial enterprise.

Chapter Seven -----

An Epistemic Community At Work on the “Structural Constitution”

I suppose like any organization it does start to have influence on personnel primarily and then through personnel, performance and ideas. That’s the other slogan you hear in Washington: “policy is people.” “Ideas have consequences” and “policy is people.” It’s true because if you get appointed or elected you’re not going to have a serious impact unless you can immediately ramp up and hire people who you don’t have to educate on basic principles of agreement... So one of the things I think is different about the Federalist Society today from when it started twenty-five years ago is that it’s in a position to have that kind of influence.

- Federalist Society member Douglas Kmiec, Mar. 14, 2008⁴¹⁸

The very existence of the Federalist Society for Law and Public Policy is premised on the belief, most famously articulated in the title of a 1984 book by conservative thinker Richard Weaver, that “ideas have consequences.”⁴¹⁹ This explains the Society’s continuing emphasis on ideas, debate, education and intellectual engagement. However, as member Douglas Kmiec explained in the interview excerpt above, one of the principal reasons ideas become consequential is because, as the saying goes, “policy is people.” The Federalist Society’s founding generation, many of whom had worked in the Reagan Justice Department, well-understood the connection between ideas, people, and policy. The Society’s evolving focus on and investments in professional development, credentialing, and networking reflect this critical understanding. Moreover, Co-Founder David McIntosh (and several other members) discussed the Federalist Society’s impact explicitly in these terms:

[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.⁴²⁰

In the previous five chapters, I have used the epistemic community framework to show how certain ideas about the “structural constitution” found their way from the Federalist Society network, through particular people, into law and legal policy over the last three decades; some of those “untold ways,” to recall McIntosh’s language, that ideas about the unitary executive, non-delegation, federalism and state sovereignty were implemented (or not) in a subset of critical judicial decisions and Executive branch policies.

This chapter aggregates some of the most important findings of those five chapters. It first provides a summary of this epistemic community at work and examines trends in network participation, citations to Federalist Society scholarship, and citations to the Originalist canon. Next, taking all the evidence into consideration, it reviews and assigns rough scores (High, Medium, Low) for the degree of Federalist Society network idea diffusion in each of the twelve Supreme Court cases examined. Finally, it examines the varying degree of idea diffusion across cases and finds that, more than any other variable, *doctrinal distance* – that is, the size of the step the Supreme Court was taking away from its established constitutional frame – seems to best explain the frequency with which Supreme Court decision-makers relied on the “intellectual capital” of the Federalist Society network in the cases under consideration in this thesis.

An Epistemic Community At Work By The Numbers, 1983-2001

This section aggregates and reviews the data collected for each of the twelve Supreme Court cases examined in the thesis. Specifically, it examines separately each of the three categories of data catalogued for each case (Federalist Society network participation, citations to Federalist Society scholarship, and citations to the Originalist canon) and asks: what do these numbers tell us about this epistemic community at work? The short answer is, on their own, very little. However, if we combine these numbers with some of the qualitative data and analysis from previous chapters, we can see some interesting trends and patterns beginning to emerge.

Federalist Society Network Participation

The primary reason I catalogued Federalist Society network participation in each of these cases was to establish, per the epistemic community framework, a pathway of idea transmission from the Federalist Society network to policymakers. Within this framework, network actors would act as “cognitive baggage handlers” (Haas 1992, 27) transporting the ideas of the Federalist Society network to decision-makers on the Supreme Court. As summarized by Table 7.1, I found that in all twelve cases examined there was at least one Federalist Society network actor (one “cognitive baggage handler”) participating in the litigation. Once a network presence was established, the analysis focused not on the quantity of participants in each case but on the quality of that participation – whether the network actor(s) endorsed the epistemic community’s

Table 7.1

Number of Federalist Society Network Participants as Amici, Counsel and Judicial Decision-Makers in *Chadha* (1983) through *Amer. Trucking* (2001)

	<i>Amici Curiae</i> (friends of the court)	Counsel for Litigant(s)	Judicial Decision-Makers	Totals
<i>INS v. Chadha</i> (1983)	2	3	0	5
<i>Bowsher v. Synar</i> (1986)	1	4	1 (Circuit)	6
<i>Morrison v. Olson</i> (1988)	4	0	1 (SC) 2 (Circuit)	7
<i>Mistretta v. U.S.</i> (1989)	2*	2*	1 (SC)	5
<i>New York v. U.S.</i> (1992)	4*	1*	2 (SC)	7
<i>U.S. v. Lopez</i> (1995)	4	1	2 (SC)	7
<i>S. Tribe v. Florida</i> (1996)	2	0	2 (SC)	4
<i>Printz v. U.S.</i> (1997)	3 (1*)	0	2 (SC)	5
<i>Clinton v. C. of NY</i> (1998)	4 (1*)	2	2 (SC)	8
<i>Alden v. Maine</i> (1999)	2	1*	2 (SC)	5
<i>U.S. v. Morrison</i> (2000)	11	3 (1*)	2 (SC) 2 (Circuit)	18
<i>Whit v. Am. Truck</i> (2001)	20	3	2 (SC) 4 (Circuit)	29

*Indicates number of those actors articulating positions at odds with epistemic community shared beliefs

ideas about the “structural constitution,” how those ideas were expressed and transmitted, and whether or not they were picked up and used by judicial decision-makers in their written opinions. In other words, while the participants were a vital part of the circulatory system under study, it was the ideas circulating through that system that were of primary interest in the empirical chapters.

That being said, viewing the rates of Federalist Society network participation across these twelve cases does tell us something about this epistemic community at work. Table 7.1 lists participation in each category (as amici curiae, counsel or litigators, and judicial decision-makers) for each of the twelve cases chronologically, top to bottom. Given the growth of the Federalist Society network from a few hundred law students in 1983 to more than 30,000 students and legal professionals as of 2001 (Teles 2008, 150), it would be reasonable to assume

that overall Federalist Society network participation in Supreme Court cases would have increased over time. If one were to look only at the first two cases in Table 7.1 (*INS v. Chadha* (1983) and *Bowsher v. Synar* (1986)) and compare them with the last two cases (*U.S. v. Morrison* (2000) and *Whitman v. American Trucking* (2001)), then the difference in network participation would indeed be striking. *Chadha*, litigated just one short year after the founding of the Federalist Society, featured only five total network participants. Most importantly, the network was completely unrepresented in the crucial category of judicial decision-makers. The Federalist Society network was only slightly better represented in *Bowsher* with six participants total and one judicial decision-maker at the Circuit Court level. Fast forward fourteen years to the litigation in *Morrison* and the picture is completely different. Eighteen members of the Federalist Society network participated in the litigation and four of those eighteen participated as judicial decision-makers (two on the Supreme Court and two on the Circuit Court). Even more impressively, twenty-nine members of the Federalist Society network participated in the litigation in *American Trucking*, decided just one year later. Four of those twenty-nine network members decided the case for the Circuit Court and two others for the Supreme Court.

But, if we look at the eight cases decided in the fourteen years between *Bowsher* and *Morrison*, we get a very different picture of Federalist Society network participation; one that does not seem to track the growth of Federalist Society membership. As Table 7.1 illustrates, network participation fluctuated somewhat, between four and eight total network actors per case, but did not vary dramatically between *Chadha* and *Alden*. Again, it could very well be true that in the aggregate of all Supreme Court cases between 1983 and 2001 Federalist Society network participation in litigation has indeed increased as the network itself has expanded. However, this does not do the explanatory work for the twelve cases I examined in the thesis. Instead, network participation in these cases seems to be best explained with reference to the intensity of interest in the area of doctrine within the Federalist Society as measured by the saliency of the topic at Federalist Society National Conferences. If we set aside the totals for *American Trucking* (for reasons I will discuss shortly), then the three Commerce Clause cases (*New York, Lopez*, and *Morrison*) combined to attract the greatest number of network participants as *amici curiae* and as litigating counsel. As I discussed in Chapter Five, of all the structural doctrines examined in the thesis, federalism (and the commerce clause in particular) has been the most salient topic of discussion at Federalist Society National Conferences since its founding.

On the other hand, if we count the participation totals in *American Trucking*, then clearly the non-delegation cases (*Mistretta, Clinton*, and *American Trucking*) win out. But *American Trucking* is a unique case. Because the legislative delegation in question was to an administrative agency, the EPA, whose task it is to regulate businesses, this case activated both the non-delegation advocates and the Pro-Business contingent within the Federalist Society network. The actors who submitted briefs in *American Trucking* were overwhelmingly representative of the Pro-Business faction of the network, though the non-delegation group certainly showed up as well. If we combine mentions of the non-delegation doctrine at

Federalist Society National Conferences (which, as I wrote in Chapter Three, has been the headlining panel topic at two Federalist Society National Conferences⁴²¹) with topics involving anti-regulation, economic liberties and business interests, then these far surpass in total numbers discussions of Congress' commerce power and help explain the intensity of interest in the litigation in *American Trucking*.⁴²²

Coming in second or third in terms of Federalist Society network participation (depending on how we score *American Trucking*) are the separation of powers cases that dealt with the question of a Unitary Executive (*Chadha*, *Bowsher*, and *Morrison v. Olson*). As I discuss in Chapters Two and Four, the theory of the Unitary Executive, first gestated in the Reagan Justice Department and then nurtured and developed by Federalist Society network actors and academics, has appeared with some regularity at Federalist Society National Conferences. The topic of Executive power has been the headlining topic at two Federalist Society National Conferences.⁴²³ All told, a total of eight panels featuring over thirty high-profile speakers have been dedicated to this issue at National Conferences.⁴²⁴ Finally, the state sovereignty cases (*Seminole Tribe*, *Printz* and *Alden*) exhibited the lowest intensity in terms of network participation as *amici curiae* and litigating counsel. The Tenth Amendment, the “mirror image” of the Supreme Court’s Commerce Clause jurisprudence, is often mentioned alongside the commerce clause in Federalist Society speech-acts. That being said, the analytical focus has consistently been on the commerce clause with the Tenth Amendment playing a supporting role. As I discuss in Chapter Six, the Eleventh Amendment has appeared considerably less frequently in Federalist Society National Conference dialogue than has either the Commerce Clause or the Tenth Amendment. It has not headlined a National Conference, a panel, or even a single speech-act. In fact, the handful of actors who have mentioned the Eleventh Amendment at National Conferences have done so only in passing.⁴²⁵ It is therefore not surprising that the litigation in *Seminole Tribe* and *Alden* in particular did not attract the kind of interest that *Morrison* or *American Trucking* did.

The finding that Federalist Society network participation in litigation tended to correlate in these cases with the intensity of doctrinal interest as expressed at National Meetings corroborates some of the insights I gleaned from personal interviews. Several interviewees discussed how the Federalist Society has allowed them to get to know other scholars and litigators with similar interests and one result of this has been the increased frequency with which they submit *amicus curiae* briefs in Supreme Court litigation. For example, member and Pepperdine Law Professor Douglas Kmiec discussed the role of the Federalist Society network in facilitating the writing and submission of a joint amicus brief in *District of Columbia v. Heller*, the 2008 D.C. gun ban case:

Well, law professors submit briefs based on their academic interests and my interests were shaped by my Reagan Administration service and that, we’ve already determined, overlaps with a good deal of the building of the Federalist Society... [Charles J.] Cooper called me about this one and said, “I don’t know what your position is on the Second Amendment but would you take a look at the brief filed by Janet Reno

and the Solicitor General and tell me what you think.” So this is a brief filed by a pretty suspicious looking group: Ed Meese, Bill Barr, Bob Bork, Viet Dinh, Richard Willard, myself... And [the filing of the brief] happened I suppose because first the Federalist Society pulled us together as former colleagues and then now on this current issue we at least have some common ground in seeing this properly interpreted.⁴²⁶

Unsurprisingly, the areas in which network actors tend to have the most “common ground” are those around which the Federalist Society has constructed most of its programming at National Conferences. Not only does this reinforce commitment to these shared beliefs and principles, it also allows network members to sharpen their ideas, test them out in front of a friendly audience, and find willing collaborators to put these ideas into *amicus curiae* briefs should these issues reach the Supreme Court. The Federalist Society network and its conference programming, Steven Teles has observed, has also allowed conservative public interest firms to identify litigators with well-defined legal and constitutional agendas and pair them “with relevant cases” to be litigated in the federal courts (Teles 2008, 167). As we see from Table 7.1, nine of the twelve cases examined were litigated by at least one member of the Federalist Society network. The two cases that exhibited the highest intensity of interest, *Morrison* and *American Trucking*, were each litigated by three Federalist Society network members.

This is all to say that in future cases in which the litigation concerns an area of great interest to Federalist Society network actors, it would be reasonable to expect the network participation as *amici curiae* and litigating counsel to reflect this intellectual interest. However, as I will show in great detail in a later section of this chapter, intensity of network interest and participation does not always or even often translate into epistemic community impact (at least in the short run). Before I move on to that discussion, however, the next sub-section compares citations to Federalist Society scholarship across the twelve cases examined in this thesis.

Citations to Federalist Society Network Scholarship

Throughout the thesis, I have catalogued and qualitatively explored references to Federalist Society network scholarship in *amicus curiae* briefs, counsel briefs, and judicial opinions. As I explained in Chapter One, while this scholarship is published outside the institutional boundaries of the Federalist Society, it is often encouraged and nurtured by Federalist Society activities and fellow network members. Moreover, the best of this scholarship; i.e., that which most closely mirrors or elaborates the Federalist Society’s shared beliefs, is included in the Federalist Society’s web-published *Bibliography of Conservative and Libertarian Legal Scholarship*. Members are thus institutionally encouraged to use the *Bibliography* as a resource in their own writing and legal research. Citation to this scholarship in

Table 7.2

Number of Sources of Federalist Society Network Scholarship Cited by Amici, Counsel and Judicial Decision-Makers in *Chadha* (1983) through *American Trucking* (2001)

	<i>Amici Curiae</i> (friends of the court)	Counsel for Litigant(s)	Judicial Decision-Makers	Totals
<i>INS v. Chadha</i> (1983)	2	0	1 (Circuit Ct)	3
<i>Bowsher v. Synar</i> (1986)	3	0	1 (Dist. Ct)	4
<i>Morrison v. Olson</i> (1988)	3	0	2 (Circuit Ct)	5
<i>Mistretta v. U.S.</i> (1989)	0	0	0	0
<i>New York v. U.S.</i> (1992)	2	2	1 (SC Maj.)	5
<i>U.S. v. Lopez</i> (1995)	6	1	0	7
<i>S. Tribe v. Florida</i> (1996)	0	1	0	1
<i>Printz v. U.S.</i> (1997)	5	2	5 (SC Maj.)	12
<i>Clinton v. C. of NY</i> (1998)	3	0	1 (Dist. Ct)	4
<i>Alden v. Maine</i> (1999)	0	0	0	0
<i>U.S. v. Morrison</i> (2000)	1	0	0	1
<i>Whit v. Am. Truck</i> (2001)	8	0	0	8

a brief or judicial opinion is thus a strong indicator that the author(s) are relying on the ideas of the Federalist Society network – its “intellectual capital” – to support their argument. Apart from helping us locate and track the ideas of the Federalist Society network on a case by case basis, what do the numbers of sources of Federalist Society scholarship cited across all twelve cases tell us about this epistemic community at work?

If we start with *amici curiae* and look at the number of sources of Federalist Society scholarship cited by decade we do see a slight increase in the average number of sources cited per case (80s: 2/case; 90s: 2.7/case; 00s: 4.5/case). Again, as the Federalist Society network has expanded and grown institutionally it has certainly contributed to an increase in the publication of conservative and libertarian legal scholarship. As Steven Teles has explained, the Society has encouraged conservative and libertarian legal scholarship by supporting promising Academics through its meetings and activities first and foremost, but also through financial fellowships like

the Olin Fellows Program and through the creation of the Faculty Division of the Federalist Society (Teles 2008, 173-178). As interviewees described it, the Faculty Division was important because it created a counter-balance to the purportedly left-leaning professional association of law school professors, the American Association of Law Schools (AALS).⁴²⁷ University of San Diego Law Professor and Academic Michael Rappaport, who is one of the leading conservative scholars publishing in law reviews today, explained to me how the Federalist Society network has encouraged him in his own scholarship: “[The Federalist Society] is very important in the Academy... if I have an article that I’m writing, talking about various originalist theories out there [I will consult with] Randy Barnett and Gary Lawson and those are people I would’ve met in some way through the Federalist Society.”⁴²⁸

So while the proliferation of conservative and libertarian scholarship in law reviews might help explain the slight increase in citations to network scholarship by *amici curiae* that Table 7.2 illustrates, the sample of cases I examined in this thesis is not large enough to say anything about the overall trend of citations to Federalist Society scholarship over time. However, if we combine this count of the number of sources of Federalist Society scholarship cited over time with a qualitative look at who is doing the citing, these numbers reveal another very interesting trend. If we review the list of signatories on all friend of the court briefs that included at least one citation to Federalist Society network scholarship, we find that almost two-thirds (65%) of the *amicus curiae* briefs that included at least one citation to this scholarship also included at least one Federalist Society network actor as signatory. This makes sense within the epistemic community framework which sees network members as the primary “cognitive baggage handlers” transporting the community’s shared ideas to decision-makers.

Even more interestingly, however, prior to the litigation in *Lopez*, this figure was even higher, at 80%. This could suggest a few things. First, it could mean that Federalist Society scholarship and ideas are becoming more mainstream. This, after all, was one of the principal goals of the founders of the Federalist Society. Alternatively, we know that friends of the court and those submitting briefs take cues or “signals” from judicial decision-makers (Baird 2008) and tend to frame and support their arguments according to the revealed preferences of the decision-makers. Those looking to persuade a Supreme Court whose conservative members are sympathetic to Originalism and historical arguments might make use of these sources of scholarship even if they, themselves, are not “true believers.” To that end, after Justice O’Connor’s opinion in *New York*, which relied in critical part on the scholarship of Federalist Society member Michael McConnell and also cited the Originalist canon 20 times (see Table 7.3), lawyers who were not Federalist Society network “true believers” began citing Federalist Society scholarship with greater frequency. *New York* was also the first case I examine in which newly appointed Originalist and Federalist Society hero Justice Clarence Thomas participated. This strategic-litigant explanation might also help explain the fact that while a total of four counsel briefs cited network scholarship from *New York* to *Printz*, only one of these was authored by a Federalist Society network actor (25%).

For the purposes of this thesis, the single most important category of citations to sources of Federalist Society scholarship is that by judicial decision-makers. It is the ultimate goal of any epistemic community to transmit its ideas into policymaking and citations to Federalist Society scholarship in judicial opinions are an indicator that they have succeeded at that in some measure. Looking at Table 7.2, we can see that in half of the cases examined at least one judicial opinion referred to at least one source of Federalist Society scholarship in constructing its legal analysis. Four of these, however, were at the District or Circuit Court of Appeals level (*Chadha*, *Bowsher*, *Morrison v. Olson*, and *Clinton*) while only two opinions citing network scholarship ultimately became the Supreme law of the land (*New York* and *Printz*). It is noteworthy that three of these six opinions (50%) were authored or joined by at least one Federalist Society affiliated judicial decision-maker. In *Bowsher*, then-Judge Antonin Scalia joined a per curiam opinion for the D.C. District Court. In *Morrison v. Olson* the Circuit Court majority opinion was authored by frequent Federalist Society participants and Judges Laurence Silberman and Stephen Williams and in *Printz*, Justice Antonin Scalia authored the Supreme Court majority opinion that drew on a remarkable five sources of Federalist Society network scholarship to strike down a provision of the Brady Act on Tenth Amendment grounds.

While Federalist Society scholarship is certainly not the only source of idea transmission from the network to judicial decision-makers, it is an important one. As Table 7.2 illustrates, the most important providers of this “intellectual capital” in these twelve cases were *amici curiae*. As I mentioned in an earlier paragraph, nearly two-thirds of the *amicus* briefs that relied on Federalist Society scholarship listed at least one member of the Federalist Society network as a signatory. This finding is significant because it confirms that, as of 2001, the ideas of the Federalist Society network were still being transmitted primarily through network members as the epistemic community framework would predict. However, given that the trend pre-*Lopez* was that these ideas nearly exclusively (80%) appeared in the *amicus* briefs of Federalist Society members, this could suggest that in future cases citation of Federalist Society scholarship might not continue to be a reliable indicator of epistemic community membership. Moreover, with the addition of Federalist Society-affiliated Justices John Roberts and Samuel Alito to the Supreme Court, we might well expect a wider variety of litigants and *amici curiae* – arguing both sides of the case – to attempt to support their arguments with Federalist Society scholarship and with sources from the Originalist Canon, which is the subject of the next subsection.

Citations to the Originalist Canon

In Chapter One, I demonstrated that a strong commitment to Originalism as a method of constitutional interpretation was one of the most important shared beliefs of the Federalist

Society as an epistemic community. In Executive Director Eugene Meyer's view, the Federalist Society's most important contribution to American law and the legal culture has been in its consistent promotion and support of Originalism: "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."⁴²⁹ Prior to the founding of the Federalist Society, the theory of Originalism and the ideas it embodied were still considered to be "off the wall" as far as most of the legal-political community was concerned. As Federalist Society member Michael Rappaport confirmed in our interview, "now, for example on Originalism, there's a good deal of stuff outside the Federalist Society being done on Originalism. But, for a long time, there wouldn't have been."⁴³⁰ Given the close relationship between the Federalist Society and Originalism (which I detail in Chapter One of this thesis) throughout the empirical chapters I found it useful to catalogue and qualitatively explore citations to the Originalist canon by *amici curiae*, litigating counsel, and judicial decision-makers. While this is an admittedly weaker indicator of Federalist Society idea diffusion, overlapping citations to the same sources in a friend of the court brief and a Supreme Court opinion, for example, served as a flag for closer investigation. If the amicus brief under scrutiny was authored by a Federalist Society network actor and the Supreme Court opinion in fact adopted several of the same sources, logic, and language of that brief (as was the case in *Alden*, for example) then I could point to the *amicus curiae* brief as an effective mechanism of idea diffusion from the Federalist Society network to the judicial decision-maker.

This sub-section shifts the focus from individual citations and tracing idea transmission to the overall trends in citations to the Originalist canon across the twelve cases I examine in the thesis. It looks at who is using these Originalist sources, how often, and explains the potential import of these findings for our narrative of the Federalist Society as an epistemic community at work. The far right column of Table 7.3 on the following page calculates the total number of citations to the Originalist canon from amici, counsel and judicial decision-makers for each case. Calculating the average number of citations per case by decade, I found that the average number of citations per case actually decreased (80s: 64, 90s: 61, 00s: 39). This seems counter-intuitive given the almost unanimous impression of informants I interviewed on both the legal left and the legal right, that Originalism has become increasingly more mainstream in the Academy and the Court since the 1980s. An interview excerpt from Charles J. Cooper provides a sense of how members viewed Originalism in the 1980s versus in 2008:

[The Federalist Society] has had the single largest influence in making conservative legal opinion respectable in the larger legal community and in particular legal Academia. When in 1981 Originalists were viewed as alien beings and were ridiculed, really, in what passed for the scholarship of the day. The faculties of the law schools were monotheistic in that they all knelt before the altar of judicial activism, liberal judicial activism... That has changed significantly. By no means are conservative legal thinkers the dominant force; to the contrary, conservative legal thought remains a distinct minority viewpoint in the legal academy but it is a respected one and it is now a substantial one within the Academy and it's the dominant voice in the courts.⁴³¹

Table 7.3

Number of Citations to the Originalist Canon by Amici, Counsel, and Judicial Decision-Makers in *Chadha* (1983) through *American Trucking* (2001)

	<i>Amici Curiae</i> (friends of the court)	Counsel for Litigant(s)	Judicial Decision-Makers	Totals
<i>INS v. Chadha</i> (1983)	4	61	17 (Circuit Ct) 21 (SC Maj) 5 (SC Diss)	108
<i>Bowsher v. Synar</i> (1986)	13	30	1 (Dist Ct) 2 (SC Maj)	46
<i>Morrison v. Olson</i> (1988)	55	0	21 (Circuit Ct) 2 (SC Maj) 11 (SC Diss)	89
<i>Mistretta v. U.S.</i> (1989)	3	3	4 (SC Maj) 1 (SC Diss)	11
<i>New York v. U.S.</i> (1992)	12	2	20 (SC Maj)	34
<i>U.S. v. Lopez</i> (1995)	23	0	1 (Circuit Ct) 37 (SC Maj)	61
<i>S. Tribe v. Florida</i> (1996)	15	4	5 (SC Maj) 33 (SC Diss)	57
<i>Printz v. U.S.</i> (1997)	40	23	27 (SC Maj) 25 (SC Diss)	115
<i>Clinton v. C. of NY</i> (1998)	24	8	4 (Dist Ct) 6 (SC Maj)	42
<i>Alden v. Maine</i> (1999)	27	2	12 (SC Maj) 16 (SC Diss)	57
<i>U.S. v. Morrison</i> (2000)	66	3	2 (Circuit Ct)	71
<i>Whit v. Am. Truck</i> (2001)	7	0	0	7

If we look at the percentage of overall citations by category over time (*who* is citing the canon in each case), then the numbers do seem to align with the impressions of Chuck Cooper and other interviewees who observed the shift from Originalism being the subject of “ridicule” in the 1980s to having become the “dominant voice in the courts.” In the first four cases I examine chronologically, a large majority of the citations to the Originalist canon (59%) appeared in the Justice Department’s briefs. This is not surprising given that, as I demonstrated in Chapter Two, the Reagan Justice Department was widely regarded as “a Federalist Society shop.”⁴³² On the other hand, only a third (33%) of those citations appeared in judicial decisions and, even more critically, only 11% were featured in a Supreme Court majority or concurring opinion. In other

words, most of the citations to the Originalist canon came from Federalist Society network members outside the Supreme Court, while only a small percentage were actually featured in what would become the law of the land. As I mentioned, over the six cases I examined in the 1990s, the average number of citations to the Originalist canon per case was a bit lower than the decade prior. However, over half of those citations appeared in judicial opinions (51%) and, even more importantly, 30% were featured in Supreme Court majority or concurring opinions. So we see that while the overall number of citations might have decreased over the twelve cases, from the 1980s to the 1990s there was a critical increase in the one category that ultimately matters most in terms of epistemic community impact. The two cases decided in 2000 and 2001, *Morrison* and *American Trucking*, did not continue this trend. As we can see from Table 7.3, however, *amici* in *Morrison* cited the Originalist canon in their briefs more times than *amici* in any other case examined in this thesis. I offer some thoughts as to why the Supreme Court opinion in *Morrison* did not follow suit in the next section. The litigation in *American Trucking*, on the other hand, inspired very few citations to the Originalist canon from *amici* and none from counsel or judicial decision-makers.

Something else that emerges from this data is the percentage of citations by the Supreme Court contingent who opposed the epistemic community position in the case. That would include, for example, the dissenting or minority Justices in every case except the three in which the Federalist Society network position on the “structural constitution” did not carry the day: *Morrison v. Olson*, *Mistretta*, and *American Trucking*. Given that Originalism has most commonly been associated with the Federalist Society network and “true believers” like Charles J. Cooper, we would expect those arguing the non-epistemic community position to reject these arguments and embrace a different interpretive philosophy in their opinions. I found that while this was certainly the case in the 1980s, it was markedly less so in the decade that followed. In the four cases litigated in the 1980s, Justices arguing the non-epistemic community position accounted for only 4% of total citations to the Originalist canon in these cases. To recall the language I introduced in Chapter Two, those on the other side articulated a “pragmatic” approach to the separation of powers; one with a long history in Supreme Court precedent and one which did not require the support of founding sources to articulate. In the six cases decided in the 1990s, however, Justices arguing on the other side accounted for one fifth (20%) of all citations to Originalist sources. Originalism, once nearly exclusively the province of members of the Reagan Justice Department and the Federalist Society network – the “true believers” – was by the 1990s being used more frequently by the other side to respond to these Originalist arguments on their own terms.

So while the average number of citations per case actually decreased from one decade to the next, in the critical category of judicial decision-makers citing Originalist sources, it increased significantly from the 1980s to the 1990s. And, as the last paragraph demonstrated, use of the Originalist canon by the other side in judicial opinions saw a dramatic increase in the 1990s as the liberals used Originalist arguments to respond to the Rehnquist Court’s “New

Federalism” decisions. These two findings provide some evidence of what many Federalist Society actors I interviewed referred to as “changing the terms of the intellectual debate.” As Federalist Society member Daniel Troy described it, the fact that the left is now using Originalism “is just a striking example of the sea change in the intellectual climate that the Federalist Society has wrought... there’s no doubt that it’s changed the debate constitutionally.”⁴³³ Boalt Law Professor and Federalist Society member John C. Yoo also talked about the Federalist Society’s role in changing the terms of the constitutional debate on the Supreme Court specifically:

I think certainly in my professional lifetime the debate, the dialogue about constitutional law has shifted much more towards Originalism. So if you read Supreme Court opinions from the sixties and seventies there’s almost no discussion about what the Framers thought... and if you read Supreme Court opinions today even liberals on the Court take it seriously or will even criticize the majority for not being faithful enough. So I think there’s been a big shift in the dialogue [and] I think the Federalist Society has had an amazing impact and influence when measured against its numbers.⁴³⁴

While I don’t have an exhaustive sample, this change in the constitutional debate and the greater acceptance of Originalist arguments is certainly reflected in the twelve cases I examine that treat the “structural constitution.” As I discuss in the concluding section to this chapter, this “sea change” in the intellectual climate and the move to Originalism on the Supreme Court is an important part of the Federalist Society’s long-term strategy of changing the law and the legal culture (which are mutually reinforcing goals). Before I begin with that discussion, however, the next section evaluates the work of this epistemic community on the “structural constitution” from *Chadha* through *American Trucking*. Specifically, it evaluates the degree of idea diffusion from the Federalist Society network into Supreme Court majority and concurring opinions as a rough measure of epistemic community impact in each case. It then examines the variation across cases with reference to three variables: Federalist Society network participation, political infiltration, and what I refer to as doctrinal distance.

An Epistemic Community’s Work Evaluated

The principal aim of this thesis has been to evaluate the impact of the shared ideas and beliefs of the Federalist Society network as an epistemic community on the articulation of twelve of the most salient Supreme Court opinions concerning federalism and separation of powers – the “twin doctrines of the structural constitution” – since the Federalist Society’s founding. Thus far, I’ve evaluated that impact on a case by case basis, demonstrating in great detail the efforts of Federalist Society network actors to transmit these shared beliefs through briefs, lower court opinions and scholarship to Supreme Court decision-makers. And, as we’ve seen, those efforts

Table 7.4

Overall Impact of Federalist Society Network Ideas on Supreme Court Majority and/or Concurring Opinions in *Chadha* (1983) through *American Trucking* (2001)

	HIGH	MEDIUM	LOW	NONE
<i>INS v. Chadha</i> (1983)	X			
<i>Bowsher v. Synar</i> (1986)			X	
<i>Morrison v. Olson</i> (1988)				X
<i>Mistretta v. U.S.</i> (1989)				X
<i>New York v. U.S.</i> (1992)		X		
<i>U.S. v. Lopez</i> (1995)	X			
<i>S. Tribe v. Florida</i> (1996)		X		
<i>Printz v. U.S.</i> (1997)	X			
<i>Clinton v. C. of NY</i> (1998)		X		
<i>Alden v. Maine</i> (1999)	X			
<i>U.S. v. Morrison</i> (2000)			X	
<i>Whit v. Am. Truck</i> (2001)				X

have resulted at times in a high degree of epistemic community impact and at other times have translated into little or no impact at all. This section takes all the evidence of Federalist Society network idea diffusion into account, assigns a score of “high,” “medium,” “low,” or “no impact” to each case, and addresses the question of what best explains the variation across cases.

In scoring epistemic community impact in each case, the results of which appear above in Table 7.4, I considered the degree of idea diffusion from the Federalist Society network into the majority and/or concurring opinions of the Supreme Court. While epistemic community idea diffusion into lower court opinions and into dissenting opinions of Supreme Court decision-makers constitutes additional evidence of this epistemic community at work (and might well translate into impact in the longer term, for example, if the dissenting opinion becomes the majority opinion), I decided to limit my measure of impact to the degree of idea diffusion into the judicial opinions that represented a majority of the Supreme Court Justices’ views on the constitutional doctrine in question.⁴³⁵ With that in mind, we can see from Table 7.4 that three cases received a score of “no impact” (*Morrison v. Olson*, *Mistretta*, and *American Trucking*). In

these three cases, the epistemic community's beliefs about the "structural constitution" did not win the support of a majority of decision-makers on the Supreme Court. Of the nine cases where the Supreme Court did rule in favor of the epistemic community's preferred outcome, we can see that the degree of impact of the Federalist Society network's ideas on the respective judicial opinions in those cases varied greatly. Two cases were scored as exhibiting "low" impact (*Bowsher* and *Morrison*), three received a score of "medium" impact (*New York*, *Seminole Tribe*, and *Clinton*), and four were scored as having a "high" degree of impact (*Chadha*, *Lopez*, *Printz* and *Alden*). In the three sub-sections that follow, I consider separately three variables that might account for the variation of impact across the nine cases in which the views of the Federalist Society as an epistemic community won the support of a majority of the Supreme Court. Once again, because the sample I look at is small, the relationships between each of these variables and the degree of epistemic community impact must be understood to be suggestive and not definitive.

Federalist Society Network Participation as Amici Curiae and/or Litigators

The epistemic community literature suggests that the impact of a particular epistemic community is in some sense correlated with the degree of network mobilization; i.e., with the number of members actively working to diffuse the shared ideas and beliefs of an epistemic community into a governing institution at any given time (Adler and Haas 1992, 371-372). In other words, the logic proceeds, the more individuals there are acting as "cognitive baggage handlers" on behalf of the epistemic community, the greater the degree of epistemic community beliefs being inserted into the policymaking dialogue. In the context of the American legal enterprise, we can think of participation in litigation as *amici curiae* or as litigating counsel as indicative of the degree of epistemic community mobilization in each case. This hypothesis is also more or less consistent with Charles Epp's finding in *The Rights Revolution* (Epp 1998) that the more active the "support structure" (litigators, legal organizations, think tanks) was in bringing and financing cases and developing legal strategies, the more successful it was in bringing the desired legal change about. If we think of the Federalist Society as part of the "support structure" for the kind of conservative and libertarian legal changes its members hope to see realized on the Supreme Court, then it is reasonable to suspect that there might be a relationship between Federalist Society network participation and the degree of epistemic community impact.

Of the twelve cases I examine in the thesis, I am particularly interested in how this dynamic played out in the nine cases where the Supreme Court majority ruled in favor of the Federalist Society position on the "structural constitution." After all, if the Supreme Court is

Table 7.5

Relationship Between Federalist Society Network Participation and Degree of Impact of Federalist Society Network Ideas in Majority and/or Concurring Opinions in *Chadha* (1983) through *American Trucking* (2001)

Degree of Impact of Federalist Society Network Ideas

	HIGH	MEDIUM	LOW	NONE
HIGH			<i>U.S. v. Morrison</i> (2000)	<i>Whit v. A. Trucking</i> (2001)
MEDIUM	<i>INS v. Chadha</i> (1983) <i>U.S. v. Lopez</i> (1995)	<i>Clint v. C. of NY</i> (1998)	<i>Bowsher v. Syn.</i> (1986)	<i>Morrison v. Olson</i> (1988)
LOW	<i>Alden v. Maine</i> (1999) <i>Printz v. U.S.</i> (1997)	<i>S. Tribe v. Fla.</i> (1996)		
NONE		<i>New York v. U.S.</i> (1992)		<i>Mistretta v. U.S.</i> (1989)

Federalist Society Network Participation

predisposed to rule in favor of the epistemic community’s preferred outcome and there are several network participants submitting briefs and providing “intellectual capital” to support this position, we might expect the judicial opinion to reflect a high degree of reliance on these network ideas. So, in scoring Federalist Society network participation in each case I limited my count to network participants who were articulating the position that most accurately reflected the epistemic community’s shared beliefs on the “structural constitution.” Table 7.5 illustrates the relationship between the intensity of network participation as *amici curiae* and counsel (or the degree of “mobilization” to borrow language from the epistemic community theorists) and the degree of impact as scored and illustrated in the previous sub-section. Contrary to what we might expect from the epistemic community literature, these twelve cases demonstrated no significant relationship between participation and impact. If we exclude the cases in which there was no Federalist Society impact (the far right column), then only in *Clinton v. City of New York* did the degree of network participation correlate with the degree of epistemic community impact. In fact, the case with the second highest degree of network participation (*Morrison*) exhibited a

low degree of idea diffusion, while two of the cases that attracted the fewest number of Federalist Society participants as *amici curiae* and counsel (*Printz* and *Alden*) demonstrated a high degree of epistemic community impact.

This is certainly not to say that, in the aggregate, Federalist Society network participation in litigation as *amici curiae* and litigating counsel has not had a meaningful effect on the judicial dialogue; that is, on the overall number of Supreme Court opinions that are using the “intellectual capital” of the Federalist Society network in justifying and supporting their legal arguments. After all, as we saw with the Second Amendment brief in *Lopez*, ideas submitted in one case might not have an immediate impact on the majority opinion in that case. They might, however, lay the groundwork for future Supreme Court opinions and, in this way, have a lasting, longer-term impact on judicial doctrine. What I am saying, however, is that in the twelve cases I examined, Federalist Society network participation was not an accurate predictor of the degree of idea diffusion into the majority and/or concurring opinions on a case by case basis as we might expect from the literature on epistemic communities.

Political Infiltration (Federalist Society Network Affiliated Judicial Decision-Makers)

Another variable derived from the epistemic community literature is *political infiltration*. By that, I mean the extent to which members of an epistemic community manage to infiltrate the relevant decision-making institution and gain access to the policymaking process. Whereas the previous variable, *network participation*, looked at the number of epistemic community members attempting to influence policymaking from the outside-in, political infiltration focuses on epistemic community members who have direct input into the policymaking process as decision-makers. As epistemic community theorist Peter M. Haas has written, political infiltration is one of the greatest predictors of epistemic community influence, or impact: “To the extent to which an epistemic community consolidates... power within [the relevant governing institution] it stands to institutionalize its influence and insinuate its views into... politics” (Haas 1992, 4). Therefore, Haas has argued, “it is the political infiltration of an epistemic community into governing institutions which lays the groundwork for a broader acceptance of the community’s beliefs and ideas” (Haas 1992, 27). So, in terms of our narrative of the Federalist Society as an epistemic community at work, how well did political infiltration explain the varying degrees of Federalist Society network impact across the twelve cases examined?

Beginning with the four cases that received the highest score in terms of epistemic community impact (*Chadha*, *Lopez*, *Printz*, and *Alden*), we see that with the exception of *Chadha*, which featured zero Federalist Society network participants as judicial decision-makers (see Table 7.1), political infiltration at the Supreme Court level was held constant, at two

members per case. Federalist Society affiliated Justices Antonin Scalia and Clarence Thomas participated in three of the four highest scored cases I examined and wrote for the majority (Scalia in *Printz*) or separately (Thomas in *Lopez*) in two of those three cases. However, the epistemic community was equally well-represented at the Supreme Court level in one case in which the Federalist Society network's ideas had no impact (*American Trucking*), one in which it had low impact (*Morrison*), and three in which that impact was scored as medium (*New York, Seminole Tribe*, and *Clinton*). So, clearly, political infiltration of Federalist Society network actors at the Supreme Court level does not do all the explanatory work here.

Glancing back at Table 7.1 and looking at Federalist Society network participation at the Circuit Court of Appeals Level, we can also quickly rule out political infiltration at the lower court level as any kind of predictor of epistemic community idea diffusion into Supreme Court majority and/or concurring. When I began this research, I theorized that within the epistemic community framework as applied to the judicial enterprise, lower court opinions written by Federalist Society network affiliated judges would be important mechanisms of idea diffusion from the network into Supreme Court opinions, particularly if the Supreme Court opinion upheld the lower court ruling. While I did find a significant correlation between political infiltration at the Circuit Court level and epistemic community idea diffusion into the relevant Circuit Court opinion (the Circuit Court versions of *Morrison v. Olson*, *Morrison*, and *American Trucking*), surprisingly, these ideas were rarely transmitted through those appealed opinions into Supreme Court doctrine. This held true even in cases where the Supreme Court ruled consistently with the lower court. In *Morrison*, for example, the Circuit Court majority and concurring opinions written by Federalist Society affiliated judges Michael Luttig and J. Harvie Wilkinson each exhibited a high degree of epistemic community idea diffusion, as I detail in Chapter Five, but none of these ideas manifested themselves in the majority or concurring opinions of the Supreme Court in *Morrison*.

Were it not for the litigation in *Chadha*, which featured zero Federalist Society network participants as judicial decision-makers and which also exhibited a high degree of epistemic community impact, we might think that political infiltration at the Supreme Court level was necessary but not a sufficient condition for a high degree epistemic community idea diffusion. If we limit our definition of political infiltration to the judicial branch in general, and the Supreme Court in particular, then the findings in *Chadha* certainly call into question the importance of political infiltration as a precondition for epistemic community impact. As I detailed in Chapter Two, however, with a bit of rearranging, critical portions of the Supreme Court majority opinion in *Chadha* read almost identically to that of the Justice Department's brief. At this point, as I also explain in Chapter Two, the fledgling Federalist Society and the Reagan Justice Department networks completely overlapped in terms of ideas and personnel. So, in this case, if we expand our understanding of political infiltration to account for the epistemic community presence in the Reagan Justice Department and look at how closely the Supreme Court opinion in *Chadha* mirrored the Justice Department's brief, then the high degree of epistemic community idea

diffusion in *Chadha* begins to make sense, even absent political infiltration of judicial decision-makers in the litigation.

There is no question that political infiltration, whether we conceive of it narrowly as including only network affiliated judicial decision-makers or a bit more broadly as we did in *Chadha*, is a critical component of epistemic community idea diffusion. As more and more Federalist Society members gain direct access to policymaking and decision-making opportunities, the more potential conduits the network has through which to transmit their shared beliefs into law and policy. Some of those conduits are going to be more active than others at one time or another (for reasons I discuss in the next sub-section), but having them in place unquestionably increases the odds of idea transmission. The founders of the Federalist Society have acknowledged as much and have discussed the network's impact in these exact terms. For example, in Chapter One I cited the following excerpt from my interview with Co-Founder Steven Calabresi who discussed the dynamics of Federalist Society membership and political infiltration in the following manner:

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... That being said, because 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 in the way that Yale Law School alumni who've become judges have tended to push judging in a legal realist direction.⁴³⁶

So while political infiltration is not on its own a reliable predictor of epistemic community impact on a case by case basis, it is certainly important for the overall mission of the Federalist Society network in particular, and of legal epistemic communities in general. With four Federalist Society network affiliated Supreme Court Justices currently sitting on the bench deciding cases (Scalia, Thomas, Roberts and Alito) and with more than a quarter of Republican judicial appointees to the Circuit Court bench having active ties to the Federalist Society network,⁴³⁷ it would seem that this particular epistemic community has all the conduits in place to “push judging” in a “libertarian-conservative direction” under the right conditions. In the following sub-section I'll discuss one condition in particular, drawn from the twelve cases examined in this thesis, under which these Federalist Society network judicial conduits are likely to become highly active transmitters of epistemic community ideas.

Doctrinal Distance (Un-sticking Constitutional Frames)

So, if we cannot explain or predict epistemic community impact on Supreme Court opinions with reference to Federalist Society network participation (the number of “cognitive baggage handlers” working from the outside-in to transmit ideas to decision-makers) or with exclusive reference to the political infiltration of network members (the number of network affiliated conduits ready to receive and pass those ideas on into judicial opinions), then how can we explain the variation in idea diffusion we saw across the twelve cases examined in this thesis? In this sub-section I step outside of the epistemic community literature and focus instead on the judicial decisions themselves. In particular, I focus on the size of the step the Supreme Court is taking away from its established doctrine, what I am referring to as *doctrinal distance*. I find that in these cases there is in fact a striking correlation between the size of the step the Supreme Court is taking in a particular case and the degree of epistemic community idea impact on the written judicial opinion(s). In other words, the more incrementally the Supreme Court moved in the cases under examination, the less it relied on outside “intellectual capital” from the Federalist Society network to construct its written opinions. On the other hand, in cases where the Supreme Court made a medium or large move away from its established constitutional framework it relied more heavily on the epistemic community’s ideas about the “structural constitution” to articulate and justify its decisions. I’ll illustrate this relationship between doctrinal distance and idea diffusion across the twelve cases under examination in this study. I’ll then explain this finding with reference to path dependence within the legal-judicial enterprise and the unique problem of Supreme Court judicial authority in the American political system.

If we look again at the degree of idea diffusion across all twelve cases (illustrated in Table 7.4), we see that the four cases that received the highest scores for Federalist Society network idea diffusion were *Chadha*, *Lopez*, *Printz*, and *Alden*. Of the twelve cases I examined, these were also the four cases in which the Supreme Court took the biggest steps away from its established constitutional frames in those doctrinal areas. The decision in *Chadha* marked a clear break with the Supreme Court’s more “pragmatic” separation of powers jurisprudence, which, as I explained in Chapter Two, had privileged political convenience and flexibility in governance over a strict separation of powers jurisprudence. The opinion in *Chadha*, which relied heavily on sources from the Originalist canon to justify the decision, signaled for the first time in decades that the Supreme Court was willing to embrace a more rigid, “formalistic” approach to policing the boundaries between legislative and executive power. Similarly, the Supreme Court’s decision in *Lopez* to apply a more limited and narrow interpretation of Congress’ Commerce Power in striking down the Guns Free School Zones Act is frequently cited as one of the most “revolutionary” federalism decisions of the past fifty years (Whittington 2001; Johnsen 2003; Clayton and Pickerill 2004). The Supreme Court’s shift in *Lopez* to a more limited understanding of federal power vis-à-vis the states was justified with a plethora of references to the Originalist canon as well as to Federalist Society scholarship in both the

majority and concurring opinions. As Chief Justice Rehnquist wrote in the opening of the majority opinion in *Lopez*, the Supreme Court was starting over from “first principles.”⁴³⁸

The Supreme Court’s decision in *Printz*, handed down just two short years after *Lopez*, was similarly revolutionary in its novel application of the Tenth Amendment’s state sovereignty doctrine. In fact, following on the heels of *New York*, the decision in *Printz* has been understood to create a new Supreme Court doctrine - the Anti-Commandeering Doctrine – and to have elevated the “formalistic” approach to federalism to new heights (Adler 2001). In constructing this new constitutional frame for the Tenth Amendment, the Supreme Court opinion by Federalist Society mentor Justice Scalia relied on five sources of Federalist Society scholarship and several sources from the Originalist canon. Finally, while *Alden* does not have the political sex appeal that *Lopez* and *Printz* do, scholars nonetheless understand it as a revolutionary decision for its expansive interpretation of the Eleventh Amendment’s state sovereign immunity protections. For example, legal scholar Erwin Chemerinsky has referred to the decision in *Alden* as “remarkable” and as representing “a dramatic change in the law” (Chemerinsky 2000, 1285). Building on the medium step it had taken in *Seminole Tribe* three years prior, the Supreme Court in *Alden* relied on sources from the founding to argue that the concept of state sovereign immunity was inherent in the structure of the Constitution itself and not just limited to the Eleventh Amendment’s protections. As such, the states’ protection against federal lawsuits was not limited by the text of the Eleventh Amendment and could thus be applied more expansively to curb the federal government’s power to provide remedies for its citizens.

The three big constitutional steps taken in *Lopez*, *Printz*, and *Alden* were preceded by two medium-step decisions which laid the groundwork for these cases and relied to a lesser but still significant extent on Federalist Society “intellectual capital” to do so. Because I do not have a case study before *Chadha* (the Federalist Society did not exist prior to 1982) I cannot track this pattern for all four cases that received a high score for epistemic community idea diffusion. Nonetheless, it seems noteworthy that two of the three cases scored as medium impact in Table 7.4 (*New York* and *Seminole Tribe*) preceded three bigger constitutional steps in *Lopez*, *Printz*, and *Alden*. The Supreme Court decisions in *Lopez* and *Printz*, for example, both followed in different respects from the majority opinion in *New York*. Justice O’Connor’s lengthy theoretical justification of the benefits of “our federal structure” in *New York* (for which she relied on the scholarship of Federalist Society scholar Michael W. McConnell for intellectual and historical support) laid the groundwork for Chief Justice Rehnquist’s opening in *Lopez* and also became the foundation for Justices Kennedy and O’Connor’s exhaustive defense of the formalistic approach to federalism in their concurrence in *Lopez*.

As I mentioned briefly in the previous paragraph, *New York* also provided some of the theoretical support for the Supreme Court’s Anti-Commandeering Doctrine, which would be fully fleshed out and articulated by Justice Scalia in *Printz*. The decision in *Seminole Tribe* can also be considered a medium-step decision, in that it laid the groundwork for the Supreme Court’s far more expansive interpretation of the state sovereign immunity doctrine in *Alden* three

years later. These two medium-step decisions, *New York* and *Alden* also exhibited a medium degree of Federalist Society network idea diffusion. The third and final case that received a score of medium impact (see Table 7.4) was *Clinton*. The Supreme Court decision in *Clinton* to strike down the Line Item Veto Act turned out to be narrower in scope than *New York* and *Alden*. Because the majority did not frame the constitutional issue in terms of the non-delegation doctrine or in terms of the separation of powers doctrine more generally (as Justice Kennedy's concurrence indicated it should have), the opinion in *Clinton* did not do much to advance the separation of powers campaign of non-delegation enthusiasts. As such, it should be classified as a small-step case and one which, at least as of yet, has not laid the foundation for a full-scale constitutional revival of the non-delegation doctrine. However, if and when the Supreme Court is ready to take such a step, we might expect the majority to look to Justice Kennedy's concurring opinion in *Clinton* as a source of theoretical support (and Federalist Society network "intellectual capital") to justify that shift in constitutional frame.

While the no impact cases (*Morrison v. Olson*, *Mistretta* and *American Trucking*) certainly also correlate with the non-steps the Supreme Court took in those cases in terms of adhering to their inherited constitutional frames, it is the low impact cases (*Bowsher* and *Morrison*) that doctrinal distance does perhaps the best job of explaining. In the wake of the Supreme Court's decision in *Chadha*, the ruling in *Bowsher* represented another victory in principle for proponents of a more rigid, formalistic understanding of the separation of powers doctrine. However, unlike in *Chadha*, the judicial opinion in *Bowsher* makes use of just a few Originalist sources and does not spotlight to any significant extent the ideas and "intellectual capital" embedded in the Federalist Society affiliate-authored Justice Department brief. Instead, the Supreme Court relied on its prior handiwork in *Chadha* to support its decision that the Comptroller General Act violated the separation of powers doctrine. Similarly, while the litigation in *Morrison* generated an intense amount of Federalist Society network interest in terms of participation by *amici curiae* and counsel, this epistemic community "intellectual capital" was also conspicuously absent from the Supreme Court's majority opinion. It was only in the brief concurrence by Justice Thomas that the Originalist interpretation of the Commerce Clause received even a nod. Instead, the opinion in *Morrison*, which applied the constitutional frame that had been so carefully constructed in *Lopez*, merely cited this decision and the principles embodied therein for striking down the relevant provisions of the Violence Against Women Act. Because the Supreme Court had already labored to reconstruct and theoretically justify its new constitutional frames in *Chadha* and *Lopez*, it did not need to spend outside "intellectual capital" to do so again in *Bowsher* and *Morrison* – cases which reinforced these frames but did not extend or alter them in any significant way. So, here again, the degree of idea diffusion in these two cases is correlated with the size of the step the Supreme Court took (or in this case did not take) in *Bowsher* and *Morrison*.

Doctrinal distance as an explanation and predictor of the degree of epistemic community impact on Supreme Court opinions makes sense in the context of what we know about law and

the American judicial enterprise as being both highly path-dependent and preoccupied with the problem of justifying the power of judicial review in a democratic system. The American judicial enterprise and judicial-decision-making in particular, as Gordon Silverstein has written, is “distinctly different” from decision-making and policymaking in the political branches:

...judicial decision-making follows different rules and is driven by different incentives, limited by different constraints, and addressed to different audiences in a different language than is the political process. The way judges articulate, explain, and rationalize their choices and the way earlier decisions influence, shape, and constrain later judicial decisions are distinctly different from the patterns, practices, rhetoric, internal rules, and driving incentives that operate in the elected branches and among bureaucrats (Silverstein 2009, 63).

One unique constraint of the American judicial enterprise is 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 order to persuade a similarly trained and educated legal and political audience that these decisions were well-reasoned and authoritative, these opinions must situate the given decision within an established legal or constitutional framework or, alternatively, they must provide a convincing argument for why that framework should either be ignored, altered, or reconstructed entirely. In other words, judicial decision-makers can either attempt to fit the case within an “existing line of reasoning” (Silverstein 2009, 64) citing precedent and prior case law to justify their ruling or they can, as Chief Justice Rehnquist did in *Lopez*, “begin with first principles” and instead construct an altered or new line of reasoning – a new constitutional frame – to justify their decision.

The less costly, lower risk option for decision-makers is to justify their decisions with reference to the existing constitutional framework, particularly if that frame and the attendant precedents have become entrenched from years of judicial reliance and authoritative citation. As former Supreme Court Justice Robert Jackson wrote in *The Struggle for Judicial Supremacy*:

Justices are drawn only from the legal profession. The entire philosophy, interest, and training of the legal profession tend toward conservatism... it is much concerned with precedents, authorities, existing customs, usages, vested rights, and established relationships. Its method of thinking, accepted by no other profession, cultivates a supreme respect for the past, and its order. Justice Cardozo has well said that the “power of precedent, when analyzed, is the power of the beaten track.” No lawyer sufficiently devoted to the law to know our existing rules, the history of them, and the justification for them, will depart from them lightly (Jackson 1979, 313-314).

If we want to think about Justice Jackson’s observations in terms of path-dependence, once the Supreme Court starts down a path or line of reasoning and once that path is “beaten” or entrenched in doctrine, the “set-up costs” of “un-sticking” the old line of reasoning and constructing a new one are very high (Pierson 2000, 254). This is because the further the Supreme Court decides to move away from its established constitutional frame in a given case, from the “beaten path” as Justice Jackson referred to it, the less it will be able to rely on past lines of reasoning and precedent to legitimate and support its ruling and the more it will have to

fish around for alternative authorities, theories, and constitutional frames to justify its decision. I argue that it is this precise dynamic that opened the door for the Federalist Society as an epistemic community to frame and shape the Supreme Court's legal reasoning by providing ideas, authoritative sources, and legal arguments that were used to "un-stick" and reconstruct the constitutional frames articulated in *Chadha*, *Lopez*, *Printz* and *Alden* and, to a lesser extent, in *New York*, *Clinton* and *Seminole Tribe*. Once that constitutional frame was laid down and the "intellectual capital" incorporated into Supreme Court doctrine, the door for epistemic community impact was closed and the Supreme Court could once again justify its rulings according to its own precedent, as we saw in *Bowsher* and *Morrison*.

Because the American judicial enterprise is unique, operating under a different set of constraints and concerned with a different set of problems than are the political branches, the variables that might help predict epistemic community impact on administrative decision-making, for example – *network participation* (mobilization) and *political infiltration* – did not succeed in doing the explanatory work in these cases. Instead, it was *doctrinal distance*, a variable drawn from the institutional nature and norms of the Supreme Court and the judicial enterprise, which best explained the variation in Federalist Society network idea diffusion across all twelve cases examined in the thesis. While the sample of cases I examine is not exhaustive, *doctrinal distance* as an explanation and predictor of epistemic community influence also makes sense in terms of we know about the judicial enterprise, path-dependence, and the problem of judicial authority. Thus, as I write in the conclusion to this thesis, I would expect that behind some of the most notable and sweeping shifts in constitutional understanding throughout Supreme Court history, periods entailing shifts of great *doctrinal distance*, that there has been an epistemic community of some sorts at work; a network of legal experts providing judicial decision-makers with the "intellectual capital" that legitimated, supported, bolstered, and defended those dramatic path changes. Looking forward, as the Supreme Court appears well-positioned to enact other significant doctrinal changes with a solid conservative majority in place and to extend what scholars have referred to as the "conservative counterrevolution" into other areas of constitutional law, we should expect the Federalist Society network to be a fruitful source of "intellectual capital" and to help off-set some of the "up-start" costs of un-sticking entrenched liberal constitutional frames and constructing conservative and libertarian alternatives.

"An Epistemic Community's Work is Never Done"⁴³⁹

As I wrote in the introduction to this thesis, focusing on epistemic community idea diffusion as a measure of influence involves a recognition that law and constitutional development is a long-term, iterative game. If the timing is right, then the "intellectual capital"

invested in a particular case might bring immediate returns – as it did in *Chadha*, *Lopez*, *Printz* and *Alden*, for example. However, if a majority of the Supreme Court is not ready or willing to significantly alter or change the existing constitutional frame, then those ideas and authoritative sources will be filed away for future cases when, as Justice Thomas wrote in *Printz* of the Second Amendment, the Supreme Court “might be willing to reconsider” its existing doctrine in a particular area. In the meantime, as Federalist Society member and University of Virginia law professor Lillian Bevier described it to me in an interview, “a lot of the time, it’s just like dripping water. You know it can wear away a stone but it takes a lot of drips. So it’s just a question of getting these ideas out there.”⁴⁴⁰

This thesis has examined some of the ways in which this Federalist Society network has, through idea diffusion, worked to “wear away” the existing Supreme Court doctrines on federalism and separation of powers – the “twin doctrines” of the “structural constitution.” Over the course of two decades, just like “dripping water,” these actors have successfully moved Originalist constructions of the “structural constitution” from the realm of “off the wall” to “good legal craft” (Balkin and Levinson 2000). As I demonstrated earlier in this chapter, Originalism, once nearly exclusively the province of members of the Reagan Justice Department and the Federalist Society network in the 1980s is now used with much more frequency by *amici*, counsel and judicial decision-makers arguing the other side of the case. And while Federalist Society scholarship is still principally being cited in the briefs of other network members, I also showed earlier in this chapter that the percentage of non-Federalist Society affiliated *amici* and counsel citing this scholarship has increased since the 1980s, when it really was only the “true believers” who relied on it as an authoritative source. These seem to be reliable indicators that, as several Federalist Society members commented, the “terms of the debate” surrounding constitutional law and interpretation have indeed changed. Thinking about this shift in terms, again, of path-dependency, it is now the Federalist Society’s legal reasoning that has become the dominant constitutional frame in at least two important doctrinal areas – the Tenth Amendment and the Eleventh Amendment – and the one that liberals must now either work within or invest in the costly process of deconstructing if and when they regain a majority on the Supreme Court.

In the meantime, the Federalist Society as an epistemic community is still at work on the “structural constitution.” First and foremost, as I demonstrated earlier in this chapter, in the areas of litigation that are most important and salient within the Federalist Society network, network members are participating in Supreme Court litigation as *amici curiae* and counsel more often. They are, to paraphrase Lillian Bevier’s language, successfully getting their ideas out there in hopes that they might help “wear away the stone” of entrenched liberal legal reasoning. And, as I have documented throughout the thesis, the Federalist Society network is also helping to entrench their own reconstructed constitutional frames by acting as a vocal and approving “judicial audience” (Baum 2006) in the media and in legal scholarship. And in the areas where change has been incremental or frustrated, like with the non-delegation doctrine, the epistemic

community is working to develop litigation strategies, encouraging the publication of scholarship supporting and developing its constitutional position, and spreading their beliefs to the next generation of civic leaders coming up through the ranks of the Federalist Society network. Here, again, Federalist Society member Michael Rappaport's observation about long-term constitutional change seems appropriate to recall: "You want to change the world, you have to be patient."⁴⁴¹ And that is precisely why, as the heading of this chapter's final section indicates, *an epistemic community's work is never done*.

Conclusion -----

Epistemic Communities and Constitutional Change: An Agenda for Future Research

These final pages move beyond the case of the Federalist Society for Law and Public Policy and the “structural constitution” and identify directions for future research on the role of epistemic communities in the process of constitutional change more generally. Drawing on the finding that it was *doctrinal distance* that best explained the degree of epistemic community impact across the twelve cases I examine in the thesis, it would be reasonable to expect that networks of intellectuals have had a hand in helping to construct and support some of the most dramatic shifts in Supreme Court doctrine in American constitutional history. If this is true, then this finding would have implications for how we think about the mechanisms of constitutional change and the role of civic actors in shaping and articulating those changes. In other words, if we find that indeed the most dramatic shifts in constitutional doctrine have been in part developed and supported by networks of intellectual elites, then this speaks to the all-important question of “Who governs?” (Dahl 1961). Whether or not this kind of institutional permeability is a measure of good democratic health or of elite capture is a normative question I reserve for the time being, pending more evidence and (in the language of the court) further deliberation.

Explaining constitutional change has become something of a cottage industry within Political Science. Scholars have long been fascinated by periods of large scale constitutional change, or constitutional “revolutions.” How can the same constitutional language be interpreted to mean “A” one day and “B” the next? What are the variables that contribute to revolutions in constitutional understanding and what are the influences that shape them? Moreover, what do the answers to these questions mean for the relationship between democracy and judicial review? With few exceptions, the scholarly voices that have dominated this discussion have all echoed variations of the same proposition – that the “Supreme Court follows the election returns.”⁴⁴² In other words, constitutional change is best explained with reference to electoral politics. This insight finds its most robust expression in the scholarship associated with “regime politics theory” (Dahl 1957; Graber 1993; Gillman 2006; Whittington 2001; Balkin and Levinson 2001; Clayton and Pickerill 2004). This theory maintains that constitutional revolutions are ultimately driven by elections. The people elect a President who then exercises the power of appointment to fill the federal courts with individuals who share his party's broad political agenda: “when Presidents are able to appoint enough judges and Justices, constitutional doctrines start to change” (Balkin and Levinson 2006, 102).

Complicating the regime politics theory of constitutional change, however, is the work of Charles Epp whose influential book, *The Rights Revolution*, showed that having the right case of characters on the Supreme Court is necessary but not sufficient for large-scale constitutional

change. In particular, Epp and others have found that serious constitutional change also requires a cooperative "support structure" - litigants and legal organizations with the resources to bring the right cases to court as well as legal academics and interest groups to nurture and develop the ideas and legal strategies that support doctrinal change (Epp 1998, 44-70; Teles 2008, 11-12; Southworth 2008, 8). What I found in this thesis confirms the most important findings of both of these bodies of literature. As regime politics theory indicates, having the right cast of characters on the Supreme Court – accomplished through Presidential appointment and ultimately driven by electoral politics – was essential for large-scale constitutional change. The four cases I examined in which the Supreme Court demonstrated a significant course-reversal (*Chadha*, *Lopez*, *Printz* and *Alden*) were all decided by a majority of Republican-appointed Supreme Court Justices. So, having a majority of decision-makers willing to invest in the costly enterprise of reconstructing a constitutional framework was critical in the cases I examined. At the same time, we also saw that the Federalist Society as an integral part of the “support structure” for constitutional change played a vital role in helping to shape and articulate the written opinions in those cases. Making sure the ideas and “intellectual capital” were out there, moving through the circulatory system, off-set some of the high costs associated with altering and reconstructing constitutional frames and lines of legal reasoning and helped the Justices overcome some important persuasional obstacles. This work, then, builds on both these bodies of literature by demonstrating, through idea diffusion, just how interconnected the “support structure” and Supreme Court decision-makers actually are during periods of dramatic constitutional change and by highlighting, through the epistemic community approach, the pathways of influence that connect them.

In thinking about constitutional change, this work on the Federalist Society for Law and Public Policy helps explain the shape and character of at least one part of the “conservative counterrevolution” many scholars and observers believe to be currently underway on the Supreme Court (Simon 1999; Kramer 2001; Schroeder 2001; Tushnet 2005). But the “conservative counterrevolution” is only the most recent period of revolution in American constitutional history to capture scholars’ attention and it most certainly will not be the last. So, if we are persuaded that epistemic communities and their ideas are most valuable during periods of dramatic constitutional overhaul, when *doctrinal distance* is greatest, then we might expect analogous communities to have a significant role in shaping and crafting other revolutionary Supreme Court decisions. Looking back, three periods of American constitutional history would seem to warrant a more careful investigation of epistemic community impact: the rise of *Lochner* era jurisprudence and the apparent influence of laissez-faire economics in the late 19th and early 20th centuries (Gillman 1993), the demise of *Lochner* era jurisprudence and the rise of sociological jurisprudence under the New Deal Court in the late 1930s and 1940s (Irons 1982; Cushman 1998), and the “rights revolution” of the 1950s and 1960s articulated in the progressive jurisprudence of the Warren Court (Epp 1998; Horwitz 1999). If we could, consistent with the epistemic community approach, reconstruct in greater detail the pathways of idea transmission in the most revolutionary of these cases we might be able to get a sense of who (if anyone) was providing the “intellectual capital” for these paradigm-shifting decisions.

For example, we know from Howard Gillman's work in *The Constitution Besieged* that the *Lochner* era Supreme Court was motivated by "a principled commitment to the application of a constitutional ideology of state neutrality" that was supported by then-contemporary theories of economic liberty and *laissez-faire* economics (Gillman 1993, 199). Gillman expertly traces the intellectual history of *Lochner* era jurisprudence back to the Founding Era, demonstrating how these controversial Supreme Court decisions embodied a theory of state-individual relations articulated in certain documents of the Founding Fathers. And while he acknowledges the role that "legal elites" generally play in making constitutional theories authoritative and legitimate (Gillman 1993, 17), we are left without a satisfactory answer to the questions of who these legal elites were and to what extent they had a hand in shaping the articulation of *Lochner* era jurisprudence. For instance, Gillman demonstrates that Thomas Cooley's 19th century treatise, *Constitutional Limitations* was highly influential as intellectual support for several *Lochner* era decisions on property rights and the limits of federal power. Similarly, Barry Cushman in his book *Rethinking the New Deal Court*, argues that the state-neutrality theory was part of the "constitutional cosmology" in the late-19th century and, more to the point, formed part of the "constitutional culture" in which the Supreme Court was then immersed (Cushman 1998, 140-156). Was there a broader epistemic community at work in the late-19th and early-20th centuries supporting and developing this "constitutional cosmology"? What did it look like? Did members of this epistemic community participate in litigation or simply provide ideas and "intellectual capital" through scholarship? How organized was this epistemic community (if at all) and was it, like the Federalist Society, consciously and deliberately trying to influence the articulation of Supreme Court doctrine?

The demise of *Lochner* era jurisprudence and the rise of a more sociological approach to judging – usually epitomized by the now-infamous "switch in time that saved the nine"⁴⁴³ – represented another paradigm-shift in the Supreme Court's constitutional understanding of the role of the federal government vis-à-vis the states and the individual. Scholars Peter Irons and Barry Cushman have both explored the role that the New Deal lawyers working in the Justice Department under President Roosevelt had in carefully crafting the successful legal and constitutional arguments supporting the new, expansive economic role of the federal government (Cushman 1998; Irons 1982). Others have looked at the emergence of legal realism and sociological jurisprudence in legal theory and in the law schools. For example, legal historians Morton Horwitz and Neil Duxbury have shown how prominent legal elites in the Academy drew on legal realism to defend the New Deal in their scholarship and public lectures in the 1930s and 1940s (Horwitz 1992, 213-246; Duxbury 1995, 232-238). But where and how did these two groups of actors and ideas – one situated in civil society and the Academy and the other in the Roosevelt Justice Department – intersect or overlap? And, further, what were the overlaps between the Supreme Court Justices deciding the New Deal cases and these networks? Scholars and observers have noted the role Felix Frankfurter played in mentoring and recommending clerks and young lawyers who shared his pro-New Deal beliefs for positions in government agencies and the Justice Department. In fact, *Time* magazine reported in 1939 that there were

already “125 of Frankfurter’s protégés, whimsically referred to as ‘the Happy Hot Dogs’ in government service at that time” (Green 2009, 1208). Were there other discernible pathways of transmission between the three groups; individuals with similar professional associations and/or legal training? And how active were these pathways on a case by case basis in transmitting “intellectual capital” to Supreme Court decision-makers?

Finally, we could and ought to be asking similar questions about the progressive rights jurisprudence that became the calling card of the Warren Court. For example, Morton Horwitz argues that the Warren Court’s jurisprudence was remarkable not only for its articulation of a living, changing constitution that needed to be responsive to evolving standards of decency and human dignity, but also for another intellectual curiosity: “one of the most amazing reversals in constitutional history is how a doctrine [natural rights jurisprudence] held in such low esteem, so discredited in 1940 came to be used by the Warren Court to represent [an] emancipatory... way of talking about the law” (Horwitz 1993, 8). Part of this remarkable jurisprudential move in the area of natural rights, which began with the New Deal Court, was to differentiate property rights from other substantive rights. While the rationale for this distinction was articulated as early as 1938 in Justice Harlan Stone’s Footnote 4 to the *Carolene Products* decision, it was not until the Warren Court that this progressive rights jurisprudence reached its full expression (Lusky 1982). While much has been written about the “process-based” (Ely 1980) rights theory this footnote and the Warren Court decisions subsequently inspired, the more interesting question for our purposes would be what (or who) helped shape and frame the Warren Court jurisprudence in the first place? Apart from Footnote 4, were there other, more proximate influences and sources of “intellectual capital” the Justices drew on to articulate this progressive rights jurisprudence? Was there in fact an epistemic community at work and, if so, what did it look like and how did it operate?

These three cases studies of constitutional “revolution” in the 20th century would provide a more systematic understanding of the role epistemic communities have played in helping to construct, support, defend and legitimate constitutional change over time. Knowing where the “intellectual capital” in these prior revolutions came from, how it was transmitted, and under what conditions it was relied on with more or less frequency in judicial opinions would not only give us a better understanding of the role epistemic communities play in effecting constitutional change but also, more importantly, how that role might have expanded, contracted, and evolved over time. For example, in order to fully understand and evaluate the Federalist Society as an epistemic community at work, we would need to know where on the scale of epistemic communities does the Federalist Society rate in terms of the returns on its intellectual investments? How do we explain the relative rates of success of epistemic communities over time? Is the Supreme Court more or less permeable to outside ideas and framing now than it was in the early 20th century? If so, what explains this? Is the Federalist Society simply a more institutionalized and therefore more highly visible epistemic community or is it actually – as many of its members suggested to me in interviews – *sui generis*?⁴⁴⁴ In other words, is the

Federalist Society simply playing the game of intellectual influence more aggressively than have past epistemic communities or has it fundamentally altered the structure of the game by institutionalizing the epistemic community?

The founding of a progressive counterpart to the Federalist Society in 2001 – the American Constitution Society – might suggest that the game of influencing and shaping the articulation of Supreme Court opinions and the rules of engagement surrounding the “battle for control of the law” (Teles 2008) have fundamentally changed. The American Constitution Society (ACS) is identical to the Federalist Society in its institutional machinery, with an emphasis on creating a community of legal elites who share a particular legal and constitutional philosophy, networking these elites and supporting their professional development. Like its philosophical foil, ACS boasts a growing number of lawyer and student chapters. It sponsors conferences, debates, colloquia and networking events and supports a number of working groups that develop litigation strategies on issues such as federalism, executive power, and judicial nominations. As former Executive Director of ACS Lisa Brown explained it to me in an interview, “the ultimate goal [of ACS] is to further a progressive vision of law and policy, to get ideas out there and have them be acted on and implemented... over time as people go into different positions of all sorts and different jobs in government and judging, then you actually see more of the...realizing of the ideas.” Brown continued that the ideas were important, but it was the “ideas connected to the people... the network” that had been the Federalist Society’s formula for success; a formula ACS has been doing its best to try to imitate.⁴⁴⁵ Looking forward, given the emphasis both the Federalist Society and the American Constitution Society are placing on ideas, networks, and the pathways that facilitate the transmission of those ideas into law, the epistemic community approach should offer future scholars and Supreme Court observers a way to keep score and to track ideas and idea diffusion into judicial decisions as these two sides continue to battle for control of the law in the decades to come.

Finally, as I wrote in the introductory paragraph of this concluding chapter, while I think the normative implications of this study and of future studies on epistemic communities and constitutional change are extremely important, I will just introduce them briefly here, leaving a more complete consideration of the normative questions for another time. Empirical studies of constitutional change in the American legal context, of the variables that influence and shape constitutional development, are very often undertaken as part of a larger normative agenda in response to some variation of the “counter-majoritarian dilemma;” a problem most famously articulated in the work of Yale constitutional scholar Alexander Bickel (Bickel 1962). Briefly stated, the “counter-majoritarian dilemma” arises when one attempts to square the power of judicial review – the power of unelected judges to strike down popularly enacted legislation – with democracy and majoritarian rule. Unlike constitutional theorists, who resolve this dilemma with reference to defensible methods of constitutional interpretation, social scientists tend to weigh in on this debate by providing evidence of outside influences on judicial decision-making and constitutional development. If constitutional change is simply the product of the whims and

policy preferences of unelected judges, then the power of judicial review becomes a tool of arbitrary, non-democratic rule. However, if we can link constitutional development to broader democratic influences, then the “counter-majoritarian” problem disappears (Peretti 1999). This is exactly what the political regimes theorists argue they have done. By showing that “the Supreme Court follows the election returns” and linking constitutional development to electoral politics and judicial appointments, these scholars argue that constitutional decisions almost always embody the values of the prior governing coalition. In fact, political regimes scholar Mark Graber has gone so far as to reclassify and write-off Bickel’s classic formulation as the “non-majoritarian difficulty” (Graber 1993).

My work on the Federalist Society and epistemic communities suggests a different dimension of influence on Supreme Court decisions; one that is not democratic, or popular, but rather elite in nature. Its mechanisms are also acute and proximate rather than vague and diffuse. In other words, whereas the political regimes theorists look at the general values embodied in the decisions and link them to the appointing political parties and their respective values, broadly conceived, the epistemic community approach allows us to see in specific instances the impact of the ideas and “intellectual capital” of a particular network of elites on the construction and justification of Supreme Court written opinions and doctrine. The two are not necessarily at odds, of course. Just as interest groups can be understood as part of the democratic process, broadly understood, so can epistemic communities like the Federalist Society be understood as elite filters and transmitters of mass democratic preferences. On the other hand, discussions of interest groups within Political Science are rife with concerns about “elite capture” and echoes of James Madison’s warnings in *Federalist 51* about guarding against the “mischief of faction.” If, for example, one could make the case that the Federalist Society for Law and Public Policy is in fact more ideologically and philosophically extreme than the median voter and that through political infiltration and access to decision-makers it has succeeded in helping to push the law further to the right than it might have gone under other circumstances, then epistemic community impact could be understood as a more subtle form of “elite capture.” And while Political Scientists believe they have resolved the “counter-majoritarian dilemma,” the phenomenon of epistemic community influence, if in fact there is ample evidence of this throughout constitutional history, might present a new twist on this very old problem.

Again, whether or not we should be talking about an “epistemic community dilemma” is a question reserved for another time, pending much more evidence and further deliberation. In this concluding chapter, I’ve suggested an agenda for research that would help inform these normative concerns about epistemic communities and constitutional change and help guide future inquiries into the ideas and actors that help shape constitutional law, thereby effectively shaping the rules and relationships that govern how we as citizens conduct our public and private lives.

Appendix -----

List of Interviews

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

Carter Phillips. Managing Partner, Sidley Austin, LLP. January 30, 2008.

Daniel Troy. Attorney, Sidley Austin, LLP; Special Assistant, Office of Legal Counsel (1984-1988). January 30, 2008.

Daniel Ortiz. Professor of Law, University of Virginia Law School. February 6, 2008.

Daniel Polsby. Dean and Professor of Law, George Mason Law School. February 11, 2008.

David Lyle. Deputy Executive Director, American Constitution Society (2002-present). June 19, 2008.

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

Donald Devine. Vice-Chairman, American Conservative Union; Director, U.S. Office of Personnel Management under President Ronald Reagan. February 7, 2008.

Douglas W. Kmiec. Professor of Law, Pepperdine University; Office of Legal Counsel under Presidents Ronald Reagan and George H.W. Bush. March 14, 2008.

Edwin W. Meese, III. U.S. Attorney General under President Ronald Reagan (1985-1988); Fellow, Heritage Foundation. February 5, 2008.

Eugene Meyer. President, Federalist Society. February 8, 2008.

Fred L. Smith. President and Founder, Competitive Enterprise Institute. January 16, 2008.

Gail Heriot. Professor of Law, University of San Diego; Commissioner, United States Commission on Civil Rights. March 18, 2008.

Goodwin Liu. Professor of Law, University of California, Berkeley Law School; Board of Directors, American Constitution Society; Nominee to Ninth Circuit Court of Appeals. June 27, 2008.

Gregory Maggs. Senior Associate Dean for Academic Affairs and Professor of Law, George Washington University Law School. January 22, 2008.

John C. 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). January 16, 2008.

John T. Noonan. Senior Circuit Judge, Ninth Circuit Court of Appeals. January 14, 2008.

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

Laurence Claus. Professor of Law, University of San Diego; former John M Olin Fellow at Northwestern University School of Law. March 18, 2008.

Lee Liberman Otis. Office of Legal Counsel, George H.W. Bush Administration; General Counsel (2001-2005); Co-Founder, Federalist Society. June 4, 2008.

Lillian BeVier. Professor of Law, University of Virginia Law School. February 1, 2008.

Linda Chavez. Chairman, the Center for Equal Opportunity; Staff Director, U.S. Commission on Civil Rights (1983-1985). January 29, 2008.

Lisa Brown. Executive Director, American Constitution Society (2001-2008). June 19, 2008.

Louis Michael Seidman. Professor of Constitutional Law, Georgetown Law School. February 15, 2008.

Michael Carvin. Partner, Jones Day; Deputy Assistant Attorney General, Civil Rights Division (1985-1987); Deputy Assistant Attorney General, Office of Legal Counsel (1987-1988). January 28, 2008.

Michael Greve. Director of the Federalism Project, American Enterprise Institute. February 12, 2008.

Michael Horowitz. Senior Fellow, Hudson Institute; General Counsel, Office of Management and Budget under President Ronald Reagan. January 22, 2008.

Michael Rappaport. Professor of Law, University of San Diego Law School; Special Assistant, Office of Legal Counsel under President Ronald Reagan. March 17, 2008.

Randy Barnett. Professor of Legal Theory, Georgetown University Law School. June 10, 2008.

Richard K. Willard. Partner, Steptoe and Johnson, LLP; Assistant Attorney General, Civil Rights Division under President Ronald Reagan. January 31, 2008.

Robert Post. Dean and Professor of Law, Yale Law School; Board of Directors, American Constitution Society. June 12, 2008.

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). January 29, 2008.

Spencer Abraham. U.S. Senator from Michigan (1994-2001); U.S Secretary of Energy (2001-2004); Co-Founder, Harvard Journal of Law and Public Policy. June 3, 2008.

Steven Calabresi. Professor of Law, Northwestern University; Co-Founder, Federalist Society. April 3, 2008.

Thomas A. Smith. Professor of Law, University of San Diego Law School; Senior Counsel, President Reagan's Council of Economic Advisors. March 19, 2008.

Tony Cotto. Former Student Chapter President at George Washington University Law School, the Federalist Society. January 31, 2008.

Walter Berns. Resident Scholar, American Enterprise Institute. January 24, 2008.

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Yee, Albert S. 1996. "The Causal Effects of Ideas on Policies." *International Organization*, 50 (1): 69-108.

Yoo, John C. 1996. "The Continuation of Politics by Other Means: The Original Understanding of War Powers." *California Law Review*: 167-305.

-----, 1998. "Sounds of Sovereignty: Defining Federalism in the 1990s." *Indiana Law Review*, 32: 27-44.

Notes -----

¹ Transcript from 2007 National Lawyers Conference in Washington, D.C. available at www.fed-soc.org.

² *Printz v. United States*, 521 U.S. 898 (1997), Justice Thomas concurring at 938.

³ According to the Federalist Society's website, the Student Division includes "more than 10,000 law students," and the Lawyers Division "over 30,000." See www.fed-soc.org/aboutus (last accessed 2.9.09). Executive Director Eugene Meyer noted in a personal interview that this number could be well "over 40,000... depending on how you count." Interview with Eugene Meyer, 2.8.08.

⁴ This reference comes from an internal Justice Department memo from Kenneth Cribb to President Reagan's Chief of Staff that referred to federalism and separation of powers as the "twin Constitutional doctrines" of the structural constitution. Document obtained from the Ronald Reagan Presidential Library in Simi Valley, CA on Mar. 12, 2008. See "Topics of Discussion," Talking Point #5. Presidential Handwriting File, Series IV, File 173, 459153SS.

⁵ In order to have some measure of the most salient, or talked about, decisions dealing with the "structural constitution" within the legal community, I performed a simple search on Lexisnexis Academic's law review database. For the first group of cases, I performed a search on Jan. 17, 2009 using search operator "separation of powers" and pulled more than 3,000 results. I filtered results by relevance and I selected every fifth law review article (1, 5, 10, etc...) until I had a set of 10 articles total. I then performed a content analysis for mentions of Supreme Court decisions and came up with the six decisions listed in this paragraph, which seemed to divide - though not perfectly - into cases dealing with legislative delegation and cases dealing with Executive power. For the second group of cases, I performed a similar search on Jan. 16, 2009 with search operator "New Federalism" and pulled 2,753 results. I used the same filtering and selection criteria to generate these six decisions, with one exception: *City of Boerne v. Flores* was removed from the list because, though it was a federalism case, it also brought in questions about religious liberty and ended up being a case principally about judicial supremacy vis a vis the Congress in determining questions of constitutional interpretation. So, instead, I included in my analysis the seventh most salient decision according to this count, *Seminole Tribe v. Florida* which presented more of a straightforward federalism question.

⁶ Wiber, M. G., "An Epistemic Community's Work is Never Done." *Paper presented at the annual meeting of the The Law and Society Association, Berlin, Germany*. July 25, 2007.

⁷ The Mayflower Hotel has been the location of several of the Federalist Society's National Student and Lawyer Conferences.

⁸ See, for example, interview with Carter Phillips on 1.30.08: "*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 on 1.22.08: "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, 1.28.08: "... 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 Willard on 1.31.08: "I think it's pretty *sui generis*..."

⁹ See, for example, Wiber, Melanie. "An Epistemic Community's Work is Never Done," *Paper presented at the annual meeting of the Law and Society Association, Berlin, Germany*, Jul. 25, 2007; Dotterwiech, Lisa, "Who Knows What?: A Study of the Role of Epistemic Communities in the Making of the No Child Left Behind Act," *Paper presented at the annual meeting of the Midwestern Political Science Association, Palmer House Hotel, Chicago, IL*, Apr. 03, 2008; Alma Maldonado, "An Epistemic Community and its Intellectual Networks: The Field of Higher Education in Mexico." Unpublished Doctoral Dissertation, Boston College, 2004.

¹⁰ Teles cites Jack M. Balkin on this point: "The 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).

¹¹ All the figures in this section come from the Federalist Society's website, www.fed-soc.org/aboutus/id.28/default.asp and were last accessed Feb. 16, 2009.

¹² See www.fed-soc.org/aboutus. last accessed Feb. 16, 2009.

¹³ I coded the speaker lists for the entire set of presenters at Federalist Society National Meetings from 1982-2008. Speakers were coded for their occupation at the time they were participating in the event. For instance, Kenneth Starr, who has participated in nine Federalist Society National Meetings, was coded three different ways during three different periods of his career history: as Executive Branch (US 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%); Legislative Branch (45 or 2%).

¹⁴ Interview with Gail Heriot, Mar. 18, 2008.

¹⁵ I borrow the phrase "boots on the ground" from Federalist Society member and American Enterprise Institute Scholar Michael Greve. Interview with Michael Greve, Feb. 12, 2008.

¹⁶ See www.fed-soc.org/aboutus. last accessed Feb. 16, 2009.

¹⁷ 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.

¹⁸ 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.

¹⁹ Interview with Roger Clegg, Jan. 29, 2008.

²⁰ See, for example, Interview with Douglas Kmiec, Mar. 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, Jan. 16, 2008: "I could tell you the Federalist Society [stands for] Originalism and the strict separation of powers."; Interview with Steven Calabresi, Apr. 3, 2008: "The Society has always been consistently interested in promoting... a greater respect for the separation of powers."

²¹ See, for example, Interview with Charles J. Cooper, Jun. 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, Jan. 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, Jan. 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."

²² *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."

²³ Interview with Charles J. Cooper, June 2, 2008.

²⁴ See, for example, Interview with Douglas Kmiec, Mar. 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, Mar. 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, Mar. 18, 2008: "I just don't think that judges should be pretending the constitution says something about them when it 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, Jun. 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, Feb. 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, Jan. 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, Mar. 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 what was the limit on the state. You would never allow the state to rewrite it."

²⁵ 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"; 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."

²⁶ See, for example, Interview with Daniel Troy, Jan. 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, Feb. 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, Jun. 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, Feb. 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, Jan. 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."

²⁷ Interview with Loren A. Smith, Jan. 24, 2008.

²⁸ Interview with Eugene Meyer, Feb. 8, 2008.

²⁹ See 1995 National Student Conference: "Originalism, Democracy, and the Constitution" and 2005 National Lawyers Convention: "Originalism."

³⁰ 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."

³¹ 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 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, 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."

³² I took a sample of 207 distinct speech-acts, defined as one transcript from one individual's presentation at a Federalist Society conference, just over 10% of the total number of 1,957 speech acts on record from Federalist Society National Conferences from 1982-2008. I coded these for citations to Founding Documents and other historical sources used in Originalist analysis. Out of the 268 mentions of Originalist sources I coded for, 173 were to the *Federalist Papers* generally, 70 cited other records of the Founding Fathers' beliefs (James Madison, Alexander Hamilton, George Mason, Thomas Jefferson), and 25 were mentions of other Founding documents such as the Massachusetts Constitution, the Virginia Declaration of Rights, and the Virginia and Kentucky Resolutions.

³³ See, for example Interview with Daniel Troy, Jan. 30, 2008: "So 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."; Interview with Edwin Meese, III, Feb. 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, Feb. 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 John Yoo, Jan. 16, 2008: "One [thing the Federalist Society stands for] is commitment to Originalism."; Interview with Michael Rappaport, Mar. 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, Jun. 10, 2008: "Once I made the move to Originalism, and not only that, became one of the leading theoretical spokespeople 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 Willard, Jan. 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, Feb. 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."

³⁴ See www.fed-soc.org/aboutus/ last accessed Feb 19, 2009.

³⁵ Interview with Thomas Smith, Mar. 19, 2008.

³⁶ Interview with Thomas Smith, Mar. 19, 2008.

³⁷ Document obtained from the Ronald Reagan Presidential Library in Simi Valley, CA on Mar. 12, 2008. See "Memo from Pat Buchanan for the Chief of Staff," January 30, 1987. Presidential Handwriting File, Series IV, File 173.

³⁸ Document obtained from the Ronald Reagan Presidential Library in Simi Valley, CA on Mar. 12, 2008. See "Memo from David Chew to Donald T. Regan, January 30, 1987." Presidential Handwriting File, Series IV, File 173. 459153SS: "We agreed on one extra talking point, numbered #5 in the attached revised talking points. Unfortunately, the President got the talking points last night. Now we have to go back to him and give him a new set. You know how much he hates that. I feel these last minute add-ons should be turned down. They don't add much and annoy the President. But given it's a Meese request and that you agree, I have made the changes."

³⁹ Document obtained from the Ronald Reagan Presidential Library in Simi Valley, CA on Mar. 12, 2008. See "Telephone Message Request from the Office of the Attorney General," January 29, 1987, 3pm. Presidential Handwriting File, Series IV, File 173.

⁴⁰ Document obtained from the Ronald Reagan Presidential Library in Simi Valley, CA on Mar. 12, 2008. See "Topics of Discussion," Talking Point #5. Presidential Handwriting File, Series IV, File 173, 459153SS.

⁴¹ For an exploration of the extent to which the fledgling Federalist Society overlapped with the Reagan Justice Department, both in principle and in personnel, see Amanda Hollis-Brusky, "The Reagan Administration and the Rehnquist Court's New Federalism: Understanding the Role of the Federalist Society," available at http://works.bepress.com/amanda_hollis/1.

⁴² See, for example the 1998 Federalist Society National Student Symposium: "Reviving the Structural Constitution."

⁴³ Interview with Charles J. Cooper, Jun. 2, 2008.

⁴⁴ Interview with Eugene Meyer, Feb. 8, 2008.

⁴⁵ Interview with Steven Calabresi, Apr. 3, 2008.

⁴⁶ See 1982 National Conference: "A Symposium on Federalism"; 1984 National Conference: "A Symposium on Judicial Activism"; 1987 National Lawyers Conference: "Changing the Law: The Role of Lawyers, Judges and Legislatures"; 1989 National Lawyers Conference: "The Presidency and Congress: Constitutionally Separated and Shared Powers"; 1992 National Student Symposium: "The Legacy of the Federalist Papers"; 1992 National Lawyers Conference: "The Congress: Representation, Accountability, and the Rule of Law"; 1993 National Student Symposium: "Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law"; 1995 National Student Symposium: "Originalism, Democracy, and the Constitution"; 1996 National Lawyers Convention: "Congress, the Courts, and the Case for Self-Discipline"; 1998 National Student Symposium: "Reviving the Structural Constitution"; 1999 National Lawyers Conference: "The Rule of Law, Modern Culture, and the Courts at Century's End"; 2001 National Lawyers Convention: "Judicial Decisionmaking"; 2002 National Lawyers Convention: "The Constitution, National Security, and Foreign Affairs"; 2004 National Student Symposium: "Private Law: The New Frontier for Limited Government"; 2005 National Lawyers Convention: "Originalism"; 2006 National Lawyers Conference: "Limited Government"; 2008 National Lawyers Convention: "The People and The Judiciary"; 2008 National Student Symposium: "The People and the Courts."

⁴⁷ Interview with Douglas Kmiec, Mar. 14, 2008.

⁴⁸ Search conducted on Jan. 21, 2009 using LexisNexis Academic. Exact search dates were 01.01.1981 - 12.12.2008. I selected the Wall Street Journal, National Review, American Spectator and The Weekly Standard and the total combined search of all four sources yielded 1,059 hits for "federalism" and 826 hits for "separation of powers." As I indicated, 185 of the articles returned under the "federalism" search (17%) were authored by participants in Federalist Society National Meetings and 154 of the articles returned under the "separation of powers" search (19%) were authored by participants in Federalist Society National Meetings.

⁴⁹ See, for example, Dawn Johnsen, "Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change," 78 *Indiana Law Journal* 363 (2003); Jack M. Balkin and Sanford Levinson,

"Understanding the Constitutional Revolution, 87 *Virginia Law Review* 1045 (2001); and Christopher H. Schroeder, "Causes of the Recent Turn in Constitutional Interpretation," 51 *Duke Law Journal* 307 (2001) (all citing mostly federalism and separation of powers cases as forming the heart of the "constitutional revolution" or the "turn in constitutional interpretation").

⁵⁰ Interview with Louis Michael Seidman, Feb. 15, 2008.

⁵¹ See www.fed-soc.org/events for a small sampling of all the events the Federalist Society sponsors each year.

⁵² The Behavioralist school focuses on the "votes" of Supreme Court Justices, qualifying these as either "liberal" or "conservative" broadly understood. See, for example, Jeffrey A. Segal and Harold J. Spaeth, "The Influence of Stare Decisis on the Votes of Supreme Court Justices," *American Journal of Political Science*, 40 (4) 971-1003 (Nov. 1996). But, as Martin Shapiro has long observed (Shapiro 1968) and more recent scholarship has reiterated (Silverstein 2009), the requirement that judges "give reasons" means that the actual opinions that judges write and how they articulate their justifications become important variables in understanding the development of judicial and legal policy.

⁵³ Interview with Michael Rappaport, Mar. 17, 2008.

⁵⁴ Other young Federalist Society members recruited into the Justice Department under Attorney General Meese included John Harrison, Daniel Troy, Peter Keisler, Carolyn Kuhl, John Manning, Brad Clarke, and Blair Dorminey. As Federalist Society Executive President Eugene Meyer confirmed, when Meese took over the Justice Department as Attorney General in 1985, "there was a Federalist Society and that's what they drew from" in recruiting their special assistants. Though the Society was not the formidable pool of talent it was today, Meyer continued, "what there was, they hired." Interview with Eugene Meyer, Feb. 8, 2008. For a more detailed exploration of the extent to which the fledgling Federalist Society overlapped with the Reagan Justice Department, see Amanda Hollis-Brusky, "The Reagan Administration and the Rehnquist Court's New Federalism: Understanding the Role of the Federalist Society," available at http://works.bepress.com/amanda_hollis/1.

⁵⁵ 1989 National Lawyers Conference, "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers." Transcript reprinted in 68 *Washington University Law Quarterly* 3 (1990); 2000 National Lawyers Conference, "The Presidency." Transcript available at www.fed-soc.org.

⁵⁶ See 1989 National Lawyers Conference: "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers," *Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, Delegations of Rulemaking Authority*. Participants included David Schoenbrod, Frank Easterbrook, Steven Ross and Theodore Olson; 1989 National Lawyers Conference: "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers," *Address: Erosion of the President's Power in Foreign Affairs*. Address by Robert H. Bork; See also 1992 National Lawyers Conference: "The Congress: Representation, Accountability, and the Rule of Law:" *Panel IV: Who Controls the Administrative State?* Participants included A. Raymond Randolph, Theodore B. Olson, and Louis Fisher; See also 2000 National Lawyers Conference: "The Presidency," *Panel I: Is the Presidency Better Off Now Than Eight Years Ago?* Participants included Steven Calabresi, Charles Cooper, Bernard Nussbaum, Nelson Polsby and Jennifer Newstead; *Panel II: Presidential Oversight and the Administrative State*. Participants included Samuel Alito, Jr., Christopher DeMuth, Alan Morrison, Richard Pierce, Peter Strauss, and A. Raymond Randolph; See also 2002 National Lawyers Conference, "The Constitution, National Security, and Foreign Affairs," *Panel I: The President v. Congress: Who Has the Upper Hand in Foreign Affairs and National Security?* Participants included Walter Dellinger, Frank Easterbrook, Louis Fisher, Robert Turner, John Yoo, and Timothy Flanigan; *Administrative Law and Regulation: Confidentiality and Deliberations in the Executive Branch*. Participants included Shannen Coffin, C. Boyden Gray, Joseph Guerra, David Vladeck and Jerry Smith; See also 2004 National Lawyers Conference, "Celebrating Brown v. Board of Education's Promise of Equality," *The PATRIOT Act: A Three-Year Retrospective*. Participants included Viet Dinh, Timothy Lynch, Christopher Wray, and Samuel A. Alito, Jr.

⁵⁷ See, for example Christopher S. Yoo, Steven G Calabresi, and Anthony J Colangelo, "The Unitary Executive in the Modern Era, 1945-2004" *Iowa Law Review* 90 (January 2005); Steven Calabresi & Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary" 105 *Harv. L. Rev.* 1153 (1992); L. Gordon Crovitz &

Jeremy A. Rabkin (eds), *The Fettered Presidency: Legal Constraints on the Executive Branch*; Steven G. Calabresi & Saikrishna Prakash, "The President's Power to Execute the Law," 104 Yale L.J. 541 (1994); Steven G. Calabresi, "Some Normative Arguments for a Unitary Executive," 48 Ark L. Rev. 23 (1995); Peter Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 599-601 (1984); Geoffrey Miller, Government Lawyers' Ethics In A System Of Checks And Balances, 54 U. Chic. L. Rev. 1293, 1296 (1987); Geoffrey Miller, Independent Agencies, 1986 Sup. Ct. Rev. 41, 68-69.

⁵⁸ See, for example, J. Gregory Sidak, "Spending Riders Would Unhorse the Executive," *Wall Street Journal*, Nov. 2, 1989; L. Gordon Crovitz, "Rule of 'Met w/ Keating's S&L Senators. Again. End of Log," *Wall Street Journal*, Jan. 24, 1990; David Rivkin and Lee A. Casey, "There is Only One Executive," *Wall Street Journal*, Aug. 29, 2007; Bradford A. Berenson, "Earth to Second Circuit: We're at War," *Wall Street Journal*, Dec. 29, 2003.

⁵⁹ Frank Easterbrook, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority. Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 536.

⁶⁰ Cynthia Farina, 1998 National Student Symposium, Panel V: Undoing the New Deal?. Transcript reprinted in 22 Harvard Journal of Law and Public Policy (1999), at 227.

⁶¹ Theodore B. Olson, 1992 National Lawyers Conference, Panel IV: Who Controls the Administrative State?. Transcript reprinted in 23 Cumberland Law Review (1992-1993), at 126.

⁶² Theodore B. Olson, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority. Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 543.

⁶³ Frank Easterbrook, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority. Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 536.

⁶⁴ Burt Neuborne, 1998 National Student Symposium, Panel I: Formalism and Functionalism Reconsidered. Transcript reprinted in 22 Harvard Journal of Law and Public Policy (1999), at 45.

⁶⁵ Dick Thornburgh, 1989 National Lawyers Conference, Opening Address: "The Presidency and Congress: Constitutionally Separated and Shared Powers." Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 485.

⁶⁶ Frank Easterbrook, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority. Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 536.

⁶⁷ See, The Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation (1988) (hereafter *Constitution in the Year 2000*). A number of interviewees linked these reports to Stephen Markman who had also been serving as the President of the D.C. Lawyers Chapter of the Federalist Society (Teles 2008, 145). See, for example Interview with Daniel Troy, Jan. 30, 2008: "Obviously you had Steve Markman at the Office of Legal Policy who was writing these great pieces which you should definitely go back and read about legislative history and about Originalism. He's got this sourcebook, I mean go back and look at what OLP was putting out then."; Interview with Douglas Kmiec, Mar. 14, 2008: "Steve Markman was the head of [the Office of Legal Policy] in the second term... here's a memo from Steven Markman, February 1, 1989 'Report on Adverse Inferences from Silence.' So I mean these are things I actually still consult from time to time..."; Interview with Richard Willard, Jan. 31, 2008: "When Meese was Attorney General, Steve Markman worked for him and headed up the Office of Legal Policy which was like a think tank within the Justice Department and published a lot of monographs on constitutional law and things like that"; Interview with Steven Calabresi, Apr. 3, 2008: "All the papers on various subjects about Originalism and so forth, my impression is that Steve Markman as the head of the Office of Legal policy really came up with the idea of putting together those

papers and publishing them." For a summary of the content of these Office of Legal Policy reports, see Dawn Johnsen, "Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change," 78 *Indiana Law Journal* 363 (2003).

⁶⁸ *Constitution in the Year 2000*, at 180.

⁶⁹ *Constitution in the Year 2000*, at 181.

⁷⁰ See, 1989 National Lawyers Conference, Panel III: Congressional Control of the Administration of Government; 2000 National Lawyers Conference, Showcase Panel II: Presidential Oversight and the Administrative State; and 2005 National Lawyers Conference, Panel on Administrative Law: Originalism and the Administrative Procedure Act.

⁷¹ *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985). The Supreme Court held that the Environmental Protection Agency per the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) was constitutionally permitted to initiate arbitration proceedings despite the fact that it is not an Article III court.

⁷² *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). The Supreme Court held that an administrative agency, the Commodity Futures Trading Commission (CFTC) may, in some cases, perform the quasi-judicial function of adjudicating counterclaims in the trading of futures contracts despite the fact that it is not an Article III court.

⁷³ *Constitution in the Year 2000*, at 178.

⁷⁴ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988).

⁷⁵ 8 USCS 1254 (c) 1.

⁷⁶ See *Jagdish Rai Chadha v. Immigration and Naturalization Service*, 634 F.2d 408 (1980), at *423.

⁷⁷ 634 F.2d 408 (1980), at *433-434.

⁷⁸ See 1980 U.S. Briefs 1832 (hereafter *ABA Brief*), at *18-19; 1980 U.S. Briefs 1832 (hereafter *INS Brief*); and 634 F.2d 408 (1980) (hereafter *Chadha Circuit*), at *421.

⁷⁹ See *ABA Brief*, at *17-18; *INS Brief*, at *81; and *Chadha Circuit*, at *433.

⁸⁰ See *ABA Brief*, at *42; *INS Brief*, at *52; and *Chadha Circuit*, at *433.

⁸¹ Compare, generally, *INS Brief* at *48 with 634 F.2d 408 (1980), at *433-434. Specifically, in analyzing the bi-cameral requirement, both speech-acts rely on: The Federalist 47; The Federalist 51; The Federalist 62; The Federalist 73; J. Story, *Commentaries*; M. Farrand's *The Records of the Federal Convention of 1787*; and a law review article by H. Lee Watson: Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 *Calif. L. Rev.* 983, 1066 (1975).

⁸² See, *Immigration and Naturalization Service v. Chadha et. al*, 462 U.S. 919 (1983) (hereafter *Chadha*), at *946-951.

⁸³ Compare generally *Chadha*, at *946-951 with *INS Brief*, at *48-62. Sources cited by the majority in *Chadha* and briefed by the Justice Department include: M. Farrand's *The Records of the Federal Convention of 1787*; J. Story, *Commentaries*; Federalist 73; Federalist 22; Federalist 51; and Federalist 62. For an illustration that these sources were used almost identically, compare *INS Brief*, at *51 ("Thus, James Wilson, later a Justice of this Court, observed during the debates of the Constitutional Convention: Despotism comes on mankind in different shapes. Sometimes in an Executive, sometimes in a military, one. Is there no danger of a Legislative despotism? Theory and practice

proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it. 1 M. Farrand, *supra*, at 254") with *Chadha*, at *949: ("In the Constitutional Convention debates on the need for a bicameral legislature, James Wilson, later to become a Justice of this Court, commented: "Despotism comes on mankind in different shapes. sometimes in an Executive, sometimes in a military, one. Is there danger of a Legislative despotism? Theory & practice both proclaim it. If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it." 1 Farrand 254").

⁸⁴ *Chadha*, at *951.

⁸⁵ *INS Brief*, at *61.

⁸⁶ 2 USCS 901 et seq.

⁸⁷ See Brief for the United States, 1985 U.S. Briefs 1377; 1986 U.S. S. Ct. Briefs LEXIS 165 (hereafter *US Brief*), at *25.

⁸⁸ See, generally, *US Brief*, * 29 -51.

⁸⁹ 626 F. Supp. 1374 (1986) (hereafter *Bowsher District*, at *1401-1402

⁹⁰ *Bowsher District*, at *1398. See also Brief of the American Federation of Labor and Congress of Industrial Organizations (Laurence Gold, Counsel of Record), 1985 U.S. Briefs 1377; 1986 U.S. S. Ct. Briefs LEXIS 161, at *30-47.

⁹¹ *Bowsher, Comptroller General of the United States v. Synar, Members of Congress, et al.* 478 U.S. 714 (1986) (hereafter *Bowsher*), at *736.

⁹² *Bowsher*, at *736.

⁹³ *Bowsher*, at *730 ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty. In constitutional terms, the removal powers over the Comptroller General's office dictate that he will be subservient to Congress"), and *726-727 ("The dangers of congressional usurpation of Executive Branch functions have long been recognized. '[The] debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.'")

⁹⁴ 28 USCS 49, 591-599.

⁹⁵ Brief for the United States as Amicus Curiae Supporting Appellees, 1987 U.S. Briefs 1279; 1988 U.S. S. Ct. Briefs LEXIS 980 (hereafter *US Brief*), at *17 ("It is not an accident that the whole of the executive power is vested in the President: the purpose was to create a unitary, vigorous, and independent Executive responsible directly to the people. See J.S. App. 27a; C. Thach, *The Creation of the Presidency, 1775-1789*, at 70-75, 119-123, No. 40-160 (1969); *id.* at vii (introduction by Herbert Storing); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 599-605 (1984).")

⁹⁶ *US Brief*, at *18-19 ("[The Framers also explained the importance of unity in the Executive as a structural principle, which they adopted in reaction to experience with divided executive responsibility under the Continental Congress and in the state governments, n2 and after rejecting several proposals that would have diffused executive power n3 Placement of the executive power "in a single hand," Hamilton explained, was an essential attribute of the energy that was "a leading character in the definition of good government" (*The Federalist No. 70*, at 423, 424)... n2 See Miller, *Independent Agencies*, 1986 *Sup. Ct. Rev.* 41, 68-69 (describing the disorganization that plagued the Continental Congress's efforts to direct the American Revolution)").

⁹⁷ *US Brief*, at *88-89.

⁹⁸ See Laurence Silberman, 1989 National Lawyers Conference, Panel I: Agency, Autonomy and the Unitary Executive . Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 500 ("Asking me to speak on the doctrine of the unitary executive is very much like asking General George Pickett to speak on the future of the Confederacy after the Battle of Gettysburg. For just as historians love to point to Pickett's Charge as the high water mark of the South's effort to secede, some legal scholars have labeled my opinion, in which my colleague Steve Williams joined and collaborated, as the brief apogee of a constitutional lost cause").

⁹⁹ *In Re: Sealed Case*, 838 F.2d 476 (hereafter *Morrison Cir.*), at *480.

¹⁰⁰ See *Morrison Cir.*, at *488-489 ("Of the decisions clearly taken [at the Constitutional Convention], perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President.' Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. Rev.* 573, 599 (1984). See generally THE FEDERALIST No. 70 (A. Hamilton).").

¹⁰¹ See *Morrison Cir.*, at *488 ("The Framers provided for a unitary executive to ensure that the branch wielding the power to enforce the law would be accountable to the people.").

¹⁰² See *Morrison Cir.*, at *488 ("Madison referred to the doctrine of separation of powers as an "essential precaution in favor of liberty," THE FEDERALIST No. 47, at 323 (J. Cooke ed. 1961), and it is part of "our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government.") and at *482 ("It strains belief that in the face of this scheme the Framers would insert a clause into the Constitution that would allow Congress, the branch most feared by the Framers, see THE FEDERALIST No. 48 (J. Madison)...to abrogate the President's power to appoint Executive Branch officers.").

¹⁰³ See *Morrison Cir.*, at *488-489 ("Of the decisions clearly taken [at the Constitutional Convention], perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President.' Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *COLUM. L. Rev.* 573, 599 (1984).") and at *502 ("If reviewed at all, these kinds of Executive Branch determinations are normally examined under a deferential arbitrary and capricious standard because of concerns for separation of powers... See generally 4 K. DAVIS, ADMINISTRATIVE LAW § 29.10 (1958) (a system of review that requires a federal court to merely repeat the decision process of an administrative or legislative agency violates Article III").

¹⁰⁴ *Morrison, Independent Counsel v. Olson et. al.*, 487 U.S. 653 (1988) (Hereafter *Morrison*), at *671 and *675.

¹⁰⁵ *Morrison*, at *699. I attended a book-signing and lecture by Antonin Scalia sponsored by the Federalist Society and billed as "An Evening with Justice Scalia" on June 3, 2008 at the Marriot Wardman Park in Washington, D.C. In response to a question from the audience about his favorite opinion he'd authored, Justice Scalia cited *Morrison v. Olson* and quoted from his dissent and - along with dozens of audience members who were able to recite the line on command - recalled the line: "this wolf comes as a wolf." He also added that the "best ingredient for a good dissent is a really stupid majority opinion," indicating his strong feelings about the majority opinion in *Morrison*.

¹⁰⁶ See *Morrison* at *731-732("The problem is less spectacular but much more worrisome. It is that the institutional environment of the Independent Counsel -- specifically, her isolation from the Executive Branch and the internal checks and balances it supplies -- is designed to heighten, not to check, all of the occupational hazards of the dedicated prosecutor; the danger of too narrow a focus, of the loss of perspective, of preoccupation with the pursuit of one alleged suspect to the exclusion of other interests." Brief for Edward [*732] H. Levi, Griffin B. Bell, and William French Smith as *Amici Curiae* 11. It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide."); and see also Brief for Edward H.

Levi, Griffin B. Bell, and William French Smith as Amici Curiae in Support of Appellees (David A. Strauss Counsel), 1987 U.S. Briefs 1279; 1988 U.S. S. Ct. Briefs LEXIS 981, at *25 ("This aspect of the Department's operations exemplifies the way in which the unitary Executive Branch functions. Under the unitary Executive established by the Framers, no agency with a narrow mission can pursue its policies without restraint. All of them must submit to the authority of higher officials who take a broader view -- and ultimately to the authority of the President, who, as the single person elected by the nation as a whole, has the broadest view.")

¹⁰⁷ M. Farrand, *The Records of the Federal Convention of 1787*; *Massachusetts Constitution of 1780*; Federalist 47; Federalist 49; Federalist 51; Federalist 73; Federalist 78; Federalist 81.

¹⁰⁸ See, for example, *Morrison*, at *705 (To repeat, *Article II, § 1, cl. 1, of the Constitution* provides: "The executive Power shall be vested in a President of the United States." As I described at the outset of this opinion, this does not mean *some of* the executive power, but *all of* the executive power. It seems to me, therefore, that the decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void."); at *729 ("That result, of course, was precisely what the Founders had in mind when they provided that all executive powers would be exercised by a *single* Chief Executive. As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense are a due dependence on the people, and a due responsibility." Federalist No. 70, p. 424. The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." *Id.*, at 427."); and at *697 ("The Framers of the Federal Constitution similarly viewed the principle of separation of powers as the absolutely central guarantee of a just Government. In No. 47 of *The Federalist*, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty." *The Federalist* No. 47, p. 301 (C. Rossiter ed. 1961) (hereinafter *Federalist*). Without a secure structure of separated powers, our *Bill of Rights* would be worthless, as are the bills of rights of many nations of the world that have adopted, or even improved upon, the mere words of ours.").

¹⁰⁹ *Morrison*, at *627 ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Those who hold or have held offices covered by the Ethics in Government Act are entitled to that protection as much as the rest of us, and I conclude my discussion by considering the effect of the Act upon the fairness of the process they receive), and at *732 ("It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide.").

¹¹⁰ See Jeremy Rosen, "The Independent Counsel Act: An Unconstitutional Delegation of Power to Judges." *The Federalism & Separation of Powers Practice Group of the Federalist Society Newsletter*, Vol 3, 1 (Spring 1999).

¹¹¹ See Laurence Silberman, 1989 National Lawyers Conference, Panel I: Agency, Autonomy and the Unitary Executive. Transcript reprinted in 68 *Washington University Law Quarterly* 3 (1990), at 500

¹¹² See Charles Fried, 1988 National Lawyers Conference, Debate: After the Independent Counsel Decision: Is Separation of Powers Dead? Transcript reprinted in 26 *American Criminal Law Review* (1989), at 1667.

¹¹³ See Samuel A. Alito, Jr. 1988 National Lawyers Conference, Debate: After the Independent Counsel Decision: Is Separation of Powers Dead? Transcript reprinted in 26 *American Criminal Law Review* (1989), at 1667.

¹¹⁴ See Theodore Olson, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority. Transcript reprinted in 68 Washington University Law Quarterly 3 (1990), at 543.

¹¹⁵ For published transcript, see 16 Harvard Journal of Law and Public Policy (1993), 59-73.

¹¹⁶ William J. Clinton, President of the United States, Et Al., Appellants v. City of New York, Et. Al. 524 US 417 (1998), Justice Kennedy, concurring at *450.

¹¹⁷ *Constitution in the Year 2000*, 171-172.

¹¹⁸ 276 U.S. 394 (1928), at *405-406.

¹¹⁹ Industrial Union Department, AFL-CIO v. American Petroleum Institute et. al, 448 U.S. 607 (1980). Hereafter, *Benzene*.

¹²⁰ See *Benzene*, at *685-688, Rehnquist concurring: "We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era. If the nondelegation doctrine has fallen into the same desuetude as have substantive due process and restrictive interpretations of the Commerce Clause, it is, as one writer has phrased it, "a case of death by association." J. Ely, *Democracy and Distrust, A Theory of Judicial Review* 133 (1980). Indeed, a number of observers have suggested that this Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators. Other observers, as might be imagined, have disagreed. If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge. Far from detracting from the substantive authority of Congress, a declaration that the first sentence of [Sec.] 6 (b)(5) of the Occupational Safety and Health Act constitutes an invalid delegation to the Secretary of Labor would preserve the authority of Congress. If Congress wishes to legislate in an area which it has not previously sought to enter, it will in today's political world undoubtedly run into opposition no matter how the legislation is formulated. But that is the very essence of legislative authority under our system. It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process."

¹²¹ Interview with Charles J. Cooper, Jun. 2, 2008: "There was a time when Rehnquist, my mentor, was the lone ranger..."

¹²² See 1989 National Lawyers Conference: "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers," *Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, Delegations of Rulemaking Authority*. Participants included David Schoenbrod, Frank Easterbrook, Steven Ross and Theodore Olson; 1999 National Lawyers Convention: "The Rule of Law, Modern Culture, and the Courts at Century's End." *Administrative Law and Regulation Group Panel: The Non-Delegation Doctrine Lives!* Participants included David Schoenbrod, Peter Schuck, Edward Warren, Christopher Wright, and C. Boyden Gray.

¹²³ Speech Acts at Federalist Society National Conferences (1982-2008) that discuss congressional delegations of power include; Paul Bator, 1988 National Lawyers Conference; Stephen Breyer, 1989 National Lawyers Conference; E. Donald Elliot, 1989 National Lawyers Conference; David Schoenbrod, 1989 National Lawyers Conference; Frank Easterbrook, 1989 National Lawyers Conference; Theodore Olson, 1989 National Lawyers Conference; Peter Strauss, 1989 National Lawyers Conference; Kate Stith, 1989 National Lawyers Conference; Jerry Smith, 1992 National Lawyers Conference; Cass Sunstein, 1992 National Lawyers Conference; Martin Redish, 1992 National Lawyers Conference; Louis Fisher, 1992 National Lawyers Conference; : Louis Michael Seidman,

1994 National Lawyers Conference; Thomas Griffith, 1996 National Lawyers Conference; Steven Calabresi, 1996 National Lawyers Conference; John McGinnis, 1997 Student Symposium; Frank Easterbrook, 1998 Student Symposium; Burt Neuborne, 1998 Student Symposium ; Richard B. Stewart, 1998 Student Symposium; David Schoenbrod, 1999 National Lawyers Conference; Peter Schuck, 1999 National Lawyers Conference; Edward Warren, 1999 National Lawyers Conference; Christopher Wright, 1999 National Lawyers Conference; C. Boyden Gray, 1999 National Lawyers Conference.

¹²⁴ Media search included the *National Review*, *Wall Street Journal*, *American Spectator* and the *Weekly Standard*, initially filtered - as detailed earlier - for mentions of "federalism" and "separation of powers" from 1.1.1981 - 12.12.2008. A search for "delegation" produced only fifteen total articles (with by-line) discussing legislative delegation. Of these, eight (53%) were written by Federalist Society network actors: Terry Eastland, "Reading Roberts' Mind," *Weekly Standard*, Aug. 1, 2005; John McGinnis, "Post-Federal Case: Federalism would now be impossible to restore but there are other means to the same end," *National Review*, Sept. 1, 1998; Steven Calabresi, "Line Item in the Sand," *National Review*, Oct. 10, 2007; Randall Lutter and Christopher Demuth, "Wizards of Ozone," *Weekly Standard*, Jun. 21, 1999; Douglas Kmiec, "An Indefensible Line," *National Review*, Oct. 11, 2007; Richard Epstein, "Through the Smog: What the Court Actually Ruled," *Wall Street Journal*, Mar. 1, 2001; Douglas Kmiec, "Would It End With the Supreme Court?" *Wall Street Journal*, Nov. 27, 2000; Kenneth W. Starr, "A Verdict on Sarbanes-Oxley: Unconstitutional," *Wall Street Journal*, Dec. 16, 2006.

¹²⁵ See, for example, David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale 1993); David Schoenbrod, "The Phoenix Rises Again: the Nondelegation Doctrine from Constitutional and Policy Perspectives," 20 *Cardozo Law Review* 731 (1999); David Schoenbrod, "The Delegation Doctrine: Could the Court Give It Substance?" 83 *Michigan Law Review* 1223 (1985); Kenneth Culp Davis, "A New Approach to Delegation," 36 *University of Chicago Law Review* 713 (1969); Kenneth Culp Davis, *Administrative Law of the Eighties* 3:1 (1989); Martin H. Redish, *The Constitution as Political Structure* (1995); Marci A. Hamilton, "Representation and Nondelegation: Back to Basics," 20 *Cardozo Law Review* 817 (1999); Michael Rappaport, "Veto Burdens and the Line Item Veto Act," 91 *Northwestern Univ. Law Review* 771 (1997); Michael Rappaport, "The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York," 76 *Tulane Law Review* 265 (2002).

¹²⁶ Martin H. Redish, 1992 National Lawyers Conference, Panel I: The Legislative Role in the American Republic. Transcript reprinted in 23 *Cumberland Law Review* 1 (1992-1993), at 23.

¹²⁷ Burt Neuborne, 1998 National Student Symposium, Panel I: Formalism, Functionalism, and the Separation of Powers. Transcript reprinted in 22 *Harvard Journal of Law and Public Policy* 1 (1998), at 45.

¹²⁸ David Schoenbrod, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers. Transcript reprinted in 68 *Washington University Law Quarterly* 3 (1990), at 533.

¹²⁹ Paul M. Bator, 1988 National Lawyers Conference. Debate: Is Separation of Powers Dead? Transcript reprinted in 26 *American Criminal Law Review* 4 (1989), at 1667.

¹³⁰ Jeremy Rabkin, 1987 Federalist Society Symposium on Federalism, "The Success of the Separation of Powers and its Contemporary Failings," *Brigham Young University Law Review* 3 (1987), at 1003.

¹³¹ Jonathan R. Macey, 1992 National Lawyers Conference, Panel III: Congress, the Courts and the Bill of Rights. Transcript reprinted in *Cumberland Law Review* 1 (1992-1993), at 93.

¹³² Theodore Olson, 1989 National Lawyers Conference, Panel II: Presidential Lawmaking Powers. Transcript reprinted in 68 *Washington University Law Quarterly* 3 (1990), at 543, 548.

¹³³ John O. McGinnis, 1997 National Student Symposium, Panel IV: "Public Choice and the Structural Constitution." Transcript reprinted in 21 *Harvard Journal of Law and Public Policy* 1 (1997) , at 195 .

¹³⁴ Richard B. Stewart, 1998 National Student Symposium, Panel V: Undoing the New Deal. Transcript reprinted in 22 Harvard Journal of Law and Public Policy 1 (1998), at 45

¹³⁵ For example, legal scholar John McGinnis expressed the same concerns with "rent-seeking" by interest groups as a dangerous consequence of legislative delegation that he articulated in his 1997 talk at the Federalist Society one year later in the *National Review*. See John McGinnis, "Post-Federal Case: Federalism would now be impossible to restore but there are other means to the same end," *National Review*, Sept. 1, 1998: "The principal task for Republicans today is to dissolve the new Constitution formed in the Progressive Era and the New Deal. The simplest solution would be to go back home again -- to restore federalism as a check on the Federal Government. Since our political system enshrines at least the fossil of this beautiful creation, this strategy may seem promising.... Another means of restraint would be an amendment preventing Congress from delegating excessive regulatory authority to Executive Branch agencies. The Framers gave legislative authority to Congress rather than to the President precisely because they knew that it would be difficult to obtain from that diverse and cranky body the consensus necessary to take away liberty and property. By contrast, the bureaucratic elite of various Executive agencies can pursue goals that the legislature could not publicly endorse and can restrict our liberty much more rapidly... restrictions on delegation would simultaneously limit government and redirect control over it away from special interests and elites and to the people."

¹³⁶ See, for example Interview with Daniel Troy, Jan. 30, 2008: "I read Schumpeter, Friedman and Hayek. *Road to Serfdom* was the most important book I ever read."; Interview with Donald Devine, Feb. 7, 2008: [in response to intellectual inspirations], "Hayek's *Road to Serfdom*."; Interview with Douglas Kmiec, Mar. 14, 2008: "We believe in a Hayekian universe and it will ultimately take on the order of the mind and will have a very well-conceived structure because of that, but it doesn't have central planning in the beginning"; Interview with Michael Rappaport, Mar. 17, 2008: "Now I think today nobody would write anything on the common law without knowing Hayek's theory of the common law but in those days even someone as important as Hayek could be kind of forgotten and ignored... if you come from a libertarian slash conservative perspective, more than anything I guess I was Hayekian, you would never believe that judges should be able to re-write the law to pursue their policy objectives. I mean, the law was what was the limit on the state"; Interview with Michael Horowitz, Jan. 22, 2008: [describing the fledgling Federalists working in the Reagan-Meese Justice Department] "... and here were young people searching for ideas, here were young people who saw the disaster of left politics, who knew it had nothing to do with idealism... who saw the country weakened... and they knew the answers they were getting were not the only answers. Did someone read Hayek? Sure."; Interview with Roger Clegg, Jan. 29, 2008: "Conservatives in the United States are very big on liberty. I was just reading Hayek's concluding chapter of the *Constitution of Liberty* and *Why I am not a Conservative* but he is a conservative. He's not a European conservative but American conservatives are very libertarian - one set of values Americans want to conserve is liberty."

¹³⁷ Interview with Steven Calabresi, Apr. 4, 2008: "one of the...conservative intellectuals I was very influenced by is Friedrich Hayek."

¹³⁸ Interview with Eugene Meyer, Feb. 8, 2008.

¹³⁹ Interview with Eugene Meyer, Feb. 8, 2008.

¹⁴⁰ *Mistretta v. United States*, 488 U.S. 361 (1989); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Whitman v. American Trucking*, 531 U.S. 457 (2001).

¹⁴¹ 18 USCS 35551 et seq., 28 USCS 991-998.

¹⁴² See 1987 U.S. Briefs 1904; 1988 U.S. S. Ct Briefs LEXIS 1128, at Brief of Amicus Curiae, National Association of Criminal Defense Lawyers, at 15 and at 16.

¹⁴³ *Mistretta*, at *380.

¹⁴⁴ *Mistretta*, at *381.

¹⁴⁵ *Mistretta*, at *412.

¹⁴⁶ *Mistretta*, at *415-417.

¹⁴⁷ *Mistretta*, at *415.

¹⁴⁸ *Mistretta*, at *426-427.

¹⁴⁹ It should be noted that the Supreme Court would revisit the constitutionality of the Sentencing Guidelines *United States v. Booker*, 543 U.S. 220 (2005). In this case, a majority of the Supreme Court struck down the provision of the legislation that required federal district judges to impose a sentence within the calculated range of the Guidelines. They reasoned that the Guidelines violated the Constitution's Sixth Amendment by impinging on a litigant's right to a trial by jury and thus should be considered only advisory, not mandatory.

¹⁵⁰ 2 USCS 691 et seq.

¹⁵¹ See *Raines v. Byrd*, 521 U.S. 811 (1997).

¹⁵² See *City of New York, et. al v. William J. Clinton. Snake River Potato Growers, Inc, et. al., v. Robert E. Rubin*, 985 F. Supp. 168 (1998).

¹⁵³ Several network actors interviewed referred to Justice Thomas as a great hero of the Federalist Society. See, for example, interview with Douglas Kmiec, Mar. 14, 2008 ("Yeah if there ever was a model somebody would hold out as the jurist who is unafraid to explore originalist implications it would be Justice Thomas because on a wide variety of topics, the Establishment clauses, he's not afraid to say that this was to protect state established churches. No other Justice, even those affiliated with the Federalist Society would defend state established churches"); see also interview with Randy Barnett, June 10, 2008 ("... everybody needs icons, everybody needs heroes. [Justice Scalia] serves that role. Justice Thomas serves that role for many people, too" and, in referring to the "Justice trading market" within the Federalist Society, Barnett noted that "Justice Thomas' stock [has] really [gone] up").

¹⁵⁴ See Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan and Carl Levin as Amici Curiae in Support of Appellees, 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490.

¹⁵⁵ Compare 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **32-33: "You do me no more than Justice when you suppose that from motives of respect to the Legislature... I give my Signature to many Bills with which my Judgment is at variance... From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto. To do the latter can only be Justified upon the clear and obvious ground of propriety." 33 The Writings of George Washington 94, 96 (1940) with 985 F. Supp. 168 (1998), at *178: "This approach has been cautioned against since the founding of our democracy. "If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." George Washington, Farewell Address, September 19, 1796 in 35 The Writing of George Washington 229 (John C. Fitzpatrick ed., 1940)."

¹⁵⁶ Compare 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **15:"The Framers were students of history. They built on knowledge that in England 'the share of legislation which the constitution has placed in the crown, consists of rejecting, rather than resolving.' 1 W. Blackstone, Commentaries on the Laws of England 154" with 985 F. Supp. 168 (1998), at *180: "Sir William Blackstone, Commentaries on the Laws of England, 146 (9th ed., reprinted 1978) (1783) ('In all tyrannical governments the supreme magistracy, or the right of both making and of enforcing the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.'"

¹⁵⁷ Compare 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **27-28: "... the Framers not only accepted 'human nature,' No. 51, p. 349 (Madison), but enlisted it to help bring about an enduring republic. There

would be conflicts. 'Ambition must be made to counteract ambition,' Madison wrote. Thus, the Constitution is organized around devices that offset 'by opposite and rival interests, the defect of better motives.'" *with* 985 F. Supp. 168 (1998), at *180: "Madison later wrote, 'But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.' *The Federalist No. 51*, at 349. (J. Cooke ed. 1961)."

¹⁵⁸ See 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **38 (citing Michael Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 *Nw. U. L. Rev.* 771 (1997)) and at **42 (citing Lawrence Lessig, "Lessons from a Line Item Veto Law, 47 *Case W. Res. L. Rev.* 1659 (1997)). See also 985 F. Supp. 168 (1998), at *180 (citing Robert Destro, *Whom Do You Trust? Judicial Independence, the Powers of the Purse & the Line Item Veto*, 44-*Jan. Fed. Law.* 26, 29 (1997)).

¹⁵⁹ 985 F. Supp. 168 (1998), at *181.

¹⁶⁰ *Clinton*, at *438. Compare with 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **43: "Article II, section 3 provides that the President shall 'recommend' measures to the Congress, a power that enables him 'to point out the evil, and to suggest the remedy.' 3 J. Story, *Commentaries on the Constitution* S 1555, p.413 (1833)."

¹⁶¹ *Clinton*, at *440. Compare with 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **32-33: " 'You do me no more than Justice when you suppose that from motives of respect to the Legislature... I give my Signature to many Bills with which my Judgment is at variance... From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto. To do the latter can only be Justified upon the clear and obvious ground of propriety.' 33 *The Writings of George Washington* 94, 96 (1940)."

¹⁶² *Clinton*, at *440. Compare with 1997 U.S. Briefs 1374; 1998 U.S. S. Ct. Briefs LEXIS 490, at **15: "The Framers were students of history. They built on knowledge that in England 'the share of legislation which the constitution has placed in the crown, consists of rejecting, rather than resolving.' 1 W. Blackstone, *Commentaries on the Laws of England* 154."

¹⁶³ *Clinton*, at *450.

¹⁶⁴ *Clinton*, at *465.

¹⁶⁵ 42 USCS 7409(a), 42 USCS 7409(b)(1).

¹⁶⁶ *American Trucking Ass'ns v. EPA*, 175 F. 3d 1027 (1999).

¹⁶⁷ 175 F. 3d 1027 (1999), at *14a.

¹⁶⁸ 175 F. 3d 1027 (1999), at *74a-75a.

¹⁶⁹ Stephen F. Williams, "Hayek on the Bench." Reprinted in *Cornell Journal of Law and Public Policy*, 4 (1994-1995), 479, 481.

¹⁷⁰ Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, Thomas, Ginsburg and Breyer all joined in the pertinent part of Section II discussing the issue of legislative delegation. Justice Breyer wrote separately to argue that the legislative history, which the majority does not consider, further supports the Court's conclusions. See 531 U.S. 457 (2001) (Hereafter *American Trucking*), Justice Breyer concurring, at *490-491.

¹⁷¹ *American Trucking*, at *474.

¹⁷² *American Trucking*, at *487.

¹⁷³ See Brief of the Manufacturers Alliance/MAPI Inc., The Aluminum Association, and the Steel Manufacturers Association as Amici Curiae in Support of Respondents, 1999 U.S. Briefs 1257; 2000 U.S. S. Ct. Briefs LEXIS 450 (David Schoenbrod and Marci A. Hamilton listed as counsel), at *11-12: "Although this Court has struck agency laws on delegation grounds in many special circumstances, it has affirmed many delegations that appear extraordinarily broad...Thus, the hit-or-miss enforcement of the delegation doctrine continues to cause harm to representative democracy and government accountability. Just as this Court has seen fit to rebuild the fences around Congress's power through its recent Commerce Clause and Fourteenth Amendment, Section 5, jurisprudence, it should reinforce its delegation doctrine now...Because this case concerns EPA's interpretation of the CAA, it offers the opportunity for this Court to vindicate the core values of the delegation doctrine..."; See also Brief for the American Institute of Certified Public Accountants As Amici Curiae in Support of Respondents, 1999 U.S. Briefs 1257; 2000 U.S. S. Ct. Briefs LEXIS 448 (Theodore Olson listed as Counsel), at *11-12: "Legislation affecting the division of legislative authority between Congress and the administrative state, like legislation raising federalism concerns, raises equally sensitive separation of powers issues. See, e.g., *Benzene*, 448 U.S. at 673-74 (Rehnquist, J., concurring). Accordingly, just as it has done in the area of federalism, the Court should adopt a clear statement rule as part of the nondelegation doctrine to ensure that Congress explicitly considers not only "important choices of social policy," but also the constitutional concerns that are implicated by delegating to agencies the authority to make those policy choices. In addition, adopting a clear statement rule would allow federal courts to avoid reaching the sensitive separation of powers issues raised by a delegation of policymaking authority on an important question of national policy in cases where Congress has not already considered those issues in the first instance."

¹⁷⁴ Speaker Agenda and Schedule for 1999 National Lawyers Convention, November 11-13, 1999. Obtained courtesy of Federalist Society Executive Offices and on file with author.

¹⁷⁵ Richard Epstein, "Through the Smog: What the Court Actually Ruled," *Wall Street Journal*, Mar. 1, 2001

¹⁷⁶ 175 F. 3d 1027 (1999), at *14a: "Where (as here) statutory language and an existing agency interpretation involve an unconstitutional delegation of power, but an interpretation without the constitutional weakness is or may be available, our response is not to strike down the statute but to give the agency an opportunity to extract a determinate standard on its own... Doing so serves at least two of the three basic rationales for the nondelegation doctrine. If the agency develops determinate, binding standards for itself, it is less likely to exercise the delegated authority arbitrarily."

¹⁷⁷ Richard Epstein, "Through the Smog: What the Court Actually Ruled," *Wall Street Journal*, Mar. 1, 2001

¹⁷⁸ Interview with Michael Rappaport, Mar. 17, 2008.

¹⁷⁹ John T. Woolley and Gerhard Peters, *The American Presidency Project*. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at <http://www.presidency.ucsb.edu/ws/?pid=65326>.

¹⁸⁰ Interview with Daniel Troy, Jan. 30, 2008.

¹⁸¹ See The American Presidency Project: www.presidency.ucsb.edu. A search for "unitary executive" in all Presidential public papers from 1981-2008 performed on March 18, 2009.

¹⁸² John Yoo, 2006 Federalist Society National Lawyers Convention, "Panel Discussion on Federalism: Executive Power in Wartime." Transcript reprinted in 5 *Georgetown Journal of Law and Public Policy* (2007), at 325.

¹⁸³ Roger Pilon, 2006 Federalist Society National Lawyers Convention, "Panel Discussion on Federalism: Executive Power in Wartime." Transcript reprinted in 5 *Georgetown Journal of Law and Public Policy* (2007), at 319-320.

¹⁸⁴ John Yoo, 2006 Federalist Society National Lawyers Convention, "Panel Discussion on Federalism: Executive Power in Wartime." Transcript reprinted in 5 *Georgetown Journal of Law and Public Policy* (2007), at 325.

¹⁸⁵ Richard Cheney, 1989 Federalist Society National Lawyers Convention, "Address: The Impact of Separation of Powers on National Security." Transcript reprinted in 68 *Washington University Law Quarterly* (1990), at 526.

¹⁸⁶ Robert F. Turner, The Federalist Society Online Debate Series. "FISA." December 11, 2007. Available at www.fed-soc.org.

¹⁸⁷ Robert H. Bork, 1989 Federalist Society National Lawyers Convention, "Address: Erosion of the President's Power in Foreign Affairs." Transcript reprinted in 68 Washington University Law Quarterly (1990), at 695.

¹⁸⁸ Roger Pilon, 2006 Federalist Society National Lawyers Convention, "Panel Discussion on Federalism: Executive Power in Wartime." Transcript reprinted in 5 Georgetown Journal of Law and Public Policy (2007), at 321.

¹⁸⁹ David Rivkin, The Federalist Society Online Debate Series. "Executive Privilege Continued." August 17, 2007. Available at www.fed-soc.org.

¹⁹⁰ Theodore Olson, 1996 Federalist Society National Lawyers Convention, "Panel II: Reforming Government Through Oversight: A Good or Bad Idea?" Transcript reprinted in 13 The Journal of Law and Politics (1997), at 567.

¹⁹¹ L. Gordon Crovitz, 1989 Federalist Society National Lawyers Convention, "Panel III: Congressional Control of the Administration of Government: Hearings, Investigations, Oversight, and Legislative History." Transcript reprinted in 68 Washington University Law Quarterly (1990), at 598.

¹⁹² Edwin Meese III, "Before the D.C. Lawyers Chapter of the Federalist Society." Nov. 15, 1985. Available at www.fed-soc.org.

¹⁹³ Steven Calabresi, "The Legal Significance of Presidential Signing Statements," at 2. Available at www.fed-soc.org.

¹⁹⁴ Steven Calabresi, "The Legal Significance of Presidential Signing Statements," at 2. Available at www.fed-soc.org.

¹⁹⁵ Steven Calabresi, "The Legal Significance of Presidential Signing Statements," at 16-17. Available at www.fed-soc.org.

¹⁹⁶ Steven Calabresi, "The Legal Significance of Presidential Signing Statements," at 18. Available at www.fed-soc.org.

¹⁹⁷ Theodore S. Olson, 1989 Federalist Society National Lawyers Convention, "Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority." Transcript reprinted in 68 Washington University Law Quarterly (1990), at 543.

¹⁹⁸ Frank Easterbrook, 1989 Federalist Society National Lawyers Convention, "Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority." Transcript reprinted in 68 Washington University Law Quarterly (1990), at 536.

¹⁹⁹ "Presidential Signing Statements," Signed By the Honorable Edwin Meese, III, Professor John S. Baker, the Honorable Charles J. Cooper, Mr. David B. Rivkin, Jr., Professor Gary Lawson, Mr. Lee A. Casey, Professor Steven G. Calabresi, Professor Robert F. Turner. Available online at www.fed-soc.org.

²⁰⁰ "Presidential Signing Statements," Signed By the Honorable Edwin Meese, III, Professor John S. Baker, the Honorable Charles J. Cooper, Mr. David B. Rivkin, Jr., Professor Gary Lawson, Mr. Lee A. Casey, Professor Steven G. Calabresi, Professor Robert F. Turner. Available online at www.fed-soc.org, at 2-3.

²⁰¹ This list was produced through a search of the United States Department of Justice Office of Legal Counsel's online archive of published "Memoranda and Opinions," which I accessed on Mar. 16, 2009. I cross referenced all signatories on published memos from 2001-2008 with my list of Federalist Society participants at National Meetings and came up with these twelve names. See <http://www.usdoj.gov/olc/opinions.htm>.

²⁰² As of Mar. 16, 2009 the total number of signatories on Office of Legal Counsel "Memoranda and Opinions" archived online from 2001-2008 was 27. As I explained above, the total number of signatories affiliated with the Federalist Society network was 12 (44%). As of this same date, the total number of "Memoranda and Opinions" archived on the Office of Legal Counsel website between 2001-2008 was 145. According to my inventory, 91 of these were signed by at least one Federalist Society network actor (63%). <http://www.usdoj.gov/olc/opinions.htm>.

²⁰³ United States Department of Justice, Office of Legal Counsel. Memorandum for David S. Kris, Associate Deputy Attorney General From John C. Yoo, Deputy Assistant Attorney General. "Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the 'Purpose' Standard for Searches." September 25, 2001. (Hereafter *OLC Memo 9.25.01*).

²⁰⁴ *OLC Memo 9.25.01*, at 6.

²⁰⁵ *OLC Memo 9.25.01*, at 6.

²⁰⁶ *OLC Memo 9.25.01*, at 6.

²⁰⁷ *OLC Memo 9.25.01*, at 8.

²⁰⁸ United States Department of Justice, Office of Legal Counsel. Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel Department of Defense From John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel. "Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States." October 23, 2001. (Hereafter *OLC Memo 10.23.01*).

²⁰⁹ *OLC Memo 10.23.01*, at 7.

²¹⁰ *OLC Memo 10.23.01*, at 6.

²¹¹ *OLC Memo 10.23.01*, at 7.

²¹² *OLC Memo 10.23.01*, at 25.

²¹³ United States Department of Justice, Office of Legal Counsel. Memorandum for William J. Haynes, II General Counsel, Department of Defense from Jay S. Bybee, Assistant Attorney General. "Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations." March 13, 2002. (Hereafter *OLC Memo 3.13.02*); United States Department of Justice, Office of Legal Counsel. Memorandum for Alberto R. Gonzales, Counsel to the President from Jay S. Bybee, Assistant Attorney General. "Re: Standards of Conduct for Interrogation under 18 U.S.C. SS 2340-2340A." August 1, 2002. (Hereafter *OLC Memo 8.1.02*); United States Department of Justice, Office of Legal Counsel. Memorandum for William J. Haynes, General Counsel of the Department of Justice from John C. Yoo, Deputy Assistant Attorney General. "Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States." March 14, 2003. (Hereafter *OLC Memo 3.14.03*).

²¹⁴ *OLC Memo 3.13.02*, at 2.

²¹⁵ *OLC Memo 8.1.02*, at 2.

²¹⁶ See *OLC Memo 8.1.02*, at 36: ("The President's constitutional power to protect the security of the United States and the lives and safety of its people must be understood in light of the Founders' intention to create a federal government 'cloathed with all the powers requisite to the complete execution of its trust.' *The Federalist* No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because 'the circumstances which may affect the public safety' are not 'reducible within certain determinate limits,' it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the

defence and protection of the community, in any matter essential to its efficacy.""); at 22: ("There are no reported cases of prosecutions under Section 2340A... Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 327-28. Nonetheless, we are not without guidance as to how United States courts would approach the question of what conduct constitutes torture. Civil suits filed under the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note (2000), which supplies a tort remedy for victims of torture, provide insight into what acts U.S. courts would conclude constitute torture under the criminal statute."); and at 44: ("Nonetheless, leading scholarly commentators believe that interrogation of such individuals using methods that might violate Section 2340A would be justified under the doctrine of self-defense, because the combatant by aiding and promoting the terrorist plot 'has culpably caused the situation where someone might get hurt. If hurting him is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible.' Michael S. Moore, *Torture and the Balance of Evils*, 23 Israel L. Rev. 280, 323 (1989) (symposium on Israel's Landau Commission Report)").

²¹⁷ *OLC Memo 3.14.03*, at 19.

²¹⁸ For a more thorough overview of this incident and the follow-up investigation, see U.S. Department of Justice, Office of the Inspector General, "An Investigation into the Removal of Nine U.S. Attorneys in 2006." September 2008. (Hereafter *OIG Report*).

²¹⁹ *OIG Report*, at 1.

²²⁰ *OIG Report*, at 326, 357.

²²¹ United States Department of Justice, Office of Legal Counsel. Letter from Solicitor General and Acting Attorney General Paul Clement to the President, "Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys." June 27, 2007, at 1 (Hereafter *OLC Memo 6.27.07*).

²²² *OLC Memo 6.27.07*, at 4 ("See, e.g., *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op. O.L.S. 751, 758-759, 767 (1982) (documenting refusals by Presidents Jackson, Tyler, and Cleveland to provide information related to the decision to remove Executive Branch officials, including a U.S. Attorney)").

²²³ See United States Department of Justice, Office of Legal Counsel, Theodore B. Olson, *History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress, Part II: Invocations of Executive Privilege by Executive Officials* 6 Op. O.L.C. 782-783 (1982). Compare with *supra* note 12.

²²⁴ *OLC Memo 6.27.07*, at 2 ("As the Supreme Court has explained, '[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and to do so in a way many would be unwilling to express except privately.' *United States v. Nixon*, 418 U.S. 683, 708 (1974); see also Letter for the President from John Ashcroft, Attorney General, *Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents* at 2 (Dec. 10, 2001) ('The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.')).

²²⁵ United States Department of Justice, Office of Legal Counsel. Letter for the President from John Ashcroft, Attorney General, *Re: Assertion of Executive Privilege with Respect to Prosecutorial Documents*. Dec. 10, 2001. Available at <http://www.usdoj.gov/olc/executiveprivilege.htm>.

²²⁶ United States Department of Justice, Office of Legal Counsel. Memorandum Opinion for the Counsel to the President from Steven G. Bradbury, Principal Deputy Assistant Attorney General, "Immunity of Former Counsel to the President from Compelled Congressional Testimony." July 10, 2007 (Hereafter *OLC Memo 7.10.07*).

²²⁷ *OLC Memo 7.10.07*, at 2.

²²⁸ *OLC Memo 7.10.07*, at 2.

²²⁹ OLC Memo 7.10.07, at 2.

²³⁰ OLC Memo 7.10.07, at 3.

²³¹ See T.J. Halstead, Congressional Research Service (CRS) Report for Congress, *Presidential Signing Statements: Constitutional and Institutional Implications*. September 17, 2007, at 9. Including the nine statements President Bush issued after the report was published in September of 2007, this percentage remained exactly consistent.

²³² A Search of the American Presidency Project's database for all Public Papers containing the phrase "unitary executive" from 2001-2008 retrieved 78 results (see Figure 4.1). 12 of these were executive orders and other public papers, while 66 were signing statements, which constitutes 41% of all signing statement issued (see Figure 4.4). See also T.J. Halstead, Congressional Research Service (CRS) Report for Congress, *Presidential Signing Statements: Constitutional and Institutional Implications*. September 17, 2007, at 10; Letter from the United States Government Accountability Office (B-308603) to Senator Robert C. Byrd and Representative John Conyers, Jr. *Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Act*. June 18, 2007, at 4-6; The American Bar Association, *Task Force on Presidential Signing Statements And the Separation of Powers Doctrine*, at 15.

²³³ T.J. Halstead, Congressional Research Service (CRS) Report for Congress, *Presidential Signing Statements: Constitutional and Institutional Implications*. September 17, 2007. The American Presidency Project: www.presidency.ucsb.edu: identified nine additional signing statements issued by the George W. Bush Administration after CRS Report publication. I found that seven of these contained constitutional objections and thus, after recalculating, the total percentage remained constant at 78%.

²³⁴ See T.J. Halstead, Congressional Research Service (CRS) Report for Congress, *Presidential Signing Statements: Constitutional and Institutional Implications*. September 17, 2007, at 10 ("Professor Philip J. Cooper has characterized the constitutional objections raised by President Bush as falling across seventeen categories, ranging from generalized assertions of presidential authority to supervise the "unitary executive branch" to federalism limits imposed by the Supreme Court in *United States v. Printz*. The Bush II Administration has been particularly prolific in issuing signing statements that object to provisions that it claims infringe on the President's power over foreign affairs (oftentimes with regard to requirements that the Administration take a particular position in negotiations with foreign powers); provisions that require the submission of proposals or recommendations to Congress (asserting that they interfere with the President's authority under the Recommendations Clause to "recommend such Measures as he shall judge necessary and expedient); provisions imposing disclosure or reporting requirements (on the ground that such provisions may interfere with the President's authority to withhold sensitive or privileged information); conditions and qualifications on executive appointments (asserting infringement on the President's authority pursuant to the Appointments Clause); and legislative veto provisions (on the ground that they violate bicameralism and presentment requirements as established in *INS v. Chadha*)).

²³⁵ George W. Bush Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005 March 9, 2006. John T. Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>.

²³⁶ See, for example, H.R. 3199, S 106A ("Audit - The Inspector General of the Department of Justice shall perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority provided to the Federal Bureau of Investigation under title V of the Foreign Intelligence Surveillance Act of 1978").

²³⁷ See, for example, George W. Bush Statement on Signing the National Defense Authorization Act for Fiscal Year 2002 December 28, 2001 ("Several provisions of the Act, including sections 525(c), 546, 705, and 3152 call for executive branch officials to submit to the Congress proposals for legislation. These provisions shall be implemented in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend to the Congress such measures as the President judges necessary and expedient"); George

W. Bush *Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003* September 30, 2002 ("The executive branch shall construe as advisory the provisions of the Act, including sections 408, 616, 621, 633, and 1343(b), that purport to direct or burden the conduct of negotiations by the executive branch with foreign governments, international organizations, or other entities abroad or which purport to direct executive branch officials to use the U.S. voice and vote in international organizations to achieve specified foreign policy objectives. Such provisions, if construed as mandatory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch."); *George W. Bush Statement on Signing the Intelligence Authorization Act for Fiscal Year 2003* November 27, 2002 ("The executive branch shall implement sections 325, 334, and 826 of the Act, and section 8H(g)(1)(A) of the Inspector General Act of 1978 as enacted by section 825 of the Act, relating to submission of recommendations to the Congress, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. Many provisions of the Act, including section 342 and title VIII, establish new requirements for the executive branch to disclose sensitive information. As I have noted in signing last year's Intelligence Authorization Act and other similar legislation, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."); *George W. Bush Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004* November 6, 2003 ("Title III of the Act creates an Inspector General (IG) of the CPA. Title III shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces."); *George W. Bush Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004* December 17, 2004 ("The executive branch shall construe provisions in the Act that mandate submission of information to the Congress, entities within or outside the executive branch, or the public, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties...To the extent that provisions of the Act purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient."). John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>.

²³⁸ *George W. Bush Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004* December 17, 2004. John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>.

²³⁹ *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>. A search for "Chadha" under Public Papers from 2001-2008 on March 30, 2009 retrieved thirty-three different Bush Administration signing statements.

²⁴⁰ "Presidential Signing Statements," Signed By the Honorable Edwin Meese, III, Professor John S. Baker, the Honorable Charles J. Cooper, Mr. David B. Rivkin, Jr., Professor Gary Lawson, Mr. Lee A. Casey, Professor Steven G. Calabresi, Professor Robert F. Turner. Available online at www.fed-soc.org, at 2-3.

²⁴¹ *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>. A search for "Chadha" under Public Papers from 2001-2008 on March 30, 2009 retrieved thirty-three different Bush Administration signing statements. The same search using the dates 1983 (date of Chadha ruling) - 2000 retrieved 37 total signing statements issued by Presidents Reagan, George H.W. Bush, and Clinton.

²⁴² *George W. Bush Statement on Signing the Energy and Water Development Appropriations Act, 2002* November 12, 2001. John T. Woolley and Gerhard Peters, *The American Presidency Project* [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>.

²⁴³ George W. Bush *Statement on Signing the Department of Homeland Security Appropriations Act, 2005* October 18, 2004. John T. Woolley and Gerhard Peters, The American Presidency Project [online]. Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). Available at: <http://www.presidency.ucsb.edu>.

²⁴⁴ United States Department of Justice, Office of Legal Counsel. Memorandum For the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, "Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001. (Hereafter *OLC Memo 1.15.09*).

²⁴⁵ *OLC Memo 10.23.01*, at 7.

²⁴⁶ See, for example, Associated Press, "Obama team expected to broker subpoena deal." Nov. 12, 2008 ("A years-long legal dispute between the White House and Congress over testimony by President Bush's aides likely will be resolved under the incoming Obama administration... Obama will likely broker a compromise with the Democratic-led Congress over whether to force top aide Joshua Bolten and former aide Harriet Miers to testify in front of lawmakers or hand over documents about the 2006 firings of nine U.S. attorneys... Litt said it would likely be done without forcing the subpoena issue that could set a long-lasting precedence for future White House dealings with Congress"). Available at <http://www.msnbc.msn.com/id/27681741/>; See, also, Associated Press, "Ex-Bush Aides to testify on U.S. attorney firings." Mar. 5, 2009 ("Karl Rove and Harriet Miers agreed Wednesday to be questioned by the House Judiciary Committee, settling for now a major U.S. constitutional dispute that was going to be decided by the courts. The legal issue was the constitutionality of Bush's assertion of executive privilege, to order the aides not to testify. But there was also the political issue of who created the list of federal prosecutors who would lose their jobs. The House and Senate judiciary committees held more than a dozen hearings and depositions, but they never did learn the answer... The agreement calls for Rove and Miers, Bush's top political adviser and White House counsel, to be interviewed by the House committee in closed testimony "under the penalty for perjury," Conyers said. The committee could release the transcripts afterward, but the agreement also allows for public testimony."). Available at http://www.usatoday.com/news/washington/2009-03-05-bush-attorney-fired_N.htm.

²⁴⁷ Letter from the United States Government Accountability Office (B-308603) to Senator Robert C. Byrd and Representative John Conyers, Jr. *Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Act*. June 18, 2007, at 1.

²⁴⁸ See T.J. Halstead, Congressional Research Service (CRS) Report for Congress, *Presidential Signing Statements: Constitutional and Institutional Implications*. September 17, 2007, at 21.

²⁴⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), held that the military commissions set up by the Bush Administration to try detainees at Guantanamo Bay, Cuba violated both the Uniform Code of Military Justice and the 1949 Geneva Conventions. See Scalia's dissent at *666 ("Of course in its discussion of legislative history the Court wholly ignores the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases."); and George W. Bush *Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act of 2006* December 30, 2005 ("The Executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005").

²⁵⁰ The White House, Office of the Press Secretary, "Memorandum for the Heads of Executive Departments and Agencies, Subject: Presidential Signing Statements." March 9, 2009 ("With these considerations in mind and based upon advice of the Department of Justice, I will issue signing statements to address constitutional concerns only when it is appropriate to do so as a means of discharging my constitutional responsibilities... To ensure that all signing statements previously issued are followed only when consistent with these principles, executive branch departments and agencies are directed to seek the advice of the Attorney General before relying on signing statements issued prior to the date of this memorandum as the basis for disregarding, or otherwise refusing to comply with, any provision of a statute.").

²⁵¹ Michael McConnell, "Federalism: Evaluating the Founders' Design," 54 *U. Chi. L. Rev.* 1484 (1987), at 1493.

²⁵² *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992)

²⁵³ "The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

²⁵⁴For a good summary of what is often referred to in Supreme Court lore as "The switch in time that saved nine" and the constitutional revolution in federal power that followed, see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*. Oxford: 1998, pp. 11-32.

²⁵⁵*NLRB v. Laughlin Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937) (upheld the National Labor Relations Act of 1935 and held that Congress could use its Commerce Power to pass wage and hour restrictions on intrastate labor); *Wickard v. Filburn*, 317 U.S. 111 (1942) (held that the Agricultural Adjustment Act could be applied to control the production of wheat, even if grown for personal consumption only); *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (held that based on the fact that even local establishments served out of state customers, Congress could use its commerce power to apply the 1964 Civil Rights Act to private establishments who refused to serve African Americans).

²⁵⁶ President Reagan, Inaugural Address, Washington, D.C., January 20, 1981.

²⁵⁷ Gallup Poll News Service, 2/05/1982-2/5/1982. Question Qn6d ("Under the New Federalism program, many of the present responsibilities of the federal government would be turned over to the individual states and local communities. To begin with, the federal government would provide the necessary money to pay for these social programs, but gradually the states would take over the payments for their own programs by local taxation. Does this "New Federalism" sound like a good idea or a poor idea to you?"). Question Total N = 2744 (Good Idea = 1356, 49.42%; Poor Idea = 1037, 37.79%; No opinion = 351, 12.79%). Question Qn6b (Have you heard or read about the Reagan Administration's "New Federalism" proposal?) [IF YES, ASK:] To the best of your knowledge. What are the main arguments IN FAVOR of the "New Federalism" program?. Question Total N = 1360 ("Gives power back to states/decentralization of government" = 413, 30.37%).

²⁵⁸ *Constitution in the Year 2000*, 138.

²⁵⁹ *National League of Cities v. Usery*, 426 U.S. 833 (1976).

²⁶⁰See *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985) (*Hereafter Garcia*), Justice Rehnquist dissenting at *580 ("But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.")

²⁶¹ Results from a content analysis of 207 distinct speech-acts from Federalist Society National Conferences (1982-2008).

²⁶² Search conducted on Jan. 21, 2009 using LexisNexis Academic. Exact search dates were 01.01.1981 - 12.12.2008. I selected the Wall Street Journal, National Review, American Spectator and The Weekly Standard and the total combined search of all four sources yielded 1,059 hits for "federalism." As I indicated, 185 of the articles returned under the "federalism" search (17%) were authored by participants in Federalist Society National Meetings.

²⁶³ Media search included the *National Review*, *Wall Street Journal*, *American Spectator* and the *Weekly Standard*, initially filtered - as detailed earlier - for mentions of "federalism" and "separation of powers" from 1.1.1981 - 12.12.2008. A database search for "commerce" within the returned results for "federalism" revealed 39 articles written by Federalist Society network actors. See, for example: Terry Eastland, "Bookshelf: Keeping the Federal Government in Its Place," *The Wall Street Journal*, Aug. 19, 1987; Jeremy Rabkin, "State Your Business," *The American Spectator*, Jul. 1995; Steven G. Calabresi, "A Constitutional Revolution," *The Wall Street Journal*, Jul. 10, 1997; Jeremy Rabkin, "Bill's Fickle Feminists," *The American Spectator*, May 1998; Michael W. McConnell, "Let the States Do It, Not Washington," *The Wall Street Journal*, Mar. 29, 1999; Daniel E. Troy, "Electing the Supreme Court," *The Weekly Standard*, May 10, 1999; Michael Greve, "Federalism is More Than States' Rights," *The Wall Street Journal*, Jul. 1, 1999; R. Alexander Acosta, "In 2000, Supreme Court Is at Stake Too," *The Wall Street*

Journal, Aug. 23, 1999; Theodore B. Olson, "Aaaand They're Off! The Justices Go to Work," *The Wall Street Journal*, Oct 4, 1999; Jeremy Rabkin, "Federalism v. Feminism: The Supreme Court is likely to side with the federalists," *The American Spectator*, Dec 1999/Jan 2000; Charles Fried, "Opponents of Federalism Are Mired in a Time Warp," *The Wall Street Journal*, May 16, 2000; Michael S. Greve, "A Federalism Worth Fighting For," *The Weekly Standard*, Jan. 29, 2001; Jeremy Rabkin, "The Ducks Stop Here," *The American Spectator*, Feb. 2001; Douglas W. Kmiec, "Screening Judges," *National Review*, Sep. 5, 2001; Jonathan H. Adler, "The Framers' Design," *National Review*, Nov. 1, 2001; Robert A. Levy, "None of Their Business," *National Review*, May 22, 2002; Ronald D. Rotunda, "Federalizing the Windy City," *National Review*, Jun. 18, 2002; Richard A. Epstein, "A Federal Case," *National Review*, Oct. 28, 2002; Terry Eastland, "The Estrada Pinata," *The Weekly Standard*, Feb. 24, 2003; Jonathan H. Adler, "Suicidal Folly," *National Review*, Aug. 19, 2004; John Engler, C. Boyden Gray and Kenneth Starr, "Phony Federalists," *The Wall Street Journal*, Jun. 1, 2004; Christopher Cox, "The Marriage Amendment Is a Terrible Idea," *The Wall Street Journal*, Sep. 28, 2004; Jonathan H. Adler, "High Court Anxiety," *National Review*, Dec. 1, 2004; John Engler, C. Boyden Gray, and Kenneth Starr, "High-Tech Federalism," *National Review*, Apr. 27, 2005; Jonathan H. Adler, "Federalism, Up in Smoke?" *National Review*, Jun. 7, 2005; Randy E. Barnett, "The Ninth Circuit's Revenge," *National Review*, Jun. 9, 2005; Terry Eastland, "Reading Roberts' Mind," *The Weekly Standard*, Aug. 1, 2005; Randy E. Barnett, "William Rehnquist," *The Wall Street Journal*, Sep. 6, 2005; Richard E. Epstein, "Still Defending the New Deal Program," *The Wall Street Journal*, Sep. 7, 2005; Terry Eastland, "Farewell to the Chief: William H. Rehnquist," *The Weekly Standard*, Sep. 26, 2005; Nelson Lund, "Putting Federalism to Sleep," *The Weekly Standard*, Oct. 31, 2005; Jonathan Adler, "Environmental Enemy #1," *National Review*, Jan. 3, 2006; Hadley Arkes, "Servatius Redux," *National Review*, Jan. 27, 2006; John O. McGinnis, "Bookshelf: A Justices Is Weighed in the Balance," *The Wall Street Journal*, Jan. 31, 2006; Jonathan H. Adler, "How Conservative Is this Court?" *National Review*, Jul. 5, 2007; John O. McGinnis, "One Blueprint for Obama," *The Wall Street Journal*, Jul. 15, 2008.

²⁶⁴ See, for example, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387 (1987); Douglas W. Kmiec, *Rediscovering a Principled Commerce Power*, 28 Pepp. L. Rev. 547, 560-62 (2001); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 857-862 (2003); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 Sup. Ct. Rev. 125, 130 (1996); See Richard A. Epstein, *Propter Honoria Respectum, Constitutional Faith and the Commerce Clause*, 71 Notre Dame L. Rev. 167, 188-89 (1996).

²⁶⁵ William Van Alstyne, 1988 National Lawyers Convention, Panel II: Federalism and the Scope of the Federal Criminal Law. Transcript reprinted in 26 Am. Crim. L. Rev. (1989), at 1737.

²⁶⁶ Lynn A. Baker, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 95.

²⁶⁷ Richard A. Epstein, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel V: Undoing the New Deal? Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 209.

²⁶⁸ Charles J. Cooper, 1992 National Student Symposium, "The Legacy of the Federalist Papers," Panel V: The Anti-Federalists After 200 Years: Pundits or Prophets? Transcript reprinted in 19 Harv. J. L. & Pub. Pol'y (1993), at 119.

²⁶⁹ Pete du Pont, 1992 National Student Symposium, "The Legacy of the Federalist Papers," Epilogue: Federalism in the Twenty-First Century: Will States Exist? Transcript reprinted in 19 Harv. J. L. & Pub. Pol'y (1993), at 137.

²⁷⁰ Lino A. Graglia, 1992 National Student Symposium, "The Legacy of the Federalist Papers," Panel V: The Anti-Federalists After 200 Years: Pundits or Prophets? Transcript reprinted in 19 Harv. J. L. & Pub. Pol'y (1993), at 129.

²⁷¹ Lynn A. Baker, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 95

²⁷² Antonin Scalia, 1982 National Symposium: A Symposium on Federalism. "The Two Faces of Federalism." Transcript reprinted in 6 Harv. J. L. & Pub. Pol'y (1982-1983), at 19.

²⁷³ Epstein NLC 1989 get cite.

²⁷⁴ Richard A. Epstein, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel V: Undoing the New Deal? Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 209.

²⁷⁵ Charles Fried, 1982 National Symposium: A Symposium on Federalism. "Federalism - Why Should We Care." Transcript reprinted in 6 Harv. J. L. & Pub. Pol'y (1982-1983), at 1.

²⁷⁶ John O. McGinnis, 1997 National Student Symposium: Law and Economic and the Rule of Law. Panel VI: Public Choice and the Structural Constitution. Transcript reprinted in 21 Harv. J. L. & Pub. Pol'y (1997-1998), at 195.

²⁷⁷ Richard A. Epstein, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel V: Undoing the New Deal? Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 209.

²⁷⁸ *Garcia*, at *580.

²⁷⁹ *New York v. United States*, 505 U.S. 144 (1992) (*Hereafter New York*), *United States v. Lopez*, 514 U.S. 549 (1995) (*Hereafter Lopez*), *United States v. Morrison*, 529 U.S. 598 (2000) (*Hereafter Morrison*).

²⁸⁰ 42 USCS 2021b et seq.

²⁸¹ See Summary of *New York v. United States* on lexis nexis.

²⁸² The *Tenth Amendment* provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (*U.S. Const. amend X*); The *Eleventh Amendment* provides that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" (*U.S. Const. amend. XI*); and the Guarantee Clause provides that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence" (*U.S. Const. art. IV, S 4*).

²⁸³ *The State of New York, The County of Allegany, New York and The County of Cortland, New York v. The United States of America et al.* 942 F.2D 114 (1991) (*Hereafter New York Circuit*), at *119.

²⁸⁴ *New York Circuit*, at *119 (citing majority opinion in *Garcia*).

²⁸⁵ *New York Circuit*, at *121.

²⁸⁶ *New York*, at *187-188.

²⁸⁷ *New York*, at *188. Compare with Michael W. McConnell, 1982 National Symposium: A Symposium on Federalism. "The Politics of Returning Power to the States." Transcript reprinted in 6 Harv. J. L. & Pub. Pol'y (1982-1983), at 103 ("...the federal government has put itself in the position of managing partner of an enterprise, rather than that of a separate sovereignty. The States, to a very real extent, have been reduced to the role of administering federal programs, rather than functioning as sovereign States."); and with Charles J. Cooper, 1994 National Lawyers Convention: Reinventing Self-Government, Can We Still Have Limits on National Power? Panel III: The Federal Judiciary and Self-Government. Transcript reprinted in 4 Cornell J. L. and Pub. Pol'y (1994-1995), at 500 ("At the wholesale level, surely no one will deny that the states have been "melted" into little more than administrative units of the federal government. This has come to pass largely as a result of the Court's interpretation of the Commerce Clause..."); and with Roderick M. Hills, Jr. 1998 National Student Symposium: Reviving the Structural Constitution, Panel IV: Federalism in Constitutional Context. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 181 (Under the heading: "How States Have Become Federal Agencies: ...state and local

governments, which I will collectively call 'non-federal governments' frequently act as administrative arms of the government.")

²⁸⁸ See, for example, *New York* at *155 ("In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: 'The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties.' The Federalist No. 82, p. 491 (C. Rossiter ed. 1961); at *157 ("Interstate commerce was an established feature of life in the late 18th century. See, e. g., The Federalist No. 42, p. 267 (C. Rossiter ed. 1961) ('The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience'); at *164 ("The Convention generated a great number of proposals for the structure of the new Government, but two quickly took center stage. Under the Virginia Plan, as first introduced by Edmund Randolph, Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. 1 Records of the Federal Convention of 1787, p. 21 (M. Farrand ed. 1911). Under the New Jersey Plan, as first introduced by William Paterson, Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation. 1 *id.*, at 243-244. These two plans underwent various revisions as the Convention progressed, but they remained the two primary options discussed by the delegates. One frequently expressed objection to the New Jersey Plan was that it might require the Federal Government to coerce the States into implementing legislation. As Randolph explained the distinction, 'the true question is whether we shall adhere to the federal plan [*i. e.*, the New Jersey Plan], or introduce the national plan. The insufficiency of the former has been fully displayed There are but two modes, by which the end of a General Government can be attained: the 1st is by coercion as proposed by Mr. Paterson's plan[, the 2nd] by real legislation as proposed by the other plan. Coercion [*is*] *impracticable, expensive, cruel to individuals.* . . . We must resort therefore to a national *Legislation over individuals.*' 1 *id.*, at 255-256 (emphasis in original). Madison echoed this view: 'The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.' 2 *id.*, at 9"); and at *165 ("In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; for a variety of reasons, it rejected the New Jersey Plan in favor of the Virginia Plan. 1 *id.*, at 313. This choice was made clear to the subsequent state ratifying conventions. Oliver Ellsworth, a member of the Connecticut delegation in Philadelphia, explained the distinction to his State's convention: 'This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity. . . . But this legal coercion singles out the . . . individual.' 2 J. Elliot, *Debates on the Federal Constitution* 197 (2d ed. 1863). Charles Pinckney, another delegate at the Constitutional Convention, emphasized to the South Carolina House of Representatives that in Philadelphia 'the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present.' 4 *id.*, at 256.").

²⁸⁹ *New York*, at *157.

²⁹⁰ *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (*Hereafter Gregory*).

²⁹¹ Michael McConnell, "Federalism: Evaluating the Founders' Design," 54 *U. Chi. L. Rev.* 1484 (1987), at 1493.

²⁹² *Gregory*, at *458.

²⁹³ *New York*, at *157 ("The benefits of this federal structure have been extensively cataloged elsewhere, see, e. g., *Gregory v. Ashcroft*, 501 U.S. at 457-460; Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 3-10 (1988); McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. Chi. L. Rev.* 1484, 1491-1511 (1987), but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution").

²⁹⁴ *New York*, at *176-177.

²⁹⁵ 18 USCS 922 (q)(1)(A)

²⁹⁶ See, "Five Children Killed As Gunman Attacks A California School," *The New York Times*, Jan. 18, 1989.

²⁹⁷ Interview with Daniel Troy, Jan. 30, 2008; Interview with Michael Carvin, Jan. 28, 2008.

²⁹⁸ See Speaker Agenda for 2008 Federalist Society National Lawyers Conference on "The People and the Judiciary" (available at www.fed-soc.org). Phillips participated on a panel with, among others, Roger Pilon, Jerry Smith, and Ken Starr. I also interviewed Phillips on Jan. 30, 2008 for this research. He described himself as "somewhat more conservative" than most law school faculty. He also mentioned that he had a close relationship with at least one of the founding members, Peter Keisler, and a working relationship with others such as Samuel Alito and Charles J. Cooper. Phillips also demonstrated a thorough grasp of the Federalist Society's unifying principles and beliefs, stating that he believed "federalism" and "respect for states' rights" as the "driving forces" of the Federalist Society.

²⁹⁹ *United States of America versus Alfonso Lopez, Jr*, 2 F 3D 1342 (1993) (*Hereafter Lopez Circuit*), at *1345.

³⁰⁰ See *Lopez Circuit*, at *1346 ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 115 L. Ed. 2d 410, 111 S. Ct. 2395, 2399 (1991). Justice O'Connor's observation is particularly apt in the context of this case, which pits the states' traditional authority over education and schooling against the federal government's acknowledged power to regulate firearms in or affecting interstate commerce. Lopez argues that *section 922(q)* exceeds Congress' delegated powers and violates the *Tenth Amendment*.) and ("In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. [HN3] If a power is delegated to Congress in the Constitution, the *Tenth Amendment* expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the *Tenth Amendment*, it is necessarily a power the Constitution has not conferred on Congress.' *New York v. United States*, 120 L. Ed. 2d 120, 112 S. Ct. 2408, 2417 (1992)."); at *1365 ("Two years later, in *Gregory v. Ashcroft*, the Court held that the Age Discrimination in Employment Act (ADEA) did not sweep away the Missouri Constitution's provision for the mandatory retirement of state judges at age seventy. Arguing that a State's power to set the qualifications for its judiciary 'is a decision of the most fundamental sort for a sovereign entity,' 111 S. Ct. at 2400, the Court held that the ADEA did not bespeak a sufficiently clear intent to annul this state prerogative: 'Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance."); at *1365-1366 ("Nevertheless, *Gregory*, *Union Gas*, and *Bass* establish that Congress' power to use the *Commerce Clause* in such a way as to impair a State's sovereign status, and its *intent* to do so, are related inquiries. Thus, in *Gregory*, Congress' power to trump the Missouri Constitution was unquestioned but its intent to do so was unclear; hence the Court held that the State's *Tenth Amendment* interests would prevail. Here, Congress surely intended to make the possession of a firearm near a school a federal crime, but it has not taken the steps necessary to demonstrate that such an exercise of power is within the scope of the *Commerce Clause*.)

³⁰¹ *Lopez Circuit*, at *1365-1366.

³⁰² *Lopez*, at *552.

³⁰³ *Lopez*, at *575.

³⁰⁴ *Lopez*, at *584.

³⁰⁵ Richard Epstein, "The Proper Scope of the Commerce Clause," 73 Va. L. Rev. (1987), 1393-1395.

³⁰⁶ *Lopez*, at *586-587.

³⁰⁷ *Lopez*, at *601-602.

³⁰⁸ See, generally, "Reviving the Structural Constitution," 22 Harv. J. L. & Pub. Pol'y iii (1998-1999).

³⁰⁹ The Fourteenth Amendment reads: "... No State shall make or enforce any law which shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.... The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (*U.S. Const. amend. XI., sec. 5*).

³¹⁰ See Title IV of Public Law 103-322.

³¹¹ *Christy Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3D 820 (1999) (*Hereafter Morrison Circuit*), at *825.

³¹² *Morrison Circuit*, at *826.

³¹³ *Morrison Circuit*, at *854.

³¹⁴ *Morrison Circuit*, at *889.

³¹⁵ See J. Harvie Wilkinson, "The Fourteenth Amendment Privileges and Immunities Clause," 12 Harv. J. L. & Pub. Pol'y 43 (1989) at 51-52.

³¹⁶ *Morrison Circuit*, at *892-896.

³¹⁷ *Morrison Circuit*, at *897.

³¹⁸ *Morrison Circuit*, at *897.

³¹⁹ See J. Harvie Wilkinson, "The Fourteenth Amendment Privileges and Immunities Clause," 12 Harv. J. L. & Pub. Pol'y 43 (1989) at 51-52.

³²⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997). This case struck down the Religious Freedom Restoration Act (RFRA) and, in doing so, was seen to severely limit the power of Congress to pass legislation under Section 5 of the 14th Amendment. Petitioners in *Morrison* made a similar claim of Congressional power under Section 5 and the Court rejected it, foreclosing another avenue for Congress to pass legislation that applies against the states.

³²¹ *Morrison*, at *606.

³²² *Morrison*, at *627.

³²³ *Morrison*, at *644-645 ("If we now ask why the formalistic economic/non-economic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the *Commerce Clause* or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power").

³²⁴ *Morrison Circuit*, at *899.

³²⁵ *A.L.A. Schechter Poultry Corp v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

³²⁶ *National Labor Relations Board v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel Inc v. United States*, 379 U.S. 241 (1964)

³²⁷ Jeremy Rabkin, "Sex, Violence, and the Supreme Court; The Constitution prevails over congressional pandering to feminists." *The Weekly Standard*. May 29, 2000.

³²⁸ Charles Fried, "Opponents of Federalism Are Mired in a Time Warp." *The Wall Street Journal*. May 16, 2000.

³²⁹ Randy E. Barnett, "William Rehnquist." *The Wall Street Journal*. Sep. 6, 2005.

³³⁰ *Gonzales v. Raich*, 545 U.S. 1 (2005) (held that under the Commerce Clause Congress may ban the use of medical marijuana even where states have approved it for medicinal use).

³³¹ Chief Justice John Roberts, Justice Samuel Alito, Justice Clarence Thomas, Justice Antonin Scalia. Justices Roberts and Scalia were in dissent in *Wachovia*; Justice Alito ruled with the majority; Justice Thomas did not participate in the decision.

³³² *Watters v. Wachovia Bank*, 550 U.S. ____ (2007) (held that Congress had the power to preempt state regulations on subsidiaries of national banks operating within particular states).

³³³ Jeremy Rabkin, "Sex, Violence, and the Supreme Court; The Constitution prevails over congressional pandering to feminists." *The Weekly Standard*. May 29, 2000. See also, Steven G. Calabresi, "A Constitutional Revolution." *The Wall Street Journal*. Jul. 10, 1997; Terry Eastland, "Farewell to the Chief: William H. Rehnquist." *The Weekly Standard*. Sep. 26, 2005. See also See, Steven G. Calabresi, "'A Government of Limited and Enumerated Powers': In Defense of *United States v. Lopez*," 94 Mich. L. Rev. 752 ; Steven G. Calabresi, "The Era of Big Government is Over," 50 Stan. L. Rev. 1015; Lino A. Graglia, "United States v. Lopez: Judicial Review under the Commerce Clause," 74 Tex. L. Rev. 719; John C. Yoo, "Defining Federalism in the 1990s," 32 Ind. L. Rev. 27.

³³⁴ *New York*, at *155 ("In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the *Tenth Amendment* expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the *Tenth Amendment*, it is necessarily a power the Constitution has not conferred on Congress.").

³³⁵ Though Lawson is not often credited as one of the three principal Co-Founders of the Federalist Society (Lee Liberman Otis, David McIntosh, and Steven Calabresi) he was mentioned by several network actors as one of the critical, early contributors in terms of developing the philosophy and libertarian side of the statement of principles of the Federalist Society. See interview with David McIntosh, Jan. 25, 2008 ("[Gary] was one of the early people that put on the first symposium in the Yale chapter."); Interview with Douglas Kmiec, Mar. 14, 2008 ("Gary would be someone who is very active in the Federalist Society today... [and] had systematically studied Hayek and would come out on that side of the spectrum"); Interview with Steven Calabresi, Apr. 3, 2008 ("One of our first chapter events at Yale Law School, we had a poster that said 'sponsored by the Federalist Society' and one of our members wrote an asterisk next to 'Society' and wrote at the bottom 'spontaneous collection of individuals acting together.' I thought that was kind of funny in terms of people caring about that. When we were first forming the chapter the same individual, Gary Lawson... when we were founding the Society he was in a Randian libertarian phase and he initially wanted us to call the Society the Ludwig von Mises Society..."). Lawson is also on record as participating in 8 Federalist Society National Conference Events.

³³⁶ *Printz v. United States*, 521 U.S. 898, at *923.

³³⁷ U.S. Const. amend X.

³³⁸ See *United States v. Darby*, 312 U.S. 100 (1941), at *123-124 ("Our conclusion is unaffected by the Tenth Amendment... [which] states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than

to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers").

³³⁹ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (*Hereafter Union Gas*)

³⁴⁰ *Union Gas*, at *44-45.

³⁴¹ Results from a content analysis of 207 distinct speech-acts from Federalist Society National Conferences (1982-2008).

³⁴² Search conducted on Jan. 21, 2009 using LexisNexis Academic. Exact search dates were 01.01.1981 - 12.12.2008. I selected the Wall Street Journal, National Review, American Spectator and The Weekly Standard and the total combined search of all four sources yielded 1,059 hits for "federalism." As I indicated, 185 of the articles returned under the "federalism" search (17%) were authored by participants in Federalist Society National Meetings. Of these 185, 11 (6%) made specific mention of the "Tenth Amendment," the "Eleventh Amendment" or "state sovereignty." See, for example, Jeremy Rabkin, "State Your Business," *The American Spectator*, Jul. 1995; Hadley Arkes, "The Law; More Supreme than Ever," *National Review*, Jul. 26, 1999; Timothy Lynch, "Criminal Theory," *The Weekly Standard*, Feb. 14, 2000; Michael S. Greve, "The Real Division in the Court," *The Weekly Standard*, Dec. 25, 2000; Michael S. Greve, "A Federalism Worth Fighting For," *The Weekly Standard*, Jan. 29, 2001; Jonathan H. Adler, "The Framers' Design," *National Review*, Nov. 1, 2001; Richard A. Epstein, "A Federal Case," *National Review*, Oct. 28, 2002; Randy E. Barnett, "William Rehnquist," *The Wall Street Journal*, Sep. 6, 2005; Edward Whelan, "The Right Justice - Alito isn't just confirmable - he's a great choice," *National Review*, Dec. 5, 2005; Terry Eastland, "Farewell to the Chief: William H. Rehnquist," *The Weekly Standard*, Sep. 26, 2005; Terry Eastland, "The 'Good Judge': Antonin Scalia's two decades on the Supreme Court," *The Weekly Standard*, Nov. 13, 2006.

³⁴³ Martin Redish, 1996 National Lawyers Convention, Panel III: Disciplining Congress: The Boundaries of Legislative Power. Transcript reprinted in 13 *The Journal of Law and Politics* (1997), at 585.

³⁴⁴ David Sentelle, 1988 National Lawyers Convention, Panel III: Federalism and the Scope of Federal Power. Transcript reprinted in 26 *Am. Crim. L. Rev.* (1989), at 1737.

³⁴⁵ Pete Du Pont, 1992 National Student Symposium, "The Legacy of the Federalist Papers," Epilogue: Federalism in the Twenty-First Century: Will States Exist? Transcript reprinted in 19 *Harv. J. L. & Pub. Pol'y* (1993), at 137.

³⁴⁶ Alex Kozinski, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 *Harv. J. L. & Pub. Pol'y* (1998-1999), at 93.

³⁴⁷ Lynn A. Baker, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 *Harv. J. L. & Pub. Pol'y* (1998-1999), at 95.

³⁴⁸ Charles J. Cooper, 1992 National Student Symposium, "The Legacy of the Federalist Papers," Panel V: The Anti-Federalists After 200 Years: Pundits or Prophets? Transcript reprinted in 19 *Harv. J. L. & Pub. Pol'y* (1993), at 119.

³⁴⁹ Theodore Olson, 1982 National Conference, "A Symposium on Federalism." Transcript reprinted in 6 *Harv. J. L. & Pub. Pol'y* (1982-1983), at 7.

³⁵⁰ John S. Baker, Jr. 1992 National Student Symposium, "The Legacy of the Federalist Papers," Panel III: Liberty and Constitutional Architecture. Transcript reprinted in 19 *Harv. J. L. & Pub. Pol'y* (1993), at 59.

³⁵¹ See, for example, Paul Bator, 1982 National Conference, "A Symposium on Federalism." Transcript reprinted in 6 *Harv. J. L. & Pub. Pol'y* (1982-1983), at 51 ("It also strikes me, however, that the formula under the Eleventh Amendment, in a peculiar way, conspired precisely in the same direction. That is, the basic fact under the Eleventh Amendment that we don't sue states, that instead we sue officials, has colored the way we think constitutionally about the application of the Constitution no less profoundly than the Fourteenth Amendment"); Geoffrey R. Stone,

1987 Lawyers Convention, "Precedent, the Amendment Process, and Evolution in Constitutional Doctrine." Transcript reprinted in 11 Harv. J. L. & Pub. Pol'y (1988), at 67 ("The processes of constitutional amendment are quite cumbersome. As a consequence, in the 200-year history of the Constitution, only four times has the nation adopted a constitutional amendment to overrule a Supreme Court decision: the Eleventh Amendment overruled *Chisolm v. Georgia*..."); Alex Kozinski, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 93 ("In *Lopez*, the Court acknowledged the limit of Congress' power under the Commerce Clause. In *Seminole Tribe*... the Court gave new life to the Eleventh Amendment"); William Marshall, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 139 ("The Court quickly followed the case with important rulings narrowing the scope of federal power under other constitutional provisions. These decisions included *Seminole Tribe v. Florida*, limiting federal power to abrogate a state's Eleventh Amendment immunity... the full story as to how these cases might lead to a redrawing of the constitutional parameters governing the judicial enforcement of federalism has yet to be told"); Tom Detty, 1996 National Lawyers Convention, Panel III: Disciplining Congress: The Boundaries of Legislative Power. Transcript reprinted in 13 *The Journal of Law and Politics* (1997), at 585 ("My question focuses more on the Eleventh Amendment than the Tenth or the Ninth Amendments. For the past several decades, Congress has fairly routinely provided for citizen suit provisions in the laws that, in many cases, have allowed suits by citizens directly against the States of the Union which, in some of our view, injures the sovereignty and respect for the states as entities, as sovereign entities").

³⁵² These Practice Groups operate around distinct issue areas within the Lawyers Division of the Federalist Society (Administrative Law, Civil Rights, Environmental Law and Property Rights, Federalism and Separation of Powers, Intellectual Property, Litigation, Religious Liberties, etc). Apart from publishing articles, they also meet at the National Lawyers Conferences to discuss and debate issues of mutual concern. For a list of officially sponsored Practice Groups and web links to Volumes 3-10 (August 2002 - February 2009) of *Engage: The Journal of the Federalist Society's Practice Groups* see www.fed-soc.org.

³⁵³ Steven Tepp, "State Sovereign Immunity and the Enforcement of Intellectual Property Rights," *Engage*. Volume 4, Issue 2 (October 2003), at 81.

³⁵⁴ Steven Tepp, "State Sovereign Immunity and the Enforcement of Intellectual Property Rights," *Engage*. Volume 4, Issue 2 (October 2005), at 81.

³⁵⁵ William Thro, "Toward a Simpler Standard for Abrogating Sovereign Immunity," *Engage*. Volume 6, Issue 2 (October 2005), at 69.

³⁵⁶ *U.S. Const. Art. III, Sec. 1 and 2* ("The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts... The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority... to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming land under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens and subjects").

³⁵⁷ *Lopez*, at *583 (Justices Kennedy and O'Connor concurring).

³⁵⁸ *Seminole Tribe of Florida v. Florida Et Al*, 517 U.S. 44 (1996) (Hereafter *Seminole Tribe*); *Jay Printz v. United States*, 521 U.S. 898 (1997) (Hereafter *Printz*); *John H. Alden, Et Al v. Maine*, 527 U.S. 706 (1999) (Hereafter *Alden*).

³⁵⁹ Alex Kozinski, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 93.

³⁶⁰ See 25 *USCS 2710(d)(3)*.

³⁶¹ <http://library.findlaw.com/1999/Jan/1/241489.html>.

³⁶² 801 F. Supp. 655 (S.D.Fla1992).

³⁶³ *Seminole Tribe of Florida v. State of Florida*, 11 F. 3D 1016 (1994) (Hereafter *Seminole Tribe Circuit*).

³⁶⁴ See Brief of Amicus Curiae States of California, Washington, Alabama, Arizona, Arkansas, Colorado, etc., 1994 U.S. Briefs 12; 1995 U.S. S. Ct. Briefs LEXIS 310.

³⁶⁵ See Brief for Petitioner, 1994 U.S. Briefs 12; 1995 U.S. S. Ct. Briefs LEXIS 211, at *48 ("See also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. Cal. L. Rev. 51 (1990); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889 (1983)... the Framers recognized that the Indian Commerce Clause counteracted the powers of the states. The clause rejected "counterpoise" in favor of exclusive federal authority over Indian affairs.").

³⁶⁶ See Brief of Amicus Curiae States of California, Washington, Alabama, Arizona, Arkansas, Colorado, etc., 1994 U.S. Briefs 12; 1995 U.S. S. Ct. Briefs LEXIS 310 (Hereafter *States Brief*).

³⁶⁷ *States Brief*, at *16, 21.

³⁶⁸ See Brief of Respondents, 1994 U.S. Briefs 12; 1995 U.S. S. Ct. Briefs LEXIS 309, at *41.

³⁶⁹ *Seminole Tribe*, at *66.

³⁷⁰ *Seminole Tribe*, at *68.

³⁷¹ *Seminole Tribe*, at *70.

³⁷² *Seminole Tribe*, at *72-73.

³⁷³ *Seminole Tribe*, at *149-150.

³⁷⁴ See 18 USCS 921.

³⁷⁵ Summary from LexisNexis, *Printz v. United States*.

³⁷⁶ See *Richard Mack v. United States of America*; *Jay Printz v. United States of America*, 66 F. 3D 1025 (1995) (Hereafter *Printz Circuit*).

³⁷⁷ Walter Dellinger has participated in eleven (see Figure 1.4) Federalist Society National Conferences as a representative of the liberal point of view on various panels and debates.

³⁷⁸ *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz 1994); *Printz v. United States*, 854 F. Supp 1503 (D. Mont. 1994) (Hereafter *Printz District*).

³⁷⁹ *Printz District*, at *1513.

³⁸⁰ *Printz Circuit*, at *1030.

³⁸¹ *Printz Circuit*, at *1029.

³⁸² *Printz*, at *905.

³⁸³ See, for example, *Printz*, at *915 - 917 ("In addition to early legislation, the Government also appeals to other sources we have usually regarded as indicative of the original understanding of the Constitution. It points to portions of *The Federalist* which reply to criticisms that Congress's power to tax will produce two sets of revenue officers--for example, "Brutus's" assertion in his letter to the *New York Journal* of December 13, 1787, that the Constitution "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community, eat up their substance, and riot on the spoils of the country," reprinted in 1 *Debate on the Constitution* 502 (B. Bailyn ed. 1993). "Publius" responded that Congress will probably "make use of the State officers and State regulations, for collecting" federal taxes, *The Federalist* No. 36, p. 221 (C. Rossiter ed. 1961) (A. Hamilton) (hereinafter *The Federalist*), and predicted that "the eventual collection [of internal revenue] under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States," *id.*, No. 45, at 292 (J. Madison). The Government also invokes the *Federalist's* more general observations that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *id.*, No. 27, at 176 (A. Hamilton), and that it was "extremely probable that in other instances, particularly in the organization of the judicial power, the officers of the States will be clothed in the correspondent authority of the Union," *id.*, No. 45, at 292 (J. Madison). But none of these statements necessarily implies--what is the critical point here--that Congress could impose these responsibilities *without the consent of the States*... It is interesting to observe that Story's *Commentaries on the Constitution*, commenting upon the same issue of why state officials are required by oath to support the Constitution, uses the same "essential agency" language as Madison did in *Federalist* No. 44, and goes on to give more numerous examples of state executive agency than Madison did; all of them, however, involve not state administration of federal law, but merely the implementation of duties imposed on state officers by the Constitution itself: "The executive authority of the several states may be often called upon to exert Powers or allow Rights given by the Constitution, as in filling vacancies in the senate during the recess of the legislature; in issuing writs of election to fill vacancies in the house of representatives; in officering the militia, and giving effect to laws for calling them; and in the surrender of fugitives from justice." 2 *Story, Commentaries on the Constitution of the United States* 577 (1851)... Even if we agreed with JUSTICE SOUTER's reading of the *Federalist* No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed, and from the pen of the most expansive expositor of federal power. Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution." C. Rossiter, *Alexander Hamilton and the Constitution* 199 (1964). More specifically, it is widely recognized that "The *Federalist* reads with a split personality" on matters of federalism. See D. Braveman, W. Banks, & R. Smolla, *Constitutional Law: Structure and Rights in Our Federal System* 198-199 (3d ed. 1996). While overall *The Federalist* reflects a "large area of agreement between Hamilton and Madison," Rossiter, *supra*, at 58, that is not the case with respect to the subject at hand, see Braveman, *supra*, at 198-199. To choose Hamilton's view, as JUSTICE SOUTER would, is to turn a blind eye to the fact that it was Madison's--not Hamilton's--that prevailed, not only at the Constitutional Convention and in popular sentiment, see Rossiter, *supra*, at 44-47, 194, 196; 1 *Records of the Federal Convention* (M. Farrand ed. 1911) 366, but in the subsequent struggle to fix the meaning of the Constitution by early congressional practice, see *supra*, at 5-10.").

³⁸⁴ *Printz*, at *918.

³⁸⁵ See *Printz*, at *921 ("The dissent, reiterating JUSTICE STEVENS' dissent in *New York*, 505 U.S. at 210-213, maintains that the Constitution merely *augmented* the pre-existing power under the Articles to issue commands to the States with the additional power to make demands directly on individuals. See *post*, at 7-8. That argument, however, was squarely rejected by the Court in *New York*, *supra*, at 161-166, and with good reason. Many of Congress's powers under Art. I, § 8, were copied almost verbatim from the Articles of Confederation, indicating quite clearly that "where the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it." Prakash, *Field Office Federalism*, 79 *Va. L. Rev.* 1957, 1972 (1993)); at *923 ("We have thus far discussed the effect that federal control of state officers would have upon the first element of the "double security" alluded to by Madison: the division of power between State and Federal Governments. It would also have an effect upon the second element: the separation and equilibration of powers between the three branches of the Federal Government itself...The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive--to insure both vigor and accountability--is well known. See *The Federalist* No. 70 (A.

Hamilton); 2 Documentary History of the Ratification of the Constitution 495 (M. Jensen ed. 1976) (statement of James Wilson); see also Calabresi & Prakash, The President's Power to Execute the Laws, *104 Yale L. J.* 541 (1994). That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."); and at *924 ("What destroys the dissent's Necessary and Proper Clause argument, however, is not the *Tenth Amendment* but the Necessary and Proper Clause itself. When a "Law . . . for carrying into Execution" the *Commerce Clause* violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra*, at 19-20, it is not a "Law . . . proper for carrying into Execution the *Commerce Clause*," and is thus, in the words of The Federalist, "merely [an] act of usurpation" which "deserves to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, *43 Duke L. J.* 267, 297-326, 330-333 (1993)");

³⁸⁶ *Printz*, at *927.

³⁸⁷ *Printz*, at *932.

³⁸⁸ See *Printz*, at *933 (quoting *New York v. United States*) ("Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

³⁸⁹ See *Printz*, at *936 (Justice O'Connor concurring) ("Our precedent and our Nation's historical practices support the Court's holding today. The Brady Act violates the [*936] *Tenth Amendment* to the extent it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers."); and at *936-937 (Justice Thomas concurring) ("The Court today properly holds that the Brady Act violates the *Tenth Amendment* in that it compels state law enforcement officers to 'administer or enforce a federal regulatory program.' See *ante*, at 25. Although I join the Court's opinion in full, I write separately to emphasize that the *Tenth Amendment* affirms the undeniable notion that under our Constitution, the Federal Government is one of enumerated, hence limited, powers...Accordingly, the Federal Government may act only where the Constitution authorizes it to do so").

³⁹⁰ *Printz*, at *938.

³⁹¹ See Amicus Brief on Behalf of Academics for the Second Amendment, 1993 U.S. Briefs 1260; 1994 U.S. S. Ct. Briefs LEXIS 275 (Hereafter *Academics Brief*).

³⁹² *Academics Brief*, at *13-16.

³⁹³ *Printz*, at *939.

³⁹⁴ See *District of Columbia v. Heller*, 554 U.S. ____ (2008), J. Scalia writing for the majority.

³⁹⁵ *Printz*, at *952.

³⁹⁶ *Printz*, at *954.

³⁹⁷ *Printz*, at *913, 912, 914, 915

³⁹⁸ See *District of Columbia v. Heller*, 554 U.S. ____ (2008). In a 5-4 decision written by former Federalist Society mentor Justice Scalia and joined by Federalist Society network actors Chief Justice John Roberts, Justice Samuel Alito, Justice Thomas and also by Justice Kennedy, the Supreme Court held - as Justice Thomas had argued in *Printz* - that the Second Amendment protected an individual's right to possess a firearm. While a full analysis of this case is beyond the scope of this thesis - as it is limited to cases dealing with the "structural constitution" - it is

nonetheless interesting to note how deep the Federalist Society network connections run in this case. The D.C. Circuit opinion in *Heller* was written by Federalist Society network actor Laurence Silberman and joined by fellow Federalist Society participant Thomas B. Griffith. The case was masterminded and sponsored by Cato Institute Fellow and Federalist Society network actor Robert A. Levy. Federalist Society affiliated individuals who submitted *amicus briefs* in this case include Charles J. Cooper, Clint Bolick, Bradford A. Berenson, Daniel Polsby, Randy Barnett, Richard K. Willard, Eugene Volokh, Nelson Lund, and Paul Clement.

³⁹⁹ 29 USCS 216(b), 29 USCS 216(c).

⁴⁰⁰ John H. Alden et al. v. State of Maine, 715 A 2D 172 (1998), at *8.

⁴⁰¹ Brief of the States of Maryland, Alabama, Arizona, Arkansas, Colorado, etc As Amici Curiae in Support of Respondent, 1998 U.S. Briefs 436; 1999 U.S. S. Ct. Briefs LEXIS 504 (Hereafter *States Brief*).

⁴⁰² *Alden*, at *713.

⁴⁰³ *States' Brief*, at *9-10.

⁴⁰⁴ *Alden*, at *716-718.

⁴⁰⁵ *Alden*, at *724.

⁴⁰⁶ *Alden*, at *758-759.

⁴⁰⁷ *Alden*, at *808.

⁴⁰⁸ *Alden*, at *813.

⁴⁰⁹ Interview with Charles J. Cooper, Jun. 2, 2008.

⁴¹⁰ *Edelman v. Jordan*, 415 U.S. 651 (1974).

⁴¹¹ *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). (Hereafter *Katz*).

⁴¹² *Katz*, Stevens, J. opinion, at 20 (PDF from Cornell Law Library: <http://www.law.cornell.edu/supct/pdf/04-885P.ZO>).

⁴¹³ *Katz*, Thomas, J. dissenting, at 7 (PDF from Cornell Law Library: <http://www.law.cornell.edu/supct/pdf/04-885P.ZD>).

⁴¹⁴ Interview with John C. Yoo, Jan. 16, 2008.

⁴¹⁵ Timothy Lynch, "Criminal Theory," *The Weekly Standard*. February 14, 2000.

⁴¹⁶ Randy Barnett, "William Rehnquist," *The Wall Street Journal*. September 6, 2005.

⁴¹⁷ Jonathan Adler, "The Framers' Design," *National Review*. November 1, 2001.

⁴¹⁸ Interview with Douglas Kmiec, Mar. 14, 2008.

⁴¹⁹ Richard Weaver, *Ideas Have Consequences* (Chicago: 1984).

⁴²⁰ Interview with David McIntosh, Jan. 25, 2008.

⁴²¹ See 1989 National Lawyers Conference: "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers," *Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, Delegations of Rulemaking Authority*. Participants included David Schoenbrod, Frank Easterbrook, Steven Ross and Theodore Olson; 1999 National Lawyers Convention: "The Rule of Law, Modern Culture, and the Courts at Century's End." *Administrative Law and Regulation Group Panel: The Non-Delegation Doctrine Lives!* Participants included David Schoenbrod, Peter Schuck, Edward Warren, Christopher Wright, and C. Boyden Gray.

⁴²² The topic of Free Markets or Economic Liberties has headlined five Federalist Society National Conferences (1989 Student Conference, 1997 Student Conference, 1999 Student Conference, 2004 Student Conference, 2006 National Lawyers Conference) and a very quick count of speech-acts relating to Pro-Business topics (anti-regulation, certain law and economics analysis, limited government) tallied at least 47 different speeches at Federalist Society National Conferences.

⁴²³ 1989 National Lawyers Conference, "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers." Transcript reprinted in 68 Washington University Law Quarterly 3 (1990); 2000 National Lawyers Conference, "The Presidency." Transcript available at www.fed-soc.org.

⁴²⁴ See 1989 National Lawyers Conference: "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers," *Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, Delegations of Rulemaking Authority*. Participants included David Schoenbrod, Frank Easterbrook, Steven Ross and Theodore Olson; 1989 National Lawyers Conference: "A Federalist Society Symposium on the Presidency and Congress: Constitutionally Separated and Shared Powers," *Address: Erosion of the President's Power in Foreign Affairs*. Address by Robert H. Bork; See also 1992 National Lawyers Conference: "The Congress: Representation, Accountability, and the Rule of Law:" *Panel IV: Who Controls the Administrative State?* Participants included A. Raymond Randolph, Theodore B. Olson, and Louis Fisher; See also 2000 National Lawyers Conference: "The Presidency," *Panel I: Is the Presidency Better Off Now Than Eight Years Ago?* Participants included Steven Calabresi, Charles Cooper, Bernard Nussbaum, Nelson Polsby and Jennifer Newstead; *Panel II: Presidential Oversight and the Administrative State*. Participants included Samuel Alito, Jr., Christopher DeMuth, Alan Morrison, Richard Pierce, Peter Strauss, and A. Raymond Randolph; See also 2002 National Lawyers Conference, "The Constitution, National Security, and Foreign Affairs," *Panel I: The President v. Congress: Who Has the Upper Hand in Foreign Affairs and National Security?* Participants included Walter Dellinger, Frank Easterbrook, Louis Fisher, Robert Turner, John Yoo, and Timothy Flanigan; *Administrative Law and Regulation: Confidentiality and Deliberations in the Executive Branch*. Participants included Shannen Coffin, C. Boyden Gray, Joseph Guerra, David Vladeck and Jerry Smith; See also 2004 National Lawyers Conference, "Celebrating Brown v. Board of Education's Promise of Equality," *The PATRIOT Act: A Three-Year Retrospective*. Participants included Viet Dinh, Timothy Lynch, Christopher Wray, and Samuel A. Alito, Jr.

⁴²⁵ See, for example, Paul Bator, 1982 National Conference, "A Symposium on Federalism." Transcript reprinted in 6 Harv. J. L. & Pub. Pol'y (1982-1983), at 51 ("It also strikes me, however, that the formula under the Eleventh Amendment, in a peculiar way, conspired precisely in the same direction. That is, the basic fact under the Eleventh Amendment that we don't sue states, that instead we sue officials, has colored the way we think constitutionally about the application of the Constitution no less profoundly than the Fourteenth Amendment"); Geoffrey R. Stone, 1987 Lawyers Convention, "Precedent, the Amendment Process, and Evolution in Constitutional Doctrine." Transcript reprinted in 11 Harv. J. L. & Pub. Pol'y (1988), at 67 ("The processes of constitutional amendment are quite cumbersome. As a consequence, in the 200-year history of the Constitution, only four times has the nation adopted a constitutional amendment to overrule a Supreme Court decision: the Eleventh Amendment overruled *Chisolm v. Georgia*..."); Alex Kozinski, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 93 ("In *Lopez*, the Court acknowledged the limit of Congress' power under the Commerce Clause. In *Seminole Tribe*... the Court gave new life to the Eleventh Amendment"); William Marshall, 1998 National Student Symposium, "Reviving the Structural Constitution," Panel III: Constitutional Federalism Reborn. Transcript reprinted in 22 Harv. J. L. & Pub. Pol'y (1998-1999), at 139 ("The Court quickly followed the case with important rulings narrowing the scope of federal power under other constitutional provisions. These decisions included *Seminole Tribe v. Florida*, limiting federal power to abrogate a state's Eleventh Amendment immunity... the full story as to

how these cases might lead to a redrawing of the constitutional parameters governing the judicial enforcement of federalism has yet to be told"); Tom Detty, 1996 National Lawyers Convention, Panel III: Disciplining Congress: The Boundaries of Legislative Power. Transcript reprinted in 13 *The Journal of Law and Politics* (1997), at 585 ("My question focuses more on the Eleventh Amendment than the Tenth or the Ninth Amendments. For the past several decades, Congress has fairly routinely provided for citizen suit provisions in the laws that, in many cases, have allowed suits by citizens directly against the States of the Union which, in some of our view, injures the sovereignty and respect for the states as entities, as sovereign entities").

⁴²⁶ Interview with Douglas Kmiec, Mar. 14, 2008.

⁴²⁷ See, Interview with Gail Heriot, Mar 18, 2008 ("...because all the law professors who come to the [AALS] conference are going to be in town, the Federalist Society decided it would have a parasitic conference on the AALS... we have our little Federalist Society gathering, which people come in and out of and we had a panel on Prop 209 with five speakers. Of those five, three were against it. So it wasn't just that we had a balanced panel, we had it slightly titled against us. And we're considered the right wing cranks, there? It just seems absurd. I think the Federalist Society is certainly a conservative and libertarian group but it's more centrist than the AALS which purports to be a non-political group."). See also, Interview with Michael Rappaport, Mar 17, 2008 ("Now there's even a faculty division which is again modeled on the AALS... and they're pretty good. The website, they've got podcasts of all kinds of things... those are great because you don't even have to go to the conferences now.")

⁴²⁸ Interview with Michael Rappaport, Mar. 17, 2008.

⁴²⁹ Interview with Eugene Meyer, Feb. 8, 2008.

⁴³⁰ Interview with Michael Rappaport, Mar. 17, 2008.

⁴³¹ Interview with Charles J. Cooper, Jun. 2, 2008.

⁴³² Interview with Thomas A. Smith, Mar. 19, 2008.

⁴³³ Interview with Daniel Troy, Jan. 30, 2008.

⁴³⁴ Interview with John C. Yoo, Jan. 16, 2008.

⁴³⁵ Given the decline in consensus on the Supreme Court, particularly during the Rehnquist Court tenure, I found that limiting the scoring only to Supreme Court majority opinions did not in fact accurately capture a majority of the Justices views on the constitutional doctrine in question; many of which are expressed and supported in more nuanced form in separate or concurring opinions.

⁴³⁶ Interview with Steven Calabresi, Apr. 3, 2008.

⁴³⁷ On February 9, 2010 I cross referenced my list of Federalist Society Network Participants with the list of Republican nominated judges from 1981-2008 published on the Federal Judicial Center's website and found that 27% of all nominees had presented at Federalist Society National Conferences.

⁴³⁸ See *Lopez*, Rehnquist, C.J. for majority ("We start first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist* No. 45, pp. 292-293 (C. Rossiter ed. 1961)).

⁴³⁹ Wiber, M. G., "An Epistemic Community's Work is Never Done." *Paper presented at the annual meeting of the The Law and Society Association, Berlin, Germany.* July 25, 2007.

⁴⁴⁰ Interview with Lillian Bevier, Feb. 1, 2008.

⁴⁴¹Interview with Michael Rappaport, Mar. 17, 2008.

⁴⁴² "no matter whether th' constitution follows th' flag or not, th' supreme court follows th' iliction returns." Peter Finley Dunne, *Mr. Dooley's Opinions* 26 (1901).

⁴⁴³ The phrase refers to Associate Justice Owen J. Roberts' surprising jurisprudential flip-flop in *West Coast Hotel Co. v. Parrish*, a 1937 case that challenged a Washington State minimum wage law. Roberts' move signified the end of the Supreme Court's constitutional opposition to President Roosevelt's economic recovery legislation and ushered in a new era in which the Supreme Court would give Congress wide constitutional latitude in determining the scope of its regulatory power.

⁴⁴⁴See, for example, interview with Carter Phillips on 1.30.08: "*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 on 1.22.08: "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, 1.28.08: "... 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 Willard on 1.31.08: "I think it's pretty *sui generis*..."

⁴⁴⁵ Interview with Lisa Brown, Jun. 19, 2008.