Chapter Nine

An Opinionated History of the Federalist Society

John O McGinnis

I am very grateful for the invitation by The Samuel Griffith Society to talk about the Federalist Society. As some of you may know, the Federalist Society is an organization of conservative and libertarian lawyers in the United States which now has over 10,000 dues-paying members and another 30,000 sympathizers who come to meetings. It is the American counterpart of your own Society and thus it may offer your Society some useful lessons, just as I am sure we could profit by understanding your own work.

The Federalist Society has been both the most important new civic association in the United States in the last quarter century as well as the most important civic association in my own life. Thus, I hope I will be forgiven for giving a talk that is at once personal and abstract, that tries to convey both how the Federalist Society has inspired me by its ideals and changed the United States by its activities. In doing so, I hope to emphasize that the Federalist Society can serve as a model for civic associations of lawyers and those interested in law in other nations who want to revive the vision of the rule of law and limited government – twin glories of western civilization.

The Federalist Society began when I was a student at Harvard Law School in the early 1980s. It was started by a handful of students at other law schools, principally Yale and the University of Chicago. The prime movers of the founding had known one another from their days as undergraduates at the Yale Political Union – perhaps the most prestigious debating society in the United States, the equivalent of the Oxford Union in the United Kingdom. What startled and depressed them in the transition to law school from their undergraduate college was the absence of debate about the fundamental issues of law. Both the faculty and the student body at their law schools and at élite schools across the nation were so uniformly liberal (in the modern American sense of liberalism) that liberal assumptions were rarely if ever challenged in the classrooms or the cafeteria. As a result, discussion at law school was shrouded in a pall of orthodoxy. Judicial activism and social engineering were praised, and the importance of markets and fidelity to law were neglected, if not actively disparaged.

As veteran debaters, the founders of the Society naturally thought a remedy was to create a forum for disputation. And thus the first Federalist Society event was held in 1982 at Yale Law School, and the topic was federalism.[1] A handful of conservative Professors from across the country, including then Professor (now Justice) Scalia, attended. It should be emphasized that the motivation for this meeting was ideological debate, not partisan mobilization. There has never been a partisan litmus test for speakers or members. The Society has always been open to both Democrats and Republicans, even though the increasingly partisan debate over constitutional law has meant that fewer Democrats than Republicans are members.

Indeed, the *credo* of the Federalist Society is a simple one that should command broad consensus: "the state exists to preserve freedom, the separation of powers is central to our Constitution, and it is emphatically the duty and province of the judiciary to say what the law is, not what it should be".[2] It is a mark of how far law has fallen short of its classical ideals, that an organization with such a philosophy has proved so controversial.

A few liberal students in fact protested its first convention, carrying placards that denounced the Society as the vanguard of reaction in general, and a threat to constitutionally based abortion rights in particular. Given the overwhelmingly left-liberal nature of the academy, the protestors' concern about the power of a rag-tag band of dissenters must have seemed somewhat comical at the time. But given the power of the ideas expressed and the growth of the Society in the next three decades, these student protesters were oddly prescient.

This first formal convention presaged many of the features that have made the Society so successful. First, the Society has enjoyed the advantages of intellectual jujitsu. It is precisely because the legal academy was so utterly dominated by left-liberals that the Federalist Society had a void to fill, and in filling the gap in legal intellectual discourse, it could attract a lot of attention. Second, like The Samuel Griffith Society, the

programs have been serious intellectual events with publishable papers. The notion is that members' ideas will be improved over time by presentations that are serious enough to stand the test of time. Because of focus on publication, the Society has created a symbiotic relationship with the *Harvard Journal of Law and Public Policy*, a conservative law review run out of Harvard Law School, but by a staff of student editors from leading law schools across the nation. The *HJLPP*, as it is called, is one of the most widely circulated law reviews in the nation, and four times a year it delivers three or four substantial articles on law from a conservative or libertarian perspective. It also publishes the proceedings of the yearly Federalist Society student symposium.

It has also been crucial to the Society's success that much of its programming takes place in law schools. First, universities continue to be our prime generator of ideas. As John Maynard Keynes said, "Practical men, who believe themselves to be quite exempt from any intellectual influence, are usually the slaves of some defunct economist".[3] And the legal gloss on Keynes' epigram is that the legal theorizing of today is the judicial opinion of tomorrow. For instance, Justice David Souter, who sits on our Supreme Court, largely follows the legal process school that was dominant at Harvard Law School when he was a student.

Because of the Federalist Society many more students are exposed to conservative and libertarian ideas about the substance and process of law, and this exposure can pay dividends twenty years from now through better judges. Second, students have time to explore ideas in a way practitioners do not. But if one can get students involved and committed to the Society, as practitioners they will have the resources to sustain the organizations and the status to realize these ideas in practical form during their many years at the bar. To paraphrase the Jesuit boast, "Give me the law student until his graduation and I will give you the lawyer for life".

While I was one of the founding members of the Harvard Law School Chapter, I did not attend the first convention, but was fortunate enough to attend the second convention, held at the University of Chicago Law School. There the topic was judicial activism.[4] I can say that this convention was one of the formative experiences of my intellectual life. Before the convention I had become a pretty listless and alienated law student. Although I was on the *Harvard Law Review*, the principal legal journal of the Harvard Law School, the presidency of which launched the career of Barak Obama, I did not participate much in its intellectual life. Most of my fellow editors thought my ideas crazy and gave me little work. At the *Review*, I was relegated to sitting next to its one true eccentric and talking about his single jurisprudential passion – the law of the medieval papacy. Outside of the *Review*, I saw fifty movies in my third year of law school. I probably saw more movies than I read cases.

The Chicago convention lifted me out of my slough of despond. Here were students who did not automatically dismiss my ideas, and here were faculty members who expressed my intuitions far more articulately than I could. I was at once comforted by company and challenged to reach the level of the panelists. It was a marvelous combination of fellowship and rigour that I am sure has spurred on thousands of other students to live more seriously and largely in the ideas of the law.

For a student, the conference's other remarkable feature was the large measure of sharp disagreement among the distinguished panelists. First, many liberals in good standing were invited to participate. The openness to opposing ideas has been a mark of all the Society's subsequent conventions. In my view, it has been a key to the Society's success, earning the respect of Professors in the more liberal mainstream of the academy and greater influence for its ideas in the long run.

But disagreement raged not only between those sympathetic and those antipathetic to the ideals of the Federalist Society, but among committed Federalists themselves. There was no party line: famous Professors like Richard Epstein and Frank Easterbrook disagreed fundamentally about such matters as the nature of legal interpretation.[5] If one were inclined to intellectual puns, the essence of the Federalist Society has been right clashing with right.[6]

The result has not been tragic, but it has made for great theatre, and I do believe the theatrical aspect of internal disagreement among Federalist Society stalwarts has been an important source of the Society's continuing appeal. The audience looks forward to the sharp repartee between the troupe of academics and practitioners they have come to know.

The internal disagreement also performs two other important functions. First, it keeps scholars and other participants alive to the possibility of nuance and subtle mistakes. Ideologically external critiques of work are, of course, helpful: they elicit better rhetoric, but only rarely substantive rethinking of fundamental building blocks of political philosophy. Internal critiques, however, are likely to be taken sympathetically and really

change steps in arguments on the ground. As a result of this internal questioning, important changes have come to conservative jurisprudential ideals.

For instance, originalism began as the doctrine of original intent: under this view constitutional interpretation is to be guided by the intent of those who framed the document. But many participants in the Federalist Society critiqued this doctrine, because it was difficult to discern the intent of the multi-member bodies that drafted and ratified the Constitution, and because a focus on intent slighted the importance of the understanding of the audience. The Constitution was government of, by, and for the people, and it was thus their understanding that was paramount.

A new view of originalism was thus born – one that focused on the original public meaning of the words rather than the "original intent" of the enactors of the document. But even as original meaning became the dominant view, the debate on the exact content of originalism has not ended. Even the content of original public meaning is now a source of dispute among the Society's members. Some believe that the public meaning is fixed by the legal interpretative rules at the time the Constitution was framed.[7] Others disagree. Such developments mark substantial refinements and improvement in conservative jurisprudence, and provide intellectual capital from which to draw in the future.

Second, for any modern conservative movement to be successful it must be a fusion between traditional conservatives and classical liberals, often now called libertarians in the United States. There is simply never enough of either segment of the right to be a powerful, let alone majoritarian social movement. Their union is ultimately predicated on strong agreement on a matter of political philosophy that transcends policy differences – the pre-eminence and salience of accountability for the individual. That is why conservatives and libertarians are united against the Left's schemes of social engineering.

Yet traditional conservatives and libertarians disagree on more than a few policy matters. Indeed, on a whole variety of specific issues, from pornography to the war on drugs, they are divided, sometimes bitterly so, with libertarians opposed to restrictions on freedom and conservatives sympathetic to government efforts to preserve traditional values. These divisions also carry over to disagreements about government structure, with libertarians generally being more enthusiastic about vigorous judicial enforcement of enumerated and even unenumerated constitutional rights, including a *Bill of Rights*, whereas conservatives tend to argue for deference to legislation and more broadly to the traditions of society.

It is important to encourage these internal debates. First, for the sake of internal cohesion, these disputes must be aired. Disparate elements of a coalition are more likely to stay together if they have felt they got a fair hearing. Second, the disputes help forge the most attractive "fusionist" position, which is often a compromise or combination of the purest positions of the libertarian and traditional conservative viewpoints.

I have continued to be involved in the Federalist Society since that convention in Chicago, but I want to switch to a more impersonal discussion of three institutional transformations that have been crucial to making the Society the most important new civic organization of the last quarter of the 20th Century in America. These important organizational changes are: 1) establishing student chapters in almost every law school across the United States; 2) establishing chapters of practitioners in a majority of major cities; and 3) creating legal practice groups that focus on particular subject matter areas.

First, the Federalist Society created chapters in almost every law school in America. The national student conventions, like the one I attended, continued. But national conventions cannot reach everyone, nor can they counteract the continual left wing influence exerted by law Professors on students at their home institutions. Thus, local student chapters play an essential role in both recruiting new members and in creating a counterpoint to the overwhelmingly dominant left-liberal ideology of the American law school.

To that end, the main office of the Federalist Society now pays for conservative and libertarian Professors to travel across the country. These visits become catalysts for the miniconventions with debates with local liberal faculty members. When students are able to do comparison shopping between conservative and liberal ideas, even those who were previously liberal often become converts.

Students, of course, graduate to become full fledged attorneys, and the second important move of the Federalist Society was to create local lawyers' chapters across the nation. These chapters have become focal points in every major city for continuing agitation on behalf of conservative and libertarian legal ideas. They hold regular meetings and debates. Unlike topics at the national convention, the topics at local chapters are often more narrowly focused and of more direct relevance to practice. The New York chapter, for instance, has held important meetings in the areas of corporate governance and tort reform.

The recruiting of practitioners among chapters across the nation has been so successful that the Federalist Society may be second only to the American Bar Association as a national organization in the number of practicing lawyers it has as members. The Federalist Society then took advantage of these numbers to become a kind of shadow ABA. For instance, it publishes a newsletter that comments on and implicitly critiques the organized Bar, on such matters as the ABA's opposition to tort reform and support for constitutional abortion rights.

Third, as the numbers of practising lawyers in the Federalist Society grew, the national organization created practice groups, in which lawyers from across the nation could meet their counterparts in a wide range of practice areas such as employment law, corporate law, and communications law. In this way the Society broadened its focus from constitutional law and interpretation to the entire range of controversial legal issues. The Society thus increased both its appeal and impact among practising lawyers.

I should mention that one of the most active practice groups (of which I incidentally am a member) is that in international law. This practice group has sought to hold debates on the status of international law in American law, because in a wide variety of ways, academics and others have suggested that international law should become a source of American jurisprudence and binding norms even if it has not been ratified by the political branches. This question of how international law should relate to domestic law is emphatically not a parochial American one. In the democratic West as a whole, the question of how the nation state should relate to international law will become an increasingly central question in an era of globalization. The central danger is that international law will transfer power away from democratically elected governments, and lodge authority in unaccountable international agencies and tribunals. It is one concrete area where I believe the Federalist Society and The Samuel Griffith Society could have many useful exchanges.

Moreover, as a result of these changes in organizing lawyers, the Society now hosts a yearly convention for lawyers as well as one for students. These lawyers' conventions are held in Washington, and now regularly attract Supreme Court Justices, Cabinet members and even, on occasion, the President of the United States. They show the power of the Federalist Society and reinforce the solidarity of its members.

As the Federalist Society has grown in size and power, there have come the temptations of size and power – to throw the weight of the Society around and become another Washington lobby. This development would have been a great mistake. A pressure group necessarily becomes organized around the positions for which it lobbies. As a result it ceases to be open to new ideas and change. Such openness is essential to allow the Society to adapt, and in adapting the law to new circumstances. While principles of conservatism and libertarianism in law are unchanging, their particular application often cannot remain the same. Indeed, law must often change so that things can remain the same.

Under the leadership of its President, Gene Meyer, the national office of the Federalist Society has wisely taken a consistent stance against lobbying or taking positions on legislation and judicial decisions. In that sense, the spirit of debate engendered by the founders of a fledgling, academic and politically powerless society remains the animating spirit of the 10,000 strong, now Washington-based organization. Just as a religion remains truer to its purposes, if it can retain the spirit it enjoyed when its members were few, scattered in catacombs and liable to persecution, so too will a civic association remain vibrant and fertile of ideas, if it hews to the intellectual objectives that first brought it into being.

The refusal to take political positions has had the advantage of repelling the now constant attacks made on the Society as its members become more numerous and its ideas have gained influence and even ascendancy in the legal outlook of the current Administration. One of my own home State's Democratic Senators has made a practice of asking nominees to federal office in their confirmation hearings, whether they had been members of the Federalist Society. These questions, although unconsciously echoing the 1950s refrain, "Have you ever been a member of the Communist Party?", are certainly an indication that the Society has captured the imagination of its opponents. But by remaining a debating Society at its core, the Society is able to deflect much of the incoming political flak.

An excellent recent book, *The Rise of the Conservative Legal Movement* by Steven Teles, has commented shrewdly on the Society's refusal to take positions. Professor Teles has suggested that this refusal maintains the Society as a civic association rather than an interest group.[8] A civic association serves vital functions for an ideological movement as a whole. According to Teles, "it provides a common venue, resolves disputes, and establishes rules for interaction".[9] In short, it serves as an encompassing interest for generating conservative and libertarian ideas and sustaining networks of conservatives and libertarians. The Federalist Society would serve

these functions much less well, and be liable to splinters and division, if it became committed to particular positions and became embroiled in the day-to-day politics of Washington.

To stay apart from particular positions, the Society cannot be financially dependent on interest groups that want particular results. A civic association devoted to advancing an encompassing ideological interest must have a financial base that reflects these commitments. As a result, the Society has raised most of its funds from foundations and individuals rather than companies and trade associations. Despite this, the Society has been very successful, raising this year about ten million dollars, while employing only the equivalent of four full-time members in fund-raising. The profile of Federalist Society donors is much younger than that at most organizations.[10] I think this is again a happy consequence of its student orientation. Many members can be expected to give for a lifetime to an organization that was more intellectually nurturing than the college or law school they attended.

Nevertheless, while the Society itself has remained resolutely apart from both policy positions and partisan politics, it offers networking opportunities for those who want to translate ideas into policy formation and political activism. As a result, it has created the most powerful political cultural force for conservative ideas about law that I believe the United States has ever known. From its inception, influential members of the Society have ascended to the bench. Frank Easterbrook of the 7th Circuit, J Harvie Wilkinson of the 4th Circuit, Dennis Jacobs of the Second Circuit and, most recently, Michael McConnell of the 10th Circuit are but a few of the intellectual heavyweights who now shape the interpretation of federal law. (The Circuit Courts are Federal intermediate appellate courts – the equivalents of the NSW Court of Appeal.) In the executive branch of the current Administration, it may well be that members of the Society occupy the majority of consequential legal positions. The result is an Administration more focused on conservative ideals and less on partisanship than it otherwise would be.

But the scope of the Federalist Society's power, and the extent to which it has changed legal culture, was most reflected in the reaction to the nomination of Harriet Miers to the United States Supreme Court. For those of you in Australia who understandably do not follow the intricacies of the American Supreme Court nomination process, Harriet Miers was nominated to fill the vacancy created by Justice Sandra Day O'Connor's resignation in the fall of 2005. She was the President's personal counsel at the White House, but she had no experience in the kind of constitutional issues that come before the Court.

There was a chorus of conservative opposition to this choice, both because the nomination was seen as an insult to the many qualified nominees, like those named above, who had seriously grappled with the hard issues of constitutional law, and because such nominees, unlike Miers, would make an enduring difference in our constitutional law and culture. Such potential nominees had been largely nurtured by the Federalist Society, and thus it was the Society that was largely responsible for the pool of strong alternatives that made Ms Miers seem so weak in comparison. And it was members of the Society, as influential opinionmakers, who subjected her nomination to such ferocious criticism that the President was forced to withdraw it and nominate Samuel Alito of the Third Circuit Court of Appeals.

Before Judge Alito ascended the Bench, he had himself been a member of the Federalist Society and had worked at the Office of Legal Counsel. That office acts as the chief solicitor to the executive branch as a whole, and proved an engine room of the Reagan legal revolution in its effort to restore such fundamental ideas, as originalism and federalism, to American jurisprudence. A nominee who combined experience both as a jurist and a government lawyer for the most transformative conservative administration in a generation, was obviously a Justice who could move the law in a direction consistent with the Federalist Society's *credo*.

It is a mark of the distance that the Federalist Society has traveled, from a Society focused on the legal academy to one devoted to the larger world, that the culture that it created had the power to constrain a sitting conservative President and make his choices sounder than they would have otherwise been. As a result, whatever the apostasy of Senator John McCain on other aspects of the conservative agenda, a President McCain is also likely to nominate judges who are as jurisprudentially sound as is consistent with being confirmed by a Senate that will be collectively well to his left.

The Society, however, has not been resting on its laurels. There can be no assurance that conservatives will continue to have the kind of electoral success that has made possible the appointments of Justices like John Roberts and Samuel Alito. Moreover, in the long run the battle over law is a battle of ideas. Thus, the Society has recently turned its energies to trying to change the composition of law faculties at our universities. This task is a daunting one, because at élite law schools politically active faculty members on the left outnumber those on the right by close to six to one.[11]

The Federalist Society has created four programs to accomplish this goal. First, it has established a faculty division. This faculty division accomplishes for faculty members what the practice groups accomplish for practicing lawyers. It provides a forum for improving ideas as well as a network of contacts and a sense of camaraderie. Second, the Society gives out fellowships to promising conservative lawyers who are considering going into teaching. These fellowships are absolutely vital, because the market for law Professors in America grows more competitive by the year. Candidates need to have written substantial articles before going on the market – a task almost impossible while remaining in private practice. These fellowships, which secure a position at a major law school for a year, give promising candidates for academia the leisure to write. They have paid off, with over a dozen recipients now secure in academia.

Third, and more recently, the Society has started a forum to advance candidates for the job market. Just this month I participated in the first three-day session designed to prepare conservative candidates. We vetted their talks and gave mock interviews. It was good fun to play a liberal academic for a few days and so better prepare the candidates for the hostile gauntlet they will face. In my view, conservatives still face substantial discrimination in the academy, particularly in public law. They need to be more widely and better published than their liberal peers in order to be hired laterally and move up the academic pecking order to major universities and more substantial influence in society at large. These fellowships and preparatory sessions will give them an added boost.

Fourth, the Federalist Society has also established a new set of fellowships for young untenured academics. It will allow them to take a leave of absence for a semester to write a major article. These fellowships will also be very useful in permitting young conservative academics to get additional time to produce additional articles, to allow them to be hired laterally at better schools, and move up the ladder of prestige that characterizes the legal academy.

In closing, let me discuss the reasons that I believe that a society like the Federalist Society or The Samuel Griffith Society is needed in any advanced industrial society, not only in the United States or Australia. Lawyers, as Alexis De Tocqueville noted, have played an aristocratic function in the United States,[12] and this is true by extension in any modern democratic society, because they are the experts in democracy's legal mode of governance. In a classical liberal society, one largely regulated by private law, lawyers tend to be a force for classical liberalism, because it is that legal framework which gives them their livelihood. This is one of the reasons why Alexander Hamilton, the great defender of the commercial republic, was so enthusiastic about judicial review. Lawyers could be counted upon to uphold the essential framework of property and contract rights that advanced commerce.

But since the birth of the modern regulatory state and social democracy, the interests of lawyers have changed. They are the technocrats and enablers of regulation and redistribution. The more a nation intervenes in economic affairs to regulate and redistribute, the greater slice of compliance costs and transfer payments lawyers can expect to receive. As a result, they are no longer supporters of property rights or even a stable rule of law. Their interest lies frequently in dynamic forms of legal transformation and the uncertainty they bring.

Given that the financial interests of contemporary lawyers are so much in tension with the classical liberalism and even some of its rule of law values, only a strong ideological interest will provide a sufficiently counteracting force. And given the importance of classical liberal values to the prosperity and security of citizens, such a counterbalancing is essential to a modern democracy, with its permanent impulse to regulation and redistribution. Thus, a society of right minded lawyers, as well as citizens interested in the sound development of law, may be the most important civic association of any kind for the health of our modern Western societies. In that sense, the Federalist Society and The Samuel Griffith Society are not only important to their own societies but are models for modern market democracies everywhere.

Endnotes:

1. See 6 *Harvard Journal of Law & Public Policy* 1 (1983) (symposium on federalism).
2. http://www.fed-soc.org/aboutus/id.28/default.asp.
3. John Maynard Keynes, *The General Theory of Employment, Interest and Money* 383 (1936).

4. See *HJLPP* 1 (1984).
5. Compare Frank Easterbrook, *Legal Interpretation and the Power of Interpretation*, 7 *HJLPP* 87 (1984) with Richard A Epstein, *The Pitfalls of Interpretation*, 7 *HJLPP* 101 (1984).
6. G W F Hegel, *Lectures on the History of Philosophy* 446 (1995) (defining tragedy as "right clashing with right").
7. See, e.g., John O McGinnis & Michael B Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 Const Comm, 371 (2007).
8. Steven Teles, *The Rise of the Conservative Legal Movement* 153 (2008).
9. *Ibid.*.
10. Conversation with Gene Meyer, President of the Federalist Society (July 30, 2008).
11. See John O McGinnis *et al., The Patterns and Implications of Political Contributions By Elite Law School Faculty*, 93 Geo L J 1167 (2005).
12. Alexis de Tocqueville, *Democracy in America*, 282 (Henry Reeve trans. 1841).