

The Federalist Society's Influence on the Federal Judiciary

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Only twenty-five years after its founding, the Federalist Society today boasts a nationwide membership including renowned attorneys, politicians, policy makers, and jurists. Although the Society maintains that it is not a political organization, liberal political activists claim the Society has long pursued an ambitious—and extremely conservative—political agenda. In this article we ask: do members of the Federalist Society decide cases in a more conservative manner than other nonmember jurists? Using data on decision making in the U.S. Courts of Appeals, we find Federalist Society members are significantly more conservative than nonmembers and examine the long-term implications of our study.

Keywords: *judges; courts; decision making; appointments*

The first chapter of the Federalist Society was founded at Yale Law School in 1980, and the following year, a second chapter began at the University of Chicago Law School (Bossert 1997; Hicks 2006). By 1982, the Federalist Society was legally established as a nonprofit corporation and thereafter became a national organization (McIntosh 2003). From its inception, the Federalist Society sought to provide a counterbalance to the “liberal jurisprudence” that prevailed in the nation’s law schools at that time, most notably by developing a method of constitutional interpretation now known as textualism (alternatively referred to as originalism). As the Society’s Executive Director, Eugene Meyer, explains textualism:

If a word meant “x” when the Constitution was passed, and it means “y” today . . . you presumably want to stick with the meaning it had before. But for the most part, [textualism requires that] you interpret what the meaning [of the Constitution] was [when passed] based on what the meaning was in the past, and you pay attention to changes [in that meaning] over time. (Meyer 2002)

The Society has also long focused attention on the proper role of federal court judges in our democracy. They contend that judges should practice “judicial

restraint”; unelected jurists should not interject their personal policy preferences when interpreting the Constitution:

Is the court interpreting the text and meaning of the Constitution? If it is, and they [the judges or justices] are doing the best they can do . . . their judgment might be off, but there is not a structural problem. If the court is saying, “gee, we don’t like the direction policy is going in this country [and w]e want to change the direction of policy . . .” that is not a proper role for the courts. (Meyer 2002)

It has also been part of the Federalist Society’s central mission “to present their ideas [about originalism] more articulately . . . [which] could cause others to listen to these views more attentively, and, perhaps ultimately, to question some of the liberal positions which are being presented as the law” (Proposal to Form a National Conservative Legal

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Organization 1982, quoted in Teles 2008, 140 and 314). In short, the Society made plain as early as 1982 that it hopes to “transition” nonbelievers—lawyers who support the method of constitutional interpretation that sees the document as “living” and “evolving”—into committed supporters of originalism (Teles 2008).

Because the Society’s positions on both constitutional interpretation and the role of unelected judges were deemed as viable legal arguments to further conservative political policy goals, the Society soon found itself important allies in Republican presidential administrations.

Society Members Gain Influential Positions in the Executive and Judicial Branches

The association between the Federalist Society and the Executive Branch began during the Reagan administration when Michael Horowitz, Reagan’s Director of the Office of Management and Budget, contacted the Society’s founding members and began introducing them to key people in the Reagan administration (Teles 2008). Edwin Meese—Counselor to the President (1981–1985) and Attorney General (1985–1988)—was another early supporter of the organization (Shapiro 1998; Teles 2008). Meese also urged all lawyers at Justice to become affiliated with the Federalist Society (Landay 2000). To this end, in 1985, the Federalist Society created its lawyers’ division for practicing attorneys, law professors, and judges. Meese then began elevating Federalist Society members to positions of importance in the Reagan Justice Department. By 1986, all twelve of the Assistant Attorneys General in the Justice Department were tied to the Federalist Society (Lewis 1991).¹ Notably, the three original founders of the Society, Steven Calabresi (from Yale) and David McIntosh and Lee Liberman (from Chicago), held key policy making positions in the Reagan Justice Department (*New York Times* 1986). With a Justice Department replete with Federalist Society supporters, it was not long before the Reagan administration began selecting Society allies for important seats on the federal bench, including Antonin Scalia to the Supreme Court. Reagan made all three of the Society’s original faculty advisors federal court judges.²

The Society continued to wield significant influence in the George H. W. Bush (“Bush [41]”) Justice Department. Federalist Society members C. Boyden Gray (Counsel to the President) and Lee Liberman (Deputy Counsel to the President) were reportedly

Table 1
Federalist Society Members Nominated to U.S. Supreme Court and the U.S. Courts of Appeals by Administration, 1989–2005

Name	Court	Year First Nominated	Membership Listed on Questionnaire
Bush (41)			
Samuel Alito	3rd Circuit	1990	Yes
Lillian Bevier ⁺	4th Circuit	1991	Not available
Dennis Jacobs	2nd Circuit	1992	Yes
Francis Keating ⁺	10th Circuit	1991	Not available
Michael Luttig	4th Circuit	1991	No
Sheldon Plager	Federal Circuit	1989	Yes
John Roberts ⁺	D.C. Circuit	1992	Not available
Clarence Thomas	D.C. Circuit	1989	No
Clarence Thomas	Supreme Court	1991	No
Bush (43)			
Samuel Alito	Supreme Court	2005	Yes
Carlos Bea	9th Circuit	2003	Yes
Janice Brown ⁺⁺	D.C. Circuit	2003	Yes
Jay Bybee ⁺⁺	9th Circuit	2001	Yes
Michael Chertoff	3rd Circuit	2003	No
Edith Clement	5th Circuit	2001	Yes
Steven Collonton	8th Circuit	2003	Yes
Deborah Cook ⁺⁺	6th Circuit	2001	No
Miguel Estrada ⁺	D.C. Circuit	2001	Yes
Thomas Griffith ⁺⁺	D.C. Circuit	2004	No
Raymond Gruender	8th Circuit	2003	Yes
Harris Hartz	10th Circuit	2001	Yes
Brett Kavanaugh ⁺⁺	D.C. Circuit	2003	Yes
Carolyn Kuhl ⁺	9th Circuit	2001	No
Michael McConnell	10th Circuit	2001	Yes
David McKeague ⁺⁺	6th Circuit	2001	Yes
Priscilla Owen ⁺⁺	5th Circuit	2001	No
William Pryor ⁺⁺	11th Circuit	2003	Yes
John Roberts ⁺⁺	D.C. Circuit	2001	No
John Roberts	Supreme Court	2005	No
John Rogers	6th Circuit	2001	Yes
Henry Saad ⁺	6th Circuit	2001	Yes
Jeffrey Sutton ⁺⁺	6th Circuit	2001	Yes
Diane Sykes	7th Circuit	2003	Yes
Timothy Tymkovich ⁺⁺	10th Circuit	2001	Yes

⁺Not confirmed.

⁺⁺Confirmed in subsequent congressional session.

very involved in choosing Bush (41)’s circuit court judges and Supreme Court justices (Miner 1992). This period thus saw a second Society member appointed to the Supreme Court (Clarence Thomas) and eight more members nominated to the courts of appeals (though three were not confirmed). Set forth in Table 1 is a list of all Federalist Society members nominated by presidents Bush (41) and George W. Bush (“Bush [43]”) to the Supreme Court and the U.S. Courts of Appeals.³

After Clinton was elected in 1992, the Federalist Society became a “Justice Department in exile” (Neas, quoted in Bossert 1997). However, during this

period, Society members continued to network, and young lawyers affiliated with the Society were awarded prominent clerkships with conservative federal judges also affiliated with the Society (Bossert 1997). With the election of Bush (43) in 2000, however, Society members would once again gain prominent positions in the federal government, including many high-ranking current and former Justice Department officials.⁴ But, what sets the Bush (43) administration apart from prior Republican administrations is its reliance on the Federalist Society to fill a *majority* of its appointments to the Supreme Court and courts of appeals.

As we try to monitor the legal DNA of President [W.] Bush's [judicial] nominees, we find repeatedly the Federalist Society chromosome. Why is it that membership in the Federalist Society has become the secret handshake of the [W.] Bush nominees for the federal court? (Benac 2005, 2, quoting Durbin)⁵

Both of Bush (43)'s Supreme Court nominees, and more than two-thirds of Bush (43)'s nominations to the courts of appeals made in his first term are Federalist Society members (see Table 2).

Liberal Interest Groups Accuse the Federalist Society of a Right Wing Cabal

Notwithstanding the significant influence the Society and its members have wielded in three straight Republican administrations in terms of staffing the Justice Department, the West Wing, and the federal bench, the organization has always maintained that it is a nonpolitical organization. Thus, for example, the Society has made a point of refraining *qua* organization from taking public stands on particular legal cases or endorsing the appointment of specific people to the bench (Bossert 1997). But, liberal activists counter, the Society nonetheless seeks to influence legal decisions through a different method than that traditionally followed by interest groups: by encouraging Republican lawyers to join the organization; indoctrinating them to adopt the Society's conservative method of constitutional interpretation known as textualism; and then seeing that Federalist Society members are strategically placed in positions of influence in the Justice Department and on the federal bench.

In support of their argument, liberal activists are quick to point to a document prepared by Society

affiliates serving in the Reagan Justice Department (Cavendish 2002; Gandy 2002; Neas 2002).⁶ Specifically, in 1988, the Reagan Justice Department issued the Guidelines on Constitutional Litigation (the "Guidelines"). The Guidelines were intended to act as a roadmap for U.S. Attorneys litigating cases in federal district courts (Department of Justice 1988, 1). The Guidelines were not mere suggestions, but instead, "should presumptively be followed" (Department of Justice 1988, 1).

As a primary tenet of constitutional interpretation, the Guidelines instructed U.S. Attorneys to advance, whenever possible, constitutional arguments using textualist interpretations of the Constitution. Prosecutors' primary duty at this stage of the litigation was to "educate" lower court judges on the theory of textualism and to lay the groundwork for strong appellate arguments (Department of Justice 1988, 3). The Guidelines also set forth specific areas of law for which these textualist arguments were most relevant, including cases involving civil liberties for criminal defendants, federalism, civil rights for minorities, and privacy rights. To this end, the Guidelines specifically instructed prosecutors to argue in legal briefs for the reversal of some of the Supreme Court's most seminal decisions of the twentieth century, including *Roe v. Wade*, *Miranda v. Arizona*, and *Wickard v. Filburn* (Department of Justice 1988, 54, 82, 86).⁷

In conformance with the Guidelines' vision—and consistent with the Society's central tenet to advance a textualist interpretation of the Constitution—Republican administrations have repeatedly tried to overturn longstanding Supreme Court precedents that conservatives often characterize as "liberal" decisions made by "activist" justices and judges. For example, in *Planned Parenthood v. Casey* (1992), the Bush (41) administration sought to overturn *Roe* and in *Dickerson v. U.S.* (2000), it sought to overturn *Miranda*. In both of these cases, the Federalist Society members then sitting on the Supreme Court (Scalia in *Casey*; Scalia and Thomas in *Dickerson*) voted to overturn *Roe* and *Miranda*.⁸

Liberal interest group leaders also contend that, with the increasing number of Federalist Society members on the federal courts, the organization's goals—first articulated during the Reagan administration—are well within reach:

Their [the Federalist Society members'] goal was to change the way that the law is made and enforced in this country. To make a sea change

in the way everything was done. And they have done it little by little. They started small. And they have in the last 20 years, I think, already accomplished an enormous amount of what they wanted to do and it has gone completely under the radar. (Gandy 2002)

Other liberal activists concur, and fear that, ultimately, the Society will gain enough clout to put constitutional interpretation “back where it was before 1937” (Neas 2002). Others worry specifically about the future of civil rights laws passed in the 1960s (Gandy 2002; see also Aron 2002; Cavendish 2002).⁹ In short, liberal activists believe that the Society is seeking to “accomplish in the courts what Republicans can’t achieve politically” (Gandy 2002; Neas 2002)—that is, to overturn progressive Supreme Court precedent and congressional legislation through the appointment of extremely conservative federal court judges.

Hypothesis, Data, and Method

We now subject to empirical analysis the claim that Federalist Society members sitting on the federal bench are more conservative than other jurists, including other Republican jurists:

Judges who are affiliated with the Federalist Society are more conservative in their judicial decision making behavior than judges who are not affiliated with the Federalist Society.

We test this hypothesis using data on decision making behavior of judges who sit on the U.S. Courts of Appeals. As the level of the federal judicial hierarchy with the most Federalist Society members, data on decision making in the courts of appeals provides the best opportunity to test our hypothesis.

We focus on two separate legal issues to test our hypothesis, one criminal and one civil: (1) does a search alleged to be illegal under the Fourth Amendment require that incriminating evidence be suppressed at trial; and (2) should a congressional statute be declared unconstitutional because Congress has overstepped its authority to the detriment of a state’s sovereignty in violation of the Tenth or Eleventh Amendments? These issues were chosen for two critical reasons. First, while one of these issues, states’ rights, is inextricably intertwined with the Society’s core mission, the other, law and order, has been an issue embraced by the Republican Party (including

Republican judges) since the Nixon administration (Scherer 2005). Second, both legal issues present a judge with clear choices between liberal and conservative outcomes. In search and seizure cases, the judge must either suppress evidence that incriminates the defendant so as to safeguard core constitutional rights (the liberal position) or deny defendant’s claim of a constitutional violation to maintain “law and order” (the conservative position). In the states’ rights area, the judge must choose between curtailing the power of the federal government (the conservative position) and expanding it (the liberal position).

The unit of analysis is each judge’s vote (not the ultimate holding of the case), rendered on a three-judge or *en banc* appellate panel in all cases meeting certain criteria set out below.¹⁰ The cases included in this study are the entire universe of “nonconsensual” decisions (defined below) in the two selected issue areas rendered by the United States Courts of Appeals, including all eleven numbered circuits, the District of Columbia Circuit, and the Federal Circuit. For the search and seizure data we use all cases decided between January 1, 1994, and December 31, 2005. For the states’ rights data, we use all cases decided from January 1, 1996, through December 31, 2006. Included in the analysis are the votes of circuit court judges in active service and circuit court judges with senior status. District court judges sitting by designation were excluded. Not only are these judges not necessarily fungible with appellate judges (Brudney and Distlear 2001), but also, there is insufficient newspaper reporting on these appointees to code the Federalist Society membership variable as described below. We include the votes of judges appointed by Presidents Bush (41), Clinton, and Bush (43).¹¹

The analysis focuses specifically on “nonconsensual” decisions rendered by the courts of appeals in the relevant time frame. To be considered a “nonconsensual” decision, one of two conditions must be met: (1) the appellate panel—be it a regular panel or an *en banc* panel—rendered a split decision (i.e., there was at least one dissenting vote against the majority ruling); or (2) the appellate panel, though unanimous in its own decisions, reversed or vacated the decision of the district court judge below.¹²

We identified the cases comprising these two data sets from a series of comprehensive searches on the electronic database WESTLAW. Included in the data are decisions officially designated by the court for publication in the *Federal Reporter*, as well as decisions not designated by the court for official publication but reprinted in full on the WESTLAW database.¹³

We constructed two models (one for each data set), employing a number of control variables in addition to the major explanatory variable, Federalist Society membership.

Dependent Variables

The dependent variable in the states' rights data set is the vote of each individual judge either agreeing or disagreeing with the plaintiff that the state government's rights prevail over the federal government's rights. In the Tenth Amendment cases, this would mean a vote agreeing or disagreeing with the states' rights advocate that the federal government has exceeded its power under Article I, Section 8 of the Constitution. In the Eleventh Amendment cases, this would mean a vote agreeing or disagreeing with the state that it is immune from suit, and that the federal government has not properly abrogated state sovereign immunity in the challenged congressional statute. Collectively, these two categories of cases are referred to throughout as "states' rights" cases.

The dependent variable in the search and seizure data set is the vote of each individual judge either agreeing or disagreeing with the criminal defendant that, by virtue of the government's violation of his or her Fourth Amendment rights, incriminating evidence of the defendant's guilt must be suppressed at trial.

Independent Variables

Federalist Society membership. Because the Federalist Society is a loose confederation of law students, lawyers, and judges, it is difficult to pin down precisely who on the federal bench is officially a dues-paying "member" of the Society as opposed to someone merely affiliated with the organization and its policy stances (Peterson 2005). Membership lists are carefully guarded. Accordingly, we code this variable two ways, each using a different definition of Federalist Society Affiliate. The first definition is a judge who listed that he or she was a member of the organization on his or her questionnaire submitted to the Senate Judiciary Committee as part of the confirmation process. Questionnaires are available to the public for all nominees from 1989 to the present.

The problem with this very narrow definition of Federalist Society member is that, increasingly, actual members of the Society have chosen to omit their affiliation with the organization on their questionnaires. This trend came to light during the confirmation hearings of Chief Justice John Roberts in 2005. Though his questionnaire stated nothing about being a

member of the Federalist Society, the *Washington Post* uncovered that he was not only a member, but was a member of the Society's leadership council (Lane 2005). Moreover, during the earlier days of the Society's existence, when there were fewer practicing attorneys chapters, lawyers and law professors who were appointed to the bench may have had very close ties to the Federalist Society but technically were not "members." Accordingly, such close affiliates may have omitted their ties to the organization on their questionnaire because they were not dues-paying "members."

To account for the under-reporting of Federalist Society membership on Judiciary Committee questionnaires, we alternatively code this variable by including not only those listing membership on their questionnaires, but also, judges who are identified in at least two separate newspaper articles as "members" of the Federalist Society. Nominees characterized as merely affiliated in some way with the Society were not counted as being members for purposes of this study.¹⁴ Newspaper articles were identified through the Lexis/Nexis and Factiva databases. Because news of a court of appeals nomination is often of more local interest, rather than of national interest, it was necessary for us to search beyond what are considered national newspapers like the *New York Times*, the *Wall Street Journal*, and the *Washington Post* (though these newspapers are included in the two data bases we used for our searches).

The states' rights model also includes a number of variables that previous scholarship has identified as relevant to analyzing judicial voting in federalism cases (e.g., Collins 2006; Solberg and Lindquist 2006) or more generally in models involving judicial review (Sala and Spriggs 2004). These include the principal *legal issue* (Tenth versus Eleventh Amendment challenge); the *ideological proximity of the challenged statute to the judge*; the *ideological proximity of challenged statute to Congress*; the *additional number of liberal amicus curiae briefs* (versus conservative briefs); and the *age of the statute*. For the search and seizure model, we include a number of variables related to facts in search and seizure cases that previous scholarship has identified as impacting judicial decision making behavior (e.g., Segal 1983, 1986). These include *place of the search*, *presence of a warrant*, *extent of the search* (limited search such as a pat-down versus a full-blown search) and whether the search took place at an *international border*.¹⁵

Table 2
States' Rights Model
Nonconsensual Decisions, U.S.
Courts of Appeals, 1996–2006⁺

	β	Robust Standard Error	<i>P</i>
Judicial Background Variables			
Federalist Society member	1.90	0.61	0.001
Ideology of judge	1.79	0.74	0.008
Black judge	-1.05	0.58	0.036
Female judge	-0.01	0.43	0.492
Senior judge	0.89	0.84	0.143
Case Variables			
Eleventh Amendment	-0.63	0.38	0.047
Additional liberal amici	-0.50	0.14	0.000
Judge-policy proximity	0.48	0.50	0.168
Congress-policy proximity	-7.22	3.22	0.012
Age of statute	0.00	0.01	0.407
Constant	-1.48	1.06	0.082

Note: (pro-states' rights vote coded 1; anti-states' rights coded 0).
N = 229

Chi-squared = 68.51; significant at .000

Pseudo *R*-squared = .214

P values are one-tailed.

⁺Coefficients for circuit control variables are omitted. Seventh Circuit was used as the baseline in the model.

In both models, we also control for variables related to the judge's background including *political ideology*, *race*, *gender*, *circuit* and whether the judge has taken *senior status*. We detail the coding of all independent variables in the online appendix.

Results

Both models are estimated using logit, as our dependent variables are measured dichotomously. Because some judges in the data sets vote multiple times, our models use robust standard errors to correct for potential heteroskedasticity and also cluster around each judge to account for possible nonindependence between observations.¹⁶ Although dummy variables for each circuit were included in the models, we do not report these coefficients in the tables. The Seventh Circuit was used as the baseline circuit in the model because it is generally deemed neither a particularly liberal nor conservative circuit.

Table 2 reports the results of the states' rights model. As expected, the Federalist Society coefficient is positive and statistically significant (using $\alpha = .05$, one-tailed test). This is true even after controlling for political ideology (which is also statistically significant). As hypothesized, members of the Federalist

Society do exhibit more conservative voting behavior than nonmembers.

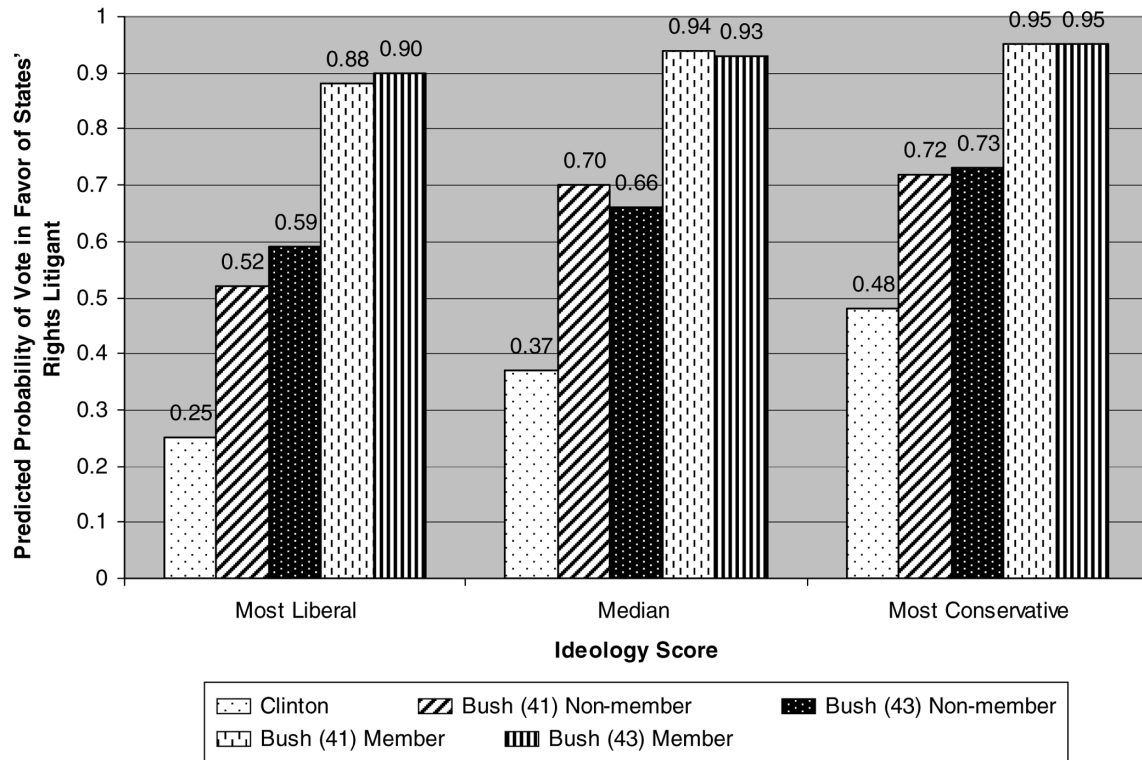
Turning to the rest of the states' rights model, several other coefficients are statistically significant. A judge is less likely to vote for the states' rights position if he is black; an Eleventh Amendment challenge is made; more pro-federal government amici briefs are filed; and the greater the distance the policy is from the current Congress.

To facilitate interpretation of the logit coefficients we have calculated predicted probabilities of votes in favor of the states' right litigant. We assume the following conditions: a white male judge in active service; deciding a Tenth Amendment case; with the same number of amici briefs filed on the pro- and anti-federal rights sides; and involving a federal statute that has moderate ideological distance from Congress. We present the pro-states' rights vote by appointing president, ideology, and Federalist Society membership. These post-estimation probabilities are depicted in Figure 1.

From Figure 1 we can see that the most liberal Clinton appointee has a 0.25 probability of voting for the state's rights position, the median Clinton appointee a 0.37 probability, and the most conservative Clinton appointee a 0.48 probability. For Bush (41) appointees who are not Federalist Society members, the most liberal of this cohort has a 0.52 probability of voting for the conservative position, the median a 0.70 probability, and the most conservative a 0.72 probability. For Bush (43) judges who are not members of the Federalist Society, the most liberal of this cohort has a 0.59 probability of voting for the states' rights position, the median judge a 0.66 probability, and the most conservative a 0.73 probability. Even Republican appointees not affiliated with the Society stand solidly to the right of Democratic appointees on the ideological spectrum when deciding states' rights issues.

For Federalist Society members, there is an even higher probability that the judge will support a textualist interpretation of the Tenth and Eleventh Amendments. In the Bush (41) administration, for a judge who is deemed less conservative by traditional judicial ideology measures, membership in the Society raises the probability of casting a conservative states' rights vote from 0.52 to 0.88 (a difference of 0.36); for a judge whose ideology score places him at the median of this cohort, membership increases the probability of casting a conservative vote from 0.70 to 0.94 (a difference of 0.24); and for the most conservative among the cohort, membership increases

Figure 1
Predicted Probabilities of Vote in Favor of States' Rights Litigant by Appointing President, Ideology, and Federalist Society Membership⁺



⁺Assumes a white male judge in active service, deciding a Tenth Amendment case with an equal number of amici briefs on both sides, and involving a statute that is moderately distant from the median member of Congress.

the likelihood of a pro-states' rights vote from 0.72 to 0.95 (a difference of 0.23). Results for Society members appointed by Bush (43) are very similar to those for Bush (41) appointees. For the Bush (43) appointee with the most liberal ideology score, Society membership increases the likelihood of a conservative federalism vote from 0.59 to 0.90 (a difference of 0.31); the Bush (43) appointee with the median ideology score from 0.66 to 0.93 (a difference of 0.27); and the most conservative from 0.73 to 0.95 (difference of 0.22).

With respect to the search and seizure cases we ran two separate models, one using our broad definition of Federalist Society member (identified through questionnaires and newspaper articles) and one the narrower definition (questionnaires only). Because there was no substantive difference between the results of the two models, we present only the results of the model using the broader definition of Federalist Society membership (see Table 3).¹⁷

Like the states' rights model, we again find the coefficient for Federalist Society membership is statistically significant, even after controlling for ideology (which is slightly higher than the .05 significance level used in this study). As hypothesized, Society members are more likely to uphold the government's search as consistent with the Fourth Amendment (the conservative position) than a nonmember. We also find that black judges are less likely than white judges to rule in favor of the government when a search is challenged in court, and senior judges more likely than active judges to rule in the government's favor. Moreover, although slightly above the $p = 0.05$ level of statistical significance (one-tailed test), searches made with a warrant are more likely to be upheld than warrantless searches.

As we did with the states' rights model, we also calculated the predicted probability of a conservative search and seizure vote to facilitate interpretation of the logit coefficients. We assume a full-blown search of a home without a warrant and decided by a white male

Table 3
Search and Seizure Model
Nonconsensual Decisions,
U.S. Courts of Appeals, 1994–2005⁺

	β	Robust Standard Error	<i>P</i>
Judicial Background Variables			
Federalist Society member	1.60	0.38	0.000
Ideology of Judge	0.47	0.30	0.055
Black judge	-1.16	0.31	0.000
Female judge	0.04	0.21	0.420
Senior judge	0.92	0.54	0.045
Case Variables			
Place of Search			
Home	Baseline	—	—
Car	0.42	0.22	0.026
Luggage	0.09	0.29	0.372
Person	0.15	0.24	0.261
Warrant obtained	0.44	0.28	0.056
Limited search	0.01	0.21	0.484
Border search	-0.29	0.41	0.240
Additional liberal amici	0.23	0.35	0.252
Constant	-0.80	0.43	0.031

Note: (vote against defendant coded 1; vote against defendant coded 0).

$N = 923$

Chi-squared = 128.31; significant at .000

Pseudo *R*-squared = .108

P values are one-tailed.

⁺Coefficients for circuit control variables are omitted. Seventh Circuit was used as the baseline in the model.

judge still in active service. These post-estimation probabilities are depicted in Figure 2.

As illustrated in Figure 2, the most liberal Clinton appointee has a 0.31 probability of voting against a criminal defendant in a search and seizure case, the ideologically moderate Clinton appointee a 0.34 probability, and the most conservative a 0.37 probability. For the most liberal Bush (41) appointee who is not a member of the Federalist Society, there is 0.38 probability of a vote against a defendant, a 0.42 probability for a judge who lies in the middle of the ideological spectrum for this presidential cohort, and a 0.44 probability for the most conservative among this cohort. For non-member Bush (43) appointees, the most liberal of the cohort has a 0.40 probability of casting a conservative criminal decision, the median judge a 0.41 probability, and the most conservative a 0.43 probability.

More importantly, across the board, Federalist Society membership substantially increases the likelihood that a Republican judge will vote against a criminal defendant on a suppression motion turning on the

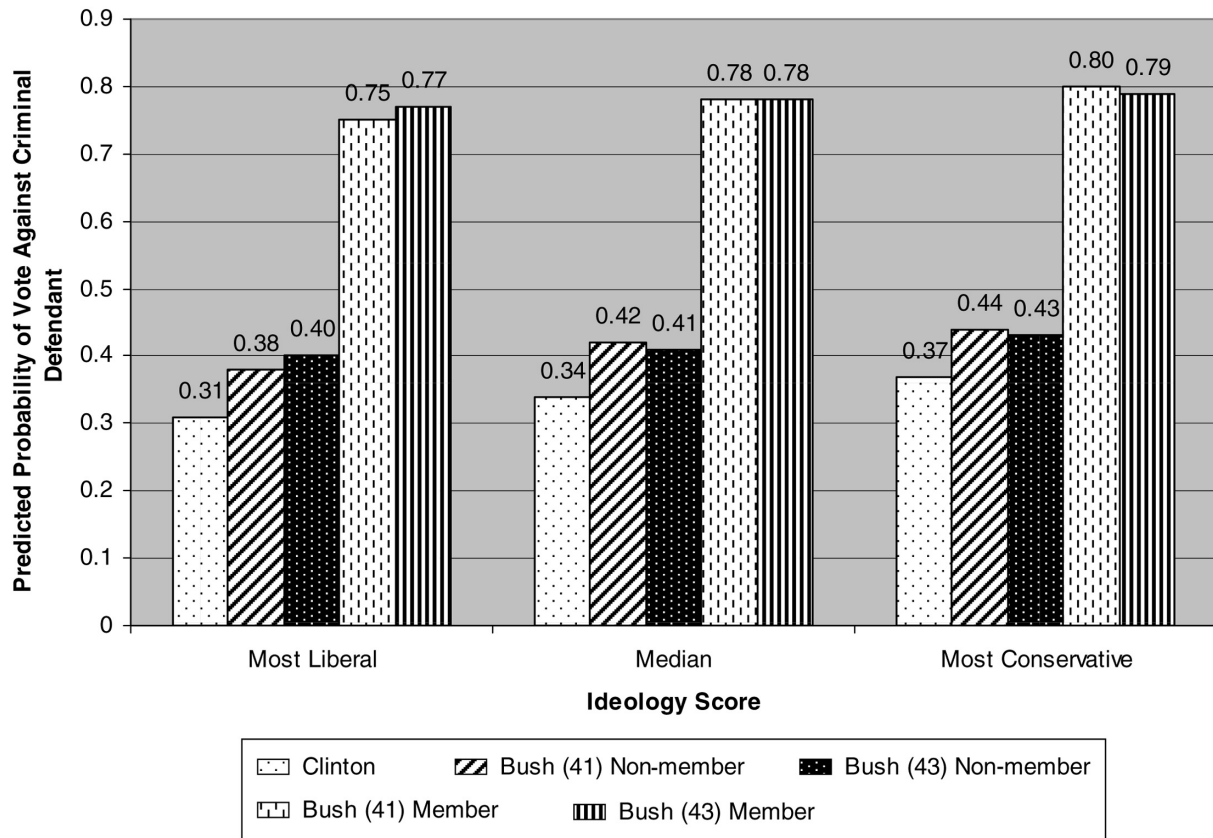
Fourth Amendment. In the Bush (41) administration, for a judge who is deemed less conservative by traditional judicial ideology measures, membership in the Society raises the probability of casting a conservative criminal vote from 0.38 to 0.75 (a difference of 0.37); for a judge whose ideology score places him at the median of this cohort, membership increases the probability of casting a conservative vote from 0.42 to 0.78 (a difference of 0.36); for the most conservative judge in the cohort, membership increases the likelihood of a conservative vote from 0.44 to 0.80 (a difference of 0.36). For Bush (43) appointees, Society membership increases the likelihood of a conservative vote from 0.40 to 0.77 (a difference of 0.37) for the most liberal of the cohort; from 0.41 to 0.78 (a difference of 0.37) for the median judge in the cohort; and from 0.43 to .79 (a difference of 0.36) for the judge with the most conservative ideological score in the cohort.

Why Is the Society Influencing Decision Making?

Without question, our results demonstrate that Federalist Society membership has a statistically significant and substantively large impact on judicial decision-making behavior on the U.S. Courts of Appeals. This is true not only with respect to legal issues inextricably intertwined with the Federalist Society, such as states' rights, but also with issues long associated with the Republican Party writ large. We now consider *why* the Federalist Society may be influencing judicial decision making.

There are two possible explanations as to why Federalist Society membership increases the likelihood of a conservative vote. One hypothesis is that the Society *attracts* its members from among those Republican lawyers and law students who already lie on the conservative end of the ideological continuum; this theory we term the "attraction" theory. Pursuant to the attraction theory, a variable controlling for Society membership may be conceived of as simply measuring a judge's political ideology. A second hypothesis is that the Society *converts* Republican lawyers who join its ranks to adopting the originalist method of constitutional interpretation. In other words, membership in the Society somehow socializes lawyers who may not ascribe to the originalist mode of constitutional interpretation when they join the organization—instead ascribing to the "living and evolving" constitutional paradigm—in such a manner that, over time, they are transformed into proponents of originalism; this theory is termed the "conversion" theory.

Figure 2
Predicted Probabilities of Vote against Criminal Defendant by Appointing President, Ideology, and Federalist Society Membership for the Search and Seizure Model[†]



[†]Assumes a white male judge in active service, deciding a case involving a full-blown search of a home with no warrant.

Unfortunately, given our data, it is impossible to reject the null hypothesis of either theory. At first glance, it may seem that we could rule out the attraction theory because our models control separately for Society membership and the judge's political ideology, and membership is still statistically significant. One could argue that if Society membership were measuring political ideology, then we would expect that this coefficient would *not* be statistically significant when political ideology is controlled for separately. However, it is just as plausible that the political ideology measure we use—and that is now the standard measure in studies of lower court decision-making behavior (Giles, Hettinger, and Pepper 2001)—simply does not accurately capture the political ideology of the new breed of Republican judge which includes members of the Federalist Society. This is because the Giles et al. measure is predicated exclusively on traditional notions of what it means to be a Republican judge, measures developed prior to the predominance

of Society members in the Republican cohort of judges on the federal bench.¹⁸ Thus, in our models, it may be that the membership and ideology measures are *both* capturing political ideology.

Our data also presents limitations in making firm conclusions about the conversion theory. On the one hand, our finding that Society members are almost twice as likely as other Republican judges to render a conservative vote on a search and seizure motion seems to refute the notion that the Society is “converting” otherwise traditional Republicans to their way of thinking. This is because of the fact that such a “law and order” approach to criminal civil liberties cases has been a mainstay of Republican judicial selection since the Nixon administration thus pre-dating formation of the Society (Goldman 1997, 198). In short, Republican lawyers would not need the Federalist Society to introduce them to the idea that there is a competing approach to Fourth Amendment interpretation from that set down by Warren Court

precedents. Thus, the fact that Federalist Society members are significantly more likely to adopt an originalist reading of the Fourth Amendment than nonmember Republicans suggests that the Society is simply attracting the most conservative lawyers in the Republican Party—the same type of lawyers that Nixon was trying to identify in declaring a “law and order” litmus test for his judicial appointments.

But, to reject the null hypothesis (that the Society is not converting members), we would optimally need temporal data on judicial decision making—i.e., decisions made before and after particular judges joined the Society. More conservative voting behavior by a judge after joining the organization would be compelling evidence that the Society converts members into more conservative jurists; the absence of change would suggest that conversion is not at work. Such a study, however, is not possible using legal decisions given that Society-affiliated judges are chosen by Republican presidents specifically because they are *already* members of the organization and, as such, can be counted on to decide cases consistent with the president’s conservative policy agenda. One possible study that may be able to overcome this hurdle—and, critically, a research design not reliant on legal decisions—would be to conduct interviews with law students who are members of the Federalist Society and explore, through qualitative methods, the reasons why they joined the organization and how membership may have impacted their views on constitutional interpretation.¹⁹

Long-Term Implications of This Study

Notwithstanding the fact that no definitive conclusion can be drawn on why the Federalist Society influences judicial decision making, there are still important implications suggested by our central empirical finding. First, this study brings into serious question the method that political scientists are currently using to measure the political ideology of lower court judges. That method imputes senators’ and presidents’ Poole–Rosenthal ideology scores (Poole and Rosenthal 1997)—based on their public voting records (for congressmen) and public stances on congressional statutes (for presidents)—to lower court judges who have never taken a stand on these bills. Moreover, to the extent that these Republican senators and presidents are not affiliated with the Federalist Society, we now have clear evidence that the elected officials’ ideology scores are underestimating the conservativeness of Republican-appointed judges

who are affiliated with the Society.²⁰ Future studies of judicial voting behavior should include control variables for Federalist Society membership (as well as race and gender) in addition to the Poole–Rosenthal scores.

Second, this study demonstrates that there is now at work a new model for interest groups to follow in pursuit of their goal of influencing law and legal policy. Heretofore, studies of interest group influence on legal decision making have centered on three distinct strategies: sponsoring or financing federal court litigation (e.g., Epstein 1985; Schlozman and Tierney 1986); filing amicus curiae briefs in other parties’ federal court cases (e.g., Caldeira and Wright 1988); and lobbying the president and senators concerning judicial appointments to the Supreme Court (Caldeira and Wright 1998) and the lower federal courts (Bell 2002; Scherer 2005). The Federalist Society, in contrast, has forged a new path. It has sought to influence decision making by educating young lawyers to reject the conventional method of constitutional interpretation taught in the nation’s law schools, and instead, adopt originalism as the only correct method of interpretation. In short, through their decades-long intellectual and networking efforts, the Society has made originalism a widely accepted alternative to “living constitutionalism” and, as such, has provided conservative lawyers, sitting judges, and future judges the legal tools they need to reach conservative outcomes in constitutional cases. In this way, the Society accomplishes what more traditional grass roots organizations do, not by lobbying elected officials or litigating in court, but rather, by educating Republican lawyers.

Third, this study has serious implications on what types of judges we can expect future Republican presidents to appoint. Given how accurate and powerful a predictor Society membership is as to the likelihood that a potential nominee will have an extremely conservative voting record, it should be expected that future Republican presidents (at least those elected on a conservative platform) will increasingly turn to the ranks of the Federalist Society to nominate the majority of their federal court judges. We have already witnessed such a trend in the last two decades (see Table 1). Society membership, in essence, eliminates for a conservative Republican president the uncertainty surrounding a nominee’s ideology and thus allows that president to avoid the situation that Bush (41) faced when it became apparent that his first Supreme Court appointee, David Souter, was not as conservative as originally thought, or even conservative at all.

Fourth, and related to the last point, as Republican presidents increasingly turn to the Federalist Society to

make their federal court nominations, we should in turn expect Democratic senators to oppose Republican federal court nominations with greater frequency. Democratic senators come under a lot of pressure from liberal interest groups to block confirmation of Society members who are viewed as hostile to progressive social issues. Accordingly, it is likely that the judicial confirmation process will become further polarized than it is today.

Finally, with more Federalist Society members on the bench, we should also, increasingly, see written constitutional opinions focusing on the text and the original intent of the Framers, rather than on recent history and currently acceptable social norms as non-Society members have tended to do. Future research should focus on content analyses of the case law to track this change.

Conclusion

The results of this study confirm liberal interest groups' claims that Republican-appointed judges tied to the Federalist Society are more conservative than judges who are not members. If the trend started by Bush (43)—making Society members the majority of appointments to the two highest levels of the federal judicial hierarchy—continues with future Republican presidents, the Federalist Society will arguably have gone a long way in realizing its original goal to change the way we, as Americans, interpret the Constitution. In short, there will be a sizable presence of Society members on the federal bench, and these jurists will interpret the Constitution according to the dictates of originalism, not the method which sees the Constitution as an evolving document.

Notes

1. Given that the lawyers division of the Society was not started until 1985, and had few chapters in the mid-1980s, practicing attorneys could not formally become members of the Society during most of the Reagan administration. Instead, during this early period in the Society's history, Justice Department officials and judges were characterized as "friends of" or "sympathetic to" the organization by virtue of speaking at one of the student chapters' symposia (Carter 2001). In contrast, by 2001, when Bush (43) took office, there were an estimated twenty thousand practicing attorneys who were full-fledged "members" of the Society's Lawyers Division (www.fed-soc.org/aboutus/id.28/default.asp).

2. Antonin Scalia and Robert Bork were appointed to the D.C. Circuit appellate court and then the Supreme Court (though Bork ultimately was not confirmed to the high court), and Ralph Winter to the Second Circuit.

3. As detailed below, we used two alternative methods to measure Federalist Society membership. Both the broad definition (judges identified in newspaper articles as "members" of the Society) and the narrow definition (judges who identified themselves as members on the Judiciary Committee questionnaire) are noted on Table 1.

4. For example, members included Theodore Olson (former Solicitor General), Paul Clement (current Solicitor General), Larry Thompson (former Deputy Attorney General), and Viet Dinh (former Assistant Attorney General for Legal Policy).

5. Richard Durbin (D-IL) is a member of the Senate Judiciary Committee.

6. Elizabeth Cavendish is the former General Counsel of NARAL Pro-Choice America; Kim Gandy is the president of the National Organization for Women; Ralph Neas is the president of People for the American Way.

7. *Roe* held that the 14th Amendment's Due Process Clause encompasses a substantive right to privacy, and that includes a woman's right to terminate a pregnancy. *Miranda* held that the Fifth Amendment's ban on self-incrimination—together with the Sixth Amendment's requirement that all indigent criminal defendants be afforded appointed counsel—requires that the police inform people of these rights before interrogating them. *Wickard* held that a congressional statute prohibiting individuals from growing wheat for personal consumption was sufficiently related to interstate commerce so that it may be regulated by the federal government.

8. Current Supreme Court justice Samuel Alito, also a Society member, was on the Third Circuit panel that heard *Casey*; Alito voted to uphold Pennsylvania's restrictive abortion statute *in toto*.

9. Nan Aron is the president of the Alliance for Justice.

10. Because of the possibility that *en banc* decision making differs from decision making on a three-judge panel, we ran alternative models for each data set analyzing only the votes made on three-judge panels. The coefficients for Society membership were substantively comparable to those in the models using all votes.

11. Although the cases analyzed contained votes of Presidents Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter, we excluded these votes because these appointments were made before the Federalist Society was founded. We exclude the votes of Reagan appointees because, as explained above (see note 1), membership opportunities in the Society for practicing attorneys during the Reagan administration were very limited.

12. In contrast to the Supreme Court, the circuit courts do not have discretionary dockets. As such, they decide over 99 percent of all federal appeals taken in the United States. Because the vast majority of these appeals are not "close" cases, but are taken so as to exhaust all possible legal avenues, there is generally only one clear decisional path available to the sitting judges. In other words, the case may be finally adjudicated—and full agreement reached by the appellate panel and the district court judge—without underlying political ideologies playing a role in the decision-making process. In short, fully consensual decisions in the lower federal courts are generally deemed to reflect decisions based on precedent, statutes, or facts (Goldman 1966; 1975).

13. There is some debate as to whether unpublished decisions bias a sample of cases (e.g., Songer 1988). Accordingly, we ran the analysis without these votes as well and the substantive results were largely the same.

14. For example, neither William Haynes—merely referred to as “a regular” at Society meetings (Smith and Eggen 2005) nor D. Brooks Smith—said to have given speeches to the Society—(Lewis 2004) were coded as members.

15. Inter-coder reliability tests were performed on 10 percent of the observations in the two data sets. The kappa statistics ranged from .9 to 1 in the states’ rights data set, and .7 to 1 in the search and seizure data; both ranges indicate a substantial level of agreement in the coding (Landis and Koch 1977; Spriggs and Hansford 2000).

16. In the states’ rights model, there were a total of 86 judges contributing votes. The number of votes per judge ranged from one to eight; the median number of votes per judge was two. In the search and seizure model, there were a total of 120 judges contributing votes. The number of votes per judge ranged from one to twenty-six; the median number was five.

17. Because there were significantly fewer observations in the states’ rights data, we lacked a sizable enough sample of Federalist Society members under the narrow definition to run two separate models.

18. As explained in Appendix A (available in the online version of the article) these scores are derived from Poole–Rosenthal common space ideology scores, which are calculated specifically for presidents and members of Congress. A lower court judge is presumed to have the exact same ideology score as either his appointing president (when neither home state senator is from the same party as the president) or his home state senators (when at least one is from the president’s party).

19. We wish to thank one of our anonymous referees for suggesting this novel approach designed to tease out the attraction versus conversion theories.

20. Similar problems exist with this method of measuring judicial ideology for Democratic-appointed judges. Despite the fact that studies have demonstrated black judges are more liberal than white judges in certain kinds of cases (Scherer 2005) and women judges more liberal than male judges (Boyd, Epstein, and Martin 2007), Poole–Rosenthal scores are not adjusted when a senator or president is a white male, and the judge a female or African American.

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