The Reagan Administration and the Rehnquist Court's New Federalism: Understanding the Role of the Federalist Society

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This article takes to task and complicates the narrative advanced by Professor Dawn Johnsen in her 2003 Indiana Law Review Article, “Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change.” Using evidence drawn from an in-depth examination of the speeches and writings of actors associated with both the early Federalists and the Reagan Administration, archival documents from the Ronald Reagan Presidential Library, as well as data gathered from personal interviews, this study presents a richer, more nuanced, and more complete narrative of the impact of the Reagan Revolution on the New Federalism. In sum, it finds that if we’ insert the fledgling Federalist Society here’ we can begin to tell a plausible story of conceptual influence that connects the Reagan Administration agenda with the Rehnquist Court federalism decisions.

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I. Introduction

Briefly stated, the aim of this article is to supplement and amend the narrative advanced in Professor Dawn Johnsen’s 2003 Indiana law review article, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*.\(^1\) This flagship article and the lessons drawn from it have given birth to a handful of subsequent publications, both academic and popular, a legal conference, and a left-legal working group.\(^2\) As the title suggests, Johnsen hopes to persuade her audience that the Rehnquist Court’s New Federalism doctrine\(^3\) is the product of a comprehensive constitutional agenda pursued by President Ronald Reagan. To make her case, she introduces readers to a set of previously unexamined documents generated by the Office of Legal Policy (OLP) in the Department of Justice under President Reagan. As she demonstrates, these reports describe in detail the Reagan Justice Department’s positions on issues of federalism and congressional power and reflect a strong desire to replace existing constitutional doctrine with interpretations based on the Original meaning of the Constitution.\(^4\) The bulk of her analytical contribution then consists of measuring these Justice Department recommendations against a series of Rehnquist Court’s opinions and teasing out the conceptual similarities between the two sets of texts. From this comparison, Johnsen concludes that the Rehnquist Court New Federalism doctrine should be understood, at least in part, as an example of Presidential influences on constitutional change.

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4 Johnsen, *supra* note 1, at 389-390.
Using an interpretive approach that emphasizes unpacking institutional contexts to examine the beliefs and activities of relevant actors, this article shows that while Johnsen’s research instincts are right-headed, her narrative presents a broad stroke portrait that obscures a much more subtle and detailed landscape of the actors and ideas involved in constitutional change. Bringing this landscape into sharper focus is the article’s primary objective. To do so, I present evidence drawn from an examination of the speeches and publications of actors associated with both the fledgling Federalist Society and the Reagan Justice Department, archival documents from the Ronald Reagan Presidential Library, as well as data gathered from personal interviews conducted in 2008. The article is organized as follows: Section II evaluates the Johnsen narrative of what was going on at the Reagan Justice Department, reviews existing literature and published accounts that challenge this interpretation, and presents a reconstructed narrative based on new archival research and interview data. Section III looks at the tenuous bridge of influence Johnsen builds between two groups of actors separated by more than a decade, challenges her explanation on conceptual grounds, and offers a set of more plausible links between actors in the Reagan Justice Department and actors on the Rehnquist Court. Section IV unpacks the thick context of two of the principal cases associated with the New Federalism, United States v. Lopez (1995) and United States v. Morrison (2000) and Section V concludes with some thoughts on the study of constitutional change.

II. Exploring The Thick Context of the Reagan Justice Reports

If the Department of Justice Office of Legal Policy (OLP) reports are to be seen as institutional context and potential stimuli for later Supreme Court decisions, this should be revealed by evidence about the political and intellectual context in which the reports themselves were produced. Based on other historical accounts, interview data and archival research, I show that even a beginning sketch of what was going on at Justice provides persuasive evidence that the roles of the fledgling Federalists in providing a

5 See generally Amanda Hollis-Brusky, Interpretive Theory, in HANDBOOK OF GOVERNANCE (SAGE publications, forthcoming 2009) (a useful examination of the epistemology and methodology associated with an interpretive approach to social science).
fair sum of the intellectual capital for the constitutional agenda attached to the Reagan Revolution should not be overlooked in any narrative about the emergence of the New Federalism.

A. Professor Johnsen’s Narrative

In her section on “The Reagan Revolution,” Professor Johnsen situates the Office of Legal Policy (OLP) reports within President Reagan’s larger public campaign for reducing the size of government. Other efforts Johnsen describes include President Reagan’s First Inaugural Address in which he announced his intention to “curb the size and influence of the Federal establishment” and his Federalism Executive Order of October 1987 which translated this concern into a directive, clearly stating that the “presumption of Sovereignty should rest with the individual States.” Johnsen also examines a series of public speeches given by Reagan’s Counselor turned Attorney General (AG) Edwin Meese III in 1986 that advanced an Executive branch understanding of constitutional law and, in doing so, directly and boldly challenged Supreme Court doctrine. These speeches, along with the responses they provoked from Justices William J. Brennan and John Paul Stevens (among others) are now referred to collectively as The Great Debate. Consistent with these more visible Reagan Administration efforts to curb federal power, Johnsen explains, a group of “largely unnoticed” lawyers at the Department of Justice had been working prodigiously to develop “strategies for moving the law in the desired direction.” Johnsen highlights these Justice Department “strategies” in two Justice Department Office of Legal Policy (OLP)

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6 Johnsen, supra note 1, at 384, 385.
7 Id. at 389.
8 THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY, THE GREAT DEBATE, INTERPRETING OUR WRITTEN CONSTITUTION (1986) (available online at www.fed-soc.org). See, e.g., Edwin Meese, III, Attorney General of the United States, Speech Before the American Bar Association (July 9, 1985): (“It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment”); see also Justice William Brennan Speech at Georgetown University (October 12, 1985): (“There are those who find legitimacy in fidelity to what they call ‘the intentions of the Framers.’ In its most doctrinaire incarnation, this view demands that Justices discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them. It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility”).
9 Johnsen, supra note 1, at 389.
publications: the Department’s *Guidelines on Constitutional Litigation*\(^{10}\) and a second report, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation.*\(^{11}\) As evidence of the Administration’s intent to curb federal power, Johnsen points to a thirty-four page section in the *Guidelines* report which, as she shows, outlined the Justice Department’s vision for a limited government and classified past Supreme Court precedent as being either “consistent” or “inconsistent” with this vision.\(^{12}\) The second report Johnsen examines, *The Constitution in the Year 2000* describes two divergent paths the Supreme Court could take in the coming decades on fifteen constitutional issues, ranging from federalism and the separation of powers, to the right to privacy, to freedom of association, and highlights what would be at stake were the Court to elect one path over the other.\(^{13}\) As Johnsen describes, it is easy to infer from the tone of the report which future path its authors or, as she writes, President Reagan was encouraging the Court to follow: “It nonetheless was entirely clear, from this report as well as other Reagan Administration statements and actions, that President Reagan believed the ‘activist’ courts generally were on the wrong course and he cared deeply about which future path they would take for virtually every issue discussed in this report.”\(^{14}\)

In sum, the Justice Department OLP reports are thus principally to be understood in the Johnsen narrative as one component of a sweeping agenda on the part of President Reagan to remake constitutional law:

President Reagan’s efforts to transform constitutional meaning put him in a class with Franklin D. Roosevelt and a handful of other Presidents. Reagan developed and pursued a constitutional vision extraordinary in its breadth of issues, its detail of analysis, and its ambition for presidential power… with the benefit of the Court’s decisions since 1995 and the previously unexamined Department of Justice reports, we are better able to appreciate that, at least on issues of congressional power and federalism, Reagan’s success has been considerable and continues.\(^{15}\)

\(^{10}\) OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1989) [hereinafter GUIDELINES].
\(^{12}\) Johnsen, *supra* note 1, at 392.
\(^{13}\) *Id.* at 398.
\(^{14}\) *Id.* at 398.
\(^{15}\) *Id.* at 407.
To hang this critical component of the Reagan Revolution on the shoulders of President Reagan and Attorney General Meese, might seem appropriate; after all, these were the two most visible and public figures in the Administration. However, a closer look at some published accounts and academic literature on that time period suggests that this narrative might well be incomplete. It confirms that a closer look at those “largely unnoticed” and unnamed Justice Department actors might indeed be vital to this narrative of constitutional change.

**B. Challenges or Inconsistencies**

A survey of some of the literature on Ronald Reagan, the Reagan Presidency, and the Reagan Department of Justice produces a number of gaps in the Johnsen interpretation outlined above. From his perspective as former Solicitor General in the Reagan Justice Department, Charles Fried writes that like any large legal or political movement, the Reagan Revolution ought to be understood as a “function of persons and of personality: the President’s first of all, but of all the principal actors and advisers who tried to make the revolution.”

Beginning with the President, then, a number of scholars and Administration insiders offer interpretations of Reagan’s person and administrative personality that challenge his role as cast in the Johnsen narrative. The most direct challenge is offered by David Stockman, former head of Office of Management and Budget: “[Reagan] was a consensus politician, not an ideologue. He had no business trying to make a revolution because it wasn’t in his bones… his conservative vision was only a

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16 *Supra* note 9.
17 LOU CANNON, REAGAN (1982).
vision. He had a sense of ultimate values and a feel for long term directions, but he had no blueprint for radical governance.”21 Reagan, in Stockman’s words, had no “blueprint for radical change” but he did have a vision and an a priori understanding of what government ought to do and ought not to do.22 Similarly, Justice insider Douglas Kmiec writes in his memoir that “Ronald Reagan was always the first to admit that he was a non lawyer” though he did have a general understanding of what judges ought to do and ought not to do: “notwithstanding this common sense distrust of lawyering, [he] recognized well that there was a pressing need to affirm the Constitution as the embodiment of the rule of law.”23 How Reagan implemented his vision is the subject of at least two other academic studies that suggest that Reagan saw as his main task “to enunciate his goals and sell them rather than watch over operations or intervene obtrusively in the process of decision making and policy formulation at lower levels.”24

According to the Johnsen narrative, the second principal actor spear-heading the Reagan Revolution in federalism was Edwin Meese III. In the words of former Solicitor General Charles Fried, Attorney General (AG) Meese was meant to be a “lighting rod” for the legal revolution the Reagan Administration was attempting to promulgate.25 However, in his memoir Order and Law: Arguing the Reagan Revolution, Fried himself is hesitant to attribute to Meese the kind of programmatic intent implied in the Johnsen narrative.26 Moreover, Lou Cannon, in his biography of Reagan observed that,

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21 STOCKMAN, supra note 18, at 9.
22 Id. at 90 (“Reagan’s body of knowledge is primarily impressionistic: he registers anecdotes rather than concepts. I soon learned that it made less sense to tell him that you were eligible for a 35-cents-a-meal lunch subsidy if your income was above 190 percent of the poverty line than to tell him, ‘The kids of cabinet officers qualify.’ He was not surprised by these revelations; they conformed to his a priori understanding of what outrages the federal government was capable of perpetrating”).
23 KMIEC, supra note 19, at 17-18.
24 Bert A. Rockman, The Style and Organization of the Reagan Presidency in JONES, supra note 18, at 9. See also CAMPBELL, supra note 18, at 217 (Campbell describes Reagan’s administrative approach in a nut-shell: “basing appointments on unquestioned loyalty to the fundamental tenets of the administration; maintaining an overarching focus on broad strategic political strokes; and fostering policy networks within issue areas”).
25 FRIED, supra note 19, at 49.
26 See id: (“Ed Meese did not strike me as a basically audacious person… [he] was too good a lawyer to be easy as a revolutionary. Yet, given the legal and constitutional nature of the revolution, his presence at the head of the troops was indispensable. It is hard for me today—as it was when we would debate particular positions and actions—to be sure just how personally committed Meese was to all aspects of this revolutionary program”).
“Meese, despite the hard line he takes on criminal justice matters, is not an ideologue.”

While it is undeniable that Meese used the bully pulpit of the Attorney General to challenge the academic liberal left in his *Great Debate* speeches and to push a legal agenda that helped usher in a new era of conservative legal thought, evidence from Fried and others suggests that Meese was aided in these tasks by an important and, perhaps indispensable, group of young lawyers working under him at the Justice Department:

Also, however, it is not quite true that Meese did it. These speeches were written for Meese by his cadre of committed young assistants. Because those who were standing with or behind the Attorney General thought of themselves as revolutionaries, they did not trust the usual channels to deliver results. The bureaucracy could not be trusted to implement a revolutionary program. I and other political appointments could not be trusted completely: unlike the very young members of the inner circle, we were not creatures of the movement.

The former Solicitor General’s impression is not an isolated one. At least two additional published sources gesture at the influence of the group Fried refers to elsewhere in his memoir as the “cadre of eager, philosophically committed young assistants” recruited into Justice under AG Meese. Moreover, all three sources identify these young lawyers as drawn from the ranks of the then-fledgling Federalist Society for Law and Public Policy. Given these accounts that challenge the roles of Reagan and Meese

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27 CANNON, supra note 17, at 316.
28 FRIED, supra note 19, at 51.
29 Id. at 31.
30 See CLAYTON, supra note 19, at 151 (“With Meese as Attorney General, the Justice Department increasingly came under the influence of New Right groups such as the Heritage Foundation, Federalist Society, and Washington Legal Foundation… Meese energized the leadership of the department with New Right activists and stepped up efforts to ‘credentialize’ young New Right lawyers, placing them in key policymaking positions in the department. Charles Cooper headed up the Office of Legal Counsel, Stephen Markman the Office of Legal Policy, John Bolton the Office of Legislative Affairs, Douglas Ginsburg the Antitrust Division, Terry Eastland the Office of Public Affairs, and Steven Calabresi, David McIntosh, and Kenneth Cribb were Special Assistants”); and at 156 (“[Rex] Lee attributed Meese’s statements to an ‘over-zealous speech writer’… The Attorney General’s speechwriter, Terry Eastland, said Meese ‘simply did not grasp the nature of the assault we were making on the new judicial politics.’”). See also David M. O’Brien, *Federal Judgeships in Retrospect, in BROWNLEE AND GRAHAM, supra* note 18, at 331 (“…the Justice Department’s agenda reflected both staffing and the political strategy of young ‘movement conservatives.’ They were attracted to the department and were recruited from the senatorial staff of Reagan Republicans and the ranks of former law clerks to leading conservative jurists, like Justice Rehnquist, as well as law professors elevated by Reagan to the federal bench, such as Robert H. Bork, Antonin Scalia, Richard Posner, and Ralph Winter. In addition, many were associated with the Federalist Society, a conservative legal fraternity founded in the early 1980s”). See also FRIED, supra note 19, at 183 (“But Attorney General Meese and his young advisers—many drawn from the ranks of the then-fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite
as cast by Johnsen in her narrative, I recast these more visible actors in a new narrative that accounts for
the parts played by other actors in the Justice Department; the unnamed lawyers at the Office of Legal
Policy and elsewhere in the Reagan Administration. To return to the first citation I referenced from
Charles Fried’s memoir, I will take a closer look and examine the other actors “who tried to make the
revolution”31 in order to tell a more complete narrative of the context of these Justice reports and their
relationship to the New Federalism.

C. A More Complete Narrative

In the course of my interviews with actors involved both in the Reagan Justice Department and
the fledgling Federalist Society,32 I twice heard an unsolicited recapitulation of a somewhat famous quote
attributed to former Secretary of State Henry Kissinger.33 The actual quote is as follows: “High office
teaches decision making, not substance. It consumes intellectual capital; it does not create it. Most high
officials leave office with the perceptions and insights with which they entered; they learn how to make
decisions but not what decisions to make.”34 Kissinger’s description of the relationship of high office to
intellectual capital was twice used to explain the role of the Special Assistants and the other young
lawyers in the Reagan-Meese Justice Department who tried to “make the revolution.”35 I excerpt a

radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state
regulation of business and property”).
31 FRIED, supra note 19, at 21.
32 I use the phrases “associated with” and “involved with” the Federalist Society throughout this article for two
reasons: (1) my aim is not to explore the institutional behavior of the Federalist Society understood as a formal
organization headquartered in Washington, D.C. For a good, recent book that does this see STEVEN M. TELES,
membership lists. So instead of discussing “members” I have identified “actors” as being “involved with” or
“associated with” the organization through documented participation at meetings, self-identification through
writings and other published sources, and word of mouth references triangulated with personal interviews.
says it, he says that when you get into government you learn decision-making but you don’t gain intellectual capital,
you spend it. And ideas are the currency”). Compare with interview with David McIntosh, at the Offices of Mayer
Brown, LLP, Washington, D.C. (Jan. 25, 2008) (“One thing I learned in office is that you’re not gaining intellectual
capital, you’re using it”).
34 Popularity attributed to Henry Kissinger.
35 Supra note 20.
particularly revealing portion of an interview that speaks directly to the relationship of these lawyers to the more visible faces of the Reagan Revolution:

One thing I learned in office is that you’re not gaining intellectual capital, you’re using it…So you had President Reagan heading the country, Ed Meese leading the Justice Department, and one of their decisions is who to appoint to the Supreme Court. Another decision is filing a case challenging *Roe v Wade*. They know what they think is the right decision and have asked bright people to staff it for them so they think through all the options… a group of people, and they happened to coalesce around the Federalist Society, thinking through what is the right answer for that… so I think they benefited enormously from having that as they’re executing their jobs and making their decisions - a large group of people building that intellectual capital.

The source of this interview, David McIntosh, was one of the “cadre of eager, philosophically committed young assistants” mentioned in the Fried memoir. He is also one of the three principal founders of the Federalist Society for Law and Public Policy. Founded in 1981 by a small group of law students at Yale and the University of Chicago as part of an attempt to bring conservative and libertarian speakers to campus to debate members of the academic left, the Federalist Society network now claims over 40,000 active participants. With an annual budget of over $7 million, the national organization sponsors thousands of activities for its hundreds of student and professional chapters including talks, debates, conferences, lunches and networking socials. In working to challenge and displace what its members perceive to be the “orthodox liberal ideology” dominating the entire legal profession, the Federalist Society has over the last quarter century built “a conservative and libertarian intellectual network that extends to all levels of the legal community.” Federalist Society Co-founder, Steven Calabresi, described the size and scope of the project: “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 in an ideal world, obviously this is a very ambitious goal, but the goal would be to have the kind of cultural

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36 McIntosh, supra note 33.
37 FRIED, supra note 19, at 31.
38 See www.fed-soc.org (The Federalist Society website claims to have 10,000 student division members and 20,000 lawyer division members) but see interview with Eugene Meyer, at The Federalist Society Executive Offices, Washington, D.C. (Feb. 8, 2008) (Executive President Eugene Meyer said it could be more than 40,000 “depending on how you count”).
39 TELES, supra note 32, at 148.
40 Federalist Society for Law and Public Policy, supra note 38, at “About Us.”
impact that Harvard or Yale have.” The founding and rapid growth of the Federalist Society has been documented and discussed by journalists, interest groups, and scholars alike. Far less attention, however, has been paid to the striking overlap between both the personnel and principles of the fledgling Federalist Society and those of the Reagan Justice Department. The sources that do gesture at it fail to elaborate on the nature and extent of this overlap. Using interview data, archival evidence, and other published sources, this section establishes the relevant overlaps in personnel and then moves on to examine the overlapping principles or ideas of this networks of actors.

Having come into Justice from the White House, Attorney General (AG) Meese was, as he describes it, able to handpick the best legal minds to staff his positions; “really great legal thinkers” suitable for the new role he envisioned for the Justice Department:

One of the things we wanted to do was… [to] have people understand the broader intellectual context in which a system of law – and think of that in the larger sense in our nation – should be carried out and how the Justice Department could contribute to enriching that legal system, both in terms of the day to day work we were doing but also in terms of the speaking and the other kinds of things we did, recognizing that the Justice Department should be a leader in the legal profession as a whole.

T. Kenneth Cribb recalled that while Meese had initially expressed a preference for “grey haired people” there weren’t enough who fit comfortably within this new role the AG envisioned for the Justice

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41 Interview with Steven Calabresi, at Northwestern University Law School, Chicago, IL. (Apr. 3, 2008).
45 FRIED, supra note 19, at 31, 51, 183. See also CLAYTON, supra note 19, at 151, and O’Brien in BROWNLEE & GRAHAM, supra note 18, at 331.
Instead, a number of young energetic intellectuals were recruited into the Department. One of the functions the Federalist Society network performed, even at a young age, was to provide an aggregate talent pool from which rising conservative stars could be identified, nurtured, and then placed into clerkships or lower-level administration positions. Indeed, Cribb described the “nascent” Federalist Society as a group of brilliant young lawyers who “staffed the assistant positions” in the Justice Department. Federalist Society President Eugene Meyer also remembers AG Meese drawing from the ranks of the four year old organization: “There was a Federalist Society and that’s exactly what they drew from. They hired Steve Calabresi who was a co-founder, David McIntosh who was a co-founder, Blair Dorminey who was a speechwriter for him and was also very involved in the Federalist Society. What there was, they hired.” In fact, all three co-founders of the Federalist Society, with Lee Liberman Otis as the third, worked as special assistants at Justice. Evidence from a set of archived talking points for President Reagan’s scheduled phone call to Eugene Meyer on January 30, 1987 also suggests that there were several Federalists at Justice: “I know that many members of the Federalist Society are now working in my Administration, particularly in the Justice Department under Attorney General Meese. Your organization has been a source of strength for us.” President Reagan repeated this thought over a year later, in an archived draft of an address to the Federalist Society on September 9, 1988: “You are fighting for renewed respect for the integrity of our Constitution, for its fundamental principles, and for its wisdom. And in this, of course, you’ve had multitudes of friends in our Administration.”

48 Id. at 14:20.
49 Meyer, supra note 38.
50 See Meese, supra note 46 (In response to the question of how he first heard about the Federalist Society: “Well, I probably first heard about it from the founders of the Federalist Society; Steve Calabresi, Dave McIntosh, and Lee Liberman – Lee Liberman Otis now. They were all working for me in the Justice Department so I learned about it from them and they asked me to participate in some of the meetings”).
52 See “Presidential Address: Federalist Society Lawyers Convention,” Mayflower Hotel, (Sept. 9, 1988), WHORM Box 414.
Paper trails pieced together from other archival evidence demonstrate that the Justice Department under Meese was indeed, as it came to be known by others in the Reagan Administration, a “Federalist Society shop.”

Archived memos, drafts, and documents pertaining to Supreme Court nominations alone confirm the involvement of key members of the founding generation of Federalists - David McIntosh, Peter Keisler, Steve Calabresi, Lee Liberman Otis, Blair Dorinne, and Brad Clark - in drafting

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53 Interview with Thomas A. Smith, University of San Diego Law School, San Diego, CA (Mar.19, 2008).
54 See “White House Staffing Memorandum, Subj: Draft Bork Op-Ed Number 7,” (Sept. 1, 1987) WHORM FG 051 Box 7 (Edits in McIntosh’s Handwriting: “Looks good, just a couple of suggestions on p.3 and p.5. David McIntosh for TKC [T. Kenneth Cribb]), and “White House Staffing Memorandum Subj: Draft Presidential Op-Ed on Judge Bork,” (Aug. 31, 1987), WHORM FG 051 Box 7 (Edits in McIntosh’s Handwriting: “Here are a couple thoughts, David McIntosh for TKC, Jr”), and “Memorandum for David McIntosh from Terry Abdo, Subj: Mailing List for Presidential Letter,” (Aug. 7, 1987), WHORM FG 051 (518193 – 1110) (“Attached is a list of OPL constituents that should receive a Presidential letter regarding the Bork nomination. As we discussed, I have compiled another list of names where a thank you from the President would be appropriate”).
56 See “Memorandum for A.B. Culvahouse, From T. Kenneth Cribb, Jr, Subj: Kennedy Swearing-In Ceremony,” (Feb. 10, 1988) (On the importance of Calabresi’s help with judicial confirmations: “If possible, could you include on the list of invitees for the Kennedy swearing-in ceremony a couple of people who were helpful with past judicial selection and confirmation matters: Steve Calabrese [misspelled], Clerk, Justice Scalia’s Chambers”), and “White House Memo To David Chew, From Will Ball, Subj: Lawyers/Academics,” (Jul. 23, 1987), WHORM FG 051, Box 8 (526566) (List of prominent Academics compiled by Justice with parentheses next to name indicating whose chore it was to call and ask for support for Bork nomination: Calabresi listed to call Yale Law School faculty, including his uncle Guido Calabresi).
57 See “Memorandum for A.B. Culvahouse, From T. Kenneth Cribb, Jr, Subj: Kennedy Swearing-In Ceremony,” (Feb. 10, 1988) (On the importance of Liberman’s help with judicial confirmations: “If possible, could you include on the list of invitees for the Kennedy swearing-in ceremony a couple of people who were helpful with past judicial selection and confirmation matters: Lee Liberman, Professor, George Mason Law School”), and “White House Memo To David Chew, From Will Ball, Subj: Lawyers/Academics,” (Jul. 23, 1987), WHORM FG 051, Box 8 (526566) (List of prominent Academics compiled by Justice with parentheses next to name indicating whose chore it was to call and ask for support for Bork nomination: “LL” listed under several contacts including Alan Ram of Texas, Alan Schwartz of USC, Steve Morris of USC, Henry Holtzer of Brooklyn Law, Richard Epstein of Univ. of Chicago Law School, and Randy Barnett of Chicago Kent Law).
58 See “Memorandum for A.B. Culvahouse, From T. Kenneth Cribb, Jr, Subj: Kennedy Swearing-In Ceremony,” (Feb. 10, 1988) (Re: Invites to Kennedy swearing-in ceremony: “Also, if there is room in the staff section, David McIntosh and Blair Dorinne of my staff would appreciate the opportunity to attend”).
and editing Op-eds in support of Supreme Court nominees, White House talking points, and other official correspondence on behalf of the Reagan Administration. Of the dozens of archived documents footnoted below, three are particularly illustrative of the role this group of young actors had, in David McIntosh’s words, in “building intellectual capital” for the Reagan Administration. Perhaps most striking is a draft Op-ed written by Peter Keisler, who, in addition to serving on the Federalist Society’s Board of Directors from 1983 to 2000, was twice cited in interviews as an important member of the founding generation of Federalists. The document header reads: “Draft Presidential Op-Ed on Judge Bork: Why I Nominated Judge Bork by Ronald Reagan, September 9, 1987.” In addition to demonstrating a strong proficiency with the writings and philosophy of Robert Bork (which as his former law clerk, Keisler certainly had), the draft also echoes language found in the Federalist Society’s statement of principles, which I explore

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59 See “White House Memo To David Chew, From Will Ball, Subj: Laywers/Academics,” (Jul. 23, 1987), WHORM FG 051, Box 8 (526566) (List of prominent Academics compiled by Justice with parentheses next to name indicating whose chore it was to call and ask for support for Bork nomination: Brad Clark listed to call R. Kent Greenawalt of Columbia Law School).

60 See McIntosh, supra note 33.

61 See interview with Michael Carvin at Jones Day, Washington, D.C. (Jan. 28, 2008) (“Oh I worked with, I guess, four of the five founders… I joined the Justice Department in ’83 and I guess the Federalist Society started in ’82, ’83 somewhere around there. So I worked with then Lee Liberman, now Lee Otis, Steve Calabresi… Peter Keisler was at White House Counsel… and Dave [McIntosh]”). See also Interview with Carter Phillips, Sidley Austin, LLP, Washington, D.C. (Jan. 30, 2008) (“I’ve got a former partner who’s one of those founding members, Peter Keisler…”).


63 Id. at 3 (“As Judge Bork put it: ‘By conventional modes of interpretation, it would be impossible to use the Constitution to prohibit that which the Constitution explicitly assumes to be lawful’). See also at id. (“…as Judge Bork has put it, ‘the judge who looks outside the Constitution looks inside himself and nowhere else’”), and at 5 (“As Judge Bork himself has stated, the sole task of the judge ‘is to translate the framers’ or legislator’s morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist”), and at 9 (“But more than this, Judge Bork will be a valuable addition to the Court, because of his refusal to indulge in what he aptly terms ‘judicial imperialism’”).

64 Compare The Federalist Society’s 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”) (available at www.fed-soc.org/aboutus) with supra at 2 (“…in recent decades, many citizens, myself included, began to wonder whether some judges were substituting ‘will’ for ‘judgment,’ whether in some instances they were applying the law or simply enforcing their own views”), and at 3 (“Too many judges have turned away from the Constitution and looked instead to their personal beliefs…they choose not to interpret the law, but to make it”), and at 5 (“The only test I apply in choosing judges is that they understand the divisin of labor – that they share my belief that the Constitution requires laws to be written by the legislatures and interpreted by the courts”), and also at 7 (“More fundamentally, an activist judge robs individuals of their most precious constitutional freedom: the right to govern themselves democratically. Every time a judge makes up a right, the area for democratic freedom shrinks…at the expense of the Constitution, the rule of law, and the freedom of the American people”).
at length later in this article. While we cannot be sure who else had a hand in writing and editing the
Presidential Op-Ed, the language therein leaves little doubt that Keisler put his stamp on the document the
world would attribute to Ronald Reagan. Further evidence of Keisler providing intellectual capital for his
superiors is found in another memo written by Keisler for Arthur B. Culvahouse, White House Counsel to
President Reagan. The memo is attached to a redrafted letter thanking conservative intellectual Russell
Kirk for his support in the nomination of Judge Bork:

Russell Kirk is a conservative intellectual of some distinction. If the American conservative intellectual
movement can fairly be divided into ‘libertarians’ and ‘traditionalists,’ Dr. Kirk can be regarded as the
leading proponent of the latter school, a celebrator of the writings of Edmund Burke. There is nothing
objectionable in the proposed response, but it reads like a form letter acknowledgment. I have drafted an
alternative which is more directly tailored to this particular respondent.55

One additional archived document highlights the role these fledgling Federalists played as intellectual
liaisons for the Reagan Administration to the academic world. The document is a several page list of
prominent conservative and libertarian academics to be contacted by members of the Justice Department
in order to ask each to support publicly or write on behalf of Judge Bork.56 Next to each academic’s name
is a set of initials indicating whose job it was “to call” said individual and solicit support. Young
Federalists “BC” (Brad Clarke), “LL” (Lee Liberman), and “SC” (Steven Calabresi) are each listed as the
point person for several names on that list.

In addition to providing this intellectual support for their superiors, anecdotes from personal
interviews as well as a look at the speaker lists from Federalist Society national meetings suggests that the
presence of these energetic young Federalists had the effect of spreading the “culture”57 of the Federalist

55 Memorandum for Arthur B. Culvahouse, Jr., From Peter D. Keisler, Subj: Response to Dr. Russell Kirk/ Bork
Nomination.” (Jul. 27, 1987), WHORM FG 051 Box 4.
56 “White House Memo To David Chew, From Will Ball, Subj: Laywers/Academics,” (Jul. 23, 1987), WHORM FG
051, Box 8 (526566).
57 See interview with Dan Troy, at Sidley Austin, LLP, Washington, D.C. (Jan. 30, 2008) (“I went to work for the
Office of Legal Counsel for Mike Carvin, for Chuck Cooper – all these people who were deeply immersed in the
Federalist Society. John Manning… Brad Clarke who writes a lot on Originalism and is a professor here at [George
Washington], Mike Rappaport who is at [the University of San Diego]. So these are the people I worked with… I
Society throughout the rest of the Justice Department. Joining Attorney General Meese, who was recruited by his Special Assistants to attend and speak at events, several Assistant Attorney Generals (AAG) and other higher-ups at Justice also became regular attendees at national meetings and D.C. Lawyers Chapter lunches. In fact, of the seventy-six speakers listed on the published agendas of Federalist Society national meetings from 1981 to 1988, nineteen (25%) of those speakers were serving or would serve at some time in the Reagan Administration. Federalist Society Co-founder Steven Calabresi explained how he and the other young Federalists at Justice spread the culture of the Society to the more seasoned Department personnel:

There were a number of special assistants like myself who were folks in their twenties or early thirties and many of them came from Federalist Society ranks and were active in the Society. The Assistant [Attorney Generals] who tended to be just a little bit older, more like mid- or late-thirties, some of them were don’t remember the day I heard about the Federalist Society but it was what we all did. When there was a Federalist Society event, we all went. So I was hanging out with my friends. And I tell you, ever since that point, I’ve been immersed in the culture of conservative lawyers, which substantially overlaps with the culture of the Federalist Society”).


69 E.g., Domestic Policy Advisor T. Kenneth Cribb. See interview with Steven Calabresi, supra note ** (“[Cribb] immediately recognized what we were trying to do with the Federalist Society when we first talked to him because ISI had been an important influence for him and he realized the Federalist Society was an attempt to do in the law schools very much the same kinds of things that ISI was doing at the undergraduate level”). See also “Presidential Address: Federalist Society Lawyers Convention,” Mayflower Hotel, (Sept. 9, 1988), WHORM Box 414 (Cribb was described by President Reagan in a draft of a speech to the Federalist Society as “among the patron saints of the Federalist Society”). E.g., Assistant AG for the Civil Division, Richard Willard. See interview with Richard Willard, Steptoe and Johnson, LLP, , Washington, D.C (Jan. 31, 2008) (Willard became involved through Lee Liberman Otis who was working as his special assistant at Justice: “I think it’s through her that I heard about it and started attending their programs and activities and have been involved in one way or another ever since”). E.g., Michael Carvin, Assistant AG at both Civil Rights and at the Office of Legal Counsel. See Carvin supra note 61 (Carvin also became active through his interactions with the founding generation of Federalists). E.g., Charles J. Cooper, Assistant AG at the Office of Legal Counsel. See interview with Charles J. Cooper, at Cooper and Kirk, Washington, D.C (Jun. 2, 2008) (Cooper also became involved shortly after coming into the Justice Department: “… I don’t recall it prior to joining the Reagan Administration but very early on I became acquainted with the Society and became very much involved, essentially speaking as a government official and otherwise attending as just an attendee the Society’s events or many Society events even if I wasn’t speaking”). E.g., Assistant to the Solicitor General and Assistant AG for the Office of Legal Policy, Roger Clegg. See interview with Roger Clegg, Center for Equal Opportunity, Falls Church, VA (Jan. 29, 2008) (“…after I graduated from law school I went to clerk for a year and then I went to work in the Justice Department in the Reagan Administration and soon started to hear about [The Federalist Society]… we were always looking for bright, young, conservative lawyers and so I had a lot of reason to know about the Federalist Society. I started going to different Federalist Society events and met the people there, you know, met Leonard Leo, met Gene Meyer and Lee Liberman and some of them, Lee I worked with when she was at the Justice Department and especially when she was in the White House and you know just over the years had more and more dealings with them, went to these different conferences and got their mailings”).

involved in the Society like Steve Markman before they became Assistant [Attorney Generals]. Others found out about the Society from us and then became enthusiastic about it and began participating in it a lot. So, for example, Chuck Cooper who was the head of [the Office of Legal Counsel] and William Bradford Reynolds, who was the head of the Civil Rights Division, became very enthusiastic about the Federalist Society once they found out about [it] and what we were trying to do and they participated in a lot of our events.\footnote{71}

One of those Assistant AGs Calabresi mentions, former head of the Office of Legal Counsel Charles J. Cooper, described the resulting “ideological affinity” or “shared set of beliefs” between the Reagan Justice Department and the Federalist Society:

There was just a philosophical, ideological affinity between the Federalist Society and the Reagan Administration. The two entities or organizations shared a common set of beliefs about law, the nature of law, the nature of the judicial function. That more than anything else is what bound the Federalist Society and the Reagan Administration… a shared set of beliefs about, in the broader sense, the nature of government but in particular the nature of judging and the role of the courts, and in the Constitution’s role in defining and delimiting government.\footnote{72}

Given the overlap in personnel and the overlapping cultures of the Justice Department and the Federalist Society discussed earlier in this article, it is not surprising that the normative legal and political foci of the one would come to dovetail with the principles and priorities of the other; that an “ideological affinity” would arise between the two. Indeed, even a brief examination of some of the speeches and the official publications of Justice Department actors reveals a shared set of normative ideas about law and politics that seems to map onto the ideas broadly associated with the Federalist Society for Law and Public Policy. In a retrospective conference discussing the legacy of the Meese Justice Department, several prominent actors referenced at least one of three general normative priorities of the Department: the preservation of freedom through fidelity to the text or original meaning of the Constitution, the maintenance of the separation of powers and federalism, and the appointment of constitutionally faithful judges.\footnote{73} Further evidence of the salience of these three broad normative priorities within the Justice

\footnote{71} Calabresi, supra note 41.  
\footnote{72} Cooper, supra note 69.  
\footnote{73} See generally Cribb et. al, supra note 47. See, e.g., Domestic Policy Advisor T. Kenneth Cribb at 5:07 (“Meese executed Reagan’s theory of the Constitution which fell under the Three Aspects of the Preservation of Freedom: The text of the constitution must be strictly followed as it is the only text a free people have consented to be
Department can also be found in the two Office of Legal Policy (OLP) reports Professor Johnsen examines. On the importance of federalism, for example, *The Constitution in the Year 2000* instructs its readers that, “the framers saw this dual system of government, which they called ‘federalism,’ as a means to the end of protecting individual liberties.” The *Guidelines for Litigators* goes even further in suggesting specific legal strategies for arguing on behalf of these important constitutional principles of federalism and separation of powers: “…these explicit constitutional provisions regarding the organization of the federal government allow government litigators to cite and make arguments based on specific clauses rather than on… broad based conceptual rubrics such as ‘federalism’ or ‘separation of powers.’” In addition to the publications Johnsen cites, the Office of Legal Policy also published two separate handbooks on Originalism, which had developed as the methodological handmaiden of the ideal of constitutional fidelity and which would also become part of the Justice Department criterion for evaluating constitutionally faithful or principled judges. Indeed, the *Guidelines for Litigators* lays out as its primary objective “to provide a jurisprudence faithful to our Constitution” and encourages litigators to “educate lower courts, thereby laying the groundwork for making stronger appellate arguments, on the governed by, the Constitution secures the blessings of liberty by limiting government, and the common defense ought to be energetically undertaken to protect the people’s freedoms”) and at 11:00 (elevating judicial selection to the “top of the agenda” was one of the Department’s first tasks). See also Assistant AG for the Office of Legal Counsel Douglas Kmiec at 44:42 (“The written Constitution, under Meese and Reagan, would be faithfully executed”), and at 43:00 (“federalism matters”). See also Assistant AG for the Office of Legal Policy Stephen Markman at 59:35 (“Meese succeeded in transforming 1/3 of the Government [the Judiciary] and this was in no way serendipitous… the objectives were carefully laid out and executed by the Meese Justice Department). See also Theodore Olson at 16:00 (discusses the role of the Meese Justice Department in “reshaping and reorienting” the federal judiciary by appointing “principled jurists”).

74 On the importance of constitutional fidelity and original meaning, see GUIDELINES, supra note 10, at 1 (“…this manual seeks to provide a jurisprudence faithful to our Constitution”), and at 3 (“this focus does not, however, relieve government attorneys of their obligation to educate lower courts, thereby laying the groundwork for making stronger appellate arguments, on the original meaning of the relevant constitutional or statutory provision”). On the importance of appointing constitutionally faithful judges, see THE CONSTITUTION IN THE YEAR 2000, supra note 11, at iii (“There have been few times in the history of our country at which former Chief Justice Hughes’ famous statement that ‘the Constitution of the United States is what the judges say it is’ has more accurately depicted the state of American jurisprudence”).

75 THE CONSTITUTION IN THE YEAR 2000, supra note 11, at 130.

76 GUIDELINES, supra note 10, at 5.


78 See TELES, supra note 32, at 158-159.
original meaning of the relevant constitutional or statutory provision.” The *Constitution in the Year 2000* also opens with an admonition of the dangers of judicial activism, a concept that is set in opposition to constitutional fidelity throughout the text: “There have been few times in the history of our country at which former Chief Justice Hughes’ famous statement that ‘the Constitution of the United States is what the judges say it is’ has more accurately depicted the state of American jurisprudence.”

The text of the Federalist Society’s published mission statement brings this normative common ground into sharp relief: “[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.”

Federalist Society President Eugene Meyer insisted that this overlap was not accidental: “[Meese] hired [Federalist Society members]… because he cared about these things.” In addition to the Federalists he hired, Attorney General Meese also solicited the help and advice of several legal academics active in the Federalist Society in putting together the Office of Legal Policy (OLP) publications that make up the centerpiece of the Johnsen narrative: “we had a lot of help from people who were law professors around the country… many of them became advisors to the Federalist Society.”

Former Office of Legal Counsel Special Assistant Daniel Troy explained the resulting relationship between the ideas of the Federalists and the policies of the Justice Department, making specific reference to the OLP reports:

> I think what the Reagan Meese Justice Department did, it enabled us to take the ideas that were part of the Federalist Society and broadcast them, institutionalize them, put them into action. 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.

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79 GUIDELINES, *supra* note 10, at 1, 3.  
80 *CONSTITUTION IN THE YEAR 2000, supra* note 11, at iii.  
81 Federalist Society for Law and Public Policy, *supra* note 38, at “About Us.”  
83 Meese, *supra* note 46.  
84 Troy, *supra* note 67.
Stephen Markman, the Assistant AG for the Office of Legal Policy and the principal author of the OLP reports, was a critical figure in articulating and developing the ideas and principles associated with the Reagan Revolution and also played a significant role in evaluating judicial candidates on the basis of these ideas and principles.\(^85\) Prior to coming into the Justice Department, Markman had served as the President of the D.C. Lawyers Chapter of the Federalist Society. This chapter, according to Co-founder Steve Calabresi, was the epicenter of this crosscutting network of conservative legal actors and ideas.\(^86\) Finally, the 1996 Federalist Society publication, *Conservative and Libertarian Legal Scholarship: An Annotated Bibliography*,\(^87\) co-authored by Reagan Justice alumnus Roger Clegg, recommends several of the same historical and academic sources referenced in the Office of Legal Policy reports, highlighting one additional way in which these overlapping ideas and principles moving through both these networks were institutionalized well after the Reagan era.

The presentation of this evidence should not be construed as an attempt to make causal claims about who started the Reagan Revolution. It should rather be understood as part of a narrative attempting to better understand the actors who, in the words of Charles Fried tried to “make the revolution” and the ideas around which it was constructed. This narrative does not downplay the importance of having President Reagan and Attorney General Meese at the heads of the Administration and Justice Department. Indeed, speaking with the actors involved, it is clear that both figures were indispensable. Michael Carvin, an Assistant AG at both Civil Rights and at the Office of Legal Counsel, described the profound

\(^85\) See TELES, *supra* note 32, at 158.

\(^86\) See Calabresi, *supra* note 41 (Calabresi provided a rather colorful anecdote to illustrate this point: “There were a lot of people active in the [D.C. Lawyers] Chapter beyond the Justice Department as well but certainly among the political appointees in the Department, a significant number of them were members of the Chapter and tended to go to the Chapter events. I remember one Chapter event where a leading liberal activist said somewhat ominously – we always met in a somewhat old, fairly inexpensive Chinese restaurant, which looked like it was fairly precarious – and this particular individual said something to the effect of, ‘boy if there were ever a fire in this restaurant it would certainly take out or it would certainly eliminate a lot of the conservative impetus in the law’”). See also TELES, *supra* note 32, at 145-147 (on the importance of the D.C. Lawyers Chapter of the Federalist Society).


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impact Reagan and Meese had as leaders in credentialing both the ideas and the personnel of the Federalist Society:

[Meese] greatly helped in using the Attorney General’s position as a bully pulpit for saying the kinds of things that many Federalists, the founding members of the Federalists, undoubtedly believed and, you know, the Justice Department . . . became a hot bed of people who both shared the President’s views and Meese’s views of the proper approach to the law. I mean, after all, that’s how I met, for example, all those [Federalist Society] guys I mentioned before and, you know, if you believed in this stuff and were excited why wouldn’t you go into an administration that shares those views and if your particular interest was law, why wouldn’t you go to the Justice Department?88

Further, according to several actors, Ronald Reagan made it respectable to be a conservative and to discuss conservative ideas but, most importantly, as Carvin alludes to above, he brought a number of bright young conservatives to Washington who might not have otherwise come.89 What is important to note at this point is that those actors who remained in Washington stayed connected and active in conservative law and politics through the Federalist Society. Thus, with a better understanding of what was going on at Justice, the thick context of the origins of the Office of Legal Policy reports, and all the actors who tried to make the revolution, we will be in a better position to tell a story of how these ideas and actors might have influenced the Rehnquist Court’s New Federalism.

III. Filling in the Gaps from Reagan to Rehnquist

How do we establish a plausible connection between a set of documents produced in the 1980s by one set of actors and a set of Supreme Court decisions in the mid-1990s produced by a different set of actors? In other words, how do we fill in the gaps between the ideas and agenda embodied in the Reagan

88 See, e.g., Carvin, supra note 61. See also Meyer, supra note 38 (“[Meese] helped educate . . . our founders working for him in the Justice Department . . . and one of the main things we’ve had from day one is constitutional interpretation and the importance of the constitutional text and he used the bully pulpit of the Attorney General to greatly heighten the appreciation of constitutional text in terms of speeches he gave”).
89 See Troy, supra note 67 (“What Ronald Reagan did was he made it respectable to make conservative arguments. One of the things that he did was he brought all these people to Washington. All these people came to Washington who otherwise never would have come to Washington; many of whom stayed. Because once upon a time conservatives didn’t come to Washington, right? From the ‘30s to the ‘80s why would you go to Washington?”).
Justice Department OLP documents and the Rehnquist Court’s New Federalism opinions? I show that if we ‘insert the Federalist Society here’ we will be better equipped to bridge the gap between the Reagan and Rehnquist revolutions in Professor Johnsen’s narrative and to conceptualize the influences on constitutional change in this area.

A. Professor Johnsen’s Narrative

Sandwiched between the content analysis of the Justice Department OLP reports and the subsequent comparison with the Rehnquist Court federalism decisions, Professor Johnsen includes a small, three-page sub-section called “Constitutional Change through Judicial Selection.” Though she does not articulate it in this way, the purpose of the sub-section is to attempt to fortify the conceptual links she draws between the Justice reports of the late-1980s and the Rehnquist Court federalism decisions of the mid-1990s with some interpersonal or political links. To do so, Johnsen points to the 1988 OLP report, The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation which seemed to provide something of a guide for evaluating the “values and philosophies of the men and women who populate” the federal judiciary. She further notes that in addition to publishing these reports, the Office of Legal Policy (OLP) was also “entrusted with assisting President Reagan with the selection of federal judges.” Because Johnsen does not labor to unpack this link in terms of the influence of key actors in OLP on judicial selection and the corresponding philosophies of judicial nominees, her narrative paints with a rather broad brush the connections between the OLP documents and the Rehnquist Court’s New Federalism. As Johnsen points out, President Reagan nominated three of the Justices who would come to be referred to as the Rehnquist Court “federalism five:” Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy. Indeed, Johnsen insists that “President Reagan’s

90 See Johnsen, supra note 1, at 396-399.
91 Id. at 397.
92 Id.
93 Id at 399.
greatest influence on the development of constitutional meaning … through… his appointments to the United States Supreme Court.”94 The clear implication is that President Reagan’s federalism agenda, embodied in the OLP reports, made its way into Supreme Court doctrine via judicial selection.

B. Challenges or Inconsistencies

Because Professor Johnsen fails to examine the thick context of the Office of Legal Policy (OLP) reports, the key figure her narrative posits between the ideas embodied in the OLP reports and those articulated in the Rehnquist Court decisions is President Reagan; the lone mechanism of constitutional change his decisions on judicial selection. There is no question that the power of the President to reconstitute the federal judiciary through judicial selection is an important part of this narrative and, indeed, all narratives of constitutional change. But I would argue that it does not and cannot do all the explanatory work. This is because the bridge Johnsen constructs rests on a number of assumptions that do not coexist easily with much of what we know about the politics of judicial selection as well as Supreme Court behavior. First off, Johnsen’s explanation presumes detailed knowledge on the part of the President and the other actors involved in judicial selection of the nominee’s views on federalism. This was certainly not the case with the nomination of Sandra Day O’Connor, the first of President Reagan’s federalism three. Given the overriding political concern to fulfill Reagan’s promise to nominate a woman to the Supreme Court, relatively little attention was paid to her judicial philosophy. Indeed, I could find no documented evidence to suggest that her views on federalism were thoroughly examined or even relatively well understood by the Administration.95

94 Id. at 397.
95 See generally WHORM FG 051 Box 1 – Box 3 (Compared to the Bork nomination, for example, there is a relative dearth of documentation on the O’Connor nomination. Most of the archived documents deal with framing O’Connor’s views on abortion). For evidence that the Administration could have gone with a female who was known to be a much more vocal advocate of federalism and states rights at the time, see “Letter to White House from Eva Scott,”(Jun. 25, 1981), WHORM FG 051 Box 1, White House Correspondence Tracking Sheet # 030235 (Letter recommending Phyllis Schlafly for appointment to what would become the O’Connor seat).
Secondly, even if an Administration does manage to mitigate the knowledge problem by devoting a significant amount of time, resources, and intellectual capital to pinning down a candidate’s federalism philosophy, we know from academic studies that judicial selection is a process loaded with political variables; any one of which could cause a President to select a candidate whose federalism philosophy might be deemed less than ideal. This was brought into sharp relief in the aftermath of President Reagan’s failed nomination of Judge Robert Bork to the Supreme Court. President Reagan’s decision to nominate Robert Bork was, according to David McIntosh, at the “pinnacle of two years of research through a lot of potential people who would be good Supreme Court justices and a lot of thought about what makes a good justice and what is an appropriate conservative theory of law.” Given that Judge Bork was either a former mentor to, teacher of, or employer of several of the individuals working in Justice at the time of his nomination, it is unsurprising that his views on federalism and other constitutional issues overlapped with those articulated in the OLP reports that Johnsen details. What was surprising at least to some individuals working in Justice was that the long, drawn-out confirmation battle over Bork was followed by the rather rushed selection of Douglas H. Ginsburg; a candidate who then-head of the Office of Legal Counsel, Doug Kmiec, described as “the Harriet Myers of my generation.” Apart from his research on administrative law, Ginsburg’s judicial philosophy was a relative unknown to those working to get him confirmed. As Kmiec explained, “[Ginsburg] was largely picked because it was thought he did not have…the paper trail that Bork had.” After Reagan withdrew Ginsburg’s nomination over an admission of past marijuana use, he nominated the man who would become the eventual successor to the seat, Anthony Kennedy. Kmiec explained that Judge Kennedy was a “known commodity in terms of temperament” but that it was clear from his appellate court opinions that he would be something of “a wild card in terms of an appointment.”

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96 See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES (1997), at 359 (“There has been a constant tension between patronage, merit, and policy-ideology considerations in the appointments process”).
97 McIntosh, supra note 33.
98 Interview with Douglas Kmiec, at Pepperdine University School of Law, Malibu, CA (Mar. 14, 2008).
99 Id.
100 Id.
obligation to help the President succeed in getting someone confirmed,” Kmiec admitted in retrospect that “one of the things that might not have been considered in Kennedy’s case was his philosophy of judging or interpretation.” Archival evidence suggests that his judicial philosophy was evaluated by the Justice Department, at least on matters of federalism, and that in fact Kennedy was deemed to be “weak” on federalism. In a hand-written memo attached to a draft letter that would go out to solicit support for the Kennedy nomination, T. Kenneth Cribb references a passage which suggests that Kennedy is a dedicated federalist that he believed should be deleted from the letter and gives the following reasons: “Kennedy is not clearly a super charged TURBO [caps original] powered federalist/ I would leave it out, but don’t feel strongly/ Also, not all conservatives are federalists/ Finally, during the selection process, DOJ kept saying that Kennedy was weak on federalism.” Thus, of the three members of the “federalism five” President Reagan nominated, it appears that the first (O’Connor) was relatively unknown in terms of judicial philosophy and that the final (Kennedy) was viewed as weak on federalism by the Justice Department.

Thirdly, Johnsen’s explanation assumes not only that the federalism philosophy or preferences of Reagan’s nominees were known at the time of nomination, but also that these preferences were fixed in a way that would ensure that the Justice would act in compliance with Reagan’s federalism agenda. Indeed, legal conservatives have lamented and a few scholars have documented the tendency of Supreme Court Justices appointed by conservative Presidents to become more liberal once on the bench and free of political constraints. Yet these three Justices did, in their opinions, articulate something very close to

101 Id.
102 See “White House Staffing Memorandum, Subj: Letter to Kennedy Supporters,” (Nov. 18, 1987), WHORM FG 051 Box 5, Document no. 498196 (Cribb has crossed out the following wording from the draft letter: “In addition, Judge Kennedy believes, as I do, that our constitutional system is one of enumerated powers…And that unless the Constitution grants a power to the federal government, or restricts a state’s exercise of that power, it remains with the states or the people”).
103 Handwritten memo in blue marker attached to Id.
104 See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES (2006), 140 (On the ‘Greenhouse Effect’: “…some conservative commentators have an explanation for the unexpected moderation of certain Republican appointees. In their view, Supreme Court justices work in a social environment that is dominated by liberal
the Reagan Administration ideal point in their New Federalism decisions half a decade after Reagan had left office and well into their tenure as Justices. How, then, do we explain this? I show that with a proper understanding of the thick context of the Office of Legal Policy reports and the role of Attorney General Meese and the fledgling Federalists in fostering a network of crosscutting actors and ideas, we can start to construct at least the scaffolding of a solid bridge between the Reagan Administration on federalism and the Rehnquist Court’s New Federalism.

C. A More Complete Narrative

The Justice Department actors who provided a good amount of the intellectual capital for the Reagan Revolution left Justice but continued to be acolytes of the movement, carrying its ideas into the Academy, into private practice, and into the Judiciary. Attorney General Meese described how having Justice Department alumni serving as “key leaders” in the “legal profession” has allowed this network of actors to have a “major impact” long after leaving Justice:

I would say that because of the people, I think there has been a major impact… we have a lot of people in legal education, we have somewhere between six and twelve professors at major law schools around the country – Steve Calabresi at Northwestern, John Harrison at UVA, John McGinnis at Harvard, Gary Lawson up at Boston University, Paul Cassell, now at the court but he was at Utah, Doug Kmiec at Pepperdine. Then in addition to that we have a lot of leaders of the profession – Brad Reynolds, Chuck Cooper, Mike Carvin at Jones Day. So these are all people who, Doug Ginsburg of course who’s now at the court – well, we have a lot of judges. We have a lot of judges that came out of there and so between the law schools, the legal profession and the Judiciary, after our second term was over, we provided a lot of the key leaders in those various parts of the legal profession.\(^{105}\)

Meese further described these Justice alumni as integral to his work at the Heritage Foundation as members of his “virtual” network or legal advisory group.\(^{106}\) The individuals Meese cites, without exception, also all continued to be active in the Federalist Society for Law and Public Policy in the decade

\(^{105}\) Meese, supra note 46.

\(^{106}\) Id. (“the broad advisory group I rely on and the virtual university or virtual think tank aspect of bringing in other people, that all comes out of, or many of those people were participants in the Justice Department”).
following their tenure at Justice. In fact, these actors formed the core of the organization’s leadership, its “true believers” as one observer described. More than just a virtual network, then, the Federalist Society provided an actual and regularized network through which these individuals could remain connected, develop their ideas and constitutional understandings, and spread them to other conservative lawyers coming up through its ranks. As scholar Steven Teles explains, “by encouraging sustained interactions among its members, the [Federalist] Society – in particular the D.C. chapter – has created the deliberative conditions necessary for convergence in the ideas of the conservative legal [movement].”

As a result of this convergence in ideas, as Teles describes it, this overlapping network of actors can best be understood as constituting something like a legal epistemic community. By that I mean these actors now seem to share: (1) a broad set of normative beliefs about law and politics embodied in a shared cannon of texts; (2) a set of causal beliefs about the legal and political conditions under which those normative ideals are best preserved; (3) a preferred interpretive methodology in Originalism; and (4) a common policy enterprise. Understanding this network of legal actors as an epistemic community built around a shared set of normative legal principles and dedicated to seeing those principles implemented in legal and political decisions brings to the fore the importance of ideas and, for our purposes, of tracing the previously examined shared ideas and language about federalism through this network of actors in reconstructing our narrative of influences on constitutional change.

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108 TELES, supra note 32, at 146.
109 See Peter M. Haas, Introduction: Epistemic Communities and International Policy Coordination, 46 International Organization 1 (Winter 1992) at 3 (“An epistemic community is a network of professionals with... (1) a shared set of normative and principled beliefs... (2) shared causal beliefs... (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise, (4) a common policy enterprise – that is, a set of common practices with a set of problems to which their professional competence is directed...”).
110 E.g., the principal normative belief (1) that was repeated in publications, conferences, and even in amicus curiae briefs to the Supreme Court is that the state exists to preserve freedom and that the Constitution secures the blessings of liberty. From that guiding normative principle follows (2) the causal belief also highlighted in Sections II and IV that judicial enforcement of the structural provisions of the Constitution, that is, proper policing of the separation of powers and federalism, is a means to preserving this end of liberty. The shared criteria of validity (3) is manifest in the well-documented, intense, and sustained promotion of Originalism as the method of constitutional interpretation that these actors believe best ensures both judicial restraint and constitutional fidelity. Lastly, the common enterprise of this network of legal actors (4) is “to promote an awareness of these principles [liberty, separation of powers, judicial restraint] and to further their application though its activities.” See www.fed-soc.org/aboutus.
Though he did use the language ‘epistemic community,’ Federalist Society co-founder David McIntosh did articulate a similar framework for understanding the influence of this network of legal actors on law and politics:

[It] is essentially [Federalist Society Executive Director] Gene [Meyer's] mantra. 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. There are 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. We'll have fifty years to see what training lawyers in this way actually means in terms of impact on our society.\(^{111}\)

Some of the “untold ways” in which the overlapping principles and normative concerns explored in the previous section are “being implemented” are, of course, more visible than others. One way to get at this impact then is to look at the more visible manifestations of these conservative and libertarian ideas about Originalism and federalism in judicial opinions and \textit{amicus curiae} briefs. Reagan Justice insider Doug Kmiec confirmed that he is frequently solicited to join in submitting \textit{amicus} briefs to the Supreme Court with his former Office of Legal Counsel colleagues on constitutional issues that these actors would have reason to care about. In a recent example, Kmiec explained how he came to be a signatory on a brief submitted in \textit{District of Columbia v. Heller},\(^{112}\) the D.C. gun case:

[Chuck] Cooper called me about this one… this is a pretty suspicious looking group, Ed Meese, Bill Barr, Bob Bork, Viet Dinh, Richard Willard, myself, and you’ll notice this is mostly \textit{[Office of Legal Counsel]} people… and that happened I suppose because first the Federalist Society pulled us together as former colleagues and then now on this current issue we have at least some common ground in seeing this properly interpreted.\(^{113}\)

That being the case, a closer examination of the ideas articulated in judicial opinions and briefs, the individuals articulating them, and their relationship to these overlapping networks of Reagan Justice

\(^{111}\) McIntosh, \textit{supra} note 33.  
\(^{112}\) 128 S. Ct. 2783, 2008 U.S. Lexis 5268.  
\(^{113}\) Kmiec, \textit{supra} note 98.
alumni and Federalist Society members should allow us to tell a plausible story about impact. I make a modest attempt at doing that in the next section with the Commerce Clause decisions handed down by the Rehnquist Court.

IV. Unpacking the Rehnquist Court’s New Federalism: *Lopez* and *Morrison*

The task of this section will be to unpack the intellectual context of the Rehnquist Court federalism decisions to establish a more proximate link between the ideas articulated in the Reagan Justice Department and those of the Rehnquist Court Justices in their opinions. As an illustration, I analyze the impact of these actors and ideas on the Commerce Clause cases: *United States v Lopez* and *United States v Morrison*.\(^{114}\) I show that in both these opinions, and their Circuit court predecessors, substantial links can be drawn, both conceptual and personal, between decision-makers and the overlapping networks of Reagan Justice alumni and individuals active in the Federalist Society for Law and Public Policy.

A. *United States v Lopez (1995)*

Before the Supreme Court handed down its landmark ruling in *Lopez*, it issued an opinion in a 1991 case called *Gregory v Ashcroft*\(^ {115}\) which involved a challenge to the mandatory retirement provision for Missouri State judges on the grounds that it violated a provision of a 1967 federal statute protecting against age discrimination in employment. Though the case did not directly involve a challenge to the commerce power of Congress, the Court in its opinion goes to great lengths to paint this case of federal statutory construction as a very serious issue implicating the “delicate balance” between the state and


federal governments in our structure of dual sovereignty.\textsuperscript{116} The author of the opinion, Justice O’Connor, cites \textit{The Federalist Papers} at length in her discussion of the importance of maintaining our federal structure. These papers are a favorite source and subject of discussion of individuals affiliated with the Federalist Society; one of whom, Antonin Scalia, was a sitting Justice on the Court when this decision was handed down. At the first national Federalist Society meeting on “Federalism,” Professor Scalia opened his remarks with the following: “When I began to prepare some thoughts for this conference on federalism, I got out my handy \textit{vade mecum} copy of the \textit{Federalist Papers} to see what they might have to say on this subject.”\textsuperscript{117} In fact, the year following the decision in \textit{Gregory} the Federalist Society held an entire national conference on the topic of “The Federalist Papers” featuring distinguished speakers Richard Epstein, Mary Ann Glendon, Lino Graglia, and Reagan Justice alumni Edwin Meese III and Charles J. Cooper, among others.\textsuperscript{118} In her \textit{Gregory} opinion, Justice O’Connor also makes reference to a 1987 law review article by another notable individual at that 1981 Federalist Society conference on “Federalism,” Michael McConnell. McConnell is a Reagan Administration alumnus,\textsuperscript{119} and has been an active participant at Federalist Society meetings since its inception.\textsuperscript{120} The McConnell article referenced in the body of the Court opinion is entitled “Federalism: Evaluating the Founders’ Design.”\textsuperscript{121} The remarkable thing is that the rationale expressed in O’Connor’s \textit{Gregory} opinion in support of preserving our federal structure is taken almost verbatim from the McConnell piece. I excerpt first from the McConnell article and then from the O’Connor opinion:

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

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\textsuperscript{116} \textit{Gregory}, 501 U.S. at 460.


\textsuperscript{119} McConnell served as assistant counsel in the Office of Management and Budget (1981-1983) and in the Solicitor General’s Office at the Department of Justice (1983-1985).


communities to take advantage of their neighbors. And, third, decentralization allows for innovation and competition in government.\textsuperscript{122}

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.\textsuperscript{123}

The McConnell article is itself a review of a book by Raoul Berger called \textit{The Founders’ Design}. Berger, whose scholarship laid some of the intellectual foundations for the cluster of theories associated with Originalism, is also cited multiple times in the Reagan Justice Department reports.\textsuperscript{124} The McConnell piece and the Berger piece are both also recommended as authoritative sources on federalism in the Federalist Society annotated bibliography drafted by Reagan alumnus, Roger Clegg.\textsuperscript{125} It is also worth mentioning that one of O’Connor’s clerks whose help would have been enlisted in the drafting of the \textit{Gregory} opinion was Gregory Maggs who has served as Faculty Advisor for the George Washington University Federalist Society Student Chapter since 1993.\textsuperscript{126}

The Supreme Court opinion in \textit{Gregory} and the theory of federal structure articulated therein is important to our narrative because it is cited as support for reigning in Congressional power in the Fifth Circuit opinion\textsuperscript{127} that would become the progenitor of \textit{Lopez}. The \textit{Lopez} case, which challenged the constitutionality of the Gun-Free School Zones Act of 1990,\textsuperscript{128} presented the question of whether the regulation of handgun possession fell within the scope of Congress’ Commerce Clause powers.\textsuperscript{129} In a decision that would place significant limits on the federal power to regulate under the Commerce Clause

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122 \textit{Id.} at 1493.  \\
123 \textit{Gregory}, 501 U.S. at 458.  \\
124 \textit{See}, \textit{BIBLIOGRAPHY OF ORIGINAL MEANING}, \textit{supra} note 77, at 241, 242, 253, 257, 259. \textit{See also GUIDELINES}, \textit{supra} note 10, at 4 (extended excerpt from Berger’s \textit{Government by Judiciary}).  \\
125 \textit{See Federalist Society Bibliography, supra note 87, at 10.}  \\
126 \textit{See} phone interview with Gregory Maggs (Jan. 22, 2008). (Maggs clerked for O’Connor during the 1989-1990 term. Anecdotally, Maggs is also married to the sister of Federalist Society Co-Founder Steven Calabresi).  \\
127 United States v. Lopez, 2 F.3d 1342, (5\textsuperscript{th} Cir. 1993).  \\
128 18 U.S.C. § 922 Q.  \\
129 U.S. Const. art. I, § 8: “[Congress shall have the power] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”
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for the first time since the New Deal, the Fifth Circuit Court and then the Supreme Court ruled that Congress did not have the constitutional authority to enact the legislation in question. Judge Garwood, in the opening line of his Fifth Circuit opinion, echoes a prominent portion of the *Gregory* opinion (without citation) and, in doing so, cites the same passage of Federalist 45 from the same page of the same edition of *The Federalist Papers* the Court relies on in *Gregory*. This is also the same edition recommended by the Federalist Society in their published annotated bibliography.\textsuperscript{130} I first present the excerpt from *Gregory* and then from the Circuit decision in *Lopez*:

The Constitution created a Federal Government of limited powers. ‘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., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it: ‘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).\textsuperscript{131}

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.\textsuperscript{132}

Judge Garwood later cites the *Gregory* opinion explicitly in his articulation of the importance of our structure of dual sovereignty: ‘“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).”\textsuperscript{133}

More to the point for our purposes, the Supreme Court in *Lopez* begins its opinion with a near verbatim recitation of the language expressed in *Gregory* and the Circuit court decision:

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See Federalist Society Bibliography, *supra* note 87, at 8 (“*The Federalist*. The versions edited respectively by Clinton Rossiter and Jacob E. Cooke, along with their introduction, are the best”).
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*Lopez*, 2 F.3d at 1345.
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*Lopez*, 2 F.3d at 1346.
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We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, Sec. 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 (1991) (internal quotation marks omitted). ‘Just as the separation and independence of the coordinate branches of the Federal Government serves 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.’

Chief Justice Rehnquist does not articulate at length, as Justice O’Connor does in Gregory, the benefits derived from our federal structure as conceived by the Founders, but the over-arching principle is the same and, indeed, expressed in close to the same language. Furthermore, Justice Clarence Thomas, chairman of the EEOC under President Reagan and a figure who has been described as a “hero” and an “icon” of Federalist Society members, writes a concurring opinion in Lopez in which he engages in an in depth analysis of the original meaning of the Commerce Clause, relying on historical sources specifically recommended in the Justice Department’s Bibliography of Original Meaning, including the Elliot Debates, and an edited history of the ratification:

As one would expect, the term ‘commerce’ was used in contradistinction to productive activities such as manufacturing and agriculture… See e.g., 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); id., at 336 (M. Smith at New York Convention).

134 United States v. Lopez, 514 U.S. at 552.
135 See interview with Randy Barnett, at Barnett residence, Washington, D.C. (Jun. 10, 2008) (“People need, everybody needs icons, everybody needs heroes. [Justice Scalia] serves that role. Justice Thomas serves that role for many people too… But, because he’s quieter and he’s not as caustic and not as combative, he doesn’t get the attention that Justice Scalia does”). This characterization of Justice Thomas as a “hero” for Federalists was further illustrated for me during an informal interview with several former Federalist Society Student Chapter Presidents (who wish to remain anonymous). I was told about former Solicitor General Theodore “Ted” Olson’s Annual Barbecue to which select student leadership of the Federalist Society were invited each summer. These students recalled the thrill of seeing the “glitterati” of the conservative legal world all gathered in one spot and how every summer, without fail, Justice Thomas would come and get swarmed by adoring law students who would talk to him about their favorite Originalist opinions he’d authored. For more on “Ted Olson’s Barbecue” as a signal or sign of commitment to the Federalist Society movement and its ideas, see also TELES, supra note 32, at 159 ([Quoting from Federalist Society Co-Founder Lee Liberman Otis: “ ‘When I was hiring at [an executive agency], we would not only look for whether someone was in the Federalist Society but whether he or she actually attended monthly Federalist Society lunches or were at Ted Olson’s annual barbecue, signs that they were willing to bear a cost for the signal’”]).
136 See BIBLIOGRAPHY OF ORIGINAL MEANING, supra note77, at 78-81 (in citing recommended historical sources for interpretation of the Commerce Clause, see “The Federalist,” “Elliot’s Debates” with specific reference to both the “Massachusetts” and “New York” conventions Thomas references, and “The Documentary History of the Ratification of the Constitution” by M. Jensen”).
137 Lopez, 514 U.S. at 587.
Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other -- that each "substantially affected" the others… Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History).\footnote{38}

Justices Kennedy and O'Connor also join in a lengthy concurring opinion that discusses the history and importance of the Judiciary's role in preserving the structure of divided government. Drawing once again on The Federalist Papers and, even more notably, on a piece of historical scholarship recommended by the Federalist Society annotated bibliography,\footnote{139} Kennedy and O'Connor enter into a thoughtful discussion of the importance of the "four structural elements" of the Constitution; separation of powers, checks and balances, judicial review and federalism:

There is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political freedom. See…G. Wood, The Creation of the American Republic, 1776-1787, pp. 524-532, 564 (1969). Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.\footnote{140}

Echoing language from Chief Justice John Marshall, now famously enshrined in the Federalist Society statement of principles, the Justices further argue that the Court is in a unique position to safeguard federalism: "…as the branch whose distinctive duty it is to declare ‘what the law is,’ Marbury v. Madison, 1 Cranch, at 177, we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of clear and bright lines."\footnote{141} Additionally, in the final page of the concurrence, the Justices cite one of the three benefits of federalism expressed in Gregory (and borrowed from the Michael McConnell article) as further cause to strike down the legislation in question: “The statute now

\footnote{138} Id. at 590.
\footnote{139} See Federalist Society Bibliography, supra note 87, at 8 (“Gordon S. Wood, The Creation of the American Republic 1776-1787 (1969). This classic work of intellectual history discusses how, between the Declaration of Independence and the framing of the Constitution, American political thought was fundamentally transformed”).
\footnote{140} Lopez, 514 U.S at 575-576.
\footnote{141} Id. at 579. Compare with Federalist Society statement of principles, supra note 38, at “About Us” (“…that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be”)}.
before us forecloses the States from experimenting and exercising their own judgment.”142 Also worth mentioning are the Federalist Society affiliated law clerks who would have been working under the Justices between the term the case was heard143 and the term the opinion was delivered.144 One of those law clerks, Viet Dinh, later penned an article praising O’Connor for her commitment to federalism.145 Both the Thomas concurrence and the highly theorized Kennedy-O’Connor Lopez concurrence are important because each will be cited by Chief Justice Rehnquist in support for the Supreme Court’s decision five years later in Morrison.

Several interested parties also contributed their own articulated theories of the proper balance of governmental power as amici curiae or “friends of the court” in Lopez. Federalist Society affiliated Professors Charles Rice,146 Daniel Polsby,147 Randy Barnett,148 and Henry Mark Holzer149 were among two dozen or so legal academics who signed onto a brief that discussed the original understanding of the Second Amendment as well as the importance of maintaining the proper balance of power in government in order to secure that liberty.150 Carter Phillips, the counsel for the respondent in Lopez, Alfonso Lopez,

142 Lopez, 514 U.S. at 583. Compare with McConnell, supra note ** (“And, third, decentralization allows for innovation and competition in government”), and with O’Connor from Gregory, supra note ** (“[federalism] allows for more innovation and experimentation in government”).
150 1993 U.S. Briefs 1260, see for example at 16 (“The very concept that the Second Amendment could be a states' right is an invention of our own Century's gun control debate. The text and the legislative history demonstrate that the Founding Fathers had not even the remotest inkling of such a states' "right" concept, whether in connection with the Amendment, or otherwise. So, for instance, when the Tenth Amendment guarantees prerogatives of the states
Jr., is also an alumnus of the Reagan Justice Department. While he has been described as a moderate conservative by Federalist Society insiders, his brief expresses a deep concern with maintaining the federal structure as a “means to a greater end - liberty.” This suggests that even if these are not his deeply held beliefs, Phillips thought that a strong originalist defense of federalism and the separation of powers, using language germane to both the Reagan Justice department and the Federalist Society, was crucial to winning over members of the Rehnquist Court.

B. United States v Morrison (2000)

In the years between Lopez and Morrison there was an incredible revival of interest in and scholarship on federalism; both in praise and in condemnation of the Court’s new Commerce Clause jurisprudence as articulated in Lopez. Several prominent Reagan Justice alumni and Federalist Society actors took to penning positive evaluations of the decision, applauding it as an important step toward reigning in federal power. The Federalist Society national leadership also responded by organizing a

against federal interference, they are referred to as "powers", not "rights." And the Second Amendment right is not only to keep, but also to "bear" arms. Only individuals "bear" arms. States do not).

151 See Troy, supra note 67. See also Carvin, supra note 61.

152 See Carter G. Phillips, 1993 U.S. Briefs 1260 at 14-15: (“Second, findings serve to safeguard federalism and maintain the constitutional scheme of separation of powers. Federalism, the division of powers between the states and the national government, is the overarching principle embodied throughout the Constitution. Findings safeguard federalism by ensuring that, before Congress exercises its powers under the Commerce Clause, it has addressed the issues of federalism such exercise may raise. Findings preserve separation of powers by obviating the temptation to substitute judicially inferred findings for congressional statements. Both federalism and separation of powers are means to a greater end -- liberty. The Constitution seeks to protect liberty by diffusing power, both between the state and federal governments and among the branches of the federal government. Requiring Congress to make findings furthers this objective by setting forth procedural requirements that must be met before these balances are disturbed”).

153 Indeed, a Westlaw search conducted on Mar. 3, 2008 returned 1,777 law review articles citing “U.S. v Lopez” between 1995 and 2000.

1998 National Symposium called “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 originalist approach to constitutional interpretation embodied in *Lopez*. It is unsurprising, therefore, that the Fourth Circuit opinion in *Morrison* and its Supreme Court counterpart would generate particular interest and excitement from the Federalists interested in building on the perceived revival of the structural constitution signified by *Lopez* half a decade earlier. The *Morrison* case challenged the constitutionality of a provision of the 1994 Violence Against Women Act (VAWA), which permitted victims of gender-motivated violence to file suit in federal court. The question before the courts was whether the federal legislation exceeded the constitutional powers of Congress under both the Commerce Clause and the 14th Amendment. In a five to four decision, the Rehnquist Court decided that this provision of VAWA was indeed unconstitutional. For our purposes, three sets of visible links to the Federalist Society and the Reagan Justice Department in *Morrison* are of particular interest. The first set involves the counsel for respondent Antonio Morrison; the second the judges who delivered the opinion of the Fourth Circuit Court; and the third the actors submitting briefs to the Supreme Court as *amici curiae* and the theories and ideas articulated therein. I will explore each in turn.

The Counsel for respondent Antonio Morrison, Michael Rosman, argued the case on behalf of the conservative public interest law firm, the Center for Individual Rights (CIR). Steven Teles has

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155 See 22 Harv. J. L. & Pub. Pol’y iii-v (1998-1999) (speaker agenda for Federalist Society conference on “Reviving the Structural Constitution”). The term “structural constitution” is an oft-cited term within Reagan Justice Department and Federalist Society circles. It functions as an umbrella term for those provisions of the Constitution that give effect to the separation of powers, both vertical and horizontal, as opposed to those provisions dealing with substantive rights (such as the First Amendment). The dozens of actors who used this term during interviews proves that it has indeed insinuated itself into the lexicon of conservative legal discourse, though even those who used the term with most frequency, including Charles J. Cooper and Steven Calabresi, were unable to identify its precise origin.


158 U.S. Const. Amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article”).
documented the litigating partnership that developed between CIR and Reagan Justice alumni. Teles shows that several Reagan alumni, including Theodore Olson, Michael Carvin, and Michael McConnell, were identified and solicited to take on important cases like *Morrison* through the Federalist Society network. As Teles explains, the “Federalist Society network made it easier to identify lawyers ideologically attuned to CIR’s mission and skilled in particular areas of law.” In addition to CIR General Counsel Michael Rosman, who spoke recently at a Federalist Society conference on “Limited Government,” former Reagan Solicitor General and Federalist Society speaker Charles Fried also appears as a signatory on the CIR brief for *Morrison*. With deep connections to both these networks, it makes sense that Rosman and Fried’s argument in *Morrison* would turn on the oft-echoed proposition in both the Reagan Administration and Federalist Society circles that divided government is a precondition for individual liberty. To further illustrate this point, the brief cites language from the *Gregory* opinion, which, as we witnessed, also found its way into the Kennedy-O’Connor concurring opinion in the Supreme Court version of *Lopez*:

> The Constitution created a federal government of enumerated powers "to ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)); *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) ("it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one"). Morrison has a right to be free from an overreaching Congress, just as he has the right to be free from a Congress that would pass a law abridging freedom of speech. Thus, petitioners err in believing that the number of states who do or do not support a federal tort remedy is of any consequence. Even if all of them supported it, they cannot defeat this constitutional protection of individual liberty.

In addition to the individuals arguing the case for the respondent, the judges handing down the Circuit version of the *Morrison* opinion are also of particular interest to our narrative. The Fourth Circuit opinion, striking down the federal law, was delivered by Judge Michael Luttig. At the beginning

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159 See TELES, supra note 32, at 227.
160 Id. at 226-227.
163 Id. at 11-12.
of the Reagan Administration, Judge Luttig served as a special assistant to White House Counsel where he worked under Fred Fielding, the chair of Reagan’s Counsel on Federal Judicial Selection. He later left to clerk for Judge Scalia. His ties to the “true believers” within the Federalist Society are substantial. In one uncorroborated source Judge Luttig is described as only hiring clerks with membership in the Federalist Society on their resumes.\(^{165}\) Whatever his formal relationship to the organization, Judge Luttig delivers an opening in this opinion worthy of praise from even the truest of “true believers” who adhere to the Federalist Society statement of principles. Luttig, with his own variation on the theme of divided government as a means to the end of freedom, opens his opinion with the following:

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.\(^{166}\)

The judge delivering the concurring opinion in this Circuit case, J. Harvie Wilkinson, also has visible ties to both the Reagan Justice Department (Assistant AG for the Civil Rights Division 1982-1984) and the Federalist Society. In a 1988 talk delivered at the Federalist Society National Symposium, Judge Wilkinson engaged in an extended exploration of the original meaning of the 14\(^{th}\) Amendment. In broaching the topic of whether or not the “Privileges and Immunities” clause ought to be resurrected, he advised that the Court should be cautious and not attempt to enact swift and broad changes to the constitutional landscape: “the fortuities of uneven constitutional development must be respected, not cast aside in the illusion of reordering the landscape anew” and that “[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

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\(^{165}\) Amy Bach, *Movin’ on Up with the Federalist Society*, The Nation, October 1, 2001 (“Judge Michael Luttig on the Court of Appeals for the Fourth Circuit, for example, hires only students with membership in the Federalist Society or comparable credentials on their resumes. And almost all of Judge Luttig's clerks go on to clerkships at the Supreme Court. His unheard-of batting average is sustained because Judge Luttig diverts clerks who don't land a clerkship with other Justices to Justice Scalia (whom Luttig himself clerked for) and Justice Clarence Thomas”).

\(^{166}\) *Morrison*, 169 F.3d at 825-826.
Chief Judge Wilkinson’s concurrence in *Morrison* is more or less a ten page defense of the new federalism with specific attention paid to the question of judicial activism; a concern echoed from his Federalist Society talk a decade or so prior. After an extended review of what he terms the “three stages” of this century’s judicial activism, Judge Wilkinson concludes that the New Federalism strikes 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:

> In the end, neither swift retreat to cramped notions of commercial activity nor cessation of our judicial role will do. Only a role that is measured and cautious will ensure that a balanced allocation of powers in our federal system remains to protect our individual liberty. Today's holding is a measured one. To sustain this provision would signal that state governments are due no more than the sweet pieties of lip service and that no limits whatsoever exist on the exercise of congressional power.

This lengthy concurring opinion by Judge Wilkinson on judicial activism seems to be proof positive of Professor Lawrence Baum’s notion that judges are often performing for a particular audience. In this case, given the thrust of the concurrence, I believe it would be fair to infer that at least part of that audience consisted of Reagan Justice alumni and actors associated with the Federalist Society. After all, the Federalist Society’s second major national conference held in 1983 was called “Judicial Activism: Problems and Responses” and actors who were at that time or would be involved in the Reagan Administration included Rex Lee, Paul Bator, Loren A. Smith, and Grover Rees III; in sum almost a third of the speaker agenda.

> Given that the outcome of *Morrison* was fairly predictable in light of recent precedent, the interest in this case as measured both by the number and qualitative content of *amicus* briefs submitted to the Court was remarkable. Ed Meese, in our interview, said that one way in which he believes the individuals in the Reagan Justice Department continue to have an impact on the law is through the briefs

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168 *Morrison*, 169 F.3d at 898.  
he and the members of his virtual group of advisors work on and submit to the Supreme Court in important cases.\textsuperscript{171} \textit{Morrison} was clearly such a case. The record shows that Meese submitted a brief to the Court as Counsel on Record for the Claremont Institute.\textsuperscript{172} The Meese brief consists of an eight-page originalist argument cast entirely in terms of the intent of the Framers in developing our federal structure and the original meaning of the constitutional provisions meant to ensure that structure remains intact. Apart from drawing heavily on \textit{The Federalist Papers} the brief relies on a 1987 publication by Kurland and Lerner called \textit{The Founders’ Constitution} for its other historical source documents; the same volume recommended by the Office of Legal Policy for interpreting the Commerce Clause.\textsuperscript{173} According to former head of the Office of Legal Counsel Doug Kmiec, who pulled this three volume set off his book shelf to show me during our interview, the Kurland and Lerner volumes were required reading for those working in the Justice Department under Meese: “…this is an annotated Constitution, clause by clause, sentence by sentence, with the original material that would have been in the library of the founders…everybody had to have one of these.”\textsuperscript{174}

No fewer than six other individuals with visible ties to the Federalist Society submitted briefs in the \textit{Morrison} case. Second in prominence only to the Meese brief is the amicus brief co-authored by Professor Richard Epstein and Clint Bolick for the Institute of Justice.\textsuperscript{175} Of Epstein, Charles Fried noted in his memoir that he and his theories were in part responsible for the “radical views” of regulation that

\begin{footnotes}
\footnotetext[171]{Meese, \textit{supra} note 46 (“I think [our impact is] continuing because of the people that are out there continuing to do good work. For example on the \textit{Heller} case that’s coming up, the gun case… Ted Olson, we shouldn’t forget Ted. Now he wasn’t technically in my term, he had already left but he was certainly a product of that and a close advisor and confidant to me during the time that I was in the Justice Department. But I was thinking of the \textit{Heller} case, this Washington gun case where we have a lot of people helping on that in various ways and other major cases today that I know I get importuned to help participate in various briefs for Supreme Court cases by people I worked with in the past there”).}
\footnotetext[173]{See BIBLIOGRAPHY OF ORIGINAL MEANING, \textit{supra} note 77, at 245.}
\footnotetext[174]{Kmiec, \textit{supra} note 98.}
\end{footnotes}
Meese adopted courtesy of his Federalist Society advisors. This view is corroborated both by the reliance on Epstein’s scholarship in the Reagan Justice Department Bibliography as well as Professor Epstein’s stalwart presence at Federalist Society meetings and events. According to published record, from his first appearance on record at the 1982 Conference on Judicial Activism until the present, Epstein has spoken at a remarkable eleven national events. At one of those events, the 1998 Federalist Society Conference on “Reviving the Structural Constitution,” Epstein had the following to say about *Lopez* and the prospects of revitalizing the limits on the Commerce Clause:

> It will take more than a single constitutional decision. It will actually take some loyalty by state appellate court judges and by federal circuit judges to push *United States v Lopez* beyond its currently embattled position. Our task is not to work the political revolution in a moment. Our task is simply to understand that there is a strong intellectual case for recognizing that the pre-1937 synthesis on these issues was, in fact, more intellectually coherent than the post-1937 approach.

That is essentially what Epstein and his co-author, Clint Bolick, attempt to do in their brief to the Court in *Morrison*. While his documented appearances at Federalist Society events are fewer than those of Epstein, Clint Bolick is himself a Reagan Administration alumnus. He served as a special assistant to Clarence Thomas at the EEOC and has been dubbed by one commentator the protégé of controversial Reagan Civil Rights figure William Bradford Reynolds. The Epstein-Bolick brief itself is a fifteen-page argument attempting to articulate the strong intellectual foundations for a limited interpretation of

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176 See Fried, *supra* note 19, at 183 (“Certainly economic liberty, deregulation… were among the projects that had brought me to government and the administration in the first place. But Attorney General Meese and his young advisers—many drawn from the ranks of the then fledgling Federalist Societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein—had a specific, aggressive, and, it seemed to me, quite radical project in mind: to use the Takings Clause of the Fifth Amendment as a severe brake upon federal and state regulation of business and property”).


181 See DAVID BROCK, BLINDED BY THE RIGHT: THE CONSCIENCE OF AN EX-CONSERVATIVE (2002) at 136 (“One conservative leader was Clint Bolick, a bald, cherub-faced former special assistant to Clarence Thomas at the EEOC who went on to become a protégé of William Bradford Reynolds, who had fought to roll back civil rights protections in the Reagan Justice Department”).
the Commerce Clause; the “pre-1937” interpretation Epstein refers to in his Federalist Society talk. The authors argue that the “constitutional structure, text and history all show that Congress’ power under the Commerce Clause is limited” and further attempt to persuade the Court that “the structural limitations on Congress’s power were imposed to guard the prerogatives of the states as part of a complex federal system.” In a similar vein, the brief submitted by Federalist Society affiliates Jeffrey H. Sutton (now a Sixth Circuit judge) and William H. Pryor (now an Eleventh Circuit judge) urges the Court that the “invalidation of one provision of VAWA preserves our dual sovereignty and confirms that federalism is one among many counter-majoritarian guarantees that preserve liberty.” Lastly, two other visible figures in Federalist Society circles, Erik Jaffe and Phyllis Schlafly articulated their federalism related concerns in a brief to the Court.

The Supreme Court opinion handed down in *Morrison* in 2000 is neither as theoretically interesting nor as self-reflective as its Fourth Circuit precursor. Chief Justice Rehnquist uses the framework developed in *Lopez* and the 1997 case *City of Boerne v. Flores* to conclude that the federal statute under consideration was not within the power of Congress to enact. That being said, the Rehnquist *Morrison* opinion is noteworthy for its reliance on both the Thomas concurrence and the Kennedy-O’Connor concurrence from *Lopez*. Rehnquist cites these opinions as authoritative sources in his

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184 Id. (confirming Pryor’s participation in 2006 Nat’l Lawyer’s Conference as well as 2007 National Student Conference).
186 See Federalist Society website, supra note 38, at “Publications” (confirming Jaffe as participant in 2006 conferences on Felon Voting, the Voting Rights Act, Campaign Finance, and Voting Fraud as well as a 2007 event on Union Dues).
187 Id. (confirming Schlafly’s participation in the 2006 Nat’l Lawyers Conference as well as 2007 National Student Conference).
189 *City of Boerne v. Flores*, 521 U.S. 507 (1997). This case struck down the Religious Freedom Restoration Act (RFRA) and, in doing so, limited the power of Congress to pass legislation under § 5 of the 14th Amendment. Petitioners in *Morrison* made a similar claim of Congressional power under § 5 and the Court again rejected it.
discussion of the history of the Commerce Clause,\textsuperscript{190} the constitutional limits of congressional authority,\textsuperscript{191} and the importance of judicial review to enforce limits on the political branches.\textsuperscript{192} As was noted in the previous subsection, embedded within these Lopez concurrences are several of the ideas and normative concerns embodied in both the Justice Department Office of Legal Policy reports and the Federalist Society statement of principles. In addition to these citations to Lopez, the Rehnquist opinion also makes explicit reference to the “benefits of federal design” catalogued in the Gregory opinion which, as we saw earlier, are borrowed from the Michael McConnell law review article: “As we have repeatedly noted, the Framers crafted the federal system of government so that the people’s rights would be secured by the division of power. See… Gregory v. Ashcroft, 501 U.S. 452 (1991) (cataloging the benefits of the federal design).” Lastly, in its discussion of the “language and purpose” of the Fourteenth Amendment, the Rehnquist opinion references the majority opinion in Flores, which relies on the scholarship of 19th century legal theorist Thomas Cooley.\textsuperscript{193} This same work, Constitutional Limitations, also appears as a

\textsuperscript{190} Morrison 529 U.S. at 607-608 (“As we discussed at length in Lopez, our interpretation of the Commerce Clause has changed as our nation has developed. See Lopez 514 U.S., at…568-574 (Kennedy, J., concurring); id., at 584, 593-599 (Thomas, J., concurring); see also id. at 619 (“With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate… see also Lopez 514 U.S., at 584-599 (Thomas, J., concurring) (discussing the history of the debates surrounding the adoption of the Commerce Clause and our subsequent interpretation of the Clause”).

\textsuperscript{191} Id. at 610-611 (“But so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause will always engender ‘legal uncertainty’… see also id., at 573-574 (Kennedy, J., concurring)

\textsuperscript{192} Id. at 616 (“Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace. See Lopez, supra, at 575-579 (Kennedy, J., concurring); see also at ** (“Moreover, the principle that ‘the Constitution created a Federal Government of limited powers’ while reserving a generalized police power to the States is deeply ingrained in our constitutional history…see also Lopez 514 U.S., at 584-599 (Thomas, J., concurring)”.

\textsuperscript{193} See Morrison, 529 U.S. at 620-621 (“These limitations are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government. See Flores supra at 520-524 (reviewing the history of the Fourteenth Amendment’s enactment and discussing the contemporary belief that the Amendment ‘does not concentrate power in the general government for any purpose of police government within the states’ (quoting T. Cooley, Constitutional Limitations 294, n. 1 (2d ed. 1871)”).
recommended source in both the Office of Legal Policy’s *Guidelines on Constitutional Litigation*\(^{194}\) and the Federalist Society annotated bibliography.\(^{195}\)

**C. A More Complete Narrative**

The task of this section was to offer a modest and preliminary analysis of the thick intellectual context of the Rehnquist Court’s Commerce Clause decisions in order to draw out the links, both conceptual and interpersonal, between judicial decision-makers and the overlapping networks of the Reagan Administration and the Federalist Society for Law and Public Policy. In order to establish these links, I started by examining what former head of the Office of Legal Counsel Charles J. Cooper referred to as “the work product of the courts;”\(^{196}\) their opinions. Because judges and Justices do not vote like legislators, but instead articulate their decisions in opinions intended to persuade a legal and political audience, these written decisions are rich resources for the mining of ideas. The preceding interpretive analysis of the language used, the authoritative sources cited, and the normative principles embedded in *Lopez* and *Morrison* highlighted the prominence of certain clusters of ideas embodied in the Office of Legal Policy reports Professor Johnsen examines in her article. But because ideas need networks of actors to migrate across space and time, in order to tell a plausible story of conceptual influence, a more robust and proximate set of links was needed. Close attention to the activities of actors associated with the Federalist Society allowed me to bolster these conceptual links with interpersonal network links and bridge this temporal and spatial gap. Judicial decision-makers were either themselves shown to be former Reagan alumni and/or Federalist Society participants, and/or were shown to have relied on scholarship

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\(^{194}\) See *GUIDELINES*, *supra* note 10, at 12.

\(^{195}\) See Federalist Society Bibliography, *supra* note 87, at 18 (“Thomas M. Cooley, *Constitutional Limitations* (Legal Classics Lib. Ed. 1987). This 1866 classic, by a leading scholar on state constitutional law, reminds us that this is an important area for those who take federalism seriously”).

\(^{196}\) See Cooper, *supra* note 69 (In response to the question of how he would track the impact of actors associated with the Federalist Society: “Well, you would have to start with the courts and you’d have to look at the work product of the courts, which is their decisions, their opinions. The Federalist Society can’t take credit for that except in a sort of loosely derivative way. That has been the product of the judges that have been appointed and therefore the appointing authorities but the Federalist Society has been an important contributor to that process at a number of levels”).

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authored by individuals active in either one or both of these networks, and/or were shown to have drawn from the shared cannon of conservative and libertarian scholarship initially compiled in the Office of Legal Policy and further developed by actors in the Federalist Society.

This evidence should be understood for what it is: an attempt to show how the legal ideas nurtured in the Reagan Administration and further developed, refined and exchanged within the Federalist Society network, shaped the articulation of one part of the Rehnquist Court’s New Federalism doctrine. The resulting narrative of the thick contexts of *Lopez* and *Morrison* situates judicial decision-makers within a network of conservative and libertarian legal actors, or as I suggested in Section III, an epistemic community, that privileges certain normative ideas about law, shares an understanding of the conditions under which those normative ideas are realized, shares an interpretive methodology, and has a common interest in seeing the law or the legal culture move to the right. It does not, however, make strict causal claims about the influence of particular actors or institutions on judicial decision-makers, where ‘influence’ is understood as the capacity to change the minds or, to use current political science jargon, the “votes” of Supreme Court Justices.197 The value of this study lies instead in its examination of the ideas and the language judicial actors used to articulate their opinions and in sketching out the network of actors that supported, nurtured, and developed those ideas and that language. Because that language, once enshrined in Supreme Court doctrine, then goes on to shape and constrain the language in which future courts articulate their opinions as well as how other legal and political actors write policies and legislation,198 these epistemic communities, though often overlooked, can be important and influential players in the development of legal and political meaning.

198 See generally GORDON SILVERSTEIN, LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINTS, SAVES AND KILLS POLITICS (forthcoming 2009).
V. Conclusion

When attempting to understand the relationship between ideas and institutions, it is often the case that scholars associate a cluster of legal and political ideas with the most visible or institutionally privileged actor to articulate them and then attribute influence without further investigation. Hence, in the Johnsen article, the discovery of conceptual similarities between a set of Reagan Justice documents and the Rehnquist Court New Federalism unfolds as a narrative about Ronald Reagan and judicial selection; of Presidential influences on constitutional change. As I have tried to show in rebuilding a small part of that narrative, the task of teasing out influences on constitutional change can be a painstaking, labor-intensive job. I applied an interpretive technique to one small portion of this job, the Commerce Clause opinions in *Lopez* and *Morrison*, and the resulting story testifies to the numerous, subtle, and complex ways actors associated with the overlapping networks of the Reagan Administration and the Federalist Society influenced the manner in which the Rehnquist Court articulated its federalism doctrine. In sum, Professor Johnsen’s work should not be considered incorrect, rather incomplete. As I hope this critical effort demonstrates, a better narrative of constitutional change will be populated not only by the most visible actors involved but also by those actors who, often in “untold ways,” act to bring that change about. To return to Charles Fried’s insightful words that I have continued to paraphrase throughout this article, an understanding of any revolution in constitutional doctrine must account for all the “actors… who tried to make the revolution.”  

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199. See McIntosh, *supra* note 33.
200. See FRIED *supra* note 19, at 21.