THE CONSERVATIVE INFLUENCE OF THE FEDERALIST SOCIETY ON THE HARVARD LAW SCHOOL STUDENT BODY

GEORGE W. HICKS, JR.*

---

* Law Clerk to the Honorable Janice Rogers Brown, United States Court of Appeals for the District of Columbia Circuit, 2005–2006; Law Clerk to the Honorable John G. Roberts, Jr., United States Supreme Court, 2006–2007. J.D., Harvard Law School, 2005; A.B., Harvard University, 2000.

For their unflagging support and assistance with this Article, I thank Professor Daniel Coquillette, Jennifer Carter, Matthew Cooper, Kevin Plummer, and Anne Marie Calareso and the Harvard Law School Dean of Students Office. I am additionally indebted to the scores of Harvard Law School professors and alumni who shared their valuable time and even more valuable thoughts with me in personal interviews. I have endeavored to characterize all comments in the fairest and most accurate light and regret any misstatements or other errors, which are mine alone. The views expressed in this Article in no way reflect the positions of Judge Brown or Chief Justice Roberts. This Article is dedicated to the memory of Suzanne Richardson, Dean of Students, Harvard Law School, 1993–2004.

"Conservative students at Harvard Law School are a tiny and beleaguered minority."

—Professor Paul Bator, 1985[1]

"I love the Federalist Society."

—Dean Elena Kagan, 2005[2]

I. INTRODUCTION

Reasonable minds may disagree on any number of legal issues, but when discussion turns to legal institutions, one proposition appears almost incontrovertible: Harvard Law School (HLS) is a "bastion" of liberalism.[3] Or so public perception would have it: On television[4] and in newspapers,[5] the image of Harvard Law School as a repository of left-leaning individuals and ideas is nearly unshakeable. Harvard Law is popularly viewed as part of the "liberal establishment,"[6] a place of learning where "[o]ne opinion exists . . . and that is the liberal opinion."[7] This belief is reinforced by the ubiquitous presence of high-profile liberal professors like Laurence Tribe[8] and Alan

---

1. Paul Bator, Bruce Bromley Professor of Law, Harvard Law School, Remarks at the Harvard Club of New York (May 13, 1985), *reprinted in* THE HARVARD SOCIETY FOR LAW & PUBLIC POLICY & THE FEDERALIST SOCIETY FOR LAW & PUBLIC POLICY STUDIES, A DISCUSSION ON CRITICAL LEGAL STUDIES AT THE HARVARD LAW SCHOOL 11 (1985) [hereinafter Harvard Club Transcript].

2. Elena Kagan, Charles Hamilton Houston Professor of Law and Dean of the Faculty of Law, Harvard Law School, Remarks at the Federalist Society National Student Symposium Banquet (Feb. 26, 2005).

3. Jonas Blank, *All the Right's Moves*, HARV. L. BULL., Spring 2003, at 18.

4. *See, e.g.*, *CNN In the Money* (CNN television broadcast, June 5, 2004), transcript #060500CN.V63, *available at* 2004 WLNR 7249503 (quoting a news program host asking a young conservative author about to attend Harvard Law School, "You talk about a liberal place to spend some time, Harvard Law School might be one of the top two or three in the country, don't you think?").

5. *See, e.g.*, David Daley, *Randall Kennedy: Intent is Everything*, HARTFORD COURANT, Feb. 24, 2002, at 4 (describing Professor Randall Kennedy's career at the "liberal bastion[]" of Harvard Law School).

6. Barbara Amiel, *Where Do Nice Guys Finish?*, TORONTO SUN, Oct. 13, 1996, at C4 (noting that "[t]he liberal establishment remains virtually unchallenged from Harvard Law School to The Washington Post").

7. Robert Kurson, *Who's Killing the Great Lawyers of Harvard?*, ESQUIRE, Aug. 2000, at 82, 88.

8. *See, e.g.*, David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, 320 (referring to the "notoriously liberal

Dershowitz[9] in courthouses, on briefs, and before cameras, and by the headline-generating acts of alumni now serving as elected government officials, including Eliot Spitzer '84, the scourge of corporate titans as Attorney General of New York; Barney Frank '77, the leading voice for gay rights in the U.S. House of Representatives; and Charles Schumer '74, the thorn in President George W. Bush's side on the Senate Judiciary Committee. In addition, the law school is but one component of Harvard University, which has garnered its own revealing moniker, the "Kremlin on the Charles."[10] And while it is a stretch to characterize Harvard Law School as the Red Square to the University's Kremlin, even that most poised of publications, *The Economist*, recently referred to Harvard Law as the "command centre of American liberalism."[11] As popular sentiment would have it, then, Harvard Law School is utterly, indisputably, and almost monolithically leftist.

Despite this outward reputation, however, a quiet transformation has been taking place at Harvard Law School over the past several decades, the manifestations of which now challenge long-held assumptions about the institution's supposedly skewed ideological makeup. The trend, largely unnoticed by commentators and observers but borne out by both anecdotal and empirical evidence, is this: Conservatism has slowly but surely been making significant inroads among Harvard Law School students. Not only has a sizable and vocal conservative minority emerged within the student body in recent years, but also, and more consequentially, a broader rightward shift of ideological sentiments among the HLS student body as a whole has taken place. Put another way, looking back at the past

---

Laurence Tribe"); Michael Powell & Eric Pianin, *How Green Should Their Valley Be?*, WASH. POST, July 27, 2001, at A1 (describing a plaintiff's retainment of "Laurence Tribe, the liberal Harvard Law professor" to challenge a congressional statute).

9. *See, e.g.*, Anne Applebaum, Op-Ed, *The Torture Myth*, WASH. POST, Jan. 12, 2005, at A21 (referring to "Alan Dershowitz, the liberal legal scholar"); Richard H. Weiss, *Shifting Alliances: September's Terrorist Attacks Changed the Face of Politics*, ST. LOUIS POST-DISPATCH, Dec. 9, 2001, at B1 (describing "liberal attorney and O.J. Simpson dream teamer Alan Dershowitz").

10. This phrase has been attributed to, among others, Senator Joseph McCarthy, *see, e.g.*, Daniel Swift, *Inviting the Team up for Tea*, N.Y. TIMES, June 22, 2003, § 7, at 19, and President Richard Nixon, *see, e.g.*, Jason Steorts, *All-American Summers*, NAT'L REV. ONLINE, June 24, 2002, http://www.nationalreview.com/comment/comment-steorts062402.asp.

11. *Pinkos and Pistols*, ECONOMIST, Apr. 13, 2002, at 32.

thirty years, not only are there now more conservative students at Harvard Law School, and not only are those conservative students more vocal, but the ideological beliefs of the average HLS student are now also more conservative. Both the mean and the median student have moved toward the right.

Moreover, these developments are attributable almost entirely to factors intrinsic to Harvard Law School. It is true that the average American has become slightly more conservative over the past three decades,[12] and law students drawn from a national pool would be expected to reflect this trend to some degree. The national trend, however, is much weaker than the student trend documented in this Article; the more marked increase in the conservatism of the HLS student body is due to matters affecting Harvard Law in particular. Changes to the administration and faculty, for example, have significantly driven this transformation. Yet there remains an additional element antecedent to these personnel changes—indeed, a motivating force behind them—that has played a crucial role in prompting and fostering the rightward shift of the student body: the formation and rise of the Federalist Society at Harvard Law School.

The Federalist Society is a national organization of law students and legal practitioners that describes itself as "a group of conservatives and libertarians dedicated to reforming the current legal order."[13] Driven by the belief that "[l]aw schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society,"[14] the Society is "committed to 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."[15] The Society "seeks to promote awareness of these principles and to further their ap-

12. American National Election Studies, Liberal-Conservative Self-Identification, 1972–2004 (Nov. 27, 2005), http://www.umich.edu/~nes/nesguide/toptable/tab3_1.htm (data showing that mean self-identification has shifted slightly to the political right since 1972).

13. Fed-Soc.org, Our Background, http://www.fed-soc.org/ourbackground.htm (last visited Jan. 16, 2006).

14. Fed-Soc.org, Our Purpose, http://www.fed-soc.org/ourpurpose.htm (last visited Jan. 16, 2006).

15. Fed-Soc.org, Our Background, *supra* note 13.

plication through its activities."[16] It features student and lawyer divisions, with student chapters at approximately 180 law schools,[17] including Harvard.

Much ink has been spilled over the national Federalist Society's role within the current Bush administration—among other things, its perceived influence on cabinet members, Department of Justice officials, and judicial appointees.[18] But it is the Harvard Law School chapter of the Federalist Society that this Article seeks to explore. Specifically, this Article is an examination of the formation and early years of the Federalist Society chapter on the Harvard Law School campus and its role in bringing about a changing of the ideological guard at the law school. This Article explores the ideological atmosphere that had developed at Harvard Law School by the late 1970s and early 1980s; the approaches by which conservative students during those times attempted to provide an alternative voice to the overwhelmingly liberal environment of the era; the extent to which one group of conservative students, the Society for Law and Public Policy—now the Harvard Federalist Society—succeeded in triggering a counterreaction to the dominant beliefs of the time and reorienting the ideological direction of the school; and the effects of these actions on the law school, including conservative-friendly personnel changes and, ultimately, a rightward shift in the beliefs of the HLS student body. Twenty-five to thirty years ago, conservative students at Harvard Law were ideological outliers who struggled to gain credibility in class and acceptance on campus. Today, the Harvard Federalist Society is one of the most prominent voices at the law school, an organization that sports a well organized,

---

16. *Id.*

17. *Id.*

18. *See, e.g.*, Thomas B. Edsall, *Federalist Society Becomes a Force in Washington*, WASH. POST, Apr. 18, 2001, at A4; Martin Garbus, *A Hostile Takeover: How the Federalist Society is Capturing the Federal Courts*, AM. PROSPECT, Mar. 2003, at A16; Neil A. Lewis, *A Conservative Legal Group Thrives in Bush's Washington*, N.Y. TIMES, Apr. 18, 2001, at A1. The national Federalist Society garnered heightened publicity during the nominations of John G. Roberts, Jr., Harriet Miers, and Samuel A. Alito, Jr., to the United States Supreme Court. *See, e.g.*, Jason DeParle, *Nomination for Supreme Court Stirs Debate on Influence of Federalist Society*, N.Y. TIMES, Aug. 1, 2005, at A12; Michael A. Fletcher, *What the Federalist Society Stands for*, WASH. POST, July 29, 2005, at A21; Al Kamen, *Miers's Long-Ago Federalist Slap Still Stings*, WASH. POST, Oct. 21, 2005, at A21; David D. Kirkpatrick, *Despite Recent Gains, Conservative Group is Wary on Direction of Court*, N.Y. TIMES, Nov. 11, 2005, at A20.

well established presence on campus. Thus, while it is far too soon to refer to Harvard Law School as a bastion of conservatism, it is no longer accurate, because of the efforts of conservative students both past and present, to continue reflexively to associate Harvard Law School with unadulterated liberalism.

Before continuing, a preliminary word on this Article's use of "conservatism" is necessary. Admittedly, it is a catch-all term, and bifurcating ideas and individuals into "conservative" and "liberal" categories is a rough division at best. One framework that may be helpful going forward is a three-strand structure that Professor Richard Fallon has elaborated in scrutinizing the "conservatism" of the Supreme Court.[19] Professor Fallon identifies three types of conservatism: substantive conservatism, methodological conservatism, and institutional conservatism.[20] It is this first type of conservatism, substantive conservatism, that this Article generally means to evoke when using the term "conservative." Substantive conservatism generally means an outlook disfavoring the criminally accused and civil rights-civil liberties claimants; favoring takings claimants; and adopting positions that are anti-union, pro-business, anti-liability, and anti-injured person.[21] Fallon admits this definition is "obviously crude" and further subdivides "self-identified political conservatives" into "libertarians, who generally believe that that government governs best which governs least, and social conservatives, who favor governmental regulations to protect traditional values and structures."[22] Although the principles of those two groups may often seem at odds with each other, an underlying thread does unite them. As Professor Robin West has written,

> Conservative political theory . . . is united by its antipathy to state normative authority and preference for social authority . . . . [S]ocial conservatives urge the state to defer to the visions of the good embedded in a community's moral institutions; . . . free-market conservatives locate normativity in the outcomes generated by and the preferences reflected in economic markets. [Both], however, view these forms of au-

19. *See* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002).

20. *Id.* at 446.

21. *Id.* at 447 (citing Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 815 (1995)).

22. *Id.*

> thority as importantly higher or better than the normative authority of "the state."[23]

Although substantive conservatism, divided between libertarianism and social conservatism, is the main form of conservatism that this Article emphasizes, Fallon's two other definitions of conservatism bear mentioning as well. Methodological conservatism describes how one favors reaching legal decisions and fashioning legal rules. The generally conservative positions in this regard are again divided into two: "originalist" understanding, which asserts that issues should be resolved in accordance with the Framers' understanding of the Constitution's text; and "Burkean" understanding, which is not as tied to constitutional text but places great weight on a reverence for tradition, a distaste for sweeping constitutional generalizations, and a preference for movement in incremental steps.[24] Another manifestation of methodological conservatism is the law and economics framework,[25] which, like originalism and Burkean interpretation, disfavors untethered, broad generalities and binds itself to the mast of an underlying element. Rather than constitutional text or "tradition," however, its underlying element consists of the "theories and empirical methods of economics."[26] Methodological conservatism need not be correlated with substantive conservatism,[27] but the two are often tied together in practice.[28]

Finally, Fallon defines institutional conservatism as an approach "favor[ing] a narrow role for the judiciary, or at

---

23. Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 658 (1990).

24. Fallon, *supra* note 19, at 448–49.

25. Interview with David Wilkins, Kirkland and Ellis Professor of Law, Harvard Law School, in Cambridge, Mass. (Apr. 5, 2005) [hereinafter Wilkins interview].

26. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 19 (3d ed. 1986).

27. *See* Interview with Alan Dershowitz, Felix Frankfurter Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 29, 2005) [hereinafter Dershowitz interview] (noting the substantive liberalism of leading law and economics scholars like Guido Calabresi, Louis Kaplow, and Christine Jolls).

28. *See* Fallon, *supra* note 19, at 450 ("First, an originalist methodology may tend to promote substantively conservative outcomes with respect to many issues. Second, behind the specific preferences of substantive conservatives may lie a generalized desire for order and stability; if so, this preference may go hand-in-hand with a preference either for clear rules established by the Constitution's framers and ratifiers or for traditionalism and incrementalism in judicial methodology." (citations omitted)).

least . . . disfavor[ing] judicial innovation."[29] This meaning has less applicability once removed from the judicial context, but it does have some relevance in discussing increasing conservatism at Harvard Law School. Institutional conservatism can be taken to mean how much weight one puts on traditional standards in deciding admissions, faculty appointments, and other aspects that constitute a law school.[30] Institutionally conservative members of a law school might more often prefer customary, more objective measures of excellence when reaching decisions and spurn alternative, nontraditional approaches, just as institutionally conservative decisionmakers might disdain similar innovation within the judiciary.

This Article does not purport to review the entire history of the law school in the last thirty years, an undeniably Herculean task, nor does it contend to provide an exhaustive history of conservatism at Harvard Law School or even the Federalist Society itself, both of which could easily fill a book. Rather, this Article seeks to document the heretofore untold early history of the Harvard Federalist Society, the circumstances that preceded and prompted its founding, its place within the larger Harvard Law School environment in which it was formed, and the substantial impact it had on reframing the ideological atmosphere at Harvard Law School in the 1980s and continues to have today. A history of the last thirty years of Harvard Law School cannot be written without acknowledging and understanding the role of conservative students and the Federalist Society in shaping the school's arrival at its present state. This Article seeks to further that understanding.

To that end, the Article proceeds as follows. Part II documents the state of conservatism at Harvard Law School prior to the formation of the Federalist Society, describing the shift in student attitudes after the Vietnam War and Watergate and the effect of this trend on conservative outlets at the law school. Part III tells the story of the founding of the national Federalist Society, including the role of Harvard students in its genesis. Part IV explains the formation and early years of the Harvard chapter of the Federalist Society. Part V describes the Harvard chapter's 1985 presentation of a panel at the Harvard Club of

29. *Id.*

30. Wilkins interview, *supra* note 25.

New York that fundamentally altered the course of the law school. Part VI examines the rightward shift of the HLS student body and its relation to the past and present efforts of the Harvard chapter of the Federalist Society. Part VII concludes.

II. "YOU HAD TO HAVE A SENSE OF HUMOR ABOUT IT": CONSERVATIVE PRECURSORS TO THE FEDERALIST SOCIETY AT HARVARD LAW SCHOOL

A. The Demise of the "Conservatizing Milieu"

For much of the Twentieth Century, Harvard Law School bore the hallmarks of a relatively conservative institution, its character more rooted in tradition and less progressive-minded than its peers. The modern Harvard curriculum was grounded in Langdellian theory in which "'law, considered as a science,' consisted only of a discrete number of 'principles and doctrines.'"[31] Even after this theory was abandoned in the face of criticism from legal realists, curricular change at Harvard advanced only cautiously in comparison to its competitors, Columbia and Yale, where academic and curricular innovations had been launched in the 1920s and 1930s.[32] The New Deal prompted the first serious effort to reform the HLS curriculum, but World War II put an end to this attempt.[33] In 1946, Erwin Griswold assumed the deanship, a position he would hold until 1967. Under Griswold, who "set a high moral tone for the Law School,"[34] the Harvard Law of the 1950s and 1960s was a "conservatizing milieu."[35] Indeed, "the leitmotiv of student life during the Griswold deanship was the extent to which students ignored national politics in favor of an almost exclusive concern with their future careers."[36]

Accordingly, it is no wonder that Professor Arthur Sutherland made the general point in his 1967 history of Harvard Law

---

31. JOEL SELIGMAN, THE HIGH CITADEL 45 (1978).

32. *See id.* at 50–52, 63.

33. *See id.* at 67.

34. *Id.* at 72 (internal quotation marks omitted). Professors joked that under Griswold, no faculty member got divorced because "no one would have dared." *Id.*

35. Interview with Duncan Kennedy, Carter Professor of General Jurisprudence, Harvard Law School, in Cambridge, Mass. (Apr. 10, 2005) [hereinafter Kennedy interview].

36. SELIGMAN, *supra* note 31, at 89.

School that "students of law are, on the whole, quite conservative,"[37] for his experiences at Harvard would have shaped such a comparative opinion. It is also not surprising that, in being groomed primarily to practice law among the large firms of the time, Harvard Law students' politics would mirror those of the nation. On October 5, 1967, the *Harvard Law Record*, the student-published newspaper of Harvard Law School, reported on a "straw primary" that the Harvard Law Republicans conducted in anticipation of the 1968 presidential election. More than 80% of the student body participated, and in figures "close to the national averages," 31% identified as Republicans, 44% as Democrats, and 25% as independents.[38] Thus, at the end of 1967, if political party affiliation is any indication, the Harvard Law School student body displayed, if not a relatively balanced ideological mix, at least one that reflected the nation as a whole.

The social and cultural tumult that swept the country in the late 1960s and early 1970s had an extraordinary effect on Harvard Law School, dramatically altering the ideological outlook of the student body. Although a general history of Harvard University and Harvard Law School during this period is beyond the scope of this Article, the Vietnam War era was unquestionably a period of enormous change and unrest at Harvard Law School. Increasingly progressive and activist students challenged the policies of both the law school—the deanship of which Griswold had resigned in 1967—and the national government. Indeed, only three weeks after the *Record* reported the aforementioned political survey, its front page contained a story stating that approximately fifty HLS students, almost eighty percent of them in their first year, had joined in a march on Washington to protest Vietnam policy.[39] On that same front page, another story noted similar socially driven stirrings among the faculty and reflected in course offerings.[40] Other in-

37. ARTHUR SUTHERLAND, THE LAW AT HARVARD 283 (1967).

38. *Students Name Rockefeller GOP Candidate*, HARV. L. REC., Oct. 5, 1967, at 15.

39. *Law Students March in Washington Protest*, HARV. L. REC., Oct. 26, 1967, at 1.

40. *See* Jack Tate, *The New Wave*, HARV. L. REC., Oct. 26, 1967, at 1. The article noted that "[t]he crescendoing intensity of social consciousness within the political fabric of America has strikingly manifested itself . . . in the . . . attitudes of the Harvard Law School faculty and in the curriculum offered by the school. Across the spectrum of the faculty . . . awareness of the problems of the poor and op-

dications of a leftward shift in the student body rapidly proliferated in the proceeding years: the formation of a radical law students' group in fall 1968,[41] distribution of anti-war leaflets by nearly 600 students in conjunction with a national Moratorium Day in fall 1969,[42] travel by about 400 students to Washington, D.C. in May 1970 to participate in anti-war activities,[43] and the passage of a resolution by nearly 700 students demanding that the faculty cancel spring exams in 1970 to show support for the anti-war movement.[44]

Surveys reported in the *Record* confirm a precipitous drop in student conservatism accompanying these activities. Whereas in the October 1967 poll 31% of students identified as Republicans, an October 1968 pre-election poll showed that only 21% of students supported Richard Nixon in the general election.[45] This latter survey evidenced rising student radicalism as well, pushing the mean HLS student ideology leftward: One student answered, "I would not vote. Revolution is the answer"; another wrote in the name of Eldridge Cleaver.[46] By March 1972, according to another *Record* poll, only 11% of students identified themselves as Republicans.[47] The article remarked that the voting "clearly disclosed the Law School's liberal preferences."[48] Just before the 1972 election, that number dropped to

---

pressed seems to be competing with the natural concern for the powerful and the affluent in American society." *Id.*

41. *See* Lawrence Gartner, *Radical Group Started*, HARV. L. REC., Sept. 26, 1968, at 1, 12 (adding that the organization mostly consisted of first-year students).

42. Bob Hernandez, *Moratorium Came to HLS: Students March, Canvass, Listen*, HARV. L. REC., Oct. 23, 1969, at 3.

43. Michelle Scott, *HLS Groups Begin Peace Activities*, HARV. L. REC., May 21, 1970, at 3. Included in this number are several professors who accompanied the students to Washington. *Id.*

44. Michael Lurey, *Law Students Vote to Join Strike*, HARV. L. REC., May 21, 1970, at 1 (adding that some professors also supported the proposal). The faculty rejectted this proposal but voted to allow students the option of taking all exams at home over the summer. *See* Bob Hernandez, *Faculty Alters Final Exams*, HARV. L. REC., May 21, 1970, at 1.

45. Kevin Kane, *Humphrey Overwhelms Nixon in Poll*, HARV. L. REC., Oct. 31, 1968, at 1. Admittedly, the affinity between ideological beliefs, party affiliation, and presidential preference is not perfect. For example, the results of this poll could have reflected choices by students who considered themselves conservative but held a personal disdain for Nixon.

46. *Id.*

47. David Cocke, *McGovern Prevails in Student Poll*, HARV. L. REC., Mar. 3, 1972, at 1.

48. *Id.* at 6.

10%, in a poll that showed 83% of HLS students supported George McGovern.[49] Not only was Harvard Law School "heavily Democratic,"[50] but given the fact that McGovern ultimately garnered only 38% of the popular vote in one of the most decisive presidential defeats in history,[51] it was clearly moving in a decidedly different direction than the rest of the nation.

B. The Republican Club

Throughout the Vietnam Era, conservatives at Harvard did not lack an outlet for fraternizing, networking, and advancing conservatism. The law school had sported a Republican Club since 1947, when it was organized as a committee of the University Young Republican Club.[52] It became an autonomous organization in 1958, christening itself the Harvard Law and Graduate Schools Republican Club.[53] As its name suggests, the club, while primarily consisting of law students, also included members from other schools, particularly the business school.[54] The organization thrived at the beginning of the 1960s; its photo in the 1962 yearbook shows 77 members, and its description boasts more than 300 members.[55] But it was not immune to

---

49. Bob Brown, *McGovern Sweeps Poll with 83%*, HARV. L. REC., Oct. 20, 1972, at 1.

50. *Id.* at 4.

51. *See, e.g.*, Joan Vennochi, Op-Ed, *Is Dean Another McGovern?*, BOSTON GLOBE, Nov. 18, 2003, at A19 (describing the 1972 election as a "landslide victory for Nixon" and a "crushing defeat for McGovern").

52. 1971 HARVARD LAW SCHOOL YEARBOOK 215.

53. *Id.*; Telephone Interview with Hal Mickelson '74 (Mar. 24, 2005) [hereinafter Mickelson interview]; Telephone Interview with James Shorter '75 (Mar. 19, 2005) [hereinafter Shorter interview]. This Article will provide the graduation year of alumni upon first reference when the year of graduation is relevant to the discussion. Therefore, graduation years of HLS professors or administrators who graduated from the law school are not listed unless within the context of that individual as an alumnus of the school.

54. Shorter interview, *supra* note 53.

55. 1962 HARVARD LAW SCHOOL YEARBOOK 189. A word of caution is necessary about drawing inferences from yearbook photographs, as they are not necessarily an accurate proxy for the number of individuals or strength of an organization in a given year. They may consist only of the organization's officers (without a caption indicating this) or may have been taken at a particular function not attended by all members. *See* Telephone Interview with John P. Frantz '96, President, Harvard Federalist Society, 1995–1996 (Mar. 31, 2005) (warning that relying on his year's photograph, taken at a single event, would provide an "inaccurate assessment" of the true size of the organization). Nevertheless, yearbook photographs can be a useful gauge of general trends in membership size, level of commitment

the changes that affected Harvard in the late 1960s and early 1970s. Its 1969 yearbook photo shows only 31 members;[56] its 1970 photo, 22;[57] and its 1971 photo, only 20.[58] This membership decline mirrored the drop in the number of conservatives on campus: By the early 1970s, according to one alumnus's estimate, only 3 to 5% of the campus would openly identify as conservative.[59]

Those alumni who were in the Republican Club in the early 1970s recall it as small but still "fairly active."[60] According to Donald Ayer '75, approximately twenty-five people were actively involved, though it was "always a pretty discreet group of people."[61] The Club served both political and social functions. On the political front, the members held meetings, hosted speakers, and took a trip to Washington, D.C. each spring,[62] which one alumnus characterized as "not much more than a bunch of college kids going to D.C. on spring break who wanted to meet famous people" and found that the Harvard name opened doors.[63] The group's makeup was "big-tent," with many Rockefeller Republicans; it thus directly contrasted the Republican Club at Harvard College, which included more "true-believing conservatives" and was more "ideological."[64] Socially, the club scheduled trips to meet with Republican Clubs at nearby colleges—most of which, not coincidentally, were women's colleges such as Wellesley, Mount Holyoke, and Smith.[65] Former members make no apologies for their ulterior motives: The law school was predominantly male at this time,

---

among members, and strength of group leadership in encouraging members to appear at group events or photo sessions.

56. 1969 HARVARD LAW SCHOOL YEARBOOK 200.

57. 1970 HARVARD LAW SCHOOL YEARBOOK 194.

58. 1971 HARVARD LAW SCHOOL YEARBOOK, *supra* note 52, at 214.

59. Telephone Interview with Richard Willard '75 (Mar. 20, 2005) [hereinafter Willard interview].

60. Shorter interview, *supra* note 53 *see also* Telephone Interview with Richard Carrigan '74 (Mar. 20, 2005) [hereinafter Carrigan interview] (characterizing the club as "pretty active").

61. Telephone Interview with Donald Ayer '75 (Mar. 21, 2005) [hereinafter Ayer interview].

62. Carrigan interview, *supra* note 60.

63. Mickelson interview, *supra* note 53.

64. *Id.*

65. Shorter interview, *supra* note 53.

so visiting these chapters was "quite an attraction."[66] Many Republican Club members were also members of Lincoln's Inn, which drew less of the "real radical types"[67] and more individuals who "would want to spend money on social dues to drink inexpensive scotch"; such individuals tended to be more inclined toward conservatism.[68]

The Republican Club did not serve as a forum for serious legal or intellectual discussion of conservative legal views; it was very much a political, partisan organization.[69] While the members may have discussed being conservative among themselves, there was no effort to write about conservative issues in a scholarly manner nor any effort to inform or persuade others through campus debate.[70] In this sense, while the Republican Club served as an outlet for conservatives at Harvard Law School, its purpose differed considerably from the missions of later HLS conservative organizations. The club did serve as a sanctuary for conservatives, whom one alumnus described as an "embattled minority" on campus at that time,[71] but it did not engender any affirmative animosity. This is in large part because it was not a forum to propose or espouse conservative legal views.[72] Unlike the hostile reaction the Federalist Society would inspire in its early years by encouraging conservative outspokenness, the Republican Club, and conservatives on campus in general, by remaining "discreet," stayed largely underneath the Harvard Law School radar. But only a few years into the 1970s, national events would again provide a setback to conservative students at Harvard Law School, a blow to which they responded in typical Harvard Law fashion: with gallows humor.

C. The Rehnquist Club

On June 17, 1972, five men were arrested while breaking into the offices of the Democratic National Committee at the Water-

66. Mickelson interview, *supra* note 53.
67. Shorter interview, *supra* note 53.
68. Mickelson interview, *supra* note 53.
69. Ayer interview, *supra* note 61.
70. Carrigan interview, *supra* note 60.
71. *Id.*
72. Ayer interview, *supra* note 61.

gate hotel and office complex in Washington, D.C.[73] By April 1973, President Nixon's chief of staff, top domestic adviser, and attorney general had resigned over the growing scandal.[74] By August 1974, the Watergate affair brought about the resignation of President Nixon himself.[75] As wearying as the affair was for both the nation in general and the Republican Party in particular, it dealt a near-fatal blow to Republicans on the Harvard Law School campus, eviscerating what little conservative presence may have previously existed. The entire Watergate affair was "terrible for morale" among Republicans on campus, states one alumnus.[76] President Nixon "totally embarrassed himself" with Watergate,[77] and the ignominy spread to those Harvard Law students who had previously supported his political efforts. The post-Nixon, post-Watergate years were "not a very good time to be a Republican," another alumnus notes,[78] and the fate of the Republican Club bears this out. By 1973, the Club numbered thirteen in its yearbook photo; by 1976, only four.[79] By 1977, it had disappeared completely.[80]

While President Nixon's decline and fall may have spurred the demise of conservative organizations at the law school, it coincided with the appearance of what can only be politely regarded as one of the most bizarre student organizations in recent Harvard Law School history. The 1973 Harvard Law School yearbook contains, in the student organization section, the usual pictures and blurbs of the various Ames Clubs of the time. These clubs, now defunct, were named for great jurists and organized primarily to field teams for the annual moot court competition.[81] But nestled among the pages portraying

---

73. *See* Alfred E. Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST, June 18, 1972, at A1.

74. *See* Haynes Johnson & Laurence Stern, *3 Top Nixon Aides, Kleindienst Out*, WASH. POST, May 1, 1973, at A1.

75. *See* Carroll Kirkpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A1.

76. Mickelson interview, *supra* note 53.

77. Carrigan interview, *supra* note 60.

78. Willard interview, *supra* note 59.

79. *See* 1973 HARVARD LAW SCHOOL YEARBOOK 222; 1976 HARVARD LAW SCHOOL YEARBOOK 201; *see also* Janny Scott, *Roberts's Roots as Conservative*, N.Y. TIMES, Aug. 21, 2005, at A1 (quoting a former HLS student characterizing the Republican Club of the time as "miniscule").

80. The club would not reappear until the spring of 1987. *See* David Snouffer, *HLS Republicans Organize to Stem Liberal Tide*, HARV. L. REC., Apr. 24, 1987, at 2.

81. Mickelson interview, *supra* note 53.

the likes of the John Marshall Club and the Learned Hand Club is a decidedly incongruous outfit named after a jurist who had ascended to the Supreme Court only a year earlier: the Rehnquist Club. In contrast to the austere images of other Ames Club photos, the Rehnquist Club photo depicts nineteen students wearing various costumes, including Mexican ponchos and fur coats; smoking pipes; and grinning widely at the camera.[82] The names accompanying the picture are clearly fictitious: they include "Checkers," "A. Hiss," "N. Guilty," "#568-86-9490," and "T. Chamber Pott." Perhaps most absurd of all is the blurb juxtaposed with the photo, which is reprinted in full as follows:

> "The formation of the Rehnquist Club was a victory for free speech and minority rights," said co-founder Elwood Greed. "Prior to its birth, there was virtually no foothold at Harvard F. Law School for the worldwide forces of atavism and revanchism."
>
> From the outset, the Club faced serious obstacles. Many of its potential supporters felt that "membership" in any "group" smacked of bleeding heart collectivism. Yet the Rehnquisters were inexorably drawn together, lonely spokesmen for the pro-American viewpoint amid legions of knee-jerking sob sisters.
>
> The club's activities centered on its monthly Patriotic Discussion Session, informally yclept The Rehnquisition. Early topics for 1972-73 included: Nuclear Weapons: A Solution for the Urban Problem?; The Ninth Amendment and Your Right to Own Gold; and Perversion of Justice—Unnatural Acts of Congress. Hotly debated, though rejected by the club, was Yodar Krevich's proposal for Retroactive Birth Control: "Many of the 20-to-25 year-olds running around Cambridge are here only because of their parents' inadequate population control technology. We ought to correct the mistakes of years past . . . ."
>
> Other Rehnquist Club activities have been less successful. Harvard's Criminal Law faculty reportedly refused to cosponsor a colloquium on "Coddling the Moral Degenerate" because it would duplicate their present curriculum. Limousine Liberals throughout the Commonwealth are resisting plans for a projected Underwater Motorcade around Martha's Vineyard in 1976.

---

82. 1973 HARVARD LAW SCHOOL YEARBOOK, *supra* note 79, at 223.

> Each year, the club presents its Elijah Adlow Award for No-Nonsense Law Enforcement. Past recipients have been Clinton Eastwood, Duke Wayne, Popeye Doyle, Mayor Rizzo, Inspector Lestrade, Generalissimo Franco, and the Sheriff of Nottingham.[83]

The 1974 yearbook features a similarly curious photo (featuring names like "G. Liddy" and "J. Dean, III") and blurb.[84] In fact, the Rehnquist Club reappears in the Harvard Law yearbook up through 1979, each time featuring disguised members, fictional names, and descriptions so colorfully over-the-top in conservative rhetoric that it is difficult to tell if the members' motives—if they had any—were to promote right-wing or left-wing views.[85]

The Rehnquist Club was not actually a student organization at all. It was the brainchild of a conservative student, Hal Mickelson, as a way to poke fun at what conservatives at Harvard Law School felt was an overwhelming sense of liberalism on the HLS campus, particularly with President Nixon under fire in the White House. According to several "members" of the club, Mickelson came up with the idea, wrote the tongue-in-cheek blurb, and collected money to pay the fee for placement in the 1973 yearbook.[86] Mickelson acknowledges that the Rehnquist Club was a "phony Ames Club" that had no existence apart from getting together for the photograph.[87] He characterizes it as a "smart-aleck way" to draw attention to the paucity of conservatives and conservative ideas on campus. It was a time when, because of Watergate, "if you wanted to be a right-

---

83. *Id.* (omission in original).

84. 1974 HARVARD LAW SCHOOL YEARBOOK 211 ("The Rehnquist Club, spiritual Valhalla of atavists and revanchists everywhere, entered its second triumphant year at Harvard F. Law School in 1973-74. . . . Several of the School's tax experts startled the Club with an expose, 'After-Tax Income—Another Subsidy for the Wealthy,' in which we discovered that the Federal government often allows wage earners and investors to keep large fractions of their income from nongovernment sources, thus enabling them to subsist entirely outside the welfare system.").

85. *Cf.* Clyde Haberman, *In Defense of Privilege, With a Wink*, N.Y. TIMES, Nov. 9, 2004, at B1 (describing "Billionaires for Bush," a political protest group mocking Republican policies by publicly appearing in tuxedos, gowns, top hats, and tiaras and satirically arguing in favor of corporations, lobbyists' rights, and an end to taxes).

86. Carrigan interview, *supra* note 60; Shorter interview, *supra* note 53. According to Richard Carrigan, "In those days, any organization, no matter how real or unreal, could ask to have their picture taken." Carrigan interview, *supra* note 60.

87. Mickelson interview, *supra* note 53.

winger, you had to have a sense of humor about it." It "wasn't a lot of fun to be a Republican, or a conservative, or a right-winger, or any of those things," Mickelson says, "so you had to make your own fun."[88] The members were largely drawn from the Republican Club but also included some of Mickelson's fellow residents of the third floor of Ames Hall, who were not themselves conservative but "in on the joke."[89]

Though obviously an over-the-top gag, the Rehnquist Club's brief existence underscores that the post-Vietnam War, post-Watergate atmosphere of Harvard Law School had undergone a shift toward a considerably more left-wing environment. The Republican Club had entered its death spiral, and conservative students were left to resort to underground, once-a-year frivolity in order to make any statement at all on campus or find any sanctuary, real or unreal. The "club" continued to appear in the yearbook throughout the rest of the decade, but, paralleling the dwindling numbers in the Republican Club, its photo featured fewer people each year, bottoming out at three persons in 1979 before the group finally succumbed to history. By that point, however, a serious outlet for conservatism on campus had formed, one that comprised the first step toward the formation of the Federalist Society and the eventual transformation of the ideological climate at Harvard Law School.

D. The Harvard Society for Law & Public Policy and the Harvard Journal of Law and Public Policy

In spring 1977, two third-year Harvard Law students, Spencer Abraham and Steven Eberhard, approached Dean Albert Sacks with an idea for a new student law journal. The creation of a journal at Harvard Law School was not an infrequent event in those days:[90] The recent formation of the *Women's Law Journal* brought the number of student specialty publications to five, the others being the *Civil Rights-Civil Liberties Law Review*, *Environmental Law Journal*, *International Law Journal* (the first of the specialty journals, commencing publication in 1959), and

88. *Id.*

89. *Id.*

90. *See* Douglas H. Ginsburg, *Reflections on the Twenty-Fifth Anniversary of the* Harvard Journal of Law & Public Policy, 25 HARV. J.L. & PUB. POL'Y 835, 835 (2002) (describing the formation of a new law journal as "an almost commonplace event" at Harvard in the late 1970s).

Journal on Legislation, in addition to the longstanding *Harvard Law Review*. Abraham and Eberhard, however, sought not "merely to add another specialized journal to the long list of periodicals" at the law school.[91] Believing that the existing specialty journals generally maintained a liberal perspective,[92] they instead desired to create a journal that would encompass a broad range of legal, political, and economic topics from a unique editorial viewpoint: one "broadly characterized as conservative."[93]

Abraham and Eberhard were then serving as managing editor and note editor, respectively, of the *Journal on Legislation*, which the *Record* described at the time as "liberal-leaning."[94] Dissatisfied with their journal experience,[95] they felt that conservative ideas had been "all but dismissed" from law journals and that "conservative students had almost no opportunity to pursue and develop their own thoughts and interests."[96] These barriers led to two negative consequences: First, it made it difficult for conservative students to reap the benefits of participating in law journal publication, diminishing both personal satisfaction and employment opportunities; second, the dearth of conservative law journals stifled the development of new conservative ideas.[97] Abraham and Eberhard were not oblivious to the challenge ahead of them. As Abraham later noted, the legal academy at the time "was dominated by people whose devotion to big, centralized government caused them to

---

91. E. Spencer Abraham, *Introduction: Twentieth Anniversary Volume,* Harvard Journal of Law & Public Policy, 20 HARV. J.L. & PUB. POL'Y 1, 1 (1996).

92. *See* Bill Ross, *Conservative Law Journal to Appear Next Spring*, HARV. L. REC., Sept. 23, 1977, at 6 (quoting Steven Eberhard).

93. E. Spencer Abraham & Steven J. Eberhard, Preface, 1 HARV. J.L. & PUB. POL'Y v, v (1978).

94. Ross, *supra* note 92, at 6.

95. *See* David Price, *Conservative Journal Asserts Independence*, HARV. L. REC., Dec. 7, 1984, at 12.

96. Abraham, *supra* note 91, at 1.

97. Prospectus, Harvard Society for Law and Public Policy, Inc. 1 (Nov. 15, 1978) [hereinafter SLPP Prospectus] (on file with author). Years later, Judge Alex Kozinski highlighted a third need for a conservative law journal: "Many of the gains made by liberals during the 1960s and 1970s had come in the courts. It was apparent that conservatives could not achieve their objectives by appealing to voters alone; they would have to persuade judges as well. . . . [A] medium of communication was required to disseminate these arguments to the legal community." Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 1–2 (1995).

advocate an activist judiciary that would twist the meaning of laws, and even the Constitution, to serve their policy goals."[98] Aside from this generally adverse environment, the atmosphere at Harvard in particular was even more unwelcoming. As Judge Douglas Ginsburg, then an assistant professor at the law school, later recalled, "the faculty of the Harvard Law School was overwhelmingly hostile to conservative ideas and the student body appeared to be only a little more diverse."[99]

Abraham and Eberhard experienced this inhospitability firsthand in their meeting with Dean Sacks, who offered them office space but, unlike the other journals, no school funding or use of the school's publication resources. The reason given was that the school did not wish to subsidize a publication that openly advocated a particular ideological viewpoint.[100] The students were somewhat incredulous, given the implication, implausible to them, that publications like the *Civil Rights-Civil Liberties Law Review* adopted a nonideological stance, but the fact remained that if they were to issue a conservative law journal, they would have to raise the funds and arrange for publication on their own.[101] To do so, on June 6, 1977, Abraham and Eberhard incorporated the Harvard Society for Law & Public Policy, Inc., a Massachusetts nonprofit corporation whose major operating arm would be the *Harvard Journal of Law and Public Policy* (JLPP).[102] The two students did not know

98. Abraham, *supra* note 91, at 1.

99. Ginsburg, *supra* note 90, at 835.

100. SLPP Prospectus, *supra* note 97, at 3.

101. Sacks's refusal was a stroke of serendipity for the journal. By remaining financially independent from the school, it was able to avoid the many conditions that the school placed on subsidized publications. For example, in 1981, the administration, with little warning, informed three journals that they would be restricted to publishing only two issues per year, rather than the three they had been releasing. *See* Erich Merrill, *Journal Issues Slashed by Sacks*, HARV. L. REC., Sept. 25, 1981, at 1.

102. SLPP Prospectus, *supra* note 97, at 1; additional data obtained from the Commonwealth of Massachusetts Corporations Division.

During its first seven years, the JLPP's full title was the *Harvard Journal of Law and Public Policy*. Beginning with Volume 8, Issue 1, published in winter of 1985, the title was changed to the *Harvard Journal of Law & Public Policy*. The reasons for this modification from "and" to "&" remain unknown. When referring to the journal's title in full, this Article will use the earlier name (that is, with the ampersand spelled out) to maintain consistency, unless a cited document specifically uses the alternative form.

it, but they had just sown the seeds for the national Federalist Society, the Harvard Federalist Society, and the reorientation of the law school.

The JLPP faced a number of early challenges but realized success from the beginning. Its most critical need was securing necessary funding, all of which had to come from outside sources given the law school's refusal to subsidize it. In October 1977, its corporate parent, the Society for Law & Public Policy, received its tax-exempt status.[103] The Journal then obtained $10,500 in contributions for its first fiscal year ended September 30, 1978, against only $8,400 in expenses.[104] Many of the initial funds appear to have been provided by a single donor, John P. McGoff of Panax and Global Communications Corporations.[105] Prior to its inaugural issue, it sold approximately 250 subscriptions,[106] a notable quantity for a publication with no track record and an indication of the demand for conservative legal scholarship. The first issue, which featured five articles, one book review, and two student notes, appeared in summer 1978 and achieved all of the Journal's major goals: "providing a forum for alternative ideas, making a real contribution to the public debate on issues of significant national concern, giving law students the opportunity to publish a journal including their own work, and providing its readers with the wisdom of an array of prominent American conservatives."[107]

With the positive reception of their first issue and an inaugural fiscal year in the black, the founders of the JLPP set their sights on even bigger achievements. In November 1978, the Harvard Society for Law & Public Policy, Inc. (SLPP) issued a

---

Similar confusion reigns over the name of the Society for Law & Public Policy. Documents refer to the name with the ampersand symbol as well as with the ampersand spelled out. The bylaws of the Society, however, state that "[t]he name of this corporation shall be the 'Harvard Society for Law & Public Policy, Inc.'" Bylaws of the Harvard Society for Law & Public Policy, Inc. 1 (May 24, 1977) (on file with author). Therefore, this Article, when referring to the Society's name in full, will employ the ampersand symbol unless a document specifically denotes otherwise.

103. Data obtained from Internal Revenue Service Exempt Organizations Master Listing, http://www.irs.gov/taxstats/charitablestats/article/0,,id=97186,00.html (follow "States: Massachusetts" hyperlink) (last visited Jan. 16, 2006).

104. SLPP Prospectus, *supra* note 97, at 3, 11.

105. *See* Acknowledgements, 1 HARV. J.L. & PUB. POL'Y vii, vii (1978).

106. SLPP Prospectus, *supra* note 97, at 5.

107. *Id.* at 4.

fundraising prospectus to potential donors outlining an ambitious five-year plan. The document contemplated three separate functions for an ever-expanding SLPP, an entity that had previously served only as the corporate parent for the journal. First, the SLPP would continue to publish the JLPP, moving to semi-annual publication by 1980 and quarterly publication by 1982.[108] Second, it would ramp up its budding efforts at establishing a Research Bureau, which would provide "research services for state and national legislators, public interest groups, and other concerned citizens, at their request, on issues of substantial public concern."[109] Having already completed one research project for a member of the House of Representatives,[110] the SLPP planned to expand these efforts, "eventually leveling off at approximately ten or twelve per year."[111] Third, by 1980, the SLPP would publish a quarterly magazine, separate from the JLPP, which would report and analyze recent court decisions, administrative actions, and pending legislation of interest to the conservative community.[112] The magazine would be distributed to a "national conservative law student membership organization," the members of which would pay five dollars in return for the magazine, a discount on a JLPP subscription, and "certain other services to be provided by the organization."[113] By 1983, the SLPP prospectus asserted, each of these three prongs of the Society—a quarterly JLPP, a research service, and a quarterly magazine distributed to a national conservative student network—would be self-supporting.

The SLPP founders plainly envisioned their organization as constituting the epicenter of a burgeoning conservative movement. "The tremendous response to the Society's first year operations," they wrote, "has vindicated the belief of the founders that there is a need for such an organization." Conservative law students, legislators, academics, lawyers, and public policy makers, they believed, were "anxious to avail themselves of the

---

108. *Id.* at 4–5.

109. *Id.* at 5–6.

110. The report, produced at the request of Rep. Philip Crane, assessed the constitutionality of a bill the congressman introduced requiring removal of all cases relating to abortion from the original and appellate jurisdiction of all federal courts, including the Supreme Court. *Id.* at 6.

111. *Id.*

112. *Id.* at 7.

113. *Id.*

Society's services and publications."[114] Unfortunately, the founders' optimism proved excessive; for reasons unknown, many of their goals were not realized. The JLPP did not publish semi-annually until 1983,[115] the research service faded away, and no quarterly magazine appears ever to have been published. As a result, the SLPP continued to function merely as the corporate umbrella for the JLPP. It would serve no other purpose for several years, until a group of enterprising students at two rival law schools, inspired by the same frustrations that motivated the JLPP's founders, forged conservative organizations on their own campuses. With the aid of the JLPP, these groups coalesced to create a national network far beyond what the SLPP's visionaries could have possibly imagined. Only then would the SLPP itself return to life as a critical player at Harvard Law School.

III. "IT SEEMED LIKE THE OBVIOUS THING TO DO": THE FOUNDING OF THE NATIONAL FEDERALIST SOCIETY

A. Yale and Chicago

Around the same time that Abraham and Eberhard were beginning the JLPP at Harvard Law School, three undergraduates at Yale University—Steven Calabresi, Lee Liberman, and David McIntosh—met during the course of their involvement with the Yale Political Union, a campus debate organization.[116] The Union fostered a party system under which students would choose to affiliate with a particular party that would then host its own weekly debates, hold discussion meetings, and send representatives to debate against other parties' speakers in Union-wide forums.[117] Liberman was a member of the more con-

---

114. *Id.* at 8.

115. Volume 3, released in summer 1980, is identified as "No. 1" on the cover. Furthermore, a note on the inside reads, "With Volume III the Harvard Journal of Law and Public Policy is proud to announce that it will begin publishing semi-annually rather than annually. The second number of Volume III will appear in January." 3 HARV. J.L. & PUB. POL'Y v (1980). This suggests that plans were still in place as of mid-1980 to publish semi-annually. The promised second issue never appeared, however, and the *Journal* did not publish semi-annually until 1983.

116. Telephone Interview with Steven Calabresi, George C. Dix Professor of Constitutional Law, Northwestern University School of Law (Mar. 31, 2005) [hereinafter Calabresi interview].

117. *See* Yale Political Union, http://www.yale.edu/ypu/about.html (last visited Jan. 16, 2006).

servative Party of the Right; McIntosh led the liberal Progressive Party; and Calabresi, who would become president of the Union, headed the moderate Independent Party.[118] Despite coming from different ideological backgrounds, the three students shared both a close friendship and an increasingly conservative outlook. Staying in touch after graduation, each worked in Washington, D.C. the summer before beginning their respective tours of duty at law school: Calabresi at Yale Law School, and Liberman and McIntosh at the University of Chicago Law School. While in Washington, the three continued to meet regularly, and, in the course of their discussions, they floated the idea of forming a conservative law organization in law school.[119]

Law school proved a rude awakening for the three students. Arriving at Yale in fall 1980, Calabresi quickly felt alienated by what he perceived to be an overwhelmingly liberal atmosphere—"much more left-wing than it is today," he notes.[120] Campus debate appeared to be as one-sided as that which Calabresi had experienced at Yale College, where, as president of the Union, he was criticized by the student newspaper for inviting unpopular speakers to campus to engage in debates that he had hoped would "make apathetic students think and talk about politics."[121] Yale Law, however, was even worse, for the "faculty was much more liberal" than that of the College.[122] A professor who studied at Yale concurs that in the 1980s, conservative topics "just weren't permitted for discussion" at the law school, and "there was a lot of silencing going on."[123] The election of President Ronald Reagan in November threw the liberalism of Yale into bold relief against what appeared to be a rightward trend across the rest of the nation. Calabresi had worked on Reagan's campaign and was eager to bring the insights of national conservative leaders to the law school. His

---

118. Jill Abramson, *Right Place at the Right Time*, AM. LAWYER, June 1986, at 99, 100.

119. Calabresi interview, *supra* note 116.

120. *Id.*

121. Abramson, *supra* note 118, at 100. The *Yale Daily News*, for example, demanded that Calabresi un-invite a South African ambassador, whom Calabresi had invited to debate then-Congressman Allan Lowenstein. *Id.*

122. *Id.*

123. Interview with anonymous Harvard Law School faculty member, in Cambridge, Mass. (Mar. 29, 2005) [hereinafter Anonymous Faculty Interview 1].

experience with the Yale Political Union suggested that a similar organization at the law school might provide a forum for these alternative views.[124]

Calabresi found several kindred spirits at Yale Law, including Gary Lawson, now a professor at Boston University School of Law, and Tom Bell, now a partner at Simpson Thacher & Bartlett LLP in New York City. The students thought it would be "a lot of fun" to form a group to bring conservative and libertarian speakers to the school to challenge the reigning liberal orthodoxy.[125] Over lunch, they hashed out the first critical issue: what to name themselves. Lawson, a committed libertarian, suggested "The Ludwig von Mises Society" after a philosophical forebear of the libertarian movement. Another proposal, "The Alexander Bickel Society," generated little enthusiasm. A third offering, "The Federalist Society," met with initial opposition. Lawson contended that "The Anti-Federalist Society" was a more apt name because the Founding-era Anti-Federalists favored decentralized government, a principle the students at the lunch table shared. "The Federalist Society" ultimately prevailed, however, for three reasons. First, it called to mind the *Federalist Papers*, which the students viewed as the epitome of reasoned discussion and rational persuasion, two of their common interests. Second, the Federalists of 1787 were the faction committed to the Constitution, which the students wanted to restore in the face of perceived liberal reformulation. Third, the reference to federalism in the name implied a balance between state and national governments, which the students preferred to the disproportionately centralized national government that they believed had developed.[126] Having agreed on a name, the embryonic Federalist Society approached then-Professor Ralph Winter of Yale Law School about serving as its faculty advisor. Winter was sympathetic and agreed to the post, but he warned that their mission was "hopeless."[127]

By fall 1981, the Federalist Society was an official student organization at Yale. In January 1982, it hosted its first event, a debate over *Roe v. Wade* between Professor Grover Rees of the University of Texas Law School and Burt Marshall, former As-

124. Calabresi interview, *supra* note 116.
125. *Id.*
126. *Id.*
127. *Id.*

sistant Attorney General under President Kennedy and a Yale faculty member. The event was, unequivocally, a "complete flop."[128] Immediately afterward, Professor Winter approached the students with tears in his eyes, explaining that he thought their efforts were going nowhere.[129] But a second event was far more successful. The Society invited Professor Richard Epstein of the University of Chicago Law School to argue in favor of *Lochner v. New York*. Epstein spoke for twenty minutes and proceeded to take questions from the audience, which included a number of Yale Law faculty members.[130] The discussion was spirited, pointed, and—most importantly—centered on an issue that had rarely, if ever, been broached publicly in a number of decades. The event proved that room did exist for alternative debate on the Yale Law campus—and perhaps at other law schools as well.

Meanwhile, at another one of those law schools, the University of Chicago Law School, Lee Liberman and David McIntosh found the climate of opinion similar to what Calabresi had encountered at Yale. Despite Chicago's growing reputation as the most conservative of the top law schools, owing largely to its prominence in the law and economics movement,[131] Liberman noticed that while President Reagan's election suggested the mood of the country was becoming more conservative, at Chicago "every single organization we saw was on the left."[132] Having stayed in touch with Calabresi, who spoke with his good friends almost every day,[133] Liberman and McIntosh simultaneously decided to inaugurate a Federalist Society of their own at Chicago. For their faculty advisor, they turned to a Chicago professor who was visiting Stanford at the time but

---

128. *Id.*

129. *Id.*

130. *Id.*

131. *See, e.g.*, Maxwell L. Stearns, *Restoring Positive Law and Economics: Introduction to Public Choice Theme Issues*, 6 GEO. MASON L. REV. 709, 718 (1998) (referring to "noted Chicago School law and economics scholars" including Ronald Coase, Richard Posner, Frank Easterbrook, and Richard Epstein); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 37 (1999) (describing the "Chicago school of law and economics" as "conservative in its politics").

132. Telephone Interview with Lee Liberman Otis (Mar. 28, 2005) [hereinafter Otis interview].

133. Calabresi interview, *supra* note 116.

who nonetheless agreed to assist the fledgling group: Antonin Scalia.[134]

With encouragement from Professor Winter, the two Federalist Society groups decided that it "would be fun" to hold a conference at Yale on conservative thought, which they scheduled for spring 1982.[135] They worked together on securing speakers and other logistics. In speaking with Professor Scalia, Liberman and McIntosh learned of a similar effort by a Stanford group, the Stanford Foundation for Law and Economic Policy.[136] After coming across an article in *Human Events*, a conservative weekly, that mentioned the JLPP, Liberman contacted Spencer Abraham, who had graduated from Harvard Law several years earlier and was teaching law in Michigan.[137] She raised the prospect of the JLPP's publishing the symposium's proceedings and invited the JLPP to cosponsor the conference.[138] Abraham agreed, and the symposium now had its four sponsors: the Yale Federalist Society, the Chicago Federalist Society, the Stanford Foundation for Law and Economic Policy, and the *Harvard Journal of Law and Public Policy*.[139]

B. The First National Symposium

The students faced two initial challenges in staging their conference: funding and publicity. At first, all expenses were paid out of pocket.[140] Professor Scalia then suggested to the Chicago students that they request a grant from the Institute for Educational Affairs (IEA).[141] IEA eventually donated $20,000 for the

134. Otis interview, *supra* note 132.

135. Calabresi interview, *supra* note 116.

136. Otis interview, *supra* note 132.

137. *Id.*

138. *Id.*

139. Calabresi interview, *supra* note 116.

140. Telephone Interview with the Honorable David McIntosh (Mar. 31, 2005) [hereinafter McIntosh interview]. McIntosh served as a congressman for the Second District of Indiana from 1995–2001.

141. Otis interview, *supra* note 132. The Institute for Educational Affairs was founded in 1978 to identify and support right-leaning causes toward which the John M. Olin Foundation, its sole benefactor, could direct its donations. *See* JOHN J. MILLER, STRATEGIC INVESTMENT IN IDEAS: HOW TWO FOUNDATIONS RESHAPED AMERICA 13–14 (2003), *available at* Guidebooks @ The Philanthropy Roundtable, http://www.philanthropyroundtable.org/guidebooks/guidebooksindex.htm#strategic (follow "PDF Version" hyperlink) (last visited Jan. 16, 2006); Institute for Educational Affairs, http://www.media transparency.org/recipientprofile.php?recipientID=524 (last visited Jan. 16, 2006).

meeting, comprising the vast majority of funds raised.[142] Because the driving forces behind the symposium, the Yale and Chicago Federalist Societies, existed only as student groups, the Harvard Society for Law & Public Policy, still functioning solely as the corporate umbrella for the JLPP, served as the nonprofit conduit through which the grant money could be donated tax-free.[143]

To attract conference attendees, the students decided to publish a small blurb in the *National Review*, the conservative monthly, where several of their friends worked.[144] The first mention of the Federalist Society in national print appeared as the last item in a list of short squibs:

> The Federalist Society, a group of conservatively inclined law students, with chapters at Yale, Columbia, and Chicago, will be sponsoring a symposium on 'The New Federalism: Legal and Political Ramifications.' (No, Dan, it's not that your show doesn't do the job; it's just that we already know what *you* think.) Time: April 23-25. Place: Yale Law School. Speaking: Judge Robert Bork, D.C. Circuit; Judge Richard Posner, 7th Circuit; Judge Ralph Winter, 2nd Circuit; Walter Berns; Antonin Scalia, editor of *Regulation* magazine; and many more. Anyone interested (most especially including law students) should write The Federalist Society, 401A Yale Station, New Haven, Connecticut 06520.[145]

According to David McIntosh, the listing was intended to increase attendance at the symposium; they were not contemplating a national organization with chapters at other schools.[146] But the advertisement had the additional, unintended effect of

---

142. Calabresi interview, *supra* note 116. The chairman of IEA at the time, Irving Kristol, later called this grant "the best money we ever spent at IEA." MILLER, *supra* note 141, at 29 (internal quotation marks omitted).

143. Telephone Interview with Eugene Meyer, President, The Federalist Society for Law and Public Policy Studies (Mar. 25, 2005) [hereinafter Meyer interview].

144. Calabresi interview, *supra* note 116.

145. *The Week*, NAT'L REV., Apr. 2, 1982, at 334, 336. The identity of "Dan" in the description remains unknown. The three founders admit they have very little memory of a Columbia Law School chapter existing at the time. Calabresi interview, *supra* note 116; McIntosh interview, *supra* note 140; Otis interview, *supra* note 132. Calabresi believes a college friend may have started a chapter there, but he does not recall how it would have found its way into the *National Review* blurb. Calabresi interview, *supra* note 116. In any event, there is no other evidence that the Columbia chapter played a visible role in staging the first symposium or founding the national organization.

146. McIntosh interview, *supra* note 140.

prompting students at other law schools to inquire about forming their own groups.[147] Liberman admits, "We didn't know we were starting a national organization,"[148] but in response to the demand from other schools, she and McIntosh began assembling booklets explaining how to start chapters on other campuses. The two stayed up all night compiling materials to hand out at the symposium in April.[149]

The event itself, entitled "A Symposium on Federalism: Legal and Political Ramifications," was a "huge success."[150] Two hundred students from more than twenty law schools attended the two-day conference, which explored such issues as the foundations of federalism, the possible uses of the national government for conservative ends, an economic theory of federal jurisdiction, constitutional conventions, the Hatch abortion amendment, and the politics of returning power to the states.[151] The roster of speakers included Judges Robert Bork, Richard Posner, Ralph Winter (who had recently been appointed to the federal bench), and Thomas Brennan; Professors Charles Fried, Antonin Scalia, Paul Bator, Grover Rees, John Noonan, Lino Graglia, and Maurice Holland; and practitioners Walter Berns, Theodore Olson, Michael McConnell, and Morton Blackwell.[152] Shortly thereafter, the JLPP published the symposium's proceedings in a special issue, bringing the ideas discussed at the conference to its entire readership. The Preface to the special issue described the symposium as "an extraordinarily significant event."[153] It continued, "At a time when the nation's law schools are staffed largely by professors who dream of regulating from their cloistered offices every minute detail of our lives . . . the Federalists met—and proclaimed the virtues of individual freedom and of limited government."[154]

---

147. Otis interview, *supra* note 132.

148. *Id.*

149. McIntosh interview, *supra* note 140.

150. Calabresi interview, *supra* note 116.

151. The Federalist Society for Law & Public Policy Studies (1983) (unpublished brochure, on file with author).

152. *Id.*

153. Curtis M. Dombek & Frederick D. Nelson, Preface, 6 HARV. J.L. & PUB. POL'Y vii (1982).

154. *Id.* One JLPP editor at the time notes that the only individual who would not release his symposium remarks to the Journal was Judge Bork, the event's keynote speaker. Judge Bork gave no reason for his refusal, but it was widely suspected that given the likelihood of his being nominated for the Supreme Court,

C. Creating a National Organization

The success of the symposium bred two significant developments. First, the founding students resolved to hold a second conference the following year at the University of Chicago Law School. The professors and judges who had participated in the first meeting so enjoyed both the symposium and the opportunity to see each other that they were happy to repeat the experience.[155] Second, the students decided to form a national organization. According to Lee Liberman Otis, "It seemed like the obvious thing to do. The thing was as much demand-driven as anything."[156] By summer 1982, there were ten to fifteen chapters at other schools, with still others waiting in the wings.[157] But there was no central body to coordinate efforts among them, and no funding mechanism in place to support the various chapters.[158] Calabresi, Liberman, and McIntosh contacted Spencer Abraham to gauge his interest in helping form a national organization. The support of both Abraham and the JLPP was critical to the students for several reasons. First, the Harvard name would lend greater legitimacy to their early efforts.[159] Second, the JLPP, in addition to serving as the mouthpiece for the first symposium's proceedings, was five years old by this point and was relatively well established in comparison to the fledgling speakers' group. Thus the JLPP, too, would bolster the new organization's legitimacy. Third, Abraham himself was the only individual among them who had "done something successfully at law school and was out of law school,"[160] thereby lending an element of gravitas to what had been, until then, solely a student-run group.

---

he wanted to reduce his paper trail as much as possible—to no avail, as it turned out. Telephone Interview with anonymous Harvard Law School graduate (Mar. 27, 2005).

155. McIntosh interview, *supra* note 140.

156. Otis interview, *supra* note 132.

157. McIntosh interview, *supra* note 140.

158. *Id.*

159. Calabresi interview, *supra* note 116 (noting that having top schools represented meant that "students at other schools would rally to the banner we were raising"). Although the Stanford group had been the fourth of the major sponsors of the first symposium, the leading individual behind that group had graduated, and the chapter subsequently faded away for some time. *Id.*

160. McIntosh interview, *supra* note 140.

Over summer 1982, the Yale, Chicago, and Harvard representatives hashed out the details of creating a national organization. Considerable debate arose concerning the name of the larger body, with Yale and Chicago favoring "The Federalist Society" and Harvard favoring "The Society for Law & Public Policy." The compromise name selected was a hybrid: "The Federalist Society for Law & Public Policy Studies."[161] More quickly resolved was the matter of an emblem: The representatives chose a bust of James Madison, since he was "the drafter of the United States Constitution and the great Federalist compromise that established our form of government."[162] Charles Bork, son of Judge Robert Bork, drew the silhouette portrait that still adorns the Society's materials, supposedly giving Madison a "nose job" since Madison's actual profile was deemed "too ugly to be on any brochure."[163]

On September 8, 1982, the Federalist Society for Law & Public Policy Studies was legally established as a not-for-profit corporation.[164] McIntosh, entering his third year of law school, handled the incorporation work.[165] On the initial board of directors were five people who represented the leadership of the three most significant existing student groups: Spencer Abraham, Steven Calabresi, Lee Liberman, David McIntosh, and Peter Keisler, another Yale Law student.[166] Having established a legal structure, the founders then set about raising funds for

---

161. David McIntosh, *Introduction to the Federalist Society 2002 Symposium on Law and Truth*, 26 HARV. J.L. & PUB. POL'Y ix, ix (2003).

162. *Id.* at ix–x.

163. *Id.* at x.

164. *See* Illinois Corporation/LLC Search, http://cdsprod.ilsos.net/CorpSearchWeb/corpsrch.html (select radio buttons for "Corp" and "by Name" and search for "Federalist Society") (last visited Jan. 16, 2006).

165. McIntosh interview, *supra* note 140. For this reason, the national Federalist Society has always been an Illinois corporation.

166. The Society's founders believed that most right-leaning student organizations had met their demise because of internal politicking and the holding of elections. They therefore decided to adopt a corporate governance structure similar to that of many modern universities, including Harvard and Yale: The Society's board would be self-replicating, with no elections for directors, who would instead be chosen by the board. At the same time, though, the founders placed no limit on the number of officers the board could choose. Consequently, today, if the board comes across a person who it feels is "energetic about the organization," it will find a position for that person and bestow a title. As a result, the organization currently has approximately one hundred employees who function in officer capacities. Calabresi interview, *supra* note 116.

the budding organization. They found success with three organizations that provided the bulk of their seed money: IEA, supporter of the first symposium; the Scaife Foundation; and the John M. Olin Foundation.[167] The funding enabled the Society to place a one-third page advertisement for the second symposium, scheduled for April 1983, in the *National Review*[168] and to subsidize students wishing to attend.[169] By autumn 1983, its founders all having graduated, the national Federalist Society moved its operations to Washington, D.C. and hired its first full-time employee, Eugene Meyer, now the organization's president.[170]

IV. "THERE'S NO ROOM FOR A CONSERVATIVE ORGANIZATION AT HARVARD LAW SCHOOL": FORMATION AND EARLY YEARS OF THE FEDERALIST SOCIETY AT HARVARD LAW SCHOOL

A. The First Group

While Harvard alumnus Spencer Abraham might have been the name the national Federalist Society founders most closely associated with the Harvard element of the organization, several other Harvard Law School students had attended the symposium at Yale in spring 1982. One of these students, Fred Nelson '83, agreed to head up the law school student effort at

---

167. Otis interview, *supra* note 132.

168. *See* NAT'L REV., Apr. 1, 1983, at 367.

169. *See The Week*, NAT'L REV., Mar. 18, 1983, at 294, 296 ("Attention lawyers, law students, and political philosophers: are you tired of being told an attack on the Supreme Court is an attack on the Constitution? The Federalist Society for Law & Public Policy Studies, a new group of conservatives and libertarians interested in the current state of the legal order . . . will be holding its second annual symposium next month. The topic: 'Judicial Activism: Problems & Responses.' . . . Student travel scholarships available.").

170. McIntosh interview, *supra* note 140; *see also The Week*, NAT'L REV., Oct. 14, 1983 ("LAW STUDENTS: Tired of shopworn liberal ideas on campus? The Federalist Society for Law and Public Policy Studies is a group of conservatively inclined law students, faculty, and lawyers challenging the orthodox liberal ideology that dominates the legal profession today. The society, with active chapters at Yale, Chicago, Harvard, Columbia, and some thirty other law schools, has just started a speakers' bureau designed to bring more conservative speakers to law-school campuses. For further information, write: The Federalist Society, c/o Smiley, Olson & Gilman, 1815 H Street, N.W., Suite 600, Washington, D.C. 20006 . . . .").

Harvard.[171] Two other students, Robert Delahunty '83 and John McGinnis '83, were early recruits. Delahunty and McGinnis had met during their second year of law school and, unaware of the recent Yale symposium and the national Federalist Society's conception, had independently been discussing starting their own conservative organization on campus.[172] When Nelson informed them at the beginning of their third year of law school that a nationwide effort was already underway to foster right-leaning groups at law schools, they instead decided to join forces with Nelson and several other students to activate a chapter of the national Federalist Society at Harvard Law School. The students elected not to follow the lead of other early student chapters of the national organization by calling themselves the "Harvard Federalist Society." Instead, they adopted the name of an organization that had lay dormant since its own founders' plans for a far-reaching conservative network had dissipated.[173] Thus, in the fall of 1982, the Harvard Society for Law & Public Policy (SLPP) was resurrected and reborn as the Harvard Law School chapter of the national Federalist Society.

The goals of the SLPP, as it came to be known on campus, were several. First and foremost, according to Nelson, its first president, it hoped to "help create a friendly atmosphere for conservatives on campus," that is, to establish a presence that made it "acceptable for students to raise their hand in class and advocate positions of individual freedom, instead of just listening to the collectivist and social ideas which now dominate class discussion."[174] Second, it planned to bring conservative speakers to campus, participate in debates with students "both formally and informally," and write position papers on legal issues to send to legislators.[175] Last, it would attempt to organize other chapters of the Federalist Society at law schools throughout New England by "preaching to the heathen at

171. Telephone Interview with John McGinnis, Class of 1940 Research Professor of Law, Northwestern University School of Law (Mar. 31, 2005) [hereinafter McGinnis interview]; *see also* Erich Merrill, *Conservatives Spring to Life*, HARV. L. REC., Oct. 8, 1982, at 9 (describing Nelson as "instrumental in organizing the group").

172. McGinnis interview, *supra* note 171.

173. *Id.*

174. Merrill, *supra* note 171, at 9 (internal quotation marks omitted).

175. *Id.*

schools like B.U. and Suffolk."[176] Nelson also promised that the group would "have a little fun and cause a little trouble like most other organizations here do."[177]

In its first year, the SLPP held weekly meetings that, as one member told the *Record*, attracted between twenty and thirty students.[178] From the beginning, its members were an "interesting assortment."[179] A sizable share of the group consisted of students who were libertarian and Rockefeller Republican in spirit: those who, above all, favored the concepts of limited government and federalism.[180] At the same time, there were "more culturally conservative" people as well.[181] Thus, there existed a social conservative-libertarian split, with a number of people on both sides.[182] Yet despite the chances for schism, the early members believed that they were so small a minority given the principles on which they agreed that it was better to stick together rather than split apart over their differences.[183] The small membership displayed a diversity that in some respects belied the conservative stereotype—for example, William Lash '85, the head of recruiting for the first group,[184] was African-American—but in other respects reinforced it—for example, the membership was "overwhelmingly male," which one early member attributed to the image that conservatives then had at Harvard Law School.[185]

The SLPP had difficulty establishing a profile both on campus and within the national organization during its first year, for it suffered from somewhat of an identity crisis given the JLPP's concurrent presence. SLPP members understood the distinction between the two organizations: The Journal was for articles, and the Society was for other activities like policy de-

176. *Id.* (quoting Nelson) (internal quotation marks omitted).

177. *Id.* (internal quotation marks omitted).

178. *Id.* This estimate is almost certainly an exaggeration for the sake of the newspaper report; early members recall attendance at meetings rarely topping ten students. *See infra* text accompanying notes 211–12.

179. Telephone Interview with anonymous Harvard Law School graduate (Mar. 29, 2005) [hereinafter Anonymous Graduate Interview 2].

180. *Id.*

181. *Id.*

182. Telephone Interview with Kaj Ahlburg '84, Vice President, Harvard Society for Law & Public Policy, 1983–84 (Apr. 2, 2005) [hereinafter Ahlburg interview].

183. *Id.*

184. Merrill, *supra* note 171, at 9.

185. Ahlburg interview, *supra* note 182.

bates and speaking programs on legal issues.[186] Nevertheless, the line was less clear to others, and the SLPP had difficulty climbing out of the JLPP's shadow. The JLPP was the much more established outfit, having existed for more than five years by that point. It was also the original link between Harvard and the national Federalist Society, and it was the brainchild of one of the national Federalist Society's founding board members. Furthermore, the JLPP had published the proceedings of the national Federalist Society's symposium, which raised the Journal's status significantly among conservative thinkers across the country and made it the national organization's quasi-official publication. At the Yale symposium, Steven Calabresi worked closely with Spencer Abraham, a JLPP founder, but "didn't really get to know" many of the other Harvard students who attended and would later comprise the SLPP.[187] And according to David McIntosh, while the Chicago contingent was "delighted" to hear that Harvard students wanted to establish a Society chapter separate from the Journal, in his mind, "the SLPP and the JLPP were the same people."[188] Compared to the JLPP, then, the SLPP was almost an afterthought.[189]

B. The Harvard Atmosphere

Notwithstanding any difficulties the SLPP had in getting noticed by the national Federalist Society, the atmosphere at Harvard in the early 1980s ensured that its activities would soon garner considerable attention on campus. As previously noted, the Vietnam Era had initiated the swinging of the ideological pendulum at Harvard Law School back in a leftward direction from the "conservatizing milieu" that preceded it. In comparison to the tumult of the late 1960s, the 1970s were relatively calm. A *Record* editorial at the end of the decade lamented, "The 1970s have been a time when HLS students withdrew from concern with and involvement in political matters."[190] A

186. Anonymous Graduate Interview 2, *supra* note 179.

187. Calabresi interview, *supra* note 116.

188. McIntosh interview, *supra* note 140. Indeed, nearly all of the Harvard students who attended the Yale symposium also worked on the JLPP, which undoubtedly contributed to the confusion between the SLPP and JLPP.

189. It should be added that the SLPP only obfuscated matters by naming itself after the JLPP's corporate parent, rather than adopting a distinct moniker of its own.

190. Editorial, *The Seventies in Retrospect*, HARV. L. REC., Dec. 7, 1979, at 10.

dearth of activism, however, did not necessarily impede the further leftward shift of the student body. The period between 1973 and 1979 was a time "when it was almost possible to graduate from Harvard without ever encountering a card-carrying conservative" or "having seriously to confront a conservative position."[191] Professor Laurence Tribe has described the era as one in which "conservatives, self-identified or self-conscious, would have been inclined not to be very vocal at the school."[192] By the late 1970s, according to Douglas Cox '80, who served as editor-in-chief of the JLPP, the student body was "almost monolithically left."[193] Professors offered little respite; to them, conservatives offered "a certain humor value," persons who could be counted on to keep a slow discussion moving.[194]

The same 1979 *Record* editorial that bemoaned the lack of activism on campus urged that students "seek to rekindle some of their enthusiasm for criticizing, and trying to change, the worse aspects of the status quo on various levels."[195] The editors soon got their wish, for by the early 1980s, according to Professor Duncan Kennedy, the campus had become a "radicalizing milieu."[196] In other words, not only did the campus exhibit, in Professor Robert Clark's words, "a conventional leftist leaning,"[197] it made people more leftist than when they arrived. Beginning in 1980 and lasting until 1992, student protests outside the dean's office in the months of April or May became "an annual occurrence."[198] These activities most commonly centered on a perceived lack of diversity in faculty hiring, but the largest was a series of protests in 1983 in response to a faculty

---

191. Scott, *supra* note 79. Scott's article refers to both Harvard College and Harvard Law School.

192. Amy Goldstein & R. Jeffrey Smith, *Midwestern Scholar with a Steady Conservative Bent*, WASH. POST, Sept. 4, 2005, at A6 (internal quotation marks omitted).

193. Telephone Interview with Douglas Cox, Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C. (Mar. 17, 2005) [hereinafter Cox interview].

194. *Id.* (stating that "the entirety of my Harvard education deemphasized the Founding, deemphasized the constitutional text").

195. Editorial, *supra* note 190, at 10.

196. Kennedy interview, *supra* note 35.

197. Telephone Interview with Robert Clark, Harvard University Distinguished Service Professor and Austin Wakeman Scott Professor of Law, Harvard Law School (Apr. 8, 2005) [hereinafter Clark interview].

198. *Id.*; *see, e.g.*, Mike Isbell, *Student Protest Disrupts Closed Faculty Meeting*, HARV. L. REC., May 4, 1984, at 1.

proposal that would have permitted professors in large classes to take class participation into account in grading.[199] Student organizations drove further activism: In the winter of the 1982–1983 school year, the Third World Coalition, a collection of minority student organizations, organized a boycott of a winter term course on race discrimination, offered an alternative course in the spring, and staged a student-faculty forum later that spring that attracted nearly 500 students for the purpose of airing their grievances.[200] Concurrently, but largely out of sight of the students, the faculty itself was engaged in an increasingly hostile battle between radicals and traditionalists over faculty appointments and, in a larger sense, the direction of legal thought and the law school, a battle that the SLPP would soon enter to great consequence.

Not surprisingly, conservative views found little to no acceptance within this "radicalizing milieu." John McGinnis describes the environment as one of "overwhelming liberalism," a place "very hostile" toward conservative views.[201] Robert Delahunty states that an "overwhelming majority of students were liberal to far left," and "some were kind of Marxist."[202] There was a "universal assumption that things were wrong with American society."[203] Kaj Ahlburg, the vice president of

---

199. Clark interview, *supra* note 197; *see also* Brad Hudson & Charles Thensted, *"We Won't Talk if You Won't Teach,"* HARV. L. REC., May 12, 1983, at 3 (observing that protests of the grading proposal included a 500-person demonstration outside Langdell Hall, a 100-person occupation of the faculty library, and a four-hour sit-in by more than 90 persons of the dean's reception area and entrance hall); *Students, Profs Discuss New Grade Proposal*, HARV. L. REC., May 12, 1983, at 1 (noting that the proposal itself only permitted increases in grades for beneficial class participation and did not authorize lowering grades for poor class participation). The proposal was eventually rejected; nevertheless, as Professor Clark wryly remarks, the fact that the largest student protest occurred in response to a possible change in grading "gives you an idea of where student priorities really lie." Clark interview, *supra* note 197.

200. *See* Dave Horn, *Third World Coalition Renews Support for Course Boycott*, HARV. L. REC., Sept. 17, 1982, at 1; Brad Hudson, *TWC Offers Alternative Spring Course*, HARV. L. REC., Jan. 21, 1983, at 1; Steve Cowan, *Students and Faculty Pack Open Forum*, HARV. L. REC., Mar. 11, 1983, at 1. The forum was repeated the following year, drawing approximately 450 students. *See* Andrea Hartman & Steven J. Cowan, *Open Forum Focuses on Power*, HARV. L. REC., Mar. 2, 1984, at 1.

201. McGinnis interview, *supra* note 171.

202. Telephone Interview with Robert Delahunty, Associate Professor of Law, University of St. Thomas School of Law (Mar. 28, 2005) [hereinafter Delahunty interview].

203. *Id.*

the SLPP in 1983–1984, its second year, remembers that it "would have been rare to hear three conservative voices in a single semester," and, if those voices were heard, they "would be followed by ten people shouting [them] down."[204] In addition, the campus atmosphere created a chilling effect on those right-leaning students who might have wished to comment. As Dean Elena Kagan '86 recalls, there were some conservatives, but "nobody knew who they were."[205]

One incident crystallizes the extent to which near-reflexive liberalism had pervaded much of the campus by the early 1980s. In April 1981, a group of five law school students sought permission to place an announcement in the *HLS Adviser* informing other students of their ability to seek refunds for the portion of their health service fee that covered the cost of elective abortions. Despite the students' claims that the *Adviser* had run an allegedly pro-abortion notice only several months before, the administrator in charge of the *Adviser* refused to publish the announcement, claiming that "notice of an administrative policy should come from an administrator."[206] The group then turned to distributing anonymous leaflets in student mailboxes. The leaflets described the policy and contained a form for requesting a refund, and the students provided a box near the mailboxes to deposit completed forms. Within a day, the box had been destroyed. A replacement box was soon torn apart as well.[207]

As a final indignity, while a *Record* editorial covering the affair castigated the unidentified individuals responsible for the vandalism, it first took the five anti-abortion students to task because their anonymous leaflet distribution showed "irresponsibility on their part." Their nameless pamphleteering, it continued, "influences members of their intended audience to take their views less seriously than they might otherwise."[208]

---

204. Ahlburg interview, *supra* note 182.

205. Interview with Elena Kagan, Charles Hamilton Houston Professor of Law and Dean of the Faculty of Law, Harvard Law School, in Cambridge, Mass. (Apr. 6, 2005) [hereinafter Kagan interview].

206. Carl Oppedahl, *Abortion Foes Encourage Fee Refunds*, HARV. L. REC., Apr. 10, 1981, at 1 (internal quotation marks omitted).

207. *Id.* at 16 (internal quotation marks omitted). It is also notable that the single anti-abortion student quoted in the *Record* article covering the incident asked not to be identified. *Id.* at 1.

208. Editorial, *Speaking out Responsibly*, HARV. L. REC., Apr. 10, 1981, at 10.

The editorial then applauded eight individuals who had signed their names to a pro-abortion petition posted in response to the anti-abortion group's activities.[209] The editorial professed a wish that "future proponents of controversial views . . . follow th[is] example."[210] In so doing, the editorial failed to comprehend, on one hand, the chilling effect on campus that had compelled proponents of an unpopular view to remain anonymous, and, on the other hand, the stark ideological imbalance that made it no particular feat of courage to sign one's name to a petition espousing an already overwhelmingly popular view. The episode illustrates not simply the pervasive liberalism of the day, but also the extent to which students presumed such views with an almost casual, unblinking instinctiveness.

C. Early Activities and Early Reactions

Within this "radicalizing milieu," the SLPP struggled to make its mark on campus debate. Its initial numbers were small; in contrast to one member's claim to the *Record* that the organization sported a membership "in the thirties,"[211] other early members recall a "very small, very informal" core membership in the first year of six to ten individuals.[212] Bringing speakers to campus was "central" to the SLPP's mission,[213] and the group had a "rudimentary" speakers bureau whose members would meet with Professors Paul Bator and Charles Fried to get ideas for possible visitors,[214] but its early attempts to entice speakers did not meet with much success.[215] At the same time, the Harvard name still had some influence. When several SLPP members traveled to the second national Federalist Society symposium at Chicago in spring 1983, Professor Antonin

209. *Id.*

210. *Id.*

211. Merrill, *supra* note 171, at 9.

212. McGinnis interview, *supra* note 171; Ahlburg interview, *supra* note 182; Telephone Interview with anonymous Harvard Law School graduate (Mar. 25, 2005) [hereinafter Anonymous Graduate Interview 3].

213. Anonymous Graduate Interview 2, *supra* note 179.

214. Ahlburg interview, *supra* note 182.

215. Delahunty interview, *supra* note 202 (stating that he was unable to recall any speakers during the 1982–1983 year).

Scalia offered to let the contingent stay at his house, which they did for the duration of the conference.[216]

The SLPP focused much of its early efforts on issues internal to Harvard Law School. As John McGinnis remembers, the group was much more connected to the events taking place at Harvard, rather than the "great political and philosophical issues of the day."[217] Meetings consisted largely of discussing local campus issues and developing strategies on possible reactions to them.[218] For example, in spring 1983, the group authored and forwarded to the HLS Placement Committee a proposal to permit the U.S. Army to recruit on the Harvard Law campus, which the school had forbidden because of the Army's exclusion of homosexuals and subsequent violation of the school's nondiscrimination policy.[219] The committee, chaired by Professor Abram Chayes, unanimously rejected the proposal, instigating complaints from SLPP members about the "abrupt, per se manner" with which the submission was dealt.[220] The Society then published a letter in the *Record* outlining its argument for the rule change.[221] The military recruiting proposal was typical of the SLPP's activities during its first year. The Society was interested in making sure that the administration knew that the student body was not monolithic and that competing views did exist. During student protests, for example, SLPP members would approach the administration with appeals not to accede to the strikers or take other action that would otherwise validate the strikers' actions as an acceptable, rational form of debate.[222]

---

216. Ahlburg interview, *supra* note 182; Anonymous Graduate Interview 2, *supra* note 179.

217. McGinnis interview, *supra* note 171.

218. *Id.*

219. Brad Hudson, *Army Recruiters Still Banned at HLS*, HARV. L. REC., Mar. 4, 1983, at 8.

220. *Id.* (quoting Robert Macaulay) (internal quotations marks omitted); *see also* Delahunty interview, *supra* note 202 (stating that attempting to persuade Chayes was like "butting our heads against a stone wall" and that Chayes appeared to have found the whole affair "amusing").

221. Harvard Society for Law & Public Policy, Letter to the Editor, HARV. L. REC., Apr. 22, 1983, at 14 ("Whether or not the Army's policy is defensible—and members of our group disagree about this—it is certainly *lawful*; and given that it is lawful, we see no justification for treating soldiers any differently from other recruiters.").

222. Anonymous Graduate Interview 3, *supra* note 212.

As the Society continued to adopt positions, and in an increasingly public manner, campus reaction to its activities grew more hostile as well. In November 1983, in response to a campus protest against the U.S. invasion of Grenada that had attracted several hundred students,[223] the SLPP held a counterrally several days later in support of the action.[224] They advertised this rally by posting signs reading: "Celebrate the Liberation of Grenada! And the Safe Return of the U.S. Students! . . . Society for Law and Public Policy." By the next morning, almost all of the posters had been removed and replaced with posters reading: "Come Celebrate the Conquest of the Grenadan People! We'll Kill as Many People As it Takes to Make the Word [sic] Safe for Democracy! . . . Society for Law and Public Policy."[225] Replacement posters that the SLPP put up were also quickly torn down or had "Fascists" written on them.[226] According to Kaj Ahlburg, members of the "Peace Now" movement on campus threatened to break up the SLPP celebration;[227] accordingly, the Society ensured that plainclothes police were on hand for the gathering, which took place in Harkness Commons and ended up drawing about thirty people.[228] That same week, fake posters by a "Students for Law and Private Policy" were posted, which read: "No More Soviet Puppets! Stop Marxist Pierre Trudeau! Sponsored by: Harvard Students for Nuclear Destruction and Harvard Law Students for Acid Rain, Pollution, Toxic Wastes and James What [sic]."[229] The situation did not improve over the course of the year; in May 1984, more SLPP signs—these asking, "How many of your

223. *See* Michael Malamut, *Hundreds Protest Invasion of Grenada*, HARV. L. REC., Nov. 4, 1983, at 1.

224. Brad Hudson, *Battle of the Boards: SLPP Signs Removed*, HARV. L. REC., Nov. 18, 1983, at 2.

225. *Id.*

226. *Id.*

227. Ahlburg interview, *supra* note 182.

228. Hudson, *supra* note 224, at 2. Shortly thereafter, the SLPP also cosponsored a rally with other university organizations on the steps of Memorial Church, protesting "Soviet Aggression" in the Caribbean and Middle East. Louis Hoffman, *Conservatives Stand up for Principles*, HARV. L. REC., Nov. 18, 1983, at 2.

229. Hudson, *supra* note 224, at 2. The signs were doubtlessly attempting to invoke James Watt, the development-minded Secretary of the Interior under President Reagan.

friends are conservative?"—were defaced within hours of their posting.[230]

In general, the administration offered little support; Ahlburg describes it as "not exactly friendly" to the SLPP.[231] The day before the SLPP's Grenada counterrally, for example, the Dean of Students, Mary Upton, met with the group to suggest that it cancel the event in order to avoid a confrontation with those planning to picket it. The SLPP responded that since its own picket of a visiting Nicaraguan Sandinista speaker earlier that week had been blocked by Harvard police, it assumed there was a policy against picketing indoors. The dean denied that any such policy existed, prompting one individual present to ask, "Why is it that the conservatives can't carry signs on Wednesday night but the liberals can on Friday night?"[232] An assistant dean who was also present at the meeting agreed, saying, "We have to give the *appearance of* impartiality."[233] In another incident, when Dean Upton attempted to block the SLPP from adding its name to the door of the JLPP office in the Hastings basement, she told the Society's leadership, according to Ahlburg, "There's no room for a conservative organization at Harvard Law School."[234] However dispiriting the administration's reaction to the SLPP may have been, Ahlburg notes that the antagonism was "great from a fundraising standpoint."[235] The Society was able to illustrate to potential donors how seemingly oppressed they were on campus, leading to increased funding from outside sources. As a result, he says, members of the administration "really shot themselves in the foot."[236]

The SLPP did have a few supporters in the faculty. From the beginning, Professor Charles Fried served as its advisor, a position he still holds today; Professors Paul Bator, Robert Clark,

---

230. Roger B. Madison, Letter to the Editor, HARV. L. REC., May 4, 1984, at 12.

231. Ahlburg interview, *supra* note 182.

232. Madison, *supra* note 230, at 12.

233. Ahlburg interview, *supra* note 182 (emphasis added).

234. *Id.* Bennett Cooper '86, president of the SLPP in 1985–1986, notes of Dean Upton: "She *hated* us. She hated the Society. She hated the Journal." Telephone Interview with Bennett Cooper, President, Harvard Society for Law & Public Policy, 1985–1986 (Apr. 1, 2005) [hereinafter Cooper interview].

235. Ahlburg interview, *supra* note 182.

236. *Id.*

and Hal Scott also lent support during the early years.[237] After the SLPP's Grenada invasion rally, for example, Professor Scott asked the group to make sure "to invite him for the Nicaragua liberation party."[238] For the most part, however, it was the general sense of many in the group that most professors were not friendly to the positions or analytical frameworks adopted by members of the Society.[239] The SLPP's first major event, in spring 1984, would take on many of these professors and set into motion a process that pushed the HLS ideological pendulum back in the opposite direction.

That spring, the SLPP was selected to host the national Federalist Society's third student symposium. The topic chosen, "Legal Education and the Spirit of Contemporary American Law," was particularly appropriate for the Harvard Law School setting. By this time, the HLS faculty was engaged in an epic struggle over the direction of legal theory, the composition of the faculty, and the future of Harvard Law School. Commentators and observers of the law school have devoted pages to this saga,[240] which is arguably the dominant episode in the law school's last thirty years, and a complete history of which is beyond the scope of this Article. In general, however, the conflict pitted faculty adherents of the Critical Legal Studies (CLS) movement, which had gained a foothold at Harvard Law in the 1970s, against more traditionalist professors. Among other things, CLS scholars branded law schools, and Harvard Law School in particular, as illegitimate hierarchies that only promoted the existence of inherently unequal legal rules.[241] Not

237. *Id.*; McGinnis interview, *supra* note 171; Anonymous Graduate Interview 2, *supra* note 179; Anonymous Graduate Interview 3, *supra* note 212; Cooper interview, *supra* note 234.

238. Cooper interview, *supra* note 234. In 1985, when the library featured a display entitled "The Specialty Law Reviews at Harvard," which included five journals but excluded the JLPP, *see Legal Briefs*, HARV. L. REC., Mar. 15, 1985, at 5, Professor Bator interceded to get the JLPP placed within the display. *See* Abramson, *supra* note 118, at 103.

239. Anonymous Graduate Interview 3, *supra* note 212.

240. *See, e.g.*, RICHARD D. KAHLENBERG, BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL 21–22 (1992); ELEANOR KERLOW, POISONED IVY: HOW EGOS, IDEOLOGY, AND POWER POLITICS ALMOST RUINED HARVARD LAW SCHOOL 35–56 (1994); Calvin Trillin, *A Reporter at Large: Harvard Law*, NEW YORKER, Mar. 26, 1984, at 53.

241. *See, e.g.*, KERLOW, *supra* note 240, at 48 (describing how CLS professors argued that "theoretically encased fields of law, such as Contracts, are historically responsive to social and political change and reflect[] state power to advance cer-

surprisingly, this approach struck a nerve with other, less radically inclined professors. As one individual put it, "What these guys do intellectually is say all law is bullshit, and that hits people where they live. . . . [We] traditional lawyers have spent our whole lives saying it's not bullshit."[242]

In 1982, tensions escalated beyond mere theoretical disagreements when CLS proponents gained enough votes from left-leaning faculty to block the appointment of a professor they opposed,[243] purportedly because she was "not CLS."[244] From that point forward, relations between various factions of the faculty rapidly soured. In March 1982, Professor Charles Nesson, attempting to stem the rising divisions, wrote to his colleagues, "We are a highly politicized faculty, whether we admit it to ourselves or not."[245] Yet two years later, the faculty was more politicized than ever.[246] The rift played out most seriously in faculty appointments, which became a "competition for allies" among the various caucuses.[247] To more traditionalist professors, the fight was nothing less than "a struggle for the soul of this institution."[248] As a senior professor at the time stated, "If these people have their way . . . in ten years people will say, 'What ever happened to Harvard Law School?'"[249]

For most of this period, students and alumni were unaware of the increasing faculty dissension. To be sure, students were acquainted with CLS and flocked by the hundreds to public lectures by CLS professors.[250] But it was not until 1984 that the

---

tain ends") (internal quotation marks omitted). For an example of one of CLS's organic texts, see generally DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983).

242. KERLOW, *supra* note 240, at 47–48 (internal quotation marks omitted). For another fundamental criticism of CLS scholars, see Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 ("The professionalism and intellectual courage of lawyers . . . cannot abide . . . the embrace of nihilism. . . . Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals.").

243. *See* Trillin, *supra* note 240, at 59.

244. KERLOW, *supra* note 240, at 48 (internal quotation marks omitted).

245. Trillin, *supra* note 240, at 75 (internal quotation marks omitted).

246. *Id.* at 76.

247. *Id.* at 82.

248. *Id.* at 54 (internal quotation marks omitted).

249. *Id.* at 82 (internal quotation marks omitted).

250. *See, e.g.*, Brad Hudson, *Horwitz: A Critical Look at Studying Law*, HARV. L. REC., Nov. 19, 1982, at 5 (describing a talk by Professor Morton Horwitz, the first

faculty battles exploded onto the public scene, with the opening salvos fired at the SLPP-sponsored Federalist Society symposium at Harvard. The symposium's advance brochure pulled no punches concerning the subject matter of the conference:

> There is a crisis in contemporary American legal culture. The rule of law, the importance of liberty, and the possibility of impartial legal scholarship have been called into question. The American legal system has been characterized as an instrument of oppression. Legal education has become a political issue: some would use it as a means of achieving fundamental change in American society. The symposium will critically examine these developments and the suppositions of those who call for radical transformation.[251]

At the symposium itself, which took place February 24 through 26, 1984, panels included "The Radicalization of the Professoriate," "Views on Legal Education" (a debate between Professors Richard Epstein and Duncan Kennedy), and "Legal Education: Proposals for Change."[252] It was during this last panel that several Harvard Law professors first publicly expressed pointed criticism of the CLS movement. Professor Hal Scott, for example, derided CLS scholars as "debunkers and critics, not builders," who "do not care about the problems of the real world and real professionals."[253] He also called for more rigorous faculty hiring policies, stating, "If this means hierarchy, we need more of it."[254] Another faculty member, Professor Robert Clark, advocated the "return of Langdell" in the form of a new commitment to a more scientific study of law.[255] Professor Clark would soon have much more to say on this topic.

---

in a series "designed to introduce students to Critical Legal Studies," that drew more than 200 students); *see also* Beth Bergman, *Profs Push Workplace Leftism*, HARV. L. REC., Dec. 9, 1983, at 15 (describing a lecture to 175 students by Professors Duncan Kennedy and Morton Horwitz that urged "creating resistance within the belly of the corporate beast" (internal quotation marks omitted)); Lee Christie, *Prof. Frug Urges Critical Look at Law*, HARV. L. REC., Dec. 3, 1982, at 9 (describing a CLS-oriented talk to 150 students by Professor Gerald Frug).

251. Harvard Society for Law and Public Policy, A Symposium on Legal Culture (Feb. 24, 1984) (unpublished brochure, on file with author).

252. *Id.*

253. Hal Scott, *Legal Education: Proposals for Change*, 8 HARV. J.L. & PUB. POL'Y 317, 318 (1985).

254. *Id.* at 320.

255. Robert C. Clark, *The Return of Langdell*, 8 HARV. J.L. & PUB. POL'Y 299 (1985).

The symposium was "very successful"[256] from a number of standpoints. First, it led to an increase in the number of SLPP members the following year.[257] Second, its attendees, who numbered between 100 and 200 people,[258] left with an appreciation for the diversity of opinion the SLPP attempted to maintain. It was no secret where the Society itself stood on the issue; promoting the symposium, a full-page *Record* advertisement stated, "We provide a reasoned alternative to the radical and 'progressive' ideologies that have come to dominate to an increasing extent intellectual life at Harvard Law School."[259] At the same time, however, the symposium communicated these views in forums that presented both sides of the matter, a practice unusual at the law school.[260]

Third, and most significantly, the 1984 symposium constituted the first major public airing of the schism between CLS and traditionalist scholars. In particular, it represented the first public expression of serious frustration by more conservative, traditionalist Harvard Law School faculty members. The symposium prompted increased media coverage of the matter as well. Shortly after the symposium, the *Record* published a two-part, front-page series exploring the faculty rupture in greater depth.[261] One month later, a lengthy article by Calvin Trillin appeared in the *New Yorker* describing in great detail the intensifying war.[262] The piece was replete with quotes from professors describing a "deep and at times bitter division in the faculty."[263] One of them characterized Harvard Law, in comparison to other top law schools, as "the unhappiest place."[264] The Trillin piece provided alumni with an eye-opening glimpse

256. Cooper interview, *supra* note 234.

257. Ahlburg interview, *supra* note 182.

258. *See* Mike Isbell, *Conservatives Fault Legal Education*, HARV. L. REC., Mar. 2, 1984, at 2; Ahlburg interview, *supra* note 182.

259. Advertisement, HARV. L. REC., Feb. 10, 1984, at 8.

260. *See* Cooper interview, *supra* note 234 (stating that symposium attendees unaffiliated with the SLPP expressed surprise that "there are liberals on your panels").

261. *See* Miguel Rodriguez, *Faculty Divisions Spark Pointed Political Debate*, HARV. L. REC., Mar. 2, 1984, at 1; Miguel Rodriguez, *"Politicized" Faculty Affects Tenure, Teaching, Research*, HARV. L. REC., Mar. 9, 1984, at 1.

262. *See* Trillin, *supra* note 240, at 53.

263. *Id.*

264. *Id.* (internal quotation marks omitted).

at what their alma mater had become, and they did not like what they were reading.

V. A "DECLARATION OF WAR": THE HARVARD CLUB PANEL

A. The Buildup

During the 1984–1985 school year, as the faculty conflict carried on, the SLPP continued to build a presence on campus. Departing from previous years' practice, it had begun to move away from taking specific positions on campus issues, instead presenting speakers or panels that presented alternative viewpoints for audience members to consider. For example, in October 1984, the SLPP featured a talk by Charles Murray and William Kristol on whether the Great Society programs had left the poor any better off than twenty years prior.[265] Later that spring, it sponsored the annual John M. Olin lecture, in which Professor Grover Rees of Texas defended the use of litmus tests in choosing Supreme Court Justices and after which Professors Paul Bator and Randall Kennedy offered commentary.[266] Two other April events confirmed that conservative students at Harvard Law had gained at least some measure of recognition within the campus consciousness. First, in a debate entitled "Reagan's Record on Civil Rights," staged by another campus organization, an SLPP member served as a representative for the "right" on a three-student panel that questioned the speakers after their presentations.[267] Second, in the *Record*'s annual April Fool issue, the weekly "Fenno" column—a longstanding, anonymously written, tongue-in-cheek commentary on campus personalities, trends, and events—made its first acknowledgement of a conservative presence on campus in a facetious advice column.[268] 1985 also marked the SLPP's first appearance in the Harvard Law School yearbook.[269]

---

265. Miguel Rodriguez, *SLPP Guest Assaults War on Poverty*, HARV. L. REC., Nov. 2, 1984, at 4.

266. John David Dyche, *Rees Defends Ideological Tests*, HARV. L. REC., Apr. 12, 1985, at 1.

267. *See* Paul Weisenfeld, *Edley, Reynolds Debate Civil Rights Record*, HARV. L. REC., Apr. 12, 1985, at 2.

268. *See Dear Fenno . . .*, HARV. L. REC., Apr. 1, 1985, at 9 ("Dear Fenno: I'm a conservative. I feel so all alone at HLS. Everyone here wants everything free. Free financial aid, free speech, free love. Am I the only conservative on this campus? Signed, Someone Who Pays . . . . Dear Someone: No, you're not the only conserva-

The last major SLPP event of the 1984–1985 year was a precursor to what would become its most momentous undertaking. The Society sponsored a forum entitled "Do Critical Legal Studies Scholars Belong on Law School Faculties?"[270] The event featured Professor Phillip Johnson of Boalt Hall Law School, Assistant Professor Clare Dalton of Harvard Law School—a CLS proponent—and Professor Richard Parker of Harvard Law School. To an overflow crowd of 200 individuals,[271] including a number of faculty members,[272] Johnson made a spirited, provocative case against CLS and, in particular, against Professor Duncan Kennedy. His talk illustrated the notoriety the HLS faculty conflict had, by this point, achieved at other law schools. Johnson put it bluntly: "When law professors from around the country get together these days, a frequent topic of discussion is the scandalous situation at the Harvard Law School."[273]

Indeed, by that point in the school year, the divisions between the faculty had deepened. Opponents of CLS had garnered enough votes to delay the tenure decision of Assistant Professor Dalton for two years.[274] The law school had made no lateral appointments to tenured positions since 1981.[275] Relations among the faculty were at their nadir. While popularly billed as a struggle between two equally strong forces, one on the "left" and the other on the "right," the antagonism levied a disproportionate toll on faculty members more closely aligned with the latter group, those most repelled by the rhetoric of the CLS contingent. Professor Paul Bator would soon depart in

---

tive on this campus. If you'll tell me where I can find the free love, I'll tell you where the rest of the conservatives are.").

269. *See* 1985 HARVARD LAW SCHOOL YEARBOOK 212.

270. Mike Sturm, *Future of CLS: Growth or Passing Fad?*, HARV. L. REC., Apr. 12, 1985, at 3.

271. *Id.*

272. Cooper interview, *supra* note 234.

273. Letter from David M. Bader, President, Harvard Soc'y for Law & Pub. Policy, and Eugene B. Meyer, Executive Dir., Federalist Soc'y, to Harvard Law School Alumni (Apr. 22, 1985) [hereinafter Harvard Club Invitation] (internal quotation marks omitted) (on file with author).

274. *See* Vincent Chang, *Appointments Committee Balks at Dalton Tenure*, HARV. L. REC., Apr. 19, 1985, at 1; Vincent Chang, *Dalton Gets Two More Years*, HARV. L. REC., May 10, 1985, at 1.

275. Harvard Club Transcript, *supra* note 1, at 7.

frustration for the University of Chicago Law School.[276] Professor Robert Clark, too, thought strongly about leaving. In spring 1984, several SLPP members had visited Professor Clark's office to offer their best wishes before graduating and to thank him for his support of the group. The visit became a twenty-minute meeting during which Professor Clark aired his frustrations with the law school and hinted at his own leaving.[277] Though the members pleaded with him not to go, Clark himself states that he had "absolutely" considered leaving the school, as it was "too unpleasant" and people were "always fighting."[278] John Hart Ely, a former Harvard professor who had assumed the deanship of Stanford Law School, had invited Professor Clark to spend six weeks in Palo Alto that summer working on law and economics projects, with the intention of offering Clark a permanent place on the Stanford faculty. Professor Clark ended up "lov[ing]" his summer experience and was prepared to accept Ely's offer; however, his family objected to the move, and, for that reason only, Professor Clark remained at Harvard.[279] Other professors harbored similar dissatisfaction and also thought seriously about leaving Harvard during this period.[280]

Against this backdrop, and having already hosted several forums on campus on the subject, the SLPP decided, in spring 1985 and in conjunction with the national Federalist Society, to stage a panel in New York City on Critical Legal Studies. The motivation was primarily to bring the faculty battle, which was threatening to drive the remaining right-leaning professors from the law school, squarely before HLS alumni in New York, the city boasting the greatest concentration of influential law school alumni. These measures were necessary because, as one alumnus recalls, appealing to the administration was useless; it was widely believed that then-Dean James Vorenberg lacked the wherewithal to resist the CLS forces.[281] The SLPP chose to

---

276. David A. Kaplan, *Goodbye, Harvard*, NAT'L L.J., Oct. 7, 1985, at 4.

277. Ahlburg interview, *supra* note 182.

278. Clark interview, *supra* note 197.

279. *Id.*

280. *See* David Margolick, *The Split at Harvard Law Goes down to Its Foundation*, N.Y. TIMES, Oct. 6, 1985, at E7 (quoting an anonymous professor as stating, "There are a lot of us who want to leave but who are really conflicted").

281. *See* Cooper interview, *supra* note 234 (alleging that Dean Vorenberg was "completely spineless" and had "no stomach for anything"); *see also* Telephone

stage a panel, rather than simply issue a statement or present a single speaker, for two reasons. First, the panel format aligned more closely with the methodology that the SLPP had, by this time, adopted: presenting both sides of an issue for an audience. Second, the SLPP realized that a panel format would be more effective at communicating the anti-CLS message it intended the event to send. Issuing a manifesto representing a single viewpoint would have little impact; on the contrary, hosting a debate would command more attention and arouse greater interest, especially among alumni who had little previous exposure to the issues or had not yet established any firm opinions about CLS.[282]

Assisting in the SLPP's efforts was the newly formed New York lawyers' chapter of the national Federalist Society, of which Kaj Ahlburg, a former SLPP vice president and the organizer of the 1984 symposium at Harvard, served as the first president. The New York event would be the chapter's inaugural event, and Ahlburg arranged to hold it at the Harvard Club of New York, in midtown Manhattan, at lunchtime on May 13, 1985.[283] Ahlburg and SLPP students on campus invited four professors to the panel, all of whom initially agreed to participate: Representing the "right" or traditionalists would be Professors Paul Bator and Robert Clark; representing the "left" or CLS scholars would be Professors Duncan Kennedy and Morton Horwitz.[284] The national Federalist Society provided funds to cover rental of the Harvard Club, the speakers' expenses, the costs of publishing and distributing a transcript of the panel's proceedings after the event, and postage for the invitations, which were sent to all New York-area alumni.[285]

If the faculty schism was contentious, the letter from the SLPP and the national Federalist Society inviting area alumni to the Harvard Club event only fanned the flames. Dated April 22, 1985, the letter opened by inviting the recipient to "learn more about the intellectual crisis confronting Harvard Law

---

Interview with anonymous Harvard Law School faculty member (Mar. 22, 2005) [hereinafter Anonymous Faculty Interview 2] (calling Vorenberg an "extremely weak dean").

282. Cooper interview, *supra* note 234.

283. Ahlburg interview, *supra* note 182; Harvard Club Invitation, *supra* note 273.

284. Ahlburg interview, *supra* note 182.

285. Meyer interview, *supra* note 143.

School and legal education in general."[286] It then listed some of Duncan Kennedy's more seditious statements, including many likely selected to incite ire among the New York lawyers on the mailing list. They included, "there should be equal salaries for everyone from professors to janitors," "lawyers should be assigned to big firms at random, flattening their hierarchical ordering," and law firm associates should engage in "the politicization of corporate law practice, which means doing things and not doing things in order to serve left purposes."[287] The letter warned of "the impact of critical legal studies on legal education, particularly at Harvard," before offering a litany of student complaints about CLS-oriented classes at the law school culled from Board of Student Advisors surveys.[288] It closed by stating that the SLPP "believes it is important to bring to the attention of alumni the pervasive effects this movement is having at Harvard Law School."[289]

In retrospect, admits Eugene Meyer of the national Federalist Society, "We wouldn't do the same thing today" with regard to the letter's language.[290] Its polemical tone surely attracted a larger audience, but it also resulted in Professor Horwitz's withdrawal from the panel. He issued a prepared statement about the event that read in part:

> [I]ts organizers misled me concerning its tone and purposes. I had been led to believe we were to engage in a serious and thoughtful discussion before interested alumni about legal education at Harvard Law School.
>
> Instead, the alumni were invited to join in a highly inflammatory attack on a serious and important form of scholarship. Such an attack would constitute interference with academic freedom that I doubt most Harvard Law School alumni would countenance.[291]

As an eleventh-hour replacement for Horwitz, the SLPP secured Professor Abram Chayes, and the panel commenced. Moderated by Judge Ralph Winter, each panelist was given ten

---

286. Harvard Club Invitation, *supra* note 273.
287. *Id.*
288. *Id.*
289. *Id.*
290. Meyer interview, *supra* note 143.
291. Harvard Club Transcript, *supra* note 1, at 1.

minutes to speak, after which questions were taken from the floor.[292]

B. The Debate

Professor Horwitz was both incorrect and correct. Contrary to his prepared statement, the Harvard Club panel discussion did consist of serious and thoughtful discussion, and the questions indicated extraordinary interest among the alumni about the state of legal education at Harvard Law. At the same time, however, while not rising to the "inflammatory" level that Professor Horwitz predicted, both Professor Bator's and Professor Clark's remarks constituted the most vitriolic public condemnation of Critical Legal Studies and the state of the law school, criticisms that would continue to ring for years after their first utterance. Professor Clark opened by describing the prominence of CLS at Harvard Law School before attempting to explain the movement to a largely unfamiliar audience:

> Consider the following seven major institutions of the modern western world . . . : 1. Science . . . . 2. Technology. 3. Business and commerce . . . . 4. Large, formal organizations . . . . 5. Capitalism. 6. Conventional law practice and the legal profession (i.e., you the audience and your law firms and your work). 7. Traditional legal scholarship . . . . If your attitude is deeply antipathetic to all seven of these institutions and practices, then you will find fellowship and support among CLS scholars. . . . I'm talking about deep-seated[,] thorough-going, fundamental antipathy and dislike for these seven things. Only that will get you into the club.
>
> If, like me, you find yourself basically in favor of these things like science, business, and the legal profession, then you'll have to seek some other path.[293]

Professor Clark then offered and vigorously dissected five typical criticalist claims[294] before discussing the CLS movement's primary effect on Harvard Law School, which was "prolonged, intense, bitter conflict among different groups of faculty members."[295] CLS scholars, he alleged, were engaged in

---

292. *Id.*
293. *Id.* at 4.
294. *See id.* at 5–6.
295. *Id.* at 7.

a "ritual slaying of the elders" and employed bad-faith voting techniques to block certain appointments.[296]

Professor Clark, the chair of the school's lateral appointments committee, then candidly informed the audience that the law school had been unable to hire any professors from other law schools for four years. This was the case not only because of the criticalists' stonewalling techniques, but also because, when the faculty did actually manage to agree on an appointment, the political situation at the law school so repelled the recipients of the offers that they turned the offers down, including one professor who, according to Clark, "laughed in my face."[297] As a result, the school found itself unable to hire senior scholars with proven track records, which Clark regarded as a "very unhealthy condition."[298]

Professor Kennedy followed Professor Clark, but he did himself no favors with the audience by immediately admitting that Clark was "actually not very far off the mark in lots of his characterizations."[299] Continued Kennedy, "I was thinking, 'Right on. Power to the people. He's got a good point there. If that's what we're saying, we're right.'"[300] He then also equated the CLS movement to "a rag-tag band of left over 60's people and young people with nostalgia for the great events of 15 years ago,"[301] another comment unlikely to endear himself to an audience of Wall Street lawyers. Finally, he mounted a spirited defense of CLS, claiming in his conclusion that "[w]hat is going on is a classic transition battle" and that CLS was being used "as a whipping boy for everything bad about liberal reform of legal education."[302]

Professor Bator spoke next, delivering a scathing attack on the CLS movement and its impact on Harvard Law School. He opened by commenting on the tone and content of the invitation letter, which the two preceding panelists had briefly criticized. He agreed that the letter was "inappropriate," but,

---

296. *Id.*
297. *Id.* at 29.
298. *Id.* at 8.
299. *Id.*
300. *Id.*
301. *Id.* at 8–9.
302. *Id.* at 10–11.

> as a subject of discussion today it seems to me to represent a red herring. The suggestion that there is a dangerous conservative or right-wing or red-baiting conspiracy at Harvard Law School is ludicrous. Conservative students at Harvard Law School are a tiny and beleaguered minority. The only purpose of the Society for Law and Public Policy is to provide the Law School with a small voice which will stand as an alternative to the overwhelming liberal orthodoxy that dominates both the faculty and the student body. That voice should be encouraged and applauded.[303]

Professor Bator then commenced a tripartite assault on the CLS movement. He first scorned its theoretical underpinnings, claiming that "[a]s a school of philosophy," CLS would not "prove to be an important or powerful movement."[304] He then derided its supposed penchant for encouraging radicalism among students and lawyers:

> [A]s a radical political movement on the general American political scene, CLS is a complete non-starter . . . . [B]oth CLS practitioners and CLS audiences consist entirely of a tiny and exclusive little elite of enormously privileged law professors and law students, talking to each other in a context that is simply marginal to the important movements of political life in this country.[305]

He then moved on to his third major point: that despite its insignificant "real world" effect, CLS was having, according to Bator, an "absolutely disastrous effect on the intellectual and institutional life of Harvard Law School."[306] The CLS contingent, he claimed, had created a "difficult, contentious, and inflamed atmosphere, in which only the most disciplined is able to focus on serious work."[307] Professor Bator then described the impact of the movement's "cultural philistinism" on the hiring process, echoing Clark's early concerns by maintaining that "serious and productive non-left scholars do not want to be at an institution devoted to guerrilla warfare."[308]

---

303. *Id.* at 11.
304. *Id.* at 12.
305. *Id.* at 12–13.
306. *Id.* at 13.
307. *Id.* at 14.
308. *Id.*

Professor Bator closed by admitting that his view represented a "minority view" and that other faculty members might argue to the contrary. But he offered the audience members some questions to consider in deciding which account to believe and whether the law school was suffering from "mediocritization":

> [T]o what extent does the School's faculty consist of people who are widely and generally regarded, in the academic world and in the profession, as leaders of legal thought? How many people on the faculty are people whose contributions to scholarship and to improvement of the law make them outstanding leaders in legal education? . . . Ask around, count noses, think for yourself.[309]

After offering a list of leading Harvard professors who had recently retired and asking who was poised to replace them, Professor Bator delivered a memorable closing line: "It is the vitality of intellectual integrity and academic excellence at Harvard Law School that is at stake. On that, there is no right or left, only right and wrong."[310]

Professor Chayes was the fourth to speak, and his remarks contrasted almost entirely with Professor Bator's. Chayes, who identified himself as part of the "muddy middle,"[311] regarded the law school as "richer, more diverse, [and] more vibrant" than at any point in his forty years at Harvard Law.[312] In terms of scholarship, he considered the school to be the "center of creative intellectual work in the law school arena," while in terms of impact on students, he saw no "falling off of student interest" in choosing to attend Harvard over competitor schools.[313] He also denied any homogenous uniformity on campus, noting the presence of both the SLPP and the JLPP (or "Law and Public Policy Journal," as he called it). It was, in his experience, the "first time . . . that the big liberal consensus has been shattered."[314] He closed with a defense of CLS by stating that "[i]f criticizing the profession makes you a CLS advocate . . . that is the excuse for having an academic law school, a law school in a

309. *Id.* at 15.
310. *Id.*
311. *Id.* at 24.
312. *Id.* at 16.
313. *Id.* at 16, 17.
314. *Id.*

university, rather than a trade school or a bar review course to prepare lawyers for life."[315]

A question-and-answer period followed, during which Professor Clark offered additional concerns about the state of Harvard Law School and levied even more stinging accusations at CLS adherents and the environment he claimed they fostered. He expressed dismay about declining faculty quality at the law school, telling the audience that he thought the "scholarly eminence per person at Harvard" had dropped "seriously below that of several other competing law schools."[316] He claimed that the CLS movement had made life "incredibly miserable for people who are not in it" and challenged Professor Chayes's assessment that the faculty was diverse and vibrant, maintaining instead that the emerging attitude of the law school had become, "Let a thousand flowers bloom, so long as they're all leaning sharply to the left."[317] The questions the audience members posed strongly indicated that they shared Professor Clark's concerns. Seven of the nine questions the audience members asked suggested, at minimum, skepticism of CLS, its tactics, and its effects, and, at maximum, alarm. Judging from the immediate audience response, then, the SLPP appeared to have realized its purpose in holding the panel.

C. The Aftermath

The Society was not finished, however. In the days following the panel, it prepared a transcript of the remarks, which it then sent to all Harvard Law School alumni in the greater New York City area.[318] Included with the transcript was a separate letter that Duncan Kennedy had requested to have enclosed. In his letter, Kennedy objected to the original letter inviting alumni to the panel as "inconsistent with the obligation of a debate sponsor."[319] He identified three grounds for this allegation: First, the

---

315. *Id.* at 17–18.

316. *Id.* at 19.

317. *Id.* at 22 (internal quotation marks omitted).

318. *See* Letter from David M. Bader, President, Harvard Soc'y for Law & Pub. Policy, and Eugene B. Meyer, Executive Dir., Federalist Soc'y for Law & Pub. Policy, to Harvard Law School Alumni 1 (undated) [hereinafter Transcript Cover Letter] (on file with author).

319. Letter from Duncan Kennedy, Professor of Law, Harvard Law School, to David M. Bader, President, Harvard Soc'y for Law and Pub. Policy, and Eugene B. Meyer, Executive Dir., Federalist Soc'y 1 (June 11, 1985) (on file with author).

letter incorrectly described the CLS movement as if it were a homogenous organization devoted to propagating the views Kennedy himself held, which he admitted were "outrageous statements" that few others in CLS shared. Second, the letter wrongly accused CLS professors of "indoctrinating" students when, Kennedy claimed, "even our strongest critics" disagreed that this occurred. Third, the letter misrepresented the actual state of student reaction to CLS professors, taking survey quotes out of context and glossing over the general inclination for students to complain about professors.[320] Nevertheless, Kennedy's letter closed by commending the SLPP for circulating the panel transcript among the alumni, for it would "allow them to form their own judgment about what is and is not going on at the school."[321]

The Society included Professor Kennedy's letter with the transcript and included its own cover letter, signed by SLPP president David Bader and national executive director Eugene Meyer. The letter expressed their pleasure in including Kennedy's letter "in the spirit of encouraging a free and open discussion."[322] In fact, the SLPP students were all too willing to accede to Professor Kennedy's request. As one put it, "We were happy to publicize anything he wanted to say."[323] Bader and Meyer even quoted, in their own concluding paragraph, Kennedy's closing remark about forming one's "own judgment," an indication of how strongly they believed that alumni reading the panel transcript would come out on the side of SLPP and the traditionalists at Harvard Law School.

They were right. The panel became, in Professor Robert Clark's words, a "turning point event" in the history of the law school.[324] As Kaj Ahlburg states, "It's one thing to have a couple dozen people on campus making noise, but having alumni making noise is much different."[325] Many crucial alumni in New York City, including members of the Harvard University Board of Overseers, became alarmed.[326] Mostly oblivious until

320. *Id.* at 1–2.
321. *Id.* at 2.
322. Transcript Cover Letter, *supra* note 318, at 1.
323. Ahlburg interview, *supra* note 182.
324. Clark interview, *supra* note 197.
325. Ahlburg interview, *supra* note 182.
326. Clark interview, *supra* note 197.

then to the events simmering at the law school, they wanted to know how the law school's seeming turn for the worse would affect the faculty, as well as how it would affect students' viewpoints and their desire to go to law firms.[327] The panel's proceedings left many of them "shocked," and they subsequently "let the Harvard Law administration have the benefit of their views."[328] And crucially, they spoke not just by voicing their opinion, but also by "holding back their dollars."[329]

Moreover, major news media, which had thus far devoted little attention to the conflict, picked up the story, fanning the flames of alumni outrage.[330] A short story in the *New York Times* on Professor Paul Bator's September 1985 decision to leave Harvard cited his remarks at the event,[331] as did a much lengthier *Times* article in October that specifically covered the faculty conflict and the SLPP panel. The story ominously reported that "while no one is writing the law school off, it is in trouble."[332] It quoted a professor from the University of Chicago Law School who equated the CLS scholars' actions to a "campaign to destroy [an] American culture icon[],"[333] a pronouncement surely unsettling not just to most Harvard Law alumni, but even to those unaffiliated with the school. The story, which had not painted CLS in a particularly flattering light to begin with, closed by repeating one of Duncan Kennedy's statements from the panel: that as long as the law school continued to turn out "highly competent young lawyers," then the audience members "should smile, you should nod, you should sit on your hands and forget it."[334] Whatever optimism Professor Kennedy was hoping to invoke with his assurance, it instead came off as patronizing in its implication that the audience members, and Harvard Law

---

327. *Id.*

328. Charles Bork, *Battle for the Law Schools*, NAT'L REV., Sept. 26, 1986, at 44, 46.

329. Terry Carter, *At Harvard Law, a New Era Dawns*, NAT'L L.J., Aug. 7, 1989, at 1, 44.

330. *See id.* (noting that "[i]t was the Harvard Law alumni who . . . hollered loudest when the upheaval spilled over into the national news pages").

331. David Margolick, Legal Notes, *A Professor at Harvard Law Heads to West and to Right*, N.Y. TIMES, Sept. 15, 1985, at 58; *see also* Kaplan, *supra* note 276, at 4 (quoting Professor Bator as saying, "I've had as much to say as I can about CLS and can't add more").

332. Margolick, *supra* note 280, at 7.

333. *Id.*

334. *Id.*

alumni in general, were foolish to question or express concern over the current state of affairs at their alma mater.

The reaction of the New York alumni and media spurred the SLPP to take its efforts to still another level. Many of the alumni who had received copies of the transcript urged the Society to bring the debate to alumni around the country.[335] In fall 1985, with the assistance of the national Federalist Society, the SLPP mailed a complimentary copy of the transcript to every Harvard Law School alumnus in the country. Included with the transcript were the *New York Times* articles covering Professor Bator's departure and the Harvard Club event.[336] This latest mailing set off additional media coverage of the law school split; articles on the struggle soon appeared in the *Washington Post* and *Time*, both mentioning the previous summer's panel and both casting CLS in an unfavorable light.[337] Alumni indignation soared even higher. Letters from alumni across the country poured into the SLPP office requesting additional copies of the transcript and thanking the SLPP for the "valuable service" it was performing—letters even from those alumni who, in the words of one graduate, held political views "probably very different from those of your members."[338] The law school became so besieged with alumni complaints about the state of affairs that it established a communications office to handle the grievances.[339]

The reaction was so fierce that Dean James Vorenberg took the unprecedented step of sending his own letter to every Harvard Law graduate—28,000 in total.[340] Vorenberg's letter was surprisingly candid. Rather than attempting to spin recent events in a wholly positive light, the three-page, single-spaced

---

335. Letter from Bennett Evan Cooper, President, Harvard Soc'y for Law & Pub. Policy, and David M. McIntosh, President, Federalist Soc'y for Law & Pub. Policy Studies, to Harvard Law School Alumni 1 (undated) (on file with author).

336. *Id.*

337. *See* Al Kamen, *War Between Professors Pervades Harvard Law*, WASH. POST, Dec. 21, 1985, at A3 (stating that "[t]he trouble began, according to most observers, when a small group of New Left radicals arrived on campus in the 1970s"); Richard Lacayo, *Critical Legal Times at Harvard*, TIME, Nov. 18, 1985, at 87 (describing Kennedy and other CLS adherents as "flaunt[ing] a confrontational '60s style of incivility and antic provocation in relations with their colleagues").

338. Letter from Isaac D. Benkin to Bennett Cooper, President, Harvard Soc'y for Law & Pub. Policy 1 (Dec. 2, 1985) (on file with author).

339. Carter, *supra* note 329, at 44.

340. Kamen, *supra* note 337, at A3.

letter immediately acknowledged alumni concern and frankly admitted that "[t]he faculty is less cohesive and homogeneous than at any time in my memory—maybe less so than at any time in the School's history."[341] It continued, "Both within and outside the School there are concerns about the effects of faculty conflicts on the quality of the School's educational program and its ability to appoint and hold faculty members."[342] After describing the steps he planned to take to address the situation, Dean Vorenberg ended the letter by reassuring the alumni that Harvard "continues to hold the leadership position it has held throughout the 20th century," and that he had "no doubt" that it would maintain this position.[343]

Despite the explanations the letter offered, its promises of tougher action,[344] and its positive ending note, the fact that Dean Vorenberg felt compelled to send it indicated a situation that was out of control. Moreover, statements the dean had made in the second *New York Times* article—sent to every alumnus by the SLPP—suggested that he was trying to appease both sides of the conflict, rather than forcefully addressing the situation.[345] As one current Harvard professor attests, Dean Vorenberg was getting "so much flak from the leftists" that he "could not function effectively."[346]

D. A Leader Emerges

The Harvard Club event and ensuing publicity did identify one individual who could seemingly function effectively amidst the chaos enveloping the law school: Professor Robert Clark. As one report later termed it, the SLPP panel constituted

---

341. Letter from James Vorenberg, Dean, Harvard Law School, to Harvard Law School Alumni 1 (Dec. 10, 1985) (on file with author).

342. *Id.*

343. *Id.* at 3.

344. *See, e.g.*, *id.* at 2 (discussing new procedures enabling the dean to "recommend visiting appointments to the Governing Boards of the University without the delays involved in full faculty-meeting review," and maintaining that the dean was "prepared to act to prevent any deadlock in making strong tenure and tenure-track appointments").

345. *See* Margolick, *supra* note 280, at 7 (quoting Dean Vorenberg as saying that "[w]hat has gone on here in the past 5, 10, 15 years has been the creation of a much more broad-based and creative faculty than before, and some of our differences reflect that breadth. . . . The school is paying a price for its strength").

346. Anonymous Faculty Interview 2, *supra* note 281.

Professor Clark's "declaration of war."[347] It marked the moment when Clark, "a liberal-to-moderate by any measure outside Cambridge,"[348] emerged, in Professor Duncan Kennedy's words, as a "leader of the right."[349] The panel not only confirmed to the alumni that there was a crisis and that something had to be done but, most importantly, established that "there was a way to do something about it," that there existed the "guy on the white horse" who could eventually restore order.[350] As Professor Clark himself later stated, "Lots of people agreed with me, but they didn't want to stand up."[351] Clark's appeal extended beyond conservative alumni, stretching to all Harvard Law School graduates who feared their investment in their law degrees was being degraded.[352] Even if liberal themselves, these individuals viewed the liberal faculty members at HLS, Dean Vorenberg chief among them, as too weak to stand up to the radicals. The SLPP panel initiated a strong wave of alumni support for getting the law school back under control, and it identified Professor Clark as someone who would fight back.[353]

While the battles raged on for several years afterward, it was clear that the tide had begun to turn. In 1986 and 1987, four assistant or visiting professors associated with CLS—Daniel Tarullo, Ziporrah Wiseman, Clare Dalton, and David Trubek—failed to receive tenure.[354] Tarullo's decision was the first denial of tenure to an HLS assistant professor in seventeen years.[355] Trubek's and Dalton's reviews incorporated additional stages of scrutiny that illustrated the strength Clark and his traditionalist forces had gained within both the appointments process and—after intense alumni pressure and media coverage—the University administration. Though the law school narrowly approved tenure for Trubek, Harvard University President

347. Daniel Golden, *An Unconventional Traditionalist*, BOSTON GLOBE, Mar. 4, 1990, Magazine, at 12.

348. Editorial, *Lux et Veritas Redux?*, WALL ST. J., Feb. 23, 1989, at 15.

349. Kennedy interview, *supra* note 35.

350. *Id.*

351. Golden, *supra* note 347, at 15.

352. *Id.*; *see also* Carter, *supra* note 329, at 44 ("[HLS alumni] saw those Harvard Law tickets they'd been punching throughout their careers diminishing in value.").

353. Kennedy interview, *supra* note 35.

354. KERLOW, *supra* note 240, at 50–53.

355. *Id.* at 51.

Derek Bok, himself a former HLS professor and, briefly, dean, interceded, convening an outside review committee and ultimately vetoing the faculty's decision.[356] The faculty had delayed Dalton's tenure decision for two years,[357] and when it took up the issue again, Robert Clark served as the "point man and primary voice" for opposition to her appointment.[358] Dalton's work was subjected to unprecedented levels of exacting analysis, with Professor David Rosenberg authoring an eighty-nine-page memorandum harshly critiquing her work.[359] Dalton fell four votes short of receiving tenure.[360] Her rejection, according to Duncan Kennedy, dealt a severe blow to CLS and radicalism in general. It was the point at which it became clear that "young professors couldn't be lefties anymore if they wanted to get tenure."[361] The conservative forces that had emerged following the SLPP panel, with Professor Clark as their general, had become so prominent that in spring 1988, when James Vorenberg announced his plans to step down as dean, his decision was immediately ascribed to mounting pressures from the right-wing element within the Harvard Law community.[362]

The chain of events set in motion by the Harvard Club debate culminated on February 17, 1989, when President Bok named Robert Clark to succeed Vorenberg as dean of the law school.[363] To say that this decision was unexpected is an understatement; to say that it provoked controversy is indisputable. On the search committee himself, Clark was rarely mentioned in reports speculating about Vorenberg's possible successors.[364] Not suprisingly, his selection ignited a firestorm of criticism as

---

356. *Id.* at 52.

357. *See supra* text accompanying note 274.

358. *See* Chris Crain & Greg Herbert, *Bok Taps Clark as New Dean: Faculty Split Along Ideological Lines*, HARV. L. REC., Feb. 24, 1989, at 1 (quoting Professor Lewis Sargentich).

359. KERLOW, *supra* note 240, at 51.

360. *Id.*

361. Kennedy interview, *supra* note 35.

362. *See* Greg Herbert & Chris Crain, *Vorenberg Steps Down from Deanship: Pressure from Right Is Alleged*, HARV. L. REC., Apr. 29, 1988, at 1.

363. *See* Crain & Herbert, *supra* note 358, at 1.

364. *See* Greg Herbert, *Dean Search Lacks Input, Students Claim*, HARV. L. REC., Sept. 16, 1988, at 1 (failing to mention Clark among a list of supposed serious contenders); Chris Crain, *Speculation Narrows as Bok Nears Dean Choice*, HARV. L. REC., Jan. 20, 1989, at 1 (identifying five front-runners and including Clark in a second list of those "possibly still under consideration").

well as some praise. Faculty opponents of the selection called it "the worst possible choice Bok could have made," "a disaster for the law school," and "a bad and divisive appointment."[365] Proponents termed it "an excellent choice" and "terrific," deeming the negative reaction to be "the usual crybaby response."[366] The general reaction among students was "a mixture of surprise and concern."[367] However divided the response, Clark's mandate was much clearer: According to Professor Laurence Tribe, the chairman of the dean search committee, the appointment represented the view that "conciliation is less important than progress."[368] Clark himself declared an opposition to "satisficing," a term he defined as "accommodating various interests or keeping people happy as a goal in itself."[369] In so doing, Dean Clark adopted an approach markedly different than that of his predecessor, who critics claimed had acted indecisively and tried too hard to placate both sides.[370] In choosing Clark, Bok clearly indicated which side had the upper hand going forward.

The SLPP events that had laid bare the depths of the school's civil war and put Clark on the map as a resistance figure were frequently recalled in the days and months following his appointment. Directly beneath its banner headline announcing Bok's decision, the *Record* plastered a quote Clark delivered at the SLPP-sponsored National Student Symposium at Harvard

---

365. *Faculty Reactions Range from Praise to Scorn*, HARV. L. REC., Feb. 24, 1989, at 5 (quoting Professors Frug, Horwitz, and Sargentich).

366. *Id.* (quoting Professors Wolfman, Scott, and Fried).

367. Dan Kroll, *Bok Taps Clark as New Dean: Students Wary of Choice*, HARV. L. REC., Feb. 24, 1989, at 1.

368. Crain & Herbert, *supra* note 358, at 16.

369. Greg Herbert & Tom Bilello, *Clark Responds to Charges of Faculty Divisiveness, Pledges Effort to Recruit "Qualified" Women, Minorities*, HARV. L. REC., Feb. 24, 1989, at 8.

370. *See* sources cited *supra* notes 281, 345–46. In the *Record*'s 1989 April Fool issue, the regular staff cartoonist drew a series of frames captioned "Today at HLS, Inc. . . ." that juxtaposed depictions of HLS professors with captions ascribing to them characteristics that were the polar opposite from their usual selves. For example, the caption accompanying Duncan Kennedy's picture read, "Duncan Kennedy began teaching corporate finance," and that accompanying Alan Dershowitz's read, "Alan Dershowitz got his ego under control." The caption for James Vorenberg read, "Jim Vorenberg took decisive action without a committee report." Luke Cole, *HLS, Inc.*, HARV. L. REC., Apr. 1, 1989, at 5.

in 1984.[371] The lead *Record* article restated his comment at the 1985 Harvard Club event that CLS adherents were engaging in a "ritual slaying of the elders."[372] In an interview with the paper, Clark referred to "that Harvard Club Symposium on CLS," calling its transcript a "famous document" that offered a generally "comprehensive statement" of his views on CLS.[373] Major media outlets profiling Clark and his new position, including the *Boston Globe* and *New York Times*, invoked the panel,[374] with the *Wall Street Journal* labeling it a "watershed" event and devoting a lengthy sidebar to excerpts from the discussion.[375] Even today, the two living panelists from the event,[376] though likely still far apart on many issues, unwaveringly agree on the significance of the SLPP's 1985 Harvard Club debate. Professor Kennedy recalls it as an "amazing event" that proved a "turning point" in the school's history.[377] Dean Clark agrees that it "made a huge difference," even though he "never would have anticipated it."[378] Above all, it "had many long-term effects on the development of Harvard Law School":[379] among them, the development of an increasingly conservative student body.

VI. "YOU CANNOT OVERSTATE ITS IMPORTANCE": THE RIGHTWARD SHIFT OF THE STUDENT BODY AT HARVARD LAW SCHOOL

The appointment of Robert Clark as dean of Harvard Law School in 1989 was the climax of a series of events that had gradually broken down the "radicalizing milieu" that had de-

371. Crain & Herbert, *supra* note 358, at 1 ("I think that both Critical Legal Studies dogmas are deeply pernicious, and have to be combatted in legal education. It is very bad to indoctrinate students with these attitudes. I think the best [weapon] against them is some sort of return to careful, methodologically rigorous thinking." (quoting Clark, *supra* note 255, at 307)). The newspaper actually misquotes Clark's article, though not to any significant degree.

372. *Id.* at 16.

373. Herbert & Bilello, *supra* note 369 at 30. Clark added, "Duncan was there too. He had equal time." *Id.*

374. Golden, *supra* note 347, at 15; Ken Emerson, *When Legal Titans Clash*, N.Y. TIMES, Apr. 22, 1990, § 6 (Magazine), at 26 (describing the "heated session" at the Harvard Club, where "[m]uch of the heat was provided by a young Bob Clark").

375. Editorial, *supra* note 348, at 1.

376. Paul Bator died in 1989; Abram Chayes died in 2000.

377. Kennedy interview, *supra* note 35.

378. Clark interview, *supra* note 197.

379. *Id.*

veloped at the law school in the 1970s and reached its apex in the early- to mid-1980s. The sequence began with the founding of the Society for Law & Public Policy in 1977, which begat further developments that promoted an increasingly louder and more emboldened conservative presence on campus among both students and faculty. The formation of the SLPP paved the way for the publication of the *Harvard Journal of Law and Public Policy* in 1978, which fostered the creation of the national Federalist Society in 1982, which then led to the revival of the Harvard SLPP as a Federalist Society chapter shortly thereafter. In the face of open hostility, the SLPP encouraged and promoted dissident voices on the Harvard campus, establishing enough of a toehold to provide forums for professors increasingly frustrated with the direction of HLS to express their concerns publicly. The SLPP and national Federalist Society then broadcast these concerns to a worldwide audience of alumni and media through the seminal Harvard Club event, the aftermath of which revealed widespread alumni dissatisfaction with the orientation of the law school and incited a counterassault by conservative faculty members, leading to the eventual appointment of Professor Robert Clark as dean.

As the above account illustrates, conservative Harvard Law students played integral roles in bringing about the events that permitted and encouraged the conservative counterreaction among alumni and faculty. What remains unexplored is the long-term effect of these events on the Harvard Law student body. An exhaustive examination of the history of Harvard Law School during Clark's deanship, which lasted until 2003, is well beyond the scope of this Article; however, it is clear that the student population of the law school became noticeably more conservative during that time and although the average student is still liberal, students are more conservative today than at any point in the past several decades. This Part explores the extent of this rightward shift among students and the reasons this shift has taken place.

A. Has There Been a Shift in the Student Body?

Determining whether the student body has become more conservative is a difficult task given the paucity of longitudinal data for such assessments. For example, while the school newspaper and other student groups used to conduct presidential

pre-election polls fairly routinely, offering some insight into ideological trends at the law school over time,[380] this practice seems to have been discontinued in recent years. Still, useful information about possible shifts in the student population can be gleaned through several approaches. The first approach is purely anecdotal, collecting the insights and recollections of professors who have taught at HLS over a span of years or who spent separate periods there as students and, later, professors. These faculty members are in a suitable position to comment on long-term ideological trends they have perceived among the student body over the years. The second approach is a mixture of anecdotal and empirical evidence, examining a smaller subset of the student population, the *Harvard Law Review*, and comparing former members' descriptions of its ideological orientation with a survey of current members' beliefs. The third approach is purely empirical, surveying the Harvard Law Class of 2007 on a range of ideological questions. This last approach permits direct comparison with the small amount of empirical data that does exist from years past, in addition to allowing the reader to draw his own conclusions about the ideological balance and political viewpoints of today's HLS student body and how they might contrast with commonly held perceptions about Harvard Law students.

1. Professors' Views

Current HLS professors almost unanimously agree that a rightward shift has taken place among the HLS student body in recent years. The near-universality of this opinion across a broad range of professors—liberals and conservatives, long-time professors and recent arrivals, public law and private law scholars—is striking. Professor Elizabeth Bartholet, for example, states that well into the 1990s, she was not particularly conscious of any change having occurred; now, however, she believes there has "definitely" been an increase in both the number of conservative students and their prominence on campus.[381] Professor Charles Fried agrees, maintaining that

380. *See* sources cited *supra* notes 37–38 and accompanying text; notes 45–50 and accompanying text.

381. Interview with Elizabeth Bartholet, Morris Wasserstein Public Interest Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 25, 2005) [hereinafter Bartholet interview].

there has "absolutely" been a shift. While years ago only a few "brave souls" would advance conservative positions, these stances are now, he maintains, "entirely respectable," and legal arguments grounded in conservative methodologies are common.[382] Other long-time professors concur in these general sentiments: Professor Alan Dershowitz sees a "major difference" in the prominence of conservatives on campus today as compared with prior years;[383] Professor Mary Ann Glendon notes that the present number of conservative students who are confident and articulate in classroom discussions is a "real change" from the past;[384] and Professor Lloyd Weinreb observes a departure from the "extreme radicalism" of earlier times.[385] Their views are shared by more recent arrivals to the HLS faculty. Dean Elena Kagan believes that, as compared to her time as an HLS student in the mid-1980s, "there is a greater conservative presence" and "greater acceptance of those methodologies."[386] Another younger professor describes that he is "stunned" at the number and prominence of conservative students at HLS, deeming it "100% correct" to conclude that a rightward shift has occurred.[387]

Other professors offer more in-depth commentaries about a rightward shift. Professor David Wilkins believes that in addition to an increase in political conservatism among the student body, which has "clearly" occurred in both numbers and voice, an "enormous change" has also taken place with regard to methodological conservatism.[388] When Wilkins was an HLS student in the late 1970s, law and economics was a marginal analytical approach at best, a "fringy, way-out" mode of thinking about the world.[389] Now, he says, it is "one of the most

---

382. Interview with Charles Fried, Beneficial Professor of Law, Harvard Law School, in Cambridge, Mass. (Apr. 4, 2005) [hereinafter Fried interview].

383. Dershowitz interview, *supra* note 27.

384. Interview with Mary Ann Glendon, Learned Hand Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 23, 2005) [hereinafter Glendon interview].

385. Interview with Lloyd Weinreb, Dane Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 24, 2005) [hereinafter Weinreb interview].

386. Kagan interview, *supra* note 205.

387. Anonymous Faculty Interview 1, *supra* note 123.

388. Wilkins interview, *supra* note 25.

389. *Id.* Professor Wilkins notes that when now-Professor Louis Kaplow, a year behind him on the *Harvard Law Review*, wrote his student note on law and economics, "nobody knew what he was talking about." *Id.*

dominant analytical frameworks for thinking about law and legal rules," with Harvard a leading research center for the school of thought.[390] Professor Duncan Kennedy is similarly unequivocal about the shift in the student body: he maintains that "[t]he center of gravity has shifted dramatically to the right."[391] When he began teaching in the 1972–1973 school year, approximately one-sixth of each incoming class, he thinks, would define itself as "left of liberal" on either a race, gender, or "radical" basis. This group took a "very long time" to disappear, but it finally did so around 1995–1996.[392] Conversely, the percentage of each class that would identify as libertarian or conservative in the 1970s was four to five percent at most. Now, Kennedy estimates, probably twenty percent of each first-year class has some "recognizably ideological conservatism." He believes this development emerged in the mid-1990s, when one would find larger and larger proportions of randomly selected first-year students less sympathetic to paternalist solutions and to legal interventions based on, in Professor Kennedy's words, "the notions that minorities or women are systematically screwed."[393]

The rightward drift of student ideologies has also manifested itself within the curriculum. The topics HLS professors present in their courses, how they lead discussions, and how students respond within these settings are noticeably more conservative than in previous years. Professor Bartholet, for example, has taught employment discrimination since the late 1970s. For the first decade, she taught it largely as a civil rights course, believing that many if not most of the students in the class were planning on careers as plaintiffs' civil rights lawyers or at least thinking of the issues from a civil rights perspective. Classroom discussions were based on this assumption. In the last twelve years or so, however, it has become "blatantly obvious" to her that many of her students will instead be working for employers and are thinking of the issues from an employer's perspective. Her students now routinely speak up on behalf of

390. *Id.*
391. Kennedy interview, *supra* note 35.
392. *Id.*
393. *Id.*

employers' economic interests or argue against affirmative action—two opinions rarely, if ever, voiced in previous eras.[394]

Similar examples occur in the criminal law classroom. Professor Weinreb recalls the moment when he knew a shift was taking place. During a discussion in the 1980s on sentencing, one student, answering a question about an appropriate sentence for a particularly heinous crime, responded that the convicted defendant "should be hung." Regardless of the class's reaction, which Professor Weinreb cannot recall, such a long time had elapsed since one could talk about the death penalty favorably in class that even mentioning it in such a light represented a change.[395] The change is present in Professor Dershowitz's criminal law course, too; he notes that he no longer has to play the "conservative devil's advocate" during class discussions; plenty of students now do it for him.[396]

The phenomenon has taken place in both the private and public law spheres. In the private law context, Professor Clark recalls that in the 1980s, it was "common" for students to ask, in his corporate law course, why more class time was not being devoted to nonprofit companies or the rights of nonshareholder groups affected by companies. These questions, he says, no longer arise.[397] Along public law lines, a longtime constitutional law professor remarks that during the 1980s and first half of the 1990s, the most articulate and involved students in class were those who were "very liberal or left of that."[398] Around 1995, this balance began to change: There were fewer students whom he would consider "left of liberal" and more students who were conservative. In the past five years, this professor reports, in-class discussion has become a balanced dialogue.[399] Professor Ernest Young, a 1993 HLS graduate and now a tenured faculty member at the University of Texas Law School, visited Harvard Law in 2004–2005 and taught a seminar on federalism and a larger course on foreign affairs and the Constitution. A right-of-center professor himself, he admits

394. Bartholet interview, *supra* note 381.

395. Weinreb interview, *supra* note 385.

396. Dershowitz interview, *supra* note 27.

397. Clark interview, *supra* note 197.

398. Telephone Interview with anonymous Harvard Law School faculty member (Mar. 29, 2005) [hereinafter Anonymous Faculty Interview 3].

399. *Id.*

disappointment in not having had in his seminar "a bunch of liberals to persuade" as he had been anticipating.[400] Furthermore, he is "stunned" that he managed to get through the entire semester in his foreign affairs class, which covers sensitive topics like war and torture, "without getting yelled at for something."[401]

Only a small number of professors dissent from the view that HLS students have shifted rightward; even still, these faculty members acknowledge changes that suggest greater conservatism in the ideological makeup of the student body. Professor Martha Minow, for example, believes that the 1980s witnessed a noticeable increase in the number of confident libertarians speaking out in class. From the mid-1990s to the present, though, she has perceived an appreciable decline with respect to libertarian outspokenness. While students may still hold those views, she adds, seldom does she hear them in her courses, often leading her to advance those positions in the interest of classroom debate.[402] At the same time, though, she acknowledges the demise of a "very vocal left" that once existed on campus. She also remarks that, in her family law classes, more students today are likely to talk about religion as a "personally meaningful part of their lives."[403] Professor Bartholet, who also teaches family law, similarly notes an increase in students who take a "powerfully religious perspective."[404] Professor Heather Gerken worries that she still does not hear enough conservative voices in her seminars on democracy and election law, but she acknowledges that many of her colleagues take an opposing view about the reorientation of the student body's ideological leanings.[405] For the most part, then, the Harvard Law School faculty is near-uniform in its appraisal that the student body at the school has shifted toward the right.

---

400. Interview with Ernest Young, Visiting Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 30, 2005) [hereinafter Young interview].

401. *Id.*

402. Interview with Martha Minow, William Henry Bloomberg Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 25, 2005) [hereinafter Minow interview].

403. *Id.*

404. Bartholet interview, *supra* note 381.

405. Interview with Heather Gerken, Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 25, 2005) [hereinafter Gerken interview].

2. *The* Harvard Law Review

Though it is debatable how closely its membership represents the student body as a whole, the *Harvard Law Review* serves as a useful case study in examining the rightward shift in the student body. At the very least, it provides a small but significant complement to professors' anecdotal views that Harvard Law students have become more conservative. Alumni recollections spanning the 1970s, 1980s, and early 1990s paint a picture of an overwhelmingly liberal *Harvard Law Review* during those years. According to Donald Ayer '75, no more than a "handful" of *Review* editors were conservative during his tenure.[406] Richard Willard '75 agrees; he recalls two to three conservatives on the editorial board.[407] The situation had barely changed by the time John McGinnis '83 served as an editor. He states that "maybe three" people were conservatives, with the body adhering to an "unbelievable orthodoxy" and publishing some "really crazy stuff."[408] Even in the early 1990s, no more than a "handful" of conservatives served on the *Review*,[409] recalls Professor Young, an editor at the time. Another alumnus recalls that most of the editors in that era "tended to be quite liberal."[410]

In comparison, the present *Harvard Law Review* displays a comparatively balanced ideological composition that previous members would likely find remarkable. An anonymous survey conducted during March 2005 asked the members of the *Review*, all second- and third-year students, to characterize their political views in one of five categories: far left, liberal, middle-of-the-road, conservative, or far right. Eighty-five of eighty-eight editors responded, with the results shown in Chart 1.

---

406. Ayer interview, *supra* note 61.

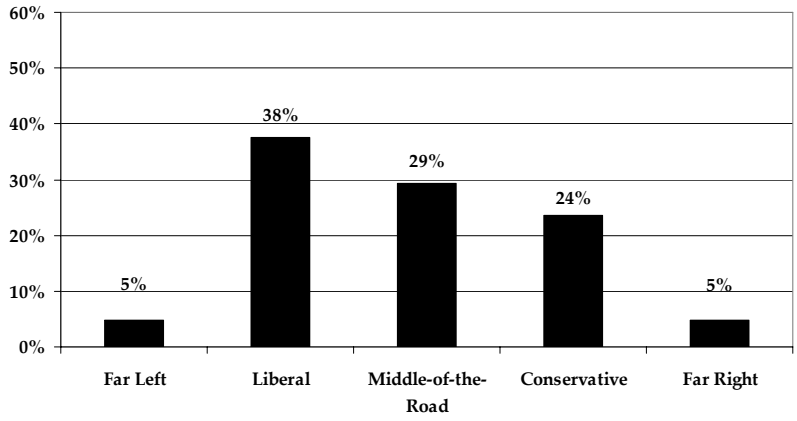
407. Willard interview, *supra* note 59. The 1974–1975 *Review* contained sixty-four editors.

408. McGinnis interview, *supra* note 171. The 1982–1983 *Review* contained eighty-seven editors.

409. Young interview, *supra* note 400. The 1992–1993 *Review* contained eighty-two editors.

410. Interview with H. Christopher Bartolomucci '92, President, Harvard Federalist Society, 1991–1992 (Mar. 31, 2005). Bartolomucci notes that he considered his own class of editors to be "evenly balanced," but if one added in the classes ahead of and behind his own, conservatives would total about ten percent of the overall membership. *Id.*

Chart 1: Political Self-Identification of HLR Editors



The survey reveals several points of significance. First, over one quarter of the *Law Review* self-identified as right of center, a stark contrast to earlier decades. Second, the percentage of students identifying themselves as left-of-center did not comprise even a majority within the *Review*, barely exceeding forty percent of the membership. Third, the percentage of students who freely admitted to "far right" views equals the percentage who espoused "far left" views, thus providing a balancing component on the outer bounds of the ideological spectrum.

Of course, a single survey of the *Law Review* cannot demonstrate a conservative trend among its membership. The 2004–2005 board of editors could have uncharacteristically skewed rightward, a single-year anomaly not borne out in previous or later years. But even if that is true, the survey results suggest an overall increase in the number of conservative students at HLS sufficient to make such an anomaly more likely than it might have seemed only a decade earlier, when most would have considered it impossible. Moreover, the *Law Review*'s readership has perceived an evolution in recent years toward greater ideological balance at the publication. As Professor Charles Fried points out, for example, the *Review* boasts a "strong cadre" of conservatives.[411] More significantly, he adds that the contents of the publication's pages reflect this change; whereas student notes and case comments used to evaluate the

411. Fried interview, *supra* note 382.

judiciary from only a liberal point of view, they now level criticism from both right and left standpoints.[412] The *Harvard Law Review* of recent years may well mirror the same rightward trend that professors' comments suggest has taken place within the HLS student body as a whole.

3. The Harvard Law Class of 2007

Few empirical data exist to make direct comparisons between today's student body and those of yesteryear. Nevertheless, a comprehensive survey gauging the ideological views of today's HLS students can perform several valuable functions. First, where similar data do exist from previous years, conclusions about shifting student ideologies can be drawn from answers to particular questions asked in different eras. Second, survey results offer a snapshot of where current HLS students stand on a number of general and specific ideological issues, from which a reader can draw his own conclusions about the student body's political leanings. Third, a survey can serve as a benchmark to students, administrators, or other observers who wish to conduct similar studies in the future and draw comparisons to the current HLS student body.

To these ends, an anonymous survey was conducted among members of the Class of 2007 when they were in their first year at HLS.[413] The one-page paper survey posed twenty questions. Eighteen asked for the respondent to state his level of agreement with a particular ideological statement: agree strongly, agree somewhat, disagree somewhat, or disagree strongly.[414]

---

412. *Id.*

413. Admittedly, a survey of the entire student body would have been preferable; however, the moderate difficulty of surveying all first-year students pales in comparison to polling second and third-year students. First-year students attend required classes within fixed sections, unlike second- and third-year students, who are interspersed among elective courses, clinicals, and independent projects. As an easily located and captive audience, first-years are much easier to survey than their upperclass colleagues, ensuring a much higher response rate and more reliable results.

414. A number of these questions, and the answer format, were adopted from the UCLA Higher Education Research Institute's annual survey of college freshmen, which the Institute has conducted since 1966 as part of its Cooperative Institutional Research Program. Additional questions were derived from the Institute's post-collegiate survey of former undergraduates. *See generally* Cooperative Institutional Research Program http://www.gseis.ucla.edu/heri/cirp.html (last visited Jan. 31, 2006).

The last two questions asked the respondent to characterize his political views and to characterize the status of conservative students at HLS. During March 2005, this author visited each first-year section and distributed the survey to all students present in the class. Students had two minutes to fill in their responses and return the survey to the administrator. Of 549 students,[415] 426 completed the surveys, for an overall response rate of 78%.[416] The results were then tabulated and are summarized in the Appendix following this Article.

The data reveal that the HLS Class of 2007 is noticeably more liberal than the national population as a whole, as indicated through both general ideological self-identification and answers to specific political questions.[417] This is neither surprising nor unexpected: Even those HLS professors who acknowledge a rightward shift among the student body still consider the students to be left of the country.[418] At the same time, though, with less than 60% of students identifying as left-of-center, it can hardly be said that the current HLS student body—if the Class of 2007 is an accurate proxy—is the overwhelmingly liberal monolith that prior generations of student bodies may have resembled or that popular perception may hold.

Furthermore, a closer look at the responses to the more specific policy questions reveals a number of intriguing findings. For example, the survey indicates that HLS students generally support affirmative action, with 65% disagreeing to some extent that affirmative action in college admissions should be abolished. Yet this leaves 35% opposing affirmative action to some degree—not an insubstantial amount. Moreover, as compared with generations past, this represents a remarkable shift toward the right: a *Record* survey in spring 1978 showed

---

415. Data from the Harvard Law School registrar's office.

416. Because students not attending class on the day the survey was administered were not able to respond, this sample is not random. Nevertheless, there is no reason to think that there is a correlation between ideological viewpoint and the reasons students miss class, and in any case, 78% is a sufficiently high response rate that these responses adequately represent the views of the entire class.

417. *See* American National Election Studies, *supra* note 12 (finding that in 2004, 23% of Americans self-identified as left-of-center, 26% as middle-of-the-road, 32% as right-of-center, and 20% answering that they either don't know or have not thought about it).

418. *See, e.g.*, Wilkins interview, *supra* note 25 (noting that the center of the student body remains "considerably to the left of center of the American public"); Glendon interview, *supra* note 384 (stating that "Harvard is behind the country").

only 9% opposition to affirmative action.[419] A 289% increase in opposition to affirmative action is nothing short of extraordinary.

While past empirical data do not exist for other direct longitudinal comparisons, the survey results reveal other levels of support for "conservative" positions that, though not mirroring the nation as a whole, would still likely garner reactions of surprise from HLS alumni who attended the school in the past few decades. Nearly a quarter of students agree to some extent that American courts show too much concern for criminals' rights, and more than a quarter favor the death penalty. Almost a third believe the wealthy pay enough in taxes, and a similar number view "faith-based funding" as permissible under the First Amendment. Again, these numbers still indicate a clear overall leftward sentiment among HLS students. But it must be recalled that, as compared to the general population, college graduates are more inclined toward liberal views to begin with, and incoming law students especially so.[420] Therefore, it is worth questioning whether the HLS student body is really any more liberal today than its counterparts at other top law schools, and whether it may in fact be much less so. More significantly, when the opinions of today's HLS students are thrown into relief against the views that the students of the 1980s' "radicalizing milieu" likely held, it is clear that significant ideological movements among HLS students have taken place and that, on a relative scale, today's student body is likely more conservative than at any point in the past thirty years.

B. Reasons for the Rightward Shift in the Student Body

The views of Harvard Law professors, a closer look at the *Harvard Law Review*, and a survey of the ideological positions of the HLS Class of 2007 offer strong evidence that the student body at Harvard has shifted rightward over the past few decades. As certain as this move toward conservatism may be,

---

419. Tammy Jacobs, *3L's Unhappy with HLS Teaching*, HARV. L. REC., Apr. 28, 1978, at 7.

420. *See, e.g.*, J.D. Droddy & C. Scott Peters, *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000*, 53 J. LEGAL EDUC. 33, 41–42 (2003) (concluding, after an extensive survey, that "all college graduates (including law students) are much more liberal than the general population" and that "entering law students are, on average, more liberal" than the broader population of college graduates on a number of key indicators).

though, its causes are more uncertain. Nevertheless, the shift can likely be traced to a number of drivers that fit within two broad categories: factors external to Harvard Law School and those inherent to the HLS environment. It is within this latter category, HLS-specific factors, that the influence of the Federalist Society chapter at Harvard Law School is most demonstrably observed, in its role both as an instigator of the events that led to Robert Clark's appointment as dean and as a continuing and increasingly prominent presence on campus in the years since.[421]

1. External Factors

Without a doubt, larger national trends external to Harvard have played a role in moving the HLS student body rightward. The increasing conservatism of the nation in recent decades, and the "political revolution" that has accompanied it,[422] is the "main thing" that has effected a more conservative body, according to Professor Fried.[423] Other professors concur: One constitutional law scholar cites national demographic trends as the "principal causal factor" in the HLS trend,[424] and another underscores the massive "reevaluation" of issues that has occurred in the country during the past twenty years.[425] As is often the case, Professor Duncan Kennedy puts it best when, in citing the "powerful shift" in national culture, he maintains that it is now "infinitely less cool to be a liberal" than it used to

421. During the 1987–1988 school year, the Harvard Society for Law & Public Policy changed its name to the Harvard Federalist Society. *See* Interview with Paul Cellupica '88, President, Harvard Federalist Society (Mar. 29, 2005). By that point, according to Cellupica, the national Federalist Society and its network of student chapters had become established and well known, and members of the Harvard student chapter had colloquially become known on campus as "The Federalists." It therefore made sense to the campus chapter that its name comport with that of the national organization and other student chapters. *See id.* The exact date of the name change is unknown, though, since the modification only required that the group notify the Dean of Students Office; no formal or legal actions were necessary. Only the name of the student organization changed, not the corporate parent of the JLPP. The Harvard Society for Law & Public Policy, Inc., continues to exist today as a non-profit Massachusetts corporation that publishes the JLPP.

422. *See* American National Election Studies, *supra* note 12; Dershowitz interview, *supra* note 27.

423. Fried interview, *supra* note 382.

424. Anonymous Faculty Interview 3, *supra* note 398.

425. Glendon interview, *supra* note 384.

be.[426] As a result of this national shift, more college students identify themselves as conservative before arriving at law school. Naturally, Harvard Law has felt the effects of these larger shifts in the country.

Other exogenous factors may affect the applicant pool as well. Professor William Stuntz observes that as the federal government has increasingly come to be under the control of Republicans, the Department of Justice, White House Counsel, and independent agencies have grown steadily more conservative, often more conservative than the Presidents who oversee them. The missions of the DOJ and other government legal departments have subsequently shifted away from environmental crusading, civil rights advocacy, and other examples of more activist regulatory oversight that these offices championed before the government's rightward shift. Students fervently interested in these more liberal policies—who, in earlier years, would have gone to law school to pursue them—end up choosing not to attend law school at all, opting instead for policy degrees or other approaches they view as more amenable to their professional goals.[427] The pool of law school applicants consequently becomes more conservative, affecting the composition of student bodies at all schools, Harvard included.

2. HLS-Specific Factors

Yet the rightward shift among the HLS student body is more than the sum of forces that have affected all law schools. A number of elements specific to Harvard Law School have contributed to the trend, almost all of which are traceable, to some extent, to the presence of the Federalist Society on the Harvard Law campus. The first category of such factors includes those ensuing from the 1989 appointment of Robert Clark as dean of the law school, an act that, as this Article explains, was the culmination of a sequence of events that the Harvard SLPP put into motion in the early 1980s. The second category includes factors brought about by the ongoing role of the Federalist Society on the HLS campus in recent years.

---

426. Kennedy interview, *supra* note 35.

427. Interview with William Stuntz, Professor of Law, Harvard Law School, in Cambridge, Mass. (Mar. 25, 2005) [hereinafter Stuntz interview].

a. The Role of Dean Robert Clark

A small minority of professors claims that the dean plays no role in bringing about the rightward shift of students.[428] Conversations with professors, however, suggest that the dean can have an enormous effect on the ideological composition of the student body in three ways: in admissions, in shaping a faculty, and in setting an overall tenor for the campus. As dean, Robert Clark had a significant conservatizing influence along all three of these dimensions.

By selecting the members of the admissions committee, the dean has indirect control over the makeup of the student body. In addition, while admissions committee members have considerable discretion in selecting which students will receive offers to attend,[429] the dean can cabin the committee members' discretion to a certain extent by issuing broad directives they must follow during the admissions process.[430] As dean, Robert Clark altered both the makeup of the admissions committee and the broad principles it was to follow in making admissions decisions. The committee that he installed was "the most conservative committee" the faculty had "ever seen," according to one professor.[431] Among the professors who served on it throughout Clark's tenure were Professors David Westfall, David Herwitz, and Mary Ann Glendon,[432] none of whom would have been mistaken for leftists.

In addition to its membership, Dean Clark altered the committee's mandates as well. Out were admissions policies that, according to Professor Duncan Kennedy, had "contributed to the liberal-radical strength" during James Vorenberg's tenure, such as preferences for applicants who had taken time off, engaged in public works, or participated in other significant outside activities or experiences.[433] In their place was, above all, a renewed emphasis on numbers: grade point averages and

---

428. *See, e.g.*, Dershowitz interview, *supra* note 27 (claiming the influence of the dean in effecting a rightward shift is "zero"); Minow interview, *supra* note 402.

429. *See* Bartholet interview, *supra* note 381 (citing the members' "enormous" discretion); Gerken interview, *supra* note 405 (noting that the members have "lots of discretion").

430. Gerken interview, *supra* note 405.

431. Interview with anonymous Harvard Law School faculty member, in Cambridge, Mass. (Mar. 23, 2005).

432. *Id.*

433. Kennedy interview, *supra* note 35; Clark interview, *supra* note 197.

scores on the Law School Admissions Test.[434] Dean Clark also pressed for increased geographic diversity and an array of undergraduate majors that went beyond the usual humanities and social sciences fields.[435] In Clark's own words, he wanted and got a committee "that was pretty sensible."[436] Though he maintains he "never, ever, ever" directly told the committee how to act on any given applicant, his changes almost certainly played a significant role in pushing the student population in a more conservative direction.

The dean also plays a significant role in driving the appointments process,[437] and to the extent that faculty members exert any influence on student beliefs, the professors whom Dean Clark brought to the Harvard Law faculty further contributed to the rightward shift among students. Clark emphasized hiring professors in the fields of law and economics, business law, and transactional law.[438] As a result, economic conservatism started to become very visible at HLS by the mid-1990s.[439] First-year classes, particularly Torts, Contracts, and Property, began to incorporate methodologically conservative frameworks like law and economics analysis, which "absolutely" had an effect on students' views.[440] Admittedly, the methodological conservatism of law and economics need not be correlated with ideological conservatism;[441] however, many of the landmark law and economics opinions first-year students read in first-year classes are written by judges who are also known for their ideological conservatism, and whose ideology often colors their rhetoric and their analysis.[442] Thus,

---

434. Clark interview, *supra* note 197.

435. Kennedy interview, *supra* note 35 (stating that Clark wanted fewer "spoiled Swarthmore kids who majored in film").

436. Clark interview, *supra* note 197.

437. *See* Bartholet interview, *supra* note 381 (describing the "enormous power" the dean has over appointments).

438. Clark interview, *supra* note 197; Bartholet interview, *supra* note 381; *see also* Carter, *supra* note 329, at 3 (maintaining that Clark's appointment of law and economics scholar Louis Kaplow to an Associate Dean position "signaled a full-throttle move" toward these types of fields).

439. Weinreb interview, *supra* note 385.

440. *Id.*; *see also* Wilkins interview, *supra* note 25.

441. Wilkins interview, *supra* note 25.

442. *See, e.g.*, Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174 (7th Cir. 1990) (Posner, J.); *see also* Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351, 423 (2001) (stating that Judge Posner "does not

even if the numerous HLS law and economics professors added during Clark's tenure are considered ideologically liberal,[443] their incorporation of law and economics into first-year classes necessarily increases the level of ideological conservatism that students encounter during their formative first year. The result is an additional contribution to the broader long-term conservatism trend at the law school.

The last way in which a dean can exert influence over the student body's ideological leanings is through the overall tenor that he sets for the campus. Professor David Wilkins states that there is "no question" that the dean sets the tone for "how things are going to be."[444] As dean, Robert Clark established from the beginning an atmosphere on campus markedly different from that of his predecessor, one both antipathetic to radical stirrings within the student body and sympathetic to conservative interests. First, Clark exerted a heavier hand in controlling campus unrest than James Vorenberg. When, for example, students disrupted a faculty meeting in 1984 with a protest over diversity, causing such a disturbance that the faculty was forced to find a new location for the meeting, Vorenberg offered only stern language in response.[445] In contrast, fewer than three years into his own deanship, Clark dealt much differently with the actions of the "Griswold Nine," a group of students who staged a twenty-four hour pro-diversity sit-in in the hallway outside the dean's office. Following the students' April 1992 protest, formal disciplinary charges were issued against all nine students, and after a public Administrative Board hearing, the Board issued warnings to each of them.[446] Though only minor reprimands, the fact that the school actually exacted punishment against students had a transformative

---

study economic theory in order to further our knowledge of economics" but rather "to justify a legal regime consistent with a politically conservative point of view"). Richard Epstein, another leading law and economics scholar and a noted libertarian, is the author of a leading first-year Torts casebook. *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (8th ed. 2004); *see also* Bailey Kuklin, *Evolution, Politics, and Law*, 38 VAL. U. L. REV. 1129, 1206 n.268 (2004) (identifying Epstein as "[a]mong the libertarians best known in the legal literature").

443. Dershowitz interview, *supra* note 27 (noting Professors Jolls and Kaplow).

444. Wilkins interview, *supra* note 25.

445. *See* Isbell, *supra* note 198, at 1.

446. *See* John Regis, *Ad Board Moves Against Students*, HARV. L. REC., Apr. 17, 1992, at 1; Glennis Gill, *The Griswold Nine: From Start to Finish*, HARV. L. REC., Sept. 18, 1992, at 6.

effect. After 1992, the protests that had been occurring every spring since 1980 immediately stopped—proof that, in Clark's own words, "sanctions do work."[447] Professor Duncan Kennedy agrees: Between 1992 and 1994, he states, the "student activist culture collapsed" in the face of a clear "change in the school's culture."[448]

Dean Clark also established a welcoming tone toward corporate and business interests, a jarring contrast from the "radicalizing milieu" from which he was plucked to lead the law school. Clark sought to emphasize that all sectors should benefit from the work of HLS graduates, including businesses, and that it was "not a horrible thing" to go work for a large law firm.[449] In his first address to incoming students, in September 1989, he told them, "Do not let anyone convince you that you are 'selling out' in whatever career you choose."[450] He included among these careers corporate law, which he defined as "helping the wheels of commerce turn and helping business produce the goods and services needed by society."[451] Clark's viewpoint had an effect on students. As Professor Alan Dershowitz lamented, students who arrived with plans to perform public interest work but ended up going into corporate law used to feel "guilt-ridden, knowing that they were going to have to go to work for the big law firms."[452] Dean Clark's exhortation, though, allowed them to leave law school "without any guilt."[453]

b. The Role of the Current Federalist Society

Robert Clark's deanship shifted the ideological makeup of the Harvard Law student body toward the right. At the same time, though, Dean Clark almost certainly would not have been put in a position to carry out his conservatizing policies without the Harvard Federalist Society, whose early incarnation, the Society for Law & Public Policy, provided the mechanisms

447. Clark interview, *supra* note 197.

448. Kennedy interview, *supra* note 35. Shortly after Clark's appointment, one HLS professor summed up Clark's tone and the direction it set for the law school: "He's the no-bullshit dean and this is the no-bullshit future." Carter, *supra* note 329, at 44 (quoting Professor David Kennedy).

449. Clark interview, *supra* note 197.

450. Emerson, *supra* note 374, at 28 (internal quotation marks omitted).

451. *Id.* (internal quotation marks omitted).

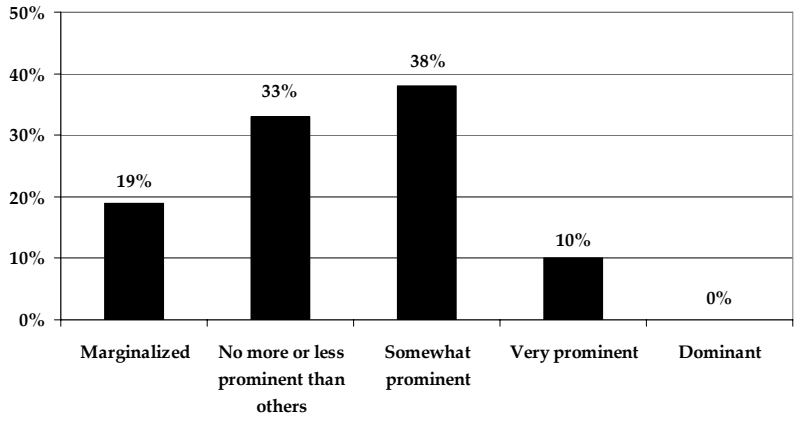
452. *Id.* at 68 (internal quotation marks omitted).

453. *Id.* (internal quotation marks omitted).

by which Clark came to prominence. Yet the Harvard Federalist Society's role in fomenting the rightward shift of the HLS student body is not limited to its early efforts at stirring up conservative opposition to the 1980s "radicalizing milieu." In the years since its founding, as the Society has continued to grow and evolve, it has constituted both a reason for and a reinforcer of increasing conservatism among the student body. A complete history of the Harvard Federalist Society between the 1985 Harvard Club event, which initiated the Clark-led conservative counterreaction against the radicals, and the present exceeds the bounds of these pages. It is almost undeniable, though, that the organization has continued to play a pivotal role in fostering the conservative presence on campus to the prominent position it now occupies.

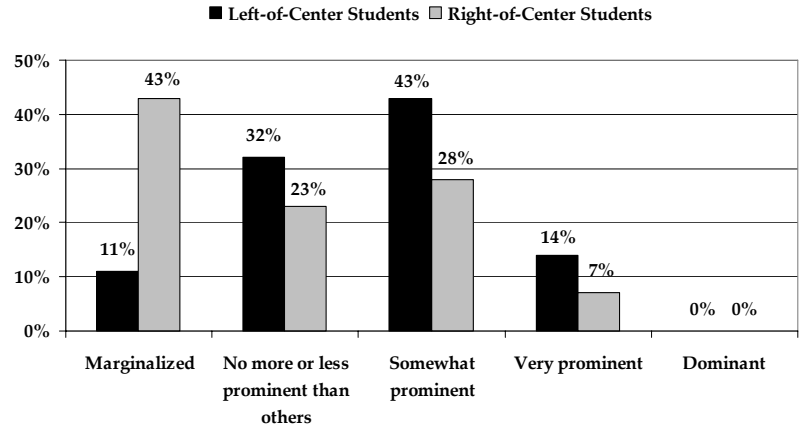
And that presence is prominent. In the same survey of the HLS Class of 2007, respondents were asked to characterize the status of conservative students at the law school. Their answers, summarized in Chart 2, reveal that even though conservatives are a clear minority among the HLS student population, as gauged by student self-identification and responses to specific ideological questions, the HLS student body views them as having established either parity or better within the campus debate.

Chart 2: Perception of Conservatives at HLS by the HLS Class of 2007



As the data indicate, eighty-one percent of the Class of 2007 believes that conservatives on campus are either equal to or more prominent on campus than other students. Ten percent of students even go so far as to deem conservatives' presence "very prominent." Moreover, while nineteen percent of students characterize conservatives as "marginalized," it is notable that many of these responses are given by conservatives themselves; Chart 3 shows the results stratified by students self-identified as left-of-center and as right-of-center:

Chart 3: Perception of Conservatives at HLS by the HLS Class of 2007



These data show that the prime driver for the view that conservatives are marginalized on the HLS campus is conservatives themselves; in contrast, nearly ninety percent of liberal and far left students, who comprise a majority of the student body, believe that conservatives have attained parity or better, with a majority maintaining that conservatives have established a "somewhat prominent" or "very prominent" status on campus.

That conservative students have managed to level the playing field in the eyes of their fellow students illustrates the day-to-day influence the Harvard Federalist Society has exerted upon the Harvard Law School campus and its enduring role in fostering and reinforcing the rightward shift of the student body. As Professor Dershowitz states, the Federalist Society is the "single most important reason" for the rise of conservatism on campus; he maintains that "you cannot overstate its impor-

tance."[454] From its humble origins as a weekly meeting group for a half dozen or so disaffected ideological outcasts, the Harvard Federalist Society has evolved into a veritable empire on the law school campus, one that, according to Professor Wilkins, has "clearly changed the culture" among both students and faculty.[455] Its mailing list now contains more than 300 students,[456] and its executive board now includes a president, treasurer, four vice presidents, and fifteen appointed positions, not including student liaisons representing each first-year section. Its mission continues to center on presenting speakers and debates—in the 2004–2005 academic year alone, it sponsored or co-sponsored fourteen such events[457]—but it has branched out to other roles as well. Among its additional activities are monthly colloquia at which members discuss pressing legal issues with each other,[458] student-faculty lunches that allow students to interact closely with leading faculty members,[459] and community service events and conservatively oriented pro bono opportunities.

The group has also expanded its emphasis on providing a supportive sanctuary for conservative and libertarian students. It hosts a welcoming barbecue for newly arrived first-years, a women's dessert gathering, and monthly parties for members. It provides a course outline bank to its members and stages members-only panels on taking exams, securing summer jobs, landing judicial clerkships, and applying for the *Harvard Law Review*. It has forged strong ties with its alumni, hosting a 150-person alumni reception in November of 2004 and bestowing an annual "Distinguished Alumni" award. In February 2005, the Harvard Federalist Society hosted, for the fourth time, more often than any other campus chapter, the Federalist Soci-

---

454. Dershowitz interview, *supra* note 27.

455. Wilkins interview, *supra* note 25.

456. Upon being told of the size of the current Federalist Society's membership, Robert Delahunty, one of the original members of the group, exclaimed, "Good heavens! That many?" Delahunty interview, *supra* note 202. Kaj Ahlburg adds that the idea of even 150 people in the Federalist Society would have been "mind-boggling" to the early members. Ahlburg interview, *supra* note 182.

457. Information regarding the Federalist Society's 2004–2005 activities is taken from its annual report submitted to the Dean of Students Office (on file with author).

458. In the fall of 2004 alone, the group offered colloquia on "Federalism and the Law," "Stem Cell Research and Cloning," and "Health Care in America."

459. The 2004–2005 year included eleven faculty lunches.

ety's National Student Symposium. The event drew more than 900 students and judges from across the country who discussed the topic of "Law and Freedom." Speaking at its banquet, Dean Elena Kagan noted that the event was one of the largest student conferences ever held at Harvard Law School by any organization and declared to all in attendance, "I love the Federalist Society."[460]

The increased size and scope of the Harvard Federalist Society mirrors its considerable presence on campus and its subsequent effect on the ideological makeup of the HLS student body. Through its significant resources and activities, the Federalist Society has contributed to the rightward shift of the student body in two distinct ways. First, it offers a peer support network for conservatives, libertarians, and moderate students on campus,[461] enabling these students to become more confident in their views and, aware of a critical mass of like-minded students, more outspoken in class and on campus. Harvard Law professors routinely cite this function as one of the group's most significant aspects. The Federalist Society has "acted as a magnet" for such students,[462] helping conservatives to "come out of the closet"[463] and realize that "there are others like them."[464] Professor Mary Ann Glendon states that the Federalist Society lets "students who are not entirely with the majority atmosphere of the faculty and students" know that "they are not alone."[465] Once this critical mass is realized, another professor notes, conservatives become willing to speak up and support each other, even if they are still in a minority of the

460. Kagan, *supra* note 2 (adding amiably, "But you are not my people."); *see also* Anna Schneider-Mayerson, *Harvard Law on a Heterodox Hiring Spree, Listing to Right*, N.Y. OBSERVER, Dec. 5, 2005, at 1.

461. Throughout its history, the Federalist Society chapter at Harvard has always described itself as catering to "conservative and libertarian" students. *See, e.g.*, 1990 HARVARD LAW SCHOOL YEARBOOK 157; 1995 HARVARD LAW SCHOOL YEARBOOK 167; 2001 HARVARD LAW SCHOOL YEARBOOK 39. Beginning in 2003, however, it expanded its self-identified scope to include "conservatives, libertarians, and moderates." *See* 2003 HARVARD LAW SCHOOL YEARBOOK 63; *see also* HLS Federalist Society, http://www.law.harvard.edu/students/orgs/fedsoc/ (last visited Jan. 31, 2006) (currently describing the organization as "a group of conservative, libertarian, and moderate law students").

462. Kagan interview, *supra* note 205.

463. Dershowitz interview, *supra* note 27.

464. Bartholet interview, *supra* note 381.

465. Glendon interview, *supra* note 384.

population.[466] Moreover, the group emboldens conservative students not only to speak, but to speak well. Professor Heather Gerken believes that the Federalist Society brings together students who are not only more "confident," but who "have thought about what they believe."[467] Conservative students now have a network in which they can develop, strengthen, and articulate right-leaning arguments before offering them in class.[468] The result, Gerken adds, is that conservative students who speak in class are often better prepared in their arguments than their liberal counterparts.[469]

Second, the Federalist Society also succeeds in shaping the views of those who might not otherwise have considered themselves sympathetic to the organization's perspective. In other words, not only does it encourage confidence, articulation, and outspokenness by those students who already consider themselves conservative, but it also wins over others of more moderate or even liberal persuasions to the principles it espouses, adding to the total number of conservatives on campus. It does so through several approaches. By hosting numerous open forums that include speakers from all points along the ideological spectrum, the organization draws non-members into its audiences. In exposing these non-members to conservative opinions that might not otherwise receive an airing at Harvard Law, the organization may thus succeed in persuading such students, who may be unsure of their own ideological positions or even hold opposing views, to become more sympathetic to the conservative viewpoint.[470] In addition, the Federalist Society's impressive social, academic, and career support system entices not just dyed-in-the-wool conservatives, but many other students who, though not diametrically opposed to the organization's general views, might not have

466. Anonymous Faculty Interview 3, *supra* note 398.

467. Gerken interview, *supra* note 405.

468. Cox interview, *supra* note 193.

469. Gerken interview, *supra* note 405. Professor Dershowitz notes that the increased force of conservative arguments in class has the ancillary benefit of compelling liberals to defend their views with greater rigor. Liberals, Dershowitz says, must now rely on actual analysis to back up their points, and "not just their souls." Dershowitz interview, *supra* note 27; *see also* Scott, *supra* note 79 ("Some [now-prominent conservatives educated at Harvard Law in the 1970s] now say that being a part of that often ridiculed minority left them with skills that have been essential in their movement's subsequent success.").

470. Wilkins interview, *supra* note 25.

otherwise aligned with the group. As Professor Dershowitz quips, "Liberals offer better sex, but conservatives offer better jobs."[471] And as the Society has continued to provide opportunities for its members and draw in students, it has become, in Professor Fried's words, "self-reproducing,"[472] enabling it to continue growing each year and maintain, if not further, the conservative shift of the Harvard Law School student body.

VII. CONCLUSION

If alumni from Harvard Law School classes of thirty, twenty, or even ten years ago were to walk the campus today, they would no doubt be impressed by the recent physical renovations to Pound Hall, Harkness Commons, and the Law School Library. Flipping through the school catalog, they would marvel at the size of the faculty and the breadth of course offerings. And scanning the bulletin boards around campus, they would express amazement at the array of extracurricular activities and opportunities available to students. In short, they could not fail to be astounded by what has become, in Dean Elena Kagan's words, the "New York City of law schools."[473] However, they would probably not immediately perceive the most substantial change that has taken place at Harvard Law over the past three decades, for this development is not at once recognizable to the casual observer. Only after sitting through classes where students now argue to expand criminal liability and to limit affirmative action; only after eavesdropping on a lunchtime discussion of law and economics among *Harvard Law Review* editors; only after attending a debate on the place of the Ten Commandments within the public square would alumni begin to reach the same conclusion that anecdotal and empirical evidence bear out: that a noticeable rightward shift has taken place among the Harvard Law School student body.

What might most surprise these alumni is not merely that HLS students have become more conservative, but that this transformation was even possible. Thirty years ago, even

---

471. Dershowitz interview, *supra* note 27. He adds, "Maybe the conservatives offer better sex now, too." *Id.*

472. Fried interview, *supra* note 382.

473. Adina Levine, *Kagan Declares State of the Law School is "Very Strong,"* HARV. L. REC., Sept. 30, 2004, at 1.

twenty years ago, it would have seemed inconceivable. And, admittedly, the process was an incremental one. But as this Article has attempted to show, one group of students on campus, the Harvard Federalist Society, has been responsible since its 1982 founding for fostering much of the change along the way. Building on the efforts of conservative students in the 1970s, the organization sought to increase the visibility of conservatism on campus in both number and voice. In its early incarnation as the Society for Law & Public Policy, the group struggled to establish itself in the shadow of the JLPP and in the face of an overwhelmingly liberal, if not radical, campus atmosphere. Despite adversity, it eventually gained enough of a presence to provide the crucial mechanisms for a conservative counterreaction by faculty and alumni, ultimately leading to the appointment of Robert Clark as dean and his ensuing conservatizing influence on the school. In its prominent, far-reaching modern manifestation, the Federalist Society provides a means for aggregating conservative students into a critical mass of articulate, confident speakers and thinkers; it offers to its ever-growing list of members a support system of enviable reach and considerable resources; and it presents a forum for communicating conservative legal philosophy and policy to the entire campus, drawing in additional members while serving current ones. In short, the Federalist Society has been, from its first days, both a reason for and a reinforcer of the rightward shift on campus, functions it continues to serve today.

So substantially has the campus atmosphere changed and so prominent has the Federalist Society become at today's Harvard Law School that at least several HLS professors now view Harvard as "the preferred place for high-end conservative law students" to attend.[474] Determining the accuracy of this view calls for more extensive study of the ideologies, motivations,

---

474. Stuntz interview, *supra* note 427 (adding that he is "not the only one who thinks this"). The school's growing reputation as an incubator for conservative legal luminaries is illustrated by a recent Associated Press article identifying eight young attorneys who might serve as members of the Supreme Court in thirty years. Otis Hart, *Supreme Court of Tomorrow: A VERY Speculative Look at the Roberts Court—in 2035*, ASSOCIATED PRESS, Oct. 3, 2005, *available at* http://asap.ap.org/stories/35981.s. Of the eight highlighted individuals, the four who brandish recognizably conservative credentials are all Harvard Law School graduates, and these attorneys constitute four of the six Harvard Law School graduates named to the list. *Id.*

and aspirations of not just current Harvard Law School students but also its applicants, its admittees, and those individuals currently attending other top-tier law schools. And even if true, whether it remains the case as the law school continues to advance and evolve is subject to scrutiny in the years to come. The mere fact that professors even entertain such speculation, though, is itself a telling indicator of the rightward shift of the HLS student body. Furthermore, the indeterminacy of that particular proposition in the future does not detract from what is much more certain about both the past and the present: that the Harvard Federalist Society has played and continues to play a critical role in shaping Harvard Law School's long and storied history, and that it will likely contribute to future chapters of these annals as well.

VIII. APPENDIX

Chart 4: Political Self-Identification of the HLS Class of 2007

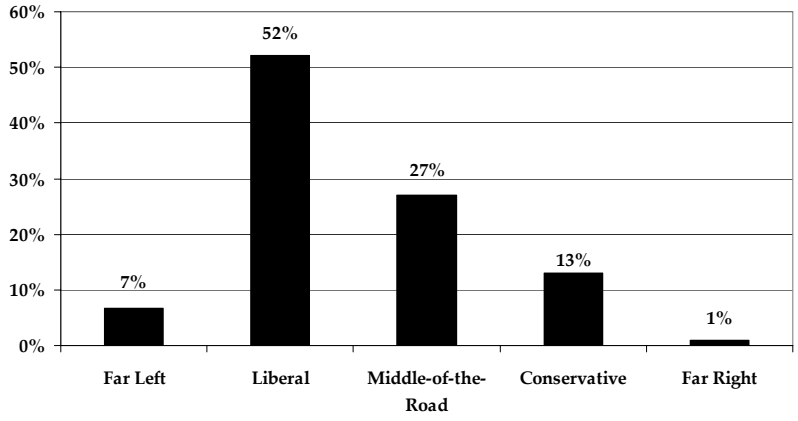
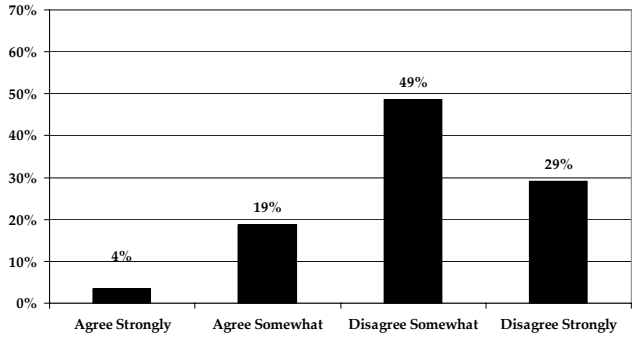
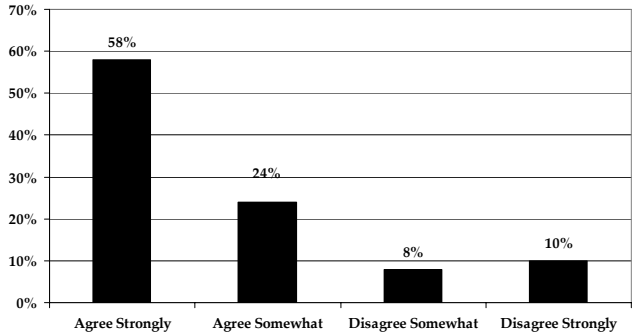


Chart 5: Responses by the HLS Class of 2007 to Discrete Ideological Statements

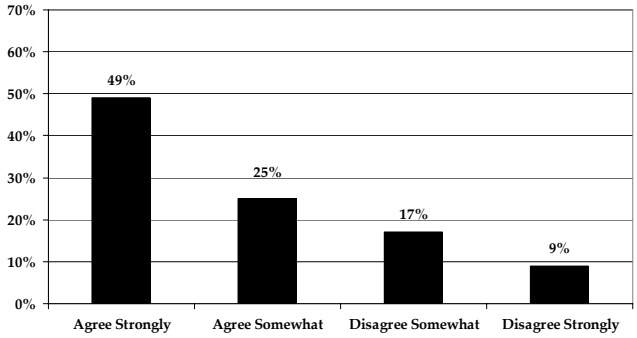
There is too much concern in the courts for the rights of criminals



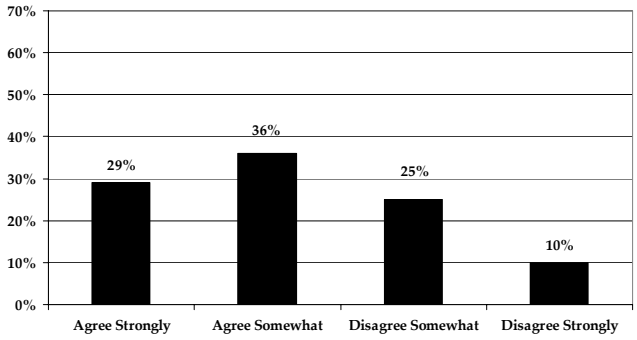
Abortion should be legal



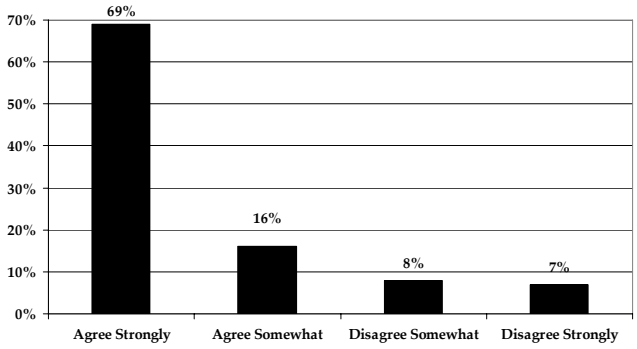
The death penalty should be abolished



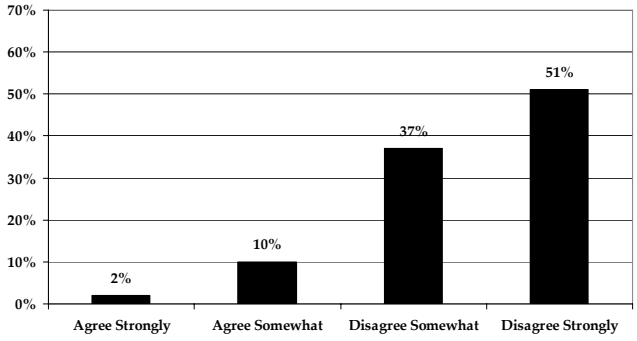
Marijuana should be legalized



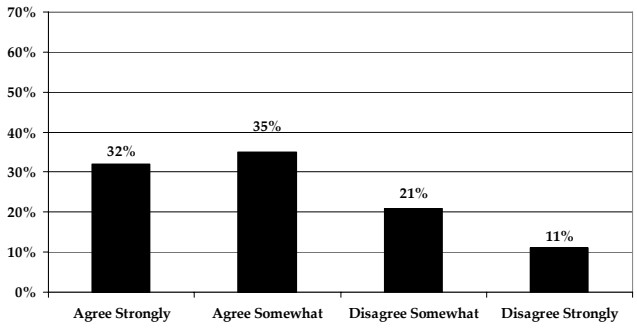
Same-sex marriage should be permissible



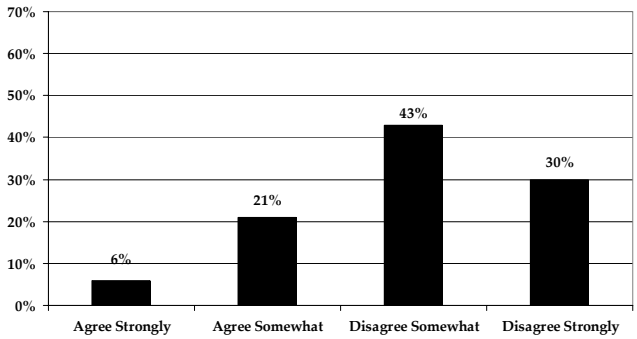
Racial discrimination is no longer a major problem in America



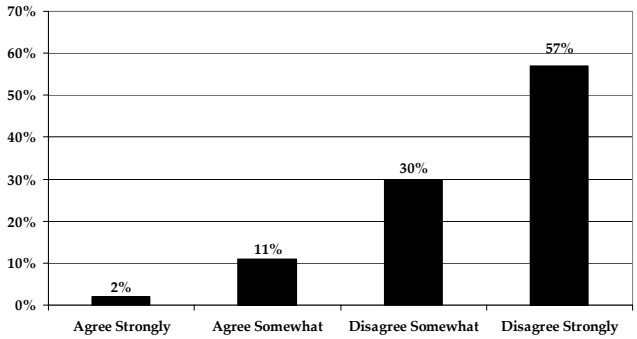
Wealthy people should pay a larger share of taxes than they do now



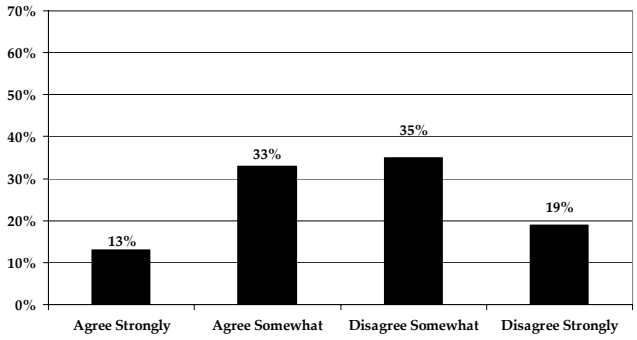
Colleges should prohibit racist/sexist speech on campus



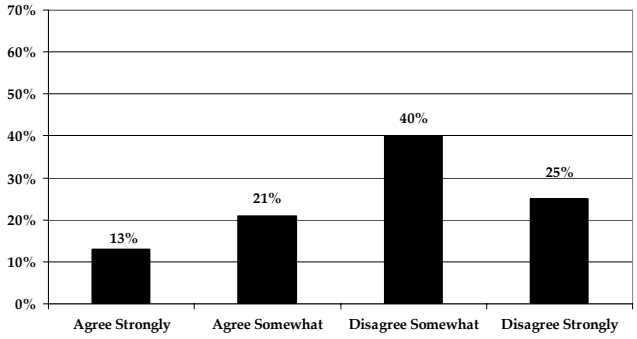
One should always support one's country, whether it was right or wrong



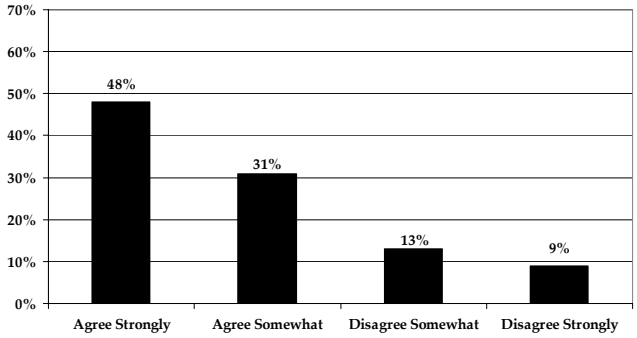
The freer the market, the freer the people



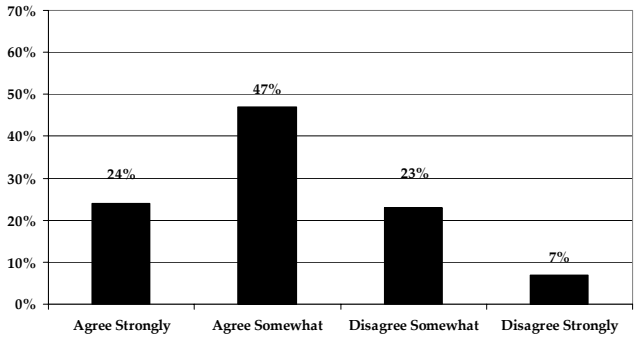
Affirmative action in college admissions should be abolished



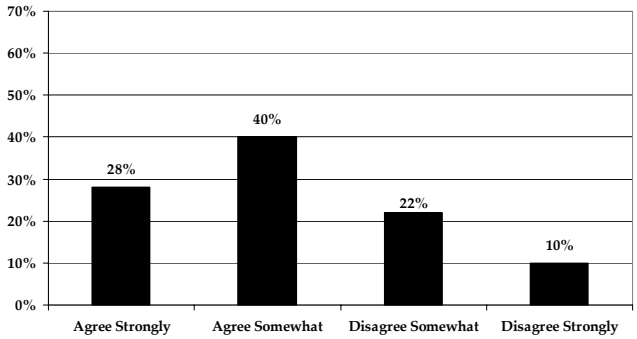
If two people really like each other, it's all right for them to have sex even if they've known each other for only a very short time



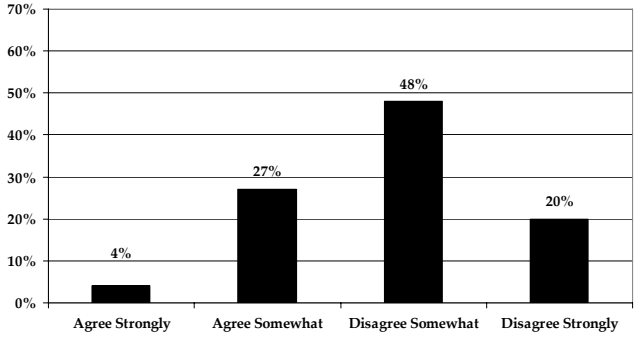
Our civil liberties are being excessively curbed in the name of counterterrorism



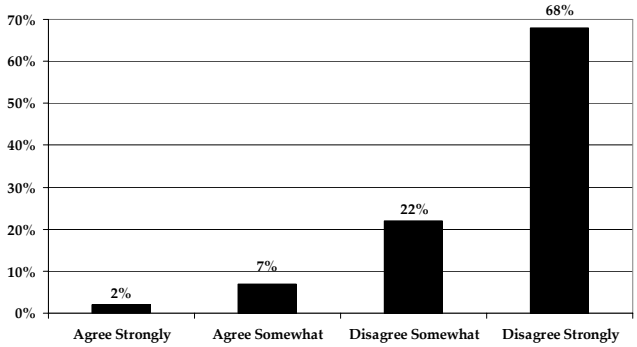
Faith-based funding by the government is a violation of the separation of church and state



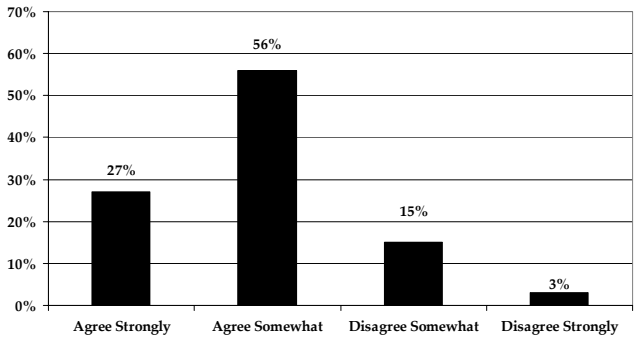
The influx of illegal immigrants into the country is a serious problem



Individuals who organize or participate in anti-government protests are unpatriotic



The trend toward globalization is one that should be welcomed



In the United States, everybody has basically the same opportunity to be successful