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# LESSONS FROM THE RISE OF LEGAL CONSERVATISM

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# LESSONS FROM THE RISE OF LEGAL CONSERVATISM

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INTRODUCTION .....	415
I. THE CONSERVATIVE-LIBERTARIAN CHALLENGE TO THE LEGAL LEFT .....	417
II. LESSONS FOR THE STUDY OF LEGAL CHANGE.....	420
A. The Demand and Supply of Resources for Legal Change .....	420
B. Limitations of Teles’s Analysis.....	422
III. LESSONS FOR CONSERVATIVE AND LIBERTARIAN LEGAL ACTIVISTS .....	424
A. Learning from the Left.....	425
B. Independence from Business Interests.....	427
C. The Shortage of Follow-up Litigation .....	428
CONCLUSION.....	430

## INTRODUCTION

Steven Teles’s *The Rise of the Conservative Legal Movement*<sup>1</sup> represents the best and most thorough attempt to document the spectacular growth of conservative efforts to influence the law since the 1970s. Both scholars and legal activists have much to learn from his careful account of this important episode in legal history.

Part I of this Review briefly summarizes Teles’s analysis. Part II considers its lessons for scholarly understanding of legal change. Teles’s most important claim is that effective institutionalization of legal change requires not only a demand for reform by voters or interest groups, but also a supply of trained

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1. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2007).

advocates, public interest law firms, and judges willing and able to influence the law in the direction desired by an insurgent political movement. As Teles effectively demonstrates, public demand for legal change does not in itself generate the needed supply of institutional resources. Through his analysis of the growth of conservative and libertarian organizations such as the Federalist Society, the Institute for Justice (IJ), and the Center for Individual Rights (CIR), Teles chronicles the difficulties faced by the legal right in its attempts to create the cadre of lawyers and institutions they needed to challenge liberal dominance over the law. The successes and failures of this effort are instructive.

Part II also briefly discusses a few limitations of Teles's argument. Perhaps the most important shortcoming is his neglect of social conservatives' efforts at law reform. Most of Teles's account focuses on libertarian organizations that sought to use judicial review to limit the power of government. Social conservatives, by contrast, sought to undo judicial constraints on government power for the purpose of using the state to advance conservative ends, most notably, banning abortion and pornography. Fuller consideration of the social conservative experience is needed to test the generalizability of Teles's conclusions.

Finally, Part III shifts gears and addresses some of the lessons of Teles's account for libertarians and conservatives who wish to strengthen judicial limits on government intervention in the economy. To succeed, pro-market public interest organizations must keep their distance from business interests. In addition, Teles shows that pro-market legal activists have not done enough to promote follow-up litigation to exploit and enforce major precedential victories. On this point, as on others, legal activists of the right can learn from their left-of-center counterparts.

For the sake of full disclosure, I should mention my connections with several of the organizations Teles examines. I am a member of the Federalist Society and have served on the Executive Committee of its Federalism and Separation of Powers practice group (an unpaid position) for the last two years. I have also written several pro bono amicus briefs and served as a student law clerk for the Institute for Justice, a libertarian public interest firm that figures prominently in Teles's book. Finally, I am a professor at George Mason University School of Law, which Teles

discusses because of its role in promoting libertarian-leaning law and economics scholarship in the academy.<sup>2</sup>

I am too young to have played much role in the origins and development of any of these organizations and therefore have no direct reputational stake in any of the points Teles makes about these historic events. Although I was asked to write this Review in part because of my role as an “insider” in some of the organizations Teles analyzes, I am in fact more of an outsider when it comes to almost all the events on which Teles focuses. Still, readers must decide for themselves whether they believe my “insider” status compromises the scholarly objectivity of this review.

#### I. THE CONSERVATIVE-LIBERTARIAN CHALLENGE TO THE LEGAL LEFT

Traditional American conservative legal thought suffered a crushing blow during the Great Depression and New Deal era. The Depression seemed to discredit free market ideology, and the appointment of numerous liberal Democratic judges during the twenty-year period of Democratic political dominance from 1933 to 1953 ensured that the federal judiciary was overwhelmingly hostile to property rights and economic liberty claims.<sup>3</sup> During the 1950s, the Supreme Court issued several decisions eliminating much of the modest protection for economic liberties and property rights that had survived the Depression and New Deal.<sup>4</sup> Over the next two decades, liberal activist lawyers in the academy and the legal profession built up an extensive network of public interest organizations and supportive pro bono advocates that promoted left-of-center causes through litigation.<sup>5</sup> The network garnered support from sympa-

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2. See TELES, *supra* note 1, at 207–19.

3. See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 30–44 (1997) (noting that deference to government economic regulation was a major criterion for Franklin Roosevelt in picking judges).

4. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (foreclosing nearly all challenges to “economic” regulations under the Due Process Clause of the Fourteenth Amendment); *Berman v. Parker*, 348 U.S. 26 (1954) (holding that almost any governmental purpose was sufficient to justify the use of eminent domain under the Fifth Amendment).

5. See TELES, *supra* note 1, at ch. 2.

thetic officials in government bureaucracy and an overwhelmingly liberal legal academy, which helped transmit liberal ideas about the role of law and interest students in promoting liberal legal causes. During this era, conservatives and libertarians had little in the way of a parallel legal network of their own.

Beginning in the late 1960s, a political backlash arose against the perceived excesses of liberal jurisprudence. Indignation at “activist” liberal judges helped elect Richard Nixon and Ronald Reagan to the presidency and also aided many lesser-known conservative politicians. As Teles documents, however, conservatives found it difficult to translate electoral success into legal change. Without a cadre of elite conservative lawyers willing to move the law in their preferred direction, conservatives could not easily find judicial appointees who could reliably be counted to vote their way. Without a network of public interest groups and other litigators, they could not easily bring cases to establish conservative-leaning precedents. Finally, the dominance of liberals in the academic and intellectual worlds ensured that conservative and libertarian views of the law seemed unjust and disreputable to most legal professionals, impeding their potential acceptance among lawyers and other influential elites.<sup>6</sup> As Teles emphasizes, the “liberal legal network” of entrenched elites in the judiciary, academy, government bureaucracy, organized bar, and public interest law ensured that the liberal reforms could not easily be challenged or reversed.

To counter liberal dominance in the legal system, conservatives and libertarians sought to build up their own alternative network of lawyers, activists, and academics. Teles’s book is the most complete account of this effort to date. In the field of public interest law, right-of-center activists set up such organizations as the Institute for Justice and the Center for Individual Rights, each of which went on to win important victories in state and federal courts.<sup>7</sup> The Federalist Society, established in 1982, was intended to influence the battle of ideas in the academic world and the legal profession.<sup>8</sup> Both the Society and other conservative and libertarian organizations sought to increase the presence of right-of-center speakers and scholars in the academy,

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6. Teles discusses these points extensively. *See id.* at chs. 1–2.

7. *See id.* at ch. 7.

8. *See id.* at ch. 5.

providing scholarships and networking opportunities for young conservatives and libertarians seeking to pursue academic careers. Libertarian-leaning law and economics scholars established new research centers intended to challenge traditional liberal legal thought with interdisciplinary scholarship.<sup>9</sup>

Despite stereotypes of a “vast right-wing conspiracy,” Teles shows that many of these efforts were started by individual “organizational entrepreneurs” rather than a centralized network. For example, a handful of law students at Yale and the University of Chicago founded the Federalist Society at a time when they were “a small minority” in “what they saw as a hostile institution” dominated by the political left.<sup>10</sup> Major right-of-center public interest firms such as the Institute for Justice and Center for Individual Rights had comparably humble origins, both being established by a handful of activist lawyers with only modest initial funding.<sup>11</sup> Conservative and libertarian efforts to challenge the legal left were often poorly coordinated and vulnerable to a variety of tactical and strategic pitfalls, many of which Teles describes in detail.

Some of the more effective conservative-libertarian organizations succeeded in part because they limited their focus and deliberately avoided excessive involvement in judicial nominations and contentious political issues. For example, the leaders of the Federalist Society consciously focused solely on networking and sponsoring speaker events, panels, and conferences. They avoided involvement in battles over judicial nominations, litigation, and political campaigns because they believed that this kind of activity would likely divide the Society’s membership along ideological lines (conservatives versus libertarians) and detract from its primary mission.<sup>12</sup>

Overall, Teles demonstrates that conservatives and libertarians were at least partly successful in their efforts to challenge the legal left. Unlike forty years ago—when the political left overwhelmingly dominated the federal judiciary, the organized legal profession, public interest law, and the academy—today there is sharp competition between left and right in all of

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9. *See id.* at chs. 4, 6.

10. *Id.* at 137–39.

11. *See id.* at 222–25, 237–44.

12. *See id.* at 152–62.

these arenas. At the same time, legal liberals still retain important advantages over conservatives in many fields, including the academy—where the vast majority of law professors remain on the political left<sup>13</sup>—and public interest law—where the liberal network remains much stronger than its conservative-libertarian counterpart.<sup>14</sup>

## II. LESSONS FOR THE STUDY OF LEGAL CHANGE

### A. *The Demand and Supply of Resources for Legal Change*

Perhaps the most important among Teles's interesting findings is that political "demand" for legal change is not by itself sufficient to supply it. Traditional scholarship on the political role of courts generally assumes that they are highly responsive to dominant political coalitions that can appoint judges and write new statutes.<sup>15</sup>

Teles argues convincingly that political demand for legal change does not necessarily generate supply. The "liberal legal network" he describes had partially succeeded in entrenching liberal policies and precedents against political challenge, even when conservatives achieved electoral victories.<sup>16</sup> Liberal influence over the law was facilitated by judges, elite lawyers, public interest law firms, and academics, all of whom enjoy a high degree of insulation from electoral pressure. Even if conservatives could succeed in changing the ideological orientation of the judges who staff the courts, change in legal doctrine and prece-

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13. See, e.g., John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005) (documenting the predominantly liberal political leanings of elite law school faculty).

14. See, e.g., TELES, *supra* note 1, at 249–57.

15. For a classic early article arguing that courts have little power to resist public opinion and broad social trends, see Robert A. Dahl, *Decision-making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279 (1957). For more recent works advancing a similar thesis, see, for example, MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). For a critique of some of these works' assumptions and conclusions, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004) (reviewing MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004)).

16. See TELES, *supra* note 1, at ch. 1.

dent requires finding capable litigants and lawyers to bring the appropriate cases over a sustained period of time.<sup>17</sup> To challenge the liberal legal network with any hope of success, conservatives had to develop a competing network of their own.

In principle, an emerging political coalition can simply allocate resources to build the legal network it needs. Demand could efficiently and swiftly stimulate supply. As Teles shows, however, this smooth demand-supply relationship does not necessarily occur. It took conservatives and libertarians many years to develop the institutions needed to mount an effective challenge to legal liberalism, and in some ways the task remains incomplete even today.<sup>18</sup> The Federalist Society was not founded until 1982, fourteen years after Richard Nixon's 1968 electoral victory, which was driven in part by public anger at "activist" liberal judges. Conservatives failed to develop effective public interest law firms until the rise of IJ and CIR in the early 1990s, some twenty years after conservative and libertarian activists first recognized the need for such institutions.<sup>19</sup>

The liberal legal network the right sought to challenge took many years to develop. In retrospect, it is not surprising that it took conservatives and libertarians substantial time and effort to rival it. Both the liberal legal network and its conservative-libertarian counterpart are "public goods" for their respective political movements.<sup>20</sup> Once such a network develops, movement supporters can enjoy its benefits even if they have not contributed to its establishment and maintenance. As a result, one can expect an undersupply of "legal network" goods, for much the same reasons why other public goods such as clean air may be undersupplied by the market. Many of those who benefit from the good have incentives to "free ride" on its production. Only a small proportion of conservatives and libertarians actively contributed to the establishment of the legal network described in Teles's book, just as only a small proportion

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17. See *id.* at 11–12; see also CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998) (emphasizing the importance of strategic litigation in bringing about legal change).

18. See *infra* Part III.

19. See TELES, *supra* note 1, at chs. 3, 7.

20. For classic discussions of public goods, see JAMES M. BUCHANAN, *THE DEMAND AND SUPPLY OF PUBLIC GOODS* (1968) and MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (rev. ed. 1971).

of the nation's liberals contributed to the earlier establishment of the liberal legal network. Given this structure of incentives, the surprising fact is not that these networks took so long to develop, but that they were established on such a large scale at all.

B. *Limitations of Teles's Analysis*

Perhaps the most important shortcoming of Teles's work is that it is not a truly complete discussion of the subject implied by its title. Indeed, the book might have been more accurately entitled *The Rise of the Libertarian Legal Movement*. With the exception of the Federalist Society—which, as Teles notes, deliberately maintains “big tent” neutrality between libertarians and conservatives<sup>21</sup>—most of the major institutions profiled in the book are either explicitly libertarian (such as IJ) or primarily focused on advancing the libertarian elements of the conservative agenda (such as CIR and various law and economics programs). As Teles notes, legal mobilization by “religious right” social conservatives has been discussed by previous scholars.<sup>22</sup> But there is still a need for a comparative analysis of the full range of right-of-center legal movements over the last several decades.

Teles pays little attention to right-of-center movements and legal institutions motivated primarily by religious considerations or to the social conservative backlash against liberal efforts to use the courts to protect “obscene” speech, extend abortion rights, and limit government “entanglement” with religion. Teles does note that these causes have gained relatively less ground in the academic and public interest worlds than have libertarian ones, and he suggests that courts might be better vehicles for efforts to limit government power (as libertarians seek to do) than for efforts to expand or protect it (as social conservatives wish to do in those areas where they disagree with libertarians).<sup>23</sup> This is an intriguing thesis, but it warrants a more systematic discussion than Teles provides. A greater focus on social conservative legal movements might have enriched Teles's analysis and provided a good comparative foil for assessing the more libertarian organizations on which he focuses. To the ex-

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21. See TELES, *supra* note 1, at 143–44, 152–57.

22. See *id.* at 287 n.8 (citing STEVEN BROWN, TRUMPETING RELIGION: THE CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2003)).

23. See *id.* at 231–32.

tent that Teles is right to believe that social conservatives have had less success in the courts than libertarians, a sound theory of legal change should be able to explain why.

Teles also fails to address some factors that might have reinforced his thesis. As mentioned above, he does not sufficiently consider that the creation of a conservative legal network was a public good for the conservative movement and thus likely to be undersupplied.<sup>24</sup> Teles does briefly mention public goods theory, noting the role of the Federalist Society in providing public goods for the conservative legal movement, as well as the earlier role of foundations in supplying public goods for legal liberals.<sup>25</sup> But he does not consider the more general role of public goods problems as an obstacle to the growth of legal movements and to their ability to translate political success into legal change. Fuller analysis of this point might have enriched his discussion of the organizational challenges facing conservative and libertarian legal activists as well as their liberal adversaries.

Similarly, Teles correctly recognizes that courts are to some extent protected against electoral pressure because the law is “[c]omplex, technical, and professionalized,” and therefore heavily influenced by specialized professional elites whom voters cannot easily remove.<sup>26</sup> This does not, however, fully explain why electoral outcomes often fail to change legal institutions more than they do. After all, voters could potentially support candidates who promise to pass legislation restricting judicial power, appoint new judges with a different ideology, and defund bureaucrats and other officials who resist the voters’ policy preferences. Teles ignores the crucial point that most voters remain “rationally ignorant” about politics and therefore know very little about political issues, especially complex and technical ones such as the development of legal doctrine.<sup>27</sup> Thus, they often find it difficult to tell whether elected officials have fully implemented their policy preferences. Public ignorance allows

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24. *See supra* Part II.A.

25. TELES, *supra* note 1, at 44, 136.

26. *Id.* at 9.

27. *See, e.g.,* Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287 (2004) (documenting widespread political ignorance and its implications for judicial review).

government officials greater autonomy from voters, enabling policies to persist even in the face of potentially hostile public opinion.<sup>28</sup> This insulation from democratic responsiveness is particularly prevalent in highly technical fields such as constitutional law, where ordinary voters likely encounter great difficulty in understanding how the relevant issues work and determining the true impact of court decisions. Scholars of legal change who seek to build on Teles's pathbreaking work should take the role of public ignorance into account in seeking to explain the timing and direction of activist-driven legal reform.

### III. LESSONS FOR CONSERVATIVE AND LIBERTARIAN LEGAL ACTIVISTS

Organizations such as IJ and CIR have achieved some impressive victories. IJ's Supreme Court cases include *Granholm v. Heald*,<sup>29</sup> holding that the Dormant Commerce Clause forbade states from banning interstate importation of wine for the purpose of protecting in-state wine producers from competition, and *Kelo v. City of New London*,<sup>30</sup> in which IJ attempted to reverse nearly fifty years of Fifth Amendment Takings Clause precedent allowing government to condemn virtually any property it wanted to acquire. CIR's Supreme Court cases include *Rosenberger v. Rectors and Visitors of University of Virginia*,<sup>31</sup> a crucial case that proscribed state universities from discriminating against student religious organizations in funding decisions, *United States v. Morrison*,<sup>32</sup> a major precedent limiting federal power under the Commerce Clause, and the companion affirmative action cases *Grutter v. Bollinger*<sup>33</sup> and *Gratz v. Bollinger*.<sup>34</sup>

Teles does an excellent job of explaining the growth of non-liberal public interest law. He notes that the success of libertar-

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28. See, e.g., Samuel DeCanio, *Bringing the State Back in . . . Again*, 14 CRITICAL REV. 139 (2000); Samuel DeCanio, *State Autonomy and American Political Development: How Mass Democracy Promoted State Power*, 19 STUD. IN AM. POL. DEV. 117 (2005).

29. 544 U.S. 460 (2005).

30. 545 U.S. 469 (2005). For a detailed analysis of *Kelo* and its relationship to earlier precedent, see Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 225-44 (2007).

31. 515 U.S. 819 (1995).

32. 529 U.S. 598 (2000).

33. 539 U.S. 306 (2003).

34. 539 U.S. 244 (2003).

ian and conservative public interest law groups was not fore-ordained. Indeed, early efforts in the 1970s and early 1980s were mostly dismal failures. How did the founders of IJ and CIR turn things around? Teles notes two important causes: The second generation of libertarian public interest firms first learned from the strategies of their liberal predecessors and then distanced themselves from business interests.<sup>35</sup> Despite important successes, Teles also notes some major continuing shortcomings of the libertarian public interest movement.

#### A. *Learning from the Left*

IJ founders Clint Bolick and William Mellor deliberately copied the successful tactics of the NAACP Legal Defense Fund (LDF).<sup>36</sup> Like the LDF, IJ seeks sympathetic clients—often minority homeowners or entrepreneurial small businesses—for its economic liberties and property rights cases.<sup>37</sup> This is part of IJ’s more general strategy of fighting in the court of public opinion as much as in the courtroom. Even when IJ loses a case in court, as happened in *Kelo*, it sometimes makes long-term gains by generating a political backlash and by undermining the prior elite consensus supporting status quo jurisprudence. The effort to seek sympathetic clients and influence public opinion was consciously copied from similar initiatives by the NAACP during the years leading up to its 1954 victory in *Brown v. Board of Education*.<sup>38</sup>

By contrast, Teles argues that CIR pursues a more narrowly “legalistic” approach, seeking to make the strongest possible legal case, with relatively little attention to the attractiveness of the client or to public relations concerns.<sup>39</sup> This strategy resembles the tactics employed by the ACLU in its early years. For example, CIR’s clients in *United States v. Morrison* were rapists,<sup>40</sup> a type of case IJ might have been reluctant to take.

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35. See TELES, *supra* note 1, at ch. 7.

36. See *id.* at 245–46. As Bolick told Teles: “We borrow heavily and consciously from the Left for our litigation strategies, mainly from the [NAACP] LDF in its campaign to overturn *Plessy*.” *Id.* at 245.

37. See *id.* at 244–45.

38. 347 U.S. 483 (1954).

39. *Id.* at 246–47.

40. See *United States v. Morrison*, 529 U.S. 598, 602–03 (2000) (describing the facts of the case).

Which strategy is better? Both have been successful to a degree and there is no need to make a categorical choice. IJ rightly emphasizes the importance of public relations and sympathetic clients. CIR, however, correctly recognizes that you can sometimes win important cases even with unattractive clients. Sometimes, clients who will look unsympathetic in the press have the strongest legal cases. Overall, however, it seems that IJ has been somewhat more successful. Although CIR has won as many or more important courtroom victories, IJ has been more effective in leveraging its courtroom victories—and even its defeats—into actual change in the real world. For example, IJ's campaign against eminent domain has almost certainly had more effect in constraining the powers of government than CIR's effort to curtail government-sponsored affirmative action, which ended in a painful Supreme Court defeat in *Grutter v. Bollinger* that generated only a limited political backlash. Although Michigan did later enact a ban on affirmative action by referendum<sup>41</sup>—CIR's case was a challenge to affirmative action at the University of Michigan—the vote spurred little in the way of a nationwide reaction. In the aftermath of IJ's defeat in *Kelo*, by contrast, forty-three states have enacted laws restricting the use of eminent domain, a bigger legislative reaction than that generated by any other Supreme Court decision in American history.<sup>42</sup> Although many of the new laws will likely prove ineffective in constraining takings, several states have passed strong reforms and others may end up doing so in the future.<sup>43</sup> IJ's strategy takes more account of the reality that the impact of judicial decisions is often determined as much outside the courtroom as within it. On the other hand, CIR is able to take advantage of strong legal cases with unsympathetic clients. Sometimes, it may be difficult to find a case with comparable legal merit where the client is more appealing.

The general lesson is that conservative and libertarian legal activists have much to learn from their liberal counterparts.

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41. See Scott Jaschik, *Michigan Votes Down Affirmative Action*, INSIDE HIGHER ED., Nov. 8, 2006, <http://www.insidehighered.com/news/2006/11/08/michigan>.

42. See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=976298](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976298).

43. See *id.*

Despite the efforts of IJ and CIR, it may well be that this insight has not yet been fully exploited.

*B. Independence from Business Interests*

Libertarian and conservative public interest law firms are sometimes denounced as mere shills for business interests. Ironically, Teles shows that these groups had to reduce their ties to business before they could achieve any real success. Early conservative public interest firms established in the 1970s usually had close ties to business groups such as state chambers of commerce, and were often funded by corporations.<sup>44</sup> This created two serious problems. First, the press and public opinion could stigmatize the groups as the shills they to a certain extent were.<sup>45</sup> Second, and even more important, business interests often conflict with the conservative and libertarian agenda of limiting government power and protecting free markets. Many businesses actively support government regulations that suppress their competitors or grant them special privileges and favors. Teles shows that early conservative public interest firms sometimes had to drop promising economic liberties cases because they conflicted with the self-interest of powerful business backers. For example, the Mountain States Legal Foundation, an early pro-free-market public interest firm, was forced to drop a challenge to the Denver cable television monopoly because one of its business backers was “the potential head” of the monopoly and stood to benefit financially from its perpetuation.<sup>46</sup>

IJ, CIR, and other “second generation” libertarian public interest firms learned from this mistake. Instead of depending on business groups for funding, they relied mostly on donations from ideologically motivated individuals and foundations, backers who mostly lacked a narrow self-interested stake in the litigation pursued by the public interest firms they funded.<sup>47</sup> Today, much of IJ’s litigation agenda on property rights and economic liberties actually opposes powerful business interests. For example, developers and other politically connected

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44. See TELES, *supra* note 1, at 67–73.

45. See *id.* at 69.

46. See *id.* at 64–66.

47. See *id.* at ch. 7.

businesses benefit from the types of “economic development” and “blight” condemnations that IJ challenges.

It is somewhat surprising that it took so long for right-of-center public interest lawyers to realize that business interests were not necessarily their friends. As far back as Adam Smith, free market advocates have recognized that many business interests benefit from the expansion of government regulation and routinely lobby for special favors from the state.<sup>48</sup> Smith famously wrote that “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the publick.”<sup>49</sup> More recently, public choice economists have emphasized the role of business interests in expanding government whenever it was in their narrow self-interest to do so.<sup>50</sup> Unfortunately, public interest lawyers had to learn this lesson the hard way. “Real world” lawyers could have saved themselves much trouble by reading the academic literature on business-government relations produced by denizens of the ivory tower.

### C. *The Shortage of Follow-up Litigation*

The conservative-libertarian public interest movement still has at least one major weakness relative to its liberal rivals: the comparative paucity of lawyers available to litigate “follow-up” cases that enforce and build on major favorable precedents.

This is a significant shortcoming. One of the most powerful findings of social science research on judicial review is that even the most important precedents do not enforce themselves. Government officials and interest groups will generally do all they can to evade or ignore judicial decisions that restrict their powers.<sup>51</sup> It took some twenty years of follow-up litigation (as well as congressional intervention) to force southern public schools to obey *Brown v. Board of Education*.<sup>52</sup> In some cases,

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48. See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 661–62 (R.H. Campbell & A.S. Skinner eds., Liberty Classics 1981) (1776) (documenting role of business interests in promoting “mercantilist” regulations that benefited them at the expense of consumers).

49. *Id.* at 145.

50. For a survey of the relevant literature, see DENNIS C. MUELLER, PUBLIC CHOICE III 347–53 (2003). See also OLSON, *supra* note 20, at 141–48.

51. See, e.g., ROSENBERG, *supra* note 15, at 78–82, 86–93.

52. See, e.g., KLARMAN, *supra* note 15, 398–421 (discussing often effective “massive resistance” to enforcement of *Brown*); ROSENBERG, *supra* note 15, at ch. 3 (same).

necessary follow-up litigation can be conducted by business interest groups with a financial stake in the outcome. For example, abortion clinics had an interest in conducting follow-up litigation after *Roe v. Wade*.<sup>53</sup> However, this will rarely be true of cases where the most important beneficiaries of a decision are poor or politically weak. In such situations, pro bono efforts by private attorneys can play a crucial role. The poor and politically weak are the most important potential beneficiaries of libertarian public interest efforts in the fields of economic liberties and property rights (among others). For example, some three to four million mostly poor and minority Americans have been displaced through “blight” and “urban development” federal takings since World War II as a result of federal and state court decisions allowing government to condemn property for virtually any reason.<sup>54</sup> The wealthy and politically influential can usually defend their property rights and other economic interests via the political process and therefore have less need for judicial protection.

As Teles describes, liberal public interest lawyers can rely on an extensive network of attorneys in private law firms and bar associations to do follow-up work for them on a pro bono basis.<sup>55</sup> Despite some modest efforts to create a parallel network,<sup>56</sup> conservatives and libertarians lag far behind in this area. Top lawyers at both IJ and CIR have identified this as probably the most important weakness of right-of-center public interest law and its “greatest organizational failure.”<sup>57</sup> Whether this weakness will be remedied in the future is difficult to tell.

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53. See ROSENBERG, *supra* note 15, at 195–201.

54. See Somin, *supra* note 30, at 269; see also Ilya Somin, *Blight Sweet Blight*, LEGAL TIMES, Aug. 14, 2006, at 42. For more detailed discussion of the reasons why protection of property rights is likely to disproportionately benefit the poor, see Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the “Poor Relation” of Constitutional Law*, in THE UNITED STATES SUPREME COURT: CONTESTED CONSTITUTIONAL DOCTRINES (Steven Kautz et al. eds., forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1247854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854) [hereinafter Somin, *Taking Property Rights Seriously?*].

55. See TELES, *supra* note 1, at 24–33, 249–50.

56. See *id.* at 251–52, 255–56 (discussing IJ’s efforts to get more libertarian-oriented lawyers involved in pro bono litigation).

57. *Id.* at 253–54.

## CONCLUSION

As Teles shows, the libertarian and conservative legal movement has launched an important and partially successful challenge to the previously overwhelming liberal dominance of American legal institutions. At the same time, however, the movement is still far short of achieving many of its goals. At least at the federal level, judicial protection for property rights remains relatively weak,<sup>58</sup> and protection for economic liberties is weaker still.<sup>59</sup> As this Review goes to press, Barack Obama and the Democratic Party have just won a major political victory. Whether that victory will set back conservative and libertarian legal causes as much as liberal victories of the New Deal era did will become clear over the next few years. At the very least, the appointment of a new generation of Democratic judges who are relatively hostile to free markets and property rights may make libertarian courtroom victories harder to achieve.

In sum, the conservative-libertarian legal movement has achieved some important successes, but still has crucial weaknesses. Whether it can overcome the combination of its own shortcomings and a potentially adverse political environment remains to be seen. Free market advocates may once again have to spend some time in the legal wilderness before they can win further victories. But the road back from that wilderness may be easier this time because of the valuable resources provided by the legal network whose development Teles so ably describes.

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58. For a survey, see Somin, *Taking Property Rights Seriously?*, *supra* note 54 (discussing recent federal court jurisprudence). Protection for property rights is much stronger in some state supreme courts. *See id.*

59. The highly deferential *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), remains the dominant federal constitutional precedent in this field.