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Steven M. Teles: The Rise of the Conservative Legal Movement

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Introduction

REFLECTING ON RICHARD NIXON'S sweeping victory over George McGovern in the 1972 presidential election, the young White House aide Patrick Buchanan told the president that, even though liberalism was still dominant in institutions such as the media, "the Supreme Court is another story. The president has all but recaptured the institution from the Left; his four appointments have halted much of its social experimentation; and the next four years should see this second branch of government become an ally and defender of the values and principles in which the President and his constituency believe."¹ Buchanan's hopes, and those of the conservative movement, would soon be proven sorely misplaced, as the Burger Court revealed itself to be the "counter-revolution that wasn't."²

Flash forward to 2005. President Bush has nominated one of his closest advisers, Harriet Miers, to replace Sandra Day O'Connor on the Supreme Court. The reaction from the conservative legal establishment is immediate, harsh, and pointed. William Kristol, editor of the *Weekly Standard*, groaned that the nomination left him "disappointed, depressed and demoralized."³ Todd Zywicki, professor of law at George Mason University Law School, summed up the mood of many in the conservative legal movement when he opined in the *Legal Times* that

inspired by thinkers such as Scalia, Thomas, Robert Bork, and Richard Posner, and nurtured by groups such as the Federalist Society and the Institute for Justice, the conservative legal movement in America has grown in confidence and competence, building a deep farm team of superbly qualified and talented circuit court judges primed for this moment. The prevailing liberalism of the contemporary legal culture was on the ropes and primed for a knockout—only to have the president let it get off the canvas and survive this round.⁴

Within weeks of Kristol's and Zywicki's laments, Miers's nomination was withdrawn and replaced with that of Samuel Alito, whose connections to the conservative legal movement were so strong that they became a central topic in his confirmation hearings.

The contrast between these two vignettes is telling. The inability of Nixon's four appointees to transform the Supreme Court taught conservatives that electoral success was not enough, in and of itself, to produce legal change: conservatives' failure in the Court reflected a deep imbalance between their forces at the elite level and those of their liberal counterparts. A generation later, the conservative legal elite—a group that did not, in any meaningful sense, exist in the early 1970s—led the charge

against the president's nominee and pushed the president to appoint one of their own. This book will explain how the conservative legal movement, outsmarted and undermanned in the 1970s, became the sophisticated and deeply organized network of today.

By the time of Buchanan's memo, conservatives were well on their way to capturing the Republican Party and turning it into a powerful, movement-based vote-getting machine, capable of prevailing in mobilization-heavy contests like the battle over the Equal Rights Amendment.⁵ Grass-roots liberalism, by contrast, was shrinking, while its forces at the elite level—in the professions, universities, the media, and Washington-based public interest organizations—were surging.⁶ These new liberal elites, and the Democratic Party of which they were an increasingly central part, were of little use at election time. Yet conservatives like Buchanan would find themselves repeatedly frustrated by the liberals' success at limiting the impact of conservative electoral power on the law.

Although conventional wisdom holds that the Republican coalition was held together by anticommunism and opposition to taxes, just as important were the specter of "activist judges" and the liberal organizational network that supported them. Businesses hated the courts for legitimizing and accelerating the expansion of the federal regulatory state. Western farmers, ranchers, and extractive industries detested them for limiting their use of federal lands. Southerners continued to resent their part in dismantling segregation. Northern ethnic refugees from the Democratic Party seethed at the "forced busing" mandated by judges like Massachusetts's Arthur Garrity. Religious conservatives were enraged by the Supreme Court's constitutional sanctioning of abortion and its restrictions on school prayer. While their particular grievances differed, the conservative coalition was drawn together by a shared opposition to liberal judges, professors, and public interest lawyers and by a unified call for "strict constructionism" and "judicial restraint."

What conservatives in the early 1970s only dimly recognized was that reversing liberal accomplishments in the law was more strategically problematic than other conservative goals, such as reducing taxes and stiffening the American response to the Soviet Union. While relatively little elite mobilization was necessary to translate electoral victories into policy outcomes in these areas, in the law conservatives faced liberal opponents with a much more impressive set of resources: elite law schools, a large chunk of the organized bar, a vast network of public interest lawyers, and the still-powerful liberal understanding of rights. If they were to have any chance of influencing the development of the law, conservatives would have to compete directly with liberals at the level of organizational, and not simply electoral, mobilization.

Spurred by their overlapping grievances, informed by an increasingly sophisticated knowledge of how to produce legal change, and coordinated by a strategically shrewd group of patrons, conservatives began investing in a broad range of activities designed to reverse their elite-level organizational weaknesses. While similar kinds of organizational development were happening in other domains where conservatives faced liberal entrenchment, in no other area was the process of strategic investment as prolonged, ambitious, complicated, and successful as in the law.⁷ This book is an effort to explain the legal regime that conservatives faced, how they responded to it, and what accounts for the timing and relative success of their response.

My explanation for the character of conservative countermobilization in the law combines multiple traditions in the social sciences. From historical institutionalism, I draw a focus on how the choices of social and political movements are decisively influenced by the nature of the regime they seek to dislodge. I borrow insights from organizational theory to explain the *internal* challenges that insurgents face and how these can decisively shape their ability to devise optimal competitive responses to entrenchment. Finally, from the sociology of knowledge and the professions and the political science study of the policy process, I draw lessons on how the status quo is protected by constructions of expertise, conventional wisdom, and prestige.

My choice of these tools does not mean that I ignore the importance of electoral power or the intrinsic merits of ideas. Against the trend in political science studies of law, however, I argue in chapter 1 that changes in the form of political competition over the past half-century, especially the increasing importance of ideas and professional power, have led to a decline in the power of elections to cause comprehensive change, especially in highly entrenched political domains. As a consequence of this shift, the rhythm of large-scale political transformations in highly insulated policy and institutional domains, such as the law, is increasingly determined by nonelectoral mobilization. Change in these domains is generated by the ability of insurgents to develop strategies appropriate to specific forms of entrenchment, and to generate organizations capable of effectively implementing those strategies. The “problem solving” character of countermobilization, therefore, requires combining a structural focus on inherited constraints with close attention to the problem-solving efforts of political agents.

I take seriously the argument that conservatives have found greater success in the law because their ideas—such as the negative side-effects of state planning and regulation—were shown over time to be superior to those of their liberal counterparts. My reconstruction of the history of the conservative legal movement shows, however, that ideas do not develop

in a vacuum. Ideas need networks through which they can be shared and nurtured, organizations to connect them to problems and to diffuse them to political actors, and patrons to provide resources for these supporting conditions. Of even greater significance, the market for ideas is one in which incumbents have substantial resources with which to frustrate the challenges of competitors, regardless of how compelling their ideas are. In short, while there is a “market” for ideas, it is one that is institutionally sticky and requires entrepreneurial activity to give it life. For this reason, intellectual history is necessary but not sufficient.

Given my focus on the structural constraints facing countermobilizers, it is essential to place the mobilization of legal conservatives in the context of the regime they opposed. Chapter 2 sets the stage for the examination of conservative mobilization that is to come by tracing out the development of the liberal legal regime, identifying the sources of its strength and durability, and thus the strategic challenges that it presented to conservative countermobilizers. This framing also reveals that legal liberals faced some of the same challenges that their conservative successors confronted a generation later.

Chapters 3 through 7 shift the analysis to the primary subject of the book, the conservative legal movement.⁸ Chapters 3 and 4 examine the earliest organizational response to the rise of legal liberalism. The “first generation” of conservative public interest law firms, driven primarily by locally rooted, business-supported firms, was largely unsuccessful, and led the conservative movement to reconsider its approach to legal change. By contrast, the intellectual school known as “law and economics,” both at the University of Chicago and in the programs of Henry Manne’s Law and Economics Center, was remarkably successful. The differing outcomes of these two efforts at organizational countermobilization demonstrate that the movement’s success was not simply determined by the availability of financial resources, the perception of threat, or the opportunities provided by electoral victories, but was critically shaped by the decision-making of organizational entrepreneurs.

Chapters 5 through 7 take the story into the 1980s and 1990s. Chapter 5 examines the Federalist Society, showing how a group of network entrepreneurs built a formidable organization to establish a conservative presence in the nation’s law schools and created the social capital upon which the movement’s intellectual and political entrepreneurs would draw. In chapter 6, I pick up the story begun in chapter 4, focusing on the Olin Foundation’s efforts to institutionalize law and economics in America’s elite law schools and Henry Manne’s ambitious project to create an entire law school around the field. In chapter 7, we return to the subject of conservative public interest law, with a comparison of the Center for Individual Rights and the Institute for Justice, the quintessen-

tial “second generation” conservative public interest law firms. I show how they responded to the organizational design and strategy failures of the first generation, and how they drew upon the conservative support structure’s new intellectual and network resources to challenge legal liberalism in the courts.

The core of this book, chapters 3 through 7, is based almost exclusively on interviews and internal organizational papers. Unfortunately, very little of the documentary history of the conservative legal movement has been archived. Almost every document referred to in this book, therefore, was given to me directly by the organizations involved. To acquire these documents, I agreed that, while I would be free to quote from them in any way I thought appropriate, they would be for my exclusive use. I offered this arrangement to my sources because I believed that it was the only way that this material would ever get into the public domain. Because other scholars will not be able to check my arguments against the original documents or interviews, I have erred on the side of longer quotations, and have not strictly limited my presentation of the cases to material with direct bearing on my theoretical arguments. This should allow other scholars to draw different conclusions, and provide a foundation for future scholarship on these subjects.

I have found repeatedly through the writing of this book that the combination of interviews and contemporaneous documents was essential. While interviews are quite important, memory, on its own, is fallible, as most people tend to remember events in such a way that they form a coherent narrative. Memory, however, is often tidier than history. Contemporaneous documents, especially grant proposals—a wonderful and woefully underused source—help to fill in the holes of memory. What is more, they help to correct for the very real problem of survivor bias in the study of organizations, the tendency to focus on projects that worked (and thus were continued) and to ignore the equally interesting ideas that were tried and failed, or were considered and shelved.

Even these sources do not completely convince me that the story told in these pages is definitive. The history of the conservative legal movement is still in its infancy, and, in almost all my cases, I was working more or less from scratch. As a result, this book is only as good as the papers that organizations kept and the candor of my informants. Events on which there was a large documentary base, for example, may loom larger than those that were equally important, but less thoroughly documented and preserved. My hope is that this will be the first of many books on the subject. I look forward to having my errors corrected by those who come after me.