

## INTELLECTUAL COUNTERMOBILIZATION

*The Rise of the Conservative Legal Movement: The Battle for Control of the Law*  
by Steven M. Teles (Princeton, NJ: Princeton University Press, 2008)

Steven M. Teles has written a remarkable book that reinforces the truth that ideas have consequences. The book deals with the battle of ideas, but not in the way that the battle is usually conceived. The book is not about the effort to win electoral majorities in order to effect conservative change, and it is only indirectly about conservative ideas themselves. It is instead about the “nonelectoral mobilization” of conservative elites in reaction to legal liberalism in its various guises, from the one-sidedness of law schools to activist judges and the network of liberal organizations that feed cases to them. The author’s story is of the imperfect market for ideas, where incumbents have huge advantages and clever entrepreneurial activity is necessary for new ideas to get a fair hearing. Thomas Jefferson suggested that “reason and free inquiry are the only effectual agents against error.” Well, not quite—at least if they are unsupported by cunning and cash.

As Max Weber anticipated at the dawn of the twentieth century, rule by experts is the leitmotif of capitalist modernity. In America, the creation of the administrative state by progressive reformers put a premium on knowledge—whether of the substantive sort, or merely knowledge of the levers of the administrative state itself.

Expertise, networking, agenda control, and litigation became the vehicles for social change. In the wake of progressivism and the New Deal, liberals effectively established an exclusive legal network, setting important precedents in the Supreme Court. They also took over the law schools. The curriculum, philosophy, programs, and professoriate all shifted in a leftward direction.

The Democratic Party’s political dominance began to fade by the late 1960s, but the liberal legal network ensured continuing policy victories through the pursuit of cases in areas including civil rights, poverty, and public interest law. These victories transferred enormous amounts of power from elected legislatures—where conservatives maintained considerable support—to courts, where they did not. Indeed, if we can learn anything by reflecting on American domestic politics in the twentieth and twenty-first centuries, it is that it has become increasingly

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necessary to bring cases before courts of law in order to win a wide range of moral, constitutional, and policy victories.

But bringing such cases is no small task. And it is one that cannot be seriously attempted without laying much groundwork. Legal ideas and doctrines must be professionally legitimized before courts will take cognizance of them. This is a job for elite intellectual entrepreneurs, not the common man. Intellectuals—supported by networking experts, political experts, and philanthropists—are the protagonists in Teles’s story of the growth of the conservative legal movement. And by “conservative,” Teles means to include those of libertarian persuasion.

In Teles’s account, conservatives proved relatively ineffective in their early forays into public interest law in the 1970s, generally in defense of “individual rights” against the collective or the state. Among other factors, they were insufficiently media-savvy and lacked a conservative legal network like the one that would come into existence in the 1980s. They were also overly dependent on their alliance with American business, which had been increasingly co-opted by the administrative state and had adapted itself to the new legal regime.

Conservative public interest law ascended a steep learning curve marked by many years of trial and error. It came into its own only with the establishment of organizations such as the Center for Individual Rights and the Institute for Justice, beginning in the late 1980s. Eschewing a reliance on relatively unprincipled business leaders for support, these organizations established close relationships with charitable foundations. This new class of conservative legal actors was motivated by ideas rather than interests and in this lay the source of its relative success.

Another significant conservative “countermobilization” began with the rise of

the law and economics movement. This movement, which started to coalesce in the 1970s, brought academic entrepreneurs such as Henry Manne at George Mason University together with theorists such as Richard Posner and Ronald Coase, all supported by a variety of conservative philanthropic interests.

Instead of directly challenging legal liberalism in court through public interest litigation, the law and economics movement dedicated itself to undermining the intellectual foundations of that liberalism. It borrowed insights from economics to show, in a rigorous fashion, the costs—economic, social, and moral—associated with legal outcomes widely and reflexively understood to bring forth only benefits.

According to Teles, Manne had very specific entrepreneurial skills that led, among other things, to the founding of law and economics programs at several universities and law and economics seminars for federal judges. Efforts such as these gave wings to the intellectual leaders of the movement, creating a network of scholars who could move their approach toward academic respectability in increasingly elite law schools.

Economists, of course, are well familiar with the notion of market failure, and the law and economics movement exploited a major one in building George Mason Law School into a national institution. In a competitive market, those who discriminate pay for the privilege in terms of higher labor costs and lower profits. To the extent that conservatives are discriminated against in the market for jobs in the academy, those willing to hire conservatives are at a competitive advantage. In Teles’s account, George Mason was therefore able to hire very high quality but “undervalued” faculty who, in a more perfect market, would have gravitated to higher-ranked institutions.

In explaining the degree to which law and economics rose to prominence, Teles shows us that much labor in the trenches and a large amount of fortune—good and bad—played their respective roles. For example, he reminds us of the importance of patrons to the conservative legal renaissance as he details the sometimes turbulent relationships of academic entrepreneurs to their donors. In doing this, he performs an important service by reminding us that such factors must always be understood if we are to account fully for the rise and fall of great ideas and intellectual movements.

With the founding of the Federalist Society by a small group of law students in the early 1980s, conservatives within the legal community would finally have access to the networking opportunities that had previously been available only to legal liberals. Since its inception, the Society has recruited and provided an intellectual home for conservative law students and attorneys, thereby expanding their confidence and influence throughout the academy and the judicial system. In doing so, it has consciously provided an intellectual and organizational alternative to the liberal legal establishment by providing competition to that establishment without actually replacing it.

There has been an important and ironic consequence to this intellectual networking activity: as it helped weaken the power of the liberal establishment, it “further weakened the idea that there are any ‘neutral’ standards, and in particular any institutions that can be counted upon to defend them. . . . Neither the Federalist Society nor its enemies on the left can count on the authority or legitimacy that the institutions of the law once held in American life.” Of course, that weakening of the idea of the majesty of law cannot be said to be the fault of the Federalist Society or of other conservatives involved

in countermobilization activities. Conservatives simply felt the need to respond to the wholesale politicization of law that began in earnest in America with the progressive movement and its offshoots. Nevertheless, this new “large republic” of factional conflict within the legal profession shows just how long and arduous the process of recovery is destined to be. The ideal cherished by so many members of the Federalist Society—that law be neutral, transcending ideological conflict—is in some sense further away than ever. And of course there is no guarantee that the truth will, ultimately, win out.

Teles claims convincingly that lessons drawn from the conservative experience are applicable to other political entrepreneurs and their patrons. To the extent that conservatives or others concentrate too much on winning public opinion and electoral mandates, they do so at their peril. Alternate strategies are required. Teles offers a fascinating account of the myriad moving parts that did and must work together to effect large-scale political change.

If this book has a noticeable flaw, it is that it is far too jargon-laden. Scattered throughout are phrases such as “historical institutionalism,” “organizational theory,” “sociology of knowledge,” “interaction between inheritance and agency,” “boundary maintenance,” and many more. The author tries, often in vain, to make these concepts relevant to his argument—perhaps in an effort to make the book as rigorous as possible, but also, one suspects, to make it as appealing as possible to a university press. This is unfortunate insofar as it makes the work less readable than it would otherwise be. Teles has essentially written a history, and an important one at that. Had he been more comfortable in the garb of historian rather than modern social scientist, he might well have found an even larger and more influential audience.