CONSERVATIVE LAWYERS AND THE CONTEST OVER THE MEANING OF "PUBLIC INTEREST LAW"

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This Article examines how conservative and libertarian lawyers created a field of legal advocacy organizations in the image of public interest organizations of the political left and how they adapted the model and rhetoric of public interest law practice to serve different political ends. As conservatives developed a cadre of competent and committed advocates and deployed nonprofit legal advocacy organizations on behalf of their own visions of the public interest, they modified the conventions of this unconventional form of politics.

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INTRODUCTION

The term "public interest law" first appeared in the late 1960s[1] and initially was associated almost exclusively with liberal causes.[2] When conservative public interest lawyers declared their entrance into the political scene in the mid-1970s, their critics portrayed them as cheeky challengers of left legal activists, not the same breed of professional.[3] Since then, however, conservative and libertarian legal advocacy groups have multiplied,[4] and the idea that these organizations and their lawyers might be similar in important respects to those of the liberal public interest law movement has gained currency. This Article is a study of how conservative and libertarian lawyers accomplished that feat—how they created a vibrant, highly differentiated field of conservative legal advocacy organizations modeled on liberal public interest law firms (PILFs) and generated substantial competition among legal advocacy groups of the left and right over the meaning of "public interest law."[5]

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1. *See* F. RAYMOND MARKS ET AL., THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY 251 (1972) (calling the public interest law firm a "totally new form"); Burton A. Weisbrod, *Introduction*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 1, 1 (Burton A. Weisbrod et al. eds., 1978) [hereinafter PUBLIC INTEREST LAW] (describing the book as "an attempt to understand and assess the role of one recent, and still fledgling, institutional innovation, 'public interest law,' and the public interest law firm"); Charles R. Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 119 (1974) (asserting that "[f]ive years ago, the term 'public interest law' had not been coined").

2. *See* JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 71–76 (1978); Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1455 (1984).

Conservative interest groups have resorted to the courts to forge public policy since the late nineteenth century, and at least one conservative legal advocacy group, the National Lawyers' Committee of the American Liberty League, claimed that its positions represented the "public interest." *See* LEE EPSTEIN, CONSERVATIVES IN COURT 38–44 (1985); GEORGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE, 1934–1940 (1962); Frederick Rudolph, *The American Liberty League, 1934–1940*, 56 AM. HIST. REV. 19 (1950). However, from 1940, when the National Lawyers' Committee disbanded, through the mid-1970s, groups claiming to litigate for the public interest were almost exclusively liberal. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996); CLEMENT E. VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900 (1972).

3. *See, e.g.*, Michael Horowitz, The Public Interest Law Movement: An Analysis With Special Reference to the Role and Practices of Conservative Public Interest Law Firms 1 (n.d.) (unpublished memorandum) (on file with author) ("Conservative public interest law firms are seen as being largely oriented to and indeed dominated by business interests, a description which is unhappily not wide of the mark for many such firms."); *cf.* Houck, *supra* note 2, at 1419 (asserting that the new conservative public interest law groups established in the 1970s "were created, funded, and remain largely directed by leaders of American business corporations").

4. *See infra* Part I.B–.D. For a list of some of these organizations and their founding dates, see Appendix.

5. Early social science research on public interest law focused exclusively on liberal organizations. *See, e.g.*, HANDLER ET AL., *supra* note 2; PUBLIC INTEREST LAW, *supra* note 1. Several more recent studies of public interest law have included conservative groups. *See* KAREN

The creation of conservative PILFs during the past three decades was just one part of a larger phenomenon of conservative institution building that began around the time of Barry Goldwater's failed 1964 presidential bid.[6] That campaign was "the first political expression of a rising conservative movement"[7] that had intellectual roots in the work of traditionalists, classical liberal economists, and anticommunists.[8] Despite substantial contradictions among these intellectual currents,[9] they came together in opposition to the liberal establishment, which conservatives blamed for Goldwater's overwhelming defeat. This powerful coalition of religious conservatives, libertarians, business interests, and nationalists united behind the task of building a conservative infrastructure—a "counter-establishment"—to help win hearts and minds for conservative ideas,[10] just as the Brookings Institution and other intellectual centers supported by the Ford and Rockefeller Foundations had won support for the view that an activist federal government would promote national progress. They invested in existing organizations, such as the Hoover Institution and the American Enterprise Institute, as well as new ones, such as the Heritage

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O'CONNOR & LEE EPSTEIN, PUBLIC INTEREST LAW GROUPS: INSTITUTIONAL PROFILES (1989) (including more than twenty conservative organizations in their study of public interest law organizations); Catherine R. Albiston & Laura Beth Nielsen, Mapping Law and Social Reform in the New Millennium: Results From a National Random Sample of Public Interest Law Firms in the United States (unpublished manuscript prepared for the Law & Society Ass'n Annual Meeting, May 30, 2002, Vancouver, Canada) (on file with author) (describing a study of public interest law firms whose definition encompasses firms on the political right).

6. *See* JAMES A. SMITH, THE IDEA BROKERS: THINK TANKS AND THE RISE OF THE NEW POLICY ELITE 167–89 (1991).

7. *Id.* at 167.

8. *Id.* at 168–69.

9. *See* Jerome L. Himmelstein, *The New Right*, *in* THE NEW CHRISTIAN RIGHT 13, 15–18 (Robert C. Liebman & Robert Withnow eds., 1983). Himmelstein describes agreement among constituencies of the New Right that "liberals operating through the federal government" are to blame for America's economic problems, moral decline, and national security concerns. He notes, however, that:

> New Right ideology remains fraught with tensions and contradictions. Its economic liberalism and social traditionalism . . . are based on some apparently inconsistent assumptions. The libertarian notions of individualism and freedom picture society as nothing more than an aggregate of individuals that will work admirably well if these individuals are left free to pursue their own interests. Libertarianism takes an optimistic view of human drives and a dim view of any effort to restrain those drives. Social traditionalism, in contrast, regards society as a web of values and institutions that transcends individuals and binds them together. It fears untrammeled human drives and stresses the importance of societal restraints. If economic libertarianism stresses the dangers of too much restraint on the individual, social traditionalism stresses the danger of too little. Similarly, while economic libertarianism is comfortable with self-oriented, materialistic values, social traditionalism regards such values as dangerous and corrosive of the social bond.

Id. at 17.

10. *See* SIDNEY BLUMENTHAL, THE RISE OF THE COUNTER-ESTABLISHMENT: FROM CONSERVATIVE IDEOLOGY TO POLITICAL POWER 4–5 (1986); SMITH, *supra* note 6, at 170.

Foundation, the Institute for Contemporary Studies, the Cato Institute, and dozens of other think tanks and conservative policy institutions.[11] This trend accelerated in the mid- to late 1970s, as a weak economy and corporate resistance to regulation and government deficits mobilized business to substantially increase its support for conservative policy organizations.[12] *Public Interest* editor Irving Kristol published a series of columns in the Wall Street Journal encouraging business leaders to invest in research supporting private markets and limited government,[13] and William Simon, Treasury Secretary in the Nixon and Ford Administrations, called on business to "rush by multimillions" to sustain and expand the "counterintelligentsia."[14] The law and economics movement, with substantial funding from the Olin Foundation,[15] brought Chicago economic analysis to law graduates and judges and promoted research that generally favored markets and opposed government intervention.[16] Catholic advocacy organizations mobilized to

11. *See* SMITH, *supra* note 6; JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996).

12. *See generally* THOMAS FERGUSON & JOEL ROGERS, RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS 78–113 (1986); Don Morgan, *Conservatives: A Well-Financed Network*, WASH. POST, Jan. 4, 1981, at A1. For an analysis of how business interests mobilized and coordinated financial contributions in the late 1970s to influence congressional elections, see Tie-Ting Su et al., *The Coalescence of Corporate Conservatism From 1976 to 1980: The Roots of the Reagan Revolution*, *in* 4 RESEARCH IN POLITICS AND SOCIETY: THE POLITICAL CONSEQUENCES OF SOCIAL NETWORKS 135 (Gwen Moore & J. Allen Whitt eds., 1992). For discussion of how business interests helped to transform economic policy in the 1970s and early 1980s, see Dan & Mary Ann Clawson, *Reagan or Business? Foundations of the New Conservatism*, *in* THE POWER STRUCTURE OF AMERICAN BUSINESS 201–17 (Michael Schwartz ed., 1987), and J. Craig Jenkins & Craig M. Eckert, *The Right Turn in Economic Policy: Business Elites and the New Conservative Economics*, 15 SOC. F. 307 (2000).

13. *See, e.g.*, Irving Kristol, *Business and "The New Class,"* WALL ST. J., May 19, 1975, at A8; Irving Kristol, *On Corporate Philanthropy*, WALL ST. J., Mar. 21, 1977, at A18.

14. WILLIAM E. SIMON, A TIME FOR TRUTH 246 (1978). He explained:

> What this means is nothing less than a massive and unprecedented mobilization of the moral, intellectual and financial resources which reside in those who still have faith in the human individual, who believe in his right to maximum responsible liberty and who are concerned that our traditional free enterprise system, which offers the greatest scope for the exercise of our freedom, is in dire and perhaps ultimate peril. I mean nothing less than a mobilization of those who see a successful United States as the real "last best hope of mankind" and who are not afraid to be counted among those who do.

Id.

15. *See* FERGUSON & ROGERS, *supra* note 12, at 87; Tamar Lewin, *3 Conservative Foundations are in the Throes of Change*, N.Y. TIMES, May 20, 2001, at A30 (describing the Olin Foundation's support for law and economics programs at Harvard, Columbia, Yale, Stanford, and Berkeley).

16. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 330–419 (1995); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 83–105 (1995). The law and economics movement now encompasses various strands of scholarship, some of which defy the association between law and economics and conservative and libertarian political views. *See, e.g.*, Susan Rose-Ackerman, Comment, *Progressive Law and Economics—and the New Administrative Law*, 98 YALE L.J. 341 (1988); Gillian K. Hadfield, *Households at Work: Beyond Labor*

oppose abortion and to support state aid to parochial schools.[17] In the late 1970s, evangelical Protestants began to organize around a variety of social issues, including family, education, and the relationship between church and state, through a network of fundamentalist churches, television preachers, and private Christian schools.[18] Together these diverse strands of conservatives built an organizational infrastructure to challenge what they perceived as the liberal consensus.[19]

This Article considers one particular aspect of this investment in conservative institution building: the creation of legal advocacy groups to counter the influence of liberal PILFs. Drawing on a variety of public sources and interviews with seventy-two prominent lawyers who work for conservative and libertarian advocacy groups,[20] it describes how conservative and libertarian lawyers established conservative public interest law

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Market Policies to Remedy the Gender Gap, 82 GEO. L.J. 89 (1993). For a collection of essays exploring and challenging the economic conception of practical rationality, see BEHAVIORAL LAW AND ECONOMICS (Cass Sunstein ed., 2000).

17. *See* THE CATHOLIC CHURCH AND THE POLITICS OF ABORTION: A VIEW FROM THE STATES (Timothy A. Byrnes & Mary C. Segers eds., 1992); Kevin R. den Dulk, Prophets in Caesar's Courts: The Role of Ideas in Catholic and Evangelical Rights Advocacy 36–37 (2001) (unpublished Ph.D. dissertation, University of Wisconsin, Madison) (on file with author).

18. *See* JEROME L. HIMMELSTEIN, TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM 97–128 (1990); J. CHRISTOPHER SOPER, EVANGELICAL CHRISTIANITY IN THE UNITED STATES AND GREAT BRITAIN: RELIGIOUS BELIEFS, POLITICAL CHOICES (1994); THE NEW CHRISTIAN RIGHT: MOBILIZATION AND LEGITIMATION (Robert C. Liebman & Robert Wuthnow eds., 1983).

19. *See* PAUL GOTTFRIED, THE CONSERVATIVE MOVEMENT (1993); HIMMELSTEIN, *supra* note 18; GODFREY HODGSON, THE WORLD TURNED RIGHT SIDE UP: A HISTORY OF THE CONSERVATIVE ASCENDANCY IN AMERICA (1996); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (2001); GEORGE H. NASH, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (1976).

20. The interviews were conducted in 2001 and 2002, as part of a larger empirical project on lawyers for conservative causes, some aspects of which I am pursuing with John P. Heinz, Northwestern University and the American Bar Foundation, and Anthony Paik, University of Iowa. We compiled a list of lawyers who worked for organizations that appeared on the conservative side of "issue events"—legislative events involving issues that were important to various conservative constituencies during the period from 1995 through 1998. We supplemented this list with lawyers who worked for organizations appearing in two compiled lists of conservative organizations: the *Conservative Directory*, published by RightGuide.com, and the Heritage Foundation's list of "U.S. Policy Organizations," BRIDGETT G. WAGNER ET AL., POLICY EXPERTS 2000: A GUIDE TO PUBLIC POLICY EXPERTS AND ORGANIZATIONS 681–789 (2000) [hereinafter POLICY EXPERTS]. I interviewed lawyers for all the major conservative constituencies, with some variation in practice setting, geographic location (including New York, Washington, D.C., Virginia, California, Arizona, Illinois, Indiana, Missouri, and Minnesota), age, and gender. Most of the interviews were taped and transcribed. They varied in length from forty-five minutes to almost four hours. To maintain confidentiality, citations to the interviews refer to interview dates but not lawyers' names.

organizations[21] and competed for resources, members, and influence. It examines how their adoption of this organizational form has changed the meaning of "public interest law" and how the expansion of conservative public interest law groups has generated interest group competition in courts. This account begins somewhat arbitrarily in the early 1970s, when

21. I define "conservative" to refer to various ideological strands of the uneasy but successful coalition of libertarians, business conservatives, and social conservatives that comprise the conservative movement. *See generally* GOTTFRIED, *supra* note 19; HIMMELSTEIN, *supra* note 18. All of the organizations discussed in this paper and listed in the Appendix seek (or sought, in the case of several organizations that no longer exist) to advance the interests of one or more of these constituencies. Defining the universe of conservative and libertarian public interest law organizations for purposes of this Article was somewhat problematic. However, most of the organizations in the Appendix appear in the Heritage Foundation's publication, POLICY EXPERTS, *supra* note 20, the Heritage Foundation's online *Insider Guide to Public Policy Experts and Organizations*, *at* http://www.policyexperts.org/index.cfm, or the *Conservative Directory*, published by RightGuide.com in 2000. The remaining organizations defined their missions in terms that placed them within one of the core constituencies of the conservative movement: Americans for Effective Law Enforcement, About AELE, *at* http://www.aele.org/About.html ("an 'organized voice' for the law-abiding citizens regarding this country's crime problem"); Catholic League for Religious and Civil Rights, About Us, *at* http://www.catholicleague.org/faqs.htm ("[T]he Catholic League defends the right of Catholics—lay and clergy alike—to participate in American public life without defamation or discrimination."); Center for Individual Freedom, Where We Stand, *at* http://www.cfif.org/htdocs/legislative_issues/where_we_stand/index.html (stating that the organization opposes gun control and favors tax cuts, reduced government spending, and tort reform); Center for the Original Intent of the Constitution, Patrick Henry College, Homepage, *at* http://www.phc.edu/about/default.asp (describing its purpose: "to prepare Christian men and women who will lead our nation and shape our culture with timeless biblical values and fidelity to the spirit of the American founding"); Liberty Counsel, Homepage, *at* http://www.lc.org (stating its mission: "advance[ ] religious freedom, the sanctity of the human life and the traditional family"); Liberty Legal Institute, About Us, *at* http://www.libertylegal.org/about.htm ("Liberty Legal successfully battles in the courts for religious freedoms, students' rights, parental rights, [and] the definition of family . . . ."); National Federation of Independent Business Legal Foundation, Homepage, *at* http://www.nfib.com/page/legalFoundation/ ("The Foundation protects the rights of America's small- and independent-business owners by ensuring that the voice of small business is heard in the nation's courts and by providing small business with important legal resources."); National Law Center for Children and Families, Homepage, *at* http://www.nationallawcenter.org (antipornography organization); Stewards of the Range, Homepage, *at* http://www.stewardsoftherange.org (property rights organization); Thomas More Law Center, Homepage, *at* http://www.thomasmore.org/about.html (describing its mission as "the defense and promotion of the religious freedom of Christians, time-honored family values, and the sanctity of human life").

This Article does not distinguish sharply between PILFs, think tanks, and educational organizations, all of which may participate in what we commonly call "public interest" law work and all of which may qualify as public charities to which contributions are deductible under § 501(c)(3) of the Internal Revenue Code. It focuses on organizations that rely heavily on lawyers and present themselves as public interest law organizations. Although scholars have not reached any consensus about the definition of public interest law, some have taken more inclusive approaches than the one employed here. *See, e.g.*, O'CONNOR & EPSTEIN, *supra* note 5, at viii (defining "public interest law" groups as "the many and varied organizations that litigate on behalf of the public interest and/or use the courts to achieve policy ends"); Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, *in* PUBLIC INTEREST LAW, *supra* note 1, at 4, 20 (defining the public interest sector as "that portion of the voluntary, non-profit class of organizations that is engaged in . . . activities that have a sizeable collective-consumption, or external benefit component").

the growth of conservative lawyer groups began to accelerate and when these organizations started to position themselves as public interest advocates.[22]

This Article focuses primarily on the principal founders and leaders of conservative public interest law organizations, most of whom were lawyers. These groups also received critical support from business leaders, who organized in the 1970s to respond to a spate of new regulatory legislation,[23] clergy, who reacted to civil liberties groups' success in relaxing abortion laws and imposing stricter boundaries between church and state,[24] and other conservatives who sought to resist liberalized criminal laws, busing, the Equal Rights Amendment, and affirmative action.[25] Moreover, they drew crucial resources and assistance from foundations committed to supporting conservative causes[26] and from an

22. *See* EPSTEIN, *supra* note 2, at 45. This Article does not address lawyers' roles in earlier stages of the conservative project: in defense of traditional elites during the Founding Era and Jacksonian periods, *see* Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247 (1914), in disputes over slavery during the early and middle nineteenth century, *see* ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975), and in defense of property and business interests in the post–Civil War era through the 1930s, *see* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895 (1960); Robert W. Gordon, *"The Ideal and Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST–CIVIL WAR AMERICA 51 (Gerald W. Gawalt ed., 1984).

23. *See* FERGUSON & ROGERS, *supra* note 12, at 86–88; *see also* LEONARD SILK & DAVID VOGEL, ETHICS AND PROFITS: THE CRISIS OF CONFIDENCE IN AMERICAN BUSINESS (1976); Jack L. Walker, *The Origins and Maintenance of Interest Groups in America*, 77 AM. POL. SCI. REV. 390, 397 (1983).

24. *See* DALLAS A. BLANCHARD, THE ANTI-ABORTION MOVEMENT AND THE RISE OF THE RELIGIOUS RIGHT: FROM POLITE TO FIERY PROTEST 22–36 (1994); HIMMELSTEIN, *supra* note 18, at 97–128; den Dulk, *supra* note 17.

25. *See* SARA DIAMOND, ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND POLITICAL POWER IN THE UNITED STATES 66–91 (1995); *see also* Himmelstein, *supra* note 9.

26. *See* SMITH, *supra* note 6, at 194–213; STEFANCIC & DELGADO, *supra* note 11; Yves Dezalay & Bryant G. Garth, *Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 354 (Austin Sarat & Stuart Scheingold eds., 2001); Gregg Easterbrook, *"Ideas Move Nations,"* ATLANTIC MONTHLY, Jan. 1986, at 66.

The foundations most frequently mentioned in interviews were the Sarah Scaife Foundation, John M. Olin, Lynde and Harry Bradley, and Smith Richardson—sometimes called "the four sisters." *See* GOTTFRIED, *supra* note 19, at 129. The Sarah Scaife Foundation was created by the granddaughter of Andrew Mellon, whose son, Richard Mellon Scaife, began promoting conservative causes after her death. The John M. Olin Foundation was created in 1953 by the Olin Corporation, but it began to play an important role in the conservative movement in 1977, when William Simon assumed the presidency and Michael Joyce was named executive director. *See* Leon Howell, *Funding the War of Ideas*, CHRISTIAN CENTURY, July 19, 1995, at 701. The Smith Richardson Foundation was funded by the Vicks and Smith Brothers cough medicine fortune. The Bradley Foundation became a significant force in 1985 when Allen-Bradley was sold for $1.5 billion and the existing foundation received $275 million. Bradley then hired Michael Joyce from Olin to raise the foundation's profile. *See id.*

For a list of the largest foundation supporters of different categories of conservative and libertarian nonprofit organizations, see John P. Heinz et al., *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5, 21 (2003).

emerging policy-research network capable of translating conservative and libertarian ideas into legislative and litigation campaigns.[27] These lay leaders and patrons created conditions and supplied resources that were essential for the success of the new conservative public interest law groups, but this Article considers them only indirectly.

Lawyers were particularly interesting participants in the creation of this organizational field, not only because they initiated the enterprises and recruited patrons, but also because they had a distinctive stake in its success. The liberal public interest law movement of the 1960s and 1970s fundamentally challenged traditional conceptions of law and the role of lawyers in its operation. The very label, "public interest lawyer," asserted moral superiority over attorneys who represented private clients—particularly corporate clients—in conventional practices. Moreover, the moral activism that the new public interest lawyers posed as the alternative to conventional value-neutral practice norms supported causes that many conservatives did not favor. Conservative public interest law groups would vindicate the notion that conservatives, like liberals, could field a cadre of principled crusaders.[28] Although the contest took the shape of investment in organizations, it also was a war of ideas about what types of practice were legitimate and what constituted worthy public service.

This portrait shows lawyers adapting existing organizational forms and modes of legal activism to the goals of the conservative movement. Those who established the first conservative public interest organizations in the mid-1970s sought to expand the rationale for public interest law organizations to reach new constituencies. The founders of liberal public interest law groups asserted that such groups were necessary to redress the failures of pluralism—to give "underrepresented" interests access to the decisionmaking processes of large

27. *See* Michael Patrick Allen, *Elite Social Movement Organizations and the State: The Rise of the Conservative Policy-Planning Network*, *in* 4 RESEARCH IN POLITICS AND SOCIETY: THE POLITICAL CONSEQUENCES OF SOCIAL NETWORKS, *supra* note 12, at 87; J. Craig Jenkins, *Nonprofit Organizations and Policy Advocacy*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 296, 310–11 (Walter W. Powell ed., 1987).

28. Austin Sarat and Stuart Scheingold have argued that cause lawyers both challenge and legitimate conventional practice norms:

> Legal professions everywhere both need and at the same time are threatened by cause lawyering. They need lawyers who commit themselves and their legal skills to furthering a vision of the good society because this "moral activism" puts a humane face on lawyering and provides an appealing alternative to the value-neutral, "hired-gun" imagery that often dogs the legal profession.

Austin Sarat & Stuart Scheingold, *Introduction* to CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 3 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter CAUSE LAWYERING] (footnotes omitted).

bureaucracies. The first conservative public interest law groups sought to redefine public interest law to encompass different underrepresented interests, and the field was wide open. These organizations were largely reactive; they generally did not articulate well-defined affirmative agendas. Many failed within the decade. In the 1980s and 1990s, however, lawyers established new conservative and libertarian public interest groups that sought to distinguish themselves from the first generation through the greater purity of their ideological commitments, better articulated policy agendas, and more proactive strategies. This also was the period during which evangelical and fundamentalist Christian organizations significantly increased their involvement in legal advocacy, taking their place alongside better established Catholic organizations.[29] As the field became more specialized, lawyer entrepreneurs struggled to establish and defend their niches within the conservative public interest law field. Older organizations served as training sites for founders of new conservative and libertarian legal advocacy groups.

Part I of this Article describes how a field of conservative public interest groups has emerged since 1970 to contest the meaning of "the public interest" and the legal profession's responsibility with respect to that ideal. Part II explores how conservative and libertarian PILFs have become frequent and effective participants in public law litigation, challenging the preeminence of liberal PILFs and unsettling assumptions and practices of public interest law.

I. THE CREATION OF AN INFRASTRUCTURE FOR CONSERVATIVE LEGAL ADVOCACY

The conservative public interest law movement was a direct response to the creation of public interest law organizations in the late 1960s and 1970s and to the legal and social changes these groups helped produce. A small band of liberal public interest lawyers, dubbed "the new public interest lawyers" in a 1970 comment in the *Yale Law Journal*, created intense interest in an alternative model of legal practice through which lawyers might promote significant social change. The success of these organizations presented an obvious counterstrategy for conservatives: to beat liberals at their own game by creating public interest law groups to speak for competing values and

29. *See* Gregg Ivers, *Please God, Save This Honorable Court: The Emergence of the Conservative Religious Bar*, *in* THE INTEREST GROUP CONNECTION: ELECTIONEERING, LOBBYING, AND POLICYMAKING IN WASHINGTON 289 (Paul S. Herrnson et al. eds., 1998); Jayanth K. Krishnan & Kevin R. den Dulk, *So Help Me God: A Comparative Study of Religious Interest Group Litigation*, 30 GA. J. INT'L & COMP. L. 233, 249–53 (2002); den Dulk, *supra* note 17, at 34–42.

constituencies. They adopted the organizational form and rhetoric of public interest law to serve sometimes conflicting causes of the conservative movement.

A literature on organizational formation helps explain how this organizational field has evolved and the importance of lawyers in its creation. It highlights the roles of institutional entrepreneurs[30] in establishing new organizations, choosing among available forms, and recruiting patrons and members. Thirty years ago, in a seminal article analyzing the development of American farm groups, Robert Salisbury challenged a view advanced in the interest group literature, that interest groups are "a kind of automatic fruit of the process of social differentiation."[31] His "exchange theory of interest groups" emphasized the essential role of the entrepreneur or organizer who must "make the first move" to initiate enterprises and attract members and patrons.[32] Although many of the organizations contemplated by his exchange theory were groups devoted to winning material benefits for their members, he also considered groups that pursue primarily "purposive benefits," including public goods and "expressive benefits," which give voice to interests and values.[33]

Exchange theory addresses how organizational fields develop over time; capital and entrepreneurs "often come from other, older organizations,"[34] and established groups frequently serve as training grounds and sources of inspiration for new organizers.[35] Thus, Salisbury argued, "the emergence of extensive

30. Hayagreeva Rao defines "institutional entrepreneurs" as "ideological activists who combine hitherto unconnected beliefs and norms into an organizational solution to a problem." Hayagreeva Rao, *Caveat Emptor: The Construction of Nonprofit Consumer Watchdog Organizations*, 103 AM. J. SOC. 912, 916 (1998) (citing HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963)).

31. Robert Salisbury, *An Exchange Theory of Interest Groups*, 13 MIDWEST J. POL. SCI. 1, 4 (1969). Salisbury rejected what he called "the proliferation hypothesis"—that organizations form almost spontaneously through the identification of common interests among individuals, a natural "fission-like" process caused by conflict among specialized groups. *Id.* at 4, 7. He also challenged the "homeostatic mechanism hypothesis"—that organizations form as the result of disruption of equilibrium among social groups and that group formation to reestablish a satisfactory equilibrium generates "counterorganization among rival groups in a kind of dialectical process." *Id.* at 5–6.

32. *Id.* at 12.

33. *Id.* at 16. Salisbury's work helps explain why leadership in expressive groups is less secure than leadership in material benefit groups. In unions and other material benefit groups, a factional challenger who wishes to displace the organization's leaders must provide at least comparable material benefits to prospective members and risk exclusion from the group and loss of whatever benefits group membership confers. In purposive and expressive groups, a rival to leadership must simply find startup capital and offer a more appealing message or agenda. Expressive groups, therefore, are "cheap to organize but fragile." *Id.* at 30. Among advocacy groups seeking to influence public policy and give voice to values, one should expect frequent challenges from within for preeminence in the field. *Id.* at 16.

34. *Id.* at 14.

35. For example, Salisbury explained how the Grange spawned new organizations:

> [O]nce the Grange had set the example of a viable organization of farmers, a large number of people, especially those with direct experience in the prototype group, were attracted by the prospect of establishing farm groups of their own. One might follow as another collapsed. They

organized group life in a political system (a) will tend to be a gradual process, partially dependent on the spread of the organizational experience to socialize and recruit organizers, and (b) will depend upon the accumulation of social capital sufficient to invest in the formation of durable organizations."[36]

More recently, scholars have built on Salisbury's work by examining how and why institutional entrepreneurs create new organizations,[37] and how they forge new organizational forms drawing from available resources and cultural materials.[38] Organizational entrepreneurs within one field sometimes adopt models drawn from other fields to act on their grievances or goals.[39] Choices of organizational forms may influence organizers' claims to legitimacy,[40] as will decisions about how to frame the theory and purpose of the organizational form.[41] Thus, in her study of how women's groups between 1890 and 1920 adapted organizational models from the voluntary association sector for political ends, Elisabeth Clemens demonstrates that "models of organization are not only conventions for coordinating action but also statements of what it means for certain people to organize in certain ways for certain purposes."[42] When insurgent groups use "familiar organizational

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might be differentiated by region or by crop or both. They might stress somewhat different combinations of material or political or rhetorical objectives. But in a broader sense they were all in the same line of business, and many of these businessmen came to constitute a rather specialized and self-sustaining subset of farm organizers.

Id.

36. *Id.* at 14–15.

37. *See, e.g.*, Anthony J. Nownes & Grant Neeley, *Public Interest Group Entrepreneurship and Theories of Group Mobilization*, 49 POL. RES. Q. 119, 119 (1996) (examining "the process of group mobilization from the perspective of the entrepreneur" and finding that "individuals—especially entrepreneurs and their friends—are the driving force behind public interest group formation").

38. *See, e.g.*, Elisabeth S. Clemens, *Organizational Repertoires and Institutional Change: Women's Groups and the Transformation of U.S. Politics, 1890–1920*, 98 AM. J. SOC. 755 (1993); Paul J. DiMaggio & Walter W. Powell, *Introduction* to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656, 665–67 (1996); Rao, *supra* note 30; Hayagreeva Rao et al., *Power Plays: How Social Movements and Collective Action Create New Organizational Forms*, 22 RES. ORGANIZATIONAL BEHAV. 237 (2000).

39. *See* Elizabeth A. Armstrong, *Crisis, Collective Creativity, and the Generation of New Organizational Forms: The Transformation of Lesbian/Gay Organizations in San Francisco*, *in* 19 SOCIAL STRUCTURE AND ORGANIZATIONS REVISITED 361, 362 (Michael Lounsbury & Marc J. Ventresca eds., 2002); Elisabeth S. Clemens, *Invention, Innovation, Proliferation: Explaining Organizational Genesis and Change*, *in* 19 SOCIAL STRUCTURE AND ORGANIZATIONS REVISITED, *supra*, at 397, 399–401.

40. *See* Robin Stryker, *Rules, Resources, and Legitimacy Processes: Some Implications for Social Conflict, Order and Change*, 99 AM. J. SOC. 847 (1994).

41. *See* Paul DiMaggio, *Interest and Agency in Institutional Theory*, *in* INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT 3 (Lynne G. Zucker ed., 1988); Fligstein, *supra* note 38, at 663–64; Rao, *supra* note 30, at 917.

42. Clemens, *supra* note 38, at 775 (citation omitted).

forms" in "unfamiliar ways," they sometimes "destabilize existing institutions and ultimately contribute to the institutionalization of new conventions for political action."[43]

This literature about organizational entrepreneurship highlights the significance of lawyers' roles in assembling resources for conservative public interest law groups, legitimating this new form, and integrating it into the existing public interest law field. It also helps explain how the earliest conservative PILFs spawned their own competitors by training lawyers who would eventually found their own groups, how investments in conservative lawyer organizations several decades ago have shaped the form, number, and influence of today's conservative public interest law groups, and why the choice of organizational form has contributed powerfully to the effort by conservative and libertarian lawyers to reconstitute the meaning of "public interest law."

A. The Emergence of a New Organizational Form: (Liberal) Public Interest Law Firms

The public interest law movement emerged in the second half of the 1960s to demand broader participation in government policymaking.[44] Public interest law organizations claimed to represent people whose interests were so diffuse that they fell outside the marketplace for legal services. They drew from earlier models,[45] including the American Civil Liberties Union (ACLU), which represented political and religious dissenters,[46] and the National Association for the Advancement of Colored People Legal Defense Fund (LDF), which campaigned to dismantle racial segregation.[47] Public interest law firms, however, distinguished themselves from their predecessors by pursuing broader issue agendas and expanding the range of strategies to include not only constitutional litigation but also other types of law reform

43. *Id.* at 763.

44. For a much more complete account of the early history of liberal public interest law, see Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209–18 (1976).

45. *See* Houck, *supra* note 2, at 1439–41; Rabin, *supra* note 44, at 209–18.

46. *See* SAMUEL H. WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 45–47 (1990).

47. *See* MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 105–37 (1987). Advocacy groups claiming to represent broad constituencies were pioneered by lawyers of the Progressive period, with Louis Brandeis the "master" of this institutional form. Robert Gordon, *The Legal Profession*, *in* LOOKING BACK AT LAW'S CENTURY 319, 325 (Austin Sarat et al. eds., 2002). One of the earliest predecessor organizations was the National Consumers' League, which litigated to improve working conditions for women and children beginning in the early 1900s. *See* VOSE, *supra* note 2, at 163–78; Clement E. Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267 (1957).

litigation and administrative and legislative advocacy. While the ACLU and LDF addressed the need to provide counsel to relatively powerless minorities, the new public interest law groups would vindicate the interests of diffuse majorities.[48] Unlike the ACLU and LDF, which in their early years relied heavily on volunteers to supplement their small professional staffs, the new public interest law groups obtained foundation grants to support full-time counsel.[49] This change allowed public interest lawyers to develop highly specialized expertise, to create ongoing monitoring relationships with agencies, and to compete effectively against opponents represented by lawyers in private firms.[50]

In form, public interest law organizations closely resembled private law firms, with staffs composed of lawyers and support personnel organized to pursue litigation, administrative and legislature advocacy, and negotiation. As Robert Rabin noted in his assessment of public interest law in the mid-1970s:

> Structurally . . . the public interest law firm looks very much like its corporate-commercial counterpart: it is a law office organized to manage a caseload involving the standard mix of judicial and administrative appearances as well as informal negotiations with clients and adversaries. A certain number of staff attorneys are complemented by a secretarial staff, paraprofessionals, and in some offices, a few student interns.[51]

Unlike commercial firms, however, these groups were not dependent on clients, whose needs and demands might not coincide with the organizations' law reform goals.[52] The infusion of foundation funding allowed them to avoid

48. *See* Benjamin W. Heineman, Jr., *In Pursuit of the Public Interest*, 84 YALE. L.J. 182, 182–83 (1974) (reviewing SIMON LAZARUS, THE GENTEEL POPULISTS (1974)).

49. *See* Rabin, *supra* note 44, at 233. The ACLU and LDF later became more like the new public interest law groups by adopting a varied mix of strategies and employing more full-time lawyers. By 1975, LDF had a staff of 25 attorneys. *See* Houck, *supra* note 2, at 1441.

50. *See* Rabin, *supra* note 44, at 232–33.

51. *Id.*

52. Some critics on the left have resisted the view that public interest law occurs primarily within organizations that do not depend upon client fees. *See* Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 729–32 (2001) (arguing that "the assumption that 'public interest' law involves lawyering in arrangements funded through means other than client-paid fees is a strong but virtually unexamined precept in many 'public interest' circles"); Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805, 808 (1971) (failing to appreciate the pro bono contributions of lawyers in private firms may cause "the public interest law firm [to] become the institutionalized conscience of the bar. For the traditional practitioner, justice may become, even more than it is today, 'someone else's' problem"); *cf.* Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 STAN. L. REV. 1427, 1445 (2002) (asserting that today's elite bar has abandoned any attempt to articulate a vision of how its work relates to a public conception of the lawyer's role and has relegated concerns about the public interest to "separate corps of officials and other specialists"). Justice Thurgood Marshall, former legal director of the NAACP, questioned the distinction between public interest and commercial practice drawn in the U.S. Supreme Court's decisions on the constitutional permissibility of bar rules prohibiting lawyers' solicitation of clients. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 468–77 (1978) (Marshall, J., concurring).

relying on client fees and gave them freedom to pursue full-time law reform. The public interest firm was, then, "a hybrid of sorts, implementing the kind of broad ideological goals ordinarily associated with a multifaceted reform strategy through a traditional litigation-oriented form of organization."[53]

Although there was considerable disagreement about the meaning and theoretical justification for this organizational form,[54] public interest lawyers generally asserted that new types of organizations and lawyers were necessary to respond to the deficiencies of pluralism by representing groups whose interests were underrepresented in administrative agencies and courts.[55] Consumer advocate Ralph Nader and his associates claimed to speak for ordinary citizens with a stake in the outcome of decisions of unresponsive corporate and government bureaucracies.[56] Charles Halpern, cofounder of the Center for

53. Rabin, *supra* note 44, at 232.

54. The Council for Public Interest Law defined "public interest law" as

> the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.

COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 6–7 (1976). For other attempts to define "public interest law," see, for example, JEREMY COOPER, PUBLIC INTEREST LAW 10 (1991) ("Public interest law involves in essence the use of a wide and diverse range of strategies to widen the access of the general populace to the sources of power and the decision making processes that affect their daily lives, specifically using the processes of the law to achieve this end."); Weisbrod, *supra* note 21, at 22 ("[A public interest law] activity is an activity that (1) is undertaken by an organization in the voluntary sector; (2) provides fuller representation of underrepresented interests (would produce external benefits if successful); and (3) involves the use of law instruments, primarily litigation."); Robert Borosage et al., *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3 (1970) (using the term "to refer to lawyers who represent the underrepresented groups and interests in society"); Edgar S. & Jean Camper Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1006 (1970) ("[U]nderlying the currency of 'public interest law' is a newly emergent and valid understanding of the need to protect all members of society in their relatively passive capacity as citizens who consume not only material goods and services but also governmental policies and programs."); Winton D. Woods, Jr. & Clark L. Derrick, *The Practice of Law in the Public Interest*, 13 ARIZ. L. REV. 797, 798 (1971) ("The term public interest law does not lend itself to precise definition. It clearly contemplates, however, the representation of diverse groups of people presently underrepresented in our society."); *cf.* Hegland, *supra* note 52, at 809 ("The public interest law movement is the assertion of special interests which are currently slighted or ignored by decision makers in defining the 'public interest.'"). For discussion of the conceptual difficulties of the idea of the "public interest," see GLENDON SHUBERT, THE PUBLIC INTEREST: A CRITIQUE OF THE THEORY OF A POLITICAL CONCEPT (1960); Heineman, *supra* note 48, at 183–87; Frank J. Sorauf, *The Public Interest Reconsidered*, 19 J. POL. 616 (1957).

55. *See, e.g.*, Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095, 1098 (1971).

56. *See* ROBERT F. BUCKHORN, NADER: THE PEOPLE'S LAWYER 154–55 (1972) (quoting Nader: "It is abundantly clear that our institutions . . . are not performing their proper functions but are . . . serving special interest groups at the expense of voiceless citizens and consumers. . . . A primary goal of our work is to build countervailing forces on behalf of citizens . . . ."); Ralph Nader, *Introduction* to MARK J. GREEN,

Law and Social Policy (CLASP), argued that corporations were concerned primarily with "production, profit and the maintenance of power," while regulatory agencies charged with holding corporations accountable to other social values "have proven too limited in resources, too remote from grassroots concerns, and too amenable to political influence to accomplish their task adequately."[57] Public interest law groups would open administrative agencies' procedures to participation by the citizens they were supposed to benefit. They would expand the repertoire of citizen activists to include "direct and significant participation in the central decision making process of the corporations and bureaucracies," with recourse to administrative hearings and courts when such access was denied.[58]

The public interest law movement was intertwined with a strong critique of the legal profession—the view that lawyers' conceptions of professionalism aligned their duties with their economic self-interest.[59] Ralph Nader asserted that most lawyers, in most of their work, undermined the public interest.[60] Charles Halpern argued that government lawyers generally sought to prevent citizens from participating in agency proceedings, and that

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THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS, at ix, xii (1978) (describing the public interest bar as an "instrument[] of citizen access to the legal system").

57. Halpern & Cunningham, *supra* note 55, at 1097 n.4. The critiques of corporate America that Halpern and Cunningham cite as sources of inspiration for the new public interest lawyers include: ADOLF A. BERLE, POWER (1969); ADOLF A. BERLE, POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY (1959); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); JACQUES ELLUL, THE TECHNOLOGICAL SOCIETY (1964); JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (1967); MICHAEL HARRINGTON, THE OTHER AMERICA (1962); HERBERT MARCUSE, ONE-DIMENSIONAL MAN (1964); WILLIAM H. WHYTE, THE ORGANIZATION MAN (1956); and Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

58. Halpern & Cunningham, *supra* note 55, at 1098.

59. *See id.* at 1102–03; Ralph Nader, *Law Schools and Law Firms*, BEVERLY HILLS B. ASS'N J., Dec. 1969, at 8; Ralph Nader, *The Role of the Lawyer Today*, MICH. ST. B.J., Nov. 1970, at 17; Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). These critics echoed the views of Benjamin Twiss, who had reached similar conclusions several decades earlier. *See* BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 254–64 (1942).

60. Ralph Nader, *Crumbling of the Old Order: Law Schools and Law Firms*, NEW REPUBLIC, Oct. 11, 1969, at 20, 21. Nader writes:

> Lawyers labored for polluters, not anti-polluters, for sellers, not consumers, for corporations, not citizens, for labor leaders, not rank and file, for, not against, rate increases or weak standards before government agencies, for highway builders, not displaced residents, for, not against, judicial and administrative delay, for preferential business access to government and against equal citizen access to the same government, for agricultural subsidies to the rich but not food stamps for the poor, for tax and quota privileges, not for equity and free trade.

Id. Nader has elaborated on this theme more recently. RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA, at xvii, 193–231 (1996) (asserting that corporate lawyers accentuate imbalances in a legal system that already strongly favors the rich and powerful at the expense of all others).

"private practice, committed as it is was almost exclusively to corporate interests, provided little hope for administrative reform."[61] Although these charges were hardly new,[62] the tone of the criticisms of the late 1960s was especially harsh. This challenge to traditional practice norms briefly appeared to threaten the stream of top law school graduates into large law firms.[63] One observer called this critique by a new generation of lawyers part of a "modern legal revolution"—a "potentially . . . devastating" challenge to "lawyers' concepts of who they are and thus to the plush and prestigious world many of them inhabit."[64] It constituted an affront to the professional elite's position that the

61. Halpern & Cunningham, *supra* note 55, at 1103.

62. In a speech at Harvard in 1905, Louis Brandeis asserted that the prominent American "lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people." Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559 (1905). Henry L. Stimson offered a similar view in explaining his decision to leave his Wall Street firm to become a United States attorney: "It has always seemed to me, in the law from what I have seen of it, that wherever the public interest has come into conflict with private interests, private interest was more adequately represented than the public interest." RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 162 (1969).

63. *See* Robert Reinhold, *New Lawyers Bypass Wall St.*, N.Y. TIMES, Nov. 19, 1969, at A37 (reporting that none of the thirty-nine graduating Harvard Law Review editors was likely to take a position in private practice after graduating and quoting one student who said of Wall Street firms: "We are not interested in what they are interested in."); Art Smith, *A Law Student's Viewpoint*, PRO BONO REPORT TO THE ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, July 1, 1971, at 6 (noting that Harvard Law School graduates entering private practice declined from 65 percent in 1950 to 41 percent in 1968, and that Yale Law School graduates entering private practice declined from 41 percent in 1968 to 31 percent in 1969). *But see* Rita J. Simon et al., *Have There Been Significant Changes in the Career Aspirations and Occupational Choices of Law School Graduates in the 1960's?*, 8 LAW & SOC'Y REV. 95, 101–02 (1973) (studying graduates of the University of Chicago and University of Illinois law schools and finding that top graduates in the 1960s were more likely than top graduates in the 1950s to enter large law firms). Some firms responded by offering top law graduates opportunities to work on public interest cases. *See* MARKS ET AL., *supra* note 1, at 256; Robert L. Kidder, *Lawyers for the People: Dilemmas of Legal Activists*, *in* PROFESSIONS FOR THE PEOPLE: THE POLITICS OF SKILL 153, 161 (Joel Gerstl & Glenn Jacobs eds., 1976); *cf.* Jerry J. Berman & Edgar S. Cahn, *Bargaining for Justice: The Law Students' Challenge to Law Firms*, 5 HARV. C.R.-C.L. L. REV. 16, 22–30 (1970) (describing student attempts to bargain with leading firms to establish formal pro bono programs).

64. David P. Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 GEO. WASH. L. REV. 547 (1970). Riley cites incidents in which Harvard students picketed recruiters from Cravath, Swaine & Moore to protest their representation of clients with interests in South Africa and Ropes & Gray to protest their representation of coal mining companies in West Virginia. *Id.* at 552. A group of law students organized by Ralph Nader confronted Lloyd Cutler and John Pickering to challenge their settlement of an auto pollution case on behalf of the Automobile Manufacturers Association. *See* William M. Blair, *Law Students Trade Charges With Leading Capital Lawyer*, N.Y. TIMES, Oct. 10, 1969, at A30. Cutler accused the students of "practicing McCarthyism in reverse." *Id.*

Nevertheless, when the IRS announced in 1970 that it had "temporarily suspended the issuance of rulings for public interest law firms" except for "the familiar legal aid groups" providing representation for the poor, some of Washington's most prominent law firms and former leaders of the ABA pushed the agency to recognize a broader range of public interest law firms as charitable 501(c)(3) organizations. *See* Houck, *supra* note 2, at 1443–45.

public interest emerged as a byproduct of adversarial processes in which they engaged on behalf of clients,[65] through lawyers' efforts to reconcile clients' objectives with the purposes of the legal framework,[66] and through lawyers' direct engagement in public service.[67]

Dozens of public interest law organizations were created in the late 1960s and early 1970s to pursue social change through courts, legislatures, and administrative agencies. Nader established a network of specialized consumer interest law firms, including the Project on Corporate Responsibility, the Center for Auto Safety, the Center for the Study of Responsive Law, and the Public Citizen Litigation Group.[68] The Environmental Defense Fund was founded in 1968,[69] and CLASP was formed the following year.[70] CLASP served as a model for Public Advocates, the Center for Law in the Public Interest, and many other liberal groups.[71] Some legal services programs, which had roots in legal aid organizations of the late nineteenth and early twentieth centuries, shifted their missions to law reform.[72] By 1976, there were over ninety public interest law organizations, employing over 600 attorneys,[73] many of them supported by the Ford Foundation.[74] Law schools forged ties to these organizations,[75] and public interest groups recruited many elite law school graduates.[76] Public interest law groups achieved highly publicized

65. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 277–81 (1976).

66. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 23–24 (1988).

67. *See* ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 8–9, 165–66 (1964); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 267–75 (1990).

68. *See* O'CONNOR & EPSTEIN, *supra* note 5, at 37–38, 43–44, 175.

69. *See* Houck, *supra* note 2, at 1443.

70. *See* Borosage et al., *supra* note 54 , at 1112.

71. *See* EPSTEIN, *supra* note 2, at 119–20.

72. *See generally* EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974); JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 136–59 (1982).

73. *See* COUNCIL FOR PUB. INTEREST LAW, *supra* note 54, at 2, 3.

74. *See* Dezalay & Garth, *supra* note 26, at 360; Halpern, *supra* note 1, at 121.

75. *See* KALMAN, *supra* note 2, at 43–59.

76. A Hogan & Hartson memorandum of the same year found it "increasingly evident" that "there is a tendency among young lawyers, particularly those with the highest academic qualifications, to seek out public service oriented legal careers as an alternative to practice in the larger metropolitan law firms." Memorandum from Community Relations Study Committee, to the Executive Committee of Hogan & Hartson 2 (Sept. 8, 1969), *quoted in* Riley, *supra* note 64, at 578–79; *cf.* Neil K. Komesar & Burton A. Weisbrod, *The Public Interest Law Firm: A Behavioral Analysis*, *in* PUBLIC INTEREST LAW, *supra* note 1, at 80, 83 (finding that public interest lawyers were significantly more likely than their counterparts in private practice "to have been in the top quarter of their law school graduating class, to have participated in the Law Review, to have served as a law clerk, and to have graduated from a high quality law school").

successes in the courts, administrative agencies, and legislatures.[77] They benefited from a receptive judiciary during the Warren era and from loosening standards regarding standing, ripeness, sovereign immunity, and private rights of action.[78]

Galvanized by the achievements of this new breed of lawyers and their organizations, some conservatives responded by attacking the premises of the movement. Some asserted that public interest law groups undermined democratic processes by replacing the decisions of elected officials with edicts from the courts,[79] and some, including many religious conservatives, rejected the rights discourse of much of the new public interest litigation.[80] Conservatives, however, also sought to create their own organizations with similar form and opposing mission.[81] While liberal public interest law groups were thought to resort to the courts to redress their political disadvantage in other arenas,[82] conservative public interest law groups were primarily a response to liberal groups' perceived dominance in the courts and administrative agencies.[83] One libertarian lawyer observed that liberal PILFs were "extremely

77. *See, e.g.*, Wilderness Soc'y v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (en banc) (allowing environmental groups to intervene in an action challenging the sufficiency of an environmental impact statement prepared for the trans-Alaska pipeline).

78. For example, *Office of Communication of the United Church of Christ v.* FCC, 359 F.2d 994 (D.C. Cir. 1966), held that a church group and community residents had standing to challenge the license renewal application of a television station in Jackson, Mississippi. In *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608 (2d Cir. 1965), the Second Circuit rejected an argument that citizens groups lacked standing to challenge a license granted to Consolidated Edison to build an electricity generating plant.

79. *See, e.g.*, Dana L. Thomas, *On the Right Side: The Pacific Legal Foundation Is Doing Yeoman Work*, BARRON'S, Feb. 2, 1976, at 7 (reporting that one critic stated that "the majority of Americans, as represented by their elected government officials, should have as much to say about the environment as the Sierra Club").

80. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (arguing that American rights talk tends to discourage compromise and to obscure corresponding personal and civil responsibilities); den Dulk, *supra* note 17, at 5 (asserting that Catholic and evangelical groups were "deeply suspicious of . . . the values embodied in legal rights").

81. *See* Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 655–56 (1993) ("Beginning in the 1970s, many so-called 'upperdogs,' or 'advantaged' interests, such as corporations and business interests, were in adversarial relationships with 'underdogs' or 'disadvantaged' interests, like the ACLU and the NAACP LDF. The advantaged groups found themselves out-gunned and out-matched.").

82. For scholarship reflecting this "political disadvantage" perspective on litigation and social change, see FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE (1976); TUSHNET, *supra* note 47; CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

83. *See* Epstein, *supra* note 81, at 656 ("Advantaged interests, who knew only of political battles in legislative and executive arenas, found themselves overpowered . . . . [A]t least initially, they viewed the balancing of countervailing interests as a goal in and of itself."). Epstein also has suggested that corporations and business interests may have turned to litigation to gain favorable judicial interpretations of legislation passed by Congress between 1960 and 1980. *Id.* For a list of cases decided in the 1970s that dismayed Christian conservatives, see Dennis R. Hoover & Kevin R. den Dulk, *Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada*, 25 INT'L POL. SCI. REV. 9, 18–19 (2004).

successful," and "conservatives tried to replicate that."[84] Another said: "[A]ll these liberal litigating organizations are out there bringing citizen suits, . . . and the idea was to take a leaf from their book and start conservative litigating organizations that would bring lawsuits from their side of the spectrum."[85] The organizational counterattack began with business-oriented groups. Christian evangelicals, whose ambivalence about engaging with secular law delayed their participation in legal rights advocacy, took up the challenge soon thereafter.

B. Conservative PILFs Since 1970: A Sketch of the Field

The mobilization of conservatives to counter the influence of left legal activists began in the late 1960s with groups that claimed to speak for particular diffuse constituencies. Americans for Effective Law Enforcement, for example, was established in 1966 to provide an "'organized voice' for the law-abiding citizens"[86] and to respond to the ACLU's success in liberalizing criminal laws during the Warren Court years.[87] The National Right to Work Committee established a Legal Defense Foundation in 1968 to handle legal work tied to its opposition to compulsory unionism.[88] Catholic organizations, including the U.S. Catholic Conference, the Catholic League, and the National Right to Life Committee, began sponsoring right-to-life advocacy in the late 1960s and early 1970s.[89] The first organizations to call themselves conservative public interest law organizations, however, appeared in the mid-1970s.

An important moment in the mobilization of business constituencies behind new public interest law organizations was the publication of the "Powell Memorandum." In 1971, shortly before he was appointed to the United States Supreme Court, Lewis Powell delivered a memo to the U.S. Chamber of Commerce asserting that "[n]o thoughtful person can question that the American economic system is under broad attack."[90] He cited Ralph Nader as "[p]erhaps the single most effective antagonist of American business"[91] and argued that "the time has come—indeed, it is long overdue—for the wisdom,

84. Confidential Interview (June 2001).
85. Confidential Interview (June 2001).
86. Ams. for Effective Law Enforcement, *supra* note 21, *at* http://www.aele.org/About.html.
87. *See* EPSTEIN, *supra* note 2, at 89.
88. *See id.* at 48–49.
89. *See* den Dulk, *supra* note 17, at 44–47.
90. *Confidential Memorandum: Attack on American Free Enterprise System*, WASH. REP. SUPP., Aug. 23, 1971, at 2 [hereinafter *Confidential Memorandum*]. The anxious tone of Powell's speech echoes the concerns of conservatives in the 1890s, as described by Arnold Paul, that "the entire equilibrium of American society was being called into question." PAUL, *supra* note 22, at 232.
91. *Confidential Memorandum*, *supra* note 90, at 3.

ingenuity and resources of American business to be marshaled against those who would destroy it."[92] Powell asserted that American business had neglected to exercise significant influence in the courts, where "the most active exploiters . . . have been groups ranging in political orientation from 'liberal' to the far left."[93] He urged business to take a more aggressive stance "in all political arenas," but he asserted that "[t]he judiciary may be the most important instrument for social, economic and political change."[94]

The Powell memorandum contemplated that the U.S. Chamber of Commerce would become the primary representative of American business in the courts and agencies, and his proposal eventually led to the establishment of the National Chamber Litigation Center in 1977 as a nonprofit, tax-exempt membership organization.[95] Several years earlier, however, groups that styled themselves as conservative PILFs began to emerge with support from a few foundations and businesses.[96] In 1973, Ronald Zumbrun, an attorney who had participated in a task force convened by Chief of Staff Edwin Meese III to implement welfare reform under then California Governor Ronald Reagan,[97] worked with the California Chamber of Commerce and other government lawyers[98] to establish the Pacific Legal Foundation. By 1978, six more firms had been created under the auspices of an umbrella group, the National Legal Center for the Public Interest: the Southeastern Legal Foundation, in Atlanta;[99] Mid-America Legal Foundation, in Chicago; Gulf and Great Plains Legal Foundation (renamed Landmark Legal Foundation in the mid-1980s), in Kansas City; Mountain States Legal Foundation, in Denver; the Mid-Atlantic Legal Foundation (now the Atlantic Legal Foundation), in Philadelphia; and the Capital Legal Foundation, in Washington, D.C.[100] The late 1970s also saw the establishment of several independent conservative PILFs, including the New England

92. *Id.* at 4.
93. *Id.* at 7.
94. *Id.*
95. *See* EPSTEIN, *supra* note 2, at 59–60.
96. *See* Houck, *supra* note 2, at 1456.
97. *See* George E. Bisharat, Right Lawyers for the Right Time: The Rise of the Pacific Legal Foundation 13–14 (1998) (unpublished manuscript, on file with author).
98. *See* BRINGING JUSTICE TO THE PEOPLE: A STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT (Lee Edwards ed., 2004); Henry Weinstein, *Defending What? The Corporation's Public Interest*, JURIS DOCTOR, June 1975, at 39.
99. The Southeastern Legal Foundation is perhaps best known for filing a complaint in 1998 with the Arkansas Supreme Court Committee on Professional Conduct recommending that President Clinton be disbarred. *See A License to Revisit the Word "Is," That Will Be the Result if Clinton Keeps His Right to Practice Law*, TIME, June 5, 2000, at 47.
100. *See* James W. Singer, *Liberal Public Interest Law Firms Face Budgetary, Ideological Challenges*, 11 NAT'L J. 2052, 2056 (1979).

Legal Foundation[101] and the Washington Legal Foundation,[102] which addressed not only regulatory matters but also social issues such as capital punishment, school prayer, and abortion.[103]

Religious conservatives produced their own public interest law groups beginning in the 1970s. The Catholic League for Religious and Civil Rights was founded in 1973 to protect the rights of Catholics to participate in public life. Americans United for Life, which began as a nonsectarian educational organization in 1971, was closely allied with the Catholic Church, and in 1976 it established its Legal Defense Foundation to serve as the legal arm of the pro-life movement.[104] The first of the protestant evangelical groups to litigate was the Center for Law and Religious Freedom, established by the Christian Legal Society in 1975 to address First Amendment issues and to promote state accommodation of religious beliefs.[105]

Protestant evangelical groups initially focused primarily on defending private religious schools from government interference.[106] They did not begin to initiate litigation until the mid-1980s,[107] when they mobilized to fight abortion and to promote greater religious expression in the public sphere,[108] particularly in public schools.[109] In 1979, televangelist Jerry Falwell campaigned to persuade fundamentalists to overcome their distaste for politics and to engage with secular legal institutions.[110] In the early 1980s, evangelical leaders began urging lawyers to confront the forces that had removed prayer and Bible reading from schools and that had culminated in the Supreme Court's ruling in *Roe v. Wade*.[111] In 1980, editorials in *Christianity Today* asserted

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101. *See* O'CONNOR & EPSTEIN, *supra* note 5, at 163.

102. *See id.* at 203.

103. *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 75 (1989).

104. *See* EPSTEIN, *supra* note 2, at 94–99.

105. *See* O'CONNOR & EPSTEIN, *supra* note 5, at 51.

106. *See* Krishnan & den Dulk, *supra* note 29, at 251.

107. *See* den Dulk, *supra* note 17, at 39–42; Ivers, *supra* note 29, at 293. Only one amicus brief was filed by an evangelical organization in the Supreme Court in the period between 1971 and 1980. *See* Krishnan & den Dulk, *supra* note 29, at 247; *see also* Gustav Niebuhr, *Conservatives' New Frontier: Religious Liberty Law Firms*, N.Y. TIMES, July 8, 1995, at A1 (quoting Mathew Staver, president and general counsel of Liberty Counsel: "Once conservatives and Christians began to see that the political arena was not addressing their concerns and that their legislation was being struck down in the judicial arena, then it was time to get involved.").

108. *See* STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2002); Krishnan & den Dulk, *supra* note 29, at 249–51, 253.

109. *See* David Treadwell & Mark Landler, *Parents Win Suit to Control Pupils' Reading*, L.A. TIMES, Oct. 25, 1986, at A1.

110. *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 342 (2001).

111. 410 U.S. 113 (1973).

that evangelicals were "apathetic" in the face of the abortion rulings. "For all practical purposes, the Supreme Court has unwittingly legalized murder," one stated, and "Christians must stand up, speak out, and be counted."[112] In 1981, Francis Schaeffer published *A Christian Manifesto*, in which he decried the "shift from the Judeo-Christian basis for law" toward a "new sociological law."[113] He asked: "[W]here were the Christian lawyers during the crucial shift from forty years ago to just a few years ago? . . . [S]urely the Christian lawyers should have seen the change taking place and stood on the wall and blown the trumpets loud and clear."[114] In a conference on federalism that launched the Federalist Society for Law & Public Policy Studies in 1982, John T. Noonan, then a Berkeley law professor, noted that the pro-life movement was impaired by "an amateur, predominantly nonlegal leadership" that was "in great need of expert advice," and he urged law students to enlist in the effort to "reverse what, by every standard, is the most serious invasion of state power in our century."[115] The Christian Right began fielding their own legal advocacy organizations to translate dismay about the Supreme Court's rulings on religion and abortion into a new brand of public interest law.

New conservative and libertarian PILFs and legal advocacy groups founded during the 1980s included Christian evangelical groups such as the Rutherford Institute (1982), Home School Legal Defense Association (1983), Concerned Women for America Education and Legal Defense Foundation (1983), National Legal Foundation (1987), and Liberty Counsel (1989). They included law and order groups, such as the Criminal Justice Legal Foundation (1982) and Crime Victims Legal Advocacy Institute (1985), and libertarian organizations such as the Competitive Enterprise Institute Free-Market Legal Program (1986), Manhattan Institute's Center for Legal Policy (1986), Cato Institute's Center for Constitutional Studies (1989),[116] and Center for Individual Rights (1989). The Federalist Society for Law and Public Policy Studies, an association of conservative and libertarian lawyers, was founded in 1981 "to reorder 'priorities within the legal system to place a premium on

112. *Beyond Personal Piety*, CHRISTIANITY TODAY, Nov. 16., 1979, at 13.

113. FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 42–43 (1981).

114. *Id.* at 47.

115. John T. Noonan, Jr., *The Hatch Amendment and the New Federalism*, 6 HARV. J.L. & PUB. POL'Y 93 (1982).

116. The Competitive Enterprise Institute Free Market Legal Program, the Manhattan Institute's Center for Legal Policy, and the Cato Institute's Center for Constitutional Studies are programs within think tanks, not separate organizations.

individual liberty, traditional values and the rule of law' and to create 'a conservative network that extends to all levels of the legal community.'"[117]

Conservative and libertarian public interest organizations founded in the 1990s included the American Center for Law and Justice (1990), American Family Association Center for Law and Policy (1990), National Family Legal Foundation (1990), Institute for Justice (1991), Defenders of Property Rights (1992), Alliance Defense Fund (1993),[118] National Law Center for Children and Families (1993), Center for the Study of Popular Culture, Individual Rights Foundation (1993), Judicial Watch (1994),[119] Texas Justice Foundation (now Justice Foundation) (1994), Becket Fund (1994), Northstar Legal Center (1994), Center for Equal Opportunity (1995), Pacific Justice Institute (1997), Liberty Legal Institute (1997), Center for Individual Freedom (1998), American Civil Rights Union (1998), Claremont Institute's Center for Constitutional Jurisprudence (1999), Foundation for Individual Rights in Education (1999), and Thomas More Law Center (1999).

C. Institutional Entrepreneurship and the Founding of Conservative and Libertarian PILFs

Although the field of conservative PILFs developed in the context of a growing conservative movement and an increasing availability of foundation funding to build conservative institutions, individual lawyers were critical to the effort.[120] They initiated the enterprises, sold their ideas to members and patrons, and built programs around these organizational missions. Lawyers

117. *Judge Scalia's Cheerleaders*, N.Y. TIMES, July 23, 1986, at B6. Although the Federalist Society does not itself take stands on policy issues, it defines its mission in terms of the political commitments of its members, as "a group of conservatives and libertarians dedicated to reforming the current legal order," and it seeks to "provide[] opportunities for effective participation in the public policy process." The Federalist Soc'y, Our Background, *at* http://www.fed-soc.org/ourbackground.htm.

118. The Alliance Defense Fund does not litigate cases but serves as a clearinghouse for grants to legal advocacy groups. *See* Sara Diamond, *Watch on the Right: The Religious Right Goes to Court*, HUMANIST, May 1994, 35, 35–37.

119. Judicial Watch initially gained publicity for its suits against the Clinton Administration. *See* Harvey Berkman, *Go Ahead, Call Klayman "Litigious,"* NAT'L L.J., Nov. 25, 1996, at A11. The organization received a grant from the Sarah Scaife Foundation and assistance from conservative activist Richard Viguerie. *See* David Segal, *Pursuing Clinton Suits Him Just Fine*, WASH. POST, May 30, 1998, at A1. More recently, however, Klayman has turned his attacks on President Bush. *See* Louis Jacobson, *Turning the Tables*, 34 NAT'L J. 1946 (2002).

120. In his study of nonprofit consumer watchdog organizations, Hayagreeva Rao has noted "that resources do not preexist as pools of free-floating assets but have to be mobilized through opportunistic and collective efforts . . . ." Rao, *supra* note 30, at 913.

have played significant roles in the founding of all but a few of these conservative and libertarian PILFs.[121]

Indeed, lawyers' accounts of their roles in creating conservative lawyer groups indicate that many *viewed* themselves as institutional entrepreneurs. A lawyer who established one of the earliest conservative PILFs said that he and several other lawyers had decided that "what we need is a different type of public interest law firm, and it started a conversation," and they "took a fly at it."[122] Another explained how he had vowed to create a new kind of advocacy group committed to libertarian principles: "There [was] a role for this, there is a vital niche for this, a desperate need, an important potential."[123]

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121. As noted above, the founders of the Pacific Legal Foundation, the first of the conservative public interest law groups, were primarily lawyers. Daniel Popeo, a lawyer who served in the Nixon Administration, established the Washington Legal Foundation. *See* STEFANCIC & DELGADO, *supra* note 11, at 47. Former Moral Majority activist Michael Farris founded the Home School Legal Defense Association, *see* MITCHELL L. STEVENS, KINGDOM OF CHILDREN: CULTURE AND CONTROVERSY IN THE HOMESCHOOLING MOVEMENT 98–99 (2001), and Yale Law graduate Pat Robertson established the National Legal Foundation, *see* George Papajohn, *Town to Bear Cross in Court*, CHI. TRIB., Dec. 27, 1985, at C1, and the American Center for Law and Justice, *see* Am. Ctr. for Law and Justice, History of the ACLJ, *at* http://www.aclj.org/about/default.aspx?Section=10. Robertson also founded the Christian Coalition and Regent University. *See id.*; Donald P. Baker, *Robertson's University Denied Tax-Free Bond: Judge Affirms School's Religious Nature*, WASH. POST, July 31, 1999, at B1. Edwin Meese III, Attorney General in the Reagan Administration and now Distinguished Fellow at the Heritage Foundation, participated in founding the Pacific Legal Foundation and Crime Victims' Legal Advocacy Institute. *See* Richard Harrington, *Connie Francis' Crusade*, WASH. POST, Dec. 16, 1981, at C1. Meese also participated in founding other important institutions of the conservative movement, including the Institute for Contemporary Studies and the American Civil Rights Union. *See* Morgan, *supra* note 12; *see also* Stephen Koff, *Conservatives Propose Group to Counter ACLU*, PLAIN DEALER, Oct. 14, 1998, at 12A. Other lawyer founders include: William Bennett (Empower America); Clint Bolick and Chip Mellor (Institute for Justice); Steven Calabresi, Lee Liberman, and David McIntosh (Federalist Society); John Eastman (Center for Constitutional Jurisprudence, Claremont Institute); Peter Ferrara (American Civil Rights Union); Kevin Hasson (Becket Fund); John Howard (Individual Rights Project); Fred Inbau (Americans for Effective Law Enforcement); Sam Kazman (Competitive Enterprise Institute's Free-Market Legal Program); Manuel Klausner (Libertarian Law Council and Reason Foundation); Larry Klayman (Judicial Watch Inc.); David Llewellyn (Western Center for Law and Religious Freedom); Jordan Lorence (Northstar Legal Center); Nancie and Roger Marzulla (Defenders of Property Rights); Michael McDonald (Center for Individual Rights); Thomas Patrick Monahan (Free Speech Advocates); Joseph Morris (Lincoln Legal Foundation); Allan Parker (Texas Justice Foundation); Roger Pilon (Cato Institute's Center for Constitutional Studies); Alan Sears (Alliance Defense Fund and National Family Legal Foundation); Jay Sekulow (American Center for Law and Justice); Kelly Shackelford (Liberty Legal Institute); Robert Showers (National Law Center for Children and Families); Mathew Staver (Liberty Counsel); Leonard Theberge (National Legal Center for the Public Interest and its affiliates); and John Whitehead (The Rutherford Institute).

Some conservative legal advocacy groups established before the late 1960s also were founded by lawyers. For example, Cincinnati lawyer Charles Keating established Citizens for Decency Through Law in 1957 to pressure law enforcement officials to prosecute obscenity laws and to influence courts' handling of obscenity cases. *See* O'CONNOR & EPSTEIN, *supra* note 5, at 53–54.

122. Confidential Interview (Mar. 2002).

123. Confidential Interview (Apr. 2001).

A founder of another conservative PILF reported that he and a colleague had identified a "market niche" and had concluded that "there's a better way to do this, and we should give that a shot at some point—build a better mousetrap."[124] Another observed: "I thought there was a real need in the conservative legal community for a group that engaged in direct litigation as opposed to amicus briefs for individuals that were ignored by the traditional public interest groups like the ACLU and the NAACP."[125] One founder said that lawyers had previously pursued the "wrong provision of the Constitution" and that "if you found the right cases you might be able to win and start feeding some good law."[126] A lawyer who took a sabbatical from his private law practice to establish an organization that would help local enforcement officials prosecute pornography had believed it necessary to "pioneer some new tactics."[127] A lawyer who founded a group using money from the Legal Services Corporation characterized his efforts as "entrepreneurial,"[128] and, describing his work to establish a new civil liberties group, said: "Conservatives who believe in free speech don't give to the ACLU, you know. . . . They needed a vehicle, and so I created one to help them."[129]

D. The New Conservative Public Interest Law Groups and the Contest to Define "Public Interest Law"

This subpart considers how the field of conservative public interest law organizations developed and how the lawyers who established these groups framed their missions, recruited patrons, and defended their positions in the field. It also examines how older organizations became training sites for new institutional entrepreneurs.

1. The First Conservative PILFs

Lawyers who founded the earliest antiregulatory PILFs disputed several of the premises of the public interest law movement. The idea that PILFs represented a broad "public interest" provided an easy target for disgruntled

124. Confidential Interview (June 2001).
125. Confidential Interview (Mar. 2001).
126. Confidential Interview (Mar. 2001).
127. Confidential Interview (Oct. 2001).
128. Confidential Interview (Jan. 2002).
129. *Id.*

conservatives.[130] One lawyer interviewed for this project observed: "That was [Charles Halpern's] arrogance—to think that the liberal [perspective represented] the public interest."[131] The founder of another conservative lawyer group said that public interest organizations actually represented "extreme viewpoints."[132] The President and Director of the Capital Legal Foundation asserted:

> Despite their "public interest" motto, . . . most of these groups have a particular political ideology, a set agenda for economic, political and social change, and limited constituencies. They are, in fact, *special interest* groups and no different from any other group that attempts to lobby public opinion and garner governmental support for a particular cause. Their use of the "public interest" label is a ruse and a disguise.[133]

Daniel Popeo, founder of the Washington Legal Foundation, stated: "For too long, the Ralph Naders and the Jane Fondas of this world have had unlimited license to say what the public interest is."[134]

The more coherent justification for public interest groups of the left—that they provided access to interests that were not adequately represented in the judicial and administrative systems[135]—also drew criticism,[136] but it provided a

130. It also drew criticism from the left. *See, e.g.*, SIMON LAZARUS, THE GENTEEL POPULISTS 151–57 (1974); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 491 n.63 (1976); Leroy D. Clark, *The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 U. KAN. L. REV. 459 (1971); Robert Rabin, *Abandoning Our Illusions: An Evaluation of Alternative Approaches to Law Reform*, 27 STAN. L. REV. 191 (1974) (reviewing LAZARUS, *supra*); Rabin, *supra* note 44, at 230–31. For a critical assessment of Louis Brandeis's independence from clients and of the "notion of the public good, abstracted and definable by the uncorrupted individual rather than through the communal process of collision and interaction among individuals and groups," see Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1466 (1996).

131. Confidential Interview (Apr. 2001).

132. Confidential Interview (Mar. 2002).

133. DAN M. BURT, ABUSE OF TRUST: A REPORT ON RALPH NADER'S NETWORK 133 (1982).

134. Beth Brophy, *Defender of the Right*, FORBES, Jan. 21, 1980, at 84, 86.

135. *See* Rabin, *supra* note 44, at 230 ("The public interest lawyer, by providing representation to groups that have been unable to organize effectively to compete in the marketplace for the services of skilled advocates, has broadened the range of value advocacy."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1764 (1975) ("'Public interest' advocates . . . do not represent—and do not claim to represent—the interests of the community as a whole. Rather they espouse the position of important, widely shared (and hence 'public') interests that assertedly have not heretofore received adequate representation in the process of agency decision.").

136. *See, e.g.*, Jeremy Rabkin, *Public Interest Law: Is It Law in the 'Public Interest'?*, 8 HARV. J.L. & PUB. POL'Y 341, 342 (1985) (asserting that the idea that public interest law means representing unrepresented interests "makes little sense" because "it does little to explain why there is a significant number of 'unrepresenteds'"); Stewart, *supra* note 135, 1764–70 (arguing that resources available for the representation of "fragmented 'public' interests" are insufficient to ensure that all parties significantly affected by agency decisions receive representation and noting that public interest lawyers are not accountable to those whose interests they purport to represent); *cf.* Hegland, *supra* note 52, at 807–08

rationale for creating a new set of institutions giving voice to diffuse conservative constituencies. The procedural justification for public interest law fit the assertion of some conservatives in the 1960s and 1970s that they constituted disorganized majorities whose interests were not well represented in the courts. This argument also was essential to claims by conservative advocacy organizations that they qualified as public charities to which contributions were tax deductible under section 501(c)(3) of the Internal Revenue Code.[137] Thus, the founders of the new conservative law groups sought to adopt the rationale for public interest law to describe their own organizations' purposes. A lawyer involved in the formation of one of the first conservative PILFs observed: "[W]e decided not to become an enemy of the public interest law movement, but to become a part of [it] . . . ."[138]

The new conservative groups would be "public interest's alternate form" and would complement the work of "traditional" public interest law organizations by completing the ideological spectrum.[139] These organizations employed the inadequate representation rationale to claim new constituencies for public interest law. One founder said:

> Some groups . . . in the established movements chose the environmental field. Others chose welfare as a field. Others chose poverty law as a field, and so forth. So we staked out a claim initially to taxpayers and small businessmen and jobs creation and things like this as our field of public interest law.[140]

Raymond Momboisse, a founder of the Pacific Legal Foundation, asserted that his organization represented "the free enterprise system and the little guy."[141] Daniel Popeo said that the constituents for conservative PILFs were: "consumers, workers, unions, property owners as well as property seekers, the

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(asserting that the movement's rhetoric, which distinguishes public interest lawyers ("good guys") from other lawyers ("bad guys") undermines the goal of expanding representation to unrepresented individuals).

137. This provision, which allows for tax deductible contributions, applied to litigating organizations only if their work was "in representation of a broad public interest rather than a private interest." Rev. Proc. 71-39, § 3.01, 1971-2 C.B. 575. The organization could not receive fees for its services from clients and could receive court-awarded fees only if the prospect of the award did not substantially influence the organization's case selection. Rev. Proc. 75-13, § 3.02, 1975-1 C.B. 662; Rev. Rul. 75-76, 1975-1 C.B. 154. The objective of the guidelines appeared to be "to reserve the exemption for representation of broad public interests that cannot command representation in the traditional marketplace for legal services . . . ." Laura B. Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201, 214 (1988). The IRS has since modified these standards, primarily by setting forth procedures under which public interest law firms may accept fees for their services. Rev. Proc. 92-59, 1992-2 C.B. 411.

138. Confidential Interview (Mar. 2002).

139. Daniel J. Popeo, *Public Interest Law in the 80's*, BARRON'S, Mar. 2, 1981, at 27, 27–28.

140. Confidential Interview (Mar. 2002).

141. Singer, *supra* note 100, at 2054.

victims of crime, and the victims of unfair labor practices."[142] John Whitehead asserted that "Christians and other religious people need an advoca[cy] group that will fight for their causes, just like [sic] the ACLU fights for their[s]."[143]

The new conservative groups mimicked the conventions and tactics of the "traditional" public interest firms, but they also differed in important respects. Like their liberal counterparts, they emphasized litigation and administrative advocacy,[144] but liberal groups sought access to regulatory processes to check corporate power, while the earliest conservative groups focused primarily on countering the influence of liberal public interest advocates. One conservative founder said that his group sought to "change the psychology" of government regulators who might be tempted to adopt positions advocated by left activists to avoid lawsuits; they would show regulators that "whichever way I rule, I'm going to be sued."[145] Unlike liberal groups, which frequently participated in litigation as parties in the 1960s and 1970s,[146] conservative groups participated primarily as amicus curiae.[147] This reactive approach stood in sharp contrast to the affirmative law reform strategies of many of their adversaries. Like the liberal law groups, which relied heavily on funding from the Ford and Rockefeller Foundations,[148] the first conservative PILFs received financial support from a handful of foundations, including the John M. Olin and Sarah Scaife Foundations and the J. Howard Pew Freedom Trust.[149] Unlike their liberal counterparts, however, they also received money directly from American businesses,[150] and their projects often were determined by their donors' interests rather than by coherent and well-defined ideological commitments. Their reliance on corporate contributions also fueled suspicion that they should not qualify for charitable status;[151] under the applicable standard, public interest law groups merited such advantageous

142. Popeo, *supra* note 139, at 28.

143. JOHN W. WHITEHEAD, SLAYING DRAGONS: THE TRUTH BEHIND THE MAN WHO DEFENDED PAULA JONES 147–48 (1999) (recalling his remarks at a Christian Legal Society meeting in the mid-1970s, several years before he founded the Rutherford Institute).

144. For a discussion of the law reform model, emphasizing impact litigation, administrative advocacy, and, to a lesser extent, public education and lobbying, see HANDLER ET AL., *supra* note 2, at 31–35; Rabin, *supra* note 44, at 209–24.

145. Confidential Interview (Mar. 2002).

146. *See* EPSTEIN, *supra* note 2, at 133; Karen O'Connor & Lee Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. POL. 479, 480–82 (1983).

147. *See* O'CONNOR & EPSTEIN, *supra* note 5, at 482–84.

148. *See* Rabin, *supra* note 44, at 210–29; Joel F. Handler et al., *The Public Interest Law Industry*, *in* PUBLIC INTEREST LAW, *supra* note 1, at 42, 47.

149. *See* ARON, *supra* note 103, at 77.

150. *See id.* at 76–77; Houck, *supra* note 2, at 1455–56.

151. *See* Houck, *supra* note 2, at 1515–25.

tax treatment and the "white hat" status it conferred[152] only if they provided representation on issues where the individuals or groups involved lacked "a sufficient economic interest to warrant the utilization of private counsel."[153] While many liberal PILFs developed highly specialized expertise, which enabled them to monitor important developments and to compete with the most able adversaries in private practice, the first conservative PILFs generally did not do so. In contrast to their liberal adversaries, which were concentrated in Washington, D.C., most of the earliest conservative foundations were located outside D.C.—for example, in Sacramento, Atlanta, Kansas City, Denver, Philadelphia, and Chicago,[154] far removed from the site of most federal policymaking.

PILFs of the right were sufficiently similar to PILFs of the left to give them similar rhetorical high ground. By embracing the organizational form, purpose, and rhetoric of the public interest movement, conservative groups engaged in a form of "legitimacy politics" with their liberal adversaries.[155] Public interest lawyers enjoyed exalted status in law schools and elite law firms in the 1970s.[156] Conservative groups attempted to turn the luster of this new practice model to their advantage. The "frames" of PILFs—theories about how the form would correct the failings of pluralism—would help conservatives shape public perception of these new groups as appropriate and valid.

In the first few years of the conservative PILFs' existence, conservative and liberal groups exchanged fire about the legitimacy of each other's claims to serve the public interest. Leaders of some conservative groups asserted that their public interest claim was superior to those of their liberal counterparts because their constituencies were broader. One founder said that his group's reliance on corporate funding and individual donations was a virtue: "We . . . put ourselves in the position of being able to say you now, if you can't

152. *Id.* at 1429–30.

153. Rev. Rul. 75-76, 1975-1 C.B. 154.

154. The divergence in geographic focus of conservative and liberal groups may have narrowed since the 1970s. In her 1983–1984 survey of public interest law centers, Aron found that 62 percent were headquartered in the Northeast, primarily in Washington, D.C. and New York. The proportion of groups centered in Washington, D.C. had fallen from 44 percent in 1975 to 29 percent in 1983–1984. ARON, *supra* note 103, at 31. Our study of lawyers representing selected conservative and libertarian organizations found that 37 percent of the most active conservative and libertarian lawyers were located in Washington, D.C. Heinz et al., *supra* note 26, at 31. We also identified substantial differences in lawyers' geographic location by types of constituencies served. Lawyers who represented business groups and "mediators"—organizations that bridged the various constituencies—were heavily concentrated in D.C., while lawyers for social conservative groups were located primarily in Virginia, the West, and the Midwest. *Id.*

155. *See* Stryker, *supra* note 40.

156. *See* Dezalay & Garth, *supra* note 26, at 357.

sell your program to the public, you probably aren't truly a public interest organization."[157] From the left, critics argued that conservative PILFs represented the interests of groups that already dominated American politics. Ralph Nader spoke for many critics when he asserted that conservative PILFs were "agents of corporations and not public interest law firms."[158] One attorney for Public Advocates quipped that "[t]he Pacific Legal Foundation is a public-interest law firm in the same way that catsup is a vegetable under Reagan's new school lunch guidelines."[159]

Within the conservative movement, several influential critics suggested that conservative PILFs established in the 1970s had adopted the form of liberal PILFs without grasping why those groups succeeded. One critic, Michael Horowitz,[160] a lawyer who later served as General Counsel to the Office of Management and Budget in the Reagan Administration, persuaded the Scaife Foundation in the late 1970s to finance a study of conservative public interest groups. His scathing report asserted that "advocates for and members of the traditional public interest law movement have largely isolated their conservative counterparts as hyphenated 'public-interest' pretenders."[161] He predicted that "the conservative public interest movement will make no substantial mark on the American legal profession or American life as long as it is seen as and is in fact the adjunct of a business community possessed of sufficient resources to afford its own legal representation."[162] Horowitz argued that the existing conservative PILFs were parochial, overly dependent upon business patrons, focused excessively on litigation—particularly filing amicus briefs—and, for the most part, staffed by "appallingly mediocre" lawyers.[163] He decried their failure to cultivate relationships with academics and elite law schools.[164] Horowitz urged conservative foundations to withdraw support from most of the existing groups[165] and to invest in

157. Confidential Interview (Mar. 2002).

158. *See* Nancy Blodgett, *The Ralph Naders of the Right*, A.B.A. J., May 1984, at 71.

159. Paul C. Gerber, *The Pacific Legal Foundation: Its Goal Is Deregulation*, CAL. LAW., Nov. 1981, at 26, 28 (quoting Robert L. Gnaizda, Senior Attorney, Public Advocates, Inc. of San Francisco, California (quoted in Houck, *supra* note 2, at 1544 n.684)).

160. Horowitz is now a Senior Fellow at the Hudson Institute. *See* Hudson Inst., Michael Horowitz, *at* http://www.hudson.org/learn/index.cfm?fuseaction=staff_bio&eid=HoroMich.

161. Horowitz, *supra* note 3, at 1.

162. *Id.* at 2.

163. *Id.* at 54 ("[A] principal basis for the success of many traditional public interest firms has been the intelligence, ambition and, indeed, the very brilliance of their directors and staff.").

164. *Id.* at 60.

165. The report exempted the Pacific Legal Foundation and Mountain States Legal Foundation from many of its criticisms, but not from its charge that conservative public interest firms had failed to be "where the action is"—Washington, D.C. *Id.* at 72–74.

organizations that would replicate the strategic choices of liberal public interest law firms and build intellectual and moral content into their programs.[166]

Horowitz argued that challenging the left's definition of public interest practice was critical to the effort: "[W]hat is at stake in public interest law is not so much a battle over cases won and lost as of ideas and ideologies . . . ."[167] He asserted that conservative public interest firms "[have] had essentially no impact on the still-prevailing notions of law students and young attorneys that their career options are largely restricted to serving the public interest (i.e., enhancing governmental power) or 'selling out' (i.e., working for a private law firm and its private sector clients)."[168] He urged conservative foundations to support groups that made plausible claims to speak for unrepresented interests, built relationships with law schools and bar associations, and recruited talented young attorneys. The latter goal, he argued, was particularly important:

> Only when the staffs at conservative public interest law firms are comprised of law review editors, former law clerks and, in no small part, of alumni of national law schools, will the movement be in a position to initiate and participate in a real dialogue and in a truly national competition as to which legal policies and ideologies are truly "in the public interest."[169]

Several activists interviewed for this research argued that the earliest conservative PILFs had misunderstood the reasons for liberal groups' success. They had failed to appreciate the importance of developing specialized expertise, participating in advocacy in all fora through which law is made and shaped—including legislatures, agencies, and the press as well as the courts—and seeking to mold the terms of debate by initiating and not just defending claims. One observed that the first groups had "made a number of really big mistakes" that rested "on a really basic misunderstanding about how these firms on the liberal side actually worked."[170]

> One of the fundamental mistakes was to think that Ralph Nader was successful because he was a gas-bag and had an opinion about everything. And that's of course not true. If you look at the Naderite institutions or at the environmental law firms, they know exactly what they're doing. So, it's much better to have a very highly specialized

166. This prescription echoed themes that Irving Kristol advanced in *The Public Interest* and *The Wall Street Journal*—that corporate philanthropy needed to invest in intellectual firepower if it hoped to influence public policy. *See* Easterbrook, *supra* note 26, at 67.

167. Horowitz, *supra* note 3, at 2.

168. *Id.* at 6.

169. *Id.* at 54–55.

170. Confidential Interview (June 2001).

> center for auto safety that does nothing but auto safety than to have sort of Liberalism Incorporated or Liberal Lawyers Incorporated. And what the conservative firms had all done at the outset was not to specialize but to sort of agitate for conservative nostrums.[171]

He asserted that conservatives were wrong to have viewed liberal public interest lawyers as "mavericks who were somewhat isolated from American politics and . . . got in court what they couldn't get in Congress."[172] Liberals had succeeded, in part, because Congress and the courts worked in tandem to defend federal mandates: "[T]hese groups in effect act as the monitors and deputies of the congressional committees that run this stuff, and vice versa."[173] Conservative groups had to take a different approach, to "look around for niches in legal system where you can in fact operate, where the legal environment is relatively favorable for you, and where you don't depend on the good graces of Ed Muskie and Henry Waxman to make your gains."[174] Another person interviewed for this project argued that conservatives had failed to appreciate the importance of playing insider politics. He said of Charles Halpern of the Center on Law and Social Policy:

> [His] brilliant insight was—he had been working for Arnold & Porter and he saw lawyers there every day reading the Federal Register on behalf of private interests—and he wanted guys to do the same on behalf of the public interest. . . . Here were all these conservative public interest law firms that didn't want Washington to be the source and center of all power and decision making. So they were setting up public interest law firms around the country. . . . That's insane. You've got to come to Washington. That's where decisions are made. The real thing that makes things happen is not the lawsuit you file, not the formal meeting you schedule when you fly in from Kansas City, but the brown bag lunches that the Environmental Defense Fund was having with the head of EPA, the informal calls, the personal links . . . , being known to and feeling free to call and being a source for newspaper reporters . . . . If you're way the hell out there in Sacramento, it's meaningless. The liberal groups never made that mistake.[175]

171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* In his view, this meant that conservatives should "go to constitutional litigation and not fight over the niceties of the Clean Air Act."
175. Confidential Interview (Apr. 2001).

2. Second-Generation Conservative PILFs

Although the first conservative PILFs failed to replicate the most successful of the liberal PILFs, they initially faced little competition from within the conservative movement. A lawyer for one of these groups observed, "[W]e were the only public interest law firm that was philosophically other than liberal to radical, which left us all the room we needed."[176] As the field became more specialized, however, conservative public interest firms faced challenges from conservative critics. They also faced competition from newer groups that disputed the older organizations' commitment to principle and failure to adopt specialized and proactive strategies. The founders of the new challengers typically came from older organizations.

In the 1980s, conservative philanthropists withdrew support for many conservative antiregulatory groups established in the mid-1970s[177] and invested in organizations that more closely resembled their most successful liberal opponents. They supported long-term strategies, including large intellectual projects,[178] research designed to map detailed litigation campaigns,[179] and efforts to appoint judges sympathetic to the goals of reducing economic regulation and allowing greater governmental accommodation of religion.[180] Many PILF founders interviewed for this research recounted how

176. Confidential Interview (Mar. 2002).

177. *See* ARON, *supra* note 103, at 78 (referring to the organizations' financial problems); Confidential Interview (June 2001) ("There was this sort of sense of crisis . . . . The donors thought they hadn't gotten their money's worth, and a lot of these conservative firms had hit the skids.").

178. *See* Easterbrook, *supra* note 26, at 80 (describing the conservative movement's investment in think tanks to advance and refine conservative ideas); Joanne Omang, *The Heritage Report: Getting the Government Right With Reagan*, WASH. POST, Nov. 16, 1980, at A6 (reporting on the release of the Heritage Foundation's $100,000 study, a 3000 page *Mandate for Leadership*, which Heritage Foundation president Edwin Feulner described as a "blueprint for the construction of a conservative government").

179. One person interviewed for this research observed:

> [T]he success of conservative movement politics has depended in very large measure on intellectuals and importantly on the donors' ability to comprehend that point. And not immediately look for . . . "What's the payoff two years down the road?" but "Is this an important thing?" The Manhattan Institute is the best example of that. All it did, initially, at least, was find Wally Olson, find Peter Huber, and [Charles Murray]. Just let them write.

Confidential Interview (June 2001). For a discussion of the more general phenomenon of conservative policy-research institutions' employment of writers to produce books and periodicals designed to influence public policy, see Allen, *supra* note 27, at 102–06.

180. *See* DUXBURY, *supra* note 16, at 358 (regarding the goal of reducing economic regulation); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 285–345 (1997); Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 318–30 (1989). The Horowitz Report had urged conservatives to play greater roles in judicial selection. Horowitz, *supra* note 3, at 75 (noting the "absence of any input on the part of the conservative movement in the critical judicial selection process").

they had secured funding to write books, to commission scholars to develop litigation blueprints,[181] and to establish legal centers to implement strategies outlined in their written work.[182]

Conservative foundations coordinated their investments in lawyer groups to maximize their impact. Several particularly influential grant directors—Michael Joyce for the Olin Foundation,[183] Richard Larry for the Sarah Scaife Foundation, and Leslie Lenkowsky for the Smith Richardson Foundation—were the principal architects of this cooperation.[184] One long-time lawyer activist said:

> There were some visionaries on the philanthropic side. . . . They knew what the other groups were doing and they were not isolated mosaic tiles . . . They pulled back to see the big picture. If you only have five philanthropies and you know that each one is giving $50,000 to one group, then you expect more from that group and so on and so forth. So they were . . . farsighted in trying to pick winners and losers and trying to give money where they thought it would do some good.[185]

One of the most successful ventures promoted by conservative foundations in the 1980s was the Federalist Society, an association of conservative and libertarian lawyers "dedicated to reforming the current legal order."[186] The Federalist Society has played an important part in nurturing the political commitments of conservative and libertarian lawyers, helping them network with one another, and facilitating their involvement in legal advocacy for

181. Confidential Interview (Apr. 2001).

182. *E.g.*, Confidential Interview (June 2001) (describing how the interviewee had obtained support to write publications targeted to an audience of "about 500 people who think about these things seriously and carefully" with the hope that "over time, this stuff will sort of percolate and eventually resonate"); Confidential Interview (Mar. 2001) (lawyer noted that a speech he gave in 1981 had spawned a conference, a book, an ABA program, a Federalist Society panel, and eventually the institution he now runs: "[Y]ou see from these little seeds you get trees eventually, and you get to change in the terms of the debate"); Confidential Interview (Mar. 2001) (lawyer who had written a book setting forth his law reform vision met a foundation director who asked him: "How would I like to put my book into practice, which was exactly the invitation I was hoping someone would give me some day."); Confidential Interview (June 2001) (lawyer reported that he approached the director of a think tank and said: "I've been thinking about setting up a center for [his area of legal expertise]," and that the foundation director responded: "Funny, I've been thinking about the same thing. . . . Why don't you draft me a proposal.").

183. Joyce later became executive director of the Bradley Foundation. *See* Howell, *supra* note 26, at 702.

184. *See* Easterbrook, *supra* note 26, at 277 (quoting Michael Horowitz, who asserted that these three "understood that just by funding a few writers and a few chairs they could make a breakthrough").

185. Confidential Interview (Sept. 2002).

186. Federalist Soc'y, Our Purpose, *at* http://www.fed-soc.org/ourpurpose.htm.

conservative and libertarian causes.[187] It began as a small debating society launched in 1981 by several Yale law students, including Steven Calabresi, with encouragement from Ralph Winter and Robert Bork, who were Yale law professors at the time.[188] The same year, two of Calabresi's friends from Yale College, Lee Liberman[189] and David McIntosh, established a chapter at the University of Chicago Law School, with Antonin Scalia, then a member of the faculty, as their adviser, and professors Richard Epstein, Richard Posner, and Frank Easterbrook providing support.[190] The two chapters convened a symposium on federalism in the spring of 1982, with money raised from the Institute for Educational Affairs (on whose board Irving Kristol served),[191] the Olin Foundation, and the Intercollegiate Studies Institute.[192] The national organization grew out of that conference, with the Olin Foundation funding a Federalist Society speakers bureau and helping the organization establish chapters at other law schools.[193] The *Harvard Journal of Law & Public Policy*, launched by Spencer Abraham and Steven J. Eberhard in 1978,[194] became the Federalist Society's official publication. The preface to the first symposium issue indicated that the Federalist Society would serve as a forum for alternative visions of the legal profession's proper role:

> 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, at a time when the legal profession's largest lobbying group pushes on with its statist agenda, the Federalists met—and proclaimed the virtues of individual freedom and of limited government.[195]

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187. *See* Rex Bossert, *Conservative Forum Is a Quiet Power: ABA Watchdog*, NAT'L L.J., Sept. 8, 1997, at A1.

188. *See* Jill Abramson, *Right Place at the Right Time*, AM. LAW., June 1986, at 99–100.

189. Lee Liberman now goes by Lee Liberman Otis and serves as General Counsel, U.S. Department of Energy. *See* Al Kamen, *On the Bench, Room on the Right?*, WASH. POST, Oct. 31, 2003, at A23.

190. Abramson, *supra* note 188, at 101.

191. *See* Sidney Blumenthal, *Quest for Lasting Power: A New Generation Is Being Nurtured to Carry the Banner for the Right*, WASH. POST, Sept. 25, 1985, at A1.

192. *Acknowledgments*, 6 HARV. J.L. & PUB. POL'Y, at vii (1982).

193. *Id.*

194. *See* Robert Schlesinger, *An Energy Chief Fueled by Intellect*, BOSTON GLOBE, May 17, 2001, at A21; *see also* 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 (2002).

195. *Preface*, 6 HARV. J.L. & PUB. POL'Y, at iii, iii–iv (1982). Speakers for the first Federalist Society Symposium included: Harvard law professor Charles Fried, who later served as Solicitor General of the United States from 1985 to 1989; Theodore Olson, then Assistant Attorney General, Office of Legal Counsel, Department of Justice, U.S. Solicitor General from 2001 to 2004, and now a partner, Gibson, Dunn & Crutcher; Antonin Scalia, then University of Chicago law professor, later D.C. Circuit judge, and now U.S. Supreme Court Justice; University of Texas law professor Lino Graglia; Richard Posner, Seventh Circuit Court of Appeals judge; Harvard University law professor Paul M. Bator, who later served as Deputy Solicitor General from 1982 to 1985; Berkeley law

The organization sought to appeal to lawyers from all strands of the conservative movement and to promote an alternative model of how lawyers might serve the public interest.[196]

Conservative PILFs established in the late 1980s and 1990s sought to distinguish themselves from their predecessors by showing that they had better developed agendas and more plausible claims to represent underrepresented constituencies. While most of the first conservative PILFs focused primarily on filing amicus briefs, many of the newer groups sponsored cases and thereby acquired greater control over fundamental strategic concerns such as selecting clients, developing the factual record, and framing issues on appeal.[197] They also borrowed some liberal PILFs' practice of recruiting big firm lawyers to handle their cases pro bono.[198]

Although many founders of conservative PILFs expressed antipathy toward liberal public interest lawyers, some founders of the newer groups emphasized their debts to the "traditional" public interest law movement. A lawyer for one group said: "[W]e owe our success to the pioneering work that was done by a variety of organizations, starting most notably and obviously, of course, with the NAACP and ACLU, through Nader . . . ."[199] A lawyer for an activist think tank said that the founder of his organization "model[ed] it on several environmental groups, which he saw as having succeeded in bringing various types of specialties under one roof."[200] Another said that his

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professor John T. Noonan, Jr., now Ninth Circuit Court of Appeals judge; Michael McConnell, then Assistant General Counsel to the Office of Management and Budget, later University of Chicago law professor, University of Utah law professor, and now Tenth Circuit Court of Appeals judge; and Yale law professor Ralph Winter, now Second Circuit Court of Appeals judge. *Id.* at iii–iv.

196. Federalist Soc'y, *supra* note 186. The Federalist Society's mission statement says that it is:

> [A] group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.
>
> The Society both seeks to promote an awareness of these principles and to further their application through its activities. This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, and law professors.

Id. The Federalist Society's Executive Director, Eugene Meyer, is the son of Frank Meyer, who in the 1950s tried to unite libertarians and traditionalists around "fusionism"—a synthesis of ideas about freedom and moral authority. *See* GOTTFRIED, *supra* note 19, at 16–17.

197. *See* Ivers, *supra* note 29, at 294.

198. For discussions of how the ACLU and Lawyers' Committee for Civil Rights Under Law used this cooperating attorney model, see HANDLER ET AL., *supra* note 2, at 27–29; Rabin, *supra*, note 44, at 217.

199. Confidential Interview (Apr. 2001).

200. Confidential Interview (June 2001).

organization's practice of "having a blueprint and really thinking it through before we do it and then sticking with that area of law over a long period of time" was "patterned after the NAACP Legal Defense Fund very, very consciously."[201] A social conservative who founded a religious liberties group in the early 1990s asserted that "traditionalists" only recently have taken the offensive in proposing favorable constitutional doctrine and that "ACLU groups" had been doing that for decades and "are much better at it."[202] Larry Klayman, the founder, chief executive and general counsel of Judicial Watch, observed that he had "talked with Nader's people" about how they were structured and tried to emulate Nader's tactics.[203] Jay Sekulow has expressed admiration for the methods and accomplishments of Thurgood Marshall.[204]

As the field of conservative public interest organizations became more specialized, groups and their leaders struggled to differentiate themselves and to compete in the market for patrons, credit, and influence. Lawyers interviewed for this research generally were keenly aware of their organizations' positions in the constellation of conservative advocacy groups and able to describe their own distinctive strengths. One lawyer observed that it is no longer possible to raise money with a general fundraising pitch:

> In . . . the early days of direct mail and in the early days of going to foundations, we could get general operations grants for a broad program statement. I think it is harder and harder to do that these days. . . . You really have to have a pretty well-defined product to sell, and I think that is what has driven the formation of a lot of these new groups. They have to have a pretty clearly defined product so that they can find their niche in the market.[205]

This competition for resources has provoked infighting among similar groups and has led conservative movement leaders to try to suppress conflict. One lawyer described struggles among some of the earliest antiregulatory public interest groups:

> Back in the 70s, conservatives were at war with each other. The Heritage Foundation came along, and their goal was peace, and they accomplished it. . . . [A]t one time your greatest enemies were within your philosophical spectrum, not without, and that's no longer the case. . . . Ed Feulner [one of the founders of the Heritage Foundation]

201. Confidential Interview (Mar. 2001).
202. Confidential Interview (Nov. 2001).
203. David Keene, *Clinton-basher Klayman Targets Bush, GOP*, THE HILL, Apr. 18, 2001.
204. *See* Marc Fisher, *Unlikely Crusaders: Jay Sekulow, 'Messianic Jew' of the Christian Right*, WASH. POST, Oct. 21, 1997, at D1 (reporting that Jay Sekulow "worships the methods and legacy of Thurgood Marshall").
205. Confidential Interview (Mar. 2002).

> put pressure on groups, using the resources available to him: people, powerful people, board members, what have you, just said, "This is going to stop."[206]

Several lawyers for religious liberties organizations spoke of intense competition among Christian groups (one described it as "internecine warfare" and another called it "the dark side of the right-wing evangelical movement")—a rivalry that led national religious leaders to create the Alliance Defense Fund, an organization that would suppress factional fighting by channeling foundation money to cooperating organizations.[207] The Federalist Society also has attempted to reduce tension across conservative and libertarian constituencies by working to "creat[e] a conservative and libertarian intellectual network that extends to all levels of the legal community."[208]

While leaders of the conservative movement may have limited the amount of infighting predicted by Salisbury's exchange theory by cajoling and pressuring leaders of rival groups to cooperate, competition for resources and recognition continues. A lawyer who tried to account for tension among some religious liberty groups observed: "I think what drives that antagonism is economics, because they perceive themselves all to have fishing lines in a small pond. Maybe when somebody else drops a line in there, everybody's got to move over and . . . everybody gets fewer fish."[209] Another lawyer said of the property rights groups, "we like to compete. We all want to be out there getting the biggest cases, the most important cases, the cases where we think we can do the most good."[210] A lawyer who works on affirmative action described disputes among libertarian groups about funding and credit for litigation successes: "There's not a lot of incentive for them to work

206. Confidential Interview (Nov. 2001). The Heritage Foundation attempts to promote cooperation by convening regular meetings of lawyers for conservative and libertarian groups, *see* Robin Toner, *Conservatives Savor Their Role as Insiders at the White House*, N.Y. TIMES, Mar. 19, 2001, at A1, and by supplying selective benefits to cooperating organizations, including regular briefings on breaking developments and moot court sessions judged by experienced appellate litigators to prepare PILF lawyers for Supreme Court appearances, Confidential Interview (Nov. 2001).

207. A lawyer for one religious group explained, "What ADF said was, we want a coordinated effort. We want you all singing from the same sheet of music." Confidential Interview (Nov. 2001). The religious leaders that founded the Alliance Defense Fund included Dr. James Dobson of Focus on the Family, Dr. Bill Bright of Campus Crusade for Christ, and Dr. D. James Kennedy of Coral Ridge Ministries. *See* Alliance Def. Fund, About Our Founders, *at* http://www.alliancedefensefund.org/about/default.aspx?mid=121.

208. Federalist Soc'y, *supra* note 186. For an analysis of whether the Federalist Society promotes communication among conservative and libertarian lawyers, see Anthony Paik et al., Networks of Collective Practice Among Notable Conservative Lawyers (unpublished manuscript, on file with author).

209. Confidential Interview (Oct. 2001).

210. Confidential Interview (Mar. 2002).

together."[211] Several lawyers described competition among groups to control the creation of precedent in their issue areas.[212]

Consistent with Salisbury's observations, the lawyers who launched and maintained the newer, more specialized groups often came from older organizations. The founders of the Center for Individual Rights, for example, had previously worked together at the Washington Legal Foundation.[213] The creators of the Institute for Justice had served at the Mountain States Legal Foundation;[214] one also had directed the Pacific Research Institute and the other had launched the Washington, D.C. office of the Landmark Legal Foundation.[215] John Whitehead worked at the Christian Legal Society before founding the Rutherford Institute,[216] and Michael Farris, the founder of the Home School Legal Defense Association, was formerly general counsel of Concerned Women for America Legal Defense Foundation.[217] Alan Sears, President and General Counsel of the Alliance Defense Fund, previously ran Citizens for Decency through Law and later the National Family Legal Foundation.[218] Thomas Jipping, who headed the Judicial Selection Monitoring Project for the Free Congress Foundation, moved to Concerned Women for America to run their "campaign for judicial nominees."[219] The general counsel of the Competitive Enterprise Institute previously served as a staff attorney at the Pacific Legal Foundation.[220] The chief counsel for the American Center for Law and Justice previously worked for Christian

211. Confidential Interview (Sept. 2002).

212. *E.g.*, Confidential Interview (Oct. 2001); Confidential Interview (Dec. 2001); *see also* Arthur Santana, *Pro-Gun Groups Split on Tactics: Cato Institute, NRA Quarrel Over Challenges to D.C. Law*, WASH. POST, July 21, 2003, at B5 (describing a dispute between the National Rifle Association and the Cato Institute over control of litigation challenging the District of Columbia's handgun ban); Pam Smith, *Uneasy Alliance*, RECORDER, Mar. 4, 2004, at 1 (describing the consolidation of two cases brought by the Alliance Defense Fund and the Liberty Counsel to invalidate San Francisco's gay marriages and a possible struggle for control of the litigation agenda).

213. *See Beachhead for Conservatism*, NAT'L L.J., Dec. 27, 1999–Jan. 3, 2000, at A11.

214. *See* Steven A. Holmes, *Political Right's Point Man on Race*, N.Y. TIMES, Nov. 16, 1997, at A24.

215. *See* William H. Mellor & Clint Bolick, Heritage Lecture 342: The Quest for Justice: Natural Rights and the Future of Public Interest Law (Sept. 10, 1991), *available at* http://www.ij.org/profile/speech.html.

216. *See* WHITEHEAD, *supra* note 143, at 147–49.

217. *See* Dudley Clendinen, *Conservative Christians Again Take Issue of Religion in Schools to Courts*, N.Y. TIMES, Feb. 28, 1986, at A19.

218. *See* Anthony R. Lovett, *Naked Brunch: Bad Vibes and Ugly Food at an Antiporn Seminar*, PLAYBOY, June 1992, at 46.

219. Tanya L. Green, *Democrats Continue Killing Bush's Judicial Nominations*, CONCERNED WOMEN FOR AM. LEGAL STUD., Sept. 6, 2002, *at* http://www.cwfa.org/articledisplay.asp?id=1818&department=legal&categoryid=misc.

220. *See* David B. Ottaway & Warren Brown, *From Life Saver to Fatal Threat: How the U.S., Automakers and a Safety Device Failed*, WASH. POST, June 1, 1997, at A1.

Advocates Serving Evangelism,[221] and the director of the National Legal Center for Children and Families was employed by Citizens for Decency Through Law.[222] The Center for Equal Opportunity's general counsel came from the National Legal Center for the Public Interest.[223] Liberty Legal Institute was founded by a regional coordinator for the Rutherford Institute.[224] Conservative advocacy organizations, then, appear to be important sites for socializing and recruiting new institutional entrepreneurs.

The field of conservative public interest law is now quite well developed, with distinct constituencies of conservatives represented by different organizations and lawyers.[225] An attorney who has participated in conservative public interest law since the mid-1970s said: "We've seen a lot more groups form . . . around much narrower interests."[226] Where there once were a few regional conservative organizations representing the business perspective on regulatory matters, there now are dozens of groups, including some libertarian organizations that attempt to distance themselves from large business interests. The views of Christian evangelicals, which in the 1980s found expression primarily through the Christian Legal Society and the Rutherford Institute, are now advocated by many more groups representing much more particular interests, differentiated along theological lines and by issue.[227] In addition to the groups that were established in the 1970s, there now are specialized legal advocacy groups focusing on affirmative action, home schooling, pornography, property rights, school vouchers, tort reform, and gun ownership. Organizations also distinguish themselves from one another according to the types of strategies pursued—for example, direct representation versus amicus participation, grassroots activism versus insider networking, and research targeted at Congress and the media versus scholarly publications directed primarily at professors and judges.

221. *See* Ken Foskett, *Religion to the Rescue: Lawyer Rides Fundamentalist Tide From Ruin to Riches*, ATLANTA J. & CONST., Nov. 5, 1991, at D1.

222. *See* Lynn O'Shaughnessy, *Boycott Aimed at Stores With X-Rated Films*, L.A. TIMES, July 12, 1987, at 1.

223. *See* W. John Moore, *Collision Course*, 26 NAT'L J. 2830 (1994).

224. *See* Liberty Legal Inst., Biographies, *at* http://www.libertylegal.org/bio.htm.

225. We have examined relationships among these lawyers and the organizations they serve and the implications of those relationships for cohesion within the American conservative movement. *See* Heinz et al., *supra* note 26.

226. Confidential Interview (Mar. 2002).

227. Confidential Interview (Dec. 2001).

Conservative and libertarian PILFs sometimes oppose one another[228] and occasionally even form alliances with liberal PILFs.[229]

II. THE CHANGED FACE OF PUBLIC INTEREST PRACTICE

During the past three decades, as conservatives have deployed an organizational model born of liberal legal activism to pursue different social and political goals, they have unsettled conventions and assumptions about public interest practice, increased competition in the courts, agencies, and legislatures, and gained the upper hand in public policy debates.[230]

This change in the composition and meaning of public interest practice resulted from a process of adaptive institution building by conservatives and libertarians. The creation of conservative PILFs to compete with liberal PILFs has altered the politics of public interest practice by eliminating the equation between public interest law and liberal politics and by dramatically increasing the number and diversity of nonprofit organizations that seek to influence public policy making.

In the late 1960s, the public interest law movement was almost synonymous with left legal activism. Today dozens of conservative and libertarian organizations call themselves "public interest law" groups.[231] The Institute

228. In *Lawrence v. Texas*, 539 U.S. 558 (2003), for example, a challenge to a Texas antisodomy statute, the Cato Institute and the Institute for Justice filed briefs in support of the plaintiffs' challenge and were opposed by more than a dozen conservative advocacy groups. *See infra* note 258.

229. In *Hill v. Colorado*, 530 U.S. 703 (2000), for example, the ACLU sided with the American Center for Law and Justice in a challenge to a Colorado statute prohibiting anyone within one hundred feet of a health care facility's entrance to approach within eight feet of another person, without that person's consent, to pass a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling, with that person. In *Keller v. State Bar of California*, 496 U.S. 1 (1990), the ACLU joined the Pacific Legal Foundation in a First Amendment challenge to the use of mandatory fees to support political activities unrelated to regulating the profession or improving the quality of legal services.

230. In her study of how women's voluntary associations became a significant political force in late nineteenth and early twentieth centuries in the United States, Elisabeth Clemens observes that "when deployed in novel ways by unfamiliar groups, even the most familiar organizational models can have unsettling consequences for political institutions." Clemens, *supra* note 38, at 758. She further notes that "the adoption of a particular organizational form influences the ties that an organized group forms with other organizations" and "shapes . . . relations with political institutions." *Id.* at 771. "Once an organizational form is viewed as being simultaneously a statement of identity and constitutive of broader institutional fields, social movements appear as not only vehicles of preexisting interests and causes of specific political outcomes, but as critical sources of institutional change." *Id.*

231. The charitable status of some of these organizations may be questionable under the "broad public interest" and commercial infeasibility criteria of the governing IRS guidelines. Most of the groups listed in the Appendix, however, appear to meet these broad requirements, which have never been well defined and whose application to groups representing consumers, women, and environmentalists long ago undercut any notion that only groups serving the poor or powerless should qualify. This Article does not attempt to assess whether the agendas of any particular groups described here serve the private interests of their patrons and thus disqualify them from 501(c)(3) status.

for Justice, for example, describes itself as "the nation's premier libertarian public interest law firm" whose mission is to "preserv[e] freedom of opportunity and challeng[e] government's control over our lives."[232] The Washington Legal Foundation claims to be "the nation's preeminent center for public interest law, advocating free-enterprise principles, responsible government, property rights, a strong national security and defense, and balanced civil and criminal justice system."[233] Pat Robertson's American Center for Law and Justice asserts that it is "this nation's preeminent public interest law firm" dedicated "to defending and advancing religious liberty, the sanctity of human life, and the two-parent, marriage-bound family."[234] The Criminal Justice Legal Foundation calls itself "a nonprofit public interest law organization dedicated to restoring a balance between the rights of crime victims and the criminally accused,"[235] and Defenders of Property Rights claims to be "the nation's only national public interest legal foundation dedicated exclusively to property rights protection."[236] In a new book on

232. Inst. for Justice, Cases, *at* http://www.ij.org/cases/index.html.

233. Wash. Legal Found., Resources: WLF Mission, *at* http://www.wlf.org/Resources/WLFMission.

234. Am. Ctr. for Law & Justice, About ACLJ, *at* http://www.aclj.org/about/default.aspx.

235. Criminal Justice Legal Found., About CJLF, *at* http://www.cjlf.org/infomain.htm.

236. Frontiers of Freedom Press Briefing (Jan. 23, 2004), *available at* http://www.fnsg.com. Other conservative and libertarian groups that describe themselves as PILFs, or as legal advocacy organizations engaged in public interest litigation, include: Atlantic Legal Foundation, Homepage, *at* http://www.atlanticlegal.org ("Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm whose mission is to advance the rule of law by advocating limited, effective government, free enterprise, individual liberty and sound science."); Center for Constitutional Jurisprudence, Claremont Institute, Projects, *at* http://www.claremont.org/projects ("The Claremont Institute formed the Center for Constitutional Jurisprudence, a public interest law firm, in order to further its mission through strategic litigation."); Center for Individual Rights, Fighting for Individual Rights, *at* http://www.cir-usa.org/history.html ("CIR marked an attempt to duplicate the success of liberal public interest law firms in the conservative public interest realm"); Community Defense Counsel, Homepage, *at* http://www.communitydefense.org; Landmark Legal Foundation, Homepage, *at* http://www.landmarklegal.org (describing the organization as a public interest law firm dedicated to preserving "America's founding principles of individual liberty, free enterprise and limited government"); Mountain States Legal Foundation, MSLF Action, *at* http://www.mountainstateslegal.org/mission.cfm ("MSLF undertakes nationally significant public interest litigation" to "(1) . . . ensure that the law is applied in accordance with the requirements of the Constitution and the intent of Congress, that is, the rule of law; and (2) to change public attitudes regarding important matters of public policy."); National Federation of Independent Business Legal Foundation, *supra* note 21, *at* http://www.nfib.com/page/legalFoundation.html ("The NFIB Legal Foundation, a 501(c)(3), tax-exempt public-interest law firm . . . protects the rights of America's small- and independent-business owners by ensuring that the voice of small business is heard in the nation's courts and by providing small businesses with important legal resources."); National Legal Foundation, About the NLF, *at* http://www.nlf.net/About.html ("The National Legal Foundation is a Christian public interest law firm dedicated to the preservation of America's freedom and constitutional rights."); New England Legal Foundation, Homepage, *at* http://www.nelfonline.org ("The New England Legal Foundation is a not-for-profit public interest foundation whose mission is promoting public discourse on the proper role of free enterprise in our society and advancing free enterprise principles in the

"the freedom-based public interest law movement" published by the Heritage Foundation, Edwin Meese describes liberal lawyers of the traditional movement as "so-called public interest lawyers."[237] Of the fifty-three organizations that described themselves using the words "public interest law" or "public interest legal" in briefs filed in the U.S. Supreme Court from 2000 through 2004, twenty-one were conservative or libertarian organizations listed in the Appendix.[238] In accordance with the Horowitz report's prescription in the early 1980s, conservative and libertarian groups have "challenge[d] the moral monopoly . . . enjoyed by traditional public interest lawyers and their allies"[239] by asserting claims on behalf of different constituencies and articulating their own visions of the public good. They have stripped the term "public interest law" of its exclusively left-oriented connotations.[240]

Conservative PILFs and foundations have aggressively recruited able law students and recent law school graduates to their causes. The Alliance Defense Fund offers a nine-week Blackstone Fellowship annually to approximately sixty "highly motivated Christian law students" between their first and second years of law school. The purpose of the program, according to its sponsors, is "to train a new generation of lawyers who will rise to positions of influence and leadership as legal scholars, litigators, judges, and perhaps even

courtroom."); Southeastern Legal Foundation, About Southeastern Legal Foundation, *at* http://www.southeasternlegal.org/default.aspx?page=14 (asserting that it is an "Atlanta-based public interest law firm which advocates limited government, individual economic freedom, and the free enterprise system in the courts of law and public opinion"); Thomas More Law Center, *supra* note 21, *at* http://www.thomasmore.org/about.html ("The Thomas More Law Center is a not-for-profit public interest law firm dedicated to the defense and promotion of the religious freedom of Christians, time-honored family values, and the sanctity of human life.").

237. Edwin Meese III, *Foreword* to BRINGING JUSTICE TO THE PEOPLE, *supra* note 98, at i, ii.

238. These organizations were the Alliance Defense Fund, American Center for Law and Justice, Americans United for Life, Atlantic Legal Foundation, Becket Fund for Religious Liberty, Claremont Institute Center for Constitutional Jurisprudence, Center for Individual Rights, Defenders of Property Rights, Institute for Justice, Judicial Watch, Landmark Legal Foundation, Mountain States Legal Foundation, National Federation of Independent Business Legal Foundation, National Legal Foundation, New England Legal Foundation, Northwest Legal Foundation, Oregonians in Action Legal Center, Pacific Legal Foundation, Southeastern Legal Foundation, Thomas More Law Center, and Washington Legal Foundation.

239. Horowitz, *supra* note 3, at 3.

240. The claim that conservative legal advocacy groups should be called "conservative public interest law" organizations extends beyond these organizations' own promotional materials. Harvard Law School's Office of Public Interest Advising publishes a guide to Conservative/Public Interest Law. VIRGINIA A. GREIMAN & NOAH LONG, OPIA'S GUIDE TO CONSERVATIVE/LIBERTARIAN PUBLIC INTEREST LAW: EXPLORING OPPORTUNITIES WITH NONPROFITS, RESEARCH INSTITUTES AND GOVERNMENT AGENCIES (2003). Harvard also offers counseling for students interested in finding jobs with conservative PILFs. Telephone Interview with Alexa Shabecoff, Assistant Dean for Public Interest Advising, Harvard Law School (Nov. 12, 2004). One of the most recent and comprehensive studies of public interest law firms in the United States defines the term to include conservative groups. *See* Albiston & Nielsen, *supra* note 5.

Supreme Court justices."[241] Many conservative PILFs offer paid summer internships and promote them as highly competitive opportunities.[242] The Pacific Legal Foundation's "College of Public Interest Law" offers paid litigation fellowships to top law graduates,[243] and the John M. Olin Foundation supports a Federalist Society scholarship program giving recent law graduates financial support while they prepare for the legal academic job market.[244]

The rise of conservative public interest law groups also has altered the dynamics of public law litigation, with conservative and libertarian groups now frequently initiating constitutional challenges and "traditional" PILFs playing defensive roles. While liberal public interest law groups may have been optimistic about what they could achieve through the courts in the 1960s and 1970s, they have since become less invested in affirmative litigation strategies. The Republicans' electoral success and attendant influence over governmental processes, the more conservative composition of the federal judiciary resulting from appointments by Presidents Reagan and Bush I and II, and cutbacks in funding for legal services programs have encouraged the retreat of many progressive lawyers from a bold vision of their roles in social change through law reform to a more modest and circumscribed part in community-based political action.[245] Academic critics have questioned the relationship between legal rights activities and social movements and have argued that legal strategies discourage client initiatives, divert resources away from more effective strategies, and leave larger social change undone.[246]

241. *See* Alliance Def. Fund, Blackstone Legal Fellowship Internship, *at* http://www.alliancedefensefund.org/programs/blackstone.php.

242. *See, e.g.*, Ctr. for Individual Rights, CIR Internships and Clerkships, *at* http://www.cir-usa.org/intern.html (inviting applications for a limited number of paid summer clerkships for students with "first-rate legal academic credentials, a commitment to public interest work, and excellent writing skills"); Inst. for Justice, Programs for Undergraduate and Law Students, *at* http://www.ij.org/students/index.html (indicating that "[s]ummer clerkships are highly competitive" and noting that while most students arrange their own funding, "some paid positions are available").

243. *See* Pacific Legal Found., National Litigation Fellowships, *at* http://www.pacificlegal.org/EmploymentDetail.asp?iID=7.

244. *See* Federalist Soc'y, John M. Olin Fellows in Law, *at* http://www.fed-soc.org/Seeking/Olin.htm.

245. *See* Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, *in* CAUSE LAWYERING, *supra* note 28, at 118, 133 (describing "sharply curtailed expectations—a tacit abandonment of transformative objectives" among left activist lawyers in Seattle). For friendly critiques of this trend, see Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001), and Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

246. *See, e.g.*, MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 200 (1986) ("Legal tactics not only absorb scarce resources that could be used for popular mobilization . . . [but also] make it difficult to develop broadly based, multi issue grass-roots associations of sustained citizen allegiance."); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 341 (1991) (asserting that courts "act as 'fly-paper' for

Much of the academic literature on progressive lawyers in the late 1980s and 1990s focused on the dangers of lawyer domination and the possibility of promoting client empowerment by surrendering professional authority.[247] Although some liberal public interest law groups continue to pursue law reform through courts and administrative agencies, and while progressive scholars continue to struggle to define constructive roles for lawyers,[248] the political left generally has lost faith in lawyers' capacity to contribute to significant social change.[249]

Some of the same conditions that have discouraged progressive lawyers have emboldened conservative activists.[250] Lawyers for conservative and libertarian causes have deployed dozens of new PILFs to eliminate or diminish rights forged by liberal public interest law groups and to establish and

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social reformers who succumb to the 'lure of litigation'" rather than pursuing more effective legislative alternatives); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (1974) (arguing that activist lawyers generally adopt a simplistic view of the relationship between litigation and social movements); Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y Q. 5, 9 (1985) ("[L]aw must be subordinated to other modes of activism and other disciplines; indeed, legal means of resolving problems should be avoided whenever possible, for they tend to reinforce the client's experience of powerlessness."); Steve Bachmann, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 4 (1985) ("Organized masses of people, not lawyers, play the critical roles [in social change]."); *see also* ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE 13 (1982) (quoting the former national director of the ACLU asserting that "[t]o the extent that government is capable of distributing benefits, the power lies in the hands of the executive and legislative branches. The authority of the judiciary is largely limited to helping previously ignored interest groups enter the competition.").

247. *See, e.g.*, GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23 (1992); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659 (1987/1988); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

248. *See, e.g.*, WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001); Scott L. Cummings, *Recentralization: Community Economic Development and the Case for Regionalism*, 8 J. SMALL & EMERGING BUS. L. 131 (2004); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004); Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING, *supra* note 28, at 201, 201; Symposium, *Constitutional Lawyering in the 21st Century*, 9 J.L. & POL'Y 297 (2001).

249. *See generally* David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327 (1996).

250. Clint Bolick recently observed: "As the Left recognized decades ago, and as we are now beginning to appreciate more fully, law is a powerful tool for social change." Clint Bolick, *School Choice: Triumph for Freedom*, *in* BRINGING JUSTICE TO THE PEOPLE, *supra* note 98, at 55, 65.

revitalize "counter-rights."[251] Some of their initiatives have focused on rolling back constitutional doctrines recognized by the Warren and Burger Courts—for example, the right to abortions under *Roe v. Wade*,[252] constitutional protections for criminal defendants, and Establishment Clause restrictions on school vouchers programs. They have participated in legislative campaigns to promote victims' rights, to expand property rights against environmental claims,[253] to outlaw racial preferences, and to prohibit gay marriage. They also have worked to broaden constitutional guarantees—for example, to invalidate affirmative action programs as violations of the Equal Protection Clause, revitalize the Privileges or Immunities and Due Process Clauses of the Fourteenth Amendment as restrictions on economic regulation, bolster property rights, enforce "enumerated powers" constraints on federal government authority, expand the concepts of "equal access" to governmental benefits for religious groups and religious liberty in the private sector, strike down campaign finance laws under the First Amendment, challenge political activity by unions and compulsory union dues, and change standards regarding courts' use of scientific evidence and punitive damage awards. In the four years from 2000 through 2004, forty-two of the conservative and libertarian PILFs listed in the Appendix filed briefs in 144 Supreme Court cases. Six of those organizations filed over a dozen briefs during that period: the Cato Institute (eighteen briefs), Rutherford Institute (sixteen briefs), American Center for Law and Justice (sixteen briefs), Washington Legal Foundation (thirty-eight briefs), Criminal Justice Legal Foundation (forty-six briefs), and Pacific Legal Foundation (thirty-four briefs).

Some conservative and libertarian PILFs now rival their liberal counterparts in size and resources. The Pacific Legal Foundation had revenue of approximately $7.3 million for Fiscal Year 2002,[254] and the Institute for Justice reported $6.3 million for the same period. The American Center for Law and Justice had almost $16 million in revenue, and the Alliance Defense Fund, which awards grants to other advocacy groups, had over $15.7 million.

251. *See* Thomas F. Burke, *The Rights Revolution Continues: Why New Rights Are Born (and Old Rights Rarely Die)*, 33 CONN. L. REV. 1259, 1267–69 (2001).

252. *See* Robin Toner, *For G.O.P., It's a Moment*, N.Y. TIMES, Nov. 6, 2003, at A1; *cf.* Dennis J. Horan et al., *Editors' Introduction* to ABORTION AND THE CONSTITUTION: REVERSING *ROE V. WADE* THROUGH THE COURTS, at xi (Dennis J. Horan et al. eds., 1987) (describing a conference sponsored by Americans United for Life, "Reversing *Roe v. Wade* Through the Courts," on March 31, 1984).

253. *See* Burke, *supra* note 251, at 1269.

254. These are estimates to the nearest $0.1 million, based on income figures provided by the organizations' IRS Form 990s, which tax-exempt entities are required to file. Form 990s are available on the GuideStar online database of nonprofit organizations, http://www.guidestar.org. The most recent tax year for which comprehensive data were available was 2002.

Other well-funded groups include the National Right to Work Legal Defense and Education Foundation ($6 million), Center for Individual Rights ($1.6 million), Rutherford Institute ($2 million), Mountain States Legal Foundation ($2.3 million), Washington Legal Foundation ($4.5 million), and the Federalist Society ($4.1 million). Although none of these groups rivals the ACLU ($48.7 million), Environmental Defense, Inc. ($43.7 million), or the Natural Resources Defense Council ($59.8 million), their resources compare favorably with other major liberal public interest law organizations, such as the NAACP Legal Defense and Educational Fund ($7.9 million), Alliance for Justice ($3 million), Center for Law and Social Policy ($3.8 million), Equal Rights Advocates ($2.2 million), Public Advocates ($0.6 million), Public Citizen Foundation ($7.5 million), Lawyers' Committee for Civil Rights Under Law ($4.2 million), Center for Constitutional Rights ($2.8 million), NOW Legal Defense and Education Fund ($7.1 million), and People for the American Way Foundation ($6.1 million).

This mobilization of public interest law groups on the right to match PILFs on the left represents an extension of the pluralist premise of the public interest law movement—that all affected interests should be represented in public policymaking processes.[255] Public law litigation and administrative advocacy now attracts participation from many more organizations representing a fuller array of ideological positions.[256] For example, *Lawrence v. Texas*,[257] the challenge to Texas's antisodomy statute, drew amicus curiae briefs not only from gay rights groups, the ACLU, NOW Legal Defense Fund, and a variety of other civil rights and human rights organizations, but also

255. Academic debates about whether courts should engage in making public policy, and whether it is even possible for them to avoid doing so, have raged for three decades. The classic argument in favor of the view that courts should venture beyond private dispute resolution is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). For critical commentary on public law litigation and institutional reform litigation, see DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. 104 (1975); and Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, 574 ANNALS 52 (2001). For a much more recent defense of public law litigation that takes into account the evolution of structural remedies during the past three decades, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

256. As Epstein has observed, "[c]ourtrooms . . . may no longer be much different from legislative corridors, which often serve as arenas for competing interest groups." EPSTEIN, *supra* note 2, at 148. Paul Collins has evaluated competing accounts of the influence of amicus briefs. *See* Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 807 (2004). For a discussion of the larger political phenomenon, the dramatic increase in the mobilization of interest groups since the 1950s, see Walker, *supra* note 23, at 394–95.

257. 539 U.S. 558 (2003).

from more than a dozen conservative and libertarian organizations.[258] In *Grutter v. Bollinger*[259] and *Gratz v. Bollinger*,[260] a pair of cases brought by the Center for Individual Rights challenging the University of Michigan's use of affirmative action to increase enrollment of black and other minority students, the Supreme Court received briefs in support of the plaintiffs from the Cato Institute, Claremont Institute Center for Constitutional Jurisprudence, Center for Equal Opportunity, Independent Women's Forum, American Civil Rights Institute, Center for Individual Freedom, Reason Foundation, Pacific Legal Foundation, Criminal Justice Legal Foundation, and the Center for New Black Leadership.[261] In last Term's challenge to the pledge of allegiance, *Elk Grove Unified School District v. Newdow*,[262] liberal groups such as the ACLU and Americans United for Separation of Church and State[263] met opposition from

258. *See* Amicus Brief of the American Center for Law and Justice, *Lawrence* (No. 02-102); Brief of Amicus Curiae of the Center for the Original Intent of the Constitution, *Lawrence* (No. 02-102); Brief of Amicus Curiae Concerned Women for America, *Lawrence* (No. 02-102); Brief of Amicus Curiae of the Family Research Council, Inc. and Focus on the Family, *Lawrence* (No. 02-102); Brief of Liberty Counsel as Amicus Curiae, *Lawrence* (No. 02-102); Brief of Amici Curiae, Pro Family Law Center, Traditional Values Coalition, Traditional Values Education and Legal Institute & James Hartline, *Lawrence* (No. 02-102); Brief of Amicus Curiae of Public Advocate of the United States, Conservative Legal Defense and Education Fund, Lincoln Institute for Research and Education, Help and Caring Ministries, Inc., and Citizens United Foundation, *Lawrence* (No. 02-102); Brief of Amicus Curiae of United Families International, *Lawrence* (No. 02-102). Two libertarian organizations, the Cato Institute and the Institute for Justice, filed briefs in support of the petitioners. Brief of the Cato Institute as Amicus Curiae, *Lawrence* (No. 02-102); Brief of the Institute for Justice as Amicus Curiae, *Lawrence* (No. 02-102).

259. 539 U.S. 306 (2003).

260. 539 U.S. 244 (2003).

261. Brief of the Cato Institute as Amicus Curiae, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief Amici Curiae of the Center for Equal Opportunity, the Independent Women's Forum, and the American Civil Rights Institute, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief of Amicus Curiae Center for Individual Freedom, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief of the Center for New Black Leadership as Amicus Curiae, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief of Amicus Curiae the Claremont Institute Center for Constitutional Jurisprudence, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief Amicus Curiae of Pacific Legal Foundation, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief of Amicus Curiae of Reason Foundation, *Grutter* (No. 02-241); *Gratz* (No. 02-516).

Corporations filed none of the briefs supporting petitioners. Indeed, many of the nation's largest corporations supported the university's policies. *E.g.*, Brief For Amici Curiae 65 Leading American Businesses, *Grutter* (No. 02-241); *Gratz* (No. 02-516); Brief of General Motors Corp. as Amicus Curiae, *Grutter* (No. 02-241); *Gratz* (No. 02-516). For a discussion of the shift in American corporations' positions on affirmative action from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) to *Grutter* and *Gratz*, see David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1548–53 (2004).

262. 124 S. Ct. 2301 (2004).

263. Amicus Curiae Brief of Americans United for Separation of Church and State, ACLU, and Americans for Religious Liberty, *Newdow* (No. 02-1624).

over a dozen conservative organizations.[264] This competition between PILFs of the left and right has made public policy formation in the courts and administrative agencies more complicated and antagonistic[265] and has contributed to acrimony over judicial nominations.[266] It also has laid bare an essential truth about public interest law—that advocates for 501(c)(3) law reform organizations, all viewing themselves as public interest lawyers, may disagree fundamentally about what the public interest requires.[267]

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264. Brief of the American Legion as Amicus Curiae, *Newdow* (No. 02-1624); Brief of the Catholic League for Religious and Civil Rights and the Thomas More Law Center as Amici Curiae, *Newdow* (No. 02-1624); Brief of Amicus Curiae Center for Individual Freedom, *Newdow* (No. 02-1624); Brief of Amici Curiae of Christian Legal Society, The Center for Public Justice, Concerned Women for America, and Christian Educators Association International, *Newdow* (No. 02-1624); Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence, *Newdow* (No. 02-1624); Brief of Amicus Curiae of Focus on the Family, Family Research Council, and Alliance Defense Fund, *Newdow* (No. 02-1624); Brief of Liberty Counsel, Wallbuilders and William J. Federer as Amicus Curiae, *Newdow* (No. 02-1624); Brief of Amicus Curiae of Pacific Research Institute and Pacific Legal Foundation, *Newdow* (No. 02-1624); Brief of Amicus Curiae of the Rutherford Institute, *Newdow* (No. 02-1624); Brief of Amicus Curiae of Wallbuilders, Inc., *Newdow* (No. 02-1624).

265. *See* O'CONNOR & EPSTEIN, *supra* note 5, at 482 (noting a threefold increase in conservative interest group participation in Supreme Court cases between 1969 and 1980); Epstein, *supra* note 81, at 655 ("[C]onservative groups, both single-issue groups as well as those with more broadly-defined agendas, have followed the lead of their liberal counterparts and now regularly resort to the courts."); Gregory L. Hassler & Karen O'Connor, *Woodsy Witchdoctors Versus Judicial Guerrillas: The Role and Impact of Competing Interest Groups in Environmental Litigation*, 13 B.C. ENVTL. AFF. L. REV. 487 (1986); Francis J. Flaherty, *Amicus: A Friend or a Foe?*, NAT'L L.J., Nov. 14, 1983, at 1 (asserting that "the recent growth of conservative public interest law firms . . . has produced 'a new force in the filing of amicus briefs'" (quoting political science professor Steven Puro)); *see also* ANDREW JAY KOSHNER, SOLVING THE PUZZLE OF INTEREST GROUP LITIGATION 7–11 (1998) (showing an increase in amicus participation from under 15 percent of cases in 1950 to over 92 percent in 1994); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 751–56 (2000) (presenting data showing an increase in amicus participation).

266. *Cf.* Sheryl Gay Stolberg, *Democrats Issue Threat to Block Court Nominees: Feud With White House*, N.Y. TIMES, Mar. 27, 2004, at A1 (describing "an escalation of an increasingly hostile battle between Democrats and Republicans on Capitol Hill over Mr. Bush's judicial nominees"); *see also* Tom Hamburger & Peter Wallsten, *Business Lobby to Get Behind Judicial Bids*, L.A. TIMES, Jan. 6, 2005, at A1 (reporting National Association of Manufacturer's new multimillion dollar initiative, called the "American Justice Partnership," to generate grassroots support for confirmation of President Bush's federal judicial nominees).

267. *See* Hegland, *supra* note 52, at 809 (noting that "there will be conflicts between public interest firms. The clearest example is the conflict between ecology firms and poverty firms. Insistence on strict conservation measures will raise the costs of low cost housing; curtailment of pollution causing power generation will mean that many poor families will go without heat."); Patricia Wald, *Frank M. Coffin Lecture on Law and Public Service: Whose Public Interest Is It Anyway? Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3, 6 (1995) ("[A]cross the legal landscape we see environmentalists opposing Native Americans; labor unionists vying with racial and ethnic minorities and women's advocates; pro-choicers pitted against right-to-lifers, all perceiving themselves as public interest lawyers.").

In addition to challenging the definition of public interest practice and altering the dynamics of public law litigation, conservative and libertarian law groups also have modified the form of public interest practice. Some of their methods for identifying and recruiting clients make liberal groups' outreach and public education strategies look narrow and modest. Jay Sekulow, for example, finds new cases for the American Center for Law and Justice through his radio show "Jay Sekulow Live!",[268] which airs on more than 550 radio stations,[269] and his television show, "ACLJ This Week."[270] When his organization learns of incidents he views as infringements on religious liberty, he dispenses what he calls "SWAT teams" of lawyers to meet with offending officials throughout the country.[271] Mathew Staver, founder of Liberty Counsel, hosts two radio programs and a television show called *Law and Justice*.[272] He has helped to establish a new law school to "teach the biblical worldview" and "practical lawyering."[273] Michael Farris teaches an online high school level constitutional law course, with his own *Constitutional Law for Christian Students* as the required text.[274] Several conservative PILFs encourage prospective clients to submit information about their claims through their web sites.[275] Conservative and libertarian PILFs have expanded the cooperating attorney model pioneered by the ACLU. The Institute for Justice holds seminars on public interest litigation for hundreds of students, policy activists, and lawyers, and invites graduates of these programs to join its "Human Action Network."[276] The Alliance Defense Fund runs week-long training programs—"National Litigation Academies"—several times each year to "train a generation of attorneys" to "restore American's legal system over the next 30 to 40 years,"[277] and each lawyer who attends the academy

268. *See* Fisher, *supra* note 204.

269. *See* Am. Ctr. for Law & Justice, About Chief Counsel, *at* http://www.aclj.org/about/default.aspx?Section=11.

270. *See* Am. Ctr. for Law & Justice, On the Air, *at* http://www.aclj.org/ontheair/default.aspx.

271. *See* Niebuhr, *supra* note 107.

272. *See Jacksonville Journal*, FLA. TIMES UNION, Sept. 25, 2002, at B3.

273. Thomas Crampton, *Using the Courts to Wage a War on Gay Marriage*, N.Y. TIMES, May 9, 2004, at A12.

274. *See* Constitutional Law for Christian Students Online, Introduction, *at* http://conlaw.hslda.org/introduction.asp.

275. Organizations that use this approach include the Institute for Justice, *see* Inst. for Justice, Contact Us, *at* http://www.ij.org/potentialcase/index.html; Liberty Counsel, *see* Contact Us, *at* http://www.lc.org/contactus.html; and the Rutherford Institute, *see* Rutherford Inst., Need Legal Help?, *at* http://www.rutherford.org/help_now/online_help_request_form.asp.

276. Inst. for Justice, Training Programs, *at* http://www.ij.org/han/index.html.

277. Alliance Def. Fund, National Litigation Academy, *at* http://www.alliancedefensefund.org/programs/nla.php.

commits to provide 450 hours of pro bono legal work over three years.[278] Some of these practices might be expected to produce their own rounds of mimicry by public interest organizations of the left. Indeed, the Federalist Society's success in mobilizing conservative and libertarian lawyers and creating a network based on shared political identity inspired the creation of the American Constitution Society, modeled directly on its competitor.[279]

CONCLUSION

This Article has examined how lawyers have created dozens of conservative and libertarian public interest law organizations during the past few decades and how those organizations have influenced the dynamics of public law litigation. Lawyers' aggressive building of law-related institutions has placed them in the center of the conservative movement. One activist conservative lawyer interviewed for this project observed:

> If you look at the conservative movement generally since World War II, in the 1940s and 1950s it was primarily an intellectual movement. . . . In the 1960s particularly with the Goldwater nomination . . . a political dimension was added . . . . And then with Ronald Reagan, it became a governing . . . movement as well. . . . [T]he whole conservative legal movement, which started in the 70s—the combination of the public interest legal groups and the Federalist Society—has given a much more prominent position to lawyers in the conservative movement.[280]

The growth and success of conservative public interest law has coincided with conservative movement's improved record for recruiting elite lawyers and creating attractive career paths for them. A Wall Street Journal editorial in 1981 observed that conservative public interest groups, unlike "[t]he Naderite public interest law firms," had failed to "tap[] into the national legal community."[281] Twenty years later, however, as Republicans' electoral success has created attractive opportunities for lawyers with conservative credentials, conservative public interest organizations draw from a more elite pool.[282] Many

278. *Id.*

279. *See* Tresa Baldas, *Law School Turf War Ignites: The Federalist Society Vies With Emerging ACS*, NAT'L L.J., April 26, 2004, at 1; Terry Carter, *A New but Growing Group Seeks to Counter the Influence of the Conservative Federalist Society*, 39 A.B.A. J. 50 (2003); Alison Frankel, *The Federalists' Foil*, AM. LAW., Feb. 2003, at 26.

280. Confidential Interview (June 2001).

281. *The Horowitz Report*, WALL ST. J., Mar. 19, 1981, at A26.

282. *Cf.* Heinz et al., *supra* note 26, at 18–20. Our analysis of the characteristics of lawyers who worked for organizations active in conservative causes found that the credentials of lawyers for "order maintenance" organizations, abortion opponents, and religious groups were considerably less elite than those for the "mediator" organizations—groups that seek to speak for a broader constituency. *Id.*

of the lawyers associated with today's conservative law groups are partners in major law firms, senior government officials, and judges.[283] One lawyer

283. Many of the lawyer founders mentioned in this Article served in high levels in the Reagan and Bush I Administrations—some of them while they were very young. Edwin Meese III, who helped found the Pacific Legal Foundation and the Crime Victims' Legal Advocacy Institute, served as U.S. Attorney General in the Reagan Administration and was one of President Reagan's most important advisors. Michael Horowitz, author of the "Horowitz Report" discussed *supra* Part III, served as General Counsel for the Office of Management and Budget from 1981 to 1985. *See* Hudson Inst., *supra* note 160. Alan Sears, President and General Counsel of the Alliance Defense Fund, served as Executive Director of the Attorney General's Commission on Pornography. *See* Don Kowet, *PBS Referees a Fine Brawl Over Politics of Fig Leaves*, WASH. TIMES, July 3, 1991, at E1; Alliance Def. Fund, About Alan E. Sears, Esquire, *at* http://www.alliancedefensefund.org/about/alansears.php. Michael Carvin, a founding board member of the Center for Individual Rights, was special assistant to the Deputy Assistant Attorney General and Deputy Assistant Attorney General, Civil Rights Division, 1983 to 1987, and Deputy Assistant Attorney General, Office of Legal Counsel, 1987 to 1988. *See* Ctr. for Individual Rights, *supra* note 235, *at* http://www.cir-usa.org/history.html; Jones Day, Attorneys, *at* http://www1.jonesday.com/attorneys/bio.asp?language=English&AttorneyID=10744. Joseph Morris, founder of the Lincoln Legal Foundation, served as General Counsel of the United States Office of Personnel Management (formerly the U.S. Civil Service Commission), and later as Chief of Staff and General Counsel of the United States Information Agency, and as Assistant Attorney General of the United States in charge of the Office of Liaison Services. *See Candidate File*, CHI. SUN-TIMES, Oct. 23, 1994, at A25. Clint Bolick, founder of the Institute for Justice, was Assistant to Assistant Attorney General William Bradford Reynolds from 1987 to 1988 and Special Assistant to EEOC Commissioner Ricky Silberman (wife of D.C. Circuit Judge Lawrence Silberman) from 1985 to 1986. *See* WHO'S WHO IN AMERICAN LAW 75 (5th ed. 1987–1988); Hoover Institution, Clint Bolick, *at* http://www-hoover.stanford.edu/BIOS/bolick.html. William Mellor, cofounder of the Institute for Justice, served in the Reagan Administration as Deputy General Counsel for Legislation and Regulations in the Department of Energy. *See* Inst. for Justice, Staff Biographies: William H. Mellor, *at* http://www.ij.org/staff/Mellor.html. Roger and Nancie Marzulla, founders of Defenders of Property Rights, both served in the Reagan Justice Department; he as Assistant Attorney General for the Land and Natural Resources Division and she in the Civil Rights Division. *See* W. John Moore, *Taking on 'Takings,'* 24 NAT'L J. 582 (1992); *Constitutionally Protected Property Rights and the Government's Power to Acquire Land*, 8 REAL EST./ENVTL. LIABILITY NEWS, May 2, 1997 (book review). Robert Showers, Jr., founder of the National Law Center for Children and Families, served as Special Assistant to Attorney General Edwin Meese in 1986 and Acting Deputy Assistant Attorney General, 1988. WHO'S WHO IN AMERICAN LAW 725 (5th ed. 1987–1988); *National Law Center for Children and Families Appoints Richard Whidden as Executive Director and Senior Counsel*, NLC REPORTER (Nat'l Law Ctr. for Children and Families, Fairfax, Va.), Dec. 2004, at 2. C. Boyden Gray, founder of the Committee for Justice, served as Counsel to the President from 1989 to 1993 and Counsel to the Vice-President, 1981 to 1989. *See* Comm. for Justice, Chairman of the Committee, The Honorable C. Boyden Gray, *at* http://committeeforjustice.org/contents/about/gray.shtml. William Bennett served as head of the National Endowment for the Humanities and Secretary of Education in the Reagan Administration and as "drug czar" in the first Bush Administration. Paul D. Colford, Editorial, *Impatience Proves a Virtue for 'Czar' William Bennett*, L.A. TIMES, Sept. 3, 1998, at E7. Kevin Hasson, founder of the Becket Fund, served as Attorney-Advisor for the U.S. Department of Justice's Office of Legal Counsel, where his responsibilities included advising the Reagan Administration on church/state issues. *See* Becket Fund, About the Becket Fund, *at* http://www.becketfund.org/index.php/person/3.html. Steven Calabresi, cofounder of the Federalist Society, served as Special Assistant to Attorney General Edwin Meese after clerking for Judge Ralph Winter and Justice Antonin Scalia. *See* Bossert, *supra* note 187. Lee Liberman Otis, another founding member of the

associated with religious groups asserted that the conservatives' constitutional litigators now match the left's most able lawyers: "Fifteen years ago our best people were not as good as their best people, but now I think they really are."[284] Twenty years ago, one might have been hard-pressed to name a handful of well-known conservative lawyer activists. Today's most prominent lawyers associated with the conservative movement—for example, Edwin Meese, Theodore Olson, James Bopp, Jay Sekulow,[285] Robert Bork, C. Boyden Gray, Charles Cooper, and Clint Bolick—perhaps are better known even if they are not household names, and all of them participate in organizations that groom younger conservative and libertarian lawyers. Conservative lawyer networks have flourished during the past few decades. The Christian Legal Society, established by lawyers who met to pray together at an American Bar Association Convention in 1959,[286] now has 3800 members, with 165 student chapters and ninety-four attorney chapters.[287] The Federalist Society boasts 5000 student members at approximately 145 law schools, 20,000 legal professionals in sixty cities, and a law faculty division.[288] Its fifteen practice groups sponsor conferences, generate publications, promote lawyers' involvement in public policy processes,[289] and facilitate their appointment as judges and government officials. In short, the field of conservative public interest law has grown considerably in size, influence, and stature since the mid-1970s. As one lawyer in this study observed, "I don't think it is any longer debatable whether they have a meaningful presence on the scene."[290]

In one sense, it is remarkable that lawyers have secured for themselves such important roles in a movement that has displayed considerable hostility

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Federalist Society, also clerked for Justice Scalia and worked in the Reagan Justice Department. Serving in the White House under President Bush, she assisted C. Boyden Gray in screening judicial nominees. *Id.*

One lawyer interviewed for this study observed, "The credentialing of lawyers during the Reagan Administration is probably the single biggest factor, along with the selection of conservative judges, in . . . really launching the [conservative law] movement into a more prominent and successful role." Confidential Interview (Mar. 2001).

284. Confidential Interview (Nov. 2001).

285. Sekulow has argued more than ten cases before the Supreme Court. *See* Am. Ctr. for Law & Justice, *supra* note 269, *at* http://www.aclj.org/about/default.aspx?Section=11.

286. SAMUEL B. CASEY, GREAT IS HIS FAITHFULNESS: FORTY-TWO YEARS OF "HIS-STORY" AT CLS, *at* http://www.clsnet.org/clsPages/history.php.

287. *Id.*

288. *See* Federalist Soc'y, *supra* note 117.

289. The Federalist Society's new online Pro Bono Center matches lawyers to "opportunities for pro bono service in the cause of individual liberty, traditional values, limited government, and the rule of law." Federalist Soc'y, Pro Bono Ctr., Homepage, *at* https://www.probonocenter.org/home.aspx.

290. Confidential Interview (Mar. 2002).

toward lawyers and legal activism.[291] In another respect, however, it is unsurprising that lawyers should play essential parts in countering the successes of liberal public interest law groups. Although conservatives blamed public interest lawyers for many of the trends they mobilized to oppose, lawyers were essential to the strategy of fighting fire with fire. It remains to be seen whether several recent Supreme Court defeats for conservatives—on gay rights,[292] affirmative action,[293] government funding for religious programs,[294] Internet pornography regulation,[295] and the legal rights of "enemy combatants"[296]—will reinforce lawyers' influence within the conservative movement or diminish their roles.[297] Also unknown is whether conservatives' success in building an infrastructure for conservative public interest advocacy will spur progressives to make similar large, long-term, and coordinated investments. There are signs of interest among Democratic donors in building a network of nonprofit organizations to match the conservative advocacy infrastructure.[298] Some of these philanthropists resolved to meet after the November 2004 election to match patrons with "progressive entrepreneurs with ideas that need money,"[299] and lawyers may be among the institutional entrepreneurs who vie for investment capital from these patrons.[300] Their success may depend upon rebuilding an electoral coalition and sympathetic judiciary. At the moment, however, lawyers for causes of the political left generally seem dispirited, marginalized, and uncertain of their roles, while conservatives and libertarians confidently proclaim themselves the new public interest lawyers.

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291. For scholarship commenting on American lawyers' remarkable aptitude for creating new markets for their services, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 633–54 (2d ed. 1985); ROBERT L. NELSON ET AL., LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 6 (1992); and LAWYERS IN SOCIETY: COMPARATIVE THEORIES (Richard L. Abel & Philip S.C. Lewis eds., 1989).

292. Lawrence v. Texas, 539 U.S. 558 (2003).

293. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

294. Locke v. Davey, 540 U.S. 712 (2004).

295. Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).

296. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

297. Kevin den Dulk has suggested that a string of litigation defeats for Protestant evangelicals could begin a cycle of disengagement from politics and legal advocacy. *See* den Dulk, *supra* note 17, at 6.

298. *See* Matt Bai, *Wiring the Vast Left-Wing Conspiracy*, N.Y. TIMES, July 25, 2004, § 6 (Magazine), at 30.

299. *Id.*

300. *Id.* (asserting that wealthy Democrats had agreed to meet after the election to "create a kind of venture-capital pipeline that would funnel money into a new political movement, working independently of the existing Democratic establishment").

APPENDIX: FOUNDING DATES OF SELECTED CONSERVATIVE AND LIBERTARIAN PUBLIC INTEREST LAW ORGANIZATIONS, LATE 1950S THROUGH 2000

Citizens for Decency Through Law 1957*
Christian Legal Society 1959
Morality in Media 1962
Americans for Effective Law Enforcement 1966
National Right to Work Legal Defense Foundation 1968
Catholic League for Religious and Civil Rights 1973
Pacific Legal Foundation 1973
Center for Law and Religious Freedom, Christian Legal Society 1975
National Legal Center for the Public Interest 1975
Mid-America Legal Foundation 1975*
Americans United for Life Legal Defense Foundation 1976
Southeastern Legal Foundation 1976
Atlantic Legal Foundation 1976
Landmark Legal Foundation 1976
Capital Legal Foundation 1977*
Mountain States Legal Foundation 1977
Washington Legal Foundation 1977
New England Legal Foundation 1977
Pacific Research Institute 1979
Oregonians in Action Legal Center 1981
Concerned Women for America Education and Legal Defense Foundation 1981
Federalist Society for Law and Public Policy Studies 1982
Rutherford Institute 1982
Criminal Justice Legal Foundation 1982
Home School Legal Defense Association 1983
Free Speech Advocates/New Hope Life Center 1984*
Competitive Enterprise Institute Free Market Legal Program 1986
Manhattan Institute, Center for Legal Policy 1986
National Legal Foundation 1987
Northwest Legal Foundation 1987
Center for Individual Rights 1989
Cato Institute, Center for Constitutional Studies 1989
Liberty Counsel 1989

Lincoln Legal Foundation 1989
American Center for Law and Justice 1990
National Family Legal Foundation (now Community Defense Counsel) 1990
American Family Association Center for Law and Policy 1990
Institute for Justice 1991
Stewards of the Range 1992
Defenders of Property Rights 1992
Alliance Defense Fund 1993
Center for the Study of Popular Culture, Individual Rights Foundation 1993
National Law Center for Children and Families 1993
Judicial Watch 1994
Becket Fund 1994
Texas Justice Foundation (now Justice Foundation) 1994
Western Center for Law and Religious Freedom 1995*
Northstar Legal Center 1994*
Center for Equal Opportunity 1995
Pacific Justice Institute 1997
Liberty Legal Institute 1997
American Civil Rights Union 1998
Center for Individual Freedom 1998
Claremont Institute's Center for Constitutional Jurisprudence 1999
Foundation for Individual Rights in Education 1999
Thomas More Law Center 1999
Center for the Original Intent of the Constitution 1999
National Federation of Independent Business Legal Foundation 2000

* Indicates organizations that no longer exist.