

## Book Review

Steven M. Teles, *The Rise of the Conservative Legal Movement: the Battle for the Control of the Law*. Princeton: Princeton University Press, 2008, pp. 339, \$38.50 (cloth), \$24.95 (paper).

Reviewed by Jacob Heilbrunn

In the past several decades, conservatism has gone from being a fringe movement to a potent force in American political and intellectual life. The demise of the Rockefeller Republicans who hailed from the East Coast and the simultaneous rise of a rock-ribbed “movement” conservatism has meant that the Republican party has steadily moved to the right, a development that has been abundantly chronicled in a number of scholarly and popular books. One of the tactics that conservatives embraced in the 1970s to counter what they saw as liberal dominance in institutions such as the universities and newspapers was to form their own counter-establishment. Conservatives in general—and neoconservatives in particular—believed that what Irving Kristol termed a parasitic “new class” of professors, journalists, and government bureaucrats had emerged that was hostile to the free enterprise system and controlled the commanding heights of society. And so it was up to conservatives to perform the lonely work of creating their own network of journals, newspapers, think-tanks, and other organizations to challenge the putative supremacy of liberal thinking. In essence, conservatives were aping what they believed were the accomplishments of liberals in using foundations and other such institutions to establish hegemony over elite and popular political discourse.

One such organization is the Federalist Society. It was established in 1982 at the University of Chicago, Harvard, and Yale law schools. Its intent was ostensibly conservative, but its aim was revolutionary—to return to the so-called “original intent” of the Founding Fathers and to decry “judicial activism” that contravened the spirit of the Constitution. Divining that intent—or whether it even existed—is a perennial source of controversy. Judicial activism, more often than not, may be in the eye of the beholder, as the Supreme Court wrestles with the principle of *stare decisis*.

But the establishment of the society, which served as a seedbed for both the Reagan and George W. Bush administrations, was a significant step in the formation of the modern conservative movement. Conservatives targeted the

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Supreme Court as fertile territory. Their efforts seem to have been rewarded. Last year, the *New York Times* reported that a new study published in *The Vanderbilt Law Review* indicates that the politicization of the court has now reached down to the court's law clerks: "Until about 1990, the study shows, there was no particular correlation between a justice's ideological leanings and what his or her clerks did with their lives. Clerks from conservative chambers are now less likely to teach. If they do, they are more likely to join the faculties of conservative and religious law schools. Republican administrations are now much more likely to hire clerks from conservative chambers, and Democratic administrations from liberal ones. Even law firm hiring splits along ideological lines."<sup>1</sup>

Perhaps the foremost members of the Federalist Society are Supreme Court Justice Antonin Scalia and Chief Justice John Roberts. The question hovering over them—and, by extension, the Federalist Society itself—is whether they really are adopting a parsimonious approach to the Constitution or whether they are simply using the term "original intent" as, in fact, pious humbug—nothing more than a convenient smokescreen for dressing up their own political predilections as representing original intent in order to advance their own radical doctrines.

In *The Rise of the Conservative Legal Movement*, Steven M. Teles offers a valuable and searching study of the conservative legal movement. Teles is an associate professor of public policy at the University of Maryland and a visiting lecturer at Yale Law School. He has interviewed many leading members of the Federalist Society and a variety of other groups and foundations. He has performed a good deal of archival research as well. His scholarly insights and impartial tone ensure that his account will form an essential part of the growing literature on the rise of the right. His argument is that those on the left who detect a grand conspiracy on the part of the right to seize power misconstrue its successes. Instead of following a master plan, conservatives have proceeded more fitfully, advancing here, retreating there, but always with the ultimate hope of supplanting their liberal adversaries.

To explain the rise of the conservatives, Teles begins by charting the emergence of what he calls the liberal legal network which he notes first took hold with the New Deal, "whose revised constitutional orthodoxy paved the way for an expansion and centralization of government" (22). By the 1960s, liberalism had become synonymous, in the eyes of many, with good government and worthy, progressive causes. The Ford Foundation, the American Bar Association, and other important institutions, Teles writes, were supporting an effort to "liberalize the legal profession" (23). The Ford Foundation, under the leadership of McGeorge Bundy, who had been John F. Kennedy's national security adviser and an unflinching supporter of the Vietnam War (until he left government service in 1966 and denounced the conflict), supported the

1. Adam Liptak, Sidebar: In Supreme Court Clerks' Careers, Signs of Polarization, *N.Y. Times*, Dec. 21, 2009, <http://www.nytimes.com/2009/12/22/us/22bar.html?r=1>.

development of legal clinics for the poor. The notion that the law had become divorced from reality had taken hold and the clinics were seen as a way for fledgling lawyers to gain practical experience.

The Warren Court also left an imprint on the legal profession. Law schools began to promulgate a heroic conception of lawyers that “went hand in hand with a heroic role for the courts, and not incidentally an elevated status for law professors” (45). Teles attributes many successes to the liberal legal network. He believes that it had a marked effect in increasing welfare eligibility, reforming prisons, promoting school busing for racial balance in urban schools, and legalizing abortion as the law of the land (54).

Teles points to several halting attempts by conservative figures and organizations in the early 1970s to stymie and reverse liberal advances. He chronicles, among other things, the creation of a conservative public interest law firm called the Pacific Legal Foundation, partly supported by the California Chamber of Commerce, which had become alarmed by the ability of the Wilderness Society, Friends of the Earth, and the Environmental Defense Fund to slow the construction of the Trans-Alaska Pipeline (61). At the same time, former American Bar Association president Lewis Powell wrote a memorandum for the U.S. Chamber of Commerce that has become famous for its warning to businessmen about legal liberalism, warning them that they had “responded—if at all—by appeasement, ineptitude, and ignoring the problem.” But Teles maintains that it was not until conservatives focused on building their movement around intellectuals and academics—as opposed to businessmen—that they would be able to alter the tenor of the courts. Conservatives, in other words, pursued an activist course that emphasized individual rights. To accomplish that, Teles writes, “Conservatives would have to change the ideas of legal elites before they could effectively change the behavior of courts” (89).

Perhaps Teles’s most interesting case study is of the Federalist Society, which focused on cultivating intellectual entrepreneurs. While acknowledging the sway of the society, he attempts to demarcate its influence by arguing that the activities of the organization are too often conflated with those of its members. Whether this distinction can be maintained as finely as Teles contends is questionable. But Teles offers a very perceptive account of the founding of the society, stressing the importance of the individuals who were at its core.

As Teles notes, the society viewed itself as an alien, even subversive, force embedded in a hostile institution. It viewed law schools as having been captured by the left. He describes the society in almost Bolshevik terms: “This founding organizational mission has been sustained by a leadership cadre that has, with only small adjustments, controlled the Society for its first quarter-century and will, in all likelihood, do so for another two decades” (138).

Antonin Scalia, then a professor, played a decisive role in connecting groups at Yale and Chicago as well as hosting the Harvard Law Federalist Society members at his home in Chicago. The Reagan administration was receptive

as well. Membership may have carried a stigma in the academy, but it was a badge of honor on the right. It was also something of an employment card. According to Teles, “by hiring the Society’s entire founding cadre the Reagan administration and its judicial appointees sent a very powerful message that the terms of advancement associated with political ambition were being set on their head: clear ideological positioning, not cautiousness, was now an affirmative qualification for appointed office” (142).

After the abortive nomination of Robert Bork, a founding member, to the Supreme Court in 1986, the Society’s membership went up dramatically. It has substantial in-kind contributions and membership dues. And its importance on the right has only increased. The George W. Bush administration relied heavily on the Society to staff its ranks. One former official explained to Teles, “Precisely because the law schools and legal establishment are so liberal, membership and especially leadership in the Federalist Society is a costly signal of commitment to legal conservatism, and so as a result it is also a valuable signal.... We would not only look for whether someone was in the Federalist Society but whether he or she actually attended monthly Federalist Society lunches or were at Ted Olson’s annual barbecue, signs that they were willing to bear a cost for the signal” (158–88).

The retribution that would be exacted for attending Ted Olson’s “annual barbecue” is never specified but it is consistent with the right’s belief that anyone defying liberalism, or the left, will pay a heavy price in the form of ostracism and contempt. Self-pity has never been in short supply among a right-wing movement that otherwise touts the virtues of self-reliance. Nevertheless, Teles suggests that the Society is not wholly beholden to the Republican Party, indicating that it objected to Bush’s nomination of the abysmal Harriet Miers to the Supreme Court (161).

But does the Society practice a form of indoctrination? Or, to put it another way, does it subtly enforce a conservative mode of intellectual thought that can itself be as stifling as the left-wing orthodoxy it purports to combat? Teles puts it in a rather genteel fashion: “Through repeated contact with other conservatives, the Society’s networks reinforce ideological commitment, transform general attitudes into well-formed philosophical commitments, and as a consequence make members more willing to defend their views publicly.”

Part and parcel of ventilating those views publicly, Teles writes, is attempting to damage the legitimacy of the ABA. Upon the failure of the Bork nomination, which had been opposed by the ABA, the Society decided, Teles says, to “get revenge on the liberal legal elites who were seen as responsible for Bork’s defeat” (169). Teles does not seem to believe that this goal has really been achieved. Instead, a kind of permanent civil war has erupted in which “the law has become wracked by seemingly unending ideological conflict, making it even harder to move toward the Society’s understanding of the rule of law as something that transcends the ideological conflicts of the day. The Society’s activities have injected competition into the legal professions, but not, at least for now, a new establishment” (180).

As skillfully as Teles dissects the structures of the conservative legal movement, he does not really grapple with the actual ideas they represent. Coolly analytical, he refrains even from interpreting and evaluating them. This has its advantages, conferring upon his study an impartial tone. But his failure to tackle the ideas represented by the Federalist Society and other conservative organizations is ultimately somewhat unsatisfying.

He takes at face value, for example, the proposition that the Society's understanding of the rule of law "transcends" ideological conflicts, at least in theory. But this may not be quite right. The Society, from the outset, has been an ideological weapon devoted to advancing an extremely narrow conception of the public interest. It is also the case that it is hard to square the Society's espousal of original intent with the kind of radical interventions that the Supreme Court has been staging under the aegis of Justice John Roberts, such as toppling limits on campaign financing by corporations. This is not conservatism. It is radicalism.

Still, even as numerous works appear about conservatism, Teles's is surely a pioneering one in the legal field. The lifespan of the movement he has chronicled is not over. If the Supreme Court is any guide, it may have just begun.