

The Rise of the Conservative Legal Movement: The Battle for Control of the Law

by Steven M. Teles

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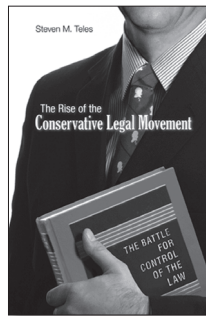
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Steven Teles, in his book *The Rise of the Conservative Legal Movement*, seeks to move beyond electoral politics towards an understanding of the role played by intellectual entrepreneurship in shaping American law. At the heart of Teles' study is a rejection of what he calls the 'myth of diabolical competence'—the notion that those involved in the American conservative movement devised a grand plan that they successfully implemented without fault. He notes that 'while there is a "market" for ideas, it is one that is institutionally sticky and requires entrepreneurial activity to give it life.'

Rather than provide a narrative of unfolding success, Teles, an Associate Professor of public policy at the University of Maryland, highlights the manner in which American conservatives have learnt from their false starts and failures. Notably, he argues that the difficulties faced by a number of the earlier conservative legal groups in America (such as the Pacific Legal Foundation established in 1973) largely arose from their close association with business leaders. Conservative activists are revealed as having an ambiguous relationship with business—often reliant on corporate funding but also advocating a free-enterprise system that threatens existing vested commercial interests.

Teles concludes that 'the emergence of forthrightly libertarian firms like IJ [the Institute for Justice] and CIR [Center for Individual Rights] ... had to await the decline of business's leadership of the conservative movement and its replacement with an alliance between intellectuals and charitable foundations.' By complicating the relationship between business and conservative activists, the *Conservative Legal Movement* offers a refreshing analysis of an area where corporate funding is often seen as crucial in explaining intellectual and political success.



What conservatives have done with their funding is shown to be more significant than its total quantum.

While Teles succeeds in making the case for the significance of institutional history and design in explaining the successes or failures of non-electoral political movements, his analysis is, at times, unanimated by the ideas of his conservative subjects. He begins the *Conservative Legal Movement* by noting that 'intellectual history is necessary but not sufficient' and concludes with the comment that 'conservatives became more effective by challenging, and ultimately changing, their ideas'—yet the actual intellectual shifts that conservatives have undergone are partly obscured in his narrative.

Teles, for example, draws attention at the start of his study to the tensions within American conservative circles that arose as a result of the nomination by George W. Bush of his close advisor Harriet Miers to fill a vacancy on the US Supreme Court. While this particular controversy is discussed adequately, it would have been helpful if Teles' study questioned more broadly the extent to which American conservatives

have been forced to re-examine their ideological first-principles, and the coherence of their political alliances, as a result of the dramatic developments of the Bush years.

Appropriately, Teles demonstrates the manner in which conservatives have adapted the structures of the legal groups and think tanks they have run in order to defuse potential internal ideological conflicts. In this sense, institutional design is linked to ideology. He mentions, for example, the manner in which the encouragement of pro-bono legal activism for conservative causes helped facilitate "spontaneous, decentralised action" that libertarians have philosophical reasons to prefer to conscious, centralised planning.' Yet, the actual ideological positions American legal conservatives have occupied—the intellectual driving forces behind the process of institutional entrepreneurship—need to be more clearly illuminated.

Teles does examine some key intellectual shifts. He notes, for example, the move by the influential Federalist Society from supporting the notion of judicial restraint in favour of 'original meaning' in constitutional law. He concludes his discussion of the Society by noting that a consequence of its attacks upon liberal legal institutions has been, 'counter to its typical members' philosophy,' a weakening of the idea that 'there are any "neutral" standards, and in particular any institutions that can be countered upon to defend them.' Teles suggests that such a dilemma was unavoidable—a conclusion that leaves one hungry for a more detailed discussion of how exactly those identifying themselves as 'conservatives' have assimilated notions of legal activism into their world view.

Australian readers should be warned that, unsurprisingly, Teles uses American political terminology.

His subjects are variously described as ‘conservative,’ ‘neoconservative,’ ‘classical liberal,’ ‘economic liberal’ and ‘libertarian.’ While these terms have relatively clear meanings in the US context, they carry different connotations elsewhere. Outlines of the views and intellectual traditions with which these labels correspond would have been helpful.

Where Teles is at his best is in his analysis of the manner in which the conservative legal movement was shaped by the earlier success of liberals (or ‘progressives’ as they are more likely to be known in Australia). Teles gives this analysis a prominent position at the start of the *Conservative Legal Movement* making clear his view that ‘... while their particular grievances differed, the conservative coalition was drawn together by a shared opposition to liberal judges, professors, and public interest lawyers ...’ While Teles emphasises the roots of the conservative legal movement as a reaction to the perceived success of liberals in influencing bodies such as the American Bar Association, he avoids typecasting liberal views. Rather, the views held by liberals are revealed to be as varied as the institutions they have influenced. This fleshing out of liberal ideas and their intellectual and organisational influence upon conservatives is both illuminating and necessary given the often-noted trend of left to right defection following the ‘mugging’ of liberals by ‘reality.’

The Rise of the Conservative Legal Movement has much to offer those who still strive to enhance their intellectual advocacy through the development of groups such as think tanks. Importantly, Teles’ focus on the institutional entrepreneurship implicitly demonstrates the historical path dependence followed by such advocates. The subjects of Teles’

study, such as Richard Posner and his colleagues who sought to bring the insights of neo-classical economics to bear on the study of the law, all faced what they believed was a dominance of liberal ideas in both the academy and wider society. They developed ideas and packaged them in institutions in a way that they thought were suitable to the challenges of their time. As writer Rick Perlstein noted in response to the *Conservative Legal Movement*, ‘as ideological tendencies “left” and “right” are never symmetrical’—the one cannot replicate the methods of the other. Teles’ warning directed to ‘liberals’ applies across the political spectrum—today’s intellectual advocates need to avoid answering yesterday’s questions.

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Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law
by Michael A. Carrier
 Oxford University Press
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Alexander Graham Bell thought the telephone would be used primarily to broadcast the daily news. Instead, it was primarily used for personal communication and became an indispensable part of our daily lives. In his book *Innovation for the 21st Century* Michael Carrier, professor of law at Rutgers School of Law in New Jersey, uses this example to

demonstrate the unpredictability of new technologies and their potential applications.

This unpredictability is an important issue in intellectual property policy. While intellectual property law is designed to reward innovation with temporary monopoly rights, these rights can also be an obstacle to subsequent innovation.

Carrier discusses how copyright, often overlooked in the analysis of innovation law, affected the development of ‘peer to peer’ (P2P) communications networking technology. P2P technology allows data transfer directly between network users rather than through third parties as in the case of the world wide web. Early entrants into the market for P2P music sharing, such as Napster, provided software that allowed users to easily share their MP3 files, bypassing the traditional method of buying songs online or in store. P2P technology indexed the location and contents of files available on the computers of individual users and facilitated the exchange process.

Fearing revenue loss due to P2P music sharing, the recording industry sued Napster for violating copyright in 2000 under the US *Digital Millennium Copyright Act* in the first major P2P copyright infringement case. A preliminary injunction was granted against Napster based on a finding that Napster would likely be held liable for contributory copyright infringement and vicariously liable for copyright infringement. This was because Napster knew that its software was used for copyright infringement and failed to prevent such use. The court’s decision resulted in Napster’s closure.

Carrier argues that this and similar other rulings have held back development of technology with