

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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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

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 lawyers⁹⁸ 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 Foundation¹⁰¹ 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

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.