

The Rise of The Conservative Legal Movement - A Crooked Timber Seminar on Steven Teles' Book

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Contents

Contents	ii
Introduction	1
Jack Balkin - What Teles Can Tell Us About Constitutional Change	3
Rick Perlstein - What Liberals <i>Shouldn't</i> Learn from Conservatives	7
Tyler Cowen - One Economist's Perspective on the Law and Economics Movement	10
Mark Schmitt - Bunglers, Egos, and Law vs. Politics	13
David Post - Living Life Forwards	17
Kimberly Morgan - Legal Conservatives as Closet Gramscians	20
Henry Farrell - Fabians and Gramscians in Law and Economics	23
Moneybollocks and Money Problems	24
Law and Economics and Market Politics	28
Fabio Rojas - The Failed Conservative Revolution	31
Aaron Swartz - Political Entrepreneurs and Lunatics with Money	33
Steven Teles - Response	37

Introduction

Welcome to a seminar on Steve Teles' recent book *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*. This has already become a landmark book in the burgeoning literature on American conservatism, charting out the organizational strategies through which economic conservatives and libertarians (as the book notes, it doesn't have much to say about religious conservatism) sought to respond to the liberal legal culture of 1960s America, and to turn it back. It's a great story, not least because Teles talks about the mistakes that the conservatives made as well as their successes. There is a tendency on the left to see the conservative movement as an incredibly efficient institutional Borg that adopted a masterplan in the 1960s, implemented it through the 1970s, 1980s and 1990s, and then saw it all collapse in the last couple of years. Teles gives this account the lie, showing us the organizational false starts as well as the success stories. As with other seminars, all the contents are made available under a Creative Commons With Attribution Non-Commercial Sharealike license.

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⁴<http://www.orgtheory.net>

⁵<http://www.aaronsw.com/weblog/>

Jack Balkin - What Teles Can Tell Us About Constitutional Change

Because constitutional change is a focus of my research these days, I thought I might say a few words about how Steve Teles' book *The Rise of the Conservative Legal Movement* is important to contemporary theories of constitutional change. Teles' book discusses how competition between different ideological groups occurs outside of the electoral process: through institution building, norm development and norm proliferation. These mechanisms are quite important to understanding constitutional change, and legal change more generally.

To understand the importance of Teles' book for constitutional theory, start with Bruce Ackerman and his well-known theory of constitutional⁶ moments⁷. At certain points in American history, constitutional norms become markedly different from what they had been before. The watershed produced by the New Deal is one central example; the civil rights era of the 1960s and early 1970s is another. Constitutional law and the underlying assumptions of constitutional law are very different in 1940 than they were in 1920; we can tell a similar story about the differences between 1955 and 1975. Very significant changes occurred in a little more than a decade and very different assumptions became dominant. The formal presence of constitutional amendments is not necessary for these changes to occur. No amendments occurred during the struggle over the New Deal; amendments did occur during the civil rights era, but they were either irrelevant to that struggle (the 25th) or at the periphery (the 24th and the 26th).

Ackerman argues that big constitutional changes occur through a succession of different constitutional regimes begun by quasi-revolutionary periods he calls constitutional moments. Constitutional moments produce fundamental change outside the Article V amendment process; they require the mobilized support of the American people. This support is signaled, demonstrated, and confirmed through a series of defining elections. So in Ackerman's model the New Deal transformation begins with the 1932 election and it is consolidated with the 1940 election. The civil rights revolution begins with the Supreme

⁶<http://www.amazon.com/We-People-Foundations-Bruce-Ackerman/dp/0674948416>

⁷<http://www.amazon.com/We-People-Transformations-Bruce-Ackerman/dp/0674003977/>

Court's 1954 decision in *Brown v. Board of Education*, and it is ratified in the 1964 election and consolidated (in Ackerman's view, not mine!) in the 1968 election.

Contrast Ackerman's model with the model of change that Sandy Levinson and I have proposed⁸. We argue that constitutional change occurs in small steps as well as large ones. The key issues for us are (1) who gets to staff the courts and (2) how the courts usually reflect and support the constitutional commitments of the dominant national coalition. Thus, we explain constitutional change (at least in doctrines) through partisan entrenchment in the judiciary. Constitutional change occurs because parties and affiliated social movements press to appoint jurists who have similar views to their own; when parties are able to appoint enough of these judges to be added to allies already on the bench, the judges start to change doctrine. If enough judges are added in a short period of time, what you get looks like almost revolutionary change.

Thus, for example, although the Supreme Court stops opposing Roosevelt in 1937, the big doctrinal changes begin to occur (and become more or less permanent) over the next six years, when Roosevelt gets to fill eight seats on the Supreme Court (and one seat twice). A Supreme Court filled with adherents of the New Deal is likely to have a transformative effect on doctrine, and so it did. The Civil Rights Revolution is due to (1) the cumulative effect of presidents from both parties appointing racial liberals to the courts; and (2) Felix Frankfurter's retirement in 1962, and the appointment of Arthur Goldberg, which cemented a five person liberal majority just as political liberalism was ascendant in the political branches. Supported by (and supporting) a liberal President and a liberal majority in Congress, the Warren Court upheld new civil liberties laws and imposed the liberal majority's values on regional majorities, especially in the South.

Ackerman's model is interested in big changes at the level of new regimes; Levinson's and my model, by contrast, is interested in changes great and small. For Ackerman, We the People must self-consciously understand that the Constitution is being amended outside Article V and give their consent through a series of key elections. In Levinson's and my model the people don't have to have this self-conscious understanding. Elections matter, but primarily because they decide who becomes President and who holds the balance of power in the Senate, thus affecting who gets appointed to the courts. Social mobilizations matter a great deal too, but they matter especially because they change public opinion, social mores and constitutional common sense. This affects the assumptions of judges on the bench, as well as what kinds of people will get appointed to the bench later on.

How does Teles' book intervene in this debate between Ackerman's model and Levinson's and mine? Teles points out that partisan competition outside of the electoral process and in civil society is very important to understanding political success. This competition doesn't necessarily involve judicial appointments, although obviously civil society groups can be heavily involved in the fight over judicial appointments. But Teles points out (correctly) that there are important venues for entrenchment other than the judiciary.

⁸http://papers.ssrn.com/sol3/papers.cfm?abstract_id=930514

Entrenchment in civil society may be just as important and, in some respects, just as long lasting. Indeed, entrenchments in institutions of civil society may be altogether necessary for partisan entrenchments in the judiciary to occur and to be effective.

To put it simply, John Roberts and Sam Alito did not appear out of nowhere. They got their start in the Reagan Justice Department in the 1980s. They were also part of a larger social movement that produced a team of ideological allies who could become qualified for the federal bench and perhaps someday the Supreme Court. Teles' book shows us, if any demonstration were necessary, that it is not enough just to win elections. It is true that you must have the opportunity to appoint new judges, but you also have to have a stock of reliable people to choose from when you get that opportunity. You have to have a litigation support system to bring cases for those judges to hear. You have to have a group of think tanks and institutions that will work out ideas and figure out which cases to bring. You have to have a cadre of ideologically committed people in civil society, in think tanks, in journalism and in the media who will support you and who are in it for the long haul. It takes about twenty five years to grow a Supreme Court Justice, as the Roberts and Alito nominations showed. Long term investments in civil society are necessary to produce significant changes in constitutional doctrine.

Teles emphasizes the struggle over constitutional common sense that is played out in civil society, or what I like to call the battle over what is "off the wall" and "on the wall." Professionals— and lawyers and judges are nothing if not professionals— like to think of themselves as reasonable and definitely not crazy. So what is "on the wall" and what is "off the wall" matters intensely to them and their sense of professional identity. The ability to change the boundary between these categories pays extra dividends in shaping professional legal discourse and legal thought in addition to its effects in ordinary politics. When civil society organizations help shape what is "on the wall" and "off the wall" in constitutional thought, they move the ideological goal posts, so to speak, allowing certain views that once were out of the mainstream to be seen as reasonable, or within the sphere of the reasonable.

Teles points out that success in changing the law and legal culture in the late twentieth century required a shift from grass roots organizations, businesses and Republican elected officials to a "new class" of ideologically motivated actors in think tanks, in the academy, in public interest organizations, in the mass media, and above all, in foundations, who served as the major patrons for the new class. These people created a counter-establishment in law, journalism, media, and the academy that could support constitutional and legal change. Here Teles draws on Charles Epp's very important work on the legal support structure for rights revolutions⁹. In the process, he extends Levinson's and my idea of partisan entrenchment from the judiciary and the elected branches to the institutions of civil society.

Teles' triple focus on non-electoral competition, on the neglected supply side for consti-

⁹<http://www.amazon.com/Rights-Revolution-Activists-Comparative-Perspective/dp/0226211622>

tutional change, and on the importance of shaping constitutional common sense, offers a distinctive take on how constitutional regimes change over time. In many ways it is more hospitable to Levinson's and my model than Ackerman's theory of constitutional moments. Ackerman's model focuses on relatively swift changes in basic constitutional values ushered in by pivotal elections. Instead, Teles defines regimes as multiple reinforcing sources of durable political advantage, both in electoral politics, and outside it (for example, in civil society, in legal argument, in litigation, and so on.). If Teles is correct, then regime change can't happen all at once, or even within a decade, as Ackerman's theory suggests. Rather, regime change, when it occurs, occurs gradually, and in different sectors at different times. For example liberal legalism does not emerge full blown in 1932, or even in 1940, when the New Deal transformation occurs. The establishment of Liberal legalism occurs over many years, and some features actually blossom after the 1964 election, when the liberal establishment is about to lose its hegemonic status.

I close with one last point about Teles' relevance to contemporary constitutional theory: During the last twenty years or so there has been, primarily on the left, a focus on so-called "popular constitutionalism"—the idea that constitutional interpretation should be taken back from the courts and returned to "The People." Liberal legal academics were partly attracted to the idea of popular constitutionalism because of the rise of conservative forms of "judicial activism," in the 1990s and 2000s—in particular, the Rehnquist Court's increasingly robust use of judicial review to strike down liberal laws and policies in the name of conservative constitutional values.

There is enormous irony to the liberal embrace of popular constitutionalism, at least as a normative matter. One reason why the Rehnquist Court was doing what it was doing was that in some sense the people had spoken—they had repeatedly elected conservative Republicans to office, making them the dominant party in the United States. The work of the Rehnquist court did reflect the constitutional vision of popular social movements, just not liberal social movements.

Teles' book suggests another reason why the liberal embrace of popular constitutionalism on the left is mostly a romantic vision. The "new class" that does much of the work of promoting constitutional and legal change cannot be equated with the unwashed masses, grass roots organizations or the "average American." Rather, the "new class" consists in a series of ideologically committed intellectuals, members of the media, academics, public interest lawyers, bureaucrats, judges, and members of the organized bar. What Teles offers us is not a battle of the grass roots versus the establishment, or of We the People versus an imperial judiciary, but a struggle between an existing liberal elite legal establishment (and its resources) and a rising counter-establishment with its own elites (and its own resources). That is to say, Teles argues that what liberal scholars have tended to label "popular" constitutionalism is actually a struggle between different sets of elites.

Rick Perlstein - What Liberals *Shouldn't* Learn from Conservatives

One of the impressive things about Steven Teles' book is that it helped orient me better about the apparent implications of my own work. When I wrote *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus*, the notion that, in narrating the capture of the Republican Party by the conservative movement, I was offering advice to progressives (like me) about how to seize national power themselves, was distant in my mind if it was present at all. The exigencies of commercial promotion (a perhaps over-glib framing of the book as an allegory for liberals) and an accident of history (the cult-following the paperback developed among progressives wrapped up in the nascent Netroots and Howard Dean movements) led to the book being read rather narrowly: as a universally applicable "movement" blueprint. Not infrequently I would receive phone calls and emails from avid left-insurrectionists for practical advice as to how a "progressive infrastructure" to match the conservative one built through and after the Goldwater campaigns. Not infrequently I would convince myself I had plenty to say on the subject—though not without ambivalence. When, of all extraordinary things, I was invited to address the Senate Democratic caucus on "building a progressive idea infrastructure," I said what I pretty much still believe: interests, not ideas, have much more motor force in politics. Ideas are fine, but if anything progressives have too many ideas. But deliver some more middle class entitlements like free healthcare, I argued, and Democrats will really be on their way to a restored hegemony.

One of the things I was groping to express, I now realize—have been groping to express ever since—is that as ideological tendencies "left" and "right" are never symmetrical. Somehow "copying" the methods of one to deliver the other to glory is dumb. "Left" and "right" are not functions of each other but ontologically distinct categories (for an explanation of this idea see here¹⁰; what's more—even more—their histories are institutionally embedded, not merely path dependent but radically path dependent. Teles makes this fact the analytic payoff of his study.

It shouldn't be news to activist: to win any fight, first you must understand your enemy. "The most successful conservative projects," Teles points out, were "responses to the

¹⁰http://www.whatliberalmedia.com/rev_cjr.htm

character of liberal entrenchment.” His portrait of how that entrenchment evolved and obtained hegemony in the legal world—the “Liberal Legal Network”—is solid and convincing. One of Lyndon Johnson’s legislative creations—the Legal Services Corporation—becomes the nation’s preeminent “strategic litigant,” submitting 169 cases to the Supreme Court between 1966 and 1975, with a higher acceptance rate than the solicitor general. More and more, all sorts of actors seeking social change following the opportunities offered them by an activist Warren Court, availing themselves of the blunt instrument of federal litigation. One by one, we see a set of institutions responding to and magnifying the change: Congress expands the ambit of justiciability and enhances the categories protected under civil rights law. The American Bar Association comes to frame “legal liberalism as a philosophy of modernization and process.” Clinical education is institutionalized by the post-’60s generation, not incidentally as a liberal project, transforming constitutionally conservative institutions—Ivy League law schools—into beachheads for liberal, even radical, policy-making—on the death penalty, on the prison system, on land use, on welfare rights.

This echt-institutionalist even slips in a bit of cultural history: the new genre of glossy law school admissions brochures that depict the federal courts as the Lexington-and-Concord, the Runnymede, the Selma of the 1970s: the very frontier of justice and freedom. The “once low-rent area around Dupont Circle [facilitating] the opportunity for frequent interaction.” The terrain of the law has been transformed; the Footnote Four Generation is at its high tide, institutionalizing a “progressive vision of history.” The Ford Foundation plays a critical one, but one that reveals an unanticipated tension. We see MacGeorge Bundy and his board trying to convince funders and tax lawyers that the politicization of a generation of lawyers isn’t political; and those same lawyers defining their function ever more politically—even as their professors reject their liberal “predecessors’ obsession with the ‘counter-majoritarian difficulty,’ and also oblivious to “the substantial costs these imposed on business and local governments.”

We see, in other words, a textbook example of top-down social change, the mild psychological imperialism taken on by the phrase “public interest,” and feel empathy for the particular sense of dispossession this particular aspect of the New Politics inspired among conservative elites—who, if there were to be oligarchies, were used to being the oligarchs themselves. As actors in history, liberal lawyers find themselves in just the position Lao Tzu wants to see a successful army: taking the fight where the enemy least expects it, where they are most unprepared to fight back. “The power of this network came in large part because of the weakness of its opposition in case after case by their intellectual superficiality, their almost total lack of agenda control, an absence of information, and a vacuum in support from professional elites.”

The rest of the book narrates the legal right’s s fumbling response, and shows both their failures and successes as structurally telling. Arrangements that spoke to this strategic situation—and, as Teles writes, “were adaptations to specific weaknesses of the conservative movements”—succeeded. Arrangements that did not proved failures. “To the degree that

liberals invest resources in replicating conservative organizations designed for problems different from the ones they face today, they will waste money, time, and human capital.” This is an excellent lesson.

Tyler Cowen - One Economist's Perspective on the Law and Economics Movement

Law and economics has done well for some straightforward reasons. Most of all, law schools have become more research-oriented over the last twenty years. Publication is more important and word-of-mouth about the quality of publication is more important. Law and economics, which draws so much of its method from economics, has been ideally positioned to benefit from this trend, albeit by a kind of historical accident.

The eighty-page “blah blah blah” law review article is harder to sell in an age of competitive professionalization of the law professor market itself. Law and economics arguments usually can be stated succinctly and the quality of argumentation and evidence is relatively easy to evaluate. It is possible, for instance, that an argument or piece of evidence is wrong and can be demonstrated as such. If law and economics requires some technical knowledge, so much the better for its ability to “signal” the quality of law school professors. I expect these trends to continue.

The conservative branch of the law and economics movement has in particular grown for some reasons rooted in politics. Starting with Reagan, we have had Republican Presidents willing or eager to appoint conservative judges to the bench or other positions of influence (e.g., Ed Meese under Reagan). The conservative side of the legal profession has risen rapidly in relative status and influence. The organization and growth of The Federalist Society has accelerated this process and given it grass roots.

I view the relatively conservative nature of the law and economics movement as a historical accident which is already more or less obsolete. For better or worse, the wave of the future is scholars such as Cass Sunstein, not Henry Manne. The simple lesson is simply that in the long run “mainstream” usually wins out, even if the efforts of Henry Manne shifted or accelerated what later became mainstream trends.

One topic which interests me is how the “conservative” law and economics movement, as it is found in legal academia, differs from “market-oriented” economics, as it is found in the economics profession. The “right wing” economist and legal scholar will agree on many issues but you also will find fundamental variations in their temperament and political stances.

Market-oriented economists tend to be libertarian and it is rare that they have much respect for the U.S. Constitution beyond the pragmatic level. The common view is that while a constitution may be better than the alternatives, it is political incentives which really matter. James M. Buchanan's program for a "constitutional economics" never quite took off and insofar as it did it has led to the analytic deconstruction of constitutions rather than their glorification. It isn't hard to find libertarian economists who take "reductionist" views of constitutions and trumpet them loudly.

The conservative wing of the law and economics movement, in contrast, often canonizes constitutions. Many law and economics scholars build their reputations from studying, interpreting, or defending the U.S. Constitution. You don't get to higher political or judicial office by treating a constitution in purely economic terms.

A second set of differences stems from issues of foreign policy, executive power, and due process, as manifested for instance in the recent debates on torture and detainment of terrorists. Many legal scholars on the right have been forced to either ally themselves with the Bush administration or break with it. The market-oriented economists haven't faced such a stark dilemma. When it comes to economic issues, there is a readily available default position that keeps you friends with (almost) everyone. You can believe that the Bush administration spent too much but that the Democrats might have been much worse in this regard. Furthermore economists as a whole are less interested in political office than are legal scholars; we have no equivalent of the Supreme Court (chairing the CEA isn't worth nearly as much in terms of influence or prestige) and thus we are freer agents.

For these reasons, there has been less of a crisis of conscience or polarization among the market-oriented economists. Maybe that will change with the fallout from the financial crisis or global warming but so far the economists have been less politicized than the legal scholars.

I am an economist and when I meet my peers from the legal side of the law and economics movement I often feel as if I am stepping on culturally foreign territory. Overall I feel more at home, culturally and intellectually speaking that is, talking to conservative Democratic economists.

As for the subject directly at hand, I enjoyed reading Steve Teles's book and I thought it was very carefully researched. It is the best single-volume introduction to its chosen topic. I recommend it to all those who think they might be interested.

For obvious reasons, the part of the book which interested me most was the section about my home institution, George Mason University, and in particular the School of Law. I liked this part of the book too, but I felt it didn't give a complete picture. In particular there wasn't enough coverage of the students, a key part of any law school.

I've taught a Law and Literature at the GMU School of Law for seven years now. At the same time, I've had no real contact with law school governance, as my tenure is in the economics department. (Oddly, although I am an economist, the course contains close to zero economics. Just about every year, I eventually hear something like "You mean you're not an English professor?") From my contact with the students, which by now is extensive,

I have never noticed signs that I am in anything other than a standard law school.

Never. If I mention “moral hazard” or the “Coase theorem” in regard to the legal discussion in the Book of Exodus, I get a few giggles. Maybe you could count that. I also believe the student body is more ethnically and intellectually diverse than at many top-tier law schools and yes that does mean it is probably more politically conservative than is the student body at Harvard Law. But I believe that is due to our northern Virginia location, and other demographic factors, rather than due to the influence of the faculty in any significant way.

They’ve been a great group of students, deeply interested in new and different ways of thinking about law, whether it be through the lens of economics or through film and fiction. They’re very curious and very willing to challenge whatever I throw at them. I could not get them to agree that the last section of Smilla’s Sense of Snow consists of imagined rather than real events. They think critically about virtually everything they are taught.

So the primary narrative of GMU Law, as I experience it, is that of an educational institution. Teles’s discussion provides a more novel perspective, but it is important not to forget the weight and importance of daily routine and I mean that term in a positive sense. Students come and learn about law, and in turn become lawyers, and that is indeed the main story of what goes on.

Mark Schmitt - Bunglers, Egos, and Law vs. Politics

“When we care about something, we waste money on it,” the political theorist Benjamin Barber once told me, an aphorism that came to mind frequently as I read *Building The Conservative Legal Movement* several months ago. On one level, sure, the book chronicles one of the most successful social and intellectual transformations in American history, and perhaps the only one that did not involve a mass movement. The Law and Economics project in particular had an influence far beyond the legal world, bringing the tools and priorities of neoclassical economics to bear on any question of policy, so that questions such as the appropriate level of regulation in financial markets were answered by the very framing of the question. It was an oversimplification, but not crazy, when someone said to me recently, “I want someone to write the whole story of everything that led to the financial crisis, starting with that whole Law and Economics thing.”!—more—;

Yet on another level, *BTCLM* is a story of wasted resources, of bungling and false starts, egos and overreach, in sharp contrast to the mythology of the “Conservative Message Machine Money Matrix,” to use the title of the PowerPoint presentation that was used to fire up liberal donors a few years ago. Like the PowerPoint, Teles starts from the now-famous, once-forgotten “Powell Memo,” Richmond lawyer and soon-to-be Justice Lewis Powell’s recommendations to a neighbor about how the U.S. Chamber of Commerce could respond to the emerging liberal public-interest legal community. He’s not alone in exaggerating the memo’s negligible influence (I tried to debunk the myth¹¹ of the Powell memo in 2005), but he at least doesn’t treat it as the blueprint for all conservative organizing that followed. What every progressive in awe of the right’s past successes must understand is that there was no blueprint, no master plan, and no great planner.

As Teles says at the end, what there was was a willingness among the funders to take chances, to admit mistakes and yet not become paralyzed by them, and a practice among the funders, sometimes intentional, of “spread betting” on ideas and individuals, some of which would succeed and others fail, and others that would fail in the hands of one entrepreneur and succeed with another. And ultimately, it’s hard to avoid concluding that

¹¹http://www.prospect.org/cs/articles?article=the_legend_of_the_powell_memo

personality makes all the difference – that organizationally-minded, open and pleasant characters like Steve Calabresi of the Federalist Society succeed where passionate and complicated geniuses often fail. Having worked at a liberal foundation, I often thought there was too much emphasis on personality, a “star system” in which a few people can get grants and lots of good ideas go unfunded, but there is quite a case to be made for the focus on individuals – so long as it is the right individuals in the right roles — as much as it goes against liberal instincts about meritocracy and equal opportunity.

The chapter on the liberal legal movement was as revelatory to me as those on the conservatives, and I know other readers had a similar experience. In part this is because we are so accustomed to thinking of a grand conservative movement, against which the center-left was simply unarmed, that we forget that the conservative movement itself was a reaction against a liberal movement that had had its day – or more than its day, a whole era known as the period of “liberal consensus.” But we are not as conscious of that movement, because it seemed to operate so effortlessly within the broader trends of the day.

I first became part of the “progressive infrastructure,” or movement when I went to work for a liberal foundation – George Soros’s Open Society Institute – in 1997, after a few years working in the Senate. I was amazed to realize how much of the liberal infrastructure was really a legal and litigation infrastructure: All those organizations whose names began with “Lawyers Committee for . . .” or ended with “Legal Defense Fund” were obvious, but many of the organizations with names that began “Center on . . .” or “Center for . . .,” like the Center for Law and Social Policy, had begun life as “support centers” for the legal services system. They were staffed by lawyers, or by economists and policy experts who provided facts to support legal arguments, and their primary method of social change was to use courts to force remedies for injustices in housing, employment, health care, government benefits, and other fields.

By the late 1990s, all these litigation organizations were beginning to feel the limits of their legalistic theory of change, as well as practical limitations such as the restrictions on class action suits imposed by Congress. The organizations changed their names (the Lawyers’ Committees, a classic formulation from the 1960s now have catchier names like “Human Rights First”), or expanded their public relations efforts or joined coalitions with grassroots community organizations.

But it wasn’t simply a matter of changing names or finding partners. The liberal legal movement was built on certain assumptions about politics, or I should say, certain anti-political assumptions that made a lot of sense in the civil rights era: Politics was a stacked deck. The non-majoritarian Senate and the power of the South meant that the country would never step out of the shadow of states’ rights and into the sunlight of human rights. But *emj*Brown v. Board of Education/*emj* provided a template for a court that could look beyond basic legal interpretation to the obvious reality, and get one step ahead of the political stalemate. And decades of organizing were based on that hope. The legal liberals didn’t view it as a movement, just a kind of manifest destiny – the courts could lead us to the founding vision of the country even if politics couldn’t.

But there's a difference between courts being a step ahead of politics (and the *Brown* Court was not ahead of the country, even if it was ahead of 40 senators and the Southern committee chairs), and rejecting politics altogether. And as Gerald Rosenberg argued in *The Hollow Hope*, legal remedies hit their limits when they were far ahead of politics. More significantly, the window opened by *Brown*, to use empirical data and obvious outcomes to reach a constitutional result that was not as obvious within the airless confines of constitutional and statutory interpretation, closed quickly. And this was not the work of the conservative legal movement: Justices Breyer and Ginsburg, as well as liberals on the circuit courts, are as responsible as conservatives for narrowing the realm of the law to a fairly constrained and technical reading of statutes and their intents. *Brown* stands as the awkward exception: even conservatives can't accept (or can't admit that they could accept) a method of constitutional interpretation that does not allow the Court to outlaw segregation, but they are no longer willing to take its methodology as a template.

The liberal legal movement differed from its later conservative counterpart in its relationship to politics. The liberal movement was an evasion of politics, it was designed by people who, based accurately on the experience of the 1940s and 1950s, thought politics would never grant a large portion of this country's citizens their basic rights as human beings. And so it magnified claims of rights – which are claims above politics – and then tried to convert other substantive claims, claims of distributive justice such as welfare or housing, into rights claims, above politics. And that is where it stalled.

The conservative legal movement had a different relationship to politics from the start. The sub-movements Teles describes – law and economics, the Federalist Society, and the conservative public interest law infrastructure – all viewed themselves as more or less aligned with the conservative political project from Goldwater through Reagan and beyond, which gained strength from seeing itself as a “remnant” taking on the established order. For all the talk of originalism, they don't make much pretense that the legal order they seek was separate from a political order. And while in the 1930s, conservative courts had thwarted liberal politics, with rare exceptions, this wasn't how legal conservatives saw their role. And for the most part, the legal order they were pursuing just happened to coincide with the interests of the more powerful – on property rights, for example, or in law and economics.

But an interesting lesson of *BTCLM* is that the movement seems to have been most successful when it kept some healthy distance from politics. The Federalist Society maintains a nice and open spirit – a law student might join Federalist or at least go to some talks who would never in a million years be seen at a Young Republicans meeting. And the Law and Economics project seems to have succeeded finally when it situated itself within the Ivory Tower, inculcating professors into the heart of academia. It is not an arm of conservative politics, and there are liberals (for example, current Obama administration official Cass Sunstein) who have embraced some of the insights of Law and Economics. Here, too, the conservative legal movement differs from the caricature held on the left, which views it as an instrument of fierce ideological warfare, against which we have to fight back with

discipline and intensity of our own, banishing the “squishes.” The successful efforts seem to have been much more open, benign, non-exclusive, and non-political than one would assume.

The lesson of the book, then, is profoundly liberal. It is that a successful agenda-changing movement should be flexible, unpredictable, and open to politics without losing itself to short-term political goals, and that it’s funders should respect all that and be willing to waste a little money along the way.

David Post - Living Life Forwards

“Life must be lived forwards, but it can only be understood backwards.”¹²

“One of history’s uses is to remind us how unlikely things can be.”¹³

I have considerably less to say about Steve Teles’ book than the other participants here. That should not be taken as criticism of the book – indeed, I think that *The Rise of the Conservative Legal Movement* is a terrific book, scholarship of the highest order, and I learned a great deal from it – about the rise of the “LLN” (Liberal Legal Network) in the 1960s and 70s (and in particular about the role that the Ford Foundation, under its then-President MacGeorge Bundy, played in developing that network, about which I knew very little prior to reading this book), about the early failures of the counter-revolutionary attempts (by groups such as the Mountain States Legal Foundation and the Center for Constitutional Litigation), about Henry Manne, and Richard Mellon Scaife, and the Olin Foundation, about the rise of “law and economics,” and about many other people, events, institutions, and ideas that played an important role – at least, Teles has persuaded me that they played an important role – in the rise of the conservative legal movement.

It’s a fascinating story, well-told. As someone who lived through the period he describes, it’s very interesting to see how things happened, how X was connected to Y which was connected to Z, how particular events, seemingly insignificant at the time, were to have deep and lasting impacts on the political debate and landscape. It’s a story, a re-creation of the past, and it helps us understand how the world came to be what it is today – always a useful and important thing to do.

If I thought Teles missed something, or misinterpreted something, or gave undue weight to development X while slighting development Y, I’d try to persuade you of that. But I don’t – I’m no scholar of this period or these issues, and as far as I can tell, Teles got the story more-or-less right. I buy it. I have nothing whatsoever to say about the book *on its own terms* – about its facts, and the placement of those facts into a plausible cause-and-effect chain leading up to the present.

¹²Kierkegaard, *The Concluding Unscientific Postscript to The Philosophical Fragments*.

¹³Jonathan Spence, “Treason by the Book.”

There's a good reason that generals, as the saying goes, are always fighting the last war. It's the same reason the drunk looks for his lost keys under the streetlight rather than in the dark alley where he actually dropped them: The light's better there. We won't find our keys, and we won't learn how to fight the next war – but what else can we do? It's just as Kierkegaard said – we live forward, but can only understand backward. That's just part of the human condition, the way the world is constructed.

Teles' book describes how the last war went – unraveling (or perhaps it can be better be called re-raveling) the past. It confirms, as all good re-ravelings confirm, that we can make sense of the past – that from the millions, and hundreds of millions, and billions, of events and people and actions and institutions and connections between people, and events, and actions, and institutions, some mattered a great deal for what happened next, while most mattered not at all, and that we can, if we work hard enough, single out the ones that mattered – the hiring of Henry Manne as Dean of the University of Miami, say, or the founding of the Mt. Pelerin Society, or the publication of *Law and Economics*.

The problem, for me at least, is that nobody knew at the time, and *nobody could possibly have known* at the time, that these events (or the many, many others Teles describes) mattered. Suppose Teles had written his book, complete and comprehensive up to “the present,” in, say, 1975. Would he, or anyone else, have been able to detect, from among the billions of events and people and actions and institutions in 1975, and all of the connections between those people, and events, and actions, and institutions, which ones mattered and which ones didn't? Would he have known, based on all of his deep understanding of the events leading up to Henry Manne's deanship, that it mattered?

Of course not. For all Teles knew – for all anyone could know – Henry Manne could have been hit by a bus the day he began work at the University of Miami. Or he could have failed miserably and been laughed out of town.

We see in retrospect – Teles' 2009 book shows us – that had that happened, the rest of the story would have unraveled very differently. History is like that; it's an absurdly complex network of events and causal links between events, and we know that a perturbation at one point in the network can have profoundly disproportionate effects on the trajectory of the whole system. Manne's deanship, we now can see (thanks to Teles' 2009 book), was one such perturbation.

But no one knew at the time, and no one could have known at the time, that Manne's deanship mattered, for the simple reason that *it did not matter “at the time,” it only came to matter because of what happened next*. Had Henry Manne been hit by a bus the day after he became dean, his having become dean would not, in fact, have mattered. Teles' 2009 book – a guidebook to the things that mattered leading up to 2009 – would have given Dean Manne, at most, a footnote: “Who knows what would have happened had Dean Manne not been tragically cut down in 1975? Perhaps the federal takeover of law schools in 1994, and the Socialist revolution of 2000, would never have occurred? We'll never know . . .”

So not only is Teles' 2009 book radically incomplete as a description of what happened

– he’s missing all of those bus accidents where people who would have mattered had the accidents not occurred were struck down – but it gives us no guide about what matters today. 2009 is just like 1975 – it’s “the present.” And the future is always what happens next. Just as Teles’ 1975 book would not have shed any light on the things that were mattering in 1975, his 2009 book doesn’t shed any light on what matters in all that is going to happen this afternoon.

“Those who do not remember the past are condemned to repeat it.” There are few, if any, sillier clichés out there. Remembering, and understanding, the past is a wonderful thing, because it enriches our understanding of human experience and how the world got to be the world that it is. But I cannot for the life of me see how that understand will help me avoid mistakes in the future – or the present (which was the future, up until a moment ago). If and when I am transported back into the past, I promise not to repeat the mistakes that were made then – I’ll give Henry Manne a security detail, and tell them to keep him away from buses. But how that helps me, going forward into 2009, I fail to see.

Kimberly Morgan - Legal Conservatives as Closet Gramscians

The first thing to be said is that Steve Teles has written a terrific book. *The Rise of the Conservative Legal Movement* tackles a topic of vital importance, is exhaustively researched and documented, and offers thoughtful and nuanced arguments that, for the most part, persuade. The book also achieves the rarely achievable: it bridges the divide between academia and, for lack of a better term, non-academia, offering a theoretically rich account that draws on historical institutionalism, organizational theory, and the sociology of knowledge, while also supplying much red meat for political columnists and combatants from across the ideological spectrum. I especially appreciated his desire to pry open the black box of organizational dynamics, looking not only at why the conservative legal movement has had many successes, but how it has done so, with attention thus to the crucial ingredients of money, leadership, luck, and learning that contributed to these successes. I also learned a great deal about both the conservative legal movement and American politics in the late 20th century.

I could continue to pile on the accolades, as many scholarly and popular commentators have done, but given that this is a book seminar that aims to stimulate debate, I will move on to a few critical observations. Perhaps unfortunately, these observations come from someone who knows little about the law and so I will have to approach the book from the standpoint of a political scientist attuned to the structure of theoretical and empirical argumentation. From this perspective, the book offered a good many insights but also left me with some questions.

One of the things that intrigued me about this book was the Gramscian edge to Teles's analysis, by which I mean the way he conceptualized the problem facing conservatives as a subset of a more general challenge for social movements that seek to combat hegemony. Powerful groups entrench themselves not only through electoral power, but through domination of the major institutions of a society – educational, financial, professional, media, cultural, and so on. Their ideas and way of life thus come to seem normal, natural, inevitable. For insurgents, be they Islamic militants in Pakistan today, communists in early 20th century Italy, or conservatives in the 1960s United States, they must not only battle

political domination head on but construct a parallel universe of institutions that steadily erodes the power of dominant groups throughout the society, economy, and polity. In many ways, this framework fits the case of the conservative legal movement, and conservative movement more generally, as activists have challenged liberalism not only through electoral mobilization, but through the construction of an alternative civil society: private schools or, barring that, home schooling; universities and law schools; foundations, a number of which are discussed in this book; and media programs and outlets, to name some examples.

The basic question this raises is how these kinds of anti-hegemonic movements emerge and why they sometimes succeed. There are plenty of movements that pop up around discrete causes, but fewer successful movements that take on some of the basic premises on which a society operates. Such movements should be especially rare given that they must develop a long-term strategy and have only weak prospects for success, as Teles describes early in the book. Activists wander in the wilderness with vague glimmers of hope for any real impact on the world they live in. So what gives rise to these movements and why do they sometimes succeed?

Teles's answer often hinges on fairly idiosyncratic factors: key individuals who found themselves at the right place at the right time; smart decisions or the ability to learn from past mistakes; funders willing to support the movement at important junctures. There's no grand strategy, at least in the beginning; instead, individuals construct networks and institutions that beget resources for the creation of yet more networks and institutions. Teles thus focuses a good deal on agency, but as a result gives less attention to the structural side of the structure-agency divide. Where he pays most attention to political opportunity structures is in examining the Liberal Legal Network as the structure against which conservatives react, and he also notes some important shifts in American politics that increase the importance of elite political competition. Beyond that, Teles does not spend much time examining other political opportunity structures that might make the conservative legal movement more or less likely to emerge and succeed.

Given the seeming success of the larger conservative movement – if not always in concrete policy terms, then in blocking further change along liberal lines and in constructing alternative political and social institutions – I wondered whether there are greater forces at work here beyond these individual agents. One could cynically argue that money is behind it all: conservatives often represent a point of view that business and people with means like; thus, the mobilization he describes could be analyzed, as David Vogel has done, through the lens of the business reaction against the regulatory state since the 1970s. Teles intriguingly argues that legal conservatives often achieved more when they got away from seeming to be in the pocket of business. Still, the basic fact remains that there are conservative foundations with enormous amount of money that they are pouring into conservative causes and institutions.

I also am less willing than Teles is to jettison electoral factors in explaining the rise of the conservative legal movement. I wholeheartedly buy his argument that there is no direct linkage between electoral success and legal change: the lag time for legal movements to

bear fruit shows there is no easy connection between the two. I would posit a more indirect connection however, as electoral victories such as that of Reagan in 1980 galvanized the movement and made credible conservative ideas that had been largely rejected in 1964 when espoused by Goldwater. Moreover, had liberal Democrats not only taken over the party by the 1970s but also continued to win elections, they would have continued to shape the judiciary along liberal lines and taken other hegemony-building measures that would have made it that much harder for conservative challengers to gain a foothold.

More generally, the right-ward shift of the Republican party since the 1970s and its electoral successes since then show that there is a deep well of conservatism in American society that is there to be tapped. Whether that well is fed by cultural beliefs about free markets and individual rights, economic power relations that favor business over labor, defenders of local political authority in a federal system, or some other source, the fact remains that conservatism has long been a powerful force in American politics and has had renewed influence since the 1980s. The conservative legal movement is one arm of that larger force that has been particularly successful because of the way the law offers an access point for social change in the US. The question I would thus pose to Teles and the readers of this symposium is how we can understand the relationship between the larger structural or contextual forces at work here with the individual actors who worked on the ground to effect change.

A final question I would pose concerns how best we can think about anti-hegemonic movements and their leadership. Gramsci wrote at a time when centralized, hierarchically-organized communist parties fought against bourgeois domination. They had leaders, they had foot soldiers, they had a vision of how economic and political change would occur. By contrast, the creature Teles describes is a headless one with a large number of appendages, sometimes waving in unison, sometimes moving in uncoordinated ways. There was no vast, right-wing conspiracy, but a confluence of events and people that moved the society and the law down a particular pathway. This may be a more realistic account of how movements work in practice, but I wanted to know how we should think more generally about why some movements succeed where others do not. How can a movement achieve its goals when it has no center, no unified leadership, and often no coherent and agreed-upon strategy? Perhaps this is where the conservative example can make liberals optimistic about their own prospects for achieving social and political change.

Henry Farrell - Fabians and Gramscians in Law and Economics

One important part of Steve Teles' story is the rise of law and economics as a major approach to understanding how the law and regulation does (and should) work. Steve has a nice discussion of how law and economics became institutionalized, despite the opposition of various law professors, in two key ways. First, rich donors (and especially John M. Olin) helped support law and economics programs in a variety of law schools around the country (including non-conservative schools such as the Boalt school in Berkeley). Second, Henry Manne built up George Mason University's Law School as an explicitly libertarian institution.

These are two quite different approaches to institution building. The first involves working with existing power structures - identifying elite institutions, and using money as leverage to persuade them in directions that you (the conservative or libertarian multimillionaire) find more congenial. The potential benefits are that if you do succeed in changing them, you likely reshape the entire field. The potential problem is that your efforts will be diluted - that people will take your money and apply it in ways that you would prefer not to, and that your ideology will be watered down as it is diffused among people who don't share your political priors. The second involves trying to re-order power relations by building an entirely new institution (or taking over a not very successful existing one), and using it as a spearhead for your movement. The benefit is that you can do this without having to make the same compromises - you can work more or less from a blank slate, re-ordering the institution better to your liking, without having to compromise or dilute your principles as much. The disadvantage is that unless you are very skilled and very lucky, it will be much harder to reshape the field as a whole (since you are *both* trying to persuade others in the field that your approach merits attention *and* that your (previously non-existent or not very-well regarded) institution should be taken seriously.

The dilemma of whether to adopt what Steve describes as a 'Fabian' (burrowing into existing institutions) or a 'Gramscian' approach (building a new one) is a general one for institution builders (Dan Drezner identifies very similar problems in his discussion of

institution building in foreign policy making here¹⁴. And Steve indeed concludes that the Olin approach has succeeded in influencing the field at the cost of ideological coherence, while the Manne approach has succeeded in building up an ideologically coherent program at the cost of influence in the field.

I think that this analysis is largely right, although it perhaps under-estimates the extent to which law and economics has realigned the field of law and regulation - more on this later. But what it does do in my view is to make it clear that the rise of law and economics *cannot be understood very well within the terms of law and economics itself*. In other words, the factors that explain the relative success of law and economics as an approach suggest a quite different set of causal accounts than those that law and economics accounts usually focus on. When we look at both the ways in which GMU law school has succeeded in relative terms (and it has), and how law and economics has become a pervasive way of understanding the world both on the left and the right, we don't see a neutral Walrasian auctionplace with *tatonnement*, and competition between anonymous market participants, each seeking to respond to forces of supply and demand that are the result of exogenous preferences. Instead, we see intensely personal efforts not only to play in the marketplace as it is, but to reshape it, by persuading participants to value things that they didn't value before.

Moneybollocks and Money Problems

Steve's account discusses at length the standard explanation that GMU professors themselves like to use when they want to explain the relative success of George Mason University Law School - market failure and Moneyball. George Mason's genuinely impressive reinvention of itself as a well regarded second tier law school (its previous reputation had been dismal, even in the regional market) is owed, according to this account, to the failure of other law schools to hire impressive research talents whose politics were uncongenial to them. GMU faculty members depict this as a kind of market failure. Other schools, which might prefer to hire left-liberal mediocrities over sharp, well-published libertarians pay a price for their discrimination. More to the point, they leave easy pickings on the table for others to sweep up. Institutions that don't discriminate on the basis of ideology should have a clear competitive advantage over institutions that do.

There is a specific comparison that George Mason University law school figures like to draw upon; that with Michael Lewis's *Moneyball*. GMU law school types see themselves as like the Oakland team in Lewis's book - they are playing the numbers, and hiring smart people that other academic teams are irrationally passing over. Steve's book quotes Daniel Polsby, Dean of GMU's law school as saying

we are proponents of moneyball here, and we have a pretty simple predictive

¹⁴<http://www.danieldrezner.com/research/abstracts.htm#ideas>

model of productivity here, and it very rarely fails us, and anybody can use it ... We're not burdened by intolerance for people who have libertarian and conservative leanings, and we're not going to discriminate against them. It may be the case that we would discriminate against people on the left, with socialist inclination, but that becomes very theoretical because our dear friends in the food chain snap those people up.

But it is not only Polsby. David Bernstein¹⁵ and Todd Zywicki¹⁶ use the same metaphor to describe GMU too.

Now, to be clear, there is probably something to this. I imagine that there are some scholars whose brilliance is underestimated because of their political affiliations (which is not, of course, to say that all scholars with unpopular political affiliations are brilliant). But there is also a fair amount of what might fairly be described as self-congratulatory Moneybollocks in this point of view. The problem that GMU faced was quite different from the problem faced by Michael Lewis's Oakland A's. In baseball, as best as I understand it (which is not that well, but I'm pretty sure I am right on this) there is a clear, explicit, and for the most part exogenous scoring system - with a few judgment calls around the margins, people can agree on what action should score x .

The Moneyball strategy, in its original variant, was a recognition that some players who weren't necessarily very flashy, nonetheless scored better than their market prices would suggest, suggesting that they were a bargain. But in academia (and perhaps especially in legal academia), you *don't have* any really satisfactory system of scoring that neutral bystanders could (mostly) agree on. Nor does GMU even pretend to adopt a real 'Moneyball' strategy, as Posner effectively admits with his crack about socialism (and if, as his claim suggests, there are more overtly socialist professors being hired by top law schools than overtly libertarian professors, I'll fry up my one and only hat, and eat it). The market shaping tactic that it has adopted *requires* hiring on ideology, not on some abstract notion of merit - and while the two may have similar short term consequences, they are really quite different in logic and ultimate effect.

The difference stems from the fact (and I am slightly adapting what I said in my earlier post here) that a closer attention to candidates' underlying form isn't necessarily going to allow under-ranked departments to claw their way up the ratings. "Winning" as a department or school doesn't depend on performing better in some absolute sense, so much as persuading your peers in other institutions that you are winning. The closest one gets to a neutral metric for success (I am not even going to *get into* the purported neutrality of US News and World Report's ranking system) is publication in highly ranked journals, but this is far from independent, especially in the legal academy, where anonymous peer reviewed journals are mostly crowded out by law student edited journals, where the reviewers know the identity of a paper's author. Student law journal editors have a lot of papers to review

¹⁵http://volokh.com/archives/archive_2006_02_26-2006_03_04.shtml#1141069946

¹⁶<http://crookedtimber.org/2006/03/01/academic-moneyball/#more-4376>

in a short space of time (the joys of a multiple submission system) and are likely to pay a lot of attention to the reputation of an author's school when they're deciding whether to publish his or her article. I don't think it is unreasonable to suspect that if you are an unknown from a highly ranked school, you have a much better chance of getting published than an unknown from a less prestigious school.

Thus, top schools have very smart people (in all probability, more talented on average than those in less well ranked schools) – but they probably do better in relative terms than any differences would merit. Furthermore, the ability to hire perceived stars is an important part of the reputational capital of these schools (even if these stars are over-valued). *Ceteris paribus*, departments that hire equally (or nearly as) talented people, who aren't perceived as stars, are going to find it more difficult to improve their rankings than they should. To some extent, the “success” of top law schools is a self perpetuating phenomenon which is difficult, perhaps impossible, to overturn using a pure Moneyball strategy.

What this suggests is that GMU law school's success in the rankings is only partly thanks to the ability of its Dean to exploit others' irrationality by spotting underexploited talent elsewhere, and hiring it. It is also the product of trying to redefine the rules of the legal marketplace, by establishing a different kind of intellectual capital (that of conservative and libertarian thought in the legal academy), and persuading others that this capital had value. I can understand why GMU law professors might like to represent their success as the triumph of rationality in the marketplace; it reinforces their own express understanding of how the world works. But canny recruitment of legal talent is only part of the story (and perhaps not the most important part). As Steve argues:

Manne's programs for law professors overcame unfamiliarity by equipping academics with the basic concepts of economics, eliminating the mystery associated with unfamiliar concepts. Those programs eroded the field's ideological stigma by creating personal bonds between the legal academy's mainstream and law-and economics, and by convincing participants that economics was an ideologically neutral set of tools. Manne's programs for federal judges also helped erase law and economics' stigma, since if judges - the symbol of legal professional respectability - took the ideas seriously, they could not be crazy and irresponsible. This account suggests the limitations of thinking about intellectual change through the metaphor of the 'marketplace of ideas.' In any market, there are some things that participants simply will not buy and sell because they are considered immoral or inappropriate for exchange. Through most of the 1960s, for example, it could barely be said that law and economics was in the marketplace at all, because the market's normsetters refused to take it seriously.

In other words, the quite real (if limited) success of Henry Manne's efforts to promote

law and economics at GMU rested in large part on his efforts (through GMU and perhaps more importantly elsewhere) to *change the underlying basis of the market for legal scholarship*. He sought to change the profession's perceptions regarding what was worthwhile legal research and what was not, with some considerable success. To understand what happened, you need economic sociology, not economics. Changes in actors' self-perceptions, in their disciplinary norms, in the kinds of work that they value and disparage, and in the ways that they conceive of the market are crucial components of the story of law and economics. Libertarian law professors became more valuable in the legal academic marketplace because law professors (as a collective body) became more likely to accept and believe that libertarian-inflected law and economics was a valuable commodity. And changes in taste of this sort are exactly the kind of thing that economic theory itself is terrible at explaining. Moneyball is a cute metaphor, and does capture a limited part of what went on. But if GMU law school had adopted a pure Moneyball strategy, it wouldn't be where it is today, under any reasonable set of expectations. It not only had to hire smart people with unorthodox views - it had to persuade others that their specific *kind* of smartness and heterodoxy had value.

This should obviously give some pause to law and economics triumphalists at GMU and elsewhere. If the success of law and economics can't be explained (and I really don't think it can be) within the internal intellectual categories of law and economics itself, then those categories are of limited explanatory scope. NB that this does *not* mean that they are useless - it *does* mean that (to adopt another market metaphor) a diversified intellectual (and, I would argue, ideological) portfolio is valuable to intellectual inquiry (even if its value in the academic marketplace is less certain). It also, possibly, leads to some problems that Steve talks about around the edges of his story. The two components of the GMU strategy - Moneyball (scoop up undervalued scholars) and econ soc. (persuade others that libertarian and law and economics approaches are useful) cut against each other over the longer term. In particular, if you really succeed in persuading other schools that they should value libertarian scholarship, then those other schools won't behave 'irrationally' any more (not that they were necessarily behaving 'irrationally' to begin with, if the market didn't value libertarian scholarship, libertarians had difficulties in publishing in top journals etc), and will grab interesting scholars at the entry stage as well as later on. And this presents real problems for a school like GMU that even in the best of all worlds is financially under-resourced compared to top tier law schools with fat endowments (albeit less fat than they used to be).

The book discusses the difficulties that GMU has had in becoming a feeder for top ranked programs elsewhere - while a couple of scholars (including Zywicki and Bernstein) have visited at top programs elsewhere, they usually haven't moved (whether because of personal choice or because they weren't asked to is unclear - the recruitment process for lateral moves in the legal academy is rather opaque to me at least). I suspect that at least part of this may be because the bright right-of-center law professors *aren't* being ignored anymore, but are being recruited by top programs with more money right at the beginning

- Moneyball may only get you so far.

Law and Economics and Market Politics

I think that Steve arguably underestimates the significance that law and economics has had for both law and politics. In fact, I think it is hard to *overestimate* this impact. Steve is right to say that the Fabian strategy (in this instance of encouraging major law schools to take up law and economics through giving ‘em money) carries the risk of diluting the ideology. But ideological dilution isn’t all bad - if the resulting brew is weaker, there is very likely a lot more of it.

A recent article on the revival of the Kaufmann foundation’s Law and Economics program provides a nice illustration of this. I quote from a Fortune article¹⁷ describing it.

Though the field of law and economics has often been seen as a politically conservative movement, the leader of the Kauffman initiative will be Robert Litan, Kauffman’s vice president of research and policy. Litan has held prominent governmental positions during Democratic administrations and has been affiliated with the centrist-to-liberal Brookings Institution for nearly 20 years. Among other things, Litan was deputy assistant attorney general in the antitrust division of the Clinton Justice Department when Justice first went after Microsoft in the 1990s. (Litan has both a Ph.D. in economics and a law degree from Yale.) “I’d characterize the law-and-economics school as a mode of economic thinking,” says Litan in an interview, contending that it is politically neutral. “There are many people in the field who are Democrats as well as Republicans, liberals rather than conservatives.”

...How does the current economic collapse — and its implicit lesson that over-reliance on market mechanisms have led us to disaster — affect his and Kauffman’s plans? “Ironically,” he responds, “it may be an even bigger deal now that economy is collapsing. We are now about to have a huge national debate on the role of markets and regulation ... and how much are we going to roll back from the market-oriented philosophy in which a lot of law-and-economics participated. ... From our viewpoint we’re hopeful that whatever repairs we make in the economic system, we don’t kill off risk-taking and entrepreneurial drive, because that’s what we need for growth.”

Now on the one hand, Bob Litan is a genuine slightly-left-of-center moderate Democrat. The new initiative furthermore seems to be devoting specific attention and energy to a set of issues that libertarians and liberals mostly agree on - the horrid mess that is intellectual property law in general, and patent law in particular (the convergence on these issues

¹⁷<http://features.blogs.fortune.cnn.com/category/law-and-economics/>

between strong libertarians like David Levine and lefties like the Public Knowledge crowd is real and impressive). But there is another hand. Litan (if he is not being misquoted here, and the quotes certainly seem consonant with what I think he believes) seems to espouse two positions that would likely not have been espoused by left-of-center types thirty years ago - (1) That the market needs to be protected against regulation, and (2) that this is a politically neutral position that should be obviously true to both left and right. The preponderance of these two mutually reinforcing beliefs among 'moderate' left of center in this country - represent, in my view, an emphatic and important victory of the law and economics movement. If you win the technocrats (and law and economics arguably *has* won the technocrats), then you very nearly have won the entire game.

To be quite clear, I am not arguing that the view that we need to protect markets from regulation is useless, let alone universally malign. Markets can surely produce good things, and should, under many circumstances, be allowed to do so with a minimum of interference. My point is a little subtler. I think I detect in Litan's viewpoint (and I surely detect it in many other emanations of sort-of left of center moderation) an implicit set of normative assumptions about what politics (and in particular political economy) involve. These assumptions stem from the belief that the market, when it works properly, is the best possible way of achieving essential human freedoms. It may be that under some circumstances markets have problems, whether because they cannot themselves always produce their own rules, resolve issues of externalities etc. Under these circumstances, government can play a role in regulating markets, but they should minimize that regulatory interventions to that which is absolutely necessary.

This is one plausible account of how the political economy should work. It is certainly the account that we see in much of the law and economics literature, which certainly has a clear anti-regulatory bias. But it is *not*, contra Litan, a *politically neutral* account. It prioritizes some values over others. It makes some kinds of distributional arrangements more likely, and other kinds of distributional arrangements less likely. Nor is it by any means the only plausible account of how the political economy should work. For example, one might reasonably prefer collective choice made through democratic processes (as many actual lefties do). And there are other positions too. But discussing the strengths and weaknesses of these different accounts involves *political* debate over what kinds of values our economic arrangements should seek to achieve. If we conceive of political economy as a set of technical discussions over how to best allow markets to achieve what they can achieve while adopting the bare minimum of regulation necessary to prevent the market from eating itself, then we effectively foreclose these debates.

And here, I suspect (though I certainly can't prove) that law and economics has played a very significant role indeed in taking these debates off the table. It offers an apparently neutral technical apparatus for analyzing the relationship between laws, regulations and market outcomes. However, it is skewed in practice by a pronounced pro-market bias, starting, as it usually does, from the assumption that the market is the most efficient way of achieving individuals' desires and needs. This bias doesn't *necessarily* flow from the

technical apparatus of its parent discipline, economics (c.f. the work of Jack Knight and Jim Johnson). But in practice, the two are closely associated.

Law and economics, as it is theorized in the legal academy and applied to regulatory politics is a diluted form of the pure libertarian variant of public choice (which was far more pronouncedly hostile to the very idea of the federal government than law and economics as a whole). But precisely because it is so diluted, and because it appears technical and uncontroversial, it has a much wider influence than an overtly libertarian political program would have. Smart liberals (Cass Sunstein is the most obvious example) think in ways that are profoundly structured by their exposure to law and economics. Sometimes this may be salutary (there are real insights in law and economics and in libertarian thought). Sometimes (in my view), not so much. But whichever which way, it isn't politically neutral or anodyne at all. Instead, it is a real political position, which has significant normative consequences, and should be debated as such, not merely accepted as a commonplace.

Fabio Rojas - The Failed Conservative Revolution

Steven Teles' *The Rise of the Conservative Legal Movement (RCLM)* is an important book. It is one of the few studies to thoroughly address the institutionalization of conservative politics. It's also a well motivated account. Using ideas from contemporary sociology, Teles frames the conservative legal movements as an example of resource mobilization. Winning elections isn't enough to implement conservative policy. One must create conservative networks and organizations that can be used to fight and win court battles.

In this response to RCLM, I'd like to argue that conservative legal movement is a failed movement. We have come to view the period from the 1970s to the 2006 Congressional election as an unqualified victory for the American right. Republicans put three of their own in the White House and gained control of the House of Representatives. The 9/11 era allowed a conservative White House to restructure the Federal government and expand its powers.

However, from a larger perspective, the conservative movement has been a failure. The conservative movement has targeted major policy domains for reform, only to win the occasional battle. Repeatedly, conservative activists railed against the New Deal era regulatory regime, but much of it remains. Cases like *Kelo* show that repeated appeals to property rights can fail even in courts that have been substantially shaped by conservative ideology. Conservatives have fought against *Roe v. Wade*, yet abortion remains legal in all states with few restrictions. Nearly all attempts to regulate, or re-regulate, private social life have ended in failure. There have been some victories, such as periodic tax code reforms, or the 1996 welfare reform act, but the state that liberals built in the 1930s and 1960s remains with few modifications.

How does the conservative legal movement fit into this picture? I argue that it mirrors the right's general inability to substantially restructure American life. Let me draw on a few themes from RCLM to motivate the argument. In the closing chapters of RCLM, Teles notes that there is a general frustration within the movement because people seem to be attracted to hot button issues. Unlike liberal legal activists, who might tirelessly fight over a modest case like a tenant-landlord dispute, conservative activists appear most willing to

donate their time for ideologically sensitive cases like campus speech codes.

Another theme: much of Teles' book is dedicated to the law and economics school of thought, but Teles' discusses how law and economics has now moved toward the academic mainstream. It's no longer the case that law and economics is exclusively done by conservatives, or that it supports conservative policy prescriptions. Law and economics is now one specialty among many.

What do these two examples show? The first shows that the conservative legal movement has grown by leaps and bounds since the 1970s, but it is not yet at the stage where it can reform the legal system through challenging the law at multiple levels. The movement is unable to take the fight to the "ground" and perform a wholesale reconstruction of the law. The second example shows that the academic system has co-opted law and economics. The law and economics movement probably allowed a cohort of conservative law professors to successfully gain tenure, and it might be a standard tool for analysis in a few areas of law (such as anti-trust), but overall, the legal academy remains a politically liberal institution. The average law student is not required to take law and economics, nor does the average judge automatically rely on economics as an analytical tool. At most, one could say that law and economics is a well regarded specialty in the academy and that a notable group of judges use it.

I'll conclude this essay by providing an interpretation of the conservative legal movement's failure. By the late 1960s, liberals had succeeded in many domains: they regulated the economy in the 1930s, they provided extensive social support policies in the 1960s, they liberalized social mores in the 1970s and beyond. This reconstruction of society triggered various push-backs. The radical left claimed that the liberals hadn't gone far enough, while the right claimed these reforms shouldn't have been done at all.

What prevented the radical left and the conservative right from overturning the liberal society was that they were unable to provide an ideology that could act as a foundation for a new political order. Americans couldn't live in a world without state sponsored safety nets and subsidies. At the same time, Americans could not accept the radical left's promise of a state that appropriated the economy and focused on marginalized groups. Similarly, the conservative legal may have helped judges reach market oriented decisions in some cases, but the legal mainstream could not accept it as a new way of doing law. In the end, the RCLM documents the rise of an important movement, but this movement has only produced a niche in the legal academy, not a revolution in the law.

Aaron Swartz - Political Entrepreneurs and Lunatics with Money

One of the interesting things about capitalism is that, if you have money, people seem to just magically appear to meet your needs. When it rains in New York City, vendors materialize to sell me an umbrella. When I was walking to the inauguration, the streets were lined with people selling hats and handwarmers. I certainly didn't ask anyone to bring me a hat; I didn't even realize I would want one, or I would have brought it myself — but people predicted that I would and brought it for me.

The more money you have, the more crazy these desires can get. If you're rich, people offer to launch you into space¹⁸, build large buildings with your name on them¹⁹, or set up lavish cemetery plots²⁰. Or, as Steven Teles demonstrates, push the law to be more to your liking.

What's striking about the rise of modern conservatism is that it was *not*, in large part, the creation of big business. Big business, all things considered, was pretty happy with the liberal consensus. They weren't exactly itching to drown the government in the bathtub²¹, especially when it did so much for them.

Teles makes this clear with his brilliant first chapter²² on the *liberal* legal network. "From the perspective of the early twenty-first century", Teles notes, "it is perplexing why these wealthy, well-positioned, white men—presidents of the American Bar Association, leaders of the nation's largest foundations—put their support behind a project to liberalize the legal profession." (23) You had groups as respectable as the Ford Foundation, the ABA, and the OEO supporting a project as activist as the Legal Services Program which, Teles writes, "helped transform the administration, and ultimately the politics, of public aid." (32) Law schools started *pro bono* clinics, and the Ford Foundation funded a dozen legal

¹⁸<http://www.virgingalactic.com/>

¹⁹<http://www.multicians.org/reunion-04/images/whg-sm.jpg>

²⁰http://www.politico.com/blogs/thecrypt/1208/Roland_Burriss_Monument_to_Me.html?showall

²¹http://en.wikiquote.org/wiki/Grover_Norquist

²² Actually the second — as with most academic books, the first chapter is theoretical background and the story doesn't begin until after.

activist groups. (Admittedly, the other major foundations refused to join in.)

Corporations did attempt to strike back — as Teles documents in a chapter called “Mistakes Made”. He quotes an influential report on these early attempts, complaining that they simply took money from a company and spent it fighting that same company’s legal battles, a law firm structured as a tax dodge. Afraid of alienating the shareholders of their corporate donors, they shied away from principled ideological stands and didn’t influence the larger political debate.

But the real conservative movement was funded instead by wealthy extremists on the fringes of the business world. It was the creation of people like Richard Mellon Scaife, who inherited part of the vast Mellon fortune from his alcoholic mother. Joseph Coors inherited a brewing company, John M. Olin ran a relatively-obscure chemical company, R. Randolph Richardson inherited the money his father made by selling Vick’s to Procter and Gamble.²³ None of them can exactly be called Titans of Industry, or even titans of industry. Yet these are the men who bankrolled not just the conservative legal movement, but the conservative movement in general.

This fact is sometimes obscured by a document called the Powell Memo. Written by Lewis Powell, shortly before Nixon made him a Supreme Court Justice, it calls on the US Chamber of Commerce to defend “the free enterprise system” from “the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians” that would dare to criticize it.

The Powell Memo kicks off most histories of the right-wing think tank, not because it was so clearly influential, but because it was so clear: “The national television networks should be monitored”, Powell wrote, “in the same way that textbooks should be kept under constant surveillance.” What passionate critic of the free enterprise system could resist such a quote?²⁴

But the quotes have disguised the fact that Powell’s suggestions didn’t exactly come to pass. It wasn’t the Chamber of Commerce or major businesses that took on these tasks, but a network of independent, ideologically-based think tanks. And these think tanks weren’t founded by eminent Men of Business, but by a new class of people — a group we might call political entrepreneurs.

Dan Burt was a little-known Massachusetts lawyer when he took over the Capital Legal Foundation and turned it into one of the first effective conservative-movement law firms. Henry Manne was merely a legal scholar when he began pitching Pierre Goodrich (millionaire stockpicker) on building a new right-wing law school. Lee Liberman Otis was just

²³ Note how many of them directly inherited their fortunes. I’ll leave it to someone more inclined to psychological speculation to comment on the relationship between an conservative philosophy and strong support for the system that let your father make his millions.

²⁴ Kim Phillips-Fein’s excellent new history, *Invisible Hands*, is notable for how hard it works to put the Powell Memo in its proper context, noting how much was done before the memo was even written and casting a skeptical eye on claims of the memo’s influence.

a law student when she started pitching Scaife and others on the need for the Federalist Society.²⁵

The field even has its serial entrepreneurs. Paul Weyrich was the press secretary for a Republican Senator when he met Joseph Coors. Over the next few decades, Weyrich used Coors' money to start the Heritage Foundation, the Free Congress Foundation, Moral Majority, the American Legislative Exchange Council, and various other groups that haunt any history of modern conservatism's rise.

Just like the vendors at the inauguration, political entrepreneurs sought out people with money and tried to sell them something they didn't even know they wanted. (Manne to Goodrich: "the Augean stables were cleaned by diverting a stream of water through them . . . One law school dedicated to propositions like those you propound . . . would do more to discipline all the other[s] than anything I can think of." Note how Manne claims to promote the ideas "*you* propound".) Nonprofits are small enough and rich people are wealthy enough that it only takes a handful of lunatics with money to fund a whole forest of think tanks.

And yet, there must be crazy lefty billionaires too. So why do most lefty think tanks rarely go any farther than the Clintonite consensus? (To take a story in the news recently, conservatives have had some fun²⁷ pointing out the Center for American Progress, like Obama, is in favor of sending *more* troops to Afghanistan.) It's easy to understand why big corporations wouldn't want to push left-wing ideas, but it's harder to understand why there aren't any brazen rich people who do.

Which leads me to suspect the limiting factor isn't the funders, but the entrepreneurs. The average lefty wants to *do stuff*, not hobnob with rich people and manage a staff. They're not particularly cut out for organizational work nor do they hang around with the kind of people who are. If they do hang out with entrepreneurs, they're more likely to be the kind who start small, hip technology companies, which just makes them wonder why they're not making millions doing that instead of wasting time on this political bullshit. (One friend recently left lefty activism to make Firefox plugins.)

As a good institutionalist, I'm a bit uncomfortable proposing what basically amounts to a cultural explanation for this phenomenon, but while it's less intellectually satisfying it's at least more politically optimistic. If one of the things holding the left back is a lack of political entrepreneurs, then all we need to do is make more.

Now I just need to find some lunatics with money.

Full disclosure: Aaron Swartz recently co-founded the Progressive Change Campaign

²⁵ For an example in another field, see my previous piece on Roger Bate, whose Africans Fighting Malaria spends its timing trying to claim environmentalists kill African babies²⁶. Bate tried to start the organization by hitting up his friends at Philip Morris, but in the end could only get the money from a Californian mining magnate. (Interestingly, many find this hard to believe and argue that Philip Morris must have been the real funder).

²⁷http://yglesias.thinkprogress.org/archives/2009/04/non_turnarounds_on_afghanistan.php

Committee, making him something of a political entrepreneur himself. Before that he was one of those lame tech startup entrepreneurs, founding reddit.com. This piece is written entirely in his personal capacity, of course.

Steven Teles - Response

Chapter One of *The Rise of the Conservative Legal Movement* opens with a quote from Stephen Skowronek, which I think sums up much of what I was trying to argue in the book: “Whether a given state changes or fails to change, the form and timing of the change, and the governing potential in the change—of these turn on a struggle for political power and institutional position, a struggle defined and mediated by the organization of the preestablished state.” In writing this book, Skowronek’s words haunted my own attempt to make sense of what was going on so many decades later. As Skowronek so powerfully argued, politics never starts from zero—it always starts *somewhere*. In order to make sense of what conservatives did, therefore, I needed to start with “the organization of the preestablished state.”

I am glad that so many of the participants in this forum took note of Chapter Two of the book, which explains the origins and development of the liberal legal network. It is easy—too easy—for liberals to see themselves as embattled and defensive, but in order to make sense of what conservatives did in the period under discussion, it is vital for us to recognize that they saw themselves, and with very good reason, as the insurgents against a deeply entrenched regime.

There is certainly a great deal of “agency” in my account, and a number of the participants in the forum draw attention to it. My book is full of entrepreneurs, people feeling around in the dark trying to figure out how to make headway against modern liberalism. They tried things, made mistakes, and then tried some new things. In making these decisions, their personal idiosyncrasies mattered, in some cases quite profoundly. But all of this entrepreneurship operated against the background of a powerful structure, that of the modern administrative state and the liberal legal network that grew up around it. Ultimately, I hoped to show that we should not think of “agency” and “structure” as rivals, or even as being mutually exclusive. As I state in the last paragraph of the book, “The constraints and structures of any particular period are, however, often the creation of a previous generation’s political agents. In the short term, politics is, in fact, a world of constraints, but to agents willing to wait for effects that may not emerge for decades, the world is full of opportunity.” Agents have to operate in a world of structures. But if they have a long time horizon, they can create new structures, which will then act to constrain

the next generation of agents. And so on.

So, the book draws on three sets of theoretical tools—historical institutionalism (to explain the importance of inherited constraints and structures); resource mobilization theory in sociology (which explains the simple fact that an opportunity is no good unless there's someone organized to exploit it) and; the literature on entrepreneurship and, as Gerald Ganz calls it, “strategic capacity” (which together explain that resources themselves are not as important as their effective and strategic deployment).

I note these multiple tools for a few reasons. First, we social scientists often get hung up on “testing” theories, when in fact theories may operate best as tools for helping us make sense of particular, time-bound phenomena—and a good social scientist, like a good carpenter, needs multiple tools, not simply one. Second, if we think about social science as at least partially engaged in a project of explaining particular, time-bound phenomena, then we are doing something not unlike what our brethren in history or journalism do. The difference, I think, is that we in fact have some very powerful tools that they do not. When we can manage to combine the historian's diligence in digging around in archives and imagining the past as it was actually experienced, and the journalist's nose for a story and capacity to coax sources to open up, with these theoretical tools, we can generate powerful—and even interesting!—findings. The more we can get in the habit of combining multiple methods and multiple theoretical tools (rather than fighting as to whose methods or tools are better) the better the accounts we can give of important parts of our lived social and political reality.

Before I get on to the specific commentaries on the book, I should first note that—wow, what a humbling group of commentators! Every author dreams of playing in the intellectual sandbox with such a group. This, more than anything, is the payoff from the labors and frustrations that go into a book like this. I'll take no more than a stab at each of their commentaries.

In his essay, David Post questions whether historical knowledge is of any use in helping us make sense of what we should be doing now. “If and when I am transported back into the past, I promise not to repeat the mistakes that were made then – I'll give Henry Manne a security detail, and tell them to keep him away from buses. But how that helps me, going forward into 2009, I fail to see.” Obviously, one cannot use what someone did at another time, under a different set of conditions, to tell us what to do today.

Thankfully, I didn't make that claim, which is something that Rick Perlstein, with his usual acuity, picked up on. An analogy is only good insofar as the things being analogized are really comparable. Conservatives made mistakes when they unthinkingly replicated in one context something that had worked for them—or for their liberal foes—in a very different context. Carefully studying what someone else did can, at the least, help you avoid making old mistakes, but only an accurate and searching understanding of one's own situation can prevent the making of all new ones.

Finally, many mistakes come from believing that you are learning from what someone else did, when in fact you are acting on a mistaken understanding of their actions. That

was clearly the case for the first generation of conservative public interest lawyers, and also for many of the organizations that liberals created in the early 2000s. Genuinely learning from another organization's experience, especially that of an opponent, requires the ability to enter into how the world really seemed to them, the conflicts and challenges they actually faced—but in most cases, ideologically-motivated actors lack either the connections or the imagination to go through this exercise.

Consequently, they concoct a “model” in their minds that may not have much if any relationship to reality. Where liberals understanding of conservatives is concerned, this is what I call the “myth of diabolical competence,” the belief that conservatives always knew what to do, had a fantastically detailed plan, were lacking in internal conflict, possessed infinite resources, etc. I will only note that I think that Rob Stein's famous PowerPoint presentation on the conservative movement was a major victim of this myth, with very real consequences that are only gradually being unwound. If there's any take-away point I hope liberals get from my book, it's that the myth of diabolical competence is, indeed, a myth (and I appreciate Mark Schmitt for noting this as a central point of my book), and that conservatives' mistakes, rather than its successes, may actually have the most to teach them.

Kim Morgan's comments are great, so figuring out something to say requires nitpicking. Thankfully, nitpicking is an area in which I am genuinely expert. In the book, I argue that access to resources is less important in explaining success than what organizations do with those resources—I privilege strategy over raw resource mobilization. Like a lot of political scientists, Kim seems suspicious of this, especially given that I'm studying a movement that has at least the potential support of business—not a trivial thing in the United States. Kim says that “the basic fact remains that there are conservative foundations with enormous amount of money that they are pouring into conservative causes and institutions.” This is a point that is so commonly presented to explain the relative success of conservatives that I think it needs to be addressed directly. First, we need some clarity on what are “enormous amounts.” When I take a look at the list of the 100 largest charitable foundations in the US by assets (a very rough measure, to be sure, but at least a starting point), I get two (Kauffmann at #27 and Daniels at #51) that are moderately conservative, but not very. Only at #83 does one reach the Bradley Foundation, the sole foundation on the list that actively supports the conservative policy/media/academic infrastructure. Koch isn't there for some fairly peculiar reasons, and Scaife would probably make it if all of its various foundations were reported together. That still leaves the overwhelming majority of the list in the hands of non-ideological foundations, or those with a liberal tilt (and in many cases more than that). Conservatives get money from sources other than large foundations, but the idea that conservatives are successful because they have a lot of money (relative to liberals) is hard to support empirically. If one wants to explain the difference in the effectiveness of the conservative policy infrastructure and that of liberals, the size of their pots of money is not the place to start—it's what they do with it that matters.

So the disjuncture between Kim's theoretical expectation of “business power” and what

the data seem to show (as well as what my book argues historically) raises a first-order problem for the social sciences—if the wealthy have so much money, why does so little of it go to go to serve their class interests? First and foremost, business is a “they,” not an “it.” Business’ interests are heterogeneous, as well as being socially and ideationally constructed and highly dependent on what government happens to be doing. There are certainly sectors of business that have a directly conflictual relationship with government, but large swathes of business extract their living from government, have learned to use government against their competitors, or have reconciled themselves to its involvement in their operations. It was precisely this tension that created such significant problems for the first generation of conservative public interest lawyers, especially when they tried to challenge things like government-created monopolies (as the Mountain States Legal Defense Fund did, leading to its most important funder, Joe Coors, to quit its board).

Second, business, to use Marx’s distinction, may be a “class in itself” but it is not, in the absence of some form of external organization, a “class for itself.” Even if business had interests more objective and homogenous than I believe they are, that does not mean that they have the organizational wherewithal to act on them. Business faces the same collective action problem that other interests have, so the fact that individual businessmen have money doesn’t mean that they will necessarily put it into acting on their “class interests,” as opposed to, say, their aesthetic or recreational interests, or their desire to translate their money into social status. Third, the people who spend business-generated money are often not those who generated it, so there’s no reason to think that it will be spent to serve “business interests” (as opposed to the almost randomly distributed interests of wealthy people’s children).

There is no one whose judgment on political and organizational strategy I respect more than Mark Schmitt. It pains me, therefore, to have to begin my discussion of his essay with his comment that I “start from the now-famous, once-forgotten ‘Powell Memo’...” and that I am “not alone in exaggerating the memo’s negligible influence.” In Chapter Two, near the end, I do refer to the Memorandum as “seminal,” which is not as accurate as the word I use later, which is “notorious.” But in the actual discussion of the Memorandum in Chapter Three (pp. 61-62), I introduce it mainly to note that the first generation of conservative, business-dominated public interest law firms shared its strategic analysis—that conservatives could restore a lost legal equilibrium of judicial restraint by providing the “other side of the story” in court. I conclude that single paragraph on Powell by observing that his recommendations were a mistake (the same mistake that the firms that were actually created by conservatives in the 70s made). So, I agree with you! The Powell Memorandum reflected a line of thinking that was increasingly popular among certain businessmen, but it wasn’t a “roadmap” or a “blueprint” for much of anything, and the approach it recommended was a failure.

On to more important matters. Mark starts his essay out by quoting Ben Barber, to the effect that, “When we care about something, we waste money on it.” Yes, absolutely, but as Mark knows better than anyone, there are better and worse ways of wasting money.

In my experience, liberal-ish foundations often waste money precisely by trying to be too “responsible” with the funds under their control. They make grantees write huge proposals, go through complicated “evaluations” that are often inappropriate to the fields of advocacy or scholarship, give money for individual projects rather than general support (which makes building a strong organizational culture almost impossible) and just generally infantilize and get in the way of their grantees. Conservatives did not waste their money this way. Rather, their waste came from what I call “spread betting” (a term given to me by Mark Blyth)—throwing money at a bunch of different projects, letting the grantees run with their idea, and then seeing which worked and then doubling down. With a few exceptions, the conservative foundations were not the real agents of the story—they didn’t concoct a lot of “initiatives” or put out “requests for proposals.” They found people who seemed like they knew what they were doing, and then gave them the wherewithal to show what they could do with the resources.

That, I think, is one lesson we can take from the conservative experience—people, not projects. That is, philanthropists may actually have the knowledge and the skills to evaluate an organizational entrepreneur, to determine whether she is a good bet (with the emphasis on the probabilistic nature of the term “bet”). They might be able to judge the surface plausibility of their broad strategy. There is no reason to believe that foundation program officers, on the other hand, have the capacity to sketch out grand strategic plans for the coordination of action that will have any likelihood of actually working out. This is what I think of as the philanthropic equivalent of Hayek’s “fatal conceit”—the idea that actors at the center have the knowledge to coordinate action beyond a fairly narrow compass. Even at their most aggressive point (when the Olin foundation was pushing for the creation of a law and economics program at Harvard, to beat back the left-wing “crits”), conservative philanthropists were reactive, in that they responded to concerns from the field (more traditional, anti-crit HLS faculty members) and encouraged the creation of a program that had been done elsewhere.

Better for philanthropists to limit themselves to supporting a broad range of organizational entrepreneurs, with only the thinnest of plans connecting them, and avoid weighing them down with requirements that might make sense from the 20th floor of a building in New York, but which are distorting at the organizational level at which the rubber hits the road. That is the right way to waste money.

Aaron Swartz wonders why those to the left of standard-issue Democratic liberals tend to be relatively invisible, especially as compared to political organizations on the right, which seem to offer more of a haven for those pretty far from the consensus of the sensible center. First of all, I think Aaron is right, as an empirical matter—the center seems to exercise a more powerfully magnetic pull on the left than it does on the right (among political organizations, that is—no one who has stepped on a university campus could think that the magnetic pull of the center is operative there). I think Aaron is right to think that the characteristics of rich donors are not the right place to start in trying to explain this relative imbalance. He wonders whether “the limiting factor isn’t the funders,

but the entrepreneurs. The average lefty wants to do stuff, not hobnob with rich people and manage a staff. They're not particularly cut out for organizational work nor do they hang around with the kind of people who are." I'll defer to Aaron on the features of the typical lefty. And I should note that there were certainly conservatives in my story who had little desire or aptitude for "managing a staff" or thinking about the mechanics of building and maintaining an organization (the founders of CIR, for example).

If you want to create a political organization that can last over the long-term, there really is no substitute for having a leader who thinks really carefully about how to make careful personnel decisions, motivate subordinates, listen to and try to shape the expectations of funders (aka "hobnob with rich people"), and advertise for the organization in a broader issue network. The scarcest commodity in elite political organizing is not money, but intellectually and politically motivated leaders who have the ability to effectively carry out these organizational tasks. In particular, to get back to Aaron's point about money, it may be the willingness and ability of those on the left to ask in an effective and creative way for money that is the problem, not the willingness of wealthy people to give it if asked.

Jack Balkin is the reader that every author wishes he had. I honestly have nothing to say about the first 80% of Jack's review, because it is such a fantastic summary of what the book was trying to do, especially where law and theories of legal change are concerned. I agree with Jack that my argument is much less tethered to grand cycles of change a la Ackerman, and more friendly to incrementalist theories like that presented by Jack and Sandy Levinson. When I wrote the book, I pointed to Sandy and Jack's work as the best possible version of the "electoral theory" of legal change, which says that shifts in the behavior of courts are driven by changes in the composition of the presidency and Congress, which are reflection of social movements that shift parties' positions over time. I sense from Jack's response that our numerous lunches and his reading of my work convinced him that elections aren't enough to construct a comprehensive theory of the kind he wants to produce. So, on that point, I'll declare victory and get out.

Jack recognizes that, as his last couple of paragraphs indicate, once you admit that a great deal of legal change is not tethered to any sort of electoral cycle then you've reintroduced in another form the legitimation problem that his theory (and that of Ackerman) was designed to liquidate—that hardy law school perennial "the counter-majoritarian problem." Jack observes, rightly, that, "Teles argues that what liberal scholars have tended to label 'popular' constitutionalism is actually a struggle between different sets of elites." Precisely. And the problem for Jack is that there's no particular reason to think that this sort of elite conflict can legitimate the exercise of judicial power on anything like a democratic basis—which is the basis that Jack's work heretofore has been grounded on. If Jack and I are right, therefore, it may be that the entire project of "popular constitutionalism" is, at its core, flawed. Consequently, advocates of popular constitutionalism either need to call into question the empirical claims that I (and people like Charles Epp) have made, or they need to rethink their commitment to legitimizing a muscular role for the courts on the basis of democratic theory. I won't pursue the matter further here, but I am positive that

popular constitutionalists can't succeed at the first task, and I have severe doubts that they will be much more successful at the second. At the very least, they'll have to think deeply about whether they have a substitute for the "popular" piece of popular constitutionalism.

I can find very little to disagree with in Tyler Cowen's contribution to this symposium. But I found his discussion at the end, on the students at George Mason University School of Law (GMUSL), worth commenting on briefly. As I understand it, Henry Manne had two objectives when he took on the task of creating a School of Law at GMU. I think that it is beyond question that he was successful on one dimension, in that GMUSL has created a home for libertarian (and, given its more recent hires, conservative) law professors, and in dramatically raising the prestige of the institution (starting from nearly zero in terms of prestige, GMUSL now regularly ranks in the Top 50—US News currently puts the school at #41, and Brian Leiter ranks the school at #35 in terms of student quality).

On the other hand, Henry had the objective of creating a law school that would break the mold, producing students qualitatively different than those of existing institutions. Tyler raises some questions as to whether, on this dimension, it has been successful. He observes that, "From my contact with the students, which by now is extensive, I have never noticed signs that I am in anything other than a standard law school." I think that Tyler is probably right about this—and he knows more than I do!—and it suggests a pretty profound structural problem in the law school market. No matter how hard you try to set up a law school that will compete on a different margin than everyone else, students will judge that school by the same metric on which they judge every other institution. Students use the *US News* rankings to guide their choice of law school, and law firms use the rank of the law school (combined with their grades) as a proxy for raw intelligence. So students apply to law schools roughly without regard to whatever particular profile the school happens to be peddling. It may be that GMUSL students get a different sort of preparation around the edges than students at other schools, but for the most part not because they sought it out, or because it's being demanded by the market.

The reason they're given a different education, to the degree that they are, and the reason the faculty has a different character than at other law schools, is not due primarily to the market for and of students. Rather, GMUSL is different because of the market for faculty.

That brings me to Henry Farrell's bracing response to my book. There is way too much to deal with in Henry's essay than can be effectively addressed in this space, so I'll deal with only one point—that the success of GMUSL cannot be explained through the tools of law and economics. I agree, and I think I say as much in the book. The "market for ideas" is, at best, an incomplete metaphor for understanding how intellectual change happens. As Henry rightly points out, there is an irreducibly sociological process that operates before anything that can be understood as market dynamics can kick in. Ideas and those who hold them come to either possess stigma or (to use Bourdieu's term) distinction. They are thought of either as the sorts of ideas that reasonable, responsible people hold, or those that are believed by disreputable, unprofessional wackos. So how do ideas get "destigmatized?"

That is, how do they enter into the legitimate marketplace for ideas?

What Henry Manne was trying to do in his seminars for federal judges and professors was only to a limited degree an exercise in persuasion—that is, convincing these important professional actors that he and his allies were right. What he was really up to was taking away the whiff of sulphur that law and economics had come to be associated with. The simple fact that judges were spending a few weeks learning about economics, and its applications to law, sent a signal to the rest of the profession that this was no longer (in Jack Balkin’s terminology) “off the wall,” since by definition an idea that federal judges take seriously *is* mainstream. Many law professors saw law and economics as strange and forbidding in a non-specific way, but in any case something that responsible people kept their distance from (and that they avoided where faculty hires were concerned). By subsidizing these professors to spend a few weeks hanging out with economists and law and economics practitioners, Manne’s programs gave these professors a name and a (hopefully friendly!) face to associate with the field. While they didn’t generate distinction (that would come later), they did take away stigma. And by doing so, they gave law and economics the opportunity to compete in a stigma-free market. I think that this two-stage process—destigmatization, then competition—actually applies to a much broader range of intellectual life than does the metaphor of the marketplace of ideas.

There could be no better place to end my response than with Fabio Rojas’ conclusion that, when considered in the broad sweep of history, the conservative legal movement has been a failure. I think that’s overstating matters considerably, but there is certainly something to Fabio’s point. In fact, I just published a co-edited book, *Conservatism and American Political Development*, that makes a somewhat similar point, arguing that when we look at the areas where liberal victories of the past were most deeply embedded (Social Security, K-12 education, the environment), what is striking is how little conservatives have achieved.

Whether we think the conservative legal movement has been a failure depends enormously on our standard for success. Fabio points to the *Kelo v. New London* case as an example of conservative failure. Was it? On the one hand, it was a great victory, in that the Institute for Justice got the case in front of the Supreme Court—a major victory of agenda setting. On the other hand, IJ lost. Turning to the aftermath of the case, on the one hand IJ was phenomenally successful, in that millions of people now have some conception that economic development takings might be a problem, and the subject got on the legislative agenda of a majority of states. On the other hand, as Ilya Somin (who worked with IJ on the case) notes, almost all of the post-*Kelo* legislation was useless, in many cases concocted by defenders of the status quo to give the public the impression of “action” where nothing real was being done. If IJ and its allies had more of a “ground game” in states across the country, they might have been able to move beyond “agenda setting” to “alternative specification,” but when faced with a force as richly funded, organized and tied to state and local political elites as real estate developers, perhaps failure was foreordained.

Conservatives have, across a wide range of areas, been impressively successful in putting

new ideas on the political agenda that would have been considered crazy just a few decades ago. I am not at all sure that I agree with Fabio that the reason they have failed, however, is intellectual. While there certainly is an intellectual component of their limited success, I believe a more powerful explanation would look to the deeply embedded character of modern activist government. For example, conservatives actually convinced a lot of people that there were problems with Social Security, but could not get over the very big hump represented by the public's reliance on the program, and the powerful organizations arrayed in its defense. In the case of *Kelo*, massive majorities of the public have been convinced that economic development takings are abusive, but the organizational asymmetry between their defenders and opponents is extraordinary. One could probably tell a similar story about school reform, which would be much less about ideas than about raw interest organization and policy feedback.

Modern liberalism has proven to be very potent as a device for protecting turf once won, but its failure to compete effectively in the realm of ideas has—at least until recently—limited its ability to win new ground. Modern conservatism, by contrast, has pushed ideas out of the realm of stigma and into the mainstream of policy debate, but has proven incapable of mustering the troops in areas beyond its constituencies' core interests (like taxation and national defense) to take ground from its opponents.

The conservative legal movement, therefore, can be seen both as a case of the opportunities for elite mobilization, but also of its limits. Modern conservatism has waged, in Skowronek's terms, "a struggle defined and mediated by the organization of the preestablished state." Where that state has been most deeply dug in, conservatives have accomplished the least. That conservatives' got so little when they attacked the citadel of modern liberalism may be counted a failure. But it should not have been a surprise.