

Like *Miller*, the next case, *Korematsu*, is also a dead letter today. In *Korematsu v. U.S.*, the Court sanctioned a flagrant violation of civil liberties, declining to strike down the internment of 120,000 Japanese Americans, on the basis of plain legal and factual fictions concerning the orders by the government, the loyalty of those interred, and the “urgent need” of the government. The case stands today as a warning to any Court too inclined to ignore civil liberties in a time of war. I must disagree, however, with Levy and Mellor’s invocation of *Korematsu* to protest the Bush Administration’s prosecution of the war on terrorism and specifically the treatment of Jose Padilla, who, unlike those interred during World War II, was detained with individualized evidence of ties to hostile foreign powers. Despite the difficulties and complexities of the war against terrorism, the Bush Administration has largely succeeded in the constitutional balancing of civil liberties and security.

At this point, the book turns to the topic of the taking of private property by government, an area where William Mellor is the visionary. In a trio of cases, the authors lament government’s Court-granted power to seize the property of the innocent, take homes to give the land away to developers, and destroy property value through regulation without providing any compensation. Particularly significant is *Kelo v. City of New London*, which has rejuvenated a political movement, largely due to the prowess of Mellor’s Institute for Justice, which served as counsel and public relations for the plaintiff. The taking of a private home and giving the property to a private developer, supposedly to increase tax revenues, outraged the public and resulted in new legislation in many states to limit property takings to actual *public uses*, as the Fifth Amendment requires.

U.S. v. Carolene Products is another case concerning individual’s economic rights. It illustrates how special interests are able to capture the legislative process and direct it from the general welfare to their own benefit, a particular concern of James Madison in crafting the Constitution. In *Carolene*, the Court gave its sanction to this mischief, with the result that today “special interest legislation and protectionist laws stifle or prohibit outright the pursuit of productive livelihoods in a vast array of occupations ranging from African hair braiders to casket retailers to taxicab drivers.”

The last of the dirty dozen unfortunately sanctions government discrimination on the basis of race in the name of somehow furthering equal protection, another instance of the Court turning a clear constitutional mandate on its head. *Grutter v. Bollinger* concerned the use of racial preferences by a public university to advance “diversity.” Levy and Mellor rightly label this reasoning “pure sophistry” to allow a *de facto* quota, thus authorizing a public institution to engage in racial discrimination.

So that’s the twelve, and a well-chosen group it is, but is it *the* dirty dozen? Levy and Mellor are honest from the start that their approach to selecting cases is bounded, focusing on those that violated the principles of limited government and have an ongoing and negative social impact. The reader may well think of other cases that might have been included. This is a target-rich environment.

Certain cases are conspicuous by their absence. *Roe v. Wade*, for example, is tucked into an appendix. Though the

decision is “wrongheaded,” the authors do not count *Roe* among the worst cases because the Court’s result “may well be the middle ground that many states would adopt.” This is an unsettling conclusion that diminishes the importance of the rule of law and fidelity to the constitutional text across the board.

My minor criticisms do not detract from an excellent book that deserves, and I hope will receive, wide public attention and readership. And I hope as well that it will prompt others to consider their own “dirty dozen” lists and, in that way, be the first in a series that holds the promise to give our sometimes esoteric constitutional debates greater practical and public relevance.

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

BY STEVEN M. TELES

Reviewed by Daniel H. Lowenstein*

In the penultimate chapter of this excellent book, Steven M. Teles contrasts the prevailing moods at two public interest law firms which he regards as among the top achievements of the conservative legal movement (or CLM, as I shall abbreviate it). At the Center for Individual Rights (CIR), the founders “d[o] not believe that history [i]s on their side,” liberalism having “already corrupted the fundamental forms of law, politics, and society.” This “dark, sardonic” mood contrasts markedly with the “sunny optimism” at the Institute for Justice (IJ).

Throughout the book, Teles seeks to cast the CLM as a success story, but some conservative readers may conclude that there is more of CIR’s darkness than of IJ’s sunshine in the big picture. True, Teles describes impressive, even remarkable achievements, but “The Battle for Control of the Law” is still a pretty one-sided affair.

Teles’ determination to tell a success story may account for the sense that there are two books between these covers. The first, consisting primarily of the first two chapters, contains astute observations on changes in American policymaking processes, illustrated in Teles’ illuminating description of the ascendancy of what the author calls the liberal legal network. The second provides an account of the failure of early conservative legal ventures in the 1970s, followed by with detailed descriptions of what Teles regards as the movement’s greatest successes: the Law and Economics movement, the Federalist Society, and the aforementioned public interest law firms, CIR and IJ.

Teles intends to unify the book by showing, in the chapters describing these different aspects of the CLM, how conservatives responded to the strategic and tactical demands of the American political system, adapting the strategy and tactics of the liberal legal network to the conservatives’ own situation. But he succeeds only partially, as long stretches go by with few or no

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references to the background strategic and tactical questions, so that it is difficult to glean a systematic sense of which of the challenges described in the first chapter were met by the CLM and which were not.

Why does this occur as a consequence of Teles' decision to cast the CLM as a success story? The book consists of four major parts: (1) the nature of the policymaking system, and the challenges for any movement seeking influence in that system; (2) an account of how the liberal legal network met these challenges and achieved predominance; (3) a description of the CLM's false start in the 1970s; and (4) the successes of the new approaches in the 1980s and 1990s. But these successes, though marked, were also limited. Many of the challenges the CLM could not overcome at all, and in very few areas did their achievements come close to matching those of the liberal legal network. Teles does not conceal these limitations, but keeping them in the background makes it difficult for him to make systematic connections with the more theoretical framework established in the first chapter and illustrated by the rise of the liberal legal network.

A good concluding chapter helps to mitigate this weakness in the book, which in any event is greatly outweighed by the strengths of each part of the book considered on its own merits. The first, more theoretical part should interest anyone interested in how groups have come to influence public policy in contemporary American government, even those with no particular interest in the conservative movement.

The most important background circumstance to this story was the "increasing importance of ideas and professional power [which] led to a decline in the power of elections to cause comprehensive change, especially in highly entrenched political domains." The fracturing of power made responsibility for policy "hard to affix," as the most effective forms of political participation were diverted into "particularistic, piecemeal forms." As elections declined in importance, influence increasingly came to depend on "expert opinion, issue framing, and professional networks." Political parties did not fade away, but much of their competition now occurs "in the realm of elite organizational mobilization." One consequence was that, although Republicans won most presidential election starting in 1968, conservatives saw little policy movement in their direction in many fields, including law.

These ideas are richly elaborated, especially in Teles' account of the rise of the liberal legal network. Space does not permit an adequate summary here, but Teles shows that a great many streams flowed into what became a surging river. Among these were: the development of a compelling liberal legal ideology, coming out of the legal realist movement of the mid-twentieth century and bolstered by a pervasive sense of idealism generated by certain decisions of the Warren Court, especially *Brown v. Board of Education*; the effective work of the NAACP Legal Defense Fund, the American Civil Liberties Union, and eventually a host of liberal litigating organizations; the conversion of professional organizations, especially the American Bar Association, from conservatism to liberalism; heightened attention to Legal Aid, culminating in the legal services program, which was the most effective and enduring of the programs associated with the War on Poverty;

the eventual and nearly total predominance of liberalism and more extreme forms of leftism on law school faculties; and the massive intervention of liberal philanthropy, most importantly by the Ford Foundation.

Teles next describes the rise of regional, conservative "Legal Foundations," persuasively explaining that most of these initiatives failed because, among other reasons, they lacked a well-founded sense of mission. Conservatives had not yet developed ideas that could compete with the well-developed liberal jurisprudence that was, by then, prevalent. The donors to these early conservative public interest firms lacked sophistication. They included conservative foundations that understood the importance of influencing the course of law, but did not yet have the experience from which they could derive effective methods. Other important sources of funds presented particular difficulties. To appeal to individual donors in fundraising mailers, the organizations found it necessary to devote many of their resources to filing amicus briefs that usually had little influence but permitted the firms to claim that they were engaged in numerous cases. Corporate donors favored their short-term goals over basic principles shoring up the market system.

Teles finally turns to the success stories: Law and Economics, the Federalist Society, CIR, and IJ. Most readers, including those who have been closer to the events in question than the present reviewer, will learn a great deal from Teles' narratives. Nor are they merely descriptive. Although they are not as closely tied to the framework established in the early chapters as they might be, they are filled with illuminating analysis and insight.

Anyone, liberal or conservative, who reads these chapters is likely to admire the earnestness, resourcefulness, persistence, and prudence that characterized the pioneers of the Law and Economics movement, the Federalist Society, and the public interest firms. Teles rightly gives equal attention to the managers of conservative foundations who learned the lessons of experience and gave these pioneers indispensable encouragement and support. Law and Economics gave conservative lawyers and, especially, legal academics a solid ideological and analytical foundation. Its reputation has risen, partly through the remarkable efforts of Judge Richard A. Posner, from eccentric to still controversial but unquestionably respectable. The Federalist Society created intellectual ferment among conservative lawyers and law students, gave conservative legal perspectives respectability by reason of the intellectual integrity and balance of the exchanges the Society sponsored, and, not at all incidentally, catalyzed the creation of networks of conservative lawyers that would improve their ability to handle cases efficiently, boost morale, and facilitate recruitment of conservative lawyers for the judicial and executive branches of government when Republicans were elected. CIR and IJ litigated and won some notable cases and, occasionally, were able to imitate their liberal peers in turning even a litigation loss into an occasion for effective political action. *Kelo* is an important example.

These achievements more than justify Teles' title. But if we are to assess his subtitle dispassionately ("The Battle for Control of the Law"), we had best bear some facts in mind. The

median faculty member at nearly every American law school is a very liberal Democrat. The 40,000 student and lawyer members of the Federalist Society are dwarfed by the 410,000 members of the American Bar Association. The American Association for Justice (previously named the Association of Trial Lawyers of America, with 65,000 members) is a major source of Democratic Party campaign funds. If you dropped CIR and IJ into a pot containing all the liberal litigation groups, you would never find them again.

Teles is aware of these disparities, but his accentuation of the positive causes him to seek the causes of achievements much more than the causes of the limits to those achievements. True, he emphasizes from the beginning the particular difficulties that a “countermobilizing” movement encounters. In his concluding chapter he argues that skillful entrepreneurs, always in too-short supply to exploit political opportunities, are likely to leave “big bills left on the sidewalk.” The CLM’s second generation, particularly CIR and IJ—thanks in part to the intellectual and networking infrastructure created by Law and Economics and the Federalist Society—was able to scoop up bills left by the first generation, the regional legal foundations. But Teles’ metaphor leaves open the question: Could the first generation have picked up pennies and the second generation dollar bills, while there are hundred-dollar bills on the sidewalk across the street? The structure of his book does not encourage him to pursue that important question.

It may be relevant here to mention the one significant substantive quarrel I have with Teles’ book. In contrast to his two excellent chapters on Law and Economics, there is barely any mention of concepts such as originalism and textualism, ideas that loom large in conservative legal discourse. This is not by coincidence. More than once he remarks that one of the lessons learned by the successful second generation of the CLM was to abandon concepts such as “judicial restraint” and “strict construction.” He equates pursuit of judicial restraint with passive defense of government, contrasted with libertarian-minded litigators aggressively contesting government action. These categories and contrasts greatly simplify very complex relationships, as Teles in effect acknowledges in passing when he concedes that IJ’s litigation in defense of school choice was at once a defense of government action and pursuit of a libertarian objective.

Admittedly, I have been a strong believer in judicial restraint for the better part of four decades. It is one of the Federalist Society’s best qualities that readers of this journal are sure to include partisans of judicial restraint and libertarians alike. But my personal preferences and yours apart, there are two reasons to regret Teles’ one-sided account of the intellectual thrust of the CLM.

First, his claim that the CLM has rejected judicial restraint is simply not true. As mentioned, concepts such as originalism and textualism are basic terms of conservative discourse that have probably penetrated general legal thinking to a degree comparable to that of Law and Economics. A recent article in this journal opened with this pronouncement: “Judicial pragmatists have implicitly ceded the moral high ground to more restrained approaches to constitutional interpretation.” (Raymond J. Tittmann, *Judicial Restraint and the Supreme Court*:

Phillip Morris USA v. Williams, 8 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY PRACTICE GROUPS 3, 109.) There followed a short but thoughtful discussion of the nature of judicial restraint and the degree to which various Supreme Court conservatives have lived up to it. Such a discussion is hardly unrepresentative of contemporary conservative legal discourse. Thanks in part to the efforts of judges like Antonin Scalia, Frank Easterbrook and numerous other scholars, no one, no matter how liberal—or, indeed, no matter how libertarian—can teach a course in constitutional law nowadays without devoting considerable attention to originalism—or, for that matter, a course in statutory interpretation without devoting even more attention to textualism.

Second, there are indications in Teles’ book that libertarian ideas and even the libertarian temperament may make solving some of the CLM’s problems especially difficult. In an interesting passage he notes that a “legal movement needs to have an informal division of labor, with a substantial pool of lawyers willing to engage in fairly routine but often labor-intensive trial work that applies existing precedents.” The CLM, Teles says, has its share of generals—lawyers willing and able to bring the glamorous, visible case—but it is short on troops ready to follow up. One example evident to me as a faculty member at UCLA is the paucity of legal action to enforce Proposition 209, the anti-preferences initiative. If Proposition 209 were a liberal measure, the University of California would have had to triple its litigation budget. As Teles acknowledges, the CLM’s problem “may be inseparable from the virtues of the more libertarian (as opposed to religious) side of conservatism: a belief system that does not celebrate an ethos of service, humility, or collective endeavor is likely to be hampered when movement activities call for just those attributes.” Later, Teles observes that CIR and IJ have depended on what he calls a “new class” of conservative lawyers, motivated by ideological and cultural goals. Again, one may doubt whether Law and Economics will, by itself and in the long run, produce such a cadre in sufficient numbers. Contemporary conservatism is famously a “fusion” between libertarianism and what is inadequately called traditionalism. I do not know whether there are hundred-dollar bills on the sidewalk waiting for conservative legal entrepreneurs to find them, but if there are, I doubt they will be found by a movement that abandons half of its impetus.

The Rise of the Conservative Legal Movement can be criticized for certain omissions, namely full consideration of the CLM’s non-libertarian modes and the limitations to its success. But in the interest of fairness and accuracy we had best conclude by heeding Oscar Hammerstein’s advice, offered by him in the context of reflections on the exceptional nature of the human female: “It’s a waste of time to worry over things that they have not, we’re thankful for the things they got.” Serious students of American politics, government, law, and conservatism will be thankful for the things Teles’ book has got.