

## BOOK REVIEW

### *The Rise of the Conservative Legal Movement*\*

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It might be tempting for political liberals, who would like to rely upon the United States Supreme Court to defend individual liberties and to sustain progressive legislation, to conclude that the sky has fallen. It started falling, of course, even before the tenure of William Rehnquist as Chief Justice. But with the appointment of John Roberts as Chief Justice and Samuel Alito as an Associate Justice, the transformation of the Court is accelerating. And the sky? Well, one can almost touch it. The modern Court can now be relied upon to strive to protect business interests against legislation designed to protect workers, consumers, and the environment; to halt the judicial expansion of personal liberty interests while expanding judicial protection of property interests; to interpret a “colorblind” Constitution by rolling back affirmative action and school-desegregation plans; to restrict access to courts by upping the ante on pleading requirements and statutes of limitation; and to weaken the boundaries between church and state. On these and many other issues, the Roberts Court’s advancement of the conservative political agenda is well underway.

A few examples suffice to illustrate the ideological content of the Roberts Court’s jurisprudence. Professor Jeffrey Rosen describes the current direction of the Court as “exceptionally good for American business.”<sup>2</sup> In Chief Justice Roberts’s first two terms, the Court heard seven antitrust cases, compared to less than one per year during the Rehnquist Court.<sup>3</sup> The Court resolved them

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1. Professor of Law, Suffolk University Law School. The author would like to express his appreciation to his research assistants, Suffolk Law students Danielle McLaughlin and Margaret Hagen, for their invaluable assistance with this book review.

2. See Jeffrey Rosen, *Supreme Court Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, available at <http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html> (commenting on Court term as friendly to business interests).

3. See *id.* (noting increase in antitrust cases heard by Roberts Court).

all in favor of the corporate defendants and in the process overruled an almost 100-year-old precedent holding minimum price restraints to be per se anticompetitive.<sup>4</sup> Consumers lost when the Court held that regulatory action by a federal agency preempted a state tort action against an allegedly defective medical product in one case, and in another when the Court afforded insurance companies a good-faith defense for a mistaken reading of a regulatory statute.<sup>5</sup> The Court has continued to protect corporate defendants against large punitive damage awards.<sup>6</sup> Environmental claims have had mixed success, with parties favoring regulation winning some procedural victories, but losing on the merits in other cases.<sup>7</sup> In a sharp departure from a decision just seven years earlier,

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4. See *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2710 (2007) (rejecting per se illegality rule applied to vertical minimum-resale-price agreements); *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2387-89 (2007) (affirming dismissal of antitrust claims against security underwriting firms as incompatible with securities laws); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1961 (2007) (affirming dismissal of antitrust conspiracy action against local telephone exchange carriers due to insufficient pleading). The Court's ruling in *Twombly* abrogated *Conley v. Gibson*, 355 U.S. 41 (1957), with respect to the sufficiency of pleadings in the face of a motion to dismiss. *Id.* at 1969; see also *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 127 S. Ct. 1069, 1072 (2007) (applying strict test applicable to claims of predatory pricing to claims of predatory bidding). In this case, the plaintiff sawmill operator brought an action under § 2 of the Sherman Act, alleging its competitor obtained monopsony power in the Pacific Northwest market for alder sawlogs through predatory bidding; however, the Court reversed the judgment in favor of the plaintiff. *Id.* at 1072-74; see also *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006) (holding mere fact that tying product is patented does not create presumption of market power). This decision abrogated a previous Supreme Court precedent, thereby reflecting that Court's historic disapproval of tying arrangements has substantially diminished. *Tool Works*, 547 U.S. at 42-43; see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 3 (2006) (holding oil companies' joint venture not per se illegal horizontal price fixing agreement); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 169-70 (2006) (holding truck manufacturer not liable for unfair secondary-line price discrimination under Robinson-Patman Act).

5. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007-08 (2008) (holding patient's negligence, strict liability, and implied-warranty claims pre-empted by FDA premarket approval process); *Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2214-15 (2007) (holding notice not required where rate charged equal to rate in absence of credit report). The Court held that although willful failure required by the statute covers reckless action, the defendant was not liable for its mistaken belief that the statute did not apply to initial applications for insurance because such a reading was not objectively unreasonable and thus fell short of the "unjustifiably high risk" of violating the statute necessary for recklessness. *Id.* at 2216.

6. See *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1060 (2007) (holding punitive damages award violation of due process). The Court held when a jury bases a punitive damages award in part on a desire to punish the defendant for harming nonparties, such award constitutes deprivation of property without due process. *Id.*

7. See *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 752 (2008) (holding court may sua sponte raise special statute of limitations despite waiver by government). The decision resulted in barring a claim that the environmental protection activities of the government constituted an unconstitutional taking of plaintiff's mining leasehold rights. See also *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2537-38 (2007) (holding decision not within EPA discretion, thereby triggering no consultation requirement regarding protection of species); *Massachusetts v. Env'tl. Prot. Agency*, 127 S. Ct. 1438, 1458 (2007) (holding state had standing to challenge denial of petition to make rules regarding greenhouse emissions). Further, the Court held that the EPA has statutory authority to regulate such gases and can avoid promulgating regulations "only if it determines that greenhouse gases do not contribute to climate change or . . . provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." *Id.* at 1462; see also *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (defining term "navigable waters" under Clean Water Act narrowly). In rejecting a broader definition by the Army Corps of

the Court upheld a law criminalizing abortion by means of intact dilation and evacuation, despite the fact that the statute made no exception for the need to protect the health of the mother.<sup>8</sup> Important decisions on the Fourth Amendment have run against criminal defendants.<sup>9</sup> The Court held voluntarily adopted school integration efforts in Seattle, Washington, and Louisville, Kentucky, to be unconstitutional, over a passionate dissent by the moderate Justices.<sup>10</sup> In a failure to follow what was arguably a controlling precedent, the Court held that taxpayers had no standing to bring an Establishment Clause challenge to a federal agency's use of federal money to fund conferences to promote the President's faith-based initiatives.<sup>11</sup>

On one level, the Court's turn to the right appears to be a simple consequence of the fact that Republican presidents appointed all but two of the sitting Justices.<sup>12</sup> But the story of how conservatives have built a legal movement that has successfully challenged the hegemony of liberal legal thought is far more complicated and sophisticated than that. This story is told in great detail in Steven M. Teles's book, *The Rise of the Conservative Legal Movement*.<sup>13</sup>

Teles begins by explaining his theories of how political power is exercised and how political change takes place. In his view, over the past half-century there has been a decline in the power of political parties and elections to make change. The "increasing importance of ideas and professional power" requires

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Engineers, the Court defined "navigable waters" to include only relatively permanent, standing or continuously flowing bodies of water and excluded channels through which water flows intermittently or channels that periodically provide drainage for rainfall. *Rapanos*, 547 U.S. at 739. The Court reasoned that such interpretation fulfills the purpose of the Act, which aims to "protect the primary responsibilities and rights of the States . . . to plan the development and use of land and water resources." *Id.* at 722-23.

8. Compare *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007) (holding Partial-Birth Abortion Ban Act of 2003 not unconstitutional on its face), with *Stenberg v. Carhart*, 530 U.S. 914, 929-30 (2000) (holding partial-birth abortion statute unconstitutional). In *Stenberg*, the Court found the statute unconstitutional where it lacked an exception for preserving the health of the mother and where it imposed an undue burden on a woman's right to choose an abortion because it applied to the D & E procedure as well as the D & X procedure. *Id.*

9. See *Samson v. California*, 547 U.S. 843, 857 (2006) (holding suspicionless search of parolee not violation of Fourth Amendment). The Court explained that parolees have a diminished expectation of privacy compared to probationers. *Id.* at 850; see also *Hudson v. Michigan*, 547 U.S. 586 (2006) (holding knock-and-announce rule violation does not require suppression of all evidence).

10. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767-68 (2007) (holding voluntarily adopted plans relying on race to determine student assignments to schools unconstitutional).

11. Compare *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2559 (2007) (holding challenge not within exception to prohibition on taxpayer standing established in *Flast v. Cohen*), with *Flast v. Cohen*, 392 U.S. 83, 105-06 (1968) (setting forth narrow exception to rule against taxpayer standing).

12. Ruth Bader Ginsburg and Stephen Breyer were appointed by President Clinton, John Paul Stevens by President Ford, Antonin Scalia and Anthony Kennedy by President Reagan, David Souter and Clarence Thomas by President George H.W. Bush, and John Roberts and Samuel Alito by President George W. Bush.

13. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

“nonelectoral mobilization” to bring about change.<sup>14</sup> Policymaking is controlled by “networks that cut across agencies, levels of government, and the state-society divide, rather than by political parties.”<sup>15</sup> This explains why in the 1970s, even though the Republicans had captured the presidency through Richard Nixon, and Nixon had made four appointments to the Supreme Court, the law did not change as much as conservatives had hoped. The liberals still controlled “a much more impressive set of resources: elite law schools, a large chunk of the organized bar, a vast network of public interest lawyers, and the still-powerful liberal understanding of rights.”<sup>16</sup> The politics of law are “acutely sensitive to the increasing significance of ideas, information, networks, issue framing, and agenda control in American politics.”<sup>17</sup>

A principal contribution of Teles’s book is his identification of the problems conservatives faced in mobilizing against liberal control of crucial legal networks and institutions, and his characterization of these problems as fundamentally *organizational*.<sup>18</sup> He explains, first theoretically and then in detailed factual accounts, how the conservative legal movement challenged the entrenched liberal legal polity through the development of an “alternative governing coalition.”<sup>19</sup> Of necessity, writes Teles, such a coalition must comprise “*intellectual, network, and political entrepreneurs, and the patrons that support them.*”<sup>20</sup> Teles devotes most of the book to a description and analysis of the entrepreneurs and patrons responsible for the development of conservative public-interest legal institutions, the law and economics movement, the Federalist Society, and the implementation of their goals in law schools, the bar, the courts, and the government.

Before turning his attention to the conservative legal movement, however, Teles describes how the liberal legal network developed as a powerhouse of political, legal, and social influence. The foundation of liberal dominance was the New Deal. The preeminence of liberal thought and action grew as a consequence of the work of the NAACP Legal and Defense Fund, the ACLU, the National Lawyers Guild, the Supreme Court’s decision in *Gideon v. Wainwright*,<sup>21</sup> the subsequent explosion in the numbers of legal-services lawyers and programs, an expanded interest on the part of the American Bar Association in legal-aid programs, the growth of clinical education in law schools, the development of liberal public interest law, and crucial support

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14. *See id.* at 3.

15. *See id.* at 7.

16. *See id.* at 2.

17. *See* TELES, *supra* note 13, at 9-10.

18. *See id.* at 14.

19. *See id.* at 17.

20. *See id.* at 17.

21. 372 U.S. 335 (1963) (holding Sixth Amendment right to assistance of counsel applies to states through Fourteenth Amendment). The Court’s landmark ruling held that an indigent defendant in a criminal case has a constitutional right to counsel appointed and paid for by the state.

from the Ford Foundation for many of these initiatives. Furthermore, in the late sixties and early seventies there was enormous growth in the size of law faculties in the United States, just as “the law students who would fill those positions were moving decisively to the left.”<sup>22</sup> The new generation of liberal law professors “sought to legitimate the expanded role of the judiciary ushered in by the Warren Court,” as compared with the previous generation who had “cut their teeth on legal realism and judicial restraint.”<sup>23</sup>

A centralization of policymaking in Washington, D.C. advantaged the liberal public-interest organizations in the capital that “networked into its web of agencies, courts, media, congressional subcommittees, and research organizations.”<sup>24</sup> As a result, the liberal legal network had “substantial and far-reaching influence” on public policy.<sup>25</sup> Teles concludes, in part:

[T]he courts and the federal government became substantially more sympathetic to legal liberalism, providing elite sanction for its goals (in the form of Supreme Court decisions) and subsidy for its organizational development . . . . [I]n the wake of the civil rights movement, the idea of rights gained a powerful cultural status, making the political claims of legal liberals seem identical to morality, progress, and common decency, a part of elite common sense.<sup>26</sup>

Unfortunately, Teles leaves relatively unqualified this description of the success of the liberal legal network. In fact, liberal legal goals were never more than partially realized, social and racial justice remained elusive in significant and enduring respects, and prevailing corporate interests were never seriously compromised. This reviewer would have welcomed greater discussion of the structural and political forces that capped the success of legal liberalism even before a conservative reaction. Certainly from a progressive perspective, it would be necessary to analyze the limitations of the liberal ideology itself in order to appreciate why it was not more successful. In any event, having described what the conservatives were up against, Teles devotes the rest of the book to analyzing the conservative countermobilization.

No mere summary of Teles’s rich history of the conservative legal movement can do justice to his work. Based on access to confidential documents and extensive interviews with key personnel, he describes in minute detail the challenges the conservatives faced; the variety of approaches,

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22. See TELES, *supra* note 13, at 42.

23. See *id.* at 44. Teles’s account of this period was particularly interesting to this reviewer, who was a student during the sixties at Yale Law School, which is featured prominently in the book. It was wonderful to gain new insights on a subculture I had been a part of from a book written forty years later.

24. See *id.* at 54.

25. See *id.* at 54.

26. See TELES, *supra* note 13, at 56.

philosophies, and programs they devised; the different players and personalities involved; and the specific problems they encountered. His thoughtful analysis of what strategies and which players succeeded and which failed will be invaluable both to political organizers and to political scientists. The role of particularly effective organizational entrepreneurs is repeatedly emphasized in Teles's accounts of various groups and institutions. Among the leaders described by Teles as having significant influence are Dan Burt at the Capital Legal Foundation; Chip Mellor and Clint Bolick, the founders of the Institute for Justice; Michael Greve and Michael McDonald, the founders of the Center for Individual Rights; Henry Manne in the field of law and economics; and Steven Calabresi, Lee Liberman Otis, and David McIntosh, founders of the Federalist Society. All this reviewer hopes to achieve is to whet the appetite of readers who may be interested in this treasure trove of material.

Teles breaks the development of conservative public interest law into two periods. The first generation of such firms was not particularly successful, in large part because the firms were too closely tied to business interests. Teles explores examples of the conflict between the interests of individual business and conservative ideology and the resulting failure of the business base to support libertarian causes.

Michael Horowitz, who later became a senior fellow at the Hudson Institute, analyzed the weaknesses of the initial conservative public-interest firms in a crucial report to the Scaife Foundation.<sup>27</sup> Horowitz moved the agenda of conservative public interest in an ideological direction and emphasized the development of legal thought. He perceived that "nobody has sufficiently offered young lawyers the sense that one can be caring, moral, intellectual, appropriately ideological, while at the same time being radically opposed to the stale views of the left."<sup>28</sup> He "identified the university, rather than the corporation, as the key site of competition in the law."<sup>29</sup> Horowitz also criticized the focus of conservative public-interest firms on writing amicus briefs, which he concluded were relatively meaningless and ineffectual, as compared to undertaking productive litigation.

The second generation of conservative public-interest firms learned from the shortcomings of the first and distanced themselves from individual business interests while developing more forthrightly libertarian principles. In addition, conservatives freed themselves from the advocacy of judicial restraint, an argument that had been effective only in opposing the dominance of liberal thought in the courts.<sup>30</sup> The new conservative public interest firms "learned

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27. See *id.* at 67.

28. See *id.* at 67 (quoting Michael Horowitz, *In Defense of Public Interest Law*, in INSTITUTE FOR EDUCATIONAL AFFAIRS, PERSPECTIVES ON PUBLIC INTEREST LAW, FOUNDATION OFFICERS FORUM OCCASIONAL PAPERS, NO. 2, 7-8 (1981)).

29. See TELES, *supra* note 13, at 70.

30. See *id.* at 89.

that conservative interests could only be protected by actively using courts to establish new or reinvigorate old rights, rather than simply standing in the way of the activism of the Left.”<sup>31</sup> As a result of making these and other necessary changes, the conservative public-interest firms became more successful and “both the Institute for Justice and the Center for Individual Rights have established impressive track records of placing significant cases before the Supreme Court.”<sup>32</sup> Teles provides an instructive and detailed account of the history of both firms.

Teles devotes two chapters to the history of the field of law and economics. The initial difficulty this discipline faced was that it was not taken seriously in academia. Teles describes the process by which this was overcome in considerable detail, emphasizing, of course, the role of the University of Chicago Law School and Richard Posner. Teles points out, however, that the work of Henry Manne was equally important. Manne was an “intellectual entrepreneur” who, among other projects, organized Economics Institutes for Law Professors at the University of Rochester, the Liberty Fund conferences for law and economics practitioners, and the Economics Institute for Federal Judges. Manne taught over 650 law professors and, at the Institute’s height in 1990, 40 percent of the federal judiciary in his programs.<sup>33</sup> Ultimately, law and economics became accepted as a legitimate discipline, and significant programs and influential professorships were established in elite law schools. Much of this was made possible through the support of John M. Olin and the Olin Foundation.<sup>34</sup> Teles concludes that “law and economics is the most successful intellectual movement in the law of the past thirty years.”<sup>35</sup>

The influence of the Federalist Society is recognized throughout the book. The Society was formed in 1982 and has been remarkably successful in organizing and supporting conservative lawyers and law professors, having conservatives appointed to the federal bench, and influencing the development of the law in areas of interest to its members. Four members of the current Supreme Court are either members or close allies.<sup>36</sup> The vast majority of lower federal court judges appointed by recent Republican presidents are either members or have been approved by Federalist Society members involved in the appointment process. Members occupy key positions in the Department of Justice and on the legal staffs of other federal agencies. Members represent

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31. *See id.* at 221.

32. *See id.* at 220.

33. *See TELES, supra* note 13, at 106, 113.

34. *See id.* at 183-219.

35. *See id.* at 216.

36. Justices Scalia, Thomas, and Alito are acknowledged members of the Federalist Society. During his confirmation hearings, Chief Justice Roberts claimed to have no recollection of being a member, although his name appeared in the organization’s 1997-1998 leadership directory as a member of the steering committee of the Washington, D.C. chapter. *See* Charles Lane, *Roberts Listed in Federalist Society ‘97-98 Directory*, WASHINGTON POST, July 25, 2001, at A01.

litigants before the Supreme Court or file amicus briefs on behalf of organizations with aims similar to those of Federalist Society members. Federalist Society professors on the faculties of law schools, particularly elite law schools, have succeeded in gaining respect for conservative legal views and in training a new generation of conservative lawyers and law professors. The intellectual work that members have done to develop legal theories and arguments to advance conservative positions has fueled significant campaigns to change the law in a wide variety of areas.

The Federalist Society has experienced spectacular growth in recent years. The annual budget grew from \$3,000,000 in 2002 to \$7,316,571 in 2006.<sup>37</sup> There are 195 student chapters, one at every accredited law school in the United States.<sup>38</sup> There are more than 40,000 Federalist Society members nationwide in sixty Lawyers Division chapters.<sup>39</sup>

Teles traces the development of the organization from its beginnings as a student group in 1982. One of his most useful insights is his description of the Federalist Society's approach to "boundary maintenance."<sup>40</sup> He explains that the Society itself does not take policy positions on legal or political questions because its members represent a broad range of conservative and libertarian viewpoints and may disagree about particular legal issues. The organization sponsors frequent debates on legal issues, openly exploring these disagreements. By avoiding contests about which positions the organization should adopt, however, it is possible to keep everyone inside the tent.<sup>41</sup>

Teles argues that it is essential to distinguish between the organization and the actions of its members, or as he puts it, between direct and indirect outputs:

The most significant direct output is debate: over half of the organization's funding goes to sponsoring speakers and its national meetings. The indirect outputs of the Society network are best understood as the conservative movement's return on the social capital produced by the Society's debating activities. None of the Society's effects on the politics of judicial nominations, networking, placement of members, or facilitating connections across government is denied or foresworn by its leaders. That said, the Society could never have produced these effects had it pursued them directly.<sup>42</sup>

The distinction that Teles labors to make is important for understanding his useful theory of boundary maintenance, and in understanding the internal

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37. 2006 ANN. REP. (The Federalist Soc'y for Law and Pub. Policy Studies, Wash., D.C.), Apr. 2007, at 34, 37, available at [http://www.fed-soc.org/doclib/20070511\\_2006AnnualReport.pdf](http://www.fed-soc.org/doclib/20070511_2006AnnualReport.pdf).

38. See *id.* at 4.

39. See *id.* at 37.

40. See TELES, *supra* note 13, at 135.

41. See *id.* at 152-62.

42. See *id.* at 163.

politics that have allowed the Federalist Society to survive as an organization. In terms of the practical political impact of the Federalist Society on law and politics, however, it is a distinction without a difference. For example, while it is true that the Federalist Society has not formally endorsed judicial nominees, it would be highly artificial to consider the activities of Lee Liberman Otis, one of the founders, in vetting judicial nominees for President George H.W. Bush as the business of a single member. Indeed, as Teles himself notes, “formal involvement in judicial selection may have been rendered unnecessary by the growth of the Society’s network.”<sup>43</sup> As far as the outside world is concerned, the activities of Federalist Society members are the business of the Society.

The Federalist Society provides organizational, financial, political, intellectual, and social support that is crucial to the empowerment of conservative lawyers, scholars, and judges. For example, debates organized by the Washington, D.C. chapter created networks that are “especially valuable in overcoming the intrinsic informational challenges of coordinating action across the executive branch.”<sup>44</sup> The debates are also crucially important, of course, in furthering the intellectual work of Federalist Society members. As Teles explains, “ideas do not develop in a vacuum. Ideas need networks through which they can be shared and nurtured, organizations to connect them to problems and to diffuse them to political actors, and patrons to provide resources for these supporting conditions.”<sup>45</sup> The ability of the Federalist Society to focus on intellectual work has been supported by sophisticated institutional patrons with long-term vision that have not insisted on an immediate return on their investment.

The principal accomplishments of *The Rise of the Conservative Legal Movement* are the wealth of detailed factual material that Teles provides and his incisive analysis of why certain actors and institutions have succeeded or failed. His use of organizational theory is particularly useful in understanding the internal dynamics of the individual conservative groups that he studied.

In his final chapter, Teles reaches valuable conclusions about the organizational imperatives of groups and movements seeking political power. His summary of the value of ideas to maintaining a durable competitive advantage in politics, for example, is pithy:

Political movements can attain a durable advantage by identifying their own ideas with common sense, intellectual seriousness, responsibility, professionalism, and ordinary decency, while claiming that their opponents’ ideas are “off the wall” – eccentric, irresponsible, morally dubious, and outside the professional mainstream.<sup>46</sup>

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43. See *id.* at 158.

44. See TELES, *supra* note 13, at 147 (quoting David McIntosh).

45. See *id.* at 3-4.

46. See *id.* at 266.

Much of the detailed material presented in earlier chapters documents the steps taken by the conservative legal movement to legitimate their ideas in that sense.

There, however, are weaknesses in Teles's overall project. In a word, there is insufficient attention to law. Perhaps this criticism is unfair because the content of the law is not Teles's topic. His failure to take it into greater account, however, leaves his narrative of the movement he has studied incomplete in important ways.

For example, Teles describes the attention paid to affirmative action by both the Institute for Justice and the Center for Individual Rights. His discussion of the effect of this issue on the development of these organizations is instructive. There is very little in this book, however, that explains the impact that the conservative legal movement has had on the content of the law as it relates to racial classifications. For example, the influence of this movement on the concern over whether the Constitution must be "colorblind," an issue that dramatically divided the Supreme Court in the *Seattle School* case, is not explored at all.<sup>47</sup> For an account that repeatedly emphasizes the preoccupation of the conservative legal movement with ideas, Teles gives too little attention to the content of the ideas in question.

Perhaps it is inattention to the content of law that leads to the suggestion in the final chapter that control over the law swings back and forth between liberal and conservative "regimes."<sup>48</sup> Teles concludes, "few if any of the sources of durable change are so entrenched as to be immune from challenge. Rather than being noncompetitive, it is better to think about entrenched regimes as being 'contestable markets.' . . . [P]olitical regimes almost always have vulnerabilities. Resistance is almost never futile."<sup>49</sup>

This may be true of politics, but it is not an accurate description of the history of law. The reality is that control over American law, particularly constitutional law, has not alternated between liberals and conservatives. The Warren Court was the *only* liberal period in the history of the Supreme Court. While it may have been necessary for a conservative legal movement to employ the methods described by Teles to regain control over American law, the truth is they had lost control for only a very brief period. The law itself is inherently conservative.

Nonetheless, far be it from this reviewer, who spent most of his career as a plaintiffs' civil rights lawyer, to argue that resistance is futile. I am recommending Teles's book to all my liberal and progressive colleagues. He argues, "The rhythm of political change is produced by the interaction of the problems and puzzles generated by the dominant regime with the problem-

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47. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007).

48. See TELES, *supra* note 13, at 268.

49. See *id.* at 268.

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solving and adaptation of their opponents.”<sup>50</sup> Perhaps if liberals and progressives pay enough attention to the lessons about problem-solving and adaptation taught in this valuable book, Professor Teles will have an opportunity to write a sequel, *The Renaissance of the Liberal Legal Network*.

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50. *See id.* at 270.