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Lawyers and the Conservative Counterrevolution

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JEFFERSON DECKER. *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government*. New York, NY: Oxford University Press, 2016.

AMANDA HOLLIS-BRUSKY. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution*. New York, NY: Oxford University Press, 2015.

What roles have lawyers played in the conservative counterrevolution in US law and public policy? Two recent books, Jefferson Decker's The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government *(2016), and Amanda Hollis-Brusky's* Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution *(2015), speak to the question. This essay explores how these books relate to a larger story of the conservative legal movement and the roles that lawyers and their organizations and networks have played in the conservative turn in American law and politics. It highlights four interrelated threads of the movement's development: creating a support structure for conservative legal advocacy; remaking the judiciary and holding judges accountable; generating, legitimizing, and disseminating ideas to support legal change; and embracing legal activism to roll back government. The essay then considers a continuing challenge for the movement: managing tensions among its several constituencies. Finally, it suggests how this story has played out in litigation to challenge campaign finance regulation.*

INTRODUCTION

The US conservative legal movement is flourishing. Conservatives and libertarians exercise considerable influence on law and policy through an infrastructure of organizations, lawyers, and financial patrons. They have developed a deep bench of highly credentialed lawyers who hold prominent positions in law firms, advocacy organizations, think tanks, universities, and government. Republican administrations have drawn on that pool to make judicial appointments, which has significantly improved conservatives' prospects for success in the courts. They have pursued ambitious advocacy campaigns and achieved major litigation victories on a host of issues,

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including guns,[1] religious liberty,[2] campaign finance,[3] labor,[4] voting rights,[5] and class actions.[6] The 2016 presidential election has given the movement additional momentum, as President Trump has appointed judges recommended by conservative legal movement organizations (Savage 2017), has tapped conservative lawyers to serve in his administration (Mahler 2018), and has begun to reduce the regulatory state in key areas, including health consumer protection, the environment, education, telecommunications, employment, and the use of federal land.

How did we get here? Conservatives have worked hard to keep liberal jurists off the bench and to appoint their own. But large-scale legal change also requires an effective "support structure" (Epp 1998), including lawyers, organizations, and funding sources. Conservatives have founded advocacy organizations and think tanks, generated and refined arguments supporting their policy objectives, and sold legitimacy for these ideas in the face of contrary prevailing doctrine. Financial patrons have supported institutions and ideas that advanced the movement's goals and sustained their commitment over time. Together, these various mobilizing efforts have contributed to fundamental change in law.

Two recent books advance our understanding of the roles of lawyers in the conservative counterrevolution. Jefferson Decker's *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* offers an account of the early history of this mobilization in the 1970s and 1980s. In particular, it considers how some lawyers came to embrace the pursuit of "counter-rights" to defeat legal

1. See *District of Columbia v. Heller* (2008) (the Second Amendment guarantees an individual right to possess a handgun in the home for purposes of self-defense); *McDonald v. City of Chicago* (2010) (the Second Amendment applies to state and local government as well as the federal government).

2. See *Good News Club v. Milford Cent. Sch. Dist.* (2001) (allowing religious club to meet in school after hours did not violate the Establishment Clause, and denying the group access to the school facilities violated the organization's free speech rights); *Greece v. Galloway* (2014) (town's practice of inviting local clergy members to open each legislative session with a prayer did not violate the Establishment Clause of the First Amendment); *Burwell v. Hobby Lobby* (2014) (as applied to closely held corporations, Department of Health and Human Services regulations requiring employers to provide their female employees with no-cost access to contraception violated the Religious Freedom Restoration Act of 1993); *Nat'l Institute of Family and Life Advocates v. Becerra* (2018) (California law that required crisis pregnancy centers to provide patients with information about the availability of low-cost or free abortions violated the First Amendment).

3. See *Citizens United v. FEC* (2010) (striking down limits on corporate expenditures in federal elections); *Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) (invalidating a matching fund provision of Arizona's public campaign finance system); *McCutcheon v. Federal Election Comm'n* (2014) (invalidating overall limits on the total contributions an individual can give in an election cycle).

4. See *Harris v. Quinn* (2014) (finding that the First Amendment prohibits collection of an agency fee from home health care workers who do not want to join or support a union); *Janus v. AFSCME* (2018) (taking union agency fees from unwilling public sector employees violates the First Amendment); *Epic Systems Corp. v. Lewis* (2018) (upholding the enforceability of arbitration agreements containing class and collective action waivers despite "concerted activity" protections under federal and state labor law).

5. See *Shelby County v. Holder* (2013) (finding Section (b) of the Voting Rights Act of 1965 unconstitutional); *Husted v. A. Philip Randolph Institute* (2018) (process used by Ohio to remove voters from voter rolls did not violate the National Voter Registration Act).

6. See *AT&T Mobility LLC v. Concepcion* (2011) (Federal Arbitration Act preempted California State contract law, which deemed class action waivers in consumer contracts unenforceable); *American Express Co. v. Italian Colors Restaurant* (2013) (Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery).

liberalism. Amanda Hollis-Brusky's *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* explains how the Federalist Society for Law and Public Policy, a conservative and libertarian lawyer network, has influenced constitutional doctrine in several key areas—including the reach of federal government power, the right to bear arms, and corporate political speech. Both books contribute to our understanding of how conservatives have used the courts to advance their policy agenda and why the effort has been so successful, building on earlier work in this vein (Teles 2008; Southworth 2008).

This essay examines how these books relate to a larger story of the conservative legal movement and the role that lawyers and their organizations and networks have played in the conservative turn in US law and politics. It is a story of the legal profession's success over time in giving lawyers leading roles in a movement that initially regarded law and legal activism as impediments to its success. I highlight four interrelated threads of the movement's development: creating an infrastructure for conservative legal advocacy; remaking the judiciary and holding judges accountable; generating, legitimizing, and disseminating ideas to support legal change; and embracing legal activism to roll back government. The essay then considers a continuing challenge for the movement: managing tensions among its several constituencies. Finally, it suggests how this story has played out in litigation challenging campaign finance regulation.

CREATING AN INFRASTRUCTURE FOR CONSERVATIVE LEGAL ADVOCACY

The conservative legal movement coalesced in the early 1970s, fueled by conservatives' frustration with their inability to translate election victories into law. Liberal public interest law groups established in the 1960s and early 1970s were using their network of organizations and lawyers to impede conservatives' policy agenda through litigation and administrative advocacy. Conservatives organized to gain influence in arenas then dominated by liberal elites—legal advocacy groups, the judiciary, law schools, and professional networks. They invested in a broad range of activities designed to help them prevail in "the battle to control the law" (Teles 2008).

As part of this mobilization, conservatives created new advocacy organizations to counter the influence of liberal public interest law firms. Like the groups they opposed, these conservative law organizations claimed that they were engaging in "public interest law" (Epstein 1985; Southworth 2005). Lawyers were the principal founders and leaders of these groups, but they received critical assistance from foundations and other patrons.

Some business leaders were inspired to support conservative public interest law groups by the release of a memo drafted by Lewis Powell and delivered to the US Chamber of Commerce just months before Nixon appointed him to the Supreme Court. While serving on the Court from 1971 through 1987, Powell earned a reputation as a moderate conservative and a swing vote, but the "Powell Memo" was a call to arms. It asserted that the US economic system was "under broad attack" and that there was an urgent need for American business to mobilize "against those who would destroy it" (Powell 1971). Powell argued that business interests faced pervasive

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hostility in universities, the media, and "among respectable liberals and social reformers," and that the very survival of the free enterprise system depended on a willingness of business leaders to confront their detractors. The memo urged business leaders to take a more aggressive stance "in all political arenas," but especially in the courts, which, he suggested, "may be the most important instrument for social, economic and political change" (Powell 1971, 8).

The Powell Memorandum led to the establishment of the US Chamber Litigation Center (Epstein 1985, 58–59), which today employs a roster of litigators rivaling the most elite Washington appellate boutiques (Reuters 2014) and states as its mission "fighting for business in the courts" (US Chamber Litigation Center 2018). But even before the Chamber created its own litigation unit, the Powell Memo began to circulate among "a network of ideologically committed, right-wing businessmen" who distributed it to friends and business associates (Decker 2016, 47). Some enterprising lawyers and policy entrepreneurs found the memo useful in their efforts to secure funding for new think tanks, legal advocacy groups, and media outlets.

The first legal advocacy group to style itself as a conservative public interest law firm was the Pacific Legal Foundation. Ronald Zumbrun, an attorney responsible for defending welfare reform under then California Governor Ronald Reagan, worked with the California Chamber of Commerce and other government lawyers to found the organization in 1973. By 1978, six more regional firms were created under the auspices of an umbrella group, the National Legal Center for the Public Interest. Decker offers detailed profiles of two of these groups, the Pacific Legal Foundation and the Mountain States Legal Foundation, and the lawyers and patrons who supported them, exploring their motivations, what brought them together, and the challenges they encountered along the way. The late 1970s also saw the establishment of several independent conservative public interest law firms, including the New England Legal Foundation and the Washington Legal Foundation, which addressed not only regulatory matters but also social issues such as capital punishment, school prayer, and abortion.

Religious conservatives produced their own public interest law organizations beginning in the 1970s. Catholics mobilized to oppose abortion and to support state aid to parochial schools (Byrnes and Segers 1992; den Dulk 2001, 36–37). Evangelical Protestants organized around a variety of social issues, including family, education, and the relationship between church and state (Liebman and Wuthnow 1983; Soper 1994), and they substantially increased their involvement in legal advocacy in the 1980s and 1990s (Brown 2002; Hacker 2005).

Many of the first conservative public interest law groups were not particularly successful. The most influential diagnosis of the problem came from Michael Horowitz, a lawyer who persuaded the Sarah Scaife Foundation to finance a study of conservative public interest groups. His scathing report found that most of the existing organizations were parochial, overly dependent on business patrons, and staffed by "appallingly mediocre" lawyers (Horowitz 1980, 54). He argued that it was critical for conservative public interest organizations to achieve greater independence from business benefactors, develop specialized expertise, and find more sympathetic clients for their litigation campaigns. He urged conservative patrons to focus on developing credibility for conservative ideas, building relationships with law schools and bar

associations, recruiting able and idealistic young attorneys into the movement, and placing them in senior positions in government and private practice (1980, 20–21, 54–55). He also highlighted the importance of monitoring judicial appointments, noting "the absence of any input on the part of the conservative movement in the critical judicial selection process" (1980, 75).

Conservative patrons thereafter redirected resources to advocacy organizations that more closely resembled their liberal counterparts in terms of demonstrating independence from financial supporters, developing specialized expertise, cultivating relationships with academics, journalists, and government officials, and charting affirmative litigation strategies framed around the interests of ordinary individuals (Southworth 2005, 1252–56; Teles 2008, 89, 220–64). For example, the Center for Individual Rights, established in 1989 by two alums of first-generation public interest law firms, focused primarily on challenging affirmative action and campus speech codes. The Institute for Justice, founded in 1991 by Clint Bolick and Chip Mellor, who had worked together at Mountain States Legal Foundation, sought to dismantle laws and regulations they deemed inconsistent with individuals' economic liberty and property rights (Teles 2008, 237–44). Different patrons supported specialized organizations that pursued the agendas of social conservatives and the religious right on issues such as home schooling, guns, school choice, and religious liberty (den Dulk 2001; Brown 2002; Hacker 2005). Some of those organizations are large and well-funded.[7]

Over the past several decades, conservatives have deployed dozens of legal advocacy organizations to eliminate or diminish rights forged by liberal public interest groups and to establish and revitalize counter-rights. Over time, these organizations have attracted more elite lawyers and staked a claim to the special legitimacy that the public interest law label confers (Southworth 2013). Many lawyers associated with these organizations have moved into government service at the federal, state, and local levels.

In addition to supporting conservative advocacy organizations, conservative and libertarian philanthropists backed other types of institutions and long-term strategies directed toward transforming law. They invested in think tanks, such as the Heritage Foundation, the Cato Institute, and the Manhattan Institute, and in new law schools, such as Regent and Ave Maria. They also supported new journals and other media outlets, as well as scholarly enterprises, such as law and economics (Teles 2008, 180–219), and projects designed to map litigation strategies. Some foundations coordinated their philanthropy to maximize its impact (Southworth 2005, 1255–56).

One of the most important and enduring of the conservative legal movement's investments has been the Federalist Society, an association of conservative and libertarian lawyers "dedicated to reforming the current legal order" (Federalist Society 2018a). It began in 1982 as a small debating society launched by law students at Yale and the University of Chicago. These students sought to address what they perceived as a disparity between the ascendance of conservative and libertarian ideas in electoral politics and their hostile reception in elite law schools. Robert Bork was the group's advisor at Yale, and Antonin Scalia, then a law professor, was the adviser at the University of Chicago. The organization also received key support from Reagan

7. The Alliance Defending Freedom, for example, has 41 staff attorneys and a budget of approximately $50 million (Alliance Defending Freedom 2018b).

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Administration appointees, such as Attorney General Edwin Meese and Michael Horowitz (author of the Horowitz Report [1980]). The Federalist Society quickly attracted funding from conservative patrons, who saw that the organization could serve as a network linking conservatives in advocacy organizations, government, private practice, the Republican Party, legal academy, and courts (Teles 2009).

The Federalist Society has contributed greatly to the success of the conservative legal movement. It operates as a site for recruiting and grooming conservatives and vetting them for eventual appointment to the bench and other influential positions (Southworth 2008, 138–39; Teles 2008, 141–42). The Society provides opportunities for law students and young lawyers to meet prominent conservatives, and it supplies a credential that some judges and other employers view as evidence of applicants' political leanings (Southworth 2008, 138–39).[8] It also serves as an incubator of ideas, generated through conferences and practice group activities, and then presented to courts and policymakers (Hollis-Brusky 2015). It administers the Olin-Searle-Smith Fellows in Law program, which gives junior scholars funding to write books and articles and thereby prepare to secure tenure-track faculty positions (Federalist Society 2018c). It produces its own publications, and it supplies an extensive list of "policy experts" who speak to the media on dozens of topics (Federalist Society 2018d). Although the Federalist Society does not itself take positions on public policy, it encourages its members to do so, and its Pro Bono Center matches lawyers to service opportunities consistent with the organization's broad mission (Federalist Society 2018e). The Society's annual conventions in Washington, DC, attract thousands of lawyers, law students, and scholars from all constituencies of the conservative alliance. Its financial patrons include not just well-known conservative donors, such as Charles and David Koch, the Lynde & Harry Bradley Foundation, Searle Freedom Trust, and Sarah Scaife Foundation, but also the U.S. Chamber of Commerce; major law firms, such as Gibson Dunn & Crutcher, Sullivan & Cromwell, and WilmerHale; as well as global corporations, including Google, Microsoft, Walmart, and Pfizer Inc. (Federalist Society 2018f).[9] Originally conceived as an effort to confront and challenge the liberal legal establishment, the Federalist Society has since facilitated the creation of a counterpart on the political right—a *conservative* legal establishment.

REMAKING THE COURTS AND HOLDING THEM ACCOUNTABLE

As Horowitz observed in his report for the Scaife Foundation, the conservative movement had not yet begun to play any significant role in the judicial selection process before the beginning of the Reagan Administration (Horowitz 1980, 75). Richard

8. The Federalist Society's membership solicitation cites the opportunity to "interact[] with prominent public officials, judges, and scholars" as the first of eight reasons to join the organization (Federalist Society 2018b).

9. Other major law firms that gave $10,000 or more to the Federalist Society in 2017 included Baker & Hostetler LLP, Covington & Burling LLP,, Debevois & Plimpton LLP, Dechert LLP, DLA Piper, Foley & Lardner LLP, Hogan Lovells US LLP, Jones Day, King & Spalding LLP, Kirkland & Ellis LLP, Latham & Watkins LLP, Mayer Brown LLP, McGuire Woods LLP, Morgan Lewis & Bockius LLP, O'Melveny & Myers LLP, Sidley Austin LLP, Wiley Rein LLP, and Winston & Strawn LLP (Federalist Society 2018f).

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Nixon made reining in "activist judges" a central theme of his 1968 election campaign. By the time he left office in 1974, he had appointed four Supreme Court justices (Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist), forty-six federal court of appeals judges, and 181 federal district court judges. However, these appointments did not produce the legal counterrevolution that conservatives had hoped for (Blasi 1983; McMahon 2011), perhaps because Nixon was not fully committed to that goal (McMahon 2011). Things began to change in the 1980s, when Reagan made a more concerted effort to transform the judiciary. His appointments included three Supreme Court justices (Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy), eighty-three federal court of appeals judges (including conservative luminaries such Frank Easterbrook, Douglas Ginsburg, Robert Bork, Ralph Winter, Kenneth Starr, Edith Jones, Laurence Silberman, J. Harvie Wilkinson III, and John Noonan), and 290 district court judges.

The Federalist Society has played an important part in conservatives' efforts to remake the courts and hold them accountable. Reagan's judicial appointees included many senior statesmen in the Federalist Society network, such as Antonin Scalia, Ralph Winter, and Robert Bork, who served as advisors to the first Federalist Society chapters, and Frank Easterbrook and Richard Posner, who also supported the fledgling group (Abramson 1986). The founder of the Federalist Society's DC Lawyer's Chapter, Stephen Markman, served as Assistant Attorney General in Reagan's second term and drew on the Federalist Society network to identify promising judicial nominees (Teles 2008, 158). Lee Liberman Otis, one of the Federalist Society's founders, also relied on information supplied by Federalist Society members while directing the White House Counsel's work on judicial nominations in President George H. W. Bush's administration (Teles 2008, 158). Since then, the Federalist Society has become a highly organized and sophisticated network and a de facto screening committee for judicial appointments in Republican administrations.

The first major public demonstration of the Federalist Society's muscle on judicial appointments came in George W. Bush's administration, with his nomination of White House Counsel Harriet Miers in 2005 to fill Sandra Day O'Connor's seat. The nomination generated a ferocious fight over Miers's qualifications and lack of demonstrated commitment to the movement. The strongest opposition came from lawyers associated with the Federalist Society. Robert Bork called Miers's nomination a "slap in the face to the conservatives who've been building up a conservative legal movement for the past 20 years" (Cannon 2005). The White House withdrew Miers from consideration less than a month after Bush nominated her. Bush then nominated Samuel Alito, who immediately received enthusiastic approval from Federalist Society leaders (Teles 2008, 1).

The Federalist Society's control over federal judicial appointments has only increased since the Miers episode. The organization's executive director, Leonard Leo, has shepherded the last three Republican Supreme Court nominees through the appointment process.[10] During the presidential campaign, Trump relied on the Federalist Society and the Heritage Foundation to develop a list of twenty-one potential

10. Leo initially supported the Miers nomination but warned the White House that gaining the support of the conservative legal community "was going to be a heavy lift" (Toobin 2017).

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Supreme Court nominees to replace Justice Scalia,[11] and all three of the final contenders were on that list. Nine of the twenty-one names on Trump's short list spoke at the Federalist Society 2018f National Lawyers Convention, including the ultimate nominee, Neil Gorsuch (Roeder 2017). The list later expanded to twenty-five, and included Brett Kavanaugh, whom Trump nominated to fill Justice Anthony Kennedy's seat following his retirement. Leo took a leave from the Federalist Society in July 2018 to assist in the selection and confirmation of Kennedy's replacement (Achenbach 2018). The Federalist Society also influences judicial appointments in the lower courts. No single group on the left exercises comparable influence on judicial appointments in Democratic administrations.

The Federalist Society has contributed to constitutional change not only by getting the right people appointed to the bench but also by serving as a vigilant "audience" (Baum 2006; Baum and Devins 2010) for judicial decision making and by helping to ensure that conservative appointees remain loyal to their conservative and libertarian commitments and avoid drifting left once on the bench (as Justices David Souter, Anthony Kennedy, and Sandra Day O'Connor arguably have done) (Hollis-Brusky 2015, 19–20, 148–64). Federalist Society members hold the justices accountable by expressing disappointment in those justices who depart from expectations and by praising those who do not. Hollis-Brusky cites the example of *Gonzales v. Raich* (2005), in which Justice Scalia joined the majority in holding that the federal government may criminalize medical marijuana when states have approved its medicinal use. Federalist Society members sharply criticized Scalia (Hollis-Brusky 2015, 157). More recently, the Federalist Society network generated a public backlash when Chief Justice Roberts voted to uphold the Affordable Care Act's individual mandate (Farrell 2017). When Sixth Circuit Court of Appeals Judge Jeffrey Sutton did not appear on Trump's list of potential Supreme Court nominees, some speculated that Sutton's vote against striking down the Affordable Care Act explained the omission (Feldman 2016).

GENERATING, LEGITIMATING, AND DIFFUSING IDEAS TO SUPPORT LEGAL CHANGE

One major challenge for the conservative legal movement has been developing and disseminating intellectually respectable arguments for changes in legal doctrine. As Teles has observed, "for ideas to be taken seriously by the courts they cannot be seen as wholly novel or outside the realm of legitimate professional opinion" (Teles 2008, 12). Much of the work of developing credibility for positions not previously accepted in law—supplying "cultural capital" for them (Teles 2008, 136)—falls on lawyers because "selling legitimacy" is "the lawyer's job" (Gordon 1984, 51, 53–54). The task is to build support for ideas initially regarded as outlandish, thereby making the intellectual and political climate more favorable to the desired change. Much of this work occurs well before lawyers take their cases to court.

11. Justice Scalia died in February 2016. In March 2016, President Obama nominated Merrick Garland to fill Scalia's seat, but the Senate refused to hold a hearing or vote on his nomination.

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Hollis-Brusky argues persuasively that the Federalist Society has played a key role in generating credibility for conservative legal arguments and reshaping constitutional doctrine. In particular, she shows how the Federalist Society has supplied cultural capital that legal and judicial decision makers have used to support decisions that departed sharply from established precedents. For example, lawyers associated with the Federalist Society developed arguments for reinterpreting the Second Amendment's right to keep and bear arms as a personal, not a collective, right in *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010). In *Citizens United v. Federal Election Commission*, they persuaded the Court to find that First Amendment protections for free speech cover corporations as well as individuals. They helped shift the Supreme Court's position on federal power under the Commerce Clause, leading the Court in *United States v. Morrison* (2000) to find that Congress lacked the authority to enact the Violence Against Women Act. They have also advanced a robust theory of state sovereignty protected by the Tenth Amendment. This theory prevailed in *Printz v. United States* (1997), in which the Supreme Court invalidated the Brady Handgun Violence Prevention Act, a statute requiring a national system of background checks for handgun purchases. In *NFIB* et al. *v. Sebelius* (2012), the Supreme Court found that the expansion of Medicaid through the Affordable Care Act exceeded Congress's power under the Tenth Amendment (but it nevertheless upheld the provision as a valid exercise of Congress's taxing power).

With respect to each of the cases, Hollis-Brusky identifies evidence of Federalist Society influence, in party and amicus briefs, scholarship cited in the decisions, and connections between the judges (including lower court judges whose decisions are under review by the Supreme Court) and their clerks. As to all these areas, she shows how the Federalist Society has promoted the development of ideas once regarded as radical and helped them become the law of the land. The key vehicle for this networking has been the Federalist Society's sixteen practice groups,[12] which organize events (including teleforum calls, in-person programs, and panels for the organization's national meetings) and produce articles (Federalist Society 2018g).

Hollis-Brusky frames her analysis of the Federalist Society's influence in terms of its similarity to what scholars of international relations have called an *epistemic community* (EC), defined as "a network of professionals with expertise in a particular policy area bound together by a shared set of normative and principled beliefs, shared causal beliefs, shared notions of validity, and a common policy enterprise, who actively work to translate these beliefs into policy" (Hollis-Brusky 2015, 10). She coins a new term, *political epistemic network* (PEN), to describe a model more appropri-

12. They are Administrative Law & Regulation; Article I Initiative; Civil Rights; Corporations, Securities and Antitrust; Criminal Law & Procedure; Environmental Law & Property Rights; Federalism & Separation of Powers; Financial Services & E-Commerce; Free Speech & Election Law; Intellectual Property; International & National Security Law; Labor & Employment Law; Litigation; Professional Responsibility & Legal Education; Religious Liberties; and Telecommunications & Electronic Media (Federalist Society 2018g).

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ate for capturing the operations and influence of the Federalist Society.[13] Although the EC and PEN are nearly identical in structure—"an interconnected network of experts with policy-relevant knowledge who share certain beliefs and work to actively transmit and translate those beliefs into policy" (2015, 10–12)—Hollis-Brusky distinguishes the PEN in terms of the kinds of knowledge networks it seeks to model—"legal/constitutional versus scientific/technocratic" (2015, 11). This modification is critical for modeling the Federalist Society's influence, she says, since there is no objective truth in law:

> Law is not like science, and lawyers and judges are not like technocrats. Claims to legal knowledge are non-refutable, always politically contested, and depend more on the authority and power of the speakers and their institutional positions than they do on the persuasiveness or objective truth of the knowledge itself (see, e.g., Fish 1980, 1989; Balkin and Levinson 2001) … Thus, beliefs ("principled," "causal," and notions of "validity") in the PEN model should be understood as strategic and instrumental rather than sincere and objectively grounded … What makes the PEN's beliefs widely held and shared among network members is acknowledged and agreed-upon political value. (2015, 11)

Thus, the PEN concept accounts for "the politically constructed dimensions of legal knowledge, legal authority, and the path-dependent nature of legal precedent" (2015, 5).

Explaining the Federalist Society's influence by comparing it to an epistemic community is extremely useful in accounting for how this network promotes the diffusion of ideas. However, it may tend to overemphasize the importance of legal knowledge and to downplay the other types of social capital brought to bear in legitimating constitutional change. Also important to the success of constitutional campaigns in some of the key areas identified by Hollis-Brusky have been the stature and "relational expertise" (Sandefur 2017) of lawyers who present the theories and the social capital of the law professors whose ideas the Court cites. These lawyers' and law professors' influence comes, in part, from their positions in the Federalist Society hierarchy and in hierarchies and networks beyond the Federalist Society PEN. In most of the cases analyzed by Hollis-Brusky, well-known and well-connected Supreme Court advocates have played key roles on the side of those advancing the conservative/libertarian position. For example, Paul Clement, who argued on the conservative/libertarian side in two of the gun rights cases, as well as *NFIB v. Sebelius*, a challenge to the Affordable Care Act, served as US Solicitor General from 2005 until 2008 and has handled more than eighty-five cases before the US Supreme Court. Ted Olson, who handled the Supreme Court argument in *Citizens United*, served as Solicitor General under President George H. W. Bush and has argued sixty-three cases before the Supreme Court. These lawyers' credibility with the justices and their clerks flows not

13. She defines a PEN as "an interconnected network of professionals with expertise or knowledge in a particular domain, bound together by … a shared vision of the proper arrangement of social and political life (shared principled and normative beliefs); shared beliefs, largely instrumental, about how best to realize that vision (shared causal beliefs); shared interpretations of politically contested texts (shared notions of validity); and a common policy project, broadly defined" (2015, 13).

only from their substantive expertise and appellate advocacy skills but also from their relations with powerful clients, senior positions in government and private practice, inside knowledge of the justices' attitudes and interests, and exceptionally elite educational credentials—a characteristic they share with the justices, all of whom attended Harvard or Yale.[14] Similarly, the professors whose scholarship the Court cited in judicial opinions considered by Hollis-Brusky—for example, Richard Fallon, Michael McConnell, Richard Epstein, and Lillian BeVier—derive their authority not just from the strength of their analysis but also from their positions on the faculties of elite law schools—Harvard, Stanford, University of Chicago, and University of Virginia, respectively.

Hollis-Brusky tells us a great deal about how the Federalist Society network has influenced constitutional doctrine, and it is likely that no other organization has contributed as much to the conservative counterrevolution in law. But the Federalist Society is part of a much larger, sprawling effort to "control the law" (Teles 2008). The conservative legal movement includes not only the lawyers and judges who participate in Federalist Society activities but also a larger set of legal advocacy organizations, think tanks, media outlets, and financial patrons. Those institutions and actors are themselves linked to broader economic, political, and cultural shifts since the 1980s. All these other elements have contributed to generating, legitimating, and diffusing ideas to support legal change.

Much of the work of legitimizing and selling these ideas has come from the advocacy organizations that bring and support the big cases. As Hollis-Brusky is careful to say, the Federalist Society does not litigate. In all the cases examined in her book, other organizations initiated the lawsuits. These organizations identified clients, framed the issues and served up legal theories, shepherded cases through the courts, and marshaled allies to support their positions. The conservative identities of these organizations and their allies may also have influenced the justices' perceptions of the issues and "provided important cues to the justices about … the stakes of the cases for social groups toward which the justices felt positive or negative affect" (Baum 2017, 69). These advocacy organizations have also been active in judicial selection and confirmation battles,[15] and they are part of the "audience" for judicial decision making (Baum 2006; Baum and Devins 2010).

These advocacy organizations and their lawyers have also influenced the litigants' prospects for success through their advocacy in arenas beyond the courts—for example, by lobbying and testifying before legislatures and agencies and engaging with the media. Choosing appealing "frames" for their arguments may have increased the likelihood that their ideas would resonate with political and civil society actors (NeJaime

14. Justices Kagan, Breyer, Ginsburg, Kennedy, Roberts, Scalia, and Gorsuch attended Harvard, and Justices Alito, Sotomayor, and Thomas attended Yale. Justice Ginsburg transferred to Columbia when her husband took a job in New York City.

15. For example, when President George W. Bush nominated DC Circuit Judge John Roberts and later Third Circuit Judge Samuel Alito to fill vacancies on the Supreme Court, the National Rifle Association (NRA) investigated the nominees and decided that it was comfortable with the appointments. According to Chris Cox, Executive Director of the NRA's Institute for Legislative Action, the NRA would have mobilized its considerable political influence to fight the nominations had it concluded that Justices Roberts and Alito would not be reliable on Second Amendment issues (Cole 2016, 135–36).

2013; Cole 2016) and ultimately make their way into legal doctrine (Epstein and Kobylka 1992; Silverstein 2009). Supreme Court justices generally resist the idea that their decisions might be shaped by outside influences, but they nevertheless often are responsive to ideas developed through social and political movements, cultural trends, and media discussions (Balkin 2015, 14–16). Indeed, the Supreme Court sometimes refers directly to indications of popular conviction about the meaning of constitutional provisions as evidence of constitutional meaning (Siegel 2008), and this is not just a feature of opinions authored by advocates of a 'living constitution"; originalists are also responsive to popular understandings of the constitutional stakes involved. In his opinion in *Heller*, for example, Justice Scalia noted "the reliance of millions of Americans … upon the true meaning of the right to keep and bear arms" (*Heller*, 128 S. Ct. at 2815 n. 24). In the campaign for gun rights, molding public sentiment about the meaning of the Second Amendment may have been as important to the outcomes as arguments made by lawyers in briefs and oral arguments (Cole 2016).

As already noted, financial patrons also have played an indirect role in generating, legitimating, and diffusing ideas by funding legal advocacy organizations, think tanks, journals, media outlets, and other intellectual projects designed to drive conservative legal change. The patrons of these institutions and projects have often influenced the organizations' agendas, and they have sometimes stood to benefit. It is no coincidence that the early conservative public interest law groups focused on property rights and limiting federal government power to regulate public lands; their primary sponsors were resource extractors, construction companies, real estate developers, and ranchers (Decker 2016, 57–58, 81, 112–13, 160–61). Decker makes a convincing case that many of the patrons associated with these groups were true believers in the causes they sought to advance, but the donors' interests—rather than well-defined principles—sometimes influenced case selection. Indeed, Decker identifies the roots of the GOP's current position on environmental policy in its early reliance on support from western conservatives who had a financial stake in reducing regulation.[16] The second generation of conservative public interest law firms learned a lesson from the first generation's failures—that advocacy organizations that appeared beholden to their patrons would lack credibility. They persuaded supporters that greater independence would make them more effective in advancing the patrons' long-term goals. However, unsurprisingly, there often remains a connection (on the political left as well as the right) between the agendas of advocacy organizations and the interests of their benefactors.

EMBRACING RIGHTS AND LEGAL ACTIVISM

There have been continuing struggles within the conservative movement over whether conservatives should embrace judicially enforced rights and legal activism,

16. This view is consistent with Daniel Farber's research showing that environmentalism was not always anathema to conservatives and, indeed, that Ronald Reagan, Barry Goldwater, and William Buckley regarded themselves as environmentalists. Farber shows that conservatives' turn toward anti-environmental positions "reflected the emergence of a coalition composed of disaffected Westerners and business interests (particularly the fossil fuel industry), supported by an interlocking network of foundations, donors, and conservative policy advocates" (Farber 2017, 2). For another perspective on the Republican Party's relationship with environmentalism, see Adler ().

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defined here as a willingness to strike down legislation and reconsider precedent. The right's backlash against the social movements of the 1960s and the Warren Court's rulings on desegregation and abortion significantly shaped legal thought in the movement's early years. Many conservatives rejected the rights discourse of liberal public interest advocacy, arguing that it tended to discourage compromise and obscure personal and civic responsibility. Conservatives also complained that liberal legalism and activist judges undermined democratic processes by replacing the decisions of elected officials with edicts from the courts.

This mistrust of rights and activism led the first generation of conservative public interest law groups to focus primarily on defense and on getting law out of the way. As Teles puts it, "[the Pacific Legal Foundation] and its successors would be a shield, not a sword" (Teles 2008, 61). Over time, however, a more proactive approach gained momentum. Many conservative/libertarian legal advocacy groups began to "actively use the courts to establish new or reinvigorate old rights, rather than simply standing in the way of the activism of the Left" (Teles 2008, 221). Moreover, as they invoked judicially enforced rights, they often framed their claims in terms of a conception of liberty and freedom that left little room for government planning and regulation. This version of conservative advocacy went well beyond anything envisioned in the Powell Memo.

This shift from defense to offense and conflict within the conservative movement over legal activism are primary themes of Decker's book. He shows that lawyers at the Pacific Legal Foundation and Mountain States Legal Foundation initially viewed themselves as mobilizing in defense of "overwhelmed public officials and a timid public sector" (2). Many of the founders and patrons were skeptical of the rights revolutions of the 1960s and 1970s and the expansion of legal regulations relating to land use, employment policies, and consumer protection. At first, they sought to return to orderly government processes characterized by collaborative relationships between business and government officials, but over time the orientation of lawyers in these groups changed from defending government officials and the private sector to declaring war on the US regulatory state.

Decker emphasizes the geographical and political context of the founding of many of the antiregulatory groups established in the 1970s—that many of them emerged in the West, home of the largest tracts of public lands, where tensions between economic development and environmental concerns played out most intensely and brought westerners into conflict with federal bureaucrats. The founders of these organizations were motivated to respond to what they viewed as an unwarranted explosion of lawsuits initiated by elite left-leaning lawyers from the East, and to the rise of regulation in the name of protecting against harm to consumers and the environment. These western conservatives contributed to the emergence of a radical and potent brand of conservative advocacy dedicated to challenging government planning and regulation. Decker demonstrates that these lawyers were not *just* part of the support structure for conservative legal change; in advancing bold new theories about constitutional constraints on governmental power, they also helped redefine what conservatism would ultimately come to mean.

The Pacific Legal Foundation was one of the first organizations to embrace rights and legal activism, but a similar shift unfolded at the Mountain States Legal

Foundation, Washington Legal Foundation, and other first-generation conservative public interest law groups.

A transition from defense to offense also occurred on the religious right among organizations and lawyers on the front lines of the issues of primary concern to social conservatives—abortion, gay rights, and religion in the public square. Religious conservatives initially opposed activism in the courts because they viewed it as a "worldly" distraction from spiritual concerns (den Dulk 2001; Sears 2004, 69). Their early forays into litigation emphasized defending private religious schools from government interference rather than using the courts to advance their public policy goals (Brown 2002; Krishnan and den Dulk 2002, 249–51). But Protestant evangelical groups began to initiate litigation in the 1980s as they mobilized to fight abortion and to promote greater religious expression in the public sphere (Ivers 1998, 293; den Dulk 2001; Brown 2002). The Christian Right adopted the language of rights and became "accustomed to the courts as a field of battle in the culture wars" (Bennett 2017).

This move toward embracing rights advocacy generated tensions between the new activists and more restrained conservatives. The latter groups included public intellectuals such as Robert Bork, Ralph Winter, and Nathan Glazer, who simply wanted to challenge and constrain liberal public interest lawyers. These traditional conservatives "worried that the rights revolution had not produced real equality so much as a convoluted and ungovernable patchwork of competing claims—each of which was supposed to be unconditional and unalienable" and that "[a]dding a bunch of conservative counter-rights to the mix did not necessarily constitute an improvement" (Decker 2016, 110).

The struggle also carried over into governance, and especially into the Department of Justice, as conservative lawyers, including some refugees from conservative public interest law groups, moved into the Reagan Administration. Differences in attitudes quickly emerged between advocates of judicial restraint and more radical lawyers. For example, some senior members of the Reagan Administration advocated for an aggressive effort to "strike at the funding, status, and influence of the public interest left" (Decker 2016, 122), while Reagan's first Attorney General, William French Smith, worried about appearing to withdraw support for civil rights enforcement. Disagreements also emerged as to whether and when precedent should yield in order to implement a conservative vision of the constitution. Reagan's first Solicitor General, Rex Lee, thought that an aggressive stance toward overturning established precedent would alienate the justices and undermine the stature of his office. Reagan's second Solicitor General, Charles Fried, fought with activist lawyers over what position to take on regulatory takings, and he expressed discomfort with the influence of Richard Epstein and some of the other libertarians associated with the Federalist Society, whom Fried considered "quite radical" (Decker 2016, 195). And while racial and other discrimination played a very minor role in the work of the first conservative public interest law firms, they became a focus of conservatives in the Reagan Justice Department. William Bradford Reynolds, who ran the Civil Rights Division during both of Reagan's terms, and Clarence Thomas, who ran the Equal Opportunity Commission (EEOC) from 1982 to 1990, charted strategies to promote "color-blindness," and Clint Bolick, who worked for the EEOC under Thomas and then as an assistant to Reynolds, helped implement this agenda. (Several years later, Bolick joined his old

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boss at the Mountain States Legal Foundation to found the Institute for Justice, which litigates to challenge government authority with respect to schools, occupational licensing, property, and money in politics [Institute for Justice 2018a]). Some of these lawyers favored extending constitutional protection of individual liberty and personal freedom "to all manner of economic relationships"; they believed that "conservatives needed to stop worrying and celebrate the civil-rights revolution" and then "they needed to take it to its logical end—freeing Americans from an oppressive regulatory state" (Decker 182).

One especially useful idea for those seeking to promote conservative constitutional change without seeming to abandon opposition to legal activism has been "originalism," a jurisprudential approach rooted in the idea that the constitution has the meaning ascribed to it by those who drafted and ratified the original document and its amendments. At the beginning of the Reagan Administration, conservatives were limited by legal tools then available to resist the liberal legal agenda. They had inherited the Nixon era's rhetoric regarding strict constructionism and law and order (Teles 2009). However, these ideas were insufficient to support the goal of using the courts to reduce regulation and to establish a set of counter-rights; conservatives needed an intellectually respectable judicial philosophy that would serve the conservative movement in areas where judicial restraint would not accomplish their objectives. During his time as Attorney General in the Reagan Administration (1985–1988), Edwin Meese delivered a series of speeches outlining how the Reagan Administration's legal agenda related to constitutional interpretation. Building on earlier work by Robert Bork (1971) and Raoul Berger (1977), both highly critical of the Warren Court, he pledged that the Reagan Administration would "endeavor to resurrect the original meaning of constitutional provisions" (Meese 1985). Originalism supplied an approach that would provide intellectual legitimacy not only in areas where conservatives wanted judicial deference to the other branches of government but also where they needed the courts to intervene to reverse existing doctrine and to more aggressively police constitutional restrictions on governmental power (Teles 2009).

Many conservatives have found this mode of constitutional interpretation powerfully attractive. Its appeal stems not only from its appearance of simplicity and neutrality but also from its usefulness in advancing conservatives' policy preferences on many, though not all, issues (Post and Siegel 2006, 572; Bartlett 2012, 548).[17]

Originalism was not born in the Federalist Society, but the organization has played a key role in refining and legitimating the theory.[18] It has been the theme of

17. Justice Scalia's brand of originalism sometimes led him to find violations of constitutional rights in criminal matters—for example, overzealous police investigations, infringement of the rights of the accused to confront witnesses, and intrusions on the right to a jury trial (Smith 2016).

For abortion opponents, endorsing originalism has entailed significant tradeoffs; it has allowed them to influence the selection of judicial nominees and increased their chances of eventually overturning *Roe v. Wade,* but it has required sacrificing the goal of establishing a constitutional right to life (Ziegler 2014).

18. Several types of originalist theories have emerged from these debates. "Original intent originalism," a view endorsed by Bork, Berger, and Meese, suggests that the original intentions of the Framers should guide constitutional interpretation. "Original meaning originalism" requires judges to resurrect the public meaning of the constitution's language at the time of enactment. Justice Scalia, one of the foremost proponents of this approach, advocated looking to "how the text of the Constitution was originally understood" (Scalia 1997, 17), and, with respect to the Bill of Rights, to "the writings … of … intelligent and informed people of the time (1997, 38).

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two of its national meetings—the 1995 National Student Conference (Hollis-Brusky 2015, 185, n. 22) and its 2005 National Lawyers Convention (Federalist Society 2018h)—and many speaker panels, including one on "Originalism and the First Amendment" at the 2016 National Lawyers Convention (Federalist Society 2018i). Originalism's most famous proponent, Justice Antonin Scalia,[19] was one of the Society's original sponsors. Prominent members of the Society have produced academic articles on originalism (e.g., Lawson 1992; Barnett 1999), and the organization produced a volume of speeches on the topic to commemorate the twenty-fifth anniversary of the Federalist Society's founding (Calabresi 2007). Originalism also has served the Federalist Society's organizational maintenance goals, providing a theory of interpretation upon which conservatives, libertarians, and business advocates generally agree. It is a thin idea that brings the Society's members together in a common organizational space while holding differing meanings for them—serving simultaneously as a glue connecting them and a source of productive disagreement.[20] Society members' broad endorsement of originalism has helped it serve as a mediating institution for the conservative legal movement, promoting cooperation among the diverse constituencies in litigation and legislative work (Southworth 2008, 141).

Opposition to judicial activism has also been a unifying theme within the Federalist Society. The organization's mission statement asserts that "it is emphatically the province and duty of the judiciary to say what the law is, not what it should be" (Federalist Society 2018a). But members disagree about what constitutes judicial activism and when it is justified. Some, such as J. Harvie Wilkinson, have long argued in favor of judicial restraint, arguing that conservatives should hesitate to overrule longstanding precedents (Wilkinson 2012). However, others say that the justices should overrule judicial decisions that are inconsistent with the constitution's original meaning, however well settled the precedents may be, and that rulings to correct constitutional errors do not constitute impermissible judicial activism. University of Chicago law professor Richard Epstein took this position in a 1984 debate with Antonin Scalia (then DC Circuit Court of Appeals judge and later US Supreme Court justice), when he claimed that judicial intervention is required to protect economic rights guaranteed by the constitution and to correct previous "intellectually incoherent" decisions abdicating that responsibility (Epstein 1985, 15–16). Another advocate of this position is Randy Barnett, who favors judicial activism to achieve libertarian ends (Barnett 2004). At the 2013 National Lawyers Convention, Wilkinson and Barnett debated "whether courts are too deferential to the legislature."[21] (Afterward, Barnett said that he believed that "the room was with me" [Beutler 2015].)

Since the 1980s, conservatives and libertarians have pursued ambitious litigation campaigns on a broad range of topics. Some of their initiatives have focused on reversing or limiting constitutional guarantees recognized by the Warren and Burger Courts—for example, the right to abortion under *Roe v. Wade*, constitutional

19. Some scholars have argued that Scalia was inconsistent in his originalism. See, for example, Dershowitz (2017), Gordon (2017, 366, 369, 371), and Hasen (2018).

20. I am indebted to Steven Teles for this observation.

21. Sixth Annual Rosenkranz Debate: Courts Are Too Deferential to the Legislature, November 10, 2013, https://www.youtube.com/watch?v=evp84_XcSwY (accessed October 22, 2017).

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protections for criminal defendants, and Establishment Clause and state constitutional restrictions on school voucher programs that include religious schools. However, conservatives and libertarians have also sought to broaden and other constitutional guarantees—for example, to invalidate affirmative action programs as violations of equal protection, revitalize the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment to overturn economic regulation, enforce "enumerated powers" constraints on federal government authority, bolster property rights, strike down campaign finance laws as violations of the First Amendment, invalidate gun control laws on Second Amendment grounds, and challenge political activity by unions and compulsory union dues (Southworth 2008, 34–35). Lawyers for religious conservative groups have charted broad affirmative litigation strategies framed in terms of religious liberty, free speech, and the First Amendment.[22]

MANAGING CONFLICT AND PROMOTING COOPERATION WITHIN THE CONSERVATIVE ALLIANCE

The conservative law movement is hardly monolithic. It includes not only the libertarians, who are the primary focus of Decker's and Hollis-Brusky's books, but also business representatives, social conservatives, nationalists, and Tea Party activists (Heinz, Southworth, and Paik 2003). The lawyers for these different constituencies hold very different views about policy priorities (Southworth 2008, 101–10; Hollis-Brusky and Wilson 2017). For example, business representatives and libertarians do not share the religious right's opposition to same-sex marriage and commitment to outlawing abortion, and libertarians and social conservatives are not particularly interested in advancing business advocates' priorities, such as limiting class actions and tort liability for corporations. Moreover, the lawyers for these constituencies come from different social and educational backgrounds, work in different places, and draw support from financial patrons (Heinz, Southworth, and Paik 2003). In interviews, lawyers for these constituencies sometimes expressed disapproval of each other's values (Southworth 2008, 41–65).

Managing tension among the constituencies and their lawyers and reconciling diverging policy agendas is a constant challenge for the conservative movement and the Republican Party. In particular, avoiding conflict among its elements on judicial appointments and in litigation has been, and continues to be, important for their success in the courts. Conservatives' record of generally avoiding direct conflict in the courts, and sometimes rallying amicus support by coalition allies who have no direct stake in the litigation outcomes, has been a major achievement.

This success may be partly attributable to the work of the Heritage Foundation and the Federalist Society. Both are "mediator" organizations, which seek to appeal to all of the constituencies of the conservative alliance (Heinz, Southworth, and Paik

22. See the Alliance Defending Freedom's website, which describes dozens of cases in which the organization represents parties in litigation relating to "religious freedom", the "sanctity of life," and "marriage and family" (Alliance Defending Freedom 2018a).

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2003), and both have worked hard to unify and mobilize lawyers for conservative causes (Southworth 2008, 124–48, 153–54).

The Federalist Society appears to be an especially important site for airing differences among constituencies and lawyers for conservative and libertarian causes, alleviating some of that tension through interaction, and maintaining order within the conservative legal movement. The organization pitches its mission and programming at a level of generality that inspires a sense of shared commitment; it describes itself as "a group of conservatives and libertarians interested in the current state of the legal order … founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be" (Federalist Society 2018a).[23] Even though the last of these principles has been somewhat controversial within the Federalist Society, the mission statement still works as a mobilizing frame. An analysis of ties within the network of lawyers for conservative and libertarian causes suggests that the Federalist Society plays an important role in bringing lawyers for the various constituencies together (Paik, Southworth, and Heinz 2007). One lawyer I interviewed asserted that the Federalist Society "seems to be the vast connector," and another said that "the Federalist Society has made a major, major contribution to … communication" within the coalition (Southworth 2008, 135).

Cooperation among various elements of the conservative coalition on judicial appointments and litigation may also be attributable more broadly to the "negative partisanship" (Abramowitz and Webster) and "affective polarization" (Iyengar, Sood, and Lelkes 2012) of the US electorate in the twenty-first century. In other words, this cooperation may be motivated less by a common sense of purpose than by shared dislike of Democrats.

THE CAMPAIGN TO DEREGULATE CAMPAIGN FINANCE

My current research on campaign finance litigation in the Roberts Court relates to this larger story of lawyers and the conservative counterrevolution, and it helps to illustrate points made above regarding threads of the conservative legal movement's project and continuing challenges. Particularly relevant are the recent proliferation of conservative/libertarian advocacy organizations active in campaign finance litigation and the creation of specialized groups to pursue strategic litigation campaigns; the relationship between the Supreme Court's composition and its rulings on campaign

23. The Federalist Society's broad mission statement echoes the "fusionism" articulated by Frank Meyer, an intellectual who tried to forge common ground between libertarians and traditionalists in the 1960s. As editor of the Books, Arts and Manners section of the National Review (Nash 1996, 321–22), he recruited contributors to review the work of major intellectuals of diverse conservative perspectives, and as the editor of a volume of essays, What Is Conservatism? (Meyer 1964), he attempted to articulate a "Common Cause" that would unite libertarians and traditionalists around a synthesis of ideas about freedom and moral authority. Soon after its founding, the Federalist Society hired Eugene Meyer, Frank Meyer's son, to serve as its executive director, and he continues to serve as the organization's president. Under Eugene Meyer's leadership, the Federalist Society has pursued an approach to forging consensus among conservative and libertarian lawyers much like the fusionism that Frank Meyer sought among conservative intellectuals several decades earlier (Southworth 2008, 28, 131–33).

finance regulation; long-term investments in generating, legitimating, and disseminating ideas necessary to reshape legal doctrine in this area; the pursuit of an affirmative rights strategy and effective use of a free speech and liberty frame; and efforts to secure cooperation among diverse coalition partners.

One of the first major Supreme Court cases on the constitutionality of campaign finance regulation was *Buckley v. Valeo* (1976), a challenge to the Federal Election Campaign Act of 1971, as amended in 1974 (FECA). The amendments, adopted with bipartisan support in the wake of the Watergate scandal, included limitations on the amount an individual could contribute to a federal candidate, limitations on the amount an individual could spend independently of a federal candidate, and disclosure requirements. President Nixon's Solicitor General Robert Bork and Attorney General Edward Levi filed a brief on behalf of the Attorney General and the Federal Election Commission, defending the contribution and expenditure limitations and disclosure requirements, but they also filed a second brief expressing skepticism about the constitutionality of FECA's contribution and expenditure limits. The only public interest law groups involved in the litigation were the New York Civil Liberties Union, as one of the parties challenging the legislation, and Common Cause, the League of Women Voters, and the Center for Public Financing of Elections, filing amicus briefs defending the statute. The *Buckley* Court upheld the contribution limits and disclosure requirements but invalidated the spending limits on First Amendment grounds.

Two years later, the Court decided *First National Bank of Boston v. Bellotti* (1978), a challenge by several national banks to a Massachusetts law limiting corporate spending on ballot measures. The US Chamber of Commerce, Pacific Legal Foundation, and several other conservative public interest groups founded in the 1970s filed amicus briefs in support of those challenging the restriction. Justice Lewis Powell, author of the Powell Memorandum, wrote the majority opinion, which struck down the spending restriction. Powell thought that the Court should take the opportunity to rule that corporations held the same free speech rights as individuals, but he was unable to persuade the other justices to endorse such a broad proposition about corporate First Amendment rights (Winkler 2018, 312–15). He nevertheless secured a 5–4 majority to invalidate the spending restriction by focusing on the rights of listeners rather than the rights of corporations. Powell's opinion in *Bellotti* found that the political expression restricted by the Massachusetts law was valuable to the public and that its restriction was unconstitutional regardless of the identity of the speaker. In a footnote, the opinion explained that the Court did not intend to call into question longstanding restrictions on corporate spending in *candidate* elections.[24]

In the years since *Buckley* and *Bellotti*, campaign finance cases have attracted participation by many more legal advocacy organizations. Over time, the alignments have become increasingly partisan, with well-defined alliances of parties and amici usually

24. 435 U.S. 765, 787 n. 26.

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on opposing sides.[25] Opponents of campaign finance regulation significantly increased their litigation presence following the passage of the Campaign Finance Reform Act of 2002 (BCRA, also known as McCain-Feingold), which banned party "soft money" and extended federal regulation of campaign advertisements to cover some "sham" issue ads. Senator Mitch McConnell, who had been leading the Republican fight against campaign finance reform since the late 1980s (Mutch 2014, 171), immediately challenged the law in *McConnell v. FEC* (2003), but the Supreme Court upheld the BCRA, citing the government's "strong interests in preventing corruption, and particularly its appearance," and "substantial evidence" that soft money contributions give rise to both.[26]

The anti-regulatory side ramped up their efforts following their loss in *McConnell* and in response to what they perceived as disadvantages vis-à-vis the reform side in terms of specialized expertise, foundation support, media presence, and rhetoric (Smith 2016). They have since won a series of litigation victories. In *Randall v. Sorrell* (2006), the Court found that Vermont's limits on campaign contributions and expenditures violated the First Amendment. In *Federal Election Commission v. Wisconsin Right to Life, Inc.* (2007), it held that the BCRA's limitations on corporate electioneering were unconstitutional as applied to Wisconsin Right to Life's ads urging people to call two U.S. Senators to tell them to oppose a filibuster of judicial nominees. In *Davis v. Federal Election Commission* (2008), the Court found that the "Millionaire's amendment" to the BCRA, which raised the contribution cap for individuals running against self-financed candidates, violated the First Amendment. In *Citizens United v. Federal Election Commission* (2010), it held unconstitutional a provision of the BCRA limiting corporate expenditures in federal elections, overruling two major precedents in the process. The Court relied on Justice Powell's opinion in *Bellotti* in ruling against a restriction that distinguished between corporations and other types of speakers.[27] In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011), the Court invalidated a provision of Arizona's public financing system that provided additional matching funds to participating candidates based on amounts spent by privately

25. The challengers of campaign finance regulations have sometimes received support from several organizations that generally side with Democrats on issues other than campaign finance, including, most notably, the ACLU and the AFL-CIO. The ACLU has argued that the First Amendment protects contributions and campaign expenditures, but it has supported disclosure requirements and public financing (ACLU 2018). The ACLU's position on campaign finance regulation has been controversial within the organization and among its senior staff. See generally Ronald Collins (2014), commenting on the controversy within the ACLU over campaign finance regulation, and the filing of briefs by the ACLU and "former ACLU officials" on different sides in six Supreme Court cases on campaign finance. The AFL-CIO was among the challengers in *McConnell v. FEC* and in *Citizens United*, although it claimed that the government's interest in regulating corporate electioneering was much more substantial than its interest in regulating union participation, and it has since called for overturning *Citizens United* as it applies to corporate expenditures (AFL-CIO). Other liberal advocacy groups have argued against restrictions on political spending by nonprofit groups. In *FEC v. Wisconsin Right to Life,* for example, the Alliance for Justice filed an amicus brief arguing that "citizen organizations" have a First Amendment right to advocate for their views before the public without government interference. Brief Amicus Curiae on Behalf of the Alliance for Justice, March 23, 2007, 2007 U.S. S. Ct. Briefs Lexis 270.

26. 124 S. Ct. 619, at 628–29.

27. See *Citizens United*, 558 U.S. at 343 (stating that corporations should not "be treated differently under the First Amendment simply because [they] are not 'natural persons'" (quoting *Belotti*, 435 U.S. at 776)); id. at 347 ("[T]he First Amendment does not allow political speech restrictions based on the speaker's corporate identity.").

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financed opponents and independent groups. In *American Tradition Partnership v. Bullock* (2012), it found unconstitutional a Montana statute providing that a corporation may not make expenditures supporting or opposing candidates or political parties, and in *McCutcheon v. Federal Election Commission* (2014), the Court struck down aggregate limits on the amount an individual may contribute to all federal candidates, parties, and political action committees in an election cycle.

Leading this litigation campaign have been several conservative groups specializing in such work and framing their missions in terms of First Amendment rights to free speech and political expression. James Bopp, cofounder in 1997 of the James Madison Center for Free Speech, is widely credited with leading a long-term litigation campaign to eliminate campaign finance regulation (Mencimer June 2011; Hasen 2016, 116). Test cases brought by Bopp include *Randall v. Sorrell*, *FEC v. Wisconsin Right to Life*, *Citizens United*, and *McCutcheon*, as were several other cases relied on by the majority in those cases. Another specialized group, the Center for Competitive Politics, was founded in 2005 by Bradley Smith, former chairman of the FEC and author of a book, *Unfree Speech* (2001), which argued that most campaign finance regulation is unconstitutional. The Center, recently renamed the Institute for Free Speech, calls itself "the nation's largest organization dedicated solely to protecting First Amendment political rights" (Institute for Free Speech 2018). The Institute for Justice launched a project to challenge campaign finance restrictions around the same time, and it, too, characterizes its work in this area as the defense of "the right to free speech" against "political censorship" (Institute for Justice 2018). The Center for Competitive Politics and the Institute for Justice were co-counsel for the plaintiff in *SpeechNow.org v. FEC* (2010), in which the DC Circuit held all limits on contributions to "independent expenditure committees" (also known as Super PACs) unconstitutional, and the Institute for Justice brought *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011). These three specialized groups—the James Madison Center for Free Speech, the Center for Competitive Politics, and the Institute for Justice—along with the Cato Institute's Center for Constitutional Studies, have led the way in the courts, legislatures, and media in advancing the view that restrictions on money in politics are limits on the ability to speak about elections. Their mission statements indicate that they seek to protect the interests of ordinary citizens and citizen groups against oppressive government regulations designed to silence them.[28]

28. See, for example, James Madison Center for Free Speech, The Threat to Free Political Speech, https://www.jamesmadisoncenter.org/about/mission.html (accessed November 4, 2017) ("There are powerful forces in government, both state and federal, who view the First Amendment's protection of political expression as a loophole in our election laws that they must close. Some, therefore, are seeking to use government to suppress the right of citizens and citizen groups to participate in our democratic process by limiting their right to speak out about the actions of public officeholders and the position of candidates on issues and by limiting the right of citizens to join together to make their voices heard on issues of public concern"); Institute for Justice, Political Speech, IJ Defends the First Amendment from Political Censorship, http://ij.org/issues/first-amendment/political-speech/ (accessed November 4, 2017) ("under the guise of reform, campaign-finance regulations protect incumbents from electoral competition and stifle political speech and association"); Institute for Free Speech, Policy and Issues, Freedom Files CCP Profile, http://www.ifs.org/external-relations/ (accessed November 4, 2017) ("It's not the big guy who is harmed by campaign finance reform … It's the small business person. It's the nonprofit organization. It's the group of citizens in the community who just see a problem in their community and decide to do something about it.").

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Challenges to campaign finance regulation have played out against a backdrop of debates about constitutional interpretation and originalism. Some of the Supreme Court's conservatives have argued on originalist grounds that campaign finance laws should be struck down.[29] But as originalism has "made headway in the courts and ascended in the political scene" (Posner 2011), defenders of campaign finance regulation have also invoked the Framers.[30]

Changes in the composition of the US Supreme Court surely have influenced recent outcomes in campaign finance litigation. There has been a marked shift of momentum away from regulating money in politics during the past decade, and many observers have attributed the change to the departure of Sandra Day O'Connor and her replacement by Samuel Alito (e.g., Mutch 2014, 175; Hasen 2016, 108). The Court has invalidated or severely limited nearly every campaign finance restriction it has considered since Alito's arrival, although it has continued to support disclosure laws (Hasen 2016, 29).[31] The appointment of Neil Gorsuch has cheered opponents of campaign finance regulation because several of his opinions while serving as judge on the DC Circuit Court of Appeals suggest that he is highly skeptical of campaign finance regulation.[32] With another Trump nominee for the Supreme Court, Brett Kavanaugh, now awaiting confirmation, opponents of

29. See, for example, *Austin v. Michigan Chamber of Commerce,* 595 U.S. 652, 684–85 (1990) (Scalia, J., dissenting); *McConnell v. FEC,* 540 U.S. 93, 252–53 (2003) (Scalia, J., concurring in part and dissenting in part); *Citizens United v. FEC,* 558 U.S. 310, 385–93 (2010) (Scalia, J., concurring).

30. Several scholars have developed originalist arguments in favor of upholding campaign restrictions. For example, Lawrence Lessig has argued that the Framers believed the elections should make the government dependent on the people alone and that they did not intend to permit "dependence corruption" (Lessig 2014), and Zephyr Teachout has similarly argued that the Framers held a broad understanding of corruption (Teachout 2014). In *McCutcheon v. FEC* and *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* several amici used that research in their briefs. See, for example, Brief of Constitutional Scholars as Amici Curiae in Support of Respondents, Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011), 2011 WL 661706; Brief Amicus Curiae of Professor Lawrence Lessig in Support of Appellee, McCutcheon v. FEC, 134 S. Ct. 434 (2014), 2013 WL 3874388; Brief of the Brennan Center for Justice at N.Y.U. School of Law as Amicus Curiae in Support of Appellee, McCutcheon v. FEC, 134 S. Ct. 434 (2014), 2013 WL 3874429.

In his dissent in *Citizens United*, Justice Stevens, joined by Justices Ginsburg, Breyer, and Sotomayor, argued that the decision could not be defended on originalist grounds. The dissenters asserted that "[t]o the extent that the Framers' views are discernable and relevant to the disposition of this case, they would appear to cut strongly against the majority's position." 558 U.S. 310, 426. In *McCutcheon*, Justice Breyer's dissenting opinion, joined by Justices Kagan, Ginsburg and Sotomayor, referred to the Framers' interest in maintaining the integrity of public governmental institutions and their responsiveness to the people. 134 S. Ct. 1434, 1467.

31. One exception is *Williams-Yulee v. Florida Bar*, which held that a state prohibition on the personal solicitation of campaign funds by a judicial candidate did not violate the First Amendment because "judges are not politicians" (2015, 1662).

32. In his concurring opinion in *Riddle v. Hickenlooper* (2014), Judge Gorsuch suggested that limits on campaign contributions should be subject to strict scrutiny. In *Republican Party of Louisiana, et al. v. FEC* (2017), in which the Supreme Court issued a summary decision rejecting a First Amendment challenge to sections of the BCRA that prohibit state and local parties from spending "soft money" (money that does not comply with federal campaign finance limits) on federal elections, Justice Gorsuch indicated that he would have heard the appeal.

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campaign finance regulation have set their sights on striking down all campaign contribution limits.[33]

The support structure behind the campaign to deregulate campaign finance has served as an attentive "audience" for the Court's campaign finance decisions, and it has helped generate cultural capital necessary for reshaping First Amendment doctrine. As documented in Hollis-Brusky's chapter on *Citizens United* (61–89), the Federalist Society's Free Speech and Election Law Practice Group has been a key site for developing and legitimizing ideas used in party and amicus briefs and ultimately incorporated into the Roberts Court's opinion in *Citizens United* and other recent campaign finance decisions. The Free Speech and Election Law Practice Group formed in 1996, following the defeat of Congress's first attempt to enact what eventually became McCain-Feingold (Hollis-Brusky 2015, 65–66). James Bopp served as co-chair of the Free Speech and Election Law Practice Group from its founding in 1995 through 2005, and many other lawyers on the challenger's side in the Court's recent campaign finance cases hold or have held leadership roles in the Federalist Society (Southworth 2017, 25). The Federalist Society also has important links to the Court. Four of the justices in the majority in *Citizens United*, *Arizona Free Enterprise PAC*, and *McCutcheon*—Alito, Thomas, Roberts, and Scalia—have spoken at Federalist Society national conventions, and Scalia, Thomas, and Alito had/have longstanding ties to the organization. Justice Gorsuch was the featured speaker at the 2017 Lawyers Convention Annual Dinner (Federalist Society 2018j). The increased presence of easily recognizable conservative individuals and groups as challengers and amici in campaign finance cases may have contributed to conservative justices' hostility toward the regulation of electoral activity (Baum 2017, 67–68).

The Federalist Society Free Speech and Election Law Practice Group has played a key role in coordinating amici participation. In *Citizens United*, nineteen organizations on Citizens United's side had at least one lawyer with ties to the Federalist Society on the brief. A leading opponent of campaign finance regulation whom I interviewed confirmed the importance of the Federalist Society Free Speech and Election Law Practice Group as a vehicle for mobilizing amici on the challengers' side: "It's our sort of group where we network. It's a very valuable function the society performs."[34]

The largest financial patrons for parties and amici on the antiregulatory side in *Citizens United* and *McCutcheon* included long-time backers of the conservative legal movement, such as the Lynde and Harry Bradley Foundation, but also new patrons, including some who have built vast fortunes in finance and pharmaceuticals

33. In May 2018, the Ninth Circuit denied rehearing en banc in *Lair v. Motl*, which upheld Montana's contribution limits. But five judges joined in a dissent saying that the Supreme Court's opinions in *Citizens United and McCutcheon* require evidence of actual or apparent quid pro quo corruption to sustain contributions limits. In another case, *Zimmerman v. City of Texas*, the Fifth Circuit denied en banc rehearing of a challenge to Austin's $350 contribution limit. The Supreme has ordered the City of Austin to respond to a request for Supreme Court review. If the Court were to grant cert in these cases, contribution limits might fall.

34. Confidential Interview 44.

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(Southworth 2017, 16).[35] The primary political patrons of the campaign have been Senate majority leader Mitch McConnell and the Republican National Committee (RNC). Senator McConnell has long been the Republicans' point person for defeating campaign finance legislation in Congress, and he has been a major force behind efforts to undo campaign finance regulation through the courts. He helped found James Bopp's group, the James Madison Center for Free Speech (Dyche 2010, 124; Collins and Skover 2014, 30), as well as Brad Smith's Center for Competitive Politics. The RNC has also been a major funder of Bopp's litigation projects (Mencimer June 2011) and has helped enforce discipline among parties and amici (Southworth 2017).

The ability of advocates on the challengers' side in the Roberts Court's big campaign finance decisions to build a broad coalition despite difference in the values, backgrounds, and perspectives of the lawyers involved likely contributed to their success (Southworth 2017, 29–31). Several of the lawyers I interviewed said that they believed that the size of the coalition on the challenger's side has been useful to their position. More radical elements, including some libertarians who argue that the government should play no role at all with respect to money in politics,[36] serve up strong populist rhetoric unlikely to make its way into Supreme Court opinions, but their participation supports the view that campaign deregulation benefits ordinary citizens. One business advocate suggested that the alliance between business advocates and lawyers associated with libertarian and Tea Party groups serves all of them well: "The cause elements are driven much more ideologically [than the business interests]. And thank goodness for that. Sometimes they're like Don Quixote but the rest of the time they accomplish a lot of very good things in preserving freedom of speech and liberties."[37] Free speech and liberty have proven to be powerful frames around which to build this coalition.

CONCLUSION

The essay explored how lawyers have created a field of advocacy organizations, groomed candidates for appointment to the bench and senior positions in private practice and government, generated and legitimated ideas supporting conservative legal change, and embraced legal activism to overturn adverse precedents and roll

35. Among the largest foundation patrons of the Center for Competitive Politics, the Institute for Justice, and the Cato Institute from 2003 through 2013 were the Robert W. Wilson Charitable Trust, Searle Freedom Trust, Lynde and Harry Bradley Foundation, and Dunn's Foundation for Right Thinking (Southworth 2017, 16). The largest foundation contributors to the James Madison Center for Free Speech during the same period were the Mercer Family Foundation, Lynde and Harry Bradley Foundation, John William Pope Foundation, and Dick and Betsy DeVos Family Foundation (Foundation Center 2017).

36. In interviews, some lawyers associated with Tea-Party-affiliated organizations mentioned the recent Internal Revenue (IRS) targeting scandal as evidence that government could not be trusted to wield power responsibly. In 2013, the IRS revealed that tax-exempt status applications from groups with "Tea Party" or "Patriot" in their names received additional scrutiny (Cochrane 2017). The Inspector General's report later found that the IRS had targeted liberal as well as conservative organizations. Treasury Inspector General for Tax Administration, Review of Selected Criteria Used to Identify Tax-Exempt Applications for Review, https://perma.cc/4MUN-JLRC.

37. Confidential Interview 16.

back the regulatory state. Lawyers made themselves useful to a movement that initially focused primarily on getting (liberal) lawyers out of the way.

Their efforts are likely to have enduring consequences. As Decker notes in his epilogue, the rights strategy that conservatives initially resisted and then repurposed may prove to be more effective for conservatives than liberals, in part because conservatives have changed the composition of the courts to make them more responsive to conservative legal advocacy. The Federalist Society, whose membership Hollis-Brusky pegged at approximately 40,000 with a budget of $10 million (2), now has more than 60,000 members (Federalist Society 2018k), and a $28 million budget (Federalist Society 2018f).[38] The organization's hold on the judicial appointment process in Republican administrations has never been greater.[39] Conservatives have established a working majority on many issues before the Supreme Court, and Neil Gorsuch's record strongly indicates that he will help conservatives consolidate their gains on guns, affirmative action, campaign finance, abortion, voting rights, and religious liberty, and that he will embrace an activist stance toward policing the boundaries of federal governmental power (Ford 2017; Wolf 2018). Conservatives are likely to make several more Supreme Court appointments and many more appointments in the lower federal courts in the Trump Administration (Hulse 2017), and these life-time appointments will shape litigation outcomes for decades to come.[40] The "farm team" of originalist judges available for appointment by a Republican president includes many who view Scalia's record on originalism as too "faint-hearted" (Hasen 2018, 95).

Policy disagreements among different constituencies of the conservative/libertarian coalition are a continuing threat to the conservative legal movement. Such conflicts have been on public display within the Trump Administration on issues such as immigration, trade, national security, health care, "the Wall," taxes, the use of public lands,[41] and race relations. Also evident are differences between those who care about process, protocols, and the rule of law, on the one hand, and those who would compromise them in order to further their policy objectives, on the other. These disagreements have not yet interfered with the ability of conservatives and libertarians to

38. Extensive pro bono activities by Society members amplify the organization's influence well beyond what it might otherwise accomplish with this budget.

39. In his remarks at the Federalist Society's 2017 National Lawyers Convention, President Trump's White House Counsel, Donald McGahn, emphasized that President Trump "is very committed to what we are committed to here, which is nominating and appointing judges who are committed originalists and textualists." Event Video, 17th Annual Barbara K. Olson Memorial Lecture, November 18, 2017, available at https://www.c-span.org/video/?437462-8/2017-national-lawyers-convention-white-house-counsel-mcgahn (accessed November 19, 2017).

40. As of August 22, 2018, President Trump had confirmed 1 associate Supreme Court justice, 26 judges for the U.S. courts of appeals, and 25 judges for the U.S. district courts. He had 84 federal judicial nominations pending. See United States Courts, "Confirmation Listing," http://www.uscourts.gov/judges-judgeships/judicial-vacancies/confirmation-listing.

41. For example, a feud between President Trump and attendees at a meeting of conservative and business-oriented donors in August 2018 highlighted divisions over immigration, tariffs, and global military alliances (Waterhouse 2018). Some business groups and environmentalists are opposing efforts to take land back from the federal government and give it to the states (Johnson 2017). This dispute implicates questions about a possible political realignment of western jurisdictions, as they move from economies based on extractive industries (with major financial patrons coming from oil, gas, etc.) to an emphasis on clean energy, technology, and tourism (Farber 2017).

cooperate in high-stakes litigation, but only time will tell whether such cooperation will continue and how division within the movement will shape its future.

We now have a two-sided legal establishment serving polarized elites (Graber 2013; Devins and Baum 2016). Both phalanxes of lawyers benefit from the idea of autonomous law that stands apart from politics and political ideology, and both benefit from the idea that major policy battles, especially those over the meaning of the constitution, should be resolved in the courts. Meanwhile, just as conservatives have borrowed public interest law and rights strategies from the left, progressive lawyers are now searching for ways to learn from conservatives' recent successes to wage a counterassault. If past is prologue, we should expect that lawyers will continue to find ways to make themselves relevant to the changing social, economic, and political conditions around them.

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