

Jefferson Decker. *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government.* Studies in Postwar American Political Development Series. New York: Oxford University Press, 2016. 353 pp. \$29.95, paper, ISBN 978-0-19-046731-9.

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In recent years, two broad questions about the 1970s have occupied US political historians. The first asks how a fractious, marginalized Right began to coalesce under the Republican banner and wrest political power from a liberal establishment dominant since the New Deal. The second grapples with why the size and scope of the federal government managed to expand so much more rapidly in an age of limited resources and conservative backlash than during the sixties' high tide of economic growth and liberal consensus.

Jefferson Decker untangles the paradox of these overlapping story lines in his engaging new book, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government*, which takes as its subject the history of non-profit, public interest legal foundations on the right. More specifically, he traces the evolution of conservative legal thought in the seventies and beyond from outright skepticism of judicial activism to Strangelovian enthusiasm: in this case, right-leaning lawyers learned to stop worrying and to love the rights revolution. This change of heart, he argues, took place within an institutional context that allowed conservatives to challenge liberal policy dominance and transform politics at century's end. What became a campaign to roll back the police power of the regulatory state in

the name of individual property rights, however, began as a defensive operation to check the most prominent catalyst for state expansion in the seventies: the new social regulation.

The new social regulation refers to the next generation of federal regulatory activity that evolved beyond the agencies of the Progressive and New Deal eras. It not only expanded the realm of government oversight beyond discrete markets and microeconomics but also shifted the locus of policymaking from Congress and the executive to the courts. By the early seventies, judges and legislators had rendered judicial access more open and affordable with procedural changes broadening citizen standing to sue, rights of action, and recovery of court costs. A wave of private litigation followed, brought by organizations claiming to represent the public interest. These cases targeted the government-sanctioned activities of market actors, or those undertaken directly by state and federal agencies. They sought to protect mass constituencies newly empowered by grassroots movements, like racial minorities or users of environmental amenities, from future harm: the disparate impact of aptitude tests on African American job applicants, for example, or the toxic effects of DDT on humans and endangered species. The stringent standards, deadlines,

and "citizen suit" provisions of pollution control legislation, the environmental impact statement process, and the administrative rules promulgated by various bureaucracies all invited such lawsuits. Indeed, during the Nixon administration alone, the number of federal regulations tripled.

But as Decker notes, the new social regulation's prominent legal bent also emerged as an outgrowth of political weakness and limited resources. The Equal Employment Opportunity Commission issued rules because Congress denied it subpoena power and the other tools wielded by traditional regulatory agencies to force compliance; the expansive mission of the Environmental Protection Agency (EPA) cut across all industries and discouraged "capture" by regulated interests, but made even its multi-billion-dollar budget seem like butter scraped over too much bread. In an "Age of Limits," fiscal or otherwise, public officials eschewed taxing and spending as the means to promote social policy. More often, they chose to outsource regulation to private litigants who sued to enforce unfunded legislative mandates on state and local governments.

The National Resources Defense Council (NRDC), National Welfare Rights Organization (NWRO), Mexican American Legal Defense Fund (MALDEF), and a host of other organizations took up the charge with alacrity. In the wake of the post-*Brown v. Board of Education* (1954) rights revolution, this nonprofit, "public interest Left" took its cues from the legal strategy of the National Association for the Advancement of Colored People (NAACP) and Ralph Nader's campaign against corporate malfeasance, concluding that the fast track to social change ran through the courts. What began as an adversarial posture against the federal government became more collaborative over time, as sympathetic Great Society liberals forged close institutional and financial ties with the organizations poised to sue them. The resulting network extended from top-tier law schools and congressional subcommittees to the

Ford Foundation and federally subsidized legal-services clinics. All of it, Decker observes, reflected a broader cultural shift in liberalism toward "post-materialist" values. Lingering social inequities and environmental decline demanded redress: not through market forces, interest group bargaining, or deference to discretionary bureaucratic expertise, but rather with the clarity and finality of judicial decrees.

The capricious impact of the new social regulation on commercial and private activity raised a hue and cry among right-wing detractors over the sanctity of free enterprise and the constitutional limits of federal power. Instead of a direct electoral backlash, what followed was "a remarkable decade of institution-building on the American Right," as conservative donors and policy entrepreneurs "began to counter liberal legal advocacy" on its own turf (p. 49). Specifically, Decker recounts how the upstart organizations associated with conservative legal activism helped transform and transmit ideas about property rights and regulatory "takings," which, over time, served to alter court precedents, policy outcomes, and the very composition of the Republican Party.

Decker's emphasis on the importance of institutions, professional networks, and issue framing within elite legal circles builds on Steven M. Teles's (*The Rise of the Conservative Legal Movement: The Battle for Control of the Law* [2008]) and Amanda Hollis-Brusky's (*Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* [2015]) histories of the Federalist Society. Teles, however, depicts the seventies and early eighties as wilderness years for a fledgling conservative public interest law establishment hamstrung by parochialism, close ties to business interests, and outmoded constitutional arguments. Decker's deeper dive into the available sources produces a more nuanced assessment of this period, buttressed by vivid portraits of real people and issues that too often take a

back seat to political science modeling in Teles's telling.

The earliest and most sustained opposition to the new social regulation took hold in the American West. The Sunbelt, of course, has long been synonymous with what Donald T. Critchlow calls "the conservative ascendancy" (*The Conservative Ascendancy: How the Republican Right Rose to Power in Modern America* [2011]), and California, at least, looms large in Decker's story. Pacific Legal Foundation (1973) was the first nonprofit public interest law firm to contest the social agenda of coastal liberals. Piqued by the efforts of welfare rights activists to derail reforms of the state's public assistance programs, Ronald Zumbrun, an attorney and aid to then governor Ronald Reagan, envisioned an organization that could counter the destabilizing impact of liberal law fare on orderly government operations.

But faced with a sudden scarcity of Republican officeholders in the wake of post-Watergate elections, Zumbrun recalibrated PLF's mission in a more libertarian direction. Rather than defend the discretion of state administrators from challenges mounted by the Sierra Club or NWRO, its lawyers took aim at government planners and overreaching regulators. They ended up defending the interests of taxpayers and traditional rights of property owners, using the tools and tactics of the Left to stymie narrowly conceived environmental initiatives. As it turned out, the dilatory potential of environmental impact statements and judicial review cut both ways. PLF lawsuits were soon forcing government agencies to reassess the broader costs and benefits of carpooling mandates, waste treatment projects, and pesticide bans. PLF also conducted a war of attrition against the California Coastal Commission. Typical of new social regulators, the commission used restrictive zoning rules, instead of more costly land purchases, to wring concessions from private interests for a public good: in this case, limiting seaside development in the name of ecology

and public access. Subsequent legal battles culminated with the landmark Supreme Court case *Nollan v. California Coastal Commission* (1987), which curtailed, on Fifth Amendment grounds, "the power of governments to force land owners to surrender part of their ownership rights" (p. 181).

Despite California's prominent claim as the cradle of public interest law on the right, Decker is eager to shift the locus of the conservative ascendancy beyond the Sunbelt. Like historian James Morton Turner in *The Promise of Wilderness: American Environmental Politics since 1964* (2012), he looks instead to the Mountain West, a region that supplied the margin for a Republican Senate majority in 1980. There, the contentious politics of the public domain pitted environmental advocates against ranchers, farmers, and other locals long conditioned to resent the unalloyed reach of the federal government. Before Reagan tapped the wellspring of discontent embodied by the Sagebrush Rebellion, Denver beer baron and conservative philanthropist Joseph Coors bankrolled Mountain States Legal Foundation (MSLF), with attorney James Watt at the helm. Watt, a born-again Christian and well-connected career bureaucrat in the Nixon and Ford administrations, understood the power of publicity when he set out to mount "a noisy case against the new social regulation" (p. 82). Decker resists the lure of caricature and presents a balanced portrait of Watt as a man acting in defense of a region he viewed as under threat from hostile outsiders. He resented environmentalists and their allies within federal agencies, who used statutory wilderness reviews and excessive regulations to "lock up" the region's timber, minerals, and grazing land, inviting economic decline, energy shortages, and future exploitation. Although MSLF's legal tactics resembled PLF's, they differed in substance, safeguarding rights to more modern iterations of property, including access to land and resources leased by the federal government.

Watt did not hesitate to portray himself as a judicial activist, using the power of the courts to protect a perceived majority against the anti-democratic tendencies of liberal special interests. Critics denied that the affluent plaintiffs Watt and others defended equated to the vox populi, or even required pro bono representation. But as the Carter administration forged formal new ties between government agencies and the public interest Left, more organizations on the right entered the fray. Among others, the Washington Legal Foundation sustained itself using Richard Viguerie's direct mail operation, and rushed in where even Watt feared to tread, litigating controversial culture-war issues involving crime, abortion, and school prayer. Such groups sought "to articulate new, conservative 'counter-rights' that showed ... how the judicial enforcement of certain rights had compromised the equally valid rights of other people or organizations" (p. 104).

On the eve of the Reagan Revolution, the conservative response to public interest law remained heterodox. Some, including the eventual founders of the Federalist Society, conceived it as a front in the battle of ideas, with the potential to attract idealistic young lawyers and prompt cultural change at elite law schools. Others hoped it might provide a wedge to uproot "the rules and informal subsidies" that sustained liberal legal activism (p. 121). But many within Republican circles continued to view judicial activism of any kind as "incompatible with a conservative vision of the constitution" (p. 111).

No one perspective dominated the Reagan administration's subsequent efforts to roll back the regulatory state. Indeed, this lack of consensus sheds light on why conservative efforts to shrink the size and scope of government fell short of the president's revolutionary rhetoric. Watt, elevated to Interior secretary, tried to quell the Sagebrush Rebellion, not by transferring control of the public domain to the states but rather by changing a bureaucratic incentive structure that kept natural

resources in "administrative limbo" (p. 131). In his efforts to reorient decision making away from courts and litigious interests back toward a top-down model of executive management that Gifford Pinchot himself would have approved, Watt had to rely on internal bureaucratic reorganizations rather than sweeping legislative changes. The same went for fellow Coloradans Robert Buford at the Bureau of Land Management and Anne Gorsuch at the EPA. Their subsequent misdeeds and bogey-man status among environmentalists, meanwhile, became a fundraising bonanza for wilderness organizations and stoked an effective counterattack. Others within the administration preferred to wield the power of the state to defund the public interest Left, but found more moderate Republicans hesitant to assail organizations like the Legal Services Corporation or practices like fee shifting that enjoyed broad support among lawyers and public interest groups. Moreover, top officials like Solicitor General Rex Lee and Attorney General Edwin Meese looked askance at attacks on the new social regulation based in rights-based litigation rather than executive consolidation.

Despite mixed signals from within the executive and mixed efforts by understaffed and underfunded right-leaning public interest law firms, by the late 1980s conservatives sought "to use their progress on property rights to create a new vision of American constitutional government" (p. 181). The remainder of Decker's narrative traces the growing receptivity of judges to the ideas on efficiency, social costs, and takings developed in the burgeoning literature on law and economics, promulgated within the Federalist Society, and incorporated into legal briefs by conservative lawyers. *Nollan v. California Coastal Commission* and similar takings cases exasperated more cautious officials in the Reagan Justice Department, who realized that their younger, more receptive colleagues (many culled directly from PLF or MSLF) hoped "to make government pay compensation for taking of property every time its regulation impinged

too severely on a property right" (p. 195). Doing so threatened to undermine basic government operations, and in some instances the principle of *stare decisis*.

But as Decker notes, this new generation of conservative lawyers sought to establish legal precedents delegitimizing government regulation and forcing the police power to yield to individual property rights, just as New Deal lawyers had striven to do the opposite. In this context, the constitutional doctrine of "originalism" likewise evolved beyond the defensive notion of "strict construction." It came to accommodate a more vigorous understanding of rights incorporated under the Fourteenth Amendment. Transcending Antonin Scalia's majoritarian interpretation of "original public meaning," Clarence Thomas located a natural law foundation for rights in the Declaration of Independence, and argued for the resurrection of the Fourteenth Amendment's "privileges and immunities" clause, long rendered inoperative by the post-Reconstruction *Slaughterhouse Cases* (1873). Libertarian lawyers affiliated with the Institute for Justice (IJ) even began to defend a substantive due process claim to property reminiscent of the Progressive-era *Lochner v. New York* (1905) decision, which prominent conservative jurists like Robert Bork had once rejected out of hand. Their most recent litigation has contested occupational licensure, civil forfeiture laws, and eminent domain abuses on this basis, often on behalf of minority clients.

Although the IJ could not save Susette Kelo's home from the wrecking ball, the subsequent backlash against government takings for "public-private" economic partnerships offered more evidence of the sea change in law and culture Decker so diligently traces in his even-handed book. Indeed, the ethos of individualism inherent in rights-based rhetoric seems to play more to conservative strengths, while often straining the egalitarian ethic liberals embrace. "Conservatives could not turn back the clock on the rights revolu-

tion," he concludes, "but they could make a rights revolution of their own" (p. 227).

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