

REBALANCING THE SCALES OF JUSTICE: ASSESSMENT OF PUBLIC INTEREST LAW †

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I. INTRODUCTION

After the apex of the civil rights movement of the 1960's, public interest law grew rapidly.¹ Concern about underrepresentation of minority interests in the legal system led to the founding of numerous public interest law firms. In general, these firms sought to "balance the scales of justice" by litigating for expanded rights in a variety of issue areas.²

Paralleling the new conservatism of the 1970's was the swift rise of conservative public interest law.³ Conservatives, perceiving that liberals had tipped the scales of justice, sought to rebalance the legal system. Nonetheless, commentators continued to equate public interest law with the advocacy of liberal positions.⁴ This tendency has

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¹ See CENTER FOR PUBLIC INTEREST LAW, *BALANCING THE SCALES OF JUSTICE* (1976) [hereinafter cited as CPIL, *SCALES OF JUSTICE*] for a complete list of firms founded through 1976.

² See generally *The Practice of Law in the Public Interest*, 13 ARIZ. L. REV. 797 (1971); Berlin, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970); Cahn & Cahn, *Power to the People or To the Profession?*, 79 YALE L. J. 1005 (1970); Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C. L. REV. 1133 (1976); Halpern, *Public Interest Law, Its Past and Future*, 58 JUDICATURE 118 (1974); Halpern & Cunningham, *Reflections on the New Public Interest Law*, 59 GEO. L. J. 1095 (1971); Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207 (1976); PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (B. Weisbrod ed. 1978) [hereinafter cited as Weisbrod, *PUBLIC INTEREST LAW*].

³ See generally Jordan & Rubin, *Governmental Regulation and Economic Efficiency: The Role of Conservative Legal Foundations* in A BLUEPRINT FOR JUDICIAL REFORM 241 (P. McGuigan & R. Radar, eds. 1981); R. Momboisse, *Public Interest Law — Plague or Panacea*, paper delivered at the University of Wisconsin Law School, Madison, Wisconsin (April 3, 1980); in O'Connor & Epstein, *The Rise of Conservative Interest Group Litigation*, 45 J. OF POL. 479, 481 (1983) [hereinafter cited as O'Connor & Epstein, *Conservative Litigation*], the authors note that conservative group involvement in Supreme Court litigation increased approximately sixteen percentage points between the 1969 and 1980 terms.

⁴ See generally Weisbrod, *PUBLIC INTEREST LAW*, *supra* note 2. In a comprehensive treatment of the public interest law industry, he and those contributing to the volume focused exclusively on traditional liberal public interest law. Even as late as 1982, Robert Stover, in his study of law students entering the field of public interest law, excluded conservative firms from his analysis. In defining public interest law, he claimed that "for varying reasons, most public interest law has involved working for goals far more congruent with the philosophy of the political left than with that of the political right." Stover, *The*

led to a misperception about the politicized nature of the legal system. Not only are "liberals" continuing to go to court, but also conservatives are now presenting the courts with their views of the public interest. This has led some commentators to conclude that the courts are battlefields of competing group interests.⁵ Thus, in this article we compare the growth and future of liberal and conservative public interest law in the United States.

II. THE RISE OF LIBERAL PUBLIC INTEREST LAW

While public interest law came to the fore in the late 1960's, "various movements and programs . . . contributed to [its] shape, structure and underlying ideology."⁶ The first of these,⁷ the National Consumers' League (NCL), began to use litigation to improve the working conditions of women and children in the early 1900's.⁸ The litigation strategy it used to preserve the constitutionality of protective legislation later provided a model for other public interest law firms. It employed the test case approach and the pioneering "Brandeis brief,"⁹ tactics now regularly associated with public interest law generally, and the Legal Defense Fund¹⁰ of the National Association for the Advancement of Colored People (NAACP), specifically.¹¹ From 1908 to 1936, the NCL regularly

Importance of Economic Supply in Determining the Size and Quality of the Public Interest Bar, 16 LAW & SOC'Y. REV. at 455 (1982) [hereinafter cited as Stover, *Public Interest Bar*]. See also *supra* note 2.

⁵ According to one director of a conservative legal foundation, "The Courts have become the battleground for the supremacy of ideas in this country." Popeo, *Public Interest Law in the 80's*, Barrons, March 2, 1981.

⁶ CPIL, SCALES OF JUSTICE, *supra* note 1, at 19.

⁷ Some would argue that public interest law can be traced to the first legal aid office that was established in New York City in 1876. CPIL, SCALES OF JUSTICE, *supra* note 1, at 21-26. While this and other offices provided legal assistance to the needy, legal aid societies were not concerned with the broad public interest, but rather the interests of individual clients. See generally R. SMITH, JUSTICE AND THE POOR (1919); E. JOHNSON, JUSTICE AND REFORM (1974).

⁸ See generally M. NATHAN, THE STORY OF AN EPOCH-MAKING MOVEMENT (1926); J. GOLDMARK, IMPATIENT CRUSADER: FLORENCE KELLEY'S LIFE STORY (1953); Vose, *National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. OF POL. SCI. 267 (1957); D. BLUMBERG, FLORENCE KELLEY; THE MAKING OF A SOCIAL PIONEER (1966); C. VOSE, CONSTITUTIONAL CHANGE 163-79 (1972).

⁹ In particular, its use of sociological data, in the absence of legal precedent, was pathbreaking. Levin and Moise, *School Desegregation Litigation in the 1970's and the Use of Social Science Evidence*, 39 L. & CONTEMP. PROBS. 50 (Winter 1975); Vose, *The National Consumers' League and the Brandeis Brief*, 1 MIDWEST J. OF POL. SCI. 267 (1957) and P. ROSEN, THE SUPREME COURT AND SOCIAL SCIENCE (1972).

¹⁰ See *infra* note 15.

¹¹ See Barker, *Third Parties in Litigation* 29 J. OF POL. 41 (1967); Belton, *A Comparative Review of Public and Private Enforcement of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 924-52 (1978) [hereinafter cited as Belton, *A Comparative Review*];

used both tactics to defend maximum hour or minimum wage laws.¹²

During the same period that the NCL was litigating to uphold protective legislation, other organizations also began to represent their interests in court. For example, in 1920 several individuals organized the American Civil Liberties Union (ACLU) to defend draft evaders and alleged communists against government prosecution and to protect unions against employer harassment.¹³ Nineteen years later the NAACP, which had sporadically participated in litigation since 1915,¹⁴ specifically created a Legal Defense and Education Fund (LDF)¹⁵ to represent the interests of blacks in court and in particular to systematically litigate to end segregation in housing¹⁶ and schools.¹⁷ Following the lead of the NAACP, the American Jewish Congress (AJC) established the Committee on Law and Social Action (CLSA) in 1945 to take legal action against the numerous religious accommodationist laws that were enacted during the 1940's.¹⁸ Thus, through the early 1960's, these three organizations were the major liberal interest group litigators in the United States.

In the mid 1960's, however, a new breed of liberal litigators — groups concerned with representing their definition of the public interest in court — emerged. At the core of this movement was

and Corlner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287, 306 (1968).

12 See K. O'CONNOR, *WOMEN'S ORGANIZATIONS' USE OF THE COURTS 72-73* (1980) for a list of these cases.

13 C. MARKMANN, *THE NOBLEST CRY* (1965); D. JOHNSON, *A CHALLENGE TO AMERICAN FREEDOM* (1963); Bean, *Pressure for Freedom*, unpublished Ph.D. dissertation, Cornell University (1955); *THE PULSE OF FREEDOM* (A. Reitman, ed. 1975); Comment, *Private Attorneys-General: Action in the Fight for Civil Liberties*, 58 YALE L. J. (1949) [hereinafter cited as *Private Attorneys-General*].

14 In 1915, attorneys for the NAACP filed an amicus curiae brief in *Guinn v. United States*, 238 U.S. 347 (1915).

15 See generally C. VOSE, *CAUCASIANS ONLY* (1959); J. GREENBERG, *CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE* (1977) [hereinafter cited as J. GREENBERG, *JUDICIAL PROCESS*]. While the LDF facilitated the creation of a test case strategy, its formation was closely tied to changes in the Internal Revenue Service code. In early 1983, the NAACP successfully challenged the right of the NAACP Legal Defense Fund to continue to use the NAACP initials.

16 For an account of the LDF litigation campaign that led to its victory in *Shelley v. Kraemer*, 334 U.S. 1 (1948), see C. VOSE, *supra* note 15.

17 For an account of the litigation that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954), see R. KLUGER, *SIMPLE JUSTICE* (1976) and J. GREENBERG, *JUDICIAL PROCESS*, *supra* note 15, at 1-120.

18 See *Private Attorneys-General supra* note 13, at 589-95; Harper and Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172 (1953); F. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (1976); Pfeffer, *Amici in Church-State Litigation*, 44 L. & CONTEMP. PROBS., 83 (Spring 1981).

Ralph Nader. His early campaign against General Motors and publication of *Unsafe at Any Speed* in 1966 alerted corporate interests that the courts would now be used to challenge them and their products.¹⁹ Within two years of this expose on the safety of Corvairs, Nader began to establish what is now termed the "Nader Network."²⁰ Groups dedicated to using the courts for reform of corporate practices and/or social change comprised a significant part of this network.

Almost simultaneously with the emergence of "Nader's Raiders", environmentalists began to resort to litigation to challenge other kinds of business practices.²¹ The Sierra Club, like the NAACP and the American Jewish Congress, organized its own tax-exempt legal defense fund in 1969.²²

The instant visibility of these and other firms led the Ford Foundation to recognize the potential utility of increased litigation on behalf of minorities and other "disadvantaged" groups.²³ Beginning in 1967, and continuing with greater force into the next decade, the Ford Foundation began to channel millions of dollars into various groups litigating in the public interest.²⁴ The first groups to receive Ford funding included established civil rights

19 For accounts of Nader's activities, see J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 71-101 (1978) [hereinafter cited as J. HANDLER, SOCIAL MOVEMENTS]; D. SANFORD, ME & RALPH: IS NADER UNSAFE FOR DETROIT? (1976); R. DETOLEDANO, HIT AND RUN: THE RISE AND FALL? OF RALPH NADER (1975); H. GOREY, NADER AND THE POWER OF EVERYMAN (1975); R. SNOW & B. WEISBROD, CONSUMERISM, CONSUMERS AND PUBLIC INTEREST IN PUBLIC INTEREST LAW (B. Weisbrod ed. 1978).

20 See D. BURT, ABUSE OF TRUST (1982); T. DYE AND H. ZEIGLER, AMERICAN POLITICS IN THE MEDIA AGE 224-57 (1983).

21 See generally Trubeck, *Environmental Defense I: Introduction to Interest Group Advocacy in Complex Disputes*, in B. WEISBROD, PUBLIC INTEREST LAW [hereinafter cited as Trubeck, *Environmental Defense*]; J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 43-69 (1978); F. SCHAUMBURG, JUDGMENT RESERVED: A LANDMARK ENVIRONMENTAL CASE (1976); F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1973); and R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT (1976).

22 FORD FOUNDATION & AMERICAN BAR ASSOCIATION, PUBLIC INTEREST LAW: FIVE YEARS LATER 16, 52 (1976) [hereinafter cited as FORD FOUNDATION, PUBLIC INTEREST LAW]; HANDLER, SOCIAL MOVEMENTS, *supra* note 19, at 44 (1978).

23 See Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 J. PUB. L. 287 (1968). Cortner claims that disadvantaged groups "are highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation." *Id.* at 287.

24 FORD FOUNDATION, NINE FOR EQUALITY UNDER LAW — CIVIL RIGHTS LITIGATION 9 (1977).

organizations such as the LDF and the Lawyer's Committee for Civil Rights Under Law (LCCRUL).

While newer than the LDF, the LCCRUL, which was founded in 1963 by prominent attorneys²⁵ at the request of President John F. Kennedy,²⁶ had quickly achieved a reputation for excellence, particularly in Mississippi where its lawyers acted "as missionaries to" the local bar.²⁷ Often functioning as a legal aid service in the South,²⁸ LCCRUL also worked to desegregate the bar and to revise outmoded criminal codes and bail bond systems²⁹ which adversely affected low-income, inner-city blacks.

Shortly thereafter, the Ford Foundation moved to fund, and in effect create, several other public interest law firms.³⁰ For example, in the early 1970's, Ford recognized the need for litigation on behalf of women. In 1972, Ford provided the Women's Law Fund with a \$140,000 two year start-up grant³¹ to represent the interests of women in court. Since its initial grant to the Women's Law Fund, Ford has funded numerous other women's rights litigators including the Women's Rights Project of the ACLU, the Women's Legal Defense Fund, the National Organization for Women (NOW) Legal Defense and Education Fund, the Women's Equity Action League Legal Defense and Education Fund, and the National League of Women Voters.³² According to a former Presi-

25 These initially included several past presidents of the American Bar Association, all former Assistant Attorney Generals for Civil Rights and several former Attorneys and Solicitors General. CPIL, *SCALES OF JUSTICE*, *supra* note 1, at 55.

26 *Id.*; LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 10 YEAR REPORT 21-25 (1973); Stewart and Heck, *Insuring Access to Justice*, 66 JUDICATURE 84 (1982).

27 P. WATTERS AND R. CLEGHORN, *CLIMBING JACOB'S LADDER: THE ARRIVAL OF NEGROES IN SOUTHERN POLITICS* 146 n.18 (1967).

28 Stewart & Heck, *The Day-to-Day Activities of Interest Group Lawyers*, 64 Soc. Sci. Q. 173 (1983).

29 FORD FOUNDATION, ANNUAL REPORT 5 (1968).

30 The LDF and LCCRUL became models for later organizations claiming to litigate in the public interest. For example, in 1967, at the behest of LDF attorneys, Ford met with Chicano leaders, who requested money to fund an organization that would litigate for Chicanos in the same manner in which the LDF had represented black interests. Mexican American Legal Defense and Education Fund, *LOS ANOS DIAS* (no date). Ford decided to grant that request upon concluding that "Mexican-Americans were the most disorganized and fragmented minority in American life and that they needed a national organization to serve their social, economic, and public needs." T. CASTRO, *CHICANO POWER* at 150 (1974). Thus, in 1968, the Mexican-American Legal Defense and Educational Fund (MALDEF) was established with a 2.2 million dollar grant from Ford. FORD FOUNDATION, ANNUAL REPORT at 6 (1968).

31 FORD FOUNDATION, PUBLIC INTEREST LAW, *supra* note 22, at 24, 52; FORD FOUNDATION, *supra* note 24, at 23.

32 See FORD FOUNDATION, ANNUAL REPORTS, 1972 to date. See also K. O'CONNOR, WOMEN'S ORGANIZATIONS' USE OF THE COURTS, *supra* note 12; O'Connor & Epstein, *After*

dent of the NOW Legal Defense and Education Fund, “[a]mong the giants, only the Ford Foundation has moved in all the appropriate ways to meet the needs of the feminists.”³³ Ford Foundation dollars also were instrumental in the early successes of three environmental public interest law firms — the Environmental Defense Fund, the Sierra Club Legal Defense Fund, and the Natural Resources Defense Council. Foundation support allowed these groups to increase their litigation activities and to expand their involvement to a variety of areas including coastal zone management, water resources development and the location of power plants.³⁴

The “public interest,” however, has been even more widely represented by general public interest law firms supported by Ford and other foundations.³⁵ Groups such as the Center for Law and Social Policy (CLSP) at the Catholic University Law School and Public Advocates, Inc., unlike women’s rights and environmental firms, litigate in a wide range of issue areas. CLSP³⁶ has participated in cases as diverse as women’s rights,³⁷ health, international trade, and mine safety.³⁸ In addition to these organizations, numerous other public interest law firms were created or expanded during this period. Because of the growth and diversity of the movement, the Ford Foundation sponsored a conference in 1974 to assess the status of public interest law in the United States. One outgrowth of that conference was the creation of the Center for Public Interest Law (CPIL) which among other projects, con-

the ERA - Is Litigation A Viable Alternative Strategy?, YALE L. & SOC. POL’Y REV. (forthcoming); M. BERGER, LITIGATION ON BEHALF OF WOMEN 7-8 (1980).

³³ Tully, *Funding the Feminists*, Foundation News 24-25 (March-April 1975). While the Ford Foundation has been the primary source of funds for many of these groups, the Playboy Foundation early on contributed heavily to the Women’s Rights Project of the ACLU. NOW, however, declined those funds because of its negative image of *Playboy*. Greenwald, *Litigation for Social Change* (unpublished manuscript).

³⁴ FORD FOUNDATION, ANNUAL REPORT 14 (1976); FORD FOUNDATION, PUBLIC INTEREST LAW, *supra* note 22, at 17-18.

³⁵ It also should be noted that the Ford Foundation has funded several law school clinics, many of which litigate in the general public interest and often serve as training grounds for future public interest lawyers. For example, Ford helped to create the Institute for Public Interest Representation at the Georgetown University Law Center. See G. HARRISON & S. JAFFE, THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUTENCIES 18 (1973).

³⁶ See Halpern and Cunningham, *supra* note 2; CPIL, SCALES OF JUSTICE, *supra* note 1, at 125-27.

³⁷ Those attorneys responsible for CLSP women’s rights litigation, however, recently founded the National Women’s Law Center.

³⁸ Center for Law and Social Policy, *Annual Reports*.

ducted a comprehensive evaluation of the public interest law movement. Its 1976 survey found that there were over seventy such firms litigating in areas as diverse as consumer and environmental protection, political reform and mental health.³⁹

While this study dramatically illustrated the diversity of the movement, many of its component groups shared several common features. First, these firms generally prefer to represent plaintiffs,⁴⁰ rather than to file *amicus curiae* briefs, a more limited form of intervention.⁴¹ While direct representation can be a costly tactic,⁴² outside funding often allowed these groups to initiate important test cases by which to win precedent setting victories. Traditional liberal public interest law firms pursued this strategy in at least thirty-nine percent of the 679 cases in which they participated during the 1969 to 1980 terms of the Supreme Court.⁴³

While most of these public interest law firms preferred to sponsor cases,⁴⁴ they were active as *amicus curiae* in sixty-one percent of the cases decided by the Supreme Court during that same eleven term period. When these groups participated as friends of the court, they tended to reinforce each other's litigation efforts through coordination, either in the form of co-sponsored briefs or *amicus* briefs filed in support of the sponsoring party.⁴⁵ These

39 See CPIL, *SCALES OF JUSTICE*, *supra* note 1, at 79-81.

40 Generally this occurs in the form of or in conjunction with what many refer to as a test-case strategy. Because this strategy often involves careful planning and coordination, it may be becoming increasingly difficult to pursue given the large number of groups working in closely allied areas. Additionally, it should be noted that in this article, we use the terms "direct sponsorship" and "representation of parties" interchangeably.

41 For the growing use of *amicus curiae* briefs as a litigation tactic, see Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 *YALE L. J.* 694 (1963); K. O'CONNOR, *supra* note 12, at 115-123; O'Connor & Epstein, *An Appraisal of Hakman's Folklore*, 16 *L. & SOC'Y REV.* 311 (1982); Puro, *The Role of Amicus Curiae in the United States Supreme Court, 1920-1966*, (1971) (unpublished Ph.D. dissertation, State University of New York at Buffalo); Vose, *Interest Groups and Litigation*, (September 1981) (paper presented to the annual meeting of the American Political Science Association, New York City). Additionally, for the apparent effectiveness of this type of strategy, see O'Connor & Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 *JUST. SYS. J.* 35 (1983) wherein the authors found that the Justices of the U.S. Supreme Court actually cited *amicus curiae* briefs of interest groups or public interest law firms in eighteen percent of the 813 cases resulting in a full opinion in which at least one *amicus curiae* brief was filed.

42 See generally Belton, *A Comparative Review*, *supra* note 11, at 924-52; Westin, *Someone Has to Translate Rights into Realities*, 2 *CIV. LIB. REV.* 104 (Fall 1975); C. VOSE, *supra* note 8.

43 O'Connor and Epstein, *Conservative Litigation*.

44 See *supra*, note 38.

45 Jointly authored *amicus* briefs have become a tactic regularly employed by liberal interest groups. See O'Connor and Epstein, *Interest Group Participation in Racially-Based Employment Discrimination Litigation*, 25 *HOW. L.J.* 709 (1982) [hereinafter cited as

firms cooperate because they have similar objectives and all generally stand to benefit from each others' victories. While individually they represent a range of group interests, they all seek expanded interpretations of legislation and/or the Constitution. Thus, because each has a similar view of the public interest, rights that are secured for one disadvantaged group often affect the litigation efforts of other public interest law firms.

Second, at least through the late 1970's, most of these groups continued to receive foundation support. Recognizing the impact that these groups had upon the law, foundations continued to channel large sums of money to public interest law. Thus, these firms are similar in their continued heavy reliance upon private foundations to support their litigation activities.

Sponsorship, foundation funding, and growing expertise allowed these groups to increase their litigation activities steadily. Between 1970 and 1981, liberal interest group involvement in Supreme Court litigation increased by fifteen percent.⁴⁶ Correspondingly, these firms also were highly successful. For many, a cyclical pattern developed in which the more they went to court, the more cases they won. Conversely, the more often they won, the more frequently they sought to litigate.⁴⁷

While these similarities collectively fostered the development of a unified public interest law movement, several judicial decisions, federal legislation, and access to the executive branch of government also facilitated that growth. For example, as early as 1963, the United States Supreme Court recognized the special role of group representation of minority interests. Writing for the Court in *NAACP v. Button*,⁴⁸ Justice William Brennan noted that

Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930's, for example, no less is it true of the Negro minority today. And under the conditions of modern government,

O'Connor and Epstein, *Interest Group Participation*]; J. PELTASON, *FEDERAL COURTS IN THE POLITICAL PROCESS* (1955); C. VOSE, *supra* note 8.

⁴⁶ O'Connor and Epstein, *Conservative Litigation*.

⁴⁷ For a more thorough discussion of the importance of interest group perceptions of judicial acceptance of their claims, see S. Wasby, *Interest Group Litigation Strategy in an Age of Complexity*, in *INTEREST GROUPS AND PUBLIC POLICIES* (Cigler & Loomis eds. 1983) [hereinafter cited as Wasby, *Litigation Strategy*]. For a discussion of the importance of this kind of "repeat player" status see Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y REV. 95 (1974).

⁴⁸ 371 U.S. 415 (1963).

litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances
. . . For such a group, association for litigation may be the most effective form of political association.⁴⁹

Fifteen years later, in 1978, the Burger Court continued the Warren Court tradition of support for public interest law. In *In re Primus*,⁵⁰ seven Justices acknowledged the special role the ACLU has played "in the defense of unpopular causes and unpopular defendants."⁵¹ In *Primus*, the Court upheld an ACLU attorney's right to solicit clients by mail so long as the inquiry was not for personal or financial gain.⁵²

Additionally, statements of some of the individual Justices reveal their support for the movement. For example, Justice Thurgood Marshall, who served as General Counsel of the LDF and argued *Brown v. Board of Education*,⁵³ recently commented that

Public interest law seeks to fill some of the gaps in our legal system. Today's public interest lawyers have built upon the earlier successes of civil rights, civil liberties and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies and legislatures, they provide representation for a broad range of relatively powerless minorities — for example, to the mentally ill, to children, to the poor of all races. They also represent neglected interests that are widely shared by most of us as consumers, as workers, and as individuals in need of privacy and a healthy environment.

These lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decisionmakers. They have made it possible for administrators, legislators and judges to assess the impact of their decisions in terms of all affected interests. And, by helping to open the doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.⁵⁴

⁴⁹ *Id.* at 429-31 (footnotes omitted).

⁵⁰ 436 U.S. 412 (1978).

⁵¹ *Id.* at 427-28.

⁵² *Id.* at 426-32.

⁵³ 347 U.S. 483 (1954).

⁵⁴ Marshall, *Foreword* to FORD FOUNDATION, PUBLIC INTEREST LAW, *supra* note 19 at 6-7. Additionally, it should be noted that Justice Powell served as vice-president of the National Legal Aid and Defender Association from 1964 to 1965.

Thus, since the rise of public interest law in the 1960's, the Supreme Court and some individual Justices have articulated their approval and support for those activities.

Another factor that facilitated the growth of public interest law was the inclusion of an attorneys' fees award provision in several civil rights statutes.⁵⁵ While many organizations have long been recognized as "private attorneys general" litigating on behalf of group interests,⁵⁶ it was not until inclusion of specific provisions allowing for judicial awards of attorneys' fees that public interest law firms could be reimbursed for litigating actions brought in the public interest. In addition, in 1980, Congress passed the Equal Access to Justice Act,⁵⁷ which allows prevailing parties who challenge federal governmental practices to petition the Court for an award of attorneys' fees. Thus, some liberal public interest law firms rely very heavily on attorneys' fees awards to provide as much as eighty percent of their operating budgets.⁵⁸

Finally, public interest law firms' access to the executive branch was greatly expanded by President Jimmy Carter.⁵⁹ According to David Broder, Carter was the first President "to recruit large numbers of public interest advocates into the executive branch."⁶⁰ Examples of important Carter appointees drawn from the ranks of

⁵⁵ See generally Note, *Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest*, 24 HASTINGS L.J. 733 (1973); Settle & Weisbrod, *Financing Public Interest Law in Weisbrod*, PUBLIC INTEREST LAW, *supra* note 2; Nussbaum, *Attorney's Fees in Public Interest Litigation*, 48 N.Y.U. L. REV. 301 (1973); and H. NEWBERG, PUBLIC INTEREST PRACTICE AND FEE AWARDS (1980).

⁵⁶ See *Private Attorneys-General*, *supra* note 11; J. CASPER, LAWYERS BEFORE THE WARREN COURT (1972).

⁵⁷ 5 U.S.C. § 504; 15 U.S.C. § 634b; 28 U.S.C. § 2412; 42 U.S.C. § 1988 (Supp. IV 1981). See generally Note, *Will the Sun Rise Again for the Equal Access to Justice Act?*, 48 BROOKLYN L. REV. 265 (1982); Simmons, "The Equal Access to Justice Act": Private Enforcement of Public Contract Law, 12 Pub. Cont. L.J. 284 (1982); Robertson and Fowler, *Recovering Attorneys' Fees from the Government under the Equal Access to Justice Act*, 56 Tul. L. Rev. 903 (1982).

⁵⁸ See Terris, *Hard Times Ahead for Public Interest Law*, 4 JURIS DR. 22 (July/August 1974).

⁵⁹ See generally J. CALIFANO, GOVERNING AMERICA (1981); G. BELL, TAKING CARE OF THE LAW (1982).

⁶⁰ Broder, *Changing of the Guard: Power and Leadership in America* at 237 (1981). Broder has estimated that more than one hundred key positions in numerous executive departments and commissions were occupied by former public interest advocates. *Id.* at 238. Former chair of the Federal Trade Commission, Michael Pertschuk, in fact, often referred to the Commission as "the most active public-interest law firm in the government." *Id.* at 227. Carter, however, may not have been the first president to recruit from the ranks of public interest lawyers. For interesting analyses of Franklin Roosevelt's reliance on this sort of personnel, see P. IRONS, THE NEW DEAL LAWYERS (1982) and B. MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982).

liberal public interest firms include Assistant Attorney General and Chief of the Civil Rights Division within the Department of Justice, Drew Days III, a former LDF attorney; Joan Claybrook, who headed the National Highway Traffic Safety Administration and formerly worked for Ralph Nader; and Joseph Onek, a former director of the Center for Law and Social Policy (CLSP) who worked on the White House Domestic Policy staff from 1977 to 1979.⁶¹

In addition to his appointments within the executive branch, President Carter nominated numerous movement attorneys to the federal bench. Many of the judicial appointments made by Carter had strong ties to the public interest law movement.⁶² Ruth Bader Ginsberg, who was appointed to the United States Court of Appeals for the D.C. Circuit, was the former head of the Women's Rights Project of the ACLU as well as a General Counsel for that organization. Also appointed to the D.C. Circuit was Patricia Wald, who had formerly been associated with the Mental Health Law Project.⁶³

Based on growing judicial receptivity, statutes favoring public interest law and access to the executive branch, liberal public interest law flourished during the 1970's. Its successes, however, soon prompted the formation of a new public interest law movement, which sought to counterbalance the growing liberal presence in court.

III. THE RISE OF CONSERVATIVE PUBLIC INTEREST LAW FIRMS

While liberal, or as conservatives call them, "traditional" public interest law firms were obtaining rights for disadvantaged members of society, their victories were beginning to affect conservative interests that often had a financial stake in the outcome of particular cases.⁶⁴ For example, the LDF's victories in employ-

61 Other examples of those with ties to the public interest law movement during the Carter administration include Benjamin Heineman, a CLSP who was an Assistant Secretary of HEW and Anthony Roisman, chief staff attorney for the Natural Resources Defense Council who was made chief of the Hazardous Waste section of the Land and Natural Resources Division of the Justice Department.

62 Report of ongoing research of Thomas G. Walker, Emory University.

63 Another example of an "activist" judge appointed to the federal bench is LDF attorney Joseph W. Hatchett, who was appointed to the United States Court of Appeals for the Fifth Circuit.

64 See D. BURT, ABUSE OF TRUST (1982); Singer, *Liberal Public Interest Law Firms Fight Budgetary, Ideological Challenges*, National Journal 2052 (December 8, 1979) [hereinafter cited as Singer, *Liberal Firms*].

ment discrimination,⁶⁵ environmentalists' litigation campaigns against developers⁶⁶ and consumer attacks on business practices and products⁶⁷ collectively began to have a substantial impact on American business. The cumulative effect of a string of movement victories led to a widespread belief among business executives and conservative politicians that their interests were not being represented in the judicial forum.⁶⁸

This was not the first time that conservatives had recognized the need to litigate to represent *their* interests in court. In 1935, conservatives opposed to the New Deal formed the National Lawyer's Committee of the American Liberty League.⁶⁹ This organization was established to litigate New Deal legislation including the National Labor Relations Act and the Agricultural Adjustment Act, but given the political climate and the Court's eventual abandonment of substantive due process, the group disbanded when it quickly became apparent that its efforts could no longer have any impact.⁷⁰

It was not until over thirty years later that conservatives once again began to discuss the need for organizations to represent their interests in court. One of the first conservatives to recognize this void was Lewis F. Powell, Jr. Two months prior to his Supreme Court nomination, at an appearance before a meeting of the Chamber of Commerce of the United States of America, he claimed that

Other organizations and groups . . . have been far more astute in exploiting judicial action than American business. Perhaps the most active exploiters of the judicial system have been groups ranging in political orientation from "liberal" to the far left. . . . It is time for American business — which has

⁶⁵ See Belton, *A Comparative Review*, *supra* note 11; Wasby, *Litigation Strategy*, *supra* note 47.

⁶⁶ See Trubeck, *Environmental Defense*, *supra* note 21.

⁶⁷ See *supra* note 19.

⁶⁸ Interviews with Raymond Momboisse, head of PLF Washington, D.C. office, in Washington, D.C. (Nov. 3, 1982) [hereinafter cited as Momboisse interview], John Cannon, President, Mid-America Legal Foundation in Chicago, Ill., April 21, 1983 and Ernest Hueter, President, National Legal Center for the Public Interest in Washington, D.C. (Nov. 2, 1982). Hueter, for example, claims that "business and industry (was) suffering as well as individual taxpayers." [hereinafter cited as Hueter interview].

⁶⁹ Wolfskill, *The Revolt of the Conservatives* (1962); P. IRONS, *THE NEW DEAL LAWYERS* (1982) and Vose, *Litigation as a Form of Pressure Group Activity*, 319 *ANNALS OF AMER. ACAD. OF POL. & SOC. SCI.* 20 (1958).

⁷⁰ Wolfskill, *supra* note 69; *New Deal Foe Folds Up*, *The New York Times* (Sept. 24, 1940) at 20.

demonstrated the greatest capability in all history to produce and influence consumer decisions — to apply their great talents vigorously to the preservation of the system itself.⁷¹

These concerns prompted leaders of the California Chamber of Commerce to conduct a survey to determine if there was an interest in, or a need for, the kinds of actions suggested by Powell.⁷² The findings of this study are clearly reflected in the following assessment made by Raymond Momboisse, a member of the California Chamber. According to Momboisse,

Litigation purportedly brought in the public interest has not benefited the people. It has deprived them of jobs, housing, food, and medicine. It has increased costs. It will soon limit their supply of electricity with resulting health hazards and hardships.

By any test, the general public has not been well served by many of our self-proclaimed "public interest" law groups.⁷³

Sentiments such as these, when buttressed by the outcome of the Chamber of Commerce study, led several members of Governor Ronald Reagan's administration, including current Presidential advisor Edwin Meese, to found the Pacific Legal Foundation (PLF) in Sacramento, California in order to represent their conception of the "public interest" in court.⁷⁴ The PLF represented a pilot attempt by conservatives to determine whether they could use the courts effectively in a variety of policy areas. It was founded on the view that traditional public interest law firms were not providing the courts with an accurate portrayal of the public interest.

The PLF immediately began to litigate a wide range of cases. It particularly emphasized environmental regulation,⁷⁵ generally op-

71 Quoted in Mid-Atlantic Legal Foundation, *Defending Your Rights* at 1 (no date).

72 Momboisse interview, *supra* note 69. According to Momboisse, then a California state attorney general, while he and Ronald Zumbrun, then in the Department of Welfare, were lobbying for and later litigating to uphold then Governor Ronald Reagan's controversial welfare reforms, they came into contact with liberal public interest law firms, whose purpose was to "entirely destroy the governor's reform programs." During the same period that they were doing "battle with these groups," the state Chamber of Commerce recognized the need for an independent public interest law firm and thus appointed a committee which in turn recommended establishment of PLF with Momboisse and Zumbrun as its first two attorneys.

73 Momboisse, *Public Interest Law*, paper delivered at the University of Wisconsin Law School, Madison, Wisconsin, at 7-8 (April 3, 1980).

74 According to Hueter, the PLF was funded "to fight fire with fire." Hueter interview, *supra* note 69.

75 In fact PLF's first legal action involved contesting a preliminary injunction case that was sought to stop the use of DDT to end the spread of a moth epidemic. Momboisse interview, *supra* note 69.

posing the claims of numerous environmental protection groups.⁷⁶ Its founders were satisfied with its impact and perceived that other regional firms like the PLF could potentially form a conservative public interest law movement. While within two years of its creation it was too early to point to major PLF victories in court, according to its founders,⁷⁷ its ability to make an immediate impact on the judicial process during its formative period can be attributed to the strong financial backing PLF received from the business community. Large corporate interests and/or foundations including the Lilly Endowment, the William Hearst and the John M. Olin Foundations and the Southern-Pacific Company have been and continue to be major supporters of the PLF.⁷⁸ These funds allowed PLF to immediately hire several committed staff attorneys and the requisite support staff and provided the money necessary to conduct important pre-trial discovery and to pay for litigation expenses.

Many within the conservative community were convinced that this experiment had worked. In fact, the successes of PLF on the west coast led its founders to commission a study to determine if a similar public interest law firm would work successfully in other regions.⁷⁹ The results of this study, which indicated the "immediate success" of the PLF, in turn led its author, Leonard Therberge, to take steps that led to the founding of the National Legal Center for the Public Interest (NLCPI) without the support of the PLF.⁸⁰

The NLCPI was created to facilitate the establishment of "a network of regional firms," which would be modeled after the PLF.⁸¹ Within a year of its formation, NLCPI acted to meet this objective by creating the first of what were to be several member conservative firms including the Southeastern, Gulf Coast and

76 For example, in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976), the Sierra Club Legal Defense Fund argued that the Department of the Interior's exemption of coal reserve developers from the filing of an environmental impact statement violated the National Environmental Policy Act of 1970. While the Sierra Club's position was supported by an amicus curiae brief from the Environmental Defense Fund, the Supreme Court chose to adopt arguments of the PLF and the Federal government by upholding the Interior Department's exemption. See also Pacific Legal Foundation, *Annual Report* (1981).

77 Hueter interview, *supra* note 69.

78 Pacific Legal Foundation, *Statement on Funding*, March 1982.

79 Mombousse interview, *supra* note 69.

80 *Id.*

81 Hueter interview, *supra* note 69.

Great Plains, Capital, Mountain States, Mid-Atlantic, and Mid-America Legal Foundations.

Once the NLCPI created and staffed these foundations, it claims to have “assumed the role of a clearinghouse and service organization” for member firms,⁸² but according to some member firms they no longer rely on NLCPI for very much assistance.⁸³ In fact, the Capital Legal Foundation has specifically disassociated itself with the Center as a result of a fund-raising dispute.⁸⁴ While the NLCPI has assisted and facilitated the increased conservative presence in courts, each member firm now “operates as an independent entity with its own board of directors, its own legal advisory board and its own funding responsibilities.”⁸⁵

The first regional center established by the NLCPI was the Southeastern Legal Foundation (SELF). Charged with representing the public interest in nine southern states,⁸⁶ SELF was incorporated in Atlanta, Georgia in early 1976. The Hon. Ben Blackburn, a former member of Congress,⁸⁷ was elected the first president. Seed money from the NLCPI was supplemented with support from several foundations, but by 1977 SELF had over two hundred member foundations and firms including the Broyhill and U.S. Steel Foundations and General Motors, Gulf Oil, Sears Roebuck, and Pepsico Companies among others.⁸⁸ This increased funding has allowed it to grow from two to five attorneys.⁸⁹

Even though SELF has substantial business backing, its litigation activities, like those of the other regional firms, reflect a strong concern for free enterprise. According to Blackburn, “anyone with a special privilege granted at the expense of the general public is fair game, and we don’t care who is on the other side.”⁹⁰

82 *Id.*; see also NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, 1980 ANNUAL REPORT, inside cover, [hereinafter cited as NLCPI, 1980 REPORT].

83 Interview with attorneys at Mountain States Legal Foundation and Capital Legal Foundation. In fact, according to Momboisse, PLF has never been affiliated with NLCPI and it was “questionable how much help the NLCPI actually provided to the other groups.” Momboisse interview, *supra* note 69.

84 Interview with Kate Kimball, staff attorney with Capital Legal Foundation in Washington, D.C. (Nov. 3, 1982). [hereinafter cited as Kimball interview].

85 NLCPI, 1980 Report, *supra* note 82 at 7.

86 Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

87 Mr. Blackburn also was an unsuccessful Republican primary candidate for the Governorship of Georgia in 1982.

88 Southeastern Legal Foundation, *Annual Report 1977* at 8 (March 1978).

89 *Id.*

90 Lauterback, *Southeast [sic] Legal Foundation Snarls Liberal Red Tape*, Business Atlanta, reprinted by Southeastern Legal Foundation, (December 1981).

SELF's concern with regional issues is well illustrated by its participation in *FERC v. Mississippi*.⁹¹ In that case, SELF supported Mississippi's contention that the federal government's Public Utility Regulatory Policy Act of 1978⁹² represented "a form of federal control over the states which threatens the system of federalism and the individual liberties of the citizens of the states."⁹³ SELF attorneys argued that this Congressional regulation of commerce violated the tenth amendment of the Constitution. Through these and other litigation efforts, SELF has attempted to represent the regional interest through its advocacy of the conservative conception of the public interest.

Shortly after SELF's incorporation, NLCPI facilitated the creation of five other foundations also modeled after the PLF. Each was designed to represent the public interest in a particular geographic area and all were headed by prominent conservatives. For example, the Great Plains Legal Foundation's first President, Christopher S. Bond, was a former governor of Missouri and its first Chairman was a former head of the Chamber of Commerce of the United States.⁹⁴ Like SELF, all of these firms initially relied heavily on seed money from NLCPI but now receive substantial support from corporate, foundation, and conservative sources.⁹⁵

The Mountain States Legal Foundation (MSLF) has been the most active of the affiliated firms.⁹⁶ MSLF's first president was the prominent conservative James Watt.⁹⁷ Although it does have a Washington, D.C. office, MSLF operates in a discrete geographical area⁹⁸ like the other regional firms. Its offices, maintained through corporate funding and contributions from individuals, have allowed MSLF to guard its regional interest in four general areas of the law: constitutional rights, separation of

91 452 U.S. 936 (1981).

92 P.L. No. 95-617, 92 Stat. 3117 *et seq.* passing 16 U.S.C. (Supp. III) § 2601.

93 Brief of Southeastern Legal Foundation, Inc., *amicus curiae*, in Support of Appellees submitted in Federal Energy Regulation Commission and James B. Edwards, Secretary of Energy v. The State of Mississippi, *et al.*

94 Hueter interview, *supra* note 69.

95 Singer, *Liberal Firms*, *supra* note 64.

96 Hueter and Momboisse interviews, *supra* note 69.

97 In fact, Mountain States was one of the last firms founded because of the lengthy search for a lawyer that was "savvy politically." Additionally, its founders wanted a "westerner" who would be able to "litigate federal laws west of the 100th meridian." Interview with Chip Mellor, Acting President of the Mountain States Legal Foundation, in Denver, Colo. (Sept. 2, 1982).

98 It operates in Arizona, Colorado, Eastern Washington, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming.

powers and federalism, public access to federal lands, and state water rights cases.⁹⁹ For instance, in *Idaho v. Freeman*,¹⁰⁰ MSLF sought

to establish the right of the state legislature to rescind its approval of a proposed constitutional amendment before ratification by three-fourths of the states occurs and to establish the constitutional necessity for three-fourths majority concurrence of Congress in extending any time limit previously set for state consideration of a proposed amendment.¹⁰¹

Perhaps the most important of MSLF's contributions to the growth of conservative public interest law has been its involvement in cases in which environmental issues are at stake. In *Sierra Club v. Watt*,¹⁰² MSLF won what it considers to be a "major" victory when a federal appeals court protected "established water rights from federal interference sought by the Sierra Club."¹⁰³ According to MSLF, had the Sierra Club won, "water use authorized under state law could have been cancelled in favor of water use for aesthetic purposes on all federal lands."¹⁰⁴ In another case, *Mountain States Legal Foundation v. Dickenson*,¹⁰⁵ MSLF challenged the Grand Canyon Park Service's banning of motorized rafts on the Colorado River. Thus, while MSLF has been involved in a wide range of public interest issues, given the region it represents, like the PLF, it often has found itself at odds with liberal environmental law groups.

With initial guidance and seed money from NLCPI, MSLF and several affiliated centers have attempted to model themselves after the PLF. Like the PLF, they have sought to represent their view of the public interest in a wide range of policy areas, often with a regional focus. In contrast to these is the Washington Legal Foundation, a non-affiliated firm. While it has the same ideology as the other conservative firms, it is "fully national in scope,"¹⁰⁶ and does not seek to represent a regional interest. Unlike the other

99 Mountain States Legal Foundation, *Annual Report* (1981).

100 507 F. Supp. 706 (D. Idaho 1981).

101 Mountain States Legal Foundation, *Summary of Legal Activity 1977-1981* at 5 (hereinafter MSLF, *Summary*).

102 659 F.2d 203 (D.C. Cir. 1981).

103 MSLF, *Summary*, *supra* note 101 at 9.

104 Mountain States Legal Foundation, *The Change and the Challenge* at 4.

105 Unreported case noted in MSLF, *Summary*, *supra* note 101.

106 Washington Legal Foundation, untitled report at 16 (1981).

firms, the WLF intentionally limits its amicus curiae activity and prefers instead to sponsor cases.

Under the leadership of its founder, Dan Popeo, WLF "aims [its] activities at the American public as well as the courts and administrative agencies."¹⁰⁷ Therefore, many of the cases it has selected to sponsor have been ones which have attracted significant media attention. WLF represented Senator Barry Goldwater and twenty-five other members of Congress in their attempt to stop President Carter from terminating the Mutual Defense Treaty with Taiwan without congressional participation.¹⁰⁸ More recently, WLF attorneys are representing Timothy McCarthy in his \$46 million civil suit against the Hinckley family.¹⁰⁹

Like those of liberal groups in the mid-1970's, the activities of WLF and the other conservative firms have been fostered by a number of factors. First, several conservative organizations, including the Scaife Family Foundation, the John M. Olin Foundation, and the Joseph A. Coors Co., have contributed heavily to conservative firms. Just as the Ford Foundation facilitated the development of the liberal groups and thereby affected the direction they took, conservative funders have left their imprint on the conservative firms, leading many of them to become involved in social as well as business issues.

Second, these groups, like their liberal counterparts, generally share a similar outlook and thus can coordinate their efforts.¹¹⁰ But, in contrast to the liberal groups, they often try to stay out of each other's cases.¹¹¹ This attempt to avoid duplication of efforts has served to conserve scarce resources and allow staff attorneys to concentrate their efforts in other cases. Thus, it is uncommon,

107 See n. 106, *supra*. Additionally, the WLF litigates in a far wider range of issue areas. For example, unlike any of the other firms, it participates in crime victims and abortion litigation. In fact, it even has a Crime Victims Program.

108 444 U.S. 996 (1979).

109 Perl, *Way Cleared for Action on Suits Against Hinkley by 3 Victims*, Washington Post, (June 25, 1982) (reprinted by WLF).

110 In fact, the Washington, D.C. based Heritage Foundation sponsors monthly luncheons to bring a wide range of conservative litigators together to discuss strategy, cases pending, etc. Additionally, Hueter has noted that the NLCPI has continued to exist "so the right hand (knows) what the left hand (is) doing." Hueter interview, *supra* note 69.

111 According to Momboisse, for example, the PLF has "seldom gone into litigation that the other public interest law firms are doing because there's only a limited amount of manpower . . . when the same view is being presented." Momboisse interview, *supra* note 69.

particularly at the Supreme Court level, to see these groups participating in conjunction.

Finally, the activities of conservative firms have been fostered by governmental support, particularly from the Supreme Court and the executive branch. While liberal groups benefited during the Warren Court era, conservatives often have found the Burger Court to be receptive to their arguments. The Burger Court not only has become increasingly conservative in the areas of criminal justice, race discrimination, and economic liberties.¹¹² but several Justices now serving on the Court have voiced their support for conservative public interest law. As previously noted, Justice Lewis Powell urged the Chamber of Commerce to litigate on behalf of business.¹¹³ Justice William Rehnquist's opinions regularly support conservative interests.¹¹⁴ The lone Reagan appointee, Justice Sandra Day O'Connor, also has expressed support for conservative interests, both in her opinions and in correspondence with the NLCPI.¹¹⁵

Moreover, there are numerous examples of executive branch support for or ties to conservative firms.¹¹⁶ From the beginning, close advisors of President Reagan were instrumental in the founding of the PLF and, later, regional centers. In addition to the important positions held by Messrs. Watt and Meese, Roger Marzulla, who replaced Watt as the head of MSLF, was appointed as Special Counsel in the Land and Natural Resources Division of the Justice Department. Similarly, the Solicitor General of the United States, Rex E. Lee, was a former member of the Legal Advisory Board of MSLF.¹¹⁷

IV. AN ASSESSMENT OF THE STATE OF PUBLIC INTEREST LAW

As the preceding discussion reveals, the term "public interest law" can no longer be associated with liberal interests alone. Con-

112 Goldman, *Constitutional Law and Supreme Court Decision-Making* at 542-543 (1982).

113 See text at notes 71-73, *supra*.

114 See note 106, *supra*.

115 National Legal Center for the Public Interest, *What They Are Saying . . . About the Work of NLCPI* (hereinafter NLCPI, *What They Are Saying*) notes that Justice O'Connor has written "I will be pleased to receive and read the WATCH REPORT. It should help me keep abreast of current concerns affecting the judiciary."

116 It should also be noted that several former members of Congress also serve on the Boards of many regional centers thus providing important access to the *legislative* branch. For example, former U.S. Senator Clifford Hansen and former Rep. Wayne Aspinall both serve on the Board of Directors of MSLF.

117 In fact according to Solicitor General Lee, perhaps the "greatest measure" of the

servative interests are regularly represented by their own breed of public interest law firm. Yet, even though conservative and liberal firms have become frequent participants in litigation and share many similarities because of the nature of their constituencies, each faces a unique set of problems, and remedying these difficulties may lead to the eventual dominance of one interest over the other.

While funds for conservatives have increased rapidly, those earmarked for liberal public interest law are in decline.¹¹⁸ Funds provided by the Ford Foundation, which liberal public interest law firms depend upon so heavily, are being cut back dramatically. In 1979, Ford announced that it would terminate funding to ten public interest law firms.¹¹⁹ Additionally, the Legal Services Corporation (LSC), which has played a particularly important role in representing the poor and underwriting the operating budgets of several liberal firms, is under serious attack by the Reagan administration. In fact, most of President Reagan's appointments to the LSC's board of directors have been committed to dismantling it. Because of these problems, some public interest law firms are beginning to rely heavily on other financial sources, including awards of attorneys' fees.

The financial situation of conservative firms is in direct contrast to that of their liberal counterparts. Corporations and conservative foundations, many of which are reluctant to finance liberal firms, now contribute heavily to conservative firms which litigate in the public interest. Unlike their liberal counterparts, some conservative legal foundations have vowed not to accept or to seek attorneys' fees awards. According to Dan Popeo, head of Washing-

success of conservative litigators, is their placement of supporters in the executive branch. Interview with Rex E. Lee in Washington, D.C. (Sept. 13, 1982).

118 Singer, *Liberal Firms*, *supra* note 64; see also Clark, *After a Decade of Doing Battle, Public Interest Law Firms Show Their Age*, 12 *National J.* 1136 (1980). Firms particularly in danger are those funded by the Legal Services Corporation. They include: Center for Law and Education; Center on Social Welfare Policy and Law; Disability Rights Education & Defense Fund; Food Research and Action Center (FRAC); Handicapped Persons Legal Support Unit; Indian Law Support Center, Native American Rights Fund; Mental Health Law Project; Migrant Legal Action Program; National Center for Immigrants' Rights; National Center on Women and Family Law; National Center for Youth Law; National Consumer Law Center; National Economic Development and Law Center; National Employment Law Project; National Health Law Program; National Housing Law Project; National Senior Citizens Law Center; National Social Science and Law Center; and National Veterans Legal Services Project.

119 *Ford Foundation to Stop Aid to Public Interest Firms*, *Washington Post*, Sept. 14, 1979, sec. F at 1.

ton Legal Foundation, WLF will not accept awards of attorneys' fees since it believes that public interest law should be supported by the public.¹²⁰

Another area of concern to both types of firms is the recruitment and retention of expert counsel. Nevertheless, the problems faced by each differ substantially. One factor often noted as having been critical to the success of the traditional firms — their ability to attract creative young attorneys from Ivy League law schools — may be in jeopardy. As one commentator has noted, the increasing non-ideological nature of recent law school graduates may lead to a reduction in the pool of capable students eager to work in liberal firms.¹²¹ This decreasing number, coupled with the financial problems faced by liberal firms,¹²² may lead to the hiring of less than first-rate attorneys.

Conservative firms, on the other hand, pay higher salaries than their liberal counterparts and often do not demand total devotion to the "cause."¹²³ While these factors have increased the pool of lawyers willing to join conservative firms, some have criticized this approach to hiring and have noted that this lack of ideological commitment has been apparent in their litigation activities. For example, Office of Management and Budget Legal Counsel Michael J. Horowitz has claimed that these firms

... barely participated, if at all, in that war of ideas and ideologies that Irving Kristol has so articulately written about over the past five to ten years and about which I feel so strongly.

There are a few firms that are doing what the traditional public interest law movement has so successfully done: giving young lawyers a chance to vent their idealism, creating healthy climates within the groups themselves for internal, vigorous debate, and using whatever tools of law are available to pursue their own visions of the public interest, which are, of course, radically different from those which Ralph Nader pursued.¹²⁴

120 Interview with Dan Popeo, General Counsel, Washington Legal Foundation, in Washington, D.C. (Jan. 11, 1983).

121 Stover, *Public Interest Bar*, *supra* note 4.

122 *See supra* note 58.

123 Kristol, *Public Interest Law: An Overview* in Institute for Educational Affairs, *Perspectives on Public Interest Law*, Foundation Officers Forum, Occasional Papers, number 2 at 23-30 (1981) (hereinafter IEA, *Perspectives*). Also Kimble and Mellor interviews.

124 Horowitz, *In Defense of Public Interest Law* in IEA *Perspectives* at 7-8.

This problem has been further exacerbated by the failure of conservative public interest law firms to associate themselves with, or to draw upon, the talents of leading law schools.¹²⁵ In fact, in an evaluation of these firms, Horowitz emphasized the abject failure of conservative public interest law firms to become associated with the law schools near their offices.¹²⁶

In contrast, many liberal firms are either headquartered in a law school or closely affiliated with one.¹²⁷ These law schools not only provide additional, inexpensive legal services but also train liberal attorneys. This fusion of liberal public interest law with law schools,¹²⁸ however, was not accomplished overnight; instead, it was the result of decades-long attempts at cooperation. Whether conservatives will follow in this "tradition" remains to be seen.¹²⁹

Development of this tradition may hinge on conservative agreement on the need for such firms. While liberals and civil libertarians have recognized the imperative nature of resort to the courts, conservatives are not nearly so unanimous in opinion.¹³⁰

125 Interview with Michael Horowitz in Washington, D.C. (Jan. 13, 1983). It should be noted, however, that some firms are beginning to make inroads in this area. For example, the WLF is actively pursuing ties with law schools and academics, Washington Legal Foundation, untitled at 16 (1981). Additionally, some firms have attempted to recruit law school faculty to serve on their advisory boards. For example, Thomas Morgan, Dean of the Emory Law School serves on the Legal Advisory Board of SELF and formerly served on the Board of the Mid-America Legal Foundation.

126 Horowitz, *The Public Interest Law Movement: An Analysis with Special Reference to the Role and Practices of Conservative Public Interest Law Firms*. Mimeo prepared for the Scaife Foundation (1980).

127 See *supra* note 35. Additionally, the New Mexico Law School assisted the Mexican American Legal Defense and Educational Funds efforts to establish a branch office in Albuquerque, New Mexico. MALDEF, *Los Anos Dias* (no date). The WRP of the ACLU also has close ties with New York City area law schools.

128 Additionally, several law schools offer scholarships to students who plan to pursue careers in liberal public interest law. Perhaps one of the most well-known of those programs is the Root-Tilden Scholarship program offered at New York University. The Reginald Heber Smith Fellowship program administered at the Howard Law School also has played an important role in training public interest lawyers.

129 It should be noted, however, that several conservative firms now have internship programs to facilitate the training of, and strengthen ties with, several law schools. For example, in 1978, PLF established a College for Public Interest Law, which awards law school graduates with one to two year fellowships at PLF office. *Grants to College of Public Interest Law*, *The Reporter* at 3 (Sept.-Oct. 1980).

130 See generally, IEA, *Perspectives*, *supra* note 123. One area of particular controversy among conservative firms is the acceptance of attorneys fees awards particularly under the Equal Access to Justice Act. MSLF, for example, remains philosophically opposed to recovery from the government but according to one MSLF attorney, a failure to seek reimbursement for attorneys fees under the Equal Access to Justice Act would be "cutting off their nose to spite their face." Interview with MSLF staff attorney in Denver, Colo. (Sept. 4, 1982). Also, while PLF accepts awards of attorneys fees, in contrast to liberal firms, these awards account for "less than 5 percent of its income." Bob Best of PLF quoted in Jackson, *Paying Lawyers to Sue the Government* at 682. In contrast, NLCPI, has en-

Many conservatives have disapproved of judicial activism, regardless of its ideological direction. They have criticized not only the tactics of conservative firms,¹³¹ but also the need for such firms *per se*. One commentator has noted that he

think[s] they have been tactically wise and strategically unwise. Tactically wise because by cluttering up the courts with ideological pursuits, they have at least made clear to some neutrals left in this country that conservatives can screw up the legal system as well as liberals — making it possible, in the long run, for a consensus to develop again in the country which is hostile to the overuse of the legal process.¹³²

While interest group activity has not necessarily produced an “overuse of the legal process,” it clearly has affected the number of cases brought and, perhaps more importantly, has shaped the way in which issues are defined and presented to the courts. Thus, while liberal firms enjoyed a near monopoly on ideology in the late 1960’s and early 1970’s, today both liberals and conservatives are involved in structuring cases for later appeal. Which interest may ultimately prevail may depend upon which group can reconcile its present problems.

couraged member firms not to seek recovery of fees. In fact, NLCPI attorneys have rejected requests from liberal firms to work cooperatively for increasing legislative and judicial acceptance of fee provisions. Hueter interview.

131 Horowitz, for example, has specifically criticized the regional foundations’ reliance on amicus curiae briefs because he believes that their briefs “made no substantial difference in outcomes,” but were merely propaganda tools. *In Defense of Public Interest Law* in IEA, *Perspectives* at 7-8.

132 Silverman, *Public Interest Law vs. Judicial Self-Restraint* in IEA, *Perspectives*, *supra* note 123 at 18; *see also A Symposium on Judicial Activism: Problems and Responses*, 7 HARV. J.L. & PUB. POL. 1 (1984).

