

3-1-2005

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Recommended Citation

Foden, Timothy L., "The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement" (2005). *Connecticut Public Interest Law Journal*. Paper 30.

http://lsr.nellco.org/uconn_cpilj/30

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The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement

TIMOTHY L. FODEN[†]

I. INTRODUCTION

Perform a brief Westlaw or Lexis search on the freedom-based public interest movement and you will come up with very little, if anything at all. Similarly, the typical survey class on public interest law offers no information on the more conservative and libertarian wing of the public interest movement. This lack of readily available information prompts a number of questions. Who are the people behind such organizations? Why is it difficult to find information on their work? What is the movement's agenda?

A brief look at a few of these organizations reveals a number of different goals. Freedom-based public interest groups advocate for traditionally conservative causes. Groups such as the Institute for Justice and the Pacific Legal Foundation have launched litigation campaigns against such institutions as the welfare system and the environmental regulatory regime. Other organizations such as the Alliance Defense Fund litigate for the insertion of religious symbols and practices in public spaces. Running the gamut of conservative causes, the freedom-based public interest legal movement has co-opted the once exclusively liberal term, public interest.

The Orwellian name-game behind the self-asserted title “freedom-based public interest law movement”¹ (“FBPILM”) is heavily responsible for the newly contested definition of public interest. The reason why there is a lack of ascertainable information on these groups is linked to their seemingly innocuous assumption of the term “public interest.” When thinking of public interest, the average lawyer or law

[†] The author would like to thank Professor Richard Wilson for his encouragement of a peculiar topic that required a somewhat journalistic approach. The author would also like to thank Chip Mellor and Trent England for graciously meeting with him and sharing their views. Last, the author would like to thank Todd Young, who took the time to give detailed responses to many e-mail inquires.

¹ See, e.g., Lee Edwards, *The First Thirty Years*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 1, 1 (Lee Edwards ed. 2004).

student thinks of the traditional liberal institutions such as the American Civil Liberties Union (“ACLU”), legal aid societies, and public defender services. However, organizations aimed at advancing conservative goals also refer to themselves as public interest organizations. This appropriation of a traditionally liberal name is the most likely source of confusion.

There is an important distinction between the freedom-based public interest organizations and those traditionally associated with the term public interest—ideology. The freedom-based public interest organizations, “reflect New Right values in the judicial system”² by striving to effect tenets of conservative policy through the courts. In their own terms, these tenets include the protection of economic rights, securing a place for religion in the public square, suing to protect “traditional moral values,” and protecting the rights of private property owners.³ Roughly translated, this means that the FBPILM opposes liberal economic policies, the presence and acceptance of liberal sexual attitudes, and attempts to develop land for the common good or for environmental purposes. These principles are in opposition to those traditionally connected with the public interest movement. Nonetheless, these organizations feel that their collective mission is truly in the public interest.

This article will consider what I believe to be the next great issue in public interest law—the battle for the public interest. With a growing cadre of conservative institutions appropriating the title public interest and working to advance an agenda that is typically antithetical to groups that traditionally bear that label, battle lines are being drawn.

Historically, liberal public interest organizations faced opposing counsel representing the state or corporations. Now, however, these public interest groups are more often finding themselves opposed by well-funded and highly motivated conservative organizations. Equally as interesting, the FBPILM also frequently positions itself in opposition to the state, but in a different capacity than the traditional liberal groups.

This article not only seeks to answer broad questions on the origins and underlying ideology of the FBPILM and provide an objective account of the operations, goals, and methods of these organizations, but also to shape the current discourse by providing a critique that is needed in light of these organizations’ ability to shape public perception through

² Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1455 (1984).

³ See EDWIN MEESE III, *Foreword* to BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT iii (Lee Edwards ed. 2004).

publication and public relations efforts. The article will give a brief history of the movement and a survey of some of the more prominent freedom-based public interest legal organizations and will also examine the extent to which conservative public interest groups have appropriated liberal methodologies and the concept of public interest law. Additionally, I will examine the FBPILM's concerted attack on the organizations and accomplishments of the traditionally liberal public interest movement. Finally, this article seeks to define the conservative legal movement's narrow conception of the public interest and how it reflects the movement's ideological foundations and the interests of the movement's founders.

II. WHERE DID THEY COME FROM?: THE ORIGINS OF THE FREEDOM-BASED PUBLIC INTEREST MOVEMENT

Much as the early traditional public interest groups were formed as a reaction against unjust social conditions, the freedom-based movement also emerged as a reaction to powerful social forces. In the case of the conservative public interest legal movement, however, the source of their motivation was the success of the traditional legal public interest movement.⁴ The reactionary nature of the FBPILM, combined with its roots in the ideology of the "new right," gives the movement its primary identity.

Historically, public interest law was the province of organizations pursuing liberal causes.⁵ Mostly originating at the turn of the twentieth century, organizations such as the ACLU, National Association for the Advancement of Colored People ("NAACP"), and the various legal aid societies set the bar for the practice of public interest law with their successes in the courtroom. Traditional public interest organizations pioneered the use of litigation as a tool of social change. Covering a variety of social causes including segregation, free speech, and the incorporation of international human rights standards into American law, the efforts of these organizations culminated in a number of dramatic societal changes in the later half of the twentieth century. Much of this success took place in the 1960s and early 1970s, when traditional public interest groups saw huge gains in areas such as civil rights, rights of the

⁴ See *id.* at ii.

⁵ Houck, *supra* note 2.

accused, and environmental protection. Eventually, however, the success of these groups also “set the stage for a backlash.”⁶

This backlash came in the form of the birth of the FBPIILM. Most commentators agree that the conservative public interest movement began in 1973 with the creation of the Pacific Legal Foundation (“PLF”). Indeed, many important leaders in the current FBPIILM view the creation of the PLF as the seminal moment in the movement’s brief history.⁷ In 1971, the United States Chamber of Commerce (“Chamber”) asked Lewis F. Powell, Jr., then a corporate lawyer practicing in Virginia, to draft a document explaining his views on problems facing the American business community. In response, Powell penned a vitriolic essay entitled “Attack on American Free Enterprise System” in which he decried “the greening of America” and labeled Ralph Nader the “single most effective antagonist of American business.”⁸ Further illustrating the reactionary nature of the FBPIILM, the Powell memorandum laid out an ambitious counter-offensive that called for the creation of conservative public interest groups to defend the business community in the courts. The Chamber widely disseminated the memorandum, and it was well-received by the leaders of the California Chamber of Commerce who eventually formed the network that gave birth to the Pacific Legal Foundation.⁹

This network consisted largely of California attorneys and civic leaders, many of whom were part of then-Governor Ronald Reagan’s welfare reform team.¹⁰ These leaders of California industry asked Ronald Zumbun, the deputy director for legal affairs at the California Department of Social Welfare to draft a formal proposal that eventually became the Pacific Legal Foundation’s Articles of Incorporation.¹¹ Zumbun and others felt that “a serious imbalance” existed in the public interest law field, so he, with the help of businessman John Fluor and

⁶ Houck, *supra* note 2, at 1455-1456.

⁷ Telephone Interview with Chip Mellor, Co-Founder and President, Institute for Justice (Nov. 23, 2004); Email Interview with Roger Clegg, Vice President and General Counsel, The Center for Equal Opportunity (Nov. 23, 2004); Telephone Interview with Trent England, Legal Policy Analyst, The Heritage Foundation (Nov. 24, 2004).

⁸ Houck, *supra* note 2, at 1457. *See also* CHARLES A. REICH, THE GREENING OF AMERICA; HOW THE YOUTH REVOLUTION IS TRYING TO MAKE AMERICA LIVABLE (1970).

⁹ Houck, *supra* note 2, at 1458-60.

¹⁰ Edwards, *supra* note, 1 at 10-11.

¹¹ *Id.* at 11.

future United States Attorney General William French Smith, set out to remedy the perceived imbalance.¹²

Fluor also had personal motivations to develop a legal foundation more amenable to his interests as a businessman. At the time of the PLF's founding, California business moguls like Fluor were increasingly troubled by the expansion of regulations affecting their investments, especially with regard to the environment. In 1972, environmental public interest groups used the courts to delay offshore oil drilling in the Gulf of Mexico and won injunctions against an Alaskan oil pipeline.¹³ Following the creation of the PLF, Fluor's "stature and vision" would become a "key to the PLF's early success,"¹⁴ but those attributes may not have been as important as his skills as a rainmaker. As stated by a former PLF president, Fluor "almost single-handedly raised the seed money to get us launched. He got his ten buddies, or whatever it was, to return favors and give some money to open the doors."¹⁵ With these kinds of business moguls responsible for the creation of the nation's first conservative public interest group, the logical conclusion is that the PLF was meant almost as a private law firm for corporate interests, rather than an organization dedicated to helping the larger general public.

The goals of the PLF were rooted in conservative ideology and the private interests of its big business backers. Nowhere is this more obvious than in the statements of PLF members themselves. In addressing a gathering of corporate counsel in 1979, PLF Chairman Joseph J. Burris appealed to the crowd, "[b]ecause of our special position, and because many of you often prefer to maintain a low profile where direct confrontation with government agencies is concerned, we are the logical spearhead to do the job."¹⁶ The early actions of the PLF "reflected the priorities of its sponsors", namely addressing growing environmental activism.¹⁷ Included amongst these early tasks were the organizations' support for continued use of DDT, the use of public grazing lands without environmental review, advocacy for the use of herbicides in national forests, and fending off what they considered overzealous environmentalists.¹⁸ The PLF would also advocate a

¹² *Id.* at 10-11.

¹³ *See id.* Houck, *supra* note 2, at 1458-60.

¹⁴ Edwards, *supra* note 1, at 11.

¹⁵ Houck, *supra* note 2, at 1460.

¹⁶ *Id.* at 1454-55.

¹⁷ *Id.* at 1461.

¹⁸ *Id.*

significant reinterpretation of the Fifth Amendment's Takings Clause to protect private property rights.¹⁹ The early operations of PLF and its ever-increasing budget demonstrated that "[b]usiness interests were being served" and that "[b]usiness interests were going to finance the service."²⁰

The PLF's success against what it termed "radical environmental groups" prompted the foundation to expand its efforts to other regions of the U.S. To facilitate this expansion the founders of the PLF, with the help of the rainmaker Fluor and the ubiquitous Richard Mellon Scaife, created the nationwide National Legal Center for the Public Interest in 1975.²¹ Viewing the term public interest as encompassing both ends of the ideological spectrum, the National Legal Center's purpose was to replicate the PLF model in other regions. It went on to found the Mountain States Legal Foundation, what is now the Atlantic Legal Foundation, and the Landmark Legal Foundation, covering the Great Plains states, amongst others.²² Again demonstrating the movement's historically reactionary roots, the National Legal Center helped create these regional organizations by meeting with regional chambers of commerce and informing them of "the clear and present dangers of public interest law" and asking them to help create a counter-force.²³

Much like the early liberal public interest movement, the freedom-based movement sought to create an image of the struggling upstart, capitalizing on the early financial disparity between the two ends of the ideological spectrum in the public interest field. Lee Edwards, a scholar at the Heritage Foundation, invoked this image when he discussed the organizational and funding gulf between liberal public interest groups and freedom-based organizations: "[a]s late as 1988, conservative legal groups had a total of fewer than 50 litigators and combined budgets of less than \$11 million, while their philosophical opponents boasted hundreds of lawyers and federal and state funding in the hundreds of millions of dollars."²⁴ By 1989, however, the number of conservative public interest litigators equaled that of liberal public interest attorneys at that in 1969.²⁵

¹⁹ *Id.*

²⁰ Houck, *supra* note 2, at 1462.

²¹ *Id.* at 1475-1476.

²² Edwards, *supra* note 1, at 11.

²³ Houck, *supra* note 2, at 1476.

²⁴ Edwards, *supra* note 1, at 12.

²⁵ *See id.*

Whether such a struggle for financial solvency ever took place is doubtful. A review of the financial interests behind the original regional legal foundations, such as the PLF and the Mountain States Legal Foundation (MSLF), reveals that the FBPIILM has a history of attracting generous benefactors. While there are numerous examples of corporate involvement in the genesis of freedom-based public interest groups, one example illustrates the point that “financial struggle” is a relative expression. The MSLF began in 1977 with a grant from the National Legal Center for the Public Interest (itself the recipient of donations by Texaco, Exxon, the three major automakers, and other corporate interests) of \$58,000.²⁶ In 1978, over 175 corporations made donations of \$500 or more, and corporations such as Coors and Amoco supplemented these contributions with larger grants.²⁷ Within four years of its founding, MSLF had a gross revenue of \$1,250,000.²⁸ Not only does it appear that organizations such as MSLF never truly struggled in terms of resources, the corporate funding behind such organizations “reflects the mission.”²⁹

Despite these infusions of cash, the FBPIILM still perceives itself as engaged in a struggle against formidable opposition. These organizations view their challenges as greater than that of their liberal opponents, because the conservative groups must combat heavily staffed and funded government agencies that often team with the preexisting liberal or radical public interest organizations.³⁰ Additionally, conservative public interest groups believe that an activist judiciary and a liberal mass media further impede their path to success.³¹ However, claims of struggle and hard financial times seem duplicitous considering that much of the FBPIILM receives strong backing from business institutions.

The conservative legal movement enjoyed its first critical successes during the Reagan administration, in the mid 1980s. The conservative groups helped to successfully petition the Supreme Court for certiorari on a number of “individual rights” cases³² and helped defeat three California Supreme Court justices in their bids for

²⁶ Houck, *supra* note 1, at 1478, 1476.

²⁷ *Id.* at 1478.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Edwards, *supra* note 1, at 12-13.

³¹ *Id.*

³² *Id.* at 13.

reelection.³³ The PLF claimed victory in a case that defeated private property regulation using the Fifth Amendment takings clause.³⁴

III. HISTORY: EXPANSION

Following the Pacific Legal Foundation's creation in 1973, public interest groups with a conservative or libertarian philosophy began to proliferate. These organizations began to tackle a number of issues that related to the larger conservative agenda. The Landmark Legal Foundation, the Institute for Justice, and a number of other groups began to wage courtroom battles for school vouchers.³⁵ The Alliance Defense Fund spearheaded an attempt to preserve Judeo-Christian principles in American society.³⁶ Most recently, the FBPILM played a large role in the debate over affirmative action, with the Center for Individual Rights representing the petitioner in *Grutter v. Bollinger*,³⁷ one of the University of Michigan affirmative action cases.³⁸ The cornerstone of the movement, however, remains the so-called "battle for economic liberty," an effort by conservative legal groups to improve the business climate and lessen government regulation of business through the courts.

In the 1980s, a number of umbrella organizations began networking and coordinating the various issue-based conservative public interest litigation groups. Organizations like The Federalist Society, the Heritage Foundation, and the Cato Institute work to further the movement in a non-litigative capacity. The Heritage foundation provides a forum for brief conferences, strategy sessions, and moots conservative advocates appearing before the Supreme Court.³⁹ In addition, the Cato institute works through the media and other outlets to "change the climate of ideas" so that the public will become more receptive to the litigation efforts of the FBPILM.⁴⁰

With the help of such umbrella organizations, the FBPILM has proliferated and diversified. In addition to the expanding cadre of public

³³ *See id.*

³⁴ *See id.* (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)).

³⁵ *See id.* at 15-17.

³⁶ *See id.* at 18-19.

³⁷ 539 U.S. 306 (2003).

³⁸ *See* Brief for the Petitioner at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

³⁹ Edwards, *supra* note 1, at 39; England Interview, *supra* note 7.

⁴⁰ Edwards, *supra* note 1, at 39.

interest groups addressing economic issues, groups addressing social issues from a conservative perspective have also become a force in this relatively young movement. Working ever closer to achieving organizational and financial parity with the traditional liberal organizations, the FBPIILM is poised to become a viable ideological antagonist to groups originally recognized as public interest organizations.

IV. WHO ARE THEY?: A BRIEF LOOK AT SOME OF THE CAUSES AND ORGANIZATIONS

The constituent groups of the Freedom-Based Public Interest Legal Movement now speak to a variety of social and economic issues. However, there is a somewhat distinct cleavage between those organizations with economic interests and those that focus on social issues. Working along this cleavage, this section looks to provide both a survey of FBPIILM groups and a critique of their motives and ideological foundations.

A. *The Alliance Defense Fund and “Religious Liberty”*

The main force behind the social prong of the conservative public interest movement are groups fighting for self-termed “religious liberty.” Groups like The Rutherford Institute, The American Center for Law and Justice (ACLJ), and The Becket Fund for Religious Liberty advocate for an increase in religion’s place in American society and for its recognition in government.

While a number of these groups purport to support no particular religious sect, the clear majority advocate on behalf of evangelical Christianity. The Religious wing of the Freedom-Based Public Interest Movement began, primarily, with the efforts of evangelical Protestants and other Christians to fight what they perceived as an encroaching government threat to their ability to practice their faith in the United States.⁴¹ The roots of the religious movement’s litigation efforts date back to *Widmar v. Vincent*,⁴² a case concerning the right of students to participate in a weekly evangelical Christian service at the University of

⁴¹ Alan E. Sears, *Defending Religious Liberty*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 67, 67-68 (Lee Edwards ed. 2004).

⁴² 454 U.S. 263 (1981).

Missouri-Kansas City. The religious public interest movement claimed *Widmar* as a success because the Court allowed the students to hold their service⁴³, rejecting what the movement termed an, "extreme 'separation of church and state.'"⁴⁴

However, arguing in favor of increased tolerance of the Christian faith in the public square is only a segment of the religious public interest movement's agenda. These groups also oppose groups they feel are hostile to religion. For instance, groups like the Alliance Defense Fund ("ADF") feel particularly threatened by traditional liberal public interest organizations:

Groups such as the [ACLU] seized the opportunity to initiate a systematic campaign of litigation, disinformation, and intimidation to silence people of faith and stop government acknowledgement of religion with their extreme interpretation of the Establishment Clause.⁴⁵

The argument that a rival organization is attempting to "intimidate" people of faith not only illustrates the reactionary foundations of even the social wing of the FBPIILM, it showcases what groups like ADF feel is in the public interest: a less secular society and a watered down version of the establishment clause.⁴⁶

Religious public interest groups' conception of the public interest also extends beyond their own practice of religion to other social issues. ADF has identified attempts to legalize pornography, and, "homosexual and other sexual behavior that most Americans [find] immoral or contrary to their faith and beliefs,"⁴⁷ as catalysts behind the growing religious public interest movement. This illustrates the fact that these groups are not simply attempting to argue for religious freedom, but to "preserve a traditional American legal worldview rooted in Judeo-Christian principles."⁴⁸ It is clear from the above, that the religious wing of the FBPIILM feels that the elimination of pornography and homosexuality and a return to traditional Christian values is in the public interest.

⁴³ *Widmar*, 454 U.S. at 277-78.

⁴⁴ Sears, *supra* note 41, at 67-68.

⁴⁵ *Id.* at 68.

⁴⁶ *See id.* *See also* U.S. CONST. amend. I.

⁴⁷ Sears, *supra* note 41, at 69.

⁴⁸ Sears, *supra* note 42, at 73.

B. Economic Liberty and the Institute for Justice

The majority of freedom-based public interest groups are in pursuit of what they term economic liberty. These economic or business-based public interest organizations feel that government and environmental interests constrain free enterprise. Therefore, unbridled economic development and unrestricted use of private property are both in the public interest. Coincidentally, if the public interest benefits from the success of American business and economic liberty, so do the corporate economic backers of FBPILM organizations pursuing economic liberty.

The Institute for Justice (IJ) best articulates what the term economic freedom means to the FBPILM. Founded by William “Chip” Mellor and Clint Bolick in 1991, the IJ advocates, through litigation, for what it calls “The Four Pillars of the American Dream.” These pillars are economic liberty, private property rights, free speech and school choice.⁴⁹ Housed in a beautiful office just a block from the White House, the IJ receives most of its \$6.5 million dollar operating budget from individuals and family based foundations like the Scaife and Bradley foundations.⁵⁰

When IJ speaks of economic freedom, it refers mainly to aiding the growth of entrepreneurship through deregulation and the abolition of arcane and encumbering laws. Such was the case when IJ took up the cause of Denver taxi cab drivers attempting to break through that city’s taxi monopoly in the early 1990’s.⁵¹ There the Institute failed to achieve its goals of breaking up the monopoly entirely, but it was successful in creating a place in the market for its particular clients.⁵² Economic freedom, however, also means combating what the IJ views as “the flipside of economic liberty,”⁵³ welfare programs. In Camden, New

⁴⁹ Mellor Interview, *supra* note 7.

⁵⁰ *Id.*

⁵¹ Press Release, Institute for Justice, Institute for Justice Files Test Case to Break Up Taxicab Monopoly, Protect Economic Liberty (Jan. 28, 1993), *available at* http://www.ij.org/economic_liberty/denver_taxi/1_28_93pr.html (last visited May 2, 2005).

⁵² Mellor Interview, *supra*, note 7.

⁵³ *Id.*

Jersey, IJ combated the local Legal Service Corporation affiliates on behalf mothers that “wanted off welfare” and wanted reform.⁵⁴

Additionally, the IJ pursues a vigorous campaign against abuse of eminent domain laws. This program works with a subsidiary grassroots campaign known as “The Castle Coalition” to help private landowners facing the taking of their land in order to clear way for municipally sponsored private development.⁵⁵ In this capacity, the IJ helps individuals, often middle-class, who hope to retain their property or business. While these efforts do not necessarily reach out to a broad base of the population, much of which continues to rent, they are nonetheless commendable.

Other economic liberty groups, however, do not necessarily share the IJ’s relatively modest goals or middle-class client base. A 1984 study by Professor Oliver A. Houck found that a majority of the cases litigated by PLF, Mountain States Legal Foundation, and the New England Legal Foundation did not qualify as public interest under the Internal Revenue Service’s standards. This means that these cases were ones in which the clients could most likely afford the costs of litigation themselves, or there were sufficient connections between the case and the interests of donors to the organization.⁵⁶ An example of this kind of economic freedom litigation is the work of the Mountain States Legal Foundation which advocated positions that “directly benefited corporations represented on its board of directors, clients of firms represented in its board of litigation, or major contributors to” their budget.⁵⁷

C. *The Center for Equal Opportunity and the Issue of Affirmative Action*

As indicated earlier, the freedom-based public interest movement weighed in heavily on recent debates over affirmative action programs. The FBPIILM takes credit for stemming widespread “discrimination through quotas and other preferences.”⁵⁸ A number of these

⁵⁴ *Id.*; Chip Mellor, Institute For Justice, *Carry the Torch* (1996), available at http://www.ij.org/publications/torch/ctt_3_96.html (last visited May 2, 2005).

⁵⁵ Mellor interview, *supra* note 7. See also <http://www.castlecoalition.org>.

⁵⁶ Houck, *supra* note 2, at 1460-1506, 1546.

⁵⁷ *Id.* at 1481.

⁵⁸ Roger Clegg, *Equality Under the Law*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 97, 97 (Lee Edwards ed. 2004).

organizations have litigated against affirmative action in high profile cases. The Mountain States Legal Foundation argued against affirmative action “set aside” programs in *Adarand Constructors v. Pena*.⁵⁹ Additionally, the Washington Legal Foundation played a leading role in *Podberesky v. Kirwan*,⁶⁰ a Fourth Circuit case challenging scholarships based on race and also filed a number of Amicus briefs in the case. And in 1997, the Individual Rights Foundation’s represented a white police lieutenant against the city of Los Angeles in a race discrimination claim.⁶¹

The role of the FBPILM in the fight against affirmative action, however, is not limited to litigation. The Center for Equal Opportunity (“CEO”) is a non-litigating organization that aims to eliminate racial quotas and preferences, and works to eradicate bilingual education and other “anti-assimilationist” policies.⁶² Believing that affirmative action programs ultimately harm the beneficiaries, the group challenges such programs by writing letters to universities, municipalities, and corporations, and by alerting government bodies to discriminatory or illegal affirmative action programs.⁶³ Through these methods and others, non-litigating organizations push the FBPILM’s conservative agenda in the area of affirmative action.

V. HOW DO THEY DO IT?: METHODOLOGY AND CO-OPTION

Conservatives, and therefore the FBPILM, have had a long antipathy towards what they term judicial activism, so it seems counterintuitive that the movement would take up the method of the test case and other staples of traditional public interest litigation. However, that is exactly what the FBPILM has done. In co-opting the name public interest, conservative groups adopted some of the methods of the left and created new methods but such practices are antithetical to their conservative ideology that eschews any form of activism. In many ways, the conservative public interest law organizations patterned their practice on the work done by pioneering liberal organizations, albeit with better

⁵⁹ 515 U.S. 200 (1995).

⁶⁰ 38 F.3d 147 (4th Cir. 1994); Clegg, *supra* note 58, at 114.

⁶¹ Clegg, *supra* note 58, at 114-119; *see also* David Rosenzweig, *White LAPD Officer Awarded \$20,000 In Job Bias Lawsuit*, LOS ANGELES TIMES, July 16, 1998, at B5.

⁶² Clegg Interview, *supra* note 7.

⁶³ *Id.*

funding.⁶⁴ Through such actions, conservative organizations have co-opted the term public interest, turning it into an ideological battleground, rather than just another expression for leftist legal organizations.

A. *Funding*

Before looking into the methods which FBPIILM groups utilize to attain their objectives, it is important to look at the funding that allows them to employ such methods. Much like their liberal opponents, conservative public interest groups receive a great deal of their funding from foundations.⁶⁵ Established by major corporations, these foundations contribute heavily to the operating budget of FBPIILM organizations, particularly those with economic liberty objectives. Private foundations such as the Castle Rock and Scaife Foundations contribute approximately thirty-eight million dollars to these broad-issue organizations.⁶⁶ Unlike most traditional liberal public interest groups, however, many FBPIILM organizations received substantial funding from large and diverse corporations drawn to their tax-exempt status.⁶⁷ While many organizations such as Institute for Justice, receive a small percentage of their funding from direct corporate contributions,⁶⁸ the Pacific Legal Foundation has directly solicited businesses.⁶⁹ Direct corporate contributions, plus the corporate origins of the family foundations raise questions as to whether the goals of these organizations comport with the interests of the entire public.

B. *Methodology*

I. *Activism*

What makes the conservative adoption of litigation so peculiar is the overall sentiment amongst conservatives that activism, both from lawyers and judges, is normatively bad. An example of this feeling can be found in Lee Edwards' article about the FBPIILM, "*The First Thirty*

⁶⁴ E-mail Interview with Todd Young, Southeastern Legal Foundation (Nov. 30, 2004).

⁶⁵ Houck, *supra* note 2, at 1456.

⁶⁶ See John P. Heniz et al., *Lawyer for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5, 22 (2003).

⁶⁷ Houck, *supra* note 2, at 1456.

⁶⁸ Institution for Justice, *Institute Profile: Who We Are*, at <http://www.ij.org/profile/index.html> (last visited May 2, 2005).

⁶⁹ Houck, *supra* note 2, at 1462.

*Years.*⁷⁰ This article is littered with critical references to both activist judges who play the role of policy maker from the bench and activist legal organizations that have deviated from providing everyday legal services to the needy to staging frivolous impact litigation efforts. According to Trent England, a policy analyst at the Heritage Foundation, the concept of judicial activism causes some level of schism in the FBPIILM.⁷¹ While hard-line conservatives like Judge Posner go out of their way to defer to the political branches, England feels that most conservatives believe in the right of judges to strike down unconstitutional legislation as long as they are not creating social policy.⁷² This feeling is not universal, however, as the more libertarian groups of the FBPIILM have come to embrace a more activist judiciary, flying in the face of the traditional conservative values.⁷³

2. *Test Cases and Selectivity*

Advocating for a cause typically means employing the test case. Although the test case is a hallmark of activist liberal public interest work, the conservative groups have utilized this method with a great deal of selectivity. FBPIILM groups are so highly selective when it comes to choosing clients for test cases, that questions arise as to whether these organizations are advancing their client's agenda or their own. Of course the cause/client dilemma also resonates within liberal circles,⁷⁴ but this does not detract from the contention that FBPIILM groups may be advancing an agenda that is neither in their clients' interest nor in the public's.

⁷⁰ Edwards, *supra*, note 1.

⁷¹ England Interview, *supra* note 7.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Nancy D. Polikoff, *Am I My Client? The Role Confusion of a Lawyer*. 31 HARV. CIV. RTS.-CIV. LIB. L. REV. 443-469 (1996) (discussing the inner conflict of an attorney who is part of the Gay and Lesbian movement, but is also an "insider" in the legal system, representing movement members through a client-centered approach); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in Social Desegregation Litigation*. 85 YALE L.J. 470-493 (1976) (discussing the travails of litigating social desegregation cases where the lawyer must determine how to represent the diverse interests of individual clients and the class as a whole, as well as the dilemma of advancing a cause but not necessarily alleviating the plight of an individual client, and the ramifications of such decisions under the Rules of Professional Conduct.).

Chip Mellor, of the Institute for Justice, outlines his organization's requirements for accepting a case—"sympathetic clients," "outrageous facts," "evil villains," and "simple facts."⁷⁵ This formula is part of a strategic blueprint that helps the IJ play cases out in front of the media. Mellor, like any liberal public interest lawyer, acknowledges the difficulties of client/cause litigation, "there is always a potential conflict."⁷⁶ However, Mellor adds that because of the IJ's selection requirements, the client/goal conflict usually creates tension, but is rarely a problem.⁷⁷

Other organizations display such a high degree of scrutiny in selecting their cases, that it is clear that the interests of the organization come first. For instance, the Southeastern Legal Foundation ("SLF") turns away ninety-seven percent of all case inquiries.⁷⁸ According to Todd Young of SLF, the organizations' "issue and case selection process does not contemplate the likelihood of financial support from" any contributors.⁷⁹ Nonetheless, the SLF seems to share many of the goals of its contributors. An early SLF case illustrates this point. In *Southern Appalachian Multiple Use Council v. Bergland*⁸⁰ the foundation represented a commercial lumber and mining organization in a challenge to a federal decision to withdraw parts of a U.S. forest from multiple uses. Several companies associated with SLF, including SLF board members and major contributors, stood to gain from the maintenance of the multiple-use classification.⁸¹ Clearly, these organizations must have been within the three percent of clients that meet the SLF's stringent selection criteria.

3. *Amicus Briefs*

Another method that the FBPIILM uses to obtain its goals is the filing of amicus briefs. The conservative public interest movement views the amicus curiae brief as an excellent tool to "counteract the growing tendency of . . . judges to succumb to pressure from liberal . . . sources to rule according to elitist 'fashions of the moment.'"⁸² A good

⁷⁵ Mellor Interview, *supra* note 7.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Young Interview, *supra* note 64.

⁷⁹ *Id.*

⁸⁰ 15 ERC (BNA) 2049, 11 ELR 20679 (W.D.N.C. 1981).

⁸¹ Houck, *supra* note 2, at 1500.

⁸² Meese, *supra* note 3, at iv.

example of the utility of the Amicus Brief was the affirmative action decision in *Grutter*. The Cato Institute, PLF, and the Center for Individual Freedom all filed briefs that echoed the argument made by the equally conservative Center for Individual Rights.⁸³ This is an example of the concerted efforts by conservative organizations to not only take up a fight with the liberal public interest organizations, but to challenge them using methods the liberals helped pioneer.

C. *The Takings Clause*

Despite the conservative animus towards activist judicial decision-making, the freedom-based public interest movement has successfully advocated for an expansive interpretation of the Fifth Amendment takings clause in order to accommodate their principles concerning private use of land.⁸⁴ The takings clause reads that property will not “be taken for public use, without just compensation.”⁸⁵ This simple sentence has led to messy judicial doctrines. Commentators agree that the framers intended the clause to center on the physical invasion of property, such as harboring troops or the building of a road.⁸⁶ The clause was read quite conservatively until the early 1980s when the conservative public interest movement, fearful of environmentalists, began to use the doctrine not for compensatory purposes, but to oppose governmental regulation.⁸⁷ Employing the ideas of University of Chicago professor Richard Epstein, the FBPIILM introduced the courts to an absolutist view of the takings clause, “if any part of a property interest [was] diminished, if you lost an inch of space or a dollar in value, [there is] a takings claim.”⁸⁸ To effect this new doctrine, the movement set about creating “a new level of judicial intervention far greater than . . . we ever have had.”⁸⁹ Not only was the goal here the transformation of

⁸³ See Brief for the Petitioner at 1, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

⁸⁴ Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 342-44 (2004).

⁸⁵ U.S. CONST. amend. V.

⁸⁶ *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551-52 (1870); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 515-16 (1998).

⁸⁷ Houck, *supra* note 84, at 342-44.

⁸⁸ *Id.* at 345 (citing RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985)).

⁸⁹ *Id.*

long-standing doctrine, but, the results were favorable, with courts interpreting the doctrine to include partial and temporary takings.⁹⁰ It would therefore seem that conservative distaste for judicial activism does not apply when considering issues of private property.

D. Co-Option

The co-option of liberal methods in achieving conservative goals raises the issue of whether the FBPILM has also co-opted the term public interest. Even the preeminent leader of the movement, former Attorney General Edwin Meese recognizes that, for some time, the term public interest was used to describe attorneys who were liberal in their political views.⁹¹ It would therefore seem that conservative legal groups appropriated not only the litigation methods of the left, but also the name by which they are traditionally associated.

Unsurprisingly, the FBPILM does not believe that they have encroached on traditional liberal territory. Todd Young, of the SLF, states that conservative groups have “an equal or better” claim to the nomenclature public interest because of their representation of individual over group rights.⁹² Trent England, of the Heritage Foundation believes that the conservative public interest movement is simply carrying on the fine tradition of public interest groups, like the NAACP, that, in recent decades have stopped pursuing what is truly in the public interest.⁹³ England feels that the left has not placed a brand upon the term public interest and that it is open to everyone’s use.⁹⁴ While these groups recognize that public interest “was totally the province of the left,” they feel that their goals are in the public interest and therefore, the term has evolved to take on new meaning.⁹⁵ This evolution narrows the definition of the public interest considerably, and in doing so, it co-opts and transforms conceptions of public interest law.

⁹⁰ *Id.* at 346-347.

⁹¹ Meese, *supra* note 3, at ii.

⁹² Young Interview, *supra* note 64.

⁹³ England Interview, *supra* note 7.

⁹⁴ *Id.*

⁹⁵ Mellor Interview, *supra* note 7.

*VI. WHO'S AGAINST US?: FIGHTING THE TENETS OF THE TRADITIONAL
PUBLIC INTEREST MOVEMENT*

Adding to the confusion created by the battle for the public interest title is the fact that the FBPIILM positions itself to combat the traditional liberal organizations as often as possible. Considering the fact that the very genesis of the FBPIILM was a reaction to the accomplishments of the left, this should not be surprising. All of the organizations polled for this article regularly find themselves on the opposite side of the courtroom from the traditional public interest organizations such as the NAACP and ACLU.⁹⁶ In fact, one leader of a conservative public interest organization was even quoted to say, "if I could meet on the Potomac River on a raft in the middle of the night with the ambassador of our counterparts on the left, and if we could agree to sever our roles, I would unhesitantly agree to such a treaty."⁹⁷ Although conservative organizations often find themselves in league with liberal groups on certain issues, the real story is the record of FBPIILM attacks on the traditional tenets of the public interest legal movement.

A. *IOLTA*

The idea of involuntarily relinquishing funds is abhorrent to most conservatives. Therefore, accounts that offer residual funds to expand legal services to the poor, known as Income on Non-Interest Bearing Lawyer Trust Accounts (IOLTA) were a logical target for conservative public interest groups.

Despite the fact that expanding legal services to the poor is a venerable public interest aim, The Washington Legal Foundation ("WLF") initiated a number of nationwide lawsuits challenging IOLTA funds. Utilizing the expanded interpretation of the Fifth Amendment takings clause in tandem with the First Amendment, WLF argued that IOLTA coerced financial support for programs with which they disagreed (Legal Services Corporation) and took property without just compensation.⁹⁸ Although the Supreme Court narrowly found IOLTA

⁹⁶ *Id.*; Clegg Interview, *supra* note 7; England Interview, *supra* note 7; Young Interview, *supra* note 64.

⁹⁷ Houck, *supra* note 2, at 1535.

⁹⁸ Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 771-73 (2002).

programs to be constitutional,⁹⁹ WLF and a host of other conservative organizations have continued their attacks by lobbying individual state legislatures.¹⁰⁰

B. *Legal Services Corporation*

Few traditional public interest organizations draw the ire of conservatives more than the Legal Services Corporation (“LSC”). The main charge these groups levy against LSC is that it has forsaken its clientele, the poor, in order to pursue quixotic campaigns of impact litigation. These arguments, and many others, come from a number of organizations in the FBPILM.

According to Chip Mellor, the Institute for Justice lobbied against the reauthorization of LSC in the mid-nineties.¹⁰¹ IJ was not alone in this challenge. Kenneth Boehm, Chairman of the National Legal and Policy Center and a former executive at LSC has made a crusade out of eliminating the institution. Boehm has testified before the Commercial and Administrative Law subcommittee of the House Judiciary Committee about the evils of the LSC, and recommends its eradication.¹⁰² Boehm argues that LSC is an anachronistic haven of activists that use the program to advance a political and ideological agenda.¹⁰³ Boehm has also written law review articles decrying LSC’s failure to reform in the face of Congressional demands.¹⁰⁴ Boehm and many of his conservative compatriots argue that regional and local legal aid groups perform LSC functions better and less politically.¹⁰⁵ Nowhere, however, does Boehm propose any solutions to improve access to justice as a result of LSC efforts.

C. *Legal Clinics*

⁹⁹ *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998).

¹⁰⁰ Weissman, *supra* note 98, at 774-75.

¹⁰¹ Mellor Interview, *supra* note 7.

¹⁰² *Thwarting the Will of Congress: How the legal Services Corporation Evaded, Diluted, and Ignored Reform. Before the House Comm. on the Judiciary Subcomm.on Commercial and Admin. Law* (Feb. 28, 2002) (statement of Kenneth F. Boehm, Chairman, National Legal and Policy Center).

¹⁰³ *Id.*

¹⁰⁴ Kenneth F. Boehm, *The Legal Service Corporation: Unaccountable, Political, Anti-Poor, Beyond Reform and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321 (1998).

¹⁰⁵ *Id.* at 364.

Conservative public interest groups have also assailed student-run law school legal clinics. While some groups, like IJ have created business-oriented legal clinics, other groups have sought to limit the ability of clinics to provide meaningful representation for clients. The most startling example of this was the attack on the Environmental Law Clinic at Tulane Law School.

The controversy began when the clinic agreed to represent a community of African Americans seeking to enjoin a Japanese company from building a factory in its already polluted community. Business organizations and the governor condemned the clinic and sought to amend the state's student practice laws. After numerous court battles, the Fifth Circuit Court of Appeals upheld the Louisiana Supreme Court's amended student practice rules forbidding students from representing clients whose income is two times greater than the poverty level.¹⁰⁶ Not only were the early attacks on the clinic and the student practice rules engineered by businesses and politicians interested in possible financial benefits, but the fight for greater restrictions was also stewarded through the appeals process by Washington Legal Foundation's own legal clinic at George Mason University Law School.¹⁰⁷

The conservative public interest movement is reactionary in origins, purpose, and motives. As such, public interest law is no longer a synonym for legal groups but a battlefield. The battle extends beyond particular court cases, as the FBPILM has attacked liberal accomplishments such as LSC student-run legal clinics and IOLTA. The very tenets of the traditional public interest movement are threatened by the resources and will of the Freedom-Based Public Interest Legal Movement.

VII. THE PUBLIC WHO? THE FREEDOM-BASED PUBLIC INTEREST MOVEMENT'S CONCEPTION OF THE PUBLIC INTEREST

With the recent development of the conservative public interest movement, the term public interest has lost the meaning it once held. Liberal groups tend to frame the public interest in terms of access to justice, the defense of universally recognized human rights, and

¹⁰⁶ SCLC v. Supreme Court, 252 F.3d 781 (5th Cir. 2001). See also Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33, 91 (2000).

¹⁰⁷ Weissman, *supra* note 98, at 776-77.

substantive equality. The FBPILM defines the public interest in terms of greater economic opportunity, protection of property rights, and the defense of traditional values. So what is the public interest? One must look to their conceptions of the public interest and provide an analytical critique.

The major FBPI organizations conceive the public interest as the vigorous enforcement of the individual liberties set forth in the Constitution.¹⁰⁸ To the FBPI, public interest means the freedom to use property in any way an individual desires, the freedom to seek rent, and to be free from unconstitutional quotas.¹⁰⁹

Analyzing the FBPILM's conception of the public interest from a more critical perspective tends to narrow the definition. Essentially, free enterprise, Christian values, and the protection of private property are the core pillars of the FBPILM's definition of public interest. Though Edwin Meese may claim these values to be "the genuine public interest," it would appear that these interests do not apply to a large cross-section of the public. For instance, while IJ may believe that expanded entrepreneurship is in the public interest, this speaks little to those who have no desire to enter the business world. Additionally, protection of private property rights has next to no utility to the large renting population of the U.S. Lastly, the large swath of the population that does not practice evangelical Christianity has little concern for the place of the Bible in public affairs. Stated simply, the FBPILM conception of the public interest speaks primarily to business and property owners and conservative Christians who believe in an amorphous idea of traditional values.

The kind of representation that freedom-based public interest organizations provide is commensurate with this narrow idea of the public interest. The IRS defines a public interest legal firm for taxation purposes as one that "provides access for unrepresented issues to the judicial system."¹¹⁰ The IRS also recognizes that public interest means "representation of a broad public interest rather than a private interest."¹¹¹ The FBPILM represents issues that lobbyists, corporations, and religious organizations address fervently and are in no way unrepresented. Furthermore, these interests are often primarily private in nature and are not always of broad public concern.

¹⁰⁸ Mellor Interview, *supra* note 7.

¹⁰⁹ England Interview, *supra* note 7.

¹¹⁰ Rev. Proc. 71-39, 1971-2 C.B. 575. Houck, 93 Yale L.J. at 1449.

¹¹¹ *Id.*

The organizations in the FBPILM concerned with social issues, such as the role of religion in the town square are not in search of the public interest. Even though a great number of people in the United States hold religious views, it does not follow that their greater interest is served by the installation of the Ten Commandments in municipal buildings or in the state's regulation of homosexual behavior and pornography. At heart, these organizations hope to benefit the evangelical Christian community and impose their unsolicited views upon the wider public.

With regards to the economic contingent within the FBPILM, it can be said that these groups mainly represent the interests of businesses. As previously mentioned, a 1984 study of business-oriented FBPILM organizations found that six out of eight organizations had a docket with a majority of cases that would not qualify as public interest for taxation purposes.¹¹² This illustrates the fact that these organizations, for the most part, represent business interests, not the broad public interest. In many cases, these organizations essentially function like private corporate law firms, rather than broad based public interest organizations. In fact, private attorneys were at one time said to be upset with the Pacific Legal Foundation for attracting potential paying clients.¹¹³ A statement by the first president of the Mountain States Legal Foundation, James Watt, reflects the FBPILM's myopic vision of the public interest, "[w]e're not broad based, we're narrow based; we believe in the free enterprise system."¹¹⁴

VIII. CONCLUSION

One commentator has remarked that the Pacific Legal Foundation was a public interest law firm in the same way that catsup was a vegetable under Reagan's school lunch guidelines.¹¹⁵ This witty aphorism speaks to the title and very heart of this paper. The very forces that public interest pioneers fought against have appropriated the term and the movement to represent their own interests. The interests of the freedom-based public interest legal movement are not the traditionally broad interests associated with public interest law. Considering the resources, ideological commitment, and resilience of these organizations,

¹¹² Houck, *supra* note 2, at 1460-1508.

¹¹³ *Id.* at 1515 (quoting BUSINESS WEEK, Sept. 6, 1976, at 42).

¹¹⁴ *Id.* at 1479.

¹¹⁵ *Id.* at 1544.

their official title is of now of secondary importance. The traditional public interest movement must not concern itself with issues of nomenclature, rather it must conceive of new strategies to battle a new and formidable opponent.