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The Second Legal Revolution

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Will a new legal strategy on the right be a force in the policy arena? Stay tuned.

President Franklin D. Roosevelt's initial attempts to implement New Deal legislation were blocked by the U.S. Supreme Court. After his threat to pack the court with favorable justices, the "switch in time that saved nine" reversed earlier rulings and lead to a significant expansion in the economic powers of the federal government.

During the decades that have followed, federal courts have ruled on (and some would say inflamed) controversies on social disputes surrounding race relations, abortion and the place of religion in public life, generally advancing what is considered a liberal position.

In time, though, conservatives started to join liberals in seeking to advance their causes in the courts.

In 1973, the Pacific Legal Foundation was created. Today it calls itself "the oldest and most successful public interest legal organization that fights for limited government, property rights, individual rights and a balanced approach to environmental protection."

The Federalist Society followed suit in 1982, created as a means for conservative and libertarian lawyers to gather and some would say, plot to take over the federal courts.

In 1991, the Institute for Justice, a public interest law firm grounded in libertarian thought, was born. It has fought restrictions on economic freedom, such as requirements that African-style hair braiders secure an expensive and, for their purposes, unnecessary cosmetology license. The institute's most famous case may be one that it lost at the Supreme Court, the 2006 Kelo decision, which affirmed that the U.S. Constitution does not bar the use of eminent domain for economic development purposes.

As these three different organizations show, the conservative and libertarian pushback against liberal legal victories has operated largely in the federal courts. But the action may not stay there for long.

In 2007, Clint Bolick, one of the two co-founders of the Institute for Justice who had left the organization a few years before, launched the Scharf-Norton Center for Constitutional Litigation at the Arizona-based Goldwater Institute. The Goldwater Institute was, until

that point, strictly a policy shop that produced reports and op-eds about public policy in the state. With the new center in place, the institute has entered the legal arena as a litigant. As with its policy work, its legal work addresses state rather than federal issues. So far it has secured a victory for open records in local government as well as increased autonomy for the state's charter schools.

If Bolick has his way, the Scharf-Norton Center won't be the last of its kind. In his 2007 book David's Hammer, Bolick took a somewhat unusual stance for a libertarian or conservative: He endorsed judicial activism. It is, he said, an essential tool in protecting citizens against out-of-control legislators and executive branch officials. In a Wall Street Journal op-ed that predated the publication of his book, Bolick wrote that both "liberal and conservative attacks on judicial activism are hopelessly subjective and inconsistent." Replaying the emphasis of entrepreneur-versus-government that has been a significant tactic of the Institute for Justice, he lamented that courts "have read out of the Constitution vitally important protections of individual rights, such as the constraints against government interference with the sanctity of contract and the privileges or immunities of citizenship." It was time, he said, for conservatives and libertarians to press the courts to recognize such protections.

In a manifesto published by the Goldwater Institute's new legal center, Bolick called for the establishment of similar groups in other states. His reasoning is intriguing because it's one that most citizens don't recognize, even if they have an interest in public affairs.

In his manifesto, titled "The First Line of Defense," Bolick favorably quoted Justice William Brennan. While I suspect that Bolick disagrees with many of the rulings that Justice Brennan issued, he favorably quoted Brennan's commentary that state constitutions offer protections "often extending beyond those required beyond the Supreme Court's interpretation of federal law."

The emphasis on the federal system, Bolick wrote, can blind us to the importance of state governments and especially the state constitutions. In his essay, Bolick cited several provisions typically found in state constitutions that offer protections that conservative and libertarian activists ought to press courts to recognize and enforce. Some deal with criminal justice, such as victim rights or restrictions on asset forfeiture in criminal cases. Others are "good government" measures that require legislation benefiting a specific locality or private interest to be introduced as a single-issue bill.

Still other constitutional provisions, if vigorously applied, might prohibit subsidies to specific businesses or industries (corporate welfare). The most ambitious vision that Bolick suggests is to use constitutional clauses regarding contracts to constraint a variety of regulations on private enterprise.

Will Bolick's vision come to pass? The answer may depend in part on how much on how much our political system remains a federal one—that is, one with power distributed across 50 capitals rather than concentrated in one. Then again, his renewed focus on state constitutional questions may be a key to reinvigorating federalism.