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Lawyering and the Public Interest in the 1990s

Harold A. McDougall

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Lawyering and the Public Interest in the 1990s

Cover Page Footnote

I wish to thank the AALS Section on Clinical Legal Education's 1990 Annual Conference and the Clinical Theory Workshop at Columbia University Law School for affording me the opportunity to speak on the juxtaposition of public policymaking and the public interest. These engagements and the ensuing responses helped me refine my thinking on these topics. I also wish to thank my colleagues Ron Collins and Peter Kahn for criticism and comments, and the students in my Law and Public Policy class, particularly Susan Engelman and Michele Reifsnnyder Danilowicz, for their research and their opinions. Of course, all the mistakes are mine.

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LAWYERING AND THE PUBLIC INTEREST IN THE 1990s

HAROLD A. McDOUGALL*

INTRODUCTION

FOR the 1990s, we need a working model for practicing and teaching law in a “post-modern” legal system.¹ This is not a model limited to federal court litigation, but rather examines three branches (judicial, legislative, and executive/regulatory) and three levels (federal, state, and local) of government operating in a state of dynamic equilibrium.

The dynamic equilibrium of the post-modern legal system is characterized by a number of tensions and conflicts. One is a tension between regulation and deregulation. Another is a conflict between rights secured by ownership of property (the “Old Property”²) and rights secured by government subsidy and regulation (the “New Property”³). Yet another is a tension between tightly focused advocacy by “special interests”⁴ and

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1. See N. Reich, *Reflexive Law and Reflexive Legal Theory: Reflections on Postmodernism in Legal Theory* (April 1988) (paper delivered at Bremen) (copy on file with author).

“Post-modern” is a term used to describe the legal system arising from extensive government intervention in and regulation of the economy, generally characteristic of the legal systems of all advanced industrial democracies in the period since World War II. See generally Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 U.C.L.A. L. Rev. 999 (1988) (discussing the various theories about the “modern social welfare state,” New Property, administrative bureaucracy and regulation, post-modern ethics, and the views of the Critical Legal Studies and Legal Realism movements). Cf. also Lipkin, *Beyond Skepticism, Foundationalism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 Cornell L. Rev. 811, 816 n.16 (1990) (“modern” refers, *inter alia*, to the “process of secularization and rationalization giving rise to new modes of thought such as rationalism, liberalism, and positivism”) (citing D. Kellner, *Critical Theory, Marxism, and Modernity* 3-4 (1989)).

2. See *infra* note 101 and accompanying text.

3. See generally, C. Reich, *The New Property*, 73 Yale L.J. 733 (1964) (exploring the relationship between individual wealth and the individual’s relationship to government). See also *infra* text accompanying notes 102-04 (New Property holders are private property owners who benefit from government subsidies, licenses and regulations).

4. “Special interest” advocates are those who seek to promote the advancement of rights secured by the Old Property over the New Property. See *infra* note 104 and accompanying text.

the need to promote the widely "diffused interests" of the general public⁵ in quality-of-life issues such as civil rights and civil liberties, peace, environmental quality, consumer protection, and adequate health care.

The equilibrium is driven by both conflict and cooperation among public interest advocates,⁶ special interest advocates, and institutional actors in all branches of government.⁷ To date, special interest advocates and institutional actors have generally dominated this equilibrium. This Article will attempt to explain why public interest advocates have had lesser influence, and will sketch the type of theoretical training and professional development which will be necessary to prepare public interest advocates to be more effective.

In thinking of this new model, there are three overall topics to consider. Part I of this Article discusses the need for a theoretical perspective from which to describe and analyze our post-modern legal system. Part II considers the need for a pragmatic perspective from which to generalize about how our post-modern legal system operates.⁸ Part III of this Article examines the need for a working model of legal practice, informed by the theoretical and pragmatic perspectives developed, to examine the work of public interest advocates representing social movements in a post-modern legal system. This Article concludes that legal educators must train their students to respond to the public interest legal system of the 1990s.

5. See N. Reich, *supra* note 1, at xxv; *infra* note 106 and accompanying text.

Generally speaking, the diffuse interests of the public can only be articulated coherently by a social movement which emerges to press the issue—civil rights, or environmental quality, or peace, for example. Public interest advocacy organizations often become the lobbyists or litigators for such social movements.

The relationship between public interest organizations and social movements is a dynamic and often uncertain one, requiring the student to develop an understanding of social movements, of public interest organizations, and of the relation between the two. See generally McDougall, *infra* note 9 (describing how lawyers make decisions regarding public policy); *infra* text accompanying notes 183-92 (regarding the role of social movements in public interest activities).

6. See *supra* note 5.

7. Institutional actors in the government include all manner of elected and appointed government officials in the legislative, judicial, regulatory, and executive branches and their respective staff.

8. For a discussion of a new theory of "legal pragmatism," see Farber, *Legal Pragmatism and the Constitution*, 72 Minn. L. Rev. 1331, 1331-32 (1988). "Pragmatism" describes a general movement of scholars away from "foundationalism," that is, the attempt to construct a theory justifying judicial review, and toward an approach to legal problems which "uses every tool that comes to hand, including precedent, tradition, legal text, and social policy." *Id.* See also West, *The Limits of Neopragmatism*, in Symposium on the Renaissance of Pragmatism in American Legal Thought, 63 S. Cal. L. Rev. 1747, 1747 (September 1990)(discussing the limits of neopragmatism). Further discussion of the theory of legal pragmatism is beyond the scope of this article.

I. THEORETICAL PERSPECTIVE ON A POST-MODERN LEGAL SYSTEM

A. *The Langdellian Model and Its Critics*

In a previous article,⁹ I discussed the gap between theory and practice which developed as Dean Langdell worked to create a model for the study of law which was sufficiently "academic" for his Harvard University colleagues in the Arts and Sciences.¹⁰ To render the study of law more academic, Langdell created a model which focused almost entirely on the analytical component of appellate court decisionmaking. The impact of Langdell's model on the study and practice of law was profound.

First, Langdell's examination of law and related theories evolved through the use of abstract models which presented law as a closed system, susceptible to study through the use of linear thinking.¹¹ Second, the practice of law, caught up in the concreteness and chaos of real life, became an art engaged in by the "seat of one's pants" unless actually arguing before an appellate tribunal. Only then did there seem to be any relation between the abstraction of the law and the concreteness and particularity of society.¹² Third, the theoretical and practical aspects of dealing with legislation and regulation were greatly underemphasized, if not altogether ignored.

Ironically, just as the study of law was moving away from the concreteness, incoherence, and uncertainty experienced by practitioners, theories were developing in the physical sciences that were capable of accounting for such experience. These theories of physical relativity had their corollaries in the jurisprudence of the Legal Realists, who rose to challenge Langdell's model.¹³

B. *From Realism to "Policy Science"*

One of the most important contributions of the Legal Realists was to demonstrate that social life cannot be "deduced" from abstractions such as legal doctrine.¹⁴ This raised a two-pronged inquiry: By what process,

9. The article got started as I observed a method of practice among Washington lawyers that I had never seen or studied before. It simply did not fit the classroom model. I was charged with the responsibility of creating an academic model with which to study and teach about this phenomenon, and so I set out to develop a theory.

The first step was McDougall, *Lawyering and Public Policy*, 38 J. Legal Educ. 369 (1988) [hereinafter *Lawyering*], describing how these lawyers made decisions. The second step was McDougall, *Social Movements, Law, and Implementation*, 75 Cornell L. Rev. 83 (1989) [hereinafter *Social Movements*], a description of how these lawyers make up a system of law and policy implementation.

10. McDougall, *Social Movements*, *supra* note 9, at 87-88.

11. *See id.* at 86-88.

12. On the separation and connection between linear, "left-brain" thinking and empathetic "right-brain" thinking, see discussion, *infra* text accompanying notes 202-07.

13. One of the Realists' most important contributions here was the idea of clinical education. *See generally* Frank, *Why Not a Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933) (a clinical legal education is the best way to qualify people to practice law).

14. *See* Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1277, 1293 (1984) (citations omitted).

other than by intellectual deduction, do such abstractions shape social life?¹⁵ And further, how in turn is the abstraction of legal doctrine likewise shaped by social life itself?

Myres McDougal, in a 1947 address to the Yale Law School, described Legal Realism as a movement which had established that legal doctrine was meaningful only when regarded as a set of tools, used in the context of community processes, to effect or justify a particular distribution of values.¹⁶ Before Realism, the Formalists who held sway viewed law and legal doctrine simply as a "set of technical symbols," rather than as the "whole of a community's institutions of government, both formal and real—the sum of all the *power* decisions of the community."¹⁷ For the Formalists, the function of law was to maintain order rather than to orchestrate the production of community values. Law's primary official was the judge, and little concern was shown for the legislative or administrative branches. And clearly, the lawyer's role was that of a technician only, rather than the manager of the wide assortment of decisions which comprise the social process of identifying, producing, allocating and distributing value.¹⁸

While congratulating his Realist colleagues on their decisive break with Formalism, McDougal also challenged them. He urged them to move beyond their critique of formalism and turn to "Policy Science," a new curricular approach. McDougal felt the new approach was needed to prepare students for the legal issues arising in the post-New Deal (i.e., "post-modern") era, in which law would manage, rather than merely tinker with, social life. McDougal promised that policy science would

15. See generally Clune, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Role of Law and Lawyers*, 69 Iowa L. Rev. 47 (1983)(discussing "implementation," which is the design of government policy to effect social change).

16. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 Yale L.J. 1345, 1345 (1947).

17. *Id.* at 1348. McDougal saw law not merely as a set of technical symbols, but instead as an expression of the reciprocal framework within which conflict was moderated and managed, if only because of the duality or reciprocal nature of all law. See McDougal, *Law as a Process of Decision: A Policy-oriented Approach*, 1 Nat. L. F. 53, 62 (1954). Legal doctrine in this sense only describes patterns of restraint previously agreed upon by coalitions that may or may not remain actively regenerating those patterns, or that may have disintegrated completely. Law-prophets then arrange for the public worship of these reified patterns, without reference to the historical, political, economic contexts in which they were created.

"The language of authoritative myth is not adequate to the descriptive task because it does not make clear and discriminating reference to the events that precipitate decision, the variables that affect decision, or the effects of decision." *Id.* at 62. Of course, that does not mean such myths cannot be used to affect decision itself. One would ignore such power at one's peril. *Id.*

Reconsider the meaning of "legal drafting" in this context—it is the arrangement of words which wield power. Under such circumstances, it is important for the drafter to be connected to the processes which create and arrange power relationships, and the values which are the object of such processes.

18. McDougal, *supra* note 16, at 1348.

make the necessary connections between law and society, between the abstract and the concrete, between theory and practice. Legal Realism as a merely critical exercise could not equal policy science in this respect.

To appreciate the importance of the opportunities and obligations of the post-modern era, it was only necessary for McDougal to review the lack of social understanding from whence the nation had come. By 1947, an understanding of "psychology and personality, of how the human mind works[,]""¹⁹ had begun to develop slowly, with only slight "insight into group behavior, social processes and community institutions."²⁰

As a consequence of this knowledge, and of the events of the Great Depression and World War II, the nation had moved beyond a time when private enterprise could act "free of any deep concern about its future,"²¹ when wealth could be pursued without regard to the effect such pursuit might have upon the community, and without regard as to how the community might respond.²² We could no longer pursue power without regard for the "stability of the framework" in which power was acquired.²³ Enlightenment, respect and morality could no longer be pursued in atomistic fashion, without regard for the quests of others or for how the collection of such individually rational quests might, somehow, add up to collectively irrational results.²⁴

Policy science, McDougal hoped, would put together what we knew about law and what we knew about social life, and help us begin to function as a community.²⁵ As a community, there were some urgent problems we would have to face: (1) "to preserve our domestic strength and prevent economic depression;" (2) "to preserve our power position . . . in the world community;" and (3) "to inhibit the growth of anti-democratic forces, 'the elements that destroy human dignity,' at home as well as abroad."²⁶

Unfortunately, McDougal himself did not complete the project of analytically and practically connecting legal knowledge with the knowledge of social life. Instead, he confined himself to creating broader and more flexible definitions. He did not, in the sphere of domestic policy, actually apply these definitions in a sufficiently concrete way to put his models in motion. Thus, his work became inaccessible to most students.²⁷ To realize the potential McDougal saw for policy science, a curriculum would

19. *Id.* at 1346.

20. *Id.* at 1347.

21. *Id.*

22. *See id.*

23. *See id.*

24. *See id.* *See also* Kronman, *Contract Law and Distributive Justice*, 89 *Yale L.J.* 472, 493-97 (1980)(on strength, intelligence, etc., as socially/collectively produced (and, by rights, owned)).

25. *See* McDougal, *supra*-note 16, at 1347-49.

26. *Id.* at 1348.

27. The contrary might be said of his work on international policy, which had a decidedly goal-oriented—and rather conservative—energy.

have to be designed which provided students with the opportunity to both study and participate in the process by which abstract legal doctrines are first transformed into judgments, laws and regulations, and finally, into patterns of living for real people in real life.

C. "Legal Process" Displaces Policy Science

Generally speaking, the attempt to develop a policy science curriculum was not taken up by Yale or any other school. It was not until Hart and Sachs at Harvard began to move away from the strict study of appellate court opinions, and began to study the legislature and the bureaucracy as well, that a theory might develop that could describe the legal process in a way that reflected McDougal's concerns. Hart and Sachs' study of the institutional character of each of the three branches of government, and of the interaction among them, was called the "Legal Process" approach, and was an important step beyond the Formalism McDougal disparaged.

By considering the interactions among the bureaucracy, the legislature, and the judiciary, Hart and Sachs' "Legal Process" approach enabled the law for the first time to be studied as an open rather than closed system.²⁸ Legal Process analysis opened the door for an investigation of the open-ended reasoning processes which characterize legislative and bureaucratic activity. As a corollary, the use of open-ended reasoning by courts could also now be explored.

Hart and Sachs had a tiger by the tail, however. They were generally unable to develop theories to cope with the randomness and incoherence of the post-modern legal system. They began developing models of how each branch of government acted and reacted, but could not develop new ways of thinking about lawyering—about the development of law from abstract legal doctrines and the implementation of law into patterns that affect social life.²⁹

Because of these shortcomings, the Legal Process project never progressed beyond a life as a set of duplicated materials for use at Harvard Law School. But the as yet unanswered challenge of Policy Science to connect theory, legal structure and social life was taken up by three different "schools of thought" in legal education, all associated with the 1960's and 1970s. These three schools were Critical Legal Studies ("CLS"), Law and Economics (Public Choice) and Clinical Legal Education.

D. CLS, Public Choice and the Challenge of "Post-modern" Law

The randomness and incoherence of law as an open system, touched on by the Realists, has been reassessed by CLS theorists. Hart and Sachs thought the randomness and incoherence of the modern legal system

28. It is circular and recursive; a model of "cybernetic interactionism." See Clune, *supra* note 15, at 78.

29. For more detail, see McDougal, *Social Movements*, *supra* note 9, at 91-92.

could be tamed or confined by rules, and the rules, rather than the processes, became the focus of their study.³⁰

The CLS movement pointed out the flaws in a model which ignored the political dimension: the fashion in which legal decisionmakers in all three branches went about their business, and the general freedom from public accountability that each enjoyed. They further charged that all institutional structures served to create false distinctions between the individual and the collective, classifying the former as "subjective" and the latter "objective." These false distinctions were being used to manipulate, confuse and take advantage of the public rather than build community among them. When pressed for a plan to alter social life, however, CLS nearly self-destructed in nihilism, proving too intellectually rarified for the task of praxis.³¹ CLS has most recently sought refuge in support for women's and minority perspectives, and has yet to face the task of developing a praxis rooted in the reality of the white, privileged, left-leaning, intellectual male.³²

The job of sorting out the institutional character of the three branches of government that were the primary actors in the Legal Process model, particularly the legislature and the bureaucracy, was taken up by the branch of Law and Economics called "Public Choice." The theory is so named to denote the "public" choices involved in legislation and regulation, as opposed to the "private" choices denoted in the contracts which feature large in traditional Law and Economics material.³³ Public Choice theorists, unlike most Law and Economics scholars, concentrate on the public-law operations of legislatures and regulatory bureaucracies, rather than studying private-law transactions.³⁴

30. For an interesting digression on this issue, see Lipkin, *supra* note 1, at 834, which correlates skepticism with Legal Realism and CLS.

31. See McDougall, *Social Movements*, *supra* note 9, at 94-95 & nn.65-77.

32. In this respect, many CLS theorists have taken a position not unlike that taken by white liberals of the 1960s and 1970s when confronted with the black nationalism of the period. Cf. Peller, *Race Consciousness*, 1990 Duke L.J. 758, 840-844 (discussing how white liberals and progressives rejected race consciousness as a way to avoid issues of white cultural identity that black nationalism brought to the fore). *But see* Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369, 370, 372 (1982-83)(principal role of the legal system is to shape popular consciousness toward accepting political legitimacy of the status quo, a social order most people find alienating and inhumane).

33. The Critical Legal Studies group has made some important contributions in this area. Professor Mark Tushnet, for example, has commented on the Court. *See, e.g.*, M. Tushnet, *Red, White and Blue* (1988)(a critical analysis of constitutional law); Tushnet, *Principles, Politics and Constitutional Law*, 88 Mich. L. Rev. 49 (1989)(discussing fundamental issues about the nature of constitutional government); Tushnet, *Toward a Revisionist History of the Supreme Court*, 39 Clev. St. L. Rev. 319 (1988)(discussing the Supreme Court's role in securing the federal government as an independent source of law beyond interference from state governments). Professor Gerald Frug has written on the bureaucracy, *see* Frug, *supra* note 14. The field of describing the actions of the legislature, however, has been dominated by Public Choice theorists.

34. Law and Economics has been dominated by the "Chicago School," which views the function of government to be no more than to ensure a wealth-maximizing result. *See*

In the Public Choice view, legislation is a dynamic, inconsistent equilibrium in which law grows out of a series of compromises fueled by legislators' desires to be re-elected, by the expedient accommodation of special interests and lobbying by individuals and groups.³⁵ In the Public Choice view legislators do not respond evenly to all lobbyists. Instead, they react most positively to well-organized and politically influential ("special interest") groups that pursue focused benefits or protection which are not sought by the general public.³⁶

In the administrative realm, Public Choice theorists see special interests exercising even greater power. "Iron triangles" develop between a regulatory agency, the legislative committee that oversees it, and the special interest group representing the industry that the agency is required to regulate. Through these iron triangles, special interest groups influence the process of implementation and enforcement of legislation even more than they affected the original framing of such legislation.³⁷

Because the quest for re-election in the legislative arena, and the iron triangle in the regulatory arena, together create a contentious process which is political rather than rational, early Public Choice scholars such as Judge Posner recommended that judges shun the field. Judges, in their view, had no business upsetting a political balance achieved by elected or appointed representatives of the people, and should leave any resultant problems or distortions to the electorate, who have the power to retain or expel public officials.³⁸ Early Public Choice theorists displayed an unshakable faith in the electorate's willingness and ability to throw the rascals out—a willingness evidenced in the popularity of the 1980s Republican Party program of deregulation.

In sum, early Public Choice theorists greatly contributed to the now prevailing view that "democratic government serves the interests of

Comment, *Refusals to Cross Stranger Picket Lines and the Wealth Maximization Principle: An Economic Analysis of the Views of the NLRB and Judge Posner*, 41 U. Miami L. Rev. 533, 542 (1987). Chicago School adherents see these private deals, spurred by individual desires to maximize wealth, as the only legitimate means by which social resources can be allocated. See *id.* at 542-43. Chicago school adherents mistrust government, and fear that it will be captured by special interests. Government, or "public" choices, then, should play as minimal a role as possible in determining economic policy or redistributing wealth. See *id.*

35. Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. Pitt. L. Rev. 691, 705, 710-17 (1987). For a discussion of "special interests" and its relation to theories of regulation and deregulation, see *infra* text accompanying notes 101-06.

36. See *id.* at 704-06.

37. DeBow & Lee, *Understanding (and Misunderstanding) Public Choice*, 66 Tex. L. Rev. 993, 999-1000 (1988).

38. Eskridge & Frickey, *supra* note 35, at 707-08. This position has caused some to view the Law and Economics movement as a revival of Langdellian formalism, and a right-wing attack on Legal Process. See Brest & Vanderberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 Stan. L. Rev. 607, 657 (1987). But see M. Tushnet, *Red, White and Blue* 196 n.17 (1988)(recent development of a "liberal reformist law-and-economics").

whichever interest group turns out to be the most powerful"—i.e., "special interests"—and that very little can, or should be, done about this other than to reduce the influence of government.³⁹ Though conceding that legislators occasionally respond to lobbyists who (for ideological or even altruistic purposes) seek benefits or protection for the public at large,⁴⁰ Public Choice theorists minimize the importance and effect of this phenomenon.⁴¹ With CLS flirting with nihilism or occupying itself with "support work" for minority and female intellectuals, and with Public Choice reducing itself to an apology for the status quo or for deep cuts in the regulatory state, it is left to public interest advocates to give voice to the diffuse (not special) interests of the general public.⁴² Advocacy in the public interest was central to Clinical Legal Education in its early years, and still influences Clinical Legal Education curricula.

E. *Clinical Legal Education: Practice in Search of a Theory in the Post-Modern World*

Hart and Sachs never developed a lawyering model. The Clinical Legal Education movement, though concentrating on lawyering topics, has focused almost exclusively on adjudication, and has not really paid sufficient attention to the lawyering process involved in legislation and regulation. In other words, the Clinical Legal Education movement is not studying the implementation of law other than through the study of judicial remedies, giving it a decidedly "Langdellian" cast. Clinical legal educators have yet to develop a vision of law implementation which takes into account both the interaction among social and economic forces seeking intervention by all branches of government as well as the consequent interaction of those forces with government and with one another as they seek to create policy.⁴³ As we shall see, the fragmentary insights of Policy Science, Legal Process, CLS, and Public Choice can be synthesized in such a way as to usefully broaden the field of vision of clinical legal theorists and practitioners, and to help them prepare their students for the task at hand.

The work of noted legal activist and Clinical Legal Education theorist Anthony Amsterdam provides a useful example. Professor Amsterdam

39. See Kahn, *Regulation and Imperfect Democracies*, prepared for *Regulating the Future*, at 2 (publication forthcoming); McDougall, *Social Movements*, *supra* note 9, at 92 & nn.51-54, 93 & nn.55-57.

40. See Eskridge & Frickey, *supra* note 35, at 704.

41. See DeBow & Lee, *supra* note 37, at 1005-12. But see Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *Colum. L. Rev.* 223, 240-44 (1986)(the Constitution and the federal courts can serve to restrain private interest groups).

42. For a discussion of the role of "diffuse" public interest in the law and policymaking process, see *infra* notes 183-200 and accompanying text.

43. This has been called "implementation" research and theory. See McDougall, *Social Movements*, *supra* note 9, at 83. See also Clune, *supra* note 15, at 50-53 (discussing implementation research and theory). CLS is also experimenting with clinical legal education. See Gabel & Harris, *supra* note 32, at 370-71.

has written that traditional, formalist, classroom approaches to teaching law have been too narrowly focused on skills such as case reading and interpretation, doctrinal analysis and application, and logical conceptualization and criticism.⁴⁴ He has contrasted clinical experiences with formalist approaches, pointing out that clinics develop different kinds of skills in students—skills such as ends-means thinking, hypothesis formulation and testing in information acquisition. Clinics, Amsterdam maintains, expose students to decisionmaking in situations where options involve differing and often uncertain degrees of risk.⁴⁵

Professor Amsterdam's conception, however, remains "traditional" in that it does not look beyond litigation.⁴⁶ This is not surprising. The rise of the Clinical Legal Education movement about twenty years ago⁴⁷ coincided with the height of confidence on the part of civil rights organizations and other public-interest groups in the Supreme Court as a means of solving social problems. If the Clinical Legal Education movement were to be initiated today, however, legislation, regulation and negotiation might be the training areas of choice.

The reasons why legislation and regulation are preferable to litigation as a means of addressing broad social problems are innumerable and, other than a note that the arguments for federal judicial activism are hopelessly pegged to the Warren Court era, need not be mentioned here.⁴⁸ Unlike traditional classroom teachers for whom the appellate court opinion is the center of the academic universe,⁴⁹ the pedagogy of clinics constantly places clinical teachers in the position of solving real problems. While the former group continues to resist the importance of legislation and regulation, this importance has become obvious and imperative for the latter.⁵⁰ How might the practical insights of clinical legal educators and the theoretical insights of Policy Science, Legal Process, CLS and Public Choice adherents be synthesized into a praxis for the post-modern legal system?

In this Article, I will reach toward this praxis, which I call Public

44. See Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. Legal Educ. 612, 613 (1984).

45. See *id.* at 614-15.

46. In his article, Professor Amsterdam does not discuss how students develop lawyering skills from experience and what role their teachers have in facilitating that learning process. Much more work is needed on the theory of "learning how to learn from experience." That discussion, however, is beyond the scope of this article; I have touched on it elsewhere. See McDougall, *Lawyering*, *supra* note 9, at 372-75.

47. See Cahn & Cahn, *Power to the People or the Profession: The Public Interest in Public Interest Law*, 79 Yale L.J. 1005, 1024-31 (1970).

48. See generally Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 Mich. L. Rev. 189 (1988)(discussing the past, present, and future of liberal legal scholarship).

49. See McDougall, *supra* note 9, at 86-89.

50. Many clinicians were taught in law school by academics who pushed litigation and appellate practice as the core of law; despite their experiences to the contrary, many clinicians still have the "litigator's habit."

Interest Lawyering. In Part II, I will view the law and policy universe which a public interest lawyer confronts in the 1990s. In Part III, I will review the lawyering skills needed to practice in this universe.

II. THE PUBLIC POLICY UNIVERSE OF THE 1990s

A workable model of the "post-modern" public policy universe of the 1990s should focus our learning upon lawyering in an open system, concentrating on the practical and the political as well as on the theoretical. It should also take note of all three principal sources of law—the "corpus juris" of our domestic legal system.⁵¹ The model must focus not merely on rules but on a process of decisionmaking that occurs within, and as a response to, a larger community process.⁵² It must, in short, thoroughly comprehend the journey, traversed daily, from the abstraction of law (legal doctrine, regulations, etc.) to the concreteness and particularity of social life.

Such a model must consider a set of controversies which both illuminate and go to the core of the institutional character of the various branches of post-modern government. These massive, ongoing controversies, which generate turbulence around each of the principal branches of government, are as essential for a practitioner to perceive as it is for a sailor to be aware of the existence of riptides or breakwaters.

These controversies, or turbulences, though latent since the founding of the nation,⁵³ have emerged forcefully in the "post-modern era." This era opened with the New Deal's initiation of massive governmental intervention into the economy,⁵⁴ and was expanded by the New Frontier/Great Society's massive governmental intervention into the social structure.⁵⁵ It is closing with struggles over conservative political dominance, beginning with the cases growing out of Watergate,⁵⁶ but continuing into

51. See Amsterdam, *supra* note 44, at 618.

52. McDougal, *supra* note 16, at 1355.

53. See Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 Ohio St. L.J. 175, 179-86 (1990); Yassky, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 Yale L.J. 431, 432-33 (1989).

54. See Shapiro, *APA: Past, Present, Future*, 72 Va. L. Rev. 447, 455 (1986). See also Yassky, *supra* note 53, at 431 ("Roosevelt's innovations centralized within large bureaucracies power that previously had been dispersed among the three governmental branches. This consolidation of power fits uneasily into the constitutional framework established by the Founders"); *id.* at 433-35 (nondelegation doctrine). See generally Yassky, *supra* note 53 (developing and applying a post-New Deal approach to the allocation of government power).

The New Deal was designed to "pacify the major players in the political game, and to allow industry clients to earn modest monopoly profits, provided the clients shared those profits with organized labor and did not unduly burden the public." De Long, *New Wine for a New Bottle: Review in the Regulatory State*, 72 Va. L. Rev. 399, 422 (1986).

55. See DeLong, *supra* note 54, at 422, 436 (social regulatory agencies such as the Occupational Safety and Health Agency and the Environmental Protection Agency have no stopping point; when has there been "enough" regulation?).

56. See, e.g., *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. 425 (1977) (Presidential Recordings and Materials Preservation Act, which directed the Administrator of General

issues regarding Congressional control over executive agencies⁵⁷ and their budgets,⁵⁸ the independence of special prosecutors,⁵⁹ individual rights both to privacy⁶⁰ and to affirmative relief for discrimination⁶¹ and the relative authority of Congress and the President to make war.⁶² Of special importance in comprehending this era is an understanding of the role of the media, the President, Congress, the bureaucracy and the federal courts, especially the Supreme Court.

A. *The Role of the Media in Public Policy: Agenda-Setting*

No discussion of public policymaking and the fate of the public interest would be complete without a comment on the role of the media. While the news media is sometimes portrayed as an objective "mirror" of the events which form the cultural, political, and economic parameters of our society, each media organization is first and foremost a business.⁶³ As such, it is responsive to specific external pressures, more generalized social and political "norms," and the professional culture and political

Services to seize President Nixon's records, did not unconstitutionally invade his right to privacy); *Buckley v. Valeo*, 424 U.S. 1 (1976)(the contribution, disclosure and record-keeping provisions of the Federal Election Campaign Act are constitutional); *United States v. Nixon*, 418 U.S. 683 (1974)(discussing the extent of the President's immunity from the judicial process). See Entin, *supra* note 53, at 175-79 (especially 175-76), 186-190 (discussing the renewed attention given to separation of powers disputes by the Supreme Court in the aftermath of Watergate).

57. See *INS v. Chadha*, 462 U.S. 919, 954-58 (1983). See also Entin, *supra* note 53, at 190-95 (discussing the legislative veto and the holdings of *Chadha*).

58. See *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986). See also Entin, *supra* note 53, at 196-200 (discussing *Bowsher* and other cases defining executive powers and the removal procedure); Rodriguez, *The Substance of the New Legal Process* (Book Review), 77 Calif. L. Rev. 919, 926 (1989)(reviewing W. Eskridge & P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (1988)); Levinson, *Balancing Acts: Bowsher v. Synar, Gramm-Rudman-Hollings, and Beyond*, 72 Cornell L. Rev. 527, 530-39 (1989)(discussing the *Bowsher* Court's characterization of the Comptroller General's function as "Executive"); Note, *Beyond Bowsher: A Separation of Powers Approach to the Delegation of Budgetary Authority*, 55 Brooklyn L. Rev. 1405, 1410-13 (1990)(discussing majority, concurring and dissenting opinions in *Bowsher*).

Another way to look at this is to say that Congress can remove an officer with executive responsibility only through the process of impeachment. See Entin, *supra* note 53, at 187 n.86. Still another "take" is that Gramm-Rudman-Hollings violated bicameralism and presentment. See Note, *supra*, at 1414, which discusses Stevens' concurrence.

59. See *Morrison v. Olson*, 487 U.S. 654, 661-62 (1988); Entin, *supra* note 53, at 201-06.

60. See generally *Roe v. Wade*, 410 U.S. 113 (1973)(acknowledging a woman's right to an abortion, which may, however, be outweighed by the state's compelling interest in the health of the mother and/or fetus). *But cf.* *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989)(upholding Missouri statute regulating the performance of abortions).

61. See *Croson v. City of Richmond*, 488 U.S. 469, 493-508 (1989); Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., 136 Cong. Rec. S1019-25 (daily ed. Feb. 7, 1990).

62. See *Ange v. U.S.*, 752 F. Supp. 509, 514-15 (D.D.C. 1990). See also *Dellums v. Bush*, 752 F. Supp. 1141, 1144-45 (D.D.C. 1990)(discussing the President's and Congress' constitutionally vested power to declare war).

63. Television, especially, exhibits very strong entertainment and commercial biases. See Collins & Skover, *supra* note 48, at 1087; D. Kellner, *Television and the Crisis of Democracy* 111 (1990).

orientation of its members.⁶⁴

Each media organization, as a going concern, must respond to external pressures from advertisers,⁶⁵ organizational affiliates,⁶⁶ news sources and interest groups.⁶⁷ Source pressure is one of the most important. Large corporations and government agencies can bring a great deal of pressure to bear on media organizations through press releases (which are a surprisingly effective way to "lobby" news media), news conferences, "backgrounder" conferences, and leaks.⁶⁸ Government officials have at times attempted to manage and even directly intimidate the media. Certainly, all large public and private bureaucracies hire public relations firms to handle their relations with the media.

Each media organization also operates under the "internal" pressures of interpersonal relations and professional norms,⁶⁹ production processes,⁷⁰ cost-benefit analysis, and profit⁷¹ and legal constraints.⁷² Deadlines and the quest for "soundbites," for example, affect the shape and contour of newsreporting. Groups of reporters covering the same event can result in "pack" journalism, in which all agree on a certain variation of a news story or even designate one or two to write it for all of them.⁷³

Even more important, however, are the tendencies of the media to present news in dramatic and personalized form, focusing on individuals and their personalities (including the personalities of newscasters as well as those of news "makers") rather than on political, economic and process factors.⁷⁴ Thus, absent a background in public affairs, it is very difficult for the "consumer" of news to discern how the economic and political system actually works. This focus on *dramatis personae* encourages the untutored consumer to view events as carried on by super-personalities and reinforces his or her own feelings of powerlessness and disengagement.⁷⁵

It is for this reason that the President, rather than members of Congress or the Supreme Court, is likely to be a candidate for a news story. The President is easy to present as a dramatic figure, and is likely to collaborate with the media in this respect. Truly controversial events occurring in less dramatic settings—the Supreme Court, federal agencies,

64. See D. Graber, *Mass Media and American Politics* 82-83 (1989).

65. See R. Berkman & L. Kitch, *Politics in the Media Age* 90-93 (1986).

66. See *id.* at 93-94.

67. See *id.* at 87-90, 94-95.

68. See *id.* at 87-89; D. Nimmo & K. Saunders, *Handbook of Political Communication* 449-52 (1981).

69. See D. Graber, *supra* note 64, at 47-52.

70. See R. Berkman & L. Kitch, *supra* note 65, at 79-82, 84-86.

71. See *id.* at 78-79.

72. See generally D. Graber, *supra* note 64, at 89-113 (discussing legal restraints on rights of access and of free publication).

73. See R. Berkman & L. Kitch, *supra* note 65, at 82-84.

74. See L. Bennett, *News: The Politics of Illusion* 82-84 (1988).

75. See *id.* at 27.

or Congressional committees—may well be overlooked, reducing the information flow to the public.⁷⁶

Further, longstanding policy problems, such as excessive defense spending, the problems of savings and loan institutions, poverty, and the lack of adequate health care and housing, are likely to become newsworthy only when they reach crisis proportions. This further reinforces the sense of powerlessness in the consumer, who is increasingly left out of the decisionmaking process.⁷⁷

Finally, “normalization” of the media presents events and personalities in a favorable light only when they conform to media personnel’s perception of what the consumer will “buy.”⁷⁸ Official versions of events are sought out, and the views of “deviants” such as strikers, demonstrators, and members of minor political parties are undercut, minimalized, or discredited.⁷⁹ As a result, the range of models for acceptable political behavior is narrowed considerably, and we see more and more “conservative” political candidates emerging and winning.⁸⁰ This has been particularly true in Presidential elections.

C. *The Presidency*

Public Choice theorist Martin Shapiro argues that an increased concentration of power in the office of the President (the so-called “imperial” Presidency) is an aberration which has been brought about by casting our Chief Executive more and more in the role of the head of a parliamentary government, with the extraordinary power there entailed, without the restraint of party discipline.⁸¹

Though FDR was the first “imperial” President, it has been the Republican party, through skillful manipulation of the national electoral process, that has monopolized the office.⁸² This has become more salient as campaign finance reform has moved the nominating process away from party functions (the Democrats had the larger, stronger party) to an open-media event, in which dollars count for more than bodies and the “normalization” tendencies of the media have worked to the advantage of conservative candidates.⁸³

76. *See id.* at 35-36.

77. *See id.* at 46-49.

78. *See* L. Bennett, *News: The Politics of Illusion* 51-52, 60-62 (1988).

79. *See id.* at 52.

80. *See id.* at 60.

81. *See* Shapiro, *supra* note 54, at 449-52. Parliamentary democracies, such as England, place the control of the executive branch of government in the hands of the party that is elected to a majority of the seats in the legislative branch. Executive power in such systems is greater than that afforded the executive in our non-parliamentary democracy, but it is held in check by the power of the majority party to form a new government. *See id.*

82. *See generally* Rauh, *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. Rev. 213, 213-20, 247-49 (1991)(article suggests a struggle of paradigms between liberals and conservatives).

83. *Buckley v. Valeo*, 424 U.S. 1 (1976), is the Supreme Court’s critique of Congress’

The imperiousness of the office is illustrated internationally through the President's increased power to commit troops abroad in hostile situations free of restraint by Congress. More recently, this issue has been reflected in the Persian Gulf crisis,⁸⁴ but it has been seen, during the terms of both Democratic and Republican Presidents, in the Cuban Missile crisis, the Vietnam War, the invasions of Grenada and Panama, the mining of Nicaraguan harbors, and the Iran-Contra scandal. Domestically, the imperiousness of the Presidency is expressed in terms of the Chief Executive's control over the bureaucracy,⁸⁵ but, as in the Watergate scandal, the President's power has been extended even into the lives of private citizens.

The most important efforts to restrain the "imperial" President arose from the uproar surrounding Watergate and the Vietnam conflict, both legacies of the Nixon Presidency. The principal remaining piece of legal structure on the international front remaining from the Vietnam War era is the War Powers Resolution.⁸⁶ The War Powers Resolution has been a controversial, and often ineffective, means of keeping the President in check.⁸⁷ In the most recent court test of the President's warmaking power, for example, it was not even mentioned. Rep. Ron Dellums and thirty-odd other members of Congress, suing in the District Court for the District of Columbia, argued only that President Bush could not commit

attempt at campaign finance reform in Presidential elections, and gives us some sense of the Court's likely response to current attempts to reform Congressional campaign finance. The *Buckley* court considered the constitutionality of key provisions of the Federal Election Campaign Act of 1971 and related provisions of the Internal Revenue Code, all as amended in 1974, which attempted to regulate contributions and expenditures in Presidential campaigns, as well as set up a system of public financing for Presidential primaries and national elections.

Because money is required for access to the media, the Court reasoned that a restriction on the amount of money a candidate could spend in a campaign would abridge free speech, essentially by reducing its volume and amplitude. *See id.* at 18-19. *See generally* Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. Chi. L. Rev. 892, 917-24 (1984)(discussing the Supreme Court's failure to promote electoral rationality in *Buckley* and its progeny).

Of course, "a system of allocating offices on the basis of ability to pay is irrational; there is no relationship between wealth and the ability to lead the nation or promote its welfare." *Id.* at 928. The upshot of the *Buckley* decision, however, may be to the contrary: you can't buy a candidate, but you can buy an election.

84. Compare H.R.J. Res. 658, 101st Cong., 2d Sess., 136 Cong. Rec. H8312 (daily ed. Sept. 27, 1990)(resolution introduced by Rep. Fascell supporting Bush's action with respect to Iraqi aggression against Kuwait) with H.R. Con. Res. 372, 101st Cong., 2d Sess., 236 Cong. Rec. H7890 (daily ed. Sept. 19, 1990)(resolution introduced by Rep. Bennet limiting support to that taken in accordance with United Nations Security Council directives and mandating Congressional approval of military offensive action). *See also* S. Con. Res. 147, 101st Cong., 2d Sess., 136 Cong. Rec. S14206 (daily ed. Sept. 28, 1990)(introduced by Sen. Mitchell and identical to H.R.J. Res. 658).

85. *See Morrison v. Olsen*, 487 U.S. 654, 670-77 (1988).

86. 50 U.S.C. § 1544(c)(1991).

87. *See Richardson, Checks and Balances in Foreign Relations*, 83 A.J.I.L. 736, 738-39 (1989). *See also* P. Holt, *The War Powers Resolution: The Role of Congress in U.S. Armed Intervention* 11-12 (1978)(discussing compliance with the Resolution by President Ford).

troops to offensive hostilities in the Persian Gulf without prior Congressional authorization.⁸⁸ Their suit was mooted when Congress voted to support the President's decision.

The principal item of legal structure on the domestic front remaining from the period, the Independent Prosecutor statute, grows out of the experiences with Watergate.⁸⁹ This statute might well see service in investigations into Iran/Contra and the Savings & Loan crisis.⁹⁰

D. Congress

In Congress, the lack of party discipline is a key problem. The leadership of Congress has decentralized from committee chairs to subcommittee chairs and, finally, to a state of affairs in which virtually any Member can grab a headline and affect the agenda for public policy.⁹¹

One of the reasons party discipline is so lax is that the parties no longer play the primary role in selecting candidates and supporting their campaigns. The candidates are selected through primaries, and a primary, unlike the old party caucus technique of selecting candidates, is a media event. Because media advertising is a matter of money rather than building party discipline, "Old Property" holders and Political Action Committees ("PACs") exercise more influence than the parties do.

The traditional justification for deference to the will of the legislature is that the elected legislature represents the majority. CLS theorists argue, however, that the vast majority of the electorate is utterly passive and any preferences they express are so hedged by inequality and ignorance as to be almost meaningless.⁹² The electorate is powerless and "T.V.-addled,"⁹³ bombarded with information which is scattered and parochially focused, albeit highly financed. This type of information may not play the informational role for which "free speech" protections were designed. Such information may be not as important, in the post-modern era, as information which is channelled through parties and other groups that reinforce the rationality of the decisionmaking process.⁹⁴ Because the re-emergence of party discipline and a stronger role for parties vis-a-vis the media in selecting and promoting candidates seems unlikely, it

88. See *Dellums v. Bush*, 752 F. Supp. 1141, 1143-44 (D.D.C. 1990).

89. See *Ethics in Government Act of 1978*, 28 U.S.C. §§ 591-99.

90. See generally *Morrison*, 487 U.S. at 712-13, 732-33 (Scalia, J., dissenting)(observing that independent counsel could be selected to prosecute any federal official for engaging in conduct that Congress disapproved).

91. For an extended discussion of the erosion of party influence in both the electoral and governance processes, see McDougall, *The New Property vs. the New Community*, 24 U.S.F. L. Rev. 399, 404-07 (1990) [hereinafter *The New Property*]. *Contra* G. Jones & J. Marini, *The Imperial Congress 195-96* (1988)(a congressman who votes contrary to his party's policy may preclude himself from obtaining a seat on a preferred committee).

92. The Critical Scholar's view is summarized in Eskridge & Frickey, *supra* note 35, at 326-30.

93. McDougall, *Social Movements*, *supra* note 9, at 95 & n.70.

94. See Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 Mich. L. Rev. 917, 918-25 (1990).

will be up to public interest organizations and social movements to fill in the gaps.⁹⁵

Another reason for the erosion of policy discipline is the parties' abdication of their role in setting and implementing the agenda for public policy. The media has virtually monopolized the field of agenda-setting.⁹⁶ Lobbyists and staff collaborate on the implementation of the agenda. Thus, the party is left with very little control.

According to Norbert Reich, the legislature generally responds to "special interests . . . put forward by social actors who are well organi[z]ed because they may win (or lose) a great deal by social change."⁹⁷ The Public Choice view on Congress is that each incumbent is in a monopoly position with respect to political influence, and charges the going rate. Add to this the Public Choice view that legislators respond more to constituents who have much to lose than to those who have much to gain,⁹⁸ and you have a partial explanation for the policy paralysis and spiralling budget deficits in which we find our government.

It is plausible that powerful special interests will not allow government to affect their affairs without influencing the government in return. Attempts to control this process may only encourage special interests to operate in a more creative and covert fashion.⁹⁹ With the imposition of sanctions, however, these groups' conduct can be deterred or at least brought before the public.¹⁰⁰

95. See McDougall, *Social Movements*, *supra* note 9, at 94-96.

Social movements face the challenge of manipulating voter preference, which is often achieved by creating strongly compelling counter-images in order to prevail in the policy arena. Humans respond to compelling, graphic stories. Broadbased statistical studies which counter such stories typically fail to receive comparable attention. The impact of the Willie Horton story, compared with the impact of statistical data on the uneventful nature of most prison furloughs, demonstrates the premise. See Margulies, "Who Are You to Tell Me That?": *Attorney-Client Deliberation Regarding Non-Legal Issues and the Interests of Non-Clients*, 68 N.C. L. Rev. 215, 219-20 n.23 (1989).

96. See K. Lawson & P. Merkl, *When Parties Fail* 170 (1988).

97. N. Reich, *supra* note 1, at xxv-xxvi.

98. Judge Posner's position on the operations of Congress is summarized in W. Eskridge & P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 324-26 (1988).

99. See Comment, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 Wis. L. Rev. 1395, 1409-15 (1989).

100. According to a 1978 Common Cause study, needed reforms include disclosure of:

- (a) identities of organization's major lobbyists;
- (b) major issues on which organization lobbies;
- (c) estimated total amount of money organization spend on lobbying;
- (d) amount of money spent on major grassroots lobbying campaigns; and
- (e) the identities of organizations which are major contributors to the lobbying organizations.

See Cohen & Wolff, *Freeing Congress from the Special Interest State: A Public Interest Agenda for the 1980s*, 17 Harv. J. on Legis. 253, 290-91 (1980).

E. *The Bureaucracy*

1. Regulating the Old Property or Deregulating the New: Which Way for the Public Interest?

Given the directions in which both the Presidency and the Congress have evolved in the post-modern era, there are important limits, in practical terms, of both New Deal-style government regulation (compatible with a "Legal Process" theory) and Reagan-style deregulation (compatible with a "Public Choice" theory). Some private property owners (perhaps factory owners, large landowners or owners of commercial businesses) see their economic well-being as vindicated by an unregulated market. They seek to escape from, rather than to benefit from, government assistance and/or regulation.¹⁰¹ Let us refer, collectively, to such private property owners as holders of "Old Property."

Under New Deal and Legal Process conceptions of the law, the legislature and bureaucracy are called into service to regulate the activities of such holders of Old Property. Charles Reich considered those who benefit from the resulting system of government regulation of the economy to be holders of a different, "New Property."¹⁰² These are the beneficiaries of government subsidies, licenses, and regulations of all kinds.

Ironically, Old and New Property holders can turn out to be the same people. Public Choice theory provides a useful explanation of how and why this can happen. Legislators are very interested in being re-elected, and sometimes use their power under a New Property regulatory system to benefit, rather than restrict, holders of Old Property, who are often well-heeled and can finance campaigns. Bureaucrats, whose responsibility it is to execute the New Property program of government regulation and subsidy, must respond to the legislators, who manage bureaucratic agency budgets as well as their scope of authority—and consequently their power. Bureaucrats are also occasionally interested in directly currying favor with Old Property interests that may afford them lucrative corporate positions upon leaving the "revolving door" of government service. Thus, as discussed above, iron triangles are formed between Old Property holders, the bureaucrats who are assigned to regulate them under a New Property system and the legislators who are assigned to oversee the bureaucrats.¹⁰³ Iron triangles are likely to develop in part because of the lack of party discipline. The dependence of candidates on (i) Old Property holders and PACs for campaign funds, (ii) media for agenda-setting and communication with the voters, and (iii) lobbyists for coordination and implementation of policy likewise provides a fertile medium for iron triangles.

Thus, the holders of the Old Property have found a way to influence and manage the exercise of government regulation and subsidy intro-

101. See C. Reich, *supra* note 3, at 771-73.

102. See *id.* at 785-87.

103. See G. Calabresi, *A Common Law for the Age of Statutes* 46-51 (1982).

duced into our system by the New Property. As the interests of the holders of the Old Property penetrate the New Property regime, we call them "special interests."¹⁰⁴ In this corruption of the Legal Process/regulatory ideal, accurately described by Public Choice theorists, regulations wind up strengthening Old Property interests with New Property privileges they could not have achieved in the private sector.

Transportation magnates, for example, have been treated to barriers that restrict the entry of newcomers into their economic field, creating publicly-supported cartels.¹⁰⁵ Banks have been treated to a "free ride" on taxpayer-insured deposits. Developers have been allowed to play fast and loose with government money designed to house the poor. Thus, the regulatory system rationalized by Legal Process winds up serving "special interests" rather than the "public interest." This creates iron triangles among a special interest, the regulatory agency charged with supervising it and the congressional subcommittee charged with supervising the regulatory agency.¹⁰⁶

Iron triangles are certainly not for the protection of the public—the scattered, diffuse and unconnected individuals who were to be the beneficiaries of New Property rights such as clean air and water, pure food, and antidiscrimination. Norbert Reich refers to these generalized needs for improvements in and protection of quality of life (not held exclusively by any special interest group or focused on parochial economic advancement) as the "diffuse interests" of the public.¹⁰⁷

Public Choice theorists, so clearly aligned with the ideology of Reagan republicanism, advocated massive deregulation as a means of putting an end to the corruption of government with which they associate the New Property. But the deregulatory ideal has begun to sputter as it becomes clear that Old Property "special interests" are at least as adept at getting their way under deregulation as under regulation—perhaps more so. The savings and loan ("S&L") crisis is the clearest example.¹⁰⁸

a. *The S&L Crisis Part I: The Failure of "New Property" Regulation*

The S&L crisis has a price tag exceeding \$500 billion,¹⁰⁹ three times the cost of the Vietnam War. The Depression decimated the banking industry in the 1930s, shaking the Old Property's grip on our financial system. Many banks closed and the unfavorable economic conditions of the times prevented and discouraged the opening of new lending institu-

104. *See id.*

105. *See Kahn, supra note 39, at 307 n.104.*

106. *See McDougall, Social Movements, supra note 9, at 95 & nn.75-76. See also McDougall, New Property, supra note 91, at 399-400 (generally discussing problems created by or associated with New Property).*

107. N. Reich, *supra note 1, at xxv-xxvii.*

108. The following discussion is based on Bearak & Furlong, *Totting Up the Blame for the S&L Crisis*, L.A. Times, Sept. 16, 1990, at 1, col. 1.

109. *See Quint, New Estimate on Savings Bailout Says Cost Could Be \$500 Billion*, N.Y. Times, Apr. 7, 1990, at A1, col. 1.

tions. Consequently, the country lost its historical source of funding for mortgage loans; the construction industry collapsed; and many individuals, unable to refinance their existing mortgages, lost their homes.¹¹⁰ The S&L system created by the New Deal Congress was a species of the New Property, based on government subsidy and regulation rather than on the *laissez faire* system.

As part of an overall response to the collapse of the financial system, Congress in the 1930s assigned to the Federal Home Loan Bank Board the responsibility of both promoting and regulating S&Ls so that public concerns about the stability of the financial system could be mitigated. Congress also provided for citizen deposits in the S&Ls to be insured by the federal government for up to \$40,000.¹¹¹ The taxpayers would back individual deposits against S&L failures. Finally, Congress limited the rate of return banks could earn for money lent and the amount of interest the S&Ls could pay out to depositors, and it restricted S&L lending exclusively to long-term mortgages for the purchase of private homes.¹¹² The overall objective was to encourage savings, contribute to the viability of the economy, and ensure that funds would be available for the common citizen to purchase his own home at a reasonable price.¹¹³

As long as the S&L industry enjoyed substantial government protection and operated in a relatively stable environment, the rules of the game thus established seemed to work. The public had a source for private home ownership and a safe harbor for its nest eggs. The S&Ls were confined to long-term home loans, and as long as interest rates remained stable, their income would exceed their liabilities to depositors.

However, the rules of the game changed with the onset of the Vietnam War. Interest rate increases affected the ability of S&Ls to compete with other financial institutions; the S&Ls were forced to pay greater interest on their deposits than they were receiving on their home loans.¹¹⁴ Toward the end of the 1970s, interest rates approached 20%. Banks and other financial institutions offered relatively high rates of return, but the S&Ls were still restricted in this respect.¹¹⁵ Depositors began withdrawing their funds from the S&Ls and placing them with institutions which offered a greater return.¹¹⁶ By the end of the Carter Administration, the economy had buckled and inflation sent interest rates sky high. Money

110. See Note, *Too Many Consonants and Not Enough Consonance: The Development of the S&L Regulatory Framework*, in Annual Survey of Financial Institutions and Regulation, the S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S263, S267 (1991).

111. See generally *id.* (describing the origin of the deposit insurance system).

112. See Note, *Causes of the Savings and Loan Debacle*, in Annual Survey of Financial Institutions and Regulation, the S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S301, S302 (1991).

113. See *id.* at S303 n.16.

114. See *id.* at S303-04.

115. See *id.* at S304.

116. See *id.*

was rapidly being drained from S&Ls.¹¹⁷ The economic underpinnings for this piece of the New Property were disappearing. Deregulation was by then coming into vogue, and it was to that policy that policymakers began to turn for an answer to the S&L problem.¹¹⁸

b. *The S&L Crisis Part II: Deregulation and the Re-Emergence of the Old Property*

Congress in 1980 reacted to the growing S&L crisis by adjusting the rules of the game in a contradictory fashion. The first adjustment was to raise the limit on insured deposits by raising the insured ceiling from \$40,000 to \$100,000.¹¹⁹ This expanded New Property protection for depositors. Next, however, Congress passed the Garn-St Germain Act of 1982,¹²⁰ which freed S&Ls from dealing exclusively in long-term mortgages on family homes and took the banks one large step toward deregulation, returning to the Old Property, *laissez faire* approach. The investment world was opened up to all manner and form of real estate investment.

However, Congress failed to take into account the S&Ls' inexperience in operating in these new, uncharted waters. The Garn-St Germain Act allowed the S&Ls to keep less money on reserve for unanticipated crises, allowed questionable accounting systems to be implemented, lowered the capital requirements of the industry, and basically discouraged oversight of the S&Ls.¹²¹

In addition, the Bank Board itself abandoned policies that were intended to reduce risk to the taxpayer in favor of greater investment flexibility in the free market, policies which it thought would revitalize the S&L industry. The remaining regulation still required by the Board was ineffectual because of the Board's lack of resources and staff.

The rules in many states were also adjusted to better fit the economic policy of the current administration. Because of the expanded range of permissible investments for both federally- and state-chartered thrift institutions under the deregulatory regime,¹²² the S&L industry was ripe for exploitation by cash-desperate entrepreneurs, as well as by certain criminal elements. The low capital requirements instituted by the Garn-St Germain Act enabled such individuals to acquire an institution by investing little or no capital. For these investors there was almost nothing to lose if their investments did not prove successful.

117. *See id.*

118. *See id.* at S305-08.

119. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified at various sections of 12 U.S.C.).

120. Pub. L. No. 97-320, 96 Stat. 1469 (1982)(codified at 12 U.S.C. § 1811).

121. *See* Note, *supra* note 112, at S314-16.

122. *See* Felsenfeld, *The Savings and Loan Crisis*, in Annual Survey of Financial Institutions and Regulation, the S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S7, S23-29 (1991).

Recall, however, that New Property protection had not only been retained, but was also expanded for depositors. Thus, banks could gamble in "Old Property" fashion with "New Property"—government- (i.e., taxpayer-) backed savings deposits. They went on a spree and took the taxpayers along for the ride. Pursuant to Garn-St Germain, the Bank Board's "hands-off" posture and other "deregulatory" statutes and policies of both state and federal government, the S&Ls became free-wheeling gamblers with taxpayer-backed, insured deposits as their "stake."

c. *The S&L Crisis Part III: The Special Interests
vs. the Public Interest*

The S&L industry, during the 1980s, contributed millions to the campaigns of many in Congress. Many of the entrepreneurs that purchased failing S&Ls also had important contacts in the Capitol. When Federal Home Loan Bank Board ("FHLBB") Chairman Edwin Grey began cracking down on the industry, S&L owners called in their chits with various members of Congress to pressure and even intimidate the regulators.

By the time the health of the nation's thrifts came to the attention of the general public, much of the net worth of the thrifts had already been lost. Some thrifts in Texas had engaged in so many corrupt practices that it took a month to prepare the referrals for criminal prosecution. Assets lost through fraud or poor investment, however, only account for a portion of the losses to taxpayers. The administrative and interest costs in themselves will be the biggest drain on state and federal funds. What went wrong? What happened to the New Property as a paradigm for organizing social life with respect to homeownership and the maintenance of sound savings and loan institutions?

From the beginning, lawmakers had a personal interest in the S&L legislation. First, by creating safe havens for individuals' nest eggs and providing funds for home ownership, those in Congress helped support the "American Dream" and thus insured their own re-election. Second, Congress and the S&L industry it created embarked on a long courtship. Over twenty two million dollars from the thrift industry found its way to congressional campaigns in the 1980s, giving the S&Ls a strong hand in setting Congress' agenda in the field.

With the help of Congressional oversight, the industry "captured" the regulators as well. Bank Board employees were poorly paid and overworked. Those Bank Board employees who "worked well" with S&L institutions often found better paying jobs waiting in the private sector. At the same time, industry people were often appointed to top level government positions. This "revolving door" was the crowning feature of agency capture. As a result, regulators have favored the S&L industry to the detriment of the diffuse public interest in financial security that they

were supposed to protect.¹²³

2. Control of the Bureaucracy¹²⁴

The S&L crisis is a prime illustration of the need to control the bureaucracy in the public interest. It is also a prime illustration of the failure of Congress to perform that role. How, then, is bureaucracy to be controlled? What degree of autonomy does and should the bureaucracy enjoy from either Congress or the President?¹²⁵

The Administrative Procedure Act ("APA"),¹²⁶ a creature of the New Deal/Legal Process era, was presented as a means of maintaining control over the bureaucracy through requiring rational, public processes subject to judicial review.¹²⁷ Key provisions of the APA involved the scope of judicial review of agency action and the distinction between adjudication and rulemaking. The compromise contained in the APA provided that agency adjudication would be subject to judicial review; that rulemaking would be relatively immune from judicial review; and that all other decisions would be committed to agency discretion.¹²⁸

With respect to the latter, some concern was expressed about the excessive adherence to procedural formalities required in the adjudication process. Too much adherence to procedure was thought to limit the bureaucracy's ability to handle policy disputes. Administrative law was not to be "judicialized;" rather, the agencies should have the freedom to arrive at correct, public-interest-oriented decisions.¹²⁹

Questions regarding rulemaking did not arise at first, as agencies did not engage in extensive rulemaking until the 1960s. At that point, a concern was raised by conservatives that agencies engaging in extensive rulemaking had come to wield too much concentrated power. In parliamentary government systems, the executive wields great power, but parliament controls the executive. Professor Shapiro argues that the APA was the tool of New Dealers who sought to create the executive half of that system to the exclusion of the parliamentary half.¹³⁰ Courts were to defer to the legislature, the legislature was to defer to the agencies, and the agencies were to follow the directives of the President (at the time, Franklin D. Roosevelt).

But liberals have lost control of the Presidency and have become less

123. See Note, *A Note to Congress and the FDIC: After FIRREA, Where's the BIF?*, in Annual Survey of Financial Institutions and Regulation, the S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. S459, S497 n.307 (1991).

124. Compare Shapiro, *supra* note 54 (Public Choice view of the bureaucracy) with Frug, *supra* note 14 (CLS view of the bureaucracy).

125. See Shapiro, *supra* note 54, at 486-87.

126. Ch. 324, 60 Stat. 237 (1946)(dispersed throughout Title 5 U.S.C.).

127. See Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 Va. L. Rev. 219, 227 (1986).

128. See *id.* at 227-32.

129. See *id.* at 232.

130. See Shapiro, *supra* note 54, at 450-51.

sure of their control over the legislature. As a result, says Shapiro, they retreated to a view of relative agency autonomy, backed by judicial review. Unfortunately, liberal loss of the Presidency has led to liberal losses in the courts, particularly the Supreme Court.

F. *The Judiciary*

Are courts the proper guardians of the public interest? According to Norbert Reich, the answer is no. In his view, courts are reluctant to enforce the rights of the diffuse interests of the public. Courts see the interests of holders of Old Property or "special-interest" New Property as well-defined entitlements. In contrast, judges are apt to view the diffuse public interests in, say, environmental quality as amorphous and lacking the precision of subjective claims made by clearly-identified interests.¹³¹

Moreover, the federal courts in general, and the Supreme Court in particular, are being stripped of any tendency to protect the diffuse interests of the public in pure food and drugs, a clean environment, and the civil rights of minorities. This process has been carried on by a succession of conservative Presidents who have appointed Justices to the Court who espouse certain political views.¹³²

Liberal President Franklin D. Roosevelt was a strong advocate of "transformative appointments" to the Supreme Court.¹³³ Roosevelt was faced with a conservative Supreme Court which had since 1905 consistently struck down state economic regulation contending that the state legislature had usurped its proper authority.¹³⁴ In the 1930s, the Court took on Roosevelt's New Deal, striking down New Deal legislation on similar grounds. These decisions spurred Roosevelt to "transform" the conservative, activist Court. Soon Roosevelt nominees comprised a majority of the Court, and they affirmed all New Deal legislation.¹³⁵ During the Warren and early Burger Court eras, the Court was atypically to the left of Congress, and particularly to the left of most state legislatures, not only in terms of economic policy but in terms of civil rights and civil liberties as well.¹³⁶ As a consequence, liberals focused more and more of their attention on the Court.

131. See N. Reich, *supra* note 1, at xxx. These differences in judicial approach to special interests and diffuse public interests are generally subsumed under the rubric of "standing."

132. See Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164, 1179-84 (1988).

133. See L. Baker, *Back to Back: The Duel Between FDR and the Supreme Court* 9 (1967).

134. See *Lochner v. New York*, 198 U.S. 45, 57 (1905).

135. See generally C.H. Pritchett, *The Roosevelt Court* (1948)(discussing changes made by Roosevelt appointees in the New Deal era in fields such as criminal law, labor and economic regulation).

136. See generally Nichol, *An Activism of Ambivalence* (Book Review), 98 Harv. L. Rev. 315 (1984-85)(summarizing the various evaluations of the Warren and Burger Court eras).

After a generation of liberal domination of the Supreme Court, however, the first signs of reversal began to appear. It took another generation for the process to be completed. First, in 1960, liberal Justice Fortas lost his battle to be confirmed by the Senate as Chief Justice. Then, in 1968, Richard Nixon made opposition to the Warren Court part of his presidential campaign.

President Nixon nominated three Justices who would curb the judicial activism that yielded social change, and who would not expand the decisions issued by the Warren Court.¹³⁷ His first nominee, Judge Clement Haynsworth, Jr., was rejected by the Senate on political and ideological grounds. The second, Judge G. Harold Carswell, was rejected on similar grounds, added to concern regarding his ethics and professional qualifications,¹³⁸ his symbolism for Nixon's "Southern Strategy," his lack of professional distinction and his questionable civil rights record.¹³⁹ Judge Harry Blackmun, Nixon's third nominee, was accepted. His "competence, temperament, and non-judicial record" were promptly reviewed and accepted.¹⁴⁰

When Nixon nominated Blackmun, he appeared to be a conservative judge. Blackmun has since become "a pragmatic, strongly independent jurist who more often than not votes with the Court's two more liberal Justices."¹⁴¹ Thus, President Nixon only achieved partial success. His transformative effort created a politically conservative Court in the realm of criminal procedure, education and social welfare. However, on issues of discrimination, alienage, legitimacy and abortion rights, the Court remained liberal and activist.

When President Reagan came to office in 1980, he fostered the conservative judicial movement begun in the 1970s.¹⁴² President Reagan's chance to realign the Supreme Court came when Justice Stewart retired in October 1980. Sandra Day O'Connor, Reagan's first appointment, was a critical fifth vote for the conservative bloc, but she was cautious and change came slowly.¹⁴³

In 1986, when Lewis F. Powell, Jr. retired, President Reagan's chance arose to imprint the Supreme Court by creating a bloc of four indisputable conservative votes.¹⁴⁴ Though Robert Bork was rejected, the Senate, exhausted from the Bork fight, confirmed Anthony Kennedy based on

137. McConnell, *Haynsworth and Carswell: A New Senate Standard of Excellence*, 59 Ky. L.J. 7, 21 (1970).

138. *See id.*

139. *See id.* at 21-23.

140. *See id.* at 25.

141. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations* (Book Review), 95 Yale L.J. 1283, 1314 n.186 (1986)(quoting Jenkins, *A Candid Talk With Justice Blackmun*, N.Y. Times Magazine, Feb. 20, 1983, at 22).

142. *See* E. Witt, *A Different Justice* 1 (1986).

143. *See id.* at 10.

144. *See* Cohodas, *For Robert Bork, The Real Test Begins Now*, 45 Cong. Q. 2159 (Sept. 12, 1987).

his temperament, professional qualifications and integrity even though some senators had grave reservations.¹⁴⁵ Justice Kennedy has been an influential fifth vote, creating a conservative bloc and a Reagan legacy of conservative Justices who may serve for a generation.¹⁴⁶

President Bush, following in the footsteps of Nixon and Reagan, had his chance to further the Supreme Court's conservative transformation when Justice William J. Brennan, Jr. retired. While Justice Brennan had spent his thirty-four years on the bench "reinforcing individual rights against government power,"¹⁴⁷ President Bush's nominee, Judge David H. Souter, is expected to complete the transformative process described above.¹⁴⁸ It is also important to remember that the lower federal courts—the D.C. Circuit Court of Appeals, for example, but also many others—have been shifted as significantly to the right by Reagan-Bush transformative appointments as has the Supreme Court itself.

Today, the conservative majority advocates judicial restraint and deference to the intent of the framers, to the Constitution and to Congress. Eventually, however, the Court may engage in conservative activism to impose limitations on the power of Congress to engage in liberal policymaking. The political labels of judicial activism and judicial restraint may well reverse themselves, not only with respect to civil rights, but also with respect to the New Deal-positive government that overcame separation of powers to create economic rights.¹⁴⁹

G. *Separation and Coordination of the Branches of Government*

Liberals view the Bill of Rights as the principal guardian of public freedom, and expect the Supreme Court, as in Chief Justice Earl Warren's time, to take the lead in vindicating the Bill of Rights.¹⁵⁰ Conservatives, on the other hand, regard separation of powers as the principal means with which to guard American freedom.¹⁵¹ Separation of powers entails the dispersion of power among the branches, in order to guard

145. See generally Biskupic, *Justice Kennedy: The Fifth Vote*, 47 Cong. Q. 1695 (July 8, 1989)(discussing Justice Kennedy's voting record).

146. See Biskupic, *Solid New Majority Evident as 1988-89 Term Ends*, 47 Cong. Q. 1694 (July 8, 1989).

147. Stewart, *The Great Persuader*, 76 A.B.A. J. 58 (Nov. 1990).

148. See *id.*

149. See generally Cohen, *More Myths of Parity: State Court Forums and Constitutional Actions for the Right to Shelter*, 38 Emory L.J. 615, 615 (1989)(discussing the creation of a state constitutional right to shelter).

150. In this regard, the Court's most important historical decisions have been in the protection of free speech, the franchise, and the electoral process. See Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U L. Rev. 1239, 1240 (1989). Compare *Trist v. Child*, 88 U.S. 441, 451 (1875)(contracts to lobby Congress unenforceable) with *United States v. Harriss*, 347 U.S. 612, 626 (1954)(limits of lobbying registration statute).

151. See Gelfand & Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents From Justices O'Connor and Scalia*, 64 Tul. L. Rev. 1443, 1444 (1990). Two related concerns of conservatives are those of factionalism and those of aggrandizement. See generally Pierce, *supra* note 150, at 1244-50 (discussing the

against any branch of government aggrandizing itself at the expense of another or of the people.¹⁵² The Federalists believed dispersion of political control was best accomplished by keeping each branch independent from control by the other, and by maintaining a specialization of each branch so that government could not operate without the assent of all three.¹⁵³

Until the New Deal, the Supreme Court engaged separation of powers issues primarily through the "nondelegation" doctrine, limiting the amount of legislative authority Congress could delegate to an administrative agency.¹⁵⁴ Since then, the federal nondelegation doctrine has fallen into abeyance. In sorting out separation of powers cases, the Court has expressed itself most forcefully in those cases touching on the areas of major political turbulence in the national government. The Court's analysis in such cases rests on two distinct approaches:¹⁵⁵ a "formalist" approach¹⁵⁶ and a "functionalist" approach.¹⁵⁷

Formalism looks to a strict separation of the three branches, with intermingling only as prescribed by the Constitution's rule of law, to accomplish dispersion of political control.¹⁵⁸ The question here is, has there been aggrandizement of one branch with respect to another?¹⁵⁹ Functionalism, on the other hand, looks to an *ad hoc* accommodation among the three branches so that effective government can take place while preserving the dispersion of political power at the minimum constitutionally-required level. As such, functionalism is perhaps more of a "checks and balances" approach than a "separation of powers" approach.¹⁶⁰ It is of necessity *ad hoc*, and is more compatible with theories

changing role of Congress in government policy-making). Factionalism and aggrandizement threaten the people with minoritarian and majoritarian domination. See *id.* at 1241.

152. See Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 271. See also *id.* at 272 (the courts have been particularly concerned about Congressional aggrandizement).

153. See Yassky, *supra* note 53, at 431, 433.

154. See *id.* at 431, 433-35.

155. See *id.* at 435.

156. See Sherry, *Separation of Powers: Asking a Different Question*, 30 Wm. & Mary L. Rev. 287, 289-93 (1989); Levinson, *supra* note 58, at 527-30. For a definition of formalism, see Note, *Separation of Powers: A New Look at the Functionalist Approach*, 40 Case W. Res. L. Rev. 331, 335-36 (1989-90). See also Entin, *supra* note 53, at 219-20 (for an argument that the formalist approach comports with advocacy of limited government).

157. See Entin, *supra* note 53, at 206-09. For a definition of functionalism, see Note, *supra* note 156, at 333-35. See also Entin, *supra* note 53, at 220-22 (for an argument that the functionalist approach comports with advocacy of expanded government).

158. The formalist cases are associated with the Burger Court, essentially trying to hold the line as an increasingly Democratic Congress began to assert its interest in controlling the bureaucracy. See Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 Notre Dame L. Rev. 587, 596-601 (1990). It has been argued that the formalist cases involve in their fact patterns specific violations of the constitutional text. See Bator, *supra* note 152, at 272.

159. See Gelfand & Werhan, *supra* note 151, at 1464.

160. Separation of powers is violated when the "[challenged action] prevents the [affected] Branch from accomplishing its constitutionally assigned functions." Bator, *supra*

of pluralism.¹⁶¹ The question here is whether the balance of power among the three branches has been disturbed.¹⁶²

Maintaining separation of powers boundaries is not an easy task for the Court, particularly when turf battles between the two directly accountable branches are involved.¹⁶³ Recently, however, the Court seems to be showing more enthusiasm for enforcing separation of powers principles through litigation. It has thus become more typical for the Court to police the role of Congress and the President in overseeing the federal agencies constituting the Bureaucracy.¹⁶⁴

Congressional oversight of agency action has been hampered by the decentralization of authority to myriad subcommittees, the breakdown of party discipline in Congress¹⁶⁵ and the consequently enhanced power of staff and lobbyists.¹⁶⁶ In fact, Congress has been delegating more and more authority to the agencies, particularly through a process described by one commentator as "intransitive" legislation.¹⁶⁷ Attempts by Congress to re-assert control through nonlegislative mechanisms have been turned back by the Court,¹⁶⁸ ostensibly because the possibility of legislative aggrandizement and the danger of factionalism would increase.¹⁶⁹

The President (working through the Executive Office) has been somewhat more successful in getting the bureaucracy to do his bidding. The President himself can hire and fire the Departmental Chiefs of the non-independent agencies.¹⁷⁰ The Office of Management and the Budget ("OMB"), part of the Executive Office of the President, has the power to review agency statements, proposals and regulations pursuant to its power over the agencies' budgets.¹⁷¹ A variety of other executive agen-

note 152, at 273 (*quoting* Nixon v. Administrator of Gen'l Servs., 433 U.S. 425, 443 (1984)).

161. Some argue that the functionalist approach enhances the representation of diffuse interests by impartial bureaucratic managers, free from the influence of "special interests." See generally, Sunstein, *Interest Groups in American Law*, 38 Stan. L. Rev. 29 (1985) (broad discussion of the influence of factions on the political process).

162. See Gelfand & Werhan, *supra* note 151, at 1464.

163. See Entin, *supra* note 53, at 209-27.

164. See Yackle, *Choosing Judges the Democratic Way*, 69 B.U.L. Rev. 273, 281 n.26 (1989).

165. See K. Lawson & P. Merkl, *supra* note 96, at 285-90.

166. See Pierce, *supra* note 150, at 1242-43, 1244-47. Congress has also been weakened by the breakdown in party discipline effected through electoral reform and the rise of PACs. See *id.* at 1246.

167. See *id.* at 1244-47. See also De Long, *supra* note 54, at 425-27 (discussing problems of determining congressional intent of statutory directives to agencies).

168. See, e.g., Bowsher v. Synar, 478 U.S. 714 (1986) (executive authority lodged in office controlled by Congress); INS v. Chadha, 462 U.S. 919 (1983) (legislative veto). The theory seems to be that Congress' power ends with the passage of a law. "Implementation must be left to officials who are not subject to direct congressional control." Kramer, *The Constitution as Architecture: A Charette*, 65 Ind. L.J. 283, 288 n.18 (1990).

169. See Pierce, *supra* note 150, at 1249 & n.55.

170. See DeLong, *supra* note 54, at 412.

171. See *id.* at 412.

The OMB was established to bring order out of the policy and financial chaos that

cies which ultimately report to the President also influence agency action.¹⁷²

The courts, however, in addition to being able to police Congressional and Presidential oversight, also have the power to conduct their own procedural and substantive review of agency action.¹⁷³ Court involvement in this area, directed by the APA and focusing on procedural regularity, compliance with statutory mandate and abuse of discretion,¹⁷⁴ has become the hope of many liberals for the extension of New Deal-type regulation in the face of deregulatory strategies from conservative Presidents.¹⁷⁵

These liberal hopes were localized in the once-liberal D.C. Circuit Court of Appeals. The D.C. Circuit invented the doctrine of "statutory duty" to keep agencies cleaving to the line of '60s social welfare legislation, bolstering them against deregulatory Presidents.¹⁷⁶ Eventually, "judicialized" and "following statutory duty," the agencies could have been freed from accountability to the President and could have followed a liberal, regulatory, "New Property" agenda.¹⁷⁷

Liberal theorists such as Professor Sunstein were apparently not persuaded that such agencies would run amok, balancing against that possibility the benefits of strict judicial review to ensure that agencies adhere to their statutorily-mandated duty.¹⁷⁸ They seemed to believe that agencies could be made to serve the public interest rather than respond to special interests. The method was to permit the D.C. Circuit Court to interpret an agency's statutory mandates and to precipitate a dialogue with the various interests at stake, thus setting in motion a process of reasoned decisionmaking.¹⁷⁹

The D.C. Circuit Court, it was hoped, would grant a "preferred position" for minorities and others who have been given New Property rights (e.g., the elderly in terms of Social Security),¹⁸⁰ and would also prevent special interest groups from capturing an agency. Through this process, the New Property could perhaps be purged of its "special-interest" corruption. New Legal Process theorists apparently believed that purging was achievable through collaboration with the once-liberal D.C. Circuit

reigned in the Capitol in the 1960s. Reagan's E.O. 12,291 dramatically increased OMB's power. This was followed by E.O. 12,498, which acted as an "early warning" system, requiring agencies to notify OMB of any significant intelligence-gathering. See Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059, 1060-63 (1986).

172. See DeLong, *supra* note 54, at 412-13.

173. See *id.* at 411.

174. See *id.* at 417.

175. See Shapiro, *supra* note 54, at 484-88.

176. See *id.* at 488.

177. See *id.*

178. See Sunstein, *supra* note 161, at 64. See also Shapiro, *supra* note 54, at 468 (summary of Sunstein's theory).

179. See Shapiro, *supra* note 54, at 484-85.

180. See C. Reich, *supra* note 3, at 734-46.

Court. Thus, the agencies would operate as a fourth branch of government and “do the right thing” regardless of deregulationist pressures from the Executive or “special-interest” regulation from Congress.¹⁸¹

The process of transformative appointments has reached even the liberal D.C. Circuit Court of Appeals, however. Recent decisions give the lie to Professor Sunstein’s hopes. Even if the D.C. Circuit Court had not been transformed, however, it is likely that agencies with freedom from political accountability would respond to tightly-organized special interests rather than serve the diffuse interests of the public. As mentioned above, bureaucrats have their own reasons for responding to holders of “special-interest” New Property. The degree of agency independence thus remains a key issue.¹⁸²

H. *Public Interest Lawyering in the “Real World”*

It is now conceded by many conservatives that less government will not necessarily cure the social and economic problems of a democratic society.¹⁸³ There is need to protect the people from the aggrandizement of any branch of government, but there is also a need to promote government activity that is required to protect the “diffuse interests” of the public in values such as civil rights, civil liberties, environmental protection, and pure food and drugs. While a hamstrung government cannot act to favor a faction, it also cannot act to protect the people from the encroachment of the private sector.

By the same token, more government isn’t necessarily the answer either, particularly when the government itself is undisciplined and out of control. As a gap widens between the cost of government and the revenues available to pay for it, more and more members of the public

181. See Shapiro, *supra* note 54, at 479.

182. There are important questions to be raised about which of these institutions is best suited to control agency action, questions which should be considered in light of the particular agency function sought to be affected and the particular value sought to be achieved. For example, how do procedural justice and error tolerance intersect? See DeLong, *supra* note 54, at 415. Which is best for the task of control, the judicial focus on fairness and procedure? The Office of Management and the Budget (“OMB”) emphasis on spending cuts? See *id.* at 424-25. See also Morrison, *supra* note 171, at 1067 (OMB operates in secrecy); *id.* at 1071 (Congress, by amending the Administrative Procedure Act or by rider to OMB’s appropriations, should prohibit OMB review of agency decision-making except through on-the-record comments). The legalism of the Department of Justice? See DeLong, *supra* note 54, at 419-20. The Executive Office of the President? See *id.* at 425.

In some instances, the Court might do well to take note of the possibility that other institutions might better regulate an agency in a particular context. For example, courts are particularly inept at agency control problems involving coordination of different programs, resolution of interagency conflicts, and conflicts between specific congressional directives and broader expressions of national policy. See *id.* at 424. By contrast, courts perform well with delegation and due process issues. See *id.* at 425. See also *id.* at 418 (discussing the internal processes of the agency rather than the procedures by which it ministers to the outside world).

183. See Kahn, *supra* note 39, at 15-17, for citations to such conservative views.

have become concerned with the cost of the bureaucracy, what it does, and for whom.

But how is that attention to be focused? In the S&L instance, it would be fair to say that members of the "diffuse," scattered public are too remotely connected to what is going on to recognize the direct impact government policy choices have on their personal well-being. The operation of the media—dramatizing, personalizing and fragmenting the news—makes it even more difficult for the public to get a firm grip on such issues.

The role of a social movement in countering this disaffection is to expose the issue, empowering individuals to grapple with it through communication, education and coalition-building. This type of exposure should take place, if possible, before the crisis occurs. It may be too late to raise questions once the money is lost and disbursed into the economy, once the troops are committed, once a community is choked by cancer from toxic waste, and once the diffuse public has committed itself to a distorted, media-generated vision of the issues. The need for lawyers to aid social movements in defending the "diffuse" interests of the public requires that we develop both a theory and a practice of public interest law.¹⁸⁴

The New Legal Process, an intellectual movement aiming to revive Legal Process rationality in the face of CLS and Public Choice critiques, seems to be in search of a source of public values other than the Old Property in its naked, nonregulated state, or in the "special-interest" garb it has donned to exploit the New Property.¹⁸⁵ Because the public itself is diffuse, New Legal Process thinkers have apparently not seen a way for the public to become constructively involved in policymaking. Rather, they have focused on one or the other branch of government as leader of a hermeneutic dialogue which would perhaps offset the tendency of any one branch to degenerate into a forum for Old Property or "special-interest" New Property.¹⁸⁶ They have generally not recognized that the diffuse interests of the public can sometimes be discerned through contact with social movements, perhaps confusing social movements and the resultant public interest organizations with undesirable "special interests."

184. See N. Reich, *supra* note 1, at i. Lawyers are a necessity because we are moving into what Ulrich Beck calls the "risk society" of chaos and atomization (with a need for networking in an information, as opposed to a mass, economy). See *id.* at ii (citing U. Beck, *Risikogesellschaft Auf demwegineine andere Moderne* (Frankfurt 1987)). See also *id.* at ii (citing Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *Law & Soc'y Review* 239 (1983)).

185. See McDougall, *Social Movements*, *supra* note 9, at 98-101.

186. See generally Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 *U. Pitt. L. Rev.* 691 (1987)(focusing on the legislature); Fiss, *Objectivity and Interpretation*, 34 *Stan. L. Rev.* 739 (1982)(focusing on the judiciary); Sunstein, *Factions, Self-Interest, and the APA: Four Lessons Since 1946*, 72 *Va. L. Rev.* 271 (1988)(focusing on the bureaucracy).

Movements for civil rights, consumer's rights, and a better environment are the closest thing we have to an unadulterated expression of the public interest, however. Because of the corruption of the New Property/regulatory system by "special interests," the diffuse interests of the public cannot be left to a hermeneutic dialogue among the branches of government. Instead, social movements have surrogates that operate in the public policy system—the Leadership Conference on Civil Rights, various Nader organizations pursuing consumer interests, various environmental organizations—whose influence can only be appreciated when examining the overall process by which law is developed and implemented. To appreciate the role of social movements in legal discourse, we must get beyond simply studying law "as it is."

The key lies in an examination of the role of law in the conflict between "special interests" and "diffuse interests." According to Norbert Reich,¹⁸⁷ in the chaos of post-modern society, law is neither an "autonomous" force, as the Formalists and holders of the Old Property would have us believe, nor the rational instrument of social engineering envisioned by the Realists, Legal Process adherents and advocates of the New Property. Law is, instead, a forum for the management of conflict.¹⁸⁸ Law does not *resolve* conflict, but rather, *manages* it.

Considering law as a forum for the management of social conflict, we can begin to examine the development and implementation of law through a process of confrontation and clash between representatives of diffuse interests, on the one hand, and powerful adversaries holding either Old Property or "special-interest" New Property on the other.¹⁸⁹ I have commented on this role of law elsewhere.¹⁹⁰

When a social movement, seeking to assert diffuse interests in the face of abuse by an Old or "special-interest" New Property holder, pressures the state for some form of legal intervention (regulation, legislation, adju-

187. See N. Reich, *supra* note 1, at xxvii-xxxii.

188. See *id.* at xxiv.

"Certain participants in the community process have deprived, or are threatening to deprive, other participants of claimed values, and one or both sets of participants, threatening as well as threatened, may appeal to the process of community authority to facilitate or restrain the deprivation." McDougal, *supra* note 17, at 57. See also Clune, *supra* note 15, at 58-61 (discussing the struggle between "social movements" (representing "diffuse" interests) and "regulated organizations" ("special interests")).

189. See generally N. Reich, *supra* note 1, at xxix (citing Clune, *Legal Disintegration and a Theory of the State*, in Working Papers, Series 2/5, 26 (1987)(available from the Institute for Legal Studies, Madison, WI)).

Rights of special interest groups have a tendency to become *privileges*. These privileges enjoy a broad constitutional and legal protection without being counterbalanced by social responsibility and solidarity. . . . They are directed against those who want social change. . . . [It is] "a ludicrous model of social planning, pitting members of the collective against each other in a haphazard series of disorganized, egoistical contests which disrupt social bonds and overextend the total amount of collective resources.

Id. at xxxii.

190. See McDougall, *Social Movements*, *supra* note 9, at 109-15.

dication, executive order, or treaty), it gets a "compromise."¹⁹¹ The state, "relatively autonomous" from the will of social actors, must incorporate into its intervention the interests of those whose behavior the social movement seeks to regulate, the "diffuse interests" represented by the social movement, and the state's own institutional agenda. In this pragmatic universe, a compromise is the best the social movement can hope for.¹⁹²

Such compromises are ephemeral legal patterns which manage conflict by regulating the intensity the conflict will thenceforth take. The compromise prescribes the instruments which can be deployed by either side as the conflict ensues. Typically, the compromise also identifies a forum to which the adversaries may turn for technical—or even radical—refinements in the original legal pattern.¹⁹³ This perception of the law's management function can be expanded by viewing the adversaries as free to address related claims to other forums. Thus, we see adversaries moving strategically and tactically among courts, legislatures, regulatory agencies, the media, and chief executive officers on federal, state, and municipal level. This is the "recursiveness" and "cybernetic interactionism" described by Clune in his 1983 work.¹⁹⁴ This is a moving picture of law as an "object, product, and determinant" of social conflict.¹⁹⁵

Norbert Reich is concerned especially with the collective and individual "action rights" which make legal forums available to social movements as a procedural matter.¹⁹⁶ In his view, these are essential to enable

191. See Clune, *supra* note 15, at 88-89.

192. For a definition of "compromise," see *id.* at 88.

193. For an example of this process, see McDougall, *Social Movements*, *supra* note 9, at 111-15 (recursive and cybernetic interaction of Leadership Conference on Civil Rights, special interest groups, and the Reagan Administration in the passage of the Civil Rights Restoration Act of 1988).

194. See Clune, *supra* note 15, at 78.

[O]fficials and representatives of effective control groups are both continuously gathering and disseminating information or intelligence for the enlightenment of the authoritative prescribers and appliers of policy and continuously recommending specific policies to such prescribers and appliers. . . . By still different procedures [they are also] in constant process of appraising and terminating outmoded prescriptions.

McDougall, *supra* note 17, at 57.

Decisions are responses to precipitating events best described as value changes in social processes, are conditioned by many different variables in the particular social processes in which they occur, and have in turn continuing effects upon such processes.

Id. at 65.

195. See Wright, *Modes of Political Class Struggle in the Capitalist State*, 4/5 Kapitalistate 186 (1976).

196. The various civil rights acts and the environmental protection statutes are good examples. Note "private attorneys general" provisions of much of the legislation. Note also the proposition that "rights are only abstractions until they affect human behavior." McDougall, *The New Property*, *supra* note 91, at 400. The process of translating 'rights' into altered behavior patterns is a complex and indeterminate one. See *id.* at 402-03.

a social movement to protect itself from losses in the political arena.¹⁹⁷ Public interest litigators are finding it increasingly difficult, however, to gain access to federal courts to protect such rights by adjudication. Even those courts which are sympathetic to public interest views often cannot hear such claims because of the increasingly restrictive law of standing issues being promulgated by the Supreme Court. In fact, public interest litigators may do well to avoid federal court even if they can gain standing, as the Court shows every sign of returning to the kind of conservative judicial activism that has been characteristic of the Court for most of its history.

Further, too much reliance on legal forums (especially courts) and insufficient political action (electoral and non-electoral, in communities and neighborhoods as well as statewide and nationwide coalitions) will enervate a social movement and render it ineffectual in both the political and the legal realm. The social movement's legitimacy to speak in the legal forum is precarious; it depends on the perception of the state apparatus—primarily legislative, but also regulatory and judicial—that the social movement commands the allegiance of the diffuse interests it purports to represent.¹⁹⁸ A social movement is not like a union, representing workers as the result of an election.¹⁹⁹ It must constantly re-establish its legitimacy, both with the diffuse public it purports to represent and the legal functionaries whose intervention it seeks.²⁰⁰ It's quite a tightrope to walk.²⁰¹

III. PUBLIC INTEREST REPRESENTATION: MODES OF ANALYSIS AND ACTION

A. Introduction

We have examined the theories of law that comprehend its open-ended

197. See N. Reich, *supra* note 1, at xxxiii.

198. This is complicated by the fact that social movements, unlike unions, are "not organi[z]ed on a large membership basis. They need 'selective incentives' . . . to avoid 'free riding.' Therefore, they seemingly do not enjoy democratic legitimacy but are still necessary to allow for the pursuit of the quality of life." *Id.* at xxvii.

199. N. Reich calls these "reform rights." See *id.* at xxxvi.

[S]ocial movements for the protection of diffuse interests usually fall outside traditional legal arrangements which are based on a government of laws protecting highly specific "subjective rights." The only exception so far has been the recognition of collective rights to trade unions. . . . Nothing comparable is available in other areas of social conflict, such as environmental, consumer, and equal rights protection.

Id. at xxvii.

200. See generally N. Reich, *supra* note 1, at xxxvi (summarizing the various competing rights among members of industrialized societies). An advantage of reading a European author here is that his references to what Charles Reich refers to as the "new property" also include the more thoroughgoing experiments at legal intervention in the economy attempted by the socialist countries. See also *id.* at xxx; Clune, *supra* note 15, at 78 (definition of "reformist political fabrication").

201. See McDougall, *Social Movements*, *supra* note 9, at 98 & nn. 91-94; N. Reich, *supra* note 1, at xxviii.

character and that take note of the contribution of the various sources of law to the *corpus juris* of the legal system. We have discussed the theories of law that comprehend the development and implementation of law, as well as "what the law is." But we have not yet considered how a public policy approach requires teaching students different lawyering skills to cope with the world we describe. To what extent do clinical teaching methods enhance learning and teaching about advocacy in legislative, regulatory and litigation contexts? The remainder of this Article is devoted to these questions.

1. Ends-Means Thinking

For clinical legal educators working with clients, the practical and pedagogical issue is how to solve the client's problem. The clinician's education leads him or her to consider court judgments as the only legal arrangements which have the kind of permanence or stability that can put a client's problem "to rest." In practice, however, the clinician begins to discover two important variations from his or her law school training.

First, court judgments are less permanent, and legislation or regulation²⁰² more permanent, than previously assumed. Judicial precedents are not completely permanent—even the Supreme Court occasionally reverses itself—and constituencies pieced together in a legislative coalition are not completely ephemeral. Coalitions around certain legislation—such as the National Labor Relations Act—have stood the test of time longer than some Supreme Court opinions.²⁰³

Second, legislation and regulation are more the product of a "rational" process than heretofore assumed, and court judgments are less the outcome of a "rational" process than previously assumed. The very process by which precedents are synthesized into a "judgment" or rule, especially at the appellate and Supreme Court levels, is much more like legislation than we tend to realize.²⁰⁴

We are looking here at the possibility that precedent (litigation, appellate practice), legislative coalition (legislative practice), oversight coalition (regulatory practice) and consensus (mediation and negotiation) are perhaps not so dissimilar as we have previously maintained. They might be better characterized as points on a continuum. The ends-means thinking that is appropriate in the "post-modern" legal universe requires that

202. A discussion of mediation and negotiation is beyond the scope of this article.

203. Whenever the balance of forces undergirding the National Labor Relations Act is disturbed, a "watershed" occurs and a perception of injustice arises. Cf. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 Minn. L. Rev. 265, 290-91 (1978)(the same analysis with respect to the Wagner Act).

204. Cf. R. Woodward, *The Brethren* 2-3 (1979)(describing the seven decision-making steps used by the Supreme Court). Also, judgments have only an illusion of finality. Cf. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979)(on the structural injunction).

we consider this varied pattern of sources of law and forums from which to get legal remedies, and understand the characteristics of each.

2. Contingency Planning/Comparative Risk Evaluation

A public policy approach helps students to see the impact and influence of social movements and the role of the media in setting the institutional agenda for society as a whole.²⁰⁵ These and other forces converge to create a social and institutional environment in which certain outcomes are more or less likely to emerge.

In the post-modern legal universe, we have thus begun to move away from the idea of law as frozen in appellate court opinions, and toward a process which is constantly in motion. State intervention does not end a conflict, it merely frames it, confines it within acceptable boundaries, and, within those boundaries, the conflict continues.

The question that the student and practitioner must ask in this context is: "How do we activate the legal apparatus of the state to respond to a client's problem?" What is the best forum? The judiciary, the legislature, or an administrative agency? There are clearly situations in which litigation is not the right instrument to use for achieving a certain objective, and legislation (broad sweep) or regulation (case by case or rulemaking) is more appropriate.²⁰⁶ Once law is seen as the structural result or outcome of a drive for state intervention, we can begin to treat judgment, legislation, and regulation as equally available remedies.²⁰⁷

3. Hypothesis Formulation/Information Acquisition

Now that alternate forums are being considered, what skills should be developed for effective advocacy in each? Legal reasoning in a litigation context requires the marshalling of precedent. The litigator has to frame the issue so that available precedents will be pieced together in a pattern that "covers" the problem at hand. In a legislative context, legal reasoning requires the marshalling of arguments that will command the loyalties of diverse constituencies, which can in turn be built into a coalition large enough to sponsor, or even perhaps pass, the bill. In a regulatory context, legal reasoning requires an examination of statutory authority and internal agency decisionmaking processes as well as an ability to resort to both litigation-specific and legislation-specific legal reasoning if either the courts or the legislature are to be invoked to externally control agency action.

Language and proposals have to be drafted around which a coalition can be formed and which can keep the coalition in a pattern that "cov-

205. See generally D. Graber, *supra* note 64, at 119-24 (impact of media on societal behavior).

206. 193. See generally McDougall, *Lawyering*, *supra* note 9, at 379-83 (theoretical perspectives about the law).

207. See McDougall, *Social Movements*, *supra* note 9, at 115.

ers" the problem at hand. For such language to be drafted, information must be retrieved, aggregated and formulated into hypotheses that can convince a broad array of persons affected by the "problem" to see their common interests in addressing it.

Advocates who are assigned tasks of data retrieval and analysis must know how to work with data. They must develop a sense of what is available and learn how to use sources such as statistics, public records, corporate reports and the Freedom of Information Act.²⁰⁸ Moreover, ethical questions come up in data collection: How scrupulous should the collector be? How ethical should the collector be in terms of research and presentation?

In what form should data or the conclusions drawn from data be presented? There are essentially two approaches, empirical and anecdotal. Anecdotes can provide a profile of the problem, sum it up, evoke it. Anecdotes are especially important from a media standpoint, but an advocate may never get to present an anecdote to a decisionmaker unless a factual predicate can be established. The advocate must first be prepared to prove that the anecdotal information is expressive of a larger pattern—a "big" problem, the solution to which will have a "big" impact.

We thus see a need for skill in data collection, retrieval and aggregation, particularly by statistical and other empirical methods needed to prove that a problem exists and that it touches many people ("left brain" techniques). The practitioner will also require a kind of "right brain" empathy, sensitivity and creativity to distill that data into a compelling paradigm, story, or even anecdote which will evoke the necessary comprehensive understanding of the problem identified. These are skills which should be seen as "agenda-setting" as much as they are "advocacy." Far from the Lone Ranger paradigm of the lawyer, our role in pursuit of the public interest—in judicial as well as legislative and regulatory forums—is much more that of enabler than of decision-maker.

4. "Building Community" and "Right-Brain" Skills²⁰⁹

The skills employed in negotiation, mediation, networking, consensus and coalition-building are the skills of building community. These communities may be built among a small group or a very large group of people; the communities may be lasting, or they may be ephemeral. What I wish to touch on here is the relevance of right-brain "skills" like empathy and the ability to see patterns and connections to such community-building.

Graham Strong seems to be the pioneer on Right Brain Lawyering.²¹⁰ Graham's recent draft, "The Lawyer's Left Hand—Non-Analytic

208. 5 U.S.C. § 552 (1991).

209. See McDougall, *Lawyering*, *supra* note 9, at 374, 383-84; McDougall, *Social Movements*, *supra* note 9, at 93 nn. 58-60, 96-97.

210. See also Lipkin, *supra* note 1, at 867-71 (legal and moral theory construction).

Thought in the Practice of Law," is apparently confined to the context of litigation, and sees the lawyer as working alone. While Graham seeks to develop intuitive skills to make a lawyer a better interviewer and counselor, for example, he still sees the lawyer as a litigator, one man against all odds. These aspects are very much part of the Langdellian paradigm he attacks, and reveals how much of that paradigm still dominates the thinking of most clinicians.

The key to breaking out of the Langdellian paradigm is not simply to release the right brain so that we can, as individuals, serve our clients better. It is to release the "ego boundaries" which make us not only, in the final analysis, unable to conceive of solutions other than those which involve litigation or actions leading to it, but even make it difficult for us to conceive of litigation remedies which we do not personally author and control.²¹¹

A collapse of ego boundaries enables us to merge our work with that of others through networking, first within the litigation realm, and then across litigation, regulation and legislation.²¹² This is how the coalitions are built which bring together "diffuse" interests and create the social movements which are one of our most important sources of public values. Social movements can actually be inhibited by a "Lone Ranger" style of litigation; the networking and interaction which is necessary to advance a legislative agenda, for example, builds community in a way that victories by a single litigator, no matter how important, cannot create. Further, if members of the public are not actively involved, the social movement loses credibility and influence. We thus must begin to prepare ourselves and our students to see lawyers' roles as facilitating the trusteeship of diffuse interests exercised by social movements.

Once we are prepared to work with others in a collaborative workstyle, there are a number of right-brain skills which are very useful in the kind of coalition-building which is necessary for legislative and "implementation" practice. One is the ability to see patterns intuitively, even artistically, where others strive for detail, "missing the forest for the trees."²¹³ Another is the ability to sense and pick up connections between people and causes based on prior experience.²¹⁴

Further, administrative and legislative advocates learn to attack a

211. See Solomon, *Client Relations: Ethics and Economics*, 23 *Ariz. St. L. J.* 155, 180-81 (1991).

212. Note that ego boundaries tend to reify personality variants, shared by all, into "reactionary, conservative, liberal, and radical" dispositions. Cf. Lipkin, *supra* note 1, at 871-74 (a sort of "Myers-Briggs" conception of political personality type). Once a political disposition is thus formed, the political ego is subject to flattery, threat and manipulation just as the social ego is. See *id.*

213. For example, analytical versus associational or networking skills, or legal drafting, which cannot be too clearly expressed without fractionating coalitions or obscuring issues. Cf. Lipkin, *supra* note 1, at 868-70 (linear thinking versus required "fuzzy logic"); Margulies, *supra* note 95, at 236 (impact of diagnostic thinking on paradigms and human inference).

214. See G. Bellow & B. Moulton, *The Lawyering Process* 299-301 (1987).

problem, rather than an opponent, and learn to seek compromises. Compromises are facilitated in their conceptualization by right-brain skills, and in their execution by a collapse of ego boundaries. Administrative and legislative "compromises" are economic/political/legal equilibria which are, in truth, "communities," even if only short-lived. Perhaps classroom and clinical teachers and scholars can begin to see that court judgments are equilibria as well, constantly being calibrated and re-calibrated. Just as litigators make choices between solving problems by going "all the way" to judgment, legislative advocates make choices about going "all the way" to getting a bill passed. In either case, tactics short of full-blown strategies may be preferable in order to sustain informal, "community" relationships which may ultimately be as important as "high-megaton" state sanctions in altering patterns of social life at the most basic level. Thus, public interest lawyers may frequently find themselves looking for negotiations, compromises, and settlements which are on the litigation or legislation track but which do not go all the way to the end of the line.

Interviews with public interest lawyers regarding relevant lawyering skills in this type of practice reveal a preference for negotiation²¹⁵ and networking skills,²¹⁶ with less focus on the litigation-related skills of research, writing and advocacy.²¹⁷ They are also concerned not only with the question of which skill to use but how and when to use it.²¹⁸ Public interest lawyers also caution that coalition work is not all right-brain, "touchy-feely" stuff.²¹⁹ A public interest lawyer not only builds coalitions

215. [T]he needed skills are meeting facilitation, coalition building, empathy, knowing when to hold a tough position and when to make a deal. Our work needs people who care about taking positions carefully, being as substantively correct as possible. Less ego grandstanding would help too.

Letter from Barbara J. Bramble, Director, International Program, National Wildlife Federation to Prof. Harold A. McDougall (Oct. 29, 1990)(letter on file with author).

216. A good public policy lawyer can network with peers, agency personnel, and constituencies of organizations/participants in coalitions to garner support for a particular position. See Letter from Dierdre Halloran, Associate General Counsel, U.S. Catholic Conference, to Prof. Harold A. McDougall (Oct. 26, 1990)(letter on file with author).

217. Telephone and letter interviews conducted with thirty public interest lawyers beginning October 1, 1990. (names and correspondence on file with author).

218. For me the most difficult task is determining [how] the . . . skills I possess should be brought to bear. Sometimes it is right to negotiate amicably; at other times, only hard-ball litigation will do. The hardest job I have is determining which general course to follow. Though many cases are clear a larger number are in a grey area. In particular I need to . . . overcome my own conciliatory tendencies.

Letter from Paul Rosenzweig, Assistant Attorney General, Environmental & Natural Resources Division, Environmental Crimes section, to Prof. Harold A. McDougall (Oct. 26, 1990)(letter on file with author).

219. Alan Houseman, of the Center for Law and Social Policy, offered these observations on coalition work, based on eighteen years of experience in Washington:

1. Organization and staff are key. To be effective, a Coalition must have organizational backing and hardworking, thoughtful, knowledgeable and politically astute staff. While accountability is important, particularly to coalition constitu-

tions, but he or she also services them, which is demanding work requiring traditional as well as "post-modern" legal skills.

A lawyer representing a coalition needs to be aware of, and prepared to accommodate, the internal review processes of various organizations participating in a coalition. A good legislative or regulatory or litigation product must be orchestrated and timely reviewed by all organizations involved in the coalition before it is presented to a governmental decisionmaker for action.²²⁰ Activity at this scale and level of complexity makes efficient organization and able staff key elements in the coalition's capacity to reach consensus on specific policies and positions.

Some advocates feel that coalition work is necessary to develop a broad base for action, but complain that they spend too much time in meetings. Behind every coalition, they say, are "a few workhorses who know the issues technically, who know the [H]ill or agency players, who work very hard, and who know how to marshal political support for their positions."²²¹ Others stress the importance of developing and maintaining an effective grass-roots network to keep the coalition accountable.

5. Modes of Public Interest Advocacy

a. *Legislative Advocacy*

Generally speaking, the legislative advocate needs to know the processes, formal procedures, informal institutional dynamics, and appli-

ments and their members, the capacity to act quickly and make hard decisions is even more important.

2. It is essential to reach conclusions on specific legislative positions or at least the detailed framework within which the key actors can function. Coalitions must have the staffing and take the time to reach conclusions, even if it creates intense internal tension.

3. The coalition must have the capacity somewhere to draft specific legislation reflecting the coalition position and such legislation must be realistic. And it must have the ongoing capacity to respond immediately (without meetings) to legislation and amendments proposed by committee staff or Members or other interest groups.

4. The coalition must develop an effective grass roots network that is somewhat accountable to the coalition. There must be constant and effective communication to the grass roots network and the network members must be given specific, real, tasks to do which they can do.

5. The coalition must have the capacity to develop effective materials for committee staff and members, for coalition members, for grass roots people, and for the press.

6. The coalition must generate press for its views and respond immediately to negative press.

7. Except for general information meetings, coalition meetings must be focused on real issues and require real work from people who are participants.

Letter from Alan Houseman, Director, Center for Law and Social Policy, Washington, D.C. to Prof. Harold A. McDougall (Nov. 5, 1990)(letter on file with author).

220. See Halloran, *supra* note 216. The process by which the Americans With Disabilities Act was recently passed by Congress would make an excellent case study of this process.

221. See Houseman, *supra* note 219.

cable advocacy skills involved in shaping legislation both in the first instance and as legislation evolves due to pressures from special interests, advocates for the diffuse interests of the public, and other branches of government.²²² Also essential to effective legislative advocacy are an understanding of legislative protocol generally, and specifically that used in the relevant committee or subcommittee, as well as a knowledge of the key players on a committee or subcommittee.²²³ In addition, a sophisticated sense of how to call on the media is always helpful.

One key area is the use of legislative history.²²⁴ At what point will a court consider legislative history in interpreting a statute?²²⁵ Will it consider post-enactment legislative history? Where and how in the process of drafting legislative history can the advocate make the greatest impact in terms of later regulatory or judicial interpretation? Advocates need to understand the specific legislative history of each section of a law upon which their attention is focused and consider how the law came about and who was involved in it.

As any Hill legislative advocate will attest, legislative staff are key players in the process. It is very important to understand how powerful staff are; they can make it nearly impossible to see their Member. An advocate first has to convince key staffers before he or she can get to the Member; the staffers are very protective, and some simply have their own agendas. Advocates, then, as a matter of necessity, must develop a sense of what sorts of things will capture a staffer's attention. For that, it is important to know how the Member's positions are formed as a general matter. A sense of what the Member's position on an issue has been in the past can be invaluable, and can often be gleaned from legislative history if other sources of information are not available. This kind of information is particularly helpful if the Member has a new staffer who wasn't part of the original process. "I can't believe Senator Smith is no longer with us on this issue," the advocate can say. An advocate who lacks such knowledge can quickly lose credibility with a Member's staff.

Often, the only way an advocate can get around a staffer is to find what constituent groups in the advocate's coalition have clout with the Member. This points up the importance of local contacts, which should be developed to enhance an advocate's ability to influence legislators and even key agency personnel.

Especially today, local pressure from a broad variety of groups is far more effective in many legislative situations than coalition lobbying

222. See AALS Section on Legislation Newsletter, *Statement on Teaching Legislation in Law Schools* (December 1989).

223. Letter from Bill Magaven, U.S. Public Interest Research Groups, to Prof. Harold A. McDougall (Nov. 1, 1990)(letter on file with author).

224. See Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 Am. U.L. Rev. 277, 306 (1990).

225. An interesting study could be made of the opinions of Justice Antonin Scalia on the subject of the judicial use of legislative history.

[done] in Washington. . . . Of course, broad-based Washington efforts are essential to get major legislation passed or to prevent harmful legislation from passing. But, the most effective efforts (at least on the domestic policy side) arise from direct local pressure on Members, with appropriate Washington follow-up.²²⁶

A final area of interest is the use of testimony. When should members of a public interest group, in particular, speak and what should they say? A number of public interest group representatives have had the unfortunate experience of having their testimony used against them in later litigation or even in the same hearing.

b. *Regulatory Advocacy*

As a formal matter, the advocate should be able to draft regulatory comments, which have a different focus and format than legislation. Certainly, in addition, a regulatory advocate must be able to follow an issue from the legislative process through the regulatory process, concerning himself or herself with the degree to which the legislative intent is being carried out by the agency through its regulations. However, it is important for advocates to be prepared to research regulatory agency decisions from the inside as well as from the outside, with a particular emphasis on the agency's informal, internal decisionmaking processes.

It is important to be able to follow the "paper trail" left by decisionmakers within an agency, for example. An advocate wants to look at the internal networking of the agency itself. Who wields real power? Is it the commissioners or are they just figureheads? Does the staff make decisions? Where are the pressure points?

An advocate becomes aware of these internal processes through informal channels, built up over time through networking. Developing contacts inside agencies becomes very important. These contacts can give an advocate the inside "scoop" on the approach an agency is likely to take on a particular issue, where the agency is really heading, what it is looking for.

At the same time, experience and inside contacts help the advocate to locate the lower levels of agency documents on which agency decisionmakers rely. These documents do not rise to the level of precedent or regulation, but nonetheless they influence the agency's decision. Tax is an example: there is the code and its regulations, but there are also revenue rulings, private letter rulings and general counsel memoranda which are not precedent. The advocate cannot cite them in court, but in making a presentation to the agency, the advocate would want to be aware of their existence and how they shaped the final agency decision.

226. Houseman, *supra* note 219.

c. *Public Interest Litigation*²²⁷

As with regulatory practice, there is some overlap between litigation and legislation advocacy. Particularly with respect to legislation creating a private right of action, or creating an entitlement, the legislative advocate may confer with the litigator to determine the desired contours of the right in question. What due process rights are desired, for example? With respect to an entitlement, should reviewing courts be directed to require extensive notice and an administrative hearing before the granting agency terminates the entitlement?

Probably the most important skill for a litigator representing a national public interest organization, such as the ACLU or NAACP, is the ability to get familiar with the court in which he or she is called to bring a case. State courts and federal district courts, in particular, have local rules and pretrial procedures which an advocate must know to avoid being placed at a disadvantage. Other important information includes the identity of members of the panel from which judges will be drawn. Much of this information can be discovered by networking with local lawyers or by sitting in on trials to get a sense of local community norms and values and to identify the idiosyncracies of particular judges.

The ability to get familiar with a new court framework is particularly essential to litigators representing social movements today, because "forum-shopping" has become increasingly important among both plaintiffs and defendants. Many liberal public interest groups, aware of the increasingly conservative cast of federal courts due to appointments by Nixon, Reagan, and Bush, prefer to litigate in state courts on state law and constitutional grounds.²²⁸ Liberal public interest lawyers litigating in state courts pursuant to state legislation in some cases find that the states have discrimination, environment, and consumer protection laws that are more favorable to their cause than those found in the federal system.²²⁹ Many states have an Equal Rights Amendment, for example, which does not exist in federal jurisprudence.

On the other hand, lawyers who represent conservative opposition to liberal public interest organizations often seek to take issues out of liberal state courts and into conservative federal courts. These lawyers are using the federal court system's removal statute,²³⁰ once used by civil rights attorneys when the federal courts were more liberal than those of the

227. See generally Collins & Skover, *supra* note 48, at 198-212 (historical account of how liberals have reacted to a conservative attempt to frame the nature of public law discourse from the late nineteenth century to the present).

228. See Collins, *The Once "New Judicial Federalism" & Its Critics*, 64 Wash. L. Rev. 5, 6 (1989); Collins, *Reliance on State Constitutions: The Montana Disaster*, 63 Tex. L. Rev. 1095, 1099-1100 (1985).

229. There are also variations in statutes of limitation, nature of available relief (e.g., injunction as opposed to damages) and the like, which might influence a litigator's choice between state or federal court.

230. 28 U.S.C. §§ 1442, 1446 (1988).

states.²³¹ At the same time, lawyers for social movements and public interest groups, particularly those operating on a national level, have become adept at avoiding federal circuits in which "bad" law might be created and sent up to the Supreme Court.

d. *Lawyering and the Politics of Information*

The public policy advocate should be attentive to the means of exerting external pressure on media organizations, both to exert such pressures and to counter pressure being exerted by opponents. In the short run, public policy advocates representing social movements must be especially aware of the importance of monitoring the content of media programs and the importance of attaining greater coverage of selected events.

In the long run, however, a network for the distribution and exchange of intelligence must be built which can provide the "diffuse" public with more access to information than they now have. Closer interaction with public radio stations such as NPR and the Pacifica News Service are critical to this effort. Churches, universities, and other institutions devoted to dialogue and exchange are essential as well.

Dependence on the media as an organizing tool, however, would, especially in the long run, be a grave mistake. The media will tend to select a "hero" of the social movement, and the resultant concentration of attention on one individual will in turn undercut the organizational dynamics and internal trust of the movement itself. On the other hand, the movement itself may be depicted as "deviant," with similarly deleterious effects.²³²

A prime task of the social movement's information network, then, is to expose the biases of the media, its profit orientation, and the manner in which its analysis and interpretation of the news is distorted by dramatization and personalization.²³³ The network must also help and encourage individuals to develop their own analyses for sorting out information.²³⁴

231. See generally Collins & Skover, *supra* note 48, at 216-19 (describing liberal trend in state courts since the 1970s); see also *Michigan v. Long*, 463 U.S. 1032 (1983) (Supreme Court reaches out to reverse a liberal search and seizure decision based on state court's citation of the Fourth Amendment, despite reliance of state court on state constitutional grounds in deciding case). For comment, see Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92 (1984).

232. See L. Bennett, *supra* note 74, at 52, 60.

233. Cf. Collins & Skover, *supra* note 48, at 198-201 (new legal conservatism movement used the media to challenge liberal judges and interest groups to respond to the issues raised).

234. The creation of new forms of legal scholarship and models to raise the level of analysis of legal practitioners in this field is also part of this information networking process.

CONCLUSION

Public Choice theorists and Reagan deregulators sought to impose some order on the chaos of the postmodern state by withdrawing government from the equation. These forces are now beginning to concede that the "politics of unregulation" may yield results as dismal as the politics of regulation. They may well conclude that attempts at campaign finance reform, attempts to enforce ethical standards for legislators and bureaucrats, and attempts to limit special interest distortion of the legislative process may do more to correct the evils of our present system "than one-sided limits on the role of government."²³⁵

Public interest practitioners cannot place so much faith in rules, however. Implementation researchers who seek to support the efforts of public interest lawyers and provide a context for training students who wish to enter this field would do well to demonstrate, therefore, that post-modern law does not progress in an orderly fashion and cannot be "tamed" or rendered motionless by rules. At the same time, it is important not to paint a picture that all is chaos, either. Unlike CLS, implementation researchers should not "aspire" to disorder. Rather, they should try to help students understand the roots of disorder in the post-modern system, how it developed, and where it is going, so they can practice effectively in a disorderly context. This can be accomplished by training students to see patterns and probabilities, continually appraise possible directions and to be prepared to discern emerging outcomes.

Following and understanding the role of social movements is essential to seeing and creating patterns in the chaos and disorder of contemporary public interest lawyering. The interests of the public stand a greater chance of being protected by social movements making the governing process more accountable than by campaign finance reforms or other restraints designed to rein in an electoral and governing process that has thus far been proven to be beyond the control and even the interest of the voters. More attention needs to be paid to social movements as trustees of the diffuse public interest in issues of economic well-being, social welfare, civil rights and environmental balance.²³⁶

At the outset, social movements were an attempt to represent diffuse interests in the face of government management by myriad, and often conflicting, "special interests." Social movements and the public interest organizations which represent them may thus *appear* to be "special interests," because they, like the PACs and special interest lobbying groups, are moving into the vacuum left by the erosion of the party structure.²³⁷

Social movement and public interest requests for legal intervention are

235. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 Cornell L. Rev. 280, 312 (1990).

236. See generally McDougall, *Social Movements*, *supra* note 9, at 118-22 (the people, expressing themselves through social movements ["diffuse interests"] as the source of values in public discourse).

237. See McDougall, *The New Property*, *supra* note 91, at 404-07.

entertained, however, because the government needs "legitimation through protecting the public against health, environmental, or economic risks."²³⁸ Thus, a social movement's "clout" depends upon the government's perception that they have mobilized (or can mobilize) the "diffuse interest" of the public in civil rights, environmental quality, and/or consumer protection. The government will not respond to the social movement if the movement's credibility with the "diffuse" public is so low that the government does not thereby stand to gain any appreciable legitimation benefit.

Even then, certain wings of the governing coalition, particularly those which favor Old or "special-interest" New Property holders, will attempt to discredit the movement. In other cases, the government will make "symbolic" concessions to the movement which serve the government's legitimation purposes but which will be subverted by special interests who have captured the bureaucracy in charge of implementing the new policy.²³⁹

In one sense, the rise of social movements to protect the diffuse interests of the public in the policymaking process holds within it the seeds of a more voluntaristic, communitarian approach to democracy in which the business of constructing social life reverts increasingly to the people. This might occur because of the "scorched earth" deregulatory policy of the Reagan-Bush era. Or it could occur because social movements and other voluntary associations find, stepping into the vacuum left by the disappearance of the bureaucracy, that there are many things they would simply rather not entrust to it even given the choice. Or it could be some combination of both. Suffice it to say that the big question of bureaucracy—how can it be controlled—may give way to an even larger question: how much of it do we actually need?

I am not arguing that social movements depart from the state forum completely; at this point in history that would be stupid and dangerous.²⁴⁰ I also do not advocate the "rollback" of law to permit more social interaction (essentially a Public Choice/Deregulatory position). What I do point out is that (1) unless the social movements build strong community ties, and perhaps build strong community in the process, they cannot expect to effectively pursue their legal goals in official government forums; (2) as these development and implementation coalitions take on a life of their own and begin to discern ways in which they can manage problems without going to the state as a matter of first resort, they will become more powerful; and (3) the eventual emergence of a

238. N. Reich, *supra* note 1, at xxvi (citing Clune, *Legal Disintegration and a Theory of the State*, at 16 in Working Papers, Series 2/5 (1987)(available from the Institute for Legal Studies, Madison, WI)).

239. *See id.* at xxvi.

240. *But cf. id.* at v (proposition that "particular social sub-systems are better not dealt with by law, since they thereby lose their specific characteristics or become 'colonised.'"). *See also* Gabel, *supra* note 32, at 370-72 (explaining the role of the legal system as a means of making society's inhumane social order appear legitimate).

strong public interest movement will not only place the "diffuse" interests of the public in a better bargaining position vis-a-vis the Old Property and "special-interest" New Property, but will enable these diffuse interests to be pursued independently of both.²⁴¹

As we look at the deterioration of the economic and political underpinnings of the post-modern era, we as lawyers and teachers must begin to prepare ourselves and our students to play a role in constituting the democracy—political and economic—which can and should mark our future. We must train ourselves and our students to create instruments that can empower the values of our community and heighten the integrity and comprehensiveness of public discourse.²⁴² The values of access and accountability, not merely rules or ethics, should be our touchstones. For that, we will have to look not only beyond our roles as litigators, but beyond our roles as lawyers.²⁴³

241. See McDougall, *The New Property*, *supra* note 91, at 407-15, 417-18.

242. As discussed above, some of these basic skills include coalition-building, working at consensus, a sense of humor, an appreciation of the values of access and accountability; the willingness to "follow through" on an issue and "nail down" a solution. Cf. McDougall, *Social Movements*, *supra* note 9, at 98-100, 118-22 (community building through the new legal process). See also McDougall, *The New Property*, *supra* note 91, at 417-18 (describing a "New Community" comprised in part of community-based organizations).

243. The preceding may well create some controversy. For a discussion of how new modes of legal action have created new lawyering roles, and the uneasiness with which traditionalists in the profession confront those roles, see Clune, *supra* note 15, at 98-104.

