

## Did Public Interest Lawyers Undermine the New Deal Order?

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Paul Sabin, [Environmental Law and the End of the New Deal Order](#), 33 *Law & Hist. Rev.* 965 (2015).

[Paul Sabin](#)'s recent article puts elite liberal lawyers at the center of the story of the demise of the "New Deal order" – that "period of time between the 1930s and 1970s when the federal government, in close partnership with business and labor organizations, greatly expanded its coordination of the national economy and individual industries, as well as its development of natural resources and public infrastructure projects." (P. 969.) Sabin draws on a wealth of oral histories, interviews, and archival materials to provide an engaging history of public interest environmental lawyers and organizations – including the Environmental Defense Fund, the Center for Law and Social Policy, the Natural Resources Defense Council, and the Sierra Club Legal Defense Fund. These lawyers and law firms challenged New Deal assumptions; in doing so, Sabin argues, they were as key to the fracturing of New Deal-style liberalism as its conservative critics.

Sabin describes how environmental lawyers, like other public interest lawyers in the 1960s, were inspired by the successes of the NAACP and ACLU in using litigation for social change. And while they shared Americans' growing distrust of government action in the Vietnam War era, they were also specifically influenced by the mid-century critique of administrative governance as slow, rule-bound, unresponsive, and/or corrupt. Agreeing that the New Deal agencies tasked with protecting the public interest had failed to do so, environmental lawyers pointed specifically to the ways in which Americans and their environment were harmed by federal officials' pursuit of centralized planning and economic growth. These elite lawyers with stellar credentials, who three decades earlier might have pursued their interest in public service through jobs at the agencies and commissions, now sought to become an external check on agency governance.

These lawyers thus turned to the courts – the bane of New Deal policymaking – to challenge government projects and agency orders. As Sabin explains, "public interest law firms sued the government in order to improve its performance, rather than dismantle it. They denounced both government overreach and agency passivity. They questioned government's representativeness, effectiveness, and expertise. Government, they argued, no longer had a monopoly on scientific and technical knowledge." (P. 972.) Environmental lawyers demanded administrators include in their decisionmaking process evidence of environmental harm produced by experts outside the agencies. This was a direct response to the various criticisms of the administrative state in the 1950s and 1960s. Many critics charged that administrators were too insulated from the public, while others argued that they were too easily accessible to business interests. Responding to both criticisms, environmental advocates sought to bring environmental concerns into the administrative process. They did so by demanding that judges expand the category of standing to include those suffering aesthetic and environmental injuries. As Congress joined the environmental cause, lawyers also took advantage of new statutory language authorizing citizen suits against agencies and requiring agencies to consider environmental impact statements.

While environmental lawyers succeeded in their specific tasks – halting development projects, questioning chemical usage, and changing administrative law doctrines to ensure greater participation – their approach, Sabin argues, also had unfortunate consequences. First, he suggests, these elite lawyers only envisioned change within the existing legal and political establishment. Relying on legal methods made sense to lawyers, of course, who were "idealistic and hopeful about peaceful social change overseen by the courts. They distinguished themselves from protesters and rioters, and they believed that the system would respond to their legal claims." (P. 990.) And much of the funding for environmental law firms came from the Ford Foundation, which was enthusiastic about finding a way "to create an

'antagonist of government' that would stay clearly within the bounds of the American legal system." (P. 1001.) At a time when the very idea of a single "public interest" was under attack, these lawyers continued to assume that they could speak for the public. This elite vision of social reform, Sabin argues, restricted the kinds of alliances that lawyers could make and limited the radical potential of environmentalism as a movement.

Second, he suggests, the lawyers' embrace of an anti-bureaucratic perspective weakened the New Deal order perhaps more than these lawyers had intended. Theirs was "[a] new kind of liberalism—skeptical and distrustful of government, yet still committed to collective action by the state." (P. 1000.) Environmental lawyers rejected the assumptions of the New Dealers and those of free market conservatives, offering "a third alternative: an informed, active citizenry, represented by professional experts, who would ensure that government agencies pursued the true public interest." (P. 972.) However, Sabin argues, their criticisms of the administrative state weakened New Deal institutions from one side as conservatives were attacking those same institutions from another. In addition, they "helped drive a wedge into the New Deal political coalition by attacking economic development projects, such as the Alaskan pipeline, that generated jobs for the white, male, working class voters who traditionally supported the Democratic Party." (P. 1000.)

"Environmental Law and the End of the New Deal Order" is a fascinating case study of the development of environmental law, and the personalities and institutions that shaped it. (Sabin makes clear that these firms developed before, not after, the burst of environmental, health, and safety legislation in the 1970s.) It suggests the need for similarly rich studies of other areas of public interest litigation. While much has been written on civil rights and welfare rights litigation, historians are only now beginning to explore public interest litigation in the administrative state. This article also offers a broader reflection on the relationship between litigation and social change. Sabin explains how these lawyers drew on an already robust trend of public interest litigation and how they adapted it to their own purposes, while making clear both the advantages and disadvantages of their litigation-focused approach. Through an insightful examination of liberal lawyers attempting to redefine the public interest, Sabin contributes not just to scholarship on environmental law and administrative law, but also to a rich body of research on liberalism, anti-statism and the rise of the conservative movement.

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