

Social Grievance and Legality:

Legal Mobilization and Social Change in the Postwar United States

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1 Introduction

“If the NAACP attack on discrimination is converted into [a legal] attack on union organization it will inevitably be used by employers to defeat or weaken union organization, which in the end will obstruct rather than aid the achievement of job rights for Negroes.”

-David Feller, counsel for the United Steel Workers, to UAW President Walter Reuther¹

“We go into struggles with ideas of equality - equal treatment - that we have learned and used in the past. But the idea takes on new meanings and possibilities as new problems come up, as new needs develop, as we get squeezed in new ways. Pay equity extends how we think about equality, but it is only a step in a long process of learning how to help ourselves, of figuring out what needs to be done.”

- Female union organizer, discussing the impact of litigation for pay equity in the 1970s²

“People didn’t set out to make Bork a martyr because it would be politically useful to the conservative cause to have a martyr. People genuinely felt outraged. They felt the way if their father or mother had not been confirmed to the Supreme Court, or some close personal friend. There were a lot of people who felt this way and nursed their sense of grievance.”

-Steven Calabresi, law professor, on Robert Bork’s failed nomination to the Supreme Court in 1987³

This essay explores the complex relationship between social movements and legal institutions via an analysis of post-World War II efforts to reshape American politics and public policy. Why do social activists turn to legal institutions to advance their claims? What are the intended and unintended consequences of this choice? And is legal mobilization best conceptualized as an instrumentally wielded strategy or a transformative, semiotic social practice? I explore the answers sociolegal scholars have offered to these questions via three

¹Quoted in Frymer (2008: 41).

²Quoted in McCann (1994: 273).

³Quoted in Teles (2008: 169).

case studies: Of the civil rights movement in the 1960s; Of the pay equity movement in the 1970s and 1980s; And of the conservative legal movement in the 1980s. What emerges is a tale of complex causality, whereby legal institutions generate both constraints and transformative political opportunities for social change. We begin in Section II with Paul Frymer's *Black and Blue*, which analyzes the civil rights movement's legal efforts to integrate labor unions in the 1960s and underscores how even the most effective litigation campaigns can produce Pyrrhic victories. As David Feller predicted in the first opening quote of this essay, the civil rights movement's legal victories against organized labor had the unintended consequence of weakening an organizational infrastructure that could have promoted black employment in the long-term. Conversely, Michael McCann's detailed study of the pay equity movement in *Rights at Work* (Section III) portrays litigation as a partially constitutive social practice capable of fostering politicizing experiences that inculcate an empowering and enduring legal consciousness amongst social activists even in the wake of courtroom defeat. As the female union organizer in the second opening quote articulates, litigation proved to be an important means of altering the self-conceptions and broadening the repertoire of strategies of dissatisfied women in the workplace. In Section IV we turn to Steven Teles' *The Rise of the Conservative Legal Movement* and its argument that non-electoral countermobilization efforts by conservatives in the 1980s showcase how law can be leveraged by strategic political activists as a mask to insulate incremental policy changes from the vicissitudes of the electoral arena. As Steven Calabresi recounts in the third quotation, conservatives were increasingly outraged by the perceived chronic liberalism permeating American legal institutions, which had facilitated the entrenchment of the post-New Deal social welfare state and hampered the professional careers of conservative intellectuals like judge Robert Bork. The retrenchment of liberal policy, conservatives quickly concluded, could only be achieved by reshaping the American state's legal apparatus from within. Finally, in Section V I probe the risky allure of legal mobilization, arguing that social movements' turn to legal institutions is likely to be fostered by activists who embrace a diverse repertoire of social change strategies and who recognize the comparative advantages of non-electoral mobilization.

2 Fomenting Pyrrhic Victories: Civil Rights Litigation and Organized Labor

The law can be invoked by resourceful social movements to further their cause, but this strategy is seldom free of unintended consequences. In *Black and Blue*, Paul Frymer describes how the American State's fragmented labor policy pinned the civil rights movement on a collision course with labor unions in the 1960s. Courts proved eager to embrace civil rights lawyers' calls to integrate labor unions and enforce civil rights law but, in so doing, judges largely ignored labor law and undermined workers' collective bargaining rights. By bleeding labor unions to death via financially crippling litigation, judges permanently weakened an organizational structure which, if reformed, could have fostered the the long-term empowerment of black workers. The

civil rights movement's litigation strategy, then, achieved a Pyrrhic victory - improving black representation within unions increasingly sapped of political power.

2.1 Set for collision: The origins of the courtroom clash between labor and civil rights

The foundations of this courtroom clash between labor unions and the civil rights movement can be traced to the fragmented structure of the American state's labor policy. The Wagner Act of 1935, often heralded as the "Magna Carta" of the labor movement, authorized workers to elect union representatives who could negotiate binding contracts governing "wages, benefits, hiring and firing, and general workplace conditions" (Frymer 2008: 23). The Wagner Act also created the National Labor Relations Board (NLRB), chartered to protect unionized workers from employer sanctions by leveraging cease-and-desist powers (Ibid: 31). the NLRB "was a critical agency in promoting union power in labor's heyday of the 1930s to the 1960s," but it also promoted the political interests of the original parties to the legislative bargain - "in this case, white, blue-collar unions" (Ibid: 13; 24). Indeed, with African American representation lacking in the 1935 Congress, efforts to attach a "duty of fair representation" to the Wagner Act had failed (Ibid: 29). Hence the NLRB continually allowed unions to discriminate against black workers by arguing, "in many ways correctly," that it lacked jurisdiction over civil rights issues (Ibid: 31; 13).

Where the Wagner Act was the defining "super-statute" for white laborers, the 1964 Civil Rights Act was the equivalent for their black counterparts. *Inter alia*, the Act created the Equal Employment Opportunity Commission (EEOC), "an agency specifically designed to weed out discrimination by both employers and unions" (Ibid: 15). Yet unlike the NLRB, the EEOC lacked teeth: Senate Minority Leader Everett Dirksen had successfully attached an amendment to the Civil Rights Act removing the EEOC's cease-and-desist powers, and the EEOC was "understaffed and underfunded" from the get-go (Ibid: 40). It was in this context that it relied "on lawyers, sometimes through the Department of Justice but more often private lawyers who filed class-action lawsuits," for enforcement (Ibid: 34).

Despite the flawed, dual structure of American labor policy, tensions between the civil rights movement and labor unions emerged only gradually. In fact, the National Association for the Advancement of Colored People (NAACP) and labor unions collaborated at first: "The NAACP . . . began in the 1940s to become more directly involved in union civil rights. This was because it saw the newly formed [Congress of Industrial Organizations (CIO)] as a potential ally. . . By 1947, the NAACP was working arm in arm with the CIO to mobilize new members for both organizations" (Ibid: 54-56). Yet in the 1950s and 1960s the pressure to integrate unions reached a boiling point. The situation was exacerbated because "[the unions'] priority was maintaining union power, and even progressive union leaders such as [Walter P.] Reuther [of the United Auto Workers] had endorsed the inclusion of locals into their membership that had constitutions mandating

segregation. . . As evidence and charges of far more systematic problems surfaced, union leaders stonewalled, denied, and attempted to deflect the accusations” (Ibid: 68). The NAACP, in turn, grew increasingly critical of labor. At first “they wrote letters, tried internal mediation, mobilized local union members around the country, and used publicity,” but “after this extensive effort by the Association failed. . . it took a more aggressive, litigious stance” (Ibid: 46). The NAACP’s legal team gained the ability to sue unions under Title VII of the Civil Rights Act, and it was encouraged to do so not only by the EEOC but by a growing number of civil rights organizations. In short, “the continuing resistance of unions to civil rights reforms eventually led to the activism of courts and lawyers” (Ibid: 69).

Courts proved to be willing partners of the civil rights movement, and they began to attack labor unions left and right for violations of Title VII. First, they “called for dramatic action to remedy racial inequality in the labor movement and infringed on labor laws designed to protect union autonomy;” Second, “courts made unions comply with these rulings by allowing civil rights lawyers to bring many discrimination cases to federal court; authorizing the use of class actions; awarding back pay, attorneys fees, and punitive damages to civil rights plaintiffs; and demanding that labor unions and employers pay all these awards” (Ibid: 72). In effect, courts made it too financially costly for unions not to comply with the Civil Rights Act. As the President of the United Papermakers and Paperworkers wrote in a 1972 message to members, “we are forced by the developments in the field of civil rights to make substantial and radical changes in our seniority, progression lines, promotion and lay-off practices. . . We must face the fact that unless we do what the law requires we will be bled to death financially” (Ibid: 91).

2.2 Victory is bittersweet: Formal representation in the absence of political power

The success of civil rights lawyers in pushing for the integration of labor unions in the courtroom proved bittersweet. Although courts were eager to enforce the Civil Rights Act, they proved unsympathetic and ignorant of the Wagner Act’s provisions, and consequently favored granting rights to individuals facing discrimination on the basis of race while refusing to extend equal protection to those discriminated against on the basis of class (Ibid: 6). “Judges. . . quite rightly found unions consistently in violation of the Civil Rights Act,” Frymer writes; “In doing so, however, they ignored labor law, and thus issues such as collective bargaining, majority representation, seniority, and security agreements were not addressed in antidiscrimination law. . . As a result, unions found themselves in courtrooms with judges who were fairly ignorant of labor law and insensitive to . . . why even the most discriminatory of unions, if reformed, could serve to benefit civil rights causes down the road” (Ibid: 15). In this context, corporate lawyers were able to expand civil rights while simultaneously “weakening the chief opposition to free market capitalism” (Ibid: 7; 25).

Ultimately, while litigation proved extremely successful in integrating labor unions, it had the unintended

consequence of weakening one of the constitutive pillars of the Democratic Party, a pillar that could have served the interests of all workers regardless of race. American democracy, Frymer concludes, is “messy,” and when we rely too much on “formal definitions of representation,” as the courts did in the 1960s and 1970s, we lose sight of the fact that “democratic equality will often necessitate action by those who are less directly representative to the public, not because they are removed from public opinion and the tyranny of the majority but because they have incentives to represent both minority and majority groups that are unable to represent themselves effectively. . . democracy should not be defined simply in terms of representation but also in terms of power and outcome” (Ibid: 130).

3 Empowerment via Legal Consciousness: The Pay Equity Movement’s Legacy

Frymer’s analysis is a stark reminder of how even seemingly successful forms of legal mobilization can bear pernicious unintended consequences in the long-term. Yet his narrative treats litigation as an instrumental strategy whose success is best measured by its policy outputs or overall political impact. In so doing, Frymer ignores the degree to which litigation is also an emotionally resonant social practice that can engender beneficial side-effects even when it fails to meet its public policy objectives. Indeed, via a case study of the pay equity movement’s legal mobilization in the 1970s and 1980s, Michael McCann’s *Rights at Work* demonstrates how the process of litigation can supply critical identity-constituting experiences for social movement participants. Specifically, although the struggle for pay equity emerged following women’s rising participation in the labor market, it was ultimately the turn to litigation that had the most profound and long-lasting impact on female workers. While early courtroom victories were quickly replaced by repeated defeats in light of the rise of the conservative legal movement in the 1980s, the beneficial legacy of legal mobilization was captured by its ability provide politicizing experiences for women workers, to legitimize their claims via a familiar rights discourse, to forge political opportunities for collective action by raising expectations, and to cultivate an enduring legal consciousness.

3.1 The origins of the struggle for equal pay and the turn to litigation

McCann draws on the “political opportunity” and “resource mobilization” approaches to the study of social movements to discuss the genesis of the pay equity movement in the 1970s (McCann 1994: 93). First, the changing postwar work environment is highlighted as an important precondition for mobilization, as “the rapid and steady historical entry of women into the workplace. . . disrupted traditional expectations by and about women regarding their “proper” social roles” (Ibid: 97). Once part of the labor force, however, women found rampant discrimination and even gender-based segregation. These pernicious practices had the unintended consequence of forging solidarity amongst female workers: By “concentrat[ing] large numbers

of women...in similarly exploitative and physically proximate work situations,” employers “encourag[ed] a greater group identity among women” (Ibid: 113). Once solidarity ties had been forged and common grievances shared, women became increasingly active within labor unions. In fact, “the unionization of women was an essential precondition, as well as a result, of pay equity movement,” and unsurprisingly unions became “the primary source of money for technical research, formal legal action, lobbying efforts, and publicity around the [pay equity] issue” (Ibid: 118-119). Feminist groups, like the National Organization for Women (NOW), also became an important ally (Ibid: 120). Sympathetic lawyers became involved in the campaign as well, and the pay equity movement soon began to draw on the “rich legacy of rights-based legal reform within modern American political culture” inculcated by the civil rights movement (Ibid: 130; 100).

At first, pay equity advocates won what were perceived to be some important victories. For example, in *County of Washington v. Gunther* (1981) the Supreme Court “extended substantial support to the pay equity idea... While refusing to explicitly endorse the comparable worth idea, the majority’s willingness to extend Title VII provisions to cover discrimination among different jobs opened a potentially large crack in the door to future legal claims” (Ibid: 53). These courtroom cases generated a “tremendous amount of mainstream media attention,” which focused disproportionately on litigation rather than other political actions by the pay equity movement, such as labor strikes, union negotiation battles, and electoral campaigns (Ibid: 58-59). In short, these court cases contributed to women’s “perception of expanded opportunities for effective political challenge” (Ibid: 94).

3.2 Defeat in the courtroom, victory in the hearts and minds: The legacies of litigation

Under the auspices of the Reagan Administration, however, by the mid-1980s “the courts began closing the door of access to gender-based comparable worth claims” (Ibid: 84). It seemed that “all employers had to do to win judicial vindication in most cases during the 1980s... was simply to invoke a “free market” defense at every turn... and, if all else fails, to justify discriminatory policies as a legitimate business practice even where a prima facie case has been made” (Ibid: 41). Short of “smoking gun” evidence that “employers consciously designed action to exploit women,” judges were increasingly hostile to the claims of the pay equity movement (Ibid: 39). Hence in the final analysis the movement achieved “only limited success in federal courts,” and McCann’s interviewees recalled “much bitterness about the palpable conservative turn of the judiciary and government generally,” along with a sense that legal mobilization had been “sapped of its earlier energy” (Ibid: 47; 279). Once courtroom defeats became frequent, movement-associated lawyers were “quick to halt or revise their reliance on the courts” (Ibid: 294).

And yet, something fundamental endured. Activists are not born - they are forged by social experience. Indeed, most of the pay equity activists interviewed by McCann “recounted... remarkably parallel stories

about specific politicizing experiences that transformed them into committed activists” (Ibid: 132). In particular, McCann found that a “large majority” of his interviewees “credited the [*County of Washington v. Gunther*] decision and other early cases as primary educational cues that generated their own initial personal interest and involvement in the cause” (Ibid: 56). Secondly, pay equity activists could now draw upon a rich and empowering legal discourse. “Rights discourse,” argues McCann, “empowered women workers by enabling them to “name” - i.e. to identify and criticize - hierarchical relations in familiar, “sensible” ways” (Ibid: 65). Hence the pay equity movement was able to strategically draw on a language imbued with legitimacy to advance its claims in the electoral arena. As economist and pay equity advocate Heidi Hartmann noted, “once the idea of comparable worth or pay equity could be framed by lawyers in terms of rights against wage discrimination, it took on a lot of credibility and power” (Ibid: 51). Finally, what may have originated as the tactical referencing of courtroom victories to raise expectations and legitimate pay equity eventually provoked a profound identity transformation. McCann’s interviewees “repeatedly emphasized... that perhaps the single most important achievement of the movement has been the transformations in many working women’s understandings, commitments, and affiliations - i.e., in their hearts, minds, and social identities” (Ibid: 230). In particular, union activists repeatedly spoke “in enthusiastic and expansive terms” about how the benefits of legal mobilization “transcended “mere” economic redistribution” (Ibid: 258). This enduring legal consciousness was instilled not via “abstract intellectual inquiry” but through the “practical experience in political struggle for new rights” that followed initial courtroom victories (Ibid: 272).

In short, by treating litigation as a semiotic, politicizing, and partially constitutive social practice, McCann underscores how legal institutions limit and foment social change at the same time. Progressive social activists, in other words, have grown to recognize an inherent “duality” to the law: “People at the “bottom” are used to seeing law in two ways at once. From an “outsider” perspective, they view law critically as an unprincipled source of privileged power. From an “insider” perspective, they adopt an “aspirational” view of law as a potential source of entitlement, inclusion, and empowerment” (Ibid: 233). It is precisely the thickness and ambiguity of law, then, that allows its practice to simultaneously constrain and enable social change.

4 Law as an Insulating Mask: The Rise of the Conservative Legal Movement

While stressing the long-term transformative effects of pay equity litigation, McCann does not dwell on the potential relationship between progressive legal mobilization and the rise of the conservative legal movement in the 1980s. If social movement activists spurred a conservative backlash against the perceived co-optation of legal institutions by leftist radicals, then McCann’s optimistic narrative deserves closer scrutiny, and the benefits of an emergent legal consciousness would have to be weighed against the costs borne through

successful right-wing countermobilization. Steven Teles' historical analysis in *The Rise of the Conservative Legal Movement* provides just this challenge to McCann's narrative. Motivated by a shared sense that liberal elites had successfully co-opted courts, law schools, and public interest lawyers to expand the post-New Deal social welfare state, conservatives launched a non-electoral countermobilization effort aimed at transforming the American legal apparatus into a collective advocate for limited government and libertarian, free-market principles. Success did not come easily, and indeed the conservative coalition "often made serious errors, and succeeded by shrewd adaptation rather than by the far-sighted pursuit of a grand plan" (Teles 2008: 280). Yet Teles' narrative provides a rare account of an ultimately effective right-wing countermobilization effort spurred precisely by the sort of progressive legal mobilization lauded by McCann.

4.1 Shared grievances, tactical mistakes: The early years of conservative countermobilization

The conservative legal movement was incubated within the glow of successful Democratic legal mobilization. Conservative lawyers, law professors, and law students had helplessly witnessed the Supreme Court's progressive civil rights crusade in the 1960s and 1970s under the leadership of Chief Justice Earl Warren. They had subsequently experienced the agony of failure via Richard Nixon's inability to roll back the social welfare state and to transform the Supreme Court into a conservative institution (Ibid: 60). If liberalism was to be defeated, capturing the presidency clearly was not enough, for "[m]any of liberalism's achievements derived from the skillful use of power by a transformed federal bureaucracy, staffed by actors sympathetic to (or previously involved in) social movements. This system's advent gave liberal Democrats the ability to push their policy agenda even when the presidency was in the hands of Republicans" (Ibid: 6). Liberals, conservatives concluded, had instituted a system of Gramscian hegemony by skillfully manipulating the insularity of legal institutions, "where opportunities for concealing normative choice in technical garb are widely available" (Ibid: 16). Conservatives would thus have to defeat the Democrats at their own game: They would have to develop "an alternative governing coalition. . . composed of intellectual, network, and political entrepreneurs, and the patrons that supported them" that would nonetheless "adopt many of their rivals' organizational forms" (Ibid: 17; 275). In short, they would have to launch a non-electoral battle for control of the law from within the very capillaries of liberal legal institutions.

Yet in the 1970s the fledgling conservative legal movement was "outsmarted and undermanned," and proved unsuccessful in its attempts to reclaim control of American legal institutions. The first generation of conservative public interest law firms, like the Pacific Legal Foundation (PLF), sought the patronage of businesses in their quest to mobilize resources (Ibid: 58). They advocated for judicial restraint and free-market principles to counter the perceived excesses of liberal regulation and social welfare. Yet business proved an unreliable political ally, unwilling to "stand up for libertarian causes when they damaged the

interests of specific firms” (Ibid: 66). Furthermore, the privileged role of business in conservative public interest law “hampered its ability to seize the moral high ground and wage the battle of legal ideas” (Ibid: 68). Morally deflated, the kiss of death for conservative public interest law was its fateful choice to organize geographically rather than functionally, which stifled inter-organizational competition and innovation while preventing unified lobbying efforts in Washington D.C. (Ibid: 62).

4.2 Learning and resurgence: Strategic litigation and the reshaping of American law schools

Defeat for the founders of first generation public interest law was often coupled by the humiliation of having to subsequently seek employment within the very governmental agencies they had sought to dismantle or reshape. Yet it was precisely these reluctant “refugees” that began to plan an ultimately successful second generation of public interest law in the 1980s (Ibid: 59; 81). Clint Bolik and Chip Mellor were particularly influential early strategists in this regard: They argued that it was fruitless to oppose judicial activism and that conservatives “needed to escape the bounds of judicial restraint” (Ibid: 86). Specifically, instead of opposing judicial policymaking *in toto*, conservatives should “change the ideas of legal elites” and convert the judiciary into a powerful collective exponent of conservative principles (Ibid: 89). Yet to be successful, conservatives had to act under the camouflage of liberal templates for legal mobilization. And so it was that the newly founded Institute for Justice began to lodge cases before the federal courts “designed for maximum dramatic impact, typically through representing a racial minority or low-income person challenging a large institution, with a great deal of emphasis on the personal dimension of the case” (Ibid: 244). This strategy generated sympathy for the organization’s clients, which facilitated converting outrage in response to early courtroom defeats into “several thousand new small dollar donations” to support further litigation (Ibid).

Early courtroom defeats also hammered another lesson into the minds of conservative activists: Conservative public interest law would continue to fight an uphill battle so long as “law schools [remained] the breeding ground of the liberal public interest movement” (Ibid: 70). In this light, the conservative Olin Foundation pioneered an innovative strategy aimed at “penetrating the elite law schools:” The material promotion of law and economics scholarship. James Piereson, the executive director of the foundation, articulated the underlying logic: “Law and economics is neutral, but it has a philosophical thrust in the direction of free markets and limited government. That is, like many disciplines, it seems neutral but isn’t in fact” (Ibid: 190). The University of Chicago was the principal benefactor of the Olin Foundation’s initial patronage, and it quickly became the “spiritual center” of the conservative law and economics movement (Ibid: 91). Milton Friedman fiercely advocated for free market principles with an almost “evangelical” zeal; Richard Posner’s pugnaciousness “created a strong incentive for even the unsympathetic to become competent in law and economics;” and Chicago graduate Henry Manne founded a series of summer institutes at the University

of Miami and George Mason University to train law professors and judges in libertarian economic analysis (Ibid: 96; 101; 112). By the close of the 20th century even Harvard Law School - previously a bastion of leftist, post-modern legal scholarship - had become a center of decidedly conservative law and economics education (Ibid: 199).

Yet the push to reshape American legal education did not come solely from external actors like the Olin Foundation: Demand was cultivated and mobilized within legal academia itself. The most representative case is that of the incredibly successful and influential Federalist Society, founded by students at Yale Law School in 1982. Conservative law students at Yale felt “embedded in what they saw as a hostile institution,” and they subsequently arranged a conference to unite like-minded colleagues together and solicit the sponsorship of intellectuals like Robert Bork and Antonin Scalia. Steven Calabresi, one of the conference organizers, remarked that “suddenly conservatives at fifteen other law schools began calling... That was a process of almost spontaneous generation. It turned out that there was an enormous demand at other law schools for the kind of thing we felt a demand for at Yale” (Ibid: 139). Within only a few years, the society’s signature tie, with its picture of James Madison, was transformed from a “stigmatized” symbol into “a badge of pride” (Ibid: 165). In this light, Scalia proved to be a particularly influential sponsor, helping to legitimize the organization, open a Society chapter at the University of Chicago, and cultivate the patronage of Republican Senator Orrin Hatch (Ibid: 142). The Reagan administration soon took notice, and “hired the Society’s entire founding cadre” (Ibid: 145). The political message could not be more clear: “ideological positioning, not cautiousness, was now an affirmative qualification for appointed office” (Ibid: 145). Indeed, Reagan’s appointment of Scalia to the Supreme Court in 1986 and promotion of conservative justice William Rehnquist to Chief Justice in the same year signaled the awakening of a conservative jurisprudence within the most powerful judicial institution in the land. The failed nomination of Bork - another Federalist Society sponsor - in 1987 “was tremendously energizing for conservatives,” rekindling their efforts to pack the courts with like-minded judges (Ibid: 171).

By the 1990s, the conservative legal movement was no longer a fledgling, faltering, marginal blip on the American political landscape: It had penetrated and begun to transform the very bastion of postwar progressive policymaking. By leveraging the intellectual vision of sponsors like Scalia and Bork, the material resources of patrons like the Olin Foundation, and the tactical shrewdness of public interest lawyers like Bolik and Mellor, conservatives managed to convert a legal infrastructure allied with progressive social movement activists into a political vector championing limited government and neoliberal economics.

5 Conclusions: Social Movements and the Allure of Law

Clearly, the mutually-constitute relationship between legal institutions and social movements is multifaceted and complex. Law fosters Pyrrhic victories by facilitating debilitating competition amongst social movement sectors that would be better served by working together, but legal mobilization can also foment an empowering and enduring legal consciousness amongst social activists. At the same time, legal institutions insulate non-electoral, incremental conservative countermobilization efforts to reverse the hard-fought achievements of progressive social activism. Given this mixed record, why is it that social movements take the risk of turning to legal institutions? How should we understand the magnetic draw of legality?

Each of the foregoing case studies offers a partial answer to the foregoing question. Frymer emphasizes that “the centrality of courts in the policy-making process is symptomatic of a greater problem in American state development - the inability of the nation to represent all Americans equally through electoral democratic representation” (Frymer 2008: 134). That is, had the civil rights movement been able to persuade elected officials or union leaders to promote racial equality in labor unions, then it is unlikely that organizations like the NAACP would have turned to judicial institutions for a remedy. In this light, it is legal institutions’ accessibility and insulation from electoral pressures that opens a political opportunity for change. This insight is also congruent with Teles’ assessment. The conservative legal movement was numerically small and comprised primarily of elites - students and professors at top-ranked law schools, conservative intellectuals, and federal judges - and consequently the prospect of success in the majoritarian arena of electoral politics was negligible. By bearing the mask of technical legal neutrality and fostering an incremental ideological shift within the legal establishment, conservatives were nonetheless able to achieve substantial public policy change. Finally, despite his emphasis on the identity-transforming power of litigation, even McCann underscores that initially women leaders in the pay equity movement turned to the courts because judges were perceived to be sympathetic to the cause and because courtroom victory promised to raise the expectations of female workers. In short, while recognizing that the cumulative effect of legal mobilization cannot be reduced to the intended outcomes of social activists’ strategic choices, it appears that the allure of legality is likely to be nurtured by activists who embrace a diverse repertoire of social change strategies and who recognize the comparative advantages of non-electoral mobilization.

6 References

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