THE PUZZLE OF SOCIAL MOVEMENTS IN AMERICAN LEGAL THEORY

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In one of the most striking developments in American legal scholarship over the past quarter century, social movements have become central to the study of law. In constitutional theory, movements have emerged as key drivers of legal reform, creating new constitutional ideals and minimizing concerns of activist courts overriding the majority will. In lawyering theory, movements have appeared as mobilized clients in the pursuit of social change, leading political struggle and shifting attention away from concerns about activist lawyers dominating marginalized groups. In a surprising turnabout, social movements—long ignored by legal academics—have now achieved a privileged position in legal scholarship as engines of progressive transformation. Why social movements have come to play this dramatic new role is the central inquiry of this Article.

To answer it, this Article provides an original account of progressive legal theory that reveals how the rise of social movements is a current response to an age-old problem: harnessing law as a force for social change within American democracy while still maintaining a distinction between law and politics. This problem erupted as an intellectual crisis after Brown v. Board of Education asserted a model of social change through law—what scholars termed "legal liberalism"—that placed courts and lawyers in the lead of progressive movements. In the decades following Brown, legal liberalism provoked a forceful reaction by progressives who viewed court and lawyer activism as illegitimate and counterproductive. A core contribution of this Article is to show how contemporary scholars have responded to the decline of legal liberalism by developing a competing model—"movement liberalism"—that assigns leadership of transformative legal change to social movements in order to preserve traditional roles for courts and lawyers. In doing so, movement liberalism claims to achieve the lost promise of progressive reform, while attempting to avoid critiques of court and lawyer activism that have divided progressive scholars for a half-century.

After explaining the rise of movement liberalism, this Article offers a critical perspective on its promise. On the positive side, this new model offers a deeply optimistic account of the capacity of movements to enhance democratic participation that usefully focuses attention on the critical role of grassroots mobilization in reshaping law. Yet by spotlighting movements, the model obscures important aspects of how courts and lawyers may affirmatively contribute to social change. As a result, movement liberalism ironically ends up carrying forward the very critiques of courts and lawyers that it claims to surmount, while reproducing the precise debate about the role of law and politics in progressive social change that it seeks to bridge. The Article concludes by suggesting that what is needed is not grand theory that posits grassroots activism as an antidote to court and lawyer activism, but rather an empirically grounded account of when movements, courts, and lawyers may effectively work in concert for change.

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INTRODUCTION

This Article is about a central puzzle of contemporary American legal scholarship: the dramatic rise of social movements as key actors in legal theory.[1] In the last fifteen years, references to "social movements" in U.S. legal periodicals has more than quadrupled in absolute terms and doubled in percentage terms over the prior period.[2] Perhaps even more significantly, social movements have become critical to the work of prominent scholars in fields at the heart of American legal theory, where they have emerged as key drivers of legal change.[3] This is a surprising turnabout for social

[1] *See*, *e.g.*, Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 UNIV. PENN. L. REV. 1 (2001).

[2] As an indication of the growing influence in social movements, from 1970 to 1985, there were 96 articles in Westlaw's Law Reviews & Journals database referencing "social" /2 "movement" (this was 0.6% of 17,347 total articles). From 1985 to 2000, the number climed to 1,893 (0.9% of 205,401 total articles); since then (as of January 1, 2015), there have been 7,850 articles (2.0% of 402,421 total articles). *Cf. Law School Faculties 40% larger than 10 years ago*, NATIONAL JURIST, Mar. 9, 2010; *see also* David A. Snow, Sarah A. Soule & Hanspeter Kriesi, *Mapping the Terrain*, *in* THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 3, 5 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004) (noting the increase of social movement articles in the top four sociology journals between the 1950s and 1990s).

[3] LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994); Jack M. Balkin, *Brown, Social Movements, and Social Change*, *in* CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE (Robert L. Hayman Jr. and Leland Ware ed., 2008); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. (2005); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120

movements, which as empirical phenomena were more prominent in the 1960s and as a scholarly field has long occupied a marginal position in social science and been largely ignored by legal academics.[4] And yet, a half century after the zenith of social movements in American politics,[5] they have now achieved a privileged position in legal scholarship as engines of progressive transformation. Why social movements have come to play this impressive new role—and what it means for legal theory and practice—is the central inquiry of this Article.

To answer it, this Article advances three core ideas. *First*, it makes the novel claim that the social movement turn in legal scholarship can only be understood as the current version of an intense and long-standing historical debate over the appropriate role of law and lawyers in democratic social change. Although this debate crosses ideological lines, it has been most pronounced and controversial within "progressive" legal scholarship,[6] which has divided over the relation between law and transformative politics since the civil rights period.[7] The first key contribution of this Article is to recover this critical intellectual history in order to explain how the emergence of social movements in contemporary legal scholarship addresses foundational critiques of court and lawyer cooptation of social change.

Building from this intellectual history, the *second* contribution of the Article is to offer a theoretical synthesis of the contemporary law and social movement literature. The synthesis links together essential insights of social movement scholarship in the two key scholarly fields where it has evolved—constitutional law and the legal profession—into a model of legal change that this Article calls *movement liberalism*. In this model, social movements are positioned as leaders of progressive legal reform in ways that promise to reclaim the transformative potential of law while preserving traditional roles for courts and lawyers. The Article delineates and analyzes the features of this model, which are framed around two essential concepts, *majoritarian courts* and *movement lawyering*, which respond to the critiques of earlier periods.

Having explicated the model, the Article turns to critical appraisal. Here, the *third* argument is that, contrary to its ambitious effort to bridge divisions in progressive legal theory, the new social movement literature ultimately carries forward the very critiques of courts and lawyers it seeks to surmount, while reproducing the precise debate about

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YALE L.J. 2028 (2011); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

[4] For the essential contributions to this literature, see Part I.C., *infra*.

[5] It was just over fifty years ago that Martin Luther King, Jr. led civil rights protestors across the Pettus Bridge in Selma, one of the symbolic highpoints of the civil rights movement captured in the recent movie, *Selma* (2014). *See* TAYLOR BRANCH, PILLAR OF FIRE: AMERICAN IN THE KING YEARS, 1963-65 (1998).

[6] The term "progressive" is used here to correspond to the range of views generally associated with the political left in the United States beginning in the Progressive Era, which are directed at shifting power and resources to those at the bottom of social hierarchies, including the poor, racial and ethnic minorities, women, LGBT people, and political dissidents. Its basic tilt is toward the achievement of greater equality as opposed to individual liberty (although it is often linked with civil libertarianism). *See* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006); Herbet Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149 (1995).

[7] For the seminal contribution on this point, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciounsness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

the role of law and politics in progressive social change that it seeks to bridge. The affirmative theoretical point that emerges from this critique is that legal theory on law and social movements, freighted by decades of debate over America's civil rights legacy, would now benefit from scholarly renovation that brings it in line with innovations in social change practice—a renovation that may offer a lens through which to recapture a more nuanced and optimistic account of how social movements, courts, and lawyers may effectively work in concert for change.

The Article proceeds as follows. Part I frames what is at stake in the scholarly debate over the role of law and lawyers in social movements. To set the stage for the historical overview that follows, it briefly outlines the fundamental "law-politics" problem that has bedeviled progressive legal theory: how to harness law as a force for social change within American democracy while still maintaining a distinction between law (as neutral and procedural) and politics (as partisan and substantive). Part II then offers a historical account that explains how this problem has structured progressive legal debate for more than a century, erupting in intellectual crisis after *Brown v. Board of Education*, when it became associated with the controversial ideology of *legal liberalism*.[8] This ideology posited a model of progressive social change led by an alliance of activist courts and activist lawyers.[9] Part II shows how legal liberalism disrupted the law-politics compromise of the earlier era and caused deep rifts among progressive scholars that led to intellectual impasse by century's close. A key contribution of this Part is to demonstrate how legal liberalism became identified with foundational critiques of courts and lawyers—that they were ineffective in producing social change and unaccountable to the very constituencies they purported to serve—and to show how these critiques played out in the two fields linked to the legal liberal model: constitutional law, concerned with the legitimacy of activist courts, and the legal profession, concerned with the legitimacy of activist lawyers. This Part also highlights how, within legal theory during this time, social movements played no affirmative analytical role—rather, they operated as an implicit ideal against which legal liberalism was critiqued. As a bridge, Part III turns away from legal scholarship to map the parallel development of empirical social science research on courts, lawyers, and social movements, which also exploded after *Brown* but was largely ignored within core legal academic debates. Doing so sets the stage for the recent social movement turn in law by delineating the underlying empirical frameworks—and their concepts of mobilization, impact, and backlash—which have now become essential to legal scholarship with the advent of empirical legal studies.[10]

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[8] *See* FRED RODELL, A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, 283 (1955); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

[9] *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1998).

[10] *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

Having laid this foundation, the remainder of the Article explains why progressive scholars have incorporated social movements as key actors in legal theory, describing how movements respond to the law-politics problem in constitutional and legal profession scholarship, and then offering a critique and set of tentative prescriptions for moving forward. Part IV begins by linking the historical account of legal liberalism to the emergence of a new model of *movement liberalism* designed to respond to its predecessor's perceived flaws. Toward that end, Part IV synthesizes the contemporary constitutional and legal profession scholarship to describe the movement liberal vision, which assigns transformative legal change to social movements in order to respond to the legal liberal critiques of courts and lawyers, while still promising to deliver the large-scale transformation to which its legal liberal predecessor aspired. This vision rests upon two critical elements that attempt to resolve the law-politics problem: one is a model of majoritarian courts, which articulate changes in law only after social movements have built majority support for those changes through politics; the other is model of movement lawyering, in which lawyers represent empowered social movement actors pursuing predefined movement goals, placing such organizations in the lead of progressive law reform and thereby allowing lawyers play their conventional professional role.

The Article then asks whether movement liberalism lives up to its promise of advancing progressive politics without compromising the legitimacy of law. Part V concludes that it ultimately does not, showing that rather than bridging the conflicts that emerged out of the legal liberal period, movement liberalism ultimately reproduces them, only now on empirical grounds. Part VI ends by reflecting on the productive lessons to be drawn from the new social movement scholarship and how they might be reframed to develop an affirmative theoretical account of lawyers in contemporary social movements.

I. FRAMING THE LAW-POLITICS PROBLEM IN LEGAL THEORY

The central thesis of this Article is that social movements are a new answer to an age-old problem within legal theory. This Part briefly presents the essential outlines of this problem in order to frame the history of scholarly debate that follows. The law-politics problem in legal theory centers on the appropriate role of law in a democratic society. Theorists have long divided democracy into two spheres: one of "politics," where norms are debated by interest groups and enacted into law in ways that reflect their power, and the other of "law," where disputes are settled based on the application of rules to all individuals equally and neutrally irrespective of social position.[11] Theorists acknowledge that law is ultimately derived from norms generated through political conflict, but the idea of the "rule of law" is that, once these norms are codified in constitutions and statutes, legal rules should operate irrespective of the power of

[11] *See* BRAIN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY (2001).

parties bound by them or the ideology of judges entrusted to apply them.[12] This is the foundation of a system of constitutional rights and judicial review, in which law operates to check the "passion" of the majority in favor of essential democratic values: equality and liberty.[13]

The core problem of progressive legal theory arises precisely because the values that progressives seek to advance—greater regulation of the private market, redistribution of resources, and protection of political dissidence and minority rights—pit them against interests that typically have greater power to influence politics.[14] Such interests could use their power to resist law, so it is critical for the proper functioning of democracy that they do not. To ensure that the powerful follow the rule of law, they must perceive either a sanction for noncompliance or a benefit for compliance. Precisely because the powerful can influence when and how government decides to impose sanctions, proponents of the rule of law cannot simply rely on government coercion to deter or punish noncompliance. Rather, powerful social interests must be held in check by law because they perceive systemic benefits in doing so, even if in the short-term complying with law may not be in their self-interest.[15] It is in this sense theorists assert that, for democracy to work, the powerful must agree to follow law, at least sometimes, because they perceive it to be *legitimate*.[16]

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[12] Here, a controversial question is whether judges ever simply apply law or whether the idea of law is too indeterminate, thus requiring judges to exercise political discretion. *See* H.L.A. HART, THE CONCEPT OF LAW (1961); RONALD DWORKIN, LAW'S EMPIRE (1986); *see also* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2012); Scott J. Shapiro, *The "Hart-Dworkin Debate": A Short Guide for the Perplexed*.

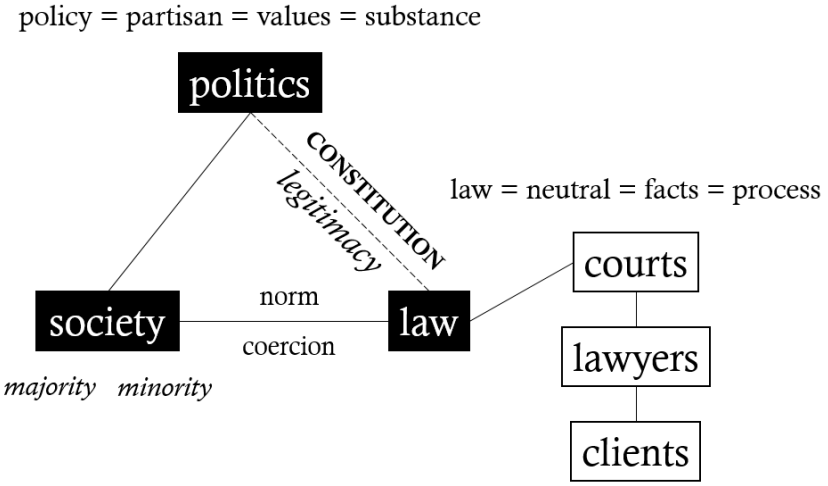
[13] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOL. 1, 289 (1835) (Phillips Bradley trans., 1945 ed.) ("When the American people are intoxicated by passion or carried away by the impetuosity of their ideas, they are checked and stopped by the almost invisible influence of their legal counsels.").

[14] It is important to note that this is predominately a progressive, not conservative, problem because conservativism tends toward maintaining the legal status quo while progressivism, as its name implies, is oriented toward change. Although this is generally true, to the degree that conservatives have adopted a change-oriented legal approach in reaction to the civil rights movement would argue in favor of understanding the law-politics dilemma in nonideological terms—though it is also important to note that within legal theory, the problem has been debated almost entirely within progressive thought.

[15] *See* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893); Talcott Parsons, *The Law and Social Control*, *in* LAW AND SOCIOLOGY: EXPLORATORY ESSAYS 56 (W.M. Evan ed., 1962); MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein ed., 1954). For analysis, see Trubek, *supra* note *Max Weber*; *see also* William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STANFORD L. REV. 565, 573 (1985) (stating the Progressive-Functionalist view of "normative integration, the notion that individuals and the various specialized roles in the society are held together by a more general moral culture").

[16] David M. Trubek, *Max Weber and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 736; *see also* Owen Fiss, *The Autonomy of Law*, 2 YALE J. INT'L L. 517 (2001); Christopher Tomlins, *How Autonomous Is Law?*, 3 ANNU. REV. L. SOC. SCI. 45, 49 (2007).

Figure 1: Elements of the Law-Politics Problem



The central importance of law's legitimacy in democracy gives rise to the key challenge for progressives seeking to mobilize law to advance their substantive values.[17] When these values are in conflict with the interests of power holders, legal mobilization often requires countermajoritarian action by courts and lawyers to advance minority interests against the "tyranny of the majority."[18] From this vantage point, progressive reformers frequently find themselves in the position of at once criticizing law as an instrument of power, but also relying upon the rule of law to check power and promote greater equality. This puts them in a bind: if progressive reformers do not push hard enough for legal change, they may be acquiescing to the perpetuation of injustice. If they push too hard—if they too explicitly link legal reform to their substantive values—they risk politicizing law and thereby undermining the very legitimacy they need to check the power of opponents and advance their goals. And even if they find a way to advance reform through law without destabilizing it, reformers may succeed only in tinkering at the margins and giving legitimacy to a legal order that remains structurally unfair.[19] From this standpoint, the law-politics problem within progressive legal theory presents a fundamental challenge: *how to justify a legitimate role for courts and lawyers in shaping law to promote progressive ends, while preserving the democratic line between law as neutral and procedural, on the one hand, and politics as partisan and substantive, on the other.*

II. THE RISE AND FALL OF LEGAL LIBERALISM

This Part provides a historical overview of progressive legal theory to show how the law-politics problem has animated scholarly development during four critical periods: (1) *legal realism*, from the beginning of the twentieth century through the New

[17] David Trubek, *Reconstructing Max Weber's Sociology of La*w, 37 STAN. L. REV. 919 (1985).
[18] DE TOCQUEVILLE, *supra* note.
[19] MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 242 (1990); Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA FORUM 32.

Deal; (2) *legal liberalism*, from *Brown* through the end of the Warren Court; (3) *critical legalism*, during the era of conservative political ascendance; and (4) *pragmatic liberalism*, associated with the liberal-centrism of the 1990s. As this Part argues, the law-politics problem framed progressive scholarly debate at each stage in relation to underlying political conflict, producing a series of unstable theoretical resolutions that ultimately fractured progressive scholars around the question of law's appropriate role in social change. A key insight of this account is to show how the law-politics problem organized debate in the two scholarly fields most concerned with policing the law-politics boundary: *constitutional law*, focused on the appropriate role of courts, and the *legal profession*, attuned to the appropriate role of lawyers. Debate in these two fields operated along parallel—and strikingly similar—lines even though the fields themselves were divided by academic status and did not interact.

To summarize the argument: In the first part of the twentieth century, legal realism *avoided* the law-politics problem by framing law's independent role in relation to the rise of class-based majoritarian politics and positing a process-oriented theory of institutional specialization that neatly separated law from policymaking. Following *Brown*, legal liberalism *defined* the law-politics problem in terms of the democratic legitimacy of courts and lawyers advancing rights for underrepresented interests, framed around countermajoritarianism in constitutional law and professionalism in legal profession scholarship. As the claims of those interests expanded against the backdrop of conservative political ascendance in the 1980s, critical legalism *contested* the possibility of a principled law-politics division and questioned its political value, pitting radical critics who pushed away from legalism as a political strategy against mainstream and outsider scholars who continued to defend the law, albeit on different grounds. In the aftermath of this debate, as progressives gave up on the hope of grand theory and sought instead to leverage smaller-scale opportunities for political change in inhospitable conditions, pragmatic legalism sought to *rebuild* a vision of law from the "bottom up" that looked for new legal norms in community-based struggle while relying on the indirect effects of law to reshape politics.

A. Legal Realism: Avoiding the Tension

Legal realism as an intellectual movement in the 1920s and 1930s was generally associated with a critique of adjudication that presumed judges could decide cases by reasoning deductively from formal legal rules, coupled with call to study those rules empirically in order to test whether they actually produced their intended results.[20] Yet

[20] *See* Brian Leiter, *American Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY (2d ed. 2010). Realism—as it emerged in tentative form in the early twentieth century writings of Holmes, Pound, and Frankfurter, and then grew in the 1930s with the leadership of Llewellyn, Hale, Cohen, and Fuller—was framed by its proponents as a counter to legal formalism. Formalism as a technique of judicial reasoning was associated with three notions: first, that the common law existed as a closed system separate from politics within which legal disputes could be decisively resolved; second, that this law could be scientifically organized under coherent legal categories with determinate, a priori rules derived from authoritative legal materials; and third,

realist scholars also posited an affirmative jurisprudential theory that marked the first effort within progressive legal thought to articulate a democratic role for courts and lawyers that addressed the law-politics problem.[21] This section makes two claims about the legal realist period. First, it argues that the realist position ultimately *avoided* the law-politics problem by bracketing race—and thus evading the countermajoritarian difficulty—while arguing for judicial and professional roles that expressed law's *independence* from corporate influence in politics.[22] This view of independence allowed realists to present a tentative process-oriented resolution of the law-politics problem that rested on institutional specialization. Second, by juxtaposing the conventional story of realism with historical accounts of black legal progressivism during this same period, this section argues that the realist law-politics resolution was both artificial and under pressure by the time of the New Deal. This comparison highlights that there were already competing strains of progressive thought well before the NAACP's legal assault on *Plessy v. Ferguson* began: While white realists advanced the dominant concept of independence, black progressives asserted the ideal of *representation*—of subordinated minority groups by courts and lawyers acting to advance countermajoritarian rights.

1. Dominant Strain: Class and Independence

Even as W.E.B. DuBois proclaimed in 1903 that "[t]he problem of the twentieth century is the problem of the color-line,"[23] it was class inequality to which legal realism

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that by reasoning deductively and analogically, judges could rely solely on such rules to reach a definitive legal outcome in a particular case Scholars use a variety of terms and definitions for formalism. *See*, *e.g.*, ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 1; Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 LEGAL THEORY 111 (2010); *see also* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006). Tamanaha argues there was not a clear "formalism" prior to 1890s and that realists view of judging, which contained both skepticism but also recognition of rule-bound nature, mirrored what historical jurists wrote in 1880s and 1890s. *See* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2009); JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICAN (1976); *see also* CHRISTOPHER COLUMBUS LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

[21] Politically, realism intervened at a moment of national transformation shape by struggles over race and class. The end of the Civil War and passage of the Thirteenth Amendment formally eliminated the legalized race-based slavery that had ravaged the union. MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981); *see also* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 11 (2000). Doing so ushered in a period of rebuilding that unleashed pent-up forces of industrialization, which swept through a nation recovering from catastrophic upheaval—while still grappling with the unsettled legacy of its primary cause. STEVEN J. DINER, A VERY DIFFERENT AGE: AMERICANS OF THE PROGRESSIVE ERA 15, 27 (1998); *see also* H.W. BRANDS, AMERICAN COLOSSUS: THE TRIUMPH OF CAPITALISM (2010); LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 256 (2010); PURCELL, *supra* note, at 11; ROBERT H. WEIBE, THE SEARCH FOR ORDER, 1877-1920.

[22] *See* BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007); *see also* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEXAS L. REV. 731 (2009). *Cf.* Mark V. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1216 (1981) ("Concern over Realism's legacy seems to recur at generational intervals.").

[23] W.E.B. DUBOIS, THE SOULS OF BLACK FOLK (1903).

responded—with race relegated to a footnote in the debate.[24] From the perspective of scholars loosely allied under the realist banner—white, male academic elites at Ivy League schools—there were two central challenges to law posed by industrial capitalism in the Gilded Age[25]: first, keeping courts from interfering with the growing political success of class-based progressive social movements,[26] and second, preventing powerful corporations from exploiting loopholes to undermine public regulation in their business dealings. Legal realism responded to these challenges by asserting new roles for courts and lawyers that sought to protect law's *independence* from corporate power. For courts, independence meant deferring to labor-backed political reform, while for lawyers, it meant *not* deferring to corporate client self-interest.

The realist position on courts reflected what scholars perceived to be the central political dilemma of the time: how to unleash the power of class-based policy reform from the punitive gaze of judicial review,[27] exercised by a Supreme Court solicitous of corporate power.[28] As the labor movement built strength at the turn of the century,[29] its legislative successes were repeatedly thwarted in court,[30] while union organizing was undercut by lower courts' issuance of antilabor injunctions.[31] Particularly after *Lochner*

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[24] United States v. Carolene Products Co., 304 U.S. 144 (1938).

[25] SEAN CASHMAN, AMERICA IN THE GILDED AGE (1993). The Gilded Age was marked by the dominance of the trusts, soaring inequality between the new corporate rich and industrial wage earners, and the increasing clash of capital and labor. J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (1956); *see also* CHRISTOPHER TOMLINS, FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580-1865 (2010).

[26] These movements stood for a stronger role for government in the economy to counteract monopolies, empower workers and small farmers, and ensure social welfare for the largely immigrant residents of urban slums. *See* FRIEDMAN, *supra* note, 254; TOMLINS, *supra* note, at 8; *see also* MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1970-1920 (2005); JOHN WHITECLAY CHAMBERS, THE TYRANNY OF CHANGE: AMERICA IN THE PROGRESSIVE ERA (20000); LEWIS GOULD, AMERICAN IN THE PROGRESSIVE ERA (2001); RICHARD HOFSTADTER, THE AGE OF REFORM (1960).

[27] Marbury v. Madison, 5 U.S. 137 (1803).

[28] PURCELL, *supra* note, at 15.

[29] Beginning in the 1880s, the labor movement sought legislation curbing the worst abuses of industrial capitalism, aligning with settlement house reformers to empirically document abuse, winning state laws prohibiting child labor, limiting the work day for women and workers in hazardous occupations, and banning tenement production. DINER, *supra* note, at 22, 200; *see also* NELSON LICHTENSTEIN, STATE OF THE UNION: A CENTURY OF AMERICAN LABOR 11 (2002) ("By 1912, perhaps the apex of Progressive reform, some thirty-eight states had passed child-labor laws and twenty-eight set maximum hours for women workers." Almost all states outside the south had workers compensation; more than half had laws protecting some classes of male workers.). However, outside of this "minimalist" strategy, wider legislative reforms—like the eight-hour work day and minimum wage—were repeatedly invalidated in court under the rationale of "liberty of contract." FORBATH, *supra* note, at 38; *see, e.g.,* Adkins v. Children's Hospital, 261 U.S. 525 (1923); Hammer v. Dagenhart, 247 U.S. 251 (1918).

[30] WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 38, 43 (1991); *see also* FRIEDMAN, *supra* note; RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT, 1860-1915 (1944); HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970 (2015); BENJAMIN TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942); GEROGE WOLFSKILL, THE REVOLT OF THE CONSERVATIVES: A HISTORY OF THE AMERICAN LIBERTY LEAGUE (1962).

[31] *See* Vegelahn v. Guntner, 44 N.E. 1077 (Mass. 1896). In addition, because unions had no legal status, their members were prosecuted for criminal conspiracy for "oppressing" rights of employer. TOMLINS, *supra* note,

v. New York invalidated New York's maximum hour law for bakers on substantive due process grounds,[32] realists made it their project to reveal how formalist legal reasoning, which purported to be apolitical,[33] provided cover for a substantive political agenda[34]: advancing *laissez faire* capitalism.[35]

Although explicitly concerned with exposing the political character of judicial decision making,[36] Legal realism linked its critique of judicial review to an implicit

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at 48 (citing Old Dominion Steamship Co. v. McKenna, 30 F. 48 (S.D. N.Y. 1887); Walker v. Cronin, 107 Mass. 555 (1871)); *see also* FORBATH, *supra* note, at 147 (noting that the Clayton Antitrust Act of 1914, banned labor injunctions unless irreparable harm and then the Norris-Laguardia Act of 1932 banned them outright).

[32] 198 U.S. 45, 53 (1905). The *Lochner* freedom of contract reading of the Fourteenth Amendment built on a series of pro-business state cases during this time. *See* Ritchie v. People, 40 N.E. 454 (1895); Godcharles v. Wigeman, 6 A. 354 (1886); *see also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 33 (1992).

[33] *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988). The idea of law constraining judicial decision making through deductive reasoning was championed by Blackstone and Hale. 1 WILLIAM BLACKSTONE, COMMENTARIES *69. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND (1713).

[34] In this sense, realism was associated with a deconstructionist method that revealed how judicial decision making, particularly in commercial law, applied norms derived from existing economic practice (like "liberty of contract") to determine socially regressive legal outcomes. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 200 (1992); *see also* Felix S. Cohen, *The Ethical Basis of Legal Criticism,* 41 YALE L.J. 201 (1931); Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1063 (1934); L.L. Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429 (1934); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909) Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925).The classic works of Realist thought exposed the indeterminacy of precedent, thereby revealing how judicial decision making necessarily involved the exercise of policy choice. *See* JEROME FRANK, LAW AND THE MODERN MIND (1930); OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW (1897); Felix S. Cohen, *The Ethical Basis of Legal Criticism,* 41 YALE L.J. 201 (1931); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Wesley A. Sturges & Samuel O. Clark, *Legal Theory and Real Property Mortgages*, 37 YALE L.J. 691 (1928); L.L. Fuller & William R. Perdue, Jr.*, The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918).

[35] HORWITZ, *supra* note, at 16; WILLIAM W. FISHER, III, MORTON J. HORWITZ & THOMAS A. REED, AMERICAN LEGAL REALISM xii (1993); *see also* EDWARD CORWIN, THE TWILIGHT OF THE SUPREME COURT 78 (1934); DAVID RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY (2013); WILFRID E. RUMBLE, AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968). For a different view of this history, see BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010) (critiquing the historical narrative of formalism disrupted by Realism, arguing that there was much realist judicial decision making in the latter part of the 19th century).

[36] The Realist focus on judicial lawmaking was based on its core claim of legal indeterminacy. Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 750 n.2 (2013); *see also* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 120 (2009); LEITER, NATURALIZING JURISPRUDENCE, *supra* note, at 21-23; EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS IN THE LAW 537-556 (1953); Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205, 208-09 (1986); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 607-610 (2007); Duncan Kennedy, *Freedom and Constraint in Adjuidcation: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518 & n.1 (1986); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 822 (1983); G. Edward White, *The Inevitablity of Critical Legal Studies*, 36 STAN. L. REV. 649, 651 (1984).

theory of institutional specialization.[37] The reformist goal of realist scholarship—to reconnect "legal justice" and "social justice"[38]—was to be achieved not though judicial activism, but rather by rejecting the centrality of common law adjudication in favor of "new principles, introduced by legislation, which express the spirit of the times."[39] Realism's call for a "sociological jurisprudence" was therefore meant to replace one set of social facts[40]—the existing regime of market transactions that courts were using to justify decisions like *Lochner*[41]—with another derived from a deeper analysis of the underlying political conditions and power differences that enabled industrial inequality and exploitation.[42] Analyzed with the new tools of empirical social science, legal rules could thereby be brought into line with social reality through ameliorative legislation and—as the New Deal approached—expert problem solving in the administrative state.[43] Courts, in this framework, would remain independent of the corrupting influence of corporate capital by deferring to the majority's legislative will.[44]

The realist position on lawyers reflected an analogous concern over corporate power. For realists looking out on the legal profession in the early twentieth century, the central threat was the perceived commercialization of legal practice and decline of professional independence among newly minted "corporate lawyers."[45] In language

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[37] Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 40 (David M. Trubek, ed., 2006).

[38] *See* Pound, *supra* note.

[39] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). Although it was Pound who first called for greater attention to "law in action," Lwelleyn connected it to progressive politics by advocating sociological study to promote legal reform. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

[40] The arrival of empirical social science, building from the influence of Darwinism and the reaction against Euclidean mathematics, undercut the idea that law could operate according to a closed system of formal rules that had determinate normative content and thus opened the door to realism's attack on judicial review: EDWARD PURCELL, THE CRISIS OF DEMOCRATIC THEORY 8 (1973); see also MORTON WHITE, SOCIAL THOUGHT IN AMERICAN: THE REVOLT AGAINST FORMALISM (1949).

[41] Pound, *supra* note *Liberty of Contract*, at 454 ("Why do so many [courts] force upon legislation an academic theory of equality in the face of practical conditions of inequality?").

[42] *Id.* at 35-36 ("Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient.").

[43] HORWITZ, *supra* note, at 200.

[44] The *Lochner* era, as it turned out, was swept away not by Realist scholarship but real politick, as President Franklin Roosevelt's threat to pack the Supreme Court led to the "switch in time that saved nine," a jurisprudential shift by Justice Roberts that effectively repudiated *Lochner* by upholding Washington's minimum wage law, and thus paving the way for the Court to uphold key parts of the New Deal administrative state (itself built by realist lawyers). *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[45] Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 3 (1988); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 7999, 862 (1992). The transformation of the legal profession at the turn of the twentieth century gave impetus to the first effort in ethical codification. This effort drew on antebellum legal treatises that incorporated values of ethical independence from clients that would form part of the foundation for the 1908 Canons. *See, e.g.,* DAVID HOFFMAN, A COURSE OF LEGAL STUDY; RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES (1817); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854); ABA CANONS OF PROFESSIONAL ETHICS (1908); *but see* Susan D. Carle, *Lawyers' Duty to Do*

that echoed critiques of courts' capitulation to big business, giants of the progressive era voiced concern over the declining ethics of the corporate bar,[46] contrasting what they did—devise "bold and ingenious schemes by which their very wealthy clients, individual or corporate can evade the laws"[47]—with what they ought to do—serve as an independent check on the power of those very same clients.[48] This position, captured by Brandeis's "lawyer for the situation," expressed a view of lawyers as guardians of a "public profession."[49] What this meant in the realist context was an updated version of Tocqueville's "balance wheel" concept: instead of tilting law in favor of corporate clients through litigation, corporate lawyers were to mediate between corporate power and the public good to foster democratic stability.[50]

Echoing its approach to adjudication, realists articulated a vision of professionalism that welded lawyer independence to a theory of institutional specialization.[51] The professionalism advanced by realists was one in which the corporate lawyer would exercise independent judgment in order to push back against corporate client interests in the nonlitigation realm of client counseling.[52] There, outside of the domain of adversarial legalism, lawyer autonomy from client influence was necessary to ensure that corporate client plans fit within the broader public purposes that Progressive-era regulation demanded.[53] In contrast, within the adversary system, realists supported more conventional professional notions of neutral client advocacy in ways that linked

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Justice: A New Look at the History of the 1908 Canons, 24 L. & Soc. Inquiry 1 (1999) (noting that the Canons departed from Hoffman and Sharswood in important ways that promoted client-centered advocacy).

[46] Adolf A. Berle, Jr., *Modern Legal Reform*, *in* 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 340, 344.

[47] AUERBACH, *supra* note, at 33 (quoting Roosevelt).

[48] *See* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996) for a critical evaluation of this posture.

[49] AUERBACH, *supra* note, at 85. This view of independence also resonated with an elitist strain in progressivism, which often "viewed reform by experts as a vehicle for the reestablishment of elite ascendency in public life." AUERBACH, *supra* note, at 85. The idea was that lawyers would show corporate clients that "conflict was a result of short-sightedness and confusion rather than of divergent norms, and to recommend that it be resolved simply by showing individuals that their true interests converged with the public interest." Simon, *supra* note, at 68; Saul Touster, *Book Review*, 76 HARV. L. REV. 430 (1962) (reviewing BERYL HAROLD LEVY, CORPORATION LAWYER...SAINT OR SINNER? THE NEW ROLE OF THE LAWYER IN MODERN SOCIETY (1961)).

[50] *Id.* at 14. ("Lawyers were to be the guardians, in the face of threats posed by transitory political and economic powers, of the long-term values of legalism."); *see also* Alfred L. Brophy, *Foreword: Lawyers and Social Change in American Legal History*, 54 ALA. L. REV. 771, 774 (2003) (noting that the nineteenth century lawyer was celebrated for "stopping radical reform" and helping to "maintain order.").

[51] *See* William H. Simon, *The Ideology of Advoacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

[52] The view of professionalism-as-independence was pronounced from on high by lawyers in the pantheon of progressive legal elites. *See* Louis Brandeis, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION 329, 337 (1933); HARLAN F. STONE, LAW AND ITS ADMINISTRATION 165-66 (1915); Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934).

[53] As Spillenger recounts, some of Brandeis's most famous and controversial representations, such as his decision to effectively place himself in the role of trustee for client James Lennox's nearly bankrupt tannery business in order to devise a plan to repay creditors that would be "fair to all," fit within this model. Spillinger, *supra* note, at 1518-19 (noting also that such "counsel for the situation" was premised on Brandeis's relentless political nonaffiliation that cut against his claim to serve the public); *see also* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990). Spillenger also suggests that the more relevant division was between private litigation and representation that involved what Brandeis defined as public issues.

back to their vision of courts. In private disputes over corporate conduct, courts would act as impartial umpires resolving arguments involving the application of law to fact; in that context, it was deemed appropriate for lawyers to zealously advocate their clients' best interests in a truth-seeking forum where legal claims were checked by opposing counsel and vetted by judges.[54] Realists also suggested that the professional duty of elite lawyers required that they deploy their prodigious advocacy skills in favor of public regulation when it came under attack. Brandeis's famous support of Oregon's maximum hour law for female laundry workers in *Muller v. Oregon* symbolized this brand of realist professionalism[55]: a prestigious corporate pro bono lawyer bucking his client constituency to argue for judicial deference to state employment regulation.[56]

Legal realism advanced a resolution to the law-politics problem that rested on a specific definition of the challenge posed by industrial capitalism, which in turn supported a unified theory of courts and lawyers in democracy. In this scheme, courts would apply "law" according to strict standards limiting the scope of judicial review and legislatures would make policy to be refined by legal experts in the administrative state.[57] While lawyers could freely engage in policy development in their role as New Deal technocrats,[58] as client representatives they would stick to their job of promoting legal compliance in the public interest.[59] Connecting this theory of adjudication and

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[54] Lon L. Fuller & John D. Randall, *Professional Resposibility: A Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1968); ABA CANONS OF PROFESSIONAL ETHICS Canon 15 (The lawyer owes "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be whthheld form him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty."). The problem of unequal access to law, and the impact that had on the perceived legitimacy of the legal system (especially among the new immigrant urban poor), was resolved by calling for increased charitable investment in legal aid as a mechanism of procedural fairness not substantive justice. REGINALD HEBER SMITH, JUSTICE AND THE POOR (1919).

[55] 208 U.S. 412 (1908).

[56] *See* MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS (Nancy Woloch ed., 1996). By marshalling social science data on on the negative health impacts of extreme work hours to argue in favor of the Oregon law, it was the perfect riposte to *Lochner*'s judicial activism in disregard of social reality. And Brandeis's success—though premised on what would become a controversial brand of difference feminism—augured *Lochner*'s ultimate demise. *See* David E. Bernstein, *From Progressivism to Modern Liberalism: Louis Brandeis as a Transitional Figure in Constitutional Law*, 89 NOTRE DAME L. REV. 2029 (2014).

[57] *See* PURCELL, *supra* note; *see also* Kennedy, *supra* note *Three Globalizations* (noting that "agencies were supposed to bring 'expertise' to bear, meaning both social science and concrete pragmatic knowledge. 'They were law reformers, writing theory, doing studies, drafting legislation….'"); *see also* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 310 (1978).

[58] *See* Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292 (1954) (arguing in favor of lawyers engaging in preparatory empirical studies to support legislation and administrative rulemaking). For a portrait of the politics of the New Deal, *see* RICHARD HOFSTADTER, THE AGE OF REFORM (1977); H.W. BRANDS, AMERICAN COLOSSUS (2010). Corporate lawyers "carried their own crusade against the New Deal" in order to preserve control over "law" and maintain prestige. RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL 169-71 (1995).

[59] *See* David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 42 VAND. L. REV. 717, 729 (1988); *see also* Ben Glassman, *Representing Law, Representing Truth: Legal Realism and Issues in the Ethics of Representation*, 44 HOW. L.J. 1 (2000).

lawyering with support for legislative reform, realists could simultaneously be against court-centered legal activism and in favor of progressive political change. Yet this resolution depended on assiduously avoiding the "race question" and thus failing to confront the deep tension in realist jurisprudence.[60] In the end, although realism persuasively theorized the role of law in relation to economic populism, it did not resolve the looming question of what affirmative role courts and lawyers should play in the countermajoritarian struggle for racial justice.[61]

2. Recessive Strain: Race and Representation

Although race was absent from the realist conversation, it was the focal point of parallel discussions by black progressives struggling to devise a response to the violence of Jim Crow.[62] While they had no faith in law's independence from politics, they had ample reason to want to build it—yet on quite different terms than their white realist counterparts. Whereas realists could connect a critique of judicial activism with support for social movement-led policy reform, black progressives did not have that luxury. As Jim Crow crushed the viability of racial justice movements and the possibility of legislative reform in the "nadir period" of the post-Reconstruction

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[60] *See* MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 639 (2009); Christopher Bracey, *Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1619 (1995); Axel R. Shafer, *W.E.B. Du Bois, German Social Thought, and the Racial Divide in American Progressivism, 1892-1909*, 88 J. AM. HIST. 925 (2001); *see also* Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 861 (2001) (reviewing Brandeis's "conspicuous evasion of public issues that dealt with inter-ethnic relations between African-Americans and European-Americans and its complicity in rendering judicial decisions that reinforced the core principles of the segregation regime"). Hale's critique of the failure of states to enforce the Fourteenth and Fifteenth Amendments against discrimination by private individuals focused on solving the problem of state nonenforcement through the passage of federal antilynching law. Robert L. Hale, *Rights Under the Fourteenth and Fifteenth Amendments Against Injuries Inflicted by Private Individuals*, 6 LAW. GUILD REV. 627, 639. Llewellyn, although promoting law's ability to "set up ideals" expressed skepticism about the ability to law to change racial attitudes, and worried about racial backlash. Karl Llewellyn, *What Law Cannot Do for Inter-Racial Peace*, 3 VILL. L. REV. 30, 31 (1957). Cohen also argued that the appropriate venue for racial remediation was the executive branch, not the courts. Felix S. Cohen, *To Secure These Rights: The Report of the President's Committee on Civil Rights*, 57 YALE L.J. 1143 (1948).

[61] In this sense, realism was primarily concerned about protecting the courts and the litigation process from politicization that undermined majoritarianism. It did not fully confront what legal autonomy meant when majoritarianism itself was the problem—as the growth of totalitarianism abroad and the rise of Jim Crow at home spotlighted. *See* PURCELL, *supra* note at 96-99. In this regard, political scientists had begun focusing on the dangers to democracy of majority public opinion. See WALTER LIPPMAN, PUBLIC OPINION (stating that democracy was a hollow idea and that "[w]hen public opinion attempts to govern directly, it is either failure or a tyranny"); WALTER LIPPMAN, THE PHANTOM PUBLIC (expressing pessimism that the public could govern democracy); WALTER LIPPMANN, A PREFACE TO POLITICS (1912) (arguing that the best society is guided by a few intelligent leaders toward best outcomes); *see also* HAROLD D. LASWELL, DEMOCRACY THROUGH PUBLIC OPINION (1941); CHARLES EDWARD MERRIAM, POLITICAL POWER: ITS COMPOSITION AND INCIDENCE (1934). The antipopulist strand of realism coalesced around the expertise model of the administrative state, but this model did not address (and in fact explicitly excluded) the problem of racial subordination.

[62] SUSAN D. CARLE, DEFINING THE STRUGGLE: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1915 (2013); Mack, *supra* note. These intellectuals were located at the nexus of progressive political-legal organizations (before and through the formation of the NAACP in 1908) and black academic institutions (notably Howard Law School after Houston's arrival in 1929).

South,[63] progressives sought to define a political program that advanced a pragmatic role for courts to protect African Americans from repressive politics led by a vanguard of lawyers seeking to enlist courts in a project of social reform. In this context, black progressives understood the challenge to law, and the solution to the law-politics problem, in terms precisely contrary to those of white realists: rather than deferring to majoritarianism, law had to operate as a check on its excesses; and rather than confining policy reform to specific institutional spheres, such reform had to develop through dynamic engagement among the branches. Resolving the law-politics problem thus hinged on a justification for the very judicial activism from which realists recoiled, now framed by black progressives around the concept of *representation*: by courts and lawyers of the interests of African Americans as a politically disenfranchised minority group.

For black progressives at the turn of the century, the politics of race argued in favor of a pragmatic position on the countermajoritarian role of courts. After the post-Civil War crack in the impregnable fortress of white supremacy,[64] racial subordination quickly reasserted itself as the suffocating reality. Southern legislatures codified a post-Reconstruction system of total segregation, in which the federal government acquiesced and to which the Supreme Court gave its imprimatur.[65] It was, in the Court's words, time for blacks to cease "to be the special favorite of the laws,"[66] a point it made with brutal clarity in *Plessy v. Ferguson*'s sweeping endorsement of the "separate but equal" doctrine.[67] In this bleak environment, black progressives—"forerunners" of the civil rights movement to come[68]—developed a political strategy that rejected the institutional specialization of realists, instead embracing a broad

[63] RAYFORD W. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT: THE NADIR, 1877-1901 (1954). Blacks were also largely shut out of the benefits of the New Deal and thus could not view the federal administrative state as a source of hope.

[64] Building on the Reconstruction Amendments—the 13th (1865), 14th (1868), and 15th (1870)—Southern blacks one step away from slavery aligned with radical Republicans to achieve a level of government representation that, although never complete, constituted a "stunning departure in American politics." ERIC FONER, RECONSTRUCTION, 1863-1877: AMERICA'S UNFINISHED REVOLUTION 355 (1988).

[65] The failure of the Republicans to convert enough whites to sustain the party in the South brought Reconstruction to a swift and bitter end, leading to the withdrawal of federal troops after the 1877 presidential election). *Id.* at 575 (describing tumultuous 1877 election in which Democrat Tilden won the popular vote but Republican Hayes claimed a controversial victory in the electoral college).The Supreme Court permitted Jim Crow by deferring to facially neutral voting requirements (such as literacy tests and poll taxes) that shut blacks out of the polls and interpreting the Reconstruction Amendments to apply only to "state action," thus undercutting federal legislative efforts to bar discrimination in public accommodations and penalize lynching. *See* The Slaughterhouse Cases, 83 U.S. 36 (1873) (holding that the 14th Amendment did not apply to state police power); The Civil Rights Cases, 109 U.S. 3 (1883) (nullifying Civil Rights Act barring discrimination in public accommodations on the ground that government did not have power under the 14th Amendment to bar private discrimination); United States v. Harris, 106 U.S. 629 (1883) (invalidating Force Act of 1871 imposing federal penalties on local crimes, which sought to prevent KKK murders for which local officials would not prosecute).

[66] The Civil Rights Cases, 109 U.S. 3, 24 (1883) (Bradley, J.).

[67] 163 U.S. 537 (1896).

[68] *See* CARLE, *supra* note; SHAWN LEIGH, AN ARMY OF LIONS: THE CIVIL RIGHTS STRUGGLE BEFORE THE NAACP (2012).

conception of "law reform" that was understood to encompass a dynamic combination law-making strategies: including "race uplift" initiatives, legislative advocacy, and court-centered change. Although deep fractures developed among advocates of competing models,[69] black leaders—even as they aligned themselves with different organizations[70]—promoted movement along all tracks simultaneously in the hope that smaller victories would accumulate into larger transformation.[71] By the time W.E.B. DuBois split from Booker T. Washington to help found the Niagara Movement, a strategic approach to law reform had developed targeting a "robust mix of litigation, legislation, and social welfare objectives."[72]

This position recognized no clear boundary between law and politics. But rather than undermining the value of law, this recognition only served to increase the importance of building law's legitimacy to advance the cause of racial justice. Toward that end, mainstream leaders called for a gradual strategy of leveraging judicial review—in carefully selected circumstances—to challenge state-based segregation and thus counteract black disenfranchisement in the realm of representative politics. After its founding in 1909, leaders of the NAACP were clear-eyed about both the limits of

[69] Three basic schools of thought emerged—none of which were mutually exclusive. Conservatives, whose views were associated with Booker T. Washington, argued for a retreat from the state and the pursuit of "race uplift" through intraracial community building. *See* CARLE, *supra* note; SHAWN LEIGH, AN ARMY OF LIONS: THE CIVIL RIGHTS STRUGGLE BEFORE THE NAACP (2012). Radicals, seeing opportunity in the rising power of the labor movement, argued in favor of cross-racial alliance with the white working class in order to advance national reform that would simultaneously address the interlocking problems racial subordination and poverty. CARLE, *supra* note, at 9 (noting split between Ransom, and later Dubois, who focused on "democratic, labor-based, coalition-organizing approach" versus Washington's "conservative, racial interest group or power-brokering model of racial progress"). Pragmatists, while not rejecting the importance of intraracial or cross-racial work, also embraced legal reform strategies to redress the deprivation of civil and political rights in the areas of most grievous concern, especially to the middle class: discrimination in the criminal justice system and public accommodations, the denial of the franchise, unequal schools, and arbitrary violence. *Id. at* 55.

[70] The NAACP's formation also marked the rise of organizational specialization. *Id.* at 289. The NAACP, coming out of the Niagara Movement, was oriented toward legal reform, with an explicit focus on litigation expressed in the creation of its National Legal Committee. The Urban League took over the economic development mantle of the Washington wing of the Afro-American Council; the National Negro Congress focused on political action; while the International Labor Defense was created to advance a more radical cross-racial and labor movement-oriented agenda. TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 146 (stating that organizations held "comparative advantages in different spheres": the NAACP in litigation, the National Negro Congress in political action; and the Urban League in job creation).

[71] Organizational development during the "nadir" period reflected competing positions and moved toward pragmatic engagement with the state. Early groups, like the Afro-American League, sought to combine work outside and inside the state, supporting race uplift, but also engaging in lawmaking when there were opportunities to do so. *Id.* (describing early efforts by the Afro-American League to pass a national education bill that would have directed more money to segregated black schools, and successful efforts in the North after the Civil Rights Cases to pass bills banning discrimination in public accommodations). Early test-case litigation resulted in a range of outcomes. *See id.* at 115-16, 206 (noting success of Afro American Council case in early 1900s challenging segregating seating in Jacksonville street cars, but failure of Niagara Movement case challenging denial of seating on first class train in interstate commerce under Virginia segregation law); *see also* Mack, *Rethinking*, *supra* note (citing Carter v. Texas (1900) and Rogers v. Alabama, 192 U.S. 226 (1904)).

[72] CARLE, *supra* note, at 289 (noting that the Niagara Movement's foundational document committed it to "push test cases in court," particularly around transportation).

court victories and their potential to spark political mobilization.[73] As the group sought to secure funding for what would become the *Brown* litigation campaign, it stressed the political benefits of "a large-scale, widespread, dramatic campaign to give the Southern Negro his constitutional rights,"[74] which included making "the cost of a dual school system so prohibitive as to speed the abolishment of segregated schools," giving "courage to Negroes to bring similar actions," and focusing "as nothing else will public attention north and south upon vicious discrimination."[75] In proposing to "boldly challenge the constitutional validity of segregation,"[76] NAACP leaders were cognizant of the "danger . . . entailed by any sort of effective action we can hope to take in our campaign."[77] Yet, given the alternatives, risking those dangers was necessary to build the doctrinal and political momentum to dismantle Jim Crow.

Although black progressives could plainly see the conservative ideological tilt of courts, they sought to fashion a pragmatic theory of judicial review in which planned litigation and strategic judicial intervention could expose cracks in the foundation of Jim Crow to be exploited through further organizing and political work. In this sense, the Court's "switch in time" and rapprochement with the New Deal pointed toward new legal opportunity. Chief Justice Harlan Stone's famous "footnote four,"[78] issued the same year that Thurgood Marshall took over the NAACP's legal team,[79] named the issue that had long lurked beneath realist jurisprudence: What should the Court do when majoritarian legislation was in fact antidemocratic? While this issue would splinter progressive legal thought after *Brown*, the Court's recognition of its

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[73] *Id.* at 289.

[74] KLUGER, *supra* note, at 132.

[75] *Id.* Worried about the impact on labor solidarity, the Garland Fund—with the NAACP's acting secretary Walter White on its board—initially split over whether to give $100,000 to the NAACP for White shored up support by stressing the pragmatic goals of the litigation: to TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 13-14 (stating that labor-oriented Garland Fund board members, including Ralph Bunche and Roger Baldwin, dissented on the ground that the funds should be used to support labor solidarity with groups like International Labor Defense). On a 6-5 vote, the NAACP received the grant that would shape the next twenty-five years of its litigation agenda. When the fund was granted, DuBois objected, arguing in favor of the position he had long condemned: acceptance of segregation and the project of racial uplift. TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 8 (citing W.E. DuBois, *Segregation*, THE CRISIS, Jan. 1934).

[76] *Id.* at 134.

[77] TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 28.

[78] United States v. Carolene Products Co., 304 U.S. 144 (1938) (positing strict judicial review of legislation that restricted the political process or reflected "prejudice against discrete and insular minorities").

[79] The NAACP, buoyed by funding from the Garland Fund and having transitioned to black leadership, set its sights on equalizing resources in K-12 and creating opportunities for university study. White took over as secretary in 1933, hiring Houston in 1935 to lead the assault on segregation; Marshall joined him in 1936. Kluger, *supra* note, at 197.Building off of legal work begun by lawyers outside the NAACP staff office, the organization won early victories striking down Missouri's segregated law school, Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), and a Virginia school board's policy of lower pay for black teachers, Alston v. Sch. Bd. of City of Norfolk, 112 F.2d 992 (1940). Each victory raised the NAACP's profile, but also highlighted problems with the equalization argument, which dragged the NAACP into complex and protracted litigation around the adequacy of separate graduate schools for blacks and the appropriateness of awarding teacher pay based on subjective criteria of merit. By the mid-1940s, organizational pressure was therefore building for a new win outside the framework of equalization. TUSHNET, *supra* note, at 104.

importance signaled receptivity to the group's frontal equal protection assault on segregation and channeled resources by civil rights organizations into litigation.

Yet even as the NAACP geared up to attack *Plessy* in the Supreme Court, its lawyers were cautious of what they could achieve.[80] In Charles Hamilton Houston's words, "we use[] the courts as dissecting laboratories to extract from hostile officials the true machinations of their prejudices," "we use the courts as a medium of public discussion, since it is the one place that we can force America to listen," and "we attempt to activate the public into organized forms of protest and support behind these cases, under the theory that a court demonstration unrelated to supporting popular action is usually futile and a mere show."[81] Adopting their own version of "sociological jurisprudence," black lawyers presented empirical "facts" of segregation and its impact directly to the courts as a basis for the affirmative articulation of legal rights.[82] In this model of court-based changed,[83] litigation was presented as a means to shift public opinion.[84]

This pragmatic approach to litigation framed a particular understanding of the professional role of lawyers in black struggle: because lawyers occupied a new and very small professional class within black society, attention focused on how to build a cadre of activist professionals to advance the civil rights cause.[85] Particularly as control of the NAACP shifted to black lawyers in the 1930s,[86] tactical questions about how much and what type of litigation to use merged with questions of strengthening black leadership and promoting community accountability. Early legal success,[87] combined with the

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[80] Houston's approach also reflected his (and other NAACP lawyers) connection to legal realism. Thus, during the early period of NAACP legal activities, its approach aligned with the basic principles of realism's emphasis on the "law in action." Minutes of Board Meeting, 13 March 1916, Papers of the NAACP (1982) (cited in Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 L. & HIST. REV. 97, 97 (2002)).

[81] TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 348-49. Marshall, echoing Houston, argued that litigation could help "build a body of public opinion" in support of the legal changes that alone would be ineffective. As late as 1948, Loren Miller followed up the victory in *Shelley v. Kraemer* by arguing that "[t]he legal victory will prove a hollow triumph unless the battle against residential segregation is also won in the field of public opinion." *Id.*

[82] This use of empiricism was also different than the white realists: instead of using it to affirm social legislation, it was presented as grounds for new court doctrine.

[83] Mack, *Rethinking*, *supra* note (stating this view was influenced both by Marxist critiques of law and courts, as well as progressive skepticism of courts inherited from Frankfurter and Pound).

[84] *See* Mack, *Rethinking*, *supra* note, at 297-98 (although Charles Chesnutt believed that "Courts and Congress merely follow public opinion, seldom lead it, lawyers viewed litigation as one way to potentially shift public opinion).

[85] In the 1920s, there were only about 1100 black lawyers in the United States, roughly 100 of whom had elite educations. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 125 (1975).

[86] Carle, *Race, Class, and Legal Ethics*, *supra* note, at 100-108 (noting that the first NAACP legal community was comprised of white progressives, like Moorfield Story, who came out of abolitionist tradition and saw their work as a product of noblesse oblige; because they viewed their own work as "advancing this public good" they understood themselves as exempt from very ethical rules they were helping to write).

[87] Early test cases were cultivated by local affiliates, particularly in New York, whose lawyers won public accommodation cases; committee and then staff attorneys worked to win important cases striking down grandfather clauses in voting and local residential segregation ordinances. *See* Carle, DEFINING THE STRUGGLE,

notion of lawyering as race uplift,[88] to highlight the need for black lawyers to "represent the race" in litigating for greater equality.[89] Howard Law School emerged at the center of this project, with Houston's ascendance as vice dean in 1929 transforming Howard from a poorly regarded trade school to the training ground for impending legal assault on Jim Crow.[90] Houston swiftly raised standards and reoriented the school to provide deep practical experience to the new generation of black lawyers, which included Marshall, who recalled Houston issuing a stark challenge: "we had to be social engineers or else we were parasites."[91]

For these new "social engineers," using law as a tool of representation involved a contested process of negotiating whose interests were served. From the beginning, this caused tensions around class difference within the black community and class solidarity across race. The interests of middle-class blacks—whose economic worlds revolved around the segregated economy—focused on the harm of unequal schools, segregated transportation, and the denial of voting rights.[92] Black exclusion from unions and the benefits of the New Deal had the effect of pushing black lawyers away from the administrative state that their white progressive counterparts had built and staffed, and more toward the courts as the venue of last resort.[93] In the 1940s, growing working class membership, combined with a challenge from class-oriented groups like International Labor Defense,[94] encouraged NAACP lawyers to focus on litigating economic rights—largely by filing suits against discriminatory unions,[95] thus attempting to leverage substantive due process claims to bring blacks within the protection of the New Deal

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supra note, at 113-117 (describing US v. Guinn (1915), striking down grandfather voting clauses, and Buchanan v. Warley (1914), invalidating a local ordinance preventing blacks from living in white neighborhood).

[88] The 1920s black bar focused primarily on race uplift; but that idea was merged into a legalist strand, with elite black lawyers coming to see effective lawyering in white arenas (like courts) as a way to advance the uplift idea: proving to the white world that blacks could rise by their own talents and be just as good (even better) than their white counterparts. *See* Mack, *Rethinking*, *supra* note, at 266. During the interwar period, leading treatments of black bar emphasized service to interracial institutions. *See e.g.,* CARTER G. WOODSON, THE NEGRO PROFESSIONAL MAN AND THE COMMUNITY (1934); Charles Houston, Tentative Findings re: Negro Lawyers (Jan. 23, 1928) (unpublished manuscript) (on file with the Laura Spellman Rockefeller Memorial Papers).

[89] *See* KENNETH MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012).

[90] Houston graduated from Harvard Law School and took the job as vice dean of Howard in 1929.

[91] KLUGER, *supra* note, at 128 (recounted by Marshall, who came to Howard in 1930); *see also* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983); Bracey, *Legal Realism*, *supra* note, at 1622; David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education *and the Conscience of the Black Corporate Bar*, *in* RACE, LAW, AND CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 137, 137 (Austin Sarat ed., 1997).

[92] AUERBACH, *supra* note, at 210-17.

[93] Despite the success of unions like A. Phillip Randolph's Brotherhood of Sleeping Car Porters and efforts of the Wobblies, blacks were largely excluded from mainstream (AFL and later CIO) unions because of systematic discrimination. Thus, for black leaders, the culmination of labor's agenda in the New Deal was seen a codification of its racist policies. *Id.* at 180. The NAACP had lobbied to implement Wagner Act without discrimination and to deny certification to unions that discriminated.

[94] ILD represented the defendants in the Scottboro case. TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 39.

[95] RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 196 (2007) (showing how NAACP began to file discrimination suits against boilermakers union and railroads under New York fair employment law).

framework.[96] However, the Cold War reconciliation between the NAACP and anticommunist unions turned the group away from suing unions,[97] pivoting it more singularly toward the attack on *Plessy*, and connecting civil rights litigation to an assault on state action and away from private market discrimination.[98] Although this meant valuing middle-class interests, NAACP leaders remained sensitive to how their litigation success depended upon support of local community members to build and sustain cases.[99]

Postwar progressive legal thought began in a place of dynamic tension: white realists seeking to maintain a separation between law and politics by confining class-oriented law reform to the administrative state, and black progressives by building an autonomous legal space for race in court under the Equal Protection Clause. *Brown* represented a fragile reconciliation: by striking down school segregation, the Supreme Court could be seen advancing representative politics—correcting an egregious political process flaw denying blacks the right to equal education—while otherwise maintaining its deferential posture toward economic legislation. Similarly, the NAACP lawyers who argued the case embodied both independent lawyer-expertise—mobilizing social science to craft a case that responded to an intractable social problem—and community representative, growing out of and deeply accountable to the interests and aspirations of African Americans in the Jim Crow South. Yet this resolution to the law-politics problem—expressed in the ideal of legal liberalism—would be severely tested as the Southern civil rights movement asserted a broader challenge to the system of legalized segregation, while other social interests began to claim new rights in court.

B. Legal Liberalism: Defining the Problems

If progressive legal academic thought could avoid the law-politics problem in the pre-war era, owing to the dominance of class-oriented legal realism in the legal

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[96] *Id.* at 143. This had the effect of Though Marxist-inspired intellectuals issued a strong critique of courts as superstructural, the racism of vanguard unionism made the embrace of autonomous legalism a strategic necessity, TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 11. seen in antidiscrimination litigation against federal government and union collusion to exclude black workers in federal projects, like the Hoover Dam. Mack, *Rethinking*, *supra* note, at 324. In the 1940s, in addition to battling university and salary suits, the NAACP pursued litigation on behalf of black workers in shipyards and against segregated unions, under *Lochner*-like theories of substantive due process (i.e., unions were depriving black workers of their property right to work). GOLUBOFF, *supra* note, at 206-208.

[97] David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights*, 1943-1972, 63 STAN. L. REV. 1071, 1075 (2011) (claiming that before Title VII, the NAACP and Urban League attacked job discrimination at state level by arguing for state fair employment practices agencies with exclusive jurisdiction, rather than private rights of actions, in order to manage conflict within the movement, "denying more militant and increasingly litigious local protest networks an entrée' into the courts").

[98] GOLUBOFF, *supra* note, at 218-268.

[99] TUSHNET, THE NAACP'S LEGAL STRATEGY, *supra* note, at 148. There were also pragmatic concerns, as segregationists used conventional professional concerns to attack NAACP lawyers, particularly those trying to implement desegregation after *Brown*. Susan Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 UNIVERSITY OF CHICAGO ROUNDTABLE 281 (2001).

academy, avoidance was no longer possible in the subsequent period of legal liberalism. The specific debate provoked by *Brown* erupted over how progressives should respond to the use of law as a countermajoritarian strategy, which threatened to replace ideals of judicial and professional independence with practices of judicial and professional activism.[100] These practices, which in the 1970s were packaged under the label of legal liberalism, came to be associated with the idea that progressives should place "trust in courts, particularly the Supreme Court" to produce "those specific social reforms that affect large groups of people, such as blacks, or workers, or women, or partisans of a particular persuasion; in other words, policy change with nationwide impact."[101] The idea of legal liberalism was therefore explicitly premised on an *alliance* of activist lawyers and activist courts, both of which were essential—working in concert—to achieve "specific social reforms" valued by progressives.

Legal liberalism was never a complete description of a complicated social reality,[102] but it gained prominence in the legal academy as a way to summarize the perceived democratic threats posed by the progressive alliance of courts and lawyers.[103] During the period of legal liberalism, scholars in the two legal academic fields most closely associated with courts and lawyers *defined* these threats as the central focus of academic debate. Within constitutional law, the threat was framed as the *countermajoritarian problem*: the risk of activist courts substituting their own vision of justice for that of democratically elected lawmaking bodies representing the majority will.[104] Within the legal profession, the threat was framed as the *professionalism problem*: the risk of activist lawyers substituting their own vision of justice for that of the clients and constituencies they claimed to represent.[105]

As this section suggests, defining the law-politics problem in this way was accompanied by three important scholarly developments. First, although legal liberalism was explicitly premised on an alliance of courts and lawyers in the

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[100] In challenging racial segregation, *Brown*—and the rise of legal liberalism that it ushered in—framed the democratic role of courts and lawyers in precisely the opposite terms as realists had: courts were supposed to overturn the majority legislative will insofar as it subordinated minorities, while lawyers for those minorities were supposed to zealously represent their interests in pushing the courts to articulate new rights.

[101] KALMAN, *supra* note, at 2; *see also* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 258 (2005).

[102] *See* Mack, *supra* note; *see also* Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUPREME COURT REV. 297.

[103] Legal liberalism, as such, never existed as a theory of law; rather, it developed as a creation of its critics, who pieced together elements of NAACP-style impact litigation and Warren Court activism into an implicit theory of legal and social change. It was a reflection backward: a way that those who lived through the tumult of the change that surrounded *Brown* and its aftermath could make sense of what had been gained and lost. Coming at a moment at which the heady success of progressive social movement politics, and their expression in the courts, was being challenged and reversed, discussions of legal liberalism were linked to a sense of opportunity lost. In this sense, legal liberalism is like "legal formalism" before: it "does not really have an identity of its own" but exists only as a reflection of realists. *Cf.* ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (2008).

[104] *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficult, Part Five*, 112 YALE L.J. 153 (2002).

[105] *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

progressive law reform project, scholars divided study of these constituent parts into separate analytical domains divided by academic status: with constitutional law at the apex and legal profession at the base. Second, despite this bifurcation, scholars in each domain engaged in parallel debates, which coalesced around emerging "process" and "liberal" positions. Third, in these parallel debates, the scholarly methodology shifted. In contrast to the commitment to empiricism that progressives espoused when they were defining realism on the periphery of the mainstream academy, now that progressives had *become* the mainstream, their methodological program shifted: from empirical critique of the old order to a theoretical defense of the new.

1. The Countermajoritarian Problem

For progressive constitutional scholars in the 1950s, *Brown* posed the fundamental challenge that realism had studiously ignored—famously articulated as the "countermajoritarian" difficulty.[106] The question was how the court, as an unelected body, could justify the exercise of judicial review to strike down the acts of the very majorities on which democracy staked its legitimacy.[107] For progressives still haunted by the specter of *Lochner*, the answer had to be something other than simply advancing a political agenda with which they agreed.[108] What that something would be quickly split progressive legal thought into two camps, both within mainstream liberalism, but with different views of the nature of judicial review—and, ultimately, the relation between law and politics.

Process-oriented scholars concerned with the implications of countermajoritarianism for democratic legitimacy sought to ground legal liberalism on the foundation of "neutral principles"[109]—a set of positive rules that constrained judicial discretion within a broader theory of institutional competence and lawmaking.[110] Process theorists sought to claim the mantle of realism's law-politics compromise by assigning lawmaking to the legislative and administrative domains while advocating judicial restraint.[111] Within this framework, *Brown* was correct as a

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[106] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

[107] KALMAN, *supra* note.

[108] *See id.* at 19 (quoting Frankfurter that the court could not become a "superlegislature' for 'our crowd'").

[109] Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) ("A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their genrality and their neutrality transcend any immediate result that is involved.").

[110] *See* HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953); HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: THE BASIC PROBLEMS IN THE MAKING AND APPLICATIO OF LAW (1959); Henry Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84 (1959); Albert Sacks, *The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96, 96 (1953).

[111] Hart and Sacks's famous formulation of this approach was the notion of "institutional settlement," in which "decisions which are the duly arrived-at result of duly established procedures" were entitled to strong deference. HART & SACKS, THE LEGAL PROCESS, *supra* note, at 4; *see also* ALPHEUS THOMAS MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 107 (1962); William N. Eskridge, Jr. & Philip P. Frickey, *The*

matter of politics, but dubious as a matter of law since it failed to rest its holding on neutral grounds, thereby posing unacceptable legitimacy risks.[112] For process scholars, the maintenance of legitimacy counseled in favor of "attempting to separate law from politics, process from substance, facts from values,"[113] in order to promote "public acceptance."[114] Toward this end, Herbert Wechsler famously cautioned against hurried judicial resolution of difficult policy questions, calling instead for "the maturing of collective thought."[115] Alexander Bickel issued the strongest statement of this position, arguing in favor of judicial review in only rare occasions when the court could "pronounce and guard values in a principled fashion and to build consensus around them," and warning that court intervention in politics would not work "if it ran counter to deeply felt popular needs or conventions, or even if was opposed by a determined and substantial minority and received with indifference by the rest of the country."[116]

Defenders of legal liberalism interpreted realism's legacy differently,[117] emphasizing its critical role in correcting the deficiencies of democracy. For these scholars, the relevant law-politics precedent was not the dominant vision of institutional specialization and independent expertise of the New Dealers, but rather the pragmatic approach to representation enacted by NAACP lawyers and espoused in *Carolene Products* footnote four. Claiming this mantle, Judge Learned Hand made the liberal case for aggressive judicial review, stating that it was "altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers."[118] Unlike the process theorists, liberals like Hand were comfortable with the courts' ability to ascertain and respond to political process flaws and thus felt it unnecessary to impose additional legal restraints on the court's ability to strike down legislation that interfered with minority rights.[119]

Making of "The Legal Process", 107 HARV. L. REV. 2031 (1994); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994).

[111] Friedman, *supra* note, at 198 (describing the outbreak after Wechsler); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345 (1958).ALPHEUS THOMAS MASON, THE SUPREME COURT: PALLADIUM OF FREEDOM 107 (1962).

[112] Friedman, *supra* note, at 198 (describing the outbreak after Wechsler); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Paul A. Freund, *Storm Over the American Supreme Court*, 21 MOD. L. REV. 345 (1958).

[113] KALMAN, *supra* note, at 36.

[114] BICKEL, *supra* note, at 83.

[115] Weschler, *supra* note.

[116] BICKEL, *supra* note, at 258.

[117] KALMAN, *supra* note, at 268 (suggesting these scholars were the next generation, shaped more by *Brown* than *Lochner*).

[118] LEARNED HAND, THE BILL OF RIGHTS 29 (1958); ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).

[119] CHARLES L. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY (1960); Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

As the Warren Court moved from its early *Brown*-era jurisprudence on race and civil liberties, to its second wave of decisions on school prayer, reapportionment, and criminal defense, the class-race split of the realist era became encoded within constitutional theory as the law-politics debate crystallized over the scope of judicial review: with process scholars profoundly suspicious of countermajoritarianism and liberals eager to support judicial activism in favor of minority rights.[120] Notably, this debate played out entirely on the ground of legal theory. Turning their backs on the realist call for empirical study, progressive legal scholars agreed on the centrality of countermajoritarianism as the defining issue of constitutional theory, but divided over the normative question of how "activist" courts should be in the exercise of judicial review.

2. The Professionalism Problem

Emerging scholarship on lawyers also wrestled with the law-politics problem in the wake of *Brown*—interpreted through the lens of legal professionalism. As the realist ideal of Brandeisian independence appeared even further on the retreat in corporate law firms,[121] its association with legal liberal lawyers, who self-consciously advanced law reform on behalf of marginalized groups, provoked professional anxiety. In the national reformist zeal of the War of Poverty, a new infrastructure of "legal rights activity" was created on the NAACP model.[122] Heeding the call for a "civilian perspective" on poverty law that emphasized the use of test cases to address systemic issues,[123] the federal government sponsored the dramatic expansion of legal services to the poor. This was followed by the endowment of progressive legal organizations and clinical legal education by the Ford Foundation in the late 1960s and early 1970s—launching the "new public interest law."[124]

Legal scholars noted the proliferation of public interest law and focused on the question of its normative legitimacy.[125] The professionalism question turned on

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[120] *See* Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[121] On the rise of the corporate law firm, see JEROME CARLIN, LEGAL ETHICS: A SURVEY OF THE NEW YORK CITY BAR (1967); J.W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS (1950); ERWIN O. SMIGEL, THE WALL STREET LAWYER (1964).

[122] JOEL F. HANDLER, THE PURSUIT OF LEGAL RIGHTS (1978).

[123] Edgar S. Cahn & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1320-30 (1964). Supporters of legal services urged the federal government to do more to defend local law reform efforts against state and local political interference. *See* Note, T*he Legal Services Corporation: Curtailing Outside Political Interference*, 81 YALE L.J. 231 (1971); Jerome B. Falk Jr. & Stuart R. Pollak, *Political Interference with Publicly Funded Lawyers: The CRLA Controversy and the Future of Legal Services*, 24 HASTINGS L.J. 599 (1973); Ted Finman, *OEO Legal Services Programs and the Pursuit of Social Change: The Relationship Between Program Ideology and Program Performance*, 1971 WIS. L. REV. 1001 (1971); Richard Pious*, Congress, the Organized Bar, and the Legal Services Program*, 1972 WIS. L. REV. 418 (1972); Richard Pious, *Policy and Public Administration: The Legal Services Program in the War on Poverty*, 1 POL. & SOC'Y 365 (1971); *see also* Agnew, *What's Wrong with the Legal Services Program*, 58 A.B.A. J. 930 (1972) (arguing that "legal services program was not created to give lawyers a chance to be social engineers on a grand scale").

[124] Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3. (1970).

[125] LON FULLER, THE ANATOMY OF THE LAW (1968).

whether it was appropriate for lawyers to actively pursue social change rather than neutrally representing client interests.[126] In answering it, scholars coalesced around process-liberal positions that echoed those of their constitutional law counterparts. Process-oriented defenders of professional neutrality expressed discomfort with the growing prominence of the policy-oriented test case litigation model. Paul Freund, following the legal process school, emphasized that "law reform in response to the felt needs of the public is a concern of the legislature, not of the judges."[127] He went on to champion the ideal of independence, noting that the "distinctive role of the legal profession is to serve as the architect of structure and process," and observing that lawyers were more equipped to represent public agencies in resolving "diverse points of view."[128] In a similar vein, Geoffrey Hazard asked whether the "law-reform potential of litigation through the Legal Services Program . . . is not considerably exaggerated" while legislation "has been given inadequate attention."[129] Although acknowledging the attraction of courts to the "politically weak," he cautioned against the "ephemeral legitimacy" of judicial lawmaking, its lack of implementation tools, and the absence of means of "stimulating and sustaining political support," which was crucial to support its efforts to "benefit the have-nots, especially because so many of the have-nots are black."[130]

Defenders of legal liberalism responded by attempting to position public interest law squarely within professionalism, emphasizing its role in facilitating minority group representation. In this spirit, scholars emphasized public interest law's consonance with professional notions of the public good and stressed the impossibility of interest group representation in the absence of externally funded legal organizations.[131] From this perspective, legal work on behalf of the poor and other marginalized groups, rather than revealing the lawyer's political commitment, was an expression of the professional ideal of public service. Following this tack, early accounts of public interest lawyering advanced a procedural definition aligned with pluralism: public interest lawyers represented "the underrepresented groups and interests in society."[132] Yet this definition begged the key question—How representative were public interest lawyers

[126] This was not simply a matter of academic concern. *See* NAACP v. Button, 371 U.S. 415 (1963) (overturning Virgina law outlawing barratry, champtery, and maintenance).
[127] Paul A. Freund, *The Legal Profession*, 92 DAEDALUS 689, 690-93 (1963).
[128] *Id.*
[129] Geoffrey C. Hazard, Jr., *Law Reforming in the Antipoverty Effort*, 37 U. CHI. L. REV. 242, 244 (1970).
[130] *Id.* at 245-55.
[131] Edward Berlin, et al., *Public Interest Law*, 38 THE GEORGE WASHINGTON LAW REVIEW 674 (1970s); Charles R. Halpren & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Francis B. Stevens & John L. Maxey, *Representing the Unrepresented: A Decennial Report on Public-Interest Litigation in Mississippi*, 44 MISS. LJ. 333 (1973); *see also* Richard Frank, *The Public Interest Lawyer*, 7 THE INTERNATIONAL JOURNAL OF LAW AND ECONOMICS 180 (1972) (describing CLASP's International Project).
[132] Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3. (1970).

of group claims?—and thus immediately confronted the question of accountability that had also loomed over black progressive debate.[133]

Critics argued against law reform on client autonomy grounds: that it was likely to give lawyers too much discretion to set agendas and shape litigation in ways that were unaccountable to the very people they purported to represent.[134] This criticism came from the right, but also from erstwhile allies on the left. Edgar and Jean Cahn, who had been instrumental in shaping the legal services program, expressed "concern [about] the moral implications of a group of independent lawyers free to choose their own version of the public interest. This raises the critical question of accountability in a democratic society."[135] In addition, defenders of professional virtue worried that the creation of a separate class of lawyers whose job it was to promote the "public interest" would have negative effects on civil engagement by the private bar.[136]

As Hazard's earlier criticism of public interest law suggested, there were concerns not only with lawyer accountability, but also with litigation's efficacy as a social change tool. Echoing the positions of NAACP lawyers in the pre-*Brown* era, many on the left, including some of public interest law's own practitioners, were skeptical that litigation, on its own, could produce social transformation. In his foundational 1970 *Yale Law Journal* article, Steven Wexler roundly criticized court-centered strategies and instead urged lawyers to "strengthen existing organizations of poor people, and to help poor people start organizations where none exist."[137] Prominent public interest lawyers agreed.[138] Marian Wright Edelman, reflecting on her early career at the NAACP in

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[133] *See*, *e.g.*, Harry P. Stumpf, et al., *The Legal Profession and Legal Services: Explorations in Local Bar Politics*, 6 LAW AND SOCIETY REVIEW 47 (1971).

[134] Harry Brill, *The Uses and Abuses of Legal Assistance*, 31 PUBLIC INTEREST 38 (1973) (criticizing Legal Services Program main office lawyers use of class actions as ineffective and victimizing those it purported to help); Leroy D. Clark, *The Lawyer in the Civil Rights Movement--Catalytic Agent or Counter-Revolutionary?*, 19 KANSAS LAW REVIEW 459 (1971); Carolyn F. Etheridge, *Lawyers Versus Indigents: Conflicts of Interest in Professional-Client Relations in the Legal Profession*, *in* THE PROFESSIONS AND THEIR PROSPECTS 245 (Eliot Friedson ed., 1973); Geoffrey C. Hazard, *Social Justice through Civil Justice*, 36 U. CHI. L. REV. 699 (1969) (arguing against law reform in legal services on inefficiency grounds); Philip J. Hannon, *The Leadership Problem in the Legal Services Program*, 4 LAW AND SOCIETY REVIEW 235 (1970) (blaming the federal government for overriding local preferences for individual service); Dennis G. Katz, *The Public's Interest in the Ethics of the Public Interest Lawyer*, 13 ARIZ. L. REV. 886 (1971).

[135] Edgar S. Cahn & Jean C. Cahn, *Power to the People or the Profession? The Public Interest in Public Interest Law*, 79 YALE L.J. 1005, 1008 (1970). Within their critique, special bite was reserved for poverty lawyers: "Thus in the case of the poor, the lawyer may feel that he can, with impunity, impose his own will and his own convictions as to what is 'best for his client.'.... In this respect, it must be said that private law firms tend to honor the lawyer-client relationship more scrupulously than poverty lawyers." *Id.* at 1041.

[136] *See* Kenney Hegland, *Beyond Enthusiasm and Commitment*, 13 ARIZ. L. REV. 805 (1971). For analysis of private bar's role in public interest, see ALLAN ASHMAN, THE NEW PRIVATE PRACTICE: A STUDY OF PIPER & MARBURY'S NEIGHBORHOOD LAW OFFICE (1972); F. RAYMOND MARKS, THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY (1972); David P. Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 GEO. WASH. L. REV. 547 (1970).

[137] Wexler, *supra* note, at 1053-54; *see also* JONATHAN BLACK, RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND IN THE COURTS (1971).

[138] *See* Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1981); Cahn & Cahn, *Power to the People*, *supra* note; Peter Edelman, *Responding to the Wake-Up Call: A New Agenda for Poverty Lawyers*, 24

Mississippi, concluded: "The thing I understood after six months there was that you could file all the suits you wanted to, but unless you had a community base you weren't going to get anywhere."[139] Echoing this sentiment, Gary Bellow, former deputy director of California Rural Legal Assistance, called test case litigation "a dead end," arguing that "'rule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism."[140] These views resonated with those of "movement" lawyers who saw their work in terms of supporting organized efforts to transform society,[141] and often saw tension between conventional legal action and transformative change.[142] As this suggested, while critics on the right were attacking legal liberal lawyers for too forcefully crossing the law-politics line, critics on the left suggested the opposite problem: that those lawyers needed to understand law reform in more dynamic political terms. As the 1960s began to recede from view, such skepticism came to penetrate the heady idealism with which the legal liberal project had begun. And just as black progressives dissented from the dominant view of realism in the preceding era, the gathering critique of legal liberal practice—that it was ineffective and unaccountable—precisely framed the nature of progressive divisions to come.

C. Critical Legalism: Contesting Law's Neutrality

Two decades after *Brown*, the legal and political landscapes were transformed. "All deliberate speed" in the South and struggles over integration in the North had cast a shadow over the achievements of the civil rights movement;[143] President Nixon's election in 1968 signaled the rise of an invigorated conservatism reacting to civil rights victories and the clash over the Vietnam War;[144] the Burger Court, despite rulings in *Goldberg v. Kelly* and *Roe v. Wade*, and some expansion of civil liberties, pursued a doctrinal course that curtailed the signature achievements of its predecessor in the areas of welfare rights,[145] civil rights,[146] and criminal justice.[147] In 1973, Watergate

N.Y.U. REV. L. & SOC. CHANGE 547 (1998); James Lorenz, *Lawyers, Law and the Poor*, 27 GUILD PRAC. 192 (1968).

[139] *The New Public Interest Lawyers*, *supra* note, at 1081.

[140] *Id.* at 1077.

[141] ANN F. GINGER, THE RELEVANT LAWYERS (1972) (transcripts of movement lawyer discussions at Berkeley summer session workshop); *see also* Victor Rabinowitz, *The Radical Tradition in Law*, *in* THE POLITICS OF LAW 310 (David Kairys ed.,1982).

[142] *See* MARLISLE JAMES, THE PEOPLE'S LAWYERS (1973); Victor Rabinowitz, *The Radical Tradition in Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 310 (David Kairys, ed., 1982).

[143] TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1854-63 (1988); THOMAS J. SUGRUE, SWEET LAND OF LIBERTY: THE FORGOTTEN STRUGGLE FOR CIVIL RIGHTS IN THE NORTH (2009).

[144] STEVEN M. TELES, THE RISE OF THE CONSERATIVE LEGAL MOVEMENT (2008).

[145] Dandridge v. Williams, 397 U.S. 471 (1970).

[146] Milliken v. Bradley, 433 U.S. 267 (1977); Washington v. Davis, 426 U.S. 229 (1976); Lau v. Nichols, 414 U.S. 563 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[147] Gregg v. Georgia, 428 U.S. 153 (1976); Apodaca v. Oregon, 406 U.S. 404 (1972).

exposed the duplicity of lawyers in massive governmental corruption, provoking professional soul-searching, while the end of the Vietnam War also augured a reorientation in the progressive social movement activism that had roiled the nation.[148] As the legal liberal version of social change appeared to reach its limit—erupting in bitter fights over abortion, busing, and affirmative action—optimism began to fade. Rather than "balancing the scales of justice,"[149] legal liberalism came to be seen as woefully inadequate to address deeply ingrained social inequality—too thin a concept to address the deep conflicts convulsing American society. How could what was essentially a proceduralist framework for resolving political disputes address what critics viewed as deep structures of subordination that operated outside the state? At this moment, progressive scholars began to sour on the legal liberal project itself—leading a critical turn in analyzing the role of law in social movements.

This section explores how scholars in this period of critical legalism fundamentally *contested* the law-politics division, calling into question not just whether there could ever be a defensible line—*but whether, as a political matter, progressives should even engage in the project of trying to define it*. In this debate, for the first time, a critical perspective emerged that challenged the basic premise of legal realism and legal liberalism: that liberal capitalist democracy, as it had evolved in the United States, was politically desirable and fixable through incremental legal reform. This challenge reframed the law-politics problem on entirely new grounds, organizing progressive legal debate around two foundational critiques. One centered on the political *accountability* of legal activism, with critics contending that lawyer-led, court-centered change undercut grassroots leadership and disempowered marginalized communities. The second critique centered on the political *efficacy* of legal activism, with critical scholars claiming that the project of justifying judicial and lawyer activism disserved the very movements that activism was intended to help. The debate was internecine and electric, leaving deep scars that by the 1990s fractured progressive legal scholars in the academy at the very moment progressivism itself was being undone in the real world of politics.

1. The Critique of Legal Neutrality: Constitutional Rights in Adjudication

Critical legalism as it arrived in the 1970s academy was framed by two fundamental challenges to law's independence. Within institutional politics, the realist resolution of the law-politics problem—to assign law reform to specialized agencies acting the in the public interest, while limiting judicial discretion—had fallen apart as political conservatives sought to "fundamentally contest" policy formation in the administrative sphere,[150] while legal liberalism thrust courts into the center of

[148] The assassination of King and Robert Kennedy in 1968 signaled the rise of more militant movement activism.
[149] COUNCIL ON PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE (1976); *see also* THOMAS EHRLICH & MURRAY L. SCHWARTZ, REDUCING THE COSTS OF LEGAL SERVICES: POSSIBLE APPROACHES BY THE FEDERAL GOVERNMENT 582 (1976); Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985).
[150] Mark Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TEACHERS LAW 20, 22 (1979).

controversial social policy disputes.[151] In this way, all law "became politicized."[152] Outside of institutional politics, social movement activism posed serious challenges to legal authority. Although the civil rights movement had relied heavily on law, it also asserted the right to break law viewed as illegitimate.[153]

a. Defense

The initial strategy of mainstream progressive scholars confronting the decline of legal liberalism was to double down on a strategy of defending it.[154] Eager to protect the Warren Court's jurisprudence in the face of escalating attacks,[155] these scholars mounted a defense of legal liberalism that once again sought to advance a principled justification for law's separation from politics.[156] The basic project remained the same: to justify the line between legitimate judicial reasoning and political instrumentalism. In contrast to the prior period—in which the countermajoritarian debate played out in the familiar discourse of law—scholars now sought support from new intellectual quarters: political theory.[157] Duly armed, now familiar positions were staked out.

Liberal scholars attracted to substantive rights-based theories of justice sought support in Rawlsian political philosophy, which by asserting the "priority of the right over the good," promised a framework of individual rights that could be placed beyond social dispute.[158] Ronald Dworkin linked this idea to a theory of adjudication seeking to eliminate the exercise of political discretion from even the hardest judicial case by following the Rawlsian principle that each citizen had "the right to equal concern and respect in the political decision about how the goods and opportunities" of society were

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[151] The post-*Brown* era had also ushered new institutional role for courts that contravened the institutional competence framework. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978); Ralph Cavanaugh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371 (1980); DONALD HOROWITZ, THE COURT AND SOCIAL POLICY (1977); Gerald E. Frug, *The Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980).

[152] Tushnet, *Postrealist*, *supra* note, at 22; *see also* THEODORE J. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY (1969) (calling into question the viability of interest group pluralism).

[153] Particularly as new left movements—antiwar, feminism, black power, counterculturalism, and others—took center stage and adopted antiauthoritarian tactics, law's legitimacy was challenged. *See* BRYAN BURROUGH, DAYS OF RAGE: AMERICA'S RADICAL UNDERGROUND, THE FBI, AND THE FORGOTTEN AGE OF REVOLUTIONARY VIOLENCE (2015).

[154] Tushnet, *supra* note, at 29-31 (arguing that three traditions had emerged—law and economics, legal philosophy, and legal sociology—none of which dealing adequately with the realist challenge to legal meaning).

[155] THE FEDERALIST SOC'Y, THE GREAT DEBATE (1986).

[156] Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982).

[157] John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 569-70 (1979) (arguing that as the social scientific side of realism declined, the philosophical side "flowered" as did the "political reformist side").

[158] JOHN RAWLS, A THEORY OF JUSTICE (1971).

distributed.[159] Other scholars, like Frank Michelman, used the Rawlsian "search" for a "principled account" of rights to articulate a theoretical basis for a "specific welfare guaranty,"[160] as well as other "fundamental" constitutional rights.[161]

Process-minded scholars shared the goal of protecting the legacy of the Warren Court but differed with liberals over the appropriate foundation: instead of analytically derived rights, process scholars defended legal liberalism in relation to the legitimacy of the broader political system. John Hart Ely's comprehensive defense of "representative reinforcement" as a principle for judicial review was the high-water mark of this approach, in which he argued for generally locating "value determinations" in the sphere of politics, but emphasized the need for countermajoritarian judicial intervention when "the ins are choking off the channels of political change to insure that they will stay in and the outs will stay out."[162] In recognition of the challenge to legal neutrality, Ely conceded that the representation reinforcement principle was not part of the Constitution itself, but argued that it was a necessary interpretative tool in light of the "impossibility" of answering hard cases from the Constitutional text alone.[163] Although couched in a defense of legal liberalism, it was precisely this interpretive "impossibility" that radical critics would assert to undermine it.

b. Critique

As the courts and political branches began to move away from liberal reformism in the 1970s, left critics, rather than shoring up the foundations of legal liberalism, worked to hasten its demise. Their focus was on the politically pernicious effect of "legalism,"[164] which they viewed as promoting a "law-worship" that crowded out space for more transformative politics.[165] Breaking with the realist faith in law,[166] left critics charged that it served the interests of socially powerful groups over the long-

[159] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 283 (1977).
[160] Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966 (1973).
[161] Kenneth Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). For a critique of fundamental rights arguments, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (arguing that the debate over fundamental rights is "essentially incoherent and unresovable").
[162] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).
[163] *Id.* at 13; *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).
[164] JUDITH N. SKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1964); *see also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 3 (2001).
[165] Lestor Mazor, *The Crisis of Legal Liberalism*, 81 YALE L.J. 1032, 1034 (1972) (reviewing ROSTOW, IS LAW DEAD? and THE RULE OF LAW (Wolff ed. 1971)).
[166] Hutchinson & Monahan, *supra* note; *see also* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

term.[167] From this viewpoint, law appeared as "a source of violence, as one of the institutions in decay."[168] In opposition to legal liberalism, critics argued for a new vision of law that would advance a definition of equality "which does not rest with the evenhanded administration of opportunity to unequals, but demands a distributive justice which compensates for inequalities, whatever their origin."[169] For critics, the crisis in law's legitimacy represented not an occasion for retrenchment, but an opening for wider transformation. In this sense, critical legal studies sought to turn the deconstructive impulse of realism against the New Deal-Civil Rights liberalism that realism had advanced.[170] In doing so, CLS would fully embrace the concept of "law as politics" in order to shake the legitimacy of law and support the forces of progressive change that were already arrayed against the liberal state.[171]

Mounting this critique required constructing its target. CLS therefore crafted a definition of legal liberalism that fused Warren Court jurisprudence with the classical liberalism anathema to the realists. "The metaphysical underpinnings of legal liberalism [rest on] the view that society is an artificial aggregation of autonomous individuals; the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice."[172] According to CLS, the basic flaw in legal liberalism was that it reduced what were essentially social problems—discrimination, poverty, inequality—to individual problems to be resolved through the enforcement of

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[167] Tushnet, 1977, *supra* note, at 105.

[168] Mazor, *supra* note, at 1052. Here, there was racial division, with Cruse countering that "from the very outset, the law was always dead or ineffective for blacks." Harold Cruse, *The Historical Roots of American Social Change and Social Theory*, *in* IS LAW DEAD? 326 (Eugene V. Rostow ed., 1971).

[169] *Id*.

[170] Gordon, *Critical Legal Histories*, *supra* note, at 72-76 (arguing that CLS rejected functionalist accounts of law in society, including those put forward by law and economics, pluralism, realism, and law and society); *cf.* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW (1973); G. KOLKO, THE TRIUMPH OF CONSERVATIVISIM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963).

[171] Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 216-21 (1984). In so doing, CLS aspired to "the development of a social theory that need not be demobilizing in adverse political conditions." Tushnet, *Critical Legal Studies: A Political History*, *supra* note, at 1528. The goal, at bottom, was to eliminate the artificial barrier liberalism erected between law and politics, and thereby unleash social forces to produce something fundamentally different. What that thing was was never fully specified, but it was built on a critique of class domination, coupled with New Left critiques of other social sites of domination, which pointed toward a system more firmly rooted on principles of community and equality than legal liberalism. Direct democracy and robust bottom-up participation were touchstones of the new critical approach. Duncan Kennedy, *Antonio Gramsci and the Legal System*, 6 ALSA F. 32, 36 (1982) (stating that "there is a vital form of interaction between legal intellectuals—that is, lawyers, judges and other kinds of legal workers—and working class people, which is simply to try to systematically demystify legal reasoning as something that somehow can be used as an argument for or against doing anything").

[172] Karl Klare, *Law-Making as Praxis*, 40 TELOS 123, 132 n.29 (1979). From here, CLS sought to show how realism itself carried forward a faith in law and optimistic functionalism that made it inadequate as a basis for progressive politics. Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152, 1154 (1985); *see also* Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 902 (1988) (stating that "realism perpetuated the basic flaw of formalism: its commitment to determinacy. Instead of seeing the social world as determined by law, realism insisted that legal decisions are and should be determined by their social context").

legal rights.[173] In Duncan Kennedy's famous articulation of this position, rights "legitimated" social unfairness—validating a "condition of bondage" rooted in liberalism's "fundamental contradiction": "that relations with others are both necessary to and incompatible with our freedom."[174] By masking the necessity of solidaristic "relations with others" to achieve freedom, legal liberalism disserved the cause of progressive justice it claimed to advance.[175]

A core theoretical move of CLS was to redraw the relationship between law and society, as it broke down the boundary between law and politics. Whereas earlier theoretical frameworks assumed a tight correspondence between law and social values, CLS argued that law was "relatively autonomous" from society, which meant that people might follow law because of its normative power even though it did not serve their immediate interests.[176] Law, in this sense, was "constitutive" of social relations, rather than flowing out of them (in the functionalist account) or acting upon them (in the positivist account). This insight had controversial political implications. Because people had come to believe in the legitimacy of law as an independent force with the power to change society, they had become unable to see how individual rights strategies were now constraining collective action. CLS thus turned the legitimacy of law on its head: viewing it as a source of "legitimation" that obscured and ultimately undermined more effective political avenues for advancing less powerful social interests.[177] The political response, from this vantage point, was to critique the very theoretical and doctrinal positions that mainstream liberals has built to justify legal neutrality. To advance this critique, CLS sought to undermine the law-politics line viewed as the root of the problem.[178] By exposing hidden contradictions in judicial doctrine, CLS scholars sought to reveal how law was used to systematically prefer individualism over collective solidarity,[179] while showing the incoherence of any theory of judicial review resting on

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[173] Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976). Kennedy launched the movement by linking Harvard's legal process school to formalism—arguing that the tension inherent in liberalism could not be neatly resolved, as Hart and Sacks had argued, by assigning law to spheres of institutional competence and agreeing upon neutral principles. His paper for tenure at Harvard Law School positioned realism as a response to what he termed "classical legal thought," which was built on formalist adjudication advancing the public-private divide. KENNEDY, CLASSICAL LEGAL THOUGHT, *supra* note.

[174] Kennedy, *Form and Substance*, *supra* note, at 1705.

[175] Kennedy argued that liberalism sought to reconcile this contradiction by dividing the world into private and public spheres that, rather than solving the contradiction, only covered it up: serving as a "denial and an apology" for political conservativism. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 211 (1979).

[176] KELMAN, *supra* note, at 242.

[177] In this sense, the *Brown*-inspired rights revolution was incompatible with the CLS project, which was "nothing short of reimaging the relationship between civil society and the state." Clare Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229, 244 (1983) (reviewing DAVID KAIRYS, THE POLTICS OF LAW (1982)); *see also* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984) (arguing that legal liberalism, tied to a commitment to individualism and process, undermined the left's search for community and substance).

[178] David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 248 (1984) ("[T]he separation between law and politics becomes a myth.").

[179] MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 6 (1987). While Kennedy applied this methodology to private law, others moved it into public law: showing how judicial privileging of liberal individualism

neutral principles.[180] The legal liberal strategy of expanding constitutional rights drew the most critical focus,[181] igniting a project of "trashing" as "the most valid form of legal scholarship available at the moment."[182] This "deconstructionist" project was designed to challenge what Roberto Unger called "false necessity"[183]: a collective legal

narrowed the radical aspirations of labor, Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 290 (1978); Katherine van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); antidiscrimination, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1977); family, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497 (1983); Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. 623 (1980); tort, Richad L. Abel, *A Critique of American Tort Law*, 8 BRIT. J. L. & SOC'Y 199 (1981); and local government law, Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980). Whereas the Realists turned the classicists tools against them—exposing the logical ambiguities or inconsistencies in formalist order—CLS adherents imported "critical theory," a mix of linguistic theory and Marxism from Continental Europe. ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 4 (1983) ("If the criticism of formalism and objectivism is the first characteristic theme of leftist movements in modern legal thought, the purely instrumental use of legal practice and legal doctrine to advance leftist aims is the second"); *see also* Note, *Round and Round the Bramble Bush: From Legal Realism to Critical Legal Studies*, 95 HARV. L. REV. 1669 (1982). Within this debate, empiricism was shunted to the side in favor of argument that pitted the mainstream liberal embrace of political philosophy against the CLS adoption of critical theory. Pierre Schlag, *Critical Legal Studies*, *in* OXFORD INTERNTIONAL ENCYLCOPEDIA OF LEGAL HISTORY 295 (Stanley N. Katz ed., 2009); Robert W. Gordon, *Historicism in Legal Scholarship*. 90 YALE L.J. 1017 (1981); *see also* Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057 (focusing on destabilizing character of history to law). From the left, part of the retreat from social science corresponded to a reaction against the rise of law-and-economics as a conservative version of legal process. *See* Tushnet, *Legal Scholarship*, *supra* note, at 1208; *see also* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 388 (1981) ("[T]he program of generating a complete system of private law rules by application of the criterion of efficiency is incoherent."); Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275 (1981); George Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal St. 65 (1977). It also reflected the critics' discomfort with empiricism's ability to ground any jurisprudential theory in normative principle, as well as their view of law and society as too closely aligned with legal liberal reformism. *See* Hutchinson & Monahan, *supra* note, at 200-201; *see also* David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 8 (1990) (stating that law and society had an "implicit programmatic vision which resonated with the projects of liberal lawyers").

[180] In this vein, Tushnet argued that Ely's representation reinforcement principle failed to offer a neutral justification for judicial review since "representation-reinforcing review necessarily involves judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation." Mark V. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1038 (1980). More broadly, any theory of judicial restraint was only plausible on a shared normative commitment that placed the society over the individual, and thus "proves unable to provide a constitutional theory of the sort that it demands without depending on communitarian assumptions that contradict its fundamental individualism." Tushet, *Following the Rules Laid Down*, *supra* note, at 785.

[181] Anthony Chase, *The Left on Rights*, 62 TEX. L. REV. 1541, 1553 (1984).

[182] Alan D. Freeman, *Truth and Mysticfication in Legal Scholarship*, 90 YALE L.J. 1229, 1231 (1981) ("advocating negative, critical activity as the only path that might lead to a liberated future"). "The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholarship." *Id.* at 1230.

[183] ROBERTO UNGER, FALSE NECESSITY ANTI-NECESSARITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (2002).

consciousness that understood liberal rights as the only viable form of politics.[184] Other CLS scholars described the political damage this overreliance on rights could do for progressive causes by challenging energy into abstract legal concepts,[185] obscuring the need for "positive" rights,[186] and ultimately leaving rights holders at the mercy of bureaucrats who could exercise their discretion to undermine them in practice.[187] The critical program was not entirely negative, however, but also incorporated a reimagining a regimes of rights that would advance collective ends,[188] while reenvisioning doctrinal analysis in a way that would explicitly engage with underlying social conflict about norms and name how the resolution of a particular legal dispute involved the selection of one norm over another.[189]

c. Response

The power of CLS was that it linked a critique of law to its critique of politics: in pressing its argument about the indeterminacy of law, critics sought to convince progressives of the insufficiency of liberalism to support a politics of collective action. Mainstream liberals responded at both levels: rejecting CLS's most radical antifoundationalist claims about law in order to reclaim the political value of courts.

Mainstream liberals fought back against the CLS charge that such a project was necessarily coopted and thus politically limiting. They rejected the idea that rights were incompatible with meaningful left politics, chastising critics by noting that while "liberal rights theory may be incoherent . . . certain liberal rights themselves need to be defended not disparaged.[190] Defenders of liberalism relied on the idea that rights were

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[184] Kairys, *supra* note, at 249; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1525 (1991).

[185] Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984) (arguing that rights are unstable, indeterminant, convert real experiences into abstractions, and "impede advances by progressive social forces"); *see also* Trubek, *Balbus*, *supra* note, at 561 ("Social movements may mobilize the symbols of legality and employ legal procedures to wrest real victories at the expense of dominant groups; yet this very commitment to legality may forestall other forms of activity—e.g., political mobilization, or ideological challenge—that might affect more substantial or enduring change.").

[186] *Id.* at 1386 (claiming that "[i]t is not just that rights-talk does not do much good . . . it is positively harmful").

[187] William H. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

[188] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 53 (1983) ("The central idea of the system of destabilization rights is to provide a claim upon government power obliging government to disrupt those forms of division and hierarchy that, contrary to the spirit of the constitution, manage to achieve stability only by distancing themselves from the transformative conflicts that might disturb them.").

[189] *Id.* at 16-17 (arguing for a "deviationist doctrine" marked by a "willingness to recognize and develop the conflits between principles and counterprinciples"). In Unger's view, this doctrinal approach would open up space for and be informed by new experimentalist ideas about the state and market, "alternative institutional forms," that could be incorporated into the legal structure. *See id.* at 22; *see also* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 135 (1996) (arguing for "alternative institutional futures" to supplant the "institutional fetishism" inherent in the dominant mode of "rationalizing legal analysis").

[190] Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 512 (1984); *see also* Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 626-27 (1984) ("When the center is insecure, a challenge from the left, whose adherents, so those in the center think, should be at least sympathetic bystandards, is likely to be infuriating.").

"double edged: The underdogs who have won them can also be coopted by them; the overdogs who conceded them . . . are always vulnerable to being undermined by their radical potential."[191] Liberal defenders also argued against the notion of a "fundamental contradiction" between individual rights and communitarian solidarity, suggesting instead a dialectical relation in which rights could "express political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social or political movement, particularly at its early stages."[192]

CLS's challenge to the law-politics divide confronted constitutional theory with the "interpretivist" question[193]: If law had no objective meaning, where were judges to look in making what were essentially political choices? While CLS argued for abandoning constitutionalism altogether, conservatives responded that the answer could be found in the constitution's "original meaning."[194] Looking to a different history, constitutional "republicans" pushed back against CLS and conservatives at once by arguing that the constitution rested on a set of communitarian values, not just individual rights, which gave substance to contemporary liberal ideals. In Michelman's terms, the republican tradition emphasized "self-government realized through politics" that depended on a constitutional commitment to "situated judgment, dialogue, and civic virtue."[195] In this frame, countermajoritarianism could be reconciled with democracy by understanding the Justices as "modeling active self-government" by making deliberative decisions in the public interest.[196] In this view, the court could affirm democracy by deciding cases based on "civic virtue"—which could mean invalidation of majoritarian legislation or, on the cusp of the Rehnquist Court, more likely deference to progressive local solutions threatened by federal preemption. However, republicanism—like rights-based liberalism—still foundered on the fundamental question: whose public interest? And, as scholars pointed out, the republicanism progressives sought to revive was historically associated with exclusion and authoritarianism that made it an unlikely bridge to the politics of inclusion championed by critical race and feminist scholars.[197]

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[191] Gordon, *supra* note, at 95; *see also* Trubek, *Balbus*, *supra* note, at 561.

[192] Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); *see also* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

[193] Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

[194] *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L.J. 1 (1971). By the 1980s, liberal constitutional theory also responded to the rise of law and economics. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1972). *Cf.* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592 (1985).

[195] Frank Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

[196] *Id.*; *see also* Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). In Laura Kalman's words, "republicanism offered the hope of a public interest that law could serve." KALMAN, *supra*, at 159.

[197] *See* KENNETH KARST, BELONGING TO AMERICA 3 (1989); CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Diane Polan, *Toward a Theory of Law and Patriarchy*, *in* THE POLITICS OF LAW 294 (David Kairys ed.1982); David Cole, *Getting There: Reflections on Trashing from*

As mainstream efforts to reclaim rights suggested, for many progressive legal academics, the problem with CLS was its dangerous rejection of legal liberalism without a clear vision of plausible alternatives. Debate centered on the degree to which legal liberalism constituted a total system of hegemony or whether it offered possibilities for progressive reform.[198] In one sense, the CLS critique of legalism swept so broadly as to encompass nearly all forms of political action that was oriented toward changing state rules.[199] What did it mean to divorce authentic left politics from the liberal state? Was the objection to the form of politics (protest intertwined with litigation) or the outcome (rights-based rules, whether enacted by legislatures or defined by courts)? Was the problem then "law," "rights," or "power"? And what type of nonrights-based regimes enacted the values of equality espoused by CLS? These were the questions raised by progressive scholars of color, who agreed with the CLS critique of legal neutrality, but broke from its repudiation of legal liberalism. Echoing the black progressive break from realism a generation earlier, critical race theory scholars offered a pragmatic defense of rights that that emphasized the constitutive value of rights in stemming the worse abuses against minority groups and serving as a platform for further political mobilization.[200]

Feminist Jurisprudence and Critical Theory, 8 HARV. WOMEN'S L.J. 59 (1985); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Catherine A. MacKinnon, *Feminisim, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635 (1983); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 401 n.64 (1984); Janet Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980).

[198] KELMAN, *supra* note, at 7 ("CLS theorists have devoted a great deal of their efforts to demostrating that law and society are inseparable or interpenetrating and arguing that traditional pictures of the relationship between law and society that ignore that point almost invariably make law seem both more important that it is (in supposing that particular structures require particular rules) and less important than it is (in ignoring its basic constitutive nature)."). Some CLSers believed in a stronger version of the Marxist critique of law in which the "ruling class induces consent and demobilizes opposition by masking its rule in widely shared utopian norms and fair processes, which it then distorts to its own purposes." Gordon, *Critical Legal Histories*, *supra* note, at 93. Others emphasized that legal norms are always "double edged: The underdogs who have won them can also be coopted by them; the overdogs who conceded them … are always vulnerable to being undermined by their radical potential." *Id.* at 95 Scheinder urged that rights be viewed dialectically: as both a way to "express political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social or political movement, particularly at its early stages;" she also acknowledged the power of rights to constrain, though suggested that it depended on "the particular movement that asserts the right and the particular time at which it does so." Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986). Minow argued for a right to connection and suggested how rights could create economic and social bonds. Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); *see also* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

[199] *See* Wendy Brown & Janet Haley, *Introduction*, *in* LEFT LEGALISM/LEFT CRITIQUE 1, 8 (Wendy Brown & Janet Halley eds. 2002).

[200] CRT scholars showed how dominant interpretative practices, even those championed by the mainstream and class-based radical left, marginalized important viewpoints and interests, GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 6-9 (1995), leading to the "exclusion of minority scholars from the central areas of civil rights scholarship." Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. (1984).

Along these lines, CRT scholars argued that by "looking to the bottom" to the experiences of those "who have seen and felt the falsity of the liberal promise," offered a different perspective that ultimately could affirm the promise of rights: showing how the "dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color," who by force of their subordination embrace the "right to participate equally in society with any other person," while simultaneously recognizing that "rights are whatever people in power say they are."[201] In this vein, Kimberlé Crenshaw article accused CLS scholars of "disregard[ing] the transformative potential of liberalism offers," without an alternative.[202] Trashing rights was harmful in this view because it suggested that law reform efforts, rather than the logic of racial subordination itself, "contributed to the ideological and political legitimation of the continuing subordination of blacks."[203] From this perspective, rights were "the means by which oppressed groups have secured both entry as formal equals and also the survival of their movement in the face of private and state repression."[204] What was needed, in Patricia Williams' view, was therefore "not the abandonment of rights, but an attempt to become multilingual in the semantics of evaluating rights."[205] How to become fluent in this semantics—and whether it would lead to a better society—was the question that hung over progressive constitutional theory as the last decade of the millennium began.

2. The Critique of Lawyer Neutrality: Client Autonomy in Representation

The 1970s brought legal profession scholarship its own legitimacy crisis—and a similar pattern of response within progressive scholarship. As the legal liberal project went into decline, critics of public interest lawyers suggested that their lack of political neutrality was partly to blame—pushing the legal system to address social problems outside of its competence and undermining the conventional notion of client accountability. The other professional crisis came from outside legal liberalism, arriving in the Watergate scandal, which revealed high-level government lawyers involved in a massive cover-up of criminal wrongdoing.[206] These twin challenges—too

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[201] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). Pushing these themes, other scholars critiqued CLS for its "failure or refusal to develop a positive program," Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 440 (1987), while arguing that "the oppressed could make rights determinate in practice." Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King*, 103 HARV. L. REV. 985 (1990).

[202] Kimberle W. Crenshaw, *Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

[203] *Id.*

[204] *Id.*

[205] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 149 (1991).

[206] Watergate provoked a revision to the ABA accreditation standards to include "substantial instruction" in professional responsibility within law schools, and also precipitated the appointment of the Kutak Commission in 1977 leading to what would become the Model Rules of Professional Conduct in 1983. *See* Tom Clark, *Teaching Professional Ethics*, 12 S.D. L. REV. 249 (1975).

much independence from clients who lacked power and too little from those who held it—once again focused attention on the professionalism problem.

a. Defense

Born into a legitimacy crisis,[207] early legal profession scholarship sought to defend the core principle of lawyer neutrality: the idea that lawyers were duty-bound to zealously advance client interests, even if it meant acting against their own personal morality, which was "differentiated" from and thus not compromised by actions taken in accord with professional role.[208] Role neutrality raised two fundamental problems that mapped onto the very issues raised by the crisis the profession was then confronting. First, neutrality could suggest lack of regard for client interests in ways that encouraged the pursuit of the lawyer's own ends—the problem raised by public interest lawyering.[209] Second, neutrality could suggest lack of regard for the morality of client ends in ways that might facilitate the bad acts of powerful clients—as Watergate and new corporate legal scandals revealed.[210] Early legal profession scholarship took aim at these different targets.

For those worried about the taint of client misconduct, the task was to justify lawyer neutrality against the charge that it simply facilitated the bad acts of powerful clients who could game the system.[211] Scholars like Monroe Freedman justified lawyer neutrality on process grounds predicated on the value of adversarial system itself: for that system to work, it required lawyers to present unfiltered versions of client claims

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[207] Legal ethics as a field of scholarship was virtually nonexistent prior to the 1970s. There were important early ethical treatises and ethical codification projects, but serious scholarship on professionalism in law was scarce. Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 22 (1951) (arguing that the concept of zealous advocacy meant achieving "detachment" from client ends by cultivating "a sense of craftsmanship" separate from the political agenda of clients). For other early works, see Charles Wolfram, *Client Perjury*, 50 SOUTHERN CAL. L. REV. 809 (1977); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Geoffrey Hazard, *A Historical Perspective on the Lawyer Client Privilege*, 66 CAL. L. REV. 1061 (1978).

[208] Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975); see also Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 66 (1978). Schwartz summarized the neutral advocacy idea in the principles of professionalism—working to "maximize the likelihood that the client will prevail"—and nonaccountability—"which relieves the advocate of legal, professional, and moral accountability for proceeding according to the first principle." *Id.* While Schwartz accepted their force in the context of advocacy, he argued that the nonadvocate had a duty to avoid using unconscionable means to achieve unconscionable ends—a version of the independence ideal. *Id.*; *see also* Murray Schwartz, *The Zeal of the Civil Advocate*, 8 LAW & SOC. INQUIRY 543 (1983).

[209] Wasserstrom, *supra* note, at 1 (suggesting that role amorality is associated with the idea that "the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and paternalistic fashion").

[210] *Id.* (suggesting that amorality meant that a "lawyer's stance toward the world at large" was "at best systematically amoral and at worst more than occasionally immoral"). For the major corporate scandal of that era, see the OPM case. DEBORAH L. RHODE, DAVID LUBAN & SCOTT L. CUMMINGS, LEGAL ETHICS 281 (6th ed. 201).

[211] MARVIN E. FRANKEL, PARTISAN JUSTICE (1980); Warren Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078 (1979).

to court in order to advance the vindication of individual rights.[212] For lawyers to play this systemic role, they had to devote their full powers to maintaining client trust, which meant promising to promote their clients' cause to the limit of the law—even if sometimes that resulted in miscarriages of justice.[213] Taking a different tack, but coming to a similar conclusion, Charles Fried defended lawyer neutrality not as a means to a systemic end, but as fostering professional relationships that were "good in themselves."[214] By neutrally deferring to a client's "individual autonomy," and adopting the clients "interests as his own," the lawyer enacted the "classical definition of friendship,"[215] which justified assisting in client actions that the lawyer himself might view as morally abhorrent.[216] In this way, Fried and scholars in his tradition of moral philosophy linked the lawyer's "amoral ethical role" to the achievement of client autonomy as the highest value in a liberal democratic society.[217]

Although primarily directed at justifying advocacy *at odds* with the public interest, the defense of lawyer neutrality also operated as an implicit critique of public interest lawyering itself—associated, as it had become, with lawyer activism. In this way, the

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[212] MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467 (1992); Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA.. L. REV. 1939, 1953 (1988); Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); William R. Meager, *A Critique of Lawyers' Ethics in an Adversary System*, 4 FORDHAM URB. L.J. 289 (1975). John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

[213] Monroe H. Freeman, *Perjury: The Lawyer's Trilemma*, 1 LITIGATION 26 (1975). Distortions resulting from client malfeasance were outweighed by the aggregate benefits of adversarial adjudication, while those resulting from unequal access to law posed a political problem, not one to be resolved within the lawyer-client relationship.

[214] Charles Fried, *The Lawyer as Friend, The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1075 (1976); *see also* Edward A. Dauer & Arthur Allen Leff, Correspondence, *The Lawyer as Friend*, 86 YALE L.J. 573 (1977); ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS (1980); THOMAS L. SHAFFER, LEGAL INTERVIEWING AND COUNSELING (1976); Andrew Kaufman, Book Review, 94 HARV. L. REV. 1504 (1981) (reviewing ALAN H. GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS).

[215] Fried, *supra* note, at 1071.

[216] *Id.* at 1080 ("If the legal system is itself sensitive to moral claims, sensitive to the rights of invidiuals, it must at times allow that autonomy to be exercised in ways that do not further the public interest.").

[217] A decade after Fried, Stephen Pepper offered the most robust defense of the "amoral ethical role of the lawyer," based on what he termed the "first-class citizenship model." Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613 (1986); *see also* Andrew L. Kaufman, *A Commentary on Pepper's "The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 651 (1986). In Pepper's view, first-class citizenship meant the exercise of individual autonomy, which in a "highly legalized society such as ours," depended on access to law through lawyers. In order for citizens to realize autonomy, they needed unmediated access to law through lawyers who would not "substitute" their own "moral beliefs" by acting as "judge/facilitator." Pepper, *supra* note, at 618-620. Wolfram also offered defense of neutral partisanship. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986); Anthony D'Amato & Edward J. Eberle, *Three Modes of Legal Ethics*, 27 ST. LOUIS U. L.J. 761 (1983); Charles Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 201 (1984); Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619 (1978); Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195 (1987).

mainstream defense of lawyer neutrality converged with an internal critique of public interest lawyering leveled by new entrants to the legal academy who were products of the very legal liberalism they now called into question. Although qualitatively different from each other, and from process and rights-based defenses of lawyer neutrality, these internal critiques nonetheless resonated with the theme of protecting client autonomy.

Derrick Bell's broadside against NAACP lawyers challenged legal liberalism on its own terms: arguing that although legal liberal lawyers could play an important representative function in theory, they were simply not doing so in fact.[218] By arguing that elite white and black NAACP lawyers were either disregarding or minimizing the voices of African American parents who wanted quality schools not just integration, Bell located the dispute over the social policy of busing squarely within the core principles of neutral advocacy. The metaphor he invoked, of the NAACP lawyers "serving two masters," underscored the idea that client interests were being sacrificed: both to funder priorities and to the NAACP attorneys' own assessment of appropriate educational goals. Bell's argument hinged on a sympathetic reading of Justice Harlan's dissent in *NAACP v. Button*, in which he stressed that the lawyer's "divided allegiance"—to the cause of school desegregation as well as the clients—could "prevent full compliance with his basic professional obligations." Bell went further, suggesting that NAACP lawyers were violating the spirit of the professional code, if not its letter, by allowing "the influence of attorney and organization" to create conflicts with the interests of class members who were diffuse, uniformed, and divided.[219]

Whereas Bell focused on the accountability problem in class representation, newly minted clinical educators, many having just exited poverty law practice,[220] emphasized accountability to individual low-income clients.[221] For these theorists, the autonomy threat was not that of lawyers standing up to powerful clients, but rather failing to hear

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[218] Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

[219] Bell's intervention was explosive. He was striking at the legal organizational heart of the civil rights movement and what he viewed as the white paternalism that had come to define its mission. Bell himself had just broken the color line of elite law school teaching, becoming the first African American tenured faculty member at Harvard Law School, after serving as a lawyer in the Civil Rights Division of the Department of Justice and assistant counsel to the NAACP LDF. In other words, he was a product of legal liberalism, but also an outsider. As an elite academic, he was the first to have standing to articulate out loud a critique of white paternalism that black lawyers and activists had long held in private—and he did so in the pages of that bastion of legal progressivism, the *Yale Law Journal*. It was this race-critique of white legal liberal disregard of black interests, folded into the language of a professional critique of lawyer conflict of interests, which gave *Serving Two Masters* its tremendous punch, prompting legal ethics scholars to grapple with the problem of class conflicts. Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982) (arguing for renovation of concept of "class representation"); *see also* Stephen C. Yeazell, *From Group Litigation to Class Action—Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980).

[220] William H. Simon, *Homo Pyschologicus: Notes on a New Legal Formalism*, 32 STAN. L. REV. 487, 553 (1980).

[221] *See* Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEVELAND ST. L. REV. 555, 557 (1980) (reviewing literature on "micro"—"what does the lawyer do, for whom, in what context, and why?"—and "macro" issues—"what can law and lawyers accomplish?"); Kandis Scott, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U. L. REV. 337, 345 (1987).

the wishes of the most vulnerable.[222] From this perspective, promoting client autonomy was not primarily about either systemic justice or individualism as an intrinsic moral good, but rather about producing better substantive outcomes in particular cases. The move to "client-centered lawyering" was designed to reverse the polarity of deference in the lawyer-client relationship by reformulating "expertise" to emphasize the non-legal merits of the case—about which the client knew best.[223] In contrast to lawyers who "primarily seek the best 'legal' solutions to problems without fully exploring how those solutions meet clients' nonlegal as well as legal concerns," the client-centered approach envisioned a lawyer who "helps identify problems from the client's perspective, actively involves the client in exploring potential solutions, encourages the client to make decisions likely to have substantial impact."[224]

Clinical scholars sought to reconcile this emphasis on client autonomy with their commitment to law reform through a distinctive version of institutional specialization.[225] Within the realm of interviewing and client counseling, techniques of active listening and information-gathering were to be used by lawyers to reframe the client "problem" in the broadest possible terms, encompassing legal and non-legal goals, and thereby limiting the scope of lawyer discretion to a narrow set of strategic decisions.[226] This client autonomy-enhancing approach, when directed toward poor clients, would redistribute legal resources and enhance the quality of dispute resolution within the adversarial system.[227] Outside of the individual representation context, poverty lawyers had broader authority "to use the law for political or social change,"[228] which they could advance, in Gary Bellow's view, by coordinating individual cases "directed towards specific changes in particular institutions that affect the poor, and accountable individual legal service."[229] In this way, Bellow believed in the possibility

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[222] Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 108 (1977) ("In most discussions between lawyer and client, the lawyer does almost all of the talking, gives little opportunity for the client to express feelings or concerns, and consistently controls the length, topics and character of the conversation.").

[223] DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977) (Chapter 1).

[224] *Id.*

[225] Gary Bellow and Bea Moulton in their seminal text on the "lawyering process" explicitly invoked the process theorists' emphasis on neutrality and legal craft. GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: ETHICS AND PROFESSIONAL RESPONSIBILITY (1978).

[226] Binder, supra note. Early clinical approaches focused on the role of the lawyer in litigation. *See* Harold A. McDougall, *Lawyering and the Public Interest in the 1990s*, 60 FORDHAM L. REV. 1, 9 (1991).

[227] E. Clinton Bamberger, *Of Lawyers, Law Firms, and Law Practice for People: Ideas for New Lawyers*, 12 COLUM. HUM. RITS. L. REV. 57 (1980) (urging students to work for the poor and not corporations).

[228] "Why," he asked, "should professional legal advice to the poor become shallow, cautious, and incomplete?" *Id.* at 109.

[229] *Id.* This was Bellow's concept of "focused legal-political action." Clinical educators and other scholars generally chafed at the lack of strategic focus of legal aid and its retreat from a reformist vision. Gary Bellow, *Legal Aid in the United States*, 14 CLEARINGHOUSE REV. 337 (1980); EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM (1978); JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 122 (1982); HARRY P. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF LAW (1975).

of fusing strong reform lawyering with greater client accountability and participation, thus "reconciling accountability to individual clients and the need for large systemic changes in the private and public institutions that change their lives."[230]

b. Critique

Just as in the constitutional law debate over the law-politics line, the core issue in lawyering scholarship during the critical legal period was the problem of discretion. Whereas constitutional law scholars concerned about law's neutrality sought to minimize the exercise of judges' discretion to shape policy outcomes in adjudication, so too did legal profession scholars concerned about lawyer neutrality attempt to limit lawyers' discretion to shape client goals in representation. Toward this end, defenders of lawyer neutrality worked to shore up the division between substantive goals, to which lawyers were required to defer, and procedural means, with respect to which lawyers could exercise discretion. Clearly identifying and differentiating autonomously derived client goals from lawyer advice was the lynchpin of this scheme.

Critical scholars in the legal profession field—again echoing the arguments made in the CLS critique of adjudication—fundamentally rejected the premise that there could be a defensible line drawn between substantive client ends and procedural legal means, and questioned the political value of endeavoring to do so. From the CLS perspective, client autonomy was too indeterminate to justify lawyer neutrality and too individualizing to support progressive politics.

William Simon's critique of the "ideology of advocacy," made this case most forcefully, arguing that because client "ends are subjective, individual, and arbitrary, the lawyer has no access to them."[231] Counseling clients thus inevitably required a lawyer to refer back to her own values in helping the client shape his own—and, in this sense, lawyers were in fact never neutral.[232] Because client autonomy from lawyer influence was not possible, the ideal of lawyer neutrality simply masked the political choices lawyers were making to support client goals that the lawyer was involved in constructing.[233] Since lawyers were deeply implicated in constructing individual

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[230] *Id.* at 122 (arguing that institutions can be forced to change when they are "(a) confronted with a substantial number of complainants; (b) with a real stake in the outcome; (c) who do not have to absorb the attorney and other costs").

[231] Simon, *Ideology of Advocacy*, *supra* note, at 53.

[232] Simon, *Homo Psychologicus*, *supra* note.

[233] Moreover, any attempt to assign lawyer discretion to the realm of "means" further disregarded the degree to which a lawyer's purportedly "procedural" decisions about strategy in fact affected client outcomes—once again involving the lawyer in determining ends. Simon, *Ideology of Advocacy*, *supra* note, at 51. Simon argued that the "ideology of advocacy" was not justified on systemic grounds—since there was no reason to believe that "the kind of impartiality enhanced by adversary advocacy is likely to lead to more accurate, socially efficient decisions," and dismissed the boundary drawing compromise of the realists since there was no way of "confining the roles to the situations to which they are appropriate." *Id.* at 76-78. For another critical perspective arriving at the same conclusion, see Duncan Kennedy, *The Responsibilty of Lawyers for the Justice of Their Causes*, 18 TEX. TECH. L. REV. 1157, 1159 (1987) ("I think you are tarred with bad actions of clients that you facilitate in your work as a lawyer.").

problems as legal disputes, Simon suggested that the main result of the ideology of advocacy was to obscure the lawyer's substantive role in channeling group conflict into the adversarial system—where "the sacrifice of substantive ideals is not acutely felt."[234] In this sense, by clinging to the illusion of accountability to autonomous client choice, lawyers were reinforcing the status quo.

Exposing lawyering as discretion all the way down was designed to bring normative disputes about "substantive ideals" explicitly into the lawyering process in ways that critics hoped would ultimately build solidaristic connections and advance progressive values. Lawyers were thus urged to embrace a robust and politically ambitious conception of professional role that linked discretion to the fundamental values of the legal profession, which to critics like Simon were rooted in progressive conceptions of the public good. This vision was fully compatible with realist conceptions of independent professional judgment to promote public values in the corporate counseling context,[235] as well as "aggressing lawyering in situations where the interests of the client or client community involve a challenge to external hierarchy."[236] In this way, the critical attack on client autonomy simultaneously challenged mainstream apologists of corporate lawyering and proponents of client-centeredness in the public interest lawyering context.[237]

Instead of "sublimating" substantive political conflict, critics urged a model of lawyering in which lawyers would use the legal system as a place to air political grievances and assert alternative political visions. In this vein, Gabel and Harris sought to "link the theoretical advances made by [CLS] with the accumulated practical experience of creative" lawyers to break the power of the legal system as a tool of legitimation.[238] In the place of legal liberal lawyering, they offered a "power-oriented"

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[234] *Id.* at 125.

[235] William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); *see also* Robert Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); William H. Simon, *Babbit v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985).

[236] William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 474 (1984).

[237] In this regard, Simon criticized both Bell and the clinical scholars. Against Bell, he argued that he posited a determinate set of community interests that did not exist and, in so doing, precluded the idea that lawyers might productively shape class interests or that the path pursued by the lawyer might be more preferable to both groups than a divided solution. Against clinical scholars, Simon argued that clinical education's emphasis on neutral skill training shifts "attention away from cases and statutes and the professional discourse of lawyers and judges toward the practical tasks of lawyering" within the "community-of-two," and thus "appears a product not so much of the legal services and public interest practice, as of the abandonment of this kind of practice." Simon, *Homo Psychologicus*, *supra* note, at 488, 554 (critiquing "psychologically informed interviewing and counseling techniques" (citing SHAFFER, *supra* note)). In addition, he rejected clinicians' justification of client-centeredness by reference to poor clients, arguing instead that the client-centeredness students learned in the clinical context would generally be carried into corporate practice where the idea of respecting client autonomy would facilitate the exercise of corporate client power.

[238] Peter Gabel & Peter Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 373 (1982-1983) (arging that "the conservative power of legal thought is not to be found in legal outcomes which resolve conflicts in favor of dominant groups, but in the reification of the very categories through which the nature of social conflict is defined"); *see also* JOHN SAYER, GHOST DANCING THE LAW: THE WOUNDED KNEE TRIALS (2000) (showing how AIM used courtroom as political

or "counter-hegemonic" approach essential to a "delegitimation strategy," which subordinated "the goal of getting people their rights to the goal of building an authentic or unalienated political consciousness."[239] In this framework, radical lawyers were to view the legal system as "diverse locuses of state power that are organized for the purposes of maintaining alienation and powerless," and to then use those systems to "build the power of popular movements."[240]

c. Response

In the wake of the critique of lawyer neutrality, legal profession scholars confronted two critical questions that went to the heart of the meaning of representation. First, without the anchor of client autonomy, were there any fundamental principles to guide the exercise of lawyer discretion and to ensure accountability of lawyer to client?[241] While progressives championed the exercise of discretion to promote "nonhierarchical communities of interest,"[242] given the critical insistence on the unavoidability of normative conflict,[243] it was impossible to rule out alternative, and less progressive, professional choices. Second, the critical position hinged on a confidence that lawyers could exercise moral judgment to make desirable social choices on behalf of marginalized client constituencies. Yet, given how that judgment was often mediated by race and class privilege, why should the progressive commitment to challenging hierarchy cede so much power to elites? From this perspective, why wasn't the principle of respect for client autonomy, though imperfect, necessary to protect nonelite communities from the threat of lawyer domination?

With respect to the question of fundamental professional values, scholars sought to navigate a position between the mainstream claim that lawyer neutrality was possible and desirable and the critical claim that such neutrality was illusory and pernicious.[244]

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forum on US-Indian relations); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1023-26 (1994).

[239] *Id.* at 375.

[240] *Id.* at 377; *see also* RADICAL LAWYERS: THEIR ROLE IN THE MOVEMENT AND THE COURTS (Jonathan Black ed., 1971); Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 13 (1985); Steve Bachman, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984-1985); Paul Harris, *The San Francisco Community Law Collective*, 7 LAW & POL'Y 19 (1985).

[241] While the CLS critique of legal neutrality militated in favor of judges exercising less discretion, the CLS critique of legal neutrality seemed to argue for lawyers exercising more.

[242] Simon, *Visions of Practice*, *supra* note.

[243] Unger, *CLS*, *supra* note, at 60 (stressing the inevitability of "a small number of opposing ideas: principles and counterprinciples").

[244] One approach that echoed the republican turn in constitutional law was to deny that the legal profession was rooted in the values of liberal individualism, which justified the client autonomy view, instead suggesting that it was grounded in civic republicanism, which justified lawyering that promoted the public good. *See* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992) (locating republican professional values in Sharswood—including duty to court and to represent the poor, as well as a rejection of "consciously pressing for unjust judgment" (quoting George Sharswood, *An Essay on Professional Ethics*, 32 A.B.A. Rep. 1 (5th ed. 1907), quoting Chief Justice Gibson in Rush v. Cavenaugh, 2 Pa. 187, 189 (1845)); *but see* David Luban, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589 (1993) (stating that the opposition between communitarianism and liberalism was overdrawn).

David Luban's *Lawyers and Justice* was the high-water mark of this approach, which accepted the plausibility of autonomous client decision making, but denied that it argued in favor of a neutral conception of the lawyer's role.[245] Taking on proponents of lawyer neutrality on their own philosophical ground, Luban argued that a lawyer's commitment to neutrally promoting client autonomy had to be justified by the institutional values such a commitment advanced[246]—which, in the case of the American civil adversary system, was the goal of "finding truth and promoting legal rights."[247] But since the civil system systematically failed to achieve this goal, it similarly failed to justify the strong version of lawyer neutrality.[248] Instead relying on the "adversary excuse" to justify "role amorality," lawyers thus had to generally follow "ordinary morality," which meant that lawyers could no longer personally disavow the bad acts of their clients. Because client autonomy was only as morally good as the ends to which it was put, lawyers had an obligation to stop clients from committing autonomous acts that were socially harmful.[249] Conversely, when lawyers used law to advance the fundamental political value of promoting openness in a democratic society, by combatting discrimination or poverty, the strength of those fundamental values could justify overriding client control.[250] Luban's work constituted a philosophical defense of legal liberalism in which the lawyer's moral activism was seen as promoting democratic legitimacy even as it potentially trammeled on client autonomy. It therefore constituted a philosophical defense of the law-politics line by

[245] Luban rejected the adversary system defense of role neutrality when there was weak evidence that the system itself produced fair and accurate outcomes David Luban, *The Adversary Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983); *see also* Susan Wolf, *Ethics, Legal Ethics, and the Ethics of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983); Robert J. Kutak, *The Adversary System and the Practice of Law*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83 (David Luban ed., 1983).

[246] DAVID B. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 129 (1988) (stating the "fourfold root of sufficient reason").

[247] *Id.* at 92.

[248] If system outcomes depended on unequal access to lawyers and procedural tricks, then lawyers could not justify their own actions by reference to the claim that they advanced systemic values. *Id.*

[249] *Id.* at 171 (stating that lawyers had a duty to "make the law better by law reform activity, and . . . make their clients better by using their advisory role to awaken the clients to the public dimension of their activities"); *see also* David B. Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 4 AM. B. FOUND. RES. J. 637, 639 (1986).

[250] In Luban's view, so long as "the clients are also committed to the cause" and the "outcome of the [lawyer] manipulation represents the will of the political group," any lawyer manipulation itself would be justified morally even if disapproved as a professional matter. LUBAN, *supra* note, 340. For Luban, the test was the effectiveness of the representation, which could never be perfect. Against the charge that public interest lawsuits constituted an illegitimate usurpation of legislative lawmaking—the "objection from democracy"—Luban adopted a proceduralist defense, pointing to systemic legislative failure for minority groups and "silent majorities" disabled by collective action problems as a normative justification for public interest litigation. *Id.* at 389; *see also* David B. Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2224 (1989).

asserting morally activist law as a response to the procedural failure of democratic politics.[251]

Despite this defense, the concept of moral activism continued to come under assault. The new Model Rules of Professional Conduct, though backing off of the advocacy ideal,[252] left little room for the moral activism, reinforcing the emphasis on client control over the "purposes to be served" by the representation, while making clear that lawyers remained unaccountable for those ends.[253] The continued rise of big law firms and evidence of corporate lawyer identification with their clients put pressure on the ideal of ethical independence in corporate practice.[254] Some progressive scholars chafed against the notion of moral activism as giving too much discretion to individual lawyers in ways that raised significant concerns about horizontal equity,[255] particularly as the legal profession became more stratified,[256] and lawyers remained unequally distributed;[257] while conservatives

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[251] William Simon and Deborah Rhode arrived at similar conclusions about the democratic role of lawyers in advancing justice, although each did so based on difference conceptions of justice. *See* William H. Simon, The Practice of Justice (1988) (advancing a concept of justice based on the "legal merits); and Deborah L. Rhode, In the Interests of Justice (2000) (promoting a concept of justice that involved lawyers accepting personal moral responsibility for their professional acts and more equitable access to legal services); *see also* David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873 (1998) (reviewing SIMON, *supra*); Geoffrey C. Hazard, *In Defense of Lawyers*, 93 MICH. L. REV. 1196 (1995) (reviewing MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994)).

[252] Model Rules of Prof'l Conduct R. 1.3 cmt [1].

[253] *Id.* R. 1.2 cmt [1].

[254] *See* ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy*, 37 STAN. L. REV. 503 (1985).

[255] David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

[256] *See* JEROME E. CARLIN, LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO (1994); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); *see also* Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms of Studies of the Legal Profession*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1 (Robert L. Nelson, David M. Trubek, Rayman L. Solomon eds., 1992) (arguing that professionalism reflects and shapes changing nature of law practice).

[257] Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995). For other perspectives, see EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK (1986); GIRARDEAU A. SPANN, RACE AGAINST THE COURT (1993) (court has disadvantaged minorities by turning them into Supreme Court "dependents"); Marshall Berger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982) (arguing against law reform and for legal aid); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995) (claim that legal aid's institutional choices reinscribe professional values that undercut reform potential of legal services); Stuart A. Scheingold, *The Dilemma of Legal Services*, 36 STAN. L. REV. 879 (1984) (arguing in favor of "neighborhood activism" as contributing to "an effort strategy for reform when employed with other tactics"); see also MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE (1994); CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES (1992); Derrick Bell, *The Supreme Court 1984 Term–Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1986); Carrie Menkel-Meadow, *Legal Aid in the United States, The Professionalization and Politicization of Legal Services in the 1980's*, 22 OSGOODE HALL L.J. 29 (1984); Nathan Hakman, *Political Trials in the Legal Order: A Political Scientist's Perspective*, 21 J. PUB L. 73 (1972); Charles R. Halpren & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Muhammed I. Kenyatta, *Community Organizing, Client*

sought to reassert professional tradition in the face of the progressive "moralizing of law."[258]

Into this mix, poverty law scholars offered a different reaction against lawyer activism that echoed earlier concerns about client autonomy. These new scholars generally accepted the critical insight that lawyers inevitably influenced client decision making, but drew different conclusions: arguing against the extension of lawyer activism in favor of expanding the space for client activism.[259] In poverty scholars' work, the critical emphasis on legal consciousness was intertwined with a view of lawyers as agents of social control, interwoven with race and feminist critiques of legal liberalism.[260] Following the interpretative turn in constitutional law, legal representation became seen as part of linguistic battle,[261] in which the authority to tell stories was a critical power struggle.[262] Seminal works in poverty law during the late 1980s and early 1990s critiqued legal liberal lawyers whose efforts to mediate between the social realities of their clients and the institutional world of law and politics reproduced the domination they were trying to fight. The prototype was Gerald Lopez's "regnant" lawyer, who viewed himself as "the preeminent problem-solver in most situations" and viewed subordination as susceptible to legal challenge,[263] which even when successful, would "either fail to challenge fundamental arrangements or prove more exhilarating for the lawyer than client."[264]

Lucie White's self-reflection on her own lawyering for "Mrs. G" set the standard for critical analysis. Her frame was to accept the normative desirability of due process,[265] but then deny that it was afforded in practice. The piece thus embraced the

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Involvement, and Poverty Law, 35 MONTHLY REV., Oct. 1983, at 18; Philip M. Lord & Patricia L. Smith, *The New Black Lawyer as Community Builder*, 7 BLACK L.J. 62 (1980); Harold McDougall, *The Role of the Black Lawyer: A Marxist View*, 7 BLACK L.J. 31 (1980).

[258] David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991) (arguing that the "pendulum among both legal academics and law students is swinging rapidly away from the past decade's infatuation with theory drawn from other disciplines, back in the direction of law's aboriginal grand tradition); *see also* ERIC A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67 (1990). As examples of this change, see ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW (1984); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35, 37 (1981); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1040 (1990).

[259] *White Knight*, 108 HARV. L. REV. 959 (1995) (reviewing JACK GREENBERG, CRUSADERS IN THE COURTS (1994); Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61 (1996).

[260] ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993); Austin Sarat, *"…The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990).

[261] Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989).

[262] *See* LÓPEZ, *supra* note, at 43 (stating that lawyers use stories and arguments "to help establish meaning and distribute power"); *see also* Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

[263] *See* LÓPEZ, *supra* note, at 24, 29 (stating that regnant lawyers "litigate more than they do anything else," "connect only loosely to other institutions or groups in their communities," "believe subordination can be successfully fought if professionals, particularly lawyers, assume leadership").

[264] *Id.* at 49

[265] Lucie White, Subordination, *Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3 (1990).

realist suspicion of law-in-action, particularly the discretion in the welfare bureaucracy,[266] but then linked that suspicion to critical theoretical accounts that suggested how power differentials within the lawyer-client relation made the lawyer part of the apparatus of disempowerment. Though well-intentioned, the lawyer sought to fit the client's story within a narrative of "necessity" in order to gain legal relief; however, Mrs. G's "survival skills" disrupted this "conspiracy" and asserted the truth as a way to break the silence and undermine the lawyer's own view of Mrs. G as a "victim."[267] In this way, Mrs. G, like other subordinated women, had "evaded complete domination through their practice of speaking."[268]

Scholars offered responses that fused client participation within the lawyer-client relationship to external challenges to power.[269] Collaboration among co-equal problem-solvers was the dominant theme of this work,[270] in which "clients, like lawyers, offer special practical know-how" that is laced together with "the efforts of other problem-solvers—the client himself, his family, friends, neighbor, community activists, organizers, public employees, administrators, policymakers, researchers, and funders."[271] In this way, poverty law practice could "avoid" the "conventional separatism that characterizes so much of activist work" and the preemption of "other

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[266] JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1986).

[267] White, *supra* note.

[268] Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1040 (noting influence of Foucault: "White's meticulous focus on the language used in the hearing room itself…vividly illustrated the ways in which legal discourse operates as an instrument of power to exclude, silence, and oppress."). Alfieri similarly focused on "client narrative" to explore "interpretive violence" in food stamp case of Mrs. Celeste. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991). Again, the idea drawn from postmodern theory was to parse the language, showing how the "normative meanings and images" articulated by the client went "unheard" by the lawyer in his own quest to fit those meanings into a legal storyboard compelling within the framework of law. *Id.* In this sense, traditional practices of lawyers constituted an "interpretive struggle" which was "violent": client "voices are silenced and stories are forgotten," sacrificing "client self-empowerment." The veneer of lawyer "neutrality" contributed to the "legitimacy of silencing client narrative." *Id.* at 2133.

[269] Alfieri theorized a "reconstructive" approach that, while not able to "wholly eradicate the violence of silencing traditions," could "allow the poverty lawyer to assign an empowering meaning to client narratives and to envision an alternative to the image of the unspeaking client." *Id.* at 2138. Drawing a distinction between domination within the lawyer-client relationship and subordination outside it, White showed how lawyers could create space within legal process to change legal consciousness, responding to critical theories of law by attacking the "third dimension of power." For other work in this vein, see Barbara Bezdek, S*ilence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Luke W. Cole, *Empowerment as the Key to Environemtnal Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992); Clark Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Enthnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Pratice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 BUFF. L. REV. 71 (1996); Binny Miller, *Given Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (194).

[270] Lopez's critique of "regnant" lawyering was set against a "rebellious" approach in which lawyers treated clients as "capable, with a will to fight." LÓPEZ, *supra* note, at 50.

[271] *Id.*

representatives" through an "integrated view of lawyer and client as part of a larger network of cooperative problem-solvers."[272]

Yet within this integrated view, concerns about lawyer overreaching remained. Scholars focused on empowering clients to tell their stories unburdened by the influence of more powerful lawyers, who lacked cultural, racial, and class identification. "In order to negotiate the risks of tailoring—of shaping the law to respond to the needs of subordinated groups—the power to tailor must shift to those that the tailoring seeks to help."[273] Alfieri argued for a separation between the lawyer's professional and political roles: "The poverty lawyer's role in political confrontation is limited. . . . In no circumstance should she participate in [direct] action. Nor should she assume the role of political counsel on matters of tactics and strategy."[274] From this perspective, legal liberalism assumed the "myth of inherent indigent isolation and passivity," which the new scholars sought to challenge by applying "critical consciousness" to facilitate "the organization and mobilization of grass roots client alliances."[275]

Critics charged that poverty scholars were erecting a straw man target, positioning themselves against a "regnant" model that did not provide a "complete or accurate picture of both the process and the substance of lawyering for the poor."[276] Others argued that poverty lawyers were romanticizing their clients in ways that disabled effective lawyering. Along these lines, Simon argued that the "dark secret" of progressive lawyering—missed by the poverty law scholars—was that client interests were hopeless indeterminate and disharmonious, making it inevitable (and often good) that lawyers were there to influence client interests.[277] Finally, poverty law scholars were charged with attacking the wrong target—blaming legal allies for failures that were

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[272] *Id.*

[273] White, *supra* note. In reflecting on this literature, Buchanan distinguished between the position of lawyer as faciltitor (building on Paolo Freiere), which sees empowerment through legal process, and lawyer as strategist, focused on gaining advantages for disempowered people. Buchanan, *supra* note, at 762; *see also* Lucie E. White, Goldberg v. Kelly *on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 886 (1990-1991). For critical perspective, see Robert Dinnerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); see also Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889 (1995); Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 Clinical L. Rev. 639 (1995); Janine Sisak, *If the Shoe Doesn't Fit…Reformulating Rebellious Lawyering to Encompass Community Group Representation*, 25 FORD. URB. L.J. 873 (1998).

[274] Anthony Alfieri, *The Antimonies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 670 (1987-1988).

[275] *Id.* at 665.

[276] Ann Southworth, *Taking the Lawyer out of Progressive Lawyering*, 46 STAN. L. REV. 213, 215 (1993); *cf.* Matthew Diller, *Poverty Lawering in the Golden Age*, 93 MICH. L. REV. 1400, 1414 (1995) (arguing against the proposition that lawyers, rather than political opposition, were the main barrier to progressive reform: "The failure of the NWRO stands as a testament to the enormous barriers to organizing poor people around the issue of welfare rights."); *see also* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993).

[277] William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 MIAMI L. REV. 1099, 1111 (1994).

the result of massive political countermobilization—and proposing a political program of "micropolitics" that gave up on the progressive aspiration for structural change.[278]

D. Pragmatic Legalism: Rebuilding Law from the Bottom-Up

By the 1990s, "faith in the progressive possibilities of law has been shaken."[279] The critical legal debate over law's neutrality and its aftermath crystallized progressive divisions over the role of courts and lawyers in social change, which had become organized around two foundational critiques. The *accountability critique* focused on the perceived disconnect between legal liberalism and legal neutrality—framed in constitutional law in terms of the lack of accountability of activist judges to autonomous law, and in the legal profession in terms of the lack of accountability of activist lawyers to autonomous clients. The *efficacy critique* focused on the perceived disconnect between legal liberalism—framed in terms of a politics led by those activist judges and lawyers—and transformative social change. Although these critiques converged against legal liberalism, there were nuances that placed them in tension with one another in ways that mapped onto intellectual tensions within progressive thought. Concerns about accountability pushed both mainstream and CRT scholars back toward rights-based principles that CLS found politically stifling, while CLS's insistence on trashing legal neutrality made it lose sight of how doing so could undermine accountability to nonelites in its alternative radical vision.

These divisions drove progressive legal debate within constitutional and legal profession scholarship toward pragmatic legalism by century's close: searching to ground law in a set of normative principles that reflected the experiences and aspirations of the marginalized groups which progressivism claimed to serve, while also finding spaces within which to advance progressive political alternatives to ascendant conservatism. Conservativism had succeeded in reshaping progressive legal debate in two ways: first, by fundamentally contesting the meaning of the public good, it reinforced the intellectual move away from comprehensive theoretical frameworks justifying the law-politics divide; and second, by scaling back the signature achievements of legal liberalism, it changed the baseline for evaluating what counted as effective progressive political interventions. In this context, legal scholars struggled to develop a new set of pragmatic intellectual and political principles to *rebuild* an account of law's role in progressive reform that was at once accountable and effective in the new environment. No longer championing broad transformation, the progressive legal vision turned toward identifying space for smaller victories, creating opportunities for

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[278] Joel Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992). Within clinical education, Gary Blasi made a parallel critique, arguing that the theoretical framework of the new poverty law disabled practical struggle by undermining the value of lawyer expertise, which he sought to reclaim on the foundation of cognitive science. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995); Gary L. Blasi, *What's a Theory For: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063 (1993-1994) (critiquing reliance on critical theory and reasserting importance of social science to lawyering).

[279] Sally Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11, 12 (1995).

local engagement, and limiting political damage. Grand theory gave way to mid-level analysis, while deep critique was superceded by pragmatic reformism.

1. Decentering Courts in Constitutional Theory

The seeds of the pragmatic turn in constitutional theory were sewn in the waning phase of CLS. Robert Cover's 1983 *Nomos and Narrative* proved to be a bridge from the radical uncertainty of interpretivism ushered in by the CLS indeterminacy critique to the pragmatic search for alternative sources of constitutional meaning. Acknowledging that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning,"[280] Cover proposed looking at how noncourt actors contributed to shaping the normative universe—the "nomos"—as a way to understand how constitutional norms change: the process of "jurisgenesis." Drawing on Cover, prominent scholars attempted to reclaim law as a force for social integration, while being sensitive to imposing dominant meanings on diverse social interests. Echoing the call of CRT scholars, and drawing upon law-and-society studies of legal consciousness, Martha Minow argued for grounding legal interpretation in the language and practices of ordinary people to reconstruct new communities of meanings that would give new content to legal rights in socially just ways.[281] In her view, looking to the "bottom" responded to the indeterminacy critique by "treating rights as a particular vocabulary implying roles and relationships within communities and institutions, [suggesting] how rights can be something—without being fixed and can change—without losing their legitimacy."[282] Identifying this legal pluralism was politically important because it affirmed the resistance strategies deployed by those at the bottom, while also positing a link between changing legal consciousness and broader process of social change. However, for scholars focused on state transformation, legal pluralism was insufficient to the extent that it remained rooted in local legal mobilization outside the state. The challenge remained of linking these bottom-up interpretative practices to a state-oriented politics of progressive reform.[283]

Within constitutional law, there was a discernible shift in perspective and methodological focus. If top-down, heavily theorized constitutional law was at a conceptual dead-end, then perhaps looking to the bottom for constitutional meaning would provide an exit. Out of Cover's earlier concept of "jurisgenesis," an alternative constitutional narrative began to emerge, one that found power in the assertion of alterative constitutional claims by ordinary citizens.

Prominent scholars began to widen their analyses beyond the court, looking instead to lawmaking practices of the "people" who created constitutional change from the

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[280] Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

[281] Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1896 (1987).

[282] *Id.* at 1892.

[283] *See* Harold A. McDougall, *Social Movements Law and Implementation: A Clinical Dimension for the New Legal Process*, 75 Cornell L. Rev. 83, 86 (1989); *see also* Steven L. Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225 (1989).

bottom-up.[284] Rather than political theory, scholars embraced history from below, using studies of local—often non-elite—actors to demonstrate how legal reform percolated up. Bruce Ackerman launched this new movement with a theory of constitutional amendment "outside of Article V" effectuated by mass citizen action that culminated in "constitutional moments" in which policy makers and courts adopted new legal interpretations denied by prior generations. Ackerman, whose first volume of *We the People* was published in 1991, sought to reconcile judicial review with democracy by differentiating "regular politics" from "constitutional politics."[285] In regular periods, the court served its democratic function by invalidating legislation at odds with the constitutional values produced by the prior democratic process; in times of constitutional politics, those values were contested and revised by "new majorities" that transformed constitutional orders through "higher law making:" Reconstruction, the New Deal, and the Civil Rights society. In these moments, it was politics from below that mattered, though Ackerman was less interested in mechanisms of grassroots change (or who precisely was in the lead) than in identifying its essential role in constitutional development. The key move was to repudiate the salience of the countermajoritarian difficulty by reframing constitutional decision making as about validating the higher lawmaking choices of the people: "the courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep support for their innovations."[286] In this view, if the "citizenry" did not like the court's direction, it could mobilize again to create a new order.

Other scholars were less theoretically ambitious, but more grounded. Randall Kennedy's legal history of the Montgomery Bus Boycott was a pointed rejoinder to critics of legal liberalism, choosing to fight them on ground they valued most: that of grassroots social movement activism. In Kennedy's telling: "Litigation served as the Negro's most successful and aggressive form of political activity throughout the first half of this century."[287] To prove this, he highlighted how the Montgomery Improvement Association's lawsuit against the bus segregation ordinance succeeded at the moment the city was set to enjoin the boycott itself such that "without the suit and the eventual support of the Supreme Court, the boycott may well have ended without attaining any of its expressed goals."[288] In addition to sustaining the boycott, the lawsuit contributing to a new legal consciousness that was essential to the subsequent

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[284] *Cf.* JOHN BRINGHAM, THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS (2000).

[285] ACKERMAN, *supra* note. For critical reviews, see Jane Schacter, *A Moment for Pragmatism*, 113 MICH. L. REV. 973 (205); Sidney Tarrow, *The People Maybe? Opening the Civil Rights Revolution to Social Movements*, 50 TULSA L. REV. 415 (2015);

[286] *Id.*

[287] Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1064 (1989). "King and his associates met defeat of various sorts in the legal arena. But much of the current thinking about law and its relationship to the Movement unduly minimizes the benefits that blacks received through their participation in state and federal judicial forums.

[288] *Id.*

movement success.[289] James Pope similarly drew upon grassroots study to push back against the CLS claim that rights were demobilizing by showing how radical labor leaders went "outside the formally recognized channels of representative politics" to assert their own "constitution of freedom" in which the right to strike was protected under the 13th Amendment. However, unlike Kennedy, Pope's story of "constitutional insurgency" presented a negative role for movement lawyers, who sought to soften the activists' radical interpretation by presenting strikers arguments in free speech terms, which ultimately failed and undermined labor's most ambitious aspirations.[290]

Yet the idea of studying "legal consciousness . . . from the bottom up" began to catch on.[291] Jack Balkin argued that "to understand the Constitution's proper role in forging a democratic culture, we must understand something about the nature of social hierarchies and how social groups struggle for power and status within those hierarchies."[292] Other progressive scholars developed theories of minimal judicial review that were designed to leave open space for precisely this type of "struggle for power." Robin West expressed lingering progressive skepticism of judicial review, arguing that "the appropriate forums for progressive constitutional advocacy under the Fourteenth Amendment should be Congress and state legislatures, rather than the courts."[293] Paralleling West's call for avoiding the "adjudicated Constitution," Cass Sunstein argued for judicial decisions to be "narrow rather than wide, shallow rather than deep" in order to reduce the burdens of decisions and costs of judicial mistake, thereby giving fuller scope to the democratic process.[294] Mark Tushnet, an earlier champion of CLS, argued against the notion that the court was always supreme, positing rather that "disagreements over the thin Constitution's meaning are best conducted by the people, in the ordinary venues for political discussion."[295] Notable about this scholarship was both its faith in democratic politics to ultimately get the issues right and also its newfound engagement with empirical social science. In defending their theories, both Sunstein and Tushnet focused on judicial errors and the risk of political backlash. Within this literature, the question, as Tushnet put it, was no longer what courts should do, but what they actually did—leaving some to ask whether progressives had "lost faith" in the progressive promise of judicial review.[296]

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[289] *Id.* at 1065 (stating that "successes of the legal struggle helped to create a state of mind that was absolutely essential to the Movement, a consciousness that King articulated with more power and grace than anyone: a sentiment of righteous outrage").

[290] James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 958 (1997).

[291] *Id.* For other important contributions in this vein, see Gary D. Rowe, *Constitutionism in the Streets*, 78 USC L. REV. 401 (2005); Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution"*, NYU L. REV. 1456 (2001).

[292] J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2316 (1997).

[293] ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENt 4 (1994).

[294] CASS R. SUNSTEIN, ONE CASE AT AT TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10-11, 46 (1999).

[295] MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (1999).

[296] Erwin Chemerinsky, *Losing Faith: American Without Judicial Review?*, 98 MICH. L. REV. 1416 (2000).

2. Decentering Lawyers in Lawyering Theory

Those who studied lawyers also sought to respond to the concerns raised in the critical phase.[297] A key concern related to representation, raised both by Bell in the context of public interest law and by clinical scholars writing about poverty lawyering.[298] This literature highlighted the risk of lawyer overreach and generally offered a version of lawyering that emphasized client control. As one poverty law scholar put it, "Today, we question anyone's right to make . . . an attempt to speak for those who have not spoken for themselves."[299] The other concern was about legal efficacy. On one side, scholars continued to express skepticism that litigation, now seen as a "dysfunctional family member,"[300] could make a difference in movements for social change.[301] On the other side, building on Handler's critique of the "micropolitics" of poverty law scholarship, scholars asked whether the focus on client autonomy and empowerment could scale up to the kind of structural challenges associated with legal liberalism.[302] Was it possible to enact the democracy in legal practice that one aspired to the political realm?[303] These two concerns were, of course, deeply interconnected: Was it possible for lawyers to advance progressive social change while staying accountable to clients?[304]

Reacting against the critical literature, progressive scholars sought to rebuild an image of progressive lawyers as deeply sensitive to community needs,[305] but still wielding law to reshape power in "politically depressing" times.[306] The early steps were tentative.[307] With public interest law deeply contested, scholars began searching

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[297] Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283 (1998); *see also* Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, *in* THE POLITICS OF LAW, *supra* note, at 115.

[298] Bell, *supra* note; *see also* William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

[299] Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*, 64 TENN. L. REV. 1065, 1067.

[300] Rivkin, *supra* note, at 1068.

[301] McDougall, *Lawyering and the Public Interest*, *supra* note, at 40-43 (discussing "modes of advocacy").

[302] STEVE BACHMANN, LAWYERS, LAW, AND SOCIAL CHANGE 39 (2001) ("Organized masses of people, not lawyers, play the critical roles, and the significant victories (or losses) occur outside of the sphere of law."); McDougall, *Lawyering and the Public Interest*, *supra* note.

[303] Rivkin, *supra* note; Lucie E. White, *Democracy in Development Practice: Essays on a Fugitive Theme*, 64 TENN. L. REV. 1073 (1997).

[304] *See* Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996). For argument against lawyer identification with client interests, see Madeleine C. Petrara, *Dangerous Identification: Confusing Lawyers with Their Clients*, 19 J. LEGAL PROF. 179 (1994-95).

[305] Karen L. Loewy, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1869, 1891 (1999-2000).

[306] Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J. L. & GENDER 323 (2007).

[307] Responding directly to radical critics, Cornel West offered pragmatic defense of liberal lawyers, in which he pointed out that the CLS critique of courts also tarred the lawyers who claimed rights in the first instance: "some of the CLS trashing of liberalism as the level of theory spills over to liberal legal practice. This spillover is myopic, for it trashes the only feasible progressive practice for radical lawyers vis-à-vis the courts. This myopia becomes downright dangerous and irresponsible when aimed at civil rights lawyers for whom the very

for a new frame that might capture the type of activist work that lawyers sought to pursue. A 1995 symposium at Harvard Law School brought together some of the leading thinkers who proposed a variety of frameworks for melding accountability and efficacy—while reframing the very terms of the debate. As "public interest law" had been hopelessly contested by the right and delegitimated by its association with legal liberalism, scholars searched for other meanings. Minow offered the concept of "political lawyering" to capture the notion of "a lawyer collaborating with disadvantaged people, not serving them from a distance . . . a lawyer helping people with little power claim their rights as well as their authority to take action."[308] The idea was both to emphasize the collective nature of representation and political struggle,[309] and to distance lawyering from test case litigation.[310] In "dark times," lawyers were urged to "help invent new forms of coalition politics," while striving to "bear witness and name what happens to people, even or especially when all else seems impossible."[311]

Echoing these themes, Bellow emphasized how his own work had spanned courts and other domains, sometimes ignoring "litigation entirely in favor of bureaucratic maneuvering and community and union organizing. Even when pursuing litigation, we often placed far greater emphasis on mobilizing and educating clients, or strengthening the entities and organizations that represented them, than on judicial outcomes."[312] Connecting this deemphasis of court-centered advocacy with a rejection of lawyer neutrality, Bellow asserted that "we were not detached professionals offering advice and representation regardless of consequences; we saw ourselves responsible for, and committed to, shaping those consequences."[313] Social vision was crucial, necessary to avoid unreflective practice that legitimated the status quo, but that vision had to be shaped in "alliance" with those served in a way that "generates bonds and dependencies" and "permits us to talk seriously about purposive judgment—when and whether to intervene or seek influence—in situations in which one has unequal power in a relationship."[314]

These themes fed into an emerging discussion of "community lawyering."[315] This literature reflected both a move away from litigation (responding to the problem of

effort to extend American liberalism may lead to injury or death in conservative America." Cornel West, *The Role of Law in Progressive Politics*, 43 VAND. L. REV. 1797 (1990).

[308] Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. REV. 287, 288 (1996).

[309] *Id.* (referencing Arendt to invoke the notion of politics in which "all people can participate…and express the ideals of freedom and equality").

[310] *Id.* at 289.

[311] *Id.* at 294; *see also* Martha Minow, *Law and Social Change*, 62 UNIV. MISSOURI-KANSAS CITY L. REV. 171 (1993).

[312] Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 Harv. C.R.-C.L. L. Rev. 297, 300 (1996).

[313] *Id.*

[314] *Id.* at 303.

[315] Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229 (1999); Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 Clinical L. Rev.

efficacy) and toward community (responding to the problem of accountability), and was visible across substantive areas.[316] Scholars promoted the provision of nontraditional services to community "partners" to allow "community members to set their own goals and choose their own methods."[317] The community was defined as "people united by common geographical proximity as well as to a significant extent by race, experience, and cause."[318] And lawyering in this vision spanned a broad range of practical roles: "mediator, facilitator, problem-solver, collaborator, or statesman."[319] The goal was to enforce rights, improve communities, and promote "[f]eelings of pride, connectedness, and power."

This shift to the local reflected dissatisfaction with legal liberalism, but also changing political reality.[320] As 1980s deregulation gave way to 1990s devolution, there was greater scope of legal intervention in systems of local governments, often conducted in connection with nonprofit organizations engaged in service delivery and community economic development.[321] Yet within this environment, familiar political and practical disputes reemerged. Focusing on community development, some scholars identified models of "lawyering for empowerment,"[322] in which the goal of lawyers was to keep client groups out of entanglements with governmental and private sector actors. Others, pivoting toward "new governance," embraced the progressive possibilities of public-private partnerships,[323] promoting local political collaborations,

147, 148 (2000); Karen L. Tokarz et al., *Conversations on 'Community Lawyering': The Newest (Oldest) Wave in Clinical Legal Education*, 28 J. L. & POL'Y 359 (2008).

[316] LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 153 (2001); Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153 (2004).

[317] Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445 (2002).

[318] *Id.* at 450.

[319] *Id.* at 453.

[320] It also resonated with the notion of that there was no single legal profession, but rather multiple "communities of practice," within which professionalism was enacted. *See* LYNN MATHER ET AL., DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE (2001); ROBERT NELSON ET AL., LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (1992).

[321] *See* Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45 (2002); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 J. L. & POL'Y 249 (2004); *see also* Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245 (1995).

[322] Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999-2000).

[323] Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcar*e, 2002 WIS. L. REV. 575 (2002).

multidisciplinary practice,[324] and nonrights-based remedies.[325] Moreover, the move toward community-based organizational representation raised concerns about whose voices counted in defining and executing community goals, and whether the lawyer could ever stay neutral in the construction of community interests.[326]

Building on these discussions, scholars within the critical tradition of the prior wave of clinical scholarship sought to clarify and reposition its aims, differentiating it from the negative critique of lawyers and tying it to an affirmative program of collaborative social change attuned to structural subordination. Ascanio Piomelli argued that the core of what he termed the "collaborative" vision of lawyering was not critique but a "call to involve clients in the actual implementation of remedial strategies. Clients not only get to decide what their lawyer will do, but they participate in carrying out those decisions, often by speaking out on their own behalf and/or working with community groups."[327] The emphasis was on promoting direct democratic engagement, not change through representative leaders: "It is a vision of society and social change that values participatory democracy and broadly-based popular political mobilization over professional-driven efforts to craft and implement wise and attainable reform."[328]

The new poverty law literature developed alongside, and increasingly interacted with, a law-and-society literature that sought to redirect the study of lawyering along empirical lines. This empirical impulse was spurred by the seminal research of Austin Sarat and Stuart Scheingold, who convened scholars across law and social science to investigate what they termed "cause lawyering." Their theoretical framing linked the social scientific study of legal practice and the legal profession to discussions of legal ethics: a cause lawyer was a "moral activist" who shared "with her client responsibility for the ends" of the representation,[329] thus contesting what Simon had called the "ideology of advocacy."[330] This framing positioned cause lawyers as at once vindicating professionalism—and calling it into question. The cause lawyer's attempt to "reconnect law and morality" made "tangible the idea that law is a 'public profession,'" but also threatened that ideal by "destabilizing the dominant

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[324] *See id.* at 576; *see also* Louise G. Trubek, C*rossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law"*, 2005 WIS. L. REV. 455, 461 (2005); Louise G. Trubek, *Old Wine in New Bottles: Public Interest Lawyering in an Era of Privatization*, 28 FORDHAM URB. L.J. 1739 (2001); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000).

[325] Simon, *Legal Pragmatism*, *supra* note.

[326] Marshall, *Mission Impossible*, *supra* note; Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

[327] Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 440 (2000); *see also* Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, UTAH L. REV. 395, 459 (2004); *see also* Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721 (1996); Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 VT. L. REV. 459 (1993).

[328] Piomelli, *Foucault*, *supra* note, at 459. Katherine Kruse associates this move with the "jurisprudential turn" in legal ethics. *See* Kruse, *supra* note.

[329] Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998).

[330] Simon, *Ideology*, *supra* note.

understanding of lawyering as properly wedded to moral neutrality and technical competence."[331]

The project was incredibly generative,[332] stimulating interest in differentiating and categorizing different types of cause lawyering, both in terms of approaches to client relations and tactical emphases.[333] In and around the project, scholars both sought to differentiate the various ways that lawyers deployed expertise in the service of social change—moving away from the impact litigation model—and also to reclaim litigation as a productive tool.[334] Scholars showed how lawyers worked at multiple levels in multiple domains to pursue change for marginalized constituencies.[335] Law reform litigation came in for reconsideration,[336] particularly as the growing LGBT rights movement used litigation to advance equality claims while assiduously avoiding the pitfalls of legal liberalism. Scholars emphasized the process of legal mobilization rather than rights claiming.[337] Lawyer expertise was reexamined against the backdrop of new test case litigation.[338]

At the cusp of the new millennium, lawyering scholars nonetheless still struggled to link together these new developments in a framework that could reconcile transformative social change with accountable client service.[339] Social movements began to emerge in these conversations, but on the margins: as aspirations, not central actors.[340] Within progressive legal thought, the vision of law as a cooptive force,

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[331] Sarat & Scheingold, *supra* note, at 3.

[332] Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, *in* CAUSE LAWYERING, *supra* note; Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, *in* CAUSE LAWYERING, *supra* note (Austin Sarat and Stuart Scheingold eds., 1998). Although generative, the cause lawyering frame had downsides. For one, it circumscribed analysis by framing case lawyering within the paradigm of understanding the motivation and roles of lawyers, thus generally avoiding inquiry into the social consequences of legal mobilization. Additionally, by positioning the cause lawyer in contrast to the conventional lawyer, Sarat and Scheingold seemed to miss Simon's central point, which was that lawyers were never neutral.

[333] Thomas Hilbink, *You Know the Type...: Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657 (2004).

[334] Jane Larson, *Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s*, 87 NW. U. L. REV. 1252 (1993).

[335] Barbara L. Bezdek, *Reflections on the Practice of a Theory: Law, Teaching, and Social Change*, 32 LOYOLA L.A. L. REV. 707 (1999); *see also* Loewy, *supra* note, at 1878 (showing that "multilayered strategies of legal advocacy organizations recognize the necessity for these different approaches"); *see also* Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic,* 150 U. PA. L. REV. 173, 177 (2001).

[336] Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1144 (1995) (saying civic humanism comes closes to matching LDF's work, "transformative in purpose, yet cunningly incremental in execution.").

[337] MARTIN DUPIUS, SAME-SEX MARRIAGE, LEGAL MOBILIZATION AND THE POLITICS OF RIGHTS (2002).

[338] William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997); *see also* Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 24 NYU REV. L & SOC. CHANGE 487 (1999).

[339] Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 GEO. J. LEGAL ETHICS 155 (2006); *see also* Michelle N. Meyer, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 HARV. L. REV. 1510, 1528 (2006).

[340] John O. Calmore, *"Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professioal Re-Socialization*, 37 LOYOLA L.A. L. REV. 1167, 1204 (2004); Eric Mann, *Radical Social Movements and the Responsibility of Progressive Intellectuals*, 32 LOYOLA LA L. REV. 761, 766 (1999); David R.

limiting social transformation and locating power in the hands of legal elites, continued to hold sway. Although scholars had decisively rejected top-down visions of social change in favor of pragmatic bottom-up strategies that avoided the foundational critiques role of courts and lawyers, they had yet to articulate an affirmative vision of how to connect bottom-up legal struggle to broad-based structural reform. Reflecting on this state of affairs, Orly Lobel criticized progressive scholars for moving "outside of law," arguing that by abandoning transformative visions of law "in the service of indirect effects," progressives risked ceding law as a "vehicle for conservative agendas."[341] The time for change had arrived.

Rice, *The Bus Rider's Union: The Success of the Law and Organizing Model in the Context of an Environmental Justice Struggle*, 26 ENVIRONS: ENVTL. L. & POL'Y J. 187 (2003); Austin Sarat, *Recapturing the Spirit of* Furman: *The American Bar Association and the New Abolitionist Politics*, 61 L. & CONTEMP. PROBS. 5 (1998).

[341] Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciounsness and Transformative Politics*, 120 HARV. L. REV. 937 (2007).

Figure 2: Progressive Positions on the Law-Politics Problem

	PROCESS	LIBERAL	CRITICAL	PRAGMATIC
Position in Politics	• majority • class-oriented	• minority • identity-oriented	• majority • class-oriented	• dynamic • mixed
View of Law	• negative • concerned with legitimacy costs of courts acting against majorities • preserve legitimacy through neutrality	• strong positive • concerned with legitimacy costs of courts failing to act against majorities • promote legitimacy through equality	• strong negative • concerned with legitimacy as barrier to radical politics • undermine legitimacy through critique	• weak positive • concerned with legitimacy as a tool for reformist politics • build new visions of legitimacy
View of Politics	• functional • support majoritarian politics of reform	• partially flawed • support countermajoritarian politics of reform	• fundamentally flawed • support majoritarian politics of transformation	• partially flawed • support multifaceted politics of reform
Role of Social Movements	• reform law through institutional politics	• defer to law	• transform political system	• reform law through noninstitutional politics
Role of Courts	• deferential judicial review (federal) in favor of majoritarian politics vs. elite power	• activist judicial review (federal) in favor of countermajoritarianism vs. local politics of identity-based subordination	• generally misdirect radical politics • forum for political protest	• useful for achieving indirect effects; potential risks/benefits in winning and losing
Role of Lawyers	• independent professional expertise in the public interest • lawyer for the situation	• activist lawyering in favor of countermajoritarian politics • public interest lawyer	• expose politics of law • radical lawyer	• leverage law to advance constituency goals • cause lawyer
Law-Politics Resolution	• law entirely independent from politics • specialization (administrative state)	• law trumps politics • specialization (federal courts)	• law equals politics • revisionist (mobilize politics to reshape law)	• law relatively independent from politics (mobilize law for discrete gains in politics) • nonspecialization (make law in different spheres)
Period	• New Deal	• Civil Rights	• Conservative	• Polarization

III. THE EMPIRICAL PATH OF LAW: COURTS, LAWYERS, AND MOVEMENTS IN SOCIAL SCIENCE

The moment at which law and social movements intersect in progressive legal theory is also the moment at which law and social science intersect more broadly within mainstream legal scholarship. By the 1990s, what would shortly become the "empirical legal studies" revolution in law—what some scholars would hail as the "new legal realism"—was gaining momentum.[342] This revolution would build upon a long-standing tradition of interdisciplinarity led by law-and-society scholars, but would channel social science into the scholarly mainstream in ways that departed from the theoretical and political aims of the law-and-society movement. Understanding the role that social movements would come to play in progressive legal theory requires understanding the underlying empirical framework for evaluating courts, lawyers, and movements that would be incorporated. This Part provides that essential background, tracing the trajectory of relevant social science research up to the point of the social movement turn in law. It makes two basic points.

First, this Part reveals the development of two general approaches to thinking about the empirical relationship between law and social change. One approach was to look at what caused groups to mobilize law for policy change and whether such mobilization produced significant change through courts. This literature, organized around the *inputs* to legal reform, debated whether litigation or broader political trends explained changes in legal doctrine. The other approach was to ask whether legal reform, once achieved, made a difference in society. This literature, organized around the *outputs* of legal reform, debated whether changes in legal doctrine produced compliance or ignited backlash. The key is to show that, by the time this literature is incorporated into law, there are fundamental disagreements within each approach about the significance of different causal factors. The second main point advanced in this Part is that research on social movements in the field of sociology developed along a parallel track, organized around a similar input-output framework that also contained deep scholarly divisions. When the field of "law and social movements" develops, it does so not simply by borrowing concepts and findings from social science, but taking sides in debates.

A. Law in Social Movements

Prior to the 1950s, there was no serious empirical analysis of the political role of lawyers and courts, the reasons for and impact of litigation, and the relation of law to social movements.[343] As it did with law, *Brown* transformed the social science field, galvanizing scholarly attention across disciplines by reframing what lawyers and courts

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[342] Kate Kruse, *Getting Real about Leagl Realism, New Legal Realism, and Clincial Legal Education*, 56 N.Y. LAW REV. 659, 662 (2011/12); *see also* Howard Erlanger et al., *Is it Time for a New Legal Realism*, 2005 WIS. L. REV. 335.

[343] *See* JEROME SNOLNICK, THE SOCIOLOGY OF LAW IN AMERICA: OVERVIEW AND TRENDS, SOCIAL PROBLEMS 5 (1965).

did as part of a broader social process of policymaking,[344] in which litigation served as a vehicle for underrepresented groups to exercise political voice,[345] while courts acted as important producers of public policy in their own right.[346] Scholars in political science and sociology quickly divided up the field. On one side, they looked at "inputs" into the judicial process: analyzing whether litigation or politics caused courts to issue opinions of social import. On the other, scholars sought to evaluate judicial "outputs," asking what impact, if any, court decisions had on social behavior. Within each domain, sharp disagreements broke out, with some scholars drawing optimistic conclusions about the power of lawyers and courts to produce progressive change, while others remained deeply pessimistic.

1. Inputs: Legal Mobilization

On the input side, where the main question was why courts issued groundbreaking decisions, political scientists (most invested in the political role of the judiciary) took the lead, vigorously debating two types of causal mechanisms. In one camp were those who claimed that planned litigation campaigns of the type employed by the NAACP in *Brown* were the decisive causes of constitutional law changes, like *Brown* itself and *Shelley v. Kraemer* before it.[347] Here, scholars contended that what caused significant Supreme Court policy shifts was investment in legal capacity by challenger groups,[348] which facilitated planning, shaped the court's agenda,[349] and imposed decisional

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[344] *See* CASPER, LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957-66 (1972); *see also* WALTER F. MURPHY, CONGRESS AND COURTS (1962) (analyzing the legal brinksmanship between the Warren Court and Congress attempting to reverse it on some issues).

[345] Richard C. Cortner, *Strategies and Tactics of Litigants in Constitutional Cases*, 17 JOURNAL OF PUBLIC LAW 287, 287 (1968) (stating that some groups "are highly dependent on the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy"); Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 20, 21 (1958) (stating that legal groups "link broad interests in society to individual parties in Supreme Court cases"); *see also* JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW (1959); GEORGE EATON SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES (1958); Lewis M. Killian, *Myrdal, Sumner, and the Desegregation Crisis*, *in* THE NEGRO IN AMERICAN SOCIETY 65-70 (1958); Ronald M. Rose, *Sociological Factors in the Effectiveness of Projected Legal Remedies*, JOURNAL OF LEGAL EDUCATION 470 (1959); Clement E. Vose, *Litigation as a Form of Pressure Group Activity*, 319 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 20, 21 (1958).

[346] JACK W. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 65 (1955). A decade after *Brown*, one scholar could note that "the suggestion that courts participate in the making of public policy is still shocking to many Americans." George W. Spicer, *The Federal Judiciary and Political Change in the South*, 26 THE JOURNAL OF POLITICS 154, 154 (1964); *see also* MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE (1964).

[347] CLEMENT E. VOSE, CAUCASIONS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES (1959).

[348] VOSE, *supra* note, at 252

[349] *See* HERBERT JACOB, DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES (1969); WALTER V. SCHAEFER, PRECEDENT AND POLICY (1956); Charles D. Breitel, *The Courts and Lawmaking*, *in* LEGAL INSTITUTIONS TODAY AND TOMORROW 1 (M. Paulsen ed., 1959).

pressure.[350] In short, lawyers and strategic litigation were decisive. In the other camp were scholars who claimed that broader trends in politics was what mattered the most. Robert Dahl famously made this case, arguing that Supreme Court decisions ultimately reflected the values of the dominant political alliance, despite some time lag, because the Justices were the product of judicial appointment by that alliance.[351] While this position recognized a role for lawyers and litigation, it ultimately attributed legal development to broader structural shifts in politics and elite attitudes.[352]

Notable about both positions was that they generally accepted the representational function of legal organizations like the NAACP and the political legitimacy of the court decisions flowing out of their campaigns—positions that were being debated within the legal academy. Just as the critical intervention disrupted legal scholarship on the democratic role of courts and lawyers, Stuart Scheingold's attack on the "myth of rights" redefined the terms of debate within law-and-society research. Writing out of a dissident tradition in political science, Scheingold's key move was to associate the litigation activity of public interest groups with the pursuit of individual rights and systemic legitimacy, and to then characterize that pursuit as ideological mystification: "The principal impact of the myth of rights is on cognition and, more specifically, on perceptions of legitimacy."[353] By confusing rights with results, this mythology promoted "acquiescence" and generated "support for the political system by legitimating the existing order."[354] Linking the failure of court enforcement to the litigation that produced it, Scheingold's analysis for the first time assigned blame for the misguided pursuit of rights to activist lawyers themselves, suggesting "that the problem with litigative approaches may be less with the strategy than with the strategists."[355] In addition, Scheingold argued that litigation was effectively useless in achieving the direct results which it sought: "Without support of the real power holders, then, litigation is ineffectual and at times counterproductive. With that support, litigation is unnecessary."[356] Litigation, in this view, was only effective in promoting so-called "indirect" effects: "a dual process of activating a quiescent citizenry and organizing groups into effective political units."[357] Here, too, Scheingold was critical of "activist lawyers," who he said "tend to be ill-equipped for and

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[350] *See* Cortner, *supra* note, at 288.

[351] Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 JOURNAL OF PUBLIC LAW 279, 293 (1958); *see also* STUART S. NAGEL, COURT-CURBING PERIODS IN AMERICAN HISTORY 9 (analyzing the effect of efforts by presidents to curb court action).

[352] *See*, *e.g.*, RICHARD J. RICHARDSON & KENNETH N. VINES, THE POLITICS OF FEDERAL COURTS (1970); Joel B. Grossman & Austin Sarat, *Political Culture and Judicial Research*, 1971 WASH. U. L. REV. 177; Glendon Schubert, The Juducial Mind: Attitudes and Ideologies of Supreme Court Judges, 1946-1963 (1965); *see also* MCCLOSKY, THE AMERICAN SUPREME COURT 224 (1960) ("It is hard to find a single instance when the court has stood firm for very long against a really clear wave of public demand.").

[353] STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 90 (1974).

[354] *Id.* at 91.

[355] *Id.* at 95.

[356] *Id.* at 118.

[357] *Id.* at 131.

(therefore?) ill-disposed toward mobilization."[358] Building off of this foundation, he added that by choosing rights, activist lawyers diverted energy and potentially resources away from more productive mobilization strategies and worked an additional harm by promoting "one-on-one conflicts within the framework of the adversary process" in ways that tended to "fractionalize political action—dividing rather than uniting those who seek change."[359]

After Scheingold's intervention, research split into two streams. Mainstream political science carried forward its interest in the role of litigation and courts in democracy,[360] building upon the earlier input studies on why marginalized groups turned to court and why courts made transformative policy decisions. In this phase, scholars paid increasing attention to the role of public opinion in court decision making, testing the validity of Dahl's seminal theory of the Supreme Court.[361] Researchers following Dahl investigated how public opinion influenced judicial decision making through two mechanisms. In one, public opinion shaped judicial ideology through the political process: public opinion was expressed through the election of new officials, who would in turn appoint judges who roughly shared their views. The other mechanism was more direct: judges concerned with court legitimacy were seen to be independently sensitive to shifts in public opinion. Political scientists debated the impact of opinion through these mechanisms and familiar splits emerged.

On one side were scholars who denied that the empirical evidence showed a strong link between opinion and judicial decision making. In this vein, Jonathan Casper argued that the evidence did "not tend to support Dahl's thesis," instead revealing a Supreme Court quite willing to strike down federal legislation and intervene to protect minority rights in ways that were more aggressive than what would be expected based on mainstream political values.[362] Other studies suggested that Court decisions were not consistent with "diffuse or inchoate values widespread among Americans," but were influenced by "the complex interaction between ideological activists, ideological elites, the nation's institutional and structural arrangements, and the character of dominant political majorities in the United States."[363] Yet by the early 1990s, public opinion had become the focal point of new scholarship questioning the idea that the Supreme Court was a countermajoritarian institution at all. In an important intervention, Mishler and

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[358] *Id.* at 210.

[359] *Id.* at 214.

[360] *See* ANDREW C. JANOS, POLITICS AND PARADIGMS: CHANGING THEORIES OF CHANGE IN SOCIAL SCIENCE (1986); DAVID RICCI, THE TRAGEDY OF POLITICAL SCIENCE: POLITICS, SCHOLARSHIP, AND DEMOCRACY (1984).

[361] Weissberg offered a broader assessment of the role that public opinion played in government, questioning how intelligible public policy is and how possible and desirable it is to achieve "opinion-policy congruence." ROBERT WEISSBERG, PUBLIC OPINION AND POPULAR GOVERNMENT 6-7 (1976).

[362] Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976).

[363] David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 L. & POL. Q. 405 (1983); *see also* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) (arguing that "the justices have most often exercised their power to declare state and federal practices unconstitutional only when the dominant national coalition is unable or unwilling to").

Sheehen claimed data from 1956 through 1989 showed court decisions tracking public opinion after a short time lag, supporting the view of a majoritarian, responsive court.[364] Researchers focused on the decisive influence of judicial attitudes, which tended to be congruent with the president and congress that appointed them,[365] although not always so.[366] Reflecting on the newly privileged status of public opinion in models of Supreme Court adjudication, some researchers noted the historical irony: public opinion, once reviled by political scientists like Walter Lippman as irrational and dangerous to democracy, was now being asserted as a benign force that kept the Supreme Court in check.[367]

The second research strand followed Scheingold's earlier lead. Michael McCann, building on the sociological concept of legal mobilization developed in the individual disputing context, developed an alternative conceptual framework that provided a bridge to the growing law and social movement field. Taking the point of view of the lawyers,[368] rather than the court, and focusing on how the lawyers mobilized law at the lower court level, McCann concluded that legal mobilization had important positive effects in the pay equity movement, particularly in the early phases of movement building and policy reform.[369] Although McCann concluded that reform litigation was of limited effectiveness in promoting legal implementation, he was more optimistic about its "indirect" effects, emphasizing how law was used by activists to achieve policy concessions, build movement infrastructure, and transform the legal consciousness of the actors involved.[370] Positing an "interpretative, process-oriented legal mobilization approach," emphasizing the "intersubjective power of law in constructing meaning," McCann argued that law could advance movements in multiple ways: by acting as a "catalyst;" providing "formidable tactical leverage for social political advocates;" "generating responsive action" to basic policy demands; "winning voice, position, and influence in the process of reform policy implementation," and shaping the way ordinary people understood the power of law in their day-to-day lives.[371] Instead of law coming in from the top-down to damage

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[364] William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96-97 (1993).
[365] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).
[366] William Mishler & Reginald S. Sheehan, PUBLIC OPINION, THE ATTITUDINAL MODEL, AND SUPREME COURT DECISION MAKING: A MICRO-ANALYTIC PERSPECTIVE, 58 J. POLITICS. 169, 197 (1996).
[367] *See id.*
[368] Michael McCann & Helena Silverstein, *Rethinking Law's Allurements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note; Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANNU. REV. LAW SOC. SCI. 17 (2006).
[369] MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).
[370] Michael McCann, *How Does Law Matter for Social Movements?*, *in* HOW DOES LAW MATTER? 76 (Garth & Sarat eds., 1998); *see also* McCann, *Social Movements and the Mobilization of Law*, *in* SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS (Costain & McFarland eds. 1998);
[371] McCann, *How Does Law Matter*, *supra* note.

movements, it was seen as integrally linked to day-to-day struggle, advancing from the bottom-up.[372]

2. Outputs: Legal Impact

Output-oriented research focused on whether court decisions, once rendered, made a difference in the world—or, in scholarly parlance, whether they had a "social impact."[373] Again, empirical disagreements quickly surfaced. Political scientists in the two decades after *Brown* produced an impressive body of "court impact" studies: the central result of which was to repeatedly show that court decisions generally, and Supreme Court decisions in particular, failed to translate into robust social change on the ground.[374] This research measured the impact of a vast range of legal decisions—in the areas of religion,[375] civil rights,[376] civil liberties,[377] and criminal law[378]—on direct

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[372] Meranto, *Litigation as Rebellion*, *in* SOCIAL MOVEMENTS AND AMERICAN POLITICAL INSTITUTIONS, *supra* note, at 216.

[373] *See* R. Bauer, *Detection and Anticipation of Impact: The Nature of the Task*, *in* SOCIAL INDICATORS 1 (R. Bauer ed. 1966).

[374] Compliance studies swept more broadly than court impact, also exploring everyday compliance with basic social regulation. *See*, *e.g.*, Donald T. Campbell & H. Laurence Ross, *The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis*, 3 LAW & SOC'Y REV. 33 (1968); Johannes Feest, *Compliance with Legal Regulations: Observation of Stop Sign Behavior*, 2 LAW & SOC'Y REV. 447 (1968).

[375] WILLIAM K. MUIR JR., PRAYER IN THE PUBLIC SCHOOLS (1967); W.M. Beaney & Edward Beiser, *Prayer and Politics: The Impact of Engel and Schempp on the Political Process*, 13 J. PUBLIC LAW 475 (1964); Gordon Patric, *The Impact of a Court Decision: Aftermath of the McCollum Case*, 6 J. PUB. L. 455, 455 (1957); F.J. Sarouf, *Zorach v. Clauson: The Impact of a Supreme Court Decision*, 53 AMER. POL. SCI. REV. 777 (1959); H. Frank Way, Jr., *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 2 WESTERN POL. Q. 21 (1968); *see also* Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the Schempp Decision*, 10 MIDWEST J. POL. SCI. 305 (1966) (studying the reaction of Tennessee school districts to the Court's decision in *Abington School District v. Schempp*, in which it struck down a Tennessee statute requiring Bible reading; showing that despite decision, 70 of 121 school districts were still following state law).

[376] HARRELL R. RODGERS JR. & CHARLES S. BULLOCK, LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES (1972); *see also* ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL DESEGREGATION CASES (1957); ROBERT L. CRAIN, THE POLITICS OF SCHOOL DESEGREGATION: COMPARATIVE CASE STUDIES OF COMMUNITY STRUCTURE AND POLICY MAKING (1968).

[377] SAMUEL KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM (1968) (on free speech, privacy, and assembly); Levine, *The Supreme Court and Sex Censorship: A Study of Judicial Efficacy*, *in* THE AMERICAN POLITICAL ARENA (Fiszman ed., 1970).

[378] *See*, *e.g.*, Thomas Barth, *Perception and Acceptance of Supreme Court Decisions at the State and Local Level*, 17 J. OF PUBLIC LAW 308 (1968) (studying whether court decisions on defendant rights affected district attorney behavior); Note, *Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967) (showing that police interrogation practices only partly adhere to *Miranda* 25 of 118 suspects were informed of their rights); Richard J. Medalie, Leonard Zeitz & Paul Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1966) (finding that although 40% of arrestees were given *Miranda* warnings, only 7% invoked their right to counsel); *but see* MILNER, THE COURT AND LOCAL LAW ENFORCEMENT (1971) (studying Wisconsin police departments in first year after *Miranda* came down and suggesting that the decision had the effect of increasing the professionalization and standardization of interrogation procedures); RICHARD H. SEEBURGER & R. STANTON WETTICK, JR., MIRANDA IN PITTSBURGH—A STATISTICAL STUDY, IMPACT OF SUPREME COURT 150 (showing that the percentage of confessions dropped after *Miranda*).

compliance (by public officials and private individuals) and public opinion. Although there was some variation, the overwhelming thrust of this literature was to validate the realist insight: showing that law on the books diverged from the law in action, thus revealing the "banality of noncompliance,"[379] while casting doubt on the power of courts to produce meaningful social reform.

Critics challenged impact studies on methodological and conceptual grounds. While some political scientists issued an internal critique, the most strident challenges were voiced by legal sociologists. First, impact studies came under methodological fire for jumbling outcome measures,[380] making unfounded causal inferences,[381] and relying on inadequate theory.[382] Responding to these problems, scholars (mostly sociologists) aligned with the law-and-society movement showed how legal decisions could, in fact, produce favorable results in criminal procedure and school desegregation cases.[383] A related criticism focused on the impact research's failure to compare its findings on courts to analogous research on the barriers to enforcement of legislatively enacted laws, which revealed similar barriers to enforcement that called into question the unique nature of noncompliance in the judicial context.[384] Some critics went deeper, arguing that the court impact tradition was based on flawed premises about legal

[379] K.M. DOLBEAR & P.E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE (1971).

[380] James P. Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, 4 LAW & SOC'Y REV. 583, 583 (1970).

[381] James P. Levine & Theodore L. Becker, *Toward and Beyond a Theory of Supreme Court Impact*, 13 AMERICAN BEHAVIORAL SCIENTIST 561 (1970).

[382] Malcolm M. Feeley, *Power, Impact, and the Supreme Court*, *in* Impact of Supreme Court Decisions 218, 225 (Theodore Becker & Malcolm Feeley 1973).

[383] *See* Norman Lefstein, Vaughan Stapleton & Lee Teitelbaum, *In Search of Juvenile Justice—Gault and Its Implementation*, 3 LAW & SOC'Y REV. 491 (1969) (due process rights for minors); *Comparative Analysis of the Eight Cities*, 2 LAW & SOC'Y REV. 90 (1967) (school integration); *see also* Donald T. Campbell & H. Laurence Ross, *Connecticut Crackdown on Speeding—Time-Series Data in Quasi-Experimental Analysis*, 3 LAW & SOC'Y REV. 33 (1969). On the emergence of law and society and its project of promoting a "liberal political agenda," see Richard L. Abel, *Law and Society: Project and Practice*, 6 ANN. REV. L. SOC. SCI. 2 (2010); see also Bryant Garth & Joyce Sterling, *From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State*, 32 LAW & SOC'Y REV. 409 (1998).

[384] STEPHEN L. WASBY, THE IMPACT OF THE SUPREME COURT (1970); Stephen L. Wasby, *The United States Supreme Court's Impact: Broadening Our Focus*, 49 NOTRE DAME L. REV. 1023 (1973-1974). For studies of compliance in other domains, see EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1978) ("after a policy mandate is agreed to, authorized, and adopted, there is underachievement of stated objectives,…delay, and excessive financial cost."); JEFFREY L. PRESSMAN & AARON B. WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (1973) (demonstrating problems in implementing employment program in Oakland, which hinged on providing capital to businesses rather than subsidizing wages); *see also* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES (1973); FREDERICK M. WIRT, POLITICS OF SOUTHERN EQUALITY: LAW AND SOCIAL CHANGE IN A MISSISSIPPI COUNTY 282-283 (1970); Edwin M. Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 423; Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338 (1975).

autonomy. From their theoretical perspective, society deeply constrained law,[385] and thus gaps between law on the books and law in action were a feature of the system, not a bug.[386] In this vein, Richard Abel questioned the entire project of court impact studies since they presumed a correspondence between law and society that did not exist, producing skewed results and focusing undue attention on the Supreme Court.[387] This observation reframed the discussion in more positive terms by suggesting that courts could be useful allies in social change, pushing society beyond where it would otherwise go—even if that was not to the point of complete change.

Picking up this thread, Joel Handler's analysis of social movements and the legal system was foundational, for the first time drawing together court impact studies with nascent sociological research on social movements.[388] Yet rather than analyze the impact of law on social movements, Handler conceptualized liberal rights organizations, like the ACLU and NAACP, as social movement organizations themselves, thus focusing analysis on why they formed and what impact their formation had on legal outcomes. In this sense, though he linked together theories of organizational formation and outcomes that had defined the political science tradition, in did so in a way that ultimately reinforced its basic conclusion: that outcomes hinged on the nature of the judicial relief sought and whether it required a long-term commitment of bureaucratic resources and agency-level discretion to implement. Like court impact studies, he thus viewed courts as generally ineffective at producing "direct effects," though he sounded a more optimistic note about the role of lawyers in producing positive indirect benefits, like changing elite attitudes or raising consciousness.[389]

Beginning in the 1980s, public opinion was also in ascendance in output research as scholars in the court impact tradition began looking at the courts' ability to shape public opinion with its decisions. Predictably, there was more empirical disagreement: while some argued that "the Supreme Court probably shapes aggregate distributions of public opinion,"[390] others cautioned that court opinions affected public attitudes in complex ways depending on how the opinion was treated within the broader political environment: controversial cases could produce consensus when there was greater homogeneity of opinion, but could split and polarize when "the social environment is

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[385] Carl C. Auerbach, J. PUBLIC LAW 446 (1960) ("It is, of course, very difficult to say what change is cause; and which, effect."); *see also* Ernest M. Jones, *Impact Research and Sociology of Law: Some Tentative Suggestions*, 1966 WISC. L. REV. 331.

[386] GLYNN COCHRANE, DEVELOPMENT ANTHROPOLOGY (1971) (stating that "it is society that controls law and not the reverse").

[387] Richard L. Abel, *Law Books and Books about Law*, 26 STAN. L. REV. 175, 185 (1973) ("Why should we expect harmony between law and behavior rather than some other relationship—dissonance, for instance, or a purely accidental conjunction?").

[388] JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978).

[389] *Id.*

[390] Gregory A. Caldeira, *Courts and Public Opinion*, *in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 312 (John B. Gates & Charles A. Johnson eds., 1991).

heterogeneous."[391] Attitudes were also seen as related to the effectiveness of legal implementation, with scholars finding positive correlations between Supreme Court decisions like *Roe* and policy implementation in situations where officials had favorable attitudes toward the decisions.[392] While some critical scholars continued to take impact studies to task for assuming a consonance between law and society that did not exist and inaccurately focusing on hard cases "where law is least likely to be effective,"[393] others took the opposite tack: arguing that even when legal opinions were successfully implemented, they could hurt the social movements they intended to help by forcing them to reframe their grievances within "governmental forms and structures of the dominant society."[394]

Coming out of political science, Gerald Rosenberg in his influential book *The Hollow Hope*, offered what would be the apotheosis of court impact studies of the civil rights era.[395] The project was impressive in its scope and ambition, which was to determine "whether, and under what conditions, courts produce significant social reform."[396] To do so, Rosenberg went beyond scholars before him in two ways. First, he developed a sophisticated theoretical model of the "Constrained Court," which presumed that "courts will generally not be effective producers of significant social reform for three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation."[397] He then hypothesized conditions under which court decisions could overcome this presumption—namely, when the legal claim was based on strong precedent and had substantial elite and public support—and established a framework of outcome measures—broken into direct enforcement and "indirect

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[391] Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751 (1989). Scholars also argued that opinion was shaped by race. James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120 (1992).

[392] Jon R. Bond & Charles A. Johnson, *Implementing a Permissive Policy: Hospital Abortion Services after* Roe v. Wade, AM J. POL. SCI. 1 (1982); Kathleen A. Kemp, Robert A. Carp & David W. Brady, *The Supreme Court and Social Change: The Case of Abortion,* 31 W. POL. Q. 19 (1978). Other scholars found organizational culture to be critical to decisional impacts, while still others noted that lower court enforcement was stronger when the issue area was relatively uncontroversial. Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L.J. 513 (1980); John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502 (1980); Donald R. Songer & Reginald S. Sheehan, *Supreme Court Impact on Compliance and Outcomes:* Miranda *and* New York Times *in the United States Courts of Appeals*, 43 W. POL. Q. 297 (1990).

[393] Austin Sarat, *Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. F. 23, 27-30 (1985); *see also* Ralph Cavanagh & Austin Sarat, *Thinking about Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 L. & SOC. REV. 371 (1981) (criticizing the argument that courts should not engage in policy making functions because they do not have the institutional competence to deal with such matters); Donald R. Songer, *Case Selection in Judicial Impact Research*, 41 W. POL. Q. 569 (1988) (criticizing the methodology for selecting lower court cases in impact research).

[394] Rita Bruun, *The Boldt Decision: Legal Victory, Political Defeat*, 4 LAW & POL. Q. 271 (1982).

[395] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[396] Id. at 9.

[397] *Id.* at 11.

effects" on public opinion and political mobilization—to test his hypothesis. Second, Rosenberg amassed a formidable amount of empirical data to investigate the relationship between court decisions and social change across the iconic issue areas of legal liberalism: civil rights (particularly *Brown*) and women's rights (particularly *Roe*), as well as the environment, voting, and criminal procedure. On the basis of this sweeping analysis, he offered his famous conclusion: that "U.S. courts can almost never be effective producers of significant social reform."[398]

Rosenberg's controversial analysis of *Brown*—that the decision produced no meaningful desegregation and instead of generating public support, provoked political backlash—received the most attention.[399] There were two key findings that would prove critical to subsequent legal scholarship. With respect to the direct effect of *Brown* on segregation—measured by the percentage of black children enrolled with whites in the South—Rosenberg argued that the opinion itself produced no meaningful change in the decade after *Brown*. And that it was only with the arrival of the 1964 Civil Rights Act, which threatened to cut off federal funding for segregated schools, that there was significant desegregation. In short, the lesson was that while legislation worked to produce integration, the judicial decision did not. The second finding was to deny any substantial indirect effect of *Brown* on public opinion or movement activism. Rosenberg's analysis was that although there was substantial elite support for desegregation prior to the court's 1954 decision, the decision itself caused a retrogression of support and, among Southern whites, contributed to backlash.[400] Moreover, he concluded based on a review of media material that there was no evidence that *Brown* contributed to the direct mobilization of the civil rights movement.[401] In doing so, for the first time, Rosenberg had succeeded in shifting the case against the court's decision in *Brown* from the ground of legal neutrality to the ground of legal efficacy.[402] Not only was *Brown* deemed ineffective, it was claimed to have hurt the very cause it purported to support.[403] It was at this moment that social scientific study of courts, lawyers, and social change would reach a climax, with the clash of two approaches—one rooted in the political science court impact tradition and the other in the sociological study of legal mobilization—that would provide the intellectual

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[398] *ROSENBERG, supra note* at 338.
[399] *Id.* at 70-75.
[400] *Id.* at 75.
[401] *Id.*
[402] Scholars took aim at both his methodology and his interpretations of the data. *See* Malcolm Feeley, *Hollow Hopes, Flyper, and Metaphors*, 17 LAW & SOC. INQUIRY 745 (1992); Jonathan Simon, *"The Long Walk Home" to Politics*, 26 LAW & SOC'Y REV. 923 (1992).
[403] McCann drew a sharp conceptual division between his approach and Rosenberg's, which he viewed as resting upon a "positivist" conception of law as entirely autonomous from society. This split between the two set the foundation for the debate underlying the next wave of legal academic research on law and social movements: offering competing conceptual frameworks (legal impact versus legal mobilization), competing perspectives (courts versus law), and competing evaluations on the potential of law as a progressive tool. For the classic debate between the two, see Michael McCann, *Causal Versus Constitutive Explanations (or, On the Difficulty of Being So Positive…)*, 21 LAW & SOC. INQUIRY 457 (1996); Gerald Rosenberg, *Positivism, Interpretivism, and the Study of Law*, 21 LAW & SOC. INQUIRY 435 (1996).

foundation for the impending conversation about social movements in the legal academy.

B. Social Movements outside of Law

Beginning in the 1970s, social movements became central to legal scholar's critique of courts and lawyers—but as an alternative political ideal, not actors in their own right. Yet just as they were being implicitly offered in the legal academy as models of direct democracy negated by legal liberalism, they were being dissected within sociology,[404] generating a parallel critical discussion about the role of movements in liberalism's decline.[405] Despite exploring similar themes—especially the potential for elite cooptation and the demobilizing effect of seeking reform through the state—law and social movement research stood apart as critiques of liberalism that did not intersect.

There were also important parallels between the new sociology of social movements and the political science research on litigation and courts. Just as political science had responded to *Brown* by reframing litigation as an alternative form of representative democracy by excluded minority groups, sociology began to conceive of social movements in the same terms. In contrast to earlier understandings of social

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[404] Burstein, *supra* note, at 1205. Within social science, scholarship on social movements did not take off until after the civil rights movement had occurred. Early theorists understood collective behavior, like social movements, as a product of social dysfunction: an expression of the breakdown of structures of social integration caused by rapid transformation. In this sense, movements were viewed as deviant, not part of the normal apparatus of political expression. *See* Doug McAdam, John D. McCarthy & Mayer N. Zald, *Social Movements*, *in* HANDBOOK OF SOCIOLOGY 696 (Neil J. Smelser ed., 1988). Reflecting the time lag between social and theoretical development, the seminal work during this time did not yet link movement formation to the advancement of political change by minority groups—as the civil rights movement would crystallize—but rather on the relationship between "social strain" and forms of "collective action" associated with totalitarianism: crowds, riots, rebellion, revolution, and nationalism. *See* ANTHONY OBERSHALL, SOCIAL CONFLICTS AND SOCIAL MOVEMENTS 32 (1973); *see also* TED ROBERT GURR, WHY MEN REBEL (1970); KURT LANG & GLADYS ENGEL LANG, COLLECTIVE DYNAMICS (1961); THEODORE LOWI, THE POLITICS OF DISORDER (1971); NEIL J. SMELSER, THE SOCIOLOGY OF ECONOMIC LIFE (1963); RALPH H. TURNER & LEWIS M. KILLIAN, COLLECTIVE BEHAVIOR (1972); Roger Brown, *Collective Behavior and the Psychology of the Crowd*, *in* SOCIAL PSYCHOLOGY 709 (1965); James C. Davies, *Toward a Theory of Revolution*, 27 AM. SOC. REV. 5 (1962). Joseph R. Gusfield, *The Study of Social Movements*, *in* ENCYCLOPEDIA OF SOCIAL SCIENCES 445 (1968); Gary T. Marx & James L. Wood, *Strands of Theory and Research in Collective Behavior*, 1 ANN. REV. SOC. 363, 376 (1975); *see also* PORTA & DIANI, *supra* note, at 7 (structural functionalists viewed "collective action as the exclusive product of malfunctions of the social system or, more specifically, of its integrative apparatus"). This scholarship built on social psychological theories of irrationality to channel human action into various forms of antidemocratic behavior. *See* STEVEN M. BUCHLER, UNDERSTANDING SOCIAL MOVEMENTS: THEORIES FROM THE CLASSICAL ERA TO THE PRESENT 76 (2011) ("Movements were too political for sociology and too unorthodox for political science."); *see also* DONATELLA DELLA PORTA & MARIO DIANI, SOCIAL MOVEMENTS: AN INTRODUCTION 2 (1999).

[405] While the sociology of social movements was largely absent through the 1960s, caught "off guard" by the "social turbulence that shook the United States and many European countries," it exploded over the next decade. McAdam, McCarthy & Zald, *Social Movements*, *supra* note, at 695. For a review, see PORTA & DIANI, *supra* note, at 2; see also ALBERTO MELUCCI, JOHN KEANE, PAUL MIER, NOMADS OF THE PRESENT: SOCIAL MOVEMENTS AND INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY (1989); ALAIN TOURAINE, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS (1981).

movements as outside of politics,[406] civil rights protest had reframed movement activism as "simply politics by other means,"[407] in which movements emerged to "represent the interests of groups excluded from the polity."[408] For movement scholars in this initial wave, litigation specifically and law in general were mentioned only in passing, part of the political context within which movement actors calculated strategy—but not a central part of that strategy itself. This was in part a *definitional* choice, with scholars seeking to distinguish movements from interest groups and thus to distinguish movement strategy from "institutional" politics, like lobbying, legislative advocacy, and presumably (though not explicitly) litigation.[409] Again echoing the political science literature on social change litigation, social movement research during this period was organized around a framework of inputs and outputs,[410] in which the question of causation and meaning of impact were sharply debated.

With respect to the question of what caused movements to emerge, debate centered on the relative importance of internal (organizational) versus external (political) factors.[411] The key issue was what mattered most in translating grievances into collective challenges to power[412]—the concept of "mobilization."[413] In the ensuing exchange,[414] on one side was resource mobilization theory, drawing upon classical economics to argue that the availability of organizational resources and how they were

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[406] *See* J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOCIOLOGY 529; *see also* RALPH H. TURNER & LEWIS M. KILLIAN, COLLECTIVE BEHAVIOR 246 (1972); PAUL WILKINSON, SOCIAL MOVEMENTS 27 (1971). Early sociology attempted to define types of social movements according to their ultimate aims (transformative or incremental) and their degree of organization. *See* Herbert Blumer, *Collective Behavior*, *in* AN OUTLINE OF THE PRINCIPLES OF SOCIOLOGY (Alfred M. Lee ed., 1939). Joseph Gusfield, *The Study of Social Movements*, *in* ENCYCLOPEDIA OF THE SOCIAL SCIENCES 445-52 (1968); Marx & Wood, *supra* note. RALPH H. TURNER AND LEWIS M. KILLIAN, Collective Behavior 223 (3rd ed. 1987).

[407] WILLIAM GAMSON, THE STRATEGY OF SOCIAL PROTEST 138-39 (1975).

[408] Jenkins, *supra* note, at 529; *see also* CHARLES TILLY, FROM MOBILIZATION TO REVOLUTION (1978); J. Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946-1972)*, 42 AM. SOC. REV. 249 (1977); DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970 20 (1982); *see also* Charles Bright & Susan Harding, *Processes of Statemaking and Popular Protest: An Introduction*, *in* STATEMAKING AND SOCIAL MOVEMENTS: ESSAYS IN HISTORY AND THEORY 9 1984).

[409] Marx & Wood, *supra* note, at 376; *see also* John D. McCarthy & Mayer N. Zald, Resource Mobilization and Social Movements: A Partial Theory, 82 Am. J. Soc. 1212, 1218 (1977); Richard K. Scotch, *Disability as the Basis for a Social Movement: Advocacy and the Politics of Definition*, 44 J. SOC. ISSUES 159 (1988). The early study of social movements largely ignored political mobilization through legislatures and legal mobilization through courts as outside of its scope. SIDNEY TARROW, STRUGGLING TO REFORM: SOCIAL MOVEMENTS AND POLICY CHANGE DURING CYCLES OF PROTEST (1983).

[410] FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLES' MOVEMENTS (1977); Jenkins, *Resource Mobilization Theory*, *supra* note; Marx & Wood, *supra* note, at 376.

[411] *See*, *e.g.*, Mayer N. Zald & Roberta Ash, *Social Movement Organizations: Growth, Decay and Change*, 44 SOC. FORCES 327 (1966). A similar focus on organizations developed within political science accounts of interest groups. *See* Robert H. Salisbury, *An Exchange Theory of Interest Groups*, 13 MIDWEST J. POL. SCI. 1, 11 (1969).

[412] *See*, *e.g.*, AUGUST MEIER & ELLIOTT RUDWICK, CORE: A STUDY IN THE CIVIL RIGHTS MOVEMENT, 1942-1968 (1973); Jo Freeman, *The Origins of the Women's Liberation Movement*, 78 AM. J. SOCIOLOGY 792 (1973).

[413] GAMSON, *supra* note, at 12; *see also* AMITAI ETZIONI, THE ACTIVE SOCIETY, 388-389 (1968); OBERSCHALL, *supra* note, at 28; TILLY, *supra* note, at 7.

[414] There were divisions between the U.S. and European approaches, with U.S. researchers influenced by economic theory and Europeans struggling with the legacy of Marxism. PORTA & DIANI, *supra* note, at 2.

"aggregated for collective purposes" was the critical determinant of social movements,[415] allowing leaders to make rational choices to build organization and thus overcoming the free rider problem of constituency members.[416] On the other side, political process theory argued that "social insurgency is shaped by broad social processes that usually operate over a longer period of time."[417] Resources and grievances were important, but political opportunity—splits within extant political coalitions, the emergence of new allies, and the reduction of state-sanctioned repression—was decisive.[418]

At stake in this debate was more than just the question of causation. More deeply, it focused attention on the critical role of elites—and how they affected outcomes. Access to resources was important to build organization, but where those resources came from mattered. Resource mobilization theory located social movement organizations (SMOs) within a broader field of political actors,[419] in which *funders* of movements were potentially distinct from movement beneficiaries.[420] Funding could come with strings attached. Classical SMOs defined by a mass membership base promoted accountability but lacked a dependable flow of resources;[421] larger SMOs, over time, were more likely to become professionalized, dependent on elite patronage and paper memberships, and increasingly focused on "problems of organizational maintenance."[422] It was precisely this risk of professionalization that drove political process theory's concern with movement cooptation, which stemmed from the need to sustain external elite funding, prompting the "dissolution of indigenous support" as "insurgents increasingly seek to cultivate ties to outside groups."[423] In this sense, process theory linked movement emergence to its tactical repertoire and ultimate effectiveness, rejecting a "top-down vision of social reform" "pursued exclusively through institutionalized channels" that "pose no threat to the established structure of polity membership."[424] Within this framework, movement power rested on dissent and disruption;[425] while the goal of this disruption might be to change elite attitudes,

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[415] McCarthy & Zald, *supra* note, at 1216; *see also* Jenkins & Perrow, *supra* note, at 249.
[416] OBERSHALL, *supra* note, at 155 (drawing on MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).
[417] McAdam, *supra* note, at 41.
[418] *Id.*
[419] McCarthy & Zald, *supra* note, at 1218; *see also* Russell L. Curtis & Louis A. Zurcher, Jr. *Stable Resources of Protest Movements: The Multi-Organizational Field*, 52 SOC. FORCES 53 (1973); Mayer N. Zald & Michael A. Berger, *Social Movements in Organizations: Coup d'Etat, Insurgency, and Mass Movements*, 83 AM. J. SOCIOLOGY 823, 824 (1978).
[420] Mayer N. Zald & John D. McCarthy, *Introduction*, *in* THE DYNAMICS OF SOCIAL MOVEMENTS: RESOURCE MOBILIZATION, SOCIAL CONTROL, AND TACTICS (Mayer N. Zald & John D. McCarthy eds., 1979).
[421] They distinguished between "professional social movement organizations" characterized by elite patronage and paper memberships, and classical SMOs defined by a mass membership resource base.
[422] McCarthy & Zald, *supra* note, at 1234; *see also* Zald & Ash, *supra* note.
[423] MCADAM, *supra* note, at 55.
[424] *Id.* at 24-25.
[425] From this perspective, movements could mobilize indigenous resources from the "mass base" to maximize their essential "structural power" to "disrupt." MCADAM, *supra* note, at 31, 37.

dependence on elite funding was anathema to movement success.[426] Scholars marshalled evidence in favor of difference sides of this organization-versus-politics debate,[427] while some tried to bridge the two.[428]

As this debated suggested, judging impact turned on underlying conceptions of the political system and what constituted "success."[429] For those who viewed the political system in more open, pluralistic terms, organization helped movements be repeat players in the political process in ways that produced benefits over time. For those, in contrast, who saw politics as fundamentally closed and hierarchical, organization risked cooptation; success came only by exploiting fissures in the ruling class, imposing such high costs through direct action that elites were forced to make concessions.[430] The more groups were invested in the conventional political system and nurtured by it, the less likely they would exercise that power. Opportunity theorists thus focused on the ways in which movement dissent could exploit political openings.

In analyzing the influence of structural opportunities, scholars focused on the importance of favorable political conditions. Sympathetic political coalitions could exchange benefits for electoral support while also reducing the potential for repression;[431] movements could benefit from electoral instability, when social and economic change created opportunities for new alignments to emerge; or they could form strategic alliances with elites to advance policy change.[432] Media coverage was key.[433] In this sense, "protesters win, if they win at all, what historical circumstance has already made ready to be conceded."[434] What movements sought also influenced their chance of success. Marx and Wood argued that movements were more likely to succeed when they did not challenge fundamental values and interests; their demands were focused and solutions clear; there was minimum discomfort to nonparties; and the

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[426] *Id.* at 27; *see also* Herbert H. Haines, *Black Radicalization and the Funding of Civil Rights, 1957-1970*, 32 SOC. PROBS. 31 (1984).

[427] Jenkins & Perrow, *supra* note, at 251 (arguing that the farmworker movement succeeded in 1965-1972, when it failed earlier, because of key changes in "the political environment the movement confronted, rather than by the internal characteristics of the movement organizations and the social base upon which it drew"); *see also* ALDON MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT (1986); J. Craig Jenkins & Craig M. Eckert, *Channeling Black Insurgency: Elite Patronage and Professional Social Movement Organizations in the Development of the Black Movement*, 51 AM. SOC. REV. 812 (1986).

[428] There were also efforts to bridge U.S. and continental approaches. *See* Jean L. Cohen, *Strategy or Identity: New Theoretical Paradigms and Contemporary Social Movements*, 52 SOC. RES. 663 (1985); Bert Klandermans, *New Social Movements and Resource Mobilization: The European and the American Approach*, INT'L J. OF MASS EMERGENCIES & DISASTERS 13, 21 (1986).

[429] Debra C. Minkoff, *The Organization of Survival*, 71 SOC. FORCES 887 (1993) (focuses on organizational survival as success: "membership groups that follow an accepted course of action based on moderate objectives and targeted to nonpolitical arenas are relatively secure").

[430] PIVEN & CLOWARD, *supra* note.

[431] Jenkins, *Resource Mobilization Theory*, *supra* note, at 547; *see* WILLIAM BRINK & LOUIS HARRIS, THE NEGRO REVOLUTION IN AMERICA (1964); Paul Burstein, *Public Opinion, Demonstrations and the Passage of Antidiscrimination Legislation*, 43 PUB. OPINION Q. 157 (1979).

[432] TILLY, FROM MOBILIZATION TO REVOLUTION, *supra* note; *see also* JOHN WALTON, WESTERN TIMES AND WATER WARS: STATE, CULTURE, AND REBELLION IN CALIFORNIA (1992).

[433] EDIE GOLDENBERG, MAKING THE NEWS (1976).

[434] PIVEN & CLOWARD, *supra* note, at 250.

demands were consistent with widely accepted social values.[435] Ultimately, how scholars judged impact depended on the metric of success. Jenkins argued that success could be understood in three ways: short-term changes in public policy; alternations in composition and organization of political decision making; and long term changes in the distribution of socially valued goods and transformation of hierarchies.[436] Nonetheless, most research focused on policy outcomes, and less on implementation and the redistribution of power.[437]

Within these debates, law generally played a minor role,[438] though there were important early exceptions.[439] As legal liberalism ebbed, social movement scholars became more attuned to the potentially productive role law could play in advancing mobilization.[440] In seminal early work, Alan Hunt argued that rights could be productive tools of social change to the extent that they involved "mobilization of forms of collective identities."[441] Paul Burstein argued that increased litigation around equal employment opportunity, and the positive correlation between collective actions and successful outcomes, showed that "successful movements generally utilize proper channels as well as outsider tactics."[442] This positive assessment turned in part on the definitional question since movements had to be defined as including institutional tactics, like litigation, for there to be the potential for compatibility.[443] Criticizing those who argued that only dissent produced productive outcomes, he saw value in "the possibility that part of the movement was able to innovate by turning to legal channels and developing new approaches to legal doctrine."[444]

IV. THE PROMISE OF MOVEMENT LIBERALISM

Legal liberalism advanced a theory of social change through legal change. It placed faith in the idea that an alliance of activist courts and lawyers could use progressive lawmaking to advance core political protections and broaden political participation by disempowered groups. In doing so, it sought to address the law-politics problem in

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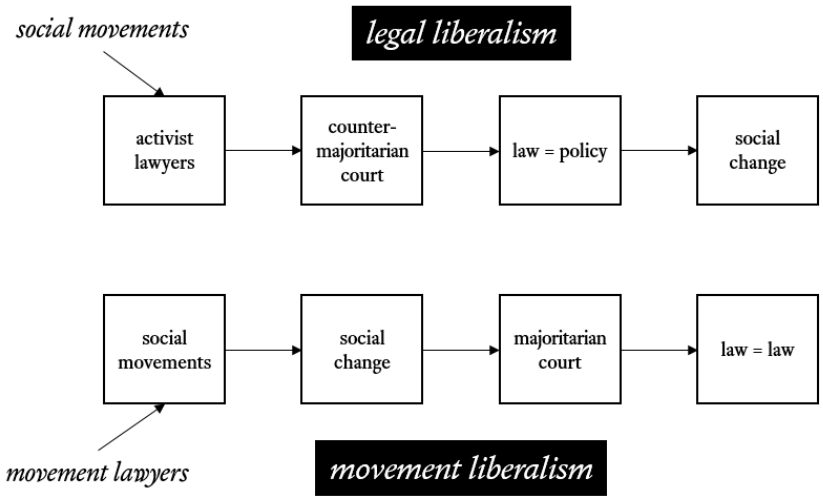
[435] Marx & Wood, supra note, at 405.
[436] Jenkins, *Resource Mobilization Theory*, *supra* note, at 544.
[437] PORTA & DIANI, *supra* note, at 235. For an exception, see Paul D. Schumaker, *Policy Responsiveness to Protest-Group Demands*, 37 J. POLITICS 488 (1975).
[438] There were exceptions. *See e.g.*, MCADAM, *supra* note (arguing that *Brown* affected the Montgomery Bus Boycott).
[439] Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552 (1984) (arguing that legal control was a more effective strategy of limiting the success of the civil rights movement than violent repression); *see also* STEVEN E. BARKAN, PROTESTORS ON TRIAL: CRIMINAL JUSTICE IN THE SOUTHERN CIVIL RIGHTS AND VIETNAM ANTIWAR MOVEMENTS (1985).
[440] Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOCIOLOGY 1201, 1204-05.
[441] Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J. L. & SOC. 309, 325. (1991).
[442] Burstein, *supra* note, at 1221 (showing that mobilization of EEO laws in federal court have increased since 1960s, that collective action (class actions, federal intervention, amici) is correlated with success).
[443] *Id.* at 1203.
[444] *Id.* at. 1222; *see also* Frances K. Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690 (1983).

progressive legal thought by asserting the neutrality of representation as an objective basis for minority-projecting judicial decisions (responding to the countermajoritarian problem) and for public interest lawyering (responding to the professionalism problem). As Parts II and III showed, that effort proceeded by carving the study of courts (constitutional law) from the study of lawyers (legal profession), and by carving legal scholarship from social science. By the 1990s, the liberal legal project had collapsed under the double weight of external political attack and internal legal critique. Within the legal academy, the collapse occurred as legal liberalism was whipsawed between centrist objections on one side (that it was illegitimate and thus threatened liberal democracy) and radical objections on the other (that it was legitimating and thus reinforced the very subordination it claimed to attack). As Part II concluded, it was in the wake of this collapse that scholars searched for a way to reclaim law as an engine for progressive change while guarding against these central critiques.

This Part argues that this search has lead progressive scholars to embrace the promise of a new *movement liberalism* that places its faith in social movements to redeem progressive politics without compromising law. It suggests how movement liberalism has been framed within contemporary legal thought as a response to the challenge to law's legitimacy associated with legal liberalism. The new movement liberalism has deliberately looked away from traditional institutions—courts, agencies, and legislatures—as generators of legal and social change, and instead focused on the bottom-up mobilization of less powerful groups as independent lawmaking actors. Drawing upon a formidable body of interdisciplinary social science, scholars have presented a deeply optimistic account of the capacity of social movements to enhance democratic participation by marginalized groups, strengthen the foundations for social justice in law and legal institutions, and redistribute economic resources and social goods. This growing literature, in both tenor and content, is deeply supportive of social movements and eager to build—or rebuild—their power. There are two general conversations—one about courts and the other about lawyers—that have operated in distinct scholarly fields but are connected in their underlying empirical orientations and normative commitments. This Part draws together these two conversations to elaborate the key concepts—*majoritarian courts* and *movement lawyering*—that seek to reconcile law and progressive politics within the new movement liberal model. This Part maps these two concepts, showing how they have been used social science to make the progressive case about the role of law.

Figure 3: Movement Liberal Model of Law and Social Change



A. Majoritarian Courts

Within constitutional law, movement liberalism responds to the fundamental countermajoritarian problem by advancing a vision of judicial review that supports majoritarianism rather than contradicts it. In so doing, the model has sought to simultaneously reassert the court as a vehicle for progressive reform while rescuing it from the charge of judicial activism—reestablishing the law-politics boundary disputed by legal liberalism and its critics. This section presents the model of majoritarian courts that emerges from contemporary legal scholarship, shows how it trades on the social science empiricism of the previous periods, and links it to the movement liberal framework.

As Part II showed, the critique of legal liberalism focused progressive scholars on the search for legal meaning: Which interpretive communities mattered for establishing the content of constitutional law? At the close of the millennium, the politics of "looking to the bottom" to recover the authority of "we the people" to engage in direct self-government and higher lawmaking helped to reconcile judicial review with democratic politics through a program of judicial deference, but only served to refocus the question on which groups could mobilize through politics to reshape constitutional law in progressive directions. The countermajoritarian difficulty was not so deftly avoided. It was plausible to imagine the court being persuaded to validate new majoritarian political values, but the issue of minority protection through law still lingered.

Movement liberalism attempts to bridge the space between bottom-up theories of constitutional interpretation and judicial review and the politics of progressive social

change. How? To begin, the Supreme Court is stripped of its primacy as "the only institution empowered to speak with authority when it comes to the meaning of the Constitution."[445] Instead, the idea of "popular constitutionalism" rejects judicial supremacy. As Larry Kramer put it, "less is more when it comes to limiting self-government, and we should be thinking about a minimal model of judicial review that calls upon judges to intercede only when necessary."[446] This move is a political reaction by progressives against a conservative Supreme Court—a theory of minimalism designed to create space for progressive democratic experimentation—but it is more than just that. The notion of popular constitutionalism is also a historically grounded jurisprudential theory that seeks to rescue progressive judicial lawmaking from the charge of elite social engineering by locating legal change where it legitimately should be: in majoritarian politics.[447]

By decentering the court, popular constitutionalism raises basic questions of mechanics: how exactly do majorities influence judicial decision making? Here is where constitutional law has turned to social science for empirical help: drawing on political science to erect a model of judicial majoritarianism and on sociology to make it progressive. Popular constitutionalism has first drawn from political science research on public opinion and judicial decision making to link judicial review to popular politics.[448] Barry Friedman opened the door to social science importation, arguing that though it had a great deal to teach, it was "a body of work that has received little notice by the legal academy."[449] Drawing on the public opinion literature, Friedman has made the strongest case for "mediated" popular constitutionalism, arguing that there are two mechanisms that account for the "congruence of popular preferences and judicial outcomes."[450] One, following Dahl, is the appointment process, in which presidents "appoint people whose views are congenial, and who can survive the confirmation process."[451] Jack Balkin has labeled this "partisan entrenchment."[452] The other mechanism is more direct: because judges need popular support both to maintain judicial legitimacy and promote enforcement of judicial decrees, they have incentives

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[445] Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 15 (2001).
[446] *Id.* at 166.
[447] Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 1002 (2004) (noting that arguments rest on "controversial empirical assumptions" that "turn on 'facts' that can never be tested or proved"); Jack Balkin, *Populism and Progressivism and Constitutional Categories*, 104 YALE L.J. 1935 (1995) (arguing that "progressivist sensibility" is constituted by "elitism, parternalism, naivete,…isolation from concerns of ordinary people").
[448] Friedman made this connection most directly, relying "heavily on research in the social sciences" to demonstrate the "substantial congruity between popular opinion and the decisions of constitutional judges." Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2595, 2598 (2003).
[449] *Id.* at 2599.
[450] *Id.* at 2610.
[451] *Id.*; *see also* Jack Balkin & Stanley Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (referring to this process as "partisan entrenchment").
[452] Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 34 SUFFOLK L. REV. 27, 28 (2005).

to "ensure their decisions do not stray too far outside the mainstream."[453] What this means in particular contexts is complicated since generalized support for the court can make it withstand some deviations from the political midpoint, particularly on issues of low public salience; however, when the court weighs in on issues of social import, Friedman suggests that its decisions are less likely to educate the public than to polarize preexisting views, potentially contributing to backlash.[454] In this way, judicial supremacy and popular constitutionalism are "dialectically connected": the court makes authoritative legal pronouncements only after the public has generally subscribed to the position—as a form of judicial validation.[455] "Public opinion serves as an important constraint" on the court, which "has some freedom to go its own way" but "if it strays too far away from these constraining forces, it inevitably is brought back into place."[456] On this view, public opinion is not simply correlated with judicial decisions, *but given causal power*. Thus, *Brown* may be interpreted as a pro-majority opinion since "popular sentiment favored what the Court was doing and national interests were furthered by it."[457] In Balkin's terms, the court is "less anti-majoritarian than nationalist."[458]

Yet rooting judicial decision making in majoritarian politics does not solve the critical problem legal liberalism sought to address—the problem of nonelites excluded from or disempowered in politics—nor does it suggest how the court may support progressivism. How do groups that are disfavored by public opinion play a role in a model of court decision making that depends on majority public opinion? How does a majoritarian court advance progressive reforms? This is the point at which constitutional law has turned to sociology to write social movements into the model. Scholars took steps to initiate this incorporation in the early 2000s, with Cary Coglianese using the institutionalization of the environmental movement to show how "social movements, law, and society interact with one another in a more direct, bidirectional fashion than is generally recognized."[459] Edward Rubin offered a systemic review of the underlying social science to argue that legal scholars had failed to appreciate the role of social movements in mobilizing law for legal change, opting instead to study only what happened inside of lawmaking forums and the impact of legal change on society.[460] In Rubin's terms, legal scholars had failed to "pass through the

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[453] Friedman, *Mediated Popular Constitutionalism*, at 2613.
[454] *Id.* at 2624-25 (citing Franklin & Kosaki, *supra* note).
[455] Robert Post & Reva Siegel, *Popular Constituitonalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004).
[456] Barry Friedman, *The Importance of Being Positive*, 72 CINCINNATI L. REV. 1279-80 (2004).
[457] *Id.*
[458] Jack M. Balkin, Brown*, Social Movements, and Social Change*, *in* CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE (L. Ware ed. 2008).
[459] Cary Coglianese, *Social Movements, Law, and Society*, 150 U. PENN L. REV. 85 (2001).
[460] Edward Rubin, *Passing through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PENN. L. REV. 1, 49-50 (2001).

door" of the courthouse to understand the "empirical world of mobilization, recruitment, political strategy, and organizational behavior."[461]

Progressive constitutional theorists who accepted this invitation to "pass through the door" have used social movements to fill out the picture of constitutional lawmaking. The essential move has been to identify social movements as a bridge between "the people," popular opinion, and legal change: crucially, it is the *social movement*, not simply an inchoate "public" that reshapes politics and opinion to produce court change. In the model of partisan entrenchment, social movements "have helped determine who becomes a judge or Justice and hence whose views of the Constitution become part of positive law."[462] Movements also matter in shifting public opinion more directly: "reshap[ing] constitutional common sense, moving the boundaries of what is plausible and implausible in the world of constitutional interpretation."[463] In this way, social movements influence law by "altering opinion, particularly elite public opinion" which is what matters most to judges seeking to preserve legitimacy.[464] This model forms both a positive theory of adjudication and also serves to explain iconic progressive decisions of the past. For instance, in Klarman's view, "neither *Brown* nor *Lawrence* created a new movement for social reform; both decisions supported movements that had already acquired significant momentum by the time their grievances had reached the Supreme Court."[465]

This model of majoritarian courts linked to social movements reframes the law-politics problem in ways that respond to concerns about judicial legitimacy and the effectiveness of court decisions to produce reform. Legitimacy is preserved while progressivism is advanced by imagining courts as responding to movement pressure. Accountability to the democratic process and underrepresented interests is maintained by positioning social movements as the essential agents of change and understanding judicial decision making as deferring to the new consensus created by movement activism. This happens by movements asserting new norms through direct action and using their power to reshape political processes to support new judicial appointments.[466] The crucial point is that law is not made by courts but by the social movements themselves; law therefore remains neutral vis-à-vis politics, while remaining ready to affirm progressive causes on the basis of objective changes in public opinion. Moreover, by promoting a sense of authorship of constitutional change—through the iterative clash of movements and countermovements—movement liberalism enhances democratic legitimacy and reinforces the separation between law

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[461] *Id.* at 51.
[462] Balkin, *supra* note.
[463] *Id.* at 30.
[464] *Id.*; *see also* Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements,* 154 U. PENN. L. REV. 927, 949 (2006).
[465] Michael Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431 (2004).
[466] Balkin, *How Social Movements Change (or Fail to Change) the Constitution*, *supra* note.

and politics as movements speak in the language of constitutional rights on their own terms, rather than relying on activist courts to do so for them.[467]

With respect to judicial effectiveness, the empirical point drawn from political science is that court decisions lag behind culture—reflecting popular, and especially elite, attitudes—rather than lead it;[468] and to the extent they do not wait for the appropriate moment, judicial decisions risk backlash.[469] This empirical foundation strengthens the model's claim to promote more stable and enduring reform. By changing social attitudes before law changes, social movements ensure legal compliance: their work is culture shifting rather than just rule shifting.[470] And by synching public attitudes with their position, social movements avoid the downside risk of political backlash.

Elegant as it is, this basic picture nonetheless obscures further mechanical difficulties and progressive problems. Most significantly, what do movements have to do to forge new majorities that shift law in their favor? Because this model is organized around adjudication, it raises the same concern that critical scholars raised about legal liberalism: that the project of political mobilization must be framed in ways that garner mass and elite support; doing so channels politics into the accepted normative frameworks of liberalism, especially its commitment to individual rights; and this discourse ultimately proves susceptible only to moderate political demands. This position creates a dilemma for progressives because it welds social movement politics to some version of elite politics: it says, in effect, that social movements succeed in changing norms by persuading bystanders and elites to adopt their views. In this sense, it asserts an interest convergence thesis to the extent that is suggests social movement claims will be successful when connected to majority interests.[471]

The progressive response to this dilemma has varied. Some scholars concede that social movement mobilization ultimately reinforces liberal pluralism—thus converting it to a positive story of minority assimilation into mainstream politics. In this vein, William Eskridge envisions the interaction between "identity-based" social movements and constitutional courts as a conduit by which movements are integrated into the political mainstream, facilitating an essential "politics of recognition" that

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[467] Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1345 (2006).

[468] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[469] *See* Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 THE JOURNAL OF AMERICAN HISTORY 81 (1994); David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, COLUM. L. REV. (2013); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011); David Schraub, *Sticky Slopes*, 101 CAL. L. REV. 1249 (2013).

[470] Friedman, *Mediated Popular Constitutionalism*, supra note, at 2607 (finding that "in the main the results of Supreme Court decisionmaking comport with the preferences of a majority or at least a strong plurality, something that many political scientists now take as a given.").

[471] *Cf.* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

succeeds in removing the most overt barriers to political participation and thus assimilating movements into "normal politics."[472] Although Reva Siegel locates assimilative forces within politics rather than courts, she similarly understands the contest over constitutional meaning to enable movements to build political alliances in ways that break down barriers to political participation.[473] Other scholars, like Gerald Torres, resist the notion that social movements have to make political compromises that undercut their progressive goals,[474] arguing instead that movements can succeed in shifting cultural norms in progressive directions so long as "non-elite actors have to have a voice earlier in the agenda setting process" thus ensuring the adequacy of their "representation."[475]

B. Movement Lawyers

The question of representation links the idea of majoritarian courts with the concept of movement lawyering. By asserting a productive link between movement activism and legal reform, movement liberalism reimagines the role of law in progressive social change and has thus spotlighted—and invited deeper reflection on—how social movements relate to lawyers, who mediate between movement claims and state power, but in so doing pose familiar risks to movement legitimacy and success.

Within legal profession scholarship, the new movement liberal research has focused on demonstrating how most lawyers, most of the time, are not like those in the iconic stories of legal liberalism. To the contrary, lawyers in the contemporary literature are movement-centered: they take their cues from the community,[476] work closely with organizers, follow the lead of social movement organizations, and deploy law strategically, and often incrementally, to advance discrete movement goals.[477] Their work expands far beyond courts (though does not reject litigation as movement leverage), encompassing policy advocacy, organizational counseling, community education, and protest support.[478] And the lawyers are politically sophisticated,

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[472] William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2388 (2002).

[473] Siegel, *Constitutional Culture*, *supra* note, at 1397-98; *see also* Caroline S. Schmidt, *What Killed the VAWA?*, 101 VA. L. REV. 501 (2014) (suggesting that the failure of civil rights remedy was based in part on lack of movement lawyer coordination); Mary Ziegler, *The Price of Privacy, 1973 to the Present*, 37 HARV. J. L & GENDER 285 (2015) (arguing that activists prioritized choice arguments not just because of *Roe* but also because of need to respond to antiabortion activists and changing political opportunities).

[474] Guinier & Torres, *supra* note, at 2752 ("Such an effort emphasizes the tools that social movements use to make law and the role of ordinary people whose collective struggle and collective commitments inform the lawmaking process.").

[475] Gerald Torres, *Legal Change*, 55 CLEV. ST. L. REV. 135, 142 (2007).

[476] *See*, *e.g.*, Anthony V. Alfieri, *Faith in Community: Representing "Colored Town"*, 95 CAL. L. REV. 1829 (2007); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000).

[477] Kathleen Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note, at 249.

[478] *See* Scott L. Cummings & Douglas Nejaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235 (2010); *see also* Douglas Nejaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663 (2012); Douglas Nejaime, *Cause*

tracking polling data about public attitudes, developing communication strategies to influence media spin, and strategizing about how to deal with potential movement backlash. Overall, this literature emphasizes the descriptive point that lawyers are decisively not pursuing the legal liberal "myth of rights"—to the contrary, they are putting movements first. The prescriptive claim is that lawyers should treat movements in client-centered terms, counseling them to advance movement-defined ends in order to help them build power and achieve their goals.

Like its constitutional law counterpart, the new movement literature on lawyering incorporates social science to respond to the professionalism problem in legal liberalism, in which activist lawyers were seen to violate norms of professional neutrality in pursuing their own political projects disconnected from client interests and input. The new movement lawyering model draws on critical visions of community lawyering from the prior period,[479] but builds on the legal mobilization framework pioneered by McCann, promising to avoid the critique of lawyer domination and relink legal representation to structural change.

In forging a pathway for movements from social science into law,[480] Sarat and Scheingold's 2006 cause lawyering volume on social movements was a critical bridge.[481] In it, they asserted the critical conceptual difference of framing lawyering around movements, which "tend to be more concrete and embodied in the people who work in and form them, the organizations that represent them, and the actions taken to advance the movements' goal."[482] This was important because it reduced the potential for lawyer manipulation by positing a client that had the resources and decision making capacity to pursue its own ends. There was also an important methodological dimension to this reframing, since analysis could "start with movements and examine what cause lawyers do for and to them."[483] The movement focus also reframed what movements did around the concept of legal mobilization: rather than lawyers bringing suits disconnected from movement aims, the framework emphasized rights as a "political resource."[484] In this analysis, lawyers could be good professionals, deferring

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Lawyers inside the State, 81 FORDHAM L. REV. 649 (2012). For discussions of the pedagogical dimensions of this movement, see Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINCIAL L. REV. 355 (2008); Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447 (2005); Barry et al., *Teaching Social Justice Lawyering*, 18 CLINCIAL L. REV. 401 2012; Juliet Brodie, *Little Cases on the Middle Ground*, 15 CLINCIAL L. REV. 333 (2009); Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Imapct*, 20 CLINCIAL L. REV. 39 (2013); Sarah H. Paoletti, *Finding the Pearls When the World Is Your Oyster: Case and Project Selection in Clinic Design*, 5 DREXEL L. REV. 423 (2013).

[479] *See Creating Models for Progressive Lawyering in the 21st Century*, J. L. & POL'Y 297 (panel discussion).

[480] Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANNU. REV. LAW SOC. SCI. 653 (2010); Anna-Maria Marshall & Dnaiel Crocker Hale, *Cause Lawyering*, 10 ANNU. REV. LAW SOC. SCI. 301 (2010)

[481] Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 1 (Austin Sarat & Stuart A. Scheinold eds., 2006).

[482] Sarat & Scheingold, *Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note, at 2; *see also* STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN (2004).

[483] Sarat & Scheingold, *Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note, at 2.

[484] *Id.*

to the movement, or could "push to legalize the movement agenda and unwittingly . . . redirect the agenda, undermine leadership, and stifle grassroots energy."[485] With the lawyer role thus appropriately defined, "the movement takes the lead."[486]

As it has developed, the movement lawyering literature responds to the legal liberal critiques of lawyer accountability and litigation efficacy by emphasizing the themes of client-centered lawyering and multidimensional advocacy.[487] The movement lawyering model appears in connection with a range of substantive areas: housing,[488] elder law,[489] LGBT,[490] women's rights,[491] policing,[492] and disability,[493] among others. The literature adopts the perspective of the lawyers, showing how they understand their work and relate to clients.[494] This shift in perspective spotlights the legal consciousness of the lawyers as a way of showing how they attempt to simultaneously promote client accountability and political transformation.[495] It also is a way to underscore the professional legitimacy of movement lawyering, showing how it enacts a version of the "ideology of advocacy," while simultaneously evincing commitment to a progressive cause.[496]

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[485] *Id.* at 12.

[486] Erskine & Marblestone, *supra* note; *see also* Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note, at 84; Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note, at 302; Hilbink, *The Profession, supra* note; Meili, *Consumer Cause Lawyers*, *supra* note; Gordon, *supra* note.

[487] Barbara L. Bezdek, *Alinsky's Prescription: Democracy Alongside Law*, 42 J. MARSHALL L. REV. 723 (2009).

[488] Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181 (2010); Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383 (2014).

[489] Nina A. Kohn, *The Lawyer's Role in Fostering an Elder Rights Movement*, 37 WM. MITCHELL L. REV. 49, 50 (2010).

[490] Douglas NeJaime, *Marriage, Cruising, and Life in Between: Clarifying Organizational Positionalities in Pursuit of Polyvocal Gay-Based Advocacy*, 31 HARV. C.R.-C.L. L. REV. 511 (2003); Dougls NeJaime, *New Entrants Bring New Questions*, 19 LAW & SEXUALITY 181 (2010); Dean Spade, *Trans Law and Politics on a Neoliberal Landscape*, 18 TEMPLE POL. & C.R. L. REV. 353 (2009).

[491] Merry et al., *Law from Below: Women's Human Rights and Social Movements in New York City*, 44 LAW & SOC'Y REV. 101 (2010).

[492] Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers,* 128 HARV. L. REV. F. 253 (2015).

[493] Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527 (2014).

[494] Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551 (2011); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigaiton in Kentucky, 1984-1995*, 26 LAW & SOC. INQUIRY 631 (2001); Michael Paris, *The Politics of Rights: Then and Now*, 31 LAW & SOC. INQUIRY 999 (2006).

[495] Showing how activists understood the role of law, *See* COREY S. SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE (2009); Idit Kostiner, *Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change*, 37 LAW & SOC'Y REV. 323 (2003); Jessica A. Rose, *Rebellious or Regnant: Police Brutality Lawyering in New York City*, 28 FORDHAM URB. L.J. 619 (2000).

[496] Tom Lininger, *Deregulating Public Interest Law*, 88 TULANE L. REV. 727 (2014); Ann Southworth, *What is Public Interest Law?*, 62 DEPAUL L. REV. 492 (2013).

Within this perspective, the movement lawyers' relationship with clients is key. Lawyers are portrayed as eager to collaborate and promote client ends.[497] Stories of movement lawyering reveal lawyers representing already-mobilized clients,[498] not the vulnerable or disorganized clients emphasized in the legal liberal model.[499] Lawyers work with "partners with organizing capacity" who are "sophisticated in mounting and directing campaigns and have a history of organizing."[500] In Sameer Ashar's account of lawyering for "resistance movements," he describes the representation of low-income immigrant workers connected with a broader campaign to organize back-of-the-house employees in a chain restaurant, directed by the labor group Restaurant Opportunities Center (ROC-NY). Although the legal representation was complicated by the "tripartite relationship between lawyers, workers, and organizers," the lawyers were "careful not to influence workers against their prior political commitments to ROC-NY." In this way, the "organizers and workers held the lawyers accountable."[501] Similarly, in Jennifer Gordon's historical analysis of lawyering for the United Farmworkers union (UFW), she notes that the union avoided "lawyer domination" by virtue of its "breadth and strength at the time that it brought lawyers onto its staff, its leaders' recognition of the power of law and the mutual respect among lawyers and organizers."[502]

Other scholars similarly emphasize the interaction between mobilized clients and client-centered lawyers.[503] In a careful account of transgender political mobilization, lawyers "take leadership from, and support the goals of, community organizing projects," on "decarceration," in which lawyers play "important roles—but not the most important roles."[504] Sarah London's study of reproductive justice similarly shows how "those most oppressed should be at the center of the struggle—directing the goals of the movement and building power to achieve them."[505] Other scholars have

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[497] Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008)

[498] Hilbink, *You Know the Type*, *supra* note, at 664.

[499] *See* Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133 (2007) ("[L]awyers largely partner with community organizations rather than representing isolated individuals." *Id.* at 2141.).

[500] Charles Elsesser, *Community Lawyering—The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L., 375, 386 (2013).

[501] Sameer Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1918 (2007).

[502] Jennifer Gordon, *Law, Lawyers, and Labor: The United Farmworkers' Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1, 9 (2005).

[503] Anne Bloom, *Practice Style and Successful Legal Mobilization*, 71 LAW & CONTEMP. PROBS. 1 (2008); Ingrid Eagly, *Criminal Clinics in the Purusit of Immigrant Rights: Lessons from the Loncheros*, 2 U.C. IRVINE L. REV. 91 (2012); William P. Quigley, *Ten Questions for Social Change Lawyers*, 3 LOY. PUB. INT. L. REP. 204 (2014); Rebecca A. Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347 (2012).

[504] Gabriel Arkles, Pooja Gehi & Elana Redfield, *The Role of Lawyers in Trans Liberation*, 8 SEATTLE J. SOC. JUST. 579, 583 (2010).

[505] Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 Berkeley J. Afr.-Am. L. & Pol'y 71, 99 (2011) ("Integrative lawyering would involve a lawyer or law firm reaching out to an organized reproductive justice group, such as California Latinas for Reproducitive Justice, to determine whether and how laywers can play a role in helping them achieve their goals.").

provided comprehensive accounts of lawyering for coalitions aligned with social movements.[506] In Hina Shah's reflection on her clinical work, she describes lawyers representing the California Domestic Worker Coalition to pursue a legislative "bill of rights," in which the client coalition had "clearly articulated goals and transparent decision making."[507] Michael Grinthal describes movement lawyers as "political enablers," illustrating the work of lawyers for the Student Nonviolent Coordinating Committee (SNCC) and the UFW as "facilitating or opening spaces for organizing and the exercise of relational power," thereby enabling "the group to make its own demands." In this model, litigation is useful as a "focal point for authentic organizing."[508] Where movements are already mobilized, lawyers in this literature help spark them by partnering with "community-based organizations and . . . utiliz[ing] the law to assist with community-building as a step toward fortifying sustainable movements."[509]

As these accounts highlight, deference to client decision making and support for client empowerment are critical themes in the movement lawyering vision.[510] As Melanie Garcia puts it, "movement advocacy empowers the client to begin more immediately working toward social change with the other members of her community or with members of the relevant social movement."[511] Although lawyers "are often fueled by an intense passion for the cause they represent," that need not be the case in the social movement context where "traditional lawyers can instead achieve a similar level of dedication to the client's goals by a true commitment to . . . zealous advocacy and deferring to the client."[512] Movement lawyers are thus urged to "strive to achieve an ego-less practice,"[513] and to focus on addressing power at the intersection of

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[506] Bloom, *supra* note; Robin Golden, *Collaborative as Client: Lawyering for Effective Change*, 56 N.Y.L. SCH. L. REV. 393 (2011-12); Reyna Ramolete Hayashi, *Empowering Domestic Workers Through Law and Organizing Initiatives*, 9 SEATTLE J. SOC. JUST. 487 (2010); Carmen Huertas-Nobel, *Promoting Worker-Owned Cooperatives as a CED Empowerment Strategy: A Case Study of* Colors *and Lawyering in Support of Participatory Decision-Making and Meaningful Social Change*, 17 CLINICAL L. REV. 255 (2010); Gowri Krishna, *Moving Beyond the One-Person, One-Vote Floor*, 34 BERKELEY J. EMP. & LAB. L. 101 (2013); Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Prax, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717 (2003).

[507] Hina Shah, *Notes from the Field: The Role of the Lawyer in Grassroots Policy Advocacy*, 21 CLINICAL L. REV. 393, 416 (2014) (legislative advocacy, client-centered).

[508] Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. Pa. J.L. & Soc. Change 25, 53 (2011); *see also* Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263 (2011).

[509] Alizabeth Newman, *Bridging the Justice Gap: Building Community by Responding to Individual Need*, 17 CLINICAL L. REV. 615, 619 (2011); *see also* April Land, *"Lawyering Beyond" Without Leaving Individual Clients Behind*, 18 CLINICAL L. REV. 47 (2011).

[510] *But see* Deborah J. Cantrell, *Lawyers, Loyalty and Social Change*, 89 DENV. U. L. REV. 941 (2012) ("hyper-loyalty impedes social change by limiting the range of relations that can be explored as sites for problem solving").

[511] Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO. J. LEGAL ETHICS 551, 565 (2011).

[512] *Id.* at 566; *see also* Kathryn A. Sabbeth, *Zeal on Behalf of Vulnerable Clients*, 93 N.C. L. REV. 1475 (2015).

[513] Jim Freeman, *Supporting Social Justice Movements: A Brief Guide for Lawyers and Law Students*, 12 HASTINGS RACE & POVERTY L.J. 191, 202 (2015).

multiple identities.[514] In this way, movement lawyering responds to the lawyer domination that has too often "led to unstable change."[515]

As this suggests, the client-centered style of movement lawyering is associated with more effective and enduring social change, which is advanced through the deployment of multiple strategies to achieve ultimate political goals.[516] Although lawyers are deferential to client ends, they are highly valued for their legal skill.[517] Litigation is one tactic among many that lawyers use, typically desirable for its indirect effects in gaining political leverage, framing an issue, or influence public opinion.[518] In this way, litigation is presented as valuable to "achieve organizing aims in ways that were essentially indifferent to the outcome in courts."[519] This includes mobilizing "sometimes hostile state power, both through adjudication and agency enforcement against" movement targets.[520] Along these lines, litigation is reframed as providing a potential boost to movements even when the specific lawsuit fails on the merits, as in *Bowers v. Hardwick*,[521] while also sometimes serving as a form of "stealth advocacy," which does

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[514] Kevin Escudero, *Organizing While Undocumented: The Law as a "Double Edged Sword" in the Movement to Pass the Dream Act*, 6 Crit 30 (2013) ("intersectionality as a social movement strategy"; law "as both a tool and the target for movement activism." *Id.* at 36.).

[515] Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535, 581-82 (2009) ("[T]he dominance of social movements by lawyers and legal solutions has led to unstable change. Truly transformative change occurs only when technical legal change is accomplished by a cultural shift that supports it.").

[516] *See* Laureen Carasik, *"Think Glocal, Act Glocal": The Praxis of Social Justice Lawyering in the Global Era*, 15 CLINICAL L. REV. 55 (2008); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1240 (2003); Sharon K. Hom, *Equality, Social and Economic Justice, and Challenges for Public Interest Lawyering*, 8 N.Y. CITY L. REV. 511 (2005); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505 (2003); Jayanth K. Krishnan, *Mobilizing Immigrants*, 11 GEO. MASON L. REV. 695, 698 (2003); Fran Quigley, *Growing Political Will from the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions*, 41 COLUM. HUM. RTS. L. REV. 13, 45 (2009); Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185 (2010); Irene Sharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Clinic*, 12 CLINCAL L. REV. 243 (2005).

[517] Gordon, *The Lawyer Is Not the Protagonist*, *supra* note, at 2138 (noting that movement lawyers ask "how can legal levers put the group in a position to achieve its goals?"); Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516 (2011); Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. Rev. 1223 (2005).

[518] *See* Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715 (2010); Alan K. Chen, *Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903 (2013) (reviewing RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY (2011)); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323 (2009); Charles F. Sable & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Simon, *Solving Problems vs. Claiming Rights*, *supra* note.

[519] Gordon, *supra* note, at 2139; *see also* Christopher Coleman et al., *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663 (2005).

[520] Ashar, *Resistance Movements*, *supra* note, at 1921.

[521] NeJaime, *Winning Through Losing*, *supra* note. *See also* Catherine Albiston, *The Dark Side of Litgation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61 (2011); Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817 (2013).

not seek to "make law" but rather to "alter social facts on the ground, and then play defense to preserve that alteration."[522] As this underscores, movement litigation is strategically coordinated with political mobilization—to positive effect. In one illustration from the marriage equality movement, low-profile litigation is used to establish parental rights first, laying the ground for the pursuit of marriage through "multidimensional strategies."[523]

In this model, rights are seen as tools not traps. They can shine the spotlight on systems of lawlessness to mobilize attention and political pressure.[524] They can also be claimed by lawyers in ways that catalyze movements,[525] for example, by creating a new discourse for resistance to language discrimination,[526] or reframing the status of the family.[527] In her work on Supreme Court decision making, Lani Guinier frames litigation as a space to give voice to the marginalized, even when those voices are only heard in dissent.[528] Others have noted how litigation confers legitimacy on movements,[529] and reshapes the way ordinary people understand the possibility for action.[530] While much of this literature has focused on contemporary movements, some scholars have reflected backward to recover new models for combining litigation and movement organizing, with groups like SNCC and Saul Alinsky's Industrial Areas Foundation displacing the NAACP as new paragons of smart advocacy.[531]

As movement lawyering reclaims litigation, it also reframes the range of advocacy skills that may be effectively deployed. Throughout the literature, lawyers use "legal

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[522] Margo Schangler, *Stealth Advocacy Can (Sometimes) Change the World*, 113 MICH. L. REV. 897 (2015) (reviewing ALISON GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS (2015)).

[523] Wyatt Fore, *DeBoer v. Snyder: A Case Study in Litigation and Social Reform*, 22 MICH. J. GENDER & L. 169, 199 (2015).

[524] *See* Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009); Laurel Fletcher, *Defending the Rule of Law: Reconceptualizing Guantanamo Habeas Attorney*, 44 CONN. L. REV. 617; Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQ. L. 441 (2010).

[525] *See* James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559 (2009).

[526] *See* Ming Hus Chen, *Governing by Guidance: Civil Rights Agencies and the Emergence of Language Rights*, 49 HARV. C.R.-C.L. L. REV. 291 (2014).

[527] *See* Jill Maxwell, *Leveraging the Courts to Protect Women's Fundamental Rights at the Intersection of Family-Wage Work Structures and Women's Role as Wage Earner and Primary Caregiver*, 20 DUKE J. GENDER L. & POL'Y 127 (2012); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293 (2015).

[528] Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence*, 89 B.U. L. REV. 539 (2009).

[529] Corey S. Shdaimah, *Lawyers and the Power of Community: The Story of South Ardmore*, J. MARSHALL L. REV. 595 (2009) (noting that legal action "confers legitimacy.").

[530] *See* Laura Beth Nielsen, *Social Movements, Social Process: A Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671, 679 (2009) ("I urge caution in underestimating the constitutive power of law in (a) the consciousness of ordinary citizens; (b) everyday inteactions between people; and (c) the capacity of social movement organizations to survive.").

[531] Tomiko Brown-Nagin, *Does Protest Work?*, 56 HOW. L.J. 721 (2013); Mark Egerman, *Rules for Radical Lawyers: Advancing the Abortion Rights of Inmates*, 21 COLUM. J. GENDER & L. 46 (2011-2012).

and non-legal intervention" to promote movement goals.[532] Lawyers engage in "collaborations with agencies,"[533] and make alliances with other powerholders to advance client causes.[534] They use tactics outside of litigation, in an "integrated" fashion[535] that creates strategic virtuous spirals.[536] Law is also asserted as a "symbolic resource" for framing disputes, providing movements with discursive advantages in setting the agenda and defining the issue.[537] In this way, movement lawyering can draw attention and resources to new issues or cast old ones in a different light.[538] Overall, legal mobilization—in combination with other movement strategies—is reclaimed as a positive force, supporting movements in advancing multiple "forms of resistance."[539]

V. THE PERSISTENCE OF PROGRESSIVE DIVISION

How well does the turn to social movements work in resolving the law-politics problem at the heart of progressive legal theory? This Part argues that, despite its promise, movement liberalism ultimately leaves progressive scholars with the very same problems that it purports to solve. It makes two claims. First, it argues that despite the effort to bridge progressive division, movement liberalism ends up reproducing the very debate it seeks to transcend. Second, it suggests how movement liberalism's attempt to reframe courts and lawyers in a more positive light in fact end up reinforcing versions of the foundational critiques—only now on empirical rather than normative grounds. Reflecting on the underlying stakes of the law-politics debate within the new movement literature, this Part therefore suggests how its selective use of social science

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[532] Anthony V. Alfieri, *Faith in Community: Representing "Colored Town"*, 95 CAL. L. REV. 1829, 1840 (2006) ("[T]he task of race-conscious community lawyers is to learn how to use legal and non-legal intervention to expand the collaborative process."); *see also* Anthony V. Alfieri, *Integrating into a Burning House: Race- and Identity-Conscious Visions in* Brown*'s Inner City*, 84 S. CAL. L. REV. 541 (2011); Anthony V. Alfieri, *Resistance Songs*, 93 TEX L. REV. 1459 (2015); Anthony V. Alfieri, *(Un)Covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805 (2008).

[533] Ashar, *Resistance Movements*, *supra* note, at 1922.

[534] Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DENV. U. L. REV. 457 (2009); Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012).

[535] Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465 (2010). *See also* Dean Spade et al., *Law Reform and Transformative Change: A Panel at CUNY Law*, 14 CUNY L. REV. 21 (2010).

[536] *See* Marcy L. Karin and Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLINICAL L. REV. 563 (2011); Paul Nolette*, Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry Through Government Litigation*, 40 LAW & SOC. INQUIRY 123 (2015).

[537] Amy Kapczynksi, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008); *see also* Martha F. Davis, *Law, Issue Frames and Social Movements: Three Case Studies*, PA. J.L. & SOC. CHANGE 363 (2011).

[538] Douglas NeJaime, *Framing (In)Equality for Same-Sex Couples*, 60 UCLA L. REV. DISCOURSE 184 (2013); Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327 (2013); Ziegler, *Framing Change*, *supra* note.

[539] Richard A. Brisbin, Jr., *Resistance to Legality*, 6 ANN. REV. L. & SOC. SCI. 25, 33, 37 (2010). *See also* Neta Ziv, *Lawyers Talking Rights and Clients Breaking Rules*, 11 CLINICAL L. REV. 209, 230 (2005) (stating that "lawyers can try to expose the underling distributive flaws of the socio-political system which led their client to break the law").

to fight a long-standing battle about the appropriate role of courts and lawyers in the project of progressive reform has obscured as much as it has revealed.

A. Reproducing Critical Legal Debate

While the incorporation of social movements into progressive legal thought responds to central problems in the study of courts (countermajoritarianism) and lawyers (professionalism), bridging differences underscored by critical legal studies, it also reveals familiar patterns of political disagreement. Movements, as it turns out, do not neatly resolve the theoretical challenges at the heart of progressive legal thought, but rather reproduce them on new—empirical—grounds. As this Part shows, delving deeper into the new social movement literature reveals patterns of disagreement that reflect—and even reinforce—the same debates from legal liberalism, which this Part categorizes around three approaches: process, liberal, and pragmatic.

1. Process

In the legal process framework, the key concern is protecting law's legitimacy through a clear demarcation of law from politics. Classical legal process theory in the wake of *Brown* extended the institutional specialization of realism to argue for an approach to adjudication that depended upon the articulation of "neutral principles" as a basis for rights extension by courts. The rationale was to limit judicial discretion in a framework of institutional competence within which social reform would occur through politics, while law would change only on the basis of social consensus. The parallel move within the legal profession was to imagine the adversary system as a procedural site of neutral dispute resolution and lawyers as neutral facilitators of that process, which would in the aggregate produce rough justice. Just as constitutional law was concerned with law's decisional autonomy from judicial politics, the professional scholarship expressed concern with client's decisional autonomy from lawyers' politics. Within movement liberalism, a similar framework has emerged—only now on the ground of empirical claims about the social costs of movement efforts to use law to change politics, framed in terms of law reform that deviates from public opinion. There are three elements to the process framework.

First, this framework operates through a set of presumptions that differentiate law from politics. This is evident in the way that the process approach understands how courts (especially the Supreme Court) make decisions and how those decisions affect social behavior.[540] Thus, within the process framework, social change occurs first outside of legal change[541]; court decisions then occur as a reflection of social change,

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[540] Michael J. Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 138 (2013) ("Lawyers and law professors may care greatly about legal doctrine, but the Justices do not appear to be much influenced by it—at least not in landmark cases such as *Brown* and *Windsor*.).

[541] Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 Harv. J. L. & GENDER 251, 290 (2009) ("Because courts are never at the vanguard of social reform,

working to "constitutionalize consensus and suppress outliers."[542] In this view, court decisions are a close mirror of predominant social norms that reflect majoritarian attitudes. As a result, social norms act as a strong restraint on Court decisions. Judicial decisions that deviate from social norms and seek to change behavior through state coercion are viewed with skepticism: they either fail to produce the change in behavior they desire or, worse, they cause people to lose respect for the court and mobilize against its decisions. In this sense, the process approach builds on the political science research finding that judicial decisions are the product of political realignment and popular opinion, rather than organized legal capacity, litigation strategy, and doctrinal argument that puts pressure on judicial decision making.[543] It also accepts the view of political scientists in the "court impact" tradition, dating back to the 1960s but most prominently associated with Rosenberg, who argue that court decisions do little to affect social behavior or attitudes.[544]

Second, within the process framework for courts, public opinion plays a role akin to "neutral principles" in limiting judicial discretion. Again, this view relies on the political science literature that finds a positive correlation between judicial decisions and public opinion, and suggests that this correlation may be read to show how opinion acts as a limit on judicial decision making, primarily at the Supreme Court level.[545] This occurs through both mechanisms described above: as changing public opinion becomes reflected in changing voting patterns, which eventually translate into the political appointment of judges whose views generally conform to those of the ruling political coalition; and as judges respond directly to public and especially elite opinion about the issues they confront. In both versions, social movements play key roles in shaping judicial decision making, either through changing electoral coalitions and thus judicial appointments or by advancing new constitutional norms that shift attitudes more directly. In either version, public opinion operates as a proxy for judicial legitimacy: courts pay attention to opinion precisely because they are concerned about the need for sustained public support.[546] Caution against getting out "too far ahead" of the public asserts opinion as the neutral point around which judicial decision making varies.[547] It also reflects the political science claim that attitudes are generally resistant to being

litigation victories depend on social change that has already occurred."); *see also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 378 (1985).).

[542] MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2012). Friedman argues that "the function of judicial review in the modern era is to serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of their Constitution." FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note, at 16.

[543] *Cf.* EPP, *supra* note; LAWRENCE, *supra* note; VOSE, *supra* note.

[544] This scholarship divides social impacts into "direct" and "indirect" effects, but generally finds little of either.

[545] *See* TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2011); *see also* Lawrence Baum, *Probing the Power of the Supreme Court*, 48 TULSA L. REV. 203 (2011) (reviewing TOM S. CLARK, THE LIMITS OF JUDICIAL INDEPENDENCE (2011) & MATTHEW E. K. HALL, THE NATURE OF SUPREME COURT POWER (2011)).

[546] Baum, *supra* note, at 205.

[547] *See* FRIEDMAN, THE WILL OF THE PEOPLE, *supra* note.

influenced by the legal and moral authority of the court. In this frame, maintaining law's independence from politics is equated with keeping it within the boundaries of public opinion and thus minimizing legitimacy costs.[548] The fact that law reflects but does not produce norm change and is ineffective at enforcement argues for an implicit theory of judicial minimalism.[549] Changing public attitudes is the function of politics; conforming to public attitudes if the function of law.

Finally, the process approach associates the concept of backlash with an implicit framework of institutional specialization. The role of public opinion in cabining judicial discretion is revealed in the mechanics of backlash. Under the backlash thesis, not only do courts risk legitimacy with the public at large by announcing decisions at variance with public opinion, they also risk harming the very movements they purport to advance. This happens when the discrepancy between what the court decides and what the people believe is too large, inciting "anger over 'outside interference' or 'judicial activism.'"[550]

For this concept to work as a critique of adjudication in hard constitutional cases, it must make two counterfactual assumptions. First, it must leave open the door for an alternative means of protecting minority rights, otherwise in its broadest form it would become an argument for ignoring minority oppression—which itself would have significant democratic legitimacy costs. By positing that legal change follows social change, however, the process approach solves this problem: because the court reflects but does not produce social change, it is forced to wait for such change to take place through other channels. And the background assumption within the process literature is that such change is forthcoming—it is only a matter of time until political, economic, and social factors coalesce to produce the attitudinal shifts that prepare the court to validate the new consensus.

Backlash occurs, in this view, when court decisions "alter the order in which social change would otherwise occur."[551] This leads to the second counterfactual assumption, which is that backlash would not have occurred if social change had proceeded through normal political channels. [552] This institutional assumption depends on the notion that backlash either does not occur or is less likely to occur when law changes through other political channels precisely because of the presumption of majority acceptance.[553] Taken together, the idea is that while the court has little power to do good in situations of low public support, it has great power to do harm. Thus, it would be better off to deploy a strategy of restraint and deferral. In this model, it has to be that politics at some points opens up to minority groups, otherwise they would be consigned to perpetual subordination. The implicit normative point is that social movements

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[548] *Cf.* William N. Eskdridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279 (2005).

[549] SUNSTEIN, *supra* note; TUSHNET, NEW CONSTITUTIONAL ORDER, *supra* note.

[550] Klarman, Brown *and* Lawrence, *supra* note, at 473

[551] *Id.*

[552] GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW, SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS (2009).

[553] KLARMAN, FROM THE CLOSET TO THE ALTAR, *supra* note.

pursuing change should build power outside of law, through channels with greater institutional competence to handle their demands.

Within the process framework, *Brown* is the foundational case—as it was in Wechsler's original theory, which defended the substantive outcome but not the court's decision. Klarman's account of *Brown* could also be read to support the correctness of the substantive outcome of school desegregation, but not the court's prescribed course for getting there. In Klarman's account, law is not the cause of the court's decision in *Brown*, which is instead the product of "enormous changes in the surrounding social and political contexts."[554] Although public opinion was moving forward during the time that *Brown* was considered,[555] there were still seventeen Southern states solidly committed to Jim Crow and the political benefits to segregationists of opposing *Brown* were significant.[556] Thus, the result was backlash, measured by increasing violence against blacks, decreasing movement activism, a shift of political parties further toward virulent segregationism, and successful resistance to segregation. However, it is precisely the repugnance of the South's response to *Brown*—symbolized in the ugly televised images of Bull Connor's attack dogs in Birmingham—that turned northern elite opinion firmly in favor of federal intervention, leading to the 1964 Civil Rights Act and the 1965 Voting Rights Act. Through this logic, the substantive outcome of *Brown* is vindicated, though the process of its achievement is criticized. Institutional specialization is suggested by the assertion that it was "[o]nly after the 1964 Civil Rights Act threatened to cut off federal educational funding for segregated school districts" enforced through executive agency action that desegregation began to occur.[557] *Brown* is denied to have contributed to the 1964 Act by severing its connection to the protest phase of the movement: associating the decision with a decline in protest activity in 1954 and casting "significant doubt on any causal connection" between *Brown* and the Montgomery bus boycott,[558] which is widely viewed as initiating the movement's protest phase.[559]

Although this framework has been articulated primarily around the question of what role courts play in relation to law reform campaigns advanced by social movements, it presents an implicit view of the role of social movement lawyers. If legal liberalism put lawyers at the center of social change, the process view of movement liberalism contains a spillover argument that implicitly views lawyers as either unimportant or potentially dangerous. The claim that social change, not legal

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[554] Klarman, Windsor *and* Brown, *supra* note, at 130-31 ("For *Brown*, the critical development was World War II," which highlighted the need to sync American values at home to those it purported to represent abroad, and the Great Migration of blacks from South to North, which "enhanced black political power" and facilitated "coordinated social protest."); Klarman, Brown *and* Lawrence, *supra* note, at at 443 ("It was these sorts of changes—political, social, demographic, and ideological—that made *Brown* possible.").

[555] *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 6 (2004).

[556] *See* Jack M. Balkin, Brown*, Social Movements, and Social Change*, *in* CHOOSING EQUALITY: ESSAYS AND NARRATIVES ON THE DESEGREGATION EXPERIENCE (Robert L. Hayman & Leland Ware eds., 2009).

[557] This is also an argument advanced empirically by Rosenberg. Klarman, *Backlash Thesis*, *supra* note, at 84.

[558] Klarman, *Backlash Thesis*, *supra* note, at 86 n.9.

[559] *See* BRANCH, PARTING THE WATERS.

investment, causes court decisions suggests that lawyers and litigation strategy matter little—or at least much less than politics—in shaping judicial outcomes. It is true that lawyers are need to file the case that produces the court decision, but beyond that task, their work is overwhelmed by the powerful influence of exogenous social change, rendering movement lawyers bit players whose strategic decision making is tangential to the larger drama of constitutional change. Yet the message communicated by the backlash thesis is that if lawyers push the court too fast, they may ignite a negative reaction that hurts the cause that they are attempting to advance. This conclusion has two implications. One is that within judicial arena, lawyers should pay less attention to using the courts as political tools; courts, at least at the apex, will make decisions once they are ready, not because of strategic investments by lawyers. The other implication is that lawyers, if they desire to produce social change, might do better to invest in advancing those social and political changes that do the real work, rather than litigation.

Other scholars have explicated connected the idea of institutional specialization to the lawyering role.[560] For instance, Tom Stoddard claimed the goal of legal activism should be directed toward shifting culture, rather than rules, and suggested that this could be achieved more effectively outside of court.[561] His case in chief also rested on the 1964 Civil Rights Act, which he viewed as an example of successful culture shifting.[562] Stoddard argued that it was important that change came from Congress, not the Supreme Court. "If the new rules had come down from on high from the Supreme Court, many Americans would have probably considered the change of law illegitimate, high-handed, and undemocratic—another act of arrogance—by the nine philosopher-kings sitting on the Court. Because the change emanated from Congress, however, such sentiments of distrust . . . never came to affect the legitimacy of this stunning change in American law and mores."[563]

More recently, Eskridge has elaborated an argument that cautions against lawyer influence over identity-based social movements that resonates with process concerns about democratic legitimacy and backlash. While echoing the CLS argument that lawyer involvement can channel movement activism toward "assimilative and reformist rather than separatist and radical stances,"[564] he also cautions that

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[560] This argument also resonates with the idea of role specialization advanced by critical scholars in the prior era. *See* Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 448 (1996).

[561] Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 NYU L. REV. 967 (1997).

[562] For Stoddard, the key element in the Act's passage was not the formal political process, but wider public process that surrounded it. "The Act was a product of continuing passage and informal national debate of at least a decade's duration . . . over the state of race relations in the United States. . . . It is this debate—not the debate in Congress—that really made the Act a reform capable of moral force." *Id.* at 976.

[563] *Id.* at 977.

[564] Eskridge, *Channeling*, *supra* note, at 467 ("[O]nce the lawyers get involved, legal reform comes to dominate other types of action more than before, and the movement as a whole tends to assume an increasingly lawyerly aura. This has consequences for the social movement: formal equality has dominated other goals because lawyers feast on formalism; the movement has tended toward assimilation and reformist rather than separatist and radical stances, because lawyers cannot defend the latter before judges and legislators who are their

overzealous legal activism, by moving too quickly to change culture through law, may provoke a countermovement based on a "politics of disgust," which may be "intensive and potentially violent."[565] Thus, the boundaries of appropriate lawyering are narrowly drawn: subsidiary to other movement activism in order to avoid political cooptation, while simultaneously careful not to move too forcefully to ignite backlash. Overall, the process view reinforces the critique of legal liberalism, both of its lawyers, who self-confidently believed they could litigate the country into accepting their substantive values, and of the court, which presumed that its intervention would cause the virtuous spiral of rule change leading to cultural change.

2. Liberal

So-called "footnote four" liberals after *Brown* responded to the process critique by seeking to justify a strong role for judicial review on the basis of constitutional values as a defense of the Warren Court. This view was most vulnerable to process-based (and conservative) claims of judicial activism and radical left claims of political cooptation. It was therefore the most direct target of the radical critique of rights, which sought to expose liberalism as an inherently limited progressive strategy. As Part II showed, critical attacks on legal authority evolved into deep deconstructionist debates about the meaning of texts, particularly those derived from elite sources, which led to a search for appropriate "interpretive communities" in which the voices of subordinate groups were heard. Within progressive legal thought, the liberal view thus sought to navigate the shoals of neutral principles and the critique of rights toward a middle-ground defense of legal liberalism.

The liberal approach within the new social movement scholarship seeks to carve out a defense of Warren Court-style liberalism, only now on grounds less vulnerable to process and radical critiques. Its primary aim is to revive the positive legacy of seminal liberal legal decisions and connect them to affirmative accounts of judicial decision making and lawyering in contemporary politics. This defense is based on two moves designed to respond, on the one hand, to process concerns about legal legitimacy and, on the other, to critical concerns about legal authority.

The first move is to reframe the political science foundations of judicial decision making in ways that leave open a more affirmative role for social movements in shaping constitutional law. Liberals generally accept the political science view that courts are constrained by public opinion, which limits what is "constitutionally possible,"[566] and see courts acting to "ratify the views of national majorities."[567] Yet some, at least, have pushed back on process claims about the role of public opinion, arguing that the

audience; and members of the minority who are the least like the mainstream American have tended to be left behind.").

[565] Eskridge, *Backlash Politics: How Constitutional Litigation Has Advanced Marriage Equality in the United States*, 93 B.U. L. REV. 275, 279 (2013).

[566] JACK M. BALKIN, CONSTITUTIONAL REDEMPTION 11 (2011).

[567] Balkin, *Brown, Social Movements, and Social Change*, *supra* note.

existence of constitutional anomalies—court opinions that either fail to suppress constitutional outliers or deviate significantly from the ideological center of the ruling political coalition—call into question the empirical model about how courts make decisions in hard cases.[568] Even those liberal scholars who accept public opinion as a constraint see social movements in a more active light than their process counterparts. Social movements matter because they affirmative shape public opinion to shift the "boundaries of the reasonable, and the plausible," in order to "open up space for new forms of constitutional imagination and new forms of constitutional utopianism, both for good and for ill."[569] In this way, the liberal view appears to imagine a more affirmative role for social movements in shaping politics and popular opinions.[570] Although the process view does not deny the role of movements in politics, it has tended to deemphasize the role of social movements by ascribing legal change to macro-level social changes, rather than specific social movement political strategies.

Second, liberal scholars tend to question the institutional assumptions of the process approach: namely, that court decisions deviating from opinion impose unique backlash and legitimacy costs. Liberals take issue with both claims. With respect to backlash, liberals call into question process theory's key counterfactual: that positive social change would have occurred in the absence of a court decision and such change would not have provoked backlash. This is Linda Greenhouse and Reva Siegel's essential claim about *Roe*: in contrast to backlash theory, they show how even before that Supreme Court decision, Republican strategists were using the abortion issue as a tool of party realignment by seeking to attract Catholic voters and social conservatives away from the Democrats—suggesting that countermobilization was already well underway.[571] With respect to legitimacy, the liberal approach reframes backlash as normal politics rather than aberrational politics: instead of backlash constituting a distortion of a well-functioning political process of achieving a stable consensus, the liberal view positions backlash as part of the predictable back-and-forth of political struggle in which one movement's advance invariably provokes countermobilization. Against scholars like Klarman and Eskridge, this vision then reverses the law-politics framework posited by process theory, which suggests that legitimacy depends on decisions staying within the zone of political neutrality. Conversely, liberals argue that it is democratically valuable to question the court's autonomy to interpret the constitution. For them, democratic legitimacy depends on the people believing that they have a role in constitutional interpretation, which they are able to express through

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[568] Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014); Justin Driver, *The Constitutional Conservativism of the Warren Court*, 100 CAL. L. REV. 1101 (2012).

[569] BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note, at 11.

[570] Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374, 389 (2007).

[571] Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2033 (2011).

backlash to "promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation."[572]

In this way, liberals associate legitimacy not with the court staying out of politics, but through its deep involvement in robust dialogue and constitutional engagement with the people.[573] Law is less sharply distinguished from politics: adjudication is framed as one strategy by which social movements seek political change.[574] Yet courts still "play a special role in this process" by virtue of exercising "a distinctive form of authority to declare and enforce rights."[575] Liberals therefore see court decisions as vindicating important social values and argue in favor of "substantive constitutional ideals."[576] As this suggests, liberals are more inclined to see a complex and multidirectional relation between law and social values, which may be reshaped through the process of democratic constitutional engagement.

It is precisely at the point of defining the content of "substantive constitutional ideals" that liberals have long run into trouble on the right and left. In the new social movement scholarship, they seek to respond to both perils through the same basic move. The liberal view responds to the right by portraying constitutional change as the product of pluralism: the productive resolution of clashing bottom-up claims of legal recognition that work their way through the legal process and eventually make their imprint on law.[577] It is the political work of these bottom-up movement processes that—even in their failure—change constitutional culture; not top-down lawyer-driven, court-centered social engineering so anathema to the right. Even when the courts "choose sides" in politics, they are presented as doing so with an invitation to the losers to continue the dialogue.

On the left, the liberal view simultaneously marginalizes the radical critique of legal liberalism associated with CLS and avoids the core representational concerns raised by left critics. CLS's critique of legal liberalism had presented social movements as an implicit political alternative: by exposing the legalist strategy as a barrier to deep change, the field could be cleared to permit social movements to gain power and fundamentally reshape the system. Movement liberalism blunts this aspect of the CLS critique by embracing movements as the primary engines of change, but does so toward the end of defending (and redefining) the mainstream liberalism against which the critics recoiled—yet which now has come to occupy the far left in the contemporary (more moderate) political landscape. This is a key element of the new movement literature overall: by placing movements at the center of analysis, the political project is to reclaim mainstream liberalism not advance more radical political ends.

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[572] Roe & Siegel, *supra* note, at 376 (Democratic constitutionalism suggests that it is neither feasible nor desirable for courts to elevate conflict avoidance into a fundamental principle of constitutional adjudication.).
[573] *See* ACKERMAN, *supra* note.
[574] Balkin, Brown*, Social Movements, and Social Change*, *supra* note, at 251 ("There are three basic institutional avenues for social movement politics: They are (1) litigation–seeking redress in courts; (2) legislation–seeking redress in Congress or state legislatures; and (3) direct action–trying to change people's minds through street protests, boycotts, sit-ins, and other types of demonstrations.").
[575] Greenhouse & Siegel, *supra* note, at 374.
[576] Post & Siegel, *supra* note, at 377.
[577] Siegel, *Constitutional Culture*, *supra* note, at 1330-31.

By centering movements—and decentering courts and lawyers—the liberal view also seeks to respond to the left critique of legal authority: that the creation of constitutional norms under legal liberalism was the product of an elitist liberal vision that ignored or deemphasized the views of marginalized communities they purported to represent. This was Bell's critique of the NAACP "serving two masters," and was expressed in the poverty law critics discomfort with traditional forms of legal representation. Liberals generally avoid this concern by deemphasizing the dynamics of representation and the role of lawyers. In a point of connection between the liberal and process approach, lawyers play a lesser part in liberal social movement accounts of constitutional change; they are subsidiary to the main action enacted by movements in which voices of dissent are sometimes acknowledged but not central to the story. Litigation happens, often as a strategy of last resort,[578] but it occurs against the backdrop of political mobilization, rather than the reverse. Siegel's work is the most important in this regard. Although her progressive movement stories reference lawyering, and culminate in court decisions, the main action is outside of court, in the political debate that surrounds and ultimately informs doctrinal development. In a prominent example, in her account of the "de facto ERA"—the constitutionalization of antidiscrimination protection for women through courts against the backdrop of debate around the politically doomed constitutional amendment—although movement lawyers set the frame for strict scrutiny analysis and argue in favor of a "dual strategy" of law and politics,[579] their work is largely eclipsed by the more central movement-countermovement dynamic between ERA proponents (like Betty Friedan and Bella Abzug) and Phyllis Schlafly's STOP ERA.[580]

Yet there is a tension between the liberal embrace of the power and authenticity of bottom-up movements as social change agents and its commitment to elite politics, which are not only compatible with the liberal view, but *essential*: because minorities (like blacks in the Jim Crow South) cannot influence politics alone, they have to form alliances with those in power.[581] This does not mean simply selling out: alliances can come through the application of pressure won through protest. However, the gains from that leverage operate through elite-mediated political reforms within the structures of democratic liberalism. In this way, movement liberalism reconstitutes pluralist interest group theory on the foundation of social movements. Because of this, lawyers occupy an uncomfortable role in liberal social movement theories of courts: in order for the pluralist account to work, lawyers have to be genuine representatives of bottom-up democratic processes, not the independent rights-claimers condemned by critics of legal liberalism. Liberal constitutional theory achieves this in large part by shifting focus away from lawyering and endowing cohesive movements (or movement organizations) with the primary authority to make constitutional law. Yet this account is plausible only to the extent that one imagines lawyers as exercising little discretion in

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[578] Balkin, Brown*, Social Movements, and Social Change*, *supra* note.

[579] Siegel, *Constitutional Culture*, *supra* note, at 1371.

[580] *Id.* at 1389.

[581] Balkin, Brown*, Social Movements, and Social Change*, *supra* note (stating that "social movements tend to succeed best when they are able to call upon the interests, the values, or the self-conception of majorities.").

the process of client selection, issue framing, and substantive argumentation over the content of constitutional norms. In this way, strong lawyers are a problem in the liberal account, causing it to shade too closely back into legal liberalism. As a result, the liberal model of movements in adjudication marginalizes lawyers even as it attempts to recover an affirmative role for courts in progressive social change.

Within the movement lawyering literature, there is a parallel move to reconstruct the role of lawyers in rebuilding political liberalism that seeks to avoid critiques of legalization and misrepresentation.[582] Responding to the claim of legalization, movement lawyers are portrayed emphasizing culture-shifting outside of courts, connecting litigation to other forms of politics and public relations.[583] Movement lawyer responsibility for bad outcomes is questioned by suggesting the inevitability of backlash and showing how movement lawyers sometimes lack of control over the timing and content of frontal constitutional challenges.[584] And the liberal view presents positive portraits of lawyers collaborating with elites to produce change, while seeking ways to protect movements from state cooptation.[585]

This literature attempts to respond to concerns about misrepresentation by emphasizing accountability to mobilized clients in contexts where client groups have more control over process. Yet as the literature on movement lawyers turns attention to the lawyering process, it expresses a disinclination to engage with internal movement schisms over what counts as relevant constituency "interests." Instead, movement lawyers are portrayed as expert professionals, lending critical legal resources to advance strategies defined by their social movement organizational clients. Dissent is either ignored as outside the scope of organizational representation, which serves interests defined by organizational leaders, or dealt with through representational choices seeking to minimize conflicts of interest.[586]

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[582] Within the liberal frame, this research presents lawyers advancing a domestic project that seeks to rebuild old movements that powered the New Deal, and invest in new movements that carry forward the equality ideal, while simultaneously (and sometimes reluctantly) engaging in a national politics of pragmatism, in the hope of preserving what remains of the New Deal and Great Society (and waiting for an opportunity to reclaim the court). This approach is expressed in efforts to revitalize the legal services program after decades of funding cuts and substantive restrictions, protect the status and social justice mission of clinical legal education from the new emphasis on market-based skills, and defend liberal public interest law from the conservative counter-movement. These national-level efforts are then coupled with a more progressive local politics of redistribution, taking advantage of the opportunities afforded by demographic change and municipal power to deepen the rights of workers, immigrants, gays and lesbians, and other groups associated with liberalism (though always mindful of the specter of federal preemption). *See* Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 UC IRVINE L. REV. 939 (2015); David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

[583] Nan Hunter, responding to Stoddard, argued that historical contingency, rather than specific institutional characterists, explained whether litigation versus legislative change would be culture shifting. Nan Hunter, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009 (1997)j; *see also* Michael Waterstone, Michael Stein & David Wilkins, *Disability Cause Lawyers*, 53 WM. & MARY L. REV. 1287 (2011).

[584] Cummings & NeJaime, *supra* note.

[585] *See* Alfieri, *supra* note; Ashar, *supra* note; Cummings & NeJaime, *supra* note.

[586] Generally, liberal scholars are more comfortable with expansive forms of representation in contexts where direct democratic participation by marginalized groups is unlikely or impractical. Mark Neal Aaronson,

3. Pragmatic

The pragmatic approach within the new social movement literature shares many of basic political values of liberalism and a skepticism of court-centered, lawyer-driven social change—but does so on different grounds and for different animating reasons. Left critics of CLS—focusing on intersectional analyses of race, gender, sexual orientation, and other identity-based hierarchies within its overarching class frame—often sought to defend the ideal of rights as a viable political strategy within liberalism, despite its flaws. Their primary concern was to ensure that rights strategies reflected authentic participation and sensitivity to the ways in which different forms of social power were exercised outside of but also within communities of resistance. Reflecting the movement of legal scholarship "to the bottom," left critics of CLS sought to reconstruct democratic legal meaning from interpretative communities from below.

Pragmatic scholars have used social movements as a rejoinder to both the mainstream liberal inattention to representation and the utopian CLS claim that something better would follow the decline of liberal capitalism. As such, the pragmatic approach to movement liberalism is quintessentially liberal, not radical: its primary aim is to deepen democracy through robust participation in and authorship of social movement activism. In this strain of social movement literature, social movement activists represented by lawyers but also "representing themselves" become "important interpretative communities of our democracy."[587] The difference between the pragmatic and liberal approaches is that the critics see meaningful and sustainable legal change as emanating from those authentic voices at the bottom of social movement hierarchies. Its main point of departure from the liberal view is in its emphasis on nonelite representation. Pragmatists thus differentiate their project both from legal liberalism and from what they view as more elite-oriented movement liberalism in terms of how they understand positive outcomes, appropriate means, and meaningful representational practices.

First, with respect to outcomes, pragmatists differentiate sharply between the achievement of positive law and deeper social change, and cast the legal liberal project as either primarily interested in the former (law on the books) or overly optimistic that positive law change may eventually translate into enduring normative and behavioral change. Guinier and Torres, in discussing the legal liberal model of the NAACP, suggest that its approach of changing law "sector-by-sector" was "important but insufficient" precisely because "the required focus on doctrine and rules deflected time, energy, and resources from the harder work of changing the culture."[588] In this sense, law is distinguished from society or "culture," and the pursuit of positive law

Representing the Poor: Legal Advocacy and Welfare Reform During Reagan's Gubernatorial Years, 64 HASTINGS L.J. 933, 973 (2012) (arguing in favor of more expansive concept of representation when "an overarching purpose of the representation is structural—that is, to have a place in a targeted legal or policy body").

[587] Guinier & Torres, *supra* note, at 2781.

[588] *Id.* at 2748-49.

reform is seen as inadequate to the goal of permanently changing attitudes and norms. Legal liberals are accused of pursuing one-off rule change rather than "significant, sustainable social, economic, and/or political change" that "can permanently alter the practice of democracy by changing the people who make the law and the landscape in which that law is made."[589]

Second, the pragmatic approach is deeply skeptical of court-focused law reform. This skepticism stems not from a view about the inherent limits of litigation, but rather the inevitability of its slide into elite control. Thus, the critical view seeks to expand "beyond litigation-centric social change, which is often driven by national elites…. [It is] not a critique of tactical litigation per se, but of the tendency in litigation to migrate from tactics to strategic centrality in theories of change."[590] This is true even when the lawyers themselves may be personally committed to playing a subsidiary role due to the institutional processes by which litigation gains attention, funding, and prominence within movements.[591] Litigation works, in this view, when it is firmly anchored to social movement organizing and strongly controlled by social movement constituents.[592] In this sense, the pragmatic position sees the potential of legal mobilization to reshape culture, but tends to anchor that potential outside of court, where nonelites can control the agenda and the direction of reform.

Third, the pragmatic vision seeks to decouple movements from elite influence in order to position them as engines of authentic bottom-up social change. The stories within the pragmatic vision are therefore quite different from those within the process versus liberal debate. Instead of tracing the change-making power of relatively cohesive movements in national politics, emphasizing elite voices like King or Friedan in the process, the critical vision tends to focus more carefully on movement dynamics at the local level, where the lesson is often one of more radical movements being coopted either by elite lawyers or elite movement leaders more concerned with intermediation than representation. This then leads to the core of the pragmatic vision, which differentiates between nonelite and elite interests within the movements themselves—associating transformative change with the activism of the nonelite factions.

In these stories, nonelite interests are betrayed by mainstream lawyers and movement elites, both of whom threaten the transformative cause by seeking reform that operates too squarely inside the frame of "normal politics." Guinier and Torres's example of the efforts of the Mississippi Freedom Democratic Party (MFDP), led by activist Fannie Lou Hammer, to be seated at the 1964 Democratic National Convention

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[589] *Id.* at 2749-50. "Success" involves "transform[ing] the culture that controls the meaning of legal changes." *Id.* at 2755.

[590] *Id.*

[591] Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. L. & SOC. CHANGE 107 (2014); Gwendolyn Manriquez Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. (2014); Jaime Alison Lee, *Can You Hear Me Know: Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405 (2013)

[592] See Guinier & Torres, *supra* note, at 2779 ("The MIA was a constituency of accountability, capable of holding lawyers like Gray to the discipline of shared power.").

illustrates this approach. They characterize the MFDP's effort as a "challenge to state power [that] came from outside the precincts of normal politics."[593] As a result, the efforts of their lawyer, white elite Joe Rauh, to negotiate a settlement in which the MFPD would gain a compromise of two seats, rather than its desired full share, constituted a failure to appreciate the nature of the MFPD challenge: as an outsider to the community and a well-connected white liberal serving multiple "masters," he "misunderstood the power of the MFPD, which he tried to channel into conventional deal-making."[594] When the MFPD pushed back on this compromise, it was again misrepresented by none other than Martin Luther King, Jr. himself, who "sought to preserve his own status as an individual power broker" instead of advancing the "larger vision of justice" embraced by the MFDP.[595] Thus, in the end, it was the failure of accountable non-elite representation—both legal and political—that undermined the MFDP's most ambitious goals.

Lawyering scholars in this pragmatic vein have similarly highlighted participation and control by non-elites as the touchstone of movement lawyering. In his essay on the legal profession, Aziz Rana argues that the primary failure of ethical conceptions of lawyerly "independence" has been its linkage to elite politics in which lawyer-statesmen exercise individual leadership instead of promoting popular forms of participation.[596] Rejecting models of ethical discretion as "softer versions of the legal guardian idea," Rana argues for a vision of independence in which "attorneys should employ their discretionary judgment to strengthen the capacity of social groups to intervene in administrative decision making and create more participatory modes of economic and political governance."[597] This view connects with the "collaborative lawyering" model advanced by Piomelli: "At its core, collaborative lawyering is an effort to practice, promote, and deepen democracy—more precisely, a participatory democracy in which individuals and communities flourish by unleashing their full energies and potential in joint public action."[598] In both visions, the intellectual forerunner is John Dewey, not Louis Brandeis; the heroes are nonelites like Fannie Lou Hamer, Ella Baker, and John Lewis (not King), and the iconic organizations are MFDP, SNCC, and Students for a Democratic Society (not the Southern Christian Leadership Council or the NAACP).[599]

Tomiko Brown-Nagin's story of movement lawyering in Atlanta illustrates this approach. Focusing on the power of dissent by nonelites within movements, she contests the dominance of NAACP lawyering in the civil rights era by drawing attention to the work of more radical grassroots lawyers, representing groups like SNCC and the

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[593] Guinier & Torres, *supra* note, at 2770.

[594] *Id.* at 2770. The challenge was not about getting the best deal; the challenge was not to abaondon fundamental values." *Id.* at 2771.

[595] *Id.*

[596] Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665 (2009)

[597] *Id.* at 1703.

[598] Ascanio Piomelli, *The Democratic Roots of Collaborative Lawyering*, 12 CLINICAL L. REV. 541, 548 (2006)

[599] Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383 (2009).

Committee on Appeal for Human Rights, who rejected the incrementalism of NAACP attorneys to file omnibus litigation challenging segregation in all Atlanta municipal facilities.[600] These lawyers developed more embedded relationships with the direct action elements of the movement, coordinating legal work with organizing tactics, and in so doing achieved success that NAACP did not at the local level.[601] In this way, her work reveals a different version of civil rights lawyering that responds to Bell's critique of the NAACP "serving two masters." Yet in doing so, this vision generally imagines the role of lawyers as outside counsel for movements. The normative takeaway from the pragmatic vision of social movement lawyering—which is a strong theme in the movement liberal scholarship overall—is that lawyers should stand behind movements, supporting them when necessary, but always take care not to lead.

B. Reinforcing Foundational Critiques

Overall, the new social movement literature has provided a deeply optimistic account of the capacity of movements to enhance democratic participation by marginalized groups. Yet, in so doing, it has reinforced scholarly division: orienting the mobilization discussion around the relation of lawyers to clients and constituencies, while orienting the reform discussion around the impact of court decisions on movement activism and cultural norms. This division, in turn, has served to reproduce a version of the foundational critiques within the law and social movement field: in the professional literature by emphasizing lawyer deference to nonlawyer movement actors (to promote accountability) and the constitutional literature by emphasizing judicial deference to movement political challenges (to promote efficacy). The new social movement scholarship thus carries forward critical assumptions from the legal liberalism it rejects by treating the problem of accountability as specific to lawyers (as distinct from nonlawyer activists) and the problem of efficacy as specific to law (as distinct from politics). This treatment conflates problems of interest group accountability with risks specific to professional control (rather than to social movement leadership more broadly), while similarly conflating less-than-optimal outcomes and movement reversals with shortcomings specific to legal action (rather than limits on outsider political challenges more generally). It thereby misses key lessons from the social movement theory it relies upon, while disserving evaluation of contemporary efforts to use law to advance progressive social change.

1. Accountability

Movement liberalism asserts a strong version of lawyer accountability by shifting the perspective from legal liberal lawyers representing vulnerable individuals or diffuse classes to movement lawyers representing mobilized organizations. In this model,

[600] BROWN-NAGIN, *supra* note, at 207.
[601] *Id.*

lawyers represent "a movement and not a class."[602] Yet this shift hides underlying problems.

For one, the vision of movement lawyering tends to present movements as having coherent interests that can be communicated to lawyers in determinate ways. Movements are presented in terms of finite organizations, whose leaders represent their constituents; they are seen as able to communicate a unified position of legal interest, which lawyers can understand and act upon within the legal system. "[M]ovements approach law and lawyers deliberately and strategically, if at all."[603] Yet in positing a determinate movement with discernible interests that can be "deliberately and strategically" communicated to lawyers, the literature at times overstates the potential for autonomous client decision making. As the sociological literature on movements shows, the boundaries of movements are porous and contested; there are internal factions and mainstream-radical dynamics; and there are some elements that are more professionalized and others that are more grassroots.[604] Lawyers representing movements therefore must navigate significant representational challenges in contexts in which decision making is diffuse and contested. What does it mean to represent a movement in this way?

Some movement scholars attempt to answer this question by differentiating among movement lawyers, defined by their representational and tactical choices. Yet doing so can conflate problems of lawyer accountability with problems of movement accountability more generally. Guinier and Torres's example of MFDP highlights this issue. In their story, there is a failure of legal liberal lawyering: the northern elite white lawyer, Joe Rauh, "did not grasp" the nature of the MFDP challenge and therefore sought to negotiate a legalistic solution, rather than appreciating that the goal of representation "was not the same as 'freedom.'"[605] But it is not clear that the failure was legal counsel or political push back; nor is it clear that the ultimate problem was legal representational conflict as opposed to intramovement political conflict. Indeed, it seems arguable from the account that Rauh did his best in the face of a classic organizational conflict: Who spoke for the MFDP? Its leadership, which seemed to support the compromise? The majority? Or the subgroup led by Fannie Lou Hammer? If it was the executive officers, then Rauh's belief that "he could not vote for the proposal, nor could he endorse the compromise with the party chiefs, without the approval of" the officers seems like a plausible representational position, consistent with organizational ethical rules.[606] Guinier and Torres's critique that Rauh "did not have the consent of the entire MFDP delegation" is apt but also not decisive.

In addition, in the MFDP example, there were intramovement schisms that seemed as important as the claimed failure of legal representation. Indeed, Guinier and Torres's point that "the dominance of elite thought reveals a tension in the ways even

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[602] Guinier & Torres, *supra* note.
[603] Brown-Nagin, *Elites*, *supra* note, at 1502.
[604] *See supra* text and notes.
[605] Guinier & Torres, *supra* note, at 2772.
[606] *Id.*

the most sympathetic elites 'represent' non-elites at the moment of action" seems like the most central point, revealed in the exchange between MFDP and King, in which King stated: "So, being a Negro leader, I want you to take this [compromise], but if I were a Mississippi Negro, I would vote against it."[607] It is precisely the representational equivalence between the lawyer and the leader that cuts against the traditional critique of legal liberal lawyers like Rauh.[608] It was not that Rauh was acting inappropriately because he was a lawyer; *but because he was an elite*. With both Rauh and King, it was the eliteness of their political position and their willingness to accept compromise that gave less than full expression to the fundamental challenge of the MFDP that mattered. "By attempting to serve two masters, King sought to preserve his own status as an individual power broker," in contrast to Hamer who tried "to hold them accountable to a larger vision of justice."[609] This suggests that the *fundamental problem is one of representational choice and practice, not legalism per se*.[610]

This emphasis on elite versus nonelite accountability maps onto a parallel debate within the social movement literature itself.[611] Movement scholarship in law often glosses over these problems, placing power in coherent movements that are presumed to be representative. Ultimately, pragmatic versions of movement liberalism hinge on the extent of direct nonelite participation[612]—a claim similar to that made by CRT theorists against CLS and poverty law critics against public interest law. In this sense, the ultimate disagreement is over the best form of politics as much as it is about the role of law in it. The core tension is around the degree to which movements engage in strategies of elite intermediation. Some movement scholarship suggests that authentic participatory movements can achieve change without compromise; yet in distancing themselves from elite politics, they tend not to articulate an affirmative transformational pathway for radical politics. By thus elevating nonelite participation as the touchstone for authentic politics, scholars reproduce the basic debate within progressive legal thought between liberals comfortable with representational practices designed to broaden participation and critics who see unmediated participation as the goal.

There are other accountability challenges revealed by the movement literature. The scholarly focus is on "how lawyers and other public citizens represent social movements to make law."[613] Yet there are three layers of representation occurring in movement lawyering: lawyer-to-client, client-to-movement, and movement-to-constituency. The interaction among these layers raises familiar representational

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[607] *Id.* at 2773.
[608] *Id.*
[609] *Id.* at 2774.
[610] Guinier & Torres, *supra* note, at 2774.
[611] *See supra* text and notes.
[612] Guinier & Torres, *supra* note, at 2781 ("The bus boycott involved a theory of popular mobilization *and* a theory of representative democracy. Social movement activists, represented by lawyers but also representing themselves, became important authoritiative interpretative communities of our democracy.").
[613] *Id.* at 2752.

problems. Jules Lobel's description of lawyers who use "courts as a forum for protest" highlights this problem.[614] As he notes, in the movement lawyering context, "[t]he legal struggle is . . . a part of a broader political campaign, not the engine of change itself. But the process of using court cases to "further a public dialogue or a political movement," "radically redefines the role of the lawyer," who "does not act as the neutral, detached advocate posited by the traditional model, nor even the less detached, elite, sympathetic and empathetic legal expert of the law reform model."[615] Rather, movement lawyers must build their case based on "broad moral and political themes," looking at "the interaction between the litigation and the broader interests of their clients and the movements they represent," thus creating "the potential to come into conflict with the needs and interest of the individual clients."[616]

The movement-to-constituency accountability problem is also complicated in ways not deeply interrogated by movement liberal scholars. Many contemporary progressive movements have become assimilated into "normal politics" and professionalized in ways that may constrain their ability to disrupt—a key element of their power.[617] This is a point prominent in social movement theory, but often overlooked in contemporary legal theory. Legal scholars distinguish between "movements" and "interest groups" precisely because the latter are part of conventional politics and therefore viewed as both less responsive to marginalized constituencies and also more constrained in making transformational demands. However, to the extent that social movement organizations are professionalized within American politics,[618] the line between "social movement organizations" and their "interest group" counterparts becomes harder in some contexts to defend—and partly an issue of characterization. Scholars have tended to select out social movement organizations from historical practice that are aligned with the most grassroots elements of movements—the MIA, MFDP, SDS, the UWF—but what are the contemporary analogues? Many of the contemporary social movement stories associate "movement actors" with professionalized organizations that operate by being responsive both to constituents and also donors and other elites. In this sense, by reframing representation around mobilized clients, movement liberalism does not avoid the accountability problem, but just shifts it to the organizational level.

2. Efficacy

The movement liberal resolution of the law-politics problem works by locating movements within the domain of "politics," not law. Movements are formally differentiated from the legal process—they emerge "outside" of law—to then take

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[614] Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004).
[615] *Id.*
[616] *Id.*
[617] PIVEN & CLOWARD, *supra* note.
[618] Leila Kawar, *Legal Mobilization on the Terrain of the State: Creating a Field of Immigrant Rights Lawyering in France and the United States*, 36 LAW & SOC. INQUIRY 354, 368 (2011).

form and reshape the meaning of law in ways that puts it on objective foundations. Movements thus "make law" through politics and courts then apply the law that movements make.

Yet it is not conceptually or practically easy to carve "law" off from social movement "politics."[619] Some scholars have managed this problem by arguing that movements definitionally exclude legal mobilization: the "hallmark" of movements is the "effort by citizens to directly influence public policy by appealing directly to the public and a target audience of decision makers, such as government representatives."[620] Yet this separation runs against a counter-trend in the social movement literature that argues in favor of legal mobilization as a critical part of a movement's tactical repertoire.[621] Although scholars generally agree that "noninstitutional" politics is central to social movements, many understand law and legal activism as "inside" movements rather than as external concepts that are engaged at the movement's behest.[622]

Even assuming that movements are "extra-legal," the law-politics division in movement liberalism relies on differentiating between when law is used "tactically" to gain political advantage as opposed to "strategically" to make new law. Strategic uses—by appealing directly to the court for rule change—would violate the law-politics boundary. But in practice this line between tactical (culture-shifting) and strategic (rule-shifting) movement uses of law is indeterminate.

Take Guinier and Torres's account of the Montgomery Bus Boycott. In their view, the litigation connected to the boycott illustrated the utility of litigation in supporting political mobilization, not to "make law" in the classic legal liberal sense. This was, in part, a function of the Montgomery Improvement Association's ability to hold its lawyer—Fred Gray—to account: "Gray supported rather than led the boycott organized by the MIA, whose key resources grew out of grassroots mobilization and mass action."[623] The synergy between the movement and the litigation was also a product of the way litigation was pursued: for tactical advantage (to circumvent the city's effort to enjoin the boycott) not as a goal in itself. Thus, when the Supreme Court ruled that the Montgomery system was unconstitutional, Guinier and Torres read it as an acknowledgment of the power of the boycott, not the litigation: "Although it was the intervention of the Supreme Court, ruling on the case Fred Gray brought in federal court, that ultimately declared the segregated buses unconstitutional, it was the social movement activism embedded in a biblical belief in justice that shortened the distance between our democracy's reality and its potential to be the 'greatest form of

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[619] Eskridge, *Channeling*, *supra* note.

[620] Brown-Nagin, *Elites*, *supra* note, at 1503.

[621] This literature is reviewed in Part I.C.1.b, *supra*.

[622] John L. Campbell, *Mechanisms of Evolutionary Change in Economic Governance: Interaction, Interpretation and Bricolage*, *in* EVOLUTIONARY ECONOMICS AND PATH DEPENDENCE 1- (Lars Magnusson & Jan Ottosson eds., 1997).

[623] Guinier & Torres, *supra* note, at 2770 ("The MIA was a constituency of accountability, capable of holding lawyers like Gray to the discipline of shared power." *Id.* at 2779).

government on earth.'"[624] However, this assessment depends on characterization. While it is no doubt true that the boycott was responsible for the political victory, the Supreme Court case itself did extend *Brown* in new ways (to city transportation) that went beyond its doctrinal basis and thus involved more than just legal application.[625] Moreover, it is important to note that in its negotiations with the city, the MIA's position was *more conservative*—conceding ongoing segregated sections on the bus—than the ultimate legal resolution—which eradicated bus segregation altogether.[626]

As the Montgomery example suggests, movement liberalism posits a relation between law and politics that claims to produce more sustainable change than its legal liberal counterpart. By changing public opinion and shifting culture *first*—and changing rules secondarily to adapt to the new norms—movement liberalism promises more stable, yet no less transformative, democratic transitions.

However, it is not clear that the distinction between "law" and "culture" bear the weight of progressive transformation placed upon it. This distinction within the movement literature suggests both that movements are relatively more effective at producing transformative attitudinal shifts, on the one hand, and that law is relatively less effective, on the other. Yet both assertions are empirically controversial.

The idea that movement politics may succeed in effectively shifting culture, while powerful, also tends to understate the extent to which such culture shifting may channel movement politics into assimilative directions—an idea that resonates with critiques of legal liberalism. Research on issue framing and attitudinal shifts suggests that cultural changes occur when they build upon and extend existing values. Scholars have recently focused attention on how the "framing" aspects of social movement politics may be a double-edged sword, gaining resources for movement claims but also sanitizing them to comport with mainstream values. As Suzanne Goldberg argues in the context of social change litigation, arguments are "risky" if they rub against "long-settled social hierarchies and norms" and thus produce anxiety about nonincremental change.[627] In social movement framing struggles, the language of law is often used to make political claims, thus raising precisely this narrowing risk.[628] The struggle for public opinion would predictably channel movements into more mainstream directions. This is one of the central left criticisms of the marriage movement: that by locating LGBT claims in dominant normative frameworks, it ceded the movement's critical potential to transform the meaning of gender and sexuality.[629]

On the other side, the counterclaim—that law is relatively ineffective in shaping opinion in positive ways—is also empirically contested. In movement liberal

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[624] *Id.* at 2780.
[625] For this analysis, see Coleman, *supra* note; Kennedy, *supra* note.
[626] *See* BRANCH, *supra* note.
[627] Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014) (Some arguments risker than others because they).
[628] Paris, *supra* note, at 638.
[629] Nancy Scherer, *Viewing the Supreme Court's Marriage Cases Through the Lens of Political Science*, 64 CASE W. L. REV. 1131 (2014).

scholarship, the attitudinal effects of litigation-driven court decisions are generally presented as weak or counterproductive. Debate centers on whether judicial opinions shape attitudes on two levels. At the grassroots level, the empirical question focuses on the degree to which legal opinions produce indirect effects by framing the horizon of political possibility for movement activists, thereby motivating collective action. Montgomery is again a flashpoint in this debate, with supporters of legal liberalism suggesting that *Brown* motivated King and others to pursue the boycott in Montgomery, while critics suggest that the evidence for that connection is too thin.[630] At the more general level of public opinion, debate centers on whether legal decisions can make the public accept positions that a majority currently rejects—a problem that relates to the backlash thesis. For the backlash thesis to be persuasive, it has to be the case that public opinion discrepancies provoked by court decisions are mediated through backlash and not norm adjustment. Here, *Loving v. Virginia* is the case in chief,[631] with some scholars arguing that public opinion against miscegenation was strong when *Loving* was decided, but did not produce backlash; while others suggest that while this is true, the number of states actually outlawing interracial marriage was dwindling and that was the more accurate marker of public sentiment.[632]

The focus on opinion as the target for advocacy—the "law in action" that counts most in producing sustainable change—is problematic on other grounds. Opinion itself is flexible and notoriously hard to pin down, subject to manipulation by media and political actors.[633] If the route to change is through opinion, not law, then there is cause for concern in the new technological age characterized by media consolidation and viral citizen journalism. Being able to "spin" movement action in this context is much harder than it was in the 1960s when media conduits were much fewer and authoritative sources like network news anchors could shape public views.

This observation leads to some final questions about the power of the movement liberal framework to resolve the law-politics problem by linking the political efficacy of movement activism to the idea of democratic legitimacy. The idea of democratic legitimacy in movement liberalism is based on the presumption of lawmaking through politics not courts. Legitimacy works to promote sustainable change: because lawmaking through politics is more legitimate than judicial lawmaking, it is presumed to be more stable and thus more effective in producing change on the ground. But this presumption fails to engage with three types of counterfactual problems that require further empirical attention.

The first is the problem of movement influence over politics. This problem again relates back to the issue of backlash. The backlash story rests on the counterfactual availability of legal reform through politics, which presumes that backlash is less likely to occur against legislative wins than judicial wins. However, there are

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[630] *See* Garrow, *supra* note; Kennedy, *supra* note.
[631] 388 U.S. 1 (1967).
[632] *See* Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011).
[633] LIPPMAN, PUBLIC OPINION, *supra* note.

counterexamples—the explosive reaction to Obama's health care reform singular among them—that counsel in favor of further empirical research into the question of whether backlash occurs based on the institutional forum in which law is made (courts versus legislatures) or based on the volatility of the underlying social issue.[634]

The second problem is with the assumption that legal reform through politics is more effective and sustainable than legal reform through law. The idea of courts as weak producers of enforceable legal change, central to the critique of court decisions as a "hollow hope" for progressive reformers, is an important insight only if it is true in *relative* terms: that is, if legislative resolution of contentious social policy issues are more apt to promote legal compliance. Yet here again, there are important examples of nonenforcement of legislatively enacted social policy—with current debates about the "unraveling" of the 1965 Voting Rights Act prime among them[635]—that raise questions about this counterfactual assumption, which has also been the subject of significant empirical investigation showing how regulation is subject to backsliding and bureaucratic noncompliance over time.[636]

The final problem relates to the ability of progressive movements to influence politics in the first instance. For movement liberalism to work, it has to be the case that politics is open to movements to press their case and achieve legislative success over time—drawing attention to the role of countermovements.[637] Particularly with the rise of conservative countermovements and the influence of money in politics, the progressive movement pathway into politics is uncertain and requires more sustained investigation. Overall, conservative movements are a problem in the movement liberal vision precisely because they disrupt the ability of progressive movements to achieve their ultimate goal of reform through politics. Movement liberals tend to embrace conservative movements on the ground that they enhance the core systemic value of pluralism, but in so doing reaffirm the difficulties of progressive reform—either inside or outside of court.

Outside of court, the conservative movement's power to reframe contested social policy issues has been strong: civil rights as special rights; anti-affirmative action as colorblindness; the labor movement as a special interest group; corporations as individual rights-bearers.[638] If anything, these developments should give pause to the power of framing and culture shifting to advance progressive projects over time. Just as

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[634] *See* Fontana & Braman, *supra* note.

[635] *A Dream Undone: Inside the 50-Year Campaing to Roll Back the Voting Rights Act*, N.Y. TIMES, July 29, 2015.

[636] Rachel Spector, *Dignified Jobs at Decent Wages, Reviving an Economic Equity Model of Employment Discrimination Law*, 36 BERKELEY J. EMP. & LAB. L. 123 (2015) (showing how Title VII has not created broad expansion of economic opportunity for workers of color).

[637] *Cf.* Frank Munger, *Globallization Through the Lens of Palace Wars: What Elite Lawyers' Careers Can and Cannot Tell Us about Globalization of Law*, 37 LAW & SOC INQUIRY 476 (2012).

[638] Margaret Burnham, *The Long Civil Rights Act and Criminal Justice*, 95 B.U. L. REV. 687 (2015) (reassessing the way that violence structured Jim Crow and resistance to it); *see also* Eskridge, *Channeling*, *supra* note; FORBATH, *supra* note; Siegel, *Constitutional Culture*, *supra* note; Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658, 1661 (2010) (reviewing SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT).
Courtenay W. Daum & Eric Ishiwata, *From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements*, 44 LAW & SOC'Y REV. 843, 871 (2010).

legal liberals watched as the conservative movement appropriated the tools of social change through law to "beat them at their own game," so too have conservatives now absorbed the ideological frame, strategic innovations, and tactical repertoire of the social movement, so that the raw political gains from the eruption of dissent in the 1960s have become normalized as part of "institutional politics." The conservative movement's success has depended in part on deploying the tactics of progressives—often with more resources and tapping into deep wellsprings of racism and nativism that have proven resilient to efforts to change. In addition, progressive movements have lost the normative and strategic advantage of first-mover status. The same playbook that progressive movements pioneered in the 1960s is now the standard for conservative countermobilization: against taxes, LGBT rights, environmental regulation, and immigration; in favor of guns, Christianity in the public sphere, and property rights.[639] From this perspective, social movements, like law, do not offer an integrating concept, but only reposition the clash of absolutes outside of law.[640] It is therefore not clear that a progressive strategy that depends on movement power—while calling for court and lawyer reticence—can be counted on to deliver the promised political payoff.

CONCLUSION

Every generation of legal scholars struggles to make sense of the intellectual inheritance received from those who came before, carrying on battles started long ago. For progressive scholars within the legal academy, those battles have been organized around a fundamental challenge: extending democracy's promise of equal justice under law to those on its margins. In addressing that challenge, progressives have confronted a double barrier: from the outside and from within. Their project of shifting power to those without it starts at a point of structural disadvantage and depends crucially on the idea that law means something more than just a tool of the status quo. Yet just what that means has also confronted progressives with internal challenges since the ideal of democracy they espouse has generally presupposed a commitment to energized participation at odds with the professionalism inherent in juriscentric visions of social change. Moreover, to the extent that progressives have sought to mobilize law to advance transformative projects built on greater participation by nonelites within the polity, they have politicized law in ways that have risked the legitimacy of the very tool they have deployed.

The history of progressive legal thought has been about negotiating this tension. From realism onward, it has succeeded in momentary resolutions that have responded to the politics of the time. Social movements have informed politics at each stage: as actors in the real world rather than objects of legal inquiry. Why that has changed—why social movements have taken on a more prominent role within progressive legal

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[639] ISAAC MARTIN, RICH PEOPLE'S MOVEMENTS: GRASSROOTS CAMPAIGNS TO UNTAX THE ONE PERCENT (2013).

[640] Kennedy, *Three Globalizations*, *supra* note.

theory over the past decade—has been the central inquiry of this Article. To answer it, the Article has provided an original account of progressive theory to show that the emergence of social movements in law is a contemporary response to an age-old problem: making law advance progressive politics, while simultaneously keeping politics out of law. As this Article has shown, that paradox—the core dilemma of progressive legal thought—has framed debate from realism through legal liberalism through critical legal studies and its aftermath. Progressive scholars have turned to social movements over the last decade to help to address this problem, positioning social movements as the central engines of change, with courts and lawyers lagging behind and never leading. This formulation has permitted a view of legal and social change that produces progressive outcomes but avoids the charge of court and lawyer activism.

However, as this Article has argued, the new scholarship submerges as much as it reveals. By taking the focus off the legal liberal alliance of activist courts and activist lawyers, the scholarship hides deeper questions about how law does and should relate to social movement politics, and thus avoids critical empirical and normative questions at the heart of progressive debate. As this Article has suggested, rather than solve the fundamental theoretical dilemma of progressive legal thought, movement liberalism may simply switch out one "hollow hope" for another, while evading a clear reckoning with the underlying normative question: When, if ever, should courts and lawyers be leaders in social movements? Answering that question will require scholars to reappraise legal liberalism and the critiques of activist courts and activist lawyers that have shaped progressive legal thought ever since. In the end, the promise of movement liberalism is to refocus attention on the legacy of legal liberalism itself. Rather than viewing legal liberalism as a target to attack or a nostalgic memory to reconstruct, scholars might instead begin to rethink how elements of the past might be recombined to create a pathway toward a different future—how a smart, savvy legal liberalism might be reclaimed as integral to movements for progressive change.