RETHINKING THE FOUNDATIONAL CRITIQUES OF LAWYERS IN SOCIAL MOVEMENTS

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INTRODUCTION

The question of whether lawyers help or hurt social movements has been hotly debated by legal scholars for nearly half a century. As progressive social movements began to decline in the 1970s, scholars developed a powerful critical account of the role that lawyers had played, stressing how lawyer domination and overinvestment in legal tactics had worked against sustainable grassroots activism. Despite significant changes in politics and the profession since the civil rights period, these foundational critiques of progressive lawyering have persisted, fostering profound skepticism about what lawyers can do "for and to" social movements.[1]

This Article argues that the current moment invites reconsideration of these critiques. The rise of new social movements—from marriage equality to Black Lives Matter to the recent mobilization against President Trump's immigration order—and the response of a new generation of movement lawyers eager to lend support has refocused attention on the appropriate role that lawyers should play in advancing progressive social change. Rather than fall back on familiar critical themes, the time is ripe for developing a new affirmative vision.

This Article seeks to reappraise the foundational critiques of progressive lawyers from the perspective of comparative institutional analysis. This analysis locates lawyers within a broader field of social activism in which nonlegal actors confront their own set of challenges in advancing movement goals: such as struggles over leadership, debates over the desirability of gradual versus radical change, and the constant threat of reversal and backlash. Legal scholars, focusing on what they know best (lawyers and courts), have not investigated the challenges to social movement activism within this broader field, which is the subject of a

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1. *See* 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. Scheingold eds., 2006).

significant scholarly literature in social science. Drawing on insights from social science research, this Article asks how evaluation of lawyers in social movements might change if the same analytical tools that have been used to spotlight the limits of lawyers and legal advocacy were also applied to nonlegal actors and strategies. What would we learn by comparing the challenges social movements face *outside* of law to those faced by lawyers mobilizing *inside* the legal system? This Article's central claim is that expanding the frame of critical analysis to highlight the parallel challenges that *nonlawyers* face in advancing social change outside of court weakens the power of critical accounts specific to *lawyers*. In short, reframing the way we think of social movements can rehabilitate the way we think about lawyers' contributions to them.

I. LAWYERS AND SOCIAL MOVEMENTS: TOWARD A COMPARATIVE INSTITUTIONAL PERSPECTIVE

More than a half century ago, the NAACP's seminal victory in *Brown v. Board of Education*[2] ignited intense debate—in the academy and in the streets—over the appropriate role of lawyers in the struggle for social change.[3] With America on the cusp of political upheaval that would transform understandings of the relation between law, social movements, and state power, the question of whether lawyers promoted or impeded reform went to the core of the democratic projects championed by civil rights and other progressive movements of the time. The answers formulated in the wake of *Brown*, as these projects began to decline, have framed subsequent discussions of lawyering for social change around two foundational critiques. The first is one of lawyer *accountability*, claiming that lawyers advancing rights on behalf of marginalized constituencies risk letting their own ideological commitments undercut the interests of those they serve.[4] The second is one of legal *efficacy*, claiming that court-centered legal strategies are ineffective at best, unable to change social practice on the ground, and detrimental at worst, causing social movement demobilization and backlash while legitimizing the status quo.[5] Taken

2. 347 U.S. 483 (1954).

3. For a classic account, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

4. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471–72 (1976); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 163–64 (2004).

5. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338–39 (1991) (concluding that courts almost never effect social change); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 91, 214 (2d ed. Univ. of Mich. Press 2007) (1974) (arguing that lawyers pursuing rights generated "support for the political system by legitimating the existing order" and promoting "one-on-one conflicts within the framework of the adversary system"); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051–52 (1978) (arguing that U.S. Supreme Court decisions legitimize the status quo rather than promote change); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*,

together, these critiques have anchored a descriptive account of civil rights history that associates overinvestment in law reform—the classical strategy of "legal liberalism"[6]—with the decline of the very progressive movements that *Brown* helped to spark.[7] And they have supported a normative account of social change lawyering in which lawyers play a circumscribed role, deemphasizing courts and deferring to clients in the quest to build power from the bottom up.[8]

The recent explosion of scholarly interest among legal academics in social movements has occurred against the backdrop of these foundational critiques. On one side is a conversation about lawyers and lawyering, which has played out in the academic fields of the legal profession and clinical law, drawing upon insights from legal mobilization theory.[9] Here, recent research has focused on demonstrating how contemporary lawyers, unlike their legal liberal predecessors, do not rush to court seeking national policy change for underrepresented groups. To the contrary, lawyers in the contemporary literature follow the lead of social movement organizations and coordinate law with politics in efforts to achieve campaign objectives.[10] Empirically, this literature stresses that lawyers are not blinkered by the "myth of rights" in ways that undermine movement activism.[11] Prescriptively, the literature suggests that lawyers *should* represent movements in client-centered terms, using law to ensure that "the movement takes the lead."[12]

This conversation has been largely disconnected from scholarship within constitutional law but has important resonances with it. Like the lawyering literature, its main focus is on the role of social movements as crucial democratic actors. Decentering the U.S. Supreme Court, scholars have drawn attention to the role of social movements producing constitutional law from the bottom up by opening space for new constitutional orders to emerge and channeling movement claims into pressure for judicial

81 J. AM. HIST. 81, 82–83 (1994) (arguing that *Brown* caused backlash that set the civil rights movement back in the short term).

6. LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 2 (1996); *see also* Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before* Brown, 115 YALE L.J. 256, 263–64 (2005).

7. GORDON SILVERSTEIN, LAW'S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS 123–24, 127 (2009) (discussing the backlash against Roe v. Wade, 410 U.S. 113 (1973)).

8. *See* Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2146 (1991).

9. *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

10. Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2144 (2007).

11. *See, e.g.*, Sameer Ashar, *Public Interest Law and Resistance Movements*, 95 CALIF. L. REV. 1879, 1919–20 (2007).

12. Kathleen M. 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 1, at 249, 257–58.

recognition.[13] This happens by movements asserting new norms through direct action, changing public opinion, and using their power to reshape political processes to support new judicial appointments.[14] Scholars in this literature make the empirical claim that once social movements have shifted culture and transformed politics, Supreme Court decisions change to validate the new consensus social movements have produced.[15] The normative implication is that the Court *should* lag behind culture, which intersects with the lawyering literature in that both place social movements out ahead of legal change. To the extent that courts do not heed this warning, they risk a backlash that undermines the causes they purport to advance.[16]

Both of these literatures present powerful and deeply optimistic accounts of the transformative potential of grassroots mobilization, appropriately supported by law and legal institutions. Yet, in so doing, they reproduce a version of the foundational critiques within the new social movement scholarship: promoting lawyer deference to social movement clients to enhance accountability and promoting judicial deference to social movement political activism to enhance efficacy. In the professional literature, lawyers are skilled technicians—"hired guns"—for movements.[17] In the constitutional literature, they are deemphasized as agents of reform. Because legal change occurs through bottom-up norm generation, culture shifting, and judicial appointment making, the role of lawyers is limited to the formalistic one of filing the case (so a court may validate the principles that movements have already enacted). The takeaway from both literatures is that lawyers should stand behind movements, supporting them when necessary, but not get too far out front.

Implicit in this portrait of lawyers is a crucial counterfactual: that putting movements first will in fact yield more accountable and effective challenges to power. All too often, this counterfactual is presumed rather than proven. It is nearly always the case that in analyzing a campaign for systemic reform, one can find errors in judgment, flaws in execution, or disappointing results. However, in judging the impact of *lawyer* strategic decisions on a given campaign, the relevant question is whether lawyers and legal advocacy do a better or worse job than the available alternatives. Answering that question with precision is impossible because one can never know how events would have unfolded if lawyers had not been involved. Even if it is possible to dissect and critique legal strategy and outcomes with twenty-twenty hindsight, it is never possible to know if the problems

13. *See generally* William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001).

14. *See* Jack Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 28–30 (2005).

15. *See id.* at 30; *see also* Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2595 (2003) (discussing the empirical connection between public opinion and judicial outcomes).

16. *See generally* Klarman, *supra* note 5.

17. *See, e.g.*, Erskine & Marblestone, *supra* note 12, at 258–59.

identified were a product of the unique limitations of law and legal strategists.

This is where comparative institutional analysis may helpfully reframe the discussion. While the new social movement literature reprises familiar critical themes, it also provides an opportunity to revisit and potentially move beyond the critical account of progressive lawyers.[18] It does so by paving the way for incorporation of parallel social science discussions of accountability and efficacy that permit comparison of lawyers and legal action to their social movement counterparts. This comparative institutional perspective addresses the limits of existing theoretical accounts, which have overstated the role of lawyers and court-centered advocacy and understated the role of nonlawyer leaders and nonlegal strategies—and the challenges the latter face in social movements. By explicitly theorizing the opportunities for and constraints on alternatives to law, a comparative institutional perspective reveals how the foundational critiques of lawyers may be better understood as specific versions of more general criticisms of social change actors and strategies.

II. REFRAMING THE FOUNDATIONAL CRITIQUES

This part suggests how a comparative institutional perspective helps to reframe the foundational critiques in ways that soften their negative edge, revealing lawyers as less suspect allies in challenges to power. In each case, reframing works by incorporating insights across the existing law-social science disciplinary divide. Incorporating a more complex understanding of social movements as comprised of independent organizational actors with their own representational contests reframes the accountability critique as *a problem of leaders, not just lawyers*. This changes the analytical approach by comparing the risks of alternative representational structures (inside and outside of the lawyer-client relationship) and the benefits of coordination between lawyers and nonlawyers in potentially reducing conflicts. The project therefore becomes identifying and evaluating the conditions under which movement leadership is most likely to be accountable.

Similarly, incorporating a more nuanced view of how lawyers become involved in movements and the viability of alternative courses of political action reframes the efficacy debate as *a problem of politics, not just law*. This changes the analytical approach to court impact and backlash by comparing the tradeoffs of available political alternatives while also considering the benefits of coordinated legal and political strategies. The project then becomes identifying and evaluating the conditions under which outsider challenges (legal and political) are most likely to succeed in changing rules, promoting implementation, avoiding backlash, and shifting power.

18. *See* Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 940–41 (2007).

At bottom, using a comparative institutional perspective facilitates the same basic analytical move: comparing lawyers and legal action to their social movement counterparts. Doing so helps to deepen the evaluation of the role of lawyers in social movements by focusing on their *relative accountability* and *relative efficacy*. This comparative institutional framework repositions criticisms of lawyers and lawyering as specific versions of more general criticisms of social change actors and strategies. Understanding this specificity permits a finer-grained judgment of accountability and efficacy because the relative comparison group changes: if all social change actors and actions confront some version of the same problems, then the question becomes whether lawyers and legal strategies do a better or worse job than viable alternatives—and under what conditions.

A. Relative Accountability: What Is Special About Lawyers?

This section explores the concept of relative accountability by engaging with two critical interventions about the lawyer's role in social movements: Derrick Bell's famous indictment of civil rights lawyers for "serving two masters" in the pursuit of school integration,[19] and Lani Guinier and Gerald Torres's more recent work on "demosprudence" as a movement-oriented model of progressive lawyering that also contains a critical perspective on its legal liberal counterpart.[20] In both cases, the basic method is to reframe each discussion in a comparative institutional framework by reference to insights from social science about parallel accountability problems in social movement activism. The goal is to shift the terms of each discussion away from lawyers per se to more generalized problems of social movement mobilization: in Bell's account, focusing on the problem of organizational *professionalization* (rather than professionalism) and in Guinier and Torres's account, focusing on the problem of *elite* representation (rather than legal representation).

1. Professionalization

The critical view of lawyers as a threat to collective action rests on concerns about the nature of the professional relationship in social movement contexts where mechanisms for promoting lawyer accountability to clients and broader constituencies are said to be weak.[21] Derrick Bell's famous critique of NAACP Legal Defense and Education Fund (LDF) lawyers resonated so powerfully within the legal academy precisely because it sounded in terms of professionalism and legal ethics. By arguing that LDF lawyers were either disregarding or minimizing the voices of African American parents who wanted quality schools, not just integration, Bell

19. *See generally* Bell, Jr., *supra* note 4.

20. *See generally* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014).

21. *See* Simon, *supra* note 4, at 162.

located the dispute squarely within the core principles of zealous advocacy.[22] The metaphor "serving two masters" underscored the idea that client interests were being sacrificed: both to funder priorities and to the LDF attorneys' own assessment of the appropriate educational goal.[23] Bell's argument hinged on a sympathetic reading of Justice John Marshall Harlan II's dissent in *NAACP v. Button*,[24] in which he stressed that LDF lawyer's "divided allegiance" could "prevent full compliance with his basic professional obligations."[25] Bell went further, suggesting that LDF 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, uninformed, and divided.[26]

Bell's critique framed the lawyer's role in social movements by isolating the problem of conflicting loyalties in the class action context and situating that problem within a familiar professional discussion. Although Bell's critique trenchantly spotlighted the fundamental problem of accountability in cause lawyering, it distorted the issue by treating it in isolation from the broader social movement context and suggesting that the problem and solution could be understood through analysis of the ethical rules.[27] However, the mere fact of a potential formal ethical violation begged the most important professional and political questions. Formal rules of professional responsibility, as the conduct of southern states in response to NAACP enforcement activity underscored, could be manipulated by opponents to undermine legitimate legal activity.[28] More significantly, litigation that raised formal conflict questions could still be socially valuable if more people within the affected constituency benefitted overall relative to alternatives in which subgroups pursued conflicting goals or did nothing.[29]

From a comparative institutional perspective, the deeper question raised by Bell's analysis is which type of agency relationship between movement leaders and their constituency is most likely to produce accountability in a particular context. Bell's fundamental claim—that idealistic leaders funded by well-resourced actors outside of the main constituency may act in ways that diverge from the interests of a significant portion of the constituency they purport to represent—is generalizable. The questions are then twofold. First, in a particular social movement context, is there something about lawyers and their legal organizations that poses unique representational risks? And, second, is there something about nonlegal social movement organizations that makes them better suited to the representational task?

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22. *See* Bell, Jr., *supra* note 4, at 504.
23. *Id.* at 489–93.
24. 371 U.S. 415 (1963).
25. Bell, Jr., *supra* note 4, at 499.
26. *Id.* at 504.
27. *See id.* at 512.
28. *Button*, 371 U.S. at 419–26.
29. *See* William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 481 (1984).

Critics of lawyers and legal organizations in social movements make two types of arguments. First, they suggest that there may be something inherent in the nature of the lawyer-client relationship that makes it incompatible with strong lawyer accountability to constituency ends. In this account, lawyers either represent individual clients, whose ability to monitor lawyer activity is inherently restricted (and particularly so when the clients are vulnerable), or the lawyers represent groups through devices like the class action, which are unaccountable because named plaintiffs often have "no significant individual stake, and as a result, no incentive to monitor."[30] Professional rules emphasizing lawyer independence and confidentiality are said to increase the risks to accountability by inhibiting monitoring by organizations outside the lawyer-client relationship that may have greater power and sophistication and thus would be better positioned to ensure that lawyers serve constituency interests.[31] The second critical argument is that by virtue of their legal expertise, lawyers are in a position to turn to the legal system to advance their own version of a constituency's best interests (Luban's "problem of democracy"), sometimes against the views of other movement leaders.[32] In Bell's famous words, "Idealism, though perhaps rarer than greed, is harder to control."[33]

But is such idealism any easier to hold accountable when it is enacted by nonlawyers? Movements, as aggregations of loosely connected organizational and individual actors, always speak through leaders, who often voice conflicting views.[34] Monitoring problems and agency costs are also classic problems within social movement organizations (SMOs), though they may operate in different ways. The "iron law of oligarchy,"[35] that SMOs tend to be dominated by elites over time and preoccupied with concerns of organizational maintenance,[36] suggests that SMOs may confront similar pressures that put stress on constituent accountability. From a formal ethics perspective, it is true that third parties are not permitted to control lawyers or have access to specific types of client information.[37] However, there are often other monitoring mechanisms available, particularly in dense organizational fields where political relationships create pressures on lawyers to conform to goals expressed through other types of leadership structures. Moreover, in some contexts,

30. Simon, *supra* note 4, at 163.

31. *Id.*

32. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 341–43 (1988).

33. Bell, Jr., *supra* note 4, at 504.

34. *See* DAVID S. MEYER, THE POLITICS OF PROTEST: SOCIAL MOVEMENTS IN AMERICA 71–74 (2007) (discussing the organizational complexity of social movements and the potential for conflict and cooperation).

35. *See generally* ROBERT MICHELS, THE IRON LAW OF OLIGARCHY (1911).

36. *See* FRANCIS FOX PIVEN & RICHARD CLOWARD, POOR PEOPLE'S MOVEMENTS: HOW THEY SUCCEED, WHY THEY FAIL, at xxii (1977).

37. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2016) (stating the basic confidentiality duty); *id.* r. 1.7(a)(2) (stating that a conflict exists when there is a "significant risk" that legal representation of a client will be "materially limited by the lawyer's responsibilities to . . . a third person").

lawyers may perform essential tasks articulating a unifying movement platform and overcoming internal community divisions.

Mark Tushnet's account of LDF's drive to *Brown* makes this point explicitly. In reflecting on the inherently political solution to the problem of conflicting interests in movement representation, Tushnet notes: "Both Houston and Marshall had enormous ability at the essential, and fundamentally political, task of coordinating the conflicting interests of the various constituencies that the NAACP's litigation had to satisfy."[38] As Tushnet's analysis suggests, from a comparative institutional perspective, accountability must be judged based on a contextual view of the broader movement field, which includes both non-movement lawyers asserting dissenting legal claims as well as other political actors to whom movement lawyers must ultimately answer. Lawyers can, given the porousness of the legal system, go off on their own in ways that are inconsistent with movement aims. But it is also possible for nonlawyer activists to garner attention and financial support for positions at odds with broader movement views.[39]

With respect to funding conflicts, which Bell stresses in his analysis of LDF, a key insight of resource mobilization theory in sociology is that SMOs that rely on external funders who are not direct movement beneficiaries are "likely to have high levels of tension and conflict."[40] While mobilizing external resources is necessary to overcome the free rider problem and build organization, it also embeds the problem of external control as part of the SMO's basic architecture.[41] As social movement scholars have shown, when SMOs become more professionalized and dependent on sustained patronage from philanthropic groups, the problem of leader ideological and funder conflicts deepens—just as they do in legal groups.[42] Accountability, from this comparative perspective, is related to organizational professionalization, not legal professionalism as such.[43]

Viewing this issue through a comparative institutional lens does not negate the critique of lawyer accountability but contextualizes it in helpful ways by taking the concept of "representation" outside of the narrow confines of professionalism. This perspective decouples the issue of representation from the professional framework, where it has been too cabined by traditional associations with legal ethics, which have

38. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 157 (1987).

39. *See generally* BRYAN BURROUGH, DAYS OF RAGE: AMERICA'S RADICAL UNDERGROUND, THE FBI, AND THE FORGOTTEN AGE OF REVOLUTIONARY VIOLENCE (2015) (documenting the rise of radical leftist groups in the 1970s, including the Weather Underground, Black Liberation Army, and Symbionese Liberation Army).

40. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. SOC. 1212, 1216–31 (1977).

41. *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970, at 45 (1982).

42. 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, 827 (1986).

43. *See id.*

overdetermined critiques by pointing to discrepancies between lawyer actions and the contested interests of their constituencies. Comparative institutional analysis enables a relative evaluation of different models of constituent representation, which interact and compete in the messy real world of social movement conflict, while revealing how nonlegal movement representatives confront analogous accountability problems as they mobilize dissent outside of law.

2. Elites

From a comparative institutional perspective, evaluating lawyer accountability to movements requires appraisal of alternative structures of representation and how well they advance constituent interests. Challenges to the adequacy of representation in social movements are often couched in terms of *political arguments* wielded by one faction of a movement against another. For example, Tomiko Brown-Nagin's history of civil rights efforts in Atlanta after *Brown* reveals conflict between the NAACP as an older, more elitist, and incrementalist political organization and the Student Nonviolent Coordinating Committee (SNCC) as a younger, more radical, and more politically confrontational group.[44] This conflict played out in terms of lawyering style with NAACP lawyers like A.T. Walden committed to "biracial negotiation and piecemeal civil rights litigation,"[45] while lawyers for SNCC, particularly Lou Holt, engaged in a "crusade to marry litigation and direct action."[46] But the conflict went beyond models of lawyering, as each group represented different constituencies (the established black elite versus students) and adopted different approaches to political mobilization (negotiation versus protest), reflecting distinctive social change visions that lawyers were enlisted to advance.

The complex nature of accountability in social movements and the challenge of evaluating lawyer interventions is highlighted in Guinier and Torres's important work on demosprudence, in which they posit an affirmative role for lawyers in collaborating with movements to promote sustained democratic change.[47] In a key example, Guinier and Torres focus on the role of lawyers in relation to the Mississippi Freedom Democratic Party (MFDP).[48] The MFDP, led by grassroots leaders including famed activist Fannie Lou Hamer, sought to be seated at the 1964 Democratic National Convention as the "official Mississippi delegates," in place of the all-white Democratic Party delegation, which had excluded blacks from the franchise.[49] In Guinier and Torres's story, the northern elite white lawyer, Joe Rauh, who represented the MFDP, is portrayed in unfavorable terms as

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44. TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 195 (2011).

45. *Id.* at 199.

46. *Id.* at 194.

47. *See* Guinier & Torres, *supra* note 20, at 2743 ("The role played by legal professionals . . . is essential.").

48. *Id.* at 2762.

49. *Id.*

a legal liberal insider whose quest for a pragmatic resolution to the high-stakes standoff at the convention—a "behind the scenes" compromise in which the MFDP would take two seats at the convention rather than its sought-after full delegation status—undercut the radical potential of the MFDP's position.[50] Rauh, in this view, "did not grasp" the MFDP's fundamental goal, which was to "organize, to develop the power of the local people to change their own circumstances,"[51] and ultimately to promote participation and secure "freedom," not simply "a convention seat for two 'representatives.'"[52] And Rauh did not pursue the appropriate means to achieve this goal, failing to appreciate that the MFDP's "challenge to state power came from outside the precincts of normal politics," instead channeling that challenge into "conventional deal-making."[53]

What seems clear from Guinier and Torres's account is that Rauh had multiple conflicts of interests in representing the MFDP: he was a delegate from D.C. and "beholden to national unions" as legal counsel to the powerful United Auto Workers, whose president, Walter Reuther, was part of the team attempting to negotiate a compromise (along with leaders from the Johnson administration and the Southern Christian Leadership Conference, represented by Martin Luther King Jr.).[54] However, it is not clear how much Rauh mishandled his charge, which was to gain the MFDP "shared seats with the regulars,"[55] or what precisely turned on *his* representational conflicts as opposed to the conflicts among the civil rights movement leadership convened to find a solution to the MFDP challenge. The MFDP was not "the movement" but rather an important organizational component of it, which had retained Rauh precisely because his insider status gave him credibility in the convention process.[56] In that process, movement leaders, including King, were already trying to negotiate a solution. With President Johnson intent on holding the Southern Democratic Party together in the face of threatened defections if the MFDP was seated in full, compromise appeared inevitable.[57]

In Guinier and Torres's story, Rauh sought to negotiate a legalistic solution, rather than appreciating that the goal of representation "was not the same as 'freedom.'"[58] But it is not clear that the ultimate problem was legal representational conflict as opposed to intramovement political conflict. Rauh's participation in the negotiations on its own seemed appropriate, even essential, to representing his client's interests. Perhaps it was true that Rauh failed to bargain hard enough, did not adequately express the degree to which the MFDP viewed the fight as having "a right

50. *Id.* at 2769–70.
51. *Id.* at 2771–72.
52. *Id.* at 2772.
53. *Id.* at 2770.
54. *Id.* at 2769–71.
55. *Id.* at 2769.
56. *Id.* at 2770.
57. *Id.* at 2769.
58. *Id.* at 2772.

side and a wrong side,"[59] or expressed support for a two seat compromise he knew would be unacceptable to his client. However, those failures have to be weighed against what was possible and how Rauh understood his duty.

In this regard, 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 Hamer? If it was the executive officers, then Rauh's belief that "he could not vote for the proposal, nor could he endorse the compromise within the party chiefs, without the approval and support of" the officers seems like a plausible representational position, consistent with organizational ethical rules.[60] From this point of view, Guinier and Torres's critique that Rauh "did not have the consent of the entire MFDP delegation" is apt but not decisive.[61] Moreover, the MFDP ultimately rejected the compromise and walked away from the convention,[62] a position the group would have likely ended up with even if Rauh had not played a brokering role given the background political maneuvering to push compromise.

Folded into the story of Rauh's lawyering, the MFDP example draws attention to the critical role of elites in social movement governance and how they affect the legitimacy of representation. A central premise of movement lawyering is that following the dictates of movement leadership renders legal representation more accountable to nonelites than the conventional civil rights model, in which lawyers' pursuit of elite interests was viewed as undermining the goals of constituent members, as Bell's critique of the NAACP LDF underscored.[63] Guinier and Torres make a similar claim by distinguishing authentic movement organizations from "interest groups," viewed as part of conventional politics and therefore less responsive to nonelite constituencies.[64] However, it may be practically difficult to distinguish movement organizations from interest groups in ways that give lawyers clear guidance about authenticity. Although an orientation toward institutionalized politics and ties to external funding may be general characteristics of interest groups,[65] the line between such groups and SMOs is often too blurry to serve as a general proxy for distinguishing elite and nonelite representation.

Ultimately, in charged debates among movement organizational leaders, schisms are unavoidable and tend to occur along mainstream/radical and elite/nonelite lines. Lawyers make representational choices in the context of these splits and, as William Eskridge has pointed out, may generally be inclined toward mainstream and elite positions by virtue of their training

59. *Id.* at 2770.
60. *Id.* at 2771.
61. *Id.*
62. *Id.*
63. *See* Bell, Jr., *supra* note 4, at 503–05.
64. *See* Guinier & Torres, *supra* note 20, at 2757.
65. *See* Jack Walker, *The Origins and Maintenance of Interest Groups in America*, 77 AM. POL. SCI. REV. 390, 403–04 (1983).

and status.[66] However, it is important to underscore that the problem of elite influence is not a problem of lawyering per se but rather a problem of political representation embedded in social movements that then shapes lawyer choices about client selection and tactics.

In the MFDP example, the failure of elite leadership seemed as important as the failure of legal representation in thwarting the MFDP's bid to be seated at the convention. Indeed, Guinier and Torres's insight that "[t]he dominance of elite thought reveals a tension in the ways even the most sympathetic elites 'represent' non-elites at the moment of action" seems like the most central point.[67] This tension is revealed in the exchange between the MFDP delegates and Martin Luther King Jr., 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."[68] As this suggests, King was in a similar representational position to Rauh.[69] With both the lawyer Rauh and the nonlawyer King, it was the eliteness of their political position and their willingness to accept compromise that ultimately shape Guinier and Torres's assessment. "By attempting to serve two masters, King sought to preserve his own status as an individual power broker," in contrast to Fannie Lou Hamer who tried "to hold [power-holders] accountable to a larger vision of justice."[70] This suggests that the fundamental accountability problem was not one of *legal* representation per se but *elite* representation more broadly.[71] In the end, it was the refusal of elites to support the MFDP's most ambitious goals that contributed to their failure.

Critics of lawyer accountability are right to point out the ways in which lawyer conflicts affect group representation, but they less frequently compare lawyer conflicts to those faced by nonlawyer movement leaders. Yet, as the MFDP example illustrates, nonlawyer leaders must navigate their own conflicts among various movement interests.[72] Although it is fair to presume that grassroots movement leadership structures, run by members of the affected constituencies, will generally be more accountable than lawyers (especially when the lawyers are outsiders), that presumption might not hold in all cases and would need to be tested on its own terms in specific contexts. Along these lines, scholars like Tushnet have argued that NAACP lawyers, at least in the early phase of the desegregation campaign, helped to create well-developed accountability structures and were

66. Eskridge, Jr., *supra* note 13, at 466–67 (arguing that once lawyers get involved in a social movement, the movement "has tended toward assimilationist and reformist rather than separatist and radical stances, because lawyers cannot defend the latter before judges and legislators who are their audience").

67. Guinier & Torres, *supra* note 20, at 2773.

68. *Id.*

69. *Id.*

70. *Id.* at 2774.

71. *Id.*

72. *See* TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68, at 129 (2006) (discussing leadership tensions between the Southern Christian Leadership Conference and the Student Nonviolent Coordinating Committee).

answerable to other movement stakeholders.[73] In contrast, accounts of grassroots heroes, such as Cesar Chavez, portray examples of authoritarianism and peremptory decision making at odds with the principles of participatory democracy they espoused.[74]

B. Relative Efficacy: As Opposed to What?

The question of whether law is an effective means to produce social change has focused primarily on the value of litigation and court-centered reform in contemporary social movements. Although much of the scholarship has concentrated on the evaluation of court decisions themselves, legal efficacy also shines the spotlight on the decision making of lawyers in relation to the question of whether to pursue legal change through court.[75] Specifically, empirical claims about the weak enforcement powers of courts have supported the critical argument that lawyer investment in achieving policy-shifting court decisions may constitute a misallocation of movement resources.[76] Similarly, empirical claims that aggressive court decisions changing policy may push society too fast too soon have been used to suggest that lawyers defer litigation until society is ready in order to avoid backlash.[77] These claims form an interlocking critical analysis in which court action is disfavored for either achieving too little (weak enforcement) or too much (backlash). Implicit in this critical analysis is the notion that better routes to reform exist through social movement mobilization in politics and legislative policy change, which would leverage stronger tools at the legislature's disposal to produce better implementation on the ground and avoid backlash by achieving greater cultural acceptance. It is this counterfactual that requires deeper interrogation.

This section explores the idea of relative efficacy through analysis of two seminal scholarly positions on court-based reform: Gerald Rosenberg's famous empirical analysis of the Supreme Court as a "hollow hope" for progressive reformers, particularly his analysis of the failure of *Brown* to produce meaningful desegregation in the South, and Michael Klarman's "backlash thesis," which he applied to *Brown* and then extended to the pre-*Obergefell* marriage equality movement. Again, in each case, the goal is not to prove either argument wrong on their own terms but rather to surface and engage with the implicit counterfactual embedded in each analysis: that there were viable and more effective nonlegal routes to the achievement of movement goals. The aim is to shift the frame of critical

73. *See* TUSHNET, *supra* note 38, at 157; *see also* MCADAM, *supra* note 41, at 132–33 (noting that local NAACP officials, along with clergy and students, held key leadership positions in the nascent movement).

74. FRANK BARDACKE, TRAMPLING OUT THE VINTAGE 538–39 (2011) (describing Chavez's decision to purge suspected "leftist" leaders of the United Farm Workers' boycotts in 1976).

75. *See, e.g.*, Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 818 (2006).

76. *See* Lobel, *supra* note 18, at 949–50.

77. *See, e.g.*, MICHAEL KLARMAN, FROM THE CLOSET TO THE ALTAR 167–68 (2013).

analysis away from the specific limits of court-centered reform toward the more generalized social movement challenges of policy *implementation* (not just court enforcement) in the face of local resistance and of *countermobilization* (not just backlash) in the face of social movement success.

1. Implementation

A major concern about legal reform strategies is that they rely on an institution—the courts—with weak enforcement powers and, as a result, end up overinvesting in efforts that are unlikely to produce good results. This criticism builds on the legacy of court impact studies in political science and rests on a premise of institutional specialization: because courts announce but do not enforce law, they are ill positioned to be agents of social change.[78] The comparative institutional perspective presented here spotlights the fact that all decisions requiring affirmative governmental action—whether issued by courts, promulgated by agencies, or enacted by legislatures—have the potential for noncompliance and thus all raise the possibility of a gap between law on the books and law in action. The voluminous social science literature on implementation makes precisely this point,[79] which is directly relevant to the ex ante strategic question of whether legal change should be pursued through court or other institutions.

In general, scholars have treated the impact of court decisions on social reform in isolation from consideration of how such decisions fare relative to viable alternatives.[80] Critics of reform litigation might be able to prove the absence of a correlation between a court decision and an implemented rule, but that gap is politically significant to the extent that the decision to pursue legal change through the court displaced a nonlegal strategy that was more efficacious. Put differently, if political mobilization also might result in a gap between a legislative rule and its implementation, the strategic decision of whether to pursue law or politics requires a relative assessment of enforcement alternatives. From this wider perspective, court enforcement is seen as part of the more general problem of policy implementation. Comparative institutional analysis provides a way to assess this general problem by drawing attention to empirical evidence of implementation challenges outside of courts and also making connections to stories of movement decline after legislative, rather than judicial, victories.

The lack of comparative institutional analysis of the enforcement problem reflects underlying disciplinary fault lines. Legal scholars interested in enforcement have gravitated toward political science studies of

78. *See* ROSENBERG, *supra* note 5, at 15.

79. *See, e.g.*, EUGENE BARDACH, THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1978); ROBERT T. NAKAMURA & FRANK SMALLWOOD, THE POLITICS OF POLICY IMPLEMENTATION (1980); JEFFREY L. PRESSMAN & AARON B. WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (1973).

80. *See, e.g.*, Stephen L. Wasby, *The United States Supreme Court's Impact: Broadening Our Focus*, 49 NOTRE DAME L. REV. 1023, 1024–25 (1974).

courts, which have developed along a separate track than research on policy implementation. 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.[81] In this line of research, scholars found that desegregation plans often resulted in little actual desegregation,[82] court decisions barring mandatory religious instruction were widely disregarded,[83] and the Warren Court's revolution in criminal procedure produced laws to protect suspect rights that received only partial respect from law enforcement officials.[84] Although these and other studies used various methodologies,[85] they were united in the general conclusion that law on the books systemically diverged from the law in action—revealing the "banality of noncompliance."[86]

Coming out of the court impact tradition, Gerald Rosenberg, in his influential book *The Hollow Hope*, offered what would be the apotheosis of court impact studies of the civil rights era.[87] The project was impressive in its scope and ambition, which was to determine "whether, and under what conditions, courts produce significant social reform."[88] 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."[89] 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

81. *See* Jon B. Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. SOC. SCI. 323, 324–25 (2012) (noting that court impact studies "had their heyday in the late 1960s and early 1970s").

82. *See Comparative Analysis of the Eight Cities*, 2 LAW & SOC'Y REV. 89, 96 (1967) ("Even in cities with the most ardently committed boards which had adopted seemingly comprehensive plans for integration, there was much less change than one would have suspected.").

83. Robert H. Birkby, *The Supreme Court and the Bible Belt: Tennessee Reaction to the* Schempp *Decision*, 10 MIDWEST J. POL. SCI. 304, 308 (1966) (studying the reaction of Tennessee school districts to the Court's decision in Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963), showing that despite the decision, 70 of 121 school districts continued Bible readings in class).

84. *See* Michael Wald et al., *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1613 (1967) (finding that "[n]ot much has changed after *Miranda*" in terms of how police conduct interrogations).

85. James P. Levine, *Methodological Concerns in Studying Supreme Court Efficacy*, 4 LAW & SOC'Y REV. 583, 584 (1970).

86. *See* KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE 151 (1971).

87. *See generally* ROSENBERG, *supra* note 5.

88. *Id.* at 9.

89. *Id.* at 10.

(particularly *Brown*)[90] and women's rights (particularly *Roe*),[91] as well as the environment,[92] voting,[93] and criminal procedure.[94] On the basis of this sweeping analysis, he offered his famous conclusion: "U.S. courts can *almost never* be effective producers of significant social reform."[95]

Rosenberg's controversial analysis of *Brown*, concluding that the decision produced no meaningful desegregation and instead of generating public support provoked political backlash, received the most attention.[96] 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*. In addition, he argued 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.[97] The lesson was that while legislation worked to produce integration, the judicial decision did not.

However, while it was true that more rapid desegregation occurred after 1964, there are confounding variables and later countertrends that cloud the picture. First, the Court explicitly delayed enforcement in its famous remedial order counseling "all deliberate speed."[98] It was not until the Supreme Court's 1968 decision in *Green v. School Board of New Kent County*[99] that it fully committed itself to wiping out segregation "root and branch."[100] A study by the UCLA Civil Rights Project found that legal enforcement affected the rate and scope of desegregation, which peaked in 1988 due in part to focused resources devoted by the federal Department of Justice to enforcement efforts; decline occurred as a result of "a strong legal attack on desegregation orders, led by the Reagan and Bush administrations' Justice Departments and, in 1991, the Supreme Court authorized the termination of desegregation plans."[101] Second, over time, despite short-term improvement, residential resegregation and legal failures to extend the scope of desegregation orders beyond jurisdictional boundaries caused school segregation to revert to the same level it was in

90. *Id.* at 42.
91. *Id.* at 175.
92. *Id.* at 271.
93. *Id.* at 292.
94. *Id.* at 304.
95. *Id.* at 338.
96. *Id.* at 70–71.
97. *Id.* at 74–75.
98. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1954).
99. 391 U.S. 430 (1968).
100. *Id.* at 438.
101. GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 10 (2014), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf [https://perma.cc/8JNA-F4GR].

1968,[102] complicating Rosenberg's claim that legislative reform was an essential spark to desegregation.

Rosenberg also denied any substantial indirect effect of *Brown* on public opinion or movement activism. He argued that although there was substantial elite support for desegregation prior to the Court's 1954 decision, the decision itself caused a retrogression of public support, especially among southern whites.[103] However, in terms of the effect of *Brown* on the mobilization of movement actors, the evidence is mixed. Although Rosenberg suggests *Brown* did not contribute to mobilization, other scholars have noted the power of *Brown* in making segregation appear vulnerable, referencing King's famous speech on the eve of the Montgomery bus boycott.[104] In this regard, activist Bayard Rustin spoke directly to the relationship between *Brown* and the movement's success:

> What made '54 so unusual was that the Supreme Court in the *Brown* decision established black people as being citizens with all the rights of all other citizens. Once that happened, then it was very easy for that militancy, which had been building up, to express itself in the Montgomery bus boycott of '55–'56.[105]

From a comparative institutional perspective, the question of how court decisions affect social change may be usefully reframed in comparison with parallel discussions within political science on the implementation of legislative statutes and administrative rules—i.e., policy enacted through the political branches and not the courts. Echoing the research on court impact, an important early study noted that implementation depended on the qualities of the regulation (clarity and sanctions), regulators (degree of executive commitment and resources), and regulatees (cohesiveness, leadership, and levels of defiance).[106] Looking at these factors, researchers concluded that policy reform produced mixed results in different contexts. Roger Hanson and Robert Crew found that reapportionment did not produce significant changes in state spending in central cities,[107] while two separate studies found that federal employment policies were not implemented in Oakland, leading Eugene Bardach to issue this harsh indictment: "[A]fter a policy mandate is agreed to, authorized, and adopted, there is underachievement of stated objectives, . . . delay, and excessive financial cost."[108] Joel Handler, in his pathbreaking work on welfare policy, emphasized how frontline administrative discretion of welfare

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102. *Id.*

103. ROSENBERG, *supra* note 5, at 75.

104. Christopher Coleman, Laurence D. Nee & Leonard S. Rubinowitz, *Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest*, 30 LAW & SOC. INQUIRY 663, 674 (2005).

105. VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S, at xxvii (Henry Hampton & Steve Faye eds., 1990).

106. FREDERICK M. WIRT, POLITICS OF SOUTHERN EQUALITY: LAW AND SOCIAL CHANGE IN A MISSISSIPPI COUNTY 282–83 (1970).

107. Roger A. Hanson & Robert E. Crew, Jr., *The Policy Impact of Reapportionment*, 8 LAW & SOC'Y REV. 69, 89 (1973).

108. BARDACH, *supra* note 79, at 3.

officers made policy implementation diverge from the intent of helping the poor.[109] Overall, implementation research found that, although the political branches potentially had more levers to pressure compliance on the ground, such as the withdrawal of local funding, they nonetheless faced significant barriers to implementation in the face of local officials with decision-making discretion.

In addition to highlighting parallel enforcement programs across different lawmaking domains, a comparative institutional perspective also helps to reframe the broader critique of court-centered reform as co-opting and demobilizing social movements. Again, the comparative institutional move is not to deny that this can occur but to point out how parallel co-optation and demobilization dynamics may happen in the wake of legislative success. In this regard, the labor movement offers a counterstory of legislative victory followed by movement decline that is given less attention in critiques of legal liberalism. In William Forbath's historical account, it was precisely organized labor's distrust of courts, sewed by judicial nullification of labor-backed redistributive policy and interference with collective action though antistrike injunctions, that shaped the labor movement's voluntarist approach to government regulation.[110] The movement first sought to protect the right to strike against judicial interference and then to protect labor's freedom to collectively bargain through statutory codification and administrative enforcement.[111] Yet the pathway of legislative reform, designed to disentangle organized labor from the courts, did not succeed over the long term in sustaining the movement, which has seen union density rates in the private sector fall dramatically—undermined by a combination of corporate resistance, legal revision, and administrative co-optation.[112]

2. Backlash

The critique of legal efficacy relates not only to the degree to which court decisions fail to work on the ground but also to how they may impose harm on social movements. This concern is most prominent in discussions of backlash, which has become an important framework for assessing policy-shifting court action.[113]

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109. *See* Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479, 484–85 (1966).

110. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 16 (1991).

111. *Id.* at 163–65 (discussing passage of the Norris LaGuardia and Wagner Acts).

112. *See generally* Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

113. *See, e.g.*, Scott L. Cummings, *Empirical Studies of Law and Social Change*, 2013 WIS. L. REV. 171, 203 (discussing the Obama administration's decision not to assert the broad constitutional right to marry in the Supreme Court litigation over California's Proposition 8, barring same-sex marriage).

Backlash is a concept with a long history,[114] which achieved prominence in law with historian Michael Klarman's analysis of *Brown*,[115] followed by political scientist Gerald Rosenberg's analysis of same-sex marriage litigation.[116] The concept of backlash builds upon the political science literature on the relation between judicial decision making and public opinion.[117] The basic question underlying backlash is whether rule change produces culture change or vice versa. This question has direct implications for strategic advocacy decisions by lawyers. If court decisions reflect but do not produce norm change, that counsels in favor of the tactical decision to build up support on the ground before turning to the court. If court decisions do move public opinion, then lawyers may be wise to go to court before investing deeply in political mobilization. In the real world, the prospective impact of court decisions is inherently uncertain and lawyers considering litigation to achieve policy reform must make complex judgments about how their judicial success might shape public attitudes about their cause—for better or for worse. The comparative institutional perspective developed here adds an another strategic layer, which is that, in weighing the decision to litigate, advocates must also make predictions about the potential of nonlegal strategies to affect public opinion and produce backlash.

The backlash thesis states that when a court decision is strongly out of line with a majority of the public's view of an issue, the majority will resort to politics to counteract that court decision.[118] The intensity of the backlash depends in part on the degree of variance between public opinion and the court's opinion: the greater the public opposition, the more vigorous the backlash.[119] Lawyers assessing the prospective decision to litigate for policy change must therefore ask themselves whether public opposition to their position is so strong that winning in court risks mobilizing opposition in ways that could impair or even negate their victory. The comparative institutional framework suggests, in addition, that lawyers must judge the costs of this potential judicial backlash relative to the anticipated costs of other routes of social movement action, including the costs of doing nothing.

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114. *See* Rita Bruun, *The Boldt Decision: Legal Victory, Political Defeat*, 4 LAW & POL'Y Q. 271, 286 (1982).

115. *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Michael J. Klarman, *supra* note 5.

116. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 355–419 (2nd ed. 2008).

117. *See, e.g.*, William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 197 (1996).

118. KLARMAN, *supra* note 77, at 169 ("Political backlash results from government action that strongly contravenes public opinion.").

119. *Id.* at 168 (noting how court decisions in favor of same-sex marriage "generated enormous political backlash because they endorsed gay marriage at a time when public opinion, which had been growing more progressive on other gay rights issues, remained strongly opposed to it").

A comparative framework is meant to spotlight a critical but widely overlooked point in the backlash literature, which is that the concept of *judicial* backlash implies that a *nonjudicial* path to a movement's goal exists that would not produce backlash at all, or would produce backlash at a lower level of intensity. Although it is impossible to ever prove or disprove this counterfactual, it is helpful to make it explicit in order to better judge the risks and rewards involved when lawyers have to make the strategic choice of whether to pursue impact litigation.

This comparative analysis asks, in part, what the potential is for backlash to occur through legislative policy reform. In this regard, there is some debate within the literature about the mechanics of backlash: in particular, whether backlash is more likely to occur when a court makes a controversial decision of social policy instead of a legislature.[120] The issue is whether backlash is related to what the public views as the relative institutional competence of courts and legislatures in making controversial social policy decisions, so that if a court makes such a decision, the backlash independently responds to the fact that it was a *court* decision, rather than the decision itself.[121] William Eskridge suggests this in his analysis of *Roe v. Wade*,[122] where he argues that the Court short-circuited politics and "declared a winner" on a divisive social issue.[123] In his discussion of the movement for abortion rights, Gordon Silverstein makes a similar claim about the institutionally specific risks of court reform: "Unlike a political strategy in which it would have been necessary to change public opinion before embedding these protections in law, a judicial strategy allowed policy change without necessarily changing minds."[124] Thus, "changes in judicial appointments could (and have) put these policy accomplishments at great risk."[125]

Klarman, in his most recent work on same-sex marriage, states that whether government action "derives from legislatures or courts seems relatively unimportant" in producing backlash.[126] Supporting this view, a recent experimental study showed that whether a controversial legal change at odds with public opinion occurs via courts or legislatures does not significantly affect average attitudes about the underlying issues, although court decisions increase the intensity with which those attitudes are held.[127]

The comparative institutional perspective focuses on how the judicial backlash thesis depends on the possibility of extralegal social movement alternatives to court action and suggests how directly engaging that

120. *See generally* David Fontana & Donald Braman, *Judicial Backlash or Just Backlash?: Evidence from a National Experiment*, 112 COLUM. L. REV. 731 (2012) (summarizing this debate).

121. *See id.* at 739–40.

122. 410 U.S. 113 (1973).

123. William N. Eskridge, *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005).

124. SILVERSTEIN, *supra* note 7, at 271.

125. *Id.*

126. KLARMAN, *supra* note 77, at 169.

127. Fontana & Braman, *supra* note 120, at 763–64.

possibility may reframe how we assess lawyers' tactical choices. Doing so requires adopting the lawyer's perspective at the moment of decision making in order to evaluate how the backlash calculus affects whether or when to turn to courts as a social change tool.

Klarman's view of backlash rests on the following observations. The first is that court decisions may raise the public salience of issues in ways that force people and politicians to take a position that they may not have had to confront, often provoking a more negative reaction.[128] Second, although there may be no difference in public reaction when courts or legislatures decide on issues at the same distance from public opinion, courts are more likely to make decisions at a larger variance and thus are more likely to be in the position of provoking backlash.[129] Third, the intensity of the backlash is related to the intensity of support for and against the issue: if decision opponents are more mobilized than supporters, the backlash will be worse.[130] Both the second and third points relate to the nature and extent of the backlash that ensues. When more people feel more strongly about the incorrectness of a court decision, they will go further to reverse it through political channels. This is related to a fourth point, that controversial decisions provide vehicles for political parties to mobilize their constituents for overall political advantage.[131]

Another set of backlash arguments relates not to the impact on decision opponents but on decision supporters. Here, the idea is that controversial decisions that have a high public profile may reset a movement's agenda in a way that diverts resources away from other important issues that may have otherwise had political traction. In the marriage context, Klarman's argument (before the events leading to *Obergefell v. Hodges*[132]) was that *Goodridge v. Department of Public Health*[133] moved the focus away from hate crime and antidiscrimination legislative advocacy in conservative states, and the momentum for more politically popular civil unions receded.[134] A related argument is that controversial opinions undercut the ability of a movement's political supporters to capitalize on opponents' extreme positions on other issues. Thus, if Democrats wanted to score political points because of the Republican Party's extreme views opposing antidiscrimination laws for gays and lesbians, that became harder when the political focus shifted to marriage, an issue about which there was more political consensus across party lines.[135]

One implication of the backlash analysis is that if there is a wide discrepancy between public opinion and what would be asked from a court, then lawyers should think hard about whether to proceed with the court challenge. The difficult question is how to conduct that evaluation in a way

128. KLARMAN, *supra* note 77, at 165–66.
129. *Id.* at 169.
130. *Id.* at 172.
131. *Id.* at 183.
132. 135 S. Ct. 2584 (2015).
133. 798 N.E.2d 941 (Mass. 2003).
134. KLARMAN, *supra* note 77, at 179.
135. *Id.* at 180.

that fully considers the range of risks and rewards. First, two obvious but important, observations are in order about lawyer decision making. One is that there is a threshold calculation about whether a legal challenge will be successful on the merits. Movement lawyers must have a degree of confidence, which is never 100 percent, that they have the precedent, arguments, and enough judicial allies to carry the legal day. This is inherently uncertain, but one can make predictions based on past decision-making records. The point is that this is a separate calculation from the backlash one, which goes to the problems that may arise *after* achieving legal success.

This leads to a second observation, which relates to how lawyers might think about the costs of winning. In almost any situation in which a minority group deprived of rights seeks their validation through court, the minority does so in contravention of public opinion. This means that the strategic choice for lawyers is either one of continued deprivation of the right or the pursuit of reform through court with backlash (because backlash is defined as a majority political response to a minority-advancing judicial decision). In other words, one would expect that a dominant and hostile majority would respond to a court decision upholding minority rights by using the political machinery that the majority, by definition, already controls to reverse it. And, indeed, we know from the historical record, dating back to *Brown*, that movement lawyers consider this possibility when they decide whether to proceed to court by asking: Is the expected cost of backlash greater than the expected benefit of court victory, measured against the baseline of the continued deprivation of the right?

From a lawyering perspective, this calculation can be broken down into related sets of questions. First, what is the cost of maintaining the status quo of a continued rights violation? One aspect of this question relates to how long the deprivation might last in the absence of legal challenge. That is, if socioeconomic conditions and demographic trends are changing rapidly such that public attitudes are moving toward support for the minority position, movement lawyers might decide to wait given the potential downsides of legal action and the deeper change they might achieve through a legislative strategy built on growing public support. This is one of the arguments against *Roe*: that choice supporters were making progress at the state level and had this been left to play out, a more stable equilibrium could have been achieved.[136] A state-by-state approach, however, raises a second dimension of the problem, which is the potential for geographic variation. Although it may be true that a state-by-state approach embeds victories in politically sympathetic states and may not mobilize opposition in hostile states, the rights deprivation remains in those hostile states. That is in fact what happened with respect to same-sex marriage before *Obergefell*.[137] Thus, part of the legal equation is whether

136. For an analysis of this argument, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).

137. *See* Robert Barnes & Fred Barbash, *Supreme Court Hears Arguments in Historic Gay-Marriage Case*, WASH. POST (Apr. 28, 2015), https://www.washingtonpost.com/

substantial rights deprivation is tolerable, and for how long, and what the appropriate tipping point is at which the Court might weigh in favor of the right to "suppress outliers."[138] This is an extremely difficult question but one that will always inform a movement lawyer's choice.

Even if continued rights deprivation would be intolerable, that does not answer the question of whether to assert a legal challenge, because success could reinforce the status quo or make conditions worse. Thus, a second question is whether backlash makes the challenger group worse off than it otherwise would have been without litigation. That was Rosenberg's position on marriage prior to the campaign that culminated in *Obergefell*: that because *Baehr v. Lewin*[139] and *Goodridge* sparked constitutional amendments in twenty-seven states and statutory amendments in others, it set the movement back below the starting point by making it harder to achieve the goal of marriage.[140] How should lawyers think about the risk that social reform litigation "may set their cause back"?[141]

First, and more narrowly, it would not seem like the passage of a statute in a state where there is de facto denial of a right is a significant setback because the right would have to be asserted via legislative process or court opinion in any event. What about the constitutional amendments? These were in states where the opposition to marriage was so deep that it seems implausible that the politics would have changed within a reasonable time frame. In such a context, how harmful a state constitutional amendment is to the ultimate realization of a movement goal is partly a function of how difficult the amendment would be to rescind. Some states, for example, permit constitutional amendments via majority vote on ballot initiatives. In those states, the achievement of majority public support for a movement's goal would permit the movement to reamend the constitution to codify that goal. Although this would certainly involve significant investments of time and money, it is not clear how much more costly it would be than codifying the promovement goal in a deeply hostile state through alternative means.

A deeper problem for movement proponents is that moving too quickly may not only cause a counterreaction in the form of new legal barriers to goal achievement, it may also move further away from the goal by causing public support to deteriorate. A court decision resulting in a constitutional amendment foreclosing the right is bad for movement proponents on its own terms. It is worse if it also causes more people to be opposed to the right since that would make it harder to reverse the legal damage done by the amendment itself. So if the ultimate pathway to reform is through shifting culture, then that goal moves further away. However, it is difficult to predict in advance if a legal decision will have a negative or positive

politics/courts_law/supreme-court-will-hear-historic-arguments-in-gay-marriage-cases/2015/04/27/083d9302-ed24-11e4-8666-a1d756d0218e_story.html?utm_term=.a1f2396f2e2d [https://perma.cc/93GA-8YP8].

138. Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 961 (2014).

139. 852 P.2d 44 (Haw. 1993).

140. ROSENBERG, *supra* note 116, at 416.

141. *Id.* at 419.

effect on public opinion. For instance, in California, there was no evidence that opposition to marriage increased because of the California Supreme Court's assertion of a constitutional right to marry in 2008.[142] Or consider *Loving v. Virginia*,[143] which was followed by a *decrease* in public support for antimiscegenation laws although opposition to interracial marriage was as high in the mid-1960s as opposition to same-sex marriage was in the early 1990s before the *Baehr* decision in Hawaii.[144]

Two further points are in order. From an ex ante perspective, even if one accepted that there were costs of pursuing legal redress through courts and that the movement could end up in a worse position by doing so, that would not end the analysis. For one, there is the uncertainty point. One would want to calculate the probability that certain harms would occur. In the event that there was a significant possibility that they would not, a court challenge might be worth pursuing given the intolerable nature of the status quo.

The comparative institutional point is that even if one was confident of negative consequences flowing from a court strategy, those consequences would have to be compared against the consequences of viable movement alternatives. As already suggested, there is always the alternative of waiting, but for those in the movement who either suffer or identify with the harm, the cost of waiting is likely to be intolerably high.

The backlash thesis does not typically presume that the alternative to court action is doing nothing. Rather, the argument is that a political strategy is available and would be more effective at building public support over time in ways that bring about more sustainable change. However, here too, the picture is more complicated precisely because court decisions are not the only opportunities for political entrepreneurs to mobilize opposition. As has been the case with President Obama's legislative achievements, like Obamacare, and executive action, like the Deferred Action for Childhood Arrivals program, nonlegal successes can also be used to stoke political opposition.[145] And even a state-by-state political approach may ultimately build to the point that it becomes a wedge issue that might be used to galvanize opposition. Linda Greenhouse and Reva Siegel's analysis of the history of *Roe* demonstrates this dynamic by showing how political entrepreneurs within the Republican Party were already working with the Catholic Church to mobilize religiously conservative voters against

142. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1321–24 (2010).

143. 388 U.S. 1 (1967).

144. Karlyn Bowman, *Interracial Marriage: Changing Laws, Minds and Hearts*, FORBES (Jan. 13, 2017, 10:43 AM), https://www.forbes.com/sites/bowmanmarsico/2017/01/13/interracial-marriage-changing-laws-minds-and-hearts/#153f6f597c59 ("In 1963, 59% of whites favored laws against interracial marriage. In 1968, 53% did. By the summer of 1970, a majority said such laws should not exist, and a majority has given that response ever since.") [https://perma.cc/Y3WE-AKHT].

145. Grace-Marie Turner, *A Resistance Movement Rises Against ObamaCare*, FORBES (Dec. 10, 2012, 5:02 PM), https://www.forbes.com/sites/gracemarieturner/2012/12/10/a-resistance-movement-rises-against-obamacare/#54e1ad782c7d [https://perma.cc/5Q4Z-UR2W].

abortion as part of the party's "Southern Strategy" before the Court's decision.[146] Particularly in a post-Trump era in which hyperpartisanship and the pervasiveness of media spin have made it easier to use information to motivate political attacks, one can foresee legislative victories also posing backlash risk. Whether the risk is greater or less than that incurred by a decisive Supreme Court decision is again a complex and uncertain question. The point here is to underscore that developing better theoretical and empirical frameworks to answer the question is critically important to charting prospective mobilization and judging its outcome.

In this regard, some scholars have recently sought to focus attention on how strategic lawyer decision making intersects with the potential for backlash. David Schraub's analysis of when legal arguments or decisions may produce "sticky slopes" that injure a movement is an important case in point.[147] In Schraub's view, a sticky slope occurs when the achievement of policy success *A* at time one acts to block further reform *B* at time two.[148] This possibility has strategic implications, as "the specter of the sticky slope may counsel opposing, delaying, or modifying the demand for *A*, on the grounds that it will pose a later barrier to *B*."[149] One of Schraub's examples of a "simple" sticky slope is the Supreme Court's decision in *Griswold v. Connecticut*,[150] which he suggests may have mobilized more people to oppose "its extension to abortion rights in *Roe v. Wade*."[151] He also identifies as a sticky slope a legal success that demobilizes a movement, "dissipating its momentum and rendering it vulnerable to counterattack."[152] In his analysis of "wrong argument" sticky slopes, he traces how particular legal frames, like "colorblindness," which appear compelling at the time they are presented (as in *Brown*), may later turn against the movement as they feed too easily into arguments by movement opponents, as he suggests was the case in the Court's use of colorblindness to strike down a Seattle school district's voluntary desegregation plan in *Parents Involved v. Seattle School District No. 1*.[153] In Schraub's terms, "Early reformist rhetoric and argumentation often sets the tone for the entire course of the movement, and if it is not chosen carefully a social movement can get stuck due to initial missteps."[154] Moreover, arguments that push too hard, instead of nudging norm change, can produce noncompliance or undermine confidence in law, which can have a negative impact on long-term social movement goals.[155]

Although Schraub's conception of sticky slopes is theoretically compelling and empirically plausible, it raises problems that are also

146. Greenhouse & Siegel, *supra* note 136, at 2083–85.
147. David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1249 (2013).
148. *Id.* at 1252.
149. *Id.*
150. 381 U.S. 479 (1965).
151. Schraub, *supra* note 147, at 1263.
152. *Id.* at 1264.
153. 551 U.S. 701 (2007); *see also* Schraub, *supra* note 147, at 1278–79 (citing *Parents Involved*, 551 U.S. 29).
154. Schraub, *supra* note 147, at 1290.
155. *Id.* at 1299–300.

apparent in the backlash literature. First, although Schraub resists the backlash frame and does extend his analysis to all types of movement policy gains, his main focus is on the sticky slope potential of court decisions. As discussed above, although court-induced stickiness is an important strategic consideration for lawyers and activists contemplating a court-centered reform strategy, it is only part of the analysis because one must also contemplate the consequences of alternative strategies, as well as of inaction, which itself may become "sticky" by suggesting acquiescence to the status quo. As social movement theorists emphasize, *any* type of political success can dampen movement mobilization,[156] while issue framing may tend toward more mainstream normative concepts in order to have the broadest resonance,[157] a move that also makes them particularly susceptible to later revision. Finally, even if it is true that some types of legal strategies and arguments may produce sticky slopes that have long-term movement costs, those costs must be weighed against the likelihood that other strategies would have produced better results. The indeterminacy of doctrine makes it hard to imagine how movement opponents bent on undoing old gains could not find some rhetorical basis in original movement arguments to do so. Would black students have been better off in the long term if the *Brown* Court had mandated equalization, rather than desegregation, as Bell has suggested?[158] Would they be better off if the Court had not weighed in at all and activists had sought local political solutions instead?

Changes in the media have also affected the way advocates think about court-based strategies in relation to backlash. It seems plausible that in the 1950s and 1960s, public opinion of the Supreme Court was such that many people viewed it as a neutral body above politics. In this context, it may have been the case that by overtly wading into politics in *Brown* and subsequent high-profile cases on deeply contested issues of social policy, the Court lost its veneer of neutrality in a way that provoked strongly negative public reactions.

However, times have changed so that popular opinion of the Court may hinge less on its neutrality. The structure of political contention is highly developed, and media culture is profoundly different than it was at the time of *Brown*, when the conduit of information transmission was through major periodicals or the canonical nightly television news.[159] Now, in contrast, opinion is deeply influenced by a range of new media actors, vying for

156. *See* Devashree Gupta, *The Power of Incremental Outcomes: How Small Victories and Defeats Affect Social Movement Organizations*, 14 MOBILIZATION 417, 418 (2009).

157. For a discussion of how collective action frames may enable or constrain social movement mobilization, see David A. Snow & Robert D. Benford, *Master Frames and Cycles of Protest*, *in* FRONTIERS IN SOCIAL MOVEMENT THEORY 133 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).

158. Derrick A. Bell, *Bell, J., Dissenting*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 185, 187 (Jack Balkin ed., 2002).

159. Steven H. Chaffee & Miriam J. Metzger, *The End of Mass Communication?*, 4 MASS COMM. & SOC'Y 365, 369–74 (2001).

attention in the hyperpartisan and more decentralized 24/7 news cycle.[160] This means it is no longer simply the case that the public will react to court decisions based on a preexisting narrative frame about judicial competence but that public reaction will be shaped by competing narratives crafted by partisans and often disseminated through social media feeds that target a selected audience. Proponents of court decisions will therefore need to get their message out to combat negative messaging from the other side. How this competition plays out is not completely certain; the only certainty is that it will occur and that advocates must have a public relations plan to complement their litigation plan. In assessing backlash threat in this new environment, comparative institutional analysis must therefore assess a broader range of factors related to opinion formation and change.

In the end, the risk of court-specific backlash analysis is that it may present an incomplete cost-benefit calculation that shapes a negative assessment of legal interventions in ways that have the effect of counseling in favor of a politics of lawyer circumspection. In this critical vision, by framing the issue as backlash, what may at bottom be dynamics that systematically disadvantage challenges by less powerful social groups are converted into justifications for blaming lawyers for the results of their challenges. The frame of backlash suggests something wrong with the strategic choice as opposed to the underlying opposition in the first instance. Movements are thus in a double bind: locked into subordination until enlightened views ultimately prevail or blamed for the hostility engendered should they have the temerity to challenge the status quo.

CONCLUSION

This Article has sought to reframe the foundational critiques of lawyers in social movements by holding up the mirror of critical scholarly commentary on their nonlegal counterparts. The goal of this exercise has been to spotlight important similarities in the problems scholars identify across the domains of legal and nonlegal mobilization for social change. Overall, comparative institutional analysis draws attention to how risks of legal action may be overstated by the tendency to conflate negative campaign outcomes resulting from political disadvantage with negative campaign outcomes resulting from the use of legal strategies. Because it is generally not possible to know whether a particular bad legal outcome is worse than hypothetical alternatives (either waiting or advancing change through nonlegal channels), scholars may misidentify weaknesses in social movement politics as defects in reform-oriented lawyering. Similarly, the rewards of movement-led change may be overstated because of a tendency to extrapolate historical lessons from different epochs and political contexts to the present era, in which progressive movements face distinct constraints.

160. *See, e.g.*, Matthew A. Baum & Philip B.K. Potter, *The Relationships Between Mass Media, Public Opinion, and Foreign Policy: Toward a Theoretical Synthesis*, 11 ANN. REV. POL. SCI. 39, 52–53 (2008).

Reframing the foundational critiques of lawyers through the lens of this comparative institutional perspective yields two important insights. First, reframing suggests that scholarly discomfort with lawyer participation in social movements may express less of a professional critique than a political one, reflecting deeper concerns about the movement costs of elite representation and the pursuit of institutional politics. From this vantage point, accountability concerns are not intrinsically about the representational problems of the lawyer-client relationship but rather about the political tradeoffs of elite representation of different elements of contested social movement constituencies. Efficacy is not just a debate about litigation and courts but reflects political disagreements over the utility of elite intermediation, incremental reform, and the legitimacy of democratic institutions. Second, broadening the theoretical perspective to encompass the challenges faced by nonlawyers in social movements may rehabilitate the role of their lawyer counterparts—revealing lawyers as less suspect allies in outsider challenges to power and pointing toward a more optimistic account in which lawyers act as partners, and sometimes even leaders, in struggles for transformative democratic change.