The Social Movement Turn in Law

In one of the most striking developments in American legal scholarship, social movements have become central to the study of law. This "social movement turn" is a current response to an age-old problem in progressive legal thought: harnessing law as a force for social change while maintaining a distinction between law and politics. The core contribution of this article is to show how contemporary scholars in the legal academy have responded to this problem by building on social science and sociolegal studies to develop a new model—movement liberalism—that assigns leadership of transformative legal change to social movements in order to preserve traditional roles for courts and lawyers. Movement liberalism aims 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. Yet, as the article shows, rather than resolving the law-politics problem in progressive thought, movement liberalism ultimately serves to reproduce long-standing debates—only now on empirical rather than normative grounds. In conclusion, the article suggests that, by carrying forward the critical visions of lawyers and courts that it seeks to transcend, movement liberalism may be missing key insights from the empirical research upon which it claims to rely. This conclusion offers a specific application of the broader interdisciplinary "translation" problem identified as a core challenge of New Legal Realism and suggests that legal scholars writing about social movements may benefit from a more systemic engagement with the underlying empiricism upon which their theoretical claims rely.

INTRODUCTION

Within American legal scholarship, it is the moment of social movements.[1] A half-century after Martin Luther King, Jr. led civil rights protestors across the Edmund Pettus Bridge in Selma (Branch 1998), there has been an explosion of interest in an area that until the 1990s occupied a marginal position in an already marginalized field of the social sciences. Up to then, social movement research was the domain of academic sociology departments—considered by mainstream legal academics, when at all, as nostalgic throwbacks, disconnected from the reality of conservative political ascendance and the rise of pragmatic centrist-liberalism.

But then, beginning in the 1990s and exploding in the Bush era—at the very apogee of liberal distrust of national political institutions consolidated under conservative control—something curious happened. Social movements—particularly those on the political left—made a dizzying comeback, moving from the margins to the mainstream of American legal thought. And, though the scholarship was largely the product of legal progressives, the comeback of social movements expressed something more than mere nostalgia—not just a longing for the heady 1960s, but at once a theory of lawmaking and a program for political

[1] 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 climbed 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). References in the past 15 years have more than quadrupled in absolute terms and doubled in percentage terms over the prior period. the increase of social movement articles in the top four sociology journals between the 1950s and 1990s).

action founded on empirical insights from the very social science long ignored. This scholarship built upon—and increasingly interacted with—emerging sociolegal studies of "law and social movements" (Boutcher & Stobaugh 2013), advanced primarily by social scientists outside of law schools, who investigated how law shaped social movements, how movements mobilized law as a resource to advance claims, and how lawyers related to movement organizations to build power through law (McCann 1994, McCann & Silverstein 1998). While the rise of this law and social movements scholarship as an interdisciplinary field has received growing attention within sociolegal studies (McCann 2006, Edelman, McCann & Leachman 2010), the parallel explosion of interest in social movements at the center of American legal theory has remained underappreciated (Rubin 2001).

The lines of intellectual development within the legal academy were notable in their scope and speed. At the apex, in the field of constitutional law, progressive social movements emerged as important lawmaking actors, reshaping politics and norms in ways that sparked "constitutional revolutions" (Ackerman 1991). Closer to practice, in the study of lawyers and lawyering,[2] social movement organizations began to appear as important client groups in the struggle for progressive reform, setting the social change agenda and thus shifting attention away from foundational concerns about lawyer accountability to vulnerable individual clients or diffuse classes (see, for example, Alfieri 2007, Ashar 2007, Cummings 2015, Gordon 2007, Freeman 2015, NeJaime 2011). In a surprising turnabout, social movements achieved privileged positions in both fields: presented in laudatory terms as the engines of progressive transformation. How did this happen? And why?

This article argues that social movements have been elevated to prominence within contemporary legal scholarship as a response to the fundamental problem of progressive legal thought (Kennedy 2006, Hovencamp 1995) over the past century: how to harness law as a force for progressive social change within American democracy while still maintaining a distinction between law and politics. This "law-politics" problem emerged during the Progressive era and erupted as an intellectual crisis after *Brown v. Board of Education*, which changed the political calculus for progressives: forced to justify why it was acceptable for courts and lawyers to intervene against the majoritarianism of Southern Jim Crow. As the democratic aims of political liberalism dimmed with the rise of conservatism, *Brown* came to stand for a new, and controversial, ideology: *legal liberalism*.[3]

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[2] In the legal academy, the study of lawyers and lawyering has been centered in three overlapping areas of inquiry: traditional legal ethics, focused on the study of professional norms; clinical theory, focused the relation between practical lawyering, pedagogy, and social justice; and the legal profession, which is focused on the organization of legal practice and the relation of lawyers to society. Legal profession studies are most aligned with sociolegal approaches and have gained more prominence within legal scholarship as legal scholars have turned toward empiricism. In this vein, see, e.g., Henderson & Galanter 2010, Krishnan 2013, Southworth 2010, Wilkins 1992, Rhode 2008.

[3] An early use of the term was by Fred Rodell, who described the Black-Douglas-Murphy-Rutledge bloc on the Supreme Court as "a solid four-man core of living legal liberalism" (Rodell 1955, 283). Early critics of social reform through law coined the term "liberal legalism" to distinguish it from political liberalism (Trubek & Galanter 1974). It was not until the 1980s, with the advent of Critical Legal Studies, that the idea of legal liberalism took hold as a concept (Komesar 1985, Dalton 1985).

Though deeply contested and never precisely defined, the concept of legal liberalism came to be identified with faith in law generally, and courts in particular, to correct defects in pluralism; reliance on lawyers in advancing social reform, particularly through impact litigation; and emphasis on the enforcement of individual rights, with special priority given to civil and political over economic and social rights (Kalman 1998, Mack 2005, Simon 2004). Legal liberalism thus framed rested on *an alliance of activist courts and activist lawyers* in the pursuit of progressive reform.

Legal liberalism was never a total system—nor even an accurate empirical description of a complicated social reality (Mack 2005, Schmidt 2010)—but it gained prominence within the legal academy in the 1970s and 1980s as a way for its critics to summarize the perceived democratic threat posed by courts and lawyers acting as political partisans. In the wake of *Brown*, these threats came to constitute the *defining theoretical problems* of the two legal academic fields most closely associated with courts and lawyers. 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. Within the *lawyering* field, 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. Both problems, at bottom, were concerned with maintaining law's independence from politics—its autonomy (Tomlins 2007)—against the charge that legal liberalism threatened to coopt law in the service of its own vision of the good society. By thus harnessing law for substantive over procedural reform, legal liberalism revealed activist courts and lawyers as dangers to democratic pluralism—and thus to the very movements they purported to help.

These problems have roiled progressive legal thought for the sixty years since *Brown*—and have defined a different set of scholarly boundaries in law than in sociolegal studies, which has been less invested in defined the law-politics line. As legal academics began to reflect back on why political liberalism had failed, many focused on the costs of legal liberalism and developed a powerful critique of it. In this critical vision, massive backlash against seminal court decisions, particularly *Brown* and *Roe v. Wade*, undercut the New Deal-Civil Rights democratic coalition and ignited the rise of political conservatism. Activist lawyering, blinkered by the "myth of rights" (Scheingold 1974), asserted standing to speak on behalf of the "underrepresented" (Note 1970), misinterpreting their needs and misdirecting their dissent into legal channels where it withered and died (Lobel 2007). Within this frame, it was the use of law as politics by elite lawyers and judges that contributed to the damage: turning the public against progressive values they too forcefully declared, while often overriding the interests of the very groups they purported to represent. From this perspective, it therefore seemed plausible to blame legal liberalism for the decline of political liberalism, begging the question: How could law and lawyers help to advance a transformative and sustainable progressive politics without being coopted or undermining the progressive forces they sought to empower?

Over the past decade, a new and powerful answer has emerged: *social movements*. In constitutional law, social movements have been presented as a response to the countermajoritarian problem: because movements are the critical actors that create new norms, reshape politics, and shift public opinion,[4] the role of courts (and especially the Supreme Court) is viewed as confirming an already developed social consensus rather than shaping a new one. Courts, in this model, lag behind social movements, rather than lead them—and in so doing, ultimately validate the new majority that social movements forge. Similarly, within the lawyering scholarship, social movements have been presented as a response to the professionalism problem: because movements drive the social change agenda, with movement organizations headed by nonlawyers in charge of defining strategy and tactics, lawyers can advance progressive change by representing movement organizational clients in a conventional lawyer-client relationship. Lawyers, in this model, also lag rather than lead—reinforcing their role as zealous client advocates while minimizing the risk of client domination. In neither account is law viewed as strongly instrumental—a means to an end (Tamanaha 2006)—but rather as decidedly constrained.

As this suggests, a critical feature of this new social movement literature in law is that it draws heavily on longstanding social science and sociolegal empirical research traditions on the role of lawyers, courts, and social movements in producing (and sometimes undermining) democratic change. In this sense, the social movement turn reflects an important conjuncture of law and social science "translation" (Mertz 2016, see also Erlanger et al. 2005) in which legal scholars are mining qualitative and quantitative empirical research in order to make claims about how legal change may best contribute to enduring social reform. The new social movement literature in law thus reflects the broader process of interdisciplinary engagement associated with the rise of New Legal Realism—a revival and extension of the law-and-society movement that seeks to advance "theory-driven empirical research about law-in-action" (McCann 2016). And, as this article will discuss, it raises the particular challenges of interdisciplinary translation as legal scholars borrow empirical insights about court decision making and social movement mobilization to *make normative points about the appropriate role that legal and nonlegal actors should play in broader social change processes*. Significantly, the social movement turn in legal scholarship reflects and reproduces essential normative fault lines within progressive legal thought about whether, and to what degree, lawyers and courts should play prominent roles in social reform. Thus, one of the critical insights of this project is to highlight how, as legal scholars turn to social movements, they are using findings and concepts from social science and sociolegal studies not simply to add empirical depth to legal scholarship, but to *take sides in a long-standing theoretical debate*.

This article situates the current social movement trend in legal scholarship within the fundamental debate over the legacy of legal liberalism. It argues that the theoretical problems at its heart—countermajoritarianism and professionalism—

[4] For key works, see Kramer 2004, West 1994, Balkin 2008, Brown-Nagin 2005, Eskridge 2001, Greenhouse & Siegel 2011, NeJaime 2012, Rubin 2001, Siegel 2006.

are now being addressed in legal scholarship by a new empirically oriented model of law and social change that this article calls *movement liberalism*. The key point is that movement liberal scholarship builds off of empirical insights about the role of social movements, courts, and lawyers in ways that coalesce around a descriptive model of the relationship between law and social change that seeks to avoid the critiques of liberalism, while still delivering sustainable progressive transformation. Rather than relying on litigation and courts, movement liberalism places its faith in social movements to correct pluralism's defects by promoting grassroots organization and protest politics to change political culture and thereby advance social reform on behalf of disempowered groups. Within this model, individual rights are tools, but not ends in themselves; courts reinforce movement efforts after their hard work is done, but do not "get out ahead." In a stark break with scholarly debates of the past, this model attempts to build normative theory on the foundation of empirical study and institutional analysis that form the hallmarks of the New Legal Realism (Nourse & Shaffer 2009).

The central aim of this article is to explore how movement liberalism has been presented within legal scholarship as a way of reasserting a politically productive relationship between courts, lawyers, and social change from the "bottom-up." In doing so, it not only seeks to explain and analyze an important development in legal theory, but to also serve as a bridge between the social movement conversation in the legal academy and the broader interdisciplinary conversation about law and social movements coming out of sociolegal studies (Albiston 2011, Stryker 2007, Chua 2012) and intersecting with scholarship about litigation, courts, and social movements in political science and sociology.[5] The article contends that legal scholars have insufficiently engaged with the underlying empirical literature on law and social movements, and would benefit from a more sustained conversation with sociolegal and social science scholars about the meaning and role of social movements in American democracy. This conversation, in turn, may illuminate the particular ways in which law and social movements has developed within sociolegal scholarship that open new possibilities for reassessing core concepts.

At bottom, this article therefore seeks to make an intervention about the pathway of intellectual arbitrage in law that serves as a window into broader processes of interdisciplinary scholarly production that illuminates potential risks and identifies opportunities for deeper exchange. Toward that end, its method is to

[5] I recognize that the line between what I am calling "legal scholars" and "sociolegal scholars" is blurry—increasingly so, in the period of empirical legal studies. However, as I suggest in the analysis below, the important distinction I am drawing is between those scholars within the American legal academy who have historically been motivated by a set of theoretical questions about the role of courts and lawyers in a democratic system that have foregrounded those actors, emphasized their unique contributions to legal development, and been more sensitive to preserving the boundary between law and politics. Sociolegal scholars (both inside and outside of law schools), while always overlapping, have in contrast focused on how adjudication and lawyering are situated within the broader social field and have emphasized the ways in which law and politics are co-constitutive. How and why these positions are interacting is at the center of the story I am telling (2017a, 2017b).

review and synthesize the contemporary social movement literature *in law* to illuminate the particular role that social movements have come to play. Doing so reveals how movement liberalism—the idea that social movement activism from below can redeem progressive politics without compromising law—trades upon insights from sociolegal and social movement studies in order to respond to fundamental theoretical problems that have split progressive legal scholars since *Brown*. Specifically, by relinking theories of deferential judicial review with support for redistributive policy and the protection of minority rights, movement liberalism aspires to achieve the jurisprudential equipoise disrupted by the Warren Court. And by conjoining the ideology of advocacy with cause lawyering, movement liberalism reestablishes the professional harmony undercut by the rise of public interest law. At a moment when America is more polarized than it has ever been over fundamental values, movement liberalism therefore promises a way for legal scholars to reaffirm a commitment to democratic pluralism without giving up the fight for transformative political change. It does so by making the *empirical claim* that movements are most likely to succeed when they mobilize politics first, and law only secondarily. This empirical claim then supports movement liberalism's implicit *normative claim* that courts and lawyers *should* defer to movements, because by doing so, better and more sustained progressive change will occur.

The article provides a critical analysis of movement liberalism that appraises its conceptual and empirical foundations, showing how the new social movement turn in legal scholarship links theoretical debates about the legitimacy of law as a tool for social change with empirical insights about law's potential and limits. The article begins with a descriptive overview that sets forth the critical debate spurred by legal liberalism about the limits of law and then traces the parallel conversations in sociolegal studies and social science about the tradeoffs of legal and political mobilization in advancing progressive change. Drawing on this scholarly foundation, the article next synthesizes the key insights of the movement liberal model in the two key scholarly fields where it has evolved: constitutional law and lawyering scholarship. As it argues, social movements in this model are positioned empirically as bottom-up 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, framed around two essential concepts, *majoritarian courts* and *movement lawyering*, each of which respond to the critiques of earlier periods. The article shows how these concepts build on social science to present a picture of social change through political mobilization that advances legal reform without undercutting the legitimacy of law. This picture fuses critical analyses of impact litigation and judicial impact coming out of political science (Gould & Barclay 2012) with accounts of legal mobilization and the "indirect effects" of court decisions that have become the hallmarks of sociolegal approaches to law and social movements (Handler 1978a).

The article then offers a preliminary appraisal of movement liberalism—both as an assessment of its contributions thus far and an invitation to a more sustained

interdisciplinary dialogue. It suggests that, despite efforts to bridge critical perspectives on the role of law and lawyers in social change, movement liberalism ultimately reproduces aspects of the very progressive legal debate it hopes to transcend, while reinforcing a version of the critiques that it seeks to surmount. Linking back to the insights of New Legal Realism, the article therefore suggests that the process of scholarly translation from social science into law is being conducted in such a way that empirical conclusions about the relation of law and social movements are being channeled through existing normative frameworks to advance preexisting normative positions. This conclusion offers a specific application of the broader interdisciplinary "translation" problem identified as a core challenge of New Legal Realism and suggests that legal scholars writing about social movements may benefit from a more systemic engagement with the underlying empiricism upon which their theoretical claims rely.

THE LEGACY OF LEGAL LIBERALISM

The story of how and why social movements have come to matter within contemporary legal scholarship takes off at the moment of crisis within progressive legal thought caused by *Brown*. The specific debate provoked by *Brown* erupted over how progressives should respond to a decision that threatened to replace ideals of judicial and professional independence with practices of judicial and professional activism. These practices, which were subsequently packaged under the label of legal liberalism, came to be associated in the most influential accounts 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" (Kalman 1998, 2). The idea of legal liberalism was therefore explicitly premised on the union of activist lawyers and activist courts, both of which were essential—working in concert—to achieve "specific social reforms" valued by progressives.

Yet 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.[6] 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 sense of opportunity lost. However, even as a new generation of scholars questions the historical accuracy of the legal liberal account (Carle 2015, Mack 2005, Schmidt 2010), it continues to hold sway as a critical framework for understanding and evaluating the role of lawyers and courts in social change. Thus,

[6] 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 its critics. Sebok (2008).

to understand the rise of social movements in legal thought, it is necessary to frame the social movement turn against the backdrop of the legal liberal debate over the law-politics problem in progressive legal theory: *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.*

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. Thus, as progressive legal thought was channeled into realism as a critical project (Horwitz 1992, Kennedy 2006, Leiter 2010, Fisher, Horwitz & Reed 1993), it did not have to fully confront concerns about the legitimacy of court-led, lawyer-driven progressive reform. Instead, realist scholars could advance a progressive agenda by arguing that courts and lawyers should support the majoritarianism of progressive economic reform legislation (Horwitz 1992, 200). Realists thus attacked aggressive judicial review of economic regulation and zealous legal advocacy for corporate clients, both of which were seen as promoting unbridled industrial capitalism (Singer 1988, Gordon 1988).

Following *Brown* and the rise of legal liberalism, the law-politics problem could no longer be so neatly evaded. If progressive legal thought could avoid the law-politics problem in the pre-war era, owing to the dominance of class-oriented legal realism in the legal 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*. Scholars in the legal academy writing during this period named and debated the law-politics problem in terms of the democratic legitimacy of courts and lawyers advancing rights for underrepresented interests. 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 (Bickel 1962, Friedman 2002). 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 (Luban 1988). Progressive scholars during the civil rights period debated the possibility and desirability of judicial and lawyer activism that could simultaneously advance progressive values (like desegregation) while maintaining the democratic legitimacy of legal institutions. Herbert Wechsler's "neutral principles" became the flashpoint of this debate within constitutional law (1959), splitting off process-oriented scholars who advocated judicial minimalism from "footnote four" liberals who, following Justice Harlan Stone in *Carolene Products*, believed 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" (Hand 1958, 29). A parallel dispute broke

out in the nascent lawyering literature around the importance of professional neutrality, with scholars like Paul Freund (1963) arguing that "law reform in response to the felt needs of the public is a concern of the legislature, not of the judges," while defenders of legal liberalism emphasized the importance of the new "public interest lawyers" (Note 1970) in facilitating the representation of "underrepresented" minority groups (Harrison & Jaffe 1972).

Just as the Warren Court's decision in *Brown* ignited law and social change research, the end of that Court's term—and the legal liberal project with which it was associated—provoked critical reappraisal. In the period of progressive disenchantment that followed, it was perhaps inevitable that law's power to produce social change would come under scrutiny, even attack. If the rise of progressive social movements in the 1960s had embodied the promise of deeper democracy, their decline called for a post-mortem analysis in which courts and lawyers would be examined as a contributing cause. Most notably, beginning in the 1970s and building over the next decade, scholars associated with Critical Legal Studies (CLS) began to contest the possibility of a principled law-politics division and question its political value, pitting CLS critics who pushed away from legalism as a political strategy (see Kennedy 1976, Klare 1979, Unger 1983) against mainstream and outsider scholars in critical race and feminist traditions who continued to defend law, albeit on different grounds (see Sparer 1984, Crenshaw 1988). These critical legal debates over law's neutrality and its aftermath crystallized progressive divisions over the role of courts and lawyers in social change, which in this period of progressive disenchantment with law became organized around two *foundational critiques*.

The *accountability critique* focused on the perceived disconnect between legal liberalism and professional neutrality—framed in terms of the lack of accountability of activist lawyers to autonomous clients. The criticism, famously advanced by Derrick Bell (1976), was that legal liberal lawyers, by virtue of their ability to define legal wrongs and control the direction of impact litigation, could pursue their own political agendas in ways that were only weakly responsive to—and sometimes even in conflict with—the interests of the constituents whom the lawyers purported to serve. Bell focused on class action conflicts between African American parents supportive of equalizing funding for their schools and the leadership of the NAACP, which Bell charged with the counterproductive pursuit of "integration ideals" held by organizational funders and elite supporters (489). He used the metaphor of "serving two masters" to reflect the lawyers' conflict between their commitment to client and cause (492-93). Though Bell's specific target was civil rights lawyering in pursuit of integration through controversial strategies like busing, his concern with lawyer control and accountability in the law reform model became an important theme of the legal liberal critique more broadly (Lobel 2007, 952).

The *efficacy critique* focused on the perceived disconnect between legal liberalism—framed in terms of legal reform led by activist judges and lawyers—and transformative social change. A central problem with legal liberalism was the challenge of enforcement: winning "law on the books" was one thing, but

translating law into action was quite another. Critics of legal liberalism suggested that there were unique constraints on enforcing judge-made law owing to the institutional limitations of courts (Hazard 1970). Even worse, in particularly contentious cases where countermajoritarian legal strategies challenged majoritarian politics—like *Brown* and *Roe v. Wade*—critics argued that social movements could be harmed through backlash, igniting opposition politics in ways that hurt the very causes lawyers sought to advance (Klarman 1994).

Scholars associated with CLS broadened the attack, but from a dramatically different starting point. While mainstream liberals saw political overreach as a central threat to law, CLS scholars saw law's legitimacy as the main barrier to radical transformation (Kennedy 1976, Unger 1983). In this vein, CLS scholars argued that legal liberal emphasis on enforcing rights was "positively harmful" because it diverted attention and resources away from more effective social movement activism (Tushnet 1984, 1386), and ultimately buttressed the legitimacy of a system that hid massive inequality under the banner of neutral equality under law. Response to this critique split progressive scholars into different camps. Debate centered on the degree to which legal liberalism constituted a total system of hegemony or whether it offered possibilities for progressive reform (Gordon 1984). Responding to CLS, some critical race theorists offered a pragmatic defense of rights, arguing that by "looking to the bottom" at the experiences of those "who have seen and felt the falsity of the liberal promise" (Matsuda 1987), the potential of rights could be affirmed as a "means by which oppressed groups have secured entry as formal equals" (Williams 1991). Martha Minow, responding to the CLS claim that law was hopelessly indeterminate, similarly counseled scholars to look to the "bottom" for the meaning of rights, treating them "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" (Minow 1987, 1892). Drawing upon emerging law-and-society studies of legal consciousness (see Silbey 2005), this "interpretive" approach to constitutional law making was politically important because it affirmed the resistance strategies deployed by those at the bottom, while also positing a link between normative pluralism and broader processes of social change (Cover 1983, Minow 1987). However, for scholars focused on state transformation, the strategy of "looking to the bottom" was insufficient to the extent that it remained rooted in local legal mobilization outside the state (see Sparer 1984). The challenge remained of linking these bottom-up interpretative practices to a state-oriented politics of progressive reform (McDougall 1989).

A similar division developed in progressive law scholarship about lawyering. Building on critical accounts of legal liberalism, seminal works in poverty law produced during the era of political conservatism questioned well-intentioned 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 López's "regnant" lawyer, who viewed lawyers as "the preeminent problem-solvers in most situations" and viewed subordination as susceptible to lawyer-led campaigns—even though, in López's account (1992,

24), those campaigns would "either fail to challenge fundamental arrangements or prove more exhilarating for the lawyer than client." Reacting against this legal liberal model, scholars promoted a more grounded, community-based approach in which lawyers could create space within the legal process to change legal consciousness and thereby produce more enduring transformation (White 1988, 760). If legal liberalism was problematic because of its top-down approach to problem-solving, one solution proposed by poverty scholars was to build solutions from the bottom-up, empowering marginalized client communities to devise and execute their own strategies for social reform (see Alfieri 1991).

Critics suggested that this bottom-up approach gave up on the transformative goals of legal liberalism for an unrealistic vision of client empowerment. William Simon, sympathetic to CLS, invoked the indeterminacy of client interests to argue both that progressive lawyers invariably influenced clients and that client interests were far from harmonious—suggesting that the poverty law critics imputed a romantic power to community that was belied by the messy reality of intracommunity disputes (Simon 1994, 1107). Lawyers, in this view, inevitably influenced client decision making and thus should use that influence to promote social justice (Simon 1998, 9-10). Sociolegal scholar Joel Handler (1992, 724) took aim at the micro-analysis of poverty law stories, which he suggested were overdetermined by their postmodern commitment to challenging power within the lawyer-client relationship instead of orienting outward to fight structural power exercised by conservative adversaries. Out of this critical exchange grew other scholarly efforts to link empowerment and transformation: the robust "community lawyering" literature of the 2000s (see, e.g., Marshall 2000), the idea of "law and organizing" (Cummings & Eagly 2001), and the embrace of "democratic lawyering" (Piomelli 2000). Yet none provided a satisfactory account of how bottom-up legal strategies could achieve the type of sweeping social change associated with the civil rights era.

It is against the backdrop of this debate that the new social movement turn in progressive legal scholarship has emerged. The key point is that the current wave of scholarly interest in social movements is yet another intervention in the broader conversation about the relation between law and progressive politics sparked by *Brown* and reaching its critical crescendo with the decline of legal liberalism. The core question raised by *Brown* and the legal campaigns that followed its model was what role lawyers, litigation, and courts should play in countermajoritarian movements for social change. The social movement turn in law seeks to answer this question in ways that avoid legal liberal concerns about accountability and efficacy while still delivering transformative progressive reform.

THE EMPIRICAL PATH OF LAW AND SOCIAL MOVEMENTS

Appreciating the role that social movements have come to play in progressive legal theory requires understanding the underlying empirical and theoretical frameworks for evaluating courts, lawyers, and movements that legal scholars would borrow from social science and sociolegal studies. This part presents that

essential background by providing an overview of the development of sociolegal research on law, as well as the evolution of social movement studies in sociology, up to the point of the social movement turn in legal scholarship. In this way, it traces the parallel rise of the contested field of "law and social movements" outside of legal scholarship as a way of setting the stage for the "social movement turn in law." The key point is that, as social science on law and social movements is incorporated into legal scholarship, it carries with it significant theoretical and empirical divisions about the relation of collective mobilization to social change from the underlying disciplines. Thus, when legal scholars turn to social movements, they do so not simply by borrowing concepts and findings, but taking sides in social science debates.

From Court Impact to Constraint

In the two decades after *Brown*, empirical attention focused on the political role of litigation and courts—not direct action. Social scientists, particularly in the field of sociology, were yet to explore social movements as political actors (Marx & Wood 1975). *Brown*—coming before the civil rights movement's pioneering use of collective action inside and outside of conventional politics—had an earlier impact on the empirical study of lawyers and courts, galvanizing scholarly attention across disciplines by reframing what lawyers did (litigation) and what courts did (judicial decision making) as inherently political activities (Peltason 1955, Spicer 1964, Cortner 1968).

Political scientists during this first wave pioneered studies examining whether organized litigation activity changed law and whether law, once changed, impacted society. In this new literature, there was initial optimism about the role of law, although significant scholarly divisions emerged. On the one side, scholars framed litigation as a means of political representation (Vose 1959) and contended that what caused significant Supreme Court policy shifts was investment in organizational capacity by challenger groups, which facilitated planning, shaped the court's agenda (Vose 1959, Jacob 1956), and imposed decisional pressure (Cortner 1968). On the other side were scholars like Robert Dahl (1957) who argued that Supreme Court decisions ultimately reflected the values of the dominant political alliance produced by the prevailing electoral majority, despite some time lag, because the Justices were the product of judicial appointment by that alliance. While Dahl's position recognized a role for lawyers and litigation, it ultimately attributed legal development to broader structural shifts in politics and elite attitudes, which invited litigation to validate what the Justices were already inclined to do.

First-wave political science also produced an impressive body of "court impact" studies (Bauer 1966), which measured the relationship between court decisions and legal implementation (Gould & Barclay 2012). Although the studies covered a wide range of issue areas and deployed varying methodologies and metrics, their central thrust was to repeatedly show that court decisions generally, and Supreme Court decisions in particular, failed to translate into robust social change on the ground

(Campbell & Ross 1968)—thus revealing the "banality of noncompliance" (Dolbear & Hammond (1971). Although these studies repeatedly discovered "gaps" between law on the books and law in action, they were genuinely quizzical about the limits of legal enforcement, interested in how to enhance compliance, and not explicitly critical either of lawyers who pursued legal reform or the courts that enacted it. Scholars in the law-and-society tradition were more sanguine, arguing that gaps were a feature of the system, not a bug (Cochrane 1971, Abel 1973), thereby 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 correspondence with judicial pronouncements.

As the 1970s brought growing conservatism and changes in judicial personnel, optimism about courts as a fulcrum for progressive change began to erode. Over the next two decades, scholars began to emphasize political and cultural factors affecting judicial attitudes and decision making (Ulmer 1984; Segal 1985)—thus deemphasizing the role of impact litigation. 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 (Ashman & Alfini 1974, Rohde & Spaeth 1976). 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 (Ball 1987).

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 (1976) 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. 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, elites, the nation's institutional and structural arrangements, and the character of dominant political majorities in the United States" (Adamany & Grossman 1983).

On the other side, scholars continued to see a positive relation between public opinion and court decision making, and viewed the court as actively responding to dominant social values. Reflecting on his own ruling regime theory, Dahl (1989) reasserted that "the views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country." Barnum (1985) argued that the Court played a role bridging the gap when national and state public opinion diverged—effectively bringing recalcitrant states into line with evolving national norms. By the early 1990s, scholars in this line of research began questioning the idea that the Supreme Court was a countermajoritarian institution at all. In an important empirical intervention, Mishler and Sheehen (1993) 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, although they stated (1996) that many judges "showed no responsiveness to public opinion" and that "individual attitudes should be treated as fluid and dynamic."

Reacting against the attitudinal model, Lee Epstein and Joseph Kobylka (1992) sought to refocus attention on the role of legal precedent as an independent factor explaining why judges made the decisions they did. In their analysis, legal change depended not simply on public opinion, judicial ideology, or interest group pressure, but also on the language of law itself: the pull of precedent and legal argument played an independent role in shaping (or preventing) legal change. In Epstein and Kobylka's terms, the choice by social reform groups in the abortion and death penalty contexts of "which arguments to tender and which to ignore" were significant in a *negative* sense: shaping the doctrinal terms of debate in ways that undermined their own long term success. "By continuing to press for legal interpretations that would provide absolute and conclusive victories, both abolitionists and pro-choicers set the stage for their own defeat . . . . They were blinded to the necessity of strategic backtracking by the tyranny of absolutes, the belief that to win big once is to establish for all time the precedential basis for future legal victories." In this view, it was reformers' own undiluted zeal that caused they to cling to positions that hurt the very causes they sought to help.

One could read the political science literature coming out of this stage as reinforcing pessimism about impact litigation and the lawyers who conducted it. The attitudinal model of judicial decision making implicitly devalued the role of lawyers and litigation in producing seminal court victories, since it suggested that (although someone had to file a lawsuit) it was broader shifts in society and politics, rather than legal ingenuity, that caused legal reform. Yet, following Epstein and Kobylka, public interest lawyers could cause social movement harm to clinging to outdated legal positions instead of engaging in strategic capitulation. From this perspective, one could infer that the appropriate role of lawyers was to mobilize law in ways that were directed toward shifting the political culture, which would eventually produce changes in law.

Beginning in the 1980s, public opinion was also in ascendance in outcome-oriented research as scholars in the court impact tradition began looking at the courts' ability to shape public opinion with its decisions. Predictably, there was empirical disagreement: while some argued that "the Supreme Court probably shapes aggregate distributions of public opinion" (Caldeira 1991), 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 heterogeneous" (Franklin & Kosaki 1989).

Building on this work, Gerald Rosenberg (1991) in his influential book *The Hollow Hope*, offered what would be the apotheosis of court impact studies of the civil rights era. The project was impressive in its scope and ambition, which was to determine "whether, and under what conditions, courts produce significant social

reform" (Id. at 9). 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." (Id. at 11). 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." (Id. at 338).

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 (Id. at 70-75). 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. 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. Not only was *Brown* deemed ineffective, it was claimed (at least in the short term) to have hurt the very cause it purported to support. Despite vociferous criticism by sociolegal scholars (see, e.g., Feeley 1992, Lawrence 1992, Simon 1992), Rosenberg's work solidified a picture of courts as doubly dangerous social change allies: weak enforcers of legal rights but strong producers of political countermobilization.

From Impact Litigation to Legal Mobilization

While the political science research on courts—in highlighting their constraints in responding to social change activist demands and producing meaningful reform on the ground—offered implicit judgments of the role of lawyers and legal mobilization in advancing social change, a related strand of sociolegal research building from Stuart Scheingold's attack on the "myth of rights" (1974) was far more direct. Scheingold argued that not only was impact litigation largely ineffectual in producing social change, it could be actively detrimental to the very

progressive causes that lawyers and courts sought to benefit. A dissident political scientist writing within the law-and-society tradition, Scheingold welded together a critique of impact litigation and the lawyers who pursued it, arguing that litigation was, at best, useless, and at worst, harmful: "Without support of the real power holders . . . litigation is ineffectual and at times counterproductive. With that support, litigation is unnecessary." Litigation, in Scheingold's view, was only effective in mobilizing a "politics of rights" by promoting "indirect" effects: "a dual process of activating a quiescent citizenry and organizing groups into effective political units" (131). In this framework, lawyers were most susceptible to the lure of the myth and guilty of carrying it forward. Scheingold (210) thus chastised "activist lawyers," who "tend to be ill-equipped for and (therefore?) ill-disposed toward mobilization."

While Scheingold's attack was fundamentally focused on the legal liberal vision of top-down public interest lawyering, Marc Galanter's analysis of "why the haves come out ahead" took aim at the poverty law model of access to justice (1974). Galanter's key move was to acknowledge the importance of individual rights claiming as the conduit by which the legal system received its inputs, but to further disaggregate the "litigation game" in ways that suggested that even if members of underserved groups mobilized law at more equal rates, they would still fail to "come out ahead." This was because those litigants tended to be ad hoc users of the legal system—"one shotters" (OSs) in Galanter's term—who were up against repeat players (RPs), like corporations, which could use their superior knowledge of the system and long-term perspective to "play for rules": settling weak cases and litigating strong ones to judgment in order to "trade off tangible gain in any one case for rule gain" (100-01). The implications of Galanter's analysis reinforced a critical picture of lawyers and courts as guardians of progressive interests. Galanter tapped into the pessimism of the court impact tradition to argue that "change at the level of substantive rules is not likely in itself to be determinative of redistributive outcomes" because rule change "in itself is likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels" (149). This militated in favor of looking away from law toward other strategies for reform: "litigating and lobbying have to be complemented by organizing, provisions of services and invention of new forms of institutional facilities" (151). In this campaign, lawyers were not to be fully trusted: "The more that lawyers view themselves exclusively as courtroom advocates, the less likely they are to serve as agents of redistributive change" (151).

Taken together, the double risks of demobilization and unequal outcomes highlighted by Scheingold and Galanter constituted a stinging indictment of the lawyer-led, court-centered vision of social reform associated with legal liberalism. The idealistic view of law as an instrument of liberation and social justice began to give way to a gloomier notion of law as a tool of domination and injustice (Silbey 2006). This emerging critical perspective channeled law-and-society scholarship into different streams—both of which moved away from a focus on impact litigation and its effects on state power, toward the idea of *legal mobilization*. The shift in analytical focus was from macro-level analyses of why and how

disadvantaged groups used impact litigation as a form of political activity directed toward the state, and toward mid- and micro-level analyses of why and how organizations and individuals mobilized law to achieve *indirect effects*—such as resolving disputes or changing attitudes—that were generally outside of courts and formal political channels.

Organizational analysis was exemplified in empirical studies by Handler and his colleagues, which provided a comprehensive review of public interest law organizations (Handler et al. 1978) and spotlighted how social change-oriented legal organizations mobilized resources and expertise toward systemic challenges across issue areas, often in the pursuit of indirect effects outside of court, such as changing elite attitudes or raising consciousness (Handler 1978a). This research fed into an emerging discussion about the evolution of progressive lawyering away from the iconic impact strategy of *Brown* toward multifaceted advocacy that combined organizing, public education, and media strategies in more coordinated legal and political campaigns (Aron 1989, Cowan 1977, Neier 1982).

The micro-level analysis was evident in emerging studies of "disputing," which asked why and how individuals converted grievances into legal claims. In contrast to the rights-claiming in court that characterized the public interest law movement, the focus of this research was on the mobilization of private law concepts by individuals in their day-to-day lives (Lempert 1976). The theoretical culmination of this work was William Felstiner, Richard Abel, and Austin Sarat's (1980-81) analysis of the "transformation" of disputes, which drew close attention to the "relationship between the parties"—their "relative status," "history of prior conflict," and "strategic interaction"—as well as the interaction of factors such as party objectives and ideologies, and the position of reference groups and political representatives, to map how individuals converted "perceived injurious experiences" from grievances into disputes: a process they memorably labeled "naming, blaming, and claiming." Although acknowledging that lawyers could help people in this process by providing information and exploring solutions (646), lawyers were also viewed as potential threats to the positive resolution of disputes: controlling litigation, discouraging second opinions, and rejecting requests for assistance (645). Echoing Scheingold and Galanter, courts were also cast in a suspicious light, operating to "individualiz[e] remedies" rather than offer collective justice (648).

The gathering image of lawyers and the legal system as a source of constraint caused some sociolegal scholars to begin looking at how law could be mobilized by individuals outside of formal legal institutions (Silbey 2006). In this emerging literature on "legal consciousness," scholars retreated from measuring law as a cause and effect of change, and instead began to attend to "the meanings and interpretive communication of social transactions," while moving away from "the formal institutions of law" (Id. 327). Scholars in this vein began to focus on how law was understood and used in "everyday life" (Merry 1990, Yngvensson 1988). The essential frame of analysis was taking stock of how individual understandings of law interacted with other normative systems—the idea of "legal pluralism"—and how that interaction produced different types of legal and nonlegal action: in

some cases directing people away from court to avoid the loss of control, and in others pointing them toward it.

Responding to this shift, Michael McCann (1991:225-226) expressed his "fear" that the reaction against the rights claiming spurred by Scheingold's "myth of rights" narrative could "too easily ossify into a cynical 'myth of non-rights' that is neither justified by historical experience nor helpful for confronting present political challenges." McCann's response (1991: 226) to this dilemma was to propose a concept of "legal mobilization" that reinforced the turn away from "formal state forums" to evaluate the use of "both official and indigenous legal norms and practices generally contribute but limited, partial, and contingent constitute influences in most domains of citizen activity." Looking back on the legal consciousness literature, Silbey (2006) claimed that the central question it raised was "how to theoretically and methodologically bridge the micro worlds of individuals and macro theories of ideology, hegemony, and the rule of law."

Social Movements Outside of Law

Social movements, which would become that "bridge," were developing as a field in their own right during this same time. There were important parallels between the new sociology of social movements and the social 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 movements as outside of politics, events in Montgomery, Birmingham, and Selma, the rise of the student and antiwar movements, and uprisings around the world in 1968, reframed movement activism as "simply politics by other means" (Gamson 1975:138-139), in which movements emerged to "represent the interests of groups excluded from the polity" (Jenkins 1984), by mobilizing "sufficient political strength to bargain successfully with established polity members" (McAdam 1982). As a result, within social science, scholars in the post-civil rights era developed two parallel frameworks for understanding minority group responses to the failure of majoritarian democracy, each with the same internal debates, thus raising the looming question: For minority groups excluded from interest group politics, what was the better social change tool: litigation or protest?

In the ensuing now-classic sociological exchange over the role of social movements, on one side was resource mobilization theory, drawing upon classical economics to argue that the availability of organizational resources and how they were "aggregated for collective purposes" was the critical determinant of social movements, allowing leaders to overcome the free rider problem of constituency members by offering tangible and solidaristic benefits (McCarthy & Zald: 1216). 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." (McAdam 1982:41). 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.

At stake in this debate was more than just the question of movement emergence. More deeply, whether movements were driven by access to resources or power linked the question of *why* movements formed to *how* they mobilized (means) and *what* they achieved (ends). With respect to the nature of movement mobilization, debates over resource mobilization versus political process focused attention on the critical role of *elite support* and *professionalization* in shaping a movement's "tactical repertoire." Access to resources was important to build organization, which was necessary to plan and execute movement actions, but where those resources came from shaped what that actions looked like. In a key theoretical move, resource mobilization theory located SMOs within a broader field of political actors, in which *funders* of movements were potentially distinct from movement beneficiaries. This highlighted a fundamental tension: Classical SMOs defined by a mass membership base promoted accountability but lacked dependable resources; yet 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." (McCarthy & Zald 1977:1234). It was precisely this risk of professionalization and deradicalization that drove political process theory's concern with movement cooptation (McAdam 1982:55, see also Piven & Cloward 1973).

The end of the civil rights protest cycle and the rise of conservatism in the United States reoriented social movement scholarship. On the one hand, the growth of new conservative SMOs, funded by corporate entities to advance corporate-friendly policies, and deploying the central "tactics" of progressive movements of the past, called into question both the notion of a movement as responsive to the grievances of an "excluded group," and the link between movements and a specific set of nonnstitutional tactics. If conservative groups engaged in protest outside of institutional politics, how essential was protest to the core definition of a social movement? On the other hand, the increasingly hostile political environment raised new questions about the pros and cons of resource mobilization. How were professionalization and organizational maintenance to be viewed in the face of political hostility?

As the pendulum swung from progressive protests to a conservative counter-reaction, attention focused on the role of opportunities and resources throughout various stages of "cycles of protest" (Tarrow 1983). While the essential tradeoff between professionalization and institutional politics persisted, scholars sought to reframe the issue in relation to what was politically viable at a given point in time. In this regard, Suzanne Staggenborg's analysis of the pro-choice movement stressed the potential benefits of coalition building. While noting that coalitions could play a productive role in mounting challenges by consolidating resources for collective activities (like lobbying) and fostering specialization allowing individual SMOs to "conserve resources for tactics other than those engaged in by coalitions" (1986:388), she emphasized that coalitions could sustain a movement when environmental conditions turned adverse by promoting collaboration and reducing

costs (1991). Thus, as times changed, organizations adapted, deployed various tactical strategies that, in totality, could move a cause forward in various institutional domains (Clemens 1993). In this sense, the theoretical perspectives on opportunities and resources began to evolve toward more complicated pictures of movements that were organizationally complex, tactically diverse, and operating in institutional political arenas as well as the street. Added to these perspectives were more serious efforts to theorize the complex motivations of participants in movements, drawing attention to the micro-level dimensions of movement participation and the core framing tasks that movements undertook to enlist constituents (Snow & Benford 1988; Frontiers 1992).

Against the backdrop of these developments, social movement scholars initiated efforts to fuse foundational concepts into synthetic modeling. Tarrow's *Power in Movement* (1994) was an early effort that sought to map out the dynamic interaction among opportunity, resource, and framing variables as they created and sustained contentious politics during protest cycles. The main thrust of this scholarship was to argue that while opportunities mattered for movement emergence, the shape they took and the impact they had were dependent on the complex ways that organizational leadership and networks developed, the power of different framing devices, the role of state actors, elites, and movement opponents, and how media and other conduits of information reacted. A more radical direction was McAdam, Tarrow, and Tilly's move away from a focus on social movements altogether to study the "dynamics" of "contentious politics" (2001), which included all sorts of political action, including strikes, revolutions, and nationalism, but also insider political strategies. Just as sociolegal scholars decentered lawyers and courts as the essential foci of analysis and agents of change, so too did social movements scholars shift the analytical lens away from movements as the core actor in accounting for democratic transformation.

Notable within all of these frameworks was the degree to which law was *not* generally theorized as a factor influencing movement emergence, a tool of mobilization, or a result of movement activism. For movement scholars into the 1990s, 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 (Marx & Wood 1978). There were implicit references and sporadic efforts to identify law's role in movements. In McAdam's process model (1982), law emerged at different points in the story: legal change affected the political shifts that set the stage for movement emergence, while contributing directly (as in the case of *Brown*) to the political vulnerability of segregation. Steven Barkan (1984), in contrast, viewed law as a constraint on the civil rights movement, arguing that legal repression was more successful than violence in limiting movement advances. As protest ebbed, social movement scholars became more attuned to the potentially productive role law could play in mobilization. Connecting to studies of framing and hegemony,

Alan Hunt (1991) argued that rights could be productive tools of social change to the extent that they involved "mobilization of forms of collective identities." More pragmatically, Paul Burstein (1991) 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." Criticizing those who argued that only dissent produced productive outcomes, Burstein 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." Social movement scholars during this period generally neglected law as an outcome or "consequence" of social movement mobilization (McAdam, McCarty & Zald 1988), despite the fact that scholarly assessments of movement "success" often hinged on policy wins (Gamson 1973), with many accounts featuring "social movements that included, as a central aspect of their program, the creation of new laws or the reform of existing ones" (Rubin 2001).

Law and Social Movements

In the early 1990s, sociolegal scholars of legal mobilization were searching for a way to bring structural analysis and state-oriented challenges back into focus after the "cultural turn" directed attention to individual empowerment and legal consciousness; and, reacting against Rosenberg and the court impact tradition, there was a desire to defend litigation and adjudication against charges of counterproductivity. For social movement scholars, the closing space for organized dissent within political conservativism and the need to link theory to the developing reality of professionalized SMOs engaged in multifaceted tactics pushed scholars to reevaluate the role of law in social movement struggles. In these scholarly context, law was drawn to social movements, and social movements were drawn to law.

When the field-defining work came, it would operate against the backdrop of these foundational debates—and take sides within them. In *Rights at Work*, McCann (1994) set out to reorient the study of law against the critical vision that had developed in the post-civil rights era. To do so, he fused together the core theoretical concepts that had developed up to that point: legal mobilization and indirect effects. In his "process-oriented" approach, he emphasized the "constitutive" concept of law and post-structural notions of power. Rejecting the instrumental view of law that characterized impact studies, McCann argued that the role of law in movements was multifaceted: "raising citizen expectations regarding political change," leveraging "formal changes in official policy," and shaping "subsequent movement development, articulation of new rights claims, alliance with other groups, policy reform advances, and social struggle generally" (Id. at 2, 3, 11). Taking the point of view of the lawyers, 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. 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. Instead of law coming in from the top-down to damage movements, it was seen as integrally linked to day-to-day struggle, advancing from the bottom-up.

McCann's focus on the relation between law and union organizing set the frame for his analysis. He was not studying impact strategies to claim new rights in court, nor was he studying movements of weak or diffuse constituencies. To the contrary, his focus was on the ways that unions deployed law in sophisticated political strategies characterized by the "tactical use of legal leveraging in concert with other bargaining and lobbying strategies" (1994:144). Thus, his emphasis was on the role of law and lawyering in the context of a strong "client"—organized labor, where litigation was "an ancillary or supplementary tactic to increase worker leverage in bargaining processes" (Id.). Accordingly, courts were less central to overall strategy, and diminished in importance over the lifespan of the movement, particularly "after 1985, when the courts began closing the door of access to gender-based comparable worth claims" (Id. at 84). In this context, lawyers deployed multiple tactics: "active in generating movement publicity, rallying support from union members, coalition building, and political strategies." Simply put, they were not pursuing the myth of rights, but rather took direction from strong union leaders and thus were "bound both by the influence of competing leadership groups and by the goals of the large organizations to which they belong."

The immediate impact of McCann's intervention was to frame the new "law and social movements" field precisely around a constructivist view of law, in which lawyers and courts were decentered, both in terms of methodological focus and in terms of the kinds of campaigns that later scholars choose to study. This opened up a new line of scholarly inquiry that rejected myth of rights and hollow hope narratives: it was more optimistic. But it also pointed scholars of law and social movements in a particular direction: toward bottom-up views in which law was valued as a resource and not as an end that could change social behavior without additional political work (McCann 2006). Litigation was useful as "a source of institutional and symbolic leverage against opponents," used to "dramatize abuse" and "win favorable media attention" (Id. at 29-31).

The work that followed thus presented a sharply different picture than the one that emerged in the post-civil rights era, emphasizing a particular mode of legal engagement: lawyering in connection with mobilized groups that underscored the political limits of courts. In the emerging law and social movements literature, lawyers were presented as political actors, standing alongside other activists, and courts were presented as relevant for leveraging indirect effects. In Silverstein's (1992) study of animal rights, she adopted a "decentered approach . . . exploring the continuous and dynamic interaction between the judicial and the nonjudicial." Law fostered political activism by serving as "prods to further action" as in Polleta's account (2000) of grassroots activists at SNCC, CORE, and the Council

for Federated Organizations during the civil rights movement: "rights claimsmaking was effective in mobilizing people for non-litigational activities such as registering to vote, participating in economic boycotts, demonstrating against segregated facilities, and forming political parties." While law and politics were "co-constitutive," the role that law played in shaping politics was largely strategic and tactical.

This emphasis on legal mobilization/indirect effects ran through the flowering of law and social movement scholarship that followed (see Barclay, Jones & Marshall 2011). Scholars stressed the function of law in building movements and framing their claims (Hilson 2002, Paris 2010, Pedriana 2006), and promoting "pragmatic resistance" in which activists treated law as "purely tactical" (Chua 2012). Others explored how "the politics of rights" shaped the lawyering approach to the marriage equality movement, examining how law served as part of the "opportunity structure" that channeled movement activism and framed core movement demands in different subject areas (Dupius 2002; Goldberg-Hiller 2002) while also exploring how litigation strategies were sometimes shaped in "anticipation" of countermobilization (Dorf & Tarrow 2014). Scholars deepened analysis of the pros and cons of litigation as a social change tactic (Albiston): how it could channel movement resources into more conservative social movement goals in the United States (Letvisky; Leachman, Morag Levine), but also how it could result in pro-poor decisions by courts on social and economic rights outside of U.S. jurisdictions (Brinks & Gauri 2012). Bottom-up analyses revealed how mobilization outside of legal institutions created new legal meanings at work (Albiston 2011) and in court (Lovell et al. 2016), while reframing the role of human rights in domestic struggles (Merry 2010).

Though this scholarship reclaimed law as a productive force in social movements, it did so on grounds that reinforced a circumscribed role for lawyers and courts, in which each was relevant to constructing movement identities, leveraging policy wins, and changing constituent consciousness. And even though McCann himself was clearly focused on the complex interactions between law and politics, and was careful in his analysis not to assign blame for less-than-optimal results to features of the legal system, the mobilization approach he pioneered resonated most powerfully with scholars committed to a particular vision of bottom-up social change. Indeed, McCann's own vision (2006:24) of social movements emphasized their advancement of "more radical aspirational visions of a different, better society," their reliance on "communicative strategies of information disclosure and media campaigns as well as disruptive symbolic tactics such as protests, strikes and the like," and their responsiveness to "core constituencies of nonelites whose social position reflects relatively low degrees of wealth, prestige, or political clout." This vision of movements—and the attendant roles for lawyers and courts that it carried with it—would prove foundational for the social movement turn in legal scholarship.

THE PROMISE OF MOVEMENT LIBERALISM

By the 1990s, in American law schools, the liberal legal project had collapsed under the double weight of external political attack and internal legal critique. As discussed earlier, 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). 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 the foundational critiques of lawyers and courts. As this part argues, coming out of this search, contemporary scholars have responded to the decline of legal liberalism by developing a body of scholarship that has coalesced around a new alternative—*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 aspires 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.

This part synthesizes contemporary social movement scholarship to describe and analyze the features of this model. As it shows, 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—and thus reflecting the New Legal Realist influence (McCann 2016)—scholars have presented an 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 (constitutional law and the legal profession) 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. It maps these two concepts, showing how they have been used social science to make the progressive case about the role of law.

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

disrupted by legal liberalism and its critics. This part presents the model of majoritarian courts that emerges from contemporary legal scholarship, shows how it trades on social science empiricism, and links it to the movement liberal framework.

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 (Minow 1987)? 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 minimalism (Sunstein 1999, Tushnet 1999). But this move 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 since 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. 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" (Kramer 2001). Instead, the idea of "popular constitutionalism" rejects judicial supremacy. As Larry Kramer (2001, 166) 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." 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 politics (Kramer 2004, Balkin 1995).

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 (Friedman 2003, 2598). 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" (Friedman 2003, 2599). 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" (Friedman 2003, 2610). One, following political scientist Robert Dahl (1957), is the appointment process, in which presidents "appoint people whose views are congenial, and who can survive the confirmation process" (Friedman 2003, 2610, see also Balkin & Levinson 2011). Through this "partisan

entrenchment" (Balkin 2005, 28), the ideology of the judiciary remains closely aligned with that of the ruling political coalition, though often after a time lag. 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 to "ensure their decisions do not stray too far outside the mainstream" (Friedman 2003, 2613). 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 (Friedman 2003, 2624-25). 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 (Post & Siegel 2004). "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" (Friedman 2004, 1279-80). On this view, public opinion is not simply correlated with judicial decisions, *but given causal power*. In Friedman's (2004, 1295) terms, "The Supreme Court does not buck public opinion for long, but ultimately comes into step with it, at least on most matters." In this sense, the court is "less anti-majoritarian than nationalist" (Balkin 2008). From this perspective, *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" (Id.).

Yet rooting judicial decision making in majoritarian politics raises the critical question that legal liberalism sought to address: How do nonelite groups that are disfavored by public opinion play a role in a model of court decision making that depends on majority public opinion? This is the crucial point at which constitutional law has turned to sociology to write social movements into the movement liberal model. Scholars took steps to initiate this incorporation in the early 2000s, with Cary Coglianese (2001) using the institutionalization of the environmental movement to show how "social movements, law, and society interact with one another in a more bidirectional fashion than is generally recognized." That same year, Edward Rubin (2001) 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 for legal change, opting instead to study only what happened inside of lawmaking forums and the impact of legal change on society. In Rubin's terms (2001, 51), legal scholars had failed to "pass through the door" of the courthouse to understand the "empirical world of mobilization, recruitment, political strategy, and organizational behavior."

Progressive constitutional theorists who accepted this invitation to "pass through the door" have used social movements to fill out the picture of bottom-up 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" (nor an

established "interest group") that reshapes politics and opinion to produce court change. In Balkin's 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" (Balkin 2005). Movements also matter in directly shifting public opinion: "reshap[ing] constitutional common sense, moving the boundaries of what is plausible and implausible in the world of constitutional interpretation" (Balkin 2005, 30). 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 (Balkin 2005, 30, see also Balkin & Siegel 2006, 949). 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 (2004) 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."

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 pluralistic change and understanding judicial decision making as deferring to the new consensus created by movement activism. The crucial point is that law is not made by courts but by the social movements themselves. Once social movements have shifted culture and transformed politics, Supreme Court decisions validate the new consensus that movements produced. 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, making social movements the authors of constitutional change enhances democratic legitimacy and reinforces the separation between law and politics as movements speak in the language of constitutional rights on their own terms, rather than relying on activist courts (or lawyers) to do so for them (Siegel 2006, 1345).

With respect to judicial efficacy, the empirical point drawn from political science is that court decisions lag behind culture—reflecting popular, and especially elite, attitudes—rather than lead it (Friedman 2009); and to the extent they do not wait for the appropriate moment, judicial decisions risk backlash (see Klarman 1994, Fontana & Braman 2013, Greenhouse & Siegel 2011, Schraub 2013). This empirical foundation strengthens the movement liberal 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.[7] 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 (Bell 1980).

The progressive response to this dilemma has varied. Some scholars concede that social movement mobilization ultimately reinforces conventional pluralism—thus converting it to a positive story of minority assimilation into mainstream politics. In this vein, William Eskridge (2002, 2388) 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 succeeds in removing the most overt barriers to political participation and thus assimilating movements into "normal politics." Once this happens, identity-based movements confront countermovements opposed to the establishment of affirmative rights of remediation and the court is generally obliged to withdraw from the fight in order to "keep group conflict within the bounds of a moderating pluralism" (Eskridge 2002, 2388). The role of the court is therefore to accommodate social movement challenges to political pluralism. In this sense, Eskridge (2002, 2406) cautions that "popular constitutionalism may be a good idea but it is hardly a progressive panacea."

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. In her view, it is the power of countermobilization in politics (and not simply the pull of judicial elites) that causes social movements to reframe their claims in terms that can attract widespread mainstream support. Her account (2006) of the de facto ERA illustrates this point. In it, pro-equal rights movement leaders (acting in opposition to movement lawyers' views) accept a narrower definition of sex discrimination (that excludes sexuality and reproduction) as a way of accommodating the arguments of opponents who sought to link the ERA with legalization of abortion and same-sex marriage. In contrast, Gerald Torres resists

[7] According to Friedman (2003, 2607), "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."

the notion that social movements have to make political compromises that undercut their progressive goals, 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" (Torres 2007).

Movement Lawyering

The issue of "representation" connects 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 (Gordon 2005b, 2007, Alfieri 2007, Ashar 2007, Hilbink 2006, Meili 2006, Bachman 2001, Ziegler 2011), who mediate between movement claims and state power, but in so doing pose familiar risks to movement legitimacy and success (Sarat & Scheingold 2006).

In the lawyering literature, 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 in which (so the story goes) lawyers turned to courts to bring national policy change for underrepresented groups by expanding rights. To the contrary, lawyers in the contemporary literature are movement-centered: they take their cues from the community (Alfieri 2007, Diamond 2000), work closely with organizers (Cummings & Eagly 2001), follow the lead of social movement organizations, and deploy law strategically, and often incrementally, to advance discrete movement goals (Erksine & Marblestone 2006). Their work expands far beyond courts (though does not reject litigation as movement leverage), encompassing policy advocacy, organizational counseling, community education, and protest support. And the lawyers are politically sophisticated, tracking polling data about public attitudes, developing communication strategies to influence media spin, and strategizing about how to deal with potential movement backlash (Cummings & NeJaime 2010). 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 implicit 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. This new movement literature draws upon the critical visions developed in response to legal liberalism, but seeks to reconstruct a version of lawyering that avoids their central thrust. Methodologically, the new movement lawyering literature has relied on the concepts of legal mobilization and indirect effects (McCann 2006): linking together a bottom-up perspective on legal

mobilization developed in the disputing and legal consciousness scholarship (Silbey 2005), with social movement studies in sociology (McAdam 1982, Benford & Snow 2000, McCarthy & Zald 1977). In this sense, instead of law coming in from the top-down to damage movements, it is reclaimed as integrally linked to day-to-day struggle from the bottom-up (Meranto 1998).

Beginning in the 2000s, legal scholars focused on lawyering turned to the legal mobilization framework as a way to avoid the legal critique of lawyer accountability and relink legal representation to structural change. As the mobilization framework spread from social science to law (see Edelman, Leachman & McAdam 2010), Austin Sarat and Stuart Scheingold's cause lawyering project on social movements was a critical bridge. In it (2006, 2), 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 for them, the organizations that represent them, and the actions taken to advance the movements' goal." 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 a critical methodological dimension to this reframing, since analysis could "start with movements and examine what cause lawyers do for and to them" (Sarat & Scheingold 2006, 2). The movement focus also reinforced the move to reframe what lawyers did around the concept of legal mobilization: rather than lawyers bringing suits disconnected from movement aims, the framework emphasized rights as a political resource. In this analysis, lawyers could be good professionals, deferring to the movement, or could "push to legalize the movement agenda and unwittingly . . . redirect the agenda, undermine leadership, and stifle grassroots energy" (Sarat & Scheingold 2006, 12; see also Hilbink 2004).

Drawing on this empirical foundation, the new 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 (McCann & Silverstein 1998). The movement lawyering model appears in connection with a range of substantive areas: housing (Hartigan 2010, Rankin 2014), elder law (Kohn 2010), LGBT rights (NeJaime 2003, 2010, Spade 2009), women's rights (Merry et al. 2010), policing (Karakatsanis 2015), labor (Cummings 2007, 2009, 2011, 2015), immigrant rights (Gordon 2005b, Eagly 2012), and disability (Waterstone et al. 2011, Waterstone 2014), among others. The literature adopts the perspective of the lawyers, showing how they understand their work and relate to clients (Ashar 2007). 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 (Shdaimah 2009, Kostiner 2003, Rose 2000). In this way, the new literature seeks to underscore the professional legitimacy of movement lawyering, showing how it advances client-centeredness, while simultaneously evincing commitment to a progressive cause.

Within this perspective, the movement lawyers' relationship with clients is key. Lawyers are portrayed as eager to collaborate and promote client ends (see, for example, Rhode 2008). Stories of movement lawyering reveal lawyers representing

already-mobilized clients, not the vulnerable or disorganized clients emphasized in the legal liberal model (Gordon 2007, 2141). Lawyers work with "partners with organizing capacity" who are "sophisticated in mounting and directing campaigns and have a history of organizing" (Elsesser 2013, 386). In Sameer Ashar's (2007) 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" (Ashar 2007, 1918). Similarly, in Jennifer Gordon's (2005a, 9) 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."

Other scholars similarly emphasize the interaction between mobilized clients and client-centered lawyers (see, for example, Eagly 2012, Quigley 2014, Sharpless 2012). In a careful account of transgender political mobilization (Arkles et al. 2010, 583), 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." Sarah London's (2011, 99) 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." Other scholars have provided comprehensive accounts of lawyering for coalitions aligned with social movements.[8] In Hina Shah's (2014, 416) 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." Michael Grinthal (2011, 53) 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." Where movements are not 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" (Newman 2011, see also Land 2011).

As these accounts highlight, deference to client decision making and support for client empowerment are critical themes in the movement lawyering vision. As Melanie Garcia (2011, 565) puts it, "movement advocacy empowers the client to begin more immediately working toward social change with the other members of

[8] See, for example, Golden (2012), Hayashi (2010), Huertas-Nobel (2010), Krishna (2013), Wing (2003).

her community or with members of the relevant social movement." 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" (Garcia 2011, 566, see also Sabbeth 2015). Movement lawyers are thus urged to "strive to achieve an ego-less practice" (Freeman 2015, 202), and to focus on addressing power at the intersection of multiple identities (Escudero 2013, 36). In this way, movement lawyering responds to the lawyer domination that has too often "led to unstable change" (Torres 2009, 581-82).

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. Although lawyers are deferential to client ends, they are highly valued for their legal skill (Glick & Foster 2006, Gordon 2007).[9] Litigation is one tactic among many that lawyers use, typically desirable for its indirect effects in gaining political leverage, framing an issue, or influencing public opinion (Brescia 2010, Chen 2013, Sabel & Simon 2004). In this way, litigation is presented as valuable to "achieve organizing aims in ways that [are] essentially indifferent to the outcome in courts" (Gordon 2007, 2139, see also Coleman et al. 2005). This includes mobilizing "sometimes hostile state power, both through adjudication and agency enforcement against" movement targets (Ashar 2007, 1921). 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* (NeJaime 2011, Depoorter 2014, but see Albiston 2011), while also sometimes serving as a form of "stealth advocacy," which does not seek to "make law" but rather to "alter social facts on the ground, and then play defense to preserve that alteration" (Schlanger 2015). As this underscores, movement lawyers seek to strategically coordinate litigation with political mobilization—to positive effect. In one illustration from the marriage equality movement (Fore 2015, 199), low-profile litigation is used to establish parental rights first, laying the ground for the pursuit of marriage through "multidimensional strategies."

In the movement lawyering model, rights are seen as tools not traps. They can shine the spotlight on systems of lawlessness to mobilize attention and political pressure (Ahmad 2009, Fletcher 2011, Gordon 2010). They can also be claimed by lawyers in ways that catalyze movements (Moliterno 2009), for example, by creating a new discourse for resistance to language discrimination (Chen 2014), or reframing the status of the family (Maxwell 2012, Scott & Scott 2015). In her work on Supreme Court decision making, Lani Guinier (2009) frames litigation as a space to give voice to the marginalized, even when those voices are only heard in dissent. Others have noted how litigation confers legitimacy on movements (McCann 2006), and reshapes the way ordinary people understand the possibility for action (Nielsen 2009, 679). While much of this literature has focused on

[9] For a view of this point from the conservative public interest law movement, see Teles 2009, Southworh 2010.

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 (Brown-Nagin 2013, Egerman 2012). Along these lines, Gordon's analysis of the UFW (2005a), introduced above, showed how law could play "an important supporting role in the rebirth of a movement," offering lessons to contemporary labor leaders. Similarly, new research on lawyering prior to the civil rights period has focused attention on how the act of representation in court "challenged racial identity confirmations," resulting in "local experimentation and small-scale transformation" that fed into larger movements (Carle 2014, 541, Mack 2012).

As movement lawyering reclaims litigation, it also reframes the range of advocacy skills that may be effectively deployed. Throughout the literature, lawyers use "legal and non-legal intervention" to promote movement goals (Alfieri 2007, 1840). Lawyers engage in "collaborations with agencies" (Ashar 2007, 1922), and make alliances with other powerholders to advance client causes (Berenson 2009, NeJaime 2012). They use tactics outside of litigation, in an "integrated" fashion (Zalman 2010, Spade et al. 2010), which creates strategic virtuous spirals (Karin & Runge 2011, Nolette 2015). Law is also asserted as a "symbolic resource" for framing disputes, providing movements with discursive advantages in setting the agenda and defining the issue (Kapczynksi 2008, Davis 2011). In this way, movement lawyering seeks to draw attention and resources to new issues or cast old ones in a different light (NeJaime 2013, Luna & Luker 2013). Overall, legal mobilization—in combination with other movement strategies—is reclaimed as a positive force, supporting movements in advancing multiple forms of resistance (Ashar 2007, White 1990).[10]

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? Despite the effort to bridge progressive division, this part suggests that movement liberalism ends up reproducing a version of the very law-politics debate it seeks to transcend, while reinforcing versions of the foundational critiques—only now on empirical rather than normative grounds. While the incorporation of social movements into progressive legal thought responds to central problems in the study of courts (countermajoritarianism) and lawyers (professionalism), and seeks to bridge differences underscored by critiques of legal liberalism, it nonetheless 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 grounds. By delving deeper into the new social movement literature in law, this part surfaces patterns of disagreement that reflect

[10] For other analyses of the role of law in resistance, see Brisbin 2010, Ziv 2005.

and reinforce long-standing progressive scholarly positions, which this part categorizes around three approaches: process, liberal, and pragmatic.

Process

In the legal process framework, the key concern is protecting law's legitimacy through a clear demarcation of law from politics. As discussed earlier, 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 (Pepper 1986). 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. Probing more deeply into the movement liberal literature reveals the emergence of a similar process framework—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 this process approach.

First, the process 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 (Klarman 2013). Thus, within the process framework, social change occurs first outside of legal change (Klarman 2009, 290); court decisions then occur as a reflection of social change, working to "constitutionalize consensus and suppress outliers" (Klarman 2004, see also Driver 2011). 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 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 (Dahl 1957), rather than organized legal capacity, litigation strategy, and doctrinal argument that puts pressure on judicial decision making (see, for example, Epp 1998, Lawrence 1990, Vose 1958). It also accepts the view of political scientists in the "court impact" tradition, dating back to the 1960s but most prominently associated with Rosenberg (1991), who argue that court decisions do little to affect social behavior or attitudes.

Second, within the process framework, 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 (Clark 2011, Baum 2011). 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 (Baum 2011, 205). Caution against getting out "too far ahead" of the public asserts opinion as the neutral point around which judicial decision making varies (Friedman 2009). It also reflects the political science claim that attitudes are generally resistant to being influenced by the legal and moral authority of the court. In this framework, maintaining law's independence from politics is equated with keeping it within the boundaries of public opinion and thus minimizing legitimacy costs (Eskridge 2005). The fact that law reflects but does not produce norm change and is ineffective at enforcement argues for an implicit theory of judicial minimalism (Sunstein 1999, Tushnet 1999). 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'" (Klarman 2004b, 479).

For backlash 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 it would sanction ongoing 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" (Klarman 2004b, 479). This leads to the

second counterfactual assumption, which is that backlash would *not* have occurred if social change had proceeded through normal political channels. 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 of democratic lawmaking. In its strongest form, the backlash 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. Again, 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 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 (1959), 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 (Klarman 2013b, 130-31), 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." Although public opinion was moving forward during the time that *Brown* was considered (Klarman 2004a, 6), there were still seventeen Southern states solidly committed to Jim Crow and the political benefits to segregationists of opposing *Brown* were significant. Thus, the result of the court decision 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 (Klarman 1994). 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 (Klarman 1994, 84).[11] *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 (Klarman 1994, 86), which is widely viewed as initiating the movement's protest phase (Branch 1988).

Although the process framework has been articulated primarily around the question of what role courts play in relation to law reform campaigns advanced by social movements, it also presents an implicit view of the role of social movement

[11] This is also an argument advanced empirically by Rosenberg (1991).

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 activist lawyers as either unimportant or potentially dangerous. The claim that social change, not legal 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 needed 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 reform. 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. Taken together, this story can be read to say that although lawyers may not matter that much in doing good (because court decisions reflect underlying conditions), they do in fact matter in doing bad (because court decisions cause backlash against their movements). This conclusion has two implications. One is that movement 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. In this way, the process view reinforces a critique of the hubris of legal liberalism, both of its lawyers, who self-confidently believed they could litigate the country into accepting their substantive values, and of the Supreme Court, which presumed that its intervention would cause a virtuous spiral of rule change leading to cultural change.

Other scholars have explicitly connected the idea of institutional specialization to the lawyering role.[12] For instance, Tom Stoddard (1997) 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. His case in chief also rested on the 1964 Civil Rights Act, which he viewed as an example of successful culture shifting. Stoddard (1997, 976-77) emphasized that it was important that change came from Congress, not the Supreme Court. "The new rules of law were widely disliked, especially by whites in the South, but the opponents of the Civil Rights Act of 1964 never rose in rebellion, either formal or informal, against enforcement of the statute. 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."

More recently, Eskridge (2002) has elaborated an argument that cautions against lawyer influence over identity-based social movements that resonates with

[12] This argument also resonates with the idea of role specialization advanced by critical lawyering scholars in the prior era (see Polikoff 1986).

process concerns about democratic legitimacy and backlash. For Eskridge, constitutional lawmaking is an intrinsic part of identity-based social movements, which are channeled into court to contest violence and discrimination. However, Eskridge draws boundaries around appropriate movement lawyering by warning that too much lawyer influence can divert and coopt movements' more ambitious goals: "once 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 assimilationist and reformist rather than separatist and radical stances, because lawyers cannot defend the latter before judges and legislators who are their audience; and members of the minority who are the least like the mainstream American have tended to be left behind" (Eskridge 2001, 467). More pointedly, when lawyers are not exerting a conservatizing force, they may risk inflaming opposition, harming the movement by provoking backlash (Eskridge 2013). Thus, the boundaries of appropriate lawyering are narrowly drawn: subsidiary to other movement activism in order to avoid accommodation, while simultaneously careful not to provoke a "politics of disgust," which may cause backlash that is "intensive and potentially violent" (2013, 279).

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 (Michelman 1969). This view was vulnerable to process-based (and conservative) claims of judicial activism, as well as radical left claims of political cooptation. It was therefore the most direct target of the CLS critique of rights, which sought to expose liberalism as an inherently limited progressive strategy (Tushnet 1984). Beginning in the 1980s, CLS attacks on the indeterminacy of rights and their "legitimation" of injustice evolved into deep deconstructionist debates about the meaning of legal texts and the role of nonelites in authoring the meaning of legal change (Minow 1987). 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 similarly 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 preserving legal legitimacy and, on the other, to critical concerns about authorizing inequality.

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" (Balkin 2011, 11) and see courts acting to "ratify the views of national majorities" (Balkin 2008). Yet liberals push back against strong process claims about the role of public opinion as a constraint on adjudication, arguing that the 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 significance of public opinion in shaping judicial decisions in hard cases (Driver 2014, 2012). 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 affirmatively 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" (Balkin 2011, 11).

In this way, the liberal view appears to imagine a more affirmative role for social movements in shaping politics and popular opinions. As discussed above, 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 (Klarman 2004). The liberal view adopts a more positive account of movements generally and court-based strategy in particular: movements are critical players in reshaping politics, while court decisions are seen in a more productive light, as part of a democratic dialogue that invites "popular engagement" in which people debate the meaning of law "within the dense network of communicative exchange that sustains the democratic legitimacy of the Constitution" (Post & Siegel 2007, 389).

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. 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 (2011) 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. *Roe* may have intensified countermobilization, but it was a matter of degree and not of kind. In this sense, the liberal approach reframes backlash as normal politics rather than aberrational politics: instead of backlash constituting a distortion of a well-functioning political process for 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 defined by reasonable variation around median public opinion. In contrast, liberals see an affirmative value in court decisions that potentially disrupt public norms and provoke counter-reaction. For them, democratic legitimacy depends on the people believing that they have a role in constitutional interpretation, which they are able to express through backlash to "promote constitutional solidarity and invigorate the democratic legitimacy of constitutional interpretation" (Post & Siegel 376).

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 (Ackerman 1991). Law is less sharply distinguished from politics: adjudication is framed as one strategy by which social movements seek political change (Balkin 2008, 251). Courts "play a special role in this process" by virtue of exercising "a distinctive form of authority to declare and enforce rights" (Greenhouse & Siegel 2011, 374). Liberals therefore see court decisions as vindicating important social values and argue in favor of "substantive constitutional ideals" (Post & Siegel, 377). 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, liberal scholars 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 (Siegel 2006, 1330-31). 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 an important political dimension of the new movement literature overall: by placing movements at the center of analysis, the political project is to reclaim mainstream liberalism not to advance more radical political ends.

By centering movements—and decentering courts and lawyers—the liberal view also seeks to respond to the left critique of legal representation: 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 (Lopez 1992, White 1990). 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 (Balkin 2008), 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. For example, in her important account (Siegel 2006) 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 for equal rights—although movement lawyers set the frame for strict scrutiny analysis and argue in favor of a "dual strategy" of law and politics (Siegel 2006, 1371), 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 (Siegel 2006, 1389).

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. 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 pluralism. 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 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. 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 (Cummings & NeJaime 2010). 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 (Dorf & Tarrow 2014). And the liberal view presents positive portraits of lawyers collaborating with elites to produce change, while seeking ways to protect movements from state cooptation (NeJaime 2012).

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, as described above, 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. Harkening back to the earlier public interest law tradition, some liberal scholars have advocated for more expansive forms of representation in contexts where direct democratic participation by marginalized groups is unlikely or impractical. In this vein, Mark Aaronson's (2012, 973) recent historical account of lawyering against welfare reform in California under Governor Reagan articulates conceptions of representation in which "traditional ethical concerns about client control and accountability" give way to an emphasis on "predictability" in order to facilitate "group legal representation as a form of political action."

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 CLS's overarching class frame—often sought to defend a pragmatic conception of rights mobilization as a viable political strategy within liberalism, despite its flaws (see, for example, Crenshaw 1988). The primary concern of these scholars 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.

These pragmatic scholars have turned to 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 the literature, social movement activists represented by lawyers but also "representing themselves" become "important interpretative communities of our democracy" (Guinier & Torres 2014, 2781). The difference between the pragmatic and liberal approaches is that the pragmatists are more apt to 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 classical 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 could eventually translate into enduring normative and behavioral change. Guinier and Torres (2014, 2781), in discussing the legal liberal model of the NAACP, suggest that its approach to 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." In this sense, law is distinguished from society or "culture," and the pursuit of positive law 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."

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" (Guinier & Torres 2781). 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 (see Carpenter 2014, Leachman 2014, Lee 2013). Litigation works, in this view, when it is firmly anchored to social movement organizing and strongly controlled by social movement constituents (Guinier & Torres 2770). 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 rather than authentic 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 Guinier and Torres's prominent account (2014), 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 institutional 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 illustrates this approach. They characterize the MFDP's effort as a "challenge to state power [that] came from outside the precincts of normal politics" (Guinier & Torres 2014, 2770). 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." 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. Thus, in the end, it was the failure of accountable nonelite representation—both legal and political—that undermined the MFDP's most ambitious goals. This contrasts with the story of Fred Gray's Supreme Court litigation in relation to the Montgomery Bus Boycott, where the Montgomery Improvement Association (MIA) "was a constituency of accountability, capable of holding lawyers like Gray to the discipline of shared power" (Guinier & Torres 2014, 2780). Although the case he filed permitted the MIA to avoid a state court injunction and emerge from the boycott victorious, because his lawsuit operated within the movement campaign, it was consistent with a "theory of popular mobilization and a theory of representative democracy."

Lawyering scholars in this pragmatic vein have similarly highlighted participation and control by nonelites as the touchstone of movement lawyering. Reflecting on *Gideon*, Alfieri argues that "legal process and client-centered models of lawyering" "focus on adversarial rights and material outcomes at the expense of democratic empowerment and minority collaboration" (Alfieri 2005, 1463). In his essay on the legal profession, Aziz Rana (2009, 1703) 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. 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." This view connects with the "collaborative lawyering" model advanced by Piomelli (2006, 584): "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." 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 the MFDP, SNCC, and Students for a Democratic Society (not the Southern Christian Leadership Council or the NAACP) (see Piomelli 2009).

Tomiko Brown-Nagin's (2011) story of movement lawyering in Atlanta is another illustration of 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 Committee on Appeal for Human Rights, which rejected the incrementalism of NAACP attorneys to file omnibus litigation challenging segregation in all Atlanta municipal facilities (Brown-Nagin 2011, 207). These "movement lawyers" developed more embedded relationships with the direct action elements of the civil rights struggle, coordinating legal work with organizing tactics, and in so doing achieved success that the NAACP did not at the local level. In this way, Brown-Nagin's work reveals a different version of civil rights lawyering that responds to Bell's critique of the NAACP "serving two masters." In doing so, this vision constructs the role of lawyers as outside counsel for movement organizations. The normative takeaway from the pragmatic vision of social movement lawyering is that lawyers should stand behind movements, supporting them when necessary, but always take care not to lead.

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 theory over the past decade—has been the central inquiry of this article. To answer it, the article has argued 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. Progressive legal scholars have turned to social scientific studies of law and 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—which this article calls *movement liberalism*—has offered a view of legal and social change that produces progressive outcomes while minimizing the charge of court and lawyer activism.

How should the turn toward movement liberalism be judged? On the one hand, as this article has suggested, the new movement liberal literature has provided a deeply optimistic account of the capacity of movements to enhance democratic participation by marginalized groups. And yet, in doing so, it has served to reproduce progressive debates about the role of lawyers and courts in social change, while also restating versions 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). In this way, the new social movement scholarship 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).

In the end, therefore, the new movement liberalism is less a definitive answer to the law-politics problem than a call for deeper theoretical and empirical inquiry. By taking the focus off the legal liberal alliance of activist courts and activist lawyers, the social movement scholarship opens up analysis of important avenues for political transformation, but does so by submerging underlying empirical and normative questions about the political role of social movements in contemporary society and the relation of lawyers and courts to them. Thus, while the social movement turn in law offers new hope, it simultaneously presents new puzzles. Significantly, although law and social movement research builds on an empirical foundation, there remain analytical gaps between the treatment of movements in law and social science. Whereas legal scholars have tended to emphasize social movement solidarity and the power of protest to produce sustainable political and

cultural change, social movement scholars have highlighted conflicts both within and across movement organizations (McAdam 1982, Meyer 2007, Clemens & Minkoff 2007, Haines 1984), constraints on disruptive political tactics and framing collective struggles (Buechler 2011, 153, Staggenborg 2011, 34-41), the limits of movement influence over policy reform (particularly in the face of countermovement mobilization) (Meyer 2007, 173-77, Amenta & Caren 2007), and the inevitably cyclical nature of "contentious politics" (McAdam, Tarrow & Tilly, 2001, 28-32, Tarrow 2011, 199-200).

In this sense, 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. And that project will require that legal scholars probe more deeply into the underlying empiricism upon which their current analyses of social movements depend. Doing so would reveal the contested nature of social movement accountability and political efficacy in the social movement literature itself—shining a comparative institutional light on the claims that legal scholars are currently making about the potential of social movements to play a central role in progressive theories of social change. This type of deeper engagement between the "law" and "social movements" research fields—building upon New Legal Realist insights—would enhance interdisciplinary "translation" and reframe the critical visions of lawyers and courts that still underlie the current wave of social movements research in law. As a result, 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. That is the central promise of the new movement moment.

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