

HOW THE U.S. SUPREME COURT MATTERS: NEW INSTITUTIONALIST PERSPECTIVES ON JUDICIAL POWER¹

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I. INTRODUCTION

Scholarly perspectives regarding how and how much the U.S. Supreme Court matters in the nation's public life have varied widely over recent decades. By and large, assessments have shifted in response to broader political currents.

It was common from the late 1950 through the 1970 for intellectuals—and especially those with liberal commitments—to portray the Court as a significant democratizing force in post-New Deal American politics. This understanding responded to and for the most part heralded the Warren Court's activism in areas of equal protection, due process, and free speech. Many social scientists found in this activity new evidence of the dynamic political “pluralism” that characterized American politics. In this view, the federal judiciary established itself not only as one of many significant actors in the political landscape, but as a unique source of institutional “access” for those citizens disenfranchised or ineffective in gaining voice elsewhere in the system. Other intellectuals emphasized instead the distinctive moral authority of the Court as a defender of

¹ This paper is a newly titled version of an essay now published in Cornell Clayton and Howard Gillman, *et al.*, *The Supreme Court and American Politics: New Institutional Approaches*, University of Kansas Press, 1999.

individual rights and liberties. In the most idealistic version —popularized in books like Anthony Lewis’ *Gideon’s Trumpet*, Jack Peltason’s *Fifty-Eight Lonely Men*, and Richard Kluger’s *Simple Justice*— the High Court was portrayed as a heroic band of White Knights who courageously wielded their swords of principled legal reason to slay monstrous injustices long afflicting our nation. While these accounts varied in focus and tone, each tended to assume that winning in court was the key indicator of political success and that the Court’s actions were inherently consequential in addressing the social problems at stake.

Scholarly assessments of judicial importance grew more circumspect as the political context changed, liberal hopes faded, and the judicial legacy was subjected to new modes of analysis beginning in the 1970, however.² Behavioral social scientists, relying on a positivist epistemology and sophisticated research methods, were among the first to question earlier expectations. On the one hand, such studies attempted to show that the Court rarely acts boldly or independently. Rather, it has followed the lead of the dominant political coalition or lawmaking majority most of the time (Dahl 1957; Funston 1975). On the other hand, behavioral scholars demonstrated as well that the actual “impacts” of heralded landmark judicial decisions on established social practices have been far less significant than often assumed.³ For example, a host of studies found that local government evasion was widespread among police responding to historic Court decisions mandating fair investigative and interrogation practices as well as among education administrators in the aftermath of rulings barring religious practices in public schools (Horowitz 1977; Dolbeare and Hammond 1971). More recently, Gerald Rosenberg’s trenchant treatise, *The Hollow Hope* (1991), identified similar patterns of non-compliance for a variety of landmark decisions in post-war America. Perhaps most important, he demonstrated how the Court’s high-profile order of school desegregation at “all deliberate speed” in *Brown v. Bd. of Education* (1954) met with widespread evasion and open defiance throughout the South. Only when the president intervened with armed

2 Of course, skepticism about the automatic consequences of court action is hardly new. Some legal realists such as Roscoe Pound emphasized in an earlier era the “limits of effective legal action” (1917).

3 See Becker and Feeley (1973), Canon (1977); Dolbeare and Hammond (1971); Rodgers and Bullock (1972).

force and Congress later took statutory action backed up by financial sanctions did significant desegregation commence. In sum, behavioral impact studies have tended to conclude that the Court rarely challenges the prevailing currents of national politics, while its capacity to command compliance in resistant institutional settings distant from the nation's capital is weak. As such, these studies dramatize the great "gap" between the promises of liberal court action and its actual impact on social practice (Becker and Feeley 1973). For many scholars, these findings have underlined a basic insight of "legal realism", that judicially constructed law is mostly epiphenomenal and derivative of, rather than an independent force shaping, social and economic life.

Other scholarly approaches recently identified with "new institutionalism" have refined or revised the skeptical conclusions of such behavioral impact studies. Much of this scholarship has endeavored to demonstrate that the Supreme Court matters rather more than most behavioral "gap" studies suggest, although such influence is highly complex and contingent in character as well as normatively ambiguous in its implications for the advancement of social justice. The following pages will briefly outline two specific dimensions—one focusing on "strategic interaction" among political actors, the other focusing on law's "constitutive" power—of recent institutional analysis regarding the many roles of courts, and especially the Supreme Court, in American society.⁴ Each of these orientations differs in its core questions, its foundational assumptions, its basic units of analysis, and its standards of assessing judicial "influence". So far, only limited effort has been made to integrate insights of both approaches into a single, comprehensive, multi-dimensional framework for understanding how legal institutions matter in public life. However, I shall argue that the recent development of the "new institutionalism" as an intellectual movement provides both opportunity and motivation for the development of just such linkages between different but potentially complementary analytical modes.

4 Both "strategic" and "constitutive" frameworks have been invoked to explain the intrinsic motivations or rationalities of judges as well, but the focus here will be on the external "effects" of 'judges' actions.

II. POLITICS IN THE SHADOW OF THE COURT: THE STRATEGIC INTERACTION APPROACH

1. *The Court and strategic politics*

The first dimension of institutional analysis that we will review has focused on the “strategic interaction” of courts with other political actors. Studies focusing on strategic interaction have emanated from a wide variety of scholarly traditions, including: traditional behavioral science studies of the Court’s roles in national government (Dahl 1957; Casper 1976; Funston 1975); more qualitatively oriented, quasi-positivist historical studies of judicial roles in particular policy processes (Melnick 1983; Johnson and Canon 1984; Graber 1993; Rodgers and Bullock 1972; Burgess 1992); interpretive studies of civil disputing and legal mobilization (Scheingold 1974; Zemans 1983; Olson 1986; Milner 1986; McCann 1994; Silverstein 1996); and, most recently, more formalized models derived from rational choice and game theory frameworks (Epstein and Walker 1995; Knight and Epstein 1996; Farber and Frickey 1991; Eskridge 1991).⁵ While all of these types of studies have contributed to contemporary scholarship on the Court, the last two —interpretive and game theory frameworks— have been most commonly identified specifically with the “new” institutionalism (Smith 1988). The common focus of such studies regards how the deliberations and actions of various social agents —including individuals, groups, and institutions both in and beyond the state— are shaped by understandings about settled norms articulated by courts as well as by expectations of likely court action in unsettled areas of law. Such interaction among political agents is considered to be “strategic” to the extent that it is consciously deliberative, oriented toward instrumental “effectiveness” in advancing particular goals, and hence loosely understood as “rational” (see Epstein and Knight 1997; Gillman 1998).⁶

⁵ These approaches differ, to be sure, in their most basic understandings of human subjectivity, legal conventions, social power, and causality; indeed, positivist and post-positivist interpretive projects disagree about the very goals of analysis. Such differences will be addressed to some degree in the later part of this paper, although extended discussion is limited by space.

⁶ Most of the analysis by rational choice scholars has focused on how the social context of multiple institutional actors shapes or conditions strategic choices that judges

Understood in these terms, the strategic approach departs from core assumptions of traditional institutional accounts of behavioral “impact” studies in some important ways. For one thing, the two approaches differ somewhat in how they view the legal products of judicial activity. Behavioral impact studies tend to view judicially constructed law in narrow terms of relatively discrete and determinate rules or commands. This is important, for this model of law establishes clear standards for evaluating compliance by targeted groups. Scholars who address judicial influence in terms of strategic interaction, by contrast, tend to view judicial actions as more variable and open-textured in character. As Marc Galanter puts it, the law articulated by courts is better understood as complex signals rather than “a set of operative controls. It affects us primarily through communication of symbols —by providing threats, promises, models, persuasion, legitimacy, stigma, and so on” (1983:127)—. As such, judicial constructions of law are understood to be inherently indeterminate and subject to multiple interpretations by differently situated actors.⁷

It follows that most studies of strategic interaction likewise assess judicial influence itself in somewhat different terms than do impact models. Traditional behavioral approaches to institutions tend to conceptualize judicial “impact” in quite mechanical terms of “causality”. The logic is well captured in political scientist Robert Dahl’s classic formulation: “A has the power over B to the extent that he can get B to do something B would not otherwise do” (1961:12). Adapted to the institution in question, the Supreme Court is viewed as the legal agent whose impact is measured by its effectiveness in altering specific behaviors of various targeted officials and citizens in prescribed ways. This influence of legal directives, to the extent it exists, is viewed for the most part as unidirectional, linear, and direct. Moreover, in many schemes, the

make. But these accounts also at least imply or point toward insights about how judges likewise shape the strategic context of action by other actors in (Congress, president, bureaucrats) and out (interest groups, social movements, business interests) of the state.

⁷ Different analytical frameworks vary in the degree to which law is viewed as indeterminate and subject to multiple interpretations. Game theorists often identify law with “rules”, but their focus on the strategic interaction between judges and other political actors implies a fair amount of indeterminacy in “law”. By contrast, interpretivists explicitly ground their analysis in assumptions about the under-determined but socially constituted character of legal action.

intended behavioral change must occur relatively quickly and affect a wide scope of targeted subjects to count as significant.⁸ Finally, only responses that are in compliance, or at least are consistent, with Supreme Court mandates count as noteworthy. Again, the assumption that law is manifest in clear, determinate directives is essential to measuring impact in these causal terms.

Social scientists interested in strategic politics generally concede the central insight of behavioral “gap” studies alleging that federal courts alone rarely “cause” significant social change in predetermined directions. But most contemporary scholars interested in strategic action find such a claim hardly remarkable. After all, no single institution in our mixed governmental system possesses sufficient power to unilaterally “cause” widespread, significant social change. Moreover, our courts were designed as the “least dangerous branch” of our governmental scheme; they generally possess neither executive police powers nor direct control over budgetary resources with which to compel compliance from others (Horowitz 1977; McCann 1992). Indeed, judicial decisions typically are restricted to specific parties—for the Supreme Court, involving mostly governmental actors—in particular cases. For unspecified others, each ruling is akin to a weather vane showing which way the judicial wind is blowing. For all these reasons, it thus is not surprising that studies assessing whether courts unilaterally cause great change come to mostly negative conclusions.

The problem, however, is that linear impact approaches also tend to overlook the many complex, subtle ways that the courts do greatly matter in our society. For scholars interested in strategic interaction, this means evaluating forms of influence beyond capacity to obtain behavioral compliance (see Brigham 1987:205). After all, judicial decisions do not simply dictate particular types of behavior; rather, they identify potential opportunities and costs, resources and constraints, which become meaningful only in the diverse strategic responses by differently situated public and private actors in society, many of which are unintended and unanticipated by judicial authorities. “The messages disseminated by courts do not... produce effects except as they are received, interpreted,

⁸ Rosenberg, for example, emphasizes changes that occur within only a couple of years of most decisions and deems as significant only those changes that affect bureaucracies on a nationwide basis (1991).

and used by (potential) actors”, notes Galanter (1983:136). As such, judicial power is understood in relational and intersubjective terms, and it includes symbolic and communicative as well as material dimensions.⁹ The positivist emphasis on relative “determination” of behavior by discrete social forces is replaced with the attention to dynamic processes of ongoing, contingent dialectical interaction among reasoning human subjects and institutional actors.¹⁰

One classic way of conceptualizing this strategic influence of courts is in terms of the “shadow” they cast on “bargaining” relationships among officials and/or citizen subjects (Mnookin and Kornhauser 1976; Galanter 1983). In this view, court actions provide various strategic “endowments” to parties engaged in different relationships throughout society. Such judicially authorized endowments thus typically become “bargaining chips” or resources in negotiations that flow from predictions about what the parties would get if they ended up in court or before

⁹ One very inviting and useful way to conceptualize these distinctions among types of power is provided in the three-level approach developed and illustrated by John Gaventa (1980). The positivist impact approach tends to approach matters of judicial influence at the “first” level of instrumental, unidirectional power. Scholarship that focuses on strategic interaction tends to develop the second level of power, which focuses on interactions within consciously recognized social structures of opportunity and constraint. Interpretive approaches to law’s constitutive power work primarily at the third level of power, which has to do with how cultural conventions prefigure and shape the intersubjective norms and understandings that bind officials and citizens alike.

¹⁰ It is worth noting at this point some significant disagreements among different traditions of strategic interaction analysis in this regard. Rational choice or game theorists root studies in a microeconomic model of subjects as narrowly self interested utility maximizers. Actors’ preferences or goals themselves tend to be understood as relatively fixed, exogenous, and largely beyond the scope of study. Moreover, rational choice models largely assume that patterns of institutional relations, and law, emerge as the product of individual, short-term strategic actions by discrete actors. Finally, most, but not all, rational choice approaches claim fidelity to goals of assessing and demonstrating relative “causal” factors in positive fashion, although causality is understood in more dialectical and dynamic terms than entertained by compliance oriented impact models. Interpretive scholars, by contrast, focus more on how legal constructions and norms shape the very formulation of specific ends, goals, interests, and aspirations of subjects as well as the instrumental means for advancing those ends. As such, interpretive scholars focus research more on the very processes of interpretation and deliberation about ends and means by historical subjects, and especially on contests over the social construction of subject claims and understandings. See the discussion of “constitutive” theory later in this paper for elaboration. See also the debate between Epstein (1997) and Gillman (1997).

other legal authorities. These chips include considerations about both the expected outcomes of adjudication and the expected financial, organizational, emotional, and symbolic costs imposed by participation in formal legal processes. Judicially constructed legal endowments influence not just the terms of specific negotiated relationships, moreover, but the very formulation of particular claims and willingness to act on them, to escalate disputes, and even to negotiate at all. The assumption is that courts not only resolve discrete disputes over law's meaning through clear commands; they also routinely deter, invite, structure, displace, and transform disputing activity throughout society. Courts, "as institutions, are not therefore unimportant", for various political actors' "strategic options and resources and even goals are to some extent supplied by the law and the institutions that 'apply' it" (Galanter 1983:119). Critical to this understanding is the fact that such judicial influence on strategic action usually is manifest in relationships prior to, and often wholly apart, from the filing of legal charges, consultation with lawyers, and or even expectation that courts or other official third parties actually might intervene in particular relationships (McCann 1994).

The above conceptualization was developed to make sense primarily of trial court influence in routine civil disputes, but it is equally applicable to the high profile workings of the Supreme Court in our national public life. In particular, the strategic approach aims to provide important insights into the political dynamics of shared government authority—including the "checking and balancing" interplay among various institutions at the national level as well as the interaction among different levels of federal jurisdiction—that is at the heart of our nation's constitutional design. Furthermore, while the Supreme Court for the most part considers only cases involving government officials, the strategic approach is sensitive to how Court actions indirectly create important expectations, endowments, incentives, and constraints for public and private actors alike in institutional venues throughout society.

Most contemporary scholars agree that the Supreme Court has exercised significant influence in shaping the strategic terms of political debate and struggle in this way throughout American history, as examples cited below will support. But it is worth recognizing that this role has

significantly increased in scope during the last half century.¹¹ While the Court has significantly withdrawn from the major constitutional disputes over the regulation of capitalist development that dominated its agenda for nearly 150 years, it played a huge role in vastly expanding the public agenda of attention to issues of constitutional liberties and civil rights for decades after WWII. Moreover, the federal courts generally, following the lead of the Supreme Court, have expanded the scope of the judicial intervention in many aspects of government regulatory procedures and practices. Indeed, some analysts have characterized this “judicialization of government administration” as one of the most significant changes in American governmental processes over the last century (McCann 1986; Stewart 1975). The increasing recognition and anticipation of such judicial intervention is one factor that renders courts as powerful authoritative bodies in contemporary American public life.¹²

The reach of the Court’s influence on strategic interaction has been too extensive and varied for a comprehensive coverage here. Instead, I outline five general ways that are suggestive of how the Court shapes the terms of strategic interaction among political actors in society. For each, I provide very brief examples of influence among different types of actors, including co-equal (executive, federal, judicial) branches of national government, local and state government officials, and organized social groups (business, labor, social movements) who interact with government.¹³

11 This is not to say the issues on which the Court has intervened are more important today, however. It strikes me that the significance of issues where the Court’s influence has been felt in recent decades is no greater—and perhaps is less so—than those disputes over the direction of capitalist economic development into which the court intervened during the nineteenth and, early twentieth centuries.

12 Other factors that have augmented the prestige, role, and authority of the Court in modern times include: increased access to varied constituent interests and causes; growth and democratization of the legal profession; the expanded authority of federal government generally; the enlarged discretion assumed by the Court in defining its own agenda; the increasing bureaucratization and interdependence with other branches; and, arguably, changing social patterns of discourse centering on rights.

13 A major contribution to the focus on how appellate court impact is conceptualized in terms of different types of populations was pioneered by Johnson and Canon (1984). Their approach frames influence and analysis in relatively positivist terms, but their work points toward more interactive understandings of power than do traditional impact studies.

A. The judiciary and the displacement of political conflict

One of the most important conclusions of behavioral social science studies, I noted earlier, is that the Supreme Court for the most part has only rarely exercised bold or independent policy initiative. Rather, conventional accounts suggest, the Court typically follows the policy agenda and preferences of legislative majorities at the national level; its most salient actions often involve enforcing this agenda on resistant officials at state and local levels (Dahl 1957). The primary exception is in periodic moments of “critical realignment” in national politics, when the Court might continue to represent for a short time the policy agenda of a previous lawmaking coalition (including a president who appointed key judges) against a new or ascendant policy coalition (Funston 1975; Adamany 1980).¹⁴ There is much truth in this view, but it also is incomplete and overly simplistic about the relationship between the Court and other co-equal branches of national government (Casper 1976; Graber 1993).

Frequently the Court has entered as an independent actor into major conflicts where dominant lawmaking coalitions are either unwilling or unable to act in a concerted, decisive manner. Sometimes judicial majorities simply impose their own judgment in matters where other actors lack power or will to deal effectively or successfully with a policy matter (Epstein and Walker 1995). But, also, other branches at many times have welcomed, even “invited”, judicial action on significant issues that are too divisive or politically costly for elected officials to address.¹⁵ In this way, the Court often becomes an access point for social interests rebuffed elsewhere, a forum for the “displacement of conflict” from other institutional arenas (see Schattschneider 1975). One significant, if seemingly ironic, implication is that “independent” judicial review of this sort ser-

¹⁴ This phenomenon is distinguished from two other types of majority action in partisan elections. “Maintaining elections” are those in which the majority party retains the loyalty of the electorate expressed in previous elections and wins the presidency”. “Deviating elections” involve a short-term defeat of the majority party (due to specific issues or circumstances) that does not reflect changes in longer term voter allegiance. “Realigning elections” occur when party loyalties are redefined to create a new majority party and give it control of government over an extended number of subsequent elections. The most commonly cited examples of the latter are the elections of Jefferson in 1800, of Jackson in 1828, of Lincoln in 1860, and of Roosevelt in 1932. See Adamany (1980).

¹⁵ The best discussion of this phenomenon is Graber (1975). The examples I cite here are drawn in large part from Graber’s discussion.

ves both the reigning national party coalition and the party system itself as often by removing disruptive issues from the agenda of majoritarian electoral politics as by following explicit majoritarian policy preferences (Graber 1993).

One excellent historical example of this phenomenon was the infamous *Dred Scott* decision (Newmyer 1968; Fehrenbacher 1978; Potter 1976; Graber 1993). Jacksonian era moderates in both parties sought to sidestep the deeply divisive slavery issue as much as possible for decades. Conflicts over new territories thus were settled by a series of legislative compromises dividing jurisdictions between slave and “free labor” status, while federal appellate courts for the most part refrained from ruling on the key constitutional issues at stake. The spirit of legislative compromise and electoral insularity from conflict was undone, however, by the Mexican War, which fueled fears that all the newly acquired territories would be opened to slavery, along with the resulting Wilmot Proviso of 1847 aiming to prevent that possibility. As prospects for congressional compromise gave way to sectional rancor and the promise of “popular sovereignty” was ravished by the bloody Kansas-Nebraska experience, party leaders openly appealed to the Supreme Court for a legal resolution. Several bills in the 1850 ceded authority to the Court to adjudicate individual conflicts over slave ownership, while the newly elected president Buchanan declared that the status of slavery in the territories was a “judicial question, which legitimately belongs to the Supreme Court of the United States” (cited in Graber 1993:48). However lamentable the Court’s specific response in *Dred Scott*, the justices arguably acted less to circumvent political compromise than to insulate electoral politics from growing sectional divisiveness through appeals to higher constitutional principles. The Court’s ultimate failure should not obscure the strategic relationships at stake among the key actors.

The Court’s more widely celebrated action in *Brown v. Board of Education* can be interpreted in much the same terms. presidents Truman and Eisenhower consciously worked to sidestep the issue of racial segregation as a national electoral concern while, at the same time, appointing justices supportive of civil rights and pushing the Supreme Court through amicus briefs to take the lead in challenging southern apartheid on constitutional grounds (McAdam 1982). Only later, once public opinion outside the South galvanized in support of civil rights advocates

and against white violence, did partisan lawmakers take action in passing legislation against racial segregation. Likewise, political scientist Mark Graber convincingly argues that the Court's controversial rulings interpreting antitrust legislation in *U.S. v. E.C. Knight* (1895) and constructing a constitutional privacy right protecting women's choice in abortions (*Roe v. Wade* 1973) both exemplified similar patterns of displacing conflict from divisive electoral arenas to less politically vulnerable judicial venues. Indeed, to a large degree the Court's overall "double standard" doctrine regarding constitutional rights following the New Deal reflects this same strategic logic of institutional relations. Relative partisan consensus about the legitimacy of economic regulation rendered it a fairly "safe" issue for legislators to act on in the decades following the 1930, while more divisive social issues such as civil rights, abortion, local policing techniques, censorship, and the like were displaced into the hands of the High Court.¹⁶

B. *The Court as catalyst: legal agendas, opportunities and resources*

A second way that the Court often influences strategic politics is by stimulating or inviting positive responses to its directives from government actors or citizen groups often not directly involved in specific cases. When the Court acts on a particular disputed issue, it can at once: elevate the salience of that issue in the public agenda; privilege some parties who have perceived interests in the issue; create new opportunities for such parties to mobilize around causes; and provide symbolic resources for those mobilization efforts in various venues.¹⁷ Responses from various audiences might address the specific issue to which the Court speaks or some other issue which the court's action is interpreted to, at least potentially, concern. Moreover, such mobilizing action often involves pri-

¹⁶ It is relevant to note that the right-wing Republican reaction to these trends in the last two decades—which was most prominent and explicit during the Reagan presidency—attempted to reclaim various social issues like abortion, affirmative action, police authority, and censorship as partisan matters while stacking the Courts with conservative judges averse to earlier liberal "activism".

¹⁷ Legal mobilization and other interpretive theorists attuned to law's "constitutive" power would add here attention to how the Court contributes to the "framing" of particular issues and disputes. See the later sections of this essay.

marily further litigation. As Christine Harrington and Daniel Ward's classic study of federal litigation has suggested, court rulings not only rarely "settle" political conflicts; they often serve to encourage or generate further litigation on public issues (1995). At the same time, however, court rulings can just as often stimulate or "invite" —often unintentionally— other types of political action, including: unilateral official initiatives, lobbying of officials for such action, media publicity tactics, and grassroots organizing, to name a few. In short, the process of displacing controversial issues from electoral venues into judicial forums often ends up catalyzing as much as discouraging political mobilization around them among various political audiences (Johnson and Canon 1984).

For example, the Court's construction of the "double standard" logic extending minimal scrutiny to federal economic regulation opened the floodgates for federal legislative initiatives, often urged by interest group coalitions, regulating corporate behavior in a host of ways since the 1930 (McCann 1986). Likewise, actual and expected Court actions often shape the specific terms in which congressional initiatives are framed. We know, for example, that legislators both anticipate judicial statutory interpretation when writing new laws and "rewrite" laws in response to judicial rulings "inviting" clarification of previous policy actions (Estridge 1991; Katz 1997; Spiller and Tiller 1996). In similar fashion, local officials often welcome judicial rulings as an opportunity to take action on long neglected matters. This was the case, for example, with many liberal bureaucrats at the state and local as well as federal levels in responding to opportunities opened up by judicial rulings authorizing race- and gender-based affirmative action in the 1970 (Burstein 1991). The rapid increase in abortion clinic openings after *Roe vs. Wade* was another response to opportunities opened up by the Courts (Rosenberg 1991).

Perhaps the best documented responses to judicially created opportunities and catalysts to action involve the mobilization of political interest groups and social movements. As noted above, Stuart Scheingold demonstrated decades ago that Court actions could be a resource in mobilizing activity in a variety of ways, including *activating* and *organizing* core constituent groups members as well as *realigning* support from third parties (1974). My own research on the politics of gender-based pay

equity (or “comparable worth”) reform provided a detailed account of this process (1994). The very reform strategy itself was conceived by union and civil rights lawyers responding to emerging Court rulings that demonstration of race or sex-based discriminatory “impact” could establish a judiciable claim under the 1964 Civil Rights Act. Wage discrimination claims were filed in federal courts during the 1970 in an attempt primarily to develop new case law, but in many local contexts such lawsuits also became key resources for organizing women into unions or activating grassroots involvement among the already organized. This activity increased dramatically in local and state venues around the nation after the 1981 Court finding of sex-based wage discrimination against female prison guards in *Gunther vs. Co. of Washington*. In short, the movement was conceived, born, and developed as a formidable political force out of opportunities and resources created by federal court, and especially Supreme Court, rulings. Parallel accounts have been provided for a variety of both national and local political movements for environmental causes, civil rights, women’s rights, animal rights, and the rights of the physically and mentally disabled (McCann 1986; Melnick 1983; O’Connor 1980; Silverstein 1996; Olson 1986; Milner 1986).

C. Strategic leverage and relational power

Judicial influence extends beyond just encouragement of “new” disputes and strategic mobilization initiatives, of course. In addition, courts often influence the strategic positions of parties already engaged in ongoing policy bargaining or relational struggles. As such, judicially distributed “endowments” discussed earlier can significantly influence the relative “leveraging power” available to various parties locked into prolonged patterns of conflict. In this regard, Court actions might either alter *or* reaffirm the preexisting status of relevant parties, thus often providing a critical resource or “bargaining chip” that determines the outcome of the conflict itself. And, as such, court actions can significantly shape the inclinations of parties to continue, to escalate, to settle, or even to withdraw from the dispute or relationship at stake. In all these cases, it is worth noting that Court intervention rarely “legalizes” an extra-legal relationship, but is more likely to simply refigure the legal terms of a relationship already thoroughly legalized in various ways.

One good example involved the situation of president Richard Nixon during the Watergate affair. The president refused to turn over (eventually damaging) tape recordings of White House conversations to two subsequent Special Prosecutors appointed by his own Attorneys General, thus sending the conflict to the Court. Once the Justices ruled against Nixon, the position of his adversaries was significantly enhanced, his support in Congress and the public plummeted, and he was left with few alternatives to resignation (Cox 1976). Judicial action can increase institutional leverage of various parties in more routine and subtle ways as well. For example, expansive readings of civil rights law by the Court in the 1970 provided considerable support for aggressive affirmative action policies by many divisions in the Department of Justice during the Carter era (McCann 1994).

Court actions often influence the balance of power between the executive branch and Congress at the national level on specific types of issues. For example, Epstein and Walker show how the Court supported and thus enhanced presidential opposition to radical Republican congressional designs for strong reconstruction efforts after the Civil War in *Ex Parte Milligan* (1866), while reversing its leveraging authority in a similar case involving military tribunals just a few years later in *Ex Part McCardle* (1869). As formal game theory modeling demonstrates, strategic judicial action at once responds to *and* shapes the institutional power relationships among governmental actors. Another more contemporary example illustrates the point well. The primary thrust of Court rulings in this century —most directly framed by Justice Sutherland’s “sole organ” doctrine in *U.S. vs. Curtiss-Wright* (1936)— has been to grant the president considerable authority to act unilaterally, without congressional approval, in many types of foreign policy making activity. The result has not only been to provide fairly routine post-hoc constitutional support for disputed presidential actions, but actually to enable, even to invite and generate, continued monopolization of foreign policy action by the Chief Executive. “The courts have steadily fed the springs of presidential power”, writes David Gray Adler (1989: 177).

Other Court actions have served to protect existing government practices of many types against various forms of continuous political challenge. In recent decades alone, such practices include: abusive police investigative and interrogations practices; racially discriminatory death

penalty policies; government inaction on race and gender-based inequities in employment; and legal protection provided to lucrative private production and sale of pornographic materials. At the same time, Court rulings also have often sustained the bargaining leverage of various social groups organized to *challenge* government actions (or inaction). Leverage provided by the expectation of favorable judicial action was a critical factor in the relative success of gender-based pay equity reform activism in the 1980 as well as by other campaigns for women's rights, environmental causes, animal rights, disability rights, and freedom of speech for political dissenters in previous decades (McCann 1994; McGlen and O'Connor 1980; Melnick 1983; Silverstein 1986; Olson 1986; Shiffrin 1993).

D. *Court action as a strategic constraint on options*

It is worth noting that virtually every invitation, opportunity, and leveraging resource created for some parties by Court rulings at the same time creates potential constraints or disincentives for other parties. These constraints might be felt directly, or they might indirectly result from the privileging of rivals. For example, the Court's line of reasoning following *Curtiss-Wright* has limited congressional authority as much as it has bolstered Presidential boldness in foreign policy matters (Adler 1989). Richard Nixon's options in the imbroglio over Watergate, discussed above, surely were limited as much by the Court's ruling as was the position of his critics enhanced.

The impact of judicial constraints is not always so clear-cut or zero-sum, however. For example, the line of decisions beginning with *Buckley v. Valeo* (1976) have at once significantly constrained, channeled, and justified recent congressional deliberations over federal campaign finance reform, although this limitation has hardly been unwelcome for many legislators (Schockley 1989). And while full compliance has hardly been achieved, Court rulings surely have worked to constrain (or at least redefine) the options of police officers in investigating crimes and interrogating suspects (Skolnick and Fyfe 1994; Leo 1996) as well as school administrators supportive of integrating religious practices in public schools (Dolbear and Hammond 1971).

The same constraining influence is true for social groups and organizations as well. Since the 1930, for example, the Court's "double

standard” logic has provided few constitutional resources for corporate challenges to legislation as an infringement on property rights or as a violation of commerce clause authority.¹⁸ At the same time, the Court also placed important constraints on the strategic options —both on particular substantive goals and tactics— of the evolving labor movement in early twentieth century America (Forbath 1991; Hattam 1993). Indeed, the Court can close opportunities for social movement strategic action and even undo whole movements that its own actions previously had generated or encouraged.¹⁹ This clearly happened with the gender-based pay equity movement in the 1980. While seemingly favorable decisions by the federal courts early in the decade opened the way to “disparate impact” claims of discrimination in the workplace, a series of Court rulings significantly narrowing the reach of the 1964 Civil Rights Act took away an important legal resource and significantly crippled the movement just as decisively by the end of the decade (McCann 1994). The demise of the Civil Rights movement was more complicated, but increasingly conservative Court rulings on affirmative action beginning in the late 1970 dramatically limited the options of advocates for people of color in the nation as well (Scheingold 1989).

E. *Stimulating counter-mobilization*

Finally, Court actions can also generate various types of counter-mobilization aiming either to undo directly or to circumvent the effects of judicial rulings.²⁰ As such, Court rulings may facilitate or catalyze waves of political mobilization quite contrary to what the justices intend or expect. For example, various presidents and legislators have led the way in (so far, unsuccessful) efforts to overturn by either constitutional

¹⁸ This is not to say that corporate capacity to fend off government regulation and to shape government policy is not great, by any means. See McCann (1986).

¹⁹ In an important sense, every opportunity also “constrains” action in that it privileges certain ways of doing over other ways of doing things. This is a central insight of the “constitutive” perspective developed in subsequent sections of my discussion.

²⁰ Judicial impact studies tend to discount “counter-mobilization” activity as an indicator of judicial influence because it defies the compliance standard; indeed, political reaction is considered a sign of judicial impotence. Scholars who focus on strategic interaction, by contrast, find countermobilization as an important indicator of how courts matter in social life.

amendment or statutory authority High Court rulings on constitutional issues regarding prayer in public schools, flag burning, and privacy rights to abortion. Moreover, Congress regularly writes new legislation to overturn, “correct”, or bypass judicial interpretations of earlier statutes, and increasingly has worked to write legislation in more careful ways to reduce the potential for discretionary judicial readings of law (Eskridge 1991). One good example of this is the Civil Rights Act of 1991, which was passed under pressure from a coalition of liberal groups to “restore” elements of the ‘disparate impact’ test for discrimination that the Court had virtually eliminated from civil rights law through a series of rulings in the 1980s. It is relevant to emphasize here that both co-equal branches and local officials often have challenged judicial supremacy and have acted on their own constructions of constitutional law in various policy areas (see Burgess 1992). The widespread evasion and even open defiance of the Court’s desegregation mandate in *Brown* by local southern officials provides perhaps the most dramatic example of this in modern times (Rosenberg 1991). Other forms of counter-mobilization action have been far more subtle, yet still important. For example, most commentators agree that the invalidation of the legislative veto in *Chadha* did not greatly limit congressional oversight of administrative agencies, largely because legislators developed a variety of other resources and strategies for achieving their ends (Korn 1996).

Landmark Court rulings more than a few times have generated mass social movements of considerable significance in their commitment to undoing judicial “wrongs” as well. Examples include the Populist movement’s response to various pro-corporate Court decisions in the late nineteenth century (Westin 1953), the White pro-segregation movement defying *Brown* again in the 1950s (McAdam 1982), the right-to-life movement following *Roe vs. Wade* since the 1970s (Rosenberg 1991), and the anti-pornography coalition in the 1980s (Downs 1999). In each case, opposition to the Court became a critical rallying cry around which citizens and official representatives mobilized, often producing significant political clashes for substantial periods of time.

2. A composite case: the Court and the civil rights movement

History is generally far more complex than the five briefly noted analytical categories and specific anecdotes noted above suggest. Indeed,

many analysts have insisted that Court's influence on strategic politics must be understood in terms multiple subtle, indirect, unanticipated interactions over long periods of time. No case better illustrates this confluence of different judicial influences than the legacy of the Civil Rights movement briefly touched on in previous pages (see McAdam 1982; Morris 1984; Scheingold 1989).²¹ Those observers who are skeptical about judicial influence rightly point out that the initial impact of the Court's landmark *Brown* decision (1954) was to galvanize defiant reaction from the White southern power structure while the president, Congress, and even the Court itself passively watched, designating it as a largely "local" problem. As noted above, leading lawmakers looked for the Court to exercise leadership on constitutional grounds in part to minimize the development of the issue as a divisive partisan matter. At the same time, however, the *Brown* "victory" emboldened and encouraged middle class Black leaders in the NAACP, who "spearheaded the resistance of the black community" (Morris 1984:32). On the one hand, the ruling raised the southern blacks' hopes by "demonstrating that the Southern white power structure was vulnerable at some points" and providing African-Americans new practical resources and alliances for reform action. "The winning of the 1954 decisions was the kind of victory the organization needed to rally the black masses behind its program; by appealing to black's widespread desires to enroll their children in the better-equipped white schools it reached into black homes and had meaning for people's personal lives", summarizes Aldon Morris (1984:34).

On the other hand, increasing white coercion and violence stimulated more radical forms of grassroots organization and protest action in the black community itself. "The two approaches —legal action and mass protest— entered into a turbulent but workable marriage" (Morris 1984:39). Again, the judicialization of the racial issue ended up catalyzing as much as discouraging political mobilization. The escalating clashes between the non-violent civil rights protesters and often violent white segregationists —some directly in response to court rulings mandating desegregation— expanded the scope of the dispute to include federal officials, local courts, the northern media, and national public opinion. In short, the *Brown* victory alone surely did not "cause" social change

21 For a very different view from an "impact" perspective, see Rosenberg (1991).

in any direct or mechanical sense, but it figured very importantly into the complex chain of events that we understand as the Civil Rights movement leading up to congressional passage of the 1964 Civil Rights Act a decade later. “It would be misleading to present the courtroom battles in a narrowly legal light”, concludes Morris (1984:26). Previous pages have outlined subsequent efforts by shifting judicial majorities to expand and later to restrict interpretations of the 1964 Act, thus documenting further the complex role of the Court in the politics of civil rights over the last half century.

III. SUPREME COURT AUTHORITY AND LAW’S CONSTITUTIVE POWER

The second dimension of Court influence identified by socio-legal scholars is more diffuse and elusive but every bit as pervasive and important as are its manifestations as strategic signals and resources. In short, it concerns the ways in which the Court’s practices of legal construction are “constitutive” of cultural life. Whereas analysis of how the Court figures into strategic political interaction has drawn attention from many social science traditions, attention to the Court’s constitutive power has been the exclusive concern of “interpretive” socio-legal scholars.²² As such, it is worth summarizing some of the social constructionist assumptions that underlie interpretive theories of legal practice and take us to the heart of the constitutive framework.

1. *Interpretive socio-legal theory*

We begin with how interpretivists understand the *character* of law itself. In the interpretive framework, law is understood to entail more than just the rules and commands that behaviorists emphasize, and even more than the discrete but open-textured signals or messages from legal officials (such as judges) that strategic approaches specify. Rather, law is understood capaciously as distinctive “ways of knowing” —as spe-

²² This includes again a variety of different traditions, but one can find examples of this type of interpretive analysis by some Critical Legal Studies scholars (Gordon 1984), many legal philosophers (Cover 1986; Minow 1987), and a growing number of post-positivist social scientists (Brigham 1997; Gillman 1996; Merry 1985; Sarat 1990; McCann 1994).

cialized knowledges, symbolic logics, or discursive conventions— that develop from and are expressed through legal practice. In short, legal conventions do not dictate behavior so much as convey recognizable “rationalities of action” through which social life is understood, transacted, and generated by legal actors. The core insight at stake here is that legal conventions contribute to the intersubjective bonds of *ideology* and discursive logic from which human agents develop their very capacity for meaningful interaction. As Sally Engle Merry puts it, “ideology is constitutive in that ideas about an event or relationship define that activity, much as rules about a game define a move or a victory in a game” (1986:254; Brigham 1987). This point underlines the view that legal constructions are more than abstractions. Rather, they are embedded within material practices and relationships; they are a form of *praxis* (Klare 1979). As will be demonstrated in the following pages, legal norms authorize actions and institutional relations with great material consequences in collective life, for example, discriminating between those whose fates are poverty or wealth, freedom or imprisonment, life or death (Cover 1986).

Moreover, legal conventions are understood to be inherently ambiguous, indeterminate, and contestable in character. Law’s meanings are not self evident, after all, but are subject to multiple constructions and contestation over time by differently situated legal actors. Hence constitutive approaches shift the terms of analysis away from political conflicts among discrete agents with predefined interests to contests over the very cultural (and, specifically, legal) frameworks, categories, and concepts by which political struggles are defined and become meaningful (Brigham 1997; McCann 1994). This does not mean that the possibilities of legal interpretation and contestation are boundless or arbitrary, as legal realists tend to assume. Growing out of learned conventions and long developing social relations, even highly innovative legal practices carry with them their own limitations, biases, and weighty baggage. Legal cultures “provide symbols and ideas which can be manipulated by their members for strategic goals”, instructs Merry, “but they also establish constraints on that manipulation” (1985:60). Interpretive socio-legal scholars have debated the extent and implications of law’s indeterminacy. But all acknowledge the relatively mutable, adaptive, and contingent character of law as a medium for reproducing social order.

This understanding about law's inherent character is related to different understandings about the very *location of law*. Most traditional behavioral perspectives —often manifest in many strategic action studies as well as judicial impact studies— tend to assume a fundamental separation between law and society. In this view, law is formulated by legal elites (such as judges) in insular institutional settings of the state (such as the federal courts) and *imposed* as an alien, exogenous force upon a society otherwise structured largely by extra-legal interests and conventions. This assumption again sustains the view that identifying law's discrete effects in social practice is a relatively clear-cut matter for empirical investigation.²³

Interpretive socio-legal scholars once more take a quite different view. As they see it, legal knowledges are not imposed upon society so much as inscribed within the very institutional fabric of social relations. Specific constructions of law thus are not divined from mystical sources and cast down like thunderbolts from on high.²⁴ Rather, they develop continuously out of established legal conventions widely recognized and materially embedded within both specialized and general community practices. As such, socio-legal scholars emphasize that all members of a polity are *at once* a subjects and, at least potentially, active “mobilizers” of law in routine social interaction (Zemans 1983). “Efforts to create and give meaning to norms...often and importantly occur outside formal legal institutions such as courts...(and constitute) an activity engaged in by non-lawyers as well as by lawyers and judges”, affirms Martha Minow (1987:1861-2).

²³ Traditional institutionalists in the realist/positivist mode tend to argue that judicial “law”, as rules and precedential rulings, is not a particularly significant constraint on either judicial officials (judges, administrators) themselves or on the general public. See Gillman, 1996.

²⁴ The more common legal realist position that judges simply construct law to advance their own policy preferences or attitudes is equally problematic from the interpretivist view. In the latter perspective, a judge's very interests, preferences, understandings, and acts of legal construction are all shaped by the learned conventions of institutionalized legal practice. See Gillman 1997; Brigham 1987.

2. *The Supreme Court and the Legal Constitution of Politics*

The premises outlined above inform interpretivists' understandings about how courts, and especially the Supreme Court, contribute to the legal constitution of social life. Courts are integral institutional agents of law's constitutive power in that they produce, reproduce, and transform fundamental legal conventions and knowledges. Indeed, legal conventions both produce to a large extent what courts themselves "do" in practice as well end up as courts' most significant products in society. These legal practices communicate far more than discrete signals about institutional opportunities, resources, and constraints which political actors consider in their strategic deliberations about action. More fundamentally, the activity of courts in "policing" official legal meanings and practices contributes to the legal construction of shared cultural understandings about how society is organized, the reasonable expectations that citizens extend to each other, the terms for framing claims about ills and injustices in our society, and the public status accorded to various citizen subjects—in short, to the very foundations of authoritative knowledge that inform our politics and public life—. As political scientist John Brigham has argued, the legal logics and symbols generated by courts are to many terrains of social interaction what language is to the act of speaking. His elaboration of this point is worth citation:

In a political sense, the impact of appellate courts is on how they structure political life... As an opinion enters the political environment it joins with a configuration of defined interests and values operating around institutions, doctrines, and perceptions of what is possible.... Here, by interpreting the authoritative concepts governing politics, the courts exert their greatest influence. By refining the language of politics they contribute to the association of what is possible with the authority of the state (1987:196).

Again, judicial demarcation of "what is possible" refers not just to those discrete options for action that engaged political actors consciously assess, but to the very frameworks of understanding, expectation, and aspiration through which both citizens and officials *interpret reality* or, to quote Geertz, "imagine the real" around them (1973). Specifically, judicial constructions of legal norms act as practical "filters" that simplify the complex welter of social experience and make it accessible,

meaningful, manageable. As Carol Greenhouse has argued, legal logics provide specific authoritative terms for cultural “differentiation” among things, relationships, persons, and events —the very stuff of social life (1988)—. The legal norms articulated by courts provide an array of classificatory schemes, categories, and taxonomies that provide significant criteria by which we sort out experience into comprehensible and “appropriate” groupings (Kessler 1993). Such legal frames enable us to make sense of who we are (who we are like and unlike), that to which we aspire (what we want and do not want), what we can rightly expect of others (what is appropriate and inappropriate action, who is guilty and innocent), and so forth. In short, legal norms and discourses become part of the basic cultural material from which we develop our very perceived interests, identities, and inclinations. These knowledges thus enable and facilitate our very capacity to function as meaning-making subjects within society. But, of course, they also constrain us as social actors in important ways as well. The very process of classifying and organizing into meaningful terms tends to recognize and privilege some features, characteristics, and relationships in social life while ignoring, slighting, or distorting others. Law enables some ways of knowing and imagining while precluding or impeding other potentially valid interpretive perspectives.

Furthermore, Court practices work to impart *legitimacy* to its preferred legal constructions and authorized practices. This legitimation process encompasses many elements. It includes, most obviously, the explicit arguments provided by officials to justify their actions or prevailing institutional arrangements. These arguments are typically advanced through distinctive modes of “legal reasoning” by which adjudicated incidents and relations are decontextualized, treated as prototypical examples of broader categories, and assessed according to abstract principles and highly stylized discursive conventions. Such abstract, distancing practices along with the characteristically “formal”, rationalistic language of appellate legal construction are important techniques for characterizing judicial action as objective, neutral, and principled (Kairys 1982; Scheingold 1974). At another level, appellate courts, and especially the Supreme Court, carry out their duties through an elaborate array of rituals, ceremonies, and regalia in elaborate architectural settings that invest their actions with an almost religious sense of higher authority. This authority

is further supported in turn by an infrastructure of institutions—including lower courts, the legal profession, the mass media—that virtually canonize the Court’s words, logics, and practices, contributing to what Brigham calls the “cult of the Court” (1987). And behind all of these institutional trappings looms the often unspoken yet very real coercive, violent capacity of the state to enforce official judicial logics on those subjects insufficiently bound by fidelity to prevailing legal conventions (Cover 1986).

Such constitutive power is not the identifiable product of individual legal decisions by the Court, of course. Rather, this power is manifest in the accumulated cultural legacy of judicial actions and routine practices over time. These legal conventions are in turn learned, internalized, and *normalized* by citizens through many forms of cultural participation—through formal education, mass media, popular culture, and personal experiences directly within legalized institutional settings—.²⁵ And in these ways the foundational legal knowledges, conventions, and justifications transmitted by courts are reproduced and reinforced within the manifold practices, relationships, arrangements that structure daily life throughout society. Together, argues Mark Kessler, all of “these processes mystify law’s power, transforming the arbitrary and cultural features of social life into that which is considered natural, inevitable, and perhaps most important, universal” among the citizenry (1992:565). In this regard, the constitutive power of law generated in part by courts is more deeply formative and enduring in its impact on subject identities, consciousness, and constructions of interest than its manifold signaling effects on particular strategic interactions.²⁶ Indeed, law’s constitutive

²⁵ The concepts of “legitimation” and “normalization” have been used somewhat interchangeably by some scholars, but I employ them to refer to slightly different social processes. As I see it, legitimation refers to processes of explicit justification as right or just, while normalization involves processes that render certain understandings as “natural”, inevitable, taken-for-granted. While analytically distinct, however, these processes surely are often interrelated in practice.

²⁶ It again is useful to invoke the conceptual distinction between the second and third levels of power designated by Gaventa (1980). The second level of power refers more to the “mobilized bias” inherent in the identifiable rules, arrangements, and relational structure of social organization. It refers to more or less conscious deliberations about what is possible, desirable, or feasible in particular situations. The existing rules favor some parties and exclude others, render plausible some arrangements while discouraging others, make some actions rewarding while others are highly costly. The third level of power addresses the more general “social myths, language, and symbols” in a

power is perhaps greatest when we are least aware of its manifestations in the taken-for-granted “common sense” that facilitates our social interaction and informs our routine strategic and moral reasoning processes (see Brigham 1997; McCann 1994). “There is ample evidence that perceptions of desires, wants, and interests are themselves strongly influenced by the nature and content of legal norms,” argues Frances Kahn Zemans (1983:697).

Finally, it is important to point out that, while often de-emphasized or obscured in interpretive studies, law’s constitutive power is inextricably intertwined with its influence on strategic action. This recognition is implicit in Tocqueville’s famous words routinely cited in scholarship on American legal culture. His most commonly cited phrase recognizes the frequency of legal mobilization and interventions in American public life. “Scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question”, he wrote. But the less often cited words that follow this passage are equally important in recognizing the related constitutive power of legal discourses.

“Hence all parties are obliged to borrow, in their daily controversies, the ideas, even the language, peculiar to judicial proceedings... The language of the law thus becomes, in some measure, a vulgar tongue. And the spirit of the law penetrates into the bosom of society, even into the lower classes”.

Among contemporary scholars, “legal mobilization” theorists in particular have attempted to identify the interrelated aspects of law’s constitutive power and influence in strategic action. Scheingold’s seminal *The Politics of Rights* stressed how the authoritative status of constitutional language, the Supreme Court, and legal rights conventions invests legal reform tactics with great symbolic power (1974). This power of legal conventions simultaneously can render legal action an effective mobilizing resource for reformers *and*, unwittingly, divert them from alternative ways of understanding social relations, framing claims, and formulating political tactics. Whatever the outcome, he argued, law’s capacity to facilitate strategic interaction is directly related to its deeper

culture through which arrangements are perceived, understood, and accepted as “natural” or given. It refers to that aggregation of learned knowledges that prefigure and facilitate, but only rarely are subjected to, conscious critical interrogation itself.

constitutive capacity to construct a shared intersubjective culture of common symbols, myths, and meaning-making conventions.²⁷

My own research on the legal mobilization strategies of unionized women to achieve equitable wages during the 1970 and 1980 provides a similar but more detailed picture of this relationship (1994). As noted above, the very idea of pay equity as a reform cause was consciously shaped in response to both specific rulings by federal courts signaling opportunities for further claims and by the general legal frame of “antidiscrimination” that had come to dominate political debates over race and gender-based inequality in American society. Federal courts—and especially the Supreme Court in the key *Griggs* and *Gunther* cases—thus not only shaped the conscious formulation of particular goals and tactics of the movement, but they generated the very normative and conceptual framework within which the movement was imagined. As the movement developed, litigation was utilized to publicize reform claims, to mobilize active grassroots constituencies, to leverage bargaining power with employers, and to pressure for effective reform implementation.

These legal tactics varied in their effectiveness in different locations of strategic interaction. But even where wage gains were modest, my study shows, the legacy of legal action shaped and reshaped—constituted and reconstituted—the political identities of individual actors and the institutional context in which they acted. “Legal rights became increasingly meaningful both as a general moral discourse and as a strategic resource for ongoing challenges to status quo power relations” (1994:281). In short, federal appellate courts contributed in important ways to reproducing and transforming the intersubjective legal terrain of interaction in many female-intensive workplaces around the nation.²⁸

²⁷ This linkage between law’s constitutive power and its facilitation of strategic interaction is nowhere better developed than in studies of civil disputing processes, and especially in recent scholarship on law and everyday forms of resistance. Because such studies focus mostly on local trial courts and other “lower” level legal institutions, however, they are not discussed in this essay. However, see Mather 1997.

²⁸ Helena Silverstein more recently has concluded much the same thing in her analysis of legal mobilization practices by animal rights activists. She explicitly argues that “the relationship between practice and legal meaning highlights the importance of examining strategic uses of legal forms.

If, as suggested here, legal meaning structures and is structured by action, then the exploration of strategic action is crucial to an exploration of legal meaning. Attempts to strategically deploy, for example, legal languages, legal statutes, or litigation are

3. *The legal constitution of ideology, interest, and identity: historical examples*

A host of other examples can be cited from both distant and recent American history to illustrate the High Court's contributions to law's constitutive power. The Marshall Court played a critical role both in establishing the power of judicial review and in using that review to sustain traditional Federalist commitments to protecting the ideological-sanctity of property rights in the volatile young republic (Nedelsky 1990; Newmyer 1968; McCann 1984). A litany of landmark rulings added salience and content to public norms such as federalism, police power, contractual obligations, commercial enterprise, and "property" itself in ways that significantly structured both the practices of capitalist development and the politics surrounding it. The Marshall Court, writes R. Kent Newmyer, "worked for a powerful, self-sufficient, centralized nation resting on an economic foundation of commerce and free enterprise... Without doubt, American history has favored the principles Marshall worked for" (1968:148). The Taney Court not only continued as it reformed this tradition, moreover, but it played a critical role in authorizing limited constitutional understandings about the rights of propertied slaveholders and rightslessness of their slaves. While the Court of that era is rightly maligned for its nefarious ruling in *Dred Scott*, it should not be forgotten that expectations and even invitations (see above) of judicial intervention shaped national political debate over slavery in largely constitutional terms framed for decades by earlier judicial rulings (Fehrenbacher 1978; Newmyer 1968).

Equally notable was the Court's role in shaping and constraining political debate about the proper scope of governmental regulation of corporate production in the fifty years prior to 1936. Often remembered as the *Lochner* era for its most famous decision, the Court invoked constitutional principles of (substantive) due process and commerce clause authority to restrict what was considered "class-based legislation" protecting workers and consumers (Gillman 1993). These restrictions on progressive reform legislation were joined by constructions of antitrust

shaped and informed by legal meaning; in turn, these attempts shape and redefine legal meaning" (1986:13).

statutes and use of common law injunctions to directly constrain the collective action of working class, agrarian, and other reformers. Following the lead of the Supreme Court, the judiciary took the lead in structuring the terms of newly developing industrial relations rife with open class conflict. On the one hand, the Court's bold actions not only invalidated existing state laws and eventually federal New Deal legislation, but it further discouraged even the formulation of many other regulatory restrictions that were sure to defy judicial constructions of constitutional principles. Likewise, Court opinions provided grand opportunities for rapid expansion and reckless or exploitive behavior by manufacturers and other business interests for many decades. As noted in previous paragraphs, the Court significantly defined the strategic options for action by key players—big and small business, labor, farmers, crafts workers—in the high stakes struggles over the form of capital growth in the United States.

On the other hand, however, the Court's legal constructions also constituted more profoundly the very terms of the ideological debate, expressed interests, and group identities that bound the contestants in those political battles. For example, the agrarian Populists targeted the Supreme Court as the enemy of small farmers and working people in the 1890, and struggled to use various political and legal means to overcome judicial "tyranny" (Westin 1953). But what is interesting is that the Populist platform appealed to the very same legal principles—constitutionalism, property rights, equal citizenship, republican freedom, state's rights—with which the Court thwarted their political designs. In short, the Court, and the legal legacy it authorized, defined to a large extent the very normative terrain on which political struggle was waged. This is equally true for evolving labor politics early in the century as well. William Forbath and other scholars have demonstrated that constitutional rulings, repeated labor injunctions, and other actions by the federal courts contributed toward shaping the labor activists' identities, material interests, and capacities for collective action (1991; see also Orren 1991; Hattam 1993). Specifically, judicial action encouraged a more liberal, voluntarist, workplace-centered, anti-statist, rights-oriented ideology focused on revoking specific court constructions rather than the more radical logic of European unions sustained by class-based solidarity, national reform legislation, and socialist ideals. "Courts shaped labor's

strategic calculus; in more subtle ways, law also altered labor's ideology... Labor leaders at all levels began to speak and think more and more in the language of the law", Forbath concludes (1991:7).

Other judicial constructions in the same era further constrained dissent as well, delegitimizing certain groups and claims while encouraging or acknowledging others. Mark Kessler's compelling study of free speech doctrine in the post-WWI era is a fine case study in point (1993). He identifies two ideological strands in free speech doctrine: a libertarian tradition valuing free speech as a critical part of our political tradition that must be protected except in the most unusual cases; and a "pragmatic" approach that balanced protection for speech with the need for restrictions where expression might prove "dangerous". When combined with other ascendant ideological currents such as nativism, scientific racism, and nationalism, the "clear and present danger" doctrine was widely embraced to authorize intolerance and punishment of those working class dissenters viewed as "alien", "un-American", and hence subversive and "dangerous". "Because the institution from which this discourse emanated, namely, the Supreme Court, was held in such high regard—perceived as objective, neutral, nonpartisan, and authoritative—it legitimated the appropriation of social constructions of 'otherness' in other cultural contexts to distinguish between 'acceptable' and 'unacceptable' political expression" (589). In short, the Court played an important role in demarcating both the boundaries legitimate ideological discourse and the selective identities of those entitled to speak in one of the more politically charged moments of our nation's history.

Much the same type of judicial influence—at once enabling and delimiting the terms of political challenge—was evident among the civil rights movement of the 1950 and 1960. The initial legal strategy of middle class Black activists was to undo the legacy of "separate of but equal" jurisprudence that provided constitutional protection to institutionalized segregation in the nation, especially in the South. Once again, opposition to inherited law was framed in essentially legal terms and waged in substantial part through legal institutions. The eventual victory in *Brown* not only created strategic opportunities and leverage for further collective action discussed previously, but it also consolidated the liberal, legalistic, civil "rights" logic of antidiscrimination at the heart of the

movement.²⁹ And this basic legal logic continued to prevail even as movement tactics gravitated toward grassroots non-violent protest and demands for more radical social agendas were voiced. This experience with legally-oriented rights claims and appeals to the federal courts has left an enduring legacy—one entailing both transformation and constraint—in the African-American community and the nation overall (see Sarat 1997). As Kimberle Williams Crenshaw has argued, “antidiscrimination law represents an ongoing ideological struggle in which the occasional winners harness the moral, coercive, and consensual power of law” (1988:1335). Once again, the strategic potential of legal tactics has depended on the constitutive legal authority of general normative logics largely shaped by federal courts. This pervasive power of law in framing much of the debate for egalitarian change among people of color is clearly demonstrated by notable writings such as Derrick Bell’s “The Civil Rights Chronicles” (1987). This fascinating collection presents a wide array of fictional narratives about racial injustice that, while taking quite diverse views toward the implications of legal categories and tactics, confirm the powerful pull of legal “equality rights talk” as a framework for making sense of racial relations in our society.

Many other examples could be cited. Indeed, many of the most salient public issues—discrimination against women, ethnic minorities, gays and lesbians; the incendiary abortion issue; pornography and hate speech; campaign finance regulation; the relationship between religion and public education; gun control; restrictions on police abuse; death penalty policy; to name a few—have been understood and contested in distinctly legal terms delineated by the federal courts over time. In fact, the rise of rights-oriented politics generally as a characteristic political phenomenon in twentieth Century America owes greatly to changes in the Court’s basic jurisprudential practices. Likewise, the very faith that formalizing disputes and taking them “all the way to the Supreme Court” can promote justice—captured by Scheingold’s “myth of rights” (1974)—is another expression of law’s power in constituting our political imagination. As pointed out above, even those citizens who oppose prevailing court constructions and legal frames typically pose their own counter-

²⁹ Actually, the movement drew on a mix of liberal legal rights and traditional Protestant ideological elements in the appeal, as so often has been the case in American politics.

claims in terms of legal traditions authorized by the courts.³⁰ In sum, what the Supreme Court does and says clearly has a significant effect on the range of possibilities that even receive attention in our polity.

IV. HEGEMONY, THE COURT AND LEGAL AUTHORITY

The recognition of law's constitutive power in our culture raises, for many critical scholars in the new institutionalist tradition, the issue of the Court's role in sustaining systemic hegemony. The term "hegemony" refers to the aggregate of socio-cultural-political forces that generate consent and induce acquiescence to status-quo power relations (Williams 1977:110).

I would argue in this regard as above, however, that the Court's contributions to such acquiescence include both its strategic influence and its deeper constitutive power. Attention to strategic influence emphasizes how courts invite and discourage, and hence shape and channel, conscious disputing activity (or inactivity) in the polity. Such a focus tends to identify types and degrees of changes in relative power relations that are far more complex than just designations of winners and losers. I noted already how studies attuned to strategic interaction have taught us much about the dialectical relationships between the Court and other state institutional actors, including especially dominant lawmaking coalitions. Many scholars have contended that the Court rarely challenges prevailing national electoral coalitions, often enforcing that consensus against resistant local interests and taking on controversial issues that party moderates would prefer to keep out of electoral politics (Dahl 1957; Graber 1993). Of course, other scholars in this tradition disagree about the conclusions from such studies. In any case, however, such debates surely have contributed to our understanding about the continuities, transformations, and points of contestation in the prevailing constellation of expressed preferences and group positions that rule the nation in particular eras.

³⁰ While much of such discourse focuses on rights-oriented claims, this hardly exhausts the types of claims and counter-claims that emanate from the legal conventions articulated by courts. John Brigham develops several alternative constitutive legal forms, including realism, remedy, and rage (1997).

Likewise, legal mobilization studies have shown that “have-nots” and subaltern groups sometimes do improve their situation through legal tactics, while the “haves” and dominant groups sometimes are forced by law to relinquish some of their power. This is the heart of the claim by legal mobilization scholars that law can “cut both ways —serving at some times and under some circumstances to reinforce privilege and at other times to provide the cutting edge of change” (Scheingold 1989:76). Nevertheless, most legal mobilization studies confirm that even meaningful changes arising from particular contests rarely alter, and in fact often only reinforce, the overall patterns of social hierarchy and group power relations within society. Overall, both types of studies regarding political interaction have much to teach about what Schattschneider called the “mobilization of bias” in American society— that “set of predominant values, beliefs, rituals, and institutional procedures... that operate systematically and consistently to the benefit of certain persons and groups at the expense of others” (cited in Gaventa 1980:14).³¹

This last point is where constitutive theory begins to add its significant insights about the contributions of law to sustaining hegemony. Constitutive theorists emphasize that, even when law serves as an strategic resource for various parties in or out of government, it at the same time constrains those parties by limiting other options and channeling action into prevailing institutional processes and normative frames. To the extent that judicial constructions of law facilitate disputing activity at all, regardless of immediate outcomes, they thus also *incorporate* social action into familiar, well established ways of doing and understanding things. “Popular struggles are a reflection of institutionally determined logic and a challenge to that logic... Demands for change that do not reflect the institutional logic... will probably be ineffective”, notes Crenshaw (1366-7). This incorporative role of courts in preserving the general legal structure of relations —and especially inherited patterns of class, racial, gender, sexual, ethnic, religious hierarchy— even as they enable specific legal challenges and changes is a critical dimension of how hegemony is sustained as a dynamic interactive process of meaning-making activity (see McCann 1994:304-310). By recognizing this, constitutive

³¹ Again, it makes sense to view the contributions of socio-legal scholarship regarding strategic interaction in terms of the “second level of power” outlined by Lukes and Gaventa.

analysis does not discount strategic legal interaction in the shadow of courts, but rather interprets such activity from a more systemic ideological perspective.

At the same time, constitutive analysts tend to probe further the Court's capacity to legitimate and normalize prevailing power relations in ways discussed earlier. On the one hand, this requires attention to the routine practices by state authorities aiming to justify prevailing institutional arrangements, relationships, and "rationalities of action" that structure social life. This practice of recurrent justification for established ways of doing things as reasonable, right, even natural—regardless of outcomes in specific cases—is one of the most important roles played by our appellate courts, and especially by the Supreme Court. On the other hand, we noted earlier, every action encouraging and legitimating one set of arrangements at the same time precludes, obscures, and delegitimizes other possible arrangements and understandings. Even when its justifications for status quo arrangements are not convincing, therefore, the accumulated traditions of knowledge production by the courts over time place real constraints on alternatively imagined forms of community. As Austin Sarat has put it:

Law is ...most powerful when it stifles demands before they are voiced or destroys them before they acquire access to any important arena. Law works not only when it overcomes resistance, that is, when it wins the contest, but when it effectively prevents the fight...The power of law is found in the dispersion and penetration of legality as an ideological form and in the legitimating effects of that form (1985: 31).

We can see this institutional dynamic at work in historical events already discussed. For example, the triumph of an "exceptionally" legalistic, voluntaristic, rights-oriented political strategy within the American labor movement owed to many factors. But most analysts agree that the federal courts' authorization of state coercion to quell labor protests, narrowing of opportunities for effective legal reform, and justification of prevailing market relations and republican values in society—all played a key role in shaping labor movement strategy and ideology—. The result was not necessarily that most union workers were convinced by the rightness of judicially constructed law, but rather that modest legal alternatives to the courts' vision were rendered as the only

ones that were sensible, or even plausibly imaginable, for many leading labor activists in that historical context. Much the same dynamic was at work in the civil rights movement (see Scheingold 1988; McCann 1992). While Supreme Court decisions giving new meaning to “equal rights” did facilitate significant struggle and important changes in social relations (especially in the South), that same legal legacy privileged certain claims and modes of action while delegitimizing others as dangerous, costly, unrealistic, or senseless. The promise of inclusion and voice offered by the Court’s integrationist logic of equal rights to a large degree thus ended up excluding, silencing, or repressing other possible visions of social justice—at least for a time, until the severe limits of the legal promise became palpable amidst the increasingly reactionary environment of the 1980.

Even distrust of the Court’s legal constructions typically produces little challenge to the status quo. This is the message of Kristin Bumiller’s important research. Her study illustrates how many victims of race and gender discrimination avoid formal legal action because their dependent status—as welfare recipients, tenants, employees, students, and the like—leaves them vulnerable to reprisal or ruin. Indeed, the legal promise of redress for discrimination only “reinforced...the bonds of victimhood”, offering few remedies through law, little escape from law, and few alternatives to law (1988). In short, those whom Bumiller studied were to a large extent constituted as victims by law, powerless to challenge its hegemonic power.³²

It is worth adding, however, that all systems of hierarchy and domination are not equal. A distinguished line of critical interpretive scholarship has contended that legally constituted modes of hegemony are preferable to other, more arbitrary forms of rule. As E.P. Thompson has argued, for example, the rule of law and the courts that administer it provide alternatives to, as well as authorizations for, naked coercion and violence (1975). Moreover, law’s intrinsic promise of equal treatment both imposes constraints on the powerful and provides opportunities and

³² In my view, however, this line of thinking often tends to overstate the ideological grip of law. My own research tends to emphasize the degree to which citizens often are aware of law’s power to make sense of things as well as law’s role in sustaining hierarchies, indignities, and harm. Moreover, official legal categories and logics are often contested. See McCann (1994). Also, see the interesting literature on law and every day forms of resistance; see McCann and March (1996).

resources to subaltern groups to challenge their subordination through resort to the courts and other legal tactics (McCann 1994; Silverstein 1996). This has led yet others to characterize liberal legal regimes as tending toward a more “soft” or “open” mode of hegemony where law and its institutional authorities, such as the Supreme Court, are more responsive to the less powerful than in other regimes (Scheingold 1988; McCann 1994).³³ Whatever one’s position in this debate, however, attention to law’s constitutive power and strategic influence alike seem critical elements in debates over the Court’s role in sustaining hegemonic power and status quo relations.

V. CONCLUSION

This essay has outlined two different aspects of Supreme Court influence in American politics addressed by recent social science studies of legal institutions. Attention to both strategic and constitutive dimensions tends to confirm that the Court matters significantly in our public life, although that influence is complex, contingent, and often quite subtle in character. Moreover, each perspective points to, parallels, and often intersects with identifiable trends in what is called “new institutionalist” analysis” (Smith 1988). Yet, so far, there have been relatively few efforts at constructive dialogue between adherents of these different modes of socio-legal analysis. The discussion that has occurred has been mostly in the form of an argument—especially between formal game theorists in the positivist tradition who emphasize “strategic” action and interpretive or historical analysts who stress law’s constitutive power—about the relative merits of rival epistemologies and methodologies. Few serious efforts to develop complementary approaches integrating or synthesizing both strategic and constitutive dimensions of analysis have been undertaken by public law scholars to date. This is lamentable in that

³³ Socio-legal scholars disagree somewhat over the degree to which legal forms sustain hegemonic order and constrain the development of “counter-hegemonic” possibilities. In general, it strikes me that scholars in the U.S. who focus primarily on the practices and constructions of federal courts take a more skeptical view, while those who focus more on legal action—especially the “politics of rights”—by groups and individuals in society often find more room for resistance and transformative struggle (see McCann 1994), although not necessarily for legal “success”. For a fine discussion in the latter mode, see Hunt (1993).

previous pages have labored to demonstrate the inherent connections between these aspects of law's power in actual social practice.

The emergence of the new institutionalist movement thus could be propitious in that it provides both opportunity and motive for intellectual engagement and synthesis. It offers an opportunity in that scholars committed to research in both strategic interaction and constitutive power have identified themselves with the movement (Smith 1988; Gillman 1997; Epstein 1977). The movement might generate a motive, moreover, in that efforts to develop broader frameworks of analysis that integrate or at least balance attention to both dimensions could represent major achievements in intellectual analysis of courts, and of political institutions generally. After all, fruitful dialogue about combining these different frameworks has taken place in other areas of political analysis, such as international relations studies and political theory (Klutzn 1995; Finemore 1996; Johnson 1991). One possible route to this end for new institutionalist legal scholars might simply entail combining rational choice or other behavioral approaches focusing on strategic activity with more historical and interpretive analytical approaches to the subject.³⁴ This effort is intriguing, but it requires combining several very different conceptions of agency, power, and institutional relations as well as of method and interpretation—indeed, quite contrary epistemologies altogether—. A rather different tack for new institutionalists might involve attempts to incorporate attention to strategic interaction within a consistent interpretive framework emphasizing law's constitutive power. Some steps have been taken in the latter direction, but much more remains to be done.³⁵ In any case, such efforts provide at least some further reason

³⁴ One important contribution in this regard is Lynn Mather's (1997) recent effort to integrate different approaches in her very interesting analysis of tobacco litigation politics. The study is very much in the spirit of the argument advanced here. However, Mather's study: is about legal mobilization in trial court litigation rather than about appellate courts per se; draws distinctions among key categories (identifying strategic concerns strictly with behavioral analysis) in ways somewhat different than I have developed here; and (perhaps prudently) eschews the potential epistemological tensions at stake.

³⁵ Legal mobilization scholars (see Mather 1997; Silverstein 1996; also McCann 1994) again have been most interested in this integrative effort. Most interpretivists, however, have expressed little interest in theorizing about "micro" level strategic or instrumental aspects of legal interaction, and instead have focused their attention on broadly constitutive dimensions (but see Gillman 1998). Moreover, interpretive studies of appellate courts have been directed primarily to analysis of judges' actions and prac-

to think that labors to develop integrated multi-dimensional analyses would be productive for new institutionalist scholarship regarding appellate courts.

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tices (internal studies of courts) rather than to how those practices affect political interaction and processes generally ("external" concerns). In this regard, unfortunately, the interpretivist version of "new institutionalism" may end up only reinforcing the longstanding obsession of political scientists with more-or-less traditional doctrinal study of appellate courts in historical context.

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