“We’re Not Breaking the Law. We are Exercising our Citizen’s Right to Enforce it.” *Organizers, Litigation Strategies, and Movement Legal Remedies*

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Abstract

"We're Not Breaking the Law. We are Exercising our Citizen's Right to Enforce it": Organizers, Litigation Strategies, and Movement Legal Remedies

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In this dissertation, I explore why activists and organizers pursue litigation strategies to achieve social change in the face of three daunting hurdles: (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language, almost always inadequate to describe social ills; and (3) even a legal victory's results are uncertain because of the judicial branch's lack of enforcement power. Therein lies the puzzle this dissertation seeks to address: Given inherent constraints in pursuing litigation strategies that make costs high, and success rates low, why do actors seeking social change pursue litigation strategies and judicial intervention? My findings lead me to argue that activists and organizers often pursue litigation strategies when (1) the underlying political process makes administrative intervention politically undesirable or fraught with political stonewalling and interference and (2) rights claiming relies on new, poorly

defined rights. These two factors combined create lasting limitations—both formal and informal—in the exercising of state authority to enforce these new rights. Under these circumstances, mobilizing the law might be the only viable option to achieve the sought-after social change. While the two conditions, to any degree, are necessary, they are insufficient as the decision to pursue litigation strategies ultimately lies with organizers and their organizational capacity. Further, I argue that, given the conditions listed above, this shift to judicial intervention allows activists and organizers to (1) move their agenda past destructive political stalemates, (2) define the social and political ills they seek to reform on their terms, and (3) be the ones to enforce the judicial remedy they helped shape. This framework, the *movement legal remedies framework,* centers the analysis on advocates whose harm is at the root of the investigated legal harm and the nuanced and complex reasons organizers use litigation strategies.

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DEDICATION

To Rachel

Chapter 1. INTRODUCTION

I was both an activist for marriage equality and a law student when it became apparent that marriage equality lawsuits were finally making their way to the United States Supreme Court. *United States v. Windsor* (2013) and *Hollingsworth v. Perry* (2013) were both stumbling through the lower courts, providing both good and bad news to civil rights advocates. Invariably, the debate about the constitutionality of marriage equality, much like that around every significant constitutional civil rights debate, turned on whether courts ultimately help produce or inhibit social change.

Observers pondered whether lesbian, gay, bisexual, transgender, and queer (LGBTQ) civil rights activists were mistaken to rely on the courts' lengthy and costly process to deliver equality. Many inside and outside the LGBTQ movement wondered if the resources used for litigation efforts should have been spent lobbying Congress and the president for comprehensive LGBTQ equality legislation. The debate centered on whether judicial decisions' necessarily incremental nature was the correct path for LGBTQ equality. Could LGBTQ activists have achieved broader change through legislation, as they did with the repeal of Don't Ask Don't Tell (HR 2965, S 4023)? Could they have achieved more meaningful change through executive action, as was the case with President Obama's expansion of Executive Order 11246 to protect federal LGBTQ workers from discrimination? Lastly, in terms of results, many questioned whether a Supreme Court decision in favor of marriage equality—a decision that would put the Court ahead of national public opinion as measured by polling—would lead to a social backlash outweighing its legal gains. It was noteworthy that, at times, questions surrounding the effectiveness of courts to marshal social change were more prevalent than substantive legal debates on whether marriage equality was constitutional.

I found this academic debate particularly interesting since it seemed completely disconnected from my experience as an activist in the LGBTQ movement. While organizers were strategizing all the possible avenues to achieve equality for LGBTQ people, academics criticized the movement for its idealistic focus on judicial interventions. While organizers were actively debating the long-term disadvantages of reinforcing the legal categorization of sexual orientation as an immutable trait, academics criticized organizers for being too naïve and believing that a judicial victory would be a silver bullet for LGBTQ equality. While there are many ways one can criticize the approaches taken by the LGBTQ rights organizers, the only narrow-focus approach I could see was that of legal and socio-legal scholars' debate on whether the Supreme Court, alone, can create social change or if there was a perfect intervention elsewhere.

The courts' effectiveness as a venue for social and political change remains a hotly debated question in socio-legal and legal scholarship. The marriage equality debate over this question focused on the most recent decision, *Goodridge v. Dept. of Public Health* (440 Mass. 309 (Mass. 2003)). In *Goodridge*, the Massachusetts Supreme Court required the legal recognition of same-sex marriages, and socio-legal scholars disagreed on whether the 2003 decision was a net-positive or a net-negative for the LGBTQ movement.

Legal scholar Michael Klarman (2005) argued that *Goodridge*'s impact was ultimately negative, as its most significant consequence "may have been the political backlash that it inspired" (482). He explained that the broader impact of the Supreme Court decision is that "[B]y outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance" (482). Interpreting *Goodridge* as ultimately a loss for same-sex marriage proponents, Klarman predicted that now that the Court has intervened, it will be harder for LGBTQ advocates to secure marriage rights for gays and lesbians since court-mandated social change can ultimately work against those seeking reforms since it mobilizes greater resistance than change accomplished through legislatures or other democratically operated institutions and it has limited impact (475). This perspective is one taken by many socio-legal scholars. The argument that not only are courts ineffective creators of change but that their intervention is overall a detriment to social movements is one shared across legal, political science, and socio-legal scholars (Klarman 2005; Rosenberg 2008; Silverstein 2009.

Alternatively, political scientist Daniel Pinello (2006) argued that "*Goodridge* had a profound inspirational effect for the marriage movement, among elites and the grassroots, at home and beyond" (190). In *America's Struggle for Same-Sex Marriage* (2006), Pinello's investigation of the growing LGBTQ movement and state and federal litigation "diminish[es] the perception that courts are hollow hopes for significant social reform" (193). Unlike the previous discussion, Pinello concluded that the Massachusetts Supreme Judicial Court achieved incredible success in expanding marriage equality to same-sex couples. Doing so inspired "political elites elsewhere in the country to follow suit and in mobilizing grassroots supporters to entrench their legal victory politically" (2006, 192). Pinello is purposeful in his discussion and directly acknowledged that his findings challenged the dominant view in political science that courts were not reliable instruments of meaningful social change (2006, 192).

The debate between Pinello and Klarman is one of many concerning litigation strategies to address social and political harms, most famously epitomized by Rosenberg's (2008) query:

"Can courts bring about social change?" However, this question is neither interesting—for what political branch can cause social change alone—nor is it helpful in understanding courts' impact on social change efforts. Beyond this general limitation, these debates also display three specific shortcomings. First, they focus on courts and judges as the primary and deciding actors driving social change, neglecting how advocates originally conceived and started these legal actions (Klarman 2005; Rosenberg 2008). Second, they assume the only goal of litigation strategies is to win a legal case, ignoring the nuanced and complex reasons advocates may engage in litigation (Rosenberg 2008; Silverstein 2009). And finally, they analyze courts in an institutional and political vacuum, looking almost exclusively at the Supreme Court and judicial review. Because of these shortcomings, this social change debate centers on the cost and timeliness of litigation, unpredictability in judicial decision-making, and courts' lack of direct enforcement powers. Only infrequently is the focus on the indirect effects of judicial decisions, and rarely is the focus on the advocates' injury, giving rise to the legal claim at hand (Klarman 2005; Rosenberg 2008).

I seek to address these limitations by investigating the litigation efforts of Black workers in the early Civil Rights Act era and the nuanced and complex consequences of judicial decisions and remedial frameworks on both activists and government actors. This approach allows me to attend to what activists were trying to accomplish and how they viewed litigation strategies within the general scheme of the change they were trying to create. Further, I examine the courts and their role as statutory interpreters, not as judicial reviewers. When these threads are combined, this approach allows me to investigate organizers' potential to create change through litigation strategies by engaging with the courts as part of their local political environment and influencing judicial interpretations of newly enacted and ambiguous laws.

In this project, I explore why activists and organizers pursue litigation strategies to achieve social change in the face of three daunting hurdles: (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language, almost always inadequate to describe social ills; and (3) even a legal victory's results are uncertain because of the judicial branch's lack of enforcement power. Therein lies the puzzle this dissertation seeks to address: Given inherent constraints in pursuing litigation strategies that make costs high and success rates low, why do actors seeking social change pursue litigation strategies and judicial intervention?

My findings lead me to argue that activists and organizers often pursue litigation strategies when (1) the underlying political process makes administrative intervention politically undesirable or fraught with political stonewalling and interference and (2) rights claiming relies on new, poorly defined rights. These two factors combined create lasting limitations—both formal and informal—in the exercising of state authority to enforce these new rights. Under these circumstances, mobilizing the law might be the only viable option to achieve the sought-after social change. While the two conditions, to any degree, are necessary, they are insufficient as the decision to pursue litigation strategies ultimately lies with organizers and their organizational capacity. Further, I argue that, given the conditions listed above, this shift to judicial intervention allows activists and organizers to (1) move their agenda past destructive political stalemate, (2) define the social and political ills they seek to reform on their terms, and (3) be the ones to enforce the judicial remedy they helped shape.

This framework, the *movement legal remedies framework,* centers the analysis on advocates whose harm is at the root of the investigated legal harm. Additionally, it looks into the nuanced and complex reasons organizers use litigation strategies. Unlike what many socio-legal scholars within the litigation of politics assume, organizers are certainly aware of litigation strategies' many trade-offs. This awareness means that litigation strategies are usually one of the many efforts to organizers engage in to address social harms. However, given the right conditions, litigation strategies become the most likely venue for success. While scholarly debates have focused on a singular and perfect intervention, organizers' experiences in seeking change have often been strategic, complex, multi-pronged, and opportunistic. The movement legal remedies framework attempts to ground the analysis in that strategic, complex, multi-pronged, and opportunistic use of litigation strategies.

In this dissertation, I engage with the complex and contingent question of why activists and organizers pursue litigation strategies to achieve social change. By highlighting the benefits of courts to social movements, I show the transformative potential of litigation when it empowers those whose rights were violated to define and correct those violations. I argue the legal system can be an effective tool for social change by investigating how organizers weaponized judicial interpretation, court rulings, and remedial frameworks in the post-Civil Rights Act years.

Using a legal mobilization framework to identify and label the effort of engaging with the legal system to achieve social change, I take up Zemans' (1983) definition of legal mobilization, "[T]he law is . . . mobilized when a desire or a want is translated into a demand as an assertion of rights" (77). To better understand whether courts and litigation can affect social change, I also employ Scheingold's (1974) idea that law and rights may be best characterized as "resources" (137) for disadvantaged groups. This approach goes beyond litigation and rights claiming to explore how litigation strategies can be used with other forms of activism, such as grassroots protest activities, lobbying, and media attention (McCann 1994).

For this research project, I examine Black construction workers' legal mobilization following the passage of the Civil Rights Act of 1964. Title VII of the Civil Rights Act is an ideal case to investigate why, despite low success rates, organizers continued to pursue litigation strategies to create social change. In the next section, I provide a brief overview of the social, legal, and political context that gave rise to Title VII's regulatory framework. Then I describe this project's leading cases and methodological approaches. I conclude with an outline of the dissertation and my central findings.

1.1 Historical Context

The history of Black workers' organizing for equal employment opportunities is as long as it is heartbreaking. From the 1887 attempt to organize Black sugar cane workers, to the 1919 attempt at organizing in the Arkansas Delta, to efforts of Black workers in the South during the 1930 and 1940s to unionize garment and textile factories, these efforts have often ended in bloodshed. While it is beyond this dissertation's scope to do justice to that history, it is essential to emphasize how government attempts to address employment discrimination have followed and been in response to Black workers organizing for better economic opportunities (MacLean 2008; Taylor 1999).

During World War II, in response to Black workers' demand for equal opportunities for defense industry jobs during heightened production and a threat of a march on D.C., if these demands were not met, President Roosevelt issued the 1941 Executive Order 88028. The order banned discrimination in industries with federal contracts and established the Fair Employment Practices Committee (FEPC) (Belton et al. 2004, 20). Since then, every president has addressed employment discrimination by amending and adding to this initial executive order. For example, President Kennedy issued Executive Order 10925 in 1961, ordering government contractors to “take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin.” President Johnson amended Kennedy’s order with Executive Order 11246 (Belton et al. 2004, 20). While most administrations following Johnson have amended EO 11246—with the last being President Obama’s inclusion of “sexual orientation, gender identity” to the protected categories—it is still the primary law protecting workers under federal contract.

During the mid-1950s, in response to increased social protests, marches, sit-ins, and other demonstrations against employment discrimination, Congress, led by then-Senate Majority Leader Lyndon Johnson, enacted the Civil Rights Acts of 1957 and 1960. These laws primarily addressed voter registration and the jurisdiction of federal courts in a civil rights case. The acts also created the US Commission on Civil Rights to study violations of voting and other civil rights and to recommend remedial legislation and the Civil Rights Division of the Justice Department. These laws also empowered the attorney general to file civil actions and to obtain injunctions against interference with the right to vote based upon race (Farhang 2010, 96–97).

The Civil Rights Act of 1964 was the culmination of Congress’ attempts to address civil rights. It is impossible to divorce the passage of the Civil Rights Act from the mobilizing and direct-action efforts of the time. Nothing illustrates this connection better than the fact that the March on Washington for Jobs and Freedom that took place on August 28, 1963, where over 250,000 civil rights supporters marched in DC, coincided with when the Civil Rights Act was being debated before the House Judiciary Committee (Blumrosen 1993).

The Civil Rights Act of 1964 is the most comprehensive federal statute enacted to provide individuals with a remedy for unlawful discrimination. Title I barred unequal application of voter registration requirements. Title II prohibited discrimination in motels, hotels, theatres, restaurants, and all other public accommodations which were engaged in interstate commerce. Title III outlawed state and municipal governments from barring access to public facilities based on an individual's religion, gender, race, or ethnicity. Title IV encouraged public school desegregation. Title V expanded the scope of the Civil Rights Commission. Title VI gave the federal government the means to enforce Title IV by preventing discrimination in government agencies that received federal funding. Title VII prohibited certain employers from discriminating on the basis of race, color, religion, sex, or national origin and created the Equal Employment Opportunity Commission. Title X created the Community Relations Service, whose task was to help local people in cases of discrimination (Civil Rights Act of 1964, Pub. L. No. 88-352, § 101(2)(C), 78 Stat. 241, 241 (codified as amended at 52 USC § 10101)).

While Title VII addressed employment discrimination, there were some obvious and significant shortcomings in the law. Instead of empowering the Equal Employment Opportunity Commission (EEOC) as a single-purpose administrative agency, like the National Labor Relations Board, Title VII's enforcement mechanism was a complex blend of public and private enforcement, with private enforcement predominating (Farhang 2010, 108–109). Congress created the EEOC solely to investigate discrimination claims and conciliate between employers and employees. It empowered the Department of Justice, rather than the EEOC, to prosecute Title VII claims allowing the attorney general to sue based upon a "pattern or practice" of discrimination (Farhang 2010, 109). Further, the Department of Labor, acting through the Office of Contract Compliance (OFCC), kept its authority under the pre-existing executive orders to address employment discrimination under federally funded contracts. Last, private citizens could also pursue the law's enforcement and take the case to federal court (Blumrosen 1993; Farhang 2010; Gould 1977; Graham 1990).

Another significant Title VII limitation was the lack of a comprehensive definition of the term “discrimination.” While the act specified that it prohibited practices like segregation and the failure or refusal to hire on the basis of the protected class status, it primarily used the concept of discrimination in defining discrimination (“otherwise to discriminate” or “otherwise adversely affect . . . status as an employee”). To this day, Title VII litigation remains concerned mostly with establishing the scope of the law, including the statutory definition of the concept of “discrimination” (*Price Waterhouse v. Hopkins* (1989); *Altitude Express v. Zarda* (2018)).

In particular, the statutory interpretation debate centers on whether Title VII was limited to addressing individual discrimination or if it extended to systemic discrimination. Although several federal laws prohibit discrimination in employment, Congress did not actually define the term “discrimination” until the Americans with Disabilities Act in 1990. For Title VII, Congress left the “final responsibility” for defining discrimination to the federal courts (*Alexander v. Gardner-Denver* (1974)). In 1977, after a decade of Title VII litigation, the Court finally explicitly defined the theories of discrimination covered in Title VII as “disparate treatment” and “disparate impact.” In *Teamsters v. United States* (1977), the Supreme Court explained that “disparate treatment” occurs when “an employer simply treats some people less favorably than others because of their race, color, sex, religion, or national origin” (335). As for “disparate impact,” the Court explained that it “involves employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity” (335). During the period investigated in this study—the decade following the passage of the Civil Rights Act—there was no settled definition of “discrimination” under Title VII. This means that during the cases discussed here, the definition of "discrimination" was up for debate, and those mobilizing Title VII were at the leading edge of its statutory construction.

While the Civil Rights Act was an institutional innovation, it left many questions unanswered, including who was responsible for the enforcement of the law and what, exactly, counted as discrimination. Additionally, the mechanism it outlined for further clarity was the private right to sue. Title VII was designed to require further legal action to be meaningful. Consequently, civil rights advocates actively pursued the courts to argue for new political and legal opportunities based on this new law during those early years. With its uncertain and ambiguous legal language, its over-reliance on judicial interpretation and remedies to effect change, and the absence of an implementation framework, pursuing litigation strategies based on Title VII should have been doomed as it suffered from all the shortcomings identified by critics of legal mobilization for social change.

1.2 THE CASES

As Title VII offers a unique lens to analyze the effectiveness of pursuing litigation strategies to create social change, for this project, I explore early Civil Rights Era affirmative action efforts that sought to desegregate the construction trades in Seattle and New York. In particular, I investigate Black construction workers' legal mobilization following the passage of the Civil Rights Act of 1964. This population of cases is important to understand why activists continue to pursue litigation strategies for three reasons.

First, while Title VII was an institutional innovation, and one that became a model for later social-regulatory legislation, it was deeply deficient in how it defined its scope and enforcement mechanism (or lack of), how it delegated authority to agencies and courts, and even what exactly it sought to address. Despite its inherent inadequacies, legal mobilization of Title

VII became the basis for a durable and arguably effective anti-discrimination enforcement program through affirmative action plans.

Second, no other industry has been the object of more protest and litigation concerning employment discrimination than the construction industry. The story of trade unions and government programs aimed at eliminating discrimination in this industry is complicated and contradictory. However, the inadequacy of both private and government attempts to desegregate the industry remains a persistent theme. Before the Civil Rights Act, construction trade unions openly excluded Black workers from membership in many skilled trades and their unions, and, in those cases where Black workers were allowed to join, their numbers were severely limited. This exclusion was crucial in the early post-Civil Rights Act years as the construction industry was one of the few industries growing in the early to mid-1960s. In “The Last Bastion of Discrimination: The New York City Building Trades and the Struggle over Affirmative Action, 1961–1976,” historian Nancy Banks details why construction became the focus of anti-discrimination and desegregation efforts. She explains that construction became one of the few prosperous industries during the economic downturn in the 1950s and 1960s. Many labor historians have labeled this period a “golden age of construction” in which “[c]onstruction workers especially prospered” (Banks 2006). However, minority populations were almost entirely denied the benefits of this economic boom. For example, in New York, over ninety-two percent of the construction workers employed in the metropolitan area were white (Banks 2006, 32–33). This exclusion was particularly offensive since much of the construction was federally funded. The exclusion of Black workers from these employment opportunities meant that public dollars were funding discrimination against these workers.

Third, I focus on Seattle and New York for three reasons. First, scholars often center their analyses of the history of affirmative action in construction labor unions in Philadelphia and Chicago. The most well-known affirmative action plan is the controversial and mandatory "Philadelphia Plan." The "Chicago Plan," the most well-known voluntary affirmative action plan, is also often discussed in opposition to the Philadelphia Plan as a labor-friendly alternative (Gellman 2010; Gould 1977). Scholars have paid less attention to other hometown plans or other construction affirmative action plans. In both Seattle and New York, the most successful affirmative action plans emerged as part of a court decree and its remedial actions. It was legal mobilization that gave rise to the successful affirmative action plans in both cities. I selected these two cities with the goal of examining two cases where legal mobilization led to social change; I then isolate the factors that made them successful. Finally, both cities had active organizing coalitions that led the desegregation litigation efforts, which provides unique insights into the organizers' strategies.

1.3 Methodology

This analysis is an in-depth case study with rigorous historical and theoretical engagement (Bates et al. 1998; Pedriana and Stryker 2004). I selected the archival records for the research project based on the formal Title VII enforcement authority framework. Records for the private Title VII plaintiff, and records for the Department of Justice, Department of Labor, and the Office of Contract Compliance (OFCC), were all investigated.

Archival records comprise the primary source of evidence for the case studies. Relevant records were photographed and transcribed from the following archives:

1. National Archives and Records Administration in Washington, D.C., College Park, MD, and Seattle, WA.
2. University of Washington Special Collections, Seattle-WA.
3. Schomburg Center for Research in Black Culture, New York, NY.

At the National Archives and Records Administration, I conducted archival into the following collections were investigated during this research project:

1. Department of Labor Files, 1965–1975 – Record Group 174 (DOL)
These archives were a collection of letters, reports, correspondence, and labor and employment law reports.

2. Department of Justice Files, 1965–1975 – Record Group 60 (DOJ)
These archives were a collection of letters, internal and external legal memos, correspondence, and legal decisions for early Title VII cases.

3. Office of Contract Compliance Files – Record Group 174.4.9 (OFCC)
These archives were a collection of letters, internal and external memos, correspondence, and weekly report logs for the regional offices in Seattle, Chicago, New York, Boston, New Orleans, Cincinnati, Saint Louis, San Francisco/Bay Area, and Washington DC. These reports offer a unique record of the day-to-day operation of state actors working toward the construction industry's desegregation.

4. Equal Employment Opportunity Commission, 1965–1972 – Seattle, Record Group 403 (EEOC)
Court Docket for <u>United States v. Local 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers</u>, 315 F.Supp. 1202 (W.D. Wash. 1970)

While most of these records were standard government documentation, such as correspondence, reports, and memos, the OFCC's archives also included "weekly reports." These records are unique to the OFCC and provide detailed descriptions of federal enforcement of Title VII on the construction trades.

For nearly a decade, the OFCC operated approximately fifteen "area coordinators" in twenty-two major cities across the country to guide and unite compliance efforts of federal agencies active in construction. These area coordinators were required to submit "weekly logs" to the national office that detailed their activities, as well as their thoughts on local desegregation efforts. These reports offer a unique record of the day-to-day operation of state actors working toward the construction industry's desegregation. As explained by a memo delineating area coordinators' work, the national office expected "weekly reports detailing their activities, including the names of people in meetings they attended, the significance of each reported event, appraisals of each contractor's compliance situation, and projected activities for the following two weeks" (*OFCC*, 4/EEO Folder, Memo on Area Coordinators, April 21, 1965). These reports became the primary line of communication among local OFCC offices and with the national office.

Further, the OFCC reports revealed what was actually occurring in each city's desegregation efforts. For example, as part of the filing for a pattern and practice lawsuit in New York, the DOJ submitted a copy of the area coordinator's report that served as evidence of discrimination. The report read, "I concur in the judgment of the Civil Rights Group that these locals have a 'rigid pattern of discrimination to exclude Negro workers" (*Rios et al. v. Enterprise Association Steamfitters* (1975)). Similarly, in another case, the DOJ used a weekly report to show the labor union was not acting in good faith in their negotiations with minority workers. The DOJ attorney used a New York area coordinator's weekly report stated that he had been in "those meetings with the labor union," to express surprise that labor unions were arguing that they were unaware of the quota determination (*OFCC,* New York Field Office Report, October 19, 1965).

Government records are the primary sources investigated to explore legal mobilization opportunities during the early Title VII years. These records provide detailed information on early Title VII cases, communications within and across the different state agencies empowered to enforce Title VII, and communications between state agents and organizers. These records also contained information on civil rights organizations and organizers involved in the enforcement of Title VII, which is of particular interest to my project. While these records are invaluable to my research, it is noteworthy that they were created by and for the government and its officials. They tell the story of the early Civil Rights Act through the experiences of state actors. This one-sidedness of “official” records is a significant methodological challenge in legal and socio-legal research. I argue that this one-sidedness is why so many legal and socio-legal scholars adopt the state view as the source of truth for legal mobilization. This single (though not monolithic) perspective is why judges, attorneys, and state agencies are the center of most socio-legal and legal scholarship and why so many of our conclusions are state-centered (Frymer 2008; Pinello 2006; Rosenberg 2008). Further, this one-sidedness exists even when a complete case docket is investigated. By the time organizers’ views are written into legal claims, arguments, and briefs, their experiences, harms, and strategic choices have been translated into the language, rhetoric, and conceptual architecture that is recognizable by the legal system.

To triangulate the information in the government records, I have also investigated the archives of the two leaders for the civil rights organizations explored.

1. Special Collections, University of Washington Libraries, Seattle, WA – Labor Archives of Washington - Tyree Scott Papers (TS)

2. New York Public Library- Schomburg Center for Research in Black Culture, New York, NY- James Haughton Papers (JH)

These collections provide invaluable information on the strategies, opinions, and perceptions of these two organizational leaders. While these collections contain information on other organizations’ members, they focus on Tyree Scott and James Haughton, respectively. These resources allow me to focus on movement actors, and when I cite them, I explicitly borrow their language, their stories, and their point of view. As much as possible, I have tried to use the organizers’ language. For that, I have relied on historians who carefully studied these organizations, era, and phenomenon. In particular, for the Chicago case in Chapter 3 of this dissertation, I relied on archival research, as well as on authoritative work done on the black workers' organization, CUCA, by Erik Gellman (2010) and work done by William Gould on the Chicago Plan (1977) to tell the story from the organizers' perspective. Gould was an active participant in early Title VII cases who wrote contemporaneous academic analyses of these cases. I interviewed him as part of this dissertation project, and his archival and contemporary writing on early Title VII has been invaluable to this project. In addition to Gould's work, Trevor Griffey's (2010) dissertation on the UCWA and Tyree Scott illuminated organizers' perspectives and opinions for the Seattle case in Chapter 4. Furthermore, for Chapter 5, I relied on archival research, as on authoritative work done on the early years of the Civil Rights Act in New York by David Golland (2011) and Nancy Banks (2006). I am indebted to the work done by these historians and legal historians, which has allowed me to, as much as possible, triangulate the national archive's data with that from organizers and other contemporary legal actors.

In this dissertation, I use the following citation format: Name of Collection (Acronym), Box Number/Folder Number or Name, Title of Document. For example, a quote from a flyer distributed during an anti-New York Plan protest archived at James Haughton Papers would be cited as: *JH, 11/5, Anti-New York Plan Protest Flyer***.** A weekly report from the New Orleans local OFCC archived at the OFCC Records at NARA would be cited as: *OFCC, 7/Logs, New Orleans Field Office Reports.*

I tried to provide detailed information such as dates, authors, recipients, and references for all cited records. However, in some cases, this information is missing. For these cases, I tried to provide enough contextual relevant information to explain its value. For example, in some cases, the OFCC Weekly Reports are not dated. In such cases, I provide relevant contextual relevant, for example, for a memo summarizing the different desegregation options in Seattle that was undated and unsigned, the citation looks like this: *OFCC, 8/Reports, Options Paper- Seattle Project in "1970 Reports."*

To triangulate the data from the archives, I interviewed former members of the United Construction Workers Association in Seattle, as well as Department of Justice staffers during the *Ironworkers* litigation. Further, staffers at the District Court in Seattle were also interviewed. I conducted all but one of the interviews during Winter 2016. Those interviews are cited as Last Name, Interview. For example, excerpts from my interview with Frank Petramalo, one of the main DOJ attorneys for *Ironworkers*, would be cited as: *Petramalo, Interview.* Sadly, Tyree Scott had passed away before I started this project, and for his perspective, I relied on an interview conducted by Dr. Michael McCann in 1998.

1.4 Overview

This dissertation proceeds as follows. In Chapter 2, I discuss the scholarly debate around activists and organizers' mobilization of litigation strategies to pursue social change. At the end of the chapter, I also offer my theoretical framework to my central question and how they address long-standing limitations in the literature. In Chapter 3, I examine the socio-legal and political environment of early Title VII enforcement. I focus on the executive and legislative attempts to implement Title VII-based affirmative action programs. I discuss the most widely known program—the Philadelphia Plan—and highly lauded (at the time) model program of the Chicago Plan to show how the inherent limitations of non-litigation-based strategies were due to: (1) the underlying political process making administrative intervention politically undesirable or fraught with political stonewalling and interference; and (2) rights claiming relying on new, poorly defined rights.

Chapters 4 and 5 follow this discussion by highlighting two other affirmative action plans based on Title VII that stemmed not from executive or legislative actions but from the courts. In Chapter 4, I discuss the Seattle case, *United States v. Local 86, International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers (315 F.Supp. 1202 (W.D. Wash. 1970),* hereinafter *Ironworkers)*, and the United Construction Workers Association (UCWA), the civil rights organization that shepherd it through the courts. I primarily focus on the value and utility of legal tactics to the UCWA, an organization of Black construction workers in Seattle fighting for the desegregation of construction trade unions, and how that organization mobilized the law to enact social change. By strategically pursuing litigation strategies, influencing the statutory interpretation of Title VII to better address their experience of discrimination, and crafting new opportunities from the legal victory to desegregate Seattle construction trades, the UCWA secured the role of an official, court-authorized enforcement mechanism. *Ironworkers* was the most successful affirmative action plan in Seattle and inspired Black workers all over the country to pursue similar strategies.

Similarly, Chapter 5 focuses on the New York's case *Rios et al. v. Enterprise Association Steamfitters* (360 F.Supp. 979 (SDNY. 1973), *aff'd* in 520 F.2d 352 (2nd Cir.1975), hereinafter *Rios*) case and its plaintiff, the Black workers' organization Harlem Fight Back. Through its legal victory in *Rios*, Harlem Fight Back effectively became the enforcement mechanism for the court-ordered affirmative action plan. Harlem Fight Back's success in desegregating Local 26 is surprising, considering that multiple coexisting desegregation plans in New York could not affect the entrenched labor power-structure and its entanglement with city, state, and national politics.

In both cases, my analysis integrates legal mobilization and social movement literature, highlighting the benefits of litigation strategies to social movements, as well as the transformative potential of litigation when it empowers those whose rights were violated to define their rights, identify its violation, and enforce the corrective remedies. By positioning themselves informally as the enforcement mechanism for the court order, both organizations became well-known locally by workers seeking job opportunities and contractors attempting to comply with the affirmative action plan. This reputation and local legitimacy made these informal enforcers well-positioned to become formal enforcers.

In these cases, I show that activists and organizers seeking social change continue to pursue litigation strategies and seek judicial intervention, even though (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language, almost always inadequate to describe social ills; and (3) even when there is a legal victory, legal results are uncertain because of the judicial branch's lack of enforcement power. Despite these odds, these activists and organizers still pursue this strategy because when the underlying political process makes administrative intervention politically undesirable or fraught with political stonewalling/interference and rights claiming relies on new, poorly defined rights, mobilizing the law was possibly the only viable option to achieve social change.

While these conditions are necessary, they are insufficient as the actual decision to act lies with the organizers themselves and their internal capacity. Though organizers and activists are aware of the inherent disadvantages in legal mobilization, shifting to judiciary intervention allows activists and organizers to (1) move their reform past destructive political stalemate, (2) define the social and political ill they seek to reform in their terms, and (3) be the ones to enforce the judicial remedy that they helped define.

In Chapter 6, I compare and contrast the Seattle and New York cases. This comparative analysis allows me to draw out the different and unique aspects of the cases that made legal mobilization a useful tool for social change. I conclude by urging scholars to focus on the advocates who conceived and initiated legal actions, and not only on formal legal decision-makers. By doing so, they may account for the nuanced and complex reasons advocates might engage in litigation in their studies. Future scholars should continue to problematize the "can courts create social change" debate by analyzing courts as political actors, focusing on organizers and plaintiffs, and by investigating how organizers view the courts in relation to the other two branches to better understand why organizers continue to pursue litigation to achieve social change. By shifting the scholarly debate away from the single perfect-intervention approach that both denigrates organizers' choices and oversimplifies social issues, my dissertation demonstrates the value of focusing on the nuanced choices that organizers and activists must make in creating comprehensive movement strategies to affect social change.

Chapter 2. LITERATURE REVIEW & THEORETICAL FRAMEWORK

Whether courts produce or inhibit social change is a recurrent and heated debate in socio-legal and legal scholarship, one that centers on organizers' and activists' choices to pursue litigation strategies and legal remedies to address social problems. For example, Malcolm Feeley and Edward Rubin argue that, yes, pursuing litigation strategies was an effective choice in the case of prison reform (1992). On environmental and welfare reform, the answer seems to be maybe (Melnick 1983). These divergent answers may also be accounted for based on scholars' methodological approaches, the conceptualization of success, and who counts as legal agents (Klarman 2005; McCann 1994; Melnick 1983, 1994; Pinello 2006; Rosenberg 2008). For example, in *A Hollow Hope*, Gerald Rosenberg, looking at major civil rights cases and the Supreme Court, argued that pursuing change through legal venues is a misguided and wasteful choice (Rosenberg 2008). His critics, looking beyond canonical Supreme Court cases, took a more nuanced approach to litigation strategy and social movements and argued that court rulings can bring about particular and specific changes in public policy (McCann 1994; Pinello 2006). I categorize the debate as stemming from two separate methodological approaches: (1) the litigation of politics approach and (2) the legal mobilization approach.

In this chapter, I describe the two general approaches. Then, I argue that the second approach, the legal mobilization approach, is the most appropriate approach to address why organizers and activists continue to pursue courts and legal remedies to achieve social change. Lastly, I describe the analytical framework used in this dissertation, the movement legal remedies approach, which is an expansion of the legal mobilization approach.

2.1 THE LITIGATION OF POLITICS APPROACH

In *The Hollow Hope*, Rosenberg's query about whether litigation can lead to social change concluded that "courts can almost never be effective producers of significant social reform" (2008, 338). Rosenberg arrived at this conclusion by analyzing several of the Supreme Court's most important constitutional cases, such as *Brown v. Board of Education* (1953) and *Roe v. Wade* (1973). His analysis found that due to lack of judicial independence, lack of implementation powers, and inability to develop appropriate social policies, courts cannot be effective producers of significant social reform. He found that legal victories have had no direct (changes in institutional behavior) or indirect (changes in social attitudes and political behavior) effect on activists' attempts at social reform. Therefore, he argued that legal mobilization "seldom bring[s] reform any closer" and often "strengthens the opponents of such change" (2008, 343-342). Armed with this evidence, Rosenberg ended with a call to action, arguing that organizers would be more successful at affecting social change if they sought more democratic and political means of mobilizing citizens rather than expending time and resources on counterproductive litigation (2008, 343).

Furthermore, Rosenberg argued that courts are not only unable to create social change but also become all-consuming of social movements' time and resources. He asserted that one of the main problems with litigating for social change is that it can serve as "flypaper" for social movements. The promise of legal change will seduce social movements—a promise Rosenberg argued is hollow—and activists will direct all of their labor, financial, and organizational resources into courtroom battles (2008, 427).

Likewise, in *Brown and Lawrence (*and *Goodridge),* Klarman (2005) argued that *Brown* might have produced more harm than benefit for the Civil Rights Movement. He posited that while *Brown* produced very little school desegregation in the South, it inspired white southerners to launch massive resistance campaigns that proved largely successful. Further, "*Brown* retarded progressive racial reform in the South. . . . *Brown* also retarded the pace of university desegregation. . . . The post-*Brown* backlash in the South also reversed progress in desegregating sporting competitions, including minor league baseball and intercollegiate football and basketball. Even minor interracial courtesies and interactions uncontroversial before 1954 often had to be suspended in the post-Brown racial hysteria" (454). This "post-*Brown* racial hysteria led to 'a powerful direct-action protest movement' in the South that was brutally violent" (458).

Turning to a more contemporary mobilization of the law for social change, marriage equality, Klarman argued that *Goodridge v. Dept. of Public Health*'s most significant consequence "may have been the political backlash that it inspired. By outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance" (2005, 482). Interpreting *Goodridge* as ultimately a loss for same-sex marriage, Klarman concluded that "marriage rights will now be harder to secure for gays and lesbians" (2005, 474). Even while acknowledging that "*Lawrence* and, to an even greater extent *Goodridge*, have dramatically raised the salience of gay-rights issues," he ultimately concluded that "the more people focus on [same-sex marriage], the less they support it" (2005, 474). Finally, he declared, "judicially mandated social reform may mobilize greater resistance than change accomplished through legislatures or with the acquiescence of other democratically operated institutions" (2005, 475).

Reaching a similar conclusion through a different methodological approach, Silverstein (2009) argued that the litigation of politics has been ultimately destructive and rarely efficacious in delivering the goals sought by those who pressed for judicial intervention on social and political issues. “Law,” Silverstein argued, “has a luster, a power, an appeal, an allure” (2009. 25). Therefore, he observed that law is dangerously alluring as a political shortcut, but it does not offer an exit from “normal politics and the hard work of changing minds” (2009. 270). While Silverstein’s interbranch analysis is one of the most nuanced in placing the court in relation to the other branches of government, his engagement with activists and organizers is still limited. Silverstein argued that activists and organizers can become distracted by the allure of law and end up relying on courts exclusively because they seek “total justice.” Further, he argued that organizers and activists that pursue legal intervention are trying to “sidestep the longer, harder, process of the traditional political arts” (Silverstein 2009, 270).

In his foundational book *Adversarial Legalism* (2001), Kagan concluded that the litigation of politics has had a detrimental effect on the US political system. He analyzed the development, as well as the advantages and disadvantages of the American emphasis on litigation in policy-making and administrative processes. Using the term “adversarial legalism” to describe the American legal and policy-making systems, he explained how these systems are dominated by “costly, stressful, and inefficient litigation fostered by politicized lawyers who rely on detailed prescriptive legal rules and formal processes of contestation” (2001, 3). Kagan shared concern for plaintiffs who make “outrageous” demands for damages and notes how adversarial legalism adds the court as another player, sometimes a veto player, into policy-making. According to Kagan, this veto player, who could only be part of the process during litigation, unduly complicates governing undermining the administrative state and its agents (2001, 240–241). While Kagan recognized that there are advantages to adversarial legalism, he ultimately concluded that its negative impact on policy-making outweighs its benefits. His solution is the concentration of power in government authority by shifting power from lawyers and plaintiffs to bureaucrats.

There are several shortcomings in the litigation of politics approach, also known as the judicialization of politics approach. First, scholars focus on courts and judges as the primary and deciding actors and on how judicial review can create social change. Rosenberg and Klarman focus on judges exercising judicial review as the main mechanism for social change through litigation (Rosenberg 2008; Klarman 2005). Similarly, Kagan also focuses on judges. He focuses on judges' lack of subject-matter expertise, contrasting them with expert administrators in executive agencies (Kagan 2001). Silverstein's interbranch analysis expands analysis beyond judges but only to other state agents (Silverstein 2009). Unfortunately, this concern with judges and judicial review often leads to ignoring the complex reasons plaintiffs and organizers might initiate legal action. It also overlooks activists' and organizers' roles as legal actors in determining legal strategy, influencing legal interpretation, and enforcing legal remedies.

Second, these scholars assume activists' goals and desires when pursuing litigation strategies. Oftentimes, the assumption is that the only goal of litigation strategies is to win a case, ignoring the nuanced and complex ways advocates might use litigation for other purposes. While critiquing activists and organizers for seeking the judicial system as the one avenue for social change or seeking "total justice," scholars in the litigation-focused school neglect myriad ways of pursuing change. In doing so, they end up advocating for a single perfect-intervention — which in their view is definitely not the courts. Except for Silverstein, the litigation of politics scholars also often analyze the courts in an institutional vacuum, overlooking its place in the three-pronged American political system. The best example of this shortcoming is Rosenberg's analysis of *Brown*'s pre-Civil Rights Act effects. By arbitrarily scoping *Brown*'s impact to pre-

Civil Rights Act years, Rosenberg ignored how *Brown* was a source of inspiration for the Civil Rights Act, and its school desegregation declarations were part of the legislative debate surrounding the bill (Rosenberg 2008). Further, by comparing *Brown* and judicial intervention, and the Civil Rights Act and legislative intervention as an either/or paradigm, Rosenberg neglected to account for the fact the Civil Rights Act, as written, required continuous judicial action to define and scope its meaning and ultimate impact (Gould 1977; Graham 1990). These shortcomings call out for a different approach, one less focused on judges and judicial review, and a different way to ask the question of whether courts can create social change.

However, in answering "no" to the pithy "can courts create change" question, these scholars all identified courts' undeniable shortcomings as venues for change. As Kagan (2001) and Rosenberg explain, legal procedures are lengthy, costly, and, as best illustrated by Silverstein, can be consuming of movement resources (Klarman 2005; Rosenberg 2008; Silverstein 2009). Further, legal language is ambiguous, with Rosenberg's focus on the "all deliberate speed" in *Brown* as a notable example of this pitfall for movements (2008). Furthermore, legal results are uncertain because of the judicial branch's lack of enforcement power, an issue that Kagan highlighted as one of the three attributes of adversarial legalism: the problem of the judiciary branch fragmented hierarchy (2001). These undeniable shortcomings are acknowledged and addressed in the legal mobilization literature, a school of thought developed in response to the litigation of politics school.

2.2 The Legal Mobilization Approach

The legal mobilization framework arose in response to scholarship emphasizing the limitations of judicial action, its inherent conservatism, costliness, and ability to divert movements from direct action tactics that might prove more successful. Legal mobilization expands beyond studies that confine "law" to lawyers, judges, and courtrooms and evaluate successes and failures narrowly by looking exclusively at the judicial decision and the immediate and direct responses to that decision.

Legal mobilization scholars conceptualize "law" as not only litigation but also changing rights discourses that alter organizational opportunities, institutional resources, and grassroots strategies for contentious politics. As Zemans explained, "[T]he law is… mobilized when a desire or a want is translated into a demand as an assertion of rights" (1983, 77). Building on Scheingold's work (1974), McCann's approach to law and social change outlined the foundation of legal mobilization scholarship (1994). Developing Scheingold's idea of law as "resources" available for use in mobilizing disadvantaged groups, McCann developed a "bottom-up approach" to explore how litigation strategies can be used in conjunction with other forms of activism, such as grassroots protest activities, lobbying, and media attention. Both McCann and Scheingold argued that although the law has significant limitations as a mechanism for delivering social change, it can be a compelling and legitimate way to challenge the status quo. McCann encouraged scholars to engage in more careful examinations of legal actions by social movements and better understand how litigation can complement and compete with other movement tactics (1994).

McCann demonstrated how activists working on behalf of disadvantaged groups commonly use legal rights and law as resources to advance their causes, sometimes with considerable effect (1994). For instance, McCann showed that pay equity activists used rights claims to recruit and build local social movements as leverage to compel concessions from employers and as bargaining tools during the implementation of employers' pay equity policies. Significantly, he observed that ambiguous court decisions, and even hostile court decisions, served as potent resources for activists who creatively reinterpreted those decisions in the service of their interests. McCann demarcated four general stages of legal mobilization: (1) movement-building, (2) compelling formal changes, (3) controlling reform, and (4) transformative legacy. These four stages are essential when explaining the broad reach of legal mobilization as opposed to the litigation approach: “what is gained by such a developmental approach is the recognition that legal mobilization may contribute in different ways and with varying impacts at different points in ongoing struggles” (McCann 1994, 11).

Using the legal mobilization framework and focusing on how litigation and legal decisions can be resources for social movements, Pinello (2006) argued that “*Goodridge* had a profound inspirational effect for the marriage movement, among elites and the grassroots, at home and beyond (190).” Pinello explored litigation, state and federal courts, and the growing LGBTQ movement in *America’s Struggle for Same-Sex Marriage*. He argued that his findings “diminish the perception that courts are hollow hopes for significant social reform. With nearly all the other states and national policy-makers at odds with its goal, the Massachusetts Supreme Judicial Court nonetheless achieved singular success in expanding the ambit of who receives the benefits of getting married in America, inspiring political elites elsewhere in the country to follow suit, and in mobilizing grassroots supporters to entrench their legal victory politically” (2006, 192). In his analysis of LGBTQ organizers’ legal mobilization, Pinello went beyond the legal victory and investigated the symbolic and indirect effects of the use of litigation strategies to pursue social change. His focus was not on how magically and instantly the court changed society’s views of same-sex marriage but how those victories were resources for the LGBTQ movement to create that change themselves.

This view of new laws, litigation efforts, and legal decisions as legal and political resources is not all that sociolegal scholars borrowed from the social movement literature. Past social movement scholars argued that individuals mobilized for protest due to common interests and various kinds of dissatisfaction. However, as Olson (1971) argued, if everyone had the same interests, it would simply be easier and safer to be a "free rider" than a protestor. In considering the free-rider problem, Olson argued that all collective action was individually irrational. People would not become involved unless they were coerced or provided with direct rewards for joining.

Following Olson, social movement scholars have sought to better understand what motivates protest activities: what are the factors that make the decision to participate in collective action rational? Some scholars have focused on "resource mobilization" and whether movement entrepreneurs can mobilize group resources via organizations (McCarthy and Zald 1977). Others have focused on framing of shared dissatisfactions and argue that meanings do not emerge automatically out of pre-existing structural arrangements, unanticipated events, or long-held ideologies, but that the process of getting people to align with a particular diagnosis collectively is a purposeful act by movement entrepreneurs (Benford and Snow 2000; Gamson 1975; Snow et al. 1986).

Others, however, have focused on the idea that political opportunities matter in catalyzing individuals to action. Initially developed by Eisinger (1973), then expanded upon by Tilly (1978), the central point of the "political opportunity" framework is that exogenous factors can facilitate or constrain prospects for mobilization (Meyer and Minkoff 2004, 1457). As a result, this theory emphasizes that political opportunities shape activists' decision-making processes about when and how to mobilize. For example, scholars have argued that increased access to state, the nature of political cleavages (including divisions within the elite) (Tarrow 1998), state capacity and strength (high or low) (Amenta et al. 1994; Kitschelt 1986), alliance structures (Tarrow 1989), perceived threat (Goldstone and Useem 1998; Goodwin 2001; Loveman 1998; Rasler 1996), and more inform the likelihood of a movement's success and the repertoires of contention that a movement draws upon.

In this study, I build on the political opportunities framework by suggesting that new laws can be seen as political opportunities that galvanize actors seeking to obtain rights into action. Additionally, the lack of enforcement mechanisms in Title VII also provides social actors with new political opportunities catalyzing them into action. In this way, theories of political opportunities can better help us understand the processes of legal mobilization. Following Zemans' argument that legal mobilization is "a form of political activity by which the citizenry uses public authority on its own behalf," this dissertation examines how social movements' mobilization of the law can serve as an effective enforcement mechanism that best highlights not only the general benefits of adversarial legalism but also focuses on the benefits that litigation can bring to social movements (1983, 690). Social movements and private actors, through legal mobilization, are able to yield the power of the state against rights violators, thus becoming "state actors themselves" (1983, 690).

While scholars following the legal mobilization approach are more confident of litigation strategies' possible effect on social issues, most warn that law and legal mobilization are still only tools and resources. Legal mobilization can open up new possibilities for activists. However, this happens within the confines of law and legality. For example, McCann highlighted this problem in *Rights at Work*, when he explained that the "primary project of the legal mobilization model . . . is to analyze the constitutive role of legal rights both as a strategic resource and as a constraint for collective efforts" (1994, 7). Similarly, in *Colonizing Hawai'i*, Merry explained that "as an ideology, law contains both elements of domination and the seeds of resistance" (2000). While more hopeful of the potential to create change through litigation strategies, legal mobilization scholars still caution that to take advantage of the legal system and its remedies, organizers will have to operate within the judicial systems' domain of influence. In pursuing a coherent legal strategy, organizers will be required to make trade-offs between the true nature of their social problem and harms that are recognizable to the courts.

On the issue of trade-offs, and at the intersection of legal mobilization and labor issues, Frymer (2008) and Goluboff (2010) both recognized the victories that can emerge from legal mobilization, though they also make note of its limitations. In *Black and Blue* (2008), Frymer argued that *Brown* did implement a particular type of social change: it led to more integrated labor unions. In *The Lost Promise of Civil Rights* (2010), Goluboff acknowledges that courts did articulate more rights for Blacks and, through segregation jurisprudence, created a powerful tool against individual discrimination. However, there were also "failures in victories" (Frymer 2008). In Frymer's case, due to the bifurcated institutional arrangement of class and race in the American legal system, systematic inequality, as it related to the intersection of race and class, has never been dealt with by the courts. By maintaining these two issues (class and race) as separate issues, the law has continued to replicate these systemic injustices. Therefore, though legal mobilization led to a positive outcome, it was an outcome limited by law itself. Likewise, Goluboff argued that due to the individual rights claiming precedent in *Brown*, courts funneled other civil rights claims into an individual rights-based litigation framework, foreclosing the ability to deal with the issue of inequality more systematically. Again, while the court provided a possible solution to the issue of inequality, it did so in its language and with its tools, thereby foreclosing other approaches.

Legal mobilization scholars are concerned with understanding the consequences of pursuing social change through litigation strategies. They acknowledge that yes, (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language; and (3) legal results are uncertain. However, legal mobilization, and legal victories and losses, can contribute both objectively and symbolically to social movements seeking social and political change (NeJaime 2011). Further, while legal mobilization reinforces many aspects of social and economic inequality, it also has the capacity to empower those who are traditionally disadvantaged.

In the next section, I provide a detailed history of the development of the Civil Rights Act and Title VII to contextualize this study within a legal mobilization framework. This background history includes the debates around the Civil Rights Act's passage and the important unintended consequences of the fragmented enforcement mechanism ultimately agreed upon. I conclude with an overview of my theoretical framework, the movement legal remedies framework, that incorporates the previously discussed debates into the legal mobilization of Title VII.

2.3 Historical & Theoretical Framework

In its first century, the early American federal administrative state was organized primarily around common law actions by its citizens (Horwitz 1977). Little-to-no state bureaucratic apparatus existed. In the late nineteenth century, legislatures began creating railroad commissions and other regulatory agencies to deal with the consequences of industrialization. These agencies were required to conduct trial-like adjudicatory proceedings before adopting regulatory requirements and followed a command-and-control model of regulation under which the government was the primary investigator, prosecutor, and enforcer of federal law. Agencies constructed during this time were given broad powers through open-ended statutes. These powerful agencies greatly expanded the reach and capacity of the US regulatory administrative state. The high-point of this bureaucratic state building was President Roosevelt's creation of an "alphabet soup" of regulatory agencies in the 1930s (Stewart 1975).

However, in the 1960s, there was a move away from legislatures granting broad administrative powers to regulatory agencies. In particular, during the debate over the Civil Rights Act of 1964, a push was made to halt top-down bureaucratic state-building in social policy. Individual enforcement became an alternative for state policy administration, and instead of broad powers from open-ended legislation, enforcement became based mainly on a private right to sue. This model was reproduced in many other subsequent laws, including the Fair Housing Act of 1968 and the National Environmental Policy Act of 1969 (Farhang 2010).

The Civil Rights Act of 1964 was a revolutionary moment in American political history. The act prohibited discrimination in employment, education at all levels, and public accommodations. It empowered the federal government to enforce these prohibitions through various administrative, judicial, and financial means. Together with the Voting Rights and Immigration Acts of 1965 and the Open Housing Act of 1968, the Civil Rights Act substantially and fundamentally democratized American institutions and profoundly altered American life. However, the final version of the bill was only a shadow of the original bill.

The first proposal for the Civil Rights Act of 1964 included robust administrative enforcement machinery closely modeled after agencies stemming from New Deal legislation. The EEOC, the federal agency responsible for the enforcement of Title VII of the act, was granted adjudicatory powers and cease-and-desist authority. This centralized bureaucratic enforcement framework embodied the enforcement preferences of civil rights advocates. However, due to conflicts between ideologically antagonistic interests, the EEOC was stripped of all its enforcement powers by the final version of the bill. The EEOC that Congress finally authorized had limited formal powers and was granted neither enforcement power nor the ability to prosecute independently. The agency only had the power to investigate, collect information, and engage in conciliation talks with discriminatory employers. Compliance by employers was voluntary, and if conciliation failed, the plaintiffs could file a private federal lawsuit. At that point, the agency's official role was intended to be complete; therefore, the only formal authority the EEOC had was over a voluntary conciliatory meeting that could be challenged in a court proceeding in which the agency was not an official party (Blumrosen 1993; Graham 1990; Marshall et al. 1978).

The Civil Rights Act was the product of a compromise induced by American political institutions' fractured structure. The compromises necessary to break the longest-ever Senate filibuster were aimed principally not at limiting the act's bold assertion of equal rights but at restricting the mobilization of state power to enforce those rights (Lieberman 2007). Title VII enforcement was divided among government agencies and private litigants. While the EEOC had the power to investigate and conciliate, private litigants could bring suit against employers if no conciliation was possible. Additionally, as initially enacted, Title VII authorized the DOJ to bring lawsuits that allege a "pattern or practice" of discrimination. A pattern or practice of discrimination exists where a company repeatedly and regularly engages in acts prohibited by the statute. Isolated acts of discrimination do not constitute a pattern or practice (*Council 31, American Federation of State, County, and Mun. Employees, AFL-CIO v. Ward* (1992)).

The system of administrative enforcement through private litigation set up by the act was a purposeful move away from administrative enforcement. As Farhang (2010) explained, "The system of individual enforcement was the result of a conscious, explicit rejection of a system of administrative enforcement" (110). Furthermore, reliance on individual enforcement was a purposeful move away from administrative enforcement, long believed to be a more reliable and more effective enforcement framework. It is a plausible reading of the historical record that limiting the effectiveness of enforcement was precisely the purpose of the compromise over Title VII (Graham 1990, 129–32).

It was widely believed this legislative choice of private litigation over administrative power was intended to render Title VII's enforcement provisions "virtually meaningless" (Hill 1997). An observer of the legislative process that produced Title VII lamented that "[L]etting the complainant sue was one of the original models of anti-discrimination enforcement . . . and it has never worked" (Sovern 1966, 141). Though Title VII of the Civil Rights Act was a bold congressional statement about the economic rights of Black Americans and other disadvantaged groups, it also created a purposefully weak agency. Title VII's bold equality statement was watered down and made largely symbolic. As one leading practitioner of employment discrimination law put it, the prevailing attitude toward Title VII, as finally enacted, was that the civil rights movement had suffered a defeat (Sovern 1966). It is commonplace to say that the newly created political institution was intended to be ineffective (Hill 1997).

Kagan explains that the development of "adversarial legalism" stems from the fact that the American administrative state is too weak to meet the demands of an increasingly complicated society, and, therefore, courts become an alternate way for implementing public policy (2001). As it pertains to Title VII, the weak administrative agency that Kagan describes was purposefully created. It was a legislative choice to rely on private litigants and the courts to enforce Title VII. This choice was made by the bill's opponents to ensure it would be unenforceable, while it was deemed a necessary compromise among supporters of the bill.

Employment discrimination litigation exhibits all the disadvantages highlighted by the litigation of politics scholars (Kagan 2001; Rosenberg 2008). In *Employment Discrimination Law*, a seminal work on employment discrimination often assigned in law schools, Rutherglen critiques Title VII's enforcement framework (2007). After explaining that Title VII establishes an enforcement scheme that is divided into three stages (state or local administrative proceedings; investigation and conciliation by the Equal Employment Opportunity Commission (EEOC); and litigation by private individuals, or by the EEOC or the Attorney General), Rutherglen argues that this "three-stage scheme is inherently more complicated than any simple mechanism for purely administrative or judicial enforcement" (2007, 157). He further argued that as a result, Title VII's legal doctrine has become too complex, making litigation of employment discrimination cases highly technical and specialized. Worse, "the doctrinal complexity, moreover, does not point in a single direction but serves a variety of different purposes, some favorable to the plaintiff, others to the defendant" (158). He concludes by stating that due to this complex system of enforcement and the contradictory doctrine it has engendered, employment discrimination cases are often mired in a "multitude of collateral procedural issues" (159).

Title VII litigation is a perfect example of all the shortcomings of legal mobilization as described by litigation of politics scholars (Kagan 2001; Rosenberg 2008). First, it has high transactional costs due to a multitude of collateral procedural issues. Second, it has a lot of uncertainty and ambiguity in its legal language due to the fact that the legal doctrine governing these issues has become ever more complex. Third, it has limited guaranteed rights as Title VII legal doctrine does not point in the direction of a single interpretation. Fourth, it has low levels of judicial independence and implementation power due to the three-stage scheme that is inherently more complicated than any simple mechanism for purely administrative or judicial enforcement. Fifth, there is a need to work through legal experts as its legal doctrine is highly technical and specialized. And sixth, plaintiffs tend to lose control over their legal narrative control as many Title VII cases end up sidetracked from the underlying harm into collateral procedural issues.

However, despite these limitations, Title VII soon became the basis for a strong, arguably effective, program of anti-discrimination enforcement. As Farhang (2010) suggests, the debate over the EEOC's authority is instructive not only because it illustrates the New Deal political divide on administrative power but also because the participants were so wrong about the consequences of these arrangements for civil rights. Through the sophisticated use of legal processes, civil rights groups found themselves at the leading edge of Title VII enforcement, wielding the weapon of private litigation to make what they judged to be new, meaningful, and gratifying inroads into labor markets previously closed to Black workers (Farhang 2010). By focusing on Title VII's potential to address systemic discrimination (disparate impact), neither endorsed nor foreclosed by legislative language, civil rights organizers were able to radically expand what Title VII could address in terms of legal actions and remedies. The radical opportunities provided through the legal mobilization of racial discrimination claims through Title VII litigation were so transformative that some preeminent legal scholars of the time argued that "the civil rights movement should have welcomed the court enforcement, while those who wished to minimize the impact of the law should have preferred an administrative agency with seemingly broad powers which could be ‘captured’ by the interest is set out to regulate” (Blumrosen 1971).

The Civil Rights Act was an institutional innovation, yet, its creation left many questions unanswered, including what practices counted as discriminatory conduct, what were the appropriate remedies under Title VII, and how, in light of a toothless EEOC, the law would be enforced. These questions required plaintiffs to creatively mobilize the law and for the courts to recognize new and, at times, unanticipated causes for action under Title VII and construct creative and flexible remedies that could be enforced without a formal enforcement agency. Title VII’s weaknesses and obscurities created new legal and political opportunities that were effectively leveraged by social movements and courts. It is in this context that Black workers organized to demand the enforcement of this new federal discrimination law.

For this project, I investigate how Black workers mobilized the law following the passage of Title VII of the Civil Rights Act of 1964. Title VII was not self-enforcing or even particularly actionable as drafted; however, it was the most comprehensive law passed to address discrimination in economic opportunities, and organizers were committed to ensuring that it was enforced. One of the mechanisms available to organizers was legal mobilization, and through judicial interpretation, they were able to determine the meaning of Title VII and enforce its remedies.

This framework, the movement legal remedies framework, centers the analysis on advocates whose harm is at the root of the investigated legal harm and shows the transformative potential of litigation when it empowers those whose rights were violated to define and correct those violations. It moves away from the archetype case of the court-focused analysis of judicial review leading to social change into a more complex analysis of organizers' strategic reasons to pursue litigation strategies and legal mobilizations' multi-faceted impact on social dynamics.

While legal procedures are lengthy and costly, legal claiming is based on ambiguous language, and courts have no enforcement powers, early Civil Rights Act era Title VII's potential was deeply rooted in how political and legal actors would interpret the new law. As the underlying political process made administrative intervention politically fraught, mobilizing the law was the only viable way organizers could affect the meaning and consequence of this law. This shift to judicial intervention allowed civil rights organizers to move their agenda past a destructive political environment that was comfortable keeping Title VII purely symbolic, to define the social harm they sought to reform in meaningful and actionable terms, and to be the ones to enforce the judicial interpretation and remedy they helped shape.

In this dissertation, I build on the legal mobilization literature, acknowledging the undeniable shortcomings in court-mandated social change and showing how social actors are both aware and cautious of these limitations. I show that this awareness allows organizers to weaponize judicial intervention by defining the law meant to correct the social ill and the transformational interventions that would have been otherwise ineffective in pursuing social change into instruments to attack the underlying social structure that gave rise to their injury.

Chapter 3. THE MODEL CASES- PHILADELPHIA & CHICAGO

"This site was closed by the community," read signs at one of the many construction projects closed during the summer of 1969 by The Blackstone Nation, one of Chicago's youth gangs (Gould 1977, 303, ft. 19). The Blackstone Nation had spent most of the summer of 1969 chasing white workers from construction sites. They would target projects in minority neighborhoods where contractors had hired construction trade unions with exclusionary practices against Black workers. The actions by The Blackstone Nation became part of a movement when, on July 22, 1969, members of the Coalition for United Community Action (CUCA)—a civil rights organization composed of community and church groups, as well as local gangs—invaded the offices of the Chicago and Cook County Building Trades Council, demanding that Chicago construction trade unions stop their exclusionary practices against Black construction workers. CUCA continued to close down sites and demand the enforcement of Title VII through the summer. One of its most notable protests was that on September 22, 1969, just as the new Philadelphia Plan was being debated and approved, when over 4,000 Black activists and their allies held a protest in the Civil Center Plaza in Chicago. This direct action protested the exclusion of black workers from Chicago construction trade unions. Though the protest started peacefully, as the crowd moved to close down streets, police responded, leading to violent clashes between police and protesters (Gould 1977, 303).

These incidents are directly responsible for the successful negotiations through the fall between the City of Chicago, the Chicago and Cook County Building Trades Council, and Black civil rights organizations; it is also responsible for the affirmative action plan, the Chicago Plan, announced in early 1970 (Gould 1977; Hill 1974). This first plan failed. Continued and unrelenting direct action led to a new, better plan in 1972. This second plan had stronger public statement support from city, state, and federal government and embedded a minority group into its enforcement mechanism. However, this plan also failed (Gould 1977, 306; Hill 1974, 75). More protests, more lobbying of city, state, and federal governments led to a third Chicago Plan in early 1974. This third plan was no longer a voluntary plan but one imposed by the federal government (Hill 1974, 77). This new plan, unlike the previous two, included annual goals for a five-year period; however, like the previous two plans, it still relied on “good faith efforts” from labor unions and contractors. “The Chicago Plan was the first of the hometown plans, and it set a pattern of failure that the Department of Labor was to repeat in many other cities” (Hill 1974, 78). Despite the promise of a voluntary plan based on administrative processes, state mediation, and mutual trust and compromise, the Chicago Hometown Plan never worked. I argue that it and the Philadelphia Plan—the predecessor it was designed to correct for—failed because the change they advocated and tried to implement left the underlying entrenched power dynamics untouched.

In the last chapter, I outlined the historical background and contextual framework relevant to understanding why social change activists and organizers pursue litigation strategies even though the costs are high and success rates low. I also outlined the current literature debate and developed the movement legal remedies theoretical framework, which I use to investigate this question. In this chapter, I lay out the historical foundation for my argument. I posit that litigation strategies become attractive movement options when (1) the underlying political process makes administrative intervention politically undesirable or fraught with political stonewalling or interference; and (2) rights claiming rely on new, poorly defined rights. When there are entrenched limitations in the exercising of state authority, litigation strategies could provide an alternative and creative way to create social change.

In the following pages, I show how desegregation efforts following the enactment of the Civil Rights Act were too politically fraught, ill-defined, and poorly administered to succeed. In doing so, I detail how the model examples of affirmative action in and desegregation of the construction industry—Philadelphia and Chicago—failed to achieve the transformational change that activists and organizers sought when they fought for change.

However, from these failures, organizers and activists learned and evolved their tactics and demands, eventually pursuing the courts as an avenue for change. Activists' shift from seeking administrative to seeking judiciary intervention allowed them (1) to move the desegregation discussion away from the liberal-labor political coalition, (2) to effectively define what the workers themselves saw as discrimination and the appropriate way to address it, and (3) be the ones to enforce the judicial remedy that they helped define.

3.1 Philadelphia Plan

As the first highly visible federal government affirmative action initiative in the wake of the Civil Rights Act, the Philadelphia Plan set a course for employment policy, affirmative action and desegregation efforts, and race politics for years to come (Blumrosen 1971; Graham 1990; Pedriana and Stryker 1997). The plan is often the centerpiece of any discussion about the early Civil Rights Act era and often permeates even contemporary discussions on desegregation and affirmative action.

3.1.1 *The Original Plan*

Like many American cities, Philadelphia lost manufacturing jobs during the 1950s and early 1960s. At the same time, the construction industry experienced exponential growth, as federal urban renewal programs financed both public and private construction projects. However, like in most American cities, the economic boom from construction jobs was exclusive to white construction workers as Black workers had limited access to skilled employment in the industry. As McKee describes in *The Problem of Jobs: Liberalism, Race, and Deindustrialization in Philadelphia* (2008), "[B]uilding-trade unions had long relied on closed recruiting and apprenticeship systems based on family and neighborhood networks. Labor agreements with contractors allowed the unions to control the training and hiring process for the industry, and both job openings and spots in apprenticeship programs went almost entirely to the relatives and close acquaintances of union members" (213). This combination of declining manufacturing opportunities and explosive, yet exclusive, growth in the construction industry culminated in protests around the city of Philadelphia.

To address this issue, the Office of Federal Contract Compliance (OFCC) developed the Philadelphia Pre-Award Plan. Through the authority granted by the Civil Rights Act of 1964 and Executive Order 11246, the OFCC developed government-wide compliance programs for the construction industry in particular labor-market areas. Its first significant intervention in the construction industry was the Philadelphia Pre-Award Plan (Graham 1990).

Under this plan, the apparent low bidder on each federally funded contract was required to submit an acceptable affirmative action program for the employment of minority workers before it could be awarded the contract. However, "[T]he Plan did not outline definite minimum requirements for minority employment, nor did it detail the criteria by which minority employment would be determined. If a low bidder's proposed program was found unacceptable, the Plan provided for a pre-award conference to negotiate an acceptable revision" (Schuwerk 1972, 739). This program created considerable dissatisfaction in the construction industry, both in Philadelphia and at the national level (Schuwerk, 739).

One way the OFCC tried to quiet the Philadelphia construction industry's fears was by delegating the actual development of the plan to local authorities. On November 30, 1967, the Federal Executive Board (FEB) for the Philadelphia area began requiring affirmative action plans from contractors in that city. The Philadelphia Plan applied to all federal contracts of more than $500,000. It required that low-bidding contractors submit hiring plans indicating how they would ensure there was a "representative number" of minorities "in all trades on the job and in all phases of the work" (Graham 1990, 285). In order to bypass Title VII's anti-quota language, these goals were defined as targets established in post-bid discussions between contractors, the regional federal agency offering the contract, and the FEB Contract Compliance Committee. Commitment to that affirmative action program would then subject the low-bidder to on-the-job compliance reviews (Graham 1990, 285–89).

Members of Congress, employer groups, and associations and labor organizations, including the AFL-CIO, vehemently denounced the Philadelphia Pre-Award Plan. Critics argued that not only did it violate contract law due to its new required post-bid request, but it also violated Title VII by introducing race as a factor in employment considerations, a practice specifically outlawed by Section 703 of Title VII of the Civil Rights Act (Graham 1990; Schuwerk 137; Stryker and Pedriana 1997). By the end of 1968, Comptroller General Elmer Staats ruled that the plan violated government procurement rules and was illegal. Staats argued that all contractor duties must be made explicit before the opening of competitive bids. However, under the plan's pre-award system, which failed to say how contractors should determine manning tables, acceptable affirmative action plans were negotiated after bidding began. Choosing to avoid the political backlash and the protracted legal battle that would follow, the

Johnson Department of Labor withdrew the Philadelphia Pre-Award plan (Stryker and Pedriana, 1997, 655).

The Johnson administration had walked a political tightrope through the entire life of the Pre-Award Plan. Since Democratic Party success rested on electoral support from both unions and Black voters, the administration tried to satisfy minority demands for jobs without angering organized labor. Initially, this concern had delayed the enforcement of EO 11246. Subsequently, it kept the OFCC from delineating what affirmative action duties were required of contractors (Stryker and Pedriana, 1997, 654). By allowing Staats to kill the Pre-Award Plan on a contract law technicality, the Johnson administration was able to avoid the debate on the more explosive issue of race-conscious hiring (Stryker and Pedriana 1997, 655).

3.1.2 *The Revised Plan*

Racial turmoil due to job discrimination in federal construction contracts only increased in the post-Pre-Award Plan years. By 1969, many American cities were experiencing social, political, and economic unrest protests and organized direct actions demanding that discrimination in the construction industry be addressed. Worried about threats of further disorder, the Nixon administration decided to revive the Philadelphia Plan (Graham 1990; Skrentny 1996; Stryker and Pedriana 1997). The Nixon administration had two major reasons to revive the Philadelphia Plan. First, it was politically advantageous as it enabled Nixon to counterbalance his anti-busing initiatives with an appeal to minority voters. Second, the Philadelphia Plan created a political dilemma for the Democratic party as it drove a wedge between two Democrat constituencies: labor unions and civil rights groups (Graham 1990, 325–35; Stryker and Pedriana 1997, 656).

The Nixon administration's political motivations in reviving the Philadelphia Plan have been the subject of extensive debates. In *The Civil Rights Era* (1990), Hugh Davis Graham discusses Nixon and his Republican supporters' involvement in the Philadelphia Plan but avoids identifying their motives. Graham says the Nixon administration maintained an efficient, effective, and discrete process of desegregating public institutions. Further, he argues that the Nixon administration vigorously and unrelentingly pursued the implementation of the Revised Philadelphia Plan and used affirmative action plans as a civil rights enforcement tool of the federal government. Nevertheless, he says that Nixon had no civil rights policy and was morally indifferent to the issue. Ultimately, Graham finds that it was the federal bureaucracy, not the president, that assured the survival of affirmative action programs (1990, 325–35).

Skrentny (1996) has also argued that political motives, not a commitment to civil rights, played a significant part in Nixon's affirmative action plans. Besides reiterating the electoral advantages of pursuing the Philadelphia Plan, Skrentny also argues that Nixon's primary goal in pursuing affirmative action plans based on executive orders was consolidating as much authority as possible within the White House and away from the Democratically controlled Congress (Skrentny 1996, 181–82, 203–4). While his true motives are unknown, Nixon had strengthened the OFCC by the summer of 1969, providing it with more expansive authority and local staff. Moreover, he empowered his Secretary of Labor George Schultz and Assistant Secretary Arthur Fletcher to revise the Philadelphia Plan (Graham 1990; Pedriana and Stryker 1997; Skrentny 1996).

In June 1969, Schultz and Fletcher unveiled what came to be known as the "Revised Philadelphia Plan" in a contentious press conference at the First Bank of the United States building (McKee 2008, 233). Like the previous Philadelphia Plan, the Revised Philadelphia Plan was also managed by the FEB, which coordinated field activities of the federal contracting and civil rights enforcement agencies (Graham 1990, 288; Stryker and Pedriana 1997, 655). However, learning from the failures of the original Plan, Schultz and Fletcher addressed the contractual issues in the original plan and clarified the plan's relationship to Section 703 of Title VII.

The Revised Plan required that federal construction contractors in the Philadelphia area commit to numerical hiring ranges for minority workers in skilled construction trades based on goals established by the Department of Labor as part of the bidding. Once awarded, the contractor with the winning bid had only to make a "good faith effort" to meet these goals. Contractors could show such "good faith" by working with community groups, job training programs, or government agencies to find qualified workers or apprentices, and by requiring subcontractors to meet hiring goals (Schuwerk 1972; Stryker and Pedriana 1997).

The new plan addressed both of Staats's objections: (1) to the violation of competitive bidding rules, as it eliminated post-bid negotiations over hiring and placement requirements and instead called for hiring requirements to be spelled out in pre-bid project specifications; and (2) the Title VII challenge on the use of quotas by establishing percentage ranges for minority participation in each skill rather than fixed targets. However, while Staats agreed that the revised plan made the contractors' affirmative action duties explicit before the opening of bids, the comptroller continued to argue that the Philadelphia Plan was illegal because its race-conscious goals violated Title VII (Stryker and Pedriana 1997). By removing the issue of government contract procedures from the discussion, the Nixon administration unwittingly waded into the thorny race politics the Johnson administration had tried to avoid in the first iteration of the plan.

As expected, the National Building Trades Convention passed a resolution that rejected the Revised Philadelphia Plan and blasted it as a “quota system,” as well as “high-handed, ambiguous, and in definite conflict with the Civil Rights Act of 1964” (McKee 2008, 239). Labor unions, threatening to sue the Nixon administration, joined Staats in attacking the revised plan as inconsistent with anti-discrimination legislation prohibiting race-conscious decision making in employment. Nevertheless, the OFCC approved the first contract under the revised Philadelphia Plan in October of 1969 (McKee 2008, 239).

Plan implementation moved slowly, however, thwarted by the widely anticipated court challenge. The challenge finally came in January of 1970, when the Contractors Association of Eastern Pennsylvania charged in a U.S. District Court suit that the Revised Plan established a racial quota, and, therefore, violated both the Civil Rights Act and the Constitution’s equal protection clause (McKee 2008, 239). In response, the DOL, the City of Philadelphia, and the Nixon administration argued that the plan was legal. They argued that since the plan only required a “good faith” provision and did not “guarantee any specific number of jobs to minority group members,” it did not violate Title VII (Graham 1990, 333–34). A District Court judge agreed and ruled that because the revised plan did not require the hiring of a fixed number or percentage of minority workers, it did not violate Title VII or the Constitution (McKee 2008, 240).

The legal victory proved significant. Shortly after the district court level win, the DOL began to deploy the Philadelphia Plan nationally as a stick to encourage the adoption of voluntary “hometown plans.” “Hometown Plans” were desegregation and affirmative action plans that contractors and unions would voluntarily join, managed by local state and city agents. Though the administration expected the court battle to continue, this legal victory allowed the

Nixon administration to use the revised plan as a threat to cities unwilling to develop their own "hometown solutions" to desegregate the construction industry. By February 1970, the DOL identified eighteen cities as primary candidates for an imposed Philadelphia-style plan if they did not implement acceptable voluntary plans (McKee 2008, 240).

As expected, the contractors filed an appeal, but the U.S. Court of Appeals upheld the lower court ruling in April 1971; in October, the Supreme Court refused to hear an appeal. These decisions effectively dismissed the objections of both the comptroller general and the unions and cleared the way for the Revised Philadelphia Plan to proceed. However, enforcement of the Plan went poorly. Underfunded, understaffed, and hampered by the lengthy court case, the OFCC regional office struggled to assure that contractors complied with contracts issued under the Plan. In late June, OFCC revised the Plan's compliance system by creating specific guidelines and reporting requirements. These new guidelines required monthly reporting of "the minority percentage of man-hours per craft, by contract" (McKee 2008, 242). If those percentages fell below the contractor's minimum goal, the federal contracting agencies would issue a "show cause" notice requiring the contractor to present legitimate, specific factors that had prevented them from meeting the commitments. Failure to show such cause could lead to the suspension or revocation of a federal contract and a ban on future work. However, no suspensions or revocations actually took place (McKee 2008, 242).

By the end of 1972, the Plan was under attack not only by contractors but also by civil rights activists. "The Philadelphia Plan is a good slogan, but ineffectual," explained a local civil rights leader, "I don't think one person has been put to work under the Philadelphia Plan" (Schuwerk 1972, 138). A year after the Philadelphia Plan was announced, little visible difference could be discerned in Philadelphia construction crews who were supposedly under the coverage of the federal requirements (Schuwerk 1972, 138).

While the Philadelphia Plan was often associated with the failures of affirmative action, it did produce real—if limited—gains for minority employment in the building and construction trades. A carefully controlled compliance check of seventy-four federal projects in September 1973 showed that minorities had made inroads into the building trades, including the six critical trades targeted by the Philadelphia Plan. However, even with some success, the Philadelphia Plan is still better known for the political turmoil it created, for the weakening of the Democratic coalition, and its inadequate and underfunded implementation system (Hill 1990; Stryker and Pedriana 1997).

3.2 CHICAGO

As a direct response to the Philadelphia Plan, the "hometown approach" began in Chicago. The Chicago Hometown Plan was a response to what many in the construction industry believed was an over-reach of a coercive executive branch. Unlike the Philadelphia Plan, where contractors were compelled by the government to hire an arbitrary number of minority workers, the Chicago Plan was supposed to be a compromise between minority workers and the construction industry: where the construction industry would recognize the need to desegregate and minority workers would recognize the need to work through the existing labor market structure. The Chicago Hometown Plan was supposed to be a compromise where minority workers got jobs and a path to journeymen. At the same time, labor unions' exclusive control over the labor supply would remain protected.

The Chicago Plan served as the model for other hometown plans, not only because it was the first, but also because of the high praise it received from AFL-CIO leadership as the answer to Philadelphia (Gould 1977, 303). However, perhaps more than any other federal affirmative action program, the Chicago Plan was a direct product of Black protest. Black Chicagoans had long protested job discrimination, with some of their most long-standing grievances directed toward the unions that controlled access to skilled construction jobs. Much like Philadelphia, Black workers in Chicago were excluded from the blue-collar, middle-class construction jobs funded by the federal government. One economic study found that in Chicago, "Negro men stood just as far behind white men on the occupational ladder in 1960 as they did in 1919" (Gellman 2010, 113).

While Chicago experienced racial turmoil since 1966 due to widespread protests against housing discrimination, protests against the longstanding segregation of construction jobs increased during the summer of 1969 (Gould 1977, 303). That summer, a series of protests led by the Coalition United for Community Action (CUCA) highlighted how federal funds supported the exclusivity of skilled construction jobs in the city.

Formed in 1968, CUCA was a federation of sixty-one African American organizations that sought to desegregate the Chicago construction industry by training and placing thousands of young Black men in trades jobs (Gellman 2010, 112). Led by the Reverend C.T. Vivian, CUCA threatened to halt construction projects in Black neighborhoods by "any means" unless contractors and unions agreed to their demands. These demands included eliminating the union hiring hall and the creation of an on-the-job training program for 10,000 minority workers to be supervised by CUCA. Vivian, a minister from western Illinois, had emerged as a civil rights leader during the Nashville sit-in campaign in 1960 and was CUCA's public face and political leader (Gellman 2010, 112)

While Vivian was the face of the campaign, the muscle behind these demonstrations were three dominant gangs in Chicago: the Conservative Vice Lords, an amalgam of West Side gangs; the Black P. Stone Nation, formerly the Blackstone Rangers of the South Side; and the Disciples, formerly the Devil's Disciples, also a South Side gang. The Lords, the Stones, and the D's, as they were commonly referred to, were nicknamed "LSD" by the Coalition and provided both the largest numbers of and the rowdiest supporters of the desegregation campaign (Gellman 2010, 120).

While opponents of CUCA often seized on its collaborations with the gangs as a reason to dismiss its call for affirmative action, in "'The Stone Wall Behind': The Chicago Coalition for United Community Action and Labor's Overseers, 1968–1973," Gellman explained the importance of this Coalition to CUCA by stating:

> The CUCA leaders articulated the goals of the construction jobs campaign, but the protests themselves were led by the LSD, which claimed more than 50,000 members across the city. Wearing berets—red (for the Peace Stones), blue (for the Disciples), and tan (for the Vice Lords)—they became the shock troops of the movement to open the building trades during that summer, demonstrating at construction sites by the busload. Just as important as their numbers was their great discipline. Paul King, coalition leader, remembered gangs meeting from" seven in the morning until seven at night" and concluded that they were the most loyal Coalition participants (Gellman 2010, 121).

CUCA organized protests that started in mid-1969. That summer, CUCA's members invaded the offices of the Chicago and Cook County Building Trades Council and demanded that Chicago locals admit more Blacks to membership and establish training programs (Gould 1977, 301). They proceeded to stage a spontaneous sit-in by barricading themselves in the office before police knocked down the door and arrested seventeen protestors. Two days later, CUCA members demanded that white construction workers cease all work on three West Douglas

Boulevard sites. The somewhat confused workers obliged, and the activists posted signs that read, "[T]his job closed by the community." By the end of the month, the CUCA had shut down four more sites in African American neighborhoods as the number of protestors swelled to several hundred (Gellman 1984, 117).

In his letter to the DOL requesting federal help for the Chicago OFCC regional office, John Wilks, OFCC Director, explained that "Black youths protest the underutilization of minorities in Chicago construction trade locals. Subsequently, 20 major construction projects were shut down in protest by Black pickets" (DOL 4/Chicago Plan II, Memorandum for Assistant Secretary Grunewald, Subject: Construction Compliance in Chicago Area, February 29, 1972, Director John Wilks). Further describing the current situation as a violent and protracted struggle between Black protesters and white construction workers, Wilks explained that CUCA demonstrators had already halted over $80 million of federal construction work in Chicago, with more protests planned for the Fall (DOL 4/Chicago Plan II, Memorandum for Assistant Secretary Grunewald, Subject: Construction Compliance in Chicago Area, February 29, 1972, Director John Wilks).

At the same time, Wilks asked the federal government to intervene, Chicago-area contractors announced a voluntary segregation plan. They presented their Plan to the OFCC as the "Chicago Area Plan." However, this original proposal was rejected due to its inadequacy and the fact that it was obviously just a hastily cobbled attempt to pre-empt a Philadelphia-style plan in Chicago. In his letter explaining his rejection of the Plan, then-Acting Assistant Secretary of Labor explained that the Plan was rejected "primarily because it was a statement of intent rather than a plan of action" but also because "it was designed to delay the imposition of a Federal plan for the Chicago area" (DOL 4/Chicago Plan, Letter from Horace Menasco, Acting Assistant Secretary, to Richard Wise, Executive Assistant to the Under Secretary, December 10, 1971).

However, this failed attempt seemed to indicate to federal agents that Chicago-area contractors and labor unions might be willing to "develop their own solution to the underutilization of minorities" (DOL, 4/Chicago Plan II, Memorandum for Assistant Secretary Grunewald, Subject: Construction Compliance in Chicago Area, February 29, 1972, Director John Wilks). Due to this willingness to compromise, Chicago became "the principal testing ground of the hometown solution—the development of area-wide voluntary agreements favored by the Department as well as organized labor . . . failure to do so would result in the imposition of a Federal plan" (DOL 4/Chicago Plan II, Memorandum for Assistant Secretary Grunewald, Subject: Construction Compliance in Chicago Area, February 29, 1972, Director John Wilks). This belief that Chicago was ready for a hometown solution made it the center of the DOL's voluntary plan program.

3.2.1 *The Original Plan*

After months of negotiations, more protests, and several clashes between police and gangs, the various parties agreed to the Chicago Plan. The Chicago Plan "was signed on January 12, 1970, by twelve representatives of the Coalition for United Community Action and by one representative each of the Chicago and Cook County Building Trades and Council and the Building and Construction Employers Association of Chicago" (DOL 4/Chicago, from Malcolm R Lovell Jr, Assistant Secretary for Manpower at the DOL in D.C. to Donald Irwin, RE Chicago Plan, undated). The Plan called for 1,000 qualified minority journeymen to go to work immediately and become members of their respective trade unions; the training of 1,000 minority

17-to-24-year-olds (the age group of the three gangs); and 1,000 on-the-job trainees who would not be required to take tests to enter their chosen trade (Gellman 2010, 126).

The Chicago Plan covered all construction projects, both public and private. Its stated purpose was to ensure minority group craftsmen's participation in the construction trades in proportion to the population at large (Robbins 1972, 1213). The Plan also created a supervisory board of seven members: two each from the contractors, unions, and CUCA, plus a representative from the mayor's office. Policy decisions required five votes; the mayor's representative, therefore, served as a "wild card" to prevent total domination by the contractors and unions (Robbins 1972, 1213). This supervisory board, the Administrative Committee, would be responsible for implementing the agreement on a craft-by-craft basis.

Torrents of praise poured forth, particularly from those who had condemned the Philadelphia Plan. George Meany, a vocal opponent of the Philadelphia Plan, characterized the Chicago Plan as a "significant forward step" and one which was "substantially in line with the policy determination of the recent Building and Construction Trades Department convention and with the continuing policy of the AFL-CIO." He added, "[I]t is an achievable program that rests four-square on mutual trust. As such, it is vastly superior to any government-imposed quota system—which is, of course, artificial and discriminatory" (Gould 1977, 303). Even C.T. Vivian, leader of CUCA, said, "It [The Chicago Plan] will open the seventies to a myriad of possibilities for the black community" (Gould 1977, 304).

In his praise of the Chicago Plan, Nixon's Assistant Secretary of Labor Fletcher stated he hoped that other local "solutions" could now be brokered elsewhere. He believed that these voluntary, local affirmative action plans that bring unions, contractors, and applicants together without creating an inefficient federal bureaucracy that would impose sanctions on hostile parties, were the future of national affirmative action policy. Thus, the Chicago Plan provided the boilerplate language and process that the Department of Labor used to broker similar hometown solutions around the country (Gellman 2010, 127).

From the very beginning, however, the Chicago Plan was plagued by inherent weaknesses: “union foot dragging soon began to make the accord of January 1970 look hollow and false” (Gould 1977, 304). The first weakness was that it was signed by the contractors’ association and the Building Trades Council, and not by individual unions and employers. The unions always claimed they had not agreed to the Plan and were, therefore, not bound by it. In a letter to the DOL, OFCC officials explained that “none of the approximately nineteen affiliates craft unions considers itself bound by the signature of the single Chicago and Cook County Building Trades representatives who signed the Plan” (DOL 4/Chicago, Letter from Horace Menasco, Acting Assistant Secretary, to Richard Wise, Executive Assistant to the Under Secretary, December 10, 1971). Some of the unions “even refused to meet with the Operations Committee” (DOL 4/Chicago Plan, Manpower Administration and Office of Federal Contract Compliance and the Manpower-Joint Recommendations Report, May 14, 1971, signed by Malcolm Lovell, Assistant Secretary for Manpower and Arthur Fletcher, Assistant Secretary for Employment Standards).

Second, the agreement relied on Mayor Richard Daley, a member of the Plan’s administrative committee, to enforce it. However, from the outset, the mayor was reluctant to spend his political capital fighting the traditionally powerful labor unions (DOL 4/Chicago, Letter from Horace Menasco, Acting Assistant Secretary, to Richard Wise, Executive Assistant to the Under Secretary, December 10, 1971). These facts in Chicago are illustrative of how the political environment was inhospitable to affirmative action plans. Construction trade unions used their political influence to shield themselves from any real government intervention. Additionally, the mayor, the governor, and the president were unwilling to expend their political capital on desegregation plans, which were, at that time, still being challenged in court and tested in American cities.

A third problem, which plagued all hometown plans, related to the conditional nature of the agreement. These plans often did not include goals or timetables for each craft but only overall industry-wide goals. Additionally, hometown plans were often carefully qualified to only require the employment of minorities in specific numbers if economic conditions permitted. “In Chicago, and inevitably elsewhere, the committees of unions and employers which have had to make such economic determinations have been extremely cautious,” which led to lenient enforcement of the already abstract goals due to ever-changing economic conditions (Gould 1977, 304).

Lastly, while CUCA had significant leverage going into the Chicago Plan negotiations because of its ability to organize work stoppages effectively, the Blackstone Nation’s construction closing had created an “atmosphere in which labor unions and contractors were more willing to negotiate” (Gould 1977, 303), a joint Federal Bureau of Investigation–Chicago police crackdown on gangs undermined CUCA’s negotiating position. In his study of CUCA, Gellman argues that city officials used gang member arrests as a negotiating strategy. He explains that following arrests that just happened to coincide with Chicago Plan negotiation meetings, “the office of the Mayor added the release of a few key gang members….as a secret reward for signing the Chicago Plan” (Gellman 2010, 128).

Ultimately, the Chicago Plan could not overcome these shortcomings. In July 1970, CUCA’s leadership announced that the Chicago Plan was not working and called upon the

OFCC for help. In its letter, CUCA explained that in six months, the Plan had placed only approximately one-hundred Black workers in training programs and subsequent jobs. Noting that only one of the nineteen unions had met the goals for the training of minority workers, CUCA urged the DOL to freeze all federal funding for local building contracts and asked that a mandatory federal plan be imposed in Chicago. CUCA leaders ended the letter by stating that the Chicago Plan "is a very bad agreement as far as the black community is concerned" (DOL 4/Chicago Plan II, Memorandum for Assistant Secretary Grunewald, Construction Compliance in Chicago Area, February 29, 1972, Director John Wilks).

The Chicago Plan's failure was confirmed by the OFCC when an investigation found that while the Plan had called for 3000 placements by the time the report was written, contractors and labor unions claimed to have placed only 605 workers. However, while claiming to have placed 605 minority workers, the final report by contractors and labor unions only included information for seventy-two workers. Worse, of those seventy-two, only forty-four were identified by the OFCC. Worst yet, of the forty-four, only five were still employed at the time of contact (Gould 1977, 305). Additionally, the investigation found that:

> 1. The Chicago Plan has not developed a working relationship between the three parties of the Plan. Moreover, all three parties agree that the Plan has not worked.
> 2. The Plan has failed to produce meaningful jobs at all levels in the construction industry.
> 3. The Plan has failed to establish goals for new minority employment from individual crafts.
> 4. The Plan has failed to keep proper records of alleged minority placements.
> 5. The Plan has failed to provide proper follow-up on minority placements.
> 6. Nearly $1 million in Federal and State funds being expended to support the Plan have done little to improve entry of minority workers into the construction industry (Manpower Administration and Office of Federal Contract Compliance and the Manpower- Joint Recommendations Report dated May 14, 1971)

The report concluded by stating that the joint opinion of the Office of Federal Contract Compliance and the Manpower Administration is that the Chicago Plan and the contract in support of the Plan failed as a vehicle for attaining affirmative action in the Chicago construction trade unions. Furthermore, the report argued that the "chronology of events reveals in the clearest light that, despite federal efforts to encourage a workable and acceptable hometown solution, the Chicago Plan has been a failure…. those victimized by the Plan's failure are minority group members who so desperately need jobs to provide for their families and themselves." Therefore, the report concluded that the federal government and the OFCC should impose a mandatory federal plan on Chicago (DOL 4/Chicago Plan, Manpower Administration and Office of Federal Contract Compliance and the Manpower-Joint Recommendations Report, May 14, 1971, signed by Malcolm Lovell, Assistant Secretary for Manpower and Arthur Fletcher, Assistant Secretary for Employment Standards).

3.2.2 *The Revised Plan*

Following the collapse of the first Chicago Plan, "new" iterations of it proved only marginally better. In the spring of 1972, with a New Chicago Plan sponsored by the federal government in the works, the remaining members of CUCA renewed their struggle and attempted to learn from past mistakes. The New Chicago Plan promised 10,000 jobs by 1976 and put the Urban League in charge with help from the CUCA and other minority organizations. However, the revised Chicago Plan again had inherent shortcomings it would not overcome.

One of the crucial flaws was labor's unwillingness to work with CUCA throughout the process of identifying and recruiting minority workers. Labor unions perceived CUCA as violent and uncooperative and, therefore, had demanded to work only with the Urban League and then have the League work with CUCA, if needed. However, CUCA had legitimacy among minority groups because of its ties to neighborhood groups, a legitimacy the League lacked.

These concerns are evidenced in OFCC correspondence around the time the new Chicago Plan was signed. In his report about the New Chicago Plan, the local OFCC agent explains that "[T]he unions, the contractors, and even the [Urban] League are skeptical about the role this minority group [CUCA] could play, and several functions would prefer not to have any dealings with it" (DOL 4/Chicago Plan II, Letter from Donald Irwin to Assistant Secretary Grunewalk and Assistant Secretary Lovell, CC to Mr. Sibelman, dated March 17, 1972). Furthermore, regarding the League's participation, the OFCC correctly diagnosed that "[O]f primary concern to us is the fact that the Urban League does not speak for the minority community and when it is announced that the Government funds will be made available only to the Urban League we anticipate a reaction from many other groups such as the former Coalition involved with the previous plan and the Spanish speaking groups, the black union groups, and various street gangs all of which were associated with the previous plan" (DOL 4/Chicago Plan II, Letter from Malcolm R Lovell Jr, Assistant Secretary for Manpower at the DOL in D.C. to Donald Irwin, RE Chicago Plan, undated).

A second significant deficiency was the lack of an implementation schedule or clear goals. This failure is best illustrated in the interview that followed the announcement of the New Chicago Plan. In an exchange with a reporter, Donald Irwin, Deputy Under Secretary at the DOL, explained that "It's not a rigid program in any sense. We think that we have reasonable objectives for the first year that are attainable. But if for some unknown reason to us now, at least, if our estimates are wrong, we will revise....This is not an absolute minimum goal—this is not a maximum goal—it is what we think it is achievable. We have expectations that some crafts will exceed a vast substantial number" (DOL 4/Chicago Plan II, Interview of DOL agents with T.V. 2 News following the Press Release, October 18, 1972, The Labor Department). Similar to the original Chicago Plan, the new Chicago Plan also failed to meet its goals. The Plan could never overcome the rift it created among minority groups and its lack of proper implementation and enforcement framework.

3.3 ANALYSIS

In this dissertation, I seek to understand why activists and organizers continue to pursue litigation strategies to achieve social change when the constraints inherent in litigation strategies make its costs high and success rates low. More specifically, given that (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language, almost always inadequate to describe social ills; and, even when there is a legal victory, (3) legal results are uncertain due to the judicial branch's lack of enforcement power, why do social change actors still use litigation strategies and seek out judicial intervention?

The inherent assumption underlying this puzzle is that there are other, better avenues for pursuing change. Scholars in the litigation of politics school argue that activists and organizers should pursue "traditional, ordinary" political paths to change (Klarman 2005; Rosenberg 2008; Silverstein 2007). By this, they mean lobbying, both Congress and the president, and pushing for cultural change. Rosenberg, for example, argues that activists would be better served by lobbying Congress or pursuing administrative interventions. He goes further and argues that activists could pursue other, non-governmental avenues for change, like social, cultural, economic, political, and religious venues. In the concluding chapter of *The Hollow Hope* (2008), he notes that civil rights activists during the *Brown* era had options other than litigating or lobbying. Rosenberg argues that civil rights activists could have focused on registering black voters outside of the South, pressuring non-Southern corporations to stay out of the South, writing books, plays, poems about the injustice of racism (2008).

Similarly, Kagan (2001) argues that instead of costly, cumbersome, and unpredictable adversarial legalism, change is better achieved through an "administratively final multi-factor balancing" (387). He argues that policy-making would be more effective in a system where agencies encourage cooperation and build consensus. In this system, affected interest groups (industry, labor, environmentalists, etc.) would play a strong participatory role through a variety of corporatist mechanisms (e.g., permanent representation on key committees). This system would be based on a stable consortium of interest group representatives regularly consulting with government officials on a range of issues. The agency would have the final say, and participants lacking courts to turn to would have to persuade each other to agree (Kagan 2001, 389). While Kagan recognizes that adversarial legalism allows for the "contestability of expert opinion and official plans, openness to an array of opinions and interests, sensitivity to individual rights," he argues that these advantages do not overcome its inherent costliness, cumbersomeness, and unpredictability (2001, 398).

Both the Philadelphia Plan and the Chicago Plan are closer to the ideal mechanisms described by scholars in the litigation of politics school of thought. In Philadelphia, the executive branch took the lead, empowering both a federal and a local agency to implement its affirmative action plan. In Chicago, the OFCC and city-level officials encouraged cooperation and built consensus across minority workers and the construction trades and contractors. The Chicago Hometown Plan, like all hometown plans, was designed to be a durable system where interest groups consulted with government officials and compromised to achieve policy changes. Both Philadelphia and Chicago are examples of the other avenues for change that scholars in the judicialization of politics assume are inherently better than pursuing change through courts. Indeed, both these plans developed faster than Title VII litigation occurred, and the financial costs of developing the plan were not borne by activists and organizers (though the cost of its failure certainly was). Moreover, civil rights activists' demands did not have to be bound by judicial precedent or be legally cognizable claims. Finally, the executive branch had at its disposal both police and taxing power to enforce its affirmative action plans. Despite these three factors in favor of the plans' success, they were ultimately unable to desegregate the construction industry in their local markets.

This failure happened because while both cities had developed timely, flexibly formulated, and enforceable plans—in theory—the underlying political process made administrative intervention politically fraught, and minority workers' demands relied on new rights that were poorly defined in the Plans' execution. Furthermore, state officials were reluctant to enforce the Plans due to underlying political dynamics. Therefore, while, in theory, the Plans had a high likelihood of success, they were doomed to failure from the beginning.

For example, the Philadelphia Plan was implemented at least a year before any judicially mandated affirmative action plan was put in place. However, the Nixon administration's political motivations to quickly develop a plan likely detracted from its commitment to the actual enforcement of the plan over the long term. The OFCC in Philadelphia continuously complained of a lack of funding and support, and the administration quickly abandoned its program to expand its mandatory plans to other cities. Instead of federal-level, administrative enforcement, the Nixon administration ultimately decided to relegate the enforcement of civil rights to city-level officials (Gould 1977; Graham 1990).

While the compromise-based, voluntarily self-enforced, agency-chaperoned plan was lauded as a success by AFL-CIO and the Nixon administration, the committee created by the Chicago Plan quickly descended into in-fighting and finger-pointing. A particularly salient example of this was the embezzlement of funds for the original Chicago Plan. As described in the OFCC Weekly Report, "[The] Plan's account was overdrawn, and no more checks can be cashed against it. It was discovered that approximately $70,000 in checks had been drawn and paid to Mr. Fred Hubbard, the Project Director….The checks were signed by Mr. Hubbard and made payable to him. In order to be cashed, it was necessary that they be co-signed by one of the Plan's officers. Some were co-signed by Mr. Nader, the Secretary-Treasurer, and some were co-signed by Mr. O'Neill, the Vice-President. In both incidents, the co-signatures were found to be forged" (DOL 4/Chicago Plan, Memorandum for the Under Secretary, Alleged Embezzlement of Funds from Chicago Plan Account, May 21, 1971, Signed by Malcolm R Lovell).

However, even though there was overwhelming evidence that Hubbard was the embezzler, CUCA and the LSD were accused of the crime Furthermore, the embezzlement was often used, completely de-contextualized from the actual facts of the case, as a reason why allowing the LSD to be part of the negotiations had been a mistake (Gellman 2010; DOL 4/Chicago Plan, Memorandum for the Under Secretary, Alleged Embezzlement of Funds from Chicago Plan Account, May 21, 1971, Signed by Malcolm R Lovell).

The embezzlement was also used as a political tool. As explained in an internal DOL memo, the embezzler, Mr. Hubbard, was a city alderman and close confidant of Mayor Daly. This fact was the main reason identified by the local OFCC as to why the state Attorney General, Mr. Hanrahan, was interested in taking up the case. "Mr. Hanrahan is a Republican and has allegiances with the Illinois Governor. He is reportedly violently opposed to Mayor Daly, and since the mayor is very closely associated with the Chicago Plan, Hanrahan may attempt to use this situation as a vehicle to downgrade the mayor and his office" (DOL 4/Chicago Plan II, Memorandum for Assistant Secretary Grunewald, Subject: Construction Compliance in Chicago

Area, February 29, 1972, Director John Wilks). In Chicago, the independent representative committee with the final say on the Plan quickly became a site of corruption and bad faith, its failures were not seen in the context of what it was supposed to achieve, but simply as political tools between the state Democratic and Republican party.

I argue that both the Chicago and the Philadelphia Plan failed because the change they advocated and tried to implement left the underlying entrenched power dynamics untouched. Both required reluctant political actors to actively intervene in a fraught and contentious political environment. In both cases, "discrimination" and "affirmative action," terms left undefined by Title VII and EO 11246, were defined by those who had the most to win by keeping the definitions narrow and limited. Black workers had no say in defining their harms and determining how to address them. By using their political status as a shield, and defining the problem and controlling the terms of resolution, labor unions and their political allies were able to ensure that change would be limited and shallow.

For example, success was defined as cursory counts, which allowed labor unions and contractors to move a few Black workers around and have them count multiple times toward their goals. Practices known as "motorcycling"—in which contractors transported Black workers from site to site so as to be counted in several projects simultaneously—and "checkerboarding"—in which a contractor transferred his minority workers from his private projects to inflate their representation on public projects—all allowed unions to fulfill the requirements of the affirmative action plans without meaningfully changing their culture and practice. As McKee explained, "unions and contractors frequently engaged in a practice known as "motorcycling," in which the few blacks in a union would be shifted from one job site to another as needed to demonstrate compliance with federal standards. In a 1969 hearing on the

Philadelphia Plan, an assistant secretary of labor described this practice: “when they felt the compliance officer was going to come around they would take the one [minority] craftsman they had and put him on a motorcycle and scoot him to the next job just ahead of the compliance officer” (2008, 222).

Civil rights activists learned from the failures in Philadelphia and Chicago. These lessons were applied to other cities, where activists and organizers proactively took their grievances to the courts. This shift from administrative to judiciary intervention allowed Black workers to move the desegregation discussion away from the liberal-labor political coalition, to effectively define what the workers themselves saw as discrimination and the appropriate way to address it, and be the ones to enforce the judicial remedy that they helped define. In the next two chapters, I describe this shift in Seattle and New York. I argue that these circumstances and lessons allowed civil rights activists in these cities to effectively create change through legal mobilization.

Chapter 4. SEATTLE, THE UCWA & *IRONWORKERS*

In September 1969, a group of civil rights activists brought every federally funded construction site in Seattle to a standstill. In two of the most dramatic actions, they ran a bulldozer into an open pit on the University of Washington campus and stopped air traffic by marching more than 100 protesters onto the Seattle-Tacoma International Airport runway. These protests led by black workers who would eventually become the United Construction Workers Association (UCWA), were an expression of Black workers' frustration with the lack of enforcement of the Civil Rights Act of 1964. The United States Justice Department (DOJ) responded by filing suit against the Seattle and King County Building and Construction Trade Unions. The DOJ argued the unions' hiring practices and apprenticeship programs discriminated against workers based on their race and therefore violated Title VII of the Civil Rights Act. In *U.S. v Ironworkers,* federal district court Judge William Lindberg, from the District Court of Western Washington, agreed and imposed an affirmative action program on the unions (*United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1210 (W.D. Wash. I970), aff'd, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971), hereinafter *Ironworkers*). While this decree was "the earliest, and at the time of its issuance, the most comprehensive Title VII decree rendered in any court," it, too, was mostly ignored by the construction trades (Gould 1977, 338).

Black workers had little reason to expect the decree would be enforced, as Title VII litigation efforts were failing across the country. Most cases, like those in Cincinnati, were being actively delayed or slow-walked by labor unions betting they could stretch a lawsuit beyond the means of most Black workers' organizations (*EEOC v. Cincinnati Iron Workers Local 44 and 372* (1967)). Even those successful in court, such as the lawsuits in St. Louis and Los Angeles, were ultimately just symbolic victories as recalcitrant labor unions and contractors blocked any enforcement and effort at implementation (*EEOC v. E. St. Louis Electrical Workers Local 309* (1969); *EEOC v. Los Angeles Steam Fitters Local 250* (1968)). When *Ironworkers* was decided, even "the most comprehensive Title VII decree rendered in any court" had little chance of becoming a reality. Given the inherent constraints in litigation strategies that make costs high, and success rates low, why did the UCWA pursue litigation strategies and judicial intervention in Seattle?

Litigation was one of many ways that Black workers tried to enforce Title VII. From its inception, Title VII had enforcement limitations. The Equal Employment Opportunity Commission (EEOC), the agency established to enforce Title VII, had no enforcement powers. Moreover, contemporaneously, several other Title VII-based employment desegregation efforts, like the local hometown plans, were either failing to achieve even modest goals or were too tangled in controversy to affect change (Gould 1977; Hill 1974). Further, administrative solutions, such as the affirmative action plans in New York, Chicago, and Boston, were being weakened by labor-supporting elected and appointed officials (Gould 1977; Graham 1990). At the federal level, the Nixon administration was abandoning the Philadelphia Plan—arguably the best-known construction industry affirmative action plan at the time (Gould 1977; Stryker and Pedriana 1997).

However, litigation strategies became the best option for change as labor unions were potent political players in Seattle and, therefore, local political leadership was unlikely to clash with union leadership over a new law establishing new rights not yet scrutinized by the courts. Since *Ironworkers* was first brought two years before *Griggs v Duke Power* (1971), where the Supreme Court settled significant issues underlying Title VII litigation, including better defining "what is discriminatory" as defined by Title VII, what was required of affirmative action plans under Title VII was unclear, and few political actors were willing to independently determine the legal scope.

In the case of *Ironworkers*, the underlying political process made administrative intervention politically undesirable as the conflict between minorities and labor unions relied on new, poorly defined rights. This combination of factors led to lasting limitations—both formal or informal—in the exercising of state authority to enforce Title VII. Under these conditions, I argue that the UCWA's mobilization of the law was the only viable option to achieve change in the construction industry during the early civil rights era in Seattle.

The UCWA was well aware of litigation's inherent limitations and that legal procedures were lengthy and costly. They were vocal critics of the fact that legal claiming under Title VII was based on ambiguous statutory language, inadequate to fully describe the political, economic, and social impact of being excluded from middle-class jobs. Further, they knew that even winning in court was not enough, as courts have no enforcement power. Refusing to be limited by the law, the UCWA once again led a round of protests that brought Seattle to a standstill in the summer of 1972.

The protesters closed down I-90, stopped construction at Seattle Central Community College, and halted construction of over $50 million in private and government construction projects. In response, Judge Lindberg, in a radical turn of events, made the UCWA party to *Ironworkers* and the enforcer of the federal court order to desegregate some of Seattle's most powerful labor unions. Ultimately, the Seattle building trades decree was "on balance, the most ambitious and effective approach" ever to combat employment discrimination (Gould 1977, 357). The order went beyond a quota system to devise a comprehensive remedy. Most importantly, it empowered Black workers to view themselves as the solution to their problems.

Legal and socio-legal scholars have cited the Seattle building trades affirmative action plan as a successful case of Civil Rights Act implementation (Gould 1974, 1977; Marshall et al. 1978; Rubin 1972). The shift to judicial intervention allowed activists and organizers to overcome the co-opted local political leadership, compel the court to adopt the Black workers' definition of the harm caused by discrimination, and to become the enforcers of the judicial remedy they helped define. By contrast, governors, mayors, and federal agencies' administrative attempts proved mostly unsuccessful where *Ironworkers* had succeeded (Gould 1974; Hill 1974).

Given the timing (1970) and location (Seattle), *Ironworkers* should have failed, and yet it was the only successful plan. Why? I argue this was due to the UCWA's legal mobilization, expertly taking advantage of a new legal opportunity and enforcing the law to their benefit. By analyzing the UCWA's efforts in *Ironworkers* through my movement legal remedies framework, I focus on advocates whose harm is at the center of the investigated legal injury and investigate the nuanced and complex reasons organizers use litigation strategies. By examining the events in Seattle through the movement legal remedies framework, this chapter traces these events to organizers' strategic, complex, multi-pronged, and opportunistic use of litigation strategies.

This chapter proceeds as follows. First, I describe the social, political, and legal environment that gave rise to both the UCWA and their litigation effort, *Ironworkers*. This environment was one in which administrative intervention was politically undesirable and fraught with stonewalling, and rights-claiming based on Title VII was new and unreliable. Therefore, state authority to enforce Title VII had numerous limitations, both formal and informal.

Second, I analyze the events in this case and show that although the UCWA understood legal mobilization's inherent constraints, they still pursued litigation strategies and judicial intervention to enforce Title VII to achieve desegregation in the Seattle construction industry. Doing so allowed them to move their agenda past destructive political stalemate, define the social and political ills they sought to reform on their terms and be the ones to enforce the judicial remedy they helped shape. I conclude with a discussion of these findings' implications for the litigation of politics and legal mobilization literature.

4.1 THE SOCIOLEGAL HISTORY OF *IRONWORKERS*

Ironworkers was a result of direct action. Starting in August 1969, Tyree Scott, then a leader of a group of Black contractors, the Construction Contractor Association (CCA), organized several protests around the city of Seattle. They closed federal construction sites that violated the Executive Order (EO) 11246 and Title VII. These closures often ended with, at times, violent confrontations with the police. The targeted construction closures served two main purposes. First, they brought attention to widespread discriminatory practices, both in terms of numbers and geography. Second, they highlighted law enforcement inequities and inequalities. While labor unions, contractors, and employers—even those funded through federal dollars—violated discrimination laws with impunity, Black workers were jailed for demanding that their statutory rights be enforced.

The closure of the construction of the Medgar Evers pool at Garfield High School illustrates these two points perfectly. Medgar Evers was a National Association for the Advancement of Colored People (NAACP) leader assassinated by white supremacists in 1963. Located in the Central District, Garfield High School was the only majority-minority high school in Seattle; however, no Black workers or contractors were part of the pool construction project though the law required the participation of Black workers in federal construction. The image of Black workers being arrested for demanding to participate in the building of their communities while the white workers and contractors excluding black workers profited from opportunities created by federal funds in minority neighborhoods was printed in the main local newspapers. Federal legal actors could not ignore that Black workers protesting the construction of a pool named after an assassinated civil rights leader were being arrested for demanding that the law protecting their civil rights be enforced (Griffey 2010, 78-82).

As the construction closures continued throughout the summer and into the fall, awareness of the movement became national. White workers started walking out of construction sites once they learned Black workers planned to target that site for protests. These pre-emptive walk-outs were attempts to diminish the impact of the direct-action campaign. However, the walk-outs also highlighted union policies' deep discriminatory intent. The closure threats were so frequent and so many white workers walked out of construction sites that a trade union representative said he could not believe "that rank and file members [could] not stand the prospect of working with blacks that [they are] not willing to earn [their] daily bread" (Griffey 2010, 90). Eventually, Judge Lindberg enjoined white workers from walking out of job sites (Gould 1974; Griffey 2010).

In November of 1969, an assembly of 300 Black workers and some white supporters closed the SeaTac International Airport. They tied up ticket counters with phony ticket purchases and occupied all the bathrooms in the airport during a protest activity cleverly called "shit-ins" (Fox, Interview). The police arrested over fifty protesters, including Tyree Scott. Shortly before being arrested, Scott explained that "[W]e're for law just like you. We're here to see that laws are enforced. Why don't you enforce the laws on them [labor unions]?" (Griffey 2010, 210).

Following these actions in January 1970, the state and local government reached an agreement with the CCA, hoping to alleviate some of the pressure that the protest activities had created. As part of the governor's plan, government officials and the CCA agreed that construction projects in the City of Seattle would only be funded if at least eight percent of the workers were minority workers. However, since local leaders wanted to avoid confronting labor unions and federal contractors, they never required the construction trades to be parties to that agreement. The governor's affirmative action plan failed to hire and retain the required number of minority workers, as there was no enforcement mechanism. In response to the governor's plan, a plan union leadership perceived as an illegitimate and imposed plan, labor unions and contractors started their own internal affirmative action plans. Likewise, these affirmative action plans organized by labor unions also declined to hire and retain the required number of minority workers, an unsurprising outcome as they were arguably only created to avoid the incorporation of labor unions into the governor's plan (Griffey 2010).

As protests continued and construction in Seattle was brought to a halt, Judge Lindberg, the same judge who enjoined white workers from walking out of job sites, soon recognized that more forceful government intervention was needed to stabilize Seattle's construction industry, which had now been ensnared in protest, walk-outs, and criminal proceedings for over a year and a half. Recognizing that protests and direct action were not going to stop until action was taken to desegregate the construction industry in Seattle, he asked the DOJ to exercise its "pattern and practice" power under Title VII (Petramalo, Interview).

On October 31, 1969, the DOJ—which had begun to investigate Seattle's building trades when the demonstrations began and whose investigatory pace had quickened as Black workers escalated protest activities—brought suit against five unions: Local 86, Ironworkers; Local 99, Sheet Metal Workers; Local 46, IBEW; Local 32, Plumbers and Pipefitters; and Local 502, Operating Engineers. On June 5, 1970, Judge Lindberg found that the unions had violated Title VII of the Civil Rights Act of 1964 (Gould 1974, 1977; Robbins 1972).

Judge Lindberg's order mirrored the DOJ's request for relief and created craft-specific hiring goals and timetables, as well as more general affirmative action goals (*Ironworkers*). Further, Lindberg's order required the defendants to submit biannual data on the desegregation effort to the DOJ. Lastly, mirroring the framework of the hometown plans, Judge Lindberg ordered the creation of a committee, the Court Order Advisory Committee (COAC), composed of labor, management, government, and minority groups, to manage and oversee the implementation of the order (*Ironworkers).* "At the time of its issuance," the Seattle decree "was more comprehensive and detailed than that set forth by any other judge in any employment discrimination case in the United States" (Gould 1974, 785).

The same day as Lindberg's ruling, the Department of Labor (DOL) announced that Seattle would be one of nine cities where a version of the Philadelphia Plan would also be piloted (Marshall et al. 1978). The Seattle Plan, unlike Judge Lindberg's order, contained only general goals and timelines for all construction trade unions and required only that trade unions put forth a "good faith effort" (Marshall et al. 1978, 6).

The Office of Federal Contract Compliance (OFCC) was responsible for administering the Seattle Plan. The OFCC's enforcement powers included the ability to cancel, terminate, or suspend current contracts and to debar offenders from future participation in government contracts. Due to this apparent enforcement authority, it was seen as the most effective enforcement mechanism for affirmative action plans (Marshall et al. 1978, 83). This belief that OFCC's contractual power would provide the best chance for the enforcement of industry-wide affirmative action plans is one reason given for the expansion of the hometown plans across the country (Marshall et al. 1978). However, the OFCC failed to live up to initial expectations about its effectiveness. The first reason for this gap between expectation and practice was the lack of personnel. While several hometown plans were implemented across the country during the late 1960s, personnel levels were not adjusted to accommodate increased responsibility (Marshall et al. 19).

The second, and most important reason, was the lack of political will to enforce affirmative action programs. There was a general unwillingness by local, state, and federal government to stop and delay federal construction, as, by the time the OFCC determined that contractors and unions were violating the law, the construction project was already underway. As labor unions were particularly powerful political entities in the 1960s, few administrations, either at the federal, state, or local level, were willing to battle with construction trade unions (Marshall et al. 1978, 19). So, while the OFCC was, theoretically, the most robust enforcement mechanism for affirmative action plans, its lack of personnel and the fact that it was part of a political system unwilling to enforce civil rights law made it reluctant to exercise its role diligently.

Ironworkers' path to success was also unclear. While the decision required labor unions to submit biannual data on desegregation efforts to the DOJ, they failed to submit the reports (EEOC 32/Orders, Order Directing Defendants to Comply dated November 25, 1970, *Ironworkers*). Like the OFCC, the DOJ lacked a robust staff in Seattle, so it was exceedingly difficult to oversee enforcement of the order without the reports. Moreover, hostility between white workers and Black workers, a hostility exacerbated by construction closures and walk-outs, made the on the job training of new Black workers, an essential part of construction orientation, an unreliable training mechanism. Even when Black workers joined labor unions, workplace relations were so tense that many abandoned their positions. With financial assistance from the Quaker civil rights organization American Friends Service Committee, and dissatisfied with the progress of the judicial decree Tyree Scott, a veteran and construction worker, founded the United Construction Workers Association (UCWA), and again, took to the streets (Marshall et al. 63).

Scott had been a leader in the construction industry in Seattle for years prior to founding the UCWA. He was one of the leaders of the CCA but was pushed out of the CCA due to his continued commitment to direct action, even as Black workers were achieving administrative and legal victories. CCA's more moderate members were concerned about the impact that arrests and construction disruptions could have on government agents' willingness to continue to work with Black contractors. Opponents of affirmative action, as well as government agents, exploited this tension between direct action, government action, and legal action in an attempt to moderate what they considered to be the more extreme segments of the Black community in Seattle. In response to Scott's continued call for direct action, even after the Seattle Plan was being negotiated and Judge Lindberg was hearing the *Ironworkers* case, King County Executive Spellman complained to the *Seattle Times* "that there was no useful purpose for a demonstration at this time since a number of matters affecting black workers are presently pending in courts" (Griffey 2010, 149).

Like the CCA before it, the UCWA took to the streets to protest the lack of enforcement of Title VII and the judicial decree (Griffey 2010). However, the UCWA had an advantage over the CCA. While the CCA's protests were limited to generally arguing for fairness, the *Ironworkers'* order's specificity provided the UCWA with clear goals and timetables that could be used to measure racial discrimination. Scott realized the court order's key to success was to link a new organization to the *Ironworkers* lawsuit, thereby creating a vehicle for Black workers to demand vigorous enforcement of the court order. The ambiguities inherent in Title VII, mainly what counted as discrimination and how to remedy it, allowed Judge Lindberg to fashion the remedy he thought would best rectify labor unions' discriminatory practices. This remedy created further legal and political opportunities for the UCWA. They could now move beyond issues of fairness and justice into the more specific problems of labor unions training twenty to twenty-five Black apprentices by the end of the quarter (*Ironworkers*, 1249).

The UCWA took advantage of that new opportunity—the opportunity to enforce specific timetables and goals—to position itself as the enforcement mechanism of the court order. The UCWA, pushing for change and enforcement of that change by taking to the streets, became a social movement organization mobilized around a desire to enforce the law. Black workers in Seattle always had grievances, but *Ironworkers'* court order provided a new legal and political opportunity to crystallize their movement around a clear and measurable goal: to enforce the law. As explained by a former UCWA member, "Tyree recognized that we would have to organize ourselves as an enforcement body for the court order. Civil law has no enforcement body like criminal law, i.e., 'the police,' so UCWA job closures started using a hit and run tactic" (Griffey 2010, 234). The UCWA targeted job sites that failed to meet the court order's specific requirements. During these closures, the UCWA clarified they were not trouble-makers but there to enforce federal law. The UCWA handed out pamphlets at the job closures that read, "it is our position that we are not breaking the law. We are exercising our citizen's right to enforce it" (TS, 6/25, *Job Closings Pamphlet*).

In their continued effort to have the decree enforced, on June 1, 1972, the UCWA protested the lack of enforcement by closing down several projects on Seattle's Interstate 90 and cutting off traffic across a major traffic artery to Seattle (Gould 1974, 796). Frustrated by the fact that his order was being ignored, with the negative public attention that UCWA's protests were garnering, and limited by what the court alone could do, Judge Lindberg added the UCWA as a formal party to the suit (EEOC 32/Orders, Supplemental Order dated June 12, 1972, *Ironworkers*).

Under *Ironworkers,* the UCWA was responsible for recruiting, screening, and counseling Black apprentices. Further, it served as a direct connection to the DOJ, providing federal agents the information that labor unions had refused to provide through their biannual reports. As Frank Petramalo, the leading DOJ agent in Seattle, explained, "the UCWA guys would call us, or we would call them if there were any trouble. If a black worker had been refused hours, the UCWA would let us know, and we would follow-up with the labor unions about that violation (Petramalo, interview). The UCWA's success in Seattle contrasted sharply with Black workers' experiences in cities across the country for which the failure of affirmative action plans brought further marginalization rather than empowerment. "UCWA got more jobs for blacks in June 1972 than many affirmative action plans operating for two years in cities that were significantly larger and more racially diverse than Seattle" (Griffey 2010, 340).

The UCWA became a social movement organization mobilized around a desire to use litigation strategies to enforce the law. They did so not because they were tricked by the "allure of law" or were trying to side-step the "hard work of changing minds" (Silverstein 2007). Mobilizing the law was the only viable option to achieve social change. *Ironworkers'* political environment was one in which administrative intervention was politically undesirable and fraught with stonewalling and rights-claiming based on Title VII was new and unreliable. These factors indicated many formal and informal limitations in the exercising of state authority to enforce Title VII. The UCWA knew the constraints inherent in legal mobilization, so they actively engaged in correcting for them. If litigation strategies rely on ambiguous and ill-defined language, they fought to define the social and political ills they sought to reform. If the court was unable to enforce its order, they took to the streets to enforce the legal remedy they helped shape.

In the following pages, I analyze the events leading to *Ironworkers*. I show that even though the UCWA understood the constraints of legal mobilization, they still pursued litigation strategies and judicial intervention to enforce Title VII and achieve desegregation in the Seattle construction industry. These strategies allowed them to plow through a destructive political process, define their legal rights and injury, and enforce the legal remedy.

4.2 ANALYSIS

Ironworkers and its consequences provide an essential case study for sociolegal scholarship as it challenges many assumptions inherent in the discussion and criticisms of organizers who pursue litigation strategies, even in the face of what appear to be insurmountable obstacles. It reveals how litigation strategies might provide disenfranchised groups with an effective and meaningful way to overcome political and legal stalemate to affect change. The case emphasizes creative ways organizers can use legal claiming to help define poorly defined legal rights and remedies. Further, it illustrates how organizers can weaponize their legal victory to overcome courts' lack of internal enforcement mechanisms.

4.2.1 *Moving Past the Political Process*

In *Hollow Hope*, Gerald Rosenberg offers a procedural argument against using litigation strategies to create social change: litigation can distort perceptions about where resources are needed (Rosenberg 2008). Rosenberg argues that courts seduce social movement organizers by promising expedient legal change—a promise he argues is hollow. He explains that litigation is a costly and lengthy process, causing social movements to re-direct both effort and finances to litigation. Moreover, even if the movement eventually wins its legal challenge, the hollow legal victory alleviates the need to demand change in other venues. Therefore, even if litigation proves a successful strategy, the consequences are a loss of time and resources, as well as focus on other efforts (Rosenberg 2008, 339–342).

Furthermore, Rosenberg argues that legal mobilization can serve as “flypaper” for social movements. Like “flypaper,” courts manifest a sense of justice that attracts organizers; however, once engaged, organizers become entangled in legal processes, requirements, and formalism. This stickiness causes organizers to direct all of their efforts and financial and organizational resources into the courtroom. This stickiness turns poisonous with time, displacing other forms of movement organizing, commandeering all attention, funds, and resource battles (Rosenberg 2008, 427).

Two inherent assumptions underlie Rosenberg’s argument about costly, lengthy, and all-consuming litigation strategies. The first assumption is the existence of better, more cost- and time-efficient avenues for pursuing change. Scholars in the litigation of politics school argue that activists and organizers should pursue traditional, ordinary political paths to change (Klarman 2005; Rosenberg 2008; Silverstein 2007). By this, they mean lobbying, both Congress and the president, and pushing for cultural change (Rosenberg 2008). Kagan (2001), critiquing the American legal system’s reliance on litigation, argues that instead of pursuing the costly, cumbersome, and unpredictable adversarial legalism path, change is better achieved through an administrative process mediated by the state. However, there really never is a perfect intervention to solve social problems, and the UCWA and *Ironworker* case show that litigation strategies and court action might be the only feasible path to change.

The second assumption is that social movements are often tricked into pursuing litigation strategies exclusively, due to the allure of law, or are resource-constrained into only pursuing the courts (Rosenberg 2008; Silverstein 2007). However, while litigation undeniably involves an incredible cost for social movements, they are not necessarily forced to abandon other organizational actions for lawsuits; indeed, many do not. Though common in the litigation of politics literature, the assumption that the "allure of law" will "somehow trick organizers" ignores the multi-faceted character of many social movement organizations (Rosenberg 2008; Silverstein 2007). The UCWA's legal mobilization in *Ironworkers* shows that a combination of litigation strategies and more traditional modes of contestation and community action sometimes can create positive, egalitarian social change. Legal mobilization did not serve as a distraction for the UCWA; their actions in *Ironworkers* narrowed their focus, empowered their actions, and legitimized their grievances.

Regarding the first assumption, many litigation of politics scholars argue that the solution to the harms of adversarial legalism is to funnel these complaints through the administrative powers of the state (Kagan 2001; Rosenberg 2008). Instead of lawsuits, these issues should be solved by a more robust administrative state. The *Ironworkers* case illustrates the problems with relying on administrative solutions to social ills. In the early civil rights era in Seattle, the underlying political environment made governmental intervention politically undesirable or fraught with political stonewalling and interference (Gould 1974; Griffey 2010).

Litigation of politics scholars argue that a more robust administrative state with clearly established enforcement powers would be better positioned than individual plaintiffs to enact social policy change. This belief, though, assumes the state's political will to enact such changes. The hometown plans were ineffective desegregation tools. While scholars debate how robust administrative bodies responsible for plan enforcement were, consensus exists that lack of enforcement was due to political cooptation of the process (Fletcher 1974). As labor unions proved influential political players, many local and federal government officials were unwilling to enforce the voluntary plans on or revoke federal contracts of labor unions with discriminatory practices. Without access to the court, minority organizations and Black workers were reliant solely on administrative bodies opposed to their interests (Gould 1974; Hill 1974). By pursuing litigation strategies, social movement organizers moved the desegregation discussion away from weak administrative paths created by the co-opted political class and made political forces accountable to the politically disenfranchised.

It is critical to understand that the *Ironworkers* case, and therefore, litigation strategies and enforcement through legal mobilization, was by no means the only, or even the preferred choice for an affirmative action plan in Seattle. The UCWA's and other minority organizations' demand for Title VII enforcement, and their continued shaming of the political apparatus by highlighting the hypocritical and discriminatory enforcement of law against them but not against those violating their rights, compelled the state to address discrimination in Seattle. However, there was a lot of debate as to the appropriate way to address discrimination in the construction trades effectively.

By the late 1960s, Seattle had four separate plans affecting affirmative action efforts in the construction industry: (1) The Seattle-King County Plan—a voluntary Hometown Solution, (2) The Department of Labor's Imposed Bid Conditions, (3) *Ironworkers Local 86* court order, and (4) *Ironworkers Local 86* consent decree. These plans emerged through various initiatives to increase minority participation in the industry.

Seattle-area unions were so hostile toward any desegregation plan that the OFCC, the DOJ, and the DOL communicated among themselves and debated the best approach for Seattle. James Warren, OFCC Regional Director in Seattle, summarized the correspondence among regional and federal agents in all three agencies in his correspondence about the government's options in Seattle, titled *Options Paper-Seattle Project*. He identified three options as a (1) federally imposed plan, (2) a voluntary plan, or (3) a lawsuit. He explained that the federally imposed plan's benefits were that it "avoids public hearing," "quicker implementation than plans that require hearings," and "we can impose immediate hiring conditions." However, "it was unlikely to be obtained" and that "acceptance of unions [was] not assured" (OFCC 8/Reports, Options Paper- Seattle Project in "1970 Reports").

In explicating the costs and benefits of the voluntary plan, Warren wrote that the hometown plan's advantage was as a "tripartite solution" that allowed them (the federal government) to "provide specific numbers" that would meet bid requirements. However, again, there was "no assurance agreement is possible," and he was "uncertain as to how much time it would take to get an agreement" if one was indeed possible. Lastly, he explained that the DOJ lawsuit was a good option since it would be a "uniform solution for all trades" and that "court orders are most specific." However, he explained that this option was deficient as it would require a "public hearing [that] treats labor as the culprit" (OFCC 8/Reports, Options Paper-Seattle Project in "1970 Reports").

Warren concludes the *Options Paper-Seattle Project* memo with a summary of the OFCC, DOL, and DOJ representatives' responses:

1. OFCC: "Opts for Justice litigation because it's the cleanest and most uniform approach. He is not against trying the [voluntary plan] but believes that it has little chance of success."

2. DOL: “Thinks that referral to Justice is the best course of action...He believes that all other options will sooner or later result in Court cases.”

3. DOJ: “Doesn’t think that a voluntary plan is possible but [thinks] that referral to Justice will take too long” (OFCC 8/Reports, Options Paper- Seattle Project in “1970 Reports”).

The DOJ only instituted *Ironworkers* as a pattern and practice suit after determining that a voluntary plan was “unlikely” in Seattle (DOJ 127/Internal Legal Memos, Internal Legal Memo data February 17, 1969). Upon finding the unions guilty of discrimination, Judge Lindberg wondered if an OFCC-negotiated tripartite voluntary affirmative action plan could be a sufficient judicial remedy. Since no voluntary agreement existed, and none seemed probable, however, he proceeded to craft his remedy (Petramalo, Interview).

Litigation strategies became the focus of UCWA’s desegregation efforts not as a shortcut to or to leapfrog over the federal bureaucracy, but it was the only apparently viable option to overcome institutional barriers. As illustrated by the debate summarized in Warren’s correspondence, there was a generalized understanding that an administrative plan managed by a governmental agency was just not a possibility in Seattle. The UCWA wasn’t tricked into seeking total justice by pursuing litigation strategies; it made a strategic choice to push through the entrenched political environment by mobilizing the law.

Even labor unions understood that their exclusionary practices would go unchallenged within the administrative environment and that the judicial enforcement of Title VII posed unique potential for challenging the status quo. From the very beginning of the case, labor unions were concerned about the potential of *Ironworkers*. Upon learning that the Department of Justice had been asked to investigate Seattle-area unions, the Seattle Building Trades Council initiated a voluntary arrangement in an attempt to avoid the federal imposition of a plan; however, this voluntary plan was "judged defective" by the DOL. In its report on the program, the DOL explained its defective finding, asserting that "[T]he goals established were extremely low. This number of persons would not integrate the industry within the five-year plan" (DOL 19/Annual Reports, *Summary Report, November 1, 1971*).

Similarly, shortly after *Ironworkers* had been decided, labor unions named in the lawsuit attempted to join the Seattle Plan declared only days after the *Ironworkers* decision (EEOC 32/Orders, Order denying the defendant's request, dated June 17, 1971, *Ironworkers*). They hoped that by becoming part of the Seattle Plan, they would only be required to abide by the DOL program and could avoid the more specific court decree and the potential for contempt of court charges. The construction trades in Seattle knew that enforcement of Title VII through traditional political means was unlikely. When that strategy floundered—as Judge Lindberg refused to give up jurisdiction of the case—the unions sought to force other labor unions to join the court decree in an attempt to create a class of defendants large enough that effective enforcement would be unlikely (EEOC 32/Orders, Ordered denying defendant's request, dated December 17, 1971, *Ironworkers*). This expansion of the lawsuit also failed.

For over a year, the Seattle Plan and *Ironworkers* worked as concurrent desegregation plans in Seattle. The Seattle Plan neglected to meet even minimal quota goals and was evaded easily by the covered labor unions. With no political will for enforcement, these plans became the perfect cover for labor unions to claim they were desegregating. In reality, the unions reinforced segregation by funneling workers of color to the lowest-paid professions and keeping the skilled trades lily-white. However, the labor unions covered by *Ironworkers* continued in their attempts to leave the effective court decree and join the ineffective Seattle Plan. Sharing his continued frustration with this ploy, Woo, one of the UCWA's leaders, explained, "We didn't like the Seattle Plan. First of all, it was a voluntary plan. And they tried to overlay this voluntary plan on top of the court order that was very specific and had enforcement" (Woo, Interview).

A year after it was instituted, the Seattle Plan was de-certified. In the investigation leading to the de-certification, spokespeople for different minority groups all wrote in unified opposition to the continued certification of the plan. William Connelly, from the CCA, argued that "[T]he only plan we will ever endorse will be one in which we can participate. All these negotiations, plans, aren't worth a darn unless there is some enforcement" (DOL 21/Reports, *Investigation Report on Seattle Plan*, *dated July 13, 1972*). From the government side, the director of the Seattle Human Rights Commission also expressed his belief that the plan was "ineffective, unrealistic, and unworkable" (DOL 21/Reports, *Investigation Report on Seattle Plan*, *dated July 13, 1972*).

In addition to requesting de-certification, two minority organizations associated with the Seattle Plan argued that the best way to desegregate the Seattle building trades was to expand the class in *Ironworkers* to include other minority groups (DOL 21/Reports, *Investigation Report on Seattle Plan*, *dated July 13, 1972*). Since only Black workers were part of the original suit, the class of workers was limited to Black workers. Though local minority groups asked to expand the class for the purposes of relief, this request was never honored (DOL 21/Reports, *Investigation Report on Seattle Plan*, *dated July 13, 1972*). However, when asked to choose between the Seattle Plan and no plan at all, minority groups in Seattle chose no plan with the hope of joining *Ironworkers* or filing another suit specific to their communities in the future.

In describing the Court Order Advisory Committee (COAC) framework, Petramalo, DOJ representative in Seattle and an attorney in *Ironworkers*, explained that the DOJ and Judge Lindberg explicitly tried to mirror the DOL's structure for the hometown plan. The DOL, too, sought to create a separate administrative body, composed of all stakeholders, to manage the plan; however, the DOL's plans mostly failed while Judge Lindberg's plan succeeded—once the UCWA was added to the case. Jay Hereford, one of Judge Lindberg's law clerks during *Ironworkers*, explained that COAC's success was tied to an "Article 3 judge doing what the law requires." He continued, "it is very hard for a political agency [to do that], just look at the potential countervailing forces that could be brought to bear on the DOL" (Hereford, Interview). The COAC had the authority of the court behind them. When defendants refused to comply with the order, COAC could and did return to Judge Lindberg for more substantial or clarifying orders. Thus, the UCWA's mobilization of the law created a shield from administrative unfairness and oppression.

Further, once *Ironworkers* was decided, many Seattle construction trades felt compelled to join a voluntary plan to avoid the more substantial judicial remedy. As the DOL viewed Seattle as a new ground for affirmative action, this voluntary plan occurred simultaneously with DOL-imposed bid conditions on all federally funded construction (DOL 21/Letters, Bid Conditions- Seattle, August 12, 1971). The decision in *Ironworkers*, the newly signed voluntary plan, and the newly imposed bid conditions converged to create a demand for minority workers that would not otherwise exist. The UCWA became the source for minority labor to satisfy that demand.

Ironworkers illustrates all the main concerns expressed by scholars in the litigation of politics literature. For example, it was a lengthy and costly process. With over 550 filings from the court and the parties to the lawsuit, 350 of which came after the June 5, 1970 ruling, it required careful judicial supervision (EEOC 34/Docket, Ironworkers Court Docket). However, the political environment in which *Ironworkers* emerged also explains why organizers continue to pursue litigation strategies to achieve social change. The political climate was inhospitable to a successful administrative solution to Title VII violations in the construction industry. Local leaders were unwilling to confront construction trades about their exclusionary practices due to fear of losing their political support and endorsement. Traditional political desegregation efforts were hamstrung either by a lack of resources or political will. In this environment, *Ironworkers* became a vehicle for the UCWA to move the desegregation discussion away from this political stalemate. Organizers pursued litigation strategies, not as a shortcut but rather because it became the most probable avenue for change. Instead of "putting all their eggs in the litigation basket," the UCWA pursued their economic goals through varied venues: direct action, a voluntary plan, and yes, litigation.

The second assumption inherent in the critique of organizers' use of litigation strategy to create social change is that legal mobilization is prohibitively costly and so time-consuming that it requires that social movement organizations spend all of their resources on judicial interventions. However, even while pursuing the court case, the UCWA maintained its direct action and community organizing activities. While common in the litigation of politics literature, the assumption that the allure of law will somehow trick organizers into ignoring other avenues for change ignores the multi-faceted character of many social movement organizations.

The UCWA, like the CCA before, always considered litigation as part of their strategy and often secondary to community organizing and direct action. In describing UCWA's legal strategy, Tyree Scott explained that "we figured out some sophisticated approaches of dealing with the law, so we would not just demonstrate, but we would also file lawsuits and makeup causes of action…and pretty soon, we were sitting up in the courthouse like we had some legitimate claim to be there" (Scott, Interview). Michael Woo, one of the leaders of the UCWA, also explained the legal strategy as integral to the movement's demonstrations. He explained that "I think our vision and strategy at that time, Scott described it as two-pronged, it was innovative for its time because you complemented the legal challenge, everything from filing a complaint to moving it through the system to get it in court, and you complemented that with community involvement" (Woo, Interview). He continued, "it's hard to organize around just a legal strategy. You complement it with community organizing so that people feel like coming to an action where they are part of pushing for a solution or accelerating the process. We did that at the courthouse a number of times because we didn't feel like the decision was going to land our way. Those kinds of actions are important, and people can rally around it."

Frank Petramalo, one of the leading DOJ attorneys for *Ironworkers Local 86*, also viewed direct action as complementing legal action. When asked about the UCWA's protests during the case, Petramalo explained:

> I think that they were very helpful. I remember the demonstrations very well; I think they were very helpful as they kept the public focus on the problem in the construction industry in Seattle. I remember Judge Lindberg's courtroom being packed a couple of times…. Too often, you have a lawsuit, a decision, and everyone forgets it whether or no progress was made (Petramalo, Interview).

Scott also explained that direct actions continued, in part, even after the lawsuit had begun and even after Judge Lindberg had ruled for the UCWA because Black workers wanted to retain ownership of their lawsuit. The DOJ would not have brought suit against the Seattle building trades were it not for the CCA's direct action. In recalling the beginning of the lawsuit, Petramalo explained that "there were demonstrations in various construction sites in Seattle…a group of black Construction workers and their supporters were picketing, and I think there was some picket-line violence, and I believe that Judge Lindberg got in touch with the Assistant Attorney General back here in Washington at the Civil Rights Division and asked that the Justice

Department come and do an investigation" (Petramalo, Interview). Also recalling the beginning of the lawsuit, Michael Fox, the attorney for the UCWA, explained that

> The purposes of the demonstration in 1969 and 1970s were to call attention to the fact that there was blatant discrimination in the skilled construction trades; I don't even think that Tyree concluded that we had to get the Department of Justice involved…. I don't think there was even thought of a lawsuit at first. (Fox, Interview)

While the DOJ's enforcement was necessary for the UCWA to have the judicial decree that differentiated it from other minority organizations, Scott wanted to ensure that "we wouldn't let the Justice Department just do, come in and do the law and take the initiative from us" (Scott, Interview). It was their lawsuit, and they knew that the best impact that could have was to continue pressuring the court and the DOJ through direct action. Neither the DOJ response nor the legal victory distracted or seduced the UCWA away from direct action. They understood that legal action was only one prong of a sometimes two-pronged, and sometimes a three-pronged movement. This combination of legal mobilization and more traditional modes of contestation and community action contains the genuine potential for social change. Litigation and court victories did not serve as a distraction for the UCWA. It narrowed their focus, empowered their actions, and legitimized their grievances.

When asked what he believed were the most successful aspects of *Ironworkers Local 86*, Michael Woo prefaced his answer with, "success is a fragile thing." *Ironworkers Local 86* was by no means the perfect opportunity for a new social organization. The order required active participation by the court until late 1977. Kagan's and Rosenberg's concerns that litigation is costly and time-consuming are borne out in *Ironworkers Local 86*. However, dismissing litigation and court action as ultimately detrimental or hollow is too narrow of a view of sociolegal change. *Ironworkers Local 86* is an example of how a social movement organization mobilized the law, taking advantage of a new political opportunity to create social change effectively.

4.2.2 *Defining Rights*

Klarman (2005) argues that a primary drawback of litigating political matters is the ambiguous, indeterminate results. Since “different judges, even when confronted with the same legal sources and holding the same personal preferences, might reach different legal interpretations because they prioritize the legal and political axes differently,” litigating social and political issues creates an inconsistent patchwork of results that are detrimental to the change being sought (Klarman 2005, 5). Similarly, Kagan points to legal uncertainty as one of the worst consequences of adversarial legalism. He argues that litigating political and social issues requires that parties to the lawsuit gather their own facts, and then a judge determines which issues are relevant. Further, he argues that since myriad conflicting facts exist and a panoply of legal theories are potentially applicable to that set of circumstances, results are inherently inconsistent across suits. Compared to systems that rely on a central investigation—where a government actor gathers evidence and prunes the conflict of superfluous issues—litigant activism involves duplicative work and inconsistent application of the law (Kagan 2001, 9).

While Klarman and Kagan’s arguments ring true, they are unduly limiting. First, they neglect to account for the fact that any legal language, including legislation, not just that created by court decisions, is often ambiguous (Lovell 2003). Title VII itself was especially and purposefully vague and written to enable legal action to determine its meaning and scope (Farhang 2010; Hill 1974). Second, these arguments focus only on how detrimental ambiguity can be to social movements and not on the advantages of a flexible legal environment. There is a lot of potential for plaintiffs, activists, and organizers to strategically influence the courts to interpret vague legislation in ways to better address the harms the new law was enacted to remedy.

In *Ironworkers,* the UCWA shaped the definition of the ambiguous and legally uncertain Title VII to better address discrimination in the Seattle construction trades. Through legal mobilization, the UCWA defined the ill-defined term of "discrimination" in a comprehensive and systemic way beyond a position or job to encompass the day-to-day harm experienced by black construction workers. Instead of being limited by the vagueness of the legal term, the UCWA took it upon themselves to define what the injury of "discrimination" meant to them, as well as what was needed to provide an effective legal remedy.

"We don't just want the jobs," Tyree Scott announced during an early protest to a group of one hundred Black construction workers and their allies in Seattle. "We want some control over them" (Griffey 2010, 161). The UCWA challenged the non-compliance of the court order not just over unfulfilled quotas but also over the very structure of affirmative action plans that relied on discriminatory labor unions and contractors to train the Black workers they were actively discriminating against. Or, as Scott put it, "you can't leave those who created the problem in charge of the solution." In challenging this power structure, the UCWA demanded that they, as Black workers, should take charge of the desegregation process (Griffey 2010, 162).

One way that the UCWA challenged this power structure and took charge of desegregation was by positioning itself as a trade union. For example, in many cases, construction workers need to work through construction trades to get a job. They are trained by the trades' apprenticeship programs and then, based on seniority, assigned roles through hiring halls. Similarly, the UCWA also acted as an informal hiring hall. After identifying an eligible worker, the UCWA contacted job sites and contractors directly, vouching for a specific Black worker who was ready and able to work. Once the UCWA succeeded in getting a job commitment for a Black worker, it would then send that worker to the union knowing that the contractor would call the hall and request that worker specifically, by name, as was allowed in the court decree (EEOC 33/COAC Records, Report to the Court Advisory Board, October 15, 1972). While not a formal and exclusive hiring hall, the UCWA did function like one, intermediating between construction jobs and construction workers and ensuring that they were adequately trained and able to do the job. The argument that the UCWA was a "rival union" was made repeatedly by the construction trades to get the supplemental order adding the organization to the lawsuit invalidated ("Labor maintains that UCWA is a rival' union' and in fact does not really represent the black community," (OFCC 18/Seattle Area Coordinator Reports, Seattle Area Office Weekly Report, August 9, 1972, by Maxine Daly; EEOC 33/Docket, June 8 Pre-Trial Motion by Defendant arguing against the adding of the UCWA as a party, *Ironworkers*). This ability to circumvent construction trades' hiring allowed the UCWA to strike a powerful blow to the unions' control of their trade. By acting as a rival pseudo-union, the UCWA was able to substantially challenge the construction trades.

Throughout both the Seattle Plan and *Ironworkers*, the UCWA challenged legal remedies that focused exclusively on the number of jobs made accessible to black workers. They focused beyond the individual and their discriminatory treatment, arguing instead for the impact of unions' segregationist actions and the systemic impact on Black workers. Scott and other leaders of the UCWA urged the court to consider legal remedies in direct relation to the social harm that it was trying to address. For example, instead of focusing exclusively on equal access to a position, the UCWA convinced the court to focus on equal opportunities to succeed, on-the-job training, union membership, and equal representation by the union (EEOC 32/Orders, Order filed on July 12, 1972, expanding the UCWA's request for relief, *Ironworkers*).

Most hometown plans developed complicated statistical models to account for proportionate representations of minorities in the construction trades. Still, they neglected to account for the many reasons why a Black worker might not take a position, even when having access to it (Hill 1974). Pervasive harassment and refusal to train were not only stressful but dangerous in an industry such as construction. Segregation persisted among union membership, with Black workers often relegated to the worst and least paid jobs (Hill 1974). Worse, by creating such a hostile work environment that many minority workers left their jobs, labor unions argued that nonwhite workers were simply not dedicated enough to the job. When workers quit, unions disavowed any responsibility. They blamed the Black workers for high attrition rates, often implying that nonwhite workers were too lazy or unintelligent for skilled work and that affirmative action was impossibly utopian social engineering ("all efforts to enroll minorities in the building trades, appears to fail because of one fatal deficit: the lack of applicants," in Letter from Vincent Macaluso to John Rogers, dated April 8, 1969 in DOL 19/Correspondence). By forcing the court in *Ironworkers* to account for these discriminatory issues, the UCWA succeeded where hometown plans and other, narrower, court decisions had failed.

Michael Woo explained why litigation strategies and *Ironworkers* succeeded in meeting its desegregation goals, and the Seattle Plan did not:

> The Seattle Plan died and disappeared. It was the grassroots organizations that were able to hang on because the folks that came to the UCWA were the folks that went to work in the industry. They had the support, after five o'clock at night, from the organizers and volunteers in the organization to try to meet their needs and their challenges and deal with the frustrations, and gave the emotional support they needed. They weren't getting that from the Seattle Plan. (Woo, Interview)

White workers who felt attacked by the court order increased their hostility. Without community support, many of these Black apprentices would have left the program, as witnessed in many affirmative action programs around the country (Hill 1974). By creating a support system for Black workers actively discouraged from continuing their education, the UCWA went beyond protest activity and legal mobilization.

Speaking to the UCWA's role as a community and educational organization, in his incredibly detailed and thorough dissertation on the UCWA and Tyree Scott, historian Trevor Griffey explained that "The tiny UCWA office saw 20-30 men each morning for screening...there was a great deal of educating going on. Tyree Scott spoke to each of the men individually, then to the entire group, talking about the problem, and the potential for making a real impact on it by facing it as a group rather than as individuals and stressing the need to become a part of the new organization" (2010, 237). Similarly, when asked about these education programs, Michael Fox, the attorney for the UCWA, explained that "you don't just go zap, you are a construction worker. Things had to work out so that white journeymen were going to be cooperative teachers. There is very little you can do about that through court orders." Petramalo also focused on training as a critical role of the UCWA's enforcement of the court order:

> What you have to appreciate is that being successful in a lawsuit and getting court orders and remedies really don't work unless you have strong community support…And this is where the community organization came into play; they were very helpful in recruiting young black folks to came into these training programs and more importantly to mentor them and provide support while they went through the program. (Petramalo, Interview)

When asked about the success of *Ironworkers*, Woo discussed its measurable success- more unionized Black construction workers- but also focused on the more expansive impact of what it meant to have the social movement organization be the one who determined legal remedies. Woo shared that "the ones that are meaningful to us are the ones where those workers who took advantage of the opportunity got politicized and used their position in their industry to make it comfortable and safer for others like them who enter the industry" (Woo, interview).

The UCWA's ultimate goal was to have more Black workers on construction sites in Seattle. But those numbers alone would not be a success. Building a community, providing the support and network that allowed Black workers to succeed, benefiting the community broadly, and educating both white and Black workers was more important. This ability to re-conceptualize the harm of discrimination beyond a job vacancy to the opportunity to succeed in that position was an essential outcome of the UCWA's legal mobilization in *Ironworkers*. It is doubtful that this result could have occurred through traditional political means.

4.2.3 *Enforcing the Law*

Rosenberg attributes the courts' inability to create social change to their lack of enforcement powers to implement judicial orders, regardless of how detailed and ambitious they might be (Rosenberg 2008). Even Michael McCann acknowledges that courts' absence of enforcement power may narrow their impact to indirect effects only (McCann 1994). However, this need not be a permanent limitation on the courts. In *Ironworkers*, the UCWA overcame the judicial branch's inherent inadequacy by fulfilling the role of enforcers. Through Judge Lindberg's order, those most impacted by the court order—and therefore, those most dedicated to its success—served as the enforcement mechanism. The UCWA's role as the enforcement mechanism of the judicial remedies became a central part of the social movement organization.

Scholars and labor law practitioners alike have noted and admired Judge Lindberg's detailed court decision (Gould 1974; Robbins 1972). "The remedial system devised by the court included virtually every remedy employed in hiring hall discrimination cases and added some novel ones." (Robbins 1972, 1120). Judge Lindberg's remedial scheme includes precise and explicit administrative procedures and guidelines with a comprehensive approach to the entire employment process, from recruitment through training to referrals and membership (*Ironworkers,* 1236–1250). For example, to remedy the unions' refusal to admit Black workers to membership, the court established objective standards for admission. Similarly, to facilitate enforcement, detailed records of all applicants for membership or job referrals were to be kept, and, more importantly, explanations of why any Black worker was denied a job referral were to be documented (*Ironworkers,* 1238). Judge Lindberg wrote his decision in this manner to mirror how the construction labor market already worked. As Robbins wrote of the decision in *Federal Remedies for Employment Discrimination in the Construction Industry* (1972) only three years after, "[P]erhaps its most important attribute is its minimal impact on the current employment system" (1233).

Arguably, the original decision so comfortably fit the current power structure that it allowed unions to meet the statistical goals of affirmative action plans on paper while hollowing out its substance. Unions would cycle through Black apprentices instead of training them and discourage Black workers from staying or learning a trade. When workers quit, unions disavowed any responsibility. They blamed the Black workers for leaving the jobs, often implying that nonwhite workers were unable to conduct skilled work. Further, practices such as "motorcycling" (contractors transported Black workers from site to site to be counted in several projects simultaneously) and "checkerboarding" (a contractor transferred minority workers from his private projects to inflate their representation on public projects) all allowed unions to fulfill the court order's requirements without meaningfully changing their culture and practice. In that same vein, the court decision also allowed state actors to stay the course and retain the status quo. In one of her reports, Maxine Daly even says, "[A]s for our involvement with the Court Order Plan, there has been none" (OFCC 18/Letters, Letter from Maxine Daly, Regional Director of the Seattle Office, to Vernon Nilsen, Regional Administrator, June 6, 1971).

However, as unions' disrespect of the court decree and its mandate became more flagrant, frustration grew. Labor unions' continuous disregard for the court order and absolute refusal to even meet with the DOJ lawyers—whom they argued were the "Blacks' attorneys"—about timetables and reporting mechanisms forced organizers to reimagine the enforcement terms of desegregation orders (OFCC, 18/Logs, Area Coordinator Weekly Log).

When asked how the UCWA became a party to the lawsuit and the enforcement mechanism for the court-mandated affirmative action plan, Fox explained that "when the UCWA had more of these jobs shut down, in the summer of 1972, there were a whole series [of shutdowns] because we were concerned that the decrees that were at issue were not being aggressively enforced and so the UCWA had another series of shutdowns." At that time, Fox explained, "Judge Lindberg at the time made it clear that he wanted the UCWA to come to the court hearings since they were the ones who started the whole thing…. I formally appeared as the UCWA's lawyer, and at that point, [he] made the UCWA a party for the purposes of relief, gave us a formal role. We wanted to be directly involved, we were thinking about filing a motion to intervene, but we didn't have to, he [Lindberg] basically issued an order making us a party for the purpose of relief" (Fox, Interview).

In practice, the UCWA's role was to recruit and counsel the new Black apprentices. Additionally, the UCWA served as the "boots on the ground," providing both the court and the DOJ with much-needed investigative powers (EEOC 32/Orders, Supplemental Order dated June 12, 1972, *Ironworkers)*. "They were there, they were the boots on the ground, and they would know when there were problems developing, and they could relay the information to me when they couldn't solve them on their own," Petramalo explained. He continued, "I cannot stress enough the importance of having an organization like the UCWA involved because they were there every day; the word got around that if you have a problem go see the UCWA. They would take care of it, and if they couldn't take care of it, they would give me a call and say, 'listen, we are having this problem…' Without that kind of community support, in my opinion, very little progress would have been made."

Thus, Judge Lindberg linked the organization to *Ironworkers* lawsuit by naming the UCWA the enforcement mechanism for the court order. This new authority gave the UCWA the responsibility for enlisting Black workers to study the law, determine their rights, and decide how best to assert them (EEOC 32/Orders, Supplemental Order dated June 12, 1972, *Ironworkers*). Ironically, the structure of the decision, the one written to better align itself with the current workings of the construction labor market, provided a great transformational advantage to the UCWA and the framework it deployed to demand social change.

The UCWA's first step included contacting all workers mentioned explicitly in the court's order, as well as all workers whose detailed records were now part of the court docket. It would then work closely with these workers, ensuring they had transportation, needed equipment, and were willing and able to work. Once the UCWA had an eligible worker, it then contacted job sites and contractors directly, vouching for a specific Black worker who was ready and able to work. Organizers knew which contractors to reach and which needed additional Black workers to meet their quotas, as this information was also part of the court record and required by the court decree. Once the UCWA succeeded in securing a job commitment for a Black worker, it would then send that worker to the union knowing that the contractor would call the hall and request that worker specifically, by name, as was explicitly allowed in the court decree (EEOC 33/COAC Reports, Report to the Court Advisory Board, October 15, 1972, *Ironworkers*).

The success of this strategy soon became apparent, and in 1973, the Bureau of National Affairs report stated that "[T]hose minority workers who gained access to the construction jobs as a result of the UCWA's efforts have been well accepted by contractors. Contractors have been utilizing Black workers referred by the UCWA on posts subject to the Seattle Hometown Plan, thereby satisfying two commitments simultaneously (DOL, 19/Annual Reports, *BNA Construction Labor Report*, June 23, 1973). The DOL's decision exempting trades covered by the court's decree when it imposed an area-wide plan in Seattle is further evidence of the success of the court's plan (DOL, 19/Annual Reports, *BNA Construction Labor Report*, June 23, 1973).

By grounding its actions on the order, the UCWA worked toward the desegregation of the construction trades effectively. Organizers undercut their dependence on the discriminating labor unions' leadership to work directly with contractors more willing to hire Black workers. By being empowered and enfranchised by the court order, the UCWA transformed power relations between Black workers, labor unions, and contractors.

4.3 CONCLUSION

The UCWA's mobilization of the law propelled them above a destructive political process and allowed them to define their legal rights and injury while simultaneously enforcing its remedy. *Ironworkers* and its consequences provide an essential case study for sociolegal scholarship as it challenges many assumptions inherent in the discussion and criticisms of organizers who pursue litigation strategies, even in the face of what appear to be insurmountable obstacles. It reveals how litigation strategies might provide disenfranchised groups with an effective and meaningful way to overcome political and legal stalemate to affect change. The case emphasizes creative ways organizers can use legal claiming to help define poorly defined rights and remedies. Further, it illustrates how organizers can weaponize their legal victory to overcome courts' lack of internal enforcement mechanisms.

In this chapter, I showed how the UCWA's mobilization of the law allowed it to move beyond the political stalemate around Title VII. They were able to use the *Ironworkers* litigation process and legal remedies to plow through the political environment that created and condoned the harm their movement was trying to address. Through their own experiences of exclusion, the UCWA was able to define discrimination as not only exclusion from job opportunities but also from a representative labor union, training, community, and career development. Unlike agency-led affirmative action plans, the UCWA made *Ironworkers*' remedies comprehensive of the day-to-day experience of being a construction worker and, therefore, a much better-suited correction to the segregated work environment. Lastly, in this chapter, I showed how, by pursuing litigation strategies, the UCWA became *Ironworkers'* effective enforcement mechanism, acting like a de-facto labor union and placing workers that they trained into positions where they could succeed.

In the next chapter, I apply this framework to another case, that of Harlem Fight Back and *Rios*, to investigate why organizers continue to pursue litigation strategies despite inherent limitations.

Chapter 5. NEW YORK, HARLEM FIGHT BACK & *RIOS*

This chapter will apply the theory and framework established in Chapter 4 to New York City in the late 1960s and 1970s. Like the Seattle case, New York City's Black workers' organization, Harlem Fight Back, pursued legal mobilization, in conjunction with other forms of contestation, to create social change. By expanding the movement legal remedies framework to another city, another organization, and another litigation process, I provide further evidence that organizers continue to pursue litigation strategies to achieve social change because when political intervention is undesirable and rights-claiming relies on new, poorly defined rights, mobilizing the law might be the only viable option available. Mobilizing the law allowed Harlem Fight Back to move their agenda past destructive political stalemate, define the social and political ills they sought to reform on their terms, and enforce the judicial remedy they helped shape. At a time when every other desegregation plan in New York failed, Harlem Fight Back's legal mobilization in *Rios et al. v. Enterprise Association Steamfitters* (1973) upended the underlying political environment and transformed the economic opportunities of Black and Brown workers.

This chapter proceeds as follows. First, I introduce New York's historical and political context during the early years of the Civil Rights Act of 1964. In this introduction, I focus on the political opportunities enabled by the Civil Rights Act, Harlem Fight Back's role in desegregation efforts, and the sociolegal history of *Rios.*

Second, I analyze the events in New York during the early Civil Rights Act years through a movement legal remedies framework to explain why actors seeking social change pursue litigation strategies and judicial intervention. Similar to Seattle, by pursuing litigation strategies, Harlem Fight Back transcended the political process that muzzled their movement, defined their injury and its appropriate remedy, and became the ones to enforce the judicial remedy they helped define.

Though the Civil Rights Act undoubtedly provided new political and legal opportunities for civil rights advocates, New York experienced a flurry of political activity before the passage of the Civil Rights Act. In the early 1950s, New York City was the epicenter for the fight to desegregate public-sector unions, which were (and still are) disproportionally more diverse than private-sector unions. From these efforts, an active and close-knit community of civil rights activists was born. Among them was James Haughton, founder of Harlem Fight Back.

James Haughton was a well-known civil rights leader in New York. He was born October 8, 1929, in Brooklyn, New York, the son of West Indian immigrants. He was educated at City College of New York, Princeton University, and New York University and served as a lieutenant in the United States Army from 1951 to 1953, during the Korean War (JH 1/1, *Resume*). In November 1960, he joined the newly organized Negro American Labor Council (NALC) to increase support for equal job opportunities in organized labor, and served as assistant to its President, A. Philip Randolph. In 1963 and 1964, Haughton worked as a community organizer for the Lower Eastside Neighborhood Organization and served as chairman of the Labor and Industry Committee of the New York Branch of the National Association for the Advancement of Colored People (NAACP). In late 1964, he organized a Rank and File Cement and Concrete Workers Caucus for Equal Opportunity, later renamed the Building Trades Caucus, to work with the Labor and Industry Committee in gaining jobs for minority construction workers, which had only token numbers employed on major construction projects in New York City (JH Biography, Schomburg Center).

In November 1964, frustrated by what he perceived as a lack of aggressiveness by established organizations in attacking racial barriers in employment, Haughton founded the Harlem Unemployment Center to expand the work begun with the Building Trades Caucus. In that role, he met with construction companies and union officials and conducted site visits to document discrimination and hear worker complaints. His work with the NAACP's Labor and Industry Committee, as well as his founding of a meeting place for all civil rights organizations in the city, the Harlem Unemployment Center, made him both a central and centralizing figure in the New York desegregation community (JH Biography, Schomburg Center).

In 1969, Haughton changed the name of the Harlem Unemployment Center to Fight Back. Supported financially by its membership and outside contributions, Fight Back provided job counseling and placement for victims of racial discrimination, particularly in the building trades, but was also active in the rank and file movements of the longshore, utility, transit, garment, and other industries. Haughton described Fight Back as an organization "dedicated to lobbying shop stewards and foremen to hire more Blacks and registering skilled Black construction workers who were looking for work and willing to picket" (JH, 6/8, *Grant Proposal*, 1983). Its tactics included negotiation, lobbying, and coalition building, as well as lawsuits, boycotts, and demonstrations. By the early 1970s, Fight Back had more than 1,100 members. Construction trades became a focus of Fight Back's strategy as the economic conditions in the 1960s, Title VII, and EO 11246 created new and unexpected opportunities for civil rights organizers to push for more and better economic opportunities for Black construction workers.

In "'The Last Bastion of Discrimination': The New York City Building Trades and the Struggle over Affirmative Action, 1961–1976," historian Nancy Banks details why construction became the focus of anti-discrimination and desegregation efforts. When the economy turned downward in the 1950s and 1960s, the construction industry became one of the few prosperous sectors in the city, and therefore became the central focus of local civil rights organizations (Banks 2006). In the 1960s, New York City's construction industry experienced "the greatest commercial construction boom in New York's history." During that decade, the city's building trades unions erected approximately 200 new buildings creating 67 million square feet of office space, twice the amount in the next largest nine cities combined. In 1966 alone, nearly $1 billion was spent on construction in the city. This investment, both local and federal, created new employment opportunities with rising wages and fringe benefits that outpaced that of many other workers. During the 1960s, the unionization rate for the city's building trade workers was as high as eighty percent. Many labor historians have labeled this period a "golden age," in which "[c]onstruction workers especially prospered." However, the city's minority population was almost entirely denied the benefits of this economic boom. Over ninety-two percent of the construction workers employed in the New York metropolitan area were white (Banks 2006, 32–33).

Due to the size and economic importance of the construction industry in New York, efforts to desegregate the industry were varied and co-existed at the federal, state, and city levels. These desegregation efforts overlapped in ways that both advantaged and disadvantaged those fighting for the enforcement of anti-discrimination laws. Furthermore, they relied on several local and federal anti-discrimination statutes and on many federal and state government bodies. In this dissertation, I focus only on the desegregation efforts based on the federal Civil Rights Act of 1964 and its associated initiatives.

5.1 THE SOCIOLEGAL HISTORY OF *RIOS*

New York City's history with hometown plans is a complicated one. Due to the size of the construction industry in New York and its importance to labor leadership nationwide, several state- and city-level plans were announced. This eagerness to announce a New York-area plan was arguably rooted in labor and political leaders' enthusiasm to avoid the imposition of a mandatory federal program (Hill 1974).

In the post-Civil Rights Act environment, political and labor leaders pursued a voluntary desegregation hometown solution to preclude a federally imposed Philadelphia-style plan in New York (Banks 2006; Golland 2011). To that end, in March 1970, the New York Building Trades president began touting a plan to train local Blacks and Hispanics for union membership. Quickly dubbed the "New York Plan," this program soon won the support of union leaders and local contractors' associations. However, all negotiations regarding the plan excluded New York civil rights groups. In observing this exclusion, the OFCC Area Coordinator for New York shared with the OFCC National Office that, "[T]o date the negotiations have been conducted solely between the union, state, and city. There has been no effective 'third party-black minority' representation, unlike every other city where there has been a major settlement" (OFCC, 2/Logs Area Coordinator Weekly Log, 1970 Reports).

After their exclusion from negotiations, civil rights leaders criticized the plan publicly, as well as the politicians who supported it. However, even amid protests, the Building and Trade Unions' plan was announced as the official New York Hometown Plan. Civil rights organizations objected quickly and called for the OFCC to reject it as an official area plan. In particular, plan opponents noted that seven of the ten-person administrative committee that controlled the plan would be union members and representatives from the construction industry, and only three would come from the minority community. Worse yet, the governor and mayor would appoint minority community members, not a coalition of minority organizations. Moreover, unlike every other hometown plan at that time, the New York Plan did not include a minimum number of placed minority trainees and had a “maximum” of 800 minority trainees who could be accepted into its training program. Particularly offensive was the establishment of a separate training center for Blacks recruited under the plan (JH 11/1, Report written by Dennis Yeager, project director of the Columbia University Center on Social Welfare Policy and Law, dated 1973).

The plan also offered no guarantee of union membership or employment after training and stipulated that any signatories of the agreement were “deemed to be in compliance” with all other affirmative action requirements. This provision meant that even if no trainees were placed in jobs or received journeyman cards, unions would be considered to have fulfilled their obligation to the plan and any other affirmative action requirements of the city, state, or federal government just by signing onto the New York Plan (JH 11/1, Report written by Dennis Yeager, project director of the Columbia University Center on Social Welfare Policy and Law, dated 1973).

However, although every major civil rights organization in New York City denounced the plan—with Herbert Hill from the NAACP calling it “the worst in the country” and James Haughton writing that the plan was “not worth the paper on which it is written”—the New York Plan quickly garnered the support of Republican Governor Nelson Rockefeller and Republican Mayor John Lindsay (Banks 2006, 322). Consequently, on January 30, 1971, Mayor Lindsay quietly made it law in New York City by including it in an executive order (Banks 2006, 306).

In response to the plan's announcement and Mayor Lindsay's executive order, the New York Regional OFCC office informed New York political and labor leaders that the New York Plan did not meet the federal requirements for a valid hometown desegregation solution. In their letter to state and city leaders, the New York OFCC Area Coordinator stated that "the OFCC requires that the plans it accepts as acceptable affirmative action...have goals and timetables for each of the signatory crafts. Your plan does not designate what trades will participate, nor to what extent. Further, the New York Plan calls for a maximum of 800 trainees with the duration of the agreement to last one year. Considering there are over 100 construction locals in New York City, most with a significant underutilization of minority workers, the goal of 800 would seem not to be an appropriate solution to the problem." Further, he stated that "[O]ur office expects a tripartite group (i.e., representatives of labor, management, and the minority community) to assist in developing and carrying out the plan." Lastly, he ended the letter by stating that, "[I]t is our opinion that the New York Plan, as presently constituted, does not meet our standards for acceptance as a 'hometown' equal employment plan" (OFCC 2/Logs, Report on New York Plan, March 1971).

Despite the plan's violation of several OFCC's guidelines for hometown solutions and the explicit warning from the regional office of the plan's inadequacy, labor and political leaders felt confident that the Department of Labor would approve the plan. The New York State Industrial Commissioner even testified that though he "wasn't sure" if the plan met the federal guidelines, he "confidently expect[ed] that the Federal Government will approve the New York plan" (Banks 2006, 338).

This confidence was confirmed when, on August 11, the New York Plan was approved as the official voluntary hometown plan for New York. This approval closely followed a meeting about the plan between Peter Brennan, president of the Building and Construction Trades Council of Greater New York, and President Nixon. Brennan, who later became Secretary of Labor under Nixon, hoped his segregated New York Plan would replace the Philadelphia Plan as the preeminent desegregation plan in the country. Shortly after that meeting, President Nixon ordered the OFCC to approve the New York Plan as an acceptable hometown solution despite the regional office's findings (Golland 2011, 229).

In response to this approval, Herbert Hill and James Haughton issued a statement accusing the DOL of "reversing its decision" on the plan. Hill and Haughton also noted the highly political approval of the New York Plan: "The New York Plan is…the device to perpetuate the racist control of jobs in the construction industry by white construction workers and their alliances in both the Republican and Democratic parties" (JH, 11/5, Anti-New York Plan Protest Flyer). In addition to the statement, Haughton and Fight Back organized protests around the city's many construction sites issuing a series of demands for an amended New York Plan. The demands included a guarantee that fifty percent of the workforce at the site be residents of the neighborhoods in which the construction was taking place, and that twenty-five percent of the subcontractors be minority-owned (JH, 11/5, Anti-New York Plan Protest Flyer).

Local civil rights groups' sustained protests against the New York Plan attracted the attention of the United States Commission on Civil Rights, who subsequently held hearings on the plan. As expected, union leaders testified in favor of the plan, while representatives of civil rights, and nonwhite labor organizations, testified against it. After the hearings, the commission issued an unequivocal and full-throated condemnation of the New York Plan. In particular, it focused its criticism on the OFCC's decision to approve the plan as a valid hometown solution: "[C]onsidering the grave inadequacies of the plan its approval by [the] OFCC is inexplicable and suggests that either the federal agency is incompetent to administer its own guidelines, or… has yielded to pressure." The commission concluded by recommending that the OFCC impose a mandatory plan on all the construction labor unions in the state "without the necessity for negotiations between the industry and the minority community" (OFCC 2/Reports, Report On Commission Report by Area Coordinator, September 15, 1972).

However, as the findings were non-binding, the commission's findings were ignored, and the participating unions and employers of the New York Plan agreed to extend the plan for another year. The OFCC decided to aggressively fight against the plan, citing the fact that the original plan "had not even come close to meeting its first-year goals." Since no audits were conducted and no official reports were published on the New York Plan, official numbers on the plan's impact do not exist. However, even the most optimistic estimates showed that by August 1972, only 537 minorities had been placed in training and that only 34 were given journeymen union cards (OFCC, 20/NY Plan, *Report on the New York Plan*, November 16, 1972).

In 1972, in their effort to fight against the extension of the New York Plan, the OFCC Area Coordinator for New York asked that federal funds be withheld from the plan until three conditions were met: (1) "provisions be made for adequate and meaningful participation in negotiations for a new Plan by minority group persons," (2) a "significant increase" in the minority goals for employment in the construction industry, and (3) that a new plan be negotiated that was "a comprehensive one with specific goals for apprentices and journeymen, as well as trainees" and "audit and reporting requirements." He concluded the letter by stating that although an audit was to be conducted on every hometown plan after the first year of operation (under OFCC regulations), the regional office had submitted a request to the DOL to proceed with an audit of the New York Plan. However, as of November 1972, they had "received no permission to do an audit," and again urged the national office to provide them with the resources to conduct a full audit of the plan (OFCC, 20/NY Plan, *Letter from C.J. Cottrell to Laurence Silberman,* November 16, 1972).

Ultimately, due to pressure from the regional OFCC and local civil rights organizations, the DOJ found the New York Plan invalid. While the New York Plan was unsuccessful in desegregating the construction industry in New York, it was remarkably successful in keeping the federal government from imposing a mandatory Philadelphia-style desegregation plan in New York. As James Haughton wrote in his letter to the OFCC in opposition to the renewal of the New York Plan, "[T]he New York Plan has accomplished what it is designed to do- to keep out of New York a tough Philadelphia type plan with goals on each project- in favor of the present plan with goals only for trainees on an area-wide basis." (JH, 8/34, *Position Paper in Opposition to the New York Plan*).

James Haughton and his associates in Harlem Fight Back attempted to work through the New York Plan to desegregate the construction trades in New York. They lobbied the regional OFCC for audits and investigations into labor unions violating the plan. They urged the mayor to reconfigure the plan with the establishment of minimum goals. They sought construction trades' minority representatives, hoping to broker a relationship where Harlem Fight Back would help these unions find and mentor new minority workers. None of these "traditional venues" for change worked, however (JH, 8/34, *Position Paper in Opposition to the New York Plan*). The New York Plan was always a political maneuver to delay and prevent the imposition of a mandatory plan. Legal mobilization arose not as a way to passively avoid the hard work of changing minds but was one of the many strategies Harlem Fight Back made use of to achieve their sought-after social change. Furthermore, the traditional political modes of contestation were clearly not working.

Therefore, on March 25, 1971, Harlem Fight Back and the Employment Project at Columbia University's Center on Social Welfare Policy and Law brought a class-action lawsuit against the Mechanical Contractors' Association and the New York City Steamfitters Local 638 in what became *Rios et al. v. Enterprise Association Steamfitters* (1973). The mobilization leading to this case has been called the "flagship of the struggle around construction jobs" due to the comprehensiveness of the remedial framework established by the court (Gould 1977, 313).

The case arose when in 1970, George Rios, Puerto Rican, and Eugene Jenkins and Eric O. Lewis, both Black, were rejected for "A Branch" journeyman membership in New York City Steamfitters Local 638, and Wylie Rutledge, also Black, was rejected when he applied for an apprenticeship. The plaintiffs argued that Local 638 was violating Title VII of the Civil Rights Act (*Rios* 982).

Since its inception in 1913, Local 638 (renamed Local 28 due to a merger) had been an exclusively white union. The absence of hiring halls allowed it to nepotistically allocate available positions through traditional family networks, a practice that the New York State Commission for Human Rights found had led to the "total exclusion of Blacks" from the union ranks (*Rios,* 987). Due to this practice, the commission commenced proceedings to abolish the union. As a result of this action, Local 638 adopted a formal plan of open access to all potential applicants. That "open access" program categorically stated that, "[A]apprentices will be selected on the basis of qualifications alone, and all applicants will be afforded equal opportunities under these standards without regard to race, creed, color, national origin, or physical or psychological handicaps, provided, however, that if the physical and psychological handicaps affect the ability to perform the manual labors required by the trade, the applicant will not be accepted" (Rios, *993*).

However, the union failed to comply with its own "open access" plan. Instead, to appear to have desegregated, it separated its membership into two "Branches." The "A Branch" members were referred to lucrative, specialized jobs in construction, while "B Branch" members worked primarily in repair shops, performing routine maintenance. Additionally, the union ensured that nonwhites were excluded from the "A Branch." Regarding its apprenticeship program, to appear to be recruiting nonwhites, the union would advertise the formation of each new apprenticeship class in local Black newspapers but then reject any Black applicant on whatever grounds the union found most convenient (Golland 2011, 143). Rios, Jenkins, Lewis, and Rutledge turned to Harlem Fight Back for assistance in bringing a class-action lawsuit against the union. Fight Back was an agency dedicated to lobbying shop stewards and foremen to hire more Blacks and registering skilled Black construction workers "who were looking for work and willing to picket" (JH, 6/8, *Grant Proposal*, 1983)

For what became the *Rios* lawsuit, Fight Back turned to its partners at Columbia University. Together with Fight Back and Columbia—a melding of a grassroots organization with a prestigious academic institution—the four workers brought a class-action lawsuit against the union and their skills' contractors associations (Gould 1977, 313). *Rios* is a merger of both the private right to sue and the DOJ's authority to file pattern-and-practice suits under Title VII. It combined the lawsuit brought by the four nonwhite workers in association with Fight Back and Columbia with a DOJ action alleging pattern-and-practice discrimination by Local 638 and contractors against nonwhites (*Rios,* 983).

On March 25, 1971, a federal district judge found the union "had followed a course of racial discrimination over the years." As a result, it ordered the union to immediately admit Rios, Jenkins, and Lewis as skilled journeymen. Further, in response to the DOJ's pattern and practice suit, another federal district judge ordered the union to immediately admit "169 qualified non-white workers to membership" (*Rios,* 989). Additionally, and most importantly, like in *Ironworkers,* the *Rios* court devised a quota system to redress past discrimination against minority workers by a union. The trial court in *Rios* ordered Local 638 to increase its minority membership to thirty percent over several years to overcome the effects of past discrimination.

To oversee this plan, the judge appointed a Special Master empowered to develop an Affirmative Action Plan (AAP). The AAP eventually submitted included annual goals of minority hiring, required that the local revise its testing instruments to eliminate bias, adjust proportionate hiring of apprentices to journeyman to ensure the existence of opportunities, tabulate data on race and ethnic classifications, keep substantial records on the employment application process, and advertise in magazines, newspapers and other literature geared to minority interests. On appeal, the Second Circuit upheld the quota remedy and the appointment of the Special Master but remanded to the lower court for a reassessment of the thirty percent figure. The original goal of thirty percent was modified to twenty-six percent (*EEOC v. Local 638 et al.* (1976)). By 1987, through appeals, contempt hearings, and supplemental hearings, *Rios* had been expanded further, with the court also ordering that the unions pay fines and establish a trust that would fund a tutorial program for nonwhite apprentices, summer jobs for nonwhite youths age sixteen to nineteen, the appointment of job counselors to assist nonwhite apprentices in adjusting to the work environment, and low-interest loans to nonwhites to defray educational costs (*Rios et al. v. Enterprise* (1988)).

What made Harlem Fight Back's legal mobilization in *Rios* the "flagship of the struggle around construction jobs" was that the remedial scheme developed by the Special Master's Affirmative Action Plan was a direct response to the specific complaints and demands of its plaintiffs (Gould 1977, 313). Through direct action, new claims, and requests for further hearings, Harlem Fight Back and the other plaintiffs clearly delineated what was needed from legal remedies so that they would translate into concrete solutions to their problems. In response to Harlem Fight Back's legal mobilization, the court mandated that the labor unions address the different discriminatory shortcomings that impeded not only minority access to jobs but also their ability to succeed. From testing preparation scholarships, to apprenticeship summer programs, to mentorship opportunities, the AAP covered the minutia that created a successful construction worker, and that detail was defined through the collaboration between Harlem Fight Back and the court. Through its presentation of the case and its on-the-ground investigation of construction sites, Harlem Fight Back was able to define the necessary remedy and report violations to the court order (*Rios*).

5.2 ANALYSIS

At first glance, *Rios* illustrates all of legal mobilization's pitfalls. As litigation of politics scholars argue, legal mobilization is a lengthy and expensive process, one that demands full attention from a social movement without any guarantee that a judicial victory will actually turn into social change. Indeed, *Rios'* final appeal was heard over seventeen years after the case was decided. In that final appeal, the Second Circuit declared that "[T]his appeal is the fourth in the long history of a Title VII class action commenced in 1971 and consolidated in 1972 with a Title VII action brought by the EEOC against the same parties" (*Rios*). A lawsuit that takes over seventeen years is undeniably expensive, and burdensome, and filled with uncertainty. However, given the inhospitable political environment, Harlem Fight Back pursued litigation strategies because they were the only available means to achieve change. Only by mobilizing the law in *Rios* was Harlem Fight Back able to move past that political stalemate to effect change. Moreover, through its challenges and claims in *Rios,* Harlem Fight Back defined their Title VII rights and how to best remedy its violation. Further, the organizers overcame the courts' lack of internal enforcement mechanisms by enforcing the remedy themselves. In the following pages, I detail the organizers' strategies and their creation of social change through legal mobilization.

5.2.1 *Moving Past the Political Process*

Scholars in the litigation of politics literature assume more cost- and time-efficient avenues for pursuing change exist, and that organizers are drawn into the "allure of law" by pursuing it exclusively to achieve change (Klarman 2005; Rosenberg 2008; Silverstein 2007). However, like the UCWA, Harlem Fight Back was not ensnared by the allure or hope of law but fought to achieve equal employment opportunities through all available venues. They approached the issue of desegregation from various angles, and *Rios* rose as the most likely source of empowerment. Further, like the UCWA, Harlem Fight Back never abandoned other forms of contestation. They continued to organize protests and to work through administrative agencies to enforce the New York Plan during and after the *Rios* litigation effort.

Rios was a late attempt at desegregating the construction industry in New York. It was only attempted after multiple failures of the New York Plan, as well as attempts to work through state and city-level agencies. While litigation of politics scholars assume that organizers are foolhardy in engaging the courts, this delay in mobilizing the law indicates how cautious organizers are when pursuing litigation strategies and how purposeful they are with that choice.

Harlem Fight Back did not initiate the case until 1971, the court did not declare the initial affirmative action plan until 1972, and the full enforcement plan—post-finding of contempt for not actioning on the original court order—was only put in place in 1973 (with a final order in 1988). Throughout the early *Rios* case, the court attempted to work within the status quo to achieve desegregation. Its initial preliminary order only required the placement of the four plaintiffs at a job site. However, the union ignored even that simple order.

Instead of following the court's order, the union signed the New York Plan in an attempt to avoid the case altogether. Additionally, it cited the New York Plan's stipulation that by just being a signatory of the plan, the union had already fulfilled all of its legal desegregation duties. This action and its reasoning failed to persuade the court. In 1973, after finding that while "the union had taken some affirmative action" in compliance with the preliminary injunctions, it had not abandoned its unlawful discrimination, Judge Bonsal ordered the union to hold regular examinations for members of its "B branch" who wished to be upgraded to the "A branch" and that 175 of its 400 apprentices for 1973 should be qualified nonwhites (*Rios* 1974).

Though Haughton and Fight Back pursued alliances with state and legal actors, they never abandoned pursuing desegregation through political means, including protests and direct action. Even while *Rios* was ongoing, Haughton and Fight Back fought in the political sphere for desegregation. On August 10, 1972, Fight Back challenged the New York Plan's continued funding even as it failed to desegregate the construction trade in New York. Fight Back and the Williamsburg Neighborhood Legal Services filed a complaint with the Department of Labor against Governor Rockefeller, the Attorney General of the State of the New York, Mayor Lindsay of the City of New York, and the Corporation Counsel of the City of New York for failure to live up to the conditions of the affirmative action plan endorsed by the federal government. However, they never received a reply. On November 16, 1972, CJ Contrell, Regional Director for the OFCC in New York, reached out to the DOL, reminding them that "[T]o this date neither the Regional Director's Office nor the Regional OFCC Office, have any response from the National Office relative to any action taken or contemplated on the complaint filed" (OFCC, 2/NY Plan, Letter from, CJ Cottrell, Regional Director to Laurence H Silberman, Under Secretary of Labor, November 16, 1972).

By employing litigation strategies, Harlem Fight Back arguably affected regulatory and enforcement policies more aggressively than an administrative or executive approach. Moreover, Harlem Fight Back never placed all their eggs in the proverbial litigation basket. They pursued their economic goals through many venues: direct action, alliances with other organizations, and yes, litigation. By not accounting for the fact that a fair and robust political alternative is often foreclosed to disadvantaged groups, by assuming that it is activists' failure not to pursue a political option, and by assuming that activists naively and primarily relied on courts as a shortcut to creating change, scholars neglect the different ways social actors pursue social change and their varying effectiveness.

In addition to continuing desegregation efforts through political venues, Fight Back organized protests and construction closures. In a law review article about Fight Back in 1973, the authors state that "[T]he key to Fight Back's success in keeping 1,100 blacks and Puerto Ricans working in the construction industry is the threat of stopping work either by picket lines or court orders on jobs where there is little or no minority representation" (JH, 9/11, *Blacks and Puerto Ricans in Construction: Struggle and Opportunity*, October 1973). This dedication to direct action and demonstration is also seen in the OFCC Area Coordinator weekly reports' notes on Fight Back. In early 1973, the coordinator wrote, "Haughton said it [Fight Back] was expecting to engage in picketing job sites. . . . I suggested that if he advised me of any complaints or any deficiencies at any federally involved sites before picketing. . . . He said he would talk to his constituents about my requests." (OFCC, 2/Logs, Area Coordinator Weekly Log, 1973). Later in the year, the coordinator wrote again, "[P]honed Haughton and told him I had heard his organization might be planning some construction picketing and reiterated my request that he report any problems to me sufficiently in advance of picketing to permit amicable resolution." (OFCC, 2/Logs, *Area Coordinator Weekly Log*). These protests continued even after *Rios's* affirmative action plan had been established, with over 250 members of Harlem Fight Back closing down the construction of City College's North Academic Center in Harlem in October of 1974, demanding more minority participation (JH, 6/3, *Protest Flyer*).

One of the ways that Haughton tied litigation to community action was by tying Fight Back's membership to "willingness to picket." In both communications to their members and to their donors, Fight Back described itself as a civil rights and social service organization "dedicated to lobbying shop stewards and foremen to hire more blacks and registering skilled black construction workers who were looking for work and willing to picket." It was explicit about the connection between their legal mobilization in *Rios* and the legal remedies that came from it to enforcement through picketing and closing down construction sites. In an article titled "Organize or Perish," written after *Rios'* decision and while Haughton was working towards placing Black workers in construction jobs that "community pressure on contractors is the only way these workers can obtain jobs." For Fight Back, direct action was always integral to their strategy (JH, 7/2, Organize or Perish). Far from being tricked by the allure of law, organizers, even after a successful legal mobilization effort, understand that litigation strategies must work in tandem with organizing strategies within the community, rather than in a parallel vacuum.

Fight Back worked with state agencies and legal aid organizations while maintaining pressure through protests and direct action. This legal mobilization, combined with more traditional modes of contestation and community action, allowed them to push for social change. By combining protests and direct action, which brought them media and federal attention, with legal mobilization, which got them specific legal remedies to measure change against, Harlem Fight Back was able to effectively push to desegregate the construction industry. Litigation and court victories did not serve as a distraction for Fight Back: it narrowed their focus, empowered their actions, and legitimized their grievances.

While private enforcement of public regulatory goals through legal mobilization was the most effective way to place Black workers in construction jobs in New York, it was never the only one pursued. Harlem Fight continued to struggle for an adequate, politically negotiated local plan, but litigation emerged as the only real strategy to desegregate the construction industry. The *Rios* case is evidence of how Black workers found themselves at the leading edge of Title VII enforcement, wielding power through legal mobilization and created inroads into labor markets previously foreclosed to them. Furthermore, litigation strategies were one of many venues pursued by Black workers' organizations. Even while pursuing legal mobilization, Harlem Fight Back continued to work through administrative agencies to enforce affirmative action plans. Moreover, it continued to protest and close down construction sites, using these events to organize the community and recruit members.

5.2.2 *Defining Rights*

Harlem Fight Back's mobilizing of the law in *Rios* provided them with the ability to move past the destructive political process, define their legal rights and injury, and be the ones to enforce its remedy. In the previous section, I discussed how Harlem Fight Back moved beyond the political stalemate around Title VII through *Rios*. In this next section, I examine how Harlem Fight Back's litigation strategies defined the harm of discrimination in more specific terms than delineated in Title VII, and by doing so, shaped the resulting legal remedies.

Litigation of politics scholars argue that a major disadvantage of litigating political matters is the ambiguous and indeterminate nature of legal language (Kagan 2001; Klarman 2005). However, this critique neglects the fact that legislation is often ambiguous and that it requires legal action to determine what the new law's meaning and scope (Lovell 2003). In *Rios*, like in *Ironworkers*, Haughton and Harlem Fight Back were able to mobilize the law and influence the courts' interpretation of the ambiguous Title VII legislation in a manner that brought their own experience to bear and the promises of the Civil Rights Act into focus.

A primary challenge to desegregation efforts of the construction trades in New York, one identified by James Haughton in many of his writings, was that these labor unions were some of the most politically powerful labor unions in the country (JH 7/2, Organize or Perish). He illustrates the importance of New York construction trades nationally by highlighting Brennan's, former president of the Building and Construction Trades Council of Greater NY, ascension to Nixon's Secretary of Labor. Across the country, Black workers were relatively powerless compared to most local construction labor unions; however, nowhere did that power imbalance seem as insurmountable as in New York. To succeed where other desegregation plans had failed, Haughton knew that he needed to affect this power imbalance in a meaningful way (JH 7/2, *Organize or Perish*).

The *Rios* decision and how it impacted power relations between New York City trade unions and nonwhite workers are best observed by comparing *Rios* to the New York Plan and its consequences. The New York Plan was proposed to pre-empt a federal mandatory desegregation plan. Every aspect of the plan ensured the protection of the exclusionary status quo. For example, control over implementation (or the possibility of implementation) remained comfortably in the hands of labor leadership. “While control of the New York Plan was vested in an administrative committee composed of union representatives, employer representatives, and minority representatives, the minority representatives were to be appointed by the governor and the mayor” (JH 11/1, Report written by Dennis Yeager, project director of the Columbia University Center on Social Welfare Policy and Law, dated 1973). Therefore, in actuality, it was a labor, contractor, and government committee. Moreover, there was no guarantee of union membership for trainees upon completion of training, so the actual demographic composition of the union never had to change for the unions to be found in compliance with the desegregation plan.

Furthermore, in the New York Plan, the only specific goal was a maximum of 800 trainees—there was no mention of a minimum—and the construction industry could fulfill its obligations to the New York Plan even if no trainees were placed on sites. Finally, like in the Seattle case, the regional OFCC asked for permission to conduct an audit many times but never received any response from the national office. In a final plea, CJ Cottrell, Regional Director of the OFCC, explained that “[A]lthough a request was made for an audit by Regional OFCC, we have as of this time received no permission to do an audit of the previously approved program. This is an issue both with the community and the news media. The OFCC regulations require that an audit be made at the end of the program year.” He reiterated that “newspapers are constantly asking why an audit has not been conducted imposing Part II bid conditions” (OFCC, 2/NY Plan, Letter from CJ Cottrell, Regional Director to Laurence H Silberman, Under Secretary of Labor, November 16, 1972). However, the lack of minimum goals, timetables, and placement requirements meant that even if the OFCC had secured permission to conduct an official audit of the plan, it is unclear what they would evaluate.

Even the approval of the New York Plan as a hometown plan was due to the political power of New York organized labor. Although the regional OFCC found it inadequate as a hometown plan, it was overruled by President Nixon's DOL, and the plan was approved (Golland 2011). Not only did the New York Plan fail to desegregate the construction trades, but it foreclosed the chance of a mandatory plan as it stated that "[A]ny signatory of the New York Plan was automatically deemed in compliance with 'any affirmative action' order or plan of the city, state, or Federal government" (OFCC, 2/NY Plan, Letter from, CJ Cottrell, Regional Director to Laurence H Silberman, Under Secretary of Labor, November 16, 1972).

As evidenced by the political process that led to the approval of the New York Plan as the official hometown solution, desegregation through legislative or agency-led efforts was never a realistic option to desegregate the construction trades in New York. Legal mobilization and the *Rios* litigation was one of many desegregation venues pursued but the only one with any chance of success.

The political machinations leading to the inadequate New York Plan as the local hometown solution indicate how the agency-led, executive-led political alternative was never an actual means to achieve desegregation in New York. The regional OFCC was regularly under attack by its own national office and by the DOL. In addition to never having been able to conduct an official audit of the New York Plan, they were often understaffed. Actually, at a time when most other OFCC's local and regional offices were imposing mandatory affirmative action plans in other cities, the New York office was left completely unstaffed. "[T]he New York office of the OFCC had been completely unstaffed from February 1970 to April 1971 . . . [F]ailure to properly staff the field has given labor, management, and local and state governmental agencies license to continue or fail to halt discriminatory practices" (OFCC 2/NY Plan, Letter from, CJ Cottrell, Regional Director to Laurence H Silberman, Under Secretary of Labor, November 16, 1972). The ordinary politics path, as advocated by critics of the litigation of politics literature, was never a realistic alternative in New York. Arguably, the weakened administrative apparatus was supposed to be symbolic and serve the detracting purpose attributed to the courts. If civil rights organizations had continued to lobby an empty office, full of empty promises of desegregation, they would have failed to achieve their goals. Their pursuit of litigation strategies was not, then, a way to leapfrog the hard work of changing minds but the only viable way to achieve change.

However, *Rios* changed that. In addition to actual minimum goals, the court ordered that all its legal remedies be overseen by a court-appointed administrator with the authority to mandate further desegregation requirements, including regular audits. It is not an accident that the decision in *Rios* and the subsequent Affirmative Action Order mirrored the demands made by Fight Back when they protested the New York Plan's initial approval by the National OFCC (*Rios*). These demands focused not only on reports and auditing, but also on training, funding, and development opportunities. In particular, Haughton argued for a 4–1 ratio between white and nonwhite workers, the same ratio ultimately adopted by the court. (*Rios,* 628). By mobilizing the law, Harlem Fight Back dictated the terms of the harm that its members had suffered as well as the appropriate way to remedy it. By making the court adopt the movement's legal remedies, Fight Back was able to define the term discrimination beyond and with more clarity than what was contemplated in Title VII.

Furthermore, Haughton's interest in construction was due to the organizing opportunities available in that industry. He thought of *Rios* through a much broader and class-based lens of discrimination law and Title VII. Haughton believed the solution to poverty was a class-based approach and often used *Rios*, with its broad impact across Back and Latin communities in New York as an example of success. Haughton actually led a "working people's coalition" with Black, Brown, immigrant, and women workers across the country and argued for ways in which litigation strategies could assist in addressing poverty broadly and comprehensively (JH 14/8, New American Movement Conference, 1973). His commitment to a class-based approach is best exemplified by the end of his strategy letter: "The laws against discrimination of which you speak are of a class character….and will only be enforced as written when the demands of a united people create fears in the ranks of the bourgeoisie and its political stooges" (JH 14/8, New American Movement Conference, 1973).

Similar to the UCWA in *Ironworkers*, the court's affirmative action plan stretched beyond job numbers into the details that determine success in a construction job (Gould 1977). As labor unions had long discriminated against nonwhite workers through unnecessary examinations were now required to fund test preparation scholarships for minority workers and project study materials. To address the fact that many white apprentices started working construction by joining their fathers during summer breaks and after school, labor unions were now required to develop summer programs so that Black and Brown young men could also take advantage of these opportunities (*Rios*). This comprehensive legal remedy was much better suited to address segregation in the construction trade than a minimum or a maximum number of jobs.

5.2.3 *Enforcing the Law*

Courts' lack of enforcement power is an undeniable limit on their ability to ensure that their decisions are followed (McCann 1994; Rosenberg 2008). However, that lack of enforcement power need not be a permanent limitation on the courts. In *Ironworkers*, the UCWA overcame that inherent deficiency of the judicial branch by fulfilling the role of legal enforcement. In *Rios*, Harlem Fight Back did the same through a strategy of illustrating harm, winning a favorable ruling, and investigating the lack of compliance with the court order. While never directly empowered like the UCWA, Harlem Fight Back nevertheless exercised the role of enforcer of the legal remedies by being the court's eyes and ears on the ground.

Rios provided a legal framework that allowed Harlem Fight Back to push for desegregation. For example, since there were timetables and actual requirements for how many nonwhite workers should be in construction sites—requirements Fight Back had helped to craft—organizers investigated and verified whether labor unions followed the court-established desegregation plan. At a time when the court order required thirteen percent of the workforce to be nonwhite workers, Murray Geller, OFCC Area Coordinator for New York, noted on one of his weekly logs, "Phoned Haughton . . . He said that at 8 am he had counted 32 employees on site of whom only 2 were nonwhites. He said that during the day some of the contractors brought nonwhite employees in from other sites and that Dic Concrete [contractor] especially had been playing this game of shifting nonwhites to federal sites or picketed sites, without increasing its overall employment of non-whites" (OFCC, 2/Logs, *Area Coordinator Weekly Log*).

Upon receiving this information, Geller then contacted other state actors involved in desegregation efforts in New York. The next logbook entry was a call to the local President's Committee for Equal Employment and Opportunity (PCEEO) representative. He wrote that, "[P]honed Biermann and advised him of these allegations that Dic Concrete is 'playing musical chairs' in shifting nonwhites to sites that are under scrutiny or picketing. Bierman said he would talk to investigators about a compliance check on all of Dic's operations, including non-federally involved activities" (OFCC, 2/Logs, *Area Coordinator Weekly Log*). While the New York OFCC apparently never secured official approval to conduct an audit of New York desegregation efforts, Haughton and Fight Back were often utilized as the investigative mechanism for the office.

Additionally, Haughton and Fight Back became the default point of contact for contractors and labor unions seeking to hire nonwhite workers to satisfy the requirements of the lawsuit. Haughton rebuilt the organization as a job placement organization to set it up as the means to fulfill the *Rios* requirement. Fight Back was often the placing agency that contractors and the OFCC relied upon to place workers (*Rios*). For example, Geller writes that he "[P]honed Haughton and told him of the need of Triangle Sheet Metal for draftsman and machine maintenance men. He does not know of any applicants but will check and will advise me. He said most of the skills registered at this Center are those of laborer, lather, and carpentry" (OFCC, 2/Logs, Area Coordinator Weekly Log). The existence of Harlem Fight Back and its more than 1,000 members was evidence that there were qualified and interested workers to be placed in job sites across New York, and therefore, trade unions' inability to do so was due to their own discriminatory actions.

Empowering a civil rights organization to enforce legal remedies clearly changed the power balance between labor and nonwhite workers. For example, in the summer of 1963, labor deployed its superior bargaining power to have protesters arrested during demonstrations and to monopolize the political venues for change. Post-*Rios*, civil rights organizers deployed state power to investigate and punish non-compliant unions and contractors. In contrast to the New York Plan, where white-dominated organized labor constructed barriers against the participation of nonwhite workers, nonwhite workers were at the core of the enforcement mechanism in *Rios*: they were not simply participants but were also able to dictate the terms of their participation. Lastly, instead of prescribing what nonwhite workers should want—as the New York Plan did by focusing solely on training opportunities—the *Rios* decision empowered nonwhite workers to focus not only on union membership but also on "Branch A" and career development opportunities. Moreover, to avoid a *Rios* lawsuit and in direct response to Harlem Fight Back's construction closures, other labor unions started negotiating with the OFCC to put affirmative action goals in place ("OFCC approved training agreements for Plumbers Local #2 for 100 minority trainees and Electrical Workers Local #3 for 100 minority trainees by July 1, 1974"). This agreement shows that Fight Back and its legal mobilization in *Rios* not only changed the immediate relationship between black workers and the defendant unions, but also labor officials' ideas of what was possible and what they should accept as success. The threat of a *Rios*-like enforcement framework reconfigured what was possible in terms of affirmative action on the construction trade.

5.3 Conclusion

By mobilizing the law, Harlem Fight Back was able to move past the destructive political process, define their legal rights and injury, and be the ones to enforce its remedy. Like the UCWA before it, Fight Back moved beyond their local poisonous political environment during the early Civil Rights Act by mobilizing the law and moving the desegregation discussion outside of the labor-liberal political coalition. Through their own experiences of exclusion, they shaped the legal definition of discrimination used by the court in *Rios* to determine the appropriate legal remedy. Further, by using its local legitimacy and its authority as the plaintiff of the case, Fight Back was able to function as the enforcement mechanism for *Rios*. In the next chapter, I discuss the similarities and differences between the legal mobilization in *Ironworkers* and *Rios* and what these cases tell us about the movement legal remedies framework and both the litigation of politics and the legal mobilization literature.

Chapter 6. DISCUSSION & CONCLUSION

In the last five chapters, I have proposed and developed the movement legal remedies framework to understand why actors seeking social change [pursue litigation strategies and judicial intervention, even in the face of litigation strategies' inherent constraints. These constraints include three daunting hurdles: (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language, almost always inadequate to describe social ills; and (3) even a legal victory's results are uncertain due to the judicial branch's lack of enforcement power. Through an examination of two cases—the UCWA in Seattle and Harlem Fight Back in New York—I find that activists and organizers pursue litigation strategies when (1) the underlying political process makes administrative intervention politically undesirable or fraught with political stonewalling and interference, and (2) rights-claiming relies on new, poorly defined rights. Under these circumstances, mobilizing the law might be the only viable option to achieve the sought-after social change.

Further, as was the case in Seattle and New York, pursuing litigation strategies allows activists and organizers to (1) move their agenda past destructive political stalemate, (2) define the social and political ills they seek to reform on their terms, and (3) assume roles in enforcing the judicial remedy they helped shape. In this final chapter, I further develop the movement legal remedies framework by comparing and contrasting the UCWA and Harlem Fight Back cases to understand the explanatory potential and limitations of this framework. Finally, I propose future research avenues with this framework's potential and limitations in mind.

6.1 DISCUSSION

This dissertation provides an in-depth study of two cases: UCWA and *Ironworkers* and Harlem Fight Back and *Rios*. The focus on these two organizations allows for detailed descriptions and a nuanced understanding of context, actors, and proceedings, but it also limits the analysis to a narrow array of possibilities. With that in mind, I discuss similarities and differences between the Seattle and the New York cases that highlight and clarify this study's potential, limitations, and subsequent research directions.

Using the same framework applied in previous chapters, I compare and contrast Seattle and New York cases in how the UCWA and Harlem Fight Back (1) moved past the political process, (2) defined their rights, and (3) enforced their rights through legal mobilization. The UCWA and Harlem Fight Back's use of litigation strategies to desegregate their local construction trades provide an important case study for sociolegal scholarship because it challenges many of the assumptions inherent in the discussion and criticisms of organizers who continue to pursue litigation strategies despite apparently insurmountable challenges. Both the UCWA and Harlem Fight Back pursued litigation strategies to transcend the political and legal stalemate to affect change, to help define poorly defined rights and remedies, and to overcome courts' lack of an internal enforcement mechanism. However, each organization did so differently, and in a deeply context-dependent and specific manner. These cases, and the analysis of the differences and similarities across these cases, provide evidence of the nuanced and complex reasons organizers use litigation strategies.

UCWA and Harlem Fight Back share much in common. First, the UCWA and Harlem Fight Back were both founded with the exclusive purpose of desegregating the construction trades in their respective cities. Both organizations reconfigured themselves post-declaration of the legal remedies in their associated suits to serve as the enforcement mechanism for the court order. Second, both were well-funded through grants and sponsorships, like the UCWA's funding through the American Friends Service Committee, or private partnerships, like that between Harlem Fight Back and Columbia University Law School. These sources of funding allowed both organizations to overcome the zero-sum limitation often alluded to in the litigation of politics literature positing that litigation is prohibitively expensive and time-consuming, as well as a strategy that excludes other movement activities. Lastly, both had charismatic leaders with deep connections in the construction trades or legal and civic organizations, giving these leaders the credibility they needed to be trusted to exercise their organization's power in the advancement of public regulatory goals.

The two organizations and their pursuit of litigation strategies also contrast in important ways. Three differences are most relevant to their use of litigation strategies. First, Harlem Fight Back was an original plaintiff to *Rios*, while the DOJ initially brought *Ironworkers* and the UCWA was only added years later for the purposes of relief. Second, Tyree Scott and his associates were construction workers, while James Haughton and his associates were career civil rights organizers and not necessarily from that industry. Broadly speaking, the UCWA was an organization created by Black construction workers for Black construction workers, while Harlem Fight Back was an organization made for construction workers by civil rights organizers. Lastly, *Ironworkers* was decided before the Supreme Court had made any declaration on Title VII, while *Rios* was decided post-*Griggs*, and therefore, had the advantage of a supportive Supreme Court precedent to affirmative action plans. In the following pages, I discuss these similarities and differences and how they impacted each organization's legal mobilization process.

6.1.1 *Moving Past the Political Process*

Both the UCWA and Harlem Fight Back pursued change in a political environment that made administrative intervention politically undesirable or fraught with political stonewalling and interference. They tried to desegregate the construction trades during a time when the "traditional, ordinary" political paths to change had been co-opted by the very labor unions they were challenging. In that environment, pursuing litigation strategies became the most successful way to seek change.

Both cities had city-level plans—the Seattle Plan and the New York Plan—that failed to desegregate the construction trades. In both cities, the political coalition between labor unions and liberal politicians foreclosed administrative venues to the enforcement of Title VII. In both cities, this same coalition ensured that the agency responsible for investigating discrimination in construction, the regional OFCC, was never authorized to do its job and investigate bias in the construction industry. In both cities, there were lasting limitations—both formal or informal—in the exercising of state authority to enforce the law and create meaningful change in the construction trades. By pursuing litigation strategies, the UCWA and Harlem Fight Back moved their grievances away from that political impasse and into a new venue where they could better articulate and push for their desired intervention to achieve their sought-after social change.

Notably, both organizations were well-funded—or at least better funded than comparable local organizations. Both the UCWA and Fight Back had financial help from NGOs and the federal government. The UCWA was funded, in part, by the Quaker American Friends Service Committee and the EEOC. *Ironworkers,* the legal case in Seattle, was brought by the Department of Justice as a pattern and practice lawsuit—not as a private lawsuit by the organization. These alternate sources of funding meant that organizational resources were used for community organizing, worker training, and worker placement, not paying for lawyers and legal fees. Further, while the New York case of *Rios* was a private suit brought by Fight Back members, it was brought in association with a legal center at Columbia Law School and, shortly after the original claim, the DOJ opened the case by merging its pattern and practice lawsuit with the individual claim. Ultimately, the EEOC took on *Rios* once it was authorized to bring suits in its name.

Legal and sociolegal scholars who critique social movements' choice to pursue litigation correctly point out that the costs associated with litigation can absorb all of organizations or individuals' resources and, in particular, can divert resources from more traditional modes of contestation (Rosenberg 2008; Silverstein 2007). In both of these cases, litigation costs were defrayed by other social organizations or government entities.

Furthermore, both the UCWA and Harlem Fight Back pursued a multi-faceted strategy to desegregate the construction trades. Instead of "putting all their eggs in the litigation basket," they pursued their economic goals through many venues: direct action, a voluntary plan, and yes, litigation. Both groups continued to protest and organize their communities, even as they were able to make inroads through the courts. They understood that their actions outside the courtroom augmented the impact of those they took from inside the courtroom.

While both Harlem Fight Back and the UCWA continued to pursue direct action and community organizing—even after winning legal victories and making inroads into the construction trades—they did so in different ways. First, the court required that if the UCWA were to act as the formal enforcement mechanism for the court order, it must halt its extra-legal construction closures and protests; this limitation was never imposed on Harlem Fight Back (EEOC 34/Docket, Order dated June 27, 1972 "restraining parties from participating in further demonstrations," *Ironworkers*). Second, by formalizing the UCWA's role in *Ironworkers*, the court arguably endowed it with a pseudo-union status, while Harlem Fight Back continued to function as primarily a social service organization and community meeting place.

When Judge Lindberg made the UCWA a party for the purposes of relief and gave the organization a formal role in *Ironworkers*, he required them to bring their grievances to the courtroom and to stop protests and site closures (EEOC 34/Docket, Order dated June 27, 1972 "restraining parties from participating in further demonstrations," *Ironworkers*). Arguably, this institutionalization of Black workers and their organizations came at a cost. As Black workers "became state actors themselves," they abandoned the more radical direct-action approach that had initially been pursued (Tarrow 1998; Zemans 1983). The institutionalization of civil rights organizations meant the defusing of the revolutionary fervor and the emotionalism of the movement, which in turn diffused some of the concerns and priorities of the movement (Weiss 1985; Tarrow 1998). Further, the embedding of these organizations into the judicial bureaucracy meant that the court could now affect the development of these organizations. Post-*Ironworkers*, Scott and other UCWA officers worked closely with the EEOC to expand the *Ironworkers'* model into different industries and regions. Instead of a focus on protesting and direct action, the EEOC-sponsored programs focused on education around legal rights. These programs had mixed results and none were nearly as successful in changing the composition and demographics of the local construction trade union membership as *Ironworkers* was (Griffey 2010).

Harlem Fight Back, however, never had to stop protesting and closing construction sites. Since they were one of the original plaintiffs in *Rios*, they drew their authority to enforce legal remedies from that status. Direct actions actually fed into how Harlem Fight Back implemented the court's legal remedy. In this way, their legal mobilization is a more traditional approach to pursuing litigation strategies. Once the court declared its decision in *Rios*, Harlem Fight Back would investigate whether or not labor unions were complying. If not, they would take that evidence back to them and demand further, at times, more detailed rulings, to address the underlying issue. If none were forthcoming, they would picket and speak to the press about the violation of the court order. By taking on the role of enforcer of the ruling, Harlem Fight Back was able to investigate and then report labor unions to the court, who then corrected for the noncompliance. In the New York region's OFCC weekly reports, the tension of trying to work with Harlem Fight Back to avoid protests and more confrontational modes of contestation was a recurring theme.

Another consequence of empowering the UCWA to function as the order's enforcer was that it was authorized to operate like a construction trade union. For example, in many cases, construction workers need to work through construction trades to get a job. They are trained by the trades' apprenticeship programs and then, based on seniority, assigned roles through hiring halls. Similarly, the UCWA's first step after the court order was to contact all workers mentioned in the court's order, as well as all workers whose detailed records were now part of the court docket. It then worked closely with these workers, ensuring that they had transportation, needed equipment, and were willing and able to work. After identifying an eligible worker, the UCWA contacted job sites and contractors directly, vouching for a specific Black worker who was ready and able to work. It knew which contractors to contact, which ones needed additional Black workers to meet their quotas, as this information was also included in the court record and required by the court decree. Once the UCWA succeeded in getting a job commitment for a Black worker, it would then send that worker to the union knowing that the contractor would call the hall and request that worker specifically, by name, as was allowed in the court decree (EEOC

34/Docket, *Ironworkers* Court Docket, Report from the Court Advisory Board, October 15, 1972). While not a formal and exclusive hiring hall, the UCWA did function like one, intermediating between construction jobs and construction workers and ensuring that they were adequately trained and able to do the job. The argument that the UCWA was a "rival union" was made repeatedly by the construction trades to get the supplemental order adding the organization to the lawsuit invalidated (OFCC 18/Logs, "Labor maintains that UCWA is a rival' union' and in fact does not really represent the black community," Seattle Area Coordinator Weekly Log, August 9, 1972, written by Maxine Daly; EEOC 34/Docket, June 8 Pre-Trial Motion by Defendant arguing against the adding of the UCWA as a party, *Ironworkers*). This ability to circumvent construction trades' hiring allowed the UCWA to strike a powerful blow to the unions' control of their trade. By acting as a rival pseudo-union, the UCWA was able to substantially challenge the construction trades.

The court never empowered Harlem Fight Back in such an explicit manner, and therefore, it never functioned as a potential rival union. They operated much more like a social service agency that lobbied shop stewards and forepersons to hire more Blacks and to register skilled Black construction workers seeking work and were willing to picket. Unlike the UCWA, who took an active role guiding construction workers in the day-to-day minutia of being a member of a construction trade, Harlem Fight Back served more of an organizing and lobbying function.

The issue of Black workers' organizations undermining labor unions is one that consistently resurfaces in the civil rights' socio-legal literature (Frymer 2003; MacLean 2008). The debate centers around the fact that Black workers mobilizing the law against discriminating labor unions and the expansive legal remedies that they at times won from courts ignored "a more complicated economic reality regarding union discrimination" (Frymer 2003, 496). In critiquing the use of legal mobilization by activist lawyers and courts, Frymer argues that this focus on integrating unions through litigation became a "single-minded" pursuit and led lawyers and judges to "ignore less adversarial ways in which the process might have been resolved," in an explicit reference to Kagan's adversarial legalism argument (Frymer 2003, 496). He further observes that it was unfortunate that by pursuing litigation strategies to address discrimination in labor unions, "racial minorities" entering labor unions, "often found them gravely weakened by financial problems and social discord, leaving unions less power to negotiate collective bargaining agreements" (496). Lastly, he concludes that one irony of this story is that while courts are often defined as "hollow hopes," it was the fact that they were too powerful in promoting civil rights in labor unions that made them poor avenues for social change in this case (496).

While it is undeniable that legal mobilization addressing discrimination in labor unions weakened labor unions, Frymer, like scholars of the litigation of politics literature, assumes that there were better, less adversarial avenues for change. Similar to scholars in the litigation of politics literature, Frymer assumes that those mobilizing the law were blind to the tradeoffs inherent in their litigation strategies. Further, he neglects the perspective of civil rights organizers and their strategic reasons for pursuing legal mobilization. On this topic, UCWA's leader, Scott, was very aware that suing unions would undermine organizations that workers of color needed and that the Nixon administration was advancing a race-based divide and conquer strategy with affirmative action and contracting. He understood that the Nixon administration's affirmative action stance was a "way to weaken the trade union movement from within" (Scott, Interview). However, by taking a strategic approach to the options available in the early Civil

Rights Act era, Scott worked through the tradeoffs and decided to continue to pursue the legal mobilization as it was the most promising alternative when combined with other modes of contestation (Scott, Interview). Further, Scott explained that from this observation of the Nixon's DOJ aggressively breaking up unions, the UCWA decided that "we wouldn't let the justice department just do, come in and do the law and take the initiative from us. Because that's what was happening [in other cities] (Scott, Interview). Again, in this case, Black workers were not tricked into pursuing litigation strategies without understanding tradeoffs, and they did not pursue them "single-mindedly." They were strategic legal actors who made decisions based on the available avenues and saw litigation strategies as one of the ways to create social change.

Both the UCWA and Harlem Fight Back pursued change in a political environment where there were many limitations—both formal and informal—in the exercising of state authority to enforce Title VII. The proposed administrative solution failed, and through mobilizing the law, both were able to move past the co-opted "traditional, ordinary" political paths. While both organizations pursued many alternative paths to change, the UCWA had to make compromises to attain its formal role as enforcement for the court order. As the original plaintiff to *Rios*, Harlem Fight Back was a victim of fewer compromises, but its informal status as the enforcement mechanism meant it was less of a direct challenge to construction trades than was the UCWA.

These two cases demonstrate that formal empowerment by the court is not a necessary factor in whether litigation strategies are an effective path to create social change. However, by seeking the judicial system as an avenue for change, organizers had to adapt their language, their rhetoric, and their methods to conform to the system's definition of acceptable means of contestation; these might not be the methods which made the organization successful in the first place. Both Harlem Fight Back and the UCWA navigated the legal system with the understanding that political organizing and legal reform change were neither mutually exclusive nor always truly compatible, making choices based on the opportunities they had to create change.

6.1.2 *Defining Rights*

By pursuing litigation strategies, the UCWA and Harlem Fight Back defined the harm of discrimination in more specific terms than delineated in Title VII, and by doing so, shaped the resulting legal remedies. Similarly, both Scott and Haughton were concerned about ensuring that the legal language and remedies surrounding their litigation efforts were better tailored to address their stated societal ills. From the very beginning, Haughton was concerned about ensuring that not only job numbers but also enforcement mechanisms and audits were part of *Rios'* legal remedy. Further, the UCWA was clear that it wanted more than just jobs: they wanted control of them. They wanted control in a way similar to that of the construction trades. In this respect, Scott and Haughton were quite similar; they were aware of the limitations of law and aggressively pursued both legal and extra-legal venues to make their voices heard and translated into legal remedies.

For example, the UCWA started actively questioning the structure of affirmative action plans that required white journeymen and employers to place and train people whose presence on the job they resented: "Affirmative action's original sin, UCWA leaders argued—based on the UCWA's evolving political work and attempts to expand to other regions and industries— was that it put racists in control of the desegregation process" (Griffey 2010, 305). Instead, the UCWA used its new court-ordered power to mobilize Black workers to transform the culture of the workplace undergoing desegregation and undoing the social hierarchies and power imbalances established by racially exclusive workplaces.

Haughton, too, believed that since racism was an institutionalized issue, only systematic solutions could address it. Therefore, a quota declaration by a court would not alone desegregate the construction industry: "Racism has consciously, systematically, and with malice aforethought been made part and parcel of all the institutions through which life flows—political, industrial, and cultural institutions—all those institutions . . . have been saturated with a racist ideology in which the myths of white supremacy predominate," he explained in a strategy letter to his collaborators at Columbia Law School. "The laws against discrimination of which you speak are of a class character…and will only be enforced as written . . . when addressed as a class." Haughton brought that belief to bear in his lobbying and pressuring of the *Rios* court, ensuring the quotas were paired with an administrator, enforcement mechanisms, and actual punishment (in the form of aggressive back pay) if not met (*EEOC v. Enterprise Ass'n Steamfitters Local No. 638 of UA* (1976) (affirming in part and modifying in part district court's backpay eligibility orders)).

While similar in their beliefs that addressing discrimination required a comprehensive legal remedy, the UCWA and Harlem Fight Back conceived of their legal victories and their role quite differently. The main difference in how they defined themselves and their role can be traced to the origin of the lawsuit. The Department of Justice initiated *Ironworkers*. As first conceived, *Ironworkers* was about the exclusion of Black workers, and only Black workers, from the construction trades. Once the Seattle Plan failed, and other civil rights organizations wanted to join *Ironworkers* as a larger class, both the UCWA and the DOJ argued over expanding the case to nonwhite minorities generally. In particular, minority organizations associated with the

Seattle Plan argued that the best way to desegregate the Seattle building trades was to expand the class in *Ironworkers Local 86* to include other minority groups. Because only Black workers were part of the original suit, the class of workers was limited to Black workers. Local minority groups asked that the class be expanded for the purposes of relief, but that never occurred. The UCWA's leadership eventually expanded beyond the specific issues of Black workers, with Woo working with Filipino cannery workers and Fox working with Latin farmworkers, but the limitation inherent in how *Ironworkers* was originally conceived limited the UCWA's inroads beyond the Seattle construction trades.

The originating issue in *Rios* included both Black and Latin workers. This more expansive class allowed Harlem Fight Back to organize a much broader coalition of workers. Haughton was also a civil rights organizer first, not a construction worker. His interest in construction was due to the organizing opportunities available in that industry. Therefore, he considered *Rios* through a much broader and class-based lens of discrimination law and Title VII. Haughton believed the solution to poverty was a class-based approach, and often used *Rios*, with its broad impact across Black and Latin communities in New York as an example of success. Haughton actually led a "working people's coalition" with Black, Brown, immigrant, and women workers across the country and argued for ways in which litigation strategies could assist in addressing poverty broadly and comprehensively (JH 14/8, New American Movement Conference, 1973).

Haughton was a community organizer whose formal participation in the desegregation of the construction trades happened contemporaneously with *Rios* and the New York Plan. Moreover, Haughton had deep connections in New York academic environments, which he leveraged to find and nurture litigation collaborators. These connections allowed Fight Back, and specifically Haughton, to affect the legal narrative and presentation of the *Rios* case.

In *Ironworkers,* the Department of Justice was the one who framed and presented the case. The UCWA was only officially included in the case two years later and was, therefore, limited by the government framing of the Black workers' legal injuries. However, its focus on construction, and its construction worker membership, meant that its impact through *Ironworkers* was truly transformational to how the trade unions functioned in Seattle on a day-to-day basis.

6.1.3 *Enforcing the Law*

By pursuing litigation strategies, both the UCWA and Harlem Fight Back became the effective enforcement mechanism for their respective lawsuits. Interestingly enough, UCWA and Harlem Fight Back were formed and re-conceptualized around legal remedies. Both founders created these new organizations—Scott moved away from the CCA, and Haughton re-branded his unemployment center for *Rios*—through recognizing the court-mandated affirmative action plans would need an enforcement apparatus. By positioning themselves informally as the enforcement mechanism for the court order, both organizations became well-known locally by workers seeking job opportunities and contractors attempting to comply with the affirmative action plan. This reputation and local legitimacy made these informal enforcers well-positioned to become formal enforcers.

The choice of the UCWA as the enforcement mechanism for *Ironworkers* was not accidental. From the beginning of *Ironworkers*, before becoming a party to the suit, the UCWA had acted as an extra-legal enforcement mechanism to the court order. For example, the court's decree required that the defendant apprenticeship programs develop a pre-apprenticeship program for potential Black applicants. Two months after the court's decree, no pre-apprentices had been placed in any construction jobs in Seattle. This violation of the court order led to a series of demonstrations organized by the UCWA, and these protests spurred the court into further action, issuing a supplemental court-order mandating the hiring of ninety pre-apprentices within ten days. In the hearing that preceded the announcement of the order, in response to labor unions' claims that there were neither qualified nor interested Black workers in Seattle to fill the number of positions required by the order, Judge Lindberg mentioned the UCWA as a possible source of both interested and qualified Black workers (*Ironworkers* Supplemental Order dated December 2, 1970).

With this court sponsorship, the UCWA placed fifty-nine of the ninety pre-apprentices in the month following the supplemental order. Most importantly, it continued to check on the employment status of these apprentices to prevent any potential problems. In a report written seven months after that supplemental order, the OFCC notes that seventy-seven of the ninety required apprentices were still on the job, citing the UCWA as both the reason these workers had retained their positions and its source of information. In that letter, the OFCC recognizes that "we cannot ignore the UCWA" (OFCC 18/Logs, Area Coordinator Weekly Log, 1971).

While the UCWA's authority as the enforcer of *Ironworkers'* legal remedies came explicitly from a court order, Harlem Fight Back's influence came from a combination of its expertise and its collaboration with government entities. James Haughton had been a well-known civil rights leader in New York. His work with the NAACP's Labor and Industry Committee, as well as his founding of a meeting place for all civil rights organizations in the city, made him both a central and centralizing figure in the New York desegregation community. Haughton leveraged his work across labor issues in New York to set himself, and Harlem Fight Back, as the bridge between both minority workers and construction jobs. Further, through his legal mobilization in *Rios*, Fight Back also became a bridge between the court and the knowledge it needed to evaluate compliance with its order. When Harlem Fight Back became the enforcer of *Rios* and took on the auditing authority, reporting requirements, and demand for nonwhite workers, it actively challenged the unions' control of labor sources. It not only called attention to the labor unions' failure to adhere to the court order, but it also provided the workers needed to correct that failure.

These differences and similarities leave us critical questions on the scalability of the findings. While the differences do not appear determinative, the similarities do. The failure of the political class to address the issue of segregation is what drove both organizations to pursue litigation strategies. While the organizations defined their rights in different ways, the comprehensiveness with which they both did so was determinative of their success. Lastly, the presence of formal authority seems less critical than an organization's mission and purpose. The character of Harlem Fight Back's and UCWA's enforcement authority was different, but both organizations were committed to enforcing the lawsuit, and this mission allowed them to dedicate themselves to expanding and transforming what was possible under Title VII, and then enforcing that view of the law.

6.2 Future Research

Future research on this topic could take two different paths. The first path is to continue to complicate the question of whether courts can create social change. This dissertation on Title VII and civil rights activists illustrates how the focus on judges and judicial review obscures the myriad of ways legal mobilization can contribute to meaningful social change. Therefore, future research should investigate other cases where organizers' legal mobilization and statutory interpretation created or failed to create social change. These cases could focus on other aspects of the Civil Rights Act, like Title VI, or other laws where legal action was enabled as a means of statutory construction, like the Americans with Disabilities Act and many environmental laws.

The second path is an extension of the movement legal remedies framework beyond early Title VII litigation. Can it serve as an analytical tool beyond the Civil Rights Act and/or racial minorities? Can the framework be expanded beyond newly declared laws? Can the framework be extended beyond organized movements to decentralized movements, like Black Lives Matter or Occupy?

In the introduction, I explained why Title VII was a compelling case for the movement legal remedies framework. While Title VII was drafted with purposefully ambiguous statutory language and initially had no implementation framework, it became the basis for a durable, and arguably effective program of anti-discrimination enforcement through affirmative action plans. However, can the movement legal remedies framework be used to analyze other laws? Laws such as the Clean Air Act or the Clean Water Act have had similar weak enforcement frameworks and statutory language as that of Title VII. Furthermore, a number of local and national organizations have been created in response to the rights and regulations created by these laws (Hacker 2002). Could movement legal strategies be a new way to investigate this phenomenon?

Further, one advantage of the early Civil Rights Act years was that Title VII's ambiguous language allowed for much creativity in local enforcement frameworks. Following Herbert Hill's initial announcement that "Title VII is not self-enforcing," many civil rights organizations focused on enforcing Title VII. Each did it in their own, deeply contextualized way. *Ironworkers* is an excellent example of a creative solution to Title VII's lack of enforcement. However, *Ironworkers* was decided before Title VII jurisprudence was settled. Even in the three years between *Ironworkers* and *Rios*, we can see the definition of Title VII's ambiguous terminology and an establishment of what is considered "legitimate" remedies under Title VII law (*Rios* 1974). Could the movement legal remedies still be used to investigate the legal mobilization of a settled Title VII jurisprudence?

The past three decades have been unkind to civil rights precedent, with many of the victories from the later 1960s and early 1970s, like *Griggs*, for example, being narrowed or overturned (*Wards Cove Packing Co. v. Atonio* (1989)). In particular, the judicial weakening of the legal disparate impact standard relied in on both *Rios* and *Ironworkers* has unduly narrowed civil rights law and made standing for workers unsteady. Could the movement legal remedies still be used to investigate the legal mobilization of a hostile Title VII jurisprudence?

Lastly, the UCWA and Harlem Fight Back were instrumental in enforcing Title VII through legal mobilization. They were founded for the specific purpose of doing so with clear leadership structures and charismatic leaders. Many of the most visible social movement organizations we see today are more decentralized both in terms of leadership and in terms of mission. Would the movement legal remedies framework be a helpful analytical framework to understand the legal mobilization of more decentralized social movement organizations? Is the day-to-day experience of Black workers congregating in the same meeting area important, or could online communities be equally effective in mobilizing the law?

6.3 Conclusion

In the second edition (2008) of *The Hollow Hope,* Rosenberg expanded his theory to the issue of marriage equality. He concluded that "[U]ltimately, the use of litigation to win the right to same-sex marriage lends further support to the argument that courts are severely limited in their capacity to further the interests of the relatively disadvantaged" (419). He explained that, while he understood "the frustration felt by advocates of same-sex marriage, succumbing to the 'lure of litigation' appears to have been the wrong move . . . The lesson here is a simple one: those who rely on the courts absent significant public and political support will fail to achieve meaningful social change, and may set their cause back" (419). Seven years after the publishing of this second edition, *Windsor* (2013) and *Obergefell v. Hodges* (2015) proved Rosenberg's theory wrong in that in the case of same-sex marriage, litigation strategies would not yield meaningful social change but actually set back the cause. In light of that, Rosenberg took a step back from his previous written work in 2015, and stated that "his former predictions of a wider, lasting backlash to marriage rulings had been overtaken by the 'sea change in public opinion'" (Pinello 2017).

Marriage equality litigation, while very successful in the courts, has not brought full equality to LGBTQ individuals. But it is undeniable that these legal victories, and how they were used by organizers to push for legal victories in other areas, like employment rights, have had a meaningful positive impact on the lives of sexual minorities (*Altitude Express, Inc. v. Zarda* (2018)). It is my experience that organizers knew then—in 2003 with *Goodridge*—that winning court cases would not instantaneously transform sexual minorities into equal citizens under the law. However, then, as still the case today, courts have been a more successful avenue for LGBTQ social change than any other political avenue, as exemplified most recently by Congress' failure to pass the Equality Act, which would expand the Civil Rights Act to include sexual minorities and the success of the legal mobilization in *Altitude Express* which did just that for Title VII (2018). Organizers in the LGBTQ movement were not tricked into pursuing the courts to create change: it was a strategic decision made based on the potential for success.

In this dissertation, I have proposed and developed the movement legal remedies framework to understand why, given the inherent constraints in litigation strategies, actors seeking social change still pursue litigation strategies and judicial intervention. Activists and organizers continue to pursue litigation strategies to achieve social change in the face of three daunting hurdles: (1) legal procedures are lengthy, costly, and all-consuming; (2) legal claiming is based on ambiguous language, almost always inadequate to describe social ills; and (3) even a legal victory's results are uncertain because of the judicial branch's lack of enforcement power. Through an examination of two cases—the UCWA in Seattle and Harlem Fight Back in New York—I found that activists and organizers pursue litigation strategies when (1) the underlying political process makes administrative intervention politically undesirable or fraught with political stonewalling/interference and (2) rights-claiming relies on new, poorly defined rights. Under these circumstances, mobilizing the law might be the only viable option to achieve the sought-after social change.

Further, under these circumstances, the unique viability of success through legal mobilization is an important factor that organizers must consider constantly. In most cases, for oppressed communities, it is not about finding the perfect intervention in the system. It is about understanding the choices and consequences of available interventions. One can be strategic, even under oppression. For this project, I researched the UCWA and Harlem Fight Back and showed that pursuing litigation strategies allowed these strategic and legal actors to (1) move their agenda past destructive political stalemate, (2) define the social and political ills they seek to reform on their terms, and (3) be the ones to enforce the judicial remedy they helped shape.

Legal intervention will never be a perfect strategy—no intervention will. Humans are messy, social issues are multi-faceted, and any intervention will have unintended consequences.

Further, longstanding entrenched institutional power-players have substantial advantages and benefits in court battles (Galanter 1974). But for intervention, there are strategic ways to create social change by overcoming the imperfections of that intervention. Organizers and activists are not tricked by the allure of law or by seeking total justice; they are sophisticated legal actors weighing the costs of judicial intervention, actively fighting to define both the new law and its remedies, and using the new opportunities unearthed by mobilizing the law to create change. Sociolegal literature is unduly concerned about the conditional nature of change through courts. But that is the nature of social change: it is conditional, it will trigger backlash, and even other counter-movements. There is no non-disruptive way to disrupt the status quo. I argue that ultimately, to the pithy question of whether courts can bring about social change, the answer is yes, imperfectly, and only if organized groups use a diverse array of resources and tactics to make them.

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INTERVIEWS

Carin Clauss, Professor of Law and Former Solicitor of Labor, in discussion with the author, October 2015.
Michael Fox, Civil Rights Attorney and Attorney for the United Construction Workers Association, in discussion with the author, February 2016.
Willian Gould, Professor of Law and Civil Rights Activist, , in discussion with the author, March 2016.
Jay Hereford, Attorney and Former Law Clerk in the Western District of Washington, in discussion with the author, March 2016.
Frank Petramalo, Former Department of Justice Attorney, in discussion with the author, February 2016.
Tyree Scott, Activist and Founding Member of the United Construction Workers Association, in discussion with Dr. Michael McCann, 1998.
Michael Woo, Activist and Former Member of the United Construction Workers Association, in discussion with the author, February 2016.