

Covering Legal Mobilization: A Bottom-Up Analysis of *Wards Cove v. Atonio*

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We develop a political history of Wards Cove v. Atonio (1989) to show how Robert Cover's concepts of jurisgenesis and jurispathy can enrich the legal mobilization framework for understanding law and social change. We illustrate the value of the hybrid theory by recovering the Wards Cove workers' own understanding of the role of litigation in their struggle for workplace rights. The cannery worker plaintiffs exemplified Cover's dual logic by articulating aspirational narratives of social justice and by critically rebuking the Supreme Court's ruling as the "death throe" for progressive minority workers' rights advocacy. The cannery workers' story also highlights the importance of integrating legal mobilization scholars' focus on extrajudicial political engagement into Cover's judge-centered analysis. Our aim is to forge a theoretical bridge between Cover's provocative arguments about law and the analytical tradition of social science scholarship on the politics of legal mobilization.

You know the Griggs decision. . . . The burden was on the employees to prove harm. You could allege a prima facie case of discrimination on the basis of statistics. And then once you did that, it was on the boss to prove that he wasn't [discriminating]. So it was very easy, you know, to start this cause of action, to go into court, to set up a lawsuit. . . . [W]e had more than two dozen lawsuits filed in six or seven cities. . . . We were having a ball. . . . The money came first from the lawsuits. And so when *the law was good* we were winning. . . . The *Wards Cove* case . . . was really the *death throe* to the '64 Civil Rights Act in terms of employment. Tyree Scott, workers' rights activist (March 17, 1998)

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INTRODUCTION

The above quote is from an interview with Tyree Scott—African American ex-Marine, workers' rights leader in Seattle, and one of the most extraordinary grassroots activist leaders we have ever encountered. Scott recounted for us a period from 1970 through the mid-1980s when “the law was good” for workplace civil rights activists in locally-based social movements around the nation. The good law he identified sprang from the expansive “disparate impact” standards developed by federal judges as they began to interpret Title VII in the 1964 Civil Rights Act. As Scott saw it, the court majority in *Griggs v. Duke Power* (1971) and subsequent rulings provided critical resources for a wide array of transformative legal mobilization campaigns by minority race and female workers in the United States for nearly two decades.

In the early 1970s and 1980s, Scott collaborated with a group of young Filipino American activists who were, among other things, organizing to reform workplace conditions in the Alaskan salmon canning industry. As one part of a multipronged reform campaign, the cannery workers filed three antidiscrimination lawsuits against cannery companies in 1974. The activists won at trial and then settled favorably in two of the cases, but the third was less successful. After dragging out for over fifteen years, a surprise intervention by the US Supreme Court resulted in the landmark ruling in *Wards Cove Packing Co. v. Atonio* (1989). That case was one of a series of rulings in the late 1980s in which the Supreme Court narrowed disparate impact doctrine. The Court introduced new evidentiary requirements that made it much more difficult for workers and activists to deploy antidiscrimination law as a resource for *collective* political mobilization.¹ Although the Court majority in *Wards Cove* downplayed any departure from precedent, experienced organizers like Tyree Scott immediately recognized that the 5–4 ruling by the Court signaled the “death throes” for the good law that had, since the early 1970s, empowered many worker organizations to use civil rights law as they challenged institutionalized racism and tried to advance workplace justice.

In this article, we use the cannery workers' historical experience as a rich empirical case study for exploring some general theoretical questions about how social movement organizations use law in struggles for social change. More specifically, we explain how legal scholar Robert Cover's (1983, 1986) classic arguments about *jurisgenesis* and *jurispathy* can supplement and enhance the classic legal mobilization framework used by sociolegal scholars who study law and social movements (see McCann 1994). We show how Cover's concept of *jurisgenesis* can deepen the legal mobilization framework's understanding of activists' engagement of law by directing attention to the foundational normative universe, or *nomos*, that inspired activists' bottom-up strategies for advancing social rights and political transformation.

1. Today, cases involving collective legal mobilization against institutional discrimination using class actions or disparate impact claims are far less common than cases brought by individual plaintiffs alleging intent-based disparate treatment (Nielson, Nielson, and Lancaster 2010).

We also show how Cover's conception of *jurispathy* can enrich the legal mobilization account of the damage done by some judicial rulings. In particular, we note that the Supreme Court's destruction of promising civil rights law was expressed in *Wards Cove* as a series of curiously abstract arguments that erased legal precedents, relevant social facts, and the plaintiffs' documented history of institutional racism in and beyond salmon canneries. Indeed, Tyree Scott's lament about the judicially inflicted death throes to civil rights law clearly invites a Coverian sensitivity to systematic jurispathic "killing" that challenges the optimistic faith in courts displayed by much legal mobilization analysis. Finally, we use the cannery workers' story to draw attention to some limitations of Cover's account by highlighting important dimensions of extrajudicial political engagement that were essential components of the cannery workers' activist campaign. The need to situate litigation campaigns in the context of concurrent political struggles outside the courtroom is central to the legal mobilization approach, but such struggles are notably absent from Cover's judge-centered account.

Two interrelated aims animate this article. The primary goal is to build a *theoretical* bridge between Cover's provocative arguments about law and the analytical tradition of social-scientific scholarship about the politics of legal mobilization. Our second goal is to illustrate this hybrid framework with an *empirical* case study of the backstory of the *Wards Cove* case, a story of little-known and relatively powerless worker-activists who struggled to realize the early promise of the Civil Rights Act of 1964 in the face of a growing backlash by big business and a related rightward shift among both elected officials and judges.

TOWARD A HYBRID BOTTOM-UP ANALYTICAL FRAMEWORK

We begin by noting both the similarities and differences between legal mobilization studies and Cover's basic framework. Legal mobilization scholarship emerged as an alternative to conventional, positivistic accounts of how, why, and to what effect individuals and groups claim legal entitlements and, in varying degrees, engage with official legal actors and institutions. Those conventional accounts typically assess litigation processes by reducing them to demonstrable linear causal effects of judicial decisions on social and state actors (see Rosenberg 1991; McCann 1994). Legal mobilization scholars instead have offered a sociolegal framework that conceptualizes law more complexly as indeterminate, pluralistic, contested cultural norms embedded in society and the state alike. The language, logics, and threats of law permeate people's understandings of social life and shared obligations, making law and its impact inseparable from the symbols and rituals of legitimation that accompany its pronouncements (Brigham 1996). Legal mobilization scholarship thus developed as an analytic framework that focuses on law as a practical discourse that structures social relations and shapes the knowledge, understandings, aspirations, and strategic gambits of legal "users" or claimants (Scheingold 1974; Nader 1984–1985; Burstein 1991; McCann 1994; Albiston 2010; Paris 2010; Lovell 2012).

In this constructivist approach, formal pronouncements by authoritative decision makers, like judges, matter as much through their indirect, "radiating" effects

on citizens' perceptions of actionable risks, opportunities, possibilities, and strategic resources as through enforceable commands (Galanter 1983). Although many early classics of this field focused on legal mobilization among individuals (see Zemans 1983; Merry 1990), there are a growing number of studies focusing on organized groups that deploy law as an institutional and ideational resource for struggles aiming for broader policy changes or structural transformations in institutionalized power relations (McCann 1994; Paris 2010; Chua 2014).

Cover similarly focused on the processes by which official legal actors constructed and enforced authoritative meaning from broad, indeterminate, often contested official norms and texts.² However, Cover's interest was primarily in theoretical questions about how legal meaning is created in diverse and divided societies, rather than in questions of how, why, and how effectively individuals or groups mobilize legal resources for strategic action. He theorized legal meaning as developing not just through authoritative pronouncements of federal judges about official legal texts, but also through the narratives that different subnational communities construct over time to render sensible shared histories, experiences, and aspirations. Such informal meaning systems often are constitutive of community life in quasi-independent social spaces within the national legal system, but they also sometimes are mobilized to challenge or to change official law.

The inevitable development of different narratives among groups with different experiences means that legal meaning in any society is necessarily pluralistic. Judges are not able to monopolize legal meaning through their official pronouncements because people in different communities develop and sometimes enact competing visions of law and different commitments to the precepts of legal governance. Cover used the term *nomos* to describe the normative world of principles and narratives that shapes and expresses a group's life in society; he coined the term *jurisgenesis* to describe the process by which various communities develop the distinctive narratives of law that express their underlying *nomoi*. Cover exhorted legal scholars to take these many rival community *nomoi* and narratives as seriously as official law. To understand how law is created and made meaningful, Cover urged scholars to look beyond state institutions, and especially beyond judges, to "the multiplicity of the legal meanings created out of the exiled narratives and the divergent social bases for their use" (1983, 19).

Perhaps Cover's most important contribution was to emphasize the role of judicial authorities in selecting among competing normative visions those claims that prevail as official law and thus are enforced by state violence. Cover wrote his key works on law and violence in response to scholars who argued that technical standards of interpretation and/or well-designed institutional hierarchies could justify judicial authority as a mechanism for producing societal consensus on necessary social norms (see Snyder 1999; Post 2005). Cover's insistence that legal meaning is

2. Our aim is not to offer a definitive reading of Cover's classic texts. Rather, our aim is to adopt select concepts and insights from Cover to revise and refine legal mobilization theory. As far as we know, this is the first systematic attempt at such a theoretical bridging project, not least because few social scientists know of Cover's work, while few of the many law professors who engage Cover aim to build explanatory social theory. See Snyder (1999), but also Guinier and Torres (2014) and Barclay, Jones, and Marshall (2011).

inevitably plural challenged scholars who privileged judicial pronouncements and saw judging as an effort to find universally shared understandings of official texts. Scholars who imagined judicial interpretation as an idealized search for consensus obscured the ways that the omnipresent threat of state coercion backs judicial authority. In contrast, Cover emphasized that judicial authority is maintained by the state's "imperfect monopoly over the domain of violence" when judges seek to enforce established norms and narratives against the rival visions that inevitably develop among other communities (1983, 52).

Cover's insight about law's routine dependence on violence calls into question familiar assumptions that judicial interpretations are necessarily more authoritative and/or morally superior to alternatives that emerge from below. Cover did concede that the organized violence "triggered" by judges' words can be justified, particularly if the alternative is a more overtly violent form of intergroup warfare and destruction. However, such practical justifications of official violence provide no reason to think that judges will develop the most compelling aspirational legal visions or the best answers to particular interpretive questions. On the contrary, the primary work of judges is not embracing novel legal claims or declaring the best version of law, but the cold, bureaucratic role of advancing effective social control (see also Shapiro 1986). To do that work effectively, judges have to kill off the alternative visions of law and justice that bubble up from below to challenge legal tradition. As Cover writes: "Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest" (Cover 1983, 53).

Cover's point was not that unofficial visions of law were necessarily better than judicial visions. He instead wanted to disrupt the scholarly practice of routinely privileging judicial pronouncements while treating any bottom-up alternatives as irrelevant mistakes. Cover also acknowledged that judges do occasionally side with novel, mildly reformist articulations of justice that challenge entrenched power. Yet he also observed that the habitual judicial posture is to exaggerate the certainty of rulings in order to delegitimize and thus silence alternative views. He noted that judges are often uncomfortable with their jurispathic role, and thus take refuge in jurisdictional claims and abstract principles, which in turn makes them likely to defer to the administrative state machine and the necessity for imperial "social control" (1983, 17). This happens, as Cover showed in a later book on anti-slavery judges, even if it leads judges to violate their own deeply held personal moral commitments (Cover 1984).

Cover thus parallels legal mobilization scholars in recognizing the unsettled cultural authority of official law and insisting on the value of bottom-up study of "the law evolved by social movements and communities" (Cover 1983, 68). His distinctive contribution is to insist that scholars should not assume the primacy of some universally shared legal culture; rather, they should take seriously the ways that common legal symbols take on different meanings among different communities within a single national polity. Yet Cover developed these insights at a fairly abstract level of theorization and focused largely on formal legal texts like amicus briefs and judicial opinions. Unlike legal mobilization scholars, he did not attempt

an empirical inquiry into how movements develop through encounters with law, the impact of such encounters on the people involved, and the ways movements or communities integrate legal action with other forms of struggle.

Nevertheless, Cover's insights about the development of legal meaning within communities and movements illuminate some important new directions for empirical scholars of social movement legal mobilization practices. *First*, Cover's account suggests that scholars seeking to identify the motivating ideals and aims of movement actors need to expand the temporal scope of their inquiries. In particular, scholars need to consider how people's understandings of legal norms are connected to their identities as members of smaller communities within larger societies. Inquiries thus need to probe further back in *time* to appreciate how communal *nomoi* and narratives develop over many years and across generations. Just as Engel and Munger (2003) took seriously the lifelong development of legal consciousness for many individuals with disabilities, so does Cover's analysis invite investigations into the long historical development of social group experience, frames of reference, and aspirational visions.

Second, Cover's account of judges and jurispthic actors invites a better positioning for scholars trying to analyze or evaluate activist engagement with law. In particular, scholars need to assess activists' efforts to mobilize law from the perspective of those activists, and in light of the underlying vision of law that they develop out of their collective normative commitments. Activist invocations of law deserve to be taken seriously as legitimately grounded interpretations of law. Such an approach is essential for evaluating mobilization efforts because jurispthic judges often attempt to legitimate their chosen positions through exaggerated dismissals of alternative visions that bubble up from below. Those dismissals can distort subsequent understandings of what activists were expecting and trying to accomplish when they turned to law.

Cover's metaphor of killing captures judges' efforts not just to establish new legal standards, but also to destroy and erase the legal foundations of alternative views. We argue that the jurispthic erasures of alternative legal visions in the *Wards Cove* ruling have helped erase from historical memory the way earlier precedents facilitated collective political mobilization.³ Because those precedents were largely ignored in the Supreme Court's ruling, later judges, lawyers, and legal scholars who privilege judicial rulings as legitimate law have seen the arguments of the losing side as mistaken, and thus normatively irrelevant efforts to invent new law. In exhorting scholars to excavate and take seriously the legal visions that judges erase, Cover invites a more thorough "decentering" of official law than legal mobilization scholars often deliver in practice.

Third, Cover's account of underlying *nomoi* grounded in communal narratives helps explain why alternative normative commitments survive judicial attempts at delegitimization. Jurispthic rulings kill off alternative interpretations by denying them status as official law, but judges are less able to kill an underlying *nomos* that develops across generations of social interaction and narrative construction. Official law always speaks its own insistent dialect of normativity, but legal meaning

3. On historical erasures and jurispthy, see also Sarat and Kearns (1991).

develops in communities from a different and equally resilient array of ideational resources. Cover's approach thus helps explain why empirical sociolegal scholars have so often found that ordinary people's understandings of law are more fragmented and resistant than expected by earlier critical scholars, who worried that the totalizing effects of legal ideology narrowed the political aspirations of movements that adopted litigation strategies (see McCann 1994; Lovell 2012).

As Cover points out, the normative pronouncements that judges use to justify jurispathic rulings are aimed less to convince the losers of the state's official rightness than to comfort the winners and affirm the practical need for a designated state authority to resolve ongoing legal discord (1983, 54; 1986, 1608, 1611). Observers with strong professional commitments to law, including scholars whose understandings of activist litigation are based solely on reading appellate court opinions, may be taken in by judges' pretensions to legitimacy, but activists involved in broader organizing and political work develop commitments that provide more immunity to official legal ideology. The persistence of those broader normative commitments also means that claims emanating from alternative visions may surface again in new forms to challenge the official legal order, forcing judges again to make choices about where to grant legitimacy. Thus, legal "killing" fits easily with social movement groundings of legal mobilization theory that recognize the long life of many rights claims and legal visions (Melucci 1989; Tarrow 1995).

Cover's enriched account of legal meaning as grounded in shared *nomoi* and narratives thus illuminates new directions for legal mobilization scholarship. Moreover, his clear-eyed, realistic characterization of judges as agents of state coercion and social control represents a potentially important transformative contribution. Indeed, his insistence on recognizing the routine jurispathic role of courts provides a marked counter to the uncritical faith in official law, courts, and litigation as resources or even allies for social justice that animates many studies of legal mobilization, especially in the United States (Brisbin 2002; Lovell and McCann 2004). At the same time, however, what is missing from Cover's account, and what legal mobilization scholarship provides, is an emphasis on the important extrajudicial dimensions of political engagement over law and rights. Cover largely identified jurisgenesis with plaintiff litigation and jurispathy with judges, paying little attention to the ways that broader political forces enable and constrain judicial interpretation, or to the ways that groups develop and pursue interpretive commitments to law in nonjudicial arenas. In contrast, many legal mobilization scholars have worked to show how law-related movement activity fits into broader political struggles, including various forms of organizing for strategic advocacy of rights by social movements in diverse forums of social interaction and state authority *outside* of courts. Such activity includes both conventional and nonconventional, extrainstitutional forms of "contentious politics" (Tilly and Tarrow 2006).

Since its origins, legal mobilization scholarship has been interested in rights claiming as social practice, meaning that it that may or may not include formal claims in court, much less proceeding to trial, judgment, and reported appellate court opinion (Zemans 1983; Scheingold 1974). Hence, for example, McCann's (1994) study of legal mobilization devotes more attention to internal movement building, policy advocacy through protests, media tactics, collective bargaining,

bureaucratic implementation struggles, and the like than to what happened in associated courtroom proceedings. The key assumption animating such study is that, as Cover argues, novel group narratives largely develop through practical interaction within society, most often apart from contact with courts (Polletta 2000). Thus, a hybrid legal mobilization account should go well beyond Cover in focusing empirical study on the multiple sites, contextual factors, and power relations beyond courts that shape and express those struggles over legal meaning.

Cover's account of judges as jurispathic actors likewise links them too simplistically to the policy agendas and interests of a unified bureaucratic state machine (see Post 2005). As such, he tends to ignore the often complex ways that courts negotiate partisan and other divisions among state elites as well as routine deference to dominant social groups. Political scientists have developed a variety of analytical approaches for identifying and explaining the ways that judges at once influence and are influenced by other state actors, signaling a more multifaceted, variable relationship to shifting coalitions than Cover recognizes (see Graber 1993; Clayton and Gillman 1999; Lovell 2003; Keck 2009; Crowe 2012). More broadly, Cover's indifference to macro politics precludes attention to the ways that official law in most contexts has historically expressed and enforced the interests and ideas of most powerful social actors, including especially dominant economic interests (Lovell and McCann 2004). Again, inquiry into the latter topic is an important, if often understated, focus of much legal mobilization analysis. While we find great value in Cover's concepts for legal mobilization analysis, we argue for merging his core concerns with broader inquiries into instrumental, institutional, and ideological politics that are the hallmark of legal mobilization scholarship.

The remainder of this article sketches an account of the activist campaign that led to the *Wards Cove* case in order to illustrate the value of a hybrid analytical approach that joins Cover's framework to social scientific traditions of contextualized legal mobilization study. Consistent with both "bottom-up" approaches, our empirical effort aims to illuminate both the little-known aspirational *nomos* behind the plaintiff's claims and the impact of the Supreme Court ruling that eviscerated US civil rights law as a resource for challenging structural inequalities. We focus first on jurigensis initiated by some overlapping communities of racial minorities in the Pacific Northwest. We then turn to the Supreme Court's jurispathic ruling in *Wards Cove* and the broader political context that supported it. Both parts reveal some important ways in which following Cover's attention to *nomos* and narrative can enrich legal mobilization analysis.⁴

THE GENESIS OF A RADICAL EGALITARIAN NOMOS

One potential contribution of Cover's theorizing is to press legal mobilization analysts to explore and document more thoroughly the historical development of alternative *nomoi* that undergird challenges to official law by subcommunities and social movements. While a full accounting is impossible in this article, we at least

4. Guinier and Torres (2014) develop a similarly compelling and explicitly compatible conception of *demosprudence* to express a very similar type of bottom-up project.

sketch briefly the key components of that *nomos* developed among Filipino cannery workers over more than a century of practical struggles against what they considered state and capitalist oppression leading up to the *Wards Cove* lawsuit in the 1970s.⁵

The relevant starting point is in the late nineteenth-century experience of Filipinos with Western colonial domination. Shortly after supporting Filipino independence forces against Spanish colonial rule, the US military invaded the Philippines, brutally killed an estimated 1 million Filipino resisters, incarcerated large parts of the civilian population in concentration camps, allied with elements of the national and local ruling elites, and embarked on imposing a new constitutional order that secured authoritarian executive rule for most of the next century (Kramer 2006). A radical resistance movement committed to Philippine independence (the Katipunan) continued to generate bloody conflict and to nurture narratives of democratic revolution among many sectors of the lower class, peasants, and minority ethnic groups (e.g., Moros) for many decades to come (San Juan 2009). At the same time, many ordinary Filipinos were subjected to English-language education that portrayed a benign view of US history and assured them that they had basic rights as Filipino American nationals. This status opened opportunities for Filipino emigrants to take low-wage work in the agricultural fields and salmon canneries of the US West Coast after Congress blocked further entry of Japanese and Chinese workers. By the 1930s, a substantial diaspora of Filipino male workers thus was concentrated on the mainland, following harvest schedules from California to Washington and short, hectic summers in Alaska (Friday 1994; Fujita-Rony 2003).

Filipino workers were promised rights and economic opportunity, but their actual experience was dominated by rampant racial discrimination and class oppression. Local laws at various times restricted property ownership, racial intermarriage, and political rights to Filipinos, while harassment by criminal justice officials and white citizens was common; migrant Filipino workers were routinely excluded from participation in white society and beaten, shot, or killed by both law enforcement officials and white civilians. Author, essayist, and journalist Carlos Bulosan chronicled the exploited conditions of migrant Filipinos in his classic *America Is in the Heart*. “I feel that I am an exile in America. . . . I feel like a criminal running away from a crime I did not commit. And this crime is that I am a Filipino in America” (Bulosan 1996, vii). Bulosan vividly documented the duality of an America where a large and diverse underclass suffered from severe racial and class domination despite promises of legal equality. “America is not a land of one race or one class of men. We are all Americans that have toiled and suffered and known oppression and defeat, from the first Indian that offered peace to the last Filipino pea pickers. . . . America is also the nameless foreigner, the homeless refugee, the hungry boy begging for a job and the black body dangling from a tree” (Bulosan 1996, xxiv).

One site of this exploitation that Bulosan knew well was the Alaskan salmon canneries. Beginning in the late nineteenth century, the canneries relied on a

5. Our account here of the cannery workers grows out of many years of research for a larger book project authored by McCann and Lovell.

plantation model of mass production adopted from operations in US colonies and US-owned subsidiaries in the Pacific Rim and Caribbean, a model itself adapted from slave-based agricultural production in the US South (Fujita-Rony 2003). The most striking feature of workplace organization was the segregated structure of the workplace. Successive waves of Asian male workers and a small number of indigenous peoples of the far Northwest performed dangerous work in the least desirable and lowest paid jobs on the production line, including the work of “sliming,” “sluicing,” and “lye washing” the fish (Chew 2012). There was little mobility between the jobs performed by minority workers and higher-paying skilled and administrative positions, which were filled almost exclusively by whites.

The different treatment faced by the minority workers extended well beyond wages. Workers in the remote canneries lived in segregated, corporate-supplied housing, with the minority workers assigned to cramped, poorly insulated bunkhouses that were unmistakably inferior to the housing provided for white workers. Minority workers complained of substandard, unsanitary food in segregated mess halls and inadequate medical care for frequent illnesses and injuries. As one “Alaskero” summarized about the early era, “conditions in Alaska at that time was so awful. That is just like they were slaves. . . . They go there and get money from the contractor so they can go to Alaska and work. And, then, they come back, they are broke” (Marquardt 1992, 4).

Conditions improved in the late 1930s after Filipino workers organized a union, which evolved through several struggles over affiliation into ILWU Local 37 in the late 1940s. Bulosan himself was involved in the union as a worker and promoter of democratic socialism; he was the primary writer and editor of the union’s 1952 *Yearbook*, in which his inflammatory socialist rhetoric and the leftist commitments of other union leaders were on clear display. It was in regard to this period of defiant collective action on behalf of socialist ideals that Bulosan’s *America Is in the Heart* took its most aspirational tone. Highly influenced by decades of Filipino anticolonial resistance at home and labor radicals, communist fellow travelers, and literary populists in the United States, Bulosan’s reconstruction of familiar US principles of equality, rights, and democracy subtly expressed a critical, transformative, and politically radical cast. “America is in the hearts of men that died for freedom; it is also in the eyes of men that are building a new world” (Bulosan 1996, xxiii–xxiv).

The late 1940s and early 1950s was a period of intense struggle, as both employers and the state ramped up efforts to divide workers, deport leaders, and turn patriotic Filipinos who fought in World War II against imperial Japan into opponents of the radical union cause. But it was also a moment in which heroic struggle animated by a *nomos* of anticolonial and socialist democratic aspiration was powerfully alive in the ILWU, among farmworkers, and in the West Coast labor movement generally (Fujita-Rony 2003). It is relevant that, as evidenced by the 1952 *Yearbook*, the radical cannery workers union, like the larger ILWU, linked worker organizing to legal rhetoric of rights. The union routinely defended rights through litigation and embraced formal legal procedures as core commitments of both internal organization and national socialist transformation (see Baldoz 2011).

The union's progressive posture began to create serious problems during the McCarthy era. Many union leaders were harassed or deported by federal officials. The result was that more conservative and corrupt leaders took control of Local 37. When the young activists who later filed the *Wards Cove* case started working in the canneries in the late 1960s, the union's leaders were collecting bribes in exchange for work assignments, profiting from gambling operations in the canneries, and collaborating with employers to keep rebellious workers in line (see Chew 2012, 120–46). Thus, a new generation of Asian and native workers experienced oppressive conditions and racial discrimination with little of the capacity for collective resistance afforded previously by the union.

The plaintiffs in the *Wards Cove* and related lawsuits were led by a group of young, second-generation, mostly college-educated Filipino workers who took summer jobs in the canneries during the late 1960s and early 1970s. They recounted repeatedly to us in interviews how work in the canneries deepened their understanding about the hardships experienced by their fathers and earlier generations. We often heard invocations of the Tagalog proverb that “one who does not look back to where he came from will not reach [his] destination.”

The young activists had also studied Bulosan's 1952 *Yearbook* and befriended some of the radical leaders from the early union days, including Chris Mensalves, who sharpened their understanding of and identification with the leftist, social democratic *nomos* (see Chew 2012). The new generation of activists was also influenced by broader currents of the era, including contemporary Black Nationalists, Chicano and Asian American radicals, the multiracial Rainbow Coalition, and the anti-imperialist opposition to the Vietnam War. Finally, many of the young cannery activists were also allied with the Union of Democratic Filipinos (KDP), a movement of Philippine and Filipino American leftists committed to ousting President Ferdinand Marcos, lifting martial law, breaking the imperial grip of the United States, and promoting democratic socialism in the Philippines as well as in the United States (Toribio 1998). Thus, a complicated array of ideational influences and historical narratives of the colonial experience were fused into the anticolonial, anti-imperialist, egalitarian workers' *nomos* that inspired the activists who filed the *Wards Cove* lawsuit in the early 1970s.

FROM NOMOS TO ACTIONABLE LEGAL NARRATIVE: CHALLENGING INSTITUTIONAL RACISM

Tyree Scott, whose words began this article, is widely credited with introducing the strategic legal narrative that bridged the cannery activists' historical leftist *nomos* to practical mobilization of Title VII law as a political resource.⁶ Scott had much relevant experience in minority labor activism. After returning from a tour as a Marine in Vietnam to discover he could not find work as an electrician in Seattle because the building trade unions excluded African Americans, Scott organized the United Construction Workers Association (UCWA) and launched a direct action

6. The cannery workers clearly fit Cover's conception of a *nomos* group in that they shared a narrative vision, social organization, and mutual commitments. See Snyder (1999).

campaign that shut down some high-profile construction sites, including on the University of Washington campus and at SeaTac airport. Scott simultaneously collaborated with some supportive Equal Employment Opportunity Commission (EEOC) officials to initiate Title VII challenges against the exclusionary unions. Scott's campaigns quickly won substantial changes in employment opportunities for black and Asian American workers in the building trades around the country (Gould 1977; Griffey 2011).

While collaborating with EEOC officials, Scott befriended several young Filipino activists who had been blacklisted from cannery jobs for "making trouble." They created the Alaskan Cannery Workers Association (ACWA), modeled after Scott's organization. Scott also provided money for two of the activists, Silme Domingo and Michael Woo, to travel to Alaska, masquerading as University of Washington Fisheries School students, in order to collect evidence—photographs, interview testimony, connections with potential plaintiffs—for EEOC complaints and eventual Title VII lawsuits (Chew 2012, 17). The connection to Scott strengthened when the ACWA joined the UCWA and the United Farm Workers to create the Labor and Employment Law Office (LELO), a worker-controlled law firm dedicated to using civil rights laws to help construction, cannery, and farm workers. LELO attorneys worked with the Alaskan cannery workers to file class action lawsuits against the cannery industry. Three suits were filed against different cannery corporations, one of which was the *Wards Cove* case that ended up before the Supreme Court fifteen years later.

Law as Contested Terrain

It is worth noting at the outset that while Scott and the ACWA activists utilized Title VII litigation as part of their broader campaigns for social change, they always viewed US law and US courts ambivalently, at best. They understood the US legal system, like US liberalism generally, to be grounded in a fundamental tension between, on the one hand, market rationality, private property, and gross social inequality, and, on the other hand, modestly egalitarian and democratic political values—with the former usually trumping the latter (see Brown 2003). Moreover, the activists understood the limitations of liberal democratic law, which, even when most supportive, works only to soften capitalist exploitation and not overcome it. Thus, they followed earlier generations of Filipino radicals by embracing liberal democratic values as resources for building more radical political challenges that transcended liberalism. Like their hero and muse Carlos Bulosan, the activists expressed a jurisgenerative language that blended familiar liberal odes to rights, equal opportunity, and political democracy with invocations of multiracial solidarity, anti-imperialism, and socialist transformation in the control of social production and distribution. "They framed their grievances around equity, fairness, and civil rights" (Domingo 2010, 81), even though they saw democratic liberal principles as insufficient if necessary components of a larger progressive campaign (Toribio 1998).

Consistent with their inherited leftist *nomos*, the young reformers viewed contests over the contradictory values and visions of social ordering embedded in law through the lens of fundamental conflict between social group interests as well as principles. In a letter expressing how their understandings of law differed from that of their long-time attorney, several leaders wrote:

We see the law as a set of rules that exists as a result of a tug of war, which is a constant between the class that rules and those democratic forces that are ruled. During this ongoing war both of these forces make gains and losses. We neither see the law as something that is morally right nor stagnant. At any given time a law, in our view, reflects the relative strengths and weaknesses of its opponents and proponents. (Letter from LELO Board to Abraham Ardit, August 4, 2000. In Cindy Domingo papers, Box 4, Folder "Wards Cove." UW libraries)

Such an understanding not only displayed a defiant alternative *nomos* of the type that Cover celebrates, but it also offers a politicized parallel to Cover's own theory of dialectical tensions between *jurisgenesis* and *jurispathy*. In both views, official law at any time reflects the outcome of continuous contestation. However, while Cover emphasized the contest between official state law enforced by courts and the communal *nomos* of advocacy groups, the cannery activists urged a more complex view of social power and political organization that shaped law. In short, like many sociolegal scholars, the activists insisted that the official state law that courts enforce is shaped by dominant groups in civil society, by the haves over the have-nots, defined largely in terms of class, race, and gendered hierarchies.

The result was that law tends to be ideologically biased toward the hierarchical, market-based commitments of white male capitalists. However, like Cover, the activists also recognized that courts do sometimes offer concessions by validating modest versions of alternative visions pressed by subaltern groups. While they understood that such moments are usually short lived and unlikely to reconfigure social hierarchy, they also saw value in pursuing even temporary openings that could help advance intermediate goals, particularly given their limited alternatives. Disparate impact doctrine during the early 1970s provided such an opening.⁷

The activists also prized creativity in framing contentious legal narratives over deference to legal texts, precedents, and *jurispathic* courts. Activist Michael Simmons captured this quite clearly:

Tyree Scott would say [that] poor people should be able to treat their lawyers like rich people treat their lawyers: they tell them what to do. All these movement lawyers always try to tell the poor folks what to do. What may be the best legal strategy may not be the best movement strategy. And if you're trying to build a movement, you say, "fuck the law, we're trying to build something here." And we did not defer to lawyers at all at any time. So Tyree and I had gotten so tired of dealing with lawyers

7. For parallel understandings by feminists and female pay equity activists in the same era as the cannery worker campaigns, see McCann (1994, Chs. 7–8) and Freeman (1998).

at that level, that's the genesis of what became LELO. (Quoted in Griffey 2011, 67)

A similar sentiment was expressed by Nemesio Domingo, one of the founding ACWA activists:

Tyree was saying we need to form our own law office because now we cannot depend on the good will of the government to pursue equal opportunity, particularly for workers. And so workers needed to be really in control. And one way to do that was to have their own law office. (Interview with Nemesio Domingo, March 8, 2013)

Scott later praised the LELO attorneys who allied with him in defying legal rigidity: "Lawyers generally say, there's no precedent for this, or we can't do that, or whatever. [Movement attorney Michael] Fox's thing was always, why not? And so, that's what would happen. I tell you, I give him a lot of the credit for not stifling the creativity of the ordinary workers who came with these ideas that weren't conventional." In short, the activists boldly undertook a mode of legal mobilization that pursued legal openings but was also self-consciously defiant toward existing workplace organization, official legal doctrine, and judges. "We were seen as the renegades, I'll tell you," Scott added (interview with Tyree Scott, March 17, 1998).

These points are crucial to understanding the ACWA legal narrative that bridged their transformative *nomos* to official antidiscrimination law. As they saw it, Title VII's disparate impact standards that developed in the early 1970s in cases like *Griggs* provided an opportunity to leverage official law as a resource in their effort to advance equality and democracy against proprietary privileges in advanced capitalist society. However, they did not count on courts or official law to deliver justice or to produce equality at work. From the start, their creative legal narrative challenging institutionalized racism drew on what seemed to be settled legal principles, but was embraced to support political organization and action that transcended legal doctrine and judicial remedy.⁸ The legal narrative we develop below bridged the activists' *nomos* and narratives to official constructions of Title VII's disparate impact standards in the 1970s, but they always aspired to broader social change that they knew courts would not and could not authorize.

The Insistent Identification of Pervasive Institutionalized Racism

The ACWA activists' jurisgenerative narrative saw promise in disparate impact law because it could accommodate their understanding of racial discrimination as a

8. We underline that what follows is not a conventional or neutral jurisprudential account, but an account of the legal narrative that the activists developed to bridge their egalitarian *nomos* and official law. Our account is better understood as demosprudential (Guinier and Torres 2014; see n3). This standpoint recognizes that not all legal scholars would agree with the activists' readings of the developing case law on disparate impact before and after the *Wards Cove* ruling. For a range of views, see, for example, Brest (1976), Carle (2011), Eisenberg (1977), Farhang (2010), Freeman (1998), Karst (1978), Runkel (1994), and Spann (2010).

historically inherited and pervasive institutional feature in workplace organization. As activist Andy Pascua succinctly put it: “There was institutionalized racism” in the salmon canneries (Chew 2012, 96). The activists did not see racial and class hierarchy as primarily aberrant expressions of intentional, irrational prejudice by individual employers in an otherwise fair society. They thus recognized the limits of disparate treatment claims, given their focus on discrete and identifiable discriminatory choices by individual perpetrators. In their view, the legacies of slavery, genocide against Native Americans, subordination of Asian immigrants, and Jim Crow still permeated the structural relations and practices of US life.

The young activists’ understandings grew out of their careful attention to the historical roots of institutionalized racism in the canneries. Reform leader Gene Viernes devoted enormous time to documenting the history of domination and resistance in the canneries over several decades, and published a seven-part article series on that history in the *International Examiner*, a community newspaper (see Chew 2012). Studying the historical reach of workplace racism and class division, Viernes at once deepened the young activists’ understanding of the complex web of organizational forces that exploited minority workers and informed their renewed commitments to challenging current injustices.

KDP ally Bruce Occena later summarized the recurring problem that became apparent to many workers through efforts like Viernes’s: “There’s an unspoken rule . . . basically, the Filipinos are not allowed. This was the 1970s. My God! It was like a flashback” (Chew 2012, 92). The activists’ attention to history shaped their claim of injury in the civil rights lawsuits, which included demands for back pay going back to earlier generations of workers. As ACWA activist David Della explained, the claims “would span not only those who were working in the cannery, but . . . take into consideration the previous generations of people who had experienced discrimination in the canneries” (interview with David Della, March 8, 1998). In Nemesio Domingo’s words, “our determination to correct some wrongs became a struggle to correct the past” (quoted in Marquardt 1992, 22). The past was not past, after all; it was present in the ongoing hierarchical segregation of the canneries.⁹

In preparation for the lawsuits against the canneries, the activists carefully documented the many interrelated manifestations of racial and gender hierarchy in the canneries. During their covert investigation in Alaska, Domingo and Woo had assembled statistics, photographs, and worker testimony illustrating the multi-pronged trampling of rights. The most general wrong was in the unequal access to different cannery jobs, from initial hiring to promotion. “The jobs in the cannery were very much segregated,” Della contended. “The Filipinos were mainly in the fish part of the operation, which was continuously wet, with very long working hours. Upper mobility for us was getting out of the fish house and onto the boats. They made a lot more money there. We were never given the opportunity for those jobs . . . those jobs were reserved for the white people” (cited in Domingo 2013).

9. “We were part of a generation that started to raise questions about the company, about why it is like this, because many of our fathers and uncles before us, they just took the abuse because they had no choice” (David Della, quoted in Chew 2012, 61).

Moreover, the conditions of work, housing, eating facilities, and health care access were also separate and unequal. As Della remembered, “I saw lots of things that were disturbing, things you wouldn’t think happened, such as a segregated bunkhouse, segregated jobs . . . without any chance of promotion. Everything was segregated—your laundry, your mail, where you lived, the type of food you had . . . We had to carry our own salted barrels of meat from the boat to our kitchen” (Chew 2012, 61).

Finally, the activists emphasized that these many institutional manifestations of racial, class, and gender inequality should not be understood as primarily the product of conscious choices by identifiable perpetrators or willful decisions to target individual workers. Rather, as inheritances of a long-developing past, the conditions were sanctified as normal, natural, and even inevitable by the employers and dominant white population. Hierarchical relations and practices were also fortified by a host of rationalizing ideological constructions that were embedded in state law, including ideas about private property, owner prerogatives, market competition, and meritocracy (McCann 1994).

Employers tried to justify their adherence to established practices by claiming pressure to sustain profits, pointing to the paternal benefits of providing work to the migrant poor, and blaming contractual agreements made with the unions representing their workers. In response, the activists insisted that the core issue was more than just racial prejudice, even understood broadly. As Michael Woo told us, “the easiest way for people to understand it is to see this question of color . . . of race discrimination,” especially after the African American civil rights movement. However, the activists came to “understand how much it is a class issue, a working people’s issue, and the role discrimination plays in it” (interview with Michael Woo, March 13, 1998). In short, the denials of basic rights articulated in the cannery lawsuits were neither simple in character nor aberrant in a society long organized to sustain racial, gender, and class hierarchy. The disparate impact logic of civil rights provided one modest resource that the activists could invoke in a broader struggle against those historical and structural dimensions of unequal power.

Evidencing Institutionalized Racism: Beyond Intent, Relaxing Causality

The activists’ understanding of injustice at the canneries fit well with the distinctive evidentiary standards for disparate impact cases. First, and most important, plaintiffs advancing disparate impact claims did not need to demonstrate intentional harm, which entailed the often-insurmountable burden of showing employers’ discriminatory states of mind. While a focus on intent often obscures largely irrelevant issues of organizational power (Brest 1976; Eisenberg 1977; Karst 1978; Freeman 1998), disparate impact doctrine instead recognized institutionalized, structural dimensions of class, race, and gender hierarchy.

Second, the disparate impact standards allowed plaintiffs to build cases based on data that were accessible to plaintiffs and on other materials that were suitable for constructing narratives of structural discrimination. The most important foundation for making a *prima facie* case of unlawful discrimination was statistical

measures of segregation in hiring, promotion, and wages, which are often available through employers' own databases. As Tyree Scott noted in our opening quote, things were relatively "easy" for plaintiffs when the burden of proof was on the employer. Such measures are also well suited for linking disparities to practices rooted in past eras of more overtly hierarchical and exclusionary hiring, offering plaintiffs an opportunity to underline the inherited institutionalized character of unjust hierarchies. Further, as the efforts of the cannery workers show, evidentiary development, conventional discovery processes, and trials typically feature workers' own narratives that connect the many, complex, interrelated dimensions of exclusion and subjugation in the workplace. Finally, as legal mobilization scholars have pointed out, gathering both statistical data and historical narratives as evidence of structural racism can facilitate consciousness-raising and direct organization among workers—helping to build protests, strikes, boycotts, and publicity campaigns that can influence judges and juries, legislators, and employers (see McCann 1994).

A third feature of early disparate impact doctrine that the activists endeavored to exploit was that civil rights plaintiffs need not demonstrate direct *causal* linkages between specific employer policies or practices and discriminatory outcomes. In this regard, evidentiary records for disparate impact tended to be more empirically based but less positivist in their logic. These doctrinal innovations reflected an understanding that institutional power is not always reducible to linear causality. Policies and arrangements that were facially neutral or well-intentioned adaptations to background market conditions could still violate civil rights. Again, institutionalized racism and class exploitation, rather than aberrant expressions of individual prejudice, were the focus (Omi and Winant 1994; Bonilla-Silva 1997; Freeman 1998).

Fourth, the early disparate impact doctrines established flexible, plaintiff-friendly burdens of proof in legal contests. Before the *Wards Cove* ruling, federal judges usually recognized that the burden of proof shifted to employers once minority and female workers made a *prima facie* case using evidence of statistical disparities. Employers then had to prove that the challenged practices were justified by "business necessity" (see *Dothard v Rawlinson* 1977). Prior to *Wards Cove*, judges were not always consistent regarding what was needed to satisfy the business necessity standard, but the bar was often high, with courts discounting claims of profit maximization and treating skeptically the classic "market defense" that businesses practices are justified simply because "everyone else does it" (McCann 1994, Ch. 7). The shift in burden of proof made it easy for activists to pressure employers for reform without bearing all the costs of proving discrimination at trial. To quote Michael Woo again: "Back then, workers had the ability to just allege discrimination based on the whole *prima facie* evidence, right? That set the tone for all of the discovery and the charges and gave basis for it. A lot more opportunity, and interpretation was a lot broader" (interview with Michael Woo, March 13, 1998). Overall, the disparate impact doctrine allowed progressive plaintiffs to develop holistic, flexible, common-sense standards that assessed the "preponderance" of multiple indirect evidentiary claims for establishing "discriminatory animus," which in turn demanded high standards of business justification to avoid liability (*County of Washington, Oregon v. Gunther* 1982).

Class Action and Collective Action

One of the most promising features of the disparate impact logic embraced by cannery activists was the amenability to collective mobilization through class action lawsuits. The focus on structural inequalities embedded in longstanding practices meant that violations were systematic and thus affected groups of workers and not just individual victims of discrete discriminatory decisions. The opportunity for class actions was important in several ways. First, class action suits helped to overcome collective action and cost problems by improving the incentives for workers and their attorneys to file disparate impact lawsuits (Cramton 1995; Hensler and Moller 2000). Moreover, as scholars (McCann 1994) have shown in other contexts, the activists recognized that class action lawsuits can be useful beyond the courtroom as mechanisms for organizing workers, increasing union participation, and forging coalitions with other groups. As Scott put it: “[T]he idea of the EEOC contract . . . was to educate workers about Title VII. But what we actually did in the process, was we organized” (interview with Tyree Scott, March 17, 1998). The organizing began with workers, but, as with the legacy of gender-based pay equity, it often extended well beyond to broad coalitions. As former ACWA activist Michael Woo told us:

There was a community organizing aspect to bring in support around these lawsuits. Well, the idea was to develop a class action lawsuit . . . to not only have a legal component, which was the centerpiece of it, but have a community organizing piece to span the generations and to get the kind of community support we needed to move the lawsuits forward. . . . It was important to surface some of the earlier generations of cannery workers, to do that kind of organizing and get people feeling like this was a movement that affected all of us, affected all of our families. And it really helped in terms of surfacing not only the plaintiffs who were part of the class action lawsuit. It also was important in bringing the kind of political support in the community we needed to bear. (Interview with Michael Woo, March 13, 1998)

In sum, disparate impact claims facilitated solidaristic group action advancing a collective *nomos* that overcame, rather than perpetuated, the individualizing logic of disparate treatment litigation and much US civil law (Scheingold 1974).

Far from viewing the litigation and anticipated legal remedies as ends in themselves, the activists from the beginning integrated Title VII lawsuits into a much broader political and organizing strategy for advancing a variety of goals grounded in their ambitious *nomos* and reaching well beyond the lawsuit (and beyond the borders of the United States). Those broader efforts were sometimes linked to their involvement in litigation, but they also persisted long after the Supreme Court’s ruling led them to abandon the strategy of using Title VII litigation. First, the young cannery activists sought to challenge and replace the corrupt and unresponsive leadership of the cannery workers’ union, ILWU Local 37 (Domingo 2010, 81–100). “I think it’s 1976 where we’re becoming much more clear we . . . need to take the situation from having this lawsuits that we file outside the union, to actually

going back into the union. Part of our strategy of influence was to re-seize the union, and to change the way that it operates,” David Della told us (interview with David Della, March 8, 1998). The lawsuits provided direct support when key ACWA activists returned to Alaska as workers after a court found that the blacklist was unlawful retaliation against civil rights plaintiffs. “Most of us were blacklisted for a really long time. So we never got back up there until pretty close to when the cases were won” (interview with Cindy Domingo, March 8, 1998).

The lawsuits thus directly aided the activists’ broader effort to challenge corrupt union leaders by mobilizing worker support for a reform campaign. The activists immediately began a reform campaign as a “rank and file committee” (RFC) within the union. They revitalized long-dormant grievance processes, pressured leaders for more transparency, and ran slates of candidates in union elections. “So there’s a focus on the dispatch system, there’s a focus on organizing the unorganized that had been lost. And then there was a focus in on grievance, handling grievances and complaints. Shop steward training, you know, and getting people to actually advocate. And to move complaints from the floor into some sort of resolution with the industry through the union and all that kind of stuff. . . . Those three problems become the major reform movement cause” (interview with David Della, March 8, 1998). In 1978, the RFC slate, which was multiracial male and female, won a majority of seats on the executive board. Two years later, ACWA leaders Silme Domingo and Gene Viernes won the important vice-president and dispatcher positions. The newly elected leaders quickly accelerated efforts to “change the union back to a progressive body that protected the rights of workers” (Domingo 2010, 96). They “cleaned up the corruption” and won contracts “that allowed us grievances,” both legally grounded reforms (Hatten, quoted in Chew 2012, 82).

Second, the same activists—allied with the KDP—worked to mobilize support for ending the rule of Philippine dictator Ferdinand Marcos and to promote democratic socialism both in the former colony and its mainland metropole (Churchill 1995). The rights-based antiracism campaign in the canneries and within the union merged well with the challenge to Marcos’s rule by martial law and brutal trampling of dissenters’ rights.

Tragically, the challenge to Marcos proved the most costly of the activists’ causes. On June 1, 1981, shortly after winning support for an inquiry into Marcos’s human rights violations at the international ILWU convention, Silme Domingo and Gene Viernes were shot and killed while working in the union’s office in Seattle. Two members of the Filipino Tulisan gang were convicted of being the gunmen in the murders, but surviving friends and family members believed there had been a broader conspiracy. They built a new grassroots coalition that helped to support an independent investigation into the murders. Working with progressive lawyers, the activists launched a civil suit against Marcos and US intelligence agencies that helped uncover evidence proving that Marcos had sent the money that the president of the union used to hire the gunmen in the murders. A federal court found Marcos’s estate liable for the murders. The trial also exposed new dimensions of the corrupt, despotic rule by Marcos, including the fact that US and Philippine intelligence agencies collaborated to spy on US activists during the years prior to the murders.

Throughout the 1970s and early 1980s, the activists continued to pursue these interrelated struggles and cultivate alliances with local, national, and international activists battling at all levels of state and social power (Griffey 2011). These projects expressed the activists' jurisgenerative *nomos* of workplace equality, union power, and socialist democratic change in both the United States and in the Philippines, and they demonstrated their *nomos* worldview that legal contests are inextricably struggles between the "haves and have-nots" in society. Such political contests over hierarchical social power illustrate the political dimensions of legal rights activism that legal mobilization scholars often study but are less visible in Cover's jurisprudential focus. Again, integrating Cover's provocative theorizing into the legal mobilization framework holds greater promise than either analytical framework alone.

Remedies: Institutional Injustice Requires Worker-Led Structural Reform

The ACWA activists' articulation of pervasive and historically-based institutional racism led them to demand broad and multidimensional structural reforms. They were not narrowly seeking quotas or any other discrete, technocratically defined, one-shot legal fixes for structural problems.¹⁰ They instead sought changes in job training opportunities, hiring processes, job ladder mobility, and wage structure to remove race and gender bias. Most important, ACWA activists remained committed to direct participation by aggrieved workers in reform implementation processes. As such, efforts to democratize workplace organization required broad participation directly in reform processes. Like their mentor Tyree Scott (Griffey 2011) and gender-based wage equity workers (McCann 1994), the activists appealed to judges to authorize direct worker involvement in creating and monitoring various processes of workplace transformation.

Moreover, the activists did not think of their campaigns in terms of "desegregation" or even "integration" of the workplace. They valued increased individual opportunity for better work and wages, but they were focused on collective power in the workplace, in the union, in their local community, and in national and international politics. The scope of issues addressed by ACWA went far beyond the workplace to include immigration, health care, bilingual education, low-income housing, fair access to capital for home building and small business, and much more, including deposing the despotic Philippine president and advancing socialism at home and abroad (Chew 2012). As such, their aims better fit what Manning Marable has described as a "transformative" rather than merely integrationist *nomos* (Marable 1996).

The Jurisgenerative Project: Beyond Liberal Civil Rights

The previous observations call attention to a final point. Like Carlos Bulosan and earlier Manong socialist leaders, the young reformers' movement narrative

10. They did seek clear goals and targets in job opportunity and mobility, but the term "quota" overstates the rigidity of the requested remedies; it is a loaded term invoked by opponents to stigmatize more than to describe accurately.

challenging institutionalized racism was savvy in its conditional embrace of a liberal dialect of rights and democracy. “We wanted America to live up to its democratic ideals” (Chew 2012, 4). At the same time, though, the KDP activists in ACWA also self-identified as fellow travelers in the New Left, and as socialists (Toribio 1998; Domingo 2011, 1). The activists’ aspirations were protean and ever evolving; they drew on a *nomos* grounded in an eclectic mix of inspirations and influences that inspired a wide range of social reform projects.

That said, they were constant in their embrace of jurisgenerative inspiration from traditions of positive socioeconomic *human rights*. As Scott explained: “Now is the time to push for a new human rights agenda for the US at home, one that encompasses what have been called civil rights, workers’ rights, and women’s rights, among others” (letter from Tyree Scott and Diane Narasaki to The Hon. Ronald Dellums, July 14, 1989; Authors’ files). An affinity for human rights language dated back at least to the earliest cannery worker unionizing efforts in the 1940s, solidified in the McCarthy era, and was reborn with the young ACWA reformers in the 1970s. Clearly, their efforts in the lawsuits to pursue the relatively narrow liberal rights remedies of Title VII did not limit the workers’ aspirational rights narratives to the terms of mainstream liberal civil rights law.

JURISPATHIC COURTS AND THE EXTRAJUDICIAL POLITICS OF LEGAL MOBILIZATION

We turn now to an account of the jurispathic process through which the legal openings pursued by the cannery workers were destroyed. Like Robert Cover, we portray a process in which state actors kill off alternative interpretive visions of law. However, unlike Cover, who developed his ideas about jurisgenesis and jurispathy using examples that made judges the key actors and courts the central forums of contestation, we give an account of *jurispathy* that extends into political processes outside of courthouses. Our account follows legal mobilization scholars who decenter analysis of courts and link struggles in courthouses to outside political events and practices. We start with an analysis of court rulings in the *Wards Cove* case and follow that with sections on the broader context of civil rights politics and the political fights over Congress’s response to the Supreme Court. Combining Coverian and legal mobilization analysis, we look at the defeat of the *Wards Cove* workers as an episode in which a group of relatively powerless rights claimants became entangled in much broader institutional and political struggles.

Wards Cove in Court: A Jurispathic Exercise

The three antidiscrimination lawsuits that the ACWA activists initiated in 1974 worked very slowly through the legal process. Two of the three cases went well at trial and the workers won solid settlements by the early 1980s. However, in the third case, the trial court judge was more hostile to the workers’ legal claims and the responding company proved less willing to settle. The case dragged out for more than a decade, bouncing between the district and circuit courts as the workers

repeatedly appealed adverse rulings by the trial court judge. As the years wore on, the background legal and political context changed dramatically. Ronald Reagan's victory in 1980 led quickly to changes in EEOC and Justice Department policies (Devins 1993) and eventually to changes on the Supreme Court. The resulting conservative shift on civil rights culminated in the late 1980s, when a narrow Supreme Court majority issued a series of rulings announcing new interpretations of civil rights law that made it more difficult to connect disparate impact cases to broader collective action. *Wards Cove v. Atonio*, the third of the ACWA cases, was one of those landmark rulings. The plaintiff's lead counsel, Abraham Ardit, later summarized the impact of the underlying political changes on the case: "In the beginning, I think we all had the feeling we were swimming with the current . . ." of case law. "Then there was the point when the current changed direction. We were swimming against the current even though we were swimming in the same direction as before" (Chew 2012, 19).

The Supreme Court intervened in *Wards Cove* at the request of the employer after the workers had won a favorable circuit court ruling regarding statistical evidence. The circuit court, invoking disparate impact precedents, had overruled the trial court (and a three-judge circuit panel) and ordered the lower court to continue trying the case under the evidentiary standards established in cases like *Griggs*. The Supreme Court then intervened before more evidence could develop. In a 5–4 ruling, the Supreme Court reversed the circuit court and instructed the trial court (and, in effect, all federal courts) to allow a much narrower range of statistical evidence and to demand higher burdens of proof for plaintiffs in disparate impact cases. The majority decisively rejected the legal claims of the ACWA activists. Together with other cases of the same era, the Court substantially killed off the promise in *Griggs* that led many worker and social justice organizations to use Title VII as part of broader efforts to challenge structural discrimination in workplaces like the canneries.

Our account in this section of that *jurispathic* ruling is not a conventional jurisprudential analysis. We are not trying to offer a more compelling reading of precedent or a better interpretation of relevant statutory provisions.¹¹ We instead explore more general questions about the rhetorical strategies courts utilize as they shut down legal avenues for collective political mobilization challenging institutional racism. Our focus is less on what the justices said in *Wards Cove* than on what they did not say. In particular, we note that the Court majority had almost nothing to say about the conditions at the canneries that gave rise to the lawsuit. The case also contains little serious discussion of the earlier disparate impact precedents that inspired the workers to file Title VII lawsuits and helped them to win large settlements in two companion cases. Our argument is that such silences by *jurispathic* courts work to erase the legal foundations of alternative normative narratives. Thus, our concern is not that the justices failed to offer the best-grounded

11. Again, we view our project as closer to what Guinier and Torres (2014) call *demospudence*, in that we grant respect to minority worker democratic mobilization around a transformative rights narrative. We will cite in coming pages words from Blackmun and Stevens, who offered *demospudential* dissents, challenging the majority's arbitrary rejection of ACWA claims (Guinier 2008).

interpretation of a very open-ended statute, but with the way the majority's written justification distorted historical understandings by masking the factors that had once made the alternative legal narratives viable and compelling. Crucially, the Court's account creates a distorted picture of what motivated the activists to turn to law, which in turn distorts the impact that *Wards Cove* had on worker efforts to mobilize civil rights law.

To appreciate such distortions, scholars need to look beyond the official version of law that emerges retroactively in appellate court decisions. They need to take seriously the legal vision of activists who identify and pursue openings in the law, even if those openings are eventually closed down by jurisprudential judges. (On this point, see Goluboff [2007].) Taking the activists' alternative vision seriously reveals the promise of earlier doctrinal innovations, and allows us to develop a better understanding of law's potential role in transformative change, the judicial rulings that narrowed that potential, and, in our final section, the limitations of Congress's alleged reversal of the Court.

Eviscerating Disparate Impact

The early promise of disparate impact doctrine that the plaintiffs identified when they filed the cases in 1974 was gradually narrowed over a series of Supreme Court rulings that culminated in the *Wards Cove* ruling of 1989. The rulings together made it more difficult for plaintiffs to win disparate impact cases by establishing new guidelines that narrowed the use of statistical comparisons and altered standards for burden of proof in disparate impact cases. Under the *Griggs* framework, as we noted earlier, plaintiffs could shift the burden of proof to employers by using statistical evidence of racial disparities to make a *prima facie* showing of discrimination. Employers could still defend themselves, but they had to prove that their employment practices were driven by "business necessity."

Under that settled framework, parties often fought over what kinds of statistical comparisons the workers could use to establish a *prima facie* case. In *Wards Cove*, the plaintiffs presented statistics showing that minority workers were concentrated almost exclusively in the lower-paying positions. The company responded that disparities across job classifications simply reflected a lack of relevant skills among minority workers. The trial court sided with the employer, ruling that the appropriate comparison was not across different jobs within *Wards Cove*, but instead between the entire *Wards Cove* workforce and the surrounding geographical area. (Forty-eight percent of the cannery's workforce was nonwhite while the region's pool of workers was 90 percent white.) On appeal, the Ninth Circuit panel overruled and sided with the workers (*Atonio v. Wards Cove Packing Co.* 1987).

The Supreme Court majority rejected both the trial and circuit courts' standards in favor of yet another option that was even more indulgent toward employers. Declaring the plaintiff's comparison "nonsensical" (651), Justice Byron White's majority opinion suggested that the appropriate comparison was between persons employed in each specific position and the pool of qualified *applicants* for those positions, arguing that "if the percentage of selected applicants who are nonwhite is

not significantly less than the percentage of qualified applicants who are nonwhite, the employer's selection mechanism probably does not operate with a disparate impact on minorities" (653). To make a *prima facie* case, plaintiffs had to show either that minority candidates applied for positions and were disproportionately rejected, or prove that there were "barriers or practices deterring qualified non-whites from applying" (653).

While the Court had begun treating statistical comparisons skeptically before the *Wards Cove* case (see *Hazelwood School District v. United States* 1977), the majority made a sharper break with the past in announcing a new standard on the relatively settled question of burden of proof. The majority ruled that a *prima facie* showing of discrimination using statistics no longer shifted the burden of proof to employers, claiming instead that the "burden of persuasion" remained always with the plaintiffs. The majority further demanded that plaintiffs demonstrate a clear and direct causal connection between documented racial disparities and specific employment practices. Taken together, the rulings on statistical comparisons, burdens of proof, and causation made it much more difficult for groups of workers to win Title VII cases by invoking their institutional racism narrative. The demand that workers disaggregate their complaint and prove intent and causation made it a much more difficult challenge to demonstrate the cumulative effect of longstanding employer practices that shaped the market for labor. As Tyree Scott told us, "the *Wards Cove* case was one of the major retreats of the courts. . . . Basically what they did is they threw out all the tenets of *Griggs*, and placed the burden on the workers" (interview with Tyree Scott, March 17, 1998).

Erasing Prior Case Law

As noted above, our primary concern with the *Wards Cove* ruling is with what the Court did not say. Crucial omissions in the majority opinion obscured the promise of earlier civil rights law and thus created a distorted picture of what led so many activists of the 1970s to use Title VII suits to challenge structural discrimination.

One set of omissions marked the Court's treatment of prior disparate impact cases. Rather than defend the ruling as an effort to clarify doctrinal uncertainty, or argue that the Court was making a justified retreat from prior mistakes, White's majority opinion misleadingly positioned the Court as defender of a long-established status quo. White barely mentioned the disparate impact precedents that inspired the plaintiffs to mobilize civil rights law in 1974. He presented some short general quotes from earlier, narrower rulings that were consistent with the Court's new conclusions, but he could not cite any cases in which any courts had adopted the newly restrictive evidentiary standards. The majority portrayed the case as an effort by cannery workers and renegade circuit court judges to push law in entirely new directions, rather than as an effort by savvy activists to take advantage of the legal opening announced in *Griggs*. Justice Stevens's dissent emphasized this issue, lamenting the "majority's facile treatment of settled law" (664) and stating that its "casual—almost summary—rejection of the statutory construction that

developed in the wake of *Griggs* is most disturbing” (671–72). Stevens added that the majority was “[t]urning a blind eye to the meaning and purpose of Title VII” (663).

Erasing Social Facts

Even more striking than the Court’s failure to address disparate impact precedents, the majority opinion also paid almost no attention to the record of conditions in the canneries that the plaintiffs had developed to support their case. The Court justified its newly restrictive evidentiary rules by making speculative, abstract claims about hypothetical employers and hypothetical lawsuits rather than giving serious consideration to the facts of the case. The only comments about the conditions in the canneries that made it into the *US Reports* were some dark hints in Justice Blackmun’s short dissenting opinion. Blackmun referred to the “plantation economy” model of cannery production and protested sharply the majority’s implicit sanctioning of “institutionalized discrimination.” Blackmun lamented the majority’s indifference to the plaintiffs’ institutionalized racism narrative: “One wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was” (662).

The move away from the Alaskan canneries toward abstraction and hypotheticals was crucial to the majority’s justification of its new rules regarding statistics and burden of proof. White’s argument rested on the claim that allowing workers to rely on statistical disparities within the workplace would inevitably lead employers to adopt rigid racial quotas in order to avoid the cost of defending their hiring practices in court. White expressed this claim about defensive quotas as a self-evident truth, not as a claim supported in the evidentiary record. Indeed, the “employers” had to be hypothetical, given that the real employers at Wards Cove had never responded to the threat of disparate impact lawsuits by adopting any type of quota. The topic of quotas is quite distant from the case that was before the Court; as we noted earlier, the plaintiffs had not focused on quotas as the remedy for alleged discrimination.

Of course, Supreme Court justices sometimes have to abstract away from messy facts of cases to meet their institutional imperative of giving lower courts clear guidance on general and recurring legal questions. However, in this case, the majority’s refusal to consider the social facts underlying the case was not simply a stylistic quirk unrelated to its conclusions. For one thing, the move toward abstraction allowed the justices in the majority to issue a much more sweeping ruling.

The focus on abstractions contrasts with the earlier *Hazelwood* case in which the Court also rejected a statistical comparison used by civil rights plaintiffs (*Hazelwood School District v. United States* 1977). In *Hazelwood*, the Court’s lead opinion focused on the claim, borrowed from the earlier *Teamsters v. United States* (1977, 340), that judges should take into account “all of the surrounding facts and circumstances” when they decided what types of statistical comparisons could be used in Title VII cases (312). In contrast, *Wards Cove*’s rejection of “nonsensical” statistical comparisons to the surrounding population was framed in more universalistic terms.

Moreover, the majority largely ignored the circuit court's explanation of why the plaintiff's unusual statistical comparison made sense given the unusual nature of the salmon canning industry, that is, the seasonal work in a very remote location and the use of third-party contractors and unions to supply the pool of workers for dispatch to the canneries. Note also that the history of the case that was before the Court shows how demands for statistical comparisons to job applicants, causal proof of intent, and disaggregation of employment practices made it impossible for the plaintiffs to secure legal remedies for structural discrimination, even in a workplace with segregated bunkhouses and mess halls.

The Supreme Court majority showed considerable faith that market forces could be trusted to produce fair allocations. One telling indication of that attitude is the majority's demand for considerable deference to employers. "Courts are generally less competent than employers to restructure business practices. . . . Consequently, the judiciary should proceed with care before mandating that an employer must adopt a[n] alternative . . . hiring practice" (661). The majority's focus on the skills of job applicants came while ignoring the ways that structural conditions can distort markets and, in particular, the workers' quite plausible argument that the visible, longstanding segregation across job categories and in recruitment processes discouraged minority workers from applying for skilled positions and from developing relevant skills.¹² The Court's newly rigid evidentiary rules made such social facts irrelevant, thus killing off efforts to document narratives of institutional racism in future Title VII cases. The ruling well illustrates Cover's claim that abstractions used by jurisprudential judges obscure the normative foundations of alternative legal narratives.

The Court also created a distorted account of how the ruling would impact collective efforts to challenge injustice using Title VII. Justice White was frank about the Court's desire to protect the interests of employers. He complained that keeping the burden of proof on employers would mean that any company with statistical disparities within its workforce "could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of the methods used to select the other members of his [sic] workforce" (652). White's hypothetical scenario caricatured the *Wards Cove* case as one in which workers imposed costs on a benevolent employer by bringing a frivolous suit based only on incidental statistical patterns. In the real case before the Court, the disparate impact claims based on statistical disparities were, from the beginning, combined with other factual claims, including disparate treatment claims growing out of rigid segregation of workplace facilities.

The vision that led the cannery workers to portray cannery conditions as unlawful discrimination was not simply based on a statistical pattern, but on Gene Viernes's sophisticated analysis of the way the cannery industry had preserved exploitative job segregation through a complicated set of industry-wide

12. Justice Stevens did notice the relevant part of the case record, and noted in his dissent that three of the allegedly unskilled minority cannery workers had recently gone on, respectively, to become an architect, an Air Force officer, and a graduate student in public administration (*Wards Cove Packing Co. v Atonio* 1989, 675).

practices that determined what kinds of workers made themselves available for seasonal work (Chew 2012, 120–45). The problem for workers was not that racist employers were rejecting skilled minority applicants, but that the combination of industry-wide practices distorted the market, in particular by shaping the capacity and incentives for workers to develop relevant skills. Proving that any individual element of this labor supply chain was motivated by discrimination and not any business necessity was nearly impossible, given that any isolated element could be defended as a market-driven response to the remaining combination of factors.

Justice White also had very little to say about what it would mean to shift the cost of proving violations onto workers in low-paying jobs. Tyree Scott identified this issue of cost shifting as fundamental. “If the burden of proof is on the workers, then you’ve in effect nullified the workers’ ability to come into the courtrooms because the resources necessary are too great. And so, even when courts are sympathetic, you can’t establish it because you don’t have the resources to get to that point” (interview with Tyree Scott, March 17, 1998). White’s only comment on this issue was simply to assert that the new evidentiary standards were not unduly burdensome because “liberal civil discovery rules give plaintiffs broad access to employers’ records in an effort to document their claims” (658). Such optimism ignores not just a case record showing that imperfect recordkeeping by employers, contractors, and the union created significant challenges for the cannery workers, but also the more general problem of the costs for blue-collar workers to hire attorneys to conduct discovery, in this case against an employer whose intransigence had already dragged the case out for fifteen years.

In the short run, these kinds of distorting rhetorical poses by the Supreme Court probably do not fool anyone. Civil rights advocates (and many members of Congress) immediately saw through the posturing and recognized *Wards Cove* and other rulings of the 1980s as significant retreats that undermined the emerging forms of collective politics challenging institutional racism and sexism in the workplace.

Immediately after the Court delivered its ruling the LELO leadership called a press conference. Tyree Scott protested in passionate terms the Court’s expansion of market rationality over liberal democratic principles and human rights. Scott recognized immediately the damage the case would do to efforts by workers to use Title VII as a weapon in struggles for workplace justice:

[T]he U.S. Supreme Court dealt a major blow to the struggle for human rights and democracy in the courts in this country when, by a 5 to 4 majority, they ruled against the workers and in favor of the employers in the fifteen-year-old *Wards Cove Packing Company v. Atonio* case. . . . Now the possibility of most working people to go to court to prove discrimination suits are virtually nil. . . . In the case of class action lawsuits, it is extremely difficult, almost impossible, to gather specific information on each and every class member’s individual situation to prove discrimination. In addition to the difficulty, it is extremely costly. Once again, [this is a] blow against democracy in the courts. . . . The Supreme Court’s decision was a major

defeat, but all of us who care about human rights in this country do not intend to let it rest there. (Scott 1989)

The cannery activists also understood the importance of the cases in the broader history of civil rights law. Years later, Nemesio Domingo recalled: “There have been two periods of construction and deconstruction of civil rights in our history. And *Wards Cove* was ... clearly one of those watershed cases that clearly spells out the second deconstruction of civil rights in our history” (interview with Nemesio Domingo, March 8, 2013). The case was, in Scott’s words, the “death throes” of disparate impact as a political resource for minority and female workers’ associations.

For more distant audiences, the Court’s omissions have likely become more misleading over time. The period when “the law was good” has now receded further into the past, and the early Title VII cases that excited the cannery activists have become obscured by decades of subsequent cases that have taken law in different directions. Moreover, the political conditions that produced a bipartisan civil rights law rebuking the Court are nearly unimaginable in the post-civil rights context of “racial innocence” today (Murakawa and Beckett 2010). As what the activists considered good civil rights law and the politics that supported it faded away, the omissions and erasures in the Court’s jurispathic opinion have become more likely to obscure the significance of the legal avenues that the Court closed down in *Wards Cove*, particularly among scholars who try to understand legal developments by reading only Supreme Court opinions (Sarat and Kearns 1991).

THE QUOTAS COUNTERNARRATIVE IN THE REAGAN ERA

The activists involved in the case have long tied the judicial shifts in doctrine that culminated in *Wards Cove* to broader political struggles. Diane Narasaki, former executive director of LELO noted: “When we first brought the case, we saw law as an ally. ... But that changed the appointment of a new set of conservative federal judges” (quoted in Zia 2000, 150). That same feeling was expressed by Tyree Scott (1989) in his press conference immediately after the ruling. Scott declared that the ruling “means that ‘big business,’ through the Reagan/Bush administrations’ Supreme Court appointments, has reshaped the courts in support of management.” Narasaki and Scott are correct to point out that the US Supreme Court was hardly alone in its jurispathic retreat from the more expansive vision of civil rights law in earlier years. The justices and federal judges were players in a larger political campaign aiming to thwart civil rights and related struggles for substantive social justice politics in the workplace. In this regard, the more capacious attention to political context typically offered by legal mobilization analysts provides a necessary supplement to Cover’s more judge-centered analysis of jurispathy.

We do not try to document the full scope of the surrounding political dynamics here; nor do we claim to prove causally that the justices in the majority were driven by broader political pressures. We instead focus on one part of that context to help explain that key symbolic weapon the Supreme Court majority deployed:

the powerful counternarrative of quotas. The invocation of quotas to contain workers' civil rights has a long, well-documented history in the twentieth-century United States. Political historian Anthony Chen has traced the invocation of the "Hitlerian rule of quotas" that "spell[s] doom for the free market and meritocracy" (2006, 1238) back to Robert Moses and other opponents of New York's pioneering Fair Employment Laws in the 1940s, and from there to a broader northern coalition of business leaders, conservative Republicans, and rural whites. In later decades, charges about the dangerous specter of quotas remained a staple of conservative challenges to fair employment laws that came from both southern Democrats and northern Republicans (Chen 2006).

The quotas counternarrative was a crucial weapon in the civil rights backlash that developed in the late 1970s and 1980s, as multiple facets of long-developing opposition to civil rights advances coalesced into a formidable campaign. Most importantly, southern conservative whites began to switch to the Republican Party, creating the new Reagan coalition that linked a revitalized Christian evangelical movement with reenergized and newly ambitious big business interests connected through the US Chamber of Commerce and the Business Roundtable. The result was a powerful, albeit at times fractured, marriage of free-market demands for less government regulation of business, socially conservative demands for more government intervention in private life, and backlash against the social changes that resulted from the civil rights revolution (Edsall and Edsall 1992).

While it was by that time unpopular to outright oppose civil rights or racial equality, opposition to quotas maintained broad appeal. Thus, complaints about quotas, real or imagined, became a powerful rallying cry connecting economic and social constituencies that wanted to contain advocacy for racial and gender justice. One sociological study of media reporting found that the specter of quotas had failed to neutralize claims of civil rights in the 1960s but "was much more effective in the late 1980s and 1990s, when quota rhetoric helped undercut affirmative action policies" (Stryker 2001, 13; see also Stryker, Scarpellino, and Holtzman 1999).¹³

The Reagan administration was both product and producer of the conservative countermobilization against civil rights. Administration leaders eagerly seized on the rhetoric of quotas to justify new efforts to roll back race and gender reforms in the workplace. Indeed, Reagan had made opposition to EEOC initiatives in the Carter era a centerpiece of his campaign, arguing that "equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory" (quoted in Devins 1993, 20). Not all of the Reagan administration's initiatives were successful. William Bradford Reynolds's attempts to restore racially exclusionary private colleges and to urge a veto of the Voting Rights Act of 1965 were too transparently exclusionary and thus backfired. However, the more indirect, low-visibility

13. If quotas became a leading narrative of backlash against civil rights, then it is tempting to identify alleged neoliberalism and color-blind racial innocence as the ascendant *nomoi* informing official law (Omi and Winant 1994; Bonilla-Silva 1997; Murakawa and Beckett 2010).

bureaucratic maneuvering of Clarence Thomas at the EEOC seemed to be more effective. Instead of directly attacking civil rights, disparate impact, or the institutionalized racism narrative, he acted more quietly to refocus the agency's energies away from class action and disparate impact cases (which allegedly led to quotas) and into individual intentional discrimination lawsuits (Belz 1991 184–91; Devins 1993).

More directly significant for the *judicial* evisceration of disparate impact, Reagan used new appointments to bring about a conservative shift in the federal courts. Indeed, Reagan appointed three new conservative justices (O'Connor, Scalia, and Kennedy) who anchored the five-judge majority that executed the *Wards Cove* ruling against the cannery workers. The broader animus against civil rights law that resonated throughout the domestic policy-making centers of the Reagan administration undoubtedly influenced judicial nominations and, over time, decisions. Again, quotas were not an important issue in the lower court proceedings in *Wards Cove*, and the word “quota” was never used during oral arguments before the Supreme Court. Yet many of the amicus briefs filed in support of the employers made claims about the threat of quotas, including briefs from the Reagan administration, the Equal Employment Advisory Council, and the US Chamber of Commerce. As the *Wards Cove* plaintiffs saw it, “the quota issue was always a red herring, a rationalization for giving business what it wanted” (interview with Nemesio Domingo, March 8, 2013).

THE 1991 CIVIL RIGHTS ACT: A LIMITED LEGISLATIVE OVERRIDE

The Supreme Court's 1989 rulings inspired considerable alarm and political mobilization among both the local ACWA activists and national political and civil rights leaders. “As soon as the Supreme Court decision was handed down, Nemesio, Tyree, and I began strategizing about the legislation to reverse the decision and to restore workers' rights,” recalled Diane Narasaki, who helped to shepherd the original cannery worker class action lawsuits (Zia 2000, 152). As the Seattle activists mobilized their allies to challenge the *Wards Cove* ruling, Democrats in Congress mounted their own effort. Senator Edward Kennedy and Representative Gus Hawkins introduced a bill for a Civil Rights Act of 1990, which sought to override several recent Supreme Court statutory decisions, including *Wards Cove*. That bill passed both houses of Congress in 1990 but President Bush's veto prevented it from becoming law. The following year, after extensive negotiations over additional veto threats, the compromise Civil Rights Act of 1991 was successfully enacted. Today, that law is often characterized as a successful legislative override of the Court (Eskridge 1991; Barnes 2004; Farhang 2010), including the ruling in *Wards Cove*. The reality is more complicated. Some provisions of the 1991 CRA did restore civil rights law to where it had been before the Supreme Court's rulings of the late 1980s (Spann 2010; Selmi 2011). Other provisions took civil rights law in entirely new directions, including provisions providing, for the first time, access to jury trials and punitive damages in Title VII cases. While cases involving individual

allegations of discrimination became more rewarding, however, class actions challenging institutionalized racism under disparate impact became far more difficult (see Nielson, Nelson, and Lancaster 2010).

The provisions targeting the *Wards Cove* ruling attracted considerable attention during the political maneuvering over the 1991 bill. The public conversation regarding those provisions was dominated by the quotas narrative. For example, President Bush singled out the provisions returning the burden of proof to employers as making the proposal a “quota bill” that he would veto (Devins 1993; Runkel 1994; Farhang 2010, 188). Eventually, congressional leaders made key compromises in the legislative language in response to Bush’s threats. The final version that Congress enacted retained a provision shifting the burden of proof back to the employer in disparate impact cases, a fact that has led commentators to conclude that the 1991 Act overturned *Wards Cove* (Farhang 2010, 284, n100).

However, the gains made in the relatively clear burden of proof provisions were weakened by late changes in other associated provisions that defined “business necessity,” changes that made it easier for employers to meet the new burden of proof. The business necessity provision in the enacted law stated that the employer needed only to prove that discriminatory practices were “consistent with business necessity.” In the original 1990 bill, the corresponding provision stated that the employer had to prove that a challenged practice was “essential to effective job performance.” That language was first changed, in 1990, to “must bear a significant relationship” to business necessity, before being further amended to place the “consistent with business necessity” language in the final version (Devins 1993, 985–86). Equally important on the incentive side, the 1991 Act allows compensatory and punitive damages for disparate treatment cases, but not for disparate impact, leaving recovery under the latter only to already available equitable relief (Shoben 2003–2004).

Minority civil rights leaders and legal scholars were, and remain, divided about the effect of the 1991 Act on disparate impact, and in particular on the impact of the shifts from “essential” to “significant” to “consistent with” (e.g., Runkel 1994). While many national civil rights groups celebrated passage of the law as a major step forward from judicial retrenchment, the ACWA activists and their allies in the Seattle community were much more skeptical. Tyree Scott told us that he saw the act as a “sellout,” explaining: “[W]hat the civil rights leadership did is basically negotiate something that they saw was in their interests and saved face. But they didn’t put back the most important thing. . . . I mean, yeah, the NAACP. That whole group in Washington that does the lobbying.” He added an insight that seemed remarkably close to critical race theorist Derrick Bell’s interest convergence thesis (Bell 1980). “When business needs them [the civil rights lobby], they give them a voice, and when they don’t need them, they shut them up” (interview with Tyree Scott, March 17 1998).

The effectiveness of the 1991 Act and the damage done by late compromises in statutory text remain matters of some dispute. While it is clear that there was a sharp decline in class action disparate impact cases in the years that followed the Supreme Court’s rulings in 1989 and Congress’s response in 1991, blame for that decline also lies with a much broader set of legal changes of that same period that

together made it more difficult for social movement organizations to use legal actions in struggles for social justice (Nielsen, Nelson, and Lancaster 2010; Staszak 2015, 18–19, 97–115). In particular, more general changes in the rules for bringing class actions significantly weakened civil rights law as a tool for collective mobilization (Selmi 2003; Shoben 2003–2004, 598–99).¹⁴ Ultimately, *Wards Cove* was just one factor among many legal and political changes that reined in the creative rights mobilization that flourished in the 1970s and early 1980s. Nevertheless, as one of the pivotal rulings through which the Supreme Court signaled its rightward shift, *Wards Cove* still stands as a powerful symbol for a major turning point in civil rights history.

A final, nearly invisible feature of the 1991 CRA proved to be more directly devastating to efforts to challenge conditions at the Wards Cove cannery. As the bill moved toward final passage, Senator Frank Murkowski of Alaska maneuvered to add a provision exempting the lawsuit against the Wards Cove Company from any retroactive application of the new civil rights law. Murkowski and fellow Alaskan Senator Ted Stevens gained support from enough Republican colleagues to make the “Wards Cove exemption” a condition for passage. The Senate added the exemption in a separate, last-minute amendment in a 73–22 vote (Hanson 1991).

The surviving activists did not yield quietly. They continued to press their case in court for another decade, and channeled local outrage regarding the last-minute betrayal in the Senate into a broader political movement for civil rights reform. Forming “Justice for Wards Cove Cannery Workers,” they mounted a national campaign to draw attention not just to the offending provision, but also to the broader limits of Congress’s response to the ongoing conservative evisceration of civil rights law. ACWA and LELO activists have continued to use *Wards Cove* as a jurigenerative vehicle for political mobilization. Nemesio Domingo, Jr., Silme’s surviving older brother, visited activist groups around the United States and gave a talk titled the “Third Reconstruction” (Domingo 2000) that focused on how recent changes in civil rights law betrayed the promise of civil rights legislation of the 1960s. Nemesio Domingo and Garry Owens, a Seattle Black Panther leader who became involved in LELO, took the struggle of the Wards Cove workers as far as the UN Conference on Racism and Xenophobia in Durban, South Africa (Domingo 2013).

At the heart of their aspiration has dwelled the desire to build law that facilitates subaltern workers’ challenges to institutionalized racial and sexual inequality. Memories of the collective mobilization against the canneries and bitterness over the outcome in Congress continue to inspire progressive visions of justice in the Seattle activist community. Although the lawsuit finally ended in 2001, political activity around the *Wards Cove* case continues today. Seattle’s US Representative, Jim McDermott, has repeatedly pressed to repeal the exemption through a proposed “Justice for Wards Cove Workers Act,” even though passage of that Act today would be entirely symbolic (H.R. 4275 in the current 112th Congress).

14. There are also some scholars who argue that disparate impact remained an important weapon after 1991, and express some puzzlement regarding the apparently widespread perception among civil rights attorneys that such cases were too costly and difficult to win (Shoben 2003–2004–2004).

CONCLUSION

This essay has used the landmark *Wards Cove v. Atonio* case to explore and demonstrate the value of merging Robert Cover's provocative theorization of legal contestation with social scientific analysis of legal mobilization politics. We have shown how the activist plaintiffs in the *Wards Cove* case modeled their defiant jurisgenetic campaign around a rights-based *nomos* of the type that Cover and legal mobilization theorists alike emphasize. The two analytical frameworks are highly complementary in this regard. Moreover, the Supreme Court's eventual rejection of the cannery workers' claims and evisceration of disparate impact principles represented a classic instance of what Cover calls "jurispathy"—the routine judicial killing off of legal narratives expressing a compelling egalitarian *nomos* in favor of visions more acceptable to institutionally privileged actors. Cover's insights thus contribute to legal mobilization analysis a sober skepticism about reliance on courts as allies for creative, defiant legal rights claiming.

Cover's skepticism about the generally conservative commitment of courts to status quo state agendas should not, however, undercut the complex, contingent, and typically mixed assessments of legal mobilization scholars about whether, when, and how litigation does or does not advance egalitarian social change. The *Wards Cove* case well illustrates the complexity. For one thing, this was not an instance where a litigation campaign aimed to create new law by making novel legal claims and prompting an appellate court to take doctrine in a new direction. However ambitious the workers' social agenda, the case was filed at a time when the plaintiffs had solid support for their rights narrative in existing case law. Cover's broadly skeptical characterization of jurispathy does not deny, and should not be read to deny, the value of pursuing momentary historical openings and opportunities when progressive reformers can find some support in the courts.

Indeed, the reformers experienced early substantial advances for their progressive rights agenda both in and, especially, beyond the courtroom. The two initial lawsuits led to trial court victories and to settlements over damages and workplace reforms. The settlements not only directly produced institutional change in work conditions, but they also indirectly catalyzed the ACWA efforts to challenge and replace unresponsive and corrupt union leaders, lead a movement for democratic union reform, build a growing multiracial, multi-issue progressive movement in the Puget Sound region, and amplify their international challenges to the despotic rule of Ferdinand Marcos in the Philippines. It is important to underline that, in legal mobilization terms, the workers initially deployed litigation in a favorable political and legal opportunity structure that supported substantial success in organizing for change. While the lawsuits risked creating opportunities for retrenchment by the Supreme Court, a no-risk strategy of inaction would have precluded development of the ACWA, leaving aggrieved workers to "lump it." Of course, recognizing and assessing these advances requires looking to political engagements far beyond what happens in formal legal proceedings, a commitment that legal mobilization scholars have pursued far more than has Robert Cover.

It is relevant to acknowledge legal mobilization scholar Catherine Albiston's (2010) important point that settling lawsuits for the purpose of advancing immediate goals foregoes the option of shaping new substantive law and creating legal precedents that might produce broader changes. The ACWA activists did settle the early cases, but only after winning at trial. From the start, they were convinced that they had sufficient law on their side to advance their ambitious movement on various extralegal fronts; they had neither the resources for test case litigation nor reason to think that courts would expand further the disparate impact logic.

They later did fight the *Wards Cove* case through the appeals process to the Supreme Court, not for the prototypical purpose of making new, more progressive law, but to protect "good" law from antiegalitarian reformulation. The lawsuit became a vehicle for retrenchment only because the suit's long and tortuous trek through the lower courts prolonged resolution of the case across more than a decade and three presidential election cycles. Moreover, there is good reason to think that the Court would have found another case as its vehicle for announcing new standards if the *Wards Cove* dispute had not been available. Indeed, judicial retrenchment was manifest in a series of parallel cases decided that same term by the Court. The jurispathic ruling in *Wards Cove* thus may be viewed as a large loss for many US workers in and beyond the canneries, but from our hybrid theory perspective, the loss cannot be reasonably attributed to "faulty" or naïve strategies of the cannery activists.

While the cannery plaintiffs perhaps did not anticipate the specific legal and political changes of the 1980s, the successful countermobilization by business groups did fit their general view of how law worked. The cannery activists viewed official law as volatile and subject to changing alignments of political power in the state and in society. As noted earlier, they saw law as a product of ongoing struggle between the haves and have-nots. "At any given time a law, in our view, reflects the relative strengths and weaknesses of its opponents and proponents" (see p. 13). Again, legal mobilization analysts tend to assume a broadly similar but rather more complex posture about the politics of law in specific eras. Such scholarly analysts reject both Cover's view that courts tend to defer to a unified state machine and the instrumental Marxist view that law reflects at any moment the will of unified capitalist groups. Even if the haves generally come out ahead, state structure and political alliances in and beyond the state tend to be far more fragmented and volatile than either portrait suggests.

The macro-political context of the era was too complex to analyze adequately in this essay, but a full legal mobilization analysis would attend to the many shifts in coalitions among elected leaders as well as Court personnel along with the massive mobilization of business interests that produced the changed legal establishment. Again, we underline the value of sustaining the key commitments of the legal mobilization approach while adding Coverian attentiveness to jurisgenesis and jurispathy.

Finally, we underline again that Cover's concept of jurispathy should not be understood to involve killing alternative *nomoi* so much as denying their integration into official law. In this sense, jurispathy and jurisgenesis of alternative socially

grounded *nomoi* are best understood as dynamic, dialectically interrelated dimensions of ongoing legal practice and occasional contestation. Our study illustrates that alternative narratives challenging institutional racism at work have continued to thrive among social movement activists despite judicial rejection, legislative abandonment, and the dominant cultural ideology of “racial innocence” (Murakawa and Beckett 2010). That finding echoes historically oriented social movement scholars who have posited that radical visions animating struggles for justice, rights, and democracy rarely die (see Melucci 1989; Tarrow 1995). Rather, alternative visions tend to emerge out of concrete struggles, and then go underground like moles when the context becomes too hot or one generation burns out, only to resurface in altered forms in succeeding eras. Jurispathic courts may continue to play whack-a-mole across generations, but their rulings rarely erase defiant visions or kill progressive aspirations altogether. The promises of egalitarian civil rights at work may be thwarted and lost in one era, as Risa Goluboff (2007) has shown of labor and economic civil rights in the 1940s, but those same ideas of workplace justice were reborn in vital forms of struggle numerous times over successive decades. However devastating a loss like *Wards Cove*, struggles for justice regenerate their own force and motivation, keeping alive aspirations for generations to come (Lobel 2003; NeJaime 2011).

We end by underlining the shared commitment of both legal mobilization analysts and Robert Cover to recovering, documenting, and rendering sensible the legal visions than animate social movements and alternative communities. Such recovery provides an empirical foundation for understanding how inherited structures of hierarchical power offer possibilities as well as pose manifold obstacles to advancing social change. Such analytical narratives are useful for understanding law as one dimension of power amidst other dimensions of power. However, such scholarly exercises of decentered historical recovery also expand our thinking about the fundamental injustices around us and the possibilities of justice that might be considered. As Cover exhorted: “We ought to stop circumscribing the *nomos*; we ought to invite new worlds” (1983, 68). The legacy of Alaskan cannery workers represents one such worthy commitment to a collective *nomos* and narrative of democratic aspiration that deserves scholarly attention.

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