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Symposium on Legal Endogeneity

Political Economy and *Working Law*

Robin Stryker

EDELMAN, LAUREN B. *Working Law: Courts, Corporations, and Symbolic Civil Rights*. Chicago: University of Chicago Press, 2016.

Lauren B. Edelman's Working Law: Courts, Corporations, and Symbolic Civil Rights *(2016) offers an empirically supported theory of legal endogeneity, explaining how managerialized ideas of compliance with employment discrimination legislation diffuse in organizational fields and shape judicial doctrine. Managerialization and legal endogeneity explain how and why equality-promoting civil rights legislation may do little to reduce workplace inequalities. This essay places Edelman's theory within a broader terrain of opportunities and limits of law for promoting egalitarian change. Managerialization is not always detrimental to enhancing workplace race and gender equality. However, typically reinforcing logics of market capitalism and liberal legality often make it so, while blocking reforms countering judicial deference to managerialized compliance.*

In the late 1970s and early 1980s, organizational sociologists began developing a new, highly influential paradigm shifting focus from individual organizations to institutional processes in organizational fields (Meyer and Rowan 1977; DiMaggio and Powell 1983). Focusing on how legitimacy concerns drove coercive, mimetic, and normative isomorphism, this "new institutionalist" perspective argued that these mechanisms diffused a collective rationality of rules and routines in organizational fields. The perspective has been applied successfully to help explain both reproduction and change in organizational fields (Stryker 2000a). Based on this perspective, combined with Philip Selznick's (1969) seminal ideas about construction of legality within organizations, there now have been thirty years of institutionalist research on law and organizations.

Law and organizations scholarship showed that US firms responded to various aspects of their post–World War II and more contemporary legal environment, including but not restricted to 1960s civil rights legislation, by adopting internalized grievance systems, internal labor markets, human resource management divisions, formal affirmative action offices and policies, and maternity leave policies, and purchasing employment practice liability insurance (Edelman 1990, 1992; Dobbin et al. 1993; Dobbin and Sutton

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1998; Dobbin 2009; Talesh 2015). With respect to workplace governance, Title VII of the 1964 Civil Rights Act, prohibiting employment discrimination based on race, sex, color, national origin, and religion, was a major driver of diffusion of the new structures transforming workplace governance. As Frank Dobbin (2009, 1) noted: "Not a single sentence remains from the corporate personnel manual of 1960. Firms have changed how they recruit, hire, discipline, evaluate, compensate and fire workers."

Whether or not this transformation substantially diminished workplace race and gender inequalities is another question entirely. *Working Law* is not designed to answer this question. However, the book lays out and empirically supports a theory of legal endogeneity that provides a powerful explanation for how and why equality-promoting legislation such as Title VII may do little to reduce such inequalities.

Highlighting human resource (HR) professionals as key actors in the organizational mediation of law, in which firms managerialized the impact of law on society by constructing the meaning of compliance with Title VII, *Working Law* complements and further nuances some of the terrain covered by Frank Dobbin's (2009) *Inventing Equal Opportunity*.[1] As well, where both Edelman (2016) and Dobbin (2009) show that HR professionals shaped the way firms responded to Title VII, constructing a "business case" for compliance that assimilated antidiscrimination mandates into good business practice consistent with productivity, efficiency, and profit, *Working Law* charts new territory to show how managerialized ideas of law that diffuse in organizational fields shape formal legal rules. When official legal bodies, including courts, legislatures, and administrative agencies, defer to organizations' symbolic compliance structures, thus condoning managerial conceptions of law and compliance, law becomes endogenous to managerialization and to the symbolic structures correspondingly created (Edelman 2016, 39).

Edelman lays out multiple, interconnected phases of legal endogeneity; each phase receives empirical treatment in its own chapter. Edelman conducted both qualitative-interpretive and quantitative analyses, using multiple types of evidence including interviews with HR personnel and affirmative action officers within organizations, content analyses of HR journals, webinars and websites, judicial decisions and Equal Employment Opportunity Commission (EEOC) Guidelines, and statistical data from the EEOC and Bureau of Labor Statistics. After drawing policy implications, she uses research by others on organizational misconduct and prison governance to argue that legal endogeneity theory likely applies in realms beyond civil rights law.

Within the endogeneity process, Edelman documents four interconnected forms of managerialization: internal dispute resolution, managing away or contracting out legal risk, decoupling organizational activities from legal rules, and discursively reframing legal ideals. The last is most subtle, and also most important, because it drives

1. Each book contains unique emphases and analyses. Dobbin's book explains how and why HR professionals rather than lawyers led organizational mediation of law, without however using the term "managerialization" or explicitly contrasting ideas of legalization of the workplace and managerialization of the law. Dobbin's book also goes beyond Title VII law, for example exploring how law shaped firms' "family-friendly" policies. Meanwhile, Edelman's book makes the analytic distinction between "legalization" and "managerialization," showing that workplace transformation in the wake of Title VII involved both infusing legality and legal forms into business practices (legalization) while also, and perhaps more importantly, transforming law so that it increasingly equates with good business practice (managerialization). In the end, Dobbin's (2009) view is somewhat more optimistic than is Edelman's (2016) with respect to Title VII's capacity to enhance workplace equality (Stryker, Reynolds-Stenson, and Frederico 2017).

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organizational decoupling and internal dispute resolution, including the creation of specific symbolic structures such as grievance procedures. Edelman argues that managerial reframing of antidiscrimination law consistent with good business practice emphasizing efficiency, productivity, and profit is almost always anti-egalitarian, precisely because such reframing leads firms to adopt compliance symbols such as internal grievance procedures, to which courts defer without inquiring if these reduce race and gender workplace disparities.

Edelman supports her argument about judicial deference to firms' construction of compliance by coding and analyzing a representative sample of federal employment discrimination cases, from 1965 to 2000, and a follow-up case sample from 2004, 2009, and 2014. Finding that judges increasingly defer to structures that will rarely mitigate inequality, she argues that rights have become merely symbolic. Political mobilization and backlash against promotion of minority rights have become increasingly overt, but Edelman reminds us that, even without overt backlash, subtle, more covert cultural-institutional mechanisms also tend to undermine aggressive civil rights enforcement.

LEGAL ENDOGENEITY AND THE LIMITS ON BUSINESS REGULATION

Working Law is not framed as a contribution to political economy. However, it can be read as such, and doing so surfaces important issues for further theory and research. Within neo-Marxist and Weberian perspectives, enactment of public welfare-oriented regulatory legislation designed to curtail managerial power in ways that benefit subordinate classes and groups is readily explicable but atypical (Lempert and Sanders 1986; Stryker 2007). Historically such factors as horrific environmental or health and safety disasters, extended economic and/or state legitimacy crises, and noninstitutionalized social movements from below created opportunities for such legislation in the United States. But business actors likewise can be expected to fight back, exercising both overt and more subtle, covert power in regulatory enforcement to overturn or adapt regulation to their interests (Stryker 2000b, 2007).

Business lobbying and negotiation (Edelman 2016, 13) and self-interested positions taken in mobilization and countermobilization over legal doctrine in enforcement-related litigation and campaigns to amend regulatory legislation are overt political-institutional mechanisms through which business often shapes regulatory governance to its advantage (Edelman and Stryker 2005). Classic regulatory capture mixes overt and covert mechanisms. Managerialization of civil rights law is not occasioned by animus against minority or female employees, nor typically by a conscious desire to weaken civil rights legislation. Indeed, HR personnel who promote managerialization often see themselves as allies of women and minorities working to convince top management that it is in the company's interests to comply with civil rights laws (Dobbin 2009; Stryker, Reynolds-Stenson, and Frederico 2017). Yet judicial deference to managerialized construction of compliance, though just one mechanism among others for limiting the reach of regulation benefiting the disadvantaged, may be an especially powerful pathway for undermining aggressive civil rights enforcement. This is so because managerialization within organizations takes

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place mostly without overt conflict and against a taken-for-granted backdrop of managerial prerogative and market logic.

DOES MANAGERIALIZATION ALWAYS REDUCE EFFECTIVENESS OF CIVIL RIGHTS LAWS?

Edelman (2016) carefully notes that managerial construction of compliance need not always undermine equality goals. Dobbin (2009) argues that compliance motives vary depending on what level of legal threat employers perceive. When enforcement pressures wane, reframing law consistent with core business goals may maintain practices initially adopted for compliance that *do* enhance equality. Berrey (2015) suggests that justifying diversity policies with the "business case" is part of the more general shaping of racial discourse and practice by market logic. On the one hand, this *did* promote selective inclusion of racial and ethnic minorities and women in management. On the other hand, it left prevailing definitions of merit and a hierarchical, competitive-individualist employment system intact.

My colleagues and I found that the business case framing of family responsibilities discrimination in HR journals is *more* associated with discussion of organizational policies and practices likely to enhance gender equality than is compliance framing (Stryker, Reynolds-Stenson, and Frederico 2017). Kalev, Dobbin, and Kelly (2006) show that, while some prevalent organizational structures and programs adopted in the wake of Title VII do not increase the representation of women and minorities in top management, others do.[2] In short, while we should not assume that managerialization always will thwart the goal of increasing equality through civil rights laws, we need a great deal more social science research examining the impact of various organizational structures, policies, and practices. This research should use multiple outcome measures including hiring, firing, promotion, pay, and desegregation, and it should examine what happens among nonmanagerial employees.

CAN MANAGERIALIZATION AND LEGAL ENDOGENEITY BE CURTAILED?

Assuming that judicial deference to a managerialized Title VII typically undermines equality goals, what might curtail such endogeneity? Edelman (2016, 221) suggests that judges scrutinize organizational structures more carefully and that plaintiffs' lawyers emphasize the inadequacies of symbolic structures and remind judges that, on summary judgment and judgment as a matter of law "inferring fair treatment from symbolic structures without adequate scrutiny violates the rule that judges should not draw inferences against the non-moving party." She suggests that employers make supervisors accountable for reducing race and gender inequalities in hiring, promotion, and pay. Elsewhere in this symposium Albiston suggests that employee collective action could

2. Affirmative action plans, diversity task forces and committees, and diversity departments and managers are most effective; diversity training and evaluations are ineffective or counterproductive; and networking and mentoring have small egalitarian effects.

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counter managerialization. She also advocates for limiting the reach of the *Iqbal/Twombly* plausibility standard in pleadings and moving to outcome-based theories of discrimination. Outcome-based theories include disparate impact but also newer theories relying on research on stereotyping and implicit bias and on structural reforms that counter these biases to hold employers liable for adopting practices that facilitate bias and failing to take steps to limit bias.

These are good suggestions. With respect to legal doctrine, Pedriana and I (2017) argue that outcome-based methods of proving liability for discrimination can be viewed usefully as part of a broader approach to civil rights law that we term the group-centered effects framework (GCE).

Drawing on Weber's (1978) distinction between formal and substantive law, GCE represents a general substantive orientation to civil rights laws. It is not a legal doctrine, but rather a sociological, analytical standard against which civil rights legislation and enforcement efforts can be evaluated to assess their degree of conformity with, or deviation from, GCE. Focusing on group disadvantage rather than individual harms, and discriminatory consequences rather than discriminatory intent, GCE also involves collective legal mobilization through such vehicles as class actions, and it promotes substantive group-based results—reductions in workplace inequalities based on race, gender, etc.—rather than formal procedural justice for individual victims. Discrimination is seen to stem from institutionalized structures and systematic behavior patterns, regardless of individuals' intent.

Within Title VII, class actions, disparate impact theories of liability, and affirmative action remedies conform to GCE; individual claims, intent-based, disparate treatment theories of liability, and remedies providing procedural justice to individuals do not. Pedriana and I (2017) argue that the evidence strongly indicates that the variable effectiveness of Title VII, voting rights, and fair housing legislation, as well as the variable effectiveness of each over time, is substantially and positively associated with the extent of their conformity with GCE. Disparate impact, formulated to litigate employment testing in the wake of Title VII's passage, was consistent in that context with merit-oriented, competitive-individualist market ideology. This consistency in turn facilitated its construction and its ultimate adoption by the Supreme Court (Stryker, Docka-Filipek, and Wald 2012).

Most of the time, however, substantive, outcome-based legal doctrine is *not* consistent with the very strong market culture characterizing the United States. Instead, US liberal legality and market logic typically have a mutually reinforcing ideological power. This fact alone makes it an uphill battle to achieve many reforms that, if adopted, would curtail legal endogeneity.

Taking place in overlapping legal and business-organizational fields, legal endogeneity involves interplay between two "logics." According to Edelman (2016, 23):

> Legal logic is centered on rules and rights and involves a commitment to the rule of law—or the idea that law legitimately . . . constrains arbitrary behavior by rulers, including organizational rulers. Legal logic gives great weight to . . . due process, equal access to law, and equal protection of law; and generally holds that those principles should be given deference above the political or economic interests of any citizen or organizational entity.

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> Managerial logic . . . is centered on market rationality, organizational efficiency, and managerial control [and] holds that organizational rulers (not only business owners but also the managers to whom they have designated control), have legitimate authority to set workplace rules, to control workers, and to resolve disputes within the organization.

To this description, we can add the following. Managerial logic is embedded within a broader market culture with several key tenets. Economic behavior should be consistent with market principles, including competitive-individualist labor markets in which positions are filled according to universalistic and merit- and achievement-oriented criteria, rather than particularistic and ascription-based criteria such as race or gender. Markets, rather than concrete organizations, set prices, and markets cannot be personified and held legally liable. Managerial prerogative in the economy should be respected such that political and legal decision makers defer to it (Stryker 1996).

Meanwhile, we can identify *multiple* types of legal logic that—through actors that promote each—compete for authority and influence. Consistent with much sociolegal scholarship, we might term these liberal legality and substantive justice.

Substantive justice is oriented to achieving economic, political, and/or social goals outside law (Weber 1978)—the gender and racial equality goals pursued under Title VII are a prominent example.[3] Achieving substantive justice *through regulatory law* requires adopting legislation and interpretive doctrine that conforms maximally to GCE (Pedriana and Stryker 2017).

In contrast, liberal legality emphasizes formal law. It is oriented to rule following, general procedures applied to all lawsuits, formal equality before the law, and legal autonomy—reasoning within an internal self-referential system strictly separated from considering social context, impact, and extralegal goals. It emphasizes procedural justice, the individual's responsibility and accountability, and the importance of determining intent for assessing legal liability (Pedriana and Stryker 2017).

As is now evident, capitalist market-based ideals and liberal legality are largely mutually reinforcing in their orientation to individuals rather than to groups, and to procedure and opportunity-based notions of justice rather than to outcome-based substantive justice. Researchers find that especially, but not only, when it comes to race, Americans tend to blame individuals rather than social structures for disadvantage (Ryan 1976; Bobo and Kleugel 1993; Berrey 2015, 40). Americans likewise favor providing opportunity to individuals rather than group-based redistributive results (Kleugel and Smith 1986; Bobo and Kleugel 1993). For lawyers, including judges, socialization into liberal legality in law school and beyond (Schleef 2006; Bliss 2017) exacerbates these cognitive and normative tendencies.[4]

Deference to managerialization of Title VII likewise reflects capitalism's market ideals, especially that of managerial and business prerogative. Ideologies of managerial prerogative have been mobilized repeatedly as resources for overt political and legal

3. There is debate about whether Title VII emerged from concern with opening employment opportunities or from concern with achieving more egalitarian employment results. There is evidence supporting both sides (Pedriana and Stryker (1997).

4. Law students also have available to them and may adopt notions of substantive justice, but liberal legality typically dominates law school socialization (Scheingold and Sarat 2014; Bliss 2017).

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opposition to aggressive regulatory enforcement of many types, from labor to environmental protection to occupational safety and health law (Stryker 1996). Judges in the United States rely on this ideology to articulate what they see as a reasonable role for courts. Edelman highlights this for Title VII, but the phenomenon is more general in regulatory enforcement (Stryker 2000b, 2007).[5]

Scholars also suggest other ways in which market ideals shape regulatory aggressiveness and outcomes. Yeager (1990) argued that regulatory laws passed against powerful economic actors have limited impact or unintended effects that exacerbate problems inspiring the regulation in the first place. Such limits stem not just from the economic and political power balance among those who bear regulatory costs versus receive benefits, but also of "prevailing cultural belief systems." Business regulation "has to be justified continually within highly market-oriented cultures like the US," so regulation that constrains business activity "becomes morally ambivalent," contributing to less aggressive enforcement (Stryker 2000b, 1103). In the arena Yeager (1990) studied, moral ambivalence meant less aggressive regulation of water pollution and less pollution reduction.

I have suggested that development of a regulatory culture presuming the moral ambivalence of government regulation of business is facilitated when it is easy for regulation's opponents, whether in the formal-legal or broader political and cultural arenas, to frame regulation as undermining or partially replacing market institutions and ideals (Stryker 1996). This was true of federal clean air and water laws, which, at their outset, required firms to produce protection levels beyond those resulting as byproducts of their calculations of what and how to produce profitably for market exchange.[6] It also was true for pre–World War II federal law promoting unionization and collective bargaining, because this legislation substituted group-based political bargaining for competitive-individualist labor markets (Stryker 1989).

In contrast, the regulatory culture around early Title VII enforcement saw Title VII as morally *un*ambivalent, at least in part precisely because it could be framed so easily as promoting competitive-individualist market institutions and ideals (Stryker, Docka-Filipek, and Wald 2012). Although Title VII's promoters assumed it would increase racial equality, the question of *how* it would do so—once posed explicitly—surfaced the clash between competing ideals of liberal legality and substantive justice (Pedriana and Stryker 1997). Those who argued for liberal legality had greater legal and cultural resources to draw on to construct congressional intent (Skrentny 1996; Pedriana and Stryker 1997, 2004).

Indeed, much of Title VII and also the 1963 Equal Pay Act squared easily with putatively traditional American values of merit-based equal opportunity and could readily be viewed—and strategically framed—as enacting universalistic, competitive labor market-promoting values into law (Stryker 1996; Stryker, Docka-Filipek, and Wald 2012). That gender- and race-based discrimination against qualified job

5. In Title VII litigation, federal courts commonly opine: "This court has repeatedly stated that it is not a super-personnel department that second guesses employer policies that are facially legitimate" (quoted in Edelman 2016, 191).

6. Consistency with market ideals helped promote the rise of economic and policy science in environmental law. This includes cost-benefit analyses, market incentive schemes, and the idea of perfecting markets by removing negative externalities.

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applicants and job incumbents lacked market rationality, helped to account for employers' early fairly limited resistance to federal equal employment opportunity legislation *when viewed comparatively* with such other regulatory legislation as federal promotion of unionization and collective bargaining (Stryker 1996). Meanwhile, when aggressive Title VII enforcement could be framed more easily as contradicting market logic, this provided a potent cultural resource for political and legal resistance.

For example, in *County of Washington v. Gunther* (1981), the Supreme Court held 5–4 that Title VII wage provisions could extend beyond those of the Equal Pay Act such that an employer could be liable for gender discrimination between those working in different jobs, one held disproportionately by men, the other held disproportionately by women. But post-Gunther, the Ninth Circuit put an end to plaintiffs' efforts to use job evaluation studies to justify claims of Title VII liability based on pay differences between disproportionately female versus male jobs shown to require equal skill, responsibility, effort, and working conditions. The court stated: "Neither law nor logic deems the free market a suspect enterprise . . . Title VII does not obligate [the state of Washington] to eliminate an income inequality it did not create" (quoted in Nelson and Bridges 1999, 1).

Similarly, courts initially validated strategies of remedial affirmative action for women and minorities under Executive Order 11246 and Title VII. However, as de jure systems of racial inequality receded into the past, putative inconsistency with merit-based competitive individualism and liberal legality became increasingly effective in promoting affirmative action's retrenchment in law and politics (Gamson and Modigliani 1987; Pedriana and Stryker 1997, 2004; Berrey 2015). Moreover, the rise of managerialization generally and the business case for diversity specifically were consistent with—and promoted by—the ascendance of neoliberalism, "herald[ing] unfettered capitalist markets and the retooling of government regulation to facilitate those markets" (Berrey 2015, 37).

In sum, judges should not defer to, but instead should scrutinize, managerialized constructions of compliance. Courts should rely on high quality social science research distinguishing effective from ineffective compliance practices, and they—and legislative policy makers—should adopt GCE-oriented doctrinal approaches, including, but not restricted to, doctrine that recognizes and assesses liability for the systemic consequences of failing to monitor and correct for implicit biases. However, we should remain aware that these reforms face feasibility problems because of the strength of ordinarily mutually reinforcing liberal legal and market logics. We should be alert for opportunities to frame outcome-based doctrine as consistent with market logic. Above all, we should try to capitalize on atypical crisis situations that open opportunities for business regulation countering both liberal legality and market logic.

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