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Making Rights Work: Legal Mobilization at the Agency Level

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This article discusses how McCann's theory on legal mobilization and social change is generalizable to the legal decisions of agencies. I demonstrate how the Equal Employment Opportunity Commission (EEOC) routinely delayed and denied Title VII employment rights on the basis of sex and how this resulted in the formation of the National Organization for Women (NOW) to ensure that the sex provision of Title VII was enforced. The article also discusses the influence of NOW in shaping the first years of Title VII law and the organization's role in reversing EEOC decisions denying rights under the sex provision of the law.

Title VII of the Civil Rights Act (CRA) of 1964 protects against unlawful employment practices that create unequal employment opportunities. When the law passed, these protections extended to hiring, firing, compensation, terms, conditions, and privileges of employment as well as employment opportunity and status on the basis of race, color, religion, sex, or national origin. The CRA of 1964 also created the Equal Employment Opportunity Commission (EEOC) to enforce Title VII of the law. When the EEOC opened its doors on July 2, 1965, it faced an instant backlog of nearly 1,000 claims and the number of claims and backlog continued to grow (Pedriana and Stryker 2004:711).

By the end of the 1969 fiscal year, less than half of the over 54,000 Title VII claims received by the agency finished investigation. Of the 4,793 cases it had decided, the agency determined that only about 2,493 (52%) had "reasonable cause" to suspect discrimination had occurred. From these claims, the EEOC

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conciliated 1,350 claims of discrimination. As a result, 729 of these claims were unsuccessfully resolved over the four-year period (Wolkinson 1973: 2). This left a relatively small portion of the over 54,000 claims with even the potential for a lawsuit via the agency granting claimants the right to sue in the courts. From there, individuals still had the financial, educational, and social obstacles of bringing a claim to the courts (Felstiner, Abel, and Sarat 1980–1981; Galanter 1974). As a result, most of the Title VII legal claims brought before 1969 were interpreted by the EEOC (Wolkinson 1973: 2).

By eliminating the implementation constraint (Rosenberg 2008) and mitigating some of the obstacles of bringing claims to the courts, new and novel legal claims by individuals have the potential to influence the law and society through the claims they submit to agencies. Individual claims submitted to agencies not only place issues on the agenda of an agency but also present visions of law that may be reinforced or abated by the agency. As such, individual claims and agency responses to them have the potential to spur interest group action and social change. Yet, scholars have paid little attention to how the legal decisions of government agencies hold the potential to provoke interest group mobilization and social change.

Rather than focus on the relatively small number of interpretations regarding Title VII law made in the courts during these years, this article explores the far more numerous and everyday interpretations of Title VII made by the EEOC through its responses to claims.[1] As scholars, we tend to focus on judicial interpretations as the main source of law. Yet, agency rules and regulations have "the same weight as congressional legislation, presidential executive orders, and judicial decisions" (Kerwin 1999: 3). By shifting the focus from the courts and onto agency lawmaking, I demonstrate the applicability and potential for court-based theories to inform this other type of "lawmaking by unelected officials" (Kerwin 1999). I argue that scholars should not neglect or relegate to the sidelines the equally important role of agency made law and the ways in which rights are made either real or symbolic by government agencies (Epp 2009). Likewise, we need to understand how agencies make law, like the courts, in response to the legal claims made by individuals and interest groups (Zemans 1983).

"Law is . . . mobilized when a desire or want is translated into a demand as an assertion of rights" (Zemans 1983: 700). When a rights claim reaches an agency, the agency can shape society

[1] Those interested in the first judicial interpretations regarding Title VII should see Belton (1978), Lieberman (2007), Smith (2008), Farhang (2010), and Mulroy (2011).

through their reinforcement of rights claims, providing a form of legitimacy to the right or vision of law provided by the claimant. The agency may also delay acting on the grievance claim, or even deny it. On one hand, agency delays and denials can delegitimize the vision of rights claimed and create feelings of reduced political efficacy individuals (Soss 1999). On the other hand, these actions can result in counteractions and rights mobilization as individuals challenge the delay and denial of their perceived rights (Lovell 2006; McCann 1994).

Courts can create social change through the "expansion of goals, opportunities, and capacities for extending struggles" during ongoing processes of legal mobilization (McCann 1996: 481–482). In looking at whether legal mobilization can occur at the agency level, I ask: How and why did the EEOC respond to claims made under Title VII between 1965 and 1968 and to what extent did the responses result in remedies, mobilization, or other outcomes? In the dynamic process of legal interpretations that occurred during the early years of the EEOC, I find McCann's theory of legal mobilization is generalizable to government agencies.

Legal Mobilization Framework

Nearly 16 years before the *County of Washington, Oregon v. Gunther* (1981) Supreme Court decision on pay equity McCann uses to open the discussion in *Rights at Work* (1994), women were writing into the EEOC stating they were "...never paid a salary equal to that my male coworkers earned for the same services..." (Case number 5-10-1572).[2] The Equal Pay Act of 1963 was not working. A new law, the CRA of 1964 was passed and while women were seen as accidental beneficiaries, women saw the equal employment opportunity provisions under Title VII of the law as the remedy to their demands for equal pay and other issues of workplace inequality.

Legal consciousness scholarship focuses on how law is conceived by individuals outside the state, rather than by state officials (McCann 1994: 8). This view considers individuals not as passive or reactionary actors to the law, but "savvy participants in dynamic processes in which both citizens and government officials articulate, evaluate, and dispute competing visions of law" (Lovell 2006: 285). As such, individuals are able to mobilize the law to advance creative, expansive, and novel interpretations of

[2] This and all other quotes are in the writer's own words, including spelling, grammar, and all other errors.

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new legal rights. Lovell's research (2006, 2012) demonstrates how individuals are political actors shaping society through the claims they make to government agencies. While Lovell explains the importance of legal claims in a premovement stage, the formation of the National Organization for Women (NOW) in response to EEOC interpretations of the sex provision of Title VII shows the importance of individuals and interest groups in transitioning from the premovement stage into McCann's four stages of legal mobilization at the agency level.[3]

McCann (1994: 11) divides legal mobilization into four stages:

1. The movement building process where citizens have rising expectations for change, activate constituents and form alliances, and organize their resources for action;
2. The struggle to compel formal changes in official policy in order to address the movements demands;
3. The struggle for control over actual reform policy development and implementation among interested parties; and
4. The transformative legacy of legal action that results in subsequent movement development, additional alliances, new rights claims, policy reforms, and social struggles.

The first stage of legal mobilization came in the wake of the passage of the CRA of 1964. Women joined the ranks of other groups with rising expectations for changes in employment conditions. While they singularly wrote into the EEOC, women often expressed similar sentiments about their rights under Title VII. The failure of the EEOC to endorse this "rights talk" lead a constituency of government workers and women's rights activists to form an alliance (Lovell 2012). This constituency would form NOW with an immediate purpose to pressure for the equal enforcement of Title VII.

In advocating for stronger enforcement of the sex provision of Title VII, NOW entered the second stage of legal mobilization. The organization struggled to compel formal changes in Title VII interpretations by the EEOC to make them more in line with the agency's rulings on the race-based provision of the law. This struggle was seen through agency rulings on help-wanted advertisements, claims from flights attendants, and via EEOC responses to aspirational views of Title VII protections regarding state protective legislation.

As NOW grew and the EEOC began processing its backlog of claims, the struggle for control over policy development and

[3] I show that while the letters failed to create a new movement, they did raise issues that helped to revitalize the existing women's right movement and became a catalyst for the liberal legal agenda of the next wave of feminism.

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implementation placed NOW in a position to ask for a larger role in the interpretation and advancement of Title VII law. NOW started to grow into its role as an "NAACP for women" by demanding the same place at the table the National Association for the Advancement for Colored People (NAACP) was receiving from the EEOC and other policy actors (Pedriana and Stryker 2004; Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994). Thus, NOW entered into the third stage of legal mobilization.

Finally, the victories that NOW received at the agency level left a legacy that meant Title VII was a viable path for women. This path would pave the way for agency level endorsements of women's employment rights by the EEOC and for cases such as *County of Washington, Oregon v. Gunther* (1981). Therefore, the legal claims of women that inspired the formation of NOW and set its original agenda also helped the group grow into an organization that left the type of transformative legacy that resulted in the subsequent movement development, additional alliances, new rights claims, policy reforms, and social struggles that McCann (1994) discusses in his fourth stage of legal mobilization.

Methodology

I used an interpretive approach to understand how NOW formed and advanced through the four stages of legal mobilization.[4] In taking an interpretive approach, I was able to gain deeper understanding of the complex and dynamic phenomenon that occurred when the first interpretations of Title VII were being made by individuals, the EEOC, interest groups, and other policy stakeholders. While some coding was done to search for trends, incomplete archival records and limited data collection by the EEOC during this time period renders an interpretive method the most viable.

The interpretive approach is also beneficial for the study of legal mobilization, because it views policy targets not as passive consumers of policy, but "as active constructors of meaning as they 'read' legislative language and agency objects and acts" (Yanow 2000: 14). In other words, the interpretive method allows me to show not only how individuals are savvy articulators of law, but also how those legal visions of law can be mobilized by others to create a transformative legacy (Lovell 2006: 285). In keeping with the use of discourse tracing by interpretivists, I measure the influence of individuals, interest groups, and agency actors by

[4] For more information on interpretive methods as related to McCann's legal mobilization model see McCann (1996).

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exploring how the discourses used by individuals and NOW were incorporated into the rules and other written texts of the EEOC or when the policy positions of these actors became adopted as policy by the EEOC and its employees.

Case and Data Selection

The EEOC is the object of my study for a variety of reasons. First, the EEOC was established specifically for the purpose of enforcing Title VII. As a new agency narrowly focused on the enforcement of a new law, the amount of institutional norms and governing rules were minimized allowing insight into how such rules and norms were developed. As a result, I am able to explore how interest groups, individual claims, and the diverse institutional norms of the agency's employees shaped the institutional development of the agency from the beginning.

The EEOC is also well known for its interpretation of laws, policy development, and enforcement guidance (United States Commission on Civil Rights and Berry 2000: 9). This reputation emerged from the agency as it promoted itself as interpreting the law "in the spirit" it was intended, rather than just the letter of the law, to create broad interpretations of Title VII with regards to the race provision. The limited direct interaction with the courts during the agency's first few years, due to its lack of litigation power, also helped bolster this claim. Therefore, I can show how official government interpretations of Title VII were created by the EEOC outside of the courts.

My primary data is letters of correspondence between individuals, the EEOC, and NOW between July 2, 1965 and 1968. These letters are located in Record Group 403 at the National Archives in College Park, MD and the records of NOW and Sonia Pressman Fuentes at Schlesinger Library in Cambridge, MA. This data was compared to the rules, regulations, and other written reports of the EEOC. A number of secondary sources were also used, including autobiographies and other books written by key actors and interviews of agency employees during the time of my study. From these additional sources, I can confirm and cast suspicion on certain findings and look for strategic misrepresentation (Broockman 2012) through triangulation.

By the end of 1968, the EEOC received 36,839 charges of discrimination (Commission 2012a). To make the project more feasible, I chose a sample from the agency's general correspondence folders, because those are the files used in the only comparable study of agency correspondence (Lovell 2012). In Lovell's study of the CRS, he found that a significant number of claims to the CRS were dismissed on the basis that they lacked jurisdiction.

Therefore, I also chose to sample from the nonjurisdiction folders for comparison.

Using Atlas.ti, I coded 1,590 documents, the entire contents of the "general correspondence" and "nonjurisdiction" files using 40 variables (See Appendix). From these documents, I randomly sampled 100 documents to analyze in-depth: 50 documents from the general correspondence folders and 50 documents from the nonjurisdiction folders. The 100 sampled claims contained roughly 30% sex-based claims and 70% of claims on the basis of race and/or color. This is consistent with the records of the EEOC and percentages of total claims made on the basis of race/color and sex in these folders. The first year of agency, race and sex-based claims totaled 86.6% of all claims filed (Commission 2012a,b).

The EEOC Opens its Doors (and Mailroom)

EEOC Mandate

Prior to the passage of the CRA of 1964, employment protections at the local, state, and federal levels were convoluted and piecemeal (Chen 2009). The majority of these laws did not extend protections to women. At the state level, only 10 states and the District of Columbia prevented discrimination on the basis of sex (Murray and Eastwood 1965: 233) and complaints at the federal level were directed to the Women's Bureau of the Department of Labor (Women's Bureau).

When the CRA of 1964 was passed, the law provided the EEOC a mandate to eliminate "unlawful employment practice by informal methods of conference, conciliation, and persuasion" (*Civil Rights Act of 1964*, Public Law 88-352, *U.S. Statutes at Large* (1964): 253–266). In the larger context of the civil rights movement and passage of the law, it is generally understood that Congress expected the agency to focus on the elimination of race and color-based forms of employment discrimination. Those inside the agency from Commissioner Samuel C. Jackson, a former NAACP Director, to lower level employees also believed they were there to eliminate racial discrimination in the workplace (Commission 1990).

Although there is still disagreement among scholars regarding whether "sex" was added to H.R. 7152 to defeat the bill or as a genuine attempt to provide standardized federal protections to women, recent scholarship argues that Representative Howard Smith of Virginia was sincere when he proposed the addition (Freeman 2008; Osterman 2009). Not only was Smith was a supporter of the Equal Rights Amendment (ERA), but the addition

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occurred amidst prior attempts to create employment protections on the basis of sex (Freeman 2008: 185; Harrison 1988: 178; Smith 2008: 25). Regardless of why the CRA of 1964 extended protections to women, there was disagreement between congresswomen and women's rights activists on whether it was the proper vehicle for advancing women's rights. The ERA and state protective legislation were viewed as other alternatives (Harrison 1988: 178–179; Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994).

The ERA was unlikely to pass during the time the CRA of 1964 was under debate. However, the lobbying efforts for the ERA may have helped the sex provision's entry into the CRA of 1964 and some even considered the sex provision of Title VII to be a "surrogate for the ERA" while the National Women's Party worked behind the scenes to keep the provision in the act (Freeman 2008: 185; Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994). Even the passage of the CRA of 1964 did not end the debates over whether the law was the proper vehicle to provide protection on the basis of sex. Mary Dubin Keyserling, Director of the Women's Bureau, continued to advocate for state protective legislation to serve as the basis for employment protections for women and inside the agency divides over the issue quickly became apparent (Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994).

Furthermore, the addition of sex into a law designed with race and color in mind was problematic for the advancement of women's rights, as it has been for other groups with rights advanced on the basis of the race discrimination model. Numerous examples are found in court interpretations of the Equal Protection Clause of the Fourteenth Amendment that provide protection for women and other groups, only with lower levels of scrutiny (Lawrence 1990; O'Brien 2001; Siegel 2002). As with EEOC interpretations, courts judge sex-based claims like race discrimination, but "not *exactly* like race discrimination" (Siegel 2002: 954, emphasis in original). Women lack the history of Constitutional consideration regarding discrimination that race-based discrimination had received through constitutional amendments, social movement mobilization, and judicial decisions (Ritter 2006; Siegel 2002: 954–955).

Even during the legislative debates over the CRA of 1964, Title VII was expected to have little influence on women in the workplace. This combined with the lack of state laws covering sex-based discrimination made some argue that "there may be some application of title VII in this area [of state protective legislation]" according to Senator Carlson (D-KS), but it was not really expected to be an issue, since there was "no available evidence to

indicate that sex discrimination in employment present[ed] any problem" (Commission 1968b: 3117). This provided little guidance to the EEOC when it was presented with thousands of unexpected sex-based claims in its first year.

The political and legal environment meant that the EEOC generally believed that the CRA of 1964 was simply federalizing laws against employment discrimination on the basis of race, color, religion, and national origin that already existed in 25 states and for government contractors. Sex discrimination did not have the same level of prior laws or legislative history and, as a result, the "intent and reach of the [sex] amendment were shrouded in doubt" according to the EEOC (Commission 1966: 5). The uncertainty surrounding the addition of "sex" as a means to defeat the bill further complicated the issue in an agency that was also divided over whether the provision should have been added.

Furthermore, the high turnover rates among high ranking agency officials and lack luster support for the provision from the agency's first commissioner left a void. The NAACP and its allies in the EEOC served as the closest things the agency had to consistent policy entrepreneurs for race-based claims. However, until NOW formed, the sex provision lacked an interest group to provide the same level of expertise, added capacity, and consistent advocacy that can make a difference in terms of how rights are administered (Epp 2009).

Agency Response

It was in this context that the EEOC began processing claims.[5] While the NAACP and other organizations assisted in the facilitation of claims (Pedriana and Stryker 2004), the majority of claims made under Title VII in the agency's first 3 years were brought by individual claimants. Once claims were reviewed by the EEOC, claimants were likely to receive one of several responses: (1) an investigation into the claim, (2) a commissioner would bring charges against the accused offender, (3) the claim would be deferred to a state commission, (4) the commissioner charges would be deferred, (5) further information regarding the claim would be requested, or (6) the claim would be rejected and referred to the Civil Service Commission or other appropriate federal agency (George L. Holland to Donald L. Hollowell, May 12, 1966). While the NAACP, claimants, and eventually NOW argued that the agency was not responsive to claimants during its early years, recommendations for investigation were the most

[5] See Commission (1966) and Wolkinson (1973) for information on the claims process.

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Table 1. Race and Sex-based Claims Investigated, Deferred, or Required More Information 1965–1968*

Year	Race Number	Race Percentage	Sex Number	Sex Percentage	Other Number	Other Percentage
1966	3,254	53	2,053	34	826	13
1967	4,799	56	2,003	24	1,710	20
1968	6,650	60	2,410	22	2,112	18
Total/Average	14,703	56	6,466	27	4,648	17

Source: Commission (1966, 1967, 1968a).

**Note*: These are only charges recommended for investigation, deferred, and responded to with requests for additional information, since the EEOC only reported the basis of claims for these types of responses. This included 6,133 of the 8,854 charges for 1966, 8,512 of the 12,927 charges for 1967, and 11,172 of 15,058 for 1968. Percentages are of the total number of claims investigated, deferred or responded to with a request for more information, not the total number of claims received. Since the EEOC failed to report color-based claims separately for all 3 years, this table includes color-based charges under race.

common response during the agency's first 3 years. Recommendation for investigation included 3,773 of the agency's 6,133 responses in its first year, 5,084 of its 8,512 responses in the second year, and 6,056 of the 11,172 responses in the third year (Commission 1966: 58, 1967: 52, 1968a: 33). In other words, a total of 14,913 claims in the agency's first 3 years were recommended for investigation. These recommendations for investigation were primarily for race-based claims (see Tables 1 and 2) which corresponds with my findings, and the complaints by NOW, that the agency placed race-based claims and antidiscrimination policies at the top of its agenda.

The second most common response was that a claim was dismissed because the alleged act of discrimination occurred prior to Title VII enactment, was filed after the statute of limitation expired, or was outside the jurisdiction of the agency.[6] This included 2,063 in the first year, 1,932 the second year, and 3,886 in its third year or 7,881 total (Commission 1966: 58, 1967: 68, 1968a: 56–57). According to the EEOC, claims deferred to a state or local fair employment practice commission constituted 977 responses in the first year, 1,158 in its second year, and 2,136 in its third year or 4,271 total (Commission 1966: 58, 1967: 52, 1968a: 33). Compared to the number of claims referred for investigation (14,913 total), this also indicates that the EEOC was the primary investigator and interpreter of Title VII claims during this time.

[6] My sample of 1,590 includes mostly claims that were dismissed or deferred—22 for a reason that could not be determined based upon the content in the correspondence, 129 because another agency had jurisdiction, 70 were deferred to a state commission, 112 were ruled to not be unlawful practices under Title VII, 22 because the accused company was exempt from the law for having too few employees, and 62 claims were dismissed because the alleged act of discrimination occurred prior to Title VII enactment or was filed after the statute of limitation expired.

Table 2. Number of Claims Recommended for Investigation

	1965–1966	1966–1967	1967–1968
Race and Color	2,067	3,325	4,017
Sex	1,624	1,497	1,663
Other	82	262	376
Total	3,773	5,084	6,056

Source: Commission (1966, 1967, 1968a).

The third most common response that claimants received was a request for more information. The EEOC reported 1,383 of requests for more information in its first year, 2,270 in its second year, and 2,980 in its third year or 6,633 total (Commission 1966: 62, 1967: 52, 1968a: 33). I also found that one of the most common responses in my sample (126) were requests for more information from individuals and employers. The letters rarely specified what additional information was needed, but often they came with a charge form (55 in my sample), a postage paid return envelope, and instructions for completing the form. Finally, I also found a surprising number (248) of documents referring to conciliations. What I did not find were dismissals based in a lack of capacity or grounded in blatantly dubious legal language, like Lovell found in his study of the CRS (2006, 2012).[7]

Legal Mobilization Theory at the Agency Level

Individuals with sex-based claims of employment discrimination often found their interpretations of rights ignored or juxtaposed against an agency filled with staff that believed a woman's place was in the home and women were incapable of meeting the requirements of many jobs. The view that women belonged at home as helpmates to their breadwinning husbands was so dominate that even the vast majority of college educated women in the United States believed in the male breadwinner, female helpmate mentality in 1964 (Mason, Czajka, and Arber 1976).

Yet, women were making sex-based claims of employment discrimination that placed the sex provision on the agency's agenda, much like Zemans (1983) argues individuals set court agendas. Also like claims that individuals submit to the courts, interest groups were needed to help claimants overcome the obstacles of claiming their rights (Felstiner, Abel, and Sarat 1980–1981; Galanter 1974; Zemans 1983). Formal mobilization in the

[7] Like Lovell (2006, 2012), I also found claimants willing to challenge agency decisions.

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form of interest group creation (NOW) ensured these individual legal interpretations of the sex provision of Title VII were transformed into an interest group agenda as well. This is why McCann's theory of legal mobilization serves as an ideal starting point to explain how and why NOW formed as a result of the (in)actions of the EEOC.

Movement Building: Individual Interpretations

Individuals wrote to the EEOC "[a]s a last resort, and in great desperation . . . to complain about the lack of equality in employment opportunities for women" (Case number 5-10-1572). Like those McCann interviewed, the women writing into the EEOC and the relatively few men and women working inside the agency to advance women's rights were focused on both the immediate benefits to the claimants and the long term potential of their interpretations of Title VII to produce changes in law and society (McCann 1994: 275). Claims submitted to the EEOC on the basis of sex involved discrimination in hiring, firing, promotions, and other terms and conditions of employment. The three most common reasons for sex-based discrimination in the first year were: (1) differences in benefits (726 claims), (2) discrimination in layoff, recall, and seniority (588), and (3) state labor laws for women (291) (Commission 2006: 64). While many were similar to the claims made on the basis of race, there were some types of claims unique to women. Certain positions, including flight attendants, required women to be unmarried and within certain age and weight limits to retain their jobs and served as social as well as legal battlegrounds in determining the boundaries of Title VII.

I focus on the EEOC interpretations regarding state protective legislation and flight attendants, because these were part of the original NOW platform, and therefore, the group's influence was most likely to occur regarding these issues. In addition, state protective labor legislation was a common complaint during these early years. The plight of flight attendants involved a combination of typical and atypical types of the sex-based claims usually received by the EEOC. Their claims regarded benefits (the most common type of sex-based claim) and marriage and age limits (two of the most uncommon claims).[8] Challenges to airline employment practices via unions and media had limited success until Title VII provided a basis for declaring these requirements discriminatory (Barry 2006, 2007). The claims regarding flight

[8] There were only 45 claims involving individuals that were fired after marriage and 31 due to age limits of the 2,432 sex-based allegations in the agency's first year (Commission 1966: 64).

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attendants and state protective legislation are also worth discussion, because although NOW could not be linked to the facilitation of these claims through the archives documents I explored, NOW did sponsor some early Title VII litigation for these workers (see discussion of Mengelkoch case below).

Airlines also required flight attendants, like Octavia Stewart Wryrick, to leave or work in positions located in the airport upon marriage. In Wryrick's claim, she wrote that she was denied benefits and fired once it was discovered she was married (Stephen Shulman, November 9, 1966). In attempting to determine how the EEOC should respond to claims involving issues of age, marriage, and weight restrictions for flight attendants, Commissioner Aileen C. Hernandez wrote two versions of how the EEOC might decide Wryrick's claim dependent upon whether gender was a bona fide occupational qualification for the job (Hernandez, October 21, 1966). This demonstrates the opportunity these claims presented for the EEOC to proactively interpret the sex provision of Title VII broadly. The marriage requirement was ruled to be discriminatory, because it was not applied to male employees and in 1966, the EEOC issued guidelines forbidding women to be excluded from employment because they were married or had small children. However, the question of whether gender was a bona fide occupational qualification took more time for the EEOC to decide.

Views regarding the place of women within society were also seen through the claims on hiring, firing, promotions, and other employment conditions made by women. Not only were men considered the primary breadwinners, women were considered incapable of the same mental or physical work that men could do. For example, one claimant relayed how her employer denied her a promotion, because "women can't bear up under the pressures of the publication business," and not only lack the education to be professionals, but also would not be able to "understand mechanical things" and would not be "physically strong enough to work in a man's field" (Case number 5-10-1572).

Views that women were too emotional, physically weak, and unable to perform certain tasks were also reflected in state protective legislation. Protective legislation was passed by states to protect women from conditions of employment that could be harmful to their health, with their reproductive health and roles as mothers in mind. The laws varied by state, but protective legislation usually involved restrictions on the number of hours and/or days a week that a woman could work or how much weight women were allowed to lift on the job.

Initially, the EEOC supported state protective legislation, because women's rights groups and organized labor had

advocated for these laws at the end of the nineteenth and beginning of the twentieth century (Freeman 1995). By the time the EEOC opened its doors, these laws were showing signs of policy failure through the claims received by the agency. In addition to being the third most common type of sex-based claim received by the EEOC, claims involving state protective legislation demonstrate how the mobilization of law by individuals, and eventually NOW, shaped the interpretations of Title VII law. Claimants consistently presented a view of state protective legislation violating their employment rights under Title VII. Four of the 11 state protective claims drawn from my sample of 100 directly stated that the CRA of 1964 created *equal* employment opportunity and overturned these state laws creating *unequal* employment conditions for men and women.

Women were providing feedback that state protective legislation was not protecting them, but preventing them from working the amount of hours they wanted, and often needed, to support their families. One claimant wrote "I think the Women's Labor Law is in drastic need of changes. For example: if a female is able to and willing to work over 48 hours a week, why should she be denied the right because she is not of the male sex?" (Case number 5-11-2853). Another claim (the only one I found from a man making a sex-based claim), considered the rest breaks provided to women and minors under state protective legislation "in violation of Title VII, Section 703(a), and (1) of Public Law 88-352, on the basis of discrimination because of sex" (Case number 5-11-2675A). The male claimant went on to argue that if the EEOC ruled against him it would "contempt the conscience and will of the People of the United States as exercised through the highest legislative bodies in the land, The Senate and House of Representatives" (Case number 5-11-2675A). In reality, Congress spent little time even referencing protective legislation in its consideration of the sex provision (Commission 1968b).

In the first year of the EEOC, before the founding of NOW, claims involving protective legislation were sent to the EEOC legal department for "interpretation." This caused delays in Title VII rights for women as their claims went without investigation or efforts at conciliation—the agency's only powers at the time. On the surface, federalism issues invoked by having Title VII overturn state laws may be the primary reason women with claims involving state protective legislation were told their claims were being sent to the EEOC legal department. As letter from the EEOC to claimants stated, "...the reason for the delay in this case is that the question you have raised is complicated because it involves the existing laws of your state" (George L.

Holland to Lillian Hergert, November 2, 1965). However, relative ease in which the EEOC ruled that Title VII superseded state laws regulating the collection of data needed for its affirmative action programs (32 Fed. Reg. 2854, 1967) and general delays for sex-based claims, presents a pattern in which sex-based interpretations were considered low or no priority by the agency.

Movement Building: Delays and Denials Lead to the Formation of NOW

The first stage of legal mobilization requires more than the rights talk seen in a premovement stage (Lovell 2006, 2012). Mobilization of the law in McCann's theory also leads to constituency building, and in this case, the formation of NOW. Richard Graham, Aileen C. Hernandez, Luther D. Holcomb, and Samuel C. Jackson served as the first Commissioners of the EEOC. As chairman, Roosevelt appears to have played a mainly symbolic role in the agency. When asked by one reporter what he thought about sex discrimination, Roosevelt answered "I'm in favor of it" (Danovitch 1995: 340). However, Roosevelt is also quoted as saying he did not consider the sex provisions of Title VII to be "frightening or humorous" (Zelman 1982: 94). In general, a pattern emerges that indicates the first chairman of the EEOC was more interested in being a politician appeasing the individual or interest group he was responding to at that moment than he was in formulating EEOC policy or influencing interpretations of Title VII law.

Holcomb, the first Vice-Chairman of the EEOC, was named the Acting Chairman by President Johnson after Roosevelt's resignation and before the appointment of Stephen N. Shulman as Chairman in 1966 (Harrison 1988: 196). Holcomb had been an advocate for the removal of "sex" from Title VII during the legislative debates over the CRA of 1964 and his neglect in enforcing the sex provision indicates that he maintained his position while he was a Commissioner of the EEOC from 1965 to 1974 (Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994). At the very least, Holcomb's experience working with civil rights groups caused him to view issues of sex-based discrimination as a lower priority for the agency (Whitaker 2012). In 2000, Holcomb admitted that "…in the beginning, our number one objective was racial discrimination in the workforce. As a result, women were falling into second place…" (Whitaker 2012).

Despite the focus on race-based claims, there were strong allies for women in the EEOC during the agency's first years. These allies would help organize the constituency that created

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NOW. Hernandez was the Assistant Chief of the California Division of Fair Employment Practices from 1962 to 1965 before she became the first female Commissioner of the EEOC. On October 4, 1965, Fuentes was hired as the first female attorney for the Office of the General Counsel (The Fawcett Society 2009). From the beginning, these two women led efforts for equal enforcement of the sex provision from within the agency.

These women faced a fustrating and often hostile work environment as they advocated for sex-based claims and equal employment policies on the basis of sex. In the first year of the agency, the only other employees in the Office of General Counsel where Fuentes worked were the General Counsel Charles T. Duncan and Richard Berg, Deputy General Counsel (Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994). Duncan left the EEOC after a year. Yet, that was long enough for him to refer to Fuentes a "sex maniac" for her persistence in raising issues regarding claims of sex-based discrimination (The Fawcett Society 2009). Berg, Acting General Counsel after Duncan left, did not understand how many of the issues women complained of were problematic and after NOW was formed he expressed little interest in working with organization (Danovitch 1995: 341; Richard K. Berg to Dr. Murray, March 16, 1967). He considered sex provision of the CRA of 1964 to be an "orphan" provision (Fuentes 1999: 132–133).

Nevertheless, it was more than personal biases that resulted in differences in EEOC rulings regarding the sex and race provisions of the law. Fuentes believed there were a few reasons the agency failed to equally implement Title VII. First, the EEOC staff was primarily composed of individuals that came to the agency to fight discrimination on the basis of race and color, not sex. In their view, handling issues of sex discrimination would only divert agency attention and resources away from their cause. Second, issues involving sex raised more complex legal issues: pregnant workers, physical limitations, equal benefits, and state protective laws. Finally, Fuentes felt that sex-based claims were disadvantaged by the void of a social movement for women to give the agency guidance in how to interpret the law, like the NAACP-guided interpretations on race (The Fawcett Society 2009). While Fuentes could not control the motivations of her coworkers or the complexity of the legal questions that emerged following the passage of Title VII, she did help to create an interest group that mobilized for changes in women's rights.

By 1966, disappointment and frustration with the EEOC enforcement of sex provision was growing. After Betty Friedan (author of *The Feminist Mystique* 1963) visited the EEOC to

conduct research for a potential book, Fuentes and Commissioners Graham and Hernandez urged Friedan to create an "NAACP for women" (Harrison 1988: 193; National Organization for Women 2011; Sonia Pressman Fuentes to Toni Carabillo, May 14, 1994). At first Friedan declined, preferring that state commissions on the status of women take the lead in forming a national organization to fight for women's rights (Harrison 1988: 193). Yet, Friedan and others soon realized that the state commissions were not willing to push for equal enforcement of the sex provision of Title VII.

While attending the Third National Conference of Commissions on the Status of Women in June of 1966, Friedan and a group of 15 women, decided a national organization was not necessary, but they hoped that resolutions would be passed at the meeting to persuade the EEOC to enforce the sex provision (Harrison 1988: 193–195; The Fawcett Society 2009). When the proposed actions were rejected by the organizers of the conference, a group of attendees decided to take action. Friedan and the other women, while sitting at one of the conference meetings, planned the first meeting of a group they named NOW (Harrison 1988: 193–195; The Fawcett Society 2009).

The founders of NOW were either members of the President's Commission on the Status of Women or friends of the members (Harrison 1988: 198). The influence of EEOC insiders was instantly obvious as well. At the first official conference for NOW, Friedan was elected President based upon the recommendation of Fuentes; EEOC Commissioners Hernandez and Graham were elected the first Vice-Presidents of the organization (Harrison 1988: 196).

At the conference, it was decided that NOW was to be a temporary organization "to take action to bring women into full participation in the mainstream of American society now, assuming all the privileges and responsibilities thereof in truly equal partnership with men" (National Organization for Women 2011). Action was at the forefront of the organizers' minds. Until then, the Commissions on the Status of Women were mainly symbolic and the EEOC was failing to act on sex-based claims. It was government inaction that prompted NOW to organize.

The Struggle to Compel Formal Policy Changes

After organizing to advocate for stronger enforcement of the sex provision of Title VII, NOW entered the second stage of legal mobilization. The organization struggled to compel formal

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changes in Title VII interpretations by the EEOC to make them more in line with the agency's rulings on the race provision of the law. At the official organizing conference of NOW, in October 1966, a Statement of Purpose was adopted. The statement focused on the changing role of women in the workplace and disparity in pay and position that women had at the time, but also included references to women's political representation, inequality in education, marriage equality, and other political and social rights. These goals were partly in line with its view, urged by Fuentes, that NOW should model itself after the NAACP.

Commending the President's Commission on the Status of Women and state commissions on the status of women for what efforts they had made, the statement points out that these commissions could only advise and not implement their recommendations. Directly naming Title VII in the statement, NOW chided the EEOC stating that "the Commission has not made clear its intention to enforce the law with the same seriousness on behalf of women as other victims of discrimination" (National Organization for Women 1966). Therefore, at the organizing conference for NOW, the organization approved immediate action on Title VII, including a legal committee to work on the issues faced by flight attendants and to challenge protective labor legislation (National Organization for Women 2011). The time had come, the statement of purpose said, "to move beyond the abstract argument, discussion, and symposia over the status and special nature of women in recent years; the time has come to confront, *with concrete action*, the conditions that now prevent women from enjoying the equality of opportunity and freedom of choice which is their right, as individual Americans, and as human beings" (National Organization for Women 1966, emphasis added). The time for advancing into the second stage of legal mobilization had arrived.

A month later, on November 11, 1966, NOW demanded revisions to include sex-based protections when help-wanted advertisements were ruled to violate Title VII if they were segregated on the basis of race or color without exceptions and that advertisements were in violation of Title VII with regards to religion and national origin unless there was a bona fide occupational qualification (Associated Press 1965; The Fawcett Society 2009). In her roles as a Commissioner of the EEOC from 1966 to 1967 and then in a dual role as EEOC Commissioner and Vice-President of NOW beginning in October 1966, Hernandez became the leader in the efforts to reverse the EEOC's early interpretation of help-wanted ads, pressuring newspapers to stop their segregation of helped wanted ads based on sex

(National Organization for Women 2012).[9] As a leader of NOW, Commissioner Hernandez, helped with one of its first actions—to urge President Johnson to reconsider the EEOC ruling that sex-segregated job advertisements were not a violation of Title VII (Harrison 1988: 195).

As advertisements listing jobs on the basis of race were quickly ruled a violation of Title VII, job advertisements segregated by sex were studied by a committee comprised mainly of business interests that ruled Title VII did not extend protections on the basis of sex (31 Fed. Reg. 6414, 1966). The 17-member committee was appointed by Chairman Roosevelt to develop an interpretation of Title VII that would "conform with the law" and "respect the rights and interests of all those most affected: advertiser, publisher and those seeking employment" (Associated Press 1965; Franklin D. Roosevelt, Jr. to Hamilton Zehrbach, September 3, 1965; Hamilton Zehrbach to Franklin D. Roosevelt, Jr., August 20, 1965).[10] The end result of this committee was that newspapers were only required to print a disclaimer that the sex segregation was not intended to be discriminatory, but were organized into "male" and "female" columns because some jobs were of more interest to one sex or the other (Harrison 1988: 188). As discussed in the next section, it would take action from NOW for this ruling to be reversed (Pedriana 2004).

In another one of its first actions, NOW urged the EEOC to send a claim against North American Aviation by Velma L. Mengelkoch regarding state protective legislation to the Attorney General (NOW to President of the United States, November 11, 1966). The agency declined. The EEOC expressed no intention of "overturning" state protective legislation. In August of 1965, General Deputy Counsel Berg stated that the Commission was "not going to take the position that all state protective legislation for women goes out the window" (as quoted in Franklin 2012: 1339). The only action that the agency took with regards to state protective legislation before NOW formed was to rule in December of 1965 that minimum wage, overtime pay, rest periods, or the need for physical facilities—all the benefits that these laws

[9] In September 1966, Commissioner Hernandez worked inside the EEOC as she invoked her Title VII power that allows Commissioners to file charges against companies to file charges against twelve companies for segregating help-wanted advertisements by sex (Kenneth F. Holbert to Executive Director and Acting Director of Compliance, September 23, 1966). After she left the EEOC in 1967, Hernandez became the second President of NOW in March 1970 and established a Federal Compliance Committee within the organization to advocate for the enforcement of federal equal employment opportunity laws.

[10] See Associated Press, *The Arizona Republic*, August 20, 1965, p. 21, for a list of the committee.

provided women—would now be provided to men and that women could not be denied a job because of these benefits.

Meanwhile, individual claims made regarding state protective legislation were going without investigation or efforts of conciliation. Alone these claims could place the issue on the agenda of the EEOC, but they needed interest group intervention to ensure action. Only in August 1966, after the informal organization of NOW, did the EEOC start to refer women with claims involving state protective labor laws to the courts. While the EEOC declined to send Mengelkoch's case to the Attorney General to pursue the issue of state protective legislation, NOW did succeed in pressuring the agency into granting Mengelkoch and others the right to sue.

Meanwhile, protective legislation was also beginning to be seen less as a beneficial policy for women and more as a constraint on employers and employees alike. Women were writing to the EEOC that "The unions use it [protective legislation], the Co. uses it & the state uses it as a 'reason' for not hiring and not promoting women" under the guise of maximum hour, weight lifting, and other requirements (Case number 5-12-3181; Case number 5-10-1572). Employers also complained to the EEOC that they could not hire women they wanted. If they did hire women, according to the claims, employers would expect them "work as many hours as necessary to get the work out, and then [have them] to fake the overtime hours on her time card over a period of weeks (so that the State will not be aware of the fact that the law has been broken)" or would not pay women for the time they worked outside of the maximum hours (Case number 5-10-1572; Case number 5-11-3050). The most common type of protective legislation claims submitted to the EEOC involved restrictions on the number of hours that women could work (Commission, August 2, 1966; Commission 1966). In the first year, 262 of the 291 claims involving state protective legislation regarded overtime restrictions with the other claims made regarding weight-lifting restrictions that ranged from 15 to 35 pounds (16), rest periods (2), and general complaints about the laws (11) (Commission 1966: 64).

Under pressure from NOW, Mengelkoch's was the first protective legislation claim provided the right to sue. Before Mengelkoch could pursue a lawsuit against a law that she felt provided "...an Almighty power over the female sex...," she needed advice on how to navigate the judicial system (Velma L. Mengelkoch to Kenneth F. Holbert, September 18, 1966). However, NOW was barely formed and not advising or supporting litigants at the time. After the informal organization of NOW in June 1966, but before the organization's formal organization in

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October 1966, Mengelkoch had to ask the EEOC to "advise [her and her co-claimants] as quickly as possible how to go about filing this case before the Supreme Court of the United States here in Los Angles?" (Velma L. Mengelkoch to Holbert, September 18, 1966).

The case became *Mengelkoch v. North American Aviation* (Dan R. Anders to General Counsel and Interim Acting Director of Compliance, September 22, 1966). Mengelkoch quickly depleted her finances after 3 years of litigation and decided not to proceed with the case after a rehearing was denied (Hernandez 1975: 18). By that time, NOW had grown during the struggle over how to interpret the sex provision of Title VII and had even lent some financial support to the lawsuit. However, it was the EEOC in August 1969 that ruled state protective legislation violated Title VII when it treated men and women differently (33 Fed. Reg. 3344, 1968). It made this ruling under increasing pressure from NOW.

While Mengelkoch's case worked its way through the judicial system to little avail, delays continued for flight attendants that submitted claims regarding their benefits and unique job qualifications. Hearings on the bona fide occupational qualification issue for flight attendants were scheduled and then rescheduled (32 Fed. Reg. 11050, 1967). During this period, NOW also began to pressure the EEOC from outside regarding this issue. Eventually, in February 1968, the Commission voted three-to-one that sex was not a bona fide occupational qualification for flight attendants. Still views about the proper role of women remained in segments of the EEOC. Commissioner Holcomb inserted into the regulations that he considered being a female a requirement for working as a flight attendant (33 Fed. Reg. 3361, 1968).

The story of how the EEOC began acting upon the sex provision of Title VII demonstrates how individuals acting alone placed an issue on the agenda of the EEOC. It also demonstrates how the individual political act of claiming rights can result in mobilization and interest group formation when they are delayed and/or denied by a government agency. As NOW formed to push for the enforcement of the sex provision of the law, it allowed the visions of Title VII that these claimants had to become official legal interpretations by the agency. This process was complex and dynamic as the agency delayed acting and even initially upheld the idea that state protective legislation was not a violation of Title VII, then referred these claims to the courts when the Commissioners could not agree on the issue, until it reversed its stance under interest group pressure.

The Struggle for Control over Policy Development and Implementation

Despite these decisions, NOW failed to have the same place at the policy table as the NAACP. Furthermore, two of the sex provision's biggest allies, Commissioners Graham and Hernandez were forced to advocate for the sex provision from the outside. Graham was denied a second term on the Commission and Hernandez was forced to resign under complaints that her role as NOW Vice-President created a conflict of interest. Jackson, a former director of the NAACP, remained.

NOW hardly had the resources to operate, let alone sponsor cases in its first years. Frustrated from the lack of outsider support and still working within the EEOC Office of the General Counsel, Fuentes wrote a confidential memo remarking that NOW and other women's groups had "zero" resources for a lawyer or to file an *amicus curiae* brief in a cases of sex discrimination. The organization had spent $1,266 (of its $6,939 total income) on legal expenses between December 15, 1967 and November 30, 1968, including $875 on the Mengelkoch case (Aileen C. Hernandez to Inka O'Hanrahan 1968). Fuentes pleaded with the recipients of the memo, women's rights advocates, that the women's movement needed a full time lobbyist in Washington, D.C. to advocate for women's rights in the same way the Clarence Mitchell "the 101st Senator" advocated for blacks via the NAACP (Sonia Pressman Fuentes to Dolores Alexander, Jean Faust, Wilma Heide, Betty Boyer, and Aileen Hernandez, June 30, 1969).

Meanwhile, EEOC employees that helped create and support NOW were ignored or made the source of jokes within the agency, while those working with NOW on the outside also failed to gain the level of respect that the NAACP received from the agency. It is clear that some of the EEOC staff were aware of staff members playing a double role as EEOC staff and NOW members. For example, Berg attached a note to a letter from NOW regarding a petition the group sent to the agency telling EEOC Consultant and NOW Co-Founder Pauli Murray "Why don't you answer this? They're <u>your</u> friends" (Richard K. Berg to Dr. Murray, March 16, 1967, emphasis in original). To which Murray replied "This letter calls for Commission action. Please let me know what actions the Commission has taken, then I will be glad to draft a reply" (PM [Pauli Murray], March 16, 1967). The hostile undertone of this correspondence is repeated in other documents and demonstrates how unreceptive the agency could be toward NOW and others advocating for the development and strong enforcement of Title VII's sex provision.

The December 19, 1966 petition requested that the EEOC change its policy allowing help-wanted advertisements to be

segregated by sex, or to at least hold a public hearing on the issue. A few weeks after the follow-up letter from NOW, then EEOC Chairman Shulman responded to the organization, apologizing for the delay and inviting the organization to a hearing on this and other issues involving sex-based discrimination and Title VII (Stephen N. Shulman to Kathryn F. Clarenbach, Betty Friedan, and Caroline Davis, April 6, 1967). NOW did receive a response and eventually the agency changed its position to make sex-segregated help-wanted ads a violation of Title VII unless sex was a bona fide occupational qualification for the job (32 Fed. Reg. 5999, 1967; 33 Fed. Reg. 11539, 1968; 33 Fed. Reg. 18259, 1968). A change in Title VII interpretation attributed to NOW (Pedriana 2004). However, the delays for NOW were longer than for the NAACP and archival documents indicate a general lack of interest in responding to the demands of NOW.

The different responses from the EEOC to NOW and Fuentes' memo were also indicative of the lack of recognition by official channels that NOW had in comparison to the well-established NAACP. A month before the petition was sent to the EEOC, when asked by the Special Assistant to President Johnson if the White House should entertain NOW, Chairman Shulman responded that the organization was too new and should only be granted an audience with the President if it had a significant gain in membership by early 1967 and was able to achieve "a status worthy of Presidential attention" (Stephen N. Shulman to W. Marvin Watson, November 23, 1966).

Although it aspired to be an "NAACP for Women," in its first few years, NOW was not able to facilitate claims and translate the law, like the NAACP and other interest groups are traditionally considered in interest group litigation literature. During the first years of the EEOC, NOW was developing its own institutional policies and norms alongside the EEOC. As an organization, it lacked the reputation, finances, and staff to translate the law to individuals seeking advice, like the NAACP did via its Title VII Summer Education Campaign and through its journal *The Crisis* (Pedriana and Stryker 2004). It also lacked the entitlement to a place at the policy table that the NAACP earned through its advocacy of the CRA of 1964, submission of a mass number of claims, and through the capacity it added to the agency. What is remarkable is that using the interpretations of law from individual claimants and by forming from a coalition of activists inside and outside the state, even lacking these factors, NOW was able to influence the meaning of Title VII.

In the first few years of the organization, NOW was able to make significant changes in EEOC policy and influence the direction of litigation by relying on members working within the

EEOC and other government agencies. NOW was able to tap into a preexisting group of individuals interested in women's rights that were working on the President's Commission on the Status of Women and at state commissions. It modeled itself after a successful organization for the advance of civil rights, the NAACP. It also borrowed from the tactics of the National Women's Party—petitions, protests, and the use of media.

While the story of NOW does not coincide with the traditional understanding of interest groups and movements working as entities outside of the state in order to influence the government, it does provide valuable insight into how movements can form alongside and from within the state and why (Banaszak 2010). The story regarding the role of NOW before the EEOC gained litigation power, is that it formed in response to interagency divides over the enforcement of the sex provision of Title VII and lack of interest by government organizations (commissions on the status of women) or preexisting interest groups (such as the National Women's Party) to hold the EEOC accountable for its decisions regarding sex-based discrimination.

The story also provides an opportunity to consider the role of agency staff and how links between bureaucrats and interests groups can result in policy changes. It is remarkable that the few individuals within the EEOC that were advocating for the enforcement of the sex provision, through the platform of NOW, were eventually able to pressure the EEOC to change its first ruling on sex-segregated help-wanted advertisements and ensure that protective legislation were superseded by Title VII.

Finally, the story tells us how struggle to compel legal changes may advance into a larger struggle over the control of policy development and implementation. NOW sought more than just reversals in the ruling the EEOC made, it also wanted an opportunity to help formulate policies regarding Title VII. As a growing organization, it aspired to help the EEOC develop policies related to the sex provision, just like the NAACP was for the race provision (Chen 2009; Pedriana and Stryker 2004). By 1968, NOW had entered the third stage of legal mobilization and was actively seeking a larger role in Title VII development, both inside and outside of the EEOC.

A Transformative Legacy

Between 1968 and 1969, NOW membership grew from 1,313 to 3,033 members (Rosenberg 2008: 243). It was still nowhere near the force of the NAACP in terms of membership or a place at the table. However, it was an inspiration for the creation of other interest groups focused on women's rights and today it has

over half a million members and an expansive agenda for advancing women's rights (National Organization for Women n.d.). McCann found that coalitions constructed around the comparable worth campaign laid the basis for the coalition to act on other issues (1994: 264). Likewise, the coalition of government workers and others that formed NOW expanded their agenda to include other issues of that involve and intersect with women's rights, such as reproductive rights, violence against women, LGBT issues, and even racial justice.

Title VII law was changed by the visions of law espoused by claimants and reinforced by NOW, as the EEOC included them in their rules and regulations. While the EEOC's initial delay and denial of rights may have been a temporary setback for women's rights, the formation of NOW in counteraction to those decisions resulted in a long-term transformative legacy that continues to shape law and society even today. Due to individual claims and interpretations of Title VII, which served as a catalyst for the formation of NOW and added the sex provision to the agenda of the agency, it has been argued that the EEOC has "had greater impact in the field of women" than for other groups because of the sex provision that the agency at first found "mysterious and difficult to understand and control" (Commissioner Samuel C. Jackson quoted in Franklin 2012: 1338; District of Columbia Bar 1996).

Conclusion: Agency Action and Legal Mobilization

The divides surrounding the addition of sex into the CRA of 1964, re-emerged during the enforcement of Title VII and, as priority was placed on race-based claims at the EEOC, some of the women writing to the EEOC felt that "the Negro is treated much better than Women" in employment (Case number 5-12-3181). Some inside the EEOC also felt that women were treated unfairly by the decisions made by the Commission, including its ruling on help-wanted advertisements and regarding state protective legislation. Those within the EEOC that lobbied against the addition of the sex provision to the CRA of 1964 also acted in ways that supported their views once in the Commission.

The vague language of Title VII and Congressional intent regarding the sex provision of the law created an opportunity for the EEOC to interpret the boundaries of the law. However, women with claims of sex-based discrimination lacked an interest group that could advise the agency and work alongside and inside it to resolve issues and legal questions that arose. Claims submitted by women were being delayed as the agency formed

committees to interpret the application of the law or sent them to a divided Office of the General Counsel for a determination.

Meanwhile, individuals throughout the United States were writing to the EEOC on their own, raising issues that the agency was not prepared to decide and rule on. Congress spent little time considering whether the public would view Title VII as a new phase in legal protections that considered women equal to men, challenging state laws that provided women special protections in employment. Claimants conceptualized "protective" legislation as discriminatory laws and vehicles for union and employer discrimination. These claimants mobilized Title VII as a new federal law to overturn state protective legislation that treated men and women differently. It was these claims that placed state protective legislation on the agenda of the EEOC.

Individuals with claims of sex-based discrimination equaled approximately a third of all claims received by the agency in its first few years. These individuals were submitting claims that reflected rising expectations for change in the wake of the CRA of 1964. As NOW formed to press for action on sex-based claims of discrimination, these claims and the responses they received served as the catalyst for constituency activation and the formation of alliances. As a result, the first years of the EEOC shows how premovements stages of legal interpretations can advance into legal mobilization (Lovell 2012; McCann 1994).

The story of sex-based claims and Title VII also demonstrates how individuals acting on their own can create a coherent perception of a law which shaped the meaning of Title VII. Women (and men) clearly saw Title VII as creating *equal* employment opportunity on the basis of sex. This meant that employment laws that created unequal employment conditions, such as protective labor legislation, were in violation of this newly created right. By claiming their legal rights, these individuals were able to influence in the directions and interpretations of the law by providing feedback on policies that are failing, providing evidence for the need for rights protections, and by envisioning more expansive understandings of a law's potential than might otherwise be considered. In institutions that must react to the claims they receive, individual claims provide a voice and opportunity for government response.

Nevertheless, the EEOC was slow to act. When it did, it initially treated the sex provision as not only a lower priority, but also explicitly interpreted it differently regarding advertisements for jobs. After this ruling, and the routine delay and denial of individual claims combined with a workplace hostile to advocates of the sex provision, NOW formed. With the formation of NOW, the agenda set by the individual claims were finally provided the

expertise and newly created interest group capacity that allowed NOW to influence the shaping of Title VII.

As NOW formed alongside the EEOC, it made a difference in mobilizing the law to support the visions of claimants. Through its struggles to create formal changes in EEOC rulings regarding Title VII and in its push for control over the more general development and implementation of the sex provision, NOW was not only able to grow as an organization, it was also able to ensure reversals in agency rulings on job advertisements and state protection legislation and advancements in rulings on the qualifications of flight attendants. This demonstrates that even with limited capacity interest groups, such as NOW, can influence the legal interpretations and future directions of a law as it competes with other interests over the development and implementation of rights. In doing so, NOW shows how the second and third stages of mobilization can occur at the agency level.

Claimants may have set the initial agenda of the EEOC and NOW, but the need for a women's counterpart to the NAACP emerged because the EEOC had interpreted the sex provision of Title VII differently. While NOW was originally organized as a temporary force to ensure the sex provision of Title VII was enforced, as the organization emerged from the second and third stages of legal mobilization, it found itself with an expanded agenda to advance new rights claims and additional policy reforms. The group also inspired the creation of new alliances and groups that would contribute to the second wave of the feminist movement. As a result, claims and agency responses to them led to a transformation of society through the formation of NOW.

I leave it to other scholars to discuss the full legacy of influence NOW had in the feminist movement. Yet, there is no denying the transformative effect the group has had in advancing the role of women in law and society. I encourage other scholars to explore how legal mobilization occurs at the agency level. This study provides only a narrow short-term window into how law is used as a resource and catalyst for change by individuals and interest groups in their interactions with government agencies. Hopefully other scholars will examine how this phenomenon occurs across the rights spectrum and in extended periods of time. Only then can scholars truly understand the potential for creating social change at the agency level.

Appendix. Coding

Since many of the claims lacked the corresponding response, the responses contained in the folders were coded separately from the

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claims made. This is based upon Lovell's coding, but includes additional variables to provide opportunities for trends to be discovered and for me to ensure that the content of the 100 letters were representative of the total 1,590 documents (2006: 292). Using Atlas.ti, I coded all the documents in the "general correspondence" and "nonjurisdiction" files using the following variables:

1. Addressed to Roosevelt: as many letters were written directly to the first Chairman of the EEOC and I wanted to see if they were handled differently
2. Advice to Employer: for letters providing unsolicited advice to employers regarding their employment practices
3. Age: for claims that discriminated on the basis of age
4. Charge Form: for responses from the EEOC to individuals or interest groups that enclosed charge forms for claims that required additional information
5. Claim Dismissed: for letters from the EEOC to individuals or employers regarding claims that were dismissed
6. Claim Form: for charges made by individuals on a charge form
7. Claim is on Behalf of Others: for claims that individuals or interest groups made on behalf of others or including those similarly situated
8. Conciliation: for claims that the EEOC conciliated
9. Disability: for claims on the basis of disability
10. Gender: for sex-based claims
11. General Counsel: for claims submitted to the EEOC Office of General Counsel
12. Field Representative Will Contact: for claims that the EEOC had a field representative contact for investigation
13. Interagency: for letters that were referred to the EEOC from other governmental agencies or that the EEOC referred to other agencies
14. Interest Group: for correspondence or claims that involved an interest group
15. Intragency Letter: for correspondence from one division or person in the EEOC to another
16. Investigation in Progress: for replies to individuals that their claim was under investigation
17. Legal Counsel: for correspondence that involved or made reference to legal counsel
18. Miss: for claims that involved a claimant addressed as "Miss"
19. Mrs.: for claims that involved a claimant addressed as "Mrs."
20. NAACP: for correspondence involving or referring to the NAACP
21. National Origin: for national origin-based claims

22. No Jurisdiction Government: for claims that were dismissed because another agency had jurisdiction
23. No Jurisdiction Number of Employees: for claims that were dismissed because Title VII did not apply to their employer due to too few employees
24. No Jurisdiction Date/Time: for claims that were dismissed because the alleged act of discrimination occurred prior to Title VII enactment or was filed after the statute of limitation expired
25. No Jurisdiction Deferred to State Commission: for claims that were dismissed as they were deferred to a state commission for investigation
26. Not an Unlawful Employment Practice under Title VII: for claims that were interpreted as not protected under Title VII
27. Race: for race-based claims
28. Reasonable Cause Found: for claims where reasonable cause was found
29. Referred to Court: for claims that were referred to the courts for resolution
30. Referred to the EEOC: for claims that were referred to the EEOC from other agencies
31. Referred to Other: for claims that the EEOC referred to other agencies
32. Religion: for religion-based claims
33. Request for Information: for responses to the EEOC requesting more information from claimants or an employer before an investigation could be made
34. State Commission: for correspondence involving a state employment protection commission
35. State Protective Legislation: for claims regarding state protective legislation
36. To Employer Regarding Claim: correspondence to an employer from the EEOC regarding a claim
37. To Union Regarding Claim Against: for claims made against a union
38. Union: for correspondence involving or referencing a union
39. Unprotected: for claims that were made, but not protected under Title VII
40. Withdraw Claim: for claims that were withdrawn by the claimant

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